IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-2315

BETWEEN	ERIN A LEIGH Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	LINDSAY GOW Second Defendant

Hearing: 3 June 2009

Counsel: J W Tizard & A J Connor for defendants/applicants
J G Miles QC & J S Langston for plaintiff/respondent

Judgment: 14 July 2009

RESERVED JUDGMENT OF DOBSON J
(Strike out application)

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[1] In these proceedings, the plaintiff (Ms Leigh) sues the Attorney-General in respect of the Ministry for the Environment (the Ministry) and the second defendant as the then Deputy Secretary of the Ministry (Mr Gow) for defamation, and for negligent misstatement. The present application is one brought on behalf of the defendants for striking out either all, or various parts, of Ms Leigh's Amended Statement of Claim.

Factual background

[2] Between July 2005 and May 2006, Ms Leigh was retained by the Ministry pursuant to a number of consecutive contracts to provide advice as to communications in relation to climate change issues. In the period up to her unilateral termination of the then current contract in mid May 2006, Ms Leigh was working on successive drafts of a climate change communications strategy. The document had undertaken a number of drafts and from early May 2006 the then Minister for Climate Change, the Hon David Parker, plus other politicians and senior officials commented adversely on the content of Ms Leigh's drafts.

[3] On or about 15 May 2006, Ms Leigh was told by the person within the Ministry managing her work for it that the Minister had appointed another communications adviser, Clare Curran, to oversee the content of the communications strategy Ms Leigh was working on. As a result of what she was told, Ms Leigh terminated her involvement with the Ministry. The Amended Statement of Claim pleads this occurrence in terms that "the plaintiff resigned from her contract position with the Ministry on the same day". If the contract was one for provision of services, the legal effect of her conduct was presumably to unilaterally terminate the contract which was due to expire at the end of May 2006. Nothing turns on which is the correct legal analysis.

[4] Ms Leigh went on to other work, and the events of mid May 2006 only became relevant for the purposes of these proceedings in November 2007, when criticism was levelled at the then government for the circumstances in which Ms Curran had been hired. At that time, Ms Leigh was approached by a reporter as to the circumstances in which Ms Curran was retained and Ms Leigh ceased her

involvement on the climate change communications strategy. It appears that Ms Leigh confirmed that she saw Ms Curran's appointment as politically motivated, given Ms Curran's links with the New Zealand Labour Party, and that it was the hiring of Ms Curran that caused her to stop work on the project. Following that interview, publicity about the matter led to criticisms of the Government, and questions in Parliament. That in turn led to a request from the office of the then Minister for the Environment, the Hon Trevor Mallard, to the Ministry for information as to the basis on which Ms Leigh had been engaged, the nature of the work she undertook, and the reasons why she had terminated her contract in May 2006.

[5] The Ministry's response took the form of a Briefing Paper prepared by Mr Gow and dated 22 November 2007 (the Briefing Paper). It comprised seven relatively short paragraphs describing the circumstances in which Ms Leigh's services were contracted, the scope of what she was to do and the circumstances of her departure. Ms Leigh's Amended Statement of Claim pleads five extracts from the Briefing Paper, and alleges that its contents were false and defamatory of her in five respects. The extracts are set out in paragraph [13] below.

[6] The Amended Statement of Claim then pleads that the Briefing Paper was used by the Minister to criticise Ms Leigh's competence in the course of answers to oral questions posed of the Minister in Parliament. The Amended Statement of Claim specifies four particular comments made by the Minister in the House, treating them as a republication of some of the content of the Briefing Paper. Those are set out in paragraph [65] below.

[7] In a second cause of action, Ms Leigh also alleges that a meeting occurred on the day the Briefing Paper was prepared at which Mr Gow expanded on the content of the Briefing Paper in making certain oral statements (the Oral Statements) about Ms Leigh. The pleading alleges the Oral Statements in summary terms, and alleges that Mr Gow made statements in those terms or "which were substantially the same". It is then alleged that the Oral Statements were false and defamatory of the plaintiff as a whole, and that the Oral Statements meant, and were intended to mean, a series of five propositions adverse to her good reputation. Again, the Minister's response

to questions in the House is treated as a republication of these alleged Oral Statements.

[8] The Amended Statement of Claim then pleads in a third cause of action that the Briefing Paper and the Oral Statements were made in circumstances where the Ministry owed Ms Leigh a duty of care, and that the Oral Statements were made in breach of that duty of care when the Ministry failed to exercise reasonable care and skill in preparing the Briefing Paper and in the Oral Statements that Mr Gow made on behalf of the Ministry.

Grounds for strike out application

[9] The defendants seek to strike out the whole of the Statement of Claim on the basis that:

- the Briefing Paper is incapable of bearing the defamatory meanings alleged in respect of it;

- the differences between it and what was said by the Minister in Parliament means that the latter is incapable of being characterised as a republication of the words in the Briefing Paper; and

- there was no tenable cause of action in negligence because Ms Leigh is prevented from claiming in negligence for damage to her reputation.

[10] The defendants also invite a ruling on their affirmative defence that the circumstances of Mr Gow's communications to the Minister constituted an occasion of absolute privilege, so that recognition of that defence would constitute a complete answer to all allegations of defamation.

[11] Separately, the application challenged the tenability of the allegation in respect of the Oral Statements, arguing that Ms Leigh is obliged to allege the actual words used before such an allegation could constitute the basis of any cause of action. The defendants' argument on the strike-out also challenged the prospect of

there being two causes of action in defamation where, on the argument for the defendants, there was only a single publication and therefore only a single potential cause of action. Certain of the paragraphs alleging contextual factual matters occurring around the time of the Briefing Paper are also challenged as being irrelevant.

Briefing Paper capable of defamatory meaning?

[12] I propose to deal first with the defendants' challenge to the capacity for the words in the Briefing Paper to bear the alleged defamatory meanings. This threshold issue is one appropriately dealt with on a strike out application to be assessed on the basis that a plaintiff will make out the factual allegations as pleaded. On the basis of that assumption, the question is whether the words are capable of bearing a defamatory meaning. It is settled law that this constitutes a question of law and the approach is adequately described in *Gatley* in the following terms:

> In determining whether the words are capable of a defamatory meaning the Judge will construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might extract from them. The reasonable reader is not naive but not unduly suspicious, can read between the lines, can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. "The Court should be cautious of an over-elaborate analysis of the material in issue." (*Gatley on Libel and Slander*, 11th ed, para 36.4)

[13] Within the first cause of action, the content of the Briefing Paper relied upon, and the false and defamatory meanings alleged to arise from it, are as follows:

> 27. The Briefing Paper contained the following statements:
>
> (a) "She was responsible for developing a communications work programme for climate change communications. This went through a series of six drafts in late April to early May 2006."
>
> (b) "Around about mid May 2006, the work Erin did apparently received consistent adverse comment from government departments, from senior officials and also from the Minister responsible for climate change (Hon David Parker). Clare Curran was employed from 22 May 2006."

(c) "By 25 May 2006 Clare Curran had initially reviewed the work that Erin Leigh had done, provided advice to the Ministry on it, and indicated desirable changes."

