IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-2655

BETWEEN	EVAN JAMES READ Plaintiff
AND	MINISTER OF ECONOMIC DEVELOPMENT, MINISTRY OF ECONOMIC DEVELOPMENT AND THE ATTORNEY GENERAL Defendant

Hearing: 11 September 2007

Appearances: Mr T Jeffcott for plaintiff
W Aldred for the defendant

Judgment: 12 September 2007 at 5 p.m.

JUDGMENT OF ASSOCIATE JUDGE D I GENDALL

This judgment was delivered by me on
***12.09.07 at 5 pm**, pursuant to*
Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel

Jeffcott Muller, P O Box 16-110, Auckland

Crown Law Office, P O Box 2858, Wellington:

Introduction

[1] The plaintiff applies for summary judgment as to liability against the defendants in this defamation proceeding brought by him. The plaintiff contends the defamation arose from an acknowledged error made by the Ministry of Economic Development ("the Ministry") when publishing in 2006 details of the plaintiff's convictions under the Insolvency Act 1967 on the website of its National Enforcement Unit ("NEU").

[2] The application is opposed by the defendants. This is on the basis that they have an arguable defense of truth to the plaintiff's claim in that the imputation of dishonest conduct objected to by the plaintiff which was contained in the incorrect statement on the Ministry's website was true or was not materially different from the truth.

Background facts

[3] The plaintiff was adjudicated bankrupt on 9 October 2002 and discharged on 2 August 2006.

[4] While bankrupt the plaintiff was convicted of the following offences under s 129A and s 62 Insolvency Act 1967:

a) Five charges of managing a business while bankrupt without the consent of the Official Assignee; and

b) Three charges of being employed by a company controlled by a relative while bankrupt without the consent of the Official Assignee.

[5] The plaintiff had pleaded guilty to all eight charges and was convicted and sentenced on 28 July 2006 to 100 hours of community work.

[6] On 12 September 2006 the NEU published a partially correct and partially incorrect statement on its Business Update Website ("the website"). This was to the effect that the plaintiff on 28 July 2006 was sentenced to 100 hours community

service on charges under s 128A(1)(b) of the Insolvency Act 1967 of "failing or neglecting to answer truthfully any questions put to him at any examination" ("the Statement").

[7] The Statement correctly recorded two things, first that the sentence of 100 hours of community service had been imposed on the plaintiff and secondly that he had been convicted of charges under s 128A(1)(b) Insolvency Act 1967. The Statement incorrectly recorded however that the charges on which the plaintiff was convicted related to an offence of failing or neglecting to answer truthfully any questions put to him at any examination. These charges in fact relate to s 128 (1)(b) Insolvency Act 1967 and not s 128A(1)(b).

[8] The relevant parts of these offence sections of the Insolvency Act 1967 read:

> **128 Summary offences**
>
> (1) Every person who is adjudged bankrupt commits an offence and is liable on summary conviction to imprisonment for a term not exceeding [12 months] who-
>
> …….
>
> (b) Refuses or neglects to answer fully and truthfully all proper questions put to him at any examination held pursuant to this Act; or
>
> …….
>
> **128A Offences by undischarged bankrupts in relation to management of companies**
>
> (2) Every person who is adjudged bankrupt and who-
>
> (a) Acts as a director of a company; or
>
> (b) Fails without reasonable cause to comply with section 62 of this Act,-
>
> commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 2 years or on summary conviction to imprisonment for a term not exceeding [[12 months]] or to a fine not exceeding [[$5,000]].
>
> **62 Prohibition of bankrupt entering business**
>
> (1) An undischarged bankrupt must not, without the consent of the Assignee of the Court either directly or indirectly,-

(a) enter into, carry on, or take part in the management or control of, any business:

(b) be employed by a relative of the bankrupt or by any company trust, trustee, or incorporated society, that is managed or controlled by a relative of the bankrupt.

[9] Then in letters written on 7 February 2007 from the plaintiff and 22 February 2007 from the plaintiff's solicitor to the Ministry and the Minister of Economic Development respectively, complaints over the error in the Statement were made.

[10] By letter dated 1 March 2007 from the Ministry to the plaintiff's solicitors the Ministry -

a. Admitted that it published the Statement on the website;

b. Admitted that the statement contained an error in that the charges on which the plaintiff was actually sentenced were for whilst bankrupt and without consent:

i. Taking part in the management or control of a business and

ii. Being employed by a relative.

c. Sought to explain its conduct:

i. As an honest and genuine mistake by the NEU administrator updating statistics that was not intended to prejudice the plaintiff;

ii. By claiming that the offences that the plaintiff was actually convicted of were in any event more serious than what it had initially published.

