**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**ŌTAUTAHI ROHE**

**CIV-2019-404-002004**
**[2021] NZHC 442**

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

Hearing: 1 March 2021 (by AVL)

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

Judgment: 9 March 2021

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**JUDGMENT OF ASSOCIATE JUDGE PAULSEN**

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This judgment was delivered by me on 9 March 2021 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This is a defamation action relating to statements alleged to have been made about the plaintiff (Exit) by a representative of the defendant (Classic) at a meeting of the Mt Hutt Lodge on 19 June 2019.

[2] Classic seeks particular discovery of the following documents:

(a) Profit and loss statements of Exit for the period between January 2019 to the present.

(b) Exit's general ledger for the same period.

(c) Communications or notes of such (including SMS or any other digital communications) between any attendees of the annual general meeting of Mt Hutt Lodge on 19 June 2019 and Exit.

(d) Communications or notes of such (including SMS or any other digital communications) between Exit and any person referring to the said meeting.

[3] In relation to the financial documents sought at paras [2](a) and [2](b) above, the sole ground of opposition is that they are not relevant to the issues that are the subject of the proceeding. Latterly, Exit has also raised confidentiality concerns.

[4] While Exit initially opposed orders in relation to the documents sought at paras [2](c) and [2](d) above, it now accepts that orders can be made in terms of the application.

**Background**

[5] Exit offers a service to timeshare owners to assist them to exit their timeshare obligations.

[6] Classic is a timeshare resort management company which provides management services to body corporates of timeshare resorts.

[7] Exit sues Classic for statements allegedly made by a Classic representative at an annual general meeting of the Mt Hutt Lodge in June 2019. The statements were along the lines that Exit is a scam company. It appears there were 14 people at the meeting, some of which Exit says were its potential customers.

[8] Exit seeks only non-pecuniary relief under ss 24 and 26 of the Defamation Act 1992 (the Act) and costs. However, under s 6 of the Act its action will fail unless it proves that the publication of the statements complained of has caused pecuniary loss (s 6(a)) or is likely to cause pecuniary loss (s 6(b)) to it.

[9] Classic denies that Exit has suffered any pecuniary loss or that there is any likelihood of it doing so. It also pleads as an affirmative common law defence that if there was or is likely to be pecuniary loss it is of such a trivial nature that no action lies in respect of the statements.

[10] For context, it is necessary to track the development of Exit's claim in relation to its alleged pecuniary loss.

[11] In its original statement of claim, Exit pleaded:

> 12. As a result of the defamatory statements particularised in paragraphs 7 and 8 hereof the plaintiff:
>
> 12.1 Has suffered damage to its reputation among its customers and/or potential customers; and
>
> 12.2 Has incurred legal costs as a result of being compelled to seek an apology from the defendant and issue these proceedings.

[12] In its first amended statement of claim of 10 December 2019, Exit added a further allegation of loss as follows:

> 12. As a result of the defamatory statements particularised in paragraphs 7 and 8 hereof the plaintiff:
>
> 12.1 Has suffered damage to its reputation among its customers and/or potential customers; and
>
> 12.2 Has incurred legal costs as a result of being compelled to seek an apology from the defendant and issue these proceedings; and

12.3 Has or is likely to suffer pecuniary loss, and in particular suffered the loss of the commission it would have earned, in respect of at least one of the attendees at the meeting referred to in paragraph 5 hereof.

[13] In June 2020, Exit's lawyers wrote to Classic's lawyers concerning a request Exit provide further particulars of its claim. Exit's lawyers alleged it had suffered a considerable downturn in its business and that financial information supporting that would be disclosed. They wrote:

> In relation to the further particulars required, as discussed our client is not claiming pecuniary loss but rather indemnity costs. Nevertheless, Exit has suffered pecuniary loss but given this does not form part of the quantum it is claiming against Classic Holidays, in our view particulars relating to pecuniary loss do not need to be pleaded.
>
> Exit will however be disclosing financial information which will show that Classic Holidays' ongoing assault by making defamatory statements, either directly or indirectly against it, has caused a considerable downturn in its business in New Zealand. Since Classic Holidays' campaign against Exit commenced, the amount of cases it has been receiving in New Zealand, has dropped dramatically.

