IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001925
[2015] NZHC 3038

BETWEEN		LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INCORPORATED First Plaintiff
		ANTHONY PETER JOHNSON Second Plaintiff
AND		JOHN BERNARD BRETT Defendant

Hearing: 18 November 2015

Appearances: R Gordon for Plaintiffs
Defendant in person

Judgment: 14 December 2015

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Monday, 14 December 2015 at 11:30 a.m.
pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: MinterEllisonRudd Watts, Wellington

Copy to: J B Brett

Introduction

[1] This is an action for defamation taken by the Low Volume Vehicle Technical Association Inc (LVVTA) and its Chief Executive Officer, Anthony Peter Johnson, against a former low volume vehicle certifier, John Bernard Brett. The plaintiffs are represented by Mr RJ Gordon. The defendant appears in person.

[2] The plaintiffs now apply for an interim injunction:

(a) Requiring the defendant to forthwith remove from his website www.lowvolumevehicle.co.nz (the website), and within any other public medium, comments or statements that are untrue or are in any way defamatory of LVVTA;

(b) Requiring the defendant to forthwith remove from the website and within any other public medium, comments or statements that are untrue or are in any way defamatory of persons employed by or associated with LVVTA (including Mr Johnson);

(c) Restraining the defendant from in future publishing on the website, or within any other public medium, comments or statements that are untrue or are in any defamatory of LVVTA, Mr Johnson and/or persons employed by or associated with LVVTA,

until further order of the Court.

[3] The plaintiffs also apply for an order that the costs of and incidental to the application be awarded against the defendant on an indemnity basis.

[4] The application is opposed by Mr Brett.

Factual background

[5] The following factual background is largely taken from the affidavit of Mr Johnson dated 18 August 2015. LVVTA is an incorporated society which comprises 10 member associations, most of whom are interest groups which would

be adversely affected by motor vehicle legislation if enacted without their interests being represented during the development process.

[6] In simple terms, the New Zealand Government (and New Zealand law) requires that all vehicles meet applicable safety requirements. Once a vehicle is modified from its original state, or is scratch-built, there needs to be a method of ensuring continued compliance with those safety requirements. As such, a low volume vehicle means a make and model of a light vehicle that is:

(a) Manufactured, assembled or scratch-built in quantities of 500 or less in any one year, and where the construction of the vehicle may directly or indirectly affect compliance of the vehicle with any of the vehicle standards prescribed by New Zealand law; or

(b) Modified uniquely, or in quantities of 500 or less in any one year, in such a way that compliance of the vehicle, its structure, systems, components or equipment with a legal requirement relating to safety performance applicable at the time of the modification may be affected.

[7] The purpose of the low volume vehicle certification system is to ensure that all modified production vehicles – whether modified for commercial, passenger service, disability, recreational, leisure, sporting, or compliance purposes – and scratch-built vehicles, have been designed and constructed in such a way that they are safe to be operated on public roads; and comply as closely as practicable with the legal safety requirements applicable to high volume production vehicles.

[8] LVVTA is the organisation which develops and maintains, in consultation with the New Zealand Transport Agency (NZTA), a low volume vehicle code (the LVV code) governing the modification or construction of a low volume vehicles. The NZTA authorises low volume vehicle certifiers to make the determination as to the compliance of modified vehicles with the LVV code. LNZTA requires certifiers to enter into a deed of appointment, which requires compliance with the low volume vehicle regulatory scheme.

[9] With the oversight of the NZTA, LVVTA administers the certification regime governing low volume vehicles. LVVTA also reviews the certification decisions of NZTA authorised certifiers.

[10] The defendant, Mr Brett, was formerly a NZTA authorised certifier until his certification authority was revoked by the NZTA on 3 December 2012. He appealed the NZTA's revocation of his certification authority to the District Court. The District Court rejected Mr Brett's appeal and awarded costs to the NZTA in a judgment dated 27 December 2013.[1]

[11] On or about 29 September 2012, which was prior to the revocation of his certification authority, but when Mr Brett was under review by the NZTA for a non-compliance with his deed of appointment, he published an article on the website entitled "LVVTA incompetence endangers lives". The plaintiffs assert that it contained numerous untrue statements about the LVVTA. The plaintiffs also assert that in this article Mr Brett made various personalised attacks on Mr Johnson.

[12] On 14 November 2012, lawyers instructed by the plaintiffs wrote to Mr Brett requesting him to remove the untrue and defamatory statements from the website.

