IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000733
[2016] NZHC 1028

BETWEEN	CROSSFIT INC Plaintiff
AND	EXERCISE INDUSTRY ASSOCIATION LIMITED First Defendant
AND	R G BEDDIE Second Defendant
AND	INTERNATIONAL CONFEDERATION OF REGISTERS FOR EXERCISE PROFESSIONALS LIMITED Third Defendant

Hearing:	26 April 2016
Appearances:	D Salmon for First and Second Defendants (Applicants) A L Ringwood for Plaintiff (Respondent) (C R Langstone, for Third Defendant, excused from the hearing)
Judgment:	18 May 2016

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on interlocutory applications

Introduction

[1] In 2014, Richard Beddie spoke to and communicated with representatives of the print and television media on a number of occasions. He spoke about issues arising through some training in the fitness industry. Statements made by Mr Beddie appeared in newspaper articles and in television programmes (and were reproduced on websites).

[2] The plaintiff (CrossFit) is an American corporation which provides fitness training services internationally and licenses associated intellectual property under the "CrossFit" brand.

[3] In the newspaper articles and the television programmes, references were made to CrossFit.

[4] CrossFit sues the defendants in defamation (three causes of action); injurious falsehood (one cause of action); and breaches of ss 9, 11 and 23, Fair Trading Act 1986 (pleaded as one cause of action).

[5] The defendants are respectively:

(a) First defendant – a company which trades as Exercise Association of New Zealand (EANZ).

(b) Second defendant (Mr Beddie) – the chief executive officer and sole director of EANZ, and chairman and director of the third defendant.

(c) Third defendant – a company which trades as the International Confederation of Registers for Exercise Professionals (ICREPS).

[6] CrossFit sues all three defendants upon the basis that statements made by Mr Beddie were made not only in his personal capacity but also in his capacities as chief executive officer of EANZ and chairman of ICREPS.

[7] CrossFit alleges that in those two capacities, Mr Beddie promotes membership of the New Zealand Register of Exercise Professionals (NZREPs). CrossFit also alleges that CrossFit does not require CrossFit trainers to register as members of NZREPs.

The interlocutory applications

[8] EANZ and Mr Beddie pursue three applications, namely for orders:

(a) striking out CrossFit's fifth cause of action (breaches of the Fair Trading Act);

(b) striking out CrossFit's pleading of the meanings of particular statements made by Mr Beddie and alleged to be defamatory; and

(c) requiring CrossFit to give further and better particulars of unquantified allegations of damage.

[9] I will refer to the applicants throughout as "the defendants" although the third defendant takes no part in this application.

Striking out pleadings

High Court Rule 15.1 and the general principles

[10] High Court Rule 15.1 makes provision for orders striking out all or part of a pleading. In this case, the nature of the application is that the applicants assert, pursuant to r 15.1(1)(a), that neither the (defamatory) meanings pleaded by CrossFit nor the Fair Trading Act cause of action are reasonably arguable.

[11] The general principles applicable to the consideration of a striking out application are:[1]

(a) The Court is to assume that the facts pleaded are true (unless they are entirely speculative and without foundation).

(b) The cause of action must be clearly untenable in the sense that the Court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, even if requiring extensive argument.

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1 See *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

(e) The Court should be slow to rule on novel categories of duty of care at the strike out stage.

The pleading of defamatory meanings

The statutory provisions

[12] By s 37 Defamation Act 1992, the plaintiff must give particulars of every statement alleged to be defamatory and untrue (s 37(1)) and, where the subject of the proceedings is alleged to be defamatory in its natural and ordinary meaning, particulars of every meaning alleged unless that meaning is evident from the matter itself (s 37(2)).

[13] Under s 36 of the Act, it is the function of the Judge (in the absence of the jury) to determine whether the matter that is the subject of the proceedings is capable of a defamatory meaning.

The principles applied to determining whether words are capable of bearing a defamatory meaning

[14] I adopt the principles to be applied in determining whether words are capable of bearing a defamatory meaning as identified by Barker J in *New Zealand Magazines Ltd v Hadlee (No 2)*:[2]

> There was no dispute as to the principles to be applied in determining whether words are capable of bearing a defamatory meaning. These principles can be summarised as follows -
>
> (a) The test is objective. In the circumstances in which the words are published, what would the ordinary, reasonable person understand or infer from them as a matter of impression?
>
> (b) The stereotype of the ordinary, reasonable person is one of ordinary intelligence, general knowledge and experience of the world, with a capacity for reading between the lines; but not one who would indulge in strained or forced interpretation or groundless speculation. This hypothetical person must also be fair-minded, not avid for scandal, not unduly suspicious, nor one prone to fasten on to one

[2] *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) per Barker J at 630, Henry J agreeing with the analysis of Barker J at 635 and Blanchard J stating principles to similar effect at 625.

derogatory meaning when other innocent or at least less serious meanings could apply. [3]

(c) The words complained of must be read in context; in other words, the article as a whole must be construed with appropriate regard to the mode of publication and surrounding circumstances.

Alternative procedures

[15] On this application, the defendants have pursued an order striking out the meanings.

[16] An alternative course would have been for the defendants at some point to pursue the determination of a question under r 10.15 High Court Rules.

[17] The essential issue remains the same under the two procedures, namely whether the publication is capable of bearing the pleaded meanings.[4]

Second cause of action – the TVNZ incontinence interview

[18] On 22 June 2014, Television New Zealand (TVNZ) broadcast a news item concerning the incidence of female incontinence during exercise. The news item continued to appear on the TVNZ website until 30 March 2015.

[19] Mr Beddie had been interviewed by TVNZ for the purpose of the incontinence news broadcast.

[20] CrossFit pleads one particular statement made by Mr Beddie during the TVNZ incontinence interview.

21. During that interview ("the TVNZ incontinence interview") the second defendant said:

> Unfortunately when they've got two days training, which some people have, they don't know enough about what they don't know. Exercise professionals can actually help with it. Unfortunately some of the

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3 Footnotes omitted, Barker J referring to English authorities including *Charleston v New Group Newspapers Ltd* [1995] 2 AC 65 [1995] 2 All ER 313 (HL) at 71,320.

4 See, for instance, the analysis of the Court of Appeal in *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.

> cowboys are actually making the problem in the first place.

[21] CrossFit pleads the broadcasting of the incontinence news item and the interview of Mr Beddie.

[22] CrossFit pleads in relation to the interview of Mr Beddie –

> 22. The second defendant knew and intended when making those statements during the TVNZ incontinence interview that they were likely to be broadcast by TVNZ and expressly or impliedly authorised that.
>
> …
>
> 25. In the context of the relevant broadcast as a whole, the second defendant's statements in paragraph 21 above referred to CrossFit trainers and concerned the issue of incontinence in women, and meant that:
>
> (a) CrossFit trainers are not properly or adequately trained.
>
> (b) Some or all CrossFit trainers are cowboys.
>
> (c) CrossFit training carries a greater risk than other forms of exercise of causing incontinence in female clients.
>
> 26. The above meanings are defamatory of the plaintiff.

Defendants' pleading and application

[23] By their statement of defence, the defendants deny that Mr Beddie's statements in the TVNZ incontinence interview, in the context of the relevant broadcast as a whole, were capable of bearing the meanings pleaded by CrossFit at paragraph 25 of the claim.

