IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-539
[2019] NZHC 3356

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

Hearing:	9 and 10 December 2019 (half-days each)
Appearances:	Z G Kennedy and H M Jaques for the plaintiff PWG Ahern for the second and third defendants
Judgment:	17 December 2019

JUDGMENT OF JAGOSE J

The judgment was delivered by me on 17 December 2019 at 3.00pm.
Pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

Solicitors/Counsel:
Zane Kennedy Barrister, Auckland
MinterEllisonRuddWatts, Auckland
Morrison Kent, Auckland

[1] The plaintiff ("Mr Joyce") seeks declaratory and indemnity costs relief under s 24 of the Defamation Act 1992 (the "Act") against the second defendant ("Fourth Estate"), which publishes *The National Business Review* ("NBR") in print and website formats. Relief pleaded for my recommendation of a s 26 correction was not pursued.

[2] Mr Joyce alleges two specific passages in a NBR article titled "Joyce sacking first test of Bridges' leadership" (and, in its print format, subtitled "National MPs have finally been allowed to express what they really think of the party's unelected strategist"), published on 2 March 2018, are defamatory of him. The particular passages are emphasised below:

> ***Using Ms Adams as a proxy, he tried and failed to introduce the so-called copper tax to subsidise his friends at Chorus.***
>
> …
>
> It will be a terrible shame if [Mr Bridges] lacks the mettle that Mr Key showed in so brutally despatching Dr Brash ***and instead bows to blackmail by Mr Joyce***.

The full text of the article – appearing under the first defendant's ("Mr Hooton") byline, in his regular column titled "Weekly Hits" – is set out at the Schedule to this judgment.

[3] Mr Joyce seeks the same relief against the third defendant ("Mr Scott") – Fourth Estate's sole director and shareholder, who refers to himself as NBR's "publisher" – in relation to three tweets alleged to 'republish' the article.

Background

[4] Mr Joyce formerly was a Member of Parliament ("MP"), holding office from November 2008 until retiring on 27 March 2018 (after giving notice on 6 March 2018). Previously, he held a number of positions in the National Party's administration, including as its inaugural general manager from 2003 to 2005, and its campaign director for each the 2005 and 2008 general elections.

[5] As MP, Mr Joyce also held a number of ministerial portfolios from time to time. These included as Minister for Communications and Information Technology, to

which portfolio his fellow MP, Amy Adams, succeeded in 2011. While MP, Mr Joyce also chaired the party's campaigns for the 2011, 2014 and 2017 general elections.

[6] In the last election, no single party obtained a majority of seats in the House of Representatives. National Party MPs were unsuccessful in negotiations to form a coalition government. Then in opposition, Mr Joyce and other MPs put themselves forward to be the National Party's new leader, after Bill English's resignation from that position. In late February 2018, Simon Bridges succeeded to it by majority vote.

[7] Shortly before 2.00 pm on Thursday, 1 March 2018, a NBR journalist visited Mr Joyce unannounced in his parliamentary office, to say a "very disparaging article" about him was to be published in the NBR the next day, and invited him to exercise a right of reply. After rising from the House later that afternoon, Mr Joyce called Mr Scott, who sent screenshots of the article for Mr Joyce to read.

[8] After reading the article, Mr Joyce told Mr Scott he considered the article to be false and defamatory, and "it shouldn't be published". Mr Scott said the article had gone to print, but Mr Joyce could exercise a right of reply. Mr Joyce said that "would be a totally inadequate response in relation to this article". Mr Scott said he would see what could be done not to publish the article on the NBR's website.

[9] The following morning, Friday, 2 March 2018, the article was published in the NBR's print and website formats. That evening, by letter to the NBR, Mr Joyce's solicitors took issue with the entire article as defamatory and sought its immediate removal of the article from the website, publication of a retraction and apology in both formats, and payment of Mr Joyce's solicitor-client costs in settlement of his foreshadowed claim against the NBR.

[10] Not receiving any reply, despite extending the offer's currency from 5 to 7 March 2018 at NBR's solicitors' request, by letter of 9 March 2018, Mr Joyce's solicitors then requested retraction of the particular passages at issue in this proceeding. The retraction formally was requested under s 25 of the Act.

[11] When agreement was not forthcoming, this proceeding was issued against both Mr Hooton and Fourth Estate on 29 March 2018, alleging the article's impugned passages to be defamatory of Mr Joyce in particularised ways, and claiming relief under the Act.

[12] In late April 2018, Mr Joyce settled (and later discontinued) his claim against Mr Hooton by Mr Hooton's publication of an apology and payment of Mr Joyce's solicitor-client costs attributable to the claim against him.

