IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-009708
[2016] NZHC 2589

UNDER	the Law of Contract, the Contractual Remedies Act 1979 and the Defamation Act 1992
IN THE MATTER	of a breach of contract and defamatory statements
BETWEEN	HARRY MEMELINK Plaintiff
AND	MALCOLM GRINDLAY (BANKRUPT) First Defendant
	ROBYN GRINDLAY Second Defendant

Hearing: 26-28 September 2016

Counsel: Plaintiff in person with K Terpstra as McKenzie Friend
K I Jefferies for Second Defendant

Judgment: 31 October 2016

JUDGMENT OF COLLINS J

Introduction

[1] The issues raised in this proceeding can be distilled to the following four questions:

(1) Was Mrs Grindlay a party to a contract between Mr Memelink and Mr Grindlay dated 12 April 2013 (the contract) concerning the sale and purchase of Mr Memelink's shares in a company called "DM Recyclink Ltd" (DMR)?

(2) If so, did Mr and Mrs Grindlay cancel the contract pursuant to ss 7 or 8 of the Contractual Remedies Act 1979 (the Act) on 10 November 2013?

(3) If Mr and Mrs Grindlay did not lawfully cancel the contract, what if any damages should be awarded to Mr Memelink pursuant to s 9 of the Act?

(4) Did Mrs Grindlay defame Mr Memelink by posting on a facebook page that he "rips people off", is "a liar and that people should not enter into business with him"?

[2] The answers to these questions are:

(1) Mrs Grindlay was a party to the contract.

(2) Mr and Mrs Grindlay repudiated but did not cancel the contract.

(3) Mr Memelink is entitled to $176,786.67 by way of damages and interest at the rate of 6.5 per cent from 12 April 2014 on this sum.

(4) Mrs Grindlay defamed Mr Memelink. He is entitled to a nominal award of damages for defamation. That award is $100.00.

[3] This judgment is divided into four parts. Part I sets out the background. Part II explains why I have concluded Mrs Grindlay was a party to the contract. Part III explains why I am satisfied the contract was not cancelled by Mr and Mrs Grindlay on 10 November 2013 and the damages which Mrs Grindlay is liable to pay to Mr Memelink. Part IV explains why Mr Memelink was defamed.

PART I: BACKGROUND

[4] Mr Memelink established DMR in 2010 as a scrap metal and recycling business. It traded from premises at 5 Seaview Road in Lower Hutt. Those premises

are owned by Link Trust No. 1 (Link Trust). Mr Memelink and a Mr Hamilton are the trustees of the Link Trust.

[5] On 7 June 2012, Mr Memelink suffered a serious accident while working at DMR. This resulted in the amputation of his right leg. Mr Memelink thereafter decided to sell DMR. He placed an advertisement on Trade Me to sell the business.

[6] There is no dispute that Mr Grindlay met with Mr Memelink in early 2013 and that they negotiated terms concerning the sale and purchase of Mr Memelink's shares in DMR. It is also not disputed that on at least one occasion Mrs Grindlay accompanied her husband when they met with Mr Memelink.

[7] On 12 April 2013, Mr Grindlay and Mr Memelink signed the contract to purchase Mr Memelink's shares in DMR. The contract records that:

(1) Mr Memelink was the vendor.

(2) Mr Grindlay and Mrs Grindlay were the purchasers.

(3) Mr Memelink agreed to sell his 500 shares in DMR for $200,000.

(4) The settlement date was 12 April 2013.

(5) Mr Memelink was to remain a director of DMR until the purchase price was paid in full.

(6) Mr Memelink agreed to "assist the purchaser for a period of four weeks from the settlement date by mutual agreement".

(7) The vendor and purchaser agreed that they entered into the agreement relying upon accounts for DMR dated 31 March 2012.

(8) The shares in DMR were to be paid for at a set rate of $5,000 per month. The shares in DMR were to be paid for in full by 12 April 2014.

[8] The statement of financial position of DMR, as at 31 March 2012 recorded its total assets were $157,056.55. The largest single asset was stock valued at $105,000. Vehicles belonging to DMR were valued at $8,213.33. The balance of the plant and equipment was valued at $31,537.52.

