IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-7120
[2013] NZHC 960

BETWEEN	MARK STEPHEN HOTCHIN First Plaintiff
AND	ERIC JOHN WATSON Second Plaintiff
AND	BRUCE SHEPPARD Defendant

Hearing: 25 and 26 March 2013

Appearances: J G Miles QC and J A MacGillivray for Plaintiffs
B D Gray QC and N W Woods for Defendant

Judgment: 3 May 2013

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
3 May 2013 at 1.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Tompkins Wake, PO Box 258, Hamilton jmacgillivray@tomwake.co.nz
Rice Craig, DX EP 76506, Papakura (N W Woods, Rice Craig, PO Box 72 440, Papakura)
rc@ricecraig.co.nz neville.woods@ricecraig.co.nz
Copy to:
J G Miles QC, PO Box 2302, Shortland Street, Auckland miles@shortlandchambers.co.nz
B D Gray QC, DX CX 10258, Auckland bdgray@shortlandchambers.co.nz

[1] The plaintiffs in this proceeding sue the defendant, Mr Sheppard, in defamation. The trial is to take place later this year. Two interlocutory issues have been raised which need to be dealt with prior to the trial. They are:

(a) An application by the plaintiffs, made on 26 October 2012, seeking a direction that the trial of this matter be before a Judge alone; and

(b) An application by the plaintiffs for a review of the decision made by Associate Judge Doogue dismissing the plaintiffs' application to strike out parts of the defendant's statement of defence.

[2] Both applications are opposed by the defendant.

Background

[3] The first plaintiff, Mr Hotchin, was a director of Hanover Group Ltd and of various companies in the Hanover group, including Hanover Finance Ltd ("Hanover"). The second plaintiff, Mr Watson, was also a director of Hanover Group Ltd. Both were interested in Hanover Group Holdings Ltd, the parent company of the Hanover Group.

[4] On 23 July 2008 Hanover announced that, in conjunction with its wholly-owned subsidiary, United Finance Ltd, and its sister company, Hanover Capital Ltd, it was ceasing to accept new investments under its debenture trust deed, and suspending all payments of principal and interest to its investors ("the moratorium"). The announcement stated that it was working on a plan to restructure its business and funding arrangements.

[5] On 8 December 2008, Hanover investors voted to approve a debt restructure proposal ("DRP").

[6] During November 2009, Mr Sheppard, who was at all material times the Chairman of the New Zealand Shareholders Association, made a number of statements to the media and others about the DRP and the plaintiffs' role in it.

Subsequently, he also made statements to various people about a sale by Hanover of its interests in a Queenstown property development. The statements are alleged to have been false and defamatory, and to have caused significant damage to the plaintiffs' personal and business reputations, their credibility as businessmen and their ability to do business.

[7] The plaintiffs say that the defamatory statements meant or were intended to mean that the plaintiffs had dishonestly misled investors in Hanover; that they were "crooks" who should be imprisoned; that there is good reason to believe that the plaintiffs have participated in GST fraud and have received or were to have received a fee in exchange for committing GST fraud; more generally that the plaintiffs were involved in malfeasances, being criminal or dishonest conduct; and that the plaintiffs had misappropriated cash belonging to Hanover.

[8] The defendant has pleaded defences of honest opinion and qualified privilege. In response to that, the plaintiffs have filed and served notices under ss 39 and 41 of the Defamation Act 1992. They claim:

(a) That if the defamatory statements were opinions (which is denied) the opinions were not genuinely held; and

(b) If qualified privilege applies (also denied), the statements were motivated by ill-will or the defendant took improper advantage of the occasions of privilege.

[9] The defence of truth is not pleaded in respect of any of the defamatory statements.

Application for direction that trial be before a Judge alone

[10] The plaintiffs' application is brought pursuant to s 19A(5) of the Judicature Act 1908:

19A Certain civil proceedings may be tried by jury

...

