IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2003-425-000527

BETWEEN	WARREN ERNEST COOPER Appellant
AND	MOUNTAIN SCENE LIMITED First Respondent
AND	PHILIP WALKER CHANDLER Second Respondent
AND	FRANCIS ERIC MARVIN Third Respondent

Hearing: 9 June 2004
(Heard at Christchurch)

Appearances: ARJ Bowers for Appellant (Plaintiff)
P A Knight for Respondents (Defendants)

Judgment: 5 August 2004

JUDGMENT OF PANCKHURST J

Introduction:

[1] The appellant has been granted leave to appeal the judgment of Judge MacDonald refusing him leave to file a notice alleging that an opinion was not genuinely held pursuant to s39 of the Defamation Act 1992.

[2] Although the application for leave was filed approximately three months later than was required by the rules, the Judge considered there was a reasonable explanation for the delay. Nor did he consider there was prejudice caused to the defendant such as to justify refusing leave.

[3] However, he ruled there would be a miscarriage of justice if leave was granted, because the intended notice s39 did not contain any facts or circumstances that bore on the issue whether the opinion of the defendants was genuinely held. He concluded, therefore, that the notice served no purpose. Although noting that the notice, viewed in the most favourable light might indicate that the defendants were not justified in holding the opinions expressed, it still did not go to the issue whether the opinion was genuinely held.

[4] This appeal therefore centres on the sole ground upon which the Judge refused leave pursuant to s39(3) of the Defamation Act 1992. By consent the appeal has been heard on the basis of written submissions filed by counsel to that end. It also proved necessary to obtain the District Court file from Alexandra which occasioned some of the delay in finalisation of this decision.

Background:

[5] The plaintiff has sued the defendants in connection with the publication of an article in a weekly newspaper circulated in Central Otago. At the time the plaintiff was the Mayor of the Queenstown-Lakes District Council. The article described the plaintiff's actions in relation to a proposed property development near the plaintiff's home. In paragraph 7 of his statement of claim the plaintiff pleaded the defamatory meanings complained of in their natural and ordinary meaning. The plaintiff alleges the article labels him a hypocrite, as having double standards, and as having acted in a two-faced and devious manner in that he had publicly criticised others for allegedly opposing developments based solely on a concern to protect their own properties, while in the subject instance doing just that himself.

[6] The first defendant is a limited liability company which publishes the weekly newspaper in question. The second defendant is its editor and the third defendant its managing director.

[7] In their amended statement of defence (the defence) the defendants deny the words used in the article are capable of bearing the meaning complained of.

However, if they do then the defendants say that the defences of truth, honest opinion and qualified privilege apply.

[8] A defence of honest opinion will not succeed unless the defendant proves such opinion was genuinely held. Where a defendant pleads honest opinion it is for the plaintiff, within the specified time, to provide a notice identifying the facts and particulars upon which he relies in order to show the opinion was not honestly held.

[9] Paragraph 12 of the defence provides the defendants' particulars in reply to the plaintiff's various allegations of untrue statements contained in the original article.

[10] Then in paragraph 14 of the defence the defendants plead that to the extent the words of the article constituted opinions they were the honest opinions of the defendants on matters of public interest *"namely the plaintiff's performance as Mayor of Queenstown, and specifically, local property development issues about which the plaintiff has commented and/or publicly expressed an opinion in that respect"*. The defendants then rely on particulars in paragraphs 20.4.3 to 20.4.82 which chronicle events which occurred during the plaintiff's time as Mayor and which are said to provide a foundation for the opinions expressed (and for qualified privilege).

[11] The plaintiff's honest opinion notice responds in general terms to the matters set out in paragraph 12 (by which the defendants particularise their assertions of truth) and to the particulars in paragraphs 20.4.3 to 20.4.82 of the defence.

[12] In opposing the extension of leave to the plaintiff to file the notice the defendants contended that it did not address whether the relevant opinions were genuinely held but was simply a rebuttal of their factual particulars. In particular they submitted the particulars did not constitute *"facts and circumstances"* in terms of s39 and as such, were inadequate.

[13] The Judge agreed. He said:

> *"[16] Having considered the amended intended notice I think that Mr McKnight, for the defendants, is correct in his submission that it does not contain any 'facts or circumstances' that bear on the issue of whether the opinion of the defendants was genuinely held. It therefore serves no purpose and it can hardly be said that refusing leave would result in a miscarriage of justice.*
>
> *[17] Viewed in the most favourable light the notice might indicate that the defendants are not justified in holding the opinion expressed, but that still does not go to the issue of whether the opinion was genuinely held.*
>
> *[18] Most of the particulars centre on the plaintiff. Yet I would have expected some evidence of the defendants having expressed a different opinion on some other occasion, or acted in some way consistent with that."*

Discussion:

[14] Section 39 of the Defamation Act relevantly provides:

