IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC 140/97

BETWEEN	RUPERT DAVID KURGHAN
	First Appellant
AND	PRODOTTI D'ITALIA LIMITED
	Second Appellant
AND	FURIO ROSSI
	First Respondent
AND	O.R.A.T. PTY LIMITED
	Second Respondent
Hearing:	16 March 1998
Counsel:	M Keall for appellants T Ito for respondents
Judgment:	March 1998

RESERVED JUDGMENT OF CARTWRIGHT J

Solicitors
Keith Langton, PO Box 47114, Ponsonby, for appellants
Short & Co, DX CP25514, Auckland, for respondents

This appeal arises out of the decision of Judge J H Lovell-Smith delivered on 13 June 1997 in the District Court at Auckland. In those proceedings the first plaintiff, F Rossi (the first respondent in this appeal) and O.R.A.T. Pty Limited as second plaintiff (the second respondent in this appeal) challenged the appearance on behalf of the first and second defendant, R.D. Kurghan and Prodotti D'Italia Limited (the first and second appellant in this Court) under protest to jurisdiction. The substantive issue for ultimate determination is the allegation by the respondents that the first appellant falsely and maliciously wrote three letters to third parties in Italy, letters which contained comments which the respondents say are clearly defamatory, untrue, of a discreditable commercial nature and were a clear attempt by the first appellant as managing director of the second appellant to gain a commercial advantage over the respondents. There appears to be no challenge to the essential facts, namely, that letters signed by the first appellant were received by representatives of companies in Italy and contained the allegations concerning the first respondent who lives in Australia. The first and second respondents act as agents for the commercial entities in Italy. The appellants, it is alleged, sought to do business direct with the Italian companies and thereby stood to gain a financial advantage should that be successful.

The decision in the District Court was interlocutory in nature. The substantive issues are yet to be determined and information supporting or contradicting the respondents' allegations of defamation is as yet sparse. In the District Court the appellants lodged an appearance under protest to jurisdiction submitting unsuccessfully that the Italian Civil Court was the forum conveniens, there being a tenuous connection at best with the New Zealand jurisdiction. Both parties submit that the learned Judge in the District Court correctly stated the relevant law. She said:

In ***NZI Insurance Limited v Hintel Hill and Coles Limited*** [1906] 1 NZLR 203 at p 208 Smellie J summarised the essential principles governing a "forum conveniens". Decision as follows:

1.. Is there another suitable forum in which the case may be tried more suitably for the interest of all the parties and the ends of justice?

2. The burden of proof rests on the Defendant to persuade the Court to exercise its jurisdiction to grant a stay.

3. The burden resting on the Defendant "is not just to show that (NZ) is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the (NZ) forum".

4. Inconvenience, expedition, and costs are relevant considerations.

5. The law governing the contract ought to be applied when interpreting its terms, is also important.

6. If the Plaintiff has acted reasonably it should not be lightly deprived of a "legitimate personal or juridical advantage".

7. At the end of the exercise the Court must stand back and weigh up all the factors and do justice between the parties.

In balancing the various relevant factors the Judge came to the conclusion that

> .... In my view justice cannot be done between the parties at substantially less inconvenience or expense. [If the Italian Courts were to have jurisdiction] ... there is a strong New Zealand connection. The first-named Defendant is resident or has his principal place of business in New Zealand.

By the same token both counsel acknowledge that there is no bar to proceeding in New Zealand if the respondents have a claim which is actionable both in Italy and New Zealand. It is in the balancing of the factors referred to in ***NZI Insurance Limited*** that the forum conveniens ought to emerge.

The Judgment In The District Court

The appellants submit that for a number of reasons the Judge in the District Court erred both in fact and in law. In order to be actionable in New Zealand there must be evidence of a publication of the defamatory comments in this country. The only basis for alleging publication is in the assumed fact that the first appellant dictated the letters to a secretary who then transcribed them for his signature. Setting aside for the moment whether this is a publication for the purposes of this proceeding, there is some dispute as to whether in fact this course of action took place. Before the Judge in the District Court was an affidavit by Jo-Anne Roimata Janie Knight who annexed copies of the correspondence complained of and in the body of her affidavit said:

> Having read the letters annexed to the affidavit of Furio Rossi I believe those letters to have been written by the First Defendant from the offices of the Second Defendant in Auckland, New Zealand by virtue of the address at the top of the letters. I believe that in the normal course of business those letters in their typewritten form would have been produced at Mr Kurghan's request by his secretary, or office assistant.

