[redacted]

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2003-454-754

BETWEEN	DAVID ARTHUR JAQUES Appellant
AND	JOHN W WARD Respondent

Hearing: 15 September 2004

Appearances: Appellant in person
R B Lewis for Respondent

Judgment: 4 October 2004

RESERVED JUDGMENT OF GENDALL J

---

[1] The appellant appeals against judgment of the District Court at Palmerston North delivered on 2 December 2003 dismissing his claim against the respondent for damages for the tort of defamation. The appellant sought general damages in the sum of $55,000 pleading the former tort of slander, that no longer being distinguished from libel.

[2] The essential background facts are that the plaintiff, Mr Jaques, a solicitor, was sole director and shareholder of a company which manufactured and distributed jukeboxes or music systems. The defendant, Mr Ward, was a competitor in that business. Mr Jaques alleged that in mid-2002 Mr Ward made statements to the bar manager of a tavern in Foxton which were false and defamatory of him. The pleaded statements were:

> "(a) Neither the Plaintiff nor the Plaintiff's company holds a copyright license to make digital copies of music for the DDJ [brand] digital juke box; and/or

(b) That music copied onto the digital juke boxes manufactured by the Plaintiff's company is illegal; and/or

(c) The company that manufactures the DDJ digital jukebox (Music Systems (NZ) Limited) trades illegally and is going to be shut down; and/or

(d) The Plaintiff makes illegal copies of Windows™ 2000 software operating system."

[3] Mr Ward denied that he made the statements pleaded. The case proceeded on the basis of the plaintiff having to prove that the statements were made, and if so, whether they were capable of having defamatory meanings as pleaded and if so, the quantum of damages payable to the plaintiff. The pleaded meanings were (essentially) that the plaintiff infringed the copyright of others, and operated illegally, and fraudulently.

[4] The evidence was that statements were made by Mr Ward to a Mr Brook, the bar manager of the Foxton Tavern in conversation between them. In issue was what were the contents of the statements. No other person gave evidence as to hearing what was said. The first issue was clearly one of fact, namely whether the plaintiff had discharged the burden of proving that the statements were made, (accepting for the moment them to be capable of having defamatory meaning).

[5] In most defamation cases, publication is not in dispute – the words used can be seen in the print. But sometimes, as here, where the "publication" is verbal between two persons only, and is denied, the publication is transitory and may be more difficult to prove. That was the crucial point in this case. Had the plaintiff proved the defamatory statements had been made by the defendant?

The decision

[6] In an oral judgment District Court Judge G M Ross reviewed the evidence and allegations, including a number of background, peripheral matters concerning gossip amongst the industry, and the competition between plaintiff and defendant. The Judge then reviewed the evidence of Mr Ward and Mr Brook, to whom it was alleged that the defamatory statements were made. He referred to there being "sharp disagreement" in the evidence between them, the disagreement confined to the issue

whether Mr Ward said that Mr Jaques was *not* licensed to Microsoft for the operating system for the computer necessary for the digital system; and that he was not licensed for playing music in the tavern (inferring a copyright breach). The Judge noted that those matters were

> "seriously challenged by Mr Ward who says that the emphasis that he made in raising issues which related to licensing for either playing or copying music as well as the microsoft system, were related to the need for those who had done the work to get paid for it".

[7] The Judge thereafter continued with a detailed analysis of the evidence, making observations which were relevant, he thought, to his assessment of credibility or reliability. The Judge then referred to the plaintiff having the burden of proof on the balance of probabilities, asking himself the obvious question whether it was more likely than not that the words were used by Mr Ward. The Judge concluded that he could not:

> "be so satisfied so far as the Plaintiff's claim is concerned. It seems to me though that it is altogether more likely that the Defendant's version is more likely to be correct. In this case it seems that he had an overall awareness of the position of both himself as well as a competitor in the business...."

The Judge then set out other reasons why he preferred the evidence of Mr Ward as to the version of the discussion between himself and Mr Brook. The Judge concluded that the words pleaded were not used in the conversation and that such words as were used were not defamatory or capable of a defamatory meaning. As a consequence the plaintiff's claim was dismissed.

