IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-1274
[2015] NZHC 1348

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

Hearing: 27 May 2015

Counsel: J Sumner and S Eglinton for Plaintiffs
D McLellan QC for Defendant

Judgment: 15 June 2015

JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] The defendant (LexisNexis) applies for an order striking out claims for damages made by the second plaintiff (Elementary). LexisNexis also applies for an order for security for its costs, and an order that the proceeding be stayed pending payment of the security.

[2] In the event that the Court declines to strike out Elementary's damages claim, LexisNexis asks for an order for further discovery, directed to a particular element of Elementary's damages claim in respect of which Mr Ayers, the principal shareholder and director of Elementary, says that the plaintiffs do not have any relevant documents in their control.

[3] There is a difficulty with that assertion, as Mr Ayers made an affirmation on 7 May 2015 in which he stated (in respect of the relevant category of documents) "there are no documents of this type that the plaintiffs seek to rely on." Of course the plaintiffs' discovery obligations are not limited to documents on which they wish

to rely; they are also required to disclose documents in their control that may adversely affect their case (or support LexisNexis' case). In that sense Mr Ayers' affidavit did not adequately respond to the request for further and better discovery.

[4] At the hearing, Mr Sumner undertook to obtain further instruction from the plaintiffs, and arrange for Mr Ayers to make a further affirmation (i) confirming that no documents in the relevant category are in the plaintiffs' control (if that is the case) and (ii) describing the searches the plaintiffs have made to locate any such documents. If a further affidavit is filed deposing to those matters, Mr McLellan accepts that there will be no need for the Court to make any order on the further discovery application, except on the question of costs.

[5] I will address the strike-out and security for costs applications in turn.

Application by LexisNexis for an order striking out Elementary's damages claims

The background to the application

[6] The proceeding is a defamation claim, in which the plaintiffs seek damages in respect of statements made in two letters published by LexisNexis in *NZ Lawyer* magazine. The letters were written in response to an article written by Mr Ayers which appeared in the 1 May 2009 issue of *NZ Lawyer*, in which Mr Ayers expressed certain criticisms of software known as EnCase and EnScript. The publication of the article written by Mr Ayers attracted forceful opposing views, which were expressed in the two letters. The two letters were published in the 29 May 2009 edition of *NZ Lawyer*.

[7] The plaintiffs allege that these two letters were false and defamatory of them in various respects. They say that, as a result of the publication, Mr Ayers has been exposed and held up to ridicule and contempt, his reputation has been very seriously injured, and he has suffered seriously hurt feelings. As Mr Ayers was and remains the sole director and shareholder of Elementary, they say that Elementary has also suffered very serious injury to its reputation as a result of the publication of the two letters, resulting in the same serious injury. In effect, the plaintiffs say that

Elementary is Mr Ayers' alter ego, and that publication of any material which was defamatory of Mr Ayers, particularly in respect of his abilities in the field of computer forensics, necessarily damaged the reputation of Elementary.

[8] The adequacy of Elementary's pleading of its damages claims has been the subject of judgments of this Court on no fewer than three previous occasions. On 29 November 2011, Associate Judge Gendall ordered Elementary to provide "full and proper" particulars of the "pecuniary loss" that it had allegedly suffered and would continue to suffer. The decision of the Associate Judge was upheld on review by Kós J in a judgment dated 12 November 2012.

[9] The plaintiffs filed a second amended statement of claim on 16 May 2014, and a third amended statement of claim on 28 July 2014. LexisNexis formed the view that neither of these amended pleadings complied with the order made by the Associate Judge on 29 November 2011. It applied for an order striking out Elementary's damages claims.

[10] That application was heard by me on 6 October 2014. At that time, the relevant damages pleading (in Elementary's third amended statement of claim) was:

> 24 That as a result of the publication of the first and second letters by [LexisNexis], [Elementary] 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) [Mr Ayers] was, and remains, the sole director and shareholder of [Elementary]. [Elementary] was recognised as the alter-ego of [Mr Ayers]. Accordingly, the very serious injury to reputation suffered by [Mr Ayers], as a result of [LexisNexis'] conduct, pleaded in paragraph 23 (with the exception of [Mr Ayers'] seriously hurt feelings), resulted in the same very serious injury to the reputation of [Elementary] because of the fact that [Mr Ayers] was a director and shareholder of [Elementary].
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> (b) To year end 31 March 2010, [Elementary] has suffered a loss of profit amounting to $100,000. To the year ended 31 March 2011, [Elementary] has suffered a loss of profit amounting to $120,000.
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> (c) The loss of profit was occasioned by two major factors:
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> (i) The necessity for [Mr Ayers] (as sole director and shareholder of [Elementary]) to take reasonable steps in an

attempt to mitigate the loss caused by the defamatory publications of [LexisNexis] and thus not being able to fully apply himself to the revenue earning activities of [Elementary]; and

(ii) A decrease in custom from the general custom that [Elementary] 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.

[11] Elementary's claim for relief as set out in the third amended statement of claim read:

(b) In the case of [Elementary]: damages for pecuniary loss in the sum of $344,277.

[12] In a reserved judgment given on 28 November 2014, I directed Elementary to provide the following further particulars of para 24 and the claims for relief in its third amended statement of claim:

(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 works (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 para 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 lost revenue figures, in arriving at the lost profits figures of $100,000 and $120,000.

