

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.367-SD/01

BETWEEN

PATRICK JULIAN

First Plaintiff

AND

JULIAN'S ELECTRICAL &
ENERGY CONSERVATION
LIMITED

Second Plaintiff

AND

TELEVISION NEW
ZEALAND LIMITED

Defendant

Hearing: 17 and 18 December 2002

Counsel: J. G. Miles QC and D. M. Law for First and Second Plaintiffs
W. Akel and J.W.S. Baigent for Defendant

Judgment: 25 February 2003

JUDGMENT OF SALMON J.

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Copy: J. G. Miles QC, PO Box 4338, Auckland

[1] This is an application pursuant to Rule 418 of the High Court Rules for an order that certain questions be determined prior to trial.

[2] Rule 418 contemplates a two-stage procedure. Normally the Court first considers whether the preliminary questions are suitable for determination prior to trial. If that issue is determined in favour of the applicant there is a further hearing in relation to the identified issues or question.

[3] In this case Mr Akel, for the defendant, does not oppose the preliminary determination of most of the issues. In respect of one relating to qualified privilege he argues that that is a matter which should go to the arbiter of fact.

[4] I heard full argument in respect of all the issues.

[5] Accordingly, I formally grant the Rule 418 application, but subject to Mr Akel's caveat concerning the issue relating to qualified privilege.

Background

[6] The second plaintiff is a company owned by the first plaintiff and carrying on business in Inglewood in Taranaki. The company was initially set up as an electrical contractor and retailer. It has diversified over the last ten years into providing farm insulation products, energy conservation and other services to the rural community. In 1998 it began importing a device known as the "Powermax". It seems that it consists essentially of two powerful magnets. It is designed to remove iron from water with the result that the water is softened. Other benefits were claimed for the device.

[7] As a result of information received from the manufacturers and tests undertaken by some users and by the plaintiffs, the claims for the device included that it would kill algae, that it would reduce bacteria by up to 96 per cent and that it would protect against bacterial and parasitic infection.

[8] These claims attracted the interest of the Commerce Commission which undertook its own tests which revealed that the device was almost totally ineffective in reducing bacterial or parasitic content in water. The Commerce Commission commenced proceedings in the High Court in which the second plaintiff (Julians Electrical) was named as defendant. Those proceedings were settled at an early stage without a statement of defence being filed. The terms of the settlement required an apology and corrective advertising.

[9] Julians Electrical filed an admission of claim admitting that it breached the Fair Trading 1986 as detailed in the Commerce Commission's statement of claim. The breaches of the Fair Trading Act alleged in the claim were that the conduct of Julians Electrical was liable to mislead the public as to the ability of the Powermax to:

- [a] Render domestic water supply systems clean and safe to use and drink from or eliminate infection causing bacteria and parasites.
- [b] Eliminate infection causing bacteria and parasites from commercial supplies.
- [c] Dissolve faecal wastes in swimming pools and eliminate infection causing bacteria and parasites.
- [d] Treat water to eliminate the possibilities of infection causing bacteria and parasites and giardia and cryptosporidium.

[10] Julians Electrical's admission was dated 19 December 2000. A letter was sent to the company's distributors dated 18 January 2001. The Commerce Commission issued a media release, dated 1 March 2001 and Julians Electrical also issued a brief media release. Corrective advertising was undertaken.

[11] On 1 March the following news item was broadcast by TV One:

“A rip-off which reaped almost \$1 million.

The Distributor of a water conditioner has admitted in Court he has duped 6,000 New Zealanders.

Consumer Affairs correspondent, Mark Hannan, has the story:

Darryl Weeks was sold on this simple product:

“People were amazed that it has worked and they look at this thing and say, how could it do that?”

He is one of 6,000 people who handed over \$149.00 for the Powermax Magnetic Water Conditioner. Powermax promised to eliminate bacteria and parasites from drinking water. It also said it could get rid of cryptosporidium and giardia. In fact, it would make all your water safe and clean. The Commerce Commission disputed those claims and took the distributor to Court.

“When you claim something will purify water and it doesn’t, it seems to the Commission that there was a potential health risk.”

Powermax has been on sale for three years. There wasn’t a legal requirement for it to be tested before it went on the market.

