IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2014-412-000167
[2015] NZHC 425

BETWEEN	PIETER MATTHEW VAN DE KLUNDERT Plaintiff
AND	PAULA GAEL CLAPPERTON Defendant

Hearing: 4 March 2015

Appearances: L A Andersen and M Taylor-Cyphers for Plaintiff/Applicant
G Mason for Defendant/Respondent

Judgment: 10 March 2015

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on plaintiff's summary judgment application

Introduction

[1] The plaintiff (Mr van de Klundert) alleges he has been defamed by the defendant (Ms Clapperton) in an email (the email) which Ms Clapperton sent to Kings High School (the School) and to 17 other schools on 26 August 2014.

[2] In the email, Ms Clapperton said:

> Good afternoon,
>
> *To introduce myself,* I am Poppy Clapperton the 100% owner and sole Director of Industry Training Solutions Ltd. I have bought the South Island arm of the business off my previous business partner, Pieter van de Klundert, who operates The Learning Place based in Dunedin. He is no longer a director of or affiliated with Industry Training Solutions Ltd.
>
> *It has come to my attention* that you have reported student achievements using the provider code Industry Training Solutions Ltd 7837 in 2014.
>
> *The previous South Island arm* of the company ceased trading a [sic] such late last year when it became The Learning Place. As there was no

authorisation for the Dunedin director to sign MOU's since December 2013, after an undertaking to cease using the accreditation, I am concerned about the situation.

There may be no error or concern required, however I have no Memorandum of Understanding with your school on file authorising the use of that provider code, or any student files or copies of completed work for moderation.

So it would be appreciated if you could;

1) Check your current MOU and see which company it is with

2) If you have used Industry Training Solutions Ltd provider code 7837 in error please let me know and sort with NZQA

3) If in fact you have a 2014 MOU with Industry Training Solutions Ltd please scan and email me a copy for the company records

4) Please provide me urgently details of any outstanding student work you have that you have been authorised to use this code with

5) All MOU dated prior to today will need reauthorisation by myself to be valid

Please be assured that Industry Training Solutions Ltd and myself personally take your students [sic] learning very seriously and that from my team you will receive the very best attention.

If you would like to call me to discuss this matter, or any other matter, please call me direct on [redacted].

Kind Regards

Poppy

[3] Mr van de Klundert pleads that the three italicised paragraphs constitute a defamatory statement in that their natural and ordinary meaning is:

(a) Mr van de Klundert had acted dishonestly in reporting students' achievements using the Provider Code Industry Training Solutions Ltd (ITS) 7837 in 2014 when he was not authorised to use that code; and

(b) Mr van de Klundert is untrustworthy in that he has failed to honour an undertaking given to the defendant.

[4] Pursuant to s 24 Defamation Act 1992, Mr van de Klundert seeks (upon summary judgment) a declaration of Ms Clapperton's liability for defamation and full reimbursement of his legal costs.

[5] Ms Clapperton opposes the application for summary judgment. She asserts affirmatively a defence of qualified privilege. She has also exercised her right to file a statement of defence setting out her grounds of defence.[1]

Particulars of ill-will and/or improper advantage

[6] The defendant's statement of defence, incorporating her defence of qualified privilege, was filed and served on 13 February 2015.

[7] The Defamation Act 1992 provides the particulars which a plaintiff must give if alleging that the defendant was predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication. Section 41 of the Act provides:

> **41 Particulars of ill will**
>
> (1) Where, in any proceedings for defamation,—
>
> (a) The defendant relies on a defence of qualified privilege; and
>
> (b) The plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication,—
>
> the plaintiff shall serve on the defendant a notice to that effect.
>
> (2) If the plaintiff intends to rely on any particular facts or circumstances in support of that allegation, the notice required by subsection (1) of this section shall include particulars specifying those facts and circumstances.
>
> (3) The notice required by subsection (1) of this section shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the Court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.

[1] Pursuant to r 12.10 High Court Rules.

