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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY **CIV-2015-404-1845**

UNDER	the Defamation Act 1992
BETWEEN	JORDAN HENRY WILLIAMS
	Plaintiff
AND	COLIN GRAEME CRAIG
	First Defendant

Hearing:	26 September 2016
Counsel:	P A McKnight and A J Romanos for plaintiff S J Mills QC and J Graham for first defendant
Date of Ruling:	26 September 2016

RULING NO. 7 OF KATZ J
[Qualified Privilege]

Solicitors:	Langford Law, Wellington Chapman Tripp, Auckland
Counsel:	S J Mills QC, Barrister, Auckland P A McKnight, Quayside Chambers, Wellington A Romanos, Barrister, Wellington

[1] The defendant, Mr Craig, applies for a ruling that the Remarks and the Leaflet, the two publications that the plaintiff, Mr Williams, says defamed him, were published on occasions of qualified privilege, with the relevant category of privilege being that of reply or defence to an attack.[1] Mr Williams opposes the application and submits that the Remarks and the Leaflet were not published on occasions of qualified privilege.

[2] It is also necessary to deal with several pleadings matters that were raised at the outset of the hearing. I will address the pleadings issues first.

Pleadings issues

[3] In order not to unnecessarily constrain the parties' submissions, I directed that the parties should advance all of the arguments they wished to, regardless of any pleadings deficiencies that may (or may not) otherwise preclude that course. I would then rule on any pleadings issues concurrently with my ruling on the issue of whether the statements were made on occasions of qualified privilege.

[4] First, the defendant sought leave to amend paragraph 35 of the statement of defence to the third amended statement of claim, as follows (the proposed amendments are in bold):

> 35. The plaintiff published some or all of the allegations to each of the following people:
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> 35.1 Laurence Day, over the period May to June 2015;
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> 35.2 Brian Dobbs, over the period February to June 2015;
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> 35.3 Cameron Slater in or about June 2015;
>
> 35.4 John Stringer in or about June 2015; and
>
> 35.5 Christine Rankin, over the period May to June 2015.
>
> **35.6 Garth McVicar, over the period late 2014 to early 2015; and**
>
> **35.7 Bob McCoskrie, over the period June and July 2015.**

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[1] Refer Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [14.51]

[5] I have concluded that there is no prejudice to the plaintiff in allowing the amendment sought. The omission of Garth McVicar and Bob McCoskrie from paragraph 35 appears to be a drafting oversight rather than a deliberate omission. It is clear from the statement of defence as a whole, and the evidence adduced at trial (where both Mr McVicar and Mr McCoskrie gave evidence), that the defendant's case is that Mr Williams published all or some of the allegations to Mr McVicar and Mr McCoskrie. Indeed, such an allegation is specifically made (albeit in relation to other defences) in paragraph 2.11 of Schedule A, which sets out the "publication facts" relied on as underpinning the Remarks and the Leaflet. Paragraph 2.11 states as follows:

> 2.11 The plaintiff also disclosed details of the claim and in some cases selected documents from the Dossier to other people, in confidential meetings and/or discussions, including some of the defendant's key supporters and party board members. The list of other people included:
>
> (i) Garth McVicar
>
> (ii) Bob McCoskrie
>
> (iii) Christine Rankin
>
> (iv) Regan Monahan
>
> (v) John Stringer
>
> (vi) Laurie Stringer
>
> (vii) Laurence Day; and
>
> (viii) Brian Dobbs

[6] Mr Williams was accordingly squarely on notice that Mr Craig alleged that he had disclosed some or all of the relevant allegations to both Mr McVicar and Mr McCoskrie. In such circumstances, allowing an amendment to the pleading would not prejudice Mr Williams.

[7] The second pleadings issue involves the plaintiff. Mr Romanos submitted (amongst other things) that the Remarks and Leaflet were not published on occasions of qualified privilege because they were not published in reply to an attack by Mr Williams on Mr Craig. Rather, Mr Craig was said to have attacked Ms MacGregor first, and Mr Williams had simply replied to that attack, on her behalf. The Remarks

and Leaflet were therefore a riposte, or a reply to a reply, and as a result did not fall within the recognised category of a reply to an attack.[2]

[8] Mr Mills QC submitted that this matter was not pleaded, and should have been. I accept that submission. The matter should have been raised formally and particulars provided of the specific facts relied on to support the proposition that Mr Craig had attacked Ms MacGregor first. The defendant would not be significantly prejudiced by the necessary amendment, however, because the "particulars" of Mr Craig's attack, relied on by Mr Romanos during the course of argument, all related to factual matters that had already been fully traversed at trial. In particular, Mr Romanos relied on Mr Craig's statements in the sauna interview, Mr Craig showing the financial agreement between himself and Ms MacGregor to the Board, and the text exchange between Mr Williams and Ms Rankin on 25 May 2015. Leave to amend is therefore appropriate.

