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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 143/99

BETWEEN	RICHARD CHARLES TAINUI MANNING Plaintiff
AND	TV3 NETWORK SERVICES LTD Defendant

Hearing: 19 February 2002

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

Judgment: 25 February 2002

JUDGMENT OF MASTER VENNING
On Plaintiff's Application To Strike Out

APPLICATION

[1] The Plaintiff seeks orders striking out paragraphs 8 and 9 of the first amended statement of defence and an associated order that the Plaintiff not be required to answer the Defendant's interrogatories until further order of the Court.

[2] At paragraph 8 of the statement of defence the Defendant pleads the defence of truth. At paragraph 9 the Defendant invokes s30 of the Defamation Act 1992 (the Act).

[3] The Defendant raised the defence of truth in an earlier amended statement of defence. In a judgment delivered on 23 April 2001 this Court struck out the Defendant's pleading of truth. An application for review of that decision was

dismissed by the Full Court (Panckhurst and William Young JJ) in a decision delivered 31 August 2001.

[4] The background facts are well known to the parties and the Court. For present purposes I take the background facts as summarised by William Young J at paragraphs [8] to [16] of the review decision:

> [8] On 18 July 1999, the defendant, ("TV3"), produced a 20/20 programme which dealt with, generally, the felling of native timber on land held by Maori owners under the South Island Landless Natives Act ("SILNA") – land which is exempt from legislative restrictions on the harvesting of native timber. The first half of the programme referred, generally, to the clear felling of native timber on SILNA land. Except by way of background, this part of the programme is of no significance in the present context.
>
> [9] The second part of the programme focused on land owned by what is known as the "PNR Trust" in the Catlins. This part of the programme was introduced by Amanda Miller, one of the two presenters, in this way:-
>
> > So the race against time to clear fell continued. This was after all, legal plunder of our natural landscape. But tonight we can also reveal for the first time the unlawful logging of Silna lands. It's been happening in South Otago in an area called the Catlins. Forty percent of the South Island's virgin forest is here, but in this pristine paradise of the South, it's shades of the wild west. We're talking tree rustling down here. We had a tip off about a particular Silna block. There's no clear felling here, this is selective logging territory. We have been told Rimu as old as 500 years is being logged without the Maori landowners' consent. We're on a bulldozer track just off the main road in the Catlins. We've been told that up to a couple of weeks ago they were taking native timber out of this area. Well in spite of the messy road there's no obvious signs, but there is this track that may have been used to take out timber.
> >
> > We're here at the end of the track, at the top of a very old tree and up here a stump and something the loggers have left behind [a chainsaw blade sitting on a tree stump].
> >
> > Our search revealed more tracks off the road leading to more stumps. We were on a 400 acre block of Silna land belonging to 74 people called the PNR Trust. We don't know who made the tracks off the road or who stole the trees. What we do know is the road was built by the owner of a neighbouring Silna block. That man is Christchurch Fisheries Businessman Richard Manning and a trustee in various Silna blocks. He gained consent to build this supposed informal track last year from some PNR Trust members and the Maori Land Court. Permission was granted on the basis that the track would be for access only, not for commercial purposes.

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

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

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

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

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

Mr Warnes said:-

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

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

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

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

[14] The presenter then went on:-

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

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

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

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

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

Defamatory meanings as alleged by Mr Manning

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

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

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

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

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

[5] In dismissing the application for review William Young J stated towards the conclusion of his decision:

> [58] As indicated earlier, TV3 now wishes to advance a defence of truth based not only on the allegations of theft by destruction which I have discussed but also based on the contention that Mr Manning stole four rimu trees, the stumps of which are on PNR property in reasonably close proximity to the track.
>
> [59] As presently advised, I think it would be open to TV3 to plead, by way of a defence of truth, the allegation that Mr Manning stole the four rimu trees in question. The allegation in the 20/20 programme is, broadly, that timber was stolen from PNR land in the general vicinity of the track. Mr Manning asserts (although TV3 denies) that the programme carries the meaning that he was responsible for this theft. Whether proof that Mr Manning stole four rimu trees would necessarily result in a successful defence under s 8(3)(a) or (b) might be open to question but I am presently inclined to think that this would be a jury question.
>
> [60] Any issue as to any revised defence of truth which TV3 may be advised to plead must await any further pleading.

