IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY **CP No. 412/SD99**

BETWEEN	**PPCS LIMITED**
	Plaintiff
A N D	**NZ RURAL PRESS LIMITED**
	First Defendant
A N D	**DAVID W RITCHIE**
	Second Defendant

Date of Conference: 6 March 2000

Present: Mr S Mills, Ms K Harrison and Mr D Kwok
Mr D Hardy and Mr D Ritchie (by telephone)
M R Camp Q.C. and Ms M Kingswood (by telephone)

Judgment: March 2000

RESERVED JUDGMENT OF CARTWRIGHT J

Chapman Tripp Sheffield Young, DX CP24029 Auckland, for Plaintiff
Phillips Fox, P O Box 2791 Wellington
Scannell Hardy, DX MA75027, Hastings
M R Camp Q.C. DX SP26514, Wellington

[1] In September 1999 the plaintiff PPCS Limited (PPCS) filed a statement of claim against NZ Rural Press Limited as first defendant, and David W Ritchie as second defendant, seeking against each defendant:

[a] a declaration under s.24 of the Defamation Act 1992 of liability to the plaintiff in defamation;

[b] a recommendation under s.26 of the Act that a statement be published in the *'New Zealand Farmer'* correcting the defamation's complained of;

[c] a consequential recommendation under s.27 of the Act concerning the content, time of publication and prominence of the correction or corrections; and

[d] costs on a solicitor client basis were also sought against each defendant.

[2] On 28 October 1999 a conference under s.35 of the Act was convened. The plaintiff filed a full memorandum. Counsel for the two defendants, who had yet to file statements of defence, sought to treat the conference as an opportunity for the plaintiff to satisfy the defendants that the defendants were wrong. Regrettably representatives only of the first defendant attended that conference at which early indications were that a settlement might be achieved as between it and the plaintiff.

[3] Subsequently the plaintiff and the first defendant achieved settlement under the terms of which an apology and a correction was published in *"The New Zealand Farmer"*. In addition, an article dealing with the imposition of the US lamb quotas was published. A covenant not to sue was executed and a notice of discontinuance has been filed.

[4] Consequently the plaintiff proceeds now only against the second defendant who has briefed new counsel and filed a defence. A directions conference was

convened and used as the opportunity for the plaintiff to seek the exercise of the Court's powers under ss 26 and 27. Again the second defendant did not attend in person. A telephone link was established so that he, counsel and his instructing solicitor could participate in the argument from a distance.

The defamatory imputations

[5] It is the plaintiff's claim that in their natural and ordinary meaning the passages in the letter to the Editor of the *'New Zealand Farmer'* published on 22 July 1999, conveyed a series of imputations each of which was defamatory of the plaintiff:

[a] That the plaintiff has been solely responsible for the recent imposition of quotas on New Zealand lamb sales to the United States of America, which resulted from conduct by the plaintiff that was self-interested, heedless of the damage it might cause to the livelihoods of many New Zealand farmers, and deliberate.

[b] The plaintiff bears direct responsibility for the introduction of US tariffs on lamb, which will impose severe costs, in the vicinity of $2 - $5 per lamb, on all lamb exporters. The plaintiff's conduct has damaged the livelihoods of many New Zealand farmers.

[c] The plaintiff has not honoured its obligations as a farmers' co-operative which commits to act for the mutual benefit of all of its members; to the contrary it has deliberately ignored the need to act co-operatively and for the mutual benefit of its farmers and has been completely unconcerned with the impact of its actions on lamb exporters to the United States.

[d] The plaintiff either knew that the United States supermarket chain to which it was supplying lamb would be marketing the lamb in a way that would jeopardise future lamb sales to the United States and the future livelihoods of New Zealand sheep farmers, or it was

> commercially naive and reckless in not finding this out before it decided to supply and continue to supply lamb products.

[6] In his first amended statement of defence the second defendant denied that the passages in the letter carried the natural and ordinary meaning which the plaintiff alleged and, further, denied that the four pleaded imputations are capable of being drawn from the passages quoted and that they are defamatory of the plaintiff. The second defendant raised two affirmative defences of truth and of honest opinion and an alternative defence of qualified privilege.

[7] It has always been the plaintiff's stance that although its claim was limited to a declaration under s.24 and a recommendation under ss 26 and 27 of the Act, if the matter seemed likely to proceed to trial it might consider seeking damages against the second defendant.

Should Sections 26 and 27 be invoked prior to a Hearing?

[8] Counsel for the second defendant submits that while s.35(2)(b) of the Act gives the Court the power either with the consent of the parties or on the application of the plaintiff to exercise the powers conferred on it by ss 26 and 27 of the Act, it is "unthinkable that this power should be used on an interlocutory application without evidence or full discovery". In counsel's submission, to grant the plaintiff's application would in effect be to give the very declaration sought at trial.