[13] On 26 April 2018, the text of Mr Hooton's apology also was published in replacement of the text of the article on NBR's website. On the same day, Mr Scott published a message on social media site, Twitter:

> Attn @MinterEllisonNZ I supported a contributor – relied on his integrity & sources – backed him when he pleaded, demanded that NBR not backdown, retract or apologise for his column. He might have lost his nerve, but I will fight for his right, even if he won't. Sources are SOLID

"MinterEllisonNZ" is the username of Mr Joyce's solicitors' Twitter account. By publishing the message, the tweet was published on Mr Scott's Twitter Profile page, and to the Twitter timelines of his followers (and, by reason of the tweet's prefix "@" to their firm's Twitter username, of Mr Joyce's solicitors).[1]

[14] In subtweets to this and other tweets, Mr Scott engaged in dialogue with other Twitter users. On 10 May 2018, Mr Scott responded to another Twitter user, Hamish Price, whose tweet queried why Mr Scott "continue[d] to defend [Mr Hooton's] column attacking [Mr] Joyce", tweeting:

> I am defending freedom of speech. I don't have to agree with what gets written in my publication, but I will fight for the right of my contributors to say it. I'm not fighting Mr Joyce, I am defending the integrity of the NBR that is being challenged in a court of law.

[15] On 6 June 2018, Mr Scott responded to Mr Price's tweeted comprehension "[no] publisher has successfully defended a defamation action which the author has already retracted and apologised for", tweeting:

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[1] A convenient primer to Twitter's functionality appears at the appendix "How Twitter Works" to *Monroe v Hopkins* [2017] EWHC 433 (QB), [2017] 4 WLR 68.

> You make a valid point @hamishpricenz that's why I believe Mr Hooton cut a deal with Mr Joyce, to prevent me from subpoenaing the five people he named from the shadow cabinet that would absolutely back up his statements. With a deal done, I was expected to roll over, I won't.

[16] Under s 35, Mr Joyce sought a judicial conference, to determine if the impugned passages could bear the pleaded imputations, and (if so) under ss 26 and 27 to seek the court's recommendation Fourth Estate publish a correction. My minute of 21 August 2018 recorded at [4]:

> Mr Joyce complains the former of those extracts [at [2] above] imputes Mr Joyce is:
>
> (a) prepared to abuse his public position in order to benefit others with whom he has a private relationship;
>
> (b) a corrupt politician; and
>
> (c) prepared to engage in unlawful or unethical behaviour including crony capitalism.
>
> He further complains both together impute he is:
>
> (d) dishonest and unethical; and
>
> (e) prepared to engage in blackmail in order to further his personal interests.

[17] At my minute's [9] and [10], I concluded:

> The contended imputations here are reasonably capable of being drawn from the published words on their face. The crucial words are "his friends at" in the former extract, and "blackmail [by]" in the latter extract. They enable characterisation of Mr Joyce as corrupt and prepared to act unlawfully for his personal benefit.
>
> However, I doubt the reasonable reader of Mr Hooton's column would go so far. Rather – on the evidence presently before me, recognising the column's objective is expressed in its title, and allowing also for Mr Hooton's reputation as a provocator – the reasonable reader would conclude Mr Joyce was prepared to engage in unethical (in terms of the 'friends' allegation) and otherwise improper (in terms of the 'blackmail' allegation) behaviour, in pursuit of his (rather than his party's) political objectives. I am conscious that is not Mr Joyce's pleaded imputation.

I therefore proposed a correction in terms of the imputations I considered the passages carried, which Mr Joyce accepted, but Fourth Estate did not accept my consequent recommendation for its publication.

Pleadings for trial

[18] On 18 October 2018, Mr Joyce amended his claim against Fourth Estate to join Mr Scott to the proceeding, alleging Mr Scott's tweets meant Mr Hooton's article was true, retracted by him for reasons other than it was untrue, and responsibly and properly published by Fourth Estate, amounting to republication of the defamation, and claiming relief against Mr Scott under the Act. In its amended form, Mr Joyce partially adds my comprehended imputations to those originally pleaded,[2] and omits its original reference to "crony capitalism".

[19] Fourth Estate denies the impugned passages in the article were defamatory, either to carry any of the meanings claimed by Mr Joyce (or, if so, those meanings were true nor not materially different from the truth), or to diminish his reputation (or, if so, not materially beyond that caused by the truth of the balance of the article). As to the truth of those meanings, Fourth Estate relies also on the following separate passages from the article:

> Most satisfying for Mr Bridges, Steven Joyce mustered only four votes, excluding his own.
>
> …
>
> The National caucus will only fully reunify when the divisive Mr Joyce is out of Parliament altogether.
>
> …
>
> For nine years, Mr Joyce has stood before his colleagues claiming to be the great political genius and policy guru while belittling all their ideas. They despise him for it.
>
> …
>
> The rude and abusive way Mr Joyce dealt with officials and local people alike following the Rena disaster shocked the local MP, one Simon Bridges.
>
> …
>
> He turned legitimate questions about Labour's budget projections into the fiasco of his fake $11.7 billion fiscal hole.
>
> …

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[2] Specifically, Mr Joyce pleads the first passage also meant "[t]he plaintiff is prepared to engage in unethical behaviour", and the second passage "[t]he plaintiff is prepared to engage in improper conduct in pursuit of his political objectives". Those are not precisely adopting my formulation, as the former omits the latter's final phrase (and that omits my "(rather than his party's)"). Shortly before trial, Mr Joyce sought to amend his claim to include the former omission, among other things. As I discuss at [54]–[59] below, I refused him leave.

