**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2002-404-002102**
**CP 89-SD02**

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| BETWEEN | RODNEY DAVID HAINES<br>First Plaintiff |
| AND | HHR (NTH) LIMITED<br>Second Plaintiff |
| AND | HAINES HOUSE REMOVALS LIMITED<br>Third Plaintiff |
| AND | MFM CONTRACTING LIMITED<br>Fourth Plaintiff |
| AND | HAINES HOUSE HAULAGE COMPANY LIMITED<br>Fifth Plaintiff |
| AND | HHH (NTH) LIMITED<br>Sixth Plaintiff |
| AND | TELEVISION NEW ZEALAND LIMITED<br>Defendant |

Hearing: 3 March 2006

Appearances: Mr B O'Callahan & Ms D C E Smith for Plaintiffs
Mr W Akel & Ms H Wild for Defendant

Judgment: 5 April 2006

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## JUDGMENT OF VENNING J

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## Introduction

[1] Two interlocutory applications were argued. First, the plaintiffs' application for an order the proceeding be tried before a judge and second, the defendant's application to strike out the s 39 notice issued by the plaintiff.

[2] The background facts are well known to the parties. They have also been referred to in previous interlocutory decisions on this file. It is unnecessary to repeat them in this decision.

## Trial by jury

[3] The defendant has given notice that it requires the trial to be before a jury. The plaintiff has applied pursuant to s 19A(5) of the Judicature Act 1908 for an order that the trial be before a judge alone.

[4] Subsection 19A(5) reads:

> (5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any [civil proceedings] to be tried before a jury, if it appears to a Judge before the trial—
>
> > (a) That the trial of the [civil proceedings] or any issue therein will involve mainly the consideration of difficult questions of law; or
> >
> > (b) That the trial of the [civil proceedings] or any issue therein will require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation which cannot conveniently be made with a jury,—
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> the Judge may, on the application of either party, order that the [civil proceedings] or issue be tried before a Judge without a jury.

[5] The onus is on the applicant, in this case the plaintiff to satisfy the Court that at least one of the factors referred to in s 19A(5)(a) or (b) is made out: *M v L* [1998] 3 NZLR 104, 116; *News Media (Auckland) Limited v Young* [1989] 2 NZLR 173

(CA). If the plaintiff establishes that either s 19A(5)(a) or (b) applies the threshold is established and it is then for the Court, in the circumstances of the particular case, to determine whether a direction should be made the trial be before a judge alone or with a jury.

**The plaintiffs' submissions**

[6] Mr O'Callahan submitted that there were difficult questions of law in the present case that merged with questions of fact so that the task would be too complicated for a jury. He submitted that it would not be possible to satisfactorily isolate the questions of fact for submission to the jury. He identified the difficult questions of law as:

- whether the plaintiff or the Pearces were in breach of the house contract?
- whether the Pearces were in breach of the land contract?
- whether the plaintiff was entitled to attempt to take possession of the house and, if not, as a matter of law was the plaintiff's conduct nevertheless reasonable?

[7] Alternatively Mr O'Callahan submitted that the issues in the case would require prolonged examination of documents and investigations into questions of technical and business matters namely:

- the plaintiffs' workmanship; and
- the assessment of damages.

[8] Mr O'Callahan then submitted that, in addition to the above factors, the Court should direct trial by judge alone because;

- the complexity of the case and the issues involved would make it difficult to properly instruct a jury;

- the nature of the case meant there was a greater risk of a wrong outcome;
- the trial would be more complicated and longer before a jury;
- there were no important principles relevant to public interest in this case;
- it was relevant the plaintiffs did not seek a trial before a jury: *TVNZ v Prebble* [1993] 3 NZLR 513 (CA).

**TVNZ's submissions**

[9] Mr Akel submitted that neither the trial nor any issue therein would involve consideration of difficult questions of law. He emphasised the case is a claim in defamation, not for breach of contract. Mr Akel submitted that it was the conduct of the plaintiff in its dealings with Mr and Mrs Pearce that was in issue rather than the strict contractual position.

