IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 167-SW00

BETWEEN RURAL NEWS LIMITED

Appellant

A N D COMMUNICATIONS TRUMPS LIMITED

Respondent

378

Hearing: 2 April 2001

Counsel: L J Newhook for Appellant
D B Collins QC for Respondent

Judgment: 4 April 2001

JUDGMENT OF ANDERSON J

SOLICITORS

Brookfields (Auckland) for Appellant
Southall & Associates (Wellington) for Respondent

[1] This is an appeal against a decision of the District Court in defamation proceedings brought successfully by the respondent.

[2] The appellant is a newspaper with a circulation of about 93,000. The respondent is a public relations company which at all relevant times included amongst its clients New Zealand King Salmon Limited. That company is in the business of commercial salmon farming. It had a small research facility near Blenheim where it conducted research into the enhancement of the growth of salmon by genetic means. This work is identified in and approved by the Hazardous Substances and New Organisms (Genetically Modified Organisms Approvals) Order 1998. The business relationship between the appellant and New Zealand King Salmon Limited ("NZKS") began in October 1997 with NZKS expressing interest in engaging the respondent to assist it in the development of marketing and communication strategies about its key product, the Regal brand of salmon. In May 1998 the respondent produced a communication strategy and subsequently prepared comprehensive advice in the form of a public relations strategy document extending over more than 30 pages. It gave extensive advice on aspects of trade and official administration, environmental issues, health and technology matters, crisis management, corporate profile, and marketing issues. The section on health and technology included one and a half pages on the NZKS "transgenic programme". Of particular significance in this proceeding is the following advice included in that section:-

> Issues such as deformities and lumps on heads etc should not be mentioned at any point to anyone outside – comments like this would create ghastly 'Frankenstein' images and would be whipped up into an international frenzy by Greenpeace. This could have dreadful trade implications.

[3] The respondent's strategy paper, or part of it, somehow came into the possession of the Green Party of Aotearoa/New Zealand. On 6 April 1999 a press release was issued under the name of Ms J Fitzsimons MP, Co-Leader of the Green Party. The press release begins in this way:-

> **First evidence of a NZ g-e trial gone wrong**
>
> Papers leaked to the Green Party provide the first evidence of a New Zealand genetic engineering experiment gone wrong.
>
> The trial, in which New Zealand King Salmon has been creating transgenic fish, also involves using a public relations company to try to keep the work quiet, according to the document.
>
> Greens Co-Leader Jeanette Fitzsimons said today she was horrified at the extent of secrecy involved in the Marlborough and Nelson-based research. She was also worried about the risks to health and the environment ...

[4] The press release was picked up and expanded upon by the media. On 7 April the issue featured in a discussion during the Kim Hill programme on National Radio. Articles of a sensational nature appeared in newspapers under such headlines as "Papers reveal Frankenstein fish cover-up". On 15 April the respondent filed in the High Court at Wellington defamation proceedings against Radio New Zealand in respect of the Kim Hill programme. Those proceedings were served on 22 April 1999.

[5] In its edition of Rural News dated 19 April 1999 the appellant published the following material in its satirical column called "The Hound:-

> Lies, damn lies and PR
>
> THE news that Wellington based PR firm Communications Trumps got busted 'advising' its client NZ King Salmon not to tell the whole truth about its GMO trials, just confirms this old mutt's opinion of spin doctors and their ethics – or in some cases, lack of them!
>
> However, what is of even more concern to your canine crusader is that this same PR firm claims to be a specialist in the agribusiness sector.
>
> "Strategic public relations with special expertise and experience in the rural, export and food sectors," one of its promotional blurbs says.
>
> As one mate of the Hound's pointed out "There seems to be plenty of money in bullshit – our money that is!"
>
> Organizations with past or present links to Communication Trumps include Federated Farmers, MAF, the old forestry ministry and Crop and Food Research.

