IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-2100

IN THE MATTER OF	The Defamation Act 1992
BETWEEN	JOHN EVANS DORBU Plaintiff
AND	GENERAL FINANCE LIMITED First Defendant
AND	VEDA ADVANTAGE (NZ) LIMITED Second Defendant
AND	MORTGAGE ADMINISTRATION SERVICES LIMITED Third Defendant
AND	JAMES RODERICK LOCKIE Fourth Defendant

Hearing: 11 April 2008

Appearances: Mr S Judd for plaintiff
No appearance for second defendant
Mr S O McAnally for first, third and fourth defendants

Judgment: 30 April 2008 at 4 p.m

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Counsel:

S R Judd, Auckland – simon@simonjudd.com
Keegan Alexander, P O Box 999, Auckland – smcanally@keegan.co.nz
DLA Phillips Fox, P O Box 160 , Auckland - ian.law@dlaphillipsfox.com

Background

The proceedings

[1] In his amended statement of claim the plaintiff says that the second defendant published on its website certain credit information to the effect that the plaintiff had defaulted in his obligations to pay $8,725 to the third defendant. The plaintiff says that the publication of that material occurred at the request of the first and or third and or fourth defendant.

[2] The plaintiff alleges that the publications were defamatory in that they tended to lower his reputation and the plaintiff says that the publications had the following meanings:

a) The plaintiff had defaulted on his obligations to pay an undisputed debt;

b) The plaintiff is not credit worthy;

c) The plaintiff is a credit risk;

d) The plaintiff is not capable of managing his financial affairs;

e) By identifying the plaintiff as a lawyer who had defaulted in his obligations, the words meant that the plaintiff was not a competent lawyer or could not be trusted to act on the affairs of others as a lawyer.

[3] In paragraph 9 he pleads:

> 9. That, in addition to their natural and ordinary meaning, the words published by the defendants implied "that the plaintiff as a barrister and a commercial and corporate law consultant specialising in international tax, insurance and corporate law is not competent or cannot be trusted to assist in the financial affairs of his clients (amended statement of claim, para 9, CBD 3);

[4] Under 'particulars of innuendo' the plaintiff said:

> This defamatory meaning would be known to clients and potential clients of the plaintiff and the plaintiff's colleagues within the legal profession including solicitors, barristers and Judges who are aware of the plaintiff's practice.

The defence

[5] The defendants plead justification or truth in that they say that it was a fact that the plaintiff failed to meet the debts that were published on the website.

[6] The defendants say that the alleged defamatory words do not bear the innuendo which the plaintiff attributes to them in that they do not affect his reputation regarding his competence as a lawyer. Importantly, for the purposes of this application, the defendants say that even if the words bear the innuendo alleged by the plaintiff they are not defamatory of him due to his reputation regarding his competence as a lawyer being bad generally:

> … such reputation being evidenced by, but not limited to complaints to the Auckland District Law Society in respect of the plaintiff's competence.

The present application

[7] The First Defendant, Second Defendant and Third Defendant ("the defendants") have applied for orders that a non-party to the proceeding, Auckland District Law Society ("the ADLS"), provide discovery of:

> ..any documents pertaining to investigations of the Plaintiff under the Law Practitioners Act 1982...

[8] In summary, the defendants say:

> a) By the plaintiff's own admission, ADLS is in possession of documents pertaining to such investigations. Correspondence from ADLS confirms this;
>
> b) Such documents are relevant to this proceeding because, having put his professional reputation in issue, the plaintiff has entitled the defendants to discovery of documents that might set in motion a line of inquiry leading to the discovery of:
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> (i) Specific instances where the plaintiff's practice of the law, particularly as a barrister or international tax, insurance and corporate law advisor, has been incompetent, and/or

(ii) Evidence that establishes that the plaintiff is, in fact, incompetent in the areas of practice put in issue by him; and

c) That orders for non party discovery against ADLS are necessary because:

(i) ADLS is not at liberty to disclose the documents without such orders, and

(ii) The plaintiff has refused to discover the relevant documents himself.

