IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11464
[2017] NZHC 486

BETWEEN	ALPHACASA LIMITED Plaintiff
AND	ATTORNEY-GENERAL SUED IN RESPECT OF IMMIGRATION NEW ZEALAND First Defendant
	ATTORNEY-GENERAL SUED IN RESPECT OF MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Second Defendant
	ATTORNEY-GENERAL SUED IN RESPECT OF THE NEW ZEALAND QUALIFICATIONS AUTHORITY Third Defendant

Hearing:	25 October 2016 (Further material filed 8 November 2016)
Counsel:	M C Harris and S S McMullan for the Plaintiff D H McLellan QC and H L Martin for First and Second Defendants M F McClelland QC and C I J Fleming for Third Defendant
Judgment:	17 March 2017

JUDGMENT OF ELLIS J

---

[1] Alphacasa Ltd was formerly known as Edenz Colleges Ltd (Edenz). Edenz operated private training establishments (PTEs) for foreign students in Auckland and Tauranga. The company was established in 1988 and, at its height, had around 500 students, 44 staff and 15 contractors.

[2] In these proceedings Edenz effectively sues the New Zealand Qualifications Authority (NZQA) and Immigration NZ (INZ) for defamation and injurious

falsehood in relation to statements published about it in 2012. The Deputy Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) is also (effectively) sued as it is he who has delegated authority to issue instructions under the Immigration Act 2009.

[3] This judgment concerns interlocutory matters: the defendants have made alternative applications for strike out or for better particulars, and an application for further and better discovery.

Background

[4] In September 2012, representatives of NZQA and INZ visited Edenz's campuses unannounced, and did not give reasons for their visit. The visits were part of a joint NZQA/INZ investigation, styled "Operation Meduasa", responding to concerns about education providers who were facilitating the labour exploitation of foreign students. On 22 November 2012, Edenz was told that all applications for visas to study at Edenz would be indefinitely suspended. Neither prior notice nor an opportunity to respond was afforded to Edenz.

[5] On 23 November 2012, NZQA and INZ launched what Edenz says was a "proactive media strategy" to publicise the suspension of Edenz and three other PTEs. A joint press release was issued. This press release (which is itself said to be defamatory) forms the foundation for a number of subsequent, allegedly defamatory, publications both in the media and online. The press release is set out in full later in this judgment.

[6] In December 2012, Edenz was successful in judicially reviewing its suspension and it was set aside.[1] As well, the Minister announced that "in no instance" had Edenz been identified as part of an illegal labour scam. The investigation was closed.

[7] Edenz says that the suspension decision and ensuing publicity had a devastating effect on Edenz because the reports of the alleged illegal labour scam

---

1 *Edenz Colleges Ltd v Chief Executive, Ministry of Business, Innovation and Employment* [2012] NZHC 345.

circulated widely both locally and overseas. Student numbers declined dramatically and staff were laid off. By way of the present proceedings Edenz seeks compensation for the damage it says it has suffered.

The pleading

[8] The original statement of claim pleaded a single defamation cause of action which incorporated all of the allegedly defamatory statements. The defendants pleaded to that single (but multi-faceted) cause of action in their respective original statements of defence. It was only following a request or suggestion made by NZQA's newly instructed counsel that each statement was separated out to form eight individual causes of action. There is also a single cause of action for injurious falsehood.

[9] The defamation causes of action relate to:

(a) the 23 November 2012 press release;

(b) a broadcast on One News on 23 November 2012 which was also accessible on the One News Website;

(c) a New Zealand Herald article on 24 November 2012;

(d) a Sunday Star Times article on 25 November 2012;

(e) an internet article published on www.hothousemedia.com on 27 November 2012;

(f) an internet article published on www.universityworldnews.com on 27 November 2012;

(g) a New Zealand Herald article on (an international student recruitment provider) 28 November 2012;

(h) an internet article published by ICEF on 29 November 2012;

[10] The claim for injurious falsehood is based on all of the above statements.

[11] As I have said, each of the eight allegedly defamatory publications was based either wholly or in part on the original, 23 November, press release. In some, further oral statements made by INZ officers are also referenced. But the central pleading is that INZ and NZQA either themselves published the statements or caused them to be published. More detail about the individual causes of action will be given as needed later in this judgment.

