IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 144/2023
[2024] NZSC 35

BETWEEN	GRAHAME DOUGLAS CHRISTIAN Applicant
AND	MURRAY IAN BAIN Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: C T Patterson for Applicant
W Akel and J C Dickson for Respondent

Judgment: 18 April 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

Introduction

[1] This application for leave to appeal arises in the context of a claim for defamation brought by the applicant, Grahame Christian, against the respondent, Murray Bain. Mr Bain was quoted prominently in two articles in the *New Zealand Herald* (the articles) alleging that Smart Environmental Ltd (Smart), a waste management company associated with Mr Christian, was misusing local authority dumping facilities.

[2] Mr Christian also sued NZME Publishing Ltd (NZME) and the author of the articles, Mr Valintine. NZME retracted the articles and apologised. The claim then

proceeded to trial against Mr Bain only. Mr Christian was unsuccessful in the High Court[1] and on appeal to the Court of Appeal.[2] The High Court held that while the publications contained defamatory imputations against Mr Christian, and that Mr Bain was responsible as a joint tortfeasor, Mr Bain had successfully made out the defence of responsible communication on a matter of public interest.[3] The Court of Appeal upheld the High Court's finding that the defence was made out. Mr Christian seeks leave to appeal to this Court.

Background

[3] The factual background is set out in the Court of Appeal judgment.[4] For present purposes, it is sufficient to note two key matters. First, Mr Bain used to work for Smart and had an acrimonious relationship with Mr Christian. Amongst other matters, the two were parties to an employment dispute. Mr Bain later set up his own waste management company in competition with Smart. Second, the articles alleged that Mr Christian enabled Smart to obtain unlawful advantages at council-owned tipping stations. This included an allegation that Smart was tipping waste for less than other commercial operators, and doing so without the knowledge or approval of the Thames-Coromandel District Council (the Council). Smart was practically able to do this because it was contracted to manage these council-owned transfer stations, and thus had after-hours access.

The decision of the Courts below

[4] In determining whether the defence of responsible communication on a matter of public interest was made out, the High Court addressed the two elements of the defence: that "the subject matter of the publication was of public interest; and … the communication was responsible".[5]

[5] The High Court found the articles dealt with matters of public interest; broadly, the way local government operated, the use of rates, and the management of the

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1 *Christian v Bain* [2022] NZHC 3394 (Walker J) [HC judgment].
2 *Christian v Bain* [2023] NZCA 579 (Miller, Brown and Courtney JJ) [CA judgment].
3 See *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131; and *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640.
4 CA judgment, above n 2, at [10]–[66].
5 *Durie v Gardiner*, above n 3, at [58].

various services involved. The Court also found that the articles were responsible communications. In reaching this determination, the Court relied on, amongst other matters, the process undertaken to verify Mr Bain's substantive allegations; the opportunity provided for Mr Christian to respond to the substance of those allegations; that alleged material omissions were not so significant as to make the articles irresponsible publications; and that both Messrs Valintine and Bain had "an honest belief in the substance of the matters published".[6]

[6] In upholding the High Court's finding that the defence was made out, the Court of Appeal emphasised the steps taken to verify Mr Bain's allegations; the Council's unwillingness to disclose information; consultation with other independent and reliable witnesses; the involvement of NZME and an experienced journalist like Mr Valintine; Mr Christian's ample opportunity to comment; and that despite Mr Bain's animosity towards Mr Christian, his allegations were sufficiently verified.

The proposed appeal

[7] Mr Christian's case is that the proposed appeal involves a matter of general or public importance; namely, whether the defence of responsible communication on a matter of public interest is, or can be, made out if the publication is materially misleading by omission.[7] The applicant's submissions were helpfully categorised into three general themes by the respondents. We adopt that categorisation, which focuses on the impact of known material omissions which create a misleading impression; the relevance of Mr Bain's alleged malicious intention and its omission from the articles; and the analysis of Smart's unilateral decision to commence dumping in April 2018 and Mr Christian's email correspondence relating to this matter.

Known material omissions

[8] Mr Christian wishes to raise several points about known material omissions. The main point is that the articles omitted 25 material facts known to Messrs Bain

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6 HC judgment, above n 1, at [380]. In *Durie v Gardiner*, above n 3, at [66], the Court of Appeal said that in determining whether the publication was a responsible communication, "all the relevant circumstances of the publication" were to be considered. The Court set out a non-exhaustive list of circumstances that may be relevant.

7 Senior Courts Act 2016, s 74(2)(a).

and/or Valintine. Mr Christian contends that the effect of these omissions was to mislead the reader, and the Court of Appeal did not correctly address this effect. That these were known omissions is strongly challenged by the respondent.

