IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-00101
[2014] NZHC 551

UNDER THE	Defamation Act 1992
BETWEEN	RAZDAN RAFIQ Plaintiff
AND	GOOGLE NEW ZEALAND LIMITED Defendant

Hearing: 17 March 2014

Appearances: Mr Rafiq plaintiff in person
Ms T Walker and Mr B Thompson for defendant

Judgment: 24 March 2014

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***24.03.14 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] There is before the Court an application which the defendant has brought for security for costs. The proceeding in which the application is made is a defamation proceeding. The plaintiff is suing the defendant for defamation for $10,000,000. He does not suggest that the defendant itself defamed him but rather that, because of the way its search engine functions, any person carrying out a suitably worded Google interrogation would have been responded to by a web search page that indicated a link to an unrelated party's blog post about Mr Rafiq with the synopsis section including the words that Mr Rafiq is a "nutbar" and a "serial moaner".

[2] Apparently when the link on the search page is activated it leads to a further website which is a blog. As part of the blog relating to Mr Rafiq reference was in turn made on that site to a Human Rights Tribunal decision in proceedings before that Tribunal to which the plaintiff was a party.[1]

[3] The proceeding before the Human Rights Review Tribunal (HRRT) concerned a dispute that the plaintiff had with the Inland Revenue Department. He had sought disclosure of personal information which he said was held by the department and not all of his requests had been complied with. The outcome of the hearing before the HRRT is not important but in the course of giving its reasons, the Tribunal made reference to correspondence that Mr Rafiq had sent to the department which was as time went on "increasingly shrill, abusive and racist". The HRRT judgment was referred to in the blog that was published on the web from a home site, "http://cqae.co.nz". The name of the site reflects the apparent motto of the blogger which is "Credo Quia Absurdum Est" or "I believe it because it is unreasonable". A posting on the site on 23 November 2012 made reference to some of the messages that the plaintiff sent to the Inland Revenue Department and, subsequently the office of the Commissioner of Privacy were quoted verbatim from the HRRT judgment. The blogger in an introductory note before quoting the messages said:

> A certain Mr Razdan Rafiq recently had a judgment passed against him at the Human Rights Tribunal. Save going in to too much detail, Mr Rafiq is a nutbar and a serial moaner.

[1] *Razdan Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12.

[4] There were then set out the communications which as the HRRT had noted were couched "in astonishing language".

[5] Mr Rafiq took umbrage at the blog. He issued defamation proceedings against Google New Zealand Limited, the defendant. I understand that his argument is that if one framed a Google search in suitable terms, it would lead to a synopsis on the report page.

Application for security for costs

[6] The defendant applies for an order for security for costs pursuant to r 5.45 HCR. The rule provides as far as relevant:

> 5.45 Order for security of costs
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident out of New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or
>
> (iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) 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.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> ...

[7] A power to order security for costs was discussed in *AS McLachlan Limited v MEL Network Limited*[2] where the following comments appear:

> [13] Rule 60(1)(b) High Court Rules provides that where the Court is satisfied, on the application of a defendant, that there is reason to

[2] *AS McLachlan Limited v MEL Metwork Limited* 2002 (16 PRNZ) 747.

> believe that the plaintiff will be unable to pay costs if unsuccessful, "the Court may, if it thinks fit in all the circumstances, order the giving of security for costs". Whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances. The discretion is not to be fettered by constructing "principles" from the facts of previous cases.
>
> [14] While collections of authorities such as that in the judgment of Master Williams in Nikau Holdings Ltd v BNZ (1992) 5 PRNZ 430, can be of assistance, they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a checklist of so-called principles. That creates a risk that a factor accorded weight in a particular case will be given [752]disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.
>
> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
>
> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

Relevance of the summary judgment application

[8] The plaintiff has applied for summary judgment for damages based upon his statement of claim. It was his submission that alternatively to the other grounds the Court should hear the summary judgment application first and then deal later with the security for costs application.

[9] I do not agree. Security for costs is not limited to the costs which the other party is likely to incur at any particular stage of the proceedings. The opposing party will progressively incur costs as the proceeding progresses through the interlocutory stage. Additional, and potentially greater, amounts of costs will be incurred once the proceeding reaches the point where trial preparation commences and the trial itself takes place. When estimating security for costs the courts do not exclude from their consideration the costs that the applicant may incur in the first phase of the proceedings, as I have just explained it.

[10] There is therefore no justification for deferring a decision on security for costs as the plaintiff proposed.

Is the plaintiff impecunious?

[11] It is a threshold requirement of HCR 5.45(1)(b) that the Court must have reason to believe that Mr Rafiq will not be able to pay an adverse costs award.

[12] Mr Rafiq does not dispute that he is an undischarged bankrupt. It is reasonable therefore to believe that he will be unable to meet an award of costs.

