IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2005-441-739

	BETWEEN	BRIAN MONTGOMERY SALMON Plaintiff
	AND	LYNETTE ANNE MCKINNON Defendant

Hearing: 28-29 June 2006

Appearances: J G Miles QC and D H McLellan for plaintiff
M E J Macfarlane for defendant

Judgment: 26 October 2006

JUDGMENT OF ALLAN J

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 2.30 pm on Thursday 26 October 2006.

Solicitors:
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[1] $2 Shops are an established feature of the New Zealand retailing scene. There are 34 such shops, spread throughout the country, and located in high pedestrian traffic areas in cities and towns. They sell low cost general merchandise. The $2 Shop network is a franchised operation. The franchisor is The $2 Shop Limited (The $2 Shop). The sole director and shareholder of The $2 Shop is the plaintiff, Mr Salmon. The defendant, Ms McKinnon, is the director and shareholder of Two Bob Limited (Two Bob). That company was until recently the franchisee for the Hastings area, where it maintained shops in central Hastings and in Taradale.

[2] In August 2005, Ms McKinnon sent an e-mail to a number of other franchisees, in which she made some remarks about advertising. Mr Salmon believed those remarks to be defamatory of him. He sought an apology. Ms McKinnon did circulate a limited apology, but it was not in a form satisfactory to Mr Salmon. Subsequently he issued this proceeding, which invokes the provisions of s 24 of the Defamation Act 1992 (the Act).

[3] That section provides:

> **24 Declarations**
>
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—
>
> (a) The plaintiff seeks only a declaration and costs; and
>
> (b) The Court makes the declaration sought,—
>
> the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise.

[4] In terms of the section, Mr Salmon seeks a declaration that Ms McKinnon is liable to him in defamation, together with solicitor/client costs. He does not seek damages.

[5] Also before the Court is an interlocutory matter arising in this same proceeding. On 30 May 2006, Associate Judge Gendall delivered a reserved

judgment in which he directed Mr Salmon to give further discovery and to file and serve answers to certain interrogatories. Mr Salmon has complied with the terms of that order, but on 6 June 2006 he filed an application for review of the judgment of the learned Associate Judge. There was insufficient time for the review application to be dealt with by a Judge before the proceeding itself was heard. At the hearing, counsel were agreed that the application for review should simply be stood over for hearing at a later time. Given that Mr Salmon complied with the orders made by the Associate Judge, it appears that, for practical purposes, Mr Salmon stands to benefit from a successful review application only in respect of costs.

[6] It will be for counsel to raise with the Court, following delivery of this judgment, the question of the disposal of the review application. It is not otherwise necessary in this judgment to make any further reference to it.

Background

[7] Within The $2 Shop chain, franchisees are each parties to common form franchise agreements. Franchisees are independent operators, but they are subject to detailed contractual requirements and restrictions imposed by the terms of their franchise agreement with The $2 Shop.

[8] For the purposes of this proceeding, the focus is on those provisions in the franchise agreement which relate to advertising. Clause 2.6 of the agreement provides:

> **Advertising Levy**
>
> The franchisee shall pay to the franchisor an advertising levy as set out in paragraph 7 of the Schedule together with any taxes no later than Tuesday following the week ending Sunday for the term of the franchise including any renewal of term and upon the following basis:
>
> 2.6.1 The advertising levy paid by the franchisee to the franchisor shall be held by the franchisor in a separate bank account along with all other advertising levies received from other franchisees and the franchisor shall use such funds solely for the purpose of advertising as determined by the franchisor.
>
> 2.6.2 The amount of the advertising levy payable shall be reviewed by the franchisor every twelve (12) months and the franchisor shall have

> the right to increase the percentage of the advertising levy payable by the amount which the Consumer Price Index (All Groups) for New Zealand has increased during the previous twelve (12) month period.

[9] In Ms McKinnon's case the advertising levy was set at 4% plus GST of gross sales, payable weekly. In the 2004-2005 financial year, advertising levies received by The $2 Shop totalled a little more than $670,000.

[10] Clause 4 of the agreement (as relevant) provided:

> **Advertising**
>
> THE franchisor and the franchisee shall consult regularly on the question of advertising but the franchisor shall have the final approval as to what advertising will be done by the franchisor on behalf of the franchisee.

