IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2003-409-001484

BETWEEN	SCOTT VERNON MCGEE Plaintiff
AND	INDEPENDENT NEWSPAPERS LIMITED First Defendant
AND	TELEVISION NEW ZEALAND LIMITED Second Defendant
AND	APN NEW ZEALAND LIMITED Third Defendant

Hearing: 1 June 2005

Appearances: PHB Hall for Plaintiff
J M Mallon for First Defendant
W Akel for Second Defendant
B D Gray for Third Defendant

Judgment: 17 June 2005

JUDGMENT OF PANCKHURST J

Introduction

[1] Mr McGee alleges that he was defamed as a result of national publicity in mid 2001 following his arrest in Bangkok, Thailand, in the context of an alleged international investment scam. He was one of over 70 foreigners who were arrested by Thai police while employed to make calls to prospective investors in the investment scheme. It is undisputed that following his arrest Mr McGee appeared in a Bangkok Court and was fined 5,000 baht upon a charge of working in Thailand without a work permit. However, Mr McGee adamantly maintains that he was not

personally involved in the alleged investment scam. His role was simply to obtain the details of prospective investors who would be contacted up by others charged with the responsibility of actually obtaining investments. Hence, Mr McGee denies that he was privy to the details of the investment scheme, much less aware that it was fraudulent.

[2] The story attracted considerable attention. For example there were headlines "Kiwi in 369 Million Dollar Scam", and others, to similar effect. The story was of local interest because the publicity suggested that more than $5m had been siphoned from New Zealand investors. In broad terms the sting of the defamation alleged by the plaintiff is that he has been branded a fraudster.

[3] The defendant companies deny that their newspaper stories, television broadcasts and websites made that imputation against Mr McGee. Accordingly, the application for determination is whether the words used in the various publications are capable of bearing the defamatory meanings ascribed to them in the statement of claim. The issue is raised pursuant to r418 of the High Court Rules whereby questions may be separately determined prior to trial. In this instance my ruling is sought upon whether the words used are capable of bearing the defamatory meaning ascribed to them. This, of course, is a legal issue which must be answered before a jury is asked to determine what meaning in fact was conveyed by such words. It is common ground that this issue is suitable for a r418 ruling in the circumstances of this case.

The background

[4] The plaintiff was arrested in Bangkok on or about 26 July 2001. He was in Thailand on holiday, but working as a tele-marketer, when police swooped on Jardine Marketing, the firm by which Mr McGee was employed. He was detained, arrested and in due course appeared in court with over 70 other foreigners upon charges of working in Thailand without a work permit.

[5] The defendants were fined or received suspended jail sentences. In Mr McGee's case a fine of 5,000 baht (about NZ$250) was imposed. He was then further detained, pending his departure from Thailand which had also been ordered.

[6] The plaintiff's function with the firm was to make international telephone calls to potential investors in New Zealand, Australia and elsewhere. Other employees of the firm were responsible for sending out a prospectus to those persons who as a result of a telephone inquiry were considering investment in the scheme.

[7] These matters are common ground, in that not only were they reported upon in the various media articles, but they were accepted as being factual by Mr McGee in responses he made to notices issued by the defendants to admit facts. On the other hand, it is central to Mr McGee's case that he was innocent of involvement in any dishonesty, assuming that the allegation of a multi-million dollar international scam to be correct.

The defendants

[8] Independent Newspapers Limited is sued in relation to seven newspaper articles which appeared in the Christchurch Press, Southland Times, the Dominion, the Evening Post, the Nelson Mail and the Waikato Times between 28 July and 1 August 2001. In addition the plaintiff complains about two website publications on 28 July, which were similar in content to the newspaper articles published at the same time. To a significant degree the articles in the different newspaper articles were also similar in content.

[9] Television New Zealand Limited is sued in relation to four broadcasts on channel 1 on 27-28 July 2001 and four website articles which were published in relation to the television coverage. Again, the website articles were essentially repetitious of the broadcasts which preceded them.

[10] The third defendant, APN New Zealand Limited, is sued in relation to eight newspaper articles which appeared in the Weekend Herald, the New Zealand Herald, the Wanganui Chronicle, the Northern Advocate, the Hawkes Bay Today and in the

Daily Post (Rotorua) on two occasions. Such articles were published between 28 and 30 July 2001. In addition it is alleged that five website articles published by the New Zealand Herald between 27 July and 22 November 2001 were also defamatory of the plaintiff. Again, the content of the various newspaper articles, and website entries, is often repetitious.

The alleged sting of the publications

[11] Broadly speaking the defamatory meanings alleged by Mr McGee follow a common pattern, being that the words in their natural and ordinary meaning and implication conveyed that:

[a] The plaintiff was knowingly involved in a large fraud.

[b] The plaintiff had been arrested for fraud.

[c] The plaintiff had been convicted and sentenced in respect of the fraud.

[d] The plaintiff was linked to a money laundering racket, and

[e] the plaintiff is generally a person who was dishonest, disreputable and unscrupulous.

Some of these allegations are common to all or most publications, while others are specific to only some of the publications.

[12] In the course of argument Mr Hall indicated that the word "knowingly" in allegation [a] was surplusage and should be struck out. Likewise, he submitted with reference to allegation [e], which is alleged in the alternative, that the word "generally" could be excluded. Other counsel commented that the removal of "knowingly" from allegation [a] would make no difference, since the notion of involvement in a fraud necessarily connoted deliberate or knowing involvement. Hence, removal of this adjective was not material.

