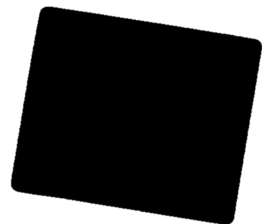
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 280/SD02



BETWEEN	**CHARLES AUGUSTINE SWEENEY** of Sydney, Australia, Barrister **Plaintiff**
AND	**PAUANUI PUBLISHING LIMITED**, a duly incorporated company having its registered office at Pricewaterhouse Coopers, Level 8, Pricewaterhouse Coopers Tower, 188 Quay Street, Auckland, Newspaper Publisher **First Defendant**
AND	**JENNIFER JEUNE McMANUS** of 52 Wairoa Road, Devonport, Auckland, Journalist **Second Defendant**
AND	**THE KNOWLEDGE BASKET – TE KETE O TE WAANANGA LIMITED** a duly incorporated company having its registered office at 10 Newell Street, Pt Chevalier, Auckland, Website Operator **Third Defendant**

Hearing and Order: 2 April 2003

Counsel: Mr J B Murray for plaintiff
Mr J R Fardell QC and Ms M A Crawford for defendants

Date of reasons: 4 April 2003

REASONS FOR JUDGMENT OF MASTER LANG
[re application for order striking out second amended statement of claim]

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Introduction

[1] By interlocutory application dated 3 March 2003 the defendants sought an order striking out the second amended statement of claim which was filed by the plaintiff on 24 February 2003.

[2] The application was opposed and at the end of the hearing on 2 April 2003 I made an order striking out the statement of claim and awarded in favour of the defendants.

[3] I now give my reasons for making those orders.

Factual background

[4] On 10 July 2002 the first defendant published in its print and internet editions an article written by the second defendant which made significant reference to the plaintiff. Part of the article could also be accessed on the third defendant's website.

[5] The article in question was headed "Lawyers, Guns and Money" and made reference to a number of events allegedly involving the plaintiff and Ms Josephine Elworthy-Jones.

[6] In the statement of claim in its present form the plaintiff alleges that the allegations and imputations to be taken from matters referred to in the article were false and that the first and second defendants knew that they were false. Alternatively, he claims that all three defendants were reckless as to whether or not the allegations and imputations were false.

[7] The plaintiff alleges that the matters referred to in the article were calculated to hold him up to ridicule and disparaging comment by readers of the article and to cause members of the legal profession in New Zealand to shun him and to consider that he should not be briefed as counsel or legal advisor.

[8] The plaintiff avers that as a consequence of the defendants' actions he has suffered considerable distress and injury to his feelings and has not received a brief as counsel or legal advisor in New Zealand since the date of publication of the article. As a result, he seeks damages against the defendants including aggravated damages.

The pleadings

[9] The original statement of claim which was filed on 19 July 2002 contained three causes of action. The first was a claim for injurious falsehood, the second was an allegation of misleading and deceptive conduct under the Fair Trading Act 1986 and in the third the plaintiff sought declarations that the conduct of the first and second defendants was unprofessional, that it amounted to a breach of accepted standards of journalism and that it was a contempt of Court.

[10] On 7 August 2002 the defendants filed an application seeking orders that the third cause of action be struck out and seeking further and better particulars of the matters pleaded in the first two causes of action. The plaintiff filed a notice of opposition to that application on 10 September 2002.

[11] On the same date a telephone conference was held before me. During that conference counsel for the plaintiff accepted that an amended statement of claim needed to be filed. At the conclusion of the conference I made an order that any amended statement of claim was to be filed and served by 23 September 2002.

[12] The matter was called again before me on 18 October 2002. By that stage no amended statement of claim had been filed, but counsel for the plaintiff indicated that he expected that it would be filed within the next few days.

[13] By 29 January 2003 there was still no sign of any amended statement of claim. As a result, the defendants filed a further application seeking to strike out the whole of the plaintiff's claim on the basis that the plaintiff had not complied with the Court's orders. That application was set down for hearing on 4 February 2003.

[14] On 3 February 2003 (the day before the hearing of the strike out application) the plaintiff filed and served an amended statement of claim. This omitted the second and third causes of action, and alleged solely that the defendants were guilty of conduct towards the plaintiff which constituted injurious falsehood.

[15] It is common ground that in order to establish the tort of injurious falsehood it is necessary for the plaintiff to establish three elements:

a) That the defendant has made a false statement about the plaintiff.

b) That the false statement was published maliciously.

c) That it has caused special damage or, alternatively, that it was likely to cause pecuniary loss to the plaintiff.

