IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-002354
[2023] NZHC 696

UNDER	the Defamation Act 1992
BETWEEN	TALLEY'S GROUP LIMITED First Plaintiff
	TALLEY'S LIMITED Second Plaintiff
	AFFCO HOLDINGS LIMITED Third Plaintiff
	AFFCO NEW ZEALAND LIMITED Fourth Plaintiff
	SOUTH PACIFIC MEATS LIMITED Fifth Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED First Defendant
	THOMAS MEAD Second Defendant

Hearing: 19 October 2022

Appearances: B Dickey and W Potter for the Plaintiffs
D Salmon KC and D Nilsson for the Defendants

Judgment: 31 March 2023

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 31 March 2023 at 4.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date.....

Introduction

[1] Between July 2021 and May 2022, 1News broadcast a series of stories regarding working conditions at companies within Talley's Group Ltd (**the Talley's Group**). The broadcasts were accompanied by articles published on the 1News website. The stories concerned the safety of the Talley's Group's operations and its management of its ACC accredited employer scheme.

[2] The plaintiffs seek declarations that they have been defamed by both the broadcasts and the articles, and indemnity costs. They do not seek damages.

[3] The defendants have pleaded truth to each of the causes of action in the plaintiffs' statement of claim; and that they reported responsibly on a matter of public interest. They also assert that the Talley's Group had a pre-existing reputation so bad that the defamatory aspects of the reporting could not have materially worsened it, based on a series of "specific instances of misconduct" going back to 2001.

[4] The plaintiffs ask the Court to strike out parts of the defendants' pleading as it discloses no reasonably arguable defence, and will cause prejudice and delay.

[5] The defendants say that the plaintiffs have failed to properly particularise their alleged financial loss, and ask the Court to order the plaintiffs to provide further particulars.

[6] In this judgment I first determine the plaintiffs' application to strike out parts of the defendants' pleading. Second, I determine the defendants' application for further particulars.

PLAINTIFFS' STRIKE-OUT APPLICATION

[7] The plaintiffs apply to strike out the following parts of the defendants' second amended statement of defence[1] (**ASOD**):

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[1] Dated 30 June 2022.

(a) the truth defence under s 8(3)(a) of the Defamation Act 1992 (**the Act**) to the ninth, 10th, 11th, and 12th causes of action, as pleaded in paragraph 72(d) and particularised at Schedule 2 (kk) to (yyy);

(b) the contextual truth defence under s 8(3)(b) of the Act to the fifth and sixth causes of action, as pleaded in paragraph 72(e);

(c) the bad reputation plea in reliance on specific instances of alleged misconduct, as pleaded at paragraphs 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 76 and 77 and particularised at Schedule 1;

(d) further and in the alternative to (c), the particulars of bad reputation relying on events unrelated to the imputations, in rows 1, 4, 5, 9, 10, 11, 15, 17, 18, 21 and 22 of Schedule 1;

(e) further and in the alternative to (c), the bad reputation plea to the ninth, 10th, 11th, and 12th causes of action, as pleaded at paragraphs 65, 67, 69, 71, 76 and 77.

[8] In each case the plaintiffs claim that the defence, plea or particulars disclose no reasonably arguable defence to the plaintiffs' claim. And that the particulars of bad reputation are liable to cause prejudice or delay, and are vexatious in that they inappropriately seek to bring into the proceeding irrelevant material that is prejudicial to the plaintiffs.

Legal principles

[9] Under r 15.1(a) of the High Court Rules 2016, the Court may strike out part of a pleading if it discloses no reasonably arguable cause of action or defence. The criteria for striking out a pleading on this ground were summarised by the Court of Appeal in *Attorney-General v Prince*:[2]

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2 *Attorney-General v Prince and Gardner* (1998) 1 NZLR 262 (CA) at 267; endorsed by the Supreme Court in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146].

(a) The application proceeds on the assumption that the facts pleaded are true.

(b) The cause of action or defence must be so clearly untenable that it cannot possibly succeed.

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

[10] Under r 15.1(b), the Court may strike out part of a pleading if it is likely to cause prejudice or delay. This rule requires an element of impropriety and abuse of the Court's processes.[3] Pleadings may be struck out when they are prolix, scandalous, irrelevant, plead purely evidential matters or irrelevant material, or are unintelligible.[4]

[11] Under r 15.1(c), the Court may strike out part of a pleading if it is frivolous or vexatious. A frivolous pleading is one that trifles with the Court's processes.[5] A vexatious one contains an element of impropriety.[6]

Truth defence to ACC Scheme causes of action

[12] To establish a defence of truth under s 8(3)(a) of the Act, a defendant must prove that the imputations contained in the published statements are true, or not materially different from the truth. They are required to prove more than the literal meaning of the published statements. They must prove the 'sting' of the imputations in those statements.[7] The standard of accuracy required is high,[8] particularly when the allegations are serious.[9]

[13] A defendant pleading truth must provide particulars specifying the statements that they allege are statements of fact, and the facts and circumstances on which they

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3 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].
4 At [89].
5 At [89].
6 At [89].
7 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [55]; Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 16.9.02.
8 Todd at 16.9.02.
9 John Burrows KC and Ursula Cheer, *Media Law in New Zealand* (8th ed, LexisNexis Wellington, 2021) at 3.4.1 citing *Reeves v Saxon* CA134/89, 17 December 1992 at 16.

rely in support of the allegation that those statements are true.[10] As explained by Tipping J, particulars of truth in a defamation action serve the following functions:[11]

(a) enabling the plaintiff to check the veracity of what is alleged;

(b) informing the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth;

(c) requiring the defendant to vouch for the sincerity of its contention that the words complained of are true; and

(d) setting parameters for what evidence may be led at trial.

[14] The ninth to 12th causes of action arise from 1News broadcasts and related web articles on 21 November 2021 and 22 May 2022. The 21 November story concerned the plaintiffs' management of their ACC accredited employers scheme (**ACC Scheme**). The 22 May story concerned a specific injury claim submitted under the ACC Scheme by an AFFCO employee, Richard Fitness.

[15] The imputations said to arise from the 21 November publications are set out at [64] and [66] of the amended statement of claim[12] (**ASOC**). The imputations said to arise from the 22 May publications are set out at [68] and [70] of the ASOC. The defendants dispute that those imputations arise, but that is not in issue in this application. What is in issue is, if and to the extent that those imputations were conveyed, whether the particulars of truth set out by the defendants in Schedule 2 to their ASOD can prove that those imputations are substantially true.

[16] The plaintiffs submit that if the pleaded imputations are found to have been conveyed by the 21 November and 22 May stories, the particulars that the defendants rely on will not avail them. The plaintiffs say that the defendants reported disparate

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10 Defamation Act 1992, s 38.

11 *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA) at [17]; applied in *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [58].

12 Dated 7 June 2022.

events together in a way that conveyed imputations they cannot now prove. They say that proving true the constituent parts of the publications will not establish the substantial truth of the imputations that have resulted from the misleading way those parts were put together. They rely on *Ah Koy v Television New Zealand Ltd,* where a defence of truth was struck out because none of the particulars alone, or in any combination, if accepted as true, could rationally support a plea of truth to the meaning alleged by the plaintiff.[13]

[17] The defendants submit that the plaintiffs' position is misconceived. They distinguish this case from *Ah Koy v TVNZ*, because here the plaintiffs do not allege that the defendants' particulars are directed at establishing the truth of a wrong imputation. Rather, the plaintiffs put forward a narrow interpretation of the defendants' truth particulars and assert that, based on this interpretation, the particulars do not go to the substantial truth of the pleaded imputations. The defendants say that the pleaded particulars are reasonably capable of broader interpretations that do support the defendants' truth defences. They submit that ultimately, the fact-finder will determine whether the evidence adduced to support the pleaded particulars supports the defendants' broader case or the plaintiffs' narrower case. They say that it would be inappropriate, and premature to strike out the defendants' truth defence based on the one possible outcome advanced by the plaintiffs.

[18] I now expand on the competing arguments with respect to each story.