Distributor, Julian’s Electrical and Energy Conservation from Inglewood in Taranaki now admits it doesn’t work.

“It was sold on the basis that it would kill a range of bacteria. They have admitted that it has no health properties at all.”

It turns out Powermax is simply two magnets that you strap to your water pipes. Independent tests done for the Commerce Commission show it didn’t purify water. Julian’s Electrical wouldn’t appear on camera. Managing Director, Pat Julian, says he regrets what has happened and the matter has been settled to the satisfaction of the Commerce Commission. Julian’s Electrical has agreed to undertake a major corrective advertising campaign and to offer refunds.”

[12] The plaintiffs issued proceedings alleging that the news item as a whole was false and defamatory and that it contained the following false and defamatory statements:

- (a) “A rip-off which reaped almost \$1 million.”
- (b) “The Distributor of a water conditioner has admitted in Court he has duped 6,000 New Zealanders.”
- (c) “Distributor, Julian’s Electrical and Energy Conservation from Inglewood in Taranaki now admits it doesn’t work.”

[13] Paragraph 6 of the statement of claim alleges that the new item as a whole and the above statements meant and were intended to mean:

- (a) That the first plaintiff was a con man who had duped thousands of New Zealanders.
- (b) That the second plaintiff was a company engaged in a scam.
- (c) That the first and/or second plaintiffs had made almost a million dollars from the scam.
- (d) That the first and second plaintiffs had admitted in Court that they were engaged in a scam which duped the public of almost a million dollars.

[14] The plaintiff claims serious economic and financial loss.

The preliminary questions

[15] The questions for determination set out in the application are:

- (a) Whether the imputations relied on by the defendant at paragraph 12 of the statement of defence are reasonably capable of bearing the meanings alleged by the plaintiffs in paragraph 6(a) to (d) of the first amended statement of claim.
- (b) Whether the particulars of truth set out at paragraph 11 of the said statement of defence are statements of fact or whether they are facts and circumstances on which the defendant relied in support of the defence of truth.
- (c) In any event whether the particulars of truth relied on at paragraph 11 are reasonably capable of supporting the defence of truth to the meanings alleged by the plaintiffs.
- (d) Whether the claim at paragraph 13 of the said statement of defence that the meanings claimed at paragraph 6 of the statement of claim were expressions of opinion is sustainable at law.
- (e) Whether the statements set out at paragraph 14 in the statement of defence are reasonably capable of being held to be expressions of opinion.
- (f) Whether the particulars set out in paragraph 11 relied on at paragraph 14 are reasonably capable of providing a fair factual

basis for any expression of opinion held to be properly open to the defendant.

- (g) Whether the broadcast could reasonably be held to be a fair and accurate report of the proceedings in the High Court at New Plymouth or the statement issued by the Commerce Commission.
- (h) Whether the broadcast could reasonably be held to have been made on an occasion of qualified privilege.

[16] I will consider each of the questions in turn.

Question (a)

Whether the imputations relied on by the defendant at paragraph 12 of the statement of defence are reasonably capable of bearing the meanings alleged by the plaintiffs in paragraph 6(a) to (d) of the first amended statement of claim.

[17] Paragraph 12 of the statement of defence pleads that the imputations contained in the broadcast were true or not materially different from the truth. It then sets out the imputations as follows:

- (a) The second plaintiff had misled a large number of New Zealanders in the promotion, marketing, and advertising of the Powermax Magnetic Water Conditioner (“Powermax”).
- (b) The Commerce Commission did not accept and disputed the second plaintiff’s claims that the Powermax eliminated bacteria and parasites, got rid of cryptosporidium and giardia and would make all water safe and clean and took the second plaintiff to Court.
- (c) Independent tests carried out by the Commerce Commission showed that the Powermax did not purify water.
- (d) The first and second plaintiffs admitted that the Powermax had no health properties and that the second plaintiff’s advertising and promotion of the Powermax that was the subject of the Commerce Commission’s claim was misleading and/or was false.
- (e) The first plaintiff regretted what had happened and the second plaintiff agreed to undertake corrective advertising and to offer refunds to purchasers of the Powermax.

