IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-7195

BETWEEN	OSMOSE NEW ZEALAND Plaintiff
AND	R N WAKELING First Defendant
AND	N R SMITH Second Defendant

CIV 2008-404-4255

AND BETWEEN	OSMOSE NEW ZEALAND LTD Plaintiff
AND	ARCH WOOD PROTECTION (NZ) LTD First Defendant
AND	BAY TREATMENT LTD Second Defendant
AND	PRIMAXA LTD Third Defendant
AND	MOMENTUS PUBLIC RELATIONS LTD Fourth Defendant
AND	RONALD PHILIP MOON Fifth Defendant
AND	ROBERT JOHN LYNDS Sixth Defendant
AND	PETER CARRUTHERS Seventh Defendant

Hearing: 20 November 2008

Appearances: Ian Gault and Garry Williams for Osmose
James Craig and Glen Holm-Hansen for Arch Wood Protection, Ronald Moon & Peter Carruthers
Ian Millard QC for Bay Treatment, Momentus Public Relations & Robert Lynds
Vanessa Bruton for Primaxa

Judgment: 3 December 2008

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 9.30 am on 3 December 2008

SOLICITORS
Bell Gully (Auckland) for Osmose
McFadden McMeeken Phillips (Nelson) for RN Wakeling & NR Smith
Simpson Grierson (Auckland) for Arch Wood Protection, R Moon and P Carruthers
McCaw Lewis Chapman (Hamilton) for Bay Treatment, RJ Lynds and Momentus Public Relations
Brookfields (Auckland) for Primaxa

COUNSEL
Ian Millard QC

Introduction

[1] Osmose New Zealand Ltd manufactures and supplies timber preservative products. It issued proceedings in this Court in 2005 against Dr Robin Wakeling and Dr Nicholas Smith. The company alleges that the defendants committed the torts of defamation and injurious falsehood and also breached the Fair Trading Act 1986 by publishing statements on 11 July 2005 about one of its timber treatments which were false and damaging. Damages of $14,737,778 are sought. Both defendants have pleaded a number of affirmative defences including truth, expressions of opinion and qualified privilege. Osmose has countered with particulars of ill-will and improper advantage.

[2] The litigation was the subject of early interlocutory activity. Dr Wakeling and Dr Smith joined four media publishers as third parties including Television New Zealand and Radio New Zealand. Applications by the media to set aside the third party notices were successful. The judgment on that question provides a full summary of the background to Osmose's claim: *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841.

[3] The parties completed the discovery process in late 2006. The defendants' affidavits of documents led Osmose to apply in late 2007 for an order for non-party discovery against Arch Wood Protection Ltd. By then the two year limitation period for bringing an action in defamation against Arch or any other parties for participating in the publication had expired. Arch initially opposed Osmose's application. An order was made by consent in March 2008.

[4] Arch filed a list of documents shortly afterwards. Following inspection of Arch's discovered documents Osmose's solicitors in April 2008, Bell Gully, advised their client that it now had a proper evidential foundation for joining Arch and other parties as defendants in the existing proceeding. Arch's solicitors, Simpson Grierson, advised Bell Gully in June 2008 that the company did not object to Osmose using its documents in formulating a claim against Arch and other parties for the purpose of joining them as parties on the existing causes of action in defamation, injurious falsehood and breach of the Fair Trading Act. Bell Gully then

gave notice to Arch and the other intended defendants of Osmose's intention to apply for leave to issue the defamation proceeding out of time: s 4(6B) Limitation Act 1950. Independently, in July 2008, it issued a separate proceeding against the additional defendants for breach of the Fair Trading Act in order to avoid expiration of the three year limitation period applying to that cause of action.

[5] Osmose has now applied for orders granting leave: (1) to bring a defamation claim against the additional defendants; and (2) to use Arch's discovery documents in the 2008 proceeding. Both applications are opposed; the first for delay and the second on principle.