The plaintiffs' fourth amended statement of claim

[13] The plaintiffs filed a fourth amended statement of claim (the Claim) on 25 February 2015. Elementary's claim for damages, as set out in para 24, is as follows:

> 24 That as a result of the publication of the first and second letters by [LexisNexis] [Elementary] 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**
>
> …
>
> (b) The fee revenue and profit of [Elementary] was as follows:

	Fees	Profit*
2007	250,478	173,145
2008	382,327	206,427
2009	211,356	81,528
2010	300,411	126,979
2011	326,539	110,797
2012	712,651	441,159

> * Profit is before shareholder salary & legal fees
>
> (c) [Elementary's] business is highly specialised. The majority of its fee revenue was derived from "one off" projects from customers referred to [Mr Ayers] by other customers or lawyers. Accordingly, it is impossible to identify the names of customers who have used other experts rather than the plaintiffs as a result of the publication of the letters.
>
> (d) [Elementary] has suffered pecuniary loss in the form of:
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> (i) a general loss of custom; and
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> (ii) the necessity for [Mr Ayers] (as sole director and shareholder of [Elementary]) to take reasonable steps in an attempt to mitigate the loss caused by the defamatory publications of [LexisNexis] and thus not being able to fully apply himself to the revenue earning activities of [Elementary],

such loss and steps taken flowing directly and in the ordinary course of things from the publication of passages from each of the first letter and the second letter pleaded above in paragraphs 19 and 20 respectively.

(e) The general loss of custom suffered by [Elementary] (loss of profit) was $100,000 to the year ended 31 March 2010 and $120,000 to the year ended 31 March 2011.

(f) Legal fees paid by [Elementary] in 2010 - $18,208.

The request for further particulars made on 20 March 2015

[14] By notice given on 20 March 2015, LexisNexis sought particulars of the "pecuniary loss" claimed by Elementary at para 24 of the Claim. It also sought further particulars of the mitigation steps referred to at para 24(d)(ii), and the losses which are alleged to have been caused by those mitigation steps.

LexisNexis' strike-out application

[15] LexisNexis says that this pleading remains inadequate, and fails in a number of respects to comply with the orders made on 28 November 2014. LexisNexis filed the present strike-out application on 16 April 2015.

[16] In its application, LexisNexis asserts that Elementary's claim for pecuniary loss is not 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. It says that the pleading continues to include unparticularised loss of profit figures, and that loss of profits is inherently a claim for special damages (which the Court directed should be properly particularised). LexisNexis contends that the pleading does not provide the basis of the calculation, or other sufficient detail to enable it to know and assess the claims it has to meet. Nor does the pleading contain particulars of the claim for "mitigation loss" which appears at para 24(d)(ii) of the Claim (that claim being a claim for actual loss and, as such, a claim for special damages, for which full and proper particulars should have been provided).

[17] LexisNexis says that, in light of the history of the matter and what it says has been a continuing default by Elementary since the orders of Associate Judge Gendall

were made on 29 November 2011, the time has come when Elementary's damages claim should be struck out for failure to comply with the Court orders.

The plaintiffs' notice of opposition

[18] In their notice of opposition, the plaintiffs say that the Claim does comply with the orders made on 28 November 2014. They say that Elementary's damages claim is a claim for loss of general custom flowing directly and in the ordinary course of things from the publication of the alleged defamatory words, and as such is a claim for general damages. No further particulars are required. The particulars now pleaded at para 24(b) simply serve to demonstrate (and to particularise to the greatest extent the plaintiffs can) the alleged loss of general custom, by disclosing Elementary's fee revenue and end-of-year profit figures.

[19] The plaintiffs say that it would not be possible for them to provide the detail or calculations contemplated at [98](2)(b) of the orders made on 28 November 2014, as Elementary's business involves "one off" projects and it is not possible to identify which potential clients elected not to engage Elementary's services as a result of the publication of the alleged defamatory material.

[20] The plaintiffs say, in essence, that Elementary has done as much as it is necessary (or possible) for it to do by way of providing particulars of its damages claim, and that the interests of justice require that the claim proceed to trial as pleaded.

[21] Finally, the plaintiffs say that this is the second interlocutory application LexisNexis has made on the same or a similar matter, and it has not sought leave to bring the application as required by r 7.52 of the High Court Rules.

LexisNexis' submissions

[22] Mr McLellan submits that Elementary has failed to comply with the orders made at [98] of my judgment given on 28 November 2014, in that it has failed to clearly elect between a claim for general damages on the one hand, and a claim for special damages by way of loss of profits on the other. He submits that Elementary

is trying to have it both ways: on the one hand it is describing the claimed pecuniary loss as a general loss of custom "flowing directly and in the ordinary course of things from the publication" (i.e. an orthodox claim for general damages), while on the other it is pleading that the same general loss of custom can be calculated in the precise amounts of $100,000 and $120,000 (the alleged lost profits for the two years in question). He submits that, in substance, the claim remains a claim for special damages, in respect of which Elementary has failed to give the particulars required by [98](2)(b) of my 28 November 2014 judgment.

[23] Mr McLellan notes Elementary avoids referring in its pleading to the expression "general damages". And, in its claim for relief, it refers to "damages for pecuniary loss in the sum of $238,208." Included within that figure is an amount for legal expenses of $18,208 paid by Elementary in 2010 – quite clearly an item of special damage.

[24] Mr McLellan submits that the table of fees and profits included at para 24(b) of the Claim also suggests that the claim is a claim for special damages by way of lost profits, although no explanation is provided in para 24(e) of the Claim as to how the figures claimed in that subparagraph relate to the actual revenue and profit figures in the table at subpara (b). He points to the apparent anomaly that the table at para 24(b) of the Claim shows that Elementary's pleaded revenue is alleged to have *increased* following the relevant publication. He submits that either there *is* a relationship, in which case particulars should be given, or there is not, in which case the particulars in subpara (b) should be removed and not be permitted to be relied upon at trial.

[25] While Elementary says that it is not possible to particularise its pleading any further, Mr McLellan submits that that is not an adequate response to the orders made at [98] of the 28 November 2014 judgment.

