

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

CIV 2007 412 1064

BETWEEN CENTRAL & LAKES REALTY
 LIMITED
 Plaintiff

AND MICHAEL JOHN BAIN
 Defendant

Hearing: 26 June 2008

Appearances: L A Andersen for Plaintiff
 T Shiels for Defendant

Judgment: 2 July 2008

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

Background

[1] In December 2007 Ms Kelly was selling her property at Earnsclough Road, Alexandra. She engaged the plaintiff, the then local L J Hooker agent in Alexandra, to act as her real estate agent.

[2] Shortly after she was approached by Mr Fitzgerald from another agency. Mr Fitzgerald informed her someone wanted to buy her house, but did not want to deal through the L J Hooker agency. A short time later she was informed by an agent of the plaintiff that she would get a letter from the person who wanted to buy her house. Mr Bain's name was mentioned. On a later date she received a letter from the defendant.

[3] The letter confirmed Mr Bain's interest in purchasing the property, that he had viewed it at an Open Home, and wished to make another inspection. He then wrote:

I am aware that you have the property listed with L J Hooker exclusively and therein lies the problem that I have no wish to deal through them, as I personally will not deal with a company that lacks honesty and moral and professional integrity

[4] Subsequently, Mr Bain did purchase the property.

[5] The evidence is that at this time Mr Bain was estranged from his wife. His wife is a real estate sales person, then engaged by the plaintiff.

The proceeding

[6] It was filed on 21 December 2007. It says the plaintiff carries on the business of a real estate agent in Alexandra and trades under the trade name of "L J Hooker". It refers to Mr Bain's letter and quotes that part I have referred to above. It then says:

6. The said letter defamed the plaintiff as in its natural and ordinary meaning it meant that the plaintiff is not to be trusted as it is dishonest and lacks moral and professional integrity.
7. By publication of the letter, the plaintiff has been greatly injured and his reputation has been brought into scandal, odium and contempt.

[7] By way of relief the plaintiff claims:

A declaration pursuant to s 24 Defamation Act 1992, that the defendant is liable to the plaintiff in defamation by stating in the letter to the vendor of the property at Earnsclough Road, Alexandra that the plaintiff lacks honesty and moral and professional integrity.

[8] In a statement of defence Mr Bain, in essence, admits the plaintiff's pleading, save for that contained in paragraphs 6 and 7 of the statement of claim.

[9] As a further defence, Mr Bain claims that the publication was made on an occasion of qualified privilege because:

- (a) The recipient of the letter was seeking to sell her property.
- (b) He was considering purchasing it and indeed did purchase the property.
- (c) He had an interest and/or duty to communicate to the recipient that he was not prepared deal through or obtain information and access, or make a possible offer through L J Hooker.
- (d) The recipient had a corresponding interest in being aware that a potential purchaser was not prepared to deal through, or obtain information and access, or make a possible offer, through L J Hooker.

[10] The plaintiff has applied for summary judgment upon its claim for a declaration. It is supported by an affidavit of Mr Sutherland, a director of the plaintiff.

[11] Mr Sutherland saw Mr Bain's letter on about 12 November 2007. He noted it had been copied to Mr Fitzgerald (the agent from another agency), and also to the Real Estate Institute. He says Mr Bain has made a very serious allegation which "has the potential to seriously damage the plaintiff's reputation and its business". Mr Sutherland considers there was no basis for the allegations and he saw them as an attempt by Mr Bain to get at his wife by attacking her employer.

[12] Ms Kelly views the letter differently. She stated:

I thought Mr Bain's letter was silly and I did not really take it seriously.

[13] Ms Kelly said she paid a commission to L J Hooker on the sale. She had used L J Hooker to purchase the property she and her partner currently own. Her partner had also sold his previous house using the services of L J Hooker. She concludes:

Nothing in the letter would stop me dealing with L J Hooker or anyone associated with L J Hooker again. I regarded it as a silly letter written in the

context of a matrimonial split up. I did not think any worse of L J Hooker or any person or company associated with L J Hooker after receiving the letter.

Principles

[14] It is available to the plaintiff to seek summary judgment upon its claim for defamation seeking a declaration it has been defamed.

[15] The onus is on the plaintiff to establish there is no defence to its claim.

[16] The real issue here is whether that paragraph of Mr Bain's letter was defamatory. There has been no issue that the letter was published nor (defence arguments notwithstanding) that the plaintiff was the entity about whom the comments were made.

