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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2015-485-484
[2017] NZHC 1757

BETWEEN	KAREN FRANCES ARNOLD Plaintiff
AND	FAIRFAX NEW ZEALAND LIMITED First Defendant
	TIMOTHY RICHARD SHADBOLT Second Defendant

Hearing:	25 July 2017
Counsel:	P A McKnight for the Plaintiff R K P Stewart and J A McNaught for the First Defendant F E Geiringer for the Second Defendant
Judgment:	27 July 2017

JUDGMENT OF MALLON J

Introduction

[1] Ms Arnold sues Fairfax and Mr Shadbolt for defamation arising out of four columns written by Mr Shadbolt and published by Fairfax in *The Southland Times* and, in respect of two of them, posted on its *Stuff* website.

[2] Fairfax applies for security for costs and leave to amend its honest opinion defence. Mr Shadbolt seeks leave to join Fairfax's application for security for costs. Ms Arnold opposes these applications.

Background

[3] Mr Shadbolt is the Mayor of Invercargill. Ms Arnold is an Invercargill City Councillor. The four columns on which Ms Arnold's defamation claim is brought concern criticisms they each made about the other. There are six causes of action corresponding to the four columns published in *The Southland Daily Times* and the two of those columns that were also published on *Stuff*. Ms Arnold pleads a number of defamatory meanings. These include, for example, that the publications meant, or would be understood to mean, that she was dishonest, could not be trusted, was not a team player, and had acted inappropriately by engaging in matters where she had a conflict of interest and by leaking confidential information.

[4] Fairfax and Mr Shadbolt deny the publications have the pleaded meanings. They also rely on the defences of qualified privilege and honest opinion.

[5] Ms Arnold commenced the proceeding in June 2015. The interlocutory steps have involved the provision of further particulars of the defences, a counterclaim by Mr Shadbolt which was discontinued in 2016, amended pleadings by each side, a reply to Fairfax's honest opinion defence and to matters in Mr Shadbolt's statement of defence, notices under ss 39 and 41 of the Defamation Act 1992, interrogatories sought of and answered by Fairfax and discovery. Ms Arnold also applied to strike out the honest opinion defence. That application was heard and dismissed by the High Court (Clifford J) in February 2016.[1] Ms Arnold lodged an appeal from that decision but later withdrew this appeal. At a case management conference on 16 March 2017 Clifford J fixed the close of pleadings date as at that date but reserved leave for Fairfax to bring an application for security for costs within one month of that date.[2] He also allocated a two week fixture for a jury trial in the High Court in Invercargill commencing 26 February 2018.

[6] On 13 April 2017 Fairfax filed its application for security for costs and leave to amend its statement of defence. The application also sought disclosure of any litigation funder. However that application is no longer pursued. On 2 May 2017 Mr Shadbolt sought leave to join Fairfax's applications for security for costs and for

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1 *Arnold v Fairfax New Zealand Ltd* [2016] NZHC 207.
2 *Arnold v Fairfax New Zealand Ltd* HC Wellington CIV-2015-485-484, 16 March 2017.

disclosure of any litigation funder. He similarly no longer pursues the application for disclosure of any litigation funder. Ms Arnold opposes the applications.

Security for costs

[7] Rule 5.45 of the High Court Rules 2016 provides for the Court to make an order for security for costs. There are two steps to obtaining an order under this rule. First the Court must be satisfied that one of the grounds set out in r 5.45(1) applies. This is a threshold question. Secondly, if the threshold is met, the Court may grant an order if it thinks it is just in all the circumstances. This is a discretionary decision.

[8] On the threshold question Fairfax and Mr Shadbolt rely on the ground provided in r 5.45(1)(b), namely:

> 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.

