EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT NEW PLYMOUTH

I TE KŌTI-Ā-ROHE
KI NGĀMOTU

CIV-2018-021-000015
[2018] NZDC 23311

BETWEEN	DAIRY PRO TARANAKI LTD Plaintiff
AND	S FOLEY First Defendant
AND	KJ & EA FOLEY LTD Second Defendant

Hearing: 26 July 2018

Appearances: S C Herbert for the Plaintiff
A R Laurenson for the First and Second Defendant

Judgment: 30 November 2018

JUDGMENT OF JUDGE G P BARKLE
Re: 1. Defendants Application to Strike Out Statement of Claim
2. Plaintiff's Application for Particular Discovery
3. Plaintiff seeking that a second set of Interrogatories be Answered

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[1] The plaintiff company, based in Hawera South Taranaki, is involved in the business of supplying dairy farms with machinery and equipment and the servicing of those items.

[2] At approximately 11.10 pm on 1 December 2015, a call was made to the plaintiff's landline telephone number that automatically diverted to the service manager Gary Wallace. The caller sought urgent assistance at the dairy shed located at the farm of [names removed] at [address deleted], Westmere near Whanganui. This is approximately 80 kilometres from the plaintiff company's depot in Hawera.

[3] On the way to the farm, Mr Wallace collected another staff member of the plaintiff living at Patea and continued to the nominated address. On arrival there was no sign of activity at the dairy shed. In Mr Wallace's experience when an urgent after hours callout is received the farm owner is invariably waiting at the dairy shed. Mr Wallace then realised that he had been the subject of a prank call. The family at the farm was not disturbed. Later enquiries with the farmer confirmed that no phone call to the plaintiff had been made by him.

[4] Uncertain of who was responsible for the phone call, the plaintiff filed an interlocutory application for particular discovery seeking that Spark New Zealand Limited ("Spark") be directed to provide any relevant documentation identifying the number from which the call was made and who the account holder for that number was. That application was filed on 29 November 2016. The lapse of almost a year from when the call was made has not been explained by the plaintiff. Following an order being made by the Court an affidavit was completed by a call investigator employed by Spark providing the relevant phone number and business name of the subscriber for that number.

[5] These proceedings were then commenced. However, the statement of claim and other required documentation were not filed until 30 January 2018, being over two years after the prank call had been made.

[6] The first defendant is a director and shareholder of KJ & EA Foley Ltd. The second defendant company is based in Opunake and is also involved in the dairy farm servicing business. Both the plaintiff and defendant company sell and service De Laval farm equipment.

[7] In the statement of claim the plaintiff seeks damages including the costs of the unnecessary callout amounting to $721.63, payment of $7500 related to the pre-commencement discovery application and general damages of $20,000.

[8] In the statement of defence, both defendants deny having made the phone call to the plaintiff on 1 December 2015.

[9] In answers to interrogatories, verified by affidavit dated 18 June 2018, Mr Simon Foley acknowledged that he was in possession and control of a mobile telephone with the number from which the call was made "*at most times during the evening*" of 1 December 2015. Mr Foley also stated that he was attending a dinner on that date as part of a De Laval industry conference at Taupo and identified a number of persons with whom he spent time that night.

[10] Against that background the following interlocutory applications require to be determined in this judgment:

(a) by the defendants to strike out each cause of action pleaded. If granted then that would make a decision on the other two applications unnecessary.

(b) by the plaintiff seeking tailored discovery.

(c) by the plaintiff requiring that the defendants answer a second set of interrogatories.

Application to Strike Out

[11] The plaintiff has pleaded two causes of action against each defendant. The first is of deceptive and misleading conduct in trade and the second cause of action is one of negligence. The pleaded facts are common to both causes of action.

[12] In summary and not disputed is that Mr Foley and representatives of the plaintiff both attended the De Laval industry conference at Taupo between 30 November 2015 and 2 December 2015. The prank call was made from a phone associated with Mr Foley and the second defendant. That call took place at 11.10 pm on 1 December 2015 and resulted in Mr Wallace and another employee of the plaintiff attending at the dairy farm of [names deleted] at Westmere near Whanganui.

