IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 393/98

BETWEEN	ANTHONY ROSS THOMAS
	Plaintiff
A N D	PAUANUI PUBLISHING LIMITED
	First Defendant
674 A N D	JENNI McMANUS
	Second Defendant
A N D	WARREN BERRYMAN
	Third Defendant

Hearing: 31 May 2001

Counsel: MC Black for the plaintiff/respondent
RJF Fardell for the defendants/applicants

Judgment: 26 June 2001

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Distribution

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Introduction

[1] The plaintiff sues the defendants for damages for defamation. The defendants apply for leave to apply for summary judgment and for summary judgment, alternatively for an order striking out the plaintiff's statement of claim, alternatively for an order for security for costs. This judgment deals with those applications.

[2] The judgment has the following sections:

[a] Brief facts (paragraphs [3]-[10]);

[b] Summary judgment: necessity for leave to apply for summary judgment (paragraphs [11]-[12]);

[c] Summary judgment: deferment of decision whether to grant leave (paragraphs [13]-[14]);

[d] Summary judgment: the parties' pleadings: plaintiff (paragraphs [15]-[27]);

[e] Summary judgment: the parties' pleadings: defendants (paragraphs [28]-[31]);

[f] Summary judgment: the approach to be adopted (paragraphs [32]-[33]);

[g] Summary judgment: the third defendant's request for the deferment of the application until after further discovery by the plaintiff (paragraphs [34]-[35])

[h] Summary judgment: the availability to the defendants of the defences of truth and honest opinion (paragraphs [36]-[42]);

[i] Summary judgment: the availability to the defendants of the defence of qualified privilege (paragraphs [43]-[52]);

[j] Summary judgment: conclusion (paragraph [53]);

[k] Strike out application (paragraphs [54]-[59]);

[l] Security for costs application (paragraphs [60]-[63]);

[m] Costs (paragraphs [64]-[66]);

[n] Orders (paragraphs [67]-[68]).

Brief facts

[3] The plaintiff is a Barrister and Solicitor of the High Court of New Zealand

[4] The first defendant is the publisher of "The Independent Business Weekly". The second defendant is the Business Editor of the paper. The third defendant is its Editor.

[5] The edition of "The Independent Business Weekly" on 8 July 1998 contained an article headed "Auckland lawyer, ANZ, govt, US Secret Service in $23m 'net scam" which referred to the plaintiff ("the First Newspaper Article"). This article was subsequently published electronically ("the First Internet Article"). The article was written by the second defendant.

[6] A second article appeared in the edition of the paper published on 22 July 1998 ("the Second Newspaper Article"), this time with the headline "Chalkie finds big money in bulldust", which again referred to the plaintiff. This second article also was published electronically ("the Second Internet Article"). The author on this occasion is alleged to have been the third defendant (although this is denied).

[7] The plaintiff alleges that he was defamed by the articles.

[8] The defendants have pleaded the defences of qualified privilege, truth and honest opinion and seek summary judgment on the basis of those defences.

[9] In the alternative, they seek an order striking out the plaintiff's first amended statement of claim on the grounds that it does not disclose a cause of action and/or that the plaintiff has been and continues to be in default in complying with orders of the Court.

[10] In the further alternative, they seek security for costs.

Summary judgment: necessity for leave to file and serve a summary judgment application

[11] Mr Fardell, for the defendants, submitted that the defendants did not require leave to file and serve their summary judgment application. He argued that each time a defendant files and serves an amended statement of defence, whether consequent upon the plaintiff's original statement of claim or an amended statement of claim, the defendant is entitled to apply for summary judgment without seeking leave to do so.

[12] I determined this question as a preliminary issue and adversely to the defendants. I did not, and I still do not, accept Mr Fardell's submission. I find nothing in the wording of r 138 of the High Court Rules which supports the interpretation argued for by Mr Fardell nor do I think that there is any reason in practice or principle to make a distinction between the rules which apply in relation to a plaintiff's application for summary judgment and those which apply in relation to a defendant's application. Furthermore, leave will not be refused in meritorious cases, so there can be no prejudice in requiring leave to be sought.

Summary judgment: deferment of the decision whether to grant leave

[13] Having made the decision that leave was required, I started to hear counsel on the question of whether leave should be granted.

[14] It became apparent fairly quickly that it would not be possible for me to make a proper decision on whether to grant leave without hearing argument on the merits of the substantive summary judgment application. I therefore deferred my decision as to whether to grant leave to bring the summary judgment application until after I had heard argument on the substantive summary judgment application. For my decision, see paragraph [53] of this judgment.

Summary judgment: the parties' pleadings: plaintiff

[15] As noted in paragraphs [5]-[7] of this judgment, the plaintiff complains that four articles published by the defendants were defamatory of him:

[a] The First Newspaper Article on 8 July 1998;

[b] The First Internet Article on the same date;

[c] The Second Newspaper Article on 22 July 1998;

[d] The Second Internet Article on the same date.

[16] The plaintiff alleges (in paragraph 10 of the First Amended Statement of Claim) that the First Newspaper Article as a whole and the following passages in it in particular were falsely defamatory of and concerning him:

[a] The headlines; and/or

[b] The paragraphs numbered 1-19 inclusive in the version of the article attached as the first schedule to the original statement of claim; and/or

[c] The paragraphs numbered 24-27 in that schedule.

