IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA402/2023
[2024] NZCA 581

BETWEEN	GURWINDER SINGH BAINS Appellant
AND	HARNEK SINGH Respondent

Hearing: 5 March 2024

Court: Courtney, Dunningham and Moore JJ

Counsel: A J Romanos for Appellant
R K P Stewart for Respondent

Judgment: 12 November 2024 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The decision of the High Court is set aside to the extent specified in [65] of this judgment and the defence of honest opinion is struck out in respect of the first meaning pleaded in relation to each of publications two, three, and four.

C The question of costs on the strike-out application falls to be considered in the High Court in accordance with this judgment.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In August 2021, Harnek Singh posted comments about Gurwinder Bains to his Facebook page, which Mr Bains alleges defamed him. In proceedings brought by Mr Bains, Mr Singh has pleaded affirmative defences of qualified privilege and honest opinion.[1] Mr Bains applied unsuccessfully to strike out those defences.[2] Now he appeals Associate Judge Taylor's decision declining the strike-out application.[3]

[2] The issues identified by the parties are:[4]

(a) Is it reasonably arguable that any of the publications were published on an occasion of qualified privilege? That is, is it reasonably arguable there existed a requisite relationship between Mr Singh and the publications' recipients for such publications to have been made on occasions of qualified privilege?

(b) In respect of the affirmative defence of honest opinion:

(i) Is it reasonably arguable that the pleaded meanings in relation to which the defence has been raised are capable of being understood as expressions of opinion conveyed by the relevant publications as a whole?

(ii) If so, is it reasonably arguable that the publication facts relied on by Mr Singh (including any generally known facts) are sufficiently indicated or alluded to in the publications to allow the pleaded meanings to be understood as expressions of opinion?

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1 Mr Singh has also pleaded truth but no issue arises in this appeal in relation to that defence.
2 *Bains v Singh* [2023] NZHC 332 [judgment under appeal].
3 The Judge granted Mr Bains leave to appeal: *Bains v Singh* [2023] NZHC 1566.
4 We have adjusted the phrasing of the issues from the way they were identified by the parties for clarity.

The background to the proceedings

[3] Mr Singh is prominent in the Auckland Sikh community and is a founding member of Sri Guru Singh Sabha Auckland Inc (SGSS), which was established in 2002 and promotes a certain Sikh ideology. Mr Singh is the lead convenor of the SGSS gurudwara (a Sikh temple) in Papatoetoe. He hosts a radio programme on Radio Virsa to publicise his views on Sikh ideology. He also uses his personal Facebook page to share his views.

[4] Mr Singh says he and SGSS have been the subject of threats and physical attacks by followers of two other Sikh sects, Damdami Taksal, who are associated with the Supreme Sikh Society of New Zealand (SSSNZ) and have a gurudwara in Takanini, and Akhand Kirtani Jatha, who have a gurudwara in East Tāmaki. The attacks on Mr Singh and SGSS apparently date back to 2009. In 2015, a group said to include Mr Bains threatened the SGSS gurudwara. In 2020, Mr Singh was seriously assaulted by a group that included members of Akhand Kirtani Jatha.

[5] Mr Bains is a Te Puke businessman. He has made charitable donations to a variety of causes in New Zealand and India and the fact that he has done so is generally known. Mr Bains acknowledges some association with SSSNZ. He says that he has given the organisation support, particularly in relation to charitable objectives. However, Mr Bains is not, and never has been, a member of SSSNZ. Nor is he a member of Damdami Taksal or Akhand Kirtani Jatha. He agrees that he was present at the 2015 incident but denies Mr Singh's characterisation of it. He is not implicated in the 2020 assault.

[6] In March 2021, Mr Bains received a SSSNZ community award for "outstanding contribution in the field [of] humanity, welfare and sports" presented by the then Leader of the Opposition, the Hon Judith Collins. Receipt of the award attracted publicity in both New Zealand and India.

