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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP NO. 111/99

1414

BETWEEN COMMUNICATIONS TRUMPS LIMITED

Plaintiff

AND JEANETTE FITZSIMONS

Defendant

CP NO. 84/99

BETWEEN COMMUNICATIONS TRUMPS LIMITED & ANOR

Plaintiffs

AND RADIO NEW ZEALAND LIMITED

Defendant

Date of Hearing: 16 July 2001

Counsel: D B Collins QC for Plaintiff
 J W Tizard for Defendant

Judgment Date: 1 October 2001

JUDGMENT OF MASTER J C A THOMSON

[1] These are two defamation suits and the defendant in each case applies for summary judgment. I deal first with proceeding CP 84/99 against Radio New Zealand. In that case the first plaintiff is Communications Trumps Limited. It is a public relations firm and the second plaintiff is the managing director thereof. The first plaintiff was involved with a body called Gene Technology Information Trust

(Genepool). As appears from the Report of the Education and Science Committee of Parliament, Genepool was largely the initiative of several Crown Research Institutes. The trust was established on 1 May 1998 with the stated purpose of providing authoritative gene technology information to enable New Zealanders to make informed choices about the use of the technology. It set up an information programme called GenePool, which created an interactive website, produced information packs and an informational leaflet, set up a public help line to supply information, and ran a series of seminars around New Zealand. It ceased its activities in May 1999. Genepool received some funding from Crown Research Institutes. The first plaintiff was contracted to New Zealand King Salmon Co Ltd as its public relations advisor. The defendant applies for summary judgment of the plaintiffs' defamation claim against it on the basis that its defence of honest opinion must succeed. The plaintiffs' claim results from a Kim Hill radio broadcast on 7 April 1999. It is alleged in paragraph 6 of the Statement of Claim as follows:

“6. During the course of the programme Ms K Hill interviewed the Honourable S Upton MP and Miss P Bunkle MP about the role of the first and second plaintiffs in providing advice to a client of the first plaintiff, the New Zealand King Salmon Co Limited (King Salmon) The broadcast also included comments about the role of the first and second plaintiffs in relation to a trust called the Gene Technology Information Trust (Genepool).”

[2] It appears from the affidavit of Rachel Margaret Roberts, who is the senior producer for the defendant that the comments, the subject of the defamation claim, were first broadcast in a 7am news report on 6 April 1999. At paragraph 7 of her affidavit she says:

“The first of these broadcasts occurred on the 7am news report which precedes “Morning Report”. The text of that news report was:

It has been revealed that the New Zealand King Salmon Company was advised to keep secret a genetic experiment near Blenheim on big, fast-growing fish.

A document prepared for it by a Wellington public relations firm says that, if the experiment does become public, there should be no mention of deformities such as lumps on the fishes' heads.

The document, obtained by the Green Party, advises the company to consider how it can keep the project under wraps.

The Greens' co-leader, Jeanette Fitzsimons, says the secrecy supports public fears about genetic modification."

[3] In summary in the Statement of Claim the first plaintiff pleads in respect of the Kim Hill broadcast on 7 April 1999 that statements made during the programme (as set out in the Statement of Claim) meant, and were intended to mean, that the first plaintiff Communications Trumps Limited's role as provider of administrative services to Genepool, while acting as advisor King Salmon, constituted a conflict of interest which was unethical and unprofessional, and further that the first plaintiff acted in a way that was dishonest, not trustworthy and lacked integrity. The second plaintiff Norrey Simmons pleads likewise.

[4] The defendant's application for summary judgment is made on the following grounds:

- (a) The defamatory meanings alleged by the defendant (sic) rely on the words set out at paragraph 7 of the Statement of Claim, being words spoken by Kim Hill and the Honourable Simon Upton.

(b) Kim Hill and the Honourable Simon Upton have deposed that the words spoken by them respectively are their genuine opinions.

(c) The plaintiffs have not alleged that the defendant had cause to believe that the words spoken by Kim Hill and the Honourable Simon Upton were not their genuine opinions.

