IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP68/99

1590

BETWEEN	MIDLAND METALS OVERSEAS PTE LIMITED	
	Plaintiff	
AND	THE CHRISTCHURCH PRESS COMPANY LIMITED	
	First Defendant	
AND	ORION NEW ZEALAND LIMITED	
	Second Defendant	
AND	TASMAN LIONEL SCOTT	
	Third Defendant	
AND	STEPHEN JOSEPH JAMES HIRSCH	
	Fourth Defendant	
AND	WELLINGTON NEWSPAPERS LIMITED	
	Fifth Defendant	
AND	NEW ZEALAND PRESS ASSOCIATION	
	Sixth Defendant	

Hearing: 16, 17 & 18 October 2000

Counsel: JRF Fardell and J M Harkess for Plaintiff
J B Stevenson and C Glubb for First, Fifth and Sixth Defendants
F Miller, J Baguley and J A Malcolm for the Second, Third and Fourth Defendants

Judgment: 11 December 2000

JUDGMENT OF CHISHOLM J

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[1] The plaintiff seeks review of the Master's orders striking out various pleadings and directing the plaintiff to amend its pleading in relation to alleged losses of profit. Cross-applications by the defendants for review of other orders contained in the same decision were withdrawn prior to the review hearing. Given that the orders under challenge were contained in a reasoned decision delivered following a defended hearing, it is common ground that this review constitutes an appeal by way of rehearing pursuant to Rule 61C(4) of the High Court Rules.

Background

[2] The plaintiff, a Singaporean company, is a worldwide supplier of electrical cables. It has supplied cables to various New Zealand electricity network operators, including Connetics Limited which is a subsidiary of the second defendant. It claims to have been defamed by various articles published in December 1998 and by statements made in January 1999.

[3] The first, fifth and sixth defendants are publishers. The first defendant publishes *"The Press"* newspaper, the fifth defendant *"The Dominion"* and *"The Evening Post"* newspapers and the sixth defendant a *"newswire"* database service. It is convenient to collectively refer to these defendants as *"the media defendants"*.

[4] For convenience the remaining defendants can be collectively described as *"the Orion defendants"*. The second defendant carries on business as the owner and operator of electricity distribution networks. At all material times the third defendant was employed by

the second defendant as its general manager of network services and the fourth defendant was employed as its network planning engineer.

[5] It is alleged by the plaintiff that on or about 24 December 1998 the second defendant, by the third defendant, made comments to a journalist about the quality of certain Chinese imported underground electric cables. On 26 December 1998 the first defendant published the following article in *"The Press"*:

> ***"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 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 percent, Mr Scott said."*

Similar articles were published in *"The Dominion"* and *"The Evening Post"* newspapers and on the sixth defendant's *"newswire"* database service. None of these articles named the plaintiff as the supplier of the cables. The plaintiff further alleges that when the second defendant, by the fourth defendant, met with various people including representatives of the plaintiff on 22 January 1999, it recapitulated the contents of *"The Press"* article and stated that the plaintiff's cables *"piss oil"*.

[6] Following issue of this proceeding on 3 March 1999 against the first to fourth defendants, the fifth and sixth defendants were joined as parties. Defamation and injurious falsehood are pleaded against all defendants. Breach of the Fair Trading Act is pleaded against the Orion defendants and negligence is pleaded against all defendants except the fourth defendant. Special, general and punitive damages amounting to several million dollars are sought. Originally aggravated damages were also sought but a prayer for aggravated damages was not included in the second amended statement of claim filed on 13 July 1999 *("the statement of claim")*.

[7] Application was made by the defendants for various parts of the statement of claim to be struck out and the plaintiff cross applied for various parts of the statements of defence to be struck out. Both sides were partially successful. For present purposes it is only necessary to refer to the orders striking out parts of the plaintiff's pleading, all of which are challenged by the plaintiff. These orders can be summarised:

- A pleading that the first, second, third, fifth and sixth defendants had *"exacerbated the harm to the plaintiff"* was struck out.
- Allegations that the first, third, fifth and sixth defendants had breached or permitted a breach of the Human Rights Act 1993 were struck out.
- Causes of action relying on negligence were struck out.