Mr Beddie's statements in the context of the TVNZ incontinence broadcast

[24] The defendants, in support of their application, exhibited an electronic copy of the relevant broadcasts. At the request of counsel, I viewed the recordings, details of which counsel had addressed in their submissions.

[25] For the defendants, Mr Salmon identified the material features of the TVNZ incontinence broadcast in this way:

3.7 The news item referred to in the Claim as the "TVNZ incontinence interview" is two minutes long. It is introduced by the news anchor in the following terms (emphasis added):

> We have the flipside now to the rush to get fit. Medical professionals are warning the popularity of intense exercise **such as CrossFit and boot camps** are leading to more people getting caught short …

3.8 Though extracts of what the applicants understand are CrossFit videos are played during parts of the news item, those videos are not expressly attributed to CrossFit, and there is no further express mention of CrossFit by either the reporter or any interviewee.

3.9 The majority of the item goes on to feature interviews with Vicki Zumbraegel a former sufferer of incontinence during exercise, Dr Jackie Smalldridge, a uro-gynaecologist, and Maree Frost, pelvic floor physiotherapists, about the possible impact of intense exercise regimes on the continence of women with weak pelvic floors, and the increase in such cases observed by those persons in recent years.

3.10 The news item contains a brief extract of an interview with Mr Beddie. The extract is introduced as follows by the reporter (emphasis added):

> The Exercise Association says that **some** ill-informed trainers are pushing people beyond their limits.

3.11 This is followed by the following statements by Mr Beddie (emphasis added):

> Unfortunately, when they've got two days training, which **some** people have, they don't know enough about what they don't know. Exercise professionals can actually help with it. Unfortunately, **some** of the cowboys are actually making the problem in the first place.

[26] The emphasis added by Mr Salmon in paragraphs 3.7, 3.10 and 3.11 of his submissions is Mr Salmon's own emphasis for the purpose of argument, and not an emphasis apparent in the recording itself.

[27] In his submissions for CrossFit, Mr Ringwood did not rely on any other spoken words in the TVNZ incontinence interview. Rather, he observed that the only exercise provider actually named in the broadcast was CrossFit and that the broadcast as a whole included:

> … the introduction which identified CrossFit, the use of CrossFit branding in video clips, and the voiceover which introduced Mr Beddie's comments.

[28] A more expansive explanation of those three matters is relevant:

(a) *The introduction*

The newsreader's introduction is in these terms –

> The flipside now to the rush to get fit. Medical professionals are warning that the popularity of intense exercise such as CrossFit and Bootcamps are leading to more people getting caught short.

The presenter then crosses over to another interviewer.

(b) *Appearance of CrossFit advertising in video clips*

Two video clips appear during the broadcast while the presenter is discussing the incontinence issue or conducting interviews. Both clips are of what appear to be exercise competitions in a gymnasium in which advertising hoardings, some of which advertise CrossFit, are seen in the background.

(c) *Voiceover introducing Mr Beddie's comments*

The voiceover introducing Mr Beddie's comments records:

> The Exercise Association says some ill-informed exercise trainers are pushing people beyond their limits.

Discussion

[29] I will discuss together the first two meanings pleaded by CrossFit ("CrossFit trainers are not properly or adequately trained" and "some or all CrossFit trainers are cowboys"). Both allege a meaning of universal application to CrossFit trainers. The meanings cannot be sustained either by reference to the statements made by Mr Beddie either in their own terms or in the context of the broadcast as a whole. The ordinary reasonable person would understand Mr Beddie's statements, in the context of the broadcast, to relate to some individual trainers and not to the entire CrossFit organisation or body of CrossFit trainers.

[30] The third meaning pleaded ("CrossFit training carries a greater risk than other forms of exercise of causing incontinence in female clients") requires a different analysis to the two meanings previously pleaded. The context in which Mr Beddie's interview appears is the warning, quoted at the start of the TVNZ incontinence broadcast, that:

> The popularity of intense exercise such as CrossFit and bootcamps are leading to more people getting caught short …

[31] When Mr Beddie in his interview comes to refer to "the problem", the ordinary reasonable person could reasonably understand the reference to be the incontinence problem. They could also reasonably understand that the "cowboys" creating the problem are those who have had only "two days training" and that that is to be a reference to some CrossFit trainers.

[32] The words used by Mr Beddie are capable, in the context of the TVNZ incontinence interview, of bearing the defamatory meaning alleged.

[33] I will accordingly be striking out the meanings alleged at paragraph 25(a) and (b) but dismissing the application in relation to paragraph 25(c).

Third cause of action – the TVNZ CrossFit interview

[34] On 20 August 2014, TVNZ broadcast a news item concerning CrossFit. The item continued to appear on the TVNZ website until 30 March 2015.

[35] Mr Beddie had been interviewed by TVNZ for the purpose of the TVNZ CrossFit news item.

[36] CrossFit pleads two particular statements made by Mr Beddie during the TVNZ CrossFit interview:

> 29. During that interview… the second defendant said:
>
> (a) "There are individuals out there who are giving out exercise advice who don't have sufficient training."
>
> (b) "The key thing is: do they meet standards that the industry has agreed on."

[37] As its third cause of action, CrossFit pleads the broadcasting of the TVNZ CrossFit news item and the TVNZ CrossFit interview of Mr Beddie. As in relation to the TVNZ incontinence interview, CrossFit pleads that Mr Beddie knew and intended when making those statements during the CrossFit interview that they were likely to be broadcast by TVNZ and that he expressly or impliedly authorised that.

[38] CrossFit then pleads the meanings upon which it relies:

> 33. In the context of the relevant broadcast as a whole, the second defendant's statements in the TVNZ CrossFit interview set out in paragraph 29 above referred to CrossFit trainers and meant that:
>
> (a) CrossFit trainers are not properly or adequately trained.
>
> (b) CrossFit trainers do not meet agreed industry standards.
>
> (c) CrossFit trainers put their clients at risk.

Defendant's pleading and application

[39] By their statement of defence, the defendants deny that Mr Beddie's statements in the TVNZ CrossFit interview, in the context of the relevant broadcast as a whole, were capable of bearing the meanings pleaded by CrossFit at paragraph 33 of the claim.

Mr Beddie's statements in the context of the TVNZ CrossFit news item

[40] As with the TVNZ incontinence broadcast, I have viewed a recording of the TVNZ CrossFit broadcast.

[41] For the defendants, Mr Salmon identified the material features of the TVNZ CrossFit broadcast in this way:

> **The "CrossFit interview" - the statements**
>
> 3.16 The "Cross Fit interview" news item (pleaded at paragraphs 28-29) of the Claim is less than two minutes long in total. It is introduced by the news anchor in the following terms (emphasis added):
>
> > It's taken the fitness world by storm, high intensity workout CrossFit. Here, nearly 10,000 people are into the exercise regime, but now there are fears **some** trainers aren't properly qualified, and could put people at risk...

3.17 The introduction is followed by a number of clips featuring CrossFit participants, and which includes the following narration (emphasis added):

> These CrossFitters say their coaching is top-notch, but the Exercise Association, which represents fitness centres, says that's not **always** the case.

