IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2016-404-001875
[2018] NZHC 2122

BETWEEN	CRAIG LEISHMAN Plaintiff
AND	ROGER HENRY LEVIE First Defendant
AND	HOME OWNERS AND BUYERS ASSOCIATION OF NEW ZEALAND INCORPORATED Second Defendant

Hearing: 14 August 2018

Appearances: J B Orpin-Dowell for the Plaintiff
J V Ormsby/N G Lawrence for the Defendants

Judgment: 17 August 2018

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by me on
17.08.18 at 3:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Grove Darlow & Partners, Auckland
Stout Street Chambers, Auckland
Wynn Williams, Auckland

Introduction

[1] This is a claim by the plaintiff, Mr Leishman, for defamation and breach of contract again the Home Owners and Buyers Association of New Zealand Inc (HOBANZ) and Mr Roger Levie, HOBANZ's chief executive.

[2] Mr Leishman is the principal shareholder and managing director of Boutique Body Corporates Ltd (BBCL). He and BBCL provide secretarial, advisory, administrative, and management services to bodies corporate. The services include those relating to resolving building defect issues. HOBANZ provides similar services.

[3] BBCL acts as a body corporate secretary for the Bella Vista Apartments, a unit title complex at Te Atatu. The Bella Vista apartments had building defect issues.

[4] The defamation claim relates to an email the defendants sent to three of the owners of the Bella Vista apartments on 22 August 2014.

[5] The claim for breach of contract has its genesis in 2008, when HOBANZ and its then president, Mr Gray, published a defamatory statement sent to the Minister for Building and Construction, about the plaintiff. Proceedings brought by Mr Leishman in relation to the 2008 defamation were settled. The plaintiff says that the publication of the 22 August 2014 email was a breach of the deed of settlement. He also says that the 2008 defamatory statements are similar to those now at issue in these proceedings and that there is a pattern of the defendants defaming him.

[6] Mr Leishman seeks orders pursuant to r 8.38 of the High Court Rules that the defendants answer interrogatories. Mr Leishman says the answers to those interrogatories will be relevant to establishing at trial the history of the relationship between the defendants and Mr Leishman and BBCL, and that the defendants have made statements (similar to those they made about Mr Leishman in 2008 and in the 2014 email) on other occasions to the bodies corporate listed in table 1, schedule 1 to the application.

[7] The defendants object to the interrogatories on the grounds that the questions are irrelevant, oppressive, raise confidentiality issues and are an attempt to illicit evidence that the defendants may call at trial.

Relevant legal principles

[8] The general principles governing interrogatories was set out by Associate Judge Bell in the earlier judgment of *Leishman v Levie*.[1] I adopt those principles for the purposes of this judgment. They include the well-known dictum in *Marriott v Chamberlain*:[2]

> The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witness whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly everything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.

[9] Barker J in *Re Security Bank Ltd (No.31)*[3] set out the four objectives of interrogatories:

(a) To obtain admissions as to facts which will support the case of the interrogating party;

(b) To obtain admissions which will destroy or damage the case of the party interrogated;

(c) Interrogatories which are in the nature of a request for further and better particulars;

(d) Interrogatories which seek to obtain accounts from a party occupying a fiduciary position.

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1 *Leishman v Levie* [2018] NZHC 721, [2018] NZAR 984 at [26]–[28].
2 *Marriott v Chamberlain* (1886) 17 QBD 154 (CA) at 163.
3 *Re Security Bank No. 31* (1984) 1 PRNZ 514 (HC), citing with approval the decision of Lockhart J in *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 (FCA) at 190.

[10] Mr Leishman says that the first two objectives are relevant in the present case. He also relies on the following passage from *Shore v Thomas*:[4]

> It is not necessary that the answer should be conclusive on the questions at issue; it is enough that they should have some bearing on the question, and that they might have a tendency to establish, or form a step in establishing, the allegations made.

