**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA202/04**

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| | BETWEEN | NATIONWIDE NEWS PTY LIMITED<br>Appellant |
| | AND | THE UNIVERSITY OF NEWLANDS<br>First Respondent |
| | AND | ROCHELLE MARIANNE FORRESTER<br>Second Respondent |

Hearing: 15 November 2005

Court: Glazebrook, Hammond and Panckhurst JJ

Counsel: B D Gray for Appellant
R P Harley for Respondents

Judgment: 9 December 2005

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed. The decision of the Associate Judge is quashed and it is ordered that the proceeding is dismissed.**

**B Nationwide News is entitled to costs in the sum of $6000 with usual disbursements.**

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**REASONS**

(Given by Panckhurst J)

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## Introduction

[1] This proceeding concerns a claim for defamation brought by the respondents against the appellant company, which is the publisher of "The Australian" newspaper. The respondents allege that they were defamed in New Zealand as a consequence of an item being published in this country through the availability of The Australian online at a designated website. Following service of the proceeding the appellant filed a protest to jurisdiction and applied to have the proceeding dismissed. That question was heard and determined by Associate Judge Gendall who dismissed the appellant's application (HC WN CIV-2004-485-489).

[2] The appeal is against that decision. There was no appeal against a further determination of the Associate Judge, namely that New Zealand is the forum conveniens.

## Factual background

[3] The first respondent (Newlands) is a company incorporated at Wellington and is the owner and publisher of an internet website entitled "The University of Newlands". The second respondent (Ms Forrester) owns and is a director of Newlands.

[4] The University of Newlands' website advocates "a new approach to education" described as "distance education". It offers courses in nine subjects, including anthropology, economics, literature and sociology, which it teaches using "distance education techniques". In general terms students receive lecture notes and prescribed readings via the internet and are to be tested by providing essays and, ultimately, a thesis which may be through email.

[5] This website has, we infer, existed for some time, although the provision of courses has not in fact commenced to this point. Teachers are yet to be recruited and students are likewise yet to be obtained. It is alleged, however, that the operation of the intended business has been greatly hindered as a result of the harm occasioned to the reputations of Newlands and Ms Forrester by the appellant (Nationwide News).

[6] In September 2002 Nationwide News published on its website under the heading "Wannabe Unis" the following:

> **Universities to watch out for: The A-Z lists**
>
> An extensive guide to active, emerging and recent degree mills and officially unaccredited universities, compiled from original research by the *Higher Education Supplement*.
>
> **Degree Mills**
>
> These "universities" offer to "confer" degrees based on life experience, with prices ranging from $300 to about $10,000."

Then followed a list of the names of the various bodies or institutions. It ran to well in excess of 100 names. Included was the University of Newlands.

[7] For a short time prior to September 2002 another internet website, named "DegreeInfo.com" (which is unassociated with Nationwide News), published information concerning the University of Newlands. The website item included this:

> The University of Newlands is advertising on H-Net for history lecturers. Seems to be a new outfit, based in NZ. Fees quoted in US$, no mention of accreditation, no physical address on website … and seems to offer their degrees by essay-writing.

Importantly for present purposes the entry included Ms Forrester's name and Wellington address. It also noted that the technical contact for the University of Newlands was a provider situated in Santa Monica in the United States.

[8] The DegreeInfo.com item concluded on the note:

> Hello, The web page made me a little nervous with the lack of accreditation status? Is anyone familiar with this school?

Ms Forrester relies on this material as the basis for her personal identification in relation to the Nationwide News website. That is, because she is identified in the DegreeInfo.com website as closely associated with the University of Newlands, persons who downloaded both it and the Nationwide News item were able to forge the necessary connection between her and the University of Newlands.

[9] In September 2003 Newlands and Ms Forrester wrote to Nationwide News' solicitors complaining that the content of the website was defamatory and requesting removal of the reference to the University of Newlands from the list of so-called degree mills. This request was repeated in December 2003, but without result.

[10] In March 2004 this proceeding was issued. The words of the "Wannabe Unis" item are alleged to be defamatory in their natural and ordinary meaning. The sting alleged is that both Newlands and Ms Forrester were described as involved in the conferring of degrees which were worthless and involved in conduct which was dishonest and unethical. With reference to the harm caused, the statement of claim alleged that Newlands had suffered:

> "serious injury to (its) business prospects", in that the "publication is likely to cause pecuniary loss (because) potential teachers and/or students will have nothing to do with (Newlands) as it is believed to be a degree mill and will only confer worthless degrees, and partnership and/or other contractual arrangements with other educational providers will be impossible as (Newlands) is believed to be a degree mill and confers worthless degrees."

