IN THE COURT OF APPEAL OF NEW ZEALAND

CA96/06

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

Hearing: 25 July 2006

Court: Glazebrook, Chambers and Robertson JJ

Counsel: W Akel and H Wild for Appellant
J G Miles QC and B O'Callahan for Respondents

Judgment: 6 September 2006 at 11am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay costs of $6,000 plus usual disbursements to the respondents. We certify for two counsel.

REASONS OF THE COURT

(Given by Glazebrook J)

Table of Contents

Introduction

[1] In March 2000, Television New Zealand Ltd (TVNZ) screened a series of broadcasts about a contractual dispute between the respondents (Haines) and a Mr and Mrs Pearce. It is fair to say that the broadcasts portrayed the dispute from the point of view of the Pearces. Haines claim that the broadcasts were defamatory in that they portrayed Haines as, among other things, dishonest, thuggish, untrustworthy, unprofessional and incompetent. Haines allege that, as a result of the broadcasts, they lost some $2.5m in revenue. They also claim general, aggravated and exemplary damages. TVNZ disputes that the broadcasts had the meanings alleged by Haines and pleads the defences of truth and honest opinion.

[2] Haines want the proceedings to be heard before a judge alone. TVNZ wants a trial by jury. Under s 19A(5) of the Judicature Act 1908, a trial by judge alone can be ordered if:

(a) the proceedings or any issue in the proceedings will involve mainly the consideration of difficult questions of law; or

(b) the proceedings or any issue in the proceedings will require prolonged examination of documents or accounts or any investigation in which difficult questions relating to scientific, technical, business or professional matters are likely to arise and the examination or investigation cannot conveniently be made with a jury.

[3] In a judgment of 9 May 2006, Venning J granted Haines' application for a trial by judge alone, finding that both of the conditions in s 19A(5) were met.

[4] There are three issues that arise on this appeal:

(a) Whether the trial or any issue in the trial will involve mainly the consideration of difficult questions of law;

(b) Whether the trial or any issue in the trial will require prolonged examination of documents or accounts or whether difficult professional or business issues will arise;

(c) Whether the discretion to order trial by judge alone was exercised by Venning J in a proper manner.

Will the trial or any issue in the trial involve mainly the consideration of difficult questions of law?

[5] TVNZ submits that the trial will not involve difficult questions of law as it will not be necessary to determine the legal rights of Haines and the Pearces in the course of the proceedings. The legal dispute between the Pearces and Haines is only relevant as part of the background in support of TVNZ's affirmative defences of truth and honest opinion. In any event the legal issues relating to the dispute are perfectly capable of being understood by the jury on the basis of directions from the

judge. In TVNZ's submission, the purchase of a house is a matter within the everyday experience of most New Zealand jurors.

[6] To assess TVNZ's submission, we must set out the factual background in more detail. Haines are in the house haulage business and, in the course of that business, they sold a second hand house to the Pearces (the house contract). The house contract required Haines to transport the house to the Pearces' section in Kamo near Whangarei, which was done in November 1998. The purchase price of the house was $60,800. The Pearces were to pay $32,500 in cash. In order to satisfy the remainder of the purchase price, the Pearces agreed (by separate contract) to transfer to Haines two vacant residential lots out of a subdivision they were undertaking (the land contract).

[7] A dispute arose. The Pearces considered Haines to be in breach of a requirement in the house contract to make their home watertight. Haines considered that the Pearces had breached the land contract because the lots prepared for survey were 640m^2 instead of 800m^2. Haines took the view that the Pearces' allegation as to a breach of the house contract was manufactured to avoid the consequences of their breach of the land contract. There followed an exchange of letters, starting around May 1999. In late February 2000, Haines took steps towards repossessing the Pearces' house, a remedy provided for in the house contract. Soon after that, on 3 March 2000, Haines and the Pearces settled their differences by agreeing that the land contract would be cancelled and that the Pearces would pay the balance of the purchase price under the house contract to Haines in cash.

[8] As can be seen from this brief factual survey, the legal position between Haines and the Pearces cannot be characterised as being only of background interest. In our view, should the meanings alleged by Haines be sustained, the correct legal position will be of central importance to assessing TVNZ's defences of truth and honest opinion. For example, whether or not Haines were within their legal rights in attempting to remove the house is clearly very relevant to the question of dishonesty and thuggish behaviour (two of the meanings alleged by Haines). It is also clearly relevant to the allegation of incompetence how far (if at all) Haines' obligation to make the house watertight extended. Whether Haines was in breach of the

obligation to make the house watertight also has relevance to the appropriateness (and TVNZ would argue legality) of their actions in attempting to remove the house. This is, therefore, also relevant to the question of Haines' alleged dishonesty, untrustworthiness and unprofessional behaviour.

