IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-3903

BETWEEN	SIMUNOVICH FISHERIES LIMITED First Plaintiff
AND	PETER SIMUNOVICH Second Plaintiff
AND	VAUGHAN WILKINSON Third Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED First Defendant
AND	WILSON AND HORTON LIMITED Second Defendant
AND	BARINE DEVELOPMENTS LIMITED Third Defendant
AND	NEIL PENWARDEN Fourth Defendant
AND	THOMAS NORMAN MUNRO NALDER Fifth Defendant

Hearing: 2 March 2005

Appearances: J G Miles QC and A E Ivory for plaintiffs
W Akel and T J Walker for first defendant

Judgment: 5 May 2005

JUDGMENT OF ALLAN J

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Introduction

[1] The first plaintiff (Simunovich) is a privately owned fishing company which until recently held substantial rights to fish for scampi. The second and third plaintiffs were at all material times directors and employees of the first plaintiff.

[2] On 29 October 2002 the first defendant (TVNZ) caused to be broadcast on TV One, a free to air television channel, a programme described as an "Assignment Special". That programme was screened following a long period of controversy in the fishing industry, marked by significant litigation and claims of corruption and other improper behaviour, allegedly involving both governmental officials and players in the fishing industry. The Assignment programme was critical of certain participants in the industry, including the plaintiffs.

[3] On 23 July 2004, this proceeding was commenced. It pleads causes of action in defamation and malicious falsehood. In addition to TVNZ, the plaintiffs name Wilson & Horton Limited as second defendant (in respect of publication in the NZ Herald of articles said to be defamatory of the plaintiff), Barine Developments Limited (Barine), a rival fishing company, as third defendant, Mr Neil Penwarden, director and shareholder of Barine as fourth defendant, and Mr T N M Nalder, a private investigator, as fifth defendant.

[4] On 1 September 2004, the plaintiffs filed an amended statement of claim, upon which they currently rely (the statement of claim). Statements of defence to the statement of claim were filed by all defendants during October 2004.

[5] On 24 November 2004, the plaintiffs filed a notice of application seeking more explicit statements of defence from the first and second defendants and seeking to strike out certain defences pleaded by the first, second and fifth defendants.

[6] On 23 December 2004, the first defendant advised the plaintiffs' solicitors it intended to file an amended statement of defence. That amended pleading was filed

and served on 15 February 2005. To some extent, it addressed the matters raised in the plaintiffs' notice of application filed on 24 November 2004.

[7] That application raises a raft of questions between the plaintiffs and certain of the defendants. I have been advised that counsel are optimistic that some questions may be able to be resolved between them. Others have been scheduled for argument during the week commencing Monday 23 May next. In the meantime, one issue was identified and argued as a separate matter before me between the plaintiffs and the first defendant. It relates to the way in which the first defendant has pleaded its defence of honest opinion.

The relevant pleadings

[8] The nub of the claim against the first defendant in defamation is pleaded in paragraphs 12-16 of the statement of claim which read as follows:

> **FIRST CAUSE OF ACTION – DEFAMATION – FIRST, THIRD AND FOURTH DEFENDANTS**
>
> 12. On 29 October 2002 the first defendant caused to be broadcast on TV One the programme described as an *"Assignment Special"* (together with the extracts or summaries referred to in paragraph 13 hereof hereinafter described as 'the programme'). Annexed to the statement of claim as Annexure 1 is a transcript of the said programme.
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> 13. Extracts or summaries of the programme were also broadcast by the first defendant in the 6 o'clock news and as promos.
>
> 14. The programme was based substantially on the affidavits referred to at paragraphs 9 and 10 and including interviews with Messrs Nalder, Patterson, Chadwick, and Penwarden.
>
> 15. The programme as a whole was false and defamatory of each of the plaintiffs. The plaintiffs rely on the programme as a whole but in particular on those parts of the programme which are highlighted in Annexure 1.
>
> 16. In their natural and ordinary meaning the words meant and were understood to mean the following:
>
> (i) That the three plaintiffs in concert or each of them were guilty of long-standing corrupt actions in respect of senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries.