[11] In practice the franchisees took an intelligent and on-going interest in advertising matters. There is evidence that they consulted among themselves, with the staff of The $2 Shop and on occasion with Mr Salmon himself. In particular, there was an annual one-day conference in New Plymouth (where The $2 Shop was based), attended each year by four nominated franchisee representatives. The purpose of those meetings was to facilitate an exchange of views about advertising issues, including the effectiveness of past initiatives and the planning of future advertising campaigns. Membership of the franchisee representative group changed each year. Ms McKinnon was a participant at the first such conference.

[12] But the franchisees had no involvement in the financial management of the advertising fund itself. Mr Salmon gave evidence that following the 2001-02 financial year, in response to some franchisees' questions, he produced accounts detailing income and expenditure from the fund and sent them to franchisees. However, he received no reaction and was never asked to produce such accounts in subsequent years. The franchisees therefore had no knowledge of the administration of the advertising account in subsequent years. Nor, it appears, were they inclined to pursue that information.

[13] It is not in dispute that decisions about advertising expenditure rested solely with The $2 Shop in terms of clauses 2.6 and 4 of the agreement.

[14] On 19 May 2003, Mr Salmon wrote to franchisees in these terms:

> **Re: Promotions**
>
> This letter is to advise that The $2 Shop Limited has purchased a Lamborghini 2-seater motor car.
>
> Coloured gold, it will go well with our corporate blue and yellow and we have secured the personalised plate:
>
> THE
> 2DOLAR
> SHOP
>
> The photographs below show the unusual, eye-catching design of the vehicle.
>
> This vehicle will be available for some promotional purposes and should be a real crowd puller.
>
> The car will be used at the Franchising Exposition which is going to be held at Epsom Show Grounds on Friday 15th, Saturday 16th, Sunday 17th August 2003.
>
> Please contact Jo-Anne to co-ordinate your ideas.
>
> Yours sincerely,
>
> 'Brian Salmon'
>
> The $2 Shop Limited

[15] The letters, which appear to have been sent by post, incorporated two reproductions of coloured photographs of the Lamborghini motor car.

[16] At least in the initial stages, the car was used in the manner contemplated by Mr Salmon. Ms McKinnon said in evidence that the car had been used for promotional purposes in the Hawkes Bay region, and photographs were produced which confirmed that. On those occasions the vehicle had been driven by the then marketing/promotions manager of The $2 Shop, Ms Jo-Anne Callaghan, and by Ms Callaghan's father. Ms McKinnon was a passenger in the car when it was driven from Flaxmere to Taradale by Ms Callaghan. Ms McKinnon also said she had seen a Ms Lorraine Butler, a former franchise manager, driving the vehicle for promotional purposes. Ms McKinnon had never seen Mr Salmon in the car, or heard of him

driving it. She said further that when Mr Salmon visited her Hastings franchise, he always drove his Rolls Royce motor car.

[17] Mr Salmon agreed that he always drove his Rolls Royce to Hastings, but said he had driven the Lamborghini in the context of promotional activities. He gave examples of a trip to Porirua about a week after the car was purchased, another to Rotorua, and some limited promotional activities in Taupo.

[18] In February 2004 the insurance brokers for The $2 Shop advised that, in order to maintain the current insurance cover, only Mr Salmon could be permitted to drive the vehicle. That requirement was observed thereafter. Mr Salmon confirmed that he did not use the Lamborghini for private purposes, and he accepted Mr Macfarlane's proposition that, essentially, the Lamborghini was used for marketing or advertising purposes in the manner foreshadowed by Mr Salmon's letter of 19 May 2003. I draw the inference that the vehicle was little used after February 2004.

[19] Mr Salmon's letter produced a written response from Mr Robert Ferrari, the proprietor of the Invercargill franchise. Mr Ferrari gave evidence at the hearing. It seems that he did not receive his copy of the letter from Mr Salmon until 1 July 2003.

[20] On 4 July 2003 he sent by facsimile a letter to Mr Salmon in the following terms:

> Dear Brian
>
> I received your letter today 1 July 2003 re: Promotions. Firstly I've got to comment that you have purchased the wrong 'mark'. The Ferrari would in my opinion have been the better option than the 'poor man's' Ferrari purchased. But of course that's my choice of sports cars and probably biased as well.
>
> Jokes aside, and the serious nature of promotion of such motor vehicle could you advise some more information.
>
> Has the Lamborghini been purchased by the national advertising levies contributed by all the franchisees in the group and company stores?

