IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1875
[2018] NZHC 721

BETWEEN	CRAIG ANDREW LEISHMAN Plaintiff
AND	ROGER HENRY LEVIE First Defendant
	HOME OWNERS AND BUYERS ASSOCIATION OF NEW ZEALAND INCORPORATED Second Defendant

Hearing:	17 April 2018
Appearances:	J B Orpin-Dowell and S F Powrie for the Plaintiff P Rzepecky and N Lawrence for the Defendants
Judgment:	17 April 2018

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Grove Darlow & Partners (J B Orpin-Dowell/S F Powrie), Auckland, for the Plaintiff
Wynn Williams (R Hern/N Lawrence), Auckland, for the Defendants
Counsel:
Philip Rzepecky, Auckland, for the Defendants

[1] The defendants apply for an order under r 8.38 of the High Court Rules requiring the plaintiff to give verified answers to their notice of 22 September 2017 to answer interrogatories. Initially the plaintiff gave answers, but they were not verified. The plaintiff answered only some of the interrogatories. The plaintiff has now filed and served verified answers but has still not answered all the questions. The defendants no longer ask the plaintiff to answer some of the interrogatories. I am required to give rulings on seven. This is a defamation proceeding. Defamation proceedings have distinct features which bear on questions of relevance, pleadings, discovery and interrogatories.

[2] Mr Leishman is the director and principal shareholder of Boutique Body Corporate Ltd, which provides secretarial, advisory and administrative services to body corporates under the Unit Titles Act 2010. It has assisted them in dealing with building defects issues, including leaky building syndrome, and has assisted in proceedings to recover damages for remedial works for leaky buildings.

[3] The second defendant, HOBANZ, is the Home Owners and Buyers Association of New Zealand. It is an incorporated society which also provides consultancy and advisory services to bodies corporate. Amongst other things it also assists them in dealing with building defect issues including proceedings to recover damages for remedial works. Mr Levie is the chief executive officer of HOBANZ.

[4] The Bella Vista apartments are a unit title complex at Te Atatu, Auckland. Mr Leishman's company, Boutique Body Corporate Ltd acts as the body corporate secretary for the Bella Vista apartments.

Background

[5] The background to this case lies in litigation to deal with leaky buildings, particularly litigation for unit title developments. Many apartment blocks have suffered watertightness defects, and that has led to much litigation by owners against developers, contractors and local authorities. While some cases go to trial, most of

them settle. For lawyers, leaky building litigation is specialist work. Most leaky building cases are taken by a small group of law firms. One of them is Grimshaw and Co, which has acted for many bodies corporate. There is also a small number of specialists—building surveyors, quantity surveyors and related experts—who are routinely called upon to give evidence for parties in leaky building litigation. Cove Kinloch is one such consultancy.

[6] In proceedings for damage to apartments, claims typically include the costs of repairs to units (estimated or actual), costs of repairs to common property (estimated or actual), loss of value (as when an owner has sold without carrying out repairs), consequential losses (such as the owners' costs of alternative accommodation while repairs are carried out), general damages for stress and anxiety, interest and court costs (including witnesses' expenses). Against that, plaintiffs will incur costs—the costs of consultants to investigate, report and give evidence on defects and remedial costs, and the legal costs of conducting the proceeding.

[7] When unit title developments suffer watertightness defects, there can be differences among the owners as to how they should deal with the problem. Some may say that repairs should be carried out without proceedings; others may contend that there should be a proceeding, there may be differences over how the litigation should be conducted, and sometimes there are strong differences within the ownership as to the extent of the defects and extent of repairs. In some cases, I have dealt with, there are differences whether these go to holistic repairs or targeted repairs. Generally, owners of apartments have little experience in leaky building litigation until it hits their block, so owners and committees generally rely on advice from outsiders (lawyers and building consultants) on how they should deal with the problems.

[8] One class of people who have consistent experience with leaky buildings and defects in apartment blocks are body corporate secretaries, such as Mr Leishman and the defendants. Mr Leishman describes the defendants as his competitors.

[9] As I have mentioned, many cases settle without going to a full hearing on the merits. Invariably, the amounts received in settlement are not the full amounts claimed. The usual factors that bear on settlement operate. The parties will wish to

avoid costs of a full hearing, particularly as a major leaky building claim within a unit title complex can run for months. The parties will seek certainty—as opposed to the uncertainty of a defended hearing. There are risk factors such as defences raised as to limitation, contributory negligence and that the evidence of the defendants' experts may be preferred over the evidence of the plaintiffs' as to the causes and extent of damage. In some cases—particularly when local authorities are not sued—there also may be uncertainty as to the ability to recover from defendants.

[10] Mr Leishman, through his company, is familiar with all these issues and I understand that the defendants are as well.

