IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-002948
[2013] NZHC 406

BETWEEN	KIM MARGARET VAN GOG Plaintiff/Respondent
AND	OWEN GRAUMAN Defendant/Applicant

Hearing: 3 July 2012

Counsel: K I Bond for plaintiff/respondent
J P Wood for defendant/applicant

Judgment: 5 March 2013

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 5 March 2013 at 4.45pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

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[1] This case concerns an alleged defamatory statement made in the context of a dispute over the management of a 23 unit residential complex in Mt Maunganui known as "The Terraces".

[2] This decision concerns an application by the defendant for particular discovery of documents relating to the management and letting of units in the complex. He contends these documents are relevant to an affirmative defence that his statements were true.

[3] The plaintiff says the defendant is not entitled to this discovery because he has not pleaded the specific statements that he says are true, and has not provided properly detailed particulars to support his claim that each statement is true.

[4] For the reasons I will now give, I find that the defendant is not entitled to the discovery he has sought.

Background

[5] The Terraces was built to provide holiday accommodation either for unit owners, or for the public under short term rentals. The complex is administered through a body corporate established under the Unit Titles Act 1972. It is managed by a building manager appointed by the body corporate.

[6] The plaintiff, with her husband, has been the building manager for the complex since 2005 when they purchased a unit (known as the management unit), to which rights attach, under a registered encumbrance, to provide letting services for owners of other units within the complex. Unit owners sign letting agreements with the building manager, as provided under a management agreement between the body corporate and the building manager.

[7] The defendant purchased a unit in the complex in about September 2009. He became dissatisfied with the plaintiff's management of the complex and formed the view that the plaintiff was not acting even-handedly in the letting of units. He has

cancelled his letting services agreement, and has sought to have the plaintiff removed as manager for the complex. He persuaded some of the other unit holders to join him in another proceeding.[1] In this proceeding they have obtained a declaration that the body corporate had no power to enter into the management agreement under which the plaintiff has been acting, but the Court also found that the encumbrance gave the building manager an exclusive right to let units in the complex to the public.

[8] On 4 March 2011, in the course of the dispute over management and letting services, the defendant sent an email to all unit owners and the secretary of the body corporate, the material part of which reads:

> Join us, move Kim on and get a professional manager who is impartial and transparent and does not steal, lie, upset guests, owners, other managers, valuers, BC Secretaries and estate agents!
>
> Let's not confuse the building managers contract and the letting service – they are 2 different things!!
>
> It's 2011 and the world has moved on, bullying tactics and games are a thing of the past – openness, fairness and trust is all that I (along with other realistic owners) are looking for.

[9] The plaintiff contends that these statements are defamatory and have damaged her reputation. She requested an apology for, and retraction of, the statements. She issued this proceeding when the apology and retraction were not given. She seeks a recommendation under s 26 of the Defamation Act 1992 that the defendant issue a correction, and an order that her costs be paid. She also seeks general damages in the event that the Court makes the recommendation under s 26 but the defendant does not publish a correction.

[10] The defendant admits sending the email, and that he has not apologised to the plaintiff for it. He pleads, as affirmative defences, that the statements are true, or were statements of honest opinion.

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[1] *ABCDE Investments Ltd & Ors v J B & K M Van Gog* [2012] NZHC 1131.

The pleadings

[11] In her statement of claim the plaintiff pleads the terms of the email as "the Defamatory Statements", and then contends:

> (a) The Defamatory Statements in their natural and ordinary meaning meant and were understood to mean:
>
> (i) The Plaintiff was unprofessional in performing her duties as building manager and letting agent;
>
> (ii) The Plaintiff lacked impartiality and had not been and would not be transparent in performing her duties as building manager and letting agent;
>
> (iii) The Plaintiff had taken advantage of her position as building manager and letting agent to steal from unit owners and other unspecified persons;
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> (iv) The Plaintiff had, in the course of performing her duties as building manager and letting agent, told lies;
>
> (v) The Plaintiff had, in the course of performing her duties as building manager and letting agent bullied and upset guests, owners, other managers, valuers, body corporate secretaries and real estate agents; and
>
> (vi) The Plaintiff was not fit to act as building manager and letting agent.

