IN THE COURT OF APPEAL OF NEW ZEALAND

CA71/04

BETWEEN	TELEVISION NEW ZEALAND LIMITED Appellant
AND	RODNEY DAVID HAINES First Respondent
AND	HHR (NTH) LIMITED Second Respondent
AND	HAINES HOUSE REMOVALS LIMITED Third Respondent
AND	MFM CONTRACTING LIMITED Fourth Respondent
AND	HAINES HOUSE HAULAGE COMPANY LIMITED Fifth Respondent
AND	HHH (NTH) LIMITED Sixth Respondent

Hearing: 17 May 2005

Court: Glazebrook, Chambers and Robertson JJ

Counsel: W Akel and T J Walker for Appellant
J G Miles QC and D C E Smith for Respondents

Judgment: 13 September 2005

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The formal answers to the preliminary questions given in the High Court as recorded in the judgment sealed on 25 March 2004 are set aside.

C **Within 15 working days of this judgment, the appellant shall file and serve an amended statement of defence:**

(a) **which omits, as part of any defence of truth, different meanings from those advanced by the respondents;**

(b) **which does not attempt to particularise individual statements in the publications as expressions of opinion.**

D **The appellant shall pay costs to the respondents in the sum of $4,000, plus usual disbursements. We certify for second counsel.**

REASONS

(Given by Robertson J)

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Introduction

[1] This is an appeal by Television New Zealand Ltd (TVNZ) from Venning J's decision delivered in the High Court at Auckland on 12 March 2004 (now reported at [2004] NZAR 513) on preliminary questions affecting matters in contention between it and Rodney David Haines and associated companies (Haines) in a defamation case.

[2] The dispute arises out of programmes broadcast by TVNZ on the *Holmes* programme on 14 March 2000, 15 March 2000, 16 March 2000 and 3 April 2000 and a broadcast on *One Network News* on 18 March 2000.

Factual context

[3] In November 1998, one of the Haines companies sold a second hand house to a Mr and Mrs Pearce. Haines relocated it from their yard in Whenuapai to the Pearces' property at Kamo, near Whangarei. It had to be cut into sections for transportation.

[4] The contract price of $90,000 was to be met by Haines House Haulage acquiring two sections in a subdivision of the Pearces' property for $60,000, a cash deposit of $29,000 and a balance sum of $1,000 was left owing.

[5] Following the relocation of the house and its re-erection, the roof leaked. A dispute developed between Haines and the Pearces over the state of the house. They also fell out over the subdivision and the sections that were to be acquired in part satisfaction of the price.

[6] When the Pearces refused to pay the balance owing, or to release Haines from their contractual obligations, the position between them deteriorated even further. Eventually Haines took the view that it was entitled to remove the house pursuant to a Romalpa clause in the contract.

[7] The various television programmes were screened against this acrimonious background of dealings.

[8] Haines contends, in para 13 of its Second Amended Statement of Claim, that the content of each of the broadcasts had some or all of the following natural and ordinary meanings:

(a) Haines rip off their customers.

(b) Haines are dishonest.

(c) Haines operate in a thuggish or intimidatory manner.

(d) Haines are not to be trusted.

(e) Haines are unprofessional, incompetent or incapable of performing their work in a workmanlike manner.

[9] TVNZ denies that the words sued upon are capable of bearing the meanings alleged by Haines. It pleads the affirmative defences of truth and honest opinion. In relation to truth it says that:

(a) Each broadcast taken either by itself or in conjunction with the previous broadcast was in substance true or not materially different from the truth; and alternatively,

(b) The imputations contained in the broadcast were true or not materially different from the truth.

[10] Further, TVNZ pleads that the proper imputations from the broadcast were:

(a) Haines failed to re-erect the Pearces' home in a proper workmanlike manner;

(b) Haines acted unprofessionally in their dealings with the Pearces;

(c) Haines operated in a threatening or intimidating manner towards the Pearces.

[11] In respect of the defence of honest opinion, TVNZ says:

(a) if the broadcast had any of the meanings alleged in para 13 (set out above at [8]), such meaning or meanings were expressions of opinion; and

(b) alternatively certain specific statements were expressions of opinion.

The procedural framework

[12] In a notice of application dated 9 July 2003, Haines sought to have a series of questions determined separately prior to trial under r 418 of the High Court Rules. These were:

> 1. Whether the imputations relied on by the defendant at paragraphs 76, 84, 93, 101, 110, 118 and 125 of the statement of defence are reasonably capable of bearing the meanings alleged by the plaintiff in paragraphs 13(a) to (e); 21(a) to (e); 29(a) to (e); 38(a), (b), (d) and (e); 45(a) to (e); 56(a), (b), (d) and (e); and 64(a) to (e) of the second amended statement of claim.
>
> 2. Whether the claim at paragraphs 77, 85, 94, 103, 111, 119 and 126 of the statement of defence that the meanings claimed in paragraphs 13, 21, 29, 38, 47, 55 and 60 of the statement of claim were expressions of opinion is sustainable at law.
>
> 3. Whether the statements set out at paragraphs 78(a) to (q), 86(a) to (q), 95(a) to (p), 104(a) to (d), 112(a) and 120(a) to (v) in the statement of defence are reasonably capable of being held to be expressions of opinion.

[13] This application was opposed on the following basis:

> **As to paragraph 1 of the Schedule to the plaintiffs' application**
>
> 1. **THE** imputations pleaded by the defendant are reasonably capable of being imputations contained in the broadcasts sued upon.
>
> 2. **THE** defendant is entitled, in its defence of truth, to plead and prove the truth of imputations contained in the broadcast sued upon and not to the imputations alleged by the plaintiffs.

