IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-7120
[2012] NZHC 2527

BETWEEN	MARK STEPHEN HOTCHIN First Plaintiff
AND	ERIC JOHN WATSON Second Plaintiff
AND	BRUCE SHEPPARD First Defendant
AND	THE NEW ZEALAND SHAREHOLDERS ASSOCIATION INCORPORATED Second Defendant

Hearing: 19 September 2012

Appearances: J G Miles QC and J A MacGillivray for Plaintiffs
P J P Grace and N W Woods for First Defendant
No appearance for Second Defendant

Judgment: 1 October 2012

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on ***1 October 2012*** *at* ***4:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

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Background

[1] In the present proceedings, the plaintiffs sue the first defendant for allegedly defamatory statements that he made about them, which are concerned with their involvement in the collapse of the finance company, Hanover Finance Ltd (Hanover), in 2008 and the widespread losses to the public that ensued from that event.

[2] The first defendant, Mr Sheppard, is a chartered accountant. He was at the relevant times the Chairperson of the New Zealand Shareholders' Association ("NZSA"). This organisation advocates for shareholders in the course of which its officers (including Mr Sheppard at the relevant time) make public comment in news media to regulatory authorities and others about matters of concern or interest regarding the operation and governance of companies. I understand that the organisation also sees its role as exposing unfair and dubious practices that it perceives threaten the interests of shareholders in (principally) public companies.

[3] The first defendant made a number of statements on television, radio and emails and as part of blogs which were severely critical of the plaintiffs. It is obvious from the content of the statements the first defendant made that he had strong views on the subject of whether the proposed debt restructuring and moratorium that the plaintiffs had initiated in regard to the Hanover companies were in the best interests of the creditors of Hanover. It was obviously his view that the debt restructuring proposal was largely to the advantage of the plaintiffs. He particularly seemed to be incensed by the fact that any obligation to inject capital as part of a settlement with creditors was conditional only, and that the obligation to do so never became unconditional. He referred to the plaintiffs as being involved in "malfeasances". As a result, the plaintiffs issued this proceeding.

[4] The comments which the plaintiffs sue on are said to have given rise to the following imputations:

a) That the plaintiffs had dishonestly misled investors (paras 20 and 27);

b) That the plaintiffs were "crooks", meaning criminals (paras 20 and 27), or criminals who should be imprisoned (para 35);

c) That there was good reason to believe that the plaintiffs had participated in GST fraud and had received or were to have received a fee in exchange for committing GST fraud (paras 35 and 41);

d) More generally that the plaintiffs were involved in "malfeasances", being criminal or dishonest conduct (paras 41 and 47);

e) That the plaintiffs had misappropriated cash belonging to a Hanover company (para 47).

[5] Mr Sheppard does not seek to establish that the factual elements of the allegations that he made are correct. But he has given notice that the statements that he made were his honest opinion held on reasonable grounds and he also claims that the statements were made in circumstances which gave rise to privilege. Further, he seeks to adduce evidence showing that the plaintiffs were in any case persons of poor reputation. It is this last aspect of the proceeding that the application now before the Court is largely concerned with.

[6] But in order for the court to deal with the present application, some consideration needs to be given to the scope and breadth of the meanings that are to be attached to Mr Sheppard's statements. That is because the defendants have sought to show that the plaintiffs were not persons of particularly good reputation and that that factor should be taken into account if any damages are to be awarded. The defendants want to show that there have been past instances of conduct on the part of the plaintiffs that show that the plaintiffs are persons whose reputations are generally bad in the aspect to which the proceedings relate. He proposes to do so by adducing evidence of past instances of alleged misconduct on the part of the plaintiffs which he says resulted in their reputations already being damaged. To do this he invokes s 30 of the Defamation Act 1992.

The strike out application

[7] Section 30 of the Defamation Act 1992 (the Act) states:

> In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

[8] Pursuant to that section, the first defendant has pleaded in paragraph 76 that the first and second plaintiffs' reputations are "generally bad in relation to the matters to which this proceeding relates". In support of that allegation, the first defendant pleads (inter alia) the following specific instances of "misconduct":

(a) That in December 1998, the second plaintiff, Mr Watson, was censured by the Securities Commission for buying shares in McCollam Print while negotiating its takeover by an entity related to him (paragraph 76(a)).