The applications for strike-out or repleading

[12] In two separate applications, INZ, MBIE and NZQA have applied:

(a) to strike out all but the fourth defamation causes of action, or alternatively for an order that an amended statement of claim be filed; and

(b) to strike out the injurious falsehood cause of action.

[13] Central to the grounds upon which the defendants say that the defamation causes of action should be struck out is their contention that they fail to set out with sufficient particularity the precise words relied upon as bearing the alleged defamatory meanings. Relatedly, the defendants say that:

(a) the affirmative defences of truth and honest opinion "cannot sensibly be pleaded" without such a properly articulated linkage; and

(b) without that linkage it is not clear which of the alleged defamatory words are said to be attributable to which of the defendants.

[14] NZQA also applies to strike out paragraph [53] of the statement of claim which quantifies the loss said to have been suffered by Edenz (or in the alternative an order requiring further particulars as to this alleged loss of value.)[2]

---

[2] A parallel application was also initially advanced by MBIE but counsel accepts that the further particulars which have since been provided suffice and does not pursue the application.

[15] As to injurious falsehood, counsel for the first and second defendants say that inadequate particulars of malice have been pleaded. Counsel for NZQA also submits that, as with the defamation causes of action, there is no way to distinguish whether the relevant allegations are made against both defendants in respect of all the statements.

Defamation pleadings: principles

[16] Section 37 of the Defamation Act 1992 provides:

> **37 Particulars of defamatory meaning**
>
> (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
>
> (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.
>
> (3) Where the plaintiff alleges that the matter that is the subject of the proceedings was used in a defamatory sense other than its natural and ordinary meaning, the plaintiff shall give particulars specifying—
>
> (a) The persons or class of persons to whom the defamatory meaning is alleged to be known; and
>
> (b) The other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations.

[17] The preliminary issue of whether the words are capable of bearing the pleaded meaning is a question of law.

[18] The relevant principles were summarised in *New Zealand Magazines Ltd v Hadlee (No 2)*.[3] There, Blanchard J said:

> In determining whether words are capable of bearing an alleged defamatory meaning:
>
> (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

---

3 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 626.

(b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

(c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

(e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.

(f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them.

[19] While Mr Harris for the plaintiff acknowledged that defamation proceedings have traditionally required particular clarity of pleading, he also said that such proceedings are one of the last areas of civil law in which applications of the present kind are brought with "an almost involuntarily reflexive regularity". He drew on Associate Judge Bell's observation, in a decision with some similarities to the present, that:[4]

> In defamation proceedings, time and effort can be wasted on pre-trial skirmishes. These tactics are commonly used by media defendants. Invariably media defendants have more resources than plaintiffs. The use of these skirmishing tactics can be attritional, calculated to wear the plaintiff down.

[20] Mr Harris said that although it is accepted that the plaintiff's obligation is to set out plainly its case as to the natural and ordinary meaning of the relevant words, equally, it will be a question in each case whether a plaintiff should be required to make clear which words complained of are alleged to give rise to the particular alleged meanings. It is not an area for mechanical approaches or pedantry.

---

4 *Howard-Smith v Truth Weekender Ltd* HC Auckland CIV-2010-404-843, 12 July 2010 at [27].

[21] But I turn now to consider the pleading of the individual causes of action in this case.

Should one or more of the defamation causes of action be either struck out or repleaded?

First cause of action – the press release

[22] The press release read:[5]

> 1 A joint New Zealand Qualifications Authority (NZQA) and Immigration New Zealand (INZ) led operation has resulted in action being taken against four Private Training Establishments (PTEs) found to be noncompliant with their obligations in respect to international students.
>
> 2 The move follows a number of unannounced visits to PTEs by officers from INZ and staff from NZQA.
>
> 3 INZ will now suspend the processing of student visa applications for the four institutions for failing to comply with their obligations under the Education Act 1989 and the Immigration Act 2009. The suspensions will not be lifted until they are fully compliant.
>
> 4 The four PTEs in question are the National Institute of Studies (Auckland, Tauranga, Otahuhu and Christchurch), EDENZ Colleges Ltd (Auckland and Tauranga), Aotearoa Tertiary Institute (Otahuhu) and the New Zealand School of Business and Government (Auckland, Christchurch and Wellington). A total of 842 international students are enrolled at the four institutions. They will be unaffected by the suspension, which only impacts on new or undecided visa applications.
>
> 5 INZ General Manager Peter Elms says the breaches were serious and include students studying for less than the minimum 20 hours per week, misleading or poorly maintained attendance records and fee discrepancies.
>
> 6 "It is concerning that these Private Training Establishments have been operating in a manner that falls well below minimum standards and, in so doing, jeopardising the quality of the education provided to their international students. The actions of a handful of PTEs can have serious implications for the reputation of New Zealand as a quality education destination," Mr Elms says.
>
> 7 "We are determined to maintain the integrity of the export education industry and New Zealand's reputation as a quality destination and we owe it to the vast majority of high quality PTEs to take a firm stance on this issue."

