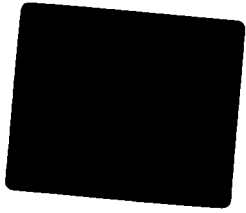


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**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2003-404-000497

BETWEEN

J F KARAM
Plaintiff

AND

AUSTRALIAN CONSOLIDATED PRESS
NZ LTD
Defendant

Hearing: 27 August 2003

Appearances: Michael Reed QC for the Plaintiff
Stephen Mills and Helen Wild for the Defendant

Judgment: 12 September 2003

JUDGMENT OF CHAMBERS J

Lawyers

Cone & Co., PO Box 2924, Auckland, for the Plaintiff
Chapman Tripp, PO Box 2206, Auckland, for the Defendant

Joe Karam takes on *North & South*

[1] On a cold June morning in 1994, a family was executed in Every Street, Dunedin. One son survived. He was David Bain. He was subsequently charged with the murder of his parents and three siblings. In May 1995, a jury found David Bain guilty. David Bain's defence had been that he was not the killer. His case was that his father killed the other family members before taking his own life.

[2] In early 1996, Joe Karam, a businessman and former All Black, became interested in the case. He researched it. He wrote a book, the thesis of which was that David Bain was innocent and that David's father, Robin, was the killer. Mr Karam has since then been at the forefront of the campaign to free David Bain.

[3] Early last year, Rosemary McLeod wrote an article which was published in the March 2002 edition of *North & South*, a monthly magazine distributed throughout New Zealand. The article was titled 'Joe Karam's Magnificent Obsession' and dealt with Mr Karam's campaign to free David Bain. Ms McLeod, in the article, is critical of Mr Karam's investigative methods. In effect, she contends that Mr Karam has not been balanced in his approach to the Bain case.

[4] Mr Karam, in March this year, decided to sue for defamation in respect of the article. But he has run into pleading difficulties. Australian Consolidated Press NZ Limited, the defendant, complains that his statement of claim does not comply with the Defamation Act 1992 and the High Court Rules. Mr Karam has already filed one amended statement of claim but ACP contends that his pleading is still non-complying. ACP contends that it is prejudiced and embarrassed by Mr Karam's pleading. This judgment attempts to resolve the impasse.

Issues

[5] The first issue is whether Mr Karam can plead that the whole of Ms McLeod's article is defamatory. Mr Mills, for ACP, contends that that is not allowed. Mr Reed QC, for Mr Karam, asserts that this is one of those special cases where the whole article may be the subject of complaint.

[6] The second issue concerns paragraph 9 of the amended statement of claim. In that paragraph, Mr Karam sets out what the words in the article in their natural and ordinary meaning ‘meant and were understood to mean’. Mr Mills complains that many of the meanings are ambiguous. He submits that Mr Karam should be required to remove the ambiguity.

[7] The third issue also relates to paragraph 9. Mr Mills submits that many of the 26 pleaded meanings are repetitive and not truly distinct. Mr Mills submits that Mr Karam should be required to delete repetitive meanings.

[8] I shall deal with these issues in turn.

Pleading of the whole article

[9] Paragraph 5 of the claim begins:

In the March 2002 edition of North & South, the defendant published an article (“the article”) titled “Joe Karam’s Magnificent Obsession”, written by Rosemary McLeod. A copy of the article is attached to this statement of claim. The plaintiff refers to the article for its precise terms, as if pleaded in full herein.

[10] Paragraph 8 of the claim begins:

The writing, printing and publication of the article when read as a whole and of the following pictures in the magazine and statements in the article was defamatory of the plaintiff: ...

[11] There is then a reference in paragraphs 8.1 to 8.3 to certain photographs. Then paragraph 8.4 begins:

The article included the following passages: ...

[12] The claim then details 52 passages from the article.

[13] Paragraph 9 of the claim begins:

The words *in the article* ... meant and were understood to mean : ... [the emphasis is mine].

[14] Before ACP filed its interlocutory application, its solicitors tried to find out exactly what this pleading meant. ACP has no difficulty with the 52 specified passages. It also does not deny that the 52 specified passages must be taken in their context, which includes the article as a whole. But ACP wanted an assurance that Mr Karam would not attempt to assert that non-specified passages were in themselves defamatory. When they were unable to obtain a clear answer to that question, this application was filed as a means of clarifying the issue. The wisdom of that course became apparent during the oral hearing before me. It was difficult to work out with precision just what Mr Reed did intend by the pleading. In the end, I got Mr Reed to dictate exactly what his position on this topic was. He submitted: 'The jury is entitled to decide that the article taken as a whole carries a sting of defamation.' He said that he envisaged a wrap-up question being put to the jury along the following lines: 'Was the article, taken as a whole, defamatory of Mr Karam?'

