IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-218
[2016] NZHC 1995

BETWEEN	ROBB MURRAY NOBLE First Plaintiff
	ARROW INTERNATIONAL (NZ) LIMITED Second Plaintiff
AND	EYAL AHARONI First Defendant
	124 WILLIS ST LIMITED Second Defendant
	PRIME HOTELS ST GEORGE LIMITED Third Defendant

Hearing: 20 June 2016

Counsel: K W Kemp and L M Van for Plaintiffs
R K P Stewart for Defendants

Judgment: 25 August 2016

JUDGMENT OF ELLIS J

I direct that the delivery time of this judgment is
4 pm on the 25th day of August 2016

[1] The plaintiffs say that the defendants have defamed them. The alleged defamation took the form of a number of "trespass" notices that were displayed in public view at and around the entrance of the St George Hotel (the St George) in Wellington. The St George is owned by the second defendant, 124 Willis Street Limited (WSL).

[2] The first defendant, Eyal Aharoni, is the sole director both of WSL and of the third defendant. The first plaintiff, Mr Noble, is a project manager employed by the second plaintiff, Arrow International (NZ) Limited (Arrow).

[3] Each trespass notice had on it a large head and shoulders photograph of Mr Noble, together with the following words:

Robb Noble
Arrow International (nz) Limited
has organised the THEFT of property
belonging to Hotel St George and unlawfully
disposing substances into its
drainage system.

This is a notice to
restrict Mr Noble from further entering the Hotel St George
property pursuant to the Trespass Act 1980

If you see him on the premises
please call police on 111

(emphasis in original)

[4] In brief terms, the notices represented the culmination of a commercial dispute between the plaintiffs and defendants about the alleged diversion and use of water from the St George by the plaintiffs at the construction site next door, and a flood which the defendants say was caused, indirectly, as a result. The background is set out in more detail below.

[5] On 8 April 2016 a without notice interim injunction requiring the defendants to take down the notices was issued by Clark J. An on notice hearing before me was subsequently required because, for reasons that presently elude me, the defendants wish to continue to publish allegations of the sort contained in the notice.

[6] It is necessary to begin by outlining the facts in a little more detail.

Background

[7] Arrow is contracted to undertake construction works at 7 Boulcott Street, Wellington which, as I have said, is next door to the St George. A seven storey building known as Boulcott Suites is being built there.

[8] On 15 December 2014 Arrow entered into an agreement with WSL to lease some office space in the basement of the St George. The lease stipulated that Arrow would pay rent of $24,000 per annum, plus GST, together with a proportion of outgoings, including "water, gas, electricity, telecommunications and other utilities or services, including line charges".

[9] An initial invoice for $2,652.67 was rendered on 19 December 2014. That sum comprised $2,000 in rent, $216.67 for power, $90 for OPEX, plus GST. No further invoices were rendered but Arrow continued to pay that same amount monthly.

[10] At around the time the lease was entered, Arrow entered into discussions about the possibility of adding Portacom toilet facilities outside the leased office space so that the construction workers would not have to enter the St George in their construction gear. Arrow says that with the agreement and consent of an agent of WSL, Arrow set up the extra facilities and connected the Portacom to St George's water services where it was directed to. This connection with the St George's water supply enabled Arrow to use the water both for the Portacom and for the building site more generally.

[11] In August 2015 there was a flood in the basement of the St George, which was later found to have been caused by the blockage of the sewer with "a large piece of building debris stuck in unprotected main drain access". Arrow accepts that it connected the construction site's sewer, and discharged surplus storm water (or, as the defendants would have it, "dirty slurry water") into, the St George sewer/drain. It does not accept that doing so blocked the sewer and caused the flood. It now says that it thought that the cesspit belonged to WCC and that no consent from the defendants was required. But in any event (the plaintiffs say) consent can be implied from the fact that they were given a key to the service room containing the sewer

connection "in order to connect the toilet block" by the defendants' maintenance manager. Arrow offered to pay the excess on WSL's insurance policy in relation to the flood damage.

[12] It is these events which form the basis for the allegation in the trespass notice that the plaintiffs "unlawfully disposed of substances into [St George's] drainage system."