> It just makes this old mutt wonder what kind of PR 'advice' these outfits have been given, and whether or not the punters need to take such outfits public utterances with a large grain of salt.
>
> With PR advisors like this around, the reputations of used car salesmen, insurance agents and politicians can only soar upwards!
>
> Harold Hound

[6] On 2 June 1999 the respondent commenced in the District Court at Auckland against the appellant the proceedings from which this appeal is brought, alleging defamation by reason of the Hound article. The respondent alleged that the words carried the following defamatory meanings:-

- The plaintiff has provided unethical and unprofessional advice to its client New Zealand King Salmon Limited.
- The plaintiff had told New Zealand King Salmon Limited not to tell the whole truth about is genetically modified salmon trials.
- That clients of the plaintiff should take the plaintiff's professional advice *"with a grain of salt"*.
- That clients of the plaintiff should be sceptical of advice given to those clients by the plaintiff.
- That clients of the plaintiff would be well advised to disregard advice given to those clients by the plaintiff.
- That the plaintiff had acted dishonestly.
- That the plaintiff had acted dishonourably.
- That the plaintiff has a poor reputation.

[7] The relief sought by the respondent was damages and alternatively a declaration that the appellant was liable to the respondent in defamation. The respondent also sought solicitor/client costs.

[8] The trial Judge held that the words complained of meant:-

- The plaintiff has provided unethical and unprofessional advice to its client New Zealand King Salmon Limited.
- The plaintiff had told New Zealand King Salmon Limited not to tell the whole truth about is genetically modified salmon trials.

- That clients of the plaintiff should be sceptical of advice given to those clients by the plaintiff.
- That the plaintiff had acted dishonestly.
- That the plaintiff had acted dishonourably.
- That the plaintiff has a poor reputation.

[9] The appellant does not take issue with those findings on this appeal. Nor does it take issue with the trial Judge's rejection of its defence of honest opinion. What it does put in issue on this appeal are four particular findings:-

1. With respect to s 6 of the Defamation Act, finding that the particular publication was likely to cause pecuniary loss to the respondent.
2. Rejecting the appellant's defence of truth.
3. Rejecting the appellant's defence based on s 46 of the Defamation Act 1992.
4. Ordering the appellant to pay the respondent's solicitor/client costs in the proceeding without giving the appellant the opportunity to be heard on that matter.

Section 6, Defamation Act 1992

[10] Section 6 of the Act provides:-

> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings—
>
> (a) Has caused pecuniary loss; or
>
> (b) Is likely to cause pecuniary loss—
>
> to that body corporate

[11] The trial Judge held that as part of its case in the District Court the respondent adduced evidence of a downturn in its work and revenue after the adverse publicity in April 1999 and a survey of its clients who were asked various questions including recent publicity had affected their opinions or business dealings with the respondent.

[12] At trial the appellant challenged the assertion of likely pecuniary loss on a number of bases. First, that there was no cogent evidence of why certain clients reduced their levels of business with the respondent or ceased to use the respondent's services. Some in fact ceased doing business with the respondent within a day or two of the original press release by the Green Party, and well before the 19 April publication by the appellant. Further, all witnesses agreed that there are many economic factors in the cyclical fortunes of business. Second, the appellant submitted that the survey evidence put in by the respondent was either inadmissible or incapable of carrying weight. Reliance was placed on the principles elucidated in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Limited* [1987] 2 NZLR 647, and *Customglass Boats Limited & Anor v Salthouse Brothers Limited & Anor* [1976] 1 NZLR 36. Third, it was submitted that the Rural News report played but a small part in the general climate of adverse publicity occurring after the original press release.

[13] When dealing with the question whether the words complained of were defamatory, the trial Judge held that they were defamatory of the commercial reputation of the respondent "and that such words were likely to cause pecuniary damage to the respondent". The grounds for that finding were not developed by the trial Judge and although he identified the various submissions on behalf of the appellant relating to absence of proof of pecuniary damage, he did not rule on the cogency of such submissions, except to say as follows:-

> I consider that the defendant has merit in its submission on the issue of damages. I have held that the materials published were likely to have caused the plaintiff pecuniary loss. However, despite my conclusion that the High Court proceedings brought against Radio New Zealand is not substantially the same as the present proceedings, there was a publication of other similar articles by other news media. These publications make the assessment of the extent of that loss virtually impossible to prove. I do not think that the evidence called by the plaintiff bridges that causal gap. For this reason I do not think that in this case I can award the plaintiff damages.

[14] There may seem to be a tension between, on the one hand, a finding that the published material was likely to cause pecuniary loss to the respondent and, on the other hand, a finding that the respondent had not proved that pecuniary loss had actually been caused by the defamatory publication. Yet s 6 itself recognises the

distinction and the ability to seek a declaration without claiming damages at all, provided by s 24 of the Act, demonstrates that a body corporate may obtain standing to sue on proof of the likelihood of pecuniary loss without proving actual pecuniary loss and may then obtain relief by way of a declaration and costs.