---

[5] I have numbered the paragraphs for ease of subsequent reference.

> 8 INZ and NZQA have had concerns over these four providers, which is one of the reasons they have been subject to inspections and subsequent action.
>
> 9 NZQA has also issued compliance notices to all four PTEs because of their failure to deposit student fees in full into their Student Fee Protection trust accounts and/or to keep accurate, complete and up to date student records.
>
> 10 If the four institutions fail to comply with their obligations NZQA has the power to impose new conditions, amend or revoke any existing conditions on their registration, and in severe cases cancel the registration of that provider.
>
> 11 NZQA's Deputy Chief Executive, Quality Assurance, Tim Fowler, says the actions of the four PTEs have undermined the integrity of New Zealand's export education industry, which has an enviable reputation and is worth around $2.7 billion a year to the economy.
>
> 12 "The vast majority of PTEs have an excellent reputation and do a very good job," Mr Fowler says. "This action sends a strong message to the industry that these sorts of breaches will not be tolerated."

[23] The first cause of action pleads that the words in the press release had, and were understood to have, the following ordinary and natural meanings:

(a) that following thorough investigation by INZ and NZQA, Edenz had been found to be in serious breach of its legal obligations;

(b) that Edenz was providing poor quality education and operating well below minimum acceptable standards;

(c) that Edenz had tarnished the integrity and reputation of New Zealand's export education industry and the reputation of other PTEs;

(d) that other PTEs were not acting as Edenz was; and

(e) that Edenz deserved to be banned from enrolling foreign students.

[24] There is no dispute that the pleading does not expressly link these meanings to specific sentences or passages in the press release. But the plaintiff says that the cause of action is pleaded as it is because the alleged meanings do not emerge, or do

not solely emerge, from particular isolated passages; rather they emerge from the release as a whole.

[25] In my view the pleading is, in general terms, adequate. The links between the various parts of the press release and the pleaded meanings are obvious; taken as a whole the words of the press release are capable of bearing those meanings. Thus:

(a) That following thorough investigation by INZ and NZQA, Edenz had been found to be in serious breach of its legal obligations: see paras [1], [3], [4], [5], [8], [9] and [10];

(b) that Edenz was providing poor quality education and operating well below minimum acceptable standards: see paras [4], [5] and [6];

(c) that Edenz had tarnished the integrity and reputation of New Zealand's export education industry and the reputation of other PTEs: see paras [4], [11] and [12]; and

(d) that other PTEs were not acting as Edenz was: see paras [4], [7], [11] and [12]; and

(e) that Edenz deserved to be banned from enrolling foreign students: see paras [2], [4], [5], [6], [7], [11] and [12].

[26] When analysed in this way it becomes apparent that every paragraph of the press release is, indeed, engaged by one or more of the pleaded meanings. Further precision is not, in my view, necessary.

[27] Nor am I able to see any difficulty in the defendants pleading affirmative defences to the claim as presently articulated. The asserted meanings are plainly expressed. To take just one example, it seems to me a simple matter to plead that:

(a) the press statement neither in whole nor in part is capable of bearing the meaning that Edenz was providing poor quality education and operating well below minimum acceptable standards; but

(b) to the extent it is capable of bearing that meaning, the meaning reflects the truth of the matter.

[28] Lastly, I consider that the defendants' reliance on this Court's decision in *Karam v Australian Consolidated Press NZ Ltd* is misplaced.[6] In that case Mr Karam had sued the publishers of *North & South* over a lengthy article criticising his investigative work on behalf of David Bain. Difficulty arose because the pleading referred to 52 specific passages but then listed defamatory meanings "in the article".[7] It was therefore not clear if the claim was limited to the 52 specific passages or encompassed the article as a whole. It was held that the pleading had to be amended so as to specify the particular passages complained of.