(ii) The second and third plaintiffs were corrupt and dishonest businessmen.

(iii) In the alternative there were serious grounds for believing that each or all of the three plaintiffs were guilty of long-standing corrupt actions in respect of senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries; or

(iv) In the alternative there were serious grounds for believing that the second and third plaintiffs were corrupt and dishonest businessmen.

(v) The three plaintiffs in concert or each of them committed or were responsible or were parties to serious criminal or fraudulent activities arising out of the plaintiffs' involvement in scampi fishing.

[9] There is a parallel pleading of malicious falsehood but it is unnecessary to consider that cause of action for the purposes of this judgment.

[10] The damages to be claimed by the plaintiffs will be very substantial. By a notice of further particulars of plaintiffs' special damage, filed on 28 February 2005, the plaintiffs gave notice that they would claim special damages of not less than $29,194,352.68.

[11] The first defendant pleads a number of defences. For present purposes it is sufficient to note that they include truth, honest opinion, and both statutory and common law qualified privilege.

[12] The focus of the argument before me was upon the manner in which the first defendant has pleaded the defence of honest opinion. In its statement of defence it relevantly pleads as follows:

Honest opinion

37 If the programme had any of the meanings alleged in paragraph 16 of the first amended statement of claim (which is denied) such meaning or meanings were expressions of opinion.

38 In the alternative, if the programme had any of the meanings alleged in paragraph 16 of the first amended statement of claim (which is denied), the statements in the programme relating to those meanings were expressions of opinion.

> 39 Further, or in the alternative, the imputations in the programme set out in paragraph 33 herein and/or the statements in the programme relating to those meanings were expressions of opinion.
>
> 40 The statements in the programme highlighted in yellow in Schedule 1 hereof were expressions of opinion.

[13] The plaintiffs claim it is not legitimate for the first defendant to plead the defence of honest opinion by reference to the imputations pleaded by the plaintiffs, and accordingly the whole of paragraph 37 and that part of paragraph 39 which refers to imputations, ought to be excised. The plaintiffs say that the first defendant is confined to pleading its defence of honest opinion by reference to the content of the broadcast programme and not the plaintiffs' pleaded imputations.

The law

[14] *Gatley* on Libel and Slander (10th ed) describes the relevant pleading obligation of a defendant pleading honest opinion (or fair comment as it is referred to in *Gatley*) as follows:

> While it would appear that the claimant must now formulate a defamatory meaning borne by the words which he seeks to defend as comment, it may be that the rule can still be satisfied in appropriate cases by simply identifying the words of the publication to which the defence is directed. In the normal case, however, he should specify, usually at the start of his pleading of the defence of fair comment the comment in the words complained of, which he will contend falls within this defence. In advancing a plea of fair comment, the defendant is entitled to look at the whole of the publication and he may cull facts on which he alleges the comment to be based from parts of the publication of which the claimant has not complained, provided those facts cannot be said to be separate and distinct defamatory statements. (paragraph 27.12)

[15] That passage suggests that in pleading a defence of honest opinion, a defendant is to look at the words used alone.

[16] Mr Akel for TVNZ argues that it is open to a defendant to plead honest opinion to both the meanings pleaded and the specific words of the publication or broadcast. It is necessary therefore to review the most helpful of the authorities to which I was referred. It is convenient to do so in chronological order.

[17] Mr Akel referred first to *Merivale v Carson* (1887) 20 QBD 275, and to the judgments of Lord Esher at p 281:

> The question which the jury must consider is this – would any fair man, however prejudiced he may be, however exaggerated and obstinate his views, have said that which this criticism has said of the work that is criticised? I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz that the plaintiff had written an obscene play, and no fair man could have said that.

and of Bowen LJ at p 282:

> We must begin with asking ourselves, what is the true meaning of the words used in the alleged libel?

