

APPLICATION

[1] The Plaintiffs seek orders requiring the Defendants to file and serve a more explicit pleading. The application is opposed. It has a degree of history to it.

BACKGROUND

[2] The Plaintiffs were formerly employed as General Managers by Healthcare Otago Ltd, the Second Defendant. The First Defendant is a director of Healthcare Otago Ltd and chairman of its Board. The Third Defendant was at all material times the Chief Executive Officer of Healthcare Otago Ltd.

[3] During 1998 the Plaintiffs initiated a personal grievance against the Third Defendant. The parties were able to negotiate a settlement of the personal grievance. Pursuant to the settlement the Plaintiffs agreed to resign as at 31 July 1998. The parties agreed the terms of settlement were to be kept confidential and also agreed upon the terms of a joint public statement. The Plaintiffs resigned from their employment as required. On 28 July 1998 the jointly agreed public statement was provided to the news media. It was subsequently published.

[4] On 30 July 1998 'The Otago Daily Times' published an article based upon a memorandum written by the General Managers to the Third Defendant Chief Executive Officer in June 1998. The article stated the memorandum had been leaked anonymously to the newspaper. The Plaintiffs say that they did not leak the memorandum to the newspaper. On 3 August 1998 the Second Defendant provided 'The Otago Daily Times' with a public statement by Mr Black as chair of the Board of Directors of Healthcare Otago Ltd in response. On 4 August 1998 'The Otago Daily Times' published the statement on the front page of its newspaper. It was subsequently broadcast on a local television station. The statement is set out in full at para 21 of the statement of claim. It is unnecessary to repeat it in this decision.

[5] The Plaintiffs allege they have been adversely affected by the publication of the statement and the subsequent actions of the Defendants. The Plaintiffs claim against the Defendants:

First Defendant

- Interference in contractual relations;
- Breach of confidence; and
- Defamation.

Second Defendant

- Interference with contractual relations;
- Breach of confidence; and
- Defamation.

Third Defendant

- Breach of contract; and
- As principal of Mr Black.

[6] The focus of the application before the Court is the defamation claim and the Defendants' pleading by way of mitigation to the claim. At para 46 the Plaintiffs claim:

“The statement of claim published by the First Defendant to the news media and set out at paragraph 21 hereof was defamatory of the Plaintiffs in that:

- i. It conveyed a false innuendo that the Plaintiffs had been dismissed or forced to leave their employment because of some impropriety, dishonesty or corruption in connection with their salary increases.

Wherefore the Plaintiffs seek:

- (a) Pursuant to Section 26 of the Defamation Act 1992:
 - i. A recommendation that the First Defendant publish or cause to be published a corrective statement; and
 - ii. An order that the First Defendant pay the Plaintiffs' solicitor and client costs.

Alternatively

Should the First Defendant fail or refuse to comply with the correction recommendation, then the Plaintiffs claim against the First Defendant:

- (a) In respect of the First Plaintiff only, special damages in the sum of \$70,000.00 being lost income sustained by the First Plaintiff over the 10 month period since resignation taking into account the settlement monies.

- (b) In respect of the First Plaintiff only, interest on the sum of \$70,000.00 at the rate of 11% per annum pursuant to the Judicature Act 1908.
- (c) General and aggravated damages in the sum of \$150,000.00.
- (d) Exemplary damages in the sum of \$35,000.00.
- (e) Costs.”

[7] In the original statement of defence filed on 27 August 1999 the Defendants gave notice under s42 of the Defamation Act. The Plaintiff sought further particulars and in response the Defendant agreed to file an amended statement of defence. That amended statement of defence was filed on 23 September 1999. It included the general statement that:

“The Plaintiffs are persons whose reputations are generally bad in the aspect to which this proceeding relates.”

[8] In response the Plaintiffs sought orders requiring the Defendants to file and serve a more explicit pleading of the defence pleaded at para 80 of the amended statement of defence. That application was made on 8 October 1999. By consent it was adjourned on the basis that the Defendants agreed to provide further particulars of para 80, specifying the sort of general bad reputation alleged.

[9] The Defendants complied with that agreement insofar as they filed a second amended statement of defence in which at para 80 they pleaded:

“The plaintiffs are persons whose reputations are generally bad in the aspect to which this proceeding relates.

Particulars

The plaintiffs had, at the material time, a reputation for being:

- (a) arrogant and aggressive;
- (b) willing to use their positions within Healthcare Otago in an irresponsible and unacceptable manner in order to advance their own personal positions and individual financial gain;
- (c) unable to conduct and maintain appropriate professional relationships with:
 - (i) the Board of Healthcare Otago;

- (ii) the University of Otago, being an important stakeholder in Healthcare Otago;
- (iii) the Health Funding Authority and other Government Health Agencies.”