[18] It will be seen immediately that the imputations pleaded by the defendant are different to those pleaded by the plaintiff. The defendant pleads that the imputations to be taken from the broadcast are that the second plaintiff misled a large number of New Zealanders. The statement of claim alleges that the imputations to be taken from the broadcast were that the first plaintiff was a con man who had duped thousands of New Zealanders and the second plaintiff was a company engaged in a scam.

[19] Historically there has been a difference of approach in England and in New Zealand to the manner in which a defence of justification can be pleaded. The New Zealand approach is exemplified by the decision of the Court of Appeal in *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234. In that case the plaintiff contended that the publication in question meant that he had used his connections with a political party to obtain an inappropriate benefit. The defendant denied that the words conveyed that meaning. He pleaded a different meaning which the Court of Appeal saw as having a defamatory sting, but less than that which was implicit in the meaning relied upon by the plaintiff. The decision is authority for the proposition that it is not open to a defendant to seek to justify a lesser meaning than that contended for by the plaintiff. A defendant is required to address directly the meaning alleged by the plaintiff.

[20] The English Courts in the 1980s restricted the right of plaintiffs in defamation proceedings to define the issues. In a series of decisions, including *Polly Peck (Holdings) Plc v Trelford* [1986] 1 QB 1000 *Williams v Reason* [1988] 1 All ER 262 and *Bookbinder v Tebbit* [1989] 1 All ER 1169 the Courts held that where there are several defamatory statements in the publication complained of which have a “common sting” the defendant may justify the sting even though the plaintiff does not complain about some of the individual defamatory statements.

[21] The Courts also held that if the specific allegations complained of are said to be instances of a broader charge, the defendant may justify the broader charge even though the plaintiff complains only in respect of one or more of the specific allegations.

[22] Since *Crush* was decided, the Defamation Act 1992 has been enacted. Section 8 now provides a statutory codification to replace the common law rules which applied at the time of *Crush*. Section 8 provides:

8 Truth

(1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.

(2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

(3) In proceedings for defamation, a defence of truth shall succeed if—

(a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or

(b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[23] It seems that the section has been the subject of consideration in only one decision since its enactment. *Manning v TV3 Network Services Ltd* (unreported, High Court, Christchurch Registry, CP.143/99, 31 August 2001) was a judgment of a full Court consisting of Panckhurst and William Young JJ. At paragraph 39 William Young J said:

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

And in paragraph 41:

... I incline to the view that *Crush* would also now be decided differently. I say this because I think that it is now open to a defendant in a shades of meanings case to allege that some or all of the facts asserted in the publication complained of are true (under

s.8(12)) and depending on how successful it is in respect of that contention to invoke s.8(3)(b).

At paragraph 45 the Judge said:

There is room for debate as to what is meant by the words “imputations contained in the matter that is the subject of the proceedings” which appear in s.8(2). [Should be s8(3).] In their ordinary meaning they refer to what is actually imputed by the publication in issue as opposed to the meanings pleaded by the plaintiff. On the other hand, when s.8(3)(a) is read with s.8(3)(b), the scheme of the subsection makes rather more sense if the words are taken to refer to the meanings as pleaded by the plaintiff. I note in passing that it is possible that this subsection was intended to do no more than reiterate the common law principle explained by Lord Shaw of Dunfermline in *Sutherland v Stopes* [1925] AC 47 at 79. For the purposes of this litigation what is important is that, on the construction of s.8(3)(a) which is most favourable to TV3, TV3 can only rely on s.8(3)(a) if the 20/20 programme can be regarded as alleging theft by destruction.

[24] I am inclined to share the view of William Young J as to the interpretation of s.8(3)(a). The “imputations” are, the plaintiff’s accusation or charge. The “matter that is the subject of the proceedings” is the publication or the part of the publication said to be defamatory. The imputation may not necessarily be coincidental with the words used in the publication. It may arise out of those words. If the imputations alleged reasonably arise out of the material said to be defamatory, then in my view s.3(a) requires a defendant pleading a defence of truth to establish that those imputations were true or not materially different from the truth.

[25] The defendant relied on s.14 of the New Zealand Bill of Rights Act and submitted that s.8 must be given an interpretation consistent with that section. The defendant submits that it is entitled to say:

This is what I said. This is what it means and this is why I said it.

And that a plaintiff cannot bind a defendant by the meanings the plaintiff pleads.

