IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-001019

BETWEEN	LOCKWOOD GROUP LIMITED Plaintiff/Respondent
AND	BARRY SMALL Defendant/Applicant

Hearing: 4 November 2011

Appearances: K T Glover and E A James for Plaintiff/Respondent
C S Withnall QC for Defendant/Applicant

Judgment: 16 November 2011

JUDGMENT OF VENNING J

This judgment was delivered by me on 16 December 2011 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date...............

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C W Withnall QC, Dunedin
E A James, Auckland

Introduction

[1] The applicant/defendant (Mr Small) seeks to strike-out the whole or parts of the fourth amended statement of claim. Mr Small also seeks an order removing the proceedings from the Commercial List and their transfer to the Invercargill Registry of this Court.

Background

[2] Allan J set out the factual background to the issues between the parties in his judgment dated 21 April 2010 on the plaintiff's (Lockwood's) application for interim injunction and to have Mr Small held in contempt. I adopt Allan J's summary. It is unnecessary for me to repeat it for the purposes of dealing with the current application.

Procedural background

[3] It is, however, necessary to record the procedural background to put the current application in context. Lockwood issued these proceedings against Mr Small on 27 February 2009 alleging breach of a tripartite agreement between Lockwood, Mr Small and Odin, a Lockwood franchisee. On the same day it obtained an ex parte interim injunction against Mr Small restraining him from discussing matters surrounding the subject matter of an arbitration to be held between the parties and from making negative comments about Lockwood.

[4] Lockwood then filed an amended statement of claim on 7 December 2009. It raised a claim in defamation for the first time. On the same day it filed an application for committal for contempt and an amended interim injunction.

[5] On 12 February 2010 Lockwood filed its second amended statement of claim in which it added a cause of action in injurious falsehood. On 19 February Allan J heard Lockwood's applications. Allan J rescinded the earlier injunction but issued an amended injunction restraining Mr Small from commenting adversely about Lockwood's honesty or integrity or the quality of its products. He dismissed

Lockwood's application to have Mr Small held in contempt. The Judge considered that the parties' obligations relating to the proposed arbitration had been satisfied.

[6] Lockwood then filed a third amended statement of claim on 3 September 2010. Mr Small responded on 4 October 2010 by applying to strike out Lockwood's claim.

[7] In a further decision delivered on 9 March 2011 Allan J declined the strike-out application but directed Lockwood to provide further particulars and file a further amended statement of claim on or before 8 April 2011.

[8] By agreement the time for compliance with Allan J's order was extended to 15 April 2011.

[9] Lockwood failed to comply with the extended time for compliance but filed its fourth amended statement of claim on 3 May 2011. Mr Small did not consider the further particulars to be adequate or to comply with the Court's direction. On 27 May 2011 he filed a notice requiring further and better particulars. On 5 August there was a telephone conference during which the Court directed Lockwood to provide the further particulars by 19 August 2011. Again, Lockwood failed to comply with that direction.

[10] On 30 August Mr Small brought the current application to strike-out the whole or parts of the fourth amended statement of claim.

[11] On 3 November, one day before the hearing, Lockwood filed and served interrogatories and a draft proposed fifth amended statement of claim in which it purported to provide the further particulars sought by Mr Small.

[12] Following the hearing I received a memorandum from Mrs Grant seeking leave to refer to *Leigh v Attorney-General*.[1] Mr Withnall promptly filed a memorandum confirming that he did not oppose my considering that case.

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[1] *Leigh v Attorney-General* HC Wellington CIV-2008-485-2315, 14 July 2009; *Leigh v Attorney-General* [2010] NZCA 624; [2011] 2 NZLR 148 (CA); *Attorney-General v Leigh* [2011] NZSC 106.

Principles applicable to strike-out

[13] The principles applicable to a strike-out are well settled. They are established in the cases of *Attorney-General v Prince and Gardner*;[2] *Couch v Attorney-General*;[3] and *Attorney-General v McVeagh*.[4]

[14] The Court proceeds on the basis that the allegations in the pleading will be established. It will not attempt to resolve genuinely disputed issues of fact, but where a factual allegation is demonstrably contrary to indisputable fact the Court may consider it.