The publications

[7] Over the course of four days between 7 and 11 August 2021, Mr Singh made the four posts to his personal Facebook page which are the subject of Mr Bains'

defamation claim. The text of Mr Singh's comments in the posts were in Punjabi, in Gurmukhī script.[5]

Publication one: posted on 7 August 2021

[8] This publication comprised comments by Mr Singh and three images: a screenshot of a post (the rape post) by another Facebook user (known as "Judge Saab"), which included a photograph of Mr Bains, and two further photographs of Mr Bains.

[9] The photograph in the screenshot showed Mr Bains sitting on a picnic table. One of the other photographs showed Mr Bains and four other Sikh men outside the Takanini gurdwara, with Mr Bains holding the SSSNZ award. The third showed a group of people following Mr Bains' receipt of the award.

[10] The rape post by "Judge Saab" was in English and said:[6]

> This motherfucker lieing to Police that he got hit on his face with a kiwifruit cutter but reality was he got punched near to his eye for saying he wanted to rape my partner lol [two face with tears of joy emojis] stop lieing Gopa Bains Manak Dheri tell them the truth that yu got thwack [oncoming fist emoji] from a girl [face with tears of joy emoji] for talking shit [rolling on the floor laughing emoji]
>
> #Boundu

[11] Mr Singh's comments appeared above the images. The agreed translation reads:

> "Hey, the ones from Te Puke"!
> Who is this "Gopa Bains"?
> "Isn't he the gold medallist of the Takanini ones"?
> "The one they were honouring with a brick of gold"!
> "What has he done to himself"?
> Although "there is no doubt about the self-appointed contractors of the martyrs":
> But "still what's the truth, tell us"!
> Well, "the third photo is telling the whole truth":
> "All the Khalistan thieves are sitting"!

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5 There were disagreements in the High Court over the correct translation of the Punjabi text. These have now been resolved. In this Court, the parties provided a schedule containing the agreed English translations.

6 The amended statement of claim says that "Manak Dheri" refers to the village in Punjab, India where the appellant is from and that "boundu" is a term of vulgar abuse.

Publication two: posted on 8 August 2021

[12] This publication took the form of a poem (attributed to a Pritam Gurdev). Below the poem is an image comprising two photographs of two men, one of Gruinderpal Singh Brar (who, it is agreed, was a member of the SSSNZ) captioned "Bunty Baba CA" and another of Mr Bains captioned "Gopa Bains Manak Dheri". The agreed translation of the first two verses of the poem is:

> I heard the characters are sold
> Taken by the wicked
> Honour is bought and sold with money
> By the sardars [(Sikh or leader)]
>
> Made a lot of money by playing the games of theft
> Respect fame are not left in the village
> Then thought the thieves

[13] The other five verses are in similar terms. In particular, the lines "I heard the characters are sold" and "[h]onour is bought and sold with money" are repeated twice more.

Publication three: posted on 9 August 2021

[14] This publication comprised a photograph of Mr Bains standing with two other men and the following text, attributed to "Azaad NZ":

> Gopa of the Takanini ones
> Spend some pennies to
> Buy a brick of gold
> And you can climb any wall
> Brother you were saying it's magical brick
> My eyes got blue just like that.
>
> Azaad NZ

Publication four: posted on 11 August 2021

[15] This post comprised an image made of two photographs, one of Mr Bains and one of another man, and the following comments by Mr Singh:

> After buying the brick of gold Mr. Gopa thought that why bother now, can do anything. Mr Bunty also kept thinking the same that now I have got the God's throne, clean and tidy servants will tidy up my future and past throughout life.

> Both persons were very desperate to become great quickly. This proves that both are followers of the same master.

