IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

(CIVIL DIVISION)

PLAINT 26/10

BETWEEN	NORMAN GEORGE
	Plaintiff
AND	TIM BUCHANAN
	First Defendant
AND	JOHN WOODS
	Second Defendant
AND	COOK ISLANDS NEWS PC
	Third Defendant

Counsel: For the Plaintiff P A McKnight
For the Defendants D McLellan and T Manarangi

Date of Hearing:	17 July 2015
Date of Delivery of Judgment:	21 January 2016 (NZT)

RESERVED JUDGMENT OF HIS HONOUR JUSTICE DOHERTY

Summary

[1] I have concluded that:

a. The court may strike out a defence in defamation proceedings but only in clear cases and should afford opportunity to re-plead in preference to striking out.

b. As the defence of fair comment is to the imputations contained in the publication rather than the words or images themselves, the imputations which the defendants seek to defend as fair comment must be identified before a strike out application can be determined.

c. It is appropriate to follow the New Zealand authorities which preclude the defendants from seeking to defend an imputation not pleaded by the plaintiff as fair comment.

d. The defence of fair comment will only be incapable of succeeding as a matter of law where the particulars pleaded are incapable of being germane to the comment.

e. The defendants' pleadings are capable of supporting the defence of fair comment and none of the other matters raised by the plaintiff warrant the defence being struck out.

f. The defendants' pleadings do not identify which of the plaintiff's imputations they seek to defend as fair comment and it is necessary in the present case that they do so.

The Application and Response

[2] The plaintiff is a barrister and solicitor in Avarua, Rarotonga and until the 2014 General Election was a Member of Parliament. On 17 September 2010 and 15 December 2011, cartoons were published in the *Cook Island News* which the plaintiff alleges identified and were defamatory of him. The second of these cartoons is the subject of this application.

[3] The plaintiff seeks orders:

a. striking out the defence of fair comment on the basis that it is "untenable because the defendants have not pleaded a single particular that, even if proved to be true, could be capable of being facts that support the imputations pleaded which means the imputations pleaded could not, as a matter of law, be regarded as fair";

b. barring the defendants from re-pleading fair comment or any other affirmative defence as the defendants have abused the opportunity to re-plead the defence, and the defence is "obviously hopeless" and "doomed to fail";

c. awarding increased or indemnity costs to the plaintiff.

[4] The defendants contend that the court should not strike out the defence as:

a. the defence is not an abuse of process;

b. the bounds of fair comment have not been determined in the Cook Islands;

c. fair comment has many complexities; and

d. the matters raised are factual issues.

Jurisdiction

[5] The defendants submit that the court's jurisdiction to strike out defences is founded in both the Code of Civil Procedure (the Code) and the court's inherent jurisdiction. The defendants note that as the Code does not specifically provide for applications to strike out parts of a pleading, the plaintiff is required to make a case as to why inherent jurisdiction should be exercised. The defendants claim that the plaintiff has not done so.

[6] The defendants further argue that the drafters of the Code can be taken to have made a conscious decision to restrict the strike out jurisdiction of r 131 to entire proceedings. For this reason, they urge the Court to consider its inherent jurisdiction in view of the local context, the applications specifically provided for in the Code and the non-mandatory nature of the statement of defence.

[7] Rule 4 of the Code provides:

> (1) Subject to the provisions of this Part, no practice which is inconsistent with these rules shall prevail in the Court.
>
> (2) If any case arises for which no form of procedure has been provided by the Act [The Judicature Act 1980-1981] or the Cook Islands Act 1915 or these rules, the Court shall dispose of the case as nearly as may be practicable in accordance with the provisions of the Act or Cook Islands Act 1915 or the rules affecting any similar case, or in such manner as the Court deems best calculated to promote the ends of Justice.

[8] The relevant part of Rule 150 of the Code provides:

> The Court may, either upon or without the application of either party and at any stage of the proceedings, -
>
> (a) Amend any defect or error is any proceedings, whether the defect or error is that of the party applying to amend or not; ...
>
> (b) ...
>
> (c) ...
>
> and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties may be made upon such terms as to costs and otherwise as the Court thinks fit, ...