Lockwood's claim

[15] As noted, Lockwood has belatedly presented a draft fifth amended statement of claim in which it purports to provide the further particulars previously directed by the Court. The amended claim is not markedly different to the fourth amended statement of claim.

[16] In the draft fifth amended statement of claim Lockwood raises the following causes of action against Mr Small:

Breach of contract

[17] Lockwood pleads that Mr Small breached the tripartite agreement. Lockwood claims damages for breach of contract in the sum of $110,000 and general damages for loss of reputation and good will of $1 million.

Defamation

[18] Lockwood pleads a number of separate instances where it says Mr Small has defamed it. It seeks a permanent injunction restraining Mr Small from commenting adversely about it and damages in the sum of $1,110,000.

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2 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267.
3 *Couch v Attorney-General* [2008] NZSC 45 at [33].
4 *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566.

Injurious falsehood

[19] The third and final cause of action is the cause of action in injurious falsehood. Again Lockwood relies on the alleged defamatory statements. It seeks a permanent injunction and damages in the sum of $1,110,000.

The application

[20] As noted, the application is directed at striking out the whole or parts of the fourth amended statement of claim.

[21] Lockwood's pleading as to the actions of Mr Small leading up to and following the tripartite agreement and prior to the issue of the proceedings on 26 February 2009 could, if made out, support the causes of action pleaded. In those circumstances there is no basis to strike-out Lockwood's claim on the ground it does not disclose a cause of action(s).

[22] However, the defendant's application is also directed at particular aspects of the pleading which he says are frivolous, vexatious or an abuse of process. The defendant also says the pleading should be struck out because of Lockwood's failure to comply with previous orders of the Court.

[23] Lockwood has failed to adequately comply with the previous directions and orders of this Court in relation to the provision of further particulars. As noted, Lockwood failed to meet the timetable imposed by Allan J in his decision of 9 March 2011 for filing an amended statement of claim. It also failed to provide the further particulars required by the order when it did file the amended claim. Lockwood then failed to comply with the further order of this Court following the telephone conference on 5 August 2011 directing the provision of further particulars. The suggested explanation for that, that the defendant moved to file its strike-out application four working days earlier than the cut-off date provided by the Court and that "overtook events" is completely inadequate and an unsatisfactory explanation for Lockwood's failure to comply with the Court's order. By the time the defendant

filed his application the date for Lockwood to comply with the Court order had already passed.

[24] However, I do not consider the default is quite yet at a level where the proceedings should be entirely struck out for failure to comply with timetable orders of the Court, as they otherwise disclose arguable causes of action and Lockwood has attempted, albeit belatedly, to comply. Any prejudice to Mr Small by Lockwood's default in compliance with the orders can be met by orders for costs.

[25] But Mr Withnall still submitted that if the Court was not minded to strike out the claim in its entirety, aspects of it should be struck out. He submitted that a number of the allegations in the statement of claim pleaded incidents occurring after the commencement of the proceedings on 26 February 2009 and so leave was required to include them. He submitted those pleadings should be struck out as leave had not been sought and obtained to include those fresh causes of action.

[26] Rule 7.77(4) of the High Court Rules reads:

> If a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the court. If leave is granted, the amended pleading must be treated, for the purposes of the law of limitation defences, as having been [filed] on the date of the filing of the application for leave to introduce that cause of action.

[27] The objection is directed at the allegations at paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 45, 46, 48(d) and 49(a)(i) of the fourth amended statement of claim.

[28] Rule 7.77(4) applies to new or fresh causes of action arising after the filing of the statement of claim. Paragraphs 32, 34, 35, 38, 39 and 40 refer to incidents that occurred after the claim was filed, but do not identify new or separate causes of action. Similarly, paragraphs 48(d) and 49(a)(i) could not, of themselves, support independent causes of action. Rule 7.77(4) does not apply to these paragraphs.