[11] As mentioned, Mr Leishman's company is the body corporate secretary for the Bella Vista apartments at Te Atatu. Mr Leishman says that on 22 August 2014 the defendants sent an email to three of the owners in the Bella Vista apartments — Nik Posa, Stu Sanders and Gary Millar:

> Thanks Gary.
>
> Your overall situation is certainly of concern without even considering the repair scope.
>
> It reflects exactly what I found at Greenstone Terrace in Queenstown when I was asked to step in I'm sure the Chairman down there would be happy to provide some thoughts if necessary.
>
> One thing to explain to owners on the litigation side is that for a matter like this to get resolved at mediation owners will need to be prepared to compromise (that is what mediation is all about) and so any suggestion that owners will get back 100% is a fairytale. The alternative is to see the proceedings through to a hearing and judgement but then one must consider the out come from a "nett" position – that is the amount awarded less the cost to get there. The counter you will be to this argument is that in that case you can apply for a costs award however the reality is that costs are awarded by the Court based on a predetermined scale and owners would be doing well to get back half their legal and expert fees (which will be considerable if the case goes all the way). So in other words, simple logic proves that recovery of 100% is almost impossible despite what owners are being told by others.
>
> If this can be explained to owners and they start to realise that they will need to put their hands in their own pockets to pay for a chunk of the work they will quickly sit up and start taking notice.
>
> Unfortunately I've got to say that I have seen this all before with exactly the same players – the picture being painted for owners is a myth and further to that, you are not being represented in a manner that will maximise your opportunities to recover damages or minimise the impact on owners.

I hope you get the right outcome at the AGM next week.

I'd be keen to see the most recent statement of claim for the case plus the AGM agenda and resolutions if you are happy to send them through.

All the best, Roger

Roger Levie
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[12] The statement of claim says that the recipients of the email repeated it to other owners in the Bella Vista apartments. That was in connection with a forthcoming annual general meeting.

[13] Mr Leishman pleads these meanings for the email:

19. The 2014 Publication meant and was understood to mean that –

(a) Mr Leishman and his company, Boutique Body Corporates Ltd ("his company"), are not competent to advise the owners in resolving building defect issues including but not limited to the recovery of damages associated with the repair of the building.

(b) Mr Leishman and his company incompetently and routinely advised owners in bodies corporates that they will recover 100% of whatever their claimed losses might be from 'leaky building' litigation.

(c) Mr Leishman and his company advised the owners of the Bella Vista apartments that they will recover 100% of whatever losses they claim in their 'leaky building' litigation.

(d) Mr Leishman and his company have been involved in a deliberate and long-standing course of unethical conduct designed to prejudice the interests of owners in Bella Vista and other bodies corporate.

(e) Mr Leishman and his company will incompetently manage the interest of owners in Bella Vista in connection with the administration and management of the 'fall-out' resulting from design and or construction defects.

(f) Mr Leishman is part of a cartel of professional advisors that deliberately and unethically over-state the extent of defects, deliberately over-claim the extent of losses and deliberately over-promise the extent of recovery to owners.

[14] Paragraph 27 of the statement of claim pleads a true innuendo, giving particulars why those reading the email would understand that it referred to Mr Leishman as one of the "players".

[15] The statement of claim also pleads that in 2008 HOBANZ and its president, Mr Gray, published a statement which led to Mr Leishman suing HOBANZ and Mr Gray for defamation. The flavour of that statement can be seen in this extract:

> … [Mr Leishman] has failed to act in the best interest of all owners, rather it seems to me that he positions himself to gain advantage of these disasters where he carefully grooms the naïve committees so that he tacitly controls the decision making process. Given the usual set of contractors that get introduced to the bodies corporate that Mr Leishman presides over, there is in my opinion, a very high probability that there are kick-backs, commissions, finder's fees – call it what you may, given that there is very rarely any competitive process or due diligence surrounding their engagement, and in some cases such as Mr Young's there isn't even a comprehensive written contract in place with the consultants or builder. This abandonment of good sound practice around what are generally multi million dollar contracts is reckless and a failure to discharge his fiduciary duty to all of the proprietors – seemingly with impunity.

[16] The parties settled. Under the deed of settlement. HOBANZ admitted that the following meanings were false and defamatory:

> 12. ...
>
> (a) As secretary of bodies corporate, Mr Leishman has been involved in a deliberate and longstanding course of unethical conduct designed to prejudice the interests of the owners.
>
> (b) Mr Leishman's conduct as secretary of bodies corporate has been so negligent, unethical or criminal that he is not fit to continue in that role.

[17] Mr Leishman also pleads that HOBANZ agreed not to publish any further defamatory statements about Mr Leishman. His case is that under the settlement agreement, HOBANZ agreed that it would not publish any further defamatory statements about him:

> 14. By clause 4 of the Settlement Agreement, the second defendant agreed not to publish any further defamatory statements about the plaintiff, meaning that the second defendant would not publish any further statements about the plaintiff:

(a) which (either on a plain and ordinary meaning or by virtue of innuendo) might tend to lower the plaintiff in the estimation of right-thinking members of society;

(b) irrespective of whether, if the statement was subject to a proceeding in defamation, the claim for defamation would succeed.

