IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 68/99

BETWEEN **MIDLAND METALS OVERSEAS PTE LTD**

Plaintiff

NOT AVAILABLE FOR SEARCH

AND **THE CHRISTCHURCH PRESS COMPANY LTD**

First Defendant

AND **ORION NEW ZEALAND LTD**

Second Defendant

AND **TASMAN LIONEL SCOTT**

Third Defendant

AND **STEPHEN JOSEPH JAMES HIRSCH**

Fourth Defendant

AND **WELLINGTON NEWSPAPERS LTD**

Fifth Defendant

AND **NEW ZEALAND PRESS ASSOCIATION LTD**

Sixth Defendant

Date of Hearing: 22 November 1999

Judgment: 8/3/00

Counsel: JRF Fardell and J M Harkness for Plaintiff
J B Stevenson and J D Atkinson for First Defendant
F Miller and J A Malcolm for Second, Third and Fourth Defendants
J M Mallon for Fifth and Sixth Defendants

DECISION OF MASTER VENNING
On Applications To Strike Out, For Particulars And Security For Costs

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Solicitors:
Russell McVeagh McKenzie Bartleet & Co, Auckland for Plaintiffs
Atkinson Butterworth, Auckland for First Defendant
(Counsel – J B Stevenson, Wellington)
Chapman Tripp Sheffield Young, Christchurch for Second, Third and Fourth Defendants
Bell Gully, Wellington for Fifth and Sixth Defendants
Cc:
Chisholm J

APPLICATIONS

[1] The First Defendant seeks orders striking out:

- The claim for exemplary/punitive damages in the first cause of action (defamation);
- The claim for exemplary/punitive damages in the third cause of action (injurious falsehood); and
- The cause of action in negligence.

In the alternative the First Defendant seeks further and better particulars of the second amended statement of claim.

[2] The Second to Fourth Defendants (the Orion Defendants) seek orders striking out:

- The whole of the second cause of action (defamation by the Second and Fourth Defendant);
- The pleading that the Second to Fourth Defendants have exacerbated the harm caused the Plaintiff and the exemplary/punitive damages sought in the defamation and injurious falsehood causes of actions; and
- The cause of action in negligence pleaded against the Second and Third Defendants.

In the alternative the Second to Fourth Defendants seek further and better particulars.

[3] The Fifth and Sixth Defendants seek orders striking out:

- The pleading of the exacerbation of harm and the claim for exemplary/punitive damages; and
- The negligence cause of action against the Fifth and Sixth Defendants.

In the alternative the Fifth and Sixth Defendants seek further and better particulars.

[4] All Defendants also pursue applications for security for costs.

[5] The Plaintiff applies for orders striking out parts of the Defendants' amended partial statements of defence which deal with the defences of truth and honest opinion. In the alternative and if necessary, the Plaintiff also seeks an order enlarging the time to serve notices pursuant to s39 of the Defamation Act.

BACKGROUND

[6] The Plaintiff is a Singaporean company. It sources and supplies electrical cable world wide. It specialises in sales to electricity network owners. The Plaintiff supplied cable to the Second Defendant.

[7] On 26 December 1998 the First Defendant newspaper published the following article:

> "Chinese Cables A Problem
>
> Canterbury power network company Orion has encountered problems with its Chinese sourced underground cables.
>
> Orion used to buy locally made paper insulated cables but changed to the cheaper Chinese cables this year.
>
> Orion's general manager of network services, Tas Scott, said oil impregnating the paper around the Chinese cables tended to become more fluid than was desirable at higher temperatures. The problem resulted in leakage of oil where the cables were joined.
>
> > 'The problem is quite manageable and no loss of supply has been experienced. We can make the joints a bit more pressure resistant'
>
> he said.
>
> Other options were being considered, one of which was not buying the cables again.
>
> The long term effect of the problem was a shorter life for the cables than was expected, Mr Scott said.
>
> The cable had complied with specifications and these would now have to be reviewed. Australian power companies had experienced similar problems, he said.
>
> > 'It certainly caught us out'
>
> Locally made cables had not given similar problems but were considerably more expensive. Since Orion started buying cable overseas the local supplier had dropped its prices 30%, Mr Scott said."

[8] The Fifth Defendant publishes *"The Dominion"* and *"The Evening Post"*. On 26 December 1998 it published an article in almost identical terms to the above in *"The Dominion"*. On 28 December 1998 the Fifth Defendant published the article in *"The Evening Post"*. On or about 25 December 1998 the Sixth Defendant

New Zealand Press Association published an article on its news wire data base service in similar terms to the article in *"The Press"* newspaper.

[9] Mr Scott and Mr Hirsch, the Third and Fourth Defendants, are employees of the Second Defendant Orion. The Third Defendant is the Mr Scott referred to in the article.

[10] The Plaintiff alleges it has been defamed as a result of the article. The Plaintiff also complains that on 22 January 1999 the Second Defendant by the Fourth Defendant, Mr Hirsch, its network planning engineer, made a number of defamatory statements at a meeting attended by representatives of the Plaintiff, the Second Defendant and Connetics. It sues the newspapers and the Press Association that published the article; it also sues Orion and its employees.

[11] The Plaintiff does not limit its claims to defamation. In the second amended statement of claim the Plaintiff raises the following additional causes of action:

- injurious falsehood;
- breach of the Fair Trading Act by the Second, Third and Fourth Defendants; and
- negligence by all Defendants except the Fourth Defendant.

PRINCIPLES

[12] The principles to apply to a striking out application have been referred to and settled in a number of cases: *Attorney-General v McVeagh* [1995] 1NZLR 558; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641. They have been recently restated in *Attorney-General v Prince & Gardener* [1998] 1 NZLR 262. The Court of Appeal held:

> "A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294 – 295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316 – 317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and

require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*)." P267

DEFAMATION/EXACERBATION OF HARM AND PUNITIVE DAMAGES

[13] All Defendants apply for orders striking out those parts of the Plaintiff's second amended claim which plead that the Defendants have acted in flagrant disregard of the Plaintiff's rights and have exacerbated the harm to the Plaintiff. They also seek orders striking out the Plaintiff's claim for punitive (exemplary) damages for defamation and injurious falsehood.

[14] The pleading complained of is principally in paragraph 32 of the amended statement of claim. It reads as follows:

> "The First, Second, Third, Fifth and Sixth Defendants have acted in flagrant disregard of the Plaintiff's rights, and have exacerbated the harm to the Plaintiff of the Articles, in all or any of the following respects:
>
> **First, Fifth and Sixth Defendants**
>
> (a) Failed or refused to apologise as pleaded in paragraph 31 herein.
>
> (b) Took no steps to verify the facts it was publishing and/or was reckless as to the truth or falsify of the articles content.
>
> (c) Breached or permitted a breach of the Journalist's Code of Ethics in that:
>
> (i) failed to fully and properly investigate the facts behind the Articles, and at no stage approached or sought comment from the Plaintiff or the manufacturer of the cables;
> (ii) distorted the true position by providing an incorrect emphasis on the cables as the source of the problem, rather than the terminations and joints used with the cables; and
> (iii) placed unnecessary and inflammatory emphasis on the Chinese origin of the cables.
>
> (d) Breached or permitted a breach of the Human Rights Act through the emphasis throughout the Articles placed on the Chinese origin of the cables, and bearing implications that denigrate an ethnic group's manufacturing abilities and ethics.
>
> **Second Defendant**
>
> (e) Failed or refused to apologise as pleaded in paragraph 31 herein.
>
> (f) Deliberately or recklessly attributed the difficulties it was apparently having to using, handling, joining or terminating the cables, the cables themselves, and to the Plaintiff.