Ninth and 10th causes of action: 21 November 2021 stories

[19] In the ninth and 10th causes of action, the plaintiffs plead that in their natural and ordinary meaning the 21 November publications conveyed the following defamatory imputations that lower the plaintiffs in the estimation of right-thinking members of society:

(a) the first to fifth plaintiffs have interfered with an injury management programme for vulnerable workers by influencing claims managers to

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[13] *Ah Koy v Television New Zealand Ltd* HC Auckland M852/00, 15 March 2001, at [25][27]; upheld in *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).

reject valid claims, reduce rightful entitlements and rehabilitation, and force injured employees back to work too early;

(b) the second and third plaintiffs are abusing their powers and responsibilities under the ACC Scheme;

(c) the first to fifth plaintiffs are cheating many injured employees out of the medical and financial support they are rightfully owed under the ACC Scheme;

(d) the first to fifth plaintiffs have exploited injured workers who are vulnerable due to their poor education or speaking English as a second language; and

(e) the first to fifth plaintiffs intimidate workers who publicise concerns about safety.

[20] The defendants plead that those defamatory imputations are true, or not materially different from the truth. The particulars of truth they rely on are set out at (kk) to (aaa) of Schedule 2 to the ASOD.

[21] The plaintiffs submit that the particulars of truth at (kk) to (aaa) only demonstrate, at best, that:

(a) the plaintiffs are accredited employers under the ACC Scheme and operate a unified claims programme across their operations;

(b) work undertaken by the plaintiffs' employees involves a high risk of injury and some of those employees are vulnerable because of their financial position, language barriers or immigration status;

(c) at various times in the past, the plaintiffs have failed to meet some of the requirements of the ACC Scheme, have declined to cover some claims submitted under the ACC Scheme and have included plant manager input as part of their assessment of claims; and

(d) the plaintiffs have, in the past, allowed up to seven people to attend hearings and meetings in relation to ACC Scheme decisions and once used the words "act of sedition" in an email.

[22] The plaintiffs submit that a significant 'sting' of the 21 November imputations is that the plaintiffs have *wrongfully* and *intentionally* withheld their employees' *rightful* entitlements under the ACC Scheme. However, they say the defendants have not identified particulars that support this allegation.

[23] The plaintiffs say that a further failing is that the 21 November stories imputed that the plaintiffs are *presently* abusing their powers, cheating injured employees and intimidating them. They say that the defendants' reliance on aspects of the plaintiffs' historic performance under the ACC Scheme does not go to that issue.

[24] The defendants dispute the plaintiffs' summary of the pleaded particulars, which they say mischaracterises and minimises them. The defendants maintain that the plaintiffs' position assumes that the evidence supporting the truth particulars will be considered in isolation, rather than as part of an overall narrative of facts and circumstances. They say that although the particulars do not mirror the strong language of the imputations, if the allegations at (kk) to (aaa) are established, it is reasonably arguable that the jury or Court will find that the 'sting' of impropriety in the pleaded imputations is true.

[25] Further, the defendants submit that it is incorrect that the particulars are directed at the plaintiffs' historic conduct, rather than their present conduct. They say that most of particulars at (kk) to (aaa) contain no temporal limit or refer to a time period that covers the dates of the publications. When proven, these allegations will reasonably support a finding that the imputations relating to the plaintiffs' present conduct are true.

[26] I find for the defendants on this point. I consider it reasonably arguable that the pleaded particulars are capable of establishing the substantial truth of the pleaded imputations.

[27] To expand, I agree that the plaintiffs' summary of the particulars is reductive. In my view, a fairer summary of the particulars provided in support of the assertion that the imputations are true is:

(a) Work undertaken by the plaintiffs' employees involves a high risk of physical injury, and a significant number of workplace injuries occur across the plaintiffs' operations.

(b) The plaintiffs are accredited employers under the ACC's Scheme, the membership of which results in significant financial or potential benefits to the plaintiffs including reduced levies and the ability to manage claims directly.

(c) Many of the plaintiffs' employees are vulnerable to potential mismanagement of workplace injury claims because of their poor financial position, language barriers, or immigration status.

(d) As at October 2019, AFFCO Holdings Ltd and AFFCO New Zealand Ltd (**the AFFCO Group**) failed to meet requirements of the ACC Scheme, including requirements relating to cover decisions and the review of declinature decisions; entitlements; complaint and review management; assessment, planning and implementation of rehabilitation; file review, case management; and confirmation of injury management procedures in action.

(e) As at June 2020, the AFFCO Group failed to comply with the ACC Scheme requirements including: initial needs assessments, which were in 'tick box' form and conducted by the injured employee's manager rather than a qualified and independent injury adviser; having generic rather than individualised action plans for injured workers; declining cover for injuries on technical grounds (such as where they were not recorded in the injury register); failing to send weekly compensation letters on time; having inadequate rehabilitation plans; and not

understanding how to calculate short and long term compensation for injured workers resulting in them being underpaid.

(f) The AFFCO Group has a history of not addressing concerns about its compliance with the ACC Scheme.

(g) Since at least 2018 the Talley's Group has allowed plant managers to influence the management and acceptance of claims by making initial cover recommendations and having ongoing input into claims.

(h) As the Talley's Group operates a unified policy for managing workplace injuries throughout its operations, the deficiencies described above affect all companies in the Talley's Group.

(i) Between 2018 and 2021 the Talley's Group declined a high proportion of workplace injury claims.

(j) The Talley's Group has employed intimidating approaches to employees who have challenged entitlement decisions, including regularly involving multiple (up to seven) counsel and Talley's Group representatives at meetings and hearings; and having once described a whistleblower who had concerns about health and safety as committing an "act of sedition".

[28] The pleaded particulars do not use the same strong language as the imputations, but nor do they need to. The particulars are the *facts* and *circumstances* on which the defendants rely to prove the truth of the imputations. It will be for the Court or jury to determine if these facts and circumstances, if accepted, prove the substantial truth of the imputations. If the facts and circumstances fall short of proving the truth of those imputations, the defendants' truth defence will fail. But I consider it reasonably arguable that if the pleaded facts and circumstances are established, when considered as a whole, the Court or jury will find that the 'sting' of impropriety in the pleaded imputations is true.

[29] The defendants' truth pleading can be contrasted to that in *Ah Koy v TVNZ*. The meaning which TVNZ alleged to be true was that Mr Ah Koy was under investigation by the police authorities in Fiji for bankrolling the attempted coup. The particulars provided in support of the truth plea were:[14]

(a) the investigation was undertaken by the police authorities in Suva, Fiji;

(b) the investigation was undertaken by a special unit within the crimes department; and

(c) the investigation commenced shortly prior to 26 May 2011.

[30] At first instance, Anderson J found that the statement of defence should be struck out because TVNZ raised the defence of truth to a different meaning to that pleaded by Mr Ah Koy.[15] He went on to find that, even if the defence of truth fairly confronted the meaning alleged by Mr Ah Koy, the particulars if accepted were not rationally capable of supporting the plea.[16] He concluded that the truth pleading should be struck out for that reason also.

[31] On appeal, the Court of Appeal found that the meaning of the statement TVNZ alleged to be true was not materially different from Mr Ah Koy's meaning. But the Court agreed that the purported particulars were inadequate because they gave no particulars of the officers involved nor upon whose complaint or instructions the investigation was commenced, the date it commenced, or the offences alleged to have been committed by those under investigation.[17] The Court upheld the finding that the plea of truth without sufficient particulars should be struck out.

[32] In my view, the particulars of truth pleaded here are in quite a different category and are rationally capable of supporting the truth plea. I conclude that the truth pleading to the ninth and 10th causes of action should not be struck out.

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14 *TVNZ v Ah Koy,* above n 13, at [15].
15 *Ah Koy v TVNZ,* above n 13, at [27(a)].
16 At [27(b)].
17 *TVNZ v Ah Koy*, above n 13, at [15][17].