[18] Mr Leishman says that Mr Levie was aware of that settlement. In this proceeding, Mr Leishman sues HOBANZ for breach of that settlement agreement.

[19] On Mr Leishman's theory of the case, he only needs to establish that the 2014 email was published and defamed him. He contends that HOBANZ will not be able to rely on defences that might otherwise be available in a claim in defamation, such as truth, honest opinion and qualified privilege. The defendants do not accept that position.

[20] Mr Leishman pleads two further causes of action against Mr Levie and HOBANZ in defamation. In my judgment, they are really just one cause of action. The second cause of action pleads the innuendo but otherwise adds little to what has already been stated in the first defamation cause of action.

[21] The defendants admit the publication, but they deny that the email of 22 August 2014 refers to Mr Leishman. They deny the pleaded meanings and also say that the 2014 email:

19. (a) Did not mention Mr Leishman or Boutique Body Corporate;

(b) Referred to Mr Levie's recent experience assisting the owners of Greenstone Terrace in Queenstown;

(c) Neither Mr Leishman nor Boutique Body Corporate were involved in Greenstone Terrace;

(d) The oral statements attributed to Mr Levie in the 2016 statement were not actually made by him, and/or are taken out of context to the general discussion; and

(e) Any discussion which Mr Levie did have with Messrs Miller, Sanders, and Posa regarding Mr Leishman at the meeting on 21 August 2014, was not capable of the alleged meanings.

[22] They have also pleaded affirmative defences of truth, honest opinion and qualified privilege. For this decision, the truth defence is important. That is pleaded as follows:

> 30. To the extent that the plaintiff alleges that the 22 August 2014 email proves that Mr Levie commented on Mr Leishman advising the owners of Bella Vista they would recover 100% of whatever losses they claim in their leaky building litigation (which is denied), Mr Levie says that this was based on the truth as follows:
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> (a) In August or September 2012, the Bella Vista Body Corporate held its annual AGM;
>
> (b) Mr Leishman was present, along with Mr Grimshaw, a lawyer from Grimshaw & Co, who Mr Leishman had specifically invited to the meeting to offer litigation services to owners;
>
> (c) Mr Grimshaw told the meeting that the owners could expect to recover 100% of the cost of the remedial work required to the building and said: "*I'll be going for 120%, and I'll get at least 100%*".
>
> (d) Mr Leishman endorsed Mr Grimshaw and his advice.

[23] Mr Leishman has given a notice of ill will for the qualified privilege defence. He has given a notice that the opinion was not genuine for the honest opinion defence. In his reply, he has denied the truth defence.

[24] I note these matters in the pleadings:

(a) The meanings that Mr Leishman pleads (in paragraph 19 of the statement of claim) go not only to his advice to the Bella Vista owners as to how much they could recover in their leaky building litigation, but are more extensive. He says that the email has more general allegations as to his lack of fitness to act for bodies corporate in resolving building defects issues and running leaky building proceedings.

(b) While the defendants deny that the letter refers to Mr Leishman, they also deny that the letter has the meanings pleaded by Mr Leishman.

(c) For their truth defence, they say that only the third pleaded meaning is true—namely, that Mr Leishman endorsed Mr Grimshaw's advice in the 2012 annual general meeting to the Bella Vista owners that they

> would recover 100 per cent of whatever losses they were claiming in their leaky building case. The defendants have not pleaded that the other meanings in paragraph 19 are true.

[25] That limited plea of truth is significant because of how defences are run in a defamation proceeding. As experienced defamation lawyers know, there are risks in pleading truth if that defence backfires. Often, if the defence is unsuccessful, it results in increased damages. There can also be heavier damages if the defence is pleaded without evidence or the plea is abandoned before trial. The defence election not to say that five of the alleged meanings are true reflects a decision not to run the high risks of alleging without a proper foundation that the allegations are true.

Interrogatories: general

[26] In *Todd Pohokura Ltd v Shell Exploration Ltd*, the Court of Appeal summarised the purpose of interrogatories:[1]

> [14] An interrogatory is a question asked before trial for the purpose of eliciting an answer on oath or affirmation which is admissible in evidence at trial. Like all questions, it must be directed towards advancing one side's case or damaging the other's case. It must accordingly be relevant to an issue raised on the pleadings or a fact in dispute for determination.
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> [15] An interrogatory must also, like a question in cross-examination, be precise and unequivocal, and amenable to a direct and meaningful answer from information within the knowledge of or reasonably available to the person required to answer. It must not place unnecessary or burdensome obligations on the interrogated party, or be prolix. And its purpose must not be to search or probe on the speculative basis that an answer may prove relevant (colloquially known as fishing). A question which offends these elements will fall within the general category of oppressiveness.
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> [16] An interrogatory is an exception to the settled manner of adducing evidence and in particular to a defendant's right not to call evidence at trial. Accordingly the court must be satisfied that the interrogatory is necessary where an application to issue interrogatories is opposed: r 8.5 High Court Rules. A material consideration is whether briefs of evidence will be given by the party to be interrogated. Moreover, an interrogatory is not to be confused with a request for further particulars.[2]

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1 *Todd Pohokura Ltd v Shell Exploration NZ Ltd* [2009] NZCA 561 at [14]–[16].