(1) Limitation

(a) Legal Principles

[6] Section 4 Limitation Act 1950 relevantly provides:

> (6A) Subject to subsection (6B) of this section, a defamation action shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.
>
> (6B) Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court, after notice to the intended defendant, for leave to bring a defamation action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it just to impose, **where it considers that the delay in bringing the action was occasioned** by mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section), or **by any other reasonable cause**.
>
> [Emphasis added]

[7] Osmose does not rely on mistake of fact or mistake of any matter of law. The only issue is whether, as Mr Ian Gault for Osmose submits, delay in bringing the defamation proceeding against Arch and the other intended defendants was 'occasioned by … any other reasonable cause'. All counsel accept that the Court has a residual discretion even if Osmose establishes this ground.

[8] Counsel's written and oral argument for the additional defendants in opposition proceeded on a close dissection of Osmose's conduct between 11 July 2007, when the two year limitation period for issuing a proceeding in defamation commenced, and 22 August 2008, when Osmose applied for leave. That is the relevant time span which falls for consideration on an application for leave: *William Cable Ltd v Trainor* [1957] NZLR 337 (CA). Mr Ian Millard QC, for Bay Treatment Ltd, Momentus Public Relations Ltd and Mr RJ Lynds, and Mr James Craig for Arch, scrutinised Osmose's conduct according to tightly subdivided or segmented periods. Mr Millard identified five stages and Mr Craig three. Their apparent purpose was to show that the whole period of the delay was not occasioned by reasonable cause: *Parris v Television New Zealand Ltd* (1996) 9 PRNZ 444 at 449; *Hodge v Television New Zealand* (1996) 10 PRNZ 263 at 266.

[9] In my judgment the intended defendants have proceeded on an incorrect construction of s 4(6B). The inquiry is into whether 'the delay' – that is, the period between the dates of expiry of the limitation time and of the application for leave – was occasioned 'by any … reasonable cause': see *Wilson & Horton Ltd v Lee* (1998) 11 PRNZ 550 (CA) at 555-557. The plain words of that provision are directed towards identifying the cause of the event of delay, not its extent or duration (which, if material, would fall within the scope of the Court's residual discretion).

[10] The decisions in *Parris* and *Hodge* are distinguishable. In *Parris* the plaintiff had issued proceedings in defamation arising from a series of television programmes. He was within time for all except the first publication. He knew throughout of his right to sue but, for circumstances beyond his control, his proceedings did not encompass the first publication. He was unaware of the limitation period until it had expired and applied for leave within four months. As Master Venning noted, the plaintiff took a number of steps immediately prior to the two year period which ran into the subsequent period. He was active throughout. Leave was granted.

[11] In *Hodge* the plaintiff failed to issue proceedings at all until 18 months after the two year limitation period had expired. His inactivity continued through the initial five months of the delay period. I do not, of course, question Master Venning's decision to refuse leave. But I respectfully question whether he was

correct in accepting the defendant's submission that 'the whole period of delay must be occasioned by reasonable cause': at 286. Counsel's adoption of that observation here has, I think, led to an erroneous focus to their opposition to Osmose's application.

[12] What, then, was the cause of Osmose's delay in bringing the action against the additional defendants? And was the cause reasonable? The circumstances of publication are apposite, and are summarised in *Osmose v Wakeling* at paras [5]-[21] as follows:

> *Background*
>
> [5] Osmose manufactures the boron based timber preservative treatment known as TimberSaver®. Dr Wakeling was formerly a wood mycologist employed by or consulting to Primaxa Ltd. Among other things that company develops timber preservative treatments. Previously he was employed by NZ Forest Research Institute Ltd. Dr Smith is a Member of Parliament and the National Party spokesperson on building and construction issues.
>
> [6] In brief summary, the relevant events are as follows. On 11 July 2005 Dr Wakeling published an article entitled "Declining Wood Durability Standards Threaten Home Owners & the Building Industry". He referred to his status as a wood mycologist, and gave his phone number. The thrust of the article was critical of the Building Industry Authority (the BIA), now the Department of Building and Housing (the DBH), for approving TimberSaver® for use in timber framing of houses in 2004. Dr Wakeling compared it unfavourably to an alternative product. In his opinion TimberSaver® failed to meet the penetration requirements of the New Zealand Standards designed to ensure adequate durability of framing.
>
> [7] Later that day, at 5.13 pm, Dr Smith issued a press release critical of both the Government and BIA, appending a copy of Dr Wakeling's article together with an extended discussion by way of hypothetical statements of questions and answers. The full text of Dr Smith's press release is as follows:
>
> > **Labour fails homeowners in timber treatment scam.**
> >
> > National's Building spokesman, Nick Smith, says Labour is allowing homes to be built of timber that does not meet its own new standard, even after the billion-dollar furore over leaking and rotten homes.
> >
> > 'Thousands of homeowners and builders are being duped into thinking they are using treated timber when, in fact, it has only been surface-sprayed'.
> >
> > 'The new standard of timber treatment NZS 3640 was adopted in 2003 after the leaky homes crisis, and requires 'complete sapwood penetration' (6.1.1.1). But in April 2004 the Building Industry Authority approved a new surface boron-treated timber, code marked as T1.2, in breach of this new standard'.

> 'This product is risky, in that 80% of the timber is left untreated, exposure to rainfall during construction will wash it off, and there is no protection from borer'.
>
> 'Consumers got burnt in 1985 with the AAC timber treatment debacle and are now paying again for errors over the introduction of untreated kiln dried timber in 1995'.
>
> 'The last thing homeowners need is another unproven, non-compliant timber product that puts their most important asset at risk'.
>
> 'Labour and the BIA seem to have learnt nothing from the leaky homes debacle. They continue to arrogantly ignore the pleas of respected timber preservation and building experts about this flawed product'.
>
> 'This T1.2 product needs urgent and independent reappraisal. We need to take a cautious approach to timber treatment after the debacles of the past two decades'.
>
> 'This adds another chapter of incompetence to this Government's response to the leaky homes crisis. They had a duty to ensure future homes would be built to a decent standard but have failed', Dr Smith says.

[8] Within an hour Dr Smith was interviewed on Radio New Zealand's (RNZ's) Checkpoint programme broadcast between 5 and 6 pm. The interviewer asked him four or five brief questions. The bulk of the interview comprised Dr Smith's responses in the same critical vein as characterised his earlier press release.

[9] Dr Smith was then interviewed live on Television New Zealand's (TVNZ's) Close Up programme commencing at 7 pm. The programme started with a pre-recorded interview by a TVNZ journalist with Dr Wakeling and two other experts. The presenter introduced the interview by reference to what is notoriously known as the leaky homes problem which has, he said, 'become a blight on our construction industry'. He then said this:

> So bad was the problem that the Government was forced to step in and put things right, supposedly. Tonight, though, a new revelation that some houses are being built with timber approved by the Government that may not meet its own standards.
>
> This is it. It's called TimberSaver. Its technical name is T1.2. Let's be fair about this. There is no problem with this product if it's used properly but what it's being used for might not be what it was made for. Building experts say it's being used widely and houses are being built of timber that they say might not give full protection against rot.
>
> Now the Opposition is demanding answers. Nick Smith and Chris Carter head-to-head in a minute, but first this from Mark Hann. [The pre-recorded interview]

[10] Later, at about 7.11 pm, the presenter conducted a direct interview, in the nature of a studio debate, with Mr Carter, the Minister for Building Issues, and Dr Smith. The latter continued with his vigorous theme of criticism of the Government and the BIA over approval of the TimberSaver® product and its handling of the leaky homes problem generally.

Osmose's statement of claim

[11] Against this background, Osmose's statement of claim pleads 11 causes of action. The first five are directed at Dr Wakeling; two in defamation, two for injurious falsehood and one for breach of the Fair Trading Act. All claim damages in the same amount of $14,737,778.

[12] Osmose's first or primary cause of action against Dr Wakeling is in defamation. It pleads that during the Close Up programme Dr Wakeling said:

> This [TimberSaver®] is likely to perform better than untreated wood but it's very unlikely to perform as satisfactorily as proven preservative treated products.

