SUPREME COURT OF QUEENSLAND

CITATION:	*Lighthouse Forward Planning Pty Ltd & Anor v Queensland Newspapers Pty Ltd & Ors* [2014] QSC 217
PARTIES:	**LIGHTHOUSE FORWARD PLANNING PTY LTD** (first plaintiff) **EMILY WILLOCK** (second plaintiff) **v** **QUEENSLAND NEWSPAPERS PTY LTD** (first defendant) **NEWS LIMITED** (second defendant) **ANTHONY MARX** (third defendant)
FILE NO:	SC No 9317 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	3 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2014
JUDGE:	Flanagan J
ORDER:	**1. Paragraphs 9, 12 and 15 of the statement of claim be struck out with leave granted to the plaintiffs to re-plead.** **2. The plaintiffs to provide further and better particulars of paragraphs 13, 19 and 20 to 23 and paragraph 2 of the prayer for relief of the statement of claim.** **3. The plaintiffs' application to administer interrogatories pursuant to r 229 of the *UCPR* be adjourned to a date to be fixed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – where the plaintiffs claim damages and injunctive relief for alleged defamation – where the defendants seek orders that certain paragraphs of the statement of claim be struck out on the ground they fail to disclose a reasonable cause of action or have a tendency to prejudice or delay a fair trial – where the defendants argue the plaintiffs failed to plead material facts regarding publication

to a third party – where the defendants argue certain paragraphs are confusing and embarrassing by making it unclear as to which defendants are alleged to have published alleged defamatory material – where the plaintiffs argue publication to a third party can be inferred by reason of the publication of mass media and argue further particulars will be provided following disclosure and administration of interrogatories – whether certain paragraphs of the statement of claim should be struck out for failure to disclose a reasonable cause of action or for having a tendency to prejudice or delay a fair trial

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – PARTICULARS – where the plaintiffs claim damages and injunctive relief for alleged defamation – where the defendants seek orders that specific particulars be struck out on the ground they have a tendency to prejudice or delay a fair trial and that the plaintiffs provide further and better particulars in relation to special and/or *Andrews* damages – where the particulars in question were alleged to be inconsistent with a pleaded material fact – where no amounts were specified for *Andrews* and/or special damages – whether particulars should be struck out on the ground they have a tendency to prejudice or delay a fair trial – whether the plaintiff should provide further and better particulars by specifying the amount of *Andrews* and/or special damages

DEFAMATION – PUBLICATION – GENERALLY – MEANING AND PROOF – where the plaintiffs claim damages and injunctive relief for alleged defamation – where the defendants seek orders that certain paragraphs of the statement of claim be struck out on the ground they fail to disclose a reasonable cause of action or have a tendency to prejudice or delay a fair trial – where the defendants argue the plaintiffs failed to plead material facts regarding publication to a third party – where the plaintiffs argue publication to a third party can be inferred by reason of the publication of mass media and argue further particulars will be provided following disclosure and administration of interrogatories – whether, in pleading an action for defamation, material facts of publication to a third party must be pleaded in the context of the online publication of news articles – whether an inference of a third party downloading or viewing the publication can be drawn solely from a bare pleading of publication

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where the plaintiffs claim damages and injunctive relief for alleged defamation – where the defendants seek orders that the plaintiffs provide further and better particulars in relation to special and/or *Andrews*

damages – where no amounts were specified for *Andrews* and/or special damages in the statement of claim – whether the plaintiff should provide further and better particulars by specifying the amount of *Andrews* and/or special damages

Uniform Civil Procedure Rules 1999 (Qld), r 155, r 161, r 162, r 171

Andrews v John Fairfax & Sons Ltd [1980] 2 NSWLR 225, applied
Dow Jones & Company Inc v Gutnick (2002) 210 CLR 575, applied
Gary Leech v John Silvester & Ors [2012] NSWSC 1367, considered
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
MacDonald v Australian Broadcasting Corporation [2014] NSWSC 206, applied
Markan v Bar Association of Queensland [2013] QSC 146, cited
Robert Bax & Associates v Cavenham Pty Ltd [2011] QCA 53, applied
Robertson v Dogz Online & Anor [2011] QSC 158, considered
Royalene Pty Ltd v Registrar of Titles & Anor [2007] QSC 59, cited

