

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

**CIV-2011 442-116**

IN THE MATTER OF proceedings under the Defamation Act  
1992

BETWEEN TONY WAYNE KATAVICH  
Plaintiff

AND TV WORKS LIMITED  
First Defendant

AND MEDIAWORKS NZ LIMITED  
Second Defendant

Hearing: 10 October 2011

Counsel: R A Moodie for Plaintiff/Applicant  
R M Heron/B J Currie for Defendant/Respondent

Judgment: 18 October 2011

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**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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*This judgment was delivered by me on 18 October 2011 at 4.30 p.m.,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Solicitors: Moodie & Co, PO Box 376, Feilding  
Russell McVeagh, Auckland

[1] The plaintiff, Mr T W Katavich, alleges that he has been defamed by statements made on a website and in a related current affairs television programme operated by the defendant, TVWorks Limited.

[2] As part of TVWorks' response to that claim, it has counterclaimed that Mr Katavich is responsible for representations about information services that Mr Katavich's interests provide via the internet (being statements either on websites operated by his interests or in email correspondence by his employees) that are in breach of the Fair Trading Act 1986. TVWorks says that its counterclaim arises out of complaints that it has received from Mr Katavich's customers.

[3] Mr Katavich has applied for further particulars of the counterclaim. He says that TVWorks' existing pleading does not inform him fairly and adequately of the alleged representations (it does not clearly identify the words relied upon nor the specific websites in which the words appeared, or the context in which they appeared), nor why the words are said to be false, misleading or deceptive. A request for particulars of Mr Katavich's customers who are said to have suffered loss, and how such loss arose, was not pursued at the hearing.<sup>1</sup>

[4] TVWorks says that it has pleaded the alleged representations precisely and Mr Katavich can be in no doubt as to the case against him. It acknowledges that it will have to prove the representations were made as pleaded, but says that the information Mr Katavich seeks amounts to proof of the allegations rather than particulars needed to understand the allegations.

## **Background**

[5] Mr Katavich is the managing director and sole shareholder of The Mulcher Limited that, trading as HoganWest, researches and markets information through the internet on topics for which Mr Katavich considers there is a commercial market. Mr Katavich has been developing this business over the past eight years, and claims to have customers throughout New Zealand and Australia, as well as other countries.

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<sup>1</sup> TVWorks had resisted those particulars relying on *Commerce Commission v Carter Holt Harvey Ltd* [2008] 1 NZLR 387 at [46]-[47], [49].

He has set up a number of websites offering information on particular industries or activities, for an upfront fee. Mr Katavich started with information on setting up radio stations and diversified into other areas including opportunities in the mining and oil industries, fishing, and adoption. For that fee, customers also had access to a follow-up service.

[6] TVWorks decided to investigate Mr Katavich's business after speaking with customers who were dissatisfied with what they had received. In early March 2010 it posted a statement on its Campbell Live website about a current affairs presentation about Mr Katavich (although not naming him at that point) which was due to show on its Campbell Live programme on 3 March 2010. Following the screening (in which Mr Katavich was identified), TVWorks posted further comments about the programme on its website. On the following two days TVWorks screened follow-up interviews and comments in the Campbell Live programme.

[7] Mr Katavich says that he was defamed by several of the statements made on the website and in the three screened programmes. He issued this proceeding.

[8] TVWorks has denied that the various statements to which Mr Katavich takes exception are defamatory. It says that they attract qualified privilege, being matters of public concern and of general public interest. More significantly for present purposes, TVWorks counterclaimed that several representations made on Mr Katavich's websites or in emails sent customers were misleading or deceptive, seeking an injunction to prevent Mr Katavich continuing to make the representations.

[9] Following receipt of TVWorks' counterclaim, Mr Katavich sought the precise dates on which each of the representations was published, the specific wording of the statements said to constitute the representations, and a precise identification of website addresses and pages in which the statements appeared.

[10] In response to that request, TVWorks said that it was not possible to identify every single date on which the representations appeared on the websites (that would require a screen print or "snapshot" of the website to have been taken daily and web

archiving sources were not that extensive), but it provided a schedule of particulars identifying the dates and website references for publication that it had been able to trace. Some representations were identified by reference to a single date of publication but the majority were identified by reference to a period – for example, “11 June 2008 – 22 April 2009”. In addition TVWorks set out in the schedule the words used in the websites or emails that were said to constitute the representations that had been pleaded.

[11] Mr Katavich says that he was confused by these further particulars, both because he did not have a copy of all of the website pages identified by TVWorks and in some cases because the words identified on the website or in the email did not appear to support the representation that had been pleaded. He queried some of the information provided in the schedule.