[11] In relation to Ms Forrester the claim alleged that the subject publication had caused serious injury to her personal, professional and academic reputation. Likely pecuniary loss was also alleged arising in part from Ms Forrester's ownership of another website, named Rochelle's Philosophy Website, from which she is said to

enjoy an international reputation. The plaintiffs claim general, aggravated and punitive damages, asserting that Nationwide News had acted and continued to act in flagrant disregard of their rights by not removing the University of Newlands from the "Wannabe Unis" list when requested in late 2003.

**The proceeding to date**

*Service*

[12] Service of the proceeding was effected on Nationwide News without leave of the Court granted pursuant to r 220. Rather, the plaintiffs relied upon r 219(a) and effected service without leave on the basis that an act in respect of which damages are claimed had occurred in New Zealand. The act was publication of the defamation which was said to have occurred through downloading from the relevant website by persons in New Zealand.

[13] On 6 May 2004 Nationwide News filed an appearance under protest to jurisdiction pursuant to r 131. Subsequently it applied pursuant to r 131(3) to dismiss the proceeding on the ground that the Court lacked jurisdiction to hear and determine it. In the alternative the application sought a stay so that the proceeding may be determined in Australia as the more appropriate forum.

[14] Various grounds were advanced in relation to the alternative applications. These included that Nationwide News does not have a business presence in New Zealand, its website is located in Australia, the proceeding had been improperly served in reliance upon r 219 and that in any event the statement of claim did not disclose a good arguable case. Nationwide News filed two affidavits in support of its applications. We shall refer to the contents of these shortly. Ms Forrester provided an affidavit in opposition.

*The High Court decision*

[15] In his decision of 17 August Associate Judge Gendall identified three matters which required his determination. These were:

(a) whether the plaintiffs had demonstrated a good arguable case in relation to r 219(a) (that is that publication of the defamation had occurred in New Zealand),

(b) whether the plaintiffs had also shown the existence of a good arguable case on the merits so as to justify the assumption of jurisdiction by a New Zealand Court, and

(c) whether New Zealand or Australia was the forum conveniens.

[16] Basing himself on the decision of the High Court of Australia in *Dow Jones & Co Inc v Gutnick* [2002] CLR 575, the Associate Judge held that publication of the alleged defamatory material had occurred in New Zealand through downloading:

> [35] To my mind, if a defendant chooses to upload information on the internet, being aware of its reach, then they assume the associated risks, including the risk of being sued for defamation. If it were held otherwise, namely, that publication occurred at the place of uploading, defendants could potentially defame with impugnity by uploading all information in countries with relaxed, or no, defamation laws.

On this basis the plaintiffs' reliance on r 219(1)(a) was held to be justified.

[17] Likewise, the Associate Judge found, albeit by a narrow margin, that the claim was sufficiently meritorious to justify assumption of jurisdiction over a foreign company. He was satisfied that the words relied upon were capable of bearing the defamatory meanings attributed to them. In relation to Newlands the Judge noted the need for evidence of pecuniary loss, or at least its likelihood, which was problematic given that the company was recently established and its business intentions were largely unrealised. With reference to the claim by Ms Forrester the Associate Judge noted the dependence place upon the DegreeInfo.com website for the purposes of her identification, a contention about which he had reservations.

[18] The essential conclusion was expressed in these terms:

> [49] Although, in my view, at this point the plaintiffs' claim does not appear to be a strong one, and given that the second plaintiff's present argument concerning identification is somewhat unconvincing, nevertheless I am satisfied that there is a serious question to be tried here in terms of the (*Bomac Laboratories Limited v La Roche Limited and Others* (2002) 7

> NZBLC 103, 627 (HC)) test and these matters should be the subject of proper inquiry at a substantive hearing.

[19] The Associate Judge was also satisfied that New Zealand was the appropriate forum for the hearing of the case. In that regard we note that counsel, Mrs Harley, advised the court that the claim on behalf of the second plaintiff was based on her local reputation, although the statement of claim asserted the existence of an international reputation by virtue of Ms Forrester's operation of the Rochelle's Philosophy Website. Because there is no appeal against this aspect of the judgment, we need not detail the Judge's reasoning.

