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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2003-404-497

BETWEEN	JOSEPH FRANCIS KARAM Plaintiff
AND	ACP MEDIA LIMITED First Defendant
AND	ROSEMARY MCLEOD Second Defendant

Hearing: 19 March 2004

Appearances: M P Reed QC and P A Morten for Plaintiff
S J Mills and H Wild for Defendants

Judgment: 27 April 2004

JUDGMENT (NO. 3) OF HEATH J

Solicitors:
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Table of Contents

Introduction

[1] This proceeding concerns an article published in the March 2002 edition of *North & South* entitled *Joe Karam's Magnificent Obsession*. Mr Karam sues both the publisher (ACP) and the author (Ms McLeod) of the article in defamation.

[2] One of the defences pleaded to Mr Karam's claim is qualified privilege. There are two aspects to the defence of qualified privilege. The first is whether the article was published on an occasion of qualified privilege. The second is whether the subject matter of the article qualifies for protection. The second question requires consideration to be given to any alleged misuse of the privilege. Generally, see *Lange v Akinson* [2000] 3 NZLR 385 (CA) at 393, paras [21]-[23] *Lange (No. 2)*.

[3] ACP and Ms McLeod seek an order under r 418 of the High Court Rules 1985 (the Rules) for the determination of a preliminary question. The defendants seek determination of the following question:

> Whether the article was published on an occasion of qualified privilege.

[4] The question for my determination is whether it is appropriate for that question to be tried as a preliminary question.

[5] Qualified privilege is not the only defence raised in this proceeding. In a detailed statement of defence both ACP and Ms McLeod plead defences of truth, qualified privilege and honest opinion. For his part, Mr Karam has delivered particulars under s39 of the Defamation Act 1992 (the Act) putting in issue whether any opinion was genuinely held. He has also given particulars of ill will (under s41 of the Act) to counter the defence of qualified privilege. Accordingly, an answer to the question posed will not determine the qualified privilege defence unless it is resolved in favour of Mr Karam.

[6] Mr Reed QC, for Mr Karam, estimates that a jury trial could take up to four weeks to hear. While it is not possible to determine accurately, at this stage, the likely duration of the trial, it seems clear to me that the trial will, at least, take between one and two weeks to complete.

Structure of judgment

[7] I deal with the matters debated in argument in the following sequence:

a) First, I summarise the principles applicable to the r 418 procedure.

b) Second, I consider the nature of the qualified privilege issue.

c) Third, I determine whether it is appropriate to make an order under r 418 of the Rules.

[8] After determining whether it is appropriate to order a preliminary question to be tried I deal with ancillary issues requiring determination prior to the hearing of major pre-trial issues scheduled to be heard over four days, commencing on 12 July 2004.

The r 418 procedure

(a) General

[9] Rule 418 of the Rules provides:

> **418 Orders for decision**
>
> The Court may, *whether or not the decision will dispose of the proceeding,* make orders for—
>
> (a) *The decision of any question separately from any other question, before,* at, or after *any trial* or further trial in the proceeding; *and*
>
> (b) *The formulation of the question for decision* and, if thought necessary, the statement of a case. (my emphasis)

[10] Generally, an order under r 418 will only be made if determination of the issue is likely to resolve the proceedings or, at least, to shorten the litigation. In *McGechan on Procedure*, at para HR 418.04(1) and (2), the learned authors state:

> **HR418.04 Key features of procedure**
>
> (1) Discretionary power
>
> The Court's power is discretionary. While in ordinary circumstances, one would not expect the power to be invoked except upon application, the rule is not so limited, and could be invoked by the Court of its own volition. The Court may also, on an application for directions under r 438(4)(d), so order: see, for example, *Thornton Hall Mfg Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304; (1989) 3 TCLR 249 (CA). The criteria relevant to the exercise of the discretion are not stated although guidance may be obtained from the decision of Barker J in *Rio Beverages Ltd v The Golden Circle Cannery* noted [1992] BCL 569. Factors relevant to the exercise of the discretion include:
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> (a) Delay in finally resolving the proceeding;
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> (b) Length of the hearing of the preliminary question;
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> (c) Whether a decision one way or the other would result in the end of the litigation;
>
> (d) Length of any subsequent hearing, and in particular whether any subsequent hearing time would be shortened by a preliminary question; and

> (e) A balancing of the advantages to the parties and the public interest in shortening litigation as against any disadvantages asserted by the defendant. The principal criterion will be reference to the underlying purpose of the rules concerned, namely whether the procedure is likely to expedite a proceeding, saving inconvenience and expense without any countervailing injustice.
>
> (2) Primary purpose
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> The decision need not itself dispose finally of the proceeding. The primary purpose of the procedure is to shorten trials.