(5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any civil proceedings to be tried before a jury, if it appears to a Judge before the trial—

(a) That the trial of the civil proceedings or any issue therein will involve mainly the consideration of difficult questions of law; or

(b) That the trial of the civil proceedings or any issue therein will require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation which cannot conveniently be made with a jury,—

the Judge may, on the application of either party, order that the civil proceedings or issue be tried before a Judge without a jury.

[11] In advancing the application, Mr Miles QC accepts that the onus is on the party seeking the direction to satisfy the Court that at least one of the factors referred to in s 19A(5)(a) or (b) is made out. If one or more of those factors exist, then it is for the Court, in the circumstances of the particular case, to determine whether to direct trial by Judge alone.

[12] The application is advanced on the basis that the trial of this matter will involve the lengthy examination of documents or accounts, including possibly matters of intention and construction of those documents, and a consideration of difficult business issues. Secondly, it is said that the trial will involve questions of law which are inextricably bound up with the factual issues, so that it will not be easy to separate the respective functions of Judge and jury. Thirdly, the plaintiffs claim that the relevant matrix of facts itself will involve the consideration of legal issues that are of more than background interest.

The allegedly defamatory statements

[13] These contentions need to be considered in the context of the defamatory statements relied on in the amended statement of claim dated 4 May 2012. The plaintiffs complain of the following statements made by Mr Sheppard:

(a) On 11 November 2009, Mr Sheppard was interviewed by TV One presenter Mark Sainsbury on the programme "Close Up at Seven". During the course of the interview Mr Sheppard made the following statement:

> These two guys and their big houses have not paid a single dime into the coffers. And the sad reality is the bond holders who voted for the nutty moratorium plan actually thought that the first $10 million was going to be paid into the company on the day they voted. It hasn't been and it won't be.

(b) Later in the same programme he said:[1]

> BS Well, look at it this way, they put a whole bunch of their rumpety crap into the company, right, their Queenstown rubbish. They got all of that off their books. Cleaned up their related party lending, so that they didn't have to actually pay any of that back. They promised to put in $20 mill, instead of actually being forced to put in $70 mill and now they haven't put [in] the $20 mill either. And better, because two years has elapsed, they have got no risk of having to put the $70 mill in, because after two years your dividends are relatively safe. They are off the hook.
>
> MS You see you…
>
> BS And I have to tell you that is always what the plan was
>
> MS So you…
>
> BS In my view
>
> MS …you call these guys crooks
>
> BS Yep

[1] In this quotation Mr Sheppard is identified by the initials BS and Mr Sainsbury by the initials MS.

MS You call them crooks, but they have [done] nothing illegal

BS Well there's crooks that break the law and there's crooks that actually pervert moral justice

MS So how can people get even?

BS Don't give them your money. If you see them run them over on the street, back your car over them. Don't offer help. You know, they live in a community. They have to learn to understand that in order to survive in a community, they have to behave honourably, because the majority of people who are honourable can simply choose to say I would prefer to pay a little more to someone who's honest. Go screw yourself.

(c) In an e-mail to a Mr Mark Cooper and others[2] dated 17 November 2009 Mr Sheppard said:

> In terms of putting Hotckin [sic] behind bars I am all ears…
>
> The management of Hanover over the last few months have been merry go rounding assets to the various parties to skim GST to generate cash, I will get some facts on this later, it is GST fraud, so for the moment take it as hearsay, by [sic] he would get a fee of $200K for dipping IRD for $3m. unbelievable if there was any credibility to it.
>
> I have copied Michael Staissny [sic] he is advisign [sic] the trustees, and Mark Weldon from the NZX as this scam, if it is coming includes a public company which in its announcements has confirmed discussions with Hanover.

(d) In an e-mail sent to the Honourable Simon Power, in his capacity as Minister of Commerce (and others), dated 20 November 2009 Mr Sheppard said:

> On Hanover look at the news this morning, they have sold 5 mile Island to a mate. It is not a real sale, the deal was offered to a client of mine and I advised him not to do it. Likely it is a gst scam.
>
> There are other "malfeasances" in Hanover.