[8] In this proceeding, Mr Andersen's submissions for Mr van de Klundert were filed and served on 18 February 2015. In terms of the 10 day requirement under s 41 of the Act for a plaintiff's notice, the submissions were therefore filed before the s 41 notice was required. The plaintiff has still not filed the notice required under s 41 of the Act although the 10-day limit has since expired.

[9] Mr Andersen's synopsis of submissions, filed for the plaintiff, indicated that he would be submitting that the defence of qualified privilege did not apply because the defendant was predominantly motivated by ill-will or otherwise took improper advantage of the occasion of publication. Mr Andersen's submissions included details as to why it is said Ms Clapperton knew that statements she had made were false or was reckless as to their truth or falsity.

[10] Mr Mason, in his synopsis of submissions for Ms Clapperton, noted the plaintiff's failure to give a s 41 notice. He did not submit that, for that reason alone, the summary judgment application ought to be dismissed but his submissions highlighted the way in which the summary judgment process has cut across the defining of issues through defamation pleadings as required by the legislation. Submissions filed shortly before a defamation hearing with substantive consequences will rarely be a satisfactory substitute for what is legally required by way of pleadings.

[11] I find the plaintiff's failure to file a s 41 notice to be a defect in its case. The provisions of s 41(1) of the Act apply to all proceedings for defamation. There is no exception for the rare case in which a plaintiff pursues summary judgment. Even in that situation, the plaintiff is required to file a s 41 notice. While Mr Mason did not urge me to treat the absence of a s 41 notice as determinative of the summary judgment application, its absence is a matter which in my judgment is relevant to the exercise of the discretion which I must exercise on any summary judgment application.

Plaintiff's summary judgment application – the principles

[12] The starting point for a plaintiff's summary judgment application is r 12.2(1) High Court Rules, which requires that the plaintiff satisfy the Court that the

defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[13] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required.[2]

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.[3]

(c) The Court will not hesitate to decide questions of law where appropriate.[4]

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.[5]

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.[6]

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.[7]

---

2 *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].
3 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
4 *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (CA) at 516.
5 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21.
6 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).
7 *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.[8]

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.[9]

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.[10]

[14] Ms Clapperton has provided evidence which, if accepted on its face, might be considered to render at least arguable the affirmative defence. Mr Andersen, recognising that evidence, referred me to the well-known passage in *Krukziener v Hanover Finance Ltd* in which Miller J, delivering the judgment of the Court of Appeal, said:[11]

> [26] The principles are well settled. … The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: … In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: …

---

8 *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28].
9 *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).
10 *Pemberton v Chappell*, above n 3.
11 *Krukziener v Hanover Finance Ltd* (2008) NZCA 187, [2010] NZAR 307, (2008) 19 PRNZ 162.

[15] The authors of the *Law of Torts in New Zealand* refer to two New Zealand defamation proceedings in which summary judgment was obtained by defendants.[12] Each had an impregnable defence based on qualified privilege.[13]

[16] The text then continues:[14]

> However, an application is unlikely to succeed where meanings are disputed or defences such as honest opinion are pleaded. In *Mitchell v Sprott,*[15] where honest opinion was an issue, the defendant failed. The Court held that it was difficult at the summary judgment stage to satisfy the Court that the defendant would succeed at trial in establishing honesty. That was more so in this case when the exact meaning of the defendant's words remained in dispute.

[17] The authors then note that there appear to be no cases as yet in New Zealand where a plaintiff has succeeded (although they refer to two successful applications in England).[16]

What the plaintiff must establish

[18] To succeed on his summary judgment application, Mr van de Klundert must establish, beyond argument, that:

(a) The natural and ordinary meanings of statements in the email were:

(i) Mr van de Klundert had acted dishonestly in reporting students' achievements using the Provider Code Industry Training Solutions Ltd 7837 in 2014 when he was not authorised to use that code; and

(ii) Mr van de Klundert is untrustworthy in that he has failed to honour an undertaking given to Ms Clapperton; and

---

12 Stephen Todd (ed) *Law of Torts in New Zealand* (6th ed, Thompson Reuters, Wellington, 2013) at [16.16].

13 *Ferrymead Tavern Ltd v Christchurch Press Co Ltd* (1999) 13 PRNZ 616 (HC) and *Tipple v Buchanan* HC Christchurch CP51/01, 30 January 2002.