> He then demanded a lead role in the failed negotiations with Winston Peters, despite knowing the NZ First leader then suspected his involvement in leaking his superannuation details.
>
> …
>
> His approach to political management is simply to reflect back to the most ignorant voters their own views.
>
> …
>
> Party president Peter Goodfellow and his fellow board members fret – not without insight into Mr Joyce's character – that their campaign strategist would respond to such a slight by throwing in the towel altogether.

[20] Mr Scott similarly denies the impugned passages carried the meanings claimed by Mr Joyce, and says Mr Joyce's pleading of the tweets' innuendo technically is deficient, and the tweets cannot have amounted to a republication of the article.

Applicable law

[21] At an exceptionally high level of description, a defamatory statement is an untrue one which tends to lessen its subject's reputation. There is any number of formulae, and examples.[3] It is the statement's tendency that matters, as it may be comprehended (on one measure) "in the estimation of right-thinking members of society generally".[4]

[22] Such 'right-thinkers' are to be attributed neither undue critical function nor undue credulity.[5] Rather, at least so far as statements appearing in a publication are concerned, focus is on the broad impression such a person, as representative of those who would read the publication,[6] would take from reading it.[7]

[23] Except where a plaintiff pleads and proves a special meaning to be attributed to the words (an "innuendo"), and then a particularised person or class of people as understanding that special meaning, the statement's words are to be given their

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3 See Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [16.3.01] and [16.3.03].

4 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240. It may be thought such estimation only could occur if the statement was to be understood as blaming the subject for such reduced reputation.

5 *Lewis v Daily Telegraph* [1964] AC 234 (HL) at 259 and 286.

6 *McGrath v Dawkins* [2012] EWHC B3 (QB) at [50].

7 *Hayward v Thompson* [1982] QB 47 (CA) at 61.

"natural and ordinary meaning".[8] The principles by which such meaning is derived are usefully compiled in *Koutsogiannis v The Random House Group Ltd*:[9]

i) The governing principle is reasonableness.

ii) The intention of the publisher is irrelevant.

iii) The hypothetical reasonable reader is not naïve but [s/]he is not unduly suspicious. [S/h]e can read between the lines. [S/h]e can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but [s/]he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts

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8 Defamation Act 1992, s 37(2) and (3).

9 *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB) at [12], citing *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 (CA) at 175F; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (HL) at 70; *Gillick v Brook Advisory Centres* [2002] EWCA Civ 1263 at [7]; *Charman v Orion Publishing Co Ltd* [2005] EWHC 2187 (QB) at [8]–[13]; *Jeynes v News Magazines Ltd & Anor* [2008] EWCA Civ 130 at [14]; *Doyle v Smith* [2018] EWHC 2935 at [54]–[56]; *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB) at [66]; *Simpson v MGN Ltd* [2016] EWCA Civ 772, [2016] EMLR 26 at [15]; *Bukovsky v Crown Prosecution Service* [2017] EWCA Civ 1529 [2018] 4 WLR 13; *Brown v Bower* [2017] EWHC 2637, [2017] 4 WLR 197 at [10]–[16]; and *Sube v News Group Newspapers Ltd* [2018] EWHC 1234 (QB) at [20]. Similarly see *Young v Television New Zealand Ltd* [2014] NZCA 50 at [25]; and *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).

[24] If any such meaning is derogatory of its subject, the defendant may plead the defence of truth:[10]

> In proceedings for defamation, a defence of truth shall succeed if—
>
> (a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

For the latter purpose, "[i]n proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication".[11]

Discussion

[25] There is no dispute the impugned article was about Mr Joyce, and published by Fourth Estate in the NBR's print and website formats. For my principal decision is if the complained-of passages are derogatory of Mr Joyce and, if so, are true or not materially different from the truth, either in themselves or as part of the article as a whole.

—the passages' readers

[26] I must put myself in the shoes of a hypothetical reader of the NBR's print and website formats. If that is to imbue such readers with any particular characteristic,

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10 Defamation Act, s 8(3). Fourth Estate also pleaded a defence of public interest (*Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131), but formally abandoned that in advance of trial.

