EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT TAURANGA

CIV-2015-070-000226
[2016] NZDC 17761

UNDER	The Defamation Act 1992
BETWEEN	JANINE DAVINA SAX Plaintiff
AND	SHERYL ANNE MCLAY Defendant

Hearing: 13 September 2016

Appearances: G C McArthur for the Plaintiff
N Ellsmore for the Defendant

Judgment: 15 September 2016

RESERVED JUDGMENT OF JUDGE T R INGRAM

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[1] The plaintiff sues in defamation. The plaintiff prepared and filed her own statement of claim in person, apparently without the benefit of legal advice.

[2] The defendant is a member of a triathlon club, Team Shorebreak. The plaintiff applied to that club for membership. In December 2013, the plaintiff was advised in writing that her application for membership had been declined.

[3] The statement of claim alleges at paragraph 18:

> "given the view held by [executive committee] members prior to 12th December 2013 which queried the defendant's course of action, the necessary inference is that the [executive committees] decision on 12th December 2013 was likely based on defamatory remarks made by the defendant about the plaintiff".

[4] Paragraph 19 says:

> "In particular, it appears the defendant made defamatory remarks to the effect that the plaintiff had previously left [Team Shorebreak] under

> dishonourable circumstances, had previously disrupted other athletes in [Team Shorebreak], and would likely cause further trouble or reputational harm to [Team Shorebreak] if the plaintiff were to be a member."

[5] Further at paragraph 25 of the statement of claim it is alleged:

> "During November 2013 and December 2013 the defendant defamed the plaintiff by publishing to members of the [executive committee] words to the effect that the plaintiff had been "disruptive" at [Team Shorebreak] run events, had previously left a [Team Shorebreak] club event in "dishonourable circumstances", and was the type of person who might bring [Team Shorebreak's] reputation in disrepute."

[6] It is further alleged at paragraph 28:

> "It is not unlikely that the [executive committee] published its determination to members of the triathlon community and/or when it did, falsely represented that due process had been followed. This is defamatory because due process was not followed and there was no basis under the [Team Shorebreak] constitution upon which the [executive committee] could refuse the plaintiff's membership indefinitely."

[7] The defendant has applied to strike out the statement of claim on a deceptively simple basis. The law is elegantly set out at 28 Halsbury's Laws of England (4th Edition) paragraph 176:

> "In an action for defamation, the actual words complained of, and not merely their substance, must be set out verbatim in the statement of claim."

[8] The point was the subject of an appeal to the New Zealand Court of Appeal in *Kerr v Haydon* [1981] 1NZLR 449 where at page 454, Sir Robin Cook said:

> "The rules of the common law that the actual words sued on should be (i) set out in the statement of claim, and (ii) proved in evidence are cognate. In my opinion they are undoubtedly part of the law of New Zealand."

[9] That view of the law prevailed with all three members of the court. An examination of the underlying policy analysis within the judgments is not required here; the law as set out is binding on this court.

[10] For the plaintiff, it has been argued that it is not appropriate to strike out a statement of claim in the present circumstances, and that the more modern mechanism of summary judgment is more apt for these particular circumstances. I

do not agree. The rule as expounded in *Kerr v Haydon* is clear, simple and straight forward, and the remedy adopted in that case was to strike the pleading out.

[11] The claim in paragraph 18 "… the necessary inference is that the [executive committees] decision on 12th December 2013 was likely based on defamatory remarks made by the defendant about the plaintiff" is indefensible. No specific words are alleged to have been used, and the defendant cannot be required to reply to a claim of likelihood. Absent a specific allegation of words used, no reply can be given, because it is not possible to say whether the words were capable of bearing the meaning ascribed to them.

[12] Paragraphs 19 and 25 of the Statement of Claim allege that "words to the effect…" were used. That pair of allegations obviously does not specify the words used, as required. Paragraph 28 alleges that "It is not unlikely that…publication of the committees' determination was made to members, falsely representing that due process had been followed". Claiming that "it is not unlikely that" publication occurred is not the same as claiming that publication of specific words actually did occur. A defamation claim must specify the words actually used, and allege actual publication. These paragraphs, and this pleading, do not comply with those requirements.

[13] Mr McArthur advised me from the Bar that the plaintiff is currently embroiled in some kind of proceedings involving the Privacy Commissioner in respect of this matter, and it was his view that there was at least some prospect that further material might be discovered in the course of those proceedings which might allow a greater degree of precision in framing the allegations.

[14] In that regard, it is noteworthy that these allegations date back to November of 2013. It is now September 2016, and the evidence before me establishes unequivocally that a discussion between the members of the executive committee took place at a poolside gathering, at which some members of the executive committee spoke amongst themselves. There is no evidence in the affidavit material before me that any note or record of the actual words spoken in that discussion was

kept by any participant. No purported record of the conversation has been discovered. The plaintiff was not present.

[15] The plaintiff's case requires an inference to be drawn that defamatory words must have been spoken, by the defendant, as opposed to any other participant at that meeting. The defendant denies that any defamatory words were spoken, and is unable to respond any further, until the words allegedly used are specified. The defendant cannot be called upon to respond until the actual words used are alleged, so that it can be ascertained that those words are capable of bearing the meaning alleged.

[16] The principles concerning the striking out of a pleading were restated i*n Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267. It is well settled that before the Court may strike out a proceeding, the causes of action must be untenable to the extent that they cannot possibly succeed. The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied that it has the requisite material. It is important to consider the case for the plaintiff as high as he can make it, and the allegations made in the statement of claim are presumed correct. A strike out application must be scrutinised with great care.

[17] The criteria for determining an application to strike out can be summarised, as follows:

[a] The application proceeds on the assumption that the facts pleaded in the statement of claim are true, regardless of whether they are admitted or not;

[b] The discretion to strike out is to be exercised sparingly and only in clear cases where the Court is satisfied it has the requisite material before it;

[c] The Court will not exercise its discretion unless the case as pleaded is clearly so untenable that the plaintiff cannot possibly succeed; and

[d] If a claim depends upon a question of law, which is capable of decision on the material before the Court, the Court should determine the question, even though extensive argument may be necessary to resolve it.

[e] It may be a question of degree as to whether the statement of claim is so defective as to require striking out; a total write-off will be struck out while a repairable but defective statement of claim may be amended. (*Marshall Futures Limited v Marshall* (1991) 3 PRNZ 200.

[18] Applying those principles to the present case, it is clear that the plaintiff has not, and is not able to specify any particular words used by this defendant, as opposed to any other participant attending the meeting. The law as set out in *Kerr v Haydon* is binding on this court, and it bars a pleading which does not recite the specific words used. In my view, this case represents a classic example of the situation the rule in *Kerr v Haydon* is designed to cover.

[19] I am satisfied that the pleading is totally defective, and is incapable of remedial amendment. In light of the current law, the Plaintiff cannot possibly succeed. The plaintiff's claim is struck out.

T R Ingram
District Court Judge