[13] Further particulars of the alleged negligent conduct were sought by the defendants. In a notice dated 1 June 2018, counsel for the plaintiff stated that the prank call is the basis of the allegation of negligence and the duty of care owed to the plaintiff

and breached by the defendants was not to abandon or leave unattended their mobile phone in circumstances that a prank call might be made from it.

[14] In the statement of defence and confirmed in answers to interrogatories, as well as an affidavit in support of the interlocutory application to strike out, Mr Foley states that he did not make the phone call nor is he aware of who made the call. In his affidavit, the first defendant said that his first knowledge of the prank call was when he received a letter from Mr S Herbert, counsel for the plaintiff, dated 5 April 2017. Mr Foley said he then telephoned Mr Wallace to convey his shock and surprise of being implicated. Mr Wallace had responded by saying he did not think it was Mr Foley's voice on the phone that night. The first defendant stated he had been advised by text by Spark on the morning of 2 December 2015 that a prank call had been made from his phone but that meant little to him.

[15] In his verified answers to interrogatories, Mr Foley also said that he was attending a conference dinner or its aftermath with a number of others at the time the call was made and that he had left his phone unattended at that time.

Defendants' submissions

[16] Mr Laurenson, on behalf of the defendants, submits that as Mr Foley denies making the call then the first and third causes of action are not able to be established. In respect of the negligence cause of action, Mr Laurenson submitted that imposing a duty of care in respect of leaving ones cellphone unattended would be extending the imposition of negligence liability "far beyond anything that had occurred in judicial history or authority."

[17] Mr Laurenson also submitted that the statement of claim seeking losses of $27,500 was an abuse of the process of the Court. Counsel emphasised that the direct cost of the call out to the plaintiff company claimed in the statement of claim was only the sum of $721.63. In addition, the claim for $7500 damages for the cost of the pre-commencement discovery application to obtain information from Spark seemed very high. The defendants submitted that the general damages sought of $20,000 were

unsustainable and that claim should be struck out even if either of the pleaded causes of action were allowed to proceed.

Plaintiff's submissions

[18] After setting out what he proposed were "uncontentious facts" Mr Herbert submitted that potential involvement in the phone call on the part of the plaintiff should be resolved by way of trial and that if established would lead to an award of damages. Counsel drew attention to the Telecommunications Act 2001 which proscribes that misuse of a telephone can result in a criminal charge being faced. Mr Herbert also underlined the business relationship between the parties and submitted that imposing a duty of care in this particular situation was not unreasonably extending liability for the defendants' conduct if proven. In respect of the claim for general damages, Mr Herbert submitted that the defendants conduct may well be characterised as malicious when all facts were established at trial.

Strike out – legal principles

[19] Rule 15.1 District Court Rules 2014 ("DCR") provides that there are four grounds that allow the Court to exercise its discretion to strike out all or part of a proceeding:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; 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.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as it considers just.

[20] The principles for strike out are now well settled and were summarised by the Court of Appeal in *Attorney-General v Prince*[1] and endorsed by the Supreme Court in *Couch v Attorney-General*.[2] The learned authors of *McGechan on Procedure* set out the principles as follows:[3]

(a) Pleaded facts whether or not admitted are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The cause of action or defence must be clearly untenable. In *Couch* Elias CJ and Anderson J said:[4]

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

(e) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in new situations. There is considerable authority that developments in negligence need to be based on proved rather than hypothetical facts.

[21] In an appropriate case, abuse of process may constitute a separate ground for striking out a pleading.[5]

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[1] *Attorney-General v Prince* [1998] 1 NZLR 262,
[2] *Couch v Attorney-General* [2008] NZSC 45 at [33].
[3] Andrew Beck and others *McGechan on Procedure* (online loose-leaf ed. Thomson Reuters) HR 15.1.02(1).
[4] Above n 2 at [33].
[5] *Pharmacy Care Systems Ltd v Attorney-General* (2001) 15 PRNZ 465 at [31].

