IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-004-1422
[2023] NZHC 1566

UNDER	the Defamation Act 1992
IN THE MATTER OF	the Defendant's Facebook statements
BETWEEN	GUWINDER SINGH BAINS Plaintiff
AND	HARNEK SINGH Defendant

Hearing:	24 May 2023
Appearances:	A Romanos (via VMR) for the Plaintiff R K P Stewart for the Defendant
Judgment:	23 June 2023

JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR
Application for leave to appeal the interlocutory judgment

This judgment was delivered by me on ***23 June 2023*** *at* ***3:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Langford Law (J A Langford), Wellington, for the Plaintiff
Rice Craig (Neville Woods), Papakura, for the Defendant

Counsel:
P A McKnight/A J Romanos, Wellington, for the Plaintiff
Robert Stewart, Shortland Chambers, Auckland, for the Defendant

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[1] Mr Bains has brought defamation proceedings against Mr Singh. Mr Bains brought an application for orders striking out Mr Singh's affirmative defences of honest opinion and qualified privilege.

[2] On 28 February 2023, the Court delivered a judgment dismissing Mr Bain's strike-out application (the **Judgment**)[1] and Mr Bains has filed an application for leave to appeal the judgment to the Court of Appeal.

[3] The following submissions have been filed in respect of the application:

(a) submissions in support of the application filed by Mr Romanos, dated 11 May 2023;

(b) submissions in opposition to the application filed by Mr Stewart, dated 18 May 2023;

(c) reply submissions filed by Mr Romanos, dated 22 May 2023.

Background

[4] Mr Singh made posts on his personal Facebook page concerning Mr Bains. Four posts are the subject of the defamation proceedings brought by Mr Bains as follows:

(a) The first post (**Publication 1**) is a republication of a Facebook post made by Judge Saab. Mr Saab's post refers to Mr Bains having been punched in the eye for saying he wanted to rape Mr Saab's partner (the **rape post**).

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1 *Bains v Singh* [2023] NZHC 332.

(b) The second post (**Publication 2**) appears to be a poem, to which a photograph of Mr Bains is appended. Mr Bains's interpretation of that post is that it suggests Mr Bains is corrupt, that he has bought his good reputation, and that he is depraved and has misconducted himself sexually.

(c) The third post (**Publication 3**), according to Mr Bains's interpretation, again suggests Mr Bains is corrupt and that he has misconducted himself sexually.

(d) The fourth post (**Publication 4**), according to Mr Bains's interpretation, is to a similar effect as Publications 2 and 3.

[5] Mr Singh admits publishing the Publications and that the Publications concerned Mr Bains, but he has raised three affirmative defences: truth, honest opinion and qualified privilege.

[6] Mr Bains applied to strike out the second and third of these affirmative defences. The result of the Judgment was that his application was dismissed; and he filed an application for leave to appeal dated 13 March 2023.

Legal principles

[7] The principle relating to when leave to appeal should be given are well settled in the decision of the Court of Appeal in *Greendrake v The District Court of New Zealand*[2] where the Court set out the following considerations, citing the decision of Fitzgerald J in *Finewood Upholstery Limited v Vaughan*:[3]

(a) a high threshold exists;

(b) the applicant must identify an arguable error of law or fact;

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2 *Greendrake v The District Court of New Zealand* [2020] NZCA 122.
3 *Finewood Upholstery Limited v Vaughan* [2017] NZHC 1679 at [13].

(c) the alleged error should be of general or public important, warranting determination or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value;

(d) the circumstances must warrant incurring further delay; and

(e) the ultimate question is whether the interests of justice are served by granting leave.

[8] Fitzgerald J in the *Finewood Upholstery* case characterised the requirement of leave as a "filtering mechanism" in respect of which the Court will "need to stand back and assess, in a pragmatic and realistic way, whether the interests of justice are served by granting leave to appeal".[4]

Mr Bains' submissions

[9] Mr Romanos, for Mr Bains, submits that:

(a) the draft notice of appeal identifies several errors that are at least arguable;

(b) the errors are important, both in terms of precedential value and to the plaintiff in the instant case;

(c) the circumstances warrant the delay of an appeal; and

(d) the interests of justice are served by granting leave.