[12] In his (second amended) statement of defence,[2] the defendant denies that the statements were defamatory and pleads truth of the statements as his first affirmative defence. The pleading of that affirmative defence relevant to the present application is:

> 17. ... if the email of 4 March 2011 carries the meanings alleged in paragraph 10 (which is denied), then the statements made in his

[2] Dated 19 March 2012.

email dated 4 March 2011 were true or not materially different from the truth and in particular:

(a) The plaintiffs [sic] was unprofessional in performing her duties as Building Manager and Letting Agent in relation to her management of the defendant's unit. Examples of which include:

(i) All the actions and events in the rest of paragraph 17 of this statement of defence (sub-paragraphs 17(b) to 17(f).

....

(b) The plaintiff used her position as the on site letting agent to direct short stay tenants staying as [sic] the Terraces to stay in units owned by her or owners who supported her in preference to using units owned by the defendant and other owners who did not like [sic], and thereby depriving those owners of income from their units.

(c) The plaintiff has not been transparent in performing her duties as building manager and letting agent in relation to her management of the complex. The areas where the plaintiff has exhibited a lack of transparency include:

....

(ii) The plaintiff has refused to disclose to owners the details of the cleaning and linen costs allegedly incurred by her on their behalf which costs she deducts from income received from letting their units.

....

(d) The plaintiff has without lawful justification:

(i) Used her position as the exclusive on site letting agent to direct short stay tenants staying as [sic] the Terraces to stay in units owned by her or owners who supported her in preference to using the defendant's or other owners' units thus depriving the them [sic] of income which they should have derived from their units.

(ii) Taken property belonging to the defendant and other owners including:

....

(4) The plaintiff has overcharged the owners for the expenses (expenses, electricity, cleaning and linen) she deducts from their income statements every month.

> (5) The plaintiff retains monies in the furniture fund after owners cancel their contracts with her. She applies that money inconsistently to her obligations under the agreement and retains interest payments generated on those funds.
>
> ....

[13] In her reply to that pleading, the plaintiff:

(a) Denies both the general allegation that she was unprofessional in performing her duties as building manager and letting agent, and the particulars given by the defendant of this allegation (save that she admits disconnecting the electricity to the defendant's units on the grounds that she was no longer responsible for the service after the defendant cancelled his letting services agreement);

(b) Admits that short stay tenants were directed to other units in preference to the defendant's unit, but otherwise says that there are insufficient particulars to plead to the allegation that she used her position to prefer certain owners to the defendant and others she did not like, thereby depriving those owners of income from their units;

(c) Says that there are insufficient particulars to allow her to plead to the allegation that she has not been transparent in performing her duties, but states that all deductions are shown on owners' monthly statements, and says that she has no obligation to disclose more than that;

(d) Again says that there are insufficient particulars of the defendant's allegation that she took property belonging to the defendant and other owners, but denies such particulars as are pleaded, including that she has overcharged owners for expenses and that she misapplied money paid into the furniture fund.

Applicable legal principles

(a) Particular discovery

[14] The application is to be considered under r 8.19 of the High Court Rules:[3]

> 8.19 Order for particular discovery against party after proceeding commenced
>
> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
>
> (a) to file an affidavit stating—
>
> (i) whether the documents are or have been in the party's control; and
>
> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and
>
> (b) to serve the affidavit on the other party or parties; and
>
> (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[15] To obtain an order for particular discovery under this rule, the party applying must establish that there are grounds for belief that the documents being sought are or have been in the possession of the other party, and that the other party should have discovered them.

(b) Relevance and particulars in discovery cases

[16] In general, a discovery order requires the parties to discover documents that are relevant to issues in the proceeding. At the time that the discovery order was made, and the plaintiff filed her affidavit in response to it, relevance was assessed by

[3] Although the application states that it is made pursuant to r 8.24, it was filed after new High Court Rules came into force on 1 February 2012. It is common ground that it is to proceed under the new rules, although there is no material difference between it and former r 8.24.

reference to whether a document related to a matter in question – either on the basis that it would be evidence on an issue or because there was reason to believe that it contained information which might enable the other party, directly or indirectly, to advance his or her case or damage the case of his or her adversary.[4]

[17] The rules governing discovery were amended from 1 February 2012. The *Peruvian Guano* test of relevance was replaced by new rules 8.7 and 8.8 under which parties are required to disclose documents on which they rely, or alternatively which adversely affect the party's own case, or adversely affect or support another party's case.[5] These new rules took immediate effect from 1 February 2012 (there is no transition provision for applications already made).[6] However, in practice there may not be significant difference between the two tests because r 8.8 allows an order for tailored discovery which may be more or less than the standard discovery under r 8.7.

