

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2004-485-489

UNDER The Defamation Act 1992

BETWEEN THE UNIVERSITY OF
NEWLANDS incorporated at
Wellington and carrying on
business as an internet web site

First Plaintiff

A N D ROCHELLE MARIANNE
FORRESTER of Wellington,
Company Director

Second Plaintiff

A N D NATIONWIDE NEWS PTY
LIMITED a company
incorporated in Australia and
carrying on business there and
elsewhere including Wellington
as a publisher of an internet web
site

Defendant

Hearing: 23 June 2004

Appearances: R. Harley for Plaintiffs
B.D. Gray for Defendant

Judgment: 17 August 2004

JUDGMENT OF ASSOCIATE JUDGE D I GENDALL

Solicitors:
Russell McVeagh, Wellington for Plaintiffs
Bell Gully, Wellington for Defendant

Introduction

[1] This is an application by the defendant for dismissal, or stay, of this proceeding on the grounds of lack of jurisdiction and *forum non conveniens*.

Background facts

[2] In the Statement of Claim the first plaintiff claims to carry on business as “an internet website called The University of Newlands”. The second plaintiff is a director and shareholder of the first plaintiff. The second plaintiff lives, and says that she runs her business, in Wellington.

[3] The defendant is incorporated in Australia and for approximately 40 years has published *The Australian* newspaper in Australia. *The Australian* is also available online at the website www.theaustralian.news.com.au. It is the online version of the newspaper that is at the centre of these proceedings.

[4] The plaintiffs allege that the defendant published defamatory words about the plaintiffs on *The Australian* website. In particular, the online newspaper published an article, entitled “*Wannabe Unis*”, about “degree mills” that offer “to confer degrees based on life experience”. The first plaintiff was included in the list of “degree mills” contained in the article.

[5] The plaintiffs submit that the description of the first plaintiff as a “degree mill” connotes that any degrees conferred by it are worthless, and that both plaintiffs are involved in dishonest or unethical conduct. Accordingly, the plaintiffs contend that the words are defamatory and likely to cause them pecuniary loss and loss of professional and academic reputation.

Current Proceedings

[6] The present proceeding was commenced on 15 March 2004. The plaintiff did not seek leave pursuant to Rule 220 of the High Court Rules to serve the proceeding

outside the jurisdiction. Instead, it appears that the plaintiffs may have relied on the provisions of Rule 219, to serve the proceedings out of New Zealand.

[7] As an alternative argument before me, the plaintiffs endeavoured to maintain that in any event, Rule 219 may have no application to this proceeding because the Statement of Claim and Notice of Proceeding were served within New Zealand on an employee of *The Australian*.

[8] This argument proceeds on the basis that Rule 199(1) of the High Court Rules applies here, and that the proceedings were served in accordance with this Rule, in that they were served in New Zealand by delivery to an employee at the defendant's only place of business in New Zealand.

[9] In my view, this argument can be disposed of quickly.

[10] Counsel for the plaintiffs contended that the defendant has a place of business in New Zealand, namely the office of an acknowledged employee of *The Australian* newspaper, this person being a member of the Parliamentary Press Gallery at Wellington.

[11] In my view, this is a far-fetched argument and cannot be sustained. To hold otherwise would mean that an office occupied by a single reporter/employee of the defendant within the New Zealand Parliament precincts would be regarded as a "place of business" for the defendant. Leaving aside any constitutional or other arguments that may arise, I am satisfied that the presence of only one reporter/employee in New Zealand with no marketing, distribution, sales, production or management network of any kind in this country, leads to the conclusion that the defendant does not have an identifiable place of business in New Zealand in terms of the test set out in *Deverall v Grant Advertising Inc* [1954] 3AllER 389 (CA). To suggest otherwise would fly in the face of logic.

[12] Any service of these proceedings upon that Parliamentary Press Gallery employee does not, in my view, comprise service in terms of Rule 199(1). I reject the plaintiffs' argument to the contrary.

[13] I turn now to consider the provisions of Rule 219.

[14] The defendant submits that since *The Australian* is produced by an Australian incorporated company, and the plaintiffs did not seek leave of the Court to serve the proceedings, the plaintiffs must satisfy the provisions of Rule 219.

[15] In addition, on 6 May 2004, the defendant filed a notice of appearance under protest to jurisdiction pursuant to Rule 131(1). It contended that the cause of action pleaded by the plaintiffs does not fall within the circumstances set out in Rule 219 and that the Court lacks jurisdiction to hear and determine this proceeding.