[15] I put to Mr Reed that his argument effectively meant that the 52 specified passages were therefore but examples of allegedly defamatory statements. They were 'examples' in the sense that the jury, on his argument, would be able to consider other non-specified passages and would be able to find those passages defamatory, even though not particularised. Mr Reed said that the word 'examples' was my word, not his. Mr Reed, for obvious reasons, did not like to accept a categorisation of his 'particulars' as 'examples'. But on Mr Reed's analysis, that is exactly what the 'particulars' amount to. He wishes to reserve the right to go outside the specified passages in order to find a defamatory statement.

[16] To put it another way, Mr Reed contends that Mr Karam can rely on:

- a) Any specified passage, defamatory in its own right;
- b) Any specified passage found to be defamatory when considered in its context;
- c) Any other statement in the article considered by the jury to be defamatory of Mr Karam.

[17] While Mr Mills accepts (a) and (b), he says that (c) is not permissible. I agree with Mr Mills. Section 37(1) of the Defamation Act requires the plaintiff to ‘give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings’. Only such specified statements can be considered by the jury. Mr Karam’s claim as currently drafted does not comply with s 37(1). In paragraphs 5 and 8, Mr Karam purports to rely on the whole article as being defamatory. That is reinforced by paragraph 9, where he pleads that it is *the article* which bears the specified meanings, rather than *the passages specified in paragraph 8.4* which bear those meanings. Paragraphs 8.1-8.4 are not particulars specifying every defamatory statement; they merely give examples, by which Mr Karam claims not to be bound. This non-complying pleading as it currently stands is likely to cause prejudice and embarrassment in terms of r 186 of the High Court Rules and must be brought into conformity with s 37(1).

[18] Mr Reed relied on a passage from *Gatley on Libel and Slander* (9ed, 1998) para 26.12, where the learned authors conceded that ‘in the exceptional circumstances where the sting of the matter can properly be said to derive from the publication read as a whole’, it may be appropriate to set out the article in its entirety. Mr Reed submitted this was such a case. I do not agree. The circumstances are not ‘exceptional’. This is a case where it is entirely possible to isolate the allegedly defamatory passages in the article, and indeed Mr Karam has done just that.

[19] Mr Reed purported to distinguish *Scott v Fourth Estate Newspapers Ltd* [1986] 1 NZLR 336, in which Williamson J held that it was essential for ‘the allegedly defamatory passages [to] be sufficiently identified’. I agree with Williamson J. I do not consider that *Scott* is distinguishable.

[20] Mr Reed also relied on *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA). In that case, it would appear that Mr Crush sued on ‘substantially the whole (with immaterial exceptions) of each broadcast item or newspaper article’: *ibid* at 236. Mr Reed noted that the Court of Appeal did not make any ‘adverse comment’ about that form of pleading. But this brief comment in the

court's judgment does not assist Mr Karam. The case was not concerned with the correctness of Mr Crush's pleading but rather with whether the statements of defence were properly pleaded. The point with which I am concerned, therefore, was not one with which the Court of Appeal was concerned.

[21] Mr Karam will need to file a further amended statement of claim. I shall leave it to Mr Karam to decide how he makes the amendment, but paragraphs 5, 8, and 9 will all need amendment. The end result must be that only specified passages can be the subject of complaint, albeit that they require to be considered in their context, which may be the article as a whole. If Mr Karam wishes to add to his 52 specified passages, he can, of course, do that in the amended pleading.

Ambiguity

[22] In paragraph 9 of the claim, Mr Karam sets out what he contends the words in the article in their natural and ordinary meaning meant and were understood to mean. Mr Karam sets out no fewer than 26 meanings. Each meaning is cross-referenced to the applicable passages pleaded in paragraph 8.

[23] Mr Mills's first complaint about paragraph 9 was that some of the pleaded meanings were ambiguous. Let me give two of his examples. The second meaning alleged is that 'the plaintiff told half-truths and quarter-truths'. Does this mean, Mr Mills asked, that Mr Karam intentionally told half-truths and quarter-truths, or does it simply mean that what Mr Karam said frequently turned out not to be accurate? The eighth pleaded meaning was 'the plaintiff was silent on issues perceived as harmful to his David Bain advocacy'. Does this mean, Mr Mills asked, that Mr Karam contends that the article was saying he was intentionally silent because he wanted to suppress any evidence which did not coincide with his view that David Bain was innocent? Or is Mr Karam saying that the article simply meant that Mr Karam did not mention matters contrary to his view for whatever reason, including, perhaps, that he was not aware of opposing views or evidence?

