IN THE SUPREME COURT OF NEW ZEALAND

SC 69/2008
[2009] NZSC 93

BETWEEN	APN NEW ZEALAND LIMITED Appellant
AND	SIMUNOVICH FISHERIES LIMITED First Respondent
AND	PETER JOHN SIMUNOVICH Second Respondent
AND	VAUGHAN HILTON WILKINSON Third Respondent

SC 70/2008

BETWEEN	TELEVISION NEW ZEALAND LIMITED Appellant
AND	SIMUNOVICH FISHERIES LIMITED First Respondent
AND	PETER JOHN SIMUNOVICH Second Respondent
AND	VAUGHAN HILTON WILKINSON Third Respondent

Hearing: 9 and 10 June 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: B D Gray QC, A L Ringwood and T C Goatley for APN New Zealand Ltd (SC 69/2008)
A R Galbraith QC, W Akel and T J Walker for Television New Zealand Ltd (SC 70/2008)
J G Miles QC and A E L Ivory for Respondents

Judgment: 26 August 2009

JUDGMENT OF THE COURT

A The appeals are dismissed.

B Each appellant is ordered to pay to the respondents jointly costs of $15,000 and one half of their reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

(Given by Tipping and Wilson JJ)

Introduction

[1] At issue in these appeals is the nature of the particulars which can be given by a defendant in a defamation suit in support of the defences of truth and honest opinion. Those particulars must give appropriate details of the facts and circumstances which are said to support the defences. In short, the point in dispute is whether the required particulars are confined to objectively provable primary facts or may include expressions of opinion or allegations by third parties about or concerning those facts. One important purpose of particulars in this context is that generally the defendant may not give evidence outside the ambit of permitted particulars. They therefore serve to focus and confine the evidence which may be given in support of defences of truth and honest opinion.

[2] The meaning of the defamatory publications at issue in this case is said to be that the plaintiffs are corrupt or, alternatively, that there are reasonable grounds to suspect that they are corrupt. Conventional particulars will supply details of primary facts and circumstances from which the conclusion that the plaintiffs are or are reasonably suspected of being corrupt may be drawn. The question in this case is whether the particulars may extend to statements of others (third parties) in which they express the opinion or make the assertion that the plaintiffs are corrupt or can reasonably be suspected of being corrupt. It matters not for present purposes

whether the facts and circumstances which form the basis of the opinion or assertion are or are not within the personal knowledge of the third party.

[3] These facts and circumstances may of course be particularised on the basis that the defendant accepts the responsibility of proving them directly. They will then be particularised directly. But can they be particularised on the basis that the third party's statement itself tends to establish the truth of the asserted defamatory meaning or the truth of the facts on the basis of which the defendant's opinion was expressed? A simple example of a conventional particular, taken from the general circumstances of this case, but which we emphasise is purely hypothetical, would be:

> On the _____ day of _____ 200__ at Auckland the plaintiff X instructed his employee Y to falsify catch records for scampi.

[4] A similar example of the contested type of particular would be:

> Z stated in an affidavit sworn at Auckland on the _____ day of _____ 200 that [he believed (or understood or claimed) that] on the _____ day of _____ 200__ the plaintiff X instructed his employee Y to falsify catch records for scampi.

Alternatively, the words in square brackets in this example could be omitted. The particular would then become a direct assertion of fact by the third party Z. Whether the third party's statement is particularised in that more direct form or as an expression of belief, opinion or assertion is, however, irrelevant for present purposes. In each case this kind of particular relies upon a statement by a third party as a particular of relevant facts and circumstances, rather than particularising the relevant facts and circumstances themselves in a conventional direct manner. The making of the statement by the third party is not itself a relevant fact for present purposes.[1]

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[1] But see paras [18] – [19] below for particulars when the honesty of an opinion is put in issue.

Factual background

[5] The respondents (plaintiffs in the High Court) are claiming very substantial damages against the appellants (defendants) for defamation and malicious falsehood. Their claims are founded on passages in publications about the allocation of quota to catch scampi, and more particularly about the relationship between the plaintiffs and the Ministry of Fisheries. The plaintiffs claim that the meaning of these passages is that they were corrupt and guilty of or parties to criminal or fraudulent conduct. The second and third plaintiffs also claim that the words in issue meant that they were corrupt and dishonest businessmen. In this pre-trial appeal, no issue arises over any of these pleaded meanings (attributing actual corruption, crime or fraud) or the defences raised to them.