First and third causes of action – Misleading and Deceptive Conduct

[22] Section 9 of the Fair Trading Act 1986 ("FTA") 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.

[23] In *Red Eagle Corporation Ltd v Ellis* the Supreme Court stated that there is no one formula for consideration of claims under s 9 FTA. Rather the approach depends on the particular situation and the Court stated that the key points included:[6]

(a) the section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances.

(b) it is not necessary to show that the defendant had any intention to mislead or deceive anyone.

(c) there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it.

(d) 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.

[24] If a s 9 breach is proved then the Court moves to s 43 of the FTA and considers whether the claimant has suffered loss or damage as a result of the defendants conduct. The Supreme Court again discussed the question of damages stating:[7]

(a) The language of s 43 has been said to require a "common law practical or common-sense concept of causation".

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[6] *Red Eagle Corporation v Ellis* [2010] NZSC 20 at [28]; [2010] 2 NZLR 492.
[7] At [29]-[31].

(b) The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct.

(c) If the Court is satisfied that the claimant was 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.

(d) The exercise of the power to make an order for payment under s 43 is, in the end, a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act.

Discussion

[25] The circumstances of what took place prior to and leading up to the phone call being made from the defendants' phone are unclear. While Mr Foley has deposed that he did not make the phone call, he was certainly about and around at the time of the call being made, if not immediately present. The first defendant has accepted he was in possession and control of the cellphone on the night of 1 December 2015.

[26] Mr Laurenson's primary submission in respect of these causes of action was that each defendant had pleaded that they did not make the call and Mr Foley confirmed that was the position by affidavit on two occasions. Therefore, an essential element of the cause of action, that is conduct on the part of either defendant could not be established.

[27] In my assessment, it is important for all of the circumstances of what took place at the time of the phone call to be considered by the Court to determine whether liability of either defendant can be established. In consideration of an application to strike out the statement of claim the facts pleaded are accepted as correct. The denial by Mr Foley that he did not make the call nor knows who made the call has not been tested under cross-examination.

[28] While it is not currently pleaded by the plaintiff the evidence may establish that the defendant, along with the presently unknown caller and others, had a common

plan or design for the prank call to be made. The interrogatories have established what associates of Mr Foley were attending the conference function on 1 December 2015. The plaintiff may decide to subpoena each of those persons to attend at trial. If that was the case, and depending on the evidence, the defendants may be found to be joint tortfeasors and be liable for any losses established by the plaintiff.

[29] Accordingly, I am not persuaded that the first and third causes of action should be struck out.

Second and fourth causes of action – Negligence

[30] In the *Law of Torts New Zealand* Stephen Todd set out the elements that must be present in order for a claim of negligence to be successful and thereby act as controls for such claims:[8]

(a) the person sought to be responsible for the negligent conduct must owe the victim a legal duty of care.

(b) that the person acted in such a way as to breach the duty of care – in short was careless.

(c) the damage suffered was caused by the persons breach of duty.

(d) the damage was also a sufficiently proximate consequence of that breach – in other words it was not too remote.

[31] In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* the Court of Appeal set out the approach to determining whether a duty of care exists, including the following:[9]

[8] S Todd, U Cheer, C Hawes & B Atkin *The Law of Torts in New Zealand* (7th Ed, Thomson Reuters, Wellington, 2016) at [5.1]

[9] *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.

(a) The ultimate question is whether in the light of all the circumstances of the case it is just and reasonable that a duty of care be imposed on the defendant.

(b) It is an intensely pragmatic question requiring careful analysis. The first matter is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. That is not a simple question of foreseeability as between the parties. It involves consideration of the degree of analogy with cases in which duties are already established. The second is whether there are policy considerations which tend to negative or restrict, or strengthen the existence of, a duty in that class of case.