[29] But the press release here is very considerably shorter than a North & South article. There are only five pleaded meanings and, as I have said, there are clear links between them and every paragraph in the press release. Unlike Mr Karam's counsel, Mr Harris is, I think, entitled to say that the press release as a whole is genuinely at issue.

[30] The defendant's other complaint in *Karam* was that the pleaded meanings were ambiguous. Chambers J said that, while some of the pleaded meanings might be amenable to more than one interpretation, this was "no more than a reflection of the inherent flexibility of language". His Honour went on to hold:[8]

> Under s 37(2) of the Defamation Act, Mr Karam was required to … 'give particulars of every meaning that [he] alleges the matter bears'. He has done that. He has expressed the meanings in simple words. I think that a jury will be able to grapple with the meanings he alleges and will readily be able to determine whether the article bears the meanings Mr Karam alleges. I am not disposed to require Mr Karam to re-plead on this ground.

---

6 *Karam v Australian Consolidated Press NZ Ltd* HC Auckland CIV-2003-404-497, 12 September 2003.

7 The allegation was that the whole article was defamatory.

8 At [25].

[31] In my view the same can be said in the present case, in relation to any "ambiguities" which the defendants say give them concern.[9]

Second cause of action – the TVNZ broadcast

[32] The second cause of action is pleaded as follows:

> On 23 November 2012 Immigration NZ and NZQA published or caused to be published the following words, for a story broadcast on One News and a print story accessible on the One News website, which were defamatory of Edenz:
>
> - Four private training institutions have been banned from enrolling foreign students ... that's because of concerns some are breaking immigration laws.
> - Investigating suspected links to employers who exploit their workers.
> - Colleges are facades for facilitating illegal work.
> - Peter Elms: "there are concerns that some of those [business] relationships [with employers] are not appropriate and that Colleges may be channelling student into employment in inappropriate conditions."
> - Graphic showing visa application suspension affects EDENZ.
> - Immigration NZ is investigating direct links between the schools and potentially exploitative employers.
> - Visas suspended for schools in exploitation probe.
>
> On their natural and ordinary meaning, the words meant and were understood to mean that:
>
> a. Edenz had been caught breaking the law;
>
> b. Immigration NZ had uncovered evidence of direct links between Edenz and potentially exploitative employers;
>
> c. Edenz was a façade for facilitating illegal work;
>
> d. Edenz was exploiting and mistreating its students;
>
> e. Edenz deserved to be banned from enrolling foreign students.

---

[9] Although not the principle focus of the defendants' applications I do however, struggle with the proposition that the alleged meaning that "other PTEs were not acting as Edenz was" might actually be defamatory. So in light of the directions made later in this judgment that is a matter which the plaintiff may wish to consider further.

[33] Again, I consider that there is a clear correlation between the pleaded words and the alleged defamatory meanings. I agree with Mr Harris that it would be "unnecessarily pedantic to require the plaintiff to join the dots … between the words and the alleged meanings".[10]

[34] But the defendants say that an "additional complication" with the second, and the remaining, defamation causes of action is that they:

(a) Are "based on publications some of which the defendants deny responsibility for";

(b) "include content which *may* be editorial content added by media organisations"; or

(c) "*may* simply be statements which the defendants did not say."

[35] By way of example, the defendants say that they are not sure whether the pleaded meaning that "Immigration NZ had uncovered evidence of direct links between Edenz and potentially exploitative employers" relates to the quoted statement by the INZ officer, Mr Elms, or to the statement that authorities are investigating suspected links to employers who exploit their workers which, the defendants say "*may* be editorial content added by TVNZ and for which the defendants may not be liable".

[36] But, as Mr Harris said, the allegation is that the defendants published *or caused to be published* all of the words alleged and that those words had the meanings pleaded. The plaintiff's case is that the media were engaged at the defendants' behest. So if:

(a) either of the defendants wish to disclaim responsibility for some of the words complained of because they constitute an allegation that could not fairly be derived from the original press statement (and must therefore be editorialising by TVNZ); or

---

[10] *Howard-Smith*, above n 4, at [21].

