**IN THE HIGH COURT OF NEW ZEALAND** **CIV 2003 404 03497**
**AUCKLAND REGISTRY**

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| **BETWEEN** | RAFAEL VITR GERDELAN |
| | **Plaintiff** |
| **AND** | THE PROBLEM GAMBLING FOUNDATION INC |
| | **First Defendant** |
| **AND** | TV3 NETWORK SERVICES LTD |
| | **Second Defendant** |
| **AND** | WILSON & HORTON LTD |
| | **Third Defendant** |
| **AND** | SUSAN COURT |
| | **Fourth Defendant** |

**Hearing**: 16 May 2005

**Counsel**: T J Darby and G E Minchin for Plaintiff
D H McLellan for First Defendant
T Allan for Second and Fourth Defendants
B D Gray for Third Defendant

**Judgment**: In accordance with r 540(4) I direct the Registrar to endorse this judgment with the delivery time of 3.00 pm on Tuesday the 7th day of June 2005.

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**RESERVED JUDGMENT OF RONALD YOUNG J**

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[1] These proceedings involve an action for defamation by the plaintiff. In this interlocutory application each of the defendants seek an order that a preliminary question be determined before trial that words published by the defendants are not

reasonably capable of bearing the particular meanings pleaded by the plaintiff. And secondly, each of the defendants ask me to determine whether the pleadings of the plaintiff provide any basis for a claim of aggravated damages.

[2] The plaintiff accepted that the two questions raised by the defendants could and should be the subject of a separate determination before trial pursuant to r 418 High Court Rules. I agree with this approach and make formal orders that the separate preliminary questions identified by each of the defendants are properly separate questions to be decided now before trial.

**Factual background**

[3] The factual background can be briefly stated. Mr Gerdelan, the plaintiff, was the Executive Director of the Problem Gambling Foundation. Television 3 through its 20/20 current affairs programme shown on 23 September 2003 alleged that there were serious questions about the way Mr Gerdelan ran the Problem Gambling Foundation and how he was spending the money of that organisation. That television programme involved an interview with the fourth defendant. The following day, the Chairman of the Problem Gambling Foundation Dr Richard Adams and a board member, Mr Northey, were separately interviewed by Linda Clarke on Radio New Zealand's 9.00 to noon programme regarding Mr Gerdelan. On Monday 23 September and on Wednesday 25 September the New Zealand Herald published two articles also relating to Mr Gerdelan and the Foundation.

[4] The plaintiff alleges that Dr Smith and Mr Northey as representatives of the Problem Gambling Foundation, Can West TV Works Limited as the owner of TV 3, APN New Zealand Limited as the owner of the New Zealand Herald and Susan Court, a previous employee of a predecessor of the Problem Gambling Foundation, all defamed him. The plaintiff seeks general damages of $400,000, aggravated damages of $100,000 and special damages.

**The first defendant's applications**

[5] The first defendant's application is that the following questions be determined separately and before trial pursuant to r 418:

a) Whether the words pleaded at paragraphs 10 and 12 of the fifth amended statement of claim are capable of having the meanings ascribed to them in paragraphs 11 and 13 respectively.

b) Whether the conduct pleaded in paragraph 15 provides any basis for a claim for aggravated damages.

[6] The first defendant's application essentially alleges that the words published are not capable of having the meanings alleged by the plaintiff, that aggravated damages should not be separately pleaded and the alleged aggravating acts are not capable of being aggravating.

**Test to be applied**

[7] Gillooly, The Law of Defamation in Australia and New Zealand, summarises the correct approach to ascertain whether the words used are reasonably capable of being the meaning alleged at p34:

> In determining whether what, if any, imputations are conveyed, the matter is considered from the point of view of a hypothetical audience comprising average members of the community. The test is: what would ordinary reasonable people understand by the matter complained of? What meaning would they divine from the words employed by the defendant?

[8] Blanchard J in *New Zealand Magazines v Hadley* (CA74/96 24 October 1996) said:

> It is worth stating some relevant principles of the law of defamation which were helpfully assembled for the Court by Mr Latimour. In determining whether words are capable of bearing an alleged defamatory meaning:
>
> a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or -her head after reading the publication.

d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.

f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v News Group Newspapers Limited* [1995] 2 AC 65, 72.

[9] I adopt this test as useful in this case. I keep in mind mere suspicion of either impropriety or guilt by the use of such words as "investigation", "suspected" and "concerning" do not illustrate a claim of guilt. (See *Ah Koy v Television New Zealand (TVNZ) & Anor* (HC Auckland, M852/00 12 July 2000, Anderson J).

[10] The applicant (defendant) also submits in this case that there is an important distinction between imputing an act and imputing a condition. The illustration is given in Gillooly as follows (p34):

> To say of a woman that she murdered her mother is to impute an act; to say of a man that he is corrupt is to impute a condition. Thus, the imputations are those charges or allegations made with respect to the plaintiff that are conveyed by the matter complained of.

[11] I keep in mind Anderson J's comments in *Ah Koy* (supra):

> The meanings of which the words complained of are capable is a question of law but is answered by reference to language, conduct and context.

And I consider relevant that the source of the comments made were two persons who were effectively the plaintiffs employer and board members who had the imprimatur of truthfulness.