[10] Mr Akel then submitted that the trial would not require examination of difficult questions involving technical or business matters. He submitted that any examination or investigation of the issues of workmanship or damages that may be required would not need to be prolonged. While he accepted there would be a need to consider accounts in relation to quantum he suggested that if necessary, the defendant had no objection to the question of quantum being determined by a judge alone: *Phillips v Metropolitan Police Commissioner* [2003] EWCA CIV382 at para [17]; see also *Gatley on Libel and Slander* ($10^{th}$ ed 2004) para 31.66.

[11] In the event the Court found jurisdiction existed under either s 19A(5)(a) or (b), then Mr Akel submitted that the trial should still be left with a jury because the right to a jury trial was particularly important in defamation cases to enable the jury to represent the relevant standard of the ordinary reasonable viewer. He submitted the respective functions of judge and jury in defamation trials were distinct and historically entrenched. He noted that defamation cases are commonly tried before a jury.

[12] Finally, he submitted that on balance the exercise favoured a jury trial at least on the issue of liability. He sought to distinguish *Prebble v Television New Zealand Limited* on the ground that it was of a highly unusual and perhaps unique defamation proceeding.

**Discussion – threshold**

[13] In my judgment the plaintiffs establish the threshold requirement under both s 19A(5)(a) and also subs (b).

[14] Mr Akel is quite correct to make the point that the case is a defamation proceeding and will raise a number of issues that commonly arise in defamation proceedings. Also, as he submitted, defamation trials are commonly tried before a jury: *Gatley on Libel and Slander* (10th ed 2004) para 34.1:

> The rule generally applicable is well known: that whether there is any, or any sufficient, evidence of a fact in issue for the jury's consideration is a question of law upon which the judge will rule, and, if there is, whether that fact has been established by the evidence, is a matter for the jury.

See also s 36 of the Defamation Act.

[15] However, it is the defendant's response to the defamatory meanings pleaded that raise issues of law that merge with the fact issues for the jury in this case. The defamatory meanings pleaded by the plaintiff are that the defendant's broadcasts suggested:

- the plaintiffs rip off their customers;
- the plaintiffs are dishonest;
- the plaintiffs operate in a thuggish or intimidatory manner;
- the plaintiffs are not to be trusted; and

- the plaintiffs were unprofessional, incompetent or incapable of performing their work in a workmanlike manner.

[16] In relation to several of these allegations the defendant raises the defence of truth. The defence is set out starting at para 73 of the amended statement of defence. It runs for some 15 pages between pages 8 and 23 of the amended statement of defence. In the course of the pleading the defendant refers inter alia to the contract for the relocation of the house between the plaintiffs and the Pearces, the separate land agreement between the same parties and the respective negotiations and correspondence regarding those agreements, together with the steps taken by the plaintiffs and its agents in relation to their rights and obligations under the agreement.

[17] A principal complaint of the plaintiff is that it is portrayed as thuggish in that it resorted to standover tactics when it proposed to retake possession of the house. The house contract contained a clause, clause 24, entitling the plaintiff to retake possession of the house and to enter the Pearce's land in certain circumstances. An important issue arising will be whether the plaintiff was entitled to act in the way it did as a matter of law, or at a lesser level, whether the plaintiff could reasonably have believed it was entitled to act in that way. That will require determination of the issue whether the plaintiff was in breach of the house contract and/or whether the Pearces were in breach of the house and related land contract.

[18] Those issues will also require consideration of the effect of the pre-contractual representations in relation to both contracts but primarily the relocation contract, (if established as a matter of fact) which will be a question of law. The issue whether the plaintiffs were entitled to take steps to repossess the house is dependent upon a finding as to the legal position under the contract. If the plaintiff was entitled to repossess the house as a matter of law, or reasonably thought it was entitled to do so, that may have a significant impact on the pleading that the defendant's programmes presented the plaintiff as thuggish and intimidatory, and the defence to those allegations.

