

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2010-404-002544

UNDER the Defamation Act 1992
BETWEEN JOHN JACOB ABRAHIM JOSEPH
Plaintiff
AND APN HOLDINGS NZ LIMITED
TRADING AS THE NEW ZEALAND
HERALD
Defendant

CIV 2010-404-002664

AND UNDER the Defamation Act 1992
BETWEEN JOHN JACOB ABRAHIM JOSEPH
Plaintiff
AND JOCK ANDERSON
First Defendant

Continued over/...

Hearing: 26 January 2011

Appearances: E Orlov for the plaintiff (both proceedings)
A L Ringwood for the Defendant - APN Holdings NZ Limited (CIV
2010-404-002544)
D H McLellan for the Defendants - J Anderson and W Butler (CIV
2010-404-002664)

Judgment: 1 February 2011

**JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

*This judgment was delivered by me on
01.02.11 at 11:00am, pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

AND

WAYNE BUTLER
Second Defendant

AND

THE NEW ZEALAND TRUTH (IN
LIQUIDATION)
Proposed Third Defendant

Counsel:

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D McLellan, Barrister, Auckland – mclellan@shortlandchambers.co.nz

[1] This judgment deals with applications in both proceedings seeking security for costs upon the plaintiff's defamation claims. The defendants want some certainty that their costs will be met if the plaintiff's defamation claims are unsuccessful.

[2] The plaintiff acknowledges he is unable to post security. The question then is whether it is appropriate for the Court to make an order requiring security nonetheless.

[3] The plaintiff claims the defendants' published articles about him have caused his impecuniosity. Further the content of the defendants' articles have exacerbated health issues and are deserving of awards of exemplary and punitive damages. Foremost, he relies upon what he considers are the merits of his defamation claims to avoid the consequence of not being able to pursue his claim as he could not he says, if he was required to post security.

[4] This judgment will briefly review the plaintiff's defamation claims by reference to the manner in which he has pleaded them, by reference to the publications in question, and then by a consideration of the circumstances in this case for and against a grant of security.

Publications

[5] I will refer to the two articles in question mentioned in CIV 2010-404-2544 (the Herald proceeding) as the Herald articles. The two articles mentioned in CIV 2010-404-2664 (the Truth proceeding) will be referred to as the Truth articles.

[6] In the Herald proceeding, the plaintiff has sued APN as publisher of the articles. In the Truth proceeding, the plaintiff has sued Mr Anderson the first defendant and Mr Butler the second defendant, as the author and the person responsible for the publications, respectively. The publisher of the Truth articles has been in liquidation since October 2009 and has been noted on the intulment of the proceeding as a proposed third defendant.

Herald articles

[7] The first was published on 7 June 2008 and the second on 19 June 2008. I do not propose to set out in full the content of those articles written by Mr Patrick Gower. In brief the first article refers to the plaintiff as having been convicted of immigration fraud; that he was fighting to stay in New Zealand; and that he was sentenced to six months home detention after admitting entering New Zealand on a false Danish passport and after applying for citizenship and a passport using the false name of Joseph.

[8] The article contained a quote from a named detective sergeant who advised:

We didn't know why the plaintiff had been to Iraq, but we were certainly concerned it could have been for a reason that could have included being involved in insurgency, terrorism.

[9] The article referred to the Police having learned that the plaintiff had previously received \$200,000 from a person in Lebanon who he would not name. An explanation by the plaintiff's lawyer was also recorded. Also recorded was the plaintiff's claim that he fled from Iraq to New Zealand in 2000 because he was accused of being involved in a terrorist killing of an Iraqi security official in 1999, and was tortured until he admitted it and was then sentenced to death. The plaintiff advised a pistol was found at his house.

[10] The article recorded that Police investigations found the plaintiff entered Denmark in 1995 and had been there until coming to New Zealand in 2000.

[11] The second article was headed:

Terrorist target memo angers Beehive.

[12] It referred to a memorandum being sent by the Chartered Secretaries New Zealand to the Government. It recorded that the memorandum called New Zealand a "target for terrorist and corporate criminal activity" because of lax Companies Office checks of persons setting up companies in New Zealand. The article further recorded that the memorandum had been sent following its earlier article about how the plaintiff set up a company under a dual identity. It noted that the company in

question owned “the North Shore Fishmonger fish and chip shop under the name of John Joseph” and was set up just two weeks after he was sentenced for immigration fraud.