[13] On 6 December 2012, Mr Johnson saw that Mr Brett had replaced the article entitled "LVVTA incompetence endangers lives" with a series of new statements under the heading "'LVVTA incompetence endangers lives' taken down". The plaintiffs assert that this new content merely repackaged many of the defamatory statements from the earlier article.

[14] On 11 December 2012, the plaintiffs' lawyers again wrote to Mr Brett requesting him to stop making the untrue and defamatory statements. Mr Brett replied on 13 December 2012:

> I have decided to remove the post which your client finds unacceptable. I trust that this will be the end of the matter.

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1 *Brett v NZTA* DC Manukau CIV-2013-055-000093, 27 December 2013.

It seems that Mr Brett did remove the statements which the plaintiffs found objectionable.

[15] The District Court judgment rejecting Mr Brett's appeal from the NZTA's revocation of his certification authority was delivered a year later, on 27 December 2013. The plaintiffs assert that very soon after that, Mr Brett recommenced his publication of untrue and defamatory statements.

[16] On or about 30 January 2014, the plaintiffs assert that Mr Brett again published a new version of the article "LVVTA incompetence endangers lives" on the website. Some of the content was the same as the 2012 article of the same name that he had previously published and removed, but some was new. Again, the plaintiffs assert that it contained numerous untrue statements about the LVVTA.

[17] On 27 February 2014, lawyers instructed by the plaintiffs wrote again to Mr Brett and requested him to remove the untrue and defamatory statements from the website. Later that day, Mr Brett responded by e-mail and said that he had corresponded with unnamed legal counsel and been advised that "a number of [the] allegations of which Mr Johnson complains could be expressions of opinion (not actionable in defamation) though others are allegations of fact". He said that he had revised the content of the article by adding the qualifier "my opinion" to some of the statements and had deleted others.

[18] On 6 March 2014, the lawyers instructed by the plaintiffs responded by saying that the modifications/removals that Mr Brett had undertaken did not cure the statements he had published of their defamatory meaning. They, again, requested that the article be removed.

[19] There followed discussions between the parties and a series of without prejudice negotiations took place. The ultimate outcome of these negotiations was a written settlement agreement entered by LVVTA and Mr Brett on 5 June 2014. That was not, however, the end of the matter. Both parties assert that the other party has breached the terms of the settlement agreement.

[20] The plaintiffs assert that they have more recently become aware of the renewed publication of untrue and defamatory material by Mr Brett. The plaintiffs assert that at no time has Mr Brett given the LVVTA the opportunity to review his intended statements before the publication, which is what he had agreed to do in the settlement agreement. The plaintiffs point to a number of recent publications by Mr Brett on the website and elsewhere which they say contain untrue and defamatory statements about LVVTA. Mr Johnson says he was particularly upset and offended by statements published by Mr Brett that the evidence of LVVTA's witnesses, including himself, given on oath during the appeal hearing in the District Court, was "a litany of lies".

[21] On 14 July 2015, the lawyers instructed by the plaintiffs wrote to Mr Brett asserting that his newly made statements were untrue and defamatory and in breach of the settlement agreement and making a request of him, yet again, to remove untrue and defamatory statements from the website.

[22] On 16 July 2015, Mr Brett responded by stating that the settlement agreement was null and void and sought to justify all of the statements published by him since the settlement agreement, but he also said that as a gesture of goodwill he had removed from the website all of the cartoons containing the word "Tony" (Mr Johnson's first name). As to Mr Brett's published allegation that Mr Johnson had perjured himself when giving evidence before the District Court, he wrote "I did so claim that Mr Johnson lied, when giving evidence under oath in these proceedings…this remains my position on the matter".

[23] Finally, regarding the lawyers' advice that the plaintiffs would be forced to commence legal action if these (latest) untrue and defamatory statements were not removed, Mr Brett also wrote:

> Legal proceedings – if you choose to take this path, I will be obliged to engage suitable legal representation, and make a counterclaim. Such a case will inevitably become an expensive tit-for-tat, a zero-sum game. Even in the unlikely event of your client being awarded costs, I would not have any means of paying such costs.

[24] Proceedings were nonetheless issued. Since then, there have been continuing negotiations between the parties. Mr Brett says he has removed all items of concern, as identified by the plaintiffs, without admission of liability, but that the list of items required to be removed by the plaintiffs keeps growing. He says that he has now removed all items that the plaintiffs have complained about, save for most of the items listed in Schedule C to a letter from the plaintiffs' lawyers dated 4 November 2015.