[19] The defendant itself put those matters in issue by its pleading of the defence of truth. For example the defendant refers to clause 24 of the house agreement and the plaintiff's assertion of its rights under it at para 74.55, before relating the steps taken by the plaintiff which leads to the defendant's pleading:

> Following this incident the Pearces felt threatened, vulnerable, scared and frightened that they would lose their home and have no where to go with a young family. They believed that they would be subject to further threats and intimidation. …

In the words of the Court of Appeal in *Guardian Assurance Co Limited v Lidgard* [1961] NZLR 860 this is a case where either:

> … matters of law and matters of fact so merge into one another that the task of the jury becomes complicated in the application to the facts of questions of law which it is difficult for the Judge to explain in language they could be expected to appreciate and apply.

or:

> … the Judge will be called upon to give consideration to difficult questions of law and where it is not possible to isolate satisfactorily questions of fact for submission to the jury.
>
> (p 864)

[20] While the issue of the rights arising out of the house and land contracts are themselves not particularly difficult, it is their impact on the trial that is important. As the Court observed in *South British Insurance Company Limited v Braithwaite* [1970] NZLR 93:

> As Cleary J. pointed out in Lidgard's case, the words "difficult questions of law" … do not mean that the questions must be subtle or profound questions of law. What the section is talking about is mode of trial. What is urged here is the difficulty of the formulation to a jury of the questions; the difficulty of the application of that formulation to facts; and the difficulty which faces the jury of giving a satisfactory answer in sufficient detail. These are the kind of difficulties which the section contemplates, …
>
> (per Turner J at p 97)

[21] In summary, while I generally acknowledge Mr Akel's point that these are defamation proceedings one of the principal matters in issue and the way the decider of fact might approach that issue will be significantly affected by the respective rights of the plaintiff and the Pearces under the house and land contracts. Those

contracts raise issues of law which, while not part of the causes of action in the proceeding, are nevertheless issues within the proceeding generally for the purposes of s 19A(5)(a). They arise from the pleading and would require a series of directions to the jury to enable the Court to rule on the issue of law.

[22] The plaintiff relies on two matters in relation to the second limb of s 19A(5). First Mr O'Callahan suggested examination of the consultants' reports would be difficult for the jury. I do not consider that the issue of the expert building evidence would itself be sufficient to satisfy the test under s 19A(5)(b). But I do accept that this case will involve a prolonged examination of accounts and a detailed investigation in relation to the business of the plaintiff when the plaintiffs seek to prove their claim for damages. That will be an exercise that could not conveniently be carried out with the jury. On that basis the plaintiff satisfies the Court that s 19A(5)(b) applies also.

[23] For the reasons given, I accept the plaintiff has satisfied the threshold test in s 19A (5).

**Exercise of the discretion**

[24] On the issue of the exercise of the discretion, both counsel referred to the decision of *McInroe v Leeks* [2000] 2 NZLR 721 at p 728 where Henry J delivering the judgment of the Court of Appeal stated at para 21:

> … At issue is a balancing exercise, under which if the threshold requirements are made out the Court must give careful consideration to how best the trial process and its management can meet the overall justice of the case, placing due weight on the entitlement of a party to seek trial by jury. The significance of the jury influence on standards of behaviour, and of vindicating in an appropriate way those who have been wronged and also vindicating those who have been wrongly charged with infringing another's rights, must be kept firmly in mind.

[25] As noted earlier I accept the force of Mr Akel's submissions that generally defamation trials are heard before a jury and that a jury performs an important role in defamation litigation. However, the right to a jury trial in a defamation case, particularly by a defendant, is not absolute.

