Stephen Nibbs v Australian Broadcasting Corporation [2010] NTSC 52

PARTIES:	Stephen Nibbs
	v
	Australian Broadcasting Corporation
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 8/09 (20922593)
DELIVERED:	2 November 2010
HEARING DATES:	13 August 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Summary Judgment – Defamation – Whether alleged imputations capable of being conveyed – Principles to be applied in Summary Judgment applications – Strike out of pleadings – Requirements of pleadings in defamation claims.

Defamation Act s 22, 27, 28(3).
Supreme Court Rules O 22.02, 23.02, 23.03, 36.03

Dey v Victorian Railways Commissioners (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner of Railways (N.S.W)* (1964) 112 CLR 125; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87; *Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* (1991) 1 NTLR 43; *Territory Loans Management v Turner* (1992) 110 FLR 341; *Hibiscus Shoppingtown Pty Ltd v Woolworths (Q'Land) Ltd* (1993) 113 FLR 106; *House v Diamond Leisure Pty Ltd* [1987] NTSC 6; *Wilson v Union Insurance Company* (1992) 112

FLR 166; *Jones v Skelton* [1964] NSWR 485; *Chapman & Chapman v Australian Broadcasting Corporation* [2000] SASC 146; *Farquhar v Bottom & Anor* [1980] 2 NSWLR 380; *Lewis v Daily Telegraph Ltd* [1964] AC 234; *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158; *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682; *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148; *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135; *Chalmers v Payne* (1835) 150 ER 67; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Molomby SC
Defendant:	Mr Roper

Solicitors:

Plaintiff:	Povey Stirk
Defendant:	Cridlands MB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Stephen Nibbs v Australian Broadcasting Corporation [2010] NTSC 52
No. AS 8/09 (20922593)

BETWEEN:

Stephen Nibbs
Plaintiff

AND:

Australian Broadcasting Corporation
Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 2 November 2010)

[1] This matter comes before the Court on Interlocutory Summons seeking orders pursuant to Orders 23.02 and 23.03 of the *Supreme Court Rules* ("the Rules"), that:

(a) Summary Judgment be entered in favour of the Defendant;

(b) in the alternative, the Statement of Claim be struck out.

[2] The Defendant's evidence on Summons is the Affidavit of Jonathan Leslie Duhs sworn 9 July 2010 ("the Affidavit").

[3] No evidence has been led by the Plaintiff.

[4] The Defendant's substantive claim is for defamation alleged to arise from a story on the "Four Corners" television show entitled "Art for Art's Sake" broadcast by the Defendant on 28 July 2008 (**"**the Broadcast") and the subsequent publication of a transcript of the Broadcast on the Defendant's website (**"**the Transcript**"**).

[5] A DVD copy of the Broadcast is "Exhibit A" to the Affidavit and a copy of the Transcript is Annexure "JLD1" of the Affidavit. The DVD was played in its entirety in the course of the hearing. Viewing the entire Broadcast is of considerable utility in properly assessing the capacity of the alleged imputations.

[6] The Statement of Claim alleges that four imputations arise, namely:-

(1) As an art dealer the Plaintiff is unscrupulous in his dealings with aboriginal artists.

(2) As an art dealer the Plaintiff is exploitive in his dealings with aboriginal artists.

(3) As an art dealer the Plaintiff exploits aboriginal artists by paying them inadequately for paintings done under oppressive conditions.

(4) As an art dealer the Plaintiff allowed aboriginal artists who were producing works for him to be locked inside a property so that one of them who needed dialysis was unable to be taken for treatment.

[7] The Defendant's submissions set out the legal principles relevant to Summary Judgment applications generally as well as specifically in the context of defamations actions. The Plaintiff does not challenge that part of the Defendant's submissions. I also agree with that summary and therefore I largely adopt and repeat the Defendant's submissions with some minor modifications.