[6] The plaintiffs allege alternatively that the publications meant that "there were serious grounds for believing" that they were corrupt and that the second and third plaintiffs were corrupt and dishonest businessmen. The defendants plead to these meanings the defences of truth and honest opinion and other defences with which we are not concerned. The particulars in support of the defences of truth and honest opinion include statements by third parties of the kind mentioned above. They comprise statements of judges in court judgments, allegations in Parliament and elsewhere by a prominent politician, statements in a report commissioned by the Solicitor-General, and in affidavits of former employees of the first plaintiff and the Ministry of Fisheries, and in notes of interviews with those deponents and fishing and legal experts. For convenience, we will refer to these particulars collectively as "third party particulars". The plaintiffs have applied to strike out the third party particulars. They succeeded in part in the High Court, but the Court of Appeal held that all the challenged particulars were impermissible. The defendants seek their reinstatement by this Court.

[7] Whether the third party particulars are permissible depends in part on whether they contravene either or both of two common law principles. The first, often referred to as the "repetition rule", is that a defendant repeating a defamatory

allegation does not prove its truth simply by proving that the allegation was made.[2] The second, known as the "conduct rule", is that it is generally necessary, when the defendant seeks to establish that there were indeed grounds for suspecting misconduct by a plaintiff, for him to give direct particulars of relevant conduct of the plaintiff rather than rely on some other source. If the third party particulars contravene either or both of these common law rules, the question becomes whether the position at common law has been modified by the Evidence Act 2006. The defendants also rely on ss 8(3)(b) and 38 of the Defamation Act 1992 for related but largely discrete arguments.

The decisions below

[8] In one of a series of judgments on pre-trial applications,[3] Allan J held that the repetition and conduct rules applied to the third party particulars. He rejected the submission of the defendants that they could rely on "credible hearsay sources".[4] The Judge described this submission as having a "certain superficial attraction" but found that it was defeated by s 50 of the Evidence Act, which prohibits a party from adducing evidence of a finding of fact in a civil proceeding to prove the truth of that fact in another civil proceeding.[5] Allan J also rejected a submission of *prima facie* admissibility based on the principles in ss 7 and 8 of the Act. He said:[6]

> … there is a distinction between an entitlement to rely upon hearsay evidence on the one hand and the character of the factual material necessary to underpin a truth defence in the first place. … In other words, a defendant cannot establish facts simply by relying on circumstances.

[9] Allan J also discussed s 38 of the Defamation Act 1992. That section requires a defendant who alleges that a publication is true in so far as it is a statement of fact and is honest opinion in so far as it is an expression of opinion to particularise which of the statements are alleged to be statements of fact and to give particulars of "the facts and circumstances" relied upon in support of the allegation that those

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2 *Truth NZ Ltd v Holloway* [1961] NZLR 22 (PC).
3 *Simunovich Fisheries Ltd v Television New Zealand Ltd (No 7)* (High Court, Auckland, CIV-2004-404-3903, 3 August 2007).
4 At para [47].
5 At para [47].
6 At para [48].

statements are true. The Judge held that the obligations resting on a defendant who raises a defence of truth are "akin" to the requirements of s 38.[7] While rejecting the submission that defendants may rely on the allegations and opinions of others as facts for the purposes of s 38, Allan J accepted that such evidence may constitute a circumstance, of which defendants are entitled to plead particulars.[8] It was however important to distinguish between facts and circumstances when providing particulars, given that circumstances were not "primary facts [able to be] relied upon for proof of the defence of truth".[9]

[10] As to the defence of honest opinion, the Judge thought that a defendant "is plainly entitled to support expressions of opinion with [statements of] facts and circumstances appearing in the same articles, that, taken together, make up the plaintiffs' allegations".[10] A defendant could also rely on the comments of others for the fact that they were made but not for their truth and, on this basis, such comments could properly support an expression of opinion.[11]

[11] The defendants appealed to the Court of Appeal[12] on the issues now before this Court and also on a number of other grounds. In a judgment delivered by Miller J, the Court allowed the appeals in part. The Court regarded the key issue with the third party particulars as being whether they were "relevant" to the defences raised.[13] In answering this question, both the conduct rule and the repetition rule were applicable. The Court applied *Shah v Standard Chartered Bank*[14] and *Bennett v News Group Newspaper Ltd*,[15] as authorities for the proposition that a defence of truth must focus on the conduct of the plaintiff. Applying the repetition rule, the Court held that:[16]

> [T]he trial may not be directed to the subjective question whether the witnesses were reliable … the fact that another person asserted that

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7 At para [24].
8 At paras [49], [65] – [68] and [104].
9 At para [49].
10 At para [79].
11 At para [83].
12 *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 (Hammond, Chisholm and Miller JJ) (CA 447/07 and CA 584/07).
13 At para [86].
14 [1999] QB 241 (CA) at p 261 per Hirst LJ.
15 [2002] EMLR 860 (CA) at para [27] per Robert Walker LJ.
16 At para [82].