(b) In relation to the same issue, the United States Securities Exchange Commission found that Mr Watson had breached a section of the Securities Exchange Act in the United States, in that there was an omission of material facts by buying and selling McCollam shares at the same time as negotiating the purchase of McCollam for Blue Star (paragraph 76(b)).

(c) That in 1999 the first plaintiff, Mr Hotchin, had breached Securities Commission guidelines on insider trading in relation to the sale and purchase of shares of a company called Pacific Retail Group Ltd. Pacific Retail admitted a breach of the guidelines but stated that the breach was not ill-intentioned (paragraph 76(c)–(d)).

[9] The plaintiffs apply to strike out these particulars of misconduct asserting that they are not proper particulars that could possibly establish that the plaintiffs' reputation is generally bad in the aspect to which this proceeding relates.

[10] The grounds for the strike out application are as follows:

a) the stated paragraphs do not disclose a defence appropriate to the nature of the pleading;

b) the stated paragraphs set out allegations of bad reputation which do not relate to the aspect of the plaintiffs' reputation to which this pleading relates;

c) the pleadings are likely to cause prejudice and delay;

d) the pleadings are frivolous, vexatious or otherwise an abuse of process.

Plaintiffs' submissions

[11] It was the submission for the plaintiffs' counsel that in the words of the Court of Appeal in *Television New Zealand Ltd v Ah Koy,*[1] s 30 permits a defendant to prove specific instances of misconduct which, if shown to be generally known, will found an available inference that the plaintiff has a generally bad reputation in the relevant aspect.

[12] It was further submitted that s 30 relaxed the position at common law, which was that evidence of the plaintiffs' bad reputation was admissible, but evidence of specific instances of misconduct were not. What mattered was reputation and not disposition. The common law rule was subject to common law exceptions. For example, a conviction was admissible on the assumption that it would necessarily affect reputation.

[13] Although s 30 has relaxed the common law rule, counsel submitted that for a specific instance of misconduct to be properly pleaded, the instance of misconduct must tend to demonstrate that the plaintiffs' reputation is generally bad "in the aspect to which the proceedings relate". As noted by Cooke P in the leading New Zealand

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[1] *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).

case on s 30, *Television New Zealand Ltd v Prebble*,[2] this requirement mirrors the common law requirement that particulars of bad reputation should be limited to the "relevant sector" of a plaintiff's life. The relevant aspect or sector is determined by the pleaded imputations of the defamatory statements. In *Prebble*, Cooke P cited with approval *Speidel v Plato Films Limited*, in which Lord Denning in the House of Lords held that:[3]

> When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the Judge to rule what is the relevant sector.

[14] Even criminal convictions: [4]

> ... must of course be relevant, in this sense, that they must be convictions in the relevant sector of [the plaintiff's] life and have taken place within a relevant period such as to affect his current reputation.

[15] As well as the requirement that any particulars must relate to the relevant aspect or sector of reputation, there must not be an inquisition without limit as to time in relation to a plaintiff's reputation. Summarising the relevant authorities in *Jorgensen v New Zealand Newspapers Limited*, Perry J stated:[5]

> Here then is a uniform expression of opinion that there must not, even on a general plea of bad reputation, be an inquisition without limit as to time or as to sector of a man's past; that even if the evidence of specific facts were to be admitted as Lord Radcliffe thought they should be [and now can be under section 30] then they should be "of sufficient notoriety as to be likely to contribute to his current reputation", and that if they take the form of convictions then they must be within a "relevant period... as to affect his current reputation" (Lord Denning); they must be "recent" (Salmon LJ); they must be "highly relevant to the imputation in the article complained of" (Salmon LJ).

