IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2012-463-666
[2013] NZHC 2684

BETWEEN	ROBERTA LE'A KAPI'OLANI CABRAL Plaintiff
AND	THE BEACON PRINTING & PUBLISHING COMPANY LIMITED First Defendant
	KEITH MELVILLE Second Defendant

Hearing: 11 September 2013

Appearances: M Keall for Plaintiff
D McLellan QCfor Defendants

Judgment: 15 October 2013

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on ***15 October 2013*** *at* ***4:30pm***
pursuant to Rule 11.5 of the High Court Rules.

.....
Registrar/Deputy Registrar

Solicitors:
Vallant Hoooker & Partners (Diane Snow), Auckland, for Plaintiff
Jones Fee, Auckland, for Defendants

Counsel:
M Keall, Auckland, for Plaintiff
D McLellan QC, Auckland, for Defendant

[1] The plaintiff has applied to strike out the defence of qualified privilege in this defamation proceeding. The plaintiff is a senior adviser to Innovations Development Group Inc, a Hawaiian corporation based in Honolulu, Hawaii, United States of America. She was the subject of an article published by *The Whakatane Beacon* on 14 February 2012. The first defendant is the publisher of *The Whakatane Beacon*. The second defendant is the journalist who wrote the article. The article was published in both print and on-line versions of *The Whakatane Beacon*.

[2] The article is headed "Fraudster in Power Project" and includes the following statements:

> A key director of a company set up to build and manage a Kawerau geothermal power project is a convicted fraudster. Hawaiian Roberta Cabral, the found of the Innovations Development Group (IDG) – a business which has established native-to-native deals with Maori trusts to build geothermal power projects, was imprisoned for fraud and tax evasion in 2002.
>
> She is now a director of Te Ahi o Maui, a company established by IDG, the Eastland Group, and the Kawerau A8D Ahu Whenua Trust.
>
> A 10-15 megaWatt power station is being developed on trust land at a capital cost of $45 million to $60 million.
>
> Other Te Ahi o Maui directors are Matt Todd, the Chief Executive of the Eastland Group, and Kani Hunia of the Kawerau A8D trust.
>
> Asked whether he was aware of Ms Cabral's convictions, Mr Todd said he was not comfortable talking about an individual but Eastland was thorough in its due diligence before doing business with IDG.
>
> He said Ms Cabral had to go through a "process" to gain approval from the Overseas Investment office and nothing *The Beacon* had told him about Ms Cabral's past was new to him.
>
> After entering guilty pleas in 2002, Ms Cabral was sentenced to 10 months in prison and three years of probation for defrauding a non-profit organisation established to benefit union members.
>
> She also admitted not filing tax returns for the $50,000 in commissions she received for her role in a $10 million investment made by the Honolulu union entity, Unity House.
>
> She laundered the commissions through a British Virgin Islands company she controlled and used for concealing her income.

> In reducing her sentence to the lowest possible under federal sentencing guidelines, Judge Manuel Real noted her lack of a prior criminal record, her guilty plea, her acceptance of responsibility and her co-operation.

[3] The article refers to attempts to contact Ms Cabral and a reply received from a Wellington public relations firm. It also states that the A8D Trust is under investigation by the Maori Land Court for alleged misuse of trust funds. It does not directly say that Ms Cabral was involved in any misuse of funds. Instead, the article refers to other persons accused of abusing their positions of trust. The article refers to the IDG Group's investment in the geothermal project. It also says:

> Despite Ms Cabral's past, the A8D trust appears happy with IDG's involvement in the geothermal power project.
>
> The *Beacon* understands trust beneficiaries met at the end of January and voted to support the project.
>
> IDG describes itself as "a strategic planning and development company that conducts business in a socially responsible, globally green manner that is respectful of native cultures".
>
> "IDG incorporates a development blueprint that promotes native-to-native relationships within the context of the traditional practice business model."
>
> Ms Cabral is described as IDG's founder, senior adviser, and as a native Hawaiian with a keen appreciation for indigenous cultures.