I adopt those observations.

[11] In *Lowe Walker NZ Ltd v Commerce Commission* [1998] 3 NZLR 385 (CA) at 389 the Court of Appeal held that the fundamental question is whether an order under r 418 will serve the interests of justice. In so holding, Richardson P, delivering the judgment of the Court, highlighted "the desirability of limiting and carefully defining r 418 orders to those cases where the interests of justice will truly be served by the procedure, notwithstanding the attendant delay and expense involved". Sir Ivor Richardson's observations reflect the common experience of both Bench and Bar that, often inadvertently, the r 418 procedure can give rise to delay and additional expense, rather than anticipated savings in time and cost. Delay and expense can arise from the availability of separate appellate processes for the questions determined as preliminary issues. An illustration of that problem in an extreme case is *Strathmore Group Ltd v Fraser* [1992] 3 NZLR 385 (PC) at 388-389.

(b) Competing submissions

[12] Mr Mills referred me to recent English authority in which the Court of Appeal had upheld orders requiring questions of qualified privilege to be addressed as preliminary issues in defamation proceedings. Mr Mills relied on those cases to support his argument that such an order should be made in this case. He submitted that the English Courts had developed that general practice as a result of the implementation of case management procedures akin to those available in New Zealand. See, in particular, *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd*

[2000] 2 All ER 931 (CA) at 936-937 and *Loutchansky v Times Newspapers Ltd (No. 2)* [2002] 1 All ER 652 (CA) at 668.

[13] Nevertheless, Mr Mills accepted that there is no immutable rule of practice to that effect in England and Wales: cf *MacIntyre v Phillips* [2002] EWCA Civ 1087 (CA) at para 35.

[14] Mr Reed submitted that the recent English cases upholding determination of qualified privilege as preliminary issues ought not to be followed in New Zealand. Mr Reed submitted that the English procedure is much dependent upon the new approach to qualified privilege in England and Wales, exemplified by *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL). That approach was not followed by our Court of Appeal in *Lange (No. 2)*. I discuss the differences in approach later.

[15] Mr Reed also submitted that there were questions of fact, relevant to the occasion of privilege, which may require determination by the jury. For that reason, Mr Reed submitted it was inappropriate to make an order under r 418.

[16] Alternatively, Mr Reed submitted that there were unlikely to be any savings in time or expense to the parties if the issue was resolved as a preliminary question. Mr Reed pointed, in particular, to the availability of appellate procedures which might prevent Mr Karam from obtaining a prompt hearing for his claim.

The nature of the qualified privilege issue

[17] An explanation of the different approaches to the defence of qualified privilege in England and Wales *(Reynolds)* and New Zealand *(Lange No. 2)* is required. *Reynolds* was heard in June 1999 by the same panel of Law Lords who had heard an appeal to the Privy Council from *Lange v Atkinson* [1998] 3 NZLR 424 (CA) (*Lange (No. 1)*) the previous week. Their Lordships delivered their decisions in *Reynolds* and *Lange* on 28 October 1999. The advice of the Privy Council is reported as *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

[18] In *Reynolds*, the House of Lords redefined the law on qualified privilege in England and Wales. But the Privy Council, in *Lange,* took the view that, notwithstanding the House of Lords' decision in *Reynolds,* it was inappropriate for it to substitute its own views for those of the Court of Appeal in New Zealand on an issue (freedom of speech) of constitutional importance. In particular, Their Lordships referred to the change in access to Government documents brought about by the Official Information Act 1982 and to the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The appeal in *Lange* was allowed, but for the limited purpose of remitting the case to the Court of Appeal for reconsideration in light of the principles set out in *Reynolds*. *Lange (No. 2)* was the result of the Court of Appeal's reconsideration of the case.