> Or has the vehicle been purchased by yourself personally or your company for occasional use to be offered to The $2 Shop group by way of an advertising fee against the national advertising levies?
>
> As it is mentioned it's available for some promotional purposes.
>
> Brian/Jo-Anne it is a most prestigious promotional tool for sure. My concern is that there are a lot of costs involved with a high performance vehicle such as transportation, insurances, maintenance costs. However, my concern would be put to rest if you could provide the information above. There could be many ideas I could provide you on this as I've had this idea by way of a Ferrari sports car and what it could generate in publicity and promotion.
>
> Regards Robert

[21] That letter produced a prompt and somewhat terse reply from Mr Salmon, also dated 4 July 2003. It reads:

> Dear Robert,
>
> **Re: Promotions**
>
> In reply to your fax dated 4 July 2003 I advise:
>
> 1. My letter dated 19 May 2003 clearly states 'The $2 Shop Limited has purchased...'
>
> 2. None of your other suspicions are correct.
>
> 3. As your fax states you have many promotional ideas and it would be helpful if these could be co-ordinated with Jo-Anne.
>
> Yours sincerely
>
> 'Brian Salmon'

[22] There is no evidence of any other franchisee having raised, in 2003, any concern relating to the purchase of the Lamborghini.

[23] In August 2005 Ms McKinnon was engaged in a discussion between a number of franchisees and representatives of The $2 Shop. That discussion, which focused on marketing and advertising issues, was conducted, at least in part, by e-mail. On 24 August 2005, Ms McKinnon sent the e-mail which is the subject of Mr Salmon's claim in this proceeding. It reads:

> Hi everyone

> Before anything else is done I believe we should sell the Lamborghini that was purchased from the Advertising Fund. That product has done nothing to enhance the sales of any of our businesses and put the funds from it back into the Advertising Fund.
>
> I look forward to the opportunity to discuss on a group basis some of the issues with regard to turnover etc but I don't think any of us should diminish what Steve has done since he has been on board with the sourcing of great stock over recent months that has sold well in just about everyone's shop and the promotion of some fantastic lines like The $2 wool that you couldn't buy anywhere else for less than $2.95, disposable cameras and the soup to name but a few and the good feedback we got from customers about the 'guy doing the promotions on the Good Morning Show'.
>
> Cheers Lyn.

[24] Not all of the franchisees were recipients of the e-mail. Ms McKinnon says 15 actually received it. A further five were on Ms McKinnon's e-mail address directory, but the e-mail to them was undelivered because the relevant addresses were incorrect. Some 13 of the then current franchisees were not on her e-mail address directory and were not recipients.

[25] The e-mail was also sent to Mr Parkes. He had been the marketing manager of The $2 Shop and had been involved in the e-mail correspondence of which Ms McKinnon's e-mail message formed part. However, he was no longer employed by The $2 Shop when Ms McKinnon's e-mail was sent, and the e-mail was instead received by Ms Karyn Stowers, who was general manager of The $2 Shop between 4 April 2005 and 31 March 2006.

[26] Ms Stowers referred the e-mail to Mr Salmon, who immediately instructed his solicitors. They wrote to Ms McKinnon on 25 August 2005 asserting that:

> As you are aware, Brian Salmon has had his Lamborghini car for some time and your allegation that he purchased it from the Advertising Fund is both false and unsubstantiated.

claiming that:

> You have belittled and embarrassed our client in the most extreme way

and requiring Ms McKinnon to:

> … immediately retract your false allegation in writing and provide a written apology to Brian Salmon personally.

[27] There followed a somewhat acrimonious correspondence between the solicitors for the parties. Initially Ms McKinnon's solicitors, Sainsbury Logan & Williams, said:

> … we are struggling to see how it is that Mr Salmon as an individual could possibly have been defamed by the statement contained in Lyn McKinnon's e-mail.

[28] But by 29 August 2005 Ms McKinnon had accepted assurances from Mr Salmon's solicitors to the effect that the Lamborghini had been purchased from the separate funds of The $2 Shop and not from the advertising levy. In consequence, in a letter dated 29 August 2005, her solicitors wrote to Mr Salmon's solicitors as follows:

> 3. Accepting what is now reported that there was no connection between the advertising bank account at TSB and The $2 Shop Limit's account with Westpac, our client does retract her statement that the car was purchased from the Advertising Fund. She sincerely apologises for the inaccuracy in the statements she made.