[18] The application of these discovery obligations in defamation cases differs from their application in ordinary litigation. If a plaintiff proves that a statement was made, and that it is defamatory, it is for the defendant to prove that the statements are true in order to rely on the affirmative defence of truth.[7] For the purposes of discovery, the defendant's role in that affirmative defence is similar to the role of a plaintiff, in that his or her allegations set the boundaries of the case and must be supported by proper particulars.

[19] The Supreme Court has recently confirmed the purpose and importance of particulars in support of the affirmative defences of truth and honest opinion[8] by

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[4] The classic statement of relevance in *Compangie Financiere du Pacificque v Peruvian Guano Co* (1882) 11 QBD 55 at 63.
[5] R 8.7.
[6] See *Karam v Fairfax New Zealand Ltd* [2012] NZHC 887 at [128] – [143]. Although a different view has been expressed by commentators: David Friar "Other changes to the rules" in New Zealand Law Society Seminar *New Discovery Rules* (October 2011) at 83 where the comment is made that discovery continues in accordance with the terms of the existing discovery order, with the possibility that the obligation to disclose is to be assessed under the old law but the courts will use the tools under the new rules to enforce that law.
[7] Defamation Act 1992, s 8.
[8] In *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [17] and [18]. The Supreme Court found that s 38 of the Defamation Act 1992 (headed *Particulars in defence of truth*) dealt only with the "rolled up" plea of truth and honest opinion but commented (at [40]) that the scope of s 38 was of academic significance only as particulars needed to be provided in support of a defence of truth at common law.

endorsing the comments of the Court of Appeal in *Television New Zealand Ltd v Ah Koy*:[9]

> [17] One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on. It can be seen that against each of these three purposes the particulars provided by TVNZ fall well short of being sufficient. It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars. In Zierenberg v Labouchere [1893] 2 QB 183 at p 186 Lord Esher MR said that a plea of justification (now of truth) without sufficient particulars was invalid and that this had been the law "from the earliest times". As Gatley says at para 27.10, it is arguable that in these circumstances there is no plea of justification on the record. On that basis a plea of truth without sufficient particulars would be at risk of being struck out.

[20] The significance for discovery of this requirement to provide adequate particulars to support a defence of truth is that there is long standing authority, confirmed recently by the Court of Appeal in *Simunovich Fisheries Ltd v Television New Zealand Ltd*, that in general, the defendant is only entitled to discovery in respect of matters raised in his or her particulars of truth.[10]

[21] Although the Court of Appeal's decision in *Simunovich Fisheries Ltd v Television New Zealand Ltd* was appealed, its statement regarding discovery was not an issue in the appeal and was not disturbed. The Supreme Court did, however, confirm[11] that conventional particulars will supply details of primary facts and circumstances and gave[12] as a hypothetical example:

> On the _____ day of _____ 200__ at Auckland the plaintiff X instructed his employee Y to falsify catch records for scampi.

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[9] *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 at [17].
[10] *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [140], which cited the decision of this Court in *Wasan International Ltd v Lee* HC Auckland CIV 2003-404-413, 26 May 2006, Associate Judge Faire at [23] that a defendant was limited to discovery of matters alleged in his or her particulars, and was not entitled to fish in the plaintiff's papers for some other defence.
[11] *APN New Zealand Ltd v Simunovich Fisheries Ltd*, above n 8, at [2].
[12] At [3].

The application for discovery

[22] The documents that the defendant says exist and ought to be produced are:

(a) The individual monthly statements of account for all units in The Terraces managed by the plaintiff for the period between August 2009 and November 2010 (being the period in which the defendant had a letting services agreement with the plaintiff);

(b) Non-redacted versions of the guest sheets attached to those monthly statements of account;

(c) The booking records for all the units in The Terraces between August 2009 and 15 November 2010;

(d) All bank statements for the business operated by the plaintiff and her husband at The Terraces between August 2009 and November 2010 which record the receipts and payments in relation to the business;

(e) The accounts for the plaintiff's and her husband's business at The Terraces for the tax years 2009, 2010 and 2011.

[23] At the time of filing his application the defendant also sought production of the hard drive of the computer used by the plaintiff in the management of the business, and another three categories of documents (subparagraphs 1(b)(v), (vi) and (vii) of the application). He is not pursuing his application for production of the hard drive, nor his application in relation to the other three categories of documents because the plaintiff has admitted facts which render one of the categories superfluous, and the defendant has accepted that there are no documents in the other two categories.