[16] At the hearing on 4 February 2003 extensive submissions were made regarding the form of the amended statement of claim.

[17] One of the issues which was the focus of submissions was that of malice. There was no reference at all to malice in the amended statement of claim notwithstanding that it is an essential element of the tort of injurious falsehood. On that ground alone Mr Fardell sought to persuade me at the hearing on 4 February 2003 that the amended statement of claim should be struck out.

[18] During the hearing Mr Murray accepted on behalf of the plaintiff that the statement of claim was deficient in failing to contain any allegation relating to malice. He therefore sought an adjournment to enable the plaintiff to give consideration to the appropriate manner in which his claim should be repleaded.

[19] Another issue which was the topic of extensive submissions at the hearing on 4 February 2003 was the nature of the loss claimed by the plaintiff. In the original statement of claim the plaintiff had sought "damages including punitive and aggravated damages" in respect of the claim for injurious falsehood. The amended statement of claim sought the same relief.

[20] Mr Fardell submitted that the pleadings were also defective so far as they dealt with the issue of any loss which might have been suffered by the plaintiff. In particular, he maintained that the amended statement of claim did not disclose whether or not the plaintiff was seeking to establish that he had suffered special damage as a result of the defendants' conduct or whether he was relying on the provisions of s 5 of the Defamation Act 1992. That section provides as follows:

> In proceedings for slander of title, slander of goods, or other malicious falsehood, it is not necessary to allege or prove special damage if the publication of the matter that is the subject of the proceedings is likely to cause pecuniary loss to the plaintiff.

[21] This issue is relevant in a number of ways. First, Mr Fardell submitted that the applicability of the section in the present circumstances remains a live issue. He pointed out that the article in question did not relate to the plaintiff's professional activities but rather to events which occurred in his private life. In those circumstances he contended that it remained open to the defendants to argue that s 5 has no application in the present circumstances.

[22] Mr Fardell contended that if, on the other hand, the plaintiff maintained that he had suffered actual loss as a result of the article, that allegation needed to be pleaded. Mr Fardell submitted that in that event the defendants would be entitled to obtain extensive particulars and discovery from the plaintiff relating to his professional practice. In particular, the defendants would be entitled to examine the plaintiff's circumstances both before and after the publication of the article in order to rebut the allegation that special damages should be awarded.

[23] During the hearing on 4 February 2003 Mr Murray indicated that the plaintiff relied squarely on the wording of s 5 and that he did not propose to adduce evidence as to the fact that he had incurred actual loss so as to be able to seek special damages. In my minute dated 4 February 2003 I referred to this issue in the following way:

> [10] Mr Murray for the plaintiff relies squarely on the wording of s 5. Importantly he confirmed to the Court that the plaintiff would not be alleging that the publication of the article had actually caused him loss in his professional practice. However, he submitted that the plaintiff would be entitled to rely on the fact that the wording of the article was such as to be likely to cause loss, and that in those circumstances he

> did not need to specify any particular loss. In reply Mr Fardell submitted that these concessions effectively put an end to the plaintiff's claim for damages for injurious or malicious falsehood.

[24] At the end of the hearing on 4 February 2003 I declined to strike out the statement of claim. Instead I agreed to adjourn the application in order to enable the plaintiff to replead his case by way of a further amended statement of claim. This was done in anticipation that the plaintiff would file an amended pleading to deal with the issues which had been raised and discussed during the hearing on 4 February 2003. In giving my decision to adjourn the strike out application to a new date I made the following comment:

> At that point the Court will be able to proceed on the basis that the statement of claim is in final form, and that all particulars which are to be provided will have been provided. I can then make a final decision regarding the strike out application in relation to all heads of damage which are claimed. The plaintiff will of course need to carefully consider the comments which Mr Fardell made in reply regarding the effect of the concession that the plaintiff does not propose to allege that actual loss has been caused to his professional practice as a result of the publication of the article.

[25] At the end of the hearing on 4 February 2003 I adjourned the strike out application to 2.15 pm on 24 February 2003. I also awarded costs to the defendants to reflect the fact that the need for a further hearing had only come about because of the plaintiff's failure to replead its case properly.

[26] The second amended statement of claim was filed at 11.50 am on 24 February 2003. As a result, it was not possible for either the Court or Mr Fardell to properly consider the new document before the resumption of the hearing of the strike out application at 2.15 pm the same day. On that basis the proceeding was further adjourned to a telephone conference on 7 March 2003 at 9 am. By that date an amended application for an order striking out the second amended statement of claim had been filed. I directed that that application be heard on 2 April 2003 at 10 am. I also directed that any notice of opposition to the amended strike out application was to be filed and served by 14 March 2003. For some unexplained reason this direction was not adhered to and the notice of opposition was not filed until 24 March 2003.

