IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 143/99

BETWEEN **RICHARD CHARLES TAINUI MANNING**

Plaintiff

AND **TV3 NETWORK SERVICES LTD**

Defendant

373

Date of Hearing: 22 March 2001

Judgment Released: 23 April 2001

Counsel: C A McVeigh QC for Plaintiff
TJG Allan for Defendant

JUDGMENT OF MASTER VENNING
On Application To Strike Out

Solicitors:
Corcoran French, Christchurch for Plaintiff
(C McVeigh QC, Christchurch)
Grove Darlow & Partners, Auckland for Defendant
Cc:
Chisholm J

[1] The Plaintiff applies for an order striking out the defence of truth pleaded in the Defendant's amended statement of defence dated 25 September 2000.

[2] When initially filed the application also sought an order the Plaintiff not be required to answer interrogatories delivered by the Defendant but that part of the application was not addressed in submissions. The Defendant's first response to the application to was to seek further particulars. The Plaintiff then filed a second amended statement of claim. The parties were unable to resolve the pleading issues between them. The Plaintiff pursues the application to strike out.

[3] As an application to strike out a pleading, the application proceeds on the basis that the Defendant can make out the allegations in the statement of defence and the Court ought only to strike out the defence if it is satisfied that the defence cannot succeed on any basis: *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289; *Holwell & Withers (trustees of Kaikohe Trust) v NZ Lotteries Commission* (Williams J, HC Auckland, CP 463-97, 3/3/99).

[4] In the second amended statement of claim the Plaintiff pleads that the television programme ran by the Defendant had the following meanings:

(a) That the Plaintiff had stolen the rimu trees which were portrayed and described by the Defendant in a portion of the programme as having been stolen from PNR Trust land; or

(b) That the Plaintiff was personally responsible for the theft of the rimu trees which were portrayed and described by the Defendant in a portion of the programme as having been stolen from PNR Trust land; or

(c) That the Plaintiff had orchestrated the theft of the rimu trees which were portrayed and described by the Defendant in a portion of the programme as having been stolen from PNR Trust land; or

(d) That the Plaintiff was somehow involved in the theft of the rimu trees which were portrayed and described by the Defendant in a portion of the programme as having been stolen from PNR Trust land.

[5] The particulars of the meanings are an expanded version of the meanings pleaded in the former statement of claim but are not different in kind. The sting of the defamation pleaded by the Plaintiff is the allegation that the Plaintiff stole rimu trees belonging to the PNR Trust.

[6] In the statement of defence the Defendant denies that the words complained of are capable of bearing the meaning attributed to them by the Plaintiff, and in addition pleads that:

> "8. If it is held that the words bear any of the meanings in paragraph 5 the imputations were true or not materially different from the truth. The defendant relies on section 8(3)(a) of the Defamation Act 1992.
>
> 9. In the alternative, the publication taken as a whole was in substance true, or was in substance not materially different from the truth. The defendant relies on section 8(3)(b) of the Defamation Act 1992.
>
> Particulars in Relation to Paragraphs 8 and 9
>
> (a) By an application (discovery of which has not been provided by the plaintiff) the plaintiff sought an easement by rights of way across Tautuku XIII, section 5 to Tautuku XIII, section 6b. The application was declined by the Maori Land Court on the 16th May 1998 ('the Declined Application').
>
> (b) Between the 16th May 1998 and 1st of October 1998, the plaintiff made further application(s) to the Maori Land Court (discovery of which has not been provided by the plaintiff) for access across Tautuku XIII section 5.
>
> (c) By an order of the Maori Land Court dated the 1st of October 1998 ('the Order') the Trust Order in respect of Tautuku XIII section 5 was varied. The Order authorised the plaintiff to use the 'informal track' through Tautuku XIII, section 5 for access to the plaintiff's land for 'non commercial purposes' ('the Informal Track').

(d) The Informal Track runs from the north-eastern boundary intersection with Regan Road in a loop, sought, then south east, then east then north to the highest point on Tautuku XIII, section 5 and back to Regan Road where it intersects the south-eastern boundary with Regan Road. The track, from the highest point, has three fingers (formerly cable lanes) from the highest point into Tautuku XIII, section 6b at its north-eastern boundary with Tautuku XIII section 5.

(e) The Informal Track is also identified as 'the Fletcher's Road' named so as a result of logging by Fletchers on this land in the 1950s.

