

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

CIV 2004-404-3903

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

Hearing: 23-25 May 2995

Appearances: J G Miles QC, A E Ivory and M Keall for plaintiffs
A R Galbraith QC, T Walker and H Wild for second defendant
B D Gray, A L Ringwood and T C Laird for fourth defendant

Judgment: 14 February 2006

JUDGMENT NO.2 of ALLAN J

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[1] In this important and complex proceeding the plaintiffs sue for defamation and malicious falsehood.

[2] The background is briefly set out in an earlier interlocutory judgment delivered on 5 May 2005, and now reported as *Simunovich Fisheries Ltd & Ors v Television NZ Ltd & Ors* [2005] 3 NZLR 134. A number of further interlocutory issues now require resolution.

[3] Originally it was intended that I hear argument on all outstanding interlocutory matters during the week commencing 23 May 2005. However, Mr Billington QC for the third and fourth defendants was not available during that week, so it was agreed that matters in which the first and second defendants were involved would proceed then. Issues affecting the third and fourth defendants were stood over for argument on 6 and 7 July 2005. That was done on the express basis that the third and fourth defendants would be bound by any rulings made as between the plaintiffs on the one hand and the first and second defendants on the other, following the May hearing. Mr Billington's acceptance of that arrangement is recorded at paragraph 3 of my minute of 18 May 2005. Matters argued between the plaintiffs and the third and fourth defendants are the subject of my judgment No.3, delivered contemporaneously with this judgment.

[4] These two judgments by no means conclude the interlocutory matters between the parties. There is an outstanding application by the plaintiffs for determination of certain issues prior to trial pursuant to r 418, and as I understand it there are likely to be further matters which require resolution.

The applications

[5] The interlocutory applications with which this judgment is concerned may be grouped as follows:

- a) Applications by the plaintiffs against both the first and second defendants seeking to strike out certain paragraphs in the respective statements of defence of those parties, which seek to set up different (and lesser) meanings from those which arise from the imputations pleaded by the plaintiffs in the context of a pleaded defence of truth;
- b) Applications by the plaintiffs seeking to strike out certain paragraphs in the statements of defence of the first and second defendants, upon the ground that those defendants have failed to comply with their obligations under s 38 of the Act in respect of the pleading of particulars of facts and circumstances.
- c) Applications by the plaintiffs in respect of the defences of honest opinion pleaded by both the first and second defendants and related issues in respect of particulars relevant to that defence.

May the defendants plead lesser meanings?

[6] This proceeding concerns the scampi fishing industry, in which the first plaintiff was at all material times a major player. The second and third plaintiffs are associated with the first plaintiff. The plaintiffs allege that the first defendant (in a television programme) and the second defendant (in its daily newspaper the NZ Herald), each published material defamatory of the plaintiffs in respect of their involvement in the industry.

[7] As against the first defendant the plaintiffs plead that parts of the television programme were false in each of the following respects:

- (i) The three plaintiffs in concert or each of them were not guilty of long-standing corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries.
- (ii) The second and third plaintiffs were not either or both of them corrupt and dishonest businessmen.
- (iii) In the alternative there were no serious grounds for believing that each or all of the three plaintiffs were guilty of long-

standing corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries; or

- (iv) There were no serious grounds for believing that each or all of the three plaintiffs were corrupt or dishonest.
- (v) The three plaintiffs either in concert or each of them had not committed or were responsible for or were parties to serious criminal or fraudulent activities arising out of the plaintiffs' involvement in scampi fishing.

[8] I have reproduced the pleading as it appears in the plaintiffs' second amended statement of claim dated 17 October 2005 (that is, after the hearing), but there is no relevant material difference between that pleading and its immediate predecessor.