The plaintiff's case

[17] It is that Mr Bain's letter in its natural and ordinary meaning meant that the plaintiff is not to be trusted as it was dishonest, and lacked moral and professional integrity.

[18] Mr Andersen refers me to two authorities in support of his submission that allegations of dishonesty and lacking moral and professional integrity are defamatory. In the first of those, *Lloyd v David Syme & Company Limited* [1986] AC 350 (PC) a well known cricketer successfully sued when it was alleged he had dishonestly and for gain rigged the result of a one day cricket match. The other, *Truth (NZ) Limited v Holloway*[1961] NZLR 22 (PC) concerned an allegation of dishonesty against a Cabinet Minister. Both support Mr Andersen's submission.

Mr Bain's case

[19] It is supported by an affidavit from Mr Bain dated 17 April 2008. In it he notes the local L J Hooker business is now operated by another and separate entity, i.e., no longer by the plaintiff.

[20] There are four matters raised as defences:

Identification of the plaintiff

[21] Mr Bain states he is not aware of any business currently operated by the plaintiff. He does not know if Mr Sutherland still lives in Alexandra or Central Otago.

[22] Mr Shiels' first submission is that there is no evidence that Ms Kelly interpreted Mr Bain's letter as applying to the plaintiff. There is a possible inference she could have interpreted it as identifying the business of the plaintiff, but that would not be sufficient.

[23] He submits the test is whether the Court could find an appropriate identification was made. Further, in the context of a summary judgment application where the publication is to one person, the test should be whether the evidence proves that the appropriate identification was made.

[24] Mr Shiels submits that there is not sufficient evidence that Ms Kelly identified the plaintiff (as opposed to the name "L J Hooker") as the subject of the statement.

Qualified privilege

[25] Mr Shiels submits that whilst defences of truth and honest opinion require proof by a defendant that the relevant facts were substantially true, the defence of qualified privilege is available in limited circumstances, even though a defendant's words concerning the plaintiff may be both defamatory and untrue.

[26] That general proposition is well documented in case law authority. The defence of qualified privilege is not available unless, in this case, Ms Kelly had a legitimate interest to be informed, and Mr Bain had a corresponding duty, or interest, to impart the information.

[27] Mr Bain has to prove that the occasion is one of qualified privilege. In the context of this summary judgment application he needs to show there is an arguable case that the occasion is one of qualified privilege. In this case he was contemplating purchasing Ms Kelly's property. He did not wish to deal through "L J Hooker". The presence of L J Hooker in the framework may have affected the possibility of a sale. In those circumstances Mr Bain says he had a proper interest in the conduct of his own affairs in communicating to Ms Kelly that he might be interested in purchasing the property, but was not prepared to deal through the agent she had appointed. It follows that Ms Kelly had a corresponding interest to receive such a communication.

Pecuniary loss

[28] Section 6 of the Defamation Act 1992 requires that proceedings for defamation brought by a body corporate shall fail unless a body corporate alleges and proves that the publication has, or is likely to cause, pecuniary loss to it.

[29] In its proceeding, the plaintiff has pleaded Mr Bain's letter "is likely to cause pecuniary loss to the plaintiff's business".

[30] Mr Shiels submits the damage, or likelihood of damage, must arise from 'the publication'. "Publication" he says is not just the words used, but also the nature of the publication and identity of the recipient. Mr Shiels adds that it is not sufficient that the words could, or even would, cause pecuniary loss if published on a different occasion to a different person, or to a wider audience.

[31] Mr Shiels refers to the lack of evidence of loss, and submits that an assumption of a likelihood of loss is not plain from the evidence available to the Court. Further, it is clear the plaintiff no longer trades the L J Hooker business in Alexandra. Apparently, there is no evidence that the plaintiff trades in any way at all now.

Remedy and costs

[32] Mr Shiels says it must be viewed in the context wherein Ms Kelly did not keep the letter, but handed it to a L J Hooker salesperson, she having been informed that Mr Bain's estranged wife worked for L J Hooker. Ms Kelly was disparaging of the letter. In that context, Mr Shiels submits the defamation proceedings, especially in the High Court, are a quite disproportionate response.

[33] Mr Shiels submits even if the alleged defamation is proved, it will not follow that solicitor/client costs will be paid.

Discussion

[34] The defence that the plaintiff has not been identified in Mr Bain's letter to Ms Kelly relies upon the principle that malicious statements which injure a man's business, but do not disparage his reputation, are not actionable in defamation. Therefore, it is not enough that a plaintiff proves that someone who read the matter complained of linked the publication to the plaintiff's business. The plaintiff must prove a link between the publication and the plaintiff.

