IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1736im99

BETWEEN **DYER WHITECHURCH & BHANABHAI**

Plaintiff

AND **PAUANUI PUBLISHING LIMITED**

Defendant

Hearing: 15 and 30 March 2000

Counsel: WGC Templeton for plaintiff
TJG Allan for defendant
PN Collins for non-party

Judgment: April 2000

INTERIM JUDGMENT OF MASTER FAIRE

Solicitors:
Lowndes Dukeson, PO Box 7311, for plaintiff
Grove Darlow, DX CP 24049 for defendant
Glaister Ennor, DX CX 10236, for non-party

[1] The defendant applies for orders:

[a] extending the time for filing certain affidavits;

[b] that a non-party, the Auckland District Law Society, give discovery of documents relating to complaints about the plaintiff and resulting action;

[c] that the liquidator of Nautilus Developments Limited and Golden Gate Holdings Limited appear and be examined on oath as to matters concerning which he has refused to make an affidavit.

[2] The plaintiff has applied for summary judgment. There is one cause of action. It is alleged that the plaintiff has been defamed by the defendant in an article published by the defendant in *"The Independent Business"* weekly newspaper. It is alleged that the publication occurred on or about 23 December 1998.

[3] The remedies sought by the plaintiff are twofold. First, a declaration is sought that the defendant is liable to the plaintiff in defamation. Second, the plaintiff seeks full solicitor/client costs against the defendant. Both remedies are sought in reliance on s 24 of the Defamation Act 1992.

[4] The first order sought by the defendant has, in effect, been rendered unnecessary by the effluxion of time. The affidavits have been filed and no objection to their late filing has been made. For the avoidance of doubt, I will include in the orders made on this application an order extending the time and directing that the affidavits of FA Rotheram, GA Waller and GS Rea be read in the summary judgment application. There will also be an order setting a timetable for any reply affidavits.

[5] It is necessary now to consider the background against which the applications (b) and (c) are made. It is alleged that the headline and article as a whole were

defamatory and untrue of the plaintiff. The specific allegations relative to specific parts of the article are identified in the statement of claim and are four in number.

[6] The headline, the first, second and third paragraphs provided:

> INVESTORS SQUEAL, NAUTILUS COWERS IN ITS SHELL
> Fiona Rotherham
>
> Investors in the collapsed downtown Auckland apartment development, Nautilus, have laid a formal complaint with the Auckland District Law Society over its affairs.
>
> Specifically, they are complaining about the company's use of a solicitor's trust account at law firm Dyer Whitechurch Bhanabhai, rather than a regular bank account, to handle the company's financial dealings.
>
> Investors say they're still out-of-pocket for rent and body corporate levies paid before the company collapsed in August.

[7] The second part of the article specifically referred to in the statement of claim, contains the following:

> On behalf of the liquidator, former Auckland detective and fraud squad head Ian Hastings is investigating the possible misappropriation of rent.
>
>> Meanwhile, on behalf of the liquidator, former Auckland detective and fraud squad head Ian Hastings is investigating the possible misappropriation of rent.
>>
>> Hastings alleges he is owed $5,000 for three months' rent o the two apartments he owns in the Nautilus development. But he has received only $2,000, paid through a Dyer Whitechurch Bhanabhai trust account cheque.

[8] The third part of the article referred to in the statement of claim stated:

> Although the company originally had its own bank accounts, the liquidators allege development finance advanced by UDC went into Dyer Whitechurch Bhanabhai's trust account before being paid out to Nautilus.
>
> The Auckland District Law Society is understood to be investigating, on grounds that this is not a proper use of a solicitor's trust account. The law society refuses to comment while the issue is under investigation.

[9] The fourth part of the article provided:

> The players in this saga are not unknown to the Auckland commercial community.
>
> In 1996, Dyer Whitechurch & Bhanabhai held shares in a company embroiled in a multi-million dollar court action with Colonial Mutual over commissions for key man insurance.

