IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-004482

	BETWEEN	HAYLEY MARGARET STEVENSON Applicant
	AND	FIONA JANE SHERWOOD AND STEPHANIE KAY HAMILTON Respondents

Hearing: 6 October 2009

Appearances: D R F Gardiner for Applicant
F Sherwood in Person for herself and S Hamilton with S Pezic as support person

Judgment: 27 October 2009 at 3.00 p.m.

JUDGMENT OF VENNING J
On application for leave to appeal out of time

This judgment was delivered by me on 27 October 2009 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Brannigans, Manukau
Copy to: Daniel R F Gardiner, Auckland
F Sherwood, North Shore City

Introduction

[1] On 23 February 2009 Judge Wilson made a restraining order in favour of the respondents against the applicant and a Ms Rowe. The order was for a period of three years. The Judge indicated costs on a 2B basis would be appropriate but reserved costs because Ms Stevenson's application for legal aid had not been determined. The Judge subsequently fixed costs on 24 June 2009.

[2] Ms Stevenson filed an application for leave to appeal out of time on 23 July 2009.

Procedural background

[3] The application for leave to appeal out of time was first called on 6 August 2009. At Ms Stevenson's request and against Ms Sherwood's opposition the application was adjourned to allow Ms Stevenson to confirm her legal representation. On 17 September the matter was further adjourned at Ms Stevenson's request against Ms Sherwood's opposition. By this time the applicant was represented by counsel, Mr Gardiner. The application was allocated a hearing for 6 October. On the evening of 5 October Mr Gardiner served Ms Sherwood and Ms Hamilton with a bundle of submissions and a substantive affidavit from the applicant. In the circumstances, although the hearing proceeded on 6 October, I reserved leave to the respondents to file any response by 20 October 2009. I have now received that response.

Factual background

[4] The respondents Ms Sherwood and Ms Hamilton are sisters. They sought restraining orders against the applicant and Ms Rowe.

[5] In relation to Ms Hamilton's application, the Judge found that Ms Stevenson confronted her at a supermarket checkout in February 2008 and abused her by calling her, amongst other things "a two-faced bitch" and that shortly after Ms Hamilton's letterbox was tagged with the word "sluts" and "Steph and Fi are sluts". From May 2008 various abusive phone calls, some of which had been traced directly to the applicant's residential address, were made to Ms Hamilton. Ms Hamilton also received notes, including references to "stupid slut". The same day the words "juvenile delinquent" were written on her letterbox. On 28 November her car was tagged with the word "sick" and her letterbox with the words "Lexi sick". Ms Rowe said she did this tagging but under duress from the applicant.

[6] On 21 November Ms Sherwood received a note which threatened Ms Hamilton and told her to stay away from the applicant's daughter. The same day Ms Hamilton's husband's car was tagged with the word "slut". On 24 November Ms Sherwood received a further note stating that Ms Hamilton's daughter was not wanted at Vauxhall School. Ms Hamilton and the applicant's children were pupils at the school. The same day Ms Sherwood's former partner received a note that stated "Fi and Stephanie might pay the price for fucking me over".

[7] When considering Ms Hamilton's request for an order the Judge found as a matter of fact that the supermarket incident, the tagging, the phone calls traced directly to Ms Stevenson's residential address and the notes that related to the school were specific acts that were committed or done by the applicant.

[8] The Judge also found that Ms Stevenson had harassed Ms Sherwood. From the use of words "sluts" and "Steph and Fi are sluts" tagged on the letterboxes on 3 and 4 March, the fact the relationship between the sisters was known to the applicant, and the numerous phone calls which were traced to Ms Stevenson's address, the Judge drew the inference that Ms Stevenson was harassing Ms Sherwood as well. He also noted that the notes made specific reference to Ms Sherwood's daughter which was information that must have come from the applicant. While putting the evidence of Ms Rowe to one side, the Judge was satisfied on the remaining evidence that on the balance of probabilities Ms Sherwood and her family had been harassed by the applicant.