[4] The plaintiff's statement of claim pleads to the following effect:

> (a) In January 2008 the trustees of the Kawerau A8D Ahu Whenua trust awarded IDG the exclusive right to develop geothermal resources for power generation on 174 hectares of Maori freehold land owned by the trust at Kawerau. In August 2010 IDG secured the services of Eastland Generation Ltd as a financial and technical partner to develop the geothermal resources on the trust land and IDG Eastland and A8D trust agreed to develop a geothermal power station on the land as a joint venture;
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> (b) A joint venture company, Te Ahi o Maui GP Ltd, was incorporated. The shareholders were Te Ahi and Eastland, IDG, and the trustees were the A8D trust. The company has six directors. IDG has a director's seat on the Te Ahi board. IDG's designated director is a Lee Erwin but the plaintiff was an alternate director to Lee Erwin between August 2011 and May 2012, but was not called upon to substitute for him during any board meeting over that period. Te Ahi o Maui GP Ltd became the general partner of the Te Ahi o Maui Ltd partnership.
>
> (c) As a senior adviser to IDG the plaintiff has been prominently involved in the geothermal project from the outset, including

frequent visits to New Zealand, direct participation in negotiations with the A8D Trust, Eastland and the New Zealand Government and the on0-going implementation of the geothermal project.

(d) Following investigations by federal law enforcement agencies criminal proceedings were taken against her in Hawaii. On 17 June 2002 she pleaded guilty in the United States District Court for the District of Hawaii to one count of evasion concerning tax liability for her returns for the calendar year ending 31 December 1992, one count of evasion of payment concerning tax liability for her tax return for the calendar year ending 31 December 1993, one count of failing to file a federal income tax return for the calendar year ending 31 December 1994, and one count of wire fraud in 1994. She pleaded guilty as part of a plea bargain. On 31 October 2002 she was sentenced to 10 months imprisonment and three years probation. She was ordered to make restitution of $25,000 to Unity House (for whom she had previously worked as consultant) and to perform 2500 hours of community service. She was imprisoned for eight months before release, and satisfied the other terms of her sentence to make restitution and perform community service.

(e) The conviction and sentence are an isolated episode in her life and she has not been convicted, charged, or investigated in relation to any other unlawful behaviour or suspected unlawful behaviour in the United States or elsewhere. She has since rehabilitated her professional and personal reputation but that rehabilitation is vulnerable to fresh allegations of wrongdoing in that she remains more susceptible to suspicion in relation to allegations of financial wrongdoing than a person with no past convictions. She enjoyed an untarnished professional and personal reputation in New Zealand before the publication on 14 February 2012.

(f) The article published by *The Beacon* on 14 February 2012 has defamed her.

(g) It conveys the following meanings:

(i) She is under investigation by the Maori Land Court for allegedly misusing trust funds.

(ii) She is under investigation by the Maori Land Court for allegedly misusing trust funds intended for the geothermal project.

(iii) There are reasonable grounds to suspect her involvement in the misuse of A8D trust funds.

(iv) There are reasonable grounds to suspect her involvement in the misuse of A8D trust funds that were intended for use in the geothermal project.

(v) There are reasonable grounds to suspect that the 2002 convictions were not an isolated episode in her life.

(vi) There are reasonable grounds to suspect that she is a serial offender; and

(vii) She is unfit to be a key director of the company set up to build and manage the geothermal project.

[5] She seeks general, aggravated and punitive damages and an injunction to restrain further of defamatory statements about her.

[6] In her submission the sting of the publication is in:

(a) the inaccurate description of her as a fraudster and the prominence accorded to that description in the headline;

(b) the raking-up of an isolated 10-year-old conviction; and

(c) abruptly changing the subject matter in the midst of the article to an investigation into the alleged misuse of trust funds that did not in fact involve the plaintiff without overtly shifting the focus of the article away from her.

[7] The defendants admit the publication but deny the defamatory meanings pleaded. The statement of defence also sets out two affirmative defences:

(a) Truth (under s 8 of the Defamation Act 1992); and

(b) Qualified privilege at common law (saved under s 16(3) of the Defamation Act).

[8] The plea of qualified privilege is:

29. If it is held that the words complained of in paragraphs 22 and 24 of the statement of claim, or the article as a whole, conveyed the imputations complained of in paragraph 25 of the statement of claim (which is denied) the defendants had a duty to publish the information about the plaintiff in the article, and the readers of the *Beacon* had a corresponding interest in receiving that information.

Particulars of occasion of privilege

29.1 The article concerned a local substantial geothermal project involving a joint venture between local commercial interests and community interests (Te Ahi o Maui GP Limited and

Eastland Generation Limited) and community interests (the A8D Trust).

