IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA
COURT OF APPEAL

CA 5/07

IN THE MATTER	of Section 57 of the Judicature Act 1980-81 and Article 60(3) of the Constitution
AND	**TEPAKI NOOAPII (TIM) TEPAKI**
	Appellant
AND	**WILLIAM FRAMHEIN**
	Respondent

Coram:	Barker JA (Presiding) Weston JA Grice JA
Counsel:	Mr Vakalalabure for Appellant Mr Little for Respondent
Date of hearing:	26 November 2007
Date of decision:	December 2007

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal is from a judgment of Fisher J in which he awarded damages and costs against the appellant in respect of defamatory statements which the applicant he had made concerning the respondent. The alleged defamatory statements were made by the appellant in the Cook Islands News, first, in a letter to the editor published on 9 December 2005, and, secondly, in an article quoting the appellant published on 26 April 2006.

2. Details of the alleged defamatory statements will appear later in this judgment. The statements arose out of the circumstances surrounding

the termination of the respondent's employment with the appellant's companies.

3. The learned Judge gave his decision at the conclusion of a five-day trial and issued written reasons on 4 July 2007.

4. On the first day of the trial, 25 June 2007, Fisher J, on his own initiative, raised the question whether the defamation trial should be adjourned on the grounds that the respondent was likely to be charged by the Police in relation to conduct which formed the factual basis for the appellant's affirmative defence of justification. The judge then delivered an oral decision in which he decided to proceed with the civil trial. That decision is the basis for one of the grounds of appeal to be discussed later.

5. When considering whether or not to adjourn the civil trial until after the criminal proceedings had been concluded, Fisher J had the following information:

   (a) A letter dated 22 June 2007 from the Commissioner of Police to the solicitors then acting for the appellant. Although, the letter does not name the respondent, it clearly was intended to refer to him. This letter states the belief that offences had been committed and that charges would be laid "within the next few days". The letter is headed "Complaint of theft/fraud by the Tepaki Group."

   (b) Evidence was given by a Detective Senior-Sergeant that charges would be brought that week.

6. On the last day of the trial, the same detective arrested the respondent and took him to the Police station for processing. Some 19 charges had been laid under s. 251A of the Crimes Act 1969 ('the Act') relating to cheques drawn by the appellant on bank accounts of one or other of the appellant's companies by which he had been employed.

7. Fisher J had expressed concern about the coincidence of the laying of the charges when defamation proceedings were pending which canvassed the same issues as the charges. He expressed surprise at the Police letter being written to the appellant's lawyers. The Judge was, in our view, understandably discountenanced that the Police had chosen to charge the respondent in the course of the civil trial. He characterized their behaviour as "outrageous" in the circumstances.

8. We have not heard the Police version on why they had acted in a seemingly high-handed way. However, we find it hard to accept that an arrest should have been made in the course of the civil trial. When one considers the burden of really serious criminal offending which most police forces have now to deal with, we see no reason why this man could not have been summoned to appear in Court on charges which were at the lower end of the scale of criminality. The respondent was not a security risk: nor was there any possible basis for saying that he was likely either to abscond or to interfere with witnesses.

9. The Police presumably were unaware of Fisher J's observations in his oral judgment on the first day of the trial that the onus was on the appellant in the defamation case to prove criminal conduct by the appellant on the balance of probabilities whereas any prosecutor would have to prove the same conduct beyond all reasonable doubt. Clearly, in our view, the Police should have waited to see what the Judge had decided on that issue, before charging the respondent.

10. Prior to the hearing of the appeal, counsel for the applicant sought leave to present as further evidence, copies of the informations laid by the Police against the respondent. The Court admitted this evidence, it being a matter of public record, although it did not qualify under the normal rules for the introduction of fresh evidence on appeal. We cannot see how this evidence makes any difference to our decision or indeed to what Fisher J had to decide.

