IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV 2008 476 000623

BETWEEN	SEBENZA INVESTMENTS LIMITED Plaintiff
AND	BRYAN KIERAN MOORE Second Plaintiff
AND	CATHERINE MARGARET BURTON Third Plaintiff
AND	SOUTH CANTERBURY DISTRICT HEALTH BOARD First Defendant
AND	THE BOARD OF THE AORAKI PRIMARY HEALTH ORGANISATION Second Defendant

Hearing: 20 August 2009

Appearances: C O'Connor for First Defendant/Applicant
G D Jones for Plaintiffs/ Respondents
I Hamilton for Second Defendant (Watching brief on this application)

Judgment: 3 March 2010 at 4pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to application for summary judgment

Background

[1] This case arises from the provision of health services in Temuka.

[2] There are three plaintiffs and two defendants. The second and third plaintiffs (Dr Moore and Dr Burton) are medical practitioners who are the principal

practitioners of the Temuka Family Practice, which is owned by the first plaintiff (Sebenza).

[3] The first defendant (the DHB) is the local District Health Board and a body corporate under Part 3 of the New Zealand Public Health and Disability Act 2000. The second defendant (Aoraki) is a primary health organisation (PHO).

[4] In August 2005 the DHB and Aoraki entered into a PHO Services Agreement for the provision of primary health services in South Canterbury.

[5] In January 2006 Aoraki and Sebenza (as the Temuka Family Practice) entered into an agreement for the provision of general practice services in the DHB's area; the contract also described as a "Back to Back Contract".

The claims in this litigation

[6] There are four causes of action. The first and second causes are contractual and the third and fourth are in defamation. In the first cause of action, Sebenza sues the DHB and in the second cause of action Sebenza seeks damages against Aoraki in the event Sebenza cannot enforce material provisions of the PHO/DHB Agreement. The DBH applies for summary judgment on the claim against it. Aoraki does not pursue Judicial Settlement Conference on the claim against it.

[7] In the third and fourth causes of action Dr Moore and Dr Burton sue the DHB in relation to publications on 1 July 2007 and 10 December 2007. The DHB also applies for summary judgment on these claims.

Summary judgment – the principles

[8] The starting point for a defendant's summary judgment application is r 12.2(2) High Court Rules, which requires that the defendant satisfy the Court that none of the causes of action in the statement of claim can succeed.

[9] Before turning to some particular issues which arise in relation to this case, I summarise the general principles which I adopt in relation to the application:

(a) The onus is on the defendant seeking summary judgment to show that none of the plaintiff's causes of action can succeed. The Court must be left without any real doubt or uncertainty on the matter.

(b) The Court will not hesitate to decide questions of law where appropriate.

(c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(f) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

Claim for breach of contract – Sebenza against the DHB

The nature of the claim

[10] Sebenza's claim against the DHB asserts that certain provisions of the DHB/Aoraki contract constituted promises by the DHB conferring benefits on and enforceable by Sebenza. Sebenza says the DHB committed breaches of those provisions for which damages are payable.

[11] For Sebenza Mr Jones emphasised that the issue is not whether a contractual relationship existed between the DHB and Sebenza – Sebenza accepts that it did not have a contractual relationship with the DHB – but rather whether the DHB through its contract with Aoraki assumed an obligation which is enforceable at the suit of Sebenza, pursuant to s4 Contracts (Privity) Act 1982.

The DHB/Aoraki contract and its provisions

[12] The DHB/Aoraki contract relied upon by the plaintiffs was entered into on or about 5 August 2005 between the DHB and Aoraki. By the contract Aoraki agrees to provide the services identified in the contract on the terms of the contract.

[13] The services relate to the provision of primary health services to eligible persons within South Canterbury and the manner in which those services are to be funded.

[14] Part D of the contract ("General Terms Governing our Relationship") provides for subcontracting. Aoraki is authorised to enter into subcontracts for the services on certain conditions. One condition (D.2.2(c)) is that Aoraki is to ensure that every subcontract it enters into under Part D provides for the DHB to exercise and enforce its rights under the DHB/Aoraki contract in relation to a contracted provider's performance of its obligations under the subcontract (including in particular the DHB's right to access information held by the contracted provider), pursuant to the Contracts (Privity) Act 1982.

[15] The contract provides in relation to contractual privity the following clause:

> **D.25.6 Contracts (Privity) Act 1982**
>
> Subject to Contracted Providers' and General Practitioners' ability to make Claims under this Agreement in accordance with Part F, no person who is not a party to this Agreement may enforce any of the provisions of this Agreement. Nothing in this Agreement shall confer any benefit on Eligible Persons, any Service User or on any Contracted Provider.

