[redacted]

In the High Court of New Zealand
Christchurch Registry

CP No 143/99

Between	RICHARD CHARLES TAINUI MANNING of Christchurch, Company Director Plaintiff
And	TV3 NETWORK SERVICES LTD a duly incorporated company carrying on business throughout New Zealand as a broadcaster, having its registered office at Auckland Defendant
Hearing:	6 August 2001
Appearances:	C A McVeigh QC for the Plaintiff J G Miles QC for the Defendant
Judgment:	31 [illegible]

JUDGMENTS OF THE COURT (PANCKHURST AND WILLIAM YOUNG JJ)

PANCKHURST J

[1] I am in full agreement with the reasons and judgment of William Young J in dismissing this application for review. I wish, however, to add some observations essentially concerning the approach to a strike out application in a defamation context, given the significant changes introduced in the recent past by the Defamation Act 1992.

[2] Mr Miles QC in challenging the conclusion reached by the Master urged that there was a need for particular care in relation to the strike out of pleadings in the new environment. He submitted that the distinction drawn by the Master, between theft by stealing as opposed to theft by destruction, was too fine. The more so since s8(3)(a) and (b) of the Defamation Act expanded the scope of the defence of truth and their import had yet to be definitively decided. Since theft may both be committed by a dishonest taking or by dealing with property such that it cannot be

restored (s220(1)(d) of the Crimes Act 1961) there was, he argued, indeed scope for a successful defence if the theft by destruction meaning could be justified.

[3] Counsel also stressed that the jurisdiction to strike out was always one to be exercised with great care and only in a clear case. Here, where there were both issues as to the meaning of the programme and as to the interpretation of s8(3)(a) and (b) it was wrong to intervene and strike out the defendant's pleading of an alternative meaning. Properly analysed the issue was not one which was susceptible of resolution at this early stage. It should be left for the trial Judge in the first instance and ultimately for determination by a jury.

[4] I am unable to accept the approach advocated. In the first place before theft by destruction may become a live issue it must be an imputation contained in the programme considered as a whole. More accurately and in terms of s8(2) theft by destruction must be a "*[fact] contained in the whole of the publication*". It is not and for the reasons which appear from the judgment of William Young J.

[5] Such conclusion I regard as one based on the meaning which the programme as a whole is capable of bearing, and therefore a judicial responsibility. It follows in my view that the issue is one properly able to be confronted in the present context. Moreover I am satisfied it would be wrong to allow TV3 to conduct a defence of truth based upon a different imputation that the one asserted by Mr Manning, when such meaning was not one which a reasonable viewer could take from the programme as a whole.

[6] For completeness I note that Mr Miles also made submissions based on *Polly Peck (Holdings) Plc* v *Trelford* [1986] 1 QB 1000. He submitted that it remained to be determined to what extent s8(3)(a) and (b) opened the door for a defendant in New Zealand to run a *Polly Peck* defence. That is to look at the whole publication in order to plead that in the context the words bore a meaning different from that alleged by the plaintiff, which alternative meaning was true. While I accept the point that the metes and bounds of s8 remain to be explored, the fact remains that the alternative meaning advanced by the defendant must be one drawn from the relevant

publication. That is not so in this instance. The 20/20 programme is not capable of supporting the meaning, theft by destruction, which the defendant seeks to aver.

WILLIAM YOUNG J

Introduction

[7] This is an application for review of a decision of the Master striking out a defence of truth in defamation proceedings.

The underlying claim

[8] On 18 July 1999, the defendant, ("TV3"), produced a 20/20 programme which dealt with, generally, the felling of native timber on land held by Maori owners under the South Island Landless Natives Act ("SILNA") – land which is exempt from legislative restrictions on the harvesting of native timber. The first half of the programme referred, generally, to the clear felling of native timber on SILNA land. Except by way of background, this part of the programme is of no significance in the present context.

[9] The second part of the programme focused on land owned by what is known as the "PNR Trust" in the Catlins. This part of the programme was introduced by Amanda Miller, one of the two presenters, in this way:-

> So the race against time to clear fell continued. This was after all, legal plunder of our natural landscape. But tonight we can also reveal for the first time the unlawful logging of Silna lands. It's been happening in South Otago in an area called the Catlins. Forty percent of the South Island's virgin forest is here, but in this pristine paradise of the South, it's shades of the wild west. We're talking tree rustling down here. We had had a tip off about a particular Silna block. There's no clear felling here, this is selective logging territory. We have been told Rimu as old as 500 years is being logged without the Maori landowners' consent. We're on a bulldozer track just off the main road in the Catlins. We've been told that up to a couple of weeks ago they were taking native timber out of this area. Well in spite of the messy road there's no obvious signs, but there is this track that may have been used to take out timber.
>
> We're here at the end of the track, at the top of a very old tree and up here a stump and something the loggers have left behind [a chainsaw blade sitting on a tree stump].