[14] In July 2020, Exit's lawyers provided Classic's lawyers with a draft second amended statement of claim which they said could be treated as a formal pleading. The draft contained detailed allegations of pecuniary loss and, in particular, as follows:

15. Prior to the AGM the plaintiff earned gross profits in the following amounts:

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|---|---|---|
| 15.1 | April 2019: | $85,387.98; |
| 15.2 | May 2019: | $79,496.61; |
| 15.3 | June 2019: | $85,532.46. |

16. In the months following the AGM the plaintiff earned gross profits in the following amounts:

| | | |
|---|---|---|
| 16.1 | June 2019: | $51,265.23; |
| 16.2 | August 2019: | $55,973.95; |
| 16.3 | September 2019: | $76,543.50; |
| 16.4 | October 2019: | $34,850.11; |
| 16.5 | November 2019: | $19,534.79; |
| 16.6 | December 2019: | $4,006.52; |

16.7 January 2020: $9,284.36;

16.8 February 2020: $9,895.97;

16.9 March 2020: $21,539.98;

16.10 April 2020: $14,306.51;

16.11 May 2020: $782.75.

17. As a result of the defendant's conduct as described above at **paragraphs 10**, **11** and **14** hereof the plaintiff sustained a loss of average gross profits in the amount of $56,382.92 per month since July 2019:

17.1 The plaintiff's average monthly gross profits prior to the AGM were $83,472.35;

17.2 The plaintiff's average monthly gross profits following the AGM were $27,089.43.

[15] At the same time, Exit provided profit and loss summaries for the period 1 March 2019 to 30 April 2020 and a monthly profit and loss statement for the period March 2019 to May 2020.

[16] However, on 27 August 2020, Exit filed its second amended statement of claim. It did not contain the allegations of pecuniary loss set out in its earlier draft, but contained the following allegations:

13. As a result of the defamatory statements and other conduct of the defendant as particularised in paragraphs 8 and 9 hereof, the plaintiff:

13.1 Has suffered damage to its reputation amongst its customers and/or potential customers; and

13.2 Has incurred legal costs as a result of being compelled to seek an apology from the defendant and issue these proceedings; and

13.3 Has suffered or is likely to have suffered pecuniary loss, and in particular in respect of the commission or commissions it would have earned in respect of at least one of the attendees at the meeting referred to in paragraph 6 hereof in an amount based upon the plaintiff's usual commission of $5,850.00 together with an administration fee of $525.00, less estimated legal costs, resulting in a net loss of $4,875.00 per customer.

**Discovery principles**

[17] Standard discovery was ordered in this case. Standard discovery only requires disclosure of documents of actual and direct relevance.[1] Where standard discovery applies, whether a document should have been discovered will usually be determined by reference to the "adverse documents" test in r 8.7 High Court Rules 2016, i.e. documents that adversely affect the discovering party's case or adversely affect another party's case. The test is one of materiality, namely "the likelihood discovery will result in *admissible* evidence of meaningful probative value to an issue in dispute".[2]

[18] An order for particular discovery may be made under r 8.19:

> … if it appears … from evidence or from the nature or circumstances of the case or from any document filed in the proceedings, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered.

[19] The key issue in applications under r 8.19 is whether there are grounds for believing a party has not discovered documents that should have been discovered. The Court generally adopts the following four-stage approach as outlined in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd*:[3]

> (a) Are the documents sought relevant, and if so how important will they be?
>
> (b) Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?
>
> (c) Is discovery proportionate, assessing proportionality in accordance with Part 1 of the Discovery Checklist in the High Court Rules?
>
> (d) Weighing and balancing these matters, in the Court's discretion applying r 8.19, is an order appropriate?

**Exit's position**

[20] The relevance of the documents sought is the issue. No issue is raised about the existence of the documents sought, nor the proportionality of discovering them.

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1 *Pyne Gould Corp Ltd v Bath Street Capital Ltd* [2020] NZHC 1247 at [13].
2 *Robert Jones Holdings Ltd v McCullagh* [2016] NZHC 2529 at [35].
3 *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 1247 at [14].

[21] Exit's position is that documents relating to its financial performance or profitability are not relevant because it will advance its claim on a very narrow basis. Mr Dale says, Exit is not trying to prove actual pecuniary loss or claiming a loss of profits. At trial, Exit will set out to prove only that it is likely it lost at least one potential customer who attended the Mt Hutt Lodge annual general meeting.