[29] That apology was not accepted by Mr Salmon's solicitors. They required Ms McKinnon to sign a separate Form of Apology in the following terms:

> 29 August 2005
>
> **FORM OF APOLOGY**
>
> To; All $2 Shop Franchisees
>
> On Wednesday 24 August 2005 I sent you an e-mail with the subject being: re: Good Morning Show. Paragraph 1 of that e-mail contained an unequivocal statement by me that the Lamborghini which The $2 Shop Limited owns was purchased from the Advertising Fund.
>
> It has now been conclusively shown to me by Brian Salmon's lawyer who also acts for the $2 Shop Limited that the statement which I made was erroneous and it also cast a dispersion (sic) upon Brian Salmon that the Lamborghini had been purchased from the Advertising Fund.
>
> I unreservedly apologise to Brian Salmon in relation to the inaccuracy of my statement which I made in my e-mail dated 25 August and I retract my statement that the car was purchased from the Advertising Fund. It was not.
>
> Yours sincerely

Lyn McKinnon

Both personally and on behalf of The Two Bob Trust

[30] In argument, Mr Miles described the draft form of apology as "standard".

[31] With the benefit of further legal advice, Ms McKinnon took the view that although she had been in error in her assumption that the Lamborghini was paid for from the advertising fund, the e-mail was not aimed at Mr Salmon and he had not been defamed.

[32] On 5 September 2005, Ms McKinnon took matters into her own hands. She sent a further e-mail to the recipients of the e-mail of 24 August, restating the terms of the first communication, advising that she had retracted her statement that the Lamborghini was paid for from the advertising fund, and that she had apologised to the franchisor for that error, but denying that anyone had been defamed. The full text of her e-mail is as follows:

> 1. By e-mail dated 24.08.2005 as listed below you were informed by me the sender Lyn McKinnon:
>
> 'Hi everyone
>
> Before anything else is done I believe we should sell the Lamborghini that was purchased from the Advertising Fund. That product has done nothing to enhance the sales of any of our businesses and put the funds from it back into the Advertising Fund.
>
> I look forward to the opportunity to discuss on a group basis some of the issues with regard to turnover etc but I don't think any of us should diminish what Steve has done since he has been on board with the sourcing of great stock over recent months that has sold well in just about everyone's shop and the promotion of some fantastic lines like The $2 wool that you couldn't buy anywhere else for less than $2.95, disposable cameras and the soup to name but a few and the good feedback we got from customers about the 'guy doing the promotions on the Good Morning Show'.
>
> Cheers Lyn'
>
> 2. The solicitors for the franchisor, The $2 Shop Limited, and for Mr Brian Salmon have since complained that this statement was wrong, in that the Lamborghini was not paid for from the Advertising Fund, but from another of the Franchisor's bank accounts. In consequence I have retracted that statement and apologised to the Franchisor for the error.
>
> 3. The correct position is that the Lamborghini was purchased by the Franchisor company, see its letter of 1 July 2003 headed 'Re:

Promotions' to franchisees stating amongst other things: 'This vehicle will be available for some promotional purposes and should be a real crowd puller'.

4. The Franchisor and Mr Salmon have also claimed that the statement was defamatory. That is not accepted nor was it intended by me as I had honestly believed that the car was purchased from the advertising fund for promotional purposes.

Yours sincerely

Lyn McKinnon

[33] That communication served only to exacerbate the differences between the parties. They were unable to settle those differences and this proceeding has followed.

The issues

[34] Mr Salmon's statement of claim, after pleading the contents of the e-mail of 24 August 2005, then alleges:

6. The words set out in paragraph 5 referred and were understood to refer to the plaintiff by reason of the following facts which were known to the recipients of the e-mail as at 24 August 2005:

   6.1 The plaintiff repeats paragraphs 1, 2 and 3 above.

   6.2 The 'Advertising Fund' referred to in the e-mail was a fund contributed to by all franchisees of The $2 Shop retail network and The $2 Shop Limited had the exclusive authority to use such funds solely for the purpose of advertising as determined by The $2 Shop Limited.