2 The current version of r 8.5 is r 8.38 of the High Court Rules 2016.

[27] Barker J's decision in *Re Securitibank Ltd (No.31)* also gives important guidance on the use of interrogatories.[3] He cited, with approval, Lockhart J in *WA Pines Pty Ltd v Bannerman*:[4]

> There are four objects of interrogatories:
>
> (a) To obtain admissions as to facts which will support the case of the interrogating party;
>
> (b) To obtain admissions which will destroy or damage the case of the party interrogated;
>
> (c) Interrogatories which are in the nature of a request for further and better particulars; and
>
> (d) Interrogatories which seek to obtain accounts from a party occupying a fiduciary position.

The well-known dictum of Lord Esher MR in *Marriott v Chamberlain* as to the broad scope of interrogatories is referred to.[5] Barker J also cited the dictum of Gresson J in *Shore v Thomas*:[6]

> It is not necessary that the answers should be conclusive on the questions at issue; it is enough that they should have some bearing on the question, and that they might have a tendency to establish, or form a step in establishing, the allegations made.

[28] Rule 8.40 of the High Court Rules states the only grounds for objecting to answer an interrogatory:

> 1 That the interrogatory does not relate to the matter in question between the parties involved in the interrogatories;
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> 2 That the interrogatory is vexatious or oppressive;
>
> 3 That the information sought is privileged; or
>
> 4 That the sole object of the interrogatory is to ascertain the names of witnesses.

As to the last point, I note that interrogatories may not be used to elicit evidence—only facts. That objection was recognised in *Marriott v Chamberlain*.[7] It has been

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[3] *Re Securitibank Ltd (No.31)* (1984) 1 PRNZ 514.
[4] *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 at 190.
[5] *Marriott v Chamberlain* (1886) 17 QBD 154 (CA) at 163.
[6] *Shore v Thomas* [1949] NZLR 690 at 695 (SC).
[7] *Marriott v Chamberlain* (1886) 17 QBD 154 (CA).

held to apply notwithstanding r 8.40. In *Wilson v Broadcasting Corporation* Heron J said that a *Marriott v Chamberlain* objection is not strictly an objection on the grounds of oppression but goes to the nature of an interrogatory.[8] See also the decision of Master Venning in *Fay v Chirnside*.[9]

Interrogatories in the context of a truth defence

[29] Mr Leishman does not contest those principles generally, but says that interrogatories in the context of the truth defence raise special considerations. He advances two propositions. The first one is this: interrogatories by a defendant to support a defence of truth are limited to the defendant's particulars in the pleading of truth.

[30] Mr Orpin-Dowell referred to *Gatley on Libel and Slander*:[10]

> Where justification was pleaded and properly particularised, the defendant was allowed to interrogate the plaintiff as to any facts which, if proved would be material evidence in support of the plea (and vice versa): the plaintiff could interrogate the defendant as to facts which would be material evidence to destroy the plea. However, the defendant was not allowed to serve interrogatories in order to fish for a defence of justification. Any interrogatories directed by the defendant to the plaintiff were limited to the issues as defined by the particulars of justification. Needless to say, if the defendant had not pleaded justification, he could not interrogate the plaintiff as to any matters which tended to establish the truth of the allegations complained of.

In a New Zealand context, justification can be read as referring to the defence of truth under s 8 of the Defamation Act 1992.

[31] I refer to some of the authorities cited in support. *Zierenberg v La Bouchere* was a case about particulars.[11] A defendant pleaded truth generally but demurred at giving particulars immediately and said that he wished to have discovery and interrogatories before supplying the particulars required. In asking for time for discovery and interrogatories, he was relying on the approach of North J in

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8 *Wilson v Broadcasting Corporation* (1987) 1 PRNZ 368 (HC) at 372.
9 *Fay v Chirnside* (2002) 16 PRNZ 87 (HC) at [15].
10 Alistair Mullis, Richard Parkes and Godwin Busutill (eds) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2014) at 31.5.
11 *Zierenberg v La Bouchere* [1893] 2 QB 183 (CA).

Sachs v Spielman.[12] The Court of Appeal held that that was not permissible. The defendant was required to give particulars of the truth defence before seeking discovery or delivering interrogatories. The basis for the court's decision can be seen in the statement of Kay LJ:[13]

> But to apply this practice to the case of libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed that he could, by the process of discovery elicit such facts.