(d) "Erin's contract was due to cease on 31 May 2006. However, she effectively finished work on 15 May. Her invoices show that she came to work for 15 minutes on 16 May 2006. I have been advised that staff reported she appeared to be in a state of concern. She then left the office, never returned and did not complete the term of her contract."

(e) "We have not found any written documentation to date that shows why Erin left suddenly. What appears to be her last formal communication with the Ministry was an invoice, which included the 15 minutes she was in the office on 16 May 2006."

28. The statements contained in the Briefing Paper ("**Written Statements**") as a whole were false and defamatory of the Plaintiff in that they meant and were intended to mean that:

(a) the Plaintiff was incompetent;

(b) the Plaintiff was irresponsible;

(c) the Plaintiff was overly emotional;

(d) the Plaintiff was not fit to be employed by a Government department, ministry or agency as a professional communications consultant;

(e) the Plaintiff's work had received consistent adverse comment from Government departments, senior officials and from the Minister Responsible for Climate Change Issues as a consequence of her incompetence.

[14] With the possible exception of the observation reported from staff that Ms Leigh "appeared to be in a state of concern" on the morning she departed, the whole of the statement is confined to matters cast as facts, and avoids the expression of any opinions about her or her work. The Briefing Paper was provided some 18 months after the events, and not because the Ministry needed to defend any suggestion it had unjustifiably dismissed Ms Leigh. To the contrary, there is no suggestion that the Ministry was going to terminate Ms Leigh's services and it appears that the Ministry would have let her contract expire at the end of May. Instead, the focus is on the circumstances that justified the hiring of Ms Curran. This context is likely to be important to the reasonably intelligent reader fully informed of all the circumstances. For instance, the statement pleaded in paragraph 27(e) that

"we have not found any written documentation to date that shows why Erin left suddenly" would have been relevant to the Minister who would be interested in any record from the time of her departure, criticising the perceived political influence in the appointment of Ms Curran. Its relevance in that light gives the statement a neutral connotation. In contrast, if the statement was attempting to justify a finding of inappropriate or incompetent behaviour on Ms Leigh's part, then absence of written notice could have been cited as a failing on her part.

[15] Mr Miles QC submitted that the content and tone of Mr Gow's Briefing Paper was quintessentially "a Wellington type communication" – he eschewed the prospect that such communications would ever occur in Auckland. Without introducing any regional tension into the analysis, I took this characterisation of the context as being peculiar to the culture and practices pervading senior civil servants' communications with each other, and with Ministers. I took Mr Miles to be suggesting that the Briefing Paper would be measured by the finder of fact as arising in the Sir Humphrey-esque world of "you might very well think that Minister, but I couldn't possibly comment". I was invited to assess the natural and ordinary meaning that could be attributed to the words as being conveyed in this relatively subtle environment in which the writer and the audience share an unarticulated expectation of the meaning conveyed "between the lines". I note that there is no pleading of specific innuendo arising.

[16] I accept that the particular context in which the Briefing Paper was prepared and presented to the Minister is very important to the natural and ordinary meanings the words are capable of conveying. However, the prospect for criticisms arising implicitly from "reading between the lines" must be balanced against another feature of the environment in which senior civil servants are required to respond to requests for information from the office of a Minister. That is, unless an opinion or evaluation is called for, a factual enquiry is responded to by provision of the facts, as they can be gathered within the time available. In situations such as requests for information enabling the Minister to respond to questions in Parliament, finders of fact are likely to realise that a materially different approach also arises – ie tell the Minister the facts, and let the Minister make of them what the Minister will.

[17] Such a limitation confining the meaning of the Briefing Paper to the facts reported, and resisting the invitation to read in positive or negative inferences in relation to the conduct described, might well break down once the Briefing Paper is the subject of dialogue between the reporting civil servant and the Minister. I need to deal subsequently with just such an allegation in the present case.

[18] However, making appropriate allowance for the approach of non lawyers, and a certain amount of loose thinking, I treat the present consideration as confined to the natural and ordinary meanings arising from the terms of the Briefing Paper in the context in which it was requested and delivered. I see no basis for adding to the meanings that may tenably arise because either the terms of the Briefing Paper itself, or the circumstances in which it had been requested and provided to the Minister, are to be interpreted as conveying an invitation from Mr Gow for the Minister to infer criticisms of Ms Leigh by "reading between the lines".

[19] Turning to each of the defamatory meanings pleaded as arising on the terms of the Briefing Paper.

"The plaintiff was incompetent"

[20] The context is that Ms Leigh had been re-appointed on two occasions and left because she was unhappy that a politically connected communications adviser was to be retained to oversee the work that she was doing. As to the elements in the Briefing Paper that could go to her competence, the first is that her work had gone through six drafts. I do not see a reasonably informed observer treating that as an indication of incompetence on her part, given the complexity and importance of the subject matter. The next element is that around the time she departed, her work received consistent adverse comment from government departments, senior officials and the Minister who was responsible for the matter she was working on. In the context of the circumstances in which Ms Leigh quit, the more natural inference is that her approach to the content was at odds with those others who commented adversely on it. Clearly, those considering her work would make adverse comments about it because they did not like its content. That does not necessarily mean that it was incompetently prepared. I acknowledge a possible progression from the

commentators' dislike of its content, to an inference that a competent person in her position would have been sensitive to the political environment, and accordingly adapted her own views to reflect this environment. However, in the context of her being an independent contractor whose contracts had been renewed a number of times, and in the circumstances of her leaving because of the vote of no confidence implicit in another person being interposed to oversee the wording of her work, that progression is not one I find naturally arising.

[21] Next, potentially going to incompetence, are the statements that she left at short notice, did not complete the term of her contract, and did not document in writing why she left suddenly. Such statements are more likely to go to the relative responsibility of Ms Leigh's conduct at the point of her departure. I do not accept that they can create or contribute to an inference that she was incompetent. Clearly, there was a division of professional views as to what ought to be contained in the paper she was working on, and that difference had got to a point where the Ministry wished the content to be influenced by another adviser. Ms Leigh was not prepared to compromise her view of the content, or lose control of its content, by having it overseen by Ms Curran. That infers a principled stand, rather than incompetence.

"The plaintiff was irresponsible"

[22] The last elements of the Briefing Paper considered in the preceding paragraph are those most likely to give rise to an inference that Ms Leigh was irresponsible. Again, measuring them in the context in which the Briefing Paper was produced, and its overall content, I am satisfied that they cannot bear that meaning. There is no suggestion of criticism of her work before "about mid May 2006", and she left at that time because someone else was being appointed to vet her work. Once all the context is taken into account, there is no suggestion that those for whom she was working were left in any doubt as to the reason for her departure, or that they would have preferred her to work out her contract. Once she had responded negatively to having her work vetted by another consultant/contractor, she was entitled to take the view that there was no point in remaining. She would stop work, and the Ministry would stop paying her, having Ms Curran on hand to carry on. As I have noted

above, the absence of a written explanation for her early departure is not relevant as a reflection on how responsibly she conducted herself at the end of her period with the Ministry. The material reason for that fact being referred to is to report to the Minister that there was no contemporaneous document recording her protest about the circumstances of appointment of Ms Curran which was the topic that had motivated the Minister's request for a report in the first place.