[17] The First Newspaper Article was carried over two pages (hence the reference to headlines). The first headline was "Auckland lawyer, ANZ, govt, US Secret Service in $23m 'net scam". The second headline read "US Secret Service swoops on $23m boodle in ANZ".

[18] Paragraphs 1-19 of the First Newspaper Article read as follows:

1 A question mark hangs over the conduct of Auckland lawyer Tony Thomas and the New Zealand and American governments following last week's move by the High Court at Auckland to freeze US$11 million, allegedly the proceeds of an international scam.

2 The money, lodged in four separate tranches on 30 April, and 13, 14 and 15 May, was deposited from the United States into account number 688168-001, belonging to Paramount Insurance Co Ltd, at the Queen St/Victoria St branch of the ANZ bank in Auckland.

3 Paramount, an Auckland-registered company, shifted its accounts to New Zealand in April only after American investment bank and brokerage Dean Witter Reynolds refused to accept any further deposits and obtained a cease and desist order from the US courts, banning Paramount from further associating itself in any way with the firm.

4 But while made public only on July 1 after the High Court lifted a blanket suppression order on all details, the action began in secret three weeks earlier, on 8 June, when Auckland lawyer, Stewart McKenzie obtained a mareva injunction, freezing some US$2.675 million in the ANZ account.

5 It was Mckenzie and his Louisiana-based client, US Associates, not the US government, who took the initial step to protect the funds. US Associates and its contributors had identified these funds as theirs.

6 Among those seeking the return of his investment is one of the biggest contributors, Robert Franzen, an Australian living in Chicago.

7 On behalf of a Singapore company, Vietmy International, Franzen ploughed some US$500,000 into a so-called "investment scheme" being run by William G Stanley, an elderly Californian resident currently under investigation by the US Department of Justice and the Secret Service. The investment was made through US Associates, which was introduced to Franzen by a business associate.

8 Stanley's "investment" schemes were promoted through his company, Stonewood Trust, of which New Zealand-based Paramount Insurance is a subsidiary.

9 Essentially, they're a sophisticated form of prime bank guarantees, where questionable financial instruments are traded on a so-called secret market and returns of up to 700%

are offered. Terms like "global mid-term notes", "106% bank guarantees", "prime world bank debentures" and "prime European bank letters of credit" are typically used.

10 Paramount Insurance Co Ltd was incorporated in Auckland on 24 April 1997 with lawyer Tony Thomas's company, Von Tempsky Nominees, as its sole shareholder. As a New Zealand-registered insurer intending to do business only overseas, it was not obliged to lodge the usual $500,000 bond with the public trustee.

11 From here, the picture becomes confused. Companies Office records for Paramount Insurance Co Ltd , searched on 1 July 1998, show the Van Tempsky shareholding was transferred on 28 April 1997 However, Thomas's offices remained Paramount's registered office until 23 June 1998 – some two weeks after US Associates obtained its mareva injunction – when Paramount's registered office moved to Auckland's Fort Street.

12 Paramount's 30 March 1998 annual return indicates the shareholders on that date were William Stanley and two other US nationals, Marvin Mears and Morris L Lerner. However a Companies Office search done on 12 June 1998 still shows Von Tempsky as Paramount's only shareholder, although the file was updated on 15 and 23 June.

13 Apart from his Paramount involvement, Thomas has also acted as the front-man for ill-starred International Casualty & Surety, a company linked to First Assurance and Casualty Co which was the subject of a RICO (Racketeer Influenced and Corrupt Organisations Act) action after it left hundreds of American policyholders US$15 million out of pocket following the 1992 Los Angeles race riots.

14 Thomas has been at pains to publicly disassociate himself from Paramount and his former client William Stanley since news of the scam broke last week. Thomas maintains he was "misled as to the true position regarding the US Associates proceedings" and had earlier advised Paramount's directors, on 28 March 1998, he was not prepared to act further for the company.

15 This, he assured The Independent yesterday, "did not involve any question as to fees".

16 But between 10 June and 17 June, Thomas sat down with McKenzie and other lawyers acting for US Associates to negotiate a settlement with Paramount for the return of US Associates' US$2,756 million.

17 Asked under what capacity he had become involved in the settlement effort, Thomas said he agreed to act only in a limited capacity. "What little was done, was done on the basis of specific and precise instructions from the company." On becoming aware of fraud allegations, "I withdrew unilaterally," he says.

18 However, Thomas ackowledges that he met the directors of Paramount "briefly and for the first and only time" a month ago on 5 June, in the US "while on business for other clients." The meeting was convened at the request of a Paramount director, he says, who asked him to reconsider his decision not to act further for the company. Thomas says he saw no reason to resile from his earlier decision.

19 On his decision to become involved with Stanley in the first place, Thomas says: "I was introduced to the directors and shareholders of this company by a client who assured me of their integrity". Von Tempsky, he says, transferred its share in Paramount to Mears "immediately following incorporation".

[19] Paragraphs 24-27 of the First Newspaper Article read as follows:

24 Some two weeks earlier, however, the ANZ bank had become suspicious.

25 Mindful of its obligations under the Financial Transactions Reporting Act to report any dodgy activity, the bank had alerted Wellington police and frozen the account. Another $US2 million deposited into the Paramount account during June was similarly frozen.