[13] The article recorded that the memorandum said:

New Zealand is a haven for terrorists looking to finance their activities and also criminals looking to launder money and commit corporate identity crimes.

Truth Articles

[14] The first dated 5 June 2008 was written by Mr Anderson and was heralded under the banner “Iraqi gunman hides in New Zealand”. That article began:

A suspected Iraqi terrorist assassin, feared to be a dangerous national security risk after lying his way into New Zealand, is fighting deportation with claims he will be executed if sent back to Iraq.

[15] The article refers to Mr Anderson being given access to official documents that described the plaintiff as “a dangerous citizen” suspected of being “involved in an insurgency and terrorism”.

[16] It is apparent these quotes and similar were conclusions or assessments drawn from information provided by a police special investigation group, as it was referred to. It referred to the plaintiff having informed ‘New Zealand authorities’ of having been picked up in Iraq, being accused of terrorism, of being tortured, thrown into jail and having his pistol seized. Also referred to was a detective sergeant’s interest in the plaintiff’s withdrawal of US\$76,000 in cash before visiting Iraq in 2005; that the Police considered the plaintiff to be a “dangerous citizen” regardless of his refugee status; and that the Police did not know why the plaintiff went to Iraq “but we were certainly concerned. It may have been for a reason that could have included being involved in insurgency or terrorism. We simply didn’t know”.

[17] The article referred to the fact that the plaintiff ran a Fishmonger fish and chip shop at Birkenhead Auckland; and that he may have breached the Companies Act when he signed his consent to be a director of the company that owned the business.

[18] The second article was published under the banner:

Iraqi liar admits fake card scam.

[19] The article refers to the fact that a lawyer, who said he accompanied the plaintiff to an Auckland kebab shop at the time he faced a rape charge (which was later withdrawn), told Truth he asked the plaintiff where he got all his money from. The lawyer said “He said he was involved in the sale of counterfeit phone cards”.

[20] The article mentioned that the lawyer, who was not acting for the plaintiff, told Truth that the plaintiff informed him that he and two or three accomplices made hundreds of thousands of dollars selling fake phone cards sourced from “Germany in Scandinavia”.

[21] Elsewhere in the article Mr Anderson wrote:

After tracing him to a conviction in Denmark and monitoring suspicious trips he made to Iraq, the Middle East and Europe with large sums of cash, Al-Bawi was considered by New Zealand Police to be a dangerous citizen and a security risk suspected of being involved in insurgency and terrorism.

The defamation claims

[22] It is pleaded with respect to the Herald articles that the natural and ordinary meaning of the words used meant the plaintiff was:

- a) A terrorist.
- b) Had links with terrorists.
- c) Was being investigated for having links to terrorists.
- d) Was involved with terrorism.
- e) Was involved in insurgency.
- f) Had lied to a bank while withdrawing US\$76,000.00.

- g) Used his business to launder money for terrorist activities.

[23] The plaintiff complains that the Truth articles were calculated to injure his reputation by exposing him to hatred, ridicule and contempt. He complains that the plain and ordinary meaning of the words used asserted:

- a) He was a dangerous national security risk.
- b) He was a dangerous citizen involved in insurgency and terrorism.
- c) He was part of a radical group and/or was of interest to Police because he posed a danger to national security.
- d) That he lied to a bank when withdrawing US\$76,000 before visiting Iraq.
- e) That he was a fraudster who obtained his money from fake phone card scams.
- f) That he was a security risk.
- g) That he was a terrorist.

[24] The plaintiff intends to have his claims tried before a Judge and jury. His counsel, Mr Orlov anticipates a brief trial only will be needed – a matter of days at most. The plaintiff denies any of those claims he says have been made about him in the Herald and Truth articles. Also he says it will be readily apparent to a jury that claims that he is a terrorist, an insurgent, a fraudster and the kind, are false and proof to the contrary is not available.

[25] In answer to my questions Mr Orlov advised that the plaintiff was not presently in receipt of a grant of legal aid. Instead the costs of his trial were being handled on a deferred payment basis. From that I infer that Mr Orlov will be paid if and when the damages claims are successful.

General principles

[26] By Rule 5.45 the Court may if it is just in all the circumstances order the giving of security of costs if there is reason to believe a plaintiff would be unable to pay those to the defendant if the plaintiff is unsuccessful in the proceeding.

