IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-6421

BETWEEN	MOHAMMED SADIQ Plaintiff
AND	BAYCORP (NZ) LIMITED First Defendant
AND	JOHN EWART HARRIS Second Defendant

Hearing: 25 February 2008

Appearances: J Dorbu for plaintiff
C Browne for defendant

Judgment: 31 March 2008

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***31.03.08 at 9 am**, pursuant to*
Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date……..…

Counsel:
Mr J Dorbu, Barrister, P O Box 105 345 , Auckland
Wilson Harle, P O Box 4539, Shortland Street, Auckland

Background

[1] Mr Sadiq has brought proceedings for defamation and negligence against two parties arising out of his being identified on a credit reporting website as a defaulting debtor. He complains that publication of information that he was indebted to a creditor in the sum of $8,483 dollars was untrue and defamatory of him. Mr Sadiq issued proceedings against the first defendant, Baycorp (NZ) Limited, alleging that it was the debt collection firm that was responsible for his name being published. He also issued proceedings against the second defendant who was the client of the debt collection firm and who initially gave the instructions for the debt to be collected from Mr Sadiq. Mr Sadiq alleged in his proceedings that the second defendant had initially provided the defamatory material to the debt collection company.

[2] The first defendant has filed an application for summary judgment against the plaintiff. Shortly before that proceeding was to be heard the plaintiff filed an amended statement of claim which made changes to the basis upon which Mr Sadiq alleged liability. The amended statement of claim seems to have been initiated as a result of two affidavits that were filed for the first defendant by a Mr Le Sueur to which I will make further reference in this judgment.

[3] In overview, the plaintiff does not suggest that first defendant was the entity that initiated the posting of the debt on the website. He says that it was another entity, Baycorp Advantage Collection Services (New Zealand) Ltd ("BACS") that did that. He says, though, that the first defendant purchased BACS's debt collection business. He says that after it took over the debt collection business, the first defendant should have ensured that the plaintiff's name was removed from the website; that the first defendant had the means to do that, and because it did not do so, it became responsible for the continued presence of the information about the plaintiff on the website. The plaintiff says that information was defamatory of him. I will now describe the evidence in more detail.

[4] Mr Le Sueur's affidavits and that of Mr Sadiq represent the totality of the evidence in this case.

[5] In his first affidavit sworn 16 November 2007, Mr Le Sueur deposed that he is a manager for the first defendant. Previously he had been employed by Baycorp Advantage (N.Z.) Ltd, in a number of management roles for a period covering 18 years. That company was part of a corporate group that indirectly operated the debt collection business through BACS, which I have already mentioned.

[6] In his first affidavit Mr Le Sueur referred to the plaintiff's claim that it was the first defendant that published defamatory statements about him on a website. He said that site, the URL of which is http://www.vedaadvantage.com, was owned by a company called Veda Advantage Limited (which I shall refer to in this judgment as "Veda").

[7] The period covered by the plaintiff's statement of claim in its first form asserted that publication of information alleging that the plaintiff had defaulted on a debt took place on or about 31 May 2003.

[8] Mr Le Sueur set out the history of the first defendant. Essentially, he said, the first defendant was incorporated 6 June 2006 and it acquired the debt collection businesses of BACS. The Baycorp Advantage Group, of which BACS was a member, had also included a credit reporting company that operated a credit website. That website was entitled www.baycorpadvantage.com. As part of the sale of the Baycorp Advantage Group, that website was renamed www.vedaadvantage.com. Baycorp Advantage Group, which sold the debt collection business to the first defendant, continues to own and operate the website under its new name. That is in conformity with the Baycorp Advantage Group as a whole changing its name so that it no longer referred to Baycorp but instead to Veda. What is clear is that the first defendant does not own the website. The renamed Veda website continues to fulfill the same function that it did previously. There has been an unbroken continuity in posting information about debtors, including Mr Sadiq, on the website.

[9] Mr Le Sueur said that on or about 22 March 2006 the first defendant's predecessor, BACS, agreed with Mr Harris, the second defendant, to collect a debt of $8,053.54 on behalf of the second defendant from the plaintiff. BACS sent a letter of demand to the plaintiff. On 5 April 2006, Mr Le Sueur says, not having received

any response from Mr Sadiq, BACS automatically transmitted electronic details of the debt that it had under collection to the company operating the www.baycorpadvantage.com website. Mr Le Sueur said that the first defendant did not publish the statements complained of, because it did not exist at the time of the publication. It was incorporated on 6 June 2006, well after the statements were posted on the website and it has never owned or controlled the credit reporting website.

