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

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2018-485-355**
**[2018] NZHC 3179**

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| UNDER | the Defamation Act 1992 |
| BETWEEN | AKEZHAN KAZHEGELDIN<br>Plaintiff |
| AND | RADIO NEW ZEALAND LTD<br>First Defendant |
| | TELEVISION NEW ZEALAND LIMITED<br>Second Defendant |

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| Hearing: | 3 December 2018 |
| Appearances: | M McClelland QC and A Romanos for plaintiff<br>R Stewart for first defendant<br>D Nilsson for second defendant |
| Judgment: | 5 December 2018 |

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**INTERLOCUTORY JUDGMENT OF ASSOCIATE JUDGE JOHNSTON**

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[1] Mr Akezhan Kazhegeldin is a former Prime Minister of Kazakhstan. At the time of the commencement of this proceeding, he was living in the United Kingdom. Apparently, he has since left that country. He has no connection with New Zealand.

[2] Between May 2016 and October 2017, the first defendant, Radio New Zealand Ltd, and the second defendant, Television New Zealand Ltd, published material relating to Mr Kazhegeldin. Mr Kazhegeldin says aspects of this material were untrue and defamatory. He sues the defendants seeking damages. Since the matter was first raised on Mr Kazhegeldin's behalf by his London solicitors in letters to the defendants in October 2017, there has been ongoing correspondence between the parties'

solicitors and counsel. To date they have been unable to resolve matters, despite averments by all three parties of a desire to do so.

[3] Mr Kazhegeldin commenced this proceeding in May 2018. The defendants entered defences (in virtually identical terms) in August 2018. Mr Kazhegeldin filed and served replies to their affirmative defences in September 2018.

[4] The defendants have now filed and served a (joint) interlocutory application in which they are seeking:

(a) an order for security for costs;

(b) an order striking out certain paragraphs in Mr Kazhegeldin's replies to their affirmative defences;

(c) an order requiring Mr Kazhegeldin to provide further particulars of aspects of his replies; and

(d) directions for the convening of a conference pursuant to s 35 of the Defamation Act 1992.

[5] Mr Kazhegeldin opposes the making of all four interlocutory orders sought (though his opposition to the last relates less to the convening of a conference than to the nature of any conference).

[6] The defendants' application was argued before me on 3 December. I am grateful to all counsel for their assistance. I will deal with the various components of the defendants' application in the order which appears to me to be most logical.

[7] As already recorded, the alleged defamatory material was first published by the defendants in May 2016. Mr Kazhegeldin did not take any steps in relation to this until his London solicitors wrote to the defendants in October 2017. Although this apparent delay is not explained in the evidence, I place no weight on it in dealing with any of the matters before me. It would not be altogether surprising if Mr Kazhegeldin had not become aware of material published in New Zealand for a time.

[8] In their October 2017 letters to the defendants, Mr Kazhegeldin's London solicitors put a relatively clear proposition to them. They asked the defendants to cease publishing the relevant material, extend a private apology to Mr Kazhegeldin, publish an apology and meet Mr Kazhegeldin's reasonable costs. It was said that if the defendants were prepared to agree to take those steps Mr Kazhegeldin would not take the matter any further. The defendants both removed the alleged defamatory material from their websites in a matter of days. The parties then engaged in correspondence and discussions through their advisers. Apparently, counsel had a without prejudice meeting on 21 October 2018. Regrettably, though, the parties have not been able to reach agreement. If anything, they now seem to be further apart. As I understand it, aside from the remedies originally sought by Mr Kazhegeldin, there is now a question of damages.

[9] As I observed to counsel during the course of the hearing, this matter is one which should be capable of settlement. I am assured by Mr McClelland for Mr Kazhegeldin and Mr Stewart and Mr Nilsson for, respectively, the first and second defendants, that all parties are anxious to resolve it.

[10] The orders I propose to make are informed by that.

**Application for an order striking out aspects of Mr Kazhegeldin's reply**

[11] The defendants plead, as their first affirmative defence, that their reports were responsible communications in respect of a matter of public interest. This defence is based on the Court of Appeal's very recent judgment in *Durie v Gardiner*[1] recalibrating the defence of qualified privilege. Obviously, amongst other things, it involves an affirmative assertion that the two agencies were acting responsibly. Mr Kazhegeldin has replied to this at [5] of his reply. Two specific aspects of this paragraph are attacked, sub-paragraphs [5.6] and [5.8].

[12] Sub-paragraph [5.6] of the reply says:

> 5.6 In a previous article, one of the journalists, Andrea Vance disclosed that for seven years she worked as a reporter for the now-defunct *News of the World* newspaper, and:

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1 *Durie v Gardiner* [2018] NZCA 278, (2018) 14 TCLR 809.

