IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2019-404-2004
[2020] NZHC 2046

UNDER	the Defamation Act 1992
BETWEEN	EXIT TIMESHARE NOW (N.Z.) LIMITED Plaintiff
AND	CLASSIC HOLIDAYS LIMITED Defendant

Hearing: 10 August 2020

Appearances: P J Dale QC and E Telle for Plaintiff
D H McLellan QC and J A R Barrow for Defendant

Judgment: 13 August 2020

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 13 August 2020 at 4.15pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
13 August 2020

[1] A hearing took place on 10 August 2020 in respect of an application by the defendant, Classic Holidays Ltd (Classic Holidays), for security for costs, notwithstanding the parties were only some $11,540 apart in respect of offer and counter-offer as to the amount of security. That the parties were unable to bridge such a gap and necessitated senior counsel being involved in a half-day hearing speaks volumes as to the state of the relationship between the parties.

[2] Originally, the application by Classic Holidays also sought further particulars of the statement of claim. The plaintiff, Exit Timeshare Now (N.Z.) Ltd (Exit Timeshare), has provided a draft second amended statement of claim (2ASOC). Classic Holidays confirms when the 2ASOC is filed, it will meet its concerns about particulars, albeit that the draft 2ASOC itself may give rise to further issues.

[3] As at 10 August 2020 the application for further particulars was not pursued, notwithstanding that the draft 2ASOC had not been filed. Classic Holidays seeks to defer the filing of the 2ASOC until after discovery. Classic Holidays seeks that it be filed within five working days of the release of this judgment. I will address that issue at the end of this judgment.

[4] Accordingly, the live issues are:

(a) the issue of costs on the part of the application relating to further particulars;

(b) whether there should be an order for security, and if so, in what amount, and costs on that application;

(c) the timing of the filing of the 2ASOC and discovery.

Context

[5] Classic Holidays is a timeshare resort management company. Its business includes providing management services to body corporates of timeshare resorts.

[6] Exit Timeshare provides advice to owners of timeshares about how to exit their timeshares, hence its name.

[7] Exit Timeshare brings a claim in defamation against Classic Holidays arising from what Exit Timeshare says were defamatory statements made about it at a meeting of the Mt Hutt Lodge Body Corporate Committee (Mt Hutt Lodge) (the Meeting). It is not in issue that the regional operations manager of Classic Holidays was present at Mt Hutt Lodge's the Meeting.

[8] The statement of claim alleges that in the course of the Meeting, a Mr White, (who with his wife held a timeshare in Mt Hutt Lodge), held up a pamphlet published by Exit Timeshare and advised those present at the Meeting that he had received it from Exit Timeshare's office in Paihia. This pleading is denied.

[9] Part of the pleading of the affirmative defence of qualified privilege at para 11[d] of the statement of defence, is that:

> Certain owners of time share units at Mt Hutt Lodge, including Mr and Mrs White, had, before the meeting, raised with the Chairperson of the meeting, Mr Gourdie, their interest in terminating or transferring their time shares.

[10] The statement of claim pleads an unnamed Classic Holidays' representative said to those at the Meeting that they should not touch Exit Timeshare and that "they are a scam" company. It is then pleaded that the regional operations manager of Classic Holidays made a number of statements about Exit Timeshare which are said to be defamatory, including that Exit Timeshare was "a scam company", that "they go around ripping people off" and that Exit Timeshare asks for money in advance from customers who would then not hear from Exit Timeshare again.

[11] The statement of claim also pleads that the natural and ordinary meaning of the statements made were to the effect that Exit Timeshare operates in a dishonest and unscrupulous manner, that timeshare owners should be afraid to trust it, along with other meanings.

[12] Classic Holidays denies the statements were made and denies the pleaded natural and ordinary meanings.

[13] Notwithstanding that Classic Holidays denies the statements said to be defamatory were made, it pleads the affirmative defence of common law qualified privilege, pleading that the statements were published on an occasion of privilege, being the Meeting which was only open to those authorised to attend. Classic Holidays says the purpose of the Meeting was to discuss matters of interest and concern to the Mt Hutt Lodge. Some Mt Hutt Lodge members attending the Meeting had raised the issue of terminating or transferring their timeshares. Hence, Classic Holidays' position is that it was appropriate for it to comment on Exit Timeshare. Again, this is against the background of Classic Holidays denying having made the statements complained of. I will return to what I consider has the appearance of an inconsistent pleading when I deal with security.