**This case - first defendant**

[12] With that background I turn to the causes of action against the first defendant. I set out firstly paragraphs 10 and 11 of the fifth amended statement of claim:

> 10. In the interview with Richard Northey the following words were broadcast of and concerning the Plaintiff.
>
> ***1*** ***NORTHEY:*** *the executive director misled the Board that there was anything to, to report of, in terms of financial profit. (alright). When we appointed our own half time person before I came on the Board she took up duties in April. She didn't have a line of reporting to the Board either but because she was concerned she did communicate to the Chair and Deputy Chair and we did resolve at the following meeting that she also report to the Board.*
>
> ***2*** ***CLARK:*** *Because until that occurred basically Mr Gerdelan...*
>
> ***NORTHEY:*** *The reporting was done by Ralph, that's right.*
>
> ***CLARK:*** *And he was essentially gatekeeping the information that the Board was getting.*
>
> ***NORTHEY:*** *Yes that's effectively what I think happened."*
>
> ***NORTHEY:*** *A challenge I guess to a voluntary organisation*
>
> 11. In their natural and ordinary meaning the words set out above in paragraph 10 and identified as Excerpts 1 and 2 meant and were understood to mean:
>
> 1 the Plaintiff was guilty of deceitful concealment from the First Defendant's Board and its accountant of particulars of expenditure he alleged he had incurred in carrying out the business of the First Defendant,
>
> 2 the Plaintiff kept financial information from the Board and so abused his position as Executive Director of a voluntary organisation, respectively.

**Paragraphs 10.1 and 11.1**

[13] The defendant points out that the first statement made by Mr Northey does not give the full quote from the broadcast and it is necessary to do so to understand the appropriate context. The full reply of Mr Northey was:

> Yes, well, a firm of outside accountants was appointed to do the accountancy work and as far as I can tell that firm was given insufficient information and the Executive Director misled the Board that there was anything to, to report of, in terms of financial profit . . .

[14] It is not clear from paragraph 11.1 exactly what the plaintiff alleges was the natural and ordinary meaning. The meaning alleged is that Mr Northey had said Mr Gerdelan was guilty of deceitful concealment from the Problem Gambling Board and its accountants of particulars of expenditure Mr Gerdelan alleged that he (Mr Gerdelan) had incurred in carrying out the business of the first defendant.

[15] The interview by Linda Clarke focussed primarily on the responsibility of Board members for oversight of Mr Gerdelan. Essentially, Ms Clarke was suggesting that the Board had not adequately investigated previous complaints about Mr Gerdelan and when it became clear there were problems it had not moved swiftly or strongly enough to investigate these serious allegations. However, there was also considerable discussion about the circumstances under which Mr Gerdelan had apparently got into difficulties. What was being suggested was that he had misused, in some way, a credit card. The first concerns arose in 2001 regarding an alleged misuse of a credit card by Mr Gerdelan. It was in that context that Mr Northey made his comments about a firm of outside accountants being appointed, the lack of information and the misleading of the Board by Mr Gerdelan. The exact phrase used by Mr Northey ("to report of, in terms of financial profit") does not make sense in the context of the discussion. There was a claim that Mr Gerdelan misled the Board in terms of financial profit. It is difficult to speculate as to what exactly was meant here however instead of "financial profit" "financial information" comes immediately to mind. Essentially what was being said by Mr Northey was that even although independent accountants had been appointed to audit financial information Mr Gerdelan had been misleading the Board that there was anything of significance to report financially.

[16] I return again to the alleged natural and ordinary meaning of these words. As I have said paragraph 11.1 makes little or no sense. What Mr Northey was saying, in my view, in the natural and ordinary meaning of the words used by him was that Mr Gerdelan had misled the Board that there was any relevant financial information of importance by withholding that information. That allegation was in the context of allegations being made about his credit card spending. Misleading the Board obviously carries with it either deliberate concealment or deliberate untruths. I would be prepared to allow the plaintiff to amend this allegation. The allegation as to the natural and ordinary meaning of the words should be that the plaintiff misled the first defendant's Board by concealing relevant financial information from the Board.

**Paragraphs 10.2 and 11.2**

[17] Paragraph 11.2 as pleaded by the plaintiff makes no sense. Whether the first defendant is a voluntary organisation is irrelevant. The second alleged ordinary meaning adds nothing to the first as redrafted and I propose to also strike that out.

[18] I turn now to the second series of allegations arising from the radio interview between Linda Clark and Dr Peter Adams they are pleaded in this way:

> 12. In the same programme Linda Clark interviewed Dr Peter Adams and the following words were broadcast of and concerning the plaintiff:
>
> *1* ***ADAMS:*** *The problem was that we were deceived and we weren't, we were not expecting that.*
>
> *2* ***ADAMS:*** *We have only become progressively aware of the extent of the deception.*
>
> *3* ***ADAMS: …*** *We didn't know he was using a Visa card and we then proceeded with trying to find out what was going on and asking him to reconcile the amounts he had spent.*
>
> *4* ***CLARK:*** *But he had credit cards and one of them he had no authority to use.*
>
> ***ADAMS:*** *The Visa credit card we were not aware of.*
>
> *5.* ***ADAMS****: Yes, in what we have worked out in the last couple of days is that we were getting and the information that the accountants were getting was incomplete. He had withheld*