[19] *Lange (No. 2)* emphasised the need to separate, as two distinct concepts, the occasion of privilege and its alleged misuse. At paras [5] and [6], at 389 the Court said:

> [5] We have carefully considered the position now reached in the United Kingdom in the light of *Reynolds*. Having reconsidered the issues and reflected upon the various ways they have been dealt with in other jurisdictions, and especially in *Reynolds*, we think it desirable to stress one point immediately. *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.*
>
> [6] In our earlier judgments we were concerned primarily with the first issue – whether the occasion was privileged. The references made to proper use of the occasion in terms of s 19 of the Defamation Act 1992 were included because, although the two questions are conceptually and analytically separate, they must be seen together when determining whether in combination the law is striking a proper balance between the competing interests. (my emphasis)

While emphasising the need to deal with the two concepts distinctly, the Court of Appeal, in para [5], acknowledged the potential for "factual overlap" on the two issues.

[20] The Court of Appeal went on to consider what is meant by an "occasion of qualified privilege". At 392-393 of *Lange (No. 2),* the Court of Appeal said:

> [18] All occasions of qualified privilege are derived either from statute or from the common law. The original concept was born of a recognition that it was not always right to presume malice from the publication of false and defamatory words. In some circumstances malice could not reasonably be presumed; these circumstances became known as occasions of qualified privilege. The occasion was privileged unless actual malice could be shown. As the common law developed, a unifying principle emerged by which the most commonly occurring circumstances capable of amounting to such occasions could be recognised. That principle was the familiar duty/interest test which was expressed by Lord Atkinson in *Adam v Ward* [1917] AC 309 at p 334 in this way:
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> > "[T]hat *a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it."*
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> [19] In *Stuart v Bell* [1891] 2 QB 341 at p 350 Lindley LJ had said:
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> > "The question of moral or social duty being for the judge, each judge must decide as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."
>
> His Lordship added that the privilege would arise if "all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty under the circumstances" to communicate the information concerned.
>
> [20] A privileged occasion thus had to be an occasion in which the duty/interest test was satisfied. If in the circumstances that test was satisfied, the occasion was capable of being regarded as one of qualified privilege. But despite a communication being made between persons who might in other circumstances have a shared interest in the subject-matter it could happen that the maker and recipients of the statement did not in the particular circumstance of the publication have the necessary interest or duty to satisfy what we are calling the shared interest test. (my emphasis)

[21] Since argument in this case the Court of Appeal has delivered judgment in *Alexander v Clegg* (CA168/02, 25 March 2004, Keith, Anderson and Glazebrook JJ). In that decision the Court of Appeal discussed the concept of an occasion of qualified privilege.

[22] At paras [55]-[60] (inclusive) of *Alexander v Clegg,* Anderson J, delivering the judgment of the Court of Appeal, explained the Court's reasons for concluding

that the words of which complaint was made were sufficiently relevant to and connected with the circumstances giving rise to the privileged occasion. His Honour cited with approval from *Laws NZ, Defamation* para 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. (footnotes omitted)

[23] Mr Mills also referred me to *Vickery v McLean* (CA125/00, 20 November 2000, Gault, Thomas, Keith, Blanchard and Tipping JJ), another case decided after *Lange (No. 2).* Delivering the judgment of the Court of Appeal Tipping J said, at para [15]:

> [15] All occasions of qualified privilege are based on an identified public interest in allowing people to speak and write freely, without fear of proceedings for defamation unless they misuse the privilege. On occasions of privilege the public interest is seen as prevailing over the protection of individual reputations. The price of the freedom is the requirement that the privilege be responsibly used. *When the Courts are asked to find that a particular occasion, not directly covered by authority, is one which should attract qualified privilege, the ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between freedom of expression and protection of reputation accordingly.* It is unnecessary for us to decide whether *Lange (No. 2)* should be extended to cover political discussion in the context of local government. This is because even if such extension were made, we are satisfied the present occasion should not be held to be within any such extended privilege. The rationale for the *Lange* privilege cannot be regarded as applying to the present circumstances. (my emphasis)