[27] As can be seen from the matters referred to above, by the time the hearing resumed on 2 April 2003 the plaintiff had filed no fewer than three statements of claim. The proceeding had been adjourned on two occasions in order to enable the plaintiff to replead its claim. The issues relating to both malice and the question of loss had been raised squarely at the hearing on 4 February 2003. At that time both Mr Fardell and the Court placed the plaintiff on notice that they expected to be able to deal with the application when the hearing resumed on the basis that the statement of claim was in its final form. I do not consider that either Mr Murray or the plaintiff could have been under any misapprehension as to the fact that the pleading needed to be in that form by the time the hearing resumed on 2 April 2003.

The hearing on 2 April 2003

[28] When the hearing resumed on 2 April 2003 Mr Fardell submitted that the two alleged defects which had been the subject of submissions in the earlier hearing (ie those relating to malice and loss) had not been cured in the second amended statement of claim. I shall deal in further detail with those issues later in this judgment. For present purposes it suffices to say that Mr Fardell contended that the plaintiff had had more than sufficient opportunity to ensure that his pleadings were in order. He argued that the statement of claim remained fundamentally defective in that it failed to provide proper particulars of both malice and loss. In those circumstances he submitted that the Court should strike out the plaintiff's claim in its entirety.

[29] In reply Mr Murray accepted the force of Mr Fardell's submissions in relation to the defective nature of the pleadings. He advised the Court that in preparing for the hearing he had not considered the effect of the two authorities relied on by Mr Fardell in his submissions (*Holmes v Anderson & Wellington Newspapers Limited* (Unreported, High Court Christchurch, A281/81, 1 March 1985 Hardie-Boys J) and *Verdon v Wellington Newspapers Limited* (Unreported, High Court Wellington, A245/85, 4 May 1983, McGechan J)). He accepted that the second amended statement of claim remained defective because it did not particularise the basis upon which the plaintiff maintains that the defendants were actuated by malice. He also accepted that the nature of the loss allegedly suffered by the plaintiff has not yet been pleaded with sufficient particularity. In those circumstances Mr Murray sought a

further adjournment so as to obtain further instructions which would enable him to file a third amended statement of claim. In making that application Mr Murray was forced to acknowledge that to date the plaintiff has shown little regard for the timetables which have either been imposed by the Court or agreed to by him.

[30] The plaintiff's application for a further adjournment was strongly opposed by Mr Fardell. He submitted that the plaintiff had been placed clearly on notice at the hearing on 4 February 2003 as to the defects which he needed to remedy by the time the hearing of the strike out application resumed. He submitted that the interests of justice required the proceeding to be brought to an end without further delay. He submitted therefore that the application for an adjournment should be refused and the proceeding should be struck out.

[31] At the conclusion of the hearing I made an order striking out the proceeding. In order to understand the basis upon which I took that step it is necessary to refer to the significance of the failure of the plaintiff to provide proper particulars regarding malice and loss.

Malice

[32] The second amended statement of claim pleads malice in the following terms:

> 13. The print and internet editions of the article were published maliciously.
>
> **Particulars of Malice**
>
> (a) the passages in the print and internet editions of the article which are set out in paragraph 10 hereof were calculated or likely to hold the Plaintiff up to ridicule and disparaging comment by reads of the article and in particular were calculated to produce the result that members of the legal profession in New Zealand would shun the Plaintiff and consider that such a person as the Plaintiff should not be briefed as counsel or legal advisor;
>
> (b) the First and Second Defendants knew that, or were reckless whether, the said passages and the allegations and imputations in paragraph 11 hereof were false;

(c) the Third Defendant was reckless whether the passages set out in paragraph 10 hereof and the allegations and imputations in paragraph 11 hereof, were false;

(d) the First and Second Defendants, by publication of the article, intended to hold the Plaintiff up to ridicule and disparaging comment by readers of the article and intended the result that the Plaintiff would be shunned by members of the legal profession.

[33] Mr Fardell submitted, and Mr Murray accepted, that the particulars given in support of the allegation are defective. They are defective because they do little more than recite the elements of malice and fail to provide any particularised basis for the plaintiff's claim.