[18] However, in my view, those passages deal rather with an earlier step in the logical process, namely the need for the jury, before considering a defence of honest opinion, to find the true meaning of the words by which the alleged defamatory statement was conveyed. Once that has been ascertained and the meaning so found held to be defamatory, then it becomes necessary for consideration to be given to a pleaded defence of honest opinion, and the question is: to what material may a defendant refer in setting up the defence? That question appears to me not to have been considered directly by the Court in *Merivale v Carson* where it was apparent on the facts that a defence of fair comment could not possibly succeed. The focus of the Court of Appeal in that case was whether the comment went beyond the limits of fair criticism.

[19] Much more recently in *Lloyd v David Syme & Co Limited* [1986] AC 350, 365, Lord Keith of Kinkel said (in the Privy Council on appeal from the Court of Appeal of New South Wales):

> Section 33(2) of the Act of 1974 provides that a defence of comment is defeated if it is shown that the servant or agent whose comment it is, did not have the opinion represented by the comment. Is the comment referred to that which is embodied in the imputations pleaded by the plaintiff, or is it actual words employed, no defamatory meaning being necessarily attributed to them? The defence of comment can only become a live issue if the comment is found to be defamatory. Therefore it appears to their Lordships that a jury must necessarily approach a defence of comment on the basis that the comment conveys such of the defamatory imputations pleaded as the jury find to have been established. The question they have to consider, where section 33(2) is pleaded, is whether or not the servant or agent of the

> defendant had the opinion represented by these defamatory imputations. There is no such thing as comment in the air. Comment must have a meaning, and ex hypothesi the jury are proceeding on the footing that its meaning is defamatory in the sense of the pleaded imputations which have been found established.

[20] Mr Akel also relies on this authority, and in particular, the concluding sentence. However, once again the focus of the Court was not upon the material to which the defence must have regard in pleading its defence of honest opinion.

[21] The passage set out above deals with an allied but different question; namely the need to identify the comment which is claimed to attract the defence. As Lord Keith confirms, the defence of comment (or honest opinion) can only become a live issue if the comment is found to be defamatory in respect of one or more of the plaintiff's imputations.

[22] Accordingly, in considering whether there is any comment to which the defence may attach, the jury must necessarily have regard to such of the pleaded imputations as have been found to be established. That is a different (and necessarily earlier) inquiry than that with which the Court is presently concerned, namely that of whether once the jury has found that one or more of the imputations pleaded by the plaintiff is made out, the defendant may ask the jury to consider in determining whether the defamatory statement was a statement of fact or an expression of honest opinion, not only the publication itself, but also the plaintiff's imputations. That question is not addressed in *Lloyd v David Syme & Co*.

[23] In *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWRL 448, the North South Wales Supreme Court considered at length the issues which arise in the present case. The judgment of Clarke JA articulated the appropriate test for determination of the question of whether a statement is comment (or honest opinion) or of fact. He says:

> It will be seen that the test directs attention to the matter which was published by the defendant and requires the jury to determine whether, in the context of the whole of that published matter, the relevant statements made or published by the defendant were statements of fact or were comment, that is, expressions of opinion or conclusions on facts stated in the material or known to the recipients of the published matter. In these circumstances the resolution of the question whether the relevant statements were made as comments or

> statements of fact could not depend upon the form of the imputation which, obviously enough, would not be seen by the recipients of the published matter. (p 467A)

[24] And by way of further clarification, a little later in his judgment Clarke JA said:

> What I have said so far does not, however, dispose of the appellants' submission for their counsel put a wider argument the thrust of which was that in considering the defence of comment the court was concerned solely to determine whether that part of the published material which was said to be defamatory of the plaintiff, rather than the imputation which it had decided was conveyed by that material, was a comment or a statement of fact. It was submitted that the passage from the judgment of Samuels JA in *Petritsis* which I have already cited supports that view. Although it may be that some of the statements made by Samuels JA are capable of providing support for the submission I am not entirely confident that, considered in its entirety, the judgment does provide the support which counsel seeks.
>
> I do not find it profitable, however, to explore that particular question for I am unable to accept the submission. In my opinion a defendant who raises a defence of comment is obliged to establish that the imputation which the jury has found that the published matter conveyed was conveyed by the writer or speaker as a comment. In this respect, as I have sought to point out, the actual form of the pleaded imputation is not a relevant consideration. What the jury is required to consider is the published material in order to determine whether the writer or speaker conveyed the defamatory statement which, according to its finding, the published matter conveyed as an expression of opinion or conclusion on the one hand or a statement of fact on the other. I regard this conclusion as consistent with principle and it is, in any event, supported by the decisions in *David Syme & Co Ltd v Lloyd* both in this Court and in the Privy Council: *Lloyd v David Syme & Co Ltd* (1985) 3 NSWLR 728. (p 467F)