(b) NZQA wishes to disclaim responsibility for the more serious "labour scam" allegations because the alleged existence of such a scam was beyond the scope of its own investigation and was only referred to independently by the INZ official, Mr Elms;

then the answer lies in an appropriately-drawn denial, not in requiring further particulars from Edenz.

[37] In short, the pleading reflects the plaintiff's case that the defendants are jointly responsible for the labour scam imputations. It is clear from the pleading that Edenz will say that the strategy of "proactive media involvement" was part of their common design and that each is jointly liable for the words and actions of the other, and all consequent publications.

Third and seventh causes of action – the Herald articles

[38] The third cause of action relates to the publication in the New Zealand Herald of a story based on the 23 November press release. The pleading is:

> On 24 November 2012 Immigration NZ and NZQA caused to be published in the New Zealand Herald the following words, which were defamatory of Edenz:
>
> > **Immigration crackdown on schools over illegal labour scam**
> >
> > Immigration New Zealand has acted against four private training establishments after an investigation into an alleged illegal labour scam involving international students.
> >
> > ...
> >
> > Yesterday it was announced that after a joint operation by the New Zealand Qualifications Authority (NZQA) and Immigration New Zealand (INZ), action would be taken against four PTEs that had been found to be "non-compliant with their obligations in respect to international students".
> >
> > "INZ will now suspend the processing of student visa applications for the four institutions for failing to comply with their obligations under the Education Act 1989 and the Immigration Act 2009."
> >
> > "The suspensions will not be lifted until they are fully compliant," the agency said.

> The four establishments are the National Institute of Studies, EDENZ Colleges Ltd, Aotearoa Tertiary Institute and the New Zealand School of Business and Government.
>
> ...
>
> It is concerning that these private training establishments have been operating in a manner that falls well below minimum standards and, in so doing, jeopardising the quality of the education provided to their international students," Mr Elms said.
>
> "The actions of a handful of PTEs can have serious implications for the reputation of New Zealand as a quality education destination.
>
> "We are determined to maintain the integrity of the export education industry and New Zealand's reputation as a quality destination and we owe it to the vast majority of high quality PTEs to take a firm stance on this issue."
>
> NZQA issued compliance notices to all four PTEs.
>
> "The actions of the four PTEs have undermined the integrity of New Zealand's export education industry, which has an enviable reputation and is worth around $2.7 billion a year to the economy," said NZQA's deputy chief executive, Tim Fowler.
>
> "This action sends a strong message to the industry that these sorts of breaches will not be tolerated."

[39] The pleading natural and ordinary meaning of these words is that:

a. Following thorough investigation by Immigration NZ and NZQA, Edenz had been found in serious breach of its legal obligations;

b. Edenz was involved in an illegal labour scam involving international students;

c. Edenz was providing poor quality education and operating well below minimum acceptable standards;

d. Edenz was exploiting and mistreating its students;

e Edenz had damaged the reputation of New Zealand as a destination for high quality education and the reputations of other PTEs;

f Edenz deserved to be banned from enrolling foreign students.

[40] The seventh cause of action is pleaded as follows:

> On 28 November 2012 Immigration NZ and NZQA caused to be published in the New Zealand Herald the following words, which were defamatory of Edenz:

Colleges stay suspended until new year

Immigration NZ will consider in the new year if it will prosecute four private training establishments found to be involved in an alleged illegal labour scam.

A joint investigation by the service and the Qualifications Authority (NZQA) found four PTEs to be "non-compliant with their obligations in respect to international students".

The National Institute of Students, EDENZ Colleges, Aotearoa Tertiary Institute and the NZ School of Business and Government have been suspended from applying for student visas until further notice.

"The suspension will not be lifted on any of the four PTEs until there is full compliance with their obligations under the Education Act 1989 and the Immigration Act 2009," said the acting head of Immigration NZ, Steven McGill.

"Prosecution action is considered on a case-by-case basis, and no decision is likely until the suspensions are reviewed in the new year"

Breaches include students studying less than the minimum 20 hour per week, misleading or poorly maintained attendance records and fee discrepancies.

...

80. On their natural and ordinary meaning, the words meant and were understood to mean that:

a. Following a careful and fair investigation, Edenz had been found in serious breach of its legal obligations;

b. Edenz was implicated in an illegal labour scam;

c. Edenz was exploiting and mistreating its students;

d. Edenz deserved to be banned from enrolling foreign students.