The plaintiff was also directed to amend its statement of claim to disclose the net profit alleged to have been lost by virtue of cancelled orders. It challenges that order on the basis that the profit margins are commercially sensitive.

Pleading That Specified Defendants Exacerbated The Harm To The Plaintiff

[8] The exacerbation of harm pleading appears in paragraph 32 of the statement of claim which forms part of the first cause of action alleging defamation:

> *"32. 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 [sic] 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 Connetics' 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." (Underlining added)*

In this cause of action special, general and punitive damages are sought against all defendants other than the fourth defendant.

[9] The reasoning behind the Master's decision to strike out references to the exacerbation of harm is apparent from the following paragraphs of his decision:

> *"[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 [to] 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."*

Since the matter was argued before the Master there seems to have been a marked change in the plaintiff's justification for the exacerbation pleading. When the matter was argued before the Master the pleading was justified on the basis that it supported the claim for punitive damages. By the time the review hearing was drawing to a close the justification for the pleading was primarily on the basis that it could support a higher level of compensatory damages.

[10] Mr Fardell's primary submission is that the plaintiff is entitled to plead exacerbation of harm *as a material fact* to support a higher level of compensatory damages, and possibly an award of punitive damages. It is, of course, implicit in that submission that the pleading can survive despite abandonment of the prayer for aggravated damages. In *Attorney-General v Niania* [1994] 3 NZLR 106 Tipping J noted that the expression *"aggravated damages"* is potentially misleading and would be better discarded. He explained at p111:

> *"Aggravated damages are still compensatory. They are designed to reflect the manner in which or the motives with which the wrong has been committed. Circumstances of aggravation can justify an increase in compensatory damages just as circumstances of mitigation can justify a decreased award.*
>
> *So-called aggravated damages apply particularly to torts which cause injury to feelings or reputation; for example defamation and, as in this case, false imprisonment. Rather than treating compensatory and aggravated damages as distinct categories of damage, it is in my view better to concentrate on the compensatory function of damages (other than exemplary). Where appropriate a greater sum is necessary to compensate the plaintiff for the injury suffered because of the way in which or the circumstances in which the tort was committed."*

Further comment by Tipping J on that subject can be found in *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 at p431. Recently Hammond J supported that view in *Manga v Attorney-General* [2000] 2 NZLR 65. Absence of any requirement in the Defamation Act or the High Court Rules for so called aggravated damages to be claimed separately is consistent with the notion that they are a component of compensatory damages. Failure to separately claim aggravated damages cannot prejudice the defendants and it must follow that abandonment of the prayer for aggravated damages of itself could not be fatal to the pleading.

[11] Does the fact that the plaintiff is a corporation support the strike out? As the Master rightly observed, aggravated damages generally relate to the injured feelings of an individual and it is not possible for a corporation to have injured feelings. But that does not necessarily rule out the possibility that the plaintiff might be entitled to recover a higher level of compensatory damages as a result of aggravating conduct on the part of the defendants. This possibility was carefully considered in *Steiner Wilson and Webster Pty Ltd v Amalgamated Services Pty Ltd* (2000) Australian Torts Reports 63,301. Crispin J concluded that there was no reason in principle why a corporate plaintiff should be denied appropriate relief by way of aggravated damages merely because the relevant harm consisted of further damage to the plaintiff's reputation rather than feelings, although he acknowledged that it may be more difficult to prove further harm has been caused to reputation. This conclusion seems to be consistent with the view expressed in *Gatley on Libel and Slander* (9th ed) at para 8.16 which cautions, however, that the injury to a corporation must sound in money by way of loss of income or injury to the company's goodwill. Given my interpretation that the exacerbation pleading is a statement of fact, strike out principles require the assumption to be made that exacerbation can be proved. On that basis the fact that the plaintiff is a corporation could not justify an order striking out the pleading.