[26] As for the allegation of pecuniary loss in the form of Mr Ayers being diverted from focusing his efforts on revenue-earning activities for Elementary, Mr McLellan submits that, in substance, this is also a claim for special, not general, damages: it is

a claim for loss of earnings capable of substantially exact calculation.[1] Mr McLellan submits that particulars of the assertions at para 24(d)(ii) relating to the mitigation losses are therefore required. LexisNexis says that particulars should have been provided of the particular activities said to have been undertaken by Mr Ayers, the calculation of the revenue alleged to have been lost as a result, and the calculation of the profit that Elementary alleges would have been earned on that lost revenue.

[27] Elementary has refused to provide any further particulars of the "mitigation losses", but has failed to explain why it has not done so (beyond stating in its notice of opposition that such particulars are not necessary, and that it is impossible for Elementary to particularise its pleading any further).

[28] Mr McLellan points to the long history of his client's attempts to obtain a properly particularised damages claim from Elementary, and submits that the time has come when the claim should be struck out. Because because the plaintiffs say it would not be possible to provide further particulars any further indulgence to Elementary would be futile.

Submissions for Elementary

[29] Mr Sumner submits that Elementary's damages claim as pleaded at para 24 of the Claim *is* a properly pleaded general damages claim, and *does* comply with the orders made at [98] of the 28 November 2014 judgment. He says that Elementary is unable to provide any further or greater particularity.

[30] He acknowledges that Elementary cannot sustain a claim for special damages, as the damages are not "capable of substantially exact calculation".

[31] In support of his submission that para 24 of the Claim should be regarded as a general damages pleading, Mr Sumner points to the opening words in the pleading at para 24 of the Claim, in which Elementary pleads that it has been exposed and held up to ridicule and contempt as a result of the publication. It says in that part of the pleading that its reputation has been very seriously injured, and that injury has

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[1] Citing the United Kingdom Court of Appeal decision in *Perestrello E Companhia Limitade v United Paint Co Ltd* [1969] 1 WLR 570 at 579.

caused it to suffer pecuniary loss. Mr Sumner submits that these opening paragraphs sufficiently categorise Elementary's claim as a claim for general damages (as opposed to a special damages claim under a different guise).

[32] Mr Sumner submits that the balance of para 24 of the Claim does not alter that position, notwithstanding the pleading of a general reduction in fees and profits. He submits that the difficulties faced by Elementary in formulating a claim for special damages (i.e. that it cannot identify any particular client whose custom was lost as a result of the publication) does not close the door to the pursuit of a general damages claim.

[33] Mr Sumner further submits that a striking out of subparas 24(b), (d)(ii) or (e) would serve no useful purpose, as Elementary would be entitled to call evidence at trial on the matters referred to in those subparagraphs, in support of its general damages claim, in any event. Mr Sumner refers to the decision of the Court of Appeal of New South Wales in *Andrews v John Fairfax & Sons Ltd*, in which the Court accepted that such evidence would be admissible at trial for the purposes of enabling the judge or jury to properly evaluate the general damages claimed.[2]

[34] Mr Sumner submits that the approach endorsed in *Andrews* should be followed in New Zealand, with the result that Elementary will be entitled to produce at trial evidence of its accounting records (relevant to its claim for a general loss of custom, which is a recognised head of general damage), and also evidence of the steps taken following the publication to minimise the impact of the allegedly defamatory statements on Elementary.

[35] Elementary has not flouted the Court's order. Rather, it has elected to provide figures which are illustrative of the general damages that will be sought at trial (at subparas 24(b), (e) and (f)). This has been done for the benefit of LexisNexis, so that there can be no surprise at trial.

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2 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, at 235.

Discussion and conclusions

[36] Elementary's damages claim should not be struck out in its entirety. With the exception of the claim for $18,208 in legal fees paid by Elementary in 2010, Elementary has now made it clear, in its notice of opposition and in Mr Sumner's submissions, that what is intended is a claim for general damages falling within [98](2)(a)(i) of my judgment dated 28 November 2014. Certainly that election should have been made within 14 days of the date of the 28 November 2014 judgment, but in my view that default is not of sufficient gravity that Elementary's damages claim should be struck out in its entirety. I note in particular that the plaintiffs have changed solicitors since the 28 November 2014 judgment, and there was a period when Mr Ayers was attempting to conduct the litigation by himself.

[37] The real issue is that Elementary may have pleaded more than was required for a general damages claim. If so, there is a secondary question as to whether the "excessive" provision of particulars somehow operates to convert an intended general damages claim into a special damages claim. In the latter event, the appropriate course is likely to be to strike-out those parts of para 24 of the Claim which I consider to be, in reality, claims for special damages.

[38] Mr McLellan referred to the United Kingdom Court of Appeal decision in *Perestrello*, concerning the distinction between general damages and special damages.[3] In that case, the Portuguese claimants claimed damages following the alleged repudiation of a contract giving the them rights of exclusive distribution of the defendants' products in Portugal. The claimant claimed, as special damages, wasted expenditure on the adaptation of its factory, and other related matters. It originally made no claim for loss of profits, but the claim for relief (after referring to the special damage claims) added the words "and damages". Very late in the piece, after a payment into court had been declined, the claimants informed the defendants that they were claiming loss of profits.

[39] On appeal, the Court of Appeal noted that for approximately five years the claim had been put as a claim for reimbursement of fruitless expenditure, and there

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3 *Perestrello E Companhia Limitade v United Paint Co Ltd*, above n 1.

was a substantial question of fairness over whether the claimant should be permitted to spring upon the defendants at trial a claim made on an entirely different basis. In those circumstances, the Court of Appeal concluded that the "and damages" pleading was not sufficient to let in evidence of a particular kind of loss which was not a necessary consequence of the wrongful act, and of which the defendant was entitled to fair warning. There had been no mention of any loss of profits in the statement of claim, and the case as pleaded was inconsistent with such a claim.

[40] Lord Donovan, giving the judgment of the Court in *Perestrello*, noted that if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, the plaintiff must warn the defendant in the pleadings that the compensation claimed *will* extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing any payment into Court.[4] The limits of that 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 is one of substance.[5] On the facts of the case, the claim for loss of profits was one which should have been pleaded.