11 Section 8(2).

some instruction may be drawn from NBR's media kit, which claims under the heading "You can judge us by the company we keep":

> For more than 45 years the National Business Review has produced edgy, award-winning journalism. We believe in a transparent democracy and all that means. We hate the suffocating red tape of bureaucracy.
>
> We have championed private enterprise, applauded its success and paid tribute to our risk takers and innovators. We celebrate success with the NBR Rich List and its tall poppies.
>
> Our readers trust us to expose the dishonest, incompetent and reckless and act as a watchdog against those who would wield undeserved power over them. They respect we are an icon that provides news coverage our rivals find legally too risky or too complex to report.
>
> They would not be surprised to know we have never lost a defamation case in court. We have, consequently, built up a camaraderie, a bond with our readers. We know we're in good company.
>
> The best.

The kit asserts NBR's print edition is read by "36,000 rich, influential and powerful readers", and provides a foundation for those adjectives by reference to its surveyed readers' occupations and incomes. On average, 247,000 page impressions on its website are accessed from 74,000 unique New Zealand browsers each week.

[27] If the NBR's print and website readers reflect the interests of its self-depiction, it may be thought they have a marginally more jaundiced view than the general population of questionable or questioned political activities. That particularly may be the case among those who pay to read either format, as being invested in the NBR's editorial perspective. But there is no evidence the article in its website format was published behind NBR's paywall.

—the passages' context

[28] The article appeared in Matthew Hooton's "Weekly Hits" column. Fourth Estate pleads the column commented "on matters of a political nature and/or made in a political context", and "was at times hard hitting and strongly opinionated":

> The tone of the articles are exclamatory by design[,] intended to entertain readers through aggressive political critiquing of current affairs and [the] state of NZ politics.

Strikingly, no evidence was led by Fourth Estate (or Mr Scott) to support those (or other) assertions in its defence. Mr Joyce's counsel, Zane Kennedy, advised in closing Mr Joyce generally accepted their characterisations, but added "the NBR is a respectable and serious journalistic publication".

—the passages' meaning

[29] Although "defamatory meaning is to be determined exclusively by an examination of the words themselves",[12] in an interlocutory judgment in this proceeding refusing Mr Joyce's application for my separate and prior determination of meaning, I observed the test for meaning nonetheless is contextual:[13]

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

I added:[14]

> My determination of meaning requires evidence of that context (which may not be met exclusively by the NBR's admissions in its defence …). It seems inevitably caught up with … trial's determinations of truth of the imputations … . 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 … . I recognise, however, any contextual evidence is likely to be of very confined compass.

[30] Without at least some contextual evidence, I am constrained in the meaning I can give the impugned passages as being exclusively from the words used in the context of the article itself, as published by NBR in print and website formats. Yet the article begs some extraneous contextual inference.

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12 *New Zealand Magazines Ltd v Hadlee (No 2)*, above n 9, 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].

13 *Joyce v Hooton* [2019] NZHC 2761 at [13], citing *Leigh v Attorney-General*, above n 12, at [19(a)] and [19(f)], citing *New Zealand Magazines Ltd v Hadlee (No 2)*, above n 9, at 625.

14 At [14].

[31] For example, Ms Adams was Mr Joyce's successor as Minister of Communications and Information Technology. Presumably, in that position, Mr Joyce had some relationship with Chorus, which may go to explain the "subsidise his friends" passage. But, without evidence of the relationship, I am limited to the words' 'natural and ordinary' meaning of a personal relationship. I am not aware of any common knowledge of Mr Joyce's relationship with Chorus such as may enable me to take judicial notice of it.

[32] The defendants' counsel, Phil Ahern, says the 'friendship' plainly is not personal but political; it is that the government was 'friendly' with Chorus. If that was the case, then presumably the words should be 'their friends', as being at least of successive ministers. But, even then, I should need evidence of ministerial or governmental disposition towards Chorus. Again, I cannot take judicial notice of such. And any unitary disposition is undermined by Ms Adam's claimed "proxy" role, which is to imply Mr Joyce's separate and unofficial, or possibly surreptitious, interest in "his friends at Chorus".

[33] Evidence also may have assisted in giving context to the "and instead bows to blackmail by Mr Joyce" passage. As the article's concluding words, they seem a clear reference back to the article's reasons for commending Mr Bridges not "[entertain] keeping Mr Joyce in the finance role or even on the front Bench", of which the article makes gnomic reference to party officials 'fretting' "not without insight into Mr Joyce's character[,] … their campaign strategist would respond to such a slight by throwing in the towel altogether".

[34] Those reasons, under the heading "Humiliation", are a litany of Mr Joyce's contended failings in political, ministerial, and strategic roles, to the extent "[t]he National caucus will only fully reunify when the divisive Mr Joyce is out of Parliament altogether". If there was something about his performance in those roles on which to rely for his retention, a less derogatory meaning of 'blackmail' possibly could be argued, but the article diligently avoids any positive attribution to Mr Joyce, and there is no evidence of any other side to his alleged failures. Mr Joyce's own evidence scrupulously avoids any such reference, preferring simple denials of the imputations against him.

