COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Veritas Investment Research Corporation, 2017 ONCA 85
DATE: 20170201
DOCKET: C61665

Weiler, Blair and van Rensburg JJ.A.

BETWEEN

The Catalyst Capital Group Inc. and Callidus Capital Corporation

Plaintiffs
(Appellants)

and

Veritas Investment Research Corporation and West Face Capital Inc.

Defendants
(Respondents)

Rocco DiPucchio and Andrew Winton, for the appellants

Brendan Morrison, for the respondent Veritas Investment Research Corporation

Matthew Milne-Smith and Andrew Carlson for the respondent West Face Capital Inc.

Heard: September 20, 2016

On appeal from the order of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated January 5, 2016, with reasons reported at 2016 ONSC 23.

R.A. BLAIR J.A.:

OVERVIEW

[1] The parties are all players in a highly-sophisticated field of the venture capital industry involving investments in distressed and undervalued Canadian companies. This action arises out of what the appellants allege was a wrongful and harmful "short selling" strategy conducted in concert by the respondents. Although the action is based on allegations of civil conspiracy and the tort of intentional interference with economic relations as well, the issue on this appeal concerns the plaintiffs' included claim in defamation.

[2] The appellants seek to set aside the order of Akhtar J. striking out a single paragraph in their Statement of Claim as disclosing no cause of action because it alleged publication of the defamatory statements by one of the respondents to unnamed third parties at unspecified times. They say the trial judge erred in this respect for a number of reasons, but primarily because they had already established a *prima facie* case of defamation by alleging publication to certain named persons (representatives of the other defendant) at a specified time and place. They submit that, in such circumstances, the failure to name all of the persons to whom publication was made and/or all the times and places of publication – when these particulars are unknown to them but known to the defendant – is not automatically fatal to a defamation claim.

[3] They also appeal from the motion judge's decision to make no order as to costs.

[4] The respondent, West Face Capital Inc., argues that the appellants seek to lower the bar for pleading to defamation so low as to provide no bar at all. Indeed – in the words of its factum – to leave the impugned paragraph in the Statement of Claim "would transform the action from one focussed narrowly on West Face's interaction with Veritas into an almost limitless Royal Commission of Inquiry into everything West Face has ever done, said or thought in respect of Callidus."

[5] In spite of this ringing admonition, however, I agree with the appellants in the circumstances of this case. For the reasons that follow, I would allow the appeal.

FACTUAL BACKGROUND

[6] The appellant, The Catalyst Capital Group Inc., and the respondent, West Face Capital Inc., compete in a sector of the investment industry involving control over distressed and undervalued Canadian companies. The appellant, Callidus Capital Corporation, is a publicly traded asset-backed lender that finances companies unable to access traditional lending facilities. Callidus was wholly owned by Catalyst prior to an Initial Public Offering of 40% of its shares in April 2014; it remains 60% controlled by investment funds managed by Catalyst.

[7] The respondent, Veritas Investment Research Corporation, is an equity research company that prepares and publishes investment research reports that are distributed to subscribers. One of those reports ("the Veritas Report"), and an earlier report prepared by West Face ("the West Face Report"), are alleged by the appellants to have contained false and defamatory statements about the appellants. The Reports are said to have been published in the following circumstances.

The Short Selling Strategy

[8] Catalyst alleges that in October 2014 West Face launched a short selling scheme targeting Callidus stock and later that year persuaded Veritas to join with it in a plan to deceive market participants into believing that Callidus was a poor investment, sullying the reputation of Catalyst along the way.

[9] "Short selling" is a risky investment strategy with the potential for either a highly profitable upside or an equally unprofitable downside, depending upon the performance of the targeted stock on the market. It involves the sale to a third party of shares in a publicly traded corporation that have been borrowed by the seller/investor from another party. The hope of the seller/investor is that the value of the shares will decline, at which point the investor will buy back the shares at the lower price and return them to the party from whom they were originally borrowed, taking the profit from the difference in price for its own benefit. The risk

is that if – instead of declining in value as anticipated – the shares appreciate in value the seller/investor must re-purchase them at the higher price and take the loss. Selling borrowed shares in this fashion is known as "selling short".