---

[2] Mr Cooper is a property developer. Other recipients of the e-mail included Mark Weldon (the Chief Executive Officer of NZX Ltd), Mr Mark Verbiest (a member of the Securities Commission), Mr Gareth Vaughan (a business journalist at Fairfax Media), Mr Brian Gaynor (a financial columnist for the New Zealand Herald) and Mr Michael Stiassney (a chartered accountant and insolvency practitioner who had been providing advice relating to Hanover). Mr Sheppard admits that the e-mail was sent to those persons.

(e) In an e-mail to Ms Jane Diplock, then Chairperson of the Securities Commission and others, dated 26 August 2010 he said:

> Now while I appreciate there is a fine line between acting to protect investors from this sort of orchestrated malfeasance and interfering it [sic] their rights, this whole series of events is without doubt in my view the worst of the finance company debacles, worse than Bridgecorp worse than 5 star. Why worse, because of the cunning and long term planning, and the apparent completely free escape from responsibility with the perpetrators pocketing significant cash.

[14] In the amended statement of defence, Mr Sheppard admits making the statements in question, while pleading reliance on the whole of the statements made on each occasion.[3] He pleads affirmative defences. Whilst denying that the statements have the defamatory meanings alleged by the plaintiffs, he asserts that even if they do, the statements in question were expressions of honest opinion which he genuinely held, or were published on occasions of qualified privilege.

[15] In relation to the TVNZ interview with Mr Sainsbury, Mr Sheppard pleads that his expressions of opinion in the interview were based on a number of facts which were either stated or referred to in the TVNZ interview, or were generally known. The facts asserted were set out in paragraph 51 of the amended statement of defence, as particulars (a) to (p).[4] In summary, those facts were as follows:

(a) The moratorium of July 2008, in which Hanover froze new investments and repayment of current investors' funds, affected more than 16,000 current investors who had invested more than $550 million in Hanover.

(b) A report by the Dominion Post and Stuff.co.nz quoting Mr Hotchin as saying it was too early to give details about the moratorium, but answers for investors would be available in about three weeks, including how much he and Mr Watson would inject into the company as part of a pledge to continue to support the business.

---

[3] In the case of the interview with Mr Sainsbury, he denies making the statements made by Mr Sainsbury.

[4] The plaintiffs deny that the defendant's statements in the TVNZ interview were based on these matters, and also deny that they are facts that can be proved to be true.

(c) A report in the New Zealand Herald on 26 July 2008 that Mr Hotchin had said that he and Mr Watson would not leave investors out of pocket, and that they had a restructuring plan and would "pour money" [sic] to make it work.

(d) An article in the New Zealand Herald on 9 August 2008 in which Mr Hotchin referred to Mr Watson's willingness to "put a cheque in, and it is a big cheque".

(e) A report on TVNZ's website on 18 September 2008 communicating Mr Hotchin's advice that there would be an initial injection of $36 million of cash and $40 million worth of property, with a further $20 million in cash injected if required.

(f) In December 2009 investors in Hanover agreed to the DRP whereby secured investors would receive repayment of 100 percent of their investment in payments staggered over five years, and unsecured investors would receive payment of 50 cents for each dollar invested in December 2013.

(g) The directors of Hanover, including the plaintiffs, recommended that investors vote in favour of the DRP.

(h) The time the defendant made the statements in the TVNZ interview, the $10 million, (which he mentioned in his statement reproduced at [13(b)] above) had not been drawn upon.

(i) The DRP included commitment from entities associated with the plaintiffs to provide additional subordinated advances of up to $20 million from 2010 onwards, if necessary.

(j) The DRP included the transfer of certain property assets (including assets in Queenstown) to Hanover from Axis Property Group Ltd at a value of $40 million.

(k) Hanover was already the second mortgagee of many of the properties to be transferred from Axis Property Group Ltd and that in some cases there were first mortgages to third parties over the properties.

(l) In its independent report on the DRP, PriceWaterhouseCoopers did not endorse the $40 million value attributed to the transfer of the Axis Property Group Ltd assets as being indicative of the current fair market value.