[9] Whether the Pearces were in breach of the land contract is also central to the issue of whether Haines were within their legal rights in attempting to remove the house. It must have an even greater effect on whether Haines were morally entitled to act as they did. We also accept Haines' submission that the question is not only whether Haines were legally entitled to behave as they did, but whether they reasonably believed that they were so entitled. A full understanding of the extent of Haines' actual contractual rights is necessary for an assessment of this question. There will also be legal issues arising as to the extent to which Haines can recover the economic loss they claim arose from the defamation.

[10] The next issue, therefore, is whether ascertaining the correct legal position involves difficult question of law in the sense that phrase is used in s 19A(5)(a) of the Judicature Act. In *Guardian Assurance Co Ltd v Lidgard* [1961] NZLR 860 at 863 - 4 (CA), this Court said that the issue under s 19A(5)(a) is not so much whether the questions of law that arise are difficult ones. The issue is whether the questions of law are such that it is difficult to keep the respective functions of judge and jury separate from one another, such as where matters of law so merge into one another that the task of the jury becomes complicated in the application of the facts to the law. The Court said that it was not possible to give an exhaustive list of those cases where s 19A(5)(a) applied. The principal matter for consideration under the paragraph, however, is the extent to which the exposition and application of matters of law may cause difficulty to the Judge and the jury in the discharge of their respective functions. This approach was affirmed by this Court in *McInroe v Leeks* [2000] 2 NZLR 721 at [11] (CA). In that case the prospect of the jury being faced with a series of interlocking and hypothetical questions was held to come within s 19A(5)(a) – see at [21].

[11] In assessing whether difficult questions of law arise in the sense required by s 19A(5)(a), we start with the question of whether Haines were within their legal

rights in attempting to repossess the house. At first blush this is a very easy question. Clause 23 of the house contract provides that the existence of any claim by the Pearces as to any failure by Haines to perform any obligation under the contract does not excuse the Pearces from making payment of the sums due under the contract. Clause 24 provides that, in the event of the Pearces defaulting with regard to any payment obligation, Haines have the option of rescinding the contract, reselling the building, suing the purchaser for specific performance or immediately taking possession and reclaiming the building. Haines, if we take the wording of the contract at face value, would appear to have been within their legal rights in removing the house, whether or not they were in default of any obligation to make the home watertight, provided there had been a failure on the part of the Pearces to pay (allegedly by breaching the land contract).

[12] Mr Akel, for TVNZ, however, argues that the right to repossess the Pearces' house was dependent on Haines not being in major breach of the house contract. While his argument was not fully developed, it seems to be based on an assertion that clauses 23 and 24 are subject to a qualification that Haines, in order to rely on the clause 24 remedies, cannot be in breach of their obligations to provide a watertight house. How far Haines' obligations to make the house watertight extended is thus crucial to TVNZ's argument. This depends not only on the wording of the house contract but also on the alleged pre and post contractual representations, discussed below. On TVNZ's argument, the resolution of the question of whether Haines were entitled to rely on their clause 24 remedies is also bound up in the factual question of the extent to which Haines breached any obligation to make the house watertight. TVNZ appears to accept that a minor breach by Haines would not prevent them from exercising their clause 24 rights.

[13] The next question is how far any obligations to make the house watertight extended. As indicated above, it is alleged that Haines gave pre-contractual assurances to the Pearces that the house could be properly joined together and that the roof would be watertight and properly secured. The Pearces commissioned a pre-purchase inspection report prior to relocation. That report stated that the roofing was in good condition. It also said that the dwelling should re-site easily and that the interior could be restored to an excellent condition, assuming that the house was well

braced and carefully transported and relocated. Whether this report has any contractual significance will need to be assessed.

[14] There were also allegedly post contractual assurances that the roof would be fixed. In December 2000, after the house had been relocated, the Pearces signed a roof completion certificate. The Pearces say that this was signed on the basis of assurances that the roof would be fixed and a handwritten clause was added to the certificate, which stated that cracked tiles still had to be repaired and the house made watertight. Any contractual significance of this certificate and the legal effect of the accompanying assurances (if they were made) will need to be assessed.