THE REPLEADED DEFENCE OF TRUTH

[6] Following delivery of that decision the Defendant filed and served a first amended statement of defence to the second amended statement of claim. In it the Defendant repleaded the defence of truth as follows:

> 8. If it is held that the words bear any of the meanings in paragraph 5 [of the statement of claim] the imputations were true or were not materially different from the truth. The Defendant relies on s8 of the Defamation Act 1992.
>
> Particulars
>
> The Plaintiff or Darryl Dewe or Les Dunn (his agents), acting on behalf of the Plaintiff unlawfully and without the consent of the owners cut down and removed four rimu trees Tautuku XIII, section 5. The rimu trees were between 1 and 80 metres from a road through Tautuku XIII, section 5, identified in the Plaintiff's document number 111.

[7] Notwithstanding William Young J's comments regarding the possibility that a repleaded defence of truth might be available to the Defendant, Mr McVeigh submitted that:

a) The allegation that the Plaintiff stole four trees is a particular which does not support the imputation contained in the programme of wholesale tree rustling in the tens of thousands of dollars;

b) The particulars do not allege a theft or stealing in the sense of the imputations pleaded; and

c) The pleading was defective by its reference to the unlawful or criminal activity of Messrs Dewe and Dunn as opposed to the Plaintiff.

[8] I am unable to accept Mr McVeigh's first submission. Section 8(3)(a) permits the Defendant to plead that the imputations contained in the matter the subject of the proceedings were true or not materially different from the truth. As noted above (at paragraph [16] of the review decision) the defamatory meanings the Plaintiff alleges are:

- That he had stolen rimu trees from PNR Trust land.

- That he was personally responsible for the theft of rimu trees stolen from PNR Trust land.

- That the Plaintiff had orchestrated the theft of the rimu trees stolen from PNR Trust land.

- That the Plaintiff was somehow involved in the theft of the rimu trees stolen from PNR Trust land.

[9] The earlier decisions dismissed the defence of truth because, as it was then pleaded, it sought to establish that the Plaintiff was responsible for the destruction of trees in the course of creating and/or relocating an access track. That, however, is not the defamation the Plaintiff sues upon. The Plaintiff sues the Defendant alleging that the Defendant has cast him as a thief.

[10] The repleaded defence at paragraph 8, subject to the comments that follow, responds to that allegation by alleging that it is true because the Plaintiff stole four rimu trees. While accepting that it was a matter of degree, Mr McVeigh submitted that an allegation that the Plaintiff stole four trees was not wholesale "tree rustling" in the tens of thousands of dollars and that the particular was not capable of bearing the meaning the Plaintiff relied upon. He submitted that this could not be categorised as a fine distinction.

[11] In *Pepi Holdings Ltd v BMW NZ Ltd & Ors* (CA 21-22/97, 25/8/97) the Court of Appeal had occasion to consider s8(3) of the Defamation Act 1992. In that case the car dealer brought defamation proceedings against a newspaper publisher and BMW New Zealand Ltd. The case arose out of comments the defendants made concerning the plaintiff's trading in cars that had had their odometers altered (or "clocked" as it was colloquially referred to). On appeal counsel for the appellant argued that although the defendants had established at trial the car dealer had known the odometers had been altered in England before they were imported that was not a

complete answer to the defamation because there was an additional sting that the cars were also "clocked" by the car dealer and that had not been established.

[12] While accepting that the meaning the dealer contended for was available on the excerpt of the article relied upon, the Court considered that once knowledge of the tampering was established there was no material additional sting. The Court said:

> Section 8(3) of the Defamation Act 1992 makes it clear that the defence of truth shall succeed if the imputations were true or "not materially different from the truth." In our view, importing or offering for sales cars known to have had their odometers rewound is not materially different from an allegation of rewinding. In both cases the importer is party to the deception in New Zealand which is based upon the rewinding. The suggestion that the importer was directly responsible for the "clocking" is not materially different from the truth.

[13] In the present case, as acknowledged by Mr McVeigh, the matter is one of degree. The imputation taken by the Plaintiff from the programme is that the Plaintiff stole rimu trees from PNR Trust land. The particulars of the defence of truth raised by the Defendant refer to the Plaintiff having stolen four rimu trees from identified land (which I take to be PNR Trust land). Mr McVeigh suggested there was some significance in that the programme talked of wholesale "tree rustling" in the "tens of thousands of dollars". Whether there were four trees taken or 50 trees taken, the material sting is calling the Plaintiff a thief. The defamatory meanings relied upon by the Plaintiff do not refer to the scale of the Plaintiff's activity. Further, Mr Warne's comments referred to above (at paragraph [12] of the review decision), put a value of $1,000 per cubic metre on the stolen rimu. If the timber was valued at $1,000 per metre, as suggested, and four trees of some age have been stolen then the value may in fact amount to some tens of thousands of dollars. I reject Mr McVeigh's first ground of challenge to the pleading at paragraph 8. The pleading is within s8(3).