3.18 A clip featuring Mr Beddie follows, in which he makes the following comment:

> There are **individuals** out there who are giving exercise advice who don't have sufficient training.

3.19 The reporter then continues his narration (emphasis added):

> **Some** CrossFitters say their concern is with the coach training CrossFit, all they need to do is a two day workshop.

3.20 A clip is then played featuring Darren Ellis, a New Zealand CrossFit instructor, making the following comments (emphasis added):

> So, someone who is coaching CrossFit should have done years of study, and this [meaning the two day workshop] is another string to their bow. **Some** people are taking that two day qualification, deciding that that's enough for them.

3.21 The reporter then discusses Mr Ellis' qualifications, noting that Mr Ellis wants "the bar set much higher for the fitness industry". This is followed by further comments from Mr Ellis: "More standards, more policing, would certainly be a great thing."

3.22 After this, Mr Beddie is reintroduced in the following manner:

> The Exercise Association says putting all coaches on the country's register of exercise professionals, or REPs, would allow the industry to set a consistent standard of training.

3.23 Mr Beddie is then shown making the following statement (emphasis added):

> **There are many good CrossFit trainers out there**. The key thing is [though]: do they meet standards that the industry has agreed on?

3.24 The item then goes on to discuss Mr Ellis' view on the merits of REPs registration before concluding:

> Both sides still trying to find a solution, but both agree, people thinking of doing CrossFit should do their homework on the instructor first.

[42] As with Mr Salmon's submissions in relation to the TVNZ incontinence interview, the emphasis added by Mr Salmon in the paragraphs I have quoted is (with one exception) Mr Salmon's own emphasis for the purpose of argument rather

than an emphasis evident in the recording itself. The one exception is that Mr Beddie in the audio record does himself place emphasis on the word "many" in the passage referred to at Mr Salmon's paragraph 3.23 set out above.

[43] In his submissions for CrossFit, in relation to the TVNZ CrossFit broadcast, Mr Ringwood did not rely on any other spoken words in the TVNZ CrossFit interview. Rather, he referred again to the fact that the news item concerns only CrossFit trainers.

[44] As with the contest between the parties on the first two meanings pleaded in relation to the TVNZ incontinence interview, the defendants' complaint with the meaning attributed to Mr Beddie's TVNZ CrossFit interview is the suggestion that Mr Beddie was making a blanket comment concerning all CrossFit trainers. The meanings pleaded by CrossFit involve the proposition that Mr Beddie may be reasonably understood to have been referring to all CrossFit trainers.

[45] The statements relied upon by CrossFit begin with Mr Beddie's express reference to "individuals out there". When the full context to which I have referred is considered, the words remain incapable of supporting a meaning which covers all CrossFit trainers. That was not a meaning capable of being taken from Mr Beddie's statements.

[46] I will accordingly be striking out the meanings alleged in paragraph 33 of the statement of claim.

Fifth cause of action – breach of s 23 Fair Trading Act

CrossFit's pleadings

[47] Under its fifth cause of action, CrossFit claims relief by reason of breaches of s 23 Fair Trading Act and also of ss 9 and 11. I will return to ss 9 and 11 below at [73].

[48] Section 23 Fair Trading Act proscribes the use of harassment and coercion in connection with the supply of goods or services. In full it reads:

> **23 Harassment and coercion**
>
> No person shall use physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

CrossFit's allegations of fact

[49] CrossFit bases its Fair Trading Act claims on the sequence of discussions which Mr Beddie had with print and television media in 2014. I have referred to the TVNZ incontinence interview (which occurred around 22 June 2014) and the TVNZ CrossFit interview (which occurred around 20 August 2014). In addition, CrossFit repeats its pleading of the first cause of action, which I have not dealt with in relation to this point as it is not in itself the subject of the defendant's strike out application.

[50] By the first cause of action, CrossFit pleads communications between Mr Beddie and a journalist in March 2014. Following the interview, the journalist wrote an article headed "Fitness can be bad for your health" which was published in newspapers and on a newspaper website on 23 March 2014, remaining on websites until dates in 2015. CrossFit pleads that Mr Beddie's statements meant that (I summarise):

(a) CrossFit has resulted in six deaths;

(b) CrossFit has rendered an Australian man paraplegic;

(c) by reason of those multiple deaths and that paraplegic injury, CrossFit is not a safe fitness training regime; and

(d) certified CrossFit trainers are not adequately trained and may push clients beyond their capability.

[51] For its Fair Trading Act causes of action, CrossFit repeats the pleading of the facts in relation to its first three causes of action.

[52] CrossFit thus pleads:

> 43. The second defendant's motivation in making the criticisms of CrossFit set out in paragraphs 9, 21, 29 and 36 above was:
>
> (a) To coerce CrossFit trainers into registering as members of The New Zealand Register of Exercise Professionals and paying the membership fee, so that they could avoid further criticism by the defendants of CrossFit training and Cross Fit trainers.
>
> (b) To coerce the plaintiff into requiring CrossFit trainers to register as members of The New Zealand Register of Exercise Professionals and paying the membership fee, so that the plaintiff and CrossFit trainers could avoid further criticism by the defendants of CrossFit training and CrossFit trainers.

[53] The allegation is of coercive persuasion rather than application of physical force.

[54] CrossFit seeks relief under s 41 Fair Trading Act (restraining the defendants from further engaging in the impugned conduct) and (unquantified) damages under s 43(3)(e) Fair Trading Act.

The defendants' strike out application

[55] The defendants seek an order striking out the fifth cause of action on the grounds that it shows no reasonably arguable claim of facts which would constitute a s 23 breach.

Coercion

[56] Counsel focussed their submissions on the concept of "coercion".

[57] Harassment and coercion are not concepts which can be pigeon-holed. Such is reflected in the judgment of Lord Romilly, MR, in *Ellis v Barker* where his Lordship said:[5]

> Coercion takes an infinite number of forms, but it may properly be thus defined: – the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have

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5 *Ellis v Barker* (1871) 40 LJ Ch 603 at 607.

> obtained, then it becomes coercion and it ceases to be persuasion or consideration.

[58] To similar effect the observation of Peterson J in *Hodges v Webb,* observing:[6]

> "Coercion" is a word of ambiguous import. In one sense, anyone is coerced who under pressure does what he would prefer not to do; but a reluctant debtor who pays under stress of proceedings is not coerced within the legal meaning of the word.…
>
> Coercion involves something in the nature of the negation of choice…

The statutory provision and authorities

[59] Section 23 Fair Trading Act was based on the Australian provision in s 60 Trade Practices Act 1974 (Cth).

[60] Section 60 Trade Practices Act is very similar but not identical to s 23. Section 60 provides:

> **Coercion at place of residence**.
>
> 60. A corporation shall not cause or permit a servant or agent of the corporation to use, at a place of residence, physical force, undue harassment or coercion in connexion with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

[61] Australian authorities have grappled with a degree of ambiguity that arises in the Australian legislation from the addition of the word "undue".[7] Those issues do not arise here.

[62] The Australian authorities serve to emphasise the evaluative nature of the exercise in which the Court is engaged when determining whether there has been coercion (or harassment).

