IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-001048
[2021] NZDC 14952

BETWEEN	BFW LIMITED Plaintiff
AND	VICKY SHI Defendant

Hearing: 21 July 2021

Appearances: L Huang for the Plaintiff
R Butler for the Defendant

Judgment: 21 July 2021

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] The defendant, Vicky Shi has lodged an interlocutory application for a summary judgment against the plaintiff BFW Limited (BFW). And in the alternative, strike out of its causes of action against her; further and better discovery. Although I have, in a previous decision on this file, revealed the short history of this litigation, I will recap it now.

[2] On 19 March 2019, Ms Shi published a photograph and a short video in a WeChat group, relating to sushi that she had purchased from a growth collective, although the sushi was made by Go Deli. Go Deli provides school lunches such as sushi, to schools on Auckland's North Shore. Ms Shi had purchased the sushi for her daughter, who was seven years of age at the time, attending Pine Hill Primary School.

[3] It appears that when the daughter returned from school, her school bag and lunch box were unpacked. The lunch box contained sushi that had become infected

with maggots. Ms Shi captured images of the sushi in this condition and because she mistakenly thought that it had been purchased on 19 March (in fact it had been purchased many days prior) she published a video questioning, in effect, the ability of Go Deli to provide healthy school lunches.

[4] It is accepted by the defendant that what was published by Ms Shi, had the potential to create the impression that the sushi was not fresh and/or had been handled unhygienically. At a conference, which was not able to properly take place, because Ms Shi was unrepresented, I did indicate that prima facie I considered that what Ms Shi posted was capable of having a defamatory meaning.

[5] Whilst Ms Shi seems to think that once she appreciated her error, she took a number of steps to correct it, in fact that is not the case. All that she did, as the evidence reveals, is to ask those to whom she had disseminated the post on that date, to desist from sharing it. At no time does the evidence reveal that she actually publicly corrected the impression that she had gained. However, that matter or lack of it, actually becomes immaterial in regards to the applications before me.

Leave to Lodge these Applications

[6] Ms Shi did not seek the leave of the Court to file these interlocutory applications and they are therefore procedurally irregular. However, because BFW did not apply to set aside the interlocutory applications, it has acceded to them and counsel for the plaintiff today, does not take the point. I therefore grant leave, post the event.

[7] The Notice of Interlocutory applications refers, of course, to the orders which are sought. And then extensively to the grounds on which each order is sought. I mention that because it is highly relevant. This application is dated 31 August 2020. Unfortunately it has not reached the Court for determination until today. I am at a loss to explain why that should be, except of course we have been beset by a number of COVID lockdowns in the interval.

[8] Be that as it may, the application leaves nothing to chance in that it explicitly defines the grounds, which it offers in support of all of the orders that it seeks. Thus,

the plaintiff has had, since that time (August 2020). I would have expected it to file evidence. In this it appears to have been deficient. That is relevant, because the main plank of the application for summary judgment (which I will discuss more in just a moment), is that the plaintiff has failed and will be unable to prove that a reasonable member of the public, would or has associated a publication with BFW.

[9] I would have expected, in circumstances where the grounds upon which the orders are sought, are so well spelled out in the notice of interlocutory application, to see evidence from the plaintiff, which puts to bed, so to speak, the deficiencies on which the defendant relies. But that has not happened in this case.

Summary Judgment:

[10] Because she is the defendant, Ms Shi needs to satisfy the Court that none of the plaintiff's pleaded causes of action can succeed. (Rule 12.2 (2)). The main premise upon which Mr Butler argues his case for Ms Shi, is that it is not reasonably arguable that, what he calls her *post* but I call her *publication*, related to the plaintiff BFW. The post related to "Go Deli"; no reasonable member of the public would or has associated the publication with BFW. And here I am talking about the first cause of action, defamation, as opposed to the second cause of action, injurious falsehood.

Defamation

[11] Mr Han describes himself as the sole director of the plaintiff, trading as "Go Deli Catering". But that is the only reference in his affidavit in opposition to the applications for interlocutory orders, referring to a link between BFW Limited and Go Deli Catering. Indeed, the remainder of that affidavit refers to Go Deli and not BFW. I am therefore left wondering how it is that there is "plenty of evidence" from which it can be proved that Go Deli Catering was defamed in the publication by Ms Shi. But there is simply no linkage between that entity and BFW.