5.6.1 admitted working in the paper's Scottish office "when those "dark arts' were in play";

5.6.2 admitted that she was aware of "some pretty dubious and underhand things that went on in the pursuit of truth";

5.6.3 admitted that, in some cases, the use of such nefarious newsgathering methods "were for juicy scoops that would have been of interest to the public, but not necessarily for the public interest";

5.6.4 disclosed that despite being aware of these "dubious and underhand" newsgathering methods, she continued to work there until 2011;

5.6.5 stated that in New Zealand, greater care is needed in publication because "the danger is you're spilling the secrets of someone whose path you're likely to cross";

5.6.6 characterised the tactic used by journalists against sources and article subjects as being "exaggerated tales of what might happen if they didn't 'set the story straight'".

[13] The defendants' submission in relation to this paragraph is that all that it does is say that Ms Vance worked for the News of the World for a period of time and relate what she records having observed. They say that as it stands the pleading is irrelevant, and pleads evidence. They say that, if there is an allegation that Ms Vance participated in irresponsible journalism whilst employed by the News of the World, Mr Kazhegeldin should say so, and identify exactly what irresponsible behaviour Ms Vance is alleged to have participated in. They say that, otherwise, [5.6] is objectionable and should be struck out.

[14] Mr McClelland acknowledges that [5.6] pleads evidence. He says that it responds to aspects of the defences which do the same. He submits that there could be no objection to these matters being explored with Ms Vance or any other witness who has knowledge of them by way of cross examination at trial.

[15] Sub-paragraph [5.8] of the reply says:

> On 31 May 2016 less than one day after the second defendant published the article on its website, Cameron Slater of *Whaleoil* observed the embarrassing research deficiencies in the defendants' publications, which he characterised as a "shabbily researched political hit job".

[16] The defendants' objection to this pleading is essentially that it is irrelevant what another journalist, in this case Mr Cameron Slater, said in an article in 31 May 2016. They say that if the purpose of the pleading is to demonstrate that the defendants' research was inadequate then it not only pleads evidence but hearsay evidence.

[17] Mr McClelland submits that it is relevant that within a matter of days of the defendants publishing their material another journalist was critical of their research and the accuracy of that material. He says it goes to whether the defendants were acting responsibly. He says that, following the publication of Mr Slater's article, the defendants, had they been acting responsibly, would have at least reviewed their articles.

[18] My overall assessment of these pleadings is that whilst they go to matters which may be relevant to the key defence, whether the defendants acted responsibly, as they stand, they are objectionable because they plead evidence. That said, it is not my perception that they are prejudicial to the defence, and there is no doubt that Mr Kazhegeldin would be entitled to lead evidence along the lines of the pleadings if the matter went to trial.

[19] In those circumstances, I decline to strike out the paragraphs.

**Application for further and better particulars of plaintiff's reply**

[20] The defendants seek further and better particulars of other aspects of Mr Kazhegeldin's replies to their affirmative defences. Here, in my view, they are on stronger ground. In [5.5] and [5.7] of both replies, and [11] of his reply to the first defendant's defence and [10] of his reply to the second defendant's defence, Mr Kazhegeldin attributes particular states of mind to the defendants. He says that the defendants had a particular intention, that being to vilify Mr Kazhegeldin. He says that the defendants were indifferent to any damage they might cause to his reputation because they believed that, being based overseas, he would not sue them. He asserts that the defendants acted disingenuously and manipulatively for strategic purposes in the litigation.

[21] The defendants say that if these allegations are to be made, they should be particularised, that is to say that Mr Kazhegeldin should plead the factual circumstances upon which assertions as to the defendants' states of mind are based.

[22] Mr McClelland accepts that if the case were to proceed to trial Mr Kazhegeldin would need to provide such particulars. I agree. Rule 5.17(2) of the High Court Rules 2016 imposes an obligation on the party alleging a frame of mind on the part of any other party to identify the factual bases for the allegation. In my judgement, Mr Kazhegeldin's replies do not comply with that rule.

[23] I propose to direct that Mr Kazhegeldin provide further particulars of the relevant allegations. This will not necessitate a full repleading of his reply to the defendants' defences. All it will require is a notice providing the additional particularisation.

**Security for costs**

[24] Rule 5.45 of the High Court Rules 2016 confers on the Court jurisdiction to order a plaintiff (and very exceptionally, a defendant) to provide security for costs in certain circumstances. This involves the exercise of a broad discretion. Invariably, it calls for the balancing of the competing interests of the parties. It is far from a straightforward exercise.

[25] However, this case is less troubling than many. For a start, it is common ground that the defendants can overcome the threshold question of whether the circumstances entitle the Court to make an order.[2] That much is conceded by Mr Kazhegeldin.

[26] Mr McClelland also accepted in argument that, as Mr Kazhegeldin is resident abroad and the Court has not been informed of where he is living, and no evidence as to his financial position has been offered, an order for the security for costs at some level is inevitable.

[27] The issue therefore reduces itself to one of quantum.

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2 High Court Rules 2016, r 5.45(1)(a)(i).

[28] The defendants say that scale costs for each of the parties in this case are likely to be in the order of $75,000. They accept that there is scope for the defendants to act jointly in the defence of the claim and do not seek security for costs for both defendants at that level. What they say is that whilst there are cost savings to be achieved by the defendants coordinating their defences, their total costs are likely to be in the order of $100,000. They seek an order for security for that amount.

