

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

**CIV 2011-485-0003
[2012] NZHC 1784**

BETWEEN	FIRST SOVEREIGN TRUST First Plaintiff
AND	MALCOLM TUKINO SHORT Second Plaintiff
AND	KERRY JACKSON BIRD Third Plaintiff
AND	NEW ZEALAND RACING BOARD Defendant

Hearing: 16-18 July 2012

Counsel: P A McKnight and R J Lynn for the Plaintiffs
C T Walker and Z A Brentnall for the Defendant

Date: 18 July 2012

RULING OF MALLON J

Introduction

[1] This is an oral ruling on the defendant's submission that the case should not be left to the jury. *By way of providing context to that ruling I record that we are at the close of the defendant's evidence in a defamation claim being tried before a jury. The background to the claim is a criminal prosecution brought against Mr Bird (the third plaintiff) in relation to a false invoice submitted to the First Sovereign Trust (the first plaintiff). Mr Bird was exonerated by the District Court in that criminal prosecution but adverse comments were made by the Judge about others involved (personnel at the Waikato Racing Club and at the New Zealand Racing Board). An article appeared in the National Business Review under the heading "Fraud highlighted in TAB and pub pokies". The article referred to claims that a number of*

pub TABs may have been fraudulently refurbished. The article referred to the District Court judgment involving funds from First Sovereign Trust and that the charges against Mr Bird had been dismissed. The article also referred to the Judge's criticisms of personnel at the Waikato Racing Club and the New Zealand Racing Board. On the same day as the NBR article was published, the New Zealand Racing Board (the defendant in this defamation case) responded with a press release which included the words "misappropriation of funds involving First Sovereign Trust and the Waikato Racing Club". The plaintiffs are the trustees of the Trust (the first plaintiffs), the Chairman of the Trust (the second plaintiff) and the Chief Executive of the Trust (the third plaintiff). They claim that these words in the context of the press release as a whole were defamatory of them in their natural and ordinary meaning. For each plaintiff five pleaded meanings are set out in the amended statement of claim – in essence, that the plaintiffs were involved in misappropriating the funds.¹ My ruling was as follows.

Meaning

[2] The first submission for the defendant is that the words complained of are not capable of bearing a defamatory meaning. The defendant refers to the well established test set out in, for example, *New Zealand Magazines Ltd v Hadlee (No 2)*.² The question for me on a submission of this kind is not what the jury will decide is the natural or ordinary meaning of the words complained about, but whether the words complained of in the press release are capable of bearing the meaning or meanings relied on by the plaintiffs. The defendant submits that they are not, in essence because that would involve a misreading of the words complained about. It is submitted that, from the use of the word "involved", it could only be taken that the Sovereign Trust was involved as a guilty party by jumping to the conclusion that that is what the word "involved" means. However the defendant says that an involvement in a misappropriation of funds can be an involvement as an

¹ The five pleaded meanings are:

- (a) That the Trust/Mr Short/Mr Bird has been involved with the misappropriation of funds;
- (b) That the Trust/Mr Short/Mr Bird has acted duplicitously or been complicit in fraud;
- (c) That the Trust/Mr Short/Mr Bird lacks integrity in relation to its business affairs;
- (d) That the Trust/Mr Short/Mr Bird has been involved in the misappropriation of gaming grants;
- (e) That the Trust/Mr Short/Mr Bird has been involved in fraudulent and dishonest behaviour.

² *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625-626 per Blanchard J.

innocent victim. And because that meaning is open, the ordinary, reasonable reader would not jump to that conclusion [of guilt] unless or without having further information that that was the meaning intended. In my view the words complained about are capable of bearing the meaning or meanings relied upon by the plaintiffs. It is a jury issue as to whether that is the ordinary and natural meaning of the words.

First plaintiffs' standing

[3] The second submission for the defendant is that the first plaintiffs have no standing to bring this claim. The claim has been brought by the three trustees of the First Sovereign Trust. However, although that is how the first plaintiffs are described, the amended statement of claim makes it clear that the claim is in fact brought by the Trust. The Trust is an incorporated body and is entitled to sue and be sued. It ought to have been named as the first plaintiffs. I consider that it is appropriate to grant the first plaintiff's application to amend or substitute the name of the first plaintiffs to that of the First Sovereign Trust. As I have already mentioned, the amended statement of claim makes it clear that it is in fact a claim brought by the Trust. That has been the basis on which this trial has been conducted, and the defendant does not point to any prejudice in the way this case has proceeded as a result of the incorrect naming of the first plaintiffs. I therefore make an order accordingly.

Identity

[4] The third submission for the defendant is that there is no evidence on which a jury could say that Mr Short or Mr Bird were identified as guilty of fraudulent or dishonest behaviour. It is submitted that the plaintiffs have offered no evidence that any recipient of the original release knew Mr Short or Mr Bird, far less that the release would have led them to understand that they had engaged in fraudulent or dishonest behaviour.

