IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2020-412-67
[2021] NZHC 1153

BETWEEN	IAN BRUCE HYNDMAN Appellant
AND	STEFAN MUTCH Respondent

Hearing: 4 May 2021

Appearances: J Moss for Appellant
D J More for Respondent

Judgment: 21 May 2021

JUDGMENT OF MANDER J

This judgment was delivered by me on 21 May 2021 at 4 pm pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

[1] The appellant, Mr Ian Hyndman, is a car dealer who specialises in selling classic cars, including Land Rover motor vehicles. He is the director of a company that sold classic automobiles on the Trade Me website. Mr Hyndman took exception to comments posted by the respondent, Mr Stefan Mutch, in respect of a listing that advertised a Land Rover vehicle for sale. Mr Hyndman sued Mr Mutch in defamation.

[2] Judge Mark Callaghan dismissed Mr Hyndman's suit.[1] The Judge found that Mr Mutch's comments were defamatory and that a defence of honest opinion was not available to him. However, the Judge found the defamatory statement was not made about Mr Hyndman personally but was directed at Mr Hyndman's company. As a result, he had not been defamed. Mr Hyndman appeals that decision.

Background

[3] Mr Hyndman has been in the business of selling used cars for some 40 years. He is the director of a company that was called Liberty Wholesale (2000) Ltd (Liberty) but changed its name in October 2017 to Classic Automobiles Co Ltd. The company previously traded under that name. Liberty was incorporated in 2000, and Mr Hyndman set up a Trade Me account under the username "liberty8" in 2005. Mr Hyndman maintained this was a private account but, prior to the establishment of a Trade Me motors account in October or November 2017, the liberty8 account was used to sell cars listed in the company's name.

[4] On 3 August 2017, Mr Hyndman's son, who was employed by his company, listed a vehicle for sale on the liberty8 account. The listing advertised a "Land Rover Defender Series 2, SWB 1951" for sale with an asking price of $15,800. A number of comments were posted relating to the advertised details of the vehicle. On 4 August, Mr Mutch, under the username "rover28" posted the following comment which was the subject of Mr Hyndman's defamation claim:

> Mate if you want to be taken seriously as a dealer you need to be willing to accept when you are wrong. If you ever come across a group of people who now [sic] their vehicle history it will likely be a Land Rover owner so you are going to have to a bit smarter [sic] than you are here to pull the wool over their eyes. Your behaviour just proves you to be as fraudulent as we all suspect. Oh

[1] *Hyndman v Mutch* [2020] NZDC 14594.

> and stop painting Land Rover wheels silver, they are supposed to be cream and ffs take the wheels off first to do it!

[5] Under the user name Liberty8, Mr Hyndman responded:

> Please understand what will follow. You by posting this statement have accused me of behaving fraudently [sic] By making that statement as fact you are defaming me. Please seek legal advice. Your question shows up immediately without me answering. This is your problem.

[6] The listing received some 838 views and 36 bidders/watchers were recorded.

[7] Mr Mutch's comment was preceded by other relevant comments and was followed by a further exchange between the two men. It is necessary to set out this chain of communication in full:

3 August 2017		
Time	**Username**	**Response**
22:44	[member 1]	Series 2 Land rover came out in 1958!
4 August 2017		
07:33	liberty 8	Are you a troll or a buyer!!???
09:47	[member 2]	They're right. Almost every word of your ad can be challenged. Even the LVVC is completely fake!
09:56	liberty8	it would appear that you are accusing me of lying, is that true?
10:17	[member 2]	No, I do not. It's clearly fake because a Series 2 did not exist in 1952. There is no other argument. You are also far overstating the case in many other respects, and are misrepresenting the vehicle. As a dealer you should know that this is 1. Illegal and 2. against TradeMe rules.
10:20	liberty8	I will now take legal action against you as what you are stating is incorrect. You are defaming me and my business. That I will not tolerate.
10:24	[member 2]	No, I will not withdraw, do whatever you like, I am correct. I also run NZ's largest Land Rover community online. I know my case and I am not prepared to be harrassed [sic] by you. You have a FAKE LVVC. Simple. Either the year of the vehicle or the model stated are incorrect, and you are flat out lying about it. You have no reason to continue to reply to me on here, you know only too well questions do not appear if you do not answer. You continue to state your case. It is incorrect. You know it is.