[25] Mr Brett states that unfortunately he has reached the view that the plaintiffs simply wanted him to not express his honest opinion on low volume vehicle certification matters, such that the proceedings have not been able to be resolved out of court. He has, however, now placed the following statement on the website:

> John was a LVV certifier for 13 years. John has long been a whistle-blower, expressing the view that the LVV system is dangerously deficient. John's authority was revoked in December 2012.

[26] Further, Mr Brett has now also included the following apology on the website:

> The LVVTA has brought it to my attention that statements I have made in relation to it and its employees may be perceived as defamatory. I sincerely regret that and apologise for any harm caused. I have taken down the statements identified by the LVVTA of concern to it. I have strong views about the low volume vehicle certification process and intend in the future to direct my energies into the public enquiry now being held in relation to it.

[27] Finally, Mr Brett seeks to justify all remaining contested statements listed in the plaintiffs' lawyer's letter mentioned above.

The law

[28] The plaintiffs have cited *American Cyanamid Co v Ethicon Ltd* as setting out the legal principles applicable to the grant of an interim injunction.[2] In *American Cyanamid*, the English House of Lords enunciated a two-stage approach in the consideration of interim injunction applications:

(a) Whether there is a serious question to be tried in the proceeding; and

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2 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

(b) Where the balance of convenience lies.

[29] The *American Cyanamid* approach is, however, not usually applied in defamation cases. In *TV3 Network Services Ltd v Fahey,* the Court of Appeal stated:[3]

> Any prior restraint of free expression requires passing a much higher threshold than the arguable case standard. In *A-G v British Broadcasting Corp* [1981] AC 303, 362; [1980] 3 All ER 161, 183 (HL) Lord Scarman said:
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> > the prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is a substantial risk of grave injustice.
>
> Over a century ago the Court of Appeal in *Bonnard v Perryman* [1891] 2 Ch 269; [1891-4] All ER Rep 965 (CA) said (at p 284; p 968):
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> > the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. … Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.
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> Soon after *American Cyanamid,* Oliver J in *Bestobell Paints Ltd v Bigg* [1975] FSR 421, 429-430, in a passage cited with approval by Cooke P speaking for a five-Judge court in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 (CA) said (at pp 5-6):
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> > There is an old and well established principle which is still applied in modern times and which is in no way affected by the recent decision by the House of Lords in *American Cyanamid Corporation v Ethicon* [1975] FSR 101, that no interlocutory injunction will be granted in defamation proceedings, where the defendant announces his intention of justifying, to restrain him from publishing the alleged defamatory statement until its truth or untruth has been determined at the trial, except in cases where the statement is obviously untruthful and libellous. That was established towards the end of the last century and it has been asserted over and over again.
>
> The Court has jurisdiction to restrain the publication of defamatory matter but it is exercisable only for clear and compelling reasons. First, where the focus is on the allegedly defamatory matter in the proposed publication which the publisher intends to justify, the circumstances must be exceptional to warrant an injunction rather than leaving the complainant with his or her remedy in damages.
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> …

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3 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA) at 132.

> Second, in the case of successive defamations the same principle applies, namely that the jurisdiction to restrain the publication of the further proposed publication is exercisable only for clear and compelling reasons.

[30] The learned authors of *Gatley on Libel and Slander* put it this way:[4]

> Generally, such an injunction can only be granted where a party to an action has invaded or threatens to invade a legal or equitable right of the other party, which can be enforced by the court, or when one party has behaved or threatens to behave in an unconscionable manner. The latter does not include publication of false or defamatory statements. Accordingly, the jurisdiction to grant interim injunctions in the field of defamation and malicious falsehood arises where there has been, or there is threatened, a publication of a defamatory statement or a false statement which would give rise to a claim for malicious falsehood.[5]

[31] The plaintiffs rely on *Boyle v Nield* in support of their submission that an interim injunction is warranted in the present case.[6] Messrs Boyle and Sweeny were Christchurch lawyers who were called criminals by Mr Nield, who said they were involved in a $600,000 swindle. Comments made by Mr Nield included:

> Take me to Court if I have the story wrong. You are a lawyer and a thief.
>
> PS maybe an ex-lawyer very soon, but you'll always be a criminal.

[32] Tipping J held that the allegations made by Mr Nield about the plaintiffs were of considerable gravity and clearly defamatory. He noted that the matters of which Mr Nield complained had been the subject of a complaint by him to the District Law Society and that the Law Society had not found the complaints established. The matter had then gone to a lay observer who was of the same mind.