[16] In *Jorgensen*, the plaintiff (who was obviously notorious as a convicted murderer) complained of imputations that he had been given favourable treatment in prison, that he was hated by the other prison inmates and that he informed on the other prison inmates. In support of a plea of general bad reputation, the defendants

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2 *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 524.
3 *Speidel v Plato Films Limited* [1961] AC 1090 (HL) at 1140.
4 *Goody v Odhams Press Ltd* [1967] 1 QB 333 at 341, cited with approval in *Jorgensen v New Zealand Newspapers Ltd* [1974] 2 NZLR 45 (SC).
5 *Jorgensen v New Zealand Newspapers Limited* [1974] 2 NZLR 45 (SC) at 51.

put forward the plaintiff's convictions for murder some eight or nine years previously. Applying the law to the facts, Perry J held:[6]

> These imputations concerned the sector of [the plaintiff's] life as an inmate of a prison. This period of his life is from March 1964 to the date of the article—April 1972. We are, therefore, concerned with his character or reputation as a prisoner during that period. The conviction is in no way relevant to this sector of his life and precedes it in time. As the matter does not meet this test of relevance in these two aspects, I took the view that it should not weigh with the jury in their assessment of damages. Judges have repeatedly emphasised the need to be fair to the man defamed.

[17] It was a further submission of the plaintiffs that because the share trading transactions took place some 10 years before the events that led to the failure of the Hanover group, they cannot have relevance to the estate of the plaintiffs' reputations at the point where they were allegedly defamed.

Defendants' submissions

[18] Mr Grace for the first defendant accepted that s 30 of the Act requires the specific instances of misconduct to relate to a plaintiff's reputation "in the aspect to which the proceedings relate". This requirement is similar to the qualification that was imposed at common law, which required that pleaded matters had to relate to "the same sector of the plaintiff's life".[7] He referred to the example given by the authors of *The Law of Torts in New Zealand*:[8]

> So, if an allegation is made about the competence of the plaintiff as a journalist, the matters related to the plaintiff's driving record or marital history should not be admissible in mitigation of damages.

[19] He further submitted that the scope of s 30 was considered in detail by the Court of Appeal in *Television New Zealand Ltd v Prebble*.[9] In that case the Court of Appeal confirmed that "the aspect to which the proceedings relate" reflected the existing law. Cooke P (with whom all other members of the Court agreed on this

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6 Ibid.

7 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [16.6(3)(a)].

8 Ibid.

9 *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA). Although this decision has been overturned by the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (PC), the appeal to the Privy Council was concerned with parliamentary privilege and not with the principles cited here.

point)[10] acknowledged that identifying the relevant area of conduct may be difficult. He referred to the judgment of Lord Denning in *Speidel v Plato Films Ltd*:[11]

> When evidence of good character or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector.

[20] The plaintiff in *Television New Zealand v Prebble* claimed the relevant sector of his life was his performance as Minister of State-Owned Enterprises. Cooke P considered this was too narrow. He considered the relevant sector to be the plaintiff's integrity concerning his reputation as a politician.

[21] Cooke P also noted that the Judge could, if necessary, control the exclusion of evidence as the trial went in order to protect the trial being diverted from the true issues.[12]

[22] It was Mr Grace's submission that the plaintiffs are attempting to "compartmentalise reputation into overly refined segments"[13] as a basis for a submission that paragraphs 76(a) to (d) do not relate to an aspect at issue in the proceeding. He further submitted that s 30 of the Act does not require the instances of misconduct proved by the defendant to be identical to the defamatory meanings alleged, as the plaintiffs argue. It simply requires the instances of misconduct to be directed to that sector of the plaintiffs' character which is relevant.[14] In this proceeding, he said, the sector of the plaintiffs' character which is relevant is:

a) The integrity of the plaintiffs' conduct in relation to the business affairs of commercial entities in which they are interested; and

b) Their conduct in breaching regulatory obligations in the conduct of their business affairs.

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[10] The headnote suggests McKay and Gault JJ dissented but a reading of their judgments showed they agreed with Cooke P on this issue.
[11] *Speidel v Plato Films Ltd* [1961] AC 1090 (HL) at 1124–1125.
[12] *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 525, lines 7–13.
[13] Ibid, at 547, lines 38–39 per McKay J.
[14] Ibid, at 524, lines 35–40, citing *Speidel v Plato Films Ltd* [1961] AC 1090 (HL) at 1124–1125.