29.2 The Geothermal Project would have a capital cost of between $45 million and $60 million.

29.3 Innovations Development Group and the plaintiff had a significant commercial and operational role in the Geothermal Project.

29.4 Innovations Development Group had or would be obliged to make significant payments to A8D Trust and had been paid or would be due significant payments by A8D Trust.

29.5 The plaintiff had convictions for fraud as set out in paragraphs 11 to 15 of the statement of claim.

29.6 A8D Trust was under investigation by the Maori Land Court in relation to allegations of misuse of trust funds.

29.7 The plaintiff had to gain approval from the Overseas Investment Office in order for IDG to be involved in the Geothermal Project.

29.8 Innovations Development Group promoted "native to native" relationships within a context of a traditional practice development model and promoted itself to A8D Trust and its associated interests and partners in the Geothermal Project on that basis.

29.9 The Geothermal Project and the plaintiff's involvement in it were matters of legitimate public interest by reason of paragraphs 29.1 to 29.7 above.

[9] The defendants have not based their plea of qualified privilege on the publication of matters under s 16 and the First Schedule of the Defamation Act 1992.

[10] Under s 19 of the Defamation Act 1992 a defence of qualified privilege will fail if the plaintiff proves that the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication. So far, the plaintiff has not made any plea under that section, but Mr Keall indicated that she was likely to do so if the strike out application failed. For this case I am not required to consider questions under s 19, those being matters of fact which would be determined by a jury. In this case, the question is whether it is reasonably arguable that the publication was on an occasion of qualified privilege.

[11] No notice under s 19A(2) of the Judicature Act 1908 requiring a trial by jury has been given yet, but Mr McLellan QC indicated that the defendants have a preference for a jury trial.

Strike-out principles

[12] The plaintiff's application is made under r 15.1 of the High Court Rules. The parties agreed that the following passage from *Attorney-General v Prince and Gardner*[1] stated the test for strike-out:

> A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possible succeed *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at 294-295; *Takaro Properties Ltd (In Receivership) v Rowling* [1978] 2 NZLR 314 at 316-317; the jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material (*Gartside v Sheffield Young & Ellis* [1983] 1 NZLR 37 at 45; *Electricity Corporation v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield Young & Ellis*).

[13] The reference in *Attorney-General v Prince and Gardener* to *R Lucas & Son (Nelson Mail) Ltd v O'Brien* is important, because that case was an application to strike out a defence of qualified privilege in a defamation proceeding. While it is not unknown for the court to strike out a qualified privilege defence before trial,[2] there is a greater number of cases where the court, exercising due caution, has declined to do so.[3]

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1 *Attorney-General v Prince and Gardener* [1998] 1 NZLR 262 at 267.

2 See *Jones v Templeton* [1984] 1 NZLR 448 (CA), *Ah Koy v Auckland Star Ltd* Auckland HC Auckland CP 2009/88 7 December 1989 Tompkins J. In *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC) Harrison J held on the pleadings that the third parties had a defence of qualified privilege on the merits.

3 Examples are *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, *Isbey v New Zealand Broadcasting Corporation* [1975] 1 NZLR 721, *Johannink v Northern Hotel Hospital Restaurant and Related Trades Industrial Union of Workers* HC Auckland CP 1888/90, 29 April 1992 Master Kennedy-Grant, on review 28 May 1992 Doogue J, *Karam v ACP Media Ltd (No 3)* HC Auckland CIV-2003-404-497 Heath J 27 April 2004, and *Julian v Television New Zealand Ltd* CP 367-SD/01 H C Auckland 25 February 2003, Salmon J.

[14] Here an affirmative defence is the subject of the strike-out application. It is to be considered on the basis that the plaintiff will succeed in proving her case, that the defendants will not be able to rely on their defence of truth, and that the allegations in paragraph 29 of the statement of defence will be proved at trial. The question is whether these facts, if proved, give the defendant an arguable defence.