[9] The Judge considered the orders were necessary considering the extent of the harassment and the length of time over which it had occurred.

[10] After making the orders the Judge discussed the issue of costs with counsel. There was general agreement (even by counsel for the applicant) that costs on a 2B basis would be appropriate but as Ms Stevenson's application for legal aid had not been determined by that time the Judge reserved formally costs. Later, when the respondents' counsel learnt the legal aid had been declined, costs were sought. The Judge formally made an order for costs at that stage on a 2B basis.

The criminal proceedings

[11] Apart from facing the application for restraining orders, the applicant and Ms Rowe were also the subject of criminal charges arising out of the various incidents described to the Court. Counsel for the applicant sought to have the application for restraining orders adjourned until after the criminal matters were completed. The Judge declined the application, noting that there had been three fixtures allocated for the case and that Ms Sherwood and Ms Hamilton were entitled to have their application heard. Ms Rowe also wished the matter to proceed.

[12] Because of the impending criminal proceedings the applicant decided not to file an affidavit in support of the notice of defence despite r 461R of the District Courts Rules 1992 which required a defendant who intended to defend an application for restraining order to file an affidavit setting out sufficient particulars to indicate the grounds on which the defence was based, together with sufficient information to inform the Court of the facts relied on in support of the defence.

[13] The Judge noted that in the absence of such an affidavit Ms Sherwood and Ms Hamilton were potentially prejudiced in that they did not know on what basis the defence was to be advanced.

[14] While the Court had a number of options available to it under r 461R(3)(a) and (b) (including striking out the defence) the Judge was not prepared to go as far as to strike out the defence but rather, permitted the applicant to appear at the hearing

for the purpose of making submissions but not for the purpose of cross-examining the uncontested evidence of the plaintiffs. The Judge noted that even on that basis there would be a separate issue as to whether the evidence was sufficient to establish the statutory requirements under the Harassment Act 1997 for the order sought.

Principles to apply

[15] An applicant for leave to appeal out of time is seeking an indulgence of the Court: *Commissioner of Inland Revenue v Dick* (2000) 14 PRNZ 378 (HC). The factors to be considered on such an application have been discussed in a number of cases. *Juken Nissho Ltd v Attorney-General* (1998) 12 PRNZ 380 and a number of other cases confirm that the relevant considerations are:

a) The extent of the delay.

b) The explanation for the delay.

c) When and under what circumstances was the decision to appeal taken?

d) The prejudice to other parties if the time is extended.

e) Strength of the appeal.

f) Any other relevant circumstances.

[16] While these factors are relevant to the exercise of the discretion at the end of the day the overriding consideration is the interests of justice in the particular case.

The extent of the delay

[17] The delay in this case is undue. Five months elapsed from the delivery of the substantive decision to the filing of the application for leave to appeal out of time. The application itself is some 85 working days out of time.

The explanation for the delay

[18] In her affidavit the applicant notes that the criminal prosecution against her has changed significantly during the various appearances before the Court. As a result she says that she decided she might:

> justifiably challenge the decision by Judge Wilson and the related decision on costs. To do that I required legal aid. Otherwise I would be unable to afford to do so.

She then applied for legal aid.

[19] The applicant's explanation for the delay, namely a change in circumstances by reason of the change in criminal prosecution over time, is not an adequate explanation for the lengthy delay in this case. If the applicant was aggrieved by the decision of Judge Wilson, as she says she was, she could have lodged a notice of appeal within the 20 working days for the appeal. In her affidavit she says that she instructed Mr Gardiner for the first time on 5 March in relation to custody and other matters involving her daughter. That was less than two weeks after the Judge's decision. If she wished to, she could have discussed the issue of an appeal with Mr Gardiner and filed an appeal within time.

[20] Nor is the fact the applicant was waiting for legal aid a proper excuse for failing to file the appeal. The appeal document filed on 23 July was filed by the applicant herself and before she had legal aid approved for the present application and proposed appeal. If she could file the appeal document herself on 23 July, she could have done it earlier.