[24] There are other pleaded meanings to which Mr Mills referred but I think these two examples of his illustrate the point.

[25] While I accept that some of the pleaded meanings may be amenable to more than one interpretation, that is really no more than a reflection of the inherent flexibility of language. Under s 37(2) of the Defamation Act, Mr Karam was required to give to 'give particulars of every meaning that [he] alleges the matter bears'. He has done that. He has expressed the meanings in simple words. I think that a jury will be able to grapple with the meanings he alleges and will readily be able to determine whether the article bears the meanings Mr Karam alleges. I am not disposed to require Mr Karam to re-plead on this ground.

Repetition of meanings

[26] Mr Mills submitted that the court should not allow a plaintiff to plead repetitious meanings. As authority, he cited *Gatley* at para 26.21 (footnote 83) and *Grubb v British United Press Ltd* [1963] 1 QB 309 (CA) at 329, *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) at 282, and *Yelash v In Print Publishing Co Ltd* [1972] NZLR 83 at 86. Mr Reed did not dispute the principle. He did dispute, however, that the pleaded meanings were unduly prolix or repetitious.

[27] On this issue, both counsel's arguments have some merit. Mr Mills is right when he says that the difference between some of the pleaded meanings is so slight as to be illusory. Mr Reed is right, however, when he says that plaintiffs are stuck with their pleaded meanings: *Crush (supra)* at 239. Defendants, in pre-trial skirmishing, may well try to reduce the number of pleaded meanings, only then at trial to assert before the jury that the meanings asserted do not reflect the words in the article.

[28] I think that plaintiffs should be barred from pleading only meanings that are obviously repetitious. There are, I think, five sets of meanings in the present claim which are unduly repetitious.

[29] First, Mr Karam pleads the following four meanings:

- (c) the plaintiff intentionally distorted the facts;

- (f) the plaintiff pushed a version of the truth that was not sustainable on the facts;
- (t) the plaintiff was prepared to fabricate his case;
- (u) the plaintiff was prepared to continue inventing new claims in the media.

[30] All of those mean the same. They are all assertions that the plaintiff intentionally distorted the facts. The third definition of ‘invent’ given in *The Oxford English Dictionary* is ‘to devise something false or fictitious; to fabricate, feign, “make up”’. It is clear that that is the sense in which Mr Karam is using the word ‘invent’ in meaning (u). It is obvious that that meaning is identical to meaning (t) and that both those meanings are strikingly similar to meaning (c). All four references can very simply be reduced to one pleaded meaning.

[31] The second set comprises these pleaded meanings:

- (e) the plaintiff intentionally omitted material damaging to his case;
- (h) the plaintiff was silent on issues perceived as harmful to his David Bain advocacy.

[32] Both of those pleadings mean the same: Mr Karam in what he writes intentionally omits material which is damaging to his case that David Bain is innocent. Although meaning (h) was given as one of Mr Mills’s examples of ambiguity, I think it is clear that meaning (h) is to be construed as intentional and wrongful silence with respect to material which does not fit the Karam thesis. That is also reflected in the close correlation between the passages in paragraph 8 relied on for meaning (e) and the passages relied on for meaning (h). (Incidentally, Mr Reed made much of the fact that none of the 26 pleaded meanings was cross-referenced to *exactly* the same specified passages in paragraph 8. There is, with respect, nothing in that point. Many of the 52 specified passages are very similar in content. It would be easy to alter the cross-referencing without making any substantive change to the pleading.)

[33] The third set comprises these pleaded meanings:

- (a) the plaintiff was dishonest;

(p) the plaintiff lacked integrity.

[34] I can see no difference in meaning between those. A principal meaning of 'integrity' is 'uprightness, honesty, sincerity': see *The Oxford English Dictionary*. To lack integrity is to lack honesty or to be dishonest.

[35] The fourth set comprises these pleaded meanings:

(v) the plaintiff improperly used money that did not belong to him to support his case;

(x) the plaintiff misused donated funds.

[36] These meanings are said to come from three pleaded passages, which collectively read as follows:

He is not forthcoming when I ask how he manages to support himself, let alone fund a campaign ... He will only tell me in broad terms that he gets by, and that his campaign costs a lot. One way in which he seeks money for it is the Golden Key campaign. ... Karam does not answer my questions ... he tells me he alone decides how any money is spent. He won't tell me anything more specific.