[16] Rule 131 provides in part:

(1) A defendant who objects to the jurisdiction of the Court to hear and determine the proceeding in which he has been served may, within the time limited for filing his statement of defence and instead of so doing, file and serve an appearance stating his objection and the grounds thereof.

...

(5) At any time after an appearance has been filed under subclause (1), the plaintiff may apply to the Court by interlocutory application to set aside the appearance.

(6) On hearing an application under subsection (5), the Court,-

(a) If it is satisfied that it has jurisdiction to hear and determine the proceeding, shall set aside the appearance; but

(b) If it is satisfied that it had no jurisdiction to hear and determine the proceeding, shall dismiss both the application and the proceeding.

[17] Alternatively, in the event that the Court does have jurisdiction, the defendant seeks to stay the proceedings on the basis that the New Zealand High Court is not the most convenient forum, *forum conveniens*, for the determination of this matter.

[18] The application to stay or dismiss the proceeding is opposed by the plaintiffs.

General principles relating to appearance under protest as to jurisdiction

[19] Rule 219 outlines the circumstances in which pleadings may be served on a defendant outside New Zealand without leave. A defendant may object to the jurisdiction of the Court where it takes the view that the case falls outside the categories listed within Rule 219. The objection is lodged by filing an appearance under protest to jurisdiction under Rule 131, which as I have noted above occurred here.

[20] In *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 523 (PC), the Privy Council held that notwithstanding the right conferred by Rule 219, the Court retains a discretion as to whether its jurisdiction should be declined. Thus, where a defendant has been served overseas, the onus is on the plaintiff to satisfy the Court not only that it meets the requirements of Rule 219 but also that it has a good arguable case.

[21] Even if the Court does in fact have jurisdiction to hear the proceeding, it also has an inherent jurisdiction to stay proceedings on the ground that New Zealand is not the *forum conveniens*.

[22] I propose to deal with the arguments relating to Rule 219, the merits of the case, and *forum conveniens* in that order.

Compliance with Rule 219

[23] The plaintiffs rely on the following provision of Rule 219 as entitling them to serve proceedings on the defendant without the leave of the Court:

219. When allowed without leave

Where in any proceeding a statement of claim or counterclaim and the relevant notice of proceeding or third party notice cannot be served in New Zealand under these rules, they may be served out of New Zealand without leave in the following cases:

- (a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand

...

[24] The grounds on which proceedings may be served outside New Zealand without leave will be interpreted conservatively, consistent with the view that the Court must be exceedingly careful before allowing pleadings to be served out of jurisdiction: *Eyre v Nationwide News Pty Ltd* [1967] NZLR 851 (SC).

[25] Further, the plaintiff bears the onus of establishing a good arguable case that the claim falls within the specific limb of Rule 219 that the plaintiff relies on *Bomac Laboratories Ltd v La Roche Ltd & Ors* (2002) 7 NZBLC 103, 627 at 103,635 cited in *Baxter v RMC Group* [2003] 1 NZLR 304 at 312.

[26] Thus, the plaintiffs have the onus of establishing that the defendant has done an act in New Zealand, in respect of which damages are claimed. In this instance, the plaintiffs allege that the defendant has published defamatory material, and it is in respect of this act of publication that they seek damages. The issue is whether the publication of the material, whatever its content, took place in New Zealand.

[27] The defendant submits that the plaintiffs themselves did not plead, in their statement of claim, that the material was published in New Zealand.

[28] *Dow Jones & Co Inc v Gutnick* [2002] 210 CLR 575, a recent decision from the High Court of Australia, is pertinent in addressing the issue of publication on the internet. In that case, an Australian resident brought an action within the Australian jurisdiction, against an American publisher who published an article on a subscription news site on the internet that was allegedly defamatory of him.

[29] The central issue before the Full Court of the High Court of Australia was whether the purportedly defamatory material had been published in New Jersey, where the web server was located, or in Australia, where the article had been viewed. If the defamatory material had been published in Australia, then pursuant to

r7.01(1)(I) of the Supreme Court Rules of Victoria, the Court would have jurisdiction to determine the proceeding.

[30] Ultimately, the High Court of Australia decided that the publication occurs, and accordingly the tort of defamation is committed, in the place where the plaintiff downloads the information that is damaging to his or her reputation: *Gutnick* (supra) at p. 607.

[31] Before me, counsel for the defendant contested this and submitted that *Gutnick* can be distinguished on a number of grounds. The only relevant ground, at this stage, is that *Gutnick* concerned a subscription website, which required members to pay for access and to which entry could only be gained through the use of passwords. Thus, according to the defendant, the decision in *Gutnick* does not apply to cases, such as the present, involving publication on the “World Wide Web” generally. The defendant submits that support for this argument can be derived from obiter comments in *Macquarie Bank Ltd v Berg* [2002] NSWSC 1110, [BC200208149](#) (SC).