[10] Mr Romanos then addresses each of these criteria.

Honest opinion – Publication 1

[11] Mr Romanos raises five grounds of appeal in relation to Publication 1.

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4 Above n 3 at [14].

First ground

[12] The first ground is that translational differences between the parties should not have weighed in favour of denying strike-out. Mr Romanos submits that the defence of honest opinion at the strike-out stage could only be considered on the legal assumptions that, at trial, the plaintiff's translation would be accepted and the meanings would be upheld. He also submits there were no material differences between the parties' translations bearing on the relevant meaning at issue.

[13] However, this issue has been superseded because, as stated at [9] of Mr Bains's reply submissions dated 22 May 2023, Mr Bains has filed an amended reply (pleading) whereby Mr Singh's translations are admitted. I will therefore not consider this issue further in this judgment.

Second ground

[14] The second ground advanced by Mr Bains for appeal is that the Court incorrectly enquired whether "the publication" was capable of being read as an expression of opinion, rather than properly determining whether the "pleaded meaning" was capable of being read as an expression of opinion.

[15] Mr Romanos submits that this was a key contested issue between the parties on the applicable law, with the parties making submissions as follows:

(a) Mr Bains submitted that the Court's task was to read each publication in full, consider the words complained of in the light of the pleaded meanings to which an honest opinion defence was raised, and determine whether such meaning was capable of being understood by readers as an expression of opinion.

(b) By contrast, Mr Singh submitted that a correct enquiry is whether the words were capable of being understood as expressions of opinion, not meanings pleaded by Mr Bains. Mr Singh's submissions were to the effect that it is clear that the task for the Court is to review the words

used by each publication and determine whether those words are capable of amounting to expressions of opinion.

[16] Mr Romanos submits that in *Television New Zealand Ltd v Haines*,[5] the Court made it clear that the relevant inquiry is in respect of the pleaded meanings (also called "imputations") and Mr Singh's approach on this point was clearly wrong as the law is settled.

[17] Mr Stewart, on the other hand submits that the Court of Appeal in *Haines* said it was not persuaded that this dichotomy[6] encapsulated the real issue and accordingly it is not correct to say that the Judge in the first instance must **only** consider the pleaded imputations or meanings to determine whether they are capable of being opinion because the imputations are conveyed through the words used by the publication. He submits the Court of Appeal recognised this by saying the tribunal of fact needs to look at "the publication as a whole not just the words in isolation, devoid of the imputations". He submits that accordingly it was not an error for the Court to refer to the publication as capable of being read as an expression of opinion and the publication is a reference to both the words used by the publication as a whole and the meanings it is alleged to convey.

[18] My view on this is that the Judgment followed the approach in *Haines* of looking at the publication as a whole, as referred to by the Court of Appeal in the *Haines* decision.

[19] In conclusion on this point, it is my view that the preferred position is that set out above in the *Haines* decision as argued by Mr Stewart, and therefore Mr Singh's arguments are not untenable and accordingly a strike-out is not justified on this ground.

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5 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [89]-[92].

6 That is, whether the pleaded meaning, as opposed to the actual words used in the publication, can be opinion for the purposes of the defence of honest opinion -*Haines* at [87].

Third ground

[20] The third ground for appeal is that because of its error in relation to considering the "publication" rather than pleaded meanings, the Court did not undertake the relevant enquiry to determine whether the pleaded meanings were capable of being read as an expression of opinion.

[21] In answer to this ground, my view is that the Court took the view that the distinction between the statements of fact and opinion (comment)is not an easy one, and Publication 1 was capable of being read as an expression of opinion. Accordingly, Mr Singh's arguments were not untenable and strike-out was not justified on this ground.

