**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2012-485-1921**
**[2014] NZHC 1604**

| | | |
|---|---|---|
| BETWEEN | JON STEPHENSON<br>Plaintiff |
| AND | RICHARD RHYS JONES<br>First Defendant |
| | THE ATTORNEY-GENERAL<br>Second Defendant |

Hearing: 1 July 2014

Counsel: E D Nilsson for Plaintiff
H B Rennie QC and H S Hancock for Defendants

Judgment: 9 July 2014

---

**RESERVED JUDGMENT OF MACKENZIE J**

---

*I direct that the delivery time of this judgment is 3 pm on the 9th day of July 2014.*

Solicitors: Lee Salmon Long, Auckland, for plaintiff
Crown Law, Wellington, for defendants

[1] This is an application to strike out an allegation in the plaintiff's second amended statement of claim, namely as to one of the pleaded meanings of the statement upon which the plaintiff sues for defamation.

[2] The plaintiff's claim for defamation arises from a statement issued by the defendant in response to two magazine articles written by the plaintiff. The action was tried before a jury in July 2013. The jury was unable to agree. The second amended statement of claim was filed in April 2014, preparatory to a retrial. The defendant applies to strike out paragraph 30(b). Paragraph 30 in its entirety reads:

> In their natural and ordinary meaning, or by necessary implication, the Statement (including the quoted passages) meant and was understood to mean:
>
> (a) The plaintiff was untruthful when asserting in the SST and Metro Articles that he had visited the CRU base;
>
> (b) The plaintiff lied in the SST and Metro Articles;
>
> (c) The plaintiff's journalism in the SST and Metro Articles should not be trusted.

[3] I address first the submission of counsel for the plaintiff that the issue raised by this application has been finally determined as between the parties, by a ruling given by me at the trial, on 17 July 2013. I ruled that all of the meanings then pleaded, which were set out in paragraph 23 of the first amended statement of claim "are sufficiently capable of being seen as bearing a defamatory meaning that the issue should be left to the jury". Counsel for the plaintiff submits that the ruling gives rise to an issue estoppel between the parties, so as to prevent the defendant from raising this issue on the present application. Counsel for the plaintiff further submits that r 7.52 of the High Court Rules applies. That requires the leave of a Judge, which may be granted only in special circumstances, before a party who fails on an interlocutory application can apply again for the same or a similar order.

[4] The ruling at the first trial does not give rise to an issue estoppel. The ruling, given in the context of the first trial, was part of the ephemera of that trial and ceased to have effect on the conclusion of that trial. The English Court of Appeal held in *Bobolas v Economist Newspaper Ltd* that rulings made and issues decided by a Judge in the course of a trial where no decision has been reached and a retrial has

been ordered are not *res judicata* and are not binding at the retrial, whether by way of issue estoppel or otherwise.[1]

[5] Counsel for the plaintiff refers to the approach of the Court of Appeal in *Joseph Lynch Land Co Ltd v Lynch*, where the Court said:[2]

> Issue estoppel is concerned with the prior resolution of issues rather than causes of action. In the same paragraph of Halsbury as that referred to above, it is said that issue estoppel precludes a party from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. …

[6] The Court of Appeal, in quoting from Halsbury, was clearly not intending to establish a principle of New Zealand law, at variance with English law on the point. The Court went on to address the question of whether points decided in interlocutory proceedings may lead to an estoppel. It said that considerable caution is necessary before coming to such a conclusion. The justice of the case must be compelling before a decision which is in substance interlocutory is held to prevent the later ventilation of an issue. It said:[3]

> But the need for caution in the interlocutory field is supported by the decision of the English Court of Appeal in *Bobolas v Economist Newspaper Ltd* in which the Court held that rulings made and issues decided by a Judge in the course of a trial where no final decision had been reached and a retrial had been ordered were not res judicata and were not binding at the retrial whether by way of issue estoppel or otherwise.
>
> It is not a long step from that proposition to the proposition that ordinarily interlocutory rulings and decisions should not give rise to an issue estoppel. …

[7] While interlocutory rulings will not ordinarily give rise to issue estoppel, it is generally undesirable for an issue decided by an interlocutory ruling to be relitigated in the same proceeding. That is addressed by r 7.52. In a defamation trial before a jury, the issue whether the words sued upon are capable in law of bearing a defamatory meaning is a question of law. That issue can be the subject of an interlocutory application before trial, or a ruling can be requested from the trial Judge. The circumstances in which this trial ruling was given did not allow the

---

1 *Bobolas v Economist Newspaper Ltd* [1987] 1 WLR 1101 (CA).
2 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 41.
3 At 43 (citations omitted).

opportunity for mature consideration and the giving of detailed reasons, which would usually be available on a pre-trial application. I regard that as a special circumstance which, to the extent that r 7.52 may apply to the ruling, justifies the grant of leave.