[14] Next Mr McVeigh submitted that the pleading in paragraph 8 that the Plaintiff "unlawfully and without the consent of the owners" cut down and removed trees was not precise enough. He submitted that the wording could encompass an allegation of theft by destruction which had been rejected by the earlier decisions of

this Court and the Full Court. Mr Allan did not accept that criticism but submitted that if necessary the particulars could be amended to provide the Plaintiff:

> ... stole four rimu trees from land described as Tautuku XIII, section 5, by unlawfully and without the consent of the owners cutting down and removing the said rimu trees. The rimu trees were between 1 and 80 metres from a road through Tautuku XIII, section 5, identified in the plaintiff's document number 111.

[15] I agree that Mr McVeigh's criticism of the existing pleading can be met by the amendment volunteered by Mr Allan. The pleading is to be amended accordingly. There is no basis to strike out the pleading on that ground.

[16] The last challenge Mr McVeigh raised to the repleaded defence of truth was the reference to the involvement of Messrs Dewe and Dunn as the Plaintiff's agents. Mr McVeigh submitted that as the focus of the programme was on the Plaintiff's criminal activities the Defendant must plead either that the Plaintiff committed the crime of theft or, if the Defendant alleges a crime was committed by the Plaintiff's agents, then the Defendant must plead that it was carried out with the criminal complicity of the Plaintiff.

[17] In response Mr Allan submitted that the Defendant's pleading that Messrs Dewe and Dunn acted on behalf of the Plaintiff was sufficient. He submitted that the reference to them acting on behalf of the Plaintiff encompassed a variety of situations, namely:

- That the Plaintiff had authorised them to steal the trees;
- That the Plaintiff thought they might steal the trees and was reckless as to whether or not they did; or
- That the Plaintiff learnt about the theft afterwards but subsequently sanctioned it and approved their actions.

[18] If that is the Defendant's case then the particulars should be clarified because, as discussed with Mr Allan during the course of submissions, on one view of it the pleading is ambiguous. It is possible that an agent, whilst acting on behalf of his or

her principal, might act unlawfully and commit a crime. The principal will not be liable for that crime or be held to have committed that crime unless the situation is, as Mr Allan submitted, that the principal either authorised the criminal act; was reckless as to whether the criminal act was going to be carried out or not; or, once learning of the criminal act, sanctioned it. It may be that is what the Defendant contends for at paragraph 8. The difficulty is, however, that as the pleading stands it is potentially ambiguous. It might be taken to refer to something less, namely that Messrs Dewe and Dunn stole the trees in the course of working for the Plaintiff, but possibly without the Plaintiff's complicity. Without more, that of itself would be insufficient to fix the Plaintiff with the criminality of their actions. The ambiguity could be resolved by a repleading that referred to and identified the criminal complicity of the Plaintiff.

[19] If the Defendant is to rely upon the actions of the Plaintiff's agents to establish theft by the Plaintiff then the basis for his responsibility for their actions should be set out. The Defendant need not be tied to any one basis. I accept it is a matter for evidence at trial as to which basis is ultimately established, if any, but the alternatives relied upon by the Defendant should be set out.

[20] In short, however, to the extent Mr McVeigh's critcisim of the pleading at paragraph 8 has validity, it can be cured by amendment. This is not a case for striking out the pleading. The defence of truth may be retained by the Defendant, provided the amendments identified above are made to it.

THE SECTION 30 ISSUE

[21] At common law a defendant could seek to mitigate damages by 'calling witnesses to speak of the plaintiff's generally bad reputation: *Plato Films Ltd v Speidel* [1961] 1 All ER 876; *TVNZ Ltd & Anor v Ah Koy* (CA 64/01, 26/11/01). It was not, however, possible to allege and prove specific prior incidents of misconduct by the plaintiff, save for proof of criminal conviction: *Goody v Odhams Press Ltd* [1966] 3 All ER 369. Section 30 of the Defamation Act now permits a defendant to:

> ... prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

[22] Section 42 requires a defendant who intends to adduce such evidence to give notice in the statement of defence:

> In any proceedings for defamation, where the defendant intends to adduce evidence of specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, the defendant shall include in the defendant's statement of defence a statement that the defendant intends to adduce that evidence.