[8] The starting point in respect of applications for Summary Judgment is *Dey v Victorian Railways Commissioners*[1] ("*Dey*"), Dixon J (as he then was) said:

> "A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."[2]

[9] In the same decision Latham CJ said:

> "But it is argued that if a case involves any question of difficulty the summary procedure of dismissing an action as vexatious should not be applied. In the present case there is nothing frivolous about the action, but if a court is of the opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile."[3]

[1] (1949) 78 CLR 62
[2] (1949) 78 CLR 62 at 91
[3] (1949) 78 CLR 62 at 84

[10] *General Steel Industries Inc v Commissioner of Railways (N.S.W)*[4] ("*General Steel*") is recognised as the seminal authority on applications for Summary Judgment. In that case, after citing with approval the above comments made by their Honours Latham CJ and Dixon J in *Dey*, Barwick CJ said:

> "… in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is no clearly untenable that it cannot possibly succeed."[5]

[11] In *Fancourt v Mercantile Credits Ltd*[6] the High Court said:

> "The power to order summary or final judgement is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."[7]

[12] The foregoing has been accepted in the Northern Territory as the appropriate test in applications under Order 22.02 of the Rules. See generally *Civil & Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd*;[8] *Territory Loans Management v Turner*;[9] *Hibiscus Shoppingtown Pty Ltd v Woolworths (Q'Land) Ltd.*[10]

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[4] (1964) 112 CLR 125
[5] (1964) 112 CLR 125 at 130
[6] (1983) 154 CLR 87
[7] (1983) 154 CLR 87 at 99
[8] (1991) 1 NTLR 43
[9] (1992) 110 FLR 341
[10] (1993) 113 FLR 106

[13] The test to be applied to Summary Judgment applications under Order 23.03 has been expressed in different terms to the applications made by a plaintiff. In *House v Diamond Leisure Pty Ltd*[11] Rice J adopted *General Steel* as the relevant test on applications under 23.03, namely whether the plaintiff's case if "so clearly untenable that it cannot possibly succeed."

[14] It was expressed in slightly different terms again by Kearney J in *Wilson v Union Insurance Company*[12] where his Honour said:

> "Order 23 is intended as a means for dealing with actions which are absolutely hopeless, those so obviously frivolous or unsustainable or untenable that is plain and beyond rational debate that they cannot succeed. The power under O 23 is to be exercised by a court with great caution; an applicant bears a heavy burden. If the plaintiff shows an arguable case, one which is not unworthy of serious discussion and of evidence being led, a case not hopeless beyond argument, an application under O 23 should be dismissed. The question is whether it would be open to the plaintiff on the pleadings to prove facts at trial which would constitute a cause of action…"[13]

[15] Notwithstanding the apparently different terminology used, I agree with the submission of Mr Roper, counsel for the Defendant, unchallenged by Mr Molomby for the Plaintiff, that a test of whether there is a real or serious question to be tried is apt in respect of applications under either Rule. What the issue ostensibly boils down to is whether there is anything in the Statement of Claim which justifies the proceedings progressing to a final hearing.

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[11] [1987] NTSC 6
[12] (1992) 112 FLR 166
[13] (1992) 112 FLR 166 at 181

[16] In defamation matters and in the context of the extant case, these principles translate to whether or not the Broadcast or the Transcript are capable of conveying the alleged imputations to the ordinary reasonable viewer. That is a question of law. In *Jones v Skelton*[14] the Privy Council said:

> "It is well settled that the question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law, and is therefore one calling for a decision by the Court. If the words are so capable then it is a question for the jury to decide as to whether the words do, in fact, convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the Court will reject those meanings which can only emerge as the product of some strained, or forced or utterly unreasonable interpretation."[15]

See also *Chapman & Chapman v Australian Broadcasting Corporation*[16] and *Farquhar v Bottom & Anor*.[17]

[17] In this respect, the test set out by Lord Reid in *Lewis v Daily Telegraph Ltd*[18] is as follows:

> "In this case it is I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try and envisage people within these two extremes and see what is the most damaging meaning they would put on the words in question…"[19]

[18] Further traits of the ordinary reasonable reader (viewer in the extant case) are crisply summarised in *Farquhar v Bottom & Anor*[20] namely:-

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[14] [1964] NSWR 485
[15] [1964] NSWR 485 at 491
[16] [2000] SASC 146
[17] [1980] 2 NSWLR 380
[18] [1964] AC 234
[19] [1964] AC 234 at 259
[20] [1980] 2 NSWLR 380

(1) The ordinary reasonable reader is a person of fair average intelligence, who is neither perverse, nor morbid, nor suspicious of mind, nor avid for scandal;

(2) The ordinary reasonable reader does not live in an ivory tower. He can, and does, read between the lines, in light of his general knowledge and experience of worldly affairs;

(3) The ordinary reasonable reader is a layman, not a lawyer, and that his capacity for implication is much greater than that of a lawyer.