[41] Mr McLellan also referred me to *Gatley*,[6] where the learned authors note that the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the absolute right to reputation. A plaintiff in such circumstances is entitled to such general damages as the Court may properly award, without the need to prove any actual damage.

[42] The authors note that a claimant claiming special damages must, as far as possible, identify specific losses which he or she claims to have suffered, and that "such allegations will obviously require greater particularity than an allegation of general loss of custom".[7]

[43] Elementary is now stating unequivocally that its claim for pecuniary loss (leaving aside the claim to recover legal fees it has paid) is a claim for general

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4 *Perestrello E Companhia Limitade v United Paint Co Ltd*, above n 1, at 579.
5 At 579, citing *Ratcliffe v Evans* [1892] 2 QB 524, at 529.
6 *Gatley on Libel* 12th ed at [26.28] and [26.29].
7 At [26.31].

damages. None of the authorities referred to by Mr McLellan appear to address the situation of the "over-supply" of particulars of financial loss where the claim is a claim for general damages, and it may be that there would be little prejudice to LexisNexis at trial if the pleading were allowed to stand. But LexisNexis is entitled to require compliance with the Court orders, and I think the matter must be addressed on that basis.

[44] If the Court is unwilling to strike out Elementary's damages claim in its entirety, Mr McLellan asks that it should at least strike-out subparas (b), (c), (d)(ii), and (e) of para [24] of the Claim.

[45] I agree that subparas (b) and (e) should be struck out. Subpara (b) appears to add nothing to the claim for general damages; in view of the increased revenue earned following the 2009 publication of the allegedly defamatory words it is difficult to see how it can add anything to the claim. Further, I accept that the two subparagraphs in combination do have the appearance of an unparticularised claim for special damages. In my view, these subparagraphs are neither necessary nor appropriate to a claim for general damages based on a general loss of custom. They will be struck out accordingly.

[46] However I do not accept that there is any basis on which subpara (c) of para 24 of the Claim should be struck-out. It is no more than an explanation for Elementary's election to claim general damages by way of a general loss of custom. It cannot be construed as a claim for special damages by way of loss of profits. Subpara (c) will accordingly remain in the Claim.

[47] Turning to subpara (d)(ii), Elementary pleads that the necessity to take the pleaded steps flowed directly and in the ordinary course of things from the publication of the alleged defamatory statements. But it seems to me that Elementary must have been able to state, at least in general terms, the nature of the activities they say Mr Ayers undertook in an attempt to mitigate the loss, and the extent to which those activities interfered with Elementary's ability to earn revenue.

[48] Mr Sumner acknowledged in his oral submissions that the mitigation steps pleading (as a component of a general damages claim) is a little more difficult than a claim for a general loss of custom. His answer was that the "mitigation steps claim" is in effect a "subset" of the general loss of custom claim, and that the plaintiffs have particularised the pleading at subpara (d)(ii) as much as they can.

[49] I do not accept that submission. A general loss of custom may be presumed to have flowed directly and in the ordinary course of things from the publication of an allegedly defamatory statement, but in subpara (d)(ii) I think the pleading goes further – it is concerned not with the market's response to the publication of the allegedly defamatory statements but with particular steps taken by Mr Ayers and Elementary to mitigate that response. In my view any such steps are within the knowledge of My Ayers and Elementary and should have been pleaded.

[50] As Bowen LJ noted in *Ratcliffe v Evans*, special damage in a context such as the present means damage (going beyond the general damage) which results from the particular circumstances of the case, for which the plaintiff ought to give warning in the pleadings in order that there may be no surprise at trial.[8] In my view, the mitigation steps which have been pleaded in this case constitute alleged damage "going beyond" the general damage which may be presumed to have flowed in the ordinary course of things from the publication. The pleading at subpara (d)(ii) of "mitigation losses", with its direct linkage to Elementary's revenue-earning capacity, is in fact a claim for special damages in respect of which further particulars should have been provided.

[51] I accept Mr McLellan's submission that Elementary has reached the end of the road as far as indulgences are concerned, and that the appropriate response is to strike out the pleading at subpara (d)(ii), together with the words "and steps" in the first line of the paragraph at the end of subpara (d) (which is applicable to both subparas (d)(i) and (d)(ii) of para 24). There will be an order accordingly.

[52] For completeness, I add that I see no merit in the "second application on the same or a similar matter" point. Certain orders were made by the Court on

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8 *Ratcliffe v Evans*, above n 5, at 528.

28 November 2014, and the issue now raised by LexisNexis is whether those orders have been complied with. That issue has not been the subject of any previous interlocutory application.

[53] The orders which I have made striking out parts of Elementary's damages pleading are concerned with the pleading only – they are not intended to constitute some sort of advance ruling on what evidence may or may not be admissible at trial on Elementary's general damages claim.

[54] In that regard, Mr Sumner refers to *Andrews v John Fairfax & Sons Ltd*,[9] a case in which the majority of the Court of Appeal of New South Wales considered that a defamation plaintiff who has not pleaded special damage may nevertheless give evidence of some particularity about the state and nature of its business, and any changes which it alleges have been wrought in it by the defamation of which it complains. Such a plaintiff is entitled to do that only for the purpose of enabling the judge or jury to properly evaluate the general damage.[10]

[55] Any questions of admissibility of evidence are matters properly left to the trial judge. All that is appropriate to say about *Andrews* on this application, is that the decision, if applied by the trial judge, may have the effect of allowing Elementary to call evidence of the matters which the plaintiffs pleaded in subparas (b) and (e) of para 24, notwithstanding the orders I have made striking out those subparagraphs.

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9 *Andrews v John Fairfax & Sons Ltd,* above n 2.