[9] In an amended statement of defence to the plaintiffs' first amended statement of claim, the first defendant sets up a defence of truth by pleading:

Truth

- 33. The programme taken as a whole did not have the meanings pleaded by the plaintiffs but was in substance true, or was in substance not materially different from the truth.
- 34. All the statements in the programme, except for those highlighted in yellow in Schedule 1 hereof, are statements of fact, which statements are in substance true or not materially different from the truth.
- 35. Further, or in the alternative, the imputations contained in the programme (but not those pleaded by the plaintiffs) were true or not materially different from the truth. The imputations in the programme are:
 - 35.1 There were sufficient grounds to suspect unlawful fishing activity by Simunovich in respect of its scampi catch to justify a full and independent public inquiry;
 - 35.2 There were sufficient grounds to suspect an improper relationship between Simunovich and the Ministry to justify a full and independent public inquiry;
 - 35.3 There were sufficient grounds to suspect collusion between the Ministry and Simunovich and/or corruption within the Ministry benefiting Simunovich, to justify a full and independent public inquiry.
- 36. The defendant relies on the facts and circumstances set out in Schedule 2 hereof in support of its plea of truth.

[10] It will be observed that the first defendant denies that the programme bore the meanings pleaded by the plaintiffs but pleads that the programme taken as a whole “was in substance true, or was in substance not materially different from the truth”. The first defendant does not plead directly to the plaintiffs’ imputations, and indeed, does not address them at all, save to deny that they arise from the programme. Instead, the first defendant sets up at paragraph 35 three alternative imputations.

[11] Whether or not the first defendant was entitled to structure its pleading in this fashion was the subject of prolonged and detailed argument, involving the analysis of a number of relevant authorities in both New Zealand and overseas jurisdictions. Prior to the enactment of the Defamation Act 1992, the Court of Appeal in *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234, dealt with a case in which the defendants had denied that the publications complained of 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, but instead 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.

[12] The Court of Appeal held in *Crush* that the defendants could not set up alternative meanings and prove the truth of those meanings. While a defendant may deny that the words used are capable of bearing the meanings alleged by the plaintiff, or prove that the meanings alleged are substantially true, it cannot attempt to prove the truth of alternative meanings.

[13] The first and second defendants argued however, that the effect of s 8 of the Act was to over-rule *Crush* with the result, so it was claimed, that a defendant may now set up and prove the truth of its own imputations, rather than pleading to the imputations pleaded by the plaintiffs. Section 8 of the Act provides as follows:

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.

[14] It is unnecessary to consider the numerous authorities cited by counsel because the issue under consideration has now been authoritatively considered by the Court of Appeal in *Television New Zealand Ltd v Haines* CA71/04 13 September 2005. The judgment of the Court post-dated the hearing in this case. However, nothing advanced by counsel in argument in the present proceeding served to distinguish this case from *TVNZ v Haines*. At paragraph [34] of the Court of Appeal judgment the contentions advanced to that Court on behalf of Television New Zealand are recorded as follows:

[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'.

[15] Those are essentially the same arguments as were addressed to me.

[16] The Court of Appeal extensively reviewed the legislative history of s 8, and held that there was nothing in the section to suggest that it was intended to abrogate the rule in *TVNZ v Crush*. The Court took the opportunity at paragraph [61] to caution against "... becoming enmeshed in the nuances and semantic distinctions which have bedevilled this subject and for minute case analysis to be permitted to dominate". Rather, the parties in a defamation proceeding must plead and run their cases in accordance with certain basic principles, including the following:

- a) A plaintiff must first establish the publication;
- b) It must next satisfy the Judge that the publication is capable of carrying the imputations contended for;
- c) The plaintiff must then prove to the satisfaction of the trier of fact that the words used have one or more of the various imputations identified, or something not materially dissimilar. If the plaintiff is unable to do that, then it will lose the case. It is at this stage that the defendant may argue the words used do not bear the meaning or meanings contended for by the plaintiff.
- d) If the plaintiff succeeds on one or more of the specified imputations, then a defendant may, in terms of s 8(2)(a) of the Act, establish a defence by satisfying the trier of fact that the imputation is true, or not materially different from the truth.

- e) It is not sufficient for a defendant at this point to claim that, even though the words are capable of bearing the defamatory meaning complained of, they also bear a lesser meaning which may prove to be true because:
 - i) The truth of the lesser meaning would not have an effect on the defamatory meaning pleaded by the plaintiff, and the defamatory meaning would remain undefended. It is not open to a defendant to raise a defence to some other issue of which the plaintiff might have complained but has not.
 - ii) A parallel inquiry into something about which the complainant is not complaining is unhelpful and potentially confusing for the jury.
- f) In an appropriate case a defendant may mount a defence under s 8(3)(b) to the effect that the broadcast as a whole was true.