(d) No material facts on which their opinions were expressed are in dispute or capable of being disputed.

[5] The plaintiffs oppose the application on the following grounds:

1. The defence of honest opinion cannot succeed because the so called statements of honest opinion were not based upon fact, alternatively;
2. There are factual issues associated with the defence of honest opinion which cannot be resolved by way of affidavit evidence, and;
3. The defendant's application and supporting evidence cannot satisfy the Court that the plaintiffs' cause of action must fail, and;
4. The circumstances do not justify the Court exercising its discretion to grant the defendant's application.

[6] Affidavits in support of the defendant's application have been filed by Rachel Margaret Roberts, Fiona Anderson (Kim) Hill and The Honourable Simon David Upton. Ms Roberts sets out how the programme came to be broadcast and the events that occurred following it. Mr Upton says in his affidavit at paragraphs 13, 14 and 15 as follows:

13. In my view, in giving the advice it did, CTL counselled NZKS to keep information to itself or control the release of information in such a selective way that the public would not be fully informed of aspects, such as deformities, which may have given rise to public fear or suspicion or demands for further enquiry or examination.
14. In my opinion, suppressing information and controlling the release of selective information so as to create an impression which does not accord with the true facts is a form of dishonesty.
15. In my opinion, in acting for both NZKSA and Genepool, CTL had a conflict of interest that it failed to manage in an ethically and professionally responsible way."

[7] Kim Hill similarly deposes. The key document which gave rise to Jeanette Fitzsimons press release on 6 April 1998 was a draft strategy document prepared by the first plaintiff for King Salmon.

[8] As to that document an affidavit in opposition has been filed by Mr Steere, the Chief Executive of King Salmon. In paragraphs 3 and 4 of his affidavit he says:

- “3. The submission presented to the Royal Commission of Inquiry into Genetic Modification was written solely by employees of our company. Most of the document was written by scientists who worked on the company's Chinook Salmon growth trials and it sets out an objective overview of the Company's transgenic research programme involving growth enhanced Chinook salmon.
4. Communications Trumps Limited had been employed by the New Zealand King Salmon Limited to prepare communications

and marketing strategy documents covering all the company's substantial activities likely to have beneficial interest from consumers and the community. Communications Trumps Limited was engaged to undertake this task in October 1997. The last of those documents was completed in or about May 1998. A draft of one of those documents – the public relations strategy document – was apparently supplied to Ms Jeanette Fitzsimons. Ms Fitzsimons erroneously interpreted that document and her subsequent press release resulted in a barrage of inaccurate and highly emotive publicity about the advice Communications Trumps Limited gave our company. Ms Fitzsimons' press statement was released on 6 April 1999."

Defendant's argument

[9] The thrust of Mr Tizard's argument is that the defendant must succeed at summary judgment level in its defence of honest opinion. He argues:

- (a) To succeed in the defence of honest opinion, the defendant must establish that the words complained of or the defamatory imputations alleged are a matter of opinion. Whether such words or imputations are capable of being opinion is a question of law and whether they are in fact opinion is a question of fact. The answer to this question need not be a simple either/or; the words may be a combination of both fact and comment.
- (b) If the words or imputations are a matter of opinion then it is necessary to show that the facts upon which the opinion was based are true or not materially different from the truth. Specifically, where the matter complained of consists partly of statements of fact and partly of statements of opinion, the defence of honest opinion does not fail merely because the defendant does not prove the truth of every statement of fact. All the defendant has to show is that the opinion was a genuine opinion

having regard to those facts referred to in the publication which were true (or not materially different from the truth) and any other facts that were generally known at the time of the publication to be true (s.11 Defamation Act 1992).

