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: 18 and 19 December 2006

Appearances: J G Miles QC, A Ivory and M Keall for the Plaintiffs
A R Galbraith QC, T J Walker and H Wild for the First Defendant
B D Gray QC, A L Ringwood and K A Newland for the Second Defendant
J R Billington QC and G Kayes for the Third and Fourth Defendants

Judgment: 3 August 2007

JUDGMENT (NO 7) OF ALLAN J
[Plaintiffs' Application for Orders Striking Out Portions of Particulars Pleaded by First–Fourth Defendants]

This judgment was delivered by Justice Allan
on 3 August 2007 at 3:00 pm, pursuant to
r 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date:

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[1] The plaintiffs were at all material times major figures in the New Zealand fishing industry. Over a period of some years the administration of the industry by the relevant government ministries, and the conduct of certain participants in the industry, were the subject of a great deal of public controversy and debate. The issues received significant attention in Parliament. There were several proceedings in this Court and the Court of Appeal and there were two separate formal Inquiries. The first and second defendants each published material relating to the state of the fishing industry in general and to the role of the plaintiffs in it in particular. In the case of the first plaintiff, the publication occurred in the course of a special *Assignment* programme screened on TV One. In the case of the second defendant the publications occurred over a period of some months in the second defendant's newspaper, the New Zealand Herald. The plaintiffs took exception to these publications and so issued this proceeding in which they claim very substantial damages for defamation and malicious falsehood. The third and fourth defendants are said to have participated in the first defendant's publication by providing material for the *Assignment* programme and participating in it.

[2] The plaintiffs' second amended statement of claim, read overall, is a complex document. The plaintiffs say that very significant portions of the publications of the first and the second defendants respectively are defamatory of them. They allege that the publications of the first and second defendants were each capable of carrying one or more of five separate defamatory meanings, namely:

i) That the three plaintiffs in concert or each of them were guilty of longstanding corrupt actions with senior personnel at the Ministry of Agriculture and Fisheries/Ministry of Fisheries;

ii) The second and third plaintiffs were each or both of them 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 longstanding

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

iv) In the alternative, there were serious grounds for believing that each or both the second and third plaintiffs were 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.

[3] The plaintiffs claim general, aggravated and punitive damages, together with special damages (of which detailed particulars are provided) totalling almost $30 million. Counsel are agreed that the claim is by some distance the largest defamation claim ever launched in this country.

[4] The defendants have filed detailed statements of defence. The plaintiffs do not accept that the statements of defence of the first to fourth defendants comply with the defendants' pleading obligations. They now apply for an order striking out as against the first defendant:

a) That defendant's pleaded truth defence to the extent that it seeks to rely on both s 8(3)(a) and s 8(3)(b) of the Defamation Act 1992;

b) Portions of Schedules I-VIII to the first defendant's statement of defence which set out particulars of the pleaded defences of truth and honest opinion;

c) The pleaded defence of statutory privilege.

[5] As against the second defendant the plaintiffs seek an order striking out:

a) The pleaded defence of truth upon the grounds that the particulars provided do not meet the requirements of s 38 of the Defamation Act 1992;

b) The pleaded defence of honest opinion upon the ground that the facts and circumstances relied upon are inadequate;

c) The pleaded defence of statutory privilege.

[6] As against the third and fourth defendants the plaintiffs seek an order striking out:

a) The pleaded truth defence on the ground that the defendants have failed to comply with the requirements of s 38 of the Defamation Act 1992;

b) The pleaded defence of honest opinion which it is alleged fails in several respects to comply with the pleading requirements associated with that defence.

Strike out principles

[7] The principles which underlie the Court's jurisdiction to strike out a pleading are well established and are not in dispute. The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied that it is the only appropriate solution. That will ordinarily be the case only where a defence is so clearly untenable that it cannot possibly succeed. Where a defect can be cured by amendment then time should be allowed for that purpose.

First defendant – truth defence

[8] At paragraph 34 of its statement of defence to the second amended statement of claim the first defendant pleads:

> The programme as a whole was in substance true, or was in substance not materially different from the truth.

There is an express reference in the paragraph to s 8(3)(b) of the Defamation Act 1992.

[9] At paragraph 35 of the amended statement of defence the first defendant (although denying that the programme bore, or was capable of bearing, the meanings alleged by the plaintiffs) pleads the defence of truth to two of the meanings alleged by the plaintiffs, namely the meanings set out in paragraph 2(iii) and (iv) of this judgment. The first defendant relies for that pleading on s 8(3)(a) of the Defamation Act 1992.

[10] The plaintiffs apply to strike out the pleading at paragraph 34 but not that at paragraph 35. In other words, they say that the first defendant is not at liberty to plead both that the programme as a whole was in substance true, and that any one or more of the meanings alleged by the plaintiffs was true. The plaintiffs argue that the first defendant must make a choice between two mutually exclusive alternatives. The first defendant says it is entitled to plead separate truth defences in the alternative. The issue in dispute turns upon the interpretation of s 8(3)(b) of the Defamation Act. In order to understand the statutory context it is necessary to have regard to both s 8(2) and s 8(3) which read:

> **8 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.

[11] The argument for the plaintiffs is that once the defendant pleads truth to any of the meanings claimed by a plaintiff (s 8(3)(a)) it cannot also plead a truth defence based on the proposition that taken as a whole the publication does not have those meanings (s 8(3)(b)) because to do so would be inherently contradictory. In order to test that argument it is necessary to have regard to the genesis of s 8. There was no equivalent provision in the Defamation Act 1954. The 1992 Act had its genesis in the first report of the Committee on Defamation, *Recommendations on the Law of Defamation*, 1977 (the McKay Report). There is in addition a helpful explanatory note to the Defamation Bill. The McKay Report recommended that the Defamation Act 1954 be amended to enable the defendant to rely on the whole of the publication in answer to a claim by a plaintiff complaining only of part of it. That was to enable a defendant to prove that the publication taken as a whole was true or not materially different from the truth. So the focus of that inquiry was not to be on whether the meanings pleaded were true but on the degree of actual injury to reputation based on the truth or otherwise of the whole publication.

[12] At paragraph 111 of the McKay Report the following passage appears:

> We agree that where a person's reputation has not been materially injured then there is no real merit in the plaintiff's case and he should not be able to succeed in an action for defamation. It may be suggested that the proposed reform will allow people to make false statements about another safely so long as they are coupled with true, but otherwise defamatory statements about a person's earlier life. We believe that the risk of this occurring is minimal because a remedy will be available if the statement as a whole contains untruths which materially affect the plaintiff's reputation. We therefore recommend that section 7 of the Defamation Act 1954 be amended to enable a defendant to rely on the whole of the publication in answer to a claim by a plaintiff complaining only of part of it.

[13] The statutory purpose underpinning s 8(3)(b) was further explained in an explanatory note to the Defamation Bill as follows:

> Sub-clause (3)(b) provides that in proceedings for defamation based on all or any of the words in a publication, a defence of truth shall succeed if the defendant proves that the publication, taken as a whole, was in substance true, or was in substance not materially different from the truth. The provision is intended to overcome unfairness to a defendant where a plaintiff selects from a number of statements in a publication only those which the plaintiff knows the defendant cannot justify, and ignores others that are true. Under the existing law, the defendant cannot prove the truth of the statements not sued on in order to show that the plaintiff's reputation was not materially injured by the statements that are untrue.