Defence of qualified privilege

The pleadings

[16] Mr Singh's pleading of qualified privilege asserts that he was under a social or moral interest or duty to publish the posts and the recipients had a corresponding interest or duty to receive them. The particulars relied on include that SSSNZ has attempted to infiltrate and destabilise SGSS in various ways and that the followers of his Facebook page are members or associates of either SGSS or SSSNZ. Although not pleaded expressly, Mr Stewart, for Mr Singh, explained that Mr Singh considers he was under a duty to bring to the attention of his followers important matters that might affect their religious beliefs and attitudes towards followers of SSSNZ.

[17] The privilege arising from a publication made on a privileged occasion will be lost if the plaintiff proves that the maker of the statement took improper advantage of the occasion of publication or was predominantly motivated by ill will.[7] Mr Bains has filed a notice under s 41(1)(b) of the Defamation Act 1992 asserting that Mr Singh was motivated by ill will or that he otherwise took improper advantage of the occasion. The particulars relied on are that Mr Singh acted with actual or reckless disregard for the truth, acted out of jealousy because Mr Bains received the award from SSSNZ and was mistaken regarding Mr Bains' association with SSSNZ.

The strike-out application

[18] Mr Bains' argument in the High Court was, essentially, that the publications were general and the defence of qualified privilege for general publications that existed prior to *Durie v Gardiner* had been subsumed into the new responsible public interest communication defence articulated in that case.[8] Mr Singh would therefore need to show that the subject matter of the publication was a matter of public interest and that he had acted responsibly in publishing the posts. Even if the defence of

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7 Defamation Act 1992, s 19(1).
8 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

qualified privilege continued to exist in its previous form, it would fail in this case because of the breadth of the publication.

[19] Mr Singh opposed the strike-out application on the basis that he was relying on the defence of qualified privilege in the traditional form that existed prior to this Court's recognition of the new defence of responsible public interest communication in *Durie v Gardiner*.

[20] The Judge set out the criteria for strike out,[9] the parties' respective submissions, and concluded that there was an arguable case for qualified privilege which should be dealt with at trial:[10]

> 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. From the evidence, which will need to be produced at trial, it will need to be determined whether there is a sufficient duty and corresponding interest in relation to the publications. In my view, the affidavit evidence discloses that the duty and interest are arguable and therefore, the defence of qualified privilege should not be struck out.

Did the Judge err in finding that the defence of qualified privilege is reasonably arguable?

[21] The defence of qualified privilege protects publications made by a person with a duty or interest to communicate them to a person or persons who have a reciprocal duty or interest in receiving the communication. The circumstances in which a publication may be protected in this way was described by Lord Atkinson in *Adam v Ward*:[11]

> A privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

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9 Judgment under appeal, above n 2, at [33], citing *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267, and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

10 At [81].

11 *Adam v Ward* [1917] AC 309 (HL) at 334.

[22] Whether an occasion is privileged is a matter for the judge.[12] This requires consideration of all the relevant circumstances to determine whether the publisher had a duty or interest in making the particular communication. The nature of the communication, the position of the publisher, the number of recipients and the nature of their interest are all relevant.[13] Before we consider this aspect, however, we address the issue argued in the High Court and advanced again in the written submissions filed on behalf of Mr Bains.

[23] Because the essence of qualified privilege is reciprocity between a person who has duty or interest in communicating information and a recipient who has a duty or interest in receiving it, communications to the public at large are usually not protected.[14] In written submissions, counsel for Mr Bains submitted that the Facebook posts were an example of general publication which could only be protected if they satisfied the requirements for responsible public interest communication privilege as articulated in *Durie v Gardiner*, namely that the subject matter of the publication is of public interest and the publisher acted responsibly.[15] He submitted that Mr Singh could not meet those requirements.

[24] But Mr Singh does not rely on this form of privilege. He relies on the traditional form of qualified privilege based on a reciprocal duty or interest in providing and receiving information. On this approach, *Durie v Gardiner* does not apply. In oral argument, Mr Romanos, for Mr Bains, responsibly accepted that the traditional form of qualified privilege does subsist, and Mr Singh does not need to bring himself within the defence of responsible public interest communication.

