

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 852-SD00

**NOT
RECOMMENDED**

BETWEEN JAMES AH KOY

Plaintiff

600784

AND TELEVISION NEW ZEALAND LIMITED

First Defendant

AND EWART BARNESLEY

Second Defendant

Hearing: 6 July 2000

Counsel: R Harrison QC for Plaintiff
W Akel and J W S Baigent for Defendants

Judgment: 12th July 2000

JUDGMENT OF ANDERSON J

SOLICITORS

Vallant Hooker & Partners (Auckland) for Plaintiff
Simpson Grierson (Auckland) for Defendants

[1] In these proceedings for alleged defamation the defendants have made an interlocutory application pursuant to R418 of the High Court Rules for a determination as a preliminary issue whether the words published by the defendants and referred to in the plaintiff's statement of claim are reasonably capable of bearing certain meanings alleged by the plaintiff.

[2] The published words occurred in the course of a television broadcast by Television One in a news programme dealing with criminal conduct of George Speight and others in connection with members of the Fiji Parliament at Suva. As is well known, George Speight and a number of accomplices took over the Fiji House of Parliament by force of arms, kidnapped the Prime Minister and many others and held them as hostages to Speight's demands for the overthrow of lawful government in Fiji.

[3] On Friday 26 May 2000 Television One broadcast film and comment about the situation in Fiji. A good deal of the material included footage or stills of persons with firearms. At one point in the broadcast the television news presenter inquired of Mr Barnsley, Television New Zealand's journalist on location in Suva:-

Now George Speight is very much the face of the rebel cause but who's actually behind it?

[4] Against a still shot, which included a photograph of a man holding a firearm, Mr Barnsley, in a voiceover, replied:-

The police are trying to find out right now. One Network News has been told that the police have five well known businessmen in their sights. These are the people they suspect or are under investigation for bankrolling this attempted coup but the interesting thing about it is that one of these people is a well known Chinese businessman who is also a former politician. Surprisingly two other names on the list are both Indians.

[5] The plaintiff alleges that the reference to "a well known Chinese businessman who is also a former politician" is intended to refer to him. Whether that is so is not in issue in this application but will obviously be an important issue in due course.

[6] The plaintiff says that the words in their natural and ordinary meaning, or by way of innuendo, were meant and were understood to mean that:-

- (1) The plaintiff aided and abetted or conspired with George Speight and others to commit the crime of treason by financing their operations and in particular their acquisition of weapons used to forcefully overthrow the duly elected government of Fiji; and/or
- (2) The plaintiff aided and abetted or conspired with George Speight and others to commit the crime of kidnapping by financing their operations and in particular their acquisition of weapons used to detain the Prime Minister of Fiji, members of his cabinet and members of Parliament against their will within the Parliament Buildings in Suva; and/or
- (3) Police authorities in Fiji were about to or likely to arrest the plaintiff for the crimes of treason and/or kidnapping; and/or
- (4) The police authorities in Fiji had good reason to believe or suspect that the plaintiff had committed such a crime or crimes; and/or
- (5) The plaintiff was under investigation by the police authorities in Fiji for committing such a crime or crimes.

[7] The defendants do not at this stage dispute that the words are capable of the meaning alleged in (5) above. However they say that the words are not capable of the meanings set out in (1)-(4). The defendants submit that it is expedient that this Court determine at this stage whether, as a question of law, the publication complained of carries those disputed meanings. How that question is decided will affect the terms of the statements of defence which have yet to be filed. Counsel for the plaintiff accepts that the present interlocutory application is appropriately made and so do I. The issue is one of law which demands no inquiry into evidence beyond a viewing, which I have carried out by consent, of a video recording of the particular broadcast.

[8] It is trite that the question whether words complained of in defamation proceedings could reasonably be taken to have the defamatory meaning as alleged is a question of law for a Judge. **Gatley on Libel and Slander**, 9th edition at 3.11; *Hyams v Peterson* [1991] 3 NZLR 648 at 655-6.