(g) Deliberately or recklessly sought to deflect criticism of measures the Second Defendant was taking to use, handle, join or terminate cables, to the quality of the cables themselves, and to the Plaintiff.

(h) Deliberately or recklessly withheld the information, or failed to clarify, that the problems reportedly experienced with Australian cables were not issues concerning cables supplied by the Plaintiff.

(i) Deliberately or recklessly withholding or failing to mention the fact that the Second Defendant, by the Fourth Defendant had travelled to China to visit the manufacturing plant where the cables were produced and verified their quality and suitability in person.

(j) Allowed pressure and criticism it was under from its former supplier BICC, and from the Christchurch City Council (relating to the use of overseas manufactured cables) to influence its response to the journalist's questions and enquiries.

(k) Took steps, and/or brought subsequent pressure to bear on its supplier, Connetics, to terminate or take steps to terminate, or to issue defect notices in respect of Connetic's cable supply agreement with the Plaintiff.

Third Defendant

(l) Responding to the reporter's enquiries in the manner set out in (f), (g), (h) and (i) above.

(m) Breached or permitted a breach of the Human Rights Act through the emphasis throughout the Articles placed on the Chinese origin of the cables, and bearing implications that denigrate an ethnic group's manufacturing abilities and ethics.

(n) Making the statements he did to the journalist despite being on notice of the fact that the difficulties were not cable, but termination related.

All Defendants

(o) Failing to take, and address the Plaintiff's complaints about the article seriously.

(p) Defending or intending to defend this proceeding, and the manner, to this point undetermined, of that defence."

Relief

[15] It is also necessary to refer to the relief sought:

"(a) Special, general, and punitive damages against the First, Fifth and Sixth Defendants.

(b) Special damages in such sum as may be proved at trial against the Second and Third Defendants.

(c) General damages in the sum of $5,000,000 against the Second Defendant, and the Third Defendant.

(e) (sic) Punitive damages against the Second Defendant in the sum of $500,000.

(f) Punitive damages against the Third Defendant in the sum of $30,000.

(g) Costs on a solicitor/client basis.

(h) Interest pursuant to s87 of the Judicature Act 1908."

[16] The Defendants submitted the Plaintiff as a corporation could not pursue a claim for aggravated damages: *'Gatley On Libel and Slander'* (1998 Sweet & Maxwell, London at paras 8.16, 9.13 and 9.14. Aggravated damages relate to the injured feelings of an individual. A corporation can not have injured feelings. During the course of his submissions Mr Fardell confirmed the Plaintiff did not seek aggravated damages. He submitted that the Plaintiff was however entitled to pursue the claim for punitive (exemplary) damages in addition the claim for compensatory damages.

[17] The pleading in the introductory wording of para 32 that the Defendants exacerbated the harm to the Plaintiff is inconsistent with the Plaintiff's disavowal of a claim to aggravated damages. It does not support the Plaintiff's claim for punitive damages. The very nature of punitive damages is that they punish, not compensate. Compensatory damages are awarded to compensate the plaintiff for the harm suffered and, where the actions of the defendant have exacerbated that harm and injured the Plaintiff's feelings aggravated damages might be appropriate. In the present case aggravated damages are not available to the Plaintiff. To that extent the reference in the introductory section of para 32 and other paragraphs of the pleadings to exacerbation of harm can not stand given that aggravated damages are not pursued. The references should be deleted.

[18] That leaves the issue whether the Plaintiff's pleading that the Defendants acted in flagrant disregard of the Plaintiff's rights and the punitive damages sought by way of relief are sustainable. The pleading is based upon s28 of the Defamation Act. Section 28 provides for punitive damages but only where the defendant has acted in flagrant disregard of the rights of the plaintiff.

[19] The Defendants are entitled to particulars of the facts or circumstances that the Plaintiff alleges would justify an award of punitive damages. In relation to the newspaper and Press Association Defendants the particulars currently pleaded are that they:

- Failed to apologise;
- Took no steps to verify the facts or were reckless as to the truth or falsity of the articles;
- Permitted a breach of the journalists' code of ethics;
- Breached or permitted a breach of the Human Rights Act;
- Failed to take and address the Plaintiff's complaints about the article seriously; and
- Defended the proceeding.

[20] Mr Fardell submitted that given punitive/exemplary damages are available in a defamation action then whether the particulars pleaded warranted an award of exemplary damages must be a question of fact to be determined by the jury or at a full trial: *News Media Ownership v Findlay* [1970] NZLR 1089; *Taylor v Beere* [1982] 1 NZLR 81; *Television NZ Ltd v Quinn* [1996] 3 NZLR 24.

[21] While in appropriate, but rare, cases the Court has been prepared to strike out or disallow claims for exemplary damages at an interlocutory stage: *Ellison v L* [1998] 1 NZLR 416 (a case in negligence); generally the conduct of the parties should properly be considered in the full factual matrix disclosed at trial – particularly so where, as here, the balance of the Plaintiff's claim for defamation will be before the Court at trial, leaving it for the trial Judge to direct the jury on the issue of damages. However, if the particulars are patently unable to sustain an award of punitive damages then that aspect of the pleading could be and should be struck out at an interlocutory stage.

[22] Mr Stevenson submitted that to exact punitive damages the publisher must have acted in the hope or expectation of material gain: *'Gatley on Libel and Slander"* at para 9.16 (referring to *Rookes v Barnard* [1964] AC 1129). On that basis he submitted the claim to punitive damages should be struck out, as there was no such pleading. However, that submission appears to overstate the position in New Zealand. In *Taylor v Beere*(supra) Cooke J (as he was) affirmed that the law of New Zealand regarding damages for defamation remained the same as approved for Australia by the Privy Council in *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 which established that exemplary damages in libel cases in Australia was not as circumscribed as to be permissible only within the limits defined in *Rookes v Barnard* (supra).