[23] In this case the Defendant pleads:

> **AND FOR A FURTHER ALTERNATIVE DEFENCE THE DEFENDANT REPEATS THE ADMISSIONS, DENIALS AND ALLEGATIONS THAT IT HAS PREVIOUSLY MADE, AND SAYS FURTHER:**
>
> 9. The plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate by virtue of the instances of misconduct which follow and which mitigate damages. The defendant relies on section 30 of the Defamation Act 1992.
>
> **Particulars**
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> (a) The defendant relies on the particulars set out in paragraph 8.
>
> (b) The Maori Land Court ("the Court") declined an application by the plaintiff for a right of way easement across Tautuku XIII Section 5 to Section 6B on 16 May 1998, discovery of which has not been provided ("the declined application"). The plaintiff:
>
> (i) Indicated to the Court that the purpose for which the easement was sought was to enable the owners of Tautuku XIII Sections 5 and 6 to have access to the Waipati River; and
>
> (ii) Suggested, as an alternative to an easement, the Court might consider more favourably granting him informal access rights using "the Fletcher's Road" being an informal track that did exist across Tautuku XIII Section 5 toward Section 6B.
>
> (c) Between 16 May 1998 and 1 October 1998 the plaintiff made further application(s) for access across Tautuku XIII Section 5 to Section 6B, discovery of which has not been provided.
>
> (d) On 1 October 1998 the Court made an order varying the constituting trust order relating to Tautuku XIII Section 5. By this variation the Court authorised the plaintiff to use "the informal track" through Tautuku XIII Section 5 for access to Section 6B for "non commercial purposes" ("the variation hearing").

(e) At the declined application and the variation hearing the plaintiff misled the Court in that:

(i) He failed to disclose that his true intention was to commercially log Tautuku XIII Section 6B without a variation of the constituting trust order in relation to that section and in contravention of clause 3(a) of that section's constituting trust order;

(ii) He intended to bulldoze a substantial road through Tautuku Section 5 to Section 6B, rather than use the informal track, to enable him to access Section 6B using heavy commercial machinery for commercial logging. This was also in contravention of clause 3(a) of the constituting trust order of both Section 5 and 6B.

(iii) He failed to advise the Court of the multiplicity of his interests namely:

a. As a Trustee of Tautuku XIII Section 6B;

b. As a director and or shareholder of Silna Holdings Ltd (a company which intended to log both Tautuku XIII Sections 6B and 5) which he intended would benefit from the application;

c. As a director and or shareholder of Woodtech Holdings Ltd (a company which intended to supervise and manage the logging of both Tautuku XIII Sections 6b and 5) which he intended would benefit from the application;

d. As an agent on behalf of three of five trustees of Tautuku XIII section 5 in making between 1 and 3 applications to the Maori Land Court for a variation of the constituting trust order;

e. As the principal of Trade Management Services (purporting to offer management expertise in relation to logging of section 6B and 5) whom he intended would benefit from the application.

(f) Following the order of 1 October 1998 at the variation hearing, the plaintiff or Darryl Dewe or Les Dunn ("his agents"), acting on behalf of the plaintiff, in addition to the actions referred to in subparagraph (a) above, unlawfully cut down and/or destroyed and/or damaged trees on Tautuku XIII, section 5 to build a road through Tautuku XIII Section 5 to Tautuku XIII Section 6B and in doing so removed and destroyed trees without lawful authority and in contravention of the terms of the order made at the variation hearing.

(g) The trees included but are not limited to the following indigenous species: Miro, Kamahi, Rimu, Beech and sub canopy species.

(h) The trees referred to were formerly:

(i) Where the road was built by the plaintiff and his agents though Tautuku XIII, section 5 and identified in the plaintiff's document #111.

(ii) Adjacent to the road where spoil and trees have been discarded into and damaging indigenous bush and trees;

(iii) Where tracks, caused by a bulldozer, run off the road into indigenous bush;

(iv) Otherwise identified in the plaintiff's document #111.

(v) Otherwise identified in the report of Indigenous Forestry Unit of Ministry of Agriculture and Fisheries to the Maori Land Court dated November 1999.

(i) The defendant does not know the precise number of all the trees but they are estimated to be not less than 200 trees in the species referred to above. The defendant is unable to be more precise because they include all of those trees destroyed by the plaintiff and his agents in making way for the road or utilised in making the road, the details of which are known to the plaintiff.

(j) No payment has been made by the plaintiff or his agents to the rightful owners of the trees.

(k) The plaintiff or his agents misled the District Council and Regional Council by stating they intended to form a road utilising the existing use provisions of the Resource Management Act on the basis that the existing informal track, being the Fletcher's track, was being upgraded. In fact the plaintiff or his agents intended to bulldoze through and construct a road through Tautuku XIII Section 5 to Section 6B rather than 'up-grade' the existing informal track.