14 Todd, above n 12, at [16.16].

15 *Mitchell v Sprott* [2002] 1 NZLR 766 (CA).

16 Being *Steinberg v Pritchard Englefield* (A firm) [2005) EWCA CIV 288; *Waterson v Lloyd MP* [2011] (EWHC) 3197 (QB). However, the *Waterson* case was reversed on appeal – see *Waterson v Lloyd MP* [2013] EWCA CIV 136. (Neither case – *Waterson* or *Steinberg* – involved consideration of the intention or subjective understanding of the maker of the statement).

(b) Ms Clapperton's defence of qualified privilege is unavailable because:

(i) The sending of the email was not an occasion attracting qualified privilege; or

(ii) Ms Clapperton was predominantly motivated by ill-will towards Mr van de Klundert when sending the email; or

(iii) Ms Clapperton otherwise took advantage of the occasion of publication when sending the email; and

(c) In the event the Court finds for Mr van de Klundert in relation to actionable defamation, the only correct exercise of the discretion in relation to relief is the issue of a declaration in the terms sought by Mr van de Klundert.

The industry context

[19] The industry context may be thus summarised:

(a) The New Zealand Qualifications Authority (NZQA) has regulatory powers under the Education Act 1989.

(b) The NZQA accredits and regulates Private Training Establishments (PTEs) which provide education services.

(c) Accredited PTEs have authority to enter into Memoranda of Understanding (MOU) with schools.

(d) The Ministry of Education requires educational courses to be the subject of an MOU if the participating student is to obtain an NZQA credit for the course.

(e) Each accredited PTE has a provider code which the school uses to report information including student achievements to the NZQA.

The parties and ITS

[20] The parties were formerly involved together in ITS. In particular:

(a) Mr van de Klundert and Ms Clapperton were joint equal shareholders in ITS, a PTE which NZQA had accredited as a provider.

(b) ITS operated through two entities being ITS North Island and ITS South Island.

(c) ITS had a provider code (7837).

(d) In February/March 2014, ITS and the School entered into an MOU.

(e) On 21 May 2014, Mr van de Klundert and Ms Clapperton entered into an agreement for the sale of Mr van de Klundert's shareholding to Ms Clapperton (the Agreement), which became unconditional on approval by the NZQA.

(f) By the Agreement:

(i) Ms Clapperton took over ITS including the South Island subsidiary, retaining the North Island business;

(ii) the ITS South Island operation ceased to operate;

(iii) Ms Clapperton on settlement took control of the existing ITS accreditation and provider code; and

(iv) Mr van de Klundert operated thereafter in the South Island solely as The Learning Place (TLP), using TLP's own provider code.

The evidence

Mr van de Klundert's initial evidence

[21] In applying for summary judgment, Mr van de Klundert filed a two-page affidavit in support. He referred briefly to the parties' shared business background, the Agreement, his right to use ITS's provider code until 3 July 2014 (subsequently corrected by Mr van de Klundert to refer to 31 May 2014) and to the email. He deposes that the email was defamatory and in what ways.

Ms Clapperton's opposition evidence

[22] Ms Clapperton, by her statement of defence and notice of opposition asserted that she has a defence in that:

(a) the email does not have the natural and ordinary meanings ascribed to it by Mr van de Klundert;

(b) the email is not defamatory;

(c) Ms Clapperton has a defence of qualified privilege; and

(d) both the summary judgment and in particular the declaration should be refused as a matter of the Court's discretion.