[24] The Court of Appeal's approach in *Lange (No. 2)* should be contrasted with the *Reynolds* approach. In *Reynolds,* the House of Lords merged the concepts of "an

occasion of qualified privilege" and its misuse. The merging of those two concepts in *Reynolds* was explained in *Lange (No. 2)* at 395 and 399 as follows:

> [24] Before considering the three matters which the Privy Council proposed this Court consider, it is helpful to refer to two important aspects of defamation law which are affected by *Reynolds*. The first is its chilling effect, which has been carefully researched in the United Kingdom in *Libel and the Media: The Chilling Effect* (1997) by Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, referred to by Lord Steyn in *Reynolds* at p 1032. Their account of social and socio-legal practice was based on responses to questionnaires, repeated interviews, and information about the media libel writs filed, set down and heard. The publishers and others questioned in that research included those involved with periodicals; the monthly publication involved in this case, *North & South*, being such a periodical. The survey led the authors to the conclusion that "the chilling effect genuinely does exist and significantly restricts what the public is able to read and hear" (p 191). The authors also stated this general conclusion applicable to all media sectors: "uncertainty in both the principles of defamation law and their practical application induce great caution on the part of the media. Virtually every interviewee, in all branches of the media, emphasised the lottery aspect attached to this area of the law" (p 186). *The blurring, perhaps even the removal, of the line between the occasion and its abuse in Lord Nicholls of Birkenhead's non-exhaustive list must add significantly to that uncertainty*. In the absence of compelling justification that consequence appears undesirable.
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> ...
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> [38] For reasons which can be briefly restated we would not strike the balance differently from the way it was struck in 1998. First, *the Reynolds decision appears to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of law. We are not persuaded that in the New Zealand situation matters such as the steps taken to verify the information, the seeking of comment from the person defamed, and the status or source of the information, should fall within the ambit of the inquiry into whether the occasion is privileged. Traditionally such matters are not of concern to that question in the kind of setting presently under discussion.* In particular, source and status may be relevant, but only in the area of reports of meetings and suchlike. For the reasons expressed in our earlier judgment, we do not consider it necessary, nor would it be in accord with principle, to import into this inquiry, for the limited purposes of the specific subject-matter now under discussion but not otherwise, a specific requirement of reasonableness. (my emphasis)

Why should the issue be tried as a preliminary question?

[25] Mr Mills submitted that the true purpose of the defence of qualified privilege was not only to protect certain classes of publication which were untrue but also to protect the publications that are true from expensive and uncertain defamation

actions, which inevitably have the potential to chill the very speech which the privilege seeks to encourage. That proposition underpins Mr Mills' submission that it is appropriate to deal with the question of the occasion on which privilege arises at the earliest possible time and with the least inconvenience to the defendants.

[26] In addition, Mr Mills relied on what was said by Lord Phillips of Worth Matravers MR in *Loutchansky,* at 668, that, when determining, in respect of any given article, whether or not it should attract qualified privilege the Court must bear in mind the likely impact of its ruling not only on the case in hand but also upon practices of the media generally. Lord Phillips said:

> Qualified privilege ordinarily falls to be judged as a preliminary issue and before, therefore, the truth or falsity of the communication is established.

[27] It follows, in Mr Mills submission, that because the general policy of the law is to encourage free speech (because of the public interest in both imparting and receiving information) the Court should ensure, so far as possible, that a streamlined procedure is used to determine whether an occasion of publication is a privileged one so that the defendant is not put to the expense and uncertainty of a trial on that issue. Otherwise, he submits, a disincentive to publish may be created which runs directly counter to the purpose of the privilege. Mr Mills relies upon the observations in *Lange (No. 2)* as to the "chilling effect" of defamation law in that regard: see 394 (para [24]) and 397 (para [32]). See also s14 of the Bill of Rights.

[28] Mr Reed and Mr Morten emphasised, in their respective submissions, the need to procure a benefit of the type contemplated by the r 418 procedure before any order for preliminary determination of an issue can be made. They also refer to the undesirable risk of a plaintiff, in a defamation suit, potentially being "burnt off" by a defendant publisher imposing unnecessary costs on him or her for tactical reasons.