COUNSEL: B Bolton (*sol*) for the plaintiffs
P McCafferty for the defendants

SOLICITORS: HopgoodGanim for the plaintiffs as town agents for Pikes & Verekers Lawyers
Thynne + Macartney for the defendants

Introduction

[1] By application filed 21 August 2014 the first, second and third defendants seek orders pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") that:

> "(a) paragraphs 9 and 15 of the Statement of Claim be struck out on the ground they fail to disclose a reasonable cause of action or have a tendency to prejudice or delay the fair trial of the proceeding; and
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> (b) paragraphs 12 to 14 and 20 to 23 of the Statement of Claim be struck out on the ground that they have a tendency to prejudice or delay the fair trial of the proceeding or are unnecessary."

[2] Two further or alternative orders are sought. First that the particulars of paragraph 13 of the statement of claim be struck out pursuant to r 162 of the *UCPR* and second

that, pursuant to r 161 of the *UCPR*, the plaintiffs provide the further and better particulars requested in requests 2, 3, 5, 6, 9, 11, 13 and 14 in the request for further and better particulars of the statement of claim dated 3 July 2014.

[3] By an earlier application filed 15 August 2014 the plaintiffs seek leave pursuant to r 229 of the *UCPR* to administer interrogatories to the first and second defendants.

Background

[4] By a claim filed 2 October 2013 the plaintiffs claim against the three defendants damages for defamation and injunctive relief. The damages claimed fall within three categories:

(a) general compensatory damages in the amount of $355,500;
(b) aggravated compensatory damages; and
(c) special damages.

[5] The proceedings concern three publications. The first matter complained of is the publication by the first defendant in the Sunday Mail on 26 May 2013 of an article authored by the third defendant entitled "Own Future First".

[6] The second matter complained of is the publication by the first and third defendants on a website located at url address www.couriermail.com.au and by the second and third defendants on a website located at url address www.news.com.au on 26 May 2013 of an item entitled "Two involved with failed Future First Investment group back in property game with new ventures".

[7] The third matter complained of is a publication by the second and third defendants on 26 May 2013 of an item entitled "Spruikers put failed Future behind them" allegedly authored by the third defendant on the Gold Coast Bulletin website at url address www.goldcoast.com.au.

[8] An allegation is also made that the second matter complained of was republished in Adelaide Now on the website located at url address www.adelaidenow.com.au on 26 May 2013 and on the same date on the website located at url address www.theaustralian.com.au.

[9] The second plaintiff is a director of the first plaintiff which is an excluded corporation for the purpose of s 9(2) of the *Defamation Act* 2005 (Qld).

[10] The statement of claim pleads that each of the matters complained of carried certain defamatory meanings of and concerning the first and second plaintiffs. None of these pleaded defamatory meanings are the subject of the defendants' strike out application.

[11] On 3 July 2014 the solicitors for the defendants wrote to the solicitors for the plaintiffs pursuant to r 444 of the *UCPR*. The letter identified the defendants' complaints in respect of:

(a) the pleading of alleged online publications (paragraphs 9 and 15 of the statement of claim);
(b) the pleading of the allegations of republication (paragraphs 12 to 14 of the statement of claim); and
(c) the pleading of damages (paragraphs 19 to 23 and paragraph 2 of the prayer for relief of the statement of claim).

[12] The letter of 3 July 2014[1] also enclosed a request for further and better particulars including a request in respect to paragraphs 9, 12, 13, 15, 19, 20, 21, 22 and 23 of the statement of claim.

[13] By email dated 31 July 2014[2] the solicitors for the plaintiffs did not consent to an order that the plaintiffs be required to amend the statement of claim.

[14] On 1 August 2014 Atkinson J made certain case flow orders which required, *inter alia*, the plaintiffs to provide an answer to the request for further and better particulars by 6 August 2014 and to file and serve any application for leave to administer interrogatories by 15 August 2014. On 7 August 2014 the plaintiffs provided their response to the defendants' request for further and better particulars. The general thrust of the response was that the requests were not proper requests for particulars and that further particulars would be provided following the administration of interrogatories and (in respect of damages) the service of expert evidence.

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1 Exhibit 'MHM1' to the affidavit of Michael Harvey Mayes sworn 21 August 2014.
2 Exhibit 'MHM2' to the affidavit of Michael Harvey Mayes sworn 21 August 2014.