(f) The plaintiff or Darryl Dewe or Les Dunn ('his agents'), acting on behalf of the plaintiff, in contravention of the Order:-

i) Unlawfully cut down and or removed and or destroyed and or damaged trees ('the Trees') from Tautuku XIII, section 5 to build a road through Tautuku XIII, section 5 ('the Road'); and in doing so
ii) Relocated the Informal Track by building the Road identified in the plaintiff's document #111. The road dissects the Informal Track at a virtual right angle.

As a consequence the plaintiff or his agents unlawfully stole the Trees (by taking or by destruction) or they converted the Trees (by taking or destruction) or they contravened the terms of a court order in relation to the Trees (by taking or by destruction).

(g) The trees included but are not limited to the following indigenous species: miro, kamahi, rimu, beech and sub-canopy species.

(h) The trees were formerly:-

i) Where the Road was built by the plaintiff and his agents through Tautuku XIII, section 5 and identified in the plaintiff's document #111; and
ii) Adjacent to the Road where spoil and trees have been discarded onto and damaging indigenous bush; and
iii) Where tracks, caused by a bulldozer, run off the road into the indigenous bush; and
iv) Otherwise identified in the plaintiff's document #111; and
v) Otherwise identified in the Report of Indigenous Forestry Unit of the Ministry of Agriculture and Fisheries to the Maori Land Court dated November 1999.

(i) The defendant does not know the precise number of the Trees but they are estimated to be not less than 200 Trees in the species referred to above. The defendant is unable to be more precise because they include all of those trees destroyed, referred to in paragraphs (f) to (h), and utilised in making the Road and taken by the plaintiff details of which are known to the plaintiff.

(j) No payment has been made by the plaintiff or his agents to the rightful owners for all of the trees he stole or converted or illegally destroyed."

[7] Mr Allan submitted that if the Court found the publication was capable of bearing the sting that the Plaintiff had taken someone else's property, then the defence was that the unlawful cutting down and removal, destruction and/or damage of the trees in contravention of an order or in the process of relocating the informal track by the creation of a new road in a different location amounted to theft as theft is defined in the Crimes Act.

[8] Alternatively he submitted that the defence under s8(3)(b) requires the Court to consider the programme as a whole, and that taken as a whole the programme conveys the following things:

(a) Unlawful taking of native timber;

(b) The use of the informal track for commercial purposes in contravention of a Court order; and

(c) Damage and devastation caused by (a) and (b).

[9] Mr McVeigh submitted that the Defendant's pleading amounted to a classic attempt by the Defendant to raise as a defence of truth that the publication in its natural and ordinary meaning without bearing the meanings alleged in the statement of claim are true in substance and in fact. He submitted that that was not permissible in New Zealand: *Isbey v New Zealand Broadcasting Corp* [1975] 1 NZLR 721 and *Broadcasting Corp of New Zealand v Crush* [1988] 2 NZLR 234 and that s8 of the Defamation Act 1992 had not altered the position.

[10] Mr McVeigh invited me to view the video tape of the item. Mr Allan suggested it was not necessary to consider the tape, but if I was to do so then I should view the whole programme rather than solely the excerpt relating to the claim made by the Plaintiff in these proceedings. I have viewed the tape. Seen as a whole the programme clearly falls into two parts. The first is the identification of a loophole in the law which enables certain South Island Maori landowners to harvest and sell native timber despite the general ban on such logging of native timber. The thrust of this part of the programme is that there is effectively one law for Maori and another for non-Maori landowners in relation to the preservation of native forest.

[11] The programme then changes tack to deal with the matters of concern to the Plaintiff. The transition is introduced by referring to the harvesting of native timber (by the Maori landowners) as legal plunder and then by a reference to unlawful logging in the Caitlins. Reference is made to "tree rustling" and "rimu logged without the landowner's consent". The programme then refers to a road that the Plaintiff was responsible for. The item identifies a number of tracks that lead off it and says "it was obvious what the tracks were made for". Reference is then made to stumps of "stolen rimu" and later to "illegal logging".

[12] The Plaintiff says that the gist of the programme is that he was actively involved in or was responsible for the removal of the stolen rimu. Reference is made to the dollar value of the trees taken being in tens of thousands. The sting of the defamation is theft for personal gain. References to "tree rustling" and "stolen rimu" are consistent with that.