[10] Mr Sadiq, in his affidavit in opposition, said that he found out in early 2007 that credit information had been lodged against his name 'on what is normally called the Baycorp credit reporting database'. He said he instructed his solicitors to write to the first defendant advising that he did not owe any money to the second defendant and requiring adverse credit information recorded against his name by "Baycorp" to be removed immediately. A letter was duly sent on or about June 2007. Later, towards end of September 2007, Mr Sadiq said he was served with Court proceedings relating to the alleged debt. He filed a statement of defence in those proceedings. He deposed that in November 2007 the solicitors for the first defendant wrote to his counsel advising that the first defendant was incorporated on 6 June 2006 and therefore is was impossible for it to have been the publisher of a statement made on 31 May 2003.

[11] Mr Sadiq at para 14 of his affidavit of 30 November 2007 said:

> 14. Veda Advantage (NZ) Limited appears to be a passive reporter of credit information published by individual subscribers and users of its credit reporting website. Responsibility for updating, removal or correction of information listed on the website rests with subscribers. Annexed hereto and marked "I" is a copy of the general terms and conditions of use of Veda Advantage's website.
>
> 15. I believe from the foregoing that from 30 June 2006, the first defendant owned the file and the debt collection business of John Harris, including the District Court proceeding filed on 10 April 2006. Since it took over control of the debt collection business, it and only it had authority to publish or continue to publish adverse credit information against me on Veda Advantage's credit reporting database. The first defendant was therefore responsible for the publication, republication and repetitive or continuing publication of the false and defamatory credit report against me since 30 June 2006. It was contradictory, I believe, that the first defendant had on the one hand a District Court proceeding to seek judgment for John

> Harris' claim, and on the other to continue to authorise for John Harris' claim, and on the other to continue to authorise publication of a default listing against me on the database.

[12] In his second affidavit, Mr Le Sueur commented on matters raised by Mr Sadiq in his affidavit dated 30 November 2007. Mr Le Sueur dealt with Mr Sadiq's assertion that the company that operated the website seemed to be a passive reporter of credit information. Mr Le Sueur said it was not possible for the first defendant to correct or remove information posted on the website. He said that the first defendant does not have access to the website for updating, removal or correction of information. He said that all modifications to published information can only be carried out by the website operator and, while the first defendant can provide information which the website operator may use to modify its site, the first defendant did not provide the information published. I interpolate that what Mr Le Sueur appeared to be saying was that the first defendant, because it was not the owner of the website, could not by direct means alter what was on the website. He accepts, though, that it can convey information about changes that are required to information about debts and debtors that it is dealing with, to the management of the website who will then correspondingly change the website content.

[13] Following the filing of Mr Le Sueur's two affidavits dated the 16 November 2007 and 10 December 2007, the plaintiff was faced with the apparent factual problem revealed by the affidavits. These establish that the first defendant did not own the debt collecting business at the time when the allegedly defamatory material was first included on the site, and did not own or operate the website. The issue of establishing publication of the defamatory comments by the first defendant therefore presented some difficulties for the plaintiff. His response was to file an amended statement of claim on the 20 February 2008 taking rather a different tack.

[14] The amended statement of claim recorded at para 3(d) that the first defendant became owner of the debt collection business and all debt collection files, including that of the second defendant on 30 June 2006. It was also alleged that the first defendant acquired:

> Electronic resources for loading, amending, deletion and updating of all publications of individual credit information and other materials incidental to the debt collection business - on or about 30 June 2006.

[15] In para 3(e) the plaintiff alleged that from 30 June 2006 the first defendant was the exclusive owner of credit information about the plaintiff on the credit reporting website, or alternatively, the first defendant became the authorised distributor of the publication for the purposes of the Films, Videos and Publications Classification Act 1993.

[16] Then followed the part of the pleading that is central to the present application, namely 3(f):

> (f) By the first defendant failing to act to amend, update or delete the adverse credit information generated by the second defendant's historical file, the first defendant became guilty of re-publication and continuing publication of the credit information.

[17] Paragraph 3(h) is also important. It says:

> (h) The first defendant took no or no adequate steps to check whether the plaintiff owed the sum as alleged or at all, or to amend, update, or delete the adverse credit information against the plaintiff.