3. **THE** defendant is not restricted to pleading truth only in respect of imputations alleged by the plaintiffs.

As to paragraph 2 of the Schedule to the plaintiffs' application

4. **IT** is open to the defendant to plead honest opinion to the imputations contained in the broadcast (whether those pleaded by the plaintiffs or the lesser meanings pleaded by the defendant).

As to paragraph 3 of the Schedule to the plaintiffs' application

5. **THE** statements set out in paragraphs 78, 86, 95, 104, 112 and 120 of the statement of defence to the second amended statement of claim are capable of being expressions of opinion.

[14] When the matter came on for hearing before Venning J, the stipulated questions of law appear to have been accorded secondary importance and the argument developed much more as an inquiry into the state of TVNZ's pleading. Nevertheless, answers were provided to the questions. The first and second questions were answered "no" and the third in accordance with an attached schedule as contained in the judgment of the Court sealed on 25 March 2004.

[15] Much of the significance of the High Court decision, however, lies not in those formal answers but rather in the amendments to the pleadings which were ordered and which do not appear in the sealed judgment. The formal questions enumerated in the r 418 application received even less emphasis before us than they had in the High Court. The argument before us was mainly about whether Venning J's pleading findings were sustainable and whether his overall reasoning, which had led to those findings and directions, was correct.

[16] Because there is a danger that, in the manner in which the case has developed, the answers on the r 418 issues could be misleading, we are persuaded that all the answers should be set aside.

The scope of the appeal

[17] Four issues are raised before us in this appeal. We received extensive written submissions on all points and counsel chose to present oral argument on the first three.

[18] The first issue is truth. In essence, this issue is whether a defendant can set up different meanings from those pleaded by a plaintiff and then seek to prove the truth of those alternative measures. Venning J held that it cannot. TVNZ accepted that such a pleading would not have been permissible under *Broadcasting Corporation of New Zealand v Crush* [1986] 2 NZLR 234 but contends that *Crush* is no longer the law in New Zealand following the enactment of the Defamation Act 1992 (the 1992 Act).

[19] The second issue (which arises only if *Crush* no longer represents the law in New Zealand) is whether the defamatory meanings pleaded by TVNZ are materially distinct from the meanings asserted by Haines. On this point the Judge concluded that they were not. TVNZ says that the meanings pleaded by TVNZ are directed at one specific charge of misconduct as opposed to Haines' contentions that the programmes conveyed a general and broader charge. The meanings pleaded by it are thus different to and less injurious than those pleaded by Haines.

[20] The third issue in the appeal is honest opinion. Venning J ordered that TVNZ amend its pleadings on this question. TVNZ contends that it should not be required to re-plead as it is entitled to plead that any imputations found by the jury are expressions of opinion (regardless of the form in which they are pleaded by the plaintiff).

[21] The final issue relates to some paragraphs in the statement of defence where TVNZ had purported to list statements in the broadcasts which they said were "expressions of opinion". TVNZ alleges that certain statements were miscategorised by Venning J as statements of fact when they were capable of being categorised as expressions of opinion.

Statutory provisions of relevance

[22] The following provisions of the 1992 Act are of direct relevance in this case:

8 Truth –

(1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.

(2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

(3) In proceedings for defamation, a defence of truth shall succeed if:

(a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or

(b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

9 Honest Opinion –

In proceedings for defamation, the defence known before the commencement of this Act as the defence of fair comment shall, after the commencement of this Act, be known as the defence of honest opinion.

10 Opinion must be genuine –

(1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.

(2) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless:

(a) Where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that -

(i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and

(ii) The defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion.

(b) Where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that -

(i) The opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant, and

(ii) The defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

(3) A defence of honest opinion shall not fail because the defendant was motivated by malice.

38 Particulars in defence of truth –

In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying –

(a) The statements that the defendant alleges are statements of fact; and

(b) The facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

Truth

The High Court decision

[23] Venning J set out the issue in the following manner:

> The essence of the first question is whether the defendant [TVNZ] is restricted to pleading the imputations or meanings alleged by the plaintiffs [Haines] or whether it can plead its own set of imputations, such meanings having a lesser defamatory sting and to then justify those different meanings.

[24] In determining this point, the Judge noted that the phrase "the matter that is the subject of the proceeding" as used in s 8(3)(a) is used in over 20 other places in the Act, and he held that it:

> [43] … refers to the publication or at least that part of the publication complained of. That is the meaning that it ought to hold in s 8(3)(a) also. The matter that is the subject of the proceeding means the publication rather than the meanings pleaded by the plaintiff.

[25] Venning J concluded:

> [44] That, however, rather begs what in my view is the essential question which is the meaning to be given to "the imputations contained" in that part of the publication. On a literal reading I accept that the reference could be to any imputations that could properly be taken from the publication. However, in my view the "imputations" referred to in s 8(3)(a) are the

> imputations or the sting pleaded by the plaintiff and do not include or permit the defendant to plead its own imputations. To that extent, I agree with the Court in *Manning* that when regard is had to the imputations, then the scheme of the subsections s 8(3)(a) and s 8(3)(b) make more sense if the imputations referred to are the meanings pleaded by the plaintiff.

[26] The Judge identified three reasons for his conclusion. First the context of the defence in s 8. The Judge concluded that the defence must relate to and answer the case which was being levelled against the defendant.

[27] Secondly, while s 8(2) overruled the effect of *Templeton v Jones* [1984] 1 NZLR 448, the new legislation did not overrule the effect of *Crush*.