[9] The principles of analysis are conveniently enumerated by Blanchard J in the decision of the Court of Appeal in *New Zealand Magazines Ltd v Hadlee* (CA 74/96, 24 October 1996) in the following terms:-

- (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
- (b) The reasonable person in reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
- (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
- (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
- (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
- (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 72.

[10] In challenging the alleged meanings, counsel for the defendants submits that the same arguments apply to (1) and (2) above. They are founded on a distinction between an imputation of being guilty and an imputation of being suspected of guilt. Counsel invoked *Lewis v Daily Telegraph Ltd* [1964] AC 234 where the respondent had published articles under the headlines “*Inquiry on Firm by City Police*” and

“*Fraud Squad Probe Firm*”. The House of Lords held that the words were not capable of meaning that the plaintiffs were guilty of fraud, although they were capable of meaning that the plaintiffs were suspected of fraud. This distinction was recognised by the New Zealand Court of Appeal in *Hyams v Peterson* [1991] 3 NZLR 648, but the Court also acknowledged that:-

... for practical purposes there can be an imputation of suspicion so strong as to be indistinguishable from guilt; it must always be a question of fact how far the defamatory meaning goes.

(p655, lines 33-36)

[11] As well as distinguishing between “suspicion” and “guilt”, counsel for the defendants submits that the broadcast is incapable of importing the crimes, specified in paragraph [6](1) and (2) above, namely:-

- *in particular their acquisition of weapons used to forcefully overthrow the duly elected government of Fiji*
- *in particular their acquisition of weapons used to detain the Prime Minister of Fiji, members of his cabinet and members of Parliament against their will*

[12] In support of that argument counsel for the defendants submits that no reference is made in the words to the use of weapons or to kidnapping by George Speight and his supporters, and that the only relevant reference is the term “bankrolling” which connotes financing the operations of Speight.

[13] Next it is submitted on behalf of the defendants that extrinsic facts referred to in paragraph 9 of the statement of claim do not make the words capable of referring to the particular crimes by way of innuendo. Generally speaking the extrinsic facts referred to are that Speight together with supporters used armed force to overthrow the elected government of Fiji and to detain by use of arms the Prime Minister, members of his cabinet, and members of Parliament, with attendant lawlessness and civil disorder in Suva and elsewhere in Fiji. Those facts are, of course, notorious and represent part of the context in which the broadcast complained of was made.

[14] The defendants also submit that the words are incapable of the meaning alleged in paragraph [6](3) above, there being a reference to being suspected or under investigation and not to guilt, nor any suggestion of a likelihood of arrest. Counsel submits further that there is no reference to the police having any evidence to support arrests or charges and that the words “trying to find out” indicate, at most,

that the police were investigating and had not come to conclusions. Counsel submits further that *bankrolling the coup* does not in its ordinary and natural meaning imply a reference to the crime of kidnapping and the extrinsic matters relied upon do not produce the meanings alleged.

[15] The defendants submit further that references to “suspect” or “being under investigation”, although capable of implying that there are grounds for suspicion or investigation are incapable of meaning that there is good reason to believe or suspect. The reliance is placed, amongst other things, on the dictum of Hunt J in *Ainsworth Nominees Pty v Hanrahan* [1982] 2 NSWLR 823, at p828, that:-

Suspicion is considerably less serious than belief.

[16] Counsel for the plaintiff submits that the words of the journalist, Mr Barnsley, must be examined in the light of the question posed by the presenter, the broadcast as a whole, and the well publicised factual context of Speight’s criminal conduct. The nature of the programme was also relevant, being hard hitting and fast moving with its meanings being perceived by viewers in that light.

