IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-003311

BETWEEN	WINSTON RAYMOND PETERS Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED First Defendant
AND	YVONNE TERESA DOSSETTER Third Defendant

Hearing: 31 July 2009

Appearances: S Mills QC and G Church for Plaintiff
W Akel and T Walker for TVNZ
No appearance for Third Defendant

Judgment: 1 October 2009

(RESERVED) JUDGMENT OF ANDREWS J
[Application for leave to file notice under Section 41 Defamation Act 1992]

This judgment is delivered by me on 1 October 2009 at 2:30pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Solicitors:
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Counsel:
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Introduction

[1] This defamation proceeding was commenced by the plaintiff, Mr Peters, by the filing of a statement of claim on 29 January 2004. There were five defendants. Three causes of action were pleaded against the first defendant, Television New Zealand Limited ("TVNZ"). Mr Peters claimed that statements were made that were defamatory of him in items broadcast on TVNZ's One News on 22 June 2004 ("the One News broadcast") and Holmes Show on 23 June 2004 ("the Holmes Show broadcast"), and in an article published on TVNZ's website on 23 June 2004 ("the Website article"). A first amended statement of claim was filed on 10 August 2004, in which the same allegations were made against TVNZ.

[2] TVNZ filed a statement of defence to the first amended statement of claim on 20 September 2004. TVNZ pleaded that the words complained of were not capable of, and could not be understood to bear the meanings pleaded. With respect to the One News broadcast TVNZ and the Website article, TVNZ also pleaded "truth", "honest opinion", and "common law qualified privilege". It pleaded the same defences and in addition "statutory qualified privilege" under the Defamation Act 1992 ("the Act") in respect of the Holmes Show broadcast.

[3] On 30 June 2009, Mr Peters filed a fifth amended statement of claim. It accommodated the fact that there had been strikeouts or settlement of the claims against all the original defendants except TVNZ and the third defendant, Ms Dossetter. The fifth amended statement of claim repeats the three causes of action pleaded in the earlier versions of the statement of claim, in respect of the One News and Holmes Show broadcasts, and the Website article.

[4] There is also a significant amendment from the previous statements of claim in that it is alleged, at paragraph 6:

> That the allegations [in respect of Mr Peters] published by [TVNZ] were:
>
> i) predominantly motivated by ill-will towards [Mr Peters] or otherwise;
>
> ii) took improper advantage of the occasion of publication.

[5] At paragraphs 7, 15 and 20 it is alleged:

> That the plaintiff's [sic] ill will prevents the plaintiff [sic] asserting defenses [sic] of qualified privilege and has aggravated the damage caused to the plaintiff.

(The first two references to "the plaintiff" should be to "the first defendant" (TVNZ).)

[6] "Statutory qualified privilege" is a reference to the defence of qualified privilege as described in s 16 of the Act. This, read in conjunction with paragraph 2 of Part 1 of Schedule 1 to the Act provides that "the publication of a fair and accurate report of proceedings in the House of Representatives or in any Committed of the House of Representatives" is protected by qualified privilege.

[7] Section 19 of the Act provides that a defence of qualified privilege will fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff ("ill will"), or otherwise took improper advantage of the occasion of publication ("improper advantage"). Section 19 of the Act applies to common law qualified privilege as well as to qualified privilege under s 16 of the Act.[1]

[8] Section 41 of the Act provides that where a defendant to defamation proceedings relies on a defence of qualified privilege, and the plaintiff intends to allege ill-will or improper advantage, the plaintiff "shall serve" a notice to that effect on the plaintiff. That notice "shall be served" on the defendant within ten working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the Court may allow, on application made to it.

[9] In this case, therefore, Mr Peters was required to serve a notice under s 41 of the Act on TVNZ by 2 October 2004. No such notice was served by that date.

