IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-003456
[2014] NZHC 391

BETWEEN	YI WU Plaintiff
AND	MAY MONCUR First Defendant
	STEPHEN COOK Second Defendant
	DERMOTT MALLEY Third Defendant
	TRUTH WEEKENDER LIMITED (IN LIQUIDATION) Fourth Defendant
	BOB KERRIDGE Fifth Defendant

Hearing:	4 March 2014
Counsel:	F Deliu for Plaintiff D M Grindle for Third Defendant
Judgment:	7 March 2014

JUDGMENT OF WILLIAMS J

Introduction

[1] The plaintiff sues the Truth Weekender newspaper (currently in liquidation) and a number of other individuals associated either with that newspaper or the stories the subject of current complaint.

[2] The plaintiff claims to have been defamed by comments published on four separate occasions in April and May 2013. Two of the stories were contained in the

company's hard copy newspaper editions of 18-24 April 2013 and 24 April-1 May 2013. Two further stories were published on the Truth's website on 24 May 2013 and 1 May 2013. The details of the publications need not detain us. I must for present purposes assume that the comments complained of were indeed defamatory.

[3] There is, as I understand it, an application for leave to proceed against the Fourth Defendant (that defendant being in liquidation as I have said), but I will not be dealing with that. The application I must address is that of the Third Defendant, Dermott Malley, for summary judgment against the plaintiff.

[4] Mr Malley was a director of the Truth Weekender at the time of the publications in question. He argues that the plaintiff's claim cannot succeed, should be struck out, and the applicant removed from the proceedings.

[5] The case for the applicant is that:

(a) he had no personal or active involvement with the publication complained of; and

(b) his directorship of the company cannot *alone* render him liable.

[6] HCR12.2(2) provides that:

> The Court may give summary judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.

[7] The principles applicable to a defendant's summary judgment application are well understood and not in dispute here. The summary judgment procedure mandates a "robust and realistic judicial attitude when that is called for by the particular facts of the case."[1] But I must be satisfied that the plaintiff cannot succeed because the defendant has a clear answer which cannot be contradicted and which amounts to a complete defence.[2] As the Privy Council noted in *Jones v Attorney-General*, the test for summary judgment is an exacting one since it is a serious step

[1] *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA) at 85.
[2] *Bernard v Space 2000 Limited* (2001) 15 PRNZ 338 (CA).

to prevent a plaintiff from bringing his or her claim to trial.[3] The claim must be clearly hopeless.

[8] Mr Grindle relied essentially on two New Zealand cases in support of his application: the first by analogy and the second more directly on point but less fully reasoned. *Wishart v Murray* related to allegedly defamatory statements being made by contributors to the Facebook page of the defendant Murray.[4] At issue was the extent of liability (if any) that might attach to him as the host of such statements. It is unnecessary to rehearse the extensive Australasian, British and American jurisprudence traversed by Courtney J in that judgment because, with respect, the Judge concisely summarised and synthesised the conflicting lines of authority so well in her judgment.

[9] The long and short of it is that hosts of Facebook pages will be regarded as publishers of the postings of others if:

(a) they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that allow an inference that the host is taking responsibility for it; and

(b) they do not know of the defamatory posting but ought, in all of the circumstances of the case, to know that postings are being made that are likely to be defamatory.

[10] Perhaps another way of putting the test is to ask whether the circumstances of the case are such that a reasonable Facebook host ought properly to have been moved to check content and remove defamatory postings.

[11] As I have said, Mr Grindle argues that this decision applies by analogy to the case of Mr Malley because he did not know of the statements published and the circumstances were not such that he ought to have known.

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[3] *Jones v Attorney-General* [2004] 1 NZLR 433.
[4] *Wishart v Murray* [2013] 3 NZLR 246 (HC).

[12] The second case is the Court of Appeal decision in *Kim v Lee.*[5] In that case the underlying facts are similar to those in this proceeding. The appellant was a director of a Korean language newspaper though he claimed not to have any active role at all in its operation. The newspaper was being sued in defamation. The appellant was found liable at trial though he took no part in it, and (he said) was not aware that the trial had been held and he found liable, until served with the judgment. The Court of Appeal ordered a retrial.

[13] That background is not as important as the Court of Appeal's brief discussion of possible defences that might have been available to the appellant at trial. The Court considered that Mr Kim had a possible defence that he took no part in the impugned publication, and had no knowledge of the statements in question.[6] I will come back to these dicta below.

[14] For the plaintiff respondent, Mr Deliu's argument can be reduced to a simple proposition. It is that if the liability of a director depends on the extent of the director's involvement in the impugned publication, or the circumstances within which (turning this time to *Wishart v Murray*), the law ought to impose an obligation on a non-active director to take the initiative, then that will always be a question of fact and degree. He argued questions of this nature are never appropriate for summary judgment.

