IN THE COURT OF APPEAL OF NEW ZEALAND

CA333/2008
[2008] NZCA 306

	BETWEEN	VONRICK CHRISFORD KERR Applicant
	AND	THE DOMINION POST Respondent

Hearing: 12 August 2008

Court: Glazebrook, O'Regan and Robertson JJ

Counsel: Applicant in person
R K P Stewart for Respondent

Judgment: 14 August 2008 at 3 pm

JUDGMENT OF THE COURT

A The application for special leave to appeal is dismissed.

B The applicant must pay the respondent costs for a standard application on a band A basis, and usual disbursements.

REASONS OF THE COURT

(Given by Robertson J)

[1] This is an application for special leave to appeal in respect of an order requiring security for costs.

[2] Mr Kerr asserts that the respondent defamed him in an article published on 6 and 9 October 2007. On the later date, he issued proceedings in the High Court at Wellington.

[3] The respondent filed a statement of defence denying the claim and raising the affirmative defences of truth, statutory qualified privilege, common law qualified privilege and bad reputation as well as a claim of misconduct in mitigation of damages.

[4] On 23 November 2007, the respondent made an application for security for costs and an associated order that the proceeding be stayed until any such security as might be ordered was paid.

[5] There was a contested hearing before Associate Judge Gendall on 19 December 2007. In a judgment delivered on 28 January 2008, Mr Kerr was ordered to pay security for costs in the amount of $30,000 and the proceedings were stayed under r 60(2)(b) pending payment in full of the security.

[6] On 5 February 2008, Mr Kerr filed an application for review. There was a hearing before Dobson J on 5 March 2008 and in a reserved decision of 13 March 2008 the Judge declined to intervene save that he indicated that if an application for summary judgment was abandoned, there may be an argument for staging the payment for security. That has not occurred.

[7] Mr Kerr next filed an application for leave to appeal to the Court of Appeal against the March decision, which was heard on 5 May 2008. A reserved decision of Dobson J of 8 May 2008 concluded that the threshold required for a further appeal was not met on any of the separate grounds, nor in their cumulative effect.

[8] Mr Kerr now seeks special leave under s 26P(1AA) of the Judicature Act 1908. The proper approach to such an application is summarised in *Waller v Hider* [1998] 1 NZLR 412 (CA).

[9] The questions of law in respect of which special leave is sought (following their unopposed amendment in June 2008) are as follows:

(a) Where the applicant makes an application for security for costs and the respondent produced to the Court supporting evidence to show the merits in statement of claim, does the onus fall on the applicant to provide evidence to the Court in those proceedings?

(b) In assessing the merits of statements of claim in security for costs proceedings, in which the respondent claims public interest and qualified privilege defences, is it critical that the Court consider whether there is a duty upon the respondent to publish, or legitimate public interest in the respondent publishing, the material in question (and the extent of any discerned public interest)?

(c) Are individuals with previous convictions entitled to have their reputation at the time of publication protected by the Courts? If the answer to the question is "yes", where there are imputations of criminal convictions in the respondent's publications and the applicant provides evidence showing the criminal convictions published to be false and without privilege, must the applicant abandon an application for summary judgment before staged security can be ordered?

(d) Where a respondent's counsel, on the respondent's behalf, provides the Courts with false statements about an applicant (that are subsequently published by the respondent), can the applicant be held liable if the statements are proved to be false or defamatory?

[10] The only determination which the Court has made at this stage is that, on a very conventional application of well-established principle (see *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747), an order should be made for security for costs in terms of r 60.

[11] In his oral submissions, Mr Kerr made particular reference to the decision in *O'Malley v Garden City Helicopters Ltd* (1994) 8 PRNZ 182 (HC), but appeared to overlook that in that case Tipping J was concerned with considerations particular to a legally aided litigant. This makes the case of limited guidance in these circumstances.

[12] There was dialogue before us as to whether, at the initial hearing, Mr Kerr's argument, that he was alleged to have convictions that he did not, was addressed by the provision of a certified list of his previous convictions. It seems a document was shown to Gendall AJ and counsel but then taken back. Mr Kerr was unwilling to make this information available to Dobson J. In the assessment of the case, this aspect did not receive special attention.

[13] Gendall AJ noted the threshold test as to whether there was reason to believe the applicant would be unable to meet an adverse costs order in the proceedings. That test was satisfied but, as required, the Judge also considered other matters which might affect the exercise of discretion. He concluded that there should be an order.

[14] Since then, nothing has been advanced which suggests that the Judge's decision was in any way wrong. There was no misapplication of principle. A second appeal is reserved for special circumstances and we do not consider that there are any here.

[15] With respect, the points now raised by Mr Kerr are misconstrued. The first does not raise a question of law or fact capable of bona fide and serious argument. Nothing has occurred which is in any way out of the ordinary. There has simply been an assessment and evaluation of the material that was placed before the Court.

[16] The second and third questions go to issues in the substantive hearing, and not to the assessment to be undertaken on whether security for costs should or should not be ordered.

[17] The fourth matter is an issue quite unrelated to the present proceeding.

[18] We are conscious that Mr Kerr is appearing for himself, and in every case there is a need, when considering security, to balance the competing interests of access and protection. This Court said in *McLachlan*:

> [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.
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> [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.

[19] What occurred before Gendall AJ was an absolutely routine assessment of the evidence and material then available, undertaken in accordance with the applicable principles. It was subject to review.

[20] No matter has been raised that would justify a further appeal. The application for special leave is dismissed.

[21] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Izard Weston, Wellington, for Respondent