[13] Osmose alleges that these words meant and were understood to mean that Osmose was and is prepared to sell in New Zealand a treatment which results in timber that is very unlikely to perform as satisfactorily as proven preservative treated products, is not adequately durable, is not fit for its purpose and has potentially serious consequences to consumers in the building industry. Innuendoes are also alleged (I shall not repeat the defamatory allegations when dealing with subsequent causes of action – the thrust is the same for each).

[14] Additionally, within this same cause of action, Osmose alleges that in the circumstances Dr Wakeling expressly or impliedly authorised or secured the repetition and republication and the sting or part thereof of the words used in the Close Up programme by 60 media outlets in New Zealand the next day; that he knew such repetition and republication would be the natural consequence of his initial publication of the article; and that repetition and republication was the probable or reasonably foreseeable consequence. A schedule nominates each of the republishers and republications.

[15] Osmose pleads that it has suffered and will continue to suffer pecuniary loss by reason of a combination of both the original publication on Close Up and republication of the words. The claim is itemised in an appendix of lost profits estimated for each year between 2005 and 2008. Mr Brian Latimour advised from the bar that it represents the company's quantification of the destruction of its TimberSaver® market suffered immediately consequent upon the defendants' torts.

[16] Osmose's second cause of action repeats its allegation that Dr Wakeling's words were defamatory in the way pleaded in the first cause of action; that he published them by giving a copy of the article or a version of it to Dr Smith for inclusion in his press release; and that he is responsible for their republication.

[17] Osmose's third and fourth causes of action allege injurious falsehood; namely that Dr Wakeling used the words in the Close Up interview and in his article either knowing that they were false or recklessly, not caring whether they were true or false, in circumstances where the publication was likely to cause pecuniary loss to Osmose.

[18] Osmose's fifth and final cause of action is the catch-all of publishing words in the Close Up programme and article in the course of trade which were false and therefore misleading and deceptive or likely to mislead and deceive: s 9 Fair Trading Act 1986.

[19] The next six causes of action are directed at Dr Smith. They essentially replicate the allegations against Dr Wakeling, but are expanded to include the RNZ programme. There is no allegation of breach of the Fair Trading Act.

[20] Dr Smith's statements in the Close Up interview which were allegedly false and defamatory are as follows:

> Now this is leaky homes all over again… But what makes me really angry is that if there was any duty after this leaky home fiasco, it was to make sure that houses today are being built properly. And now we've got a product that's a con, that's just a surface treatment where through a cheapo solution, they are not going to the expense of getting the boron right through, and that leaves home owners exposed, and that is incompetent…
>
> You've got 10,000 houses out there, have been built of this stuff, and if there's anything this Government owed people after the trauma and the heartache of leaky homes, was to make sure that the timber was properly treated. You see, Mark, you go back to '85, there was a cock up over timber treatment then, what was called the AAC treatment process that the Government had to bail out…
>
> That's right, and what you've got is a whole lot of people out there, builders and home owners, using this orange product, known as Agent Orange in the industry, of which very few people realise, it's just superficially treated, and that 80% of that wood can go rotten, and can be eaten by borer, wrecking peoples' most important asset. And the Government must be held responsible for that incompetence.

[21] Dr Smith's statements in the Checkpoint programme which were allegedly false and defamatory are:

> What concerns me is that a new standard was adopted in 2003, it required that there be full penetration of the preservative in the timber, and yet, last year, a product that is no more than a cheapo floor wood [phon] in that it just spray paints the outside of the timber is being sold on the market as though it is treated timber. It would not be accepted anywhere else in the world and, really, builders and homeowners are being duped into thinking the timber is treated when in fact it's only a surface coat…
>
> Oh, I think it's outrageous and I think it's outrageous that fifty percent of the houses, over 10,000 homes have been built out of this product in the last year with homeowners expecting that they would have some security when they do not… It's a cheapo outcome which the homeowners are being misrepresented by.