[26] In *Television New Zealand Limited v Prebble* (supra) the Court of Appeal directed a trial by judge alone against the wish of the defendant Television New Zealand Limited in that case. While I accept Mr Akel's submission that there are some distinct and unique features in the Prebble case itself, during the course of his judgment on this point in *Prebble*, McKay J referred to two English decisions of interest; *Williams v Beesley* [1973] 1 WLR 1295 and *Rothermere v Times Newspapers Ltd* [1973] 1 WLR 448. In *Williams v Beesley* Lord Diplock, delivering the leading judgment in the House of Lords, observed at pp 1298-1299:

> As respects issues of integrity and honour, these may be a weighty consideration in ordering trial by jury at the instance of the party whose integrity or honour is impugned; but it is not a sufficient ground for ordering trial by jury against his wishes at the instance of the other party.

[27] In this case it is the integrity and reputation of the plaintiff that is alleged to have been impugned by the broadcast by TVNZ. I can not accept Mr Akel's submission that the integrity of the defendant is called into question or at least not any more than any media defendant to a claim in defamation could say its integrity was challenged by the issue of proceedings. Such challenge to the defendant's actions does not itself support a jury trial against the wishes of the plaintiff.

[28] In *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, another case where the plaintiffs sought trial by a judge alone, Lord Denning MR delivering the leading judgment said at p 1017:

> Looking back on our history, I hold that, if a newspaper has criticised in its columns the great and the powerful on a matter of large public interest – and is then charged with libel – then its guilt or innocence should be tried with a jury, if the newspaper asks for it, even though it requires the prolonged examination of documents.

[29] On the facts of the present case, that statement does not hold the force which it may otherwise have. The plaintiffs in this case could hardly be described as great and powerful or for that matter to be a party with a large public profile. I consider it apparent from the *Rothermere* decision that Lord Denning was referring to persons holding public office or otherwise with a significant public reputation attaching to them. In such a case the public at large have an interest in the parties to the case. That is not the position in the present case. Nor for that matter is the matter at issue

a matter of large public interest. Were it not for the defendant's broadcasts the underlying matter would have been left as a dispute between parties to private commercial contracts.

[30] When the above principles are considered together with the difficulty of formulating the questions the jury would be required to answer, (which of necessity would branch into a series of sub-questions and even sub-sub-questions), this is a case where it is appropriate to direct trial by judge alone.

[31] Mr Akel effectively accepted that the trial could be split as between liability and the quantum. In my view it would be undesirable to split the case in that way and particularly when the sole reason for splitting it that way would be to retain the involvement of the jury at the first stage of the process.

**Result**

[32] The plaintiffs' application for trial by judge alone is granted.

**The s 39 notice**

[33] The remaining application before the Court is the defendant's application for an order striking out the plaintiff's notice under s 39 of the Defamation Act 1992.

[34] This particular issue has a somewhat convoluted history. The procedural background is relevant. For present purposes it can be summarised as follows from the chronology prepared by counsel:

- 1 May 2002 — First statement of defence filed and served
- 3 July 2003 — Statement of defence to second amended statement of claim filed and served
- 29 July 2003 — Section 39 notice served
- 6 July 2004 — Plaintiff's application for an order granting leave to file a s 39 notice out of time filed and served

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| • | 4 October 2005 | Amended statement of defence filed and served |
| • | 19 October 2005 | Second s 39 notice served |
| • | 9 December 2005 | Third s 39 notice served |
| • | 21 December 2005 | Defendant's application for order striking out plaintiff's notice under s 39 dated 19 October 2005 filed. |

[35] The plaintiff's position on the s 39 notice has changed from time to time. At one stage the plaintiff considered that fresh s 39 notices could be filed after each amended defence pleading so that there was no need to pursue the application for leave in relation to the first notice. In response the defendant sought to strike out the third s 39 notice. However by the time of the hearing Mr O'Callahan accepted that the time for filing the s 39 notice ran from the time the defence was first raised in the pleading. On that basis he accepted leave was required. He sought to pursue the application filed in July 2004. Mr Akel submitted that the plaintiff had effectively abandoned the earlier application for leave and it was not open to the plaintiff to renew the application for leave at this late stage.