[15] Even leaving aside the question of the alleged representations, the contractual provisions themselves are not easy to reconcile. Under clause 8 of the house contract, Haines undertook to re-erect the building in a workmanlike manner with the existing materials. It was acknowledged by the Pearces that incidental damage could result from the transportation of the building. The clause allowed Haines to cut the building into sections to transport it but they had to rejoin it by cleating. It also required Haines to re-erect the roof in a workmanlike manner with the existing roofing materials. It was further provided that any defects in the roof at the time of removal would be the responsibility of the purchaser to remedy.

[16] In an addendum to the contract, Haines contracted to ensure that the dwelling was watertight and that they would use their best endeavours to remove the building in fine weather and otherwise to take all precautions to avoid water damage to the dwelling. We understand that Haines assert that this obligation related to the building while it was in transit and while it was being reconstructed on site. It did not modify clause 8 and require them to fix any existing defects in the roof.

[17] We also refer to clause 19 of the house contract as it has relevance both to the question of the legal effect of any representations and as to the extent of Haines' obligations with regard to making the house watertight. Under clause 19, the Pearces agreed that they had purchased the building in existing condition and after inspection and without reliance upon any representation by Haines as to the condition and fitness for any purpose of the house.

[18] The next issue is whether the Pearces were in breach of the house contract. This depends on whether they were in breach of the associated land contract. The land contract provided that Haines would buy from the Pearces two sections stated in the contract to be "not exceeding an area of 800m^2 each". Haines say that this was a mistake and that the agreement was, and the contract should have read, that the lots would not be less than 800m^2. They argue that grounds for rectification of the contracts existed.

[19] In the event, the sections were 600m^2. In reliance on their understanding of the contractual provisions, Haines had on-sold the sections to purchasers who needed at least 800m^2 to accommodate the secondhand houses that Haines had sold to those purchasers. Haines thus found themselves in breach of those contracts. There is also an issue with regard to the time within which the Pearces were obliged to complete the subdivision. The twelve month period specified in the original land contract may have been extended to eighteen months, although it is not clear from the correspondence whether agreement on the extension was reached.

[20] It will be obvious from our brief survey of the contractual matrix that there are complex issues of law involved in the consideration of the legal position between Haines and the Pearces and that the legal issues are intertwined in many cases with issues of fact. For example, it will be a question of fact whether the various representations were made and exactly what was said. How far the representations modify the terms of the contract must then be considered. The contractual interpretation is a question of law but it is clearly dependent on the factual findings made as regards the representations.

[21] It will be a question of law whether, despite the clear words of clause 24 of the contract, Haines were deprived of the right to remove the house if they were in breach of their obligations with regard to ensuring the house was watertight. If that is the case, the extent of the breach of any obligation to make the house watertight will need to be decided. This is also a mixed question of fact and law and will depend presumably partly on some assessment of the state of the roof prior to relocation as well as its state after relocation. Whether or not the land contract in

relation to the sections is subject to rectification is also a mixed question of fact and law.

[22] We conclude that the assessment of TVNZ's defences will involve mainly difficult questions of law. Further, the issues of law are tightly intertwined with the facts at each stage of the inquiry. Venning J was therefore correct to hold that the condition set out in s 19A(5)(a) was met.

Will the trial or any issue in the trial require prolonged examination of documents or accounts or will difficult professional or business issues arise?

[23] TVNZ accepts that whether or not Haines suffered economic loss as a result of the broadcasts will require extensive evidence relating to Haines' financial affairs. It, however, submits that juries should not be underestimated and that the material should be able to be presented in a manner a jury can understand without the need for the jury to go to the underlying financial material. In any event, TVNZ submits that the important assessment will be the extent to which any financial losses stemmed from the broadcasts and this involves an exercise of judgment rather than any form of precise actuarial determination.

[24] The financial material should be able to be presented so that the differences between the parties are highlighted but we do not consider that this will necessarily make the material easy to understand. If the experts are agreed that there had been a downturn in Haines' financial position after the broadcasts and are agreed on its extent, we accept that the fact-finder would not be required to assess the underlying financial material for this stage of the inquiry. It seems to us, however, that agreement to that extent would be extremely unlikely.