(l) The Otago Regional Council notified the plaintiff or his agents on or about the 6th May 1999 that the plaintiff or his agents were in breach of the Regional Plan by: disturbing a watercourse; constructing a cross over a watercourse with a catchment of more than 50 hectares and causing sediment run-off; omitting to replant vegetation to stabilise exposed slopes.

(m) The Otago Daily Times reported on 15 February 2000, that the plaintiff had been publicly criticised by a District Court Judge when sentencing the plaintiff's agent or employee, Tony Wilson, for unlawfully cutting down and taking five rimu trees from another person" property. The Judge's criticism was that it was unfair for Wilson to have been left to take the blame for the felling rather than his employer.

[24] At the outset on this issue Mr McVeigh submitted that it was misleading to refer to pleading under this head as a further alternative defence. I accept Mr McVeigh's point. Although expressed to be in mitigation of damages, the pleading is not in the nature of a positive defence such as in a civil action where the plaintiff's failure to mitigate can appropriately be raised as an additional defence. In this case the requirement to give notice that the defendant intends to adduce evidence of reputation is a specific statutory requirement. It is only relevant in relation to the quantum of damages in the event that the defamation is established. On that basis it is not strictly an alternative defence. The correct way to plead it is, as it was pleaded in the *Prebble* case:

> IF the meanings are as alleged by the Plaintiff (which is denied) then the Plaintiff has suffered no damage by reason of the publication by the Defendant as alleged AND THE DEFENDANT HEREBY GIVES NOTICE that at the trial of this proceeding the Defendant will adduce evidence ...

[25] Next Mr McVeigh submitted that the only bad aspect of the Plaintiff's reputation that was relevant and in issue in the proceedings was his reputation as a thief, and as none of the particulars related to that they should all be struck out. On the other hand, Mr Allan submitted that the aspect of the Plaintiff's character in issue was his reputation as a logging contractor (later referred to in the course of submission as his reputation as an "honest logging contractor").

[26] Section 30 has been referred to in a number of cases. In *Ansley & Anor v Penn* (HC Christchurch, A 36/98, 28/8/98, Fraser and Panckhurst JJ) the Full Court considered that section in the course of delivering an appeal from a decision of the District Court. The case involved a claim by Ms Penn against the "New Zealand Listener". She alleged she had been defamed by the statement in a "New Zealand Listener" article that she was a psychiatric inpatient at Sunnyside Hospital in 1984, a fact she should have disclosed in her application for the nursing course but did not. There was also a considerable discussion in the article concerning her conduct during the time she was a student at the Christchurch Polytechnic in 1991. The Court had to consider what evidence was relevant in terms of ss30 and 42 when and if damages fell to be assessed. The contest was whether in Ms Penn's case the defendant was limited to evidence relevant to her psychiatric health and honesty, or whether s30

permitted the defendant to lead evidence relevant to her general performance at the Polytechnic. The District Court Judge concluded:

> ... evidence in relation to character must be directed only to the relevant sector of the plaintiff's character and in this case that is the question of her psychological health and her honesty.

That finding was upheld by the Full Court. It concluded:

> Although obviously every case must in the end turn on its own particular facts there is a degree of similarity between the present case and the example cited by Cooke P [in *TVNZ Ltd v Prebble* [1993] 3 NZLR 513] when he said: *"If a politician was generally reputed to be a bully, a reasonable jury should not on that account reduce any damages awarded to him for being falsely called dishonest"*. We do not accept the submission for the appellants that the relevant sector was *"her dispute with the Christchurch Polytechnic"*.

[27] In *Brown v TV3 Network Holdings Ltd* (HC Christchurch, CP 146/94, 22/5/95) Fraser J had to consider a challenge to the particulars the defendant intended to rely upon pursuant to s30. The case concerned a statement by the defendant broadcaster that the plaintiff had been an accomplice of a man named Beri in the hold up of an Auckland nightclub some ten years previously, and was charged with Beri and others with conspiring to commit an aggravated robbery. The statements were admitted to be untrue. However, the defendant wished to plead by way of mitigation of damages instances of the defendant's bad reputation.

[28] After referring to ss30 and 42 Fraser J concluded:

> The defamation imputes past and present participation in the criminal offences of robbery or aggravated robbery in association with Beri, a person suspected of murder and other serious criminal offences. The relevant sector of the plaintiff's reputation is accordingly participation in, or willingness to participate in, criminal offending of that sort i.e. involving dishonesty or violence.

The Judge struck out a number of the paragraphs relating to police investigations and references to the plaintiff's association with strip clubs and massage parlours and licensing difficulties.

