

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

**CIV-2014-404-001729
[2015] NZHC 509**

IN THE MATTER of the Defamation Act 1992

BETWEEN COLIN CLARK HENDERSON
 Plaintiff

AND MEDIAWORKS RADIO LIMITED
 First Defendant

 BRENDAN FRANCIS HORAN
 Second Defendant

Hearing: 5 March 2015

Appearances: AJB Holmes for First Defendant (Applicant)
 S T Scott for Second Defendant (Applicant)
 No appearance by or on behalf of Mr Henderson (Plaintiff
 (Respondent))

Judgment: 18 March 2015

**(RESERVED) JUDGMENT OF ANDREWS J
[Defendants' application for order that plaintiff give security for costs]**

*This judgment is delivered by me on 18 March 2015 at 11 am
pursuant to r 11.5 of the High Court Rules.*

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Registrar / Deputy Registrar

Introduction

[1] On 14 July 2014, Mr Henderson issued defamation proceedings against Mediaworks Radio Limited (“Mediaworks”) and Mr Brendan Horan (“Mr Horan”). Both Mediaworks and Mr Horan have applied for an order that Mr Henderson provide security for costs, and for the proceeding to be stayed until security is provided. They also seek an order that time for filing a statement of defence is extended until the security is given.

[2] Mr Henderson opposes such orders being made.

Background

[3] In a decision delivered on 13 March 1997, Mr Henderson was found guilty and convicted on 30 charges of smuggling goods and 30 charges of wilfully making false customs entries.¹ The charges were laid under ss 242 (smuggling) and 21A (making a false entry) of the Customs Act 1966, and related to 30 importations of clothing into New Zealand between September 1991 and November 1993.² Judge C M Nicholson QC found that Mr Henderson had made false entries in respect of the importations, and had thereby avoided paying import duty and GST totalling \$819,177.

[4] On 5 June 1997, Mr Henderson was fined \$800,000 and ordered to pay prosecution costs of \$41,400.

[5] On 3 February 2011, Mr Henderson was adjudicated bankrupt. He has not been discharged from bankruptcy.

[6] On 27 May 2014, Mr Henderson was interviewed by Sean Plunket on RadioLIVE (a Mediaworks radio station). It is alleged that during the interview, Mr Plunket asked Mr Horan where a story concerning Mr Horan’s mother had come from. Mr Horan is alleged to have identified Mr Henderson by his full name and

¹ *Collector of Customs v House of Pagani (NZ) Ltd and Colin Clark Henderson* DC Auckland CRN-5004020183 and CRN-5004020177, 13 March 1997.

² The Customs Act 1966 was repealed and replaced by the Customs and Excise Act 1996. However, the Customs Act continued to apply to the prosecution against Mr Henderson.

stated that he is “one of the biggest convicted fraudsters in New Zealand”. Mr Henderson alleges that the statement is false and defamatory and has lowered him in the estimation of right-thinking members of society, thereby damaging his reputation and personal character. He claims for an unspecified amount of damages against Mediaworks and \$350,000 damages against Mr Horan.

Applications for security for costs

[7] On 16 September 2014, Mediaworks applied for an order that Mr Henderson provide security for costs on a staged basis, by making payments of \$10,348, \$11,741, and \$22,885 at defined stages of the proceeding. The grounds of the application were (in summary):

- (a) Mr Henderson is an undischarged bankrupt and there is reason to believe he will not be able to pay costs if he does not succeed at the trial;
- (b) the proceeding is without merit as Mediaworks has available defences of truth, qualified privileged and/or honest opinion;
- (c) Mediaworks conservatively estimates its reasonable costs in the proceeding will exceed \$60,000; and
- (d) it is just that an order is made for payment of a total of \$44,874, on a staged basis.

[8] On 2 October 2014, Mr Horan applied for the same order, in identical terms and on identical grounds.

[9] Mr Henderson filed identical notices of opposition on 6 and 20 October 2014. His grounds of opposition were (in summary):

- (a) his claim has a reasonable prospect of success;

- (b) the alleged defamatory statement is wrong, and known to Mr Horan to be wrong, in that the convictions were not for fraud, they were 17 years ago and could reasonably be said to be forgotten, and Mr Henderson cannot be said to be “one of the biggest convicted fraudsters in New Zealand”;
- (c) the order would be oppressive in that it would prevent Mr Henderson from pursuing valid proceedings.