[9] The discretion to exercise the powers conferred in ss 26 and 27 are also specifically included in part of more general powers to call a conference and give directions under s.35. That section is clearly directed at early identification of matters in issue and resolution of the issues between the parties. Sub-section (1) provides:

> "For the purpose of ensuring the just, expeditious, and economical disposal of any proceedings for defamation, a Judge may at any time ... direct the holding of a conference of parties or their counsel, presided over by a Judge".

Parliament clearly intended that firm judicial management should be applied to defamation disputes, which can on occasion be characterised by the pursuit of principle at great cost to individuals. It is with this background that the plaintiff submits that it is appropriate to make the recommendations sought. Counsel for the plaintiff submits that on any reading the letter written by him is capable of carrying the series of defamatory imputations. As the defendant denies that it is capable of bearing those meanings, it is appropriate for the Court to rule on that issue, and if it rules in its favour, then as a natural consequence the recommendations for correction and publication ought to be made.

[10] It has long been settled that it is for the Judge to determine whether words used are capable of a defamatory meaning, while the Jury's role is to determine whether in fact the construction for which the plaintiff contends ought to be attributed to the published letter. Whether the words are capable of a defamatory meaning is treated as a question of law. As the learned authors of *Gatley on Libel and Slander* 9th ed at 34.3 put it:

> "In determining whether the words are capable of a defamatory meaning the Judge will construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might extract from them. The reasonable reader is not naive but not unduly suspicious, can read between the lines, can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. "The Court should be cautious of an over-elaborate analysis of the material in issue"".

[11] This division of responsibility between Judge and jury has been carried forward into s.36 of the Act which states:

> "FUNCTIONS OF JUDGE AND JURY IN RELATION TO MEANING OF MATTER –
>
> Where any proceedings for defamation are tried before a Judge and jury,-
>
> (a) The submissions of the parties on whether the matter that is the subject of the proceedings is capable of a defamatory meaning; and
>
> (b) The ruling of the Judge on that issue—

shall be made or given in the absence of the jury."

[12] Parliament therefore clearly intended that the ruling on the question of law should be given independently of the jury's determination of questions of fact. Indeed, Parliament must also have intended by giving the Court the powers to make the recommendations contemplated in ss 26 and 27 of the Act in a conference convened prior to hearing, that such a question of law might well be determined at a time entirely separate from the hearing itself. Support for this approach can be derived from *TV3 Network Ltd v Eveready New Zealand Ltd* CA 1993, 3 NZLR, 435 at 439 in which Cooke P considering whether the Courts have jurisdiction to grant an injunction requiring corrective advertising said:

> "In the argument for the present appellants much weight was placed on the point that in the Defamation Act 1992, ss 26 and 27, Parliament has not gone further than conferring on the Court powers to recommend corrections. We were referred to the speech of the Minister of Justice, the Hon D A M Graham, on the third reading of the Bill (531 New Zealand Parliamentary Debates 12331) which shows that the original proposal to enact mandatory powers was abandoned. But, although the Minister mentioned that the media opposed such a provision as an infringement of press freedom, the reason actually given by him for the change was that the Court could not order a correction until it had given a final judgment in favour of the plaintiff; that could be two or three years after the proceedings had been filed; a correction order then would be a waste of time or make the matter worse for the plaintiff".

[13] Applying this reasoning to the present instance, should I consider it appropriate to make the recommendations sought, any ongoing damage to the plaintiff by reason of failure to retract or correct imputations contained in the second defendant's letter will be modified. Although it must be said that the period that has now elapsed may well result in fresh interest being aroused in the story if a correction is published some eight months after original publication. However, further delays to trial can only aggravate any damage which the plaintiff might suffer should a jury find in its favour.

[14] For these reasons I do not accept Mr Camp's submission that it is impossible to separate any ruling on the question of whether the words are capable of bearing the meaning pleaded from the factual issues. In the present case, should the

defendant decide to proceed to a hearing it will be for the jury to determine whether the words used in fact bear the meanings imputed. That of necessity would involve a consideration of the affirmative defences of truth and honest opinion as factual issues. I therefore conclude that it is appropriate to consider making the recommendations sought at an interlocutory stage in the proceedings.