And by way of overall conclusion:

> To sum-up, the defence of comment will arise for consideration by the jury only when it has found that the imputations for which the plaintiff contends (or ones substantially similar) were conveyed by the material published a and that those imputations were defamatory. Once the defence of comment is raised the jury is required to consider whether the imputation it has found to arise was made by the defendant as an allegation of fact or as an expression of opinion, on facts stated, or sufficiently indicated, in the published matter. For that purpose it is not to the point that the plaintiff has pleaded his imputation as a statement of fact. The question is to be determined upon a consideration of the published material. (p 469 E-F)

[25] This judgment is authority for the proposition that a defence of honest opinion is to be approached in the following fashion:

a) First the jury must consider the imputations for which the plaintiff contends.

b) If the jury is satisfied that those imputations were conveyed by the material published, and that they are defamatory, it may then move to a consideration of the defence of honest opinion;

c) Its consideration of a defence of honest opinion must involve the making of a distinction between allegations of fact and expressions of honest opinion;

d) For that purpose the jury must consider the published material; at that stage of the inquiry the plaintiff's imputations are immaterial.

[26] In *NSW Aboriginal Land Council v Perkins* (1998) 45 NSWLR 340, the Court of Appeal dealt afresh with the question of the manner in which a defence of comment must be pleaded. Priestley JA took the opportunity briefly to summarise the judgment of Clarke JA in *Radio 2 UE* which Priestley JA believed had been misunderstood by counsel in the case then before him. He distilled the following principles from the passages in the judgment of Clarke JA.

> (a) whether or not an imputation pleaded by a plaintiff as a cause of action is an expression of opinion, or conclusion or a statement of fact or some mixture of any two or all three of these will sometimes be impossible to decide simply from the terms of the imputation itself;
>
> (b) in the kind of case referred to in (a), where the jury finds the alleged imputation was made by the published matter complained of and was defamatory of the plaintiff and the defendant is relying on the defence of comment, then it will be for the defendant to show, amongst the other requirements of that defence, that the defamatory imputation was a comment and not a statement of fact;
>
> (c) to do that the defendant is entitled to require the tribunal of fact to consider the published matter which made the defamatory imputation in order to determine whether that matter made an imputation which was comment (in which case the defendant will have succeeded in establishing one of the matters necessary to the defence) or was not (in which case the defence will have failed). (p 345C)

[27] Meagher JA regarded the issue as settled. He said (p 349) that any successful defence must be a defence to the imputation pleaded and established by a plaintiff,

otherwise a defendant would be answering a cause of action on which the plaintiff does not rely (the publication), and a cause of action upon which the plaintiff does rely (the imputation) would go unanswered. Meagher JA regarded the issue as having been settled by the Privy Council in the passage to which I have earlier referred from *Lloyd v David Syme & Co Ltd*. Importantly, Meagher JA went on to say that it was quite consistent with the Privy Council decision that a jury may, in evaluating a defence of comment (honest opinion) "… have some regard to the publication out of which the imputation arose".

[28] Interestingly, Shepherd A-JA, the third member of the Court of Appeal, having read the judgments of Priestley JA and Meagher JA, observed that:

> It may be that there is a degree of unevenness between them in relation to the development of the law, concerning the defence of comment, especially having regard to the decision of this Court in *Radio 2UE Sydney PL v Parker* (1992) 29 NSWLR 448.

Shepherd A-JA then expressly approved the analysis by Priestley JA of the judgment of Clarke JA in *Radio 2UE*.