(m) Hanover had paid the plaintiffs $70 million by way of dividend in the preceding two years.

(n) If Hanover had been placed in liquidation or receivership before the expiry of two years from the date of payment of the dividends, the payments of these dividends may have been insolvent transactions and therefore voidable under the Companies Act 1993 or otherwise recoverable.

(o) At the time of the TVNZ interview the first plaintiff was building a family home on Paratai Drive in Auckland, estimated to be worth $30 million upon completion.

(p) On 10 November 2009 Hanover announced it was no longer likely to fully repay secured investors under the DRP and estimated that secured depositors would receive between 70 and 90 cents for each dollar invested.

Of these facts, Mr Sheppard claims that those set out in (m), (n) and (p) were stated in the interview itself.[5] For the balance, Mr Sheppard claims that the facts were generally known.

[16] In their Reply dated 20 March 2012, the plaintiffs deny that the allegedly defamatory statements were based on the matters pleaded in the statement of

[5] The plaintiffs claim that the particular set out as (p) was not in fact stated in the interview.

defence, and that they are facts that can be proved to be true. They admit that the moratorium was generally known, as well as the fact that in December 2008 investors in Hanover agreed to the DRP. They deny that the particulars set out in paragraphs (b) to (e) and (h) to (n) were generally known.

[17] It is necessary also to refer to the terms of a notice given by the plaintiffs under s 39 of the Defamation Act. Under that provision, where a defendant relies on a defence of honest opinion, the plaintiff must serve notice where an allegation is to be made that the opinion relied by the defendant was not his genuine opinion. The plaintiffs have given notice alleging that the particulars relied on by Mr Sheppard are not opinions that a reasonable person could possibly hold based on the facts alleged at paragraph 51.

Submissions

[18] Mr Miles contended that the trial will necessarily involve the lengthy examination of hundreds of pages of documents, involving what he described as a "myriad of complex financial, accounting, legal, property, taxation and insolvency issues". A large number of separate and difficult legal and factual issues will need to be determined in which it would not be easy to make a clear distinction between the respective functions of Judge and jury. The relevant matrix of facts would be permeated with legal issues that would need to be assessed and understood in order to obtain a full and proper understanding of the facts.

[19] Mr Miles submitted that, in the circumstances, the statutory grounds set out in s 19A(5) to justify an order that the trial be before a Judge alone were satisfied. He submitted that the following factors favouring trial before a Judge alone should also be taken into account in the exercise of the Court's discretion:

(a) The fact that the case is of unusual complexity for a defamation case.

(b) The fact that it is the plaintiff, whose reputation is at stake, who is seeking trial by Judge alone.

(c) The increased trial duration, cost and inconvenience that would be involved if the trial were before a Judge and jury.

[20] Mr Gray QC advised the Court that despite Mr Sheppard's opposition to the application, which was based on matters of principle, he was in the end indifferent to its outcome. However, because the factual setting involved the issuing of debt securities to members of the public and publishing prospectuses for the public intended in each case to be understood and read by them, he submitted that there was a tension in the plaintiffs' stance that the matter involved complex documents which would require prolonged examination. He further said that, as no defence of truth had been raised, a close inquiry into the nature of the underlying documents ought not to be necessary.

[21] Overall, Mr Gray submitted that there was nothing in the statement of claim and the defences raised that took the case outside of the ordinary. A mix of factual and legal issues is common in defamation proceedings, as is the need to determine the boundaries between fact and opinion where a defence of honest opinion is raised.

[22] Further, the subject matter concerned the reputation of the plaintiffs and such matters do not lie within the exclusive province of Judges; rather, they are particularly suited to trial by jury. Mr Gray acknowledged that this case involves consideration of the conduct of Hanover's business affairs, but submitted that the Court should view that as a reason *for* having a jury and not a reason to direct that the trial should be by Judge alone. An additional consideration was that malice had been pleaded in response to Mr Sheppard's defence with the consequence that his reputation is also at stake. Mr Gray submitted that, as a matter of principle, members of the public should not be excluded from performing a role as jurors at the trial of someone such as Mr Sheppard, who is a commentator on investments offered to the public.