Submissions

[10] Mr Holmes’ submissions in support of Mediaworks’ application expanded on the grounds of the application. He referred to statements reported to have been made by Customs officers at the time of the prosecution to the effect that it was “the biggest fraud case every taken by the Auckland Customs Commercial Fraud Unit”.

[11] Mr Holmes further submitted that the charges were properly described as “fraud”, noting Judge Nicholson’s references to the definition of “smuggling” in s 12 of the Customs Act (“importing ... any goods with the intent to defraud ... Customs”) and “intent to defraud” (“an intent to evade ... payment of the duty or any part of the duty payable on any goods”).

[12] Mr Holmes accepted that access to the courts is not lightly to be denied for a genuine plaintiff, but submitted that an order could nonetheless be made when, in particular, the plaintiff has little prospect of success. He submitted that that is the case here. He also submitted that even if Mr Henderson were to succeed, it would be difficult to assess what “damage” he may have suffered so may not receive any award.

[13] Against that, is the fact that Mediaworks will be required to incur costs in defending the proceeding; which it will not be able to recover from Mr Henderson. Mr Holmes submitted there is a need to protect Mediaworks from being left with the costs of the proceeding. A further point made by Mr Holmes was that the court can take into account the fact that Mr Henderson’s impecuniosity was not caused by any action on the part of Mediaworks.

[14] Mr Scott made similar submissions on behalf of Mr Horan. He added that Mr Henderson had indicated in his written submissions in opposition to the application that he intended to apply for legal aid. In the circumstances, Mr Scott submitted, the court could order security for costs but reserve leave for Mr Henderson to apply to review the order if legal aid is granted.

[15] Mr Henderson did not appear at the hearing, and there was no appearance on his behalf. However, he filed an “objection” to the applications shortly before the hearing. Much of the content of this document has no relevance for security for costs and, indeed, comprises a personal attack on Mr Horan. I do not take those matters into account. However, I note the following submissions from Mr Henderson’s document:

- (a) he has a clear case in defamation against both Mediaworks and Mr Horan, in respect of a deliberate attempt to defame him, as demonstrated in the transcripts of the RadioLIVE interview;
- (b) it is unreasonable to ask Mr Henderson (being the victim) to establish and secure costs in the event that the defendants succeed in defending the claim;
- (c) Mr Henderson is a pensioner and has limited funds available. If he is not able to secure costs as applied for then this matter has no hope of being heard in the courts and will therefore represent a “one-sided conclusion”.
- (d) he has no option but to apply for legal aid and instruct new counsel following the withdrawal of his previous counsel.

Relevant principles

[16] Rule 5.45 of the High Court Rules provides that a Judge may make an order that a plaintiff provides security for costs, on the application of a defendant, if the Judge is satisfied that there is reason to believe that the plaintiff will be unable to pay

the costs of the defendant if the plaintiff does not succeed in the proceeding, and if the Judge thinks it is just in all the circumstances.

[17] In *AS McLachlan Ltd v MEL Network Ltd*, the Court of Appeal noted the need for caution in ordering security for costs:³

[15] 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 lightly to be denied.

[16] 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.

[18] The following must therefore be considered:

- (a) What is the likelihood of Mr Henderson succeeding in the proceeding?
- (b) Is there reason to believe that Mr Henderson will not be able to pay costs, in the event that he does not succeed?
- (c) Is it just to order Mr Henderson to provide security?

Mr Henderson's claim in defamation

[19] The plaintiff in a defamation action must establish that a defamatory statement has been made, the statement was about the plaintiff, and the statement has been published by the defendant. In assessing whether a statement is defamatory, there must be an assessment of the natural and ordinary meaning of the words that a reasonable person will take from the publication. A statement is defamatory if it is a false statement about a person which may tend to lower that person in the estimation of right-thinking members of society generally, or if the statement tends to make others shun and avoid that person.

³ *AS McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15] and [16].