[9] In his submissions, Mr McAnally described the plaintiff's claim in the following way:

> While the plaintiff's original claim for general damages of $5,000,000.00 has been moderated somewhat, the plaintiff now advances a claim for substantial damages of $500,000.00 plus special and punitive damages. It is apparent from the statement of claim that this significant claim for general damages is said to be justified by the additional damage to the plaintiff's professional reputation. In particular, it is said that the innuendo contained in the alleged defamatory words would be known to clients of the plaintiff, his colleagues within the profession including solicitors, barristers and judges who are aware of his practice (amended statement of claim, page 4, CBD 4).
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> The first, third and fourth defendants say that, even if defamatory words have been published and they do bear the innuendo alleged, the plaintiff's reputation as a lawyer is bad generally: defence, para 9, CBD 14 That being so, they may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to show that the plaintiff's reputation, in respect of his competence as a lawyer, is bad generally: s 30 of the Defamation Act 1992 ("the Act").
>
> Indeed, if the defendants could prove that the plaintiff is, in fact, incompetent then it would be open to them to plead truth in response to the alleged innuendo.

[10] It is also necessary to mention that at an earlier stage in the proceedings, the defendants administered interrogatories to the plaintiff. He answered them on oath in December 2007 and in them he said that on one occasion one of his bills of costs was revised by the ADLS and on another occasion a complaint made to the ADLS by a member of the judiciary was considered by the ADLS and dismissed.

The rule

[11] The rule under which the defendant brings the present application is High Court Rule 302 which provides:

302 Order for particular discovery against non-party after proceeding commenced

(1) This rule applies if it appears to the Court that a person who is not a party to a proceeding (the person) may be or may have been in the control of 1 or more documents or a group of documents that the person would have had to discover if the person were a party to the proceeding.

(2) The Court may, on application, order the person –

(a) to file an affidavit stating –

(i) whether the documents are or have been in the person's control; and

(ii) if they have been, but are no longer, in the person's control, the person's best knowledge and belief as to when they ceased to be in the person's control and who now has control of them; and

(b) to serve the affidavit on a party or parties specified in the order.

(3) An application for an order under subclause (2) must be made on notice to the person and to every other party who has filed an address for service.

(4) The Court may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made.

The Notice of Opposition and plaintiff's submissions

[12] In his Notice of Opposition the plaintiff stated:

1. There is no evidence that the Law Societies may have or may have had any documents in their possession that a person would have had to discover if the person were a party to the proceeding.

2. The orders sought are not necessary.

3. To make the orders sought would not tend to secure the just, speedy and inexpensive determination of the proceeding.

[13] Mr Judd, in his submissions, developed the point that the documents were not discoverable because they were not relevant to the proceeding. It is that aspect of the matter which I shall next discuss.

[14] He also submitted:

> 3. The plaintiff's submission is that there is no proper basis on the pleadings or proper evidential foundation for the orders sought and that this application is a "fishing expedition": see *Australian Mutual Provident Society v Architectural Windows Ltd* (1986) 2 PRNZ 510.

[15] I will be guided by the following summary contained in *McGechan on Procedure*:

> HR302.02 Jurisdictional requirements
>
> Jurisdictional requirements are the: (1) Grounds for belief that a non-party has or had documents that would be discoverable if the person was a party: (2) That the order is necessary when it is made.

Relevance of documents in question

[16] The defendants contend that there is a relevant group of documents: that is, documents relating to a complaint made against the plaintiff and also a cost-revision which the ADLS undertook with respect to a bill or bills of costs which the plaintiff rendered.

[17] The defendants say that documents in these classes are relevant because the plaintiff has put in issue his reputation as to competence and/or trustworthiness, as a barrister and international tax, insurance and corporate law consultant.

[18] Before I deal with issues of relevance, I need to deal with Mr Judd's submission that there is no evidence that relevant documents of the kind which the defendants seek actually exist. But there is no doubt that there will be documents in

existence which relate to the two ADLS proceedings that I mentioned in paragraph [16]. The fact that the two matters actually occurred was accepted by the plaintiff in answers to interrogatories.

[19] For the plaintiff, Mr Judd made a number of complaints about the state of the pleadings but in my view, for present purposes, the plaintiff's reputation is in issue. Mr Judd said that the statement of defence only sets out matters of opinion about the plaintiff. But the state of a persons reputation is an issue of fact which can be proved like any other fact.