[34] The importance of providing appropriate particulars in support of a pleading of malice is specifically addressed in Rule 181(2) to the High Court Rules. That rule provides:

> Where a party pleading alleges ... any malice ... the party pleading shall give particulars of the facts on which that party relies in alleging that condition of mind.

[35] Mr Fardell referred me to two judgments of this Court in which the question of particulars in this context were considered. In *Holmes v Anderson & Wellington Newspapers Limited* (supra) Hardie Boys J said (at p 4):

> It is desirable to emphasise the purpose of particulars of malice. It is not only to give the defendant notice of the case he has to meet. It is also to ensure that the plaintiff has some basis for his claim before the case is opened to the jury. He is not entitled to embark upon the trial in the hope that he may elicit some acknowledgement of malice as he proceeds. For this reason, the particulars must be more than general assertions of the kind that any plaintiff could make. The Rule requires the factual basis for the assertions to be stated.

[36] This statement of principle was referred to and affirmed by McGechan J in *Verdon v Wellington Newspapers Limited* (supra). McGechan J also said (at p 19):

> I join with the Master in starting out from the quoted principle recognised in *Holmes v Anderson & Wellington Newspapers.*
>
> A plaintiff pleading malice is to give particulars (a) sufficient to enable defendants to prepare evidence and (b) as a form of control to ensure

> there is some basis for the allegation of malice made. There is to be no room for "allege and hope".
>
> Moreover, I note the derivation from that principle, in relation to allegations of malice through statements known to be untrue, succinctly stated later in the same authority:
>
>> "Mr Goddard next complained of the absence of particulars to support the allegation that the defendants knew of the untruth of the statements. I think the complaint is justified. The plaintiffs must in my opinion state the grounds on which the allegations is (sic) based. That involves, I apprehend, a statement of what the true facts are said to be, and of the reasons for the claim that each of the defendants knew what they were."
>
> In short, a plaintiff who alleges through a statement untrue, and known to be untrue, cannot stop at those comfortable generalities. He must particularise the actual truth, and also the reasons such actual truth was known to the defendant. This must be done with sufficient specificity for a Court to be satisfied the defendant can prepare, and the plaintiff is not merely speculating.

[37] It is apparent from the passages referred to above that the provision of proper particulars in a case involving allegations of malice serves two functions. The first is to provide a proper basis upon which the defendant can prepare an informed rebuttal of the plaintiff's claim. The second is that it is a form of control to ensure that baseless claims are not made.

[38] At the heart of the plaintiff's case in this proceeding is an allegation that the defendants have deliberately set out to injure the plaintiff's professional standing. He says that they have done this by reporting allegations which they know are false. At the very least, he contends that the defendants were reckless as to whether or not those allegations were false. In my view it was essential in the present case for the plaintiff to set out the basis upon which he contended that the defendants either knew or were reckless as to whether or not the allegations were false. In the absence of any such pleading it is impossible for the defendants to prepare their defence to the plaintiff's claim.

[39] It should not have been difficult for the plaintiff to plead his case so as to ensure that such particulars were provided. By way of example, the plaintiff may

have alleged that the defendants knew or ought to have known that the allegations were false because of information which had been provided to them (or members of their staff) prior to the date upon which the article was published. A pleading containing these particulars would have alerted the defendants as to the basis of the plaintiff's claim and would have enabled them to investigate the allegation in order to determine whether it was true and, if necessary, to rebut it. Finally, it would have provided an objective means of ensuring that there was actually a factual basis for the pleading of malice.

[40] It is axiomatic that a plaintiff who pleads malice must have a proper basis for making that claim. In the absence of a properly particularised pleading it is impossible for the Court to judge whether or not there is in fact a proper foundation for those claims. When Mr Murray was asked directly as to the basis upon which the plaintiff maintained that the defendants knew (or ought to have known) that the allegations were false, he responded to the effect that his instructions did not enable him to make submissions on that point. He said, however, that he had no reason to believe that a factual basis did not exist. That form of assurance left the Court with little confidence as to the propriety of the basis upon which the claims in the present case have been made.

Loss

[41] The present statement of claim makes no reference to the type of loss which the plaintiff claims to have suffered. I have already referred to the practical significance of this issue so far as the defendants are concerned. It will affect the way in which they conduct their defence and it will also have a significant impact on the scope of discovery, interrogatories and requests for further particulars.