[15] In a letter dated 25 August 2014[3] the solicitors for the defendants made it clear that they did not accept that the pleading should not be amended or particulars provided until an expert report was delivered or until after further interlocutory steps.

[16] By letter dated 26 August 2014[4] the solicitors for the plaintiffs sought to more fully address the concerns that the solicitors for the defendants had raised in respect of the statement of claim. There was however no offer to amend the pleading.

Rule 171 – Principles

[17] The principles in respect of the application of r 171 of the *UCPR* are well established. The court's discretion to strike out pleadings should only be exercised in clear cases.[5] A court will only exercise the power to strike out a pleading pursuant to r 171 on the ground that it fails to disclose a reasonable cause of action where the lack of a cause of action is clearly demonstrated.[6]

[18] In *Robert Bax & Associates v Cavenham Pty Ltd*[7] the Court of Appeal stated at [16] per White JA:

> "Rule 171 closely resembles the language of former O 22 r 32 *Rules of the Supreme Court* 1991 (Qld) which enabled a judge to strike out or amend any matter in the pleading which tended 'to prejudice, embarrass, or delay, the fair trial of the action'. The word 'embarrass' has not been retained. Nonetheless any pleading which is difficult to follow or objectively ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies, is liable to strike out because it can be said to have a tendency to prejudice or delay the fair trial of the proceeding rather than 'embarrass' the opposite party."

Paragraphs 9 and 15 of the statement of claim

[19] Paragraph 9 of the statement of claim simply pleads the fact of publication of the second matter complained of on two websites. Paragraph 9 does not plead any material facts concerning the extent of publication. Paragraph (g) of the particulars to paragraph 9 states that further particulars of the extent of publication of the

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3 Exhibit 'JLD4' to the affidavit of Jonathan Leslie Duhs sworn 27 August 2014.
4 Exhibit 'JLD5' to the affidavit of Jonathan Leslie Duhs sworn 27 August 2014.
5 *Royalene Pty Ltd v Registrar of Titles & Anor* [2007] QSC 59, [6] (Mackenzie J).
6 *Markan v Bar Association of Queensland* [2013] QSC 146, [39] (Atkinson J) citing Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129.

second matter complained of will be provided after disclosure. The defendants' complaint is that publication of defamatory matter to a third party is fundamental to the cause of action in defamation. Without proof of publication the cause of action fails. The defendants submit that the plaintiffs have failed to plead those facts which will establish publication to a third party.[8]

[20] The plaintiffs' solicitors', in their letter of 26 August 2014, readily accept that publication of defamatory matter to a third party is required. The plaintiffs however submit that this element may be inferred:[9]

> "No cause of action in defamation is complete unless someone reads the publication complained of – the internet is not novel is this regard. However, courts have held that in certain circumstances, in particular mass media publications, plaintiffs are not required to particularise the recipients of the publication because the fact of publication can be inferred by reason of the nature of the publication in the circumstances of the case. See for example *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188. In our view the publication of the second matter complained of and the third matter complained of on the defendants' websites in this matter fall into the category of mass media publications and the Court can infer that publication of the second and third matter complained of took place in each State and Territory of Australia. Such position is not displaced by *Dow Jones and Company Inc. v Gutnick* [2002] HCS [sic] 56."

[21] Another answer of the plaintiffs to this complaint is the plaintiffs' intention to provide further particulars of publication and the extent of publication following disclosure and administration of interrogatories.

[22] Counsel for the defendants, in the context of online publications, referred to the decision of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Dow Jones & Company Inc v Gutnick*[10] where it was stated that:

> "Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension."

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7 [2011] QCA 53.
8 Defendants' outline of argument dated 27 August 2014, [6] – [7].
9 Exhibit 'JLD5' to the affidavit of Jonathan Leslie Duhs sworn 27 August 2014.
10 (2002) 210 CLR 575, 600 [26].