[12] TVWorks reviewed its answers, identified one passage in an email which had been advanced incorrectly as support for one of the representations, and provided a revised schedule setting out the correct supporting passage. It said that that was the extent of the particulars it could provide at that stage (before discovery by Mr Katavich), and was all that it was required to do.

[13] Mr Katavich says that he remained confused after receiving the revised schedule as it did not assist his understanding of what statements on the websites or in the emails were said to be false, misleading or deceptive, given that some of the wording on the websites differed from the alleged representations that it was said to be supporting. He issued this application.

### **Legal principles**

[14] The application is brought under rr 5.21 and 5.26 of the High Court Rules.

[15] Rule 5.26 sets out what a claim is to include, including the particulars required to support it. The relevant parts for the purpose of the present application are:

## 5.26 Statement of claim to show nature of claim

The statement of claim—

- (a) must show the general nature of the plaintiff's claim to the relief sought; and
- (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action ...

[16] Rule 5.21 gives an opposing party a right to serve a notice requiring provision of either such further particulars as may be necessary to give fair notice of the cause of action (or the particulars required by the rules to support it), or a more explicit statement of claim. The rule also provides that the Court may, if it considers that the pleading is defective or does not give particulars properly required by the notice, order a more explicit pleading to be filed and served<sup>2</sup> (and may make such an order on its own initiative).<sup>3</sup>

[17] Rules 5.21 and 5.26 apply to a counterclaim.<sup>4</sup>

[18] The primary purpose of all pleadings is to define the issues and inform parties in advance of trial of the case they have to meet so they can take steps to meet it.<sup>5</sup> The Court of Appeal commented on the significance of pleading in *Price Waterhouse v Fortex Group Ltd*:<sup>6</sup>

... Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.

... What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries...

The principles are well enough known. Difficulties lie in application in marginal situations...

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<sup>2</sup> Rule 5.21(3).

<sup>3</sup> Rule 5.21(4).

<sup>4</sup> Rule 5.54.

<sup>5</sup> *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 (HL) at 173, followed by the Court of Appeal in *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363.

<sup>6</sup> *Price Waterhouse v Fortex Group Ltd* CA 179/98, 30 November 1998, particularly at 17-19.

... As a matter of practicalities, this initial “statement” is not at the level of a full disclosure of all evidence and documentation. It is of course an abbreviated summary “statement” of the basic facts said to give rise to the claim, and of the relief which is sought.

It is the level at which such abbreviation is to be set which causes ongoing difficulties. ...

In marginal cases, it is better to avoid generalities and rules of thumb, and to return to principle. The pleader and Court simply ask “in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the case to be met?”...

... It is not an area for mechanical approaches or pedantry.

[19] A succinct statement of assistance is to be found in the judgment of this Court in *Commerce Commission v Qantas Airways Ltd*<sup>7</sup> where Barker J stated that the function of particulars was to:

- (a) carry into operation the overriding principle that litigation should be conducted fairly, openly and without surprises;
- (b) inform the other party of the nature of the case that party has to meet, as distinguished from the mode by which it will be proved;
- (c) prevent the other party from being taken by surprise;
- (d) enable the other party to know with what evidence he ought to be prepared; and
- (e) limit and define the issues.

## **The pleading**

[20] TVWorks has pleaded that the following representations were made:

...

49. From time to time, between May 2008 and May 2010, the following representations were made on the Hogan Mining Websites:

- (a) That Hogan Mining would set customers up with their own mining careers advisors, who would work through the best options for customers to get employed within the mining industry.
- (b) That Hogan Mining provided expert assistance.

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<sup>7</sup> *Commerce Commission v Qantas Airways Ltd* (1992) 5 PRNZ 227 at 230.