> Simunovich had acted improperly cannot suffice to prove that there were serious grounds to suspect it of doing so ... It is necessary to determine the truth of the imputation by reference to the primary or underlying facts, and not merely by establishing that the informant made the allegation.

Neither the availability in England of a *Reynolds*[17] privilege for responsible journalism nor the ability of defendants in that country to plead a lesser meaning, contrary to the law in this country as determined by *Broadcasting Corporation of New Zealand v Crush*,[18] justified a departure from the conduct and repetition rules. Nor did the right to freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act 1990. That right was subject under s 5 of the Act to the justified limitation that defamatory information should not be disseminated to a wider audience.

[12] In considering the general admissibility rules and hearsay requirements in the Evidence Act 2006, the Court adopted an approach similar to that of Allan J. It described the issue as being whether a person's claim that a fact was true (termed a "secondary fact") was "itself capable of establishing the truth of a defamatory imputation".[19] Secondary facts (hearsay allegations) may be admissible under the Evidence Act but are incapable of supporting a defence of truth (because of the repetition rule) and as such are irrelevant and not able to be pleaded.[20] Further, the Court accepted that there was no exception for judicial decisions, applying s 50 of the Evidence Act so as to preclude such a possibility. The Court also rejected English case law[21] suggesting that there may be such an exception,[22] noting that these decisions had subsequently been doubted in that jurisdiction.[23] The Court did, however, accept that judicial decisions might be used for setting the issues in context.[24]

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17 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
18 [1988] 2 NZLR 234 (CA).
19 At para [85].
20 At para [86].
21 *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413 (CA) and *Waters v Sunday Pictorial Newspapers Ltd* [1961] 1 WLR 967 (CA).
22 At para [98].
23 In *Stern v Piper* [1997] QB 123 at p 134 per Hirst LJ.
24 At para [99], a finding which is not challenged on appeal.

[13] The Court differed from Allan J over the interpretation and application of s 38. It found that the phrase "facts and circumstances" in s 38 "does not allow a defendant to plead any fact or circumstance whether or not it is capable in law of establishing the defence of truth."[25] As the repetition and conduct rules prevent defendants from relying on the assertions or opinions of others to establish the truth of a "grounds for suspicion" imputation, such assertions or opinions are not "circumstances" for the purposes of s 38. The Court found that s 38 applies to a defendant who relies on the defence of truth as well as that of honest opinion.[26] The Court did not accept that a defendant could rely on the assertions or opinions of others for the purposes of that defence. The essence of the defence is that any opinion expressed is predicated on "publication facts"[27] that the defendant has proven to be true.[28] An opinion or assertion is not capable of being a publication fact; publication facts must be the underlying or "primary" facts.[29] The Court relied on *Galloway v Telegraph Group Ltd*,[30] which had not been cited to Allan J. Finally, the Court noted that s 38 requires defendants to plead those publication facts that they say are true and the facts and circumstances on which they rely to prove the truth of publication facts.[31] Logically, the facts and circumstances which may be used to prove a publication fact are not required to be referred to in the publication or to exist at the time of publication.

[14] Applying these principles to the third party particulars, the Court held that:

- statements of fact may not include the fact that others made allegations or expressed opinions;[32]

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25 At para [101].
26 At para [57].
27 Facts referred to in the publication on which the opinion is based.
28 At para [122].
29 At para [122].
30 [2004] EWHC 2786 (QB).
31 At para [125].
32 At para [104].

- a defendant may not plead judicial reasons as particulars, but such reasons may form part of a narrative of what occurred to provide a context for the defences;[33]

- the statements of the politician could not be pleaded as primary facts, or to prove primary facts, but might form part of the context;[34]

- the report commissioned by the Solicitor-General could also be no more than part of the context;[35]

- the affidavits and notes of interviews with the deponents and fishing and legal experts could not in themselves be particulars, but could be recast as primary facts;[36]

The Court therefore held that the third party particulars, as pleaded, were all impermissible.

Preliminary matters

(a) "Tiers" of meaning

[15] Building on statements of Lord Reid and Lord Devlin in *Lewis v Daily Telegraph Ltd*,[37] the Court of Appeal for England and Wales in *Chase v News Group Newspapers Ltd*[38] distinguished between what has come to be characterised as "tier one", "tier two" and "tier three" meanings.[39] A "tier one" meaning imputes to the plaintiff actual misconduct; a "tier two" meaning asserts that there are grounds to believe or suspect the plaintiff is guilty of misconduct; and a "tier three" meaning

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33 At para [106].
34 At para [106].
35 At para [106].
36 At para [106].
37 [1964] AC 234 at pp 258 and 282.
38 [2003] EMLR 11 (CA).
39 At paras [45] – [46].

asserts that there are grounds for investigating whether the plaintiff is guilty of misconduct. This classification is now in widespread use in England. Applying it to the present pleadings, the respondents are alleging both "tier one" and "tier two" meanings, but, as we have mentioned,[40] particulars in relation to the former are not in issue on this appeal.