In her Judgment the District Court Judge said:

> Ms Knight was a secretary who took down dictation and typed up the letters. Mr Kurghan is the sole employee of the second Defendant.

The second sentence is palpably correct but the first is not. Ms Knight is a solicitor employed by Short & Co. solicitors for the first and second respondents. In her professional capacity she was stating what she believed would have been the ordinary course of business leading to the production of the typed letters. There was no other evidence before the Judge to challenge that analysis but clearly the learned Judge was incorrect in her assumption that Ms Knight was the secretary who took the dictation and typed the correspondence.

After the decision in the District Court had been delivered Mr Kurghan himself filed an affidavit deposing to the fact that he composed and typed the letters personally. There is therefore a question of fact to be determined which is pivotal to the question of whether publication took place in New Zealand or not. Although it might be appropriate to dispose of the matter on that point alone, where the Court is left with an inconclusive factual situation which could not have been determined conclusively in the District Court and where, as in the present instance, the respondents express their scepticism as to the accuracy of Mr Kurghan's statement, it is important to review the principles rather than dispose of the matter on a factual basis.

The appellants also argue that the Judge in the District Court incorrectly applied the facts to the principles set out in ***NZI Insurance Limited*** when she found that "Justice cannot be done between the parties at substantially less inconvenience or expense." Even if publication took place in New Zealand by means of the dictation of a letter to a secretary, that is not the real issue between the parties. Such publication was not pleaded in the statement of claim and damages are sought for the losses suffered by the respondents arising out of the allegedly defamatory remarks in the correspondence when it was "published" or received by their commercial principals in Italy. The essence of the dispute is whether those remarks were defamatory and injured the reputation of the respondents in the eyes of their Italian business associates, not whether such injury to reputation occurred in the mind of a secretary here in New Zealand.

The issue of publication in this country became of interest only as the result of the appellants decision to file an appearance under protest to jurisdiction and it is likely, as the appellants argue, that this is an issue that will "melt away" when the substantive issue between the parties is ultimately argued.

The appellants also challenge the finding of the Judge in the District Court that it will be substantially less inconvenient or expensive to dispose of the substantive issues in the New Zealand Courts. Because the publication of any defamation effectively took place in Italy a significant proportion of the evidence will come from witnesses who live or are domiciled in that country. All parties will be put to the expense and inconvenience of briefing witnesses in Italy and bringing them to New Zealand should this appeal be unsuccessful. If the matter is to be determined before the Italian Civil Court both the first appellant and the first respondent will be required to travel to Italy, but in the appellants submission that will be significantly less expensive and inconvenient than if Italian witnesses were to be required to travel to New Zealand and be briefed from Australia and New Zealand respectively.

Was There Publication In New Zealand

The starting point is that there is no ability to make a factual finding as to whether a letter was dictated by the first appellant to a secretary. In order to dispose of this point, however, it may well be appropriate to assume that the first appellant followed that procedure as described by Ms Knight in her affidavit.

The first appellant submits that the dictation of a letter containing defamatory comments is not publication in the usual sense. The process of dictation is, in his submission, a mechanical one which results effectively in the author of the letter and its transcriber combining forces to produce a typed letter. He submits that the analysis of Denning Mr to be found in ***Bryanston Finance Ltd v de Vries & Anor*** [1975] 2 All ER 609 at 616 is apposite. He said

> On what ground is dictation to a typist privileged? In my opinion it is privileged because it is in accordance with the reasonable and usual course of business. For a businessman to dictate his business letters to

> a typist in his office, even though these letters contain statements defamatory of some one or other. That very fact gives rise to a common interest between the businessman and the typist so as to make the occasion privileged. The businessman has an interest in dictating the letter to her - so as to get it written - and she has an interest or duty to take it down - so as to type it up for him to sign. I do not think that the privilege depends on the person to whom it is intended to be sent.

With respect to that analysis which is directed more at whether privilege applies on such an occasion, I do not think that it assists the first appellant in his argument that the dictation and typing of a letter is such a seamless mechanical process that no publication occurs. Before such a finding could be made it seems to me that there would need to be a factual basis for it. At one extreme were technology to be employed whereby the person dictating used voice activated equipment, clearly there could be no publication provided he or she completed the whole process down to the printing and signing of the ultimate letter. It is, however, asking too much for a Court to accept without any evidence one way or the other that a particular secretary operated so mechanically that he or she did not take any notice of the contents of a letter dictated and ultimately typed out. So for those reasons, if there were to be a finding that a secretary actually typed the first appellants letter and not, as he deposes, that he typed the letter himself then without other evidence it is asking too much of a Court to assume that the typist took no notice of the contents of the letter being so deeply absorbed in the process as to be able to ignore them.