[14] The first defendant says that its *Assignment* programme contained large segments which are not relied upon by the plaintiffs. Mr Galbraith submits that when those parts of the programme are taken into account the substantive impact of the broadcast as a whole is likely to be different from any meanings the plaintiffs may establish from the passages they rely on, even in the context of the whole broadcast. He argues that the first defendant is entitled to plead that the whole broadcast was in substance true or not materially different from the truth so that the plaintiffs are judged against the reputation they deserve in the context of the publication taken as a whole.

[15] For the plaintiffs Mr Miles says that a defendant must nevertheless elect that leg of s 8(3) upon which it wishes to rely. If a defendant chooses to run a truth defence to any of the meanings alleged by the plaintiffs, thus relying on s 8(3)(a), then it cannot also rely on s 8(3)(b). Mr Miles referred to the judgment of Venning J in *Haines v Television New Zealand Limited* [2004] NZAR 513 in which a distinction was drawn between the traditional truth defence which obliges a defendant to plead to the meanings relied upon by the plaintiff (s 8(3)(a)), and the "pick and choose" cases typified by *Templeton v Jones* [1984] 1 NZLR 448 to which the combination of s 8(2) and s 8(3)(b) was designed specifically to respond.

[16] Mr Miles submits that the s 8(3)(b) defence is open only in the "pick and choose" cases in which a plaintiff selects certain statements from the published material and sues on them to the exclusion of the rest of the publication. The plaintiffs say this is not a "pick and choose" case - the plaintiffs rely on the *Assignment* programme as a whole but they have, at the insistence of the defendants, identified a significant number of specific statements that carry the meanings attributed to them by the plaintiffs in the context of the programme as a whole. The

extracts concerned (which are very substantial but which nevertheless omit significant sections of the programme) are set out at Schedule 1 of the second amended statement of claim.

[17] The issue is therefore whether s 8(3)(b) is available to a defendant only in a "pick and choose" case. There appears to be no case directly on point but the judgment of the Court of Appeal in *Television New Zealand Limited v Haines* [2006] 2 NZLR 433 provides some assistance. At paragraphs [45]-[46] of the judgment Robertson J, delivering the judgment of the Court, said:

> [45] Section 8(2) makes it clear that, if a plaintiff complains of only part of a publication, the defendant may prove the truth of any facts contained in the whole of the publication to show the context of the statement complained of. This subsection, coupled with s 8(3)(b), means that *Templeton v Jones* is no longer good law in New Zealand.
>
> [46] Section 8(3) sets out the substantive truth defence. The important thing to note is that the defence of truth may now be proved in two different ways. Paragraphs (a) and (b) of s 8(3) provide alternatives. Under para (a), a defendant will avoid liability if it proves that the imputations pleaded were true or not materially different from the truth. We discuss later whether a defendant is limited under this paragraph to the imputations pleaded by the plaintiff. Alternatively, under s 8(3)(b) a defendant can avoid liability if it proves that the publication taken as a whole was in substance true or was in substance not materially different from the truth. These two different methods of proving truth must be separately pleaded and will be the subject of separate directions by the Judge to the jury.

And at paragraph [67] he said:

> [67] We note that TVNZ still has the ability under s 8(3)(b) to mount as a defence the argument that the broadcast as a whole was true.

[18] In my opinion the concluding sentence of paragraph [46] envisages an entitlement by a defendant to plead both limbs of s 8(3). That is a necessary inference from His Honour's observation that the two different methods of proving truth must be separately pleaded and that they must be the subject of separate directions by the Judge to the jury. That comment is not consistent with a pleading restriction of the sort for which Mr Miles argues. That conclusion is fortified by what appears at paragraph [67] of the judgment. It is plain from the reference to s 8(3)(b) in that paragraph that the court considered that TVNZ had the ability to rely on both limbs of s 8(3).

[19] *Haines* was not a "pick and choose" case. The plaintiffs there pleaded that the whole of the broadcast in question carried certain meanings, for example that the plaintiffs ripped off their customers and that the plaintiffs were dishonest. They did not, as in a "pick and choose" case, isolate certain statements and allege that they alone carried the defamatory meaning.

[20] In my opinion a defendant is entitled to rely upon both limbs of s 8(3). There is nothing in the language of the subsection itself to suggest a different outcome. Indeed, the use of the word "or" between subsections (a) and (b) tends to indicate that there are two different methods of pleading truth. Considerations of logic and fairness also suggest that the first defendant's argument is correct.

[21] The plaintiffs say that the programme carries or is capable of carrying some five different defamatory meanings. But there may be other meanings not pleaded by the plaintiffs and not defamatory. Although the plaintiffs say that they rely upon the whole programme, they have, as a pleading technique, identified relevant portions of the *Assignment* programme to the exclusion of others. In my view that leaves room for the first defendant's argument that the broadcast as a whole was true or not materially different from the truth. The s 8(3)(b) pleading is not inconsistent with the first defendant's plea of truth to two of the five meanings pleaded by the plaintiffs in reliance on some (but not all) of the first defendant's *Assignment* programme.

[22] In my opinion, therefore, the first defendant is entitled to maintain the alternative truth pleadings set out in paragraphs 34 and 35 of its statement of defence to the second amended statement of claim.

First defendant – particulars of truth and honest opinion

[23] The plaintiffs mount a fundamental challenge to the conceptual validity and overall adequacy of the particulars pleaded by the first defendant in support of its defence of truth and honest opinion. They say that the first defendant must comply with the requirements of s 38 of the Defamation Act which provides:

> **38 Particulars in defence of truth**
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> 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—
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> (a) The statements that the defendant alleges are statements of fact; and
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> (b) The facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[24] The primary purpose of s 38 is to deal with the pleading obligations of a party who relies on what was formerly known as a "rolled up" plea, namely a plea that insofar as the impugned statements are statements of fact they are true and insofar as they constitute the expression of an opinion, that opinion is an honest opinion. The first defendant has not pleaded its case in that way. The truth and honest opinion defences are separately pleaded in accordance with current practice. Nevertheless the general obligations of a defendant who raises a defence of truth are akin to those set out in s 38.

[25] In *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 Tipping J, writing the judgment of the Court of Appeal, 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. 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.

[26] To similar effect is a passage appearing in *The Laws of New Zealand, Defamation*, at paragraph 170:

> Where a defendant in proceedings for defamation raises an imputation of misconduct against a plaintiff, the plaintiff ought to be able to go to trial with knowledge of the acts which are alleged and on which the defendant intends to rely as justifying the imputations. A plaintiff cannot be expected to come to trial prepared to justify his or her entire life. A defendant who pleads truth… to a general charge must give full particulars of the facts relied on as showing that the defamatory statement is true, in order to prevent the plaintiff from being taken by surprise. The particulars must be relevant to the issues; if they are irrelevant, vague or embarrassing, they will be struck out.