*statements of accounts and bills from them and was paying them himself. We are only just starting to piece all that together. It was a systematic deception.*

13. In their natural and ordinary meaning the words set out above in paragraph 12 and identified as Excerpts 1 to 5, spoken by the first defendant and broadcast by Radio New Zealand on national radio, of and concerning the Plaintiff, were meant and understood to mean:

    1 the plaintiff had deceived his employers

    2 the plaintiff was guilty of a cover up

    3 the plaintiff was a fraudster who had misappropriated a credit card

    4 (a) the plaintiff was a fraudster who had misappropriated a credit card, or

    (b) the plaintiff had improperly used an unauthorised credit card

    5 (a) the plaintiff was a fraudster who had misappropriated a credit card, or

    (b) the plaintiff systematically deceived his employers by using an unauthorised credit card respectively.

**Paragraphs 12.1 and 13.1**

[19] Paragraph 13.1 simply reflects what Dr Adams said and is the ordinary meaning of his statement. It should not be struck out.

**Paragraphs 12.2 and 13.2**

[20] As to paragraph 13.2 this is no more than a repeat of 13.1. It adds nothing to paragraph 13.1 and should be struck out.

**Paragraphs 12.3 and 13.3**

[21] As to paragraph 13.3, there are essentially two allegations here as to natural and ordinary meaning of the words. Firstly, Mr Gerdelan was a fraudster and secondly he was someone who had misappropriated a credit card. As to the "frauster" allegation this cannot arise as a natural and ordinary meaning of the words used and the pleading should be struck out. The second part is an allegation of

misappropriation of a credit card. Misappropriation in this context has suggestions of dishonest taking or obtaining. Dr Adams told Ms Clarke that Mr Gerdelan was using a credit card that they did not know he had. I do not see that this is allegation of misappropriation of a credit card. It does not contain any allegations of dishonesty in this context. The whole allegation should be struck out.

**Paragraphs 12.4 and 13.4**

[22] As to allegation 13.4(a) for the same reasons as in paragraph [21] above the plaintiff cannot establish that the words used by Dr Adams meant that the plaintiff was a fraudster who had misappropriated a credit card. Paragraph 13.4(a) will be struck out.

[23] As to 13.4(b), there are two alleged meanings. Firstly improper use of the credit card, secondly that the credit card was unauthorised. As to the latter it is clear that Dr Adams was alleging that Mr Gerdelan had used a credit card that had not been authorised by the Foundation.

[24] As to improper use, I am satisfied that this alleged meaning is justified in the circumstances. Each defendant made the point that the use of the word "improper' can be so inappropriately vague as to be meaningless in the context of pleadings in defamation. As a general proposition this may have force unless the test against which impropriety is to be measured is identified. Here it is. Essentially what Dr Adams was saying is that the Board had not agreed that Mr Gerdelan could use the credit card and for him to do so was against Board policy. He was also saying this was a credit card Mr Gerdelan had no authority to obtain let alone use. In those circumstances the context in which impropriety is alleged is clear and paragraph 13.4(b) may remain.

**Paragraphs 12.5 and 13.5**

[25] Paragraph 13.5(a). The claim is that the words used meant the plaintiff is a fraudster who had misappropriated a credit card. For the same reasons that I have identified above that allegation is struck out.

[26] Paragraph 13.5(b) alleges systematic deceit by the use of an unauthorised card. It was difficult to establish, when Dr Adams mentions systematic deception, whether he is talking about systematic deception by the use of an unauthorised credit card, or systematic deception by the, withholding of accounts, paying these accounts himself, and providing incomplete information to the Board and to the accountants. Therefore paragraph 13.5(b) should remain with amendment so it is clear the allegation as to the ordinary meaning is that the plaintiff systematically deceived his employers by providing information to the Board and to the accountants that was incomplete and withholding statements of accounts and bills from the Board and the accountants. I would allow an amendment accordingly.

**Aggravated damages - first defendant**

[27] Two issues arise:

a) Whether pleading aggravated damages is appropriate.

b) In any even whether the allegations of aggravation are indeed capable of being in aggravation of damages.

[28] The plaintiff pleaded at paragraph 15 of the statement of claim as follows:

> 15. The conduct of the First Defendant through its Board members in making and publishing the statements complained of by the Plaintiff is aggravated by the following facts:
>
> (i) The fact that even a perfunctory enquiry by Richard Northey would have established that both the Diners Club credit card and the Visa credit card were used by the Plaintiff with the full knowledge and authority of the First Defendant's Board.
>
> (ii) The fact that Dr Peter Adams' was on the First Defendant's financial management and personally attended the meeting of that body at which he agreed to provide the Plaintiff with the Visa card.
>
> (iii) The facts that Dr Peter Adams was a paid professional director and chairman whose function it was to oversee the operation of the First Defendant and Richard Northey was paid consultancy and attendance fees by the First Defendant.
>
> (iv) The fact that statements made by Richard Northey and Dr Peter Adams and complained of by the Plaintiff were

> made recklessly and without any or any due regard as to the damage that would be inflicted on the character of the Plaintiff particularly in the circumstances in which a formal audit of the finances of the Foundation had been commissioned with KPMG.

