IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-0001
[2023] NZHC 2705

BETWEEN	WILSON PARKING NEW ZEALAND LIMITED Plaintiff
AND	DLA PIPER NEW ZEALAND First Defendant
	GILMER INVESTMENTS LIMITED Second Defendant

Hearing: 25 July 2023

Counsel: L McKeown for the Plaintiff
R Hucker for the Second Defendant

Judgment: 28 September 2023

JUDGMENT OF ASSOCIATE JUDGE BRITTAIN

This judgment was delivered by me on 28 September 2023 at 12 midday pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Duncan Cotterill, Wellington
Morgan Coakle, Auckland

Counsel:
Capital Chambers, Wellington
Molloy Hucker, Auckland

Introduction

[1] The plaintiff, Wilson Parking New Zealand Limited (Wilson) operates parking buildings. The second defendant, Gilmer Investments Limited (Gilmer), owns a property on Gilmer Terrace, Wellington Central, which was leased to Wilson and used as a carpark.

[2] The lease commenced on 20 May 1998 and expired on 30 April 2022. Wilson was required to pay a variable portion of rent based on its gross revenue from the premises and to furnish to Gilmer certain accounting information, including periodic certification from Wilson's auditors of the gross revenue.

[3] From as early as 2019, Gilmer and Wilson fell into dispute regarding Wilson's obligations under the lease. The first defendant, DLA Piper New Zealand (DLA Piper), is a firm of solicitors retained by Gilmer to represent it in respect of the dispute.

[4] On 17 September 2021, a director of Gilmer sent an email to Wilson's auditors, PwC New Zealand, raising matters relating to the dispute (the PwC email).

[5] On 5 or 6 October 2022, on instructions from Gilmer, DLA Piper sent letters to 10 parties whom Gilmer understood to be owners of other parking buildings leased to Wilson (the DLA Piper letters). The DLA Piper letters related to the dispute.

[6] Wilson alleges that the PwC email and the DLA Piper letters are defamatory and constitute misleading or deceptive conduct in breach of the Fair Trading Act 1986 (FTA). Wilson's statement of claim comprises four causes of action:

(a) against Gilmer and DLA Piper alleging defamation in respect of the DLA Piper letters;

(b) against Gilmer alleging defamation in respect of the PwC email;

(c) against Gilmer and DLA Piper alleging breaches of the FTA in respect of the DLA Piper letters; and

(d) against Gilmer alleging breaches of the FTA in respect of the PwC email.

[7] Gilmer has applied for summary judgment and, in the alternative, for an order striking out all or parts of the statement of claim. DLA Piper did not participate in the hearing of the application.

Background

[8] On 19 December 2019, Gilmer's then solicitors, Martelli McKegg, wrote to Wilson raising Gilmer's concerns about Wilson's recording of gross revenue. Correspondence followed between Wilson's solicitors, Duncan Cotterill, and Gilmer's solicitors. By February 2020, Gilmer was no longer retaining Martelli McKegg and had instead instructed DLA Piper.

[9] The correspondence between the solicitors confirms that the parties were unable to resolve their dispute. Gilmer was requesting detailed financial information from Wilson, which Wilson did not accept it was obliged to provide.

[10] In 2020, Gilmer filed an application in this Court seeking an order for pre-commencement discovery from Wilson. The application was heard by Brewer J. One of the issues in this proceeding is whether the PwC email and the DLA Piper letters fairly described Brewer J's decision.

[11] In his judgment dated 13 May 2021, Brewer J summarised Gilmer's position as follows:[1]

> [3] Gilmer considers that Wilson has breached the lease by failing to comply with provisions designed to enable Gilmer to be assured that Wilson is calculating revenue correctly for the purpose of determining whether the rent should include a revenue component.
>
> [4] Gilmer also submits that it has a report from KPMG which at least casts doubt on Wilson's report of revenue in 2019 from casual parking. And there is an apparent non-return of $0.50 card charges which Gilmer submits should be included in the revenue calculation.

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1 *Gilmer Investments Ltd v Wilson Parking New Zealand Ltd* [2021] NZHC 1071.

> [5] Gilmer submits it has an entitlement, or may be entitled, to claim relief against Wilson. Gilmer submits it is impossible or impracticable for it to formulate its claim without reference to the documents it wishes to have discovered, and that it cannot get access to the documents otherwise because of Wilson's intransigence. It submits there is no doubt that the documents may be or may have been in Wilson's control.

[12] Brewer J summarised Wilson's position as follows:

> [8] Wilson contends that none of the prerequisites for an order under r 8.20 [of the High Court Rules 2016] are made out by Gilmer. Wilson particularly criticises Gilmer's characterisation of the disclosure already made by Wilson. Wilson says that far from being intransigent it has been particularly co-operative. Wilson submits there is no extant or probable entitlement to a claim and in its submissions goes into the sort of detail that would be required for an application for summary judgment or strike out.