[5] There is evidence that the press release was issued to a large number of recipients. There is also evidence that the press release was on the New Zealand Racing Board website, until it was removed seven days later when the New Zealand

Racing Board moved to issue a correction. There is evidence that a number of witnesses who read the press release did identify it as referring to Mr Short and/or Mr Bird. There is also evidence that Mr Short and Mr Bird are prominent members of the Rotorua community, and also that the matter of the prosecution of Mr Bird and the Trust was a matter of real interest in the racing industry and generally. Those are matters from which there is an evidential basis upon which reasonably it could be inferred that those who received the press release, or who may have accessed the New Zealand Racing Board website, could have identified the press release as referring to Mr Short and/or Mr Bird when referring to the Trust as involved in the misappropriation of funds.

[6] Counsel for the defendant refers to a passage in *Gatley*³ that it cannot be presumed that material on a website will be downloaded by anyone. The passage goes on to say that it is a matter of inference and the claimant must prove a sufficient platform of facts for the inference reasonably to be drawn. In this case the high profile nature of the Department of Internal Affairs prosecution, and the prominence of or status of the New Zealand Racing Board in the racing industry, are matters upon which such an inference might reasonably be drawn.

Punitive damages

[7] The last matter raised by the defendant is that the evidence relied upon by the plaintiffs for its punitive damages claim falls far short of what would be necessary to establish a flagrant disregard of the plaintiffs' rights. The particulars relied upon are set out in the plaintiffs' submissions on this issue.⁴ In summary it submits that the plaintiffs made a conscious decision to take a very strong stand in response to the

³ Patrick Milmo and WVH Rogers *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [34.9].

⁴ The plaintiffs have given particulars and have relied upon, amongst other matters, that there was no need to name First Sovereign Trust in the press release; especially to say that the misappropriation of funds involved First Sovereign Trust; that it was a flagrant disregard of the plaintiffs' rights to decline to remove the press release from the defendant's website; that the defendant through its solicitors responded that what had been said in the press release is true and refused to take any steps to mitigate the damage that had arisen; that the defendant informed the NBR newspaper when approached that the defendant stood by the press release, indicating that the statement about First Sovereign Trust and the misappropriation of funds was appropriate and accurate; that it was only upon further approaches by the plaintiffs' lawyers indicating that proceedings would be issued that the defendant issued a statement of clarification; and finally, the defendant refused to pay the costs sought.

plaintiffs' concerns, and that there is a basis for the jury to find that in doing so the defendant acted in flagrant disregard of the plaintiffs' rights. Counsel for the defendant submits that the defendant's actions were not flagrant. They were not a knowing disregard because the defendant believed and still believes that the statement was not defamatory, and that the plaintiffs have misunderstood or misinterpreted what was said. In my view these are factual assessments for the jury to make as to whether they reach the high standard required for a punitive damages claim. There is at least an evidential basis, but whether it meets the very high threshold needed for the punitive damages will be a matter for the jury.

Pecuniary loss

[8] There is one matter that I missed out. That is the defendant submits that, in relation to the Trust's claim, there is no evidence of pecuniary loss nor any evidential basis upon which an inference of likely pecuniary loss could be drawn. The plaintiffs rely on the decision of the Court in *Rural News Ltd v Communications Trumps Ltd*.⁵ In that case Court found that there need not be any actual evidence of loss of trade or loss of goodwill, but where there is a corporate entity, if it does rely upon its reputation in one way or another to gain clients, then it is open to infer that there is likely to be pecuniary loss. Notwithstanding the lack of evidence in that regard, the plaintiffs rely in particular on Mr Bird's evidence that the Trust has clients who are the publicans, that the Trust tries to have them choose First Sovereign Trust as their gaming trust provider, and that there are a number of options out there in terms of different trusts that they can use in terms of their gaming service provision.

[9] It is accepted that there must be evidence upon which an inference of likely pecuniary loss could be drawn. There are examples where the actual evidence shows that no loss was suffered and which also shows that no loss is likely. An example is the case of *Chinese Herald Ltd v New Times Media Ltd*.⁶ In that case there was evidence of a share sale which indicated no loss of goodwill, and where the evidence

⁵ *Rural News Ltd v Communications Trumps Ltd* HC Auckland AP404/167/00, 5 June 2001.

⁶ *Chinese Herald Ltd v New Times Media Ltd* [2004] 2 NZLR 749 (HC).

showed that revenue of the newspaper had in fact increased after the date of publication of the alleged defamatory articles

[10] In this case the evidence of Mr Bird does, just, lay a foundation for an inference to be drawn by the jury, although we do not have much evidence at all as to the competition for hosting gaming machines. Mr Bird does say, however, that there are a number of options out there for the publicans, and on that basis the claim by the Trust can remain to be put to the jury.

Conclusion

[11] I think that covers all the submissions advanced on behalf of the defendant albeit in a very summary way. So that's my decision. (The case proceeds to the jury.)

Mallon J

Solicitors:
GCA Lawyers, Christchurch for the Plaintiffs
Gilbert Walker, Auckland for the Defendant