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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 276/00

BETWEEN	SREKA INDUSTRIES LIMITED
	Plaintiff
AND	OPUS INTERNATIONAL CONSULTANTS LIMITED
	First Defendant
AND	SOUTHERN CHEMICAL CONSULTANTS LIMITED
	Second Defendant
AND	D S WINTER
	Third Defendant

Date of hearing:	6 September 2001
Counsel:	K P McDonald QC for Plaintiff D H McLellan for First Defendant
Date of Judgment:	6 November 2001

JUDGMENT OF MASTER J C A THOMSON

Application

[1] The first defendant applies to strike out in its entirety the plaintiff's proceedings against it.

Parties

[2] The parties to this proceeding are:

- Sreka Industries Limited, the plaintiff. A company carrying on business as a plastic moulder and plastic extruder. It processes plastics into

various finished products including the road edge marker posts ("EMPs") that are the subject of this proceeding.

- Opus International Consultants Limited, the first defendant. The engineering consultancy firm that supplied to Transit New Zealand ("Transit"), the government agency responsible for state highways in New Zealand, (ss5 and 61(1) Transit New Zealand Act 1989) one of the reports to which this proceeding relates.

- Southern Chemical Consultants Limited, the second defendant. It conducted the chemical analysis of the plaintiff's EMPs to provide the basis for the first defendant's report to Transit. The report supplied to the first defendant is also the subject of legal action.

- Mr David Stanley Winter, the third defendant. The consulting chemist responsible for the second defendant's chemical analysis.

Facts

[3] The plaintiff produces EMPs, made of extruded white plastic with red warning and white reflectorised strips, for installation along New Zealand's highways. EMPs are used to indicate to drivers the width and direction of the road. There is therefore a public safety element. The EMPs are manufactured to the specifications of Transit, and tested by them. The important dates are the following:

- 17 September 1997: The plaintiff's EMPs are approved by Transit for use on New Zealand highways.

- 14 October 1997: The plaintiff supplies 100 EMPs to McDonough Contracting Limited ("MCL"). During 1997 and 1998 the plaintiff also supplied EMPs to the southern part of the Sough Island for installation.

- September/October 1998: MCL complains to the plaintiff that 800 EMPs failed in service.

- January 1999: The second and third defendants carry out tests on EMPs in Southland at MCL's request. They report ("the January 1999 report") to MCL that the plaintiff's products are very low in titanium dioxide ("Ti02"), which would cause failure in use because of a lack of mechanical strength and ultra-violet resistance. These findings are reported to Transit who commissions the first defendant to investigate and report on the performance of several brands of EMPs.

- August 1999: Having been commissioned to do so by the first defendant, the second and third defendants carry out further tests on the plaintiff's

EMPs. Their findings are reported to the first defendant ("the August 1999 report").

- October 1999: The first defendant reports ("the October 1999 report") to Transit that independent testing of the plaintiff's EMP is warranted.

- February 2000: Transit advises that the plaintiff's EMP may be removed from the approved list of products maintained by Transit thus preventing use of the plaintiff's EMPs on state highways.

- April 2000: Mr Keast, the first defendant's Operations Engineer in Invercargill orally advises Fulton Hogan, a roading contractor in Christchurch, that a report completed by the first defendant showed that the plaintiff "performs poorly in the field".

Causes of Action – Negligence

[4] The plaintiff claims that the second and third defendants adopted a different method of analysis for the January and August 1999 reports (this is denied). It appears that lower levels of TiO2 were reported in the August 1999 report, but the different means of analysis were not revealed, leaving the impression, according to the plaintiff, that the plaintiff had reduced the TiO2 content in its product between approval by Transit and supply to customers. The plaintiff also claims that the August 1999 report related to tests not conducted on the plaintiff's product. This is also denied.