[16] This tripartite classification provides a convenient general description of different forms of meaning. Care must, however, be taken lest classification be allowed to dictate meaning. The crucial first step is to identify the precise meaning of the words in issue, rather than attempting to force that meaning into one of the three "tiers". Meanings in different tiers may shade into each other, rather than always falling neatly into one compartment or another. The precise meaning of the words in question is crucial to whether truth or honest opinion defences are made out. Furthermore, it does not necessarily follow that a "tier one" meaning is always more serious than a "tier two" meaning, or a "tier two" meaning more serious than a "tier three" meaning. Everything depends on the precise words used, and the context in which they are used. The permissible scope of particulars should depend on appropriate matters of principle rather than on which tier of meaning is engaged.

(b) The nature of particulars

[17] It is therefore helpful to consider the nature and purpose of particulars. The Court of Appeal said in *Television New Zealand Ltd v Ah Koy*:[41]

> One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on. … It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars. In *Zierenberg v Labouchere* [1893] 2 QB 183 at p 186 Lord Esher MR said that a plea of justification (now of truth) without sufficient particulars was invalid and that this had been the law "from the earliest times". As *Gatley [on Libel and Slander* (9th

[40] At paras [5] and [6] above.
[41] [2002] 2 NZLR 616 at para [17].

> ed, 1998)] says at para 27.10, it is arguable that in these circumstances there is no plea of justification on the record. On that basis a plea of truth without sufficient particulars would be at risk of being struck out.

[18] These observations,[42] which the parties accepted as an accurate statement of the law, apply with equal force to particulars of the facts relied on in support of a defence of honest opinion. The defendant is required to identify a sufficient factual basis for its opinion, so that readers or viewers may assess the validity of the opinion for themselves against the relevant facts truly stated.

[19] The present appeals are concerned both with particulars in support of the defence of truth and particulars in support of the factual basis of the defence of honest opinion. We are not concerned with what is necessary if the honesty of an opinion is challenged. If that issue arises, it is governed by s 39 of the Defamation Act which reads in material part:

> **39 Notice of allegation that opinion not genuinely held–**
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> (1) In any proceedings for defamation, where–
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> (a) The defendant relies on a defence of honest opinion; and
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> (b) The plaintiff intends to allege, in relation to any opinion contained in the matter that is the subject of the proceedings,–
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> (i) Where the opinion is that of the defendant, that the opinion was not the genuine opinion of the defendant; or
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> (ii) Where the opinion is that of a person other than the defendant, that the defendant had reasonable cause to believe that the opinion was not the genuine opinion of that person,–
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> the plaintiff shall serve on the defendant a notice to that effect.
>
> (2) If the plaintiff intends to rely on any particular facts or circumstances in support of any allegation to which subsection (1)(b)(i) or (ii) of this section applies, the notice required by that subsection shall include particulars specifying those facts and circumstances.

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[42] Which relate to the common law obligation to give particulars of the truth defence and not to any claim that s 38 applied to truth as well as to honest opinion.

Accordingly, if the plaintiffs were to allege that the opinions expressed by the defendants were not genuinely held by them, they will be required to serve a notice to that effect and, if subs (2) applies, the notice will need to give the requisite particulars. In this context there is no problem with a third party particular.

(c) Particulars and evidence

[20] Evidence is concerned with the method of proof of facts in issue. Pleadings, including particulars, identify what is in issue. Section 7(3) of the Evidence Act provides that relevant evidence (that which tends to prove or disprove something "of consequence to the determination of the proceeding") is in general admissible. That says nothing about identification of the facts and circumstances relied on by the defendant as establishing the truth of the statement claimed to be defamatory. If put in issue, evidence relevant to proof of those facts and circumstances will be admissible unless the Act provides otherwise. That includes hearsay evidence.[43] But because hearsay evidence may be admissible to prove a fact in issue does not mean that the fact in issue is the hearsay statement. The argument is fallacious. The point is made in *Gatley*:[44]

> It may be open to a defendant to adduce hearsay evidence to establish a primary fact, but that in no way undermines the rule that statements (still less the beliefs) of any individual cannot themselves serve as primary facts.