[32] I disagree with counsel’s submission for two reasons. First, the obiter comments in *Macquarie Bank*, relied upon by the defendant, relate to the reasoning of the trial court in *Gutnick*, as opposed to that of the High Court, as the final decision had not been delivered at that time.

[33] Secondly, if the Supreme Court in *Macquarie Bank* had had the opportunity to read the High Court’s fully reasoned final judgment, in my view it could not have suggested that the decision is limited in scope to subscription websites. That is because the High Court of Australia in *Gutnick* did not itself restrict its reasoning, either explicitly or implicitly, to cases involving subscription websites.

[34] On the contrary, the High Court, in its various judgments, treats the case simply as one of publication of defamatory material on the World Wide Web. Indeed the majority of the High Court suggests that the World Wide Web is no different to any other method of communication in that “those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction”: *Gutnick* (supra) at p. 605. (As to this

note also, the discussion under the heading “Widely disseminated publications” in *Gutnick* (supra) at p. 605). The fact that the defamatory material was contained within a subscription website, as opposed to an open access website, was mentioned by the majority only in the first paragraph of their judgment, and only by way of background to the case.

[35] I agree with the position taken by the High Court of Australia. To my mind, if a defendant chooses to upload information on the internet, being aware of its reach, then they assume the associated risks, including the risk of being sued for defamation. If it were held otherwise, namely, that publication occurred at the place of uploading, defendants could potentially defame with impunity by uploading all information in countries with relaxed, or no, defamation laws.

[36] Accordingly, as I see it, the present case falls within the category outlined in Rule 219(1). In my view, it is clearly open to the plaintiffs here to rely on *Gutnick* to support their contention that the act of publishing the defamatory material occurred in New Zealand once the allegedly defamatory information was downloaded from the defendant’s website.

Merits of the case

[37] In addition to establishing that the case falls within one of the categories of Rule 219, the plaintiff must also satisfy the Court that it has a good arguable case on the merits: *Kuwait Asia Bank EC*. In *Bomac Laboratories Ltd* (supra) at p.103,637 Harrison J concluded that the “good arguable case” test will yield the same result as the “serious question to be tried” test adopted by Goff J in *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran* [1994] 1 AC 438. This conclusion was followed by O’Regan J in *Baxter* (supra) at p.313.

[38] Harrison J in *Bomac Laboratories Ltd* outlined a two stage approach to the “good arguable case” question:

[c]... the constituent elements of the test are the existence of, first, a substantial or serious legal issue for trial (*Seaconsar* (supra) at pp 456 – 457) and, second, a credible or plausible factual basis for arguing the

legal issue (*Stone* (supra) at para 24). On satisfaction of these two requirements the claim will have a sufficiently strong foundation to warrant a New Zealand Court assuming jurisdiction;

Further:

[e] In practical terms, a plaintiff must provide evidence, normally by affidavit, to comply with the good arguable case test. However, it is not the Court's function to determine any areas of factual dispute between the parties; in the event of a genuine and plausible difference, which can only be determined on cross-examination, on a point which if proven would establish a good arguable case, the Court must assume jurisdiction. It must also take into account that the plaintiff has not had the benefit of discovery at this very preliminary stage. Nevertheless, the uncontested affidavit evidence must ultimately disclose sufficient grounds for the Court to assume jurisdiction (*Stone* (supra) at para 25).

[39] The serious legal issue for trial here is broadly whether the plaintiffs have been defamed by an article published on the internet by the defendant. A critical point is whether the plaintiffs are able to show that there is a credible or plausible factual basis for arguing the legal issue.

[40] The law relating to defamatory statements is well settled. A statement which identifies the plaintiff will be defamatory where it has the tendency to lower the plaintiff in the estimation of right thinking members of society generally: *Sim v Stretch* [1936] All ER 1237 (HL). Further, the statement must be published to a third person other than the plaintiff. Where a plaintiff is a body corporate, it must also establish that the publication has caused, or is likely to cause, pecuniary loss: s6 Defamation Act 1992. Given that the first plaintiff is a recently-established company, it might be difficult for it to establish actual loss. Nevertheless, the company at trial may be able to show that the publication will affect its future trading potential or its financial structure or efficiency: *Scott v Fourth Estate Newspapers Ltd* [1986] 1 NZLR 336.