"The plaintiff was overly emotional"

[23] The principal passage which might convey this meaning is the advice Mr Gow had received from staff that the plaintiff "appeared to be in a state of concern", when considered in light of the context that she left at short notice, did not complete her contract, and did not provide any written explanation for doing so. This is to be assessed within the wider context of her terminating her work on the project as a result of being advised that Ms Curran had been appointed to oversee the content of the work she was contracted to produce.

[24] The passage does not convey an overly emotional reaction. The Briefing Paper is entirely devoid of any judgement or comment that the reaction was excessive or unwarranted. What it does convey is that she was sufficiently concerned at what she had just been told to leave work at short notice in circumstances where her concern was apparently sufficient to be discerned by those observing her at the time. I cannot see that finders of fact would treat this as inferring that the plaintiff was overly emotional. Rather, it conveys an immediate and potentially principled decision not to continue with the assignment in the changed circumstances she had just been appraised of.

"The plaintiff was not fit to be employed by a government department, ministry or agency as a professional communications consultant"

[25] The first fact that her work had gone through a series of six drafts does not render her unfit to be employed in a government department. Experience of finders of fact in a diverse array of situations might provide reassurance that anything from

the wording of an advertising jingle to a politician's speech, a commercial contract or a clergyman's sermon might undergo six or more drafts without rendering the draftsperson unfit for that particular task.

[26] The fact that a number of those considering one or more drafts of her work consistently commented adversely on it might, depending upon the context in which such adverse comments were made, suggest that the person was not fit to undertake such work. However, here, the context suggests a clash of principles with the Minister wanting a product reflecting a political agenda, and Ms Leigh's work reflecting a different approach. The initiatives to transfer the task to a communications adviser seen as aligned with the Minister's political thinking on the subject strengthens the impression that it was a difference of principle. Without more than the facts specified in the Briefing Paper, the circumstances of such a clash do not infer that a communications adviser of principle is unfit to be employed generally, but rather that the Government's agenda made it inappropriate for her to continue on this assignment. These two are quite distinct notions, and in the relevant context here, I do not see the notional reasonable person drawing a meaning of general unfitness to be employed from the description of events in the particular case.

"The plaintiff's work had received consistent adverse comment from government departments, senior officials and from the Minister Responsible for Climate Change Issues as a consequence of her incompetence"

[27] This overlaps with the analysis of the first meaning contended for. It requires there to be a tenable connection between the first, factual proposition that Ms Leigh's work had, around mid-May 2006, consistently drawn adverse comments, and the second, unstated opinion that such comments arose as a consequence of her incompetence. For the reasons set out above, I am not satisfied that such a connection between the two propositions could arise as a natural and ordinary meaning of the words complained of.

Impact of "apology"

[28] In analysing whether the terms of the Briefing Paper could sustain any of the defamatory meanings alleged in respect of it, I have not overlooked the pleading in the Amended Statement of Claim of a written statement issued on 5 December 2007 by the Chief Executive of the Ministry, Mr Hugh Logan. To understand its potential relevance, it is again necessary to quote in full the extent to which that apology is pleaded in the Amended Statement of Claim:

> 42. On 5 December 2007, Mr Logan, the Chief Executive of the Ministry, on behalf of the Ministry, issued a written apology to the media, apologising for the Briefing Paper and the Minister's Comments ("**Apology**"). The Apology included the following statements:
>
> (a) "I am concerned that written material provided to the Minister in preparation for a question in the House led to a reflection on the work of Ms Erin Leigh in 2005/06 that was not intended by the Ministry."
>
> (b) "Ms Leigh, a professional communications consultant, was contracted in 2005 by the Ministry. Her contract was renewed three times. In May 2006 she notified the Ministry that she was ending her contract and ceased work. At the time the Ministry accepted this without seeking any further explanation, and paid all contract fees billed to it."
>
> (c) "Ms Leigh had completed a number of projects under the four contracts. Her media work was professional and of good quality, especially work that she did in respect of the Waitaki Water Allocation Board of Inquiry."
>
> (d) "The climate change work on which she was engaged, with other Ministry personnel, was not yet concluded and was subsequently completed by others."
>
> (e) "Two weeks ago the Ministry was asked to provide the Minister with information on her work and her departure. Under time limitations, a briefing note was prepared from internal records and provided to the Minister."
>
> (f) "As Chief Executive, I was responsible for that briefing. I did not take it or intend it to reflect on Ms Leigh's professional ability or her performance under contract to the Ministry."
>
> (g) "The events which have followed show that the note could be, and was, interpreted in this adverse way. In particular, the Minister understood it in that way, with public and personal consequences for Ms Leigh and for the Ministry."

(h) “Because these events were connected with an investigation that had already been initiated by the State Services Commissioner, I initially considered that there should not be a separate public response.”

(i) “I now consider that there should have been a Ministry response and so I am releasing this statement. Because Ms Leigh has not agreed to the public release of the briefing note, the Ministry will not be releasing it with this statement.”

(j) “Both personally and on behalf of the Ministry I apologise for what has occurred, and I regret the public attention which has been generated.”

[29] I was not sympathetic to Mr Tizard’s argument that this was one of the paragraphs that should be struck out on the basis that it could not have any relevance. However, nor am I persuaded that the views reflected in it can have any proper influence on the analysis of whether the words in the Briefing Paper are indeed capable of conveying any of the defamatory meanings pleaded in respect of it. With great respect to the Chief Executive, his acknowledgement that the Briefing Paper could be interpreted to reflect adversely on Ms Leigh’s professional ability or her performance under her contracts with the Ministry does not reflect the analysis required by the legal test I am bound to apply. The obvious imperative confronting Mr Logan in the period after the Minister’s statement in the House was to endeavour to bridge the gap between the Legislative and Executive branches in respect of their contributions to the comments on Ms Leigh’s conduct. The Minister was immune from legal liability, and likely to be in a situation dominated by political considerations that would weigh against any public concession to Ms Leigh. At the same time, it was untenable for Mr Logan to disavow the Minister’s statement, or to seek to distance the Ministry’s Briefing Paper from what had been said in the House when to do so would state or imply that the Minister had gone materially further than the factual matters stated in the Briefing Paper.

[30] The context of Mr Logan’s statement is also material. There had been no publicity given to the Briefing Paper, and his statement acknowledged that it would not be released because Ms Leigh was opposed to that course. What created the public interest, and the matter to which he was responding in practical terms, was the terms of the Minister’s statement. An obvious motive was to diffuse problems that

might arise for the Ministry, as a result of what the Minister had said. At that point, no problems had arisen discretely in respect of what was stated in the Briefing Paper.

[31] Accordingly, the fact that the Chief Executive of the Ministry publicly acknowledged the prospect of adverse inferences arising from the Briefing Paper does not alter the conclusion I have reached that the Briefing Paper was not capable of bearing the defamatory meanings pleaded in respect of it.

[32] Accordingly, I find that the first cause of action, to the extent it alleges the Briefing Paper contained meanings defamatory of Ms Leigh, is untenable and is to be struck out.