Fourth ground

[22] The fourth Mr Romanos puts forward as a basis for the appeal is that the Court, having not engaged with the relevant inquiry, did not consider whether any of Mr Singh's pleaded publication facts were capable of supporting the pleaded meaning of "corruption". He submits that even if the Court had found this meaning to have been capable, on presentation alone, to have the appearance of a prima facie expression of opinion, the Court did not identify any pleaded publication fact by which readers could comprehend the meaning as merely an expression of Mr Singh's opinion. He submits there was no reference-point in the publication to the nature of Mr Bains's alleged corruption – no mention of Mr Bains' philanthropy to which, taking Mr Singh's case at its highest, readers may have somehow joined the dots.

[23] Mr Stewart submits that the absence of express reference to particular publication facts in the Judgment is not an error. He submits the Court found there was a sufficient indication of facts by Mr Singh to infer an opinion.

[24] My view on this issue is that the finding of the Judgment at [51] that arguably there is sufficient published facts to cause the reader to infer that the publication was capable of being read as a statement of opinion was based on the publication facts set out at [48] of the Judgment although not expressly stated at [51].

Fifth ground

[25] The fifth ground for the basis of the appeal advanced by Mr Romanos, is that the Court found it was "arguable there was sufficient indication of facts to cause the reader to infer the opinion that Mr Bains is not what he seems". Mr Romanos submits that this was a conspicuous error, as the Court applied its own meaning which was materially less injurious meaning to that pleaded by Mr Bains. Mr Romanos refers to the decision in *Fourth Estate Holdings (2012) Ltd v Joyce*,[7] and he submits it is not settled whether a trial Judge may uphold an alternative meaning, even where the difference with the plaintiff's meaning is immaterial. He submits that whatever the ambit available to a trial Judge on immaterial differences, there is no authority to support the Court's ability on a strike-out application, to apply an alternative and materially less injurious meaning, and he cites the decision in *Gatland v Fairfax New Zealand Ltd*[8] where Toogood J held that, whether for truth or honest opinion, a defendant cannot raise and set up a defence of alternative lesser meanings than those pleaded by the plaintiff – it sets up an erroneous inquiry.

[26] Mr Stewart, on the other hand, submits the rule in *Broadcasting Corporation of New Zealand v Crush*, is that it is not open to a defendant to plead that a statement has a meaning different from the meaning alleged by the plaintiff and seek to establish the truth of that different meaning.[9] He submits that the Court of Appeal in the *Joyce* decision confirmed that the introduction of the Defamation Act 1992, following the Court's judgment in *Crush*, did not affect that rule and accordingly arguably the rule in *Crush* (and *Haines*) is confined to the truth defence. The pleaded meaning is considered as part of an inquiry as to whether the statement was conveyed as opinion (or was capable of being conveyed as opinion), but not the only consideration as the tribunal of fact is also required to consider the words used, and therefore the meanings that naturally flow (or are capable of flowing) from those words. In my view is that this issue essentially comes back to the same issue as at [16]. The pleaded meanings and the Publication overall is considered, as is required by *Haines*, to determine

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7 *Fourth Estate Holdings (2012) Ltd v Joyce* [2020] NZCA 479 at [77].
8 *Gatland v Fairfax New Zealand Ltd* [2016] NZHC 970 at [55]-[70], particularly at [67].
9 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 239-240.

whether the words in the Publication were capable of being an expression of opinion or fact.

Honest opinion – Publications 2, 3 and 4

[27] I consider Mr Stewart is largely correct when he submits (at [25] of his synopsis) that the arguable errors alleged in relation to Publications 2, 3 and 4, are largely the same as those raised in relation to Publication 1 to the extent that:

(a) an arguable error that the Court incorrectly enquired whether "the publication", rather than the pleaded meanings, were capable of being read as expressions of opinion; and

(b) because of the first error, the Court did not address the relevant task - to determine whether the pleaded meanings were capable of being read as an expression of opinion.

