IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-2243

BETWEEN	V C KERR Plaintiff
AND	THE DOMINION POST Defendant

Hearing: 19 December 2007

Appearances: R.K.P. Stewart & B.J. Marten - Counsel for Defendant
V.C. Kerr – Plaintiff (in person)

Judgment: 28 January 2008 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 28 January 2008 at 3.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.

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Introduction

[1] This is an application by the defendant under r 60 for security for costs. The application brought on 23 November 2007 sought a further order that this proceeding against the defendant be stayed until such security that might be ordered was paid.

[2] The application is opposed by the plaintiff.

[3] The plaintiff's claim in this proceeding alleges that the defendant has defamed him in articles published in its newspaper on 6 and 9 October 2007.

Background Facts

[4] This is the second defamation proceeding brought by the plaintiff regarding articles published in the Dominion Post newspaper. In the first, brought in 2000, the plaintiff alleged he had been defamed in an article published on 5 November 1998. The article stated that the plaintiff had been released from prison the previous day having served a sentence for assaulting his wife during an incident in which he also threatened to drive his vehicle with his daughter in it over a cliff. The plaintiff complained that those statements were false. The plaintiff had not been serving a sentence for assault, but rather for breaching a protection order. Furthermore, the Judge in sentencing the plaintiff for that incident had accepted that he had not manifested a clear intention to drive over the cliff, which apparently was some distance from where the vehicle was parked.

[5] The defendants in that proceeding (the previous owners of the Dominion Post) applied for security for costs, which I ordered in the amount of $25,000: *Kerr v Attorney-General and Wellington Newspapers Ltd* HC WN CP 109/00 10 April 2003. On hearing that application I was satisfied that the plaintiff was impecunious, such that he met the threshold test in r 60. I was also satisfied that it was appropriate to exercise my discretion in favour of granting security for costs. In making that assessment, I took the view that the plaintiff's claim had a low probability of success.

[6] The plaintiff applied for review of my decision: *Kerr v Attorney-General and Wellington Newspapers Ltd* HC WN CIV 2000-485-630 24 September 2003. Wild J

upheld my decision. The plaintiff did not pay the security ordered and the proceedings were subsequently stayed. I mention these prior proceedings because the case for the defendant is that the circumstances of the present application are essentially the same, and that the same result should follow.

[7] The current proceedings allege defamatory statements made in two separate articles, which were annexed to the plaintiff's affidavit of 26 November 2007. I will not reproduce the articles in full here. Essentially they report on an application by the plaintiff for approval as a licensed taxi organisation, and record the view of various persons involved in the transport industry that the plaintiff is not a fit person to operate a taxi organisation licence by virtue of his previous convictions and behaviour towards female passengers in the past.

[8] The statement of claim specifies a number of allegedly defamatory statements. I note that the plaintiff has only reproduced in his claim parts of the statements complained of. For context I reproduce the complete sentences, with the parts omitted by the plaintiff italicised in square brackets.

[9] From the 6 October article:

> *"1. Court documents show Vonrick Chrisford Kerr also has convictions for his conduct toward women while driving taxis [before he was disqualified from driving passenger vehicles for three years in 1997.]*
>
> *2. [In March that year he was involved in a standoff with police when] he drove to the edge of a cliff above the Hutt motorway with his three-year-old daughter [and ignored directions to let her go.]*
>
> *3. [In a civil case brought against Wellington Newspapers by Mr Kerr for defamation, lawyers indicated] he also had convictions for assault, [abusive language and behaviour causing fear,] wilful damage, [unlawfully being in a yard and dangerous driving.]*

[10] And from the 9 October article:

> *"1. [The Director of Land Transport originally disqualified Mr Kerr from driving taxis for 10 years,] after convictions for his conduct toward women passengers in the late 1990s.*

[11] The plaintiff pleads a number of allegedly defamatory meanings in respect of each of these passages.

[12] He says that references to convictions for his conduct towards female passengers in the first and fourth passages noted above convey to the ordinary reader that he has been convicted of offences committed in the course of his employment as an on-duty taxi driver. This is false, says the plaintiff. He contends he was charged on two occasions with being unlawfully on property having driven women to their homes, but the events the subject of both those charges occurred while he was off-duty.