Insufficient particularity as to Oral Statements?

[33] Somewhat different considerations arise in respect of the Oral Statements alleged to have been made by Mr Gow to the Minister at the 22 November 2007 meeting. Mr Tizard argued that this pleading was deficient for another reason, namely that it failed to plead with appropriate particularity the words alleged to have been uttered at the meeting by Mr Gow. The relevant allegation is in the following terms:

> 51. During the Meeting, the Second Defendant, on behalf of the Ministry, made the following statements or statements which were substantially the same ("**Oral Statements**"):
>
> (a) stated that the Plaintiff was primarily responsible for developing a communications work programme for climate change communications;
>
> (b) stated that [the] Plaintiff was responsible for the "yellow gumboots" project;
>
> (c) stated that the Plaintiff's work had received consistent adverse comment from:
>
> (i) other Government departments;
>
> (ii) senior officials; and
>
> (iii) the Minister responsible for Climate Change Issues.
>
> (d) stated that her work at the Ministry was:

(i) incompetent;

(ii) open for criticism; and

(iii) required numerous changes.

(e) stated that the Plaintiff left:

(i) suddenly;

(ii) irresponsibly; and

(iii) without advising the Ministry of the reasons for her leaving.

(f) stated that, on the Plaintiff's last day of work at the Ministry, the Plaintiff:

(i) worked for a total of 15 minutes clearing out her desk; and

(ii) invoiced the Ministry for that 15 minutes.

[34] Mr Tizard is correct in submitting that the usual requirement for pleading a defamatory utterance is to plead the specific words used because the actual words in question will always have a material effect on the assessment of whether they convey one or more defamatory meanings. He relied on the Court of Appeal decision in *Kerr v Haydon* [1981] 1 NZLR 449. That decision acknowledged the relatively absolute terms in which the requirement is expressed in the English Court of Appeal decision in *Collins v Jones* [1955] 1 QB 564 where the requirement was expressed in terms that "in a libel action it is essential to know the very words on which the plaintiff founds his claim". However, he had to acknowledge that this rule is not inflexible and absolute. Even in *Kerr* it was acknowledged:

> …Sometimes a plaintiff suing for slander may be allowed to administer interrogatories to the defendant as to the precise words used. He will be required to satisfy the Court that he is not merely fishing; but if it is abundantly clear that the defendant has uttered some words slanderous of the plaintiff "of a definite character", the jurisdiction may be exercised in the discretion of the Court:…(453)

[35] Mr Miles sought to bring the present circumstances within the scope of this exception. He relied primarily on the English Court of Appeal decision in *Best v Charter Medical of England Ltd* [2001] EWCA 1588. That case involved allegations cast in similar terms to the second cause of action in the present case, in that the allegation was that the defendant had published words "to the effect that…"

Keene LJ characterised the exception as a narrow one which will arise "only rarely" (para 11). The judgment continued:

> I conclude that the exception to the normal rule only operates where the claimant can satisfy the Court that he has a good cause of action, because there is credible evidence that the defendant on a particular occasion and to a particular person made a defamatory statement about him of a specified nature. Unless there is evidence that there is a good cause of action in defamation, an order for further information under Civil Procedure Rules Part 18 would indeed be a fishing expedition. (para 13)

[36] To similar effect are the observations of the Privy Council in its decision in *Jennings v Buchanan* [2005] 2 NZLR 577:

> Where an oral statement is complained of, it is rarely possible (in the absence of a recording, a transcript or a very careful note) for a plaintiff to establish the precise words used by the defendant. But the law does not demand a level of precision which is unattainable in practice. The plaintiff must plead the words complained of, but it is enough if the tribunal of fact is satisfied that those words accurately express the substance of what was said. [5]

In the circumstances of that case, Their Lordships held that it could not matter whether Mr Jennings had said "I do not resile…" or whether the relevant journalist had asked him "Do you resile…?" and Mr Jennings had answered "No".

[37] Accordingly, there is some scope for exceptions. This may be justified, for example where a plaintiff knows of the circumstances of a communication, and the "sting" of the libel conveyed, but cannot reasonably be expected to plead the specific words used. However, defendants cannot be required to respond where there is no credible allegation with sufficient specificity to at least assess in a general way any potential liability and the grounds for defence. Similarly, an unreasonably vague pleading should not be recognised as a sufficient platform to launch discovery initiatives that would amount to "fishing".

[38] I am not prepared to strike out paragraph 51 of the Amended Statement of Claim at this stage, on the basis of its lack of particularity. Nor can I pre-judge the presently outstanding application on behalf of Ms Leigh to administer interrogatories to Mr Gow intended to elicit specific answers as to what he contributed to the 22 November 2007 meeting. At this juncture I intend assessing the capacity for the

pleading in the second cause of action to bear defamatory meanings, on the assumption that either paragraph 51 or a more particularised version of that allegation would be able to withstand a subsequent challenge to its lack of particularity. That is also not to suggest any determination that the present terms of paragraph 51 are necessarily sufficiently particularised. The extent of prejudice to Mr Gow that may follow if Ms Leigh does obtain leave to administer interrogatories, and after they are answered, the pleading remains substantially in its same terms, is an issue to be addressed if and when those contingencies ensue.

Oral Statements capable of a defamatory meaning?

[39] Accordingly, within that provisional context, I turn to consider whether the words attributed to Mr Gow in paragraph 51 are capable of bearing any of the defamatory meanings alleged in the second cause of action. These are the same five meanings as have been considered in respect of the Briefing Paper in the context of the first cause of action.

[40] Because the Oral Statements allegedly used by Mr Gow include statements that Ms Leigh was incompetent, and that she left irresponsibly, those Oral Statements are capable of bearing the meanings that she was incompetent and irresponsible as pleaded in paragraphs 52(a) and (b).

[41] As to the pleaded meaning in paragraph 52(c) that Ms Leigh was overly emotional, there is nothing more attributed to Mr Gow in the Oral Statements beyond the statements in the Briefing Paper that could possibly be capable of conveying that meaning. For the same reasons as specified in paragraphs [23] and [24] above, I do not accept that the Oral Statements are capable of conveying the defamatory meaning that Ms Leigh was overly emotional.

[42] Paragraph 52(d) repeats paragraph 28(d), alleging a defamatory meaning that Ms Leigh was not fit to be employed by a Government ministry, department or agency as a professional communications consultant. On the basis of the additional elements of Oral Statements attributed to Mr Gow to the effect that she was

incompetent and irresponsible, I find that the Oral Statements may be capable of bearing this defamatory meaning in respect of her.

[43] Similarly, paragraph 52(e) repeats paragraph 28(e) to the effect that adverse comments arose as a consequence of her incompetence. As with paragraph 52(d), the additional elements alleged to be made among the Oral Statements render such a meaning one that the Oral Statements are capable of bearing.

[44] Accordingly, with the exception of paragraph 52(c), I am not prepared to find that the Oral Statements pleaded in paragraph 52(a), (b), (d) and (e) are not capable of bearing such defamatory meanings.

