IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-2243

IN THE MATTER OF	the Defamation Act 1992
BETWEEN	VONRICK CHRISFORD KERR Plaintiff
AND	THE DOMINION POST Defendant

Hearing: 5 March 2008

Counsel: Plaintiff in person
R K P Stewart & B J Marten for defendant

Judgment: 13 March 2008

JUDGMENT OF DOBSON J

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[1] In these proceedings, Mr Kerr sues the Dominion Post for defamation. They are the second of such proceedings, the first having apparently come to an end when Mr Kerr could not meet an order for security for costs made against him.

[2] On 28 January 2008, Associate Judge Gendall ordered that Mr Kerr pay $30,000 as security for costs in the present proceedings, and that the proceedings be stayed until payment had been made in full.

[3] This was an application for review of the Associate Judge's decision. Mr Kerr notionally acknowledged the usual onus on an applicant seeking review of a reasoned decision from an Associate Judge. The particular authority acknowledged by Mr Kerr on this point was *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* (2002) 16 PRNZ 107, the headnote of which includes:

> The review under r 61C was appellate in character. The burden was therefore on the applicant to satisfy the Court that the Master made unsupportable findings of fact and/or applied wrong principles of law.

[4] However, Mr Kerr actually embarked on a very thorough re-argument of the whole issue, sometimes submitting that "it would have been better if…" the Associate Judge had adopted a particular stance, and even more generally, that he considered the Associate Judge could have dealt with certain points "better".

Threshold issue – inability to pay costs

[5] On the relative state of his impecuniosity, Mr Kerr has now filed an affidavit demonstrating that he has commenced business as a taxi driver, and that he owned a taxi insured for $29,000. Exhibits to his affidavit included a GST return for the first four months of operation to 30 September 2007, which showed a substantial excess of expenses over receipts. He advised that he expected his trading income to improve to a point where he could pay, over time out of his income, a substantial costs award. He also acknowledged that the car had been financed with a private loan, apparently from his fiancée. He rejected the notion that there would be a need for sale of the taxi in circumstances where a costs award was made against him, assuming it would be sufficient for him to meet such an obligation over a period of time.

[6] The Court file reveals that Mr Kerr sought waiver of his liability for the filing fee on the present application, and that was granted by the Registrar on 5 February 2008. When asked what he had said to the Registry in order to gain his waiver, he indicated that it was no more than that he was unable to pay the fee on the day of filing. He suggested that he could, if forced to, find the money to pay the filing fee. I was given the impression that the source of any payment would most likely be a further advance from his fiancée.

[7] When the matter was argued before the Associate Judge in December 2007, the taxi had been acquired, but the business was still very new. The return for GST purposes for four months to 30 September 2007, which was dated 6 October 2007,

could have been put before the Associate Judge, but it was not. In any event, it is unhelpful and the only gloss on it is Mr Kerr's hope that things will improve. That is not a basis for overturning the Associate Judge's finding that the threshold test is met in this case. The inability to pay a $600 filing fee a month ago is hardly encouraging in terms of any real improvement in Mr Kerr's financial predicament.

[8] Mr Kerr also criticised the Associate Judge for apparently relying on his earlier threshold decision, made on a similar application in the first proceedings, in April 2003. The only reference was:

> 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.

[9] I do not consider that reflects any material reliance on the financial circumstances that pertained in 2003. It is no more than an acknowledgement that there was a history of impecuniosity which could obviously be found to have changed, if evidence so established.

[10] Accordingly, the threshold finding of impecuniosity was readily supportable. There is no scope for finding that the analysis applied any wrong principle of law.

Discretion to order security

[11] As to the merits, the Associate Judge recognised the balance that had to be struck between the two competing interests, namely the need to ensure that genuine plaintiffs are not deprived of access to the Courts, and on the other hand, the need to protect defendants from unjustified litigation which has minimal chances of success.

[12] If the genuineness of the plaintiff is measured by determination to pursue the matter, then Mr Kerr certainly qualifies. However, it has more to do with the genuineness of the cause of action, appreciating that this is difficult to assess at the preliminary stage.

[13] A major part of Mr Kerr's argument was a rejection of the Associate Judge's provisional findings that his claims had little prospect of success. Of particular concern is the prejudice he sees in the defendant's statements about his prior convictions, having gained, as it were, a life of their own, without either the defendant or the Court being accountable for the lack of accuracy of the original statements. This is illustrated by the defendant pleading truth in respect of parts of two passages that appeared in its newspaper on 6 October 2007, in the following terms:

> 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.

And:

> 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. The defamation case never went to trial.

[14] The justification for the first of these passages is paragraph [19] of the judgment of Wild J in September 2003 dismissing an application to review the then Master's decision ordering security for costs in Mr Kerr's first defamation proceedings, brought in 2000:

> [19] To summarise, the plaintiff has convictions for his conduct toward women passengers while driving taxis, and was disqualified from driving any transport service vehicle for three years. He also has five convictions for breaching the order protecting his wife and one conviction for burglary for forcibly smashing his way into his wife's home.