26 It was only on 17 July, when US Associates returned to the High Court at Auckland to ratify a proposed settlement between Paramount and US Associates to release the latter's SUS2.675 million, that the US government turned up, demanding that the money be frozen under its auspices pursuant to investigations unspecified American authorities were conducting into Stanley.

27 On 1 July the court refused, placing the entire $US11 million under the control of the High Court registrar until further notice.

[20] The plaintiff alleges (in paragraph 17 of the first amended statement of claim) that the First Internet Article as a whole and the following passages in particular were falsely defamatory of and concerning him:

[a] The headline and the accompanying paragraph on the homepage;

[b] The headline (repeated) and the paragraphs numbered 1-19 on the story page;

[c] The paragraphs numbered 24-27 inclusive on the story page.

[21] The headline and the accompanying paragraph on the home page of the website contained the following features (as alleged in paragraph 16 of the First Amended Statement of Claim):

> 16.1 The main headline for the article appeared on the front page or "homepage" of the Internet web-site accompanied only by the name of the second defendant and the words:
>
> "A question mark hangs over the conduct of Auckland lawyer Tony Thomas and the New Zealand and American governments following last week's move by the High Court at Auckland to freeze $US11 million, allegedly the proceeds of an international scam.
>
> -go to story
>
> 16.2 The words -go to story: contained a "hypertext link" which enabled the reader, if interested, to see another page ("the story page") which repeated the main headline and set out the whole article in full (apart from the secondary headline, which did not appear in the first internet article).

[22] On the website the storypage had the single headline "Auckland lawyer, ANZ, govt, US Secret Service $23m 'net scam" and was otherwise in the same terms as the First Newspaper Article.

[23] The plaintiff alleges (in paragraph 24 of the first amended statement of claim) that the Second Newspaper Article as a whole and the following passages in particular were falsely defamatory of and concerning him:

[a] The headline;

[b] The explicit approval or incorporation by reference of the First Newspaper Article and/or the First Internet Article in paragraph 5 of

the version of the article which is printed in the second schedule to the original statement of claim;

[c] The paragraphs numbered 1-6 in that schedule;

[d] The paragraphs numbered 31-35 in that schedule.

[24] Paragraphs 1-6 of the Second Newspaper Article read as follows:

> 1 Chalkie hears that United States secret service agents are closing in on William G Stanley – the elderly Californian at the centre of an international banking scam and moves by the High Court at Auckland late last month to freeze $US11 million of his allegedly ill-gotten gains.
>
> 2 Joe Kaye, the agent spear-heading the investigation and the secret service officer whose testimony was presented at the Auckland hearing, won't comment on when – or whether – an arrest might be made.
>
> 3 But other American sources close to the case said yesterday indictments were pending against Stanley on charges of obtaining money under false pretences and money-laundering. "It might need a couple more weeks but they're getting pretty close to a grand jury," Chalkie was told.
>
> 4 This follows a 2 July raid by secret service agents on Stanley's home at Laguna Niguel, south of Los Angeles.
>
> 5 Stanley, meanwhile, is understood to have shifted the banking side of his operation to Britain, after a group of suspicious American investors obtained a mareva injunction from the High Court at Auckland on 8 June to protect their money. Their $US2.675 million – part of the $US11 million subsequently swooped on by the US government – is now frozen and under the control of the court registrar (The Independent 8 July).
>
> 6 After US broking firm Dean Witter Reynolds refused to accept any further deposits from Stanley – who'd used a false tax number to open the account in the first place – he moved the $US11 million to New Zealand. The money was deposited at the ANZ in four tranches during April and May into the account of Paramount Insurance Co Ltd , a $1 company set up for Stanley by Auckland lawyer Tony Thomas, using his company Von Tempsky Nominees as the

foundation shareholder. Thomas maintains he was simply acting as a lawyer in the transaction.

[25] Paragraphs 31-35 of the Second Newspaper Article read as follows:

> 31 One man who's considerably sadder and wiser is US Associates' investment manager, Dan Patton.
>
> 32 In an affidavit sworn in the Auckland proceedings last month, Patton denies any suggestion that he's Stanley's alleged partner in crime.
>
> 33 Sucked in by one of Stanley's salesmen, and comforted further by the "fact" that Paramount Insurance was "a substantial, international insurance company that was registered in New Zealand and had operated for in excess of 10 years," Patton says he no longer believes in "fresh-cut paper", "commitment holders" or any of the terminology pertaining to prime bank instrument fraud.
>
> 34 Depending on how the High Court in Auckland views their applications, his clients are luckier than most of the victims of Stanley and his ilk.
>
> 35 They might not be able to get their hands on it right now. But their money is still safely in the bank.

[26] The plaintiff makes the same complaints of, and relies on, the same features of the Second Internet Article as have just been described in paragraphs [23]-[25] of this judgment (see paragraph 31 of the first amended statement of claim).