[9] This threshold question requires an assessment of whether there is credible evidence of surrounding circumstances from which it may be reasonably inferred that the plaintiff will be unable to pay the defendants' costs.[3] The Court will give due weight to a plaintiff's sworn assertion that she will be able to pay costs, but this is not decisive. If this is a bare assertion or supported only by sparse details, the Court will consider whether it is appropriate to draw an adverse inference. Such an inference might be made where the defendant "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."[4]

[10] Ms Arnold has filed an affidavit about her financial position. She deposes that she owns two properties. The 2014 rateable value of those properties are $300,000 and $91,000. New rating valuations are due this year. Based on the 2014 rateable values she has combined equity of $100,000 in the properties. At market value she considers her equity is $181,000.

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3 *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [HR 5.45.02] and the cases referred to in that commentary.

4 *Stephenson v Jones* [2013] NZHC 638 at [16] applying *New Zealand Kiwifruit Board v Maheatataka Cool Pack Ltd* (1993) 7 PRNZ 209 (HC).

[11] She notes that she has paid promptly orders for costs made against her (an amount of $11,075.50) following her application to strike out the defence of honest opinion.[5] When she filed an appeal against the judgment of Clifford J, she was required to lodge security for costs with the Court of Appeal of $13,200. She deposited this sum promptly. She deposes that she has "several sources of income" and that "I am able to meet my debts as they fall due, and I will be able to meet any costs award made against me in this proceeding."

[12] She notes that she offered Fairfax security in the form of a caveat over her properties, which it did not accept. She says that if Fairfax had indicated what amount they would seek as appropriate security and made genuine inquiries about the offer she made, it "would have received security in excess of six figures, supported by undertakings made to the Court."

[13] Fairfax's contention that the threshold is met for making a security order is based on the difference between Ms Arnold's asserted equity in her properties compared with the size of the likely costs orders she will face if she is unsuccessful and her other costs of litigation. The parties have agreed category three is the appropriate costs category. Fairfax calculates scale costs on a 3B basis of $125,730. Mr Shadbolt would be entitled to the same figure. In addition, there would be significant disbursements in the form of travel and accommodation costs, expert witness fees and court costs. On this basis there is a substantial shortfall between the asserted equity of approximately $180,000 and the orders for costs and disbursements likely to be well in excess of $250,000. Fairfax submits the information about Ms Arnold's other sources of income does not suggest she has access to funds to meet this shortfall especially as she will also be incurring significant legal costs in proceeding to trial.

[14] I am not satisfied there is reason to believe that Ms Arnold will be unable to pay the costs of Fairfax and Mr Shadbolt if she is unsuccessful in her proceeding. She has substantial equity in two properties which will go some way towards meeting costs orders if she is unsuccessful. She has deposed that she is able to meet any order for costs. She has presumably been advised of the potentially large size of

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5 *Arnold v Fairfax New Zealand Ltd* [2016] NZHC 379.

any such order in deposing to that. To some extent she has shown that she is genuine about meeting any order for costs by proposing that Fairfax register a caveat against her properties. There is no suggestion she has failed to meet her debts in the past. There is nothing to suggest she would proceed with her claim at the risk of enforcement action being taken against her assets if she is unsuccessful and unable to meet an order for costs.

[15] As the threshold has not been met I decline the application for security for costs.

Leave to amend honest opinion defence

[16] The defence of honest opinion requires the opinion expressed to be genuine. Section 10 of the Defamation Act sets out three different requirements depending on who has expressed the published opinion:

(a) The first applies where the defendant is the author of the opinion. In this case the defence will "fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion" (s 10(1)).

(b) The second applies where the author of the opinion was an employee or agent of the defendant. In this case the defendant must prove the opinion did not purport to be the defendant's opinion. It must also prove it "believed that the opinion was the genuine opinion of the author" (s 10(2)(a)).

(c) The third applies where the author of the opinion was not an employee or agent of the defendant. In this case the defendant must prove the opinion did not purport to be the opinion of the defendant or of any employee or agent of the defendant. It must also prove it "had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion" (s 10(2)(b)).