[13] The dispute about Arrow's water usage arose in October 2015. Mr Aharoni emailed the plaintiffs asking if they had been using the St George's water for the construction site without permission. Mr Noble's initial response was as follows:

> Yes we are using water from the St George to run our ablution block and a hose tap. We thought that was reasonable given we actually have a lease on the place and a right to use the services. Pretty sure Jamie was OK with this – he was happy that we provided our own ablutions for the guys on the site and not have them using the common bathrooms on level 1. …

[14] The plaintiffs immediately disconnected from the supply. They later offered to pay for the extra water but subsequently queried the invoice that was rendered. The amount invoiced was based on the difference between the Council's water charges incurred in relation to the St George in 2014 and the 2015 charges and totalled $4,158.

[15] The defendants say that a complaint was laid with the Police about the "theft" of the water in March 2016.[1] It is not clear what the Police position is.

[16] The trespass notices were first observed by the plaintiffs around the St George in early April 2016. The defendants refused the plaintiffs' request to stop publishing them. These proceedings were then issued and the interim injunction obtained. As I have said, it apparently remains the defendants' wish to publish further such notices.

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[1] On 11 January Arrow gave notice that it was terminating the lease. It vacated the premises in March. There is no dispute about termination.

The essential positions of the parties

[17] The defamatory meaning presently pleaded by the plaintiffs is that the trespass notice implies that they have:

(a) committed "the criminal act of theft" in relation to property belonging to the St George; and

(b) engaged in unlawful conduct by disposing of substances into the drainage system.

[18] The defendants deny that the notice has the meanings alleged by the plaintiffs but say, in any event, that such meanings would be true or not materially different from the truth.

[19] The defendants also resist the application for the interim injunction on the grounds that the plaintiffs omitted important information from the evidence filed in support of the without notice application, in breach of their obligation of full disclosure.

The test for injunctive relief where freedom of expression is engaged

[20] Central to the issue of whether the injunction ordered by Clark J should continue is the applicability of the "much higher threshold" for injunctive relief in cases in which freedom of expression is engaged. That threshold was authoritatively confirmed by the Court of Appeal in *TV3 Network Services Ltd v Fahey*.[2] The Court in that case made it clear that the jurisdiction to restrain publication of defamatory material "is exercisable only for clear and compelling reasons" and in circumstances which are "exceptional". The impugned statements must be so "obviously untruthful and libellous" that there is "no reasonable possibility of a legal defence".

[21] Following the hearing before me, I sought further submissions on two related issues.

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2 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129; (1998) 12 PRNZ 443 (CA).

[22] The first arose from the suggestion by Ms Kemp for the plaintiffs that there was authority that, notwithstanding the *Fahey* principles, the injunctive threshold might be lower in cases where the alleged defamation is perpetrated by individuals rather than media organisations. The logic behind such a proposition might be that qualitative distinctions based on the extent of the public interest in the kind of speech at issue could, perhaps, be drawn.

[23] The second was whether the "balance of convenience" part of the *American Cyanamid* test had any part to play in free speech injunction cases.[3] That was an issue that was expressly left undecided by Ellen France J in *Ferrier Hodgson v Siemer*, notwithstanding that counsel for both parties in that case agreed that the balance of convenience was irrelevant.[4]

[24] I consider each in turn.

The threshold: private v public speech

[25] In the memorandum subsequently filed by Ms Kemp for the plaintiffs she referred me to the Court of Appeal's decision in *Alexander v Rountree*.[5] In that case an interim injunction restraining Mr Alexander from publishing defamatory statements about a firm of solicitors had been issued by Panckhurst J in the High Court. The injunction was upheld on appeal. The authors of *Media Law in New Zealand* suggest (in a footnote) that this decision indicates that:[6]

> The courts are more prepared to maintain injunctions where the news media are not involved and the matter at issue is in the nature of a private dispute.