[28] Thirdly, s 8(3)(a) had a purpose in its present form in that it meant that a defendant was able to prove that the imputation or sting alleged by the plaintiff was true, or not materially different from the truth, and permitted that approach even when the publication contained errors.

[29] Venning J adopted the reasoning of Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers Limited* (1989) 193 CLR 519 in which they said at 527 of the reasoning in *Polly Peck Holdings PLC v Trelford* [1986] QB 1000:

> With great respect to His Lordship, such an approach is contrary to the basic rules of common law pleadings and in many contexts will raise issues which can only embarrass the fair trial of the action ... A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the actions …

[30] Later, their Honours noted at 532:

> A plaintiff who pleads a false innuendo thereby confines the meanings relied on. The plaintiff cannot then seek a verdict on a different meaning which so alters the substance of the meaning pleaded that the defendant would have been entitled to plead a different issue, to adduce different evidence or to conduct the case on a different basis.

[31] And subsequently at 534:

> If the defendant is, or might reasonably be thought to be, prejudiced, embarrassed or unfairly disadvantaged by the departure – whether in pleading or preparing for trial, or adducing evidence or in conducting the case before verdict – the plaintiff will be held to the meaning pleaded. If the meaning pleaded goes to the jury and is not found by the jury, the plaintiff fails.

[32] Venning J also undertook an analysis of the legislative history in terms of the approach of this Court in *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 and found that this exercise supported the same conclusion.

[33] Finally, he referred to Mr Akel's argument with regard to consistency with s 14 of the New Zealand Bill of Rights Act 1990 but he concluded that this did not assist.

The approach of counsel

[34] TVNZ contends:

(a) The scope of the defence of truth should not depend on the way in which the plaintiffs plead their case but on the meaning which the words are found to bear. *Duncan & Neil on Defamation*, (2ed 1983) at [11.12].

(b) It should be entitled to plead truth to what it says a broadcast means and, if unsuccessful in its defence, rely on the particulars of truth by way of mitigation.

(c) In particular, a defendant should be entitled to plead and justify a lesser meaning.

(d) Section 8 of the 1992 Act should be interpreted consistently with the line of English authorities commonly referred to as the *Lucas-Box* line of authorities which has also been applied in some Australian states and Canadian provinces - see *Lucas-Box v Newsgroup Newspapers Limited* [1986] 1 WLR 147, *Gumina v Williams (No. 2)* (1990) 3

WAR 351, and *Pizza Pizza Limited v Toronto Star* (1998) 167 DLR (4th) 748, affirmed Ontario Court of Appeal 187 DLR (4th) 761.

(e) *Crush* is no longer good law in New Zealand in light of s 8 of the 1992 Act, or alternatively, is limited to the true innuendo case.

(f) The words in the section should be interpreted consistently with *Polly Peck* and various decisions in Australia, Canada and the United Kingdom which espouse this position still.

(g) The imputations referred to in s 8(3)(a) are not only those relied upon by the plaintiff but the section allows a defendant to introduce other and different imputations and establish the truth of those. The statutory test is not directed to "imputations complained of" or "the imputations alleged by the plaintiff".

[35] Mr Miles QC argues that the *Crush* decision had not been affected by the new statutory provision and that there are in any event an equal number of cases through various parts of the Commonwealth where the *Polly Peck* approach has been rejected.

The legislative history

[36] The primary issue for the Court is the effect of the enactment of s 8 of the 1992 Act on *Crush*. It is helpful, in this regard, to look at the legislative history and consider the position with which Parliament specifically dealt.

[37] The 1992 Act had its genesis in the Report of the Committee on Defamation *Recommendations on the Law of Defamation* of 1977. With regard to the then defence of justification the Report made a number of recommendations. Relevantly for present purposes, the Report stated (at [108]) that, under the then existing law, a person was able to choose one false statement in a publication and sue on that statement, ignoring the rest of the publication entirely. The defendant was consequently constrained also.

[38] The Report recommended that the Defamation Act 1954 be amended to enable a defendant to rely on the whole of a publication in answer to a claim by a plaintiff complaining only of part of it. A defendant may then prove that the publication taken as a whole was true, or not materially different from the truth. The reason for the change was explained at [111] as follows:

> [W]here a person's reputation has not been materially injured then there is no real merit in the plaintiff's case and he should not be able to succeed in an action for defamation.

[39] The second change proposed by the Report was to make it clear that it was not necessary for a defendant to prove the literal truth of the words but only their substance or sting. It was acknowledged (at [112]), that this was generally considered to be the current law but there were a number of nineteenth century cases that appeared to contradict this proposition. The Report thus recommended that the Defamation Act 1954 be amended to make it clear that a defendant could succeed in a defence of truth where it was able to show that the words complained of are substantially true. The actual amendment proposed by the Report (at [114]) was as follows:

> In an action for defamation, a defence of truth shall not fail by reason only that the facts proved to be true differ from the charge against the plaintiff in the words published, if the degree to which they differ is not material so far as any question of injury to the reputation of the plaintiff is concerned.