[25] The line of cases comprising *Lange v Atkinson (No 1)*, *Lange v Atkinson (No 2)* and *Durie v Gardiner* were concerned with general publication — publication to the

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[12] At 334; and *Stuart v Bell* [1891] 2 QB 341 (CA) at 349–350 per Lindley LJ. However, whether a privileged occasion has been misused is a question for the jury: *Lange v Atkinson* [2000] 3 NZLR 385 (CA) [*Lange v Atkinson (No 2)*] at [5].

[13] *Lange v Atkinson (No 2)*, above n 12, at [13].

[14] See Ursula Cheer (ed) "Defamation" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [15.11.1(1)(a)]. The common law has long recognized exceptions, such as media reporting of court proceedings and Parliamentary debates and other Parliamentary proceedings. Section 16 of the Defamation Act now provides that publication of the reports and matters in sch 1 is protected by qualified privilege.

[15] *Durie v Gardiner*, above n 8, at [58].

public at large.[16] *Lange (No 1)* and *Lange (No 2)* concerned mainstream media reporting and comment on political figures. Ultimately, it was held that qualified privilege could extend to generally published political statements on the basis that the nature of New Zealand's democracy means that the wider public have a proper interest in generally published statements concerning the functioning of representative and responsible government, including statements about the performance or possible future performance of individuals in elected public office.[17] However, the publication still had to be made on a qualifying occasion with the usual requirement for a reciprocal duty or interest.[18]

[26] The extension held to exist in *Lange (No 2)* was reviewed by this Court in *Durie*, which concerned a television broadcast and website stories about prominent Māori figures.[19] The reasons for reassessing the defence included that, in the intervening 18 years, there had been shifts in political power and the public expectation of accountability for non-political groups, mass communication had altered significantly as a result of changes in technology and the effect of social media, and the increasing prominence of the New Zealand Bill of Rights 1990.[20] The Court held that there was to be a new defence of "responsible communication on a matter of public interest", which would extend to all matters of significant public interest and be subject to a requirement that the communication be responsible.[21]

[27] The Court explained where the new defence would sit in relation to the common law defence of qualified privilege:[22]

> [82] In the interests of doctrinal coherence … the new defence should be a standalone defence and not part of the rubric of qualified privilege.
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> [83] … It arises primarily because of the subject matter of the publication — a matter of public interest — and not the occasion on which it is published, as in the traditional form. Unlike the traditional form, there is also no question of the "privilege" being defeated by showing the privilege was abused

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16 *Lange v Atkinson* [1998] 3 NZLR 424 [*Lange v Atkinson (No 1)*]; *Lange v Atkinson (No 2)*, above n 12; and *Durie v Gardiner*, above n 8.
17 *Lange v Atkinson (No 1)*, above n 16, at 468; and *Lange v Atkinson (No 2)*, above n 12, at [10] and [12].
18 *Lange v Atkinson (No 2)*, above n 12, at [22] and [41].
19 *Durie v Gardiner*, above n 8.
20 At [56].
21 [57]–[58].
22 Footnotes omitted.

> (malice), because the propriety of the defendant's conduct is built into the conditions under which the material is privileged. …
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> …
>
> [86] We therefore conclude that the form of qualified privilege recognised in *Lange v Atkinson* should no longer be an available defence, being effectively subsumed in the new defence of public interest.

[28] Thus, the effect of *Durie v Gardiner* was to create a new defence which did not require a shared duty or interest, but which would be available only where the subject matter of the publication was a matter of public interest and the publisher had acted responsibly.[23] This defence subsumed the extension to qualified privilege held to exist in *Lange (No 1)* and *Lange (No 2)*. It did not, however, affect the traditional form of qualified privilege, which continues to subsist.

