IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-484
[2016] NZHC 207

UNDER	the Defamation Act 1992
BETWEEN	KAREN FRANCES ARNOLD Plaintiff
AND	FAIRFAX NEW ZEALAND LIMITED First Defendant
	TIMOTHY RICHARD SHADBOLT Second Defendant

Hearing:	2 February 2016
Counsel:	P A McKnight and A J Romanos for Plaintiff R K P Stewart and R G Cahn for First Defendant F E Geiringer for Second Defendant
Judgment:	23 February 2016
Reissued:	22 June 2016

JUDGMENT OF CLIFFORD J

Introduction

[1] Karen Arnold sues Fairfax New Zealand Limited and Timothy Shadbolt. She says that Mr Shadbolt defamed her in four columns he wrote which Fairfax published in *The Southland Times*, two of which Fairfax also posted on its website *Stuff*. Fairfax and Mr Shadbolt defend those claims on the basis, first, that the columns did not carry the meanings claimed. If the jury decides that they did, and those meanings were defamatory, they both rely in the alternative on the defences of honest opinion and qualified privilege.

[2] To succeed in that, alternative, honest opinion defence:

(a) Mr Shadbolt must prove that the defamatory meanings were his genuine opinion; and

(b) Fairfax must prove that the defamatory meanings did not purport to be its opinion and that it had no reasonable cause to believe that Mr Shadbolt's opinions which constitute the defamatory meanings were not his genuine opinions.

[3] Mr Shadbolt has, in addition, counterclaimed against Ms Arnold. Mr Shadbolt says that Ms Arnold defamed him in a letter she wrote to the Editor of *The Southland Times*, which was subsequently published in that paper. Mr Shadbolt's claim is, however, only based on his being defamed in the eyes of the Editor, and not those of the readers of *The Southland Times*.

[4] In this interlocutory application, Ms Arnold asks the Court to:

(a) strike out the defendants' alternative, honest opinion, defences; or

(b) direct (as pleaded) the defendants to identify which of the defamatory meanings pleaded are defended on the basis of honest opinion or (as argued) specify with more particularity the particulars which apply to the various defamatory meanings pleaded; and

(c) strike out certain of the defamatory meanings pleaded by Mr Shadbolt in his counterclaim.

Background

[5] Mr Shadbolt is the Mayor of Invercargill. Ms Arnold is an Invercargill City Councillor. Ms Arnold, and other councillors, have been critical of the substance of, and process relating to, proposed commercial transactions involving the Council's wholly-owned subsidiary, Invercargill City Holdings Limited (Holdco). That company is, in turn, the parent company of Invercargill Airport Limited, Electricity Invercargill Limited and other entities. Mr Shadbolt, and others associated with him, have been similarly critical of proposals supported by Ms Arnold and others for the

development by the Invercargill City Council of kakapo and tuatara "recovery programme" facilities, designed to be tourist attractions (the "Kakaporium" and the "Tuatarium" respectively).

[6] The four columns that are the subject of these proceedings comment on those differences of view. In summary:

(a) The first column (published in *The Southland Times* on 25 October 2014) responded to criticism, including by Ms Arnold, of Holdco and its Chairman, a Mr Graham Sycamore, with respect to a proposal that Holdco's capital be increased. That column associates Ms Arnold, and another Councillor – Mr Pottinger – with the "remnants" of a ratepayers' association that had been critical of Mr Shadbolt over time. Amongst the words of specific complaint is the following reference by Mr Shadbolt to Mr Sycamore: "I am sure he has the moral fortitude to withstand the onslaught of half-truths, sensationalism and 'outright' lies that are being hurled in his and Council's directions".

(b) Column 2 (published on 6 December 2014) continued that line of commentary – recalling criticism of Mr Shadbolt's initiative in 2000 to provide a zero fees scheme at the Southland Institute of Technology. Noting the absence of such criticism of the Kakaporium proposal, Mr Shadbolt described it as "a hairbrained scheme to support a parrot".

