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IN THE GRAND COURT OF THE CAYMAN ISLANDS -Cmt.

CAUSE NO. 80 of 2004

BETWEEN: **Condoco Grand Cayman Resort Ltd. And** PLAINTIFFS
Michael Ryan

AND: **KYC News, Inc.** DEFENDANT

APPEARANCES:

Mr. Jeremy Walton of Appleby Spurling Hunter for the Plaintiffs
Mr. Kyle Broadhurst of Broadhurst Barristers for the Defendant

BEFORE: MR. JUSTICE SANDERSON

Hearing Date: December 7th and 8th, 2004



REASONS FOR JUDGMENT

The Plaintiffs have sued the Defendant for libel, as a result of statements made by the Defendant in its publications and on its website. The Defendant admits that the statements were made but pleads the defences of fair comment on a matter of public interest and justification.

The pleadings are extensive. The Statement of Claim is 38 pages and the Statement of Defence is 19 pages. In addition, the Plaintiffs requested further and better particulars and the Defendant has responded to that request.



The Plaintiffs apply to strike out six paragraphs of the Statement of Defence, pursuant to Order 18 Rule 19, on the basis that these paragraphs are manifestly inadequate, improper or embarrassing.

In its Amended Statement of Defence the Defendant pleads:

21. Further or alternatively, the words complained of at paragraphs 5, 8, 11, 14 and 16 of the Statement of Claim were each published on an occasion of qualified privilege:

Particulars

21.1 The Plaintiffs are the developers of the Development, one of the most important developments in the Cayman Islands.

21.2 As such, the Plaintiffs have obtained, and continue to seek to obtain, very considerable investment in the Development from members of the public, both in the Cayman Islands and overseas. Further, the Plaintiffs undertake business dealings with numerous individuals and companies in the Cayman Islands and abroad. In addition the relationship between the Plaintiffs and the Government of the Cayman Islands is a matter of great public interest and importance.

21.3 In seeking the above mentioned investment, and in their business dealings, the Plaintiffs hold themselves out as operating honestly and bona fide, and those who invest in or undertake business relations with the Plaintiffs rely on their honesty and bona fides.

21.4 The Defendant publishes a website and newsletters aimed at assisting those who wish to invest in or do business with enterprises occurring in such offshore jurisdictions as the Cayman Islands, and in particular aimed at assisting such potential investors or businesses to ensure the probity of such enterprises and those operating them. The website and newsletters are known to serve this function and used by such investors and businesses with an interest in information concerning the probity of such enterprises.

21.5 In particular, the Offshore Alert and the KYC Alert newsletter (in which the publications complained of at paragraphs 5 and 8 of the Statement of Claim) are subscription services. Subscribers to such services in particular have an interest in information concerning the probity of offshore enterprises in which they may invest or with which [they] may do business.

21.6 The Defendant has conducted an extensive investigation into the Plaintiff's activities and exercised reasonable care in obtaining and verifying the information contained in the publications, and will rely on the entirety of its investigation prior to publication.

21.7 The Defendant has approached the Plaintiffs for comment on a number of occasions during the course of its investigation. The Defendant published a number of articles prior to the articles of which complaint is made, prior to the publication of which complete lists of questions and invitations for comment were supplied to the Plaintiffs, including by emails dated 22 April 2002, 1 May 2002, 4 May 2002, 28 May 2002. The Plaintiffs declined to comment, save by letter dated 3 July 2002 in which Mr Ryan declined to answer the specific allegations made against him (and which letter was nonetheless published in its entirety in the next edition of Offshore Alert). By email dated May 21st 2002, following a request for comment by Mr Ryan on a planned article about his business activities, Mr Ryan's lawyers relied stating that Mr Ryan wished to refrain from comment about any articles about his business activities in future issues of the Defendant's publication.

21.8 The publications complained of addressed issues of public interest.

21.9 In the circumstances, the Defendant was under a moral or social duty to make the publications complained of to readers of the publications, who had a corresponding interests and/or were entitled to receive the same.