Principles relevant to meaning

[13] The meaning which words are capable of bearing is a question of law. Accordingly, s36 of the Defamation Act 1992 provides that the submissions of counsel and ruling of the Judge on the issue whether the publication complained of is capable of the defamatory meaning alleged, is to be made in the absence of the jury. If it is held the words are reasonably capable of bearing the alleged defamatory meaning, it is then for the jury to decide whether they in fact do so.

[14] All counsel subscribed to the summary of relevant principles contained in *New Zealand Magazines Ltd v Hadlee*, CA74/96, 24 October 1996, in which Blanchard J said at page 5 of his judgment:

> In determining whether words are capable of bearing an alleged defamatory meaning:
>
> (a) The test is objective: under the circumstances under which the words were published, what would the ordinary person understand by them?
>
> (b) The reasonable person is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
>
> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
>
> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
>
> (e) But the Court will reject those meanings which can only emerge as a product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
>
> (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: Charleston v Group Newspapers Ltd [1955] 2 AC 65,72.
>
> Mr Latimour referred the Court to what has been said about the qualities of the notional ordinary reader: someone "not avid for scandal" and "fair minded" (***Lewis v Daily Telegraph Limited*** [1964] AC 234, 260 and 268:

> ***Morgan v Odhams Press Limited*** [1971] 2 All ER 1156, 1177), not "unduly suspicious" (***Morgan*** at p 1177) and "not prone to fasten on one derogatory meaning when other innocent or at least less suspicious meanings could apply" (***Mitchell v Faber & Faber Limited***, English Court of Appeal (Civil Division), 24 March 1994, p 3).

The concept of reader also includes, of course, the viewer of a television broadcast.

Imputations of involvement in a crime

[15] Of the five general allegations advanced by the plaintiff in this case, the first four asserted that the various publications imputed involvement in criminal activity at one level or another. The high ground, allegation (a), was that Mr McGee was actually involved in a large scale fraud. The third allegation, that Mr McGee had been convicted and sentenced for fraud, was to very similar effect, indeed even worse in that actual involvement had matured to the point of conviction and sentence. Although not expressed as such, the second allegation, that Mr McGee had been arrested for fraud, was in effect an assertion that he was suspected of involvement in the fraud and, therefore, arrested to that end. The fourth allegation, that the plaintiff was linked to a money laundering racket, was I think in essence a variation upon the themes that Mr McGee was involved, or suspected of involvement, in a fraud particularised as involving money laundering. The word "linked" is probably unhelpful, to the extent that it does not convey whether involvement or suspicion thereof is alleged.

[16] In any event counsel helpfully advanced submissions based largely upon the leading House of Lords decision in *Lewis v Daily Telegraph Limited* [1964] AC 234. Two newspapers published a brief front page article headed with words to the effect "Fraud Squad Probe Firm". The articles indicated that officers of the London Fraud Squad were inquiring into the affairs of a named company, after criticisms by a shareholder (according to one paper) and after the shares in the company had dropped in value to about one-third their former value (according to the other). The article identified Mr Lewis as the chairman of the company.

[17] Substantial damages were awarded by separate juries against both newspapers. At the two trials rulings were given that the words used were capable of

bearing the defamatory meanings alleged. However, in that regard a distinction was not drawn between an actual imputation of guilt and an imputation of suspicion of guilt. The House of Lords accepted (Lord Morris dissenting) that the words were not capable of supporting an imputation of guilt, but were capable of supporting an imputation of suspicion, which construction was not contested by counsel for the newspapers. Unanimously, Their Lordships held that where two such competing meanings were alleged, the trial Judge must rule upon the availability of each. It was not sufficient to rule that a defamatory meaning was available, rather the ruling must say whether each of the meanings alleged was open.

[18] At 284-5 Lord Devlin said:

> A man's reputation can suffer if it can truly be said of him that although innocent he behaved in a suspicious way; but it will suffer much more if it is said that he is not innocent.
>
> It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.

[19] Lord Morris in reasoning that the articles were capable of supporting both alleged defamatory meanings, after noting that the police had done nothing to initiate the articles, continued at 268-9:

> If there was a police inquiry by a "Fraud Squad" which might result in the conclusion that any suspicion of fraud or dishonesty was wholly unwarranted, how manifestly unfair it would be to make public mention of the inquiry. What purpose could there be in doing so? With these thoughts and questions in mind, a reasonable reader might well consider that no responsible newspaper would dare to publish, or would be so cruel as to publish, the words in question unless the confidential information, which in some manner they had obtained, was not information merely to the effect that there was some kind of inquiry in progress but was information to the effect that there was fraud or dishonesty. Some reasonable readers might therefore think that the words conveyed the meaning that there must have been fraud or dishonesty.

[20] The distinction drawn in *Lewis* remains a relevant one. That said, *Lewis* was I think a more straight-forward case than the present, because the newspaper articles were very brief and concerned a single subject-matter. That was the fact of an inquiry being undertaken by the Fraud Squad. As will become apparent shortly, the publications in this case were not only longer but more diverse in terms of subject-matter. They are less susceptible of simple analysis in terms of the guilt/suspicion dichotomy.

[21] I also think that the passage quoted from the dissenting speech of Lord Morris is interesting on account of the "thoughts and questions" which prompted the conclusion that the relevant article was capable of supporting an imputation of guilt. Lord Morris was clearly of a mind that to publish information about the fact of an inquiry (absent any news release by the police), invited a conclusion of fraud or dishonesty. As His Lordship put it, "what (other) purpose could there be in doing so?" Perhaps these observations emphasise the extent to which the meanings of words may vary according to the time and values of the period in which they are spoken. Today, publicity about the fact of a police inquiry, might not excite quite the same reaction from a Judge, or in the mind of a reasonable reader, as Lord Morris supposed. The media today is, I think, less reticent than was the case in previous times, and readers probably recognise as much. Hence, the times in which words are publishing also affect their meaning.