[12] On the other hand, I have no difficulty in agreeing with the Master that as a matter of law the exacerbation pleading cannot support the prayer for punitive damages. As he said, it is well recognised that there is a clear distinction between punitive damages, which are designed to punish, and compensatory damages, which are designed to compensate. Unquestionably the reference to exacerbation in this case must be taken to refer to the compensatory category. Added to that, s28 of the Defamation Act expressly restricts an

award of punitive damages to situations where the defendant has acted in *"flagrant disregard"* of the plaintiff's rights. Clause 32 of the statement of claim tends to hedge the plaintiff's bets by alleging that specified defendants have *"... acted in flagrant disregard of the plaintiff's rights, and have exacerbated the harm to the plaintiff ..."*. The fact that the plaintiff has seen it necessary to plead the exacerbation of harm in addition to the flagrant disregard must indicate that it is attempting to add something to flagrant disregard. To the extent that the pleading seeks to justify punitive damages it infringes s28.

[13] It follows that the exacerbation pleading will have to be amended to ensure that it is confined to compensatory damages. As currently drafted most of the subparagraphs 32 (a) – (p) appear to have been formulated for the purpose of supporting the prayer for punitive damages. Possible exceptions might be subparagraphs (i), (j), (k), (l), (n), (o) and (p). The statement of claim will have to be re-formulated to ensure that the exacerbation pleading is expressly confined to compensatory damages.

Alleged Breach Of Human Rights Act

[14] The Master concluded that, given the provisions of the Human Rights Act 1993, the allegations contained in paragraph 32(d) and (m) of the statement of claim that the first, third, fifth and sixth defendants had breached or permitted a breach of the Human Rights Act was unsustainable. Section 61 of the Human Rights Act, which is the focal section, relevantly provides:

> *"61 RACIAL DISHARMONY--*
> *(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; or*
> ...

> *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."*

It was accepted by the Master that when the article was read as a whole it could be taken to suggest that the cheaper Chinese cables were an inferior product which may be potentially insulting in terms of subs (1)(a). But he decided that since the article could not be construed as *"likely to excite hostility against"* or *"bring into contempt"* the Chinese community within New Zealand or Chinese people who may intend to come to New Zealand, the pleading was unsustainable.

[15] Counsel for the plaintiff claimed that the Master had asked himself the wrong question and that this error led him to actually determine the meaning to be attributed to the articles, thereby usurping the function of the trial Judge/jury. According to Mr Fardell the Master had effectively determined the ultimate issue. He claimed that if the Master had applied the correct threshold test he would have reached the conclusion that the words were *capable* of bearing the meaning alleged in which case it would not have been open to him to strike out the pleading.

[16] *Hyams v Peterson* [1991] 3 NZLR 648 (CA) is authority for the proposition that on a strike out application it is necessary for the Court to rule whether the words complained of are *capable* of being found defamatory of the plaintiff, (that is to say, whether they *could* reasonably be taken to refer to the plaintiff and to have a defamatory meaning as alleged) and it is for the tribunal of fact to decide whether they *would* reasonably be so taken. Whether the words are *capable* of a defamatory meaning is a question of law. Section 36 of the

Defamation Act reflects this division of responsibility. I did not understand Mr Fardell to suggest that a Master does not have power to strike out a defamation pleading in appropriate cases.

[17] Examination of the Master's decision certainly leaves the impression that he may have determined the ultimate issue rather than addressing the issue of whether the words were *capable* of bearing the defamatory meaning alleged. His approach to the issue is reflected by the following passages in his decision:

> *"[28] ... 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."*

However, despite what appears to be a flaw in the Master's approach, I have not been persuaded that the outcome would have been any different if the correct question had been addressed.

[18] Even if the correct question is asked the ordinary sensible citizen test used in *Proceedings Commissioner v Archer* must still arise. Mr Fardell accepted that such test was equally appropriate for determining whether there had been a breach of s61 of the Human Rights Act. With this in mind I am driven to the conclusion that the words complained of would not be capable of the meaning alleged unless a strained and totally unrealistic interpretation of the statutory words *"likely to excite hostility against or bring into contempt"* was utilised. That would, of course, be a wrong approach. If the statutory words (particularly the word *"likely")* are construed in their ordinary sense within their statutory context it seems to me that there is not the slightest prospect that the meaning contended for

by the plaintiff can get off the ground. For those reasons I am not prepared to interfere with the Master's decision striking out clauses 32(d) and (m) of the statement of claim.

