EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2016-009-3143
[2018] NZDC 1360

BETWEEN	IAN BRUCE HYNDMAN Plaintiff
AND	DEREK ANDREW ANDERSON Defendant

Hearing:	25 July 2017
Appearances:	J Moss for the Plaintiff N G Lawrence for the Defendant
Judgment:	1 February 2018

JUDGMENT OF JUDGE R E NEAVE
ON APPLICATION FOR SUMMARY JUDGMENT

Introduction

[1] This is an Application for Summary Judgment on behalf of the defendant in an action for defamation.

[2] The defendant submits the plaintiff's claim cannot succeed and that the defendant has a complete defence to the claim.

[3] The principles applied to summary judgments in general are well known and frequently discussed in the cases.

[4] As noted by McGrath J:[1]

[1] *Jowada Holdings Ltd v Cullen Investments Ltd* CA 248/02, 5 June 2003

> [28] In order to obtain summary judgment under rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and unexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* (1987) NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209.

[5] Those comments apply mutatis mutandis to an argument by a defendant that there is no cause of action.

Facts

[6] Much litigation has occurred and significant amounts of legal ink expended over the consequences of the Christchurch earthquakes. This proceeding would have to be one of the more unusual arguments to find its way to Court with an earthquake background.

[7] The plaintiff and defendant are members of a body corporate which owned a property at 146 High Street Christchurch. This property had to be demolished following those earthquakes.

[8] The property remains undeveloped and is being marketed for sale. Several offers have been received and, suffice to say, the plaintiff appears to have been unhappy with all of them. It seems to me Mr Hyndman essentially had concerns about the marketing of the property and, I conclude, considered a better price ought to have

been obtainable and he was obviously not happy at the efforts of the Body Corporate. It seems three offers were received prior to the alleged defamation. The first proposal came from the defendant himself to the Body Corporate. This offer fell through when the plaintiff refused to sign because he considered the property had not been properly marketed with a reputable commercial agent.

[9] The second offer came in early 2015 and again, all the owners bar the plaintiff were prepared to accept the offer. The plaintiff required a number of conditions to be satisfied before he would sign the agreement, including the issue of an apology to him, to be circulated amongst the other Body Corporate members, and for his legal costs to be paid. The defendant, although disagreeing with the plaintiff's reason and rationale behind his demands, complied with the plaintiff's requests. Clearly, he hoped that by doing so he would be able to obtain the plaintiff's signature and dispose of the property. The sale was not able to proceed for unrelated reasons.

[10] A third offer came in June 2016 and again, there were difficulties about obtaining the plaintiff's signature and agreement to the purchase.

[11] Before the plaintiff would agree to sign the agreement, he demanded that the defendant and two other members of the Body Corporate "agree to anonymously donate two ambulances kitted out and delivered to the Christchurch St John Ambulance." If this were done, the plaintiff would agree to the sale of the property. This request was relayed to the defendant via the prospective purchaser. The relevant executive committee members rejected it as they thought it was unreasonable (a perhaps understandable reaction).

[12] The defendant, as the Chairman of the Executive Committee of the Body Corporate, then sent an email to all Body Corporate members. It is this email which contains the passage of which complaint is made. It reads as follows :

> Dear owners,
>
> **Regrettably the sale is not proceeding at this stage because Ian Hyndman, one of our owners, refused to sign unless a substantial payment was paid to his nominee, which was completely unreasonable. This prevented our buyer paying his non refundable $50,000 + gst deposit because there was no contract.**

> I have suggested an alternative sequence to our buyer which could achieve our outcome provided Ian Hyndman cooperates with his signature. His stake in the current offer is $60,000 which is approximately 1.58%.
>
> I understand our buyer is well on his way with his due diligence, has basic design established, close to confirming his main tenant & their building & parking requirements.
>
> Your subcommittee will discuss the options & advise.
>
> Regards
>
> Derek

[13] The plaintiff claims that the first paragraph in bold type is defamatory.

Defamation

[14] A definition of defamation is not contained in any statute, so it is necessary to have resort to the Common Law. No one definition has been adopted, but there are at least four regularly used definitions or examples of defamatory statements namely:

(a) A statement which may tend to lower the plaintiff in the estimation of right thinking members of society generally;

(b) A false statement about a person to his or her discredit;

(c) A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule;

(d) A statement about a person which tends to make others shun and avoid him or her.

