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(3)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.864/85

[redacted]

3/1

BETWEEN EQUITICORP HOLDINGS LTD
a duly incorporated company having its registered office at Auckland, Investment and Merchant Banker

Plaintiff

A N D WELLINGTON NEWSPAPERS LTD
a duly incorporated company having its registered office at Wellington and carrying on business of newspaper publishers

Defendant

Hearing: 5 February 1986

Counsel: Lockhart Q.C. & Stevenson for Defendant in support
Hurd & Sandelin for Plaintiff to oppose

Judgment: 4 March 1986

JUDGMENT OF SINCLAIR, J.

On 23 July 1984, the Plaintiff commenced an action against the Defendant for libel in respect of an article appearing in a publication of the "N.Z. Times", a weekly newspaper which is distributed throughout New Zealand and of which the Defendant is the proprietor, publisher and printer. The article complained of by the Plaintiff appeared in the edition of the N.Z. Times of 14 July 1985. The claim is for $10,000,000 and as the Defendant company was domiciled in Wellington the Plaintiff, to enable it to issue the proceed-

ings in Auckland, had to supply the Court with an affidavit stating that a material part of the cause of action arose in Auckland. That affidavit was duly filed, coming from Mr P.H. McCroskire, a solicitor in the employ of the solicitors acting for the Plaintiff company. The Defendant then in reply filed a motion for an order amending the writ by requiring that the Statement of Defence be filed in the High Court at Wellington and not in the High Court at Auckland. It is that motion with which the Court is presently concerned.

The proceedings were issued when the Code of Civil Procedure was in force but at the time when this application was heard, it was common ground that the application now fell to be dealt with under the High Court Rules (H.C.R.) which came into force on 1 January 1986 by virtue of the Judicature Amendment Act, 1985. By s.13 of the amending Statute, the H.C.R. replaced the rules which were formerly in the Code of Civil Procedure. The position as to the place where a Statement of Claim ought to be filed is governed by R.107. Primarily, the place for filing the Statement of Claim is in the office of the Court nearest to the residence or principal place of business of the Defendant. However, by R.107(2), a Plaintiff is empowered to file his Statement of Claim in the office of the Court closest to his place of residence if the place where the cause of action sued upon, or some material part thereto, is nearer to the place where the Plaintiff himself resides than to the place where the Defendant resides. It is that particular provision of the Rules which

now comes to be considered and the wording of the sub-rule is such that if the Plaintiff is able to establish that the cause of action, or a material part of it, arose at a place closer to his place of residence than the place of residence of the Defendant, then the primary provision of the rule contained in sub-rule (1) can be overridden.

The Defendant contended that the newspaper in question was printed in Wellington and that it was distributed by various agencies throughout the North Island, but that by reason of it having been printed in Wellington, the publication occurred only in Wellington when the finished newspaper was sent out. Because of its contention that that was a fact, the Defendant required Mr McCroskire to be present for cross-examination. During the course of his cross-examination he stated that he had read issues of this particular newspaper in Auckland and that he had seen it advertised and sold widely in this City and stated quite categorically that he believed that because the paper was available for sale in Auckland, that that constituted publication in this City. In fact in his affidavit Mr McCroskire stated that the distribution and publication occurred in Auckland and it was because it was read by people in Auckland, he regarded that as being equivalent to publication here. Further affidavits were also filed to show that the Plaintiff is a company incorporated in Auckland and carries on business in this City in a substantial way.

On behalf of the Defendant, an affidavit was filed by the Circulation Manager of the Defendant company which indicated that the N.Z. Times was printed by the Defendant in Wellington and that so far as Auckland was concerned, copies of the newspaper were delivered by an independent road transport operator to the premises of News Media (Auckland) Ltd which then arranged for independent contractors to deliver the newspapers to retail outlets. News Media (Auckland) Ltd paid the independent contractors it retained and in due course at the end of each month there was an accounting between the Defendant and News Media (Auckland) Ltd when the costs incurred by News Media in relation to the distribution of the newspaper were charged to the Defendant and the sales revenue received by News Media from the retail outlets were credited to the Defendant. Mr Johnson's affidavit stated that that activity was part of the normal end of month accounting within the INL Group of which both the Defendant and News Media (Auckland) Ltd are a part.