[23] Paragraphs 76(a) and (d), he said, are specific instances of misconduct on these subjects and ought not to be struck out.

[24] Where a plaintiff's general reputation in any respect is at issue, the Court is willing to allow specific instances of misconduct that affect general reputation to be proved. In *Shadbolt v Independent News Media (Auckland) Ltd*, Tompkins J said:[15]

> To come within the section, the specific instances of misconduct must relate to his reputation "in the aspect to which the proceedings relate". The immediate aspects to which the proceedings relate, in the light of my findings of the defamatory statements, are his reputation for truthfulness and for concern in the environment. But I am also prepared to accept Miss Moran's submission that his general reputation is also at issue and therefore specific instances of misconduct that may affect his general reputation can also be proved.

Submissions in reply

[25] It was the submission of Mr Miles QC that the starting point was to identify what statements by the defendants the plaintiffs considered defamatory and the way in which those statements were defamatory. In making those enquiries all parties would be bound by the plaintiffs' pleadings. From that point, it could be established what damage to their reputation it was that the plaintiffs sought compensation for. The plaintiffs, he said, could not sue on the basis that the words that the defendants used raised issues about their integrity as businessmen. The plaintiffs were concerned and sought compensation for the allegations that they had committed fraud, had broken the criminal law and deserved to be imprisoned. They considered that their reputations had been damaged because people hearing the allegations might believe them and conclude that they had in fact committed fraud or other similar crimes. It was not open to the defendants to advance their own view of alternative meanings that might be attached to the words that Mr Sheppard had used, put forward their own version of the way in which the reputations of the plaintiffs might have been harmed and then seek to adduce evidence showing that they already had a poor reputation in that area.

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[15] *Shadbolt v Independent News Media (Auckland) Ltd* HC Auckland CP207/95, 7 February 1997.

[26] Counsel submitted that the issues raised by the plaintiffs' pleading were paramount. While he did not put it in these words, I understood him to submit that steps taken to defend or to mitigate a different claim from that which the plaintiffs were making did not accord with proper procedures. As to the binding nature of the pleadings, he referred me to the Court of Appeal authority in *Broadcasting Corporation of New Zealand v Crush.* [16]

[27] Mr Miles said it was his concern that the material that the defendants wanted to put forward about breaches of regulations relating to failing to properly inform the market about material facts relevant to takeovers and other such transactions (which was the gravamen of the s 30 allegations) was irrelevant and would take the court off course from determining the real matters at issue in the case.

Discussion

[28] In the first place, I accept that it is for the plaintiff to specify what the meanings are that it attributes to the words pleaded. The Court will be required to decide whether it accepts those meanings. The plaintiff will be held to those meanings.[17] Otherwise, if the plaintiff is permitted to later change the meaning that he/she attributed to the published words, this might result in unfairness, if for example the change puts the defendant in a position where it was unable to justify the new unexpected meaning. That being so, the defendant need only prepare to defend the proceeding on the footing that the case he is to meet is built around the pleaded meanings which the plaintiff has set out in the statement of claim. If the words are not defamatory, then no more needs to be said. As *Crush* makes clear, it is not for the defendant to depart from this approach by, for example, pleading that the words have a different meaning from that which the plaintiff contends for and then seeking to justify or excuse the words as so understood. Of course, if the defendant contended that the words were not defamatory, he/she in the course of that argument might wish to demonstrate that the plaintiff had misconceived what was intended and that the words correctly understood in their context bore a different meaning.

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[16] *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA).
[17] Ibid, at 237.