[25] Even if there were such agreement, we do not accept TVNZ's submission that the extent to which any financial losses stemmed from the broadcasts will require only an exercise of judgment. In order to assess the extent to which the losses stemmed from the broadcasts the fact finder will, it seems to us, need to examine Haines' financial performance both before and after the broadcasts, understand the market trends and other performance factors which could have

contributed to any downturn (or failure of continued growth) and assess the financial effect of the broadcasts (and the duration of that effect) in light of those trends and other performance factors.

[26] TVNZ has not shown Venning J to be wrong when he concluded that the condition set out in s 19A(5)(b) was met.

Was the discretion to order trial by judge alone exercised by Venning J in a proper manner?

[27] TVNZ submits that, in exercising his discretion under s 19A(5), Venning J did not consider, either adequately or at all:

(a) The importance of the right to a jury trial;

(b) That Haines' allegations attacked TVNZ's integrity;

(c) TVNZ's public functions; and

(d) The possibility of a split trial between liability and quantum.

[28] This Court said in *McInroe v Leeks* (at [21]) that, where the s 19A(5) threshold requirements are met, the Court is engaged in a balancing exercise. It must give careful consideration to how best the trial process and its management can meet the overall justice of the case, placing due weight on the entitlement of the party to seek trial by jury and the great importance of that right.

[29] The balancing exercise involves the exercise of a discretion. In order to succeed on this ground of appeal, therefore, TVNZ must show that Venning J acted upon a wrong principle, failed to take into account a relevant matter or took into account some irrelevant matter. The question of the weight to be given to relevant factors is for the Judge, unless the resulting decision is plainly wrong.

[30] We assess each of the factors identified by TVNZ in accordance with these principles. We then examine Venning J's decision as a whole to see if it can be characterised as plainly wrong.

Importance of the right to a jury trial

[31] TVNZ's first assertion is that Venning J did not adequately take into account the importance of the right to a jury trial.

[32] Venning J acknowledged that generally defamation trials are heard before a jury. He also acknowledged the importance of the role of juries in defamation litigation. This factor was, therefore, clearly taken into account. It is only if his resulting decision was plainly wrong that it can be impugned.

Allegations affecting TVNZ's integrity

[33] TVNZ's next criticism is that Venning J failed to take into account adequately, or at all, the fact that TVNZ's integrity had been called into question.

[34] On this point Venning J said that the integrity of TVNZ is not called into question in this case any more than would be the case for any other media defendant. Venning J is very familiar with these proceedings and must be taken to know the extent of Haines' allegations. The point was thus one taken into account by Venning J. His decision can only be impugned if it is plainly wrong.

TVNZ's public functions

[35] TVNZ submits that its public functions as a state-owned nation-wide television broadcaster with statutory responsibilities for the presentation of news and current affairs should weigh heavily in favour of a jury trial.

[36] As recognised by TVNZ, Haines are not public figures. The rights and wrongs of their contractual dispute with the Pearces do not have any wider public importance except arguably to Haines' future customers, who are a limited group. That it is part of the public functions of TVNZ to present news and current affairs

does not insulate it from defamation suits and cannot by itself always dictate the mode of trial when it faces such claims.

Possibility of a split trial between liability and quantum

[37] TVNZ asserts that the preferable course would have been to split the trial between liability and quantum. Venning J said that a split trial would be undesirable where the sole reason for splitting the trial would be to retain the involvement of the jury at the first stage of the process. In TVNZ's submission, Venning J was in error because the retention of jury involvement is the very purpose of splitting the trial. It would also recognise the importance of juries in defamation proceedings.

[38] Had s 19A(5)(b) been the only condition in s 19A(5) that had been met, TVNZ's submissions would have had a lot of force. As it is, however, the condition in s 19A(5)(a) was also met and having a split trial between liability and quantum does not alleviate the difficulties outlined at [20] - [21] above.

Was Venning J plainly wrong to order trial by judge alone?

[39] TVNZ submits that Venning J's decision to order trial by judge alone was plainly wrong. Mr Akel refers to Lord Denning's judgment in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013 as authority for this submission. He says that *Rothermere* stands for the proposition that, where a defendant's integrity has been challenged and actual malice alleged, a defendant is entitled to a trial by jury even if the case may involve prolonged examination of documents.

[40] *Rothermere* involved allegations that the proprietors of the Daily Mail had, in pursuit of unconscionable superprofits and with callous disregard for their loyal employees, closed another of their newspapers, the Daily Sketch. Trial by judge alone had been ordered on the basis that there would have to be a prolonged examination of documents. On appeal, a jury trial was substituted.