[9] In an addendum to the contract it was agreed that interest on the outstanding purchase price was to be at a rate of 6.5 per cent per annum and that the purchasers would pay $20,000 towards the shares within two months from the settlement date. Mr Memelink also agreed that three trucks owned by DMR were to be repaired to a certificate of fitness standard and registered by the purchasers with the cost of this exercise being "discounted from the purchase price". Mr Memelink guaranteed all the trucks were in good mechanical condition, structurally sound and would only need minor repairs and servicing for the certificate of fitness standard. It was also agreed that a green utility would "be traded out of the company".

[10] The contract was signed by Mr Memelink and Mr Grindlay. It is agreed Mrs Grindlay did not sign the contract.

[11] On 12 April 2013, Link Trust executed a deed to lease for 5 Seaview Road. Mr Grindlay and Mrs Grindlay were named as the lessors. The deed of lease was signed only by Mr Grindlay and by Mr Memelink on behalf of Link Trust. The lease was for a term of six years. The annual rent was $69,600.

[12] The lease commenced on 1 May 2013 although Mr Memelink provided the keys to the premises before that date to enable Mr Grindlay and his wife to set up their new business.

[13] The parties appear to have had a cordial relationship at the time the contract was signed. On 16 April 2013, $15,000 was paid into Mr Memelink's bank account. That sum was made up of two cheques (one for $10,000, the other for $5,000) drawn on an account in the name of Mr and Mrs Grindlay. The parties agree this payment was made in accordance with the contract. There is, however, a dispute about whether the balance of the $20,000 that was required to be paid within the first two months from the date of settlement was in fact paid. Mr and Mrs Grindlay say that

in addition to the cheques totalling $15,000, a further $5,000 in cash was paid to Mr Memelink. Mr Memelink says he never received $5,000 in cash from Mr and Mrs Grindlay.

[14] At about the time the cheques totalling $15,000 were paid to Mr Memelink, he transferred the DMR telephone number and email addresses to Mr and Mrs Grindlay. The name of the account holders for the telephone number and email addresses was then changed on 24 April 2013 to "Seaview Scrap". Mrs Grindlay was involved in making these arrangements.

[15] On 2 May 2013, Mrs Grindlay emailed Mr Memelink asking for details of the bank account number into which the rent for 5 Seaview Road should be paid.

[16] Mr Memelink believes that during the course of April and May 2013, Mrs Grindlay was involved in setting up an account at Macaulay Metals, a major purchaser of scrap metal. He also believes that both Mr and Mrs Grindlay sold to Macaulay Metals significant items that belonged to Mr Memelink, such as parts of a ship's mast and that they sold DMR stock to Macaulay Metals with the sales being processed through an account that was owned by Mr and Mrs Grindlay, instead of through the DMR account.

[17] On 10 May 2013, $2,900 was paid to the Link Trust. That payment was in the form of a cheque drawn on an account in the name of Mr and Mrs Grindlay. The cheque was signed by Mrs Grindlay.

[18] From about this time onwards, the relationship between Mr Memelink and Mr and Mrs Grindlay deteriorated significantly. For present purposes it is sufficient to record Mr Memelink believes Mr and Mrs Grindlay disposed of a significant amount of DMR stock under the name of "Seaview Scrap" and continued to rent 5 Seaview Road for approximately nine months without making any further rent payments from that made on 10 May 2013. Mr Memelink was also concerned that Mrs Grindlay ran a side business called "Hoarders Heaven Ltd" (Hoarders Heaven), initially from 5 Seaview Road and later, in November 2013, from an address in Gracefield Road. Mr Memelink is particularly aggrieved by Mr and Mrs Grindlay

having effectively taken over the assets of DMR, used and sold those assets from new premises in Gracefield Road, and left 5 Seaview Road abandoned and in a very untidy state.

[19] Mrs Grindlay says she was never a party to the contract. I address that topic in Part II of this judgment. For present purposes it is sufficient to record that in his evidence Mr Grindlay said that as early as 17 May 2013, he sent Mr Memelink an email setting out a list of some unresolved issues relating to plant and equipment. Mr Grindlay says another list of issues was sent by him to Mr Memelink by email on 25 June 2013, but that Mr Memelink failed to respond.