[29] The areas of the reputation that are said to be attacked in this case can be identified by reviewing the nature and/or degree of the meanings that the plaintiffs say that the words bore. These are stated in the statement of claim as follows:

a) The first and second plaintiffs misled investors by falsely stating that $10 million would be paid in accordance with the Debt Restructure Plan;

b) That each of the defendants was a "crook", namely a criminal;

c) The first plaintiff was a criminal who should be imprisoned;

d) There were good grounds for believing that the plaintiffs had participated in GST fraud;

e) There were good grounds for believing that the plaintiffs, or one of them, had received or were to have received a fee of $200,000 in exchange for committing GST fraud on the Inland Revenue Department;

f) The plaintiffs were involved in a fraudulent and/or dishonest transaction involving Five Mile Island;

g) The plaintiffs were involved in "malfeasances" being criminal and/or dishonest conduct;

h) The plaintiffs misappropriated cash belonging to a Hanover company.

[30] The only comment that I would make concerning the published statements concerns the reference to the plaintiffs being "crooks". An allegation that a person is a "crook" would generally be understood as meaning that that person has in the past carried out acts that involved a criminal element of dishonesty—whether or not the person in question had a conviction entered against him.

[31] The admissibility of evidence that the plaintiff was a person of bad reputation was recognised at common law. The reasons for this were explained by Devlin LJ in *Speidel v Plato Films Ltd*:[18]

> There is no doubt that a defendant in a libel action may in mitigation of damages give evidence that the plaintiff bears a bad character. The word "character" is not here used in the sense of a man's quality or disposition but in the sense of the reputation which he bears. The action for libel is an action for loss of reputation. On the issue of damage, what has to be investigated is not whether the plaintiff is in truth a good or a bad man, but whether he is reputed to be a good or a bad man. If a man's reputation is already so bad that it cannot be made worse, the man who defames him will, in fact, have done him no further damage; and it is nothing to the point to say that his previous reputation was unjustly bestowed upon him.

[32] There will however be cases where a plaintiff who does not have an entirely satisfactory reputation may suffer additional loss to his reputation by defamatory statements. The following passage from the judgment of Cave J in *Scott v Sampson* throws additional light upon this topic:[19]

> Speaking generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know if the fact is so that he is a man of no reputation. "To deny this would," as is observed in Starkie on Evidence, "be to decide that a man of the worst character is entitled to the same measure of damages with one of an unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probably quantum of injury sustained a knowledge of the party's previous character is not only material but seems absolutely essential".

[33] The only additional point to make is that references to reputation should be read as being references to the relevant sector of the person's reputation which the proceedings bring into question. Detailed and hair-splitting distinctions about what sector of the plaintiffs' reputations has been damaged should not, in my view, be embarked upon.[20] If that occurs, there is a danger of the plaintiffs being put in a

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[18] *Speidel v Plato Films Ltd* [1961] AC 1090 (HL) at 1100–1101.

[19] *Scott v Sampson* (1882) 8 QBD 491 at 503.

[20] See caution in *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 547 against attempts "to compartmentalise reputation into overly refined segments".

position where they can exclude from the Court's attention material that is relevant to the plaintiffs' reputations and, as a result, lead to undeserving plaintiffs being compensated for loss of reputation which they did not in fact have.

[34] The question that needs to be asked is whether it can plausibly be argued that as a result of the share trading events the plaintiffs had acquired reputations which were so bad that publication of the defendant's statements could not have done them any damage or that the damage caused was limited by pre-existing poor reputation. If the Court can say with confidence that the pre-existing reputation could not possibly have any material effect on assessment of the overall harm done to the plaintiffs' reputations by the later defamation, then the pleadings ought to be corrected by striking out reference to the events that are said to have established the poor pre-existing reputation. In making that judgement, the court must take into account not only the question of whether there is any relevant overlap of the subject matter of the two separate episodes but also their separation in time. As to the last, the question that needs to be answered is whether the earlier events occurred so long ago that any tarnishing of the plaintiffs' reputations from that clause was now forgotten so that it was not a matter which could have any relevance to their contemporary standing.

[35] The thrust of the defamatory comments here is that the plaintiffs behaved criminally and fraudulently as businessmen to the extent that they ought to be imprisoned.