11. In the course of the appeal, counsel for the appellant did not pursue two of the original grounds of appeal. The first related to defects in the transcript. There were several gaps where it appeared that the recording equipment did not fully capture the whole answer of a witness or a whole of a question from counsel or the Judge. Most of these gaps occurred during the appellant's evidence.

12. We have carefully read the transcript and conclude that it records the essential facts accurately. It provides ample justification for the judge's preference for the evidence of the respondent over that of the appellant whenever a preference needed to be expressed. As it happened, there was little major conflict over the general narrative of events.

13. Even if this ground of appeal had been pursued, we should not have taken the extreme step of ordering a new trial which seemed the only option. The standard of completeness of the record of proceedings in this case is far better than that in many Pacific jurisdictions and is better than what often used to be the standard of record-keeping in New Zealand for District Court civil or summary jurisdiction trials. We note too that Fisher J had not been asked by counsel to resolve any difficulties with the transcript by reference to his own notes.

14. The second abandoned ground related to remarks allegedly made by the Judge when advised of the arrest of the respondent. The record of these remarks is non-existent and counsel were unable to agree on exactly what he said. However, it seems that he queried whether the Police had properly considered the ramifications of arresting the respondent in relation to possible claims for malicious prosecution and/or abuse of public office. We express no view on these remarks other than to say that the Judge was entitled to express concern at what had seemed to him to have been unnecessary and heavy-handed action. Those remarks were not directed to the appellant and were not indicative of bias against the appellant.

FACTUAL BACKGROUND

15. The essential facts are set out in the judgment under appeal and do not need to be repeated fully. Essentially, the respondent and his partner were employed by two of the appellant's companies in New Zealand (the Tepaki group) to manage their business in the Cook Islands. They were to be paid salaries and given free board.

16. The respondent was made a signatory for the relevant cheque accounts. One further signatory was required for cheques. The Tepaki group suffered cash shortages with the result that the appellant and his partner were not always paid their wages in a normal way.

17. Fisher J characterized the dealings of the respondent as "rather amateurish bookkeeping and financial practices." The respondent intermingled his funds with his employer's funds: he personally paid some of his employers' debts: he used his employers' funds in lieu of wages for paying some of for his own personal items.

18. Despite these casual practices, a full record of all transactions was kept by the respondent so that reconciliation of the state of accounts between the respondent and his employers was always possible.

19. For the last three months of the respondent's employment, cheques were often drawn bearing only the respondent's signature. These were honoured and paid by the Bank without demur. Some of these cheques issued with only the respondent's signature, related to his own expenses, some to his employers'. The Police charges relate only to those cheques which he drew for his own expenses.

20. The respondent resigned from the appellant's employ by an email sent on 2 September 2005. The Judge accepted that, on the same day, the respondent faxed to the appellant's lawyer a set of company accounts including cheque book registers, lists of creditors, wages calculations plus a list of personal drawings for which he was to give credit in his accounting with the appellant.

21. On 4 September 2005, the appellant vacated the appellant's property in Rarotonga where he had been living. Sometime before 5 September, he took with him a Dell computer which he had he brought from New Zealand and used for recording information of both the Tepaki group and of the respondent personally.

22. On 6 September 2005, after exchanges between the parties, the appellant agreed to the respondent keeping the Dell computer. The parties were unable to agree on to how much was due to the respondent and his partner for unpaid wages and for payments made by them on behalf of the appellant. They issued proceedings in he High Court.

23. The claims for unpaid wages etc were heard in the High Court in the week before the defamation proceedings were heard. Weston J delivered a judgment in favour of the respondent and his partner. The issues in that case were founded in employment law, whereas different issues arose in the defamation trial. As noted earlier, there was little dispute about facts before Fisher J. One matter of conflict, was that the respondent claimed that the computer had been gifted to him by the appellant. Fisher J appears to have proceeded on the assumption that, as at the date when the respondent resigned, the computer was owned by the appellant with his having had the right to use it.

