

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2010-485-1274**

BETWEEN	DANIEL FRANCIS AYERS First Plaintiff
AND	ELEMENTARY SOLUTIONS LIMITED Second Plaintiff
AND	LEXISNEXIS NZ LIMITED Defendant

Hearing: 17 October 2011  
(Heard at Wellington)

Counsel: C.A. McVeigh QC and J. Scott - Counsel for Plaintiffs  
D.H. McLellan - Counsel for Defendant

Judgment: 29 November 2011

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**JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL**

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*This judgment of Associate Judge Gendall was delivered on 29 November 2011 at  
3.00 pm under r 11.5 of the High Court Rules.*

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## **Introduction**

[1] The plaintiffs have brought a claim against the defendant, LexisNexis NZ Ltd (Lexis Nexis), in defamation. For decision is an application by LexisNexis for orders that further and better discovery be undertaken by the first and second plaintiffs, Daniel Francis Ayers (Mr Ayers) and Elementary Solutions Limited (Elementary Solutions) respectively, and that further particulars by Elementary Solutions be provided to LexisNexis.

[2] LexisNexis seeks discovery of two broad categories of documents:

- (a) Documents relevant to Elementary Solutions' claim of pecuniary loss; and
- (b) Documents relating to the settlement reached between the plaintiffs and the authors of two letters published by LexisNexis.

[3] The further particulars sought relate to Elementary Solutions' quantum claim as to pecuniary loss under r 5.33 of the High Court Rules.

[4] Those applications are opposed by the plaintiffs.

## **Background**

[5] The claim brought by the plaintiffs relates to two articles which LexisNexis published on 29 May 2009 in its fortnightly publication, New Zealand Lawyer magazine. Those articles were styled "Letters To The Editor" and were written in response to an earlier article published on 1 May 2009 in the New Zealand Lawyer magazine, written by Mr Ayers in his capacity as an employee of Elementary Solutions. Mr Ayers is the sole shareholder and director of Elementary Solutions, which is a computer forensics consultancy company. The majority of Elementary Solutions' clients are referred by lawyers who are the principal readers of New Zealand Lawyer Magazine.

[6] The article published on 1 May 2009 was entitled "Flaws found in 'EnCase®' computer forensic software". EnCase® is a computer programme used by computer forensic consultants to automate parts of their analysis work. The content of the article it might be said is readily summarised by that heading.

[7] The articles published on 29 May 2009 were authored in the first instance by Mr Victor Limongelli, President and CEO of Guidance Software and in the second instance by Mr Campbell McKenzie, Associate Director of PricewaterhouseCoopers. Guidance Software is the creator and owner of the EnCase® computer software and PricewaterhouseCoopers generally speaking is a competitor of Elementary Solutions. Those two articles are critical of Mr Ayers' 1 May 2009 article. It is the plaintiffs' case that in criticising Mr Ayers' article, the two articles in question include statements which contain defamatory meanings and which identify the plaintiffs directly. Further, there can be no arguable defence in relation to their defamatory nature.

[8] The plaintiffs have subsequently engaged in settlement processes with the authors of the two 29 May 2009 articles. In the present proceeding brought solely against the publisher, LexisNexis, it still denies any liability.

[9] The plaintiffs filed these proceedings in relation to the statements in question on 7 July 2010 and have since, on 29 September 2010, filed an amended statement of claim. That is the operative statement of claim here.

[10] By paragraph 24 of that First Amended Statement of Claim, the plaintiffs plead:

That as a result of the publication of the first and second letters by the defendant the second plaintiff has also been exposed and held up to ridicule and contempt and its reputation has been very seriously injured. It has also suffered and will continue to suffer pecuniary loss in a sum yet to be quantified.

[11] Subsequent to the filing of that First Amended Statement of Claim, discovery has been undertaken by all parties, as has supplementary discovery by way of further affidavits of documents.

## **Counsels' Submissions and My Decision**

### **Further and better discovery**

[12] The schedule affixed to LexisNexis' application lists five categories of document which it now seeks to be discovered. The fifth category has since been abandoned. The remaining four categories for which discovery orders are sought here are:

- (a) Elementary Solutions' 2010 accounts;
- (b) Any other documents that are relevant to Elementary Solutions' claim for pecuniary loss;
- (c) A copy of the executed settlement agreement between the plaintiffs and PricewaterhouseCoopers; and
- (d) All other documents relating to that settlement or any other settlement entered into between either or both of the plaintiffs and any or all of PricewaterhouseCoopers, Mr Campbell McKenzie, Guidance Software Inc, Mr Victor Limongelli, or any other party, in relation to the publications that are the subject of this proceeding.

[13] The present discovery application is brought pursuant to r 8.24 High Court Rules. On this, the parties agree as to the principles to be applied on this issue of further discovery.

[14] It is well established that an applicant must establish three jurisdictional requirements for an order under r 8.24, which are:<sup>1</sup>

- (a) Grounds for belief that the party is in or has been in possession of
- (b) A document or class of document that
- (c) Relates to any matter in question in the proceeding.