[63] Also relevant is the observation by the authors of *Treitel,* as cited by the New Zealand Court of Appeal in *Pharmacy Care Systems Ltd v Attorney General.*[8] The

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6 *Hodges v Webb* [1920] 2 Ch 70 at 85-87.

7 See, for instance, *Australian Competition & Consumer Commission v The Maritime Union of Australian* [2001] FCA 1549, (2001) 114 FCR 472 per Hill J at 59-65.

8 G H Treitel *The Law of Contract* (9th ed, Sweet & Maxwell, London, 1995) at 375, cited in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 at [91]; leave to appeal refused: *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (SC).

decision was in the context of a claim to set aside a contract by reason of duress said to have vitiated consent. The passage in *Treitel* again recognises the fact-specific nature of the enquiry when any allegation of coercion is made:[9]

> Whether the threat actually gives rise to duress must then be considered by reference to its coercive effect in each case: no particular type of threat is regarded either as *ipso facto* having such an effect, or as being incapable, as a matter of law, of producing it.

The facts pleaded in this case

[64] CrossFit pleads that the defendants share an interest in the promotion of membership of NZREPs, while CrossFit itself does not require CrossFit trainers to register as members of NZREPs.

[65] The thrust of CrossFit's claim under s 23 Fair Trading Act is that Mr Beddie's series of interviews (March 2014, June 2014 and August 2014) were calculated to persuade CrossFit, against its preferred course, to have CrossFit trainers register with NZREPs. Within CrossFit's pleaded case under its fifth cause of action, there also lies the allegation that each of Mr Beddie's three interviews contain statements that were defamatory of CrossFit.

Discussion – strike out application

[66] I am required to apply the general principles relating to the strike out of pleadings as I have summarised them above.[10] I therefore ask myself – am I certain that the fifth cause of action is clearly untenable in the sense that it cannot succeed, and is this such a clear case that it is appropriate to utilise this sparingly-exercised jurisdiction?

[67] The defendants have failed to satisfy me that the fifth cause of action is clearly untenable.

[68] There are features of this case in terms of the pleadings from which a Court might conclude, when the evidence is adduced, that the conduct as pleaded

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9 At 375. For the latest edition, see Edwin Peel *Treitel: The Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [10-002].

10 Above at [11].

amounted to coercion under s 23 Fair Trading Act. The background (common interest of the defendants in relation to membership of NZREPs) is relevant. In terms of the authorities to which I have referred, coercion carries with it the concept of the negation of choice. Such may occur through either express or implied threat. The sequential nature of interviews through 2014, particularly if Mr Beddie is found to have made defamatory statements in one or more of them, might be found to have amounted to conduct which was improperly placing pressure on CrossFit. At that point, it will be a matter for the trial Court to determine whether the conduct was by its nature coercive – it is unnecessary that the Court finds that the conduct succeeded in changing CrossFit's practices.

[69] For CrossFit, Mr Ringwood explained the threat which he says arose in this case. He submitted that, for the fifth cause of action, the statements which arguably give rise to the defamation claims are not in themselves the threats. Rather, the Court will be asked to find that the defendants' conduct indicated that statements might continue to be made about CrossFit and CrossFit trainers if CrossFit trainers did not take up NZREPs membership. As Mr Ringwood put it in his written synopsis:

> 58. The alleged coercion is that Mr Beddie will continue to make those kinds of statements unless CrossFit trainers join his organisation's register and pay its membership fee. Once they pay the fee and join the register they will be "qualified" as far as Mr Beddie is concerned and will no longer be criticised by him. It is a standover tactic; i.e. a form of extortion.

[70] There may be a number of developments between now and the close of evidence at trial which are found to justify the allegation of coercion. Such matters may arise through steps such as discovery, interrogatories and cross-examination.

[71] It is not appropriate to strike out the fifth cause of action.

[72] I have reached the above conclusion by reference to counsels' submissions which focused on the concept of coercion under s 23. Counsel did not address me on the concept of harassment under s 23. I therefore do not consider that as an alternative basis of the fifth cause of action although it may be open to CrossFit to characterise the pleaded conduct as either coercion or harassment (or both), given

that Mr Ringwood relies particularly on the repeated nature of Mr Beddie's statements.

Fifth cause of action – ss 9 and 11 Fair Trading Act

CrossFit's claim

[73] CrossFit pursues its fifth cause of action not only upon the basis of s 23 Fair Trading Act but also on the basis of ss 9 (misleading and deceptive conduct generally) and 11 (misleading conduct in relation to services) of the Fair Trading Act.

The strike out application

[74] The defendants assert that the fifth cause of action, to the extent based on ss 9 and 11 Fair Trading Act, is untenable because s 15 Fair Trading Act is a bar to any claim under ss 9 and 11 by reason of the defendants' not being news media organisations.

[75] This application raises a fundamental issue as to the correct interpretation of s 15. Counsel have informed me that they have not identified any New Zealand case law directly on the point involved. The lack of direct authority does not drive the Court to simply refuse the strike out application. The Court is called upon, notwithstanding the interlocutory context, to determine and apply the correct interpretation of s 15.

Section 15 Fair Trading Act

[76] Section 15 provides:

> **15 Limited application of sections 9 to 14 of this Act to news media**
>
> (1) Nothing in sections 9 to 14 of this Act applies to the publication of any information or matter in a newspaper by the publisher of that newspaper, not being—
>
> (a) the publication of an advertisement; or
>
> (b) the publication of any information or matter relating to the supply or possible supply or the promotion of

the supply or use of goods or services or the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land by—

(i) that publisher or, where that publisher is a body corporate, by any interconnected body corporate; or

(ii) any person who is a party to any contract, arrangement, or understanding with that publisher relating to the content, nature or tenor of the information or matter.

(2) Nothing in sections 9 to 14 of this Act applies to the broadcasting of any information or matter by a broadcasting body, not being—

(a) the broadcasting of an advertisement; or

(b) the broadcasting of any information or matter relating to the supply or possible supply or the promotion of the supply or use of goods or services or the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land by—

(i) that broadcasting body, or where that broadcasting body is a body corporate, by any interconnected body corporate; or

(ii) any person who is a party to any contract, arrangement, or understanding with that broadcasting body relating to the content, nature or tenor of the information or matter.

(3) For the purposes of this section—

(a) the expressions **broadcasting** and **broadcasting body** shall have the same meanings as they have in section 2 of the Broadcasting Act 1976:

(b) **newspaper** has the meaning given to that term by section 2 of the Films, Videos, and Publications Classification Act 1993:

(ba) **publisher**, in relation to a newspaper, means its proprietor:

(c) any 2 or more bodies corporate are to be treated as interconnected if one of them is a body corporate of which the other is a subsidiary (within the meaning of section 5 of the Companies Act 1993), or if both of them are subsidiaries (within the meaning of that section)]] of one and the same body corporate; and **interconnected body corporate** shall be construed accordingly.

The ambiguity in s 15

[77] By their submissions, counsel both recognised an ambiguity in the opening words of each of ss 15(1) and 15(2) Fair Trading Act. It arises from these words in particular –

> (1) Nothing in sections 9 to 14 applies to the publication of any information or matter in a newspaper by the publisher of that newspaper …
>
> (2) Nothing in sections 9 to 14 applies to the broadcasting of any information or matter by a broadcasting body…

[78] One interpretation of those words, contended for by Mr Salmon, is that it is the event of publication or broadcasting which ousts the operation of ss 9 – 14. On that view, persons involved in publishing the newspaper (or broadcast) and anyone quoted in the newspaper (or broadcast) have no liability.