[10] The Plaintiffs do not accept that the particulars are sufficient and have brought the application for more explicit pleading on for hearing. Counsel accepted that the application was effectively a de facto application to strike out paras 80(a) and (c) of the pleading. With the co-operation of counsel it was possible to deal with the application by way of a telephone hearing.

PRINCIPLES

[11] A defendant must comply with r130 and give such particulars as may be sufficient to inform the Court, the plaintiff and any other party of the defence. A statement of defence must also comply with r186.

[12] A pleading should only be struck out where the Court is satisfied it can not possibly succeed. However, it is clear enough that in an appropriate case the Court may strike out a pleading where the allegations of bad reputation are not relevant to the alleged defamation. The Court strikes out such a pleading to avoid the defendant diverting the course of the trial from the true issues: *TVNZ v Prebble* [1993] 3 NZLR 513.

[13] The Plaintiffs’ complaint regarding paras 80(a) and (c) is twofold. First, Ms French submitted that the allegations that the Plaintiffs were arrogant and aggressive and were unable to conduct and maintain appropriate professional relationships were not related to the sting of the defamation and as such ought to be struck out. In addition, she submitted that the allegation the Plaintiffs were unable to conduct and maintain appropriate professional relationships was too vague and imprecise: *TVNZ v Prebble* (supra); *Brown v TV3* (Fraser J, HC Christchurch, CP 146/94, 22/5/95).

[14] In response Mr Miles submitted that the Court of Appeal decision in *TVNZ v Prebble* can be distinguished as in this case the Plaintiffs, or at least the First Plaintiff, claimed special damages and as a consequence her claim must be seen in the context of a claim for damages for economic loss as well as a claim for

vindication of reputation. He further submitted that having regard to the authority of *Speidel v Plato Films Ltd* [1960] 2 All ER 521 affirmed [1961] 1 All ER 876 (particularly the statements of Devlin LJ in the Court of Appeal), and the New Zealand Court of Appeal decision in *Prebble*'s case, the particulars of bad reputation at paras 80(a) and (c) could be relevant to the Plaintiffs' complaint, perhaps not of arrogance and aggressiveness but certainly of impropriety. He submitted the matter was one for the trial Judge.

ANALYSIS – PARTICULARS OF BAD REPUTATION

[15] As noted in the leading case in New Zealand, *TVNZ v Prebble* only reputation in the sector of the plaintiff's life relevant to the alleged defamation may be pleaded in mitigation. I understood counsel to accept that in the present case the Defendants' pleading relied upon the common law position and did not rely specifically on s30 of the Defamation Act 1992. However, as noted by Cooke P in the *Prebble* case, by requiring that the reputation be "in the aspect to which the proceedings relate" s30 of the Defamation Act reflects the existing common law in any event.

[16] The position was summarised by Viscount Simonds in *Plato Films Ltd v Speidel* as:

"When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule what is the relevant sector" P890

[17] In the present case, from the pleadings at para 46 as they stand, the relevant sector of the Plaintiffs' character is the Plaintiffs' reputation for propriety, integrity and honesty. If the particulars at paras 80(a) and (c) can reasonably be said to relate to that sector of the Plaintiffs' character they can stand. If not, then on the authority of *Prebble*, and subject to Mr Miles' submission that *Prebble* can be distinguished because of the claim for special damages in this case, they ought to be struck out.

[18] Allegations that a person has acted with arrogance and aggressiveness or is unable to conduct and maintain appropriate professional relationships, while

examples of unfortunate personality traits are not relevant allegations to a person's integrity and honesty. However, they could arguably be relevant to an allegation of impropriety. The Plaintiffs plead that the statement at para 21 suggests impropriety on behalf of the Plaintiffs. The *'Oxford English Dictionary'* (2nd ed) defines "impropriety" as, inter alia:

- “(b) Want of accordance with the purpose in view; unsuitableness, unfitness, inappropriateness.
- (c) Want of accordance with good manners or decorum; unbecomingness, unseemliness, indecency; morally improper conduct.”

Allegations of arrogance and aggressiveness and a failure to maintain appropriate professional conduct could arguably amount to a want of accordance with good manners or decorum or unbecomingness or unseemliness. On that basis the allegations could arguably stand as particulars of impropriety.

[19] During the course of submissions Ms French submitted that the allegation of impropriety added nothing to the subsequent complaints in the statement of claim of an attack on the Plaintiffs' honesty and integrity. She may be right. On my reading of the article referred to in para 21 of the claim it could arguably be said to attack the honesty or integrity of the Plaintiffs as opposed to their propriety. However, at the present, the Plaintiffs plead an innuendo of impropriety, dishonesty or corruption. If the Plaintiffs wish to maintain the pleading at para 21 which alleges impropriety as a sting of the defamation then the Defendants are entitled to maintain the particulars at paras 80(a) and (c), subject to further particulars of para 80(c) being supplied. If, however, the Plaintiffs amend the claim and abandon the allegation relating to impropriety and focus upon honesty and integrity, then in that case the allegations at paras 80(a) and (c) would offend the finding of the Court of Appeal in *Prebble's* case and ought to be struck out, subject to the consideration of Mr Miles' point regarding economic loss.