[5] The plaintiff says that the second and third defendants owed it a duty to take reasonable care in the testing and reporting of the plaintiff's EMP. It says there is no experimental basis for determining the strength of EMPS by its TiO2 content, and that a link between strength and TiO2 is unclear. Findings regarding impact modification and resin dilution are also attacked.

[6] The plaintiff says that the first defendant owed it a duty to take reasonable care in preparing the October 1999 report, and knew or ought to have known that

Transit would rely on it. It was thus reasonably foreseeable that carelessness in its preparation and formulation would harm the plaintiff. The plaintiff says that this duty was breached when the first defendant adopted the January and August reports from the second and third defendants, and came to various conclusions regarding the supposed TiO2 reduction.

Defamation

[7] The January 1999 report the plaintiff says having concluded that the plaintiff's EMPs were low in TiO2, referred to the recent price increase of TiO2, and suggested that the cause of the EMP's failure was the dilution of the initial raw material with other resins at moulding. The first defendant denies that the report implied that the plaintiff was responsible. The plaintiff, however, claims that the first defendant defamed its reputation, by publishing the October 1999 report to Transit, and that the second and third defendants did likewise by publishing the January and August 1999 reports to MCL and the first defendant respectively. The plaintiff also refers to the comments made by Mr Keast in April 2000, referred to above.

Damages

[8] The plaintiff says that as a result of the reports referred to above it was forced to engage the Crown Research Institute Materials Performance Technologies ("CRIMPT") to carry out various tests and comment on the reports. It claims the costs of these reports, lost sales, administrative and executive costs, travel costs, accountancy fees, and associated expenses in obtaining reports and renewed approval from Transit. In all, the plaintiff claims $518,000 in general damages, $85,000 in special damages, and the costs of the CRIMPT reports ($3,850).

Submissions - First Defendant

[9] Regarding the negligence claim, it is said that the duty of care contended for is not supported by existing authority. While it takes the form of a *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (HL) duty, there was no reliance by the plaintiff, and the first defendant did not assume any responsibility to the plaintiff. The plaintiff may be able to show sufficient proximity with the first defendant, but there are compelling policy factors as to why a duty should not be recognised. In addition to there being no reliance or assumption of responsibility, public safety considerations weigh against a duty, and the plaintiff has various rights of challenge against Transit's decisions, one of which was successfully exercised here. It is also claimed that a duty in this case would cut across what is really a defamation claim, and therefore deprive the first defendant of legitimate defamation defences.

[10] It is submitted that the defamation claim can similarly not succeed because the precise words of the defamation have not been pleaded. It is no excuse, the first defendant says, that the plaintiff does not know what those words are. It relies on *Collins v Jones* [1995] 1 QB 564, 571. The Master notes in this regard, while the plaintiff has quoted from the January 1999 report prepared by the second and third defendants that it claims is defamatory of it, it has not done so from the October 1999 report, because it says it has yet to receive a copy in discovery. The first defendant also submits that although the plaintiff has pleaded the precise words attributable to Mr Keast, no cause of action in defamation can be based on those words as pleaded. While the words spoken by Mr Keast are said to carry the meanings pleaded in paragraph 33, none of those meanings, it says, can possibly flow from the words spoken by Mr Keast. The statement is not defamatory of the

company in its natural and ordinary meaning since it does not reflect on the company, but on its products. The only alternative possibility is an action for injurious falsehood. However, even with amendment, that cause of action could not succeed because there is no allegation that the first defendant published the words to Fulton Hogan falsely and maliciously. Malice is an essential element of a cause of action in injurious falsehood.

Plaintiff

[11] The plaintiff submits that the authorities cited by the first defendant (ie Hedley Byrne cases) in support of the application to strike out the negligence claim are inapplicable, because they relate to claims in negligence for damage to reputation arising from publication with concurrent claims in defamation. In this case, however, the plaintiff's principal claim relates to the negligent testing of the product, a separate issue, it says, from the consequences of publication. However, even if the authorities were on point, the plaintiff argues the policy factors mitigating against a duty of care do not arise.