[10] When Mr Peters' fifth amended statement of claim was filed TVNZ objected to it, on the basis that s 41 had not been complied with. Accordingly, Mr Peters has applied to the Court for leave to file a s 41 notice out of time. A draft s 41 notice

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[1] See *Lange v Atkinson* [2000] 3 NZLR 385 at [42].

("the s 41 notice") is annexed to an affidavit sworn by Mr Henry. The issue for determination is whether leave should be given.

Background

[11] The third defendant, Ms Dossetter, is the former partner of Mr Ross Meurant, a former Member of Parliament. Mr Meurant was at one time an adviser to Mr Peters and to the Simunovich Group of companies, involved in the fishing industry.

[12] Ms Dossetter swore an affidavit on 29 January 2004. In that affidavit she referred to a Parliamentary Select Committee inquiry into the scampi industry and, in particular, the involvement of the Simunovich companies in that industry. She said that the Simunovich companies had paid a substantial sum of money to Mr Peters and Mr Meurant so that their interests would be protected in the Select Committee inquiry. That affidavit was provided to TVNZ.

[13] Ms Dossetter's allegations were the subject of items broadcast in the One News and Holmes Show broadcasts, and the Website article. Mr Peters claims that all three items were defamatory of him and caused damage to his reputation. As noted earlier, ill will and improper advantage are also alleged against TVNZ in his fifth amended statement of claim.

Application for leave

[14] The grounds on which leave is sought to file and serve the s 41 notice are that the failure to do so earlier was due to the oversight of counsel for Mr Peters, that the filing and service of the notice at this stage will not cause any prejudice to TVNZ, and that not to grant leave would cause a miscarriage of justice for Mr Peters.

[15] Affidavits in support of the application were sworn by counsel for Mr Peters, Mr Henry, and by Mr Peters. Mr Henry set out the chronology of pleadings filed in the proceeding. He said that the failure to file and serve a notice of ill will after TVNZ filed its statement of defence, raising qualified privilege, on 20 September 2004, was his. He had understood the timetabling for filing a statement of defence

and other interlocutory matters to be in abeyance. He also said that his instructions, from the outset, were that TVNZ's behaviour was "malicious" (as ill will was formerly referred to), and he believed that the s 41 notice was not to be served until all issues raised by the defendants in relation to the statements of claim had been dealt with.

[16] Mr Peters' affidavit set out his grounds for the allegations of ill will and improper advantage.

[17] TVNZ opposed the grant of leave on the grounds that the delay in seeking leave was inordinate and inexcusable, that the matters set out in Mr Peters' affidavit are inadequate to support a claim of ill will or improper advantage, that where a broadcast or publication is on an occasion where qualified privilege is so obvious and compelling, the particulars of ill will or improper advantage required to defeat the defence of qualified privilege must be equally obvious and compelling, and that it is not in the interests of justice that leave be granted.

Principles governing applications for leave to serve a s 41 notice

[18] Section 41 of the Act gives no guidance as to the principles on which an application for leave to serve a notice is to be considered. Leave is at the discretion of the Court. The following principles may be identified from the authorities cited by counsel:[2]

a) Whether the plaintiff's delay was inordinate;

b) Whether that delay is excusable;

c) Whether the defendant will be prejudiced by leave being granted; and

d) Whether a miscarriage of justice will be caused to the plaintiff if leave is refused.

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[2] See *Mahuta v ATN Ltd* (1997) 11 PRNZ 321; *Gillespie v McKay* (1999) 13 PRNZ 90; *Young v Ross* HC HAM CP4/97 17 January 2000; *Alexander v Clegg* (2003) 16 PRNZ 912.

[19] In this case Mr Mills accepted on behalf of Mr Peters that the delay in serving the s 41 notice was inordinate. Counsel's submissions focussed on whether the delay was excusable, whether TVNZ would be prejudiced if leave were granted, and whether refusal of leave would cause a miscarriage of justice to Mr Peters.

Was the delay excusable?