   Particulars

   Clause 2.6 of the franchise agreement.

   6.3 As sole director of The $2 Shop Limited the plaintiff managed and controlled the company's business affairs including in relation to the use of moneys in the Advertising Fund.

   6.4 The Lamborghini motor car referred to in the e-mail was purchased by The $2 Shop Limited and the plaintiff had the use of the vehicle.

7. By way of innuendo the contents of the e-mail meant and were understood to mean that:

7.1 The plaintiff had caused The $2 Shop Limited to purchase a Lamborghini motor car using money in the Advertising Fund when the purchase involved:

(1) a dishonest use of franchisees' funds;

(2) a misuse of franchisees' funds in that the purchase was:

(a) for the plaintiff's own purposes; and/or

(b) against the interests of franchisees; and/or

(c) imprudent and extravagant.

Particulars of facts supporting innuendo

7.2 The plaintiff relies on the facts and circumstances set out in paragraph 6 above which were known to the recipients of the e-mail as at 24 August 2005.

8. The e-mail in the meanings alleged in paragraph 7 was false and defamatory of the plaintiff.

9. By a further e-mail dated 5 September 2005 from the defendant to the original recipients of the e-mail the defendant acknowledged that the words referred to in the e-mail were false and retracted them however she expressly did not accept that the words were defamatory.

[35] In her statement of defence Ms McKinnon denied that the words set out in her e-mail were meant and were understood to refer to Mr Salmon, denied that by way of innuendo the contents of the e-mail contained the meanings alleged by Mr Salmon, and denied that the words used by her were defamatory.

[36] Counsel were agreed that the issues for the Court's determination were whether:

a) Mr Salmon was identified as the subject of the publication;

b) the publication carried the innuendoes alleged;

c) those innuendoes were defamatory of Mr Salmon;

d) in the light of the Court's findings, there should be a declaration and an order for solicitor and client costs as sought.

Identification of the plaintiff

[37] Ms McKinnon's e-mail of 24 August 2005 refers to the purchase of the Lamborghini but not to the identity of the person who bought it or authorised its purchase. Indeed, the first paragraph of her e-mail does not refer to any person at all. That being so, Mr Salmon must show that reasonable recipients of the e-mail possessed knowledge from which they would understand the e-mail to refer to him.

> … the claimant may only be identifiable by reason of extraneous facts which are not generally known, in which case there is no actionable publication unless it is shown that the words were communicated to persons with such knowledge. Even in the latter type of case, however, it is not enough that the recipients of the statement did understand it to refer to the claimant; the issue is whether reasonable people with their knowledge would so understand it. (*Gatley on Libel and Slander* 10th ed 2004 p 185 para 7.4)

[38] It is for the judge to consider whether ordinary, reasonable people, having the special knowledge proved, could understand the words complained of: *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1243. Because this is a trial before a Judge alone, I must consider not only how such reasonable people could understand the words complained of, but also how they would have understood them in this case.

[39] It is open to a plaintiff to call evidence from a witness with knowledge of the background to say that he or she regards the plaintiff as the person referred to, but there is no obligation on the Court to accept such evidence. As was said by Lord Reid in *Morgan v Odhams Press Ltd* (at 1245):

> It is for the judge to decide whether on the evidence an ordinary sensible man could draw an inference that the article referred to the plaintiff. Much must depend on the degree of deliberation and concentration with which that sensible man must be supposed to have read the article. If he must have done as a lawyer or a man of business would do in scrutinising an important document to discover its meaning, he might reach one result. If he should only be supposed to have read his daily newspaper in the way in which ordinary people generally do read it he might reach a different result.

[40] In the present instance it is a reasonable assumption that recipients of this e-mail would have read it with some care. After all, the issues under discussion vitally concerned the fortunes of businesses being operated by the franchisees. The e-mail dealt also with the future of the "Good Morning Show" which was, in effect, a

television slot which some franchisees believed had produced pleasing results. There was a proposal to cancel the Good Morning Show. Some franchisees opposed cancellation.

[41] The e-mail therefore dealt with issues of substance, and it could be expected that many recipients would read it carefully or, to use the expression employed in *Morgan v Odhams Press,* with a " … degree of deliberation and concentration".