[12] In relation to the defamation claim, the plaintiff says that all of the particulars required by s37 of the Defamation Act 1992 have been provided with respect to Mr Keast. With respect to the first defendant, particulars will be provided on discovery of the October report.

Strike-out applications: the general principles

[13] Strike-out applications are made under rule 186 of the High Court Rules. A pleading may be struck out if it discloses no reasonable cause of action, is likely to cause prejudice, embarrassment, or delay, or is otherwise an abuse of process. The

facts as pleaded by the plaintiff are assumed to be true for the purposes of the application, and the question is whether the causes of action are so clearly untenable that they cannot possibly succeed. The jurisdiction should be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material, but the fact that difficult questions of law requiring extensive argument are raised does not exclude jurisdiction. Particularly relevant to this case, Courts should be very slow to rule on novel categories of duty of care at the strike out stage, *A-G v Prince and Gardner* [1998] 1 NZLR 262 (CA) and *Adams v Joseph Banks Trusts Ltd* (HC Wellington, CP224/91, 4 March 1992, Master Williams QC).

Discussion – Negligence

[14] The first point to be made is that I agree with the plaintiff that this is not a *Hedley Byrne* case. While the plaintiff's pleadings seem to be alleging negligent misrepresentations by the defendants, there is not pleaded the degree of claimed reliance by the plaintiff envisaged by *Hedley Byrne* and the cases that followed it. The plaintiff relies on straight negligence, requiring a duty of care analysis. If a duty is found, breach and damage, at least on the facts as pleaded by the plaintiff would appear to follow. The essential question then is whether a duty is owed at all.

[15] In *Anns v London Borough of Merton* [1978] AC 728 (HL) a two-stage test was proposed to determine whether a duty of care exists in a situation not clearly covered by existing authority. The Court decided it is necessary to consider first whether there is a sufficient relationship of proximity between the parties, so that the defendant could reasonably have contemplated that carelessness on his or her part could harm the plaintiff. If that question is answered affirmatively, a prima facie

duty of care arises and it is necessary then to examine the second stage, namely whether there are any external policy factors negativing such a duty.

[16] While the *Anns* approach at first enjoyed widespread support, its two-stage test was soon abandoned in England. See *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) and *Murphy v Brentwood* DC [1991] 1 AC 398 (HL). The latter case overruled the actual decision in *Anns*. In New Zealand, the position was discussed by Cooke P in *South Pacific Mfg Co Ltd v NZ Security Consultants Ltd* [1992] 2 NZLR 282, 294 (CA) where he said:

> A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

[17] In that case the Court of Appeal held that the New Zealand approach to negligence, the *Anns* test, had not, and should not be changed following the English departure from *Anns*. While English Courts had been concerned that the law of negligence should develop incrementally and not by the application of a two-stage test, our Court of Appeal considered that the *Anns* approach had not caused problems in New Zealand and should not be abandoned. However, while our Court said that it was helpful to focus on the two broad fields of inquiry considered in *Anns*, the ultimate question was whether in light of all the circumstances of the case it was just and reasonable that a duty of care of broad scope was incumbent on the defendant.

[18] The Court of Appeal considered the question again in *Connell v Odlum [1993] 2 NZLR 257 (CA).* The Court confirmed that the existence of a duty of care in novel situations depended on a pragmatic and careful consideration of all the

relevant facts weighed one against the other in what was essentially a balancing exercise. In a reworking of the *Anns* formulation, the Court considered that there are two broad fields of inquiry. The first focused on proximity. Forseeability is not the only criterion. Also important is the likelihood and seriousness of the harm, the extent to which the plaintiff relied on the defendant, and the applicability of analogous situations. Second, it is necessary to examine the broader implications for the community in recognising or denying the existence of a duty of care. Policy considerations are important, but not decisive.