[36] The procedural position in relation to the s 39 notice is this. Notices pursuant to s 39 of the Defamation Act are replies to the defence of honest opinion. As such they are pleadings: r 3 High Court Rules. As pleadings they can be amended from time to time. However, s 39 (3) requires that the first notice be served within 10 working days after the defendant's statement of defence raising the issue of honest opinion is served on the plaintiff.

[37] Section 39 provides that the notice is required when:

a) the defendant relies on the defence of honest opinion; and

b) the plaintiff intends to allege that:

i) where the opinion is that of the defendant it was not the genuine opinion of the defendant; or

ii) where the opinion is that of a person other than the defendant the defendant had reasonable cause to believe it was not the genuine opinion of that person.

[38] It follows that to issue the notice the plaintiff must be aware from the defendant's pleading whether the defendant says that the opinion is that of the defendant or of a person other than the defendant. Often that will be obvious from the context and circumstances of the case. In other cases it may be necessary for the defendant to clarify that point in its pleading before the defence can be replied to.

[39] In the present case there was no express reference to this point in the original statement of defence. It was however expressly clarified by the defendant in the second statement of defence. Presumably the defendant amended its pleading to clarify that because it considered it necessary to do so. On that basis I accept that the time for the s 39 notice to be filed was 10 working days after the statement of defence to the second amended statement of claim was filed, which was on 3 July 2003. In the result the notice was served on 29 July 2003. It was seven working days out of time.

[40] The application for leave was not made until almost a year later on 6 July 2004. I have noted Mr Akel's submission that the plaintiff has abandoned that application for leave and should not now be permitted to renew it. However, it does not appear the application has been formally dismissed by the Court. Both parties have, to a degree, contributed to the procedural morass in relation to the s 39 notice. I propose to deal with the matter on the basis that the plaintiff's application for leave is still before the Court. I will then consider the defendant's application to strike out the reply as a separate issue.

## Principles

### *Application for leave*

[41] The parties are agreed on the principles that apply to an application for leave to file a s 39 notice out of time. The relevant considerations are:

a) whether the plaintiff has been guilty of inordinate delay;

b) whether the delay is excusable;

c) whether serious prejudice has resulted to the defendant; and

d) the adequacy of the particulars in issue:

*Gillespie v McKay* (1999) 13 PRNZ 90.

*Has the plaintiff been guilty of inordinate delay in seeking leave?*

[42] While the notice itself was only seven working days out of time, the application for leave to file the notice out of time was not filed until 6 July 2004, nearly a year later. On any view of it, such a lengthy delay is inordinate, given that the notice is to be filed within 10 working days.

*Is the delay inexcusable?*

[43] The plaintiff says the notice was not filed within time due to oversight. The difficulty for the plaintiff however, is not so much in the delay in filing the notice, but in the delay before filing the application for leave and the lack of a valid excuse for most of that period.

[44] After the notice was issued on 29 July 2003 the plaintiff sought the defendant's consent to the notice being filed out of time. Consent was sought on 8 August 2003. In Mr O'Callahan's submissions he noted:

> Over time it became apparent that the parties could not agree and so the plaintiff filed an application for leave on 6 July 2004.

[45] It may have been excusable to seek to avoid the unnecessary cost of a formal application by raising the matter with the defendant's counsel and allowing the defendant a reasonable time to respond. However, failing a satisfactory response by the end of August or early September 2003 the application for leave ought to have

been brought very shortly thereafter. The delay from early September 2003 until 6 July 2004, a delay of some 10 months, is inexcusable without the need to refer to the subsequent delays.

*Is the defendant prejudiced?*

[46] Mr Akel submitted the inherent prejudice was that until the defendant received adequate particulars pursuant to s 39 it could not assess:

- the extent of prejudice itself;

- the overall merits and risks of the proceeding.