[13] The application for pre-commencement discovery was declined:

> [9] I do not accept it is impossible or impracticable for Gilmer to formulate its claim without reference to one or more of the documents it seeks in precommencement discovery. Accordingly, I am not satisfied that the order is necessary at this time.
>
> [10] On Gilmer's evidence, it can bring a proceeding for specific performance of the lease. That will trigger discovery rights.
>
> [11] On Gilmer's evidence, it can include an action that Wilson is in breach of the lease by under-reporting revenue. The KPMG report can be relied upon if Gilmer wishes to do so.

[14] Following the Court's refusal to order pre-commencement discovery, Gilmer did not file a proceeding against Wilson in the High Court. Instead, it appears that Gilmer sought to obtain the information it was seeking by alternative means.

[15] On 17 September 2021, Ms Hosford, the sole director of Gilmer, sent the PwC email to two partners of PwC. The email has not been produced in evidence, but it is quoted in the statement of claim, and that pleading is admitted by Gilmer. The quoted extracts include:

> PWC are obviously unaware that in our lease to Wilson Parking it states that the lessor, Gilmer Investments Ltd is entitled to: "Such certification shall be in such form and style and shall contain such detail and breakdown as the Lessor may require."
>
> …

> I am also attaching copies of the PWC reports of factual findings and have underlined all of the disclaimers contained in this report as this does not fulfil the Lessor's requirements in accordance with paragraph 1.2e of the lease.
>
> …
>
> We have been advised by Duncan Cotterill Wilson Parking Solicitors that Wilson Parking are only able to provide us with reconciled raw data as they only have one bank account for over 400 carparks and therefore we have been unable to perform a full audit of the financial accounts that have not already been reconciled. This is backed by a recent Judge's pre-commencement decision that Wilson Parking NZ Ltd is in breach of their lease.

[16] The "PWC reports of factual findings" that were attached to the email are not in evidence.

[17] I infer that PwC provided a copy of the PwC email to Wilson, because on 11 October 2021, Duncan Cotterill wrote to DLA Piper regarding the PwC email. Duncan Cotterill's letter recited the extracts from the PwC email quoted above and then stated:

> We understand PwC has considered Gilmer's allegations and found no basis to them.

[18] The letter from Duncan Cotterill to DLA Piper put Gilmer on notice that Wilson considered that Gilmer was in breach of the covenant for quiet enjoyment in the lease, and that the statements in the PwC email were defamatory. The letter required Gilmer to cease and desist from making defamatory allegations, contacting PwC or Wilson Parking's customers or others, and breaching the covenant for quiet enjoyment.

[19] DLA Piper responded by a letter dated 13 October 2021, containing a denial by Gilmer of any wrongdoing.

[20] There is no evidence of what transpired between 13 October 2021 and the DLA Piper letters sent on 5 or 6 October 2022. The DLA Piper letters are not in evidence. The statement of claim quotes extracts from the DLA Piper letters, and again that pleading is admitted by Gilmer. The DLA Piper letters contained the following statements, with footnotes included:

> Our client has concerns relating to possible under reporting of revenue by Wilson Parking. Our client has had difficulties reconciling the reported revenue against the reported occupancy rates and hourly carpark pricing, and has not been able to obtain full records from Wilson Parking to evidence the revenue information.
>
> …
>
> Expert evidence was obtained that "at least casts doubt on Wilson's report of revenue in 2019 from casual parking".[1]
>
> …
>
> In light of the difficulties confirming the reported revenue, our client applied to the High Court for an order for pre-action discovery to obtain the further information. Although the judge ultimately declined the application, His Honour commented that on our client's evidence, it could "*bring a proceeding for specific performance of the lease*" and could "*include an action that Wilson is in breach of the lease by under-reporting revenue*".[2]
>
> …
>
> We would be interested in hearing from you and understanding whether you … have any similar concerns with potential under-reporting of revenue under the relevant lease.
>
> [Footnote 1: *Gilmer Investments Ltd v Wilson Parking New Zealand Ltd* [2021] NZHC 1071 at [4].]
>
> [Footnote 2: *Gilmer Investments Ltd v Wilson Parking New Zealand Ltd* [2021] NZHC 1071 at [10]–[11].]
>
> (emphasis in original)

[21] I infer that one of the recipients of the DLA Piper letters contacted Wilson, because on 14 October 2022, Duncan Cotterill wrote to DLA Piper regarding the DLA Piper letters. Duncan Cotterill's letter alleged that the DLA Piper letters were defamatory and contained misleading statements amounting to unlawful interference with Wilson's business relationships. Duncan Cotterill's letter requested that Gilmer immediately cease and desist from making defamatory and misleading allegations, and from contacting Wilson Parking's landlords, customers and business associates.

[22] On 17 October 2022, DLA Piper sent Duncan Cotterill an email advising it was seeking instructions. On 19 October 2022, DLA Piper sent Duncan Cotterill an email advising that the DLA Piper letters were sent to the owners of 10 carparks on 5 or 6 October 2022, stating that there was no current intention to write to further owners.