[10] The propriety of the opinion he says is irrelevant. Opinions may be sound or unsound. That is not the issue in defamation. What is in issue is the honesty of the opinion. The test is whether the opinion is one which a person, however misguided or even bigoted, might hold or express with regard to those facts. In short, an opinion is still an honest one even though it may not be one which could be sustained when viewed objectively. It is an honest opinion so long as it was genuinely held and is an opinion which might be expressed having regard to the facts on which it was expressed.

[11] Mr Tizard argues that the most critical or fundamental fact upon which that judgment was expressed was the advice the plaintiffs gave King Salmon in the strategy paper. That advice has to be taken as the advice contained in the Green Party's press release and it was in that form when Kim Hill and the Honourable Simon Upton made their remarks. All the remarks relied on in the strategy paper appeared not only in the draft which was leaked but also in its final form. Mr Tizard says there can be no dispute that the plaintiffs gave the advice which was the subject of the comments made by Kim Hill and The Hon Simon Upton. Mr Tizard says that the plaintiffs cannot attempt to defeat the defence of honest opinion by relying on differences appearing in the draft and the final advice. He says it is not arguable that Kim Hill and the Hon Simon Upton could not have formed the opinions they did, namely that the plaintiffs had acted unethically in giving the advice they did. That,

he says, is also the position concerning their comments that the plaintiffs acted unprofessionally, were dishonest, were not trustworthy and lacked integrity. Furthermore he says the claim by the second plaintiff that the role of both plaintiffs for Genepool was administrative only cannot be sustained. He says, despite Ms Simmons assertion to the contrary, there can be no real argument that the plaintiffs were the public face of Genepool and paid for its services.

[12] Mr Tizard says in the case of Kim Hill, the provisions of s.10(2)(a) of the Defamation Act 1992 apply as she was an employee or agent of the defendant, who must therefore prove that her opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be its opinion and that it believed the opinion was her genuine opinion.

[13] In the case of the Hon Simon Upton, the provisions of s.10(2)(b) of the Defamation Act 1992 apply as he was not an employee or agent of the defendant, it must therefore prove that his opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be its opinion and that it had no reason to believe the opinion was not his genuine opinion.

[14] Where a defendant relies on the defence of honest opinion, if the plaintiff intends to allege, in relation to any opinion where the opinion was that of a person other than the defendant, that the defendant had reasonable cause to believe the opinion was not the genuine opinion of that person, the plaintiff must serve on the defendant a notice to that effect giving appropriate particulars (see s.39 Defamation Act 1992).

[15] The plaintiffs have served no notice pursuant to s.39 of the Defamation Act 1992. Mr Tizard submits there can therefore be no dispute as to the genuineness of the opinions of either Kim Hill or the Hon. Simon Upton and therefore the defendant's reliance on those opinions. Moreover, each has sworn that the opinions they expressed were their genuine opinions and there is nothing in the affidavits in answer which would dispute that.

[16] The only bases, therefore Mr Tizard says upon which the plaintiffs could impugn the defence of honest opinion are:

- The words complained of were not opinions; or
- The opinions were based on erroneous facts; or
- The facts upon which the opinions were based are disputed and cannot be resolved without trial.

Plaintiff's argument

[17] In opposing the application Mr Collins referred to the law as to honest opinion as set out in the Law of Torts in New Zealand 3rd (Ed) Todd paragraph 16.8 2(b) where the author says:

“The defence of honest opinion will not protect a defendant if he or she comments on things which never happened or which he or she got wrong”.

[18] He argues that “the opinion” must be a recognisable opinion.

[19] Mr Collins says the focus of the Radio New Zealand proceedings is upon the allegations set out in paragraphs 7.1 to 7.7 of the statement of claim which are extracts from the transcript of the Kim Hill programme. There are two separate features to the claim against Radio New Zealand namely:

- (a) The Kim Hill programme alleged Communications Trumps and Ms Simmons had a conflict of interest when assisting Genepool and advising King Salmon; and
- (b) The advice given by Communications Trumps and Ms Simmons to King Salmon was unethical, unprofessional, dishonest and lacking in integrity.