[26] Section 14 provides for the right to freedom of expression, but the Defamation Act is clearly intended to provide limits upon that right. I do not

consider that s.14 requires an interpretation of s.8 of the Defamation Act different to that set out above.

[27] The defendant then must address the imputations alleged. It may not redefine them and then plead truth in relation to its redefinition of those imputations.

[28] The question then is whether the imputations set out in paragraph 12 may be said to bear the same meaning as those alleged in paragraph 6(a) to (d) of the first amended statement of claim.

[29] Mr Akel submitted that the words “rip off” and “scam” do not necessarily mean what the plaintiff says they mean. He says for example that rip off may just mean a lack of value for money. It is, of course, open to the defendant to argue that the words are not reasonably capable of bearing the meaning imputed to them by the plaintiff. However, I note that *Heinemann New Zealand Dictionary* defines “rip off” as, “to exploit or take financial advantage of” and the *On-line Oxford English Dictionary* defines “rip off” as “a fraud, a swindle, a racket, an instance of exploitation especially financial”. The *Heinemann New Zealand Dictionary* defines the word “dupe” as “to deceive or trick” and the *On-line Oxford English Dictionary* has similar meanings, “to deceive, delude, befool or cheat”.

[30] In paragraph 12 of the statement of defence the imputation pleaded is that the broadcast alleged that the plaintiff has misled a large number of New Zealanders. That is a word that allows for unintentional or innocent actions.

[31] The imputations which the plaintiff relies on in paragraph 6 of the statement of claim plead that the broadcast alleged an intent to mislead for gain. In my view the imputations relied upon by the defendant are not reasonably capable of bearing the meanings alleged in paragraph 6 of the statement of claim.

[32] For the sake of completeness I record that even if the law in New Zealand was the same as that in England, I would hold that the plaintiffs did not have the right to redefine the issues in the way that has been done here. This is not a case of several defamatory statements which have a “common sting”. The “sting” contained

in the defendant's pleading is of a quite different order of moral culpability to that contained in the plaintiffs' pleading and, I believe, in the broadcast itself.

Question (b)

Whether the particulars of truth set out at paragraph 11 of the said statement of defence are statements of fact or whether they are facts and circumstances on which the defendant relied in support of the defence of truth.

[33] The plaintiff relies on s.38 of the Defamation Act which provides:

38 Particulars in defence of truth

In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying—

- (a) The statements that the defendant alleges are statements of fact; and
- (b) The facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[34] Mr Akel submits that s.38 is not concerned with the defence of truth, but with the defence of honest opinion. He submits that the section refers to what is commonly known as the "rolled up plea" and notes that the section refers to statements of fact and expressions of opinion. Mr Akel acknowledges that in its defence of truth the defendant does not plead which statements in the broadcast it alleges are statements of fact.

[35] However, Mr Akel also notes correctly that s.40 abolishes the rolled up plea. It provides that where a defendant intends to rely upon a defence of truth and a defence of honest opinion, the defences must be pleaded separately. Mr Akel refers to *Gatley* at paragraph 11.5 in support of the proposition that where a defendant pleads truth to the whole of the broadcast or to all of the imputations (as opposed to pleading truth to some and honest opinion to others) then no distinction between fact and opinion is necessary and s.38 will be apply.

[36] The passage from *Gatley* includes the sentence:

The defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

[37] In my view ss.38 and 40 must be read together. As a result of s.40 the defences of truth and honest opinion must be pleaded separately. The purpose of s.38 is to ensure that where both defences are raised the pleadings clearly distinguish between those matters which are said to be statements of fact and those matters which support the plea of honest opinion.

[38] In fact the defendant does plead honest opinion and relies on the particulars in paragraph 11 as the particulars of fact in support of that opinion.

[39] I have concluded that s.38 does require the defendant to distinguish between those statements that the defendant alleges are statements of fact and the facts and circumstances relied upon in support of the allegation of honest opinion. At present paragraph 11 wraps both up together and should be amended. The resolution may be as simple as to plead that all the statements in the broadcast are statements of fact.

Question (c)

In any event whether the particulars of truth relied on at paragraph 11 are reasonably capable of supporting the defence of truth to the meanings alleged by the plaintiffs.

