IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CIV 2009-404-1019

	BETWEEN	LOCKWOOD GROUP LIMITED Plaintiff/respondent
	AND	BARRY SMALL Defendant/applicant

Hearing: 4 March 2011

Appearances: C S Withnall QC for defendant
S Grant and E A James for plaintiff

Judgment: 9 March 2011

JUDGMENT No.2 OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 11.30 am on Wednesday 9 March 2011

Solicitors/counsel :
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[1] The defendant, Mr Small, entered into an agreement with Odin Construction Ltd (Odin) for the construction of a Lockwood home on Mr Small's property near Te Anau. That was prior to May 2008. At the time Odin was a Lockwood franchisee. Lockwood itself specialises in solid wood house fabrication, and operates through independently owned construction enterprises which are franchised to carry on business within defined geographical territories.

[2] A dispute arose between Mr Small and Odin with respect to contract variations. Mr Small sought to involve Lockwood in the dispute but became unhappy with both Odin's performance and Lockwood's response. He publicised his disagreement with Lockwood and Odin by communicating with and visiting certain other Lockwood franchisees and business associates, and by seeking to discredit Lockwood in the media.

[3] In February 2009 Lockwood commenced this proceeding. It alleged that Mr Small was in breach of the terms of an agreement between Lockwood, Mr Small and Odin.

[4] On 27 February 2009, I granted a without notice injunction to Lockwood against Mr Small which, in broad terms, prevented him from further disseminating material adverse to Lockwood until further order of the Court. Later, Lockwood repleaded by adding causes of action based on defamation and injurious falsehood.

[5] On 19 February 2010, I heard an application by Lockwood for variation of its interlocutory injunction and for an order in respect of an alleged contempt by Mr Small arising out of his reaction to the earlier injunction. In a detailed judgment delivered on 21 April 2010, I dismissed Lockwood's contempt application and rescinded the earlier interim injunction. I substituted an injunction restraining Mr Small from commenting adversely to any person upon the honesty or integrity of the plaintiff or its management, or upon the quality of its products until further order of the Court.

[6] Lockwood filed a second amended statement of claim on 3 September 2010.

[7] This judgment is concerned with an application by Mr Small to strike out that statement of claim in its entirety on a number of stipulated grounds. The application contends that the statement of claim, as now formulated, discloses no reasonably arguable cause of action.

The argument for the defendant

[8] At the outset of his argument, Mr Withnall advised the Court that the grounds set out in the notice of application were now much refined. Mr Withnall confirmed that the defendant did not propose to pursue grounds that were not argued during the hearing. In essence, his argument is that the second amended statement of claim is defective in that it fails to plead matters properly causative of the losses alleged to have been suffered.

[9] I deal first with the causes of action in defamation and for injurious falsehood, it being accepted that there is no material difference between them for present purposes (albeit that the elements of the respective causes of action differ).

[10] The plaintiff's claim is built upon the contents of certain e-mails sent by, or on behalf of, Mr Small to Ms Batt (an Otago franchisee), to Mr Kevin Milne (of Fair Go), and to several other unnamed franchisees. Mr Withnall points out that the plaintiff claims $110,000 arising from the loss of one particular contract, and a further $1 million in respect of the estimated loss of ten further contracts. The first of these claims is concerned with a proposal by Mr Kensington to purchase and construct a Lockwood home. In the end, he decided not to proceed. But Mr Withnall observes the plaintiff does not plead any publication to Mr Kensington, and there is nothing else in the statement of claim that links any of Mr Small's publications to Mr Kensington's election not to acquire a Lockwood home.

[11] As to the larger claim, based upon estimated losses, Mr Withnall submits that although the available market is potentially the general public, there are no pleaded particulars of publication of any statement by Mr Small to any actual or potential customer. As pleaded, publication was limited to Mr Milne and to various franchisees.