10:40	liberty8	Sorry [member 2], that's where you are wrong. Your questions show up immediately by me or not. Legal proceedings will start.
10:44	[member 2]	I don't think you know what you are talking about. As a dealership you should know better, not only about how this works but also better than to misrepresent vehicles you are selling in a public forum. As a community we are very keen to spot and weed out this sort of thing being perpetrated on the Land Rover community. Hence my keenness to have it removed.
10:50	liberty8	Gary, you really should stop. Check out what happens when you ask a question it immediately shows up. You should seek legal advice.
10:49	[member 2]	Listing reports to TradeMe as fraudulent.
13:07	liberty8	get legal advice
10:51	[member 2]	Who is Gary?
10:53	liberty8	get legal advise [sic]
10:58	[member 2]	Ahh, that old stick again. If you did your homework: (as you should, as a DEALER) HCY190 is registered as a 1964 Series 2a therefore the LVVC is incorrect on both counts. Case Closed.
11:25	liberty8	Get legal advice. Look up defamation and the acts surrounding that.
11:19	rover28	Mate if you want to be taken seriously as a dealer you need to be willing to accept when you are wrong. If you ever come across a group of people who now [sic] their vehicle history, it will likely be a Land Rover owner so you are going to have to a bit smarter [sic] than you are here to pull the wool over their eyes. Your behaviour just proves you to be as fraudulent as we all suspect. Oh and stop painting Land Rover wheels silver, they are supposed to be cream, and ffs take the wheels off first to do it!
11:29	Liberty8	Please understand what will follow. You by posting this statement have accused me of behaving fraudulently. By making that statement as fact you are defaming me. Please seek legal advice. Your question shows up immediately without me answering. This is your problem.
11:30	rover28	It's not defamation if its true!
12:12	liberty8	The details of the car will be investigated. What you have accused me of is defamation.
11:35	rover28	How about this then. Instead of refuting all the evidence suggesting there is something dodgy about this vehicle and crying about defamation. Can you please explain how selling a

		car registered as a 1964 but has a LVVC that states it is a 1952 series 2 (which doesn't exist btw) is legal. Go!
11:02	liberty8	thank you for asking the question that should have been asked at the start by you or your friend. I will investigate the information that we have a [sic] list the findings. But sadly for you and your friend the horse has already bolted. You and him have accused me of fraud, lying and other things. You have attempted to defame me. This is way [sic] I will take legal action against you both. That's a promise I will be committed to. Running a defamation case at the moment with a government department.

[8] The listing was removed by Mr Hyndman at 5.17 pm on 4 August 2017. The vehicle was ultimately sold to a third party for $15,000.

[9] The listing raised the ire of a number of viewers who appear to have been Land Rover enthusiasts because of an error in the description of the vehicle which was apparent on the face of the listing. The reference to the Land Rover being a 1952 model meant it could not be a Series 2 vehicle because that model of Land Rover Defenders was not manufactured until 1958.

[10] Mr Hyndman's evidence was that the information used in the listing had been obtained from what is called the "Low Volume Vehicle Certification Plate" (the certification plate) which is fixed onto the vehicle, and from a report provided by the "CARJAM" website which is an online register that can be searched by car dealers that lists a vehicle's details. The certification plate is required for the purpose of obtaining a warrant of fitness after a vehicle has been substantially modified or rebuilt. Both the certification plate and the CARJAM report erroneously referred to the vehicle as a 1952 Land Rover Series 2, although the CARJAM details also recorded the vehicle as having been first registered on 1 January 1964.

