IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-1274
[2014] NZHC 2998

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

Hearing: 6 October 2014

Counsel: C McVeigh QC and H Coull for Plaintiffs
D McLellan QC for Defendant

Judgment: 28 November 2014

JUDGMENT OF ASSOCIATE JUDGE SMITH

---

[1] This is a defamation claim, in which the defendant, LexisNexis, says that the second plaintiff (Elementary) has failed to comply with an order made in November 2011 that it provide full and proper particulars of the alleged injury to its reputation and its claimed pecuniary loss. It now applies for an order striking out the claims made against it by Elementary. It also applies for an order for further and better discovery by the plaintiffs.

Background

[2] The first plaintiff, Mr Ayers, is a director of and carries on business through Elementary. LexisNexis publishes *NZ Lawyer*, a weekly periodical for legal professionals.

[3] In May 2009 LexisNexis published in *NZ Lawyer* an article by Mr Ayers entitled "Flaws found in EnCase ® ASE Computer Forensic Software".

[4] LexisNexis received two letters in response to Mr Ayers' article. The authors of the two letters took issue with some of the contentions in Mr Ayers' article. The letters were published in the *NZ Lawyer* issue published on 29 May 2009. Mr Ayers and Elementary contend that the publication of the two letters defamed them.

[5] Mr Ayers and Elementary have settled defamation claims made against the authors of the letters (or the companies by whom the authors were employed). They commenced the present defamation proceeding against LexisNexis, as publisher of the allegedly defamatory material, in July 2010.

[6] Under s 6 of the Defamation Act 1992, proceedings for defamation brought by a corporate plaintiff shall fail unless the body corporate alleges and proves that the relevant publication has caused or is likely to cause pecuniary loss. Since late 2010, LexisNexis has been pursuing a request for further particulars of the pecuniary loss which Elementary claims to have suffered (or to be likely to suffer).

[7] On 29 November 2011 Associate Judge Gendall ordered Elementary to provide "full and proper particulars" of: [1]

> (a) the respects in which its reputation is alleged to have been very seriously injured; and
>
> (b) the "pecuniary loss" that it has allegedly suffered and will continue to suffer.

[8] An application to review that decision was dismissed by Kós J on 16 November 2012.

[9] When the particulars were not provided, the Associate Judge made a further order on 13 May 2013 directing the plaintiffs to file an amended statement of claim within 30 working days. That order was not complied with, and on 13 August 2013 Williams J ordered that an amended statement of claim be filed within 28 days.

---

[1] *Ayers v LexisNexis NZ Ltd* HC Wellington, CIV-2010-485-1274, 29 November 2011 at [84].

The strike-out application

[10] The plaintiffs filed a second amended statement of claim on 16 May 2014, but LexisNexis took the view that it still did not provide full and proper particulars of the loss allegedly suffered by Elementary.

[11] In its amended strike-out application filed on 10 July 2014, LexisNexis contended that the second amended statement of claim did not provide the full and proper particulars of the respects in which Elementary's reputation had been "very seriously injured", and nor did it provide adequate particulars of the pecuniary losses allegedly suffered by Elementary. In view of the various orders already made by the Court directing the plaintiffs to provide particulars, and what LexisNexis viewed as the continued inadequacy of the responses, LexisNexis contended that the time had come to strike out the second amended statement of claim for non-compliance with those Court orders.

[12] After LexisNexis filed its strike-out application, the plaintiffs filed a third amended statement of claim. The relevant pleadings of loss are set out at paras [23] and [24], as follows:

> 23. That as a result of the publication of the first and second letters by the defendant, the first plaintiff has been exposed and held up to ridicule and contempt. His reputation has been very seriously injured and he has suffered seriously hurt feelings.
>
> 24. 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. Its reputation has also been very seriously injured which has caused it to suffer pecuniary loss.
>
> **Particulars of damage to reputation and pecuniary loss**
>
> (a) The first plaintiff was, and remains, the sole director and shareholder of the second plaintiff. The second plaintiff was recognised as the alter-ego of the first plaintiff. Accordingly, the very serious injury to reputation suffered by the first plaintiff, as a result of the defendant's conduct, pleaded in paragraph 23 (with the exception of the first plaintiff's seriously hurt feelings), resulted in the same very serious injury to the reputation of the second plaintiff because of the fact that the plaintiff was a director and shareholder of the second plaintiff.
>
> (b) To year end 31 March 2010, the second plaintiff has suffered a loss of profit amounting to $100,000. To the year ended 31 March 2011, the second plaintiff has suffered a loss of profit amounting to $120,000.

(c) The loss of profit was occasioned by two major factors:

(i) The necessity for the first plaintiff (as sole director and shareholder of the second plaintiff) to take reasonable steps in an attempt to mitigate the loss caused by the defamatory publications of the defendant and thus not being able to fully apply himself to the revenue earning activities of the second plaintiff; and

(ii) A decrease in custom from the general custom that the second plaintiff had experienced for the preceding years leading up to the publication of the defamatory statement. This decrease commenced in the 2010 financial year and continued through to the 2011 financial year.

(d) Legal fees paid in 2011 & 2012 - $124,277.

[13] In the claim for relief, Mr Ayers seeks "general damages" (including an award for aggravated damages). Elementary does not expressly state whether its claim is for general damages or special damages – the claim is for "pecuniary loss in the sum of $344,277", plus interest.