[40] When the 1992 Act was introduced, the Explanatory Note stated that the Bill was based in large part on the McKay Report. With regard to clause 8 (which became s 8 of the 1992 Act) the Explanatory Note said:

> *Clause 8* implements certain of the recommendations of the Committee on Defamation in relation to the defence of justification (i.e., where the defendant alleges that the matter was true).
>
> *Subclause (1)* re-names the defence of justification the defence of "truth".
>
> *Subclause (2)* provides that in proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication. The provision is necessary for the establishment of the defence provided by *subclause (3)(b)*.
>
> *Subclause (3)(a)* provides that in proceedings for defamation, a defence of truth shall succeed if the defendant proves that the facts contained in the

> matter that is the subject of the proceedings were true, or not materially different from the truth.
>
> This means that a defendant has a good defence if he or she establishes the "substance" or "sting" of the matter alleged to be defamatory. It is not necessary for the defendant to prove that the matter is literally true. (See paras 112 to 115 of the Committee's Report.)
>
> *Subclause (3)(b)* provides that in proceedings for defamation based on all or any of the words in a publication, a defence of truth shall succeed if the defendant proves that the publication, taken as a whole, was in substance true, or was in substance not materially different from the truth. The provision is intended to overcome unfairness to a defendant where a plaintiff selects from a number of statements in a publication only those which the plaintiff knows the defendant cannot justify, and ignores others that are true. Under the existing law, the defendant cannot prove the truth of the statements not sued on in order to show that the plaintiff's reputation was not materially injured by the statements that are untrue. (See paras 108 to 111 of the Committee's Report.)

[41] As introduced, subclause 8(3)(a) read as follows:

> (3) In proceedings for defamation a defence of truth shall succeed if:
>
> (a) The defendant proves that the facts contained in the matter that is the subject of the proceedings were true, or not materially different from the truth.

[42] The word "facts" was replaced with "imputations" after the Justice and Law Reform Select Committee examined the Bill. In the Select Committee's Report to the House of Representatives on the Bill, Richard Northey MP explained the change from "facts" to "imputations" in the following way:

> An amendment has also been made in subclause (3) to replace the word "facts" with the word "imputations", because submissions indicated that the general trend and impression that the words conveyed was the issue in deciding whether they were true. That was the crucial matter and the reason the changes were made.

[43] The change from "facts" to "imputations" was thus made better to ensure that the intent of the McKay Report, as set out in the Explanatory Note to the Bill, was met (see [39] - [40] above).

Analysis of s 8 of the 1992 Act

[44] Section 8(1) is a change of nomenclature only.

[45] Section 8(2) makes it clear that, if a plaintiff complains of only part of a publication, the defendant may prove the truth of any facts contained in the whole of the publication to show the context of the statement complained of. This subsection, coupled with s 8(3)(b), means that *Templeton v Jones* is no longer good law in New Zealand.

[46] Section 8(3) sets out the substantive truth defence. The important thing to note is that the defence of truth may now be proved in two different ways. Paragraphs (a) and (b) of s 8(3) provide alternatives. Under paragraph (a), a defendant will avoid liability if it proves that the imputations pleaded were true or not materially different from the truth. We discuss later whether a defendant is limited under this paragraph to the imputations pleaded by the plaintiff. Alternatively, under s 8(3)(b) a defendant can avoid liability if it proves that the publication taken as a whole was in substance true or was in substance not materially different from the truth. These two different methods of proving truth must be separately pleaded and will be the subject of separate directions by the Judge to the jury.

Cases including s 8(2)(a)

[47] Section 8(2)(a) and its possible effect on *Crush* has been considered on only a limited number of occasions before Venning J's decision. It was referred to by this Court in *Television New Zealand v Ah Koy* [2002] 2 NZLR 616. At [7], the Court noted:

> We do not find it necessary to embark upon any review of *Crush* because we are satisfied, … that in the present case the pleadings do not genuinely raise the point. The so-called lesser defamatory meanings asserted by TVNZ are in reality meanings which are not materially different from the meanings asserted by Mr Ah Koy.

[48] Section 8 was also considered by a full Court of the High Court in *Manning v TV3 Network Services Limited* [2003] NZAR 328. William Young J noted at [41]:

> While this is perhaps not quite so clear, I incline to the view that *Crush* would also now be decided differently. I say this because I think that it is

> now open to a defendant in a shades of meaning case to allege that some or all of the facts asserted in the publication complained of are true (under s 8(2)) and, depending on how successful it is in respect of that contention, to invoke subs 8(3)(b).

[49] He later said at [45]:

> There is room for debate as to what is meant by the words "imputations contained in the matter that is the subject of the proceedings" which appear in s 8(2). In their ordinary meaning they refer to what is actually imputed by the publication in issue as opposed to the meanings pleaded by the plaintiff. On the other hand, when s 8(3)(a) is read with s 8(3)(b), the scheme of the subsection makes rather more sense if the words are taken to refer to the meanings as pleaded by the plaintiff. I note in passing that it is possible that this subsection was intended to do no more than reiterate the common law principle explained by Lord Shaw of Dunfermline in *Sutherland v Stopes* [1925] AC 47 at 79. …

[50] The latter paragraph of William Young J was commented upon in *Julian & Anor v Television New Zealand Limited* HC AK CP367-SD/01 25 February 2003 where Salmon J said at [24]:

> I am inclined to share the view of William Young J as to the interpretation of s 8(3)(a). The "imputations" are, the plaintiff's accusation or charge. … If the imputations alleged reasonably arise out of the material said to be defamatory, then in my view s 8(3)(a) requires a defendant pleading a defence of truth to establish that those imputations were true or not materially different from the truth.

[51] And later Salmon J noted at [27]:

> The defendant then must address the imputations alleged. It may not redefine them and then plead truth in relation to its redefinition of those imputations.

Discussion

[52] The short issue on this first ground of appeal is whether TVNZ is bound by the imputations raised by Haines in its second amended statement of claim and precluded from raising, and pleading, the truth of others. Venning J held that it was. Although a great deal of material was considered, this issue boils down to whether Parliament reversed the effect of *Crush* when it enacted the 1992 Act.