[41] It is not disputed by the parties that the defendant posted an article on *The Australian* website about "degree mills", and that the first plaintiff was listed as one of the universities who "confer degrees based on life experience".

[42] In light of the High Court's decision in *Gutnick*, the publication requirement appears to be satisfied.

[43] In respect of identification, while the first plaintiff was clearly identified by name on the defendant's website, the second plaintiff is neither identified by name in the article, nor is she identifiable via the first plaintiff's website. Instead, the second plaintiff contends that she has been linked to the first plaintiff through an internet discussion forum run by Degreeinfo.com. This is the only way in which the second plaintiff alleges that she can be connected to the first plaintiff.

[44] The plaintiffs submit that their inclusion in the list of "degree mills" implies that the degrees they confer are worthless, and that they are involved in conduct that is dishonest or unethical, both of which would lower the plaintiffs in the estimation of others. The plaintiffs also highlight the fact that the article has now been removed from *The Australian* website. In my view, however, this action can hardly be seen as an acknowledgement either of liability, or of the defamatory nature of the statements, on the part of the defendant. Rather, I think the defendant in its actions there was simply responding in an appropriately cautious commercial manner to the plaintiffs' allegations.

[45] The defendant, in its submissions, does not seem to deny the plaintiffs' interpretation of the words in the article. Instead, it makes two submissions in response.

[46] First, the defendant contends that the plaintiffs either have no reputation at all, as they have both only recently changed their names, or alternatively, they already have a bad reputation. In particular, the Degreeinfo.com website - which was identified by the second plaintiff as the only channel through which she could be connected to the first plaintiff - contains a number of comments that question the legitimacy of the first plaintiff. Thus, their inclusion on the list of "degree mills" cannot lower the public's estimation of the plaintiffs any further.

[47] Secondly, the defendant submits that it is an offence against sections 292(4)(a) and 292(5) of the Education Act 1989 for The University of Newlands to use the term

“university” to describe its activities, and to purport to grant a “degree”. Accordingly, it must be true that the first plaintiff is a “degree mill” which confers degrees based only on life experience.

[48] There is some strength in these arguments put forward by the defendant. However, even if the qualifications purportedly conferred by the first plaintiff are not recognised by the New Zealand Qualifications Association, and indeed might even be officially “illegal”, it does not logically follow that they are “worthless”. After all, a person who undertakes one of the first plaintiff’s courses may receive immense value from the teachings, notwithstanding the lack of official recognition. On the other hand, the fact that it is illegal for the first plaintiff to claim to be a university and to purport to confer degrees might well be seen as an adequate response to the plaintiffs’ claim that the article suggested they were involved in dishonest or unethical conduct. That is, if the plaintiffs are indeed partaking in illegal activities, then it is necessarily true that they are involved in dishonest and unethical conduct.

[49] Although there is insufficient evidence presently before the Court to make definitive findings on each of these issues, I am satisfied, but only by a rather fine margin, that the plaintiffs here have done enough to establish that they have an arguable case on the merits against the defendant. Prima facie, the defendant has published statements about at least one of the plaintiffs, the statements are capable of being construed in such a way that they might lower the plaintiffs’ reputation in the community, and the plaintiffs in their Statement of Claim allege that they have suffered pecuniary loss as a result. Although, in my view, at this point the plaintiffs’ claim does not appear to be a strong one, and given that the second plaintiff’s present argument concerning identification is somewhat unconvincing, nevertheless I am satisfied that there is a serious question to be tried here in terms of the *Bomac Laboratories* test and these matters should be the subject of proper inquiry at a substantive hearing.

Forum conveniens

[50] Even if the plaintiff is able to establish that it has a good arguable case and that the case falls within one of the categories in Rule 219, as indicated earlier, the

Court retains an inherent jurisdiction to decline jurisdiction on the basis that New Zealand is not the appropriate forum for hearing the dispute.

[51] The applicable legal principles have been generally accepted by the parties. The test for whether the Court is the appropriate Court or “forum conveniens” is essentially whether the interests of justice are best served by litigating in New Zealand or elsewhere: *Spiliada Maritime Corporation v Consulex Ltd* [1986] 3 All ER 843 at 854, *Longbeach Holdings v Bahanabhai* [1994] 2 NZLR 28 at 35.

[52] Where there is more than one court with jurisdiction to hear and determine the claim, the forum conveniens is the forum with which the action has the closest and most substantial connection: *Spiliada Maritime Corporation* (supra) at 854.