(c) Column 3 (published on 4 April 2015) addressed itself more particularly to the Kakaporium and Tuatarium proposals, and Ms Arnold's role in the promotion of those proposals. Of Ms Arnold's role Mr Shadbolt said that, "she had a conflict of interest and didn't vote on the issue. However, she made the initial presentation on the proposal and joined in the subsequent debate". He compared that to the rigid enforcement of conflict of interest rules as regards Holdco directors who had been required to "withdraw from the table and sit like dummies in the public gallery" when issues were discussed in which they had a conflict of interest.

(d) Column 4 (published on 18 April 2015) contains comments by Mr Shadbolt on the (at that point) anticipated issuance of these defamation proceedings. Faced with such proceedings, Mr Shadbolt described himself as being "in a quandary because I strongly believe in free speech and feel honour bound to vigorously defend my freedom of expression".

[7] Ms Arnold advances six causes of action, four based on the publication of each of columns 1-4 in the *Southland Daily Times*, and two based on the publication of columns 1 and 4 on *Stuff*. She manages to identify some 21 separate defamatory meanings or innuendos. These include telling "outright lies"; "promoting a hairbrained scheme to support a parrot"; acting improperly by declaring a conflict of interest in respect of the Kakaporium proposal, but then making the initial presentation on the proposal and engaging in the subsequent debate; in so doing, being a "hypocrite"; and "unreasonably, unfairly and unjustifiably" issuing defamation proceedings against Mr Shadbolt.

[8] In support of his defence of honest opinion, Mr Shadbolt pleads a set of particulars relating to each column. It is not necessary to go into the detail of those particulars. They reflect obvious conflicts on the Council and the everyday realities of local body politics. On the Holdco issues, for example: that Ms Arnold in debate is said to have suggested "that Holdco was untrustworthy". On the Kakaporium: that "*The Southland Times* pointed out that if the Kakaporium were established, 'except for maybe 15 weeks every two or three years there wouldn't be a live bird in the place'"; that "it is unclear how many people would visit a Kakaporium, and whether it would be financially viable"; and, most obviously of all: "that success in the tourism industry is unpredictable". On Ms Arnold's behaviour as a Councillor more generally, that "upon being elected her first public statement was that the message from voters was that 'it's time to get rid of some of these old farts'".

[9] In its statement of defence, Fairfax generally adopts Mr Shadbolt's particulars. The only exception to this is that, as regards the defamation said to be constituted by the first column, it adds that "*The Southland Times* had reported that the Council 'turfed out' standing orders in its consideration of the Holdco proposal".

Whether that general approach is what is called for in terms of s 10(2) of the Defamation Act is a matter I leave Mr Stewart to reflect upon. It is not an issue raised by the plaintiff, at least at this point.[1]

[10] Against that background, I consider each of Ms Arnold's interlocutory applications.

Strikeout – honest opinion defence

[11] The plaintiff's central argument here is that it is not, I infer as a matter of law, possible for a defendant in a defamation proceeding to say at one and the same time, albeit in the alternative, that the defendant's publication does not carry the defamatory meanings alleged but that, if it does, those meanings were the defendant's honest opinion. Put very simply, Mr McKnight's argument was: how can a meaning be a defendant's honest opinion if, that defendant says, that was not the meaning of what she said and cannot, therefore, have been an opinion which she intended to express?

[12] There is, I acknowledge, a "common sense" appeal to that proposition. In many contexts, common sense can be a good guide to the substantive content of the law. That is less so in the way the law recognises a defendant's entitlement (in both the civil and criminal contexts) to raise alternative defences. It is even less so as regards the law of defamation.

[13] For Mr Shadbolt, Mr Geiringer responded to that argument in two related ways. He pointed first to what he said was the recognition by the Court of Appeal in *Television New Zealand Ltd v Haines* of that very approach to defending a claim for defamation.[2] Secondly, he argued there was no necessary logical inconsistency in that approach.

[14] In *Haines*, the defendant TVNZ denied the plaintiff's pleaded meaning, advanced alternative meanings, pleaded the truth of those meanings and said, in the

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1 See the comment by the Court of Appeal at [99] of *Television New Zealand Ltd v Haines & Ors* [2006] 2 NZLR 433 (CA).