[16] It is Sebenza's case that the contract then went on to provide benefits for Sebenza, and in particular under the following provisions:

> **F.3 Payment for Services**
>
> F.3.1 Subject to clause F.3.4, we will Pay you for providing the services according to the terms and conditions of this Agreement in accordance with the terms of this clause F.3. Accordingly all references in this Agreement to your rights to Claim or restrictions on your Claiming under this Agreement apply to you or Contractual Providers as the case requires.
>
> F.3.2 We will Pay directly to you:
>
> (a) capitated Payments; and
>
> (b) management fees.
>
> F.3.3 Subject to clause F.3.4 we will Pay all fee for service Payments directly to you and you will ensure that Contracted Providers do not Claim for fee for service Payments from us.
>
> F.3.4 We both may agree in writing that we may make fee for service Payments directly to your Contracted Providers.
>
> F.3.5 All Claims by you and/or Contracted Providers for the Services, must be made under this Agreement.
>
> …
>
> F.12.1 **Ability to charge Default Interest**
>
> (a) Subject to clause F.12.3, where either of us does not pay any amount due to the other under this Agreement, the party owed the payment (or our Payment Agent where we are owed) may charge the other party interest from the date payment was due until the amount due is paid (Default Interest).
>
> (b) Where either of us owes any amount as a result of any error in relation to a Claim or a payment, the due date for the payment of this amount will be one month after written notice to the party owing the payment.

F.12.2 **Rate of Default Interest**

> The Default Interest rate will be 2 percentage points per annum above the index lending rate charged by WestpacTrust for the period involved and shall be calculated on a daily basis.

The Aoraki/Sebenza subcontract

[17] The DHB/Aoraki contract envisages subcontracts between Aoraki and contracted providers such as Sebenza, who are subcontracted to deliver the services contracted for under the DHB/Aoraki contract. These subcontracts are referred to as Back to Back Contracts. The closely integrated structural relationship between the two contracts is self-evident upon the reading of the two forms of contract, their structure, content and terminology.

[18] In a mirror of clauses D.2.1 and D.2.2. of the DHB/Aoraki contract, clause A.1 of the subcontract provides:

> **A.1. Parties to this Agreement**
>
> A.1.1 We are the Aoraki PHO and have entered into an Agreement with the South Canterbury District Health Board to provide primary health care services to meet the needs of our Enrolled Population ("**DHB to PHO Agreement"**). A copy of the DHB to PHO Agreement is available on the Ministry of Health website (www.moh.govt.nz).
>
> A.1.2 You are a Contracted Provider with whom we have subcontracted to deliver primary health care services. This subcontracting arrangement is in accordance with clause D.2 of the DHB to PHO Agreement.
>
> A.1.3 You will comply with all terms and conditions of the DHB to PHO Agreement in so far as they apply to you as a Contracted Provider. We have included some of those terms and conditions in this Agreement where necessary to clarify how those terms and conditions apply to you and your contractors.

[19] The central requirement upon Aoraki for payment of services is stated at F.3. (at [16] above).

[20] The direct relationship between default interest under DHB/Aoraki contract and under the subcontract is reflected in clause F.12.1 (at [16] above).

[21] In a further parallel with the DHB/Aoraki contract the issue of contractual privity is dealt with in these terms:

> D.25.6 **Contracts (Privity) Act 1982**
>
> You acknowledge that the DHB has the right to exercise and enforce its rights under the DHB to PHO Agreement in relation to your performance of your obligations under the Agreement (including, in particular, the DHB's right to access information held by you) pursuant to the Contracts (Privity) Act 1982.

Contractual privity – the law

[22] Section 4 Contracts (Privity) Act 1982 provides;

> **Deeds or contracts for the benefit of third parties**
>
> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

[23] The underlying rationale of s 4 of the Act lies in the intention of the parties to a contract as they have expressed that intention. This is reflected in Burrows, Finn and Todd *Law of Contract in New Zealand* 3rd ed. 2007, at 15.2.6(a) –

> The purpose of the 1982 Act, broadly, is to allow an intended beneficiary of a contract between others to enforce the benefit conferred by the contract, yet not to interfere too much with the autonomy of the contracting parties.

