IN THE SUPREME COURT OF SAMOA

HELD AT APIA

Criminal libel / Constitutional challenge
Security for costs.

BETWEEN: SAVEA SANO MALIFA and FUIMAONO FERETI TUPUA

APPLICANTS

A N D: KATALAINA MAKA SAPOLU

FIRST RESPONDENT

A N D: TOFILAU ETI ALESANA

SECOND RESPONDENT

Counsel: P A Fepulcai and H J Schuster for the Applicants
M S Jacobs QC and K M Sapolu for the Respondents

Date Of Hearing: 30 June 1998

Reasons Delivered: 8 July 1998

APPLICATION FOR ORDER DIRECTING RESPONDENTS TO GIVE SECURITY FOR COSTS - RESERVED REASONS OF MORAN J

The Applicants have been prosecuted for criminal libel. The First Respondent is the informant. The Second Respondent is the complainant.

The Applicants have mounted a constitutional challenge to the prosecution. The hearing of the criminal charge has been stayed pending resolution of the constitutional challenge.

In these interlocutory proceedings the Applicants seek an order directing that the Respondents give security for costs. It is not entirely clear whether security for costs is sought in relation to both the hearing of the criminal charge and the constitutional challenge. I am proceeding on the basis that security for costs is sought in respect of both.

The application invokes the inherent jurisdiction of the Supreme Court. That is necessary because the Supreme Court (Civil Procedure Rules) 1980 have little to say on the subject.

R30 provides for the Court's requiring a plaintiff not resident in Samoa to give security for costs in any civil proceeding.

R66 empowers the Court to require any party to give security as a condition of granting any interlocutory application.

Neither of those rules is germane to the present case.

However the Court's inherent jurisdiction to direct the giving of security for costs cannot be doubted. The Supreme Court of Samoa is a superior Court of Record (s21

Judicature Ordinance 1961) and possesses all the jurisdiction power and authority which may be necessary to administer the laws of Samoa (s31).

Absence of statutory guidance as to how the inherent jurisdiction is to be exercised does not obviate the search for principle.

As a general rule security is awarded in the following circumstances:

- If the plaintiff is a mere nominal plaintiff and is in a condition of poverty or insolvency;
- If the plaintiff is a limited company and it appears by credible testimony that there is reason to believe that a company will be unable to pay the costs of the defendant if his defence is successful;
- If a plaintiff is ordinarily resident out of the jurisdiction and has no assets within the jurisdiction which can be reached, though he may be temporarily resident in the jurisdiction;

  and

- Where the residence of the plaintiff is incorrectly stated in the writ of summons unless the misstatement is innocent and made without any intent to deceive.

Halsbury's Laws of England 3rd ed, vol 30 para 706

These are but examples of instances where the jurisdiction to direct the giving of security for costs may be exercised. The list is not exhaustive:

> "In my opinion the inherent jurisdiction to award security for costs cannot validly be said to be restricted to Halsbury's examples or other examples in the decided cases in the sense of denying the existence of the power for any other cases. It may be postulated that the general practice in the exercise of the power is to be found in the cases but it is another thing to say that an ever present inherent power to regulate the court's procedure so as to attain the ends of justice can wither away or become shrunken by limited past examples of its exercise. In my opinion the fact that in the past the power has been regularly exercised in a limited number of cases and refused in others proves the existence of but does not restrict the jurisdiction. An argument to the contrary was rejected in the Billington case [1907] 2 KB 106]] where Lord Alverstone CJ said (at p 109):

> I have always understood that the power of the superior Courts of common law to order security for costs arose from the inherent jurisdiction of those courts over their own procedure. It is true that security was as a rule ordered only in a few exceptional cases which were subject to special considerations - for example, where the action was brought by a foreigner or merely a nominal plaintiff, where it was obviously unjust that the action should be allowed to proceed unless payment of the costs were secured; but I am not aware of any statute conferring this power upon the courts of common law. The cases I have mentioned are instances in which the power of the Superior Courts of common law has in fact been recognised, but I take it that the three Superior Courts had theoretically the power to order security to be given in all cases where they thought it just to do so. Their practice in exceptional cases is proof of their general jurisdiction. Rajski v Computer Manufacture & Design Pty Ltd (1982) 2 NSWLR 443 at 448-449 - Holland J

PRINCIPLES:

Without pretending to lay down an exhaustive set of principles applicable to the exercise of the discretion to order security for costs, it seems to me that the following principles are relevant to the present case.