[22] *Hyams v Peterson* [1991] 3 NZLR (CA) is a New Zealand case which concerned imputations of criminal impropriety. The Court of Appeal upheld a pre-trial ruling that the words in question were capable of bearing the defamatory meanings ascribed to them. Cooke P in delivering the judgment of the Court said at 655:

> It is also plain that to say there are grounds for suspecting a person of fraud or other discreditable conduct is, although defamatory, often different from and less serious than an assertion of his guilt: *Lewis v Daily Telegraph Ltd* [1964] AC 234; *Truth (NZ) Ltd v Bowles* [1966] NZLR 303; *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234, 239-240; *Mirror Newspapers Ltd v Harrison* (1982) 42 ALR 487. These judgments also recognise that for practical purposes there can be an imputation of suspicion so strong as to be indistinguishable from guilt; it must always be a question of fact how far the defamatory meaning goes.

The INL publications

[23] The first publication sued upon in relation to this defendant is an article in the Christchurch Press on 31 July 2001. It read:

> **The parents of a Christchurch man being held in Thai immigration custody after a bust on an alleged $375 million Bangkok investment scam** still have no news of their son.
>
> Scott McGee's family had expected to get an update on the conditions he was being kept in but his mother last night said they had not heard from the New Zealand High Commission, but hoped to hear something today. **Mr McGee, 31, is being detained by Thai immigration authorities following raids on Thursday on Bangkok firms alleged to have orchestrated the scam. Mr McGee was one of 78 foreigners who were handed down sentences ranging from fines to suspended jail terms in relation to the scam which targeted unsuspecting investors in Australia and New Zealand**. Mr McGee was fined 5000 baht ($250) in Bangkok's Criminal Court on a charge of working in Thailand without a work permit. **He is one of about 80 being held in immigration custody accused of making high pressure sales pitches over the telephone to convince would-be investors to buy shares in shaky or non-existent companies**.

The words alleged by the plaintiff to be defamatory are shown in bold print. The words particularly relied upon by INL for the purpose of the present argument are underlined.

[24] The meanings alleged by the plaintiff in relation to this article are that he was knowingly involved in a large fraud, had been arrested for fraud, had been convicted and sentenced in respect of the fraud and that he is generally a person who is dishonest, disreputable and unscrupulous.

[25] Ms Mallon submitted that a reasonable person would not take any of the four alleged meanings from the words used in the article. It does not state, or imply, that the plaintiff was involved in fraud. Nor is the meaning that he was arrested for fraud available, since the article expressly identifies that his detention was by immigration authorities and in relation to working in Thailand without a permit. In the context of the article as a whole, the alleged meaning that he had been convicted or sentenced for fraud was not open either. Finally, the article did not cast a general aspersion on the plaintiff's character, save to the extent it records he was convicted on a charge of

working in Thailand without a permit, which is admitted by the plaintiff in any event.

[26] Mr Hall, on the other hand, argued that the words relied upon were well capable of conveying to a reasonable reader that the plaintiff was actually involved in the fraud and that he had been arrested in that connection. Readers could well regard the work permit breach as simply a by-product of the criminal involvement, which did not "expunge or significantly vary" the sting of the article. With reference to the alleged meaning that the plaintiff had been convicted and sentenced in respect of fraud, counsel pointed to the sentence that Mr McGee was one of a number "handed down sentences ranging from fines to suspended jail terms in relation to the scam …". Finally, with reference to the alternative alleged meaning, Mr Hall submitted that the article was expressed in pejorative terms and was well capable of conveying that Mr McGee was associated with the investment scam and therefore a dishonest, disreputable and unscrupulous person.

[27] To my mind the essential difference between the competing arguments reflected contrasting approaches to the "bane" and "antidote" aspects of the publication. Needless to say Mr Hall focused upon the former and expressly, or by implication, contended that the antidote aspects (which in essence are underlined) were not such as to undermine, much less eradicate, the defamatory sting of the defamatory words he relied upon. Ms Mallon, of course contended that the article read as a whole did contain antidote elements sufficient to remove the defamatory meanings for which the plaintiff contended.

[28] *Gatley on Libel and Slander* (10th Edition) at 3.29 contains this:

> … the claimant cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away their sting. If "in one part of the publication something disreputable to the plaintiff is stated, that is removed by the conclusion, the bane and the antidote must be taken together". If that were not so it would be impossible to refute charges made against another person, since the refutation must, in practice, refer to the charges. In the case of a newspaper article or television or radio broadcast the defendant is entitled to have considered as part of the claimant's case the whole of the piece from which the alleged libel is extracted.

Hence, an assessment is required of the article as a whole, in particular of the parts alleged to contain the sting and the parts said to refute or defeat it. In making that assessment the standard remains that of the ordinary reader. Will he or she read the qualification, or additional material, as sufficient to neutralise the sting otherwise contained in the article. The matter must be one of impression. And, given the very nature of the assessment which is required, whether the refutation or qualification is sufficient to cure the sting must frequently be a jury question.

[29] In my view that is so in this case. I do not consider that the references to "held in Thai immigration custody" and by "immigration authorities", even coupled with the reference to the fine of 5000 baht for working in Thailand without a permit, are necessarily sufficient to overcome the sting of the article. The most difficult allegation to sustain is the first alleged meaning, that Mr McGee was actually involved in the fraud, but in my view the words used are just capable of supporting that meaning. Equally, I am satisfied that the words are capable of supporting each of the three lesser allegations asserted in the statement of claim.