Should an order be made under r 418?

[29] It is common ground that all issues in this proceeding will not be resolved by the determination of the proposed question. Indeed, it will only resolve the qualified privilege defence if the question is resolved, pre-trial, in favour of Mr Karam. Yet

Mr Karam opposes determination of the question pre-trial. Thus, the question is whether resolution of the "occasion of privilege" issue, pre-trial, will shorten the proceeding in a way that justifies an order being made.

[30] I am of the view that there is insufficient likelihood of shortening the trial significantly to justify an order under r 418. My reasons for reaching that conclusion follow.

[31] If there are questions of fact to be determined by a jury on the question whether the publication was on an "occasion" of qualified privilege there will be no advantage in making an order under r 418 because the factual questions should be resolved by the jury rather than the Judge: see, generally, *Lange (No. 2)* at 389, para [5] and 394-395, paras [24] and [25] and *Laws NZ, Defamation* at paras 215-221. In *Lange (No. 2)*, at para [25], while discussing the merging of privilege issues in *Reynolds,* the Court of Appeal said:

> [25] ... *it is for the Judge to determine whether the occasion of the publication gives rise to a privilege (although the jury is to decide any disputed facts relevant to that issue)* and for the jury to decide whether the defendant had abused the privilege ....

The passage at para [5] of *Lange (No. 2)* is set out in para [19] above.

[32] The allegation by ACP that the article was published on an occasion of qualified privilege rests upon particulars set out in paras 27 and 28 of the Statement of Defence to the Third Amended Statement of Claim. (Ms McLeod's pleading mirrors ACP's and is to be found at paras 47-49 of the same pleading). Paragraphs 26, 27 and 28 of the Statement of Defence to the Third Amended Statement of Claim are set out as an appendix to this judgment for ease of reference.

[33] Quite clearly, the question whether Mr David Bain was the person responsible for killing other members of his family in Dunedin on 20 June 1994 was a matter of public interest. The real question, in this case, is whether Mr Karam's role as a person advocating, in the public domain, the innocence of Mr David Bain was similarly a matter of public interest. If it were a matter of public interest, the article is likely to have been published on an occasion of qualified privilege.

[34] Mr Karam does not admit the allegations set out in paragraphs 27, 28, 48 and 49 of the Statement of Defence to the Third Amended Statement of Claim. And, I have held that he cannot be required to admit those allegations: see paras [41]-[54] of my judgment of 11 March 2004.

[35] As I mentioned in para [40] of my judgment of 11 March 2004, most of the allegations contained in paras 27 and 28 of the relevant Statements of Defence can be proved at little cost to the defendants; in all likelihood through the production of the article in evidence. But there are matters of editorial comment to which Mr Karam takes exception contained within the pleading.

[36] While Mr Reed did not feel able to identify specific questions to be put to the jury on the question of "occasion of qualified privilege" I cannot, with confidence, dismiss the possibility that there will be questions of fact, some of which overlap with issues of misuse of privilege, that will require resolution by the jury in the course of the trial. That reason, together with the risk of appeals against such a pre-trial determination, weigh against my making an order that the "occasion" issue be tried as a preliminary question.

[37] The ordinary practice, pre-case management, was for the Judge to settle questions of fact to be determined by the jury in relation to both the occasion on which privilege arises and its potential misuse. Once any disputed questions of fact as to the occasion of privilege have been answered the Judge can rule, as a matter of law, on whether the occasion is one to which the privilege attaches: see *Brooks v Muldoon* [1973] 1 NZLR 1 at 7. If no questions of fact arise the Judge can be asked to rule whether the article was published on an occasion of privilege before settling any questions of "misuse" of the privilege for the jury.

[38] If that procedure is followed no time will be lost and no additional expense will be incurred. It will not be necessary to put questions to the jury concerning "misuse" of the privilege unless the article was published on an occasion of privilege or, out of an abundance of caution, the jury is asked to answer questions on the issue of "misuse" in case the "occasion" ruling is reversed on appeal.