[29] However, Mr Withnall also submitted that paragraphs 31, 33, 36 and 37 should be struck out as they are in breach of r 7.77(4). (Reference was also made to paragraphs 41, 43, 45, 46, 48 and 49, but they either refer generally to the earlier

paragraphs or refer to issues/incidents which would not support individual causes of action). The plaintiff does not plead the particular paragraphs as disclosing separate or new causes of action, but that in itself is not determinative. Paragraphs 31, 33, 36 and 37 contain allegations which, if particularised, could each independently support a fresh and stand alone claim(s) against Mr Small under the various causes of action. Rule 7.77(4) applies to such pleadings.

[30] As a related point Mr Withnall noted that insofar as the above paragraphs were relied upon to support the cause of action in defamation they would, by now, be statute barred by virtue of s 55 of the Defamation Act 1992 and would not be able to be introduced into the pleading: r 7.77(2).

[31] However, it is not clear that the paragraphs refer to incidents that did occur after 26 February 2009. As currently pleaded, at most they generally refer to incidents which may have occurred before 26 February 2009. For example, paragraph 31 pleads an event:

> ... after 19 September 2008 and on or shortly prior to 3 March 2009 ...

[32] If the incident relied on occurred prior to 26 February 2009 then the pleading should not be struck out on the basis leave was not obtained under r 7.77(4). Given the time span pleaded, the pleading cannot be struck out on that basis.

[33] Although it is strictly unnecessary to deal with the point, I record that Mr Glover submitted that because the Court has, on several occasions, considered the pleadings and made directions in relation to further particulars it was implicit that the Court had granted leave. I reject that submission. The Court was responding to the applications before it. The obligation to comply with the Rules and, in this particular case, to make any application for leave rested with Lockwood and its advisors. The terms of r 7.77(4) make it clear that a formal application is required. Lockwood has not made such application.

[34] Rule 7.77(9) enables the Court to provide relief in its discretion. But given the background to the proceeding in this case, the fact that the plaintiff is now on its draft fifth amended statement of claim, the time has passed since the amended

pleading, the plaintiff's failure to comply with orders of the Court to date and the plaintiff's failure to make a formal application for leave, I would not be minded to grant such relief. However, as noted the issue does not arise because of the time span referred to in the pleadings.

[35] Alternatively Mr Withnall submitted that the pleading at paragraphs 31, 33, 36 and 37 should be struck out as wholly lacking in sufficient particulars, particularly of the words alleged to have been used by the defendant and as such the pleading was defective.

[36] The pleading in issue is as follows:

> 31. On a date currently unknown to the plaintiff but after 19 September 2008 and on or shortly prior to 3 March 2009, Mr Small told Mr Mike Ross about the Odin dispute and said or implied that Lockwood was:
>
> (a) Accountable for the construction failures of its franchisee
>
> (b) Legally liable for correction of the defects; and
>
> (c) Failing to meet its obligations in relation to the defects.
>
> Or words to that effect. At present, the plaintiff does not know the precise words used.
>
> 33. On a date unknown to the plaintiff but after 19 September 2008 and on or shortly prior to 25 March 2009, Mr Small told Mr Norm Kensington about the Odin dispute and said or implied that Lockwood was:
>
> (a) Accountable for the construction failures of its franchisee
>
> (b) Legally liable for correction of the defects; and
>
> (c) Failing to meet its obligations in relation to the defects.
>
> Or words to that effect. At present, the plaintiff does not know the precise words used.
>
> 36. On a date unknown to the plaintiff but after 19 September 2008 and on or shortly prior to 17 August 2009, Mr Small told other members of the public, the names of whom currently are unknown to the plaintiff, about the Odin dispute and said or implied that Lockwood was:
>
> (a) Accountable for the construction failures of its franchisee
>
> (b) Legally liable for correction of the defects; and

> (c) Failing to meet its obligations in relation to the defects.
>
> Or words to that effect. At present, the plaintiff does not know the precise words used.
>
> 37. Alternatively, or in addition, on a date unknown to the plaintiff, Mr Kensington and/or Mr Ross republished the statements made to them by Mr Small, and detailed in paragraphs 31 and 33 above, to other members of the public, the names of whom currently are unknown to the plaintiff. Currently, the plaintiff does not know the precise words used.