[13] Drs Wakeling and Smith made the allegedly defamatory statements; and there was nothing on their face to link either defendant to or suggest participation by Arch or any of the other additional defendants to publication.

[14] Drs Wakeling and Smith gave discovery in August 2006. Bell Gully wrote to their solicitors, McFadden McMeeken, in February 2007 (the intervening delay is accounted for by the activity generated by the third party proceedings) expressing its opinion that both defendants, particularly Dr Wakeling, had failed to give proper discovery of all relevant electronic documents in their possession, power and control, and requested immediate compliance with their obligations. A copy of Bell Gully's letter was sent to senior counsel then representing the defendants.

[15] McFadden McMeeken responded on 27 March 2007, assuring Bell Gully that both defendants had provided full discovery.

[16] The defendants' discovery also suggested that Arch might have relevant documents within its power, possession and control. Bell Gully wrote to Simpson Grierson on 28 September 2007 following discussions between the lawyers. The firm identified three categories of relevant documents which Osmose had reason to believe were in Arch's possession, power and control, and advised of Osmose's instructions to seek non-party discovery if Arch did not comply voluntarily. By then, I repeat, the time limit for bringing an action in defamation against Arch or any other defendant based upon the statements made by Drs Wakeling and Smith had expired on 11 July 2007.

[17] The parties were unable to agree on Osmose's request, and the company applied for an order against Arch on 6 December 2007. Arch filed a notice of opposition on the grounds that the documents sought were not necessary and an order was irrelevant. Further correspondence between the solicitors followed but agreement was not reached. Synopses of written argument were exchanged before a defended hearing scheduled for 6 March 2008. On that date Arch consented to Osmose's application on the basis that the documents were commercially sensitive. Bell Gully undertook not to disclose them to Osmose.

[18] Bell Gully was satisfied as a result of its subsequent inspection of Arch's documents that: (1) many of the documents were relevant to Osmose's claim against Drs Wakeling and Smith and their affirmative defences; (2) a large number of those relevant documents were or had been in Dr Wakeling's and Dr Smith's power,

possession and control; and (3) as a consequence, Drs Wakeling and Smith were in apparent and substantial breach of their duties to provide discovery.

[19] Furthermore, Bell Gully was satisfied that Arch's documents established a proper evidential basis for Osmose to allege that the proposed additional defendants were parties to a common design with Drs Wakeling and Smith to publish the offending words, and were thus jointly and severally liable on the defamation and injurious falsehood claims for authorising, securing, inciting, contributing to and encouraging publication. Alternatively, Bell Gully was satisfied that the additional documents supported independent torts of conspiring to injure by unlawful means or deliberate interference with trade by unlawful means. Also, the firm was of the opinion that the documents supported the existing claim against Dr Wakeling for breach of the Fair Trading Act. All four tortious claims except defamation were well within the applicable six year limitation period; the Fair Trading Act claim was close to its three year expiry date.

[20] Mr Millard responsibly accepts that many of Arch's documents were or must have been in the power, possession and control of Drs Wakeling and Smith. Each is apparently in breach of his obligation to make proper discovery; if they had complied, these documents would or should have been discovered on or about 22 August 2006, well within the limitation period for bringing defamation claims against Arch and the other included defendants. I am independently satisfied that Arch's documents provide a proper evidential basis for Osmose's claims against those parties. Thus, but for Dr Wakeling's and Dr Smith's failure to make full and proper discovery, Osmose would have been in a position to join all additional defendants to the defamation claim well within the two year limitation period.

[21] I am in no doubt that Dr Wakeling's and Dr Smith's failure to discharge their discovery obligations was the operative cause of Osmose's failure to bring a defamation claim against the additional defendants on or before 11 July 2007. In terms of s 4(6B) it 'occasioned' the delay. Its causative effect was not spent by the expiry of the limitation period but continued until about April 2008 when Bell Gully inspected Arch's documents. Equally, I am in no doubt that that cause was 'reasonable' within the meaning of the section; Osmose did not act unreasonably in

not pursuing a legal remedy which it did not know existed until it was physically able to inspect and evaluate relevant documents until the first nine months of the limitation period had expired. Arguably the same facts could give rise to an operative mistake of fact by Osmose in assuming in the absence of proper discovery that Drs Wakeling and Smith were the only participants in publication of the allegedly offending statements.