Malice

[9] The key point Mr Christian wishes to raise is that Mr Bain's malice towards Mr Christian was not disclosed in the articles when it should have been. In addition, Mr Christian says that this malice was not mitigated by the level of verification undertaken, given that the articles' sources were selected and coordinated by Mr Bain. Finally, it is said that the Court of Appeal's approach is inconsistent with that of the Supreme Court of Canada in *Grant v Torstar Corp*.[8]

Smart's unilateral decision to commence dumping at discount

[10] This aspect of the proposed appeal relates primarily to an email sent on 10 April 2018 from Mr Christian to the Council. The argument is that this email demonstrates that the allegation in the published material that Mr Christian knew that no discount dumping agreement had been reached between Smart and the Council was unjustified.

Our assessment

[11] The aspects of the proposed appeal relating to known material omissions would reprise the arguments made in the Court of Appeal. The Court of Appeal rejected the argument that there can be no public interest in a misleading publication. The Court accepted that (known) material omissions may affect consideration of whether the publication was responsible, and may also suggest a failure of verification. But the Court observed that "[t]he point of the defence is that the public interest may justify a publication shown to have been inaccurate, provided reasonable steps were taken to verify it".[9]

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8 *Grant v Torstar Corp*, above n 3.
9 CA judgment, above n 2, at [109].

[12] It was in this context that the Court undertook its careful analysis of the various aspects of the arguments about verification. The Court's conclusion was as follows:

> [126] The allegations were serious, but the subject matter was of real public importance. All the defamatory imputations related to the subject matter. There was no urgency to publish but Mr Valintine did not act in haste. Rather, he went to considerable effort to corroborate Mr Bain's claims over a period of months. Some of the sources he relied upon were independent of Mr Bain and others he reasonably found reliable. The allegations were disclosed to Mr Christian, who was given a reasonable opportunity to comment in detail.

[13] Nothing raised by Mr Christian calls into question the correctness of that assessment. The complaint, on analysis, is rather that the publications were incomplete, which is simply a further particular of the acknowledged inaccuracy. As we have noted, the alleged omissions are strongly challenged by Mr Bain. This ground accordingly invites the Court to embark on a factual re-analysis. It does not raise a point of legal principle of general or public importance.[10] Nor do the matters on which Mr Christian relies give rise to the appearance of a miscarriage of justice as that term is used in civil cases.[11]

[14] We add that the logic of Mr Christian's argument is that where there are known material omissions, the publication must be irresponsible regardless of the verification undertaken on other aspects of the article. However, inherent in this submission is the proposition that the evidence must be such as to establish "knowing" suppression of material facts exculpatory of the plaintiff to the extent publication was no longer responsibly made. The list of 25 "omissions" in Mr Christian's submissions does not, by reference to evidence, establish knowing suppression and, in any event, raises matters challenged by the respondent.

[15] The proposed arguments in relation to malice have insufficient prospects of success to justify a grant of leave. The articles include reference to the facts that Mr Bain was a former employee of Smart, that he owns a competing waste management company and that there was "bad blood" between him and Mr Christian. As the respondent submits, readers with this information would understand Mr Bain's

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10 Senior Courts Act, s 74(2)(a).

11 Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

motivations. And, in any event, the Court of Appeal also accepted the fact that Mr Bain had "an axe to grind" affected the degree of verification undertaken by NZME and Mr Valintine.[12] There are concurrent findings of fact that Mr Valintine recognised Mr Bain's motivations and went to considerable lengths to seek corroboration from various sources. In these circumstances, the other matters raised by Mr Christian under this head, such as any difference in approach to that in *Torstar*, fall away and we need not address them now.

[16] In terms of the final ground of appeal, the respondent notes that the email of 10 April 2018 alleged an agreement to toll commercial waste and that at trial Mr Christian admitted the Council did not agree to tolling. Further, neither Mr Bain nor Mr Valintine were provided with subsequent relevant emails, nor had notice of their existence. In these circumstances, we accept the submission for the respondent that nothing raised by Mr Christian provides a basis for challenging the finding of the High Court that the genuine belief held by Mr Bain and Mr Valintine in the sting of the publications did not lack objective reasonableness.

[17] The criteria for leave to appeal are not met.

Result

[18] The application for leave to appeal is dismissed.

[19] The applicant must pay the respondent costs of $2,500.

Solicitors:
Maxim Legal, Auckland for Applicant
Edmonds Judd, Te Awamutu for Respondent

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12 CA judgment, above n 2, at [122].