[18] In his third affidavit, which was sworn 22 February 2008, Mr Le Sueur referred to the fact that the plaintiff had now re-pleaded his claim, but he said the new pleading still did not accurately state the events. He said that the assets that the first defendant acquired from the corporate group that had previously owned the debt collecting business included the debt collection instruction of the second defendant and this was one of many hundreds of thousands of debt collection files acquired. It also took over an electronic system that enabled the communication of information to the credit reporting business that operated the website. It did not acquire means of loading, amending, deleting or updating any individual creditor information on the website. He said the first defendant did not become the owner, author or proprietor of the credit information that was on the credit reporting website. He said that the first defendant is simply the collection agent for the creditor. He produced details of the instances where enquiries had been made to the creditor reporting company (not the first defendant) concerning the debt that was posted on the website allegedly

owed to the second defendant by Mr Sadiq. He reiterated that the debt collection instruction had been received and accepted by the first defendant's predecessor and not the first defendant. He deposed that the reference to the debt owing to the second defendant was removed from the plaintiff's particulars on the website on 3 December 2007.

[19] It is also necessary to make reference to two matters that Mr Dorbu raised in his submissions. The first concerned the agreement that was entered into between Baycorp Advantage (NZ) Limited and the second defendant, in furtherance of the second defendant's instructions to BACS to enforce the alleged debt. The document, which was apparently signed by the second defendant on 12 March 2006, records that the second defendant, who was referred to as the client, appointed BACS to carry out his instructions in relation to the debt. The agreement set out the obligations of the client, included amongst which was the following:

> 4. Provide BACS with all relevant information concerning the debt(s) and the parties responsible for the debt(s) and authorise BACS to use the information for any proper purpose and undertakes to BACS that reasonable steps had been taken to advise the debtors that delinquent debt(s) would be referred to a credit reference agency

[20] The client was also obliged by a separate provision in the document, where the client's obligations were set out, to indemnify BACS against any loss arising from proceedings concerning the information or the use of information supplied to BACS by the client.

[21] Also relevant as a matter of background are the general terms and conditions of use of the Veda website. Included in the terms is the following:

> It is your responsibility to ensure that default information is updated so that it remains accurate, up to date and complete.
>
> We provide a facility for listing and updating large volumes of default information in bulk. Please contact us if you would like access to this facility.

[22] The evidence is not explicit as to what the terms of the engagement between Veda and the first defendant were, but I will assume for the purposes of argument that the terms and conditions included the provision that I have just quoted.

Application for summary judgment by defendant: relevant principles.

[23] The following principles which are applicable to summary judgment applications brought by defendants appear from the Court of Appeal judgment in *Westpac Banking Corporation v M M Kembla* [2001] 2 NZLR 298:

> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R 186. Rather R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.
>
> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in McGechan on Procedure at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
>
> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context

> provided by trial to provide the Court with sufficient perspective.
>
> [63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.
>
> [64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

Publication of defamatory material

[24] The essential elements of defamation are to be found in the following statement which appears at paragraph 40 of the *Laws of New Zealand* volume entitled “Defamation”:

> 40. General.
>
> The essence of a defamatory statement is its tendency to injure the reputation of another person. There is no complete or comprehensive definition of what constitutes a defamatory statement, since the word "defamatory" is nowhere precisely defined. Generally speaking, a statement is defamatory of the person of whom it is published if it tends to lower him or her in the estimation of right thinking members of society generally, or if it causes that person to be shunned or avoided. Further, a statement will be defamatory if it exposes the person in question to public hatred, contempt, or ridicule, or if it is a false statement to the discredit of that person. The mere fact that an untrue statement has been made about a person does not give a right of action if the statement is not defamatory.

[25] For the purposes of this judgment, it can be assumed that the publication of the alleged fact that a person has not paid a debt which is due and owing to another, is defamatory of the alleged debtor.

[26] Publication is the communication of defamatory matter to a third person. In the case of a libel, publication consists in making known the defamatory statement after it has been reduced to some permanent form. Each communication of defamatory matter is a separate publication in respect of which proceedings may be brought. These propositions are to found at para 58 of the same volume of the *Laws of New Zealand*. The same source states a further proposition which is of some significance to this case:

> Failure to erase or otherwise remove defamatory matter from a place where it may be seen by others may constitute evidence of publication; for instance, there may be publication where the person responsible for a notice board fails to remove a lampoon from it.