[39] Neither will any problem be caused through my being required to rule on the "occasion" issue before the jury is addressed on the questions it should answer. The question is clearly in issue. I have already received detailed submissions on the legal principles. In those circumstances, the issue ought to be capable of being dealt with in a ruling in the course of the trial without causing undue inconvenience to the parties or the jury.

[40] Accordingly, while there is merit in the submissions made by Mr Mills as to the policy goals of defamation law, in the circumstances of this particular case the disadvantages of proceeding with determination of this issue as a preliminary point outweigh the advantages. I decline, therefore, to order the question to be tried as a preliminary issue.

Rule 418 application - result

[41] The application under r 418 is dismissed. Mr Karam is entitled to costs on this application. Costs are awarded on a 3B basis with disbursements. Both costs and disbursements are to be fixed by the Registrar.

Ancillary issues

[42] The next event in this proceeding is a settlement conference scheduled for 24 May 2004. If settlement is not achieved at that conference three major pre-trial issues are scheduled to be heard by me during the week of 12 July 2004: namely

a) Whether the author of the article (Ms McLeod) was an employee or independent contractor of ACP?

b) In relation to the reports made by the Police Complaints Authority, the Ministry of Justice and Sir Thomas Thorp:

i) Are they are privileged reports?

ii) Was the use of those reports in the article privileged?

iii) Whether a defence of honest opinion can rely on privileged material without the need to prove that the privileged material is true?

c) Whether matters of ill will referred to in Mr Karam's notice under s39 of the Act are relevant to the question whether an opinion is genuinely held? If so, is the s39 notice sufficient?

[43] It is inappropriate, in my view, to require further interlocutory steps to be taken before the settlement conference. Accordingly I make timetabling directions on the basis that settlement will not be achieved. If settlement is achieved these directions can be vacated at the settlement conference.

[44] Having received and considered submissions from counsel on timetabling issues I make the following directions in relation to that hearing:

a) Any applications for further and better discovery must be filed and served by 5pm on 8 June 2004. If any such applications are filed any notice of opposition must be filed and served by 5pm on 15 June 2004. If notices of opposition are filed the Registrar shall convene a telephone conference before me so that I can make further directions in relation to those applications.

b) By 5pm on 15 June 2004 the defendants shall notify the plaintiff of all affidavits on which they rely in respect of the major pre-trial issues identified in para [42]. That list shall include affidavits identified in the defendants' memorandum of 24 February 2004 so that a complete list is available in the one document. Any further affidavits in support of the issues to be determined shall be filed and served by the same time and date.

c) By 5pm on 22 June 2004 the plaintiff shall notify the defendants of any affidavits already filed on which he intends to rely in respect of

the major pre-trial issues. He shall file and serve any further affidavits by the same time.

d) Any application by the plaintiff for leave to cross-examine any deponent on the question whether Ms McLeod is an employee or independent contractor of ACP shall be filed and served by 5pm on 22 June 2004. Any notice of opposition to that application shall be filed and served by 5pm on 29 June 2004. I will determine any such application, if opposed, at the commencement of the hearings on 12 July 2004. Any witnesses who may be cross-examined, if I grant leave, shall be present in Court to be cross-examined if necessary.

e) By 5pm on 29 June 2004 any affidavits in reply shall be filed and served.

f) By 5pm on 5 July 2004 counsel shall exchange a list of authorities to which they intend to refer at the hearing. All authorities listed shall be included in a combined bundle of authorities, to be prepared by the solicitors for the defendants, to be filed and exchanged by midday on 9 July 2004.

g) By midday on 9 July 2004 the defendants shall file and exchange a paginated bundle of all affidavits to be read on the applications.

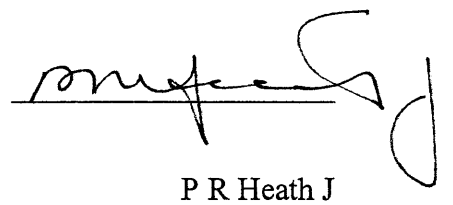
[45] I have considered whether the questions require re-formulation. I have decided not to re-formulate questions. Counsel may take it that the questions to be debated during the week of 12 July 2004 are those identified in para [42] above.

Summary of orders made

[46] The application under r 418 is dismissed with the consequences as to costs identified in para [41].

