COURT OF APPEAL FOR ONTARIO

CITATION: Able Translations Ltd. v. Express International Translations Inc., 2018 ONCA 690
DATE: 20180830
DOCKET: C63055

Doherty, Brown and Huscroft JJ.A.

BETWEEN

Able Translations Ltd.

Plaintiff
(Appellant)

and

Express International Translations Inc. and Philippe Vitu

Defendants
(Respondents)

Jeffrey Radnoff and Charles Haworth, for the appellant

David J. McGhee, for the respondents

Heard: June 29, 2017

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated November 8, 2016, with reasons reported at 2016 ONSC 6785, 410 D.L.R. (4th) 380.

Doherty J.A.:

A. OVERVIEW

[1] The appellant, Able Translations Ltd. (“Able”) sued the respondent, Philippe Vitu (“Mr. Vitu”) and his company, Express International Translations Inc. (“Express”) for defamation. The respondents successfully moved under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, for an order dismissing the action. The motion judge awarded costs to the respondents in the amount of $30,000 on a full indemnity basis.

[2] Able appeals from the dismissal, and, if that appeal fails, seeks leave to appeal the costs order. I would dismiss the appeal and refuse leave to appeal costs.

B. THE ALLEGED DEFAMATION

[3] Able is one of Canada’s largest and most successful language service companies. Mr. Vitu and his wife offer their services as English and French translators and interpreters through their company, Express. Express has no other employees.

[4] Able commenced a defamation action in September 2015. The Amended Statement of Claim referred to an internet post made by Mr. Vitu on August 31, 2015, allegedly on his own behalf and on behalf of Express. Able alleged that the post falsely claimed that Able was “disreputable in its business dealings and insolvent”. Able further alleged that the defamatory comments were made

vindictively and to advance the respondents' financial interests. Able contended that the respondents were competitors of Able.

[5] In addition to setting out the August 31, 2015 post, the Amended Statement of Claim referred to other allegedly defamatory posts and statements made by the respondents and others. Able did not identify the contents or specific sources of any of those posts or statements in its Claim.

[6] On the s. 137.1 motion, Able led evidence of a second post by Mr. Vitu on the same day (August 31, 2015) and on the same website as the first post. There was no evidence before the motion judge of the content of any posts made by Mr. Vitu or Express other than the two posts made on August 31. I proceed on the basis that the two August 31 posts are the source of the alleged defamation.

[7] The two posts were made on a website referred to as "N49.com". The website acts as a bulletin board on which individuals can post comments and others can post responses to those comments. Some of the comments posted on the website related to Able and its dealings with translators and interpreters. Able also posted responses to those comments on that website.

[8] The first August 31 post by Mr. Vitu is headed "Press Conference to Denounce ABLE". The contents are set out in full by the motion judge (para. 12). In the post, Mr. Vitu identifies Peter Fonseca as a candidate in the ongoing

federal election. Mr. Vitu also identifies Mr. Fonseca as a former vice-president of Able. The post continues:

> He [Fonseca] must know about ABLE's business and image and is part of it. Therefore, his claims as a candidate have no credibility.
>
> I suggest that we organize and hold a press conference in Mississauga about 10 days to 2 weeks before the election (end of Sept., first days of October) to denounce FONSECA. We would invite a report from the Toronto Star, the Toronto Sun and Mississauga News. I would need as many of you as possible to enlighten the press about your experience with ABLE because people have to know.
>
> I would be pissed that a guy that is part of the ABLE clique be elected to Ottawa.

[9] Mr. Vitu's second post on August 31 was a reply to someone who had responded to his initial post. In the second post, Mr. Vitu states: "ABLE's attitude with interpreters is absolutely deplorable". He goes on to criticize interpreters who have worked for Able and who are unwilling to stand up to Able. Mr. Vitu indicates that only two interpreters had replied to his suggestion that they organize a "press conference to denounce ABLE".

