

**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	VAUCHAN 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: 6 and 7 July 2005

Appearances: J G Miles QC, A E Ivory and M Keall for plaintiffs
J Billington QC and G Kayes for third and fourth defendants

Judgment: 14 February 2006

JUDGMENT No.3 of ALLAN J

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[1] This judgment deals with certain interlocutory issues which have arisen between the plaintiffs and the third and fourth defendants in these complex defamation proceedings. The allegedly defamatory statements upon which the plaintiffs sue arise in the context of the management and administration of the scampi fishing industry in this country.

[2] The relevant background is briefly described in an earlier interlocutory judgment, delivered by me on 5 May 2005, and now reported as *Simunovich & Ors v Television New Zealand & Ors* [2005] 3 NZLR 134.

[3] This judgment is being delivered contemporaneously with a separate judgment dealing with certain interlocutory matters arising between the plaintiffs and the first and second defendants. Originally it had been intended that the matters now dealt with in two separate judgments would be heard together. However, Mr Billington QC, for the third and fourth defendants, was not available when those other matters were argued, and it was agreed that issues involving the third and fourth defendants would be argued separately. That arrangement was made on Mr Billington's express undertaking that the third and fourth defendants would be bound by rulings made in the separate judgment. That undertaking is recorded in my minute of 18 May 2005 (paragraph [3]).

[4] Of particular relevance to the third and fourth defendants is my ruling in the companion judgment (following the decision of the Court of Appeal in *Television New Zealand Limited v Haines* CA71/04 13 September 2005), that the defendants are not at liberty to plead alternative imputations. It is for the plaintiffs to articulate and prove, if they can, such imputations as they contend properly arise from the publications that are the subject of the proceeding.

The interlocutory applications

[5] The following applications and cross-applications are dealt with in this judgment:

- a) An application by the plaintiffs to strike out the particulars which appear at paragraphs 92.1-92.7 of the amended statement of defence of the third and fourth defendants.
- b) An application by the plaintiffs to strike out the particulars pleaded by the third and fourth defendants in support of a defence of honest opinion.
- c) An application by the third and fourth defendants to strike out paragraphs 52(i) and (iii) of the plaintiffs' first amended statement of claim.
- d) An application by the third and fourth defendants to strike out paragraphs 53-55 of the plaintiffs' first amended statement of claim.
- e) An application by the third and fourth defendants for further and better particulars of paragraphs 11, 21, 51 and 55 of the plaintiffs' first amended statement of claim.

The truth defence

[6] The third and fourth defendants are admittedly responsible for certain affidavits and briefing notes, which were subsequently made available to the first and second defendants, and which provided the foundation for the first defendant's Assignment programme and various articles and editorials in the New Zealand Herald, a publication of the second defendant. It is the Assignment programme and certain material in the New Zealand Herald which are said to contain material defamatory of the plaintiffs.

[7] In their amended statement of defence dated 26 May 2005 (paragraph 92), the third and fourth defendants plead in essence that the contents of the affidavits and briefing notes were in substance true, or were in substance not materially different from the truth. In support of that pleading, the third and fourth defendants provide at paragraphs 92.1-92.7 a series of particulars, which are the subject of challenge by the

plaintiffs. I deal with the relevant paragraphs in the order in which they were addressed by Mr Miles.

[8] Paragraph 92.3 reads:

Alternatively, the contents of the affidavits identified as annexures 13 to 21 to the first amended statement of claim provided serious grounds for believing that each or all of the plaintiffs engaged in or participated in the activities described in paragraph 92.2.

[9] Paragraph 92.3 appears to amount to an endeavour to set up a meaning alternative to the imputations pleaded by the plaintiffs. As such, it is impermissible for the reasons set out by the Court of Appeal in *Television New Zealand Ltd v Haines* and in the ruling appearing in the companion judgment (No.2) in this proceeding. It must accordingly be struck out.

[10] Paragraph 92.2 commences:

The plaintiffs have either personally or as parties engaged in or participated in illegal fishing activities by ...

and continues by setting out in 16 numbered paragraphs certain particulars of alleged illegal fishing activities. The introductory words of that paragraph were challenged by Mr Miles as amounting to an attempt to set up an alternative meaning, but they are in my view sufficiently related to the plaintiffs' imputations to constitute a proper pleading.

[11] Paragraph 92.1 pleads that the third and fourth defendants rely on the facts set out in the affidavits as a whole. Mr Miles submits that that is not a proper pleading. There appears to be force in that submission. Section 8(2) of the Court entitles a defendant who pleads truth to allege and prove any facts contained in the whole of the publication, but that does not entitle that defendant simply to allege an entitlement to rely upon each and every fact contained in the publication.