[11] The CARJAM report further warned that the vehicle had been re-registered, having been deregistered in the past and then registered again. As is apparent from that endorsement, the various "after market" modifications set out in the TradeMe listing itself, and the presence of the certification plate, the vehicle has in the past been substantially rebuilt. As it was described by an expert witness, the vehicle is something of a "bitser" and that pedigree is the likely source of the contradictory

details supplied in the listing which were picked up by Land Rover aficionados who saw the advertisement and which caused confusion.

District Court decision

[12] After reviewing the evidence of the parties and their respective cases, Judge Callaghan concluded that "the sting" of Mr Mutch's comments imputed fraudulent or dishonest behaviour. However, the Judge considered it was less clear as to who was the object of those comments. Determining that issue required deciding who a reasonable person would consider liberty8 to be in the absence of any express reference to Mr Hyndman in either the listing or the related comments.

[13] Judge Callaghan held that a reasonable person would consider the statements made by Mr Mutch were directed at Mr Hyndman's company. The Judge reached that conclusion because the listing was posted under the Trade Me account name of liberty8, which the Judge considered was used for the purpose of extending Mr Hyndman's business to "an online forum". It was noted that the photograph of the Land Rover vehicle included in the listing, which was registered in the name of Liberty, showed it parked in a commercial yard with other vehicles that appeared to be the business premises of the company. The name of the dealership, Classic Automobile Co, can be seen in large bold type on an adjacent building.

[14] The Judge did not consider the username liberty8 was coincidental. He concluded that a reasonable person would associate that name with Mr Hyndman's company. While it was accepted for the purposes of an action in defamation that it was sufficient if only a few people who knew Mr Hyndman would have associated the comments directly with him, he considered that an "ordinary person" falling into that category of person would have considered the comments to be about Mr Hyndman's business overall, and not him personally. Judge Callaghan therefore considered the claim had to fail because the defamatory statement was made about Mr Hyndman's company and not him.

[15] For completeness, the Judge recorded his finding that the pleaded defence of honest opinion was not available to Mr Mutch before making some observations regarding any damages award that would otherwise have been made had

Mr Hyndman's claim been upheld. In that regard, the Judge observed that both parties had acted as a result of the misdescription of the vehicle in the CARJAM report. However, Judge Callaghan was critical of how Mr Hyndman had responded to those who had queried the details in the Trade Me listing.

[16] The Judge observed that, after Mr Hyndman had been alerted to the possible error, rather than check those details, he had proceeded to "challenge all commentators" and that this reaction should be reflected in any damages award. Judge Callaghan indicated that any award, had the defamation claim been made out, would have been limited to $500. The Judge considered that figure fairly reflected Mr Mutch's culpability when viewed against the overall sequence of the remarks posted on the listing, including those of others and Mr Hyndman.

The appeal

[17] Mr Hyndman appeals Judge Callaghan's finding that the defamatory statement was made against Mr Hyndman's company and not him personally. He also challenges the Judge's observations regarding the level of damages he would have awarded had the defamation claim been successful. For his part, Mr Mutch accepts the District Court's finding that his comments were defamatory and that a defence of honest opinion was not available to him. However, he maintains it was open to Judge Callaghan to conclude on the evidence that Mr Mutch's statement was directed at Mr Hyndman's company and not him personally. Further, he submits that the indicated award of $500 would have been adequate compensation in the circumstances.

[18] Because Mr Hyndman is exercising a general right of appeal the matter proceeds by way of rehearing. He is entitled to the opinion of this Court on the merits of the issue, notwithstanding that may involve an assessment of fact and degree and may entail a value judgment.[2] However, Mr Hyndman still bears the onus of satisfying me that the District Court's decision is wrong and that it should be departed from.[3]

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2 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
3 At [4].