Qualified privilege principles

[15] Whether a statement alleged to be defamatory was made on an occasion of qualified privilege is a question of law to be decided by a judge. On the other hand a decision whether the occasion of qualified privilege has been misused is a question of fact to be decided by a jury.[4]

[16] Lord Atkinson's dictum in *Adam v Ward* has been cited many times as stating the basic test for qualified privilege at common law:[5]

> ...a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[17] He also added that reciprocity of interest and duty between the maker and the recipient is essential, but that has now been rejected in New Zealand.[6] That is because of the wide variety of circumstances which may give rise to a privileged occasion. In *Lange v Atkinson (No 2)*, the Court of Appeal referred to it as a "shared interest" test.[7] The test is one of principle, not of fixed, precise rules.[8]

[18] Except in a case under s 19 of the Defamation Act, qualified privilege gives immunity in defamation even though a publication is defamatory and untrue. Some communications are considered to have such value that they should be protected regardless. The basis for protection is grounded on considerations of public interest. In *Toogood v Spyring* Parke B said:[9]

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4 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 470.
5 *Adam v Ward* [1917] AC 309 (HL) at 334.
6 *Lange v Atkinson* at 440-441.
7 *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA) at [20].
8 *Lange v Atkinson* at 440.
9 *Toogood v Spyring* (1834) 1 CM & R 180 at 192

> If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. It has long been established.

[19] Similarly in *Stuart v Bell*, Lindley LJ said:[10]

> The reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not.

[20] The use of "public interest" requires care. In *Lange v Atkinson*, the Court of Appeal explained:[11]

> The foregoing discussion on flexibility of the underlying principle (with its emphasis on social utility and shared interest), the infinite variety of possible situations, the limited role of any requirement of reciprocity, the generality of the social or moral duty or interest required, and the broad power exercised by the courts in determining the relevant social moral principle or public policy and adapting the law to the necessary condition of society does not mean that the defence of qualified privilege is without bounds. It plainly is not. The rights of individuals to their reputation are also critical. In particular, the courts have frequently rejected any argument that a general public interest can alone protect a defamatory public statement. ...

[21] It has long been recognised that there is not an exhaustive list of occasions which are privileged. In *London Association for Protection of Trade v Greenlands Ltd*, Lord Buckmaster said:[12]

> Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances of privileged occasion, may nonetheless fall well within the plain yet flexible language of the definition to which I have referred.
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> Again, it is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter, in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained, but in this investigation it is important to keep distinct matters which would be solely evidence of malice, and matters which would show that the occasion itself was outside the area of protection.

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10 *Stuart v Bell* [1891] 2 QB 341 at 346.
11 At 441-442.
12 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 22.

[22] Similarly in *Howe & McColough v Lees* Higgins J spoke against:[13]

> ... a tendency to treat circumstances of frequent occurrence as if they conclusively settled the question of the applicability of the principle. The hounds of the law sometimes lose the scent of the principle in looking for the likely cover for the game. Where the circumstances are at all exceptional, as in this case, we have to go back to the test in its full breadth and scope, unfettered by any statements of the law adapted to circumstances of the more ordinary kind. ...

[23] Ultimately in a case not covered by existing authority, the court is required to make a principled value judgment. Tipping J's judgment in *Vickery v McLean* recognises this:[14]

> [15] All occasions of privilege are based on an identified public interest in allowing people to speak and write freely, without fear of proceedings for defamation unless they misuse the privilege. On occasions of privilege the public interest is seen as prevailing over the protection of individual reputations. The price of freedom is the requirement that the privilege be responsibly used. Where the courts are asked to find that a particular occasion, and not directly covered by authority, is one which should attract qualified privilege, the ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between the freedom of expression and protection of reputation accordingly.
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> ...
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> [18] ...it is necessary for Mr Vickery to establish his asserted privilege by reference to first principles. He must show that it is in the public interest (for the common convenience and welfare of society as Parke B classically put it in *Toogood v Spyring* ...) that on an occasion such as the present, freedom of expression should prevail over protection of reputation. More specifically, he must show that it is in the public interest for people to be able to make allegations of serious criminal offending, albeit in a bona fide way to or through the news media.

[24] As the court is required to assess competing interests in a qualified privilege case, it is useful to record the interests upheld by the law of defamation. In *Reynolds v Times Newspapers Ltd*, Lord Nicholls said:[15]

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an

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13 *Howe & McColough v Lees* (1910) 11 CLR 361 at 395.
14 *Vickery v McLean* [2006] NZAR 481 (CA)
15 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) at 201.

> unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.