[53] In *Crush,* the defendants had denied that the publications were capable of bearing, or did bear, the meanings alleged by the plaintiff. The defendants did not

attempt to justify the meanings alleged by the plaintiff. Instead, the defendants pleaded that, in their natural and ordinary meaning, the words used meant, and were understood to mean, something other than the meaning alleged by the plaintiff.

[54] This Court in *Crush* held that the defendants could not set up alternative meanings and prove the truth of those meanings. A defendant can deny that the words used are capable of bearing the meanings alleged by the plaintiff, or prove that the meanings alleged are substantially true, but it cannot attempt to prove the truth of alternative meanings.

[55] In our view, there is nothing in s 8 of the 1992 Act or in its legislative history which indicates that any remedial response was intended in respect of the rule in *Crush*. Indeed, it is clear from the legislative history that s 8(2)(a) was intended to be a restatement of the classic definition of the truth (justification) defence, while making it clear that a defendant did not have to prove the literal truth of the words but only their substance or sting. This was, however, a clarification only as that was generally understood to be the law in any event – see the discussion at [39] above. As s 8(3)(a) was merely a restatement of the existing truth (justification) defence, the natural inference is that the restatement includes the law as articulated in *Crush*.

[56] An action for defamation conceptually proceeds as follows. The plaintiff must first establish the publication. Next, it must satisfy the Judge that the publication is capable of having the imputations contended for. It must then prove to the satisfaction of the trier of fact that the words used have one or more of the various imputations identified. If a plaintiff fails to do that, it will lose at that point. It is at this point that the defendant may argue that the words used do not bear the meaning contended for by the plaintiff.

[57] If the plaintiff succeeds on one or more specified imputations, then a defendant may defend itself, in terms of s 8(2)(a), by satisfying the trier of fact that the imputation is true or not materially different from the truth. It is insufficient for a defendant at this point to suggest that, even though the words are capable of bearing the defamatory meaning complained of, they also bear a lesser meaning, which may be proven to be true. This is for two reasons.

[58] First, proving the truth of a lesser meaning would not have an effect on the defamatory meaning pleaded by the plaintiff, and the defamatory meaning would remain undefended. As a matter of logic, a defence must always be a defence to something. In cases of defamation that something is the defamatory imputations pleaded by the plaintiff.

[59] Secondly, a parallel inquiry into something about which the plaintiff is not complaining is unhelpful and potentially confusing for the jury.

[60] In his written submissions, Mr Akel contended:

> It is wrong that a defamation case should be defined solely by a plaintiff when the publication is there for all to see. Requiring rigid adherence to the plaintiff's pleaded imputations is to permit form to triumph over substance.

[61] There is a danger of becoming enmeshed in the nuances and semantic distinctions which have bedevilled this subject and for minute case analysis to be permitted to dominate. Rather, it is prudent to consider the conceptual framework which applies in all litigation.

[62] It is an error to suggest that the approach of Venning J permits the plaintiff to hold the whip hand. The plaintiff sets a threshold which it must meet before the defendant is required to react. This is perfectly normal in civil litigation. It is not anything to do with form or substance. It is about a party making a specific complaint about a meaning which it says arises from a publication. If the meaning which is alleged, or something not materially dissimilar, is not established, then the plaintiff loses its case. It is only when that meaning is established that the defendant needs to respond to it, but not to some other issue which might have been complained about but has not been the subject of complaint.

[63] TVNZ is in no way curtailed from establishing that the publication does not convey the meanings asserted by Haines. If it does that, it will not be liable. Haines will have failed in its case. It is to add confusion and complexity to contend that there ought to be parallel cases going on simultaneously before a jury. The fundamentals enunciated in *Chakravarti* (and noted at [29] - [31] of this judgment) encapsulate the applicable principle.

[64] We have not overlooked the fact that Mr Akel argued that there were cases like *Polly Peck*, *Lucas-Box* and *Prager v Times Newspapers Ltd* [1988] 1 WLR 77 where his approach to this issue had been adopted by the English Courts. Those cases were determined prior to *Crush* and are considered by this Court in that decision.

[65] Mr Akel referred to subsequent cases from England, Canada and Australia which had adopted a similar view. However, he accepted that there are equally decisions which are consistent with the approach of this Court in *Crush*. Nothing in that regard has persuaded us that there was good or proper reason to reconsider the approach in *Crush* apart from assessing the consequences of the New Zealand statutory amendment.

[66] We conclude, therefore, that s 8(3)(a) does not alter the approach of this Court in *Crush* and that *Crush* was correctly decided. We are thus satisfied that Venning J correctly concluded that the answer to the first issue, with regard to alternative imputations, must be in the negative.

[67] We note that TVNZ still has the ability under s 8(3)(b) to mount as a defence the argument that the broadcast as a whole was true.

Extent of difference in meanings

[68] The second issue on this appeal arose only if we decided that *Crush* no longer represented the law. For the reasons given, we have held that *Crush* remains good law. The second appeal point therefore falls by the wayside.

[69] We should nonetheless explain briefly what the point was. Mr Miles' primary argument was that defendants pleading truth in defamation actions cannot set out to justify their own meanings, a proposition with which we agree. He submitted, however, that, if we were not with him on that point, then at the very least the defendant could not set up a meaning which was not materially different from the plaintiff's meaning. He cited in support of that proposition this Court's decision in

Ah Koy. He submitted that TVNZ's meanings were not materially different from those advanced by Haines.