[40] Mr Miles notes that there is no challenge that the particulars are insufficient to support the meanings pleaded by the defendant and that there is no challenge to the particulars supporting the plea of truth to the broadcast as a whole being in substance true or not materially different from the truth.

[41] Mr Miles' argument appears to be that the defence of truth should only stand if it is directed to the truth or otherwise of the imputations alleged in the statement of claim. I do not accept that that is so. The imputation question is a separate one already dealt with in this judgment. Other than as set out in my answer to Question

(b) I see no reason why the defence in paragraphs 10 and 11 should not stand as pleaded. Whether the defence succeeds is another matter.

Questions (d), (e) and (f)

[42] These questions challenge the defence of honest opinion. The issues raised are whether the claim, that the meanings pleaded in paragraph 6 of the statement of claim and the statements set out in paragraph 14 of the statement of defence were expressions of opinion, is tenable, and whether the particulars in paragraph 11 are capable of providing a fair factual basis for any pleaded expression of opinion.

[43] Mr Miles submits that the ultimate question of whether words are fact or opinion is for the Judge to decide, but if reasonable people would take either view the determination must be left to the jury. He referred to *Galooly, The Law of Defamation in Australia and New Zealand* at page 125 and the decision of the Court of Appeal in *Mitchell v Sprott* [2002] 1 NZLR 766 at 772 paragraph 19. The principle is discussed at some length in *Mitchell* from paragraph 17.

Thus the defendant must first show that the words complained of, or the part of them said to be an opinion, were an expression of opinion, not an imputation of fact. Sometimes it is not easy to distinguish fact from comment on fact. If that cannot be done, the words are not protected by the honest opinion defence. Sometimes words may in isolation appear to be stating a fact, but when read in context are properly understood to be drawing a conclusion from facts which have also been stated or indicated by the author or which would have been known to the person to whom the words were addressed. They can then be seen to be in the nature of a comment or expression of opinion based on those facts. The person who hears or reads the words can recognise them as an opinion which he or she can evaluate on the basis of the stated or known facts. As *Gatley on Libel and Slander* (9th ed, 1998) says at para 12.7, “words which are clearly comment are likely to be treated with more caution by the reasonable reader and hence are less damaging than assertions of fact”.

[18] Presentation is crucial to whether a statement is or is not an expression of opinion. In *O’Brien v Marquis of Salisbury* (1889) 54 JP 215 at p 216 Field J said that:

“ . . . comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the

common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion may be reasonably inferred.”

[19] The defence applies when the words appear to a reasonable reader to be conclusionary. The ultimate question, says Gatley at para 12.8, is how the words would strike the ordinary, reasonable reader. Whether they were fact or opinion is, in the first instance, for the Judge to decide. But if reasonable people could take either view the determination must be left to the jury.

[44] Mr Miles also submitted, in relation to paragraph 13 of the statement of defence, which refers to the pleaded meanings, that the defence was misconceived because a defence of honest opinion must relate to the words complained of rather than the meanings claimed by the plaintiff as applying to those words.

[45] Mr Akel submitted that in *Mitchell* the Court held at paragraph 28 against a submission of Mr Miles in that case that the question of fact or opinion must be determined in relation to the words themselves not their alleged meanings. As I read the decision of the Court of Appeal that issue was not in fact determined.

[46] Both counsel relied on the decision of the New South Wales Supreme Court in *Radio 2UE Sydney Pty Ltd v Parker* [1992] 29 NSWLR 448. After considering what is said in that case and the other authorities referred to by counsel I conclude that Mr Akel is right in his view that the defence of honest opinion can apply both to the meanings alleged and to the statements in the broadcast.

[47] Considering the news item as a whole I conclude that the statements and imputations pleaded in paragraphs 5 and 6 of the statement of claim might reasonably be taken to be expressions of opinion rather than statements of fact and the issue should, therefore, be left to the jury.

[48] As to the question whether the particulars in paragraph 11 are reasonably capable of providing a fair factual basis for any expression of opinion, Mr Miles submits that the facts relied upon must be in the article complained about or so widely known that views are likely to be aware of their existence. He relies on s.11 of the Act for that submission. I accept the submission. It is supported too by what the Court of Appeal said in paragraphs 17 and 22 of *Mitchell*.