[22] That conclusion is not, however, decisive in favour of granting leave. All counsel agree that I have a residual discretion. Osmose's conduct in the period between 11 July 2007 and 22 August 2008 falls for consideration in this context.

[23] I have previously referred to the tight dissection undertaken by Messrs Millard and Craig of the steps taken by Osmose in that period. By way of example, Mr Craig has carried out a three-part subdivision: (1) from 11 July 2007 to Bell Gully's first approach to Simpson Grierson for non-party discovery on 28 September 2007; (2) the non-party discovery process between 28 September 2007 and 27 March 2008, when Arch provided its additional documents; and (3) between Bell Gully's receipt of the additional discovery on 27 March 2008 and its application for leave in August 2008.

[24] I appreciate that this approach was based upon an assumption that the phrase 'reasonable cause' relates to the extent, not the causative event, of delay and of observations made in *Parris* and *Hodge*. I think, however, it is legally misconceived and does not in any event assist. I can address the argument in short order, treating it as falling within the Court's residual discretion.

[25] A careful retrospective analysis of the timing of each step is unhelpful. Osmose cannot be held guilty of disqualifying delay over the first of Mr Craig's three periods when it was not seeking documentary evidence relating to its existing claim against Drs Wakeling and Smith, and was not working against a known time limit which might apply to a separate claim against parties against which Osmose then had no evidence of liability. One of the critical delaying factors during the second period was Arch's opposition to Osmose's application for non-party discovery on grounds which were plainly wrong, causing a delay of some months.

And in the third period it was appropriate for Bell Gully to consider carefully and give proper advice on whether or not to join a number of other parties, who were not the authors of the allegedly offending publications, to a substantial claim. Furthermore, within three months, on 27 June, Bell Gully gave Simpson Grierson notice of Osmose's instructions to join Arch as an additional defendant.

[26] It is always possible, with the benefit of hindsight, to level criticism against a party or its solicitors for not acting as promptly as it might have at various stages along the litigation journey. In my judgment Osmose could not be said to have been aware of the legal consequences of Arch's further discovery, with the availability of discrete causes of action against a number of parties, until April or May 2008. I infer that Arch appreciated throughout the risk to which it would be exposed on an order for non-party discovery. The company itself generated significant delay along the process by raising defences which it eventually abandoned. Arch cannot be said to be free from blame in the process.

[27] I am not satisfied that Osmose ever slept on its rights: *Lee v Wilson & Horton* (1996) 9 PRNZ 707 (upheld on appeal); it cannot be guilty of sleeping on rights which it was unaware existed. The steps it took with the benefit of responsible advice after inspecting Arch's documents in April 2008 were measured and proper. A counsel of perfection might support the proposition that the company should have moved a month or two earlier. But any 'delays' by Osmose within that timeframe were relatively minor, and it is relevant that its application was made within one year of the four year extension period: see *Gibson v Blunt* HC AK CIV 2004-404-111 4 October 2004 Randerson J.

[28] Two other factors are influential within the sphere of residual discretion. First, as already noted, Osmose does not require leave to bring its action for injurious falsehood against the additional defendants. The torts of defamation and malicious conduct including injurious falsehood are materially similar (it appears anomalous that different limitation periods apply). Differences such as the burden of proving malice are unlikely to be material: see *Gatley on Libel and Slander*, 10th Ed., Chapter 20. Little point would be served in refusing leave to bring an action for defamation where a related claim for injurious falsehood is beyond a limitation challenge: see

also *Outfox Total Security (New Zealand) Ltd v Security Industry Association Inc* [1995] 3 NZLR 122 per Barker J at 128.