24. Weston J's judgment is under appeal to this Court and will be heard at the June 2008 sessions. We note that counsel for the appellant in this appeal, in a telephone conference with the presiding Judge held on 12 October 2007 (New Zealand time), specifically waived any objections to Weston J sitting as a member of this Court on this appeal.

25. We now set out the defamatory statements and relevant circumstances from the judgment of Fisher J.

> "21. The plaintiff's wage claim was reported in the *Cook Island News* of 7 December 2005. The defendant responded in a letter to the editor published in the *Cook Island News* of 9 December 2005. In the letter the defendant referred to the plaintiff's wage claim and went on to say:
>
> > *"Had you bothered to contact our office at Nikao you would have found out that a recent reconciliation by our accounts division show that William Framhein in fact owed some $3,000 to the group accounts and not the other way round, and transfers of funds have occurred under William's watch of the group accounts that amounts to fraud. The particular computer was*

gifted to the group by a Wellington bank for being a preferred customer.

The disappointment for me is that I asked the Tepaki Group Board meeting of 5 December, prior to my departure for New Zealand, that the debt owed by William be waived and the board refrain from handing their findings to the police."

22. The plaintiff's solicitor wrote to the defendant's solicitor alleging that the published letter was defamatory and seeking a retraction failing which proceedings would be issued. The defendant rejected this request. Shortly after he gave an interview to a journalist from *Cook Island News* which published the result in an article on 26 April 2006. The article contained a number of comments by the defendant upon the plaintiff's threat of defamation action describing it as "attention seeking" predicting that the plaintiff would defame himself rather than the defendant, describing the defamation proceedings as a publicity stunt and concluding "if he wants to file for defamation anchored on the information we have supplied to C I News to defend ourselves from his media outbursts let him, and let the courts decide who defamed who".

23. The article also quoted the defendant in the following terms:

"Tepaki said there were irregularities and unexpected shortage of funds during Framhein's watch of the accounts, which could not be explained until Framhein left Tepaki Group, when new staff uncovered that he as a signatory to both accounts had moved money between the two accounts without the authority of a second signatory. In other words, cheques were signed by him alone, which breached the authorization process lodged with the banks.

He said he had not bothered to respond to Framhein's attention seeking through the media as the manner of his handling Tepaki Group's accounts had been placed in the hands of the police. Tepaki said he had been told that the police now had the

evidence they required from the banks, which should enable them to move forward, and that's where that matter sat for now.

Tepaki said Framhein was an enigma. He must have known when the police fingerprinted him and told him to hand in his passport on Friday 23 December 2005, only avoiding being jailed that day through the intervention of one of Tepaki Group's staff, that he had been snapped."

24. Noting the allegation that the Police, had apprehended him, the plaintiff obtained from the Cook Islands Police a letter dated 3 May 2006 confirming that the Police never interviewed, charged, arrested or fingerprinted the plaintiff nor demanded his passport as alleged. The plaintiff's solicitors sent this to the defendant's solicitor along with a letter stating that the latest *Cook Island News* article was defamatory and asking for an apology and retraction. The defendant again refused any apology or retraction. He plaintiff then issued the present proceedings for defamation.

25. The plaintiff's wage claim came on for hearing in the High Court on 18 and 19 June 2007. In a judgment of 20 June 2007 Weston J found for the plaintiff and his partner. He held that each was entitled to wages at $800 per week (totaling $29,600) plus the two further items paid on behalf of the two companies ($3,263 and $287) less the drawings from the company to benefit of the plaintiff and his partner ($5,714). He held that no further money was due to the companies for the Dell computer as the defendant had said in his email of 5 September 2005 that the plaintiff could keep the computer so long as access was provided to extract relevant data. As the data had been downloaded, the condition was satisfied and no account had to be given by the plaintiff for the computer. In the result judgment was entered for the plaintiff and his partner in the sum of $25,024 plus interest. The Judge held that the actual employers had been TIL and the defendant personally.