[21] The distinction between pleadings and evidence also explains why primary facts relied upon as establishing the truth of a statement may be established by circumstantial evidence. But the inference properly to be drawn from the circumstances must establish conduct on the part of the plaintiff which justifies the truth of the publication.[45] Such conduct constitutes the primary fact which must be pleaded as a particular.

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43 It would not however include a finding of fact contained in a judgment in civil proceedings, because of s 50 of the Evidence Act 2006.

44 Milmo and Rogers (eds), *Gatley on Libel and Slander* (11th ed, 2008), para [29.10].

45 *Musa King v Telegraph Group Ltd* [2005] 1 WLR 2282 (CA) at para [22] per Brooke LJ.

Particulars of truth

[22] As the Court of Appeal correctly stated,[46] a key issue in assessing whether the third party particulars are legitimate is whether they are relevant. We have already observed that the evidence which can be called for the purpose of establishing the truth of a defamatory statement or the facts on which an opinion is based is limited to and by the particulars given. It is implicit therefore that if a proposed particular represents something which could not be given in evidence for this purpose, it cannot constitute a legitimate particular. Hence a particular must state a fact or circumstance which is capable of being proved by evidence that is both relevant and admissible for the purpose of proving the truth of the defamatory meaning to which the defence is addressed or the truth of the facts on which the asserted opinion is based. *Television New Zealand Ltd v Prebble* provides a good illustration. The High Court[47] struck out particulars because they referred to Parliamentary proceedings of which evidence could not have been given. The Court of Appeal[48] and the Privy Council[49] upheld the striking-out of those particulars.

[23] An opinion that a fact or circumstance is true or exists is not generally capable of establishing that the fact or circumstance is indeed true or does actually exist. That is the effect of s 23 of the Evidence Act which provides that "a statement of an opinion is not admissible a proceeding, except as provided by section 24 or 25". Opinion evidence is defined in s 4 of the Act as being a statement of opinion which tends to prove or disprove a fact. The exceptions to this general rule which are set out in ss 24 and 25 are not relevant for present purposes, dealing as they do with explaining what a witness saw, heard or otherwise perceived (s 24) and expert opinion (s 25).

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46 As noted at para [11] above.
47 *Prebble v Television New Zealand Ltd* (1992) 8 CRNZ 439.
48 *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513.
49 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1.

[24] The "repetition" and "conduct" rules are consistent with the general rules of evidence regarding relevance. The "repetition rule" might also be termed the "re-publication rule", because it treats those who re-publish the defamatory statements or assertions of others as having made the statements or assertions themselves.[50] The facts which form the basis of the repeated statement or assertion are therefore required to be proved by the re-publisher. The rationale is that re-publishers have further disseminated the defamatory statement and may therefore defend themselves only on the same basis as that available to the first publisher. The privilege which attaches to fair and accurate reports of Parliamentary and judicial proceedings[51] would not be required if there were no "repetition" rule.

[25] The "conduct rule" reflects the straightforward proposition that a defamatory imputation calls into question or impugns the conduct of the plaintiff and, in order to prove the truth of the imputation or to establish the factual foundation for an honest opinion, it is therefore necessary to point to relevant conduct of the plaintiff. The cumulative effect of these requirements is that a defendant who asserts that there truly were reasonable grounds to suspect the plaintiff of certain conduct must prove the primary facts which support that proposition. To do no more than repeat the claims of others to that effect will not suffice. Nor will evidence that the defendant was aware that others held that view.

[26] After referring to the "repetition rule" the authors of *Gatley on Libel and Slander* helpfully set out the form of pleading required to support a defence of truth to an allegation of reasonable suspicion:[52]

> In the case of a defence of justification [in New Zealand called truth] of reasonable suspicion, it is usually a requisite of such a defence that it should focus on some conduct of the claimant giving rise to reasonable suspicion. It is also necessary for the defendant to plead the primary facts and matters which, *objectively judged*, are said to have given rise to reasonable grounds of suspicion. In this regard, it is impermissible to plead as a primary fact the proposition that some person or persons announced, suspected or believed the claimant to be guilty. It may be open to a defendant to adduce hearsay

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50 As Lord Devlin said of the repetition rule in *Lewis v Daily Telegraph Ltd* at p 284: "For the purpose of the law of libel a hearsay statement is the same as a direct statement, and that is all there is to it."

51 As specified in the First Schedule to the Defamation Act 1992.

52 At para [29.10].

> evidence to establish a primary fact, but that in no way undermines the rule that statements (still less the beliefs) of any individual cannot themselves serve as primary facts.