[33] There had therefore been some investigation of Mr Nield's complaints, such that Tipping J could reasonably conclude that any defence of truth would be very hard to establish. Similarly, Tipping J was of the view that a successful defence of honest opinion was also very unlikely. Tipping J concluded:[7]

> There is no evidence and, again, I emphasis the word evidence upon which any finding could be made that there is any reasonable prospect of justification or defence of fair comment.

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4 Alistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2014) at [25.1].

5 Malicious falsehood is a separate tortious action which requires malice and special damage.

6 *Boyle v Nield* HC Christchurch CP 93/89, 6 April 1989.

7 *Boyle v Nield*, above n 6, at 7.

Discussion

[34] During the course of the hearing, I raised with Mr Gordon the fact that injunction sought was in very broad terms. I accordingly granted leave to Mr Gordon to file a memorandum setting out with more specificity the format of an interim order that (in the plaintiffs' submission) could and fairly should be made by the Court.

[35] Mr Gordon, by memorandum dated 23 November 2015, submitted that the general wording of such an interim order should follow that made by Tipping J in *Boyle v Nield*, namely:

> An order restraining the defendant whether by his servants, agents or otherwise, until further order of this Court, from publishing orally or in writing defamatory statements of and concerning the plaintiffs, by repeating the words set out in [clauses 1 to 25] of the schedule herein, or any words to the like effect.

[36] The schedule annexed to Mr Gordon's memorandum lists 25 separate allegedly untrue and defamatory statements. These 25 statements are divided into six categories:

(a) Statements to the effect that Mr Brett's certification authority was revoked by (or at the behest of) the plaintiffs, in a retaliatory effort to suppress his views on the low volume vehicle certification system in New Zealand.

(b) Statements to the effect that the plaintiffs operate or carry on business in an illegal manner.

(c) Statements to the effect that the plaintiffs are dishonest, tell untruths, and (specifically) that Mr Johnson perjured himself by lying under oath when giving evidence before the District Court.

(d) Statements to the effect that the first plaintiff (not the certifier concerned) has made erroneous certification decisions.

(e) Statements to the effect that the plaintiffs are incompetent, put their own interests ahead of public safety, and are knowingly and deliberately putting public safety and lives at risk.

(f) Statements containing personalised slurs on the plaintiff.

[37] Of the six categories, it seems to me that two appear to be more serious than the others. These are:

(c) Statements to the effect that the plaintiffs are dishonest, tell untruths, and (specifically) that Mr Johnson perjured himself by lying under oath when giving evidence before the District Court; and

(f) Statements containing personalised slurs on the plaintiffs.

[38] During the course of the hearing, Mr Brett expressed the view that the evidence given by LVVTA witnesses in the District Court appeal was wrong, but after a discussion seemed to accept that there was a distinction between being wrong and deliberately lying on oath.

[39] As far as the personalised slurs were concerned, Mr Brett said that some of these were comments by third parties, but again, he seemed to acknowledge, after discussion, that he was liable if they were defamatory because he had published them on the website.

[40] In any event, Mr Brett advised the Court that he had removed all offending material from the website, apart from 13 statements listed in Schedule C of the lawyer's letter dated 4 November 2015. In his written submissions, he sought to justify the 13 statements as being truthful or a matter of honest opinion. For example, as to the first statement which is alleged to be defamatory, "John has long been a whistle-blower, expressing the view that the LVV is dangerously deficient", Mr Brett submits that the statement is truthful. Another statement alleged to be defamatory is "Nothing has been done to prevent the next LVV disaster!" Mr Brett

submits that this statement is his opinion based on his knowledge of the actions taken and those which have not been taken by the LVVTA.

[41] In response to Mr Gordon's memorandum of 23 November 2015, Mr Brett filed a further affidavit, dated 26 November 2015, in which he says that none of the 25 allegedly untrue and defamatory statements listed in the schedule to Mr Gordon's memorandum remains on the website. He says that all were removed on or before 2 October 2015. In support of this statement, Mr Brett annexes a series of screen shots of the administrator's dashboard from the website. These show relevant posts on the website, showing dates and times of recent modifications to each post. The screen shots disclose that the relevant pages are now private, which means that they are not visible on the website.