[24] The defendant says that the discovery he seeks is proportionate to the matters at issue and costs of providing it (he has only sought the business documents that are most probative for the issues he has raised, and will accept discovery informally or

in bundles to lessen cost), and seeks the discovery before a conference under s 35 of the Defamation Act 1992.

[25] In opposition, the plaintiff does not deny that the documents sought exist, but says that they are not relevant. She says they are clearly not relevant to the matters she raises in her statement of claim and, given the absence of particulars of the defendant's primary defence of truth, and having regard to her reply to that pleading, the defendant has failed to provide a basis for relevance to that affirmative defence. She says that the defendant's allegations in the affirmative defence "set the bounds of its case" for the purpose of discovery, and he is not entitled to widen the enquiry to anything further he may wish to raise following discovery.[13]

[26] The plaintiff acknowledges that the defendant has responded to complaints about lack of adequate pleading[14] but says that it is still not stated explicitly that the defamatory statements that he says are true, or provided specific particulars that are clearly linked to those statements. Counsel gives as an example the general particular that the plaintiff directed guests to units other than the defendant's unit or units of other owners she did not like, thereby depriving those owners of income.[15] She contends that the defendant has failed to state whether that particular relates to the statement that she stole, or to an allegation of bias.

[27] Counsel for the plaintiff argued that the lack of clarity in the pleading has not been assisted by the affidavit in support of the application for discovery because it was filed before the amended statement of defence. He accepted that counsel for the defendant has sought to clarify matters in his submissions, but submits that that is not a proper substitute for pleadings, particularly to found an application for discovery.

[28] If the defendant is entitled to the discovery, there are also issues as to whether the discovery sought should be ordered, having regard to the rules as to

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[13] The second amended statement of defence still contains numerous references to the defendant providing further particulars once he has had access to the plaintiff's business records.
[14] In his second amended statement of defence.
[15] Paragraph 17(b) and 17(d)(ii) of the second amended statement of defence.

proportionality, and the timing of such discovery in relation to a proposed conference under s 35 of the Defamation Act 1992.

[29] The critical issue, therefore, is whether the defendant has pleaded his affirmative defence with sufficient specificity and detail to establish a basis for relevance of the documents he is seeking. Before examining that issue, I will set out the defendant's contentions as to relevance of the different categories of documents.

Alleged relevance

(a) Monthly statements of account, non-redacted guest lists, and booking records

[30] The defendant says that the monthly statements of account are relevant as they contain a summary of the earnings of each unit, the costs charged against those earnings and the balance to be remitted to the owner. He says that non-redacted guest lists and booking records from the database for The Terraces will give specific detail of the guest bookings for each unit (the guest lists and the booking records may be one and the same).

[31] The defendant says that these documents are needed to examine the reasons that selected persons were favoured. He expects the documents to show who the plaintiff favoured and when, and to establish the nature of the preference, namely whether higher-paying guests were diverted. The defendant says that these documents are relevant to his contention that the plaintiff diverted business to her three units and to owners she favoured, and away from him and others she did not favour. He says that these actions can be construed as stealing, and support the truth of his statement that the plaintiff is "a thief". He also says that although the plaintiff has admitted that she diverted guests away from his unit,[16] the information is still needed to test her assertion that this was done to allocate guests to "less high maintenance owners".[17]

[16] Plaintiff's reply paragraph 4.
[17] Plaintiff's notice of opposition at paragraph 5(c)(i) – (iii).

[32] The defendant contends that the documents are relevant notwithstanding the plaintiff's admission because they will either adversely affect the plaintiff's case, or support his case:

(a) They will provide a means to test the credibility of the plaintiff's explanation of the diversion.

(b) They will show whether it was wider spread than just the plaintiff's unit, as the plaintiff has admitted only that she diverted guests from the defendant's unit.

(c) They will allow him to ascertain the veracity of statements the plaintiff has made about reservations for his unit (e.g. that the whole complex was block booked for three months to November 2010 – paragraph 17(e)(xiii) of the statement of defence).

(b) The business records of The Terraces and bank accounts

[33] The defendant alleges that the plaintiff has retained money paid for future expenditure[18] on furniture by owners who have cancelled their agreements and has appropriated interest earned on money held in this fund (for the benefit of owners), and that the plaintiff has overcharged expenses for cleaning, linen and electricity.[19]

[34] The plaintiff admits that money has not been repaid, but says it has been applied to pay billed expenses. She denies overcharging owners for expenses, or that she has received (and hence retained) interest earned on the furniture fund.[20] She contends that the money is held in a cheque account which does not earn interest. She says[21] that she uses contractors to undertake cleaning and maintenance but there are no written contracts.