[19] The facts in *South Pacific*, which was consolidated with *Mortensen v Laing*, are instructive in helping to determine the present application. In both *South Pacific and Mortensen* fire destroyed insured premises, and the insurers refused liability on the basis of reports from investigators to the effect that arson was involved. Various financial harms were visited on the plaintiffs as a result. In *South Pacific* the plaintiff was an unsecured creditor of the insured company which was put into receivership, and it was considered that a duty did not extend to such persons, as it would be too wide. In *Mortensen*, however, the plaintiff was the insured. As the present plaintiff points out in submissions, this case deserves analysis because it is factually similar.

[20] There are certainly available to the plaintiff arguable reasons to find a duty of care in the present case. It can be said that the defendants were in a position to reasonably foresee that damage might result to the plaintiff if care was not taken when conducting the relevant tests. There was a strong possibility that Transit would take action against the plaintiff as a result of the defendants' findings. To this extent there is a degree of reliance by the plaintiff on the defendants to exercise care

in their investigations, and if they did not do so there was a serious risk that Transit's resulting actions might cause economic harm to the plaintiff. Arguably therefore there is proximity between the defendants (the investigators) and the plaintiff (the investigated). Put simply, the plaintiff can claim it relied on the defendants to get it right. Such reliance does not satisfy the test in *Hedley Byrne*, but I think does go some way to rendering the relationship between the parties sufficiently proximate to found a duty of care.

[21] There are, however, as the first defendant points out, factors militating against the finding of a duty of care. One is the danger that such a finding may cut across another tort, namely defamation, which is also pleaded in this case. It is clear law that where the pleaded injury is damage to reputation, an action in defamation is invariably the appropriate remedy. In *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 (CA) the Court observed that the rules of defamation have been carefully worked out over many years to provide an appropriate balance between liability for making statements about another, and freedom of expression. Superimposing a duty in negligence may distort that balance, and there are thus good policy reasons for refusing to impose a duty of care in such situations.

[22] The plaintiff attempts to distinguish *Bell-Booth* and *South Pacific* on the basis that the duty of care claimed in this case "does not relate to publication, but rather to the manner of testing – it is not a "mere loss of reputation." It submits that the Court in *South Pacific* considered that any damage to the plaintiff would arise from the publication of the report, not the way in which the report had been compiled. However in both *South Pacific* and *Mortensen* the plaintiff in each case had pleaded negligence on the basis of how the report had been prepared. It is

difficult, I think, to see how negligence in those cases could have been otherwise pleaded. As Sir Gordon Bisson's judgment makes clear, the *Mortensen* plaintiff claimed that the investigator, amongst other things, failed to interview fire brigade personnel, accurately locate the seat of the fire, or inquire as to the identity of witnesses. Similarly, the *South Pacific* plaintiff listed 37 respects in which the alleged duty of care was breached. It is therefore not correct to say that the Court was simply concerned with the report's publication, and not the manner in which it was compiled.

[23] What the plaintiff argues is that this case, unlike *South Pacific* and *Mortensen*, involves harm not limited to the injury to reputation. But in *South Pacific*, Hardie Boys J said that he could not envisage the insured suffering consequences from a negligent adverse investigator's report other than that of injury to reputation. Cooke P was of the same view. Here I am prepared to accept that it is arguable that a negligent finding by the defendants that the plaintiff's product was defective (not defamatory in itself) could conceivably cause financial harm to the plaintiff which might not necessarily be inextricably linked to reputation damage. For example, Transit could withdraw approval, as indeed it did. It is certainly not unreasonable for the plaintiffs to argue that it would seem anomalous that the defendants could make a negligent finding,add a defamatory comment to the effect that the plaintiff was deliberately diluting materials to save money, and thereby avoid a negligence claim for that reason alone.