[29] And he seeks separate aggravated damages of $100,000.

[30] In my view it is not appropriate for a separate amount to be pleaded for aggravated damages. It is appropriate to identify features of aggravation which go to total compensatory damages claimed but not separate damages for aggravation. I adopt the approach of Tipping J in *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 when he said

> [59] In *Attorney-General v Niania* [1994] 3 NZLR 106, I suggested that the expression "aggravated damages" was apt to cause difficulties and would be better removed from the legal lexicon to the extent that it suggests there are damages which fall into a discrete category called aggravated damages. I will not repeat the reasons I gave in *Niania* at pp 111 – 112. My suggestion is referred to with approval by the learned authors of Todd's The Law of Torts in New Zealand, 3rd ed, 2001, para 25.3.3, p 1186. This case demonstrates vividly how the continuing use of the expression "aggravated damages" can cause quite unnecessary problems.
>
> [60] In reality damages fall into two categories only: compensatory and punitive. Compensatory damages are capable of being both general and special but that distinction is beside the present point. The amount of compensatory damages due to a successful plaintiff will depend on the extent of the loss or harm involved. That loss or harm may be economic or it may be in the form of damage to reputation, feelings and so on; in other words, it may be harm which is felt in the mind rather than in the pocket. Where the loss is economic it defines itself without there being any necessity to invoke concepts of aggravation or mitigation. In economic terms the loss is greater or less depending on the effect of the wrong on the victim's pocket.
>
> [61] In cases where the damage is mental, the degree of harm will similarly be more or less according to the nature of the wrong and the way and circumstances in which it was inflicted. Again it was quite unnecessary to speak of aggravated damages. It is sufficient and indeed more helpful and accurate to speak, if necessary, of damages, the amount of which has been increased (or aggravated, if you like) by reason of certain features of the case. Even in cases of so-called aggravation no attempt can or should be made to fix a base figure and then add what is seen as necessary for the aggravation. Only one composite exercise and ultimate figure is involved.

That portion of the prayer therefore should be struck out.

**Paragraph 15**

[31] As for the aggravating features paragraphs 15(i) and (ii) if appropriately re-pleaded could constitute aggravating features. Essentially they are allegations that Mr Northey and Dr Adams knew that the Diners Club credit card and Visa card used by the plaintiff were used with the full knowledge and authority of the Board and that Dr Adams knew that the Visa credit card used by the plaintiff was one that had been provided by the Board. Essentially therefore this is an allegation that both knew at the time they made their statements that they were false.

[32] Paragraph 15(iii) is irrelevant and is not an aggravating feature. Paragraph 15(iv) is essentially a repetition of (i) and (ii). I therefore strike out the aggravating features included in 15(iii) and (iv) and allow with amendments 15(i) and (ii). I provide for time to re-plead at the end of this judgment.

**Second and fourth defendants**

[33] I do not propose to repeat the relevant legal issues with regard to the second and fourth defendants identified already in this judgment. On Sunday 22 September 2003 the TV3 20/20 programme was shown. Paragraphs 20 and 21 of the statement of claim relate to these defendants as follows:

> 20. The transcript of *Counting the Cost* containing the words complained of which were broadcast and published by the Second Defendant, CanWest TVWorks Limited, concerning the Plaintiff is as follows:
>
> ***1*** ***INTERVIEWER:*** *Now former staff have new worries. They're afraid he's spending up large using Foundation money, 60% of which comes from the Government.*
>
> ***2*** ***INTERVIEWER:*** *Not only that, we've obtained the records of Ralph Gerdelan's spending. The summary of the spending records we have from Ralph Gerdelan's office shows he spent $281,000 on his company credit card,*
>
> ***3*** ***INTERVIEWER:*** *Sue Court worked for Ralph Gerdelan for 4 years, but she left after clashing with him over his spending. She did not want him to have a credit card.*
> ***COURT:*** *I said no, that I didn't think that it was appropriate for a not for profit organisation to have credit cards issued to senior staff and I didn't want him to have a credit card because I felt I would lose control of the expenditure then.*

**4** ***INTERVIEWER:*** *Sue Court as the Foundation's accountant had more immediate problems. She was even worried about the petty cash.*
***COURT:*** Petty cash would be kept under lock and key.
***COURT:*** *We used to hide it in various filing cabinets around the place so that only the receptionist and I would know where it was so that nobody could get in the weekends and use petty cash for unauthorised purchases, and we kept a very small petty cash float, less than $100.*
***INTERVIEWER:*** *Why did you do that?*
***COURT:*** *Because sometimes we'd come in and the petty cash would have disappeared or there would be an IOU to say that it had been used for something.*
***INTERVIEWER:*** *And who would have written that IOU?*
***COURT:*** *Usually Mr Gerdelan.*

***5*** ***INTERVIEWER:*** *Sue Court left last year. She believed Ralph Gerdelan forced her out because she asked too many questions about money.*

***6*** ***INTERVIEWER:*** *Why would you have retail spending like that?*
***COURT:*** *I have no idea. There should be no reason for retail spending.*

***7*** ***INTERVIEWER:*** *Questions have been raised by at least one board member ... he was concerned Ralph Gerdelan had raised the limited on his credit card from $20,000 to $60,000 without seeking the permission of the board.*