[27] Mr Miles argues that the first defendant's pleading falls short of complying with certain detailed principles governing a defendant's pleading obligations in defamation cases, to be found in *Gatley on Libel and Slander* (10th ed) (2004) at paragraph 27.10:

> (a) Where a serious allegation of dishonesty is made a defendant pleading the defence of truth must plead specific instances of misconduct with which he seeks to justify the charge with sufficient particularity as to enable the claimant to know precisely what are the facts to be tried.
>
> (b) However, and as a countervailing factor, defamation proceedings ought not to descend into uncontrolled and wide ranging investigations akin to public enquiries where that is not necessary to determine the real issue between the parties. Peripheral material which is not essential to the just determination of the real issues between the parties should be excluded: *McPhilemy v Times Newspapers Limited* [1999] 3 All ER 775.
>
> (c) A defendant who has repeated an allegation of a defamatory nature about a plaintiff may succeed in justifying it only by proving the truth of the underlying allegation – not merely the fact that the allegation has been made (the so called "repetition rule").
>
> (d) In the case of a defence of truth on the grounds of reasonable suspicion there must be a focus on some conduct of the plaintiff giving rise to that reasonable suspicion (the so-called "conduct rule"). It is also necessary for the plaintiff to plead the primary facts and matters which objectively judged are said to have given rise to reasonable grounds of suspicion. In this regard it is impermissible to plead as a primary fact the proposition that some person or persons announced, suspected or believed the plaintiff to be guilty.
>
> (e) A defence of reasonable ground for suspicion may not be made out by reference to post-publication events since the issue falls to be judged as at the time of publication.

[28] The first defendant's particulars cannot be criticised on the grounds of overall paucity. The schedules containing the particulars run to some 48 pages. Schedule I (comprising 14 pages and running to 100 paragraphs) is headed "Statements in the broadcast that the first defendant alleges are statements of fact" and is intended to list

in a comprehensive fashion the facts upon which the first defendant relies as comprising the relevant facts appearing in the programme as a whole. The remaining schedules, covering 34 pages, refer to matters that gave rise to the broadcast of the special *Assignment* programme and are said to comprise circumstances going to the truth of the imputations. So on their face the particulars appear to comply with the requirements of s 38 and the distinction between facts and circumstances referred to in *Ah Koy*.

[29] These remaining schedules bear the following headings:

Schedule II	Relationship of the first and/or second and/or third plaintiff with the Ministry and the conduct of the Ministry that favoured the first plaintiff to the detriment of other fishers.
Schedule III	Judgments of the High Court and the Court of Appeal in the scampi litigation.
Schedule IV	Allegations made in Parliament and elsewhere by the Rt. Hon. Winston Peters.
Schedule V	Affidavit evidence provided to the first defendant prior to the broadcast of the programme
Schedule VI	Interviews given to the first defendant and broadcast on the programme.
Schedule VII	Involvement by Simunovich in illegal fishing activities
Schedule VIII	The reports of Mr Peter Andrew, barrister

[30] At the heart of Mr Miles' criticisms of the first defendant's particulars lie two linked considerations. The first is that the two imputations pleaded by the plaintiffs to which the first defendant has pleaded the defence of truth are "reasonable grounds for suspicion" imputations falling within the so-called second tier of the meaning classifications discussed in certain English authorities. The second consideration is that where second tier meanings are in issue a defendant must prove the truth of the underlying allegation, not merely the fact that the allegation has been made.

[31] Because Mr Galbraith argues that the repetition rule does not apply, at least in its full rigour, to this case it is necessary to examine the leading cases in which the rule has been explained.

[32] The distinction between three categories of the defence of truth appears to have been articulated for the first time in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 282 where Lord Devlin said:

> I do not mean that ingenuity should be expended in devising and setting out different shades of meaning. Distinct meanings are what should be pleaded; and a reasonable test of distinctness would be whether the justification would be substantially different. In the present case, for example, there could have been three different categories of justification – proof of the fact of an inquiry, proof of reasonable grounds for it, and proof of guilt.

[33] An alternative but useful explanation of the three tiers appears in the more recent case of *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] E.M.L.R. 11 where at paragraph 45 Brooke LJ, delivering the judgment of the Court of Appeal, said:

> The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act.

[34] In terms of that classification it is not in dispute that the plaintiffs' imputations to which the first defendant has pleaded the defence of truth are imputations which carry second tier meanings – that is they are "reasonable grounds for suspicion" meanings.

[35] Two recent English authorities provide a useful summary of the repetition rule and its application to second tier meanings. The first is *Chase v News Group Newspapers Ltd*, where at paragraph 30 Brooke LJ cited with approval the summary as set out in the court below:

> 30 When deciding whether he should strike out para 12 of the defence the judge said that he should take into account three principles of English law which had only been articulated in the last ten years, although they each carried the genetic traces of much older case law. He set them out in these terms:
>
> (i) A defence of justification based upon "reasonable grounds for suspicion" must focus upon some conduct of the individual claimant that in itself gives rise to the suspicion: *Shah v Standard Chartered Bank Ltd* [1999] QB 241, 261 (Hirst LJ), 266 (May LJ) and 270 (Sir Brian Neill).

(ii) In such a case it is not permitted to rely upon hearsay: *Shah* at 241 (Hirst LJ), 269-270 (May LJ) and 270 (Sir Brian Neill); see also *Bennett v News Group Newspapers Ltd* [now reported at [2002] EMLR 860, 869].

(iii) Nor may a defendant plead as supposed "grounds" matters post-dating publication: *Bennett* [877]; see also *Evans v Granada Television Ltd* [1996] EMLR 427, 435-6.

The first of these principles is often now called the "conduct" rule, and the second is now regarded as part of the "repetition" rule.

[36] Brooke LJ was prepared to accept that there may be second tier cases in which strong circumstantial evidence might be led implicating the plaintiff in the impugned conduct. He said:

50 I would accept, however, Mr Spearman's further submission that the language used by the members of this court in *Shah* should not be treated as if they were the words of a statute. There may be cases, of which this is unquestionably not one, in which, depending on the terms of its publication, a defendant may rely on matters which do not directly focus on some conduct on the plaintiff's part giving rise to a relevant suspicion.

51 A defendant may, for example, rely on strong circumstantial evidence implicating the claimant which might amount, objectively speaking, to the requisite grounds for reasonable suspicion. It is not, however, necessary to explore this possibility on the present appeal.

[37] But these comments do not suggest that it may be appropriate in some circumstances to depart from the repetition rule.