[45] I turn next to consider two grounds of challenge argued by Mr Tizard that I consider to be intimately linked to each other. The first argument is that the essence of the claims constitutes a challenge to what the Minister said in the House, as without the publicity his answers received and the terms in which he expressed them there could be no meaningful "sting" to any libel. Any attack on what is said in Parliament is blocked by Article 9 of the Bill of Rights 1688 (Imp), and that is argued as a complete answer to the whole claim. The second argument was that it was untenable to plead that either the Briefing Paper or the Oral Statements were "republished" by what the Minister said in the House. That involves a consideration of the materiality and extent of differences between the Briefing Paper and the Oral Statements on the one hand, and the Minister's statement on the other. That leads in turn to an analysis of the prospects that the Minister's statement is capable of bearing defamatory meanings that do not tenably arise from either the Briefing Paper or the Oral Statements. This last analysis arguably strays into the impugning of Parliament. I accordingly consider the Bill of Rights' argument first, whilst recognising that the consideration of the second issue on "republication" by the Minister is at the very least illustrative of the difficulties raised by a pleading that is in any way dependent on what has been said in the House.

Breach of Article 9, Bill of Rights 1688

[46] Mr Tizard argues that a crucial element of both causes of action in defamation is the words used in Parliament by the Minister. Before the Minister's statement was made, the extent of publication of both the Briefing Paper and Oral Statements is insufficient to warrant any substantial claim. Given that primary importance of the Minister's statement, the defendants argue that Ms Leigh is relying on the publication of the Minister's words as causing the damage, in a way that infringes Article 9 of the Bill of Rights 1688. That Article provides:

> That the freedom of speech and debates of proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

[47] It is accepted for Ms Leigh that no liability can attach to the Minister for what was said as that was an occasion of absolute privilege. However, the plaintiff resists the invocation of Article 9 as an attempt to extend the protection of absolute privilege to what is said to Ministers in relation to what they may subsequently say in the House. In New Zealand, this absolute privilege is recognised by s 13 of the Defamation Act 1992, as extending to "proceedings in the House of Representatives". Although certain specific situations such as publication of documents to the House are recognised, there is no definition of what constitutes the relevant "proceedings".

[48] Both parties invited analogies with the decision of the Queensland Court of Appeal in a judgment on striking out in *Erglis v Buckley* [2004] QCA 223. There are two material differences between the present circumstances, and those involved in that case. First, the Parliament of Queensland Act 2001 provides:

> **8 Assembly proceedings can not be impeached or questioned**
>
> (1) The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.
>
> (2) To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.

9 Meaning of ‘proceedings in the Assembly’

(1) **‘Proceedings in the Assembly’** include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.

(2) Without limiting subsection (1), **‘proceedings in the Assembly’** include

…

(c) presenting or submitting a document to the Assembly, a committee or an inquiry; and

(d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and …

[49] That scope of "Proceedings in the Assembly" is materially wider than the natural meaning attributable to s 13 of the New Zealand Act.

[50] The second material difference is that what occurred in Parliament in the *Erglis* case was the reading by the Minister of Health of a letter written by 11 nurses in respect of a twelfth nurse. All of those nurses worked in a particular ward of a Brisbane hospital, the management of which was a matter of public comment at the time.

[51] The Court of Appeal reversed an order that had struck out a pleading that referred to the letter being read in Parliament. I am satisfied that the scope of s 13 of the New Zealand Act cannot be legitimately influenced by the scope of the definition of "proceedings in the Assembly" in the Queensland Act. More importantly, a verbatim reading of a letter conveyed for wider publication is materially different from the original work involved by a Minister when crafting the Minister's own terms for reply to Parliamentary questions. Once the extent and nature of the new thinking reflected in the words used in the House is raised, then the prospect of impugning the Minister's conduct and therefore impugning Parliament is also likely to arise.

[52] In the context of an alleged republication as pleaded in this case, any material difference between the Oral Statements and their adaptation by the Minister in his statement to the House will require consideration of whether what the Minister said

beyond what the Minister was told can bear any defamatory meaning independent of those arising from the Oral Statements. This arises irrespective of the recognition of absolute privilege for the statement by the Minister in the House. Although the point has not been reached in these proceedings where it is actually, rather than hypothetically, confronted, I consider a pleading that does require an analysis of the extent, if any, of defamatory meanings arising in a republication in the House when compared with any lesser or different objectionable content in the original statement would be vulnerable to strike out on the ground that such an analysis impugns Parliament.

[53] The Privy Council considered the scope of Article 9 in *Jennings*, in the context of an alleged repetition outside the House, by implication, of an earlier statement made in the House that was alleged to be defamatory. The review of principles attaching to Parliamentary privilege, including citations from the Privy Council's earlier decision in *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 per Lord Browne-Wilkinson, which had included the recognition that parties to litigation:

> …cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. ([10] in *Jennings*, adopting what had been said at 10 in *Prebble*)

[54] It was relevant in *Jennings* to draw the distinction that this rule did not preclude references in Court proceedings to what had taken place in the House where that became relevant as a matter of history as to what had transpired. The Privy Council also cited from the judgment of Cooke P in *Hyams v Peterson* [1991] 3 NZLR 648, citing other authority for the proposition that:

> …what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arises out of something done outside the House.

Accordingly, the rationale recognised in these cases is that reference to what is said in the House will be excluded if the purpose for doing so is to invite any form of criticism of what was said. I consider the process of comparing the defamatory

meanings capable of arising on the Oral Statements, when compared with the defamatory meanings capable of arising from the Minister's statement in the House raises the spectre of just that form of critical analysis that is within the notion of "impugning" the proceedings of the House. The reality is that the plaintiff has pleaded defamatory meanings that arise from the Minister's statement and then attempted to attribute them to Mr Gow. The first premise, not explicit for obvious reasons, is that the Minister's statement was defamatory.

[55] Mr Miles suggested that this situation could be avoided by recognising that a jury be invited to disregard the extent of "embellishment" in a republication in the House. He also argued that such a prospect did not warrant strike out, because the need for such an invitation does not arise until the extent of the embellishment is ascertained as a matter of fact at trial. Where the pleading introduces the prospect of some material distinction between what the Minister was told, and what the Minister said, then any allegation of republication will traverse either explicitly, or in the negative sense when reflecting on any differences in wording, whether the words used in the House are capable of bearing a defamatory meaning that would not arise on the original statement. However, it would not be necessary to both embark on such an analysis, and to make a positive finding that additional defamatory meanings could arise from the additional matters raised only in what was said by the Minister in Parliament, to constitute a questioning or impugning of Parliament. I took Mr Miles' argument to contemplate that an impugning of Parliament would only arise once that positive finding arises.

[56] I consider that a questioning of the proceedings of Parliament must arise where a cause of action pleads that a republication occurred in the House in circumstances where there was any material difference between what was conveyed to the Minister, and what was then said by the Minister in the House. Whether the Minister's statement can qualify as a republication, in whole or in part, necessarily traverses the prospect of independent defamatory meanings arising only from what was said in the House. It is inherent in an allegation that a statement is defamatory that it is false and misleading, and evaluating whether that character can be attributed to it must be a form of questioning or impugning Parliament that is within the long-standing prohibition recognised in Article 9 of the Bill of Rights 1688.