[20] Mr Mills submitted that Mr Henry was not alone as counsel, in having overlooked service of a s 41 notice. It has happened before and no doubt will happen again. That can be accepted, but the fact that the failure to serve the notice is the fault of counsel, rather than of the party, is not in and of itself determinative of whether a delay was excusable. It is necessary to consider the reasons for the failure.

[21] Mr Mills submitted that the chronology of the proceeding, as outlined in Mr Henry's affidavit, demonstrated that the delay was excusable, as Mr Henry believed that the timetabling for filing a statement of defence (and, therefore, the service of a s 41 notice) was in abeyance.

[22] In his affidavit Mr Henry pointed to various stages of the proceeding where, he says, it was agreed by the parties that the proceeding was in abeyance: in August 2004, at the time of a strike-out application filed by TVNZ; in September 2004, when there were applications pending by the defendants; and from November 2004 until October 2005, when Mr Peters had filed an appeal against a strike out judgment. He also referred to the period from October 2005 through to October 2008, during which the parties were dealing with further strike-out applications and applications for further particulars. In summary, Mr Henry's position was that it was not until TVNZ had filed a statement of defence to a final statement of claim that he would be required to serve a s 41 notice.

[23] Mr Akel submitted that the delay is inexcusable. He referred to the wording of s 41, which required the notice to be served within 10 days of the defence of qualified privilege being raised. He submitted that the case management timetabling system could not overrule the statutory requirement of s 41.

[24] I accept Mr Akel's submission that the delay was inexcusable. The wording of s 41 is clear as to when a s 41 notice is to be served. It is not overruled or displaced by the case management system.

[25] It is, however, necessary to go on and consider the remaining two considerations. These were, indeed, the principal focus of counsels' submissions.

Would a grant of leave cause prejudice to TVNZ?

[26] Mr Mills first submitted that the only prejudice that is relevant is that which arises directly out of late service of the s 41 Notice. That is, he submitted, TVNZ cannot oppose the application for leave on the grounds that the proceeding, generally, has caused it prejudice, or on the grounds that service of the s 41 notice may defeat a defence that TVNZ had hoped to rely on.

[27] It can be accepted that the only relevant prejudice is that arising directly out of late service of a notice. However, TVNZ did not oppose leave being granted on the grounds that the proceeding, generally, was prejudicial to it, nor on the grounds that service of a notice may defeat its defence of qualified privilege.

[28] As will be discussed later in this judgment, TVNZ's primary grounds of opposition to the application for leave was that its case for qualified privilege was "so compelling" and "so obvious" that there would be no miscarriage of justice to Mr Peters, and there would be prejudice to TVNZ, if leave were granted. TVNZ's submissions in this respect will be considered under the "miscarriage of justice" heading of this judgment.

[29] Mr Mills then submitted that TVNZ would not be prejudiced by a grant of leave to file the s 41 notice, because the basis of Mr Peters' claim of ill-will has been evident from "an early stage". Mr Mills referred to the pleading at paragraph 7 of each of the third and fourth amended statements of claim (dated 16 March 2006 and 13 August 2008 respectively) where it is pleaded that:

> ... the allegations [as pleaded at paragraph 3] were published by [TVNZ] maliciously in that it's [sic] servant William Ralston and other journalist employees knew they were false as:

[Particulars pleaded at 7.1-7.8]

Mr Mills submitted that this pleading put in issue a number of the facts that are relevant to the s 41 notice, and are now included in the particulars of ill-will and improper advantage as set out in the draft s 41 notice in respect of which leave is sought.