[29] We return to the question of whether it is reasonably arguable that the publications were made on an occasion of qualified privilege. Mr Stewart argued that Mr Singh's status means that he is expected to comment on the moral character of both supporters and opponents of him and his sect. On this basis, Mr Bains' association with, and recognition by, SSSNZ means that Mr Bains' character is a matter of interest to both those supporters and opponents. Allegations that Mr Bains lied to the police and made a threat of rape are matters of genuine and serious concern to followers of Mr Singh's Facebook page, regardless of the sect to which they belong. Likewise, questions of whether Mr Bains made charitable donations for genuinely altruistic reasons or as a means of self-promotion are relevant because of SSSNZ's recognition of him as a worthy person in the community. Mr Singh therefore contends he had a duty to make the publications and those who followed his Facebook page had a corresponding interest in what he had to say about those matters because it might affect their religious beliefs.

[30] Mr Romanos emphasised, properly, that whether an occasion is privileged requires an objective enquiry and that Mr Singh's subjective beliefs as to whether he had a duty to make the publications does not mean they were made on a privileged occasion. He submitted that whatever the dispute between the sects, it could not affect whether Mr Singh had a duty to publish comments about Mr Bains. He also

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[23] At [58].

emphasised the breadth of the publication through social media and what he described as the incongruence of applying the defence to the particular form of the publications (opinions) and tone ("scathing, mocking, mirth of Mr Bains").

[31] We see the following circumstances as relevant. First, although Mr Bains is not a member of SSSNZ, he does have a connection with it.

[32] Secondly, Mr Singh holds a prominent position in the Sikh community in New Zealand. For the followers of SGSS, he is a leader in terms of spreading the philosophy of the sect. He is also well-known to followers of SSSNZ for his views, which differ from theirs and which have attracted a strong adverse response from SSSNZ.

[33] Thirdly, Mr Singh asserts, without challenge, that the majority of his Facebook followers are members of either SGSS or of SSSNZ. The posts commenting on Mr Bains were intended to inform both groups about the character of a person held up as worthy by SSSNZ. We note that Mr Singh's comments in the publications were in Punjabi so, self-evidently, there are barriers to accessing the publications for those who are not Punjabi speakers. Mr Stewart advised us, without objection, that the Facebook page has at least 10,000 followers.

[34] It has been observed that sometimes qualified privilege may exist even when those with an interest in receiving the information are quite numerous.[24] For example in *Wells v Butler*, the publication of statements in a newspaper, circulated to some 3,500 members of a trade union and republished by another union organisation with a membership of approximately 189,000 workers, was held to be privileged.[25] The statements were published in the context of the 1951 waterfront strike and O'Leary CJ considered that:[26]

> ... where you have a nation-wide upheaval, that labour leaders, whether they were of the Federation of Labour or of any other organizations, or whether their unions had remained loyal to the Federation of Labour or supported the watersiders, men in the position of Butler, Baxster, Walsh, and those

[24] Cheer, above n 14, at [15.11.1(1)(a)].
[25] *Wells v Wellington* [1952] NZLR 312 (SC) [*Wells v Butler*] at 319.
[26] At 319.

> associated with them, had a public duty to speak out, and to speak plainly, not only to their particular adherents, but to the public generally.

[35] The Judge went on to conclude that the men being sued had an interest and a duty "at least to see, so far as they could attain it, that their particular adherents, whether of the individual Labourers' Union or of the wider body, the members of the unions affiliated with the Federation of Labour, should not extend the strike by their action".[27] The extent of the publication was not regarded as something that would defeat the privilege on the basis that, in the circumstances of the waterfront strike, "it was a duty on the part of labour leaders who knew the position to tell the whole of the community what happens when a strike has commenced".[28]

[36] A more recent and comparable example is the Singaporean case of *Cheng v Central Christian Church*.[29] A magazine published an article which suggested that a particular church was a cult. The magazine was described as a publication of the evangelical community and circulated among members of that community. It had a print run of 6,000 copies, of which half went to subscribers with the rest sold at churches and "book rooms". The Court of Appeal of Singapore rejected the plaintiffs' argument that the fact members of the public had access to the magazine destroyed the privilege that might otherwise attach:[30]

