IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1736im99

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BETWEEN	**DYER WHITECHURCH & BHANABHAI**
	Plaintiff
AND	**PAUANUI PUBLISHING LIMITED**
	Defendant

Hearing: 16 June 2000

Counsel: WGC Templeton for plaintiff
TJG Allan for defendant

Judgment: 27 June 2000

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 plaintiff applies for summary judgment.

[2] The background to this proceeding was set out in my interim judgment delivered on 13 April 2000. I incorporate that judgment as part of this judgment.

[3] There is one cause of action. The relief sought is:

[a] A declaration that the defendant is liable to the plaintiff in defamation; and

[b] For solicitor/client costs.

[4] The plaintiff alleges that that it has been defamed by an article published by the defendant in *The Independent Business* weekly newspaper.

[5] The statement of claim identifies four parts of the article. The plaintiff does not now seek relief in this application in respect of the second part. The parts were set out in my judgment of 13 April 2000. They are therefore not repeated in this judgment. The reason why the application is not pursued in respect of the second part is because of the content of an affidavit filed by Mr Ian Hastings. He claims that he was engaged by the liquidator as a consultant to make inquiries relating to rent from a number of the apartments concerned. The plaintiff acknowledges that there are evidential issues relating to that second part which are not appropriate for summary judgment in the light of Mr Hastings affidavit. That concession is important in the context of this summary judgment application. The plaintiff pleads that this second passage either expressly or inferentially means that the plaintiff may be a party to a misappropriation of rent from its trust account. If true, this is a most serious allegation. If proved, misappropriation of trust money from a solicitor's trust account by a solicitor usually results in the striking off of that solicitor from the Roll of Barristers and Solicitors either by the High Court or, more often, by the New Zealand Law Practitioners' Disciplinary Tribunal.

[6] The general principles applicable in an application for summary judgment were set out in my judgment of 13 April and are not repeated. Rule 136 permits the entry of summary judgment in respect of a *"particular part"* of a claim. The position was recognised by the Court of Appeal in *AGC (NZ) Ltd v McBeth* [1992] 3 NZLR 54, 59 and 61. The Court distinguished the word "claim" from the phrase "cause of action". Jurisdictionally, there is no impediment therefore to my considering the application in respect of the other three parts. Nevertheless, what I must do is determine whether this plaintiff is entitled to relief sought in this case and having regard to the concession made in respect of the second part of the article.

[7] In essence, four defences have been pleaded. They are:

[a] The publication taken as a whole is true or not materially different from the truth;

[b] The publication is one protected by qualified privilege;

[c] That the plaintiff, suing as a firm, has failed to establish an essential ingredient, namely pecuniary loss flowing directly from the article;

[d] That the plaintiff is not a firm of good reputation or, put alternatively, the defence of reputational mitigation.

[8] The defendant raises a fifth issue. It is that the plaintiff did not advance in the first place, an evidential foundation which excluded or attempted to exclude all defences which might be raised. It was submitted by Mr Allan that this indicated a breach of the second of two obligations incumbent on a plaintiff in summary judgment. The first, is that the defendant can have no arguable defence. I examined the relevant authorities on that issue in my judgment of 13 April 2000 and do not repeat them.

[9] The second obligation which Mr Allan says applies is an obligation of candour. This issue must be considered in addition to the four defences raised.

[10] The subject of the article concerned people who purchased apartments. They are described in the article as investors. The apartments were acquired for rental purposes. Nautilus Developments Ltd handled the rent on behalf of the investors. Nautilus Developments Ltd's major shareholder was Goldengate Holdings Ltd. That company was the owner of all the apartments. It had been involved in the construction of twenty-five apartments. The construction had caused financial losses. The plaintiff is but one of several entities referred to in the article.

[11] I consider briefly the factual content of each part that remains for consideration in this summary judgment application. In the case of the first part, the statement that a complaint has been made to the Auckland District Law Society is incorrect. No such complaint had been made at the time of the article. Likewise, in the case of the third part, the statement that the Auckland District Law Society was understood to be investigating on the grounds that the use of the solicitor's trust account was not a proper use of the trust account is incorrect. There is evidence that the liquidator of Nautilus Developments Ltd and Goldgengate Holdings Ltd made a complaint to Mr George John Saunders, the Auckland District Law Society trust account auditor. Mr Montgomery acknowledges that he subsequently discovered that District Law Societies only investigate after they receive a written complaint.