10 In *Andrews*, the second plaintiff successfully sought to produce a document showing its level of receipts and expenditure both before and after the publication of the articles complained of. Counsel had emphasised in his submissions before the jury that it was impossible to work out with any precision what precise sum should be awarded to the claimant for its loss of custom, submitting that the real problem was that the losses to the claimant would be felt "in years to come".
In his judgment in *Andrews*, Glass JA described the relevant principle in the following terms:

> The distinction, as I understand it, is simply that, if a plaintiff sets out to prove special damage, he undertakes to show that the loss was caused by the defamatory publication. If he elects not to do this, but merely to prove a decline in his overall business situation, leaving it to inference that he has suffered financial loss in some way connected with the defamatory material, he is at liberty to present such a case. He is also permitted to tender financial detail in aid of such a decline of business. Indeed it is hard to imagine how a claim for general loss of this character could be presented without some supporting information of a financial kind.

Application by LexisNexis for security for costs

Legal principles

[56] Rule 5.45 of the High Court Rules relevantly provides:

> **5.45 Order for security of costs**
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> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
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> …
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
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> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
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> (i) by paying that sum into court; or
>
> (ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
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> (b) may stay the proceeding until the sum is paid or the security given.
>
> …

[57] An applicant for security for costs must persuade the Court that there is reason to believe that the plaintiff will be unable to pay the defendant's costs if the plaintiff is unsuccessful at trial. Once the Court is satisfied on that threshold issue, its discretion whether to make an order for security or not, and if an order for security is made the amount of that security, is unfettered – there is no formal checklist of principles to be applied.[11]

[58] Once the threshold test is met, the Court's task is to balance the interests of the parties. That balancing exercise may include an assessment of the merits of the plaintiff's claim, but an assessment of the merits of the dispute at an interlocutory

[11] *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13] and [14].

stage will usually only give the Court an impression – in most cases it will not be possible to form a firm view of the merits. An order for security which may have the effect of preventing a plaintiff from pursuing its claim will normally only be made after careful consideration, and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.[12]

[59] On the issue of how much evidence is required to meet the threshold of "reason to believe that a plaintiff will be unable to pay the costs of the defendant…", Quilliam J noted in *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* that what is contemplated is that there should be credible evidence of surrounding circumstances from which it may reasonably be inferred that the defendant will be unable to pay the costs. That does not require proof that the defendant will in fact be unable to pay the plaintiff's costs.[13]

Application of the legal principles in this case

[60] The plaintiffs say that there is insufficient evidence to meet the threshold, and that the application for security for costs should be dismissed accordingly. LexisNexis says that it has produced sufficient evidence to meet that test.

Mr Ayers

[61] Insofar as Mr Ayers is concerned, LexisNexis relies on the following matters:

(a) The plaintiffs delayed in paying the costs and disbursements awarded against them in my judgment of 28 November 2014. At the time LexisNexis applied for security for its costs (16 April 2015), the costs had still not been paid (they were eventually paid on 1 May 2015). And the Court scheduling fee of $1,600, which was due for payment on 2 February 2015, had also not been paid by the time LexisNexis made its application (it was paid on 22 April 2015.)

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12 At [15].

13 *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 at 519.

(b) Mr Ayers is not registered as the proprietor of any land in New Zealand, and the residential property he occupies is not registered to any interests which appear to have any relationship to him.

(c) The plaintiffs' counsel and solicitors both withdrew from the proceeding after the 28 November 2014 judgment (counsel in February 2015, and the solicitors in March 2015).

[62] In respect of the late payment of the award of costs, Mr Ayers says that in the period between 28 November 2014 and late February 2015 the plaintiffs' attention was dominated first by their consideration of my judgment of 28 November 2014 (in particular, why the damages pleading was still considered deficient), and then in taking steps to remedy the situation. They decided to terminate the brief of their counsel in this period, and their solicitor advised in February 2015 that he wished to withdraw. They say that a letter from LexisNexis' solicitors demanding payment of the sum of $7,650.40 for costs within seven days was not in fact received until 11 April 2015. Mr Ayers also contends that LexisNexis failed to provide a verified bank account number into which the costs could be paid – he says those details were not provided until 22 April 2015.

[63] Mr Ayers accepts that there are no title records on the LINZ register showing that he or Elementary is the registered proprietor of any land in New Zealand. He says that, because he regularly gives evidence in civil and criminal proceedings around New Zealand, he has for many years adopted the practice of avoiding, to the greatest extent possible, revealing details of his personal interests on publicly available registers. By way of example of that approach, he says that his name is not on any electoral roll in New Zealand (he is registered on the unpublished electoral roll).

[64] Mr Ayers' evidence is that he has been running his own businesses in the computer forensics and IT security fields since 2006. He has done that through two main companies, Elementary and Special Tactics Ltd. Mr Ayers says that he owns all the shares in Special Tactics, which is a profitable company with assets that

exceed, by a considerable margin, any adverse costs award he might have to meet if his claims do not succeed at trial. He says that the net combined revenue of his companies over the years since 2006 has never been less than $250,000 per annum, and in some years it has been considerably more.

[65] Mr McLellan submits that Mr Ayers' assertion that the plaintiffs would be able to meet any adverse costs award is unconvincing. While Mr Ayers says that he will not disclose details of his personal interests, similar sensitivities apply for many plaintiffs. In such cases, the Court's supervisory function is available to ensure that the information that is required to be disclosed for the purpose of the Court proceedings is used only for that purpose. Any such information can be the subject of specific "no-search" and non-publication orders in an appropriate case.