[25] Claims of qualified privilege have been upheld for communications with a restricted readership: complaints of misconduct to an enforcement authority and references by a former employer given to a prospective employer are typical cases for occasions of qualified privilege. In cases of wider publication, especially by the media, the ability to claim qualified privilege becomes more difficult. It was long recognised that there was privilege at common law for media reports of official proceedings, including court cases and parliamentary debates, and official statements.[16] The benefit in communicating these matters to the public was held to prevail over the interest protected by the law of defamation. It has sometimes been considered that the media could only claim privilege to the extent of making such reports. In *Truth (NZ) Ltd v Holloway* the Court of Appeal stated that for the law of defamation a newspaper has two functions:[17]

> One function is to provide its readers with fair and accurate reports of proceedings, judicial and otherwise, and of public meetings and the like. In this field, clearly, there is room for the application of the principles applied in *Perera's* case and, indeed, the Defamation Act 1954, and its earlier English counterpart, give statutory recognition to the right of a newspaper to carry out this task, subject to certain safeguards to which it is unnecessary to refer.
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> Another function performed by a newspaper is to provide its readers with news, and even gossip, concerning current events and people. It would not, we think, be an overstatement to say that some newspapers in particular require and hold their circulation by emphasising this aspect of journalism. In this second field, in our opinion, there is no principle of law, and certainly no case that we know of, which may be invoked in support of a contention

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16 E.g. *Wason v Walter* (1868) LR 4 QB 73 at 93-94.

17 *Truth (NZ) Ltd v Holloway* [1960] NZLR 69. Other decisions to similar effect are *Dunford Publicity Studios Ltd v New Media Ownership Ltd* [1971] NZLR 961 and *Templeton v Jones* [1984] 1 NZLR 448 (CA).

> that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.
>
> The proprietor of a newspaper is in a difficulty if he begins to speak of a 'duty' to publish material, because such an assertion immediately provokes the kind of caustic answer given by Lord Macnaghten in *Mcintosh v Dun* [1908] AC 390, where he said:
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> > "Is it in the interests of the community? Is it for the welfare of society,that the protection which the law throws around communications made in legitimate self-defence or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit on the characters of other people?"
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> Once it is appreciated that the law does not recognise any special privilege as attaching to the professional journalism, and that in the case of a journalist "the range of his assertions, his criticisms or his comments are as wide as, and no wider than, that of any other subject". ... It seems to us to become manifest that a journalist who obtains information reflecting on a public man or a public officer has no more right than any other private citizen to publish his assertions to the world at large.

[26] That view no longer entirely represents the current view of the role of the media. In *Reynolds v Times Newspapers Ltd* Lord Nicholls said:[18]

> Likewise, there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.

[27] This recognition of a wider role of the media has weighed in assessing claims for qualified privilege. It formed part of the Court of Appeal's reasoning in finding for privilege for generally-published statements about politicians in *Lange v Atkinson*.[19] The Court held that the legal context had changed since *Truth v Holloway* and *Templeton v Jones*.[20]

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18 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) at 200.
19 At 442-445, 447-450, 460-462
20 At 465.

[28] The plaintiff submitted that the decision in *Lange v Atkinson* was a limited exception to the principle in *Truth v Holloway*. As the article was not about an elected Member of Parliament and was not within the first function of the media in *Truth v Holloway*, there could be no qualified privilege. That submission overlooks that there may be other matters of public interest, for which the media may properly invoke the privilege. The Court of Appeal recognised this in *Lange v Atkinson*.[21] It can be seen in its citing cases such as *Webb v Times Publishing Co Ltd*.[22] Subsequent cases have recognised that the media may invoke the privilege in other circumstances: *Julian v Television New Zealand* [23] and *Osmose New Zealand v Wakeling*.[24]

[29] On the other hand the Court of Appeal was also careful to point out that matters of general interest alone are not enough to justify qualified privilege:[25]

> As Elias J mentioned in her judgment in this case, a publication is not protected by qualified privilege merely because it relates to a matter of legitimate public interest: *Truth (NZ) Ltd v Holloway*. There must be a duty or interest in the defendant to publish and the publication's audience must not exceed those with an interest to receive it. The publication must not be too wide. But there may be occasions on which the public at large has a legitimate interest in a fair and accurate report on certain matters. This is the rationale behind the First Schedule and cases such as *Perera v Peiris* [1949] AC 1. The protection of qualified privilege will however be denied to the media at common law except where the public as a whole (or the section of it to which publication is made) has the relevant interest.

[30] It is also important to note that decisions as to public interest for the defence of honest opinion (formerly fair comment) under ss 9-12 of the Defamation Act 1992 are of limited assistance in deciding the question of qualified privilege.[26] The defendants cited *South Hetton Coal Co Ltd v N E News Association Ltd*[27] as authority that the affairs of a private business, if large enough, could be a matter of public interest. That was a decision as to the defence of fair comment, as it was then

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21 At 445.