[20] Mediaworks and Mr Horan have raised the defences of truth (that is, that the statement is not a false statement), honest opinion and qualified privilege.

Truth

[21] Pursuant to s 8 of the Defamation Act 1992, Mediaworks and Mr Horan have a complete defence if they can establish that the statement is true, or not materially different from the truth.

[22] In his judgment finding Mr Henderson guilty on the charges against Mr Henderson, Judge Nicholson discussed the elements of the charge of wilfully making false entries (under s 21A of the Customs Act) and of smuggling (under s 242 of the Customs Act). Section 21A provided, as relevant:

- (1) Every person who is knowingly concerned in the making of an entry ... that is false ... in any particular commits an offence ...

[23] Judge Nicholson referred to *Collector of Customs v William Brandt & Co Ltd*, in which Holland J considered the meaning of the word “false” in the customs legislation and concluded that it:⁴

... was intended to mean more than merely erroneous and must involve an element of knowledge or intention to defraud so as to be deceitful in that sense.

[24] Section 242 of the Customs Act provided, as relevant:

- (1) If any person smuggles any goods he commits an offence ...

[25] “Smuggling” was defined in s 2 of the Act as follows:

“Smuggling” means importing, exporting, shipping, unshipping, landing, conveying, or otherwise dealing with any goods with intent to defraud the revenue of Customs.

[26] “Intent to defraud the revenue of Customs” was defined as:

- (a) an intent to evade or to enable any other person to evade payment of the duty or any part of the duty payable on any goods; of

⁴ *Collector of Customs v William Brandt & Co Ltd*, HC Christchurch AP137/86, 25 February 1987.

- (b) an intent to obtain or to enable any other person to obtain, in respect of any goods, any draw-back or refund of duty not authorised by law or in excess of that which is authorised by law; or
- (c) an intent to evade or to enable any other person to evade payment of any money payable to the Crown under this Act:

[27] Judge Nicholson found as follows in respect of Mr Henderson's offending:⁵

There is cogent evidence that Mr Henderson was knowingly involved in dual invoicing, alteration of invoices and under-statement of price.

The Judge also found:⁶

Intent to defraud

I have dealt with the aspects of Mr Henderson's involvement and his state of mind concerning the entries for the 30 importations, the subject of the smuggling charges, and found proved beyond reasonable doubt that he was the instigator and facilitator of supplying erroneous information in the Customs entries for those importations, and that he was knowingly concerned in the making of the 30 false entries. The only sensible and realistic inference from this is that in so acting his intention was to deceive Customs and thereby reduce the amount of duty which House of Pagani was required to pay to Customs. He therefore acted with intent to defraud the revenue of Customs. In this he was successful.

[28] In the light of the Judge's findings, Mr Henderson's ground of opposition that the convictions "are not for fraud" is not sustainable. As Mr Holmes submitted, there is no single crime of fraud; and fraud or an intent to defraud is a basic element of many criminal offences. The charges on which Mr Henderson was convicted clearly contained an element of fraud.

[29] As Mr Holmes recognised, whether Mr Henderson's fraud was "one of the biggest" is not easily determined. In his notice of opposition, Mr Henderson referred to a recent prosecution brought by the Serious Fraud Office against a former ASB employee, by way of example of more serious offending. However, I accept Mr Holmes' submission that, even putting aside inflation since the time of Mr Henderson's offending, the level of his offending is significant, even in today's terms. Further, the defendants referred to Customs' officers at the time of the offending, to the effect that it was "the biggest fraud case ever taken" by them.

⁵ *Collector of Customs v House of Pagani (NZ) Ltd* above n 1 at [83].

⁶ At [85].

Honest opinion

[30] Sections 9–12 of the Defamation Act apply to the defence of honest opinion. An opinion, no matter how extreme, and even if it is malicious, is protected as long as the opinion is genuine, the facts on which the opinion is based are proved to be true, or not materially different from the truth, and the opinion is recognisable as such.

[31] There is insufficient information before me as to the nature of the interview and its surrounding context for any assessment to be made as to whether the requirements of the defence are met.