[49] Mr Miles also submits that the facts relied upon must be relevant to the imputation or allegation. That this is a correct statement of the law was not challenged by Mr Akel. Mr Miles points out that some of the matters pleaded in paragraph 11 could not have been known to the defendant at the time of the publication and logically, therefore, could not have formed the basis of any opinion expressed.

[50] Generally, I accept the detailed criticisms made by Mr Miles of the content of paragraph 11 insofar as it is relied upon in support of the defence of honest opinion, the pleadings will need to be amended to comply with the requirements of s.11.

[51] The remaining two questions raise issues of privilege.

Question (g)

Whether the broadcast could reasonably be held to be a fair and accurate report of the proceedings in the High Court at New Plymouth or the statement issued by the Commerce Commission.

[52] That is a reference to paragraph 15 of the statement of defence which alleges that the broadcast was made on an occasion of qualified privilege, in that it was in part a fair and accurate report of High Court proceedings and in part, a fair and accurate report of a statement issued by the Commission.

[53] Mr Akel objects to these issues being addressed by way of preliminary determination. He refers to *Gatley* at paragraph 31.16:

If the existence of privilege either at common law or by virtue of Statute is dependent on the words being a fair and accurate report the fairness and accuracy of the report containing the words is a question of fact for the jury.

And at paragraph 13.45:

Whether the report is a fair and accurate report is a question of fact for the jury provided always there is some evidence of unfairness or inaccuracy to go to the jury. This is a question for the Judge to determine.

[54] Mr Miles submits that, when analysed, it is clear that the new item does not contain a fair and accurate report of either the Court proceedings or the Commerce Commission statement.

[55] At paragraph 34.16 of *Gatley* it is said that:

It would seem that it is for the Judge to decide whether the matter complained of can be regarded as 'a report'.

[56] The defendant relies upon paragraph 6 of Part 1 of the First Schedule to the Act. Paragraph 6 protects a fair and accurate report of the proceedings of any Court in New Zealand or of the result of those proceedings. It seems that that does not include a report of the pleadings because they are specifically referred to in paragraph 5. Publication of a report of the pleading, is only protected, in the case of proceedings before the High Court, at any time after a praecipe has been filed. That stage had not been reached.

[57] There were, of course, no proceedings to report because the matter did not go to a hearing. The bare allegation that the Commerce Commission took the distributor to Court can hardly be described as the report of proceedings. I hold that the broadcast cannot be said to be a fair and accurate report of proceedings in the High Court.

[58] As to the second part of the claim to statutory privilege, counsel relied upon paragraph 15 of Part II of the First Schedule to the Act. It protects, subject to the restrictions in s.18:

A copy or a fair and accurate report or summary of a statement, notice or other matter issued for the information of the public by or on behalf of the Government or any department or departmental officer or any local authority or officer of the authority.

[59] It does not seem to me that paragraph 15 is applicable. The Commerce Commission is not a department of Government. However, it is clear that clause 3 of Part II applies. This is as a result of subs.(10) of s.106 of the Commerce Act 1986. Subsection 10 provides:

(10) For the purposes of clause 3 of Part 2 of the Schedule 1 to the Defamation Act 1992, any statement, document, determination, clearance, authorisation, or decision made by the Commission in the exercise or intended exercise of any of its functions or powers shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.

[60] Clause 3 of Part II protects:

3. A fair and accurate report of the proceedings in an inquiry held under the authority of—

(a) The Government or Parliament of New Zealand; or

(b) The Government or legislature of a territory outside New Zealand,—

or a true copy of, or a fair and accurate extract from or summary of, any official report made by the person by whom the inquiry was held.

[61] The protection of Part II applies therefore to a fair and accurate extract from or summary of any statement, document etc. made by the Commission in the exercise of its functions or powers.

[62] I note Mr Miles' criticism that the quotes in the news report are quotes not from the Commission's official statement, but from a representative of the Commission made to Mr Hannan for the purpose of the news report. In fact, as I understand it, the statements to Mr Hannan came from the Chair of the Commerce Commission. Having read the official statement I have concluded that what was said by the Chair of the Commission was arguably a fair summary of parts of the official report. That being the case it is properly arguable that those portions of the broadcast are protected by statutory privilege.

[63] The final question asks whether the broadcast could reasonably be held to have been made on an occasion of qualified privilege.