The email noted that the allegations in Duncan Cotterill's letter dated 14 October 2022 were denied, stating that a more substantive response would be provided.

[23] A reply letter from Duncan Cotterill to DLA Piper dated 19 October 2022 confirms that Wilson was not satisfied with that response. This proceeding was commenced in December 2022.

[24] In March 2023, Gilmer filed the present application seeking summary judgment or, in the alternative, strike out of the statement of claim. Gilmer argues that the statements that form the basis of Wilson's claim are not defamatory or cause damage that was less than minor and therefore do not meet the threshold for a claim of defamation. Alternatively, Gilmer argues that Wilson cannot establish a pecuniary loss, which it contends is a requirement for a successful claim of defamation by a corporate plaintiff.

[25] Regarding the FTA claims, Gilmer argues that Wilson has not suffered a loss and that there is no basis for injunctive relief under the FTA.

[26] Wilson argues that the statements in the PwC email and the DLA Pipers letters were serious, defamatory and misleading or deceptive, and that the issue of pecuniary loss is a matter for trial.

Legal principles: summary judgment and strike-out

Summary judgment

[27] Rule 12.2(2) of the High Court Rules 2016 (HCR) provides that the Court may enter judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.

[28] The test for defendant's summary judgment was set out by the Court of Appeal in *Stephens v Barron*:[2]

> (a) The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually this will arise where the

[2] *Stephens v Barron* [2014] NZCA 82 at [9] (footnotes omitted).

defendant can offer evidence which is a complete defence to the plaintiff's claim.

(b) An application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment able to be properly arrived at only after a full hearing of the evidence.

(c) The Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment is not to be arrived at on a fine balance of the available evidence as would be appropriate at a trial.

(d) The residual discretion of the Court to refuse summary judgment would be properly invoked to avoid the oppression which would otherwise result if an application by a defendant for summary judgment would pre-empt a plaintiff exercising the right to amend the pleadings.

(e) Summary judgment should not be applied for unless the substantive merits of the case are clear and capable of summary disposal.

[29] In *Westpac Banking Corp v M M Kembla New Zealand Ltd*,[3] Elias CJ said:

> [63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.
>
> [64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[30] In *Bernard v Space 2000 Ltd*,[4] Thomas J, referring to the predecessor of r 12.2(2), described the onus on the defendant as requiring a "king hit":

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3 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA).

4 *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA).

> [21] Rule 136(2), as indicated in *Kembla* (at 313), is only appropriate where the defendant has a "*clear answer* to the plaintiff which *cannot be contradicted*". Summary judgment for a defendant "will arise where the defendant can offer evidence which is a *complete defence* to the plaintiff's claim". (Emphasis added). The requirement that there be a clear answer which cannot be contradicted and a complete defence before judgment is entered for a defendant under r 136(2) is not to be disregarded. Examples which are given of appropriate cases for summary judgment under the subrule are where the wrong plaintiff has proceeded (*Coastal Tankers Ltd v Southport NZ Ltd* 17/5/99, Master Venning, HC Invercargill, CPI4/96) or where the situation is clearly one of qualified privilege (*Ferrymead Tavern Ltd v Christchurch Press Ltd* 11/8/99, Master Venning, HC Christchurch, CPI84/98). Thus, the subrule contemplates an answer which is clear-cut; what in colloquial language would be described by counsel as a "king hit".

Strike-out

[31] Pursuant to r 15.1(1) of the HCR, the Court may strike out all or part of a pleading if it:

(a) discloses no reasonably arguable cause of action; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the Court.

[32] The principles governing strike-out applications are summarised in the Court of Appeal decision in *Attorney-General v Prince*:[5]

(a) A strike-out application is to proceed on the assumption that the facts pleaded in the statement of claim are true unless those pleaded facts are entirely speculative and lack any foundation.

(b) It is only where, on the facts alleged in the statement of claim, however broadly they are stated, no private law claims of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage.

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

(c) The threshold for strike-out is high. Before a proceeding may be struck out the causes of action must be so clearly untenable that they cannot possibly succeed.

(d) The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material.

(e) The fact that an application to strike out raises difficult questions of law, and requires extensive argument, does not exclude the jurisdiction.

[33] Under r 15.1(3), the Court has a discretion to stay all or part of the proceeding instead of striking out all or part of a pleading. It may be appropriate to make an order staying part of a proceeding if justice may require the cause of action to be determined at a later date.[6]

My approach in this case

[34] Gilmer's primary application is for summary judgment. If one or more of Wilson's causes of action is capable of succeeding, then summary judgment cannot be entered for Gilmer. If that is the case, then it remains necessary to consider whether any cause of action is untenable as a matter of law, and amenable to strike-out.

[35] I will first consider Wilson's causes of action in defamation, starting with the DLA Piper letters followed by the PwC email. I will then consider Wilson's claims under the FTA, starting with the DLA Piper letters followed by the PwC email.