Similarly, at 15.2.6(b)(i) –

> It was not desired always to require the beneficiary positively to show an intention by the parties that he or she should be able to enforce the promise, but nor was it wished that a promise should be enforceable where, as a matter of construction, this would not have been intended by the parties. In the result s 4 applies to promises to confer benefits on sufficiently designated third parties, but subject to the proviso allowing the contracting parties to show that the beneficiary was not intended to have an action.

Section 4 – did the DHB/Aoraki contract purport to confer on Sebenza the benefit to be enforced?

[24] The DHB and Aoraki made specific provision in the DHB/Aoraki contract for contractual privity. In cl D.25.6 (above at [21]) they dealt both with two questions –

(a) Was a benefit being conferred?

(b) Who may enforce the provisions of the DHB/Aoraki contract?

[25] The DHB and Aoraki expressly recognised the right of contracted providers and general practitioners to make claims under the contract in accordance with Part F – that is not a relevant process in this litigation. Although this litigation concerns capitated payments which under Part F of the contract may be made directly to a contract provider, such arrangement must be recorded in writing. There is no suggestion of such an arrangement between Sebenza and the DHB in this case.

[26] With that exception not applicable, the final sentence of cl D.25.6 precludes Sebenza's argument that the DHB/Aoraki contract confers, or purports to confer, a benefit on Sebenza. With the Contracts (Privity) Act 1982 directly in mind the parties have expressly excluded such a benefit to Sebenza.

[27] Even were there an argument that the DHB/Aoraki contract conferred a benefit on Sebenza, the Sebenza argument would be precluded for a second reason, namely the proviso to s4 of the Act. As a matter of natural construction of the first sentence of cl D.25.6 of the DHB/Aoraki contract no person who was not a party to that contract could enforce the provisions of the contract.

[28] The following passage in *Law of Contract in New Zealand* at 15.2.6(b)(v) accords with my conclusion, and reinforces the absence of any arguable claim by Sebenza that it has a right to enforce the provisions of the DHB/Aoraki contract:

(v) Intention of the contracting parties

> Where the beneficiary is designated, and assuming that his or her benefit is conferred by the contract, either the contracting parties may still seek to show that it was not intended that the promise should create an obligation enforceable at the suit of the beneficiary. An express agreement about non-enforceability is conclusive of the matter.

Alleged breaches of contract

[29] Given the absence of enforceable contractual rights, Sebenza's contention that the DHB has breached contractual rights is moot. A significant body of evidence was presented by both sides with a view to establishing the honouring or the breach of the contract as the case may be. Much of that evidence is relevant to Sebenza's claim against Aoraki under the Aoraki/Sebenza contract. Given my conclusion that the contractual claim against the DHB must fail by reason of the privity issue in any event, it is inappropriate that I enter upon an analysis of the merits of the contractual breach argument. In the event the matters proceed to trial against the second defendant, those issues will be for the trial Judge.

Defamation

The second and third plaintiffs' claims

[30] Dr Moore and Dr Burton allege that they were defamed by the DHB in two publications.

[31] First, on 2 July 2007, the DHB published a media release under the title "Lower GP Fees for 25 – 44 Year Olds". The publication is admitted by the DHB. The press release read in full:

> South Cantabrians aged 25-44 will have access to cheapter doctor visits at all but one general practice, after South Canterbury District Health Board approved the release of the last in a series of government funding rollouts aimed at reducing the cost of doctor visits.
>
> In the final roll-out $66 million has been invested nationally with over $1 million allocated to South Canterbury for those aged 24 – 44: $650,000 to reduce GP fees and $390,000 to fund the reduction of prescription medicines from $15 to $3 per item.

> South Canterbury DHB Chief Executive Craig Climo said that Aoraki PHO had advised GP fees for the target age group would range between $17 and $32. The average fee will be about $26.
>
> Mr Climo said all age groups in South Canterbury now are able to access lower fees and prescription charges, after progressive annual funding roll-outs since 2002 in which the government has invested more than $2.2 million.
>
> Mr Climo said that one practice, Temuka Family Practice, has not met requirements to qualify for the funding and will not be eligible again until January 2008.
>
> "That's unfortunate, however we do not want these patients to miss out on the cheaper doctor visits this funding was intended to achieve. Patients of Temuka Family Practice who are between the ages of 25 and 44 are advised to retain their receipts after visiting the practice. We expect to shortly advise how these patients may apply for a refund of a portion of the costs of their qualifying visit."
>
> To gain approval for the new funding, the 28 general practices within Aoraki PHO were required to demonstrate the funding would "flow through" to patients in the form of reduced fees.
>
> Twenty practices had advised their fees would reduce by at least $27.50. Four practices would set fees at $22.50 or less, a level which meets the "low fee" threshold determined by the Ministry of Health. The remaining three practices had committed to setting a fee which would not exceed 45% of their previous fee.
>
> Aoraki PHO publishes fee information by GP practices on its website, www.aorakipho.org.nz (click on "Practices in the Area", then "View Details" next to each listed practice). The site at present shows fee information as at 1 April 2007, but is expected to be updated shortly with the newly approved fees.