Article B

[30] This article published in the Christchurch Press on 1 August 2001 headed "Chch man to be deported from Thailand" is similar in content to article A. The opening five paragraphs of the article repeat most of the sting of the article of the previous day, but there are additional comments attributed to the Commissioner of the Thailand Immigration Bureau. He is reported to have said that four other detainees were believed to be the main culprits, that they could face up to five years in jail and that those held in custody were mostly low level employees accused of making high pressure sales pitches over the phone.

[31] Despite these developments in relation to the story, I remain of the view that the words used are capable of supporting the four defamatory meanings alleged in relation to this publication. My reasons are essentially the same as for article A, save that the additions made in article B may well be seen as placing the plaintiff at a lesser level of involvement in relation to the fraud. Certainly, he is excluded from being one of the "main culprits".

Article C

[32] This article appeared in the Southland Times on 30 July 2001. Its content is essentially the same as article A. Accordingly, my conclusions in relation to it are as for article A. That is, the words used are capable of supporting the four alleged defamatory meanings.

Article D

[33] This article was published in The Dominion on 28 July 2001. The thrust of the report was rather different, as indicated by the headline "Kiwis big losers in Thai swindle". Much of the article featured comments attributed to Mr Norman Miller, a spokesperson for the New Zealand Securities Commission, concerning the losses sustained by New Zealand investors in the Thai investment swindle. The parts of the article most relevant to the plaintiff's case were:

> Thai police, backed by Australian and United States authorities, arrested 84 people after a two year investigation into the scam. It was aimed at unsuspecting investors, mainly in Australia and New Zealand.

Mr McGee was then identified as the one New Zealander amongst the 70 foreigners who were arrested. The article continued:

> By all accounts all he's going to be facing is working without a workers visa and he's likely to be fined between 2000 and 10,000 baht (NZ$100-$500). However, there was also a possibility that he would be deported.

Otherwise the article sheds light on how the share scam worked and pointed out the risks involved in investing in such schemes.

[34] In my view the antidote contained in this article is stronger than that in the previous three and, in addition, the focus of the article is less upon Mr McGee. Nonetheless, reading the article as a whole I am satisfied that each of the four same alleged meanings are open, albeit the article makes it plain that Mr McGee is "by all accounts" only likely to be fined for a work permit offence. Whether that reference is sufficient to convey that Mr McGee was not involved in, or arrested in relation to, the fraud remains a jury question. Likewise, I think that the alleged meaning that the plaintiff was characterised as dishonest, disreputable and unscrupulous is for the

jury. Given the terms of this article, there is no allegation the plaintiff was convicted and sentenced in relation to the fraud.

Article E

[35] The Evening Post on 28 July 2001 contained an article headed "Kiwi among 78 foreigners arrested for scam". The article continued that the plaintiff was one of the foreigners who had been sentenced in the wake of the $375m Thai share investment swindle, it not being known what sentence he had received. However, the article made it plain that the sentences ranged from fines to suspended jail terms and that the 78 foreigners were mostly low level employees accused of making high pressure sales pitches over the phone to convince would be investors to buy shares in shaky or non-existent companies and, further, that they were charged with overstaying or illegally working in Thailand.

[36] The same four defamatory meanings are alleged. In my view the words are capable of supporting such meanings, albeit the article contains strong antidote elements. I think it is a jury question whether these elements are sufficient to answer the sting otherwise contained in the publication.

Article F

[37] This publication which appeared in the Nelson Mail on (I think) 31 July 2001 under the headline "Busted Kiwi to be deported" was essentially in similar terms to article A. Accordingly, my conclusion in relation to the four alleged defamatory meanings are as for the first article.

Article G

[38] The Waikato Times on 30 July 2001 published an article entitled "Family wait after Kiwi netted in scam" which was likewise in very similar terms to article A. My conclusions in relation to it are similar to those for the earlier article.

Article H

[39] This internet website article dated 28 July 2001 involves a twist, to the extent that the plaintiff was not identified. The article referred to "three New Zealanders" being among the 84 people arrested in Bangkok in relation to "an international stock swindle". Only three defamatory meanings are alleged, because the publication contained no suggestion that the plaintiff had been convicted and sentenced in relation to the fraud.

[40] While for the reasons already given in relation to article A, I am satisfied the words are capable of supporting the suggested meanings, the overarching question of identification remains to be considered. The plaintiff's case is that identification is established because:

> (a) On the same day on the same website the plaintiff is identified, see (article) I.
>
> (b) On the subsequent days after 28 July the defendant identified the plaintiff, see (articles) A to G inclusive.
>
> (c) Any reasonable person reading these reports would link the plaintiff to the website item in (article) H.
>
> (Paragraph 10 of the amended statement of claim).

It is convenient to reserve this question until I consider the arguments advanced by Mr Akel in relation to the second defendant's position, since in that context there is similarly a question as to identification from other sources which were published immediately after the subject article.

Article I

[41] This too was a website article published on 28 July 2001, but it identified the plaintiff by name and age. The same four defamatory meanings are alleged in relation to it. The terms of the article are substantially similar to article E. Accordingly, I am of the view that the words published are capable of supporting the meanings alleged, it being a jury question whether they in fact do so.

Television New Zealand Limited

[42] To recap this defendant is sued in relation to four broadcasts on Channel 1 over two days, 27-28 July 2001, and in relation to four website publications which followed the television coverage. The website articles were essentially repetitious of the broadcasts.

[43] As noted earlier (para [40]) certain of the publications relied upon in relation to TVNZ did not identify Mr McGee. The publications fall into two parts. News items were broadcast at two different times on 27 July (and their content featured in contemporaneous website articles), but without identification of the plaintiff. On 28 July there were two further broadcasts, and website articles, in which Mr McGee was identified by name.