[23] Ms Clapperton provided a lengthy affidavit in opposition. In her affidavit, Ms Clapperton deposed:

(a) There had been a breakdown in the commercial relationship between Mr van de Klundert and Ms Clapperton in 2013.

(b) Discussions occurred as to the future involvement of each in ITS.

(c) Discussions occurred as to whether ITS should enter into any MOU with other PTEs.

(d) In October 2013, Mr van de Klundert purchased TLP (a PTE).

(e) In January 2014, Ms Clapperton wrote to Mr van de Klundert saying:

> Please be very aware Industry Training Solutions Limited is not approving any MOU's with other training establishments, and any training done using Industry Training Solutions Limited accreditation must follow the correct procedure.

(f) Mr van de Klundert did not respond to her concerns, Ms Clapperton then thinking that it was accepted that the ITS provider number was not to be used for any other PTE.

(g) There was a protracted negotiation of the sale of Mr van de Klundert's shares.

(h) Mr van de Klundert sent an email to NZQA on 10 April 2014 seeking thoughts on whether the registration of ITS should be suspended, having regard to stated concerns as to the ability of Ms Clapperton to maintain the integrity of assessing and other matters – Ms Clapperton's firm belief is that this was a stunt by Mr van de Klundert to try to pressure her in the negotiations.

(i) By the (subsequent) Agreement, Mr van de Klundert agreed to retract this correspondence to NZQA.[17]

(j) By August 2014, Ms Clapperton had identified 18 schools (including Kings High School) which had reported student results in 2014 using the ITS provider code 7837 but ITS had no record of students from the 18 schools for 2014.

(k) There was a serious compliance issue for ITS and students as ITS could not authorise student credits to be reported against its provider code if ITS had no MOU with the schools or evidence of the student's competency.

---

[17] Mr van de Klundert subsequently on 22 September 2014 sent a letter of retraction to NZQA.

(l) Ms Clapperton made her decision to contact the 18 schools after the documents she received from Mr van de Klundert did not include any MOU with schools or records of the student's work. Ms Clapperton exhibits the responses received from the schools, many of which indicated that an incorrect ITS provider number had been used by the school.

(m) Ms Clapperton exhibits September 2014 correspondence involving NZQA in which steps were taken to ensure that accreditation arrangements were dealt with and students from affected schools received their credits. In the correspondence, Ms Clapperton noted the lack of current, signed MOU, moderated work and student work and records. NZQA, in late-September, requested Mr van de Klundert to provide those items to ITS and Mr van de Klundert told NZQA that the appropriate information would be forwarded within a couple of weeks.

(n) Ms Clapperton has received some information from Mr van de Klundert but not enough to allow ITS to comply with NZQA rules and requirements in relation to students involved on TLP courses but using the ITS provider number.

(o) Ms Clapperton regards the late-September correspondence and request from NZQA as confirming her right to be concerned about the reporting arrangements of TLP students, stating that she had an interest or duty in raising the matter with the schools as she did in her August email.

(p) Ms Clapperton refers to the statements or meanings of the 26 August 2014 email of which Mr van de Klundert complains and explains the position in relation to each matter.

(q) She accepts that her statement that Mr van de Klundert gave an undertaking to cease using the ITS provider code in December 2013

and that he breached it is incorrect, but she genuinely thought when she wrote the email that Mr van de Klundert had given an undertaking to cease using the ITS accreditation in December 2013 but now realises the undertaking was given in May 2014.

(r) Ms Clapperton had a serious medical problem in late-2013, was told to put her affairs in order and had surgery on 18 December 2013. She has since recovered but in recent months has suffered two strokes. The clarity of her memory has been affected and may well have contributed to the mistakes she made over the date of the undertaking.

(s) She is sorry about the mistake.

(t) The point of her email was to alert schools to a problem in the reporting of results which was serious both for the schools and ITS. It was not intended to damage Mr van de Klundert's reputation.

(u) She was not motivated by ill-will towards Mr van de Klundert in sending the email.