[64] Mr Akel submitted that the following principles apply.

1. The Courts are reluctant to strike out a defence of qualified privilege not having heard all the evidence.

2. The categories of qualified privilege are not closed.
3. There is a need for flexibility in determining the area of qualified privilege.
4. A defence of qualified privilege may be available in respect of a statement which is published generally.
5. The inclusion of any separable foreign and irrelevant matter does not render the occasion no longer privileged.

[65] Mr Miles raised issues in relation to the question of privilege, both statutory and at common law which relate not to whether the occasion was privileged, but rather, whether the occasion had been misused. It is important to keep the two issues separate. In *Lange v Atkinson* [2000] 3 NZLR 385 at 389 the Court of Appeal said:

While there is potential for factual overlap, it is of first importance to keep conceptually separate the questions whether the occasion is privileged and, if so, whether the occasion has been misused: see for example the speech of Lord Buckmaster LC in *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at p 23. The dichotomy between occasion and misuse is mirrored by the roles of Judge and jury in this field. Subject to the resolution of any dispute about primary facts, which is for the jury, the Judge decides whether the occasion is privileged. The jury decides whether a privileged occasion has been misused.

[66] I must, therefore, confine myself to the question as to whether the occasion is privileged.

[67] Mr Miles submitted that there was no duty to disseminate information to all the viewers of the Six O'clock News carried by Channel One. He submitted that there could be no possible justification for such wide dissemination. He noted that the Commerce Commission had made orders ensuring that the correct information was disseminated to the relevant recipients and that this included corrective advertising in relevant newspapers. There was also a requirement to notify distributors. He submitted that issues of public safety and consumer protection do not support any greater dissemination than ordered by the Commission.

[68] The submissions raise the question as to whether there is a correspondence of duty or interest. The issue is stated as follows in *Laws of New Zealand, Defamation* paragraph 101:

In order for the publication of defamatory matter to be protected by qualified privilege, the communication must be made by a person having an interest or duty, whether legal, social or moral, to make it to the person to whom it is made; further the person to whom it is made must have a corresponding interest or duty to receive the communication. The privilege extends only to communications concerning the subject with respect to which privilege exists; it does not extend to anything that is not relevant and pertinent to the discharge of the duty the exercise of the right or the safeguarding of the interest which creates the privilege. Examples are statements made for the protection or furtherance of an interest to a person who has a common or corresponding interest to receive them, statements made in protection of a common interest, and statements made in answer to inquiries; alternatively, there must be an appropriate status and subject matter to confer the privilege, such as exists in the case of fair and accurate reports of judicial or parliamentary proceedings. Irrelevant matter is not privileged; however, it does not destroy the privilege attaching to the rest of the material. (*Laws of New Zealand, Defamation* para.101)

[69] The question then is whether the public generally had an interest in receiving the communication. In this regard it is relevant to note that the product was sold on a national basis. It seems to have been directed primarily to those relying upon unreticulated water supplies and to swimming pool owners. However, the product may also have been attracted to those on reticulated supplies seeking to additionally purify their water. Given the national distribution of the product, it seems to me indisputable that people throughout New Zealand had an interest in receiving information about it. In such circumstances the news media have an interest or duty in disseminating appropriate information. The fact that the Commerce Commission has required certain steps to be taken is no answer. It seems that the corrective advertising required by the Commission was only required to be published in newspapers circulating in the Taranaki and Wanganui areas. The plaintiff's apology was required to be displayed by all Powermax stockists next to the Powermax units. That, of course, would not reach those who had already purchased such a unit.

[70] I note that in *Isbey v New Zealand Broadcasting Corporation* [1975] 1 NZLR 721 Cooke J held that the facts should be fully established before a ruling is given on

whether publication was protected by privilege. It is not appropriate in this case that the question of the application of the defence should be determined by way of preliminary application.

Conclusion

[71] The answers to the questions asked are those contained in this judgment and in particular at paragraphs 31, 39, 41, 47, 50, 62 and 70.

[72] Leave is granted to the defendant to amend the statement of defence in accordance with the findings in this judgment.

[73] Costs are reserved.

Delivered at 2.45 ~~am~~ p.m. on 25/2/ 2003.

A handwritten signature in black ink, appearing to read "A. D. Ballman J.", written in a cursive style.