Relevant legal principles

[19] The applicable law is not disputed and the relevant principles are largely well-established. The purpose of defamation proceedings is to vindicate the reputation of the person defamed. Therefore, the proper party to bring the proceedings is the person who has been actually and personally defamed. This can be either a natural person or a company. It is not necessary that the defamatory statement expressly names the plaintiff. However, it must be proved that the defamatory words were published about that person. Hints or oblique indications may be enough.[4] The accepted test is whether the words used would in the circumstances reasonably lead persons who are acquainted with the plaintiff to believe that he or she was the person being referred to in the statement.[5]

[20] It is not necessary that all readers of the defamatory statement would make the connection with the plaintiff. It is enough that there be some persons who know sufficient facts to enable them to do so.[6] As observed by Lord Reid in *Morgan v Odhams Press Ltd*:[7]

> It must often happen that a defamatory statement published at large does not identify any particular person and that an ordinary member of the public who reads it in its context cannot tell who is referred to. But readers with special knowledge can and do read it as referring to a particular person.

[21] In attempting to prove that the allegedly defamatory material concerns the plaintiff, it is permissible to point to material outside the words in issue to show that, while on their face the words do not identify the plaintiff, those reading them would understand who is being referred to.[8] In considering whether an ordinary sensible reader would reasonably identify the plaintiff as the person concerned, such reader is not expected to approach the publication with the precision of a lawyer. The relevant impression is that which would be conveyed to a person reading the article casually.

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4 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [16.4.01].

5 *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238 per Isaacs J; see C R Symmons "The Problem of Hidden Reference in Defamation" (1974) 3 Anglo-Am LR 98; see also *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 654 per Cooke P.

6 Todd, above n 4, at [16.4.01], citing *Clarke v Vare* [1930] NZLR 430 (SC).

7 *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL) at 1242.

8 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC) at 494.

A high degree of accuracy is not to be expected and a certain amount of lose thinking may be indulged in.[9]

[22] Also of some relevance to this case is the approach taken to the issue of defamation of a group. The fundamental requirement remains the same. A plaintiff can only succeed if the defamatory words can be understood to relate personally to that person. If remarks about a group of people would be understood to refer to a particular person in that group or to that person equally with other members, a suit may lie. Ordinarily, a defamatory statement about a general class of people will not be actionable by a particular member of that class. For example, a sweeping exaggerated statement that "all lawyers are thieves" would not entitle a particular lawyer to sue unless there was something to point to that particular lawyer.[10]

[23] However, words which refer to a class may be actionable if the words or circumstances indicate a particular person. It will be a question of fact in each case whether the ordinary reasonable reader could conclude that the complainant was an individual to whom the defamatory statement was directed.[11] Relevant considerations include:[12]

(a) the size of the group;

(b) the nature of the group;

(c) the plaintiff's status, duties, responsibilities or activities in the group as the real target of the defamation;

(d) the seriousness or extravagance of the allegations;

(e) the plausibility of the comments and tendency to be believed; and

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9 *Morgan v Odhams Press Ltd*, above n 7, at 1245 and 1270; *Mount Cook Group Ltd v Johnstone Motors Ltd*, above n 8, at 494–495.

10 Todd, above n 4, at [16.4.02], citing *Eastwood v Holmes* (1858) 1 F & F 347 at 349 per Willes J.

11 *Opai v Culpan (No 2)* [2016] NZHC 3004 at [38].

12 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [7.9], as cited by Associate Judge Bell in *Opai v Culpan (No 2)*, above n 11, at [38].

(f) extrinsic factors.

[24] Finally, it is irrelevant whether the author of the defamatory statement intended to refer to the plaintiff or not, or had personal knowledge of the identity of that person at the time the defamatory statement was made.[13] It is sufficient that publication was made to persons who had knowledge of sufficient facts to enable them to link the defamatory content to the plaintiff.

Were the statements defamatory of Mr Hyndman?