[42] The car belonged to The $2 Shop. All recipients knew the background to its purchase because all had received Mr Salmon's letter of 19 May 2003. There is nothing explicit in the letter to suggest that the decision to purchase the vehicle was that of Mr Salmon alone, as opposed to a decision made by management of The $2 Shop. The question is, however, whether recipients knew enough about Mr Salmon and his business to ascribe the purchase decision to him and him alone.

[43] There was evidence that Mr Salmon's organisation had a small staff (of about six or so), who were engaged in a variety of management roles. One or two staff members were involved in planning and negotiating advertising initiatives and campaigns, and in that capacity, they were in communication with franchisees. The latter were encouraged by Mr Salmon to play a significant role in devising new marketing and advertising strategies.

[44] But having said that, franchisees would have been well aware of the over-arching role played by Mr Salmon in the structure of The $2 Shop. He was the managing director and sole shareholder of that company. He was responsible for franchise sales, and so must have had a personal relationship with each and every franchisee. Mr Ferrari certainly closely identified him with the company. Moreover, franchisees would be aware that Mr Salmon played a key role in the area of advertising; he attended every annual meeting of the advertising advisory group.

[45] The franchise agreement made it clear that use of the advertising fund was entirely at the discretion of the franchisor. Mr Salmon was in absolute control of the franchisor company. His management style was "hands on" – that much is evident from the evidence of Ms Stowers who quickly became frustrated in her role as

general manager because she was unable to gain access to important financial and business information which Mr Salmon kept to himself. Mr Salmon's role in the company and his management style must have been known to franchisees.

[46] It is true that Mr Salmon's letter of 19 May 2003 acknowledged the role of the marketing manager, Jo-Anne Callaghan in co-ordinating proposals for promotional activities involving the Lamborghini car. Doubtless Mr Salmon's staff were routinely involved in planning such activities. But overall there could be little doubt that the purchase of this vehicle, and the way it was subsequently to be used, arose from decisions which only Mr Salmon could make. If the car had been purchased from the advertising fund, then that could only have resulted from a decision taken by Mr Salmon. There is nothing to suggest that anyone else within the small group of staff at The $2 Shop would have had that authority. All of this must have been within the knowledge of franchisees who received Ms McKinnon's e-mail.

[47] I therefore accept Mr Miles' submission that:

> … the defendant's words in her e-mail, 'Before anything else is done I believe we should sell the Lamborghini that was purchased from the Advertising Fund', was, to ordinary readers, with the knowledge of the franchisees, a reference to Mr Salmon as he was the only person who could conceivably be responsible for the purchase of the car using advertising levies in the first place.

[48] I find that reasonable franchisees who received the e-mail could, and would, identify Mr Salmon as the person to whom the impugned words were referring.

The innuendoes

[49] Mr Miles submitted that the pleaded meanings range from dishonesty through to imprudence in descending order of gravity. For myself, I would have thought that actions involving imprudence or extravagance might be thought rather more serious than actions which are simply "against the interests of franchisees", but nothing turns on that.

[50] Mr Miles further submitted that franchisees who received Ms McKinnon's e-mail would take one or more of the pleaded defamatory meanings from the e-mail by reason of their background knowledge of him, of The $2 Shop and of the franchise operation.

[51] The relevant law is undisputed, namely:

> The burden on the plaintiff is to give evidence of special circumstances which would lead reasonable persons to infer that the words were understood in a defamatory meaning, provided such circumstances were known to those persons to whom the words were published: *Capital and Counties Bank v Henty* (1882) 7 App.Cas. 741.

[52] Importantly, it is irrelevant whether or not the recipients of a defamatory publication believe the defamatory statement to be true. As was said in *Hough v London Express Newspapers Ltd* [1940] 2 KB 507 (CA) at 515:

> …when circumstances are proved which will clothe words otherwise innocent with a defamatory meaning the question must equally be: might reasonable people who know the special circumstances understand them in a defamatory sense? If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue.

[53] Two independent franchisees were called to give evidence which included their reaction to Ms McKinnon's e-mail, and so was directed at the claimed innuendoes. Such evidence is not inadmissible, but it is not determinative because the question for the Court is as to whether **some** of the franchisees, acting reasonably, might construe Ms McKinnon's e-mail in the manner for which Mr Salmon contends: *Hough v London Express Newspapers Limited* at 515-516.

