IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA169/2019
[2019] NZCA 661

BETWEEN	KRISTIN PIA CATO Appellant
AND	MANAIA MEDIA LIMITED First Respondent
AND	ROWAN DIXON Second Respondent
AND	JANE THOMPSON Third Respondent

Hearing:	14 November 2019
Court:	Wild, Whata and Katz JJ
Counsel:	S J Mills QC and E D Nilsson for Appellant S A McKenna and F A King for Respondents
Judgment:	18 December 2019 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The defamatory meanings pleaded in the appellant's first amended statement of claim at [11(a)(ii)–(iii)], [11(b)–(d)] to the extent they rely on [11(a)(ii)–(iii)], and all the meanings pleaded in [11(e)–(f)] are reinstated and may be pleaded by the appellant in her statement of claim.

C The respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

D The respondents are jointly and severally liable to pay the appellant one set of costs of $4,000 on their abandoned cross-appeal.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This is an appeal from part of an admirably succinct judgment delivered by Hinton J in the Auckland High Court on 13 March 2019.[1] The Judge held that two of the meanings pleaded in the statement of claim in a defamation proceeding were not available.[2] This appeal is against that part of the ruling.

[2] A cross-appeal was also brought. It has now been abandoned, so we need deal only with the costs of that cross-appeal.

Background

[3] Early in 2017 a senior New Zealand show jumping team toured Australia. Subsequently, members of the team made complaints to Equestrian Sports New Zealand (ESNZ) against another member of the team, Katie Laurie, and Ms Laurie's father, Jeff McVean, who was the team's chef d'equip.

[4] ESNZ convened a Judicial Committee to consider the complaints. That Committee directed the parties to try and settle the complaints at mediation. The parties were successful in doing that, including agreeing to the publication of a statement recording the fact of the settlement and the steps agreed to by Mr McVean and Ms Laurie. The statement records that the details of the settlement were otherwise confidential.

[5] The appellant Ms Cato is a barrister. She acted for the complainants in the mediation. On 30 November 2017, Ms Cato released the agreed statement to

---

1 *Cato v Manaia Media Ltd* [2019] NZHC 440.
2 At [48]–[50].

iSpyHorses and *Show Circuit* magazine, two equestrian media outlets which the appellant says have large online followings. The statement was not released to *NZ Horse & Pony*, which the respondents assert is this country's "highest-selling and most long-standing" equestrian publication. The first respondent is the publisher of *NZ Horse & Pony*, the second respondent the editor and the third respondent the author of the article detailed in the next paragraph.

[6] Following Ms Cato's release of the statement, for six days from 3–9 December 2017, *NZ Horse & Pony* posted on its website an article entitled *What goes on tour, doesn't stay on tour*. We summarise the article in [15] and following below, and will refer to parts of it in more detail later in this judgment. Ms Cato considered the article defamed her by suggesting she had acted unethically and unprofessionally in releasing the statement, without authority and instructions, "practically exclusively" to the *iSpyHorses* site, which is operated by her mother.

[7] From the outset, the respondents' position was — and remains — that the *NZ Horse & Pony* article was about ESNZ's disciplinary process and was "not about the plaintiff at all".[3] Consequently, attempts to resolve the matter were unsuccessful.

[8] The appellant then commenced, on 22 December 2017, a proceeding against the respondents alleging the article defamed her and claiming damages. She pleaded that the article conveyed various defamatory meanings. She applied to the High Court for a conference for the purposes of the Court making recommendations under ss 26 and 27 of the Defamation Act 1992 (under those provisions the court may recommend publication of a correction). She also applied, under r 10.15 of the High Court Rules 2016, for orders determining whether the article was capable of bearing the pleaded defamatory meanings. The application for recommendations under ss 26 and 27 was subsequently withdrawn, so Hinton J dealt only with the application to determine whether the pleaded defamatory meanings were available. It is part of the judgment on that application which is the subject of this appeal.

---

[3] Respondent counsel's words in their written submissions to us.

Are pleaded meanings available? — the law

[9] The Judge's summary of the principles is not contested. We can thus summarise, stating the principles in a case specific way. First, whether the article is *capable* of bearing the defamatory meanings pleaded by Ms Cato was a matter of law for Hinton J to determine. Whether the article *in fact* carries those meanings will be a decision for the fact-finder at trial.