[15] Whether a particular publication is likely to cause pecuniary loss will depend on the circumstances of the particular case. Where a plaintiff carries on business, as in this case, the nature of the business and the relevance of the impugned publication to that business will be important. So also will be the context in which the publication occurs. Here the respondent was and is in the business of providing services and its reputation in respect of the services it offers will be directly relevant to its goodwill. The appellant's publication occurred in the context of widespread and seemingly undeserved criticism of a sensational nature. For the appellant then to publish words meaning that the respondent had provided unethical and unprofessional advice to a client, advised it not to tell the whole truth, acted dishonestly, dishonourably and such that its clients should be sceptical about advice it gave, and that moreover it had a poor reputation, was directly to impugn its business reputation and goodwill such that some pecuniary loss was likely even if, as the Judge found, actual loss could not be proved so as to warrant an award of damages. Notwithstanding absence of proof of actual pecuniary loss, the respondent was entitled to vindication of its reputation damaged by the defamatory words which were likely to have caused pecuniary loss and such vindication could be accorded by way of a declaration, as was done.

[16] For these reasons I have not been persuaded by the appellant that the trial Judge erred in the application of s 6 of the Act.

The defence of truth

[17] This ground of appeal is advanced in the terms "the defence of truth is available to the appellant", but of course the issue is not whether the defence was available but whether the trial Judge was in error in determining that the appellant had failed to prove truth.

[18] The defence of truth is expressed in s 8 of the Act in these terms:-

> (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.

[19] The appellant's defence of truth depended at trial on the meanings and connotations of and inferences which might be taken from the public relations strategy document, all or part of which somehow came into the possession of the Green Party. Despite the excited nature of some of the media coverage provoked by Ms Fitzsimons' press release, and indeed of the release itself, there was no evidence of genetic malformations resulting from the respondent's research, still less any evidence of a "cover-up" in respect of mutated salmon. Given the meanings found by the trial Judge, the absence of any evidence of that nature was not sufficient to dispose of the defence of truth. The appellant might have succeeded with the defence if it were able to show that the respondent advised NZKS to cover up or hide evidence of research related deformities if such should occur in the future. NZKS carried out its research pursuant to the authority of the Order in Council previously mentioned but under the general aegis, of course, of the Hazardous Substances and New Organisms Act 1996. Without going into the details of that Act, it may be noted that there is a comprehensive regime for approvals and inspections and obligations to report incidents resulting in serious harm to any person or serious environmental damage. If the respondent had in fact advised its client to cover up any future deformities then evidence of such conduct would be well amenable to imputations of the nature conveyed by the appellant's publication. Since all the

appellant could rely on was the advice in the strategy documents, the meanings conveyed by those documents require consideration.

[20] Counsel for the appellant focused on the words:-

> Issues such as deformities and lumps on heads etc should not be mentioned at any point to anyone outside – comments like this would create ghastly 'Frankenstein' images and would be whipped up into an international frenzy by Greenpeace. This could have dreadful trade implications.

[21] The trial Judge held that the real nature of the advice given by the respondent to NZKS was to act conservatively and not mention to outsiders possible failures that might arise in relation to genetic experiments, such advice being in respect of a possible future occurrence. He found there was no evidence that there were in fact fish in the misshapen form mentioned by the respondent so that the advice was hypothetical. The Judge found there was a gulf between such advice and advice to lie about experiments.

[22] He also took the view that the strategy document:-

> … as well as indicating that caution should be shown in dealing with a public debate concerning such experiments, also indicated that consideration should be given to free disclosure.

[23] Counsel for the appellant did not shrink from submitting that the plain and ordinary meaning of the words used was:-

> Cover-up, lie if necessary, tell half-truths if necessary, make sure no-one finds out at any time if mutations occur.

[24] I do not accept that the respondent's strategy document was intended to or did convey the meanings contended by counsel for the appellant. They convey to me, as they did to the trial Judge, 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 the particular case. Looking at the strategy documents as a whole, taking them in the context of general public relations and marketing advice, and focusing on the section headed "Health and Technology"

in the particular strategy document, I am not persuaded that the learned trial Judge was wrong to reject the defence of truth. That ground of appeal also fails.