[13] The plaintiff says next that the reference to the "edge of a cliff" in the second passage is false, as he was at the relevant time some distance from the cliff-face.

[14] Finally, the plaintiff maintains that the references to convictions for assault and wilful damage are false, as he has never been convicted of those offences.

[15] In reply, the defendant advances a number of affirmative defences:

(a) The statements in the articles were true or not materially different from the truth: *s 8(3)(a) Defamation Act 1992*.

(b) The articles taken as a whole were in substance true or not materially different from the truth: *s 8(3)(b) Defamation Act 1992*.

(c) The articles contain a fair and accurate report of court proceedings and are therefore entitled to statutory qualified privilege: *s 16 Defamation Act 1992*.

(d) The defendant had a duty to publish the articles due to the public interest in the plaintiff's past convictions and current application for

approval as a taxi organisation. As such, the articles are covered by common law qualified privilege.

(e) The defendant intends to adduce evidence of specific instances of misconduct to establish that the plaintiff's reputation is generally bad, such that any reputational harm, and consequently damage, due to false statements in the articles was minimal: *ss 30 and 42 Defamation Act 1992.*

Security for costs – principles

[16] Security for costs is provided for in r 60, which relevantly provides:

> ***"60 Power to make order for security for costs***
>
> *(1) Where the Court is satisfied, on the application of a defendant,—*
>
> *…*
>
> *(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."*

[17] Two issues arise in the application of r 60:

(a) Whether there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if he is unsuccessful in his proceeding (the 'threshold test'); and

(b) If the threshold test is met, whether the Court should exercise its discretion in favour of ordering security.

[18] The general approach to security for costs was outlined in *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 at paragraphs [13] to [16]. The Court held that whether or not to order security and, if so, the quantum of security, 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.

[19] The Court went on to observe that 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 from a genuine plaintiff is not lightly to be denied.

[20] 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.

[21] The merits of a case in so far as they can be assessed at this interlocutory stage, will be relevant to the exercise of the discretion under Rule 60. As *McGechan on Procedure* at para. HR60.03(b) notes, there is of course a very real limit as to how far such an enquiry into the merits of a case can be made, particularly at an early stage of the proceeding – *Meates v Taylor* (1992) 5 PRNZ 524 (CA).

Threshold test

[22] Before ordering security for costs, there must be reason to believe that the plaintiff will be unable to meet a possible adverse costs award. In making that assessment, the Court is not fettered by formal burdens of proof: *Lunn v Fourth Estate Holdings Ltd* (1997) 11 PRNZ 316 at 318. Something more than a mere difficulty to pay must be established, however, and security may be declined where the plaintiff's financial position is improving and is likely to improve still further: *Rivendell Mushrooms Ltd v Horowhenua Electric Power Board* HC WN CP 844/92 13 November 1998.

[23] The defendant has estimated it will incur costs calculated on a 2B scale basis here of $53,500.00 on the assumption this matter proceeds all the way to trial. That estimate comprises costs to date, estimated costs of the interlocutory applications signaled by the defendant, and estimated costs of preparing and conducting the trial.

[24] The plaintiff claims that he is able to pay the defendant's costs if unsuccessful in his proceeding. That assertion, made on oath in his affidavit, is relevant but not decisive: *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430 at 436. However, the plaintiff has provided minimal information regarding his financial position. He states that he is working as a taxi driver but does not provide any details of his income from that business, other than to note that his financial situation is improving. I understand the plaintiff's passenger service licence commenced in June of 2007. The plaintiff gave notice of his application for approval as a taxi organisation in October 2007. Accordingly, the taxi business he speaks of appears to be of relatively recent vintage.

[25] The one concrete asset referred to by the plaintiff is his taxi vehicle, which he says is insured to a value of $29,000. No evidence is provided as to that insurance value however. The defendant has on its own initiative obtained a valuation for a comparable vehicle, which indicates that, if sold at retail, the vehicle would be worth between $20,750 and $23,050, depending on its condition. The defendant submits that the vehicle does not constitute good security, as it is a rapidly depreciating asset. That is a particular concern given these proceedings may not be resolved for some time.