[26] But I respectfully agree with Mr Stewart that *Alexander* cannot fairly be seen as representing a departure from the *Fahey* principles. The Court was there concerned with a "viciously worded" letter which had been published to an unknown number of persons about partners in the firm accusing them of acting criminally and corruptly and being guilty of bribery, perjury, fraud, conspiracy and threatening to

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3 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
4 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 5 May 2005 at [68].
5 *Alexander v Rountree* CA 229/00, 15 February 2001.
6 Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 100, n 527.

kill. It appears from the Court of Appeal's judgment (neither counsel was able to locate the decision of Panckhurst J in the High Court) that Mr Alexander had not pleaded justification or adduced any evidence in support of that defence. On appeal, the Court noted that the Judge had expressly acknowledged the stringency of the test in *Fahey* but had found that the prospect of Mr Alexander justifying the libellous statements was "remote if not non-existent". Accordingly, a "clear and compelling case" for the granting of the interim injunction on established principles had been established.[7]

[27] Accordingly, and although I acknowledge there have been calls from some academic commentators for the threshold to be lowered,[8] I consider the position is as submitted by Mr Stewart. In other words, no injunction will be granted if the defendant:

(a) raises the defence of justification unless the statement is obviously false and the court is satisfied that the defence will fail; or

(b) raises privilege, unless the evidence of malice is overwhelming.

Is the balance of convenience relevant?

[28] I have noted above that Ellen France J in *Ferrier Hodgson v Siemer*, deliberately left open the question of whether the balance of convenience test was relevant where freedom of expression is sought to be restrained at an interlocutory stage. As I said there, counsel in that case had agreed that there was no place for such an assessment when the higher threshold is applied, because (as the Judge recorded):[9]

> The logic of the balance of convenience, Mr Miles submits, arises because of the low initial threshold required for liability. By contrast here, the plaintiffs argue, once a court is satisfied that there can be no reasonable likelihood of a defence, then the issue of balance of convenience becomes irrelevant.

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7 The grant of an injunction in *Ferrier Hodgson v Siemer* is explicable on the same basis.

8 In Andrew Burtler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 13.17.7 the authors advocate for a more interventionist approach on the basis that damages may not restore the damage done by the defamation and that such a shift would not necessarily be unreasonable in terms of s 5 of the New Zealand Bill of Rights Act 1990.

9 *Ferrier Hodgson v Siemer*, above n 4, at [68].

[29] There seems to me to be logic in that submission. Whether the converse is also true (ie in a case where the Court considers that there is a reasonable likelihood of a defence) is arguably less obvious. But even then, it seems to me that making the application of the high threshold potentially contingent on, or subject to, the outcome of a subsequent balancing exercise, would undermine the policy underlying the threshold, namely the importance of freedom of expression.

[30] I am fortified in my view that the balance of convenience cannot play a part in a case such as the present by English dicta such as that contained in *Herbage v Pressdram*.[10] There, the third general principle governing the grant of injunctions in defamation cases was said by Griffiths LJ to be:[11]

> … that in the face of this long-established practice in defamation actions, the principles enunciated by the House of Lords in *American Cyanamid & Co v Ethicon Ltd* relating to interim injunctions are not applicable in actions for defamation.

[31] Accordingly, I accept Mr Stewart's submissions that:

(a) the authorities do not support the proposition that the test for injunctive relief in defamation cases is different where the matters at issue are in the nature of a private dispute and the news media are not involved;

(b) the test to be applied here is, therefore, that which was articulated in *Fahey*. In order to obtain an interim injunction the plaintiff must show that no reasonable possibility of a defence has been established on the balance of probabilities; and

(c) the balance of convenience is not and should not be a factor in determining whether to grant an interim injunction to restrain free speech.

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10 *Herbage v Pressdram* [1984] 1 WLR 1160 (CA).
11 At 1162.

This case: is there a reasonable possibility of the proposed defences succeeding?

[32] As I have said, the defendants propose to mount a two pronged defence. The first takes issue with the alleged defamatory meaning of the notice. The second and alternative is a pleading of truth or material truth.

[33] As to the first line of defence, my own, admittedly nascent, view is that the pleaded meanings are open on the face of the notice, although I acknowledge there may well be arguments the other way. But in light of my conclusions on the second line of defence I do not need to consider the "meaning" defence further in this judgment. It is therefore to the defence of truth that I now turn.

[34] In order for this defence to succeed at any trial the defendants would have to establish on the balance of probabilities at trial that the plaintiffs:

(a) committed "the criminal act of theft" in relation to property belonging to the St George; and

(b) engaged in unlawful conduct by disposing of substances into the drainage system.