(v) Because the breakdown of the business relationship had been acrimonious and she had been left bruised by it, there were a range of things she could have said about the plaintiff in the email if she had wanted to, such as Mr van de Klundert's 10 April 2014 email to NZQA but she did not do so.

(w) Ms Clapperton views the declaration as being pursued by Mr van de Klundert for marketing purposes.

(x) Ms Clapperton refers to an email from Mr van de Klundert to NZQA dated 2 September 2014 in which he recorded that, as part of the normal course of business (after he purchased TLP in October 2013), he continued trading under the name ITS for courses for which TLP did not possess accreditation. In the email he said that MOU were

sent to five schools that TLP dealt with for the US9694 course and that the unit was accidentally missed off when TLP extended the range of units in 2014. Ms Clapperton produces part of TLP's 2014 prospectus in which TLP explained that it possessed most units itself and had an MOU with another provider to be able to deliver other units, with a copy of such MOU available.

(y) TLP did not have an MOU with ITS allowing it to offer US9694 or any other course. If Mr van de Klundert or TLP had had an MOU in place with ITS the issues being litigated would never have arisen between Mr van de Klundert and Ms Clapperton.

(z) Mr van de Klundert acted appropriately, but not perfectly carefully, to protect ITS and the schools and students affected when ITS's accreditation was being used without ITS having any appropriate records.

Reply evidence of Mr van de Klundert

[24] Mr van de Klundert filed a reply affidavit. He referred to a number of paragraphs in Ms Clapperton's affidavit and deposed (amongst other things) that:

(a) Prior to his departure from ITS, Mr van de Klundert performed the head office functions of ITS.

(b) ITS had no requirement of joint approval of MOU with schools and in no instance was joint approval given.

(c) Both Mr van de Klundert and Ms Clapperton had authority to lodge MOU with schools on behalf of ITS and did so independently of one another.

(d) Ms Clapperton had no basis for a belief that the ITS provider number would not continue to be used for any other PTE (such as TLP).

(e) After the execution of the Agreement, he sent boxes of documents to Ms Clapperton and she made no subsequent contact to suggest that all of the records had not been provided until after the email was sent.

(f) The School used the ITS NZQA provider code as there was an MOU in place dated 27 March 2014.

(g) Mr van de Klundert would have expected Ms Clapperton to ask him for any records she had not received in accordance with the sale agreement but there was no suggestion that all records were not provided before Ms Clapperton filed her affidavit.

(h) TLP was a business run separately from ITS, with the ITS code being used by TLP only for unit standards it did not have.

(i) The TLP 2014 prospectus is irrelevant to the courses run by TLP using the ITS accreditation before 21 May 2014.

Supplementary affidavit of Ms Clapperton

[25] Ms Clapperton tendered a further affidavit on 24 February 2015. In the absence of consent to its production, she filed an application for leave to rely on this further affidavit. The leave was initially opposed for Mr van de Klundert but, at the hearing, Mr Andersen withdrew that opposition.

[26] In her supplementary affidavit, Ms Clapperton responded to a number of Mr van de Klundert's allegations and produced further exhibits:

(a) Contrary to Mr van de Klundert's assertions, requests had been made to Mr van de Klundert for outstanding information before 26 August 2014. Ms Clapperton produces correspondence involving solicitors from 4 June 2014 requesting files and documents.

(b) Against the background of repeated requests, when no further documents had been received by 26 August 2014, Ms Clapperton

(following discussions at a management meeting) took the step available to her of contacting schools directly.

(c) Ms Clapperton had been sure that Mr van de Klundert had given an undertaken in December 2013 but accepts that she must have been mistaken about the date, now thinking that she had run together her January 2014 email. She refers also to an enquiry her solicitor made of the NZQA in which the NZQA advised that ITS had no MOU with any other company registered with NZQA.

(d) Ms Clapperton stands by her statement that Mr van de Klundert had no authority to sign MOU after December 2013 which she still believes.

