IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-2371
[2022] NZHC 2136

UNDER	the District Court Act 2016
IN THE MATTER	of an appeal against the decision of the District Court at Auckland in [2021] NZDC 14952
BETWEEN	BFW LTD Appellant
AND	VICKY SHI Respondent

Hearing: 12 July 2022

Counsel: R K P Stewart for Appellant
R D Butler and S C I Jeffs for Respondent

Judgment: 25 August 2022

JUDGMENT OF BREWER J

This judgment was delivered by me on 25 August 2022 at 4 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Duncan Cotterill (Wellington) for Appellant
Haigh Lyon (Auckland) for Respondent

Introduction

[1] The appellant (BFW) unsuccessfully sued Ms Shi for defamation and injurious falsehood.

[2] After an aborted start in February 2020,[1] Ms Shi obtained summary judgment against BFW in July 2021.[2]

[3] BFW wants to appeal the decision to grant Ms Shi summary judgment on the defamation cause of action. As prerequisites, it needs leave to extend the time for filing its notice of appeal and it needs leave to adduce affidavit evidence from Mr Bing Feng Han (BFW's sole director and shareholder) and Ms Bai Jing (a customer of BFW).

[4] First, I grant leave to extend the time for filing the notice of appeal. The application is not opposed and Mr Han's contention that he was not advised that the appeal period ran from the date of Judge Sharp's oral judgment (rather than the date the written version was provided) is not contested.

[5] Second, I will receive the affidavits of Mr Han and Ms Jing on a *de bene esse* basis. That is to say, I will accept them on a provisional basis because of the nature of the issue in this appeal, which I will come to once I have set out the relevant background.

Background

[6] BFW sells school lunches. These can be ordered online and BFW delivers them to the schools. It trades under the name "Go Deli". Ms Shi was a customer. One day Ms Shi found a lunch containing maggots. She mistakenly formed the view it had been supplied in that condition by "Go Deli".[3] Ms Shi posted defamatory material about "Go Deli" to a social media group. Attempts to resolve the matter were

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1 On 26 February 2020, Judge M-E Sharp ordered Ms Shi to pay $5,000 to BFW for wasted costs.
2 *BFW Ltd v Shi* [2021] NZDC 14952 [District Court decision].
3 In fact the lunch had been partly consumed by Ms Shi's child the previous week and left to fester in the child's school bag over the weekend.

unsuccessful. BFW issued proceedings in the District Court for defamation and injurious falsehood.

[7] Judge Sharp granted Ms Shi summary judgment on the defamation cause of action for two reasons:[4]

(a) The Judge held there was no evidence that anyone connected "Go Deli" with BFW. Ms Shi's post did not mention BFW and there was no evidence that a customer might associate BFW with "Go Deli". Therefore, there was no evidence BFW had been lowered in the estimation of any right-thinking person.

(b) The Judge held that BFW had not proved any pecuniary loss. Although BFW put forward evidence that in the week following Ms Shi's defamatory posting it suffered a reduction in turnover of $1,982, its revenue in that financial year exceeded that of the previous year.

The issue

[8] BFW accepts, as it must, that Judge Sharp did not err in deciding that there was no evidence before her linking BFW to the "Go Deli" brand. Therefore, the Judge was correct on the evidence before her to conclude that BFW had no reasonably arguable case that it had been defamed by Ms Shi's post. Its case on appeal is that evidence of such linkage was available (and is contained in Ms Jing's affidavit). Mr Han's affidavit is to the effect that he was never asked by BFW's lawyers to obtain the evidence. He gave evidence to that effect before me. If I do not accept the affidavits and Mr Han's evidence (collectively, "the evidence") there will be no basis for the appeal.

[9] Thus the issue is whether leave should be granted to admit the evidence on appeal under r 20.16 of the High Court Rules 2016.[5] This rule provides:

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4 The injurious falsehood cause of action was similarly unsuccessful but those findings are not challenged on appeal. See the District Court decision, above n 2, at [28]–[33].

5 Mr Stewart, for BFW, submits also that the Judge should have found a reasonably arguable case for pecuniary loss given the identified, and proximate, reduction in turnover. But he acknowledges that the issue I have set out will decide the appeal.

20.16 Further evidence

(1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.

(2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.

(3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

(4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[10] Put another way, if I accept Mr Han's evidence that his lawyers did not advise him to obtain evidence from a customer who linked the defamatory post with BFW, does that amount to "special reasons" for hearing Ms Jing's evidence?

Discussion

[11] I am satisfied there are no special reasons for hearing Ms Jing's evidence.

[12] The relevant principles governing the receipt of further evidence on appeal are straightforward:[6]

(a) the Court can receive further evidence if it thinks that the interests of justice require it to do so;

(b) it is wrong to allow an appellant to bolster his or her case with additional evidence that was available at the lower Court hearing, but not adduced because of the particular view of the case being taken at the time;

(c) admitting further evidence on appeal is exceptional rather than routine. A change of heart about how a case should have been run will not suffice. The prospect of further evidence triggering a substantial relitigation before the appellate Court of the substantive case will count against admitting the further evidence;

(d) generally, the further evidence must be fresh, credible and cogent;

(e) evidence will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial;

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6 *B v A* [202] NZHC 580, (2020) 26 PRNZ 58 at [25].

(f) the absence of freshness is not an absolute disqualification. When the further evidence is not fresh, it will not generally be admitted unless the circumstances are exceptional and the grounds compelling. In addition, the further evidence needs to pass the tests of credibility and cogency;

(g) the interests of justice require the parties to put their best case forward at trial, in order to avoid wasting the Court's limited time and resources. A high value is placed on finality when the parties have been afforded the opportunity and failed to take it; and

(h) the standard to be met is "rightly high".