[29] It is important to remember that the New South Wales cases (including the Privy Council decision in *Lloyd v David Syme & Co Ltd*) were decided in the context of a statutory regime which provides that the cause of action is the imputation rather than the publication. That consideration no doubt underpins the observations of Meagher JA to which I refer in para [27] above. *Gatley* (p 295 footnote 42) observes that the New South Wales statutory provisions have given rise to some difficulty in respect of the statutory defence of comment, but that the published words must be looked at to determine whether the defamatory imputation was conveyed to the audience as a comment. *Gatley* cites *NSW Aboriginal Land Council v Perkins* in support of that proposition.

[30] In my opinion the judgment of Clarke JA in *Radio 2 UE* as explained by Priestley JA in *NSW Aboriginal Land Council v Perkins* is of considerable assistance in a determination of the issue currently under consideration.

[31] I have been referred to three recent New Zealand authorities. The first in time is the decision of the Court of Appeal in *Mitchell v Sprott* [2002] 1 NZLR 766. That was a case involving allegations of defamation where the defendant had allegedly published views critical of Dr Sprott's role in the cot death debate. The judgment of the Court was delivered by Blanchard J. It was necessary for the Court of Appeal to consider whether the words complained of were statements of fact or statements of opinion. As to that, the Court of Appeal judgment proceeded as follows:

> **Opinion or fact?**
>
> [27] The Master recorded that counsel for Dr Mitchell had contended that the proper question was whether the words themselves, not the meanings alleged by Dr Sprott, were statements of opinion or statements of fact. The Master, however, considered the issue in relation to the meanings. He concluded, without any express analysis, that in most of their alleged meanings the words complained of were arguably a statement of fact or a statement of opinion, or arguably partly one and partly the other. But, in case he was wrong about the correct formulation of the question and the correct focus should instead be on the published words themselves, he held, for the purpose of summary judgment only, that the words complained of were a statement of opinion.
>
> [28] In argument in this Court, Mr Miles put forward the view that the question of fact or opinion must be determined in relation to the words themselves, not their alleged meanings. He cited in support of this view passages in the decision of the New South Wales Court of Appeal in *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at pp 466 – 468. But neither counsel addressed the point in oral argument and, although Mr Allan took the position in his written submissions that the words complained of were a statement of fact, he appeared to accept during argument that the Court would be bound to regard both the words themselves and any of their alleged meanings as an expression of opinion. Mr Allan correctly appraised the position. The words appeared in a lengthy article about Dr Sprott's role in the cot death debate containing many factual statements about actions which Dr Sprott has taken and things which he has said, according to the author. In that context a reasonable reader would undoubtedly conclude that the words "and his tactics are aimed at preventing that debate" were an expression of Dr Mitchell's opinion concerning the narrated actions and utterances of Dr Sprott. The words, as they stand and in all their alleged meanings, are an expression of a conclusion reached or observation made by Dr Mitchell based upon the facts appearing in the article.

[32] A degree of caution is necessary in respect of any analysis of conclusions which might be drawn from this passage. First, the point was not extensively argued before the Court, although it appeared in written synopses of argument. Second, on the facts of that case it appears to have been accepted by counsel that whether one

had regard simply to the words of the publication themselves, or alternatively to any of the alleged imputations, the conclusion was the same: the statements in that case were statements of opinion rather than of fact. That is borne out by the final sentence in the passage cited above. The Court of Appeal appears to have refrained from articulating any relevant binding principle, it being unnecessary to do so.

[33] In *Julian v TVNZ* HC AK CP 367-SD/01 25 February 2003, Salmon J briefly considered *Mitchell v Sprott* and *Radio 2UE Sydney Pty Ltd v Parker*. As to *Mitchell,* Salmon J simply held that the Court of Appeal had not determined the issue of whether the distinction between fact or opinion must be determined in relation to the words themselves, or to their alleged meanings. In respect of *Radio 2UE* he concluded that it was authority for the proposition that the defence of honest opinion can apply both to the meanings alleged and to the statements in the broadcast.