[11] In Commerce Commission v Air New Zealand (No.6), [5] Asher J, referring to Shore v Thomas, held:

> "Necessary" does not mean as is suggested in some of the submissions for the defendant airlines, that the questions relate to facts crucial to the interrogating party proving its case. The threshold is not that high. Rather, necessary questions can include questions that may indirectly prove the key facts relied on. They may establish or form a step in establishing the allegations made.

[12] The plaintiff says that the interrogatories sought in this case have a tendency to establish, or will form a step in establishing, that the defendants have made statements similar to those that they made about Mr Leishman in 2008 and the August 2014 email, on other occasions.

Factual background

[13] The factual background is set out in the earlier judgment of Associate Judge Bell in *Leishman v Levie*.[6] The parties agree that is an appropriate summary for the purposes of determining this application.

The plaintiff's application for interrogatories

[14] The plaintiff has limited the scope of his application in two ways. First, he only pursues his application in relation to interrogatories (c), (e), and (f). Second, he only seeks answers in relation to the eight bodies corporate listed in table 1 of schedule 1. Accordingly, the interrogatories he seeks answers to are:

> (c) Have the defendants ever done work for, or been consulted by owners in, the bodies corporate listed in table 1 of schedule 1;

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4 *Shore v Thomas* [1949] NZLR 690 (SC) at 695; see also *Bank of New Zealand v Gardner* (1990) 2 PRNZ 278.

5 *Commerce Commission v Air New Zealand Ltd (No.6)* [2012] NZHC 2113 at [18].

6 *Leishman v Levie*, above n 1, at [5]-[25].

(e) If the answer to (c) is yes, did the defendants (or anyone on behalf of the second defendant) ever discuss the plaintiff or Boutique Body Corporates Limited with those bodies corporate;

(f) If the answer to (e) is yes, on what dates did those discussions take place.

[15] The bodies corporate listed in table 1, schedule 1 of the notice are bodies corporate that:

(a) Mr Leishman and BBCL currently or formerly provided services to; and

(b) Mr Leishman knows or strongly suspects that one or both of the defendants have been in contact with.

The defendants' objections

[16] The defendants contend that the interrogatories seek to find evidence that the defendants had conversations with other bodies corporate. They submit that the purpose must be one of three:

(a) To seek new potential causes of action to amend the pleadings or bring new claims. Such interrogatories are not relevant and are not permitted.[7]

(b) To seek evidence of different facts to use as evidence in support of the likelihood of a disputed allegation of fact occurring. Such interrogatories are not permitted.[8] *Evan v Harris*[9] confirms that interrogatories directed towards "ascertaining facts which are merely evidence of facts in issue" are not permitted.

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7 *Barham v Lord Huntingfield* [1913] 2 KB 193.
8 *Zeng v Cai* [2018] NZHC 594 at [23].
9 *Evan v Harris* (1991) 6 PRNZ 329.

(c) To seek information as to potential witnesses or other information that has been obtained by the defendants for the purposes of conducting the litigation. These are also not permitted.[10]

[17] In essence, the defendants contend that there is no pleading or evidential foundation for the interrogatories. They say that interrogatories which attempt to establish any of the above, are commonly categorised as "fishing" interrogatories and are inadmissible.

Analysis and decision

[18] I address the defendants' objections under the broad headings of relevance and fishing. The assessment of relevance focusses on the pleadings and the assessment of the fishing objection deals with the issue of the adequacy of the evidential foundation for the interrogatories.

Relevance

[19] The relevance of the interrogatories here is to be assessed, as the plaintiffs contend, by reference to the issues of whether the defendants were motivated by ill will (which will affect the availability of the defences of honest opinion and qualified privilege) and the relief sought. It is those aspects of the pleadings that are in focus.