[15] On the first two requirements, an applicant is required to demonstrate grounds for a belief that a particular document exists and that it may be, or may have been, in the control of the person from whom discovery is sought. The judge is required to be satisfied grounds exist for such belief, and this can be induced by direct or indirect evidence, the nature and circumstances of the case and any

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<sup>1</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR8.24.03].

document filed in the proceeding. In addition the documents in question should be described with some specificity.<sup>2</sup>

[16] Rule 8.18 of the High Court Rules provides that an affidavit of documents must list documents that are or have been in that party's control and that relate to a matter in question in the proceeding. The general rule remains that an affidavit verifying a list of documents is conclusive, but r 8.24 allows the court to go behind the affidavit providing there is clear evidence that the list is not conclusive.<sup>3</sup>

[17] There should be at least a prima facie indication that the documents concerned are, or have been, in the party's control.<sup>4</sup> But there is no requirement that the applicant must prove, on the balance of probabilities, that there are further documents that have not been discovered.<sup>5</sup>

[18] On the third requirement, which is essentially one of relevance, the legal test at present remains<sup>6</sup> that set out in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co.*<sup>7</sup>

It seems to me that every document relates to matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry which may have either of those two consequences.

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<sup>2</sup> *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 191 (HC) at 199.

<sup>3</sup> *Equiticorp Industries Group Ltd v Hawkins* [1994] 2 NZLR 738 (HC) at 740.

<sup>4</sup> *Beecham Group Ltd v Bristol-Myers Co* [1979] VR 273 at 279; *Astra-National Productions Ltd v Neo-Art Productions Ltd* [1928] WN 218.

<sup>5</sup> *Southbourne Investments Ltd v Greenmount Manufacturing Ltd* HC Auckland CIV-2005-404-6675, 12 June 2008 at [42].

<sup>6</sup> See *M v L* [1999] 1 NZLR 747 (CA).

<sup>7</sup> (1882) 11 QBD 55 (CA) at 63.

[19] This concept of relevance is an expansive one,<sup>8</sup> and is potentially broader than the definition in s 7 of the Evidence Act 2006.<sup>9</sup> The matters which are in question have to be identified by reference to the pleadings.<sup>10</sup>

[20] Once the jurisdictional requirements are made out, it is for the Court to consider whether its discretion should be exercised. The Court will scrutinise carefully the reasons advanced by parties affirmatively resisting production of documents where the jurisdictional requirements are otherwise made out.<sup>11</sup>

[21] An application for discovery may also be opposed where requiring discovery would be oppressive.<sup>12</sup> A balance must be struck between the potential cost, time and difficulty involved in the additional discovery against the potential value that the discovery will add to the proceedings.<sup>13</sup>

[22] I now turn to the first category of documents sought, that being Elementary Solutions' 2010 accounts. Elementary Solutions does not dispute the relevance of these documents. Rather, its reason for not having discovered these accounts is that they have not yet been completed and so at this point they do not exist. Indeed, it seems that position has been communicated to LexisNexis. Mr Stewart, the plaintiffs' solicitor on 5 April 2011 sent an email to Mr Ringwood, LexisNexis' solicitor. To that email he attached copies of Elementary Solutions' financial statements for the years ending 31 March 2007, 2008 and 2009. Mr Stewart stated,

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<sup>8</sup> *M v L* [1999] 1 NZLR 747 (CA) at 750.

<sup>9</sup> *ANZ National Bank Ltd v Commissioner of Inland Revenue* [2009] NZCA 150, [2009] 3 NZLR 123 (CA) at [5] and [24]

<sup>10</sup> *New Zealand Rail v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA) at 644.

<sup>11</sup> See *Clear Communications Ltd v Telecom Corporation New Zealand Ltd* HC Auckland CL 51/96, 22 July 1998 at 3.

<sup>12</sup> *Mao-Che v Armstrong Murray* (1992) 6 PRNZ 371 (HC).

<sup>13</sup> *Houston v Attorney-General* HC Wellington CIV-2008-485-2689, 17 December 2009 at [23]; *Worldwide NZ LLC v QPAM Ltd* HC Auckland CIV-2006-404-1827, 15 May 2009 at [78]-[80].

however, that the 2010 accounts had not been completed. Mr Ayers deposes in his 28 September 2011 affidavit that this is still the case and that he has given his assurance that once the accounts are available he will provide a copy to LexisNexis.

[23] In those circumstances, obviously I cannot be satisfied that there are grounds for belief that Elementary Solutions' 2010 accounts are in that party's possession. It would seem those accounts are still to be prepared so clearly they do not exist as yet. Accordingly, LexisNexis has not surmounted the initial jurisdictional hurdle in respect to this document.

[24] Turning now to the second category of documents sought, that being "any other documents that are relevant to Elementary Solutions claim for pecuniary loss, Mr McLellan, for LexisNexis, directed me to an earlier memorandum filed by the plaintiffs around 15 July 2011 which recorded at paragraph 3.2:

3. In relation to the classes of documents described in the Schedule to the defendant's application, counsels' instructions are as follows:

...

- 3.2 Any other documents relevant to the second plaintiff's claim for pecuniary loss – The plaintiff is unaware of any other documents. If the defendant has any particular documents in mind it should provide details.

[25] Mr McLellan noted that LexisNexis did respond to that invitation by indicating that the types of documents which would fit within this category were budgets, forecasts, records of cash flows, and income and expenses etc.

[26] In response, Mr McVeigh for the plaintiffs submitted that to the extent that this information is relevant, it would be contained in the 2010 financial accounts which are yet to be completed. Mr McLellan argued in turn that Elementary Solutions nevertheless must have the primary financial records from which the financial accounts could be prepared. Mr McVeigh's response to that was that LexisNexis had failed to show that the more detailed source material was relevant to this proceeding.