[10] In his affidavit filed on the s. 137.1 motion, Mr. Vitu acknowledged that he authored the August 31 posts. He indicated that he did so in his personal capacity and not on behalf of Express. The posts make no reference to Express.

[11] Mr. Vitu received a letter from Able's lawyers about a week after he made the posts. The letter demanded that the posts be removed immediately and that

Mr. Vitu refrain from making any further comments of any kind about Able. The lawyer's letter made no reference to Mr. Fonseca.

[12] At about the same time that Mr. Vitu received the lawyer's letter, someone (not Mr. Vitu) removed his posts from the site. Those posts did not reappear.

[13] Mr. Vitu received libel notices from Able's lawyers in September and again in November of 2015. According to Mr. Vitu's affidavit, the letters from the lawyers intimidated and frightened him. He decided that he would make no further public posts or comments about Mr. Fonseca, his relationship with Able, or Able itself. Mr. Vitu also decided that he would not proceed with the proposed press conference.

[14] In his affidavit filed on the s. 137.1 motion, Mr. Vitu asserted that Able was notorious in the interpreter/translator community for its failure to pay freelance interpreters and translators at all, or at least in a timely way. Mr. Vitu noted that there were many comments on many other websites complaining about Able's poor business practices and reputation. Mr. Vitu did not refer to or re-publish any of those comments in his two posts. There was no evidence connecting him to any of those comments.

[15] Able's vice-president filed an affidavit in which she indicated that Able could not effectively respond to many of the complaints that had been made about Able's payments to translators and interpreters because they were

anonymous. She went on to explain that in the cases in which the complainant could be identified, Able took steps to resolve those complaints. She pointed out that the only judgment obtained against Able by a translator for services provided was a case in which Able did not have notice of the proceeding.

C. THE MOTION JUDGE'S RULING

[16] The motion judge considered the operation of s. 137.1 at some length. He focused on ss. 137.1(3), 137.1(4)(a), and 137.1(4)(b). The motion judge's conclusions can be summarized as follows:

- Mr. Vitu and Express had satisfied him that the proceedings arose from an expression relating to a matter of public interest (s. 137.1(3));
- Able had not satisfied him that there were grounds to believe, either that Able's claim had substantial merit, or that Mr. Vitu and Express had no valid defence (s. 137.1(4)(a)); and
- Able had not satisfied him that the public interest in permitting its claim to proceed outweighed the public interest in protecting Mr. Vitu's freedom of expression (s. 137.1 (4)(b)).

[17] Able challenges all aspects of the motion judge's ruling. To succeed on the appeal, Able must show either that the motion judge was wrong in holding that the posts related to a matter of public interest, as required by s. 137.1(3), or, if the motion judge was correct in that regard, that he erred in his analysis of the

application of all three parts of s. 137.1(4). If the motion judge was correct in any part of the s. 137.1(4) analysis, Able's claim was properly dismissed.

[18] As I explain below, I would not interfere with the motion judge's finding that the posts referred to a matter of public interest. Nor would I interfere with his finding in relation to the public interest analysis required under s. 137.1(4)(b). Those two determinations lead to the dismissal of the appeal. I need not decide whether the motion judge was correct in his merits analysis under s. 137.1(4)(a), though I offer some comments on that analysis below.

D. ANALYSIS

(i) Section 137.1(3) – Did the Posts Relate to a Matter of Public Interest?

[19] The respondents (moving parties) had the onus to show that the posts that gave rise to Able's defamation claim related to a matter of public interest. The motion judge held that the contents of the posts, considered as a whole, related to Mr. Fonseca's suitability to sit as a member of Parliament, given his prior senior management position with Able. No one disputes that communications directed at a person's suitability to hold elected office, particularly when made in the middle of an election campaign, are communications relating to a matter of public interest.

[20] Able takes issue with the motion judge's characterization of the contents of the posts. Able contends that the posts are in reality an attack on Able's business practices and its reputation. Able submits that the attack is made "under the cloak of a political debate". The references to Mr. Fonseca are said to be a ruse intended to draw the reader to Able's allegedly disreputable business practices and poor reputation: the true subject matter of the posts.