Mr Hyndman's argument

[25] On behalf of Mr Hyndman, Mr Moss submitted that the Judge erred in his reasoning. He argued the reasonable ordinary reader would not have associated the account name liberty8 with the company because it was only the trading name of the dealership, Classic Automobile Co, that could be seen in the photograph. It was submitted an ordinary reader would not have known that the name of the company at that time was Liberty without having conducted a company search and would have been unable to connect the account name liberty8 with that company, which was trading under the name Classic Automobiles Co.

[26] Had an ordinary reader clicked on the liberty8 profile, Mr Moss submitted, it would have identified the account holder as "Ian H". It made no mention of the company name. Mr Moss also referred to Mr Hyndman's evidence of how the liberty8 account had been used. Mr Hyndman claimed that only some 20 per cent of postings to the Trade Me site using that username had been for motor vehicles and the rest had been for a myriad of personal transactions involving the sale and purchase of such things as personal furniture and camping equipment. Mr Moss submitted that the District Court had erred in finding that the site was an extension of Mr Hyndman's business, but I pause to note that at the time all the motor vehicles sold using the liberty8 username had hitherto been registered in the company's name.

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13 Todd, above n 4, at [16.3.07].

[27] Mr Moss emphasised the language used in the defamatory statement. The tone of the comments were said to show that they were being directed at an individual rather than a corporate entity. As an example, Mr Mutch had begun his statement with "*Mate* if *you* want to be taken seriously as a *dealer*" (emphasis added). It was also noted that Mr Mutch used personal pronouns. Mr Moss submitted that a company is not referred to in such a way:

> *Mate* if *you* want to be taken seriously as a *dealer you* need to be willing to accept when *you* are wrong. If *you* ever come across a group of people … so *you* are going to have to [be] a bit smarter than *you* are here to pull the wool over their eyes. *Your* behaviour just proves *you* to be as fraudulent …
>
> (emphasis added)

[28] It was submitted that it was significant that Mr Mutch had made no reference to a company, nor referred to such an entity in the usual way by using the words "it" or "they". Mr Moss submitted that Mr Mutch's statements were directed at the person who had replied to the earlier posts who, as the ordinary reasonable reader would have discerned, appeared to be the person responsible for selling the vehicle. It was submitted that anyone associated with Mr Hyndman would know that he was the dealer who was selling the vehicle and to whom Mr Mutch's statement was directed.

Mr Mutch's response

[29] On behalf of Mr Mutch, Mr More largely relied on the reasoning of Judge Callaghan and the Judge's finding of fact that the liberty8 username was associated with Mr Hyndman's company and not him personally. Mr More noted that the vehicle had been listed by Mr Hyndman's son and that it could not be suggested he had done so on behalf of Mr Hyndman personally. He submitted it could only have been listed by the son on behalf of the company. He argued that in the absence of any evidence of Mr Hyndman having been personally involved in the listing, his strident reaction to the posts could only have been for the purpose of protecting the reputation of his company.

[30] In response to the reliance placed by Mr Hyndman on the wording of the postings, in particular the use of the first person by Mr Hyndman and the second person by Mr Mutch, Mr More submitted that this use of language needed to be viewed

in the context of the prospective purchase of a motor vehicle from a company who will always be represented by a natural person. Mr More submitted that it was Mr Hyndman who responded as if the comments were being directed at him personally, and that the use of the word "you" when dealing with a company representative is common.

[31] Reference was made to the situation of a person dealing with a salesman on a face-to-face basis who is employed by a company. The salesman may well be referred to in the second person but it is well understood that if the purchase is completed it will be with the company. Mr More submitted that no different interpretation should be placed on language used in the same context or setting, albeit in relation to the sale of a motor vehicle through an internet site such as Trade Me.

Decision

[32] In the District Court the determinative issue was identified as being who was the object of the defamatory statement and, in essence, who the username liberty8 represented — Mr Hyndman personally or his company that operated the motor vehicle business. The respective arguments of the parties on the appeal, at least in their written submissions, continued to address that issue on the basis it was the pivotal point. Mr More argued that the Judge had been correct to find that an "ordinary person associated with [Mr Hyndman] would consider the comments to be about his business overall, not him personally". Whereas Mr Moss maintained it was Mr Hyndman who was being referred to by Mr Mutch.