Issues in the defamation proceedings

26. The defamation proceedings originally involved the plaintiff's partner as a second plaintiff and another Tepaki Group director and the *Cook Island News* as second and third defendants. As the proceedings progressed the parties were progressively pared down to the present plaintiff and defendant.

27. At a formal level the issues between the parties are identified in the third amended statement of claim filed on 11 June 2007 and the second amended statement of defence filed on 8 June 2007 (applied with all necessary modifications to the third amended statement of claim) as refined by agreement in my ruling of 26 June 2007.

28. In the result the prima facie essentials for the defamation claimed are common ground, namely the facts that:

(a) The words complained of were published in the *Cook Islands News* on the dates alleged.

(b) The plaintiff was identifiable as the subject of the criticisms made in the two publications.

(c) It was the defendant who wrote the letter published on 9 December 2005 and who made the statements quoted in the publication of 26 April 2006.

(d) The extracts relied upon by the plaintiff were defamatory of the plaintiff (see statement of defence para 3).

(e) The words complained of "meant and were understood to mean that the ..... plaintiff was a dishonest employ [sic] of the defendant" (statement of defence para 3).

29. As the prima facie ingredients of a cause of action for defamation are common ground the principal question is whether the defendant can escape liability by successfully relying upon an affirmative defence."

26. Fisher J found that the ingredients of the tort of defamation had been established. This finding cannot seriously be challenged, given the clear implications of dishonesty in the published material. The Judge also found reinforcement of this view in the article of 26 April 2006. He

held that the natural and ordinary meaning of those words imputed dishonesty, fraud, theft and criminality.

27. The major issue in the case was the defence of justification: which centred on allegations of criminal dishonesty in (a) the fraudulent use of company cheques and (b) theft of the computer.

28. The Judge rightfully noted that the defence was not about the respondent's inefficiency, or carelessness, or failure to follow instructions. He preferred the evidence of the respondent over that of the appellant about the appellant's acceptance of one signature on cheques. The Judge gave reasons for this preference and we consider he was amply justified in his conclusions. Indeed, on this and in other peripheral areas where he preferred the evidence of the respondent, the appellant's case takes no or too little account of the principle that an appellate court will not interfere with the findings of fact by a judge who has seen and heard the witnesses – particularly when there is ample evidence for his findings, as we consider to be the case here.

29. Fisher J held that the defence of justification had not been made out. He notes as common ground that, through the use of company cheques signed only by him, he and his partner had derived benefits of $5714. In evidence, the appellant specifically acknowledged that he did not challenge the respondent's entitlement to these drawings as being wages to which they had been entitled. He also admitted to the judge that it was immaterial to him whether the wages had been taken in cash or in kind.

30. The judge accepted the evidence of the respondent that he was entitled to take part of his remuneration in this way and that he had made no attempt to conceal anything.

31. As to the computer, as noted earlier, Fisher J appears not to have accepted the respondent's claim that this had been gifted to him. He said it was not necessary to decide that point. He said:

> "Much of the background is beyond dispute. It is clear that in late 2004 one of the defendant's companies owned a Dell computer; that the plaintiff asked for a computer, saying that the plaintiff's existing computer was too small to undertake the operations which would be required in the Cook islands; that the defendant said that the plaintiff could take the Dell computer; that the plaintiff personally paid the duties arising from its importation into the Cook Islands; that during the nine months of his employment in the Cook Islands the plaintiff used the computer to keep track of the accounts of TIUL and TPL along with his personal computer requirements; that when the plaintiff left his employment in September 2005 he took the computer with him; that when he removed it the computer still had on it the financial records of TIL and TPL; and that at that time the Tepaki companies owed the plaintiff and his partner a substantial sum in unpaid wages."