[32] The court, in turn, drew on earlier decisions, including *J'Anson v Stuart*, where it was said:[14]

> When he—that is, the defendant—took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea: Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life.

That was against the background of old common law pleadings, which were generally uninformative as to the facts, but even under the old form of pleading the common law courts insisted that where justification was pleaded it had to be supported by properly pleaded particulars.

[33] *Zierenberg v La Bouchere* was followed in *Yorkshire Provident Life Assurance Company v Gilbert*.[15] That was a defamation proceeding against defendants who alleged malpractice by the plaintiff insurance company in rejecting sound claims under policies. The decision is on discovery rather than particulars. The defendants pleaded justification. They gave particulars of about 30 claims which they said the plaintiff had refused to pay. The insurance company made discovery which included a register of policies and claims. The insurance company consented to the inspection of documents relating to the 30 claims pleaded, but objected to inspection of any other policies or claims under policies. The Court of Appeal upheld the objection. Lindley LJ said:[16]

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12 *Sachs v Spielman* (1888) 37 Ch D 295. The New Zealand equivalent is Edwards J's decision in *Scales v Hickson* (1900) 19 NZLR 202 (SC).

13 *Zierenberg v La Bouchere* [1893] 2 QB 183 (CA) at 190.

14 At 187, citing *J'Anson v Stuart* (1787) 1 TR 748.

15 *Yorkshire Provident Life Assurance Company v Gilbert* [1895] 2 QB 148 (CA).

16 At 152.

> I think it would be a very bad precedent to suggest that a person can simply by libelling another obtain access to all his books and see whether he can justify what he has said or not. I think it would be very lamentable if we should say, when a person has libelled another and has justified and has given particulars, that he is entitled to more than discovery of that which relates to those particulars.

And Smith LJ said:[17]

> … it is a case in which the defendants want, as I say, to go roving through the whole of the plaintiff company's books to find out something if they can.

In *Arnold v Bottomley* the Court of Appeal followed this line of authorities. Farwell LJ said:[18]

> A defendant in a libel action who pleads justification must state in his defence or particulars the facts on which he relies to prove such justification, and he can obtain discovery only in respect of such facts so stated.

[34] While those decision relate to particulars and discovery, I accept the plaintiff's submission that they also offer useful guidance in establishing the scope of interrogatories. If a defendant cannot obtain discovery of documents outside the scope of the particulars of a truth defence, it follows in my view that the defendant can also not interrogate on those matters.

[35] The need for particulars of a truth defence is set out in s 38 of the Defamation Act 1992:

> **38 Particulars in defence of truth**
>
> In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give *particulars specifying*—
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> (a) the statements that the defendant alleges are statements of fact; and
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> (b) *the facts and circumstances on which the defendant relies* in support of the allegation that those statements are true.
>
> (Emphasis added)

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[17] At 155.
[18] *Arnold v Bottomley* [1908] 2 KB 151 (CA) at 156.

[36] Those particulars set the parameters for discovery and interrogatories. The case law shows a strong stance taken against attempts to interrogate to establish the truth of matters that are not pleaded to be true. That is with a view to not requiring the plaintiff to justify his whole life.

[37] The plaintiff's second proposition is this: where a defamatory statement imputes to the plaintiff actual misconduct or reasonable grounds to suspect misconduct, the defendant cannot rely on post-publication events in a plea of truth. The reference to actual misconduct, or reasonable grounds to suspect misconduct, goes to statements of tier 1 and tier 2 meanings, as described by the Supreme Court in *APN New Zealand Ltd v Simunovich Fisheries Ltd*.[19] The principle which the plaintiff invokes comes from the English Court of Appeal's decision in *Musa King v Telegraph Group Ltd*.[20] In *APN New Zealand Ltd* the Supreme Court referred to that decision.[21]

[38] In *Musa King*, Brooke L J set out ten principles which Eady J at first instance had accepted from counsel. Those principles relate to the defence of justification or truth when the meaning alleged was that there were reasonable grounds to suspect that the plaintiff was guilty of misconduct or had actually taken part in misconduct. Of the ten principles, the seventh said this:

> It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the date of publication.

[39] While I accept that any statement by Eady J on matters of defamation law is entitled to the highest respect because of his enormous experience in defamation, it is not clear that the Court of Appeal's recitation of those principles is part of the ratio of the decision in that case. It appears to be no more than obiter.

[40] To that general principle, I believe that a qualification is required. That comes from an earlier decision of the English Court of Appeal in *Maisel v Financial Times Ltd*.[22] In that case, the Court of Appeal did allow allegations of post-publication

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19 *APN New Zealand LTD v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZR 315 at [15].
20 *Musa King v Telegraph Group Ltd* [2004] EWCA CIV 613 at [22].
21 At [27].
22 *Maisel v Financial Times Ltd* [1915] 3 KB 336 (CA).

conduct. The date of publication was in January 1912. The plaintiff said that the publication in the Financial Times alleged that he would have misappropriated funds from a company, Oil Trust of Galicia, if he had the opportunity. The Financial Times pleaded justification (that is, truth) and in its plea gave particulars of matters arising both before publication and afterwards. It said that from February to May 1912, the plaintiff did have the opportunity and did take company funds. The Court of Appeal allowed those allegations of post-publication conduct to stand.