[8] On appeal the appellant appeared in person and made detailed submissions on a number of aspects or remarks in the oral judgment. He accepted that some of these were only marginally relevant to the substance of the appeal but for completeness I record them in full. The appellant accepted that the main thrust of his appeal had to relate to the findings of fact of the Judge, but argued that Judge Ross was clearly wrong, for a number of reasons, in preferring Mr Ward as being more credible than Mr Brook.

[9] But first I deal with the subsidiary matters, or submissions.

Hearsay

[10] Objection was taken to the Judge deciding that certain parts of Mr Jaques' written proof of evidence contained inadmissible hearsay. Some of those rulings were correct. For example where he deposed that "a reasonable number of people coming back to me saying John was saying these things about me" and "one of my sales reps at the time – Keith Jaques (my brother) – came in one day and said John Ward had been mouthing off to the bar manager at Post Office Tavern in Foxton". Other challenged matters may not have been admissible hearsay, given that they related to Mr Jaques stating what *he* said and did, although within such passages there were statements, said to be made by another as to Mr Ward's actions which were strictly hearsay. But in the end none of these matters have any bearing on, and were immaterial to, the decision and the outcome of the appeal. The issue did not turn upon what the appellant's evidence was, but simply on whether there had been proof that the statements had been made by Mr Ward to the tavern manager.

Freedom of speech

[11] The appellant submitted the Judge erred by stating in his decision that

> "The basis of the law of defamation is that it must strike a balance between protecting the reputation of an individual on the one hand, as well as generally of course, the freedom of speech and the freedom of the press on the other."

The appellant says there is no protection given in law to a person to speak falsely of another. Of course, he is correct. But the Judge is not saying otherwise. The ground of appeal does not assist the appellant because it does not bear on the issue on appeal, as I have already said, the finding of fact that the statements were not made.

Credit for giving good service

[12] The appellant challenges the finding that:

> "The respondent was entitled to credit for giving years of good service."

The Judge was not, as the appellant contends, stating that the respondent was entitled to be free from liability for speaking falsely because of his reputation. He was simply making an observation that for 45 years the respondent, according to his evidence, had given satisfaction to his customers having extensive knowledge and involvement in the industry. There is nothing in this point.

Identification of audience

[13] Challenge is taken to the Judge's remarks that it was not until later in the piece (March 2003) that particulars were supplied by Mr Jaques as to the identity of the person to whom it was pleaded the defamatory remarks had been made. The original pleading had been that they had been made to the bar manager of the Post Office Tavern, Foxton. I think that that sufficiently identifies the person to whom the alleged statements were made. But the Judge's comments played no part at all in his ultimate finding as to fact. No issue of identity has in fact arisen in the end. This submission cannot advance the substantive appeal.

Consumer protection

[14] The appellant submits the Judge should not have made observations in his decision, when referring to some of Mr Ward's evidence:

> "...the emphasis that he made to Mr Brook was that it be checked with DDJ that there was compliance with the very issues which he raised. He has given as a rationale for this outline to Mr Brook that it was for what he described as customer protection reasons that he took these steps in relation to the tavern."

Mr Jaques submitted that such observation should not have been made, as the respondent did not plead qualified privilege. However, the Judge's observations were not made in that context. They were simply made in the context of recording the evidence that Mr Ward had given and, as Mr Jaques correctly submits, the issue for the Court was whether the pleaded statements were made. The Court addressed that question. It is not possible to elevate the Judge's comments to persuade me that he was confused as to the defence, and was viewing the matter as one of qualified privilege. All that the observations can reasonably mean is that the Judge was

accepting that the defendant was saying "Whatever I said to Mr Brook, and it was not alleged nor defamatory, I did because of my concern for customer protection".

CREDIBILITY FINDING

[15] The appellant contended that the Judge erred in a number of ways, so that, viewed collectively he came to the wrong factual conclusions. These matters argued were as follows.

Delay in recording conversation

[16] The appellant submits that the Judge erred when saying:

> "Neither party kept notes as to the discussions nor of course was it tape recorded nor relevantly or for any relevant purpose was anybody else present at the time of or during the discussions which were at the tavern itself. So no record was kept of this. Moreover and in my view not without its own difficulties, Mr Brook was not asked to repeat what had been said to him exactly in this conversation or conversations until these proceedings were well underway."