Section 46, Defamation Act 1992

[25] Section 46 of the Defamation Act 1992 provides as follows:-

> (1) In this section "publication" means the publication of any matter—
>
> > (a) In any newspaper; or
> >
> > (b) By a broadcaster; or
> >
> > (c) By any cinematographic film in any cinema that is open to the public (whether free or on payment of a charge).
>
> (2) Where any proceedings for defamation have been commenced by any person in respect of the publication of any matter, no other proceedings for defamation may be commenced by that person in respect of any other publication, at any time before the commencement of the first proceedings, of the same or substantially the same matter, unless those other proceedings are commenced—
>
> > (a) Not later than 28 working days after the commencement of the first proceedings; or
> >
> > (b) Within such longer period as the Court in which it is sought to commence the later proceedings may allow, being in no case later than the date on which a date is fixed for the trial of the first proceedings.
>
> (3) Where any proceedings are commenced in breach of subsection (2) of this section, a defendant may adduce evidence of that fact by way of defence at the trial of the proceedings, whether or not the defendant has pleaded that fact by way of defence.
>
> (4) For the purposes of this section, matter in a newspaper shall be deemed to have been published on the date of issue of that newspaper, and at no subsequent time.

[26] In relation to that statutory provision, the arguments at trial and the judgment under appeal seem to have assumed that the statutory defence would prevail if the impugned publication in the Radio New Zealand proceedings brought by the respondent were "the same or substantially the same matter" published by Rural

News Limited. I do not need to examine that issue in this judgment because an examination of the relevant chronology demonstrates that even if the alleged defamatory material in each case were the same or substantially the same the Rural News Limited publication occurred after the Radio New Zealand proceedings had been commenced. The Statement of Claim in those proceedings was filed in the High Court at Wellington on 15 April 1999 and by virtue of R106 of the High Court Rules the filing of the Statement of Claim was the commencement of the proceeding. The Rural News Limited publication occurred in its edition of 19 April 1999. Section 46 of the Defamation Act is concerned with situations where a plaintiff commences proceedings in respect of a later published matter before commencing proceedings in respect of an earlier published matter which is the same or substantially the same. Section 46 does not catch the commencement of proceedings in respect of matter after proceedings for earlier published matter have been already commenced. It is plain from a reading of the section that the words "at any time before the commencement of the first proceedings" qualify the immediately preceding gerund "publication".

[27] For these reasons that ground of appeal also fails.

The award of solicitor/clients costs

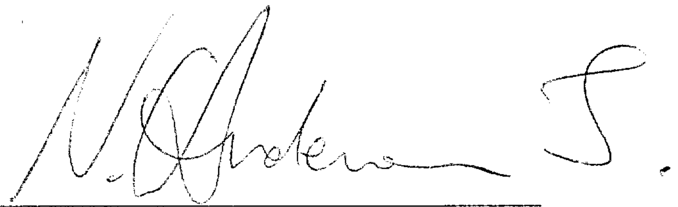
[28] The last sentence of the judgment under appeal states, without reasons:-

> Also, the plaintiff is entitled to solicitor/client costs, witness expenses and disbursements.

[29] The appellant submits that this award was made without his having an opportunity to make submissions to the Judge in respect of what must only have been a discretionary award of costs. It is the case that by virtue of s 24(2) of the Defamation Act a plaintiff is to be awarded solicitor and client costs unless the Court orders otherwise, but that statutory entitlement is dependent upon a plaintiff having sought only a declaration and costs. In the present case the respondent had sought damages and, by way of alternative, a declaration so that the issue of costs was primarily discretionary, not presumptive. Respondent's counsel had, at trial, made submissions on the matter of costs but it does seem that the appellant did not have an

adequate opportunity to make submissions directed to the Court's discretion in respect of costs. Nor has the learned trial Judge given any reasons for what represents an uncommon exercise of judicial discretion in this area. For these reasons I think the matter should be remitted to the trial Judge for rehearing on the issue of costs. The parties can present submissions to him in the light of his judgment and so that reasons may be given for whatever award in respect of costs might ultimately be made.

[30] Perhaps the parties can resolve the issue of costs in the District Court on a pragmatic commercial basis without having to argue the matter before the trial Judge, and if the costs of this appeal cannot be resolved in a similar way I will deal with the question of costs on the appeal by reference to any memoranda counsel wish to file within the next 21 days.



NC Anderson J

Signed at 4-48 ~~am~~/pm on the 3rd day of April 2001