[22] Mr Dale submits to satisfy s 6 of the Act, Exit does not have to prove actual pecuniary loss, only that on the balance of probabilities there was a likelihood of pecuniary loss which, he contends, is obvious. This is because statements to the effect Exit was a scam company would, he argues, have dissuaded potential customers present at the meeting from engaging Exit. He says the profitability of Exit's business or otherwise is not relevant to the discrete question of whether the loss of a commission was likely to have been caused by Classic's defamatory statements.

[23] Mr Dale relies upon *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* where, he argues, Dobson J accepted the proposition that the onus on a plaintiff suing for defamation did not extend to establishing that any particular loss had occurred, or the extent of such loss where a declaration only was sought.[4] Dobson J said the approach of Fisher J in *Rural News Ltd v Communications Trumps Ltd*,[5] justified:[6]

> … Mr Galbraith's submission that CPAA can discharge the onus of proving the likelihood of pecuniary loss for the purposes of s 6 by drawing inferences that loss would have been caused, so there is no necessary obligation to adduce direct evidence of pecuniary loss suffered as a result of the defamatory statements.

**Discussion**

[24] I consider the documents sought by Classic are relevant to the issue whether Exit has suffered or is likely in the future to suffer any pecuniary loss as a result of the publication of the defamatory statements. That issue arises in the following contexts:

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4 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854.
5 *Rural News Ltd v Communications Trumps Ltd* AP404/167/00, 5 June 2001 at [14].
6 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, above n 4, at [79].

(a) whether Exit can satisfy the requirements of s 6 of the Act (a threshold issue upon which its case is dependant);

(b) Classic's common law defence, that any pecuniary loss was trivial and not actionable; and

(c) to issues of credit arising as a result of prior assertions by Exit that its pecuniary losses are substantial.

[25] Where, as is the case here, a corporate entity is required to prove actual pecuniary loss or that such loss is likely to be suffered in the future the logical starting point is the entity's financial accounts. This point was made by Palmer J in *Low Volume Vehicle Technical Assoc Inc v Brett*, where he said:[7]

> [41] I consider this background demonstrates Parliament's purpose in enacting s 6 was to confine the availability of defamation suits brought by bodies corporate to the circumstances where they have suffered, or are likely to suffer, losses that are or can be reflected in the entity's financial accounts. This is because, in Lord Reid's words, "[a] company cannot be injured in its feelings, it can only be injured in its pocket"[8]

[26] The basis upon which Exit intends to advance its case in relation to s 6 may be problematic. Its stance is encapsulated in Mr Dale's submission that "the question is whether pecuniary loss was likely …". However, in *CPA Australia Ltd* Dobson J found that s 6(b) of the Act does not lower the standard of proof so that a corporate plaintiff need only prove that a defamatory utterance was likely to cause pecuniary loss.[9] The Judge accepted a submission that s 6(a) and (b) address the same requirement but in respect of past or future pecuniary loss and it would be inconsistent to treat s 6(b) as compromising s 6(a). He said:

> [68] I accept NZICA's approach to the interpretation of the scope of the section. In the present circumstances where the matter has come to trial two years after the statements complained of, the onus that [the plaintiff] is required to discharge is to prove that the statements complained of have caused pecuniary loss to it, or that those statements are likely to cause it loss in the future.

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7 *Low Volume Vehicle Technical Assoc Inc v Brett* [2017] NZHC 2846.
8 *Lewis v Daily Telegraph* [1964] AC 234 at 262.
9 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, above n 4, at [67].

[27] In any event, despite Exit's stated intention the allegations of pecuniary loss in the second amended statement of claim go beyond the argument Mr Dale advances.

[28] At para 13.1 of the second amended statement of claim, Exit pleads damage to its reputation among its customers and/or potential customers. It is not clear if this is an allegation of pecuniary loss. Mr McLellan says he has not taken it as such but as it stands there is a prospect that Exit alleges loss of goodwill in respect of which its financial records would be relevant.[10]

[29] At para 13.2 of the second amended statement of claim, Exit pleads it has incurred legal costs as a result of being compelled to seek an apology from Classic and issue this proceeding. That is an allegation of actual pecuniary loss, albeit I do not consider it satisfies the requirements of s 6.[11]

[30] Counsel's arguments focused on para 13.3 of the second amended statement of claim. Exit pleads it has suffered or is likely to suffer pecuniary loss as a general proposition and then refers "in particular" to the loss of commission or commissions. As a matter of construction, the allegation of pecuniary loss applies especially but not exclusively to the loss of commissions.