[53] The defendant bears the burden of proof to satisfy the Court that there is another available forum for the trial of the case that is more appropriate: *Society of Lloyds* (supra) at 149, *Longbeach Holdings* (supra) at 35. To discharge that burden, the defendant must show that there is another available jurisdiction which is clearly or distinctly more appropriate: *Spiliada Maritime Corporation* at 855, *Oilseed Products (NZ) Ltd v HE Burton Ltd* 1 PRNZ 313 at 316, *Kang v Hyundai Electronics Industries Co Ltd* 8 PRNZ 628 at 629.

[54] The Court has a wide discretion with regard to the factors that it may take into account. The relevant considerations are summarised by Lord Goff in *Spiliada Maritime Corporation* (supra) and have been adopted in a number of New Zealand cases, including *Baxter*, *Bomac Laboratories Limited*, *Longbeach Holdings*, and *Oilseed Products* (supra). These include:

- [a] The relative cost and convenience of proceeding in each jurisdiction;
- [b] The location and availability of documents and witnesses;
- [c] The existence of litigation in another jurisdiction, and the state of those proceedings;

- [d] Whether all relevant parties are subject to New Zealand jurisdiction, so that all issues can be resolved in one hearing;
- [e] The existence of a contract which contains an agreement to submit to a particular jurisdiction or a clause relating to the appropriateness of a particular forum;
- [f] The strength of the plaintiff's case;
- [g] Where any judgment obtained will fall to be enforced;
- [h] Whether the defendant's objection to jurisdiction or application for a stay is brought to gain tactical advantage, and not because a trial on the other forum is genuinely desired;
- [i] Procedural advantages in one jurisdiction;
- [j] A decision in another jurisdiction that it is forum conveniens.

[55] In light of these factors the plaintiff submits:

- [a] The publication took place in New Zealand;
- [b] The plaintiffs' business operations are based in New Zealand;
- [c] The plaintiffs have no connection to Australia; and
- [d] Damage to reputation has occurred in New Zealand so it must be vindicated in New Zealand.

[56] The defendant cites the following factors as supporting its argument that the plaintiffs' claim against the defendants has a more real and substantial connection with Australia:

- [a] The only connection between New Zealand and the proceeding is that the second plaintiff happens to reside in New Zealand;
- [b] The defendant is a company incorporated in Australia;
- [c] The defendant does not carry on business in New Zealand;
- [d] The publication took place in Australia;
- [e] The potential extent of any publication in New Zealand is extremely small;
- [f] The statement of claim does not allege that the plaintiffs have any reputation in New Zealand; and
- [g] The witnesses and documentary evidence required in order to defend the proceedings are located in Australia.

[57] The plaintiffs' argument that New Zealand is the more appropriate forum to determine this proceeding in my view has merit. The plaintiffs' connections and any reputation they may have are fundamentally New Zealand based. It is appropriate that the proceeding be heard in New Zealand for the purpose of vindicating their reputations in this country. According to counsel for the plaintiffs, it is their reputation in New Zealand and only in New Zealand which the plaintiffs seek to vindicate. It follows that substantive issues arising in the proceeding would fall to be determined according to New Zealand law. The defendant chose to publish the statements in question on the WorldWide Web and as I have concluded above, it also follows that the plaintiffs' damages claims here are for a tort committed in New Zealand, and not for one committed outside the jurisdiction. In acting as they have, the defendant in reality has caused this to be a New Zealand centred case involving New Zealand plaintiffs. I am satisfied that it is this Court which is the natural forum in which this case should be heard in the sense used in *Spiliada Maritime Corporation*.

Conclusion

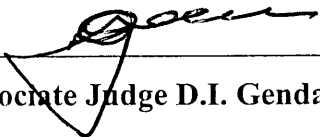
[58] Ultimately, I am satisfied, but as I have noted only by a fine margin, that the plaintiffs have done enough to show that they have a good arguable case both in terms of Rule 219 and on the merits. And I consider New Zealand to be the most convenient forum for hearing the dispute or at least that there is no other forum which would be more appropriate.

[59] For those reasons, the defendant's application to dismiss or stay the proceeding has been unsuccessful.

[60] The plaintiffs are entitled to costs, which are awarded on a 2B basis, together with disbursements (if any) as fixed by the Registrar.

Postscript

[61] I heard the defendant's application to dismiss or stay the proceeding on 23 June 2004. On 28 June 2004, the plaintiffs submitted a further memorandum. In response, the defendant submitted that I should decline to read the plaintiffs' memorandum on the basis that it is inappropriate for a party to make further submissions after the close of argument. I accept that submission. Accordingly, I have not read the plaintiffs' memorandum.


 Associate Judge D.I. Gendall

Delivered at 4.45 pm on 17 August 2004.