***8*** *A former senior staff member as told 20/20 this year's audit has been delayed because Ralph Gerdelan has provided so few receipts of his spending. Spending this former staff member says caused a crises in May when the Foundation ran out of money and couldn't pay its basic bills ...*

21. In their natural and ordinary meaning the words set out above in paragraph 20 and identified as Excerpts 1 to 8, spoken and broadcast by the Second Defendant of and concerning the Plaintiff were meant and understood to mean:

**1** the Plaintiff was profligate in his expenditure of monies which had come from the public purse,

**2** the Plaintiff had spent $281,00 of the First Defendant's money on himself,

**3** the Plaintiff forced Sue Court out of her employment because she tried to limit his spending,

**4** (a) the Plaintiff stole the petty cash,
(b) the Plaintiff improperly took money from the petty cash,

**5** the Plaintiff forced Sue Court out of employment because she was inquiring about his proper spending of the First Defendant's money,

**6** the Plaintiff had spent money belonging to the First Defendant on retail goods for himself,

| | |
|---|---|
| **7** | the Plaintiff had acted improperly so as to increase his ability to spend money belonging to the First Defendant, |
| **8** | the extent of the Plaintiff's improper spending was such that the Second Defendant could hardly function, |

The second and fourth defendants do not seek to strike out allegations (1) or (5) but do seek to strike out allegations 2, 3, 4, 6, 7 and 8.

**Paragraphs 20.2/21.2**

[34] The alleged meaning in 21.2 is that the plaintiff had spent $281,000 of the first defendant's money on himself. In my view there is no suggestion in the interview or the statement by the interviewer that supports this meaning that Mr Gerdelan spent $281,000 of the Problem Gambling Foundation's money on himself. It is simply not justified by the interview. No explicit claim is made that he spent all the money on himself nor is the ordinary meaning of the words in context capable of such a leap. I therefore strike out allegation in paragraph 21.2.

**Paragraphs 20.3 and 21.3**

[35] As to alleged meaning in paragraph 21.3 it claims Mr Gerdelan forced Sue Court out of her employment because she tried to limit his spending. This allegation is not open on the pleaded section of the interview even taking account of the whole of the circumstances. The interview records Ms Court left her job after a disagreement with Mr Gerdelan over his spending. She agrees that she did not think that he should have a credit card because she was concerned that she would lose control of expenditure as the accountant. There is no natural and ordinary meaning from this that the plaintiff forced her to resign. Indeed the natural and ordinary meaning is that she left because she could not accept Mr Gerdelan's rules relating to credit card access and use as appropriate. I strike this allegation out.

**Paragraphs 20.4 and 21.4**

[36] Paragraph 21.4(a) alleges the meaning that the plaintiff stole the petty cash. This is based on the section of the interview relating to petty cash. It must be looked at of course as a whole. The first concern the programme expresses is that Ms Court,

as the Foundation's accountant, was worried about the petty cash and kept it under lock and key so that nobody could get to the money at the weekends and use the petty cash for unauthorised purchases. She went on to say that sometimes petty cash would have disappeared or there would be an IOU to say it had been used and that the IOU would have been signed "usually" by Mr Gerdelan. I do not consider that the inference available from that conversation is that Mr Gerdelan stole petty cash. Indeed the contrary seems to be suggested, that Mr Gerdelan left an IOU when he took petty cash. While the accountant found his use of petty cash frustrating and irritating I reject the suggestion that she said he was being dishonest.

[37] The alleged meaning in paragraph 21.4(b) is that the plaintiff improperly took money from the petty cash. There is an implication from Ms Court that Mr Gerdelan's use of petty cash and IOU's was inappropriate. Essentially I consider the implication was that it was inconvenient. There is no suggestion that Mr Gerdelan was breaching any law or organisational rule in taking petty cash and leaving IOU's. It may have been inconvenient and irritating to the accountant but I cannot see how this is an allegation of impropriety or indeed how it could be defamatory. Paragraph 21.4(b) is struck out.

**Paragraphs 20.6 and 21.6**

[38] Paragraph 21.6 alleges the meaning that the plaintiff had spent money belonging to the first defendant on retail goods for himself. The context to this allegation is that Ms Court was shown a series of documents detailing retail spending by Mr Gerdelan using the first defendant's credit card. She was asked why such retail spending would have been made on the first defendant's credit card held by Mr Gerdelan. She said there should be no reason for retail spending. There is nothing in the interview or in what Ms Court says arising from the natural and ordinary meaning of the words that the retail spending was for Mr Gerdelan. I emphasise the alleged meaning that is not justified is that the goods were for Mr Gerdelan. This alleged meaning is struck out.

**Paragraphs 20.7 and 21.7**

[39] As to paragraph 21(7), the alleged meaning is that in raising the limit on his credit card from $20,000 to $60,000 without seeking the permission of the Board Mr Gerdelan had increased his ability to spend money belonging to the first defendant and had so acted improperly. I think with amendment this alleged meaning can properly be left as a natural and ordinary meaning arising from the interview. The interviewer said that Mr Gerdelan had raised the limited on the credit card from $20,000 to $60,000 without seeking permission of the Board. "Improper" in this context therefore clearly meant that Mr Gerdelan had acted without the permission of the Board in circumstances where such permission was required. The second part of the allegation in paragraph 20(7) however does not properly arise, that is, the alleged meaning he raised the limit so that he could "increase his ability to spend money belonging to the first defendant". It is appropriate to claim that the words in their natural and ordinary meaning meant that the plaintiff had acted improperly by acting contrary to the Board's rules in raising the limit on the credit card from $20,000 to $60,000 without seeking the permission of the Board. Nothing further can be properly taken from these words. It would allow paragraph 21.7 with amendment reflecting my conclusion.