(e) Ms Clapperton was in no doubt that Mr van de Klundert was running TLP courses using the ITS accreditation while having no entitlement to use the code for TLP courses. The TLP 2014 prospectus shows the 9694 course as a TLP course.

(f) In the materials Ms Clapperton has received from Mr van de Klundert are two student records for Unit Standard 9694 (dated on 2 May 2014 and moderated on 3 June 2014) which Ms Clapperton exhibits – they bear no reference to "ITS" and are marked "TLP".

(g) Ms Clapperton firmly believes that the courses run at the School (and other schools) were all run by TLP.

(h) Ms Clapperton exhibits an email which she sent to schools on 19 January 2015 correcting the date on which Ms Clapperton was to cease using ITS NZQA accreditation from "December 2013" to "May 2014".

(i) Ms Clapperton says that (when writing the email) she did not go back through the records and fact-check each statement because she was

> certain about the truth of what she was saying. She sent the email out of a concern to comply with NZQA requirements. She was being careful to comply with ITS's duties and in doing so stuck to the facts.

A remedy by way of declaration?

[27] As I have come to a clear view that the summary judgment application must be dismissed for reasons relating to both the relief sought (declaration) and the procedure used (summary judgment), I commence my discussion with those matters.

Declaratory relief

[28] Mr van de Klundert has exercised his right to seek a declaration that Ms Clapperton is liable to him in defamation.[18] He also seeks costs on a solicitor and client basis.[19]

[29] Mr Andersen supported the plaintiff's case for summary judgment upon the basis that if he satisfies the Court to the necessary standard that the elements of the tort are established and the defence of qualified privilege is untenable, declaratory relief must follow. In other words, there would be no discretion for the Court to refuse the relief sought.

[30] As Mr Mason submitted, the law is otherwise. In *Salmon v McKinnon,* Sir William Young P, delivering the judgment of the Court of Appeal, observed:[20]

> [47] Section 24 does not give a successful plaintiff an entitlement to a declaration. Such relief is discretionary. All recipients of Ms McKinnon's email were promptly told by her that the car had not been purchased from the advertising fund. Ms McKinnon had, as well, indicated a general willingness to meet Mr Salmon's reasonable costs. In that context, it is far from clear what additional benefit Mr Salmon would have derived from a declaration that she was liable to him in defamation.

[31] While the Court of Appeal's primary ground of decision in *Salmon v McKinnon* was to uphold the trial Judge's conclusion that the material complained of was not defamatory, the Court made it clear that it would also have refused

---

18 Defamation Act 1992, s 24(1).
19 Pursuant to s 24(2)(b) of the Act.
20 *Salmon v McKinnon* [2007] NZCA 516.

declaratory relief as a matter of discretion. The Court examined what additional benefit the plaintiff would have derived from a declaration and also whether the defamation proceeding was being used oppressively by the plaintiff.[21]

[32] In the Court of Appeal's subsequent judgment in *Smith v Dooley,* the Court applied *Salmon v McKinnon.*[22] It found that the trial Judge had erred in failing to exercise the discretion in relation to declaratory relief under s 24 of the Act, the Judge having thought that the declaration followed as a matter of course from the upholding of the plaintiff's claims.[23] The Court found that, had the discretion been correctly exercised, a declaration would have been refused by reason of the plaintiff's delay in suing.[24] Of significance to the present case is, not the fact that the discretion was exercised on grounds of delay, but rather that the Court recorded that counsel for the plaintiff had advanced 16 reasons which should inform the exercise of the discretion.[25]

Discussion

[33] Ms Clapperton and Mr van de Klundert have both deposed to matters which might relevantly inform the Court's discretion when considering the grant of a declaration. By the nature of a summary judgment proceeding, however, there has been no cross-examination or testing of their respective positions.

[34] Ms Clapperton's evidence brings with it shades of the "oppression" argument which found favour with the Court of Appeal in *Salmon v McKinnon.*[26] Her evidence as to the reaction of other schools to her email might suggest that those schools saw the email simply as a "constructive and helpful notice", which served to clear up an important issue over accreditation. The response received from King's High School (exhibited by Ms Clapperton) at least arguably indicates, as Ms Clapperton observed, that Mr van de Klundert's reputation had not been damaged in the eyes of that School, the School assertively coming to his defence.

