IN THE COURT OF APPEAL OF NEW ZEALAND CA125/00

BETWEEN	ROSS HAROLD VICKERY	
	Appellant	
AND	THOMAS MCLEAN	
	First Respondent	
AND	CHRISTOPHER JOHN SMALE	
	Second Respondent	
AND	GEOFFREY KEITH PHILLIPS	
	Third Respondent	

Hearing:	7 November 2000
Coram:	Gault J Thomas J Keith J Blanchard J Tipping J
Appearances:	P T Finnigan and S E K Reeves for Appellant J G Miles QC and A D Banbrook for Respondents
Judgment:	20 November 2000

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

Introduction

[1] This appeal from Hammond J seeks to extend the ambit of qualified privilege for political discussion beyond what was determined in *Lange v Atkinson* [2000] 3 NZLR 385 (*Lange No. 2*). In the High Court it was held that the occasion on which the appellant (Mr Vickery) defamed the three respondents (Messrs McLean, Smale and Phillips) was not one of qualified privilege. The Judge's primary reason was that there was "wider publication than was required". Mr Vickery has challenged the

Judge's conclusion, contending essentially that by analogy with *Lange No. 2*, or by a justified extension of that decision, the occasion of publication was one of qualified privilege.

The material facts

[2] At the relevant time the three respondents were employed officers of the Papakura District Council (the Council). Mr McLean was the Chief Executive Officer, Mr Smale was the Director of Works, and Mr Phillips the Director of Finance. In 1996 some councillors and senior officials started to investigate the feasibility of the Council contracting out the provision of water and waste water services within its district. At a meeting on 9 December 1996 the Mayor put a proposal to the Council that these two operations should be franchised, ie. operated by an outside organisation over a lengthy contractual period of time. It was thought this would save ratepayers money. The Council was of the view that, although it did not have to engage in formal public consultation on this proposal, it should do so voluntarily. A six week period was fixed for receipt of public submissions. A special meeting was held commencing on 29 January 1997, at which the submissions received were considered.

[3] Mr Vickery is a long term resident of Papakura. He had stood unsuccessfully for Council in 1995. He was Chairman of the local Ratepayers Association and was firmly opposed to the franchising proposal. He became aware of the proposal only when he saw the agenda for a Council meeting to be held on 10 February 1997. He attended that meeting and, because of what he saw as an omission from the Minutes, became suspicious of "what was going on at the Council". The prospective franchisee, in terms of a resolution of the Council at its 10 February meeting, was a partnership called United Water. One of the partners was an organisation called Generale Des Eaux. A document came into Mr Vickery's hands from a Ms Graham, suggesting Generale had been involved in corruption scandals overseas. Having come to the view that United Water's tender for the franchise was a "jack up", Mr Vickery tried to get speaking rights at subsequent Council meetings but failed. He was advised by Mr McLean of his right to approach the Ombudsman and the Auditor-General. He did so. The Ombudsman declined to intervene for want of

jurisdiction, but suggested appropriate ways in which Mr Vickery might pursue his concerns. The Auditor-General did, however, look into the matter and produced a report in April 1998 in which no suggestion was made that either the Council or its officers had committed any impropriety.

[4] Mr Vickery became "increasingly strident", as the Judge put it. On 14 April 1997 he wrote to Mr McLean referring to "abuse of power by elected and employed officials of the Council". Mr McLean invited him to state more specifically what his concerns were but received no response to this invitation. Mr Vickery decided to go public. He had learned that Ms Graham had approached the Serious Fraud Office about the matter and, on seeing a copy of her letter of complaint, Mr Vickery became even more suspicious about what was going on when he saw a suggestion in the letter that "criminal irregularities may have taken place". Mr Vickery and those supporting him publicly distributed a document making suggestions of procedural irregularities and alleging that Generale "had been involved in corruption scandals involving water contracts in three countries". On 28 April 1997 a local newspaper published a report quoting Mr Vickery as saying that "the Serious Fraud Office was investigating United Water over allegations of bribing city officials in three countries". Mr Smale, who was named in the article, was at the time acting Chief Executive Officer. He consulted the Council's solicitors, both on behalf of himself and Messrs McLean and Phillips, and in relation to the Council's position. The solicitors wrote to the newspaper which promptly retracted and apologised.