[70] This Court in *Ah Koy* did not express a view as to whether *Crush* remained good law. The reason was that, even if *Crush* was no longer the law, it was clear that a defendant could not set up and then seek to justify a meaning which was not reasonably capable of material distinction from that asserted by the plaintiff. This Court in *Ah Koy* was satisfied that the defendant's meanings were not materially different. In this case, we have grappled with the continuing authority of *Crush*. We have confirmed its continuing relevance. In light of that, we do not need to consider Mr Miles's fallback argument, as he prevailed on his primary argument.

Honest opinion

The High Court decision

[71] The Judge described the third issue in this way:

> [61] The contest between the parties on honest opinion is whether TVNZ can plead honest opinion to the meanings alleged by Haines or whether TVNZ is restricted to applying the defence to the actual words broadcast. It raises the issue of whether the pleaded meaning as opposed to the actual words used in the publication can be opinion or comment for the purposes of the defence of honest opinion.

[72] Later he said:

> [66] The defence of honest opinion only arises for consideration if the jury finds that the publication contained the imputations the plaintiff contends for. If they do, then the jury must consider whether the statements published were statements of fact or opinion. That requires consideration of the wording used in the publication itself. As Clarke JA observed [in *Radio 2UE Sydney Pty Limited v Parker* (1992) 29 NSWLR 448] the resolution of that question (i.e. fact or opinion) [could not depend upon the form of the imputation which, obviously enough, would not be seen by the recipients of the published matter.]

[73] Venning J held that TVNZ's current pleading did not accurately reflect that position. He concluded:

> [71] In my view, the matter could be addressed by an amendment to the paragraphs in the statement of defence to the second amended statement of claim. Using para 77 [set out at [11] (a) above] as an example the pleading could be amended as follows:
>
> > If the broadcast had any of the meanings alleged by para 13 [set out at [8] above] of the second amended statement of claim (which is denied) the statements in the broadcast relating to those meanings were expressions of opinion.
>
> If the pleading was amended in that way, and was combined with a direction to the jury to the effect that if they find the items contained the imputations alleged by the plaintiff then they are required to consider the broadcasts in order to determine whether they conveyed the defamatory statement as an expression of opinion or conclusion on the one hand, or a statement of fact on the other then the point would be satisfactorily addressed.

Appellant's submissions

[74] Mr Akel submitted that, where the defence of honest opinion is pleaded, a jury must first assess and decide on the meaning of the words sued upon, and then consider whether those words were conveyed as an expression of an opinion. That is, once the jury has found that the broadcast has the imputation pleaded, it must then decide whether that imputation has been expressed as opinion or fact. In deciding this, the jury may have regard to the words actually used.

[75] Mr Akel placed considerable reliance on the decision of the New South Wales Court of Appeal in *Radio 2UE Sydney Pty Limited v Parker* (1992) 29 NSWLR 448 and in particular the comments of Clarke JA at 467-71.

[76] He noted that a helpful analysis of what this meant is provided by Priestley JA in *New South Wales Aboriginal Land Council v Perkins* (1998) 45 NSWLR 340 where he said at 345:

> In my view what Clarke JA was saying was:
>
> (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). …
>
> The result is that, in my opinion, *Radio 2UE* not only clearly does not support the appellant's submission here that the defence of comment is directed to the matter and not the imputations relied on by the plaintiff, it contradicts it. *Radio 2UE* was decided on the basis that the defence of comment must be pleaded as an answer to the cause of action consisting of the imputation the plaintiff relies on and that in considering whether the imputation made by the matter was made as a comment or a statement of fact, the matter from which the imputation is derived may be taken into account.

[77] Mr Akel noted that this Court considered the issue in *Mitchell v Sprott* [2002] 1 NZLR 766 and held that it was both the words and all of their alleged meanings which was to be considered in determining honest opinion. Blanchard J said at 774:

> [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 446-468. 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, 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.

[78] Counsel argued that this approach was followed by Salmon J in *Julian v TVNZ* when the Judge said at [46]:

> Both counsel relied on the decisions of the New South Wales Supreme Court in *Radio 2UE Sydney Pty Ltd v Parker*. After considering what was said in that case and the other authorities referred to by counsel I conclude that Mr Akel is right in his view that the defence of honest opinion can apply both to the meanings alleged and to the statements in the said broadcast.

[79] Mr Akel contends the same thrust is apparent in the direction to the jury of Anderson J in *Weir & Anor v Karam & Anor* HC AK CP 139/98 20 September 2000 when the Judge said:

> … one may express an honest opinion and not be liable in defamation, even if one is wrong, provided that it is an opinion in the sense that it is an expression of belief or conclusion or deduction from facts which are stated in the context of that opinion. …
>
> What a jury has to look at is whether that actually is the context in which a statement is made. If you bear in mind the rationale you will be able to understand what is really meant in law by "opinion" as incorporated in the defence of honest opinion.

[80] As against these authorities, Mr Akel argued that Venning J was wrong in defining the contest between the parties as being whether a defendant can plead honest opinion to the meanings alleged by the plaintiff or whether a defendant is restricted to applying the defence to the actual words in the publication. He submitted that the Judge's conclusion was not supported by *Radio 2UE* or *Mitchell v Sprott* as Venning J had believed it was.

Respondents' submissions

[81] Mr Miles argued that TVNZ's position was contrary to:

(a) the wording of s 10 of the Act;

(b) the decision of this Court in *Mitchell v Sprott*;

(c) the practice in the UK, and

(d) the law in Australia.