1. Security for costs should not be awarded against a party in the position of a defendant for the obvious reason that such a party has become involved in the proceedings (usually unwillingly) upon the instigation of the plaintiff and has no choice but to defend. Such a party should not be penalised or inhibited by orders directing the giving of security for costs.

In judging whether a party is in the position of plaintiff or defendant, regard must be had to the substance rather than the form.

> "It has long been firmly established by authority that the Court cannot award security for costs against a defendant, and that in considering whether a party is a plaintiff or a defendant the Court must have regard to the substantial and not the nominal position of the parties. The question in every case is whether the party

against whom an order for security is sought is in the position of plaintiff in the proceeding in question.

C T Bowring & Co (Insurance) Ltd v Corsi Partners Ltd [1994] 2 Lloyds Law Rep 567 at 579 - Millett LJ"

2. There are strong policy reasons why orders for security for costs should not be made against informants in criminal proceedings.

It is in the public interest that offenders be prosecuted. It is inimical to that interest to inhibit prosecution by orders for security for costs.

3. In civil proceedings, any element of public interest in the litigation will tell against a requirement for security for costs because the existence of that public interest will make it desirable that the proceedings be heard - eg Hughes v Cooper 5/7/96 Salmon J, HC Auckland CP 62/95 where the fact that a counter claim raised Bill of Rights issues counted against the applicaion for security for costs.

4. Security for costs should not be ordered unless there is some reason to believe that any order for costs which might be made against a party would be rendered nugatory by an inability to pay. This principle is recognised in the New Zealand High Court Rules:

60. Power to make order - [(1) Where the Court is satisfied, on the application of a defendant, -

(a) That a plaintiff -

(i) Is resident out of New Zealand; or

(ii) Is a corpoation incorporated outside New Zealand; or

[(iii) Is, within the meaning of section 158 of the Companies Act 1955 or section 5 of the Companies Act 1993, as the case may be, a subsidiary of a corporation incorporated outside New Zealand; or]]

(b) That there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding, -

the Court may, if it thinks fit in all the circumstances, order the giving of security for costs.]

R60(1)(b) contains what has been held to be "the threshold test" which must be satisfied if security for costs is to be ordered. (McGechan High Court Rules HR 60.04)

It is inappropriate to import such a mandatory threshold test into the Samoan jurisdiction in the absence of any rule similar to R60. However it is, I think, appropriate to accept, as a guiding principle, the need for an applicant to put before the Court some basis for believing that a plaintiff might not be able to afford to meet any award of costs that might be made.

Naturally that will be difficult if the plaintiff chooses not to volunteer any information about financial circumstances.

The plaintiff's silence on that subject might permit an adverse inference to be drawn but, I accept Mr Jacobs' submission, that some evidential foundation must still be laid for the allegation that there is reason to believe the plaintiff will be unable to pay costs, before the Court would be justified in drawing an adverse inference from the plaintiff's silence.

5. The Court should, as far as possible, assess the merits of the plaintiff's claim and the prospect of its success. Security is more likely to be ordered if the claim appears weak to avert the prospect of the plaintiff's exerting undue pressure. Conversely security is less

likely to be ordered if the claim appears strong and or the defence weak: the security application may be an attempt to frustrate a hearing on the merits - Bell-Booth Group Limited v A-G (1986) 1 PRNZ 457 (as summarised in McGechan High Court Rules HR 60.04).

APPLICATION OF PRINCIPLES:

Notwithstanding that the Respondents are nominally in the position of defendants in the constitutional challenge, it is submitted that, in reality, they are in the position of plaintiffs.

In the criminal prosecution the First Respondent is the informant. The Second Respondent is the complainant.

The prosecution is, in reality, the Second Respondent's prosecution. He has instructed the First Respondent, his solicitor, to lay the information.

The Applicants are unquestionably in the position of the defendants in the criminal prosecution.

It is submitted that they remain in the position of defendants in the constitutional challenge because that challenge is simply their defence to the charge that they face.

The issue to be determined is whether the Applicants are to be seen to be simply defending themselves on the same ground upon which they have been attacked or whether they have opened up a new and diversionary counter-attack.

> "The principle seems to be that where a defendant counter-attacks on the same front on which he is being attacked by the plaintiff, it will be regarded as a defensive manoeuvre. But if he opens a counter-attack on a different front, even to relieve pressure on the front attacked by the plaintiff, he is in danger of an order for security for costs depending upon the court's assessment of the position in each case." Thunderdome Racetiming & Scoring Pty Ltd v Dorian Industries Pty Ltd (1992) 109 ALR 196 - Olney J

It is the substance and not the form that must be examined.