[27] As I earlier referred to there is no challenge by the plaintiff to a claim that he could not pay the defendant's costs if his claim against them fails. Therefore, the Court has an unfettered discretion to award security. The Court should do what it considers is fit in all the circumstances. The interests of all parties should be assessed and balanced. To the extent it is able the Court should make an assessment of the merits of a plaintiff's claim. This might involve also a consideration of issues of public interest raised by a plaintiff's claim.

[28] A Court may also inquire whether a plaintiff's impecuniosity has resulted from the defendant's actions complained of.

Considerations

The merits

[29] The Court acknowledges immediately the difficulty of making any clear assessment of the plaintiff's prospects of success, if the case is to proceed before a jury. Obviously only a provisional assessment is possible in the circumstances. These difficulties notwithstanding the Court can conclude at this stage that the plaintiff's claims are not strong, indeed they are weak. There is a prospect that both claims will fail. That prospect is greater, with respect to the Herald articles.

[30] In none of the articles was he labelled as a terrorist or an insurgent. Claims of fraud, if they were made, were adequately supported by reference to the plaintiff's convictions on offences of dishonesty concerning the circumstances in which he entered New Zealand, and his refugee status has been cancelled because of concerns about the honesty of the plaintiff's claim that he was a legitimate refugee.

[31] The Herald article of 7 June 2008 referred to his convictions, to the plaintiff's coming to New Zealand on a false Danish passport and later applying for citizenship and a passport producing the false name of Joseph. The reference to insurgency and terrorism was carefully referenced to a quotation to a detective sergeant of Police.

[32] Both the Herald and Truth articles referred to the plaintiff's own claims that he had fled Iraq following his arrest for suspicion of terrorism and insurgency and when he had been found in possession of a pistol.

[33] The heading of the original Truth headline apart, Mr Anderson's article appears clearly to have referenced statements to identifiable sources.

[34] It is the label of being a "terrorist" which absorbs most of the plaintiff's concerns by his defamation claims. It seems clear that none of the articles expressly said that he is a "terrorist". Rather, it is the plaintiff who claims to have been accused in Iraq of being a terrorist.

[35] Recently he is in New Zealand having been convicted of criminal offences for which he was sentenced to home detention – his convictions and sentence having been reaffirmed by the Court of Appeal.

[36] Currently the plaintiff's refugee status is in doubt. On 6 December 2010 the High Court refused to review a decision of the Refugee Status Appeals Authority that the plaintiff should cease to be recognised as a refugee. He is a person who within three weeks of his convictions has set up a company having sworn a declaration that he was not a disqualified person to be a director of that company. Also, and at that time he entered into a business loan agreement in the sum of \$75,000 with the Bank of New Zealand in the course of which he executed a deed of guarantee and indemnity from which, it appears, he omitted to declare his prior convictions.

[37] In the course of the High Court decision it was noted that the plaintiff's lawyer unequivocally conceded that refugee status had been procured by fraud. In the outcome of that decision the plaintiff is at risk of having his citizenship removed. Mr Orlov advises that the plaintiff proposes to appeal the High Court decision.

[38] Previously the plaintiff appealed to the Court of Appeal against his conviction and sentence in relation to the aforementioned illegal entry prosecutions. At that time the plaintiff alleged that his previous lawyer had misled him about the likely outcome if he pleaded guilty to the charges against him. The Court, who heard the plaintiff under cross examination, commented that his evidence was “often contradictory and at times completely untrue”. The Court held that the plaintiff “knew when he made the various applications and declaration that what he was telling New Zealand officials was untrue on key points”. Further, “no reasonable jury is likely to have accepted the argument that he honestly believed he was justified in his actions by reasons of fears for his family back in Iraq”.

[39] It is clear from the statement of defence filed by APN and that to be filed by the Truth defendants, that defences of ‘truth’ will be pursued. Particulars of the ‘truth’ defences have been described in considerable details. They aver to matters I have already reviewed in my assessment of the merits of the plaintiff’s claims. As well, there is considerably more.

[40] In the upshot of my assessment it is clear that the plaintiff has a not inconsiderable journey ahead of him if he is to succeed with his claims. Also and even if the reports are ultimately found to have meant that the plaintiff was a terrorist, or to have other defamatory meanings, there is the defence of statutory privilege of fair and accurate reports of Court proceedings, and qualifying privilege for reports on matters issued to the public by government ministers, and of other matters of public interest which will be relied upon in the defence of these proceedings.