[36] I agree with the plaintiffs that the share dealing transactions would, if proved, demonstrate much less egregious misconduct. This can be demonstrated by considering the consequences that follow from being fixed with the two different types of reputation. The consequences of being branded a criminal fraudster who ought to be behind bars would (if believed) clearly have a major impact on the decision to offer employment in the hypothetical case that the person defamed was actually seeking the same. That would be the case because such persons are generally felt to be unworthy of trust. The share trading derelictions on the other hand might be viewed by some persons as equivalent to a breach of ethics which should not automatically close the door on employment. The social consequences

are quite different in each case as well. Whatever a person's previous lapses, a divide is plainly crossed at the point where that person acquires the reputation for having behaved fraudulently.

[37] However, the admissibility of a plaintiff's pre-existing tarnished reputation is not restricted to circumstances where the reputation has been damaged by more or less exactly the same allegations in the past. The assessment that has to be made is whether the latest damage to the plaintiffs' reputations is similar in character to the damage previously sustained. Both sequences of events that were adverse to the character of the plaintiffs affected their standing in the same societal sector—business and commercial groups—and have in common the probity of those plaintiffs as businessmen. No doubt, they affected the plaintiffs' standing in other circles as well, such as in social groups and perhaps in their families. But that does not negate the fact that they also affected their standing in business circles.

[38] What seems likely is that at the trial, the Court that has to determine whether there has been damage to the reputation of the plaintiffs will primarily concentrate on the fact that they are businessmen. It is in that capacity that there is the greatest potential for damage to be caused to them. The reputation of members of society generally will partly depend upon them being viewed as reliable and honest. That is even more the case with businessmen. Their standing is closely linked to whether they have a reputation for being persons who can be trusted. That reputation will have already been damaged by any previous underhanded dealing, whether it is of the kind that amounts to a contravention of the criminal law or not. I am of the view that the insider trading allegations and the negative effect that they must have had upon the reputations of the plaintiffs would not inevitably be disregarded as irrelevant by the Court when assessing the proposition that publication of the defamatory statements caused substantial diminishment of reputation. It would be a matter for the ultimate Court that decides the issue to determine whether the share dealing transactions had in fact caused antecedent damage to the reputations of the two plaintiffs as businessmen.

[39] As to the issue of time lapse, I consider that this is not a case where the court on a summary application can conclude that it is unarguable that any effect that the

share trading events might have had on the reputations of the plaintiffs must have been exhausted by the date when the defamatory statements were made.

[40] Mr Miles QC stressed the fact that if the share dealing transactions are to be gone into that will have the effect of widening the scope of the proceeding and perhaps sidetracking it into a time-consuming and distracting enquiry about collateral matters. I have no doubt that, with co-operation on each side, and the Court's usual vigilance to exclude irrelevant evidence and to avoid any oppressiveness in pre-trial discovery and interrogatories, the process of putting evidence forward about the share dealing cases can be kept within manageable bounds.

[41] For those reasons I determine that the strike out application is to be dismissed.

Security for costs

[42] The defendants have made an application for an order for security for costs. The plaintiffs accept that an order would be justified. There is no agreement on what the amount of the order should be or whether security should be staged.

[43] The plaintiffs contended that defences pleaded are unlikely to be successful and that that was a factor which I ought to take into account when considering security for costs. The first obvious point is that publication is not denied and that the defendants have not sought to justify statements that the first defendant made about the plaintiff which are prima facie defamatory.

[44] One of the defences advanced is that the comments made by the first defendant were his honest opinion. The plaintiffs consider that this defence has little prospect of success. Part of the problem is that the statements that the first defendant made are not truly opinions but are rather assertions of fact. For example, under the 2008 Debt Restructure Plan (DRP) the plaintiffs were required to contribute to the sum of $10 million and had other obligations. The plaintiffs say that the $10 million was actually paid. In the course of his interview on the Close-Up program on 11 November 2009, and in a radio interview on the same day, the first defendant made

remarks to the effect that the $10 million had not been paid in and would not be. The plaintiffs say that the allegations that the first defendant made were assertions of fact and were incorrect. The defence of honest opinion would not therefore be available to him. The first defendant will apparently say that he made this allegation only after checking with the chairman of the company who confirmed that position. This is one example of the defence of honest opinion which the defendants raised under s 10 of the Act.