Evaluation

[23] I am in no doubt that the circumstances of this case satisfy the considerations set out in s 19A(5) of the Judicature Act. My reasons for reaching that conclusion

can be explained by reference to some examples of the issues that must be determined at the trial, and that arise in relation to the TVNZ interview and the defence of honest opinion. The issues of course range more widely, but this will be sufficient for present purposes.

[24] A substantial issue that arises from the pleadings, and from the plaintiffs' notice under s 39 of the Defamation Act, is whether the statements made by Mr Sheppard on TVNZ were opinions that a person could honestly and reasonably have held. It seems plain that this will require a consideration of the moratorium, the circumstances relating to the dividend payments by Hanover to the plaintiffs and the use to which those dividend payments were put, and the DRP agreed by Hanover investors in December 2008. I accept Mr Miles's submission that the latter would require consideration of the nature and extent of the financial support to be provided by the plaintiffs under the DRP (including by way of subordinated advances from associated entities), and the nature and value of the support provided for in the DRP by the transfer of property assets from Axis Property Group Ltd to Hanover. Another issue plainly raised is the solvency of Hanover in the two years leading up to the moratorium. Collectively, these issues arise directly from the particulars asserted in paragraph 51 of the amended statement of defence.

[25] Mr Gray argued that all that would be necessary in relation to the proposed moratorium or DRP is to ask what the investors would have understood from the documents and the representations made in them to induce the investors to accept a rearrangement of their rights and entitlements. However, to answer that question would inevitably involve looking at the detail of what the documents proposed. Mr Gray seemed to accept in argument that it would be necessary to form a view on the proper value of the assets to be transferred from Axis Property Group Ltd and the solvency of Hanover prior to the moratorium, although he suggested this would be so only if the plaintiffs chose to conduct the trial in that way. I do not accept that is so. The defence of honest opinion relies on a substratum of facts shown to be true and that necessarily involves an inquiry that descends into some detail, and it is the defendant who relies on the moratorium and the DRP (among other matters) in relation to the TVNZ interview.

[26] Overall, I accept the submission made by Mr Miles that the underlying subject matter of the case will involve the consideration of complex financial transactions involving a number of entities and spread over a period of three to four years. The transactions to be considered involve complex legal, accounting, insolvency, property, tax and finance issues.

[27] I consider in the circumstances that the statutory tests set out in s 19A(5) are well satisfied.

[28] Once that point is reached there is still a discretionary judgment that has to be made. As was said by Henry J in *McInroe v Leeks*:[6]

> [21] …At issue is a balancing exercise, under which if the threshold requirements are made out the Court must give careful consideration to how best the trial process and its management can meet the overall justice of the case, placing due weight on the entitlement of a party to seek trial by jury. The significance of the jury influence on standards of behaviour, and of vindicating in an appropriate way those who have been wronged and also vindicating those who have been wrongly charged with infringing another's rights, must be kept firmly in mind.

[29] It is significant for the exercise of the discretion in this case that it is the plaintiffs who seek that the trial be by Judge alone. In *Television New Zealand Ltd v Prebble*[7] the Court of Appeal upheld an appeal by the plaintiff against a refusal by the High Court to order trial before a Judge alone. In the course of delivering his judgment on that aspect of the appeal, Casey J observed:[8]

> An important segment of the fourth Labour Government's policies relating to the sale of State-owned assets and of its conduct in their disposal will be under close scrutiny if the trial proceeds. As the supporting affidavit demonstrates, it will require prolonged examination of documents. This consideration set out in s 19A(5) of the Judicature Act 1908 as justifying a Judge-alone trial is not balanced by the need to pay regard to the vindication of the plaintiff's honour by a jury; normally a powerful factor in settling for that mode of trial in defamation cases. Here it is the plaintiff himself who seeks a Judge-alone hearing. With respect to the contrary views expressed by Lord Denning MR in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, I do not see the defendant's wish to have its reputation vindicated by a jury as carrying much weight in considering the mode of trial in this case. I would allow Mr Prebble's appeal on this point.