[42] It ought to have been a simple matter for the issue of loss to be pleaded in a proper manner. It was open to the plaintiff to frame his pleadings in such a way as to make it clear that he proposed to rely on the provisions of s 5 of the Defamation Act 1992. Alternatively, it was equally open to him to allege that he has suffered actual loss as a result of the publication of the article. As his statement of claim stands, however, the only pleading which comes close to dealing with this issue is paragraph

14 of the second amended statement of claim. That paragraph contains the following allegation:

> 14. As a consequence of the matters set out in paragraphs 10 to 13 the Plaintiff suffered considerable distress and injury to his feelings and has not received a brief as counsel or legal advisor in New Zealand since the date of publication of the article.

[43] The first part of this paragraph appears to provide a basis for the plaintiff's claim for aggravated damages. However, it is difficult to discern the relevance of the second part of the paragraph. On its face it is difficult to see how that pleading amounts to reliance on s 5 of the Act. It appears to relate more to an allegation that the acts of the defendants have given rise to a claim for special damages. Mr Murray tells the Court, however, that his client does not propose to pursue a claim for special damages. Instead he proposes to rely on s 5 of the Act.

[44] Obviously the amended pleadings ought also to have addressed this issue. It was a matter which was the subject of detailed submissions at the hearing on 4 February 2003. I expected that this matter would also have been attended to in the second amended statement of claim.

Conclusion

[45] Mr Murray's primary submission in support of his application for a second adjournment of the strike out application was that he had not appreciated the significance of the principles referred to by Hardie Boys and McGechan JJ in the passages from *Holmes* and *Verdon* cited above. He accepted that as counsel he had a responsibility for properly preparing the case on behalf of the plaintiff. He submitted, however, that the interests of justice required that the plaintiff be given one further opportunity to put his pleadings in order.

[46] Whilst they are helpful to illustrate the point which was the focus of submission, I do not consider that *Holmes and Verdon* do more than emphasise a principle which is well known in this area of the law. An allegation that a defendant has deliberately published injurious material which it knows to be false is a very serious allegation to make. If proved, it could undoubtedly lead to a finding that the

tort of injurious falsehood has been made out. In those circumstances the Court is entitled to be assured that there is a real basis for the claim which is made. It must be disclosed in properly particularised pleadings. Equally the defendant must be able to respond to the claim on an informed basis. I consider that these are elementary principles, and that they ought to have been appreciated even without reference to the passages referred to from *Holmes* and *Verdon.*

[47] I bear in mind also the fact that the plaintiff is not a lay litigant. He is one of Her Majesty's Counsel evidently practising in Sydney. Mr Murray advised me that one of the reasons for the delay in filing documents in this case is that they have had to be sent to the plaintiff for checking and approval. This indicates quite clearly that the plaintiff himself has played an active role in the manner in which the case has been pleaded and conducted.

[48] The plaintiff has now had two opportunities to correct his pleadings. When the matter was adjourned on 4 February 2003 he can have been under no illusions as to the likely consequences of failing to correctly plead his case on the third attempt. Notwithstanding this fact the statement of claim remains seriously defective.

[49] In those circumstances I formed the clear view that a real issue arose as to whether or not there is in fact a real and proper basis for the plaintiff's allegation that the defendants published material which they either knew to be false or were reckless as to its falsity. The continued failure of the plaintiff to provide particulars of this allegation leads to the inference that there is no proper basis for the plaintiff's claims. Mr Murray was certainly unable to point me to any matter which could be pleaded by way of particulars to support them. In those circumstances I reached the view that it was appropriate that matters be brought to a head now, and that this proceeding should be stopped before the defendants incur further needless expense. For those reasons I made an order striking out the second amended statement of claim in its entirety.

Costs

[50] Mr Fardell submitted that costs in respect of the proceeding generally should be awarded on a category 2B basis but that costs be awarded in respect of the hearing on 2 April 2003 on an indemnity basis. He submitted that the failure of the plaintiff to properly replead the case rendered the success of his latest application inevitable, and that the Court should mark its disapproval of the manner in which the plaintiff's case had been conducted. He advised the Court that the defendants' actual costs in respect of the hearing of the application amounted to approximately $5,000.

[51] I considered that indemnity costs were not warranted, but that this was an appropriate case for the award of increased costs. I therefore awarded costs to the plaintiff in the sum of $3,000 together with disbursements as fixed by the Registrar in relation to the present application. The plaintiff is also entitled to costs in respect of the balance of the proceeding (other than in relation to steps for which costs have already been fixed) on a category 2B basis together with disbursements as fixed by the Registrar.

[52] I direct that all costs are to be paid out of the funds presently held by the Registrar.

Master G Lang

Signed at: 12.45 pm on: 4 April 2003.