[20] For the purposes of defeating the summary judgment application he says it is sufficient to address the allegation identified in paragraph (b) above.

[21] Mr Collins submits the advice which Communications Trumps gave King Salmon was accurate. It was totally consistent with what Ms Simmons has deposed was her knowledge and the knowledge which Communications Trumps had about the King Salmon research programme. Before advice can be characterised as “unethical, unprofessional or dishonest” he says it would have to be established that:

- (i) The advice was wrong; and
- (ii) The advice was tendered to King Salmon in circumstances where Communications Trumps and Ms Simmons knew the advice they were giving was wrong.

[22] Mr Collins says neither of these factual elements can be established by the defendant because:

- (i) The advice was correct; and
- (ii) The advice was tendered honestly, ethically and professionally.

[23] The key evidence that the advice was correct, the plaintiffs submit, comes from Mr Steere who has confirmed that statements made by King Salmon on 6 April 1999 were correct. Paragraphs 11 and 12 of his affidavit are as follows:

- 11. When Ms Fitzsimons' press release generated media interest in April 1999 our company endeavoured to explain what was happening in our research programme. Mr Mark Gillard, the Aquaculture Operations Manager of New Zealand King Salmons went on national radio with Ms Fitzsimons on 6 April 1999. During the course of the interview Mr Gillard explained that some of the deformities had been seen in the salmon involved in the growth enhancement trials, but that such deformities and variability were also seen in salmon not involved in the trial. Deformities are observed in all fish and animals, these are natural phenomena. I understand a transcript of Mr Gillard's radio interview was presented to the Court in this proceeding by Communications Trumps Limited.
- 12. The statements made by Mr Gillard were accurate, and are reflected in the submission made by New Zealand King Salmon Co Ltd to the Royal Commission of Inquiry Into Genetic Modification. The essential point is that while some minor deformities were observed in salmon involved in the growth trials, deformities are also found in salmon that are hatched and grown normally.

[24] As to keeping transgenic programme secret Ms Simmons has said in her affidavit at paragraph 42:

“In the PR strategy document Communications Trumps rhetorically asked NZKS if there was any point in maintaining secrecy about the trials if information about the trials were discoverable under the Official Information Act. The purpose of putting that rhetorical question to NZKS was to emphasise there was little point in trying to make the research programme secret.”

Conclusion

[25] Given the conflicts on the affidavits I am not satisfied that the facts relied on by the defendant are so patently clear that there is no room for dispute. Mr Tizard has been unable to persuade me by way of submission that the facts relied on by the defendant (and pleaded in paragraph 11 of the Statement of Defence) can be demonstrated by argument to be true and/or that they are all the facts necessary to be proved to be true for the defence of honest opinion to succeed. Such is fundamental because as Todd says at 16.8(a):

“The very basis of the defence is that a reader or listener should be able to assess the commentator’s opinion and compare it with his or her own. Thus the reader or listener must know what it is that the commentator is commenting on.”

And 16.8(b):

“The defence of honest opinion will not protect a defendant if he or she is commenting on things which never happened or which he or she has got wrong. One cannot legitimately criticise a public figure for something that person never did. As Lord Ackner once said: “It is of course well established that a writer may not suggest or invent facts and then comment upon them...The commentator must get his basic facts right.”

[26] On that issue it appears from Mr Steere’s evidence that Communications Trumps Limited work for King Salmon ended in May 1998. That was the date that Genepool was set up. If that is so it appears that the first plaintiff would not have been acting for both bodies at the same time. Further it appears the first plaintiff played no part in preparing King Salmon’s submissions to the Royal Commission and that such submissions were prepared and delivered well after May 1998. As to the

law relating to a defendant's summary judgment application, somewhat surprisingly, both counsel relied on the authorities applicable to a plaintiff's summary judgment application. The approach to a defendant's summary judgment application is however set out in two Court of Appeal judgments, *Westpac Banking Corporation v ANZ Banking Group & M M Kembla* (2001) 2 NZLR 298 and *G Bernard v Space 2000 Ltd & Ors*, CA 23200, judgment 11 June 2001. In *Westpac* the Court said at pp 313, 314:

“[63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to form on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.