[35] I thus am confirmed in my original view:[15]

> … the reasonable reader would conclude Mr Joyce was prepared to engage in unethical (in terms of the 'friends' allegation) and otherwise improper (in terms of the 'blackmail' allegation) behaviour, in pursuit of his (rather than his party's) political objectives.

[36] I do not think any marginally greater prejudice as may be attributed to NBR's readers is sufficient to carry the passages' meaning to corruption (even if only as abuse of public office), dishonesty, or illegality. I briefly was paused by the first passage's reference to "so-called copper tax" and "subsidise" to contemplate if, as financial references, something more was to be taken from the passage.[16] But that is exactly the "over-elaborate" and "too detailed" analysis I am cautioned against making.[17] The passage's imputation of something untoward in the relationship is caught by my meaning. A more severe imputation requires over-anxious examination of the tax's contemplated workings, such as may be effective to confer subsidy on Mr Joyce's "friends".

[37] I emphasise my meanings are the passages both imputed Mr Joyce's preparedness to engage in poor conduct "in pursuit of his (rather than his party's) political objectives". They are not imputations of his poor conduct more generally. The limitation springs from the subject matter of Mr Hooton's column. Their distinction from Mr Joyce's pursuit of what may be his party's political objectives also is important; even untrue allegations of sharp party-political conduct may not be defamatory.[18] Although that is to find meanings divergent from those Mr Joyce pleads, their circumscription is less injurious than claimed by him, and I thus am free to find those lesser meanings established.[19] Nonetheless, they are meanings of sufficient seriousness, of Mr Joyce's significant and self-serving impropriety, to climb above defamation law's disregard of trivialities.[20]

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15 At [17] above.
16 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 at 237.
17 *Koutsogiannis v The Random House Group Ltd*, above n 9, at [12(iv) and (v)].
18 *Dell'Olio v Associated Newspapers Ltd* [2011] EWHC 3472 (QB) at [28].
19 *Koutsogiannis v The Random House Group Ltd*, above n 9, at [12(xiii)].
20 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 414 (QB), [2011] 1 WLR 1985 at [90]; and *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142 at [59]–[63].

—the meanings' truth

[38] In opening the defence, Mr Ahern advised Fourth Estate only relied also on the following separate passages as affording the true meaning of the article as a whole:[21]

> He turned legitimate questions about Labour's budget projections into the fiasco of his fake $11.7 billion fiscal hole.
>
> …
>
> He then demanded a lead role in the failed negotiations with Winston Peters, despite knowing the NZ First leader then suspected his involvement in leaking his superannuation details.

Nonetheless, in cross-examining Mr Joyce, Mr Ahern obtained Mr Joyce's confirmation of the confidentiality of votes cast in the National Party's leadership contest. Mr Ahern's point was, if Mr Hooton could not have known the true position, he could not have misstated it: that he would "need to know the truth to do something deliberately". That appears a direct reference to the article's passage "[m]ost satisfying for Mr Bridges, Steven Joyce mustered only four votes, excluding his own", on the truth of which Fourth Estate also pleaded reliance.

[39] None of those three passages advances the truth of the meanings I have found or affords a different truth from the article as a whole. The first, in relation to the "$11.7 billion fiscal hole", expressly is about the party's, and not Mr Joyce's distinct, political objectives. In cross-examination, Mr Joyce affirmed he asserted the existence of such a hole at a media briefing, "as the [party's] campaign chair". Mr Joyce was not cross-examined on the negotiations with Mr Peters, and no evidence was led as to Mr Peter's contended suspicions. And Mr Joyce's contended unpopularity in caucus is simply a continuation of the absence of reason for his retention, evidence of which reason is critical to give the word 'blackmail' in the context of the article anything other than a derogatory meaning.[22]

[40] The passages' imputations Mr Joyce was prepared to engage in respectively unethical and otherwise improper behaviour, in pursuit of his (rather than his party's) political objectives, are untrue. They therefore are defamatory.

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21 See [19] above.
22 See [34] above.

—the tweets' innuendo

[41] Mr Joyce pleads against Mr Scott his three tweets "were intended, and would be reasonably understood to mean" the two passages were:

> true, or not materially different from the truth;
> retracted by [Mr Hooton] for reasons other than that they were untrue;
> responsibly and properly published by [Fourth Estate].

Mr Joyce pleads the tweets "accordingly amounted to a republication of the [passages'] defamatory imputations".

[42] The pleading is of an innuendo: the tweets were "used in a defamatory sense other than [their] natural and ordinary meaning". In such circumstances, s 37(3) requires:

> [T]he plaintiff shall give particulars specifying—
> (a) the persons or class of persons to whom the defamatory meaning is alleged to be known; and
> (b) the other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations

Mr Scott informally sought those particulars, and Mr Joyce specified "the persons or class of persons … are all persons who had read the article and then subsequently read [Mr Scott's] tweets".