[27] In respect of each of the articles, the plaintiff alleges (in paragraphs 11, 18, 25 and 32 respectively of the first amended statement of claim) that:

> In their natural and ordinary meaning the words so published meant and were intended to mean all or any of the following:
>
> .1 The plaintiff has been or is suspected of having been involved in the perpetration of a multi-million dollar international scam;
>
> .2 The plaintiff has been or is suspected of having been involved in defrauding innocent investors of millions of dollars;
>
> .3 The plaintiff has knowingly helped one or more dishonest clients to carry out schemes that involved large scale fraud;

.4 The plaintiff has acted in a manner which is contrary to his professional or ethical duties.

Summary judgment: the parties' pleadings: defendants

[28] The defendants have pleaded three affirmative defences:

[a] Qualified privilege

[b] Truth

[c] Honest opinion

[29] The pleading of qualified privilege is set out in paragraph 37 of the first amended statement of defence as follows:

> They repeat paragraphs 1 to 36 hereof and say that in respect of each and any publication on which the plaintiff has brought these proceedings and for which the defendants or any of them may be answerable in law, such publication was made in *The Independent Business Weekly* for the purpose of informing the business community about a matter of contemporary business interest and importance (namely the affairs of a New Zealand registered company Paramount Insurance Company Limited) and that each defendant had a duty to inform the business community in relation to such matter and the audience of *The Independent Business Weekly* had a corresponding interest in receiving such information and accordingly such publication was on an occasion of qualified privilege.

[30] The defence of truth is set out in paragraph 38 of the first amended statement of defence as follows (with the particulars omitted at this stage):

> 38 They repeat paragraphs 1 to 37 hereof and say that:
>
> (a) To the extent that they published a statement or statements that the plaintiff had been involved in any part of a multi-million dollar international scam, this was true or not materially different from the truth.
>
> (b) To the extent that they published a statement or statements that the plaintiff had been or was suspected of having been involved in defrauding innocent investors of millions of dollars, this was true or not materially different from the truth.

(c) To the extent that they published a statement or statements that the plaintiff had acted as a solicitor for one or more clients where he knew or should have known that such schemes involved large scale fraud, this was true or not materially different from the truth.

(d) To the extent that they published a statement or statements that the plaintiff had acted in a manner which was contrary to his professional or ethical duties, this was true or not materially different from the truth.

[31] The defence of honest opinion is pleaded in paragraph 39 of the first amended statement of defence as follows:

> 39 They repeat paragraphs 1 to 38 and say that to the extent that the statements published by the defendants published the following opinions:
>
> (a) An opinion that the plaintiff's conduct was open to question; and/or
>
> (b) An opinion that the plaintiff had acted in a manner which was unprofessional, unethical, inappropriate, or incompetent for a barrister and solicitor; and/or
>
> (c) An opinion that the plaintiff had attempted to distance himself from the Paramount Insurance Company Limited fraud in a way which was belated, inadequate, or lacking in credibility; and/or
>
> (d) An opinion that the plaintiff should have known that those who obtained his personal and professional assistance to establish and operate Paramount Insurance Company Limited were engaged in fraud or dishonesty.
>
> then each such opinion was published as honest opinion by the defendants being their opinion on the facts set out in the particulars set out in paragraph 38 of this statement of claim.

Summary judgment: the approach to be adopted

[32] The Court of Appeal has recently set out the approach to be adopted where a defendant seeks summary judgment against a plaintiff. In its decision of 9 November 2000 in *Westpac Banking Corporation v MM Kembla New Zealand*

Limited [2001] 2 NZLR 298 at pages 313-314 of the report the Court gave the following guidance to judges at first instance as to how they should approach the determination of defendants' summary judgment application:

> [58] The applications for summary judgment were made under Rule 136(2) of the High Court Rules which permits the Court to give judgment against the plaintiff "if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed".
>
> [59] Since Rule 136(2) permits summary judgment only where a defendant satisfies the Court that the plaintiff cannot succeed on any of its causes of action, the procedure is not directly equivalent to the plaintiff's summary judgment provided by Rule 136(1).
>
> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under Rule 186. Rather Rule 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.
>
> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
>
> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will

sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

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

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

[33] Although the Court of Appeal did not refer in this judgment to its earlier judgment in *Pemberton v Chappell* [1987] 1 NZLR 1 in relation to plaintiffs' summary judgment applications, the earlier decision contains a useful guide as to on what is meant by "satisfies" in r 136(1) and (2). The relevant passage is in Somers J's judgment at 3/49-4/17 of the report:

> At the end of the day R136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See eg *Wallingford v Mutual Society* (1880) 5 App Cas 685, 693; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99; *Orme v De Boyette* [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident - that is to say, satisfied - that the defendant's statements as to matters of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 and in the judgment of Greig J in *Attorney-General v Rakiura Holdings Ltd* (Wellington, CP 23/86, 8 April 1986).

Summary judgment: the third defendant's request for the deferment of the application until after further discovery by the plaintiff

[34] In his affidavit dated 27 October 2000, the third defendant sought to have the determination of the defendants' summary judgment application deferred until after further discovery had been given by the plaintiff (see paragraphs 4 and 9 of the affidavit).

[35] That request was not made by counsel for the defendants in his submissions and I have therefore ignored it.

Summary judgment: the availability to the defendants of the defences of truth and honest opinion

[36] The question of whether the words complained of in this case are capable of having the meanings alleged by the plaintiff has not been put in issue.