[20] I accept the submission of the plaintiff that establishing the defendants have made similar statements about Mr Leishman on other occasions may have a tendency to prove that the defendants were predominantly motivated by ill will and that these defences are not available to them. I accordingly reject the defendants' contention that the interrogatories are irrelevant.

[21] The defendants have pleaded defences of honest opinion and qualified privilege. The plaintiff's responses include that:

(a) As to honest opinion, that the opinion was not genuine;

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[10] High Court Rules 2016, r 8.40(1)(d). See also *Marriott v Chamberlain*, above n 2, at 163.

(b) As to qualified privilege, that the defendant was predominantly motived by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication.

[22] As to honest opinion, the fact that the defendant has an ulterior motive for publishing a statement may be evidence that the opinion was not genuine.[11] Non-genuineness may be established in a variety of ways, including by bad relations between the parties in the past,[12] or the fact that the defendant had a financial motivation for the statement. The fact that the defendants may have made previous similar statements about the plaintiff in the past may tend to establish that the opinion was not genuine.

[23] As to qualified privilege, this defence will fail if the plaintiff proves that in publishing the matter which is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff.[13] Ill will may be proved in a variety of ways, including by showing that the defendants have published other defamatory words about the plaintiff or repeated the defamation.[14]

[24] In *Barrett v Long*[15] the House of Lords held that other defamatory statements may be admitted to prove that the defendant acted with malice in relation to the publication sued on.

> The publication of previous libels on the plaintiff by the defendant, is admissible evidence to show that the defendant wrote the libel in question with actual malice again the plaintiff. The long practice of libelling the plaintiff may show in the most satisfactory manner, that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and that more the evidence approaches to the proof of a systemic practice, the more convincing it is…

[25] I also accept the further submission from the plaintiff that he does not need to go as far as to show that the other statements made by the defendants about him are

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11 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 903.
12 *Thomas v Bradbury Agnew & Co Ltd* [1906] 2 KB 627.
13 Defamation Act 1992, s 19(1).
14 Todd, above n 11, at 956.
15 *Barrett v Long* (1851) 3 HLC 395 at 414, 10 ER 154 at 162.

defamatory. It is sufficient that they show that the other statements reflect personal animosity, hostility or bad relations between the parties.[16]

[26] The defendants submit that an examination of the Notice of Ill Will, the Notice that Opinion Not Genuine, and the associated pleadings shows that the facts in issue are those that pertain to:

(a) The settlement deed of 3 December 2010;

(b) The circumstances of the alleged 2008 statement and the alleged 2014 publication; and

(c) The "factual matrix" upon which the opinion was based.

[27] The defendants submit that post-proceeding facts are irrelevant. For the interrogatories here to be relevant, the plaintiff must show that they are relevant to the defendants' state of mind when the allegedly defamatory comments were made. It is contended that the rule that post-proceeding facts are not relevant to determining the defendants' state of mind when making the allegedly defamatory statement, is plainly obvious on its face. A defendant cannot rely on facts of which he was unaware at the time of publication and is confined to the facts known at the time.

[28] However, I reject the submission that post-proceeding facts are irrelevant. There is clear authority to support the proposition that statements made after the publication in question are relevant and admissible in relation to the issue of ill will. *Gatley on Libel and Slander*[17] states:

> Other defamatory words published by the defendant about the claimant can be relied upon as evidence of malice, even though they are not the subject of an action, and were published after the action began. Repetition of a slander may be evidence of malice.

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16 *Simpson v Robinson* (1848) 12 QB 510 at 513 and *Horrocks v Lowe* [1975] AC 135 (HL) at 151.

17 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed Sweet and Maxwell, London 2013) at [32.39].

[29] To similar effect, Tugendhat J held in *ZAM v CFW*:[18]

> [68] There is no doubt that publications by a defendant subsequent to those which are relied as causes of action can be relied on by the claimant to prove malice, and thus the injury to a claimant's feelings.

