IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2018-404-539
[2019] NZHC 2761

BETWEEN	STEVEN LEONARD JOYCE Plaintiff
AND	MATTHEW OWEN HOOTON First defendant (discontinued)
	FOURTH ESTATE HOLDINGS (2012) LIMITED Second defendant
	TODD ALLEN SCOTT Third defendant

Date of hearing: 21 October 2019

Appearances: Z G Kennedy and H M Jaques for the plaintiff
PWG Ahern for the second and third defendants

Judgment: 29 October 2019

JUDGMENT OF JAGOSE J

The judgment was delivered by me on 29 October 2019 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
MinterEllisonRuddWatts, Auckland
Morrison Kent, Auckland

[1] In this proceeding, Mr Joyce seeks redress (in terms of ss 24 and 26 of the Defamation Act 1992) for his alleged defamation in the *National Business Review*, published by the second defendant (for convenience "NBR") and its publisher, the third defendant (Mr Scott). The claim is set down for a four-day hearing commencing 9 December 2019 (although the NBR's recent abandonment of aspects of its defence, including any requirement for subpoenas, means a materially shorter trial is likely).

[2] While denying the two passages impugned by Mr Joyce are defamatory, the NBR says they also are true, or the publication taken as a whole is true.[1] (In this judgment I refer to the NBR's defence based on the publication taken as a whole as its 'extended defence'.) If correct in either respect, NBR's defence would succeed. The NBR additionally pleads the 'public interest' defence.[2] In support of its extended defence, the NBR points to seven other passages in the publication, which it says also are true.

[3] On the present (amended) application, Mr Joyce seeks I:

(a) determine as preliminary separate questions the natural and ordinary meanings of each the passages impugned by Mr Joyce, and the other passages relied on by the NBR; and

(b) if determining the meanings of each respectively is different, strike out the NBR's extended defence; or

(c) determine the natural and ordinary meanings the passages relied on by the NBR are capable of bearing, to strike out its extended defence, if those meanings are different from those I previously found the passages impugned by Mr Joyce were reasonably capable of bearing.[3]

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1 Defamation Act 1992, s 8.
2 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.
3 Minute dated 21 August 2018 at [9].

Approach

[4] Despite the baseline expectation at least each cause of action will be determined at a single trial,[4] I may order separate and prior decision of any particular question.[5] The threshold for such is high, requiring "good, preponderant reasons";[6] judicial warnings against light resort to separate decisions are legion.[7]

[5] On the other hand, because "defamatory meaning is to be determined exclusively by an examination of the words themselves",[8] English texts (commenting on their new Defamation Act 2013's abolishment of the presumption in favour of trial by jury) commend determination of meaning "as a preliminary issue, which involves no evidence and can be dealt with as a matter of short legal argument".[9]

[6] The parties accept the five "most important" questions set out in *Haden v Attorney-General* appropriately guide exercise of my discretion to order separate decision.[10] And I may strike out any part of a pleading that is not reasonably arguable.[11] That too is a high threshold, requiring the pleading to be "clearly untenable".[12]

Separate decision?

[7] I turn first to the five questions to address the separate decision application.

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4 High Court Rules 2016 ("HCR"), rr 10.3 and 10.4.

5 Rule 10.15.

6 *Karam v Fairfax NZ Ltd* [2012] NZHC 1331 at [58(d)].

7 *Tilling v Whiteman* [1980] AC 1 (HL) at 25 per Lord Scarman; and *Clear Communications Ltd v Telecom Corporation of NZ Ltd* (1998) 12 PRNZ 333 (HC) at 335.

8 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 624 (albeit in the context of determining whether, as a matter of law, words were capable of bearing a pleaded meaning, but "where an ordinary meaning goes to a jury it will be without further evidence"), approved in *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148 at [18]–[19].

9 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander: Second Supplement to the Twelfth Edition* (Sweet & Maxwell, London, 2013) at [32.26]. See also Brian Neill and others *Duncan and Neill on Defamation* (4th ed, LexisNexis, London, 2015) at [32.43]:

> Since meaning is often such a crucial issue in defamation actions, the benefits of an early ruling are obvious: a defendant will be able to make an informed decision whether or not he should make an offer of amends and, if he chooses to defend his statement as true or honest opinion, he will be able to direct his defence to the meaning the court has found the statement to bear".

10 *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC) at [50]–[67].

11 HCR, r 15.1(a).

12 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; endorsed in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

—will there be difficult demarcation questions between those issues to be addressed at the first trial and those left for the second?

[8] Mr Joyce claims two specific passages in the publications separately or together impute he is:

(a) prepared to abuse his public position in order to benefit others with whom he has a private relationship;

(b) a corrupt politician;

(c) prepared to engage in unlawful behaviour;

(d) prepared to engage in unethical behaviour;

(e) dishonest and unethical;

(f) prepared to engage in blackmail in order to further his personal interests; and

(g) prepared to engage in improper conduct in pursuit of his political objectives.

[9] The NBR denies those imputations, asserting other passages contained true facts and saying the publications:

(a) commented on political matters in a hard-hitting and strongly opinionated context;

(b) were exclamatory by design to entertain readers by aggressive political critiquing; and

(c) would have been read and understood in that context without diminution of Mr Joyce's reputation.