[12] The plaintiff may claim damages for defamation or injurious falsehood, where the publication is likely to cause commercial loss, without any evidence being necessary of actual loss.[1] But Mr Withnall's point is that there is no pleaded causative link between publication and damage.

[13] The plaintiff's claim, insofar as it is based upon breach of contract, turns upon the so-called tripartite agreement made between Odin, Lockwood and Mr Small, and aimed principally at settling the dispute between Odin and the defendant. Clause 8 of that tripartite agreement records the agreement of the parties:

> Not to badmouth or speak negatively of the other party to any third parties while the parties are performing their obligations in terms of this Agreement …

[14] The plaintiff pleads that Mr Small is in breach of his clause 8 obligations by publishing the e-mails to which I have referred above. The plaintiff then pleads that the breaches have damaged, and will continue to cause, damage to its reputation and will result in pecuniary loss to it. The pleaded particulars are as follows:

> Particulars
>
> (a) Mr Small's disclosures to Mr Ross and Mr Kensington detailed in paragraphs 30 to 32 above have damaged Lockwood's reputation in that:
>
> (i) Mr Ross considered Lockwood's conduct in relation to Mr Small's complaint to be 'stupid';
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> (ii) Mr Kensington lost faith in Lockwood and elected not to purchase a 'Jamaican' house from the Lockwood range for his riverside property that he had previously indicated that he intended to buy. This lost transaction was worth approximately $110,000 to Lockwood; and
>
> (b) Lockwood believes that it has lost up to 10 sales as a consequence of Mr Small's statements about Lockwood;
>
> (c) Mr Small's constant one-sided communication with Lockwood's franchisees has caused anxiety and dissent within the franchisor/franchisee network, which has damaged relationships and distracted franchisees in a critically and unprecedentedly weak new house market.

[1] *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 at 498, 502.

[15] The same particulars are pleaded in respect of defamation and injurious falsehood in paragraphs 43(a) and 49(a) respectively.

[16] The first particular is concerned with the opinion of Mr Ross, a friend of Mr Small. There is evidence that Mr Ross communicated with Mr Heard, the managing director of Lockwood, for the apparent purpose of mediating the dispute between the parties to this proceeding. However, the statement of claim does not plead that there was a publication of any of Mr Small's e-mails to Mr Ross, nor is there a claim that the plaintiff has suffered any actual or potential pecuniary loss as the result of Mr Ross's involvement.

[17] The second of the particulars is concerned with the activities of Mr Kensington, again a friend of Mr Small. It appears that at one point Mr Kensington may have been considering acquiring a Lockwood home. Ultimately he did not do so. But, Mr Withnall complains, there is no pleading of any relevant publication by Mr Small to Mr Kensington, and so there is a break in the causative chain. Mr Withnall also refers to an affidavit filed by Mr Kensington early in 2010, in which he says that his decision not to proceed with a Lockwood purchase had nothing to do with Mr Small's dispute with Lockwood, but that is a factual matter which must be left until trial.

[18] The next aspect of the plaintiff's pleaded particulars is the contention that Lockwood believes that it has lost up to 10 sales as a consequence of Mr Small's publications about Lockwood. Mr Withnall argues that this particular cannot amount to a sufficient pleading of causation either, because there is no pleading of publication to the general public, which must be taken to constitute the market for Lockwood's products.

[19] Finally, Mr Withnall criticises paragraph 37(c) in that there is no pleaded link between the alleged dislocation of Lockwood's franchisee network and the prayer for relief. In particular, he argues, the averment that the dispute between the present parties has "distracted franchisees" is an insufficient pleading in respect of causation.

[20] Overall, Mr Withnall contends that the plaintiff's pleading is fatally flawed and ought to be struck out. In response to a question from the Court, he argues also that while, in other circumstances, the plaintiff might be permitted time to replead so as to provide the missing particulars, the plaintiff had had sufficient opportunity to tidy up its pleading, and the time had come to bring the proceeding to an end.