**Rule 219(a) – an act which occurred in New Zealand**

[20] The rule relevantly provides:

> **When allowed without leave**
>
> Where in any proceeding a statement of claim or counterclaim and the relevant notice of proceeding or third party notice cannot be served in New Zealand under these rules, they may be served out of New Zealand without leave in the following cases:
> (a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand:

The matter relied upon to satisfy its terms is the act of publication. The plaintiffs maintain that through downloading "publication of the defamatory article occurred in New Zealand". On this basis service on an overseas defendant, without leave, was said by the plaintiffs to be justified.

[21] Mr Gray challenged this process of reasoning. He argued that it was not necessary for this Court to decide whether it should follow the decision of the High Court of Australia in *Gutnick*, since in his submission the plaintiffs could not point to evidence of publication by downloading in New Zealand in terms of that case anyway.

*Dow Jones v Gutnick*

[22] In these circumstances we proceed on the basis, without deciding, that *Gutnick* states the law in this country. What did the case decide? The context was

similar to that in the present case. *Dow Jones* is an American company which prints and publishes newspapers and magazines (including the "Wall Street Journal"). It also operates a subscription news site on the World Wide Web, on which was published the magazine article which gave rise to the proceeding. Mr Gutnick, a resident of Victoria, alleged that the article defamed him in Australia in relation to his probity as a businessman. Service was effected, without leave, in the United States. Dow Jones entered a conditional appearance and, (as in the present case) applied for the proceeding to be dismissed for want of jurisdiction or, alternatively, to be permanently stayed because trial in the United States was more appropriate. The plaintiff gave an undertaking to the Court to sue in no place other than Victoria.

[23] Unanimously, the High Court upheld decisions that the proceeding had been properly served out of Australia under the relevant rule and that Victoria was the appropriate forum. Whether downloading in one country of information which emanated from a server in another country, was an act of publication in the former was seen as the essential issue. There were, the Court noted, more than 500,000 subscribers to the relevant news service of whom approximately 1,700 were in Australia. Moreover, the fact of downloading in Victoria was the subject of a formal concession by the defendant in the Supreme Court of Victoria.

[24] For present purposes it is sufficient to refer to the joint judgment of Gleeson CJ, McHugh Gummow and Hayne JJ (Gaudron J and Kirby J delivering separate judgments) in relation to the issue of publication. At 25 it was noted:

> The tort of defamation, at least as understood in Australia, focuses upon publications causing damage to reputation. It is a tort of strict liability, in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care.

And later in the paragraph:

> … it is a tort concerned with damage to reputation and it is that damage which founds the cause of action.

[25] With reference to the occurrence of the tort and identification of the real question for determination, respectively, the judgment contained this:

> 26 Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.
>
> 28 If the place in which the publisher acts and the place in which the publication is presented in comprehensible form are in two different jurisdictions, where is the tort of defamation committed? That question is not to be answered by an uncritical application of some general rule that intentional torts are committed where the tortfeasor acts or that they are committed in the place where the last event necessary to make the actor liable takes place. Nor does it require an uncritical adoption of what has come to be known in the United States as the "single publication" rule …".

This is a rule that publication of defamatory matter, albeit occurring in several different places (typically different American states), nonetheless constitutes a single publication in relation to which only one action for damages can be maintained.

[26] The answer to the question earlier posed was given at 44:

> In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

*Was there downloading in New Zealand?*

[27] Mr Gray submitted that, even accepting this approach, New Zealand was not shown to be the place where the present alleged defamation occurred. The essence of his submission was that the Associate Judge, having agreed with the position taken by the High Court of Australia in *Gutnick*, failed to turn his mind to whether in fact there was a good arguable case of downloading in this instance.

[28] The most pertinent evidence on the point was contained in the affidavit of Mr W R Beeby an editorial manager with Nationwide News. He deposed that the education section of the Australian website had "an average of 500 'hits' a month of which approximately seven 'hits' a month originate from New Zealand". The plaintiffs did not adduce evidence which established that anyone in New Zealand, other than Ms Forrester, had downloaded the pages relevant to the alleged defamation.