[66] Mr McLellan relies on *New Zealand Kiwifruit Marketing Board v Maheatataka Cool Pack Ltd* in support of the proposition that, in appropriate circumstances, an inference adverse to a plaintiff will be drawn if it fails to produce information about its means to pay a future award of costs.[14] In that case, Thomas J noted that a defendant invariably faces some difficulties in establishing the plaintiff's financial position. In most cases a defendant will not have access to the plaintiff's books of account or other records, and generally it can do no more than point to surrounding circumstances. The learned Judge noted that the key question was whether there was any obligation to respond when a claimant was asked for details of its financial situation. In the particular circumstances of the case, Thomas J concluded that there was no such obligation, but he allowed that there might be cases where the circumstances were such that it would be reasonable to expect a response, and the failure to provide any information could properly give rise to an inference which, perhaps added to other factors, could provide the Court with reason to believe that the claimant would be unable to pay costs in the event of it being unsuccessful at trial.[15]

[67] Was there an obligation on Mr Ayers in this case to respond on the question of his ability to meet a likely costs award if he is unsuccessful at trial?

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14 *New Zealand Kiwifruit Marketing Board v Maheatataka Cool Pack Ltd* (1993) 7 PRNZ 209 (HC) at 212.

15 At p 34-35.

[68] I do not think there was. I do not consider that there is any useful inference which can be drawn from the late payment of the costs and Court scheduling fee. The amounts are relatively small in comparison with the amounts which both parties must have expended on the litigation to date, and I think Mr Ayers' explanation that he was pre-occupied with the implications of the 28 November 2014 judgment and what appears to have been a substantial disagreement with his legal advisors, is plausible. More simply, it may be that he was not happy with the judgment and did not want to pay the costs until he had to. In either event, the lateness of the payments does not provide any reasonable basis for an inference that the plaintiffs would be unable to pay LexisNexis' costs if they were unsuccessful at trial.

[69] Nor does the change of solicitors amount to a "surrounding circumstance" that would provide a reasonable basis for the necessary inference. There is no evidence that counsel or Mr Ayers' former solicitor withdrew because fees properly payable by Mr Ayers were unpaid: the change of solicitor and counsel is just as consistent with Mr Ayers and Elementary being dissatisfied with the outcome of the October 2014 hearing and/or (rightly or wrongly) the performance of their legal advisers in relation to it.

[70] Nor is the fact that Mr Ayers is not the registered proprietor of any land in New Zealand enough to provide a basis for a reasonable belief that he would be unable to meet an adverse costs award against him. If absence of any evidence of land ownership were considered sufficient on its own to justify such a reasonable belief, every plaintiff who is not the registered proprietor of an interest in land would potentially be faced with an application for security for costs by the defendant. In my view that would be setting the evidential bar too low. Many New Zealanders reside in properties owned by family trusts, and in many cases those trusts will owe substantial debts to the individuals who established them and advanced money for the acquisition of the properties.

[71] Mr McLellan submits that no value should be placed on Mr Ayers' shares in Special Tactics Ltd, as those shares could only readily be accessed by an application to adjudicate Mr Ayers bankrupt, which would in turn render the shares of doubtful value given the personal nature of the services Mr Ayers provides through the

company and the fact that, as a bankrupt, he could no longer be concerned in the management of the company.

[72] But even if that were so, and I make no finding on the point, it would not affect my view that LexisNexis has failed to reach the threshold of establishing reasonable grounds for the Court to infer that Mr Ayers would not be able to meet an adverse costs award of the order likely to be made if his claim is unsuccessful. The onus is on LexisNexis to provide a sufficient evidential basis for the Court to draw the relevant inference, and in my view the matters it has raised, considered individually or in combination, are insufficient to provide that basis. The application for security for costs against Mr Ayers personally will accordingly be dismissed.

Elementary

[73] The position of Elementary must be addressed separately. While Mr Ayers assumes that any liability the plaintiffs would have to LexisNexis for costs would be a joint and several, I do not think that necessarily follows. It is conceivable that Mr Ayers may succeed with his claim, and Elementary may fail with its claim.

[74] Mr Ayers provided a detailed response to evidence produced by LexisNexis that Elementary is not referenced in the online Yellow Pages, and suggesting that the Wellington, Dunedin, Christchurch and Auckland numbers for Elementary listed in the online White Pages were either disconnected, or went straight through to voicemail for Elementary. His evidence is that Elementary has not advertised in the Yellow Pages for several years. It does have telephone numbers in various parts of New Zealand, including in areas where it has no physical presence. When Elementary relocated from Auckland to Christchurch in 2013 it elected not to maintain telephone numbers in Wellington or Dunedin. Those numbers were disconnected in 2013.

[75] Mr Ayers says that it is common for calls to Elementary's phone numbers to go directly to voicemail. That happens if staff are already on telephone calls or if there is no one available to answer a call.

[76] LexisNexis produced evidence of an unsuccessful attempt on 15 April 2015 to visit Elementary's website at www.elementary-solutions.com. An "error message" stated that the connection attempt failed because the connected party did not properly respond after a period of time, or the established connection failed because the host failed to respond. Mr Ayers' evidence in response is that the website *is* operational. He produced a screen shot taken on 5 May 2015 which was said to demonstrate that fact. He stated that it is common for Elementary's website to come under attack from time to time, and the result is that the site may be unavailable for short periods of time. However Ms Thompson, the law clerk employed by LexisNexis' solicitors who provided this evidence, was unable to find any cached version of Elementary's website through the "cached pages" subpage on the www.google.co.nz website, and the last webpage she was able to find on the www.archive.org website was dated 5 May 2013.

[77] Ms Thompson also gave evidence that while Elementary's address as shown on the websites at www.google.co.nz and www.facebook.com is 220 Queen Street, Auckland, it in fact has no presence at that address. She gave evidence of a call to the management of the Queen Street address on 15 April 2015, which elicited the information that Elementary was not a tenant in the building.