[79] The competing contention, advanced by Mr Ringwood, is that the key words in the s 15(1) and (2) exception are the words "by the publisher of that newspaper" and by a "broadcasting body", with no one other than the persons who qualify as the publisher of the newspaper or the broadcaster having s 15 protection.

[80] In CrossFit's notice of opposition, Mr Ringwood summarised the ground of opposition thus:

> Section 15 of the Fair Trading Act provides a limited defence to the news media. It does not provide a defence to third parties such as the first and second defendants.

[81] I recognise that there is an ambiguity of expression in s 15.

The approach to statutory interpretation

[82] The legislative direction governing general principles of interpretation of statutes is contained in s 5 Interpretation Act 1999 which provides:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[83] I begin with the text. It may be suggested that in the verbal structuring of s 15(1) and 15(2) there is a degree of support for Mr Salmon's submission that it is the event of publication which is the focus of the exclusion. By s 15(1), Parliament has provided that "nothing in ss 9 to 14 applies to the **publication** …". Had the focus been on the person publishing rather than the event of publication, such narrower approach could have been achieved in a more direct manner by beginning –

> Nothing in ss 9 – 14 applies to the publisher of a newspaper in relation to the publication of any information …

[84] Counsel referred me to no other matter in the internal text of s 15 which might assist to resolve the ambiguity.

[85] On the other hand, the heading to s 15 is available as an aid to interpretation.[11] The heading to s 15 is:

> **15 Limited application of sections 9 to 14 of this Act to news media**

[86] Mr Ringwood submits that the heading identifies a focus upon news media organisations and not upon the event of publication. He notes that this is consistent with his proffered interpretation of s 15(1) and 15(2) with the references to "by the publisher of that newspaper" and "by a broadcasting body" being interpreted to create an exclusion for the benefit of the publisher/broadcaster but not others. I will come to further consideration below of the significance of the heading when I refer to the equivalent Australian provision and Australian authority.

[87] In the course of oral submissions, it occurred to me that the expression "news media" in the heading to s 15 might itself be regarded as ambiguous in that "media" might be taken to be a reference either to media organisations as entities or to the media by which such organisations publish their material. There do not appear to be

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[11] Interpretation Act 1999, s 5(3), above at [82].

any other references to "news media" in the Fair Trading Act which might assist with interpretation. That said, the expression "media" has for some time been commonly applied to the organisations which are the entities involved, being organisations publishing newspapers, or broadcasting through radio and television. Such usage is reflected in the Defamation Act itself – for instance, the provisions under s 43 of that Act in relation to damages refer to "Any proceedings for defamation in which a news medium is the defendant …", notwithstanding the fact that s 2 of the Act defines "news medium" in the "channel of communication" sense:

> news medium means a medium for the dissemination, to the public or to a section of the public, of news, or observations on news, or advertisements:

The "chilling" effect of not protecting sources

[88] For the defendants, Mr Salmon submitted that the Court in interpreting the scope of the s 15 protection is entitled to have regard to "the chilling effect on genuine media reportage that would arise if the Fair Trading Act were applied to news reportage". Mr Salmon added that it is obvious why Parliament would not want news reporters to be hamstrung by the imposition of Fair Trading Act strict liability or the absence under the Fair Trading Act of defamation defences.

[89] The chilling effect of the Court orders requiring disclosure of press sources is a matter taken into account by courts – Laws LJ in *Ashworth Hospital Authority v MGN Ltd* referred to the Court's consideration of the chilling effect in defamation cases in this way:[12]

> In my judgment, the true position is that it is always prima facie … contrary to the public interest that Press sources should be disclosed; and in any given case, the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way.

[90] People interviewed for a news item and to be quoted in that item are in a very different category to the "Press sources" referred to in *Ashworth Hospital Authority* and similar cases. That latter category of people – "Press sources" – are able to

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[12] *Ashworth Hospital Authority v MGN Ltd* [2001] 1 All ER 991 (CA) at [101]. This passage has been cited with approval by New Zealand Courts on a number of occasions – see, for instance, *Police v Campbell* [2010] 1 NZLR 483 (HC) at [66].

provide information to the media because of the confidentiality which will be preserved. To not protect the confidentiality would be to chill the source.

[91] In relation to the scope of s 15, there is no basis on which to ascribe to Parliament a particular intention based on a concern as to the chilling effect on recorded interviewees. Counsel have not referred to parliamentary material which makes reference to a concern or consideration, through s 15, to provide protection to people such as interviewees whose recorded interviews are to be aired. There is no reason, through analogy with the chilling effect in relation to Press sources, to infer such a concern.

Parliamentary materials – New Zealand

[92] For CrossFit, Mr Ringwood referred me to one item of the parliamentary record. The Courts recognise parliamentary materials as a legitimate aid to the interpretation of its statute.[13] The authors of *Statute Law in New Zealand* state accurately in relation to Select Committee commentary:[14]

> Sometimes the materials, in particular, changes made to a Bill and the Select Committee's commentary on those changes, may give a sharper understanding of the intention of Parliament in respect of a word or phrase.

[93] Mr Ringwood referred to the explanation of the s 15 provision by the Commerce and Marketing Committee when it reported the Fair Trading Bill to Parliament on 1 July 1986. It stated:[15]

> News media interests submitted that some of the provisions of Pt 1 could overlap the law of defamation. A limited exception has therefore been **provided to newspapers and broadcasting bodies** to ensure that the Bill does not encroach upon the freedom of the Press.

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13 See, for instance, *R v Pora* [2001] 2 NZLR 37 (CA) at [104]; and see also the cases referred to in RI Carter (ed) *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at [9(d)(v)].

14 At [9(d)(v)(viii)] (citations omitted).

15 (1 July 1986) 472 NZPD 2499 (emphasis added).

Parliamentary history – Australia

[94] In the Australian Commonwealth, it was the Trade Practices Act 1974 (Cth) which proscribed misleading and deceptive conduct.[16] Section 65A Trade Practices Act was the equivalent provision to s 15 of the Fair Trading Act.

[95] From the discussion which follows it is apparent:

(a) The New Zealand provision is closely modelled on the Australian provision.

(b) The Australian provision expressly protects a defined class of "prescribed information providers".

(c) The Australian provision was enacted after the enactment of the Trade Practices Act, to remove the strict liability that may have applied to news media (and to others) under the legislation as first enacted.

(d) The focus of the amendment was on protection of a defined class of person rather than on the event of publication.

[96] Section 65A Trade Practices Act provided:

> 65A **Application of provisions of Division to prescribed information providers**
>
> (1) Nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than—
>
> (a) a publication of matter in connection with—
>
> (i) the supply or possible supply of goods or services;
>
> (ii) the sale or grant, or possible sale or grant, of interests in land;
>
> (iii) the promotion by any means of the supply or use of goods or services; or

[16] I note that the Trade Practices Act 1974 (Cth) was renamed the Competition and Consumer Act 2010 (Cth), effective 1 January 2011. Schedule 2, s 19 is the current equivalent of s 65A. It defines and protects "information providers" in similar terms.