[17] Paragraph [35] of the first defendant's amended statement of defence is therefore bad and must be struck out. The plaintiffs have pleaded their case on the basis that, in the context of the programme as a whole, certain highlighted passages are false and defamatory. That being so, it must be open to the first defendant to allege and prove any facts contained in the whole of the publication (s 8(2)). But the first defendant's pleading is defective in that while it pleads to the programme as a whole, it does not plead to the plaintiffs' imputations. That is a matter which will need to be remedied when the first defendant's pleadings are further amended.

Lesser Meanings: the second defendant

[18] Similar issues arise in the case of the second defendant. It is unnecessary to reproduce the pleadings of the parties. It is sufficient simply to note that in its statement of defence (14 April 2005) to the draft second amended statement of claim, the second defendant likewise endeavours to set up at paragraphs 35-37 meanings which are alternative to those pleaded by the plaintiff, and to which the

second defendant responds by denial in its paragraph 34. For the foregoing reasons the second defendant is not entitled to set up and establish alternative meanings and paragraphs 35-37 of its statement of defence must also accordingly be struck out.

Particulars of facts and circumstances

[19] The plaintiffs seek to strike out paragraphs 34 and 36 of the first defendant's statement of defence upon the separate ground that they do not comply with the s.38 pleading obligations which rest upon a defendant who pleads a defence of truth. Paragraph 34 refers to Schedule 1 to the amended statement of defence, which is a copy of the transcript of the relevant television programme, and pleads that all statements in the programme, save for those highlighted in yellow in the Schedule, are statements of fact which in substance are true, or not materially different from the truth.

[20] Where a defendant pleads both truth and honest opinion, s 38 of the Act imposes certain pleading obligations. This section provides as follows:

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.

[21] The particulars required to be supplied by a defendant pursuant to s 38 are:

- a) The statements in the matter that is the subject of the proceedings which the defendant alleges are statements of fact; **and**
- b) The facts and circumstances relied upon in support of the allegation that those statements of fact are true.

[22] Here the first defendant relies upon Schedule 1 to its amended statement of defence, being a transcript of the whole of the television programme. Statements within the programme which are said by the first defendant to amount to statements of opinion have been shaded yellow. The balance are alleged to be statements of fact and are the facts relied upon by the first defendant as complying with its obligations under s 38(a). The plaintiffs complain about both this pleading technique in principle, and its use in this case.

[23] Mr Galbraith in argument confirmed that the first defendant's intention in annexing schedule 1 to its amended statement of defence was to comply with s 38(a). That is, to notify the Court and the plaintiffs of those statements within the programme which are alleged to be statements of fact relevant to the matters in issue in the proceeding.

[24] The plaintiffs say that the claim that all the facts contained within the programme are relevant to the first defendant's truth defence is untenable, and that it effectively transfers the obligation from the first defendant to the plaintiffs to work out what facts the defendant is truly relying upon, and how they might be relevant to the defence as the first defendant proposes to run it. A review of the transcript of the programme reveals that there are indeed some factual passages which bear only a limited relationship to the plaintiffs' imputations. But of itself that is insufficient to justify an order striking out the relevant portion of the first defendant's pleadings.

[25] Of greater significance is the apparent categorisation as fact by the first defendant of material within the transcript which appears to be predominantly, if not entirely, opinion. By way of example, at p 11 of the transcript the following passage appears:

Reporter: ...Did MAF play favourites by awarding the lion's share of the scampi fishery to Simunovich? Although the Courts found no impropriety clearly they had misgivings on this question because they decreed that the Ministry had acted unfairly and unlawfully in the allocation of scamp fishing permits. Former Prime Minister and public law specialist, Sir Geoffrey Palmer, has acted as a consultant to Neil Penwarden's company, Barine Developers. He strongly supports the Court's findings.