[21] In advancing this submission, Able stresses that the posts offer no detail of Able's alleged improper business practices. Able argues that the absence of any detail indicates that the posts were made maliciously to damage Able's business reputation and thereby improve the business prospects of the respondents, competitors of Able.

[22] The motion judge correctly articulated the meaning of "public interest" in s. 137.1(3): see *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at paras. 50-66 (released concurrently with these reasons). His reasons (at para. 26) lean heavily on *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the guiding authority. Able's complaint is that the motion judge misapprehended the meaning of the posts. I approach this submission by asking whether the posts could reasonably bear the interpretation that the motion judge ascribed to them: see *Pointes*, at para. 66.

[23] The motion judge's interpretation of the posts was reasonable. The content of the posts assumed that the reader had knowledge of Able and its business affairs and shared the author's view of Able. The point of the posts was not to inform the reader about Able's behaviour, but to inform the reader of the connection between Mr. Fonseca, a candidate for Parliament, and Able. The posts asserted that Mr. Fonseca's candidacy should be viewed in a negative light because of his prior work connection to Able. As the motion judge aptly put it (at para. 28), the purpose of the post was "to denounce *Mr. Fonseca* by reason of his *connection* to Able" (emphasis in original).

[24] As set out in *Pointes*, at paras. 54 and 60, when deciding if a publication relates to a matter of public interest, one asks: having regard to the context and taking the expression as a whole, what is the expression about? I think the posts could reasonably be read as an opinion offered by Mr. Vitu about Mr. Fonseca's suitability for public office in light of his prior work connection with Able. Although the posts no doubt paint Able in a negative light, they do so in the course of making the point that Mr. Fonseca should not be regarded as a suitable person to hold public office as a member of Parliament.

(ii) Section 137.1(4)(a)(i) – Are there Grounds to Believe that Able's Claim Has Substantial Merit?

[25] Able had the onus of showing, on the balance of probabilities, that there were grounds to believe that its claim had substantial merit. I have examined s. 137.1(4)(a)(i) at length in *Pointes*, at paras. 73-82. My analysis in *Pointes* reflects the arguments advanced on this appeal. I will not re-summarize the arguments made on this appeal, or repeat my analysis in *Pointes*.

[26] As observed by the motion judge (para. 51), in addition to establishing that the statements complained of were made by one or more of the defendants, Able had to establish three things to make out its claim:

- The words complained of were defamatory;
- The words complained of referred to Able; and
- The words were published to at least one other person.

[27] I agree with the motion judge (para. 52) that, apart from the bald pleading, there is nothing in the motion record to connect the posts to the corporate respondent, Express. Mr. Vitu denies any connection in his affidavit. In the absence of anything in the motion record capable of connecting Express to the posts, there could be no "grounds to believe" that the defamation action against Express had any merit, much less "substantial merit".

[28] The appellant's reliance on *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, to support its claim against Express is misplaced. In *Botiuk*, some of the libellous documents were mailed out by the company's principal on envelopes with the corporate name and address. As slim as that evidentiary connection to the company might have been in *Botiuk*, there is no evidentiary connection to Express here. The claim against Express was properly dismissed.

[29] Insofar as the claim against Mr. Vitu is concerned, it is conceded that he authored the posts and that they were communicated to at least one other person. The only question was whether the language in the posts was potentially defamatory in that it could, when considered in its ordinary meaning by a reasonable and fair-minded reader, lower Able's reputation in the eyes of reasonable people: see *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at paras. 37-38; *Botiuk*, at para. 62.

[30] The motion judge considered the possible meanings of the posts. He noted the absence of evidence to support the interpretation of the posts advanced by Able, and the absence of any details about Able's business practices (paras. 63-68). He concluded, at para. 69:

> The "sting" of the words used is slight to non-existent for those unfamiliar with the allegations of the translators and interpreters assembled by Mr. Vitu in his affidavit; for those familiar with them, Mr. Vitu's words provided no basis for a reasonable person's opinion of Able's reputation to be raised or lowered.