- (c) That Hogan Mining staff were the “original experts” for customers wanting to secure work in the mining industry.
  - (d) That Hogan Mining had dedicated mining experts on staff.
  - (e) That Hogan Mining would provide customers with ongoing personal support for as long as customers needed it.
  - (f) That Hogan Mining provided a “guaranteed service” recommended by major recruitment companies and government agencies.
  - (g) That Hogan Mining would work with customers to help them to secure work in the mining industry.
50. From time to time, between May 2008 and May 2010, the following representations were made on the Hogan Oil Websites:
- (a) That Hogan Oil staff were the “original experts” for customers wanting to secure work in the oil industry.
  - (b) That Hogan Oil had dedicated oil industry experts on staff.
  - (c) That Hogan Oil would provide customers with ongoing personal support for as long as customers needed it.
  - (d) That Hogan Oil would work with customers to help them to secure work in the oil industry.
51. From time to time, between May 2008 and May 2010, the following representations were made on the Adoption Australia Website:
- (a) That Adoption Australia ran a comprehensive Australia adoption service.
  - (b) That Adoption Australia staff would provide on-going assistance to customers and up to date information as it came to hand.
52. From time to time, staff employed by HoganWest represented to customers that:
- (a) Hogan Mining specialised in assisting people with experience in the mining industry;
  - (b) Hogan Mining would provide ongoing assistance right through until customers were employed;
  - (c) all of Hogan Mining’s services were “guaranteed and proven to work”; and
  - (d) customers could get employed with Hogan Mining’s assistance.
    - (i) Email from Sarah (via [info@hogan-mining.com.au](mailto:info@hogan-mining.com.au)) to Kevin Yates dated 18 October 2009.

- (ii) Email from Vincent Warner (via [info@hogan-mining.com.au](mailto:info@hogan-mining.com.au)) to Keven (sic) Yates dated 22 October 2009.

(together, the “**Representations**”)

...

[21] It then pleads that the representations were:

- (a) misleading or deceptive or were likely to mislead or deceive, in breach of section 9 of the Fair Trading Act 1986;
- (b) false or misleading representations that services were of a particular kind, standard or quality, in breach of section 13(b) of the Act; and
- (c) false or misleading representations that services had a benefit, in breach of section 13(e) of the Act.

### **The application and opposition**

[22] There are three aspects to Mr Katavich’s application. He wants TVWorks to provide, in a more explicit counterclaim:

- (a) the precise date and time each representation was published, the actual words that are said to constitute each representation and the website address and web pages in which the statements appeared;
- (b) particulars to show why the representations, read in context, are said to be false or misleading; and
- (c) the whole of the content of websites pages and emails containing the representations so that the words said to constitute the representations can be read in their context.

[23] TVWorks opposes the application on the ground that the further particulars sought have either already been provided or are unnecessary. It says that Mr Katavich already has sufficient information to inform him about the

representations, but in any event it should not be required to provide any further particulars of the representations before it has discovery from Mr Katavich. In relation to the other two aspects of the application, TVWorks contends that particulars are not required to inform Mr Katavich of the case that he needs to answer.

[24] TVWorks' company secretary and legal counsel has given evidence that it has provided such particulars of the representations as it can in the schedule provided on 19 May 2011 and revised on 17 June 2011 (with respect to the wording of one of the representations in the emails). She says that the particulars provided to date had been obtained by searches of internet archives (which hold "snapshots" of websites as at certain dates rather than a continuous record). She also noted that the details being sought were likely to be within the plaintiff's knowledge and control (as the creator of the websites).

[25] In an oral application made in the hearing (foreshadowed in an earlier memorandum) counsel for Mr Katavich sought an order that the counterclaim be struck out unless any particulars are ordered by the Court were provided within 10 working days, on the grounds that the present counterclaim did not disclose a reasonably arguable cause of action, caused him prejudice, was frivolous and vexatious and was an abuse of the process of the Court. In support of this aspect of the application, counsel referred to TVWorks' evidence that it was not possible to provide details of each and every date and time that representations appeared on the websites (because web source archiving was not that extensive), and the fact that there were no particulars provided to show why the statements were false or misleading.

### **Particulars as to the representations**

[26] The degree of particularity with which a claim must be pleaded will depend on the circumstances of the case, and what is needed to identify issues and ensure that the other party is informed of the matters on which evidence will be needed. As stated by the Court of Appeal in *Price Waterhouse v Fortex Group Ltd* it calls for a commonsense judgment as to whether enough information has been provided to

afford the other party a fair understanding of the case to answer. The knowledge that the other party already has of a matter is clearly a factor in assessing the detail that needs to be provided to inform the other party adequately.

[27] I accept the submission of counsel for TVWorks that this is a comparatively simple case, certainly by comparison to a complex commercial case such as *Price Waterhouse v Fortex Ltd*. In addition, Mr Katavich has direct, and presumably detailed, knowledge of the websites and email correspondence that have been pleaded. His request for further detail has to be considered in that context.