A further affidavit was made on behalf of the Defendants in relation to its obligations under the Newspapers & Printers Act, 1955 and of which it was stated that the N.Z. Times was printed by two companies namely, the Defendant and the Timaru Herald Company Ltd, but I am not concerned with the latter company as it is concerned merely with the printing and distribution in the South Island. I repeat that it was the Defendant's contention that to determine where the cause of action arose, one had to look at where the newspaper in

question was printed and it necessarily followed from that argument that once the newspaper was printed, then it was immediately published because it was from the printing office that the paper was distributed to the public at large and that that equated with publication so far as the law of libel is concerned.

For the Plaintiff it was contended that there were two aspects to be considered. Firstly, the place where publication took place and secondly, the issue of the reputation of the Plaintiff. It is trite law to say that a company cannot sue either for libel or for slander unless it is defamed in the way of its business. It was part of the Plaintiff's argument that as its business was centred in Auckland, then its reputation would have to be established in respect of its business operations in this City and that that could form part of the cause of action in relation to this particular libel suit. I set that aspect of the matter to one side because I think it better to look at the primary consideration, namely, whether publication took place in Auckland.

There is no argument but that the newspaper in question in which the article complained of appeared was sent to Auckland by the Defendant and was distributed through the Defendant's agents. The writing of a libel does not give the person defamed a right of action until such time as the libel is published to a third party. This is made plain by the classic statement of Lord Esher, M.R. in Hebditch v. MacIlwaine (1894)

2 Q.B. 54, when at p.58 he said:-

> "It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel."

If one then turns to the definition of the word "publish", one finds in the Shorter Oxford Dictionary the following definition:-

> "To make public or generally known; to declare openly or publicly; to tell or noise abroad."

A secondary meaning is "to make generally accessible or available Those definitions appear to me to be particularly applicable to articles contained in newspapers which have a wide and general circulation. What better way to make a particular matter publicly or generally known than to disseminate it through the agency of the press.

In support of its argument the Defendant sought to rely upon the decision in The King v. Burdett 106 E.R. 873 but I find little help in that case as it was a case of criminal libel in the 1820's. At the moment I am required to deal with an article in a newspaper in the 1980's. A case much more in point to my mind is that of Bata v. Bata (1948) W.N. 367. In that case the libel was contained in a circular letter written by the Respondent in Zurich and subsequently delivered to each of three persons in London. A writ was issued for libel in the English Courts and an application was made for

leave to serve out of the jurisdiction on the basis that the libel had been published in London notwithstanding that it had been written in Zurich. The Court, at first instance, refused to allow service of the writ out of the jurisdiction but on appeal that order was reversed. Scott, L.J. referred to the contention of counsel for the Respondent that the libel was committed in the place where the writer wrote the libel and not where he published it as a startling proposition and at the end of the judgment it was stated that it was the publication of the contents of the defamatory document to a third party which constituted the tort of libel and that alone justified the libelled party in issuing his writ. There does not appear to be any other case other than one in Canada - which I will shortly refer to - which has had to consider this particular aspect in relation to the place where publication of a libel takes place. It was incidentally referred to by our Court of Appeal in Consumer Council v. Pest Free Service Ltd (1978) 2 NZLR 15. This was a case where the Respondent had issued a writ in Auckland for libel against the Consumer Council which was domiciled in Wellington. An application for change of venue was sought to Wellington because that was where the Appellant resided and that was the source from which the article complained of originally emanated, although the article had in fact been printed by the Otago Daily Times in Dunedin. At p.17 the Court had this to say:-

> "We have said that the writ was issued in the Auckland Registry of the Supreme Court. In reliance on RR 9 & 10 of the Code of Civil Proce-

> dure Pest Free Services nominated Auckland as the place at which the Defendants were required to file their statement of defence, with the consequence that under R.6 Auckland was also named as the place at which the action should be tried. Under R.9 Pest Free Services was able to nominate Auckland (rather than Wellington) because a material part of the alleged cause of action arose in Auckland in that the article in the Consumer magazine was published to a number of members of the Institute resident in the Auckland area."

The Court of Appeal, on the facts of the case before it, did not seem to find that the course of action which had been adopted by the Plaintiff in issuing its proceedings in Auckland was at all extraordinary. By applying a similar reasoning to the facts of the present case, one can see every justification for this Plaintiff having acted as it did.