[5] On 3 June 1997 Mr Vickery himself wrote to the Serious Fraud Office. He made a variety of complaints concerning Mr Smale's redundancy package and his honesty. He also suggested the Serious Fraud Office should question "all councillors and executive staff" on the basis that there was some corrupt dealing between the Council and United Water. Three days later on 6 June 1997 Mr Vickery wrote to three newspapers, two local and one national (the New Zealand Herald). This letter formed the main plank of the respondents' case as plaintiffs in the High Court. The letter said:

"To whom it may concern.

Former Chairman Papakura Residents & Ratepayers Ass. Inc. Chairman Papakura Concerned Citizens.

On Wednesday 14 June 1997 I laid a complaint with the Serious Fraud Office regarding actions of the Papakura District Councils decision to franchise the Water & Wastewater services for up to a fifty year period.

There was serious enough circumstantial evidence to suggest that criminal irregularity may have taken place. (Italics added).

I laid this complaint in my own personal capacity as a ratepayer of the Papakura District.

Yours sincerely

Ross Vickery

[6] The New Zealand Herald made reference to the subject on 11 June 1997 under the headline "Water Supply Battle Takes a Bitter Turn". Nothing actionable was alleged to have been published in this article. On 14 June the Serious Fraud Office informed Mr Vickery that the available evidence did not sustain the allegations he had made. On 15 June the Mayor of Papakura called for apologies from those who had been running a programme which questioned the honesty and integrity of the Council and its officers. Mr Vickery made no apology.

[7] The respondents commenced proceedings for defamation based primarily on the "To whom it may concern" publication of 6 June. They each claimed compensatory damages of $250,000 and exemplary damages of $20,000. The jury found the words complained of to be defamatory and, by reason of matters to which it is not necessary to refer, that they had been published of and concerning the respondents. The Judge rejected Mr Vickery's defence of qualified privilege in the judgment now under appeal. The jury had on a precautionary basis been asked to say whether Mr Vickery had lost any such privilege by dint of s19 of the Defamation Act 1992. They held that, if in law the occasion was privileged, Mr Vickery had not misused the privilege. Messrs McLean and Phillips were each awarded $10,000 by way of general damages, and Mr Smale $35,000. No exemplary damages were awarded.

High Court judgment

[8] The Judge noted that after the conventional parts of the plea of qualified privilege, Mr Vickery had described the publications in issue as "political expressions". In the accompanying particulars reference was made to various aspects of the circumstances including the proposition that the Council owed statutory obligations "of openness, accountability, and process", and that a long term agreement relating to a critical natural resource such as water was a matter of great public interest.

[9] The Judge then referred to the decisions of the High Court of Australia in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, and of this Court in *Lange v Atkinson* [1998] 3 NZLR 424 (*Lange No. 1*). The judgment under appeal was delivered before delivery of the judgment in *Lange No. 2*. Hammond J was, however, able to make reference to the decision of the House of Lords in *Reynolds v Times Newspaper Ltd* [1999] 3 WLR 1010. He noted that nothing in English, Australia or New Zealand jurisprudence came close to the approach of the American Supreme Court in *New York Times v Sullivan* 376 US 254 (1964). Mr Vickery has not contended for a privilege of that kind or compass.

[10] In relation to the present case the Judge said he could see:

> nothing whatsoever under the law as it stood prior to the developments of which I have just been speaking which would afford Mr Vickery the defence he raises. And, none of the tests which have latterly been suggested in any of the British Commonwealth Courts would assist him either. It is only if some extreme doctrine which would throw a very large generic blanket - with very fuzzy edges - over something which could expansively be called "political speech" could be invoked that he would have any possible defence.