[33] I do not consider determining who was the target of the statement, the business or Mr Hyndman, provides the most accurate lens to assess whether Mr Mutch's statement would, in the circumstances, reasonably lead persons to believe that Mr Hyndman is being referred to in the defamatory statement. The intention of Mr Mutch is not relevant. He did not know who Mr Hyndman was and it does not matter to whom he understood he was directing his statement, be it a natural person, a company, or a business. The key question is whether the words used would be understood by persons with sufficient knowledge of the circumstances as reflecting on Mr Hyndman

and as being defamatory of him. Essentially, whether the necessary connection between the defamatory statements and Mr Hyndman could be made.

[34] While the factual scenario was quite different, some parallels can be drawn with the situation in *Mount Cook Group Ltd v Johnstone Motors Ltd*.[14] In that case, a supposedly humorous poster promoted a ski field in an objectionably sexist manner. It was held to be defamatory of the operator of the ski field, although they were not named in the publication. The poster was printed and distributed by parties who had no connection with the operator of the ski field but its meaning was such that it likely conveyed to an ordinary sensible reader that the operator had either published or, at least, approved or condoned the publication of the poster because it appeared to be an advertisement promoting its ski area.[15] Because of the sexist nature and content of the poster and the reasonable inference to be drawn that the operator had assented to its publication, the poster was regarded as deleterious to the operator's commercial reputation. As a result, this Court found the poster was published of and concerning the operator, and that it was defamatory of it.[16]

[35] As illustrated by the *Mount Cook* case, the identification of the person being defamed does not turn on the actual factual position but the effect of publication, which is to be assessed by whether some persons with knowledge of the relevant circumstances would connect the defamatory material with the plaintiff. The question of whether Mr Hyndman was the subject of the defamatory words does not turn on a binary choice between whether the words were directed at him personally or his company through which he ran his dealership, but whether there were persons who had knowledge of Mr Hyndman's business and his involvement in the sale of motor vehicles to understand that Mr Mutch's statements bore on how Mr Hyndman conducted himself as a seller of used cars, and in particular classic vehicles.

[36] In reaching his decision, Judge Callaghan concluded that the ordinary person associated with Mr Hyndman would consider the comments to be about his business overall and not him personally. However, the effect of such a finding turns on the

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14 *Mount Cook Group Ltd v Johnstone Motors Ltd*, above n 8.
15 At 495–496.
16 At 499.

extent to which Mr Hyndman's business is distinguishable from himself, and the extent to which the business run by his company would be viewed by those with sufficient facts as being different or separate from how he personally conducts himself.

[37] No evidence was given by persons associated with Mr Hyndman or by those who had knowledge of the nature and structure of his business or the company that housed the business. Unlike in the *Mount Cook* case, no witnesses were called to give evidence of having read Mr Mutch's statement and of the connection they would make between its content and Mr Hyndman. The Court is therefore left to assess whether, from the known circumstances of Mr Hyndman's trade in used cars, a sufficient connection would be drawn by persons familiar with his business to understand that the defamatory words relate personally to him.

[38] The evidence of Mr Hyndman's business is limited. It was admitted that he was the director of Classic Automobiles Co Ltd, that was previously named Liberty before being changed on 18 October 2017. In evidence, Mr Hyndman described how he had been a "seller" of vehicles for some 20 years and a "dealer" of vehicles for 20 years. Mr Hyndman explained that he had been a car salesman since 1985 and that in 2000 he set up his own company wholesaling cars in Auckland as a registered motor vehicle dealer. He stated that he is the only person in the company who holds a licence to trade motor vehicles. It is also apparent from the evidence that Mr Hyndman's son is an employee of the company. No other evidence was provided regarding the business.