I now refer to the Canadian decision in Jenner v. Sun Oil Co. Ltd (1952) 2 DLR 526. This case concerned a defamation action where the Plaintiff lived and carried on business in Ontario and his cause of action was based on certain defamatory statements broadcast by a radio station in the United States and which were heard in Ontario. Authority had been given for the issue of the proceedings outside the jurisdiction and an application was made to set aside that ex parte order. At p.533 of the judgment, reference was made to the fact that counsel for the Defendants argued that the defamatory matter, if it was published, was not published in Ontario but had been published abroad where it was put on the ether-waves by the radio broadcasting apparatus and that if damage resulted within the jurisdiction, it resulted from the publica-

tion abroad. At p.535, McRuer, CJHC had this to say:-

> "I have come to the conclusion that there are fundamental and common-sense principles which govern the present case. Radio braodcasts are made for the purpose of being heard. The programme here in question was put on the air for advertising purposes. It is to be presumed that those who broadcast over a radio network in the English language intend that the messages they broadcast will be heard by large numbers of those who receive radio messages in the English language. It is no doubt intended by those who broadcast for advertising purposes that the programmes shall be heard by as many as possible. A radio broadcast is not a unilateral operation. It is the transmission of a message."

Later in the judgment, after referring to the decision in Bata v. Bata (supra) - to which I have earlier referred and in particular to the foundation of a libel action being in the publication of the libel - McRuer, CJHC at p.537 said this:-

> "The same principles apply to defamation by slander. A person may utter all the defamatory words he wishes without incurring any civil liability unless they are heard and understood by a third person. I think it a "startling proposition" to say that one may, while standing south of the border or cruising in an aeroplane south of the border, through the medium of modern sound amplification, utter defamatory matter which is heard in a Province in Canada north of the border, and not be said to have published a slander in the Province in which it is heard and understood. I cannot see what difference it makes whether the person is made to understand by means of the written word, sound-waves or ether-waves in so far as the matter of proof of publication is concerned. The tort consists in making a third person understand actionable defamatory matter."

It is plain that McRuer, CJHC was in total agreement with Scott, L.J. in that it was a startling proposition to suggest that the place where a libel was written was necessarily the place of publication of the libel. I am of the view that the decisions in Bata's case and in Jenner's case are particularly appropriate to the facts of the present case. If a newspaper is printed but never distributed or circulated, there may well be no publication. It is when the newspasper is distributed and circulated that its contents are in fact published. There are many instances in this country of newspapers, magazines and periodicals being printed overseas and distributed in this country. If any one of those publications contained defamatory matter of a New Zealand citizen, I do not accept for one moment that the only place where that New Zealand citizen could take action for defamation would be in the country in which the publication was printed and from which it was despatched. The printing and publishing of a newspaper and its despatch from the newspaper office cannot be regarded as being synonomous. In McFarlane v. Hulton (1899) 1 Ch. 884, it was held that a newspaper is published when and where it is offered to the public by the proprietor. It was stated that it may be published in more than one place and that where the proprietor has two offices in two different towns, at each of which he offers for sale or distribution copies of his paper, the paper is published at each office. At p.888, Cozens-Hardy, J. posed this question:-

> "What is the meaning of 'publishing' a newspaper? It is plainly something different from printing it."

I am of the view that on the evidence which is before the Court in this case, there was publication by reason of the newspaper in question having been delivered to Auckland, distributed to various outlets and then read by members of the public. When it was read by the various members of the public, its contents were published and there was publication in Auckland. Indeed Mr McCroskire's statement that the reading of the newspaper by persons in Auckland he regarded as constituting publication. I venture to suggest that any ordinary member of the public would entirely agree with him. This is not a case of re-publication. The method of distribution was selected by the Defendant which was responsible for the collation and printing of the newspaper. Those who distributed and sold the newspapers were merely acting as agents of the Defendant and publication occurred at each outlet at which the newspaper was sold. If a newspaper proprietor elects, as most will do in modern society, to sell his newspaper on a wide front, then he must accept the risks which are inherent in distributing and selling in that manner.
It is not the publication of the newspaper itself which constitutes the libel. It is the publication of the libel itself which constitutes the tort. The place of registration of the newspaper under the Newspapers & Printers Act, 1955 has nothing to do with the formulation of a proceeding for a claim for libel. The question to be answered is, where was the libel published? If it is published in Auckland as well as other places, then it can be said that the cause of action, or a material part thereof, arose in Auckland. In my view on the facts as disclosed, there was publication in Auckland.

No grounds therefore exist, in my view, for the making of the order sought by the Defendants and the application is dismissed with costs to the Plaintiff of $600.

P.D.Ivy J.

Solicitors:

Rudd Watts & Stone, Auckland, for Plaintiff;

Izard Weston & Co, Wellington, for Defendant.