[14] The plaintiffs say that this pleading now provides full and proper particulars of the respects in which Elementary's reputation has been very seriously injured, and of the loss of profit claimed. They say that they do not have to plead matters of evidence.

[15] If the Court does not accept that submission, the plaintiffs submit in the alternative that any remaining pleading deficiency is a matter capable of remedy by an order for further particulars specifying the respects in which the pleading in the third amended statement of claim is deficient. They submit that there are no grounds for striking out Elementary's claim.

[16] LexisNexis says that the third amended statement of claim remains deficient: it is not enough for Elementary to say that the alleged "very serious injury" to the reputation of Mr Ayers has resulted in the same very serious injury to Elementary's reputation. That is because (in the submission of LexisNexis) the claim does not adequately particularise the respects in which Mr Ayers' reputation is said to have been injured.

[17] In respect of the pleading of pecuniary loss, LexisNexis says that it was entitled to be properly informed of the nature of the claim it is facing, and to have the calculation which resulted in the loss of profits claims of $100,000 and $120,000 particularised with sufficient detail to enable it, and its expert accountant, to understand how these sums were arrived at. It submits that the "particulars" presently provided do not comply with the legal requirements for particulars of special damages claims, or with the order of the Court made on 29 November 2011.

[18] At the hearing, Mr McVeigh advised that the claim for legal fees pleaded at para [24(d)] of the third amended statement of claim will now be limited to a claim for legal fees incurred in the March 2010 year. That will result in a reduction in the amount claimed for legal fees from $124,277 to $18,208.13. Mr McLellan QC confirmed that LexisNexis is not now concerned with Elementary's claim for legal costs – the strike-out application is to be limited to Elementary's claim for loss of profits.

The discovery application

[19] In its amended application dated 10 July 2014, LexisNexis sought further and better discovery of 12 categories of documents listed in a schedule to the amended application. However not all of those categories were the subject of argument at the hearing. A further supplementary affidavit of documents was filed by the plaintiffs shortly before the hearing, and it may be that a number of LexisNexis' further discovery requests have now been satisfied – by the time the hearing commenced, LexisNexis still needed time to review the further supplementary list. By consent, the argument was restricted to the documents listed in categories 1, 10, and 12, with the application to be held over for argument on the remaining categories if that should prove to be necessary.

[20] The documents listed in categories 1, 10, and 12 are these:

> (1) The tax returns filed by or on behalf of the first and second plaintiffs for the years ending 2006 – 2013.
>
> …

> (10) Any documents evidencing the products and/or services provided by Elementary IT & Communications Limited to the second plaintiff.
>
> …
>
> (12) Any other documents that relate to the alleged incurring or calculation of the pecuniary loss set out in paragraph 24 of the plaintiffs' second amended statement of claim.

[21] The reference to Elementary IT & Communications Ltd (Elementary IT) in category 10 is a reference to a company of which Mr Ayers is the sole director and shareholder. In an affidavit sworn on 10 July 2014 in support of LexisNexis' application, Mr John Hagen, a chartered accountant, stated that his review of the plaintiffs' discovery to that time showed that the majority of the purchase orders discovered for the period from 1 April 2010 to 1 March 2012 had been issued to Elementary IT. No purchase orders had been discovered for the period between 30 November 2008 and 1 April 2010. Mr Hagen stated that there had been no discovery of any documentation enabling LexisNexis to determine the nature or type of services/products provided by Elementary IT, or to assess the relevance or otherwise of the relationship between Elementary and Elementary IT on the one hand, and Elementary's claim for pecuniary loss on the other.

The issues to be determined

[22] The following issues fall to be determined:

(1) Whether the plaintiffs' third amended claim provides the "full and proper particulars" ordered by the court on 29 November 2011.

(2) Whether Elementary's claim for loss of profits should be struck out:

(a) if the answer to Issue (1) is "no"; or

(b) on account of Elementary's delay in complying with orders of the Court (if the answer to Issue (1) is "yes").

(3) Whether the plaintiffs should be directed to provide particular discovery of the documents listed in categories 1, 10, and 12 in the schedule to LexisNexis' amended application

[23] I address each issue in turn.

Issue 1: Whether the plaintiffs' third amended claim provides the "full and proper particulars" ordered by the court on 29 November 2011

[24] It was common ground at the hearing that "full and proper particulars" means no more and no less than the level of particularity required by the High Court Rules. If the plaintiffs have now provided that level of particularity on the aspects of their pleading that were the subject of the orders made by Associate Judge Gendall, they will (now) have complied with those orders.

Particulars generally

[25] LexisNexis relies on rr 5.21, 5.26(b), 5.33 of the High Court Rules, and the orders of the court made by Associate Judge Gendall on 29 November 2011 and 13 May 2013, the decision of Kós J dated 16 November 2012, and the further order made by Williams J on 13 August 2013. It also refers to a number of decisions of the Courts which it submits show that it is entitled to full particulars of the basis for Elementary's claims to pecuniary loss.