2 *Haines*, above n 1.

alternative, that if the broadcast had the defamatory meanings alleged, then they constituted its honest opinion. That is, TVNZ's alternative defence was identical to that pleaded here by Mr Shadbolt and Fairfax.

[15] In the Court of Appeal the case principally concerned whether TVNZ could in its defence seek to show the truth of pleaded alternative meanings. That question was answered by the Court of Appeal in the negative. The Court went on to consider various issues relating to the way that the alternative defence of opinion had been pleaded. The detail is not important. There was no suggestion, however, that an alternative defence of that type was not available. Indeed, in the course of its discussion, the Court of Appeal suggested that an appropriate pleading of the defence would be:[3]

> If the broadcasts have any of the meanings alleged … (which is denied) such meaning or meanings were conveyed by the publication as expressions of opinion.

[16] In my view that express recognition is, as Mr Geiringer submitted, a complete answer to this aspect of Ms Arnold's application.

[17] Ms Arnold also argued that the other point she raised, the one of apparent logic, had not been considered by the Court of Appeal and therefore was not precluded. I do not agree. Pleadings in the alternative that are inconsistent, from a lay perspective, are nevertheless acceptable in law. As Mr Geiringer correctly submitted, although a defendant may not have intended particular meanings at the time, he can nevertheless plead that those meanings were, in fact, his opinion at the time. That is not to say that such an alternative pleading will not give rise to difficulties of proof, by reference to those commonsense considerations. As *Gatley* puts it:[4]

> The defendant should consider with some care his response to the meanings pleaded by the claimant. While it is open to a defendant both to deny that the words bear a defamatory meaning and to advance a plea of justification, such an approach may be difficult to sustain forensically.

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3 At [96].

4 A Mullis, R Parkes and G Busutill (Eds) *Gatley on Libel and Slander* (12 ed, Sweet & Maxwell, London, 2014).

[18] Ms Arnold's application to strike out the defendant's alternative, honest opinion, defence is therefore declined.

The defendants' particulars

[19] Ms Arnold initially argued that the defendants were required to identify which imputation or imputations pleaded were their honest opinion and, for each imputation sought to be defended, provide particulars that, if proved to be substantially true, would meet the sting of the imputation. Ms Arnold was, therefore, embarrassed and prejudiced because she was "left guessing as to the case she had to meet".

[20] Given that the defendants explicitly adopt, in the alternative, each of the defamatory pleaded meanings advanced by Ms Arnold, there is nothing in her first point. As matters developed Mr McKnight relied more on the second point, that is that the particulars did not respond to the sting of the defamation and, as further developed, were in any event so imprecise as to require repleading.

[21] It is not the role of particulars to respond to the sting of a defamation. Where required, the role of particulars is to provide the evidential basis for the relevant part of the plea.[5] There is nothing defective or embarrassing in the way the defendants have pleaded from that point of view.

[22] Ms Arnold's challenge to the inadequacy of the particulars pleaded by the defendants is similarly misplaced.

[23] Mr Shadbolt pleads four sets of particulars. By my assessment, those particulars separately address the themes of each of the four columns, and do so with

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5 As the Supreme Court said in *APN New Zealand Limited v Simunovich Fisheries Limited* [2009] NZSC 93:

> [18] These observations, which the parties accepted as an accurate statement of the law, apply with equal force to particulars of the facts relied on in support of a defence of honest opinion. The defendant is required to identify a sufficient factual basis for its opinion, so that readers or viewers may assess the validity of the opinion for themselves against the relevant facts truly stated. (Footnote omitted)

sufficient specificity as to provide an appropriate basis for Ms Arnold to plead in response. Mr McKnight pointed to the following particular, relating to the Kakaporium, to illustrate Ms Arnold's embarrassment in responding: "The kakapo is a species of parrot, and is also called the owl parrot". No doubt that particular was provided in case it might be argued that the kakapo was not a parrot, in terms of Mr Shadbolt's description of the proposal as "a hairbrained scheme to support a parrot". There is, I acknowledge, some minor overlap between various of the sets of particulars. There is clear logic to that: the particulars involved relate to the Kakaporium project that Mr Shadbolt relies on to defend as his honest opinion each of the second, third and fourth columns.