[26] Weighing up the material which is before the Court, I am satisfied that the threshold test is met in this case. Even were the plaintiff to realise the asserted value of his vehicle, that would not meet the estimated costs of this proceeding. Furthermore, the lack of any detail about the plaintiff's financial position, particularly in light of my previous findings as to his impecuniosity in April 2003, mean there is reason to believe the plaintiff will be unable to meet an adverse costs award. I note that in *Arklow Investments Ltd v MacLean* (1994) 8 PRNZ 188 it was held at 191 that adverse inferences may be drawn from the plaintiff's failure to disclose his financial position. Here, the plaintiff has provided only minimal evidence to support what is a bare assertion that he can meet a costs award.

Discretion to order security

[27] There is no presumption either in favour or against granting security for costs. As I have noted above, in *A S McLachlan*, the Court noted that it has to strike a balance between two competing interests:

(a) The need to ensure genuine plaintiffs are not deprived of access to the courts; and

(b) The need to protect defendants from unjustified litigation which has minimal chances of success.

[28] In striking that balance, I must consider the merits of the claim, to the extent that is possible at such an early stage.

[29] On the basis of the material currently before the Court, I am of the view that the defences are likely to succeed, and accordingly the chance of the plaintiff's claim succeeding is minimal.

[30] First, in my view the defendant is likely to prove the truth of most of the statements the subject of the claim. To the extent the defendant is not able to prove the truth of all of the statements, as I see the position it is likely to succeed in proving that the articles as a whole were not materially different from the truth. Specifically, with reference to the passages quoted earlier and the defamatory meanings alleged by the plaintiff in respect of those passages:

(a) *Passages one and four:* the plaintiff's claim alleges that these passages convey the ordinary meaning that the defendant was convicted in relation to events that occurred while he was on duty as a taxi driver. In fact, the decision of Judge Ongley in *Kerr v Director of Land Transport Safety* DC WN MA 100/97 31 July 1997 establishes that the plaintiff was once diverted (having admitted guilt) and once convicted of offending in which he was found unlawfully in the yard of two women whom he had driven home. In the first case, the woman was a client. The plaintiff dropped her off at her destination, left, and then returned later and was found in her yard. In

the second case, the plaintiff met the complainant in a bar and offered her a lift home, telling her he was an off-duty taxi driver. Having dropped her off, he again returned and was found on her property. The sentencing in that matter is reported as *Police v Kerr* DC WN CRN 7085006329 28 May 1997.

Of the two statements complained of by the plaintiff, only the first might be said to convey the meaning that he was on-duty at the time of the offending. While I accept that any implication he was on-duty at the time is false, in substance the statements are true, which is to say the plaintiff does have convictions for his conduct towards women while driving his taxi. Notwithstanding the offending occurred after he had dropped the women off, it was proximate to the driving, so much so that the Director of Land Transport Safety thought it appropriate to disqualify the plaintiff from holding a passenger service licence. That disqualification was partially upheld by Judge Ongley in the judgment referred to above.

(b) *Passage two:* the plaintiff alleges that the statement that he drove his daughter "to the edge of a cliff" is false. The events the subject of this statement were canvassed in a disputed facts hearing that took place before Judge Maclean, reported as *Police v Kerr* DC WN CRN 8085008820 and 8085009417 22 April 1998. Part of that report is annexed to the plaintiff's affidavit. Reference was also made to that report in Wild J's judgment reviewing my previous decision ordering security against the plaintiff.

The part of Judge Mclean's decision produced to the Court states that the police officer who approached the plaintiff's car was concerned that he was "planning to send the car down the hillway, 50 to 60 metres down a rough track, which then ended in another clearing, then quite close to an abrupt drop on to the motorway". The disputed facts hearing turned on what the plaintiff had actually intended and the Judge noted that "the car was not at that point in fact particularly

close to the abrupt drop down to the motorway" but that the officer was fairly concerned that, had the vehicle moved forward, that would have precipitated a chain of events that would have resulted in the vehicle going over the cliff.

Wild J considered Judge Mclean's judgment in his decision on review and, on the basis of those findings, concluded that it was not defamatory to state that the plaintiff "had threatened to drive his car…over the edge". I reach the same conclusion with regard to the statement presently complained of. Given the apprehension of the police officer, the conclusion of Judge Mclean that his apprehension was reasonable, and the physical location of the vehicle, the phrase "edge of a cliff" is not materially different from the truth of the matter.