[35] The defendant says that the business records and statements of its bank account are relevant to determine what expenses have been charged to the business

[18] Paragraph 17(d)(ii)(5) of his second amended statement of defence.
[19] Paragraph 17(d)(ii)(4).
[20] Paragraph 6 of the plaintiff's reply and paragraph 5(iv) of her notice of opposition.
[21] Paragraph 11(f) of the plaintiff's affidavit sworn 20 February 2012.

and whether they have been on-charged appropriately. He says that in the absence of contracts, the only way of ascertaining what has been paid and if it correlates to what has been charged is by access to the business records and bank statements. He also says that "the naked assertion" that no interest is earned on the furniture fund money cannot be tested without reference to statements for that bank account. He contends that these records are therefore relevant as they will either support or adversely affect his defence of truth.

Discussion

[36] A defendant's right to discovery in respect of an issue raised in an affirmative defence of truth is limited to matters raised in particulars relied upon to support truth.[22] A defendant who advances this defence needs to plead each defamatory statement alleged to be true, and particulars for each of those statements. It has been said[23] that the particulars must be as precise as would be necessary in an indictment, and should provide details such as dates and parties (in this case referring to the occasion of diversion and what the diversion was as between units). Those particulars must be stated with reasonable precision[24] so as to set the boundaries of the alleged misconduct.

[37] For the purposes of discovery, the particulars must be in sufficient detail to allow particular documents to be identified.

[38] The authorities are quite clear that in the absence of such particulars the defendant has no entitlement to discovery:[25]

> ...the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars is not a well-pleaded defence, and till there is such a

[22] *Simunovich Fisheries Ltd v Television New Zealand Ltd* (CA), above n 10.
[23] *Zierenberg v Labouchere* [1893] 2QB 183 (CA) at 187 (per Lord Esher, M.R.).
[24] See the example given by the Supreme Court in *APN New Zealand Ltd v Simunovich Fisheries Ltd*, above n 8.
[25] *Zierenberg v Labouchere* at p188, a passage followed by this Court in *Wasan International Ltd v Lee*, above n 10, in turn cited in *Simunovich Fisheries Ltd v Television New Zealand Ltd* (CA), above n 10.

> defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances. The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.

[39] It is not permissible for a defendant to reserve his or her position on that pleading with a view to adding more particulars after discovery:[26]

> If the defendant says that he is unable to state any such facts without discovery, the answer is simple and conclusive – he ought not to have published the libel, and cannot plead any justification for having done so.

[40] This principle was affirmed in *Yorkshire Provident Life Assurance Co v Gilbert & Rivington*.[27] In the *Yorkshire* decision, the defendant pleaded 30 instances of claims that the plaintiffs were alleged to have refused to pay, and received discovery of them, but was refused further discovery aimed at finding further cases.

[41] Counsel for the defendant argued that discovery was available where there was a relationship between the parties, relying in particular on the decision of the English Court of Appeal in *Leitch v Abbott*[28] where the plaintiff had employed the defendant as his stockbroker and claimed for an account of money and damages in respect of transaction that the defendant was to have undertaken for the plaintiff, but undertook on his own account. This case was considered by the Court in *Zierenberg v Labouchere*, which distinguished it on the basis that discovery was granted because the plaintiff had an entitlement arising out of the agency relationship of the parties. I take the same view of the present case. The relationship between the defendant and the plaintiff does not give rise to a separate entitlement to discovery, and the general principle applies. The English Court of Appeal again followed the decision in *Yorkshire* in *Arnold & Butler v Bottomley*[29] and in another liable case denied the defendant's request for an order to inspect books of the plaintiff over a certain period to support a plea of justification because the particulars contained no specific instances of the misconduct alleged. Kennedy LJ commented in his judgment:[30]

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[26] *Zierenberg v Labouchere*, above n 23, at 189.
[27] *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* (1896) 2 QB 148 (CA), a case that was followed by the Court of Appeal in *Simunovich Fisheries Ltd v Television New Zealand Ltd*, above n 10.
[28] *Leitch v Abbott* (1886) 31 ChD 374.
[29] *Arnold & Butler v Bottomley* [1908] 2 KB 151.
[30] At 159.

> I am of the opinion that the allegation of a system of wrong-doing is a wholly insufficient basis for a claim to inspect the plaintiffs' business books.