[13] The Defendant says that the programme suggests that in the course of building a track the Plaintiff destroyed timber. While strictly speaking both might arguably be theft at law, there is a real difference in terms of the defamatory meaning. One is an allegation of theft for commercial purposes and personal gain. The other is an allegation of environmental recklessness. They are quite different in the sting.

SECTION 8(3)(a)

[14] Section 8(3)(a) reads:

"In proceedings for defamation, a defence of truth shall succeed if—

(a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth;

..."

[15] The intention of s8(3)(a) was to avoid a plaintiff defeating the defence of truth if the imputations are true or not materially different from the truth: *Pepi Holdings Ltd v Pauanui Publishing Ltd* (CA 21/97, CA 22/97, 27/8/97). In that case the Court of Appeal held that importing or offering for sale cars known to have had their odometers rewound was not materially different from actually rewinding them as had been alleged in the publication sued upon. In both cases the importer was a party to the deception in New Zealand based upon the rewinding. The imputation was that the importer was dishonestly importing or selling cars with false mileage.

[16] In the present case the imputation is that the Plaintiff has stolen rimu trees belonging to the PNR Trust to a value of tens of thousands. The Defendant cannot rely upon s8(3)(a) as a defence to that imputation unless it can show the imputation was true or not materially different from the truth. The subsection does not apply to a defence based upon an imputation of a different kind. The imputation here is that the Plaintiff is a thief. Section 8(3)(a) might apply if it was found in fact it was not rimu, but other native trees, that were taken. Or, it might be that if instead of the estimated 200 trees referred to in the programme it was found that only 50 were taken. In those cases the difference may not be materially different from the truth. Section 8(3)(a) could apply. It is directed at fine distinctions defeating a defence of truth.

[17] That is not, however, the substance of the issue between the parties in this case. In the present case the Defendant wants to plead as truth that the Plaintiff was responsible for the destruction of trees in the course of creating and/or relocating an access track. That is not the defamation the Plaintiff sues upon. That is not the imputation to be taken from the programme. Before the introduction of the Defamation Act 1992 the Defendant would not have been able to plead that as a defence. Section 8(3)(a) does not alter the position. Section 8(3)(a) requires the "imputations contained in the [programme]" to be true or not materially different

from the truth. It is still for the Plaintiff to define the imputations complained of however. Section 8(3)(a) does not assist the Defendant in the present case.

SECTION 8(3)(b)

[18] Section 8(3)(b) reads:

> "(b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth."

[19] Section 8(3)(b) permits a defence of truth where the publication taken as a whole was in substance true or was in substance not materially different from the truth. The question in the present case is whether the subsection allows the Defendant to rely upon the general definition of "theft" by the destruction of trees or whether the defence has to apply to the particular or specific allegation of theft relied upon by the Plaintiff, namely theft by stealing the PNR Trust's trees for gain.

[20] Prior to the Defamation Act 1992 the Defendant would not have been able to raise the defence of truth in these circumstances. In *Broadcasting Corp of NZ v Crush* (supra) the plaintiff solicitor sued the Broadcasting Corporation in respect of statements it had made about the sale of land by him to the Crown. He alleged that the statements meant that he had got an excessive price because of his political connections. The Defendant pleaded its statement did not mean that but rather that the Plaintiff had astutely caused the Crown to overspend. The Court of Appeal held that the trial Judge was right to strike out the plea of justification and the defendant's meanings. The defendant was not permitted to justify a lesser meaning that it said could be taken from the article.

[21] In England a rather more permissive approach has been taken. In *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177 a plaintiff who had associations with a terrorist sued a newspaper in respect of articles which she said suggested she had knowingly assisted the terrorists and her friend to commit serious offences. The newspaper was allowed to plead the truth of the articles in a different and less serious sense, that the plaintiff merely ought to have suspected that her friend was a terrorist. Similarly in *Prager v Times Newspapers Ltd* [1988] 1 All ER 300 the

Court accepted that the defendant was entitled to plead by way of justification in support of any defamatory meaning which the words complained of could reasonably bear.