> … the magazine is a publication of the evangelical community and is circulated and distributed to members of that community and to churches. In these circumstances there is a duty on the part of the writer and publisher to publish that article and there is a corresponding interest on the part of the members of that community to receive it. The mere fact that persons who are not members of such community could have access to the publication does not *ipso facto* destroy that privilege. Where a libel is published on a privileged occasion and the publication does not go beyond the exigency of the occasion, the mere fact that the defamatory matter is communicated to persons who have no legitimate interest in the subject matter will not avoid that privilege …

[37] Mr Romanos, however, likened the present case to *Goyan v Motyka*, in which publications comprising letters in both English and Ukranian by members of the Ukrainian community in Australia about another member of the community,

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27 At 319.
28 At 321.
29 *Cheng v Central Christian Church* [1998] SGCA 51, [1998] 3 SLR(R) 236.
30 At [57], citing Patrick Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (9th ed, Sweet and Maxwell, London, 1998) at [14.73].

distributed to various members of the community, were held not to be privileged.[31] The longstanding ill-will between the parties had its roots in the control of a Ukrainian association. The comments were personal ones conveying that the plaintiff was a "liar and swindler" and was planning to use funds belonging to the association for himself. The trial Judge had held that the publications were not protected by qualified privilege (and were, in any event, actuated by malice).[32] The New South Wales Court of Appeal upheld the Judge's decision regarding the qualified privilege defence on the basis that the statements had been volunteered, were expressed in a tone that seemed unlikely to promote the welfare of the society in which they were published and that the class of people with any possible reciprocal interest in receiving the information was not the Ukrainian speaking community in Australia generally, so publication was made to a group that was too broad to satisfy the requirement of reciprocity.[33]

[38] Mr Stewart distinguished the present case from *Goyan v Motka* on the basis that the latter was an appeal from a decision following trial where evidence had been given and the facts surrounding the publications fully explored. We accept that this is a valid distinction. We are concerned here with a strike-out application. The question is not whether the publications were made on an occasion of privilege but whether it is reasonably arguable that they were.[34]

[39] In our view, it is reasonably arguable that, given Mr Singh's position in the Sikh community and his high profile among followers of both SGSS and SSSNZ, his publication of material directed towards the character of a person recognised by SSSNZ could have been made on an occasion of privilege. We acknowledge Mr Bains' assertion that he is merely caught in the crossfire between the two groups. But the pleading and the evidence provide a sufficient basis on which the defence might be asserted. We express no view on whether, ultimately, it should be held to be available.

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31 *Goyan v Motyka* [2008] NSWCA 28, [2008] Aust Torts Reports 81-939.
32 *Motyka v Gojan* [2007] NSWSC 31 at [206] and [209].
33 *Goyan v Motyka*, above n 31, at [88]–[89].
34 See *Attorney-General v Prince*, above n 9, at 267; and *Couch v Attorney-General*, above n 9, at [33].

Honest opinion

The strike-out decision and issues arising from it

[40] The defence of honest opinion is available where the meaning of a publication is an expression of an honestly held opinion based on facts that existed at the time of the publication. However, it must be recognisable as an opinion and the publication must indicate the factual basis for the opinion.[35] In the High Court, Mr Bains contended that neither of these requirements were met.

[41] Mr Bains asserted that the publications carried the natural and ordinary meanings that — broadly — he was guilty of sexual misconduct, was morally and financially corrupt, and had bought the award conferred on him by SSSNZ (we come to the exact pleaded meanings later). Mr Singh pleaded honest opinion in respect of all the meanings except those alleging sexual misconduct.[36]

[42] In respect of all the publications, the facts asserted as being the basis for the publications were:

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

(b) Mr Bains had received the award at a ceremony on 21 March 2021;

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

(d) Mr Bains lied to the police in relation to the cause of the injuries he sustained (during the incident at Hamilton Lake).