32. The Judge held that the allegation of theft of the computer had not been proved. He took as the definition of "theft" that in the New Zealand Crimes Act 1961 which refers to the act of taking "fraudulently and without colour of right". In so doing, he was in error since the Cook Islands Act defines theft somewhat differently, without reference to "without colour of right".

33. It was counsel for the respondent (plaintiff in the court below) who made submissions to the Judge based on the New Zealand definition of "theft". Counsel for the appellant in his closing submissions referred to the Cook Islands definition which was obviously the correct one.

34. The Judge accepted that, when the respondent left the applicant's employ, he was entitled to think that, whatever the technical position as to ownership, he would at least have been entitled to have taken the computer in part satisfaction of unpaid wages. Fisher J noted an exchange of emails on 6 September 2005 where the respondent suggested a credit of $2500 for the computer and the appellant said that the respondent would keep it "provided you allow our troops to download information belonging to the Tepaki Group."

35. The seminal position of Fisher J's judgment on the theft allegation reads as follows:

> "I am inclined to think that in both of those emails the parties were offering concessions with a view to avoiding a potential dispute. What I am clear about, however, is that this could not possibly have been theft. Theft would have required knowledge on the plaintiff's part that he was not entitled to remove the computer and a dishonest intention to permanently deprive the Tepaki companies of it. Given the history that the companies owed him a substantial sum in unpaid wages, that the companies had cash flow problems, that in the past wages had been met in part by taking equivalent benefits, and that there was a very recent precedent for including a personal computer in lieu of wages, the plaintiff would have been astonished at the suggestion that by taking the computer he was stealing. One of the essential ingredients for theft is lack of an honest belief in the right to take the item. The defendant has failed to show the requisite dishonestly. The defence of justification under his heading therefore fails as well."

36. Fisher J then awarded the respondent $60,000 general damages plus $20,000 aggravated damages. He took into account the damage to the respondent commercially and to his business reputation, the distress caused to him and the wide publication of the offending words. The second article was made in the context that the appellant knew that the respondent had not at that date been fingerprinted or photographed by the Police.

GROUNDS OF APPEAL – 1) **Failure to adjourn trial**

37. At the conclusion of hearing the appellant's arguments, it was clear to the Court that the only viable grounds of appeal were those relating to proof of theft or dishonesty by the respondent and to quantum of damages. The appellant nevertheless persisted with the ground that Fisher J was wrong not to have adjourned the defamation trial until after the criminal proceedings had been concluded.

38. On being pressed by the Court as to what the result would be if this ground of appeal were to succeed, counsel for the appellant suggested either (a) a postponement of delivery of judgment until after the criminal process including any appeal) had been included or (b) a new trial. Neither alternative is attractive. The former would involve an open-ended delay, and the latter would be quite unfair to the respondent.

39. Fisher J clearly had a discretion to delay the defamation trial until after the criminal proceedings had been completed. He exercised his discretion in favour of proceeding with the civil trial at a stage where no criminal proceedings had been launched. He noted that the Police had had 18 months within which to lay charges but had not yet done so.

40. Not only do we find no reason to hold that the Court should interfere with this exercise of a judicial discretion, but we say positively that Fisher J was right not to delay the civil trial. In fact, as that trial proceeded, the basis for criminal charges became more and more insubstantial. We particularly note, as did the Judge, that the appellant had not suggested that by taking the personal benefits the respondent was guilty of dishonest conduct and, also, that his drawing of cheques

for personal expenditure in lieu of wages was not dishonest. There needed only to be an accounting.

41. Although not referred to by Fisher J, we adopt the same approach to be applied in such situations as thet well-summarised by Anderson J in the High Court of New Zealand in *Wells v Lewis (18 December 1990 CP55/90 Hamilton).* Fisher J's judgment sits well within those principles. This ground of appeal is dismissed.