[27] There appears to be no dispute that Elementary Solutions' 2010 source financial records are within its control. Further, as Barker J commented in *Chandris Lines Ltd v Wilson and Horton Ltd*:<sup>14</sup>

The area where further discovery is most clearly required is in relation to financial details. *Kent Coal Concessions Ltd v Duguid* [1910] 1 KB 904 makes it clear that the defendant is entitled to inspect the primary records from which the unaudited balance sheets are compiled. These primary records have not been produced, merely balance sheets which are an unaudited compilation by a firm of accountants. As Farwell LJ said in the *Duguid* case at p 915: "A balance-sheet is worthless without the books from which it has been made up. When once a balance-sheet is admitted to be relevant, so much of the books as is the foundation of those balance-sheets is also admitted to be relevant". Here, as in the *Duguid* case, the plaintiff has admitted the relevance of the balance sheets, by producing them on discovery without objection.

[28] It would seem in the present case that Elementary Solutions intends to rely on the 2010 financial accounts to determine damages as to the loss it claims to have suffered. On this basis, Lexis Nexis is clearly entitled to view the basis for those accounts. As already noted, those accounts have not as yet been compiled, Nevertheless on the basis outlined at [27] above by Barker J in *Chandris Lines*, I also consider that LexisNexis here is entitled to inspect the primary source financial records. Of course, an investigation as to what is relevant must be undertaken. But, if Elementary Solutions intends to show that it has suffered a loss of custom, the defendant ought to be entitled to forecasts etc in order to reach a competent conclusion as to whether that loss of custom was caused by the articles in question or by some other means.

[29] The plaintiffs then endeavoured to argue that it would be oppressive for Elementary Solutions to determine the relevance of particular source documents in circumstances where financial accounts are underway. I disagree. The plaintiffs can reasonably determine first, which documents are within their control and secondly, which of those will inform their determination of loss due to the allegedly defamatory publications. An order as to this second category of documents is to follow.

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<sup>14</sup> *Chandris Lines Ltd v Wilson and Horton Ltd* [1981] 2 NZLR 600 at 612.



[30] I now turn to the third category of documents sought, that being the executed settlement agreement between the plaintiffs and PricewaterhouseCoopers. The parties do not dispute the relevance of this document. Indeed, the plaintiffs have discovered to the defendant an unexecuted copy of the settlement agreement as well as a faxed copy of the executed agreement. That faxed copy was obtained from counsel to PricewaterhouseCoopers. I am advised that this is in the same form as that which was executed. Mr McLellan noted that neither the plaintiffs' affidavit of documents nor Mr Ayers' affidavit dated 28 September 2011 state that the original is not within the plaintiffs' control and thus it should be discovered. Notwithstanding this, a problem seems to arise here. Attached to Mr Ayers' affidavit marked "C", is a copy of an email sent on 1 July 2011 from counsel for the plaintiffs for the settlement negotiations, Mr Brodie, a barrister from Christchurch. That email notes that his documents and files are inaccessible due to his chambers being located within a building which has become inaccessible due to recent earthquake activity. Mr Ayers deposes therefore to the plaintiffs still not knowing the whereabouts of the original executed settlement agreement.

[31] There can be no dispute here that a document which is in the possession or custody of one's solicitor is regarded as being under that party's control.<sup>15</sup> Nevertheless, from the evidence before the Court briefly outlined above, I am satisfied that reasonable attempts have been made to locate the original settlement agreement but circumstances beyond the control of the parties have made this impossible. Taking a technical view of matters here, there is a reasonable argument as I see it that I cannot be satisfied the document in question is "in the plaintiffs' control". Even if I was satisfied however that the document was within the plaintiffs' control, given first the difficulties associated with producing it and secondly, the attempts already undertaken to satisfy the defendant's requests, I would be reluctant to exercise my discretion to make the order sought, the effect of which might very well be negligible. And, in any event, I am told a true copy of the signed settlement agreement has itself been discovered.

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<sup>15</sup> *Swanston v Lishman* (1881) 45 LT 360.

[32] The final category of documents sought are those which are otherwise related to settlement in connection with these publications. On 21 January 2011 Mr Ringwood wrote to Mr Stewart for the plaintiffs to note that, among other things, documents relating to the settlements between the plaintiffs and Mr McKenzie, the author of the second of the articles published on 29 May 2009, PricewaterhouseCoopers, Guidance Software and New Zealand Forensics were all relevant to the plaintiffs' claims and ought to have been discovered.

[33] Mr Stewart responded to that letter on 3 February 2011. In his response, Mr Stewart advised that privilege was claimed in relation to any document which was related to those settlement negotiations. Following subsequent communications, however, copies of some documents were provided. The plaintiffs claim here, therefore, that all relevant documents in this category over which privilege is not claimed have been provided.

[34] In response, Mr McLellan for the defendant informed me that copies of documents relating to the settlement between the plaintiffs and Guidance Software were provided as recently as 28 September 2011. However, it does seem that a further verified supplementary list of documents to include and specify these particular documents has not as yet been sworn. Accordingly, the defendant Lexis Nexis seeks an order here to that effect. Mr McVeigh responded, arguing that a further supplementary list outlining the documents already provided is really an unnecessary waste of resources.

[35] As to documents relating to the other settlements, the plaintiffs have steadfastly maintained a claim to privilege with respect to these. In that light, LexisNexis seeks an order under r 8.16(4)(b) of the High Court Rules for the documents relating to the settlements to be individually listed, and to be described with sufficient accuracy and detail, to enable the privilege claim to be evaluated. Mr McVeigh responded to that argument, suggesting that LexisNexis has itself failed to provide the same detailed information with respect to documents over which it claims privilege in its own 29 December 2010 affidavit of documents.