[23] The point was restated by Lord Cooke in *Television NZ Ltd v Quinn* [1996] 3 NZLR 24:

> "It may be convenient to insert a reminder at this point that the narrowing into three categories of the types of case in which exemplary damages may be awarded, which was carried out by the House of Lords per Lord Devlin in England in *Rookes v Barnard* [1964] AC 1129, has not been followed in New Zealand: see *Taylor v Beere* (cit supra); *Donselaar v Donselaar* [1982] 1 NZLR 97; *McKenzie v Attorney-General* [1992] 2 NZLR 14, 21 and the accident compensation cases there collected; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299. A consequence in the field of defamation is that we are not troubled with the issue that has required attention in John and other English cases about whether a defendant news medium made "the requisite calculation". This will remain so after the present case. Whether the defendant calculated or presumed that the publication complained of would be profitable on balance, even allowing for possible liability in damages, will remain one factor relevant in considering exemplary damages. It will not be an essential condition of an award of such damages." P38

[24] Counsel for the Defendants then submitted that as a matter of principle the failure to apologise could not support a claim for punitive damages. It was submitted that while it can be taken into account in mitigation (s29 Defamation Act), it does not follow that a failure to apologise exacerbates harm. Mr Miller also referred to a passage from Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 in which his Lordship stated a failure to apologise was but tenuous evidence of malice. Against that, in *Television NZ Ltd v Quinn* (supra) the Court accepted that a refusal to apologise at the time could be considered in support of a submission for punitive damages. While in this case the information currently before the Court suggests the

Plaintiff may have some difficulty pursuing a claim based on the failure to apologise, it is not so untenable the Plaintiff should be denied the right to raise it at trial.

[25] Mr Stevenson next submitted that a number of the particulars related to post-publication actions and thus could not sustain a claim for punitive damages. This submission was directed at the failure to apologise, failure to answer the Plaintiff's concerns (once raised) and the conduct of the defence. However, in light of the decision in *Taylor v Beere* (supra) it is apparent the Court or jury are entitled to look at the whole of the conduct of the defendant from the time of publication down to the time of verdict. The fact that the actions may be post-publication does not bar the claim for punitive damages. Further, while the Defendants are entitled to defend and conduct the defence of the proceedings as they see fit, if the Defendants are ultimately found to have defamed the Plaintiff and persist with the denial of meanings which the jury finds proved, that can be a relevant factor in determining an award of punitive damages.

[26] If the newspaper Defendants failed to verify the facts or were reckless and breached journalists' ethics, then those factors could arguably support a finding that the Defendants acted in flagrant disregard of the Plaintiff's rights. They must be issues for trial.

[27] However, the allegation that the First, Third, Fifth and Sixth Defendants breached or permitted a breach of the Human Rights Act by the emphasis throughout the articles placed on the Chinese origin of the cables is unsustainable given the provisions of the Human Rights Act. Section 61 must be the provision relied upon. It states:

> "(1) It shall be unlawful for any person--
>
> (a) To publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting;
>
> ...
>
> being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
>
> (2) It shall not be a breach of subsection (1) of this section to publish in a newspaper, magazine, or periodical or broadcast by means of

> radio or television a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words."

[28] The Act requires that the words complained of to be "threatening, abusive or insulting ... being words likely to excite hostility against or bring into contempt any group of persons" on the ground of race or national origins. What are the words that deal with racial origins? "Chinese-sourced underground cables ... cheaper Chinese cables ... Chinese cables". The words used are not themselves threatening, abusive or insulting. Read as whole, the article could be taken to suggest the cheaper Chinese cables were an inferior product. That may be potentially insulting. However, the articles can not be construed as "likely to excite hostility against" or "bring into contempt" the Chinese community within New Zealand, or for that matter Chinese who may intend to come to New Zealand. The article is a complaint about a product. It is not a racial slur against Chinese.

[29] In *Proceedings Commissioner v Archer* [1996] 3 HRNZ 123 the Court held that whether written material is threatening, abusive or insulting must be a question for the reasonable person or ordinary, sensible citizen. If the same test is applied to the question whether the wording in the article is likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand the answer is no. That particular allegation is unsustainable.

[30] As against the Second and Third Defendants the additional allegations are essentially that they deliberately attributed the problems to the Plaintiff for a variety of improper motives. Whether that is so, and if so to what extent, requires a determination of the evidence which can only occur at trial. If the allegations are made out they could arguably support an award of punitive damages.

Summary

[31] In summary, the Plaintiff can not maintain a claim for aggravated damages. The pleading at para 32 that the actions of the Defendants have exacerbated the harm to the Plaintiff cannot be maintained in the absence of an aggravated damages claim. However, save for the allegations concerning the breach of the Human Rights Act

which are to be struck out, the balance of the Plaintiff's claim for defamation and consequential punitive damages may be maintained on the grounds it is arguable.

INJURIOUS FALSEHOOD/PUNITIVE DAMAGES

[32] The third cause of action pleaded is injurious falsehood. The newspaper and Press Association Defendants (the newspaper Defendants) seek orders striking out the pleading that they were reckless as to whether the content of the articles were true or false and/or lacked just cause or excuse in doing so insofar as the Plaintiff relies upon the particulars identified in paras 32(a) to (b) of the statement of claim in support of that allegation. All Defendants seek orders striking out the relief sought in relation to the injurious falsehood claim to the extent of punitive damages.

[33] Injurious falsehood is an economic tort concerned with the malicious infliction of pecuniary loss on a person by the making of false statements to a third person: *'The Law of Torts In New Zealand'* Todd, 2nd edn at para 15.10. The tort now covers any false statement which affects the defendant's pecuniary interest. The plaintiff must prove three elements to make out the tort. First, that there has been a false statement. Second, that the statement was published maliciously. Third, that damage resulted.

[34] In the present case the focus of this cause of action is whether it can be said the pleadings establish malice. Whether the content of the article was false or not can only be established at trial. Whether the Plaintiff has sustained damage must also be for trial. However, Mr Stevenson submitted, and was joined in this by Ms Mallon, that the Plaintiff's case as pleaded in the second amended statement of claim could not on any basis establish malice.

[35] Although negligence is insufficient to establish malice: *Baldwin v Shorter* [1933] Ch 427, in *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 Gallen J accepted a submission that malice could be established if the defendant knew the statements were false or was reckless whether the statements were true or were false. The pleading at para 32(b) is no doubt intended to apply that finding.

[36] Mr Stevenson submitted that the material set out in the article came from an authoritative source and there could be no obligation to verify with the Plaintiff.

However, the allegations about the cable are serious. The Orion Defendants may have had good reason to lay the blame for difficulties with the cable and associated power supply issues on another. The newspaper Defendants would have been aware of that. It may well be that failure to verify the material in those circumstances could support a submission the publisher was reckless. The Court can not determine whether the Plaintiff will be able to maintain that claim until trial. The Defendants are, however, entitled to full particulars of the basis for the allegation they were reckless as to the truth or falsity of the articles' content.