[9] In *Tini v Cook Islands (2008) News,* Hugh Williams J emphasised that the Code does not displace the court's inherent jurisdiction:[1]

> [79] The relevant rules are r 131 which gives the Court power to strike out the "proceedings" when no reasonable cause of action is disclosed, and r 150 which recounts the Court's inherent jurisdiction if there is thought to be a difficulty in striking out only part of a claim.

[10] While the application in *Tini* was concerned with striking out parts of a statement of claim, there is nothing in r 150 that limits the Court's inherent jurisdiction to statements of claim. The Code does not codify the Court's inherent jurisdiction; rather, the provision made in r 150 that the court may make "all such amendments as may be necessary for the purpose of determining the real question in controversy" means it remains. The striking out of a defence is thus plainly within the terms of rr 4 and 150.

[11] The use of the Court's inherent jurisdiction is not, however, unrestricted. It is subject to common law principles. As acknowledged in *Tuake v Toeta* by Hugh Williams J:[2] "The hurdle to striking out proceedings is deliberately set high so as not to impinge on citizens' rights of access to the Court". If the drafters of the Code did intend for the court's inherent jurisdiction to strike out pleadings to be used sparingly, the principles applicable to such applications ensure this is the case.

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[1] [2011] CKHC 77.
[2] [2010] CKHC 4 at [7].

[12] The principles relevant to striking out applications in the Cook Islands were recounted by Hugh Williams J in *Tini*, as follows:

> [77] The principles upon which strike out applications are decided are now well settled and have been recounted in a large number of decisions. For present purposes it is sufficient to note the observations of the New Zealand Court of Appeal in *Attorney-General v Prince & Gardner*, where the Judgment of three of the five members of the Court said:
>
> > A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294 – 295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316 – 317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).
>
> [78] The only omission from that codification of striking-out principles is that it is well settled that if a proceeding can be amended in a way which complies with the pleading rules, that opportunity will be given rather than striking out the claim.
>
> ...
>
> [81] It is well settled that because claims in the statement of claim are approached on the basis they are provable, on striking-out applications the Courts make no attempt to resolve disputed questions as to fact....

[13] Grice J was invited to take a more liberal approach in *Tepaki v Rarotonga Resorts Management*[3] by adopting a weighting exercise. Grice J declined to do so on the basis that the authorities cited were English cases peculiar to defamation and the

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[3] [2010] CKHC 19.

particular procedural rules in that jurisdiction. In any event, the line of authority referred to in that case is not relevant to the present application as it concerns cases where the cost of proceedings is unduly disproportionate to the claim of defamation.

[14] It is these Cook Islands cases which describe the Court's inherent jurisdiction and I am not persuaded to differ from them.

[15] The appropriate enquiry for the purpose of the plaintiff's application is therefore: Is the defence of fair comment as pleaded by the defendant so clearly untenable that it cannot possibly succeed as a matter of law? This is not a determination of whether the particulars pleaded by the defendant do in fact successfully support the defence but whether they are incapable of doing so.

[16] For the sake of completeness, the defendants argument that the defence should not be struck out because there has been no previous case where the law regarding defence of fair comment has been determined in the Cook Islands, has little merit. The difficulty, or indeed novelty, of the law involved is no bar to striking out a pleading.

The Defence of Fair Comment

[17] Although actions in defamation are subject to the Defamation Act 1993, the law of defamation in the Cook Islands is principally the common law.[4] There is a dearth of reported Cook Islands decisions on this subject, particularly on the defence of fair comment.

[18] Decisions from foreign jurisdictions provided guidance in filling this gap. I accept the submission of the plaintiff that these decisions should be treated with utmost caution as the defence of fair comment has faced statutory revision in many Commonwealth jurisdictions. For example, in New Zealand the defence has been renamed honest opinion and the defendant is required to prove that "the opinion expressed was the defendant's genuine opinion", introducing the element of subjectivity.

[19] Providing direction to the jury in *Silkin v Beaverbrook Newspapers Ltd*, Diplock LJ said of the defence of fair comment:[5]

> ... the expression 'fair comment' is a little misleading. It may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realise that the limits of freedom

[4] *Tini*, at [49].
[5] [1958] 1 WLR 743.