[11] This drew a response of 7 March 2007 from the plaintiff's solicitors expressing the plaintiff's dissatisfaction with what he explained as the Ministry's refusal to take any responsibility for its actions. This letter suggested that by publishing on the internet that the plaintiff had been convicted of a dishonesty offence the plaintiff's reputation had been severely and unjustifiably damaged and that this would not have occurred if the Ministry had published the correct information. It was said that the plaintiff had already suffered significant pecuniary loss as a result of the Ministry's actions and that it was likely this would continue.

[12] The Ministry responded in a letter dated 9 March 2007 in which it denied that there was any basis for the plaintiff's concerns and stated that the proceedings which had been threatened would be defended.

[13] Sometime after the plaintiff drew the Ministry's attention to the error, the NEU rectified this by posting the correct information on the website.

[14] In his statement of claim the plaintiff now claims damages against the defendants and although these damages are not quantified it would appear they are likely to be substantial. Compensatory and punitive damages are sought on the basis that the persons with whom the plaintiff says he would have entered into business arrangements at the time noticed the incorrect report of his convictions on the website and cancelled any further business dealings with the plaintiff. The statement of claim at para 5 pleads that the Statement is defamatory in that it:

> (a) tends to lower the plaintiff in the estimation of right thinking members of the public generally;
>
> (b) is a false statement about the plaintiff to his discredit; and
>
> (c) contains the imputation that the defendant is dishonest.

Preliminary matter

[15] At the outset of the hearing before me Mr Jeffcott counsel for the plaintiff raised a preliminary matter. This was the plaintiff's objection to any consideration of a supplementary affidavit of Shane Tyrone Keohane dated 10 September 2007, filed only the day before this hearing in support of the plaintiff's opposition to the present application. This affidavit was obviously filed late and Mr Jeffcott contended it should not be read. And in any event, he maintained that the substance of the affidavit was not relevant to a consideration of the present application.

[16] This affidavit is short. Essentially it does nothing more than annex a copy of a standard letter dated 11 October 2002 from the Official Assignee to the plaintiff at the outset of his bankruptcy and a copy of the sentencing judgment of the plaintiff by Judge D J McDonald at the District Court at Whangarei on 28 July 2006.

[17] In my view these documents are clearly relevant to the present application. Although they have been provided to the Court late, their contents will have been well known to the plaintiff and he is not prejudiced by their being considered. In addition, in my view they cannot be seen as contentious and should be read. For these reasons, a direction to this effect was made at the outset of the hearing.

Counsels arguments and my decision

[18] The plaintiff's application seeks summary judgment as to liability only pursuant to r 137 High Court Rules which states:

> **[137 Summary judgement on liability**
>
> The Court may give judgment on this issue of liability, and direct a trial of the issue of amount (at such time and place as it thinks fit), if the party applying for summary judgment satisfies the Court that the only issue to be tried is one as to the amount claimed.]

[19] The application relies on r 136 which in part provides:

> (1) The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of any such claim.

[20] The legal principles with respect to summary judgment under this rule are well settled. It is clear that the onus is on the plaintiff to satisfy the Court that the defendant has no defence to the claim – *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

[21] As to this, *McGechan on Procedure* at paragraph **HR 136.03** states in part:

> Summary judgment will not be granted where there is a credible dispute since questions of credibility can be determined only when a witness is in the witness box on oath and cross-examined, and the summary judgment procedure does not permit that method of testing allegations: *Busch v Dive & Marine Tours Limited* 19 February 1987 Hillyer J High Court Auckland CP 1587/86.

[22] In *Towers v R and W Hellaby* (1987) 3 NZCLC 100, 064 the Court said that the critical question under r 136 will generally be whether the Court is satisfied that

the plaintiff's case is unanswerable and the Court will not reach that conclusion if it can see an arguable defence.

[23] Before considering the principal defence to the plaintiff's claim put forward by the defendants it needs to be noted that at the hearing before me Ms Aldred for the defendants raised an issue as to whether in light of the Crown Proceedings Act 1950 the Ministry was properly named here as a defendant. Mr Jeffcott in response referred to s 14(2) of that Act. Before me, Ms Aldred did not pursue the point further and I need say nothing more on this aspect.

[24] Turning now to the main defence advanced by the defendants, this was outlined in their notice of opposition to the present application as a defence of truth relying on s 8(3) Defamation Act 1992. Section 8(3) provides that in proceedings for defamation 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; …

[25] These provisions broadly reflect the common law requirement that to rely on a defence of truth the defendant must prove the truth of the "sting" of the allegations, but it will not defeat the defence if he/she cannot prove the truth of some minor details in the allegations which are immaterial as far as injury to the plaintiff's reputation is concerned – see *Todd on Torts* 4th Edition para 17.9.02.