[13] I accept that the evidence of Ms Jing is credible. It is also cogent insofar as it demonstrates that at least one person who saw Ms Shi's post knew of the connection between BFW and "Go Deli".

[14] But the evidence of Ms Jing is not fresh. It was available at the time of the District Court hearing.[7] BFW had been on notice of the need for evidence linking BFW with "Go Deli" since at least 1 July 2020. As Judge Sharp observed, BFW had every opportunity to adduce evidence of this nature prior to the hearing taking place:

> [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. …
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> [8] … 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, [BFW] has had, since that time [August 2020 until July 2021]. 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 [BFW] has failed and will be unable to prove that a reasonable member of the public, would or has associated a publication with BFW.
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> [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 [BFW], which puts to bed, so to speak, the deficiencies on which [Ms Shi] relies. But that has not happened in this case.

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7 Ms Jing's affidavit (dated 13 December 2021) confirms that she spoke to Mr Han twice "shortly after" the situation in March 2019, some months before BFW filed its proceedings in the District Court in May 2019. The link Ms Jing made between BFW and "Go Deli" could then have been discovered with reasonable diligence before 21 July 2021.

[15] While Mr Han attributes this failure to his lawyers, in essence all that has happened is that BFW did not put its best case forward at the summary judgment hearing. These are not exceptional or compelling circumstances that warrant the Court now granting leave for BFW to adduce further evidence on appeal.[8]

[16] Nor would it be in the interests of justice to do so. Ms Shi posted the allegedly defamatory material on 19 March 2019. Over three years have passed. The only evidence of pecuniary loss in that time was a temporary reduction in BFW's turnover of $1,982. This is in the context of a total turnover for that year of $771,338.[9] BFW has produced no evidence of the amount of profit it claims to have lost as a consequence of Ms Shi's post. The evidence of BFW's reputation being affected (as opposed to "Go Deli") is also relatively slim.[10]

[17] The threshold for granting leave to adduce further evidence on appeal is high. This reflects in part the value that is placed on finality in litigation — a principle which is particularly pressing in a case such as this where matters ought to have been resolved some time ago. Ms Shi has offered to settle with BFW on the basis that she will compensate it for any lost turnover and will apologise on the terms sought by BFW. Yet BFW persists in its claim. I agree with the Judge that "the cost of continuing the proceedings would be disproportionate to both parties".[11]

[18] Finally, I note that even if I were to grant BFW's application to adduce further evidence, and in particular the affidavit of Ms Jing, it would not materially affect the outcome of the case. I would still dismiss the appeal. The Court of Appeal recently confirmed that for a meaning to be defamatory it must do "more than minor harm" to the claimant's reputation.[12] A body corporate has no feelings and cannot recover for

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8 See, for example, *Wooldridge v Kumari* [2021] NZHC 1975, [2021] NZFLR 461 at [39]–[43] where the appellant failed to produce evidence at trial in reliance on trial counsel advice (albeit trial counsel incompetence was not pursued at the appeal hearing as the reason for this failure). Walker J considered these were not compelling grounds for admitting the evidence on appeal.

9 BFW's net profit after tax for the 2019 financial year was $19,792.

10 Mr Butler rightly observes that more than three years after the post there is evidence of only one person — Ms Jing — who has drawn a link between Ms Shi's publication and BFW. It should also be noted that the post did not cause Ms Jing to stop purchasing from BFW.

11 District Court decision, above n 2, at [38]. See also the view expressed by Venning J in his minute dated 4 March 2022 at [4].

12 *Craig v Slater* [2020] NZCA 305 at [44].

loss of reputation: it can only recover for pecuniary loss.[13] It follows that for a meaning to be defamatory of a body corporate it must have caused (or be likely to cause) pecuniary loss that is more than minor — a company which can show only trivial or nominal losses will fail to meet this threshold.[14]

[19] As indicated above, BFW suffered a temporary reduction in turnover of $1,982. It has produced no corresponding evidence of the profit it claims to have lost as a consequence of Ms Shi's post. Any such losses would presumably be demonstrably less than the fall in turnover.[15] The evidence that has been produced also illustrates that BFW's revenue and profits actually increased in the financial year ending 2019.[16] BFW advised its solicitors on 3 September 2020 that "[o]verall 2019 [had been] a good year". I agree with the Judge that had BFW sustained any losses that were more than minor as a consequence of Ms Shi's post, it would have been able to produce evidence of those losses by now.[17]

[20] There are no special reasons for admitting Ms Jing's evidence.

Result

[21] The application to adduce further evidence on appeal is declined.

[22] The appeal is dismissed.

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13 Defamation Act 1992, s 6. See also *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [57] and [62].

14 See, for instance, the similar approach taken in the United Kingdom under s 1 of the Defamation Act 2013 (UK). Section 1(1) provides that a statement is not defamatory "unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". Section 1(2) then provides that "harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss".

15 Using BFW's net profit ($19,792) as a percentage of turnover ($771,338) for the financial year ending 2019 (2.5 per cent), the respondent suggests that a "crude" measure of loss would indicate that the reduction in turnover of $1,982 might have resulted in a corresponding reduction of BFW's net profit of $49.55.

16 District Court decision, above n 2, at [25].

17 At [26].

Costs

[23] Ms Shi is entitled to costs. If they cannot be agreed, memoranda are to be filed no later than 23 September 2022.

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Brewer J