[10] The appellants allege that West Face launched its short selling strategy in retaliation against Catalyst for an earlier lawsuit Catalyst had commenced against it regarding the use of confidential information by an employee who had left Catalyst and joined West Face. They say that in order to advance its short selling strategy, West Face's chief executive officer and others met with named representatives of Veritas in December 2014 and that the joint plan was initiated at this meeting.

The Allegedly Defamatory Statements

[11] At that meeting, the West Face representatives disclosed to the Veritas representatives the details of the West Face Report – which were unfavourable to, and allegedly defamatory of, Catalyst and Callidus – and advised as well that West Face had embarked upon a short selling strategy with respect to Callidus. West Face is said to have encouraged Veritas to prepare a similarly negative report about Callidus and distribute it to their subscribers, thereby creating the impression that West Face and Veritas had independently and separately issued negative reports. This would have the effect of deceiving the market place into believing that a negative consensus was building against Callidus, and drive the

price of Callidus' stock downward which, in turn, would bolster West Face's short-selling strategy.

[12] The Veritas Report is alleged to have been prepared as a result of this meeting and published to Veritas' subscribers in April 2015. The appellants plead that both it and the West Face Report contained false and defamatory statements impugning the financial viability and conduct of both Callidus and Catalyst. These allegations are particularized in the Statement of Claim and their details are not important to the issue on this appeal.

[13] The Veritas Report is alleged to have been published to market participants and distributed to Veritas' subscribers, and to be available for download from the Veritas website by its customers. The West Face Report is alleged to have been published and distributed to the Veritas representatives attending the December 2014 meeting, and beginning in November 2014 and continuing to March 2015, to unknown third party market participants.

The Action and the Decision of the Motion Judge

[14] In the action, Catalyst and Callidus claim damages against West Face and Veritas for conspiracy to publish defamatory statements about Callidus and for intentional interference with the economic relations of Callidus, as well as for defamation in relation to both Catalyst and Callidus.

[15] West Face moved under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to strike the entire Statement of Claim as disclosing no reasonable cause of action. Veritas moved separately to strike the pleadings against it with respect to intentional interference with economic relations and conspiracy to defame. The motion judge dismissed Veritas' motion in its entirety. He dismissed West Face's motion except with respect to paragraph 25, which he struck without leave to amend. He awarded no costs of the motion.

[16] Paragraph 25 is contained in a part of the Statement of Claim under the heading "West Face and Veritas Conspire to Publish Defamatory Statements About Callidus". It states that:

> Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.

[17] The motion judge struck this part of the pleading on the basis that it contained an impermissible plea of publication to unnamed third parties at unspecified times. The appellants argue that he erred in doing so.

[18] They also argue that he erred in refusing to award them costs of the motion, given their substantial overall success.

THE APPEAL AGAINST THE ORDER STRIKING OUT PARAGRAPH 25

[19] After reviewing the authorities, I conclude, respectfully, that the motion judge erred in striking paragraph 25 of the Statement of Claim.

[20] I agree with the appellants that the failure to name all persons to whom publication was made and/or to specify all the times and places of publication is not automatically fatal. Those particulars are unknown to the appellants but known to West Face and form an integral part of what is said to be an overall scheme of conspiracy to injure, intentional interference with economic relations, and defamation. The appellants have otherwise properly pleaded a *prima facie* claim in defamation (including publication to named persons) against West Face. The Statement of Claim, read generously and as a whole, alleges material facts disclosing publication to unnamed third persons. Viewed in this overall context, the pleading that West Face distributed the allegedly defamatory statements to third party market participants, the identities of which are known to West Face, should stand.

The Jurisprudence

[21] No one contests that the bar for striking a pleading as disclosing no cause of action is very high – is it plain and obvious that the plaintiff cannot succeed? – or that the facts as alleged in the Statement of Claim are to be accepted as true for purposes of deciding the motion: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R.

959. No evidence is permissible on a rule 21.01(1)(b) motion: rule 21.01(2)(b). The statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting difficulties.

