IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007 485 2243

BETWEEN	V C KERR Plaintiff
AND	THE DOMINION POST Defendant

Hearing: 5 May 2008

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

Judgment: 8 May 2008

RESERVED JUDGMENT OF DOBSON J

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[1] This is an application for leave to appeal to the Court of Appeal. It is pursued in respect of my judgment of 13 March 2008 which declined to review the original decision of Associate Judge Gendall of 28 January 2008 in which security for costs was ordered against the plaintiff.

[2] The claim is one alleging defamation in reports by the Dominion Post about Mr Kerr's attempts to obtain a licence to operate a taxi, in circumstances where he has certain criminal convictions which may be seen as relevant to his fitness to operate a taxi. Mr Kerr subsequently obtained a licence, and began operating a taxi in 2007.

[3] Section 26P(1AA) of the Judicature Act 1908 provides that in such circumstances the determination of the High Court is final, unless the High Court gives leave or, on a refusal to grant leave, the Court of Appeal grants special leave.

Such an application for leave must raise some question of law or fact capable of bona fide or serious argument, in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.

[4] I am not required to assess the extent of prospects of the Court of Appeal coming to a different conclusion to my own, as a direct criterion for the granting of leave. Such a second appeal is not granted for the opportunity of correction of error, but rather to afford an opportunity to clarify the law on a point sufficiently important to warrant that. Accordingly, the issues sought to be argued need to raise a matter of importance that justifies a second appeal. The requisite importance is less likely to arise on an interlocutory decision that does not substantively determine the rights and liabilities of the parties: see *Gregory v Gollan* HC AK CIV 2005 404 3485 4 July 2007, Allan J, adopting comments of the Court of Appeal in *Waller v Hider* [1998] 1 NZLR 412, and *Snee v Snee* (1999) 13 PRNZ 609.

[5] I treated the approach of the Associate Judge to determining the defendant's entitlement for security for costs as entirely conventional. For the most part, the sequence of considerations taken into account is not challenged. There were sound reasons for the defendant's claim that the plaintiff's extent of impecuniosity created a real risk that it would not be paid its costs on a successful defence.

[6] The Associate Judge then proceeded to balance the prospects of the defendant succeeding, against the serious undesirability of keeping a plaintiff with a genuine case out of his day in Court, if that would be the consequence of an order as to security for costs. It is within the parameters of the preliminary, inevitably approximate, weighing of the prospects of success that Mr Kerr identifies alleged errors that he wishes to challenge.

[7] As Mr Stewart argued for the defendant, these concerns are all premature in the sense that they go to whether the defamation claims can be made out, not whether this was an appropriate case in which to order security for costs. Even if a different weighting is justified on each of them, there is no assurance that that would lead to the opposite conclusion on the appropriateness of security for costs.

[8] The first issue identified by Mr Kerr was the proposition that when a plaintiff opposing security for costs adduces evidence of the untruthfulness of the alleged defamatory statements, then an onus should shift to the defendant to produce evidence of the strength of its defences before it could ask the Court to weigh, in favour of granting security, the apparent weakness of the plaintiff's case. Generally, applications for security for costs will involve an unapologetically "early look" at the possible merits, but it is not appropriate to conduct anything in the nature of a mini trial to provide any detailed projections of the prospects of success. Such applications are usually heard before there has been discovery and inspection, so the ability for a defendant to join issue on the relative strength of evidence will be haphazard.

[9] Here, the "evidence" Mr Kerr advanced was an analysis of his convictions in a District Court judgment. That cannot bind this Court in the defamation proceedings, and nor will it preclude the defendant leading evidence of different convictions, should it wish to, at trial.

[10] I do not see any prospect for this proposition having the requisite importance to warrant a second appeal.

[11] The second issue raised by Mr Kerr related directly to the substantive merits. It was whether the Court should consider the prospects of public interest/qualified privilege defence failing, where there had been "excess publication" – i.e. if there was a legitimate public interest in the character of the plaintiff as an applicant for a taxi driver's licence within the Wellington region, whether the Court should evaluate the prospects of such defences failing when the publication was made well beyond the environs of Wellington within which any public interest should allegedly be confined. In a very general way, Mr Kerr treated his argument on this point as supported by the judgment of Elias J (as she then was) in *Lange v Atkinson*. I take his reference to be to Her Honour's High Court judgment reported at [1997] 2 NZLR 22. That decision declined to strike out a defence of "political expression". Appeals from it went to the Privy Council and there was a subsequent reconsideration in the Court of Appeal.

[12] Neither the Associate Judge's, nor my own, judgment depended for a preliminary assessment of the prospects of success on any detailed analysis of the prospects of a qualified privilege defence succeeding. The Associate Judge acknowledged that statutory and common law qualified privilege had been pleaded in addition to truth. It was only truth that was considered in any detail. I did not consider the prospects for the qualified privilege defences. Again, the importance Mr Kerr attributes to it suggests that a preliminary expression of views determines the outcome, which is demonstrably not the case. This point cannot be elevated in this interlocutory context where there is no definitive ruling on either law or fact, into one of the requisite importance to warrant leave for a second appeal.

[13] The third point Mr Kerr sought to raise on a further appeal was whether individuals with previous convictions are entitled to have their reputation at the time of publication protected by the Courts. The obvious answer to this proposition is that any plaintiff is entitled to have their reputation protected by the law of defamation, if that person has been defamed. Mr Kerr objected to an observation by the Associate Judge in the following terms:

> 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.

[14] In its context, that statement does not raise the prospect that a plaintiff with prior convictions is, simply by virtue of those convictions, excluded from those who may seek redress by an action in defamation. Here, the plaintiff accepts that he does have a number of criminal convictions. If he has been defamed because the extent of them was overstated by the defendant, then the law permits a defendant to plead in mitigation of damage to reduce the award that might otherwise be paid to a plaintiff who, say, had no criminal convictions at all. That oblique reference to such a prospect in the context of a security for costs argument is not the occasion on which to test the appropriateness of this aspect of defamation law. The function of the Court of Appeal on a second appeal could not be discharged without a substantive

finding based on evidence adduced, as a necessary context for a debate on any change in the law.

[15] Even if one contemplated the combined level of importance that might be attributed to these somewhat disparate three points, they remain substantially below the sort of importance required to warrant leave. Accordingly, leave is declined.

Dobson J

Solicitors:
Plaintiff in person
Izard Weston, Wellington for Defendant