---

6 *McInroe v Leeks* [2000] 2 NZLR 721 (CA) at [21].
7 *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA).
8 At 537.

[30] Mr Gray argued that Mr Sheppard's integrity was at stake having regard to the fact that malice had been raised in the plaintiffs' Reply to Mr Sheppard's defence raising qualified privilege. The plaintiffs' claim that statements had been made by him that were predominently motivated by ill-will. Some observations made by Lord Denning MR in *Rothermere v Times Newspapers Ltd*[9] might justify that approach. However, as I read the cases, the context in which the importance of the jury's role in the vindication of reputation has been emphasised is in relation to the published defamatory statements themselves.

[31] In *Williams v Beesley* Lord Diplock observed:[10]

> As respects issues of integrity and honour, these may be a weighty consideration in ordering trial by jury at the instance of the party whose integrity or honour is impugned; but it is not a sufficient ground for ordering trial by jury against his wishes at the instance of the other party.

The reference here to integrity and honour being impugned was clearly to the defamatory statements in issue.

[32] Mr Gray's point is made in relation to a pleading raising malice, and in my view it can have less significance in that setting when the plaintiffs, allegedly defamed in remarks given wide circulation on television, seek trial before a Judge alone. In addition, the fact that Mr Sheppard is said to be indifferent to the outcome of the application inevitably reduces the force of the consideration raised by Mr Gray.

[33] In any event, I consider the governing consideration in the disposition of the present application is the complexity of the issues that are likely to arise and the nature of the factual and legal inquiry that will be necessary.

[34] I add that the fact that some of the key documents that will need to be examined in relation to the DRP were documents made available to members of the public does not have the significance for which Mr Gray contends. On any view of those documents they are complicated and as Mr Miles noted, those for whom they

---

9 *Rothermere v Times Newspapers Ltd* [1973] 1 WLR 448 (CA).

10 *Williams v Beesley* [1973] 1 WLR 1295 (HL) at 1298-1299.

were intended were contemporaneously urged to seek advice. For example, one letter advised investors:

> The attached documents are complex and you may need assistance in fully understanding them. Your vote is important. We recommend you … read the attached documents and/or seek advice from your usual financial advisor…

Other letters gave similar advice.

[35] For the reasons discussed I grant the plaintiffs' application and direct that the trial be before a Judge alone.

Appliction for review of Associate Judge Doogue's decision

[36] In the amended statement of defence Mr Sheppard raises as a matter in mitigation of damages an allegation that the reputation of the plaintiffs is "generally bad in relation to the matters to which the proceeding relates" and states that he intends to adduce evidence of specific instances of misconduct. Plainly, the intention is to exercise the right given by s 30 of the Defamation Act which authorises proof by the defendant, in mitigation of damages, specific instances of misconduct by the plaintiff to establish that the plaintiff is a person whose reputation is generally bad "in the aspect" to which the proceeding relates.

[37] Four of the instances of misconduct on which the defendant seeks to rely are particularised as follows:

> (a) In December 1998 the [second] plaintiff was censured by the Securities Commission for buying more than 2 million shares in McCollam Print while negotiating its takeover by Mr Watson's Blue Star Group.
>
> (b) In 1998 the US Securities Exchange Commission found the second plaintiff had breached a section of the Securities Exchange Act in the United States. This specifically related to omissions of material facts when buying and selling McCollam shares at the same time he was negotiating the purchase of McCollam for Blue Star.
>
> (c) In 1999 the first plaintiff breached Securities Commission Guidelines on insider trading in relation to the purchase and sale of shares of Pacific Retail Group Limited.

(d) On 17 August 2000 Pacific Retail Group (majority owned by the Second Plaintiff) publicly admitted the First Plaintiff had breached the Security Commission guidelines and said it was done with no "*Ill intent*".

[38] Those particulars were the subject of a strike out application advanced by the plaintiffs on the basis that the particulars given could not possibly establish that the plaintiffs' reputation is generally bad in the aspect to which this proceeding relates.