> *"**39. Notice of allegation that opinion not genuinely held** -*
> *(1) In any proceedings for defamation, where -*
> *(a) The defendant relies on a defence of honest opinion; and*
> *(b) The plaintiff intends to allege, in relation to any opinion contained in the matter that is the subject of the proceedings, -*
> *(i) Where the opinion is that of the defendant, that the opinion was not the genuine opinion of the defendant; or*
> *(ii) Where the opinion is that of a person other than the defendant, that the defendant had reasonable cause to believe that the opinion was not the genuine opinion of that person, -*
> *the plaintiff shall serve on the defendant a notice to that effect.*
>
> *(2) If the plaintiff intends to rely on any particular facts or circumstances in support of any allegation to which subsection (1)(b)(i) or (ii) of this section applies, the notice required by that subsection shall include particulars specifying those facts and circumstances."*

Subsection (3) contains the time requirement, that the notice is to be served within ten working days of service of the statement of defence, or with leave subsequent to that time.

[15] I note at the outset that ss(2) provides that "*if*" the plaintiff intends to rely on particular facts and circumstances to demonstrate that an opinion was not genuinely held "*particulars*" of those facts and circumstances are to be provided in the notice. The drafting of this subsection suggests the possibility of a notice which simply asserts that the relevant opinion was not genuine, without particular facts and

circumstances pleaded in support of that contention. While I accept it is most unlikely that a plaintiff could establish a want of genuineness, absent reliance upon facts and circumstances pleaded to that end, nonetheless the terms of the section do not impress me as much supportive of the conclusion reached by the Judge in relation to the leave application.

[16] Mr Bowers advanced two grounds in support of the appeal. The first was that the decision was influenced by a matter which the Judge should not have brought to account, namely an assessment of the notice itself. He submitted it was *"far from clear"* whether the adequacy of the notice was a material consideration when s39(3) simply conferred a discretion to extend time without definition of the matters to be considered. Mr McKnight's response was that if a notice would serve no useful purpose that factor must be relevant to the decision whether refusal of leave would give rise to a miscarriage of justice.

[17] I agree. However, I think it is only in a clear case that it would be appropriate to analyse the content of the notice in depth and reach the conclusion that it was so deficient as to serve no useful purpose, such that the interests of justice did not require a grant of leave.

[18] The second and more substantial ground of appeal advanced by the plaintiff was that, accepting it was appropriate to have regard to the contents of the notice, the Judge erred in the conclusion he reached.

[19] As to this aspect I think that the flavour of the case is an important factor. The sting of the defamation alleged by the plaintiff is that he is characterised in the article as a hypocrite, because he was generally a keen advocate for an expansive development policy for the area, save when a development was to occur too close to home. Accordingly, in order to defend their position the defendants seek to contrast the plaintiff's past acts and declarations against what he is alleged to have said and done in relation to the subject development. Essentially, as I understand it, it is this contrast which provides the basis for the defendants' contentions that factually the article was truthful and that the opinions contained in it were genuinely held.

[20] In these circumstances I do not find it surprising that the plaintiff in his s39 notice seeks to dispute, or place a different complexion upon, his past acts and declarations and likewise on his conduct with reference to the subject development. Moreover I am far from persuaded that it is illegitimate for the plaintiff to assert in the proposed s39 notice facts and circumstances which he maintains undermine the contrast which is the foundation of the defendants' case.

[21] With reference to the Judge's observation that he would have expected *"some evidence of the defendants having expressed a different opinion"* on another occasion, it seems to me that such expectation is an unrealistically high one. Of course a plaintiff would like to point to direct evidence of inconsistent action or comment by the defendants on another occasion or occasions, but more often than not a plaintiff will be forced to rely upon more indirect indications that the relevant opinion was not genuinely held. Certainly I do not accept that the absence of direct evidence of inconsistency on a defendant's part justifies the conclusion that the notice would serve no useful purpose.

[22] For these reasons I am satisfied that the contents of the notice are not such as to warrant the view that granting leave to file and serve it would be of no utility anyway. This conclusion is not intended as any endorsement of the contents of the notice. Rather it reflects that I am at least satisfied it is in the interests of justice to receive the notice. What it will achieve is for another day. I note Mr McKnight's submission that the notice is defective on account of a failure to distinguish between personal opinions of a defendant, and, adopted opinions where there was cause to believe the original holder of the opinion was not genuine : s39(1)(b)(i) and (ii). There may well be something in this complaint, at least in part. This, however, is not the time to confront that issue.

Result:

[23] The appeal is allowed. Leave is granted to the plaintiff to file a s39 notice within five working days of delivery of this judgment. The plaintiff is entitled to costs, which in the unusual circumstances of the appeal (determined without a formal

hearing) I allow in the sum of $500 with reasonable disbursements to be fixed by the Registrar in the event of dispute.

Signed at 3.00 pm on 5 August 2004.

Solicitors:
Macalister Todd Phillips Bodkins, Queenstown for Appellant (Plaintiff)
Izard Weston, Wellington for Respondents (Defendants)