[57] Where an allegedly libellous statement is made to a Member of Parliament, and such statement then forms a basis for a claimed republication of that statement in the House, then Article 9 would preclude any pleading that related to content of the alleged "republication" going in any material respect beyond the content of the original statement to the Minister. I consider that reflects the appropriate extent to which Article 9 should be applied in the present case.

[58] Mr Tizard submitted that the Court of Appeal in *Peerless Bakery Ltd v Watts* [1955] NZLR 339 recognised that absolute privilege could extend to a report by officials to the Minister. Although observations in general terms by Barrowclough CJ presiding in the Court of Appeal in that case might be taken to confirm that proposition, I do not consider that reasoning a reliable basis for extending absolute privilege to the present circumstances. The essence of the analysis in *Peerless Bakery* was that it mattered not whether a Minister's communication was to a subordinate, an equal or to a superior, and that the privilege extended because the Minister was engaged in a matter of state which warranted recognition of the privilege (see 353). Given the rationale for the privilege, I am not persuaded that the reasoning justifies extending the privilege to a communication from someone obliged to report to the Minister such as the Deputy Secretary in the present case.

[59] In support of extending absolute privilege, Mr Tizard also cited from paragraph [100] in the judgment of Fryberg J in *Erglis:*

> [100] […] It seems to me that there is something to be said for the view that a member's freedom of speech might be impaired if there were a risk that by making a speech he or she would cause an informant to become liable for increased damages. Moreover such an outcome might cause the flow of information from outsiders to dry up. I do not think these concerns are overcome by reference to the member's immunity from action. They may depend upon how robust an approach members of the Legislative Assembly take to such matters. A robust approach is easier when one's own liability is unaffected. It may be that these are matters upon which evidence should be taken; I am not sure that I am in a position in its absence to form a view.

[60] Mr Tizard was concerned that recognition of the entitlement of a plaintiff in defamation proceedings to plead a Minister's construction of what has been reported to the Minister would lead to a reversal of the long-standing convention that

Ministers accept responsibility for the actions of civil servants within their portfolios, by attributing tortious liability to a civil servant for the conduct of the Minister. It was characterised as undesirable in policy terms because of the obvious chilling effect it would have, inhibiting the full and frank reporting by senior Ministry employees to their Ministers.

[61] From the opposing perspective, Mr Miles submitted that competent civil servants acting in good faith have nothing to fear because their communications to Ministers in such situations would still attract the defence of qualified privilege so long as they were not acting recklessly or maliciously. Further, that it was in the public interest for senior civil servants to appreciate the responsibility and not be able to hide behind Parliamentary privilege where it is clear that any defamatory inferences would be given prominence in any repetition in the House.

[62] The ban on impugning proceedings of Parliament may not always be an effective balance between these two interests. However, I consider it is sufficient and appropriate in present circumstances: if a Member or Minister has gone off on a critical tack of his or her own, then the differences between an original report to the Member of Parliament and what is said in the House will generally mean that the latter cannot be a republication of the former. There would be no scope for simply ignoring the "embellishments". If, however, the civil servant's words, or a close approximation of them, are used, then liability may well arise for republication in the House, unless qualified privilege can be made out.

[63] Accordingly, I am not persuaded that absolute privilege can be claimed for the Briefing Paper, or for the Oral Statements, simply by virtue of their proximity to "proceedings in the House of Representatives". However, a discrete concern arises where the Amended Statement of Claim pleads that republication of either the Briefing Paper or the Oral Statements occurred in relevant comments in the House by the Minister, and where the pleading reveals material differences between the words used in the original instances, and those used in the alleged republication. In such circumstances the Court could not entertain the prospect of issues arising at trial in respect of alleged republication that involve consideration of whether the Minister's words could bear defamatory meanings that did not also arise from the

terms of the original publication. Article 9 of the Bill of Rights excludes such matters from being justiciable. Looked at another way, this conclusion means that republication for the purposes of aggravating the extent of defamation cannot be pleaded in respect of a statement in the House, unless that statement constitutes a material repetition of the original statement without any embellishment (as occurred in *Erglis*).

Minister's statement a republication?

[64] In part to illustrate the inevitability of straying into the question of whether the Minister's statement could bear independent defamatory meanings, I turn next to the challenge that the Minister's statement in the House could not constitute a republication, respectively of the Briefing Paper and the Oral Statements. Having found that the Briefing Paper is not capable of bearing the defamatory meanings pleaded in respect of it, the short answer is that logic dictates that any defamatory meanings alleged to arise from the Minister's statement cannot constitute republication of a non-defamatory report to him. In the event that such logic is inadequate, and to demonstrate the concerns reflected in the previous section of this judgment, I will also reflect on the extent of the material differences between them in the present strike-out context, abstracted from the actual factual enquiry that would ensue at trial.

[65] Four particular comments by the Minister are pleaded in the following terms:

(a) "Erin Leigh had repeated competence issues. She had to fix up the piece of work that she was employed to do six times after complaints from senior officials from a number of departments. As a result of that, someone had to come in and fix up that mess. Clare Curren was employed to do that."

(b) "The last record of contact that the Ministry had with Erin Leigh was when she came in, in an agitated state, for a quarter of an hour in order to clear out her desk. It is my understanding that the last non-physical contact was when she sent an invoice to the Ministry for that quarter of an hour."

(c) "Ministers have the right to insist on competent advice. That has been established for a long period of time. When something comes to them six times and is criticised by officials not only from the Ministry for the Environment but from other Government

> departments, I think that any reasonable chief executive would look for someone who could do the work. When there is someone available to try and fix up the mess who did climate change strategic work for the Australian Liberal Government, I can understand why the Ministry employed her."

> (d) "[the Plaintiff] who is a sad person, who had six attempts at doing a piece of work, and who was replaced on that job…"

[66] The authorities suggest that the test as to whether a secondary publication constitutes a republication of a primary publication may depend in part on whether the plaintiff is suing on the secondary publication as a separate cause of action for which the person responsible for the primary publication is alleged to be liable on a stand-alone basis, or whether the secondary publication is pleaded as a republication of the first merely for the purposes of adding to the extent of damage alleged to have been caused by the primary publication. For instance, the English Court of Appeal in *McManus v Beckham* [2002] 1 WLR 2982 drew the distinction that an analysis requiring the whole of the 'sting' in the first libel to be reflected as well in the alleged republication is only necessary where the second publication is relied upon as an independent cause of action. If the republication is pleaded merely in aggravation of the damages flowing from the original publication then, in pleading terms, any material part of the sting in the original publication, repeated in the republication, will be sufficient to constitute the second occasion a republication going to aggravation of the extent of damages suffered as a result of the original publication.