Legal principles: defamation

Defamatory meaning and the threshold of seriousness

[36] A body corporate may bring proceedings for defamation in the same way as an individual.[7] Ordinarily, a defamatory statement against a corporate will attack the manner in which it conducts its business or otherwise accuse it of fraud or financial

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6 *Hyslop v Society of Lloyd's* (1992) 6 PRNZ 204 (HC) at 217.
7 See *CW Wah Jang and Co Ltd v West* [1933] NZLR 235 (SC).

mismanagement. The statement must reflect on the corporate itself; imputations against its members or officials personally will not sustain an action.[8]

[37] Whether a statement is capable of bearing the defamatory meaning pleaded by a plaintiff is an issue that can be resolved on a strike-out application. The test for making that determination was stated by Barker J in *New Zealand Magazines Ltd v Hadlee (No 2)*:[9]

> (a) The test is objective. In the circumstances in which the words are published, what would the ordinary, reasonable person understand or infer from them as a matter of impression?
>
> (b) The stereotype of the ordinary, reasonable person is one of ordinary intelligence, general knowledge and experience of the world, with a capacity for reading between the lines; but not one who would indulge in strained or forced interpretation or groundless speculation. This hypothetical person must also be fair-minded, not avid for scandal, not unduly suspicious, nor one prone to fasten on to one derogatory meaning when other innocent or at least less serious meanings could apply.
>
> (c) The words complained of must be read in context; in other words, the article as a whole must be construed with appropriate regard to the mode of publication and surrounding circumstances.

[38] In *Craig v Slater*, Kós P characterised the assessment as follows:[10]

> [16] Whether a statement is capable of bearing a particular meaning is a question of law; whether it in fact conveys that meaning is a question of fact …

[39] Where defamatory statements involve allegations of misconduct, there are three tiers of possible meaning:

> (a) that the claimant is guilty of the misconduct;
>
> (b) that there are reasonable grounds to suspect that the claimant is guilty of misconduct; or

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8 *South Hetton Coal Co Ltd v North-Eastern News Assoc Ltd* [1894] 1 QB 133 (CA) at 141.
9 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 630.
10 *Craig v Slater* [2020] NZCA 305.

(c) that there are grounds to investigate whether the claimant is guilty of misconduct.[11]

While convenient, these tiers are not closed nor exhaustive. Ultimately, the precise meaning of the words and the overall context will be determinative.

[40] For a pleaded meaning to be defamatory, it must tend to affect a claimant's reputation adversely in more than a minor way,[12] referred to as the "threshold of seriousness". In *Sellman v Slater*, Palmer J treated the threshold as an element of the tort,[13] describing it as follows:[14]

> … a statement is defamatory if it causes the reasonable person reading or hearing it to think worse of the person concerned in a more than minor way.

[41] It is open to a defendant to apply to strike out a cause of action as untenable if a defendant can show their statement has caused less than minor harm to the plaintiff's reputation.[15]

[42] In assessing the level of reputational harm behind a statement, the character of that statement will be a primary factor.[16] Also pertinent is the extent of publication. In *Driver v Radio New Zealand Ltd*, alleged defamatory statements were published online, but viewed by very few people.[17] On that basis, Clark J struck out the defamation claims, holding that it was not seriously arguable that the plaintiff had suffered more than minor reputational harm.

[43] It is not possible to assess the character of an alleged defamatory statement without first determining whether the pleaded meanings are made out. I will therefore approach the application in this case by considering whether the pleaded meanings are made out and will then turn to consider whether the threshold of seriousness is met. A

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11 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15] citing *Chase v News Group Newspapers Ltd* [2003] EMLR 11 (CA).
12 *Craig v Slater*, above n 10, at [45].
13 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [63].
14 At [75].
15 At [69].
16 See Richard Parkes and Godwin Busuttil (eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022) at 28.
17 *Driver v Radio New Zealand Ltd* [2019] NZHC 3275, [2020] 3 NZLR 76.

similar approach was taken by this Court in *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*,[18] and the Court of Appeal in *Craig v Slater*.[19]

Pecuniary loss

[44] Section 6 of the Defamation Act 1992 provides:

> **6 Proceedings for defamation brought by body corporate**
>
> 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.

[45] Section 6 codifies the common law.[20] In *Mount Cook Group Ltd v Johnstone Motors Ltd,* Tipping J stated the common law position as follows:[21]

> … 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. In any such case the appropriate assessment must be made upon all the material available to the Court or the jury. 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 …

On Tipping J's summation of the common law, both actual financial loss and probable financial loss can be determined *retrospectively* as at the date of the court's assessment.

[46] However, in *CPA Australia*, Dobson J held that the first limb in s 6(a) calls for a *retrospective* assessment of whether pecuniary loss has been suffered, and the second limb in s 6(b) requires a *prospective* consideration to be undertaken at the time of the assessment, as to whether pecuniary loss is likely to be suffered in the future.[22]

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18 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854.
19 *Craig v Slater*, above n 10.
20 *Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [62].
21 *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 (HC) at 497.
22 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, above n 18, at [67]–[68], [80]–[84] and [102]–[103].