**Paragraphs 20.8 and 21.8**

[40] The final allegation is that the extent of the plaintiff's improper spending was such that the second defendant could hardly function. This arises from the interviewers' comment that Mr Gerdelan by his spending had caused a crisis when the Foundation ran out of money and could not pay its basic bills. I accept that paragraph 21(8) does reflect the natural ordinary meaning of the words used by the interviewer. The interviewer was saying that Mr Gerdelan's spending caused a crisis, that the Foundation ran out of money and that it could not pay its basic bills. An organisation that is in crisis and that has run out of money and cannot pay its basic rules could naturally and ordinarily be said to be able to hardly function. I refuse to strike out this allegation.

**Aggravated damages - second and third defendants**

[41] For the reasons I have given previously I am not prepared to allow a separate prayer for aggravated damages. A separate pleading identifying aggravating features is however appropriate. I accept the thrust of the defendant's submission that at the time of publication conduct to be aggravating must be conduct that is improper, unjustifiable or lacking in bona fides in other words it must amount to "misconduct" (see **"**Law of Defamation in Australia and New Zealand", Michael Gillooly, p202). Here the sum of paragraphs 23(i), (ii), (a), (b) and (c) of the fifth amended statement of claim, if properly pleaded are allegations of lack of bona fides and misconduct. What however must be alleged to bring them within aggravating conduct is that the second defendant in broadcasting and publishing the statements knew that the primary sources of the information contained in the programme were persons who were actuated by malice and animosity and that knowing this they proceeded with the publication. Allegation paragraph 23(ii)(d) is irrelevant and cannot be an aggravating feature. Allegation paragraph 23(iii) could be an allegation of lack of bona fides in the sense that it was misconduct to show the programme given the circumstances outlined in paragraph 23(i) and (ii) and given that an audit of the finances had been commissioned which might resolve the allegations against the plaintiff. Therefore, should the aggravating features identified by me as such be appropriately re-pleaded being paragraph 23(i), (ii)a, b, c and 23(iii) I would be prepared to allow those features as aggravating.

[42] Finally in paragraph 26 of the statement of claim the plaintiff claims as follows:

> By way of aggravating conduct the Second Defendant subsequently and on a number of occasions, particulars of which will be given at the trial of this proceeding, broadcast a scene from *Counting the Cost* to promote and advertise the new season of the documentary current affairs programme 20/20.

[43] There seems to be nothing to this complaint that I can see as aggravating. It is suggested that the second defendant has used visual material showing a "Counting the Cost" 20/20 programme still photograph as promotion generally for the current affairs programme. As I understand it there is no voice and no identification of the plaintiff as a person who had behaved improperly. Assuming it is nothing more than

that I would strike this out as an alleged aggravating feature. The plaintiff's counsel has not seen the broadcast. I am prepared therefore in those circumstances not to immediately strike out paragraph 26. I will give the plaintiff 21 days within which to view the trailer and make any further submissions if desired. If further submissions are made by the plaintiff the second defendant should have the opportunity of replying within a further 14 days.

**Third defendant**

[44] I do not propose to repeat the legal issues. The third defendant is the publisher of the New Zealand Herald who published two articles in the Herald on 23 September 2003 and on 25 September 2003 relating to Mr Gerdelan and the Problem Gambling Foundation. Paragraph 28 and 29 identify the complained of words and the natural and ordinary meaning allegations with regard to the 23 September article as follows:

> 28. On 23 September 2002 the *New Zealand Herald* newspaper printed and published an article in which the following statements appear of and concerning the Plaintiff:
>
> ***1*** *A Gambling Counsellor's $281,000 credit card spree sparks an urgent audit*
>
> ***2*** *High profile anti-gambling campaigner is under investigation after running up huge bills on Problem Gambling Foundation credit cards.*
>
> 29. In their natural and ordinary meaning the words set out above in paragraph 28 and identified as Excerpts 1 and 2 meant and were understood to mean:
>
> 1 the Plaintiff had been grossly extravagant in his spending of $281,000 being money of the First Defendant;
>
> 2 the Plaintiff was suspected of impropriety in regard to his expenditure of a huge amount of money belonging to the First Defendant respectively.

**Paragraphs 28.1/29.1**

[45] The first allegation arises from an article in the New Zealand Herald with the subheading "A Gambling Counsellors $281,000 Credit Card Spree Sparks an Urgent Audit". Of relevance is the introductory paragraph of the article which is the second

allegation made; "High profile anti-gambling campaigner is under investigation after running up huge bills on Problem Gambling Foundation credit cards". I am prepared with one minor amendment to accept the ordinary and nature meaning alleged. I do not see that the word "grossly" adds anything. I am satisfied however the natural and ordinary meaning of the words does illustrate "extravagant expenditure". The newspaper article alleges a spree and talks about the plaintiff "running up huge bills". In this context a spree combined with running up huge bills combined with the resulting need for an urgent audit all in my view go to illustrate an allegation of extravagant spending of the first defendant's money. With the amendment identified, paragraph 29.1 may remain.