[26] Rule 5.26(b) of the High Court Rules relevantly provides:

> **5.26 Statement of claim to show nature of claim**
>
> The statement of claim—
>
> ...
>
> (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; and …

[27] Rule 5.33 provides:

> **5.33 Special damages**

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

[28] Rule 5.21 is the rule under which a party who considers that the opposing party's pleading is inadequate may serve notice on the opposing party calling upon it to provide further particulars sufficient to give "fair notice" of a cause of action or ground of defence, or to provide other particulars required by the rules. If the notice is not complied with within five working days, the court may, if it considers that the pleading objected to is defective or does not give particulars properly required by the notice, order a more explicit pleading to be filed and served. This is the rule under which the further particulars were ordered by Associate Judge Gendall in November 2011.

[29] The essential purpose of pleadings is to define the issues and thereby inform the parties in advance of the case they have to meet, so that they can take steps to deal with that case. In *Price Waterhouse v Fortex Group Ltd*, the Court of Appeal noted that the provision of proper particulars remains important notwithstanding the exchange of briefs of evidence before trial, which might be thought to cure any lack of particularity in the pleadings.[2] In a case of any complexity, pleadings which are properly drawn and particularised are almost always an essential roadmap for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared, and they establish the parameters of the case. Both the Court and opposite parties are entitled to be advised of the essential basis of a claim for defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against a recognisable boundary. Neither the Court nor opposite parties should be placed in a position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.[3]

[30] The Court of Appeal went on to say in *Price Waterhouse*:[4]

> In marginal cases, it is better to avoid generalities and rules of thumb, and to return to principle. The pleader and the 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?" This is not,

---

2 *Price Waterhouse v Fortex Group* CA179/98, 30 November 1998 (CA).
3 At 17-18.
4 At 19.

> under modern practice, simply some minimum which a Defendant needs so as to be able to plead. It is intended to 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.
>
> …
>
> As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[31] Mr McLellan referred to a number of cases in support of the proposition that, where damages claims are based on estimates which are to be proven, the estimate *and the basis for its calculation* must be supplied. The cases referred to were *W H Shannon Ltd v Mico Wakefeild Ltd*,[5] *Carter Holt Harvey Ltd v Genesis Power Ltd (No 6)*,[6] and *Best Food Fresh Tofu Ltd v China Taiping Insurance (NZ) Co Ltd*.[7] None of these cases were defamation cases, and the decision in each appears to have turned on the particular nature of the claim and the degree of particularity provided in the relevant pleading.

[32] The *Best Food Fresh Tofu Ltd* claim *did* relate to a claim for loss of earnings. The loss was said to flow from the non-completion of building works and reinstatement works, and the claim was regarded by Associate Judge Bell as complex. The Associate Judge noted:[8]

> Simply pleading final figures, the result of extensive calculations, is not adequate.

[33] The Associate Judge required the plaintiff to provide a schedule setting out its calculations to show how the figures were derived.

Legal principles applicable to particulars in defamation cases

[34] Sections 4 and 6 of the Defamation Act 1992 provide:

---

5 *W H Shannon Ltd v Mico Wakefeild Ltd* HC Auckland CL34/02, 24 February 2003.
6 *Carter Holt Harvey Ltd v Genesis Power Ltd (No 6)* HC Auckland CIV-2001-404-1974, 8 August 2007.
7 *Best Food Fresh Tofu Ltd v China Taiping Insurance (NZ) Co Ltd* [2014] NZHC 350.
8 At [30].

> **4 Defamation actionable without proof of special damage**
>
> In proceedings for defamation, it is not necessary to allege or prove special damage.
>
> **6 Proceedings for defamation brought by body corporate**
>
> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings—
>
> (a) has caused pecuniary loss; or
>
> (b) is likely to cause pecuniary loss—
>
> to that body corporate.

[35] In the High Court decision of *Tairawhiti District Health Board v Perks (No 2)*, Paterson J noted that s 6 of the Defamation Act reflected the common law rule that a corporate plaintiff's claim must sound in money.[9] But the section imposes no obligation on the plaintiff to plead special damage: in referring to pecuniary loss, the section refers to injury to reputation in the way of the plaintiff's trade or business. Paterson J noted that a corporate body may sue for defamation by reason of material calculated to damage its business interests or goodwill. Damages can be awarded to it for injury to its reputation in the way of its trade or business, but not for reputation as such. A corporate body cannot be injured in its feelings. It can only be injured in its pocket.[10]

[36] Mr McVeigh referred to a number of English authorities in support of his submission that damage is assumed to have been suffered if a defamation has been proved, and a corporate plaintiff in such circumstances is not required to allege and prove special circumstances.

[37] *Ratcliffe v Evans* was a malicious falsehood case, in which the plaintiff alleged that the defendant had falsely and maliciously published an article in its weekly newspaper which suggested that the plaintiff had ceased to carry on his engineering and boiler-making business, and that the plaintiff's firm did not then

---

9 *Tairawhiti District Health Board v Perks (No 2)* [2002] NZAR 533 (HC) at [21].

10 Citing the judgment of Tipping J in *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC).

exist. [11] Damage is an essential element of the tort of malicious falsehood, but the plaintiff gave no specific evidence of the loss of particular customers or orders by reason of the publication. The plaintiff proved only a general loss of business since the publication.