[82] Mr Miles referred to a recent analysis of the problems undertaken by Allan J in *Simunovich Fisheries Limited v Television New Zealand Limited* HC AK CIV-2004-404-3903 5 May 2005 which he submitted supported the conclusion of Venning J in this case.

[83] Mr Miles' contention was that, properly read, all the authorities led to the view that it is the words complained of that have to be looked at within the context of the publication. He also referred to comments of Blanchard J in *Mitchell v Sprott:*

> [16] A defence of honest opinion can succeed only where the defamatory matter includes or consists of an expression of opinion and the defendant (the author of the opinion) proves that it was his or her genuine opinion (s 10(1)).
>
> [17] Thus 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. Sometimes it is not easy to distinguish fact from comment on fact. If that cannot be done, the words are not protected by the honest opinion defence. Sometimes words may in isolation appear to be stating a fact, but when read in context are properly understood to be drawing a conclusion from facts which have also been stated or indicated by the author or which would have been known to the person to whom the words were addressed. They can then be seen to be in the nature of a comment or expression of opinion based on those facts. The person who hears or reads the words can recognise them as an opinion which he or she can evaluate on the basis of the stated or known facts. As *Gatley on Libel and Slander* (9th ed, 1998) says at para 12.7, "words which are clearly comment are likely to be treated with more caution by the reasonable reader and hence are less damaging than assertions of fact."
>
> [18] Presentation is crucial to whether a statement is or is not an expression of opinion …
>
> [19] The defence applies when the words appear to a reasonable reader to be conclusionary. The ultimate question, says Gatley at para 12.8, is how the words would strike the ordinary, reasonable reader …

[84] Mr Miles contended that such an approach was consistent with the Act itself in s 10(1) where it says:

> In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail …

[85] Mr Miles also undertook a detailed examination of *Radio 2UE* and *New South Wales Aboriginal Land Council* both of which he submitted provided substantial support for his position. He concluded:

> It is relatively obvious why this must be the case. It is the reader of the publication who must judge whether the matters complained about amount to fact or comment. How a lawyer subsequently crafts a meaning from the words complained about is another matter altogether. The reader of the publication will never have seen the meanings alleged by the solicitors. Furthermore it cannot be right that a plaintiff, by judicious phrasing of the

> relevant meanings, should dictate whether a defendant is able to plead truth or honest opinion.

[86] Mr Miles noted that Venning J found such an approach to be consistent with the Court of Appeal's decision in *Mitchell v Sprott* when the Judge said at [68]:

> I do not read that passage of Blanchard J's judgment, particularly the last sentence, as suggesting that the jury ought to be directed to consider the imputations alleged by the plaintiff when considering the defence of honest opinion, but rather I see it as an observation by the Judge that in that particular case the actual words and the meanings could be regarded as an expression of the conclusion. Relevantly Blanchard J tied the observation to a reference to the facts appearing in the article.

Discussion

[87] This aspect of the appeal was said to raise the issue of whether the pleaded meaning, as opposed to the actual words used in the publication, can be opinion for the purposes of the defence of honest opinion. We are not persuaded that such a dichotomy of expression encapsulates the real issue. To a substantial degree it appears that on this point of appeal counsel have been talking past each other in their submissions.

[88] In light thereof, we concentrate on two matters under this head:

(a) Was Venning J correct in the way in which he ordered the statement of defence to be repleaded?

(b) Was he correct as to the way in which the jury would ultimately need to be directed on this point?

[89] In a defamation case, once a plaintiff has proved that the words used are capable of bearing the defamatory imputation complained of ("the imputation"), the defendant may, in its defence, prove either:

(a) the imputation as a statement of fact that is true or substantially true or that the publication as a whole is substantially true – see s 8(3)(a) and (b); or

(b) the imputation as an expression of honest opinion.

[90] Whether imputations are capable of being opinion is, in the first instance, for the Judge to decide. Where it is decided that the imputations are capable of amounting to expressions of opinion then the determination as to whether in the circumstances they were opinion is for the jury. The fundamental question which arises for the jury to determine is whether the imputations that they have found to exist were conveyed by the publication as expressions of opinion or as statements of fact.

[91] In determining this the jury needs to look at the publication as a whole and not just particular statements which might be categorised as statements of opinion looked at on their own. It is not correct to say that the jury is required, in deciding whether the defence of honest opinion applies, to look only at the literal meaning of words or to look at the meaning of the words devoid of the imputations which it is argued they convey or to consider the question of whether the imputations are conveyed as statements of honest opinion in a vacuum, devoid of the context in which they arise.

[92] In our view, this position was set out clearly in *Radio 2UE* where Clarke JA stated at 468:

> 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.

[93] This is also consistent with this Court's decision in *Mitchell v Sprott* – see in particular the passage quoted at [77] above.

[94] In the light of these principles the question is whether Venning J's suggested re-pleading was justified or appropriate. We are not persuaded that TVNZ's original pleading was wrong but, as the submissions on this issue have so clearly

demonstrated, we do accept that it has the potential to be ambiguous. The Judge's proposal was, in our view, intended to try and remove that possibility.

[95] The pleading as it exists could imply that the jury was to look only at the pleaded form of the imputation to decide whether it was an expression of opinion and that is not the position – see Clarke JA's comments in *Radio 2UE* at 469:

> 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 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.

[96] The fact that two such experienced defamation lawyers as Messrs Miles and Akel dispute the effect of Venning J's repleading may be an indication that even now the pleading is not clear. The change proposed by Venning J might be read as suggesting that the jury looks only at particular statements in the publication rather than how the imputations were conveyed by the publication and that it does so without considering the context of the publication as a whole. A better re-pleading may be:

> If the broadcasts have any of the meanings alleged by para 13 of the second amended statement of claim (which is denied) such meaning or meanings were conveyed by the publication as expressions of opinion.