---

21 At [47] and [50].
22 *Smith v Dooley* [2013] NZCA 428.
23 At [94]–[96].
24 At [104].
25 At [97].
26 *Salmon v McKinnon,* above n 20, at [50].

[35] These matters, if established by a defendant at trial, might reasonably lead a jury (or Judge alone) to award, in the event that the plaintiff's case was otherwise established, only nominal damages. In the context of a case where only declaratory relief is sought, they are matters which inform the discretion rather than any quantum of damages.[27]

[36] In parallel to the Court's reference in *Smith v Dooley,* Mr Mason provided a list of factors which might ultimately inform the Court's discretion in relation to whether or not to grant a declaration. Mr Mason listed 15 matters which, he submitted, indicate that a declaration should only be considered in this case after a trial. Ms Clapperton's evidence either touched on or developed a number of those matters which might go to the discretion.

[37] ITS and TLP are competitors in the market. Ms Clapperton has adduced evidence as to the response to her email from the various schools including King's High School. She suggests that Mr van de Klundert's motivation in seeking a declaration is "for marketing purposes". The Court of Appeal's judgment in *Salmon v McKinnon* indicates that the Court may take a plaintiff's motive into account in exercising the discretion as to relief.[28]

[38] Ms Clapperton's evidence also details the acrimonious nature of the business breakdown between the parties and difficulties which Ms Clapperton experienced in obtaining from Mr van de Klundert the comprehensive records which he was contractually obliged to supply. Her evidence, including NZQA correspondence, points to the importance of the required information. Mr Mason cast Ms Clapperton's case in this regard somewhat colourfully upon the basis that she was "more sinned against than sinning". Put another way, there was evidence to indicate that Mr van de Klundert's failure to deliver comprehensive documentation resulted in Ms Clapperton having not only to write to schools but to do so under time constraints. While that might not ultimately cut across a finding that the email contained defamatory material, it is nevertheless relevant to whether discretionary relief ought to be granted.

---

27 Although they might inform the quantum of any costs award, given the discretion of the Court under s 24(2)(b) not to impose solicitor and client costs.

28 *Salmon v* McKinnon, above n 20, at [49].

[39] Somewhat related is Ms Clapperton's grievance in relation to the email sent by Mr van de Klundert to NZQA on 10 April 2014, which Mr van de Klundert had agreed in May to retract but only did so on 22 September 2014. The email had the potential to cause serious damage to ITS. Mr van de Klundert's conduct in sending the email and then his delay in retracting it may be considered relevant to the Court's exercise of its discretion.

[40] Mr Mason refers to unsatisfactory aspects of Mr van de Klundert's evidence in relation to this application itself, and in particular Mr van de Klundert's incorrect implication that Ms Clapperton had not asked for further records. The correspondence exhibited by Ms Clapperton appears to contradict the plaintiff's evidence in this regard.

[41] Mr Mason submits also that it is relevant that there are uncertainties in the evidence as to how exactly TLP was running its courses and with what accreditation and rights of accreditation. Given the way the evidence has emerged in that regard, I can observe from the Court's perspective that exactly what happened is less than clear. The evidence is relatively piecemeal. That is not surprising in an interlocutory context.

Conclusion

[42] In a summary judgment context, it is the responsibility of the plaintiff to satisfy me, not only that defamation is made out and that qualified privilege does not apply but also, that a trial Court would have to conclude that declaratory relief was appropriate.

[43] While not all the matters raised for Ms Clapperton against the granting of declaratory relief are of a compelling nature on their own, Mr Mason is able to point to a range of factors which, taken together, might persuade a trial Judge to refuse a declaration. That is enough reason in itself to refuse summary judgment.