Causes Of Action Relying On Negligence

[19] Two causes of action alleging negligence were pleaded by the plaintiff, the first relating to the media defendants and the second to the second and third defendants. In relation to the media defendants it is alleged that in publishing the defamatory matter and falsehoods complained of the newspaper defendants owed the plaintiff duties to:

- adequately investigate the subject matter of the articles,
- seek comment from any supplier of the cables,
- publish the truth.

Against the second and third defendants it is alleged that in making the statements they did to the reporter they owed the plaintiff duties to:

- refer the journalist to the plaintiff for comment,
- communicate the truth.

However, it was conceded by Mr Fardell that as currently pleaded the duty to publish and communicate the truth is too onerous and that some re-formulation of this part of the pleading will be required.

[20] In simple terms the Master concluded that the plaintiff's remedy lay in defamation and that if it could not succeed in defamation there were no policy factors present in this case that could distinguish it from the clear line of binding authority (*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) which precluded concurrent liability in defamation and negligence. Thus he struck out both causes of action relying on negligence in their entirety.

[21] Mr Fardell attacked the Master's conclusion on the basis that the *Hedley Byrne* principles supported the recognition of a duty of care in this case and that in all the circumstances imposition of a duty of care on the part of specified defendants would be just and reasonable having regard to proximity and policy consideration. He claimed the authorities relied on by the Master did not constitute a barrier to the recognition of a concurrent duty of care in this case. And his submissions were rounded off by the proposition that in any event a decision concerning the imposition of a duty of care in this case would be best addressed at trial with the benefit of the overall factual matrix.

[22] A fundamental issue is whether the Master was right when he concluded that the line of Court of Appeal authority effectively ruled out any prospect of this Court recognising a duty of care in this case. To a large extent this comes down to the ratio that should be extracted from those decisions. Counsel for the plaintiff promoted a relatively narrow ratio to the effect that in claims for damage to reputation a pleading in negligence would only be inappropriate when that pleading could undermine recognised defamation defences such as truth or qualified privilege. On the other hand, counsel for the defendants advocated a much wider ratio to the effect that the law of negligence has no place in claims for damage to reputation which must be determined in accordance with the law for defamation. Like the Master I am drawn to the conclusion that a clear statement of principle has been made by the Court of Appeal along the lines advocated by counsel for the defendants, possibly subject to the caveat that there may be situations involving special relationships where the law of negligence has a role to play. This reflects the fact that the law of damage to reputation and

freedom of speech is in a field of its own and has evolved in a fashion which does not leave much room for the law of negligence outside *Hedley Byrne*. It seems to me that although the *Bell-Booth* decision was not on all fours with the claim under consideration, particularly to the extent that the defence of truth had been established in that case, the underlying principle determined on that occasion and repeated in the two later cases and even more recently in *Lange v Atkinson* [1998] 3 NZLR 424 at p469, is robust and should not be sidestepped by this Court.

[23] At least for this Court, the plaintiff's proposition that more recent developments in the law would justify recognition of a duty of care in this case is untenable. That proposition relied in part on the following observations of Tipping J in *Lange v Atkinson* at p477:

> *"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."*

And in part it relied on observations in paragraphs [47] to [49] of the Court's second decision in *Lange v Atkinson & Anor* [2000] 3 NZLR 385 which Mr Fardell said came close to importing the notion of reasonable care into the law of defamation. I note the following. First, Tipping J expressly left the media issue open for another day. Secondly, while the Court of Appeal itself expressly acknowledged that its approach *"... may in some circumstances come close to a need for the taking of reasonable care ..."* (para [48]) its comments were nevertheless in the narrow context of the misuse of occasions of privilege. Thirdly, given the earlier pronouncements of the Court of Appeal, it must be for that Court, not this Court, to lead any change in philosophy.

