IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-0801
[2022] NZHC 3221

UNDER	The Defamation Act 1992
BETWEEN	JOHN KENYON CLARKE First Plaintiff
	CHARLOTTE MARIE CLARKE Second Plaintiff
AND	FOURTH ESTATE HOLDINGS (2012) LIMITED First Defendant
	MARIA SLADE Second Defendant

Hearing:	20 July 2022
Appearances:	D Salmon KC and D Nilsson for the plaintiffs L A O'Gorman KC and A L Harlowe for the defendants
Judgment:	2 December 2022

JUDGMENT OF ROBINSON J

This judgment was delivered by me on 2 December 2022 at 2:00pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Lee Salmon Long, Auckland
Couch Harlowe Kovacevich, Auckland

Counsel:
D Salmon KC, Auckland
L A O'Gorman KC, Auckland

Introduction

The Parties

[1] The plaintiffs, Mr and Mrs Clarke, are the founders and beneficial co-owners of the Du Val Group. They are also settlors and trustees of the Du Val Foundation, a charitable trust registered under the Charities Act 2015. The Du Val Group invests in and develops property. The Du Val Foundation does not.

[2] The first defendant is the publisher of the National Business Review (NBR). The second defendant is a senior NBR journalist who, amongst other things, contributes to a regular NBR feature called "Shoeshine".

The Article

[3] On 19 April 2021 the first defendant published a "Shoeshine" article on the NBR website titled "Unholy advertising of unregulated property offers" (Article). The second defendant wrote the Article.

[4] Much of the Article concerns the promotion, by the Du Val Group and others, of unregulated property investment opportunities. In a single sentence the Article also refers to the Du Val Foundation:

> Then there is the Du Val Foundation, a charitable trust which raised $26,000 in 2019 (the last year for which accounts are available), incurred $18,000 in expenses, and gave away just $2,300.

The Proceedings

[5] In their Statement of Claim dated 30 April 2021 the plaintiffs allege that the Article is false and defamatory of them. They seek a declaration to that effect, and solicitor–client costs. Amongst other things the plaintiffs allege that in its natural and ordinary meaning, the sentence set out at [4] above, when read in the context of the Article as a whole, including its tone, meant and was intended to mean that:

(a) there are *reasons to suspect* that the Clarkes operated the Du Val Foundation *unlawfully* by spending the vast majority of the funds

collected on unspecified expenses unconnected to its purported charitable purposes;

(b) there are *reasons to investigate* whether the Clarkes operated the Du Val Foundation *unlawfully* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes;

(c) there are *reasons to suspect* that the Clarkes operated the Du Val Foundation *improperly or unethically* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes; and

(d) there are reasons to investigate whether the Clarkes operated the Du Val Foundation *improperly or unethically* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(my emphasis)

The separate question

[6] The defendants have not filed a statement of defence. But in a judgment dated 1 April 2022, Associate Judge Gardiner granted the defendants' application for a separate hearing under r 10.15 of the High Court Rules 2016 to determine whether the sentence is capable of any of the defamatory meanings alleged.[1]

The Article

[7] The Article is titled "Unholy advertising of unregulated property offers". A subheading declares: "Near–zero interest rates are pushing ordinary investors towards high-risk property funds".

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1 *Clarke v Fourth Estate Holdings (2012) Ltd* [2022] NZHC 649 at [71].

[8] Between these headings and the text of the Article is a cartoon picture above a descriptor "Property developers are able to market to 'eligible' investors". The cartoon depicts a man sitting in the back of a motor vehicle handing a document through the wound-down window to one of two people standing next to the vehicle. Those two people are each wearing T-shirts, one of which says "Mum" and the other of which says "Dad". The person in the vehicle is handing the document to the person wearing the T-shirt that says "Mum" while asking "Want to feel like a 'real' investor?".