[30] The interrogatories now sought are limited, and appropriately so. For reasons already given, I reject the defendants' contention that the interrogatories only go to propensity and do not relate to a matter that is an act or omission in any of the causes of action. *Zeng v Cai*[19] that can be distinguished on that basis.

[31] I also find that the interrogatories at issue are relevant to the question of relief. This includes both the nature of the relief sought, namely a permanent injunction, and the question of the quantum of any damages award.[20]

[32] The plaintiff says that the claim for an injunction is of particular importance to him given that the previous defamatory statement of 2008 has, so he says, in spite of the settlement agreement, been repeated.

[33] In relation to the grant of an injunction, the Court generally has to be satisfied that there is reason to apprehend that there would be further publication by the defendant.[21]

[34] Establishing that the defendants have made similar statements about the plaintiff on other occasions, and on occasions since 2014, may well be relevant to whether there is a risk of further publication in future and whether a permanent injunction should be granted.

[35] In relation to damages, malice by the defendant, including that demonstrated by the publication of other similar statements, is a factor that the Court may take into

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18 *ZAM v CFW* [2013] EWHC 662 (QB). I acknowledge that Tugendhat J does draw distinction between injury to feelings and damages for injury to reputation. However, I reject the defendants' submissions that that distinction has any relevance in this case.

19 *Zeng v Cai*, above n 8, at [23].

20 In *Gatley on Libel and Slander,* above n 18, at [31.29] it is noted that interrogatories in relation to quantum of damages are generally admissible in defamation actions.

21 *Procter v Bayley* (1889) 42 Ch D 390 (CA) at 401 cited with approval, in the defamation context, by *Gatley on Libel and Slander*, above n 20, at [9.41].

account as justifying a higher award of damages. In *C W Wah Jang & Co Ltd v West*[22] it was held that evidence of other slanders might be taken into account as showing the spirit and intention with which the slanders charged in the case were made, and that such evidence showed the need for a punitive element in the damages to be awarded.

Fishing

[36] I reject the contention of the defendants that there is no proper evidential foundation for the interrogatories and that the plaintiff is essentially fishing for evidence to bolster his case.

[37] I accept that the more substantial evidential basis for the interrogatories is set out in the plaintiff's evidence in reply, but it is, nevertheless, sufficient.

[38] The evidential basis for the interrogatories extends beyond the mere belief of the plaintiff. I accept his submission that the language used in the 2008 statement, and in the emails throughout August, when considered together with the evidence from Mr Leishman about the change of behaviour by a number of the bodies corporate (i.e. discontinuing his services) support the claim that the defendants have made similar allegations against Mr Leishman on other occasions. This includes the phrases "activities in managing body corporate affairs for a number of unit title complexes", "seen this all before with exactly the same players", "familiar with the players", "tried to stay clear of anything Craig is involved in" and "the usual suspects are involved".

[39] The plaintiff contends, in reliance on *Russell v Stubbs*[23] and *Chertkow v Retail Credit Co*[24] that even where the issue of malice is not raised, it is not fishing to interrogate in relation to other similar publications where it can be inferred that the defendant has made such statements on other occasions.

[40] The defendants submit that these cases are cases of special circumstances and can be distinguished. Mr Ormsby relies on *Barham v Lord Huntingfield*[25] where

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22 *C W Wah Jang & Co Ltd v West* [1933] NZLR 235 at 238.
23 *Russell v Stubbs* [1913] 2 KB 200 (CA).
24 *Chertkow v Retail Credit Co* [1932] DLR 390 (Alberta SC) at 395-396.
25 *Barham v Lord Huntingfield*, above n 7.

Kennedy LJ held that *Russell v Stubbs* was a unique case which turned on its own facts. Kennedy LJ rejected the notion that it created a general rule that information on unknown libels should be discovered. In *Russell v Stubbs* an affidavit had been filed by the plaintiff's solicitor which afforded prima facie evidence, and which was not contradicted, that the circular had been published to other persons and it was therefore held to be just that the plaintiffs should be permitted to ascertain who those other persons were.