[12] Todd et al chapter 16 at 16.1 page 841 of *The Law of Torts in New Zealand* states:

> The tort of defamation is designed to protect a person's reputation. In most cases the plaintiff is an individual as opposed to a body corporate, because

> damage to reputation is inherently personal. A body corporate cannot suffer "injured feelings"; it can only be injured in its pockets.

[13] The latter statement is from *Mount Cook Limited v Johnstone Motors.*[1] But most importantly, even where the plaintiff is an individual, he or she must still prove that the defamatory statement complained of, was about him or her. In other words, it must be proved that it is the plaintiff who has been defamed (*Mount Cook Limited v Johnstone Motors* (supra) pg 864).

[14] Mr Butler, for Mr Shi submits that there is a similarity between the case of *Palace Films Pty Limited v Fairfax Media Publications Pty Limited* and the present,[2] because BFW appears to be the holding company, whereas the defendant's post concerned Go Deli and did not refer to BFW expressly or implicitly. And there is no evidence before the Court that anyone who viewed or shared her publication drew a connection between Go Deli and BFW.

[15] In the *Palace Films Pty* case (supra) as commented on by the authors of *The Law of Torts,* it was stated at page 869:

> When companies sue it is important to do so using the correct name, in order to establish that the defamatory statement was: "Of and concerning the plaintiff". In *Palace Films Pty* the defamatory publication did not name the plaintiff but referred to "Palace" and "Palace Films", the business name under which the plaintiff traded. Palace Films Pty was nothing more than a shelf company that had no business and no reputation. It was unable to prove a connection between itself and the publication.

[16] In that case McCallum J stated:

> A defamatory publication is not actioned unless it is established to have been published: "Of and concerning," the plaintiff. Where the plaintiff is not expressly named, it must be established that the matter was published to at least one person who had knowledge of extrinsic facts that would provide the necessary identification. *Morgan v Odhams Press Limited.*[3]

That decision was cited and applied by Mander J in *Hyndman v Mutch*[4] where the District Court had found that Mr Hyndman personally had not been defamed, because

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[1] *Mount Cook Limited v Johnstone Motors* [1990] 2 NZLR 488.
[2] *Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 962.
[3] *Morgan v Odhams Press Limited* [1971] 1 WLR 1239 at 10.
[4] *Hyndman v Mutch* [2021] NSHC 1153 [21 May 2021].

the defamatory statement of which he complained, was directed at his company "Liberty". Mander J upheld that result on appeal and in doing so, he concluded[5]:

> The position is finely balanced, but in bringing his action it behoved Mr Hyndman to prove, as a matter of fact, that a member of the readership of the defamatory statement would likely have been a person who was positioned to identify him as the person that Mr Mutch's statement defamed, either in his personal capacity as a motor vehicle dealer or as the living embodiment of the company that operated the dealership responsible for selling the Land Rover. In the absence of discharging the onus to prove this aspect of his claim. I reach the same conclusion as the District Court, that Mr Hyndman's claim must fail

[17] Mr Butler argues that the case before me is not finely balanced, because Ms Shi's publication did not mention BFW and there is no evidence of anyone who saw it, drawing a connection between Go Deli and BFW. He remarks that this is unsurprising, given the linguistic disparity between the acronym BFW and the trading name Go Deli.

[18] And his final submission in respect to the defamation cause of action, is that here, the publication would not reasonably lead persons who are acquainted with BFW to believe that it was the person being referred to in the statement.

[19] Mr Butler has an additional ground for arguing that summary judgment should be granted to Ms Shi in respect of the defamation cause of action. And that is on the grounds that there is no evidence (there is not likely to be any evidence from the plaintiff) that the publication by Ms Shi has caused pecuniary loss or is likely to cause pecuniary loss to BFW.

[20] The text of s 6 of the Defamation Act 1992 reinforces the need for a corporate plaintiff to prove that the defamatory publication has caused loss to that body corporate, not to some other entity or party. Section 6 reads:

> 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.

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[5] At para [46].

