IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-401
[2022] NZHC 3373

UNDER	The Defamation Act 1992
BETWEEN	STEPHEN JOHN COOK Plaintiff
AND	MARGIE ARITA ENDORA THOMSON First Defendant
AND	POTTON & BURTON LIMITED Second Defendant

Hearing: 29 November 2022 (by AVL)

Appearances: Mr Cook (Plaintiff) in person
S A Woods and G S Burcher for the Defendants

Judgment: 14 December 2022

JUDGMENT OF ASSOCIATE JUDGE LESTER

Introduction

[1] Mr Cook sues Ms Thomson and Potton & Burton Ltd (**PBL**) in defamation. Ms Thomson is the author of a book published on 28 May 2019 by PBL called "Whale Oil".

[2] This proceeding was commenced on 7 March 2022 and is therefore outside the two year limitation period applying to defamation proceedings.[1]

[3] Mr Cook relies on the late notice provisions under s 14 Limitation Act 2010 (**the Act**) to say that his claim is within time.

[4] Ms Thomson and PBL, on 26 May 2022, applied for security for costs. Accordingly, no issue of delay in security being sought arises.

The Whale Oil publication

[5] Ms Thomson describes the Whale Oil book (**the book**) as a work of investigative journalism focusing on a long running smear campaign and internet harassment campaign against Mr Matthew Blomfield by the blogger, Cameron Slater and his various associates. Mr Slater ran the blog Whale Oil.

[6] The extracts from the book said to give rise to the defamation are attached as a schedule to Mr Cook's statement of claim. The book addresses an assault on Mr Blomfield which it suggests was undertaken in return for the wiping of a debt. Ms Thomson suggests a probable gang related link to the person said to have carried out the assault which she said in the book "leads to some interesting possibilities to consider". In the book, Ms Thomson then suggests at least three possible conduits between Whale Oil and the world of gangs; one being Mr Cook.

[7] Ms Thomson then records that in July 2008, Mr Cook was chief reporter at the Herald on Sunday (**the Herald**). The Police had intercepted a telephone call between Mr Cook and two drug dealers in which they discussed the purchase of

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1 Limitation Act 2010, ss 11(1) and 15.

methamphetamine. Details of those conversations are contained within a judgment of this Court in November 2010.[2]

[8] Mr Cook's work vehicle was seen outside a house the Police had under surveillance as part of a methamphetamine investigation. The Police traced the ownership of the car to the Herald with issues arising from those enquiries resulting in Mr Cook being dismissed.

[9] Further, in November 2014, Mr Cook was arrested and convicted of possessing a Class A drug and a glass pipe used to smoke the drug.

[10] The key passage in the book after this background is:

> With methamphetamine controlled through organised gangs, Cook can be considered someone who may have had contact with people willing and able to organise an armed attack.

[11] Mr Cook pleads in his statement of claim that the words would mean, and would have been understood to mean, that he:

> … can be suspected of being a criminal that introduced a gang member to a hitman who carried out a paid hit on Matthew John Blomfield at his home.

[12] Mr Cook pleads the above defamatory meaning is a tier 2 defamatory meaning. In tier 2 cases, the sting of the defamation is likely to be that the plaintiff was involved in activity that created reasonable grounds to suspect it of wrongdoing. As Cook P observed in *Hyams v Peterson*:[3]

> For practical purposes there can be an imputation of suspicion so strong as to be indistinguishable from guilt.

Security for costs principles

[13] The principles for security for costs to be ordered are well established. Under r 5.45 of the High Court Rules 2016 (**the Rules**), the Court may order security for costs if the plaintiff is resident outside of New Zealand or there is reason to believe

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2 *R v Lee* [2010] NZHC 2025.
3 *Hyams v Peterson* [1991] 3 NZLR 648 at 655.

they will be unable to pay the defendant's costs if unsuccessful and it is just in all the circumstances to do so.

Mr Cook resident in Australia

[14] The threshold for the exercise of the Court's discretion relied on here is that Mr Cook is resident in Australia. Ms Thomson and PBL also submit the circumstances suggests that Mr Cook will not be able to pay their costs if his claim fails.

[15] I am satisfied that the threshold is met given it is common ground Mr Cook is resident out of New Zealand.