[30] Mr Mills also referred to a memorandum of counsel filed by Mr Henry on 25 November 2008, in response to an application by TVNZ for determination, as a preliminary issue, of whether TVNZ's One News and Holmes broadcasts, and the Website article, were occasions of qualified privilege. At paragraph 3 Mr Henry said:

> The plaintiff filed its fourth amended statement of claim on 13 August 2008. The first [TVNZ] and second defendants have not filed its statement of defence to the fourth amended statement of claim. Qualified privilege has not yet been pleaded by either the first or second defendant in response to the most recent statement of claim. The plaintiff has therefore not had any need to rebut this, although if these defendants do plead qualified privilege, the plaintiff fully intends to rebut the defence with evidence of ill-will. ...

Mr Mills submitted that it was "very unlikely" that TVNZ did not expect a s 41 notice to be served at some stage.

[31] Finally, on the question of prejudice to TVNZ, Mr Mills submitted that the application for leave to serve the s 41 notice was filed shortly after Mr Peters' pleading had been finalised with the filing of the fifth amended statement of claim. He submitted that there was no evidence that TVNZ had commenced serious trial preparation that took no account of the issues Mr Peters seeks to raise in the s 41 notice. He submitted that any prejudice to TVNZ could be met by an order for costs.

[32] Mr Akel submitted that TVNZ would be prejudiced if leave is granted, in that it would be required to incur costs in defending a claim based on broadcasts and an article that were very much in the public interest. Further, he submitted, if leave is granted TVNZ will be obliged to continue defending broadcasts and an article in respect of which Mr Peters has not pointed, and cannot point, to any cogent evidence

of a dominant motivation of ill-will on the part of TVNZ, nor of its having taken improper advantage of an occasion of qualified privilege.

[33] In essence, Mr Akel's submission was that the prejudice to TVNZ would lie in its being required to defend a proceeding in which Mr Peters could not succeed. Mr Akel's submissions as to prejudice to TVNZ were incorporated into his submissions that there would be no miscarriage of justice to Mr Peters if he were denied leave to serve the s 41 notice. It is appropriate that they be considered in the discussion of that issue.

[34] That issue aside, I accept Mr Mills' submission that TVNZ has not shown any prejudice arising directly out of late service of the s 41 notice. I accept that the issue of "malice" has been raised in respect of TVNZ since the third amended statement of claim, and that the service of the s 41 notice now cannot be seen to affect any trial preparation already undertaken by TVNZ.

[35] I therefore turn to consider the question of whether there will be a miscarriage of justice if Mr Peters is refused leave to service a s 41 notice.

Will refusal of leave cause a miscarriage of justice to Mr Peters?

[36] Mr Mills submitted that a refusal of leave to serve the s 41 notice would cause a miscarriage of justice to Mr Peters. He submitted that through no fault of his own, Mr Peters finds himself in a position where a claim that he has pursued for five years, in order to address an "extremely serious attack on his reputation" may be defeated because he is unable to have his case properly placed before the Court.

[37] Mr Mills referred to the observation of Ronald Young J in *Newlands v Parlane* at [31]:[3]

> In the end, overall, it is the interests of justice that must dominate. ... As a general proposition, Courts give extensions of time for litigants to file documents that are out of time on the basis that most prejudice can be cured by costs and in the end it is better to allow litigants to have their day in Court and able to raise all matters they wish.

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[3] HC HAM CIV 2005-419-941 25 November 2005.

Mr Mills also referred to the observation of Master Faire in *Mahuta v ATN Limited*[4] where, as here, the principal reason for delay was that of the plaintiff's legal advisers. In the circumstances of this case, Mr Mills submitted, counsel's failure should not be visited on the party.

[38] As noted earlier, Mr Akel submitted that a refusal of leave to serve the s 41 notice would not cause a miscarriage of justice to Mr Peters. This was, he submitted, because the broadcasts and the Website article were clearly and obviously occasions of qualified privilege. Mr Akel further submitted that Mr Peters had not provided any clear and compelling particulars of ill-will or improper advantage, and could not rebut the defence of qualified privilege.

[39] It is appropriate to consider Mr Akel's submissions in turn.