[37] These pleadings were included for the first time in the fourth amended statement of claim dated 3 May 2011 and were met with the notice to give further and better particulars dated 27 May 2011.

[38] In an action for defamation the plaintiff must plead the actual words relied on and not merely their effect or substance: *Kerr v Haydon*.[5] I agree that the current pleading does not meet that requirement. Mr Withnall submitted that if it was not known what the words were nor the context in which they were used their meaning could not be ascertained and the pleading could not stand. In the absence of the particulars the defendant was embarrassed as he could not plead truth, honest opinion or qualified privilege.

[39] Lockwood's response to that is that the precise words are currently unknown to it but they are the subject of the notice to answer interrogatories. Mr Glover submitted that Lockwood was not in a position to provide further particulars unless and until the interrogatories it delivered on 3 November were answered by Mr Small. He referred to the cases of *Hickson v Scales*[6] and the *Nand v Williams & Ors*[7] to the effect that where the defendant knows the facts and the plaintiff does not, the defendant should give discovery before the plaintiff is required to provide particulars. In the supplementary memorandum Mrs Grant filed after the hearing she also referred to the more recent case of *Leigh v Attorney-General.*

[40] In *Leigh* the defendant took the point that the pleading was defective as it failed to plead the specific words used. While accepting the principle that the actual

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5 *Kerr v Haydon* [1981] 1 NZLR 449.
6 *Hickson v Scales* (1900) 19 NZLR 202.
7 *Nand v Williams & Ors* HC Auckland CP429/97, 9 September 1998, (Master Kennedy-Grant).

words in question will always have a material effect on the assessment of whether they convey one or more defamatory meanings, Dobson J noted that rather than strike out such pleadings sometimes the Court would allow a plaintiff to administer interrogatories to the defendant as to the precise words used. Dobson J noted however, the plaintiff was required to satisfy the Court that he was not merely fishing. If it is abundantly clear the defendant has uttered some word slanderous of the plaintiff of a definite character the Court may exercise its discretion to require the defendant to answer the interrogatories.[8] In the exercise of his discretion in the case before him Dobson J declined to strike out the particular pleading pending the administration of and answer to the interrogatories.

[41] On appeal on this point the Court of Appeal noted at [89]:

> [89] The authorities, as Dobson J observed, do allow of some scope for exceptions from the general requirement to plead actual words. Mr Miles was able to point to some evidence which supports the submission that this is not simply a "fishing" expedition. Two of the examples given by Mr Miles suffice. First, the respondents admit the briefing paper was prepared as an "aide memoire", suggesting that the subsequent oral statements developed material in the briefing paper. Second, a high level source is recorded as saying the Minister had briefings with officials who "dumped all over Erin Leigh". Accordingly, we agree with Dobson J that strike-out on the basis of lack of particularity is premature.

[42] The case was taken further to the Supreme Court but the Supreme Court did not have occasion to refer to this particular issue.

[43] As noted, whether the Court will hold over the striking out of pleadings pending the answer to interrogatories is discretionary. In an appropriate case, the Court may determine that the justice of the case requires the defendant to answer the interrogatories before determining the defendant's objection to the plaintiff's pleading.

[44] In the present case I do not consider the interests of justice support that course of action. As noted, these proceedings have been on foot since February 2009, some two years and nine months now. The plaintiff has been directed by the Court to provide particulars on two occasions. It has failed to comply with those

[8] Referring to *Kerr v Haydon* [1981] 1 NZLR 449 at 453.

directions. The plaintiff has been on notice since May this year of the defendant's challenge to the very issues before the Court and the perceived defect in its pleading. Lockwood was directed to respond to the request for particulars in the orders made at the teleconference on 5 August 2011. It failed to do so and only on 3 November 2011, one day prior to the fixture on the defendant's application to strike-out, has it sought to interrogate the defendant. (In passing I note that Mr Withnall has said that, having taken instructions, the answer to the interrogatories will not provide any assistance to the plaintiff). Importantly, the allegations in paragraphs 31, 33, 36 and 37 not only lack the detail of the specific words alleged, they also lack any detail of when, where and the circumstances in which it is said the statements were made. The lack of particulars is equally fatal to the pleadings' ability to support the other causes of action as well.