[97] We do not, however, consider that any re-pleading is necessary as long as proper directions are given to the jury. In this regard we consider that Venning J's suggested direction to the jury, (set out at [73] above), is an appropriate direction which encapsulates the jury's task as we have described it at [90] - [92] above.

[98] Before leaving this part of our judgment, we mention two matters. First, the current pleadings would be appropriate if TVNZ intends to plead honest opinion with respect to whichever of the imputations the jury finds proved. If, however, TVNZ considers that only some of the imputations can be defended on the basis of

honest opinion, TVNZ must specify in respect of which meanings they will be running the honest opinion defence.

[99] Secondly, TVNZ needs to give consideration to s 10(2) of the Defamation Act. That may well give rise to a need for particulars as to whose opinion was being expressed and as to the status of that person.

Specific pleading points

[100] We respectfully disagree with Venning J's decision on the final issue on this appeal but, given the way the matter was presented to Venning J, we can well understand why he fell into error.

[101] TVNZ, when pleading honest opinion with respect to each cause of action, adopted a common pattern of pleading. We shall take TVNZ's pleading with respect to the first cause of action as an example. First, TVNZ pleaded the facts and circumstances on which it relied, as required by s 38 of the Defamation Act. It then went on, in paragraph 78, to categorise which statements in the first broadcast were expressions of opinion. That was a most unusual pleading, which is not emulated, so far as we are aware, in any other case or in any defamation text. (For example, it is clear from this Court's decision in *Mitchell v Sprott* ([11]-[14]) that Mr Miles' statement of defence in that case did not attempt to particularise which parts of the article sued on were "expressions of opinion".) TVNZ having adopted this unusual pleading practice, Mr Miles applied to have some of the pleaded statements in the broadcast, said to be expressions of opinion by TVNZ, struck out on the basis that they were statements of facts.

[102] On the first cause of action, 17 statements were particularised from the first broadcast. Venning J was apparently persuaded to go through the particularised phrases, one by one, categorising each as a statement of opinion or a statement of fact. Although Venning J did not expressly so state, the clear implication from his judgment was that, when the amended statement of defence he ordered to be filed was filed, it had to omit from the list of particulars any statements which he had found to be statements of fact.

[103] On appeal, TVNZ sought to challenge six of Venning J's categorisations. These were six passages which Venning J had held to be statements of fact, not expressions of opinion. Mr Miles supported Venning J's categorisations.

[104] We consider this approach to be misconceived. We have set out our view as to the correct approach to a defence of honest opinion in the preceding section of this judgment. As necessarily follows from our conclusions on that point, the approach adopted of isolating particular phrases or clauses and considering whether those taken in isolation are expressions of opinion, is flawed. It is not necessary for the jury – still less the judge, who is not the trier of fact – to isolate which passages in the broadcast are expressions of opinion and which are statements of fact. The jury is entitled to look at the entire broadcast in determining whether imputations which it has found to exist were conveyed by the publication as expressions of opinion.

[105] What was the jury to do with TVNZ's list, whether as originally pleaded or as amended by Venning J? Was the jury to be directed that they must first categorise each of the pleaded particulars as a statement of fact or a statement of opinion? Of course not. Was the jury to be directed that they could take into account only those statements which they had found to be statements of opinion? Of course not. That simply shows the error in the existing pleading and, with respect, the error in counsel's approach to this list of unnecessary particulars.

[106] To make our position clear, we take an example from this case. If the jury finds that the first broadcast did mean that "the plaintiffs rip off their customers" (the first pleaded meaning) and if the jury find that meaning defamatory of the plaintiffs or some of them, the jury will have to consider honest opinion. In doing that, they will look at the entire broadcast in deciding whether that imputation was expressed as a statement of fact or as an opinion. No doubt, as a matter of practice, they will concentrate upon those parts of the broadcast which have led them to conclude that TVNZ did say that "the plaintiffs rip off their customers". But the jury is fully entitled to look at the broadcast as a whole when determining how that statement is to be categorised.

[107] We therefore refrain from undertaking the exercise requested by TVNZ on the six phrases in contention. In any amended pleading TVNZ should not particularise the passages in the broadcast as "expressions of opinion". The current pleading is misleading and unhelpful in that regard and it led to an erroneous exercise on the part of Venning J. This means that para 78 should be deleted entirely from the statement of defence to the second amended statement of claim.

Conclusion

[108] Because of our concern as to the way in which both the original application and this appeal have developed, we are persuaded that there must be a new consideration of some issues. Accordingly:

(a) The appeal is allowed in part.

(b) The formal answers to the preliminary questions given in the High Court as recorded in the judgment sealed on 25 March 2004 are set aside on the basis that the questions were inappropriately framed, particularly in light of the submissions advanced in this Court.

(c) An order is made that, within 15 working days of this judgment, the appellant shall file and serve an amended statement of defence:

(i) which omits, as part of any defence of truth, different meanings from those advanced by the respondents;

(ii) which does not attempt to particularise individual statements in the publications as expressions of opinion.

[109] As Haines has succeeded in part in this appeal and major problems have been identified in TVNZ's pleading, an award of costs in Haines' favour, but at a reduced rate, is in our view appropriate. We therefore order the appellant to pay costs to the respondents only in the sum of $4,000, plus usual disbursements. We certify for second counsel.

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