[10] With respect to the first part of the article, the plaintiff alleges that the words "published" meant:

> As at the date of publication:
>
> 7.1 A formal complaint with the Auckland District Law Society had been laid by investors in a collapsed Auckland apartment development Nautilus concerning Dyer Whitechurch & Bhanabhai's improper use of its trust account;
>
> 7.2. Specifically the subject of the complaint Dyer Whitechurch & Bhanabhai permitted Nautilus to use the Dyer Whitechurch & Bhanabhai's solicitor's trust account as a regular bank account, to handle the company's financial dealings;
>
> 7.3 This misuse of the Dyer Whitechurch & Bhanabhai's solicitor's trust account as a regular bank account is an improper use of a solicitor's trust account;
>
> 7.4 As a result of Dyer Whitechurch & Bhanabhai's improper use of its solicitor's trust account investors in Nautilus are out-of-pocket;
>
> 7.5 Investors who invested money in the collapsed Auckland apartment development Nautilus, have lost money by this improper use of Dyer Whitechurch & Bhanabhai's trust account.

[11] In respect of the second passage in the article, the plaintiff pleads it expressly or inferentially means:

> As at the date of publication:
>
> 9.1 Dyer Whitechurch & Bhanabhai may be a party to a misappropriation of rent from their trust account;
>
> 9.2 That misappropriation may be part of the Auckland District Law Society investigation into Dyer Whitechurch & Bhanabhai's misconduct.

[12] In respect of the third part of the article, the pleads that the words published, meant expressly or inferentially:

> As at the date of publication:
>
> 11.1 The Auckland District Law Society is investigating allegations that development funds advanced by UDC were paid into the Dyer Whitechurch & Bhanabhai solicitor's trust account before being paid out to Nautilus;
>
> 11.2 The Auckland District Law Society is investigating this as an improper use of a solicitor's trust account;
>
> 11.3 Complaints have been made to the Auckland District Law Society that Dyer Whitechurch & Bhanabhai has improperly used its trust account in receiving and paying out the UDC development funds;
>
> 11.4 The Auckland District Law Society refused to comment while the issue is under investigation.

[13] The fourth passage from the article the plaintiff pleads is that those words meant expressly or inferentially:

> As at date of publication:
>
> 13.1 That Dyer Whitechurch & Bhanabhai as an entity held and/or owned shares in a company that was embroiled in a Court action over millions of dollars involving insurance commissions and that this activity is questionable;
>
> 13.2 That Dyer Whitechurch & Bhanabhai is known as an active player in the Auckland commercial community outside the normal activities of a professional legal firm;
>
> 13.3 That Dyer Whitechurch & Bhanabhai have got involved in activities that are not normal and are questionable for a professional law practice.

[14] Four defences are pleaded. The defendant relies on two of those defences in the applications before me. They are, first the defence of truth and, second, a defence based on evidence of bad reputation in mitigation of damages. Mr Allan's principal submission was that both defences justified the making of the orders sought. That submission was made advisedly without prejudice to his principal submission that the proceeding itself is not and never was an appropriate case for summary judgment.

[15] The two remaining applications are applications in relation to the non-party pursuant to Rule 301 of the High Court Rules and in relation to the liquidator pursuant to Rule 509 of the High Court Rules. In both cases the relief sought is discretionary. In the case of non-party discovery, Rule 301 is subject to the requirement of Rule 312. That Rule provides the Court shall not make an order unless satisfied that the order is necessary at the time when the order is made. The approach to such applications was considered by Justice McGechan in *NZI Bank Limited v Philpott* 1 PRNZ 560. His Honour noted the jurisdiction to order discovery in summary judgment proceedings exists. He further noted that it would be appropriate generally to hold over discovery applications to the first hearing of a summary judgment when all the affidavits are in and the arguments are heard.

[16] A number of authorities have referred to the position in relation to discovery relating to summary judgment applications. It has been said that an application for discovery in such case would only be granted in exceptional circumstances. *DFC New Zealand Limited v Tapp* 3 PRNZ 543, 545; *Mobile Oil New Zealand Limited v Bagnall* 12 PRNZ 655, 659 and *Merit Finance and Investments Group Limited (In liquidation) vAnderson* 6 PRNZ 620, 622.

[17] The reference to exceptional circumstances may be an over-simplification. I prefer to adopt the formulation of Justice McGechan in *NZI Bank Limited v Philpott* (supra) at 565 where His Honour said that the significance of an application for discovery in the summary judgment context is reserved to those:

> relatively narrow band of marginal cases where an outline defence is made out, but the Court encounters genuine difficulty in determining whether or not there is no defence, and has a substantial reason to believe discovery in the proceeding will or may well assist that determination.