[36] As I understand LexisNexis's position, a supplementary list of documents is required here and this must take the form set out in r 8.21 of the High Court Rules.

On this, Mr McLellan referred me to the decision of Associate Judge Osborne in *Vanda Investments Ltd v Logan*.<sup>16</sup> That decision, with respect, comprehensively outlines the obligations which parties undertake in relation to discovery. At [48] his Honour summarised:

the adequate identification of discovered document[s] should achieve or facilitate at least the following purposes:

...

- (c) In relation to privileged documents -
  - i. To enable the opposite party to become aware of the documents claimed to be privileged.
  - ii. To enable that party to meaningfully consider a challenge to the claim of privilege.

[37] That statement is made in the context of there being no default requirement for a party to describe documents on discovery. However, that default position may be displaced by a court where the individual circumstances of the case warrant it.<sup>17</sup> Further, his Honour carefully considered whether documents falling under Part 1 may be grouped.

[38] Rule 8.21 of the High Court Rules provides:

**8.21 Schedule appended to affidavit of documents**

- (1) The schedule referred to in rule 8.20(2)(d) must identify or list documents—
  - (a) in the control of the party giving discovery and for which the party does not claim privilege or confidentiality, identifying them by number:
  - (b) in the control of the party giving discovery for which privilege is claimed, stating the nature of the privilege claimed:
  - (c) in the control of the party giving discovery for which confidentiality is claimed, stating the nature and extent of the confidentiality:
  - (d) that have been, but are no longer, in the control of the party giving discovery, stating when the documents ceased to be in that control and the person who now has control of them:

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<sup>16</sup> HC Dunedin CIV-2009-412-219, 27 November 2009.

<sup>17</sup> At [49].

- (e) that have not been in the control of the party giving discovery but are known by that party to relate to a matter in question in the proceeding, stating who has control of them.
- (2) Documents of the same nature in category (b), (c), (d), or (e) may be described as a group or groups.
- (3) The schedule need not include—
  - (a) copies of documents filed in court; or
  - (b) correspondence that may reasonably be assumed to be in the possession of all parties.

[39] Paragraphs (a) to (e) are, in the present case, delineated as Parts 1 to 5 in the plaintiffs’ affidavit of documents. Associate Judge Osborne, in *Vanda Investments Ltd*, concluded that the effect of r 8.21(2) is that documents listed in Part 1 may not be grouped. However, the corollary of that is that documents falling into Part 2, those in the control of the party for which privilege is claimed, may be grouped.

[40] The plaintiffs filed an affidavit of documents on 30 November 2010. Part 2 of the schedule to that affidavit details documents over which the plaintiffs claim privilege. In relation to the documents in dispute in the present application, Part 2 records:

Folder	Date	Document Type	Description
...			
2-3	Various	Various	Without prejudice communications and communications for the purpose of settlement negotiations.

[41] The plaintiffs identified the privilege claimed with respect to those documents as that arising under s 57 of the Evidence Act 2006: documents relating to settlement negotiations.

[42] On 26 January 2011, by consent, I ordered that both parties were to file and serve supplementary affidavits of documents by 9 March 2011. With the prior consent of the defendant, the plaintiffs filed their supplementary affidavit on 26 May 2011.

[43] In the present case, I do not consider that a further level of specificity is warranted. Under the High Court Rules, the plaintiffs are entitled to group documents in the manner they have. The documents are identified as relating to settlement negotiations. Such documents are, of course, privileged.<sup>18</sup> Given the broad exclusion provided by s 57, I do not consider that a further level of particularity is required in this case. There is to be no order made regarding this aspect of the defendant's application.

### **Further Particulars**

[44] I turn now to consider the second application which is before the Court. This is the defendant's application for further particulars of the plaintiffs' quantum claim. Recorded at [10] above is the plaintiffs' prayer for relief in their first amended statement of claim. LexisNexis argues that the sum sought ought to be particularised under r 5.21 of the High Court Rules.

[45] LexisNexis also relies specifically on r 5.33 of the High Court Rules which provides:

#### **5.33 Special damages**

A plaintiff seeking to recover special damages must state their nature, particulars, and amount in the statement of claim.

[46] LexisNexis seeks particulars as to:

- (a) the respects in which Elementary Solutions' reputation has been very seriously injured; and
- (b) the pecuniary loss that it has allegedly suffered and will continue to suffer.

[47] In a letter dated 15 December 2010 the plaintiffs did provide certain particulars to outline Elementary Solutions' claim of pecuniary loss. That letter stated:

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<sup>18</sup> Evidence Act 2006, s 57.

The second plaintiff will be alleging that pecuniary loss includes the following:

- Loss of profits;
- Loss of good will;
- Detrimental effects to the second plaintiff's financial structure and/or efficiency, occasioned by the time involved, cost to, and expenses incurred by the second plaintiff in attempts to ameliorate and mitigate the damaging effects of defamatory publications.

[48] Those particulars were not accepted by the defendant as sufficient however. Initially, the plaintiffs advised that they would in fact particularise their claim, and in a 15 July 2011 Memorandum to this Court, the plaintiffs record:

6. Notwithstanding its initial position, the second plaintiff has recently decided to adopt a pragmatic approach to this issue and provide particulars as to quantum of pecuniary loss, even though it does not accept it has any obligations to do so at this stage.
7. The second plaintiff needs a reasonable time [to] take expert advice in relation to those particulars.