[43] It was said that all of these facts were generally known at the time of publication. Mr Bains admitted that point in his second amended reply to the statement of defence, with the caveat that the fact that Mr Bains had made donations to charitable causes was not referred to, explicitly or implicitly, in any of the publications.

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35 *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [16]–[24].
36 Only the defences of truth and qualified privilege were raised in respect of this meaning.

[44] The Judge considered, first, that each of the publications were capable of being read as a statement of opinion.[37] Mr Romanos submitted that the Judge had misstated the issue, which was not whether "the publication" was capable of being read as an expression of opinion but rather whether the pleaded meaning was capable of being understood as opinion.

[45] Secondly, the Judge was satisfied that the factual basis for the opinions were sufficiently indicated in each case.[38] Mr Romanos submitted that, with one exception, the Judge erred in that conclusion because there was no indication of any fact on which an opinion that Mr Bains had bought the award could be based.

[46] The exception was the meaning in publication one that Mr Bains was morally (as opposed to financially) corrupt. In this Court, he withdrew that aspect of the challenge. We therefore do not need to consider honest opinion in relation to publication one.

Publication two

[47] The meanings said to be conveyed by publication two are that:

(a) Mr Bains is corrupt in that he has bought, rather than earned, his good reputation.

(b) Mr Bains is depraved in that he has misconducted himself sexually.

[48] Mr Romanos argued that these meanings were not reasonably understood as expressions of opinion because the opening words of the verses that begin "I heard" were consistent with repetition of a fact, not the expression of an opinion. As we have noted, publication two is in the form of a poem. It must be read as a whole and in doing so, one can see metaphor and imagery are used throughout, which suggest that the words "I heard" were not literal — they were used as a literary device. We think the meaning conveyed by the poem is capable of being understood as an opinion.

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37 Judgment under appeal, above n 2, at [51], [61] and [68].
38 At [51], [61] and [68].

[49] The meaning of sexual misconduct must be amenable to the defence of honest opinion. Mr Romanos accepted that publication two should be approached on the basis that readers would be aware of publication one, which clearly referenced the photographs and rape post, and would therefore have come to publication two aware that allegations of sexual misconduct had been made against Mr Bains. He therefore accepted there was sufficient indication of facts for that meaning.

[50] This leaves the submission that the pleaded meaning that the plaintiff "is corrupt in that he has bought, rather than earned, his good reputation" has no indicative factual basis. This meaning (which is also pleaded in relation to publications three and four) is said to be based on the fact that Mr Bains was generally known to have made charitable donations. Mr Romanos submitted that even if a fact is generally known it must still be sufficiently indicated, unless it is notorious, so that the publication was obviously based upon it.

[51] Mr Stewart accepted that Mr Singh must indicate that the facts on which the opinion is based. He submitted that since Mr Bains has accepted that the fact of his charitable donations is generally known, it must be at least arguable that there is sufficient indication of the facts on which those opinions were based. Mr Stewart relied on the observation made by the authors of *Burrows and Cheer: Media Law in New Zealand* that "[v]ery little [indication] if anything will be necessary if the opinion is on facts already well known to the public, either because they have been in the news already ... or simply because they are matters of notoriety."[39]

[52] We do not accept that the fact of Mr Bains' charitable donations — necessarily prior to the presentation of the award in March 2021 and so at least five months before the posts — could possibly be described as sufficiently notorious to make it unnecessary to give some indication that the opinion of corruption was based on them. The extent to which the facts relied on for an opinion must be indicated was extensively reviewed by the Supreme Court of the United Kingdom in *Joseph v Spiller*, in which Lord Phillips noted the requirement, emphasised repeatedly

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[39] Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (8th ed, LexisNexis, Wellington, 2021) at [3.3.1(a)].

in previous cases, that the comment should identify the subject matter on which it is based and explained the reason for that requirement:[40]

> [101] There are a number of reasons why the subject matter of the comment must be identified by the comment, at least in general terms. The underlying justification for the creation of the fair comment exception was the desirability that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocused.
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> …
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> [104] … The comment must … identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism.