[47] Timetabling orders are made in respect of the July 2004 hearings as set out in para [44] above.

[48] I thank counsel for their assistance at the hearing on 19 March 2004 and in their supplementary memoranda filed pursuant to leave reserved. The proceeding is adjourned for a settlement conference on 24 May 2004.



P R Heath J

Delivered at 2·50 ~~am~~/pm on 27 April 2004

Appendix

Set out below are paragraphs 26, 27 and 28 of the Statement of Defence to the Third Amended Statement of Claim (see para [32] above).

26. THE photographs and the words complained of by the plaintiff were, as a result of the facts set out in paragraphs 27 to 28 below, published by the first defendant on an occasion of qualified privilege.

27. THE article, including the photographs complained of in paragraphs 15.1 to 15.3 and the words complained of in paragraph 15.4 of the third amended statement of claim, involved matters of public interest, namely:

27.1 The guilt or innocence of David Bain, the integrity of the New Zealand criminal justice system in convicting and then upholding the conviction on appeal and the integrity of the New Zealand police in investigating the murders;

27.2 The appropriateness of the Governor-General intervening through the exercise of the prerogative to pardon David Bain;

27.3 The plaintiff's role in publicly advocating the innocence of David Bain;

27.4 The methods employed by the plaintiff in his advocacy and their implications for future police investigations;

27.5 The completeness and accuracy of the information the plaintiff has presented to the public in the course of his advocacy and the objectivity of the plaintiff as a person on whom the public can rely as a source of factual information on the issues involved in the campaign to free David Bain;

27.6 Official reports relevant to an informed public consideration of the plaintiff's advocacy and the issues he has raised, namely the PCA Report, the MOJ Report and the Thorp Report:

27.6.1 The PCA Report had been principally reported by the media only with respect to the plaintiff's reaction to it;

27.6.2 The MOJ Report had received no substantial coverage by the media; and

27.6.3 The Thorp Report had been dealt with by the media only in the context of the Minister of Justice referring the issue of whether there had been a miscarriage of justice to the Court of Appeal.

Particulars of public interest

(1) On 29 May 1995 David Bain was convicted of murdering five members of his family;

(2) On 19 December 1995 the Court of Appeal dismissed an appeal against conviction and subsequently dismissed an application for leave to appeal to the Privy Council;
(3) On 29 April 1996 the Privy Council dismissed a petition for special leave to appeal to the Privy Council;
(4) On 15 June 1998 David Bain applied for the exercise of the prerogative of mercy of the Crown;
(5) On 18 December 2000 the Governor-General, by Order in Council, referred certain matters to the Court of Appeal for its opinion;
(6) Since the dismissal of leave to appeal to the Privy Council a national campaign has been conducted on behalf of David Bain which contends he is innocent and seeks his release from prison and a pardon from the Governor-General for the murders for which he has been convicted;
(7) The plaintiff has led the campaign on behalf of David Bain and is the public face of the campaign;
(8) The plaintiff has published two books advocating David Bain's innocence, namely *"David and Goliath"*, which was published in April 1997, and *"Bain and Beyond – Cops, Courts and Criminal Justice"*, which was published in 2000 and has also published *"Innocent: Seven Critical Flaws in the Wrongful Conviction of David Bain"*, 2001;
(9) The plaintiff has spoken extensively on national television, in various public forums around New Zealand and has been published in other media and on the *freedavidbain.com* website, advocating the innocence of David Bain and setting out his views on the circumstances leading to his conviction;
(10) The plaintiff has been instrumental in the establishment of a national fundraising campaign, known variously as the David Bain Defence Fund, the David Bain Appeal and the Golden Key Campaign (hereinafter collectively referred to as *'the Fund'*), which has solicited funds from the public for the purpose of advancing the campaign to obtain a pardon for David Bain and have him freed from prison;
(11) The plaintiff has asked the public to make financial contributions to the Fund – inter alia – to help meet the forensic and legal expenses associated with David Bain's petition to the Governor-General for a pardon;
(12) The plaintiff has sought to enlist public support and pressure for a pardon from the Governor-General and as part of this campaign for public support has been instrumental in establishing the *"freedavidbain.com"* website;
(13) The plaintiff has made serious allegations about the integrity and competence of the New Zealand criminal justice system in convicting David Bain and subsequently upholding the convictions on appeal;
(14) The plaintiff has made allegations of incompetence and unlawful conduct against various members of the police force who were involved in the investigation into the murders for which