[21] The explanation for the delay is not convincing.

When and under what circumstances was the decision to appeal taken?

[22] In her affidavit the applicant says that:

> On or about 22 July 2009 I decided to appeal to the High Court against the restraining orders and the cost order made by Judge Wilson QC at North Shore District Court in February and June 2009 respectively.

There is no suggestion the applicant was not aware of her right to appeal. She was in receipt of legal advice at the hearing and she had different counsel representing her on other family matters, shortly after the hearing. Despite that, and for her own reasons, she chose not seek to appeal until 22 July.

[23] Although the applicant says that she always felt dissatisfied with the decision and felt unfairly treated, she chose not to do anything about it until the costs decision issued. She acknowledges as much by stating in her affidavit that the order for costs was a catalyst for revisiting the decision. The inference is that the appeal would not have been pursued were it not for the award of costs made against her.

Prejudice to other parties if the time is extended

[24] Where a party fails to exercise their right to appeal within time there is always a degree of general prejudice to the respondent if subsequently an application for leave to appeal out of time is granted. The extent of that general prejudice will vary from case to case. The prejudice will generally be greater the longer the delay.

[25] In some cases there may be specific prejudice. While there is no specific prejudice in a case such as the present the general prejudice to the respondents is definitely exacerbated by the long delay in applying for leave. The case involved harassment of the respondents. The restraining orders were necessary to prevent that harassment. Undoubtedly emotions run high in such cases. The certainty and security of the restraining orders will be of particular importance to the respondents and for their and their families' security. They will be prejudiced by the uncertainty associated with the appeal if leave was granted. Any hearing of the substantive appeal would not be until late February or early March 2010, a year after the hearing in the District Court.

The strength of the appeal

[26] In his submissions in support of the application Mr Gardiner emphasised that the police prosecution against the applicant has changed dramatically since the

decision was delivered. He filed a memorandum on 19 October to confirm that the police had withdrawn the two remaining informations against the applicant so that the applicant no longer faces any criminal prosecution. Mr Gardiner also submitted that the District Court Judge was wrong to proceed with the hearing rather than adjourn it pending the outcome of the criminal hearing. He submitted the Judge adopted an unduly rigid approach to the wording of r 461R. He referred to the decision of *Rudman v Way* [2008] 3 NZLR 404 to support his argument.

[27] The fact the police have withdrawn the charges against the applicant is relevant but is not decisive as to the merits of the proposed appeal. The police decision to withdraw the charges does not impact on the factual findings made by the District Court Judge in a different jurisdiction involving a different standard of proof. I also note that in her affidavit in response Ms Sherwood has attached a copy of a letter from the constable dealing with the matter. Even without relying on the latter as proof of the truth of its contents, the position is not quite as straightforward as Mr Gardiner suggests that it is, given the withdrawal of the prosecutions. It is apparent the police have made a number of practical decisions regarding the prosecution.

[28] Further, while the Judge referred to the notes, which were apparently authored by Ms Rowe, (although some of the facts in them could only have been known by the applicant) he identified a number of other features of harassment which he accepted were proved against the applicant in relation to both respondents, including the phone calls traced to the applicant's address, the face to face confrontation in the supermarket and the tagging.

[29] Nor does the case of *Rudman v Way* advance matters from the applicant's point of view. In that case Ms Way obtained a final protection order against Mr Rudman. In parallel criminal proceedings Mr Rudman faced a charge of assault. On appeal to the High Court Mr Rudman claimed the Family Court Judge should have deferred making any final protection order pending the outcome of the criminal trial and that the existence of a domestic violence order against him would prejudice his criminal trial.