[29] For Mr Kazhegeldin, Mr McClelland says that this is a straightforward case and that, at least if it were to be heard by a judge alone, it could be dealt with inside a week. It is said on Mr Kazhegeldin behalf that the quantum being sought by the defendants is excessive, and that an order for $30,000 security for costs would meet the case.

[30] Both parties accept that any order should be staged, that is to say payable at appropriate points in the progress of the proceeding.

[31] One of the considerations that is relevant to all security for costs applications is the apparent merits of the parties' cases. All of the authorities acknowledge that a judge dealing with security at an early stage in the proceeding can do no more than gain an impression of the merits.[3] The impression I have from the papers and the arguments I have heard is that Mr Kazhegeldin has a strong case in terms of establishing the defamatory nature of the allegations and that the argument will focus largely on whether the defendants acted responsibly (in the *Durie* sense).[4] As to this, my impression is that the merits are reasonably evenly balanced.

[32] The conclusion I have reached is that the defendants are entitled to a measure of protection, but that that protection ought not to be at a level which might deny Mr Kazhegeldin access to the Court. My sense is that a staged order for $50,000 costs would be appropriate, at this point at least.

[33] What I propose to do is to make an order that security be provided in the sum of $50,000. Half will be payable following the conference which I am proposing to

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3 *McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [21].
4 *Durie v Gardiner*, above n 1.

direct take place. The other half will be payable on the close of pleadings date, whenever that is. I will reserve leave to the defendants to make an application for additional security for costs closer to the trial date. In my assessment, such an order will strike a proper balance between the parties' interests.

**Conference**

[34] The defendants seek an order that a conference be convened pursuant to s 35 of the Defamation Act 1992. That provision entitles the Court to direct the parties to participate in a pre-trial conference for the express "… purpose of ensuring the just, expeditious, and economical disposal of any proceedings for defamation". The rule goes on to describe what may occur at such a conference.

[35] It may be used for the identification of issues and whether or not they are capable of being resolved, and the extent to which there may be agreement between the parties. The Court may issue recommendations. The Court may require the parties to make express admissions of fact and if a party refuses to do so that may have costs consequences. The Court may make additional orders in relation to such matters as discovery and interrogatories. The Court may issue directions in relation to pleadings. The Court may set the matter down for trial and make pre-trial directions.

[36] This provision in the Defamation Act preceded the development of a comprehensive case management regime. As far as I can see, there is nothing that a judge is authorised to do at a s 35 conference that could not be done at a case management conference or judicial settlement conference.

[37] Mr Stewart submits that, as s 35 requires that a conference under that clause be convened by a "Judge" and, prima facie, that term excludes an Associate Judge. This would mean an Associate Judge would not have jurisdiction to preside at such a conference. Mr McClelland adopts the same position. I am not sure that that is right. It overlooks r 2.1(1) of the High Court Rules that provides that an Associate Judge has all the powers of a High Court Judge when sitting in chambers. Any such conference would undoubtedly be convened in chambers as opposed to open court. Mr Stewart submitted – as politely as he could – that a High Court Judge who had experience in the conduct of defamation trials involving a jury may be able to offer more assistance

to the parties. There is something in this. However, it must be balanced against the appropriate use of judicial resources and it is certainly the case that, as matters stand, I am more familiar with this file than another Judge.

[38] On balance, I am inclined to think that the best course is to direct a judicial settlement conference and to convene that conference myself. Both parties agree that that cannot take place before February.

[39] I will direct the Registrar to arrange a one day judicial settlement conference after 1 February 2019.

**Conclusion**

[40] I make the following orders or directions:

(a) I direct that Mr Kazhegeldin provide further particulars of the allegations at [5.5] and [5.7] of both replies, [11] of his reply to the first defendant's defence and [10] of his reply to the second defendant's defence within 15 working days of this judgment.

(b) I order that security for costs be provided by Mr Kazhegeldin in the sum of $50,000. Half will be payable following the conference which I am proposing to direct take place. The other half will be payable on the close of pleadings date. When the time comes, the proceeding is to be stayed pending payment of those sums.

(c) I reserve leave for the defendants to make an application for additional security for costs closer to the trial date.

(d) I direct the Registrar to arrange a one day judicial settlement conference after 1 February 2019. The plaintiff and representatives of the defendants are to attend, either in person or by electronic means. Statements of position and will say statements are to be filed and exchanged, 15 working days before the conference by the plaintiff and 5 working days before the conference by the defendants.

**Costs**

[41] My preliminary view is that, as both parties have achieved a measure of success, costs on this interlocutory application should be reserved and be costs in the cause. However, I have not heard from counsel and therefore reach no concluded view. If counsel are unable to sort out any costs issue, as I would expect them to be able to do, they may come back to the Court by memorandum.

Associate Judge Johnston

Solicitors:
Langford Law, Wellington for plaintiff
Fee Langstone, Auckland for first defendant
Lee Salmon Long, Auckland for second defendant