[15] A defendant may escape liability for a defamatory statement in a number of ways and in particular, in this case it is alleged that :

(a) The statements are true; or

(b) They are not materially different from the truth; or

(c) That they were in any event the defendant's honest opinion.

[16] In determining whether or not a statement is defamatory, it is necessary to consider the words in their natural and ordinary meaning. "The test … is whether, under the circumstances in which the writing is published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense."[2]

[17] The reasonable person is an ordinary person with ordinary general knowledge and is neither unusually suspicious nor unusually naïve[3]:

[18] The New Zealand Court of Appeal has summarised the reasonable person test in the following propositions :

> "(a) the test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
>
> (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
>
> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
>
> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
>
> (e) But the court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
>
> (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared …"[4]

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[2] *Capital and Counties Bank Limited v Henty* [1882] 7 AC 741 at 745 per Lord Selborne.
[3] *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 259 per Lord Reid.
[4] *Young v Television New Zealand Ltd* [2014] NZCA 50.

Defence submissions

[19] In attempting to ascertain the meaning of the passage, the defendant provided a literal definition of each of the alleged defamatory words. It is submitted by Mr Lawrence:

> 22 In the first instance, the literal definition of the allegedly defamatory words should be examined :
>
> (a) substantial: of considerable importance, size, or worth;
>
> (b) payment: an amount paid or payable;
>
> (c) nominee: a person who is nominated;
>
> (d) completely: totally, utterly;
>
> (e) unreasonable: not guided by or based on good sense; beyond the limits of acceptability.
>
> 23 In the Plaintiff's Notice of Opposition he defines 'substantial payment' as "a large sum to be paid". The Defendant does not agree with this interpretation of that phrase.
>
> 24 The Defendant does, however, disagree with the Plaintiff's definition of 'nominee'. The Plaintiff's definition is not referenced, nor does it accurately define what a nominee is. A nominee is not a "named entity associated with the plaintiff"; if that were the case the Defendant would have said 'associate' or 'entity associated with', but he did not. The definition of nominee above at paragraph 22(c) should therefore be adopted.
>
> 25 The Defendant also accepts the Plaintiff's definition of 'completely unreasonable' to mean "beyond the limits of acceptability and fairness". This is a reasonably accurate combination of the two separate definitions listed above.
>
> 26 As a result, the literal interpretation of the Defendant's allegedly defamatory statement was that the Plaintiff was requiring a large sum to be paid to an entity nominated by him that was beyond the limits of acceptability and fairness.

[20] The defendant goes on to argue that the statement was both the truth and the defendant's honest opinion. It is submitted further :

> 53 Even if there was a dual meaning, as suggested by the Plaintiff, the Defendant's statement was not defamatory because:
>
> (a) The body corporate members were accustomed to the Plaintiff making last minute demands prior to him agreeing to sell the Property. A reasonable and ordinary body corporate member

in the circumstances would not have been surprised the Plaintiff was putting conditions on his signature for the third potential sale because he had a history of doing so with earlier sales ([body corporate member 1]'s email at 3(a)(iv) of the Plaintiff's Notice of Opposition is an example of the commonly held view of body corporate members that the Plaintiff was difficult to deal with). Therefore, any negative connotation associated with the Plaintiff putting a condition on his signature would not have altered a reasonable body corporate member's opinion of the Plaintiff, which is the requirement for a statement to be considered defamatory; and/or

(b) The body corporate members would have realised that the Defendant was simply stating his subjective opinion when he said the Plaintiff's demands were "completely unreasonable". The Defendant offered to clarify that the Plaintiff had asked for two ambulances to be donated to St Johns, but his offer was not accepted.

[21] The Notice of Opposition also suggests that the Plaintiff has not suffered any financial loss as a result of the alleged defamatory statement. However, as defamation is actionable without proof of any special damage or financial loss, this argument cannot succeed.[5]

Plaintiff's submission

[22] In terms of whether the statement is defamatory, Mr Moss submits :

> It is the first of these three limbs that is usually the subject of examination because the other two limbs are relatively easy to ascertain. The test of whether a statement is defamatory is an objective one, the relevant principals being set out by *Burrows and Cheer*.
>
> a. The test is objective; under the circumstances in which the words were published, what would the ordinary, reasonable person understand by them?
>
> b. The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience in worldly affairs.
>
> c. The Court is not concerned with the literal meaning or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
>
> d. The meaning includes what the ordinary reasonable person would infer from the words used in the publication…

[5] See Defamation Act 1992, s 4.

e. But the Court will reject those meanings which only emerge as the product of some strained or forced interpretation or groundless speculation…

[23] In relation to the defence of honest opinion he submits that the defence must be based on true facts and obviously an opinion, as opposed to a statement of apparent fact, as well as being an opinion genuinely held by the maker.