[23] Reference was also made to the decision of Beech-Jones J in *MacDonald v Australian Broadcasting Corporation*[11] where his Honour stated:

> "In a case such as this, identifying persons to whom the publication is alleged to have been made is merely one way of providing particulars of publication. As Mr Dawson conceded in argument, it may be in a particular case involving the internet that a plaintiff cannot name such a person but would instead rely upon an inference from, say, the number of hits and the period of time over which a matter was placed on the internet that at least one person downloaded and viewed the article in question. Be that as it may, I am satisfied that in conformity with UCPR 15.19, it is incumbent upon the plaintiff to provide such particulars as it can of the publication of the second matter complained of, including, to the extent it may be relied on by the plaintiff, the identity of any person who downloaded and viewed the second matter complained of.
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> Accordingly, I order the plaintiff within twenty-one days to provide all the facts, matters and circumstances said to support the publication of the second matter complained of including, to the extent it will be relied upon, the identity of any person other than the plaintiff who downloaded or viewed the second matter complained of."

[24] If the necessary element of someone reading the publication is to be inferred then the facts from which such inference is to be drawn should be specifically pleaded. This arises because of a combination of r 149 and r 150(2) of the *UCPR*. Rule 150(1) identifies matters that are to be specifically pleaded but without limiting r 149. Rule 149(b) requires a pleading to contain a statement of all the material facts on which the party relies. If one of those material facts is an inference that a person read the online publications then it is incumbent on the plaintiffs to plead those facts from which such an inference may be drawn. Such facts as identified by Beech-Jones J may include the number of and the period of time over which the second and third matters complained of were placed on the internet.

[25] Given that publication of defamatory matter to a third party is fundamental to the cause of action in defamation the facts from which the inference is to be drawn should be pleaded irrespective of the taking of any interlocutory steps including the administration of interrogatories and disclosure. This is because once the material facts from which the inference is to be drawn are pleaded the extent of publication becomes a relevant issue in the litigation. The defendants would be required

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11 [2014] NSWSC 206, [28] – [29].

thereafter to perform disclosure in respect to documents directly relevant to that issue. Subsequent to this disclosure the plaintiffs would be better positioned to determine exactly what further interrogatories (if any) would be required to be administered by leave of the court.

[26] The plaintiffs submitted that issues of publication and the extent of publication are matters that are wholly within the knowledge of the defendants. The plaintiffs primary position is that they should be permitted to complete interlocutory steps including administering interrogatories, prior to having to particularise the pleading or otherwise address the complaints raised by the defendants.

[27] The plaintiffs in this respect refer to the decision of Nicholas J in *Gary Leech v John Silvester & Ors.*[12]

[28] The present case is readily distinguishable from *Gary Leech* which concerned the publication of a book. In that case the defendants sought the summary dismissal of the proceedings or alternatively that the statement of claim be struck out on the basis that the plaintiff had failed to disclose a cause of action. This was because the plaintiff had not precisely identified readers of the book. This is clear from paragraph 30 of the judgment where his Honour stated:

> "The plaintiff notified the defendants in the statement of claim (particulars par 3(h)) and in correspondence that further particulars of the extent of publication will be provided after discovery and interrogatories, and on completion of investigations currently in progress. Unsurprisingly, the plaintiff does not say that his case on publication rests on the sales to Miss Hatfield and/or Mr Dodd, or that the basis for the necessary inference as to the extent of readership will be confined at trial to the particulars provided to date. In any event it is difficult to uphold the defendants' insistence for information of the precise identity of readers where they have not demonstrated a need to know for the purpose of their defence (*Lazarus* p 193)."

[29] What his Honour noted was that the plaintiff had already provided particulars of those facts from which the inference could be drawn that persons had read the book. One of these facts from which such an inference could be drawn was that the book was still available to be purchased from bookstores throughout Australia and over the internet in or about August 2011 (paragraph 3(f) of the statement of claim).

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12 [2012] NSWSC 1367.

Further, that as of January 2012 at least 48,000 copies of the book had been sold throughout Australia (paragraph 3(f) of the statement of claim). If anything *Gary Leech* supports the proposition that in a mass media case one does not need to identify actual persons who read the matters complained of on the relevant website but rather one should plead those facts from which an inference may be drawn that the matters complained of were in fact read by third parties. As Nicholson J observed:[13]