[78] In response, Mr Ayers says that Elementary maintained an office at 220 Queen Street from 2010 – mid-2013, but does not currently have an office in that building. He attached a copy of the Companies Office record showing that the registered office for Elementary *was* at 220 Queen Street between 15 July 2010 and 20 June 2013. The information shown on the website at www.google.co.nz is out of date. As for Facebook, Mr Ayers acknowledges that Elementary established a Facebook presence on a trial basis to see if social networking might be a useful tool for promoting its business. He concluded that it was not, and made no further use of Facebook for that purpose.

[79] Ms Thompson also referred in her evidence to Mr Ayers' profile on LinkedIn. The four-page profile lists both Special Tactics Ltd and Elementary as companies with which Mr Ayers is presently associated, and describes Elementary as a company specialising in computer forensics and IT security.

[80] While both Elementary and Special Tactics Ltd feature in Mr Ayers' LinkedIn profile, it is not clear which activities are performed by which company. Elementary is described briefly as a company specialising in computer forensics and IT security, but the rather larger promotional description of Special Tactics Ltd suggests that it is involved in precisely the same fields (for example, the promotional material for Special Tactics Ltd advises that the company can provide an expert or experts to give evidence in the field of computer forensics, and that it provides services in the field of IT security).

[81] Mr Ayers' response is that Special Tactics has a different target market from Elementary. He says Special Tactics is focussed primarily on the corporate market. He says that he continues to trade through Elementary, but he does not say what market Elementary serves. He did produce a copy of an article published in the *New Zealand Herald* on 26 January 2015 dealing with the issue of computer hacking, in which Mr Ayers was described as running the "security company Elementary Solutions". The focus of the article was tech-savvy teenagers' hacking activities. The article contained no mention of Special Tactics Ltd.

[82] Ms Thompson's affidavit also attached a copy of Mr Ayers' Twitter profile. The profile does not refer to Elementary. It describes Mr Ayers as a computer forensics scientist, security expert, consultant, and commentator, of Special Tactics New Zealand. His email address is shown as "…@specialtactics.nz". Mr Ayers is described as having joined Twitter in May 2009.

[83] Ms Thompson also produced a copy of an advertisement for a conference to be held on 17 June 2014, entitled "IT Security in the Post-Snowden Era". The advertisement described Mr Ayers as the "owner of Special Tactics Ltd, a nationwide computer forensic and IT security consultancy specialising in proactively addressing risk". He was said to be a native of Christchurch who had recently moved back to use Canterbury as his base of operations. The conference promotional piece did not refer to Elementary.

[84] Finally, Ms Thompson produced Companies Office particulars showing that Elementary's registered office is now at a Lyttleton address. A copy of the

www.QV.co.nz particulars for the property describes it as a residential address consisting of a two-bedroom, one-bathroom home.

[85] The registered proprietors of the Lyttleton property are an individual and a company, neither having any apparent connection with Mr Ayers or Elementary.

The threshold issue

[86] The fundamental issue raised by the evidence produced by LexisNexis is whether Elementary is still trading in any substantial way at all.

[87] Mr Ayers says that Elementary's assets include computer and related equipment with a value in excess of any likely costs which might be awarded in the proceeding. But he provides no details of those assets or their values. He says that Elementary is still trading and that he continues to promote its business, but it appears that its business activities have been scaled back in recent years. I refer in particular to the company's relocation to Canterbury, the disconnection of some regional telephone numbers, the apparently reduced use of Elementary's website (no page archived on www.archive.org since 2013), and the prominence given to Special Tactics as a "nationwide computer forensic and IT consultancy" in the June 2014 conference advertisement. The description of Mr Ayers in his Twitter profile as being "of Special Tactics" tends to reinforce that impression.

[88] Against that background, Mr Ayers has not explained *why* Special Tactics was established, and what market Elementary is now targeting if (as appears to be the case) the two companies are providing the same or similar services. And while he says that Elementary has sufficient assets to cover any adverse costs award, he points to his shares in *Special Tactics*, not Elementary, when referring to his personal financial worth.

[89] In my view the overall picture provided by the evidence is one of a deliberate "scaling back" of the activities of Elementary and the use of Special Tactics as the primary vehicle for the provision of Mr Ayers' services. In those circumstances it is difficult to see why assets of any substantial value would have been left in Elementary, or any significant new plant or equipment acquired by that company.

Elementary may still own computer equipment, but if that equipment is more than a year or two old it may well not have the value that Mr Ayers apparently ascribes to it.

[90] Having regard to those circumstances, I accept that LexisNexis has produced credible evidence of "surrounding circumstances" from which it may be inferred that Elementary would be unable to pay an award of costs if it were unsuccessful with its claims in the seven day trial scheduled to begin at the end of November 2015. I now consider that exercise of my discretion under r 5.45.

The exercise of the discretion to order security against Elementary

[91] The Court has a broad discretion in deciding whether to make an order for security for costs, and if so, in what sum.

[92] While there is no exhaustive list of considerations the Court should take into account in the exercise of its discretion, I accept Mr McLellan's submission that the following factors are often considered relevant:

(a) Whether the plaintiff's impecuniosity has been caused by the defendant.

(b) Whether the defendant delayed too long in make the application for security.

(c) The merits of the plaintiff's case.

(d) Balancing the plaintiff's interest in pursuing what might be a meritorious claim and the interest of the defendant in being paid the costs to which it will be entitled if it succeeds at trial.

[93] In this case, there is no issue over the cause of Elementary's impecuniosity: Elementary says that it is not impecunious. Nor do I consider that LexisNexis' application is barred by delay. While the proceeding has been on foot for some five years, I accept that there was nothing which would reasonably have triggered any enquiry into Elementary's ability to pay until Elementary delayed for some months

in paying the costs following the 28 November 2014 judgment. I do not believe LexisNexis had sufficient reason to make the application before it did, and therefore the delay in making the application should not count against it.