Defence of qualified privilege

[40] The leading authorities in respect of defamation claims arising out of statements made about the actions or qualities of current or former Members of Parliament are the judgments of the Court of Appeal in *Lange v Atkinson* in 1998 "(*Lange No. 1*") and 2000 ("*Lange No. 2*").[5] The Court of Appeal's judgment in *Lange No. 2* followed its reconsideration of the question of qualified privilege as a result of the judgment of the Privy Council, delivered on 28 October 1999.[6]

[41] In *Lange No. 2* at [1] the Court of Appeal noted that it had been given the opportunity by the Privy Council to reconsider the issue of qualified privilege, following the delivery of the House of Lords' decision in *Reynolds v Time Newspapers Limited*,[7] delivered the same day as the judgment of the Privy Council. In *Reynolds* the House of Lords (as expressed in *Lange No. 2* at [7]):

> ... rejected a proposition to the effect that there should be what was described as a generic privilege extending to publication of political information to the public at large. ... While recognising that publication to the world at large of political information may now properly attract protection, *Reynolds* decided

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4 (1997) 11 PRNZ 321 at 323-4.
5 [1998] 3 NZLR 424; [2000] 3 NZLR 385.
6 [2000] 1 NZLR 257.
7 [2001] 2 AC 127.

> that it was still necessary, on a case-by-case basis, to examine the circumstances of publication before determining whether the public interest was served by treating the occasion as one of qualified privilege.

[42] Having considered the position reached in the United Kingdom in the light of *Reynolds* the Court of Appeal in *Lange No. 2* stressed, at [5]:

> While there is potential for factual overlap, it is of first importance to keep conceptually separate the questions whether the occasion is privileged and, if so, whether the occasion has been misused. ... The dichotomy between occasion and misuse is mirrored by the roles of Judge and jury in this field. Subject to the resolution of any dispute about primary facts, which is for the jury, the Judge decides whether the occasion is privileged. The jury decides whether a privilege occasion has been misused.

[43] In *Osmose New Zealand v Wakeling & Ors*[8] Harrison J observed at [41] that New Zealand law differs in material respects from the law of England, in particular in maintaining the distinction between the respective roles of Judge and jury when deciding the two discrete questions of whether publication was on an occasion of qualified privilege and, if so, the second question of whether the privilege has been misused. Harrison J also noted, at [43] that in *Lange No. 2* the Court of Appeal had:

> … developed its movement away from the strict requirement of a reciprocity of interest or duty between the maker and recipient of a statement. This trend reflects the flexibility of the defence of qualified privilege and the broad tests of social morality, public utility or common convenience and welfare of society which provide its rationale. In *Lange No. 2* the Court adopted the shared interest test: at [20]-[21]. The inquiry encompasses both a qualifying occasion and qualifying subject matter: at [22].

[44] Mr Akel submitted that this Court should adopt the principles of "responsible journalism" and "neutral reportage" developed in the United Kingdom since *Reynolds*. With respect to "responsible journalism", he submitted that the English Courts were moving towards a defence of public interest, by which qualified privilege was extended from its traditional basis from matters of "general real public interest". He submitted that in *Jameel (Mohammed) v Wall Street Journal Europe Sprl*[9] the House of Lords was concerned to ensure that where the media generally acted responsibly, and the issues were genuinely of public interest or concern, the media should not be discouraged by the threat of defamation proceedings from exploring those issues and bringing them to the public's attention.

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8 HC AK CIV 2005-404-7195 19 December 2006.

9 [2006] 3 WLR 642.

[45] Mr Akel submitted that the principle of "neutral reportage" is allied to the "broader" public interest defence. Neutral reportage was described by Ward LJ in *Roberts v Gable* as follows:[10]

> In a true case of *reportage* there is no need to take steps to ensure the accuracy of the published information. ... To qualify as *reportage* the report, judging the thrust of it as a whole, must have the effective reporting, not the truth of the statements, but the fact that they were made. ... If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth. ... This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way.