(c) When a duty of care issue arises in a situation not clearly covered by existing authority the proper approach is to look at all the material facts in combination, in order to decide as a question of mixed law and fact whether or not liability should be imposed.

Discussion

[32] The ultimate question is whether in the light of all the circumstances of this case it is just and reasonable that a duty of care is imposed on the defendants. I accept that is a pragmatic question of mixed law and fact.

[33] First it is necessary to consider the degree of proximity or relationship between the plaintiff and defendants. All parties are involved in the supply of products to the dairy farming sector and servicing of machinery and equipment. The plaintiff and second defendant conduct their business in similar locations and both sell and service De Laval products. The prank call has been the direct cause of the plaintiff's loss. I am prepared to accept that there is a sufficiently proximate relationship between the parties to raise a prima facie duty of care.

[34] The asserted duty of care owed on the part of the defendants was not to abandon or leave unattended the cellphone in Mr Foley's possession on 1 December 2015. It

should not be overlooked that the plaintiff has only suffered economic loss and the Courts have been less willing to impose a duty of care in such cases. In my determination, there are sound policy reasons for denying such a duty of care arises in the circumstances of this case. The surviving cause of action allows recovery if established. It is therefore unnecessary to allow the duty of care sought to be imposed in this case to ensure the plaintiff has an available legal remedy. Furthermore, the imposition of the duty of care contended for may result in an expansive and unacceptably indeterminate class of potential defendants in other situations where a cellphone is left carelessly unattended.

[35] I therefore strike out the second and fourth causes of action in the statement of claim.

General damages

[36] The defendants sought further particulars in respect to the general damages claim. Those were provided on 1 June 2018 by way of memorandum from Mr Herbert who stated:

> The plaintiff claims general damages on the basis that vexation and inconvenience and the like were not only the reasonably foreseeable consequences of the prank call, they were the intended consequences.
>
> It is also an offence to use a telecommunication device knowingly to give a fictitious order, instruction or message.

[37] The plaintiff seeks an award of $20,000 for general damages. The plaintiff is of course a company. Direct economic loss only is pleaded. Part of the plaintiff's service to clients is to respond urgently to equipment breakdowns. Accordingly, a call at 11.10 pm while one expects relatively uncommon would not be unknown. A prank call or a genuine call would both cause "inconvenience and vexation" to the employees of the plaintiff who are called out.

[38] Intangible harm such as pain and suffering, stress and anxiety are not pleaded losses. Rather, in my view, the particulars provided by the plaintiff and set out above appear to seek an award of damages that punishes the defendants for the one-off phone call.

[39] In my determination, the claim for general damages is not sustainable. The direct loss to the plaintiff was the cost of going to the dairy farm some 90 kilometres from Hawera. That amount was $721.06. Whether the costs of the pre-commencement discovery application filed in the District Court are recoverable will be a matter of evidence and consideration by a Judge on usual principles. The claim seeking general damages simply alleging inconvenience and vexation to the plaintiff, which as I have noted, is a company is in my assessment not able to be proved. Nor could it be repleaded. Accordingly, the claim for general damages will be struck out.

Abuse of process

[40] Mr Laurenson submitted that the Court should also consider the defendants' proceeding as an abuse of process. As I understand his position that submission was largely directed at the damages sought. Therefore, as I have struck out the general damages claim, there is no need to further consider this submission.

Discovery

List of documents

[41] Rule 8.4(1) of the DCR requires a party when filing its pleading to provide a list of the documents referred to in the pleading and any additional principal documents that the party has used when preparing the pleading and on which that party intends to rely at the trial or hearing. Rule 8.4(3) provides that a party need not comply with that requirement if the circumstances make it impossible or impracticable to comply and a certificate to that effect setting out the reasons why compliance is impossible or impracticable and signed by counsel for that party is filed and served at the same time as the pleadings.