[41] Mr Orlov submits the proceedings raise matters of public interest, referring to the well publicised case of another Iraqi immigrant in recent times. Mr Orlov submits that s 27 of the New Zealand Bill of Rights Act assures citizens of a right of access to justice; that the provision of a requirement for security would prevent this.

[42] It is not clear to the Court what matter of public interest is at stake in these proceedings brought as they were in the aftermath of articles following the plaintiff’s criminal convictions.

Impecuniosity

[43] A “reasonable probability”, established by persuasive evidence, (mere assertions will not suffice), that the plaintiff’s impecuniosity resulted from the defendant’s actions complained of in the proceeding, is a matter sometimes of importance to be taken into account to refuse or reduce an order for security.¹

[44] The plaintiff has the onus of showing that, but for the defendant’s conduct, the plaintiff would have been financially secure.² However, it has been regularly acknowledged that, as with an assessment of merit, an assessment of this factor, short of a full hearing, is very difficult if not impossible.³

[45] The plaintiff claims in his notice of opposition to the security for costs applications that his impecuniosity arose as a direct result of the publication of the articles.

[46] The plaintiff deposed:

- a) Immediately upon the publication of the articles, his business “went downhill”.
- b) The turnover of the business halved immediately upon publication of the articles.
- c) His major supplier Bidvest New Zealand refused to deal or trade with him any longer. On 7 June 2008 there was a major delivery due but they were not delivered. He said he rang on numerous occasions to enquire about the status of the delivery but got no response from Bidvest. “Later I found out that Bidvest were unhappy to deal with a ‘terrorist’ and I was shocked by that. In short Bidvest did not want to deal with me on a credit basis”.

¹ *Nikau Holdings Limited v BNZ* (1992) 5 PRNZ 430 (HC) at 438.

² *S E Colbran*, *Security for Costs* (Longman Professional, Melbourne, 1993) at p 246 – 247.

³ *McGechan on Procedure*, at para HR5.45.03(3).

- d) To add to his woes he said the Bank of New Zealand from whom he had borrowed \$75,000.00, demanded immediate payment of the money because in the Bank's own words he was a "terrorist" and a "criminal".

[47] In support of his claims the plaintiff has provided an accountant's spreadsheet detailing the income of his business on a daily basis between 14 May 2008 to 5 November 2008. As well the Court has available for its consideration an affidavit from Mr Wright a manager of Bidvest. Also available to the Court are documents concerning the demand by the Bank of New Zealand for the repayment of its advance to the plaintiff's business.

[48] The accountant's spreadsheet shows that in the month of June 2008 (when the articles were published) the business grossed \$31,775.00. The following month it grossed \$42,767.00 and in August it grossed \$41,622.00. In September and October gross returns were approximately \$30,000.00 and \$27,000.00 respectively. The business ceased trading only in November 2008.

[49] The Court's assessment is that there is nothing from these figures to support the plaintiff's claims that "turnover halved immediately upon publication of the articles or that from the time of publication profits took a sharp decline".

[50] Mr Wright from Bidvest deposes that early in June 2008 he received a telephone call alerting him to a report that the owner of the Fishmonger takeaway store in Birkenhead had been convicted of a number of charges of immigration fraud and that he had been operating in New Zealand under a false name.

[51] Mr Wright states that his sole concern was to ensure that Bidvest was paid for product supplied by it; that if there was a real prospect the operator would be deported, it would give concern about payments due. Later he called the owner of the shop and confirmed that Bidvest would continue to supply the store but on the basis of payment of cash rather than on credit. Mr Wright said that a no time did Bidvest refuse to supply the business. Nor at any time did Bidvest have any concern, as is claimed, that the owner of the store might be a "terrorist".

[52] Concerning the Bank of New Zealand claim, the Court has sighted a copy of the Bank of New Zealand's summary judgment application in 2009 for recovery of its debt from the plaintiff. The documents include an affidavit from Mr Gerber of the Bank of New Zealand. A review of those documents makes it clear that nowhere in them does the Bank refer to the plaintiff being a "terrorist". The actual grounds on which the Bank required payment were that the plaintiff had not disclosed his convictions for immigration fraud, and that his company had ceased trading.