GROUND OF APPEAL – 2) **Proof of Theft**

42. The relevant part of definition of 'Theft' in s. 242 of the Act reads as follows:

> "242 Theft defined (1) Theft or stealing is the act of intentionally and dishonestly taking, or intentionally and dishonestly converting to the use of any person, anything capable of being stolen, with intent –
>
> (a) To deprive the owner, or any person having any special property or interest therein; permanently of such thing or of such property or interest; or ...
>
> (b) ....
>
> (c) ....
>
> (d) ....
>
> (2) For the purposes of subsection (1) of this section, the term "taking" does not include obtaining property in or possession of anything with the consent of the person from whom it is obtained, although that consent may be induced by a false pretence; but a subsequent conversion of anything of which possession only is obtained may be theft.
>
> (3) It is immaterial whether the thing converted was taken for the purpose of conversion or whether it was at the time of conversion in the possession of the person converting.
>
> (4) Theft is committed when the offender moves the thing, or causes it to move or to be moved, with intent to steal"

43. It will be apparent that the Cook Islands definition of theft differs from the New Zealand one referred to by the Judge. Instead of the defined New Zealand expression 'colour of right' the Cook Islands section uses the expression "intentionally and dishonestly".

44. The English Theft Act in section 1 defines a person as guilty of theft "if he dishonestly appropriates property belonging to another with the intention of permanently depriving the owner of it". The English Act goes on to discuss several different scenarios for various kinds of theft. None is relevant here.

45. What is relevant for present purposes is the discussion in English courts of the word 'dishonestly'. In *R v Ghosh [1982] QB 1053,* the English Court of Appeal held that a jury should determine dishonesty by an accused on a theft charge in two stages:

    (i) Whether according to the ordinary standards of reasonable and honest people, what was done was dishonest. If not, then the prosecution must fail.

    (ii) If it does, whether the accused must have realized that what he/she was doing was dishonest by the standard of reasonable people.

46. Such a direction to a jury need be given only in cases where the accused might have believed that what he is alleged to have done was in accordance with the ordinary person's idea of honesty. *R v Price (1989) 90 Cr.App R 409.*

47. A New Zealand case on a prosecution under a section 222 of the Crimes Act 1961 relating to a form of theft where there was no

reference to 'colour of right' and where the word 'fraudulently' was used in its own is *R v Coombridge [1976] 2NZLR 381* Richmond, P delivering the judgment of the Court of Appeal said:

> "In s. 222 of the Crimes act 1961 no express mention is made of colour of right and the word 'fraudulently' is used on its own. We think that in order to act fraudulently an accused person must certainly as the judge pointed out in the present case, act deliberately and with knowledge that he is acting in breach of his legal obligation. But we are of opinion that if an accused person sets up a claim that in all the circumstances he honestly believed that he was justified in departing from his strict obligations, albeit for some purpose of his own, then his defence should be left to the jury for consideration provided at least that there is evidence on which it would be open to a jury to conclude that in all the circumstances his conduct, although legally wrong, might nevertheless be regarded as honest. In other words the jury should be told that the accused cannot be convicted unless he has been shown to have acted dishonestly."

48. Referring to *Coombridge,* in *R v Williams [1985] 1NZLR 296,* the New Zealand Court of Appeal formulated the test thus:

> "That is how the test has been applied in this country for many years, and it is the test which must be applied here unless and until a Full Court decides otherwise.
>
> In cases under s. 222 and s. 224 of the Crimes Act 1961 where it is alleged that an accused acted fraudulently, it must be shown that he acted deliberately and with knowledge that he was acting in breach of his legal obligation. But if, that being established, the accused sets up a claim of honest belief that he was justified in departing from his strict obligations, even for some purpose of his own, then his defence must be left to the jury if there is some evidence from which the jury might conclude that his conduct, though legally wrong, might nevertheless be regarded as honest. The failure of the prosecution, in the face of that evidence, to prove that he did not have such a belief, must result in an acquittal. In deciding whether the accused was acting dishonestly at the material time, the jury are entitled to look at all the facts and statements disclosed in the evidence from which inferences as to the honesty or otherwise of his belief may be drawn. In other words, the jury in deciding on the accused's state of mind –

> honest or otherwise – (a subjective state) are entitled to ask themselves whether on the evidence it was reasonably possible that he was acting honestly, however mistakenly, (a subjective test) and if this is reasonably possible they must acquit him. This we think is entirely consistent with the view taken by the law in the many situations where the state of a person's mind is relevant in criminal proceedings."