[53] Lord Phillips concluded that "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based".[41]

[54] Mr Singh's opinion that Mr Bains had effectively "bought" his award was based on the fact that Mr Bains had made charitable donations. This fact was generally known. As a result, little was required by way of an indication that this was the basis for Mr Singh's opinion. Even a slight reference to donations having been made would have been sufficient to allow readers to identify the general basis for the opinion. But there was no indication at all of the subject matter. In our view, the making of donations was not sufficiently obvious for readers to identify the donations as the basis of the opinion as opposed to other possible reasons that Mr Singh might believe that Mr Bains had obtained the award corruptly. For example, Mr Bains' success in business could equally have been the basis for Mr Singh's opinion.

[55] We conclude that the defence of honest opinion is not reasonably arguable in relation to the first pleaded meaning in publication two.

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40 *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852.

41 At [105].

Publications three and four

[56] Because there is substantial overlap between these publications, we deal with them together.

[57] Publication three is said to mean that:

(a) Mr Bains is corrupt in that he bought, rather than earned, the award.

(b) Mr Bains thought that after receiving the award, he could misconduct himself sexually with impunity.

(c) Mr Bains did in fact misconduct himself sexually.

[58] Publication four was said to mean:

(a) Mr Bains is corrupt in that he bought, rather than earned, the award.

(b) Mr Bains thought that by getting the award, he could misconduct himself sexually with no consequences.

[59] The meanings in both are capable of being understood as expressions of opinion. Publication three is ostensibly in poetic form and is clearly opinion. Publication four is not a poem. But it uses language that is readily understood as rhetoric rather than an attempt to state facts.

[60] However, as with publication two, there is simply no indication that this aspect of the opinion is based on the fact that Mr Bains had (necessarily prior to March 2021) made charitable donations. We consider that this omission is fatal to the pleading of honest opinion in respect of the first meaning in each of publications three and four.

[61] The facts on which the meanings relating to sexual misconduct are based are sufficiently identified, again for the reasons discussed in respect of publication two.

Summary of conclusions on honest opinion

[62] It is reasonably arguable that the all the pleaded meanings are capable of being understood as expressions of opinion.

[63] It is reasonably arguable that the publication facts relating to the pleaded meanings of sexual misconduct are sufficiently indicated.

[64] It is not reasonably arguable that the publication facts relating to the pleaded meaning that Mr Bains is corrupt in that he bought rather than earned the award are sufficiently indicated.

[65] As a result, the decision of the High Court declining to strike out the defence of honest opinion insofar as it relates to the first meaning pleaded in relation to each of publications two, three and four is set aside. The defence of honest opinion will be struck out to that extent.

Costs in the High Court

[66] The High Court granted Mr Bains costs on the application for leave to appeal to this Court and the corresponding costs memorandum but reserved the question of costs on the strike-out application.[42] Mr Bains seeks to have this Court direct the High Court to award costs to him on the strike-out application. It is not for this Court to make such a direction. The question of costs on the strike-out application falls to be considered by the High Court based on the outcome of the appeal.

Result

[67] The appeal is allowed in part.

[68] The decision of the High Court is set aside to the extent specified in [65] of this judgment and the defence of honest opinion is struck out in respect of the first meaning pleaded in relation to each of publications two, three and four.

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[42] *Bains v Singh* [2023] NZHC 3316 at [12]–[14]; and judgment under appeal, above n 2, at [85].

[69] The question of costs on the strike-out application falls to be considered in the High Court in accordance with this judgment.

[70] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Langford Law, Wellington for Appellant
Rice Craig, Auckland for Respondent