[41] The court accepted that, as a general principle, a plea of justification (truth) must go to the particular matter complained of. Lord Cozens-Hardy MR referred to a statement by Phillimore LJ in an earlier hearing:[23]

> If you say of a man, "You stole a hatchet on such and such a day", you must justify that particular allegation, and that is all: it is not relevant to say that he stole a hatchet the day before, or stole a hatchet the day after.

Recognising that general principle, the Court went on to say that the allegations in the *Maisel* case were different. Lord Cozens-Hardy MR said:[24]

> In a general allegation by way of justification of general character and general tendency, which are the only words I can think of at the moment as the meaning of the word "likely", I do not see how you can exclude events which happen, I will not say years after, but within a reasonable time from the date of the publication. I instance a case which seems to me to be rather analogous: an allegation that the plaintiff was addicted to drink and would get drunk if he could. Could you exclude evidence that the day after publication of that libel he had been found suffering from delirium tremens? It seems to me you could not in answer to a general allegation of what the man was likely to have done if he could.

[42] That case is authority that when the publication is alleged to mean that the plaintiff has a general character or general propensity to act in a certain way and truth is run as a defence, the defendant may plead, as particulars of the truth defence, conduct occurring after publication as well as before. The principle in *Musa King v Telegraph Group Ltd*[25] should, in my respectful view, be confined to allegations of specific conduct as opposed to general character. Specific instances of hatchet-stealing, for example, as opposed to a tendency to act generally in a certain way.

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23 At 339.
24 At 339-340.
25 *Musa King v Telegraph Group Ltd* [2004] EWCA CIV 613 at [22].

[43] I also suggest that the analogy with fair comment may require examination. In *Cohen v Daily Telegraph Ltd*, the defendant pleaded fair comment (that is, honest opinion) and gave particulars as to facts occurring after publication.[26] The defendant relied on *Maisel v Financial Times Ltd* to support that plea. But the English Court of Appeal held that that did not apply to a plea of fair comment or honest opinion, which must be based on facts existing at the time. That is not required for the defence of truth.

[44] I have gone into this because some of the meanings pleaded by Mr Leishman go to his general character rather than specific instances of misconduct. There are pleas, for example, that Mr Leishman or his company were "not competent to advise" owners in resolving building defects issues, that Mr Leishman and his company "incompetently and routinely advised" owners as to their recovery in leaky building litigation, that Mr Leishman or his company were involved in "a deliberate and longstanding course of unethical conduct" to prejudice the interests of owners in unit titles and that he or they were "part of a cartel of professional advisors that deliberately and unethically over-state the extent of defects". If the defendants had sought to justify those statements as true, they would be able to rely on conduct after publication as well as before. The point may be moot because, so far, they have not pleaded those meanings as true.

[45] Before going to the interrogatories at issue, I note a preliminary matter that the defendants have conceded after having read the plaintiff's submissions. Part of the argument for the defendants was that Mr Leishman had pleaded that the allegations were false and highly defamatory of him. That was said to entitle the defendants to make a wide-ranging enquiry generally as to matters of truth and falsity. That argument was withdrawn in the light of Henry J's decision in *Leersnyder v Truth New Zealand Ltd:*[27]

> It is usual to allege in the statement of claim that the libel was published falsely and maliciously. Unless the statement is false, it is assumed that the plaintiff has suffered no injury to his reputation. When the words tend to defame the plaintiff, the law presumes that they are false unless and until the defendant pleads and proves that they are true. It is not technically necessary for the

[26] *Cohen v Daily Telegraph Ltd* [1968] 1 WLR 916 (CA) at 919.
[27] *Leersnyder v Truth New Zealand Ltd* [1963] NZLR 129 (SC) at 134.

> plaintiff to allege that the publication was done maliciously. The law implies malice if the words are defamatory and false unless the occasion is privileged.

As Henry J made clear, if truth is to be run as a defence, the defendant must plead it affirmatively. The burden of proof showing the falsity of an allegation does not lie on the plaintiff. Section 37 of the Defamation Act does not detract from that.[28] That requires a plaintiff to give particulars specifying every statement which the plaintiff alleges to be defamatory and *untrue* in the matter that is the subject of proceedings.