[37] In relation to the particulars currently pleaded at para 32(a) Mr Stevenson submitted that failure to apologise could only go to the mitigation of damages and could not show malice at the time of publication. However, the issue of whether the Defendants were sufficiently reckless or lacked just cause or excuse in publishing the articles must be determined by reference to their state of mind at the time of publication: *Williams Brothers Direct Supply Stores Ltd v Cloote* [1944] 60 TLR 270. As noted at para 15.12.2 in *'Todd'* malice may be inferred from such things as a failure to withdraw the statement even after a warning of its falsity, or a flimsy excuse for, or total failure to explain the reason for the initial issuing of the statement. The failure to apologise could, in certain circumstances, be some evidence of the Defendants' state of mind at the time of publication.

[38] The Plaintiff also pleaded that the newspaper Defendants breached or permitted a breach of the journalists' code of ethics. The evidence of Ms Hard and Mr Schmidt-Uili is contradictory. It is impossible to determine what the correct position is on the information currently before the Court. It is not clear which code of ethics relied upon applied, if any, and whether it could be said the Defendants breached the code(s) in any way.

[39] Mr Stevenson then submitted that there had been no breach of the Human Rights Act. I accept that submission for the reasons given earlier.

[40] Finally Mr Stevenson made the general submission that as the article did not even name the Plaintiff it would be going a long way to suggest it was written maliciously. At first sight there is force in that submission. However, if there are a limited number of suppliers and the Plaintiff could be readily identified by those "in

the know" as the supplier of the Second Defendant, then the fact the Plaintiff was not expressly named in the article may not be determinative.

[41] The Plaintiff's claim under the third cause of action is arguable save for the complaint in relation to the breach of the Human Rights Act.

THE SECOND CAUSE OF ACTION AGAINST THE SECOND AND FOURTH DEFENDANTS

[42] The second cause of action is against the Second and Fourth Defendants only. It is also a claim in defamation. It arises out of comments made by Mr Hirsch at the meeting on 22 January. In particular, the Plaintiff complains that the Second Defendant, by Mr Hirsch its employee, referred the parties at the meeting to *'The Press'* article, restated its contents, identified the Plaintiff and stated that the Plaintiff's cables "piss oil". The Plaintiff alleges that the statements are defamatory and seeks special and punitive damages against the Second and Fourth Defendants.

[43] The Second and Fourth Defendants apply to strike out this particular cause of action on the basis that the allegations made at the meeting were the subject of qualified privilege in that the persons present at the meeting had a community of interest in the subject of the remarks made. In her first affidavit sworn 22 July 1999 Ms Nanette Russell leads evidence of the relationship between the Second Defendant and Connetics. The relationship is on two levels. First contractual. The Plaintiff supplied Connetics which in turn supplied the Second Defendant with the cables. Next, Connetics is a wholly owned subsidiary of the Second Defendant. There is also a commonality of directors.

[44] Mr Fardell objected to the admissibility of the affidavit of Ms Russell. He submitted that that affidavit was not confined to incontrovertible facts and accordingly should not be read: *Adams & Ors v Joseph Banks Trusts Ltd* (CP 224/91, HC Wellington, 4/3/92). The Court of Appeal has recently confirmed that while affidavit evidence is admissible on a striking out application, the Court will not attempt to resolve genuinely disputed issues of fact and evidence will generally be limited to undisputed fact. However, where an essential factual allegation is so demonstrably contrary to indisputable fact evidence will be permitted to establish that: *Attorney-General v McVeagh* [1995] 1 NZLR 558.

[45] I accept the uncontraverted evidence of the shareholding of the Second Defendant and Connetics. In any event, I understood that Mr Fardell did not dispute the relationship between Connetics and the Second Defendant but rather submitted that where Connetics and Orion had an independent contractual relationship there was not a sufficient community of interest.

[46] Communications within a group of companies can be protected: *Price Waterhouse & Trust Ltd v Wee Choo Keng* [1994] 3 SLR 801. In the present case it is unnecessary to determine whether the claim to qualified privilege is defeated by the contractual relationship, as a claim to qualified privilege will be defeated if the plaintiff proves that in publishing the matter in question the defendant was predominately motivated by ill will towards the plaintiff or took improper advantage of the occasion of publication: s19 Defamation Act. I have come to the conclusion that is arguable in this case.

[47] Even if the meeting of 22 January constituted an occasion of qualified privilege on the basis that Orion and Connetics had a common interest through their relationship of holding and subsidiary company, the privilege can be defeated if the Plaintiff can establish that the Defendants were motivated by ill will or otherwise took improper advantage of the occasion. I note that Mr Miller submitted the Plaintiff should not be entitled to "shift ground" and assert that privilege was lost on this ground. However, the right to raise malice in response is to be found in s19 of the Act. The Plaintiff is entitled to raise it now.

[48] Mr Fardell referred to the pejorative comments by Mr Hirsch complained of, namely that the cables "piss oil". On the one hand that could be taken as a rather blunt and colourful way of expressing the practical problem with the cables. On the other hand, the same phrase uttered in a different way or context could be taken as a deliberately provocative and aggressive use of words to attack the cables' quality and to reflect on the supplier. If made in that context for that purpose it is at least arguable that there was ill will or the taking of an improper advantage of the situation sufficient to defeat the claim to privilege. Whether it was or not must be a matter for trial.

[49] The Second and Fourth Defendants' application to strike out the second cause of action is declined.

NEGLIGENCE

[50] The Plaintiff raises two causes of action in negligence. The first against the newspaper Defendants alleges that in publishing the defamatory matter and falsehoods complained of the newspaper Defendants owed the Plaintiff duties to:

- Adequately investigate;
- Seek comment; and
- Publish the truth.

[51] As against the Second and Third Defendants, Orion and Mr Scott, the Plaintiff alleges that in making statements to the reporter which were defamatory of the Plaintiff and which amounted to falsehoods concerning the Plaintiff's goods, the Orion Defendants owed the Plaintiff duties to:

- refer the journalist to the Plaintiff for comment; and
- to communicate the truth.

[52] The starting point is that in New Zealand a claim for loss of reputation is the proper subject of an action of defamation and a concurrent cause of action in negligence for the same loss cannot be sustained: *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148; *Balfour v Attorney-General* [1991] 1 NZLR 519; *South Pacific Manufacturing Co Ltd v NZ Securities Consultants & Investigations Ltd* [1992] 2 NZLR 282; *Lange v Atkinson* [1998] 3 NZLR 424 at 469:

> "This Court has similarly said that negligence has no role in the law of defamation (except for damages)." Per Blanchard J.

[53] In *Spring v Guardian Assurance Plc* [1994] 3 All ER 129 a majority of the House of Lords held that the defendant employer who provided a reference in respect of an employee to a prospective employer owed a duty of care in respect of the preparation of the reference. The House of Lords found the fact that the employee could have brought a defamation action did not prevent the recognition of a duty of care where it was fair and just to do so. The Court of Appeal decision in *Bell-Booth v Attorney-General* (supra) was distinguished.

[54] Mr Fardell sought to distinguish the earlier decisions of the Court of Appeal. He referred to the decision of Young J in *Collier v Butterworths of NZ Ltd* 11 PRNZ 581 and some obiter comment from the judgment of Tipping J in *Lange v Atkinson*

(supra) and submitted that in the circumstances of this case a concurrent claim in negligence was arguable.