[28] I also accept, however, the submission of counsel for Mr Katavich that TVWorks' allegations warrant the clarity and particularity required of allegations of fraud and dishonesty.<sup>8</sup>

[29] Counsel for Mr Katavich also relied on two authorities<sup>9</sup> which emphasised the seriousness of civil proceedings for breach of the Fair Trading Act that also constituted a criminal offence, and commented that the Court would have regard to the gravity of a factual finding adverse to the party whose conduct is in issue. These latter cases were concerned with affect on the burden of proof (the decisions were given following trial) rather than particulars, but they do reinforce the need for the claim to be pleaded clearly, and with adequate particularity.

[30] I turn now to consider the pleading and particulars in this case. TVWorks has pleaded the alleged representations in specific terms and, in the subsequent schedule, has identified wording that it says gives rise to the representations. I regard this as sufficient pleading of the alleged representations.

[31] Counsel for Mr Katavich sought to make something of the fact that some of the wording in the websites or emails differed from the pleaded representations. That is a matter for submission at trial. I consider that the representations are at least arguable, on the basis of the wording given in the schedule. I take the same view of

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<sup>8</sup> *Prosser v New Zealand Investment Trust Ltd* [1937] GLR 93 (SC) at 95; and *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 (CA) at 268.

<sup>9</sup> *Real Estate Institute of NZ Inc v Private Sale Co (Auckland Central)* [1996] 2 NZLR 371; and *BMW New Zealand Ltd v Pepi Holdings Ltd* (1996) 7 TCLR 357 (HC).

counsel's argument that in one case the representation was said to be a matter of inference from wording on the website. Counsel also took issue with the fact that the wording initially put forward to support one of the representations in an email could not be found in the email, and was amended in the revised schedule. However, the wording in the revised schedule is from the email that was identified. There may be a credibility issue over this, but I accept that this aspect of Mr Katavich's request has been adequately answered.

[32] I will deal with the remaining aspects of this request (times and dates of website publications and identification of website addresses and pages) together, as the same arguments apply to all. Counsel for Mr Katavich argued that his client was entitled to know every day on which representations were alleged to have appeared on the different websites pleaded, and for specific internet references to be provided so that he knew where to find each publication.

[33] With one qualification, I am not persuaded that this level of detail is needed to inform Mr Katavich fairly. In its revised schedule of particulars, TVWorks has identified either a specific date or a period on or within which each representation is alleged to have been published. It has also pleaded specific websites for each representation. Bearing in mind that these are Mr Katavich's websites, I consider that the schedule provides sufficient particulars to inform Mr Katavich fairly, at least ahead of discovery (and notwithstanding Mr Katavich's position that he does not have any further historical material). I accept the submission of counsel for TVWorks that Mr Katavich is aware that TVWorks does not have further particulars at this stage, that he is not genuinely embarrassed by lack of any further detail, and that any further particulars are within Mr Katavich's knowledge.<sup>10</sup>

[34] The qualification to the general view in the last paragraph is that it is not clear in cases where publication is alleged to have occurred within a period whether that publication was continuous through that period or merely that there was publication on dates within it, and the factual basis for whichever contention applies. For example, it may be that TVWorks has identified publication in identical terms at

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<sup>10</sup> Refer Andrew Beck and others *McGechan on Procedure* online ed, Brookers at [HR5.21.06]: *Shaw Savill & Albion Co v Auckland Harbour Board* (No 2) [1907] 26 NZLR 1035 at 1036; *Nand v Williams* (No 2) HC Auckland CP429/97, 9 September 1998 at [17].

the beginning and at the end of the period and relies on an inference that the relevant wording did not change between times. In that case, TVWorks is to provide particulars of the dates that have been identified, and whether it is alleged that publication was continuous between identified dates. It is also to provide any further particulars of dates of publication and websites following discovery.

### **Respects in which representations were false or misleading**

[35] Mr Katavich wants TVWorks to state “why the representations were false, misleading, deceitful or deceptive or likely to deceive”. Counsel for Mr Katavich said it was unclear which of the disjunctive aspects of the proscribed conduct (false/deceptive or merely misleading) were alleged to apply to each representation, and the essential facts relied on to support that view. He relied on the authority to which I have already referred<sup>11</sup> as to the need for particularly clear pleading of fraud. Counsel referred to the reasoning of Thomas J in *Petrocorp Exploration Ltd v NZ Refining Co Ltd*<sup>12</sup> (a civil claim involving breaches of ss 27 and 29 of the Commerce Act 1986) that the defendant was entitled to know “the essential facts” on which the plaintiff based its pleaded conclusions as to the respective breaches (for example, that the purpose and effect of the defendant’s conduct had been to substantially lessen competition). By analogy, he argues that TVWorks should be required to give particulars of the essential facts on which it based its conclusion that the representations were false/deceptive or misleading.