[24] The simple point is that, contrary to the submissions on behalf of Ms Arnold, Mr Shadbolt has not advanced a single set of particulars for all the defamatory meanings. Ms Arnold's application for further specificity is declined accordingly.

Strikeout of meanings pleaded by Mr Shadbolt

[25] The gist of Ms Arnold's letter to the Editor of *The Southland Times* was that she assessed all Council proposals with an independent mind. On the other hand, Mr Shadbolt generally accepted, and required others to accept, advice from staff and legal advisers. But if a proposal was "dear to his heart" he would take a different approach. More particularly, his opposition to the Kakaporium proposal was really "a swipe" at Ms Arnold. It came after a "rambling verbal assault aimed at me, one of several I've been subject to by the Mayor during the past few months". Ms Arnold rejected the proposition she had leaked documents. That evidenced, she said, "personal integrity; something the Mayor doesn't seem to know about".

[26] Mr Shadbolt first says that Ms Arnold's reference to a "rambling verbal assault" would be understood to mean "severe, unjustified and unreasonably lengthy criticism … in a manner characterised by such things as raised voice, name-calling, threats, fierce gesticulation, swearing and intimidatory language". He then says that other parts of the letter mean he improperly and invariably deferred to officials and

lawyers, and had lied to the Council and the public as to why he opposed the Tuatarium because he was, in fact, motivated purely by his animosity towards Ms Arnold.

[27] It is a question of law whether a publication is capable of bearing pleaded imputations. It is a question of fact whether those imputations do in fact arise, and are defamatory. The Court of Appeal in *New Zealand Magazines Ltd v Hadlee (No 2)* summarised the law as regards applications to strike out pleaded meanings.[6] I adopt the summary provided by Barker J at 630 of his judgment.

[28] Applying those principles, I am unable to see how the phrase "a rambling verbal assault" implies "severe, unjustified and unreasonably lengthy criticism … in a manner characterised by such things as raised voice, name-calling, threats, fierce gesticulation, swearing and intimidatory language". If anything the word "rambling" carries with it the meaning of unfocused and ineffective, which meanings necessarily qualify meanings that might otherwise be characterised by the word "assault". I therefore rule that statement was not capable of bearing the (allegedly defamatory) meaning Mr Shadbolt pleaded.

[29] However, I decline to make that ruling as regards the other challenged meanings. In my view, Mr Shadbolt's pleaded meanings can be taken from the letter.

[30] I therefore decline Ms Arnold's applications, with the exception that I rule that the statement "a rambling verbal assault aimed at me", is not capable of bearing the meaning a "severe, unjustified and unreasonably lengthy criticism of the plaintiff in a manner characterised by such things as raised voice, name-calling, threats, fierce gesticulation, swearing and intimidatory language".

Costs

[31] The defendants have largely succeeded. They are entitled to costs now on this interlocutory application. Costs will be on a 2B basis. If the parties cannot agree, providing an appropriately modest discount for the limited success Ms Arnold

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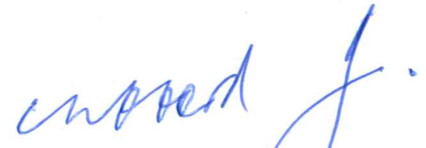
6 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA).

has achieved, memoranda of no more than three pages may be filed by the plaintiffs and the defendants. Those memoranda are to be filed by 5.00 pm Friday 4 March 2016.

Final comments

[32] I make some final comments. These are proceedings between local body politicians. By my assessment, much of the material complained of reflects the regular rough and tumble of local body politics. In that context, freedom of speech issues arise. The one complained of comment that may go further than that is Mr Shadbolt's reference to "outright lies that are being hurled in his [Mr Sycamore's] and council's direction", impliedly by "the combined forces of the blatantly ambitious Councillor Pottinger, the award-winning former Southland Times journalist Councillor Arnold, the Southland Times and the remnants of the Invercargill Ratepayers Association". But again, in context, I think it is fair to ask "Where is the harm?". I invite counsel to reflect on these matters.



Clifford J

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