Smith v Dooley and Another [2013] NZCA 428

(Appeal – CA Wellington)

Issues: Meanings – truth – defeat of qualified privilege (ill-will) – defeat of qualified privilege (improper advantage/recklessness) – declarations

Judgment: 13 September 2013

Disclosure: Ali Romanos acted for S in this appeal

Facts: In 2009, D, the chairman of a public trust, sued S, a candidate in the upcoming local elections and potential trustee, and another trustee, for comments that were published in a 2007 newspaper article. The comments were made in reference to D's denial of the existence of an email written by the CEO of the trust, which had solicited support for D. D alleged the statements in the article impugned his honesty. D's claim against S centred on S stating he found it "*disturbing*" that D had denied the existence of the email. D also initially included the newspaper in his claim but, in 2010, settled with its publishers. However, D altered his pleadings, maintaining a claim against S for the oral statement S made to the newspaper reporter. D's claim against the other defendant was maintained on the basis of a press release the former had sent to the newspaper. In 2012, after a 6-day trial in the Greymouth HC, Lang J held that S and the other defendant had defamed D, and issued a declaration to that effect (D had not sought damages).

S appealed on the issues of meanings, truth, qualified privilege – its defeat under the heads of ill-will and improper advantage/recklessness – and declarations. (The other defendant did not appeal the HC decision.)

Held: (O'Reagan P, Wild and Stevens JJ) The Court allowed the appeal on all 5 grounds. It held: that the words complained of by D were not defamatory of him in the way he contended – see [56]; that, even if the words were defamatory, they were true in substance (the Court made a finding that D had acted dishonestly) – see [69]; that, if qualified privilege *was* available to S in the context of local-body politics as an extension of *Lange* (which the Court declined to rule on – see [74]), it would not have been defeated because S was not predominantly motivated by ill-will (see [81]), and had not published the words recklessly – see [90]; and, in any event, that the Court would not have granted D a declaration, owing to D's inexplicable delay in issuing proceedings – see [104].

Supreme Court: D subsequently applied to the SC for leave to appeal the CA decision. On 20 December 2013, the SC denied D's application for leave to appeal.

Discussion:

- **Meanings:** The CA appears to have given authority to the proposition that *the re-publication of a defendant's words form the proper context in which allegedly defamatory words appear.*

  This proposition is an extension of the existing permissible context in which words complained of may be interpreted. The previous authority was to the effect that words and context must be so "*closely connected or interwoven as to constitute one transaction*" – *Brown v Marron* [2001] WASC 100, cited with approval in *McGee v Independent Newspapers* [2006] NZAR 24 (HC).

  I consider this change to be undesirable. Even though the CA stated that it allowed the newspaper article to be included as context for S's benefit, it seems this change will, in fact, benefit *plaintiffs*, who now can seemingly go beyond an original publication to examine words' meaning *in light of their re-publication*. This extension has the potential to make defendants culpable for publications that are, in themselves, innocuous and non-defamatory, but take on defamatory stings when included as part of a subsequent publication by another author. On the other hand, it is also conceivable this extension allows *defendants* to go in search of re-publication of their words, in order that they may find some 'antidote' that mitigates the sting of their original publication.

- **Truth:** The Court clarified s 8(3)(b) of the Defamation Act, making clear that for a truth defence to be made out when "*the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth*", this means that, essentially, the defendant must prove only the overarching 'sting' of the defamation; not the plaintiff's conceptualisation (pleading) of it, which is relevant to s 8(3)(a) of the Act. It will be interesting to see if defendants will tend more to rely on s 8(3)(b) as a means to subvert the principle in New Zealand that defendants cannot plead the truth of a lesser meaning – it would seem that defendants can use s 8(3)(b) to ask the Court to assess objectively the overarching sting of the defamation (which, no doubt, defendants would view as less serious than the plaintiff's conceptualisation), to see whether the defendant has been able to prove its substantial truth.

- **Improper advantage/recklessness:** The Court favoured the test articulated in *Lange (No 2)* that reckless may be found, and qualified privilege so lost, if a defendant "*takes what in all the circumstances can*

fairly be described as a ***cavalier approach*** *to the truth of the statement*". It is still a little unclear whether this standard of recklessness is purely subjective – whether the test turns on the defendant's subjective state of mind in respect of whether they were satisfied as to the truth of the statement – or whether the defendant's actions are to be viewed objectively in so fart as the defendant can be said to have acted sufficiently reasonably or responsibly so as not to have acted recklessly.

- **Declarations:** The Court held, with reference to the legislative underpinnings of declarations (assessed via statements from *Hansard* and the 1977 McKay Committee Report on Defamation) – which envisage declarations as a remedy to be sought by plaintiffs *interested in clearing their names quickly* – that inexplicable delay counts against the issuing of a declaration.

- **Publication sued upon:** This case is, in my mind, one of a concerning recent trend whereby plaintiffs are settling with media outlets before re-shaping their pleadings to maintain a technical action against others for *oral* statements made to the reporters. I suggest this is a distortion of the law. For interested parties, I have written elsewhere about this.