IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1921
[2013] NZHC 638

UNDER	the Defamation Act 1992
BETWEEN	JON STEPHENSON Plaintiff
AND	RICHARD RHYS JONES First Defendant
AND	THE ATTORNEY-GENERAL Second Defendant

Hearing: 20 March 2013

Counsel: H S Hancock for defendants (in support)
D M Salmon for plaintiff (opposing)

Judgment: 27 March 2013

RESERVED JUDGMENT OF DOBSON J
(Security for Costs)

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[1] These proceedings involve a claim for defamation. They are set down for a one week civil jury trial commencing on 8 July 2013. The defendants have applied for security for costs.

[2] The application was brought on the basis that there was reason to believe that Mr Stephenson will be unable to pay the defendants' costs if he is unsuccessful in the proceedings.

[3] The grounds for belief as to Mr Stephenson's inability to meet a costs order against him were set out in an affidavit sworn by Mr Lucie-Smith, a solicitor with

the New Zealand Defence Force. He cited as evidence of Mr Stephenson's impecuniosity an article about Mr Stephenson that appeared in the Waikato Independent newspaper on 15 August 2011. That article included the following:[1]

> For all the effort and all the danger, his job is not glamorous and it's certainly not about the money. The road he has chosen comes with no continuity of income or work. With $1.25 in his bank account at the moment, Stephenson is pausing in Auckland to recoup his finances before heading back to Afghanistan.

[4] Since Crown Law raised concerns over Mr Stephenson's impecuniosity with his solicitors in November 2012, Mr Lucie-Smith deposes that they have had no more than a simple denial that Mr Stephenson was impecunious, coupled with the statement that he had regular paid work.

[5] The defendants have calculated that their costs and disbursements in defending the proceedings are likely to be in the vicinity of $75,000 to $125,000, and that scale costs and disbursements likely to be ordered on a successful defence would be not less than $25,000. On top of that, Mr Lucie-Smith assessed Mr Stephenson's case as "weak and unlikely to succeed". He raised the prospect that if Mr Stephenson was not in New Zealand, then under the High Court Rules he might need to be treated as an overseas plaintiff.

[6] In relation to the last point, Mr Stephenson's affirmation in response stated that he is presently based principally in New Zealand, although he is sometimes required to travel outside New Zealand for his work. He is a New Zealand citizen. In light of that, the prospect of his being resident out of New Zealand as a ground for pursuing an application for security for costs[2] was not pursued.

[7] More generally, Mr Stephenson denied that he was impecunious, affirmed that he was able to meet his debts as they fell due and would be able to meet any costs award made against him in the proceedings. He affirmed that he was currently contracted for a lengthy assignment "with a major New Zealand media

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1 Marnie Hallahan "War reporter's lovely road" *The Waikato Independent* (online ed, 15 August 2011)

2 High Court Rules, r 5.45(1)(a)(i).

organisation", and referred also to being in negotiations with "another major New Zealand media organisation for full time work based in Auckland".

[8] Mr Hancock argued that Mr Stephenson's response was inadequate. Given the evidence of his impecuniosity in August 2011, Mr Hancock submitted that an onus arose for Mr Stephenson to provide more than a confined denial of impecuniosity to rebut the inference that arose. He also submitted that the absence of any detail on the extent and source of Mr Stephenson's earnings, and the absence of any reference to assets in New Zealand, should lead the Court to draw the inference that he was indeed impecunious, as Mr Lucie-Smith had assessed in his affidavit.

[9] When the defendants' concerns to have some security for costs were raised with Mr Stephenson's solicitors, he offered to lodge $10,000 in his solicitors' trust account, pending resolution of the proceedings, as a sufficient demonstration of his ability to meet an award of costs. The offer was rejected on behalf of the defendants as inadequate, and hence pursuit of the formal application. However, the making of that offer is potentially relevant in a number of ways.

[10] First, Mr Hancock argued that the making of the offer was powerful evidence of a tacit acknowledgement by Mr Stephenson that the defendants' concerns over security for costs were justified. He reasoned that if Mr Stephenson could compellingly dismiss any concerns about his apparent impecuniosity, then he would do that rather than bothering to attempt (inadequately on the defendants' view of the matter) to placate such concerns by making the offer that he did.