[12] The role of particulars in a defamation proceeding was discussed by Tipping J in the judgment of the Court of Appeal in *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 at [15] as follows:

Particulars

[15] In case this issue reappears under another guise, we will express our view on the adequacy of the particulars in issue. A defendant must provide particulars of the facts and circumstances on which it relies in support of an allegation that the statements in issue are true. The meaning of the statement in which TVNZ alleges it to be true (not materially different from Mr Ah Koy's meaning as we have held above) is that Mr Ah Koy was under investigation by the police authorities in Fiji for bankrolling the attempted coup. The particulars provided in support of the assertion that the words complained of are true in that meaning are:

- (1) the investigation was undertaken by the police authorities in Suva, Fiji;
- (2) the investigation was undertaken by a special unit within the crimes department; and
- (3) the investigation commenced shortly prior to 26 May 2001.

[16] We agree with Mr Harrison that these purported particulars, to the extent they can be called particulars at all, are inadequate. Each of them refers to "the investigation" without giving any particulars of the officer or officers in the Fiji police who were conducting the investigation nor upon whose complaint or instructions, or upon what other basis the investigation was being carried out. Neither is there any reference to the date the investigation commenced, or the offences alleged to have been committed by those under investigation. All the purported particulars add to the allegation, the truth of which is in issue, is that the investigation was being conducted by a special unit within the crimes department of the police authorities in Suva and commenced "shortly" prior to 26 May 2001.

[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. In *Zierenberg v Labouchere* [1893] 2 QB 183 at p 186 Lord Esher MR said that a plea of justification (now of truth) without sufficient particulars was invalid and that this had been the law "from the earliest times". As Gatley says at para 27.10, it is arguable that in these circumstances there is no plea of justification on the record. On that basis a plea of truth without sufficient particulars would be at risk of being struck out.

[13] Paragraph 92.1 does not fall within the principles enunciated in that judgment. A defendant ought to be able to select those facts contained in the publication upon which it proposes to rely, and to provide particulars of those facts

to a plaintiff. In its current form paragraph 92.1 is impermissible and must be struck out.

[14] The pleading obligations of a defendant who pleads both truth and honest opinion are to be found in s 38 of the Act which provides:

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.

[15] Mr Miles argues that paragraph 92.2 does not comply with the requirements of s 38 because, first, it pleads conclusions and not facts, and second, the statements lack attribution. By way of example, the first and second sub-paragraphs of s 92.2 read:

- (1) over-fishing and misdescribing species by packing by-catch and describing it as scampi:
- (2) creating false catch histories of quota species.

[16] The 16 sub-paragraphs of paragraph 92.2 comprise material collated from the affidavits and briefing notes to which I have already referred. They amount in effect to a summary of the allegations contained at various points in those documents. As such they are not facts, although they may well be “circumstances” for the purposes of s 38(b). Mr Miles is entitled to require the plaintiff to particularise both the facts themselves and their attribution (that is the document or documents in which those facts can be found).

[17] For instance, the second of the examples referred to above refers to the creation of false catch histories. That allegation appears, no doubt, in one or more of the affidavits or briefing papers prepared by or on the instructions of the third and fourth defendants. Those documents will provide context by way of time, place and

circumstance which serves to convert what is currently pleaded as conclusion into fact. The 16 sub-paragraphs can be rendered acceptable by the provision of such textual detail and by proper attribution in each case. If that is done the objectives of requiring particulars as listed in paragraph [17] of *Television New Zealand Ltd v Ah Koy* will have been fulfilled.

[18] Mr Miles was critical also of paragraphs 92.4-92.7 which claim that the Ministry of Fisheries did not make any proper investigation into the alleged offending, that the third plaintiff worked for the Ministry of Fisheries before being employed by the first plaintiff, and that certain findings of investigators employed by the Ministry of Fisheries are to be found in material annexed to the plaintiffs' first amended statement of claim. These particulars do not purport to support the claim of illegal fishing activity. Rather, they are stand alone allegations, and as such ought not to be struck out.

[19] It is appropriate to record that I heard argument from counsel as to the obligation of a defendant who pleads truth but not honest opinion to provide particulars. That argument included a detailed analysis of s 38. Counsel referred in that context to *Julian v Television New Zealand Ltd* HC AK CP367/01 25 February 2003, and to the extract from *Television New Zealand Ltd v Ah Koy* referred to above. It is unnecessary to discuss in any detail the submissions advanced because it is not in dispute that s 38 applies. There appears however to be some force in Mr Miles' submission that Tipping J, at paragraph [15] of *Television New Zealand Ltd v Ah Koy* has couched his judgment in language consistent with s 38, although in that case honest opinion was not pleaded. That suggests that although s 38 does not in its terms apply to a defendant who does not plead honest opinion, nevertheless such a defendant will ordinarily be required to provide particulars in support of a defence of truth, at a similar level of detail.