[9] The text of the article begins with an observation about Mr Clarke: "Kenyon Clarke, founder of the South Auckland property specialist Du Val Group, is not backward in coming forward." The article then refers to Mr Clarke's website on which he is said to "proclaim" that he lost his $120 million dollar business, together with his home and all his possessions twelve years ago when "the Halifax Bank of Scotland (sic) went bust". The Article refers to "claims" by Mr Clarke that he and his wife were forced to rely on government assistance, with Mrs Clarke washing her hair with soap and the pair of them eating 50c lunches to get by.

[10] The Article then moves "[F]ast forward to 2021" and reports that "according to Clarke the couple now presides over a $750m property development and investment business…". The Article reports that Mr Clarke believes in ordering a new luxury car to celebrate the launch of each project. There is reference to Mr Clarke spending $1m on a Rolls-Royce, and to having written on Facebook "Hate is the steel that sharpens my blade" alongside a picture of the vehicle. This is reported to have been in reply "to the 'haters' who derided him for being flashy."

Gone coy

[11] The Article then has a heading "Gone coy". Underneath that heading the Article reports it to be "Intriguing, then, that Du Val group was unwilling to talk to Shoeshine when she inquired about its investment offers, a range of equity securities open only to 'wholesale' or 'eligible' investors." Under this heading the Article goes on to record that:

(a) "After some prompting" Du Val group sent some information about two of its offers of securities, but that "[i]t is a shame Du Val has suddenly

gone coy, because Shoeshine would like to know more about a third offer...";

(b) "She is additionally curious about a press release sent to a comrade announcing Du Val PropTech…"; and

(c) "Shoeshine has so many questions, such as why a Du Val development of townhouses in Mangere… rates no mention on its main website."

[12] The Article then concludes the "Gone coy" with the single sentence that is the subject of this proceeding. Again, that sentence is:

> Then there is the Du Val Foundation, a charitable entity which raised $26,000 in 2019 (the last year for which accounts are available), incurred $18,000 in expenses, and gave away just $2300.

Unregulated offers

[13] The Article next contains a heading "Unregulated offers". It points out that "Du Val is far from the only group promoting unregulated property investments with glistening returns…". It quotes the Financial Markets Authority (FMA) as "planning to explore the industry's use of the wholesale exemption, and the framework around regulation of property and agricultural syndicates more generally, including how risks are disclosed".

[14] The Article refers to the general manager and co-owner of another organisation, Williams Corporation, who "[i]n contrast to Du Val" was "more than happy to chat to Shoeshine when she rang to ask about its investment products".

[15] The Article refers to other property funds that are also registered financial service providers (FSPs). The author comments that: "Perversely, Du Val Group does have an FSP… But this is not the one offering any of its property investment products."

'Wholesale' and 'eligible'

[16] The Article then discusses the nature of the wholesale and eligible investor exemptions with reference to the Financial Markets Conduct Act 2013. The Article

suggests that it is easier than it should be for people to qualify as "eligible investors", thereby exempting them from receiving the same level of information that an issuer of regulated financial products must provide.

[17] The author of the Article observes with reference to her own experience that marketers of property investment funds advertise electronically and through social media, including to people who are neither wholesale nor eligible investors. She says "there is an unholy amount of direct consumer advertising of these unregulated and high-risk products going on." The Article concludes:

> While the likes of Williams Corporation may be upfront and transparent about their structures and aims, others in the market are far more opaque.
>
> In the current dismally low interest rate environment, there is a clear and present danger that ordinary Mums and Dads blinded by glittering returns will be sucked into investments too rich and too risky for their blood.

Legal principles

[18] The relevant legal principles are well established. Whether a statement is *capable* of bearing the pleaded defamatory meanings is a matter of law to be determined by a judge, in the absence of any jury.[2] Whether the statement *in fact* bears those imputations is a question of fact to be determined by the judge or jury at trial.