[46] Mr Akel submitted that when those developments in the law are applied to the broadcasts and the Website article, each was clearly protected:

a) With respect to the One News broadcast he submitted that:

   i) it was a report of the fact that Ms Dossetter's affidavit had been tabled in Parliament;

   ii) it was the affidavit that contained the allegation;

   iii) comment had been sought from Mr Peters and others; and

   iv) TVNZ did not adopt as true or otherwise what was stated in the affidavit or by anyone else.

b) In respect of the Holmes Show broadcast Mr Akel submitted:

   i) the broadcast, in part, reports statements made in Parliament;

   ii) in other respects the broadcast reports the fact that the allegations have been made;

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[10] [2007] EMLR 16, 457 at [61].

iii) it is noted that Mr Peters was overseas at the time of the broadcast; and

iv) there are numerous references to "allegations" as opposed to proved facts.

c) With respect to the Website article, which in large measure repeats the content of the One News broadcast, Mr Akel submitted that the same matters applied as set out with respect to that broadcast.

[47] Mr Akel submitted that each of the broadcasts and the Website article are neutral reportage, or very close to it, and are therefore occasions of qualified privilege.

[48] I accept Mr Mills' submission that the relevant New Zealand authority is *Lange No. 2*. I can find no support in *Lange No. 2* for adopting the English approach either as to "responsible journalism" or as to "neutral reportage". To the contrary, where in *Roberts v Gable* it was said to be sufficient for neutral reportage that the fact of an allegation is reported (subject to losing the protection if the allegation is adopted or if the story is not reported in a fair, disinterested, and neutral way), the Court of Appeal said at [21] of *Lange No. 2*:

> A statement the subject-matter of which qualifies for protection is not by dint of that fact alone always made on an occasion of privilege. Ordinarily that will be so because the shared interest test is likely to be satisfied. But there may be times when a communication within the subject-matter will not be made on an occasion of qualified privilege, because there is in the particular circumstances no shared interest in the particular communication between its maker and recipients.

I am bound by the Court of Appeal.

[49] Thus, the occasion and the subject-matter must each qualify before qualified privilege is established. On the information presently before the Court I am not able to be satisfied that TVNZ "must" succeed in its contention that the two broadcasts and the Website article were published on occasions of qualified privilege. Even if I

were so satisfied, it is necessary to consider the question of misuse of the occasion, which is raised by the s 41 notice.

Rebuttal of defence of qualified privilege

[50] Mr Akel also submitted that TVNZ was, in this case, fulfilling its "fundamental obligation to report debate and controversy as the events of the day". Therefore, he submitted, it would be very difficult "as a matter of practical reality" for Mr Peters to establish ill-will and improper advantage. He submitted that in the present case, where qualified privilege is "so obvious and compelling", the particulars provided to rebut the defence must be commensurately obvious and compelling, and proportionate, before any triable issue arises as to ill-will.

[51] Mr Akel referred to the judgments of Eady J in *Blackwell v News Group Newspapers Limited*[11] and Tugendhat J in *Crossland v Wilkinson Hardware Stores Limited*[12]. In both judgments, the Judge required the particulars to disclose a case "more consistent with the presence of malice than its absence". He also referred to the judgment of Ronald Young J in *Newlands v Parlane* at [19]:

> ... it is appropriate in this case to consider these particulars and see ... whether there is little or nothing in the particulars which would in fact establish ill-will or lack of genuine opinion. If there is little or nothing in the particulars then in combination with the inordinate and inexcusable delay there would be little point in allowing the plaintiff to proceed with its allegations. ...