[42] No list of documents nor certificate of counsel was completed by the defendants when the statement of defence was filed and served on 1 March 2018.

[43] In a memorandum of counsel dated 7 May 2018, provided for the first case management conference, Mr Laurenson stated initial disclosure had been provided and that the defendants were not in possession of any relevant discoverable documents.[10]

[44] It is unclear whether in providing initial disclosure all relevant documents in the possession or control of the defendants had been provided to the plaintiff or that there were no such documents in existence.

[45] I have also considered the initial list of documents filed by the plaintiff. In my view, documentation that supports the claims for damages of the plaintiff should have been included in that list. One expects there will be relevant documentation in existence related to both the costs of the callout and the pre-commencement discovery application. That documentation should be disclosed.

[46] I intend to make a direction that both parties complete standard discovery. That will allow both the above matters to be attended to and clarified.

Further discovery sought by plaintiff

[47] The plaintiff filed an application for discovery dated 1 June 2018 without identifying whether standard discovery or tailored discovery was sought. Nor were the documents or classes of documents to be discovered by the defendants set out in the application. In an affidavit of Mr Gary Wallace, Operations Manager of the plaintiff, the following documents were referred to:

(i) Invoices, receipts, payment records and similar confirming attendance of the first defendant at the industry conference in Taupo from 30 November 2015 to 2 December 2015.

(ii) Evidence of travel to and from Taupo such as service station payments for fuel, en-route purchases with Eftpos banking and emails and messages corroborative of this travel.

[10] Memorandum of counsel of 7 May 2018, paragraphs 1 and 6.

(iii) Acknowledging that the defendants admitted by way of interrogatory that the prank call had been made from a cellphone associated with them then the following documents:

a. bearing upon the details of the defendants' acquisition of the mobile telephone and the terms of the account under which it was operated.

b. details of calls made to and from the mobile phone or against the relevant subscriber account (no timeframe was specified).

c. detailing the accounting between the defendants and the telecommunications service provider.

d. that establish certain details of calls made to or from the mobile telephone before and after the prank call at 11.10 pm on 1 December 2015 (what details sought to be established were not identified).

e. details of the prank call itself (what details sought to be established were again not identified).

(iv) A user manual establishing the make, model and operating instructions for the mobile telephone.

(v) Eftpos charges to the defendants' bank account for bar purchases made in the hour or hours before the prank call.

(vi) Communications of the first defendant with any associates about the fact of the prank call.

(vii) Records of Spark of notification of a prank call having been made from the phone.

[48] In response to the affidavit of Mr Wallace, Mr Simon Foley, on behalf of himself and the second defendant, stated in an affidavit dated 25 June 2018, that he was unaware that a prank call had been made to the plaintiff until receiving the letter from the plaintiff's solicitor dated 5 April 2017. That was 16 months after the alleged prank call had been made. Mr Foley noted that in both in the statement of defence and in his answers to interrogatories that he had admitted he attended the De Laval industry conference in Taupo from 30 November to 2 December 2015 and that the prank call had been made from the cellphone associated with the defendants while denying that he was responsible for the call nor knowing who had made it.

[49] Mr Foley deposed that he had contacted Spark to see what information including phone records could be retrieved and was advised information of that nature was not recorded due to the structure of his cellphone plan. Further in his affidavit he said he had no idea who had made the phone call and therefore there would be no phone records of him having made any calls to discuss such matters with any other person. Finally, Mr Foley advised that he did receive a text from Spark advising that a prank call had been made from his cellphone on the morning of 2 December 2015 but that did not include any detail of who the prank call had been made to nor about the content of the call. He therefore thought nothing further about the matter.

Relevant legal principles

[50] Rule 8.19 High Court Rules 2016 provides for particular discovery in that Court. Tailored discovery in r 8.8 DCR is the equivalent rule in this Court. In *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd*, the High Court stated there are four key considerations for such discovery applications:[11]

> (a) Are the documents sought relevant, and if so, how important will they be?
>
> (b) Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?