[94] On the merits, LexisNexis says that Elementary's claims should be regarded as relatively weak. It says first that there was an express agreement between Mr Ayers and it that it would publish any responses that it received to Mr Ayers' article. In those circumstances it says that the plaintiffs are estopped from bringing their claims. The plaintiffs deny that there was any such agreement. If there had been, they ask rhetorically why no strike-out application has been made based on the alleged agreement.

[95] Next, LexisNexis refers to its defence of honest opinion under s 10(2)(b) of the Defamation Act 1992. It says that this defence will succeed if it can show that the publication did not purport to be the opinion of LexisNexis, and that it had no reasonable grounds to believe that the opinions were not the genuine opinions of the authors. The plaintiffs say that this defence can only succeed to the extent that the material is evaluative (i.e. opinion) and based on provable facts known to LexisNexis at the time.

[96] LexisNexis also says that Mr Ayers' own article attacked the professional reputation of the corporation which developed the EnCase software, and/or the reputations of forensic computer experts who used that software. It says that the publication of the responses to Mr Ayers' article is covered by the common law defence of "defence against attack". The plaintiffs say that this defence cannot succeed. They deny that Mr Ayers' article could be considered as an "attack", but even if it was, the attack was justified due to the flaws in the EnCase software. The plaintiffs say that when an original "attack" is justified on the grounds that what was said was true, a defendant cannot plead privilege for its response. They add that the responses were not in any event fairly in answer to Mr Ayers' article, and that in publishing the letters in response LexisNexis failed to exercise the degree of responsibility and care which the occasion required.

[97] LexisNexis also contends that the publication of the two letters was a publication of matter which was of legitimate public interest, such that the defence of qualified privilege applies. The plaintiffs say that the defence of qualified privilege will not succeed. They say that, to attract the privilege, the response letters themselves must not have constituted an attack on the plaintiffs, but that is in fact what they were. They contend that the publication by LexisNexis was not without malice, and was reckless, with no consideration given to whether the contents of the response letters were or were not true.

[98] LexisNexis also refers to the settlements reached between the plaintiffs and the authors of the two letters (or their employers). It says that (if it is liable) it must have been a joint tortfeasor along with the authors of these letters, and that a settlement between the plaintiffs and the authors operated to release LexisNexis from liability under the so-called "release rule". The plaintiffs say in response that the release rule has no application, as they expressly reserved their positions against LexisNexis when they settled with the employers of the two letter writers.

[99] There are other defences raised by LexisNexis. For example, it denies that the published words had the defamatory meanings for which the plaintiffs contend. It also denies the losses claimed by the plaintiffs, and/or that any losses were caused by its publication of the two letters.

[100] Mr McLellan accepts that it is not possible for the Court to reach any concluded views on the merits of the various defences in the context of this application. However he submits that the overall picture that emerges is one of numerous defences of apparent substance to the plaintiffs' claims, and that there is a real prospect of LexisNexis being awarded a substantial amount of costs.

[101] It is neither necessary nor appropriate for me to express any view on the merits of the dispute, beyond observing that in circumstances where Elementary's revenues appear to have increased following the 2009 publication, and Elementary concedes that it cannot justify a special damages claim (apart from the claim for legal costs), any damages award would seem unlikely to be substantial. Against that, the case is set down for trial over seven days, and it is likely to be expensive for both

sides. In my view, an appropriate balancing of the parties' interests *does* require that an order for security be made.

[102] Mr McLellan produced a schedule showing costs calculated on a 2B basis at $74,227 (except the allowance for inspection of documents which, having regard to the volume of documents produced, he calculated on a 2C basis.) He asks for an order for provision of security for costs in the sum of $75,000, and an order staying the proceeding pending provision of the security.

[103] Mr Sumner submits that any award for security should be on a 2B basis, and should be "future looking" – he submits that it is generally inappropriate to make an order for security for costs that have already been incurred. He also submits that past awards for security generally include some discount on the likely award of costs.

[104] In my view the appropriate figure to fix for security is $20,000, and there will be an order accordingly. In fixing that sum I take into account the fact that there are two plaintiffs, and I have not been satisfied that any order for security should be made against one of them. There will be significant overlap in the work LexisNexis will be required to perform in defending the respective claims of the two plaintiffs. I also take into account the fact that I am unable to conclude on the evidence produced that Elementary's claims have "little chance of success", and the principle that access to the Courts for a genuine plaintiff is not lightly to be denied.[16]

Orders

[105] I make the following orders:

(a) Subparagraphs (b), (e) and (d)(ii) of para 24 of the plaintiffs' fourth amended statement of claim are struck out, as are the words "and steps" in the first line of the paragraph at the end of subpara (d) (which is applicable to both subparas (d)(i) and (d)(ii) of para 24);

(b) The application for security for costs against Mr Ayers is dismissed.

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16 *A S McLachlan Ltd v MEL Network Ltd*, above n 11 at [15].

(c) Security for costs is fixed at $20,000 in respect of Elementary. That sum is to be paid into Court (or into any solicitors' trust account on which the parties may agree in writing) within 21 days of the date of this judgment. Elementary's claims are stayed pending the payment of the security.

(d) I make no order at this stage on LexisNexis' application for further discovery. If orders are required on that application, LexisNexis may apply by memorandum, to be filed within 14 days of the date of this hearing, for the allocation of a fixture for the hearing of the application.

Costs

[106] Mr McLellan asked to be heard on the matter of costs. As to costs on the strike-out application, I am not presently inclined to increase the basis beyond 2B. Although there may have been technical deficiencies in Elementary's pleadings I do not presently consider they were likely to cause any significant prejudice to LexisNexis at trial.

[107] However I did not hear from Mr McLellan on costs, and it is appropriate that LexisNexis should have leave to file a memorandum on costs on the strike-out application if it wishes. Any such memorandum is to be filed within 30 days of this judgment. Any reply memorandum is to be filed within 14 days of the plaintiffs' receipt of LexisNexis' memorandum.

[108] Costs on the application for security for costs are reserved.

Associate Judge Smith