49. The respondent's explanation as to why he took the computer – on the scenario accepted by the Judge – clearly come within all the above formulations. Fisher J in effect found that the respondent honestly believed that his conduct, possibly technically wrong legally, should nevertheless be regarded as honest.

50. The same result is achieved using the formulation of 'dishonesty' in the Cook Islands Act as that achieved by the Judge following the 'colour of right' route. The respondent, on the Judge's clear view of the facts, could thus not have been guilty of the theft of the computer under Cook Islands law.

51. With regard to the cheques, which are still the subject of criminal charges, counsel for the appellant for the first time sought to submit that there had been offences disclosed under s. 251A of the Crimes Act 1969.

52. That section reads:

> "251A. Taking or dealing with certain documents with intent to defraud – Everyone is liable to imprisonment for a term not exceeding 5 years, who, with intent to defraud –
>
> (a) Takes or obtains any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration; or

(b) Uses or attempts to use any such document for the purposes of obtaining, for himself or for any other person, any privilege, benefit, pecuniary advantage, or valuable consideration."

53. Clearly, 'intent to defraud' has to be proved for an offence under this section. We do not need to consider the somewhat strained argument that dishonesty does not need to be shown. It would be surprising if that were so, given that the words 'dishonestly' and 'fraudulently' are interchangeable (see R v Glenister).

54. The factual findings were was put beyond all doubt by the evidence of the appellant, already referred to in this judgment, where he acknowledged that the respondent's taking of personal drawings was not dishonest.

55. In view of this evidence, it is difficult to see how any jury could convict the respondent. The likelihood is that, given such evidence from the respondent, a trial judge would not let the case go to a jury. It will be a matter for the Police or the Crown Law Office to decide whether to proceed with these prosecutions. We hope that this judgment will assist them in their enquiries in this regard.

56. Another reason for not considering the allegation that the respondent was guilty of offences under s. 251A, is that no particulars of such offences were provided or relied upon by the appellant in support of the plea of justification. Defamation litigation is highly technical and strict reliance on the rules of pleading are required. It would be unjust to consider whether there were offences under s. 251A when there had been no particulars of such an allegation provided in support of the plea of justification.

57. Accordingly, the grounds of appeal relating to the defence of justification are dismissed. We note once more in this context, that the trial Judge saw and heard the witnesses and gave careful reasons for his findings. We see no reason to disturb them.

GROUNDS OF APPEAL 3)

58. The appellant submitted that the quantum of damages awarded was excessive. Counsel pointed to the pending criminal charges as a reason for reduction. This is not a relevant consideration here. A Ms Wong had said in evidence that the respondent had been involved in 'some naughty things'. No details were given and there had been no relevant pleading in the defence. The Judge rightly took no account of these vague allegations.

59. Assessment of damages in defamation cases is a fairly subjective exercise and appellate courts do not interfere unless an award is outside the range. We think that Fisher J's award was well within the range and we dismiss this ground of appeal.

RESULT

60. The appeal is dismissed. The respondent is entitled to costs of $3000 plus disbursements as fixed by the Registrar.

61. The Registrar is ordered to pay to the respondent out of the moneys ordered by the Chief Justice to be paid into Court as a term of leave to appeal. (a) The amount of the High Court judgment in this case (b) the costs awarded above and (c) interest earned on the amount of the judgment. Any balance is to be retained by the Registrar pending

determination of the appeal in respect of the other proceedings between the parties.

Barker JA	Weston JA	Grice JA