The Plaintiffs requested further and better particulars of paragraph 21.6. That request for particulars was as follows:

Request

1. Provide full details of the nature, extent and outcome of the "extensive investigation" which the Defendant asserts to have undertaken in relation to the Plaintiffs* activities prior to publication of the words complained of. In particular, and without prejudice to the generality of the foregoing, provide full and proper particulars in relation to the following aspects of the said investigation:

1.1 The nature of any documents, materials or other items of evidence which were in the Defendant's possession (or which it was aware of) at the date of publication and which the Defendant used to inform its investigation of the activities of the Plaintiffs and its decision to publish the words complained of. As to each such document, material or other item of evidence, identify with proper particularity:

(a) Where, and in what circumstances, the Defendant came into its possession and/or because aware of its existence;

(b) The precise terms of the information acquired by the Defendant as a consequence;

(c) The nature of the conclusion(s) (if any) which were drawn by the Defendant in relation to the Plaintiffs activities as a consequence and the grounds on which any such conclusion(s) were reached or arrived at;

(d) What, if any, steps were taken by the Defendant to corroborate such information and to convince itself of its veracity and reliability;

(e) Having regard to the foregoing, on what grounds the Defendant contends that it was reasonable and proper for it to rely on the said evidence and (by necessary implication) that it was responsible to publish the allegations contained in the words complained of.

1.2 Details of information acquired from any individual(s) spoken to by the Defendant during the course of the said investigation on which it now seeks to rely. As to each such individual, identify with proper particularity:

(a) Their name, status and relevance to the said investigation;

(b) the date on which the Defendant spoke with them;

(c) The precise terms of the information acquired by the Defendant as a consequence;

(d) The nature of the conclusion(s) (if any) which were drawn by the Defendant in relation to the Plaintiffs activities as a consequence and the grounds on which any such conclusion(s) was reached or arrived at;

(e) What, if any, steps were taken by the Defendant to corroborate this information and to convince itself of its veracity and reliability;

(f) Having regard to the foregoing, on what grounds the Defendant contends that it was reasonable and proper for it to rely on the said information and (by necessary implication) that it was responsible to publish the allegations contained in the words complained of.

The Defendant answered that this was a request for evidence to which the Plaintiffs were not entitled. The Plaintiffs now apply to strike paragraph 21.6 from the Statement of Defence.

Qualified Privilege

The Plaintiffs argue that a plea of qualified privilege must meet the requirements set out by Lord Nicholls in *Reynolds v. Times Newspaper Ltd.*, [2001] 2 AC 127 (at 205) where he said:

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegations may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiffs. He may have information others do not possess or have not disclosed. An approach to the plaintiffs will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.

The judgment in *Reynolds*, (supra) did not deal with an application to strike out pleadings. It dealt with the evidence that the court may take into account in determining whether a defence of qualified privilege is available. Lord Justice Nicholls continued at page 205 where he stated:

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.

In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight.

One of the main purposes of pleadings is to allow the opposing party to fairly know the case they have to meet. In the present case, the Defendant has set out the basis for the defence of qualified privilege.

The pleading as it stands is sufficient to allow the Plaintiffs to know the defence it has to meet. Further information or evidence to support the pleadings can be obtained through a narrower

request for further and better particulars, discovery of documents and oral examination for discovery.

This was not an application for an order that the request for particulars be answered. It was an application to strike certain paragraphs of the defence. Mr. Walton submitted that if I should refuse his application to strike the pleadings, then I should, in the alternative, order that the Defendant provide the particulars requested. Mr. Broadhurst said this was not an application for further and better particulars and he was not prepared to deal with it on that basis.

It is not the courts' function to review the request for particulars and determine which of them are proper and which are not, when no application has been made to answer a request for particulars and the court has not had the benefit of having submissions from the Defendant's counsel as to whether or not this is an appropriate demand and whether or not all of the requests are proper. My initial view however, (without deciding the issue) is that the demand for particulars of paragraph 21.6 was more likely a request for evidence than a proper demand for particulars. I think the Plaintiffs may be entitled to ask for further and better particulars asking, (1) how many enquiries were made during the investigation, and over what period of time, (2) what information did it obtain as a result of those enquiries, and (3) what efforts were made to verify the information obtained. However, the request for particulars at present seems to go beyond what is required in a pleading and steps well into the area of evidence. Further, the Defendant may not be required to reveal the sources of information.