[37] In considering the availability to the defendants of the defences of truth and honest opinion, therefore, it is appropriate to start with the distinction between the two defences, as set out in two of the leading texts on the subject:

[a] *Laws NZ,* Defamation, paragraph 139:

> The defence of truth may be raised in the case of both defamatory statements of fact and defamatory opinion. However, the defence of honest opinion (formerly "fair comment") applies only to opinion and not to statements of fact. Where the words complained of contain both defamatory statements of fact and defamatory expressions of opinion, it is essential to plead truth as well as honest opinion.

> Where the defence of truth is raised, it is necessary to prove in respect of both statements of fact and expressions of opinion that the imputations in the matter complained of, or the publication taken as a whole, was true or not materially different from the truth. In a defence of honest opinion it is necessary to prove that the statements of fact on which the opinion is based are true or not materially different from the truth, and that, having regard to those facts and to any other facts generally known at the time and proved to be true, the comment on those facts is genuine opinion. The defence of honest opinion will fail unless the comments were the genuine opinion of the defendant, the latter being the author of the material. ...

[b] Paragraph 12.3 of *Gatley on Libel and Slander* (9th edition, 1998):

> Justification is a defence to any imputation contained in the words complained of, whether of comment or of fact, but if that is the plea the defendant must show that his comment is "correct". The defendant who pleads fair comment does not take upon himself this burden: the issue is not whether the jury agrees with his opinion of the plaintiff's conduct but whether it is a comment which might fairly be made on the facts referred to. On the other hand, fair comment is narrower than justification in that it is not applicable to pure statements of fact, as opposed to opinions or inferences. ...

[38] In order to succeed on the defence of truth, therefore, a defendant must prove that the imputations in the matter complained of, or the publication taken as a whole, were true or not materially different from the truth. In order to succeed on the defence of honest opinion, the defendant need not prove the truth of the imputations but must prove that the statements of fact on which the opinion was based were true or not materially different from the truth and that, having regard to those facts, the opinion was a genuine opinion.

[39] The word "involved" and its cognates have a wide range of meaning, from knowing and active participation in whatever is alleged to conduct that is unwitting and passive. No point was taken by counsel for the defendants as to the precise

shade of meaning to be attached to the word in this case. It is capable of the more serious meaning, the plaintiff alleges (in paragraph 6 of his affidavit of 4 September 2000) that it has been taken in that sense by professional colleagues and clients, and, in the absence of argument to the contrary, I propose to determine this case on the basis that the word has that meaning in this case.

[40] The first stage in determining whether either or both of the defences is available to the defendants is to determine the extent to which the facts relied on as establishing the defence of truth and as providing a basis for the defence of honest opinion have been established by the defendants.

[41] The facts relied on by the defendants as establishing truth or providing the basis for the defence of honest opinion and my findings as to whether they are proved or not are as follows:

(a) **The plaintiff was the beneficial owner of a company, Von Tempsky Nominees Limited.**

Proved.

(b) **The plaintiff, through Von Tempsky Nominees Limited, had procured the incorporation in New Zealand of Paramount Insurance Company Limited.**

Proved.

(c) **Such incorporation was procured by and for persons in the United States including one William G Stanley.**

Proved.

(d) **The plaintiff at all material times knew that Paramount Insurance Company Limited was not authorised under the laws of New Zealand to transact business in New Zealand.**

Proved. However, I do not see how that fact is relevant to either of the defences under consideration.

(e) **The plaintiff knew or should have known that Paramount Insurance Company Limited would transact business (including purported insurance and investment business) in other jurisdictions than New Zealand through the actions of William G Stanley and others associated with him.**

Proved in so far as it relates to the transaction of insurance business but not in so far as it relates to investment business. On the evidence before the Court, it does not appear that the plaintiff was aware of investment business being transacted by Paramount Insurance Co Ltd before 17 February 1998. He ceased to act for the company on 26 March 1998, except for a brief period in May-June 1998, for which, if his evidence is believed, he has provided an explanation which might be accepted by a Judge or jury at trial as sufficient to exonerate him of any criticism that might otherwise be able to be made against him.

(f) **The plaintiff knew or should have known that Paramount Insurance Company of the United States is a long-established and reputable mutual insurer and had no connection with William G Stanley or any other client of the plaintiff and had not authorised the incorporation of the New Zealand company.**

Not proved. The plaintiff denies it on oath; and there is no evidence, in my view, which sufficiently (if at all) contradicts that evidence.

(g) **The plaintiff in addition to procuring the incorporation of Paramount Insurance Company Limited acted for it as its solicitor and undertook matters and accepted further**

instructions after incorporation in respect of financial and other negotiations both in New Zealand and in the United States of America.