He made the point that the defendant is now in a position where in 2006 it must reassess the nature and extent of the evidence it would need to produce in respect to events that occurred in 2000.

[47] To the extent that there has been a delay in the progress of this proceeding, however, both parties must accept some responsibility for that. The relevant pleading is the amended statement of defence filed in July 2003. Since then the proceeding has been subject to a number of interlocutory applications, the decision on one of which has been taken to the Court of Appeal. During that process the application for leave has been put to one side.

[48] The overriding factor in cases such as this must always be whether the refusal to grant leave could potentially cause a miscarriage of justice: *Lovie v Medical Assurance Society NZ Limited* [1992] 2 NZLR 244; *Gillespie v McKay;* (supra).

[49] On this issue of overall justice of the matter (also relevant to prejudice) it can be helpful to consider the adequacy of the particulars. As Ronald Young J observed in *Newlands v Parlane* (High Court, Hamilton, CIV 2005-419-000941, 25 November 2005):

> If the particulars were inadequate and failed to properly identify allegations of ill will and lack of genuine belief then that would almost certainly tip the

> balance against giving leave to file. Where the particulars are so clearly inadequate that they fail to identify the particulars of ill will or lack of genuine belief then there would hardly be a point in giving leave in such circumstances …
>
> If there is little or nothing in the particulars then in combination with the inordinate and inexcusable delay there would be little point in allowing the plaintiff to proceed with its allegations of ill will and/or lack of genuine opinion. It would be unfair to proceed on this basis given the prospects of success in raising these issues would be modest coupled with the inordinate and inexcusable delay in giving notice.

[50] Although, as Panckhurst J observed in *Cooper v Mountain Scene Limited & Ors* (High Court, Invercargill, CIV 2003-425-000527, 5 August 2004):

> … It is only in a clear case that it would be appropriate to analyse the content of the notice in depth and reach the conclusion that it was so deficient as to serve no useful purpose, such that the interests of justice did not require a grant of leave.

*The particulars*

[51] In relation to the application for leave to file the notice out of time, I would endorse the approach by Panckhurst J in *Cooper v Mountain Scene* namely that it is only in a clear case that it would be appropriate to analyse the content of the notice in depth and reach the conclusion that it was so deficient as to serve no useful purpose such that the interests of justice did not require a grant of leave.

[52] In the present case there are two aspects of the notice which in my view are so deficient as to serve no useful purpose. They are particulars (f) and (g). In particular (f) in the s 39 notice the plaintiff says:

> (f) TVNZ broadcast opinions from alleged experts, being Mr Bigwood, Mr Sapwell and Mr Ellis in order to influence the alleged experts into giving opinions that TVNZ knew or ought to have known were misleading.

[53] As Mr Akel submitted and Mr O'Callahan was forced to concede in the course of submission the wording of the particular is difficult. It is not apparent how it can be said that opinions were broadcast from experts in order to obtain opinions from the same experts. That particular adds nothing to the challenge to the honest opinion defence.

[54] The other particular which on the information available to the Court adds nothing to the honest opinion defence is the next particular:

> (g) In attempting to ambush Mr Haines by helicopter and/or charter boat whilst Mr Haines was at a big game fishing contest, TVNZ was intending to portray the plaintiffs in a misleading and unfavourable way.

[55] The method by which the defendant may have sought to contact Mr Haines for interview cannot sensibly be said to impact on whether the opinions expressed by TVNZ were the honest opinion of the defendant TVNZ or not. Mr Akel submitted and I understood the plaintiff did not take issue with the fact that TVNZ did not broadcast any footage of its attempts to contact Mr Haines. In the course of the broadcast it is recorded that Mr Haines declined several requests to be interviewed and then agreed to an interview on conditions that were unacceptable to TVNZ.

[56] Save for those rather obvious deficiencies in the notice the other matters raised by the defendant by way of criticism of the notice would not, on an application for leave, be sufficient for the Court to rule against the grant of leave absent any other prejudice to the defendant.