[24] *Spring v Guardian Assurance Plc & Ors* [1995] 2 AC 296 was also heavily relied on by counsel for the plaintiff. It was not a defamation case but rather a claim in negligence arising from a reference provided by a former employer. Having commented, with reference to *Bell-Booth, Balfour* and *South Pacific Manufacturing,* that negligence has no role in the law of defamation (except for damages), the first *Lange v Atkinson* decision then briefly dealt with *Spring* (at p469):

> *"This is not an action brought in negligence as was Spring v Guardian Assurance Plc ... where Lord Woolf affirmed at p350 that "Negligence has always been an irrelevant consideration (I am not referring to quantum of damages) and it will remain irrelevant in an action for defamation". "*

Clearly the New Zealand Court of Appeal considered *Spring* to be of narrow application. A similar conclusion was reached by Young J in *Collier v Butterworths of New Zealand Ltd* (1998) 12 PRNZ 38 when he concluded that there was nothing in the speeches in *Spring* to suggest that a duty of care could arise in the absence of a special relationship or some particular element of proximity and/or reliance. Australia appears to have adopted a similar approach. *Spring* and the New Zealand Court of Appeal decisions were considered in *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32 with Levine J concluding that the law of negligence had a limited role to play in the matter of communications and that in media situations the lawfulness or otherwise of communication to the public depends primarily on the operation of the laws and rules of defamation. Similar views were expressed in *Bowes v Fehlberg & Ors* (1997) Australian Tort Reports 64,203 and *"GS" v News Limited & Anor* (1998) Australian Tort Reports 64,897.

[25] Against that background it is difficult to see how this Court could contemplate recognising a duty of care in this case. Fundamentally the plaintiff seeks redress for damage to its reputation. If a duty was recognised it would be very much a matter of opening the

door to concurrent claims. Both causes of action rely on similar factual allegations and seek similar remedies. In terms of proximity no special relationship between the plaintiff and the media defendants or the second or third defendants is apparent. I have difficulty in accepting Mr Fardell's proposition that there has been an assumption of responsibility or that this claim comes close to a *Hedley Byrne* situation. In terms of policy *"floodgates"* implications must be highly relevant in the case of the media defendants, and if there was no duty on the part of the media defendants it would be somewhat ironical if a duty was imposed on the second or third defendants, assuming they had no control over the media defendants' publications.

[26] The application to review the Master's decision striking out the causes of action in negligence must fail.

Disclosure of Profit Margins

[27] In a schedule to the statement of claim it is pleaded that the plaintiff has lost profit margins on orders which were cancelled or not placed as a consequence of the articles. In each case details of the circumstances are provided and the identity of the other company involved is disclosed. But it is also stated in each case that the margin is confidential and will be disclosed in discovery subject to appropriate undertakings.

[28] The Master reasoned that Rule 117 requires the plaintiff to show the nature and particulars of any claim for special damages and, citing *Lewis v Daily Telegraph* [1963] 1 QB 340, 376, he rejected the plaintiff's objection that the information was confidential on the basis that where special damages are pleaded the defendants are entitled to particulars. He noted that the file could not be searched by any party other than the parties to the proceeding

(Rule 66(6)) and that if the parties to the litigation were not already aware, they would no doubt be made aware by counsel of their responsibilities relating to the confidentiality of any information obtained during the course of the proceedings. The plaintiff was directed to disclose the net profit claimed to have been lost in relation to each of the orders identified in schedule 2.

[29] It is accepted by the plaintiff that the defendants are entitled to information about the profit margins. The sole objection is to the method of disclosure. Mr Fardell claimed that, given the relationship between the plaintiff and second defendant (including through its subsidiary, Connetics Limited), profit margins constitute highly confidential commercial information and that a restriction on disclosure is justified, at least at this stage. He suggested that it might be appropriate to restrict disclosure to solicitors/counsel for the defendants and any independent expert/s engaged by the defendants. He acknowledged that any restriction may have to be revisited.