[21] BFW has tried valiantly to argue that the matters which are contested today, should be the subject of evidence at trial and where it will be able to draw the necessary link between Go Deli Catering and BFW, in the minds of the public, in order to prove that one or more than one reasonable person identified the publication with BFW.

[22] The reason that I have spent a little time earlier in this judgment traversing the notice of interlocutory application and referring to the evidence lodged by the plaintiff, after being served with that notice is that it seems to me, had this been a possibility, then that evidence would have been filed in the Court in opposition to this application long before now.

[23] This proceeding is now over two years old. It has made no progress, for which I do not criticise anyone. But given what is at stake, and given the particularity with which the Notice of Interlocutory application is pleaded (and its grounds), I am at a loss to understand why, if the plaintiff is able to adduce evidence which would demonstrate to the Court that at trial it will be able to prove the necessary identifying link, it would not have done so. I have reached the conclusion that the reason it has not, is because it is not able to and it will not be able to.

[24] That is another way of saying that I consider that whilst the publication was certainly capable of defamatory meaning and I can well understand the plaintiff's upset about it, I do not consider in these circumstances that the defamation cause of action is reasonably arguable, on two grounds, the first because as the interlocutory application states at 2(d) I do not consider it provable by the plaintiff that a right-thinking member of the public will or has, associated the publication with BFW. Consequently the defendant cannot be proved to have made any statements about BFW, let alone statements that are defamatory of it or capable of causing it injury.

[25] But in addition, also given that the plaintiff has had more than enough time to provide evidence to the Court to reveal the pecuniary loss that it has suffered as a result of the defamatory publication and has not, it will not be and it is not reasonably arguable that in fact pecuniary loss has been caused to BFW. In fact, the financial documentation before the Court, appears to prove the opposite. In the financial year ending 2019, BFWs revenues and profit increased.

[26] Two years on, BFWs fortunes (or at least reporting on its fortunes) are set in stone, one would have thought. And if it has not been able to reveal evidence of loss by way of financial statements and reports by now, I reluctantly draw the conclusion that it will not be able to. In other words, I do draw an adverse inference to the effect that BFW has not suffered any loss.

Conclusion on Application for Summary Judgment in Respect to First Cause of Action and Defamation:

[27] Summary judgment is almost never appropriate for a defamation proceeding, as indeed the learned authors of *Lexus Nexus District Courts Practice Civil* recommend. And at first blush, I was of the opinion that this application was unlikely to succeed. However, in well-reasoned, careful and intelligent argument, Mr Butler has persuaded me otherwise. This is probably the best application of the advice that everybody should heed, which is not to leap to conclusions too soon. Despite how unusual this situation is, I conclude that there is no reasonably arguable cause of action in defamation available to the plaintiff, for the reasons that I have given. And I therefore grant summary judgment to the defendant, on the defamation cause of action.

[28] I now turn to the second cause of action, injurious falsehood. Injurious falsehood is an economic tort concerned with the malicious infliction of pecuniary loss on a person, by the making of false statements to a third person. To establish a cause of action, a plaintiff must prove a false statement about themselves or their business, that it was made maliciously and that it either caused special damage or is calculated to cause pecuniary damage.

[29] Ms Shi argues that she did not publish any falsehoods about BFW, but about Go Deli. So again, the issue of linkage and identification comes into play. Secondly, it is argued that her publication falls well short of being malicious; instead it was a *mistake* Mr Butler says, which she quickly sought to rectify. I do not consider that she did so nearly enough, but in the end that does not matter.

[30] Here, there is not even a pleading that the publication was malicious. And whilst that matter can be rectified, albeit, it would be unusual to do so in this context, the plaintiff has to be able to amass the evidence to prove the legal elements of the

cause of action. This is where the particularisation of the notice of interlocutory application and the date upon which it was filed, comes into play again. Because I would have thought, that long before now the plaintiff would have rectified this deficiency by at least filing an amended statement of claim alleging malice. And referring to or producing some evidence which would or could lead the Court to the view that malice may be provable. But there is nothing of that.

[31] The only evidence before the Court from either party indicates that whilst she made a very stupid mistake, Ms Shi did not do so intentionally. Certainly, she did not intend any ill-will to BFW, let alone Go Deli Catering. Again, it is highly unusual to be dealing with a summary judgment application in an injurious falsehood proceeding, particularly where we have a plaintiff who is asserting that the necessary evidence to prove the claim will be available at trial. But there is at least a burden on the plaintiff in the circumstances of an application such as this, to point to some evidence that it may be able to amass to prove the necessary malice. I see none and yet the plaintiff has had almost a year to do so.