[38] It was argued for the defendant that in such an action it is not enough to allege and prove a general loss of business arising from the publication, since such loss is general, and not special damage, and special damage is the gist of such an action. Bowen LJ noted that, on the facts of the case before the court, the article might have been read, and possibly acted on, by persons of whom the plaintiff had never heard. To refuse to admit such evidence would involve a denial of justice. His Lordship referred to the presumption under United Kingdom law at the time that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiffs rights, such damage being referred to as "general damage". His Lordship went on to state: [12]

> If indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things from a libel may be alleged and proved generally. "It is not special damage" – says Pollock, C.B., in *Harrison v Pearce* – "it is general damage resulting from the kind of injury the plaintiff has sustained". So in *Bluck v Lovering* under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at trial: see also *Ingram v Lawson*.
>
> (citations omitted)

[39] In *E Worsley & Co Ltd v Cooper*, Moreton J accepted that a loss of general custom, flowing directly and in the ordinary course of things from a libel, could be alleged and proved generally (the plaintiff had given no specific evidence of the loss of any particular customer or order by reason of the publication).[13] The loss was not to be considered special damage, but general damage resulting from the kind of injury the plaintiff had sustained.[14]

---

11 *Ratcliffe v Evans* [1892] 2 QB 524 (CA).
12 At 529.
13 *E Worsley & Co Ltd v Cooper* [1939] 1 All ER 290 (Ch)
14 Citing *Ratcliffe v Evans*, above n 10, at 529.

[40] In *Jameel v Wall Street Journal Europe Sprl*, the UK Court of Appeal accepted that, under United Kingdom law, a requirement that a corporation suing in defamation must prove special damage would leave many an injured corporation without remedy.[15] The Court of Appeal considered that such a requirement would not go far enough to provide necessary protection for the reputation of corporations that were at risk of being damaged by inaccurate press reports.[16]

The judgments of Associate Judge Gendall and Kós J

[41] The relevant damages pleading at the time of the judgment of Associate Judge Gendall was brief. It read:

> [24] 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.

[42] The plaintiffs' solicitors had written to LexisNexis advising that Elementary's claim for pecuniary loss included claims for "loss of profits" and "loss of goodwill". Their letter (dated 15 December 2010) referred to "detrimental effects to [Elementary's] financial structure and/or efficiency occasioned by the time involved, cost to, and expenses incurred by [Elementary] in attempts to ameliorate and mitigate the damaging effects of the defamatory publications".

[43] In a memorandum filed in July 2011, Elementary advised that it had decided to take a pragmatic approach to the issue, and would provide particulars as to the quantum of the claimed pecuniary loss (even though it did not accept that it had any obligation to do so at that stage). It sought a reasonable time to take expert advice in relation to the provision of those particulars, saying that Elementary's damage could not be quantified until its 2010 financial accounts had been completed. Elementary confirmed that as soon as those financial accounts were prepared, it would provide LexisNexis with copies of the accounts and Elementary's loss would be quantified.

---

15 *Jameel v Wall Street Journal Europe Sprl (No 2)* [2005] QB 914 (CA).
16 At [113].

[44] Particulars of the claimed pecuniary loss had not been provided when the further particulars application came on for hearing. At para [69] of the judgment, the Associate Judge noted that, while s 6 provides that pecuniary loss (or the likelihood thereof) must be proved, that pecuniary loss at least arguably may support an award of general damages. The Associate Judge accepted that there was no requirement for a body corporate to plead special damages; all that had to be shown was pecuniary loss.[17]

[45] However the Associate Judge concluded that Elementary's claim was in fact a claim for special damages, and noted that the plaintiffs did not dispute that generally a defendant is entitled to particulars of the quantum of a claim for special damages.[18]

[46] The Associate Judge appears to have been primarily concerned with the question of whether LexisNexis was entitled to a *quantification* of the claim for pecuniary loss in the face of s 43 of the Defamation Act, which provides that the statement of claim itself must not specify the quantum of damages claimed. His honour took the view that a defendant should be entitled to such quantification in a separate document, under r 5.21.

[47] The Associate Judge, having traversed the principles relating to the provision of further particulars and analysed the effect of s 43, simply concluded that the defendant's further particulars application should succeed. It is not clear that the judgment required anything more of the plaintiffs than that they should state the respects in which Elementary's reputation was said to have been seriously injured, and quantify Elementary's alleged pecuniary loss.

[48] In his November 2012 judgment on the application for review of the Associate Judge's decision, Kós J accepted that it is not essential to allege special damage in a defamation case (other than pecuniary loss in the case of a corporate plaintiff), but where special damages *are* claimed, adequate particulars must be given.[19]

---

17 *Ayers v LexisNexis NZ Ltd*, above n 1, at [70].
18 At [70].
19 *Ayers v LexisNexis NZ Ltd* [2012] NZHC 3055 at [29].

[49] The question of what particulars (if any) the plaintiffs should be required to provide was dealt with relatively briefly in the judgment of Kós J, as a "subsidiary issue". The Judge noted that this issue had received "little airtime" at the hearing before the Associate Judge, where the main issue was the question of whether particulars of *quantum* of pecuniary loss could and should be particularised. Kós J accepted Mr McLellan's submission that the letter from the plaintiffs' solicitors dated 15 December 2010 simply identified three heads of alleged financial loss, and gave no particulars of damage to reputation. His Honour added that Elementary had not persuaded him in any event that the Associate's decision in that respect was wrong.[20]

My conclusion on Issue 1

(a) Have the plaintiffs provided full and proper particulars of the respects in which Elementary's reputation has been very seriously injured?