[29] We seriously doubt that there was sufficient material before the Associate Judge to demonstrate that an act in respect of which damages are claimed had occurred in New Zealand, as required in terms of r 219(a). Typically the occurrence in New Zealand of something which is relied upon to justify service of the proceeding overseas, will not be contentious. Its occurrence will be a matter of record or at least something of which there is available evidence. But that cannot be said in this instance. It is at most a matter of supposition that someone in addition to the second plaintiff has downloaded the relevant material.

[30] There is, of course, a further complication in relation to Ms Forrester's position. Newlands is identified by name on the website. Ms Forrester is not. In her case there is only scope for harm to her reputation if someone also downloaded the DegreeInfo.com material or, perhaps, knew of her association with Newlands through some other source. This circumstance may suggest the potential for a distinction to be drawn between the two plaintiffs.

[31] With this in mind, and because we think it preferable to base our decision on whether there is a good arguable case on the merits, we turn to the second question, which requires a focus upon a range of considerations, of which whether there was publication by downloading in New Zealand is but one. This approach is, we consider, consistent with the observation of this Court in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd (No 2)* [1989] 2 NZLR 50 (CA) at 54:

> … the two-fold tests posed by the English Court of Appeal, a good arguable claim on the merits and a strong probability that the claim falls within the letter and spirit of the rule about service abroad, relate to questions that at least under (R 219(a)) merge into one in the present case."

**A good arguable case on the merits**

[32] Both counsel accepted the need for the existence of a good arguable case on the merits. This is the test most often articulated in the r 131 context. However it is as well to bear in mind what was said in *Kuwait Asia Bank*, supra, at 54:

> There would be some danger in treating any one formula as an invariable touchstone. The various speeches in the House of Lords in *The Brabo* ([1949] AC 326) confirm that view; the question is not a semantic one but one of judgment on the facts. The ultimate issue under R 131 is whether the Court is satisfied that there are sufficient grounds for it properly to assume jurisdiction. The strength of the plaintiff's case against the party served abroad and all the circumstances of the case have to be weighed. Where, as here, the action has a strong New Zealand association and arises from business or investment undertaken by a foreign company in New Zealand, we think that it is enough to show a good arguable case against the foreigner within (a) or (h). **If the dispute has little connection with New Zealand and it could be seen as exorbitant to assert jurisdiction over the foreigner, a stricter standard may well be appropriate**. (emphasis added)

*Bomac Laboratories Limited*

[33] With reference to the application of the test generally, counsel based their submissions on the decision of Harrison J in *Bomac Laboratories Ltd*. At [28] the Judge identified and described seven principles which he considered were to be applied in determining the answer to the "ultimate issue", whether jurisdiction should be assumed over a foreign person resident overseas.

[34] The Judge adopted as the first principle the need for restraint and as the second that the test is the existence of a good arguable case. Thirdly, the use of the description "good" was said to mean that the test was more rigorous than the threshold of tenability or arguability as applied in a strike-out context. It followed, Harrison J said, that there must be both a serious legal issue for trial and a credible or plausible factual basis supportive of such issue. Next, the Judge noted that typically a two-stage inquiry was necessary, being compliance with the letter and spirit of r 219 and assessment of the merits of the claim, although in practice the two issues would often merge.

[35] The fifth principle was set out in these terms:

> In practical terms, a plaintiff must provide evidence, normally by affidavit, to comply with the good arguable case test. However, it is not the Court's function to determine any areas of factual dispute between the parties; in the event of a genuine and plausible difference, which can only be determined on cross-examination, on a point which if proven would establish a good arguable case, the Court must assume jurisdiction. It must also take into account that the plaintiff has not had the benefit of discovery at this very preliminary stage. Nevertheless, the uncontested affidavit evidence must ultimately disclose sufficient grounds for the Court to assume jurisdiction.

[36] Finally the Judge noted that the degree of association or connection of the proceeding with New Zealand was always something to be considered in conjunction with a good arguable case test and that it is the plaintiff who bears the onus of demonstrating a good arguable case, both in terms of compliance with r 219 and on the merits.

[37] As was noted by Cooke P in delivering the judgment of the Court in *Kuwait Asia Bank*, New Zealand and English practice differs in relation to service out of the jurisdiction. In England leave is required under RSC Order 11,R 1. However, Order 12,R 8, the equivalent of r 131, enables a defendant to dispute jurisdiction by an application to the court to set aside service of the proceeding upon him. In such circumstances there may be a hearing in relation to jurisdiction as a preliminary issue, involving if necessary considerable inquiry into both the facts and the relevant law.