[64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.”

[27] In *G Bernard v Space 2000 Ltd & Ors*, Thomas J pointed out that to succeed pursuant to R136(c) a defendant must show the answer is clear cut what in colloquial language would be described as a “King Hit”. At p7 of his judgment he said, referring to R136:

The different approach to be adopted in relation to sub-rules (1) and (2) is founded on a fundamental principle; a citizen's right of

access to the courts. As stated by this Court in *McEvoy v Dallison* [1997] 3 NZLR 11, at 21, it is an integral element of the rule of law that everyone having a proper issue to be tried should obtain access to the Court process. When that right of access is denied, justice is denied, and the ability of society to order its affairs and resolve its differences in a regular manner is impaired. Consequently, where a plaintiff has a proper issue to be tried in is inappropriate to apply a test or adopt an approach which would bar him or her from the judicial process. That process, of course, includes interlocutory procedures which may aid the plaintiff's cause. This Court's insistence on a clear answer which cannot be contradicted and a complete defence to the plaintiff's claim, that is, a "king hit", recognises that a plaintiff's fundamental right to his or her "day in court" is not to be lightly denied."

[28] I reiterate applying those principles I am not satisfied that the Court can at summary judgment level simply accept the affidavits filed by the witnesses for the defendant (without cross examination) as sufficiently establishing the true facts, with the consequence that the defence of honest opinion must succeed. In light of the fact that the plaintiffs' dispute the whole factual foundation relied on by the defendant, this proceeding must go to trial. The application for summary judgment is therefore refused. Costs reserved.

CP 111/99 - Between Communications Trumps Ltd (Plaintiff) and Jeanette Fitzsimons (Defendant)

[29] I now deal with the defendant's application for summary judgment in this proceeding. The plaintiff's defamation suit against this defendant arises directly from the press statement she issued on 7 April 1999. In paragraphs 3, 4 and 5 of the Statement of Claim the plaintiff pleads:

3. On 7 April 1999 the defendant issued a press statement which was published to, inter alia, Newsroom. Newsroom is an electronic new dissemination service established to receive and disseminate news items. Subscribers to Newsroom access press statements issued to Newsroom by, inter alia, Members of Parliament, Government agencies and other organisations. A copy of the defendant's press statement is

annexed as a schedule to this statement of claim and forms part of this statement of claim.

4. The press statement published by the defendant said that the plaintiff:
 - Is “dodgy”.
 - Advised King Salmon to keep their transgenic salmon programme secret.
 - Used unethical methods to keep an issue of public interest secret.
 - Has deliberately impeded the free flow of information.
 - Does not have the trust of the public.
5. The plaintiff (sic) also stated Government Departments and research facilities”need to be rid of Communications Trumps”.

[30] The defendant applies for summary judgment upon the grounds:

- (a) The defamatory meanings alleged by the defendant (sic) rely on the words set out at paragraphs 4 and 5 of the Statement of Claim, being words published by the defendant.
- (b) The defendant has deposed that the words published by her are her genuine opinions.
- (c) The plaintiffs have not alleged that the opinions of the defendant were not her genuine opinions.
- (d) No material facts on which her opinions were expressed are in dispute or capable of being disputed.

[31] Mr Tizard for the defendant relied on the same arguments he advanced in support of Radio New Zealand's application for summary judgment. In essence he says there are no material facts on which opinions were expressed that are in dispute or capable of being disputed. As in the summary judgment application brought by Radio New Zealand, that contention is strongly contested by the plaintiff.

[32] Mr Collins submitted that in order to defeat this defendant's application for summary judgment it is necessary to emphasise that:

- (a) Ms Fitzsimons press release contains a series of factual errors which are relevant (section 11 Defamation Act 1999); and
- (b) In many instances the statements complained of are not expressions of opinion but purport to be statements of fact.