[19] The manner of publication is also a factor in determining what imputation is conveyed. *Amalgamated Television Services v Marsden*[21] was a case where the alleged defamatory statements were made in a media which was of a transient nature. The Broadcast in the current case is a media of a transient nature. In that case, Hunt CJ said, (with case citations omitted):

> "The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed. The reader of a book, for example, is assumed to read it with more care than he or she would read a newspaper. The more sensational the article in a newspaper, the less likely is it that the ordinary reasonable reader will have read it with the degree of analytical care which may otherwise have been given to a book, and the less the degree of accuracy which would be expected by the reader. The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking. There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual. The principles stated in these last two paragraphs – as encapsulated in *Farquhar v Bottom* – have been adopted in this Court.

[21] (1998) 43 NSWLR 158

> All of these considerations, and more, apply to matter published in a transient form – and particularly in the electronic media. Whereas the reader of the written document has the opportunity to consider or to re-read the whole document at leisure, to check back on something which has gone before to see whether his or her recollection of it is correct, and in doing so to change the first impression of what message was being conveyed, the ordinary reasonable listener or viewer has no such opportunity. Although such a listener or viewer (like the reader of the written article) must be assumed to have heard and/or seen the whole of the relevant programme, he or she may not have devoted the same degree of concentration (particularly, I would say, where it is the radio) to each part of the programme as would otherwise have been given to the written article, and may have missed the significance of the existence, earlier in the programme, of the qualification of a statement made later in the published material."[22]

[20] On the Interlocutory Summons before the Court, there are two matters requiring decision. The first task is to determine whether the imputations alleged by the Defendant are capable of being conveyed. Secondly, and if the first is answered in the affirmative, whether the pleadings are sufficient.

[21] The Plaintiff has given notice of an intention to amend the Statement of Claim. The Plaintiff concedes that imputation (3) as currently worded actually contains two separate imputations. The Plaintiff proposes to separate these out into two separate allegations namely:-

3(a) As an art dealer the Plaintiff exploits aboriginal artists by paying them inadequately for their paintings;

3(b) As an art dealer the Plaintiff exploits aboriginal artists by having them work under oppressive conditions.

[22] (1998) 43 NSWLR 158 at 165-166

[22] The case before me was largely argued on the basis of the amendment referred to in the preceding paragraph. As pleadings have not closed, Order 36.03 permits the Plaintiff to amend his Statement of Claim without leave. For that reason I will deal with the matter as if that amendment has been made.

[23] Dealing first with the capacity question, the Broadcast as a whole needs to be considered for the purpose of determining whether the alleged imputations are capable of being conveyed. The authorities acknowledge that defamatory statements are rarely made expressly. Often defamatory statements are in the form of insinuation or innuendo. Even in the case of an express statement, considering it in isolation may convey an entirely different meaning. The current case contains a good example. The Plaintiff seems to admit that he is a “carpetbagger”. If the particular comment was looked at on a stand alone basis, it would sound like an admission. However when the comment is considered in context it is clear that, rather than admitting to being a carpetbagger, the Plaintiff is merely acknowledging that others have called him a carpetbagger.

[24] Looking at the Broadcast as a whole, it commences with a narrative referring to “exploitation” in the trade in indigenous art. There is reference to “big profits going to the dealers”. The Plaintiff is identified as a dealer. In the course of the Broadcast the Plaintiff is asked questions which tend to compare gallery prices to the payment made to the artist. There is reference to a Senate investigation “designed to clean up the industry”. Immediately

thereafter the Plaintiff is told that other people in the industry refer to people “like yourself” as carpetbaggers.

[25] Later in the Broadcast a person identified as Sarah Brown is interviewed. She is described as a person involved in a kidney dialysis clinic and the presenter says:-

> “It’s run by Sarah Brown who has witnessed the exploitation of her patients at the hands of unscrupulous dealers.”

[26] Ms Brown then comments:-

> “Lots of people are really successful artists but they can’t paint for their community art centres anymore because they’re in town and so they’re easy pickings for carpetbaggers, for dodgy art dealers.”