(iv) the promotion by any means of the sale or grant of interests in land,

where—

(v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or

(vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with—

(A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or

(B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or

(b) a publication of an advertisement.

(2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if—

(a) in any case — the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or

(b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of 'prescribed information provider' in sub-section (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition) — the publication was by way of a radio or television broadcast by the prescribed information provider.

(3) In this section:

prescribed information provider means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes:

(a) the holder of a licence granted under the Broadcasting Services Act 1992; and

(aa) a person who is the provider of a broadcasting service under a class licence under that Act; and

(ab) the holder of a licence continued in force by subsection 5(1) of the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992; and

(b) the Australian Broadcasting Corporation; and

(c) the Special Broadcasting Service Corporation.

> ***relevant goods or services***, in relation to a prescribed information provider, means goods or services of a kind supplied by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.
>
> ***relevant interests in land***, in relation to a prescribed information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, where the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

[97] The modelling of the opening three lines of the New Zealand provision on the Australian counterpart is plainly evident through a comparison of s 15 (1) and (2) and s 65A. But the Australian protected category of "prescribed information provider" (defined in s 65A(3)) differs from the New Zealand protected categories of publisher of a newspaper and broadcasting body.

[98] The Australian s 65A(3) definition of "prescribed information provider" ("a person who carries on a business of providing information") means that the s 65A protection covers all such businesses. But the definition by its nature excludes persons from other businesses who happen to be interviewed for a publication or broadcast.

[99] In *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd*, French J (then a Judge of the Federal Court), considered the origin and purpose of s 65A.[17] His Honour stated:[18]

> It is appropriate to pay some regard to the genesis and purpose of s 65A.
>
> It was enacted by the Statute Law (Miscellaneous Provisions) Act (No 2) 1984 (Cth), and came into effect on 2 October 1984 some ten years after the commencement of the Trade Practices Act 1974.
>
> In that decade there had been only a few but significant decisions on the application of s 52 to statements published by the press or the electronic media.

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17 *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* [1987] FCA 340, (1987) 18 FCR 1.

18 At 6 – 7.

> None of these preceded the report of the Trade Practices Review Committee in August 1976 (the Swanson Committee Report). This perhaps explains the absence of reference to any suggested exemption for press or electronic media from the application of Pt V of the Act.
>
> At para 10.58 of its report the Committee wrote:
>
> > " … we consider that in general the Act should apply across the board and be admissible of exceptions only where a case for public benefit can be made out, or where Parliament has specifically legislated to regulate the area."
>
> There were already in place from the original enactment specific defences under s 85 applicable to publishers among others.
>
> The defences under s 85(1) of reasonable mistake, reasonable reliance on information supplied, the act or default of a third party and accident are applicable only to prosecutions under Pt VI and do not operate in respect of civil proceedings.
>
> Section 85(3) protects the person who publishes advertisements in the ordinary course of his business where he does not know and has no reason to suspect that the publication could amount to a contravention under Pt V. This defence appears to extend to civil proceedings.
>
> The responsibility under the Act of newspaper proprietors and telecasters for what they publish began to be explored in 1978.

[100] His Honour then referred to a number of judgments which recognised a problem for the media. It had become apparent that, in the absence of a statutory exclusion, newspapers had a possible strict liability under the Trade Practices Act alongside that of the persons whose statements they reported. His Honour then referred to steps taken from 1984 to consider reform, ultimately with the introduction of what became s 65A of the Trade Practices Act.

[101] French J referred in particular to the Second-Reading Speech:[19]

> Section 52(1A) never became law, but the more far reaching proposals in the form of s 65A did.
>
> The purpose of the provision was described by the then Attorney-General in his Second-Reading Speech on the Statute Law (Miscellaneous Provisions) Bill, set out in Australia, House of Representatives, Debates, 13 September 1984, 1296:
>
> > "A new section 65A is to be inserted in the Trade Practices Act 1974 to clarify the application of certain of the consumer protection provisions of that Act to the media and other persons who carry on

[19] At 9.

> business of providing information. Recent decisions of the Federal Court have suggested that a newspaper publisher may be taken to have engaged in conduct that is misleading or deceptive for the purposes of section 52 of the Trade Practices Act if the newspaper contains inaccurate information.
>
> The Government recognises the need to maintain a vigorous, free Press, as well as an effective and enforceable Trade Practices Act. In doing so, the Government recognises that, whilst the problem may have been highlighted by a defamation action, similar considerations apply in respect of actions for negligent mis-statement and actions for injurious falsehood. The Government also recognises that the difficulties in this area are experienced not only by the main newspaper, magazine and television publishers, but also by a wide range of other people who provide information.
>
> New section 65A will operate to exempt the media and other persons who engage in businesses of providing information from the operation of those provisions of Division 1 of Part V of the Trade Practices Act which could inhibit activities relating to the provision of news and other information."

The speech went on to describe the limits on the exemption, the objective of which was described in the following way:

> "These provisions ensure that information providers are not exempt from the consumer protection provisions of the Trade Practices Act in respect of the provision of information where they have what might be regarded as a commercial interest in the content of the information. In such cases, information providers must take the same responsibility for the accuracy of information as any other person who publishes information in trade or commerce. This can occur, for example, where a newspaper has agreed to publish a 'news' item about a product in exchange for the product supplier taking out paid advertising in that publication."

[102] I observe three particular points in the (Commonwealth) Attorney-General's Second-Reading Speech, namely:

(a) The concern leading to the introduction of a new s 65A lay in "recent decisions of the Federal Court [which] have suggested that a newspaper publisher may be taken to have [breached the Trade Practices Act] if the newspaper contains inaccurate information."

(b) The Government also recognises that the difficulties in this area are experienced not only by the main newspaper, magazine and television publishers, but also by a wide range of other people who provide information.

(c) The new section "will operate to exempt the media and other persons who engage in businesses of providing information from the operation of [the relevant part] of the Trade Practices Act" (self-evidently an explanation reflecting the wording of what became s 65A(3)).

[103] Although the reference in the Second-Reading Speech to "a wide range of other people who provide information" might at first sight be taken to cover those who are interviewed for news programmes, the Attorney's speech read as a whole and the provision of s 65A make it clear that the focus was on "the media and other persons who engage *in businesses of providing information"* (my emphasis).

[104] Thus, the Commonwealth parliamentary materials indicate that the focus was on an exemption for a defined class of persons (in relation to their publication) rather than to the event of publication.

Conclusion in relation to parliamentary history

[105] The parliamentary history as I have quoted it is an aid to interpretation, not the determinant of interpretation. That said, there is a consistency in the parliamentary history in both the Australian Commonwealth and in New Zealand which suggests that the intended meaning of s 15(1) - (2) Fair Trading Act is that it is the identified class of person who receives the protection of the section, rather than the event as such.

Case law

[106] Counsel indicated, as I have recorded, that they had been unable to find, in relation to the scope of s 15(1) and (2), authority directly on the point.

[107] Counsel nevertheless referred to three decisions which considered s 15 Fair Trading Act.