[38] More recently again, Eady J in *Al Rajhi Banking & Investment Corporation v The Wall Street Journal Europe SPRL* [2003] EWHC 1358 (QB) essayed a summary of principles which apply where second or third tier meanings are involved. He said (at paragraph 27):

27 …it is perhaps worth identifying certain principles which are intended to discipline those who seek to justify any defamatory allegation on the basis that the particular claimant is only involved in wrongdoing, if at all, at one or two removes. They need to be stated because the court should always be alert against any form of pleading designed to by-pass those disciplines. These principles can be derived from such recent Court of Appeal authorities as *Evans v Granada Television* [1996] EMLR 429, *Stern v Piper* [1997] QB 123, *Shah v Standard Chartered Bank* [1999] QB 241, *Bennett v News Group Newspapers* [2002] EMLR 39 and *Chase v News Group Newspapers* (cited above):

> 1) There is a rule of general application in defamation (dubbed the "repetition rule" by Hirst LJ in *Shah*) whereby a defendant who has repeated an allegation of a defamatory nature about the claimant can only succeed in justifying it by proving the truth of the underlying allegation – not merely the fact that the allegation has been made.
>
> 2) More specifically, where the nature of the plea is one of "reasonable grounds to suspect", it is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion objectively judged.
>
> 3) It is impermissible to plead as a primary fact the proposition that some person or persons (e.g. law enforcement authorities) announced, suspected or believed the claimant to be guilty.
>
> 4) A defendant may (e.g. in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact – but that in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts.
>
> 5) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion (the so-called "conduct rule").
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> 6) It has recently been acknowledged, however, by the Court of Appeal in *Chase* at [50]-[51] that this is not an absolute rule, and that for example "strong circumstantial evidence" can itself contribute to reasonable grounds for suspicion.
>
> 7) It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the time of publication.
>
> 8) A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue requires to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant).
>
> 9) Unlike the rule applying in fair comment cases, the defendant may rely upon facts subsisting at the time of publication even if he was unaware of them at the time.
>
> 10) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them.

[39] A further useful summary of the relevant principles is to be found in the judgment of the Court of Appeal in *King v Telegraph Group Ltd* [2004] EWCA Civ 613.

[40] Mr Miles argues that the first defendant's schedules infringe the prohibition of reliance upon the opinions of others as proof of a primary fact. The effect, he says, is to bypass the strict pleading rules which he says apply equally in this country as in the United Kingdom. For example, much of Schedule I (and in particular the latter portion of it) refers to statements made by others (some in the course of affidavits) including certain judgments of the High Court and Court of Appeal. That is not permissible, Mr Miles argues, in a schedule which purports to set out statements of fact. The opinions of others are not admissible as proof of the underlying allegations.

[41] Mr Galbraith, for the first defendant, argues that the plaintiffs have misapprehended the purpose behind Schedule I, which was intended simply to identify those aspects of the whole of the broadcast programme which the first defendant says are statements of fact. The contents of Schedule I were never intended, he submitted, to establish truth. Where reference is made in Schedule I to statements or opinions of other persons (such as the contents of affidavits or the judgments of the courts) the references concerned are intended only to identify the making of the statements, not their truth. As he points out there is a significant and important difference between pleading the fact that a particular statement was made and relying on the statement "testimonially": *Bennett v News Group Newspapers Ltd* [2002] EMLR 39 (CA) [38-39], *Ratten v R* [1972] AC 378 at 387 and *R v Andrews* [1987] AC 281.

[42] That distinction is well understood and can hardly be disputed. The question is however whether the particulars supplied by the first defendant are sufficient to inform the plaintiff fully and fairly of the fact and circumstances which are to be relied upon by the first defendant in support of its defence of truth: *Ah Koy* at [17]. The first defendant may be able to say that in principle its schedules comply with the provisions of s 38. But in my opinion that does not conclusively circumscribe this defendant's obligations. Schedule I may well set out all the facts contained in the programme or at least all of the material facts, and so underpin the defence based upon s 8(3)(b). But the first defendant has also pleaded truth to two second tier meanings alleged by the plaintiffs.

[43] In my view the plaintiffs are entitled to have a clearly defined (and if necessary, separate) set of particulars relating to the s 8(3)(a) defence. That has not occurred. The s 8(3)(a) particulars ought not to be subsumed in much wider particulars designed to cover the s 8(3)(b) defence (relating to the programme as a whole). It is not possible to pick out from the plaintiffs' current particulars those facts and circumstances which are alleged to support the plea of truth to the plaintiffs' pleaded second tier meanings. Schedule I is admittedly designed for a different purpose. Moreover, much of the content of Schedule I infringes the restrictions imposed by the repetition rule.

[44] In my view, it will be necessary for the first defendant to reorganise its particulars so as to separately identify:

a) The facts and circumstances relied upon in support of each plea of truth to the plaintiffs' second tier imputations;

b) The facts and circumstances relied upon in support of the first defendant's s 8(3)(b) defence.

[45] It may well be of course that there is a significant degree of overlap but I think that fairness to the plaintiffs requires that the first defendant clearly distinguishes between the separate purposes for which the relevant facts and circumstances are to be deployed.

[46] Mr Galbraith points out that there is no provision in England equivalent to our ss 8(3) and 38 and that, as he put it, "there may be a need to revisit the repetition and conduct rules" in New Zealand especially in the light of the evolving character of the law of defamation. His submissions on the point were couched in somewhat tentative language and understandably so. I do not detect in s 8(3) or s 38 anything that would suggest that New Zealand needs to adopt a different approach to the repetition and conduct rules.

[47] Mr Galbraith also submits that despite the repetition rule a defendant must have the right to rely on credible hearsay sources. For example, the first defendant

must be entitled to rely upon the judgments of the Court of Appeal on matters relating to the fishing industry and the plaintiffs' role in it. That submission has a certain superficial attraction, but s 50 of the Evidence Act 2006 (now in force) prohibits a party from adducing evidence of a finding of fact in a civil proceeding to prove the existence of that fact in another civil proceeding and as Mr Miles submits an accumulation of inadmissible evidence cannot render the totality of that evidence admissible where the constituant parts are not.

[48] Mr Galbraith referred also to ss 7 and 8 of the Evidence Act 2006 which provide that relevant evidence is prima facie admissible subject to the Judge's right to exclude it if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the outcome of the proceeding or if the probative value is outweighed by the risk of the evidence needlessly prolonging the proceeding. So hearsay evidence is not now automatically inadmissible and Court of Appeal judgments might be admitted as part of the relevant circumstances. But there is a distinction between an entitlement to rely upon hearsay evidence on the one hand and the character of the factual material necessary to underpin a truth defence in the first place. The distinction is noted at paragraphs 39-42 of *Chase v News Group Newspapers Limited*. At least in theory a defendant may now adduce hearsay evidence for the purpose of proving the pleaded particulars of truth. But those particulars must relate to facts, not the beliefs or statements of other persons as to those facts. In other words, a defendant cannot establish facts simply by relying on circumstances.

[49] Counsel for the first and second defendants submit that even if the Court concludes that the opinions of others such as judges of this Court and of the Court of Appeal are not "facts" for the purposes of the defence of truth, nevertheless they must constitute "circumstances", of which the defendants are entitled to plead particulars. I think that must be right. *The Shorter Oxford Dictionary* (5th ed) defines the term "circumstance" as "that which stands around or surrounds". Mr Miles described a circumstance as an adjunct to a fact. The defendants, in my view, are entitled to plead the opinions of others as circumstances but not as primary facts relied upon for proof of the defence of truth.

[50] Mr Miles initially invited me to undertake the painstaking task of reviewing the whole of the first defendant's particulars in the same way as did Eady J in *Armstrong v Times Newspapers Ltd* [2004] EWHC 2928 (QB). As the hearing proceeded Mr Miles relented and suggested that it would be sufficient for me to consider a few examples of the particulars challenged by the plaintiffs. Given that the terms of this judgment will require the first defendant to significantly reorder its particulars I think the better course is for me to confine my comments to one or two matters of principle which will assist in the recasting of some passages.