[19] Defamatory imputations involving allegations of wrongdoing are often divided in to three "tiers". "Tier one" meanings impute or involve allegations of actual misconduct. "Tier two" meanings involve allegations that there are reasons to suspect that the plaintiff engaged in misconduct. "Tier three" meanings involve allegations that there are grounds for investigating whether the plaintiff has engaged in misconduct.[3] This tripartite classification provides a convenient general description of different forms of meaning, but it must not be allowed to dictate meaning.[4]

[20] The four defamatory meanings alleged by the plaintiffs set out at [5] above are "tier two" and "tier three" meanings. The plaintiffs do not allege that the Article means

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2 Defamation Act 1992, s 36.
3 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC) at [15].
4 *APN New Zealand Ltd v Simunovich Fisheries Ltd* at [16].

they *in fact* operated their charitable foundation unlawfully, or improperly or unethically.

[21] In *New Zealand Magazines Ltd v Hadlee (No 2)* Blanchard J set out the legal test for determining whether words are capable of bearing defamatory meanings alleged:[5]

> (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
>
> (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
>
> (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
>
> (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
>
> (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
>
> (f) 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 add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and take different meanings from them: …

[22] More recently in *Fourth Estate Holdings (2012) Limited v Joyce* the Court of Appeal confirmed that these principles apply when determining whether words are capable of bearing the alleged meanings.[6]

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5 *New Zealand Magazines Ltd v Hadlee (No2)* [2005] NZAR 621 (CA) at 625.

6 *Fourth Estate Holdings (2012) Limited v Joyce* [2020] ZNCA 479, [2021] 2 NZLR 758. The appeal followed a substantive trial before a Judge alone and was allowed "on the ground that the passages do not convey the relevant defamatory imputations"; at [8], [76].

[23] The notional reasonable person has been said to be fair-minded, not avid for scandal, not unduly suspicious and not prone to fasten on to one derogatory meaning when other innocent or at least less serious meanings could apply.[7]

[24] The impression an ordinary person might carry away depends not just on the words of the article, but also on its tone.[8] 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".[9]

[25] The Federal Court of Australia has recently confirmed that the ordinary reasonable person in that jurisdiction shares the same characteristics. In *Nassif v Seven Network (Operations) Ltd* Abraham J held:[10]

> The hypothetical individual is a person with various characteristics, is of fair to average intelligence, experience and education, and is taken to be fair-minded and neither perverse, morbid nor suspicious of mind, nor "avid for scandal": *Rush* at [75]. The individual "is said not to be a lawyer who examines the publication overzealously, but rather someone who views the publication casually and is prone to a degree of 'loose thinking'". The ordinary reasonable reader also apparently does not live in an "ivory tower" but can and does "read between the lines" in light of their general knowledge and experience of worldly affairs. While they do not search for hidden meanings or adopt strained or forced interpretations, they nevertheless draw implications, especially derogatory implications, more freely than a lawyer would. The ordinary reasonable person is taken to have read the entire publication and considered the context as a whole, and they take into account emphasis that may be given by conspicuous headlines or captions: *Rush* at [77].[11]

The significance of pleaded meanings

[26] Counsel for the defendants, Ms O'Gorman KC, submits that if the matter proceeds to trial the plaintiffs would need to establish that the words mean what the plaintiffs allege they mean. It would be insufficient for the plaintiffs to establish a

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7 *New Zealand Magazines Ltd v Hadlee (No2)* [2005] NZAR 621 (CA) at 627, citing *Lewis v Daily Telegraph Limited* [1964] AC 234 (HL) at 284–285.

8 *Cato v Manaia Media Limited* [2019] NZCA 621 at [11].

9 At [11], citing *Lewis v Daily Telegraph Limited* [19664] AC 234 (HL) at 285 per Lord Devlin.

10 *Nassif v Seven Network (Operations) Ltd* [2021] FCA 1286. At [81] citing *Rush v Nationwide News Pty Ltd (No7)* (2019) FCA 496.