[37] Those three pleaded passages come from a section of the article where Ms McLeod is discussing campaign funds which have been donated by members of the public. The reference in meaning (v) to 'money that did not belong to him' must be a reference to the donated funds. An allegation that Mr Karam misused donated funds is no different from an allegation that he improperly used them.

[38] The fifth set is more complicated. Meaning (g) reads as follows:

The plaintiff was self-serving and not prepared to run with the truth.

[39] I have some difficulty in knowing exactly what Mr Karam means by that phraseology. The reference to the plaintiff being 'self-serving' is, presumably, a reference to his motives. The suggestion presumably is that his motives are not altruistic. The campaign is being run for purposes of self-aggrandisement or self-promotion.

[40] There are two other meanings exactly along those lines. Meaning (k) reads:

The plaintiff's motives were other than altruistic.

[41] Meaning (n) reads:

The plaintiff's campaign was improperly motivated by self-promotion and a desire to be a celebrity.

[42] The reference in meaning (g) to the plaintiff being 'self-serving' is accordingly repetitious and should be deleted.

[43] The second half of meaning (g) is that the plaintiff was 'not prepared to run with the truth'. That means something quite different from an assertion that 'the plaintiff was self-serving', and accordingly should not in any event be in the same particular. The expression 'run with' is defined in *The Oxford English Dictionary*. It is clearly being used here in the sense of 'concur, accord, or agree with'. Mr Karam is therefore saying that the article meant that he was not prepared to concur in or agree with the truth. That is exactly the same as meaning (f): 'The plaintiff pushed a version of the truth that was not sustainable on the facts.' It is also extremely close to meaning (c): 'The plaintiff intentionally distorted the facts.' This second half of meaning (g) is not required, at least in light of meaning (f). It therefore follows that meaning (g) must be deleted. Both halves are covered by other meanings.

[44] With respect to the first four sets discussed, one meaning per set will suffice. I intend leaving it to Mr Karam to select which meaning best meets the essential point being made. Meaning (g) will be deleted. This will have the effect of reducing the 26 pleaded meanings to 19.

[45] Mr Mills contended that many of the other meanings are also repetitious. While I accept that many of the other meanings are very close to each other, there is a sufficient divergence to justify Mr Karam being allowed to maintain them at this stage. This judgment should not be regarded as the last word on this topic, however. It may well be at trial that the trial judge considers that further meanings should be removed or amalgamated. The trial judge will have the responsibility of ensuring that the question trail for the jury is comprehensible. The trial judge may well conclude that to leave 19 meanings to the jury may prove unwieldy, particularly in light of the defences that may be raised to some of them. Any further refinements on

this topic, however, will best be achieved at trial once the issues and evidence are clear.

Result

[46] Mr Karam, if he wishes to pursue this proceeding, must, on or before 25 September 2003, file and serve an amended statement of claim. That statement of claim must give particulars specifying every statement that Mr Karam alleges to be defamatory and untrue in the article. The claim may allege that the meanings to be given to the particularised passages are to be taken from their context, which may include the article as a whole. I leave Mr Karam to work out exactly how to plead the matter but the following are minimum requirements for any re-pleading:

- a) Paragraph 5 must not contain a sentence to the following effect: 'The Plaintiff refers to the article for its precise terms, as if pleaded in full herein.'
- b) Paragraph 8 must not refer to the article as a whole being defamatory but must limit the allegation of defamation to specified passages.
- c) Paragraph 9 must not set out the meanings of 'the words in the article', but rather must refer to the meanings of 'the words in the specified passages'.

[47] Secondly, the new statement of claim must plead only one meaning per set in respect of the following four sets of meanings currently pleaded in paragraph 9:

- Set 1: meanings (c), (f), (t) and (u).
- Set 2: meanings (e) and (h).
- Set 3: meanings (a) and (p)
- Set 4: meanings (v) and (x).

[48] Thirdly, meaning (g) is to be deleted, being repetitious.

[49] I have deliberately allowed Mr Karam to reformulate the pleading rather than impose any particular pleading on him. If, however, ACP considers that the amended pleading does not conform with this judgment, it may apply to me for the new pleading to be considered.

Costs

[50] Both sides have had some success on this application. My provisional view is that costs should lie where they fall with respect to it. If, however, either party wishes to argue that he or it should receive costs on this application, then a memorandum can be filed setting out the claim for costs and the reasons. The costs-resisting party must in that event respond within 10 working days. The costs-claiming party may then file and serve submissions in reply within a further 5 working days. 'Working days' has the meaning ascribed in r 3 of the High Court Rules. I shall determine costs on the papers.

Signed at 4 pm. on 12 September 2003

Wren Chambers