[20] Mr Grindlay says that he sent a detailed letter to Mr Memelink on 2 August 2013, asking him to urgently address a series of specific issues. No response was forthcoming. Mr Grindlay's evidence was that he sent a further detailed letter to Mr Memelink on 10 October 2013. That letter set out all of the issues that had eventuated with DMR plant and equipment. Mr Memelink's evidence was that he did not receive the letters of 2 August 2013 and 10 October 2013 until 12 November 2013.

[21] The letters of 2 August 2013 and 10 October 2013 were sent in the names of Mr and Mrs Grindlay and repeatedly referred to both of them. For example, the first paragraph of the letter of 2 August 2013 states:

> Upon taking legal advice *we* have been advised to give you 30 days' notice to rectify all *our* outstanding issues. If this is not complied with *we* will be cancelling the contract and will require a refund of all monies *we* have paid, in full. (emphasis added).

[22] There is a dispute about whether or not Mr Memelink received the emails of 17 May 2013 and 25 June 2013, and the letters of 2 August 2013 and 10 October 2013 prior to 12 November 2013. There is, however, no dispute that on 12 November 2013, Mr Memelink received a letter purporting to cancel the contract and the lease. That letter was signed on behalf of Mr and Mrs Grindlay. There is also no dispute that copies of the 2 August 2013 and 10 October 2013 letters were included in the envelope in which the letter of 12 November 2013 was sent to Mr Memelink.

[23] The letter of 10 October 2013 from Mr and Mrs Grindlay, which Mr Memelink acknowledges receiving on 12 November 2013 set out in considerable detail the basis upon which Mr and Mrs Grindlay purported to cancel the contract on 12 November 2013. In essence, they say Mr Memelink breached the terms of the agreement by not delivering equipment and premises of the standard agreed to by the parties.

[24] The issues about equipment and plant can be distilled to 10 points.

[25] First, Mr and Mrs Grindlay say that none of the three forklifts they acquired with the business actually worked or did not work properly.

[26] Second, a "tipper truck" was in a state of significant disrepair and as at 10 October 2013 it had not certificate of fitness and was not registered. Mr and Mrs Grindlay allege they paid $2380 to get the truck running but it was subsequently ordered off the road.

[27] Third, as at 10 October 2013 the Hiab truck had no certificate of fitness and was not registered. Mr and Mrs Grindlay say they paid $1000 to get the truck running. It was thought it had a twisted chassis and was taken to a mechanical engineer who undertook $11,000 worth of repairs to the vehicle. On 2 October 2013, that mechanical engineer said that the vehicle had been repaired and that if it obtained a certificate of fitness and registration it would "be ready to go on the road". The mechanical engineer subsequently charged approximately $4,000 and it appears this was paid by Mr Memelink.

[28] Fourth, a canopy truck which Mr Memelink had taken to have repaired had not been returned to the business. The Grindlays say they paid $220 for new batteries and $85 per day to hire a replacement truck.

[29] Fifth, issues were raised about the state of a crusher which was able to be repaired at a cost of $150.

[30] Sixth, a cut-off saw had to be repaired at a cost of $450.

[31] Seventh, issues were raised about the plasma cutter, a welder, gas cutters and four side grinders, which Mr and Mrs Grindlay said did not work or had not been returned in a repaired state to the business by Mr Memelink.

[32] Eighth, Mr and Mrs Grindlay said Mr Memelink had removed a box containing tools of trade.

[33] Ninth, it was alleged that safety gear had not been provided.

[34] Tenth, Mr and Mrs Grindlay said that business computers, cash register, the alarm system and operating records were defective.

[35] Mr and Mrs Grindlay also raised issues about the state of the premises at 5 Seaview Road, including the state of the toilet, leaks in the roof, the state of the carpets and deficiencies with the roller door.

[36] The letter of 10 October 2013 also states Mr and Mrs Grindlay had paid four months' rent. They said:

> Like fools we paid you cash after the first payment went through the books because you didn't want the bank to know that you were getting any payments, we have paid 4 months worth of rent straight from the till now you are complaining that the rent has not been paid. We refuse POINT BLANK to make further payments in cash or internet banking until all these issues have been resolved.