[45] The pleadings at paragraphs 31, 33, 36 and 37 are defective in their current form and should be struck out. In the circumstances I am satisfied the just course in this case is to strike the particular paragraphs out at this stage. There must be some sanction for the plaintiff's failure to respond in a timely fashion to the defendant's request for particulars and the Court order. In the event that the plaintiff is able to obtain further particulars from the interrogatories and the claim is still within time then it may be repleaded (after leave is obtained if necessary). In the event the claim is out of time in relation to the defamation cause of action then the plaintiff can pursue an application for leave under s 55 of the Defamation Act if it is thought appropriate.

[46] Mr Withnall's next attack was on paragraphs 17 and 18 of the fourth amended statement of claim. Those paragraphs refer to a telephone discussion between the defendant and Mr Heard, the plaintiff's Chief Executive. Mr Withnall submitted they were not capable of supporting a claim in defamation given that the conversations are alleged to have been between Mr Small and Mr Heard. I accept the force of Mr Glover's response that Lockwood does not rely on those paragraphs in relation to its causes of action in defamation and for injurious falsehood but rather in relation to the breach of contract cause of action. Those paragraphs can remain.

[47] Next, Mr Withnall challenged the claim for damages for $110,000 which Lockwood claims as a loss consequential on Mr Kensington's decision not to purchase a house from Lockwood. Lockwood pleads the lost transaction was worth approximately $110,000 to it. Mr Kensington was an associate of Mr Small.

[48] Mr Withnall's challenge in relation to this pleading was in two respects. First he submitted the pleading could not stand on the undisputed evidence of Mr Kensington and the plaintiff's own officers. Second, he submitted that in any event the pleading failed to provide sufficient particulars of what was meant by the transaction being "worth approximately $110,000 to Lockwood".

[49] Mr Glover submitted that Lockwood disputed Mr Kensington's evidence and as disputes of fact could only be resolved at trial the objection must be dismissed. He also submitted that sufficient particulars of the $110,000 had been provided.

[50] The relevant pleading in terms of the breach of contract is:

> 41. Mr Small repeatedly breached clause 8 of the Tripartite Agreement.
>
> **Particulars**
>
> (a) The plaintiff relies on the conduct of Mr Small detailed in paragraphs 11 to 36 above. In particular:
>
> ...
>
> (ii) Mr Small's disclosures to ... Mr Kensington detailed in paragraphs ... 33 above; and ...
>
> 42. These breaches have and will cause substantial damage to Lockwood's reputation and result in pecuniary loss to Lockwood.
>
> **Particulars**
>
> (a) The negative statements that Mr Small made to ..., Mr Kensington, ... and other members of the public have caused:
>
> ...
>
> (ii) Mr Kensington to lose faith in Lockwood and to elect not to purchase a "Jamaican" house from the Lockwood range for his riverside property that he had previously indicated that he intended to buy. This lost transaction was worth approximately $110,000 to Lockwood.

There then follows the claim for relief for damages for breach of contract in the sum of $110,000 apparently relating to the lost transaction "worth" approximately $110,000 to Lockwood.

[51] The basis for the claim in relation to the Kensington "sale" is to be found in paragraph 33 of the statement of claim. That pleading has been struck out as wanting in particulars. Further, Lockwood's claim to the $110,000 faces a number of other difficulties. It is premised on the basis that Mr Kensington did not proceed with the sale because of what he had been told by Mr Small some time between 19 September 2008 and 25 March 2009.

[52] The difficulty for Lockwood with this pleading is that quite apart from Mr Kensington's evidence, it is not supported by its own documentary records.