[10] Second, the test for the Judge was whether an ordinary, reasonable person *could* regard the article as bearing the pleaded meanings. Having read the article, *could* an ordinary person, as a matter of impression, carry away the pleaded meaning in their mind?

[11] Third, the impression an ordinary person might carry away depends, not just on the words of the article, but also on its tone. If the article invites suspicion, defamatory imputations will more readily arise. An author "who wants to [write] at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire".[4]

[12] Fourth, the fact that the article may have been mainly or partly directed at ESNZ and its disciplinary process, did not prevent the article from also carrying imputations defamatory of Ms Cato.

[13] Fifth, the threshold for the Judge to strike out defamatory meanings pleaded by Ms Cato is high.

The article

[14] The article is a piece of investigative journalism into the complaints to ESNZ, its complaints process, and the outcome.

---

4 *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) at 285 per Lord Devlin.

[15] Mr Mills QC is justified in submitting that the article, from the outset, suggests hidden relationships and agendas, the potential for future legal action, and invites suspicion and speculation. The article starts:

> *The fallout from the senior show jumping team's six-week tour to Australia takes some further turns; we endeavour to unravel the saga*
>
> …
>
> This is a very complicated story. It is complicated because there are so many people involved, many with relationships and agendas that are not initially obvious. It involves legal processes and it potentially involves future legal action. …

[16] The article describes the tour and the concerns that ensued. It records the making of complaints and ESNZ's concerning of a Judicial Committee to consider these. Next the article refers to a complaint by ESNZ to *NZ Horse & Pony* about its publication in July 2017 of an article about the complaints being investigated by ESNZ's Judicial Committee. That July 2017 article is set out in full. There is an aggrieved tone in this part of the article, which then notes that *NZ Horse & Pony* received from ESNZ "no word of the Judicial Committee's progress". These passages, central to Ms Cato's claim, then follow:

> Out of the blue, there was progress of sorts this week, when iSpyHorses, a website-based business that specialises in advertising horses for sale, published on its Facebook page a piece with the headline: KATIE LAURIE APOLOGIZES (sic) FOR CONDUCT and a link to their website 'blog' for the story. At the end of the story there was a note as follows: *"The statement published is exactly what was agreed to be published by the parties to the mediation. It was released to the media in this form. The final paragraph is a statement issued by the lawyer for the complainants (as indicated). iSpyHorses has simply published the document in its exact form."*
>
> The statement was an unusual one for many reasons, not just for the note at the end and the fact the lawyer wasn't named, but that it was posted on the iSpyHorses' site practically exclusively despite it saying it was released to the media. Being the highest-selling and most long-standing equestrian magazine in New Zealand, you would think *NZ Horse & Pony* would have been included and have been sent a copy. But no. Instead, we were mentioned in the release, which was in itself unusual. We decided to take a closer look.

[17] Mr Mills pointed out that *NZ Horse & Pony* knew the statement was endorsed by ESNZ and that the statement recorded that it was "exactly what was agreed to be published by the parties to the mediation". Further, although *NZ Horse & Pony* knew Ms Cato was the lawyer who had released the article, he submits readers are invited

to speculate as to why her identity was not disclosed. Mr Mills contended that *NZ Horse & Pony* stated the release was "practically exclusively" to *iSpyHorses*, despite *NZ Horse & Pony* knowing that the statement had also been released to and published by *Show Circuit*. He submitted the description of *iSpyHorses* as a business "that specialises in advertising horses for sale" is deliberately disparaging. Further, Mr Mills submitted readers are invited to speculate as to why the statement was not released to *NZ Horse & Pony*, although the statement itself criticises *NZ Horse & Pony* for earlier incorrectly reporting that the complaints to ESNZ were against all of the show jumping team.