Proved. However, of itself, this course of conduct does not, in my view, prove the truth of nor provide a sufficient basis for an honest opinion regarding the imputation against the plaintiff's character. He has provided explanations which, if believed, would remove or reduce any adverse inference that might be drawn against him as a result of the closure of the company's bank account with the HongKong and Shanghai Banking Corporation and from his acting for the company in May-June 1998. In addition, the express disavowal by counsel appearing for the Government in the proceeding in May-June 1998 of any intention to suggest that the plaintiff "was in any way party to or aware of the apparently fraudulent nature of the claim made against Paramount Insurance Co Ltd " cannot be ignored, at least in the context of the summary judgment application. (In coming to this conclusion, I have not overlooked either exhibit "C" to the third defendant's affidavit dated 27 October 2000 or his receipt of the letter from Mr Stanley dated 15 March 1998, a copy of which is exhibit "WWB19" to the third defendant's affidavit of 19 July 2000. The former document was only introduced in reply. The latter document was followed within 11 days by the plaintiff's refusal to act further for the company.)

(h) **During the period of the plaintiff's involvement, Paramount Insurance Company Limited in New Zealand received sums, in the order of $US11 million, by trading and defrauding innocent investors. Such trading was not**

intended by but was facilitated by the involvement of the plaintiff.

Not proved to a sufficient standard. There are two aspects relevant to the defences:

[i] proof that the funds were received "by trading and defrauding innocent investors";

[ii] proof that this process was facilitated by the plaintiff's involvement.

As requested by the defendants (and consented to by the plaintiff) I have read the relevant affidavits in the US Associates proceeding referred to in the articles and I do not consider that evidence to go far enough to establish the defences relied on by the defendants on a balance of probabilities.

(i) **The plaintiff should have known that the purpose of the incorporation of Paramount Insurance Company Limited in the manner in which it occurred was to facilitate fraudulent or dishonest transactions.**

Not proved. No linkage was established, on the evidence before the Court, between Mr Stanley and his associates and those who had been involved earlier in other insurance companies whose conduct is alleged, by the defendants, to have been dishonest.

(j) **The plaintiff had been previously cautioned by the New Zealand authorities to make inquiries and to exercise caution in acting for unknown overseas principals in respect of insurance transactions.**

Not proved.

(k) **The plaintiff had been engaged previously in various capacities in a number of other insurance transactions which had proved over time to have an actually or potentially dishonest character including:**

(1) **The registration and operation of Lifeguard Reinsurance companies including Lifeguard Reinsurance Limited (New Zealand registered company 66231)**

(2) **The registration and operation of the Good Shepherd insurance companies including Good Shepherd Insurance Company Limited (New Zealand registered company 601832) and GS Pacific Holdings Limited (New Zealand registered company 605721)**

(3) **The registration and operation of the International Casualty and Surety Company Limited (New Zealand registered company 100327) and its connected United States company First Assurance and Casualty Co Limited (incorporated in the Turks and Caicos Islands)**

(4) **The registration and operation of Astor Re Limited, a company registered in New Zealand and trading in Australia (formerly known as Continental and Pacific Reinsurance). (New Zealand registered company Conpac Astor Reinsurance Services Limited 813429)**

With the possible exception of International Casualty and Surety Co Limited, not proved to a sufficient standard.

Not proved to a sufficient standard even in respect of International Casualty and Surety Co Limited. The evidence before the Court as to the actually or potentially dishonest character of this company is limited to articles published in The Independent Business Weekly (exhibits "WWB8"-"WWB11" to the third defendant's affidavit sworn on 19 July 2000). In one at least of those articles (exhibit "WWB8"), it is

clear that International Casualty and Surety Co Limited was not the major focus of the events reported and in another (exhibit "WWB9" to that affidavit) the allegations are treated as no more than allegations even by the defendants.

(l) **The actions of the plaintiff directly and through his company Von Tempsky Nominees Limited in the incorporation and operation of:**

(1) Paramount Insurance Company Limited; and/or

(2) Astor Re Limited; and/or

(3) International Casualty and Surety Company Limited

This is no more than a rewording of some of the earlier allegation and does not take the matter any further.

[42] In the light of these findings, I am not satisfied that a sufficient basis has been established by the defendants to justify granting them summary judgment on either the defence of truth or that of honest opinion. A sufficient basis of proven fact has not, in my view, been laid by them. This is a case to which, in my view, at least in considering the defences of truth and honest opinion, the warning of the Court of Appeal in paragraph [62] of the *Westpac Banking Corporation v MM Kembla New Zealand Ltd* judgment is particularly apposite (see paragraph [32] of this judgment).

Summary judgment: the availability to the defendants of the defence of qualified privilege

[43] Summary judgment has been granted to a defendant on the ground of qualified privilege in at least one case: *Ferrymead Tavern Ltd v Christchurch Press Co Ltd* [1999] NZAR 529, (1999) 13 PRNZ 616.

[44] It is at least strongly arguable that the articles in this case were each published on an occasion of qualified privilege. I would be prepared to make this finding on the basis that it is the function of the publisher, business editor and editor

of a paper such as The Independent Business Weekly to inform the business community about the affairs of a company such as Paramount Insurance Co Ltd and that the readership of a newspaper such as The Independent Business Weekly, being part of the business community, has a corresponding interest in receiving the information.

[45] A finding that the articles were all published on a privileged occasion would not, however, necessarily conclude the matter in the defendants' favour. The privilege does not necessarily apply to everything contained in the articles.