[32] Secondly, on 10 December 2007, the DHB published a media release under the title "SCDHB to Discontinue Refund Payments". This publication is also admitted by the DHB. The full text of the 10 December 23007 press release reads:

> South Canterbury District Health Board had advised Aoraki Primary Health Organisation that it will discontinue refund payments to Temuka Family Practice patients in the 25-44 age group effective 1 January 2008.
>
> Since the final roll-out in July of government subsidies to reduce the cost of doctors visits, SCDHB has been paying these patients the equivalent of the reduction in fees they would have received if Temuka Family Practice had met eligibility requirements for the funding.
>
> SCDHB Chief Executive Chris Fleming said, "We have been making refunds to qualifying patients as we did not want them to miss out on the cheaper doctor visits this funding was intended to achieve. We took this unique step to provide Temuka Family practice some additional time to meet

> the requirements set out nationally. This time has now passed and it is up to Temuka Family Practice to determine whether it wishes for its patients to fully benefit from the subsidy available."
>
> "Every general practice within the country has the right to determine whether or not it wishes to receive this subsidy. While the majority of practices nationally have taken this up, there are a very small number who have chosen not to. While we do not agree with the decision Temuka Family Practice has made we respect their right to do so. Unfortunately, this now means the practice's 25-44 year old patients will pay more for their doctor visits than they might otherwise have. All other practices in the South Canterbury district are receiving and passing this subsidy on to their patients."
>
> To gain approval for the funding, general practices are required to demonstrate the funding will "flow-through" to patients in the form of reduced fees. There are several mechanisms practices can use to achieve this: reducing their fees for standard consultations by at least $27.50, setting fees level which meets the "low fee" threshold determined by the Ministry of Health, or setting fees which do not exceed 45% of their previous fees.
>
> "Should Temuka Family Practice wish to access this funding, and can demonstrate the changes in its fees for this age group, the district health board will do everything it can to facilitate the introduction of the subsidy within national parameters," Mr Fleming said.

[33] Dr Moore and Dr Burton allege that the passages in the two press releases which I have emphasised were defamatory.

[34] Dr Moore and Dr Burton allege that each of the publications had the following defamatory meanings:

(a) That Dr Moore and Dr Burton had failed, refused or were unwilling to pass on the benefits of the increased funding to their 25 – 44 year old patients; and/or

(b) That the Temuka Family Practice was acting, or intended to act, in breach of its funding agreements with the DHB and Aoraki; and/or

(c) That Dr Moore and Dr Burton had acted, or intended acting, to put their own financial interests before the interests of their patients; and/or

(d) That Dr Moore and Dr Burton had acted dishonourably.

The District Health Board's grounds of defence

[35] In its application for summary judgment, the DHB asserts that the plaintiffs' defamation claims cannot succeed for two reasons:

(a) The natural and ordinary meaning of the statements complained of are not defamatory of the plaintiffs; and

(b) The words complained of, taken as a whole, are in substance true, or are in substance not substantially different from the truth.

I will examine these assertions in turn by reference to the arguability of the plaintiffs' allegations.

Is it arguable that the natural and ordinary meaning of the statements is defamatory of the plaintiffs?

[36] I adopt the following as the principles relevant to meaning.

[37] The meaning which words are capable of bearing is a question of law. If the words are reasonably capable of bearing the alleged defamatory meaning, it is then for the jury (if the trial is before a jury) to decide whether they in fact do so: *McGee v Independent Newspapers Limited* [2006] NZAR 24 at 28.

[38] In determining whether words are capable of bearing an alleged defamatory meaning, the applicable principles as set out in *New Zealand Magazines Ltd v Hadlee (No.2)* [2005] NZAR 621 at 625 apply:

(a) The test is objective: under the circumstances under which the words were published, what would the ordinary person understand by them?

(b) The reasonable person is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

(c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

(e) But the Court will reject those meanings which can only emerge as a product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.