[22] The purpose of s8(3)(b) is to enable the Defendant to raise as a defence and to establish as a defence that the publication taken as a whole was true or not materially different from the truth. It prevents the Plaintiff taking part of a publication out of context. It enables the Defendant to put the whole of the publication before the Court or jury and to establish the truth of the publication as a whole. The amendment is not directed at the pick and choose position: *Templeton v Jones* [1984] 1 NZLR 448. That situation is covered by s8(2). However, it does permit the Defendant to have the Court or jury consider all of the publication rather than selected passages relied upon by the Plaintiff.

[23] The defence must, however, be considered against the background of the "sting". In the present case the allegations are that there was "tree rustling", that rimu was logged without the Maori landowners' consent, that the reporter was able to identify stumps of stolen rimu that had a value of $1,000 per cubic metre, that timber worth tens of thousands had been logged, and that the landowners were trying to prevent the illegal logging of their land. The sting of the publication is that the Plaintiff was responsible for the "tree rustling" and stole valuable rimu trees that belonged to the PNR Trust. The Defendant is entitled to have the whole publication considered by the Court.

[24] However, the particulars pleaded by the Defendant in support of the defence of truth are quite specific and purport to support a quite different meaning altogether.

[25] Mr McVeigh referred to the decision of *Bookbinder v Tebbit* [1989] 1 All ER 1169. That decision followed the cases of *Lucas-Box v News Group Newspapers Ltd* (supra) and *Prager v Times Newspapers Ltd* (supra). The plaintiff was the leader of the Labour majority on the local council. The council decided that its stationery, including school stationery, should bear the caption "Support Nuclear Free Zones". During a by-election the defendant politician stated in a speech that the £50,000 spent on printing anti-nuclear statements on school stationery was a foolish idea and

if the Russians had not been told of the county's nuclear free policy it was arguable that he had lost £50,000. Initially the plaintiff alleged the words were defamatory and that as leader of the council he had acted irresponsibly in causing large scale squandering of public funds. The defendant then raised a number of particulars in support of the defence of justification, citing examples of the council under the plaintiff's leadership squandering public money. The plaintiff then amended the claim to allege that the words meant the plaintiff had acted irresponsibly in squandering £50,000 of public money on printing the statement supportive of nuclear free zones on its stationery. The defendant still wished to maintain the other paragraphs relating to squandering of public money on other occasions.

[26] The Court of Appeal held it was a question of law whether the words complained of were an allegation of general irresponsible spending of public money or of a specific incidence of such expenditure. The Court held that the allegation was of a specific incidence of such expenditure and the defendant was not able to pursue a defence of justification that relied upon particulars of the plaintiff's squandering of public money on other occasions.

[27] The *Bookbinder* case is different to the situation before the Court in the present situation. In that case the defendant was not able to plead particulars of other instances in support of its defence of justification to the plaintiff's claim that he had been defamed in relation to a statement he had overspent £50,000. The sting was that he had squandered £50,000 on this occasion. In the present case the Defendant does not wish to raise a defence that the Plaintiff had stolen trees on other occasions, but rather wishes to raise a defence that the Plaintiff had taken trees by destroying them. The case is of limited assistance in the present case but it does assist to explain and understand the earlier English decisions. Here the allegation is theft by stealing rather than theft by destruction. If the programme says the Plaintiff stole native rimu belonging to the PNR Trust for commercial gain then that is clearly defamatory. It is no defence to that defamation for the Defendant to prove and establish that the Plaintiff damaged the trees in relation to the construction of a road.

[28] It follows that I accept Mr McVeigh's submission for the Plaintiff that in the circumstances s8(3)(b) does not assist the Defendant either and that the defence of

truth cannot be sustained in this case. Paragraphs 8 and 9 of the amended statement of defence are to be struck out.

SECTION 30

[29] Mr Allan addressed s30 in his submissions. Section 30 permits a defendant to plead and prove in mitigation of damages specific instances of misconduct by the plaintiff in order to establish the plaintiff's reputation is generally bad in the aspect to which the proceedings relate. The application before the Court does not relate to the s30 pleading. It is unnecessary to consider that point any further at this time.

COSTS

[30] The Plaintiff is entitled to costs. There will be an order for costs on a 2B basis together with disbursements as fixed by the Registrar.

REVIEW

[31] These proceedings will be called for a telephone conference review and further direction ***at 9.15am on 25 May 2001***.

[32] The videotape that Mr McVeigh made available to the Court is to be returned to him by the Registrar.

MASTER VENNING

Delivered at 5pm ~~am~~/pm on 23 April 2001