11 The facts of *Nassif* bare some similarity to the facts of this case. However, like *Joyce* the judgment followed a substantive trial and was not dealing purely with the threshold question as to capability of meaning. Nevertheless, this statement of principle is helpful.

different meaning to that which is alleged, even if that meaning is also defamatory. Counsel refers to *Television New Zealand Limited v Haines*:[12]

> If the meaning which is alleged, or something not materially dissimilar, is not established, then the plaintiff loses its case. It is only when that meaning is established that the defendant needs to respond to it, but not to some other issue which might have been complained about but has not been the subject of complaint.

[27] Similarly, in *Broadcasting Corp of New Zealand v Crush* the Court of Appeal held that:[13]

> As we see it, [the jury] cannot be entitled to find for the plaintiff on a basis which he has disclaimed or never put forward and which the defendant has not been called upon to meet. If the plaintiff has nailed his colours to the mast as to the meaning of which he complains, it does not seem rational to suppose that the jury can legitimately give a verdict for him on finding some different and less serious meaning.

Are the words capable of the alleged defamatory meanings?

Defendants' submissions

[28] Ms O'Gorman submits that the sentence is not capable of any of the defamatory meanings alleged. She says the sentence needs to be read in the full context of the Article. She submits that the *NBR* is a respectable and serious journalistic publication containing news and opinion pieces of interest to New Zealand's business community.[14] Ms O'Gorman submits further that the tone of articles in Shoeshine is exclamatory by design, intended to entertain readers through aggressive critiquing of the current social, business and legal state of affairs of significance to New Zealand's business community. Counsel points out that the Article was only available to readers who paid an annual $449 subscription fee.

[29] As for its content, counsel submits that the Article is not a criticism of any party, and does not allege any impropriety, unethical or unlawful conduct by anybody. Instead, counsel describes the Article as an unbiased social commentary questioning the state of property investment structures in New Zealand and the relative ease with

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12 *Television New Zealand Limited v Haines* [2006] 2 NZLR 433 (CA) at [62].
13 *Broadcasting Corp of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 239-240.
14 Citing *Joyce v Hooton* [2019] NZHC 3356 at [28].

which ordinary people may qualify as "wholesale" or "eligible" investors. She says that if there is any criticism in the Article it is only of the current regulatory framework that applies those offering property investment products to "Mum and Dad" investors.

[30] Ms O'Gorman points out that all four of the alleged meanings are that "… the plaintiffs operated their charitable foundation… by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes". Counsel submits there is nothing in the Article to suggest that the $18,000 of expenses are unconnected to the Du Val Foundation's charitable purposes; nor that they are suspiciously "unspecified".

[31] Moreover, counsel submits that any such expenditure would amount to misappropriation and would necessarily amount to a breach of the Charities Act 2005 justifying a complaint to Charities Services. As such, counsel submits that the distinction in the plaintiffs pleaded meanings between conduct which may be "unlawful" and that which may be "improper or unethical" is, in this context, a distinction without a difference. All four of the meanings alleged by the plaintiffs involve misappropriation and therefore unlawfulness.

[32] Counsel submits the reference to $18,000 of expenses does not in any way suggest misappropriation, but simply advises the reader that these expenses account for much of the difference between the amount the Du Val Foundation has raised ($26,000) and the amount it has given away ($2,300). This does not suggest anything unlawful, improper or unethical about a charitable foundation donation of "just $2,300". In this regard counsel submits that an ordinary reasonable reader would understand the general concepts of charities raising funds and incurring expenses as part of their operations.

[33] Ms O'Gorman submits that any criticism the ordinary reader could infer is that the gift of "just $2,300" is low in comparison to the wealth that Mr Clarke is so proud of having achieved. She says there is no suggestion (and nor could there be) that Mr and Mrs Clarke's lavish lifestyle has been funded by the $18,000 of expenses paid out by the Du Val Foundation.

[34] For these reasons counsel submits the plaintiffs are clutching at strained or forced interpretations of the sentence, but that it is incapable of the defamatory meanings alleged.