[47] In *Rural News Ltd v Communications Trumps Ltd*, Anderson J commented on the relationship between s 24 of the Defamation Act, which permits the plaintiff to seek only a declaration of liability rather than damages, and s 6:[23]

> … s 6 itself recognises the distinction and the ability to seek a declaration without claiming damages at all, provided by s 24 of the Act, demonstrate[ing] that a body corporate may obtain standing to sue on proof of the likelihood of pecuniary loss without proving actual pecuniary loss and may then obtain relief by way of a declaration and costs.

[48] In that case, the trial Judge had found that the defendant had defamed the corporate plaintiff in a newspaper publication. The Judge concluded that no actual pecuniary loss could be proved so as to warrant an award of damages, but nonetheless awarded a declaration on the basis that the publication directly impugned the corporate's business reputation such that some pecuniary loss had been likely.[24] Anderson J found no error in the Judge's application of s 6 and dismissed the appeal.[25]

[49] In declining leave for a second appeal, Fisher J said: [26]

> … It seems to me that on any approach to the matter the evidence demonstrated that Communications was and is a commercial enterprise relying upon public relations as the source of its business. The defamatory statement was a direct reflection upon its capacities and propensities in the way in which it went about its business. Once those items were specifically proven it was open to the Court to move on to the inference that the publication was likely to cause pecuniary loss. The fact that the word "proves" is found in the section does not in any way inhibit the Court from drawing proper inferences.

[50] In *Lockwood Group Ltd v Small*, a judgment dealing with the adequacy of a pleading of pecuniary loss, Allan J said:[27]

> … Ms Grant acknowledges that there is an obligation to plead sufficient particulars to enable the defendant to understand how the plaintiff proposes to establish a causative link between the actions of the plaintiff on the one hand, and the alleged losses sustained by the plaintiff on the other. In doing so, she acknowledges also the need to bear in mind the distinction between general and special damages and the requirement, in the context of the defamation claim, that the plaintiff establish at least probable financial loss.

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23 *Rural News Ltd v Communications Trumps Ltd* HC Auckland AP 167-SW00, 4 April 2001 at [14].
24 At [15]
25 At [16].
26 *Rural News Ltd v Communications Trumps Ltd* HC Auckland AP 404/167/00, 5 June 2001 at [14].
27 *Lockwood Group Ltd v Small* HC Auckland CIV-2009-404-1019, 9 March 2011 at [23] (footnote omitted).

[51] The approach to "likely" pecuniary loss taken in *Rural News* and *Lockwood Group*, that is a *retrospective* assessment of whether pecuniary loss was likely, is preferable to the approach taken in *CPA Australia*. A retrospective assessment is consistent with the law before the enactment of the Defamation Act, as set out in *Mount Cook Group*. The McKay report confirms that s 6 was not intended to alter the existing law on the requirement for pecuniary loss.[28]

[52] Pecuniary loss includes loss in the value of a company's goodwill.[29] There needs to be an evidential basis before pecuniary loss, including loss in the value of goodwill, can be inferred.[30] If a plaintiff is relying on inferences, then there is a corresponding obligation to plead the facts from which those inferences can be drawn. The causative link between the complaint and the loss must be pleaded.[31]

[53] Finally, I note that the relationship between the threshold of more than minor damage and pecuniary loss under s 6 is yet to be fully explored in case law. For non-corporate plaintiffs, the issue will not arise, because s 6 does not apply. For corporate plaintiffs, satisfaction of the threshold and pecuniary loss are likely to go hand in hand. In this case, I will consider the threshold and s 6 separately.

Defamation in relation to the DLA Piper letters

Are the statements in the DLA Piper letters capable of being defamatory and do they meet the threshold of seriousness?

[54] Wilson pleads that the statements made in the DLA letters mean or infer:

> 19.1 that Wilson has under-reported its revenue;
>
> 19.2 that Wilson has withheld records from Gilmer to hide under-reporting of revenue;
>
> 19.3 that the High Court found, in *Gilmer Investments Ltd v Wilson Parking New Zealand Ltd* [2021] NZHC 1071 at [4], that there was expert evidence that at least cast doubt on Wilson's revenue reporting;
>
> 19.4 that the High Court determined:

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28 Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, Wellington, December 1977) at [360].

29 *Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd*, above n 20, at [12].

30 *Chinese Herald Ltd v New Times Madia Ltd* [2004] 2 NZLR 749 (HC) at [57].

31 *Lockwood Group Ltd v Small* HC Auckland CIV-2009-404-1019, 16 November 2011 at [63]–[64].

19.4.1 that there was a valid basis for Gilmer to pursue proceedings against Wilson for under-reporting revenue; and

19.4.2 that Wilson was in breach of the lease by under-reporting its revenue; and

19.5 that Wilson had under-reported its revenue not only in relation to Premises, but also in relation to other buildings/leases.

[55] The thrust of these meanings is that Wilson under-reported its gross revenue and withheld records from Gilmer to hide that under-reporting, and that the High Court considered that Gilmer had a valid basis to sue Wilson.