[29] Second, I agree with Master Venning in *Parris* and *Hodge* that prejudice is a relevant consideration. While not specifically identified in s 4(6B), this factor must always play a part. Its absence will carry weight. Neither Messrs Millard nor Craig were able to point to any prejudice suffered by Arch or the other additional defendants as a result of granting leave. Osmose's right of action for the companion tort of injurious falsehood effectively eliminates any proposition of prejudice.

[30] Leave is granted to Osmose to issue its proceeding in defamation against the additional defendants out of time.

(2) Use of Documents

[31] Osmose also seeks leave to use Arch's documents in its separate proceeding under the Fair Trading Act (the FTA proceeding). R312(4) High Court Rules provides:

> A party who obtains a copy under this rule—
>
> (a) may use that copy only for the purposes of the proceeding; and
>
> (b) except for the purposes of the proceeding, must not make it available to any other person.

[32] Some context is necessary. As Mr Craig acknowledges, in early June 2008 Simpson Grierson gave Arch's consent to Bell Gully's request for Osmose to use the Arch documents in the defamation proceeding on terms set out in a draft amended statement of claim. That draft incorporated the defamation, injurious falsehood and FTA causes of action.

[33] Bell Gully severed off the FTA cause of action and filed it under a separate proceeding on 9 July 2008 in order to pre-empt the three year limitation period applying to that claim. It is common ground that Osmose used Arch's documents for the purpose of preparing the statement of claim in the FTA proceeding. But its contents were materially the same as those contained in the earlier draft submitted by

Bell Gully to Simpson Grierson. The only difference is that the FTA cause of action became the subject of a separate proceeding rather than being filed as part of the existing claim.

[34] Mr Craig filed an extensive written synopsis in opposition based solely upon what some may see as the very sophisticated distinction that Osmose has used the Arch documents in a separate proceeding even though it had confirmed its consent to Osmose's use of the documents in support of the same cause of action in the defamation proceeding. Thus, Mr Craig submits, the company has acted in breach of R312 and must show special circumstances justifying the Court's leave to release or modify Osmose's implied undertaking given on discovery: *Telstra New Zealand Ltd v Telecom New Zealand Ltd* (2000) 14 PRNZ 541.

[35] I am in no doubt whatsoever that leave should be given. The circumstances speak for themselves. The ground for Arch's objection is of a technical nature, based upon a distinction of form rather than substance. Leave is granted to Osmose to use the documents discovered by Arch in the defamation proceeding for the purposes of the FTA proceeding.

Conclusion

[36] I direct that the FTA proceeding is to be amalgamated with the defamation proceeding and Osmose is to file a composite amended statement of claim (1) incorporating all extant causes of action against all parties, by 4 pm on 17 December 2008 and (2) particularising fully, as Mr Millard requests, all the additional allegations of defamation, injurious falsehood, conspiracy to injure by unlawful means, deliberate interference with trade by unlawful means, and breach of the FTA. Osmose should give careful consideration to whether or not it seeks to pursue its FTA claim against any of the defendants other than Dr Wakeling. The proliferation of causes of action will not advance resolution of Osmose's case against any of the defendants.

[37] As noted during oral argument, the real issue in this case appears to be the technical dispute between Osmose and some or all of the defendants about the safety

or efficacy of Osmose's TimberSaver® preservative treatment. The parties may wish to explore means of resolving this dispute in advance of trial by invoking the R418 procedure to determine a discrete question. The result should have a direct bearing on the sustainability of affirmative defences and may assist the parties to resolve their differences. Furthermore, all parties would be assisted by Osmose's particularisation of its damages claim and without prejudice provision of a brief from its expert.

[38] The proceeding must now be fast-tracked for trial. **I direct the registry to arrange a telephone conference with counsel for 9.30 am on 18 December 2008.** By then the parties are to file a joint memorandum with proposals for completing all outstanding timetabling requirements such as finalising pleadings, particularly statements of defence, and attending to discovery.

[39] Costs on this application are reserved and are to be costs in the proceeding in any event.

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Rhys Harrison J