[39] In relation to the requirement that misconduct pleaded under s 30 must tend to establish that the reputation of a plaintiff is generally bad in the aspect to which the proceedings relate, Mr Miles emphasised that in the defamation proceeding the plaintiffs were complaining about allegations that they had effectively committed fraud, broken the criminal law and deserved to be imprisoned. He contended that the particulars pleaded by the defendant, which related to breaches of regulations relating to properly informing the market about material facts relevant to takeover and similar transactions, were irrelevant to the real matters at issue here. He also submitted that the conduct relied on under s 30 must be sufficiently proximate in time to be capable of affecting reputation at the time of the allegedly defamatory remarks. He argued that because the share trading transactions which were the subject of the particulars took place some ten years before the events that led to the failure of the Hanover Group, they could not have relevance to the state of the plaintiffs' reputations at the time when they were allegedly defamed.

[40] Associate Judge Doogue rejected the plaintiffs' application. He concluded that the aspect of the plaintiffs' reputation to which the proceeding relates was their reputation as businessmen. He said:[11]

> [38] What seems likely is that at the trial, the Court that has to determine whether there has been damage to the reputation of the plaintiffs will primarily concentrate on the fact that they are businessmen. It is in that capacity that there is the greatest potential for damage to be caused to them. The reputation of members of society generally will partly depend upon them being viewed as reliable and honest. That is even more the case with businessmen. Their standing is closely linked to whether they have a reputation for being persons who can be trusted.

---

[11] *Hotchin v Sheppard* [2012] NZHC 2527 at [38].

[41] He considered that the key question was whether it could plausibly be argued that, as a result of the share trading events relied on by the defendant, the plaintiffs had acquired reputations that were so bad that publication of the defendant's statements could not have done them any damage, or that the damage caused was limited by their pre-existing poor reputation.[12]

[42] He concluded that the insider trading allegations and the negative effect that they must have had on the plaintiffs' reputations would not inevitably be regarded as irrelevant at the substantive trial. It would be for the Court that ultimately decided the issue to determine whether the share dealing transactions had in fact caused antecedent damage to the reputations of the plaintiffs as businessmen. He was also not prepared to conclude that it was unarguable that the time lapse between the events raised by the defendant and the matters the subject of the defamation proceeding was too great.

[43] In the present application for review Mr Miles has essentially repeated the arguments that he had advanced before the Associate Judge. He emphasised that the imputation of the allegedly defamatory remarks was that the plaintiffs had dishonestly misled investors, that they were "crooks" who should be imprisoned, that there was good reason to believe that they had participated in GST fraud, that they were more generally involved in "malfeasances", that they had misappropriated cash belonging to a Hanover company. These actions were all said to have occurred in the period between 2008 to 2009.

[44] Mr Miles submitted that in the circumstances the relevant aspect of the plaintiffs' reputation at issue in the proceeding is whether the plaintiffs have generally a bad reputation for acting criminally, fraudulently or dishonestly in their business affairs in the period around 2008 to 2009. Relying on *Television New Zealand Ltd v Ah Koy*[13] he submitted that the Court must then ask whether it can possibly be said that the matters pleaded by Mr Sheppard, if shown to be generally known, could found an inference that the plaintiffs have a generally bad reputation as being criminals, fraudsters or generally dishonest in their business affairs in the

---

12 At [34].

13 *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).

period around 2008 to 2009. He noted that Mr Sheppard had made no attempt to allege criminal wrongdoing, fraud or other dishonesty in respect of the matters pleaded in reliance on s 30 of the Defamation Act.