[13] As well, the defendant has established by evidence that since making this application, the Supreme Court delivered its decision in *Rafiq v Chief Executive of the Ministry of Business, Innovation and Employment.* In that case, Mr Rafiq sought leave to appeal against a decision dismissing applications to review decisions made by the Registrar of the Court of Appeal refusing to waive security for costs. The underlying appeal was in respect of an order for security for costs made against him by the High Court in a claim in which he is suing the Chief Executive for defamation.

Strength of case

[14] I consider that the injunction against making an order only after careful consideration and in a case in which the plaintiff has little chance of success is apposite in this proceeding as is the following sentence in paragraph 15 from the above quotation.

> Access to the courts for a genuine plaintiff is not likely to be denied.

[15] As well, the reference to the interests of the defendants being weighed is also in issue in this case because the defendant has the right to be protected against being drawn into unjustified litigation.

[16] I accept the submissions for the defendant that a claim which Mr Rafiq has brought has little prospect of success.

Wrong defendant?

[17] Counsel for the defendant submitted:

> 8. The evidence before the Court all points to Google Inc as the provider of the Google Search Service:
>
> (a) The Google Service terms of service state that Google products and services are provided by Google Inc.
>
> (b) Google New Zealand does not own the domain name www.google.co.nz.

[18] In the first place it is quite clear that he has no cause of action against the defendant. The owner and operator of the Google search engine is an American corporation Google Inc. This conclusion has been reiterated in several cases including the decision of Abbott AJ in *A v Google New Zealand Limited.*[3]

[19] The part that the defendant would play in any search would be by on-routing the search enquiry to the Google search machine operated by Google Inc. In those circumstances I consider that based upon the considerations I had regard to in *Sadiq v Baycorp (NZ) Limited.*[4] The defendant did not have the necessary connection with the publication of the material on the internet. As the Court found in *A v Google New Zealand Limited* there is not the requisite control or responsibility over Google's search results to establish liability on the part of the defendant for the material which was generated in the form of the reference page which contained the hyperlink which would forward the search request onto the Google Inc search machine. That being so the defendant is very unlikely to be found to be liable in defamation to Mr Rafiq. His case is a weak one.

Qualified privilege because statement of honest opinion

[20] Ms Walker for the defendant submitted:

> (a) The blog post of which Mr Rafiq complains, comprises an extract from *Razdan Rafiq v Commissioner of Inland Revenue*. Any fair and accurate report of that decision is protected by qualified privilege under s 16 of the Defamation Act 1992.

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[3] *A v Google New Zealand Limited* HC Auckland CIV-2011-404-002780.
[4] *Sadiq v Baycorp (NZ) Limited* HC Auckland CIV-2007-404-6421, 31 March 2008.

(b) The commentary on the passage protected by qualified privilege would be understood by the ordinary reasonable reader as comment. The comment is based on facts protected by qualified privilege providing a defence of honest opinion.

•Refer Gatley on Libel and Slander para 12.2 citing *Spiller v Joseph* [2010] UKSC 53.

[21] The passages quoted in the blog post were exact reproductions of the passages of the HRRT. It follows that the blog post must represent an accurate report of part of the judgment of the HRRT. Of course, the blog does not reproduce the entire judgment but there is no reason to suppose that the context in which the communications from Mr Rafiq were mentioned would have the effect of giving a different complexion or meaning to the words that he used in his communications. There could therefore be no question that the verbatim reproduction of the excerpts in question was somehow unfair. I would therefore agree that the defendant is likely to be able to successfully invoke the defence contained in s 16 Defamation Act 1992.

[22] Secondly, the commentary in the blog on the passages themselves would also be protected as comment which is based on facts protected by qualified privilege which amounted to a statement of honest opinion. The content of the words which the blogger used were robust describing the plaintiff, as they did, as a "nutbar and a serial moaner". Given the extraordinary and obscene communication which the plaintiff directed toward the Inland Revenue Department and the Office of the Privacy Commission in the course of seeking the release of information relating to himself, the blogger may very well have a defence of honest opinion.

Quantum of security for costs sought

[23] The figure that the defendant seeks by way of security has been limited to phases in the proceeding up to the hearing of a defended summary judgment hearing. Costs calculations are put forward alternatively on the basis of band 2A or 2B accordingly. No estimate of costs is advanced beyond that point for matters such as discovery, other interlocutory applications, preparation for trial and trial.

[24] There are no hard and fast rules about what future steps in the litigation a security for costs order ought to anticipate. Provision of security for future steps can

be managed by way of staged orders. However for present purposes I consider that it would not be unreasonable to make provision for security for costs up to the point where a statement of defence is to be filed. The next step is to choose whether the assessment of a band 2A or band 2B cost provides a reasonable level of security to the defendant. For want of any more precise approach, I propose to take a figure which represents the average of the 2A and 2B allocations or $9,949.

[25] There will be an order that the plaintiff is to provide security in that sum to the Registrar of the High Court at Auckland within 20 working days. There will also be an order that the proceeding is stayed until security for costs has been provided.

[26] The parties should confer on the matter of costs and if they are unable to agree are to provide memoranda not exceeding five pages on each side within 15 working days of the date of delivery of this judgment.

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J.P. Doogue
Associate Judge