[49] The plaintiffs nevertheless have not as yet provided further particulars as they say that damage cannot be quantified until the 2010 financial accounts are complete. The plaintiffs confirm that as soon as the financial accounts are prepared they will be provided to the defendant and the loss to the second plaintiff will be quantified.

[50] In any event, the plaintiffs contend, that s 43(1) of the Defamation Act 1992 prohibits the plaintiffs from particularising damages. Section 43(1) provides:

**43 Claims for damages**

- (1) In any proceedings for defamation in which a news medium is the defendant, the plaintiff shall not specify in the plaintiff's statement of claim the amount of any damages claimed by the plaintiff in the proceedings.

[51] Before turning to the parties' submissions, it is useful first to consider something of the history of this section.

[52] The Defamation Act 1992 arose out of the recommendations contained in the Report of the Committee on Defamation (1977) (the Report).<sup>19</sup> With respect to what is now s 43(1), the explanatory note to the Defamation Bill 1988 records:<sup>20</sup>

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<sup>19</sup> Defamation Bill 1988 (72-1) (explanatory note) at 1.

The principal recommendations of the Committee on Defamation that are adopted in the Bill are as follows:

...

- (j) To deal with the problem of “gagging writs”, where proceedings for defamation are brought against a news media defendant, the plaintiff should be prevented from specifying the amount of damages claimed.

...

*Clauses 33 and 34* give effect to these recommendations

[53] Clause 33(1) of the Bill is identical to what is now s 43(1).

[54] Chapter 19 of the Report considers the issue of “gagging writs”. Paragraph 412 summarises the issues as follows:

The term “gagging writ” is used to describe a defamation writ commonly claiming high damages but really only intended to stifle publication of further matter on the same subject. The use of “gagging writs” appears to have increased in recent years in New Zealand and has been a cause of concern to the news media.

[55] The Committee then turned to consider possible solutions to the issue. It commented at paragraphs 421-422:

We do not believe that there is any one solution to the “gagging writ” because in practice it is not possible to distinguish immediately between such a writ and one that is issued bona fide.

Our primary recommendation is that the plaintiff in an action for defamation in which there is a news media defendant should not be permitted to specify in his statement of claim the amount of damages claimed. This should go some distance towards removing the gagging effect of large claims. The enactment of such a provision would not prevent counsel specifying during the trial the amount of damages sought. Nor would it prevent discussion of damages in settlement negotiations.

[56] That recommendation was accordingly made in paragraph 427(a) of the Report. The authors of *Media Law in New Zealand* comment at [2.5.1]:<sup>21</sup>

The rationale [for s 43(1)] is presumably to ensure that unrealistically large sums are not specified for purposes of intimidation.<sup>22</sup>

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<sup>20</sup> See also the comments of the Rt Hon Geoffrey Palmer on moving the introduction of the Defamation Bill at (25 August 1988) 491 NZPD 6371.

<sup>21</sup> John Burrows and Ursula Cheer *Media Law in New Zealand* (6<sup>th</sup> ed, LexisNexis, Wellington, 2010) at [2.5.1].

<sup>22</sup> See *Television New Zealand v Quinn* [1996] 3 NZLR 24 at 74.

[57] The basis of those recommendations appears to have lost some degree of relevance in modern times. First, it appears that at least in some cases involving a news media defendant, damages are disclosed in a statement of claim.<sup>23</sup> Secondly, a residual issue arises where there are multiple defendants, one of which is a news media defendant but others are not.<sup>24</sup> While the practice appears to be that damages will be quantified with respect to the non-news media defendant, it is perhaps likely that the amounts will be similar as between the defendants. Thirdly, while the New Zealand Court of Appeal has acknowledged a chilling effect of defamation law based on research conducted in England,<sup>25</sup> a recent New Zealand study suggests that:<sup>26</sup>

the operation of defamation law on a dynamic, generally assertive New Zealand media, backed by strong foreign ownership, does not produce excessive chilling effects, although clearly it produces some.

[58] Indeed, at least one other commentator has suggested, after considering that study, that “it’s hard to put the chill factor above ... drafty”.<sup>27</sup> Fourthly, the Court of Appeal in *Radio New Zealand Limited v Harrison*, while noting that the damages claimed could not be specified, appears to have had no issue with the parties engaging in pre-trial negotiations where damages were quantified in aid of settlement.<sup>28</sup> Indeed, it was suggested by one judge that the accidental inclusion of a

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<sup>23</sup> See for example *Hubbard v Fourth Estate Holdings Limited* HC Auckland CIV-2004-404-5152, 16 February 2005 and Ursula Cheer “Defamation in New Zealand and Its Effects on the Media – Self-Censorship or Occupational Hazard?” [2006] NZ Law Review 467 at 490: in one study of defence lawyers’ experience in such cases, damages were specified in half of cases experienced.

<sup>24</sup> *Peters v Television New Zealand* HC Auckland CIV-2004-404-3311, 5 November 2004 at [38]-[40].

<sup>25</sup> *Lange v Atkinson* [2000] 3 NZLR 385 at 394.

<sup>26</sup> Ursula Cheer “Defamation in New Zealand and Its Effects on the Media – Self-Censorship or Occupational Hazard?” [2006] NZ Law Review 467 at 468; the study undertaken is that published as Ursula Cheer “Myths and Realities About the Chilling Effect: The New Zealand Media’s Experience of Defamation Law” (2005) 13 Torts Law Journal 259, see in particular at 299.