[35] As far as the "criminal act of theft" is concerned, s 219 of the Crimes Act 1961 (the CA) defines theft as being the act of:

> (a) dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property; or
>
> (b) dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner.

[36] It seems to me that the critical issues will be:

(a) whether the relevant water or water rights were "property" (as defined in s 2) that is owned (as that concept is articulated in s 218) by one of the defendants; and, if so:

(b) whether that property was taken or used by the plaintiffs dishonestly and without claim of right.[12]

[37] Although the point is not without legal interest I have little doubt that the defendants' position in relation to the first ("property") issue is seriously arguable. A number of matters could be advanced in favour of it, including that:

(a) property is defined as including electricity (giving rise to an ejusdem generis argument);

(b) property is defined as including interests in property; and

(c) the defendants are required to pay the Council for their water usage (or water rights).

[38] As to the second issue, no doubt the plaintiffs will contend that they believed (rightly or wrongly)[13] that they had a legal right to take the water (or use the water right) by virtue of the terms of the lease and subsequent discussions about hooking up the Portacom. But on the basis of the untested evidence that was before me, there are clearly arguments to be made to the contrary. Mr Noble's initial email response to the accusation in October 2015 evinces no certainty in terms of his belief that Arrow had the relevant authority. Indeed, he seeks to justify the water use on "reasonableness" and other "quid pro quo" grounds. There is, of course, no written amendment to the lease to rely upon. Moreover, it might be suggested that Mr Noble must have known that there would be a significant quantitative difference in the plaintiffs' water usage prior to the hook up and afterwards. It might be argued that he should have inferred that the fact that no amendment to the OPEX charge was made by the defendants after the hook up meant that the defendants were unaware (and had not consented) to what occurred.

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12 If it were found that property had been dishonestly used or taken there would presumably be little doubt that there has been an intent to deprive the owner of it permanently.

13 The definition of "claim of right" makes it clear that an alleged thief's belief in his entitlement to the property does not have to be correct in law.

[39] In my view, therefore, the defendants do have a reasonably possible defence in relation to the theft statement.

[40] As far as the "unlawful discharge" statement, the defendants would need to show that:

(a) the plaintiffs disposed of substances into the St George's drainage system; and

(b) that action was unlawful.

[41] Again, it seems to me that there are tenable arguments to that effect to be made.

[42] As to the first matter, the plaintiffs admit connecting to the drainage system to flush waste water off the building site. It seems quite possible that a certain amount of building debris and other products used on site may have been swept away with the water into the drain. The fact that building debris was, in fact, found in the drain lends support to that. Debris and other matter from the building site could fairly be described as "substances".

[43] As to the second, there are two potential avenues of unlawfulness. The first would be predicated on some form of trespass to the defendants' drainage system; the hook up to the drain could only be effected on the defendants' property. The other would be predicated on the evidence filed by Mr Brown, who has deposed that absent a building consent the connection would breach the Building Act 2004. Either strikes me as arguable.

The alleged failure to disclose

[44] It is not disputed that the email I have set out at [13] above was not included in the material that was provided to Clark J in April. It will be self-evident that I have found that email to be material. It seems to me that the way in which Mr Noble expressed Arrow's position subsequently was subtly different, but in an arguably important way. For example the statement in the email that Mr Noble was "pretty

sure" that Arrow had the requisite authority for the hook up becomes less equivocal in subsequent, more formal, correspondence.

[45] I am reluctant to come to a firm view about whether there has been a breach of the rules here. The difference between the earlier and later communications is, as I have said, subtle. The formal items of correspondence were put before the Court. And given my other conclusions it is unnecessary for me to do so.

Conclusions

[46] It follows from what I have said above that I consider that the plaintiffs are unable to meet the high threshold required for injunctive relief in a freedom of expression case. It cannot be said that the defendants have no reasonable possibility of a defence. The balance of convenience does not come into it.

[47] Accordingly the interim injunction granted by Clark J on 8 April 2016 is discharged. The defendants are entitled to costs on a 2B basis in the usual way.

"Rebecca Ellis J"

Solicitors: Arthur Harper, Auckland, for Plaintiffs
Izard Weston, Wellington, for Defendants