Determination

[17] The meanings of which the words complained of are capable is a question of law but is answered by reference to language, conduct, and context. In this case the context includes the broadcast item on Fiji and the notorious fact of Speight’s criminal conduct. In a television broadcast of quite fast moving patches of sight and sound, as this was, meanings may be conveyed or taken by impression rather than by linguistic analysis. The knowledge that the ordinary viewer would have at the time the words complained of were published would include the understanding that what Speight and his accomplices had done in using force of arms to capture Parliamentarians and others and keep them hostage to his criminal ambitions was in the execution of a premeditated plan. Accordingly if one were to say that a person had *bankrolled* that activity, one would be conveying the meaning that such person was also criminally involved in the activity, had intended activity of that type, and had provided money for it to be effectuated. The broad details of the activity, such as the deliberate use of arms and kidnapping, would be comprehended by the very nature of the plot and any reasonable person would understand that whoever financed the activity, knowing its nature, would be complicit in the specific offences fundamental to the effectuation of the scheme. Thus, whether the broadcast in question conveys a meaning of actual guilt or some degree of suspicion falling short

of actual guilt, the connotation of actual or suspected complicity in the acquisition of arms and the kidnapping of people is clearly present.

[18] However, I do not think the broadcast goes so far as to convey an imputation of actual guilt. When Mr Barnsley was asked who was actually behind the rebel cause, his relatively succinct response was qualified by the following references:-

- The police are trying to find out right now.
- The police have five well known businessmen in their sights.
- These are the people they suspect.
- Or under investigation.

[19] Counsel for the plaintiff submitted that in the known and visually broadcast employment of weapons by Speight's group the phrase "in their sights" conveys a meaning more immediate and dangerous than mere suspicion. In my judgment, however, the words cannot convey actual guilt rather than that the five businessmen are the aim or object of the police investigation. Yet the tenor of the broadcast goes beyond an imputation of mere suspicion or mere objective inquiry. The broadcast is reasonably capable of conveying that there is good reason to believe or suspect that some or all of the businessmen are guilty of aiding or abetting or conspiring with Speight as alleged; that some or all of the businessmen may well be guilty of the complicity alleged; and that there is a real likelihood of arrest of the persons being investigated.

Conclusion

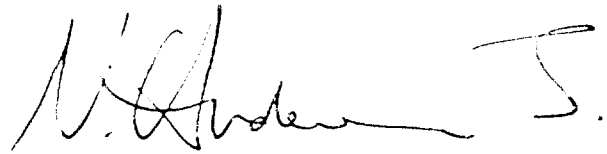
[20] For the above reasons I determine that the words complained of in their natural and ordinary meaning or by way of innuendo are not reasonably capable of the meanings set out in paragraph [6](1)-(3) hereof but are capable of the meanings set out in paragraph [6](4). However the words are reasonably capable of meaning that the plaintiff may well be guilty of aiding and abetting or conspiring with George Speight and others to commit the crimes of treason and kidnapping as particularly described in paragraph [6](1) and (2) hereof, and that there was a real likelihood that the police authorities in Fiji might arrest the plaintiff for the crimes of treason and/or kidnapping.

[21] If the plaintiff intends to amend his statement of claim to exclude the meanings which I have found are untenable and to substitute meanings in terms of

those indicated in the immediately preceding paragraph hereof, such an amended statement of claim should be filed promptly. I direct that if such amended statement of claim should be filed within seven days hereof then the defendants shall be required to file their statements of defence thereto within 21 days. If no such amended statement of claim is filed and served within seven days hereof, paragraph 8(1), (2), (3) and (4) and paragraph 9(1), (2), (3) and (4) of the present statement of claim shall be deemed to be struck out and the defendants shall file their statement of defence to the present statement of claim within 14 days hereof.

[22] The plaintiff has also sought directions in respect of the timetabling of this proceeding on the basis that the case is not complex and the plaintiff is suffering continuing damage by reason of the particular broadcast and others for which the defendants are not said to be responsible. In my view although this case, like all litigation, should be case managed in a way that ensures expeditious resolution, this case at present has no particular indications for priority or swift track treatment. It may be expedient to assign it to a particular Judge at an early stage and a decision will be made in that respect in the near future. If there is such an assignment the assigned Judge will no doubt arrange for an early conference.

[23] I fix costs as 2B but reserve the question of to whom and by whom they shall be paid.

A handwritten signature in black ink, appearing to read 'NC Anderson J.', written over a horizontal line.

NC Anderson J