[44] Mr Akel did not contest the plaintiff's contention that it was permissible to have regard to the 28 July material to identify the plaintiff in relation to the 27 July publications. Rather, the focus of his argument was that if identification was achieved in this way resort must also be had to the 28 July publications in determining whether the broadcasts and articles of the previous day were defamatory of the plaintiff. Put another way, if the publications on day 2 were to be relied upon by the plaintiff for identification purposes, then TVNZ could call in aid the contents of the day 2 publications in relation to the alleged defamatory meanings. There are, I note, elements of antidote in the 28 July publications upon which TVNZ naturally seeks to rely.

[45] In my view Mr Akel was right in accepting that as a matter of principle identification of the plaintiff with reference to article 1, may be achieved by the publication of article 2 by the same defendant. The notion that such a result may be at odds with the law of defamation is found in the principle that the cause of action is said to be complete at the time of publication. And so in *Grapelli v Derek Block (Holdings) Limited* [1981] 1 WLR 822 (CA) the Court accepted that a publication which was innocent on its face when made, could not be rendered defamatory by virtue of a later publication not of the defendant's making. However, such reasoning is subject to exceptions, which are discussed at para 3.31 of Gatley. They concern

situations where a defendant publishes one piece, but does so in a number of items over a period of time. Serialisation of a book in a newspaper or magazine, or in television broadcasts, is a straight-forward example. Equally, a single book may contain a statement in one chapter which is apparently innocuous, but which becomes defamatory as the result of a second statement in a latter chapter. Regardless of the circumstance that, as with serialisation, there may be a time lapse before the defamatory meaning becomes apparent, a cause of action arises. Plainly it would be unreal in such situations to construe the first statement divorced from the second one.

[46] As Mr Akel recognised this reasoning has been applied with reference to identification of a plaintiff. In *Haywood v Thompson* [1982] 1 QB 47 (CA) the plaintiff was not named in a Sunday newspaper article, but was named in the following Sunday paper. Both articles linked Mr Haywood to an alleged murder plot. The trial Judge ruled that the jury could look at the second article to see to whom the first article referred, and the Court of Appeal upheld that ruling. Sir Stanley Rees at 72, after reference to *Grapelli*, said that the question was whether:

> that well-established principle (in *Grapelli*) applies to a case such as the instant one when (1) original publication is defamatory; (2) when the second publication relied upon explicitly identifies the person defamed; and (3) it is published by the same party who published the original libel.

In such circumstances the necessary element of identification could flow from the second article. I think it is interesting to note the Court also held that the trial Judge rightly exercised his discretion to direct the jury to make a single award of damages in respect of both publications. If the two articles separated in time by a week were to be read together in relation to identification of the plaintiff, then damages were appropriately assessed on a similar basis.

[47] The reasoning in *Haywood v Thompson* has been followed in other cases, including *Burrows v Knightly* (1987) 10 NSWLR 651 and *Ballantyne v TVNZ* [1992] 3 NZLR 455 (HC).

[48] The more difficult question, and the one in relation to which there is less authority, is whether the defendant can rely on the subsequent publication to qualify

the meaning of the earlier one? As to this the case most in point and cited by Mr Akel was the decision of Owen J in *Brown v Marron* [2001] WASC 100. In this case the plaintiff sued in relation to a letter written by the defendant to a golf club opposing the plaintiff's admission to the club as a member. Such letter contained various imputations against the plaintiff's good character. Two and four days after the letter was written the defendant attended meetings with the club officials and qualified certain of the imputations contained in the letter. At trial the defendant sought to rely upon the oral qualifications as "relevant contextual material" which qualified the meaning of the written material at the time at which it was to be read.

[49] Owen J, after reference to *Grapelli* and to the relevant passage in Gatley concerning meaning spread throughout a book or serialised, concluded that it was appropriate to have regard to what was said at the meetings as part of the context against which the letter was to be assessed. At para [56] of the judgment in a passage now quoted as a footnote in Gatley, Owen J said:

> Each case must depend on its own facts. There must be an intimate connection between the primary source of the alleged defamation and the other material which is said to form part of the context. The primary and secondary sources must be so closely connected, interwoven or enmeshed that it is necessary to take them effectively as one transaction in order to arrive at the true import and meaning of what was written and said. The requisite degree of intimacy will usually (although not always, for example in the serialisation situation) demand contemporaniety. It will be necessary to consider all of the surrounding circumstances to decide whether the secondary materials are so intimately connected with the primary sources that they are to be taken to be a part of the context which might affect the way in which the ordinary reasonable reader would understand the words complained of.

[50] Without necessarily subscribing to the outcome reached in *Brown v Marron*, I agree with the reasoning in the above quotation that where an allegedly defamatory publication is in two or more parts, which are so closely connected or interwoven as to constitute one transaction, then meaning may necessarily have to be construed with reference to the whole. Whether such approach is appropriate will depend on all the circumstances of the particular case, but where, as here, the plaintiff relies upon a subsequent publication to establish an element of the cause of action, namely his identity, then the need to read the parts together may be irresistible. In that regard and put colloquially, what is sauce for the goose is sauce for the gander.

[51] I am also influenced in this conclusion by the circumstance that Mr McGee relies upon all of the TVNZ broadcasts and website articles within a single cause of action, in relation to which a single award of damages is sought. Although it will be necessary for the jury to focus upon each of the published items said to be defamatory of Mr McGee in various ways, it would be unrealistic I think to ask it to consider the 28 July publications as relevant to their assessment of the publications on the previous day with reference to identity, but not with reference to meaning. At least in this case, where the publications impress me as coverage of an emerging story over a two day period, it is logical to view the two broadcasts as parts of a coherent whole. For these reasons and on the facts of this case, I consider the jury must be entitled to look at both parts of the story together in assessing its defamatory meaning, if any. It follows, I shall assess whether the words used are capable of bearing the defamatory meanings alleged, on a similar basis.