[50] As at the dates of the judgments of Associate Judge Gendall and Kós J, para [23] of the plaintiff's first amended statement of claim contained a pleading that Mr Ayers had been exposed and held up to ridicule and contempt. The paragraph went on to state, without elaboration, that his reputation had been very seriously injured, and that he had suffered seriously hurt feelings. Paragraph [24] pleaded that Elementary had also been exposed and held up to ridicule and contempt, and that *its* reputation had also been very seriously injured.

[51] On those pleadings, it was not clear whether the "serious injury" to Elementary's reputation was of the same kind as that alleged to have been suffered by Mr Ayers.

[52] The plaintiffs now plead that Mr Ayers was and remains the sole director and shareholder of Elementary, and that Elementary was recognised as the alter-ego of Mr Ayers. They say that the very serious injury to reputation suffered by Mr Ayers as a result of LexisNexis' conduct (with the exception of Mr Ayers' seriously hurt feelings), resulted in the same very serious injury to Elementary's reputation, essentially because the relevant market was aware that Elementary was the trading vehicle through which Mr Ayers operated.

---

[20] At [59].

[53] LexisNexis says that this pleading is equivalent to saying that Elementary has been defamed because Mr Ayers has been defamed; it is just an allegation of defamation, not full and proper particulars of the pleaded "very serious injury". It complains also that no "very serious injury' to Mr Ayers has been particularised in the plaintiff's current pleading, although LexisNexis has apparently not thought it necessary to seek further particulars of this aspect of Mr Ayers' claim. LexisNexis submits that, to say that injury to Mr Ayers reputation results in injury to Elementary's reputation begs the question whether that is "very serious injury" to Elementary, and if so in what respects. It submits that the pleading is an "unsubtle attempt to sidestep the series of orders made since November 2011".

[54] I do not accept that submission. At paras [21] and [22] of the third amended statement of claim, the plaintiffs plead that the words used in the two letters published by LexisNexis conveyed the meaning (among other meanings) that the plaintiffs had knowingly published false and deceptive statements and had acted unethically, and that the plaintiffs were "incompetent in the field of computer forensics". The plaintiffs also plead that the words conveyed the meanings that the plaintiffs were "unprofessional in the conduct of their examination", and that the plaintiffs' work was "likely to be of inadequate quality".

[55] Elementary then pleads that, as a result of the publication of the letters, it has been exposed and held up to ridicule and contempt, and that it has suffered pecuniary loss as a result of the publication.

[56] In my view it is implicit in the pleadings that Elementary is asking the Court to infer from the combination of the pleaded defamatory meanings and the loss of profits, that some customers or prospective customers of Elementary have withdrawn their business (or not brought new business to Elementary) because they believed that Elementary was incompetent in the field of computer forensics, or was dishonest or unethical, or was accurately described by one or more of the other negative statements which the plaintiffs say were conveyed by the allegedly defamatory words.

[57] The fact that the plaintiffs have now pleaded that Elementary was perceived as the alter-ego of Mr Ayers provides a sufficient basis for LexisNexis to understand precisely the case it has to meet: if Mr Ayers was understood by the relevant market to have been dishonest, incompetent, or unethical (to take three examples from the pleaded meanings), the market's knowledge that Elementary's services were performed by Mr Ayers could hardly have failed to have caused injury to Elementary's reputation. Any trading entity's reputation is dependent to a greater or lesser degree on the reputation of its people, and that is especially so in professional fields, including the computer forensics field in which the plaintiffs operate. In the circumstances which have now been pleaded, any published statement which impugned Mr Ayers' honesty, or his professional competence or ethics, was likely to cause damage to both him and Elementary.

[58] I conclude that the present pleading sufficiently informs LexisNexis of the case it will have to meet on the question of "very serious injury" to Elementary's reputation, and in my view sufficiently complies with the Court's direction that Elementary provide full and proper particulars of the "very serious injury" to its reputation.

(b) Has Elementary now provided full and proper particulars of its alleged pecuniary loss?

[59] I accept that a corporate plaintiff such as Elementary need not plead or prove special damage – a claim for general damages based on injury to reputation in the way of the plaintiff's business is sufficient for it to meet the "pecuniary loss" requirement of s 6 of the Defamation Act.[21] But if a corporate plaintiff elects to plead special damage, it must provide particulars of that special damage.

[60] The nature of "special damage" was described by the Court of Appeal in the United Kingdom in *Perestrello E Companhia Limitada v United Paint Co Ltd*, in the following terms:[22]

> Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the

---

21 Defamation Act s 4, and *Tairawhiti District Health Board v Perks (No 2)*, above, n 9.

22 *Perestrello E Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570, at 579.

> defendant in the pleadings that the compensation claim will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court.
>
> The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. "The question to be decided does not depend on words, but is one of substance" (per Bowen LJ in *Ratcliffe v Evans* (citation omitted)).
>
> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.
>
> The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

[61] In this case, Elementary appears to have accepted that its claim for loss of profits is a special damages claim.[23]

[62] If the claim is a claim for special damages, further particulars are required in accordance with rr 5.26 and 5.33 of the High Court Rules. I see no reason why the principle in *Best Food Fresh Tofu Ltd* should not apply to a claim for special damages for defamation. As in that case, Elementary should provide the *basis* for its calculation of its loss of profits claims for the two years in question.