[53] Mr Kensington's evidence about the purchase of the Lockwood show home in the Waikato was as follows:

> 9. Some time later [after March 2009] the Hamilton show home was placed on the market and it was at a knockdown price. Because of this price, as we all love a bargain, when the franchisee contacted me I arranged an appointment for the franchisee to come out to our site for an appraisal and to give me a price for the house delivered and completed on our section. I had reservations about the feasibility of being able to move a completed house on to our section due to the long driveway, location of a power line, and the slope or lay of the land. I also spoke to a couple of well-known and respected real estate agents about the proposal, and the price, and was advised not to put a Lockwood home on the section as we would not be able to sell it. These were the reasons I decided not to proceed and I told the franchisee that I would not be proceeding any further.

[54] But even putting Mr Kensington's evidence to one side, the evidence of Mr Heard does not support the pleading. Mr Heard has extracted Lockwood's dealings with Mr Kensington from Lockwood's central database records. The records are the plaintiff's own and disclose:

> 26/03 Have concerns with guarantee of building completion in this economic climate. Friends have dispute with past South Island franchisee Odins apparently, so doesn't put much faith in Lockwood at present.
>
> 10/5/09 Jol. Interested in Jamaican show home for one of their sites.

Jol is a reference to Joe Glyde, the Hamilton franchisee.

[55] Mr Heard's evidence is that this was the first reference to any interest by Mr Kensington in the show home. It post dated the allegations complained of. It is consistent with Mr Kensington's evidence. There is then the following entry:

> 26/5/09 Jol. Not buying show home now.

[56] In summary, Lockwood's case in relation to the lost sale to Mr Kensington is that, as a result of what the defendant Mr Small told Mr Kensington about the Odin dispute, Mr Kensington lost faith in Lockwood and elected not to purchase a Jamaican house from the Lockwood range, which he had previously indicated that he intended to buy.

[57] But that pleading is inconsistent with Lockwood's own written records which confirm that it was not until 10 May, some six weeks after the latest date it is alleged Mr Kensington communicated his concern about Lockwood's treatment of Mr Small to Mr Heard, that Mr Kensington had first indicated any interest in a show home. He then determined some two weeks after that, and for his own reasons, not to proceed. There is no suggestion in the pleading of any further action by Mr Small affecting Mr Kensington in that period. Lockwood's own records are inconsistent with the proposition that anything Mr Small said to Mr Kensington affected Mr Kensington's decision not to proceed. Its own records do not support its pleading that the negative comments made by Mr Small to Mr Kensington caused Mr Kensington to cancel his intention to buy. Further, at its highest, Lockwood's own evidence suggested Mr Kensington was no more than "interested" in the home.

[58] In addition, to describe the transaction being "worth $110,000" is not a sufficient pleading of the damages claimed. It must be a claim for special damages in that it purports to represent a past loss, precisely calculable, as opposed to a claim for general damage: *Halsbury's Laws of England* (4th ed, 1975) vol 12 Damages at [1113]. Rule 5.33 requires the pleading to show the nature, particulars, and amount of special damages. The particulars must contain sufficient detail for the defendant to be able to check and confirm it prior to trial: *McGechan on Procedure* (looseleaf ed, Brookers) at [HR5.33.03]. It is impossible to say what is meant by "worth", and

whether it is a reference to gross profit or net profit or some other measure. The plaintiff has had ample time to plead the Kensington claim with sufficient particularity. It has failed to do so. It should be struck out.

[59] Next, Mr Withnall submitted that paragraphs 19 and 25 of the fourth amended statement of claim which alleged the sending of an email dated 20 February 2009 to "several Lockwood franchisees" and an email of 24 February 2009 to "several other Lockwood franchisees" without identifying the recipients was defective as it failed to plead any basis upon which the sending of the alleged email could possibly have caused the losses alleged. I accept in principle the point that unless the franchisees can be identified then the pleading cannot stand.

[60] However, as Mr Glover submitted, the identity of the franchisee Mr La Grouw is provided in the draft fifth amended statement of claim in relation to paragraph 25 and the request for particulars did not address the identity of the franchisees in issue in paragraph 19. Again, while belated, the provision of the detail in paragraph 25 is sufficient for that paragraph to remain. Lockwood should however, also provide further particulars of the franchisee(s) in relation to paragraph 25 in the repleaded claim. The issue of the causation is addressed below.