[30] In dismissing the appeal Allan J held that applications for protection orders were not to be adjourned pending the determination of parallel criminal proceedings unless there was a real likelihood of prejudice in the criminal proceedings. While he accepted the applicant had a right to silence in the criminal proceedings he considered that did not mean that the Judge was wrong to direct that the application for the protection orders should proceed. Allan J referred to the earlier decisions of *Invensys plc v Load Logic Ltd* (HC CHCH CP73/01, 26 March 2002) and *McMahon v Gould* (1982) 1 ACLC 98 and noted the right of silence does not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with normal rules merely because to do so would or might result in the defendant, if he wishes to defend the action, having to disclose what his defence is likely to be in the criminal proceeding. The applicant's right to silence in the criminal proceedings was not jeopardised by the Judge declining the adjournment in this case.

[31] Further, in this case the defence to the harassment application for restraining orders was that the applicant had not harassed the respondents and was not responsible for the acts complained of. There could have been no prejudice to her in the criminal proceedings if she made such an exculpatory statement in an affidavit in the proceedings before Judge Wilson. As Allan J noted in *Rudman v Way* at para [24]:

> ... nothing said by the appellant on oath in the course of the present proceeding operates to the appellant's prejudice. If he gives evidence at trial, then it will be to the same effect as was given to the Family Court Judge. This is not the sort of case in which the appellant could seek a tactical advantage by "keeping his powder dry". At the criminal trial the jury will no doubt be faced with a conflict of evidence, and will need to determine whether, beyond reasonable doubt, the Crown has shown that the respondent's account must be preferred to that of the appellant.

[32] Mr Gardiner also criticised the Judge's approach to r 461 as "unduly rigid". But one option available to the Judge was to strike out the defence in its entirety. He decided not to do that. The rule is part of the specific rules that apply to proceedings under the Harassment Act. Parliament has determined that there should be a requirement in such proceedings for the defence to be stated. The applicant, with the

assistance of counsel, chose not to file the affidavit. She must now accept the consequences of that decision.

[33] On the issue of costs, while the applicant is only just out of time in relation to that appeal, there is no merit in relation to the proposed appeal. At the conclusion of the hearing, and after hearing from counsel about costs the Judge indicated that an award on a 2B basis together with disbursements would be appropriate. That was not opposed by the applicant's counsel. It was undoubtedly right. The making of a formal order was postponed simply to clarify whether legal aid would be granted. If aid had been granted for the proceedings the applicant would have been immune from costs. In the event, however, aid was not granted and without the immunity costs on a 2B basis were appropriate. This was not a case where costs were left at large for full submissions by way of memorandum at a later date. The only issue for the Court was whether legal aid would be granted or not.

[34] The decision of *Bright v NZ Police* HC AK CRI2006-404-133; CRI-2006-404-134 3 August 2006 Priestley J that Mr Gardiner referred to is not of assistance. That was a decision relating to an application for costs in criminal proceedings in a quite different factual situation.

Any other relevant circumstances

[35] There are two other relevant circumstances. The first is the applicant's approach to this application since filing it in this Court. She has not advanced the application responsibly. She has sought two adjournments of the application. Her counsel filed extensive material the evening before the hearing.

[36] Next, one of the issues the appellant wishes to challenge is the length of the restraining order, three years. I note that under s 23 of the Act there is express jurisdiction to enable the Court to discharge a restraining order. If the applicant considers there has been a change in circumstances, or there is merit in her case, or the length of the order is too long she can apply to the Family Court for a discharge. She is not left without remedy by a denial of leave to appeal to this Court, particularly now that she no longer faces criminal prosecution.

Summary

[37] In summary this application for leave to appeal against the substantive decision of Judge Wilson is substantially out of time. It was apparently prompted by the award of costs. For her own reasons, the applicant chose not to appeal despite the fact she had legal advice from an early stage and at a time when an appeal could have been brought as of right. The merits of the proposed substantive appeal cannot be described as strong. The applicant has other remedies. There is no merit in the appeal against the costs order.

Result

[38] The application for leave is dismissed.

Costs

[39] The respondents represent themselves. In the circumstances there will be no order for costs.

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Venning J