[28] In relation to Publication 2, Mr Romanos submits the Court made a further error in that the Court placed undue weight on the "poetic context of Publication 2". Mr Romanos submits there is no legal principle by which a defamatory meaning, containing a poem, a song, or otherwise, is somehow more capable of being read as an expression of opinion.

[29] Mr Stewart submits that the Court, in considering the poetic context of the Publication, was not an arguable error given the requirement to look at the publication "as a whole". He submits that the context and nature in which the words are used is an important factor, both in terms of their natural and ordinary meaning and how that meaning is conveyed. He submits the Court did not suggest the Publication was "more capable" of being read as opinion because the poetic context was an additional factor supporting the Court's conclusion .

[30] My view on this is that Mr Stewart's submission is correct in that the poetic context was just one of the factors in looking at the pleaded meanings and Publication

as a whole, not a separate reason why the words were more capable of being an expression of opinion.

[31] Mr Romanos also submits, in relation to Publication 2, that the Court erred by not finding the corruption meaning as a bare comment.

[32] In relation to Publications 3 and 4, in addition to the errors alleged as set out at [26], Mr Romanos submits that did not articulate what "background facts" may have supported the comprehension by readers of the corruption meanings as an opinion – in other words, the indication of basis is not identified in the judgment. He submits there was no perceptible available connection between the words and Mr Singh actually published and any fact on which Mr Singh now relies to enable readers to comprehend the allegation of corruption as an opinion.

[33] Mr Stewart submits that the Court was aware that Publications 2 to 4 followed Publication 1, and that Mr Bains had admitted the following facts were generally known at the time of each Publication:

(a) Mr Bains had made donations to charitable causes; and

(b) Mr Bains received the Award at the Ceremony on 21 March 2021.

[34] He submits in relation to Publications 2, 3 and 4, the Court was aware Mr Bains had admitted the following facts were generally known at the time of those Publications:

(a) In August 2021, Mr Bains had expressed a desire to rape the partner of Facebook user Judge Saab; and

(b) Mr Bains lied to the Police in relation to the cause of the injury he sustained.

[35] Accordingly, Mr Stewart submitted there was no arguable error by the Court in finding the opinions concerned were capable of being conveyed against those

"known background facts" and were a "sufficient indication of basis" for those opinions.

[36] My view on this point is that Mr Stewart is correct and the Court took the view that given Publications 2, 3, 4 that followed Publication 1, and Mr Bains had admitted the generally known facts which would allow readers to make the connection between the corruption allegation and the known facts, is "a sufficient indication of basis" for those opinions.

Qualified privilege

[37] Mr Romanos submits there are six grounds of appeal in relation to the defence of qualified privilege.

First ground

[38] The first ground Mr Romanos advances is that the Court failed to reconcile the incongruence of the defence of qualified privilege, as raised in this case in respect of Mr Singh's generally published statements, with the availability (and yet Mr Singh's non-raising) of RPIC. Mr Romanos submits RPIC is a stand-alone defence and is not a limb of qualified privilege. He submits that Mr Bains' point was that whereas historically a defendant might seek an expansion of qualified privilege in respect of a generally published statement, the Court need not, and should not, give latitude to whether such expansion may be necessary in the interests of being slow to strike-out on developing law. This is because the law already now accommodates a tailored defence filling any vacuum of previous unfairness, and that Mr Singh's non-raising of RPIC in this case is an implicit concession that the defence could not be made out.

[39] Mr Romanos also submits it is difficult to see why qualified privilege could be regarded as tenable in this case, given the lack of legitimate public interest in the publications and having regard to the Court's decision in *Cabral v The Beacon Printing Publishing Company Ltd* and *Lupton v Fairfax Ltd*.[10] He submits there are

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[10] *Cabral v The Beacon Printing & Publishing Company Ltd* [2013] NZHC 2684; and *Lupton v Fairfax Ltd* [2016] NZHC 1801.

no valid distinguishing features in those cases and Mr Singh's Publications in this case by which a novel qualified privilege defence should survive.