[31] It is arguable that the motion judge went beyond the scope of the merits inquiry contemplated by s. 137.1(4)(a)(i) and effectively tried the ultimate merits of the allegation. Mr. Vitu's posts could reasonably be understood by a fair-minded person as an assertion that Able's business practices were so disreputable that anyone involved in the senior management of Able was thereby rendered unfit for public office. That interpretation could injure Able's business image and lower its reputation in the eyes of ordinary reasonable members of the community. If there was a real chance that a reasonable trier could take that view of the posts, Able had met its onus to show its case had "substantial merit": *Pointes*, at para. 80.

[32] I need not come to any firm conclusion on whether the motion judge erred in his application of s. 137.1(4)(a)(i), as I am satisfied that he properly dismissed the claim under s. 137.1(4)(b).

(iii) Section 137.1(4)(a)(ii) – No Valid Defence

[33] Mr. Vitu advanced several defences in his Statement of Defence and the material filed on the motion. In considering whether Able had provided grounds to believe that Mr. Vitu did not have a valid defence, the motion judge considered only the fair comment defence (paras. 76-80). He concluded that Mr. Vitu had established that the defence was "a serious one" with "a reasonable chance of success" (para. 80). Consequently, Able had failed to meet its burden of

satisfying the motion judge that there were reasonable grounds to believe that Mr. Vitu had no valid defence.

[34] As explained in *Pointes*, at para. 84, a motion judge is required to determine whether a trier could reasonably conclude, based on the motion record, that Mr. Vitu had no valid – that is, successful – defence to the alleged defamatory statements. The motion judge's reference to the fair comment defence as having "a reasonable chance of success" seems tantamount to a finding that Able failed to show that there were reasonable grounds to believe that Mr. Vitu did not have a valid defence. Once again, I need not come to any firm conclusion on that question, as I am satisfied that the claim was properly dismissed under s. 137.1(4)(b).

[35] Before leaving s. 137.1(4)(a)(ii), I will, however, address one submission made by the appellant. I agree with the contention that the motion judge's analysis of the fair comment defence is flawed in one respect. To succeed on the defence, a defendant must provide the factual basis upon which the allegedly defamatory opinion is based. Mr. Vitu's posts provide no insight – express, implied, or by reference to other material – into the factual basis upon which his negative opinion of Able's business reputation is based. Absent a factual foundation, fair comment cannot succeed as a defence: see *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 31; Raymond E. Brown, *Brown on Defamation*: *Canada, United Kingdom, Australia, New Zealand, United*

States, loose-leaf, 2d ed., vol. 5 (Toronto: Carswell, 1999), at pp. 15-54 to 15-56; *Rogacki v. Belz* (2004), 243 D.L.R. (4th) 585, at p. 593 (Ont. C.A.).

[36] The motion judge recognized that the posts contained no factual basis for Mr. Vitu's opinion. He held, however, that the facts on which the opinion was based would be well-known to the audience to whom the blog was directed (para. 78). With respect, there is no evidence that the blog was directed to any particular group, or that persons reading the blog would necessarily know any of the facts upon which Mr. Vitu's opinion may have been based. Absent any evidence of the basis upon which Mr. Vitu advanced his negative opinion of Able's business reputation, there were no reasonable grounds to believe that he had a valid fair comment defence to the allegations. That was, of course, not the only defence advanced.

(iv) Section 137.1(4)(b) – The Balancing of Competing Interests

[37] Section 137.1(4)(b) provides:

> A judge shall not dismiss a proceeding under subsection (3) if the responding party (plaintiff) satisfies the judge that,
>
> …
>
> (b) the harm likely to be or have been suffered by the responding party [plaintiff] as a result of the moving party's [defendant's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[38] Section 137.1(4)(b) assumes that some cases that can survive the merits inquiry under s. 137.1(4)(a) should nevertheless be dismissed prior to trial. Section 137.1(4)(b) requires a fact-specific weighing of two different manifestations of the public interest. This court has set out its interpretation of the provision in *Pointes*, at paras. 85-101.