[15] Before turning to my analysis, it is necessary to briefly summarise the evidence of the Third Defendant, Dermott Malley, upon which Mr Grindle bases his contention that the test for summary judgment is met, and that of Wu Yi upon which Mr Deliu argued his opposition.

[16] Mr Malley deposed that he had been involved as Executor Director of the newspaper until about May 2012. He became a director on 12 March 2013 but was

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[5] *Kim v Lee* [2012] NZCA 600. This case has a complex procedural history. It first came before the Court of Appeal in 2011 [2011] NZCA 256 in which the Court allowed an extension of time to appeal but suggested that by consent the matter ought better to be reheard in the High Court. When the parties could not agree, as recommended by the Court of Appeal, Heath J in the High Court declined the appellant's appeal application for rehearing. Heath J found he lacked jurisdiction. The matter came back before the Court of Appeal at the end of 2012 and it is that second judgment of the Court of Appeal that is cited by the parties in this case.

[6] At [45].

not an employee at the time, nor paid in any way. In April 2011, Mr Malley moved to Whangarei to grow kiwifruit. Between April and May (the relevant time in terms of the publication of the allegedly defamatory statements), Mr Malley says he was harvesting kiwifruit. He had 27 employees and contractors to manage and spent little time on the day to day activities of the newspaper. He said that his focus as director was the implementation of the restructuring plan approved by shareholders in March. His work related to the planned shift from a publication underpinned by adult advertising to relaunch as a "more business friendly publication". Such work as he did for the newspaper was, he said, "high level strategic work that had nothing to do with the day to day running of the newspaper." He had, he said, no involvement in the editorial activity of the newspaper and knew nothing of the story before it was published. That, he said, was the job of Cameron Slater, the paper's editor.

[17] Mr Malley said:

> I first became aware of the publication that underpins the plaintiff's claim when, on 2 May 2013, I received an email from Belinda Young, who works for the newspaper's accountants.

[18] He continued:

> I was not aware that the story was being run. I was not asked to give comment or opinion on the story, I knew nothing about it. I did not even read the paper over the relevant period.
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> I did not know that the story was being run online until I was served with these proceedings. Immediately upon receiving these proceedings I directed that the manager of the online publication remove the story and he did so.

[19] Mr Wu also filed an affidavit in opposition. Mr Wu said he did not believe that Mr Malley had no knowledge of and made no contribution to the defamatory statements. He referred to three matters. First, a letter from Mr Malley to Mr Wu's solicitor dated 6 May (in reply to the solicitor's letter of 30 May) in which Mr Malley wrote:

> I did take immediate action to verify the sources of our story.

[20] Second, he pointed out that Mr Malley's indicated that he (Malley) directed the manager of the online publication to remove the story "and he did so". Third, on

21 November 2013, more than two months after Mr Malley's application for summary judgment, one of the subject publications was still able to be viewed online.

[21] Mr Deliu argued that whatever knowledge Mr Malley had at the time of publication (and that itself would be the subject of dispute at trial), the fact that steps were taken to verify the sources meant that Mr Malley had arguably adopted the statements and they were still able to be viewed online after that. Mr Deliu also argued that Mr Malley's instructions to his manager showed he did in fact engage in editorial oversight.

[22] I agree with Mr Deliu that this is not an appropriate case for summary judgment. Both *Wishart v Murray* and *Kim v Lee* suggest some level of involvement, 'taking part'[7] or failure to act after 'being on notice'[8], is required. These standards are all going to raise questions of fact, context and degree. That was the reason Mr Kim obtained his rehearing.

[23] There are a number of areas that remain to be explored by the plaintiff not withstanding Mr Malley's affidavit. What did he mean by verification of sources? Was he adopting the stories after the event? Were they still able to be accessed online at that point? Given Mr Malley's prior very hands-on role in the newspaper, is it realistic to conclude that his kiwifruit business kept him away from editorial content? He did not hesitate to step in to direct removal once he received the proceeding. Mr Wu will not have any direct knowledge of Mr Malley's role in the business in April/May 2013. He must rely what Mr Malley says or wrote. That will make cross-examination all the more important.

[24] The test for entitlement to summary judgment is an exacting one. I note also the decision in *Read v Minister of Economic Development* where it was held that the likelihood of disputes of fact and reliance on credibility made summary judgment unsuited to defamation cases.[9] That decision related to an application by the plaintiff but the principle applies also to applications by defendants. Too much in this case

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[7] *Kim v Lee* [2012] NZCA 600 at [43].
[8] *Wishart v Murray* [2013] 3 NZLR 246 (HC) at [116].
[9] *Read v Minister of Economic Development* HC Auckland CIV-2007-404-2655, 12 September 2007.

will depend upon a careful consideration of the facts. I do not consider the plaintiff's claim is so bereft of hope that his day in court should be denied him.

[25] The application for summary judgment is dismissed accordingly. The plaintiff will be entitled to costs which I fix on a 2A basis.

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Williams J

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