[27] The Broadcast goes on and the presenter questions Sarah Brown about the extent of carpetbagging and she replies that it is “huge”. The connection is then made with the need for kidney treatment and the connection with the Plaintiff comes about as the Broadcast turns to a discussion of people missing out on necessary dialysis treatment. The association with the Plaintiff is that Ms Brown then says “there’s one property where it’s a particular problem” and it is identified as associated with the Plaintiff as he is the lessee. Ms Brown then introduces the term “deprivation of liberty”.

[28] In my view, applying the principles set out above, in particular on the basis of the most damaging meaning available, all bar the last of the imputations are capable of being conveyed. In my view an ordinary reasonable viewer, considering all these statements as a whole could come to the conclusion

that the Plaintiff is one of those persons making the big profits, one of the persons who needed "cleaning up" and one of those who has exploited the trade in indigenous art. Very relevant also is the reference by Ms Brown to "carpetbaggers", a term used to refer specifically to the Plaintiff early in the Broadcast.

[29] Mr Roper for the Defendant contends that to the extent that the imputation is dependant upon the Plaintiff being described as a carpetbagger, the imputation is rendered incapable of being conveyed by the refutation of the allegation by the Plaintiff in the course of the Broadcast. The relevant part of the Transcript is where the Plaintiff says:-

> "Ah mate. I was the original carpetbagger, you know what I mean? I was the first one that they started calling a carpetbagger.
>
> But look, me? I don't look over my shoulder at what they're saying mate. I judge myself on what these people have got to say about me not what the white art community's got to say about me."

[30] Essentially the Defendant alleges that the bane created by the assertion is outweighed by the antidote of the denial. This is a recognised principle with its genesis in the case of *Chalmers v Payne*.[23] However the mere presence of a denial does not render an otherwise defamatory imputation incapable of being conveyed. What is required before that can be the case is that the refutation is of such a nature that, taken as a whole, the matter complained of is incapable of conveying the imputation so refuted. What is required is

[23] (1835) 150 ER 67

that the publication as a whole makes it clear that the imputation is wrong. See generally *Farquhar v Bottom*.[24]

[31] That is not the case on the facts. Although it can be said that the Plaintiff denies the allegation (of carpetbagging), the overall effect of the Broadcast is to show the Plaintiff as a carpetbagger following the theme and context of the Broadcast, his denial notwithstanding. Very relevant to this is that the remark is repeated after that denial. This occurs when the presenter is interviewing Adam Knight and the relevant part of the Transcript is set out in paragraph 39 hereof. Therefore, having regard to the transient nature of the Broadcast, the ordinary reasonable viewer might miss the significance of the earlier qualification, especially in light of the adverse connotations from the remainder of the Broadcast.

[32] That deals with imputations 1 and 2. The capacity question in relation to imputations 3(a) and (b) is not as clear. The essence of those imputations is firstly that the Plaintiff pays artists inadequately for paintings and thereby exploits them. Secondly, that he also exploits them by having artists work under oppressive conditions.

[33] In relation to the former, the Defendant asserts that nothing in the Broadcast makes any assertion about adequacy of payments to artists. Mr Roper submitted that absent information about prices paid to artists relative to gallery prices or of the profit margins of dealers in aboriginal art, it is not

[24] [1980] 2 NSWLR 380

possible to convey an imputation about the inadequacy in relation to the prices paid by the Plaintiff.

[34] The relevant discussion in the Broadcast concerning prices is set it out hereunder:-

> QUINTON MCDERMONT (to Steve Nibbs): And how much would you pay her for that painting?
>
> STEVE NIBBS, ART DEALER: Seven-hundred, $800.
>
> QUINTON MCDERMONT (to Steve Nibbs): And how much would it retail at in a gallery do you think?
>
> STEVE NIBBS, ART DEALER: Probably round about the three-and-a-half maybe four grand, five grand."

[35] Later in the Broadcast, the presenter introduces a discussion about a proposed code of conduct. At this point Tamara Winikoff from the National Association for the Visual Arts says:-

> "The kinds of dealings that occur between Indigenous artists and those who have commercial relationships with them are often quite troubled and sometimes downright dishonest. And so the necessity for a code is to try regularise those relationships and ensure that artists in particular get appropriate recompense." (Emphasis added)

[36] This then is again associated with the Plaintiff by the presenter's next question, "Carpetbaggers aren't going to sign up to the code of conduct are they?".