[14] It is clear from the affidavits filed in support of the application that the relationship between the parties is, to say the least, a difficult one.

Security principles

[15] Exit Timeshare agrees with the legal principles applying to security for costs as set out in Mr McLellan QC's submissions on behalf of Classic Holidays.

[16] It is common ground that the threshold for security has been met as Exit Timeshare is a subsidiary of a foreign corporation, satisfying r 5.45(1)(a)(iii) of the High Court Rules 2016.

[17] Classic Holidays says r 5.45(1)(b) is also satisfied, that is, there is reason to believe that Exit Timeshare will be unable to pay the court awarded costs of Classic Holidays if Exit Timeshare is unsuccessful in this proceeding. To support this submission, Exit Timeshare relies on the evidence of its director, Mr Allison, who deposed that he had to pay $30,000 from his own funds into Exit Timeshare "in order to keep supporting the New Zealand Exit company". Classic Holidays says this is suggestive that Exit Timeshare would be unable to pay costs.

[18] While Exit Timeshare submits it would be unjust and inappropriate to order security, its open position, prior to the application being made, was that it had offered security of $33,460 based on 2B costs for a three day hearing. Classic Holidays calculates scale costs for a five day hearing at $53,297 and has submitted that security of $45,000 would be a reasonable sum in all the circumstances, hence my saying at the outset of this judgment that the parties were only $11,540 apart on the issue of security.

[19] Exit Timeshare's counsel describes Classic Holidays' estimate of five days hearing time as "grossly overstated".

[20] On reviewing the material provided, I consider that a co-operative approach between counsel should allow the matter to be heard within three days. It is in this regard that I return to the issue of the potentially inconsistent pleading. If Classic Holiday's case is that its representative did not say the words pleaded, then that is its defence. If its position is, in fact, that the statements were said, but the defence of qualified privilege applies, then it should say so. Further, it seems to me that if Exit Timeshare establishes that the defamatory statements as pleaded were made, it is difficult to see how they cannot carry the pleaded meanings given the nature of the allegations.

[21] *Hicks v Hicks* contains a helpful discussion of inconsistent pleadings.[1] It is impermissible to plead inconsistent allegations of fact in the alternative when, as a matter of logic to the knowledge of the pleading party, one of the alternative cases must be false.[2] Here, Classic Holiday's evidence will be that its representative at the Meeting did not make the statements complained of by Exit Timeshare.

[22] Whether an occasion is one of qualified privilege is a question of law. Accordingly, Classic Holidays could argue that the Meeting was an occasion of qualified privilege, without its position that it did not make the statements becoming an issue.[3] In *Defamation Law in Australia*, the authors referring to

---

1 *Hicks v Hicks* [2016] SASC 50, (2016) 125 SASR 34.
2 At [16].
3 Stephen Todd (ed) Todd on Torts (8th ed, Thomson Reuters, Wellington, 2019) at [16.11].

Bashford v Information Australia (Newsletters) Pty Ltd, set out the following from McHugh J's dissent:[4]

> A plea that defamatory matter was published on an occasion of qualified privilege is a plea of confession and avoidance. It accepts that the communication is defamatory, that the defamatory may be false and that its publication had caused, or may cause, harm to the plaintiff. It confesses the publication of defamatory matter, but contends that the publication is immune from liability because the public interest requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation.

[23] Exit Timeshare responded to Classic Holidays' pleading of qualified privilege by pleading that Classic Holidays was motivated by ill will towards Exit Timeshare and that Classic Holidays was reckless as to the truth of the statements.

[24] In assessing recklessness:[5]

> It is useful, when considering whether an occasion of qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required.

[25] Exit Timeshare's response to the qualified privileged defence puts in issue Classic Holiday's actions and intentions in making the statements. How Classic Holidays will tackle this issue, when its sworn evidence will be that it did not make the statements, will be a matter for the hearing.

[26] That said, Classic Holidays is entitled to defend the case as it sees fit. It may choose to take every point,[6] but if doing so lengthens the hearing, such is not a basis for requiring Exit Timeshare to pay increased security.

[27] I am satisfied that an order for security is appropriate. The fact that Exit Timeshare attempted to resolve security issues is some confirmation that it saw an order for security as inevitable, hence it offering security at the full level of 2B costs for a three day hearing.

---

4 See Patrick George *Defamation Law in* Australia (3rd ed, LexisNexis, 2017) at 423-424, *Bashford v Information Australia (Newsletters) Pty Ltd* [2004] HCA 5, (2004) CLR 366 at [58].