[46] In its judgment in *Lange v Atkinson* [1998] 3 NZLR 424 at 441/47-442/15 the Court of Appeal, in the section of the judgment headed "Qualified privilege: its development and characteristics" had the following to say on the scope of the privilege :

> The foregoing discussion of the flexibility of the underlying principle (with its emphasis on social utility and shared interest), the infinite variety of possible situations, the limited role of any requirement of reciprocity, the generality of the social or moral duty or interest required, and the broad power exercised by the Courts in determining the relevant social or moral principle or public policy and adapting the law to the necessary condition of society does not mean that the defence of qualified privilege is without bounds. It plainly is not. The rights of individuals to their reputation are also critical. In particular, Courts have frequently rejected any argument that general public interest can alone protect a defamatory public statement. As this Court said in 1959 at p 83:
>
> > ". . . there is no principle of law . . . which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest." *Truth (NZ) Ltd v Holloway*. (See similarly *Templeton v Jones*; but compare *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 297 and 310.)

[47] Similar statements are found in *Laws NZ*, Defamation, paras 101- 102 and in *Gatley on Libel and Slander*, (9th edition, 1998) paras 14.3 and 14.59-14.60. See also decisions such as *Adam v Ward* [1917] AC 309 (HL), [1916-17] All ER Rep

157, *News Media Ownership Ltd v Finlay* [1970] NZLR 1089 (CA) and *Dunford Publicity Studios Ltd v News Media Ownership Ltd* [1971] NZLR 961.

[48] It must, in my view, be open to question whether the main heading of the First Newspaper Article and the First Internet Article and paragraphs [1] and [13], at least, contained in those articles (see paragraphs [17], [18] and [20]-[22] of this judgment) are covered by qualified privilege.

[49] I am of this view for the following reasons:

[a] Paragraphs [1] and [13] of the articles are arguably "not relevant and pertinent" to the purpose of the articles pleaded in paragraph 37 of the first amended statement of defence, viz: "to inform .. the business community about ... the affairs of a New Zealand registered company Paramount Insurance Co Ltd" (cf *Laws NZ*, Defamation, para 101);

[b] Paragraph [13], at least, of the articles may be regarded as gratuitous and not part of the "general topic developed in the article" (cf *Laws NZ*, Defamation, para 102) and the quotation in *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA) contained in the passage from the judgment of the Court of Appeal in *Lange v Atkinson*, ubi supra, quoted in paragraph [46] of this judgment);

[c] Both criticisms apply equally to the main headline of the articles.

[50] I do not consider that it is safe, in the absence of fuller evidence, to determine the issue of whether the main headline and paragraphs [1] and [13] of the First Newspaper Article and the First Internet Article are within the scope of any privilege that might otherwise be found.

[51] In making this decision I have not overlooked the distinction between irrelevance, on the one hand, and excess or exaggeration, on the other (see *Gatley on Liabel and Slander* (9th edition, 1998) paras 14.59-14.60).

[52] In making my decision on the availability to the defendants of the defence of qualified privilege I have not been influenced by the suggestion (it is no more) of "ill will towards the plaintiff" or the taking of "improper advantage of the occasion of publication" put forward in argument by Mr Black, for the plaintiff. There is, at present, no notice under s 41 of the Defamation Act 1992 nor has Mr Black sought to expand on his suggestion to indicate what particulars of ill will or improper advantage might be contained in any such notice, if leave were given to file it.

Summary judgment: conclusion

[53] It follows from my findings in paragraphs [15]-[52] of this judgment, that I am not satisfied that the plaintiff cannot succeed on any of its causes of action. It follows that there is no point in granting leave to the defendants to apply for summary judgment because, if such leave were granted, their application must fail.

Strike out application

[54] As noted in paragraph [9] of this judgment the defendants seek an order striking out the plaintiff's first amended statement of claim on the grounds that it does not disclose a cause of action and/or that the plaintiff has been and continues to be in default in complying with orders of the Court.

[55] The first ground is without substance.

[56] I make the following findings in relation to the second ground:

[a] Default is alleged in respect of the following categories of document:

[i] Undiscovered documents of the plaintiff;

[ii] Undiscovered documents of Paramount Insurance Co Ltd which are in the possession, power or control of the plaintiff or have been in his possession, power or control or of which he is otherwise aware;

[iii] Documents relating to the plaintiff's travel to the United States in 1998 for the purpose of visiting clients;

[iv] Documents relating to the positive defences pleaded in the statement of defence.

[b] It is clear from the plaintiff's affidavit of 3 October 2000 that there are documents in each of these categories which have not been discovered (I set out the details of these documents in paragraph [57] of this judgment).

[c] There is no excuse, in my view, for the plaintiff's failure to make discovery of documents in the first category before now. Documents in this category were covered by paragraph [4] of my order of 27 March 2000.

[d] However, I do not consider that his failure to comply with that order merits the striking out of his proceeding.

[e] There is no reason, in my view, why the plaintiff could not have made discovery of documents in each of the other three categories listed in sub-paragraph [a] above before now. However, when the matter was before me on 30 May 2000 (see paragraph [4] of my Minute of that date) discovery of these categories was left for discussion between counsel. Unfortunately, that discussion did not take place.

[f] Having regard to the basis on which discovery of the second to fourth categories of document listed in sub-paragraph [a] was left on 30 May 2000, I do not consider it appropriate to strike out the plaintiff's proceeding because of his failure to make discovery of documents in those categories, even though I find he could have made it earlier.