[55] In *Collier v Butterworths of NZ* 12 PRNZ 38 the Court considered the effect of the decision in *Spring v Guardian Insurance Plc* (supra) on the existing state of New Zealand law. Young J reviewed the position and concluded that:

> "The decision of the House of Lords in *Spring v Guardian Insurance Plc* certainly evinces a different approach from that taken in *Balfour* and perhaps therefore a greater willingness than our Court of Appeal has shown to allow what might be regarded as a marginal case to proceed. But there is nothing in the speeches to suggest that, absent a special situation (in that case the giving of a reference by an employer in relation to an employee) there is a duty not to publish negligently defamatory remarks. There is, I might add, absolutely nothing in the speeches to suggest that there is any general duty to this effect." P42

And later:

> "... Both in New Zealand and in England and Wales there are cases where the Courts will recognise that, because of the special relationship between the parties , a duty of care in relation to the publication of derogatory statements does exist. A New Zealand example is *Furniss v Fitchett* and an English example is *Spring v Guardian Assurance Plc*.
>
> ... Such cases are the exception rather than the norm and a special relationship (for example employer/employee or doctor/patient) or some particular element of proximity and/or reliance is necessary before the Courts will hold that such a duty exists." P42

[56] In *Lange v Atkinson* Tipping J said:

> "While the news media are not generally liable for negligence as such in what is published, the issue here relates to the availability of a defence to a claim for defamation, not to liability for negligence as a cause of action in itself. It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media. But these are issues for another day." P477

[57] Mr Fardell submitted that on the strength of that comment the Plaintiff had arguable causes of action in negligence against the identified Defendants.

[58] With respect, however, the obiter comments of Tipping J were clearly made against the background of His Honour's discussion of whether the concept of reasonableness was potentially relevant to whether an occasion of qualified privilege had been misused. Earlier His Honour had expressly noted that reasonableness could not be introduced directly. It would take a rather more direct statement by the Court of Appeal to support the proposition that except in the limited situations identified by Young J in *Collier*'s case the law should be extended to provide concurrent liability in both defamation and negligence is alleged to be possible by the Plaintiff in this case. The present case is not such an exception. There is nothing special about the relationship between the parties to this proceeding.

[59] In support of his argument Mr Fardell submitted that the New Zealand authorities, particularly *Bell-Booth Group Ltd v Attorney-General* (supra) and *Balfour v Attorney-General* (supra), were distinguishable. He submitted that the Plaintiff's concurrent claim in negligence failed in the *Bell-Booth* case because the defence of truth had been proven. However, on my reading of the decision the statements of the learned President as to the principle underlying the findings go somewhat further than that. While the claim in defamation failed because truth (then justification) succeeded as a defence, the learned President, in reviewing the authorities, concluded:

> "The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.
>
> ... The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment. The duty in injurious falsehood may be defined as a duty not to disparage goods untruthfully and maliciously. In substance the appellant would add to these duties a duty in such a case as this to take care not to injure the plaintiff's reputation by true statements. All the arguments for the appellant, though put skilfully in various ways by counsel, reduce to that proposition. In our opinion, to accept it would be to introduce negligence law into a field for which it was not designed and is not appropriate." P156

[60] That passage emphasises that it is the attempt to create a duty of care in a situation where there is an existing duty in defamation that is not permissible. While I accept Mr Fardell's submission that the particular duty sought to be imposed in this case is different from that sought to be imposed in *Bell-Booth*, the duty sought to be

imposed to adequately investigate, seek comment and publish the truth are duties which are met by the duties not to defame by making untrue statements without privilege or otherwise than by way of honest opinion. In this case there is also the duty set out in the injurious falsehood cause of action not to slander the Plaintiff's goods untruthfully and maliciously. There is no reason or basis to introduce a further duty of the nature suggested by the Plaintiff.

[61] Nor is the fact the Defendant in the *Bell-Booth* case was not a news media organisation but a Government ministry sufficient to enable the case to be distinguished.

[62] While *Balfour*'s case can be distinguished on its facts the general statements of principle are again clear. In dealing with counsel's attempt to distinguish the claim before the Court in *Balfour*'s case from one in defamation Hardie Boys J stated:

> "This ... comes perilously close to defamation. Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned, but not necessarily appropriate to each other: see *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, 155-157. An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame." P529

[63] In the present case claims for defamation and injurious falsehood are available to the Plaintiff. Both are pleaded. The Plaintiff is trying to establish a case for concurrent liability in negligence in a situation where there is a duty not to defame. In such cases the Court of Appeal has disallowed concurrent claims in negligence.

[64] Reference can also be made to the case of *Sattin v Nation Wide News Pty Ltd* (1996) 39 NSWLR 32 Levine J. In that case there was a publication stating the plaintiff was married to a person shown in the photograph. In fact the plaintiff was married to another person. The plaintiff sought leave to file an amended statement of claim alleging negligence in addition to the existing defamation cause of action. Levine J reviewed *Spring* (supra) and the New Zealand cases. Levine J favoured the New Zealand cases and concluded:

> "I would add conformably with what Their Honours in New Zealand's Court of Appeal and His Lordship Lord Keith of Kinkeil remarked upon that the law of negligence really has a limited role to play in the matter of communications, it fundamentally being confined to the *Hedley Byrne* situation ... or perhaps others in which freedom of speech is not a legitimate consideration. In media situations the lawfulness or otherwise of communication to the public depends on the operation of the laws and rules of defamation: this is not to say that a communication cannot amount to a breach of confidence, for example, or indeed a breach of contract, but damages for publication in circumstances of the case with which I am concerned in my view have always been governed by the law of defamation which is the field in which the remedies have been sown and harvested."

The Newspaper Defendants

[65] The Plaintiff's complaint is that the articles are inaccurate and have defamed the Plaintiff and caused economic loss. If that is so, and is proved, the Plaintiff has its remedies in the defamation cause of action against the newspapers and the Press Association. If that is not so and the Plaintiff cannot make out its claim in defamation, there is no reason of policy evident in this case that would distinguish it from the clear line of binding authority in New Zealand that precludes concurrent liability in these circumstances.

[66] The difficulty for the Plaintiff can be highlighted by considering the allegation that the newspapers were under a duty to publish truth. I accept Mr Stevenson's submission that the law does not impose a duty to publish only truth, but imposes consequences if, in certain circumstances, material which is not true is published and causes damage. If the Plaintiff establishes the newspaper Defendants failed to adequately investigate or failed to seek comments from the Plaintiff before publishing the articles it may well be that if defamation is otherwise established that would have some significance or consequence in damages. It does not, however, found a separate duty of care.

[67] That the Plaintiff also alleges injurious falsehood in relation to goods does not advance the case. The Court of Appeal in *Bell-Booth Group Ltd* (supra) also considered slander of goods.