[37] Mr Memelink vehemently disputes all of Mr and Mrs Grindlay's allegations, which I have summarised in [25]-[36].

[38] I have put to one side issues about the state of the premises. Those issues relate to the lease. This proceeding is concerned with the contract.

[39] Seaview Scrap/Hoarders Heaven Ltd was incorporated by Mr and Mrs Grindlay on 11 December 2014. A statement of financial performance from Seaview Scrap for the year ending 31 March 2015 records the opening inventory for that business was $105,000 as at 1 April 2012. This is clear evidence that Seaview Scrap acquired the stock of DMR.

[40] There is evidence that Seaview Scrap was sold by Mr and Mrs Grindlay to a Mr Chung. I do not know when this occurred. There is also a suggestion in the evidence that Seaview Scrap may then have been onsold to a company called "Silver Fern Enterprises Ltd" owned by a Mr Greig.

History of this proceeding

[41] Mr Memelink commenced this proceeding on 27 November 2013 by suing both Mr and Mrs Grindlay for $185,000 plus interest and costs. Mr Grindlay was served with the proceeding on 27 November 2013. Mrs Grindlay was served the following day. No statements of defence were filed. Mr Memelink obtained judgment by default on 19 February 2014. The following month, Mr and Mrs Grindlay filed an application to set aside the default judgment.

[42] In a judgment delivered on 22 August 2014, Clifford J set aside the default judgment on the basis that judgment had not been entered "strictly in terms of the statement of claim" as required by HCR 15.7.05.[1]

[43] Importantly, for present purposes, Clifford J recorded:[2]

> I am satisfied that the Grindlays' letter of 12 November 2013 constituted repudiation of the Share Contract. The Grindlays wrote:
>
> > Further to our letter dated 10.10.2013, we are now CANCELLING both the contract and the lease of the Seaview Road premises and require a full refund of the 20K that has been paid to you.
>
> The letter went on to advise that they would return the keys to the building, together with its current stock, tools and vehicles, on Monday 17 November 2013.

[44] Clifford J concluded Mr Memelink could, on receipt of the Grindlays' letter of 12 November 2013, have cancelled the contract. He did not do so. Rather, he sought to enforce it. It therefore followed the full purchase price under the contract was not due when Mr Memelink sought and obtained judgment by default. Mr Memelink was not, at that stage, entitled to a liquidated amount equal to the

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1 *Memelink v Grindlay* [2014] NZHC 2009.
2 At [26]-[27].

outstanding balance of the purchase price. Clifford J therefore set aside the default judgment obtained against Mr and Mrs Grindlay.

Lease proceeding

[45] Mr Memelink and Mr Hamilton, acting in their capacities as trustees of the Link Trust, commenced proceedings in the Hutt Valley District Court against Mr and Mrs Grindlay for the non-payment of rent under the deed of lease. Judgment for $45,335 was obtained by default against Mr and Mrs Grindlay on 21 February 2014. This default judgment covered rent owing up until 12 November 2013.

[46] Mr and Mrs Grindlay applied to set aside the default judgment against them. That application was heard and determined by Judge Tuohy in the Hutt Valley District Court on 3 November 2014.[3] He set aside the default judgment but on the conditions that Mr and Mrs Grindlay pay Mr Memelink $27,350 by bank cheque and pay a further $17,980 into the court. Those payments were to be made by 24 November 2014.

[47] Mr and Mrs Grindlay appealed the conditions imposed by Judge Tuohy, when he set aside the default judgment. Mrs Grindlay's appeal succeeded on the ground that it was arguable she was not a party to the lease. Mr Grindlay's appeal failed, thereby rendering him liable to pay $27,315 to Mr Memelink in his capacity as a trustee of the Link Trust, and $17,980 into the Hutt Valley District Court.[4]

[48] Mr Grindlay did not pay the sums required. He submitted to voluntary bankruptcy in June 2015.

PART II

[49] Mrs Grindlay says that she was never a party to the contract and that it was her husband who entered into the agreement on 12 April 2013. It is submitted on her behalf that the failure to sign the contract means she was not a party. Mrs Grindlay says she was opposed to her husband embarking on the venture but that she

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3 *Memelink v Grindlay* DC Hutt Valley CIV-2013-096-520, 3 November 2014.
4 *Grindlay v Memelink* [2015] NZHC 1135.

supported him by attending to administrative matters such as banking, payments of accounts and general office tasks.