[26] Section 8(3) was considered by the Court of Appeal in *Pepi Holdings Limited v BMW New Zealand Limited* (25 August 2007, CA 21/97). There, the defendant alleged that a car dealer had wound back the odometers on imported cars. In fact the dealer had knowingly sold cars with odometers wound back by someone else. The Court of Appeal found however that the allegation was not materially different from the truth. It said that it accepted that once knowledge by the dealer of the odometer tampering was established, there was no material additional sting in the allegation that the dealer had wound back the odometers themselves.

[27] At page 37 of that decision the Court of Appeal said:

> In our view, importing or offering for sale cars known to have had their odometers rewound is not materially different from an allegation of rewinding. In both cases the importer is party to the deception in New Zealand, which is based upon the rewinding. The suggestion that the importer was directly responsible for the "clocking" is not materially different from the truth.

[28] And in *Lange v Atkinson* (1998) 3 NZLR 424 at 435 the Court of Appeal said that:

> There 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.

[29] In the present case, although the defendants acknowledge that the information posted on the NEU website prior to rectification was incorrect in that it wrongly recorded the description of the offence of which the plaintiff had been convicted (but not the penalty nor the provision under which the plaintiff was convicted) nevertheless they argue summary judgment should be refused here as the "sting" of the incorrect statement is not materially worse or different to the "sting" of the truth.

[30] Before me counsel for the defendants appeared to concede that the defendants do not dispute that the incorrect statement as to the plaintiff's offending did give rise to an imputation of dishonest conduct. However the defendant's position is that, had the error not occurred and the correct information appeared on the NEU website from the outset, the accurate statement of the plaintiff's convictions would also have contained an imputation that the plaintiff had acted dishonestly.

[31] In considering this defence, I must remind myself that the present application by the plaintiff is one for summary judgment in which the plaintiff has the onus of satisfying the Court that his claim is unanswerable and the defendants have no defence to the claim. That said, for reasons I will now outline, I am satisfied that the defendants have done enough here to show that they may well have an arguable defence such that this matter should proceed to trial and a full testing of all relevant evidence.

[32] I reach this conclusion for the following reasons:

a) The eight offences for which the plaintiff was actually convicted under s 128A Insolvency Act 1967 provided for maximum imprisonment terms of two years if convicted indictably or 12 months or to a fine not exceeding $5,000 if convicted summarily.

b) The offence under s 128(1)(b) Insolvency Act 1967 of refusing to answer all proper questions put to a bankrupt at any examination held pursuant to the Act is a summary offence only and provides for a maximum penalty on summary conviction of 12 months imprisonment.

c) In addressing the plaintiff's offences under s 128A Insolvency Act 1967 in his sentencing judgment dated 28 July 2006, District Court Judge D J McDonald at para [19] noted:

> (19) Parliament, by way of maximum penalty of 12 months imprisonment, has regarded this type of offending generally as serious. In my view it is serious because of the absolute obligations on a person when he is declared bankrupt not to engage in any type of conduct which may lead to further loss. That is why the Insolvency Act does not allow a person to enter into business on his own account while an undischarged bankrupt or use the vehicle of a company or some other legal entity to trade in effect for him with him as the driving force behind it.

d) And, in considering the plaintiff's relevant conduct here, Judge D J McDonald in that judgment went on to find:

> (6) On 18 December 2002 you (the plaintiff) filed a statement of affairs with the Insolvency and Trustee Service. You would have, at that time, had explained to you what you were allowed to do and what you were not allowed to do and as Mr Smith in my view correctly submitted, you would have been told that you were not to be involved in any way, without the leave of the Official Assignee, with companies either as a director or a manager or a primary mover. At no time did you apply to the Official Assignee to be involved in any way in any of the five companies that up until the time of your bankruptcy, as your counsel submitted, were in effect your companies.

and

(8) On 28 July 2003 you were again spoken to by the Official Assignee and again informed of the restrictions placed upon you. You were asked about your family trust and you stated that you took no active part in the managing or the running of the trust affairs.

and

(9) I have been referred in the summary to a great deal of correspondence and emails which tends to suggest that you were involved in the running of the companies and in effect controlled them. You dispute that …

and

(10) … I had, quite independent and before seeing that brief, (of Mr Halsall), come to the view from the summary of facts and from submissions of Mr Jeffcott that the defendant was continuing to be involved heavily in the running of these five companies. As Mr Jeffcott said the companies only real assets were the information that the defendant had in his own head .. therefore for the defendant to now say that he was not involved in the running of the companies, given that submission, has somewhat of an unreal air about it.

and

(11) On 9 February 2002 he was interviewed by the Official Assignee again and he admitted to them the influencing of decisions concerning the running and management of Wayby…..