[35] In terms of the alleged meanings themselves, counsel submits that the following words have the following meanings:

(a) **Unlawfully:** Counsel suggests that "unlawfully" means contrary to the law, prohibited by law, or illegal (encompassing both criminal conduct and also civil wrongs).[15] Counsel submits that this would essentially amount to an allegation that the Clarkes had broken law by spending the vast majority of the funds collected on unspecified expenses unconnected to the foundation's purported charitable purpose.

(b) **Improperly or Unethically:** Counsel submits that the meaning of "improper" depends on context, but generally means (particularly when defamation is alleged) to have operated in a way not in accordance with accepted standards of conduct or duties.[16] Counsel submits that "unethically" means to have operated in a way that is not ethical, or inconsistent with moral beliefs. In this context, and with the two words pleaded together, both words suggest acting in a way that would provide grounds for complaining to charities services (the regulator) or perhaps in a way inconsistent with the ethical standards set by private sector codes of conduct for charities.[17] In essence, this amounts to the allegation of misappropriation of funds, such as to fund the Clarkes' lavish lifestyle.

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15 *New South Wales v McMaster* [2015] NSWCA 228, [2016] 328 ALR 309 at [202].

16 See *Stroud's Judicial Dictionary of Words and Phrases* (10th Ed, Thomson Reuters, London 2000) and Peter Spiller *New Zealand Law Dictionary* (10th Ed, LexisNexis Wellington, 2022) re "Improper Conduct".

17 Counsel refers to an article on the Citizens Advice Bureau website which says that: "If you think a charity has behaved unethically or illegally, you can contact Charities Services". That page on the regulator's website gives examples of what the regulator may investigate, including whether a charity has been "involved in unlawful or corrupt use of charitable funds", "set up for illegal or improper purposes", "used to abuse tax laws", "used for significant personal profit or gain", "not reporting accurately and consistently with the requirements in the Charities Act", or "not entitled to be registered under the Charities Act". Counsel also refers to the examination part contained in s 50 of the Charities Act 2005.

(c) **Foundation's purported charitable purpose:** Counsel submits that "Charitable Purpose" is defined in s 5 of the Charities Act 2005. It "includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community". A charity's purpose is published and available to be searched on New Zealand Charities Register.

(d) **Unconnected:** Counsel submits that "unconnected" in this context would mean outside the proper scope of Du Val Foundation's operations, given its registered charitable purposes. Again, counsel submits this is an allegation of misappropriation of funds.

Discussion

[36] To assess whether the sentence, read in the context of the Article, is *capable* of any of the meanings alleged I need to consider the meaning(s) that the ordinary, reasonable person would, as a matter of impression, carry away in his or her head after reading the Article. An ordinary, reasonable person is neither a lawyer nor a linguist. They will read between the lines more readily than a lawyer will imply terms. Literal meanings are not determinative. Tone is important.

[37] I do not consider it is relevant for present purposes that the Article was available only to readers with an online NBR subscription. Evidence of publication and about NBR's online subscribers may be relevant to other issues at trial, but not to the preliminary legal question about what the Article is capable of meaning. The ordinary, reasonable reader is not to be deemed to be an online NBR subscriber.

[38] I accept Mr Salmon KC's submission for the plaintiffs that the tone of the Article is gossipy and highly suspicious. It begins by positing Mr Clarke as aggressive and something of a braggart about his own financial success. By way of contrast Mr Clarke is reported to be coy when asked about Du Val Group's investment offers of equity securities to "wholesale" or "eligible" investors.

[39] Under the heading "Gone coy" (and immediately above the impugned sentence) the Article reports that Du Val Group was "unwilling to talk" about its

investment offers, which the author finds "intriguing". She says "it is a shame Du Val has suddenly gone coy, because Shoeshine would like to know more…". The author is "additionally curious" about a press release that was "strangely issued" by a Florida PR agency. She has "so many questions". An ordinary, reasonable reader could well be left with the impression that the Article has reason to be suspicious and to investigate.