[41] Lord Denning stated (at 1018) that, despite the mass of documents that would have to be considered by the jury, the Judge in ordering a trial by judge alone had

failed to given sufficient weight to the national importance of the subject-matter, to the gravity of the charges made against the defendants, and to their legitimate desire to have them tried by the jury. It is true that Lord Denning had earlier on that page said that, where actual malice is alleged, a defendant is entitled to ask that guilt or innocence in that regard be tried by a jury. It is clear, however, from the rest of his judgment, that he considered this a strong factor to be weighed rather than an absolute entitlement.

[42] Lord Denning's was not the only judgment in *Rothermere*. Cairns LJ dissented. Lawton LJ concurred in the result but seems to have done so on the basis that the case was one likely to affect the public to such an extent that a jury should be involved (see at 1022). He also saw the issue as one that required an assessment of the choice between "jobs for men or profits for shareholders" and considered that the opinion of a jury in such a case may reflect the public's view more accurately than the assessment of a judge alone.

[43] We accept Haines' submission that *Rothermere* is only authority for the proposition that the fact a party's integrity may have been challenged is a strong factor in favour of a jury trial where issues of public importance are at stake. It does not stand for the wider proposition contended for by TVNZ. In this case, as indicated above at [36], the broadcasts related to a private contractual dispute between Haines and the Pearces and had no wider public importance.

[44] Further, as Haines points out, *Rothermere* has not been whole-heartedly embraced by this Court. In *TVNZ v Prebble* (1992) 6 PRNZ 113 (HC) Mr Prebble sought a trial by judge alone in defamation proceedings he brought against TVNZ. This Court, in *TVNZ v Prebble* [1993] 3 NZLR 513 (CA), overturned the High Court's decision providing for a jury trial. Cooke P (at 525) said that the English authorities relied on by the High Court, being *Williams v Beesley* [1973] 1 WLR 1295 and *Rothermere*, were not directed to the New Zealand statute. They did not persuade him that a trial before a jury would be likely to do justice in what was a highly unusual case. Richardson J (at 535) said that he agreed with Cooke P's conclusions in relation to the mode of trial. Casey J (at 537) said that, with respect to the contrary view expressed by Lord Denning in *Rothermere*, he did not see the

defendant's wish to have its reputation vindicated as carrying much weight in light of the plaintiff's wish for trial before a judge alone. Gault J (at 540) said that he agreed that the complexity of the case dictated trial before a judge alone. McKay J (at 550) relied on *Williams v Beesley* as a basis for giving greater weight to the desire of a plaintiff for a jury trial than would be given to a defendant.

[45] For the above reasons, we do not accept TVNZ's submission that the principles set out in *Rothermere* required Venning J to order a jury trial in this case. In addition, there was another factor taken into account by Venning J that, even by itself, may well have justified his decision, namely the difficulty of formulating questions for the jury in this case. TVNZ did not provide us (or, for that matter, Venning J) with a list of suggested questions for the jury in order to demonstrate that the jury's task would be manageable. We agree with Venning J that formulating questions for the jury in this case would be very difficult, given the interlinking of law and fact at each stage of the inquiry into the legal position between the Pearces and Haines. In our view, Venning J was correct to treat this as a very weighty factor in the balancing process and his resulting decision has not been shown to be plainly wrong.

Other possible method of splitting the trial

[46] We discussed with counsel at the hearing of the appeal whether it was possible to have some kind of hybrid process for the determination of liability, whereby the judge would decide the legal position on the various contractual issues and whatever facts were necessary to decide those legal questions. The case would then be put to the jury on the basis of the judge's directions on the contractual position.

[47] On reflection, this did not seem to us to be practical. The jury would have to be present (in order to avoid duplication of evidence) for the whole of the proceedings. They could therefore conceivably take a different view from that of the judge in relation to the facts and thus have some difficulty in accepting directions from the judge on the effect of the contractual provisions. Further, the legal issues to be decided are also not at all easy and this raises the prospect of the trial having to be

adjourned while the judge considers those issues before instructing the jury. This would be a most unsatisfactory process.

Conclusion and Costs

[48] For the reasons we have set out above, the preconditions in s 19A(5) of the Judicature Act are met and Venning J exercised his discretion appropriately. The appeal is accordingly dismissed.

[49] Costs of $6,000 plus usual disbursements are payable to the respondents. We certify for two counsel.

Solicitors:
Simpson Grierson, Auckland for Appellant
Carter Partners, Auckland for Respondents