[38] By contrast as noted in *Kuwait Asia Bank* at 52:

> … the very absence of express provisions in R 131 for the trial of preliminary issues, discovery and other matters suggests that the rule is not intended to be a vehicle or substitute for the trial of major issues in the action itself.

Nonetheless, this Court's decision, affirmed on this point by the Privy Council ([1990] 3 NZLR 513), is authority for the proposition that there is an overarching discretion to decline jurisdiction over a foreign person or entity, the exercise of which, in common with the practice in England, may require careful inquiry into the facts and the law in order to determine the protest to jurisdiction.

[39] The nature of that inquiry was further considered in *Stone & Anor v Newman & Ors* CA3/02 21 March 2002, where McGrath J gave the reasons for the decision upon an application for leave to appeal in relation to a protest ruling. The case concerned a dispute as to the sale and purchase of a racehorse involving parties in New Zealand, Australia and North America.

[40] In declining the leave application the Court said this in relation to process:

> [24] The requirement that there be a good arguable case on the merits is in part directed at ensuring that a claim against a foreign resident defendant is not speculative. It must be borne in mind, however, in assessing that factor that, as the Court pointed out in its substantive decision in *Kuwait Asia Bank* (p51), Rule 131 makes no explicit provision for trial of issues of fact or discovery in relation to questions raised under the rule. Indeed a trial of the jurisdiction issue in most cases would subvert the purpose of Rule 131. The general expectation is rather that protests concerning jurisdiction under Rule 131 are to be decided at the outset of the case on affidavit evidence. To some extent the picture the Court has of the case may accordingly at this stage be incomplete in important respects.
>
> [25] In that context the focus of the Court in considering an application to dismiss for want of jurisdiction under Rule 131 must be on the allegations made in the statement of claim and the affidavit evidence the plaintiff has put forward in support of them. The Judge will of course have regard to the plausibility of that evidence, in light of all the material before the Court, including that in the defendant's affidavits. But in considering whether the plaintiff's account meets the required standard the Court should take into account the inability of the plaintiff to obtain discovery at this stage especially in relation to matters that might be within the exclusive knowledge of the foreign defendant. On the other hand where the principal documentary evidence in the case appears to be available and the plaintiff's assertions contradicting it vague or improbable, a Judge is certainly not required to accept uncritically the factual assertions on which it is submitted on behalf of a plaintiff that there is a good arguable case.

[41] This passage probably suggests a less prescriptive approach to how a protest to jurisdiction is to be approached, as compared to *Bomac*. Moreover, McGrath J acknowledged the marked difference between the position in this country as compared to England, in that r 131 does not contain provisions designed to facilitate the trial of the question of jurisdiction as a preliminary issue. That difference in the respective rules in turn prompted the observations about the need for caution, at least in those cases where relevant information is peculiarly within the knowledge of the overseas defendant.

*The merits in this case*

[42] Mr Gray argued that the Associate Judge's conclusions as to the existence of a good arguable case were demonstrably wrong, even in terms of his expression of the reasons at [49] of the decision (see para [18]). Not only did the Associate Judge state the test as "a serious question to be tried", but he also raised a number of additional caveats which should have prompted the conclusion that there was not a good arguable case. Counsel's submission on this aspect also owed a good deal to the paucity of the affidavit evidence adduced on behalf of the plaintiffs.

[43] Ms Forrester swore the only affidavit in support of the plaintiffs' case. It covered three matters. These were service of the proceeding on a member of the Parliamentary Press Gallery who is an accredited reporter for The Australian, that The Australian is sold by at least one outlet in Wellington and that on the basis of internet searches Ms Forrester has a much greater reputation in New Zealand than in Australia, with which she has no connections other than through the Newlands' website. Hence, Mr Gray submitted, there is no actual evidence of reputation, of publication to anyone other than Ms Forrester herself and no evidence of actual damage or loss attributed to the defamatory publication. In substance the allegations contained in the statement of claim are not sustained by evidence of any kind.

[44] It is also material to refer to some factual matters which have not been mentioned to this point. The "Wannabe Unis" article was on the Nationwide News website from September 2002 to June 2004. As at September 2002 the University of Newlands Limited did not exist. A company of that name came into being on 3 December 2003 following a change in the name of its predecessor Best Information Limited. It follows that for the first 16 months that the website was online, there was not a company bearing the name The University of Newlands Limited.