[37] The Plaintiff also relies on a comment made by the presenter to the Plaintiff shortly after (proximate to the discussion set out in paragraph 34), namely,

"Others in the art industry refer to people like yourself as carpetbaggers". Mr Molomby for the Plaintiff submits that as a result the viewer has no choice but to understand the exchange about prices referred to above as being related to carpetbagging. He submits that the viewer is then forced to conclude the suggestion being made by citing the prices is that the Plaintiff is the person who pockets the difference between them. He further submits that this naturally follows as there is no other obvious explanation for their appearance in this part of the programme.

[38] In my view, looking at the Broadcast as a whole and in particular having regard to the narrative at the commencement (see paragraph 24), making due allowances for the transient nature of the publication and looking for the most damaging meanings open to an ordinary reasonable viewer, it is possible for the imputation to be conveyed.

[39] The second limb of that imputation is that the Plaintiff forces artists to paint under "oppressive conditions". Mr Roper submits that the imputation is not capable of being conveyed. He says that the only direct reference in the Broadcast to the conditions under which artists worked on the Plaintiff's property was in response to a question from the reporter to an Adam Knight where he asked "It's a pretty rough and ready set up there, though isn't it?". Again this must be looked at in context. The relevant part of the transcript follows the introduction into the program of Adam Knight, apparently an art dealer and is as follows:-

> ADAM KNIGHT, ARANDA ABORIGINAL ART: Steve was one of the first two or three aboriginal art dealers in Alice Springs and played a pretty significant role in the establishment and growth of the industry in the early days. So he uses it for conducting Aboriginal art business.
>
> QUINTON MCDERMONT (to Adam Knight): He's told us he's a carpetbagger.
>
> ADAM KNIGHT, ARANDA ABORIGINAL ART: Yeah, he would. He's an unusual man, but, and he has funny methods and he's a rough, ready sort of a chap. But at the end of the day, as I said to you originally, I only support people I believe treat their artists well and respect Indigenous people and culture and he's certainly one of those. And there's quite a few of them.
>
> QUINTON MCDERMONT (to Adam Knight): It's a pretty rough and ready set up there, though isn't it?
>
> ADAM KNIGHT, ARANDA ABORIGINAL ART: Well, its better then the Mount Nancy Hotel, a hell of a lot better.

[40] The Defendant says that an ordinary reasonable viewer will be aware of the sort of living conditions likely to be found in places such as Alice Springs and remoter areas. There was no evidence of this and I would not agree with that proposition in any event. It may be true of people living in Alice Springs or the Northern Territory but the Broadcast was a national programme and that is a relevant factor in the assessment.

[41] In my view, an imputation is capable of being conveyed as the presenter's remark, again not viewing it in isolation, comes after Mr Knight attempts to suggest that the Plaintiff treats his artists well. The remark is preceded by a false, or at least highly misleading, comment by the presenter that the Plaintiff has acknowledged that he is a carpetbagger and with all the adverse

connotations given to that term by the Broadcast up to that point. The fact that the conditions are worse elsewhere (Mount Nancy Hotel) is not enough to refute the imputation in my view.

[42] The last imputation is that the Plaintiff's artists are locked away and denied medical treatment.

[43] The alleged offending part of the Broadcast in this context is the comment by Sarah Brown quoted above where she says "…as far as I'm concerned that's deprivation of liberty". I believe that imputation is adequately refuted. Viewing the DVD of the Broadcast makes it clear that even when locked, the gates to the property only prevented the entry of vehicles. The Broadcast went on the state that the property was locked to restrict the access of intruders. The Plaintiff himself is quoted as saying as much, albeit that he refers to them as "drunks". He also states that the property remains accessible as the gate is left ajar "so that people can go in and out" and the Broadcast shows that. The suggestion that a person is denied an opportunity to get dialysis is also refuted by Peter McLean, a person apparently employed by the Plaintiff at the site.

[44] Having regard to the appropriate test, the refutation in the case of this imputation is sufficient in my view.

[45] Turning now to the sufficiency of the pleadings, in my view the pleadings are deficient and will require appropriate amendment. As the pleadings stand the Defendant cannot tell from the Statement of Claim what case it is that

the Defendant must meet. Imputations 1 and 2 primarily derive from the allegation that the Plaintiff is unscrupulous and exploitive. The pleadings largely repeat the words used in the Broadcast. The Defendant submits that the Plaintiff must plead precisely what the Plaintiff alleges is the conveyed imputation and that the Plaintiff cannot simply rely on the specific use of those words to satisfy its pleading obligations.