[52] Mr Akel submitted that nothing in the particulars set out in the s 41 notice provided an evidential foundation that TVNZ was predominantly motivated by ill-will or otherwise abuse of the occasion of qualified privilege. He submitted that no such basis could be provided, as TVNZ was simply reflecting the news of the day. He also submitted that the s 41 notice provided no causal connection between what was alleged to be a predominant motivation of ill-will, or taking advantage of an occasion of qualified privilege, and the broadcasts and Website article themselves. Again, he submitted that no such connection could be made, given that each was reporting on political events of the day.

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11 [2007] EWHC 3098.

12 [2005] EWHC 481.

[53] Mr Mills first submitted that there is no requirement in New Zealand law that the particulars set out in a s 41 notice must be proportionate or commensurate to the claimed privilege. Rather, the New Zealand authorities ask whether a miscarriage of justice will result from a refusal to grant leave.

[54] Mr Mills also referred to the Court of Appeal's comments in *Lange No. 2* at [42]-[49] in relation to misuse of an occasion of privilege. He submitted that the New Zealand authorities require a balance to be struck between the media's protection provided by qualified privilege and the protection of the individual provided by s 19 of the Act. The adequacy of a s 41 notice must be considered in that context. As to the particulars themselves, Mr Mills submitted that the issue was whether they met the standards set out in the New Zealand authorities. He submitted that they did.

[55] I am not satisfied that, even if it were the case that TVNZ's case for qualified privilege is compelling and obvious, there is any requirement that particulars be commensurate or proportionate to the claimed privilege. That does not appear from the English cases cited by Mr Akel (which refer simply to a test of "more consistent with the presence of malice than its absence") or from the judgment of Ronald Young J in *Newlands v Parlane*, in which the question asked was whether there was "little or nothing in the particulars".

[56] Turning then to *Lange No. 2*, I note that the Court of Appeal observed at [39]:

> The idea of taking improper advantage of the occasion [of qualified privilege] is important when one is considering the appropriate balance between freedom of expression and protection of reputation. ... To that extent we are able to take a more expansive approach to defining an occasion of qualified privilege because we have the ability in s19 to take a correspondingly more expansive approach to what constitutes misuse of the occasion. One development is therefore capable of being matched by another so that the overall balance is kept right.

[57] Then at [42] the Court of Appeal said:

> Although s19 was designed to reflect the common law concept of malice, it has within it the same flexibility and room for development as did malice itself; particularly in its connotation of improper purpose. The purpose of the newly-recognised privilege is to facilitate responsible public discussion

> of the matters which it covers. If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion. ...

[58] The matters that are relevant to the decision whether an occasion of qualified privilege has been misused (whether by ill-will or by improper advantage) were discussed by the Court of Appeal at [42]-[49]. The Court of Appeal held that:

a) If a false and defamatory statement that qualifies for protection is published to a wide audience, the motives of the publisher and whether the publisher had a genuine belief in the truth of the statement, will warrant close scrutiny: [43].

b) Carelessness as to the truth of a statement may support an assertion that the publisher lacked a genuine belief in the truth of the statement, or was reckless as to its truth. Thus the concept of reasonable or responsible conduct by the publisher in the circumstances becomes a legitimate consideration: [44].

c) "Recklessness as to truth has traditionally been treated as equivalent to knowledge of falsity", and both deprive a publisher of qualified privilege: [45].

d) Reckless indifference to truth is almost as blameworthy as deliberately stating falsehoods. It is useful when considering whether an occasion of qualified privilege has been misused, to ask whether the publisher has exercised the degree of responsibility which the occasion required: [46].

e) A publisher may be regarded as reckless, and misusing an occasion of qualified privilege, if it has failed to give such responsible consideration to the truth or falsity of a statement as the jury considers should have been given in all the circumstances. Thus the privilege may be lost if the publisher takes what could fairly be described as a cavalier approach to the truth of the statement: [47].

f) No consideration and insufficient consideration of the truth or falsity of a statement are equally capable of leading to an inference of misuse of an occasion of qualified privilege. The privilege is granted on the basis that it will be responsibly used: [48].