[11] *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14].

(c) Is discovery proportionate, assessing proportionality in accordance with Part 1 of the discovery checklist in the High Court Rules?

(d) Weighing and balancing these matters, in the Court's discretion applying r 8.19, is an order appropriate?

[51] Turning to the categories of documents, I conclude:

Documentation related to attendance at the Industry Conference in Taupo

[52] The first defendant has acknowledged attendance at the industry conference. Further, Mr Foley has deposed that because of the significant timeframe between the conference and the advice to him of the prank call being made of approximately 17 months and then a further eight months until proceedings were filed, that no such documentation exists.

Evidence of travel to and from Taupo

[53] The same issues arise as under the previous category of documents. However, with the acknowledgement of attendance at the conference there seems little need for such documentation to be discovered. Nor does it appear proportionate to this litigation for such documents to be required to be disclosed even if they existed.

Details of the defendants' acquisition of the mobile telephone, terms of the account with Spark and accounting between the defendants and Spark

[54] I am not persuaded there is any relevance to the matters at issue in this litigation in these categories of documentation that requires discovery to be undertaken.

Record of calls made to and from the defendants' mobile phone

[55] Mr Foley has admitted that the prank call was made from the phone that was in his possession and control on 1 December 2015. That information was also provided to the plaintiff as a result of the pre-commencement proceeding application. Spark have advised the first defendant that information in respect of calls to and from

the phone was not able to be recovered because of the structure of his cellphone plan. Accordingly, there are no documents to be provided.

Details of calls made to and from the mobile telephone after the prank call at 23.10 on 1 December 2015

[56] For the reasons set out in the previous paragraph there is no documentation able to be discovered.

Details of the prank call

[57] The same issue arises as with the above categories of documents. In addition, the defendants retrieved from Spark through the pre-commencement discovery application the detail of the time and length of the phone call. What other detail could be discovered is unclear.

Bar purchases including Eftpos charges to the bank account of the defendants

[58] Such documentation is of limited relevance (if any) and furthermore as explained by Mr Foley in his affidavit no longer exist.

Communications with associates about the prank call

[59] Mr Foley deposes that there is no documentation being phone records or otherwise in existence with respect to such communication. He has stated on more than one occasion he has no knowledge of who made the prank call and was unaware that a prank call had been made to the plaintiff until April 2017.

Advice of the prank call from Spark

[60] Mr Foley acknowledges that he received a text from Spark advising that a prank call had been made from the cellphone on the morning of 2 December 2015 but as he had no idea of who had made the call nor to whom the call was made he ignored the advice. For the reasons already outlined proof of that communication cannot be obtained. The acknowledgement of Mr Foley, however, appears to deal with this issue.

[61] Accordingly, in my determination there is little point in making a tailored discovery order as sought by the plaintiff. However, as I have already indicated, to ensure that any relevant documentation held by either party has been disclosed, I will make a standard discovery order in accordance with r 8.7 DCR.

Interrogatories

[62] By notice dated 1 June 2018 the plaintiff by its solicitor, Mr S Herbert administered a set of interrogatories on the defendants. Fifty-nine questions formed part of those interrogatories. Mr Foley, on behalf of both defendants, provided answers to those interrogatories verified by affidavit dated 18 June 2018.

[63] Seemingly not satisfied with those answers and seeking further information, the plaintiff issued a further set of interrogatories dated 11 July 2018. A further 41 questions were set out in that notice.

[64] In Mr Laurenson's submissions for the hearing on 26 July 2018, he advised that the defendants opposed answering any further interrogatories. In short, he submitted that the plaintiff had already exercised its opportunity to issue interrogatories and if dissatisfied with the answers that was a result of the poorly drafted and misdirected questions the plaintiff had included in its first notice. Further, counsel submitted the second set of interrogatories were oppressive and no more than a fishing expedition.

