

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA725/2017
[2018] NZCA 96**

BETWEEN LOW VOLUME VEHICLE TECHNICAL
ASSOCIATION INCORPORATED
Appellant

AND JOHN BERNARD BRETT
First Respondent

AND ANTHONY PETER JOHNSON
Second Respondent

Counsel: First Respondent in person
R J Gordon for Second Respondent

Judgment: 17 April 2018 at 3.30 pm
(On the papers)

JUDGMENT OF GILBERT J

The application for review of the Registrar’s decision refusing to dispense with security for costs on the First Respondent’s cross-appeal is declined.

REASONS

[1] Low Volume Vehicle Technical Association Incorporated (the Association) and its chief executive, Anthony Johnson, sued John Brett in the High Court for defamation and breach of contract. The Association’s claims were dismissed by Palmer J in a judgment delivered on 20 November 2017 but Mr Johnson’s claims were partly upheld.¹ The Judge found that Mr Brett was entitled to rely on the defence of

¹ *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846.

qualified privilege in relation to the defamatory statements made about the Association but not the defamatory statements he made about Mr Johnson.² The Judge observed that if the Association had pleaded that Mr Brett had been predominantly motivated by ill will in making the statements, the defence of qualified privilege might not have succeeded at all.³ The Association appeals.

[2] Mr Brett was ordered to pay Mr Johnson \$100,000 in compensatory damages plus costs.⁴ A permanent injunction was also granted prohibiting Mr Brett from making further defamatory statements about Mr Johnson.⁵ Mr Brett cross-appeals.

[3] Security for costs for Mr Brett's cross-appeal has been fixed at the standard amount of \$6,600. Mr Brett applied to the Registrar for an order pursuant to r 35(6)(c) of the Court of Appeal (Civil) Rules 2005 dispensing with the requirement that he pay security for costs. The application was declined by the Registrar in a decision dated 23 March 2018. The Registrar was not satisfied that Mr Brett would be unable to raise the funds required to pay security for costs. The Registrar also considered that the cross-appeal had little merit and was not one that a reasonable and solvent litigant would pursue. The Registrar noted that Mr Brett has not applied for legal aid.

[4] Mr Brett applies for a review of the Registrar's decision. The review is to be conducted by a Judge pursuant to r 7(2) of the Rules. In undertaking the review, the Judge is required to consider the matter afresh.⁶ The question is whether it would be right to require Mr Johnson to defend the judgment in his favour, which Mr Brett seeks to challenge, without having the usual protection provided by security for costs. Security may be dispensed with if necessary to preserve access to the Court of Appeal by an impecunious appellant in circumstances where a solvent appellant would reasonably wish to prosecute the appeal. A failure to seek legal aid is relevant.

[5] Mr Brett is a superannuitant. He and his partner, through their respective family trusts, own a residential property in Paeroa. The family trusts own all of the

² At [89].

³ At [7].

⁴ At [118]–[120].

⁵ At [115] and [120].

⁶ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

shares in MJT14 Ltd which owns a rental property in Papakura. Each of these properties is subject to a mortgage in favour of ASB Bank but the equity in them is not disclosed. Mr Brett's family trust owns the shares in John Brett Technology Ltd. Although this company is no longer trading, it is owed a debt of approximately \$17,600 by MJT14 Ltd. Nevertheless, Mr Brett suggests that these assets could not be utilised to fund a payment of \$6,600 for security for costs because he is unable to make unilateral decisions or draw personal loans from his trust.

[6] Mr Brett has some assets in his own name: a yacht and a mooring currently advertised for sale for \$5,000 and \$3,000 respectively; a car recently purchased for \$1,350; a modest bank balance and other personal effects.

[7] Based on the information provided, I am not persuaded that Mr Brett is impecunious and could not fund the amount required for security for costs. Mr Brett has chosen not to seek legal aid for his appeal. That is his choice but it is relevant to the assessment of whether this case raises a genuine concern about access to justice for an impecunious appellant who is unable to pursue a meritorious appeal unless payment of security for costs is dispensed with. I do not consider that this is such a case. In my view, it would not be just to require Mr Johnson to defend the judgment under appeal without the usual protection as to costs provided by security.

Result

[8] The application for review of the Registrar's decision refusing to dispense with security for costs on the First Respondent's cross-appeal is declined.

Solicitors:
MinterEllisonRuddWatts, Wellington for Second Respondent