[45] It would not be productive to attempt a full analysis of whether the defence is available in relation to the allegation about the $10 million or to the other statements that the first defendant made. It may be that such a defence is not going to be available in regard to what appears to be statements purporting to report facts as opposed to statements containing evaluative content reflecting the judgment of the defendant concerning factual matters.

[46] The first defendant also puts forward the defence of qualified privilege. It will apparently be the case for the defendants that the first defendant had an obligation as an advocate for shareholders in companies to bring to the attention of the appropriate authorities what, in his view, amounted to misfeasance on the part of company directors including the actions of the plaintiffs as directors of Hanover. The plaintiffs' response is that while Mr Sheppard may have had such an obligation, that did not justify him voicing his concerns via the news media. He could have approached the regulatory authorities by means of private communications. I consider that the plaintiffs' analysis has substance to it.

[47] It is difficult to assess the extent of the plaintiffs' prospects of succeeding with their claim. The fact that there is no real issue about publication is relevant. Further, once publication is established, the meanings which the plaintiffs attribute to the words published do not seem untenable. It is likely that a court would agree that they are defamatory. On the other hand, it will be for the defendants to establish the affirmative defences which they have pleaded. This means that the claim certainly cannot be described as having little chance of success. The plaintiffs might be vulnerable in the area of damages but that is a separate question.

[48] A further issue that Mr Grace raised concerning costs was the possibility that the Court might order pursuant to s 43 of the Act that the plaintiff is to pay solicitor and client costs to the defendants. Such an order would be possible in this case, the defendants submit, because the amount of damages awarded to the plaintiff is likely to be less than the amount claimed.

[49] It is correct that the claims in this case are large ones, with each plaintiff claiming $3.5 million. Mr Woods provided an analysis of historical damages awards which he said showed that awards of the scale would be anomalous and unlikely. Mr Miles was critical of what he described as inaccuracies in the information that Mr Woods had provided.

[50] While the information about the historical awards is helpful, it is unnecessary to refer to the cases in detail. To illustrate the points being made, I shall refer only to *Television New Zealand Limited v Quinn*.[21] The plaintiff had been defamed in two successive television programs. He had been awarded damages of $1.1 million and $400,000. On appeal to the Court of Appeal the result was that the $400,000 award was left undisturbed, but the High Court judgment setting aside the $1.1 million award was upheld. The Court of Appeal described the total of the two awards as being "startlingly high". Cooke P referred to the Court's responsibility to ensure that awards were kept within reasonable bounds.[22] He also thought that if the matter did not settle and a second trial was necessary that it might be advisable to instruct the jury that an award of over $500,000 was liable to be set aside.[23]

[51] For the plaintiff it was pointed out that the *Quinn* judgments were delivered some 16 years ago and that because of the lapse of time they were of no real assistance when it came to predicting what might be awarded in the circumstances of the present case.

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[21] *Television New Zealand Limited v Quinn* [1996] 3 NZLR 24 (CA).
[22] Ibid, at 39.
[23] Ibid.

[52] A more recent case was that of *Siemer v Stiassny*[24] where an award of $825,000 made at first instance was not disturbed on appeal. The damages in that case included aggravated and exemplary elements.

[53] On the limited basis upon which the Court hearing the present application can anticipate what award of costs might ultimately be made, I consider that it is reasonable to conclude that an award of $3.5 million could only be seen as being very much at the outer limits of what is likely to be awarded. I make that comment notwithstanding the damaging nature of the allegations that are made, the width of publication and the repetitive nature of the allegations. However, exercise of the jurisdiction under s 43 of the Act requires that the Court be of the view that the "damages claimed are grossly excessive". The wording of this section imposes a high standard and that in turn, correspondingly, reduces the risk to the plaintiffs. While in terms of historical awards it might be argued that the current claims are excessive, that on its own will not be sufficient to bring s 43 into play. For that to happen the court would have to conclude that the damages claims were so excessive that it was plain that the plaintiffs were claiming far too much by way of damages having regard to realistic assessments of the actual harm done to the plaintiffs. For present purposes, I would assess the chances of an order being made under s 43 as not being likely but, on the other hand, not being negligible.