[57] The defendant is not able to point to any particular prejudice. The basis of the honest opinion alleged is the opinion either of TVNZ's broadcasters and journalists or that of Mr and Mrs Pearce and other experts. Mr and Mrs Pearce and those other experts should still be available to TVNZ. On the other hand, the plaintiff would be prejudiced if unable to reply to the defendant's defence of honest opinion by challenging its genuineness. As noted both parties have contributed to the delay in the resolution of this defamation case and determination of the application for leave. In the circumstances I consider that, despite the inordinate and inexcusable delay in bringing the application for leave, given the lack of real prejudice to the defendant, it would be in the interests of justice to permit the notice to be filed out of time. I would grant leave accordingly.

**The defendant's application to strike out**

[58] That then leaves the defendant's application to strike out the third (amended) notice. Although that application was initially filed because it was understood the plaintiff had abandoned the application for leave, as the application is before the Court it should be dealt with. It is an application to strike out a pleading. On that basis the principles in *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262; *Attorney-General v McVeagh* [1995] 1 NZLR 558 apply, namely that the strike out jurisdiction is to be exercised sparingly and only in clear cases where the pleading is not capable of amendment. However, as noted in the decision of this Court in *Hubbard v Fourth Estate Holdings Limited* the general principle that strike out is to be exercised sparingly is more directly relevant where the matter at issue is the strike out of an entire proceeding rather than where the application is limited to aspects of the pleading, particularly where there may be an opportunity to replead.

[59] The defendant seeks to strike out the particulars as inadequate on the grounds:

- the particulars have little if any prospect of being capable of supporting an allegation that:

  a) where the opinion is that of TVNZ the opinion was not the genuine opinion of TVNZ; and

  b) where the opinion is that of a person other than TVNZ (the Pearces) TVNZ had reasonable cause to believe that the opinion was not their genuine opinion.

- The particulars, taken both together and in isolation, do not detract from the genuineness of the opinions that were expressed or TVNZ's reasonable cause to believe them.

[60] The use of the words "little if any prospect" on a strike out application is unusual. Even if there is little prospect of the pleading succeeding that is generally

sufficient for the pleading to survive a strike out application. Further, the second ground advanced is also a matter normally considered at trial.

[61] In support of the application, Mr Akel made a number of general submissions. First, he submitted that the test for whether the opinion was the genuine opinion or not was the honesty of the opinion not its reasonableness nor even the motivation of the person holding the opinion; citing *Mitchell v Sprott* [2002] 1 NZLR 766 per Blanchard J at 773:

> It is not necessary, … to show that the opinion was sound or even one which a reasonable person would hold. The test is the honesty of the opinion, not its reasonableness. A fair–minded person has been said to include even someone whose (honestly held) view may be prejudiced or obstinate.

[62] He then noted that the fact the jury or judge may personally disagree is irrelevant: *Awa v Independent News Auckland Limited* [1997] 3 NZLR 590 at 596 per Blanchard J:

> … provided that comment is factually based and expresses a genuinely-held opinion rather than being mere invective, it will be protected in a defamation action by the fair comment or honest opinion defence.

[63] Mr Akel also submitted that s 11 of the Defamation Act itself allowed some latitude to a defendant pleading honest opinion in that it was not necessary to prove the truth of every statement of fact.

[64] Mr Akel submitted that in essence, the story at the heart of the broadcast was a family expressing their feelings about their experiences and how they had been treated and building experts expressing their opinions on the state of the roof. He submitted that none of the particulars referred to by the plaintiffs in support of the notice detracted from the genuineness of the opinions expressed or suggested that TVNZ did not have reasonable cause to believe them.

[65] In response, Mr O'Callaghan submitted that the challenge to the defence was directed at the genuineness of the opinion, as opposed to its reasonableness.