> which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided – and this is the important thing – that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?'

[20] In *Spiller v Joseph,* the Supreme Court of the United Kingdom surveyed the historical approach to fair comment in cases such as *Silkin* and identified the following elements:[6]

1) the comment must be on a matter of public interest (the first element);

2) the comment must be recognisable as comment, as distinct from an imputation of fact (the second element);

3) the comment must be based on facts which are true or protected by privilege (the third element);

4) the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based (the fourth element); and

5) the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views (the fifth element).

[21] These principles of defamation apply equally to cartoons as they do to written or spoken words.[7]

[22] It is the fifth element that the plaintiff focuses on.

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[6] *Spiller v Joseph* [2010] UKSC 53; [2011] 1 AC 852; Mullis and Parkes et al (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London 2013) at [12.2].

[7] An example of such an application in the Canadian courts is in the case of *Vander Zalm v Times Publishers.* (1980) 109 DLR (3d) 531.

Striking out Fair Comment

[23] As a preliminary matter, the defendants contend that *Mitchell v Sprott*[8] provides an example of 'fairness' being left for trial. The defendant in that case had applied for summary judgment. Section 10 of the Defamation Act 1992 (NZ) requires a defendant to prove that the opinion expressed was his or her genuine opinion, as a subjective matter. As such, the Court of Appeal considered there was a logical difficulty in allowing the defendant to succeed on the defence of 'honest opinion', and therefore the element of subjective honesty, when the meaning of the comments were still in dispute. The decision is founded in the different approach taken to fair comment in New Zealand and the disputed question of fact in that case. *Mitchell v Sprott* does not preclude the Court from considering whether the defence is untenable as a matter of law in the current case.

Step One: What is the Comment?

[24] The defendants suggest they are "not obliged to plead their defence of honest opinion to each variant of meaning, but only to the cause of action" and contend that their pleaded particulars "provide sufficient support for the cartoon, and the cartoon is sufficiently germane to those facts, for the defence to be available".

[25] The plaintiff contends the defendants must identify the particular meaning or meanings to which they plead the defence of fair comment.

[26] The defence of fair comment is raised in relation to a defamatory imputation contained in a publication rather than the particular words or, as in the current case, image of which a plaintiff has complained. This means that the defence is not raised in relation to the cause of action generally as contended by the defendants. The need for defendants to identify the defamatory meaning to which they plead fair comment finds support in *Channel Seven Adelaide Pty Ltd v Manock,* where the Australian High Court held that:[9]

> the defendant's contention that in this case the meaning pleaded by the plaintiff is irrelevant to the defence of fair comment at common law is wrong. It is wrong because by the time the trial judge comes to consider the fair comment defence the question of meaning will have been decided adversely to the defendant. The meaning found is the comment to be scrutinised for its fairness.

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[8] [2002] 1 NZLR 766 at [49].
[9] (2007) 232 CLR 245 at 288.

[27] It is for this reason that the Court of Appeal of England and Wales in *Control Risks v New English Library*[10] held that the starting point in determining a strike-out application "is to identify the comment the defendants say is to be found in the words complained of and which they are seeking to defence as fair comment".[11] This requirement was followed by the High Court in *Ashcroft v Foley*.[12]

[28] The decisions in *Control Risks* and *Ashcroft* were made in the context of the ability of a defendant to defend an alternative meaning to that pleaded by the plaintiff.[13] However, the starting point utilised in those cases provides a clear framework for determining the plaintiff's application. Therefore, the first step in determining the present application is to identify the comment the defendants seek to defend as fair comment.

a) What are the meanings open to the defendants?