Sir Geoffrey Palmer (Barine's legal consultant): There is little doubt that serious injustice occurred and the Court of Appeal judgment makes that

abundantly clear by saying that the regulations that were being challenged were ultra vires, unlawful and were struck down by the Court. So it's clear that what was happening here was, in the words of the Court of Appeal, it was a series of administrative blunders, disasters, confusions and injustices.

And at p 34 there is the following passage:

Presenter: Earlier this year Neil Penwarden of Barine Developments tried to enlist the support of New Zealand's most colourful and controversial politician, Winston Peters. He says he met with Mr Peters on April 12 and 16 this year and gave him copies of the affidavits that he had prepared. As a result, the New Zealand First leader mounted a stinging attack on the Ministry of Fisheries and by implication, Simunovich Fisheries. In Parliament on April 24, Mr Peters accused the Ministry of Fisheries of corruption and said its Minister, Pete Hodgson, was involved in a cover-up.

Winston Peters (NZ First leader) [April 24]: It's a corrupt Ministry led by a Minister who fails to act and should be removed from his job if the evidence in that inquiry was ever heard and out in the public in the light of day, and I say he should go, and he knows why he should go because sir, he is involved in a most serious cover-up within his Ministry.

[26] Each of the above passages contains material which appears on its face to consist at least primarily of opinion material. The technique of simply annexing the transcript and endeavouring to excise opinion material, leaving a large body of allegedly factual material which is said to discharge the first defendant's obligations under s 38(a) has resulted in the inclusion as fact of material which amounts simply to expressions of opinion.

[27] Paragraph [34] of the amended statement of defence and Schedule 1 are struck out. They are to be replaced by paragraphs and/or schedules setting out factual material contained within the television programme which the first defendant contends to be relevant to the issues in the proceeding.

[28] In passing it is to be noted that paragraph [34] of the amended statement of defence as it stands pleads that the statements of fact "... are in substance true or not materially different from the truth". In that form the pleading seems somewhat misconceived. It is true that s 8(3)(b) entitles a defendant to prove that the publication taken as a whole was in substance true, or was in substance not materially different from the truth. But that does not entitle a defendant to plead and

prove that a given fact among many was in substance true, or in substance not materially different from the truth.

[29] The plaintiffs further claim that Schedule 2 to the first defendant's amended statement of defence ought to be struck out. Schedule 2 is headed "Facts and circumstances in support of defence of truth", and is claimed by the first defendant to satisfy its obligations under s 38(b).

[30] For the first defendant, Mr Galbraith points out that Schedule 2 is necessarily wide ranging, because the programme itself is wide ranging. It appears that paragraph 36 and Schedule 2 are intended to support the first defendant's pleaded alternative meanings which are set out in paragraph 35 and which I have now directed be struck out. What follows is directed to the first defendant's pleading of truth, insofar as that is (properly) related to the plaintiffs' imputations.

[31] The place of particulars in support of a truth defence, was recently reviewed by the Court of Appeal in *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616, where Tipping J said at paragraph 17:

[17] One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on. It can be seen that against each of these three purposes the particulars provided by TVNZ fall well short of being sufficient. It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars.

[32] Particulars serve a very important function in a case such as this, where the publication concerned is wide-ranging and detailed. Schedule 2 runs to some 36 pages and is comprised of sections devoted to:

- a) The background to and history of litigation in the scampi fishery;
- b) A synopsis of public attacks made on the Ministry of Agriculture and Fisheries by the Rt Hon Winston Peters;

- c) Details of affidavit evidence provided to the first defendant and containing allegations of impropriety involving the plaintiffs;
- d) A synopsis of a report prepared by a barrister at the request of the Chief Executive of the Ministry of Fisheries, dealing in particular with issues within the Ministry relating to administration of the scampi fishing industry;
- e) A summary of the inquiry conducted by the Primary Production Committee of the House of Representatives into the administration and management of New Zealand's scampi fishery;
- f) A summary of an inquiry conducted by the State Services Commissioner into the Ministry of Fisheries management of the scampi fishery, and of the report prepared at the conclusion of that inquiry.

[33] Schedule 2 is extremely broad in scope, and no doubt has its uses as a background paper. The question is however, whether it is a proper response to the first defendant's obligation to specify "the facts and circumstances" upon which it relies to support its defence of truth.