[40] Mr Stewart, on the other hand, submits that on this point there is nothing in the judgment of the Court of Appeal in *Durie v Gardiner*[11] that prohibits a defendant from raising the common law qualified privilege defence based on duty and interest between the maker and the recipient of the statement concerned. He submits that as pleaded the issue is **not** whether the subject matter of Mr Singh's Facebook publications is a matter of public interest, but whether there was the required duty and interest between Mr Singh as the maker of the statement and his followers on Facebook as the recipients. He submits the Court found that whether the required duty and interest existed was, based on the affidavit evidence, a matter best left to trial (as occurred in *Julian v Television New Zealand Ltd*)[12] and the Court also recognised the nature of that duty and interest would be relevant to the "general method of publication adopted by Mr Singh using his Facebook page".

[41] Finally, Mr Stewart submits that the emphasis by Mr Bains on the decisions in *Cabral* and *Lupton* are both judgments concerning publications by media companies that were said to raise matters of public interest that justified extending the boundaries of the qualified privilege defence as it applied in New Zealand at the time. In both cases the court declined to extend the defence because the subject matter was not of sufficient public interest or concern to warrant protection to readers generally.

[42] Mr Stewart submits that both those judgments are distinguishable on that basis and in this case the question is whether the necessary duty and interest existed and, if so, whether it justified publication in the manner adopted – not whether the subject matter of the publications was of sufficient public interest to justify the protection now afforded by the defence of RPIC.

[43] In my view Mr Stewarts' submissions on this point are correct, and the view the Court took was that the issue was squarely whether necessary duty and interest and

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11 *Durie v Gardiner* [2018] 3 NZLR 131.

12 *Julian v Television New Zealand Ltd* CP367-SD/01 HC Auckland 25 February 2003

the interest existed, and this is a matter that required a trial and could not be dealt with in a strike-out context.

Second ground

[44] The second ground advanced by Mr Romanos for the appeal is that the defence of qualified privilege is predicated on Mr Singh's subjective beliefs where, as a matter of law, these are irrelevant to the inquiry of whether an occasion of publication is privileged or not.

[45] On this point, Mr Stewart submits that the Court found an arguable existence of duty and interest was raised by the affidavit evidence and that the background between the two religious sects and their interaction were matters that needed to be explored at trial, to determine whether there was a sufficient basis for the duty and interest pleaded. Mr Stewart accepted that Mr Singh's subjective beliefs were irrelevant to the question of duty and interest but that the Court did not suggest it relied on those beliefs. Accordingly, there was no arguable error in the Court ruling that the evidence at trial was necessary to determine whether the required duty or interest existed at the time of the Publications and whether, as a result, those occasions were privileged.

[46] On this point my view is that the Judgment did not rely on Mr Singh's subjective beliefs but merely stated that the two religious sects and their interaction needed to be explored at trial to determine whether there was a sufficient basis for the duty and interest between Mr Singh and his followers to attract the defence of qualified privilege for the wider method of publication of statements.

Third and fourth grounds

[47] The third and fourth grounds raised by Mr Romanos for the appeal were that, whatever the dispute between Mr Singh's religious sect and the SSSNZ, this could not have any bearing on whether Mr Singh had a legally recognisable duty to publish – once, let alone repeatedly – the defamatory meanings about Mr Bains, nor whether such readers had a legally recognised interest to receive such allegations. He submits

that the Publications had all the hallmarks of "*a matter of gossip or curiosity*" rather than "*a matter of substance*", and keeping in mind the objective nature of the defence, it is difficult to see how "*the mass of right-minded men in the position of the defendant would have considered it their duty in the circumstances*" to publish the allegations at issue.