> Our search revealed more tracks off the road leading to more stumps. We were on a 400 acre block of Silna land belonging to 74 people called the PNR Trust. We don't know who made the tracks off the road or who stole the trees. What we do know is the road was built by the owner of a neighbouring Silna block. That man is Christchurch Fisheries Businessman Richard Manning and a trustee in various Silna blocks. He gained consent to build this supposed informal track last year from some PNR Trust members and the Maori Land Court. Permission was granted on the basis that the track would be for access only, not for commercial purposes.

[10] While this was being said, the programme showed footage of a track or road which had been driven into the bush. This road was built by the plaintiff, Mr Richard Manning.

[11] The programme then showed footage of an inspection of the general area by representatives of the PNR Trust, Donald Warnes and his brother Ritchie Warnes and a Ms Stephanie Blair, a local eco-tourism operator. Referring to an earlier inspection by those people of the area the presenter said:-

> To their horror they found wide tracks cast away from the road. Some that travelled more than 80 metres off the track and it was obvious what the tracks were for.

[12] Donald Warnes was then filmed observing of a tree stump that it was a metre in diameter. The presenter then went on:-

> Donald and Ritchie had the tools with them to accurately record just what was missing from where and it wasn't looking good. The worst was to come.
>
> They were surrounded by stumps of stolen Rimu. At $1,000 per cubic metre and some of them perhaps as old as 500 years. In one area alone, 10 trees gone.

Mr Warnes said:-

> I wouldn't like to estimate the monetary value on it, but I would assume it would be well into the tens of thousands of dollars.

[13] The programme then showed the reaction of the PNR Trust chairperson, Mrs Trudy Warnes, to footage of the visit. The presenter observed:-

> The 70 year old wanted to see for herself the extent of the damage.

Mrs Warnes was, when shown the extent of the damage, upset.

[14] The presenter then went on:-

> We asked Richard Manning, the man who put in the tracks who caused this damage. He wouldn't be interviewed on camera but said he was unaware of this devastation. He also said that he'd had disagreements with Trudy Warnes before, and if she was accusing him then she would have to take him to Court. Trudy Warnes and her Trust are right now considering their options because of the loss of their trees.

The programme then cut back to Trudy Warnes who said:-

> When I think back of the times that I've had to spend, the hours that I've had to put in since 1986, it makes me sad to see all the destruction in that short period of time.

[15] Most of the rest of what was said in the programme is of no particular moment, in the present context, save that the programme concluded with another presenter, Karen Pickersgill, saying:-

> Late on Friday afternoon the PNR Trustees lodged an injunction in the Maori Land Court in Wellington to try to prevent illegal logging of their land.

Defamatory meanings as alleged by Mr Manning

[16] Mr Manning alleges that the programme conveys four defamatory meanings:-

(a) That the plaintiff had stolen the rimu trees which were portrayed and described by the defendant in the above 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 the above 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 the above 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 the above portion of the programme as having been stolen from PNR Trust land.

The defence of truth relied on by TV3 when the case was heard by the Master

[17] One of the problems which TV3 faces is that the rimu stumps which it filmed were on land which Mr Manning owns and not PNR land. If it is the case that the programme bears the defamatory meanings alleged by Mr Manning, it follows that TV3 will not be able to prove that what was said was true (at least in a literal sense).

[18] TV3, nonetheless, pleaded truth as a defence. Its position, as at the time the case was heard by the Master, was, broadly, as follows:-

1. It denied that the programme has the defamatory meanings alleged.

2. But, if the programme does have any one or more of those meanings then:-

    (a) While Mr Manning was, indeed, authorised to construct a road over the PNR land, such road was to be along a defined route and not for commercial purposes;

    (b) In breach of the arrangements as to this and in defiance of an order of the Maori Land Court, the road, as constructed, did not follow the course provided for and was for commercial purposes;

    (c) In constructing the road Mr Manning cut down native trees and used the logs from those trees for the purpose of constructing the road; and

    (d) His cutting down of native trees and his use of timber obtained from them for the purpose of constructing the road was theft within the meaning of s 220, Crimes Act 1961.

