IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 404/167/00

BETWEEN RURAL NEWS LIMITED

Appellant

AND COMMUNICATIONS TRUMPS LIMITED

Respondent

594

Hearing: 5 June 2001

Counsel: R.A. Smith for Appellant
D.B. Collins QC for Respondent

Judgment: 5 June 2001

JUDGMENT OF FISHER J

Solicitors:

Brookfields, P.O. Box 240, Auckland for Appellant
Southall & Associates, P.O. Box 24-152, Wellington for Respondent

[1] In the District Court Communications successfully sued Rural for defamation. Rural's appeal to this Court failed. Rural now applies under s 67 of the Judicature Act 1908 for leave to take a further appeal to the Court of Appeal.

Factual background

[2] During the 1990s New Zealand King Salmon Limited ran a salmon breeding research programme. Communications is a public relations company. In 1998 Communications gave King Salmon some public relations advice in a "strategy document". The document included the following passage:

> 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 strategy document was leaked to the press. Rural publishes a newspaper which includes a satirical column called "The Hound". In the 19 April 1999 issue the column referred to the strategy document in the following terms:

> 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!"
>
> Organisations 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

Communications brought proceedings in the District Court seeking damages, a declaration and costs for defamation.

District Court

[4] In the District Court the trial Judge, Judge Cadenhead, held that the words complained of had the following 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 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.

[5] He rejected the defences of honest opinion and truth. In terms of s 6 of the Judicature Act he found that the publication was likely to cause pecuniary loss to Communications although he did not find that actual loss had occurred such as to attract liability in damages. He rejected the defence based on s 46 of the Judicature Act 1992 which is concerned with the relationship between proceedings against different publishers of the same material. He gave judgment for Communications in the form of a declaration that Rural was responsible for a defamatory statement and ordered that Rural pay Communication's costs on a solicitor-client basis.

The Appeal

[6] On appeal the issues before Anderson J were limited to those findings in the District Court which the appellant Rural sought to challenge in this Court. Rural did not take issue with the meanings found to be attributable to its satirical column (a point which, although clearly stated in Anderson J's judgment, seems to have escaped another publication which purported to summarise his judgment). The four District Court conclusions challenged before Anderson J were as follows:

> 1. With respect to s 6 of the Defamation Act, the finding that the particular publication was likely to cause pecuniary loss to the respondent.
>
> 2. The rejection of Rural's defence of truth.
>
> 3. The rejection of Rural's defence based on s 46 of the Defamation Act 1992.
>
> 4. The order that Rural pay Communication's solicitor/client costs without giving Rural the opportunity to be heard on that matter.

[7] Anderson J dismissed the first three grounds but upheld the appeal against solicitor-client costs. He directed that that aspect be reheard in the District Court.

Principles for further appeal

[8] Rural now seeks to take a further appeal from this Court to the Court of Appeal. It relies upon s 67 of the Judicature Act which provides:

> The determination of the High Court on appeals from inferior Courts shall be final unless leave to appeal from the same to the Court of Appeal is given by the High Court or, where such leave is refused by that Court, then by the Court of Appeal.

[9] The approach to be taken on the question whether leave should be granted in a given case has been the subject of many decisions. Applications for a further appeal will normally be declined unless the appeal would raise some question of law or fact capable of bona fide or serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the

further appeal: per Somers J in ***Cuff v Broadlands Finance Limited*** [1987] 2 NZLR 343 at pp 346-347. All else being equal, leave is less likely to be granted if the first instance decision had been upheld in this Court (see ***Riddell v Porteous*** (1996) 10 PRNZ 64 at p 65). Leave is unlikely to be granted if the case lacks general importance and raises issues of concern to the parties only: see ***Lumley General Insurance (NZ) Ltd v Oceanic Foods Limited*** (1997) 11 PRNZ 223. Ultimately the discretion is to be exercised in accordance with the interests of justice.

Question of law or fact capable of bona fide and serious argument

[10] Before me Mr Smith for Rural advanced essentially two questions said to be capable of serious argument. The first is whether in the present case there was evidence before the Court sufficient to justify the finding that Communications was likely to suffer pecuniary loss, and hence could bring a successful defamation proceeding within the requirements of s 6 of the Judicature Act. Section 6 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] In this case the District Court Judge took the view that there was insufficient evidence of loss to justify damages but still felt able to find that for the purpose of s 6 the publication was "likely to cause pecuniary loss". One infers that in declining damages the Judge must have been focusing primarily upon past losses (in terms of s 6(a)) or alternatively special damages and items of loss which could be specifically proved.