[42] Counsel for the defendant argued that the monthly statements of account to all owners, the non-redacted guest lists and booking records were needed to test the plaintiff's qualification of her admission that she had directed guests to other units that she did so because the other owners were "less high maintenance". He argued that the documents would show who was favoured and would allow the defendant to explore the reasons for the favouritism. He said that this was relevant to support the defendant's pleading of unprofessional conduct[31] and the allegation of diverting income which he contended could, in common parlance, be construed as stealing.

[43] It is significant that the defendant has expressly pleaded that he will provide "further particulars" once he has access to the plaintiff's business records.

[44] I accept the submission of counsel for the plaintiff that this pleading is no more than an allegation of a system of wrongdoing, which is insufficient to establish an entitlement to discovery on a plea of truth. There is no detail of who was favoured or disfavoured (save for the general contention that the defendant was disfavoured). I accept the plaintiff's point that the pleading has been widened since the first amended statement of defence, and is even less specific (in the earlier pleading the defendant confined his allegation to disfavour of his unit). Both in the earlier pleading and in the present pleading, there was no detail of the occasions on which this happened, or (in the case of the present pleading) the other units involved.

[45] I can accept that the defendant suspects wrongdoing (his complaints are largely about her conduct as manager), but in that case his remedy is to sue. He has chosen instead to defame the plaintiff to all the other owners in the complex. If he wants to advance the defence of truth he must be in a position to provide detail to support it before he can have recourse to the plaintiff's documents. I find that he is not entitled to these records on the basis of the present pleadings.

[46] The second category of documents concerns the plaintiff's business records and bank statements. Again the defendant seeks these records to support his

[31] Paragraph 17(a) of his second amended statement of defence.

allegations that the plaintiff was unprofessional,[32] and is guilty of stealing or lying, in relation to services charged to unit owners,[33] or retained payments into the furniture fund after cancellation of agreements[34] by owners or misappropriated interest[35] on that money. Counsel for the defendant argued that these documents were needed to test the plaintiff's contention that services had been on-charged appropriately, her contention that funds paid by owners who had cancelled had been applied towards unpaid expenses, and that no interest had been received on the furniture funds because they had been held in a cheque account which did not earn interest.

[47] These particulars are again too vague to provide adequate support for any allegation of stealing, and do not meet the tests established by the authorities that I have mentioned for an entitlement to discovery. I accept the submission of counsel for the plaintiff that the defendant is searching for any irregularity in the documents to justify his claims that the plaintiff stole from him or other unspecified owners. I note that the pleading in relation to the allegation of improper application of the furniture fund has again been widened since the first amended statement of defence. In the earlier document the defendant said that it applied to his unit and to the owners of three other (specified) units. When the plaintiff admitted that she had retained funds, but applied them against unpaid charges, the defendant amended his defence by removing the particulars, and widening the allocation to unit owners generally (without being specific). In my view this is the very circumstance that the authorities say is not permitted.

[48] As to the allegation concerning retention of interest, I accept the submission for the plaintiff that she has pleaded, and stated in sworn evidence, that the fund was placed in a cheque account on which no interest is earned, and that there is no proper basis to go behind that pleading or evidence. On the basis of that material, there is nothing in the bank statements to warrant discovery regardless of whether the defendant is entitled to it.

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[32] Paragraph 17(a)..
[33] Paragraph 17(d)(ii)(4).
[34] Paragraph 17(d)(ii)(5).
[35] Paragraph 17(d)(ii)(5).

[49] For the sake of completeness I also take the view that the broad allegation[36] that the plaintiff overcharged all unit owners for the services supplied by contractors is insufficient to provide an entitlement to discovery to support an affirmative defence of truth.

[50] As with the first category of documents, the allegations are no more than a general allegation of a system of wrongdoing. The defendant has chosen to make his concerns known by defamatory statements. He has not provided adequate particulars to support his defence of truth of those allegations. He cannot use an application for discovery to fish for that support. I find that he is not entitled to the discovery he has sought.

[51] Because of the findings I have made as to the defendant's entitlement, I do not have to consider the arguments as to whether I should exercise my discretion to order discovery, having regard to the scope of discovery that would be involved, or the timing of any discovery.

Decision

[52] The defendant's application is dismissed.

[53] Counsel have asked that costs be determined on the basis of memoranda to be filed. If the parties cannot agree on the incidence or quantum of costs, they may file memoranda. The plaintiff is to file and serve any memorandum within 15 working days. The defendant is to file and serve any memorandum within a further five working days.

Associate Judge Abbott

[36] Paragraph 17(d)(ii)(4).