[63] Pointing to cases which were concerned with a corporate plaintiff's claim for *general damages* for loss of custom, cannot assist Elementary. Either it must clearly limit its case to a claim for general damages of the kind considered in *Ratcliffe* and *Worseley*, or it must clearly set out details of how it has calculated the respective loss of profits figures of $100,000 and $120,000.

[64] I conclude on issue 1(b) that, if and to the extent that Elementary intends to claim special damages for loss of profits, it has not provided full and proper particulars of its alleged pecuniary losses. It *has* provided sufficient particulars of

---

[23] Associate Judge Gendall treated the claim as a claim for special damages in his 29 November 2011 judgment, and the claim appears to have been approached on the same basis by Kós J in his judgment of 16 November 2012.

those losses to the extent that its real claim may be a claim for general damages, based on a loss of general custom flowing directly, and in the ordinary course of things, from the publication of the statements which are said to have defamed it.

[65] If and to the extent that Elementary is claiming special damages, it is claiming damages which are capable of precise calculation, and not merely damage which could be expected to flow directly, in the ordinary course of things, from the publication of the alleged defamatory words. LexisNexis is entitled to particulars of that "precise calculation", and those particulars should include the following:

(a) details of the calculation of Elementary's claim for lost revenue in each of the years ended 31 March 2010 and 31 March 2011 (being revenue which is alleged to have been lost as a result of the publication of the allegedly defamatory words), including:

(i) the particular sources from which that revenue is alleged to have been lost; and

(ii) in respect of each such source, the facts or circumstances relied upon in support of the contention that the loss of the revenue was caused by the publication of the allegedly defamatory statements; and

(b) how Elementary has calculated the expenses to be deducted from the claimed loss revenues in arriving at its lost profits figures of $100,000 and $120,000.

Issue 2: Should Elementary's claims for loss of profits be struck out?

[66] I accept LexisNexis' submission that there have been lengthy and unacceptable periods of delay by Elementary in complying with the order of the Associate Judge directing it to provide "full and proper" particulars of the claimed pecuniary loss. Even allowing for the application for review which was eventually dismissed by Kós J on 16 November 2012, there were subsequent failures to comply with orders of the Court which have not been satisfactorily explained by the

plaintiffs. It was not until 16 May 2014 that the plaintiffs filed their second amended statement of claim, in which the loss of profits claims were quantified for the first time. And on the view to which I have come, the pleading of special damage (assuming a claim for special damages is intended) is still deficient.

[67] In those circumstances, I would ordinarily not hesitate to strike out Elementary's special damages (lost profits) claim. But I think there is one mitigating factor in this case, and that is that the particulars orders made by Associate Judge Gendall, and upheld by Kós J on review, did not specify what would *satisfy* the "full and proper" particulars orders. Certainly quantification of the lost profits claim was contemplated, but that has now been provided. [24] And I have held that the plaintiffs' current pleading *is* sufficiently particularised on the question of the alleged very serious injury to Elementary's reputation.

[68] As Kós J observed in his judgment on the review application, little "airtime" appears to have been given to the issue with which I am now concerned, at the hearing before the Associate Judge. The principal issue with which counsel and the Associate Judge (and Kós J on review) appear to have been concerned, was the application (or not) of s 43 of the Defamation Act.

[69] In a letter dated 11 June 2014, the plaintiffs' solicitors stated that they had at all times been under the apprehension that all LexisNexis required was a pleading as to the nature and quantum of the special damages (pecuniary loss) claim. They thought they had met that requirement.

[70] LexisNexis' solicitors replied by letter dated 17 June 2014, asserting that their client was entitled to be given the calculations which resulted in the sums of $100,000 and $120,000 with sufficient details to be properly informed as to whether Elementary is claiming loss of particular instructions (and if so, which instructions), or loss of particular customers (and if so which customers), or a general loss of custom (and if so how that has been calculated).

---

[24] The Associate Judge concluded that Elementary's further particulars application should succeed, immediately after a discussion of the absence of any quantification of the claims (at [78] and [79] of the judgment). So too, Kós J noted in his 16 November 2012 judgment that the main issue was whether the *quantum* of pecuniary loss could and should be particularised (at [56]).

[71] In their reply dated 10 July 2014, the plaintiffs' solicitors stated that the letter of 17 June 2014 from LexisNexis' solicitors was the first occasion on which they had received any detail identifying the particulars which LexisNexis says are necessary for it to respond to the relevant part of Elementary's claims.

[72] I note that as long ago as 23 August 2010, LexisNexis' solicitors asked not only for the precise sum claimed by Elementary for pecuniary loss, but also "the method and calculation used to derive the sum…". However it is not clear whether the terms of the judgment given by the Associate Judge on 29 November 2010 may have led the plaintiffs to believe that their obligation to provide particulars did not extend that far.

[73] There was some further correspondence between the solicitors after 10 July 2014, which included an attempt by the plaintiffs to "bridge the gap" between the parties on the particulars issue, but no agreement was reached.