[12] On an application of this nature I am less concerned with questions of inconsistency and more with the question whether, as Mr Smith contends, there was no evidence that the defamation was likely to cause pecuniary loss. I say that because it might well have been equally open to Communications to cross-appeal on

the basis that absence of proof of past or specific items of loss does not preclude damages for injury to goodwill where the defamation is likely to cause pecuniary loss.

[13] Returning to the more narrow question as it was posed to me by Mr Smith, it all seems to come down to the word "proves" in the introductory requirement that the body corporate allege and "prove" that the publication is likely to cause pecuniary loss if it is relying upon paragraph (b). I proceed on the assumption, which I have not independently tried to verify, that there was in fact no evidence of actual past pecuniary loss, nor specific evidence as to loss of Communications' goodwill. By specific I mean evidence from some witness or witnesses or any documents which directly states that the goodwill of the company was likely to have suffered or a series of detailed facts likely to lead directly to that conclusion. The approach taken by Mr Smith was that without specific evidence of that nature it would not be possible to survive the barrier posed by s 6.

[14] I would not interpret the word "proves" in s 6 in that fashion. It seems to me that on any approach to the matter the evidence demonstrated that Communications was and is a commercial enterprise relying upon public relations as the source of its business. The defamatory statement was a direct reflection upon its capacities and propensities in the way in which it went about its business. Once those items were specifically proven it was open to the Court to move on to the inference that the publication was likely to cause pecuniary loss. The fact that the word "proves" is found in the section does not in any way inhibit the Court from drawing proper inferences.

[15] I respectfully agree with the approaches taken by the other two Judges on this subject and do not consider the question capable of bona fide and serious argument for the purposes of leave to appeal.

Defence of truth

[16] The other question said to be capable of bona fide and serious argument was whether on the facts the defence of truth ought to have been upheld. I do not

understand any question of law to be involved here. It seemed to turn upon the interpretation of the words used by Communication in its 1998 strategy document. The question is whether those words might be regarded as advice to cover up or hide evidence of past or future deformities attributable to the genetic modification research programme.

[17] At first blush the interpretation which the other two Judges have placed on the words used by Communications could be regarded as a particularly benign one. However, at the hearing of this application I have been shown only the isolated passage from Communication's strategy document without textual or factual context. Judge Cadenhead had the benefit of a hearing lasting two and a half days and Anderson J a hearing of substance. On an application of this nature it is not for me to substitute my own fleeting impression for theirs. The question is whether the Court of Appeal should be troubled with an issue of that sort.

[18] The only special factor which Mr Smith urges upon me this morning is the contention that since the hearing before Anderson J further evidence has come to light which would or might have produced a different result in the Court below. To put that matter in context it is, I think, common ground that the meaning of the advice given by Communications to King Salmon will necessarily be coloured by the context in which it was said. The ethics or honesty of Communications in giving that advice will also be coloured by the facts which were then in the possession of Communications. I would, therefore, go this far with Rural - if evidence had now come to light which demonstrated that at the time it gave this advice Communications knew that there had already been significant deformities attributable to genetic modification that could be significant.

[19] The "new evidence" which Rural would seek to put forward in the Court of Appeal would not go anywhere near the factual threshold I have posed. The most that it might establish is that, although Communications knew that there had been minor deformities in the salmon produced in the research programme, the incidence and nature of the deformities differed in no way from the deformities found in any event in salmon reared by conventional means. That does not advance the matter in

terms of deformities attributable to genetic modification. It would be scientifically irrelevant.

[20] It is not for me to try to reach any final conclusions about anything substantive in this case. No evidence has put before me that would clearly have had a determinative effect upon the outcome if it had been available at the original hearing. Whether there is an unresolved question about the defence of truth which lends itself to bona fide and serious argument on appeal is a matter of degree. At its highest any such question would be purely one of fact and not one which would obviously be decided in Rural's favour.

General importance

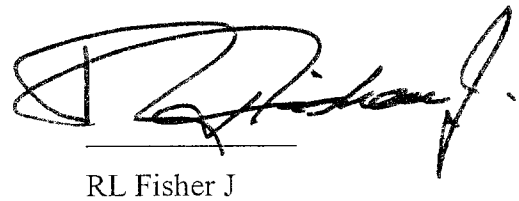
[21] It has not been suggested that the question to be raised on further appeal would be of any general importance beyond the parties.

Importance to the parties

[22] The result of this litigation was merely a declaration that Rural was responsible for a defamatory publication and an order that it pay costs. It has not been argued that it is of major or special importance to the parties.

Result

[23] The application for leave to appeal to the Court of Appeal is dismissed with costs to the respondent Communications. Without opposition from either party the costs payable to the respondent will be on a 2B basis plus disbursements to be fixed by the Registrar in the absence of agreement. Without opposition from Mr Smith the disbursements will include counsel's travel and accommodation costs.



RL Fisher J