[17] Mr Jaques submits that such a finding was incorrect because there was evidence that Mr Brook had spoken to the appellant's brother soon after speaking with Mr Ward. In part that is correct, but what the Judge said was that Mr Brook had not been asked to repeat what had been said to him "*exactly*" in the conversation. The passage referred to in the evidence relates to the time at which Mr Brook spoke to Mr Keith Jaques (after Mr Ward told me etc). The issue was whether the words pleaded were used and only the witness Mr Brook could depose as to that. The Judge was simply recording that which was obvious, namely no record was made at the time of the conversation. But the observations by the Judge related to notes or records, apart from recollections or others repeating what they believed was said. The appellant contended that the allegations were "set in stone" in the statement of claim while fresh in memory but that overlooks the fact that they were taken or pleaded from what the appellant's brother said was his recollection of what Mr Brook had told him. The Judge's observations were those which he was entitled to make in assessing the accuracy or reliability of what the two parties to the

discussion, Mr Brook and Mr Ward recollected of it. There is no substance to this complaint.

Inactivity on statements published

[18] The appellant challenges the Judge's observations that there was no evidence before him that Mr Brook had done anything following his conversation with Mr Ward which, if he had been sufficiently concerned about it, he would have acted upon it. The Judge said that such inaction supported Mr Ward's denial of the actual form of words used as alleged. Mr Jaques submitted that there was no requirement to prove that the recipient of a defamatory statement must believe it before it becomes actionable. That of course is correct. But the point that the Judge saw as relevant did not relate to that but to whether he concluded that it was more likely than not that Mr Ward's version of the conversation was correct, and not that of Mr Brook. A full reading of the passages in paras [17] and [18] of the judgment make it clear that the Judge was observing that if the alleged words had been used he could have expected the witness to have contacted higher levels of management because of serious concerns that ought to have arisen from such statements. The Judge was entitled to look at Mr Brook's actions in determining whether or not he accepted that version of the conversation was as deposed by Mr Brook. Of course, belief by a recipient in the truth or otherwise of a defamatory statement is not an ingredient of the tort and the Judge did not so find. The Judge's remarks as to actions or inaction on the part of a recipient of an alleged slanderous statement cannot be elevated into error.

Resiling from brief

[19] The appellant submits that the Court erred in referring to Mr Brook's resiling from his brief of evidence, as this is something that often can occur with witnesses who may expand on matters contained in their written brief, amending or adjusting it as circumstances require. That is well known to Courts. The issue however may be one of a "prior inconsistent statement" signed by Mr Brook, and whether that was a matter which could be given weight in assessing his credibility when, determining matters of fact. It is clear that it is the evidence given in Court and on oath that is the

evidence that the Court has to consider. Written statements and briefs are not evidence unless given in Court. Here the witness gave, in his evidence in chief, his written brief but in cross-examination departed from it. That is, something to which he had earlier given his signature was inconsistent with the evidence he gave in cross-examination. At trial, a fact finder may doubt or disbelieve the evidence given at trial. If the witness adopts the earlier statement as true then of course it becomes evidence. But if on oath at trial he or she gives evidence in conflict with the statement then it is a matter which may (not must) be taken into account in assessing credibility. It is equally the case when the inconsistency arises through cross-examination. The issue is one of credibility. The Judge did not err in observing that in his assessment of the evidence, some inconsistency existed in what the witness had said. Whilst the appellant submits that Mr Brook was coherent and consistent in the giving of his evidence which supports the allegations, that is a submission on the facts no doubt made to the presiding Judge.

Specific words used

[20] The appellant challenges the Judge's findings in para [20] where he was describing the burden of proof being on the balance of probabilities and resting upon the plaintiff. The Judge correctly posed the question "Whether it was more likely than not that what was said was as the plaintiff claimed?" The passage challenged follows:

> "In other words has the plaintiff satisfied me that it is more likely than not that the words set out in the statement of claim and particulars, were the precise words used on the one or two occasions the subject of the allegedly defamatory comments."