[39] I consider it to be tolerably clear that the Land Rover Defender was being sold by Mr Hyndman's company. The vehicle had been listed by an employee of the company, Mr Hyndman's son, and it was registered in the company's name. The username liberty8 was the means, at that time, in August 2017, that Mr Hyndman's business was able to sell vehicles online. The Trade Me account, in addition to other trading activity, be it of a personal or commercial nature, was being used for that purpose.

[40] The screenshot of the posted listing that includes the defamatory statement records that there had been 838 views. In order for Mr Hyndman to succeed in his

claim he needs to establish, on the balance of probabilities, that some of the persons who viewed the listing and read the comments, including Mr Mutch's defamatory statement, would have had sufficient knowledge to identify Mr Hyndman, either in his personal capacity, or as the principal of the business, to understand that Mr Mutch's remarks were defamatory of him.

[41] Despite a paucity of evidence regarding the structure and makeup of the motor vehicle business, it can reasonably be inferred from the details available that Mr Hyndman was largely a sole trader or "owner–operator" and that he and his company were for all practical purposes, at least to those with such knowledge, effectively one and the same. It follows that, in the circumstances of this case, I doubt it makes much material difference whether the object of the defamatory statement was Mr Hyndman or his company, because Mr Hyndman appears to have been the embodiment of the corporate entity. Allegations of fraud or dishonesty made against the company could be understood by persons with sufficient knowledge of Mr Hyndman's business to effectively be allegations against him as the directing mind of the company. I do not overlook the involvement of Mr Hyndman's son who was directly, and it appears solely, involved in the listing of the Land Rover Defender. However, the issue that must be decided is whether a reasonable ordinary reader equipped with the requisite knowledge of the relevant circumstances would have understood Mr Mutch's statements to be referable to Mr Hyndman.

[42] Where the actions of corporate entities are involved, issues may arise, as they have in this case, as to whether the statement in issue is defamatory of the company or a natural person associated with the company. It will be a question of fact and degree in the circumstances of each case. An analogy can be drawn with problems that may arise in respect of defamation of a group. A defamatory statement about a named large multinational company is unlikely to be understood as being about an individual office-holder or employee of such a large organisation. Generally, the smaller the group, the greater the likelihood that a plaintiff will be able to show that the words were directed at them personally despite the person not being individually named.

[43] It follows that a statement defamatory of a small private company known by the reader of the statement to be housing the business of a sole trader is likely to also

be defamatory of that person. In such circumstances, the naming of the company will likely reveal the identity of the sole trader to those persons with such knowledge. In such a case, it will be necessary for a plaintiff to prove, on the balance of probabilities, that the publication was likely to have been made to a person who had such knowledge of the circumstances to be able to identify the plaintiff.

[44] Returning to the present case, there is a dearth of evidence from Mr Hyndman regarding whether the limited publication of the listing was likely to include persons who were in a position to make a connection between Mr Mutch's defamatory statement and Mr Hyndman. As already noted, no evidence was called in relation to this issue. I do not consider the evidence of the link to the liberty8 profile, which refers to "Ian H", greatly advances the issue. There are no doubt people who have such knowledge but I do not consider it can be taken as read or, at least, reasonably inferred that any such people necessarily formed part of the viewership of 838 recorded on the listing which provides the only evidence of the extent of the publication.

[45] There was some evidence that Mr Hyndman had sold a lot of different cars and that his speciality was classic cars. Mr Hyndman expressed extreme concern about his reputation amongst what he described as the relatively small community of Land Rover enthusiasts and classic car enthusiasts which he considered to be future potential customers. However, that concern does not address the issue of what knowledge such people would have of the structure and organisation of Mr Hyndman's business, who was involved in it, and who managed and ran the trading operation. The involvement of Mr Hyndman's son serves to illustrate how, in the absence of evidence on this point, it cannot be assumed that Mr Mutch's statement would be read as only being referable to Mr Hyndman and no one else. In one of the earlier posts reference was made to a "Gary" whom Mr Hyndman addresses. That person replies, "Who is Gary?" So it remains unclear whether that person knew Mr Hyndman or, if that person viewed the subsequent defamatory posts made by Mr Mutch, they connected the words with Mr Hyndman.