[30] This Court has the power to restrict the use of confidential information: see *NZ Railways Corporation v Auckland Regional Council* (1990) 3 PRNZ 332 and *Port Nelson Ltd v Commerce Commission* (1994) 7 PRNZ 334, both decisions of the Court of Appeal. In the latter decision at p347 the Court said:

> *"The ability of each party to a proceeding to inspect the documents of the other, except for documents which are privileged, is important in enabling the proceeding to be brought to a just conclusion ... Sometimes, however, relevant documents which are not privileged may be commercially sensitive. Examples would be documents showing the detailed costings of products or services which are provided in a competitive market ... In some cases it may be sufficient protection that "a party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action and for [sic] no other purpose": Riddick v Thames Board Mills Ltd [1977] QB 881, 896 ... per Lord Denning MR. Use for some collateral or ulterior purpose is a contempt of Court: Church of Scientology of California v Dept of Health and Social Security [1979] 3 All ER 97, 116, per Templeman LJ ... In other cases, the Courts have directed that particular documents are to be shown only to nominated persons... Power to limit access in this way arises from the inherent jurisdiction of the Court to prevent the abuse of its process ... Orders limiting the persons to be allowed access to discovered documents have been made in many cases in the High Court ...".*

There can be little doubt that in a competitive commercial market profit margins are likely to be highly sensitive in commercial terms. While there is not a great deal of information before the Court on this topic, given the nature of the businesses in which the plaintiff and second defendant (including its subsidiary Connetics Limited) are involved I am prepared to infer that the profit margins under consideration are highly sensitive. In the context of this proceeding the profit margin information represents a comparatively narrow issue. My impression is that restricted disclosure would not hamper the defendants in the preparation of their case whereas unrestricted disclosure could result in an injustice to the plaintiff.

[31] Accordingly there will at this stage be an order restricting discovery and inspection of profit margin information to the solicitors/counsel for the Orion defendants and to independent expert/s appointed by the Orion defendants provided such expert/s have first given an appropriate undertaking to the Court to preserve confidentiality in terms of this order. An undertaking from the solicitors/counsel is unnecessary on the basis that their duty to the Court will mean that they are only entitled to divulge that information to those authorised to receive it in terms of this order. As Mr Fardell acknowledged, it may be necessary for this issue to be revisited and leave is reserved to any party accordingly. Given the foregoing orders, the order requiring amendment to the statement of claim is no longer tenable and must be cancelled. It is for the Court to determine whether in all the circumstances the statement of claim has disclosed *"the nature and particulars"* of special damages in terms of Rule 117. Having regard to the relatively extensive information already contained in the schedule as to the circumstances giving rise to the alleged loss of net profit margins and the companies involved, I am satisfied that the requirements of that Rule have been met. The door remains open for the issue to be revisited if any injustice to the defendants becomes apparent.

[32] The media defendants are in a different situation because no issue of commercial sensitivity directly arises in their case. However, given the orders that I have made it would be appropriate for undertakings to be provided by the persons mentioned below to preserve confidentiality in relation to profit margins and for information concerning profit margins to be confined to that group, at least in the meantime. I understand from Mr Stevenson that the information would need to be made available to the Chief Executives of the first, fifth and sixth defendants, the editor and assistant editor of the newspapers involved, the Chief Executive of INL, any insurers and any independent expert/s who may be consulted. There may be others. Hopefully agreement could be reached between counsel as to any other person associated with the media defendants who may reasonably be entitled to the information subject to an appropriate undertaking being provided. In addition to the above, the solicitors/counsel for the media defendants will also be entitled to the information. For reasons already expressed they will not be required to provide an undertaking.

Summary

[33] The exacerbation pleading is reinstated on the basis that paragraph 32 of the statement of claim is reformulated to ensure that it is only pleaded as a material fact in relation to the claim for compensatory damages. The application for review of the decision striking out the Human Rights Act pleading in subclauses 32(d) and (m) of the statement of claim is dismissed. Likewise the application for review of the order striking out the causes of action relying on negligence is also dismissed. The order directing the plaintiff to amend the statement of claim to disclose profit margins is cancelled and replaced by orders in terms of

paragraphs [31] and [32] of this judgment. Leave is reserved to any party to apply further should the need arise.

[34] If counsel are unable to reach agreement as to costs, they may submit memoranda and that issue will be determined by the Court.

Solicitors: Preston Russell Law, Invercargill for Plaintiff (Counsel: JRF Fardell)
McCabe McMahon Atkinson Butterworth, Auckland for First, Fifth and Sixth Defendants (Counsel: J B Stevenson)
Chapman Tripp Sheffield Young, Christchurch for Second, Third and Fourth Defendants

Delivered at 3 ~~am~~/pm on 11 December 2000.