Mr Jaques submits that that was an error because whilst a plaintiff is required to plead words complained of in the statement of claim which was done, nevertheless a plaintiff may succeed at trial if words were *substantially the same* are proved. He relied upon the Court of Appeal's decision in ***Kerr v Haydon*** [1991] 1 NZLR 449 which adopted the well known authority of ***Tournier v National Provincial and Union Bank of England*** [1924] 1 KB 461. That case and the line of authority from ***Harris v Warre*** (1879) 4 CPD 126 illustrated in ***Collins v Jones*** [1955] 1 QB 564; ***British Data Management Plc v Boxer Commercial Removals Plc and Anor*** [1996]

EMLR 349; [1996] 3 All ER 707; ***Best v Charter Medical of England Ltd*** [2001] EWCA 1588. All were concerned with the pleading requirement that the precise words must be pleaded in the statement of claim because the very words complained of are the facts upon which the action in defamation is founded. Where the defamation is based upon the written recorded word, there will be little difficulty in pleading the precise words used. Where the defamation is based upon the old tort of slander and the words used are not recorded but are transitory in nature, proof of the use of the words often becomes more difficult. A plaintiff may succeed provided it is proved by him that the precise words or those which were not materially different, and which are defamatory, were used. What has to be proved however is the words used were defamatory and fall within the substance of that pleaded. So, for example, if it were pleaded that the defendant said of a plaintiff "he stole $100 from me and he is a thief" when the actual words proven were "he stole $90 from me and he is a thief", that would be an elementary example of the words proven not being materially different from those spoken and defamatory of the plaintiff.

[21] But that is not the case here. Whilst the Judge referred to the plaintiff satisfying him that the "precise words were more likely than not" used it is apparent from further passages in his judgment that he regarded it as more probable that the respondent's version of the conversation was correct. That is, the words used were not the same as those pleaded, but materially different and not defamatory. The Judge goes on to elaborate his reasoning process by referring to the words pleaded as being:

> "Likely to be kind of amalgam of previously perceived, received and reported complaints...to the plaintiff."

[22] Further, the Judge went on to find that the words used in the conversation not only were not those as pleaded but "such as were used were not defamatory and in the sense which I find that they were used, they were not words capable of a defamatory meaning". That reasoning process is sufficient to dispose of the appellant's argument on this point. The Judge was holding that the words used were materially different from those pleaded and were not defamatory of the plaintiff. He did not base his decision upon the narrow point that the precise words having not

been proven but he went further and found that such words as were used were not actionable. This point fails.

Respondent's credibility

[23] The appellant submitted that this was the main thrust or platform of his appeal and challenges the findings of the Court in preferring Mr Ward's evidence. In a careful argument Mr Jaques referred to a number of matters or passages in the evidence which he said reflected adversely upon the respondent's credibility and that the Court erred in preferring the evidence of the respondent. He refers to the fact that no notes were made by Mr Ward of the conversation (although why this should have been the case is not immediately apparent), an available witness was not called in his support; Mr Ward's cross-examination was in contrast to his brief of evidence and generally the Court had insufficient foundation to arrive at the conclusion that the respondent's evidence was to be preferred.

[24] It is well known that challenge to a trial Judge's factual findings are especially difficult to overcome. The leading authority is ***Rae v International Insurance Brokers (Nelson-Marlborough) Ltd*** [1998] 3 NZLR 190 where the Court of Appeal held that an appellate Court could not reverse the factual findings unless compelling grounds were shown for so doing. The appellate Court has to be satisfied that the Judge's findings of fact were clearly wrong. Where factual findings are dependent upon documentary evidence an appellate Court usually has the same advantage as the Court of first instance but where assessment has to credibility and reliability is dependent upon oral evidence as it emerges in the course of a trial an appellate Court is at a very significant disadvantage. Appellants often wish to treat appeals as retrials on matters of fact and the present appeal appears to be no different. Even if a decision may be one which could have gone either way at first instance it cannot be reversed if it was one which a trial Judge was entitled to reach. As was said in ***Hutton v Palmer*** [1990] 2 NZLR 260 (CA) by Somers J when delivering the judgment of the Court at 268:

> "In a case which depends on an opinion as to conflicting testimony an appellate Court will not interfere unless it can be shown that the trial Judge has failed to use or has palpably misused his advantage; it ought not to reverse the conclusions at which he has arrived merely from its own

comparison and criticisms of the witnesses and its own view of the probabilities of the case."