[15] As to the second extract, Mr Stewart confirms that the defendant did make those assertions in the course of the first proceedings, and that all the latest publication complained about does is to report what the newspaper had intended to argue (distinctly from asserting as the truth, the fact of such convictions). In any event, the defendant will, consistently with its stance in the first proceedings, seek to establish that the allegations are substantially true.

[16] Mr Kerr criticised the Associate Judge's findings in respect of previous convictions, on the ground that they were unsupportable in the absence of positive evidence. I later gleaned from comments by Mr Stewart that a list of prior convictions had been handed briefly to the Associate Judge by Mr Kerr, but that the list was then returned (via counsel for the defendant) to Mr Kerr. This raised the obvious concern that the Associate Judge may in some way have been influenced by the content of that list, in reaching the views that he did.

[17] After warning Mr Kerr during the hearing of the course I intended to adopt, I issued a Minute affording him seven days in which to provide me with a copy of the list that he had given to the Associate Judge, against the contingency that it may have some material bearing on the findings that had been made.

[18] By Memorandum dated 11 March 2008, Mr Kerr has declined to provide that list to the Court. He argues that it did not have any bearing on the reasoning, and resists any notion that there is an onus on him to make out the absence of convictions, or to establish the errors in what the defendant has asserted. Certainly, on the terms of the Associate Judge's decision, there are no grounds for suspecting that the list of convictions may have influenced the way he approached the issue, and there is absolutely no reference to the list. In the end, the reasoning is easily supportable without speculating about any reliance placed on the list of convictions, and so it would be unnecessary to resort to it to justify the correctness of that decision.

[19] Mr Kerr's 11 March 2008 Memorandum also reveals some misapprehension that there is an onus on the defendant to provide discovery of the grounds on which it asserts truth in respect of its statements on convictions, prior to the plaintiff having to provide discovery. There is no basis for that expectation, which I mention only to negative the prospect of any support being given to it in the absence of a comment.

[20] An additional complaint on the first passage cited in [13] above is that the reference to convictions "…for his conduct toward women while driving taxis…" leads to the inference that the convictions arose out of criminal conduct towards

women whilst they were in taxis when he was driving "on duty". Again, the defendant says this characterisation of the convictions derives from the terms of paragraph [19] of Wild J's judgment, quoted in [14] above. It will presumably be argued that another meaning equally open on the words used in the judgment and in the defendant's article, is that Mr Kerr was convicted of such offences for conduct in the period when he was working as a taxi driver, and before he was disqualified from doing so.

[21] The Associate Judge dealt with this point in these terms:

> 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.
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> 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.

[22] I am not persuaded that the Associate Judge's preliminary analysis is wrong in any way.

[23] A further element of the dispute is that some of the convictions described by the defendant are of a type, or are substantially the same as (eg "common assault" cf "assault") ones of which he had previously been convicted in the United Kingdom. Under the United Kingdom Rehabilitation of Offenders Act 1974, Mr Kerr argues he has, at all times material to this action, been entitled to deny the existence of such United Kingdom convictions, and that the position is as if they were never entered.

Assuming there is evidence of the fact of such convictions, to make out a defamatory element in relation to the paper's references to them, Mr Kerr will have to succeed with the argument that the terms of the United Kingdom statute do indeed entitle him to deny that they ever existed. Without prejudging the outcome of that argument, it is certainly not without real difficulties.

[24] I have carefully considered all of the reasoning on the merits in the Associate Judge's decision, in light of Mr Kerr's attacks on it. With respect, I consider it adopted the correct approach, and reached the correct preliminary conclusion, namely that this defamation claim has only slim prospects of success. It follows that in the balancing of competing interests, those of the defendant should prevail where it is appropriately protected from litigation that appears to have minimal prospects of success, and where it would not recover a contribution to its costs on a successful defence.

Basis for staged provision of security?

[25] One discrete criticism that Mr Kerr advanced was that the Associate Judge should have considered ordering security for costs in stages: one lump sum of $30,000 is patently beyond him, but staged security might enable him to meet payment obligations, and progress his claim.

[26] Mr Stewart accepted that but for Mr Kerr's pursuit of an application for summary judgment, staged security could adequately address the defendant's concerns on the point. He argued that preparing a defence to summary judgment application so "front ended" a very substantial part of the total preparation, that a single order for security for costs is warranted.

[27] Given that the substantive case appears weak, then the prospects of a plaintiff's successful summary judgment are forlorn indeed. The current, fourth, edition of *Todd on Torts* notes that there appear to be no cases where a plaintiff has succeeded on summary judgment in a defamation case (para 17.16). The nature of the defences raised means that this is most unlikely to be the first such success.

[28] If Mr Kerr were to abandon his application for summary judgment so that the proceedings reverted to the conventional course of interlocutories, then this might well be a case for staged security. I am prepared to reserve leave for Mr Kerr to apply for a variation of the terms on which the ordered security is to be paid, in the event that the summary judgment application is abandoned. Unless that occurs, the amount and terms for provision of security remain appropriate.

Dobson J

Solicitors:
Plaintiff in person
Izard Weston, Wellington for defendant