[20] Mr McAnally's submission concerning the way in which a party can prove reputation was as follows:

> 19. Historically, there was only one way to prove generally bad reputation. There are now two:
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> (a) The first, as was the means available before 1992, is to call witnesses to speak of the plaintiff's generally bad reputation; and/or
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> (b) As introduced by s 30 of the Act, to prove specific instances of misconduct which, if shown to be generally known, could found an available inference the plaintiff has a generally bad reputation in the relevant aspect.
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> 20. "Generally known" requires that the bad reputation be known by the public or the relevant section of it. See, for example, *Manning v TV3 Network Services Ltd* (High Court, Christchurch, CP 143/99, 25 February 2002, Master Venning). In this case the relevant sector of the public are the plaintiff's clients, potential clients, lawyers and judges who are aware of the plaintiff's practice.
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> 21. The records held by ADLS may provide the defendants with information that:
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> (a) Establishes, or provides evidence of, specific instances of misconduct by the plaintiff;
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> (b) Establishes, or provides evidence of, relevant people:
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> (i) Having made such complaints due to their witnessing such specific instances of misconduct or their perception of the plaintiff's competence (i.e his reputation in the relevant aspect), or
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> (ii) Having supported such complaints, or provided evidence in the course of such investigations, due to,

> inter alia, their perception of the plaintiff's competence.

[21] Section 30 of the Defamation Act 1992 states:

> 30 Misconduct of plaintiff in mitigation of damages
>
> In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

[22] Access to the ADLS papers may assist the defendants at trial to produce evidence of specific instances of misconduct upon which to found an inference of bad reputation. As well, they may potentially assist in enquiries that lead the defendants to further sources of information which prove that the plaintiff has been guilty of misconduct. For both those reasons, the documents are 'relevant'.

[23] No doubt there will be arguments at trial concerning whether such material as emerges from discovery does in fact logically lead to the conclusion that the plaintiff has a poor reputation. The passage of time since any complaint was made, the seriousness of the conduct and the extent of knowledge within the legal profession about the subject-matter will conceivably be material. The fact that a defendant is able to establish bad reputation by proving discrete occurrences of misconduct does not mean that the evidence will be sufficient for that purpose. Section 30 is concerned with the means by which bad reputation may be established. It does not provide that any particular incident of misconduct will establish bad reputation.

[24] Mr Judd sought to counter that line of reasoning by referring to the fact that the complaint by the member of the judiciary was dismissed. With respect, I do not see the question of how the complaint was disposed of by the ADLS as having any bearing upon the matter of whether the documents held by the ADLS are relevant. In the first place, the defendants are not of course bound by the conclusion that the ADLS came to about the alleged misconduct. Secondly, access to the documents relating to the complaint would, inter alia, enable the identification of the judicial officer in question and lead potentially to further enquiries being made of that person about what that person regarded as misconduct on the part of the plaintiff. This is a legitimate use of the process of discovery.

[25] Mr Judd also submitted that such documents as the ADLS might possess relating to the cost-revision could not be relevant. He said:

> The defendants have not suggested that the plaintiff's reputation is bad because he over charges. We know nothing about the cost revision except that the cost revision committee dismissed the complaint. In these circumstances there is no basis for concluding that documents relating to the cost revision could be relevant.

[26] I agree with Mr Judd's submission. The plaintiff in his response to interrogatories accepted that on one occasion one of his bills of costs had been reviewed. The subject-matter of such cost-revisions is the propriety of professional charges. It is conceivable that a practioner's charges could be found to be excessive because the amount charged was so excessive or because the retainer did not justify particular charges. In some circumstances, the unjustified charging could amount to conduct unbecoming or unprofessional conduct. If the ADLS enquiry into the plaintiff's charges revealed such a state of affairs, it could be a relevant circumstance throwing light on his professional reputation. However, in the absence of evidence that explicitly establishes an aspect of misconduct to the plaintiff's charges, it would be unwarranted to view the cost-revision as being relevant to the plaintiff's reputation. Given that the application to review was apparently dismissed, it is unlikely that it involved a case where the circumstances would give rise to possible suggestions of professional impropriety.