(e) Given these findings of Judge D J McDonald, and the conviction entered against the plaintiff of the eight individual offences in my view it is reasonable to suggest that necessarily here the plaintiff had dishonestly misrepresented what he was doing and his status at least to the Official Assignee if not also to persons with whom he was conducting business. As I see it, a reasonable argument exists therefore that even an accurate statement of the plaintiff's convictions on the NEU website would also have carried with it an imputation that the plaintiff had acted dishonestly.

(f) The erroneous Statement showed only one transgression of the law on the part of the plaintiff and in respect of a summary offence whereas in actual fact he pleaded and was found guilty on eight separate charges.

(g) As I have noted above the offences of which the plaintiff was actually convicted could have been brought indictably or summarily and they carried potentially more serious penalties than the offence that was the subject of the initial inaccurate report.

(h) With regard to issues of "dishonesty" as I have noted above at paragraph [32](d) Judge McDonald noted that the plaintiff disputed having been involved in running the five companies in question. The Judge went on to say however that he had reached the view from the summary of facts available and from the submissions of the plaintiff's own counsel that the plaintiff was in fact continuing to be heavily involved in the running of those companies. From this as I see it, questions must arise as to whether the truth of the matter here is that the plaintiff throughout has failed to be entirely honest, a somewhat similar allegation to that contained in the incorrect website statement.

(i) In my view, reinforcement of the need for this question to be addressed, must come from paras [8] and [10] of the decision of Judge McDonald, where it seems that the Learned Judge found that the plaintiff clearly had been less than candid with the Official Assignee.

(j) The defendants seem to accept that the NEU and the Ministry in publishing the offending part of the Statement, got it wrong here. But they do suggest it was purely an administrative error of little real consequence to the plaintiff as the imputations of the Statement especially as to dishonesty of the plaintiff in terms of s 8(3) Defamation Act 1992 were "not materially different from the truth". This is for the Court ultimately to decide at trial after a proper testing of all the evidence. In my view that is what should occur here.

(k) Finally, as *McGechan on Procedure* at para HR 135.01 acknowledges:

> … it seems improbable that a plaintiff would seek summary judgment in a defamation, malicious prosecution, or false imprisonment claim. In most cases, oral evidence would be needed to decide such matters.

The reasoning behind this suggestion no doubt is that the nature of a cause of action in defamation is such that summary judgment is unsuitable because of the likelihood of disputes of fact and reliance on credibility, and possibly also the potential for a trial by jury which would be negated if the action was decided by a Judge summarily. Whilst summary judgment may be appropriate in certain claims for defamation, in my view this is not such a case. Factual disputes may well arise here where cross-examination will be necessary to support or undermine the case of one or other party.

[33] Turning now to consider the relevant parts of the plaintiff's evidence provided in support of his summary judgment application he has provided affidavits of two persons with whom he had business dealings, Mr B D Harkin and Mr A F Reardon. For the purposes of the present summary judgment application, it is arguable that the evidence contained in these affidavits is of little assistance however because significantly Mr Harkin and Mr Reardon do not appear to indicate that, in forming the judgments they did, they were aware of the actual offences of which the plaintiff had been convicted. It may not be possible therefore for the plaintiff to contend, as he endeavours to do, that the incorrect website Statement caused Mr Harkin and Mr Reardon to suspect him of dishonest conduct whereas publication of the correct details would not have given rise to the same suspicions. And the affidavit of Ms V A Read filed by the plaintiff is of questionable relevance. It adds nothing as I see it.

[34] Indeed to summarise the position, in my view there is a reasonable argument open to the defendants that an examination of the eight offences for which the plaintiff was actually convicted indicates first, that a necessary ingredient of those offences was also dishonesty and secondly that they carried at least as great an

imputation of dishonesty as the incorrect statement of failing to truthfully answer questions put to the plaintiff at examination. As I have noted, those eight offences carried greater penalties than the single offence described in the Statement, and in my view it is arguable that there can be no suggestion that the "sting" of the allegedly defamatory statement was materially different to the imputations contained in the later accurate report of the plaintiff's convictions.

[35] For all these reasons I am satisfied that the plaintiff has been unable here to satisfy the onus on him to show that the defendant has no defence to his claim.

[36] The present application for summary judgment is dismissed.

[37] On the question of costs *McGechan on Procedure* at HR 142.08 notes that costs on unsuccessful summary judgment applications should generally be reserved. *NZI Bank Ltd v Philpott* (1990) 2 NZLR 403. Rule 48E(3) appears to suggest that this approach is appropriate in the usual case. This is such as case. Costs are reserved.

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D I Gendall
Associate Judge