[33] However, I find that the truth pleading falls short of fully and fairly informing the plaintiffs of all the facts and circumstances the defendants appear to intend to rely on for their truth defence. At (oo), (pp), (qq), (rr), (ss), (uu), (zz) and (aaa) of Schedule 2, the defendants plead acts of non-compliance with ACC Scheme requirements and other failings, without identifying specifically how, by whom, and when. To comply with r 5.26 of the High Court Rules and the principles described by Tipping J in *TVNZ v Ah Koy*, the defendants need to provide particulars of the specific acts and instances relied on, including which company within Talley's Group, dates, names of individuals involved (where that would not breach their privacy) and figures where relevant. I see no reason why the defendants should not provide these particulars now rather than after discovery, based on the information they presumably already have that enabled them to make this pleading.

11th and 12th causes of action: 22 May 2022 stories

[34] The plaintiffs claim that the particulars of truth at (bbb) to (yyy) of Schedule 2 demonstrate only:

(a) the timeline of the processing and management of Mr Fitness' claim;

(b) that Mr Fitness was ultimately eligible for support under the ACC Scheme;

(c) that, once Mr Fitness' claim was accepted, the plaintiffs retrospectively compensated him for lost wages back to the date he submitted a valid injury claim under the ACC Scheme;

(d) that there was a miscalculation in this compensation, which when identified by Mr Fitness was immediately rectified; and

(e) a sweeping allegation that the plaintiffs have 'regularly' paid claimants less than their full entitlements under the ACC Scheme - without detailing a single such claimant other than Mr Fitness.

[35] The plaintiffs submit that those matters do not go to the substantial truth of the imputations and are incapable of proving the 'sting' of the most damaging allegations which are that the plaintiffs:

(a) *caused* Mr Fitness pain and suffering due to their mismanagement of the ACC Scheme;

(b) managed Mr Fitness' claim *unfairly* and *resisted* paying him his rightful entitlements, forcing him to 'fight' for those entitlements; and

(c) are operating the ACC Scheme in an *unfair* or *illegal* way.

[36] The defendants submit that the plaintiffs again rely on a narrow interpretation of particulars (bbb) to (yyy) to support their position that the defendants' truth defence is not reasonably arguable. The defendants submit that alternative, broader interpretations of the particulars are reasonably available to the jury or Court that do support the defendants' truth defence.

[37] I do not accept the plaintiffs' submission that the particulars at (bbb) to (yyy) are incapable of establishing the truth of the pleaded imputations.

[38] Contrary to the plaintiffs' submission, particular (uuu) expressly pleads a causal link between the failure to pay Mr Fitness his full entitlement under the ACC Scheme and Mr Fitness' hardship. This is preceded by the introductory particular at (ccc) where the defendants plead that between 2018 to 2021, the first to the fourth plaintiffs failed to meet basic standards of care under the ACC Scheme by regularly paying claimants less than their full entitlements, including Richard Fitness. Followed by the particular at (ddd) that (generally) underpaying entitlements results in hardship to claimants.

[39] The particulars pleaded at (ddd) to (ttt) include the following facts and circumstances:

(a) that despite Mr Fitness reporting his injury on 5 March 2021, his absence on 6 March 2021 was recorded as being for personal reasons;

(b) the plaintiffs then rejected Mr Fitness' claim for compensation made by his GP;

(c) Mr Fitness' further claim, again made by his GP who specified it was for a work-related injury, was not entered into the plaintiffs' injury management system promptly due to the absence of relevant staff;

(d) Mr Fitness' claim was then reviewed by another physician at the request of the plaintiffs without consulting Mr Fitness and that review concluded that Mr Fitness' work did not cause his injury;

(e) nearly two months later, Mr Fitness' second application was accepted by the plaintiffs and it was only then (three months after his injury) that the plaintiffs accepted his claim; and

(f) even then, the plaintiffs did not pay Mr Fitness his full entitlement until Mr Fitness raised the issue with them some months later.

[40] In my assessment it is reasonably arguable that, if these facts and circumstances are established, the Court or jury will find that:

(a) the plaintiffs' management of Mr Fitness' claim was unfair or illegal;

(b) Mr Fitness had to 'fight' to obtain his full entitlement; and

(c) the plaintiffs' mismanagement of Mr Fitness' claim caused him pain (in the broadest sense of the word) and suffering.

[41] Therefore, I refuse to strike out the truth defence to the 11th and 12th causes of action.

[42] However, the particular at (ccc) is vague and does not fully and fairly inform the plaintiffs of the facts and circumstances on which the defendants rely. This particular reads:

> Between 2018 – 2021, the first to fourth plaintiffs failed to meet basic standards of care under the ACC Scheme by regularly paying claimants less than their full entitlements, including Richard Fitness.

[43] The defendants are required to provide further particulars at (ccc), including dates, numbers, and amounts.

Contextual truth defence

[44] The fifth and sixth causes of action relate to a 1News broadcast on 3 July 2021 and an accompanying web article. To these causes of action, the defendants also plead an alternative truth defence, to the effect that "the publications taken as a whole were in substance true or in substance not materially different from the truth". This is a reference to s 8(3)(b) of the Act, which provides that:

> …
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> In proceedings for defamation, a defence of truth shall succeed if
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> …
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> (b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[45] What is required for that provision to apply is that the 'sting' of the article as a whole is substantially true and "so damages the plaintiff's reputation that the words relied upon by the plaintiff do not materially injure the plaintiff's reputation any further".[18]

[46] This is the same concept as the defence known in some jurisdictions as 'contextual truth'.[19] The defence, in conjunction with s 8(2),[20] allows a defendant to plead and prove the truth of other defamatory allegations made in the broadcast that the plaintiff has chosen not to sue on ('contextual allegations'). It ameliorates the unfairness that would result from a plaintiff being allowed to pick just one lesser

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18 *Ansley v Penn* HC Christchurch A36/98, 28 August 1998 at 13. See Burrows and Cheer, above n 9, at [3.4.2].

19 See for example s 26 of the Australian Uniform Defamation Laws.

20 Which provides that in proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

imputation out of a mass of demonstrably true allegations published by the defendant.[21] The important thing is that the effect of the contextual allegations on the plaintiff's reputation must be to 'swamp' the effect of the reputations sued upon. The overall 'sting' of the publication must be true.

[47] The defendants rely on this defence in relation to the fifth and sixth causes of action. They say that, taken as a whole, the 3 July publications are in substance true or not materially different from the truth, even if the particular statements sued on by the plaintiffs are not.

[48] The imputations that are pleaded as arising from the 3 July, 1News broadcast and accompanying web article, are that there are insufficient (only 10 or 15) emergency stop buttons at Talley's Group's Ashburton factory, and that the plaintiffs are aware of but have ignored workers' concerns about that insufficiency.

[49] The defendants contend that those imputations would not further damage the plaintiffs' reputations for viewers who also learned *from the same broadcast* that:

(a) in late 2020, Talley's Group was fined more than $300,000 over two incidents where workers were caught in exposed nip joints on conveyor belts;

(b) a District Court judge noted that the hazard was obvious and the dangers "well-known", and described Talley's Group's failure to guard against them as constituting a "long-recognised and fundamental breach"; and

(c) the Talley's Group had faced formal WorkSafe enforcement action 43 times between 2018 and 2021, including 22 health and safety improvement notices and a recommendation for prosecution.

[50] The plaintiffs argue that the pertinent difference between those matters and the pleaded imputations is that the latter are allegations about the present, rather than the

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[21] See for example *Templeton v Jones* [1984] 1 NZLR 448 (CA).

past. They say that the imputations have their own distinct 'sting', because they allege that the Ashburton factory is currently unsafe, and worse, that the plaintiffs know but do not care.

[51] The plaintiffs submit that the matters relied on by the defendants show that Talley's Group's health and safety record is not unblemished nor without incident, but they argue that this is very different to an allegation that Talley's is knowingly making its people continue to work in an unsafe environment regardless of their express concerns.

[52] The plaintiffs submit that consequently, if the plaintiffs' imputations were conveyed by the 3 July stories, then it is not reasonably arguable that the other matters relied on by the defendants under s 8(3)(b) of the Act could succeed as a defence to the fifth and sixth causes of action, and the plaintiffs seek an order that it be struck out.