In *Reynolds* (supra), Lord Nicholls concluded that the ten factors he referred to were matters that the court, depending on the circumstances, could take into account, in determining if the defence of fair comment could succeed. He said the test was not exhaustive and the weight to be given to those facts would vary from case to case.

He was referring to the evidence offered at trial, to support a pleading of fair comment and not about striking the pleading itself.

The pleadings in this case sufficiently set out the defence. With a narrower demand for further and better particulars, and/or oral and documentary discovery, the Plaintiffs will have sufficient disclosure of the Defendant's evidence (subject to the rules relating to particulars and

discoveries) in order to know what the Defendant's case at trial will be. Certainly oral discovery will allow the Plaintiffs to enquire about the evidence the Defendant is relying upon, subject of course to the rules of discovery.

Justification

The Plaintiffs seek to strike out five sub-paragraphs (21.13, 22.18, 22.19, 22.20, and 22.21), of the Statement of Defence because they say the Defendant has not plead sufficient facts to identify any alleged misconduct. The Plaintiffs say that the Defendant is merely repeating what others have said and the pleading is therefore inadequate.

The Plaintiffs submits that where a charge of misconduct is made and the Defendant enters a plea of justification, the defendant must plead the specific instance of misconduct, upon which he seeks to justify the statement, with sufficient particularity to enable the claimant to know precisely what are the facts to be tried.

The Plaintiffs rely on *Wootton v. Sievier*, [1913] 3 KB 499 where at page 508 Kennedy L.J. said:

In every case in which the defence raises an imputation of misconduct against him, a plaintiffs ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation.

The Plaintiffs also rely on the judgment of Eady, J. in *King v. Telegraph Group Ltd.* [2003] EWHC 1312 at para. 32.1:

32. From these authorities (among others) it is possible to derive the following principles, each of which Mr Rampton submits is relevant to the present case:

1) There is a rule of general application in defamation (dubbed the "repetition rule") by Hirst L.J. in *Shah*) whereby a defendant who has repeated an allegation of a defamatory nature about the claimant can only succeed in justifying it by proving the truth of the underlying allegation - not merely the fact that the allegation has been made.

The Plaintiffs seek to strike paragraph 22.13 of the Amended Statement of Defence, on the basis that the Defendant is merely repeating what someone else has said. Paragraph 23.13 states:

In particular, in *Tropxe Inc. v Ursues Securities Corp and Michael Ryan* the Ontario Court correctly found that "Ursues Securities Corporation was controlled and directed by Michael Ryan not in a way to satisfy the legitimate interests of, not only the corporation, but its creditors, but was, in fact, operated in such a way as to divert money which the Corporation had and which otherwise would have been available to satisfy this judgment, to Michael Ryan himself".

The Plaintiffs say that it is necessary for the Defendant to plead the facts upon which it relies in order to prove the allegations. That is, the Defendant must plead and prove the facts that lead the Ontario court to reach the conclusion it did. I do not think that can be correct.

The Defendant is entitled to plead and prove that a court of competent jurisdiction came to a certain conclusion. It cannot be necessary to re-try the case in a libel action to prove the same facts again. Greer L.J. said in *Cookson v. Harewood*, [1932] 2 KB 478 at 485:

I think this is rather like the case where you speak of a man having been convicted of a certain criminal offence, in which case I think you would be justified in putting in the conviction; you would not have to re-try the man". In my judgment any one who knows that a man has been convicted of larceny at a criminal trial before a Court of competent jurisdiction is entitled to say, without being sued for slander or libel, that that man has, in fact, been convicted. It seems to me that also in the case where a man submits to a domestic tribunal, any person is entitled to record the fact that that domestic tribunal decided against him. If it is a question relating to a school, and a boy is properly expelled by the competent authority, I think that any one can say, without being sued for slander or libel, that the boy was, in fact, expelled. The same thing would apply to expulsion from a club. When a man subjects himself to a domestic tribunal he must be in exactly the same position as regards complaining of a record of that domestic tribunal as every citizen who has to submit himself to the lawful tribunals of the country. It would, in my judgment, be an extraordinary result of the law of libel and slander that if you said that a properly constituted tribunal had found a man guilty of some wrongful act you could be sued for libel unless you could prove that the properly constituted tribunal had rightly decided that he was guilty.