(a) In *Pharmaceutical Management Agency Limited v Researched Medicines Industry Association New Zealand Inc*, the Court refused interim injunctions in relation to alleged breaches of s 9 Fair Trading

Act.[20] McGechan J characterised Pharmac's approach to the litigation thus:[21]

> Pharmac accepts it needs to outflank s 15 of the Fair Trading Act 1986, and seeks to do so by categorising Adis liability as that of an accessory within ss 41 and/or 43.

His Honour then referred to the decision of French J in the *Advanced Hair Studio* litigation (above at [98]), French J had decided that case on the basis that the Court had jurisdiction to grant injunctions under the equivalent of our s 41, the s 15 exclusion therefore not applying. For the purpose of the application for an injunction, counsel accepted that s 15 does not apply to accessory liability. In reaching that point, McGechan J had noted of s 15:[22]

> Clearly, s 15 was added in a conscious endeavour to preserve freedom of the press.

(b) In *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2),* the Court rescinded an injunction which had been granted in relation to the broadcasting of "Fair Go" programmes.[23] The plaintiff was suing in defamation and under the Fair Trading Act. Smellie J referred to s 65A Trade Practices Act as "the equivalent of our s 15".[24] He referred to a 1987 Federal Court judgment in which Wilcox J had recognised that:[25]

> The intention of the Parliament obviously was to remove from the operation of s 52,[26] amongst other sections and subject to certain limitations, statements made by persons who were involved in the business of publishing information.

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20 *Pharmaceutical Management Agency Limited v Researched Medicines Industry Association New Zealand Inc* [1996] 1 NZLR 472 (HC).

21 At 478.

22 At 479.

23 *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520 (HC and CA).

24 At 535.

25 *Horwitz Grahame Books Pty Ltd v Performances Publications Pty Ltd* (1987) 8 IPR 25 (FCA) per Wilcox J at 27 – 28.

26 Equivalent to s 9 Fair Trading Act 1986.

Smellie J had to determine whether there was a serious question to be argued on the Fair Trading Act cause of action on the basis that Fair Go was a "broadcaster" which fell within the protection of s 15. His Honour's finding (that there was a serious question to be argued) is not directly relevant here.[27]

(c) In *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd*, the plaintiff (the Board) sued the defendant (Apple Fields) in both defamation and under the Fair Trading Act.[28] Apple Fields argued on a strike out application that the Fair Trading Act claim could not succeed as that would be to import a meaning to the Fair Trading Act that was inconsistent with the provisions of the New Zealand Bill of Rights Act 1990. In rejecting Apple Fields' application, Master Thomson stated:[29]

> I hold that sections 5 and 6 of the New Zealand Bill of Rights Act 1990 do not allow the defendant to cut down the meaning of s.9 of the Fair Trading Act (at least arguably so). Further s.9 should not I think be given a meaning that could allow Apple Fields to make false statements in trade with impunity. That I think follows from s.15 of the Fair Trading Act which provides that s.9 shall be of only limited application to the news media (see *Pharmaceutical Management Agency Limited v. Research* [sic] *Medicines Industry Association New Zealand Inc* (supra)). By necessary implication, I think the source of any statement in trade (whether or not reproduced by the news media) must be subject to the full force of s.9, or at least again, arguably so.

Apple Fields' strike out application accordingly failed. The contrast observed by Master Thomson between the protection of the news media and the lack of protection for those in trade whose statements are reproduced by the news media is consistent with the interpretation of s 15 advanced by Mr Ringwood.

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27 The decision was upheld by the Court of Appeal – *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)*, above n 22, at 540.

28 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* HC Wellington CP 211/96, 24 July 1997.

29 At 17.

Academic commentary

[108] Mr Salmon referred me to Professor Cheer's commentary in *Burrows and Cheer: Media Law in New Zealand* in relation to the competing interpretations as to the scope of s 15:[30]

> … the protection of the section extends to the publication of information by the publisher of a newspaper. 'Publisher' is defined to mean proprietor. An argument might possibly be based on this that the section protects only the newspaper company and not the "contributor" of the piece in question. However, it is more likely that the intention was to protect all involved in the preparation of the piece once it has been published.

[109] Mr Salmon submitted that the commentary supports the conclusion that the s 15 protection extends to persons such as Mr Beddie who are interviewed or otherwise provide information for the purposes of a newspaper article or broadcast.

[110] I do not read the commentary in that way. Those "involved" in a broadcast might be grouped in at least three categories:

(a) the proprietor of the relevant newspaper or the broadcasting body;

(b) those involved in the actual production of the item in conjunction with or support of the proprietor or broadcaster (such as production company and reporters); and

(c) those members of the public or related industries who are interviewed for or otherwise provide information which is used in the broadcast or publication.

[111] In *King v TV3 Network Services Ltd* Master Thomson held that the production company of a "Target" programme for TV3 was to be treated as falling within the s 15 concept of "broadcasting body".[31] Professor Cheer does not cite authority for the conclusion that "it is more likely that the intention was to protect all involved in the preparation of the piece once it has been published". *King v TV3*

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30 Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at [7.3.3].

31 *King v TV3 Network Services Ltd* HC Wellington CP86/01, 20 December 2001 (a decision on a strike out application).

Network Services Ltd might have been cited if the intention of the commentary is to recognise protection for my second category of those involved. In terms of the legislation interpreted against the background of its parliamentary history, I read the *Burrows and Cheer* commentary as not being intended to suggest that my category at [109](c) (such as interviewees) is within the s 15 protection.

Conclusion – interpretation of s 15

[112] I conclude that the correct interpretation of s 15 Fair Trading Act is that it protects the identified entities (publisher of newspaper/broadcasting body) when there is a defined event of publication or broadcasting or publication. Others, such as those involved in other trades, whose statements are carried in the publication or broadcast, are not protected by s 15. The publication or broadcast constitutes a republication of their statements for which they may be held liable for any proved breach of ss 9 – 14 Fair Trading Act.

[113] The defendants' strike out application in relation to the pleaded breach of ss 9 and 11 Fair Trading Act will be dismissed.

Further and better particulars of damage

CrossFit's pleading of damage

[114] CrossFit filed its initial statement of claim on 13 October 2014. It pleaded in relation to each cause of action that it had suffered and was likely to suffer loss as a result of the defendant's conduct. It sought "damages".

[115] For CrossFit, Mr Ringwood accepts that by reason of the provisions of s 6 Defamation Act, CrossFit's claim must fail unless CrossFit alleges and proves that the publication of the defamatory material has caused pecuniary loss or is likely to cause pecuniary loss to CrossFit.

[116] In the current version of CrossFit's claim, (second amended statement of claim) CrossFit alleges in relation to all causes of action that it had suffered loss in the form of:

(a) damage to goodwill;

(b) damage to reputation in the way of its business; and

(c) costs of mitigation.

[117] The costs of mitigation have been precisely particularised.

[118] In relation to damages, CrossFit seeks "an inquiry as to damages".

The application and opposition

[119] The defendants seek an order that CrossFit provide further and better particulars of each of the pleadings of damage (but excluding the cost of mitigation).