[20] It is necessary to refer in particular to one aspect of Mr Billington's argument on s 38. As I understood him he contended that the expressions "those statements" in s 38(b) relates back solely to statements which are claimed to consist of expressions of opinion. That being so he argued that s 38(b) does not deal at all with the particulars required to be supplied in support of a defence of truth.

[21] I do not consider that submission is right. The word “statements” appears twice in s 38, before the phrase “those statements” is reached in s 38(b). On the first occasion the phrase is “statements of fact”, and on the second occasion – in s 38(a) – the reference is again to “statements of fact”. The expression “those statements” in s 38(b) is a reference back to the expression “statements of fact” where it twice earlier appears, and does not relate, as Mr Billington argues, to what are claimed to be statements of honest opinion. The point of Mr Billington’s argument is that if he is right, the obligation to provide facts and circumstances under s 38(b) does not arise in the context of a defence of truth.

[22] Even if Mr Billington should be right, the obligations which rest upon a defendant in respect of a pleading of truth, are akin to those arising under s 38: *Television New Zealand Ltd v Ah Koy* (paragraph [15]).

Honest opinion defence

[23] In paragraph 93 of the amended statement of defence the third and fourth defendants plead a defence of honest opinion. By way of particulars they plead first that all of the affidavits and briefing papers taken together were an expression of opinion, alternatively that each document in its entirety was an expression of opinion, and in the further alternative, that a number of particularised passages from the various affidavits and briefing papers amounted to statements of opinion. Such passages cover some seven pages of the statement of defence, and are drawn from 11 separate documents.

[24] The plaintiffs argue that

- a) the alleged expressions of opinion so relied upon by the third and fourth defendants are insufficiently related to the plaintiffs’ imputations,
- b) they are insufficiently particularised,

- c) in certain instances they are statements of fact rather than expressions of opinion, and
- d) there has been insufficient particularisation of facts contained within the publication upon which the defence of honest opinion might be founded.

[25] The hearing of this application took place in July 2005. On 13 September 2005, the Court of Appeal released its judgment in *Television New Zealand Ltd v Haines*. At paragraphs [100]-[107] the Court of Appeal criticised the practice of identifying separate statements within a publication which were alleged to amount to expressions of opinion, and said that the occurrence in that case was unusual. The Court was also critical of the exercise conducted by Venning J in that case, of categorising certain particularised phrases one by one, as a statement either of opinion or fact.

[26] I propose to adjourn for further argument the whole of the plaintiffs' application with respect to the defence of honest opinion. The issues raised by the plaintiffs are to some degree interlinked. It seems to me that some at least are affected by the views expressed by the Court of Appeal in *Television New Zealand Ltd v Haines*. The better course is to hear further from counsel before determining any of the issues raised by the plaintiffs.

What does “corrupt” mean?

[27] At paragraph 52 of their second amended statement of claim the plaintiffs allege in respect of the affidavits and briefing notes for which the third and fourth defendants accept responsibility that:

- 52. In their natural and ordinary meaning the words meant and were understood to mean the following:
 - (i) That the three plaintiffs in concert or each of them were guilty of long-standing corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries

- (ii) The second and third plaintiffs each or both of them were corrupt and dishonest businessmen.
- (iii) In the alternative there were serious grounds for believing that each or all of the three plaintiffs were guilty of long-standing corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries; or
- (iv) In the alternative there were serious grounds for believing that the second and third plaintiffs were each or both of them corrupt and dishonest businessmen.
- (v) The three plaintiffs in concert or each of them committed or were responsible or were parties to serious criminal or fraudulent activities arising out of the plaintiffs' involvement in scampi fishing.

Further particulars of the words and meanings are set out in *Schedule 3 – Affidavits* hereto.

[28] The third and fourth defendants apply to strike out those pleadings which are now reflected in paragraphs 52(i) and 52(iii) upon the basis that the published material (namely the affidavits and briefing notes) does not support the imputation that the three plaintiffs in concert or each of them, were guilty of corrupt actions with industry officials, or that there were serious grounds for so believing. The focus is upon the allegation of corrupt behaviour.

[29] It is to be noted that the third and fourth defendants do not challenge the allegations of corruption in respect of the plaintiffs' own business activities, including fishing activities.

[30] As counsel developed their argument on the point, a difference emerged between them as to whether there might be a change of meaning in respect of the word "corrupt". Mr Billington suggested that the word "corrupt" where it appeared in various of the plaintiffs' imputations might not bear a single meaning throughout.

[31] At that point Mr Miles complained that this had not been the subject of application by the third and fourth defendants, nor was he ready to deal with it in argument.