5 *Lange v Atkinson* [2000] 3 NZLR 385 CA at [46].

6 Andrew Beck (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR5.48.09] recognises that there may be tactical reasons for a denial when an allegation is known to be correct. However, the authors note a defendant who does so runs the risk of being penalised in costs.

[28] Again, the threshold for the ordering of security is satisfied by virtue of Exit Timeshare being a subsidiary of an Australian company. Exit Timeshare has not demonstrated, notwithstanding the threshold being satisfied, it would be able to meet costs. I say that for the following reasons:

(i) the reference to Mr Allison having to inject personal funds into Exit Timeshare;

(ii) the assets held by Exit Timeshare, being a number of timeshare weeks, appear to be of limited, if any, value in the present market. In this regard the absence of any independent evidence as to their value is noteworthy;

(iii) there are no financials produced for Exit Timeshare, nor any independent evidence from its accountant or the like, as to its financial position.

[29] For the reasons I have given, I do not accept that the figure sought by Classic Holidays based on a five day hearing is appropriate. Accordingly, there is an ***order*** that Exit Timeshare is to pay security for costs in the sum of $33,460 into the Court within fifteen working days of the date of this judgment.

[30] Mr McLellan was critical of para 14 of the draft 2ASOC. Paragraph 14 pleads a number of other published statements said to have been made by Classic Holidays aimed at persuading Classic Holidays' timeshare owners not to do business with Exit Timeshare.

[31] Almost all of the matters relied on are publications either from Classic Holidays' website or alleged to be in emails sent from Classic Holidays or, in one case, in a newspaper article containing comments attributed to a director of Exit Timeshare. On that basis, establishing that such statements were made should be relatively straightforward, however, the real difficulty is that the statements are predicated with the following:

> The plaintiff has experienced a significant drop in sales as a result of the defamatory statements made at the AGM and other related conduct of the defendant ….

There then follow references to the various publications. Mr Dale QC, counsel for Exit Timeshare, has confirmed these other statements are not relied on as further instances of defamation, but are for context. In response to Mr McLellan's criticism of these pleadings, Mr Dale recognised there was some force in Classic Holidays' challenge to para 14 and that it may well be dropped from the amended pleading.

[32] I am inclined to agree with Mr McLellan when he says the inclusion of these statements in the draft 2ASOC for context purposes only, is not consistent with Exit Timeshare's stated wish to have the matter advanced to a hearing as soon as possible. While Mr Dale has advised Exit Timeshare that the contents of the proposed draft 2ASOC can be treated as being a pleading, the fact is, that document has not been filed. Mr Dale has indicated para 14 may well be dropped, so the prospect of there being a para 14 in the 2ASOC creating a serious risk of increasing the length of the hearing is unlikely. If the draft 2ASOC, when filed, does contain the equivalent of para 14 or significant new matters not in the present draft, then leave is reserved to Exit Timeshare to, by memorandum, seek an increase in security. If not agreed, I envisage this would be resolved at a telephone conference.

[33] While the application does not expressly seek a stay of the proceeding in the event the security is not paid, it does seek security on such terms as the court thinks just. In the circumstances, Exit Timeshare's proceedings will be stayed if the security is not paid within the time prescribed above.

Costs in respect of security for costs application

[34] While Classic Holidays has obtained an order for security, it is in the terms of the offer made by Exit Timeshare prior to the filing of the application for security and particulars. Exit Timeshare recognised that security was appropriate and offered a satisfactory sum before this application was filed. In those circumstances, I consider Classic Holidays to be the successful party on this application. There is an ***order*** that Classic Holidays is to pay to Exit Timeshare 50 per cent of 2B plus disbursements as fixed by the registrar.

Costs on the application for particulars

[35] The application for particulars was made in part because of the effect of s 6 of the Defamation Act 1992 (the Act) which provides:

> **6 Proceedings for defamation brought by body corporate**
>
> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings—
>
> (a) has caused pecuniary loss; or
>
> (b) is likely to cause pecuniary loss—
>
> to that body corporate.

[36] The present statement of claim pleads that Exit Timeshare has suffered damage to its reputation among its actual or potential customers, has incurred costs as a result of being compelled to seek an apology from Classic Holidays and, in issuing these proceedings, has, or is likely to, suffer pecuniary loss. Pecuniary loss includes the loss of commission it would have earned from at least one of the attendees at the Meeting at which the alleged defamation occurred.[7]

[37] The only relief sought by Exit Timeshare is a declaration under s 24 of the Act that Classic Holidays is liable to Exit Timeshare in defamation and costs pursuant to s 26 of the Act.