27 July 2001 publications

[52] There were daytime and evening broadcasts on Channel 1 concerning the arrests in Bangkok in relation to an alleged stock dealing scam. There were separate website items following such broadcasts. For present purposes I think that the transcript of the 6.00 pm news broadcast materially conveys the content of the two broadcasts on that day.

[53] It was as follows:

> AND A 31 YEAR OLD NEW ZEALANDER IS BEING HELD IN BANGKOK TONIGHT ACCUSED OF BEING PART OF A MASSIVE INTERNATIONAL SWINDEL. IT'S BELIEVED KIWI INVESTORS MAY HAVE LOST MILLIONS OF DOLLARS. HERE'S CONSUMER AFFAIRS CORRESPONDENT MARK HANNAN:
>
> IN THAILAND THEY'RE CALLED BOILER ROOM BROKERS.
>
> THEY STAND ACCUSED BY POLICE IN THAILAND AND THE F.B.I. OF RIPPING OFF MILLIONS FROM UNSUSPECTING INVESTORS INCLUDING NEW ZEALANDERS.
>
> SAN SARUTANONDA, THAILAND POLICE CHIEF:
>
> WE ARE LOOKING AT THREE POSSIBLE CHARGES AGAINST THEM, FORGERY, WORKING IN THAILAND WITHOUT A WORK PERMIT AND TRADING ON THE STOCK EXCHANGE WITHOUT PROPER PERMISSION.
>
> THE BOILER ROOM BROKERS ALLEGEDLY SOLD NON-EXISTENT STOCK, AND HUNDREDS OF NEW ZEALANDERS RESPONDED.
>
> JOHN FARRELL:
>
> SOME FORTY-FIVE HAVE SAID TO US HOW MUCH THEY'VE INVESTED AND THAT IS OVER FIVE MILLION DOLLARS.

NEW ZEALAND AND AUSTRALIA WERE THE MAIN TARGETS FOR THE BANGKOK-BASED OPERATION.

PHONER:

I'M SPEAKING TO ADULT PEOPLE. I'M NOT DEALING WITH CHILDREN. IT'S THEIR MONEY TO DO WITH WHAT THEY WANT.

THOSE RUNNING THE SCHEME USED TELEPHONE TACTICS LIKE THIS.

JOHN FARRELL, SECURITIES COMMISSION:

I CAN GIVE YOU SOME WONDERFUL OPPORTUNITIES FOR INVESTMENT SO WHY DON'T YOU SEND US A CERTAIN AMOUNT OF MONEY AND WE'LL INVEST IT FOR YOU AND YOU'LL MAKE A LOT OF MONEY.

AND THEY DON'T LIKE TAKING NO FOR AN ANSWER.

JASON WOODS, TARGETED INVESTOR:

TILL YOU FINALLY SAY NO I'VE HAD ENOUGH AND THEY'D WANT TO KNOW WHY NOT, WHY DON'T YOU WANT TO BE INVESTING WITH US, THIS IS A GOOD THING, YOU'LL MAKE LOTS OF MONEY.

POLICE ARRESTED MORE THAN EIGHTY PEOPLE INCLUDING A 31 YEAR OLD NEW ZEALANDER.

BRIAN SANDERS:

HE'S THE ONLY NEW ZEALANDER WE KNOW OF WHO'S BEEN CHARGED AT PRESENT. HE'S BEEN VERY WELL TREATED.

COMPUTERS AND DOCUMENTS WERE ALSO SEIZED.

ROBERT CAHILL, FBI:

IT WILL TAKE TIME TO ANALYSE AND EVALUATE ALL THE DOCUMENTS THAT WERE SEIZED.

THEY SAY THE SCHEME COULD BE WORTH AT LEAST THREE HUNDRED MILLION DOLLARS … EVIDENCE OF WHAT IS BEING TOUTED AS THE WORLD'S LARGEST UNDERGROUND STOCK DEALING SCHEME.

MARK HANNAN, ONE NEWS.

THE ARRESTED NEW ZEALAND MAN IS EXPECTED IN COURT LATER TONIGHT.

The defamatory meanings alleged by the plaintiff are that he was involved in a large fraud, he had been arrested for fraud, he was involved in money laundering and, in the alternative, that he was a person who is dishonest, disreputable and unscrupulous.

[54] The website articles published on 27 July contained a similar content. The articles included accompanying bullet points which were called "related links" and included:

- Thai-based Kiwi claims innocence
- NZ fraudster fined in Thailand
- Kiwi held for Thai Fraud

Of course, neither the broadcasts, nor the website articles, identified the New Zealander who had been arrested.

28 July publications

[55] Again there were two broadcasts and two website articles. The content of the publications is sufficiently indicated by reference to article N, being again a broadcast on Channel 1:

> A KIWI CAUGHT IN A STOCK DEALING SCAM IN THAILAND IS TONIGHT PROTESTING HIS INNOCENCE.
>
> SCOTT MCGEE WAS ONE OF 78 FOREIGNERS ARRESTED IN AN ALLEGED SWINDLE WORTH AROUND $300 MILLION. THE CHRISTCHURCH MAN HAS BEEN FINED BY A COURT IN BANGKOK BUT INSISTS HE WAS JUST AN OFFICE ASSISTANT.
>
> AMONG THE 78 FOREIGN NATIONALS CAUGHT IN THE NET 31 YEAR OLD SCOTT MCGEE.
>
> THE NEW ZEALANDER WAS FINED 5000 THAI BAHT FOR WORKING IN THAILAND WITHOUT OBTAINING A WORK PERMIT THAT'S A LITTLE MORE THAN $250.
>
> HIS ARREST FOLLOWS A CRACK DOWN ON PEOPLE KNOWN AS BOILER ROOM BROKERS WHO ALLEGEDLY SELL SHARES THAT DO NOT EXIST.
>
> INVESTORS IN NEW ZEALAND AND AUSTRALIA WERE THE MAIN TARGETS OF THE BANGKOK BASED SCHEME. IT IS THOUGHT THAT THEY MAY HAVE LOST IN TOTAL AROUND $300 MILLION, SOME OF THOSE ARRESTED REMAIN UNREPENTANT.
>
> MEAN WHILE, SCOTT MCGEE'S CHRISTCHURCH BASED FATHER SAYS HIS SON WAS ONLY WORKING IN THE OFFICE AS A CLERICAL ASSISTANT EARNING $300 A WEEK. MCGEE IS NOW BEING HELD BY THAI IMMIGRATION OVER THE WEEKEND. THEY WILL BE LOOKING AT HIS IMMIGRATION HISTORY WHETHER HE HOLDS A VALID VISA AND A CURRENT PASSPORT.
>
> OTHERS CAUGHT UP IN THE STING ARE UNSURE WHAT THE FUTURE HOLDS.
>
> MOST THOUGH INCLUDING THE KIWI NOW KEEN TO PUT THE EMBARRASSMENT OF THE ARREST BEHIND THEM.
>
> JASON EADE ONE NEWS.

The meanings alleged vary somewhat between the publications, but follow the same themes, that the plaintiff was involved in, or arrested for, or convicted and sentenced for fraud; or, alternatively, was an undesirable, dishonest, disreputable and unscrupulous person.

[56] Mr Akel's submissions which challenged that the words were capable of

bearing the defamatory meanings alleged, involved three main aspects:

[a] That the defamatory meaning should be assessed with reference to the story as it evolved over the two day period (which proposition I accept, for the reasons already given),

[b] that the plaintiff's case involved "a technical, close and selective" focus upon parts of the publications at the expense of the publications as a whole, which was "entirely inappropriate", and when the publications were assessed objectively they imputed suspicion at most and not guilt, and

[c] with reference to the "related item" bullet points which accompanied the website articles, it was necessary to have regard to the rule that a headline cannot be taken in isolation, but must be considered in the context of the item as a whole.

In relation to the final point Mr Akel cited *Charleston v News Group Newspapers Limited* [1995] 2 AC 65, in which Lord Nicholls, for example, said at 73:

> In principle this is a crude yardstick, because readers of mass circulation newspapers vary enormously in the way they read articles and the way they interpret what they read. It is in this very consideration that the law finds justification for its single standard …
>
> I do not see how, consistently with this single standard, it is possible to carve the readership of one article into different groups: those who will have read only the headlines, and those who will have read further.

The crude yardstick was a reference to the so-called single standard, being the ordinary reader, who it is assumed will read the whole article and not just the headline, or in this instance the "related items".

[57] To my mind TVNZ's arguments are essentially the same as those advanced for INL. Particular emphasis was placed upon the antidote contained in the 28 July publications. These recorded that while Mr McGee was one of the foreigners arrested in relation to the alleged $300m swindle, he was only fined about $250 for

working without a permit. He denied involvement, protested his innocence and through his father explained that he worked as a clerical assistant for limited remuneration. The website publications said that Mr McGee was a tele-marketer and that it was others who faced more serious fraud charges which carried a maximum sentence of seven years in prison.

[58] While I accept that the antidote contained in the 28 July publication warrants very serious assessment, I am not persuaded that thereby the various defamatory meanings alleged by the plaintiff are not open. Assessment of the publications is a matter of impression. In my view the words complained of are capable of supporting the meanings alleged, and it is proper for the jury to be left to assess matters.

APN New Zealand Limited

[59] APN is sued in relation to seven newspaper articles which appeared in the New Zealand Herald, the Weekend Herald, the Wanganui Chronicle, the Northern Advocate, the Hawkes Bay Today and two articles in the Daily Post (Rotorua), being articles O to U. In addition, the New Zealand Herald published five website articles V to Z.

[60] The same defamatory meanings are alleged. All 12 publications are said to have conveyed that Mr McGee was involved in large scale fraud, had been arrested for fraud and, in the alternative, that he was an undesirable, dishonest, disreputable and unscrupulous person. In relation to five of the publications it is alleged the imputation that he had been convicted and sentenced in respect of fraud is conveyed and, likewise, in relation to four publications, that he was involved in a money laundering racket.

[61] Mr McGee was identified in each of the publications, save for newspaper article V in the New Zealand Herald on 27 July 2001. The plaintiff alleges that as in the case of TVNZ he was sufficiently identified in other articles published by the defendant the next day.

Article O

[62] The Weekend Herald of 28-29 July 2001 published an article headed "Police Swoop on Fraud Ring Nabs NZ Traveller" under a photograph which was captioned "Under Detention: Thai police say these foreign prisoners were engaged in fraudulent activities against investors overseas". The article named Mr McGee amongst the foreigners arrested in the police swoop and gave bare details of the nature of the alleged scam. It was further reported that the plaintiff was "understood" to be facing a charge of working without a visa but that "he could face further charges".

[63] I consider that the article as a whole is capable of supporting the three alleged defamatory meanings, namely that the plaintiff was involved in a large fraud, arrested for fraud and, alternatively, was an undesirable, dishonest, disreputable and unscrupulous person.