[53] In my view, it is reasonably arguable that the imputations arising from the 'emergency stop button' statements do not tend to materially damage the plaintiffs' reputation any further than the contextual statements.

[54] I accept that the 'emergency stop button' statements relate to the present, whereas the contextual statements relate to the past. However, the contextual statements relate to the very recent past, namely 'between 2018 and 2021' and 'late last year' in the context of a publication on 3 July 2021. I am not persuaded that a viewer would make the fine temporal distinction the plaintiffs suppose.

[55] Furthermore, in my view the plaintiffs overstate the difference between the pleaded imputations and the contextual statements. In particular, the pleaded statement by the District Court Judge that the hazard was 'obvious' and the dangers 'well-known', with Talley's Group's failure to guard against them constituting a 'long-recognised and fundamental breach' is not so different from the alleged 'sting' of the imputations that Talley's is knowingly making its people continue to work in an unsafe environment, regardless of their express concerns. These phrases imply an awareness of a danger and a conscious failure to respond. Certainly, it is reasonably arguable.

[56] For these reasons I refuse to strike-out the contextual truth defence at 72(e) of the ASOD.

Bad reputation pleading

[57] In Schedule 1 to their ASOD, the defendants set out 22 'instances of misconduct by the Talley's Group' to show the plaintiffs have a bad reputation in the aspects to which the proceeding relates.

[58] The defendants rely on the particulars of misconduct in Schedule 1 in three different ways:

(a) as part of denying that the publications caused the plaintiffs any pecuniary loss;

(b) in response to each cause of action, denying that the relevant imputations have injured the plaintiffs' reputations; and

(c) as part of an 'affirmative defence' that the Court exercise its discretion against making a declaration under s 24(1) of the Act.

[59] In each instance, the defendants say that the instances of alleged misconduct in Schedule 1 show that the Talley's Group already had such a bad reputation that, if the publications caused any harm to the plaintiffs, it was 'less than minor'. They give notice under s 42 of the Act that they intend to adduce evidence of the specific instances of misconduct to establish that the plaintiffs' reputation was generally bad in the aspect to which the allegedly defamatory statements relate.

[60] The plaintiffs allege that the defendants' pleading wrongly tangles-up three distinct matters:

(a) the recently recognised common law principle that *for a meaning to be defamatory* it must tend to affect the claimant's reputation adversely in a more than minor way;

(b) the statutory requirement that a corporate plaintiff must prove that it has suffered or is likely to suffer some *pecuniary loss;* and

(c) the statutory rule that *in mitigation of damages* a defendant may prove specific instances of misconduct by the plaintiff to establish that its reputation is generally bad in the aspect to which the proceedings relate.

[61] The plaintiffs argue that this 'entanglement' is wrong in principle. They say that the relevance of the matters set out in Schedule 1 is limited, as a matter of law and logically, to mitigating damages. Section 30 of the Act provides that in mitigation of damages, a defendant may prove specific instances of misconduct of the plaintiff in order to establish that the plaintiff has a generally bad reputation in the aspect to which the proceedings relate. The plaintiffs say that, as damages are not sought in this case, there is no basis to allow the defendants to take the proceedings on an irrelevant tangent into matters that do not go to the truth of the imputations.

[62] Accordingly, the plaintiffs ask that the bad reputation plea is struck out entirely. If the entire bad reputation plea is not struck out, the plaintiffs seek orders:

(a) that the particulars of events concerning wrongful dismissals and other such employment disputes be struck out, because none of the pleaded imputations relate to that aspect of the plaintiffs' reputations; and

(b) that the bad reputation plea to the ninth to 12th causes of action be struck out, because none of the events in Schedule 1 relate to the aspects of the plaintiffs' reputations that they concern – namely their conduct of the ACC Scheme.

[63] The defendants say they are entitled to plead and prove specific instances of misconduct in this case. They acknowledge that s 30 of the Act does not make explicit that specific instances of misconduct by the plaintiff may also be relevant to the exercise of the Court's discretion to make a declaration under s 24 of the Act. But they argue that this drafting does not signify that s 30 circumscribes the admission of such evidence to cases where damages are sought.

[64] Furthermore, the defendants argue that the reasons for which Parliament amended the law to allow a defendant to adduce evidence of specific instances of a plaintiff's poor reputation were unrelated to the mode of relief, highlighting the words of Lord Radcliffe in *Plato Films v Speidel*:[22]

> The difficulty is that 'general evidence of reputation' does not convey an idea of any content. Life not being a morality play or a Victorian melodrama, [people] do not enjoy reputations for being bad or good *simpliciter*, nor if they did, would the proof of such generalities throw any light upon the loss of reputation suffered from a particular libel.

[65] The defendants submit that it would be inconsistent with the scheme of the Act and not in the interests of justice if the manner in which a defendant may prove matters of general relevance to a proceeding were limited depending on the relief sought. They argue that it would be wrong if a plaintiff could curtail a defendant's right to prove matters relevant to their defence by choosing to seek a declaration rather than damages.

[66] In considering these submissions I propose to first discuss s 30 of the Act and the status of the common law prior to its enactment. I will then turn to the other reasons the defendants give for why they can raise particulars of this kind.

Section 30 of the Act – mitigation of damages

[67] It has been a feature of the common law for some time that a plaintiff's allegedly bad reputation may be taken into account to reduce the damages payable by the defendant if they are found liable for defamation. The rationale is that where a plaintiff has a bad general reputation, the damage to the reputation caused by the defamation complained of cannot be as great as it would be in the case of a person of good reputation. As Cave J said in *Scott v Sampson*:[23]

> The damage, however, which he has sustained, must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know if the fact is so that he is a man of no reputation. "To deny this would", as is observed in *Starkie on Evidence,* "be to decide that a man of the worst

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22 *Plato Films Ltd v Speidel* [1961] AC 1090 (HL) at 1130.
23 *Scott v Sampson* [1882] 8 QBD 491 at [503].

character is entitled to the same measure of damages with one of unsullied and unblemished reputation".

[68] The rationale was put this way in *Hobbs v Tinling (CT) & Co Ltd*:[24]

> It follows that a defendant may reduce the damages for libel by proving that the plaintiff had already a bad reputation. To do this, the jury must take the view that his reputation is so bad that the defamatory statement complained of would reasonably and ordinarily cause much less damage than would be caused to a man of good reputation by the same statement.

[69] Importantly, in the past, defendants were prohibited from leading evidence of particular acts of misconduct by the plaintiff to establish their bad reputation.[25] A defendant was limited to calling general evidence to prove the plaintiff's bad reputation.[26] The reason for the rule was that all that was relevant was the plaintiff's actual reputation (and not his or her disposition).[27] However, inroads had begun to be made to this principle, for example, allowing evidence of prior convictions of the plaintiff.[28]

[70] In New Zealand, s 30 of the Act relaxed the rule. It provides:

> In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

[71] In recommending this change the Committee on Defamation said:[29]

> MITIGATION OF DAMAGES
>
> **Present Law**
>
> The defendant is entitled to lead evidence in mitigation of damages. This evidence can be classified under four main headings:
>
> (a) that the plaintiff had a general bad reputation prior to publication of the defamation complained of;

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24 *Hobbs v Tinling (CT) & Co Ltd* [1929] 2 KB 1 (CA) at [17].

25 Todd, above n 7, at [16.6.01(3)(a)]; Godwin Busuttil and Richard Parkes (eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022) at 34-081 [Gatley 13th ed]. *Scott v Sampson*, above n 23, at 505 approved in *Plato Films Ltd v Speidel,* above n 22, at 1123, 1139 and 1147.

26 *Scott v Sampson* at 503.

27 *Plato Films Ltd v Spiedel,* above n 22, at 1110.

28 *Goody v Odhams Press Ltd* [1967] 1QB 333.

29 Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, Wellington, December 1997) [McKay Report] at [392][394].