[61] Finally, Mr Withnall challenged the general damages for lost reputation and good will of a million dollars. Lockwood pleads at 42(a))(iv):

> Loss of up to 10 sales to Lockwood. This belief is based on the fact that the sales of Lockwood products in Odin's former franchise territory in the period after Mr Small's negative comments were made decreased to zero for 2009 and 1 for 2010, which is disproportionate to the decrease in sales in the market generally; ...

[62] The claim is very general. As Mr Glover submitted, a company may recover for loss of goodwill or loss of reputation in a defamation action. In *Mount Cook Group Ltd* Tipping J confirmed that:[9]

> In my view the position is ... that damages may be obtained by a company in respect of defamatory material likely to cause commercial loss without any evidence being necessary of actual loss having been suffered. In any such case the appropriate assessment must be made upon all the material available

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9 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 at 497.

> to the Court or the jury. Another way of putting the point is to say that a company may obtain damages for defamation but only in respect of financial loss, either shown to have been suffered or shown to have been probable: see *News Media Ownership v Finlay* [1970] NZLR 1089 per Haslam J at p 1103 and Gatley para 954.

[63] That position at common law was effectively confirmed by s 6 of the Defamation Act which requires a body corporate to allege and prove that the publication:

(a) has caused pecuniary loss; or

(b) is likely to cause pecuniary loss.

However, the emphasis is on causation. There must be a link between the complaint and the loss caused. The Court may, in appropriate cases, make an assessment of the appropriate damage, as in the *Mount Cook* case, but before making that assessment the Court must be satisfied that the actions complained of have caused or led to the diminished goodwill or loss of reputation.

[64] Like Allan J I accept the criticism of the general nature of the pleading that as it stands, it falls to plead such a causative link. Quite apart from the obvious response that one reason for the fall-off in sales in the Odin franchisee area might well have been the general performance or financial position of the franchisee Odin, it is impossible, on the state of the current pleading, for the defendant to otherwise assess the basis of the loss claimed. The damages claim is advanced on the basis that there was a disproportionate decrease in sales in the area compared to the market generally. But no details or particulars are provided of that general decrease in sales in the market so that a comparison and consideration of the validity of the claim can be considered. Nor is it pleaded how any actions of the defendant could have affected the Odin franchisee. It does not appear to be pleaded the defendant's actions related to that area, apart from his contact with one other Lockwood franchisee. Finally, nor are any particulars provided of how 10 sales are worth $100,000 each.

[65] The issue has been raised before. In his judgment Allan J recorded the defendant's challenge to the pleading that Lockwood believed it had lost up to 10 sales as a consequence of Mr Small's publications about Lockwood. He noted and accepted the point Mr Withnall made that that could not amount to a sufficient pleading of causation because there was no pleading of publication to the general public which must be taken to constitute the market for Lockwood's products.

[66] Similarly, Mr Withnall criticised the then pleading of alleged dislocation of Lockwood's franchisee network. He noted there were no particulars to support a causative link to the prayer for relief. I agree. The averment that the dispute had distracted franchisees is insufficient on its own. This should not come as a surprise to the plaintiff. In his judgment of 9 March Allan J noted that Mrs Grant accepted there was a need for amendment of the statement of claim by the provision of further particulars. She acknowledged a need to amend the above existing pleading. The Judge recorded that:

> [22] ... the plaintiff must plead sufficient particulars to demonstrate a causative link between the acts of the defendant in respect of which the plaintiff claims and the loss flowing from those actions.

The Judge went on to record that:

> [23] ... Ms Grant acknowledges that there is an obligation to plead sufficient particulars to enable the defendant to understand how the plaintiff proposes to establish a causative link between the actions of the plaintiff [sic] on the one hand, and the alleged losses sustained by the plaintiff on the other. ... she acknowledges also the need to bear in mind the distinction between general and special damages and the requirement, in the context of the defamation claim, that the plaintiff establish at least probable financial loss: Defamation Act 1992 s 6, see also *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488.