> "As the cases show, the obligation is to provide the best particulars which a party can give at the time, with liberty to provide further particulars after discovery and inspection. The particulars to be provided must be sufficient to alert the other party of the case it has to meet. Particulars are not concerned with the adequacy of the information to actually establish the case sought to be made out (*Sims v Wran* [1984] 1 NSWLR 317, p 329). That it is open to the plaintiff to prove facts from which it can be inferred that the matter complained of in the present case was read by a third party is supported by the following passage in *David v Abdishou* [2012] NSWCA 109:
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> > '286 It is self-evident that a plaintiff can prove publication without calling evidence in every case that the matter complained of was in fact communicated to a third party. As Gatley says (at [6.9]), if the plaintiff 'proves facts from which it can be inferred that the words were brought to the attention of some third person, he will establish a prima facie case'. This will be so if it is a matter of reasonable inference that the matter complained of was 'actually seen and read by some third party': Gatley (at [34.9]). Such an inference will be particularly obvious 'where the matter is contained in a book or distributed in the news media where in practice it would seem impossible to rebut the inference and in such a case it would seem that the presumption of publication would be impossible to displace': Gatley (at [6.14])."

[30] In the present case, all that is pleaded is the bare fact of publication. No attempt has been made to plead any facts from which it may be inferred that the publication on the relevant website was read by third parties.

[31] The defendants identify a further problem with paragraph 9 of the statement of claim. The paragraph alleges that all three defendants published the second matter complained of. The particulars to paragraph 9 however refer to the material being available on two different websites and associates the first and third defendants with

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13 *Gary Leech v John Silvester & Ors* [2012] NSWSC 1367, [27].

one website and the second and third defendants with the other. The defendants submit that the situation is confusing and the pleading is embarrassing:[14]

> "The confusion is neatly illustrated by asking the questions: is it alleged that all defendants bear liability for all of the publications referred to in the particulars, or is it alleged that each defendant is liable for only some of those publications? The answer is wholly uncertain on the face of the pleading. The particulars could be read as suggesting the allegation in paragraph 9 is intended to be qualified such that only the first and third defendants are liable for publications via one website, while the second and third defendants are liable for publications via the other website mentioned, but it is not clear."

[32] I accept this submission. The introductory words to paragraph 9 would suggest that each of the first, second and third defendants are responsible for the publication of the second matter complained of on both websites. The particulars however suggest something quite different.

[33] I have considered whether the defects in paragraph 9 and 15 could be cured by an order for the provision of further and better particulars of those facts from which the inference may be drawn that the second and third matters complained of were read by third parties. The difficulty is that as paragraph 9 and 15 are presently pleaded they constitute a bare plea of publication and do not on their face disclose a cause of action. In those circumstances it is appropriate that those paragraphs be struck out with the plaintiffs being given leave to re-plead.

Pleading of republication: paragraphs 12, 13 and 14 of the statement of claim

[34] The defendants' complaint is that these paragraphs do not identify the basis upon which the first and/or second defendants are said to be liable for the alleged republications. As previously stated the second matter complained of was republished in Adelaide Now on the website located at url address www.adelaidenow.com.au and in The Australian on the website located at url address www.theaustralian.com.au." Paragraph 13 of the statement of claim alleges that the second matter complained of was published by the first and/or second defendant in circumstances where it was a natural and probable consequence of publication that the second matter complained of would be republished. The

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[14] Defendants' outline of argument dated 27 August 2014, [16].

particulars given however of the "natural and probable consequence of publication" is that the first defendant authorised the publication of the second matter complained of and the second defendant also authorised the republication of the second matter. The particulars also allege that the first defendant had an agreement with the second defendant whereby the second defendant was entitled to republish articles that appeared on the website located at www.couriermail.com.au and/or articles that appeared in the newspapers known as the Courier Mail and the Sunday Mail. An agreement is also alleged to exist as between the second defendant and entities associated with it whereby they were entitled to republish articles.

[35] The introductory words to paragraph 13 and the particulars that follow appear to merge concepts as to whether the republications were authorised by the first and second defendants or whether in the circumstances the republications were a natural and probable consequence of the publications.

[36] The defendants therefore submit:[15]

> "…it is completely unclear on the face of the pleading precisely what allegations are being made against the first defendant and second defendant: is it alleged that the 'publications' are the subject of separate complaints against the defendants, or are the plaintiffs merely relying upon the alleged republications on the issue of damages (which would appear to be the case if only the material facts alleged in paragraphs 12 to 14 are considered)."