The Comments By The Second And Third Defendants

[68] The position is the same regarding the claim in negligence against the Second and Third Defendants which is based upon the articles and the comments of Mr Scott.

[69] The Plaintiff alleges that Mr Scott's comments as reported in the newspaper articles were defamatory of it and amounted to slander of the Plaintiff's goods. It is pleaded that Mr Scott and his employer Orion owed the Plaintiff duties to refer the journalist to the Plaintiff for comment and even if that duty were satisfied, in any event, had a duty to communicate the truth.

[70] The Plaintiff and Orion had a contractual relationship. If the statements made were defamatory, false and the Plaintiff has suffered damage then outside that contractual relationship the Plaintiff will establish a claim in defamation and recover from the Orion Defendants.

[71] There is no justifiable basis to impose another relationship between the parties in this case – that of a tortious relationship. To accept the Plaintiff's submission that a duty of care was owed in this case would effectively be to impose such a duty in every business relationship.

[72] I conclude that the law is as set out by Young J in *Collier*'s case, namely that absent an exceptional case or a case of special relationship a claim in negligence can not be maintained concurrently with a claim in defamation. The Plaintiff can not establish such an exceptional case or a case of a special relationship in this case.

[73] In the event I am wrong in concluding that the Plaintiff's causes of actions for negligence can not stand with the causes of action in defamation, it is necessary to consider the claim for exemplary damages of $500,000 against the Second and Third Defendants as it relates to the cause of action in negligence.

[74] To the extent that the claim for exemplary damages against the Second and Third Defendants is parasitic upon the negligence cause of action, it is based on the allegations that the Second and Third Defendants did not refer the journalist to the

Plaintiff for comment and did not communicate the truth. The allegations of breach of the duty go no further than that. Allegations of that nature, on the state of current authorities, are quite insufficient to support an award of exemplary damages. The Plaintiff was not directly named. On my reading of them, the words attributed to Mr Scott are not extravagant. The Defendants were properly concerned with the issue relating to the cables. The statements reported were not extreme. There is no sufficient allegation nor any factual basis for the suggestion that the Second and Third Defendants acted "outrageously or with flagrant disregard" for the Plaintiff's position: see *Ellison v L* [1998] 1 NZLR 416; *Gray v Motor Accident Commission* (1998) 158 ALR 485; *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424.

[75] If necessary, the claim for exemplary damages against the Second and Third Defendants based on negligence would have been struck out, even if the claim for negligence itself could have stood.

THE PLAINTIFF'S APPLICATION FOR ORDERS IN RESPECT OF THE DEFENDANTS' STATEMENTS OF DEFENCE

[76] The Plaintiff seeks an order striking out the newspaper Defendants' defence of truth in part, and also striking out the defence of honest opinion. In the alternative the Plaintiff seeks an enlargement of time for serving a notice pursuant to s39 of the Defamation Act.

The Defence Of Truth

[77] The First Defendant pleads at para 72:

> "If the articles or words complained of have the implied or presupposed meanings alleged in paragraphs 17 and 24 of the second amended statement of claim (which is denied) the imputations or presupposed meanings alleged are true or not materially different from the truth and/or the Press Article or the words complained of taken as a whole were in substance not materially different from the truth."

Particulars are then given.

[78] The Fifth and Sixth Defendants plead at para 70 of their statement of defence:

> "In respect of the *Evening Post Article* and the *Dominion Article* referred to in paragraph 15 of the second amended statement of claim the Fifth

> Defendant pleads section 8 of the Defamation Act 1992, refers to the whole of these articles and says that the imputations contained in them were true or not materially different from the truth, or the articles taken as a whole are in substance true or are in substance not materially different from the truth."

Particulars are then given.

[79] The Plaintiff's complaint regarding these pleadings is that in addition to pleading the truth of the imputation specified by the Plaintiff the Defendants also go on to plead the truth of the literal meanings of the words contained in the articles which they are not permitted to do. Mr Fardell submitted that the Defendants were only able to allege that the underlying implications and presuppositions pleaded by the Plaintiff were true and that the Defendants' pleading of truth of the literal meanings ought to be struck out. The submission was made on the basis that the law is that the Defendants are not allowed to justify or plead truth of meanings about which the Plaintiff does not complain: *Broadcasting Corp of NZ Ltd v Crush* [1988] 2 NZLR 234.

[80] Ms Mallon submitted that the Defendants do not specifically plead alternative meanings and then plead the truth of those as was the case in *Broadcasting Corp of NZ Ltd v Crush*. Rather she submitted that the Defendants pleaded that the articles as a whole were true or not materially different from the truth.

[81] In *Broadcasting Corp of NZ Ltd v Crush* the plaintiff sued the Broadcasting Corporation and newspapers on substantially the whole of a number of broadcast articles and pleaded as to each cause of action a number of false innuendoes. The defendants denied that publications bore or were capable of bearing any of the meanings alleged by the plaintiff and did not seek to justify those alleged meanings. However, they set up their own meanings for the words published and alternately pleaded that the words published were in their natural and ordinary meaning true in substance and in fact. In upholding the decision of the High Court Judge to strike out the meanings of the publications as pleaded by the Defendants and the defence of justification (truth) the Court of Appeal held that as the plaintiff was confined at trial to the meanings alleged in the pleadings the Judge was right to strike out the defences based on the justification or truth of the defendants' alternate meanings. In that case the Court of Appeal also considered the developing line of English

authority in *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000, but did not follow it.

[82] Ms Mallon submitted that the apparent restrictions identified in *Broadcasting Corp of NZ Ltd v Crush* did not apply to the present case as the Defendants did not specifically set up and plead alternate meanings and then plead truth in relation to those alternate meanings as the defendant had sought to do in the *Crush* case. Further, she submitted that in any event s8 of the Defamation Act, enacted after the *Broadcasting Corp of NZ Ltd v Crush* decision had altered the law.

[83] Section 8, as relevant, reads:

> "(2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
>
> (3) In proceedings for defamation, a defence of truth shall succeed if--
>
> (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth."

[84] Ms Mallon submitted that s8(3)(a) did not require the Defendants to prove the imputations as pleaded by the Plaintiff, but rather it required the Defendants to prove the imputations contained in the matter that was the subject of the proceedings, namely the words of the article.

[85] However, with respect to that submission, it may be that a number of different imputations could be taken from an article or publication. It is only the imputations pleaded by the Plaintiff which are in issue in the proceedings. On that basis insofar as s8(3)(a) is concerned the Defendants may be limited to pleading and establishing at trial that the imputations complained of by the Plaintiff were true or not materially different from the truth.

[86] However, on a literal interpretation s8(3)(b) goes further and enables the Defendant to plead and prove in any event that the publication (in this case the

article) taken as a whole was in substance true or was in substance not materially different from the truth. There is no reason to read the wording of s8(3)(b) down. I note that this view is taken by Gillooly in *'The Law of Defamation in Australia and New Zealand'* 1998, Federation Press at p111.