(c) *Passage three:* the plaintiff complains that he has no convictions for assault and wilful damage. I accept that the plaintiff does not appear to have any convictions for wilful damage, however he acknowledged in the course of submissions before me that he has a conviction in Britain for "common assault". I do not consider the difference between "assault" and "common assault" to be material in the context of a newspaper article.

Furthermore, notwithstanding any inaccuracies, I note that the passage in full states that "in a civil case…lawyers indicated [the plaintiff] also had convictions for assault…wilful damage". That statement is true – I refer to paragraph [35] of my previous decision ordering security, where I record the defendants' counsel's intention to call evidence of those convictions. I acknowledge that that statement might be seen as somewhat disingenuous if the defendant is taken as having known that the indication of counsel in those previous proceedings was in fact incorrect. However, looked at overall, I am satisfied that the statement and the publication as a whole are in substance true.

[31] I conclude that the defendant as I see it is likely to succeed in its defence of truth. It is not strictly necessary therefore to canvass the other defences offered, but I refer to them simply to demonstrate that in my view the defences to this claim are comprehensive. In addition to a defence of truth, the defendants will rely on the statutory qualified privilege that exists for fair and accurate reports of court proceedings. As is evident from the foregoing discussion, most if not all of the allegedly defamatory meanings can be substantiated in the reports of the various proceedings to which the plaintiff has been a party. The defendant also relies on common law qualified privilege, citing the public interest involved when a person such as the plaintiff applies for approval to operating a licensed taxi organisation. Finally, to the extent that any of the statements might be found to be defamatory, the defendant relies on the plaintiff's generally poor reputation in mitigation of damage. While I acknowledge the plaintiff's submission that reputation is a dynamic process, and that he has not offended in some time, I consider that the nature and extent of any falsehoods in the articles do not detract substantially from the plaintiff's already, at the least, somewhat tarnished reputation.

[32] The plaintiff goes on to submit that I should exercise my discretion against ordering security for costs because the defendant is using the application as a "tactical weapon" and because the defendant's conduct is the cause of the plaintiff's impecuniosity. These claims are strongly contested by the defendant.

[33] Regarding the first submission, I do not consider the defendant is precluded from relying on r 60 simply because that will prevent the plaintiff from pursuing his claim. As noted in *A S McLachlan*, r 60 contemplates the possibility that the plaintiff will be prevented from pursuing his claim due to an order for security. The defendant is doing no more than standing on its rights in circumstances where the claim has little hope of success.

[34] On the second submission, in *Davy v Howell* (1993) 7 PRNZ 141 and *Weld Street Takeaways & Fisheries Ltd v Westpac Banking Corp* [1986] 1 NZLR 741 it was held that any "reasonable probability" that the plaintiff's impecuniosity results from the defendant's actions complained of in the proceedings will count against ordering security. However, there must be persuasive evidence of that. Mere assertion will not suffice. Here, the plaintiff refers to expenses he has incurred

installing additional security devices and stronger seat covers in his vehicle, presumably due to the recognition factor caused by the defendant's publication. In my view that is not sufficient to establish that the plaintiff's impecuniosity is due to the defendant's actions. The defendant's actions may have had some minor financial impact, but I am satisfied that the plaintiff would likely have been unable to meet a costs award in any event.

[35] I conclude that this is an appropriate case in which to order security for costs.

Result

[36] The defendant's application for security for costs succeeds. As to quantum, the defendant estimated its scale costs, calculated on a 2B basis, would comprise some $53,500. The plaintiff made no submissions as to quantum. *McGechan on Procedure* at Para HR60.07 noted on the issue of quantum that:

> *"In so far as past awards of security are a legitimate guide, they generally represent some discount on the likely award of costs as calculated under Schedule 3."*

In my view an appropriate amount for security under the circumstances here is $30,000.00 and I order the plaintiff to pay security for costs in that amount.

[37] In addition, the present proceedings are stayed under r 60(2)(b) pending payment in full of the security. An order to this effect is also made.

[38] Leave is reserved to either party to apply to the Court on 48 hours notice for further directions.

[39] The defendant has been successful and is entitled to costs on this application calculated on a 2B basis. I certify for one counsel only.

'Associate Judge D.I. Gendall'