[74] Given what appears to have been a misapprehension by the plaintiffs' solicitors over the extent of Elementary's obligation, and having regard in particular to the absence of any significant focus in the judgments of Associate Judge Gendall and Kós J on the need for particulars going beyond the quantum of the pecuniary loss claim, I do not see this as a case of a deliberate flouting of the Court's order that "full and proper particulars" be supplied. I am prepared to accept that there *has* been a genuine issue between the parties as to what particulars had to be supplied to satisfy the "full and proper" requirement of the November 2011 orders made by the Associate Judge, and in those circumstances I do not consider it appropriate to strike out Elementary's claim for special damages in the form of lost profits. However LexisNexis is entitled to further particulars of that claim if Elementary intends to pursue it.

Issue 3: Discovery of documents in Categories 1, 10, and 12

Legal principles in applications for particular discovery generally

[75] Rule 8.19 of the High Court Rules provides:

8.19 Order for particular discovery against party after proceeding commenced

If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the party's control; and

(ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and

(b) to serve the affidavit on the other party or parties; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[76] The Rules provide for two kinds of discovery, namely "standard discovery" and "tailored discovery".[25] Standard discovery requires each party to disclose documents that are or have been in that party's control and that are: [26]

(a) documents on which the party relies; or

(b) documents that adversely affect that party's own case; or

(c) documents that adversely affect another party's case; or

(d) documents that support another party's case.

[77] The parties have provided standard discovery in this case.

[78] The starting point in assessing relevance is always the pleadings. In *Commerce Commission v Cathay Pacific Airways Ltd*, Asher J said:[27]

---

25 High Court Rules, r 8.6.
26 Rule 8.7.
27 *Commerce Commission v Cathay Pacific Airways* [2012] NZHC 726 at [13].

> Discovery categories will reflect the issues and will only be ordered for the discovery of documents that are relevant to those issues. Except in exceptional circumstances, these issues will be discernible from a review of the pleadings. Discovery orders that are essentially of a "fishing" nature are not part of tailored discovery. Orders will not be granted where the categories do not relate to a pleaded relevant issue…

[79] While the statements made by the Judge in that case were directed to tailored discovery, they are equally applicable in this case.

Category 1: The plaintiffs' tax returns for the years ending 2006 – 2013

[80] Mr McVeigh advises that tax returns have been or will be provided by Elementary. He is instructed that those tax returns identify payments made to Mr Ayers. He submits that tax returns filed by Mr Ayers are irrelevant, both to Mr Ayers' own claim (which is for general damages), and to the claim by Elementary.

[81] In an affidavit sworn in support of the application, Mr Hagen opines that detailed information should be provided by the plaintiffs in respect of all relevant aspects of Elementary's business over the period 2006 – 2013, including the source documents on which financial reports, projections and analyses have been based. Mr Hagen says that tax returns filed by each of the plaintiffs come within the "source documents" category.

[82] In his submissions, Mr McLellan relied on that evidence of Mr Hagen.

[83] I accept Mr McVeigh's submissions on this issue. As Mr Ayers' claim is for general damages only, I see no basis on which his personal income over the period in question is relevant to the issues in the proceeding. The application for an order in respect of Mr Ayers' personal tax returns is accordingly refused. No order is made in respect of the application under this heading relating to Elementary, as Mr McVeigh has indicated that Elementary has provided or will be providing copies of its tax returns. However, in view of the fact that the plaintiffs only filed their supplementary list of documents very shortly before the hearing, I reserve leave to LexisNexis to raise the issue of further discovery of Elementary's tax returns if the need arises.

Category 10: Any documents evidencing the products and/or services provided by Elementary IT & Communications Ltd to Elementary

[84] In his affidavit, Mr Hagen refers to purchase orders issued by Elementary to Elementary IT & Communications Ltd between 1 April 2010 and 1 March 2012. Mr Hagen deposed that the plaintiffs' discovery (as it stood when Mr Hagen swore his affidavit on 10 July 2014) made no reference to Elementary IT & Communications prior to 1 April 2010, and that there was then nothing disclosed in the plaintiffs' discovery to enable LexisNexis to determine the nature or type of the services or products provided by Elementary IT & Communications Ltd, or to assess the relevance or otherwise of the relationship between Elementary and Elementary IT & Communications Ltd, to Elementary's pecuniary loss claim.

[85] Mr Hagen himself appeared to be unsure of the relevance of the documents sought under this heading.

[86] In his supplementary written submissions, Mr McLellan notes that the plaintiffs' most recent discovery list includes further invoices from Elementary IT & Communications Ltd addressed to Elementary. The invoices refer to "Office and Communications", and "Lease costs". The plaintiffs say in their list that no further documents exist in this category, but Mr McLellan submits it is unlikely that there are no records of the products and/or services provided by Elementary IT & Communications Ltd to Elementary in respect of these invoices.

[87] The plaintiffs' position is that all relevant documents in the control of Elementary and Elementary IT & Communications Ltd in this category (being documents relating to rent and the provision of telecommunications services) *have* now been discovered.

[88] Elementary's claim is primarily concerned with alleged losses of revenue. This discovery request appears to be directed at overheads items, and on the face of it there is nothing particularly remarkable in Elementary paying rent and telecommunications costs to a related company (which was presumably the owner or sublessor of relevant premises occupied by Elementary). The amounts being paid by Elementary for these items are clearly relevant to its lost profits claims as they are

presently framed, but documents relating to the relevant payments are said to have been discovered, and I have no evidence before me on which I could conclude that that is not so. There is presently no evidential basis for me to conclude that Elementary or Mr Ayers have in their control documents in this category which are relevant and should have been discovered, but have not been discovered.