[34] In *Haines v TVNZ Ltd* [2004] NZAR 513, Venning J heard from the same counsel much the same argument as was addressed to me. He held:

a) That the judgment of Clarke JA in *Radio 2UE* was authority for the proposition that in considering whether published statements were statements of fact or opinion a jury must consider the words used in the publication itself;

b) Echoing the judgment of Clarke JA, the resolution of that question could not depend upon the form of the imputation which would not be seen by the recipients of the published matter;

c) Such an approach was consistent with that of the Court of Appeal in *Mitchell v Sprott* and in particular with that portion of the judgment of Blanchard J in which he said that: "… the defendant must first show that **the words complained of** or the part of them said to be an opinion, were an expression of opinion, not an imputation of fact…" and further "The ultimate question says *Gatley* at para 12.8, is how the words would strike the ordinary, reasonable reader". [emphasis supplied by Venning J].

d) In any event the conclusions in paragraphs 27 and 28 of *Mitchell v Sprott* set out above were confined to the facts of that case, and were not intended to lay down a principle which would enable a jury in considering a defence of honest opinion to have regard to both the words themselves and any of the alleged meanings.

e) In respect of *Julian v TVNZ:*

> If Salmon J is to be taken as concluding that it is necessary to consider whether the imputations alleged are made out and then in order to determine the defence of honest opinion regard must be had to the actual words of the article to determine whether those imputations are conveyed by the words used in the article, then I would agree, but if the Judge is suggesting that it is appropriate to consider both the words published and the meanings and imputations alleged to assess whether the words are to be construed as an opinion, then I would, with respect, disagree. Para [70].

Discussion

[35] I agree with the conclusion reached by Venning J for the reasons articulated by him. It is for a Judge to determine whether the words complained of are capable of amounting to expressions of opinion. If they are ruled to be so capable, then the determination of whether they amount to statements of fact or opinion is a question for the jury: *Mitchell v Sprott* (p.772). Once the question has been left to the jury, then the assessment must be made in reliance on the publication itself, and not upon the plaintiff's imputations crafted at a later date.

[36] The overall question for the jury to determine is what conclusions would be drawn by recipients of the published matter – to cite *Gatley*:

> How would the words strike the ordinary, reasonable reader? (para 12.8)

[37] Such a reader can form a judgment only upon the words of the publication, or possibly in a given case, upon other facts that were generally known at the time. But the reader does not have access to the plaintiff's imputations. The need for the reader to judge for himself how far the opinion is well founded is emphasised in the

judgment of Lord Nicholls in the Hong Kong Final Court of Appeal in *Cheng v Paul* (FACV 12/2000) (Civil) at p 6.

[38] Mr Akel argues that the defendant ought to be entitled to plead and to rely upon, at trial, both the publication itself and the plaintiff's imputations. I am unable to accept that submission for the reasons already given. To do so would be wrong in principle and would introduce a confusing element of artificiality into an exercise which calls for the application of life experience and commonsense.

[39] This conclusion is, I think, reinforced by the provisions of s 11 of the Defamation Act 1992 which provides:

> 11. **Defendant not required to prove truth of every statement of fact**
>
> In proceedings for defamation in respect of matter that consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion shall not fail merely because the defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to—
>
> (a) Those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or
>
> (b) Any other facts that were generally known at the time of the publication and are proved to be true.

[40] The focus in that section upon facts that are alleged or referred to in the publication, together with other facts generally known at the time, is consistent with the conclusion I have reached.

Decision

[41] The first defendant is entitled, in pleading the defence of honest opinion, to relate the alleged expressions of opinion to statements in the published material, in this case the Assignment programme. But it is not entitled to endeavour to establish the defence by reference to the meanings alleged by the plaintiffs in paragraph 16 of the first amended statement of claim.

[42] Accordingly, paragraph 37 of the amended statement of defence of the first defendant does not have a proper basis in law. Paragraph 39 will require amendment by the deletion of any reference to the imputations in the programme.

[43] I make no orders at this stage because I am advised that various other orders related to pleadings may be required following the hearing scheduled to commence on May 23, and formal orders on the current application should be made as part of the overall review which will then be conducted.

Costs

[44] Costs are reserved.

C J Allan J