[24] Mr Moss challenges the notion that a strictly literal approach to each of the words is the correct way of examining the passage in contention. He submits also that the communication must be considered in the light of the knowledge of the recipients of the previous matter. This is akin to the submission that Mr Lawrence makes, but I am inclined to agree with Mr Moss that it actually does not assist the defendant's position. Clearly, there was the prospect the plaintiff would have been considered to be someone difficult and unreasonable by this group of people, perhaps making it more likely they would take the most adverse view of the plaintiff.

[25] It is important to note that the plaintiff is not relying upon the allegation that his behaviour was unreasonable. It would be difficult at least without a lot more, for such a statement to be defamatory. What is alleged in this case is the way in which the offending paragraph effectively suggests that the defendant is seeking to line his own pockets, or obtain some kind of unfair advantage for himself from the transaction. I have no doubt that if such a meaning is imputed to the passage it would be clearly defamatory. It would cast significant aspersions as to the defendant's honesty and integrity. At the very least, it would be suggestive of sharp business practice, particularly when viewed against the parties' previous dealings with Mr Hyndman.

Discussion

[26] In determining whether the words are defamatory it is, as noted above, necessary to decide what they mean. Generally, one takes the natural ordinary meaning which is the meaning that would be attributed to the statements by an ordinary person reading or listening to the statement. Except in a dictionary, words of course do not exist in isolation. Words take colour from other words that surround them, and from the context of the passage as a whole, and sometimes even tone may make a difference to the meaning to be ascribed to a particular passage. The

submissions of the plaintiff by taking the words individually avoid the issue of the meaning to be ascribed to the offending passage as a whole. It is course necessary to look at the whole of the email, but I am quite satisfied that there is an available defamatory meaning as set out above.

[27] At one level, it could of course be said that this statement is both harmless and completely true in a sense that a nominee is simply a person nominated by another.

[28] However, there is clearly an alternative available meaning. A nominee is someone who stands in the place of or associated with the nominating party. Particularly coupled with a description of this behaviour as unreasonable, viewed as a whole, it seems to me the paragraph is capable of sinister interpretation.

[29] I am bound to observe coming back to this matter, to prepare this decision sometime after the hearing, and on reading the passage afresh, the sting in the words struck me immediately. Given that available interpretation, it is ultimately for the fact finding tribunal to determine whether or not the statement is defamatory. While in this jurisdiction there is no jury, and a Judge will be the ultimate fact finder, I do not consider it appropriate to deal with this matter in the absence of a full hearing.

[30] Mr Moss further submits for Mr Anderson to be successful in this Application for Summary Judgment, he must prove that there is no doubt or uncertainty that the statements made were true or at least his honest opinion. Again, this is an issue which I would be reluctant to decide on a summary judgment basis. That is an assessment which could only be made after a full consideration of all the evidence. To the extent that the suggestion of personal benefit is contained in the statement, there is in fact no evidence that this is true. It is clear that the plaintiff was not seeking to benefit from the transaction personally. Further, the evidence suggests that there may have been more than one person who was holding out from providing at least a conditional acceptance of the offer and thus Mr Hyndman was not the only one in this position.

[31] Mr Moss submits at paragraphs 32 to 38 :

> 32. [Name of Body Corporate member 2 deleted], a member of the Body Corporate and one of the other members that Mr Hyndman wanted to

contribute to the donated ambulances, claims in his affidavit dated 27 March 2017 that the email accurately represented the situation by informing the Body Corporate members that Mr Hyndman was "demanding something before he would sign an agreement for sale and purchase which the rest of us had signed."

33. With respect, it matters not what [Body Corporate member 2] took the email to mean. It matters what the reasonable person took it to mean. It is an objective test, not a test of what some members of the Body Corporate thought. Even if Mr Anderson had been able to prove what all of the members of the Body Corporate thought, which tellingly he has not done, it would not matter if it was arguable that the reasonable person would have taken a different impression or inference from the words.