[56] Gilmer's notice of application states fifteen grounds in support of the application. In respect of the defamation causes of action, all but two of the grounds relate to pecuniary loss. The exceptions are grounds (h) and (n):

(h) Nor has the Plaintiff demonstrated to an arguable level that the communications had a defamatory meaning nor that the statements made were untrue especially in circumstances where the communications were subject to qualified privilege;

…

(n) The proceedings are otherwise frivolous and vexatious given the limited nature of the disclosure or publication relied upon by the Plaintiffs [sic] and the absence of demonstrating any loss;

[57] Ground (h) suggests an evidential challenge, however, it is sufficient to raise a challenge to the pleaded meanings.

[58] The grounds in Gilmer's notice of application did not expressly refer to Wilson's failure to meet the threshold for a defamation proceeding. However, ground (n) is sufficiently broad to encompass such a challenge, which was also briefly raised in Gilmer's written submissions.

[59] Gilmer's written submissions focussed on the issue of pecuniary loss. Gilmer's evidence was confined to the issue of loss, and accurately described by counsel for Wilson as sparse.

[60] Counsel for Gilmer only briefly addressed the pleaded defamatory meanings when submitting that Wilson had not met the threshold. It was submitted that the

alleged defamatory statements did not comprise serious allegations against Wilson or adversely affect Wilson's reputation. No direct attack was made on the inferred defamatory meanings.

[61] Consequently, counsel for Wilson did not make any written or oral submissions to defend the inferred defamatory meanings. Therefore, it is appropriate that I determine Gilmer's application for summary judgment and/or strike on the basis of the pleaded defamatory meanings.

[62] It is helpful to distinguish between arguments based on the character of the statements and arguments based on the nature and extent of publication. I will deal with the character of the statements first.

[63] Counsel for Gilmer submitted that the character of the DLA Piper letters must be considered in the context of an approach to parties who might be able to provide evidence to support a proceeding by Gilmer against Wilson. It was argued that the letters were no different to the provision of a statement of claim to a potential witness. The reference to the decision of Brewer J was accompanied by the name of the case and its citation, so the recipients of the letter could check the source. Counsel submitted that the recipients were likely to be sophisticated business people with access to legal advice.

[64] I reject Gilmer’s arguments. There is no evidence on whether the recipients were sophisticated business people, or how they reacted to the letters. The statements in the DLA Piper letters give the impression that Brewer J viewed Gilmer’s allegations as supported by reasonable grounds, tier two of the possible meanings (see para [39] above). An ordinary sensible reader of the letters cannot be expected to locate and read the judgment of Brewer J.

[65] I accept the submission of counsel for Wilson that the pleaded defamatory meanings are serious. The pleaded defamatory meanings cannot be characterised as trivial; they effectively characterise Wilson as, inter alia, a dishonest lessee. I find that the pleaded inferred meanings are capable of being defamatory.

[66] That leaves the issue of the nature and extent of the publication. The pleadings confirm that 10 letters were sent, and that six of the recipients were not in a contractual relationship with Wilson at the time of receipt of the letter. The pleading implies that those six recipients are former lessors of premises to Wilson, but there is no evidence of that.

[67] Counsel for Wilson submitted that the 10 letters amounted to a wide broadcast, including to entities such as Wellington City Council and Fletcher Construction. It is presently unknown whether any recipients passed on the letters to other parties. The nature and extent of the alleged publication, as pleaded, is sufficient to give rise to a tenable claim that the statements caused more than minor harm to Wilson's reputation.

[68] Regarding summary judgment, the difficulty that Gilmer faces is that at this stage of the proceeding there is no evidence to support Gilmer's argument that the nature and extent of the publication was so limited that it precludes any adverse effect on Wilson's reputation.

[69] To obtain summary judgment, Gilmer must establish that the alleged defamatory statements did not meet the threshold of affecting Wilson's reputation in a more than minor way. I find that Gilmer cannot discharge that onus.

Did the DLA Piper letters cause Wilson actual or likely pecuniary loss?

[70] Given that Wilson has elected not to adduce any evidence of loss, there is only limited evidence available to Gilmer. Counsel for Gilmer invited me to draw adverse inferences from Wilson's decision not to adduce evidence of its loss. I am not prepared to do so because that would alter the established onus on defendants applying for summary judgment.

[71] Gilmer relies on the published financial statements of Wilson for the years ended 30 June 2017 to 30 June 2022 inclusive. There is no accompanying evidence analysing these financial statements, and they are of very limited assistance at this stage of the proceeding.

[72] The DLA Piper letters were sent in October 2022, and any impact on Wilson's turnover or profit would only be ascertainable from the financial statements for the year ended 30 June 2023, which are not available. The financial statements for the year ended 30 June 2022, at this stage, prove nothing.