By italicising the words "objectively judged", the authors of *Gatley* emphasise that objective evidence of primary facts and circumstances is required, not the subjective views of others. The fact that others may hold opinions about the truth of the defamatory meaning does not tend to prove the truth of that meaning.[53]

[27] The relevant principles were cogently stated in more detail by Brooke LJ when delivering the judgment of the Court of Appeal in *Musa King v Telegraph Group Ltd*:[54]

> (1) There is a rule of general application in defamation (dubbed the "repetition rule" by Hirst LJ in *Shah*[55]) whereby a defendant who has repeated an allegation of a defamatory nature about the claimant can only succeed in justifying it by proving the truth of the underlying allegation – not merely the fact that the allegation has been made;
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> (2) More specifically, where the nature of the plea is one of "reasonable grounds to suspect", it is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion *objectively judged*;
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> (3) It is impermissible to plead as a primary fact the proposition that some person or persons (*e.g.* law enforcement authorities) announced, suspected or believed the claimant to be guilty;
>
> (4) A defendant may (for example, in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact – but this in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts;
>
> (5) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion (the so-called "conduct rule").
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> (6) It was held by this court in *Chase*[56] … that this is not an absolute rule, and that for example "strong circumstantial evidence" can itself contribute to reasonable grounds for suspicion.
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> (7) It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of

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53 The law in Australia, where defamation is State law, is to the same effect – see Gillooly, *The Law of Defamation in Australia and New Zealand* (1998), p 121, and the authorities there cited, and, as a more recent authority, *S, DJ v Channel Seven Adelaide Pty Ltd* [2008] SASC 60.

54 At para [22].

55 *Shah v Standard Chartered Bank* [1999] QB 241.

56 *Chase v News Group Newspapers Ltd* at paras [50] – [51].

analogy with fair comment) the issue has to be judged as at the time of publication.

(8) A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant).

(9) Unlike the rule applying in fair comment cases,[57] the defendant may rely upon facts subsisting at the time of publication even if he was unaware of them at that time.

(10) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them.

[28] The defendants contend that these principles should not apply in New Zealand. First, they submit that the law as stated in *Gatley* is no longer the law in England. Alternatively, they say statutory and other differences dictate a different position in this country.

[29] In support of their contention that there has been a change in the law in England, the defendants rely principally on the recent decision of the Court of Appeal in *Curistan v Times Newspapers Ltd*[58] and particularly on the judgment of Arden LJ. But *Curistan* turned on issues concerning the meaning of words and the application of privilege to a "hybrid" publication, part of which was privileged and part was not, and therefore does not assist the defendants. Indeed the dictum of Laws LJ in his concurring judgment that "the publisher's own comments must necessarily be interpreted according to their own terms and no special rule applies"[59] is unhelpful to the defendants. Neither *Curistan* nor statements in two much earlier authorities to which counsel drew our attention[60] can possibly be said to establish that the present position in England is other than as stated in *Gatley* and *Musa King*.

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57 Section 9 of the Defamation Act 1992 provides that, in this country, the defence previously known as the defence of fair comment is to be known as the defence of honest opinion.

58 [2009] 1 QB 231 (CA).

59 At para [84](ii).

60 *Cadam v Beaverbrook Newspapers Ltd* [1959] 1 QB 413 (CA) and *Waters v Sunday Pictorial Newspapers Ltd* [1961] 1 WLR 967 (CA).

[30] The alternative argument that a different rule should apply in this country is equally unpersuasive. It is correct, as the appellants submit, that s 7 of the Evidence Act 2006 establishes the principle that all relevant evidence is admissible unless excluded by statute. Section 10 makes it clear that the Act takes precedence over the common law and s 18 provides that hearsay statements are generally admissible. These provisions, however, go to the question of how legitimate particulars may be proved by evidence and not to the prior question of their legitimacy. There is also no material difference in this respect from the position in England because, as the fourth *Musa King* principle[61] notes, the Civil Evidence Act 1995 permits hearsay evidence to be called.

[31] It is also correct to say that there are currently differences between the common law principles applying to defamation in England and those applying in New Zealand. First, it has been held in this country that a defendant cannot plead and attempt to prove defamatory meanings of less gravity than those alleged by the plaintiff.[62] A plaintiff in England can do so.[63] Secondly, this Court has not yet had occasion to consider whether *Reynolds*[64] qualified privilege, founded on responsible journalism, should apply in this country. It is not immediately apparent, however, and it was not convincingly explained by counsel, why either or both of these differences should require a different approach to particulars of truth.