[87] In *'Todd on Torts'* the author notes a divergence between English and Australian law: contrast *Lucas Box v News Group Newspapers Ltd* [1986] 1 WLR 147 and *Broadcasting Corp of NZ Ltd v Crush* (supra). The author of that text goes on to suggest it would require a liberal interpretation to hold that s8 reverses the New Zealand's Courts' position in the second category of case. Insofar as the author suggests that s8 does not reverse the ruling in the *Crush* case, I accept in terms of the application that s8(3)(a) in that the imputations must be those pleaded by the Plaintiff as required by *Broadcasting Corp of NZ Ltd v Crush*. However, that does not detract from the Defendants' right under s8(3)(b) to plead and prove that taken as a whole the publication was in substance true/not materially different from the truth. Section 8 uses very different wording to the former defence of justification as found in s7 of the Defamation Act 1954. The Defendants are entitled to plead and prove that taken as a whole the publication was true or in substance not materially different from the truth. Particulars are provided. The pleading can stand.

Honest Opinion

[88] The Plaintiff also seeks orders striking out the defence of honest opinion pleaded by the Defendants. A defence of honest opinion must be on a matter of public interest, based on true facts, recognisable as opinion and genuine.

[89] Mr Fardell submitted that the subject matter of the articles was not a matter of public interest, that the opinion relied upon by the Defendants was not recognisable as opinion, that the defence could only be applied to the imputations pleaded by the Plaintiff as being defamatory, and that as such the Defendants' reliance upon the literal meanings of the words in the articles as constituting opinion could not be maintained.

Public Interest

[90] In *Bell-Booth Group Ltd v Attorney-General* (unreported, HC Wellington, A 333/85,24/11/97) Ellis J considered that public interest was:

> "... such as to affect people at large so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or others."

See also *London Artists v Littler* [1968] 1 WLR 607.

[91] Mr Fardell submitted that as the article stated the problem was quite manageable and no loss of supply had been experienced the matter was not one of public interest.

[92] The article clearly refers to the power network companies' problems with the cables. The security of supply of electricity and the cost of supply of that electricity is a matter of public interest to the community as a whole. The fact that the article stated the problem was quite manageable and no loss of supply had been experienced, while reassuring, does not detract from the public interest in the subject matter of the article. The fact that there was a problem with power supply cables in the first place is a reasonable matter for the public to be interested in.

Opinion

[93] The opinion must also be recognisable as opinion. If it does not indicate it purports to be an opinion and not a statement of fact, the defence of honest opinion can not apply. Mr Fardell submitted that the Defendants' pleading:

- That the problem was manageable;
- There was a shorter life than expected;
- The specifications should be reviewed

as expressions of opinion were unsustainable. Opinion must not be so mixed up with the facts the reader cannot establish between what is opinion and what is not: *Templeton v Jones* [1984] 1 NZLR 448.

[94] In response the Defendants submitted that statements of opinion involve value judgments as to whether they are expressions of opinion or not and whether they are capable of being expressions of opinion must be determined by the context.

[95] It is for the trial Judge to direct whether or not words are capable of being understood as opinion. Where there is a reasonable doubt whether the words are a statement of opinion or assertion of fact the question is one for the jury: *Telnikoff v Matusevitch* [1992] 2 AC 343.

[96] In the present case the statements are attributed to Mr Scott who is the general manager of network services for Orion. It must be taken that he has knowledge of the background to the issue. He is qualified to express opinions. The full sentence concerning the first statement is:

> "The problem is quite manageable and no loss of supply has been experienced. We can make the joints a bit more pressure resistant, ..."

The statement "no loss of supply has been experienced" is a statement of fact. That can be contrasted with the preceding words in the sentence that "the problem is quite manageable". That is Mr Scott's opinion. It is an expression of his belief about the problem.

[97] The next statement complained of is the "shorter life ... than was expected":

> "The long term effect of the problem was a shorter life for the cables than was expected Mr Scott said."

Again that is an expression of Mr Scott's opinion, based on his experience and knowledge of cables generally and these cables specifically.

[98] The last statement complained of, that the "specifications should be reviewed" is again, in context, a statement of opinion. It follows the statement that:

> "The cable had complied with specifications and these would now have to be reviewed."

[99] While the statement that the cable had complied with specifications is a statement of fact, the need for a review of the specifications is Mr Scott's opinion as to what is now required, given the problems that Orion had experienced with cables that met the specifications.

[100] Nor am I able to accept Mr Fardell's submission that the honest opinion can only be applied to the imputations pleaded by the Plaintiff as being defamatory. Section 8 of the Defamation Act 1954 required the expression of opinion to be

> "... fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved"

Section 10 of the Defamation Act 1992 requires the defendant to prove that the opinion expressed was the defendant's genuine opinion. It is not qualified by the requirement to have regard to such of the facts alleged in the words complained of as are proved.

[101] The Plaintiff's application to strike out the defence of honest opinion fails. The Plaintiff is, however, to have leave to issue notices under s39 outside the time provided in s39(3). It is appropriate the strike out application was dealt with before the notices were issued.

PARTICULARS REQUIRED BY THE DEFENDANTS

[102] The Defendants seek further particulars of the Plaintiff's claim. The Second to Fourth Defendants seek particulars of:

- Details of the ownership of the electrical cable supplied by the Plaintiff;
- Details of the profits and/or margins which the Plaintiff would make on each of the orders listed in schedule 2 to the statement of claim;
- Details of ownership of the PILC cable referred to in each of the orders; and
- A break down of all losses of profits allegedly suffered by the Plaintiff in each of the orders listed in the schedule.

Ownership of the Electrical Cable and the PILC Cable

[103] The statement of claim is required to show the general nature of the plaintiff's claim and give such particulars of time, place, amounts, names of persons, nature and dates of instruments and other circumstances sufficient to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action: r108.

[104] The Plaintiff's claim against the Defendants is in its capacity as supplier of the cable in question. The Plaintiff does not plead that it manufactured the cable. The identity of the ownership of the cable supplied by the Plaintiff is not a particular required to inform the Court or the Defendants of the Plaintiff's cause of action. Nor is the ownership of the PILC cable required for particulars. If relevant at all, that information may be obtained on discovery or by way of interrogatories. There is no need for the Plaintiff to provide particulars of the ownership of the cable supplied by it or to give details of ownership of the PILC cable referred to in each of the orders as a matter of pleading. This part of the application fails.

Profits/Margins

[105] The Plaintiff pleads in the schedule to the statement of claim that it has lost profit margins on cancelled orders. It says the losses and profit margins are confidential and will be disclosed in discovery subject to appropriate undertakings.

[106] Rule 117 requires the plaintiff to show the nature and particulars of any claim to special damage. A defendant is entitled to particulars of the quantum of the claim, insofar as it is quantifiable. The objection to the Defendants' request for particulars by the Plaintiff is not on the basis that the information is not available, but rather is on the basis the information is confidential. The objection is not sustainable. Where special damages are pleaded the Defendants are entitled to particulars: *Lewis v Daily Telegraph* [1963] 1 QB 340, 376.