[12] Mr Saunders has sworn an affidavit. He said that he had no recollection of having received a call from Mr Montgomery prior to June 1999. He said that he did not pass on to the Auckland District Law Society any inquiry or information concerning matters discussed with Mr Montgomery. He said that if he received calls which he detects are in the nature of a complaint his practice is to advise the person to put the complaint in writing to the Professional Standards Director of the Auckland District Law Society. He confirmed that only the Auckland District Law Society can process a complaint.

[13] In my view, Mr Montgomery's evidence does not support the allegation that a formal complaint has been laid with the Auckland District Law Society. Nor does it satisfy the allegation that the Auckland District Law Society is understood to be investigating.

[14] As to the fourth part of the article, Mr Allan acknowledged in his submissions that the defendant was wrong in the allegations that are made. Indeed, in oral submissions he said that the defendant does not rely on the defence of truth but relied only on the defence of qualified privilege in relation in the fourth part of the article.

[15] Counsel provided me with a helpful summary of authorities on the approach to be taken. They are not in dispute. A Judge sitting alone must ask whether or not the natural and ordinary meaning of the words are what is alleged in the statement of claim. *Slim v Daily Telegraph Ltd* [1968] 2 QB 157. The inquiry is not about what the writer of the article intended. The issue is whether the words convey a defamatory imputation. Lord Reid in *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 said:

> What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think that he would infer guilt of fraud merely because an inquiry is on foot.

The words must be looked at in the context of the whole of the article and, if appropriate, to the surrounding circumstances. *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 71.

[16] The first part is set out in paragraph 6 of my interim judgment. The meaning which the plaintiff says the words used in that part had, is set out in paragraph 10 of the same judgment.

[17] Clearly, no complaint has been made. The allegation that it had to do with an improper use of a solicitor's trust account is wrong. The further allegation that the use by the solicitors of their trust account as a regular bank account and that that is an improper use of the solicitor's trust account and the subject of this complaint is, likewise, wrong. Further, the allegation that the use to which the trust account was used leads to some out of pocket losses by the investors and is the subject of a complaint is, likewise, wrong. The first part is simply not limited to notification that a complaint has been made. The allegation goes to a complaint based on the improper use of a trust account which has led to loss of funds. The subject-matter is

a firm of solicitors. It relates to funds held on trust by those solicitors. In my view, those words convey a defamatory imputation. I would not put that imputation in a category as serious as that which would apply to the second part of the article.

[18] The third part is set out in paragraph 8 of the interim judgment. The meaning that the plaintiff says the words used in that part are set out in paragraph 12. Once again, the allegations are plainly wrong. The meaning attributed to this section of the article is as stated in the statement of claim. The allegation that an investigation has been undertaken on an improper use of the solicitors' trust account and in respect of that solicitor, if untrue, does convey a defamatory imputation. Once again the imputation is not as serious as that conveyed by the second part of the article. In my view, clearly the most damaging aspect of the article is that a misappropriation of trust funds by the solicitor may have occurred.

[19] The fourth part is set out in paragraph 9 of the interim judgment. The meaning which the plaintiff says the words used in that part have is set out in paragraph 14. The defendant acknowledges that the statements made are wrong. In my view, those words do have meanings as set out in the statement of claim. They carry a defamatory imputation. The same comments that I have made in respect of the first and third parts apply with respect to the fourth part and the seriousness of the imputation alleged.

[20] The above analysis leads to the principal question raised by the summary judgment application. It can be stated this way. Where the most serious allegation is not suitable for summary judgment, is it nevertheless appropriate to make a declaration that the plaintiff has been defamed in respect of those less serious allegations?

[21] To put the question in its proper context I consider the first of the specific defences that have been raised. That is the defence of truth. I do so on the basis that there is a foundation for such a defence conceded by the plaintiff in respect of the second part of the article.

[22] The defence of truth requires a consideration s 8 of the Defamation Act 1992. Subsection (3) provides that a defence of truth shall succeed if

> (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[23] In *Lange v Atkinson* [1998] 3 NZLR 424, 435 in the judgments of Richardson P, Henry, Keith, Blanchard and Tipping JJ the Court said of the defence:

> The plaintiff establishes a prima facie cause of action as soon as he or she has proved publication of defamatory words. It does not fall upon the plaintiff to prove the words are false for the law presumes them to be false. But it is a complete answer to the plaintiff's claim if the defendant proves that the defamatory words are true in substance, even if not strictly accurate in minor detail. A defence of truth succeeds if the defendant proves that the imputation contained in the matter which is the subject of the proceedings was true, or not materially different from the truth; and where the proceedings are based on all or any of the matter contained in a publication, the defendant will succeed by proving that the publication, taken as a whole, was in substance true, or in substance not materially different from the truth: s 8(3).
>
> By virtue of s 8(2), it is now possible for the defendant to succeed in a plea of truth by showing the truth of imputations in the publication not complained of by the plaintiff and by this means proving that, taken as a whole, the publication is substantially true or is in substance not materially different from the truth:

[24] There are, in essence, two aspects then that arise. The first is, is it likely that a declaration that the plaintiff has been defamed would be the made if the defendant is successful in the defence of truth in respect of the second. Could that same defence also apply to the whole article. I do not express a view on the second aspect at this stage. However, on the first aspect it seems to me at the very least arguable that a declaration would not be made in respect of the first, third and fourth aspects of the article if the defendant succeeds in the second. That is because a plaintiff could hardly claim to be defamed if the defendant proves the truth of an allegation which, in essence, is that that plaintiff has misappropriated trust moneys from its

trust account. This is particularly so when I consider the effect of proof of the truth of the second aspect and a solicitor's continued enrolment on the Roll of Barristers and Solicitors.

[25] But even if I am wrong in that conclusion, I would not enter summary judgment in this particular case because of the overall discretion that is vested in the Court in relation to summary judgment applications. That has been referred to in paragraph 21 of my judgment of 13 April 2000 where I referred to relevant authorities.

[26] In the instant case, where a declaration that a party has been defamed by an article is concerned, it seems to me, that it would be quite wrong to handle the matter on a piecemeal basis particularly where, what will obviously be the most serious aspect requires trial as to the merits.

[27] The conclusion that I have reached makes it unnecessary to make any final determination on the scope of the defence of qualified privilege as pleaded in this case. As it is, counsel were not able to address me on the judgment of the Court of Appeal delivered on 21 June 2000 in *Lange v Atkinson and Australian Consolidated Press* (CA 52/97, 21 June 2000). The Court there reheard an appeal as a result of the advice of the Privy Council delivered on 28 October 1999 and reported in [2000] 1 NZLR 257. Further, I note that the earlier Court of Appeal judgment in that case [1998] 3 NZLR 424, 470 did not express a final view as to whether a remedy of a declaration was subject to the defence of qualified privilege but simply observed that the:

> substantive law relating to defamation appears to stand apart from the remedies.

Justice Elias at first instance said ([1997] 2 NZLR 22, 48):

> I too confine my decision as to the availability of privilege to claims for damages. Nothing I have said is intended to suggest that the privilege would be a defence to an application for a declaration. The availability of qualified privilege as a defence to a claim for declaration will need to be considered carefully in a case where it

> arises. If the defendant is protected against liability for damages, a balance in keeping with the pragmatic approach of the common law may be that the defence does not apply to a claim for declaration. Much will turn on the assessment of whether the costs of litigation and the exposure to solicitor and client costs in an application for declaration is unacceptably chilling of political discussion.

In any event, in my view, a final view is unnecessary in this judgment and therefore I do not attempt to state it.

[28] Likewise, it is not necessary to form a final view on whether a partnership must prove pecuniary loss before a remedy is available. I note, however, that s 4 of the Defamation Act 1992 makes defamation actionable per se without alleging special damage. Section 6 refers to proceedings brought by a body corporate. There, pecuniary loss to that body corporate must be proved. There is no other requirement in the Defamation Act 1992 relating to partnerships. In Halsbury's Laws of England (Vol 28, 4th ed) at para 28, the learned authors refer to the fact that partners may maintain a joint action for libel or slander published of them in the way of their common trade or business without alleging or proving special damage.

Conclusion

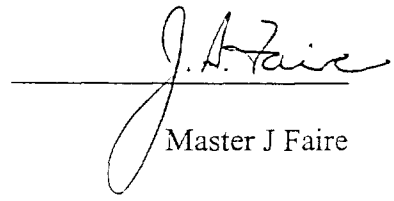
[29] The application for summary judgment is dismissed.

Costs

[30] Despite Mr Allan's submission that this application was based on a lack of candour I reserve the question of costs. The defences that have been raised are positive in nature. The reason why the application for summary judgment has been dismissed is because of the evidence led by the defendant and the concession made by the plaintiff in relation to it. In short, I see no reason to depart from the normal position which the Court of Appeal approved of in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403. Costs are reserved.

Directions and orders

[31] It will now be necessary to establish a timetable for the disposal of interlocutory applications and also a timetable to dispose of the application for discovery by the non-party, the Auckland District Law Society. Accordingly, I direct that the Registrar schedule a telephone conference involving counsel for the plaintiff and defendant and counsel for the Auckland District Law Society at 9am on 18 July 2000. The conference is for the purpose of disposing of interlocutory applications including the application for non-party discovery.



Master J Faire