[51] The plaintiffs complain that significant portions of Schedule I are conclusory. They are not necessarily objectionable on that ground if the statement concerned is essentially one of fact, but submission or opinion does not qualify as fact. There is criticism also of passages such as paragraphs 2-5 of Schedule II in that they are conclusory or vague to the extent that the plaintiffs are incapable of checking the veracity of the underlying facts. There is some force in that criticism. The defendants are not required to plead evidence but must, in my view, support allegations such as paragraphs 2-5 by providing some further factual material which will enable the plaintiffs to make its own veracity investigations as envisaged in *Ah Koy*. The whole of Schedule III is criticised on the ground that the judgments of the High Court and Court of Appeal are not facts or circumstances. In my view they are capable of amounting to circumstances (although certainly not facts). The same considerations apply to speeches made by the Rt. Hon. Winston Peters.

[52] There is a further challenge to what Mr Peters said in Parliament. It is claimed that the first defendant's reliance on a Parliamentary speech infringes article 9 of the Bill of Rights Act 1688, incorporated into the law of New Zealand by virtue of s 242 of the Legislature Act 1908 and the provisions of the Imperial Laws Application Act 1988. I do not accept that contention. The first defendant simply relies on the content of the speech. In doing so it cannot be said to question the proceedings of Parliament: see *Hyams v Peterson* [1991] 3 NZLR 648 at 657 and *Prebble v Television New Zealand Limited* [1994] 3 NZLR 1 at 11.

[53] Mr Miles submits that reliance upon the speech must call into question a proceeding in Parliament because the facts and circumstances relied upon in support

of a plea of truth or honest opinion are inherently contentious. In my opinion, that is to conflate two separate considerations. While the proceeding in this Court is contentious, the reliance on the Parliamentary speech is not because first defendant simply relies upon the speech for the fact that it was made. He does not call into question its content.

[54] The plaintiffs' complaints about the manner in which the Barine affidavits have been treated in Schedule 5 have some validity. No particulars are provided. It would, of course, be quite idle to require the first defendant to transcribe the whole of the contents of the affidavits into the statement of defence but the passages relied upon ought to be identified and attributed to the respective deponents so that the plaintiffs have precise facts and circumstances from which to work.

[55] I agree with Mr Miles that paragraphs 1 and 4 of Schedule 7 add nothing. Paragraph 4, in particular, is objectionable unless it is accompanied by appropriate further particulars.

[56] Having reached certain conclusions on matters of principle in this section of the judgment, I do not propose at this point to make any formal orders. At the conclusion of this judgment, I direct that there be, in the first instance, a telephone conference at which issues consequential on this judgment and judgment No. 6 can be discussed. One of the topics for discussion will be the extent to which formal orders ought to be made at this point.

First defendant – statutory qualified privilege

[57] At paragraphs 42 and 43 of its amended statement of defence, the first defendant pleads that Schedules XI and XII comprise fair and accurate reports of the proceedings of the House of Representatives and of the judgments of the High Court and Court of Appeal respectively, and as such are protected by qualified privilege by virtue of the provisions of Part 1 of the First Schedule of the Defamation Act 1992. Mr Miles argues that the first defendant is not entitled to rely on the defence of statutory qualified privilege because in neither case is the material published by the first defendant a fair and accurate report. He argues that the extracts from the

Parliamentary speech relied upon were interspersed with comments from the presenter in a manner that did not present the speech in a fair and accurate light, but rather was calculated to damage the reputation of the plaintiffs. Similarly, he argues, reliance on a brief extract from one judgment of the Court of Appeal is insufficient to constitute the publication a fair and accurate report of the judgment of the Court as a whole. He says that the onus lies on the first defendant to satisfy the Court that the extracts concerned were fair and accurate and that the onus has not been met.

[58] As Mr Galbraith submits, it is of fundamental importance in a democracy that the public have access to the reports of the proceedings of Parliament and of the Courts. It is, of course, quite impossible that transcripts of the proceedings be published in full on every occasion. The media is entitled to be selective and may accord emphasis to those aspects of the proceedings reasonably considered to be memorable or important: *Cook v Alexander* [1974] QB 279 at 291.

[59] Whether or not the relevant words constitute a fair and accurate report of the proceedings of Parliament or of a Court is a question of fact for the jury: *Kingshott v Associated Kent Newspapers* [1991] 1 QB 88 at 97; *Gatley on Libel and Slander* (10th ed), para 34.16.

[60] Mr Miles was inclined to concede that in the somewhat sterile environment of a strike-out application, the necessary proportionality assessment must be a difficult exercise. The issue ought not to be considered on a strike-out application unless the report is plainly not fair or accurate. In my view, this defence is not so untenable that it cannot possibly succeed and it is therefore inappropriate to disallow it.

Second Defendant – truth defence

[61] The plaintiffs sue the second defendant in respect of some 16 separate articles published on 11 separate dates. The defamatory meanings alleged by the plaintiffs are set out at [2] of this judgment.

[62] Mr Gray, for the second defendant, submits that each of the 16 publications, if defamatory, gives rise to a separate cause of action: *Gatley on Libel and Slander* (10th ed), para 24.19, and that separate causes of action are required to be pleaded separately: Rule 181. He points out that the plaintiffs have incorporated the 16 articles and 16 causes of action into a single cause of action. His written synopsis of argument continues:

> (b) The plaintiffs have then constructed a mosaic of cross-references to support the contention that various combinations of words and different articles have defamatory meanings when they are read together.
>
> (c) The statement of claim identifies 35 excerpts from the second defendant's publications (many of which have multiple paragraphs in them) as "highlighted statements". 29 of these highlighted statements are each alleged to have five different defamatory meanings in the context of each article as a whole. 15 of the excerpts have 436 cross-references to other publications and are each alleged to have five different defamatory meanings when taken together with those highlighted statements in other publications.
>
> (d) In some cases a statement is alleged to have all five meanings when considered along with highlighted statements in other articles, but the other articles are not identified.

[63] In summary, Mr Gray says, the plaintiffs allege that 35 highlighted parts of 16 publications each have the same five different meanings when taken in the context of 11,000 other words. He submits that it would have been proper for the first defendant to have made a series of applications to strike out the statement of claim (as the plaintiffs have done in respect of the defendants' pleadings). Instead, he says, the second defendant is endeavouring to take a practical approach so that the proceeding can be progressed.

[64] Against the background of that somewhat heartfelt introductory submission, it is appropriate to consider the second defendant's pleading of the defence of truth. There is no reliance on s 8(3)(b). The second defendant's truth defence is confined to a plea that four of the five imputations pleaded by the plaintiffs are true or not materially different from the truth. The exception is the imputation that the three plaintiffs in concert or each of them were guilty of long-standing corrupt actions with senior personnel of the Ministry of Agriculture & Fisheries/Ministry of Fisheries. The first defendant accordingly pleads the defence of truth to each of the second tier imputations pleaded by the plaintiffs, namely that:

> (iii) 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 & Fisheries/Ministry of Fisheries.
>
> (iv) There were serious grounds for believing that each or both the second and third plaintiffs were corrupt and dishonest businessmen.