THE EFFECT OF THE CLAIM FOR SPECIAL DAMAGES

[20] That leads me to consideration of the claim for special damages. The Defendants' submission that the distinguishing feature between the present case and

Prebble's case is the claim for specific damages is only directly applicable to the claim by the First Plaintiff. The Second Plaintiff makes no claim for special damages. In a case such as that of the Second Plaintiff where only a general claim is maintained, then as noted by Cooke P in the *Prebble* case:

“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.” P525

[21] Clearly a defendant should not be entitled to rely upon the Plaintiffs' personality characteristics of arrogance and aggressiveness to reduce any damages awarded for a defamation where the sting of the defamation is want of honesty and integrity. The Court will not permit the defendant to conduct the defence in that way. However, where the plaintiff seeks special damages as opposed to general damages and those special damages are sought on the basis that the plaintiff has lost income by reason of lost employment opportunities following the defamation, the defendant must be entitled to plead and lead evidence that the reason the plaintiff lost income was not as a result of the defamation but as a result of other aspects of the plaintiff's character. A pleading of the particulars in a positive defence based on causation as opposed to an answer to the defamation claim would be permissible.

[22] At least insofar as the First Plaintiff's claim is concerned then the allegations at para 80(a) could stand even if the Plaintiffs amend their claim to drop the allegation of impropriety, provided it is clarified they relate to this causation issue. However, the allegations at para 80(a) can not stand in relation to the Second Plaintiff's claim.

IS THE ALLEGATION OF INAPPROPRIATE PROFESSIONAL CONDUCT TOO VAGUE?

[23] The last issue is whether para 80(c) is too vague and imprecise to be sustained. Ms French properly drew my attention to Fraser J's decision of *Brown v TV3* (supra) where His Honour struck out a pleading in mitigation of damages which alleged the plaintiff had a reputation for being disreputable. His Honour noted the sting of the defamation in that case was the plaintiff's willingness to participate in

criminal offending of dishonesty or violence. Fraser J decided that “disreputable” carried too wide a connotation and struck it out.

[24] In the present case if the Defendants are to maintain the allegation that the First Plaintiff was unable to conduct and maintain “appropriate professional relationships” as a reason for her being unable to be re-employed or in mitigation to her claim for special damages then further particulars of the inability to conduct and maintain appropriate professional relationships will be required. If not, the pleading ought to be struck out for similar reasons to those adopted by Fraser J.

SUMMARY

[25] The Plaintiffs are to decide whether they wish to pursue the allegation of impropriety at para 46 of the statement of claim. If they do then the Defendants are entitled to maintain the pleading at paras 80(a) and (c), subject to the Defendants providing further particulars of para 80(c). The Plaintiffs are to advise the Court and the Defendants by memorandum within 21 days whether the pleading of impropriety is to be maintained.

[26] If the Plaintiffs do not wish to maintain the pleading of impropriety but wish to rely solely on the allegations of dishonesty or corruption on the part of the Defendants, the Plaintiffs are to file and serve an amended statement of claim by 26 May. The amended statement of claim should distinguish between the claims in defamation by the First and Second Plaintiffs both in the cause of action and in the prayer for relief to enable the Defendants to plead to each separate allegation by each separate Plaintiff.

[27] If the Plaintiffs file such an amended statement of claim restricting the complaint of the statement set out in para 21 of the claim to dishonesty or corruption then the Defendants are unable to maintain the allegations at paras 80(a) and (c) against the Second Plaintiff. The Defendants will, however, be entitled to maintain their pleading at paras 80(a) and (c) against the First Plaintiff’s claim for special damages, but restricted to a causation defence to the claim for special damages, subject to the provision of further particulars of para 80(c). The Defendants will not

be entitled to maintain the claim by way of mitigation against the Second Plaintiff's claim for general damages in defamation.

[28] In the event the Plaintiffs file an amended statement of claim the Defendants are to plead to the amended statement of claim by 9 June. In the event the Plaintiffs do not file an amended statement of claim the Defendants are to provide further particulars of para 80(c) by 9 June.

[29] Any further interlocutory applications are to be filed and served by 30 June.

[30] The proceedings will be reviewed at a telephone conference *on 12 July 2000 at 9.00am*. If there are no outstanding interlocutory applications before the Court at that conference, the proceedings will be allocated a fixture.

COSTS

[31] With the amendment to the High Court Rules the Court is now directed to fix costs on interlocutory applications: r48E.

[32] Given the outcome of the application it is appropriate that costs on this particular application lie where they fall. Order accordingly.


MASTER VENNING