…

Evidence of a Plaintiff's Bad Character

A defendant may mitigate damages by giving evidence which proves that the plaintiff is a man of bad general reputation. In such a case the damage to his reputation caused by the defamation complained of cannot be so great as it would be in the case of a man of good reputation. The defendant, however, cannot give evidence of specific facts and circumstances to show the disposition of the plaintiff as distinct from general evidence that he has a bad reputation. Thus evidence that the plaintiff had stolen a watch is inadmissible if the plaintiff had in fact stolen a clock, unless it was sufficiently well known to have affected the plaintiff's general reputation.

We think this rule is too restrictive and agree with the Faulks Committee's recommendation that a defendant should be entitled to rely in mitigation of damages upon specific instances of misconduct on the part of the plaintiff.

[72] There can be no doubt given the words of s 30 and its history, that the section only permits a defendant to plead specific instances of misconduct to establish the plaintiff's generally bad reputation to mitigate damages. I do not understand the defendants to dispute that proposition, although I note that they have purported to give notice under s 42 of the Act. That notice requirement relates to s 30. As the plaintiffs do not claim damages, ss 30 and 42 are not relevant.

[73] However, the parties are at odds about whether *the only* circumstances in which a defendant is able to plead and prove particulars of specific acts of misconduct are those specified in s 30 – where damages are claimed, and the defendant looks to mitigate the damages payable. The plaintiffs say that this was the common law position before s 30 and an Act is not intended to alter the common law unless it does so clearly and unambiguously.[30] In a defamation context, as stated by Lord Sumption in *Lachaux v Independent Print Ltd*:[31]

> There is a presumption that a statute does not alter the common law unless it is so provides, either expressly or by necessary implication. But this is not an authority to give an enactment a strained interpretation. It means only that the common law should not be taken to have been altered casually, or as a side-effect of the provisions directed to something else.

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30 *The Laws of New Zealand* (online ed) Statutes at [171] citing *Mitchell v Licensing control Commission* [1963] NZLR 553 at 558 and *Hawkins v Sturt* [1992] 3 NZLR 602 at 610.

31 *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 at [13].

[74] The plaintiffs say that if the drafters of s 24, which permits a plaintiff to seek a declaration that the defendant is liable to the plaintiff in defamation, had intended that specific instances of misconduct by the plaintiff should also be able to be proved as factors relevant to whether the court should grant a declaration, they would have said so – or at least removed the qualifier 'in mitigation of damages' from s 30.

[75] Whereas the defendants point out that at the time ss 30 and 24 were introduced by the Act, the declaratory remedy had not yet been invoked in defamation actions. They say it was assumed in most cases that there would be a claim for damages. They say that while Parliament sought to highlight, with s 24, the availability of the Court's general discretion to make a declaration, it did not go further to specify (or limit) anywhere in the Act matters the Court may consider in the exercise of its discretion.

[76] Furthermore, the defendants say that the landscape has recently changed with the introduction of the threshold requirement that the defamation has caused the plaintiff 'more than minor' harm.[32] They submit that there is no room for the *Scott v Sampson* presumption against evidence of bad reputation through specific instances of misconduct in light of this development in the common law in New Zealand. Nor in view of the related, they say, statutory requirement that the defamation has caused or is likely to cause a corporate plaintiff pecuniary loss.

[77] To my mind, the issue is one of relevance. It can only be permissible for a defendant to raise particulars of a plaintiff's prior bad reputation if that reputation has a bearing on an aspect of the claim. As noted, in the past, the plaintiff's pre-existing bad reputation has only ever been considered relevant to mitigation of damages. The defendants suggest that this consideration has wider relevance to:

(a) the new common law threshold that the publication must tend to harm the plaintiff's reputation in a 'more than minor' way;

(b) the statutory requirement that the publication must cause or be likely to cause a corporate plaintiff financial loss; and/or

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32 *Craig v Slater* [2020] NZCA 305 at [44][45].

(c) the Court's discretionary decision to make a declaration.

[78] I will consider each of these aspects in turn. In doing so, I am mindful of the original rationale for the common law excluding evidence of specific instances of misconduct by the plaintiff, which, as explained by Cave J in *Scott v Sampson,* was:[33]

> It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of.

[79] Lord Guest in *Plato Films v Spiedel* put it this way:[34]

> In my view, inconvenience and injustice would certainly follow if the law were to be as appellants argued it ought to be. If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral, and which had but an indirect bearing on the main question in the case. It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject matter of libel, introduced by the defendants for the purposes of mitigating damages.

[80] In my view these observations are still apposite today, in the sense that the defendants should not be permitted to plead particulars of prior acts of misconduct of the plaintiffs unless they are truly relevant to the matters at issue. Otherwise, the proceeding is at risk of becoming distracted from the truth or otherwise of the pleaded imputations (and the facts and circumstances that the defendants say prove the truth of those imputations) to remote and irrelevant matters.

Relevant to the common law threshold that the harm be more than minor?

[81] It is now an accepted part of the common law of New Zealand that for a meaning to be defamatory, it must tend to affect the plaintiff's reputation adversely in

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33 *Scott v Sampson,* above n 23, at p 505.
34 *Plato Films Ltd v Speidel,* above n 22, at p 1148.

a more than minor way.[35] This qualification reflects the 'serious harm' threshold developed in United Kingdom courts.[36]

[82] The issue arose in New Zealand in *CPA Australia Ltd v New Zealand Institute of Chartered Accountants (CPA Australia)*.[37] The defendant raised the objection that the statements were simply robust criticisms of one professional body about another. Dobson J considered whether there should be a minimum threshold of seriousness to warrant the intervention of the law of defamation. The Judge observed that it was well settled in England that all definitions of what may constitute defamatory material are subject to a requirement that the material complained of has to exceed a threshold of seriousness, so as to exclude trivial claims.[38]

[83] Dobson J noted that in terms of the application of such a threshold, Gatley comments:[39]

> Whether the threshold of seriousness has been met is a multi-factorial question, that must be viewed in light of the rights in art 8 and art 10, and that will require the Court to require matters such as the nature and inherent gravity of the allegation, whether the publication was oral or written, the status and number of publishees, and whether the allegations were believed, the status of the publisher and whether this makes it more likely that the allegation will be believed, and the transience of the publication.

[84] Dobson J concluded: [40]

> I would be minded to adopt the analysis exemplified in *Thornton* and other recent United Kingdom authorities by recognising a minimum threshold of seriousness. That would require a claimant to meet an objective seriousness threshold as an element of making out the actionability of alleged defamatory statements. The approach suggested in *Gatley* appears appropriate.

[85] Palmer J adopted this qualification in *Sellman v Slater*, while preferring to set the threshold at 'more than minor' rather than 'serious'.[41] In so doing, the Judge also

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35 *Craig v Slater* , above n 32, at [44][45]; approving the reasoning of Palmer J in *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [67].

36 See *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 (QBD).

37 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 [*CPA Australia*].

38 At [105], citing Alastair Mullis and Richard Parks (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at 2.4 [Gatley 12th ed].

39 At [111], citing Mullis and Parks at 2.4.

40 At [120].

41 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [68].

referred to the decision of Tugendhat J in *Thornton v Telegraph Media Group Ltd* which found that defamation claims are subject to a threshold of seriousness of whether the statement "substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do".[42]

[86] Palmer J confirmed that damage is presumed to flow from defamation, but it is a rebuttable presumption. He considered that the publisher should bear the burden of rebutting the presumption, as they, rather than the defamed, can establish most easily whether the defamatory statement has been read.[43] If the publisher can show that there is not, nor is there likely to be, sufficient damage to reputation above a certain threshold, then that should be able to be raised as a defence to a claim of defamation.[44]

[87] Palmer J concluded:

> [69] So I consider the common law of defamation in New Zealand is that damage to reputation is presumed to occur on publication of a defamatory statement. But that presumption is rebuttable. If a defendant can show their statement has caused less than minor harm to the plaintiff's reputation, that will defeat a defamation claim. It may therefore be a basis for showing a cause of action is clearly not tenable in a strike-out application.

[88] The Court of Appeal approved adoption of the 'more than minor' harm requirement in New Zealand common law in *Craig v Slater*:[45]

> [44] For a meaning to be defamatory, it must tend to affect the claimant's reputation adversely. And it must do so in more than a minor way.