[46] 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.

Damages

[47] It is not necessary for me to address the issue of damages given my conclusion regarding the substantive ground of appeal which, in any event, was only the subject of obiter comments by the District Court Judge. However, in deference to counsel's submissions, I make brief mention of the issue.

[48] Judge Callaghan indicated that if he was wrong in dismissing the claim he would, in any event, have only awarded the nominal sum of $500 in damages. Mr Moss submitted that such a sum was insufficient even in a situation where only a modest award would be warranted. He referred to a number of examples of previous awards which indicated that a much greater sum was warranted.[17] In particular, Mr Moss referred to *Wiremu v Ashby*, where Osborne J, after having concluded that the plaintiff's evidence did not point to substantial hurt to feelings or loss of reputation, awarded a "very modest" sum of $10,000.[18]

[49] Judge Callaghan's justification for indicating such a small sum was Mr Hyndman's reaction to the initial post that pointed out that the Series 2 Land Rover Mr Hyndman advertised as being from 1952 had not in fact come out until 1958. Mr Hyndman responded to that entirely factual observation with "Are you a troll or a buyer!!???" Rather than check the accuracy of the details of the listing, the Judge noted that Mr Hyndman proceeded to challenge the subsequent postings that finally led to Mr Mutch's defamatory statement. The Judge also noted that no "external evidence" was called by Mr Hyndman about the impact of the publication, although

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17 *Kim v Cho* [2016] NZHC 1771, [2016] NZAR 1134; *Ross v Hunter* [2017] NZDC 22579, [2018] DCR 770; and *O'Brien v Brown* [2001] DCR 1065.

18 *Wiremu v Ashby* [2019] NZHC 558 at [112].

that is not a necessary prerequisite to award damages to a natural person in a defamatory proceeding.

[50] Mr Moss submitted that the Judge failed to give sufficient weight to the seriousness of the allegation of fraudulent dishonest behaviour contained in the defamatory statement which damaged Mr Hyndman's reputation as a used car dealer, and that such a small award was not sufficient vindication of Mr Hyndman's reputation or compensation for the distress and anguish caused. Mr Hyndman's evidence of having contacted his son after the initial post to enquire about the listing details was also emphasised, in response to what Mr Moss described as the Judge's unfair criticism of Mr Hyndman for challenging the subsequent commentators.

[51] There is no issue that Mr Mutch's words constituted a defamatory statement and I accept that, as such and on the basis of the cases cited, the indicated award of $500 would not in the circumstances have been sufficient. However, I am bound to observe that the Judge was entitled to take into account Mr Hyndman's conduct. Whatever steps he may have been taking behind the scenes, the fact remains that his immediate response to a legitimate post regarding the details of the listing was to abuse the person who had correctly pointed out the erroneous information, and matters escalated from there. The Court heard expert evidence as to what steps should have been taken by a prudent motor vehicle dealer before the Land Rover was listed for sale and the immediate steps that should have been taken to investigate any potential error once it had been raised. Mr Hyndman's response and his failure to take down the listing until the evening of the following day does him no credit, particularly when his claim is based on the pride he takes in his professional reputation.

[52] It is not necessary that I comment further. However, I venture the following observation had I been prepared to conclude that there was sufficient evidence to safely draw the inference that it was likely that persons viewing the listing would have identified Mr Hyndman as the object of the defamatory statement. Because of the limited extent of the publication, and Mr Hyndman's failure to appropriately respond on the Trade Me site to the significant query legitimately raised with him, and which finally resulted in Mr Mutch's defamatory statement, any award would likely have been limited to $5,000 or less.

Result

[53] The appeal is dismissed.

[54] Costs follow the event in the usual way on a 2B basis.

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