[31] The manner in which the allegations of loss are pleaded do not, therefore, exclude the relevance of Exit's financial records to the issue whether it has or is likely in the future to suffer any pecuniary loss.

[32] The next matter concerns Classic's affirmative defence. Classic says Exit cannot prove even a likelihood of loss, and if it does pass that threshold, then any such loss was so trivial that no action should lie. Mr Dale has not argued that Classic cannot rely on this pleaded defence. The adoption in New Zealand of a defence based on a threshold of seriousness was discussed with approval by Dobson J in *CPA Australia Ltd*. Relevantly he said:[12]

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10 *Low Volume Vehicle Technical Assoc Inc v Brett,* above n 7, at [42].
11 At [43].
12 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, above n 4.

> [114] The New Zealand Parliament has never attempted a statutory definition of what amounts to defamation.[13] Including a seriousness threshold would provide some objective considerations helping potential claimants decide whether to sue, in circumstances where they are likely to be highly incensed and consider themselves seriously slighted when relying on an otherwise subjective assessment.

[33] Classic is entitled to advance its defence by reference to Exit's financial records, by expert evidence and cross-examination on the documents, that there is no evidence of loss or likelihood of loss. Mr McLellan makes the point that Classic must prove a negative proposition, and faced with that challenge Classic should be entitled to disclosure of the same financial documents that Exit has, otherwise Classic is at a material disadvantage. I agree with that submission.

[34] Next, Exit has asserted a very significant downturn in its business and signalled it would advance its case on that basis. Its latest pleading does not rely on this. Mr McLellan submits, and I accept, that Classic is entitled to cross-examine Exit's witnesses on this reversal of position which goes to what, I perceive, will be a central issue at trial. Exit's financial records are relevant to this exercise.

[35] Finally, Exit has already discovered extracts from its profit and loss statements thereby accepting their relevance. All that Classic is now seeking is the remainder of the profit and loss accounts and general ledger so that a complete set can be provided to its financial expert.

**Confidentiality**

[36] A director of Exit has made an affidavit stating there is such hostility between Exit and Classic that Exit does not wish to provide more information than is actually required to make out its case. It is also asserted that the making of confidentiality orders will not provide an adequate safeguard because, again due to hostility, Classic may seek to gain some advantage in using information obtained.

[37] Confidentiality is not a ground for resisting discovery. The Court may impose constraints on inspection where confidentiality is claimed, and the concerns warrant

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13 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, 2013) at [16.3].

it, but I can see no basis for imposing constraints in this case.[14] I am satisfied Classic understands the obligation to use discovered documents only for the purposes of the litigation. Exit's general allegation of hostility could apply equally to almost every litigant and does not suggest to me Classic would use discovered documents for improper purposes. Furthermore, Exit has already discovered its financial records without claiming confidentiality. It is not clear what has changed.

[38] Mr Dale submits the disclosure of the financial documents could be limited to Classic's lawyers and experts. I accept Mr McLellan's counter that it will be important that counsel and the expert witnesses are free to take instructions from Classic on those records.

**Result**

[39] Classic's application is successful. Exit is to file and serve a supplementary affidavit of documents listing all documents in its power, possession or control by 26 March 2021 as follows:

(a) Profit and loss statements of Exit for the period between January 2019 to the present.

(b) Exit's general ledger for the same period.

(c) Communications or notes of such (including SMS or any other digital communications) between any attendees of the annual general meeting of Mt Hutt Lodge on 19 June 2019 and Exit.

(d) Communications or notes of such (including SMS or any other digital communications) between Exit and any person referring to the said meeting.

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[14] *Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] NZHC 3171, [2015] 2 NZLR 670 at [32].

[40] Classic is entitled to 2B costs (for one counsel) and reasonable disbursements.

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O G Paulsen
Associate Judge

Solicitors:
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Linwood Law, Christchurch