[46] I was referred to some apparently conflicting authorities in that context. The Plaintiff relies on the decision of the New South Court of Appeal in *Hepburn v TCN Channel Nine Pty Ltd*[25] ("*Hepburn*"). The Defendant relies on *Whelan v John Fairfax & Sons Ltd*[26] ("*Whelan*"). Essentially *Hepburn* concerned a case where the plaintiff was referred to as an "abortionist". *Whelan* also concerned a case where the imputation alleged was also in respect of the actual word used, in that case the word "corrupt".

[47] In *Hepburn*, after acknowledging the need for specificity in pleadings, Hutley JA said:-

> "Where she alleges that she has been categorised in that a way calculated to damage her reputation in any meaning it could bear, she is entitled to have the imputation submitted to a jury in general terms, and the defendant has to justify it accordingly. For example a person who claims he has been defamed by being called a communist is not required to refine the imputation down to one of the varieties of communists now current, though their official commitments to subversion now vary widely….Though a defendant is entitled to know the case he has to meet, it is strange to hear the suggestions that this defendant does not understand an imputation which is precisely in the words it has used, so it is embarrassed in justifying

[25] [1983] 2 NSWLR 682
[26] (1988) 12 NSWLR 148

> it. This must mean it does not know what it is alleged an ordinary reasonable hearer may make of it."[27]

[48] *Hepburn* was not followed by the majority of the New South Wales Court of Appeal in *Drummoyne Municipal Council v Australian Broadcasting Corporation*[28] ("*Drummoyne*"). There it was held that the ordinary principles of pleading and the need to avoid uncertainty in relation to the meaning of pleaded imputations required the plaintiff to identify which of a number of different and distinct meanings might be attributed to the word "corrupt". Gleeson CJ said:

> "…ordinary principles of pleading, fairness to a defendant, and the need for clarity of issues at trial, all require adequate specification by a plaintiff of imputation or imputations sued upon…"[29]

His Honour went on to say:

> It is also appropriate to require the pleader to be more specific because, unless that is done, there is likely to be confusion in relation to the meaning for which the appellant contends. It is to the end of avoidance of of confusion and uncertainty that the requirement of specificity is directed, and the practical content of the requirement in the present case is to be determined in that light.
>
> To permit the plaintiff to frame imputations which refer to corruption without specifying which of the different possible kinds of corruption is being referred to would, by reference to the general principles stated above, and the test enunciated in *Whelan*, be to permit a contravention of the relevant rules of pleading."[30]

[49] The fundamental rule of a pleading is that the defendant is entitled to know the nature of the case to which he must plead and which he is to answer at

[27] [1983] 2 NSWLR 682 at 687
[28] (1990) 21 NSWLR 135
[29] (1990) 21 NSWLR 135 at 136
[30] (1990) 21 NSWLR 135 at 140

trial. *Whelan* confirmed that a plaintiff is required to explicitly, particularly and categorically plead the defamatory meanings which he alleges the published material would convey to the ordinary reasonable reader.

[50] In *Whelan* the plaintiff contended that by adopting the precise words in the allegedly defamatory publication, the imputation was thereby adequately pleaded. Similarly with Mr Molomby's argument in the present case.

[51] However, I agree with Mr Roper's submission that it is not a question of whether the Defendant has adequate knowledge of the actual facts. The question is whether the Defendant has adequate knowledge of what the Plaintiff will allege to be the facts. This relies on a passage from *Whelan*, where Hunt J explained the need for specificity in relation to defamation cases. His Honour said:

> "Where the defendant seeks to ascertain the case to which he must plead and which he is called upon to meet at trial, the question is not whether he has adequate knowledge of the actual facts; it is a question of whether he has adequate knowledge of what the plaintiff will allege to be the facts, for that is the case he must meet…Translated into the present situation, that means the question is not whether the defendant knows what meaning was in fact conveyed by his words (or even what he intended to convey by his words) but whether he knows what meaning the plaintiff will assert was in fact conveyed by his words to ordinary reasonable reader. The actual meaning intended by the defendant (as opposed to what was understood to be his intention from what he published) is quite irrelevant to meaning in fact conveyed to the ordinary reasonable reader."[31]