[29] The plaintiff contends that the defence of fair comment must meet the imputations pleaded by the plaintiff and further that the defendants cannot plead meanings different to those pleaded by the plaintiff. Leaving aside for the moment the issue of whether the defendants may submit an alternative meaning without having pleaded to that alternative, the defendants' submissions raise a number of alternative meanings as follows:

> "26. The cartoon was a commentary on the criminal jury system. It is an example of meat and drink to cartoonists, and other commentators, commenting on what they see as the downside of the jury system."
>
> "37. ... Read in isolation, however, it would probably be understood by most readers to be a comment on the flaws of a criminal justice system which relies on members of the public to determine guilt or innocence."
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> "43. The meanings [pleaded by the plaintiff], if upheld by the Court trial, may be exaggerated and contrary to how others may regard the jury system, however expressing an opinion that criminal trial lawyers sometimes "spin" the evidence to gain acquittals could not

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[10] [1990] 1 WLR 183.

[11] At 189.

[12] See *Ashcroft v Foley* [2011] EWHC 292 (QB) at [53]: "The pleading obligations of a defendant in the context include, first, a requirement to set out the defamatory comment, contained in the words complained of, which it is sought to defend: see e.g. *Control Risks v New English Library* [1990] 1 WLR 183. Next, having done so, a defendant must identify the facts on the basis of which it is alleged that a person could honestly express the relevant comment".

[13] A concept which this judgment rejects at [38]–[39].

conceivably be described as "something which no honest person could really believe..."

[30] This is symptomatic of the defendants' denial that the cartoon identifies the plaintiff or bears the meanings pleaded by the plaintiffs. Essentially, the defendants' argument, for example, that readers who had not read the report would see the cartoon as a caricature of a lawyer, is an argument as to identification and meaning and not the matter in issue.

[31] The defendants appear, however, to accept that the defence is a response to the plaintiff's pleaded imputations. They submit that: "If the plaintiff succeeds on one meaning to which the defence of honest opinion is available, then judgment will be entered for the defendants"[14] and then outline why some of the imputations pleaded by the plaintiff are capable of being regarded as fair comment. The clear implication is that although they deny that the defence must be pleaded to specific meanings, the defendants recognise that the defence must meet whichever of the *plaintiff's* pleaded imputations succeeds.

[32] The defendants also highlight an issue which has been the subject of divergence in Commonwealth jurisdictions: Can a defendant plead a lesser defamatory meaning and seek to defend this as fair comment? This issue is relevant to establishing the imputations that the defendants have to meet for the purposes of the plaintiff's application and to whether the defendants should have an opportunity to re-plead.

[33] This issue appears to be novel in the Cook Islands' jurisdiction.

[34] The English courts (and some other jurisdictions), in cases such as *Lucas-Box*,[15] *Polly Peck*[16] and *Control Risks,* have allowed the defendant to defend alternative meanings, but have required the defendant to clearly plead the meaning which they seek to defend. Indeed in *Control Risks*, the Court of Appeal criticised a pleading materially similar to the defendants' pleading for failures in this respect.

[35] Were these cases to be followed in the Cook Islands, they would likely introduce further pre-trial complexity into defamation proceedings. The more appropriate position, and the position that appears to be accepted by both parties,[17] is that the defendant may not plead an alternative meaning and seek to defend that meaning as fair comment.

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[14] This reference to "honest opinion" should be read as "fair comment".
[15] *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147.
[16] *Polly Peck (Holdings) v Trelford* [1986] QB 1000.
[17] The defendants suggest that they will submit at trial that the cartoon has an alternative meaning than those pleaded by the plaintiff. Based on the context, I take this to be a reference to the defendant's denial of the plaintiff's meanings rather than a suggestion that the defendants will be seeking to set up a lesser defamatory meaning to defend as fair comment.

[36] In New Zealand, the courts have for some time refused to adopt the English approach. This is because an alternative meaning does not meet the plaintiff's complaint and would instead introduce a complex "parallel inquiry into something about which the plaintiff is not complaining".[18]

[37] The possibility of a defendant raising a defence in relation to an alternative meaning has received a mixed reception in Australia. While some state courts have allowed such an approach,[19] Brennan CJ and McHugh J of Australian High Court in *Chakravarti v Advertiser Newspapers* expressed clear disapproval when making the following obiter comments:[20]

> A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the actions

[38] To allow a defendant to defend an alternative meaning would be contrary to the way in which positive defences are engaged, that is, they come after a defamatory meaning is proved. As the New Zealand Court of Appeal put it in *Haines* in the context of New Zealand's defence of truth:[21]

> As a matter of logic, a defence must always be a defence to something. In cases of defamation that something is the defamatory imputations pleaded by the plaintiff.
>
> ...
>
> 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.