<sup>27</sup> Steven Price on “Mediawatch” National Radio, 4 December 2005, cited in Ursula Cheer “Defamation in New Zealand and Its Effects on the Media – Self-Censorship or Occupational Hazard?” [2006] NZ Law Review 467 at fn 32.

<sup>28</sup> *Radio New Zealand v Harrison* CA119/98, 25 February 1999.



quantification of damages in a statement of claim does not justify striking the claim out. But, rather it rather creates potential tactical difficulties for the plaintiff in the future.<sup>29</sup>

[59] In the present case before me, Mr McVeigh contended that there is a clear conflict and that conflict ought to be resolved in accordance with r 1.4(4) of the High Court Rules. Rule 1.4(4) provides:

If in any civil proceedings any question arises as to the application of any provision of these rules, the court may, either on the application of a party or on its own initiative, determine the question and give any directions it thinks just.

[60] Mr McVeigh went on to submit that the answer here is contained in r 1.4(3)(c), which provides:

(3) These rules are subject to—

...

(c) any statute prescribing the practice and procedure of the court in a proceeding or an appeal or application for leave to appeal under that statute:

[61] Mr McLellan responded by suggesting first, that the defendant is not a news medium for the purposes of s 43. Secondly, Mr McLellan submitted that s 43 is only concerned with the contents of the statement of claim and does not prevent an order requiring particulars of quantum to be provided separately under r 5.21(1)(a). Thirdly, Mr McLellan turned his sights on the purpose and policy of the section. He submitted that the section is only concerned with general damages as it was specifically enacted to prevent “gagging writs”.

[62] On all of this, I dismiss Mr McLellan’s first point. I am satisfied LexisNexis is a news medium. Section 2 of the Defamation Act 1992 defines news medium in this way:

**News medium** means a medium for the dissemination, to the public or to a section of the public, of news, or observations on news, or advertisements:

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<sup>29</sup> *Hubbard v Fourth Estate Holdings Limited* HC Auckland CIV-2004-404-5152, 16 February 2005 at [37].

[63] Interestingly, the “About New Zealand Lawyer Magazine” section of the New Zealand Lawyer’s website records:<sup>30</sup>

*NZ Lawyer* is a weekly, legal news and opinion service designed specifically for New Zealand’s legal professionals. ...

Our mission is to ensure that New Zealand’s legal profession is well informed about the important legal issues affecting lawyers, law firms, and their clients in New Zealand.

[64] That outline of what the publication does in my view certainly fulfils the definition in s 2. The New Zealand Lawyer magazine aims to disseminate to New Zealand’s legal professionals, a section of the public, information about important legal issues by offering legal news and opinions (ie observations on news).

[65] As for Mr McLellan’s second submission outlined at [61] above, I return to that below. Therefore, I now turn to Mr McLellan’s third reason, the policy of the section. I accept Mr McLellan’s argument that the mischief sought to be avoided by s 43 is gagging writs. On this, Venning J commented in *Hubbard v Fourth Estate Holdings Ltd* at [36] “the primary mischief that s 43(1) is directed at is the intimidation of the defendant...”.<sup>31</sup> That much is abundantly clear from the history of the section. As for Mr McLellan’s other limitations on the section’s application, the history is not so clear.

[66] Mr McVeigh responded to Mr McLellan’s argument, submitting that s 43(1) is explicit in prohibiting a statement of claim from specifying “any damages”. Indeed, he maintained, the fact that special damages can be inflated to the level of a gagging writ supports the contention that the legislature intended s 43(1) to cover special damages as well as general damages and exemplary damages. I accept that submission. There is no scope for interpreting “damages” in s 43(1) to exclude

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<sup>30</sup> <[www.nzlawyermagazine.co.nz/AboutUs/tabid/142/Default.aspx](http://www.nzlawyermagazine.co.nz/AboutUs/tabid/142/Default.aspx)> retrieved 6 October 2011.

<sup>31</sup> *Hubbard v Fourth Estate Holdings Limited* HC Auckland CIV-2004-404-5152, 16 February 2005.

special damages. Further, such an interpretation does not sit well with current practice.<sup>32</sup>

[67] Mr McVeigh went on to note that s 6 of the Defamation Act 1992 requires a body corporate to prove pecuniary loss. It does not provide that a body corporate may sue only for special damages. Indeed, Mr McVeigh finds some support in the High Court decision (albeit a pre-Defamation Act 1992 decision) in *Chandris Lines Ltd v Wilson and Horton Ltd*.<sup>33</sup> In that case Barker J said at 612:

By claiming general and not special damages, the plaintiff may give evidence of a general loss of professional or business profits if it has alleged such a loss in its pleadings; actual loss can only be given as a guide to general damages when specifically pleaded. Gatley on Libel and Slander (7th ed, 1974) para 1231. If the plaintiff is entitled to show general loss of custom as a guide to the assessment of general damages, it is logical to allow the defendant to submit or prove that the loss may have had other sources.

[68] Further, the Court of Appeal commented recently in *Siemer v Stiassny* at [41]:<sup>34</sup>

Another possibility is that in many cases where, as is the case here in respect of Korda Mentha, the plaintiff is a commercial entity, it might be possible to quantify damage in terms closer to actual pecuniary loss. In such cases of special damage the appellate court's role may well be simplified: the correct award is essentially a question of fact. But it is not necessary as a matter of law that special damage to a corporate plaintiff is proven before it can recover business losses, and in this case the award for injury to Korda Mentha was on the basis that as a consequence of Mr Siemer's defamatory publications "the firm's business reputation must inevitably have suffered to some degree".