[66] The plaintiff says that the opinion could not be the honest expression of opinion of TVNZ when it was expressed without knowledge of certain facts later relied on to support the expression of opinion as in para (a) of the notice.

[67] Next, in the case of the opinion of the Pearces the plaintiff says that TVNZ had reasonable cause to believe the opinion expressed was not the genuine opinion of the Pearces because certain facts relied on to support the honest opinion were not true, (and TVNZ did or should have known that), and that TVNZ was aware of further facts which it failed to advise its viewers about (or give sufficient prominence to).

[68] If those general allegations are correct, then they could affect the honesty of the opinion of the defendant. As was observed by Blanchard J in the *Awa v Independent News Auckland Ltd* case, the opinion must be factually based as well as expressing a genuine opinion. Mr Akel suggested that if the facts were not known at the time the broadcast, which was denied by the defendant, then there may be an argument the defendant could not rely on them to set up the defence but it did not go to the question of whether the opinion was genuine or not. But conceptually, if the defendant did not know of the facts and circumstances it pleads in reliance on the defence of honest opinion at the time it made the broadcasts, then that could affect the genuineness of the opinion. Whether the defendant knew of the facts at the time or whether there may be other facts the defendant could rely on to support the opinion as submitted by Mr Akel are, in my view, matters for trial.

[69] In relation to the particulars at para (b), Mr Akel submitted that as the defence of honest opinion does not necessarily fail because a defendant does not prove the truth of all or any of the statements referred to and there were sufficient additional facts and circumstances relied on by the defendant to support the opinion as genuine then none of the particulars referred to by the plaintiffs detracted from the genuineness of the opinions expressed or the reasonableness of the defendant's cause to believe they were genuine. He also submitted the plaintiffs failed to provide particulars of how it was said the defendant should have known the facts referred to were untrue making it impossible to assess the reasonableness of its belief. In response the plaintiff's case is that in relation to the particulars pleaded at (b) the

defendant had reasonable cause to believe the opinion expressed by the Pearces was not their genuine opinion in relation to the matters set out. Again that is a factual matter that must be determined at trial. Whether there are sufficient additional facts and circumstances to support the opinion as genuine must properly be a matter for the hearing.

[70] As to the pleading at (c), (d) and (e) of the notice, if the defendant was aware of further materials which it failed to advise its viewers, then as the Court of Appeal noted in *Mitchell v Sprott* (supra):

> To state or indicate only part of the facts, omitting something which is highly relevant and which would change the complexion of what has been stated, may be misleading and may lead to the conclusion that the opinion is not based upon true facts. …

[71] For present purposes I accept that the matters raised at para (c), (d) and (e) if made out could support the plaintiff's allegation that the defendant should have known the opinion was not the genuine opinion of the Pearces given the further facts referred to.

[72] Matters (f) and (g) have been disposed of above.

[73] The last matter pleaded is at (h) that:

> At all material times the defendant was motivated to pursue the story and to cast the plaintiff's in a misleading and unfavourable light in order to increase its viewers or to increase its ratings.

[74] Mr Akel submitted that the alleged motivation was not relevant to the question of genuineness of belief. However, the intention or motivation of the defendant in pursuing the story may in certain circumstances, support an inference that the opinions were not genuinely held. As a pleading it is sufficient.

[75] The application to strike out the notice is dismissed save that the plaintiff no longer relies on the reference to 74.19 in para (a) and paras (f) and (g) are struck out.

**Costs**

[76] The plaintiffs have largely succeeded on both applications. They have however received an indulgence from the Court by being granted leave to file the notice under s 39 out of time. There will be no costs on that application. The plaintiffs will, however, have costs on the application in relation to the jury trial issue on a 3B basis together with disbursements.

**Fixture**

[77] As advised to counsel the trial of this matter could be heard commencing on 30 October 2006.

**Review**

[78] The file will be reviewed at a telephone conference before me on Monday 8 May 2006 at 9.00 a.m.

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Venning J