[27] The authority cited is *Byrne v Deane* [1937] 1 KB 818 to which I will make reference further on in this judgment.

[28] The issue that is central to the present application is whether the first defendant relevantly "published" on the Veda website material that was defamatory of the plaintiff. If it did not then the plaintiff's defamation claim cannot succeed.

Factual matters relating to issue of publication

[29] A number of factual propositions can be stated. First, the first defendant did not communicate the alleged indebtedness of Mr Sadiq to either the proprietors of the Baycorp website or the Veda website. That was done by the first defendant's predecessor, BACS, which is an entirely separate company. Secondly, I assume for the purposes of argument that the relationship between the first defendant and the proprietors of the Veda website is governed by terms and conditions akin to those which govern the relationship that existed between the BACS and the Baycorp website proprietor company at the time when the alleged debt to Mr Harris first appeared on the website. That is to say, the first defendant had an obligation to ensure that information concerning the debt/debtor is updated so that it remained

accurate, up to date and complete. Indeed, I do not understand that Mr Browne took issue with that proposition. Just what obligation, if any, though it imposed upon the first defendant with respect to the information relating to Mr Sadiq is another matter altogether and one that I will discuss shortly.

[30] Mr Browne for the first defendant submitted that the first defendant did not participate in or authorise the pleaded publications of the information on the website to those who made credit enquiries. That submission was made on the basis that it was not the first defendant that provided the information about Mr Sadiq to the website company. Mr Browne accepted that publications occurred concerning the Sadiq debt from the time when particulars of the Sadiq debt were posted on the Veda website. He submitted, though, that the first defendant was not responsible for any of those publications.

[31] As to the fact that the plaintiff's allegation arose from a failure to take steps to check on the accuracy of the information and/or have it deleted from the website, Mr Browne submitted as follows. He said that it was accepted that the first defendant could supply information to the website operator that, if the operator agreed to use it as the basis for amendments to information on the site, would have removed the allegedly defamatory material about the plaintiff. He said that the first defendant chose not to make a request. It did not cause the data to be placed on the website originally, he said. It could view the data about Mr Sadiq – just as any other subscriber could. But that did not result in first defendant being subject to an obligation to take steps to correct the damaging material.

[32] It is necessary to now examine some of the authorities to which counsel referred in the course of their arguments.

Authorities

[33] Counsel referred me to several authorities, including *Byrne v Deane*, which I referred to at paragraph [26], and also to a New South Wales judgment, *Urbanchich*

v Drummoyne Municipal Council (1991) Aust Torts Reports, 69190 which is of assistance and which I shall something about, as well.

[34] In *Byrne v Deane* the plaintiff was a member of a golf club of which the two defendants were the proprietors and the female defendant was also the secretary. One of the rules of the club provided that no notices should be posted on the club premises without the consent of the secretary. At some point the Police raided the golf club and took away gambling machines. On the day following, a piece of doggerel in typed form was put up on a wall of the club that the plaintiff said made a defamatory reference to him. The plaintiff claimed that the words on the document meant and were understood to mean that he had reported to the Police the presence of the machines on the premises and that he was guilty of underhanded behaviour and disloyalty to the defendants and his fellow members of the club.

[35] The defendants admitted that they saw the notice on the wall but denied having written it or put it there. The female defendant said at the trial that as secretary she was responsible for consenting to any notices that were posted in the club and that she might have removed the verse if she thought it harmful but she thought it was a matter of 'poking fun'.

[36] The Judge at first instance came to the conclusion that the words were defamatory and that the defendants had published the libel. This was because the defendants allowed the notice to remain on the walls of the club, over which they had complete control, and, once they had seen it, the publication of the notice was made with their approval.

[37] In the Court of Appeal, the majority concluded that the defendants were responsible for publication. As Greer L J said at page 830:

> In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.

[38] Slesser L J, who concluded that the words were not defamatory, nonetheless agreed that the defendants had published them. He said at page 835:

> I think having read it, and having dominion over the walls of the club as far as the pasting of notices was concerned, it could properly be said that there was some evidence that (the female defendant) did promote and associate herself with the continuance of the publication in the circumstances after the date when she knew that the publication had been made.

[39] The third member of the Court, Greene LJ, agreed with Greer LJ that both of the defendants were liable for publication. He referred to the fact that the fixing of the notice to the wall was not authorised by the rules of the club, was in fact a trespass, and the proprietors were entitled to remove the trespassing article from the walls: page 837. He then went on to say:

> It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that some circumstances a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances he may be doing so. The test it appears to me to be is this: having regard to all of the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it has been put?