[39] The defendants' plea of fair comment therefore must be in response to one or more of the plaintiff's pleaded imputations, or imputations materially similar.

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[18] *TVNZ v Haines* [2005] 2 NZLR 433 at [59].
[19] Eg *David Syme & Co Ltd v Hore-Lacey* (200m0) 1 WR 667.
[20] (1998) 193 CLR 519 per Brennan CJ and McHugh J at 527.
[21] *Haines*, at [58] and [62].

b) The defendants' current pleadings on comment

[40] The relevant aspect of the defendants' pleadings is:

> If Cartoon 2 identified the plaintiff and was defamatory of him (all of which is denied), the cartoon was fair comment on, if such must be established as a matter of law, a matter of public interest namely the criminal justice system.

[41] Currently, the defendants' pleadings do not identify which imputations they will seek to defend. The plaintiff submits that this can be taken to mean that the defendants will defend *all* imputations. In *Haines* the Court of Appeal observed that TVNZ's pleadings:[22]

> ...would be appropriate if TVNZ intends to plead honest opinion with respect to whichever of the imputations the jury finds provided. If, however, TVNZ considers that only some of the imputations can be defended on the basis of honest opinion, TVNZ must specify in respect of which meanings they will be running the honest opinion defence.

[42] Like TVNZ, the defendants do not give an appropriate indication in their pleadings of which approach they intend to take at trial. However, the defendants' suggestion that the defence is raised in relation to the cause of action may indicate that they seek to defend any imputation found proved by the Court.

[43] I proceed on the basis that the defendants seek to defend all imputations pleaded by the plaintiff as conveyed by the cartoon as fair comment.

Step Two: What are the facts indicated in connection with the comment?

[44] The defendants rely upon a report in the *Cook Islands News* about the case of *R v Ngataua* and plead the following particulars:

> (1) It was generally known by readers of the *Cooks Islands News* edition of 16 December 2011 that:
>
> (a) on or about 13 December 2011 an accused Iorama Ngataua was acquitted after trial before Her Honour Justice Grice and a jury of charges of aggravated robbery and assaulting a woman;
>
> (b) the plaintiff represented Mr Ngataua;

[22] *Haines*, at [98].

(c) on behalf of Mr Ngataua the plaintiff submitted to the jurors, among other things, that they should not "be overwhelmed by the DNA evidence" and they should "apply common sense" and that blood found on Mr Ngataua's clothing which the Crown submitted was proven by DNA testing to be the victim's blood "could have gotten on Ngataua's clothing in another way";

(2) Such facts were generally known by reason of a report of the proceedings in *R v Ngataua* published in the *Cook Islands News* on 15 December 2011.

[45] The plaintiff argues that the defendants cannot rely on the article published regarding the trial to prove elements of the defence of fair comment. The central reason being that the article was published in a different edition of the newspaper from that in which the cartoon in issue was published. The plaintiff relies on the following statement from *Gatley* regarding extrinsic publications and the natural and ordinary meaning of a publication:[23]

> If the alleged libel appeared in a newspaper, the defendant may be entitled to put in evidence any other article in the same issue which is referred to in the article containing the alleged libel or is otherwise connected with the article, on the basis that it is part of the context. The question is whether the relevant articles (which may be on different pages or in different parts of a newspaper) are sufficiently closely connected to be regarded as a single publication. However, if the passage on which the defendant wishes to rely is on a different page and there is no reference to it in the article, it may be regarded as too remote to have any bearing on the meaning of the words complained of.

[46] This passage indicates that the defendants cannot suggest that the article contributes to the meaning of the cartoon nor can they rely on the article as the explicit statement of the facts connected to the comment. However, it does not follow that they cannot use the article as evidence of the public notoriety of the facts.[24]

[47] It is arguable the defendants actually need not rely upon the *Cook Islands News* report of the proceedings as, insofar as the comment is based on the plaintiff's

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[23] *Gatley*, at [33.4].