[22] An additional dimension to these principles arises in defamation cases because pleadings in such actions have traditionally been held to a higher standard than is the case with other types of actions, in terms of the precision with which the material facts must be pleaded. West Face relies on this higher standard – as did the motion judge – for the proposition that para. 25 of the Statement of Claim fails to disclose a cause of action. Modern authorities have adopted a somewhat more flexible approach to the assessment of defamation pleadings than older authorities that took a very strict approach, however.

[23] Like any pleading, a statement of claim in a defamation action must set out "a concise statement of the material facts on which the [plaintiff] relies": rule 25.06(1). And, of course, the material facts must be sufficient, if proved, to establish a cause of action. In libel actions (defamatory statements in writing, as in this case), the material facts to be pleaded are: (i) particulars of the allegedly defamatory words; (ii) publication of the words by the defendant; (iii) to whom the words were published; and (iv) that the words were defamatory of the plaintiff in their plain and ordinary meaning or by innuendo. See, generally, Alastair Mullis & Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London, U.K.: Sweet & Maxwell, 2013), at paras. 26-1 to 26-26; *Lysko v. Braley* (2006), 79 O.R.

(3d) 721 (C.A.), at para. 91; *Metz v. Tremblay-Hall* (2006), 53 C.C.E.L. (3d) 107 (Ont. S.C.), at para. 13.

[24] At one time, the weight of authority required the pleading of these essential elements with strict precision, including the exact wording complained of and the names of all persons to whom the words had been published. It was, and remains the case that pleadings in defamation actions attract a more critical evaluation than pleadings involving other causes of action; they require a more detailed outline of the material facts alleged in support of the claim. Courts are attentive to guard against "fishing expeditions" in such cases. This is because – given the serious nature of such allegations and the significance of context in assessing them – it is particularly important that the defendant know the case it has to meet.

[25] While the need for as much precision as possible and for enhanced judicial scrutiny continues, however, more recent authorities have applied greater flexibility in permitting defamation pleadings to stand in certain circumstances where the plaintiff is unable to provide full particulars of all allegations. These circumstances include situations where the plaintiff has revealed all the particulars within its knowledge, where the particulars are within the defendant's knowledge, and – importantly – where the plaintiff has otherwise established a *prima facie* case of defamation (including publication) in the pleading. See, for example, *Paquette v. Cruji* (1979), 26 O.R. (2d) 294 (H.C.), at p. 296-97;

Magnotta Winery Ltd. v. Ziraldo (1995), 25 O.R. (3d) 575 (C.J.), at pp. 583-84; *Lysko*, approving *Paquette* and *Magnotta Winery*, at paras. 93-95; and *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at para. 52.

[26] In *Paquette* (a case involving publication to named persons "and others") Grange J. described the more modern approach in the following terms, at pp. 296-97:

> It is true and has been said over and over again – see, for example, *Odgers Digest of the Law of Libel and Slander*, 6th ed. (1929), at p. 504, that pleadings in a defamation action are more important than in any other class of action. It is also generally true as put by *Gatley on Libel and Slander*, 7th ed. (1974), p. 422, para. 1015, that "... the defendant is entitled to particulars of the date or dates on which, and of the place or places where, the slander was uttered. The defendant is also entitled to be told the names of the person or persons to whom the slander was uttered ...", and that the Court will not permit the plaintiff to proceed to use discovery as a "fishing expedition" to seek out a cause of action: see *Gaskin v. Retail Credit Co.*, [1961] O.W.N. 171; *Collins v. Jones*, [1955] 2 All E.R. 145. There are, however, limitations to the strictness of pleading. Our Courts have always refused to strike out a claim where the plaintiff has revealed all the particulars in his possession and has set forth a *prima facie* case in his pleading: see *Winnett v. Appelbe et ux.* (1894), 16 P.R. (Ont.) 57, and *Lynford v. United States Cigar Stores Ltd.* (1917), 12 O.W.N. 68. In the latter case Falconbridge, C.J.K.B., refused to strike out a statement of claim wherein the plaintiff had been unable to set forth the exact words of an allegedly defamatory letter which had resulted in loss of employment quoting with approval [at p. 69] the words of *Odgers*, 5th ed. (1912), at p. 624:

> "If the plaintiff does not know the exact words uttered, and cannot obtain leave to interrogate before statement of claim, he must draft his pleading as best he can and subsequently apply for leave to administer interrogatories, and, after obtaining answers, amend his statement of claim, if necessary." [Emphasis added.]