[67] When republication is pleaded for the more limited purpose of adding to the damage allegedly flowing from the original publication, the issue of whether the second publication is to be characterised as a republication of the first reflects a conventional tortious analysis of whether the damage incurred is too remote from the primary publication: see *Slipper v British Broadcasting Corporation* [1991] 1 QB 283 at 296 per Stocker LJ:

> Further, in my view, the law relating to republication in defamation cases is but an example of the rules of novus actus in all cases of tort or, where applicable, breaches of contract where that issue arises. In a defamation case where there has been republication the question whether or not there has been a breach in the chain of causation inevitably arises but such cases are not in a special category related to defamation actions but are examples of the problem and will fall to be decided on general principles and in the light

> of their own facts as established. They are not specific or special rules peculiar to defamation actions. […]
>
> It is at this point that the issue of natural and probable consequence or foreseeability arises. In my opinion this is a question of remoteness of damage and not liability and raises an issue of fact for the jury.

[68] Since the Minister's statement was made on an occasion of absolute privilege, there is no prospect of it attracting independent liability. Therefore republication is to be treated here as pleaded for the more limited purpose of aggravating the damage from the original publication. Therefore the relative closeness between the original publication and the republication is to be analysed on the basis that the latter might be pleaded in aggravation of damages so long as some material part of the "sting" in the original publication is repeated in the alleged republication.

[69] However, even measured by that standard, I am satisfied that the differences between the Briefing Paper and the Minister's statement are so material that the Minister's statement would fall outside the ambit of what could be recognised as a republication of the Briefing Paper. I acknowledge that the latter builds on the former, and addresses the same subject matter. However, when the focus is upon defamatory content, the absence of 'sting' in the factual statements in the Briefing Paper, when compared with the strong prospects of making out numerous defamatory 'stings' in the Minister's statement requires the recognition of a material distinction between the two that distances the former from the latter in any analysis of the potential defamatory consequences. The same answer arises if a conventional tortious analysis of remoteness of damage is applied.

[70] I have already determined that the Briefing Paper cannot bear any of the defamatory meanings alleged as a arising from it. To the extent that the Minister's statement built on the factual matters reported to him, that elaboration is bound to be treated by a finder of fact as what creates the prospect of any 'sting'. For example, as to the first of the Minister's statements as pleaded and cited in paragraph [65](a) above, the terms of the Briefing Paper do not provide a foundation for the comment that Ms Leigh had repeated competence issues. Nor does it warrant the comment that she had to "fix up the piece of work that she was employed to do six times…"

where that suggests that the work was expected to be of acceptable, final, quality when first produced, rather than acknowledging the nature of that work as reasonably requiring at least a number of drafts, before it will be treated as concluded.

[71] Similarly in respect of the allegation cited at paragraph [65](b) above, it may be considered critical and demeaning of Ms Leigh to suggest that she sent a separate invoice to the Ministry for the quarter of an hour spent clearing out her desk on the last day she attended at the Ministry. That criticism would not be justified by the terms of the Briefing Paper which reported the different notion that the last invoice for work up to the time of her departure included a charge for the quarter of an hour on that last day.

[72] To the extent that adverse inferences could tenably arise from most, if not all, of the Minister's statement, they all involve significant embellishment that is sufficiently remote to be distanced from the Briefing Paper in a reasoned consideration of the cause of any damage to her reputation. I am satisfied that there are too many leaps made between the factual statements in the Briefing Paper, and the Minister's statement, for the latter to be treated as a republication of the former.

[73] The second cause of action alleges that the Minister's statement constituted a republication of the Oral Statements. Because many of the 'embellishments' as between the Briefing Paper and the Minister's statement are found in the Oral Statements, I might well come to the contrary conclusion, namely that if indeed the Oral Statements are made out, then the connection between them and the Minister's statement is materially closer, to an extent justifying the allegation that the latter constitutes republication of the former. Given the uncertainty over the future of that pleading, I say no more about it at this stage. It follows from this reasoning on the possible tenability of the second cause of action that I reject Mr Tizard's arguments to the effect that there was in reality only one cause of action for defamation.

Strike out sought for irrelevance

[74] Mr Tizard also sought to strike out 10 paragraphs of the Amended Statement of Claim, on the ground that they were irrelevant.

[75] The first group of allegations are those in paragraphs 42 to 44, addressing the content of the 5 December 2007 apology from the Chief Executive of the Ministry, plus an allegation that the content of the apology did not retract the written statements made, and that a further comment in the House by the then Minister did not include an apology for the Minister's earlier comments.

[76] The so-called apology addressed only the Briefing Paper, and made no reference to the Oral Statements. As I have found the Briefing Paper not to be capable of any of the defamatory meanings allegedly arising from its terms, then it would follow that a pleading referring to an apology in respect of that Briefing Paper could not possibly have any relevance.

[77] So far as paragraph 44 makes further reference to a statement in the House that could not possibly constitute a republication of the Briefing Paper, then it is also irrelevant so far as the first cause of action is concerned.

[78] Mr Miles argued that Mr Logan's apology and the further comment by the Minister are relevant to the issue of damages because it shows that the substance of the statements had not been retracted. There is, however, a logical disconnect between the second cause of action depending on the Oral Statements, and the context and content of the apology and further Ministerial statement. If at all, the latter impacted only on the Briefing Paper where the Minister's statement could tenably be characterised as a republication of the Briefing Paper. However, that is not the case and accordingly paragraphs 42 to 44 in their present form must be struck out as a consequence of the strike out of the first cause of action. It may be that some alternative means of relating the timing and content of Mr Logan's apology to the second cause of action may arise. It is difficult to see how that could occur, but a re-pleading of different circumstances relating to the apology should not be excluded.

[79] Mr Tizard also challenged as irrelevant paragraphs 25, 29, 33, 50, 53 and 54 of the Amended Statement of Claim. Those paragraphs allege that the Ministry and Mr Gow ought to have appreciated that the information provided to the Minister would be used to criticise the competence and performance of Ms Leigh, that the Ministry had information that would have demonstrated that the Briefing Paper was false and misleading, and similar points in respect of the circumstances of the Oral Statements. Mr Tizard submits that such matters are entirely irrelevant to whether the Briefing Paper and the Oral Statements are defamatory. Mr Miles counters that they go to the existence of recklessness or lack of goodwill, and are therefore relevant in responding to the defendants' plea of qualified privilege.

[80] Some of the paragraphs might have more aptly appeared in the pleading of the negligent misstatement cause of action, but their potential relevance to qualified privilege cannot be dismissed entirely. Accordingly, if I were wrong to strike out the defamatory allegations in the first cause of action, I would not have required the exclusion of these paragraphs that appear in the first cause of action. The parallel set of allegations in the second cause of action can remain because of the prospect of relevance as argued by Mr Miles.

[81] Objection was also taken to paragraph 33 which pleads that the Briefing Paper was also published to Television New Zealand, TV3 News and (National Party Member of Parliament) Gerry Brownlee. There is no allegation as to how either the Ministry or Mr Gow was responsible for, or contributed to, the circumstances in which those further publications of the Briefing Paper occurred. Mr Tizard argues that without some attribution of responsibility to the defendants, an allegation of additional publication is irrelevant to both the existence of defamatory statements in the Briefing Paper, and also to the extent of damages arising from any defamatory statements, for which the defendants could be made liable.