[36] TVWorks resisted this request on the grounds that it went beyond the scope of particulars and was instead “probing for evidence”. Counsel for TVWorks relied on comments in *Commerce Commission v Qantas Airways Ltd*<sup>13</sup> that the function of particulars was to inform the other party of the nature of the case to be met “as distinguished from the mode in which the case will be proved”, and on comment in *Commerce Commission v Telecom Corporation of New Zealand Ltd*<sup>14</sup> that a pleading must recite the material facts that had to be proved to make out the cause of action

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<sup>11</sup> At [28] above.

<sup>12</sup> *Petrocorp Exploration Ltd v NZ Refining Co Ltd* (1992) 7 PRNZ 53 at 56.

<sup>13</sup> *Commerce Commission v Qantas Airways Ltd* (1992) 5 PRNZ 227 at 230.

<sup>14</sup> *Commerce Commission v Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004-404-1333, 21 December 2004 at [31].

but not the evidence relied on to prove those material facts. Counsel submitted that a requirement to provide further particulars as to how the representations breached the sections would necessitate reference to the evidential matters on which TVWorks would rely to prove its case.

[37] The present case can be distinguished from the more complex commercial litigation that was before the Court in *Petrocorp Exploration Ltd v NZ Refining Co Ltd* and *Price Waterhouse v Fortex Group Ltd*. The allegations in this case are straightforward, namely that each of the representations was false or misleading in breach of either s 9 or specific subsections of s 13 of the Fair Trading Act 1986. As counsel for TVWorks submitted, this is orthodox pleading invoking well-established and understood principles as to what is meant by those terms. The question for the present case is whether Mr Katavich is fairly informed without having a statement of the facts on which TVWorks relies to support its pleading that the representations are false/deceptive or misleading.

[38] The issue can perhaps be tested by reference to an example. TVWorks alleges that the representation that “Hogan Mining had dedicated mining experts” is false or misleading. It can be inferred from that pleading that the essential fact supporting this pleading is that Hogan Mining did not have any dedicated personnel with mining expertise. It will then be a matter of evidence as to what knowledge or skills Hogan Mining’s personnel had and a matter of submission as to whether that person could be called a dedicated mining expert having regard to the services being offered.

[39] I take the view that Mr Katavich is entitled to know the essential factual basis on which it is alleged that the various representations are said to be false/deceptive or misleading, as distinct from the specific evidence on which TVWorks will rely to prove those facts.

### **Pleading of website pages/emails**

[40] Mr Katavich seeks an order that TVWorks plead in its counterclaim the whole of the content of the website pages and emails that contain the alleged

representations. He contends that this is needed to put the representations into context. I accept the submission of counsel for TVWorks that this is not a requirement of pleadings, but an evidential matter for Mr Katavich to develop at trial.

### **Strike-out**

[41] Mr Katavich seeks an order that TVWorks' counterclaim be struck out if the particulars it is seeking are not provided within a set period. Although the application expresses it more widely, this aspect of the application anticipates that TVWorks will not have a reasonably arguable cause of action without the further particulars.

[42] I am not prepared to make a finding to that effect on this application. I have already expressed the view that there is an arguable case for the alleged representations arising out of the words identified in the schedule and, although I have ordered some further particulars be provided of the websites containing the representations, I am not prepared to direct that a failure to provide further particulars is fatal to TVWorks' claim. It will still be a matter of evidence for TVWorks to prove the alleged publication. I take the same view in relation to the particulars that TVWorks are to provide of the facts underlying the allegations that the representations were false or misleading. If TVWorks is unable to provide any particulars to support that aspect of their pleading, that may give Mr Katavich a basis for an application to strike-out, but the point would need to be argued on a separate application brought specifically for that purpose. I do not consider it appropriate to tack it on to the present application. TVWorks' opposition to this part of the application was based on there being no need to provide further particulars, rather than an inability to provide them.

[43] There is no reason to take the view that TVWorks will not provide particulars as required in this judgment. Accordingly, there was no basis for making the order on an "unless" basis.

## **Decision**

[44] TVWorks is to provide further particulars on its counterclaim, as identified in paragraphs [33] and [38] above. They are to be provided in the form of an amended statement of counterclaim to be filed and served within 15 working days. The amended counterclaim is to include the matters set out in the revised schedule of particulars provided to Mr Katavich on 17 June 2011, either built into the body of the counterclaim or attached as a schedule.

[45] As both parties have had some success on this application, I make no order as to costs.

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**Associate Judge Abbott**