[32] There is also a further difficulty in the way of the appellants' argument. The possibility of changing the law of New Zealand to accommodate the pleading by defendants of lesser meanings and a *Reynolds* type of qualified privilege is not before the Court in the present appeals. If the defendants had wished to advance these changes, they should have laid a foundation for doing so in their pleadings. The plaintiffs would then have had the opportunity to apply to strike out the relevant pleadings, and their legitimacy could have been before this Court along with the questions now under consideration. It would plainly be undesirable to change the law as to particulars for the reason that there were differences between the law of

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61 See para [27] of these reasons.
62 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA).
63 *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147 (CA).
64 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

defamation in England and New Zealand, without also addressing whether or not these differences should remain.

Section 50

[33] Section 50(1) of the Evidence Act states that:

> Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.

Mr Gray QC initially argued that the section does no more than make clear that the Act does not extend the application of the principles of *res judicata* and issue estoppel. He accepted on reflection, however, that the section goes further, and prevents the introduction of a judgment to prove the existence of a fact that was in issue in the proceeding in which the judgment was given. The plain words of s 50 do indeed make that clear. A finding of fact in other litigation over the allocation of quota for catching scampi cannot be relied upon by the defendants to prove the existence of that fact. The making of the finding can be proved, if the fact of its making is relevant in the later proceeding. But that would not assist the defendants in establishing the defence of truth because, as we have already demonstrated, they are required to establish independently the accuracy of the fact which was the subject of the earlier finding. Section 50 simply reinforces that position.

[34] Quite apart from the difficulty which s 50 creates for them, the defendants face the problem that the observations made by Ellis J[65] and Thomas J[66] in earlier scampi litigation, on which they seek to rely, do not, on analysis, support their position. While critical of the Ministry of Fisheries, both Judges made it clear that they were not suggesting any impropriety, let alone corruption, on the part of the Ministry or the plaintiffs. There is also the further difficulty for the defendants that the dispositive reasoning of the Court of Appeal is to be found in the joint judgment of Keith and McGrath JJ, and not in that of Thomas J upon which they seek to rely.

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65 *Vautier Shelf Company No 14 Ltd v Chief Executive of Ministry of Fisheries* (High Court, Wellington, CP 20-97, CP 327-97, CP 357-97, CP 21-98 and CP 262-98, 24 July 2000).

66 *Official Assignee v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 722 (CA).

[35] For these reasons, we conclude that the law of defamation in this country should (subject to one elaboration) require particulars pleaded in support of a defence of truth to an allegation of reasonable suspicion to comply with the principles formulated by the Court of Appeal in *Musa King*.[67] The elaboration concerns the sixth principle and is implicit within it. Circumstantial evidence cannot contribute to reasonable grounds for suspicion unless it gives rise to an available inference concerning the conduct of the plaintiff. The circumstantial evidence suggestion was first made by Brooke LJ himself in *Chase* where he said that a defendant could "rely on strong circumstantial evidence implicating the [plaintiff]",[68] as grounds for reasonable suspicion. The circumstantial evidence could hardly have any value unless it "implicated" the plaintiff by means of an available inference as to the plaintiff's conduct. This is why we have said that our elaboration represents something which was already implicit in the sixth principle.

Factual basis for honest opinion

[36] Subject to two qualifications, our discussion about particulars in support of a defence of truth is also applicable to particulars of the factual basis for a defence of honest opinion. The first qualification is to be found in the ninth *Musa King* principle; a defendant who pleads truth may rely on facts of which he was unaware at the time of publication, whereas a defendant who pleads honest opinion is confined to facts known to him at the time of the publication. The second qualification is that in the case of honest opinion, but not in the case of truth, a fact need not be independently proved if it is referred to as a fact in a fair and accurate report which attracts privilege and upon which the defendant is commenting. As Bingham LJ said, when delivering the leading judgment in the Court of Appeal in *Brent Walker Group Plc v Time Out Ltd*:[69]

> Since the general rule is that comment, to be fair, must be on facts which are shown to be true, it might be said that such comment could never be based on statements which, although made on a privileged occasion, were shown to be false or not shown to be true. But neither party to this appeal has argued for such a result and rightly not, for it would be inconsistent with the

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67 Set out at para [27] above.
68 At para [51].
69 [1991] 2 QB 33 at p 45.

> reasoning in *Wason v Walter*,[70] *Mangena v Wright*[71] and *Grech v Odhams Press Ltd*[72] already discussed. Effectively, therefore, the issue concerns the width of the "privileged occasion" exception to the general rule. Is it enough to sustain comment otherwise fair that the statement commented upon (even if false or not provable to be true) was made on an occasion of privilege? Or must the publisher meet the additional requirement, ordinarily incumbent on a publisher reporting a communication made on an occasion of privilege, of showing that his report of it is fair and accurate?
>
> In agreement with the deputy judge I accept the plaintiffs' submission that the publisher must meet this additional requirement. The wisdom in the public interest of permitting fair comment on statements made on privileged occasions (even if those statements are false or not proven to be true) is in my view clear, but the rule is an exception to the principle that comment (to be defensible) must be on facts, meaning true facts, or must be justified, and I am not persuaded that there is any public benefit in widening this exception. It would indeed be anomalous if a report lacking the qualities necessary to sustain a defence of privilege could nonetheless sustain a defence of fair comment.