**Paragraphs 28.2 and 29.2**

[46] As to 29.2 I agree with the third defendants that a report that Mr Gerdelan is "under investigation" does not mean he is suspected of impropriety in regard to his expenditure. It is difficult in any event to understand what suspicion of impropriety in this context means. By whom and in relation to what standard? Neither are identified by the plaintiff. I accept the third defendant's proposition that suspected impropriety means that he was simply under investigation. The only basis on which an investigation can raise suspicions is the implication that there is a need for an investigation which in turn indicates some form of uncertainty about the plaintiff's conduct. The plaintiff's allegation of suspicion of impropriety is so general and unhelpful here that it does not assist. I strike out the allegation in 29.2.

**Article of 25 September**

[47] Paragraph 32 and paragraph 33 complain about the article on 25 September 2005 in the following way:

> 32. On 25 September 2002 the *New Zealand Herald* newspaper printed and published a report of statements made by Richard Northey, the media spokesman for the First Defendant, in which the following statements appeared concerning the Plaintiff:
>
> **1** Gerdelan had cancelled card reissued

**2** The Problem Gambling Foundation learns how its non-suspended Executive Director got his hands on a Visa card – and claims he 'filtered' financial information to the Board.

**3** Anti-gambling campaigner Ralph Gerdelan spent thousands of dollars by getting a credit card belonging to his employers re-issued in his own name,

**4** Foundation Director, Richard Northery, said the Board had only just learned how Mr Gerdelan obtained a credit card in November. He had cancelled a card issued by Accountant Sue Court and used for general expenses and replaced it with one in his own name, said Mr Northey

**5** Mr Gerdelan's spending on the Diners Club card totalled $281,000.00 over 1 year

33. In their natural and ordinary meaning the words set out above in paragraph 32 and identified as Excepts 1 to 5 meant and were understood to mean:

**1** (a) the Plaintiff had fraudulently procured a credit card; or
(b) the Plaintiff had improperly procured a credit card,
**2** the Plaintiff was a fraudster who hid his action from his employers,
**3** the Plaintiff had defrauded his employer of thousands of dollars.
**4** (a) the Plaintiff had fraudulently obtained a credit card; or
(b) the Plaintiff had improperly obtained a credit card.
**5** in one year the Plaintiff had spent $281,000 of his employer's money on himself respectively

**Paragraphs 32.1/33.1**

[48] As to the first issue that Mr Gerdelan had the cancelled card reissued. The allegation that the natural and ordinary meaning is that Mr Gerdelan had either fraudulently or improperly procured the card.

[49] I agree with the third defendant that there is no ordinary and proper meaning capable of alleging fraud or any intentional dishonesty in obtaining the card. However I take a different view of the use of the term "improper'. The implication from the article I consider is clear that Mr Gerdelan obtained the credit card in breach of or contrary to the rules of the Problem Gambling Foundation. The article makes it clear that a credit card belonging to his employer was reissued in his own name and that the Foundation had only just learned how Mr Gerdelan obtained the Visa card. The circumstances under which the card had been replaced were detailed

in the article and the clear and ordinary meaning was that this was done in breach of Foundation rules. I therefore strike out the allegation of fraudulent procurement but allow the improper procurement alleged meaning.

**Paragraphs 32.2/33.2**

[50] The alleged meaning here arises from that part of the article relating to how Mr Gerdelan "got his hands on the Visa card and claims he filtered financial information to the Board". The alleged meaning is that Mr Gerdelan was a fraudster who hid his actions from his employers. There is no basis for the fraud allegations here either. The words are not reasonably capable of meaning that Mr Gerdelan was a fraudster. The first part of the published words add nothing to the previous allegations regarding improper procuring of a credit card. While the observation about improperly obtaining the credit card and the comment about "filtering" are in the same sentence the second comment is clearly intended to be a separate observation. The "filtering" comment does involve, in context, an allegation of hiding financial information from his employers. It could therefore be redrafted to include this allegation alone. I would therefore strike out paragraph 33.2 but allow it to be re-pleaded in the limited way that I have identified.

**Paragraphs 32.3/33.3**

[51] I note the claimed published words by the plaintiff leave off the end of the sentence actually published. The final words of the sentence are, "It was claimed yesterday". I am not convinced as the third defendant submits that the addition of the words "it was claimed" turns a proposition into a suspicion in the context of the words used. The sentence is no more than a repeat of the allegation of an improperly obtained credit card and the report of an investigation into his expenditure of thousands of dollars on this credit card. Reporting the fact of an investigation is not suggested to be defamatory and the improper obtaining of the credit card is already pleaded. This allegation should be struck out.

**Paragraphs 32.4/33.4**

[52] For the reasons already given the allegation of fraudulently obtaining cannot be sustained but the allegation of an improper obtaining can be. The first allegation is therefore struck out.

**Paragraphs 32.5/33.5**

[53] In my view the published words are no more than a factual account of what happened even in the context of the article. Nor can the implication that $281,000 was spent by Mr Gerdelan on himself be open for the reasons I have already given. This paragraph will be struck out.