[32] Ultimately it was agreed that this aspect of the application should be adjourned to allow the third and fourth defendants to file an application for

particulars of the respects in which the plaintiffs contended that it had been alleged against them that they were “corrupt”.

[33] Accordingly, this aspect of the application is adjourned. The third and fourth defendants are to file an application for particulars. In all the circumstances it will be appropriate for that to be done by way of memorandum.

The plaintiffs’ pleading: strike out application

[34] The third and fourth defendants apply to strike out paragraphs 53-55 of the plaintiffs’ first amended statement of claim. Those paragraphs allege:

53. During that time the third defendant, directed by the fourth defendant, were engaged in extensive and acrimonious litigation with the first plaintiff.
54. The third and fourth defendants in the above litigation failed to establish that individual allocations of scamp fishing rights in accordance with fishers’ catch histories were unlawful and as a consequence began a campaign against the plaintiffs.
55. As part of that campaign the affidavits were prepared and given to the individuals and institutions referred to at paragraph 11 with the intent of defaming the plaintiffs and injuring the business of the first plaintiff and the livelihood and reputation of the second and third plaintiffs.

[35] Paragraph 55 is supplemented by extensive particulars which are not reproduced here.

[36] The third and fourth defendants say that these paragraphs plead matters which are irrelevant, contain evidentiary material, and to some extent involve the relitigation of previously resolved proceedings.

[37] Since the hearing of the application the plaintiffs have filed a second amended statement of claim dated 17 October 2005. The pleading is extensively re-organised. Paragraphs 53-55 of the first amended statement of claim have no obvious counterpart in the new pleading, which now incorporates five schedules. Schedule A provides particulars of special damage, Schedules B-E provide particulars of malice and particulars related to the claim for aggravated and punitive

damages. Schedule D relates to the third and fourth defendants and appears to incorporate much of the former paragraphs 53-55.

[38] Given the extensive re-formulation of the plaintiffs' pleading, I do not propose to consider this part of the application, which in any event was only briefly argued. If the third and fourth defendants remain dissatisfied with those aspects of the plaintiffs' pleading which deal with matters formerly to be found in paragraphs 53-55, then no doubt the relevant issues can be considered as part of a further series of interlocutory applications which lie ahead.

Other matters

[39] In addition the third and fourth defendants applied for further and better particulars of paragraphs 11, 21, 51 and 55 of the first amended statement of claim. That part of the application was adjourned by consent. The relevant issues will no doubt be further considered by the third and fourth defendants in the light of the plaintiffs' second amended statement of claim.

Summary

[40] In summary the following matters have been dealt with in this judgment:

- a) Paragraph 92.3 of the particulars appearing in the amended statement of defence of the third and fourth defendants sets up a meaning alternative to the imputations pleaded by the plaintiffs, and is impermissible. It is accordingly struck out.
- b) The opening words of paragraph 92.2 of the amended statement of defence of the third and fourth defendants are sufficiently related to the plaintiffs' imputations to survive a strike out application.
- c) Paragraph 92.1 of the amended statement of defence of the third and fourth defendants is struck out.

- d) The material set out in the 16 numbered paragraphs appearing in paragraph 92.2 of the amended statement of defence of the third and fourth defendants is to be re-organised in accordance with the directions given in paragraph [16] and [17] of this judgment. At this point I do not strike out those paragraphs.
- e) I do not uphold the plaintiffs' challenge to paragraphs 92.4-92.7 inclusive of the amended statement of defence of the third and fourth defendants.
- f) The plaintiffs' application in respect of the particulars provided by the third and fourth defendants in support of the defence of honest opinion is adjourned for further argument in the light of the judgment of the Court of Appeal in *Television New Zealand Limited v Haines*.
- g) By consent I adjourn for further argument the application made by the third and fourth defendants to strike out paragraphs 52(i) and (iii) of the first amended statement of claim. The third and fourth defendants are to file an application for particulars of the plaintiffs' allegation that it has been alleged against them that they were "corrupt". The application for particulars may be made by way of memorandum.
- h) The application by the third and fourth defendants to strike out paragraphs 53-55 of the plaintiffs' first amended statement of claim is adjourned in the light of the new pleading filed by the plaintiffs but may be brought on for hearing as and when necessary.
- i) The application by the third and fourth defendants for further and better particulars of paragraphs 11, 21, 51 and 55 of the first amended statement of claim is adjourned by consent, but may likewise be brought on for hearing as and when necessary in the light of the plaintiffs' amended pleading.

Costs

[41] Costs are reserved. It will be necessary in the near future to deal with all questions of costs in respect of matters dealt with to date. Those matters include the need to determine an appropriate category for costs purposes in respect of this proceeding.

[42] 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 any remaining interlocutory matters.

C J Allan J