It is clearly not necessary to plead the facts that the Ontario court relied upon. That evidence would be in the record and the judgment of the Court. The evidence before the court will

undoubtedly be known to Mr. Ryan. Further, if the Defendant simply proves the foreign judgment it will then be a matter for the trial judge to determine what ultimate weight ought to be given to the trial judgment of the Ontario Court.

The Plaintiffs also apply to strike paragraph 22.21 on the basis that it merely repeats the findings of the Costa Rica Consumer National Commission.

Paragraphs 22.21 states:

22.21 As mentioned above, an investor in the Cacique del Mar project, Patricia Fleming, justifiably brought proceedings against Mr. Ryan's company in relation to misrepresentations made by Mr. Ryan and/or his company concerning the project before the Costa Rica National Consumer Commission. The Defendant will rely at trial upon the findings of the Costa Rica National Consumer Commission.

The Defendant at paragraph 22.22 also pleads:

22.22 The Judgement obtained by Ms. Fleming has wrongly not been paid, and such non-payment constitutes the offence of "Disobedience to the authorities" under Costa Rican criminal law. Further Ms. Fleming said she was filing, alternatively has filed, criminal charges for fraud against Mr. Ryan in Costa Rica.

For the same reasons as outlined in respect of the Ontario proceedings (and the allegations contained at paragraph 22.13 of the Amended Statement of Defence), the Defendant is entitled to plead and rely upon the judgment of the Costa Rica National Consumer Commission.

Again, the appropriate weight to be given to that judgment, will of course be a matter for the trial judge to decide.

Next, the Plaintiffs seek to have paragraphs 22.18, 22.19 and 22.20 struck. They state:

22.18 The Defendant, has during its investigation into Mr. Ryan's activities, received a number of justified complaints from clients who were persuaded to invest in the Cacique del Mar project and who were defrauded by Mr. Ryan.

22.19 By letter dated 21 March 1999 a former sales representative at the Cacique del Mar project wrote to lot owners of Cacique del Mar informing them that he had resigned. He correctly stated that “[c]ircumstances have come up here which will not allow me to continue selling property at [the project] with a clear conscience.”

22.20 Further, by letter dated 18 April 1999 two further employees of Mr. Ryan’s Cacique del Mar development company correctly wrote to lot owners of Cacique del Mar informing them that they were also resigning their positions. They correctly stated “We believed in this project from the beginning. But the last few months we have begun to question our judgement. Employees have not been paid, people have been fired unreasonably and nothing seems to be moving forward on the project. ... We feel that the actions of some of the people in this company lack integrity. We are not disgruntled employees who are trying to get back at the company. What we are, are people with a conscience, who feel responsibility for the clients that they deal with.

These paragraphs are contained in the Statement of Defence as particulars in support of allegations contained at paragraph 7.3, 10.3, 13.1, 13.2, 13.3, 13.4, and 16.3 of the Amended Statement of Defence. In addition, the Defendant provided further and better particulars of paragraph 22.18 by providing the Plaintiffs with names of 11 individuals who have provided complaints. The particulars of the complaints are then described in the Response to the Request for Particulars in the following way:

The nature of the complaints was that Mr. Ryan, representing the developer of the project, had obtained investments on the basis of a prospectus and development plan which simply had not been delivered and on the basis of information which was untrue.

The Plaintiffs argue that it is improper to simply plead complaints or statements made by others. The Plaintiffs say this offends the repetition rule and possibly the conduct rule. Certainly the Defendant will have to lead evidence at trial to support the allegations made. The Plaintiffs may also, however, be entitled to further particulars of (1) what representations did Mr. Ryan make to individual investors and which of those representations were untrue, (2) what were the “circumstances” that caused the sales representative to resign, and (3) what additional actions, if any, caused the two employees to believe the company lacked integrity. However, again this matter was not argued as an application requiring further and better particulars and I do not make any final decision in that regard.

As stated, this was not an application for further and better particulars. The Plaintiffs know what the defence is. It has the ability to apply for further particulars and to obtain the "evidence" in support of the pleadings by conducting a documentary and oral discovery. It would not be appropriate to strike these six paragraphs of the defence on the basis that they are inadequate, improper or embarrassing.

Dated: *March 22/05*

D. Sanderson J.

Dale Sanderson
Judge of the Grand Court