[17] Mr Shadbolt's defence of honest opinion relies on s 10(1). Fairfax's existing honest opinion defence relies on s 10(2)(b). Fairfax seeks leave to amend its defence to rely, in the alternative, on s 10(2)(a). Ms Arnold opposes this on the basis that her counsel had made it clear from the outset that there was a live issue as to whether Mr Shadbolt was an agent of Fairfax (s 10(2)(a)). Fairfax has consistently taken the view that Shadbolt was not its agent (s 10(2)(b)). Having made that tactical decision, Ms Arnold says it is too late to now add s 10(2)(a) as an alternative. She says she will be prejudiced if leave is granted to Fairfax.

[18] Fairfax remains of the view that this is a s 10(2)(b) situation. It wishes to add s 10(2)(a) as an alternative having been alerted to the obiter comments in *Hubbard v Fourth Estate Holdings* by Ms Arnold's counsel shortly after the close of pleadings date.[6] It contends there is no prejudice to Ms Arnold if leave is granted. The interrogatories included a question about the arrangements between Mr Shadbolt and Fairfax and in particular whether he was remunerated for his work. Fairfax has no further documents to discover if leave is granted for the amendment. It considers Ms Arnold would not need to make any material amendment to her ss 39 and 41 notice because there are only subtle differences in the genuine opinion requirement as between s 10(2)(a) and s 10(2)(b).

[19] In my view Fairfax should be permitted to amend its pleading unless this would cause material prejudice to Ms Arnold. The Judge's decision to set a close of pleading date as at the date of the telephone conference came as something of a surprise to Fairfax's counsel, who anticipated the date would be a date some time after the conference. In relying only on s 10(2)(b), counsel was unaware of the obiter comments in *Hubbard v Fourth Estate Holdings*. Fairfax's counsel was only alerted to the comments by Ms Arnold's counsel after the close of pleading date. Leave was sought promptly on becoming aware of those comments. There is still seven months until trial. When pressed, Ms Arnold's counsel was unable to assert any likely further work (for example, discovery or briefing of witnesses) that the amendment would require, other than a minor change to the opening paragraph of the ss 39 and 41 notice.

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6 *Hubbard v Fourth Estate Holdings Ltd* HC Auckland, CIV-2004-404-5152 13 June 2005 at [18].

[20] I therefore grant leave to Fairfax to amend its defence to rely on s 10(2)(a) in the alternative.

Result

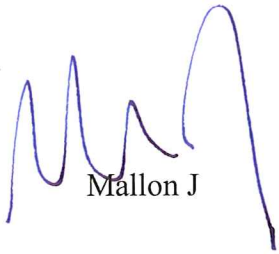
[21] Fairfax's application for security for costs is dismissed. Mr Shadbolt's application for leave to apply for security for costs is dismissed.

[22] Fairfax's application for leave to amend its honest opinion defence, to include s 10(2)(a) in the alternative to s 10(2)(b) as per the draft attached to the affidavit of Josephine McNaught, is granted. If this necessitates an amendment to Ms Arnold's ss 39 and 41 notice, she has leave to make that amendment.

[23] Fairfax and Ms Arnold have each succeeded on one application and failed on the other. I consider in the circumstances that costs should lie where they fall. I am not satisfied that Ms Arnold's possibly less than full response to the request for information of her financial position justifies displacing the presumption that costs should follow the event. It was clear from her response that she had not insubstantial equity and was willing to grant some form of security to Fairfax. Similarly I am not satisfied the fact that it is an indulgence to allow Fairfax leave to amend its defence justifies displacing that same presumption. It was open to Ms Arnold to consent to the amendment and thereby avoid the need for a defended hearing. Mr Shadbolt's application for leave has not materially added to Ms Arnold's costs. It is therefore not appropriate to make an order for costs against him.

Non-publication

[24] Because this claim will be tried before a jury I make an order prohibiting publication of the reasons for judgment in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.



Mallon J