[50] Mrs Grindlay's evidence was that Hoarders Heaven was her sideline project and that it never had anything to do with DMR or Mr Memelink.

[51] Mr Memelink was adamant in his evidence that Mrs Grindlay was a party to the contract.

[52] Much of the hearing before me was taken up with each side endeavouring to impugn the honesty and reliability of opposing witnesses.

[53] I am able to determine from contemporaneous documentation that Mrs Grindlay was a party to the contract. Part of my process of reasoning has involved the drawing of inferences from the documents in question. My reasons for concluding Mrs Grindlay was a party to the contract can be distilled to four points.

[54] First, Mrs Grindlay is named in the contract as a purchaser. If Mr and Mrs Grindlay did not intend her to be a purchaser then it is inconceivable Mr Grindlay would have permitted Mrs Grindlay's name to be recorded on the contract as a purchaser.

[55] Second, Mrs Grindlay is named as a tenant in the deed of lease dated 12 April 2013. Her status as a named tenant was entirely consistent with her being a party to the contract to purchase the shares in DMR.

[56] Third, Mrs Grindlay signed cheques in part payment for the shares under the contract. Those cheques were drawn from an account in the name of Mr and Mrs Grindlay.

[57] Fourth, the letters of 2 August 2013, 10 October 2013 and 12 November 2013 to Mr Memelink were sent in the names of Mr and Mrs Grindlay. If Mrs Grindlay was not a party to the contract there would have been no reason for her name to be included in those letters. The fact the letters consistently referred to "we" and "us"

reinforces the conclusion they were sent by Mr and Mrs Grindlay because they were both parties to the contract.

PART III

[58] In his third amended statement of claim Mr Memelink pleads:

> On or about 10 November 2013, by way of telephone, [Mr Grindlay] told [Mr Memelink] that he had sent letters complaining about the alleged problems with the plant/assets of the DM Recyclink.
>
> [Mr Memelink] did not receive the letters … [and] advised [Mr Grindlay] of this in the 10 November 2013 phone call and confirmed this to [Mr and Mrs Grindlay] by email on 10 November 2013.
>
> On 13 November 2013 [Mr Memelink] found copies of unsigned letters dated 2 August 2013, 27 September 2013 and 10 October 2013 slipped under the door of his premises … purportedly from [Mr and Mrs Grindlay] referring to issues with the plant/assets of DM Recyclink.
>
> By way of a further letter slipped under the doorway of [Mr Memelink's] premises on or around 13 November 2013 [Mr and Mrs Grindlay] purported to cancel the 12 April 2013 agreement.

[59] In her third amended statement of claim Mrs Grindlay simply denies these allegations.

[60] In his submissions, Mr Jefferies, counsel for Mrs Grindlay, elaborated on Mr Grindlay's defence. He said that if she was a party to the contract, then the contract was validly cancelled by Mr and Mrs Grindlay on 13 November 2013 pursuant to s 7(3) and (4) of the Act. Those provisions state:

> …
>
> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—
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> (a) he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
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> (b) a term in the contract is broken by another party to that contract; or
>
> (c) it is clear that a term in the contract will be broken by another party to that contract.

> (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if,—
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> (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or
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> (b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—
>
> (i) substantially to reduce the benefit of the contract to the cancelling party; or
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> (ii) substantially to increase the burden of the cancelling party under the contract; or
>
> (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.
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> …

Repudiation of the contract

[61] Like Clifford J, I am satisfied that the letter of 12 November 2013 constituted repudiation and not a cancellation of the contract. The relevant provision in the Act concerning repudiation is found in s 7(2). That subsection states:

> ...
>
> (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

[62] The letter of 12 November 2013 was repudiation and not a cancellation for the following reasons.