[29] In *Shadbolt v Independent News Media (Auckland) Ltd* (HC Auckland, CP 207/95, 7/2/97) Tompkins J also considered the application of s30. He stated:

> To come within the section, the specific instances of misconduct must relate to [the Plaintiff's] reputation "in the aspect to which the proceedings relate". The immediate aspects to which the proceedings relate, in the light of my findings of the defamatory statements, are his reputation for truthfulness and for concern in the environment. But I am prepared to accept Miss Moran's submission that his general reputation is also at issue and that therefore specific instances of misconduct that may affect his general reputation can also be proved.

It appears from that statement that Tompkins J considered the defamation was such as to put the plaintiff's general reputation in issue.

[30] The section has also been referred to by the Court of Appeal in at least two cases. In *TVNZ Ltd v Prebble* [1993] 3 NZLR 513 the respondent sued Television New Zealand alleging he had been defamed by the appellant's programme. He said the programme meant that he, whilst minister of state owned enterprises, had secretly conspired with certain highly placed business leaders and public officials to sell state assets on unduly favourable terms in return for donations to the Labour party. The respondent said the programme meant he had acted without any genuine belief the sales were for the public good and meant he had acted in a manipulative and dishonest matter to promote a conspiracy and had arranged for incriminating documents to be destroyed. The appellant gave notice that it intended to lead evidence at trial of the respondent's bad reputation as a politician generally.

[31] Although the Defamation Act 1992 did not apply to the case, members of the Court referred to the provisions of s30. After referring to s30 of the Act Cooke P stated:

> In allowing evidence of specific instances of misconduct, this is intended to be a change in the law; but the phrase "the aspect to which the proceedings relate", also used in s 40 in a requirement of pleading, reflects the existing law.
>
> Identifying the relevant area of conduct may be difficult, as Viscount Simonds recognised in *Speidel v Plato Films Ltd* at pp 1124-1125. In the same case Lord Denning put it at p 1140, in a way probably deliberately allowing for a degree of judicial judgment on the particular facts:
>
> > When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector. P524

[32] Mr McVeigh submitted that the observation by Lord Denning, cited with approval by Cooke P, was merely an example and it was not meant to be conclusive. I accept that Lord Denning's comments were general and intended to be by way of example. They are, however, a helpful example of the application of the principles. The matter is one of degree and must turn on the particular facts of each case before the Court.

[33] Justice McKay also considered the issue of reputation in his judgment in *TVNZ Ltd v Prebble*. He stated:

> I agree that it would be unreal to compartmentalise reputation into overly refined segments. The leading case is *Speidel v Plato Films Ltd* ... Devlin LJ, delivering the judgment of the Court of Appeal said at 526-527:
>
> > We would prefer to state the principle as being that the evidence must be confined to matter which a reasonable jury could properly take into account as diminishing the damages which they would otherwise have awarded. The enforcement of anti-Jewish policy in Occupied France may, of course, have involved the commission of atrocities; but if so, that is covered under the general term of war crimes which we shall next consider. Apart from that, no jury ought to diminish the damages that they would award to a man falsely accused of murder and betrayal because they hear that he has a reputation for anti-Jewish and anti-democratic activities, however repugnant such activities may be to them.

[34] In *Prebble's* the Court of Appeal differed from the trial Judge and found that the aspect of the plaintiff's character in issue was his reputation as a politician as opposed to the more restrictive reputation taken by the trial Judge that the relevant aspect was his reputation as the minister of state owned enterprises.

[35] The *Ah Koy* (supra) case did not specifically consider aspects of the reputation, merely noting that s30 permits specific instances of misconduct which, if shown to be generally known will found an available inference that the plaintiff has a generally bad reputation in the "relevant aspect".

[36] The issue then is whether the aspect to which these proceedings relate is, in Mr McVeigh's words, "his reputation as a thief", his reputation as a logging contractor (later qualified to "an honest logging contractor") as contended for by Mr Allan, or something else.

[37] The subject of "the aspect to which the proceedings relate" must be an aspect of the Plaintiff's character. The aspect of the Plaintiff's character put in issue in these proceedings is his honesty. The sting of the defamation is that he is the thief. Theft is a subset of dishonesty. All thieves are dishonest, but not all dishonest people are thieves. If the Plaintiff is correct and the programme casts him as a thief, then it challenges or puts in issue his reputation for honesty. If he is not a thief but has a general reputation for dishonesty, then that is something a reasonable jury could properly take into account as diminishing the damages they would otherwise have awarded. If Mr McVeigh's more restrictive approach is correct, then where the sting of a defamation is that the plaintiff is a thief the defendant would only ever be able to use s30 to lead evidence the plaintiff is a thief. That would presumably be by reference to criminal convictions for theft. However, evidence of criminal convictions have always been permitted. Section 30 is intended to be more permissive than that.