[11] After reference to *Cutler v McPhail* [1962] 2 QB 292, the Judge expressed his conclusion that any defence of qualified privilege Mr Vickery might otherwise have had was defeated by excess of publication. In accordance with a proper acknowledgement by Mr Miles, the Judge indicated that a communication, however intemperate, to the Council, to the Serious Fraud Office or to the Auditor-General, would have been privileged, but Mr Vickery's communication with the news media

was "a wider publication than was required. It was (at that point) outside the privilege".

Submissions in outline

[12] Mr Finnigan, in both his written and oral submissions, sought to emphasise that the whole topic of whether the Council should franchise its water supply and waste water services was one of major public interest in the district. That may be so, but the immediate topic was that of the alleged criminality of those involved in the franchising, and the three Council officers in particular. It is in that respect that the necessary shared interest referred to in *Lange No. 2* must exist. Mr Finnigan argued that the subject matter of Mr Vickery's publications was of a sufficiently "political" nature to qualify under the *Lange* rubric or a reasonable extension of it. He further contended that the width of the publications in question was no greater than was consistent with the asserted shared interest. Reference was made to a number of sections in the Local Government Act 1974 said to be relevant to the issues arising. Mr Finnigan was endeavouring to demonstrate that it was of no moment that the respondents were not themselves local body politicians but rather paid servants of the Council.

[13] He sought to draw general support from the fact that the jury had found that Mr Vickery had not misused the privilege, if it was held to exist. That submission appears to overlook the vital conceptual distinction emphasised in *Lange No. 2* at para [4] between whether an occasion is privileged and whether, if so, it has been misused. Counsel next presented argument in support of the view that if the *Lange* criteria otherwise applied, the law should logically be extended to cover local body as well as national politicians. Reference was next made to the five conditions as established in *Lange No. 1* and set out in *Lange No. 2* at para [10]. This submission did not take account of the fact that *Lange No. 2* expressly introduced a sixth criterion, namely that not only must the subject matter qualify for the privilege, but so too must the occasion: see *Lange No. 2* at para [41].

[14] For the respondents Mr Miles argued that Mr Vickery had no duty or proper interest in advising the public that he had laid a complaint with the Serious Fraud

Office, the more so when that advice was accompanied by the assertion that the complaint of serious criminal wrongdoing was supported by "serious enough circumstantial evidence". Nor, submitted Mr Miles, did the three newspapers have a proper interest in being advised that such complaint had been made. Furthermore, Mr Miles argued, the allegation of criminality was peripheral to the primary question Mr Vickery appeared to be trying to discuss, namely the alleged duty of "openness, accountability, and process" which the Council was said to have breached. As an overriding point Mr Miles contended that the press release made by Mr Vickery, advising of a complaint to the Serious Fraud Office involving Council employees together with the basis of such complaint, did not amount to political discussion of any kind, much less within the criteria established by *Lange No. 2* or any rational development of them.

Discussion

[15] All occasions of qualified privilege are based on an identified public interest in allowing people to speak and write freely, without fear of proceedings for defamation unless they misuse the privilege. On occasions of privilege the public interest is seen as prevailing over the protection of individual reputations. The price of the freedom is the requirement that the privilege be responsibly used. When the Courts are asked to find that a particular occasion, not directly covered by authority, is one which should attract qualified privilege, the ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between freedom of expression and protection of reputation accordingly. It is unnecessary for us to decide whether *Lange No. 2* should be extended to cover political discussion in the context of local government. This is because even if such extension were made, we are satisfied the present occasion should not be held to be within any such extended privilege. The rationale for the *Lange* privilege cannot be regarded as applying to the present circumstances.

[16] The essentials of the occasion at issue in the present case can be described in the following way. A disgruntled ratepayer advises the news media that he has good reason to contend that three senior servants of the Council have been guilty of corruption. He has therefore asked the Serious Fraud Office to investigate. The

publication is, ex hypothesi, defamatory of the plaintiffs otherwise the need for the asserted privilege would not exist. The context of the publication is a general complaint about the processes of the Council in tendering the franchising of its water and waste water services.