[89] In doing so, the Court confirmed that damage is rebuttably presumed (in most cases) but that it does not alter the fact that damage to reputational credit remains an element of the tort.[46]

[90] In my view, a plaintiff's pre-existing bad reputation is not relevant to the 'more than minor' threshold. The investigation of whether the threshold has been crossed is

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42 *Thornton v Telegraph Media Group Ltd*, above n 36.
43 *Sellman v Slater,* above n 41, at [65].
44 At [65].
45 *Craig v Slater,* above n 32.
46 *Craig v Slater,* above n 32, at [45].

confined to issues bearing on the gravity of the meaning of the statement, and possibly, the circumstances of its publication (such as how widely it has been read). The 13th (latest) edition of Gatley describes the application of the common law threshold in this way:[47]

> Whether the threshold of seriousness has been met has been described as a multi-factorial question, which must be viewed in light of the rights in art.8 and art.10. The result in each case will depend on the character of the statement complained of. For example, in *Thornton* itself, Tugendhat J concluded that an imputation the claimant author had engaged in copy approval, that is to say giving interviewees the right to read what the author had said about them and to change it, fell below the threshold required and was not therefore defamatory of the claimant. Similarly, in *Ecclestone v Telegraph Media Group Ltd*, Sharp J held that an allegation that the claimant was dismissive of the views of several well-known vegetarians was not capable of being defamatory. Such an imputation was at worst a breach conventional etiquette but did not reach the level of seriousness required to be actionable. Likewise, in *Daniels v BBC*, Sharp J again concluded that minor criticisms of the claimant's performance at work would not be defamatory because the necessary threshold of seriousness was not met.
>
> [citations omitted]

[91] The principle has been applied in New Zealand where there was very limited publication, as in *Driver v Radio New Zealand* where the evidence was that very few people saw the residual internet publication after the limitation cut-off date .[48] It has also been applied where the defamation was of a trifling or merely insulting nature, as in *Sellman v Slater*.[49]

[92] I conclude that the pleaded particulars of prior acts of misconduct by the plaintiffs in Schedule 1 to the ASOD have no bearing on the issue of whether the imputations tended to adversely affect the plaintiffs' reputation in a more than minor way.

[93] Even if I am wrong, it is inconceivable *in this case* that the Court or a jury would find from the pleaded particulars that the plaintiffs' reputation was already so bad that it could not have been made worse in a more than minor way by the

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47 [Gatley 13th ed] at 2.004.

48 *Driver v Radio New Zealand* [2019] NZHC 3275, [2020] 3 NZLR 76 at [74].

49 *Sellman v Slater*, above n 41. See the Annex attached to unreported version at rows 10, 11, 23, 26 and 34).

publications. The pleaded imputations are extremely serious, and the stories were published widely by New Zealand's respected, state-owned television broadcaster.

Relevant to the statutory requirement that the publication must cause or be likely to cause a corporate plaintiff financial loss?

[94] Section 6 of the Act reads:

> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings —
>
> (a) has caused pecuniary loss; or
>
> (b) is likely to cause pecuniary loss —
>
> to that body corporate.

[95] This section reflects the fact that "a company cannot be injured in its feelings, it can only be injured in its pocket".[50]

[96] This is a statutory requirement and is distinct from the recently adopted common law 'more than minor' threshold. The s 6 requirement is focused on the actual or likely impact of the defamation. Whereas, as discussed, the common law 'more than minor' threshold is concerned with the gravity of the defamatory meanings. I note that in the United Kingdom a claim must pass the common law 'seriousness' threshold and, following the introduction of s 1 of the Defamation Act 2013, a plaintiff must show that the publication has caused or is likely to cause serious harm to their reputation. This latter threshold requires the Court to look to the actual facts about its impact and not just the meaning of the words.[51]

[97] The financial loss pleaded by the plaintiffs can be grouped into these broad categories:

(a) external consultant costs, increased costs of recruitment, costs associated with a audit, the opportunity cost of sales staff, management,

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50 *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) at [262].
51 *Lachaux v Independent Print Ltd,* above n 31 at [12].

executive WorkSafe and board time spent responding to the publications;

(b) lost revenue from reduced sales as a result of consumers choosing not to buy the plaintiffs' products and farmers choosing not to supply the AFFCO Group; and

(c) indirect financial impacts due to reduced staff morale, diverted attention, anxiety and negativity, reduced engagement, and increased likelihood of resignation.

[98] To meet the statutory requirement, the plaintiffs will need to establish that the publications *caused or were likely to cause* them some of these costs, losses, or other financial impacts. It is clear from the authorities that the plaintiffs can discharge the onus of proving the likelihood of financial loss for the purposes of s 6 by "drawing inferences that loss would have been caused, so there is no necessary obligation to adduce direct evidence of pecuniary loss suffered because of the defamatory statements".[52]

[99] Evidence of prior acts of misconduct by the plaintiffs could only be relevant to this statutory requirement if it is conceivable that a jury or the Court would find that the plaintiffs' reputation was already so bad because of those acts that the publications were unlikely to have caused them *any* financial loss. For the same reasons given in relation to the 'more than minor' threshold, I find this proposition implausible in this case, where the allegations were serious and widely published by a well-respected media organisation.

Relevant to the discretion to make a declaration?

[100] Section 24 of the Act states:

> In any proceedings for defamation, the plaintiff may seek a declaration that *the defendant is liable* to the plaintiff in defamation.
>
> (emphasis added)

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[52] *CPA Australia*, above n [37], at [79].

[101] As noted earlier, the defendants submit that the courts have recognised that all matters relevant to damages, including matters relevant to mitigation of damages, are relevant to whether the Court should exercise its discretion to make a declaration. They point to *Smith v Dooley*[53] where the Court of Appeal found that the plaintiff's "inexplicable delay" in issuing proceedings, and further one year delay before having the proceeding set down for trial, were relevant considerations to the exercise of the discretion under s 24. The Court of Appeal indicated that the High Court should have declined the plaintiff declaratory relief because of this delay.[54]

[102] The defendants also rely on *Van De Klundert v Clapperton,* where this Court considered correspondence indicating that the plaintiff's reputation had not been damaged in the eyes of one of the recipients of the publication, the plaintiff's motivation for seeking a declaration, the acrimonious relationship breakdown between the plaintiff and defendant, the plaintiff's conduct, and unsatisfactory aspects of the plaintiff's evidence.[55] Associate Judge Osborne concluded that these identified factors, which would be relevant to mitigation of damages, might also persuade a trial judge to refuse a declaration.[56]

[103] In my view it is quite a leap from these authorities to conclude that because evidence of a plaintiff's bad reputation is a matter that is considered relevant to mitigation of damages it is also relevant to the discretionary decision as to whether a declaration should be made. This conclusion does not follow as a matter of logic.

[104] The declaration that a plaintiff may seek is that the defendant "is liable to the plaintiff in defamation". *Todd on Torts* observes that although not traditionally used as a tort remedy, a declaratory order may be useful where a plaintiff does not seek any real compensation or other relief but requires a statement from the Court as to whether its rights have been infringed.[57] The declaration is purely one of liability – that the defendant has published a statement about the plaintiff which may tend to lower the

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53 *Smith v Dooley* [2013] NZCA 428.
54 At [97] to [104].
55 *Van De Klundert v Clapperton* [2015] NZHC 425.
56 At [43].
57 Todd, above n 7, at 25.5.

plaintiff in the estimation of right-thinking members of society generally[58] and to which none of the recognised defences apply.

[105] As noted earlier, the reason why evidence of bad reputation has historically been permissible in mitigation of damages is because it would be wrong for a person of poor reputation to receive the same amount of compensation as a person of good reputation. This consideration is simply not relevant to whether the plaintiff has been defamed by the statement complained of. A plaintiff's pre-existing bad reputation can mitigate but not excuse the defamation. As Scrutton LJ said in *Hobbs v Tinling (CT) & Co Ltd*:[59]

> I am not aware of, and counsel was unable to refer me to, any reported case where it was held that, in the case of any prima facie defamatory statement, proof that the plaintiff had a bad reputation which could not be made worse was an answer to the action.