[41] In essence, the defendants' complaint about the pleading of the third and seventh causes of action is the same as for the second. They say that they do not know if they are alleged to be responsible only for the direct quotation from Mr Elms or for the other pleaded statements.

[42] Again, however, I accept the plaintiff's submission that the pleading is clear. It is alleged that the defendants are responsible for all the statements, not just the quotation. If there is a statement that one or both say cannot be sourced to the press release, if they deny the existence of a joint media strategy or if NZQA want to say

that INZ was on a labour scam frolic of its own then all that can, quite simply, be pleaded.

Fifth, sixth and eighth causes of action – defamatory internet articles

[43] These causes of action are based on internet articles that were also alleged to be derived from the press release, but which did not quote it fully. The pleaded meanings are, however, the same as, and are cross-referenced to, those pleaded in relation to the first cause of action (which concerns the press release as a whole).

[44] The only new argument advanced by the defendants in relation to this pleading is NZQA's contention that the fact that the same meanings are attributed to parts of the press release as are attributed to the whole means that it cannot have been necessary to plead the all of the press release in the first cause of action. I am unable to agree. It is quite tenable that the later publications extracted enough defamatory words from the press release to support the same set of defamatory meanings, in the same way that a summary is capable of supporting the same meaning as the document it summarises.

Injurious falsehood

[45] The injurious falsehood claim begins in the usual way by incorporating the background allegations. It then pleads the defendants' publication of false statements which it says was malicious. The pleaded particulars of malice are that:

> (a) Immigration NZ and NZQA published or caused to be published the statements with reckless disregard as to their truth;
>
> (b) Immigration NZ and NZQA knew that their statements about Edenz would cause serious loss to Edenz and intended that they would put Edenz out of business by the end of February 2013;
>
> (c) Immigration NZ and NZQA refused Edenz's request for prior notice of their allegations before issuing the suspension notice;
>
> (d) Immigration NZ and NZQA refused Edenz's request for notice of the allegations after issuing the suspension notice;
>
> (e) Immigration NZ and NZQA refused Edenz's request that they refrain from publicising the suspension until Edenz had been given an opportunity to be heard;

(f) an internal Immigration NZ investigation identified numerous shortcomings in the investigation and actions taken against Edenz; and

(g) Immigration NZ and NZQA never publicly withdrew their false statements about Edenz, particularly, the allegation that it was involved in an illegal labour scam.

[46] In an injurious falsehood context, malice means a dominant and improper motive of causing injury to the plaintiff. Malice will be inferred where a plaintiff can prove that the words concerned were calculated to produce damage and the defendant knew when they were published that the words were false or was reckless as to their falsity. Thus, the particulars must be predicated on an alleged false statement (as they are here) and must focus on matters going to knowledge or recklessness, and intention.

[47] Here, I am inclined to accept the defendants' submission that, by itself, the first and second of the pleaded particulars are really not much more than assertions that the abstract elements of the tort exist.

[48] Nonetheless I consider that particular (a) (the "bare allegation" that the defendants were reckless as to the truth of the impugned statements) is supported by:

(a) the subsequently pleaded allegations that the defendants refused to give the plaintiff an opportunity to comment on or refute the content of the statements before their publication or before issuing the suspension notice;

(b) the earlier pleaded allegation that the defendants subsequently refused to provide the plaintiff with the reasons for the suspension (paras [27] to [29] of the amended statement of claim (ASOC)); and

(c) the earlier pleaded allegation that the defendants had no evidence that Edenz was part of any illegal labour scam or other scheme exploiting foreign students (para [41] of ASOC).

[49] As far as the first part of particular (b) is concerned (the bare allegation that the defendants knew the statements would cause serious loss to the plaintiff) that is largely a matter of logical inference from the nature and content of the statements themselves. But there is also an earlier pleading that the defendants were specifically told of the potentially "irreparable" and "fatal" consequences to Edenz (paras [16]–[18] and [25]–[26] of the ASOC).[11]

[50] And the second part of particular (b) (the bare allegation that the defendants intended that the statements would put Edenz out of business) is supported by:

(a) the earlier pleaded allegations that the defendants sought proactive media involvement so as to maximise publicity for their actions (para [14]);

(b) the earlier pleaded allegation that the defendants implemented their proactive media strategy in breach of natural justice; (paras [23] and [24]);

(c) the earlier pleaded allegation that INZ officials intended that their action would "choke" Edenz and were worried that it might not do so (paras [39] and [43]);[12] and

(d) the subsequently pleaded particular that neither INZ nor NZQA ever publicly withdrew the statements made.