[45] Mr Miles also referred to observations of Cooke P in *Television New Zealand Ltd v Prebble*[14] in relation to a complaint raised by the plaintiff in that case that a defamatory programme had attacked his "probity" as a politician. Cooke P observed:[15]

> There is a broad difference between, on the one hand, allegations of disagreeable characteristics such as arrogance or belligerence and, on the other, allegations of want of integrity. If a politician was generally reputed to be a bully, a reasonable jury should not on that account reduce any damages awarded to him for being falsely called dishonest. Some of the alleged descriptions struck out by the Judge are capable of relating to the sting of the libel, namely *a thug, a back stabber, a street fighter*; these can all suggest something underhand. *Hysterical* can just be admitted in the context of a claim that the programme meant that the plaintiff was so worried that he arranged for papers to be shredded. I would therefore restore the words just italicised, leaving struck out as not within the relevant sector *hated, a bully, a mad dog, arrogant, pushy, offensive, belligerent, threatening, intimidatory*.
>
> There is an unacceptable risk that, if allowed to give evidence, purportedly in mitigation of damages, that the plaintiff had a reputation for any of these latter qualities, the defendant might be able to divert the course of the trial from the true issues. And even as to the alleged qualities left in, the trial Judge will be entitled to exclude evidence which, as the trial develops, emerges as a distraction rather than a legitimate exercise of defence rights.

[46] In response, Mr Gray submitted that the plaintiffs' argument defined the "aspect to which the proceedings relate" too narrowly and that the relevant field was that of the business reputation of the plaintiffs. That is essentially what Associate Judge Doogue held. Mr Gray pointed out that the plaintiffs were promoters of debt securities to the public, a different activity from dealings between private companies and one which involved matters of public reputation. In the circumstances, the matters raised by the defendant's pleading — that the plaintiffs had previously been censured by the Securities Commission, or breached regulatory controls or guidelines relating to securities — were relevant to the plaintiffs' standing as businessmen. It would be wrong to withhold the matters raised from trial and any

---

14 Above n 7.
15 At 524-525.

issue about the effect of the passage of time should be a factual question for determination at the trial.

[47] I accept Mr Gray's submissions. I note, as he did, that in the amended statement of claim the plaintiffs allege that the defamatory observations which form the basis of the claim have caused major damage to the plaintiffs' personal and business reputations, their credibility as businessmen and their ability to do business.[16]

[48] While I accept that the matters sought to be raised by Mr Sheppard are not allegations of criminal wrongdoing, they are nevertheless matters which affect the plaintiffs' probity as businessmen. To define the relevant "aspect" of their reputation as relating solely to criminal, fraudulent or dishonest actions in business affairs is, in my view, to cast the net too narrowly, and to approach the question of reputation in an overly segmented way. In *Television New Zealand Ltd v Prebble* McKay J noted that it can be unreal to compartmentalise reputation into overly refined segments. [17]

[49] I consider that the relevant aspect of the plaintiffs' character is their reputation as businessmen. Substantially, that is the reputation they claim has been affected. Arguably, the matters raised by Mr Sheppard might properly be taken into account as diminishing the damages which would otherwise be awarded.[18]

[50] To hold as I do that these matters may legitimately be raised under s 30 of the Defamation Act, is not, of course, to find that they did in fact affect the reputation of the plaintiffs at material times. That, however, is not an issue that can legitimately be dealt with on an application such as the present and in the absence of evidence. Whether, as a matter of fact, and if so to what extent, the matters raised had an effect on the plaintiffs' reputation at the time of the alleged defamations must be a matter addressed and determined at the trial.

[51] For these reasons, I decline the plaintiffs' application for review.

---

16 Amended statement of claim, paragraphs 49 and 50.

17 *Television New Zealand Ltd v Prebble*, above n 7, at 547.

18 See the observations of Devlin LJ delivering the judgment of the Court of Appeal in *Speidel v Plato Films Ltd* [1960] 3 WLR 391 (CA) at 398 at 526-527.

Summary

[52] I order that the proceeding is to be tried before a Judge alone.

[53] The application for review of Associate Judge Doogue's decision, by which the plaintiffs seek to strike out particulars (a) to (d) of paragraph 76 of the amended statement of defence, is declined.

[54] The parties have both succeeded in part and failed in part, and so it may be appropriate for costs to lie where they fall. If any party is of a different view I will receive memoranda from counsel.