[54] Mr Ferrari professed to have been shocked by Ms McKinnon's e-mail, but I suspect that that was because the suggestion that the Lamborghini might have been purchased out of the advertising fund was inconsistent with the assurance which he had been given two years earlier by Mr Salmon. On the other hand, Ms Komarkowski, a Hutt Valley franchisee, was unconcerned at the suggestion that the Lamborghini might have been paid for out of the advertising fund, provided that it was being used as a promotional tool. She said that control of the advertising fund rested with The $2 Shop, and decisions about the spending of money from the

advertising fund were for The $2 Shop and not for franchisees. Indeed, her approach to the advertising fund bordered on the fatalistic. She had formed the view that suggestions and proposals made in the past by franchisees had fallen on deaf ears, and there was little that franchisees could do to influence the advertising spend. Nor did she see the point in taking any great interest in the matter, given that advertising decisions rested solely with The $2 Shop. She did however say that she would not have regarded it as appropriate for the car to have been purchased from the advertising fund, if it was intended solely for Mr Salmon's personal use. Her evidence tends to reinforce Mr Salmon's evidence that franchisees, whilst concerned about marketing generally, made no inquiry about management of the fund itself.

[55] The evidence of these two franchisees is of some assistance. But, in the end it is for the Court to determine what reasonable franchisees, knowing the special background circumstances, would make of Ms McKinnon's e-mail. Would they draw from the e-mail the meanings pleaded by Mr Salmon? That question is to be answered by a consideration of matters known to franchisees at the time of the purchase, that is, in mid-2003, informed by their knowledge of the utilisation of the vehicle since purchase.

[56] Mr Salmon's letter of 19 May 2003, notifying franchisees of the purchase of the Lamborghini, heavily emphasised the suitability of the car as a marketing tool. The letter referred to:

a) The fact that the car was coloured gold, which suited the blue and yellow colours with which The $2 Shop was associated;

b) The fact that a personalised plate had been secured bearing the image:

THE 2DOLAR SHOP

That plate directly linked the car with the businesses carried on by the franchisees.

c) The availability of the car for some promotional purposes and the prospect that it should be a real crowd puller;

d) Mr Salmon's intention to have the car displayed at the Franchising Exposition at the Epsom Showgrounds in Auckland, some three months later;

e) Future use of the vehicle: franchisees were asked to contact the marketing manager of The $2 Shop "to co-ordinate your ideas" – that plainly amounted to an invitation to participate in the planning of marketing activities involving the vehicle.

[57] The whole thrust of Mr Salmon's letter was that the Lamborghini would be a unique and effective marketing tool. That being so, it is likely that reasonable franchisees would assume that the vehicle was purchased from the advertising fund. The cost of the car was not revealed to franchisees. At trial Mr Salmon said that the purchase price was $360,000. That figure is more than 50% of the total of the advertising fund for the 2004-5 year, and so would have represented a very significant item of expenditure if the car had been purchased from the fund.

[58] Not all franchisees would necessarily have been aware of the precise cost of such a vehicle. Ms Komarkowski certainly was not. Even if they did know the price, reasonable franchisees would have been likely to accept that the decision was ultimately for the franchisor to make, even though those franchisees might not have made the same decision themselves, and might even have disagreed with it. That conclusion is supported by the apparent disinterest of franchisees as a group in the detail of advertising expenditure. I have referred earlier to Mr Salmon's evidence about the absence of any reaction to his distribution of figures for the 2001-02 financial year.

[59] For some months after the purchase of the car it was regularly used for marketing purposes. There is evidence of a number of trips throughout the North Island. Early in 2004 insurance difficulties precluded anyone but Mr Salmon from

driving the car but there is no evidence that he thereafter used it for private purposes, and indeed Mr Salmon himself denied doing so.

[60] Ms McKinnon's e-mail was published to a relatively small number of recipients – on her evidence about 15. Before the e-mail was sent, those people had been engaged in an e-mail discussion of issues relating to marketing and advertising for the franchise operation. The e-mail in question formed part of that correspondence. Given that background, it is appropriate to consider the reaction of the recipients of the impugned e-mail, in order to assist in determining what a reasonable reader, armed with the relevant factual background, would have made of it. Notably, there is no evidence of any recipient having taken any overt step at all in consequence of Ms McKinnon's e-mail. No-one protested to Mr Salmon that the Lamborghini ought not to have been purchased from the advertising fund. There is no evidence of the matter having been raised by any franchisee in subsequent e-mail correspondence. Despite Mr Ferrari's concern, when taxed in cross-examination about his failure to protest or to make inquiries, he said he had no need to do so because there was the subsequent apology from Ms McKinnon. But that came a fortnight later. He did nothing in the interim. That suggests to me that his concerns were somewhat muted.