[59] In the light of those comments, I accept Mr Mills' submission that the particulars set out in the s 41 notice are to be looked at with regard to whether they provide a sufficient basis for a submission to the jury (if the evidence at trial is as alleged) that TVNZ was predominantly motivated by ill-will or took improper advantage of an occasion of qualified privilege.

[60] In this case the 23 particulars set out in the s 41 notice, of the facts and circumstances relied on to show ill-will and improper advantage, are grouped under three headings:

a) [TVNZ] took improper advantage of the occasion by acting recklessly, not caring whether the defamatory statements were true or false, and in all the circumstances acted irresponsibly:

Under this heading there are 11 particulars (numbered 1.1-1.11) in which it is alleged that TVNZ, including its then head of News and Current Affairs, Mr Ralston, knew of various facts and circumstances, relating to allegations against Simunovich Fisheries, findings of the Parliamentary Select Committee, and statements made by Mr Peters to Mr Ralston in relation to the Select Committee inquiry. I note Mr Mills' acknowledgement that there is an error in particular 1.1, in that the reference in the first line to "the plaintiff" should be to Simunovich Fisheries Limited.

b) Factors relevant to the gravity of the consequences of the defamatory statements:

Under this heading there are four particulars (numbered 1.12-1.15) that refer to the possible effect of the allegations on Mr Peters' Parliamentary career, information alleged to be known to TVNZ, and the likely republication and wide circulation of the allegations within New Zealand.

c) [TVNZ] was predominantly motivated by ill-will towards the plaintiff:

There are eight particulars under this heading. Particulars 1.16-1.20 state that the publications by TVNZ occurred when TVNZ knew Mr Peters was overseas, and without advising him of the allegations or seeking his explanation, that TVNZ made no attempt to investigate the truth of the allegations, and that although TVNZ had had Ms Dossetter's affidavit since 29 January 2004 it had not investigated its accuracy, referred it to proper authorities, or sought comment from Mr Peters.

Particulars 1.21-1.22 state that TVNZ published the allegations with knowledge that earlier investigations or Mr Peters in relation to similar complaints against him has resulted in decisions that the complaints were without merit, and that TVNZ knew that Ms Dossetter had not raised the allegations made in her affidavit in any of those investigations.

Finally, particular 1.23 states that the Holmes Show team was congratulated by Mr Ralston with the words "We have got the bastard".

[61] Having reviewed the s 41 notice, I am not satisfied that the particulars given are so weak and so untenable as to defeating the defence of qualified privilege that there would be no miscarriage of justice to Mr Peters in refusing leave for the notice to be served. In the words of Ronald Young J in *Newlands v Parlane*, I am not satisfied that there is "little or nothing" raised in the particulars, such that they are unlikely to be able to justify an allegation of ill-will or improper advantage, as to illustrate that Mr Peters has little or no prospect of successfully rebutting such a defence.

Overall balance

[62] It is appropriate to stand back and determine where the overall balance of justice lies. I have concluded that it lies with granting leave for the s 41 notice to be served.

[63] I accept Mr Mills' submission that if TVNZ's submissions are accepted, then Mr Peters' claim would come to an end immediately, as he could not challenge the claim of qualified privilege. That raises, in my judgment, a greater risk of miscarriage of justice than the possibility of prejudice to TVNZ in continuing to defend a proceeding in which it may eventually succeed in its claim of qualified privilege, and in which Mr Peters may not succeed in his claim of ill-will and improper advantage.

Result

[64] Leave is given for Mr Peters to serve the s 41 notice on TVNZ.

[65] The grant of leave is an indulgence. In the circumstances, TVNZ is entitled to an order for costs in its favour. If counsel are unable to agree on the matter of costs then memoranda may be filed: that on behalf of TVNZ within 15 working days of the date of this judgment and that on behalf of Mr Peters within a further 15 working days. Counsel should indicate in their memoranda whether a hearing is required.

Andrews J