[39] The motion judge's analysis of s. 137.1(4)(b) begins with a detailed examination of the factors relevant to the "harm suffered or likely to be suffered" by Able as a result of Mr. Vitu's posts. The motion judge referred to several factors that he took into account in assessing the harm suffered or likely to be suffered by Able. The factors included:

- the posts were on the site for about ten days and never reappeared;
- there was no evidence that more than a handful of people saw the posts. The evidence indicates that only two persons responded to Mr. Vitu's first post;
- the posts said nothing by way of detail concerning Able's business practices and would mean little to someone not familiar with Able and its business practices;
- Mr. Vitu's posts did not incorporate by reference the many, much more detailed and sometimes vitriolic, references to Able's business practices found on various websites;

- there was no evidence connecting Mr. Vitu's posts to the other posts describing Able's business practices;
- given the nature and quantity of complaints that were in the public realm, Mr. Vitu's comments had little, if any, capacity to cause harm to Able's reputation; and
- the affidavit filed by Able's vice-president listed certain clients whose business she said had been lost, and claimed an overall percentage drop in Able's revenues. However, the affidavit offered no details of any kind to support those claims nor, more importantly, to connect any of the alleged losses to Mr. Vitu's two posts.

[40] The factors considered by the motion judge were all relevant to his assessment of the harm suffered or likely to be suffered by Able. It was for the motion judge to weigh those factors. His conclusions that the harm was minimal and that the public interest in permitting the claim to proceed to vindicate that harm was "slight" were reasonable on the evidence.

[41] The motion judge next considered the public interest in protecting Mr. Vitu's posts. Three factors suggested a high public interest.

[42] First, the subject matter of the posts, a person's suitability for a high elected office, was a topic of great importance to the public. Second, the posts did not repeat the negative and vitriolic comments made by others about Able,

but instead focused on Mr. Fonseca's suitability for public office by virtue of his previous connection to Able. The point was not to vilify Able, but to draw the attention of the voting public to a fact that, in Mr. Vitu's opinion, provided reason to not vote for Mr. Fonseca.

[43] Lastly, the motion judge observed that this was a situation in which Able's actions had actually silenced Mr. Vitu. Because of Able's litigation threats, Mr. Vitu was effectively denied his right to fully participate in the political process. The motion judge recognized the significant public interest in protecting against that consequence.

[44] The factors considered by the motion judge were relevant to the assessment of the weight to be given to the public interest in protecting Mr. Vitu's expression. Those factors were reasonably capable of making out a compelling case in favour of protecting Mr. Vitu's freedom of expression.

[45] For the reasons set out above, I would dismiss the main appeal.

E. THE APPLICATION FOR LEAVE TO APPEAL COSTS

[46] In awarding costs to the respondents on a full indemnity basis, the motion judge applied s. 137.1(7). That section provides that a successful defendant should have its costs of the motion and the proceedings on a full indemnity basis, unless the motion judge "determines that such an award is not appropriate in the circumstances".

[47] The motion judge was alive to both the full indemnity starting point and the motion judge's power to make a different order (paras. 105-108). I see no reason why this court should not defer to his determination that the "presumption" in favour of costs on a full indemnity basis should prevail.

[48] The appellant's submissions in relation to costs target quantum more than anything else. Nothing in those submissions offers any basis upon which this court should review that assessment.

F. CONCLUSION

[49] I would dismiss the appeal and refuse leave to appeal costs.

[50] The parties may make written submissions of less than five pages in respect of the costs of the appeal. The respondents' submissions should be served and filed within 30 days of the release of these reasons. The appellant's submissions should be served and filed within 14 days of receipt of the respondents' submissions.

Released: "DD" "AUG 30 2018"

"Doherty J.A."
"I agree D.M. Brown J.A."
"I agree Grant Huscroft J.A."