[45] In a similar vein Nationwide News also adduced evidence of a name change in relation to Ms Forrester. This is in the form of a birth certificate which indicated that Ms Forrester's birth name was Roy Maxwell Forrester. Mr Forrester, we note, is still shown as holding 998 of the 1000 shares in the University of Newlands

Limited, whereas the second plaintiff is shown as having been appointed a director of the company on 1 November 2003. By contrast from August 2002 the Degree.Info.com website contained reference to Ms Forrester by her new name. When exactly the change occurred is not confirmed.

[46] Another aspect of concern arises from the relevant provisions in the Education Act 1989. Pursuant to s 162 the establishment of institutions described as a university is by Order in Council upon the recommendation of the Minister of Education. Moreover, s 292(4) provides:

> A person must not –
>
> (a) use the term "university" to describe an educational establishment or facility unless the educational establishment and facility -
>
> (i) is a university; or
>
> (ii) is a registered establishment that has the Minister's permission under section 264A to use the term; or
>
> (iii) was a university but, despite being incorporated under section 164(4) into another institution, retains the characteristics of a university as set out in section 162(4)(a) and (b)(iii):

Mrs Harley submitted that Newlands was not in breach of the section because its intention is to apply for establishment pursuant to s 162 when it complies with the necessary requirements in s 162(4). We question whether such intention can of itself provide an answer to the prohibition contained in s 292(4).

[47] Mrs Harley further submitted that the respondents did not have to prove reputation, because a plaintiff was presumed to be of good repute in the absence of evidence to the contrary. While this is undoubtedly so, in the circumstances of this case, to which we have referred in [44] and [45], it would have been helpful to the establishment of a good arguable case for there to have been some evidence adduced as to the existence of reputation.

[48] With regard to publication counsel argued that the present case was an instance of publication by mass media rendering it unnecessary for the plaintiffs to establish publication. It is of course the case that where the defamatory material was published by newspaper, radio or television a plaintiff need not prove publication to any specific person or persons : *Fullam v Newcastle Chronicle and Journal Limited*

(1977) 1 WLR 651. But this rule does not apply where a plaintiff relies on extrinsic facts, as here in order to establish that Ms Forrester was personally identified by virtue of the "Wannabe Unis" article. Moreover, whether the present case naturally falls within the mass media principle is, we think, debatable.

[49] But in any event where plaintiffs are confronted with the need to demonstrate the existence of a good arguable case, it would of course be helpful to have evidence confirming the fact of downloading by other persons, and in the case of the second plaintiff that she was identified in connection with the offending article. There is no such evidence. Indeed, when pressed we understood Mrs Harley to say that the plaintiffs do not presently know of another person, or persons, who downloaded the relevant information. Instead, a submission was made that a search for the University of Newlands on either of two search engines, Google or Yahoo, would result in a linkage between The Australian and the Degree.Info.com websites. Hence, we were invited to the view that "a large number of people both in New Zealand and world-wide must have seen both sites …". If this is the case, it is surprising that some evidence to that effect was not adduced.

[50] In relation to the need for the first plaintiff to show that the offending publication caused pecuniary loss, or its likelihood, as required by s 6 of the Defamation Act 1992 in the case of a body corporate, Mrs Harley made submissions directed to the number of students, course prices and profits which Newlands might enjoy. However, there was no affidavit evidence of this kind. As the Associate Judge recognised, Newlands is a recently established company and may not, for that reason, be able to establish actual loss. That said, however, we would have expected the provision of some proper evidence (as opposed to submissions) as a basis to predicate the likelihood of economic loss.

[51] For all these reasons we are satisfied that the plaintiffs have not shown the existence of a good arguable case and that, therefore, it is not appropriate for the New Zealand Courts to assume jurisdiction over Nationwide News in the particular circumstances of this case. In the words of *Stone v Newman* this is a claim against a foreign resident defendant which must be characterised as "speculative".

**Result**

[52] The appeal is allowed. The decision of the Associate Judge is quashed and it is ordered that the proceeding is dismissed.

[53] Nationwide News is entitled to costs in the sum of $6000 together with usual disbursements.

Solicitors:
Bell Gully, Auckland for Appellant
Russell McVeagh, Wellington for Respondents