Qualified privilege

[32] Qualified privilege is governed by ss 16–19 of the Defamation Act. Mr Holmes submitted that any fair and accurate report of the judgment of Judge Nicholson, and Mr Henderson’s convictions, is protected by qualified privilege under cl 6 of Part 1 of Schedule 1 to the Defamation Act which provides:

6. The publication of a fair and accurate report of the proceedings of any court in New Zealand (whether those proceedings were preliminary, interlocutory, or final, and whether in open court or not), or of the result of those proceedings.

[33] Again, an assessment as to the strength of this defence cannot be made on the basis of the information before me. However, as noted earlier, to the extent that the statement says that Mr Henderson is a “convicted fraudster in New Zealand”, it is a fair and accurate report of his convictions.

Overall assessment

[34] Counsel for the defendants advised at the hearing that they intend to make an application for summary judgment against Mr Henderson. In the circumstances, it is not appropriate for me to express any firm view as to the likelihood of Mr Henderson succeeding at trial. However, taking all of the above matters into account, I could not conclude that Mr Henderson has any more than “some” chance of succeeding.

Could Mr Henderson meet an award of costs?

[35] Mr Henderson said in his “objection” document that he “is a pensioner and has limited funds available”. He is an undischarged bankrupt. It is reasonable to conclude from that that he is insolvent and would not, therefore, be able to meet an award of costs.

Is it just to order security for costs?

[36] I must balance the fact that if I order Mr Henderson to provide security for costs that may have the effect of preventing him from pursuing his proceeding, against the interests of Mediaworks and Mr Horan, who will be required to incur the costs of defending the proceeding where they have little or no prospect of recovering costs if they are successful.

[37] I have concluded that in this case Mediaworks and Mr Horan should have some protection as to costs and that it is just in all the circumstances to make an order for security for costs. However, bearing in mind that Mediaworks and Mr Horan intend to apply for summary judgment against Mr Henderson, I consider it appropriate to make an order relating to the proceeding up to that stage, only. Should Mediaworks and Mr Henderson succeed in that application then the proceeding will be at an end, in any event. If they do not succeed, then the question of security for costs may be revisited.

[38] The amount sought for each of Mediaworks and Mr Horan for the stage up to statements of defence and the hearing of applications for summary judgment was \$10,348. Notwithstanding that they are separately represented, and had separate counsel appearing before me, there was (not surprisingly) a significant element of duplication in their submissions. In the circumstances, it is not appropriate to order security for costs in the amounts sought, for each of the defendants. I have concluded that the appropriate order is that Mr Henderson is to provide security for costs in the sum of \$6,000 for each of Mediaworks and Mr Horan, in respect of the first stage of the proceeding up to and including the filing of statements of defence and the hearing of applications for summary judgment.

Result

[39] There will be an order that Mr Henderson is to provide security in the sum of \$6,000 in respect of each of Mediaworks and Mr Horan (that is, \$12,000 in total) to the Registrar of the High Court at Auckland, within 20 working days of the date of this judgment.

[40] I also order that the proceeding is stayed until security for costs has been provided. It is implicit in the order for stay that Mediaworks and Mr Horan are not required to file statements of defence until such time as security for costs has been provided. In the event that security is provided, the time for filing statements of defence will commence on the date security is provided.

[41] This order for security for costs is in relation to the proceeding up to the stage of filing statements of defence and hearing the defendants' application for summary judgment. The defendants have leave to apply for further security once that stage is completed.

[42] Mr Henderson may apply for this order to be reviewed, in the event that he obtains a grant of legal aid.

[43] Although both Mediaworks and Mr Horan sought costs on their applications for security for costs, I have concluded that it is appropriate for those costs to be reserved.

Mr Henderson's further memorandum

[44] Following the hearing of the application for security for costs, Mr Henderson filed a memorandum, dated 6 March 2015, concerning press coverage of the hearing. In that memorandum, he sought the "Court's view and ruling" in relation to the report.

[45] Except as to the quantum of security for costs sought, the printout of the report annexed to Mr Henderson's memorandum is a reasonably accurate record of a proceeding heard in open court.

[46] I decline to make any ruling or direction in relation to the report.

Andrews J