The interrogatories in issue

I adopt the parties' numbering. The first are interrogatories 5.7 and 5.8 which are given under a general heading "AGM September 2012". That is the meeting referred to in the pleaded truth defence. The interrogatories and Mr Leishman's answers are:

Interrogatories 5.7 and 5.8

> **AGM September 2012**
>
> 5.7 Does Mr Leishman know if Grimshaw & Co ever advised the Bella Vista owners that they would recover close to 100% of repair costs by pursuing litigation?
>
> **Answer:**
>
> *Insofar as the question is directed at meetings prior to 22 August 2014, the plaintiff cannot recall such a statement being made to the Bella Vista owners. The statement is not recorded in the minutes. Insofar as the question is directed at the events after 22 August 2014, the question is irrelevant.*
>
> 5.8 If the answer to 5.7 is "Yes":
>
> (a) when did Grimshaw & Co give that advice?
>
> (b) how was that advice communicated to the owners of Bella Vista?
>
> (c) Did Mr Leishman endorse that advice?
>
> **Answer:**
>
> *Not applicable.*

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[28] See *Opai v Culpan* [2016] NZHC 3004 at [121].

[46] The defendants object to Mr Leishman's refusal to give an answer to his knowledge of matters arising after 22 August 2014. Here Mr Leishman is taking a post-publication objection, relying on the *Musa King* ground. The defendants' argument is that he is complaining about allegations that he over-promised and under-delivered in leaky building litigation by body corporates for whom he acted as the body corporate secretary, and the timing of his statements is irrelevant to that. They say that statements he made after 22 August 2014 would be consistent with their allegations that he made a similar statement in September 2012. That goes to his credibility. They also make a similar facts submission that proving that he made the statement on earlier or later occasions may make it more likely that he also made the same statement in September 2012. In short, they run a propensity argument. I use 'propensity' in the same sense as it is used in s 40 of the Evidence Act 2006. Section 40 recognises that propensity evidence is admissible in civil proceedings, and it may be useful in cases where someone is said to have a certain modus operandi.

[47] But, in my judgment, it is not available in a defamation proceeding where truth is at issue to allow the defendant to seek discovery and make enquiries by way of interrogatories of matters other than the specific events pleaded in the truth defence. That comes from the *Yorkshire* decision, where the defendants ran arguments that having access to records of other claims would be useful in helping them establish that their allegations of truth were well-founded. The court held that an enquiry at large as to what the company had done on other occasions could not be used to establish the truth or falsity of the matters which the defendants had pleaded in justification. Their inspection was limited only to the 30 specific cases that they had pleaded. The *Yorkshire* decision still stands as sound authority. It has been accepted in New Zealand in *Simunovich Fisheries Ltd v Television New Zealand Ltd*.[29] Given that guidance, it would not be appropriate to require Mr Leishman to go further than he has in his answer to interrogatory 5.7. It follows that he is not required to answer interrogatory 5.8.

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[29] *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [140].

Interrogatories 5.10 and 5.11:

> 5.10 Has Mr Leishman acted as secretary and manager of any body corporate other than Bella Vista where the owners have instructed Grimshaw & Co to represent them to recover the costs of repairs to building defects?
>
> **Answer:** *This is not answered on grounds of irrelevance.*
>
> 5.11 If the answer to 5.10 is "Yes" –
>
> (a) how many owners/bodies corporate?
>
> (b) how many of these:
>
> (i) did Mr Leishman introduce Grimshaw & Co.
>
> (ii) did Mr Leishman endorse Grimshaw & Co.
>
> (iii) was Mr Leishman ever present when members of Grimshaw & Co advised the owners/bodies corporate that they could recover close to 100% of the repair costs through litigation?
>
> If the answer to 5.11(b)(iii) is "Yes"; on how many occasions?
>
> **Answer:** *As at paragraph 10 above.*

[48] These questions fail for the same reason as interrogatory 5.7. They ask Mr Leishman to give information about matters outside the narrow truth defence which is confined to justifying the meaning in paragraph 19(c) of the statement of claim. The defendants do not seek to support as true the alleged meanings in other parts of paragraph 19. The question may provide useful information if the defendants were to say that allegations in other parts of paragraph 19 were true but they have not made that plea. As I have indicated, they have chosen carefully what to include in their truth defence. If they do not allege that the other meanings in paragraph 19 are true, they are not permitted to interrogate as to whether those matters are true. That would offend against the principle that the defendants may not seek discovery and interrogatories to find out whether they can plead truth for meanings which they have not yet sought to justify.

[49] The defendants also say that these matters may go to mitigation as to reputational damage. They hope to establish that Mr Leishman does not have such a wide reputation as may be presumed in the absence of evidence to the contrary. It is

important to bear in mind how evidence of bad reputation is proved. The law discourages evidence as to specific acts being run in mitigation of reputational damage. It allows evidence of general reputation only. That is the principle in *Scott v Sampson*.[30] See also Lord Denning's description of typical general evidence as to reputation in *Plato Films Ltd v Speidel*.[31] Evidence of specific acts of misconduct on other occasions cannot be given evidence. As it is not relevant to a matter in issue in this proceeding, it cannot be a foundation for interrogatories.