[33] Mr Collins refers the Court to a number of extracts from the press release. I set them out and Mr Collins' submissions relating to each of them:

“Keeping the Transgenic Salmon Programme Secret”

Mr Collins submits there is no evidence the plaintiff told King Salmon to “keep its transgenic salmon programme secret”. He says it was not a secret. He points out again the Mr Steere from King Salmon has deposed in paragraph 9 of his affidavit as follows:

“The company were not and have not been disposed to hide any aspect of the programme undertaken. From its beginning it was considered a matter of public record, was known to the scientific

community, the salmon industry and the company's major customers".

Mr Collins submits there was wide public knowledge about the research programme and that some evidence of the extent of public information about the research programme can be found in paragraph 9 of the Hon Simon Upton's affidavit. He refers again to paragraph 42 of Ms Simmons affidavit.

Also in his judgment in *Rural News Ltd v Communications Trumps Ltd* (HC Auckland 4 April 2001) Anderson J referred to public knowledge about the King Salmon programme when he said it was:

"... identified and approved by the Hazardous Substances and New Organisms (Genetically Modified Organisms Approvals) Order 1998".

Mr Collins said from such matters a Court could reasonably conclude that the plaintiff did not tell King Salmon to "keep the transgenic salmon programme secret" and that the defendant's statement was:

- An erroneous assertion of fact; and
- Not an expression of opinion.

If a Court so finds Mr Collins says the defence of honest opinion cannot be raised in relation to this part of the plaintiff's claim.

"Used unethical methods to keep an issue of public interest secret"

Mr Collins submits the plaintiff did not "use unethical methods to keep an issue of public interest secret". As to that he refers again to

the judgment of Anderson J in *Rural News Ltd v Communications Trumps Ltd* (supra) who, after examining the PR strategy document prepared by Communications Trumps Ltd concluded that the words of the document conveyed:

“... advice to be discreet in relation to public mention about events which might give rise to the misinformed and extravagantly emotive responses which seem to have occurred in this case.”

The findings of Anderson J highlight, Mr Collins submits, why it is inappropriate for this Court to try and determine whether or not Ms Fitzsimons claim that the plaintiff “used unethical methods to keep an issue of public interest secret” were assertions of opinion based on proven facts.

“Deliberately impeded the free flow of information”

Mr Collins submits such assertion is a statement of fact, not opinion.

Further he says this assertion is factually incorrect because the plaintiff never prevented King Salmon from saying anything. Nor did the plaintiff prevent anyone else from saying whatever they liked about the King Salmon research programme.

“The public have no trust in” Communications Trumps

Mr Collins submits that the natural and ordinary meaning of these words is that the public do not trust Communications Trumps.

The claim that “the public have no trust in” Communications Trumps is he argues an assertion of fact, not opinion. This assertion is, in all respects, identical to the allegation which gave rise to the proceeding in *Templeton v Jones* (1984) 1NZLR 448, namely that the plaintiff in that case “despised Jews”.

Mr Collins asserts that on the evidence now before the Court there was no evidence to support Ms Fitzsimon’s allegations.


Finally Mr Collins says that Ms Fitzsimons’ claim on 7 April 1999 that Communications Trumps is not trusted by the public caused considerable financial harm to Communications Trumps.

Conclusion

[34] I uphold Mr Collins submissions and as in the claim against Radio New Zealand, and for the reasons I set out there, I find that there are clearly disputed issues of fact which will require to be explored at trial before a Court will be able to decide the defence of honest opinion. Again therefore this application for summary judgment is dismissed. Costs reserved.

[35] A joint timetable memorandum in respect of both cases is to be filed within 14 days.

Dated at Wellington this 1st day of October 2001 at 4 am/pm.



Master J C A Thomson

Solicitors

Southall & Associates, Wellington, Solicitors for the Plaintiffs

Oakley Moran, Wellington, Solicitors for the Defendants in both proceedings

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