[18] There follows further discussion about the statement. After stating that it seemed most irregular that the statement was not released by ESNZ itself, the authors state "[a]nd that is where the plot started to thicken again." The article then sets out questions put by *NZ Horse & Pony* to ESNZ and the latter's responses including:

> Is the statement itself a breach of the confidentiality clause of the mediation?
> *That is a matter for the parties involved.*

[19] Following those questions and answers there is this passage:

> We understand that the statement on the iSpyHorses website was released by the complainants' lawyer, Kristin Cato (aka Kristin Manson), but have not yet had this confirmed. We know that Kristin is the daughter of the iSpyHorses founder/director Heather Cato. We have approached both Heather and Kristin for confirmation and comment, but have had no response from either of them to our requests for clarification. From Kristin's Linked-In profile, we have established that she has been a crown prosecutor and is now a barrister. Her legal background is obviously extensive.

[20] Mr Mills submitted that paragraph invites readers to infer that Ms Cato inappropriately released the statement to *iSpyHorses*, and not to *NZ Horse & Pony*, because her mother controlled the former. Further speculation is, in Mr Mills' submission, encouraged in a subsequent paragraph:

> As could be expected, the post was shared among the equestrian community, and there were a large number of comments made, some of them defamatory. There were many questions asked, plenty of people were quick to condemn the parties involved, and others pointed out there must [be] more to the story than what was released.

The struck-out imputations

The conflict of interest imputations

[21] The imputations the Judge struck out are "natural and ordinary" or so-called "tier one" meanings. They were in [11] of the first amended statement of claim:

> (a) The plaintiff had acted unethically in acting as counsel for the complainants in the dispute that is the subject of the Article by:
>
> (i) Being responsible for releasing a statement that is damaging to the reputations of Mr McVean and Ms Laurie;
>
> (ii) Misusing her position as a lawyer for the complainants to benefit her family by releasing the statement to iSpyHorses, a media outlet controlled by her mother, when the statement would have received wider and more effective publicity for the vindication of her clients if it had been released to Horse and Pony.
>
> (iii) Hiding that misuse of position by not identifying herself in the statement, or disclosing her relationship with the founder and director of iSpyHorses.
>
> (b) The plaintiff had acted unprofessionally or otherwise improperly in her capacity as a lawyer for the reasons set out in (a)(i)–(iii) above.
>
> (c) There are grounds to suspect that the plaintiff has acted unethically in her capacity as a lawyer for the reasons set out in (a)(i)–(iii) above.
>
> (d) There are grounds to suspect that the plaintiff has acted unprofessionally or otherwise improperly in her capacity as lawyer for the reasons set out in (a)(i)-(iii) above.
>
> (e) There are grounds to suspect that the plaintiff has acted unethically in her capacity as a lawyer by breaching confidentiality provisions in a mediation or settlement agreement by releasing the statement without the consent of her clients and/or other parties to the dispute.
>
> (f) There are grounds to suspect that the plaintiff has acted unprofessionally or otherwise improperly in her capacity as a lawyer by breaching confidentiality provisions in a mediation or settlement agreement by releasing the statement without the consent of her clients and/or other parties to the dispute.

[22] First, the Judge agreed that these paragraphs are capable of being read as suggesting that Ms Cato had used her position as counsel for the complainants to release the statement to her mother's media outlet *iSpyHorses*, when release to

NZ Horse & Pony would have achieved wider and more effective publicity for Ms Cato's clients.[5] But then the Judge said this:

> [34] However, I do not consider that the ordinary reasonable person would carry away in their head that the plaintiff was "misusing" her position as a lawyer for the complainants, or acting unethically, unprofessionally, or improperly in releasing the statement to iSpyHorses and not releasing the statement to *Horse & Pony*. The pleadings made in this regard seem to me to be stretching a point. It *would* be clear to the reader that the parties involved in the mediation were key players in the New Zealand equestrian scene and knew of the available publications. There is no suggestion that the plaintiff was acting without her clients' instructions, and nor *would* that have been possible because the means of publication used (and not used) *would* have been clear to her clients. Members of the public *would* not see a lawyer or their clients as having to be impartial between different media outlets.
>
> [35] Materially, the sense I gain from the article as a whole, and that I consider the reasonable reader *would* gain, is that *Horse & Pony*, or at least the author, are not on-side with the plaintiff's clients. The reader *would* think it understandable that the plaintiff/her clients did not release the settlement statement to *Horse & Pony*, and released it to other media.
>
> (Emphasis added.)