[106] Similarly, the defendants have not referred me to any authority where the court has considered the pre-existing bad reputation of the plaintiff relevant to a defendant's liability.

[107] They refer to the Report of the Committee on Defamation (McKay Report) in which the Committee said that the declaratory remedy targets those plaintiffs seeking only to clear their name. The defendants say that if a plaintiff has a poor reputation in the aspect to which the proceeding relates prior to the defamation, then not only will the alleged defamation have had no material impact on their reputation but further, any declaratory remedy in respect of the defamation would not succeed in clearing their name.

[108] I do not accept that submission. Read in context, the Committee used the phrase "to clear their name" as meaning to clear their name of the effect of the defamation in question. They said:[60]

> [401] The Court has a general power to make a declaratory judgment even though no other relief is sought. If a plaintiff sought a declaratory judgment to clear his name it would prevent others from making allegations that a claim

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58 *Sim v Stretch* [1936] 2 All ER 1237 HL at [1240], per Lord Atkin.
59 *Hobbs v Tinling (CT) & Co Ltd*, above n 24, at 17.
60 Mckay Report.

> for defamation was simply a gold-digging one. Although the court already possesses the power to make a declaratory judgment, it is a discretionary remedy and is so far untried as a remedy for defamation. There is considerable doubt whether a judge would be prepared to grant it. We consider that use of this avenue by plaintiffs who merely sought to clear their name would be encouraged by making a specific statutory reference to it as a remedy for defamation.

[109] As a matter of logic, if a defendant has published a statement about the plaintiff that is defamatory in that it tends to adversely affect the reputation of the plaintiff in a more than minor way, it matters not that the plaintiff already had a bad reputation. That reputation is presumed to have been made worse by the defendants' publication.

[110] Of course, a declaration is a discretionary remedy and a plaintiff who establishes that they have been defamed is not entitled to this relief as of right.[61] However, I consider it inconceivable that the Court, having found that the pleaded imputations were conveyed, that the imputations were untrue, and that this was not a case of responsible public interest reporting, would decline the plaintiffs relief because of the pleaded prior acts of misconduct set out in Schedule 1 to the ASOD.

[111] For all of the above reasons, I conclude that the particulars of bad reputation pleaded by the defendants at Schedule 1 to the ASOD are irrelevant to the issues in this proceeding and should be struck out. These particulars are liable to cause prejudice and delay and seek to inappropriately bring irrelevant material into the proceeding.

DEFENDANTS' APPLICATION FOR PARTICULARS

[112] The plaintiffs claim that the defendants' campaign of defamatory broadcasts and articles has caused and/or is likely to have caused pecuniary loss to each of the plaintiffs.

[113] The defendants say that the plaintiffs' pleading does not comply with r 5.26(b) of the High Court Rules. That rule states that a statement of claim must:

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61 *Salmon v McKinnon* [2007] NZCA 516 at [47].

> (b) give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action;
>
> …

[114] The defendants argue that because the need to establish pecuniary loss forms a central part of the cause of action for a corporate defamation plaintiff,[62] the alleged pecuniary losses by corporate defamation plaintiffs must be properly pleaded and particularised. They submit that while s 6 of the Act does not in itself require particularisation of pecuniary loss in numerical terms, the standard rules of pleadings do in most circumstances. Further, that the requirement to plead and prove financial loss is not diminished by the choice of a non-monetary remedy. They refer to the statement of Dobson J in *CPA Australia*:[63]

> [80] However, I do not accept that … where a corporate plaintiff elects only to seek relief by way of declaration and costs, it is, in some more general way, relieved of the obligation to establish that some pecuniary loss has been suffered, or is likely to be suffered in the future. Nor does it mean that the standard of proof is in some way reduced.

[115] The defendants maintain that where a corporate plaintiff alleges losses in the form of incurred costs, the date that those costs were incurred, the amount of the costs, and the nature of the services paid for must be specified.

[116] They say that where the alleged harm is in the form of damage to goodwill and trade, the pleadings are akin to a claim for the recovery of a sum of money in damages in defamation. While a plaintiff who seeks a declaration does not seek recovery of the relevant sum, its request for a remedy is founded in the alleged financial harm said to have arisen from the publication of particular defamatory statements. The defendants say that rules relating to the particularisation of damages claims for defamation apply by analogy. They rely on *Crossfit Inc v Exercise Industry Association Ltd*.[64] In that case, the Court found that a plaintiff claiming damages for alleged losses to goodwill and reputation must at least estimate the losses to inform the defendants of the case that they need to meet.

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62 Reflected in s 6 of the Act.
63 *CPA Australia,* above n 37.
64 *Crossfit Inc v Exercise Industry Association Ltd* [2016] NZHC 1028.

[117] The particulars sought by the defendants can be grouped in this way:

(a) for each plaintiff, the *dates* and *times* on which their executives and managers are said to have spent time dealing with the effect of the publications and the *alleged value* of that time;

(b) the *nature* and *value* of the alleged financial losses the publications caused or are likely to have caused to each plaintiff and particulars of *how* the publications are said to have caused those losses;

(c) for each plaintiff the *identity* of external consultants, *nature* of their services, *dates* and *times* when their services were provided and the *cost* of those services;

(d) for each plaintiff the *nature* and *extent* of costs associated with the WorkSafe audit including the *nature* and *duration* of disruption to operations, *nature* and *extent* of loss to productivity, and the alleged *direct costs* incurred;

(e) for each plaintiff the *identity* of customers and suppliers who were contacted by sales staff to reassure them, the *dates* and *times* on which the contact occurred, and the alleged *value* of sales staff time spent on this task;

(f) the *nature*, *extent* and *value* of predicted lost sales of branded Talley's and AFFCO and non-branded products;

(g) for each plaintiff the *nature*, *extent* and *value* of losses associated with reduced staff morale;

(h) for each plaintiff the alleged *increased cost* of recruitment; and

(i) any cessation or threatened cessation of supply of product from farmers to the fourth or fifth plaintiffs.

[118] The defendants contend that without these particulars, they do not have the information they need to assess the merits of the case against them, including whether 'more than minor' harm has been suffered by the plaintiffs. They cannot test the allegations by speaking to the parties allegedly involved or formulate a proportionate response to the claim. They say they also cannot test the extent to which costs associated with low staff morale, for example, are caused by the matters reported on rather than the reporting itself.

[119] The defendants further say that it should not be difficult for the plaintiffs to provide the particulars sought. Most of the reporting took place between eight months to a year ago and the plaintiffs should have 'a feel'[65] for its losses by now. Particulars of external consultant costs are easily provided. Costs and indirect losses caused by the WorkSafe audit are historic and particulars can be provided or described and estimated. They say the same applies to increased recruitment costs and that any cancellation of supply contracts will have happened by now.

[120] In my view there are three difficulties with the way the defendants conceive the issue. First, they conflate the recently adopted 'more than minor' threshold with the statutory requirement that a corporate plaintiff has suffered, or is likely to have suffered, some financial harm as a result of the publication. As discussed earlier, the common law 'more than minor' threshold was developed to eliminate trivial claims from the court system. It is a defence that can be raised by the defendant to rebut the presumption that damage flows as an ordinary consequence of a defamatory statement. The focus is on the gravity of the pleaded meaning and whether it tends to discredit the plaintiff in a more than minor way.

[121] Whereas s 6 reflects the common law rule that a corporate plaintiff's claim must sound in money.[66] That rule was well-articulated shortly before the enactment of the Act by Tipping J in *Mount Cook Group Ltd v Johnstone Motors Ltd* where he stated: "companies may sue for defamation by reason of material calculated to damage

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65 *Crossfit Inc v Exercise Industry Association Ltd,* above n 64 at [130].
66 *Tairawhiti District Health Board v Perks* (No 2) [2002] NZAR 533 at [21].

the company's business interests or goodwill".[67] The onus is on the plaintiff to plead and prove that the publication caused it financial loss or is likely to have caused it financial loss.