[41] I find that it is not necessary for me to determine whether this is a special case to which *Russell v Stubbs* might apply or whether *Russell v Stubbs* is restricted in the manner contended for by the defendants. The relevance of the interrogatories here arises in the context of the pleading, in particular, the notice of ill will. As noted above, there is clear authority that other defamatory words published by a defendant about the claim can be relied upon as evidence of malice, even though they are not the subject of the action.[26] I also accept the submission of Mr Orpin-Dowell that *Russell v Stubbs* and *Barham v Lord Huntingfield* did not deal with issues of qualified privilege and or malice/ill will.

[42] In support of their contention that the questions do not establish any facts relevant to the facts in issue, the defendants submit that even if the questions were allowed they would not establish that any other defamatory statements were made. The interrogatories sought do not seek to elicit what was communicated with the bodies corporate. I acknowledge that the answer to the interrogatories will not in themselves establish that in fact other false or defamatory statements were made. However, they may establish or form a step in establishing that the defendants made similar statements on other occasions. The interrogatories are in my view sufficiently germane to the material facts, relate to the important issue of malice and have a direct connection to the core fact of statements being made to bodies corporate about recovery rates in defective building proceedings.[27]

[43] Ultimately it will of course be for the trial judge to determine whether inferences can be drawn from all of the facts, including those established by the

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26 *C W Wah Jang & Co Ltd v West,* above n 22.
27 *Commerce Commission v Air New Zealand (No.6)*, above n 5, at [20].

interrogatories, that false or defamatory statements were made to other bodies corporate either before or after the proceedings were issued. As best as I can assess at this stage, if the answers provided to the plaintiff's interrogatories establish the relevant facts for which they are sought, it will be tenable to ask the trial judge to draw the inferences sought.

[44] In concluding that the interrogatories are both relevant and not impermissible fishing, I reject the submissions of the defendant that they are directed towards ascertaining facts which are merely evidence of facts in issue.[28] The prohibition in *Evans v Harris* is not engaged, and in any event, the distinction drawn in that case is not always easy to make. As I have concluded above, the test of whether the interrogatories are sufficiently germane to the material facts, as applied by Asher J in *Commerce Commission v Air New Zealand (No.6)*, has been made out.

Confidentiality and oppression

[45] The defendants have also raised objections to the interrogatories on the grounds of confidentiality and oppression. However, these were very much secondary objections. I note that despite referring to their standard terms and conditions about confidentiality, the defendants have not put those terms in evidence. I also find that in the circumstances here, where the interrogatories sought are now very limited, and in view of the fact that they can probably be provided relatively easily, there is no oppression. The objections based on confidentiality and oppression are rejected.

Result

[46] The plaintiff's amended application that the defendant answer interrogatories is granted.

[47] I order that the defendants answer interrogatories 5(c), 5(e) and 5 (f) as set out in the plaintiff's notice to answer interrogatories dated 28 May 2018, and to verify their answers by affidavit by Wednesday, 29 August 2018.

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[28] *Evans v Harris,* above n 9.

[48] I direct that table 1 of schedule 1 to the plaintiff's application to answer interrogatories dated 28 May 2018 is amended to record that the Body Corporate at 130 Stancombe Road is BC 371455 and not, as currently recorded, BC 372942.

[49] I further order that the close of pleadings date be extended until five working days after the defendants verify their answers namely to Wednesday, 5 September 2018.

[50] The plaintiffs have been successful with their application and in the ordinary course would be entitled to costs on the application on a 2B basis. However, for the reasons set out at paragraph 55 of the defendants' submissions I am inclined to the view that there should be a 50 percent reduction in the costs to be awarded to the plaintiff. If the parties cannot agree on costs, then memoranda are to be filed and served within 14 days.

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Associate Judge P J Andrew