[27] Applying those principles to the matter before him, Grange J. went on to state, at p. 297:

> The plaintiff maintains he was slandered by the defendant by communication to persons unknown (but associated with particular institutions) at times unknown (though within a specified time span). He sets forth the words used. He has stated everything he knows. If he proves the facts pleaded he will have established a prima facie case. The law will always protect a defendant from a frivolous action but it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant. If the plaintiff should fail to prove any of the 16 slanders specifically alleged there is always a remedy in costs. [Emphasis added.]

[28] This more flexible approach to defamation pleadings is reflected in the subsequent decision of Lane J. in *Magnotta Winery* (a case involving the plaintiff's inability to plead the exact wording of the allegedly defamatory statement[1]). After analysing many of the authorities relating to the strict requirements of pleading in defamation actions, Lane J. opted for a more flexible

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[1] The plaintiff was able to plead the substance of the defamatory words – that the defendant competitor's president had lodged a public complaint that the plaintiff's award-winning wine blend was not a "true product of Canada" – but not the exact wording.

approach. He did so recognizing the benefits to "fashioning a contemporary resolution of the tension between the need to prevent fishing expeditions, on the one hand, and the injustice of permitting defendants to escape liability for serious defamations on the other" (p. 582). At pp. 583-84, he concluded:

> On these authorities, it is open to the court in a limited set of circumstances to permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. The plaintiff must show:
>
> – that he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
>
> – that he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
>
> – that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff;
>
> – that the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.

[29] The more flexible approach was recognized by this Court in *Lysko* and, again, in *Guergis.* In *Guergis* the Court said that a plaintiff may plead that a defamatory statement was made to certain unnamed persons "where a plaintiff

has made out a *prima facie* case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons" (para. 52). See also, *Gatley on Libel and Slander*, at para. 26.7; *Jaffe v. Americans for International Justice Foundation*, [1987] O.J. N. 2370 (Ont. Master), at para. 10.

Analysis

[30] Here, although the motion judge recognized "that the old rule of specifically pleading the defamatory words has been relaxed", he declined to give effect to the *Paquette/Magnotta Winery/Guergis* line of authorities in the circumstances. He did so, essentially, because, in his view:

> (a) the vagueness of the pleading made it difficult for West Face to know the case it had to meet ("Catalyst [could not] provide the 'who, what and when' details of the alleged defamation and, as a result, fails to satisfy the necessity of pleading a coherent body of fact");
>
> (b) there was, of equal concern, "the additional potential [of] a procedural quagmire ... at the discovery stage" given that the plaintiff would be "question[ing] witnesses on an unacceptably broad basis, riding on the horse that

it requires information to support those vague pleadings"; and

(c) Catalyst had not "produced uncontradicted evidence of publication to other persons": *Guergis*, at para. 52.

[31] Respectfully, these criticisms are misplaced in the circumstances of this case. I say this for the following reasons.

<u>The Pleading Is Not Unduly Vague And Pleads "A Coherent Body of Fact"</u>

[32] First, this is not a case where the impugned pleading, read as a whole, is impermissibly vague, leaving West Face in the dark and unable to respond to the allegations of publication, albeit the third parties to whom publication is said to have been made remain unnamed. Nor is it a case – as the motion judge appears to have viewed it – where the plaintiffs are putting forward "allegations of defamation based on rumour, hearsay or information from third parties which cannot be confirmed in an evidentiary manner" or where they are engaging in a "fishing expedition" and attempting "to use their pleadings to search for the source of their cause of action at the discovery stage". The Statement of Claim sets out the material facts properly pleading a claim in civil conspiracy, intentional interference with economic relations and defamation. On the case as pleaded, these claims are intertwined and have common factual underpinnings. The Statement of Claim sets out a coherent body of facts in relation to them.