34. A key consideration is what the 'sting' or 'barb' of the defamatory statement is, in the context of a truth defence. The 'sting' must be true or not materially different from the truth. Thus in in [sic] *Pipi Holdings Ltd v BMW NZ Limited,*[6] the 'sting' was held to be a statement that a car dealer had wound back odometers. In actual fact, the dealer had knowingly sold cars that had already been wound back, and which was found to not be materially different from the truth.

35. An email send [sic] by [Body Corporate member 1] on 1 August 2016 to the Body Corporate members (except for Mr Hyndman) stated the following:

> *"As you will see I have cut Ian Hyndman out of this email for obvious reasons. Perhaps it is time for the rest of us to bite the bullet and buy him out, (what is the cost he wanted to be paid to his nominee????)"...*

36. [Body Corporate member 1]'s email clearly shows that the 'sting' of Mr Anderson's email was that Mr Hyndman was dishonest or unethical, and was trying to line his own pockets or the pockets of an associate of his. [Body Corporate member 1] uses the phrase "bite the bullet", implying that getting rid of Mr Hyndman would have been a necessary but unpleasant way to complete the sale.

37. [Body Corporate member 1] also uses multiple question marks after asking how much was to be paid to Mr Hyndman's nominee. As tone is difficult to ascertain from email messages, additional question marks denote a sense of urgency or importance or perhaps exasperation to a question and the overall position, showing [Body Corporate member 1]'s further concerns. The use of the word "nominee" again as a direct quote from Mr Anderson's email shows that the word usage (by Mr Anderson in the email) was particularly effective and noteworthy to the audience of the email.

38. Finally, it is apparent from "cutting Mr Hyndman out for obvious reasons" that [Body Corporate member 1] recognises that Mr Anderson's email was discrediting of Mr Hyndman and she in turn

[6] CA 22-97, 25 August 1997.

> did not want Mr Hyndman to know she was writing in possible support of Mr Anderson.

[32] I agree with that argument.

[33] It is also necessary to bear in mind the words of Blanchard J in writing for the Court of Appeal in *Mitchell v Sprott*[7]. At para 48 he observed :

> At the summary judgment stage of a defamation proceeding it is likely to prove difficult to satisfy a Court that it can safely conclude that at trial, after cross-examination (or comment on failure to give evidence), a defendant will succeed in establishing the honesty of his or her opinion. Unless the Court is persuaded that the evidence in the affidavits reveals conduct by the plaintiff of such a nature as would produce a comment from any dispassionate observer similar to that from the defendant, the Court will hesitate to determine the question of the honesty of the opinion in advance of a trial.

[34] In my view, such a conclusion by the dispassionate observer is far from inevitable. Further, given the issue as to the meaning of the words it cannot be determined at this stage what meaning is to be considered by the dispassionate observer. Bearing in mind the defendant argues the pleaded meaning is not accepted it is not possible to argue honest opinion until the meaning is determined.[8]

[35] In relation to the question of honest opinion, whilst this may well apply to the description of the plaintiff's behaviour as unreasonable, I do not see how it can apply to the pleaded meaning of the defamation. Nor does it matter whether or not Mr Anderson intended to convey a defamatory meaning, if his words did in fact do so. Nor is there any suggestion that he had an honest opinion that the defendant was trying to benefit himself personally. This defence would also have to fail at least at this stage of the enquiry.

[36] I do note that any damages awarded are likely to be small, however, as noted above, defamation is actionable without proof of damage. Given the relatively mild nature of the statements, an apology which has already been tendered, the reputation of the plaintiff amongst the recipients of the email may not have been particularly high and the limited publication of the alleged defamation, all of these would significantly

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[7] *Mitchell v Sprott* CA 21/01, 15 November 2001.
[8] See also *Vague v Banks* [2007] DCR 782 per Judge McElrea to similar effect.

reduce the damages. However, that is not a ground, in this case, in my view for granting the Application for Summary Judgment.

Conclusion

[37] In my view, it is arguable that the words complained of do bear a defamatory meaning and there is no evidence that the pleaded defamatory meaning can be justified in truth. The defendant's Application for Summary Judgment must therefore be refused. There is an arguable case and the matter will need to be disposed of in the usual way. The plaintiff having succeeded on his opposition to the Application for Summary Judgment is entitled to costs. If the parties seek to have that amount quantified now, then submissions may be filed within 28 days of receipt of this judgment, of no more than three pages each.

[38] The matter needs to be progressed through the system and should, in my view, now be set down by the Registrar for a settlement conference at the earliest available date.

R E Neave
District Court Judge

Signed this …… day of …… 2018 at ……..am/pm