[57] As noted in paragraph [56][b] above, I am satisfied that there are documents not yet discovered in each of the four categories of documents identified in paragraph[56][a], as follows:

[a] **Undiscovered documents of the plaintiff**

There is at least one such document, namely the plaintiff's electronic timekeeping file for his attendances on Paramount Insurance Co Ltd (see paragraph 18 of, and exhibit A to, his affidavit of 3 October 2000).

[b] Undiscovered documents of Paramount Insurance Co Ltd

Through an oversight, I suspect, on the part of the plaintiff, the word "not" is omitted from the last sentence of paragraph 6 of his affidavit of 3 October 2000, so that it reads:

> I do have any documents relating to any of the matters referred to in exhibit A which have not already been discovered

In paragraph 16 of the same affidavit he states clearly:

> All Paramount documents in my possession have been discovered.

Subject to his confirmation that I am right in my assessment that there has been an omission from the last sentence of paragraph 6 of his affidavit, I am satisfied that the defendants have not shown that there are any more documents relating to Paramount Insurance Co Ltd presently in the possession, power or control of the plaintiff.

I have not been able to locate on the Court file the plaintiff's affidavit of 27 April 2000 dealing with discovery of Paramount Insurance Co Ltd documents and therefore cannot

decide at this stage whether there are clearly documents which have been in his possession, power or control which he has not discovered or of which he is otherwise aware and which he has not discovered.

[c] **Travel documents**

It is clear from paragraph 17 of the plaintiff's affidavit of 3 October 2000 that he had a diary for 1998 (albeit that he states he did not keep detailed notes in it), travel vouchers and a passport. He makes no mention of credit card records or other information as to payments made in connection with the travel, which sub-category which one would expect to exist or have existed.

[d] **Documents relating to the companies referred to in the defendants' positive defences**

It is clear from paragraphs 21-26 of the plaintiff's affidavit of 3 October 2000 that he holds such documents. In respect of those relating to Conpac, Astor Reinsurance, GS Pacific Holdings and International Casualty and Surety Company Limited he states that he believes these documents are privileged in favour of the respective clients and states that he has requested (but not yet received) permission to provide discovery of those documents.

[58] In all the circumstances, while not being prepared to strike out the plaintiff's statement of claim because of his failure to make discovery, I am satisfied that it is urgent that I hold a conference with counsel and the plaintiff, to identify exactly what documents he holds and give directions for their discovery (with or without preservation of the client's privilege). I remind the plaintiff and those advising him of the order previously made in relation to documents of Paramount Insurance Co Ltd held by the plaintiff (I refer to paragraph [2] of my Minute of 27 March 2000).

[59] The Registrar is directed to schedule an urgent (one hour) conference before me.

Security for costs application

[60] The evidence adduced by the defendants in support of their application for security for costs is limited to a single paragraph in the third defendant's affidavit of 20 July 2000. That paragraph (paragraph 69):

> [a] Deduces from the facts that the plaintiff has changed his offices on more than one occasion, has been guilty of delaying the proceedings and has changed his counsel, an inability on the part of the plaintiff to pay his solicitors and counsel;
>
> [b] Seeks to rely on a statement made by the plaintiff in the course of "without prejudice" discussions.

[61] As to the first of these grounds:

> [a] The plaintiff has provided an explanation for the changes in counsel;
>
> [b] Inability to pay one's solicitors and counsel is not the only nor, indeed, necessarily the most obvious, explanation for changing one's office, delaying proceedings and changing one's solicitors and counsel.

[62] So far as the second ground relied on is concerned, it is clearly impermissible.

[63] The defendants' application for security for costs must therefore be dismissed.

Costs

[64] I see no reason to depart from the normal rule in respect of the costs of the summary judgment application (and the related leave application). I note that the

hearing of all four applications took one day, the vast majority of which was devoted to the summary judgment application.

[65] I will consider the question of costs in relation to discovery, once I have held the further conference with counsel referred to in paragraph [59] of this judgment and have monitored compliance with the orders made in that conference. (I note that I will not necessarily make an order for costs in favour of the defendants. I will consider the question afresh once this aspect is finally dealt with.)

[66] So far as the costs of the application for security for costs are concerned, they are insignificant in comparison with the costs of the summary judgment application and, although to a much lesser extent, the strike out application. Probably no more than half an hour was spent on this application. I therefore propose to include the costs of this application in the costs of the summary judgment application.

Orders

[67] In the light of the foregoing, I make the following orders:

[a] The defendants' applications for leave to apply for summary judgment and for summary judgment against the plaintiff are dismissed;

[b] The defendants' application for an order striking out the plaintiff's statement of claim is dismissed;

[c] The defendants' application for an order for security for costs is dismissed;

[d] The cost of the defendants' summary judgment application (and the related leave application) and of their application for security for costs are reserved for determination at or after trial;

[e] The Registrar is to schedule a 1 hr conference of counsel and the plaintiff before me on the first available date after 2 July 2000;

[f] The costs of the defendants' application for an order striking out the plaintiff's statement of claim are reserved for determination after the conference ordered in [e] and compliance with the orders made at that conference.

[68] This judgment is signed at 2.08 pm. on 26 June, 2001.

MASTER T KENNEDY-GRANT