22 *Webb v Times Publishing Co Ltd* [1960] 2 QB 535 – a report of a foreign criminal trial, not within the standard privilege for reporting domestic court cases, but in its particular circumstances was held to be of legitimate and proper interest.

23 *Julian v Television New Zealand* HC Auckland CP 367-SD/01, 25 February 2003.

24 *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC).

25 At 437.

26 There is debate whether public interest is still a requirement of the defence of honest opinion. See the discussion in *The Law of Torts in New Zealand* 6th ed, Todd and others, at 16.8.05. I am not required to address the question.

27 *South Hetton Coal Co Ltd v N E News Association Ltd* [1894] 1 QB 133 (CA).

known, not a decision as to qualified privilege. For the fair comment/honest opinion defence, public interest is given wider scope. In *London Artists Ltd v Littler Grade Organisation Ltd* Lord Denning MR said:[28]

> I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.

Freedom to express one's opinion is allowed if the facts relied on are true.[29] But qualified privilege arises in those cases where the defendant cannot rely on the truth. *Gatley on Libel and Slander* explains the differing scope of public interest for the two defences:[30]

> It may safely be said that if this requirement is satisfied for the purposes of qualified privilege then the case will also be one where the matter is of "public interest" for the purposes of fair comment. The reverse is not, however, necessarily true: fair comment, being concerned with the expression of opinion, remains a defence of wider scope than privilege.

[31] The circumstances of the publication that are considered to see whether the publication was on a privileged occasion include the subject matter, the identity of the publisher, the context and the readership. The court is not however required to inquire whether the person making the statement took proper care to find out the facts. In *Lange v Atkinson* Tipping J said:[31]

> Qualified privilege has never involved a requirement that the speaker or writer take reasonable care to ascertain the facts, with consequent liability if such care is not taken.

[32] At best such questions might arise if the court is required to consider whether the writer took improper advantage of the occasion when the defence under s 19 is raised.[32]

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28 *London Artists Ltd v Littler Grade Organisation Ltd* [1969] 2 QB 375 (CA) at 391.
29 As provided in Defamation Act 1992, s 11.
30 *Gatley on Libel and Slander* 11th ed at 12.27.
31 At 473.
32 *Lange v Atkinson* per Tipping J at 477, *Lange v Atkinson (No 2)* at [42] – [49].

The defendants' preliminary objection

[33] The defendants objected that the court should not decide now whether the publication of the article was privileged. That should wait until trial when the full facts could be established. That cautious approach has been taken when the court is not confident that the facts are sufficiently known to rule on the privilege question.[33] In this case however it is possible to apply the standard assumption in strike out cases that the defendants will be able to prove at trial all the matters they have pleaded. The defendants have given adequate particulars of the defence of qualified privilege. The court has not been left to guess as to the facts. Where there might be any doubt as to factual matters, the assumption goes in favour of the defendants. As an example, even though the Kawerau A8D Ahu Whenua Trust is an ahu whenua trust rather than a whenua topu trust, it will be assumed that it has numerous beneficiaries and that the trust has provisions for Maori community purposes under s 218 of Te Ture Whenua Maori Act. That assumption is made to allow the defendants to make good on their plea that the joint venture involves community interests.[34] The case is not far apart from those cases where the court has determined whether there is a duty of care on a strike out application.[35] It is possible to decide the question of privilege on the pleadings.

Qualified privilege in this case

[34] The first defendant publishes the Whakatane Beacon, a regional newspaper, in hard and online versions. It can be expected to publish newsworthy articles of interest to the public in the eastern Bay of Plenty, including inland as far as Kawerau. The public in that area may look to it as a source of information and comment on matters of local interest, which might not otherwise be available. In the defendants' favour it is also assumed that the readers of the Whakatane Beacon have a keen interest in the subject matter of the article in this case. Some of the readers are likely to be beneficiaries of the Kawerau A8D Ahu Whenua Trust or stand to be affected in some material way by the geothermal project. The subject matter of the article

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33 See the cases in footnote 3 above.
34 Paragraph 29.1 of statement of defence.
35 E.g. *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (CA).

covers these topics: the development by Maori of resources on their lands, the development of a geothermal project requiring a very substantial investment, a joint venture including both community and commercial interests, funding for the project coming from overseas, the foreign funder operating on a "native to native" basis, a person associated with the foreign funder having convictions in a foreign court for fraud and tax evasion, scrutiny by the Overseas Investments Office, alleged misuse of trust funds by trustees of the ahu whenua trust. The context for the article includes the plaintiff's participation in the project and the investigations into alleged misuse of funds by trustees of the ahu whenua trust.