[65] Mr Gray argues that, in strict terms, s 38 does not apply because the second defendant's statement of defence contains no rolled up plea. He may be right in that but, in my view, for the reasons already discussed, the judgment of the Court of Appeal in *Ah Koy* requires a defendant who pleads a defence of truth to plead both the facts and the circumstances said to underpin the defence. Moreover, in this case, because the second defendant pleads that defence to the second tier meanings, the second defendant must distinguish in its pleadings between facts relied upon in support of the defence, on the one hand, and supporting material, including circumstances, on the other. That conclusion follows from discussion earlier in this judgment. It is appropriate to note that Mr Galbraith carried the burden of the argument on the point but Mr Gray also made certain submissions which I took into account in determining that there must be distinction between fact and circumstance when a defendant pleads a defence of truth.

[66] The second defendant has not made that distinction in its pleadings. At paragraph 33 of its amended statement of claim it says:

> The facts and circumstances on which the second defendant relies in support of the truth of those meanings is set out in Schedule A, further particulars of which will be provided after completion of discovery and inspection.

[67] Schedule A runs to 28 pages. It is headed "Particulars of the facts and circumstances on which the second defendant relies in support of the truth of meanings (ii), (iii), (iv) and (v)". The same particulars are relied upon in respect of both the two first tier meanings and the two second tier meanings (serious grounds for belief).

[68] In my view, for the reasons already given, it is necessary for the second defendant to distinguish between facts and circumstances. A plaintiff facing a defence of truth is entitled to know precisely what facts are relied upon as primary facts as distinct from circumstances and other facts which go to establish the truth of the primary facts. Further, the plaintiffs in this case are entitled to know what facts and circumstances are relied upon in respect of each of the four pleaded imputations to which the second defendant pleads truth. To that extent, the second defendant's Schedule A must be re-organised.

[69] I turn to a consideration of the detailed particulars appearing in Schedule A, many of which are challenged by the plaintiffs. In my view, the particulars in paragraph 1 are adequate. They run to five and a half pages. All of the detail known to the first defendant is provided. Where there is a single factual allegation which lacks detail, a plaintiff may have valid grounds for complaint. But here, where the instances of alleged corruption and dishonesty are numerous and significant detail is provided in many of them, it is not appropriate, in my view, to disallow some of the particulars where all of the detail is unavailable. There is something in Mr Gray's complaint that the plaintiffs are, in effect, seeking evidence.

[70] In respect of paragraph 2, which deals with the second tier meanings, the plaintiffs justifiably complain of the failure of the second defendants to distinguish between facts and circumstances. I have dealt with this issue earlier in this judgment. Mr Gray is right to say that conclusions reached in a Court judgment and

other expressions of opinion are "circumstances" upon which a defendant may rely, but they must be pleaded separately from the primary factual material which will need to be established in order to make out a defence of truth to a pleaded second tier meaning. The same considerations apply to portions of speeches and the contents of affidavits.

[71] Mr Miles is highly critical of paragraph (m) which sets out in prolific detail certain information received from the Ministry of Fisheries under the Official Information Act. Such material is plainly not factual but, in my view, the second defendant is entitled to plead it as a particular, provided that it is identified as a circumstance and not a primary fact.

[72] The same considerations apply to paragraphs (n) and (o).

[73] Paragraph (p) consists of selected extracts from the first defendant's *Assignment* programme. Mr Miles complains that paragraph (p) fails to identify the primary facts relied upon. Mr Gray says that the passages reproduced in Schedule A are a "circumstance". If the whole of the broadcast excerpt appearing in paragraph (p) is to be treated as a "circumstance", then it should appear in a re-organised schedule, identified as such. If, however, there are facts within the programme which the second defendant proposes to adduce as primary evidence, then such facts ought to be listed separately.

[74] Paragraph (r) is, in my view, acceptable as a fact, save that particulars ought to be provided of the detail of the alleged close contact between the third plaintiff and Ministry of employees after the third plaintiff's employment had concluded.

[75] Paragraph (s), standing on its own, appears to me to add nothing. It is a conclusion only. If there is factual material which supports that conclusion, then the material ought to be specified.

[76] Paragraph (t) requires re-organisation. Much of its content seems to constitute primary factual material. Some, however, is mere circumstance. A distinction must be made. I do not propose to deal with the detailed criticisms

made by the plaintiffs of the material in paragraph (t). The second defendant's advisers can consider the plaintiffs' criticisms as they re-organise the material concerned and classify it as either fact or circumstance. But there is something, I think, in Mr Gray's submission that the plaintiffs' criticisms of the sub-paragraphs in paragraph (t) amount, at least in some instances, simply to complaints about the evidence.

Second defendant – honest opinion

[77] The plaintiffs complain that much of the material set out by the second defendant in Schedule B to its amended statement of claim for the purpose of supporting its honest opinion defence by way of particulars, is objectionable. Mr Miles' written synopsis contained only the briefest of references to his argument under this head and his oral submissions were very limited. I was simply invited to consider the terms of the application in the context of Schedule B itself. By contrast, Mr Gray provided 12 pages of written submissions on the point. Where, as here, the plaintiffs' argument turns upon what are essentially matters of detail and degree, the absence of any significant assistance from the plaintiffs is regrettable.

[78] At paragraph (x) of the application, the plaintiffs say that certain specified passages are not expressions of opinion. There is nothing in that complaint. I accept Mr Gray's argument that the correct analysis is to inquire whether any of the highlighted statements have any of the meanings alleged by the plaintiffs. If they do, then there is a second question, namely whether that meaning was conveyed as an expression of opinion. Those are jury questions. They are not issues for argument at this stage of the proceedings.

[79] The plaintiffs next complain that the second defendant purports to support expressions of opinion in one article with alleged facts and circumstances appearing in a separate article. Mr Gray submits that this complaint is inexplicable. I agree. The plaintiffs themselves plead that highlighted statements from a combination of articles have defamatory meanings when taken together. That being so, the second defendant is plainly entitled to support expressions of opinion with facts and

circumstances appearing in the same articles, that, taken together, make up the plaintiffs' allegations.

[80] In paragraph (y) the plaintiffs allege that paragraphs 45 and 46 of the amended statement of defence provided insufficient particulars of the third party or third parties referred to. I accept Mr Gray's submission that, when read with Schedule B, the particulars are sufficient.

[81] Paragraph (z) appears to raise no point not already covered elsewhere.

[82] Paragraph (aa) of the plaintiffs' application objects to a number of particulars on the grounds that they are not statements of fact but are conclusions or opinions or submissions and/or are not provable facts. I accept Mr Gray's submission that the purpose of Schedule B is to set out the facts contained in the relevant articles that support the statements of opinion contained in those articles. Their mode of expression tends to reflect the fact that they appear in newspaper articles. While they could with profit be rephrased, they give fair and adequate notice of the factual matters relied upon.