David Bain was convicted and has raised issues about the competence and integrity of the New Zealand police force generally;

(15) The plaintiff has alleged that the incompetence and unlawful conduct of the police and the miscarriage of justice he has alleged in respect of David Bain's conviction, are systemic in the criminal justice system and he intends to extend his campaign on behalf of David Bain to include other high profile murder convictions, the radical reform of the criminal justice system and the establishment of a Foundation with the following aims:

(i) To explain the shortcomings of the New Zealand criminal justice system;

(ii) To help the public understand their rights under the Crimes Act and the Bill of Rights;

(iii) To put forward proposals for reform of the criminal justice system;

(iv) To represent the falsely accused and wrongly convicted;

(16) On 20 December 2002 the Minister of Justice, in announcing that he had referred David Bain's conviction to the Court of Appeal for a full reconsideration of his conviction, noted that *"considerable community concern about the safety of Mr Bain's convictions is a big part of the reason for sending the case back to the Courts for reconsideration"*.

28. **THE** first defendant had a duty to publish the article and the readers of the article had a corresponding interest in receiving the article.

Particulars of duty

28.1.1 It repeats paragraph 27;

28.1.2 The article arose out of, and relates to, matters which have been the subject of extensive public advocacy by the plaintiff over a period of several years, and on a national basis, including the publication of two books written by the plaintiff;

28.1.3 The issues dealt with in the article were important to the public's ability to properly weigh the merits of the issues raised by the plaintiff in his advocacy of David Bain's innocence;

28.1.4 The range and complexity of the issues raised by the plaintiff in his advocacy of David Bain's innocence, and the need for them to be evaluated publicly and in detail and by a national publication that would be available to an audience that would be the same or similar to that reached by the plaintiff's campaign to free David Bain, meant that *North & South* was almost alone amongst New Zealand media in its ability to publish the article;

28.1.5 *North & South* is a national magazine which has a history of dealing with significant issues of public concern;

28.1.6 *North & South* has previously published other articles and commentary dealing with the David Bain case which reported the plaintiff's views on the wrongfulness of the conviction, the innocence of David Bain and the claimed miscarriage of justice that had occurred:

(i) August 1995, *"Beyond Reasonable Doubt – Can We Be Sure About David Bain"* by Cate Brett;
(ii) January 1997, Update;
(iii) May 1997, Book Review, *"David and Goliath"* which includes an 8 page excerpt from the book;
(iv) January 1998, Update;
(v) October 2000, Book Review, *"Bain and Beyond"*;

28.1.7 The author of the article has previously won major journalism awards for feature articles on crime and justice issues, has taken a close interest in the issues involved in the campaign to pardon and free David Bain, has previously published columns in daily newspapers dealing with this campaign, and was engaged by the first defendant to write the article because of these qualifications;

28.1.8 The article was published by the first defendant for the dominant purpose of setting out for the readership of the magazine and the public generally a detailed assessment of the issues that had been raised by the plaintiff in his advocacy of David Bain's innocence, so that the New Zealand public would have a more fully informed and balanced understanding of:

(a) The guilt or innocence of David Bain;
(b) The performance of the criminal justice system in convicting David Bain;
(c) The performance of the police force in investigating the murders for which David Bain was convicted;
(d) Whether the David Bain case shows that there are systemic problems with the criminal justice system which require a radical overhaul of that system;
(e) The methods used by the plaintiff in his campaign to free David Bain and the possible implications of these methods for future police investigations;
(f) The fundraising activities undertaken by the plaintiff on behalf of David Bain;
(g) Whether they wish to financially contribute to this fundraising;
(h) Whether they wish to become part of the pressure group the plaintiff has been instrumental in forming for the purpose of bringing political pressure to bear on the plaintiff's efforts to obtain a pardon for David Bain;
(i) The appropriateness generally of the Governor-General pardoning David Bain.