[34] I have held that that defence is available only in respect of the plaintiffs' imputations. In consequence the first defendant must replead. I have also directed that the first defendant rework Schedule 1. The first defendant will also need to review the contents of Schedule 2. In the course of that review, it will be necessary for the first defendant to refine its approach to its obligations under s 38(b). The facts and circumstances there referred to must relate, as Mr Miles submits, to the imputations pleaded by the plaintiffs. Much of the material within Schedule 2 cannot properly be brought within the category of facts and circumstances which can be related to those imputations. For example, it cannot be relevant that the Rt Hon Winston Peters has seen fit, in more than one forum, to criticise the Minister of Fisheries and the Chief Executive of the Ministry of Fisheries. Neither, it might be thought, is it relevant that the writers of certain reports had reached various

conclusions regarding the activities of the plaintiffs and/or the Ministry of Agriculture and Fisheries.

[35] However, background matters of fact appearing in the various affidavits, which are referred to at pp 12-16 of Schedule 2, may very well constitute circumstances which it is proper to include in the first defendant's particulars.

[36] Given that the first defendant's pleading must be substantially reformulated and Schedule 1 replaced, the appropriate course is simply to adjourn the plaintiffs' application insofar as it refers to Schedule 2. The application can be brought on for further argument if necessary, in the light of the first defendant's further amended statement of defence, and its amended Schedule 1.

Particulars: the second defendant

[37] The plaintiffs are also critical of the equivalent pleading of the second defendant and in particular paragraphs 35 and 37 of the second defendant's statement of defence to the draft second amended statement of claim.

[38] I have earlier concluded that paragraphs 35-37 must be struck out upon the ground that the second defendant is not entitled to plead alternative meanings.

[39] As the second defendant's pleading currently stands, the second defendant does not engage with the plaintiffs' imputations. If the second defendant intends to rely on a defence of truth, it must do so in respect of the plaintiffs' imputations. Against that background it is appropriate to consider the manner in which such a defence must be supported by particulars of fact and circumstances.

[40] Where, as here, s 38 applies, a defendant must provide both particulars of those statements which the defendant alleges are statements of fact, and separately of those facts and circumstances upon which the defendant relies in support of the allegation that those statements of fact are true.

[41] At paragraph 37, the second defendant sets out particulars of facts and circumstances which are intended to fulfil the obligation imposed by s 38(b). The particulars do not specifically refer to any particular fact or circumstance. Instead they comprise references to numerous publications dealing with various aspects of the scampi fishing industry. In summary, paragraph 37 refers to:

- a) “Interviews and discussions” conducted by a reporter employed by the second defendant.
- b) Public statements made or issued by some 17 named people.
- c) “The content” of certain Parliamentary debates.
- d) Information contained in a number of affidavits.
- e) Judgments of the High Court and Court of Appeal in relation to fisheries matters.
- f) “Various information and statements released by employees of the Ministry of Fisheries”.
- g) Material obtained by the second defendant under the Official Information Act and included in its affidavit of documents.
- h) TVNZ’s Assignment documentary “and other related reports”
- i) Reports of the Primary Production Committee and of the State Services Commission.
- j) “Reports appearing in numerous media” as particularised. There are several dozen such reports. For the most part they constitute articles appearing in various New Zealand newspapers.

[42] In my view the technique of referring compendiously to a large volume of documentary material which deals with various aspects of the scampi fishing

industry and makes allegations as to its management and administration, does not amount to compliance with s 38(b). The plaintiffs should not be expected to wade through hundreds, if not thousands, of pages of documentary material in order to extract such portions of it as the plaintiffs might suppose are relied upon by the second defendant. It is incumbent on the second defendant to extract from the listed material, those facts and circumstances upon which it relies.

[43] It is submitted for the second defendant (at paragraph 107 of Mr Gray's synopsis), that to require " ... further detail would be evidence rather than particulars". The second defendant is not required to provide further detail. Rather, it is required to provide less, but in a form which is appropriately focused and so properly informs the plaintiffs and the Court of the nature of the facts and circumstances relied upon in support of a truth defence. There is of course, no objection to the provision of particulars of the various documents already referred to in paragraph 37, provided that in each case there are specific references to such portions of the contents of the documents concerned as are alleged to constitute relevant facts or circumstances.