[35] Mr Shiels' point is that Mr Bain's letter referred to 'L J Hooker' and not to the plaintiff company by name.

[36] I do not accept that Mr Bain's letter does not identify the plaintiff. Also, it overlooks the fact that Mr Bain's letter stated he would not deal with "a company" that lacked honesty, morality and professional integrity. The statement is about the actions and attitudes of those associated with the L J Hooker name in connection with the sale of the particular property that Mr Bain wished to inspect. There can be no doubt that his words are about the persons conducting the business operating under the trade name L J Hooker in a modest sized town located in the middle of Central Otago.

[37] Nor do I hold any store by a claim that a defence of qualified privilege is available. There is an absence of authority to support a claim in the circumstances

identified in this proceeding. That does not mean such a defence is excluded. The categories of qualified privilege are not closed. Therefore, it is of little moment that no case on similar facts can be identified. The examples provided by the First Schedule to the Defamation Act are not intended to be exhaustive. Section 16(3) of the Act make that clear.

[38] A defence of qualified privilege must relate to a special occasion between the parties in a situation where the publication is to a person who has an interest, or a duty, to receive it. It is implied thereby that it does not give rein to defamatory comment about a property vendor's choice of real estate agent. In actuality, Mr Bain did not want to deal with L J Hooker because his wife was connected to that company. No duty or interest can be implied in this situation which gave Mr Bain the liberty to write as he did about the plaintiff. A defence of qualified privilege is not arguable in these circumstances.

[39] The primary issue for argument upon the plaintiff's summary judgment application concerns s 6 of the Defamation Act. By that section defamation proceedings shall fail unless a body corporate proves it has, or is likely to cause pecuniary loss.

[40] Mr Andersen submits that all the plaintiff need do is to establish that the defamatory statement is aimed at the plaintiff's business reputation with the likely consequence that the plaintiff's business will suffer. He submits it is not necessary for a plaintiff to call specific evidence to say that the business is likely to suffer because such effect is obvious from the defamatory statement, bearing in mind the position of trust real estate agents are required to have from their clients in order to perform their task of selling a house.

[41] I infer from the manner in which Mr Andersen has addressed this point, that there is no available proof of actual pecuniary loss.

[42] Clearly, Mr Bain's statement "was a direct reflection upon(the plaintiff's) capacities and propensities in the way in which it went about its business". (*Rural News Limited v Communications Trumps Limited* (HC Auckland AP404/167/00,

Fisher J at [14]). That having been established it is open to a Court to draw proper inferences about whether that publication is likely to cause pecuniary loss.

[43] I am mindful this is a summary judgment application. The plaintiff does not claim damages, rather a declaration that Mr Bain is liable in defamation. The plaintiff's approach is that it is entitled to a declaration of defamation because the Court may draw a proper inference of likelihood of pecuniary loss without the need for evidence to be called at all.

[44] This Court is well used to the exercise of drawing inferences from affidavit evidence alone. But, I consider the Court should be reluctant to conclude there is a likelihood of pecuniary loss when:

- (a) There is evidence from Ms Kelly, the recipient of the letter, that made it clear that it should not affect her ongoing relationship with the plaintiff .
- (b) That the recipient of the letter considered it was silly after she had been informed of reasons to explain its being sent to her.
- (c) There is evidence the plaintiff no longer trades as L J Hooker in Alexandra, and has not done so for some time.
- (d) More than seven months has passed since the date of the publication, in which period no evidence of pecuniary loss has been provided.
- (e) Although Mr Bain's letter referred to it being copied to two others, there is no evidence of it having been sent to those persons.
- (f) Notwithstanding the lapse of time there is no evidence of any publication other than to Ms Kelly.

Summary

[45] Proceedings for defamation shall fail unless pecuniary loss has occurred, or is likely to occur. Although a Court can in proper circumstances be invited to draw proper inferences concerning the latter consequence (the likelihood of loss) the Court should be reluctant to draw that inference when there is evidence there was no loss and, therefore, any assumption of likelihood is wrong.

[46] I am satisfied there is an arguable case that a claim of defamation will not succeed.

Judgment

[47] The application for summary judgment is dismissed.

[48] This is a case where costs ought to be fixed once the merits are determined following trial.

Solicitors

David Polson Lawyer, Dunedin for Plaintiff

Staley Cardoza, Dunedin for Defendant