[24] Eg in *Lowe v Associated Newspapers* [2007] QB 580 at 599, it was said that the effect of *Kemsley v Foot* [1952] AC 345 was that "a defendant is not precluded from pleading extrinsic facts in support of fair comment".

conduct during the *R v Ngataua* trial, the relevant facts can be taken as indicated to the world at large as they occurred in the courtroom.

[48] However, simply for this application, I intend to rely upon the particulars as pleaded by the defendants.

Step Three: Are the particulars incapable of meeting any of the relevant imputations?

[49] As the defendants have not identified an imputation or imputations that they seek to defend as fair comment, I will assess all the imputations as pleaded against the defendants' particulars.

[50] The plaintiff contends that "'no honest person could really believe the pleaded imputations on the basis of the defendant's pleaded particulars". As such, the particulars are "incapable, as a matter of law, of forming a basis upon which an honest person could express the imputations". For this proposition, the plaintiff relies upon *Dakhyl v Labouchere* in which Atkinson LJ required a personal attack to be a reasonable inference upon the particulars:[25]

> A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts ... a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried ...

[51] A similar approach was taken by Fletcher Moulton LJ in *Hunt v The Star Newspaper Co Ltd*[26] as described in *Spiller v Joseph:*[27]

> 39. That appeal concerned publications imputing to the plaintiff improper conduct in the discharge of his duties as a deputy returning officer at a municipal election. Thus the complaint related to allegations of fact but the sting of the article was that the conduct of the plaintiff had been politically motivated. The Court of Appeal in that case drew a distinction between the test of fair comment in relation to literary criticism, as laid down in *Merivale v Carson* 20 QBD 275, and the test of fair comment in relation to a personal attack on an individual.
>
> ....

[25] [1908] 2 KB 329.
[26] [1908] 2 KB 309.
[27] *Spiller*, at 39.

> 40. Fletcher Moulton LJ, and the other members of the court, thus drew a distinction between (i) defamatory allegations of fact, which had to be clearly and fairly stated, and to be true; (ii) literary criticism, which need not be reasonable but had to be honest, and (iii) imputations of motive amounting to an attack on the character of the plaintiff, which had to be reasonably drawn from the facts.

[52] The defendants challenge the standard of *Dakyhl*, pointing to criticism detailed in *Gatley*[28] and instead suggest that comments amounting to personal attack will only fail if they are "something no honest person could really believe".[29]

[53] It is telling that though initially accepted in both jurisdictions, the approach in *Dakhyl* and *Hunt* was rejected by statute in New Zealand[30] and has now been rejected in England. In *Branson v Bower,*[31] Eady J considered that such a standard introduced "another layer of uncertainty and confusion" and was inconsistent with the principles behind fair comment, that is, allowing "citizens to express hard-hitting opinions on matters of public interest honestly without fear of being brought before the courts". Eady J went on to state:[32]

> It is clear (as illustrated in a number of European cases) that there is a significant inhibition upon freedom of speech if one is required to prove the unprovable. A commentator may be able to prove facts objectively, but it is neither just nor logical to seek to subject opinion to the same test. To impose a test of reasonableness or fairness is to bring in objective criteria which have no place in the context of subjective opinion. "The objective safeguards, coupled with the need to have a genuine belief in what is said, are adequate to keep the ambit of permissible comment within reasonable bounds": per Lord Nicholls in *Cheng v Tse Wai Chun* [2000] 3 HKLRD 418, 430.

[54] Consonant with Eady J's views of the defence's limits is the statement from *McQuire v Western Morning News* that:[33]

> [if] the language complained of is such as can be fairly called criticism, the mere circumstance that it is violent, exaggerated, or even in a sense unjust, will not render it unfair. It is at the most

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[28] *Gatley*, at [12.27].
[29] *Awa v Independent News Auckland* [1995] 3 NZLR 701 at 710 (NZHC).
[30] Though note that this was accompanied by substantive reform of the elements of fair comment. It was renamed and the defendant now bears the burden of proving the opinion was their honestly held opinion.
[31] [2002] QB 737 per Eady J at [22].
[32] At [27].
[33] [1903] 2 KB 100 at 110.

evidence that it was not an honest expression of real opinion, but was inspired by malice.