The Second Respondent has been defamed. Instead of issuing civil proceedings for damages he has elected to bring a private prosecution for criminal libel. He has instructed his solicitor, the First Respondent, to lay the information. The Second Respondent is the principal protagonist acting through the agency of his solicitor.

In the context of the criminal prosecution both the First and Second Respondents are to be regarded as holding the position of plaintiffs for the purpose of the question of security for costs.

The Applicants defend themselves by invoking their constitutional right to a fair trial (Article 9) their right to freedom of speech and expression (Article 13) and their right to freedom from discriminatory legislation (Article 15).

In so doing they are not counter attacking on a different front and retain their position as defendants for the purpose of both the prosecution and the constitutional challenge.

It follows that the Respondents are in the position of plaintiffs in both proceedings and would, therefore, be amenable to an order for security for costs.

However, the Respondents are not in a position of plaintiffs in a civil suit, but, rather, hold that position in criminal proceedings. If the constitutional challenge is to be seen as essentially a defence to the criminal prosecution for the purpose of determining whether the Respondents are in the position of plaintiffs, then consistency demands that the constitutional challenge be seen essentially as part of a criminal proceeding rather than a separate civil suit.

An order requiring a person in the position of a plaintiff in a criminal proceeding to give security for costs is unprecedented.

That is not to say that such an order is outside the scope of the Court's inherent jurisdiction.

After all, these criminal proceedings are special in character in that they have been brought at the behest of a private individual rather than by the State.

Furthermore, they have been brought in circumstances where it appears that the State (in the form of the Attorney-General) has declined to act.

If, on the face of it, the prosecution lacked merit then the application for an order for security for costs would be difficult to resist.

Far from lacking merit, however, the informant and her client enjoy the advantage of a judgment of the Court of Appeal to the effect that the defamatory material complained of is reasonably capable of founding proceedings for criminal libel.

The apparent merit of the prosecution tells against the propriety of ordering informant and complainant to give security for costs. So too does the public interest in the constitutional challenge to s84 Crimes Ordinance 1961.

Finally, there is nothing before me to indicate that any order for costs against either Respondent would be rendered nugatory on account of an inability to pay.

Both Respondents have remained silent as to their respective financial means apart from a reported statement of the Second Respondent in the House that he would not pay costs exceeding $700,000.00 in relation to his civil libel suits, it being his contention that the Government should pay.

This is a statement by the Second Respondent that he will not pay the costs. That is not the same thing as a statement that he cannot pay such costs.

After the Head of State, the Second Respondent is Samoa's leading citizen and it is reasonable to suppose that he is a man of sufficient substance to meet any award of costs that might be made against him in the current proceedings.

For her part, the First Respondent is a solicitor in private practice. If the status of her clientele is anything to go by, her practice is a successful one.

Furthermore, she has a powerful incentive to meet any award of costs made against her. An unsatisfied judgment leading to bankruptcy would mean the end of her practising certificate.

In the case of neither Respondent is there any material before me upon which I might draw an adverse inference concerning ability to pay costs.

For these reasons the application for an order directing the Respondents to give security for costs has been refused.

ADDENDUM

Before leaving this judgment I should refer briefly to my refusing the Applicants' application for orders giving the following directions:

"1. The First and Second Respondents provide the following information:

(a) Confirmation of the extent of the involvement, if any, of the Attorney- General, the Attorney-General's office and the Police, prior to, and after, the laying of the information in the Magistrates' Court.

(b) Whether the First and Second Respondent have any agreement, contract, arrangement or understanding, either between themselves or a third party (in particular the Government), regarding payment of the costs of either the criminal case or the constitutional challenge."

Apart from the possible issue of the Respondents' bona fides, the relevance of any possible involvement by the Attorney-General escapes me. Given the judgment of the Court of Appeal as to the apparent merit of the private prosecution, the Respondents' motives in taking that course appear to be irrelevant.

The Attorney-General has now intervened in the proceedings at the Court's invitation and can inform the Court, if she wishes, about any prior involvement in the proceeding.

As to the application for directions that the Respondents disclose their arrangements concerning costs, I know of no basis upon which a party can be compelled to give such information. In the face of an application for security for costs the Respondents are entitled to remain silent as to their financial arrangements. They have chosen to do so and have chosen to take any attendant risk of adverse inferences being drawn from their silence.

Moran J.

.....

Moran J