[73] There is no evidence of the following matters:

(a) in respect of the six recipients who were not in a contractual relationship with Wilson at the time of receipt of the letter, whether the letter had any effect on a possible future contractual relationship with Wilson; and

(b) in respect of any recipients who were in a contractual relationship with Wilson at the time of receipt of the letter, whether the letter has prejudiced, or will prejudice, that contractual relationship, including any renewal of a lease or grant of a new lease.

[74] The evidence that Gilmer has adduced is insufficient to discharge the onus on it to show that Wilson cannot succeed with a claim that the statements caused, or were likely to cause, pecuniary loss.

Conclusion

[75] The claim for defendant summary judgment on the cause of action for defamation in relation to the DLA Piper letters fails.

[76] This cause of action is tenable as a matter of law and not amenable to strike out. However, further particulars of the alleged pecuniary loss are required.

[77] The pleading should make clear whether Wilson is alleging actual pecuniary loss under s 6(a) of the Defamation Act, or likely pecuniary loss under s 6(b), or both. Whatever the case, Wilson must provide full particulars of the type of loss suffered and the causal link to the alleged defamatory statements. If Wilson relies on inferences, then the facts that support the inferences must be pleaded.

Defamation in relation to the PwC email

Are the statements in the PwC email capable of being defamatory and do they meet the threshold of seriousness?

[78] As with the DLA Piper letters, I assess the alleged defamatory statements based on Gilmer's pleaded defamatory meanings.

[79] Wilson pleads that the statements made in the PwC email mean or infer:

32.1 that Wilson was impeding an audit of its financial accounts;

32.2 that Wilson was withholding information from Gilmer and/or PwC;

32.3 that Wilson had breached the Lease;

32.4 that a Judge had decided that Wilson was in breach of the Lease; and

32.5 misquote Clause 1.2(e) of Schedule 2 of the Lease, to bolster the assertion that Wilson had breached the Lease.

[80] The thrust of these meanings is that Wilson impeded PwC's audit of Wilson's financial accounts by withholding information from PwC, that Wilson breached its lease with Gilmer by withholding information from Gilmer and that a judge decided that Wilson was in breach of the lease.

[81] Counsel for Gilmer argued that emphasis should be placed on PwC's role as auditors and the professional standards that would be applied by PwC when viewing the email. PwC would not have considered the reputation of Wilson to be adversely affected by the email.

[82] Counsel for Wilson argued that the lease did not provide for contact between Gilmer and PwC, and the Court should focus on the contents of the email. It is irrelevant that PwC may have been prohibited from further publishing the email.

[83] The position in respect of the PwC email is different to the position in respect of the DLA Piper letters for several reasons. First, there is no suggestion that PwC further distributed the email. The class of recipients is closed.

[84] Secondly, the context of the statements is different. In the PwC email, Gilmer may have miscast Brewer J's judgment. However, it is self-evident from the contents of the email that its main purpose was to complain about PwC reports regarding Gilmer's property and to raise an audit query. It can reasonably be expected that PwC would have dealt with Gilmer's query of PwC's audit according to their usual procedures and protocols.

[85] Thirdly, the recipients were two partners of PwC, and likely to possess commercial acumen and business experience. If they were in doubt about the significance of a legal decision referred to in correspondence, then it can reasonably be expected that they would have obtained a copy of the decision and/or taken legal advice.

[86] Duncan Cotterill's letter to DLA Piper on 11 October 2021 confirms that the two partners of PwC considered the statements in the PwC email to have no basis. Therefore, Gilmer's reputation was not adversely affected.

[87] I find that this cause of action is untenable as a matter of law because the threshold of more than minor damage cannot be met due to the context of the publication, the extent of the publication and the nature of the persons to whom publication was made. The PwC email was not capable of, and did not, adversely affect Wilson's reputation. This cause of action should be struck out.

Legal principles: misleading or deceptive conduct

[88] Wilson pleads breaches of s 9 of the FTA, which provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[89] The approach to any claim under s 9 is set out in the often-cited statement of Blanchard J in *Red Eagle Corp Ltd v Ellis*:[32]

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[32] *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 (footnotes omitted).

> [28] It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties. Richardson J in *Goldsboro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation — that is, with the characteristics known to the defendant or of which the defendant ought to have been aware — would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[90] Under s 41(1) of the FTA, the Court may grant an injunction restraining a person from engaging in conduct that contravenes s 9. Where a person has suffered loss or damage resulting from misleading or deceptive conduct then there are a range of other orders that the Court can make, including an order for damages under s 43.

[91] In *Red Eagle*, Blanchard J discussed the required nexus between the misleading or deceptive conduct and loss or damage as follows:[33]

> … with breach proved and moving to s 43, the court must look to see whether it is proved that the claimant has suffered loss or damage "by" the conduct of the defendant. The language of s 43 has been said to require a "common law practical or common-sense concept of causation". The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach the effective cause or an effective cause? Richardson J in *Goldsboro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant

[33] At [29] (footnotes omitted).

> may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.

[92] Recourse to the FTA has to date been uncommon in circumstances which have traditionally been the subject of defamation claims. That is particularly so where the alleged defamation does not form part of marketing to consumers.