Article P

[64] The New Zealand Herald of 30 July 2001 reported that Mr McGee had appeared in court and been fined 5000 baht on a work permit charge. A focus of the article was the anxiety of Mr McGee's family as they waited for further news of him while he remained in custody. In my view the words of the article are capable of supporting the same three defamatory meanings and the further meaning that he was convicted and sentenced for fraud, although there is a strong argument available to the defendant that the article as a whole conveys that the conviction was only in relation to a work permit charge.

Article Q

[65] This article published in the Wanganui Chronicle of 28 July 2001 reported the arrest of 70 foreigners including the plaintiff in the context of a Bangkok share swindle. The article included comments from the New Zealand Embassy Police Attache, Mr Pinkham, to the effect that the plaintiff appeared to be "simply one of

the workers" who would probably face "immigration related (charges) as opposed to fraud related matters ...".

[66] In my view the words relied upon by the plaintiff are capable of supporting the four alleged meanings, including that Mr McGee was linked to a money laundering racket. Whether the antidote elements of the article are sufficient to dispel the defamatory meanings is, I think, a jury issue.

Article R

[67] The Northern Advocate of 28 July 2001 carried the story headed "Thai share scam hits Kiwis hard" in which the arrest of Mr McGee in the context of the scam was reported. The report carried the same comments attributed to Mr Pinkham and made it clear that the plaintiff was likely to be charged with working illegally in Thailand for which he would be fined and possibly deported. As with the previous article four defamatory meanings are alleged. Again I consider that the words complained of are capable of supporting such meanings, albeit there exists a strong antidote contention to be considered by the jury.

Article S

[68] Hawkes Bay Today published this article on 28 July 2001. It identified Mr McGee as one of the foreigners arrested in the context of the Thai share investment swindle. I am satisfied that the words relied upon by the plaintiff are capable of supporting the four alleged defamatory meanings.

Article T

[69] Under the heading "Kiwi in Thai share scam" the Rotorua Daily Post of 28 July 2001 named a McGee as someone sentenced in the wake of the $375m swindle. The sentence he received was said to be "not known", although "earlier reports suggested he was a telephone marketer for one of the investment promoters". I consider that the article is capable of supporting the four defamatory meanings attributed to it.

Article U

[70] This was a further article in the Rotorua Daily Post of 28 July 2001. It named Mr McGee as a person arrested after a two year investigation into the scam, who was likely to be charged with working illegally in Thailand although "details of his involvement were not known" save that "earlier reports suggested he was a telephone marketer for one of the investment promoters". I consider that the article is capable of supporting the four defamatory meanings alleged in relation to it.

Aticle V

[71] This publication was an article on the New Zealand Herald website on 27 July 2001. Mr McGee was not identified by name. Indeed the item said that three New Zealanders had been arrested and accused of cheating investors of more than $360m. Four alleged defamatory meanings are raised being involvement in a large fraud, arrest for fraud, involvement in a money laundering racket and, alternatively, that the plaintiff is undesirable, dishonest, disreputable and unscrupulous.

[72] While I am satisfied that the words used are capable of supporting the defamatory meanings asserted by the plaintiff, for the reasons already given (paras [48]-[51]) I am of the view that since the plaintiff is dependent upon subsequent publications by the defendant (in which he was named), the defendant can equally rely upon the antidote contained in those articles.

Article W

[73] This too was a New Zealand Herald website item published on 28 July 2001. It identified Mr McGee and, generally, the content of the item was similar to the Weekend Herald report, article O. As in relation to the newspaper report itself, I consider that the words used in the website item are capable of supporting the three alleged defamatory meanings.

Article X

[74] The New Zealand Herald on 28 July 2001 published a website item headed "$250 fine for New Zealander nabbed in Thai fraud swoop". Correctly, the item recorded that the fine was for working without a permit, but after reference to the extent of the scam, the website item concluded on the note "Mr McGee was being detained by Thailand immigration officials where he was being investigated". I consider that the three alleged defamatory meanings raised with reference to this item are available.

Article Y

[75] This is a further New Zealand Herald website item published on 30 July 2001. Its content is similar to that of the newspaper report of the same day, article P. For the reasons given in relation to that publication I am satisfied that the words used are capable of supporting the same four alleged defamatory meanings.

Article Z

[76] This New Zealand Herald website item was not published until 22 November 2001. Most of the item was directed to a fraud described as the "Evergreen scam" in which New Zealanders were said to have lost $40m. Towards the end of the item appeared this:

> The Evergreen case is the second alleged "boiler room" scam involving New Zealand and Australian victims this year.
>
> In July, 31 year old New Zealander Scott McGee was arrested and fined by Thai authorities after raids on two companies in Bangkok. Both firms pitched their investment schemes mainly in New Zealand and Australia.

It is alleged that these words conveyed that the plaintiff was involved in, arrested for and was convicted and sentenced in relation to, fraud. Alternatively, it is alleged that he is an undesirable, dishonest, disreputable and unscrupulous person. Read in the context of the website item as a whole, I consider that the words relied upon are capable of supporting the four alleged defamatory meanings.

Result

[77] In light of my conclusions that the words used in the various articles are capable of supporting the defamatory meanings alleged by the plaintiff, the applications pursuant to r418 are answered accordingly.

[78] Costs must follow the event and my tentative view is that they should be allowed on a 2B basis against each defendant. If that indication is not acceptable to any party, memoranda may be filed.

[79] There shall be a telephone conference before the trial Judge, Hansen J, on Monday, 11 July 2005 at 9.15 am to schedule the next step in the proceeding.

Solicitors:
Shamy Russ, Christchurch for Plaintiff (Counsel: PHB Hall)
Bell Gully, Wellington for First Defendant
Simpson Grierson, Auckland for Second Defendant
Bruce Gray, Auckland for Third Defendant
cc: Hansen J