[16] Here, Ms Thomson and PBL acknowledge that the Trans-Tasman Proceedings Act 2010 makes enforcement of a costs judgment less of a barrier than in other jurisdictions. However, the reality is, enforcing a New Zealand judgment in Australia is unlikely to be an economic exercise. In a number of cases security has been awarded on the basis of residence in Australia.[4]

Inability to pay

[17] Strictly, it is not necessary for the defendants to also establish that Mr Cook would be unable to meet an award of costs. Ms Thomson and PBL do not need to prove an inability to pay,[5] but there must be material from which it can be inferred that Mr Cook will be unable to pay costs.

[18] The evidence provided by Mr Cook as to his financial position in his first affidavit in opposition was at a general level. He asserts his annual net income for the past three years has been between $100,000 - $120,000 derived from his business as a freelance journalist. He sees no reason why his income would not remain within that range for the next few years. He also says that earlier this year he reached an

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4 *Reihana v Rakiura Titi Committee* [2014] NZHC 3166, *Morrell v World Solar Ltd* [2018] NZHC 518 and *Cook v Kirkland*, CIV-2017-009-3359.

5 Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.45.02].

agreement and signed a contract for syndicated rights for a television series about his own life story worth approximately AUS $750,000. He says:

> It is my view that I have the financial ability to pay a costs judgment if it is made against me.

[19] Somewhat cutting across Mr Cook's assertions as to his ability to meet a costs award is that he says to date this proceeding has been financed by a millionaire friend but that an undertaking as to confidentiality prevents that person being named.

[20] At one level these statements are very general and unsupported by any corroborative material. Mr Cook does not refer to any savings or other assets he may have nor to any liabilities he has. Just why, given what at face value is a healthy net income, Mr Cook needed the proceeding to be financed by a millionaire friend, is not explained. I can infer he required the assistance of the funder to bring the claim – why else would it be necessary for Mr Cook to have recourse to a wealthy friend?

Mr Cook applies for Legal Aid

[21] Mr Cook, in an affidavit filed on 24 November 2022, advised he had on 21 November 2022 applied for legal aid. Mr Cook did not retreat from his previous statements about his income. Mr Cook's late affidavit was filed in part because Ms Thomson and BPL via their submissions increased the security sought from $30,000 to $50,000.

[22] The original application sought security in the sum of $30,000. Ms Woods carried out a 2B costs calculation assuming a two week hearing, arriving at a costs figure of a little over $100,000. Of that, nearly $14,000 had already been incurred by the time this application was heard but nearly $10,000 of that sum was incurred after the application was filed. Security is forward looking rather than addressing sunk costs.[6] However, costs incurred after an application for security is made but before it is heard can be considered. An applicant should not be prejudiced through any delay in the hearing of an application being allocated and to exclude such costs would create an incentive for a plaintiff to delay the hearing and/or to push through steps between

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6 *Jindal v Jarden Securities Ltd* [2022] NZHC 572 at [17]-[20].

the making of the application and it being heard.[7] The costs calculation also assumes certification for second counsel.

[23] Mr Cook's late affidavit gives the impression the informal request for an increase in security and his realisation of the potential size of adverse costs he might be liable for was the straw that broke the camel's back. He said:

> In light of this information, which was not available at the time of swearing my 8 June 2022 affidavit, I do not now consider that I could meet either security for costs of $50,000 or a $101,096 costs order, either as staged amounts or in full.

[24] Mr Cook does not say he could not meet the security as originally sought of $30,000. The tenor of his evidence in June 2022 is that he could pay such a sum, certainly in June 2022 he did not say security at $30,000 would stymie his claim.

[25] That an application for legal aid has been made and is pending is not a barrier to security for costs being ordered. If security is ordered and if legal aid is granted, it is clear that Mr Cook can apply to have security revisited.[8]

[26] When security was sought in the sum of $30,000 it was not sought on a staged basis. With the increase of security sought to $50,000 it was sought that security be staged. Accordingly, Mr Cook's previous position that he could meet security was on the basis security would be a lump sum.

[27] Ms Woods submitted that the staging of security would mean that, by the time the second tranche of security was payable, the outcome of the legal aid application would be known.

[28] While Mr Cook's income is above the income thresholds set out in reg 5 of the Legal Services Regulations 2011, Mr Cook said his application has been made on the basis that there are "special circumstances" for the purposes of s 10(2) of the Legal Services Act 2011. Mr Cook did not explain what those special circumstances were.

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7 *Jindal v Jarden Securities Ltd*, above n 6, at [23] where Duffy J described the usual forward looking approach as starting from the date of the application.

