IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-001510

BETWEEN	ROBERT EDWARD JONES Plaintiff
AND	CHRISTOPHER JOHN LEE Defendant

Hearing: 13 May 2010

Appearances: M Reed QC and P Morten for the plaintiff
M McClelland and N Russell for the defendant

Reasons for Rulings: 18 May 2010

REASONS FOR RULINGS OF CLIFFORD J

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[1] Following the close of the defence case on Thursday 13 May, I dealt with a number of matters with counsel.

[2] As the transcript will record, I had earlier that day raised with Mr McClelland a difficulty I was having with the availability of the defence of honest opinion. My difficulty was, put as simply as I can, that Mr Lee was not raising as his defence that it was – to go to what I subsequently accepted was the sting of the alleged defamation – his honest opinion that Sir Robert Jones had effectively "ripped off" the shareholders of Robert Jones Investments. Rather, it was Mr Lee's honest opinion that incentive based contracts generally, and the RJI management contract as a particular example, were not in the best interests of shareholders of the company and that the RJI management contract was a ridiculous contract. Furthermore, in his evidence Mr Lee had said on a number of occasions that he had no criticism of Sir Robert, of or what Sir Robert had done.

[3] In other words, it was Mr Lee's position that the article complained of, properly understood, did not have the meanings claimed for by Sir Robert, and was not therefore defamatory of Sir Robert but rather expressed Mr Lee's essential opinion as set out at [2], which was a genuine and honest opinion based on true facts for the purposes of s 11 of the Defamation Act 1992.

[4] On Thursday afternoon, and having heard from counsel, I ruled that the defence of honest opinion was not available. My judgment was that Mr Lee was in reality advancing the defence of meaning: he was saying that the words used did not carry the allegedly defamatory meanings identified by Sir Robert Jones and moreover, properly understood, they represented an expression of Mr Lee's opinion as to incentive contracts generally, and the management contract in particular.

[5] In other words, the honest opinion argued for by Mr Lee did not respond to all or any part of the allegedly defamatory sting of the article. It was, in effect, an alternative meaning.

[6] I said I would provide brief reasons later for my ruling, and I now do so.

[7] The hearing of issues immediately after the close of the case proceeded with Mr Russell first addressing me on the question of whether or not the defence of honest opinion was available, in terms of the views I had expressed earlier to Mr McClelland. Mr Russell's core point, as I perceived it, was that the approach I was taking would mean that a defendant could not defend a defamatory meaning (Meaning A) by pointing to an honest opinion as to a different, and not defamatory, meaning expressed by the allegedly defamatory words (Meaning B). I accept that, in effect, this is the approach I am taking.

[8] I take that approach because in my judgment the defence of honest opinion must, in terms of the honest opinion pointed to, respond to the sting of the defamation, or, perhaps, a lesser defamatory meaning, found by the jury to be conveyed by the words complained of.

[9] As I advised Mr Russell, I had looked overnight for authority that might help me clarify this point. The closest authority I could find was from *Gatley on Libel and Slander* at 12.23 when, in talking over the availability of defence of fair comment, the author acknowledges in a footnote (fn 158) that "of course, first the meaning of the comment has to be established". I took that to be a reference to the meaning as established by the jury in accordance with normal principles, and therefore that it was to that meaning that the defence had to respond.

[10] Mr Russell then referred me to *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433, and in particular to the comments that appear at [91] and [92] of that decision (see [] below).

[11] Mr Russell submitted that those comments were authority for the proposition that the defendant, in pleading honest opinion, was not limited by the meaning alleged by the plaintiff, but could – in effect – plead that defence by reference to another, non-defamatory, meaning. That is, Mr Russell argued that the defence of honest opinion should not be limited by the plaintiff's pleaded defamatory meanings as *Crush*, and now *Haines*, confirmed was the case for the defence of truth or justification. In this, Mr Russell was advancing a similar argument as it would appear had been advanced for Television New Zealand in the *Haines* decision. At [85] the Court of Appeal noted the following submission made for Television New Zealand:

> It is relatively obvious why this must be the case. It is the reader of the publication who must judge whether the matters complained about amount to fact or comment. How a lawyer subsequently crafts a meaning from the words complained about is another matter altogether. The reader of the publication will never have seen the meanings alleged by the solicitors. Furthermore it cannot be right that a plaintiff, by judicious phrasing of the relevant meanings, should dictate whether a defendant is able to plead truth or honest opinion.

[12] By my analysis *Television New Zealand v Haines* does not support that approach.

[13] The case first discusses the s 8 defence of justification or truth. It is authority (at [54]) for the proposition that the rule in *Broadcasting Corporation of New Zealand v Crush* [1986] 2 NZLR 234, that a defendant cannot set up an alternative

meaning and prove the truth of that meaning, remains the law after the enactment of the Defamation Act 1992 (at [55]). The reasoning for that conclusion is helpfully set out at [56] through [62].