The NBR adds, if Mr Joyce's pleaded imputations are established, they nonetheless were true, or not materially different from the truth, or the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[10] For my separate decision is if the meaning of the passages relied on by the NBR for its extended defence is different from the meaning of the passages of which Mr Joyce complains (alternatively, if the meaning the former passages are capable of bearing is different from the meaning the latter passages are capable of bearing). The passages relied on by the NBR are in provision of particulars in its extended defence.[13] They are the passages the NBR says are statements of fact. The point of Mr Joyce's application is a defence of truth must be aimed at the same meaning as the plaintiff alleges.[14]

[11] Plainly, if by separate decision I determine (as a matter of fact) the meanings of the two paragraphs to be distinct, the NBR's extended defence could not survive, and would not require to be decided at the second trial. The second trial would only have to determine truth of the meanings of the two paragraphs, and if their publication responsibly communicated a matter of public interest. If I hold the meanings indistinct, the NBR's extended defence also would remain for determination at the second trial.

[12] Alternatively, if by separate decision I determine (as a matter of law) the meanings the two paragraphs are capable of bearing are distinct from the meanings the passages on which the NBR relies are capable of bearing, the second trial also would have to determine (as a matter of fact) the meaning of the two paragraphs. Only NBR's extended defence would not remain for determination, unless the meanings were indistinct.

[13] Mr Joyce's counsel, Zane Kennedy, emphasises the inadmissibility of evidence on meaning as a singular reason for rolling up the application for separate decision together with the separate decision itself. Thus there will be no evidential overlap with the second trial. I am less sure of that proposition. Leaving aside the distinction between law and fact in determinations if words are capable of bearing or bear particular meanings, the test for either nonetheless is contextual:[15]

> The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

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13 Defamation Act 1992, s 38.

14 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [58].

15 *Leigh v Attorney-General*, above n 8, at [19(a)] and [19(f)], citing *New Zealand Magazines Ltd v Hadlee (No 2)*, above n 8, at 625.

…

> The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. …

[14] My determination of meaning requires evidence of that context (which may not be met exclusively by the NBR's admissions in its defence, and thus is the death-knell to meaning's rolled-up determination with the separate decision application). It seems inevitably caught up with the subsequent trial's determinations of truth of the imputations and responsible communication on matters of public interest. And as a matter of efficiency, unless agreed, evidence on mode of publication and surrounding circumstances seems likely to be led from the same witnesses as contend for truth, public interest, and responsible communication. I recognise, however, any contextual evidence is likely to be of very confined compass.

—will the separate question bring the proceedings to an end?

[15] If separate decision of meaning results in one that is not defamatory, the proceeding would be at an end. Neither counsel expects such an outcome, but Mr Kennedy is optimistic separate decision in Mr Joyce's favour will "cause the defendants to reassess the merits of the remaining defences". While strategic advantage to one party may justify its pursuit of separate decision, such is not a factor in favour of its grant.

—what potential time saving does the separate question offer?

[16] Mr Kennedy relies on the anticipated strike out of the NBR's extended defence as offering a saving in time hearing evidence as to the truth of the passages on which the NBR seeks to rely for its extended defence. That is not strictly a saving afforded by separate decision alone, but I would allow it as a likely consequence of separate decision in Mr Joyce's favour. And if the separate decision went against him, no larger time would be consumed in aggregate across the two trials, because the necessary determination of meaning would have been achieved on the first trial.

[17] Nonetheless, any saving seems marginal, the defendants' counsel, Phil Ahern, advising the defendants anticipate no more than four witnesses for trial, and only

cross-examination and counsel's submissions are likely to be 'impacted' if the NBR is not permitted to pursue the extended defence at the second trial. That suggests limited evidence is to be led in support of the passages on which the NBR relies.

[18] Obviously, if contextual evidence is required to be led for my separate decision (rather than being agreed), such could not be achieved before (a second) trial in December 2019. Even compilation of agreed facts for that purpose diminishes time for my separate prior decision.

—how will appeals be dealt with?

[19] The proximity of that (second) trial in December 2019 means any separate decision application should only be granted on condition the parties agree no appeal be heard until the whole proceeding is determined. Otherwise pursuit of intermediate appeal would likely require vacation of that fixture, with all the availability complications arising for resumption (irrespective of the appeal's result). Such delay especially would be undesirable in the present proceeding, which is intended for "just, expeditious and economical disposal",[16] and already has incurred some disruption.

— are there any other practical considerations tending one way or the other?

[20] As practical matters, while the legislative scheme for prompt and effective disposal of defamation proceedings commends separate and prior decision of defamatory meaning, the relative lateness of the present application, the further steps required for separate decision, and the proximity of (the second) trial taken together tend against the application's grant.

[21] For all those reasons, I conclude Mr Joyce's application for separate decision should not be granted.

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16 Defamation Act 1992, s 35(1).

Strike out?

[22] As founded on anticipation both application for separate decision and separate decision would be in his favour, Mr Joyce's application for strike out therefore does not require determination.

Result

[23] Mr Joyce's applications for separate decision and strike out are dismissed.

Costs

[24] In my preliminary view, as the successful party, the NBR is entitled to 2B costs and disbursements.[17] That is because, from what I presently know of it, nothing in the steps taken by it in this averagely complex proceeding required other than a normal amount of time.[18] If that is not accepted by the parties, and they cannot otherwise agree, costs are reserved for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served by the NBR within ten working days of the date of this judgment, with any response and reply to be filed within five working day intervals after service.

—Jagose J

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17 HCR, rr 14.2(1)(a), (c) and (g).
18 Rules 14.3(1) and 14.5(2).