Discussion

[65] The plaintiff has failed to comply with the District Court Rules 2014 by serving the defendants with a second set of interrogatories. There is no rule that allows the delivery of a second list of interrogatories. However, the Court does retain a discretion to allow additional interrogatories. That cannot happen without an application being made seeking leave for that to take place. No such application was filed on the part of the plaintiff prior to delivering the second list of questions.

[66] The learned authors of *McGechan on Procedure* in dealing with whether a second set of interrogatories should be allowed noted that the Australian practice is only to allow those in exceptional cases.[12] In *Wilson v Broadcasting Corporation of New Zealand* Justice Heron held:[13]

> Rule 278 does not stipulate that only one notice may be filed. I think however that the new procedure also requires a prohibition on second notices. …In the interest of proper progress of litigation however, in my view only one r 278 notice can be delivered to any one party and it is a proper objection to take to a second notice that one notice has already been given. But that rule cannot affect the defendant's entitlement to seek an order pursuant to r 282. That rule is there to deal with the situation where insufficient answers have been given or where objection is taken pursuant to r 284. In this case the plaintiff objected to certain questions in the first r 278 notice she received, and whilst the questions were varied to a degree in the second notice the objection raised involves the same issues. I do not consider, in the less formal procedure that now prevails, there should be an insurmountable objection to further interrogatories being sought simply on the ground that a r 278 notice has been delivered and compiled with. Such may arise from a further consideration of the matters in issue, or they may arise as a result of objections taken or they may arise from an inadequate drafting of the initial interrogatories. In the end it is important that the Court retains the right to allow interrogatories to be delivered in any event, in order that the trial can be shortened, the issues clarified and progress made in the disposal of the case. In my view the Court has ample discretion to ensure that further interrogatories are not used as a delaying procedure, and if necessary to exclude an interrogatory which should have been asked in the first place.

[67] If the plaintiff seeks to have further interrogatories answered by the defendants, then it will be necessary for the appropriate application to be made. The plaintiff should consider whether it is seeking an order that interrogatories forming part of the first notice be fully answered, or that answers be clarified or that it be allowed to administer further interrogatories.

[68] Without wishing to constrain the plaintiff or appear to predetermine any application that it may make, I suggest that the plaintiff and counsel consider how necessary that such a step would be, the relevance of any questions that are proposed and the costs involved. As with all steps in any litigation, a sensible level of proportionality needs to be attendant on all decisions that parties make.

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[12] See n 3 at HR 8.34.13.
[13] *Wilson v Broadcasting Corporation of New Zealand* (1987) 1 PRNZ 368 at 371-372.

[69] Accordingly, I direct that the plaintiff's notice to the defendants dated 11 July 2018 seeking that supplementary interrogatories be answered need not be addressed by the defendants.

Orders and Directions

[70] The second and fourth causes of action are struck out.

[71] The claim for general damages is struck out.

[72] The application by the plaintiff for particular discovery is dismissed.

[73] The second set of interrogatories need not be addressed by the defendants.

[74] The parties have already agreed that this proceeding should attract a 2B costs categorisation. The defendants have largely been successful. They are entitled to costs on a 2B basis abated by 20 per cent to reflect that the first and third causes of action remain to be resolved. If the parties cannot resolve the quantum of costs then memoranda, no longer than three pages, may be filed by 4.00 pm on 21 December 2018. The Court will resolve any disputed issues on the papers.

[75] Each party is to complete standard discovery by way of affidavit served on the other party no later than 21 December 2018.

[76] The amount in dispute is now within the jurisdiction of the Disputes Tribunal. Mr Laurenson submitted at the hearing on 26 July 2018 that an order for transfer should be made if that was how resolution of the interlocutory applications left the proceeding. If transfer is still pursued by the defendants, then Mr Laurenson is to file and serve submissions by 14 December 2018. Mr Herbert is to file in opposition, as he indicated was the plaintiff's position, by 21 December 2018. If necessary that issue will also be resolved on the papers.

G P Barkle
District Court Judge