[32] In addition, of course, there is the necessity for the plaintiff to be able to prove that the malicious falsehood either caused special damage or is calculated to cause pecuniary damage. And again, there is no evidence of that, despite the opportunity. It is not enough for a plaintiff in these circumstances, to merely state that all will come out at trial. The Court needs more than that. The Court needs to be persuaded that at least such evidence is available. The plaintiff has not done so.

[33] Thus again, unusually, I consider that this cause of action is not reasonably arguable by the plaintiff and I am prepared in these most unusual circumstances to award summary judgment to the defendant, against the plaintiff on the second cause of action. Were I not to have made that decision, I believe that I would have dealt with the matter in respect of the strike out application, because I do agree with Mr Butler that given the only loss which has been proved and is provable to Go Deli or BFW, is $1,982 (being a one week decrease in turnover) there is revealed a disproportionate, if not vexatious claim. Everybody agrees that this matter would require a four to five day trial. To go to trial for four to five days on a cause of action, where at best, it

seems to me the only provable loss is of that sum, does indicate that it would be disproportionate and/or vexatious to proceed.

[34] I agree that Ms Shi has put BFW on ample notice of the need for BFW to prove pecuniary loss. And she did so in her statement of defence, dated 29 July 2019; she has raised the matter again and again in correspondence, through her legal representatives with BFWs solicitors. That principle applies also to the first cause of action.

[35] In essence therefore, I am saying that were I not to have granted summary judgment to the defendant on the first and second causes of action, I would likely have struck them out, because the claims against her, given the plaintiff's inability to prove actual loss or to link the publication with the identification of the plaintiff, rather than Go Deli are actually vexatious. Proceeding to trial would be disproportionate.

[36] As Mr Butler said, the plaintiff's approach to the threshold issue of pecuniary loss is telling. Mr Han's affidavit makes it clear that the focus of BFWs proceedings is to seek a correction or an apology, as opposed to seeking damages for pecuniary loss. BFW's statement of claim seeks damages in the alternative to a correction.

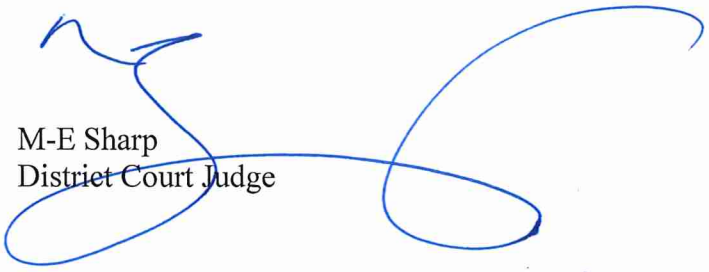
[37] I have great sympathy for BFWs position, given that its trading entity was maligned by Ms Shi's post. What she published was incorrect, inasmuch as it seemed to indicate that BFW (or at least Go Deli) provides bad lunches for school children. But at the end of the day, if the plaintiff is unable to prove pecuniary loss as a result of that publication, then its claim would fail. And equally, if it is unable to prove that the publication was made with malice and caused pecuniary or special damage, its cause of action in injurious falsehood would also fail.

In Conclusion:

[38] The extent of the publication is known and was limited. It occurred over two years ago. The extent of pecuniary loss is also known and is nominal. The publication is historic. It does not appear to have led to any further loss or material adverse consequences to the plaintiff. And I agree that the cost of continuing the proceedings would be disproportionate to both parties, having regard to those factors. That means,

that whilst I grant summary judgment to the defendant in these unusual circumstances, if I had not done so, I likely would have struck out both causes of action. There was a third application for discovery. That is no longer necessary, given the outcome which I have just expressed.

[39] I now invite you both to address me about costs. Mr Butler, my preliminary view is that whilst I have granted you the relief that you seek, given that Ms Shi certainly published defamatory material and I can well understand BFWs angst about it, there should not be an award of costs against the plaintiff.



M-E Sharp
District Court Judge