Interrogatory 5.20

[50] This question is in the context of the minutes of the annual general meeting of Wednesday 28 August 2013. The question says this:

> 5.20 The minutes record:
>
> Based on the chair's experience there is no reason not to expect a settlement close to 100% of the repair costs.
>
> If the answer to 5.14 is "Yes":
>
> (a) Was Mr Leishman the chair referred to?
>
> **Answer:** *Yes.*
>
> (b) If the answer to 5.20(a) is "Yes", in respect of the chair's experience:
>
> (i) How many leaky building and building defect cases had Mr Leishman previously been involved in?
>
> (ii) What were the addresses and/or body corporate members of the premises involved?
>
> (iii) How many of those cases did the owners and body corporate recover a settlement close to 100% of the repair costs?
>
> (iv) Was Mr Leishman referring to a net recovery after the payment of all legal costs or expenses?
>
> (v) If the answer to 5.20(b)(iv) is "No" what was Mr Leishman referring to?
>
> (vi) In how many of those cases were the plaintiffs represented by Grimshaw and Co?
>
> (vii) In how many of those cases was *Cove Kinloch* involved?

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30 *Scott v Sampson* (1892) 8 QBD 491 (DC).

31 *Plato Films Ltd v Speidel* [1961] AC 1098 (HL) at 1138–1140.

> **Answer:** *This information is both privileged and not relevant to this proceeding.*

[51] First the privilege question. The only evidence the court has as to privilege is Mr Leishman's bare answer. If privilege is to be a ground of objection, the court needs evidence to establish whether there is a basis for a claimed privilege. The court cannot decide questions of privilege without knowing the context. The best that the court could do is make some general statements which I would expect the parties would have trouble applying in practice. Unless there is a proper factual foundation, the privilege claim does not stand scrutiny. Instead, the question turns on relevance.

[52] Mr Leishman's objection of irrelevance is sound. That is for the same reasons as I have given for the earlier questions. In this case, the truth defence is about what was said at the annual general meeting in 2012 whereas these questions are about the annual general meeting in 2013. Whatever he said in 2013 is irrelevant to the truth or falsity of what he said in 2012. The questions appear to go to Mr Leishman's competence generally but I again repeat the point that the defendants have not pleaded the truth of the allegations of general incompetence. The questions are not relevant for the truth defence and therefore do not need to be answered.

Interrogatory 5.22 and 5.23

> 5.22 From that date (10 August 2010) to the present how much has Mr Leishman and/or Boutique Body Corporates Ltd charged the unit owners and their body corporate for their services as body corporate secretary?
>
> **Answer:** *This information is not relevant to this proceeding.*
>
> 5.23 From that date to the present, how much has Mr Leishman and/or Boutique Body Corporates Ltd charged the unit owners and the body corporate for their services in arranging the building defect/leaky building litigation?
>
> **Answer:** *This information is both privileged and not relevant to this proceeding.*

[53] As with the last questions, the plaintiffs have not given a proper evidential foundation on which to rule as to privilege. I do not deal with the matter on the basis of privilege.

[54] The relevance issue here is different. In paragraph 28 of the statement of claim, Mr Leishman has pleaded loss of personal and commercial reputation. Particulars are given. He pleads that it is unknown how far the email of 2014 was published and re-published by the minority owners of the Bella Vista apartments. He cannot say whether any other bodies corporate terminated his company's services after August 2014 following the email. But he does say that he can rely on invoices which the defendants charged Bella Vista, which were for services that he would otherwise have provided and charged for. Counsel explained to me that in 2015, HOBANZ provided litigation support services to the body corporate for the Bella Vista apartments and apparently charged $12,069.38. Mr Leishman's case is that but for the defamatory statements the body corporate would have retained him to do that work as well as providing his general secretarial support services. He claims that was a loss of income he would otherwise have reaped but for the alleged defamation.

[55] Those pleadings do not give any grounds for the defendants to enquire as to Mr Leishman's charges for his services as a body corporate secretary. His claim is not for loss of income, except for the loss of opportunity to earn what HOBANZ charged. Likewise, the question as to his charges for managing leaky building litigation is irrelevant. Mr Leishman does not need to answer.

Outcome

[56] The point reached now is that I have considered the interrogatories and upheld Mr Leishman's objections on the grounds of irrelevance. I have not upheld his claims as to privilege because he has not laid a proper foundation for that objection. His current answers to interrogatories stand.

[57] As to costs, the plaintiff has substantially succeeded and costs follow the event. The defendants have been vindicated in one respect, however. That goes to the format of Mr Leishman's initial answers. They were not verified and unhelpfully he gave answers without setting out the questions. That was remedied before the hearing. The defendants are entitled to a discount because they were justified in that part of their application. Costs are category 2 in favour of the plaintiff, but with a reduction of 20 per cent on account of that aspect.

....
Associate Judge R M Bell