[11] I do not accept that the making of the offer amounts to an acknowledgement by Mr Stephenson of the justification for the defendants' concerns that he is impecunious. I accept Mr Salmon's submission that the offer was made for pragmatic reasons to avoid the need for an argument on security for costs, consistently with the attitude adopted by Mr Stephenson, and on his behalf, to streamline, as much as possible, all aspects of the preparation of his case.

[12] Secondly, the outright rejection of Mr Stephenson's offer without exploring, for example, acceptance of $10,000 as sufficient security at this stage, with a suggestion of a further level of security before commencement of trial, suggests that the defendants are intent on pursuing security at this stage at a level that would represent a substantial portion of the costs they are likely to be awarded if they succeed at trial. Security ordered at a level Mr Stephenson could not presently fund would lead to the prospect of a stay. If the defendants were concerned solely to procure some security against the prospect of not being able to recover an award of costs, then a less absolute stance might have been adopted.

[13] Thirdly, the implicit demonstration of Mr Stephenson's ability to lodge $10,000 in his solicitors' trust account for the duration of the proceedings tends to negate the proposition that he is impecunious in any literal sense, and certainly suggests that there has been a material change in his financial position since mid August 2011 (assuming the article cited by Mr Lucie-Smith was accurate at the time).

[14] I am bound to treat the making of the offer as reflecting a change in Mr Stephenson's current financial position, from that suggested in August 2011 by the article cited by Mr Lucie-Smith. Further, I have some reservation that the literal terms in which Mr Stephenson's finances are portrayed on the day he was interviewed by another journalist could, in any event, be treated as necessarily reflective of his financial position longer term. The tone of the article is that foreign correspondents live on their wits. It does not suggest that, because he had virtually nothing in the bank on the day in question, he necessarily would have difficulty earning a reasonable living. The change reflected by Mr Stephenson's current ability to lodge $10,000 means that whatever weight could have been attributed to the article at the time it was published cannot now have any significance in establishing a current concern for Mr Stephenson's impecuniosity.

[15] That finding is material to the next issue, which is whether the defendants have raised a sufficient spectre of impecuniosity to impose an onus on Mr Stephenson to provide more than the sparse details he has in support of his denial of impecuniosity.

[16] On this point, both counsel invited analogy with the decision of Thomas J in *New Zealand Kiwifruit Marketing Board v Maheatataka Cool Pack Ltd*.[3] That case is a useful illustration of the case-specific analyses required in assessing whether a defendant applying for security for costs has put a plaintiff's inability to meet an award of costs sufficiently in issue to require more than a bald assertion of ability to pay. In the circumstances of that case, the Judge decided that the defendant seeking security had not done so in terms triggering any obligation on the plaintiff resisting security for costs to provide details of its financial situation.[4] Thomas J observed:[5]

> The question is always whether or not it is appropriate to draw an adverse inference against the plaintiff because of his or her silence as to their financial position. Whether or not it is appropriate is a question which can only be determined having regard to the material before the Court in each case.

[17] Mr Salmon urged that I adopt the same approach here as Thomas J in rejecting any obligation on the plaintiff to respond "… to an insubstantial challenge to his or her means by the defendant …".

[18] For his part, Mr Hancock argued that the present case was one that fell on the other side of the line as identified by Thomas J. He submitted there was sufficient evidence to put impecuniosity in issue, on Mr Lucie-Smith's affidavit, which creates an expectation of a more detailed response by Mr Stephenson. In the absence of a detailed response, the Court could draw an inference from the lack of such details adverse to Mr Stephenson's claimed ability to pay.

[19] Weighing all the circumstances of the proceedings thus far, and the context in which this application has been pursued, I am not prepared to impute to Mr Stephenson an obligation to provide fuller disclosure of his financial information than he has. Without the adverse inference that would arise out of Mr Stephenson's failure to give fuller disclosure, the defendants are unable to make out the threshold enquiry under r 5.45 that there is reason to believe that Mr Stephenson will be unable to pay the costs of the defendants if he is unsuccessful.