[44] Following on or closely related to that conclusion is the difficulty for the Court in relation to the second heading of relief claimed upon the summary judgment application, namely full reimbursement of Mr van de Klundert's legal costs pursuant

to s 24 Defamation Act 1992. Because of a successful plaintiff's presumptive right to solicitor and client costs (that is subject only to a different order of the Court), the costs relief in this area has more the nature of a substantive remedy than applies to the scale or other costs which are awarded in civil litigation generally.

[45] Although counsel did not address me on this in their submissions, it appears to me on reflection that the matters of fact which might inform the discretion on whether to make a declaration will have equal relevance to the Court's discretion in whether to depart from the presumption of solicitor/client costs.

The summary judgment context

The relevance of pleadings in defamation proceedings

[46] There is not merely an arguable case but a strong case that Ms Clapperton's email to the School was written on an occasion of qualified privilege.

[47] If the Court is to then examine whether the defence of qualified privilege succeeds, it must do so by reference to the plaintiff's assertion that s 19 of the Defamation Act applies because Ms Clapperton was predominantly motivated by ill-will towards Mr van de Klundert or otherwise took improper advantage of the occasion.

[48] For two slightly different reasons, I have concluded that the determination of that issue in this particular case cannot appropriately be made on a summary judgment context.

[49] While I accept Mr Mason's submission that the plaintiff was required, in compliance with s 41 of the Act, to serve a notice in relation to ill-will or improper advantage, I am not prepared to conclude that the failure to have served such a notice when a summary judgment hearing was pending precludes the plaintiff's reliance on such arguments. But the very fact that the plaintiff's election to pursue summary judgment has resulted in the issue of ill-will coming before the Court without proper pleadings points to the danger in a summary procedure when the law and statutory provisions relating to defamation are intended to ensure the issues are clearly

articulated before they are tried. The observation of Heath J in *Lee v The New Career Herald Ltd* is apposite:[29]

> Pleadings in defamation proceedings retain a more formal character than generally applies in other proceedings.

[50] This case reached the point of a summary judgment hearing without the pleadings required by the legislation having been completed. The particulars of ill-will required by s 41 of the Act have still not been provided. The nearest the plaintiff has come to such particulars is by some narrative paragraphs in Mr Andersen's submissions.

A case for robustly rejecting evidence as to honesty?

[51] Ms Clapperton has asserted the honesty of her actions in sending the email. She has explained, without going into detail, some medical matters which might go to explain at least one assertion in her email which she accepts was incorrect. She has explained the degree of urgency which attached to her dealing with the issues which faced ITS.

[52] I would have been inclined to find on this ground also that the Court is not in a position in a summary judgment context to robustly reject her evidence. Because I find for the two reasons expressed above that the application must be dismissed, I will refrain from analysing the competing arguments of Mr Andersen and Mr Mason as to the plausibility or otherwise of Ms Clapperton's evidence. If the matter proceeds to trial, the weighing of that evidence will be for the trial Judge. My further analysis of evidence limited to affidavits will not assist.

[53] I similarly leave to one side the submissions I heard as to whether or not the meanings of the email, as pleaded by the plaintiff, are sustainable and defamatory. By not addressing those submissions, I am not to be taken as impliedly neglecting Mr Mason's submissions or indeed the plaintiff's case in those regards. It is simply unnecessary in this judgment given my above conclusions.

---

[29] *Lee v The New Career Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 at [36].

Outcome

[54] The summary judgment application must be dismissed.

[55] In accordance with the Court of Appeal's practice outlined in *NZI Bank Ltd v Philpott,* the costs of the plaintiff's application are to be reserved.[30]

Orders

[56] I order:

(a) the plaintiff's interlocutory application dated 29 September 2014 is dismissed; and

(b) costs are reserved.

Associate Judge Osborne

Solicitors:
Alister D Paterson, Dunedin
Counsel: L A Andersen, Dunedin
Wadham Partners, Palmerston North
Counsel: G Mason, Barrister

[30] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).