[19] I have simplified what is a detailed and complex pleading by TV3. I recognise that there are hints or indications in the particulars, as pleaded, which might be thought to be consistent with an allegation of theft involving the logging

and taking away of timber. But I have no doubt that the fundamental thrust of the defence of truth, as pleaded at the time the case was heard by the Master, was based on an allegation of theft by destruction associated with the construction of the road. This is the way he viewed the defence and this was, no doubt, a function of the way in which the case was presented to him.

The application to the Master

[20] Mr Manning sought to have the particulars struck out on the basis that TV3 was endeavouring to justify defamatory meanings which were not relied upon by the plaintiff.

[21] On his case and pleading, the programme meant that he had been guilty of theft involving what was referred to as "tree rustling" and that it was not open to TV3 to plead a defence of truth based on an allegation of theft by destruction.

Section 8, Defamation Act 1992

[22] Before discussing the way in which the Master dealt with the case, it is helpful first to refer to s 8, Defamation Act 1992.

[23] This section provides:-

> (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.
>
> (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
>
> (3) 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; or
>
> (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.

[24] This section was fundamental to the argument which was advanced to the Master.

The Master's judgment

[25] The Master was of the view that it was not open to TV3 to invoke s 8(3)(a). The reasons for this were expressed as follows:-

> [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 Plaintiffs 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.

[26] The Master was, likewise, of the view that it was not open to TV3 to invoke s 8(3)(b). This is what he said:-

> [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 s 8(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 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.

TV3's application for review and its new proposed defence of truth

[27] TV3 has challenged, by way of review, the decision of the Master.

[28] As well, it has signalled a desire to advance a revised defence of truth. This revised defence of truth incorporates the particulars referred to above (see paragraph [18] above) but adds a discrete allegation of what could be regarded as being theft by tree rustling in respect of four rimu trees which once stood on PNR land, the stumps of which are located in reasonably close proximity to the road created by Mr Manning.

[29] I would normally be prepared to deal with an appeal or review on a pleading point by reference to any revisions of the impugned pleading which are put forward at the hearing of the appeal or review. In this case, however, I think that the review should be dealt with on the basis of the defence of truth as it was (and in particular as

it was construed) at the time of the hearing before the Master. The fundamental issue raised by the case is whether TV3 is entitled to rely on particulars of theft by destruction in support of a defence of truth. As will become apparent, I am of the view that the particulars of theft by destruction are not sustainable. On this basis TV3's revised defence of truth and supporting particulars will require substantial reconsideration by its solicitors and counsel and, at the very best from its point of view, substantial pruning.

Overview

[30] Section 8 must be considered in the context of the common law rules as to the defence of justification as those rules stood when the Defamation Act was passed.

[31] Where the publication complained of by a plaintiff makes a specific allegation (eg dishonesty on a particular occasion), it was not open at common law for the defendant to plead justification based on the contention that the plaintiff had acted dishonestly in other respects (eg on another occasion). This, however, was subject to the way in which the plaintiff's case was pleaded. For instance, if the publication complained of asserted that the plaintiff had acted dishonestly in a particular business transaction, the plaintiff might allege that the words used by the defendant meant that he was a person who customarily acted dishonestly in business transactions. If such a defamatory meaning was pleaded, this would, at least in a practical sense, leave it open to the defendant to plead justification by reference to particulars of dishonesty relating to business transactions other than those referred to in the allegedly defamatory publication, see *Maisel* v *Financial Times (No.1)* (1915) 84 LJKB 2145.

[32] The point can also be illustrated by the facts of *Pamplin* v *Express Newspapers Ltd (No.2)* [1988] 1 All ER 282. The background to the case was that the plaintiff had avoided payment of parking fines and television licence fees by registering his car and television set in the name of his son who, being under 10 years of age, could not be prosecuted. His behaviour was criticised by the defendant

in an article which was headed "Spiv" and contained the following pungent criticism:-

> There may be a few people who actually applaud Mr Pamplin's sleazy little ways of avoiding his legal responsibilities. But can anyone with an ounce of decency inside him not feel utter disgust for a man who uses his son in that way – and who risks turning an innocent six-year-old into the slippery, unscrupulous spiv that Mr Pamplin, quite clearly, already is.