[122] Second, the defendants' argument overlooks that a corporate plaintiff need not plead or prove that it has suffered *actual* financial loss because of the publication. It need only show that the defamatory publication is *likely* to have caused it financial loss. So, in *Mount Cook Group Ltd v Johnstone Motors Ltd* Tipping J went on to say:[68]

> There has been some suggestion that companies can only obtain damages by proving special damage, namely actual identifiable financial loss … I do not accept that proposition. In my view the position is as stated above, on the basis that damages may be obtained by a company in respect of defamatory material likely to cause commercial loss without any evidence being necessary of actual loss having been suffered … Another way of putting the point is to say that a company may obtain damages for defamation but only in respect of financial loss, either shown to have been suffered or shown to have been probable ...

[123] The McKay Report made clear that s 6 was intended to enshrine rather than change that aspect of the law, which was and remains that there is no obligation on the plaintiff to prove actual financial loss:[69]

> Lord Reid's dictum [in *Lewis v Daily Telegraph*] suggests that a trading corporate can only succeed where the defamation has either caused, or is likely to cause, actual financial loss.
>
> [360] We consider that this is good law. We are opposed to any change which would prevent a trading corporation from succeeding in an action in defamation unless it could prove actual financial loss. It is impracticable and difficult to assess and prove the amount of actual financial loss which can be attributed to a defamatory statement even where it is obvious that such loss has occurred. We consider therefore that trading corporations should continue to succeed where they can show that loss is likely to be caused by a defamatory statement.

[124] The McKay Report went on to propose the dual threshold (has suffered or is likely to suffer pecuniary loss) that was enacted in s 6 of the Act.[70]

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67 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC) at 497, where his Honour also said "the emphasis is on the fact that damages can be awarded to a company only in respect of commercial loss, however suffered".

68 At 497.

69 McKay Report at [359][360]. The dictum referred to is from *Lewis v Daily Telegraph* [1964] AC 234 at 262 per Lord Reid.

70 McKay Report at [361]. The Defamation Bill 1988 (72-1) (explanatory note) at iv records: "As recommended by the Committee on Defamation, the provision purports to state the existing

[125] Cases since the enactment of the Act have confirmed that s 6 has not set up any higher threshold than there was at common law. In *Tairawhiti District Health Board v Perks (No 2)*, Paterson J explicitly accepted that s 6 imposes no obligation on a corporate plaintiff to plead special damage.[71]

[126] This has subsequently been applied in *Ayers v LexisNexis NZ Ltd*,[72] where Associate Judge Smith acknowledged that a quite different level of particulars would be required for a special damages claim than is necessary to establish the threshold in s 6. His Honour considered the distinction as follows:[73]

> If and to the extent that Elementary is claiming special damages, it is claiming damages which are capable of precise calculation, and not merely damage which could be expected to flow directly, in the ordinary course of things, from the publication of the alleged defamatory words.

[127] Here the plaintiffs claim the latter type of financial loss. Such a case can, and in in many instances will, be inferential. In *CPA Australia*, Dobson J accepted that the plaintiff:[74]

> … can discharge the onus of proving the likelihood of pecuniary loss for the purposes of s 6 by drawing inferences that loss would have been caused, so there is no necessary obligation to adduce direct evidence of pecuniary loss suffered as a result of the defamatory statements.

[128] Third, the defendants are incorrect to hold the plaintiffs to the same standard of particularisation as would apply if the plaintiffs were claiming for the recovery of a sum of money in damages for the defamation. Rule 5.26(b) of the High Court Rules requires a statement of claim to give *sufficient* particulars of certain matters "to inform the Court and the party or parties … of the plaintiff's cause of action". The sufficiency of the particulars must be measured against the purpose of the pleading. Here, the

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common law rule in relation to defamation proceedings by bodies corporate, in order to remove any doubt in the matter."

71 *Tairawhiti District Health Board v Perks,* above n [66], at [21]. At [25] his Honour confirmed that "s 6 in referring to "pecuniary loss" is referring to injury to reputation in the way of the plaintiff's trade or business".

72 *Ayers v LexisNexis NZ Ltd* [2014] NZHC 2998 per Associate Judge Smith at [35]; which his Honour noted at [40] was consistent with the decision of the UK Court of Appeal in *Jameel v Wall Street Journal Europe Sprl (No 2)* [2005] QB 914, where the Court accepted that a requirement that a corporation suing in defamation must prove special damage would leave many an injured corporation without remedy.

73 At [65].

74 *CPA Australia*, above n 37, at [79]. Applied in *Exit Timeshare Now (NZ) Ltd v Classic Holidays Ltd* [2020] NZHC 2046 at [43].

purpose of the pleading is not to support a claim to special damages but to establish, for the purposes of s 6, that the plaintiffs have sustained, or are likely to have sustained, some financial loss because of the publications.

[129] As the above cases establish, all that is required is *the likelihood* of *some* financial loss. The plaintiffs are not required to prove special damage, nor to prove that the financial loss was of any significant magnitude. In many cases, the financial loss likely to be caused to a corporate plaintiff by defamatory reporting will not be susceptible to precise calculation but will be that which is to be expected, in the ordinary course of things, from the broadcasts in the context of the plaintiff's business. In such a case, the s 6 threshold may be discharged by the Court drawing appropriate inferences from the evidence.

[130] Applying these principles, I find that it is not necessary for the plaintiffs to quantify the various heads of financial loss identified in their pleading. The defendants' request for particulars of amounts, values and 'the extent of' the plaintiffs' financial losses runs counter to the authorities that hold that quantification is not required when a corporate plaintiff is not claiming special damages.

[131] Nor is it necessary for the plaintiffs to specify names, dates, or times. In some cases, these particulars will be necessary for the other party to understand the cause of action. That is not the case here. It is not necessary for the Court or the defendants to know these details to understand the nature of the financial losses the plaintiffs consider they have suffered or are likely to have suffered. These details, if relevant, are a matter for evidence.

[132] Having said that, the particulars do not give the defendants fair notice of how the plaintiffs claim to meet the s 6 requirement. The plaintiffs plead that the defamatory imputations have caused and/or are likely to have caused them financial loss in each of the categories described. It is unclear from this pleading whether they claim that the imputations actually caused them the financial losses described or are likely to have caused them the financial losses described, or a combination of both of these. In my view, the plaintiffs should state which of the identified categories of financial loss they claim to have suffered because of the publications; and which

categories the plaintiffs claim they are likely to have suffered as a result of the publications.

Result

[133] In relation to the plaintiffs' application to strike out parts of the defendants' second amended statement of defence:

(a) the truth defence under s 8(3)(a) of the Act to the ninth, 10th, 11th, and 12th causes of action, as pleaded in paragraph 72(d) and particularised at Schedule 2 (kk) to (yyy) is **not** struck out;

(b) the defendants are required to provide further particulars at (oo) to (aaa) within **20 working days**;

(c) the contextual truth defence under s 8(3)(b) of the Act to the fifth and sixth causes of action, as pleaded in paragraph 72(e) is **not** struck out;

(d) the bad reputation plea in reliance on specific instances of alleged misconduct, as pleaded at paragraphs 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 76 and 77 and particularised at Schedule 1 **is** struck out.

[134] In relation to the defendants' application for further particulars of the pecuniary loss pleaded by the plaintiffs in the amended statement of claim:

(a) the plaintiffs are required to state which of the identified categories of financial loss the plaintiffs claim to have suffered as a result of the publications; and which categories of financial loss the plaintiffs claim they are likely to have suffered as a result of the publications within **20 working days**; and

(b) otherwise the application is **dismissed**.

[135] In terms of costs, the outcome in relation to the plaintiffs' application to strike out is mixed. Both parties have had a measure of success. The most appropriate outcome may be for costs to lie where they fall.

[136] As the plaintiffs were successful in the defendants' application for further particulars, my preliminary view is that they should be paid their costs associated with this application on a 2B basis.

[137] If the parties cannot agree on a costs position they may file submissions of not more than four pages within **15 working days**.

Associate Judge Gardiner

Solicitors:

Meredith Connell, Auckland
LeeSalmonLong, Auckland