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3 *New Zealand Kiwifruit Marketing Board v Maheatataka Cool Pack Ltd* (1993) 7 PRNZ 209 (HC).
4 At 212.
5 At 212.

[20] That failure to make out the necessary threshold disposes of the application. In the event that I am wrong on that point, I record briefly the factors that would be relevant to the exercise of the Court's discretion under r 5.45(2) in determining whether it would have been just in all the circumstances to order the giving of security for costs.

[21] The type of proceeding and status of the respective parties can have a bearing. Mr Stephenson is a journalist operating substantially on his own, working on contracted assignments, with an apparent emphasis on overseas reporting on matters of interest to New Zealanders. At least in the immediate context of the proceedings, his work is published by mainstream media such as the Sunday Star Times and Metro magazine. He appears to have brought the proceedings because the allegedly defamatory statement complained of is treated as slighting his journalistic integrity. He alleges the statement implies that he reported visiting a CRU base in Afghanistan (when the statement is alleged to contend he did not visit it) to interview a commander at that base (who the statement is alleged to infer was not interviewed). At least on one view of the matter, the slight involved in suggesting he would write untruthfully about such enquiries would strike at the heart of his integrity as a journalist. A journalist in Mr Stephenson's position could readily claim significant importance in clearing away such a perceived slight.

[22] As to the defendants, the first defendant was the Chief of the New Zealand Defence Force at the time the statement was made. The statement appears to have been made in discharge of a part of that role, in defending the nature of the New Zealand SAS deployment in Afghanistan, by questioning the accuracy of Mr Stephenson's article that was perceived as being critical of it. Although it could not be determinative, on the balancing of those respective interests, this would not be a compelling case in which to assuage the concerns of defendants in their positions, in relation to a claim brought by a plaintiff in Mr Stephenson's position.

[23] I was also urged to form at least a provisional view about the relative strength of the case. Mr Hancock was inclined to dismiss it as a weak case, and as involving (if at all) a defamation that would be unlikely to excite a jury as involving substantial harm to Mr Stephenson's reputation. Predictably, Mr Salmon urged that, on any

provisional view, Mr Stephenson's claim should be seen as a relatively strong one and that the importance of any defamation made out was likely to strike resonance with a jury.

[24] Provisional views of the merits of any proceeding is fraught, and arguably that is particularly so with the tort of defamation and the involvement of a jury. In evaluating my discretion had it been necessary, I would certainly not be prepared at this stage to dismiss the case as inevitably being a weak one. Beyond that, there are numerous hurdles Mr Stephenson will have to surmount. However, to the extent that an impression of the relative merits might influence the exercise of the discretion, it is the type of claim that I would be reluctant to see stayed by virtue of Mr Stephenson's inability to meet a significant order for security for costs beyond a meaningful offer made and rejected.

[25] On a number of these points, Mr Salmon invited me to adopt the same approach as that of Courtney J in defamation proceedings brought by another journalist, Ian Wishart.[6] Mr Salmon had applied unsuccessfully on behalf of defendants in that case for security for costs and the reserved decision had been delivered the day before the present hearing. He cited the Judge's relatively liberal basis for assessing assets from which Mr Wishart could meet an order for costs as extending to those held in trusts, and what was perceived as the novel nature of the defamation claims that would in any event have persuaded the Judge to exercise her discretion against requiring security.[7] I am not satisfied that there are sufficient parallels for that reasoning to influence a decision in the present application. As has been recognised in other cases, the evaluations in each application for security for costs need to be dealt with in the context of the particular claim.

[26] I have not turned my mind to appropriate quantum. Mr Stephenson's offer to lodge $10,000 on account of security must represent the lower end of any appropriate range. I am not persuaded that two and a half times that amount, as sought by the defendants, would be justified.

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6 *Wishart v Murray* [2013] NZHC 540.
7 At [135], [139].

[27] Accordingly, if I was wrong in deciding that the threshold was not met, there is a real prospect that I would not have exercised my discretion to order costs of significantly more than the $10,000 that has been offered. As it is, I remain satisfied that the threshold has not been met. The application is dismissed and the plaintiff is entitled to costs on his successful defence of it.

Dobson J

Solicitors:
Lee Salmon Long, Auckland for plaintiff
Crown Law, Wellington for defendants