[40] This all leads to the impugned sentence. As noted, this sentence is the first and only reference to Du Val Foundation, which is not involved in property investment. However, in the context of the Article as a whole with its highly suspicious tone I am satisfied that the sentence is capable of leaving the ordinary and reasonable reader with the impression that the author has the same intrigue, curiosity and unanswered questions about the Du Val Foundation that she has about the Du Val Group. In particular, intrigue, curiosity and unanswered questions about how they each deal with money. The linking words at the beginning of the sentence - *"Then there is the Du Val Foundation…"* could reinforce that connection.

[41] Ms O'Gorman submits that even if the tone of the Article does invite suspicion, there is nothing in the Article to suggest that the Du Val Foundation's expenses are suspiciously "unspecified", or otherwise "unconnected to its purported charitable purposes". She says that in light of the $18,000 expenses relative to the $26,000 raised, there is nothing unlawful, improper or unethical about giving away just $2,300. She says that an ordinary reasonable reader will understand the general concept of charities raising funds and incurring expenses as part of their operations.

[42] I do not consider that the financial operations of charitable entities are matters about which "any intelligent… reader may be expected to know".[18] In *Cato v Manaia* the Court of Appeal held that the High Court was wrong to attribute to ordinary, reasonable readers knowledge that lawyers are bound to act on a client's instructions. The Court of Appeal held that this may well be known to members of the legal profession, but the Court could not assume it would also be known to ordinary

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[18] *Fox v Boulter* [2013] EWHC 1435 (QB) at [16], cited in *Cato v Manaia Media Ltd* [2019] NZCA 621 at [28].

readers.[19] Similarly, I do not consider it could be assumed that ordinary readers would know about the proper financial operation of charitable foundations. Ordinary readers may not be accountants any more than they are lawyers.

[43] I am satisfied that the sentence is capable of leaving the ordinary, reasonable reader with the impression that the author's curiosity and unanswered questions – her suspicions and wish to investigate – relate to the Du Val Foundation's deduction of $18,000 of expenses. The sentence notes that "just $2,300" of $26,000 has been given away. This is capable of leaving the ordinary reader with the impression that more should have been given away, but because of something suspicious about the deduction of expenses it was not.

[44] Finally, I am not persuaded by the defendants' argument that all pleaded meanings essentially involve the unlawful misappropriation of the Du Val Foundation's funds; but that there is no suggestion of that in the Article. As noted, the pleaded meanings are not that the plaintiffs in fact engaged in the conduct described, but that there are reasons to suspect or investigate whether they did so. In any event, I accept Mr Salmon's submission that the argument that all pleaded meanings conflate into unlawfulness requires too lawyerly and fine-grained an analysis, at this stage. The question for me concerns the impression an ordinary, reasonable reader would carry away in his or her head after reading the Article.

[45] For these reasons I am satisfied that the sentence in the Article is capable of the defamatory meanings alleged: namely that there are reasons to suspect or investigate whether the plaintiffs operated the Du Val Foundation unlawfully, or improperly or unethically, by spending the vast majority of funds collected on unspecified expenses unconnected to its charitable purposes. Whether or not the sentence actually means what the plaintiffs allege it to mean is a matter for another day.

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19 *Cato v Manaia Media Ltd* [2019] NZCA 621 at [27] – [28].

Result

[46] The answer to the preliminary question is that the sentence is capable of each of the meanings set out at paragraphs [71] (a)-(d) of Associate Judge Gardiner's judgment dated 1 April 2022.

Costs

[47] The plaintiffs are entitled to costs. I anticipate the parties will be able to agree on this but if not counsel for the plaintiffs should file a memorandum within 10 working days. Counsel for the defendants should respond within 5 working days. Memoranda should be less than five pages. I will deal with the matter on the papers unless I require further assistance.

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Robinson J