[9] The third pleadings issue relates to an argument, advanced at some length in the plaintiff's written submissions, that Mr Williams would not be regarded, legally, as the primary publisher of a number of statements and would not therefore have been liable in defamation law for many of the resulting media attacks on Mr Craig. I am not satisfied that the failure to plead this matter precludes it from being advanced as a matter of legal submission.

Were the Remarks and Leaflet published on occasions of qualified privilege?

[10] I now turn to consider the key issue before me, which is whether the Remarks and Leaflet were published on occasions of qualified privilege.

[11] Determining whether a defence of qualified privilege arises in any given case involves a two stage analysis. The first stage is to identify whether the relevant statements were made "on an occasion of privilege". This is an issue for the Judge, on which the defendant bears the onus of proof.

[12] If an occasion of privilege exists, then the second stage of the analysis is to consider whether it has been lost (hence the phrase "qualified" privilege). This is an issue for the jury, on which the plaintiff bears the onus of proof.

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2 Mullis and Parkes, above n 1, at [14.52]. See also *Kennett v Farmer* [1988] VR 991 (SC Victoria) at 1003.

[13] Section 19(1) of the Defamation Act 1992 specifies the circumstances in which qualified privilege will be lost. It provides:

> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1), a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[14] Although it is for the Judge to determine whether the statements were made on an occasion of privilege, he or she may only do so (where the trial is a jury trial) on the basis of undisputed facts. If factual issues must be resolved in order for the Judge to determine the issue, then those factual issues must be put to the jury for determination, following which the Judge can then determine whether the occasion was one of qualified privilege. This was explained by Lord Esher MR in *Hedditch v MacIlwaine*, as follows:[3]

> The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion.

[15] Mr Mills submitted that the Court can be satisfied, on the basis of *undisputed* facts, that Mr Craig's statements were made on occasions of qualified privilege. The Court is therefore in a position to rule on the issue now, without the need to refer any disputed factual matters to the jury. In particular, Mr Mills submitted that the key facts that Mr Craig has pleaded in support of his qualified privilege defence have either been admitted by Mr Williams in reply, or were not disputed in evidence at trial. Although disputes remain in relation to a few pleaded sub-paragraphs, Mr Mills submitted that those sub-paragraphs relate to facts that do not need to be proven in order for the Court to determine whether, as a matter of law, the Remarks and the Leaflet were published on occasions of qualified privilege. The Court should therefore put those disputed matters to one side, and determine whether, on the basis of the undisputed facts, the relevant statements were made on occasions of qualified privilege.

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3 *Hebditch v MacIlwaine* [1894] 2 QB 54 (CA) at 58. See also Lord Finlay in *Adam v Ward* [1917] AC 309 (HL) at 318.

[16] Mr Romanos, on the other hand, submitted that, now that all of the evidence has been heard, the Court can be satisfied that the defence of qualified privilege, as pleaded, is incapable of prevailing as a matter of law. In the alternative, Mr Romanos submitted that it is not currently possible for the Court to rule on whether the statements were published on occasions of qualified privilege, on the basis of undisputed facts. Rather, the jury's findings in respect of a number of factual issues are required in order to determine whether the statements were made on occasions of qualified privilege.

[17] I have concluded that it is possible, on the basis of undisputed facts (either because they are admitted in the pleadings, or were undisputed at trial) to determine whether the Remarks and the Leaflet were published on occasions of qualified privilege. I have concluded that they were. Given the trial pressures, and the need to reach and deliver a decision on this issue overnight, it is not possible to provide a fully reasoned decision on this issue at this stage (as I foreshadowed to counsel). Written reasons will, however, be provided in due course.

Result

[18] In conclusion:

a) Leave is granted to the defendant to amend paragraph 35 of the statement of defence to the third amended statement of claim.

b) Leave is granted to the plaintiff to amend its reply in order to plead that Mr Craig's statements were a riposte, or a reply to a reply, and as a result did not fall within the recognised category of a reply to an attack, provided that the particulars relied on are limited to those identified in argument, as summarised at [8] above.[4]

c) No amendment to the pleadings is required to address the plaintiff's submission as to his liability (or lack thereof) as primary publisher of various statements.

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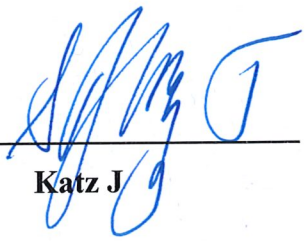
[4] Given my finding that the Remarks and the Leaflet were published on occasions of qualified privilege, it will be apparent to the parties that I did not accept this argument. The plaintiff may well take the view in such circumstances that there is no point in retrospectively amending the pleading to address the issue. It is appropriate to record, however, that leave is granted for such an amendment, in the event that the issue becomes relevant in an appeal context.

d) I find that the Remarks and the Leaflet were published on occasions of qualified privilege.



Katz J