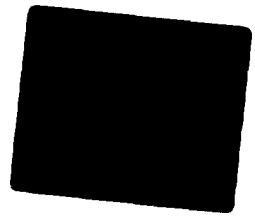
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 583-SD00

BETWEEN **MURRAY DOUGLAS EARL**

Plaintiff



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AND **JAMES BADDELEY**

Defendant

Hearing: 7 May 2001

Counsel: H Fulton and S Afshar for plaintiff
J Anderson for defendant

Judgment: 18 May 2001

JUDGMENT OF NICHOLSON J

Solicitors:
Kiely Thompson Caisley, DX CP25512, Auckland for Plaintiff
Paddy Orr & Co, DX 95029, New Lynn for Defendant

APPLICATION

[1] The plaintiff, Mr Earl, was the Secretary and Chief Executive of the Avondale Jockey Club ("the Club") from July 1996 until he was dismissed on 1 February 2000. The defendant, Mr Baddeley, was the acting President of the Club from 24 January 2000 and was a member of the committee of the Club during the period of Mr Earl's employment.

[2] On 29 September 2000 Mr Baddeley made public statements about Mr Earl's performance as Chief Executive of the Club and in particular said that Mr Earl had:

[i] deleted over 900 files from the Club's computer on his final working day; and

[ii] purchased a car for the Club and registered it in his own name; and

[iii] made over $1,300 worth of phone calls after he left the Club and had not reimbursed the Club for them.

[3] Mr Earl alleges that Mr Baddeley's statements were defamatory and seeks damages of $70,000 and costs from him. As an alternative cause of action, Mr Earl pleads there was a relationship of trust and confidence between him and the Club which extended to Mr Baddeley, Mr Baddeley had breached this duty by disclosing information and that such disclosure had been made to the detriment of and intended to injure Mr Earl's feelings, dignity, profession or calling.

[4] Mr Baddeley admits that he published the statements and pleads that the words were true in substance and fact.

[5] Mr Baddeley has applied for the alternative cause of action to be struck out on the grounds that it is an abuse of process of the Court and discloses no cause of action against him.

SUBMISSIONS

[6] Mr Anderson's principal submission was that Mr Earl's claim in respect of loss of reputation was correctly brought in defamation and was limited to that cause of action. His second submission was that Mr Baddeley was not a party to the contract of employment and there was no obligation of trust and confidence between him and Mr Earl. Mr Anderson's third submission was that even if there was such an obligation of trust and confidence, it ceased when Mr Earl left the employment of the Club.

[7] Mr Fulton submitted that Mr Earl's alternative causes of action are breach of confidence and/or breach of privacy. He submitted that the statement of claim provided the factual basis for such causes of action and that they could be heard in the same proceeding as the primary defamation cause of action.

DECISION

[8] As authority for his submission that damages for loss of reputation are purely to be pleaded and decided in defamation, Mr Anderson relied on the decisions of the Court of Appeal in *Bell-Booth Group v Attorney-General* [1989] 3 NZLR 148; *Balfour v Attorney-General* [1991] 1 NZLR 519 and *South Pacific Manufacturing Co Ltd v NZ Security Consultants & Investigations Ltd* [1992] 2 NZLR 282. He also relied upon the statement by Hallett J in *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393, 399, which was cited by Sir Robin Cooke P (as he then was) in the *Bell-Booth* case, that:

> "a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action."

[9] However, the restriction imposed by the Court of Appeal in the *Bell-Booth* case and endorsed in the *Balfour* and *South Pacific* cases was limited to excluding a negligence cause of action from an action for defamation. As stated by Sir Robin Cooke P (as he then was) in delivering the judgment of the Court in the *Bell-Booth* case:

> "The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other . . .
>
> The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element." p 156

[10] Mr Fulton pointed out that the principle stated in the *Bell-Booth* judgment that negligence could not be included with a claim in defamation was not applied by the majority of the House of Lords in *Spring v Guardian Assurance Plc* [1995] 2 AC 296. The majority distinguished the *Bell-Booth* case and ruled that in an action for defamation on an inaccurate employment reference, the fact that an employer would have a defence of qualified privilege did not bar an action by the employee in negligence for which that defence was not available. However, I consider that the judgments of the Court of Appeal in the *Bell-Booth*, *Balfour* and *South Pacific* cases represent the law of New Zealand and insofar as there is difference between the ratio of those cases and the *Spring* case, I apply the law as stated in the New Zealand cases.

[11] I do not accept Mr Anderson's submission that the effect of the New Zealand cases is that no other causes of action can be included in a defamation case. I consider that the exclusion is limited to negligence. This is made clear not only by the rationale stated in the New Zealand cases for excluding a negligence cause of action but was also explicitly recognised by Sir Robin Cooke in the *Bell-Booth* case:

> "For these reasons in our opinion justice does not require or warrant an importation of negligence law into this class of case. Where remedies are needed they are already available in the form of actions for defamation, injurious falsehood, **breach of contract or breach of confidence**." p 157 – (emphasis added)

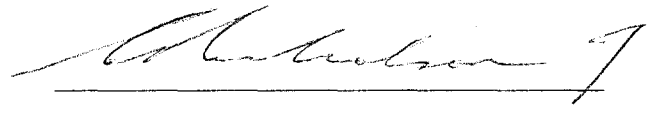
[12] I therefore rule against Mr Anderson's submission that the law does not allow Mr Earl's breach of confidence cause of action to be included in the same proceedings as the defamation cause of action. I can also see no reason why a breach of privacy cause of action should not also be included with defamation and breach of confidence causes of action but I express concern about whether the

statement of claim adequately pleads breach of privacy. However, this can be rectified by amendment.

[13] With relation to Mr Anderson's subsidiary second and third submissions, I accept Mr Fulton's submission that because of his involvement as a member of the committee of the Club which decided to dismiss Mr Earl and as an agent of the Club, Mr Baddeley could also be under the obligation of confidentiality which existed between the Club and Mr Earl and that such obligation of confidentiality would not necessarily finish when the employment terminated. Mr Fulton referred to matters stated in the confidence of mediation before the decision to dismiss. This would be a matter of evidence. However, for the purposes of the strike out application, I accept that it is arguable that Mr Baddeley was under the same obligation of trust and confidence as his principal and that such obligation continued after Mr Earl was dismissed.

[14] The jurisdiction to strike out is exercised very sparingly. I am not satisfied that breach of confidence and breach of privacy causes of action are so clearly untenable that they cannot possibly succeed. I accordingly dismiss the application to strike out the alternative causes of action.

[15] The defendant is to pay costs to the plaintiff on this unsuccessful application on a 2B basis.



C M Nicholson J

Signed at 9.55 am on 18 May 2001