[37] The plaintiffs' response to this submission is that the first and second defendants are mass media organisations. It must be therefore clear that there is an arrangement between them with respect of the republication and sharing of articles and content. Such arrangements are said to be wholly within the knowledge of the defendants and it is appropriate that the plaintiffs be entitled to provide particulars of that arrangement following disclosure and the administration of interrogatories.[16]

[38] Whilst there is some force in the submission of the plaintiffs, if the plaintiffs are relying on republications it is incumbent upon the plaintiffs to plead a consistent case. The particulars pleaded in relation to paragraph 13 of the statement of claim which allege specific agreements or authorisation are not consistent with the primary plea contained in the introductory words of paragraph 13 that the

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15 Defendants' outline of argument dated 27 August 2014, [27].

republications were in the circumstances the natural and probable consequence of the publication. I would therefore strike out the particulars to paragraph 13 pursuant to r 162 of the *UCPR* on the ground they have a tendency to prejudice or delay the fair trial of the proceeding and order that the plaintiffs provide particulars of the "circumstances" which, it is alleged, support the conclusion that the republication was the natural and probable consequence of the publication of the second matter complained of.

[39] Paragraph 12 suffers from the same defect that has been identified in relation to paragraphs 9 and 15. Accordingly paragraph 12 should be struck out pursuant to r 171 and the plaintiffs be given leave to re-plead this paragraph so as to identify the facts from which the inference may be drawn that third parties read the republications identified.

Pleading of damage: paragraphs 20, 21, 22 and 23

[40] Paragraphs 20 to 23 of the statement of claim allege as follows:

> "20. The plaintiffs claim damages for the loss of business of the kind recognised in *Andrews v John Fairfax & Sons Limited* [1980] 2 NSWLR 225 by reason of the diminution of their income following the publication of the first, second and third matters complained of until the commencement of these proceedings and in the future.
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> 21. Further particulars of the *Andrews* claim will be provided as and when they become available.
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> 22. The plaintiffs will rely on the loss of business occasioned by the publication of the matters complained of on the issue of special damage.
>
> 23. Further particulars of the special damage will be provided as and when they become available."

[41] The defendants' primary complaint is that the paragraphs make no effort to comply with r 155 of the *UCPR*. Rule 155 provides:

> "**155 Damages**
>
> (1) If damages are claimed in a pleading, the pleading must state the nature and amount of the damages claimed.

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16 Plaintiffs' submissions regarding the defendants' application dated 27 August 2014, [25].

> (2) Without limiting rule 150(1)(b), a party claiming general damages must include the following particulars in the party's pleading—
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> (a) the nature of the loss or damage suffered;
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> (b) the exact circumstances in which the loss or damage was suffered;
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> (c) the basis on which the amount claimed has been worked out or estimated.
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> (3) If practicable, the party must also plead each type of general damages and state the nature of the damages claimed for each type.
>
> (4) In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise."

[42] A separate complaint is made by the defendants in relation to paragraph 19 which pleads aggravated damages. That complaint is that paragraph 19 does not, in accordance with r 155(1), specify the amount of the damages claimed. There is no reason why an amount should not be identified in respect of aggravated damages in accordance with r 155(1). It is therefore appropriate to order that in respect of paragraph 19 and paragraph 2 of the prayer for relief that the plaintiffs specify the amount of aggravated damages claimed. Such a request was made in request 11 of the defendants' request for further and better particulars dated 3 July 2014.

[43] As to paragraphs 20 to 23 the plaintiffs accept that they are required to provide particulars quantifying the damages sought. The plaintiffs have advised the defendants that they will supply particulars of the damages claim by 3 October 2014.[17] The date originally communicated was 28 November 2014, which is the date when the plaintiffs are required to serve expert evidence in accordance with the orders of Atkinson J. The plaintiffs also refer and rely on a decision of Justice A Lyons in *Robertson v Dogz Online & Anor*[18] where her Honour stated at [34]:

> "Ordinarily a failure to comply with r 155 of the UCPR leads to a request for particulars and not to an order that the pleading be struck out. Furthermore r 371(1) UCPR provides that a failure to comply with the rules is an irregularity and does not render a proceeding or document a nullity." (*footnote omitted*)

[44] Whilst the correctness of her Honour's statement may be accepted, the plaintiffs in their plea in paragraphs 20 to 23 have not identified any facts or circumstances by

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17 Exhibit 'JLD5' to the affidavit of Jonathan Leslie Duhs sworn 27 August 2014.