[37] In the present case the facts upon which the defendants seek to base their defence of honest opinion cannot possibly be said to form part of fair and accurate reports which attract reporting privilege. The relevant passages may or may not attract privilege in their own right because the common law or statutory privileges which the defendants have pleaded as alternative defences may apply to them. Whether that is so is not in issue in the present appeals. The facts on which the defendants rely will therefore have to be independently established by them as true if they wish to rely upon them as the basis of their opinion.

Section 38

[38] Section 38 of the Defamation Act reads:

> **38 Particulars in defence of truth–**
>
> In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying–
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> (a) The statements that the defendant alleges are statements of fact; and

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70 LR 4 QB 73.
71 [1909] 2 KB 958.
72 [1958] 1 QB 310; [1958] 2 QB 275.

(b) The facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

The wording of the section is classically in the language of what was known as the "rolled-up" plea. That plea was commonly adopted by those drafting defences to defamation claims because, at common law, a defendant was not required to provide particulars of it.

[39] That position changed in New Zealand in 1957 when Rule 136C was introduced into the Code of Civil Procedure and required particulars to be given. When the High Court Rules replaced the Code of Civil Procedure in 1985, Rule 136C became Rule 189. Rules 136C and 189 were in materially the same form as s 38 but were headed "Particulars where fair comment pleaded", whereas s 38 is headed "Particulars in defence of truth". Notwithstanding that heading, s 38 should, for a number of reasons, be construed as applying only to a "rolled-up" plea in support of a defence of honest opinion and not to a defence of truth. In the first place the wording of the section, as we have noted, follows the traditional form of "rolled-up" plea. Secondly, the "rolled-up" plea is in law a plea in support of the defence of honest opinion, not the defence of truth.[73] Thirdly, the heading of Rule 189 (which s 38 replaced[74]) points clearly to that conclusion. The heading to s 38 misstates the purpose and the effect of the section.

[40] The scope of s 38 is, however, of academic significance only. Particulars must, in any event, be provided in support of the defence of truth because they are required at common law even though the section does not apply.[75] Hence nothing of substance turns on our conclusion that s 38 does not apply to the defence of truth but only to a "rolled-up" plea in support of a defence of honest opinion.

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73 See the Report of the Committee on Defamation, *Recommendations on the Law of Defamation* (December 1977) (the "McKay Report"), which affirmed that the rolled-up plea applies only to a defence of "comment" (para [162]). As the Report said, the defendant must separately plead truth if wishing to justify such matters in the publication as are held to be imputations of fact.

74 When s 56(3) of the Defamation Act 1992 revoked Rules 188 to 190 of the High Court Rules.

75 *Television New Zealand Ltd v Ah Koy*.

Section 8(3)(b)

[41] Section 8(3)(b) of the Defamation Act reads:

> (3) In proceedings for defamation, a defence of truth shall succeed if–
>
> …
>
> (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[42] This paragraph effectively reversed the judgment of the Court of Appeal in *Templeton v Jones*.[76] It was also based on an English amendment influenced by the decision of the House of Lords in *Speidel v Plato Films Ltd*.[77] It prevents a plaintiff from selecting from a substantially true publication some relatively minor aspect which is untrue but which, in the context of the publication as a whole, does not affect the truth of the general picture painted by the defendant, and hence does no material damage to the plaintiff's reputation.[78]

[43] Accordingly, the defendants may seek to establish that their publications were substantially true even if certain passages upon which the plaintiffs rely were not true. But that does not assist the defendants in their attempt to establish that the particulars which they have pleaded in support of their defences of truth and honest opinion to the passages relied on by the plaintiffs are in law good particulars.

Result

[44] The Court of Appeal was correct to find, for reasons similar but not identical to those we have given, that the third party particulars should be struck out. The appeals must therefore be dismissed.

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[76] [1984] 1 NZLR 448 (CA).

[77] [1961] AC 1090.

[78] The history of s 8(3)(b) can be found in more detail in Report of the Committee on Defamation, *Recommendations on the Law of Defamation* (December 1977) (the "McKay Report") paras [108] – [111].

[45] The two appellants should each pay the respondents jointly costs of $15,000 and one half of their reasonable disbursements, to be fixed if necessary by the Registrar.

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