[23] Accordingly, the Judge struck out the defamatory meanings pleaded in [11(a)(ii)–(iii)] and, to the extent they relied on [11(a)(ii)–(iii)], also the pleaded meanings in [11(b)–(d)].

[24] For the respondents, Mr McKenna submitted that [34]–[35] of the High Court judgment correctly apply the first part of the test for defamatory meanings; that is, whether the article *could* carry the pleaded defamatory imputations, and not the second part of the test — does it *in fact* carry those meanings.

[25] We are not persuaded by this submission. We respectfully disagree with the Judge's conclusion that that the article is not capable of bearing the pleaded "conflict of interest" defamatory meanings. Ordinary, reasonable readers of the article could, in our view, be left with the impression that Ms Cato had misused her position as counsel for the complainants, and had acted unethically or unprofessionally in and about release of the statement to *iSpyHorses* and not to *NZ Horse & Pony*.

---

5 *Cato v Manaia Media Ltd*, above n 1, at [33].

[26] Mr Mills submitted three errors may have combined to lead the Judge to her conclusion. The first two errors emerge from [34]–[35] of the High Court judgment, which we have set out in [22] above. The first is the Judge's use of the word "would" where we have emphasised it in those two paragraphs. The question for the Judge was whether ordinary, reasonable readers *could* interpret the article in the way alleged. How such readers *would* interpret it is a question for trial. However, we are not persuaded that the Judge lost sight of the proper test, because she correctly stated the test at [37] of her judgment: whether "the article is capable of bearing the defamatory meaning pleaded". So we do not accept this first criticism.

[27] Mr Mills' second alleged error does, however, resonate with us. In [34] of the High Court judgment, Hinton J attributes to ordinary, reasonable readers of the article knowledge that:

(a) the participants in the mediation knew of available equestrian publications, and knew which ones would most effectively distribute the statement they had agreed to make; and

(b) lawyers are bound to act on a client's instructions.

[28] We accept Mr Mills' submission that it cannot be assumed these are matters of common knowledge — that is, matters "which any intelligent … reader may be expected to know".[6] As to the first, there is no obvious basis for attributing that knowledge to ordinary readers, and it is difficult to reconcile with the surprise expressed in the article that the statement was published "practically exclusively" by *iSpyHorses*. The second matter may well be known amongst among the legal fraternity, but not we think to ordinary readers. Or at least, it cannot be assumed they would know this.

[29] We also agree with Mr Mills that the Judge appears not adequately to have factored in the tone of the article as a whole. We referred in [11] above to Lord Devlin's caution to authors who, by putting smoke in the air, risk suggesting that there is also a fire. We think the article does just that, included in relation to

---

6 *Fox v Boulter* [2013] EWHC 1435 (QB) at [16].

the propriety of Ms Cato's professional conduct. Mr Mills drew our attention to the following passage in the Privy Council's judgment in *Jones v Skelton*:[7]

> The concluding words of the publication complained of were: "It is beyond understanding. Or is it?" Their Lordships consider that it was open to a jury to decide that reasonable readers would conclude that the plaintiff had brought improper influence (short of corruption) to bear upon his fellow councillors. The question mark might convey to the reasonable reader the thought and the meaning that there had been some impropriety. The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place — an explanation which the writer of the letter did not care or did not dare to express in direct terms. It was therefore open to a jury to decide that a reasonable reader would conclude that the plaintiff had brought improper influence (short of corruption) to bear upon his fellow councillors.

[30] Mr Mills submitted this paragraph is almost a submission he could make about the article in *NZ Horse & Pony*. For example, having set out a comment posted by Ms Cato on *iSpyHorses*' Facebook page, the article continues:

> The obvious question from that statement is that if ESNZ was not a party to the complaints (and it was, according to the May 31 announcement on the ESNZ website), why was the Judicial Committee formed in the first place, and who actually received the complaints to start with? What is ESNZ's role in managing this sort of complaint and protecting the reputation of the organisation, and indeed the sport of show jumping itself?

[31] Those unanswered questions, but also the whole tone of the article, could leave ordinary, reasonable readers with the impression that:

(a) Ms Cato arranged for the statement to be published "practically exclusively" on her mother's *iSpyHorses* website, and, to the exclusion of *NZ Horse & Pony*, in order to give her mother an exclusive story.