[83] In paragraph (bb) of the application, the plaintiffs object to a number of particulars on the ground that they comprise hearsay and/or opinion. Mr Gray says that none of the particulars comprise hearsay or opinion. The particulars concerned relate to statements made by lawyers, Members of Parliament, Mr Andrew and the Court of Appeal. They are relied upon by the second defendant, not for the truth of their contents, but simply as evidence of the making of the statements concerned. I have dealt with the distinction earlier in this judgment. Mr Gray relies upon different authorities, namely *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 969 and *R v Governor of Brixton Prison Ex parte Levin* [1997] 3 WLR 117. But the principle is the same. Mr Gray is plainly right. The fact that a Court, for example, has made relevant findings or comments is a fact, or at least a circumstance, that can properly support an expression of opinion.

[84] Mr Gray submits that the particulars objected to by the plaintiffs are each straightforward matters of fact. They are given as particulars of matters that will be

relied upon in support of the opinion of Mr Penwarden, which is set out as highlighted statement 4/1 in Schedule 3 of the plaintiffs' second amended statement of claim. Mr Penwarden had characterised as extraordinary the decision of the Serious Fraud Office not to investigate allegations of fraud and corruption in the Ministry of Fisheries and the scampi fishing industry. Mr Gray submits that the particulars are related to the elements of the defence of honest opinion. I agree.

[85] Paragraph (ee) amounts to a wholesale challenge to the contents of Schedule B upon the grounds that the contents of the schedule do not amount to facts and circumstances which can support any expression of opinion in highlighted statements 4/1, 6/2, 7/5, 7/6 or 12/3 and/or any expression of opinion relied on by the second defendant. There is nothing in the written synopsis of counsel for the plaintiffs in support of this point beyond a bare reference to its inclusion in the application. Mr Miles did not touch on it in oral argument except to identify it as a point which would require a determination. Mr Gray, on the other hand, took me through each of the passages concerned. He submits that the impugned particulars are simply facts and circumstances contained in the relevant articles which support or are capable of supporting the opinions there expressed. I accept his submissions. The particulars are relevant to the defence of honest opinion.

[86] Paragraph (ff) of the application is said by the plaintiffs to be defective in that it purports to include facts and circumstances in support of an alleged expression of opinion in an article where those facts and circumstances do not appear. There was no further argument on behalf of the plaintiffs on the point. It seems that this is the same issue as was dealt with in the context of paragraph (x) of the application.

[87] Paragraph (gg) of the application was a complaint that five paragraphs in Schedule B do not appear in annexures 4, 6, 7 or 12 to the statement of claim, that is, they do not appear in the relevant articles published by the second defendant. Mr Gray submits, however, that it is permissible for the second defendant to support expressions of opinion, not only by reference to facts which appear in the relevant articles themselves, but also by relying on facts and matters that are generally known: s 11(b) of the Defamation Act 1992. He submits that the facts and circumstances of which the plaintiffs complain are all matters of public record and

public knowledge. There was no written or oral argument from the plaintiffs on the point. I am not prepared to consider it further.

[88] Paragraph (hh) objects to a number of particulars on the ground that they do not appear in annexure 4 to the statement of claim (the relevant article), and that they do not compare parts or matters that would have been known or easily ascertainable by readers of that article. Mr Gray accepts that the sub-paragraphs concerned will need to be re-pleaded or deleted.

[89] At paragraph (ii), the plaintiffs make the same objection, namely that certain particulars do not appear in the relevant article in Annexure 6 to the statement of claim and would not have been known or easily ascertainable by readers of the article. Mr Gray submits, correctly, that references to each of the challenged particulars are indeed to be found in Annexure 6. There is nothing in this challenge.

[90] In paragraph (jj) of the application, the plaintiffs make the same complaint about particulars relating to an article which appears in Annexure 7 to the statement of claim. The first set of particulars complained of, which relate to the statements and actions of Mr David Carter MP, do appear in the first two paragraphs of the article. The other particular, which reads:

> The Ministry did not make any attempt to correct the unfairness or unlawful decisions that had been made in relation to scampi fishing rights.

is said by Mr Gray to be implicit in the article taken as a whole and also to be common public knowledge. Again, I have nothing from the plaintiffs to the contrary. I am not prepared to interfere with these particulars.

[91] In paragraph (kk), the plaintiffs make the same complaint, namely that certain particulars do not appear in the article in annexure 12 to the statement of claim. Again, Mr Gray has pointed to material in the article which is relevant to the particulars pleaded.

[92] Finally, the plaintiffs say that paragraph 45 of the amended statement of defence:

> … fails to make it clear which expressions of opinion are limited to which third party or employee of the second defendant.

[93] Again, there is no supporting argument on behalf of the plaintiffs.

[94] Mr Grays submits at paragraph 72 of his synopsis:

> Paragraph 45 makes it clear that the opinions are "the honest opinion of a third party"; as also does paragraph 46 (which refers to "the relevant third parties").

[95] Paragraph 47 says that the facts and circumstances on which the second defendant relies for the defence of honest opinion are set out in Schedule B. The second column of Schedule B identifies the author of each expression of opinion (i.e. Mr Penwarden; Mr Nalder; Mr Palmer; and Mr Andrew). It is perfectly clear from the pleading which third party is alleged to have given each expression of opinion. I accept Mr Gray's argument there is nothing in this point.

[96] Save for the concession made by Mr Gray in respect of paragraph (hh) of the plaintiffs' application, the second defendant's pleadings in respect of honest opinion have survived the plaintiffs' challenge. There is no basis upon which it would be proper to strike out any part of the defence of honest opinion or the particulars.

Second defendant – statutory privilege

[97] At paragraphs 34-36 of its amended statement of defence, the second defendant claims statutory privilege for four identified passages on the basis that they are part of a fair and accurate report of proceedings in the House of Representatives. One further passage is said to be part of a fair and accurate report of the result of Court proceedings, and three further passages are deemed to comprise parts of a fair and accurate report of the proceeding of an inquiry held under the authority of the Government.

[98] Paragraphs 37-39 of the statement of defence contain a statutory qualified privilege defence in relation to one report of a public meeting and four passages from communications issued for the information of the public by a Government

Department or officer on the basis that they are part of fair and accurate reports of those matters.

[99] At paragraph 40 of the written synopsis relied upon by counsel for the plaintiffs, the following appears:

> The essence of the defence is that the reports have to be fair and accurate. In every case relied on by the second defendant, the reference is to Mr Peters' speeches, Court reports, the two inquiries and reports of a meeting are either not reports at all or are so condensed as to be incapable of coming under the protection of qualified privilege.

[100] No further submissions are offered. I am not prepared to consider this argument on such sparse material. Moreover, I have already dealt earlier in this judgment with a challenge to a similar defence relied upon by the first defendant. I then pointed out that, at least in the general run of cases, it will not be appropriate to consider a challenge to a claim to statutory privilege in the context of a strike-out application. It is certainly not appropriate to do so in the absence of detailed argument from the applicant.