**Aggravated damages – third defendant**

[54] For reasons already given aggravated damages should not be a separate prayer from the compensatory damages. I turn to the allegations of aggravation and consider whether they are in fact capable of aggravating damages. Paragraph 35 of the statement of claim alleges.

> 35. The conduct of the Third Defendant in publishing the words complained of by the Plaintiff in the article in the *New Zealand Herald* newspaper on 25 September 2002 was aggravated by reason of the following facts:
>
> (i) The language used was immoderate and sensationalised.
>
> (ii) The publication was reckless having regard to the fact that an audit had been commissioned with KPMG of the finances of the Foundation and that any proper or reasonable enquiry by or on behalf of the Third Defendant would have elicited the truth.
>
> (iii) The Plaintiff put the Third Defendant on notice of the Plaintiff's concerns by way of a letter of demand dated 10 February 2003. This letter referred to the publications complained of, stated that the Plaintiff had been defamed, sought an apology, requested a publication of a retraction and a statement of facts of the matter, sought payment of his costs to date and advised that if such public retractions were not made compensation would be sought. On or about 13 May 2003 the Third Defendant published further material prejudicial to the Plaintiff in which it was stated:

> *'Ralph Gerdalan ... who made much media mileage last year after admitting misuse of company credit cards. He resigned and repaid $35,000.*
>
> *Now a Consultant, he is suing the PGF for libel and seeks more than $500,000. Mr Gerdelan obviously feels it's a worthwhile gamble'.*

(iv) The further publication on 13 May 2003 (after the warning on 10 February 2003) contained a further error in that the Plaintiff had not in fact admitted misuse of company credit cards as alleged by the Third Defendant.

(v) The further publication on 13 May 2003 was worded in such a way as to deride and humiliate the Plaintiff, by asserting that he felt that it was a 'worthwhile gamble'.

(vi) The further publication on 13 May 2003 was made at the time of an international problem gambling conference in Auckland which was being attended by the Plaintiff who had a high profile in the field, which facts were known to the Third Defendant.

**Paragraph 35(i): Immoderate and sensationalised language**

[55] No detail is given in the pleading of this allegation. I see nothing in this category in the article beyond the use of colourful language. Given the plaintiff has identified nothing to justify the allegations of immoderate and sensationalised language this allegation of aggravation will be struck out.

**Paragraph 35(ii): Publication reckless**

[56] The article makes it clear that there was an audit of Mr Gerdelan's spending underway by KPMG. I do not consider that in publishing what was published the Herald aggravated damages by not waiting for the KPMG audit. This was a current newsworthy story, there was no additional damage incurred by failure to wait for the audit report. Nor is it suggested what "proper or reasonable" enquiry should have been made of whom or indeed what the truth is or was. I note the plaintiff was interviewed and his comments recorded. This proposition cannot therefore be an aggravating feature and I strike it out.

**Paragraph 35(iii), (iv), (v)**

[57] This is an allegation that after the plaintiff complained to the Herald about the original articles, the Herald further published comments stating that Mr Gerdelan had admitted misuse of company credit cards and commented about the defendant's civil action for defamation being in his mind a "worthwhile gamble". While the first alleged misstatement could be pleaded as a separate cause of action, it could also be an aggravating feature of any original defamation. The third defendant did not dispute that the second comment about "worthwhile gamble" could be an aggravation. I therefore allow both to remain as having the potential to aggravate damages.

**Paragraph 35(vi)**

[58] This is not an aggravating feature and will be struck out.

**General comments**

[59] I repeat now in this judgment what I said orally to counsel for the plaintiff during submissions. There are now five amended statements of claim, thus a total of six such statements. The defendants have not yet been required to plead in reply such has been the condition of the plaintiff's pleadings. While I am prepared to allow a further sixth amended statement of claim within the parameters indicated in this judgment, the plaintiff must accept this process is now very close to an end. Defamation pleadings require skill and experience to draft. Given six attempts by the plaintiff's legal advisors, without a clean, useable statement of claim perhaps counsel experienced in drafting such claims needs to be employed to ensure this claim does not founder on its self created procedural mire.

[60] The re-pleading will be limited so that the clearly untenable is not repeated. It should not include any of the allegations that I have struck out, nor should it include any of the allegations previously abandoned in previous statements of claim. It should be limited to re-pleading the allowed natural and ordinary meanings and aggravations identified in this judgment. There should also be a reasonable time limit on this further statement of claim. I therefore make an order that any further

amended statement of claim is to be filed and served within one month from the date of this judgment.

**Costs**

[61] Once again, the defendants have been put to considerable unnecessary trouble in bringing this application. Although not all of their claims have been successful, the vast majority have been. The vast majority have been caused by inadequate pleading by the plaintiff. The appropriate course here in my view is to make an overall order for costs. I also think it is appropriate as has previously occurred in this case to require payment of these costs immediately failing which the proceedings should be stayed. I therefore make an order for costs of $2,000 in favour of each of the three defendants, a total of $6,000, payable by the plaintiff within one month from date of this judgment. A failure to pay these costs will result in a stay of these proceedings until they are paid in full.

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**Ronald Young J**

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