This was said by the plaintiff in the statement of claim to mean that the plaintiff was:-

> [A] thoroughly idle, wicked and unprincipled individual, making money by shady and dishonest practices, who was prepared to convert his son into a similar state of depravity and who was to be abhorred and found repugnant by all reasonable people.

As Neill LJ observed drily:-

> This form of pleading opened the door to the possibility of a wide-ranging defence.

[33] Applying that approach to the present case, it follows that if Mr Manning asserted that the TV3 programme had the general meaning that he is a person who is accustomed to commit the crime of theft in relation to native timber, it would be open to TV3, at common law, to plead justification (and is, therefore, *a fortiori*, open to TV3 under the Defamation Act to plead truth), by reference to particulars which are not necessarily directly referable to anything said in the programme itself and, in particular, it would be open to TV3 to allege theft of native trees by destruction.

[34] A plaintiff can avoid the *Maisel* problem by confining the defamatory meanings alleged to what is specifically referred to in the publication complained of. This is illustrated by the English Court of Appeal decision, *Bookbinder* v *Tebbit* [1989] 1 All ER 1169. In that case, the defendant in a political speech had criticised the actions of the plaintiff who, as a councillor on a local authority, had incurred expenditure of £50,000 over-printing school stationery with the words "Support Nuclear Free Zones". The plaintiff issued proceedings in defamation and alleged that the words, in their natural and ordinary meaning, conveyed the meaning that the plaintiff had acted irresponsibly in causing large-scale squandering of public funds –

that is a general charge of squandering and not merely a specific charge of squandering £50,000 on the over-printing of school stationery. The defendant then pleaded justification and gave particulars that went well beyond the over-printing issue which had been the subject of his speech. Confronted with a wide range of allegations of squandering public funds on other occasions, the plaintiff then amended the statement of claim so that the pleaded meaning was confined to squandering public funds in respect of the over-printing of stationery with statements supportive of nuclear free zones. In light of the change in pleading and the conclusion by the Court that the words used by the defendant had conveyed naturally only a charge of squandering funds in the specific manner alleged rather than a broad charge, the Court upheld the right of the plaintiff, in that case, to narrow the issues to be determined at trial. Accordingly, the particulars of the defence of justification which related to other alleged incidents of squandering public funds were struck out.

[35] Traditional common law principles left it very much to the plaintiff in defamation proceedings to define the issues which must be determined at trial. Prior to the Defamation Act 1992, this tendency to allow the plaintiff to define the issues to be determined at trial was particularly pronounced in New Zealand. Thus, in *Templeton* v *Jones* [1984] 1 NZLR 448, a plaintiff who was subject to a string of apparently related allegations (that the plaintiff "despised bureaucrats, politicians, women, Jews and professionals" and was, therefore, involved in "the politics of hatred") was permitted to confine the case to consideration of the charge that he "despised ... Jews ...". Particulars of justification in respect of the assertions that he "despised bureaucrats, politicians, women ... and professionals" was struck out.

[36] *Templeton* v *Jones* involved a series of discrete but, perhaps, related charges against the plaintiff. *Broadcasting Corporation of New Zealand* v *Crush* [1988] 2 NZLR 234 involved rather a more complex publication which was subject to shades of meaning arguments. Broadly, the plaintiff contended that the publication meant that he had used his connections with a political party to obtain an inappropriate benefit. The defendant denied that the words conveyed that meaning and pleaded different meaning which in the Court of Appeal was seen as having a defamatory sting but one which was less than that implicit in the meaning relied on by the plaintiff. The *Crush* decision is clear authority for the proposition on the law, as it

then was, that it was not open to the defendant to seek to justify the lesser meaning which it conveyed the publication, as a whole, conveyed. *Isbey* v *New Zealand Broadcasting Corporation* [1975] 1 NZLR 721 is to the same effect.