[89] However I think it premature to make any final order on the application under this heading before Elementary has properly particularised its loss of profits claim. I accordingly adjourn the application for particular discovery of documents in this category, on the basis that LexisNexis may apply by memorandum to have the application brought on for a further hearing following its receipt of the plaintiffs' further particulars, if that should prove to be necessary.

Category 12: Any other documents that relate to the alleged incurring or calculation of the pecuniary loss set out in paragraph [24] of the plaintiffs' third amended statement of claim

[90] In his supplementary written submissions, Mr McLellan submits that there must be *calculations* relating to Elementary's claim for pecuniary loss, and that it is unlikely that no documents exist which relate to the incurring or calculation of the claimed loss.

[91] Mr McVeigh advises that his instruction is that the plaintiffs have no further documents to disclose under this heading. There *is* a calculation document or documents, but it or they are the subject of a claim or claims to litigation privilege.

[92] On the basis of the evidence which has been produced, including Mr Ayers' evidence that there are no further documents to be disclosed under his heading, I see no basis for a finding that there are relevant documents in this category which the plaintiffs have in their control which have not been disclosed.

[93] But again, I think it would be premature to make a final ruling on this application before the plaintiffs have provided the further particulars which I have ordered. Those application in respect of Category 12 documents is also adjourned, on the same basis as that set out above in respect of the Category 10 documents.

Costs

[94] Although LexisNexis has been unsuccessful in its application to strike out Elementary's claims for loss of profits, I have held that, over three years from the time it was first ordered to provide the particulars, Elementary's pleading is still deficient. I have now made an order specifying the further particulars which are to be provided.

[95] The loss of profits claim has not been struck out only because the original order did not spell out exactly what the plaintiffs were required to provide by way of further particulars, and I have been prepared to accept that the plaintiffs may not have been clear on precisely what LexisNexis was seeking (and what was legally required of them) until June 2014. LexisNexis has been substantially successful on the main matter which was argued before me.

[96] Mr McVeigh submitted that there were defaults on the part of LexisNexis in failing to promptly serve its amended notice of application, and in Mr Hagen's failure to provide in his affidavit the requisite expert witness' statement relating to compliance with the code of conduct for expert witnesses set out in the High Court Rules.[28] It is correct that the first scheduled hearing of LexisNexis' application had to be adjourned because of late notification of the amended application, but I do not think that any resulting prejudice to the plaintiffs was substantial enough to disqualify LexisNexis from the award of costs to which it is entitled, particularly when considered against the plaintiffs' own track record of delays and failure to comply with Court orders made in this case. The omission from Mr Hagen's affidavit has caused no prejudice to the plaintiffs.

[97] LexisNexis is entitled to an award of costs, which I assess on a 2B basis, together with disbursements as fixed by the registrar.

Conclusion

[98] I make the following orders:

---

[28] High Court Rules, r 9.3 and sch 4.

(1) LexisNexis' application for an order striking out Elementary's loss of profits claim is refused.

(2) Within 14 days of the date of this judgment, Elementary is to provide the following further particulars of paragraph 24 and the claims for relief in the plaintiffs' third amended statement of claim dated 28 July 2014:

(a) state whether Elementary's claim for "pecuniary loss" is:

(i) limited to a claim for loss of general custom flowing directly and in the ordinary course of things from the publication of the allegedly defamatory words (i.e. a general damages claim); or

(ii) a claim for loss of earnings incurred prior to trial which is capable of substantially exact calculation (i.e. a special damages claim);

(b) if the claim falls within paragraph 2(a)(ii) above, Elementary is to provide the following further particulars:

(i) details of the calculation of its claim for lost revenue in each of the years ended 31 March 2010 and 31 March 2011 (being revenue which is alleged to have been lost as a result of the publication of the allegedly defamatory words), including the particular sources from which that revenue is alleged to have been lost and, in respect of each such source, the facts or circumstances relied upon in support of the contention that the loss of revenue was caused by the publication of the allegedly defamatory statements; and

(ii) details of the calculation of any expenses deducted from the claimed loss revenue figures, in arriving at the lost profits figures of $100,000 and $120,000.

(3) LexisNexis' claim for particular discovery of Mr Ayers' tax returns is refused.

(4) I make no order on the application for particular discovery of Elementary's tax returns. However if any further issue arises in respect of the adequacy of Elemetary's discovery of its tax returns, leave is reserved to LexisNexis to apply by memorandum to have its application for particular discovery under this head brought on for further hearing. I will give further directions on receipt of any such memorandum.

(5) LexisNexis' application for particular discovery of the documents in categories 10 and 12 is adjourned for further hearing (if necessary), following LexisNexis' receipt of the further particulars which are to be provided by Elementary. Any application to have the discovery application relating to these categories brought on for a further hearing may be made by memorandum filed and served within 7 days after service of Elementary's further particulars. I will give further directions on receipt of any such memorandum.

(6) The plaintiffs are to pay LexisNexis' costs of the application on a "2B" basis, plus disbursements as fixed by the registrar.

Associate Judge Smith

Solicitors:
Izard Weston, Wellington for Plaintiffs
Bell Gully, Auckland for Defendant