[40] His Lordship considered that the fact that it would have been a perfectly simple and easy thing to do to remove the notice was relevant and the defendants, having the power of removing it and the right to remove it without any difficulty at all and knowing that members of the club when they came into the room would see it, must be taken to have elected deliberately to leave it there. In those circumstances, his view was the proper inference was that they were consenting parties to its continued presence on the spot where it had been put up.

[41] The facts of the *Urbanchich* case were that posters with a photograph of a number of persons in Nazi uniforms in the company of Adolph Hitler were glued to bus shelters under the control of the defendant, the Urban Transit Authority of New South Wales. One of the persons was the plaintiff and text on the poster stated that the right-wing group of which he is a member was establishing itself in the local council.

[42] The words on the poster drew attention to the fact that it showed Mr Urbanchich:

> Pictured in the company of Adolph Hitler and wartime Croatian fascist leader Ante Pavelich.

[43] It went on to say that he was now a leader of a group which has successfully penetrated the liberal party and that his collaborators have taken over the Waverley Council and were now establishing themselves in the Drummoyne branch of the liberal party. It asked 'would you vote for this man?'.

[44] The plaintiff pleaded that the posters were affixed with glue on bus shelters under the control of the Urban Transport Authority and that the Authority had been asked to remove them.

[45] Hunt J, at page 69192, referred to the elements of the tort of defamation including publication. He said that conduct amounting to publication can take many forms other than the physical transfer by the defendant of the document containing the matter complained of to a person other than the plaintiff. He made reference to the authority of *Heard v Wood* (1894) 38 SOL J 234 in which a placard containing material defamatory of the plaintiff had been suspended between two poles on the side of the road by an unknown person. The defendant sat for a long time on a stool near to the placard smoking his pipe, continually pointing at the placard with his finger – thereby attracting the attention of all who passed by to its contents. As Hunt J noted, the English Court of Appeal held that there was evidence to go to the jury of the publication of the placard by the defendant. Then at page 69193, the Judge said:

> In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.
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> Such conduct on the part of the defendant may of course be established by inference. Indeed, in most cases there will be no evidence of any such

> acceptance by the defendant expressly, and it can only be established by inference. In *Byrne v Deane*, the inference of consent by the defendants to the continued publication of the verse was drawn from the defendant's knowledge of the existence of the defamatory statement, their right to remove it and their failure to do so (see 829-830, 835, 837-838).

[46] The test, according to Hunt J, was whether the circumstances give rise to the required inference that the defendant had in fact accepted responsibility for the continued publication of the statements made on the posters.

[47] I respectfully agree with the section of Hunt J's judgment extracted at [45] above, and his endorsement of the test propounded by Greene LJ in *Byrne v Dean* which I have cited at [39] of this judgment

Decision on publication point

[48] The authorities just cited related to the appearance of documents on parts of structures over which the defendant had sufficient control as to entitle the occupier to remove the offending material. In neither case could the inference be resisted by establishing that removal would be attended by such difficulties that it would have been unreasonable to expect the occupier to remove the defamatory document. There is no reason why a parallel process of reasoning should not be applied to the presence on websites of defamatory material. But it seems to me that there must be some action that amounts to a promotion of, or ratification of, the continuing presence of the defamatory material on the website.

[49] The issue in the instant case is whether it can be said that the first defendant knew about the material on the website, occupied such a position vis a vis the website that it could have prevented the continued publication of the material and, by its inaction, associated itself with the publication in such a way that it apparently adopted or ratified the publication in the strict sense.

[50] *Byrne* was a case which determined that one could be legally liable as a publisher, without committing the actual act of publication by one's direct actions. Associating with the production of the libel by another person may in some circumstances, according to *Byrne*, constitute a publication for the purposes of

defamation law. The tests to be applied include knowledge of the existence of the continuing display of the defamatory statement, the means to control that state of affairs and an apparent unwillingness (to be deduced from all the circumstances) to end that state of affairs.

[51] The question is essentially whether the *Byrne* principle extends sufficiently widely to apply it to the different factual circumstances of this case. While no doubt the principle from cases such as *Byrne v Deane* remains good law, the issue here is whether the *ratio* of that case can be viewed as extending to the factually different circumstances here.