[27] A cost revision may be contrasted with a complaint of misconduct (in this case the complaint was apparently laid by a Judge). The subject matter of the Judge's communications with the law society in this case must have been concerned with suggested breaches of professional duty. There is no other appreciable reason why a Judge would communicate with the law society.

[28] Incidentally, the fact that it was a Judge that made the complaint means that it cannot readily be dismissed as vexatious in character.

[29] There is also another dimension to that issue. Mr Judd said that the deliberations of the ADLS were in confidence and that therefore matters raised there could not have affected the wider reputation of the plaintiff.

[30] But access to the documents, as I have attempted to show, may lead to identification of persons who believe they have observed misconduct on the part of the plaintiff and who are able to give their account of matters in these proceedings untrammelled by any restrictions of confidentiality.

[31] Then Mr Judd submitted:

> 21. As the defendants have not pleaded any incidents or other factual matters to support their allegation of bad reputation and have not identified the incident that led to the complaint, there is no basis for concluding that the complaint by the member of the judiciary may be relevant to the proceeding.

[32] I do not accept this submission. The broad test of relevance contained in the *Compagnie Financiere et Commerciale du Pacifique* v *Peruvian Guano Co* (1882-83) 11 QBD SS is the appropriate test to be applied. In a case where a plaintiff's general reputation is in issue, the fact that a Judge made a complaint about him to the ADLS is plainly relevant. Documents concerning such a matter:

> may … either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of this adversary.

[33] Returning to the matters that Mr Judd set out in his submission at para 21 (see paragraph [31] above), I am of the view that there is no requirement that the defendants must set out some factual basis for a plea that the plaintiff has a bad reputation. That in my view would be to confuse pleadings with evidence which might later be adduced in support of the issues that are raised in the pleadings. It is open to the defendants to plead that he has a bad reputation and then, by discovery, embark upon an enquiry as to specific incidents that they might plead in accordance with s 30 of the Defamation Act 1992.

[34] My conclusion is that the defendants have established the necessary base for an assertion that documents relating to the complaint made by a member of the judiciary are relevant. The documents relating to the cost-revision are not.

Is discovery necessary?

[35] As I have noted, the plaintiff's Notice of Opposition stated that the application was opposed on the basis that discovery was not necessary. Necessity is made an express requirement of Rule 302 by sub-paragraph (4).

[36] On the issue of necessity, I intend to be guided by what Barker J said in *T D Haulage Ltd v New Zealand Railways Corporation,(1986)* 1 PRNZ 668 at page 674:

> Accordingly, I consider that this Court can now take the same approach as shown in the English cases and that the rule change means that the *Fletcher Timber* approach no longer applies. The English cases require the Court to consider whether there are other ways for an applicant to obtain the private information and if there are not, how the privacy of the party required to discover can be maintained. In the present case, there is no other way for the plaintiff to acquire the information. Yet, the extreme sensitivity of the documents, plus the possibility that the documents may not be relevant, make safeguards essential.

Are there any other means by which the plaintiff could obtain the documents?

[37] I am not aware of any practical alternative means by which the defendants could obtain the information concerning alleged breaches of professional standards by Mr Dorbu. Such matters are generally not discussed in publications that circulate generally or through the legal profession. There is no other institution to which the defendants could address enquiries about Mr Dorbu and whether there have been any breaches of professional standards on his part.

[38] Professional regulatory bodies such as the ADLS occupy a unique position in that they become repositories of complaints about their members which are submitted to them in the course of discharging their obligations to maintain discipline in the profession.

[39] I consider that this view is reinforced by the consideration that the process of making of complaints and investigation of them by the ADLS is a confidential one. It is therefore unlikely that there will be a wide range of persons who have learnt of the fact that complaints were made about Mr Dorbu and who have kept records

relating to that which the defendant can have resort to for the purposes of mitigation of damages.

[40] My conclusion is that it is necessary to order discovery of the documents.

