IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-001701
[2016] NZHC 3132

BETWEEN	IAN WISHART Plaintiff
AND	CHRISTOPHER ROBERT MURRAY First Defendant
	KERRI MAREE MURRAY Second Defendant
	DIMENSION DATA NEW ZEALAND LIMITED Third Defendant

Hearing: 4 August 2016

Appearances: Plaintiff in person
D M Salmon and E D Nilsson for First and Second Defendants
H B Rennie QC for Third Defendants

Judgment: 19 December 2016

JUDGMENT OF COURTNEY J
[Security for costs]

This judgment was delivered by Justice Courtney
on 19 December 2016 at 2.40 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……

Introduction

[1] The defendants have applied for security for costs. It is the second such application by the first and second defendants and the first by the third defendant in a case that has a long and unsatisfactory history.

[2] Ian Wishart commenced the proceedings in 2012. He alleges that he was defamed on a Facebook page created by the first defendant, Christopher Murray, for the purpose of encouraging the public to boycott a book written by Mr Wishart about the now notorious Kahui murder case. Mr Wishart alleges that Mr Murray is liable, not only for statements he made personally in tweets and on the Facebook page, but also for statements posted by non-parties. The second defendant, who is Mr Murray's wife, is sued in respect of statements that she made on the Facebook page. The third defendant, Dimension Data NZ Limited (DDNZ), was Mr Murray's employer at the relevant time and is sued on the basis that is vicariously liable for Mr Murray's own actions and directly liable for having endorsed or adopted the defamatory statements.

[3] From time to time Mr Wishart has had the assistance of counsel but for the most part he has been unrepresented. His ongoing struggle to produce a pleading that complies with the High Court Rules and the Defamation Act 1992 has created significant cost and inconvenience to the defendants. Not all of the cost and delay in the case have been due to Mr Wishart's inept pleading, however; aspects of his case have thrown up novel issues for which there was no settled law in New Zealand.[1]

[4] In 2013 I declined the first and second defendants' application for security for costs. On appeal the Court of Appeal did not interfere with that decision, though it did express reservations about the evidential basis for one of my findings. The present applications are brought mainly on the basis that Mr Wishart does not own any substantial asset against which judgment could be enforced and has failed or refused to procure a guarantee from the companies that he controls or the trusts of which he is a beneficiary to meet any costs order.

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[1] Some of these issues have been resolved by the Court of Appeal in *Murray v Wishart* [2014] 3 NZLR 722.

Relevant principles

[5] Rule 5.45 of the High Court Rules, which provides for security for costs, poses as a threshold question whether there is reason to believe that the defendant will be unable to pay costs if unsuccessful and then requires an assessment of all the relevant circumstances to determine whether ordering security for costs is just in all the circumstances:

> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant – …
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> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

[6] The leading authority on security for costs is the Court of Appeal's decision in *A S McLachlan Ltd v MEL Network Ltd*:[2]

> The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not likely to be denied.
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> Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[7] Although some previous cases have proceeded on the basis that the defendant carries an onus of showing that there is reason to believe that the plaintiff will be unable to pay costs[3] the meaning of "satisfied" is settled as not implying either any onus or standard of proof but, rather, merely indicating that the Court has come to a decision on the evidence before it.[4] Ordinarily, the defendant will not have access to the plaintiff's financial information. As a result, the threshold question will often fall

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2 *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

3 See e.g. *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)*[1977] 1 NZLR 516

4 *R v Leitch* [1998] 1 NZLR 420; *R v A* [2009] NZCA 380 at [9]–[10]; *Whangape Developers Ltd v Parker* HC Auckland CIV-2006-404-5909, 1 April 2008.

to be answered by inference from the surrounding circumstances and such evidence as is available.[5]

[8] Mr Salmon, for the first and second defendants, also drew my attention to the decision in *Queenstown Community Strategic Assets Group Trustee Ltd v Queenstown Lakes District Council* in which Fogarty J required an incorporated society that claimed to be acting generally in the public interest to give security for costs, observing that r 5.45 did not contemplate a plaintiff able to pay costs but unable to be pursued for costs for want of assets. This is relevant because, although Mr Wishart is not a "public interest" plaintiff, it is common ground that he does not personally own any substantial assets against which a judgment could be enforced.

[9] The assessment of whether ordering security for costs is "just in all the circumstances" is, self-evidently, a broad enquiry and can include whether the impecuniosity was caused by the defendant's conduct and whether requiring security for costs might prevent the plaintiffs from proceeding with a bona fide claim. The Court is also entitled to make some assessment of the merits of the case.[6]

Threshold question: is there reason to believe the plaintiff will be unable to pay costs?

[10] The first and second defendants calculate their 2B costs entitlement for steps to this point not subject to previous costs awards or extant applications at $7,319. Mr Salmon points out that this figure is a fraction of the actual costs incurred. His estimate of 2B costs from this point to the end of trial (excluding the present application, allowing for only further interlocutory application and on the basis of a seven day trial) is calculated at $75,151.