[31] (1988) 12 NSWLR 148 at 154

[52] Even if *Hepburn* could separately stand against *Whelan* and *Drummoyne* that cannot directly be applied to the current case. A noun such as “abortionist”, might arguably convey a sufficiently precise meaning. The same cannot necessarily be said of adjectives such as “unscrupulous” and “exploitive” or their related verbs. A person can be unscrupulous or exploitive in many different ways. Simply repeating the terms used in part in the Broadcast is, as in *Whelan*, insufficient to inform the Defendant of what the Plaintiff alleges is the meaning said to be conveyed by the use of those words. Mr Roper set out a number of different meanings of unscrupulous in the context of this case. Although one is an extreme instance, the point is adequately made.

[53] The submission by Mr Molomby that the pleading of an allegation that the Plaintiff was unscrupulous “as an art dealer” is sufficient is not correct in my view. The words “as an art dealer” merely limit the field. It no more informs the Defendant of what is alleged to be imputed then the use of the words “unscrupulous” standing alone. Mr Roper submits that it is not for the Defendant to guess what the Plaintiff contends and I agree. That is the fundamental purpose of the pleadings.

[54] The foregoing has equal application to the second imputation. That is centred on the use in the Broadcast of the word “exploit” and other grammatically related words. The pleadings in respect of imputations 1 and 2 are therefore inadequate.

[55] The complaint about the pleading of imputations 3(a) and 3(b) is that there is no pleading of what the Plaintiff alleges is meant by "paying them inadequately" or "oppressive".

[56] Annexure "JLD4" to the Affidavit is a letter from the Plaintiff's solicitors. It states that the exchange concerning the difference in what the Plaintiff pays the artists and what the work would sell for in a gallery (see paragraph 34 above) “is a clear foundation for the suggestion in imputation [3] that the artists are being paid inadequately." If that is what the Plaintiff contends, then clearly that must be pleaded. That is particularly so if, as Mr Roper submits, a defence of justification or qualified privilege under sections 22 and 27 of the Act might be available to the Defendant.

[57] Similarly in respect of the pleading of "oppressive conditions". Annexure “JLD4” to the Affidavit suggests that derives from the references to “deprivation of liberty" and the use of the term "rough and ready". If that is what the Plaintiff contends then clearly that also must be pleaded. There is considerable force in Mr Roper’s submission that to the extent that the Plaintiff relies on the term “deprivation of liberty", a comment made only by Sarah Brown, it could be seen as no more than a statement of her opinion. In that case, the Defendant could have available the defence under section 28(3) of the Act.

[58] The existence of defences reinforces the need for adequate pleadings. This is amply demonstrated in *Chakravarti v Advertiser Newspapers Ltd*[32] where the High Court said:-

> "As 'the most damaging meaning' or meanings may be a matter in dispute, it is oftentimes necessary for a plaintiff to provide particulars of the meaning or meanings on which reliance will be placed. The necessity arises because the defendant must be able to plead not only a denial of the defamatory meaning assigned by the plaintiff but (if so advised) a plea of confession and avoidance (fair report, justification or qualified privilege). By requiring the plaintiff to plead meaning or meanings on which the plaintiff relies, the defendant is enabled to plead a defence to the particular defamation that is alleged. Then, when the action comes to trial, the meanings assigned by the plaintiff may be needed to allow the judge to identify the issues for determination: first, whether evidence to and admissible on an issue for determination and, secondly, whether the article pleaded by the plaintiff is capable of bearing the defamatory meanings which the plaintiff has assigned and which the jury is asked to find. Unless particulars be given of the meanings on which the plaintiff intends to rely, a bare pleading of the words complained of may prejudice or be embarrassing to the defendant in pleading a denial of the defamation or a plea of confession and avoidance and may prejudice the trial judge's ability to determine objections to evidence or to rule effectively on the meanings which may be put to, and be found by, the jury.[33]

[59] In summary therefore, subject to an appropriate amendment to the pleadings, the first three imputations (divided into two in the case of the third imputation) are capable of being conveyed. The Plaintiff has indicated that the amendment will be made utilising Order 36.03 and appropriate orders will be made to accommodate that.

[60] I will hear the parties as to costs and consequential orders.

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[32] (1998) 193 CLR 519
[33] (1998) 193 CLR 519 at 531