The submission that the discovery is of a "fishing" nature

[41] There are two judgments that I will refer to which provide guidance on the matter of "fishing" discovery. The first is *T D Haulage Ltd* where, at p 673, Barker J said:

> Subject to the Court's right and duty to restrict oppression which is a separate matter, it is no ground for resisting discovery of documents that may be relevant to categorise the application for discovery as "fishing". Such an accusation is hard to assess when the party making it is the only one who has seen the documents. There seems little point in placing a pejorative label on the normal discovery process. Different considerations may apply to interrogatories, but much discovery is essentially "fishing" as indeed the latter part of Brett LJ's quotation recognises.

[42] The quotation that Barker J had in mind was explained at p 673 of his judgment:

> The words of Brett LJ *in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63, are still apposite today:
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> > "It seems to me that every document relates to the matter in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words `either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences."

[43] Chilwell J considered the topic of "fishing" in the following passage of his judgment in *Australian Mutual Provident Society v Architectural Windows Ltd* [1986] NZLR 190 at 196:

> Fishing
>
> It is clear that the Court will not order discovery or allow interrogatories where the applicant is doing no more than "fishing". The meaning of the term "fishing" in this context has been discussed in a number of cases. Barker J collected several of them in *Re Securitibank Ltd* (No 31) (1984) 1 PRNZ 514. In my view, the description of "fishing" in the authorities cited by Barker J and in other authorities cited by counsel come to this; an applicant is fishing when he seeks to obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or in order to discover circumstances which may or may not support a baseless or speculative cause of action.
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> An instance of the first type is found in *Petchem Ltd v B F Goodrich Chemical Ltd* [1982] VR 485. This understanding of the term "fishing" supplies support for the opinion of Gibbs J (as he then was) in *Sharpe v Smail* (1975) 49 ALJR 130, 133:
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> > An interrogatory cannot be described as fishing if it is directed to obtaining information as to a fact relevant to an issue raised by the pleadings.
>
> That opinion was cited by Barker J in the *Securitibank* case where, rejecting an allegation of fishing, he said:[(1986) 2 PRNZ 510, 516]
>
> > In most instances, subject to any particular criticism of a particular interrogatory, the plaintiff has endeavoured to tie the question to a part of the pleadings; in general terms I do not consider that the bulk of the interrogatories come within the fishing objection. (p 7)
>
> The importance of the pleadings in determining what are the matters in question between the parties was emphasised by Kelly J in *Hooker Corp Ltd v Commonwealth of Australia* (1985) 80 FLR 94, 100 to 105. See also 13 Halsbury's Laws of England (4th ed) paras 27 and 38, *Hennessy v Wright* (No 2) (1888) 24 QBD 445, and *Hall v Alice Springs Veterinary Clinic Pty Ltd* (1982) 17 NTR 13.
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> The second type of fishing, i.e. for the baseless or speculative cause of action, is exemplified by *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, *Melbourne House of Ford Pty Ltd v Trade Practices Commission* (1979) 36 FLR 450, and *Lane v Gray* (1873) LR 16 EQ 552.
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> The complaint about "fishing" discovery is tied closely to what issues arise under the pleadings that the parties have filed in this case. In the present case the pleadings and the affidavit evidence define the issues with some precision. The documents sought relate to those issues to a degree which, in my opinion, saves them from an imputation of fishing. Nor can it be said that the allegation of agency is baseless or speculative. I cannot hold that the plaintiff is casting his net merely in hope of catching something worthwhile.

[44] I do not accept that the objection that the interrogatories are of a 'fishing' nature is a legitimate one in this case. The defendants have available to them a fair argument that the plaintiff does not have a good reputation as a legal practitioner. If that fact can be established, it is relevant to the matter of damages as I have earlier indicated when considering issues of relevance. A bad reputation has been expressly raised by the defendants. The defendants' wish to see ADLS papers is logically referable to the case as it is presently pleaded.

Orders and costs

[45] Broadly speaking my intention is to grant the application. I consider that the order should direct the ADLS to file an affidavit limited to the incident involving the complaint made against the plaintiff by a member of the judiciary. The parties should be able to agree on an appropriate form of order.

[46] Likewise, I would expect the parties to resolve the matter of costs between themselves.

[47] If agreement proves not to be possible they should file memoranda not exceeding three pages each within 10 working days.

J.P. Doogue
Associate Judge