That formulation is particular appropriate where an affirmative defence is raised or the defence is not evident on a plaintiff's pleading. In *Pemberton v Chappell* [1987] 1 NZLR 1, 3 the Court said:

> If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable

> particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

The position was further considered in *Australian Guarantee Corporation (NZ) Limited v McBeth* [1992] 2 NZLR 54, 59 where the Court said:

> Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.

[18] In principle the same approach, in my view applies to both the application for non-party discovery and the application for an order for the examination of the liquidator pursuant to Rule 509 of the High Court Rules. In appropriate cases an order under Rule 509 may be made where a summary judgment application is before the Court. *Legg v Shelf Number Nine Limited* 1 PRNZ 191.

[19] There are practical difficulties with the procedure under Rule 509 as were highlighted by Justice McGechan in *Host Catering Limited v Air New Zealand Ltd* 2 PRNZ 126. There is the issue of cross-examination. There is the mismatch between affidavit evidence and evidence given orally. Clearly the circumstances where the jurisdiction under Rule 509 should be exercised are limited. Once again, the best expression of the limitation that should apply, in my view, is that the application will only be appropriate in that relatively narrow band of marginal cases where an outline defence is made out, and the Court encounters genuine difficulty in determining whether or not there is a defence and has a substantial reason to believe that the evidence sought to be adduced will or may assist that determination.

[20] Before leaving this discussion, it is appropriate also to add my agreement to the further comment made by Justice McGechan in *NZI Bank Ltd v Philpott* (supra) at 565 in dealing in dealing with the marginal case situation where he said:

> Even in that limited range of situations, a Court encountering such difficulties might prefer to dismiss the summary judgment application under its general discretion, as a simple matter of caution and justice, rather than prolong matters through discovery, but the latter course would be open.

[21] Whilst the exercise of that residual discretion is a limited one it has been recognised: *Pemberton v Chappell* (supra) at page 5, *Waipa District Council v Electricity Corporation of New Zealand* [1993] NZLR 298, 308.

[22] A further general observation can be made on the subject of interlocutory applications before summary judgment applications are heard. In *Tilialo v Contractors Bonding Limited* (CA 50/93, 15 April 1994) the Court of Appeal at page 7:

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[23] Later, in the same judgment the Court at page 8 said:

> Drawing the line between mere assertions of possible defences and material which sufficiently raises an arguable defence so that the defendant should not be denied the opportunity to employ interlocutory procedures and have a trial is a matter of judgment. Views may well differ.

Conclusion

[24] The defences raised by the defendant and which are relied upon for the purposes for these applications are such that they are not evident from the plaintiff's pleading. Some evidential foundation for them is required. The current procedure of a hearing before the summary judgment hearing is determined is, in my view, inappropriate in this case. What it leads to is two separate analyses at different times of the nature of the defence. That is unsatisfactory and a waste of Court time. There has been substantial argument on the nature of the defence. That is not surprising having regard to the point in time when the application is made in relation to this proceeding. In my view, it is appropriate that the summary judgment application be heard and that the two applications be held over for determination with the hearing of the summary judgment application. As there has been substantial argument, in my view, a half a day should be ample time to complete the hearing of the matter on

the merits. I have been advised by the Registrar that 18 May 2000 at 2.15pm is a time when the matter may be called before myself.

Orders

[25] Accordingly, I direct:

[a] Both applications are adjourned to 2.15pm on 18 May 2000 for hearing before me;

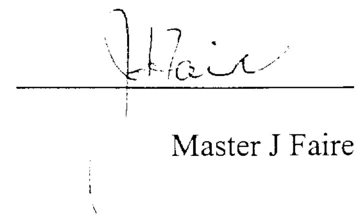
[b] The plaintiff's application for summary judgment is adjourned for hearing on the merits at 2.15pm on 18 May 2000;

[c] Any affidavit in reply by the plaintiff shall be filed and served by 8 May 2000;

[d] Time for the filing of affidavits by FA Rotherham, GA Waller and GS Rea is extended. The affidavits of those persons already filed shall be read in the summary judgment application.

Costs

[26] Costs are reserved.



Master J Faire