[35] As the qualified privilege plea is to be considered on the basis that the plaintiff will have at least some success in her claim of defamation and that the defendants will fail to some extent on their defence of truth, it is also assumed that the article means that the plaintiff is in some way implicated or involved in the alleged misuse of trust funds in the ahu whenua trust.[36]

[36] No doubt the article is newsworthy. No doubt also it would meet any public interest requirement for a defence of honest opinion. But that is not enough to meet the test for qualified privilege at common law. Something more is required – something so important that it entitles the defendants to tell the readers of the Beacon about it even though it defames the plaintiff and is not true. I am unable to find any such outranking element. That a person convicted of fraud in a foreign court is part of a foreign organisation funding a significant geothermal project, that Overseas Investment Office approval was required and obtained notwithstanding the convictions, that there is an inquiry underway as to alleged misuse of trust funds within one of the joint venture partners (one comprising a community interest), that the readers of the Beacon may have a justifiable thirst for information about these matters interest and that a significant number of those readers may be personally affected by the geothermal development do not elevate this case to one where they can arguably prevail over the plaintiff's right not to be falsely defamed. The case does not rise above one of the media generally publishing a newsworthy story. The effect of ruling that the occasion is not privileged is that journalists must find a way

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[36] This assumption does not require that the plaintiff will succeed in proving all the meanings she has pleaded.

of writing the story so that if it harms a person's reputation it does not do so falsely. In short, the journalist must stick to the truth. In this case that is not setting an unreasonable task for the media. The real issues in the case are whether the plaintiff was defamed in the way that she says that she was and whether the defendants have a defence in truth. It does not need to be diverted by questions of privilege.

[37] I refer to cases cited by the defendants. As I have already mentioned, *South Hetton Coal Co Ltd v N E News Association Ltd* is not an authority on qualified privilege. *R Lucas & Son (Nelson Mail) Ltd v O'Brien*, *Julian v Television New Zealand*,[37] *Isbey v New Zealand Broadcasting Corporation*,[38] *Johannink v Northern Hotel Hospital Restaurant and Related Trades Industrial Union of Workers* are cases where the courts declined before trial to rule on qualified privilege and accordingly are not decisions that the occasions were privileged.

[38] *Osmose New Zealand v Wakeling* is a case of a positive finding of privilege. Principal newspapers in Auckland and Wellington reported statements made by the defendants criticising the Building Industry Authority for approving the plaintiff's wood preservative treatment for timber used in house construction. The newspapers were held to have a proper role in disseminating that information and their readership was held to have a real interest in receiving that information. The context was the very severe leaky homes crisis. That case is distinguishable on its facts. The finding of privilege recognised a shared interest in giving and receiving the information. The publication in this case does not carry the same importance, as in my judgment the value of the article does not go beyond newsworthiness.

[39] *Lange v Atkinson* is about privilege generally published statements about elected Members of Parliament and is obviously distinguishable. None of these cases assist the defendants.

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[37] *Julian v Television New Zealand* HC Auckland CP 367-SD/01 25 February 2003.
[38] *Isbey v New Zealand Broadcasting Corporation* [2007] 1 NZLR 841.

Outcome

[40] In summary I find that it is not reasonably arguable that the article in the Beacon was published on a privileged occasion. I have found that on the pleadings by making the normal assumption on a strike out application that the defendants will be able to prove the facts they have pleaded. There is no privilege because notwithstanding its newsworthiness, the circumstances of the article, its subject matter, its general publication and its readership do not warrant according it immunity if it has falsely defamed the plaintiff. The real contest will be about the meaning of the statements, the extent of defamation (if any) and whether they were true.

[41] I make these orders:

(a) Paragraph 29 of the statement of defence setting out the plea of qualified privilege is struck out.

(b) The defendants shall pay the plaintiff costs on the application. If the parties cannot agree costs, memoranda may be filed.

(c) The Registrar is to allocate a conference for further directions to be given.

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R M Bell
Associate Judge