

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

**NOT
RECOMMENDED**

C.P. NO. 285-SD00

BETWEEN EDGAR ALEXANDER & ORS

Plaintiffs

A N D GRAHAM CLEGG & ANOR

Defendants

Hearing: 5 December 2000

Counsel: Z Kennedy for Plaintiffs
A H Waalkens for Defendants

Judgment: 6 December 2000

JUDGMENT OF MASTER ANNE GAMBRILL

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[1] I have an application for further particulars brought against the defendant seeking particulars of the counterclaim. The plaintiff sued in defamation and the defendant counterclaimed against the plaintiff for the losses suffered, as alleged, when the first and second plaintiffs terminated their employment by the defendant and allegedly wrongfully caused losses to the defendants business by their alleged approaches to employees and former clients.

[2] The defendant opposed on the grounds that the particulars were not necessary and requested the Court to exercise the discretion against the plaintiff.

[3] The parties are all in the direct marketing business and the first and second named plaintiffs were employed for a number of years by the second defendant. The application for particulars has to be read in conjunction with the particulars already furnished but not yet incorporated in any amended statement of defence and counterclaim.

[4] The issues appear to relate to two matters. Particulars in support of the pleadings of the truth of the statements made and particulars of quantum alleged through damage to the business.

[5] I deal firstly with the particulars sought in respect of paragraphs 20 and 28 which are generalised claims for damages and losses. Counsel have agreed that the defendants counsel will advise the Court by 13 December of the arrangements for accounting advice and by 1 February will advise the plaintiff of its retainer of an accountant to advise and quantify these losses rather than just giving blanket discovery of a number of books and accounts. The responsibility for this quantification must rest upon the defendant and the matter cannot be satisfactorily progressed until the sums claimed are identified.

[6] The other particulars sought are in respect of the pleadings of the defence of truth. These include paragraphs 12(a) to (n) and the following paragraphs are now in issue are as follows –

(a) 12(f) the pleading reads “Both the third and fourth plaintiffs perform by the first and second plaintiff the intention of competing with the second defendant and with the intention of recruiting and/or endorsement listing from the second defendant as to distributor members. The plaintiffs’ case is that there is an element of bad faith and there is a need to have the claim particularised particularly as the allegations could be interpreted as misconduct. (See *Camock Chase District Council v Kelly* [1978] 1 All ER 152 and *Re Securitibank Ltd (No. 25)*(HC, Auckland, 10.8.83, A355/81). The defendant declines to give particulars saying it is a matter of evidence. In fact it is a matter of intent and the soliciting if the pleading is to be sustained. The factual basis of saying that the first, third and fourth plaintiffs had the intent of recruiting or soliciting from the second defendant his distributor members, is I think a question of evidence. It is not a factual basis if a person has an intent. It is a question of the behaviour and attitude of the first and second plaintiff and that is the pleading. I am not prepared to order further particulars.

(b) Paragraph 12(h). The plaintiff seeks particulars;

(i) Which members of the second defendant’s distributor network were contacted and by whom?

(ii) What was said by the first and second plaintiffs to indicate an intention to recruit or solicit the second defendant’s distributors?

If there is to be a pleading that the defendants attempted to recruit and solicit distributors and/or business there must be identification of the parties. I accept the generalised pleading was these events occurred in September and October but there needs to be a firm basis established by whom and where this occurred. Counsel relied on an earlier decision in *Impact Technologies Ltd v Dixon* (HC Auckland,

14.7.89, CP2883/88). I accept that a pleading must include the names of the contacted distributors and the places of contact though I accept further that it can be pleaded as during the months of September and October. I do not accept the request in paragraph (c) as to details of what was said. That is a matter of evidence to be given to the Court.

(c) Paragraph 12(j). The plaintiff seeks particulars of the second defendant's staff members who were contacted by the first and second plaintiff with the intention of recruiting them to the business. It is acknowledged full particulars will be given prior to the hearing and the defendant suggests this will be given in evidence. I am not prepared to require the names to be given in the pleadings as they are identified as members of the staff and this will be obtained in the evidence. The period or approximate date of contact must be identified.

(d) Paragraph 12(k). There is a pleading that the actions by the first and second plaintiffs caused disruption within the second defendant's distributor network including the loss of distributors and the rumour that the second defendant was in financial difficulty. I am satisfied that that pleading needs to be amplified. The distributors and dates can be identified, although the question of rumours is probably a matter of evidence.

(e) Paragraph 12(n). This is a pleading which has little merit in the way it is presently before the Court and unless it can be further particularised should be struck out. It is all a matter of evidence as to whether these parties had business skills or not and will be a matter for the trial Judge to evaluate on the evidence.

Future Conduct

- a. The defendant's counsel will confirm the appointment of an accountant in 7 days.

b. Particulars will be furnished by 26 January 2001.

c. The accounting details should be available by 26 February 2001.

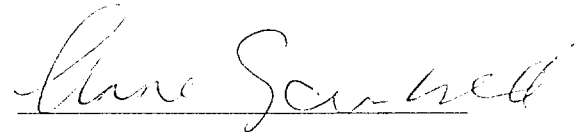
The file is adjourned to Chambers List on 9 March 2001 at 10am for further directions or setting down.

Costs

[7] There are reserved. Hearing time was 1½ hours scale 2B.

a.

Delivered at 3 ~~am~~ pm on 6th December 2000



MASTER ANNE GAMBRILL