[82] I accept that the paragraph as presently expressed is inadequately particularised to have any relevance to the case against the defendants. However, before it is removed, I consider Ms Leigh ought to be afforded an opportunity of making the allegation relevant by particularising some respect in which the further publications alleged can be attributed in some way to the defendants. In the absence

of such further particulars, then that paragraph should not remain in the Amended Statement of Claim.

Third cause of action: negligent misstatement

[83] As to the additional cause of action pleaded only against the Ministry for negligent misstatement, the submissions for Ms Leigh fairly acknowledged the starting position for the defendants' challenge to this cause of action. The written outline of the plaintiff's argument included the following:

> 11.1 A Plaintiff cannot ordinarily bring a claim in negligence for harm to his or her reputation. To impose such a duty would subvert the balance between freedom of expression and the right to individual reputation that has been achieved by the law of defamation.

[84] Here, however, it has nonetheless been pleaded for Ms Leigh that the Ministry owed her a duty of care as an independent contractor working exclusively for the Ministry in circumstances where it had special knowledge of her experience and competence, and knew that Ms Leigh would rely on the Ministry to exercise reasonable care in making any statements about her professional experience or competence. The Amended Statement of Claim then pleads that such duty was breached because the Ministry failed to adequately enquire, or have regard to, positive matters that ought to have been reflected in the comments made about her.

[85] Both parties cited the decision of the Court of Appeal in *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289. That decision confirmed the striking out of pleadings alleging a duty of care owed in tort for statements made about the quality of cables supplied by the plaintiff. The leading judgment of Gault J analysed in detail the rationale for the exception to the usual rule that no duty of care in negligence will arise for damage to personal reputation. To do so cuts across the law of defamation. An exception to this approach had been recognised by the House of Lords in *Spring v Guardian Assurance plc* [1995] 2 AC 296. That case recognised the prospect of liability in negligence where a former employee sought to claim against the former employer for a defamatory reference written without reasonable care and provided on request to prospective new employers of the plaintiff.

[86] The Court of Appeal in *Midland Metals* was inclined to confine any impact of the House of Lords' decision in *Spring* to circumstances where there was a special relationship between the maker of the statement and the person about whom the statement was made, or where there has been a relevant assumption of responsibility by the former (see [42]). The essence of the reasoning is to confirm the approach adopted in earlier New Zealand decisions, including *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA), as to the recognition of circumstances in which a novel duty of care may be recognised. That affords some priority to the concern not to create a novel duty of care in circumstances that cut across established legal liabilities in other areas, in particular defamation.

[87] Here, Mr Miles argued that the relationship between Ms Leigh and the Ministry tenably came within that exceptional category of special relationship in which a tortious duty to take care might arise.

[88] Mr Tizard submitted that recognition of the prospect of a duty of care in the present circumstances would be inconsistent with a well-established line of cases in New Zealand, including *Midland Metals* and *South Pacific Manufacturing*, that are consistently against the recognition of a possible duty of care in such circumstances.

[89] I accept that the circumstances in *Spring* are distinguishable. The Briefing Paper in issue here was not prepared as a reference, or to address Ms Leigh's competence for the sake of prospective employers. Rather, the Minister required the Ministry to provide information, in the context of criticism of the circumstances in which Ms Curran was retained, to explain the circumstances of Ms Leigh's contemporaneous departure. The Ministry had clearly defined obligations to be full and frank in a factual response, within an apparently tight timeframe. It is inherently unlikely that the law would superimpose in that situation a potentially conflicting duty to take care to protect Ms Leigh's reputation. The opportunity to consider the impact on her future employment prospects, which would be to the fore in preparing a reference, could not reasonably come within the immediate scope of concerns for the officials in the Ministry when preparing a prompt response to the Minister's request.

[90] I would not be inclined to treat Ms Leigh's status as an independent contractor, rather than as an employee, as decisive on its own. It does, however, distance her to a material degree away from the relationship that applies between an employer and employee. There is no suggestion of a requirement for performance reviews that would be undertaken periodically, or prospects for monitoring her performance to consider promotion within the organisation. In contrast to an employee, she had been present to perform personal services pursuant to a series of relatively short-term contracts.

[91] I therefore find that the relationship between Ms Leigh and the Ministry falls outside the requisite proximity that would be required to impute a duty of care.

[92] On the other classic touchstone when considering evolving circumstances in which duties of care will be imposed, namely that of policy, there are numerous additional factors that negative any justification for imposing a duty of care.

[93] First, it does cut across the recognised boundary regulating the scope of tortious liability. The Courts have been wary of imposing a duty for negligent misstatement causing damage to reputation because the law addresses that harm within the law of defamation, where specialised defences, including - relevantly - qualified privilege, are well established to regulate the scope of potential liability. Another policy consideration is not to upset the balance between freedom of expression and a recognition of rights to protection of reputation. That takes on some real significance where the context of the communication is the Ministry's requirement to respond to a request for information from a Minister of the Crown. There should be no chilling influence, as would arise from the prospect of tortious liability for negligent misstatement exerted on those responding to such a requirement, given the level of importance attaching to full, frank and prompt responses in such situations.

[94] Accordingly, I see policy considerations as supporting a finding that this is not a relationship to which the law should attribute a tortious duty of care.

[95] The practical context in which the alternative cause of action is pleaded also tells against recognising the prospect of negligent misstatement as an alternative basis for claiming damages. Having found the Briefing Paper not capable of bearing defamatory meanings, the content of that document becomes no more than context in which any subsequently particularised allegations as to the content of the Oral Statements are then pursued as the source of defamation of Ms Leigh. It would be untenable for finders of fact to be confronted with the allegedly defamatory impact of the Oral Statements and the allegedly negligent consequences of the Briefing Paper.

[96] For all these reasons, I am satisfied that a striking out of the third cause of action is warranted.

Summary

[97] I find:

a) The Briefing Paper is not capable of bearing any of the defamatory meanings pleaded in respect of it.

b) That Article 9 of the Bill of Rights 1688 precludes pleading that the Minister's statement amounted to a republication of the Briefing Paper.

c) Provisionally, that the Oral Statements could bear all but one of the defamatory meanings alleged in respect of them.

d) Certain incidental challenges on grounds of irrelevance are upheld, others dismissed.

e) The third cause of action alleging negligent misstatement is struck out as untenable on a consideration of proximity of Ms Leigh's relationship to the Minister, and policy considerations.

[98] The consequences of these findings for the Amended Statement of Claim are as follows:

a) The pleading of the content of the Briefing Paper can remain as a matter of context.

b) Paragraphs 28, 36, 37, 40 and 48 are untenable and should be struck out.

c) Paragraph 33 may remain, but is vulnerable to strike out unless particularised (see paragraph [82] above).

d) The second cause of action purports to repeat paragraphs 42 and 43. As those paragraphs are pleaded, they relate solely to the Briefing Paper, and are struck out. The reference to their repetition should also be removed.

e) Paragraph 52(c) is struck out.

f) The third cause of action (paragraphs 63 to 71) is also struck out.

[99] I invite memoranda as to costs, if the parties cannot agree on the costs consequences of this judgment.

Dobson J

Solicitors:
Oakley Moran, Wellington for defendants/applicants
Wilson Harle, Auckland for plaintiff/respondent