[17] It is of major moment to notice that those who have been defamed are not politicians, whether national or local. They are paid servants of a local body. They may contribute to policy making but they are not the ultimate policy makers. The subject matter of Mr Vickery's publications cannot sensibly be regarded as political discussion, much less political discussion of a kind contemplated by *Lange No. 2* or any rational extension of that decision. What is more, the subject matter, even if capable of being regarded as political discussion, involves an allegation of serious criminality. The law has been clear for many years that such allegations or complaints, provided they are bona fide, may be made to the appropriate authorities under qualified privilege. But the privilege is lost if the allegations are disseminated beyond those whose proper function it is to investigate and, if appropriate, to act upon them: see *Gatley on Libel and Slander* (9th edition 1998) at para 14.55; *Truth (New Zealand) Ltd v Holloway* [1960] NZLR 69 (CA); and *Blackshaw v Lord* [1984] QB 1 (CA). Thus, even if this case could be brought within the first five of the six *Lange* criteria, it does not satisfy the sixth, as we will shortly indicate. This is because publications which are disseminated too widely are not made on a qualifying occasion (*Lange No. 2* at paras [21] and [22]).

[18] If, as we hold, the present case cannot be brought within any appropriate development of *Lange No. 2*, it is necessary for Mr Vickery to establish his asserted privilege by reference to first principles. He must show that it is in the public interest, (for the common convenience and welfare of society, as Parke B classically put it in *Toogood v v Spyring* (1834) 1 CM & R 181, 193; 149 ER 1044, 1050), that on an occasion such as the present, freedom of expression should prevail over protection of reputation. More specifically he must show that it is in the public interest for people to be able to make allegations of serious criminal offending, albeit in a bona fide way, to or through the news media.

[19] Even if such allegations were responsibly made, it would be contrary both to settled law and to the public interest to allow such communications to be made under qualified privilege. We do not consider that society has changed in such a way as to justify a departure from previous perceptions of the public interest in this respect. It is, in our view, demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made, ventilated through the news media. That could only encourage trial by media and associated developments which would be inimical to criminal justice processes. Society has mechanisms for investigating crime and determining guilt or innocence. It is not in the public interest that these mechanisms be bypassed or subverted. Parliament's view, in the context of Serious Fraud Office matters, and it is a view of which the common law should take notice, can be found in ss 36 to 44 of the Serious Fraud Office Act 1990. These provisions are, broadly speaking, designed to prevent or limit disclosure of matters under investigation by the Office, and specified aspects of such investigations. Parliament has thereby recognised that the very fact that a Serious Fraud Office investigation is taking place can, of itself, cause serious damage to reputations and possible subversion of criminal justice processes. Thus, freedom of expression in this area has been curtailed to reflect Parliament's assessment of how to balance the competing interests.

[20] There is a final, rather unusual, point. The jury held that the statement primarily in issue was published of and concerning the three respondents, even though they were not named in it. Mr Vickery said in evidence that he did not intend what he said to apply to the respondents. In other words, he was claiming that he had accidentally or unintentionally defamed them, if the jury held, as it did, that the publication in its context would be understood as referring to them. Yet by asserting qualified privilege he was claiming in the same breath that he published the statement with an honest belief in its truth and pursuant to a proper interest or duty when communicating the respondents' asserted wrongdoing to the news media. The inconsistency is immediately apparent. We express no final conclusion on the point, which primarily goes to misuse. It is appropriate, however, to observe that unintentional defamation and qualified privilege are awkward bedfellows. It is difficult for Mr Vickery to say he believed in the truth of the assertion of criminality

he had made against the respondents, while at the same time saying he was not intending to refer to them.

[21] If we had held the occasion to be privileged the case would almost certainly have required retrial on the issue of misuse, both on this account and because the Judge did not have the benefit of *Lange No. 2* when directing the jury on the subject. It cannot be said with any confidence that the jury's view would necessarily have been the same. But as it is, any question of retrial on misuse does not arise.

[22] For the reasons given the Judge was right to hold that the occasion of publication in this case did not attract qualified privilege. The appeal is therefore dismissed. Costs are reserved to await the determination of Mr Vickery's application for legal aid for the appeal. Memoranda may then be filed if the matter is not otherwise capable of resolution.

Solicitors
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John Holmes, Auckland, for Respondents