[11] Mr Salmon and Mr Rennie QC, for the third defendant, both pointed out the effect of s 43(2) of the Defamation Act 1992 which provides that, even if a plaintiff obtains judgment, if the amount of damages is less than the amount claimed and the damages claimed are grossly excessive, the Court shall award solicitor and client costs in favour of the defendant. Mr Salmon identifies this provision as relevant

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5 *Concorde v Anthony Motors (Hutt) Ltd (No 2)*, above at n 3, at 519; *Arklow Investments Ltd v Maclean* (1994) 8 PRNZ 188 at 191.

6 *Ambrose v Pickard* [2009] NZCA 502.

because, although the present pleading seeks no more than $900,000, a previous pleading sought $8m, including unquantified claims for aggravated and punitive damages. As a result, the plaintiff is exposed to a claim for solicitor/client costs under s 43(2).

[12] There is a reasonable amount of information available about Mr Wishart's personal position, though not as much as the defendants would like. Mr Wishart is not the beneficial owner of any real property. He has previously given evidence that he is the settlor, a trustee and a beneficiary of a family trust that does own property[7]. In the affidavit filed for this application, he has deposed that he is a shareholder in two publishing companies and has been paid a shareholder's salary every year since 1998. The companies' incomes derive from Mr Wishart's work as a writer and investigative journalist. He usually writes two books a year, sometimes three. He earns royalties from international sales of his books. Prior to the alleged defamation, which caused significant loss, the average yield per book was $291,783.29. The year after the boycott it was $35,419.35 per book. Mr Wishart says that it has now improved from that level. His four most recent books have earned the companies $834,000 plus GST in the New Zealand domestic market.

[13] Mr Wishart also pointed out that he has paid some $20,000 in costs awards over the course of this proceeding and reiterated that his ongoing professional work, the income streams generated by that work, his position in the community and the impact on his companies and family of bankruptcy means that he would ensure that costs were paid rather than allow himself to be bankrupted.

[14] Mr Salmon urged caution about Mr Wishart's assurances, pointing out that when the first and second defendants' solicitors wrote to Mr Wishart on 16 July 2016 inviting the trustees of the family trusts to confirm the asset positions of the trusts and give undertakings that any costs award would be met from trust assets and seeking confirmation that Mr Wishart's personal financial circumstances had not deteriorated since the last application, Mr Wishart did not respond. Whilst I certainly accept that, in some circumstances, a failure to respond to such a letter might leave open an adverse inference, the timing of Mr Wishart's affidavit in

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7 Discussed at [160]–[161] of the Court of Appeal decision in *Murray v Wishart*.

opposition to the application dated 22 July 2016 means that it can fairly be viewed as a response to that letter.

[15] Mr Wishart's affidavit did not, however, touch on the possibility of the trustees offering to undertake to meet costs award from trust assets and I infer that he cannot necessarily rely on trust assets to meet a costs award. Nevertheless, I accept that Mr Wishart's work over the past 15 years has produced substantial earnings for him and the publishing companies and continues to do so. The shareholder salaries that Mr Wishart receives are derived from those earnings. I also accept as relevant that Mr Wishart has met the costs awards made against him in this proceeding. These figures are not at the same level as costs following a trial would be but they tend to support his assertion that he is capable of paying an award made against him.

[16] In the circumstances, although Mr Wishart does not have real property in respect of which a judgment based on a costs award could be enforced, I am not satisfied that there is reason to believe he will be unable to meet an award of costs.

Is security for costs just in all the circumstances?

[17] Notwithstanding my conclusion as to the threshold question, I record my view about whether it would otherwise have been just to require security to be given.

[18] I consider the following circumstances to be relevant. First, it cannot be said, particularly having regard to the Court of Appeal's decision, that it is a case with little prospect of success. On interlocutory applications Mr Wishart has had some successes and I note that in the Murrays' appeal, the Court of Appeal directed that costs should lie where they fell. I regard it as a bona fide case with prospects of success.

[19] Secondly, while there has been cost and delay in this case caused by Mr Wishart's decision to remain unrepresented not all of the cost in this proceeding is due to Mr Wishart's failings. Aspects of this case are novel and an appeal against my decision on the issue of non-party statements was inevitable, whatever it was.

[20] Thirdly, Mr Wishart has deposed that the Facebook page had an adverse effect on his income. That assertion has never been resisted and, given that the stated purpose of the Facebook page was to boycott sales of Mr Wishart's book, I accept that it is reasonably possible that the conduct for which the defendants are being sued was a cause of financial hardship for Mr Wishart.

[21] In these circumstances I consider that it would not have been just to require security to be paid, even if I had been satisfied on the threshold question.

Result

[22] The application is refused.

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P Courtney J