[48] Mr Stewart submits that this ground does not identify any arguable error. He submits that it also glosses over the nature of the duty and refers to the Court of Appeal decision in *Durie v Gardiner* where the Court recited the definition of qualified privilege as follows:[13]

> The classic definition of qualified privilege is that it arises where the maker of the impugned communication has "an interest or duty, **legal, social, or moral**, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[49] Mr Stewart submits that Mr Singh's position (as pleaded) is that the duty on him to make the statement was a social or moral one, and those who received the statement had a corresponding interest to receive it.

[50] My view on this point is that Mr Stewart's submissions are correct, and the issue was whether the circumstances relating to the dispute between the two religious sects justified a social or moral duty on Mr Singh to publish to his followers. This requires exploration at trial.

Fifth ground

[51] The fifth ground advanced by Mr Romanos for the appeal is that the Court failed to record that the only particular of qualified privilege even relating to Mr Bains, was plainly wrong in any event. He submits that conversely, at the outset, the Court stated that Mr Bains affidavits "make it clear he is neither a current nor former member of the SSSNZ". That being the case, Mr Singh's particulars of qualified privilege have literally no connection to Mr Bains and hence there can be no basis for a relevant duty or interest to publish the defamatory Publications.

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[13] Above, n 11, at [36].

[52] Mr Stewart, on the other hand, submits that Mr Bains has acknowledged his participation in the march by members of the Damdami Taksal Jatha who support the SSSNZ and the nature of the purpose of the march and Mr Bains' involvement in it is disputed, but it is clear that Mr Bains has an association with the SSSNZ and his affidavit did not dispute he was and remains a supporter of the sect. Accordingly, Mr Stewart submits that the failure to record the particular referring to Mr Bains, was not an arguable error, given the evidence before the Court.

[53] On this point, my view is that the whole issue of the background between the religious sects and the context in which the Publications were made, and whether the necessary duty and interest in publishing and receiving the Publications exists requires exploring the evidence at trial and could not be dealt with in the context of a strike-out application. In my view there was sufficient evidence before the Court that it was arguable that a duty and interest (moral or social) for Mr Singh to publish the Publication existed and that the defence of qualified privilege still existed after *Durie v Gardiner*, such that the defence should not be struck out on this basis.

Sixth ground

[54] As a final ground for appeal, Mr Romanos advances the proposition that having regard to the particulars of qualified privilege, Mr Singh's pleadings reflect an intention to introduce at trial evidence which has no bearing on Mr Bains and they are at best peripheral to Mr Singh's claimed motivations to publish the Publications. He submits that this will greatly lengthen and protract the trial of this proceeding and the Judgment incorrectly sanctions this intention holding:

> "the background between the two religious sects and their interaction needs to be explored at trial to determine whether that is a sufficient basis to justify a duty and interest for the general method of publication adopted by Mr Singh using his Facebook page.

[55] Mr Romanos submits that it is unclear how such a broad peripheral factual inquiry of the religious sects' backgrounds and interaction can possibly help resolve the objective issue of whether Mr Singh had a duty to disseminate allegations of corruption and sexual impropriety about Mr Bains.

[56] On this point, Mr Stewart submits that while it is accepted that calling evidence in relation to the background between the sects will extend the duration of the trial, doing so is necessary to determine the nature and extent of the duty and interest. He submits that without an understanding of that background (which may require the tribunal of fact to determine disputed facts), the trial judge cannot determine whether Mr Singh was under a social or moral duty to make the statements he did in relation to Mr Bains – a supporter of the SSSNZ an organisation that aligns itself with a sect in Sikhism that is violently opposed to Mr Singh's ideology.

[57] My view on this point is that, as expressed in the Judgment, it is necessary to explore this background between the two religious sects to determine whether a sufficient duty and interest (moral or social) to justify Mr Singh publishing the Publications in the manner he did.

Is the delay of an appeal warranted?

[58] Mr Romanos submits that any delays that have occurred in the proceedings to date since Mr Bains filed his application on 14 April 2022 cannot be attributed to Mr Bains. He submits that there was no trial date set for this proceeding and discovery orders cannot be made until the pleadings are set and, while any delay is frustrating, there is no exigency or commercial imperative for the appeal not to be taken.