[43] That people had read the article and then the tweets is evident from subtweets to the tweets themselves. In response to the first tweet, a subtweet asks "[i]s this hooten (sic) again?". Other Twitter dialogue between Mr Scott and others illustrates Mr Hooton's column is notorious. On 10 May 2018, the day of Mr Scott's second impugned tweet, Mr Scott's thinly-veiled contemporaneous tweeted reference to "a disgraced lobbyist" was responded to by subtweets directly referring to "a column in a journalistic publication", "a column in a news publication", and "avoiding a repeat". And that second tweet itself is responding to Mr Price's query "[i]f Hooton is disgraced, then why did you continue to defend his column attacking Joyce?". Those are enough to establish the particulars to the degree required. I can infer, among

Mr Scott's Twitter followers, some will have read both the article and the impugned tweets.[23]

[44] Mr Joyce belatedly sought to adduce Mr Price's evidence, in part to establish at least Mr Price had read the article and the tweets. Mr Price also would testify he understood the tweets to refer to the article, and produce other relevant tweets by Mr Scott (not discovered by Mr Scott, and only made known to Mr Joyce by Mr Price in the days prior to hearing).[24] Mr Scott strenuously objected to admission of that evidence, as exceptionally late and prejudicial. The prejudice was, Mr Joyce not having called innuendo evidence (his formal pleading's deficiency suggesting his advisors had not comprehended its materiality), Mr Scott was "entitled to proceed on the basis that there was no need to rebut any such evidence". Otherwise, Mr Scott was entitled to call evidence as to what readers of the tweets "took the words to mean".

[45] It is not obvious what evidence Mr Scott may legitimately have called. Because meaning is for my determination, he could only have called evidence as to extrinsic facts. But Mr Scott's own tweets, shortly in advance of the first impugned tweet, are explicit "@MatthewHootonNZ was WAY OUT OF LINE & that's why I fired him", with references to being "horrified at the hatchet job on @stevenjoyce" by Mr Hooton, "the possible motivation behind it", and his "vicious takedown of @stevenjoyce". Given how Twitter works, those provide context for Mr Scott's followers' comprehension of the subsequent impugned tweets. Contrary to Mr Scott's comprehension there was no innuendo evidence, there was enough to raise the issue.[25] Otherwise I considered it appropriate to obtain the omitted discovery. But, consistently with the approach meaning is for my determination, I excluded Mr Price's proposed evidence he understood the tweets to refer to the article.

[46] Mr Joyce's conclusory pleading the tweets "accordingly amounted to a republication" also is strongly opposed by Mr Scott. Mr Ahern correctly submits 'republication' is a term of defamation art, with the literal meaning of repeating the

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23 *Lord McAlpine of West Green v Bercow,* above n 9, at [54].

24 Having read Mr Price's brief pre-trial in the pleadings bundle, I initially comprehended a supplementary brief was sought to be provided by Mr Price.

25 See [43] above.

defamatory words.[26] But Mr Joyce pleads the defamatory meaning to be taken from the tweets;[27] it is essentially to endorse the article's truth. Mr Scott's much-tweeted disagreement with Mr Hooton does nothing to dispute the article's substance. The greatest distance Mr Scott gives the article is he "[doesn't] necessarily agree with" it. The impugned tweets cannot be understood as Mr Scott simply relying on Mr Hooton: the first tweet expressly goes beyond such reliance to assert "[s]ources are SOLID"; and the third tweet signals Mr Scott's intention to "[subpoena] the five people he named from the shadow cabinet that would absolutely back up his statements". The meaning of those two tweets is the article is, or at least its defamatory imputations are, true, as based on 'solid' sources. As untrue, they also are defamatory of Mr Joyce, and at least to the same degree as the article.

[47] But the tweets' defamatory imputation is not the same as the article. The article's imputations are of Mr Joyce's preparedness to engage in unethical and improper conduct in pursuit of his (rather than his party's) political objectives, which is untrue and therefore defamatory. The tweets' imputation is the article's imputations were true, which they were was not, and are therefore defamatory. There is a distinction to be drawn.

[48] However, I agree with Mr Ahern there is nothing alternatively or additionally defamatory of Mr Joyce in the imputations the two passages were "retracted by [Mr Hooton] for reasons other than that they were untrue" or "responsibly and properly published by [Fourth Estate]." Even if those imputations can be drawn, they relevantly only are to imply the truth of the article. And Mr Scott's second impugned tweet, claiming to defend "freedom of speech … the integrity of the NBR", may more charitably be classed with those of his other tweets supportive of NBR's contributors (although it is a close-run thing, given Mr Price's query to which it responds.)

Relief

[49] Section 24 of the Act provides:

> **24 Declarations**

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26 Todd, above n 3, at [16.5.03].
27 See [41] above.

> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—
>
> (a) the plaintiff seeks only a declaration and costs; and
>
> (b) the court makes the declaration sought,—
>
> the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the court orders otherwise.