[37] In contra-distinction to the way in which the New Zealand courts approached this issue, English courts, in the 1980s, substantially restricted the right of plaintiffs in defamation proceedings to define the contest. It is sufficient, in this context, to refer to *Polly Peck (Holdings) Plc* v *Trelford* [1986] 1 QB 1000, *Williams* v *Reason* [1988] 1 All ER 262 and *Bookbinder* v *Tebbit, supra.* The effect of these cases is that where there are several defamatory statements in the publication complained of which have a "common sting", the defendant is entitled to justify the sting even though the plaintiff does not complain about some of the individual defamatory statements contained in the publication. Further, if the specific allegations in the publication complained of are expressed as being instances of a broader charge, the defendant may justify that broader charge even thought the plaintiff complains only in respect of one or more of the specific allegations. There can be no doubt that the drift of these cases was inconsistent with the approach adopted in *Templeton* v *Jones* and *Broadcasting Corporation of New Zealand* v *Crush.*

[38] The limits of the principles developed by the English Courts are illustrated by *Bookbinder* v *Tebbit.* The fundamental limit is that a defendant is confined to justifying what is said or implied in the publication complained of. So, if the words complained of only convey a specific charge in relation to the plaintiff, it is not open to the defendant to plead and prove that the plaintiff, on other occasions, may have acted in the same way.

[39] Obviously the intention underlying s 8 Defamation Act 1992, was to bring New Zealand law into closer alignment with the principles developed in England in the cases just mentioned. There is, however, scope for debate as to just how close an alignment was intended.

[40] *Templeton* v *Jones* would now be decided differently. If that case fell to be decided now, s 8(2) would permit the defendant to plead the truth of the

defamatory allegations he had made against the plaintiff but which were not the subject of the defamation proceedings, ie that the plaintiff "despised bureaucrats, politicians, women, ... and professionals" and was espousing "politics of hatred". Further, it would have been open to the defendant to contend that, if all the charges were made out save for one (eg that the plaintiff despised Jews), either the "imputations" in the publication were not materially different from the truth and/or the publication taken as a whole was in substance true or was in substance not materially different from the truth (with the result that s 8(3)(a) and/or (b) would apply).

[41] What this is perhaps not quite so clear, I incline to the view that *Crush* would also now be decided differently. I say this because I think that it is now open to a defendant in a shades of meaning case to allege that some or all of the facts asserted in the publication complained of are true (under s 8(2)) and, depending on how successful it is in respect of that contention, to invoke s 8(3)(b).

The issues in this case

[42] Mr Manning has pleaded very specific defamatory meanings, in essence, that he stole the rimu which once stood on the stumps depicted in the programme. As I have indicated, TV3 faces the not insubstantial difficulty in the case that those stumps are not on Mr Manning's land. Accordingly, TV3 cannot and does not attempt to prove the truth of the specific meanings alleged by Mr Manning.

[43] It is clear that at common law, under the principles developed in *Templeton* v *Jones* and *Broadcasting Corporation of New Zealand Ltd* v *Crush*, Mr Manning would be entitled to have a defence of truth based on particulars as to theft by destruction struck out. He contends that the programme meant that he was guilty of "tree rustling" in that he stole the rimu trees, the stumps of which were shown on the programme. Because of the specificity of the meaning alleged, the *Maisel* principle does not apply. Under *Templeton* v *Jones* and *Broadcasting Corporation of New Zealand* v *Crush* it would not be open to TV3 to justify such a meaning by alleging and proving theft by destruction.

[44] The case, however, falls to be determined under s 8, Defamation Act 1992. Section 8(2) permits TV3 to prove theft by destruction only if theft by destruction is alleged in the programme.

[45] There is room debate as to what is meant by the words "imputations contained in the matter that is the subject of the proceedings" which appear in s 8(2). In their ordinary meaning they refer to what is actually imputed by the publication in issue as opposed to the meanings pleaded by the plaintiff. On the other hand, when s 8(3)(a) is read with s 8(3)(b), the scheme of the subsection makes rather more sense if the words are taken to refer to the meanings as pleaded by the plaintiff. I note in passing that it is possible that this subsection was intended to do no more than reiterate the common law principle explained by Lord Shaw of Dunfermline in *Sutherland* v *Stopes* [1925] AC 47 at 79. For the purposes of this litigation what is important is that, on the construction of s 8(3)(a) which is most favourable to TV3, TV3 can only rely on s 8(3)(a) if the 20/20 programme can be regarded as alleging theft by destruction.

[46] I think that the position is, broadly similar, with respect to s 8(3)(b). This subsection addresses the situation where the publication complained of is, in substance, true or, in substance, not materially different from the truth. The focus must be on the publication and the difference between what was alleged in the publication and what is established. It does not provide a licence for TV3 in this case to allege that Mr Manning has committed theft in respects other than those alleged in the publication in question. So, in this respect, I think that s8(3)(b) produces a result which is the same as that arrived at in *Bookbinder* v *Tebbit* where it was held that the defendant was not entitled to allege that Mr Bookbinder had squandered public funds in respects other than those alleged in the speech in question.