[33] West Face knows that it has to respond to an already properly pleaded case against it in defamation (including the allegation of publication to named persons). West Face knows that that properly pleaded case, and the allegation of additional publication by it to unnamed third parties, are made in the context of an alleged plan by it to work together with its co-defendant, Veritas, to publish separate reports to market participants in order to drive the price of Callidus' shares downwards thereby enhancing West Face's short selling scheme. West Face knows how and to whom it published its own report (the West Face Report) – those actions being a necessary part of the scheme. And West Face knows the time-frame within which the allegedly defamatory statements are said to have been made.

[34] Even if West Face were unable to determine the names of all third party market participants to whom the West Face Report was published, I would not strike out the pleading of publication of that report to unnamed market participants in this case. Widespread publication of the allegedly defamatory West Face and Veritas Reports to market participants is a central ingredient of the harmful scheme complained of. As noted above, the impugned paragraph is contained in the section of the Statement of Claim entitled "West Face and Veritas Conspire to Publish Defamatory Statements About Callidus" and the appellants have pleaded the material facts relating to this claim with the details they have in their possession.

[35] I do not see how West Face could legitimately expect to engage in a campaign designed to discredit the appellant's reputations in the eyes of market participants by circulating the aforementioned Reports (assuming that is proved at trial) and at the same time legitimately expect to escape liability simply because the appellants are unable to name all recipients of the allegedly defamatory material. To repeat the observation of Lane J. in *Magnotta Winery*, at p. 582, modern courts are called upon to "[fashion] a contemporary resolution of the tension between the need to prevent fishing expeditions, on the one hand, and the injustice of permitting defendants to escape liability for serious defamations on the other". Or, as Grange J. put it, in *Paquette*, at p. 297:

> The law will always protect a defendant from a frivolous action but it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant.

[36] That is the case here, in my view.

The Appellants Are Entitled To The Information On Discovery In Any Event

[37] Nor am I persuaded that the motion judge's second concern – "the additional potential [of] a procedural quagmire ... at the discovery stage" – is a valid concern here. I agree with counsel for the appellants that they will be entitled to seek the names of the recipients of the West Face and Veritas Reports on discovery in any event, given the nature of the overall claim as pleaded.

[38] The appellants' claims based in civil conspiracy and intentional interference with economic relations remain in place. Both claims are rooted in the allegation that the appellants suffered damages as a result of West Face's and Veritas' scheme to publish defamatory statements about Callidus by "deceiving market participants into believing that a negative consensus was building regarding Callidus" and "by inducing market participants to sell their Callidus shares and/or lower their estimates of Callidus' future performance" (para. 33). Both claims will be subject to the discovery process. With respect to both it will be open to the plaintiff appellants to seek information about the nature of the publication of the West Face and Veritas reports and about the identity of the recipients. Contrary to the motion judge's fears, this is not a case where the plaintiffs would be "question[ing] witnesses on an unacceptably broad basis, riding on the horse that it requires information to support those vague pleadings". They will be entitled to probe that information one way or another.

<u>The Statement Of Claim Pleads Publication To Unnamed Third Parties As A Material Fact</u>

[39] Finally, the motion judge erred in concluding that Catalyst had not "produced uncontradicted evidence of publication to other persons" (*Guergis*, at para. 52), and that:

> Absent that evidence, Catalyst cannot group defendants together without clarifying what they actually said and did or hope that some liability might end up attaching to

> one or more of them: see *Hyprescon Inc. v. Ipex Inc.*, 2007 CanLII 11316 (ON SC).

[40] There are at least two difficulties with this conclusion.

[41] First, the motion judge appears to have conflated problems relating to naming the defendants alleged to have made the defamatory publications (the grouping of defendants – not an issue here) with problems relating to naming the recipients of those publications. They are not necessarily the same. Here, the appellants have made out a *prima facie* case against West Face and Veritas, including publication to named persons. The issue is whether they should be permitted, additionally, to plead publication to persons unknown to them but known to West Face in the circumstances.