[101] Mr Gray notes that two errors have crept into the second defendant's statement of defence:

a) The wrong passage has inadvertently been included in paragraph 34(c) of the statement of defence in that it is the alternative highlighted statement contained in Annexure 8, quoting statements made by the Chair of Parliament's Primary Production Committee regarding the inquiry being conducted by that Parliamentary Committee, that is relied upon.

b) There is a cross-referencing error in paragraph 39 of the statement of defence which refers back to paragraphs 34, 35 and 36, but ought (obviously) to refer back to paragraphs 37 and 38. This second error was noted in the second defendant's notice of opposition.

[102] Mr Gray indicated that the first error will be corrected in the next pleading.

Third and fourth defendants – truth defence

[103] The third and fourth defendants made certain documents available to a number of authorities and public figures for the purpose of exposing what they regarded as improprieties within the fishing industry. The fourth defendant also assisted in the preparation of the first defendant's *Assignment* programme. They are sued in respect of the publications made by them. Their statement of defence is a much shorter and economical document than those of the first and second defendants. Indeed, the draft further amended statement of defence produced by Mr Billington at the hearing runs to just 16 pages. The third and fourth defendants do not plead the defence of truth to any of the five imputations pleaded by the plaintiffs. But they do allege, at paragraph 87, that:

> … the documents when taken together as a whole were in substance true or were in substance not materially different from the truth.

So the third and fourth defendants invoke s 8(3)(b).

[104] In support of that defence they set out some six pages of particulars. No distinction is made between facts, on the one hand, and circumstances, on the other. For the reasons given earlier in this judgment, that distinction ought to be made. Given the limited extent of the pleaded particulars, the relevant re-pleading exercise is unlikely to be extensive or time consuming.

[105] The plaintiffs also complain that the particulars provided are inadequate and lack the necessary specificity. They say that it is impermissible to construct a set of particulars, as the third and fourth defendants have done, by setting out, first, a generalised proposition, and then supporting it by providing specific instances. The complaint, as I understand it, is that the generalised propositions fail to comply with the *Ah Koy* criteria. In turn, I understand the plaintiffs to be saying that they are unable to check the veracity of the generalised propositions because they are insufficiently particularised as stand alone statements. I do not understand that submission. The introductory propositions are clearly intended to be read alongside the following detailed particulars. The focus must be on the information conveyed by each particular read in conjunction with its introductory material.

[106] The plaintiffs then argue that most of the particulars appearing in paragraph 87.1 are inadequate because they fail to specify either time, place, or the name of the first plaintiff's employee who participated in the allegedly improper conduct particularised. Certain particulars are accepted as adequate because there is said to be sufficient detail to enable the plaintiffs to check the veracity of what was said by the defendants, that being one of the purposes identified in *Ah Koy* as underpinning the need for detailed particulars where the defence of truth is pleaded.

[107] I am not prepared to strike out the challenged particulars, at least at this stage. The plaintiffs' discovery is not complete, nor has inspection been undertaken in full. Although a defendant is not entitled to fish for a new defence in the course of the discovery and inspection exercise, it may certainly seek from the plaintiffs' documents further information in respect of an allegation already particularised to some degree. In my opinion, the discussion appearing at paragraph 17 of *Ah Koy* was not intended to prevent a defendant from pleading detailed, albeit incomplete, particulars simply because the plaintiffs' task of investigating the truth of the particulars concerned might by virtue of the missing detail be rendered rather more difficult. As Mr Billington points out, the level of particularisation in *Ah Koy* was minimal and certainly nowhere near the sophisticated level of the defendants' pleadings in this case. I agree, however, with the plaintiffs' complaint about the adequacy of the particulars in paragraphs 87.4-87.6 inclusive. Each consists of a bald statement without any supporting material at all. That material does not get the third and fourth defendants over the relevant pleadings threshold.

[108] In paragraph 87.9, the third and fourth defendants plead:

> The Ministry directed John Reid, a Fishery Investigator, not to investigate allegations of illegal fishing by the plaintiffs.

[109] The plaintiffs say that the third and fourth defendants must identify the person or persons within the Ministry who gave that alleged direction. That is a proper requirement. If the third and fourth defendants are unaware of the identity of such person or persons, then they ought to be able, at least, to identify the circumstances surrounding the giving of the direction in the light of the copious documentary material available to the parties in this case.

[110] In paragraph 87.10, the third and fourth defendants refer to certain findings of the High Court and Court of Appeal. The plaintiffs correctly argue that the contents of the judgments of those Courts are not facts that can be relied upon in support of the defence of truth, but they may be circumstances which can be relied upon by the third and fourth defendants. The distinction ought to be drawn in an amended pleading.

[111] On a more general note, Mr Billington argued that the plaintiffs had failed to comply with the procedural requirements of Rule 185 and that it was, at least to some degree, premature for the plaintiffs to complain about the third and fourth defendants' particulars because discovery and inspection was not yet complete.

[112] With respect to those arguments, I think that in this unusually complex and difficult piece of litigation, the focus must be on settling the pleadings so that the parties can move towards trial. Although Rule 185 no doubt applies to all civil litigation, the special requirements of defamation cases have given rise to certain specialised pleading principles, some of which have been discussed in this judgment.

Third and fourth defendants – honest opinion defence

[113] The statement of defence filed by the third and fourth defendants to the plaintiffs' second amended statement of claim pleaded a defence of honest opinion at paragraph 88. No particulars whatever were provided. Understandably enough, the plaintiffs have complained.

[114] On 11 December 2006, a week prior to the hearing, Mr Billington filed a brief synopsis of his submissions to which he attached a draft further amended statement of claim incorporating detailed submissions in support of the defence of honest opinion. Mr Miles did not address the draft amended pleading in argument, nor did Mr Billington. In those circumstances, it would not be proper for me to embark upon the task of reviewing the task of reviewing the proposed amended particulars. The plaintiffs will no doubt renew the application if they remain dissatisfied. To the extent that leave is necessary for that purpose, it is hereby granted.

Next steps

[115] I have not, during the course of this judgment, made any formal orders. It is, I think, necessary that I hear further from counsel before making any orders in view of the nature and scope of this litigation and the scope of the matters covered in this judgment and in judgment No. 6, which is delivered contemporaneously with this one. Moreover, it is possible that I have overlooked something in the course of preparing the two judgments.

[116] There will be a telephone conference at 9:00 am on Thursday, 23 August 2007. The topics to be covered during the course of that conference will include:

a) What formal orders ought to be made;

b) Whether there is a need for an early further hearing in the light of the two judgments and in the light of the delay which has occurred since the hearing;

c) What further timetable or other directions ought to be given;

d) Whether it is appropriate to make an alternative arrangement to reserve a block of hearing time in the light of the indication from Mr Galbraith and Ms Walker that they are engaged in other major litigation at the time currently blocked off.

[117] I appreciate that some counsel may be unavailable on 23 August but it ought to be possible for all parties to be represented by counsel who have a working knowledge of the proceeding. Presumably, counsel for the fifth defendant should also be involved.

[118] Counsel are asked to file memoranda in advance of the telephone conference. A memorandum from the plaintiffs should be filed and served by 5:00 pm on Thursday, 16 August, and by the defendants by 5:00 pm on Tuesday, 21 August.

Costs

[119] Costs are reserved. Counsel may file memoranda if they are unable to agree.

C J Allan J