[38] Classic Holidays' application for particulars says s 6 of the Act requires Exit Timeshare to plead the facts and circumstances relied on in respect of the allegation that Exit Timeshare has, or is likely to suffer, loss from at least one attendee at the Meeting, including the name and amount.

[39] Given Exit Timeshare's pleading that it was a Mr White who referred to Exit Timeshare at the Meeting, and given Exit Timeshare's acceptance that Mr White, along with his wife, was looking to terminate or transfer their timeshare prior to the Meeting, the identity of the person referred to by Exit Timeshare would seem to have been clear enough, albeit not pleaded.

---

7 *Low Volume Vehicle Technical Assoc Inc v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587 at [43] rejects costs spent initiating and conducting defamation proceedings as qualifying as loss for the purpose of s 6.

[40] Mr Dale's submissions suggested that as the only relief sought by Exit Timeshare was a declaration under s 24 of the Act and costs, Exit Timeshare would not need to satisfy s 6 of the Act. I do not accept that. Section 6 provides that *proceedings* for defamation will fail in the absence of proof of loss, *not* that a claim for damages would fail in the absence of proof of loss. Exit Timeshare brings a proceeding for defamation and so must bring itself within s 6 of the Act.

[41] In *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants*, Dobson J held as the plaintiff had been unable to make out that it suffered any pecuniary loss, that such meant it was not entitled to a declaration under s 24 of the Act.[8]

[42] Essentially, Mr Dale resists costs on the grounds that while the draft 2ASOC includes details as to loss of profit, he says that such detail was in fact not necessary.

[43] I have some sympathy for Mr Dale's argument. The discussion in *CPA Australia Ltd* shows that a plaintiff can discharge the onus of demonstrating pecuniary loss for the purposes of s 6 of the Act by drawing inferences that loss would have been caused, meaning there is no obligation to adduce direct evidence of pecuniary loss suffered as a result of the defamatory statements.[9]

[44] Exit Timeshare, however, did not seek to argue that the loss of opportunity to obtain Mr and Mrs White and others at the Meeting as customers would, of itself, have been sufficient qualifying loss for the purposes of s 6 of the Act. The draft 2ASOC refers to Mr and Mrs White and others as lost potential customers.

[45] The notice for particulars sought that the attendee at the Meeting who was a lost customer, be named and the amount of lost commission set out. It also sought that Exit Timeshare name an unnamed Classic Holidays' representative who is alleged to have made the statements referred to at [10] above. It was only with the filing of the application that Exit Timeshare advised it could not provide the name sought in respect of the unnamed representative, and that it named Mr and Mrs White and others.

---

8 *CPA Australia Ltd v The New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, (2015) 14 TCLR 149 at [222].

9 At [70]-[79].

[46] Ultimately, I consider Classic Holidays was successful in its application for particulars. The identity of the lost customer should have been pleaded. I consider that Classic Holidays should be awarded costs at 50 per cent of 2B for the application along with disbursements as fixed by the Registrar, and there is an ***order*** accordingly.

Timing of filing of draft second amended statement of claim

[47] Mr Dale indicated he will want to revisit the draft 2ASOC, particularly in relation to para 14. Particulars can be deferred until after discovery. The answer to a request is one within the knowledge of the party seeking particulars.[10]

[48] The identity of the Classic Holidays' representatives at the Meeting, I expect will come out of discovery. Given Mr McLellan did not take an issue with Exit Timeshare not being able to identify the unnamed representative of Classic Holidays, this is not a case to defer the filing of the 2ASOC until after discovery. The 2ASOC is to be filed and served within 10 working days of the date of this judgment. The statement of defence to the 2ASOC is to be filed within a further 15 working days. The parties are to give standard discovery within a further 15 working days.

[49] There is to be a telephone conference before me at ***9.00 am on Friday 16 October 2020*** (with me) to address further directions – counsel are to file a memorandum (ideally joint) five working days prior.

Associate Judge Lester

Solicitors:
Sandi Anderson & Partners, Auckland
Linwood Law, Christchurch

Copy to counsel:
P J Dale QC, Barrister, Auckland
D H McLellan QC and J A R Barrow, Barristers, Auckland

[10] *McGechan on Procedure*, above n 6, at [HR 5.21.06].