[47] Accordingly, if the 20/20 programme can be taken to allege theft by destruction, it is open to TV3 to allege this pursuant to s 8(2), Defamation Act and, it may be open, in that case, for TV3 to rely on s 8(3)(a) and (b). On the other hand, if

theft by destruction is not alleged in the programme, then it is not open to TV3 to allege it now in support of a defence of truth.

[48] I, therefore, see the fundamental issue in relation to the pleading as it stood at the time the case was heard by the Master as being whether the programme alleged theft by destruction so as to permit TV3 to rely on s8(2) and (3)(a) and (b).

Does the programme allege theft by destruction?

[49] The principal focus of the relevant portion of the programme is on what is described as "tree rustling".

[50] There is no suggestion in the programme that native timber has been used in the construction of the road.

[51] There is, at best, limited mention only of general damage to the native trees. The first mention is where TV3 invited the PNR Trust chairperson, Trudy Warnes, to see footage of the TV3 visit to the area. The transcript proceeds:-

> The 70 year old wanted to see for herself the extent of the damage
>
> [Trudy Warnes] Oh look at all the trees that have been logged. That's about four trees.

Then, a little further on:-

> We asked Richard Manning, the man who put in the tracks who caused this damage. He wouldn't be interviewed on camera but said he was unaware of this devastation. He also said that he'd had disagreements with Trudy Warnes before, and if she was accusing him then she would have to take him to Court. Trudy Warnes and her Trust are right now considering their options because of the loss of their trees.
>
> [Trudy Warnes] When I think back of the times that I've had to spend, the hours that I've had to put in since 1986, it makes me sad to see all the destruction in that short period of time.

[52] Viewed in the context of what the programme was about and the filming of the stumps of the trees which had been allegedly logged, it is clear that references to

"damage", "devastation" and "destruction" are to "damage", "devastation" and "destruction" caused by selective logging rather than by the construction of the road.

[53] The only complaint about the construction of the road which is articulated in the programme (and this is at best by implication) is that the road authorised to be constructed over PNR land was not to be used for commercial purposes. There was no complaint in the programme that the road was in the wrong place and no complaint that it was constructed using native timber which had been felled.

Application of section 8 to the facts of the present case

[54] For reasons just given, the programme cannot fairly be taken to allege that Mr Manning, without approval, cut down native trees and used their timber in the construction of the road and thereby committed theft by destruction.

[55] Accordingly, s 8(2) is not of assistance to TV3. Because it did not allege theft by destruction in the programme, s 8(2) does not permit it to plead theft by destruction by way of defence.

[56] Because the programme does not assert that Mr Manning inappropriately used native timber in the construction of his road, proving that he did so would not make the programme, in substance, true, particularly if the jury were to hold that the programme conveys the imputation that Mr Manning has been guilty of tree rustling. Likewise, proving theft by destruction would not have the consequence that the publication was not materially different from the truth. Accordingly, s 8(3)(a) and (b) cannot be invoked by TV3.

[57] Accordingly, for reasons which are differently expressed but which are the same as, or not materially different from, those of the Master, I agree with the Master's decision that the defence of truth, as pleaded, could not succeed and the application for review is dismissed.

TV3's proposed revised defence

[58] As indicated earlier, TV3 now wishes to advance a defence of truth based not only on the allegations of theft by destruction which I have discussed but also based on the contention that Mr Manning stole four rimu trees, the stumps of which are on PNR property in reasonably close proximity to the track.

[59] As presently advised, I think it would be open to TV3 to plead, by way of a defence of truth, the allegation that Mr Manning stole the four rimu trees in question. The allegation in the 20/20 programme is, broadly, that timber was stolen from PNR land in the general vicinity of the track. Mr Manning asserts (although TV3 denies) that the programme carries the meaning that he was responsible for this theft. Whether proof that Mr Manning stole four rimu trees would necessarily result in a successful defence under s 8(3)(a) or (b) might be open to question but I am presently inclined to think that this would be a jury question.

[60] Any issue as to any revised defence of truth which TV3 may be advised to plead must await any further pleading.

Disposition

[61] The application for review is dismissed.

[62] The plaintiff is entitled to costs on a 3B basis.

Signed at: 3.00 pm on 31 August 2001

Panckhurst J.

William Young J.

Solicitors:
Corcoran French, Christchurch for Plaintiff
Grove Darlow & Partners, Auckland for Defendant