[25] The remarks of Thomas J in delivering his separate, but concurring, judgment in ***Rae v International Insurance Brokers (Nelson-Marlborough) Ltd*** (supra) are apt where he said at p199:

> "It may not be fully appreciated that the deference of an appellate Court to the findings of fact of the Court at first instance has founded on a number of pragmatic considerations which make it inappropriate for the appellate court to intervene. The advantages possessed by the trial Judge in determining questions of fact are manifest. Of paramount importance, of course, is the fact that the trial Judge hears and sees the witnesses first hand....He or she can form an impression of the reliability of the witnesses and, where necessary, their credibility – although in deference to the witness's feelings the Judge may not always express an adverse conclusion in that regard. As the evidence unfolds the trial Judge gains an impression from the evidence which is not necessarily or usually apparent from the cold typeface of the transcript of that evidence on appeal. The Judge forms a perception of the facts in issue from which he or she adds or subtracts further facts as witnesses give their evidence, and so obtains as complete a picture as is possible of the events in issue. The Judge perceives first hand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.
>
> An appellate Court has none of these advantages and must acknowledge that the Court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate Court to assert the capacity to be able to 'second guess' a trial Judge's findings of facts when it does not share these advantages. Exceptional caution in departing from the trial Judge's findings of fact are therefore regarded as imperative."

[26] Those remarks are even more telling in a case such as the present where the trial Judge at the conclusion of all the evidence and submissions delivered an oral judgment having not found it necessary to take advantage (and it may be in some cases a disadvantage) of engaging in a detailed semantic analysis of the written transcript of the evidence. That is, the impressions that he gained as to matters of credibility and reliability came immediately after hearing all the oral evidence and submissions. That is how a jury acts in making factual findings in defamation actions.

[27] Whilst the appellant submits that Mr Brook could be regarded as an independent witness and his testimony or evidence weighed as such, that was something clearly available and known to the Judge and he could, and no doubt did, take that into account in his assessing the weight to be given to the evidence of the

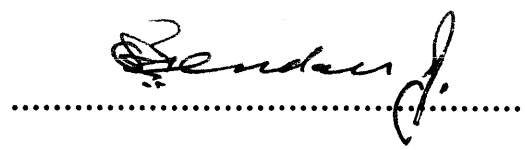
witness, where it was in conflict with that of Mr Ward. There were many matters that the Judge placed on the scales in his reasoning process to determine if he could, where he found the truth lay, or more particularly whether the plaintiff had discharged the burden of proving that the defamatory statements had been made.

[28] Having carefully reviewed the transcript and the Judge's decision it is not possible for this Court to interfere with the Judge's findings of fact and credibility. There was more than sufficient material available to the Judge to enable him to make the factual findings he did. They were findings that he was entitled to reach as the decider of fact. If they had been reached by a jury they could not have been successfully challenged.

Conclusions

[29] In the end the appellant was obliged to maintain the submission that the Judge erred in his findings of fact and that he was wrong in his assessment of credibility. The ultimate issue was one of credibility and of the Judge assessing the defendant and Mr Brook in the witness box as against the surrounding circumstances and determining what version was more probably or likely to be accurate. His findings of fact cannot be interfered with on appeal. It has not been shown that there was no basis or foundation in the evidence to enable him to reach the conclusion that he did, namely that the plaintiff had not discharged the burden on him to prove as a matter of fact that oral statements were made that were defamatory of him.

[30] The appeal is dismissed. The respondent is entitled to costs on this appeal which I fix in the sum of $2,000 being the agreed amount of security for costs.



J W Gendall J

Solicitors:
Appellant in person
R B Lewis, Barrister, P O Box 941, Palmerston North for Respondent

Delivered at 2.00 pm on 4 October 2004.