[55] The right to freedom of speech and expression is, of course, recognised in the Cook Islands Constitution. Indeed, it is in the public interest that citizens are able to express serious concerns without fear of defamatory proceedings.

[56] In my view, given the clear mandate of the Constitution, the "significant inhibition" imported by any standard of reasonableness should not be accepted in the Cook Islands context.

[57] Even without the requirement for a personal attack to be a reasonable inference on the facts, there remain situations where the defence is incapable of succeeding as a matter of law and may be struck out. This is where the facts are incapable of being pertinent to the comment. Criticism "must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners".[34] This was described as "pertinence" by Lord Phillips in *Spiller v Joseph*.[35]

[58] In my view, the particulars pleaded by the defendants are capable of being found germane to the imputations pleaded. The facts relate to the plaintiff's involvement in the case of *R v Ngataua* as defence counsel. Taking the statement of claim particulars as proved, the cartoon depicts the plaintiff speaking to his client in that case and speaking of the technique utilised in that trial. The imputations that the plaintiff alleges arise from that cartoon are that the plaintiff:

> 49.1 considered that jurors made up of his Cook Island countrymen were stupid;
>
> 49.2 considered that he was intellectually superior to jurors and could manipulate them with his higher intelligence;
>
> 49.3 was prepared to deceive jurors about trial evidence in order to secure acquittals for clients whom the defendant knew or highly suspected to be guilty;
>
> 49.4 was a dishonourable lawyer who lacked integrity;
>
> 49.5 was a dishonest lawyer;

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[34] *Tse Wai Chun Paul v Albert Cheng [2001] EMLR 777*, at [20]; an example of this in the context of a creative work is the defamatory comment in *Cornwell v Myskow* [1987] 1 WLR 630: "She can't sing, her bum is too big and she has the sort of stage presence that jams lavatories".

[35] *Spiller*, at [6].

49.6 was guilty of conduct unworthy of his professional obligations as a lawyer;

49.7 was guilty of dereliction of his duty to the Court, as an officer of the Court;

49.8 was not fit to be a barrister and solicitor in the Cook Islands.

[59] The particulars pleaded by the defendants are capable of being relevant to each of these imputations as all relate to the trial context or the plaintiff's conduct as a lawyer. Thus, the plaintiff's application cannot succeed on this ground.

Other Grounds

Inconsistent Pleadings

[60] The plaintiff raises a further concern that the defendants have taken a "disingenuous" approach to their pleadings by denying that the cartoon identifies the plaintiff and bears the meanings alleged while also pleading fair comment. The plaintiff argues the defence of fair comment has an element of subjectivity (the *honesty* of the defendant) and that the defendants' pleadings mean that it is untenable that they were expressing an honestly held opinion. The plaintiff contends that the 'fairness' element cannot be met and the defence should be struck out.

[61] The defendants counter that they have put the plaintiff to proof on the matter of identification and point to the present application as proceeding on the assumption that the plaintiff succeeds on that matter and at least one pleaded imputation.

[62] In England, the defendant to an action in defamation may plead as many different, alternative defences even where these are inconsistent (see *Gatley,*[36] and *Alderman v French*[37] and *Hackett v Tierney*[38]).

[63] This longstanding approach is open to this Court and is an approach I adopt. Unlike in jurisdictions such as New Zealand, the defendant is not required to prove the subjective honesty of the comment but rather that the comment was one that an honest person could believe. The difficulty with denying meaning and identification while also pleading a positive defence is principally evidential. It is particularly so where, as in the present case, the defendant must rely on the *Kemsley v Foot*[39] public notoriety argument in order to establish that the comment indicates facts upon which it is based (the fourth element of the defence of fair comment). The

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[36] *Gatley*, at 27.3.
[37] (1832) 18 Mass R 1 at 8–9.
[38] [1952] Ir R 185.
[39] [1952] AC 345.

defendants will likely face difficulty advancing an argument that the cartoon refers to a matter of public notoriety while also submitting the cartoon does not identify the plaintiff. However, this does not render the argument untenable for the purpose of a strike-out application.