[54] The final point to notice is that the merits of the plaintiffs' claim are not the dominant consideration that they would be in a case where the making of an order for security for costs carries with it the risk that the plaintiffs will not be able to meet the order and will not therefore be able to bring what seems to be a meritorious claim to trial. This comment assumes that notwithstanding their association with Hanover, the plaintiffs are men of financial substance. There is little doubt that they will be able to comply with an order for security for costs.

[55] For all of those reasons, not only ought an order to be made, but there are no discretionary considerations present which would justify the size of the order being reduced to reflect the financial circumstances of the plaintiffs.

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[24] *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.

[56] In my view, the order that is required to be made should provide the defendants with reasonable assurance that at least part of the legal costs will be met in the event that the plaintiffs are required to pay them. I consider that the appropriate approach to take is first of all to attempt an estimation of what the party and party costs might total and then apply a reasonable discount to arrive at the figure that should be ordered.

[57] The parties were unable to agree on the question of the likely party and party costs. They are not agreed on the scale that ought to be adopted. The defendants say that Category 3 is the appropriate category. The plaintiffs argue for Category 2.

[58] On balance, I consider that the proceeding is one that fits more comfortably into Category 2. While there is no doubt that the litigation will make heavy demands on counsel, I would not go so far as to say that special skill and experience of the type which is contemplated in Category 3 will be required. While it is correct that defamation actions possess their own complexities, in other respects it is not as comparatively complex as some of the other general proceedings in the High Court a feature of which is that they have numerous parties who have brought sub-claims between themselves, for example.

[59] Very detailed calculations have been submitted for each side. Detailed criticisms have been mutually advanced of the calculations. For example, the plaintiffs do not accept that there will be an argument about whether or not the defendants should be entitled to trial by jury.

[60] In the end, the range of costs seems to be from the plaintiffs' figure on a 2B basis of $115,000 to the figure at the other end of the scale which has been put forward for the defendants at $277,000, which is apparently based on Category 3. In both cases I have rounded the figures.

[61] It is not possible to carry out a detailed calculation which will accurately predict what the ultimate costs order might be should the matter go to trial. While it seems likely to me that Category 2 will generally be adopted, there is still a possibility of variation depending upon the number of steps that are taken at the

interlocutory stages, the duration of the trial and other relevant matters. I consider that a costs order of not less than $150,000 is justified.

[62] The next issue concerns whether there should be a discount on the total likely party and party costs and, if so, at what level the discount should be fixed. In my view it is correct that such discounting should take account of the strength of the plaintiffs' claims. It should also take into account the extent of the risk that one or other of the plaintiffs might default entirely in meeting any cost award that might follow judgment. In connection with the last point, it is not clear what if any assets could be attached within the New Zealand jurisdiction to enforce an order.

[63] There would not seem to be any basis for discounting on the grounds of financial hardship to the plaintiffs in this case.

[64] Taking all of these matters into account, it would seem reasonable to me that the plaintiffs be required to pay security calculated at two thirds of that sum, or, in other words, the sum of $100,000.

[65] There are differences between the parties as well as to the timing of payments. The simplest approach would seem to me to be to order staggered security with half the amount being required to be paid at the end of January 2013 and the balance to be paid by the end of May 2013.

[66] The next point concerns submissions that were made that costs ought not to be awarded on the application for security for costs. I do not accept that submission. Whether or not costs ought to be ordered is one issue and granting security to ensure that the orders are met is another. They are separate parts of the jurisdiction to make costs orders that the Court has. I see no reason why costs should not be allowed, if an order would otherwise be justified.

[67] As to whether a costs order ought to be made in this case, I observe that the parties have both had success. My conclusion is that costs ought to lie where they fall and I so order.

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J P Doogue
Associate Judge