[63] First, I am satisfied that the Grindlays' letters of 2 August 2013, 13 September 2013 and 10 October 2013 were not received by Mr Memelink until 12 or 13 November 2013.[5] That finding is consistent with Mr Memelink's comments to Mr Grindlay on 10 November 2013 and broadly consistent with an email sent by Mr Memelink to Mrs Grindlay on 10 November 2013 in which he pointed out that

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5 The letters were addressed to "C/o Cudby & Meade" and did not include a street address.

Mr and Mrs Grindlay were in default in relation to the payment of rent and that her situation was becoming "extremely serious" from a legal perspective.

[64] Second, by the time Mr Memelink received Mr and Mrs Grindlay's letters of 2 August 2013, 27 September 2013, 10 October 2013 and 13 November 2013, he had not said or done anything which made it clear he did "not intend to perform his obligations" under the contract. On the contrary, it was Mr and Mrs Grindlay who made it clear, in their letter of 12 November 2013 that they did not intend to perform their obligations under the contract.

[65] Third, the approach which I have taken is consistent with that followed by the Court of Appeal in *Chatfield v Jones*[6] in which purchasers of the shares in a company were held to have repudiated the contract when they failed to settle thereby entitling the vendor to cancel the contract and sue for damages. This in effect is what has occurred in the present case.

[66] Fourth, the Court of Appeal has held that purported cancellation requires the cancelling party to be ready and willing to perform.[7] By November, the Grindlays were in breach of the contract having failed to pay the set rate of $5,000 per month. The failure to contribute to the settlement price up until this point, other than the deposit, does not demonstrate the Grindlays were ready and willing to perform and therefore entitled to cancel.

Cancellation

[67] Mr Jefferies did not elaborate in his submissions on the purported cancellation of the contract by Mr and Mrs Grindlay. I interpret this aspect of Mrs Grindlay's case to be that she and her husband cancelled the contract on 12 November 2013 because either:

(1) she and her husband were induced to enter into the contract by misrepresentations made by Mr Memelink about the state and quality of DMR's plant and equipment; or

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6 *Chatfield v Jones* [1990] 3 NZLR 285 (CA).
7 *Noble Investments Ltd v Keenan* [2006] NZAR 594, (2005) 6 NZCPR 433 (CA).

(2) Mr Memelink broke a term of the contract by supplying plant and equipment that was not fit for purpose.

[68] In my assessment, the issues I have referred to in [25] and [29]-[34] relating to the relatively minor costs of repairing items of plant and equipment were not sufficiently serious to justify cancellation of the contract. There is also insufficient evidence of any pre-contractual statements made by Mr Memelink to the Grindlays, let alone misrepresentations that may entitle the Grindlays to a remedy.

[69] I place however, the three vehicles referred at [26] to [28], into a slightly different category. I do so because the parties recognised the importance of the vehicles in the contract. Clause 12 of the addendum to the contract stated:

> The vendor agrees that the 3 trucks are to be serviced/repaired to a COF standard and registered by the purchaser and the agreed costs discounted from the purchase price. The vendor guarantees that all the trucks are in good Mechanical condition with engines, gearboxes, Tyres in good condition and they are structurally sound and will only need minor repairs and servicing for the COFs. The Hiab truck will need to be certified for the new deck and this will be done by the purchaser with costs as agreed.

[70] Mr Memelink submitted that it was Mr and Mrs Grindlays' responsibility to have vehicles repaired and the cost to be deducted from the price of the shares. I consider Mr Memelink's interpretation to be a departure from the clear words of the contract. There was at the very least a guarantee on Mr Memelink's part that the trucks were in sufficient condition to "only need minor repairs and servicing for the COFs". Adopting a contextual approach, the contract required Mr Memelink to ensure the vehicles were able to be registered and obtain COFs. Mr and Mrs Grindlay were responsible for the registrations. The costs of the registrations were to be deducted from the purchase price.

[71] It is clear that by early October 2013 none of the trucks had received a COF or been registered. The Hiab truck appears to have been brought up to a condition by 24 October where it might have been able to obtain a COF and be registered (refer to [27]), but the other vehicles fell well below the standards agreed to by the parties when they agreed upon the terms of the contract. I will return to the issue of the three trucks when considering the question of relief. This however is an issue

that goes to breach of contract, rather than entitling Mr and Mrs Grindlay to cancel the contract.