[38] Assuming the defamation is established by the Plaintiff, the Defendant ought to be able to lead evidence to show the Plaintiff has a reputation for dishonesty to mitigate the damages the Court or jury might otherwise award. That approach seems to accord with the comments of Lord Denning in the *Speidel* case, as cited with approval by Cooke P in *Prebble*. It follows I do not accept that the matter is to be as restricted as Mr McVeigh would have it, but nor for that matter do I accept Mr Allan is correct when he says it is the Defendant's character as a logging contractor that is in issue. The aspect of the Defendant's character that is in issue is his honesty.

[39] Mr McVeigh then submitted that in any event, if the Court were to hold that the aspect of the Plaintiff's reputation or character in issue was his reputation for dishonesty generally, the current particulars were deficient in a variety of respects. As I have found that the aspect of the Plaintiff's character in issue is his honesty, it is necessary to consider whether the particulars the Defendant refers to can properly be said to relate to that issue.

Paragraph (a)

[40] Paragraph (a) purports to incorporate the particulars relied upon in support of the defence of truth in paragraph 8. If the defence of truth succeeds then paragraph (a) will not be required. If, on the other hand, the defence of truth does not succeed then there can be no proper basis for the Defendant to raise the same issue again on the ground that it is a specific instance of the Plaintiff's dishonesty. Paragraph (a) is superfluous and is struck out.

Paragraphs (b), (c), (d) and (e)

[41] The particulars in paragraphs (b), (c) and (d) are essentially background to the allegation at paragraph (e). At paragraph (e) the Defendant alleges that the Plaintiff misled the Maori Land Court in a number of ways. The Defendant alleges the Plaintiff misled the Maori Land Court by failing to disclose a number of relevant matters to the Court. Mr Allan submitted that more detail would be given in evidence on these matters and there was no obligation to specify on what basis the Defendant said the Plaintiff had a duty to disclose the information to the Court. He submitted it was self-evident that an applicant to a court had an obligation to provide all relevant information to the Court.

[42] However, in my view there is force in Mr McVeigh's submission that there is no allegation or particular suggesting that the Plaintiff had a duty to reveal the matters referred to and that a party to a court proceeding may decide not to disclose a variety of matters for a number of reasons. Not all such reasons need be dishonest. As was noted by the Court of Appeal in the *Ah Koy* case the purpose of particulars in defamation proceedings is:

> ... to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on. ... It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to

> lead evidence of facts and circumstances beyond those referred to in the particulars. ...

While those observations were in relation to the defence of truth itself, as far as particulars are concerned they are also applicable to the present case.

[43] As the aspect of the Plaintiff's character that is in issue is in relation to his honesty or otherwise the pleading at paragraphs (b), (c), (d) and (e) at present is insufficient. If the Defendant wishes to lead evidence of the Plaintiff's failure to disclose information to the Maori Land Court as evidence of his dishonesty then specific particulars of in what way it is said the Plaintiff had an obligation to provide the information to the Court and so acted dishonestly in not providing the information to the Court are required.

Paragraph (f)

[44] Paragraph (f) is a reference to the Plaintiff's or his agents' actions in unlawfully destroying trees. The fact the Plaintiff or his agents may have wantonly and without authority destroyed trees does not necessarily equate to acting dishonestly. The Defendant may prove specific instances of dishonest conduct by the Plaintiff but as it stands paragraph 9(f) does not necessarily allege dishonest conduct. The allegation as it stands must be struck out.

Paragraphs (g), (h) and (i)

[45] Paragraphs (g), (h) and (i) do not of themselves allege dishonesty. They provide background information to paragraph (f). They fall with paragraph (f).

Paragraph (j)

[46] Paragraph (j) is an allegation that the Plaintiff had not paid the owners of the trees for the trees destroyed or logged by them. If it is suggested that the Plaintiff and his agents (with his knowledge) attempted to cover up or deny responsibility for the damage and destruction to avoid consequences such as having to pay

compensation for the damage then that might amount to a sufficient allegation of dishonesty. As it stands, however, the allegation at paragraph (j) is not specific enough and cannot remain.

Paragraph (k)

[47] Paragraph (k) alleges that the Plaintiff or his agents misled the District and Regional Councils. Again if it is to be alleged that the Plaintiff deliberately and dishonestly misled the Plaintiff and Regional Councils then that should be stated. If it is alleged that the misleading was done by his agents then it should be stated it was done with his authority or knowledge. As presently pleaded the particular cannot stand.