Defendants' Altered Pleadings

[64] The plaintiff submits that "the defendants' particulars in support of the defence have undergone a major change since their original conception". He submits that in the original statement of defence the defendants included a 'false fact' and the 'sting' of the cartoon was based on this fact. The plaintiff further contends that "In so far as the comment was based on this *false* statement, the defence is doomed to fail". This 'false' fact is also treated as relevant to the application to preclude the defendants from re-pleading the defence.

[65] The position on the inclusion of 'false facts' is best summarised in *Kemsley v Foot*:[40]

> Twenty facts might be given in the particulars but only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendant's plea.

[66] This position is supported by section 8 of the Defamation Act 1993 which provides:

> 8. Fair comment - In an action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[67] If the defendants' comment was based on the 'false' fact alone it would fail on the third element of the fair comment defence. However, the presence in prior pleadings of a 'false' fact is irrelevant if the comment is found to be pertinent to sufficient true facts in the current pleadings.

[68] The plaintiff's application does not succeed by reason of these additional arguments.

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[40] Per Lord Porter at 358.

Re-Pleading

[69] The plaintiff seeks an order precluding the defendant from re-pleading the defence of fair comment, citing *Channel Seven*, where a majority of the High Court of Australia stated:[41]

> the matters which are said to have made up the "discussion" which the promotion is alleged to have constituted, according to paras 3.5-3.39, do not relate to the imputation that the plaintiff had deliberately concealed evidence: a discussion about supposedly incompetent investigation and testimony is not a discussion about deliberately concealed evidence. It follows that there should be no leave to replead ....

[70] The plaintiff in *Channel Seven* brought a defamation action in response to a current affairs news show which criticised the plaintiff's actions during a forensic investigation. The promotional item indicated neither facts nor notorious facts to support any possible comment. The decision of the High Court was influenced by this as well as Australian common law which imports reasonableness into the assessment of whether a comment is honest.

[71] The defendants note that Kirby J in the minority judgment expressed concern at the refusal to allow leave to re-plead and that the defendants in *Channel Seven* required leave to re-plead. The defendants contrasted this position in *Channel Seven* with that relevant part of r 153 of the Code which reads:

> 153. Amendment of statement of claim, etc. – (1) Subject to the provisions of this rule, a plaintiff may file and serve an amended statement of claim, and a defendant may file and serve an amended statement of defence or an amended counter-claim, at any time before the day of hearing without any order; ....

[72] In reply, the plaintiff argues that it would lead to absurdity if r 153 precluded the court from preventing a party from re-pleading a struck-out defence.

[73] The principles applicable to strike out applications favour allowing the defendant to re-plead the defence and while there may be occasions when the court might take the rare step of preventing a party to re-plead (without considering the merits of such), I do not consider this to be such an occasion.

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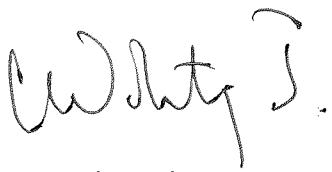
[41] This passage refers to a plea of qualified privilege which depended on the particulars pleaded in support of the defence of fair comment.

[74] I have not found that the plaintiff's application provides grounds for striking out the defence of fair comment. However, I do not consider the defendants' pleadings on this issue fairly inform the plaintiff of the defendants' case. Clarification of the imputations the defendants seek to defend would allow the plaintiff to more expediently prepare his case. These proceedings raise a number of issues, some of which have not been extensively tested by this Court. Any additional clarity in pleadings will go some way in aiding the parties and the Court in best determining the issue of this case.

[75] Pursuant to r 150 of the Code, I direct the defendants to specifically identify the imputations they seek to defend as fair comment. An amended Statement of Defence including such particulars is to be filed and served with 20 working days of the date of this judgment.

Costs

[76] The plaintiff has failed in his application and ordinarily cost would follow the event. However, bearing in mind the novelty of the issues in this jurisdiction raised by the application and my determination that the defendants should be more explicit in the pleading of the defence, I reserve the matter of costs until the matter is determined substantively, noting the argument took one-half day.



Justice Colin Doherty