18 [2011] QSC 158.

which the claim for *Andrews* damages or special damages are to be calculated. It is not appropriate that these claims remain un-particularised until service of an expert report. Whether the claim for damages is for *Andrews* damages or special damages the plaintiffs should be in a position to at least particularise these claims by reference to the state and nature of the business conducted by the first plaintiff and the changes which have been wrought by the publication of the matters complained of. As observed by Hutley JA in *Andrews v John Fairfax & Sons Ltd* at [23]:

> "… even though only general damages are claimed, the plaintiff can give evidence of some particularity about the state and nature of his business, and changes which he alleges have been wrought in it by the defamation of which he complains, but only for the purpose of enabling the jury properly to evaluate the general damages which he has claimed. The borderline as to what is admissible in proof of special damages and what is admissible in proof of general damages is, therefore, not a firm one. Material which would be admissible in proof of special damages and would tend to prove special damages may also be admitted in proof of general damages and, in the course of the trial, it may fall to the judge to see that this distinction between what is permissible as proof for one purpose and what for another is kept before the jury."

[45] His Honour noted the type of evidence that an entity in the position of the first plaintiff would be entitled to give:[19]

> "…the way in which the business had operated in the past and how it had operated up to the time of trial, for the purpose of assisting the jury to evaluate the general effect of the defamation upon its business. In the case of a business, this cannot be confined merely to its gross receipts. So confining it might be most unjust to the defendants. The general aspects of the structure of the business, its earnings and of the changes in them, have to be before the jury. The claim would become a specific one and the damages special if, for example, what it was sought that the jury should award was damages calculated by reference to the loss of a particular client, or the loss of profit over a particular period of time."

[46] In the same case Mahoney JA at [106] stated:

> "A plaintiff in defamation who sets up that he has suffered, or will suffer, financial loss because of the publication must indicate the nature of that loss. He may claim a particular and identified loss, eg, the loss of a particular contract and the profit from it; he may claim a general loss; or he may claim a combination of these two. If his claim is of the first kind, the nature of it is clear, and may be clearly pleaded and particularized. But, where the loss is of a second kind, the nature of it is more complex."

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19 [1980] 2 NSWLR 225, 236 [23].

[47] His Honour continued at [111]:

> "For the plaintiff to recover for financial loss, it must normally appear that the relevant loss actually occurred, that the loss which occurred was not too remote (because, eg, it was the kind of loss which might be expected to result from the publication), and that there was a causal relation between the publication and the loss which actually occurred."

[48] In the present case the pleas in paragraphs 20 to 23 are completely lacking in identifying the basic circumstances and causal connection as between any alleged loss and the publication of the matters complained of. It is therefore appropriate to order that the plaintiffs provide the particulars of paragraphs 20 to 23 as requested in requests 13, 14 and 15 of the defendant's request for further and better particulars dated 3 July 2014. It should be further noted that *Andrews* damages and special damages are claimed by both the first and second plaintiff. All that is pleaded as to the second plaintiff is that she is a director of the first plaintiff. There is therefore no pleaded basis for how it is said the second plaintiff is entitled to claim these types of damages.

[49] I note that in the case flow orders made by Atkinson J on 1 August 2014, order 6 contemplated that the parties are to file a consent order for mediation by 12 December 2014, such mediation to be completed by 20 February 2015. In striking out paragraphs 9, 12 and 15 and ordering further and better particulars in respect of paragraphs 13, 19 and 20 to 23 I consider that it is important, even prior to further interlocutory steps, that the pleaded issues as between the parties are clear. If the matters identified are more precisely pleaded and particularised it may well be that the defendants are able to admit that third parties read the relevant matters complained of on the respective websites and that the republications were a natural and probable consequence of the publications. A properly pleaded and particularised statement of claim, in the respects which I have identified above, may ultimately alleviate the need for any application for leave to administer interrogatories. This is particularly so given that the defendants will be required to make disclosure of documents directly relevant to an allegation in issue in the pleadings: r 211(1) *UCPR*.

[50] I will hear the parties as to further directions and cost.

Conclusion

[51] Paragraphs 9, 12 and 15 of the statement for claim should be struck out with leave being granted to the plaintiffs to re-plead. The plaintiffs should provide further and better particulars of paragraphs 13, 19 and 20 to 23 as well as paragraph 2 of the prayer for relief of the statement of claim. I would otherwise adjourn the plaintiff's application pursuant to r 229 of the *UCPR* to administer interrogatories to a date to be fixed.