[120] CrossFit opposes the application. The notice of opposition states:

> The nature of the defamatory statements is however such that complex issues arise in the assessment of damages for damage to goodwill and reputation. Those damages claimed will be the subject of expert evidence and have not yet been quantified. It is not therefore presently possible to state the amount claimed for damage to the plaintiff's goodwill and reputation.

Particularisation of damage – the rules and principles

[121] Rule 5.32 High Court Rules provides:

> **5.32 Amount of money claim**
>
> A statement of claim seeking the recovery of a sum of money must state the amount as precisely as possible.

[122] The provisions of r 5.32 sit alongside the importance which the Court attaches to clear pleading of the case which a defendant faces. As observed by the Court of Appeal in *Hopper Group Ltd v Parker*:[32]

> One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the defendant has to meet. If that is not done, it is difficult for a defendant to prepare for trial and questions such as payment into Court or offers of settlement can hardly be considered.

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[32] *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363 (CA) at 366.

[123] More recently, in *Hunt v New Plymouth District Council,* the Court of Appeal upheld the trial Judge's decision to strike out the statement of claim on the ground that it did not plead losses of a kind recoverable for negligent misstatement.[33] In reaching that conclusion, the Court referred to r 5.32 and continued:[34]

> It is no answer to say that the evidence of a valuer would have been necessary to establish any such losses. If Mr Hunt wished to pursue his claim in this respect, he should have provided the necessary particulars. It is not sufficient to assert that there is a loss and then to seek an inquiry into damages. This is not a case where some loss is established but the extent of it is unknown.

Counsel's submissions

[124] For the defendants, Mr Salmon recognised that some claims are more easily quantified than others. Defamation claims, unlike money claims under loan contracts, will always involve a degree of estimation. Mr Salmon submitted that the relevant features of this litigation are as follows:

(a) CrossFit sues on statements published some two years ago;

(b) discovery in the proceeding has been completed – CrossFit will have all its own materials relevant to financial loss and the like and also has access to the defendants' materials (should they be relevant to the quantification of damage);

(c) the justification for the interim or "stopgap"[35] approach of seeking "an inquiry as to damages", which may be appropriate in some cases, has been overtaken in this case by the passage of time and the completion of discovery; and

(d) CrossFit should now either be able to identify both the types of damage it claims to have suffered and to estimate or state particularly the sum of money sought.

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33 *Hunt v New Plymouth District Council* [2011] NZCA 406.

34 At [82].

35 See the commentary in A C Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR5.32.02].

[125] CrossFit did not file evidence in opposition. The Court will accept counsel's statement in the notice of opposition that "those damages have not yet been quantified" but that does not permit the Court to find (in the absence of evidence) that CrossFit has taken all appropriate steps towards identifying and assessing its damages so as to comply with its pleading obligation under r 5.33.

[126] For CrossFit, Mr Ringwood has stated in his submissions that the plaintiff "has been working on [establishing a monetary value for the damage to goodwill and reputation] … but it will need to be the subject of expert evidence [which] is not presently available". Mr Ringwood refers to the complexity of issues which will arise in the assessment of damage to goodwill and reputation, the complexity arising in his submissions from a number of features of the case, including:

(a) the first cause of action alleging resultant deaths and paraplegia through CrossFit training are extremely damaging to an exercise provider;

(b) publications occurred nationwide;

(c) the webcasts remained available to dates in 2015; and

(d) the cumulative effect from the series of statements.

[127] Bringing these observations together, Mr Ringwood submitted that CrossFit is not in breach of r 5.32 inasmuch as it is not possible for CrossFit to state a "specific monetary amount" for damages at this point.

[128] Mr Ringwood submitted that it is a complete answer to the application for further and better particulars that CrossFit has identified an enquiry as to damages as to the relief it seeks. Mr Ringwood refers to a passage in *McGechan on Procedure* where the authors state:[36]

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[36] At [HR16.2.01].

> The prospect of an inquiry as to damages or on account of profits permits a plaintiff to avoid particularising a claim for damages or loss of profits, or providing discovery in relation to those matters.

Discussion

[129] The requirement under r 5.32 to state as precisely as possible the sum of money the plaintiff seeks to recover is not optional. It is underpinned by the importance to the parties and the Court of properly informative pleadings of each aspect of the plaintiff's claim.

[130] The commentary in *McGechan on Procedure* to which Mr Ringwood refers is not to be taken as a statement of acceptable practice under the High Court Rules.[37] The authors' use of the words "permits a plaintiff to avoid particularising the claim for damages" is at most a statement as to what plaintiffs often do. The Court of Appeal authority (see especially *Hunt v New Plymouth District Court*)[38] is that such is not an acceptable practice where the plaintiff is able to provide either a precise claim or an estimate of damages. In the absence of evidence from CrossFit on the state of its work on the assessment of damages, I am driven to the conclusion that CrossFit must by this time be capable of providing some assessment. Indeed, at one point of his submissions, Mr Ringwood, in stating that CrossFit does not know precisely what its damages are, stated that CrossFit has "a feel for its damages".

[131] Towards the conclusion of the oral submissions, Mr Ringwood recognised that the real issue for the Court on the application for further and better particulars may be the timing at which either specific or estimated figures are to be provided.

[132] I am satisfied that it is no longer appropriate that CrossFit defer the pleading of particulars of damage. More than two years have passed since the occurrence of the events which give rise to the first cause of action which Mr Ringwood views as the defendants' most damaging conduct. Discovery is complete.

[133] It remains important, as it is likely to be in the interests of the parties and the Court, that CrossFit not have to file a knee-jerk set of particulars through the

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[37] Above at [127].
[38] Above at [121].

imposition of a short timetable. Other matters will fall to be attended to at the same time as a result of this judgment. It is appropriate in the circumstances that CrossFit have two months in which to particularise its damages.

Costs

[134] I will be reserving both the incidence and the amount of costs and disbursements.

[135] The defendants as applicants have had a measure, but not a full measure, of success on their various applications. My tentative view is that there must be an award of costs, following the event of the successful applications, but less than a full 2B calculation.[39] Disbursements would be awarded in the normal way.

[136] Counsel are to seek to resolve costs and disbursements by agreement, failing which the directions below will operate.

Orders

[137] I order:

(a) the meanings pleaded at paragraphs 25(a) and 25(b) of the second amended statement of claim are struck out;

(b) the defendants' application as it relates to paragraph 25(c) of the second amended statement of claim is dismissed;

(c) all meanings pleaded in paragraph 33 of the second amended statement of claim are struck out;

(d) the defendants' application as to all causes of action for breaches of the Fair Trading Act 1986 (pleaded together on the fifth cause of action) is dismissed;

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[39] Category 2 under r 14.3(1) and band B under r 14.5(2), High Court Rules.

(e) the plaintiff is within 40 working days to file and serve a further amended statement of claim by which:

(i) it gives effect to the orders contained in this judgment;

(ii) it provides such further and better particulars of the damages the plaintiff claims to have sustained and seeks to recover, and (without detracting from the foregoing) the plaintiff shall particularise:

1. the types of damage it has suffered;

2. the parts of its business which have suffered the damage;

3. the financial amount of each type of damage; and

4. in relation to any unfinalised amount of damage, the plaintiff's best present estimate; and

(f) costs are reserved.

Associate Judge Osborne

Solicitors:
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