[69] Therefore, while s 6 provides that pecuniary loss or the likelihood of pecuniary loss must be proved, that pecuniary loss, at least arguably, may support an

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<sup>32</sup> See *O'Regan v The Radio Network* [2001] 1 NZLR 568 (HC) where punitive damages were claimed against a news media defendant and not quantified.

<sup>33</sup> *Chandris Lines Ltd v Wilson & Horton Ltd* [1981] 2 NZLR 600 (HC).

<sup>34</sup> *Siemer v Stiassny* [2011] 2 NZLR 361 at [41] (references omitted).

award of general damages.<sup>35</sup> There is no requirement for a body corporate to plead special damages. All that must be shown is pecuniary loss.

[70] Nevertheless, in the present case, Elementary Solutions' position, as seems clear from its 1 July 2011 letter at paragraph 8, is that it is claiming special damages. Further, the plaintiffs do not dispute that generally a defendant is entitled to particulars of the quantum.<sup>36</sup> Counsel were not able to refer me to any decision where an application was made by a news media defendant for further particulars of damage. In all the cases cited where a news media defendant was involved in the proceeding, an application for further particulars was made by the non-news media defendants only.<sup>37</sup> One case which appears to come close is *Romana v McKenzie*.<sup>38</sup> In that case, the defendants applied to strike out a statement of claim brought by an unsophisticated lay litigant (see [4] of the judgment for this characterisation) which sought to sue the writer of an article about him and the publisher. The plaintiff quantified damages of \$50 million from both defendants.<sup>39</sup> Without specifying that damages need to be particularised vis-a-vis the claim against the news media defendant, Associate Judge Abbott concluded that the claim was to be struck out unless an amended statement of claim was filed addressing the deficiencies identified. Nevertheless, it does not appear in that case that his Honour was directed to s 43(1).

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<sup>35</sup> See Stephen Todd (ed) *The Law of Torts in New Zealand* (5<sup>th</sup> ed, Brookers, Wellington, 2009) at [16.6(2)(a)], in particular fn 262; see also *Mt Cook Group v Johnstone Motors* [1990] 2 NZLR 488 (HC) at 497; *Tairāwhiti District Health Board v Perks (No 2)* [2002] NZAR 533 (HC) at [21].

<sup>36</sup> See *Midlands Metals Overseas Pte Ltd v Christchurch Press Co Ltd* HC Christchurch CP68/99, 8 March 2000 at [106]; *Lewis v Daily Telegraph* [1963] 1 QB 340 at 376; *Gatley on Libel and Slander* (11<sup>th</sup> ed, Sweet and Maxwell, London, 2008) at [28.29]-[28.30].

<sup>37</sup> See *Midlands Metals Overseas Pte Ltd v Christchurch Press Co Ltd* HC Christchurch CP68/99, 8 March 2000; *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 19 March 2009.

<sup>38</sup> *Romana v McKenzie* HC Auckland CIV-2008-425-210, 3 June 2009.

<sup>39</sup> At [11].

[71] Mr McLellan sought to rely here on the decision of the Court of Appeal in *Simunovich Fisheries Ltd v Television New Zealand*. There, the Court noted at [7] that \$30m of damages were claimed and the plaintiffs had made a deliberate decision to plead this when faced with a news media defendant.<sup>40</sup> However, in my view that cannot be used as authority here for the proposition that the Court may *require* a plaintiff to particularise its claim. Counsel note that there is no mention of s 43(1) in any of the *Simunovich* decisions. It is reasonable to assume that that pleading was a mistake, as it was in *Hubbard v Fourth Estate Holdings Limited*.<sup>41</sup> Indeed, as Venning J commented in *Hubbard*, breach of s 43(1) may amount to contempt.<sup>42</sup>

[72] On this application, the Court is, therefore, faced with two competing, clear, policy implications. These are, on the one hand, the desire for a defendant to know the case against it, and on the other, the desire to avoid gagging writs.

[73] As to whether s 43 is concerned only with statements of claim, r 5.21(1) provides:

**5.21 Notice requiring further particulars or more explicit pleading**

- (1) A party may, by notice, require any other party—
  - (a) to give any further particulars that may be necessary to give fair notice of—
    - (i) the cause of action or ground of defence; or
    - (ii) the particulars required by these rules; or
  - (b) to file and serve a more explicit statement of claim or of defence or counterclaim.

[74] The plaintiffs submit here that the purpose of r 5.21 is to remedy defective pleadings for example in a statement of claim rather than to allow particulars in circumstances where they are prevented from being included in that statement of claim. I agree.

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<sup>40</sup> [2008] NZCA 350

<sup>41</sup> *Hubbard v Fourth Estate Holdings Limited* HC Auckland CIV-2004-404-5152, 16 February 2005.

<sup>42</sup> At [55].

[75] Mr McVeigh further submitted that the rationale for r 5.21(1) is simply convenience. Indeed, the authors of *McGechan on Procedure* record at HR5.21.03:

### **HR.5.21.03 Form of Particulars**

The Court has a discretion whether to order further particulars, or alternatively a new statement of claim or defence. The test is one of convenience. It was stated in *Ellison v Tairaroa* (1897) 16 NZLR 63 at 64, that:

“[W]here particulars asked are small and do not go to the root of the claim or defence, it may be more convenient to make the order in that form than to require a new statement to be filed.”