Paragraph (l)

[48] Paragraph (l) is an allegation that the Otago Regional Council advised the Plaintiff or his agents that he was in breach of the regional plan. That is a statement of fact as to the actions of a third party rather than the Plaintiff. The investigation or consideration of the matter by the Otago Regional Council is not relevant to the Plaintiff's reputation for honesty. This allegation must be struck out.

Paragraph (m)

[49] At paragraph (m) the Defendant pleads that the Otago Daily Times reported criticism of the Plaintiff by a District Court Judge. The report of what had been said by the District Court Judge is not a relevant particular concerning the honesty or dishonesty of the Plaintiff.

[50] If the allegation is that the Plaintiff dishonestly instructed an employee to log trees on a reserve, then that should be alleged. Whatever may have been reported in a newspaper report of a District Court Judge's comments on sentencing one of the Plaintiff's employees is otherwise irrelevant to a s30 defence.

Summary

[51] In summary I accept the general thrust of Mr McVeigh's submission that the particulars provided in paragraph 9 are at present deficient and fail to comply with the requirements of s30.

[52] As I read the particulars provided they fall into the following categories:

- That the Plaintiff deliberately misled the Maori Land Court at two hearings.

- That the Plaintiff authorised or instructed his agents to log trees in breach of any authority and thereby damaged trees belonging to other parties with no intention of compensating the rightful owners for the damage to the trees.

- That the Plaintiff or his agents misled District and Regional Councils.

- That on another occasion the Plaintiff authorised an agent or employee to unlawfully take trees on a reserve.

[53] For the reasons given above those allegations as they presently stand cannot be sustained. They are not directed at the dishonesty of the Plaintiff. No doubt they are framed in the way they are because of the view Mr Allan took that the aspect of the Plaintiff's character in issue was his reputation as a logging contractor. For the reasons given, that is not the aspect of the Plaintiff's character in issue. What is relevant is his honesty. It may be the Defendant can amend and provide particulars to support the Defendant's case that the Plaintiff acted dishonestly in relation to some or all of the above matters. However, as they stand the allegations all require repleading. They cannot stand are as they are.

[54] Before leaving this issue there are two final issues to address. Mr McVeigh also submitted that s30 required the misconduct in question to be generally known. He referred to the wording in s30 that the "reputation is generally bad". Section 30 permits the Court to take into account matters in reduction of damages. It would only be reasonable to reduce the damages if the plaintiff's reputation was generally

bad in the relevant aspect. If not generally bad in that aspect, then there can be no basis for reducing the damages for the defamation. For it to be generally bad, it must be known by the public, or at least the relevant section of the public. If it is not generally known to be bad there is no basis to reduce the damages. That seems to accord with Tipping J's observation in the *Ah Koy* (supra) case.

[55] Finally Mr McVeigh objected to a number of pejorative references throughout the particulars to "discovery which has not been provided". Mr Allan submitted that such was simply a factual statement. However, if anything is to be made of that, it can be made by submission or appropriate application. I accept that the reference ought not be in the final pleading to go to trial.

INTERROGATORIES/FURTHER INTERLOCUTORY MATTERS

[56] At the conclusion of the hearing I raised with counsel whether the Defendant wished to pursue the answers to the interrogatories delivered to the Plaintiff. Mr Allan indicated that he had written to Mr McVeigh's instructing solicitors regarding the further information the Defendant sought. Mr Allan submitted that the information ought to be supplied either by way of further and better discovery or by way of answers to the interrogatories. I understood Mr Allan took the practical view that provided the further information was supplied he was not particularly concerned as to how it was provided. If counsel are unable to agree on which way or to what extent the Plaintiff will supply the further information requested by the Defendant then the issue will have to be more formally addressed when the matter is next reviewed.

REVIEW

[57] The Defendant will now need to replead paragraphs 8 and 9 (if particulars of actual dishonesty can properly be provided). Such amended statement of defence is to be filed and served by 15 March 2002.

[58] These proceedings will be reviewed before me by way of telephone conference ***at 9.30am on Tuesday, 26 March 2002***. Any further directions required to deal with outstanding interlocutory matters can be dealt with at that time.

COSTS

[59] Costs are reserved. Counsel may deal with costs by way of an exchange of memoranda. The memoranda are to be filed and served by Friday, 8 March.

Signed at: 2.15 ~~am~~/pm on: 25 February 2002

Solicitors:
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Grove Darlow & Partners, Auckland for Defendant
CC:
Chisholm J