[107] This file may not be searched by any party other than the parties to the proceeding: R66(6). The parties to the litigation, if not already aware, will no doubt be made aware by counsel of their responsibilities relating to the confidentiality of any information obtained during the course of these proceedings.

[108] Detailed calculations need not be set out in the statement of claim, but the Plaintiff is to set out the net profit (ie the loss of profits) it says it has lost on each of the orders identified in schedule 2.

Particulars Sought By The Newspaper Defendants

[109] As to the particulars sought by the other Defendants, Mr Fardell submitted the particulars supplied in the statement of claim were sufficient.

[110] To the extent that the Plaintiff's statement of claim has not been struck out, the newspaper Defendants are entitled to further particulars in relation to the following allegations:

- That the First, Fifth and Sixth Defendants were reckless as to the truth or falsity of the article's content;
- That the Defendants failed to take and address the Plaintiff's complaints about the article seriously;
- The manner of the conduct of the defence which is complained of.

[111] Particulars are not required of the allegations that the Defendants failed or refused to apologise, took no steps to verify the facts, breached the journalists' code of ethics or defended the proceedings. Those particulars are self-evident. They are either correct as a matter of fact or not.

SECURITY FOR COSTS

[112] The Defendants seek orders for security for costs. The application is made under r60. Jurisdiction exists to make the order. The Plaintiff is a corporation incorporated outside New Zealand: r60(1)(a)(ii). However, as noted by McGechan J in *Agriculture Group Corp v McFarlane Laboratories (1984) Ltd* 1 PRNZ 467 there is no inflexible principle that a plaintiff with no assets within the jurisdiction should normally be ordered to give security. The Court's discretion is to be exercised by taking into account all the circumstances of the case and arriving at a conclusion which will do justice between the parties.

[113] I note that the Plaintiff has earlier agreed to submit to an order for security for costs as a condition of obtaining orders that the Defendants file statements of defence (14 September 1999). On that occasion security was fixed in the sum of $10,000 for the Second to Fourth Defendants and $5,000 for the First, Fifth and Sixth Defendants jointly.

[114] Mr Fardell submitted that the affidavit of S C Hock established that the Reciprocal Enforcement of Commonwealth Judgments Act chapter 264 of Singapore would allow the Defendants to enforce any judgment and order for costs in the Courts of Singapore. He also submitted that there was no suggestion of impecuniosity of the Plaintiff, that the Plaintiff's case was strong and the likelihood of damage to the Plaintiff should have been foreseen by the Defendants. Finally he submitted that the application could be regarded as oppressive given the status of the Defendants, particularly the newspaper Defendants.

[115] Despite Mr Fardell's submissions I am satisfied it is appropriate for a further order for security for costs to be made in this case. While it may be possible for the Defendants to enforce any order for costs by reason of the Reciprocal Enforcement of Judgments Act, it is undoubted that such a procedure would involve considerable further expense and trouble on the part of the Defendants. It is for that very reason that the rule provides for security to be provided by an overseas corporation or resident: *Phipps v Healthcare Otago Ltd* (25/3/99, HC Dunedin, CP 39/95); *Oakby v Family Court of Napier* (27/3/98, HC Napier, CP 30/96). I also record that Mr Hock says:

> "... it should be noted that registration will be ordered by the High Court of Singapore only if it thinks that it is just and convenient that the judgment should be enforced in Singapore.

Thus the enforcement of the judgment is discretionary, rather than as of right.

[116] Further, there is no specific or detailed evidence of the financial position of the Plaintiff available. The Plaintiff has chosen not to put such information before the Court.

[117] An order for security is appropriate. While the order should not be a pre-estimate of costs it should provide a realistic amount for security.

[118] The Plaintiff's claim is not straightforward. Although the claim is essentially based upon a newspaper article containing comments made by an Orion employee, the Plaintiff has raised a number of causes of action. The Plaintiff has chosen to sue all the papers that repeated the original article and also to sue representatives of the Second Defendant in their personal capacity. The sums claimed by the Plaintiff are substantial. Special damages have not been quantified as yet but general damages of

$5 million against Orion and punitive damages against it of $500,000 are pursued. Punitive damages are sought against the other Defendants. The applications currently before the Court are examples of the extensive interlocutory issues that this case will raise as it progresses.

[119] While this application was heard before the change to the High Court rules relating to costs came into effect, those rules will apply to all steps taken in the proceedings after 1 January 2000. If this case is classified as a category 2 case, with an average time taken for each step in the proceeding, and a two week hearing was necessary, then the Defendants would be entitled to costs for preparation for and conduct of the hearing of $39,000 (assuming a two week trial with one counsel). If additional counsel is certified for, which would be likely, the costs award would be $45,000. If classified as a category 3 case the figures increase to $57,000 and $68,000. Those sums take no account of other formal interlocutory steps such as interrogatories which will undoubtedly be pursued.

[120] I do not overlook that security for $15,000 has already been provided. However, that was in relation to the discovery exercise.

[121] The security should not be for the full sum that will be recovered for costs if the Defendants are successful. I also take into account there are effectively three separate camps of Defendants and the Court may deal with costs on that basis rather than regarding them as six separate Defendants, each entitled to costs. Taking the above factors into account the Plaintiff is ordered to pay or provide security to the satisfaction of the Registrar of the following sums:

(a)	For the First Defendant	$25,000
(b)	For the Second to Fourth Defendants	$40,000
(c)	For the Fifth and Sixth Defendants	$35,000
		$100,000

Sums sums will provide some real security to the Defendants without necessarily covering all the costs to be incurred.

SUMMARY OF ORDERS

(a) The Plaintiff's pleadings that the actions of the Defendants have exacerbated the harm to the Plaintiff are struck out.

(b) The Plaintiff's pleading in reliance upon a breach of the Human Rights Act in both the first and third causes of action is struck out.

(c) The balance of the Defendants' application to strike out the first, second and third causes of action are dismissed.

(d) The Plaintiff's sixth and seventh causes of action in negligence are struck out.

(e) The Plaintiff's applications to strike out the defences of truth and honest opinion are dismissed. Leave is granted to the Plaintiff to serve notices pursuant to s39(3). The notices are to be issued within 14 days from delivery of this decision.

(f) The Orion Defendants' request for particulars is granted in part as above. The particulars are to be supplied within 21 days from delivery of this decision.

(g) The newspaper Defendants' request for particulars is granted in part as above. The particulars are to be supplied within 21 days from delivery of this decision.

(h) The Plaintiff is to provide security for costs as above. The security is to be provided within 28 days from delivery of this decision.

(i) Costs reserved to be dealt with by way of memoranda. The Plaintiff is to file its memorandum within 14 days. The Defendants have 14 days to reply.

MASTER VENNING