[50] That is all the relief Mr Joyce seeks. But Mr Ahern says no relief should be granted in relation to Mr Scott, whose joinder was unnecessary to obtain the vindication Mr Joyce seeks. In reliance on *Opai v Culpan*,[28] he says Mr Scott's joinder is an abuse of process as engaging resources to determine the claim out of all proportion to the interests at stake.

[51] Critical to the decision in *Opai* was all the vindication necessary was obtainable against one party, who bore vicarious liability for the other.[29] *Opai* relied on *Jameel v Dow Jones & Co Inc*,[30] which struck out as so disproportionate a defamation claim brought in the United Kingdom regarding an article published by the United States-based Wall Street Journal on its website, and accessed by five United Kingdom subscribers (three of whom were associated with the plaintiff).

[52] I do not see Mr Scott's joinder as disproportionate at all. As I have explained, Mr Joyce is seeking vindication not only from the article's defamatory comments, but also from Mr Scott's (first and third) tweets' endorsement of their truth.[31] Mr Joyce seeks declarations both Fourth Estate and Mr Scott are liable to him in defamation. The coincidence in time – of Mr Scott's first tweet with the NBR's replacement of the article on its website, with Mr Hooton's apology – identifies the separate defamatory nature of Mr Scott's endorsement. There can be no suggestion Fourth Estate is vicariously liable for Mr Scott's tweets, or the resource committed by Mr Scott's joinder otherwise is disproportionate to Mr Joyce's interests in being vindicated also from their innuendo.

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28 *Opai v Culpan*, above n 20.
29 At [92].
30 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.
31 At [47] above.

[53] Given my findings at [40] and [46] above, I will make the declarations sought. Solicitor and client costs will follow, as s 24 provides.

Mr Joyce's application to further amend claim

[54] Slightly less than two weeks before trial, Mr Joyce sought leave to file a second amended statement of claim.[32] As I then was on circuit (although that is not in itself good reason), the application was not brought to my attention until the next week, only a week before trial. I dismissed the application, with reasons to accompany this judgment. These are those reasons.

[55] Other than cosmetic amendment, Mr Joyce's proposed second amended claim sought to change three pleaded imputations (marked-up following): "[t]he plaintiff is, or there were serious grounds for believing that he was, a corrupt politician"; "[t]he plaintiff is prepared to engaged in unethical behaviour in pursuit of his political objectives"; and "[t]he plaintiff is ~~dishonest~~ duplicitous and unethical" – and formally to include the particulars of innuendo and omit the prayer for my further recommendation of a correction. For good reason of focused trial preparation, amendment is prohibited after the close of pleadings without leave.[33]

[56] No objection can be taken to amendment "merely bring[ing] up to date the information before the court".[34] Despite earlier refusal to amend the claim to include the particulars of innuendo, leave was not required for amendment formally to include them now. But omission of part of the prayer for relief is not 'updating'; it is to change the complexion of the case. Mr Ahern said the relief sought "focuses the scope of the court enquiry, [and] has been maintained since October 2018". I did not know what the defendants' approach may have been for trial, had they known no correction would be sought. In the event, nothing material came of its omission.

[57] I also was concerned by the proposed amendments to the pleaded imputations. The first of the proposed amendments lacked particulars of the 'serious grounds' for the belief. The first and last widened the scope of the pleaded imputations. And while

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32 See note 2 above.
33 High Court Rules 2016 ("HCR"), r 7.7(1).
34 Rule 7.7(2)(b).

the second proposed amendment was partially to echo my earlier derivation of possible meaning, it also anticipated a change of focus to the pleaded imputation. I did not know what alternative response the defendants may have to those amendments, but Mr Ahern indicated a further defence would require to be filed.

[58] To obtain leave, Mr Joyce needed to "surmount the three formidable hurdles of showing that the amendment is in the interests of justice and will not significantly prejudice defendants or cause significant delay".[35] On the first, Mr Kennedy claimed the amendments were to establish the "real controversy between the parties". But that phrase is the High Court Rules' threshold for the court's (and not the parties') amendment to pleadings.[36] It is to put the cart before the horse to claim it as justifying otherwise prohibited amendment.

[59] The proposed amendments went beyond mere clarification to change the pleaded imputations, with indeterminate impact on already delayed trial then less than a week away. The filing of a new defence is not a mere technicality, and the prospect of any intermediate step (such as a demand for particulars) being required increased the prospect of significant delay.

Result

[60] I declare Fourth Estate and Mr Scott separately each are liable to Mr Joyce in defamation. I award Mr Joyce solicitor and client costs against separately each Fourth Estate and Mr Scott.