[15] The remaining question is whether it is appropriate, first, to consider whether the letter is capable of bearing the meanings asserted by the plaintiff and, then, whether to grant the orders sought. The letter as published read as follows:

> "PPCS APPROACH HAS BEEN ISOLATIONIST
>
> Sir,
>
> As a New Zealand lamb producer I wish to express my extreme disappointment and outrage at the imposition of a 9% tariff immediate and a 40% tariff on volume in excess of 1998 levels, for our lamb trade by the US Government.
>
> There has been much comment recently about the US commitment to free trade when it suits, yet I think on this issue we need to dig a little deeper and try to identify the facts that led to such action.
>
> The performance of New Zealand meat companies in the lamb market has generally been sound.
>
> In the US, the performance of our lamb marketing by the owners of the New Zealand Lamb Company has been a success story.
>
> There has been strong in-market co-operation, particularly for customer requirements and continuity of supply of the right product, with the result that prices and volumes have risen.
>
> This performance and ensuing benefits to the New Zealand lamb producer may have been compromised and put at risk by the actions taken in this market by one New Zealand company, PPCS.
>
> The volumes of lamb products consumed in the US on a per head basis, are extremely small. The products are mostly niche value cuts, which are attractively presented, innovative and sought after by the consumer.
>
> The market itself, for new and interesting products, is huge. So why, with small consumption and heavy competition from other meat-based products, do we supply a supermarket chain such as Winn Dixie, not once, but twice, with these niche value products, where they will be used for "loss leaders" for in-market promotion?

Surely there must be some idea of what purpose and value a marketing agent and supermarket will place on such a successful product as New Zealand lamb in the US market, before commitment to supply is made.

This isolationist approach by PPCS and the consequences of its actions may have imposed a direct cost on every lamb producer in New Zealand supplying the US market.

The quantum of this cost has not been identified, but it relates to price received, volume supplied and future market growth potential. Estimates place the cost between $2 and $5 per lamb.

Are lamb producers in New Zealand so well rewarded for their efforts that we can afford this added cost imposition because of the unco-operative and thoughtless approach to the market?

There is no doubt who will bear the cost for such stupidity. It won't be the processing companies or their shareholders; it will only be the producer.

It is ironic that the New Zealand company which has been identified, is a grower co-operative run by farmers co-operating for the mutual benefit of their members.

Other issues that are raised as a consequence:

- The meat industry still does not understand that a co-operative approach must become an essential ingredient to successfully return a reward to suppliers and shareholders.

- That there is no mechanism to take a case for compensation against a company when a government-to-government action is imposed that will effect the producer so badly.

- That Meat New Zealand reserves cannot effectively be used for such an in-depth investigation required for possible future action.

- That the make up of the Meat NZ Board, comprising farmers and processor CEOs, precludes accountability and a sound review process.

My final comment is directed at any meat company involved in such activities, where there can be no winners, only losers; and future market potential disrupted.

The facts are, as a winter lamb producer, I am now required to bear a cost that is unnecessary. And that Meat New Zealand, which purports to represent my interests for the use of the levy monies extracted, has failed to be accountable in the market.

> The New Zealand Lamb Company, a success story because of sensible in-market co-operation and meeting customer requirements, has been substantially disadvantaged.
>
> If the market activities of PPCS with Winn Dixie, not an exclusive arrangement as claimed, had not happened, would such a tariff impost have been able to be imposed? I doubt it.
>
> D.W. Ritchie
>
> Otane, Hawke's Bay"

Are the words capable of bearing the meaning asserted by the Plaintiff?

[16] The use of the phrases *"... put at risk by the actions taken in this market by one New Zealand company, PPCS"*, *"This isolationist approach by PPCS ..."* and *"If the market activities of PPCS ... had not happened would such a tariff impost have been able to be imposed? I doubt it"*, when read together with the headline *"PPCS approach has been isolationist"* are capable of implying that the plaintiff has been solely responsible for the imposition of quotas on New Zealand lamb sales to the United States.

[17] The use of the terms *"This isolationist approach by PPCS and the consequences of its actions may have imposed a direct cost on every lamb producer in New Zealand supplying the US market"* may imply self-interested conduct which takes no cognisance of the damage that might be caused to the livelihoods of many New Zealand farmers, and, moreover, may be capable of meaning that the plaintiff's actions were deliberate given the usual and often pejorative meaning ascribed to the word *"isolationist"*. I also note that in order to be termed *"isolationist"* the plaintiff must have intended to follow that course of action. I am therefore satisfied that the words are capable of bearing the meaning suggested by the plaintiff. Although I am not fully convinced that the words are capable of implying self interest, I remind myself of the need to resist an over legalistic interpretation and to construe the words according to "the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence ...". (Gatley infra)

[18] The words *"This performance and ensuing benefits to the New Zealand lamb producer may have been compromised and put at risk by the actions taken in this market by one New Zealand company PPCS"* inevitably implies that the plaintiff has direct responsibility for the imposition of US tariffs on lamb; as do the words *"This isolationist approach by PPCS and the consequences of its actions may have imposed a direct cost on every lamb producer in New Zealand supplying the US market"* and *"If the market activities of PPCS ... had not happened, would such a tariff impost have been able to be imposed? I doubt it"*.