[42] Secondly, and more significantly, the motion judge appears to have overlooked the fact that "evidence" is not admissible on a rule 21.01(1)(b) motion to strike a claim as disclosing no reasonable cause of action: rule 21.01(2)(b). As noted above, the facts as alleged in a statement of claim must be taken as true unless they are patently ridiculous or incapable of proof (neither of which is the case here) and the pleading is to be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting difficulties: Hunt *v. Carey*.

[43] The statement in *Guergis* and other authorities to the effect that there must be "uncontradicted evidence of publication to other persons"[2] (emphasis added) must be applied with that consideration in mind. Indeed, as the older authorities demonstrate, the phrase itself, or similar language, was developed in the context of proceedings such as motions for interrogatories or motions for particulars, in which affidavit evidence is permitted and often required. That is not the case on a rule 21.01(1)(b) motion.

[44] Here, the Statement of Claim contains numerous allegations of the fact of publication to unnamed third parties. Paragraph 25 itself alleges distribution to market participants and to third parties, the identities of which are known to West Face. Paragraph 24 pleads that "[t]he [Defendants] intended to create the impression that they had separately and independently publish[ed] negative reports about Callidus for the purpose of deceiving market participants into believing that a negative consensus was building regarding Callidus." In paragraph 33, it is alleged that the West Face and Veritas Reports "were published by the Defendants to harm Callidus and Catalyst by inducing market participants to sell their Callidus shares and/or lower their estimates of Callidus' future performance." In paragraph 38, it is alleged that "[b]y publishing the

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[2] See, for example, *Gaskin v. Retail Credit Co.*, [1961] O.W.N. 171 (H.C.), at p. 173; *Jaffe v. Americans for International Justice Foundation* (1987), 22 C.P.C. (2d) 286 (Ont. S.C.); *Russell v. Stubbs*, [1913] 2 K.B. 200n; *Barham v. Huntingfield*, [1913] 2 K.B. 193; Gerald Osborne Slade & Neville Faulks, eds., *Fraser on Libel and Slander*, 7th ed. (London: Butterworth & Co., 1936), at pp. 250-52; *Gatley on Libel and Slander*, at para. 26.7 and cases cited therein at footnote 36.

Defamatory Comments, <u>the Defendants deceived third-party market participants</u> into believing that Callidus' share price was overvalued and that Callidus was at risk of significant future losses. The Defamatory Comments <u>were made to induce these market participants to sell</u> their Callidus shares, thereby lowering its share price for a prolonged period of time" (emphasis in the foregoing citations added).

[45] These allegations must be accepted as true for the purpose of the motion and this appeal. They are uncontradicted, of course, because no statement of defence has as yet been filed. As I read the Statement of Claim, they lead – at the very least – to the irresistible inference that such publication took place. This is sufficient to meet the *Guergis* test for these purposes, in my opinion.

[46] In view of the foregoing, I need not rely on an additional argument made by counsel for the appellants. He submitted that the motion judge erred in concluding the appellants were "unable to produce any, let alone uncontradicted, evidence of publication" to unnamed third persons because there were documents incorporated into the pleading by reference that could, at a later stage of the proceedings, be considered uncontradicted evidence of such publication.

[47] The documentation referred to was an exchange of correspondence between counsel for Callidus and counsel for West Face in which the former sought production of the West Face Report to confirm whether it contained incorrect or misleading information regarding Callidus. Counsel for West Face

replied in a letter dated January 6, 2015, by saying that he was not able to respond to such vague allegations without knowing more, but went on to add:

> That said, speaking generally, West Face is confident in the accuracy of its investment research. It does not discuss companies with third parties without extensive research to support its analysis. Should Callidus commence defamation proceedings against West Face, West Face will vigorously defend itself in its Statement of Defence and demonstrate the truth of any statements that it has made about Callidus. West Face is also confident that the discovery process in any litigation commenced by Callidus will vindicate West Face's research. [Emphasis added.]

[48] Although counsel for West Face took the position in subsequent correspondence that in the foregoing letter he had not confirmed distribution of a research report to third parties, the appellants contend that the letter provides proof on the record of such publication. They characterize it as West Face having "defended its conduct and essentially 'dared' Callidus to bring a defamation claim."