[72] I conclude that Mr and Mrs Grindlay repudiated, but did not lawfully cancel the contract. It was Mr Memelink who effectively cancelled the contract when he commenced this proceeding. I now turn to the question of relief.

PART IV: RELIEF

[73] Section 9(2)(b) of the Act confers a discretion upon a court to direct a party to the proceeding to pay to any other party such sum as the court thinks just.

[74] I am satisfied that the sum of $185,000 is owed under the contract by Mr and Mrs Grindlay. They are jointly and severally liable for that sum. I am also satisfied that the three trucks referred to in the contract were not in a fit and proper state of repair. Any compensation which Mr Memelink receives should not include any sum for those three trucks. Valuing those trucks is particularly difficult at this juncture. I believe the fairest approach is to deduct from the damages which Mr Memelink might otherwise receive the sum of $8,213.33 to reflect the book value of the trucks at the time the contract was signed.

[75] I am reinforced in my conclusion that requiring Mrs Grindlay to pay the sum of $176,786.67 is a fair and just resolution to this dispute because Mr and Mrs Grindlay received the benefit of the stock of DMR, and sold a significant portion, if not all of that stock after having only paid a fraction of the purchase price for the shares in DMR as explained in [39].

[76] While it is unfortunate that Mr Grindlay's bankruptcy may mean that only Mrs Grindlay is ultimately held liable in this proceeding, I am satisfied that Mr Memelink should not be denied a just and appropriate outcome simply because Mrs Grindlay is the only defendant worth pursuing.

PART V

[77] The final portion of this judgment concerns the defamation claim. Mr Memelink's claim for defamation was not a significant aspect of his proceeding. It was barely mentioned during the course of the three day hearing.

[78] Mr Memelink says that Mrs Grindlay "posted, published or otherwise commented to others by way of facebook and community board, a statement alleging that [he] rips people off, is a liar; and saying that people should not enter into business with him". It is also alleged that Mrs Grindlay made a statement to the effect that Mr Memelink had sent a thug to intimidate her.

[79] In the third amended statement of claim Mrs Grindlay accepts that she made the statements in question. She says, however, that the statements were true.

[80] I am satisfied that the statements that Mr Memelink "rips people off", is "a liar and that people should not enter into business with him" were defamatory in that they lowered Mr Memelink's reputation in the estimation of right-thinking people.[8]

[81] Mrs Grindlay has pleaded the words she published about Mr Memelink were true.

[82] Mr Memelink does not have to prove the words in question were false. The onus is on Mrs Grindlay to prove the words were true or not materially different from the truth.[9] Mrs Grindlay has simply alleged her statements were true while Mr Memelink has equally firmly denied the truth of Mrs Grindlay's statements. Mrs Grindlay has failed to discharge the onus upon her to prove the truth of the statements she made.

[83] I have no evidence about how widely the defamatory comments were published and if anyone actually read the facebook page containing the words in question.

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8 *Sim v Stretch* [1936] 2 All ER 1237 (HL); *Goldstein v Foss* (1827) 6 B&C 153, 108 ER 409.

9 Defamation Act 1992, s 8(1) and (3)(a).

[84] In these circumstances, I think the appropriate course is to enter judgment in favour of Mr Memelink in relation to the defamation claim and award him a nominal sum of damages. That award will be $100.00.

Conclusion

[85] Mrs Grindlay was a party to the contract between Mr Memelink and Mr Grindlay dated 12 April 2013.

[86] The contract was repudiated by Mr and Mrs Grindlay but not cancelled. The contract was effectively cancelled by Mr Memelink when he pursued his proceeding against Mr and Mrs Grindlay.

[87] Mr Memelink is entitled to damages in the sum of $176,786.67.

[88] Mr Memelink is entitled to interest on the judgment for breach of contract at the rate of 6.5 per cent per annum from 12 April 2014, which is the date the shares were to have been fully paid for.

[89] Mrs Grindlay did defame Mr Memelink but he is only entitled to a nominal sum of $100.00 by way of damages in relation to this cause of action.

[90] Mr Memelink is entitled to reasonable disbursements that will be fixed by the Registrar if the parties are unable to reach agreement.

D B Collins J

Solicitors:
Jefferies Law, Wellington for Second Defendant