[51] The allegation that an internal investigation later identified shortcomings in the investigation of and actions taken against the plaintiff does not by and of itself support or go to the allegation of malice. If reliance is placed on particular findings from that investigation then they should be separately pleaded.

[52] In short, I consider that the existing pleading does contain at various places adequate particulars of malice although they are poorly set out. My own view of the

---

[11] The pleading is essentially that Edenz specifically drew to the defendants' attention the seriousness of the situation on 21 November, before the suspension was issued, and on 22 November, immediately after.

[12] The word "choke" being a quote from one of the defendants' documents.

matter is that (provided I have correctly understood the plaintiff's case) the pleading should be redrawn in line with my analysis above. If it is, then there could be no further quibble with it.

Special damage

[53] INZ now accepts that the particulars of loss of value are adequately pleaded but NZQA does not. INZ is right. The facts underlying that allegation are adequately pleaded. The additional material sought by NZQA is for evidence, not the pleading.

Discovery application

[54] Counsel for MBIE submitted that the plaintiff has failed to comply with its standard discovery obligations. MBIE sought an order that the plaintiff file an affidavit stating whether certain categories of documents are or have been in its control or in the control of Edenz Schools. Some of the requested documents are relevant to the plaintiff's allegations of damage. There are reasonable grounds to believe they are or have been in the plaintiff's control. As framed, the application suggested that the plaintiff's searches (the nature and extent of which were recorded in the affidavits already filed) had been inadequate, although that point was, quite rightly, not ultimately pursued.

[55] In any event, following the hearing counsel for the plaintiff filed a memorandum advising that the plaintiff would file a further affidavit identifying (to the best of its ability) other documents in the specified categories which have existed or which might still exist but are not now in the plaintiff's control or custody. The affidavit would also specify, if possible, whose control or custody those documents might be in.

[56] To my knowledge that affidavit has not yet been filed or served. But once it has been, it should suffice to meet the concerns driving MBIE's application.

Result

Pleadings

[57] As will be apparent from my analysis above I consider that the pleadings of the defamation causes of action adequately set out the words relied upon as bearing the alleged defamatory meanings and fairly put the defendants on notice of the case they have to answer. The pleading of special damage is adequate.

[58] The applications to strike out and for further particulars of the first to third and fifth to eighth causes of action are dismissed accordingly.

[59] As far as the ninth cause of action is concerned, although the necessary bones of a proper malice pleading can be found when the ASOC is read as a whole, I consider that this aspect of the claim could usefully be repleaded and I make an order accordingly. That order does not, however, reflect some fundamental deficiency of pleading. Rather it requires a reordering or repeating in a concise and structured way matters referred to elsewhere in the claim in the form of the requisite particulars. To that very limited extent, the defendants' application in relation to the ninth cause of action is granted.

Discovery

[60] The discovery application has essentially been resolved by consent. If the plaintiff has not already done so it is to file a further affidavit on the lines set out in counsel's memorandum dated 7 November 2017.

Costs

[61] In my view all parties have had a measure of success. There are, as well, two further, competing, matters which require mention in a costs context.

[62] First, and as counsel for MBIE pointed out, the filing and service of the strike out application did appear to result in a significant amendment to the claim in that the negligence claim was dropped. In that sense the defendants could be regarded as having had more success than my decision above indicates.

[63] But secondly, it seems that there may have been a degree of overkill in the remaining parts of the defendants' applications. As I understand it, they were not preceded by a notice requiring further particulars or any particularly constructive pre-hearing dialogue between counsel. The fact that the discovery application was effectively resolved without the need for a ruling is indicative of that. As well, I remain conscious of the dicta relied on by Mr Harris and referred to me at [19] above.

[64] For all these reasons, I consider that costs should lie where they fall.

Rebecca Ellis J

Solicitors: Gilbert Walker, Auckland, for Plaintiff
Izard Weston, Wellington, for First and Second Defendants
Kensington Swan, Wellington, for Third Defendant