The Judge then directed the plaintiff to file and serve a further amended statement of claim:

> [26] ... The further particulars are to provide such detail of the plaintiff's alleged losses and of the manner in which those losses are alleged to have been caused by any act or omission of the defendant, as will suffice to give the defendant proper notice of the plaintiff's case against him.

[67] Neither the fourth amended statement of claim nor the draft fifth amended claim address the issue. There is still no link, and no particulars to support the above pleading nor the more recent related pleading that Mr Small's actions have caused:

> Anxiety, dissent and loss of goodwill within the franchisee network which has damaged relationships and distracted franchisees . . .

[68] However, rather than strike out these aspects of the claim at this stage I propose to give the plaintiff one last chance to provide the necessary further particulars.

Summary

[69] As a consequence of the above I make the following orders/directions:

(a) paragraphs 31, 33, 36 and 37 of the fourth amended statement of claim, together with related aspects of the pleading dependent on those paragraphs, are struck out;

(b) the pleading relating to the Kensington transaction and the loss of $110,000 is struck out;

(c) the plaintiff is to provide further particulars of the franchisee(s) referred to in paragraph 19;

(d) the plaintiff is to provide further particulars of its general damages claim for lost reputation and goodwill as discussed in paragraphs 61 to 67 above.

[70] The defendant Mr Small is to respond to the interrogatories by Wednesday 30 November 2011. The plaintiff is then to file and serve any amended claim, including the above particulars, by 14 December 2011. If the pleading purports to introduce claims that would support independent causes of action, leave will be required.

Commercial List/venue

[71] Mr Withnall seeks to have the proceeding removed from the Commercial List and transferred to Invercargill as the Court nearest to where the defendant resides.

[72] The case was commenced in the Commercial List. Section 24B of the Judicature Act 1908 applies. The proceedings do not readily fall within the categories set out in that subsection. The parties do not have a commercial relationship. The only contractual relationship between them was the tripartite agreement which was discharged in or about September 2009 after the arbitration was concluded. The parties have no ongoing relationship. Essentially the plaintiff's principal claim against Mr Small, apart from the breaches of the tripartite agreement, are the claims for defamation and injurious falsehood.

[73] The plaintiff opposes the request that the case be removed from the Commercial List. The plaintiff submits that the case requires careful and consistent management. However, it has to be said that, despite the Court's directions and management to date in the Commercial List the plaintiff's failure to comply with directions has hampered the resolution of the proceedings. If the case is removed from the Commercial List it will still be case managed to fixture in the usual way. I am satisfied there is no good reason for this case, which lacks a commercial flavour, to remain in the Commercial List. The dispute appears to have been unnecessarily escalated and both parties should review their position. I order it be removed from the Commercial List.[10]

[74] That then raises the issue of venue. There is no reason for the proceedings to remain in the Auckland Registry of this Court. It has no connection with this registry. Mr Small is based in Te Anau. Mr Glover confirmed the plaintiff's head office is in Rotorua. Its witnesses would be based in Rotorua. There is no good reason to retain the case in Auckland. The Court nearest to where the defendant resides is Invercargill. The proceeding is to be transferred to the High Court at Invercargill. All further steps in the proceeding are to be taken in that Registry.

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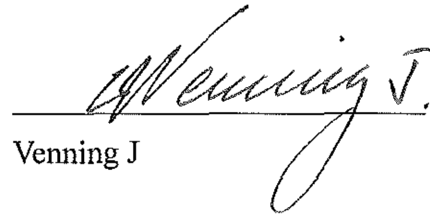
[10] Rule 29.13.

Costs

[75] The defendant has succeeded in part. However, given the plaintiff's default to date the application to strike-out was justified. The defendant is to have costs on a 2B basis together with disbursements as fixed by the Registrar for all steps relating to the application and hearing. The disbursements are to include travel (and if claimed for, accommodation of counsel).



Venning J