[49] I think that the motion judge may have overstated the case by concluding that the appellants were unable to produce "any" evidence of publication, in view of this material in the record. Whether it would be sufficient to satisfy the *Guergis* test may be another matter, however. Be that as it may, I need not resolve this issue. I am satisfied, for the other reasons outlined above, that – apart from the exchange of correspondence – there are sufficient facts pleaded in the Statement of Claim to constitute "uncontradicted evidence" of publication to

unnamed third persons, as that phrase must be understood for purposes of a rule 21.01(1)(b) motion.

Conclusion

[50] In conclusion, I return again to the language of Lane J. in *Magnotta Winery*, at p. 583-84. In my view, the appellants have demonstrated in the Statement of Claim that they are "proceeding in good faith with a *prima facie* case and [are] not on a 'fishing expedition'" (or, to put it another way, that there is a "coherent body of fact" of which they do have knowledge, that gives rise to the basis for a claim); they have "pleaded all of the particulars available to [them] with the exercise of reasonable diligence" and, although they do not have knowledge of the names of the additional third parties to whom publication has been made, that knowledge "will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which [they have] pleaded [the particulars of publication to unnamed third persons] consistent with the information then at [their] disposal."

[51] By "coherent body of fact" I take Lane J. to have meant no more than the need for the pleading to set out the essential facts required to establish at least a *prima facie* cause of action in defamation. The appellants have done that here. They have made out a *prima facie* cause of action in defamation against both West Face and Veritas.

[52] Veritas did not, and does not attack the plea in paragraph 26 of the Statement of Claim that:

> On or about April 16, 2015, Veritas published a report impugning Callidus and Catalyst to market participants (the "Veritas Report"). The Veritas Report was distributed to Veritas' subscribers and is available for download from its website by its customers.

[53] The motion judge refused to strike the plea that West Face published the West Face Report containing statements defamatory of the appellants to the representatives of Veritas. That plea in itself establishes a *prima facie* case of libel against West Face and the appellants will succeed in their defamation claim against West Face if they prove the facts underlying that claim at trial and the defendants are unable to offer a defence. All that remains in dispute is the plea that the defamatory statements were distributed as well to unnamed "third parties, the identities of which are known to West Face". For purposes of the defamation claim, this additional information is not necessary in order to establish liability – as publication to a single person is sufficient for that purpose – but the scale of publication will affect the quantum of damages: see *Gatley on Libel and Slander*, at para. 6.1.

[54] For the foregoing reasons, I am satisfied that the plea in paragraph 25 of the Statement of Claim should not have been struck.

THE COSTS APPEAL

[55] The appellants also seek to set aside the motion judge's decision to make no order as to costs on the motion. They acknowledge that a deferential standard of review applies to costs appeals, but submit that they were substantially successful on the motion – Veritas was entirely unsuccessful and most of West Face's motion was dismissed – and that they should not have been denied costs.

[56] West Face argues, on the other hand, that success was divided, that it was in fact successful on striking out the most significant and far-reaching paragraph in the appellants' claim, and that the motion judge was entitled in the exercise of his discretion to make a no-costs order in such circumstances.

[57] In view of my determination that paragraph 25 should not have been struck, however, the foregoing debate becomes somewhat academic. As the parties are now fully successful on the motion, the appellants are entitled to their costs both here and below.

DISPOSITION

[58] For the foregoing reasons, I would allow the appeal and set aside the order below striking out paragraph 25 of the Statement of Claim. I need not dispose of the costs appeal as it has become moot.

[59] I would grant the appellants their costs of the appeal, fixed in the amount of $13,000 inclusive of disbursements and HST, payable jointly and severally by the respondents.

[60] I would award the appellants their costs of the motion below, fixed in the amount of $11,500, inclusive of disbursements and HST, payable jointly and severally by the respondents.

Released: RAB FEB 01 2017

RA Blair J.A.

I agree K.M. Weiler J.A.

I agree. K. van Rensburg J.A.