[59] Mr Stewart, on the other hand, submits that the appeal process could add a further significant delay before a judgment on the appeal is issued. He submits that Mr Singh wishes to have the matter heard and determined as soon as reasonably possible.

[60] My view on this is that delay is not a determinative issue when deciding whether to grant leave to appeal in this case. Other issues, summarised at [64], are more important.

Do the interests of justice favour granting leave to appeal?

[61] Mr Romanos submits that the interests of justice favour granting leave to appeal for the following reasons:

(a) In a defamation trial it is in the interests of justice if the parties and Court are able to focus their efforts at the trial on the main issues. He submits that in this case the main issue of evidence will be the contest of truth in respect of the sexual allegations ascribed to Mr Bains. For the trial to descend into a situation dealing with two warring religious organisations, neither of which Mr Bains as an office-holder or even a member, would be unacceptable;

(b) The impact of the Judgment on defamation law is and will be significant unless overturned on appeal. He submits that flowing from the Judgment, honest opinion can now be raised virtually anywhere in irrespective of its presentation and whether a factual foundation is laid for readers.

(c) The Judgment opens the floodgates of qualified privilege for exploitation by defendants who cannot meet the RPIC criteria. He submits this will particularly affect claims based on individual-on-individual social media publications (on which most claims are now based).

[62] Mr Stewart submits that the issue of the two warring religious organisations is important to the trial, and Mr Singh contends that Mr Bains supports the SSSNZ in his support for its ideals and a denial of support for that organisation is conspicuously absent from Mr Bains's affidavit.

[63] Mr Stewart further submits that the Judgment will not lead to the floodgates consequences proposed by Mr Romanos as the Judgment does not alter the law of honest opinion – assessing the Publication as a whole (including the pleaded meanings) is required and is an indication of the basis of the opinion in the form of

publication facts. He submits that the floodgates will not open for claimants who are not commenting on matters of public interest and if qualified privilege is to succeed, the duty and interest requirement must still be established and it is not lost by excessive publication. He submits that the precedential value of the Court's Judgment is limited by the somewhat unique overlay of the religious background and the relationship between the two sects, and a plaintiff has always had the burden of proving ill-will/improper advantage under s 19 of the Defamation Act 1992 when it is raised to challenge a qualified privilege defence – in the same way the plaintiff has always had the burden of establishing the defendant's opinion is not genuine when honest opinion is raised.

Result

[64] I have considered the submissions of counsel, and in particular the lengthy submissions by Mr Romanos in support of the application and submissions in reply to Mr Stewart's submissions. By a narrow margin, I am of the view that leave should be granted for Mr Bains to appeal the Judgment. I am of the view that the following issues justify appellate consideration:

(a) The issue of whether the pleaded meanings are the only factor to be considered, or whether the Publication as a whole, including the pleaded meanings, is to be considered.

(b) Whether, following the decision in *Dury v Gardiner*,[14] the defence of qualified privilege based on duty and interest (whether legal, social or moral) still exists, or whether the only category of defence available is the defence of RPIC.

[65] In my view, these matters have more general application than to just the parties in this proceeding, and accordingly justify consideration by the Court of Appeal.

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[14] Above, n 11.

Orders

[66] I make the following orders:

(a) The application by Mr Bains for leave to appeal the Judgment to the Court of Appeal is granted.

(b) My preliminary view is that costs should follow the event and accordingly Mr Bains is entitled to costs on a 2B basis against Mr Singh. However, counsel are directed to endeavour to agree costs within **20 working days** of the date of this judgment. Failing agreement within that period, counsel for Mr Bains is to file a memorandum as to costs (not exceeding five pages) within **10 working days** of expiry of the 20 working day period, and counsel for Mr Singh is to file a reply (not to exceed five pages) within **5 working days** of the receipt of counsel for Mr Bains' memorandum. A decision as to costs will be made on the papers.

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Associate Judge Taylor