The argument for the plaintiff

[21] Ms Grant accepts that there is a need for amendment of the statement of claim by the provision of further particulars. Having said that, she points out that she came to court to face a raft of complaints about the plaintiff's pleading, many of which have now in substance been abandoned. To some degree, she complains, she has been taken by surprise by Mr Withnall's argument as now refined. But it is clear, she argues, that the identified deficiencies are capable of being met by amendment.

[22] In particular, she acknowledges that there is a need to amend paragraph 37, pleaded in respect of the breach of contract cause of action, but carried over into the defamation and injurious falsehood claims, by reference, in paragraphs 43(a) and 49(a) respectively. Ms Grant accepts that the plaintiff must plead sufficient particulars to demonstrate a causative link between the acts of the defendant in respect of which the plaintiff complains, and the loss flowing from those actions. As I understand it, the plaintiff relies principally upon communications passing between the defendant, Ms Batt, Mr Kensington, Mr Ross, and Mr Heard. The plaintiff proposes also to rely on its own management and financial information, upon expert witnesses, and upon the evidence of certain franchisees.

[23] Although the plaintiff is not required to plead evidence as such, Ms Grant acknowledges that there is an obligation to plead sufficient particulars to enable the defendant to understand how the plaintiff proposes to establish a causative link between the actions of the plaintiff on the one hand, and the alleged losses sustained by the plaintiff on the other. In doing so, she acknowledges also the need to bear in mind the distinction between general and special damages and the requirement, in the context of the defamation claim, that the plaintiff establish at least probable

financial loss.[2] Ms Grant submits that this is not a case for strike out, because the pleading is easily repaired and the plaintiff has never received the formal conventional notice for particulars which a party is normally entitled to expect before being faced with a strike out application.

Decision

[24] Where a pleading defect can be cured by amendment which the party concerned is willing to make, the ordinary course is for the Court to direct the making of the necessary amendment, rather than strike out the pleading.[3] Normally, a party dissatisfied with the state of another party's pleading will serve a written notice for the giving of further particulars prior to making an application to strike out. No such notice was given in this case. Rather, Mr Small filed a strike out application which relied on a number of grounds, many of which are not now pursued.

[25] The plaintiff is willing to make the amendments sought. I am satisfied that in all the circumstances it is appropriate to direct the provision of further particulars. It is not a case in which it would be proper to strike out the plaintiff's claim.

[26] Accordingly, there will be an order directing the plaintiff to file and serve a further amended statement of claim, on or before Friday 8 April 2011. The further particulars are to provide such detail of the plaintiff's alleged losses and of the manner in which those losses are alleged to have been caused by any act or omission of the defendant, as will suffice to give the defendant proper notice of the plaintiff's case against him. No doubt, if the particulars provided remain insufficient, then the defendant will make a further application to the Court.

[27] The proceeding is to be called in the Commercial List for further mention on Friday 6 May 2011 at 9.30 am. By then the defendant will have had an opportunity to consider the amended pleading, and the parties ought to be in a position to advise

[2] Defamation Act 1992 s 6, see also *Mount Cook Group* (fn 1).
[3] *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316.

the Court of the detail of such further interlocutory applications as may be then envisaged. It is important that this proceeding develop a degree of momentum.

Costs

[28] Mr Withnall asks for costs of the present application in any event on the ground that the plaintiff has acknowledged the defects in its pleading with which the present application was concerned. While that may be so, there are countervailing considerations. The defendant did not, as is usual, seek the relevant particulars from the plaintiff by letter before filing the application. Had that occurred, then the amendments now ordered may have been made without the need for any application at all.

[29] Moreover, the defendant has now abandoned a number of grounds set out in the very detailed strike out application. Ms Grant for the plaintiff was accordingly obliged to prepare an argument which eventually proved unnecessary.

[30] In these circumstances the proper course is, as Ms Grant submits, to direct that the parties bear their own costs of, and incidental to, the present application. There will be an order accordingly.

C J Allan J