[24] But looking at the matter in the round, in *South Pacific, Mortensen* and in the present case, there is a broadly similar scenario of a defendant allegedly negligently coming to conclusions about the plaintiff and reporting those conclusions to a third

party. As in *South Pacific*, I do not thinkthe plaintiff can escape the fact that it is the reporting of the conclusions that caused the harm (if any) of which the plaintiff complains. I do not think splitting the finding of a defect (to which negligence could attach) from the reasons for the finding (which constitute the defamation claim, and which the defendants could reasonably be expected to provide to Transit) can be asserted by the plaintiff as distinguishing the two cases. It might also unreasonably circumscribe the question of qualified privilege, which is defeated by proving malice but not mere negligence. In my view, while the duty of care question has good arguments on both sides, I find the first defendant's arguments the more convincing. Be that as it may policy factors (the second stage in *Anns*) in my opinion militate against allowing the negligence cause of action to proceed.

[25] The first policy factor is the availability of other remedies. While this factor I acknowledge does not perhaps have the force that it did in *South Pacific* because there is no contractual relationship between the plaintiff and Transit, as the first defendant points out, Transit does perform a statutory function under the Transit New Zealand Act. Thus, a public law action is available if that function is performed improperly, including judicial review. Breach of statutory duty may also give rise to damages. Add the contractual relationship between Transit and the first defendant, and I think it can readily be concluded that there is no room, or necessity, to allow a negligence claim.

[26] Second is the policy issue of public safety. It goes without saying that Transit, as the government agency is charged with looking after the nation's state highways, and thus performs a role concerned with public safety. Imposing a duty

on the first defendant to the plaintiff for conducting tests on the plaintiff's product on Transit's instructions, would I think cut across Transit's role as public protector, as was held in *Oceania Aviation Ltd v Director of Civil Aviation* (CA163/00, 13 March 2001). I accept that the *Oceania* case is slightly different from this one as there the body charged with the public safety function was actually being sued. However, s7C of the Transit New Zealand Act enables Transit to delegate or contract out its "operations to appropriate persons". This it clearly did here, and thus a duty of care as pleaded might also be said to be inconsistent with the contractual arrangement between the first defendant and Transit.

[27] Overall, while the question may not be as clear cut as it was in *South Pacific*, for the same policy reasons, as were held to be decisive there, I hold that the negligence action pleaded by the plaintiff against the first defendant is not available here. I do not overlook the fact that the plaintiff argues that the application to strike out has been made before the first defendant has provided any documents in discovery, so striking out this cause of action would be premature. As to that, I do not think that any new information provided in discovery could overcome the policy considerations considered above.

Defamation

[28] The first defendant submits that the pleading that the plaintiff was defamed in the October 1999 report should be struck out, as the plaintiff does not quote the exact words of which it complains, as required by *Kerr v Heydon* [1981] 1 NZLR 449 (CA). However, this is obviously because the plaintiff has not yet received a copy of that report in discovery. The plaintiff has undertaken to comply with these

requirements once this is done. In my view it would therefore be premature to strike out this pleading.

[29] The first defendant also says that the words attributed to Mr Keast cannot bear the meanings set out in the particulars in para 33 of the First Amended Statement of Claim, as the plaintiff claims. I agree. How Mr Keast's comments that the plaintiff is "performing poorly in the field" can be extended to mean that the plaintiff was deliberately diluting raw materials, is not apparent to me. However, the particulars required by s37(2) of the Defamation Act 1992 are not necessary if the pleaded meaning is evident from the matter itself. Here I think it is at least arguable that it is, so that striking out this pleading now would be premature. Further, an amended pleading should be able to rectify any perceived defects in the defamation cause of action.

[30] The result is the negligent cause of action is struck out against the first defendant. An amended Statement of Claim in respect of the defamation cause of action is to be filed and served within 21 days hereof. Costs reserved.

Dated at Wellington this 6th day of November 2001 at 2.30 ~~am~~/pm.

Master J C A Thomson

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