[52] The key to whether *Byrne* can be extrapolated to this case, essentially depends on whether inferences can possibly be drawn that the first defendant possessed knowledge of the defamatory statement and the ability to bring about its cessation, leading to a final inference that failure to do so indicates that the first defendant in some way allies itself with the statement.

[53] The *Byrne v Deane* facts were comparatively simple. In that case, so far as the critical issue of the defendants' intentions and state of mind were concerned, it would have been easy to infer the defendant endorsed or adopted the defamatory comments because the Court could be confident in its belief that the defendant actually knew that the publication had occurred. It would not seem to be logically possible to conclude that a defendant was complicit in the publication, in the absence of knowledge that the publication had actually occurred. Where the facts are simple – the defendants could see with their own eyes that the offending notices has been attached to the wall as in *Byrne* – the inference may readily arise. The position, however, may be different in a case where, as here, the defendants' actual knowledge that there had been a publication is moot.

[54] Publication in this case would have occurred when subscribers to the website accessed Mr Sadiq's file. See *Loutchansky v Times Newspapers Ltd* (No 2) [2002] 1 ALL ER 652 referred to in Todd *The Law of Torts in New Zealand* at 673. It is not sufficient for the plaintiff to invoke a vague concept such as that the defendant took over the debt collecting files of its predecessor, which predecessor had been

responsible for actual publication. There would need to be evidence that some human agent of the defendant adverted to the presence of the statement on the website and nonetheless took no steps for its removal. Unless such an approach, that is one requiring actual advertence, is adhered to, there is a risk of blurring the line between negligence and defamation which is to be carefully maintained: *Bell-Booth Group Limited v Attorney-General* [1989] 3 NZLR 148, 156.

[55] It is clear that the first defendant would not have known about the material when it was first placed on the website – the first defendant had not been incorporated at that point. It is unclear on what dates publication, in the sense of subscribers accessing the information, occurred. On my analysis of when the cause of action accrued, the facts necessary to make the first defendant responsible for the publication could only have occurred after the date when the first defendant was incorporated and after the first defendant knew of the presence of the material on the website for there to be a viable cause of action. Until those two preconditions were established, the first defendant could not have been liable for defaming the plaintiff.

[56] A possible inference can be drawn from the material before me that, at some point, employees of the first defendant knew about the material on the website. That inference would arise from the following circumstances:

a) The predecessor owner of the debt-collection business issued proceedings against Mr Sadiq on 10 April 2006;

b) The first defendant took over those proceedings;

c) Mr Le Sueur deposed that:

> The reference to the debt owed to the Second Defendant was deleted by Veda Advantage on 18 October 2007 after the First Defendant advised the Veda Advantage group on 15 October 2007 that a statement of defence to the debt proceeding had been received that day.

[57] The implications of the last statement that I have just quoted are not entirely clear. But it seems likely that the reason why the first defendant contacted Veda at the point when a statement of defence had been filed was because at that point the

matter was viewed as then having acquired the status of a disputed debt. But the key point is that the fact that an employee contacted Veda suggests that it is likely that he/she knew that allegedly defamatory material was already present on the website.

[58] To conclude, in my judgment one can extrapolate the legal principle underlying cases such as *Byrne* to factual circumstances considerably different from those that were present in that case. That is a legitimate process to apply, though, if the principles underlying the decision seem to be applicable to a later case even if it does involve quite different facts – even facts that could not even have been imagined at the time when the *Byrne* judgment was decided and when information technology and websites had not even been heard of. In this case, it is fairly arguable that: the first defendant knew of the presence of the statements about the plaintiff on the website; that it was the first defendant that determined whether such statements remained there or were removed; and that from the continuing presence of the statements on the website, one can, not must infer, that the first defendant accepted that it would be read by others and thereby ratified the publication. That is to say, that on the state of the evidence at this point, the issue cannot be finally determined.

[59] On the approach I have adopted the plaintiff has an arguable case and the first defendant has not met persuaded me that the plaintiff cannot succeed.

Orders

[60] The first defendant's application for summary judgment is dismissed.

[61] The parties should let me have memoranda of no more than three pages on the matter of costs within ten working days from the date of this judgment.

[62] The first defendant is to file its statement of defence to the amended statement of claim within 15 working days.

[63] For the purposes of reviewing the proceeding and giving directions for further progress in the matter, the Registrar is to allocate a further case management conference which is to be held by telephone.

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J.P. Doogue
Associate Judge