8 *Jindal v Jarden Securities Ltd*, above n 6.

[29] I am satisfied that the application for legal aid is not a barrier to this application for security. The application reinforces the misgivings I have already expressed about Mr Cook's financial position.

[30] It is not necessary to treat inability to pay as an independent threshold issue but the concerns I have expressed about the quality of the evidence as to Mr Cook's means, the conclusions that can be drawn from Mr Cook having to have recourse to a third party funder, and the fact he has applied for legal aid, are relevant to the exercise of the Court's discretion.

Merits of Mr Cook's claim

[31] As far as possible, albeit at this early stage, the Court should try and assess the merits of Mr Cook's claim. If the claim is a strong one then the need for security is lessened.

[32] Mr Cook faces the hurdle of having to establish late knowledge. Affirmative defences of limitation, honest opinion and public interest communication are raised along with Ms Thomson and PRB denying that the material is defamatory. Further, it is asserted that Mr Cook will struggle to show any damage to his reputation given he has resided in Australia since March 2016, and has not worked as a journalist in New Zealand since the time of publication of the book. The book did not have a public launch in Australia and was not advertised there and less than 1,500 copies were sold across all markets. Only three copies of the book were sold by online retailers supplying the Australian market.

[33] It is perhaps some measure of the lack of impact the book has had on Mr Cook that he says he did not know of the existence of the book until June 2021, more than two years after it was published. Mr Cook does not say others mentioned the book to him, that his freelance work in Australia suffered as a result of the publication, or publication caused him any other adverse effect. While Mr Cook submits defamation is not concerned with damage to reputation caused by the plaintiff reading the publication about himself but with damage caused by others reading the publication about him, the point is the fact publication had apparently no impact on him suggests the publication had limited, if any, impact on the public's perception of him. On the

above basis, Ms Thomson and PBL struggle to understand what damage Mr Cook can have suffered to his reputation when the book did not come to his attention.

[34] Ms Woods submitted that a plaintiff's case need not be meritless before security will be ordered.[9] While there are issues that Mr Cook must overcome in proving his case, his case is not wholly without merit – such should be reflected in the outcome of this application.

Should security be ordered and if so, at what level?

[35] I am satisfied this is an appropriate case for security to be ordered. First, the quantum of security originally sought of $30,000 is relatively modest in terms of High Court litigation. As I noted earlier, the application is brought early in the life of this proceeding.

[36] Second, there is no suggestion from Mr Cook that the ordering of security of $30,000 will stymie his ability to pursue his claim. Of course, for Mr Cook to have made such a claim in his first affidavit would have been hard to reconcile with his evidence as to his income. Mr Cook says it was the increase in security from $30,000 to $50,000 and the size of the costs he would face if his claim failed that prompted his application for legal aid.

[37] As noted, the onus will be on Mr Cook to establish late notice to meet the limitation defence but in doing so, that is, in saying he had no way of knowing about the book until it was brought to his attention, he to some extent reinforces the submission of Ms Thomson and PBL that Mr Cook will be unable to show his reputation has suffered damage.

[38] Ms Woods sought in her submissions to increase the quantum of security to $50,000 in light of the lack of financial information provided by Mr Cook and what she calls the unmeritorious nature of the claim. Those factors were present at the time the applicants made their original assessment of the quantum of security and do not warrant a last minute informal request to increase costs.

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9 *Busch v Zion Wildlife Gardens Ltd (in rec and in liq)* [2012] NZHC 17.

[39] I fix security in the sum of $30,000 being an amount Mr Cook did not say he could not meet albeit he resisted security being ordered. It also reflects that the merits are not squarely against Mr Cook. Of that sum, $10,000 is to be paid into Court within *five working days* of the date of his Judgment. That figure represents the costs (on a rounded basis) incurred between the filing of the application and its hearing. Mr Cook said he expected his legal aid application to be determined in 20 days. Given the time of year, the second instalment of $10,000 is to be paid by the end of January 2023 by which time the outcome of the legal aid application should be known. The third instalment of $10,000 is to be paid by the end of April 2023. If any instalment is not paid into Court on the due dates, the proceeding will be stayed.

[40] There is no reason why costs should not follow the event on a 2B basis, together with disbursements as fixed by the Registrar and ***I so order.***

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Associate Judge Lester

Solicitors:
Wynn Williams, Christchurch (for First and Second Defendant)

Copy to:
Mr S J Cook, Auckland (Self-represented Plaintiff)