Honest opinion/further particulars

[44] Along with the matters already addressed in this judgment, I heard argument on questions relating to the pleaded defences of honest opinion, and in respect of a claim by the plaintiffs for further particulars in the context of those defences.

[45] It is fair to say that although these matters were competently argued, they received only limited attention in the light of the primary concern of the parties to resolve the question of whether the decision in *Crush* had been over-ruled by s 8 of the Act.

[46] I have decided that all interlocutory issues relating to the defences of honest opinion and to the related question of further particulars, should be adjourned for further argument. There are two primary reasons for adopting that course which was tentatively suggested by counsel during the hearing. First, in the light of the rulings already contained within this judgment, it will be necessary for the defendants

significantly to replead. In the course of doing so it may well be that amendments will be made to some at least of the passages in respect of the statements of defence which are challenged by the plaintiffs. Second, during the course of argument an issue emerged which Mr Miles advised had taken him by surprise. That issue, raised particularly in Mr Gray's submission, but also picked up by counsel for the first defendant, relates to so-called third tier meanings. There has long been a distinction acknowledged between a statement that an allegation is true, and a statement that there are grounds for believing that it is true. The latter is sometimes referred to as a tier two meaning.

[47] In certain recent authorities, a so-called tier three meaning has been recognised. A typical tier three statement suggests that there is a need for an inquiry into a particular matter. Cases in which such an imputation has been considered include *Bennett v News Group Newspapers Limited* [2002] EMLR 39 (CA) and *Al Rajhi Banking and Investment Corporation v Wall Street Journal Europe SPRL* [2003] EWHC 1776 (QB). This rapidly developing area of the law was referred to by counsel for both the first and second defendants, and is claimed by Mr Miles to impact upon the plaintiffs' applications in respect of the honest opinion defences and related particulars.

[48] Mr Miles accordingly asked that the Court adjourn the plaintiffs' application for further particulars and certain aspects of the plaintiffs' applications in respect of the defences of honest opinion.

[49] It might be possible to isolate certain issues in respect of honest opinion and deliver a ruling upon them now. However, by far the better course, in my view, is simply to adjourn all aspects of the defendants' applications in respect of honest opinion and related particulars, upon the footing that the hearing on those matters may be resumed if any party wishes. The Court could then hear argument afresh on those matters which remain outstanding, following the rulings contained in this judgment.

Summary

[50] In summary:

- a) Paragraph 35 of the first defendant's amended statement of defence is struck out because it impermissibly pleads meanings which are alternative to the plaintiffs' imputations;
- b) For the same reasons paragraphs 35-37 of the second defendant's statement of defence to the plaintiffs' draft amended statement of claim is struck out.
- c) Paragraph 34 of the first defendant's amended statement of defence together with Schedule 1 are struck out on the ground that they failed to comply with s 38 of the Act. Schedule 2 is likewise defective but I adjourn the plaintiffs' application in respect of Schedule 2 for further argument if necessary, once the first defendant has otherwise amended its pleadings in respect of the defence of truth.
- d) Paragraph 37 of the second defendant's statement of defence, already struck out because it does not engage with the plaintiffs' imputations, is also defective in that it does not comply with s 38.
- e) All matters relating to the plaintiffs' applications in respect of the defences of honest opinion are adjourned for further argument.

[51] Given the need for repleading on the part of the defendants in the light of the plaintiffs' latest amended pleading, the defendants will be expected to replead in accordance with the contents of this judgment.

Costs

[52] Costs are reserved. It will be necessary at some point in the near future for costs rulings to be made in respect of matters dealt with to date, unless counsel can

agree. In particular, it will be necessary for attention to be given to the appropriate categorisation of this proceeding for costs purposes.

[53] Counsel are asked when they have considered this judgment to confer amongst themselves with a view to organising a judicial telephone conference at which further arrangements can be made for the disposal of currently outstanding interlocutory matters.

C J Allan J