Although exchange of particulars between parties by correspondence, not filed in the Court, is not uncommon, it can be highly inconvenient. The Judge allocated may be unaware of particulars exchanged until the commencement of the hearing. Likewise, the filing of particulars by separate document not incorporated in the statement concerned can also cause inconvenience through requiring repeated cross reference to two documents. The preferable course in most cases is to file a fresh and amended statement of claim or defence incorporating the particulars. There is authority for the order of particulars in the form of a scale plan: *Tabox v St Pancras Borough* [1952] 1 All ER 1306.

[76] The purpose of a pleading, or a statement of claim, is to:<sup>43</sup>

supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trial briefing and preparation. Discovery and interrogatories are only an adjunct, not a substitute for pleading.

[77] While s 43(1) specifically prohibits particulars as to the amount of any damages claimed in a plaintiff’s “statement of claim”, for three reasons I consider that using the r 5.21 notice for further particulars procedure to require these to be provided in some other document might lead to an awkward situation. First, by allowing a plaintiff to specify damages outside a statement of claim defeats the purpose in the section of preventing gagging writs. For a plaintiff to exclude any amount for its damages claim in its statement of claim but to then write to the defendant advising that it is seeking for example \$100 million in damages would have precisely the same effect. Secondly, to *require* parties to plead outside their statements of claim in my view is an unattractive proposition. I accept the proposition outlined by the learned authors of *McGechan on Procedure* that the test is one of convenience. To accept the defendant’s submission would remove a judge’s discretion and require that pleadings be contained in separate documents.

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<sup>43</sup> *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998.

Thirdly, to require a plaintiff to specify damages would undermine the fact that s 43(2) (which provides that if damages claimed are in excess of damages ultimately recovered, solicitor client costs may be awarded against a plaintiff) in light of s 43(1) does not apply to news media defendants.<sup>44</sup>

[78] Nevertheless, in view of the policy of the section and its focus on the protection of a defendant, it would be wholly inappropriate for a plaintiff to use it as a shield and for it to act as a sword for the defendant. Where a defendant seeks additional particulars the scheme of the protection afforded to news media defendants must be looked at sensibly. While s 43(1) expressly provides that the statement of claim itself *must not* specify the quantum of damages claimed, I consider that a defendant should be entitled to such quantification in a separate document under r 5.21. While I accept, for the reasons outlined above, that this is not an entirely desirable situation, the balance in my view must fall in a defendant's favour given the overwhelming policy requirement that a defendant in any proceeding must know the case which it is to answer. Indeed, where a claim is proceeding well down the track to trial and an amount for damages has not been specified in the statement of claim, that claim is unlikely to operate as a "gagging writ". Further, while s 41(2) does not apply to a news media defendant,<sup>45</sup> general costs principles may be applied to award a news media defendant indemnity costs for a vexatious claim brought against it. Therefore, where damages are quantified at this stage outside a statement of claim, mechanisms exist in order to avoid a claim becoming a gagging writ. That is so as I see it, particularly in light of New Zealand's evidently "assertive media".<sup>46</sup>

[79] For all these reasons, the defendant's further particulars application succeeds.

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<sup>44</sup> *Parris v Television New Zealand* (1999) 13 PRNZ 327 (HC).

<sup>45</sup> *Radio New Zealand v Harrison* CA119/98, 25 February 1999 at 3.

<sup>46</sup> See n 26 above.

### **Discovery Application**

[80] In summary, the defendant's discovery application succeeds but only in part. The plaintiffs are required to discover all primary documents relevant to particularisation of the second plaintiff's loss. I acknowledge that the second plaintiff has said that loss is not fully identifiable until the 2010 accounts have been produced. However, the claim in this proceeding has been afoot for a considerable period of time. The second plaintiff ought to be in a position to particularise some loss at this stage and should update that as and when accounts become available.

[81] (a) An order is now made that within twenty (20) working days of the date of this judgment the first and second plaintiffs are to provide further and better discovery of the documents and classes of documents described in The Schedule at [81](b) below by filing and serving an affidavit listing any such documents that are or have been in the possession, custody or power of either of them and, in respect of any document which has been but is no longer in their possession, custody or power, when they parted with the document and what has become of it.

(b) **The Schedule**

Any other documents that are relevant to the second plaintiff's claim for pecuniary loss.

[82] In all other respects the defendants' discovery application (relating to the documents listed at [12] (a), (c) and (d) above) is dismissed.

### **Further Particulars**

[83] As I have noted at [79] above, the defendants' application for further particulars has succeeded here.

[84] An order is now made that within twenty (20) working days of the date of this judgment the second plaintiff is to provide full and proper particulars of the allegations in paragraph 24 of the amended statement of claim as to:



- (i) the respects in which its reputation has been very seriously injured;  
and
- (ii) the “pecuniary loss” that it has allegedly suffered and will continue to suffer.

**Costs**

[85] As to costs, the defendant has been partly successful and partly unsuccessful in the two applications it has brought before the Court.

[86] Costs are therefore reserved. In the event that the parties are unable to settle any issue of costs that may arise between them, counsel may file (sequentially) memoranda on the costs question and these are to be referred to me. In the absence of any party indicating they wish to be heard on the issue, I will decide costs based on the material then before the Court.

**‘Associate Judge D.I. Gendall’**