—Jagose J

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35 *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA) at 385. The explanation in *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR7.7.01] "[t]he test for an amendment to pleadings after the close of pleadings date is whether it is necessary to determine the real controversy between the parties and does not result in injustice to other parties or cause significant delay" is not consistent with the Court of Appeal's judgment, which only allows "the Judge here was entitled to treat the amendments as more in the category of those clarifying issues in dispute than in the category of those introducing distinct matters for the first time" (at 385).

36 HCR 1.9.

SCHEDULE: Text of article

Joyce sacking first test of Bridges' leadership

National MPs have finally been allowed to express what they really think of the party's unelected strategist

New National leader Simon Bridges has had a solid start.

In his first 24 hours, the new leader rattled the prime minister on the floor of Parliament and raised questions about the competence of the MBIE officials administering the coalition's provincial growth fund.

Earlier, after reading out an unfortunately humdrum victory speech, Mr Bridges went off the cuff to answer the media's questions with aplomb. On the matter that most preoccupied the insular Wellington press gallery – his vote five years ago against same-sex marriage – Mr Bridges did not renounce his social conservatism but indicated he is reconciled to the status quo.

Mr Bridges then conducted interviews with all major media outlets with the light touch and polish of a John Key or Jacinda Ardern. He unmistakably signalled policy modernisation and conceded ground in areas where the previous government clearly failed, including housing and the environment.

Looking to the inevitable magazine spreads, Mr Bridges and his wife Natalie are as good looking and media savvy as Ms Ardern and Clarke Gayford. Their three young children are as cute as any new-born. National made the right choice under the circumstances.

Humiliation

In the leadership race, Amy Adams turned out to be Mr Bridges' only credible opponent. As predicted here a week ago, right-wing favourite Judith Collins was trounced. Mark Mitchell didn't even stand. Most satisfying for Mr Bridges, Steven Joyce mustered only four votes, excluding his own.

This was the first time Mr Joyce has stood for any elected office, avoiding even National's formal list selection process in 2008. His utter humiliation came as a complete surprise to him, being the first time his colleagues have felt safe to express what they think of him. The National caucus will only fully reunify when the divisive Mr Joyce is out of Parliament altogether.

For nine years, Mr Joyce has stood before his colleagues claiming to be the great political genius and policy guru while belittling all their ideas. They despise him for it.

His legacy as transport minister is Auckland's traffic chaos, after he fought against public transport initiatives while interfering in the rollout of the Hop card. The rude and abusive way Mr Joyce dealt with officials and local people alike following the Rena disaster shocked the local MP, one Simon Bridges.

As economic development minister, Mr Joyce's main legacy is his creation of MBIE, which acts as a brake on business, innovation and employment; his highly suspect all-

of-government procurement system; and his out-of-control corporate welfare machine. Using Ms Adams as a proxy, he tried and failed to introduce the so-called copper tax to subsidise his friends at Chorus. He turned the good-news story of Auckland's new convention centre into a political debacle, including an adverse Auditor-General report.

As finance minister, Mr Joyce's legacy was a fixation on a post-election tax-cut package at the expense of infrastructure and social spending, widely credited with losing National a crucial couple of points in the polls. He turned legitimate questions about Labour's budget projections into the fiasco of his fake $11.7 billion fiscal hole. He then demanded a lead role in the failed negotiations with Winston Peters, despite knowing the NZ First leader then suspected his involvement in leaking his superannuation details.

As a long-term party strategist, Mr Joyce's record is no better. He is responsible for National's 2003 constitution which removed democracy from the party apparatus. He has lost every election and by-election he has run, except the three with the politically unsurpassable Mr Key as his candidate – a detail Mr Joyce seems to regard as irrelevant. His approach to political management is simply to reflect back to the most ignorant voters their own views. It appears never to have occurred to him that the purpose of political strategy is to advance a policy agenda of one kind or another. If there really is an example of Mr Joyce's techniques rather than Mr Key's talents materially improving the party's fortunes, the caucus couldn't recall it when he sought to be their leader.

Mettle

Mr Bridges has promised change in National's line up. With Paula Bennett confirmed as deputy leader and Gerry Brownlee expecting reward for his strong support during the leadership race, Mr Bridges will fail quickly if he entertains keeping Mr Joyce in the finance role or even on the front bench. At most, he should present Mr Joyce with the same offer made in 2006 by Mr Key to Don Brash: tertiary education, mid-way along the second row.

Party president Peter Goodfellow and his fellow board members fret – not without insight into Mr Joyce's character – that their campaign strategist would respond to such a slight by throwing in the towel altogether.

So be it. If National's board has left the party so vulnerable that it is entirely dependent on one man to manage its core business of running election campaigns, that is an utter failure of governance and all of them should resign.

Mr Bridges has exceeded expectations in his first days as leader and already has the unequivocal support of many of the MPs who backed Ms Adams. He has an outside chance of limiting Ms Ardern to a single term. It will be a terrible shame if he lacks the mettle that Mr Key showed in so brutally despatching Dr Brash and instead bows to blackmail by Mr Joyce.