[14] The Court goes on to discuss the availability, in that case, of the defence of honest opinion. It does so by reference principally to the issue of whether the defamatory imputation alleged was capable of amounting to an expression of opinion, rather than being a statement of fact. The Court of Appeal prefaced the discussion of that issue with the following comments (which include those relied on by Mr Russell):

> [87] This aspect of the appeal was said to raise the issue of whether the pleaded meaning, as opposed to the actual words used in the publication, can be opinion for the purposes of the defence of honest opinion. We are not persuaded that such a dichotomy of expression encapsulates the real issue. To a substantial degree it appears that on this point of appeal counsel have been talking past each other in their submissions.
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> [88] In light thereof, we concentrate on two matters under this head:
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> (a) Was Venning J correct in the way in which he ordered the statement of defence to be repleaded?
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> (b) Was he correct as to the way in which the jury would ultimately need to be directed on this point?
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> [89] In a defamation case, once a plaintiff has proved that the words used are capable of bearing the defamatory imputation complained of (the imputation), the defendant may, in its defence, prove either:
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> (a) the imputation as a statement of fact that is true or substantially true or that the publication as a whole is substantially true (see s 8(3)(a) and (b)); or
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> (b) the imputation as an expression of honest opinion.
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> [90] Whether imputations are capable of being opinion is, in the first instance, for the Judge to decide. Where it is decided that the imputations are capable of amounting to expressions of opinion then the determination as to whether in the circumstances they were opinion is for the jury. The fundamental question which arises for the jury to determine is whether the imputations that they have found to exist were conveyed by the publication as expressions of opinion or as statements of fact.
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> [91] In determining this the jury needs to look at the publication as a whole and not just particular statements which might be categorised as statements of opinion looked at on their own. It is not correct to say that the jury is required, in deciding whether the defence of honest opinion applies, to look only at the literal meaning of words or to look at the meaning of the

> words devoid of the imputations which it is argued they convey or to consider the question of whether the imputations are conveyed as statements of honest opinion in a vacuum, devoid of the context in which they arise.
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> [92] In our view, this position was set out clearly in *Radio 2UE* where Clarke JA stated at pp 467-468:
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> > In my opinion a defendant who raises a defence of comment is obliged to establish that the imputation which the jury has found that the published matter conveyed was conveyed by the writer or speaker as a comment. In this respect, as I have sought to point out, the actual form of the pleaded imputation is not a relevant consideration. What the jury is required to consider is the published material in order to determine whether the writer or speaker conveyed the defamatory statement which, according to its finding, the published matter conveyed as an expression of opinion or conclusion on the one hand or a statement of fact on the other.
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> [93] This is also consistent with this Court's decision in *Mitchell v Sprott* (see in particular the passage quoted at paragraph [77] above).

[15] In my judgment, those comments make it clear that – the preliminary issue of form for the Judge as to whether an imputation is capable of being opinion or is a statement or fact aside – the defence of honest opinion must respond to the defamatory imputation complained of, or perhaps some lesser defamatory meaning argued for by the defendant. That defamatory meaning must – as a matter of substance – first be found to exist by the jury before the defence is needed at all. With respect, those comments do not support Mr Russell's proposition and in fact involve the rejection of his proposition as it had been articulated before the Court of Appeal in the submission quoted at [85] of the Court's judgment.

[16] It was the basis of that analysis that I ruled that the defence of honest opinion was not available in the particular circumstances of this case, given the way the case has been pleaded and given Mr Lee's own evidence.

[17] In terms of possible issues of ill-will (on qualified privilege) and damages, Mr Lee's evidence that this was a genuine opinion would be relevant, but that evidence would not be relevant to the Jury decision as to meaning.

[18] Mr Reed then, in the manner foreshadowed on Thursday evening, applied to amend the statement of claim by simplifying and reducing the number of the alleged defamatory meanings. The defence accepted all bar one of those, namely the alleged meaning that "Sir Robert Jones ripped off the shareholders". Mr Russell addressed

me on that point. His submission essentially was that he did not consider that was a meaning that was capable of being taken from the words complained of when those words were understood in their normal and ordinary meaning. I did not agree with that submission. I accepted Mr Reed's submission that the words were capable of carrying that general meaning.

[19] Mr Reed then indicated that the plaintiff did not wish to pursue the question of innuendo. I note that I had indicated the previous evening that I was having difficulty of understanding the relevance of innuendo in this case.

[20] Finally, I ruled that I did not consider Mr Lee's conduct to have been such as would make punitive damages available, and I ruled accordingly. I perceived that Mr Reed accepted, in the sense he would not formally submit to the contrary, but did not necessarily agree with, that ruling.

[21] On the basis of those matters, the Issues Sheet was then discussed and finalised.

"Clifford J"

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