[53] It is the Court's view overall that the plaintiff's claims of reasons for his impecuniosity, cannot be adequately proved, that is the impecuniosity was less likely than not attributed to the causes he refers to. In fact the evidence appears to suggest the opposite. Putting aside earlier expressed concerns regarding his withdrawal of funds for private purposes, the clear evidence is that since 2000 the plaintiff has been a recipient of legal aid to that time in 2008 when he was sentenced on his criminal convictions. Accordingly he was impecunious during that eight year period prior to the publication of the articles.

Other factors

[54] The plaintiff has claimed aggravated damages for what he describes as loss of health, stress and anxiety caused by the publication of the articles. He pleaded that prior to the publication of the articles he had a liver cyst which "worsened after the publication due to the severe stress I was under. I developed severe rheumatoid arthritis due to the stress as well as osteoporosis".

[55] In support of those claims the plaintiff enclosed a copy of a doctor's certificate.

[56] A perusal of that certificate does not support those claims of illness, stress and anxiety. The certificate is dated 18 February 2010. It notes that his rheumatoid arthritis was diagnosed in 2007 i.e. prior to the publication of the articles. It records there was a hydatid cyst liver resection in April 2008 and noted "no evidence of reoccurrence".

[57] It reported that since last seen there had been improvement in “his joints and feels at least 50 percent better...”. It reports that “he otherwise feels better in himself and has had no other intercurrent infections”.

Circumstances affecting the defendants

[58] In the APN case the defendant is a substantial corporation. Nonetheless, it will sustain losses if the plaintiff’s case against it fails. It will not recover those costs or any part of them unless security is ordered.

[59] Mr Anderson and Mr Butler do not have the backing of a substantial corporation to assist them in meeting their own ongoing costs. Likely, their losses will be significant if in the outcome the plaintiff’s claim against them fails. Mr McLellan submitted that the Truth defendants are heavily reliant on an order for security for costs to rebalance the inequity of an admittedly impecunious plaintiff proceeding with a destructively expensive defamation action.

[60] Mr Orlov’s estimate of trial time of a few days is conservative. Likely the trial will last up to two weeks if defences of truth are pursued.

Summary

[61] Significant questions arise concerning the plaintiff’s claims of the merits of his cause. The strength of those must be affected by the circumstances leading to his criminal convictions because those circumstances provide the very background that gave rise to the articles in question.

[62] It is difficult to second guess the outcome of a dispute which may be headed for a jury trial but that should not dissuade the Court from attempting an assessment. In this case that assessment is assisted by uncontested detail regarding irregularities over the establishment of his business, and the presence of evidence tending to undermine rather than support his claim of impecuniosity and health setbacks.

[63] As Mr Ringwood submitted, the fact that an order for security for costs may make it difficult or impossible for a plaintiff to proceed is inherent in the jurisdiction

to order security for costs, and does not preclude the making of an order if an order is otherwise appropriate. As the Court stated in the Nikau Holdings (supra) case at p. 438:

It is inherent in the whole concept of security for costs that the Court has “the power to order a plaintiff to do what it is likely to find difficulty in doing, namely, to provide security for costs which ex hypothesis it is unable to pay but the means by which a plaintiff satisfies such an order is a matter for it”.

Quantum of Security

[64] The amount of any security is discretionary. The amount must fit the circumstances and isn't necessarily fixed by reference to likely costs awards. Considerations include the nature of the proceeding and the complexity and novelty of issues; the likely extent of interlocutories; the estimated duration of trial; the probable scale costs payable if the plaintiff is unsuccessful; and/or the defendants estimated actual (i.e. solicitor and client) costs.

[65] In this case staged security is appropriate for the amount fixed with respect of the separate proceedings shall reflect the Court's concern about the abilities of the defendants to bear their costs in the event in the circumstances if the claims against them fail.

Judgment

[66] In respect of the Herald proceeding the plaintiff shall post security in the sum of \$15,000.00. In the Truth proceeding security is to be fixed in the sum of \$22,500.00.

[67] Security is to be provided to the satisfaction of the Registrar.

[68] The security is intended to meet the costs incurred to the conclusion of interlocutories. Accordingly, leave is reserved to the defendants to apply for further security in respect of the costs of trial when the matter is set down.

[69] Both proceedings shall be stayed pending provision of security.

[70] The defendants shall be entitled to costs on a 2B basis upon these applications. A single costs award is made in respect of the Truth defendants.

Associate Judge Christiansen