

result on the facts of *Bank of New Zealand v Fiberna Pty Ltd*.

Final observations

Two final observations can be made about matters mentioned only briefly by the Court of Appeal but which are of some importance.

First, the Court did not appear to see s 17 of the Companies Act as a complete answer on the question of whether a major transaction entered into in breach of s 129 is invalid (see [31]). That must with respect be correct (as s 17 deals only with questions of the capacity of a company itself not with the authority of corporate agents). However, it is not consistent with the earlier (and much criticised) decision of the Court of Appeal in *Hansard v Hansard* [2014] NZCA 433 at [31].

Secondly, the court in a mere footnote reference (footnote 3 at [18]) suggests that if there had been a breach by Tina of her fiduciary duty to act in the best interests of the company, that would make the contract voidable by the company in equity. That also seems correct (at least unless the other contracting party is innocent) – see for example, *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143. However, the potential invalidity of transactions at equity for breach of directors' fiduciary duty is something often overlooked.

Overall, the Court of Appeal's judgment in *Autumn Tree* is of considerable importance to the topic of company contracting. It reaffirms the danger of relying on the ability of one director (on a board of more than one) to contract on behalf of a company. It also clarifies the correct interpretation of the proviso to s 18(1) and in so doing provides more protection to innocent third parties contracting with a company. Finally, the judgment signals a change in approach on the question of validity of major transactions, and provides a reminder that a director's breach of fiduciary duty may also impact on the validity at equity of transactions entered into by a company. ■

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The new defence of responsible communication on a matter of public interest

Durie v Gardiner [2018] NZCA 278

BY **GARRY WILLIAMS**

The background

Last month, the Court of Appeal delivered its judgment in *Durie v Gardiner*. The judgment has caused quite a stir in media circles, as, in it, the court (comprised of French, Winkelmann and Brown JJ) recognised a new defence to the tort of defamation.

The factual background of the case can be quickly stated.

Sir Edward Durie and Donna Hall had issued defamation proceedings in the High Court against Māori TV and one of its reporters, Heta Gardiner.

In their statement of defence, Māori TV and Mr Gardiner contended that the words alleged to be defamatory did not bear the meanings pleaded, but also that if they did they had a defence which they described as a “qualified privilege/public interest defence”. This was pleaded in this way:

“To the extent that the words complained of ... were published, those publications were protected by qualified privilege in that they were neutral reportage, and/or subject to the *Lange v Atkinson* privilege; or an extension thereto; and/or were responsible journalism/communications on matters of public interest; or protected by a *sui generis* public interest defence.”

Sir Edward and Ms Hall applied to strike out this defence and, in the High Court, Mallon J refused to do so on the basis that it could not be said that it would inevitably fail on the facts.

Sir Edward and Ms Hall then appealed to the Court of Appeal.

The elements of the new defence

The appeal afforded the Court of Appeal its first opportunity to



consider significant landmark defamation decisions of the UK and Canadian courts which had recognised that the responsible publication of matters of public interest to the world at large could give rise to a defence.

The court concluded that it was: “... time to strike a new balance by recognising the existence of a new defence of public interest communication that is not confined to parliamentarians or political issues, but extends to all matters of significant public concern and which is subject to a responsibility requirement.”

It is immediately apparent that the new defence is not limited to responsible journalism but is available to *anyone* who publishes material of public interest in or on any medium.

The court said that the elements of the new defence are: a) the subject matter of the publication was of public interest; and b) the communication was responsible.

Guidance has also been provided as to the respective roles of judge and jury in

relation to the new defence. In a case tried by jury in New Zealand, it will be for the trial judge to determine whether the two elements of the defence are established based on the primary facts as found by the jury.

What will be a “matter of public interest”?

So how will a judge determine whether the subject matter of a publication was of public interest? Defining what is a matter of public interest in the abstract is notoriously

difficult but the court has suggested that:

“... to be of public interest the subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.”

It is clear that a story will not relate to a matter of public interest simply because it will be of interest to the public. A story that merely feeds curiosity or prurient interest in the private lives of public figures or celebrities will not be sufficient.

Further, when considering this issue, the court indicated that the trial judge “should step back and look at the thrust of the publication as a whole” and that it will not be “necessary to find a separate public interest justification for each item of information” contained in a story.

How will the element of “responsible communication” be determined?

Determining whether the communication was responsible is to be assessed by the trial judge having regard to all the relevant circumstances of the publication. These may include:

- The seriousness of the allegation – the more serious the allegation, the greater degree of diligence needed to verify it;
- The degree of public importance;
- The urgency of the matter – did the public’s need to know require the defendant to publish when it did;
- The reliability of any source;
- Whether comment was sought from



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the plaintiff and accurately reported – in most cases it will be inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond;

- The tone of the publication; and
- The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

The court also indicated that this is not an exhaustive list and that these and other such factors:

“... must be applied in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgement of the publisher, particularly in cases involving professional editors and journalists.”

What about neutral reportage?

Interestingly, the court was not able to agree whether “neutral reportage” (ie, the neutral reporting of attributed allegations) should be regarded as a separate defence, distinct from the new public interest defence.

Brown J considered it to be conceptually different and that it should not be recognised as a defence in New Zealand.

However, French and Winkelman JJ agreed with the UK and Canadian authorities that have held that neutral reportage should not be regarded as a separate defence and, in doing so, said that it rests on both public interest and responsible communication. In other words, they found that the “fact that it has its own label does not make it in substance a separate defence”.

While, the judgment is therefore authority for the proposition that neutral reportage can amount to the defence of responsible communication of a matter of public interest, the Court of Appeal did sound a warning for those who may engage in it:

“The stakes for publishers – mainstream or otherwise – who do not attempt to verify the truth of the defamatory allegation are high. They are likely to do so at their peril and accordingly the incentive to make the attempt remains high.”

There is a spectrum

The majority (French and Winkelman JJ) summarised their view by saying the new defence “thus involves a spectrum” and:

“At one end is reportage where the mere fact of the statement being made is itself of public interest and is reported as being of public interest. Further along the spectrum is a situation as in *Flood* which involved the publication not only of the fact of the

plaintiff’s investigation for corruption, but the nature of the alleged corruption. There the House of Lords said the press could not disclaim all responsibilities for checking their sources as far as practical, but provided the article was of real and unmistakable public interest and was fairly presented, the press were not required to produce primary evidence of the information given by sources. Further still along the spectrum that may however be necessary.”

The distinction between the new defence and qualified privilege, and what about *Lange v Atkinson*?

Finally, the court clarified two points.

First, the new defence is a standalone one and not part of the rubric of qualified privilege. This is due to the fact that 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.

Second, that the form of qualified privilege recognised in *Lange v Atkinson* (mass publications concerning MPs, or those wanting to be elected to Parliament) should no longer be available as a defence, being effectively subsumed in the new defence of public interest.

Conclusion

The new defence is to be welcomed. While it will not give journalists or others *carte blanche* to tarnish someone’s reputation, it will lessen the chilling effect that defamation law has had on the media. In essence, it will reward responsible and ethical reporting so that if, despite a journalist’s best efforts, the media gets it wrong, they will be able to rely on the defence to defeat a defamation claim. But the media and others will need to be mindful that there is a *quid pro quo* – they are now on notice of the high standards of conduct that will be required to establish the defence. ■

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