<u>Does Qualified Privilege Obtain</u>

In ***Bryanston Finance*** Denning MR found that:

> .... Dictation of a business letter to a typist is an occasion of privilege. It can be defeated by malice, but is not otherwise actionable"

Although the appeal was allowed in that instance, by a majority the reasons given by Lawton LJ were different from Lord Denning's while

Lord Diplock dissented. The principle is therefore of limited value but in any event the privilege, if there be any, can be defeated by malice. The difficulty is discerning whether it is necessary for the malice to attach to the publication to the secretary or whether it attaches to the ultimate recipient of the correspondence. There seems to be little doubt in the present instance that if a secretary were used by Mr Kurghan he or she was not the intended recipient of any malicious and defamatory comment but simply a means to an end. Although it is not necessary for this appeal to be determined on this point I tentatively express the opinion that publication by an employer to an employee (which takes the form of the dictation and typing of a letter intended for a third party and in which the secretary has no obvious interest or concern) is a privileged communication.

In summary, however, where as here there is no firm factual foundation upon which to base a decision in principle, either that publication has occurred or that qualified privilege does not apply, it is inappropriate to base a decision on such a hypothetical foundation. In the end result the principles stated in ***NZI Insurance Limited*** must be the basis for determining this appeal as they were in the District Court.

On appeal the decision of the Court appealed from will always be given the greatest respect particularly where there are any findings of fact or where the Court has exercised a discretion. Neither of those latter factors apply in the present instance. The factors which appear to have influenced the learned Judge most significantly are the convenience and cost and the strong New Zealand connection given that the first appellant resides or has his principal place of business here. That last factor does not appear with the greatest of respect to add much to support a strong New Zealand connection. The allegation that statements of a defamatory nature were made by the first appellant do not depend on the fact that he lives in New Zealand or carries out

business here. If proved, those defamatory statements damaged the respondent's reputation in Italy. New Zealand was simply the place of origin, a factor which is of incidental value only. Any evidence concerning the impact of the allegations must of necessity be from Italy and for that reason Italy is at least a suitable a forum as New Zealand. The first appellant must establish that Italy is the forum which is "clearly or distinctly" more appropriate than the New Zealand Courts and given the fact that most relevant evidence must originate in Italy that burden has been discharged by the appellants. When considered in conjunction with the inconvenience possibility of delay and costs, the Italian Civil Courts again must be preferable to the New Zealand jurisdiction. The cost and inconvenience of bringing Italian witnesses to New Zealand and the expense of translation and other like factors must weigh in favour of the first appellants. It is impossible to find on the information before me whether the New Zealand Courts would provide a more expedient forum for the dispute than the Italian Courts. Although the proceedings are underway here in New Zealand they have by reason of the appearance under protest to jurisdiction been stalled at a very early stage and before any other interlocutory procedures have got under way. While the first respondent clearly has a legitimate personal advantage in wishing to have the litigation disposed of in New Zealand, a forum which is undoubtedly more familiar than the Italian jurisdiction and which is closer geographically, nonetheless there appears to be no juridical advantage to him. Defamation is actionable in both jurisdictions and there is no material before me which might suggest that the choice of the New Zealand Courts would provide any advantage.

Summary

The connections with New Zealand are tenuous. Although the first appellant resides and carries on business here the damage arising from any proved defamation occurred in Italy and possibly Australia. The allegation of publication in New Zealand can at best be described as

trivial and not the real issue between the parties. If that factor is removed from the equation then there is little, if anything, which ties the dispute to this jurisdiction. While I am alive to the fact that the respondents would prefer to argue their claim in New Zealand where the system of justice, language and custom might be more familiar to them, the fact of the matter is that it is unlikely that it would be cheaper and less complicated to resolve the allegations in this jurisdiction given that on the appellants unchallenged assertion, much of the evidence must come from Italy. In all the circumstances the appropriate forum appears to me to be the Italian Civil jurisdiction. As a consequence the appeal must be allowed.

Costs

The first appellants are entitled to costs on their successful appeal which I fix at a total of $500 with disbursements if any.