(b) Distributing the statement to "key equestrian media" (*NZ Horse & Pony*) where it would be widely read would have been in the best interests of Ms Cato's clients.

---

7 *Jones v Skelton* [1963] 1 WLR 1362 (PC) at 1372.

(c) Ms Cato sought to hide the connection between herself and *iSpyHorses* by not identifying herself in the statement.

[32] Were these allegations true, they would amount to a breach by Ms Cato of her ethical and professional obligations to act in the best interests of her clients and to avoid conflicts of interest.

[33] Mr Mills supported the availability of the imputation that Ms Cato had a conflict of interest by referring to a post on the *NZ Horse & Pony* Facebook page. The commentator wrote "Omg the bit about iSpyHorses — conflict of interest (the daughter of iSpyHorses' owner was the lawyer!)". Mr Mills advised us that this post was read to the Judge during the hearing, and the respondents have not since denied that it was posted on the *NZ Horse & Pony* Facebook page.

[34] In submissions before us there was mention of "bane" and "antidote". As this Court noted in *New Zealand Magazines Ltd v Hadlee (No 2)*, these expressions were first used by Baron Alderson almost 200 years ago in *Chalmers v Payne*.[8]

[35] Mr Mills submits that the "bane" (or poison) in the article is that Ms Cato preferred her mother's interests over those of her clients, and then sought to hide that. Mr McKenna rejects any such bane but, if it is there, he submits the following paragraph of the article provides an "antidote":

> *"The lawyers for the McVeans have always knows* [sic] *this connection and there is no issue has been raised [sic] from their perspective. And it accords with the agreement reached in mediation. ESNZ have already corrected their statement which you haven't picked up on. They will be releasing more information next week apparently. But there is no requirement for them to approve the agreement that has been reached independently by the parties. ESNZ is not a party to this agreement nor was it a party to the complaints."*

[36] We do not accept that. A claimed antidote must be complete or, as it was put in *Morosi v Broadcasting Station 2GB Pty Ltd*; "destructive of the ingredients from which the bane has been brewed".[9] Although the paragraph at [35] above sets out Ms Cato's statement, including her assertion that Mr McVean and Ms Laurie knew of

---

8 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 627; and *Chalmers v Payne* (1835) 2 CrM & R 156, 150 ER 67 (Exch) at 159.

9 *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418 (NSWCA) at 420.

her connection with the iSpyHorses founder, nowhere does the article accept that Ms Cato's release of the statement was proper.

Breach of confidentiality meanings

[37] The Judge upheld these meanings, save that she said:[10]

> … except that I do not consider the article suggests the settlement statement has been released by the plaintiff without the consent of her clients.

[38] In accepting this pleaded meaning, we consider the Judge again imputed to reasonable, ordinary readers of the article knowledge that lawyers invariably follow their clients' instructions. For the reasons set out in [27]–[28] above, we consider the Judge erred in doing this and that she ought not to have struck out this pleaded meaning.

Result

[39] The appeal is allowed.

[40] The defamatory meanings pleaded in the appellant's first amended statement of claim at [11(a)(ii)–(iii)], [11(b)–(d)] to the extent they rely on [11(a)(ii)–(iii)], and all the meanings pleaded in [11(e)–(f)] are reinstated and may be pleaded by the appellant in her statement of claim.

Costs

[41] The respondents are jointly and severally liable to pay the appellant one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Costs of the abandoned cross-appeal

[42] As mentioned, the respondents' cross-appealed the judgment of Hinton J, but have since abandoned that cross-appeal.

---

[10] *Cato v Manaia Media Ltd*, above n 1, at [47].

[43] The appellant seeks costs in respect of that abandoned cross-appeal. Having considered the opposing written submissions, we allow the appellant costs of $4,000. That is an uplift of about 20 per cent on scale, reflecting that there is substance in each of the three points made by the appellant. But we intend it also to acknowledge the difficulties outlined by the respondents.

Solicitors:
Lee Salmon Long, Auckland for Appellant
Grantham Law Ltd, Hamilton for Respondents