[61] The absence of debate or expressions of concern by franchisees in August 2005, is a matter which it is proper to take into account in assessing the sense in which recipients read Ms McKinnon's e-mail. In many (if not most) cases, evidence of the reaction of individual readers would be of limited assistance for the reasons explained in *Hough*: the fact that one or two witnesses thought the words complained of did not carry the meanings for which a plaintiff contends, does not justify a conclusion that all readers would be of the same view.

[62] Here, however, the position is different. Recipients were few in number and they were all of the same class, in the sense that all were franchisees, all had broadly the same relationship with Mr Salmon, all were parties to the same form of franchise agreement, and all had participated in a prior correspondence which dealt with marketing and advertising issues.

[63] The absence of franchisee reaction is, in my view, unsurprising. Final decisions about utilisation of the advertising fund were for The $2 Shop alone, and not for franchisees. The franchisee group had opportunities to offer their ideas and initiatives to the franchisor, with respect to marketing and advertising, but both contractually and in fact, the franchisees accepted that the final decision rested with the franchisor.

[64] In my view, reasonable informed recipients of Ms McKinnon's e-mail would take it to mean simply that, whatever the justification for purchase of the vehicle from the advertising fund in 2003, it had not lived up to marketing expectations since, and a sensible decision would be to sell it and to deploy the proceeds of sale in more productive activities. A reasonable informed reader would not, in my view, take the e-mail to mean or imply that the decision to purchase the car (as assumed by Ms McKinnon, from the advertising fund) reflected adversely on Mr Salmon in any of the respects pleaded by him at paragraph 7 of his statement of claim.

[65] That is not to say that some franchisees might not have disagreed with a decision to purchase the Lamborghini from the advertising fund. There may well have been strongly held views on any such purchase, but in all the circumstances I am unable to conclude that a reasonable franchisee recipient of Ms McKinnon's e-mail would take her publication to carry any of the innuendoes pleaded.

[66] That finding is sufficient to dispose of this proceeding, but it is appropriate to say that no alternative (but unpleaded) defamatory innuendo is available on the facts. Formulations of the test for defamation vary slightly, but not to any material extent. In *Sim v Stretch* [1936] 2 All ER 1237 at 1240, the test proposed was whether:

> … the words tended to lower the plaintiff in the estimation of right-thinking members of society generally.

[67] An alternative formulation appears in *Mirror Newspapers v World Hosts* (1979) 141 CLR 632 at 638:

> [T]he plaintiff had to prove at common law that the defendant published to a third party a statement about the plaintiff of a kind likely to lead the recipient as an ordinary person to think the less of him.

[68] More recently still in *Mt Cook Group Limited v Johnstone Motors Limited* [1990] 2 NZLR 488 at 497 Tipping J said:

> What it comes down to in my view, is that the plaintiff must establish that ordinary people of reasonable intelligence … would tend to think less of Mt Cook from the point of view of its commercial ethics and standards.

[69] In my view it is not possible to derive from the publication complained of any innuendo (whether pleaded or not) which meets the tests for defamation so formulated. Some franchisees may have disagreed with the decision to purchase the Lamborghini from the advertising fund. Some may well have been distinctly disgruntled about it. But Mr Salmon was the final decision-maker, and that was known to all the recipients of the e-mail. The fact that some franchisees might have regarded the purchase and subsequent deployment of the Lamborghini for marketing purposes as of limited commercial effectiveness, does not render the e-mail defamatory.

Result

[70] I have found that the words of which Mr Salmon complains were written of him, and not, more generally, The $2 Shop. But in my view, the words concerned did not carry any of the innuendoes pleaded by him.

[71] Accordingly, I am unable to grant the declaration sought. This proceeding fails and is dismissed.

Costs

[72] Ms McKinnon is entitled to costs fixed in accordance with category 2B. Counsel may file memoranda if they cannot agree as to quantum.

C J Allan J