[42] Mr Brett also says that the NZTA is now making serious attempts to rectify the problems with the low volume vehicle certification system and have advised him that his input will be sought. This gives Mr Brett confidence that issues that he had tried to highlight are being addressed by NZTA and that appropriate action is being taken to rectify those issues. This means, according to Mr Brett, that he has no need or desire to post further criticism of the LVVTA or low volume vehicle certification systems in the future, because he now has the opportunity to address his concerns through the NZTA. He says that he can provide the plaintiffs and the Court with an assurance that none of the statements complained of will reappear at any future time and that any further postings will abide scrupulously to acceptable criticism permitted by the New Zealand Bill of Rights Act. Further, Mr Brett says he undertakes never to accuse Mr Johnson or any other person of committing perjury in the future.

[43] In addition, Mr Brett has filed an undertaking to the Court that:

(a) All the statements contained in the schedule attached to Mr Gordon's memorandum dated 23 November 2015 are no longer on the website and some of them have long been removed; and

(b) No statements similar to those contained in the schedule will be published by him or by his servants, agents or otherwise, either orally or writing until further order of the Court.

[44] In response to Mr Brett's affidavit, Mr Gordon filed a further memorandum, dated 30 November 2015, in which he says that the plaintiffs have significant concerns about the content of Mr Brett's affidavit, which is alleged to be misleading or factually wrong. The most significant factual error is said to be when one of "the most egregious" statements was removed from the website. Mr Brett says on or before 2 October 2015. The plaintiffs say the eve of the hearing on 18 November 2015. The plaintiffs are also concerned that Mr Brett's assurance that he will not repeat his published statements extends only to his statements that Mr Johnson is a perjurer.

[45] Mr Gordon further submits that there is a real risk of repetition in the event that an interim order is refused because Mr Brett believes that he has "a public duty to speak up about aspects of the LVV certification process". Finally, Mr Gordon notes that three of the 25 allegedly untrue and defamatory statements remain published, including the statement that "Nothing has been done to prevent the next LVV disaster".

[46] Having carefully considered the published material and the competing submissions, I am of the view that an interim injunction is not necessary to protect the interests of the plaintiffs pending trial. The threshold for an interim injunction in defamation cases is very high, in part because of the right to freedom of expression. The circumstances in this case are not clear and compelling and Mr Brett seeks to justify his statements. Furthermore, although the plaintiffs complain of Mr Brett republishing false and defamatory statements, he has now provided undertakings to the Court.

[47] In particular, I have regard to the following factors:

(a) None (Mr Brett) or only three (Mr Gordon) of the 25 allegedly untrue and defamatory statements remain on the website or are otherwise being disseminated.

(b) Many of the 25 statements are not obviously defamatory in that the statements may not, in fact, lower the plaintiffs' reputation in the eyes of the public, e.g., "Axle beams made of unsuitable materials have been approved by the LVVTA" (No. 11) and "LVVTA do not want to hear any criticism, even constructive criticism" (No. 14).

(c) Other statements are not obviously defamatory in that Mr Brett may have a defence of truth or honest opinion, e.g., "In the appeal hearing under my cross-examination, Mr Johnson admitted many highly dangerous and life threatening errors and practices of the LVVTA that he had previously denied" (No. 8), and "Nothing has been done to prevent the next LVV disaster" (No. 19).

(d) Although other statements seem to be more serious, e.g., "Unfortunately the Judge chose to believe the litany of lies from LVVTA" (No. 7) and a cartoon depicting Mr Johnson with knuckles dragging on the ground, accompanied by the caption "MAD Tony the "X" spurt Engineer" (No. 24), Mr Brett has undertaken to the Court that none of the 25 statements will be re-published at any future time. In particular, he has also undertaken not to accuse Mr Johnson or any other person of committing perjury.

[48] The application for an interim injunction is therefore dismissed. The plaintiffs still have the opportunity to proceed to a substantive hearing of their defamation claim and seek an award of damages against Mr Brett.

[49] My preliminary view is that costs should lie where they fall, given that Mr Brett has represented himself from the outset. However, in a number of cases it has been held that lay litigants may be entitled to a partial indemnity for fees that

they pay by way of professional assistance.[8] This may entitle the defendant to claim for disbursements, including costs associated with professional advice, if relevant documentation can be provided to the plaintiffs.

[50] If agreement cannot be reached on costs, memoranda may be filed with the Court.

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Woolford J

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[8] *Lysnar v Notional Bank of New Zealand Ltd (No 2)* [1935] NZLR 557 (CA) at 562; *Working Capital Solutions Holdings Ltd v Pezaro* [2014] NZHC 2480; *Body Corporate 160361 v BC 2004 Ltd and BC 2009 Ltd* [2015] NZHC 2979 at [104].