[19] *"Estimates place the costs between $2 and $5 per lamb"* is clearly intended to imply that such costs will be borne by New Zealand lamb exporters as are *"The facts are, as a winter lamb producer, I am now required to bear a cost that is unnecessary"* and *"There is no doubt who will bear the costs for such stupidity"*. The reader would naturally come to the conclusion that the plaintiff's conduct has damaged the livelihoods of many New Zealand farmers.

[20] The use of the words *"... this added cost imposition because of an unco-operative and thoughtless approach to the market ... It is ironic that the New Zealand company which has been identified, as a grower co-operative run by farmers co-operating for the mutual benefit of their members"* and *"The meat industry still does not understand the co-operative approach must become an essential ingredient ..."* when contrasted with the statement *"The New Zealand Lamb Company, a success story because of the sensible in-market co-operation and meeting customer requirements ..."* are capable of bearing the meaning contended for by the plaintiff that it has not honoured its obligations as a farmers' co-operative committed to act for the mutual benefit of all of its members and that, to the contrary, it has deliberately ignored the need to act co-operatively and for the mutual benefit of its farmers. Apart from the term *"... thoughtless approach to the market"* there appears to be no basis for suggesting an imputation that the plaintiff has been *"completely unconcerned with the impact of its actions on lamb exporters to the United States"* as alleged in paragraph 9.3 of the statement of claim. *"thoughtless"* and *"completely unconcerned"* even to the ordinary reader are not interchangeable statements.

[21] In putting the rhetorical question *"So why ... do we supply a market chain ... not once, but twice, with these niche value products where they will be used for "loss leaders" for in-market promotion?"* is clearly capable of the meaning the plaintiff alleges: That the plaintiff either knew or was commercially naive and reckless in not finding out before it decided to supply and continue to supply lamb products, that the United States supermarket chain would market the lamb in a way which would jeopardise future lamb sales to the United States and the future livelihoods of New Zealand sheep farmers. This imputation is borne out by the statement *"Surely there must be some idea of what purpose and value a marketing agent and supermarket will place on such a successful product as New Zealand lamb in the US market, before commitment to supply is made"*.

[22] With the exception of one aspect of the allegations made by the plaintiff I have concluded that the words used are capable of bearing the meanings stated. The test is an objective one and, as I have already held, to be applied uncluttered by detailed analysis.

Recommendations

[23] If recommendations are made under ss 26 and 27 then the second defendant will be placed in the position of taking an even greater risk than he presently does in pursuing his defence at trial. In effect, recommendations made by the Court in these circumstances would place considerable pressure on the defendant to consider settlement for pragmatic rather than principled reasons. While this may be a logical conclusion for the second defendant to draw in any event, the making of the recommendations is not a course that would be taken lightly except in the context of a settlement conference where issues by and large have been isolated and agreement reached. It seems to me that simply because the words complained of are capable of bearing the meaning the plaintiff alleges, it does not necessarily follow that the Court ought to recommend publication of a correction even where, as here, the defendant states simply that he does not accept that they are capable of bearing the meaning the plaintiff suggests.

[24] I am conscious, too, that the first defendant has published a retraction. That in itself places the second defendant in an invidious position. If he is to continue to defend this action then he must shoulder total responsibility. In the present case, while there is still the possibility that a jury might find as a matter of fact that the words do not bear the meaning the plaintiff suggests, then I think it inappropriate to require the defendant to publish a correction. To do so would in effect leave him with no realistic defence. On the one hand he would urge a jury to accept either that the words were true or that he held an honest opinion to that effect, while on the other hand, in order to protect himself from solicitor/client costs, he will have had little option but to publish a retraction. Even if a retraction is not mentioned at trial, there is the risk that a member of the jury will have read it. If he does not follow the recommendation then he faces not only an adverse jury finding but, if the plaintiff amends its statement of claim, also an award of damages as well as solicitor/client costs.

[25] It will be clear to the parties that I do not consider the defendant to be in a strong position to pursue his defence. Nonetheless, I am not prepared in the exercise of my discretion to make his task impossible. I therefore decline to make the recommendations sought.

Discovery

[26] There are still outstanding questions relating to discovery but counsel are working to resolve these. If necessary, on the filing of a memorandum, I will rule on any remaining issue.

Settlement Conference

[27] Mr Ritchie has yet to attend a settlement conference or a directions conference in person. Counsel should give consideration to a further conference before proceeding to seek a date for hearing. The matter is adjourned to a date to be set by the Registrar either for a pre-trial conference or for a settlement conference under s. 35 of the Act.

Costs

[28] The plaintiff has been successful in obtaining rulings that the words complained of are capable of bearing the meaning it suggests, while the defendant has successfully resisted recommendations under ss 26 and 27. No costs will be fixed in relation to this application. However, in general, costs under the Category 2B will be fixed on all future applications subject, of course, to application to the contrary.

Search of File

[29] The file is not to be searched without the authority of a Judge or Master.