[8] Mr Nilsson submits that the defendant's challenge to the trial ruling should have been by way of appeal. Without examining the point, I venture considerable doubt as to whether there was a right of appeal against the ruling. The practical exigencies of trial mean that it is not possible, except perhaps in exceptional circumstances, to appeal against a ruling given in the course of a jury trial. The trial proceeds in accordance with the ruling. If the trial ends in a verdict, the unsuccessful party will have a right of appeal against the outcome. The correctness of the ruling may form one of the grounds of appeal, but the appeal is against the judgment resulting from the verdict, not against the ruling. Where, as here, the trial ends without a verdict, I consider it doubtful whether there is a right of appeal against the ruling.

[9] For these reasons, I find that the defendant's application is not precluded by the doctrine of issue estoppel, or because it improperly seeks to reopen an interlocutory issue which has been determined in circumstances where it should not be revisited.

[10] I turn then to the merits of the application. The final determination of meaning in a defamation proceeding tried before a jury involves two stages. First, the Judge determines whether the words complained of are capable of bearing the meaning pleaded. Second, the jury determines whether the words in fact bear the pleaded meaning. This application is concerned with the first stage.

[11] The principles to be applied are summarised in *Jeynes v News Magazines Ltd*.[4]

> (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer

[4] *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14].

> and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" (see Eady J in Gillick v Brook Advisory Centres approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th edition), paragraph 30.6). (8) It follows that "it is not enough to say that by some person or another the words *might* be understood in a defamatory sense." Neville v Fine Arts Company [1897] AC 68 per Lord Halsbury LC at 73.

[12] There is a high threshold to be met before a pleaded meaning should be excluded. The proper role for the Judge is to delimit the range of meanings of which the words are reasonably capable, and to exclude any meaning falling outside that.[5] The Judge should be slower to rule out than to rule in pleaded meanings.[6] In *Jameel v Wall Street Journal Sprl* Simon Brown LJ said:[7]

> … every time a meaning is shut out (including any holding that the words complained of either are, or are not, capable of bearing a defamatory meaning) it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. It is a high threshold of exclusion. Ever since Fox's Act 1792 the meaning of words in civil as well as criminal libel proceedings has been constitutionally a matter for the jury. The judge's function is no more and no less than to pre-empt perversity. …

[13] In New Zealand, the relevant test is described in *New Zealand Magazines Ltd v Hadlee (No 2)*.[8] I find nothing in that decision to suggest that the later statements of the test in *Jeynes v News Magazines Ltd*,[9] and *Jameel v Wall Street Journal Sprl*,[10] are inconsistent with New Zealand law and should not be followed.

[14] Mr Rennie QC submits that at no point in the statements complained of is it said explicitly that the plaintiff lied in the two articles. Mr Rennie submits that the pleading does not identify which words are claimed to bear this meaning, directly or

---

5 *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 at [7].
6 Alistair Mullis and Richard Parkes QC *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [30.7].
7 *Jameel v Wall Street Journal Sprl* [2003] EWCA Civ 1694 at [14].
8 *New Zealand Magazines Ltd v Hadley (No 2)* [2005] NZAR 621.
9 *Jeynes v News Magazines Ltd*, above n 4.
10 *Jameel v Wallstreet Journal Sprl*, above n 7.

by necessary implication. He submits that when the words are taken as a whole, there are no words which might necessarily imply the act of lying. He submits that the words in the statement challenging or denying the plaintiff's claims in the two articles allege only errors, not lies, and that there are many possible explanations ranging from mistake on one or both sides, to the possibility that the CRU commander is being untruthful.

[15] Mr Rennie's submissions support the proposition that the words complained of may be susceptible of meanings other than that the plaintiff lied. That may be so. But the question is whether the jury might reasonably understand the words to mean that the plaintiff lied, by necessary implication. While there may be other possible meanings, the possibility that a jury might read the statement as necessarily implying that the plaintiff is being untruthful is not so remote that a jury would be perverse to take that view.

[16] As a matter of law, the words are not so incapable of bearing the pleaded meaning that a jury would be acting perversely in accepting that pleaded meaning. The pleading should therefore not be struck out.

[17] The application is dismissed. The plaintiff is entitled to costs, which I fix on a 2B basis, on this application.

**"A D MacKenzie J"**