[93] In *CPA Australia* and *Crossfit Inc v Exercise Industry Assoc Ltd*,[34] the plaintiffs pleaded claims under the FTA as an alternative to claims in defamation. In both cases the statements were made in the context of marketing to consumers.

[94] Following trial in *CPA Australia*, Dobson J accepted that there had been misleading or deceptive conduct. However, CPA Australia Ltd had been unable to adduce evidence of loss and the claim under the FTA failed on that basis.[35]

[95] Dobson J held that the threshold of seriousness for defamation claims did not apply to claims for damages under s 43 of the FTA. However, the Judge accepted that the threshold might be relevant when considering a claim for an injunction under s 41 of the FTA.[36]

[96] Blanchard J's discussion of causation in *Red Eagle*, reproduced above, is directed towards a situation where the claimant under s 9 of the FTA is the person allegedly misled or deceived. That will not always be the case.

[97] In *Pharmaceutical Management Agency Ltd v Researched Medicines Industry Assoc New Zealand Inc*, the High Court considered an application for an injunction under s 41 of the FTA.[37] The applicant was engaged in litigation with an industry body and sought an injunction restraining that body from further publishing an allegedly misleading and deceptive media release regarding the litigation.

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34 *Crossfit Inc v Exercise Industry Assoc Ltd* [2016] NZHC 1028.
35 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, above n 18, at [220]–[221].
36 At [219].
37 *Pharmaceutical Management Agency Ltd v Researched Medicines Industry Assoc New Zealand Inc* [1996] 1 NZLR 472 (HC).

[98] McGechan J held that whether the media release was misleading or deceptive was a serious question to be tried because there was room for a finding that the nature and extent of the relevant litigation was misstated in a way likely to mislead or deceive.[38] McGechan J's judgment demonstrates that s 9 of the FTA can apply in situations such as the present.

Breach of s 9 of the FTA in relation to the DLA Piper letters

[99] Counsel for Gilmer focussed on the lack of evidence of loss or damage to Wilson. Counsel's submissions were tailored to the application for summary judgment. Counsel did not advance an argument that the cause of action under the FTA is untenable as a matter of law, which is the only argument open to Gilmer given my finding on the cause of action in defamation based on the DLA Piper letters.

[100] In the absence of grounds of opposition and written submissions supporting an argument that the claim is untenable as a matter of law, I am not prepared to strike out Wilson's claim under s 9 of the FTA, both in respect of compensatory relief under s 43 and injunctive relief under s 41. The claims are tenable as a matter of law.

[101] The issues of liability and proof of loss, and the Court's exercise of a discretion in respect of injunctive relief, must be determined at trial.

[102] As with the defamation cause of action, the FTA cause of action requires further particulars of the alleged loss.

Breach of s 9 of the FTA in relation to the PwC email

[103] The position in respect of the PwC email is different. The reasons that support a strike out of the defamation cause of action (see paras [78] to [87] above) apply with equal force to the cause of action under the FTA.

[104] A reasonable person in the position of the PwC partners would not have been misled or deceived by the email. The PwC email did not objectively have the capacity to mislead or deceive the recipients. Duncan Cotterill's letter to DLA Piper on 11

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[38] At 475.

October 2021 confirms that the two partners of PwC were not misled or deceived because they considered Gilmer's allegations baseless.

[105] This cause of action should be struck out.

Costs

[106] The second defendant has been partly successful with its applications. My preliminary view is that the degree of success of the parties is more or less equal, so that costs should lie where they fall.

[107] If counsel are unable to resolve costs and disbursements by agreement, the directions below shall apply.

Result

[108] I make the following orders:

(a) the second defendant's application for summary judgment is dismissed;

(b) the second and fourth causes of action in the plaintiff's statement of claim dated 14 December 2022 are struck out;

(c) by **13 October 2023**, the plaintiff shall file and serve an amended statement of claim providing further and better particulars of the losses the plaintiff claims to have sustained;

(d) in respect of the cause of action in defamation, the particulars shall include:

(i) whether the plaintiff alleges actual pecuniary loss and/or likely pecuniary loss;

(ii) the nature of the loss;

(iii) in respect of any actual loss, an estimation of the loss;

(iv) the causal link between the alleged defamatory statements and the alleged loss;

(v) the facts that support any inferences that the plaintiff relies on;

(e) in respect of the cause of action under the FTA:

(i) the nature of the loss;

(ii) in respect of any actual loss, an estimation of the loss;

(iii) the causal link between the alleged misleading or deceptive conduct and the alleged loss;

(iv) the facts that support any inferences that the plaintiff relies on;

(f) if the parties are unable to agree on costs by 13 October 2023, then:

(i) the second defendant shall file a memorandum on costs, limited to five pages, by 20 October 2023;

(ii) the plaintiff shall file a memorandum on costs, limited to five pages, by 28 October 2023;

(iii) I will determine costs on the papers.

Associate Judge Brittain