(f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v News Group Newspapers Ltd* [1955] 2 AC 65; [1995] 2 All ER 313 (HL) at p 72; 318.

[39] I remind myself, in a summary judgment context, that I am not determining whether the words are reasonably capable of bearing the defamatory meaning alleged. Rather, I am determining whether it is arguable that the words are reasonably capable of so doing. Also if any one of the alleged defamatory meanings is arguably reasonably capable of bearing the alleged defamatory meaning, then the defendant's summary judgment application cannot succeed (unless the "truth" defence is entirely successful): r 12.2 High Court Rules.

[40] It is convenient to consider the publications by reference to three of the six principles identified in *New Zealand Magazines Limited v Hadlee*, in my own order:

(f) "Context" – the words must be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. There is a relevant context and background in the present case, some of which the Court has through the affidavits filed. There was additional funding made available to the DHB in 2007 to increase capitated funding for the provision of general medical services for health consumers within the 25 – 44 year age

group. Margaret Grace Hill, the general manager, planning and funding, of the District Health Board referred to the requirements for qualification for that funding, which lay in the contracted provider demonstrating that the fee charged by the contracted provider was at a level where it could be demonstrated that the benefit of the increased subsidy payment would be passed onto, or "flow through" to, the health consumers within that designated age group. There was a PHO agreement amendment protocol group (known as PSAAP) convened to assist the District Health Board to determine criteria. Meetings occurred. Guidelines were published and then clarifications were published. At least some of the readers of the DHB's press releases would have been aware of this context. There can be no doubt that the Court on this application does not have the full context. Explanations would have been given and expectations stated within the various bodies and discussions. The emphasis on benefits "flowing through" to consumers would have undoubtedly been a focus of such discussions both as to the health-care importance and as to the mechanism by which "flow through" was assured. The context has at least the potential to increase the sting of the two publications. In the context of the discussions, meetings and decisions which occurred through 2007 a statement that a particular provider had failed to demonstrate that funding would "flow through" to patients may have had a decidedly greater sting than in a situation where "flow through" aspirations or requirements were simply effected by the Government and/or DHB in a document, undiscussed and undebated, delivered to providers.

(c) "A matter of impression after reading the publication" – the Court is not to be confined to the literal meaning of the words or the meaning which might be extracted on close analysis. The Court is concerned with the impression that an ordinary reasonable person would take away from the article. In this summary judgment context, this inquiry is as to what are the arguable matters of impression which might be carried away by the ordinary reasonable person. As this is a matter of

impression it is of debatable value to over-analyse the four defamatory meanings alleged by the plaintiffs. What then is the arguable impression? I consider that each of the four alleged defamatory meanings is arguably a general impression which the ordinary reasonable reader might take away. The first – a failure, refusal or unwillingness to pass on benefits – (in the sense of seeing them "flow through") may well be clear rather than simply arguable; the second – acting or intending to act in breach of funding agreements – closely follows the theme of "not meeting requirements" which the DHB adopted in both press releases; the third – acting or intending to act in their own financial interests rather than their patients' – may not be expressly stated but it is an at least arguable impression of both press releases. The repeated use of the "flow through" terminology at least arguably leaves an impression that the plaintiffs have chosen to optimise their own positions rather than pass on benefits to patients; fourthly – that the plaintiffs had acted dishonourably – is the plainest instance of an "impression" allegation as there is no express reference to "dishonour". The press releases do however contain not merely the material I have already discussed but arguably contain a measure of judgement by the repeated use of "unfortunate" and (in the second article) the comment "[w]hile we do not agree with the decision Temuka Family Practice has made..." leading on to another "unfortunate" observation.

There is an arguably strong impression created by both these publications – which were after all media releases apparently crafted by someone titled "the communications adviser" – that the DHB is intending to make a point about the plaintiffs' practice. It is singled out in the very first paragraph of the 1 July 2007 release as the exception to cheaper doctor visits – "at all but one general practice". In the second article the Temuka Family Practice and its patients in the 25 – 44 year age group is the very focus the first paragraph. A trial Court might well conclude that the very intention of the articles was to create an unfavourable impression about the Temuka Family

Practice. An inference which the trial Court might draw is that the articles were published in such a way that the Temuka Family Practice might see the error of its ways and come into line.

(a) Objective test – I conclude that each of the four defamatory meanings which the plaintiffs allege in relation to the two press releases is objectively, under the circumstances under which the words were published, capable of representing the understanding of the ordinary person.

It would then be for the jury (if jury trial was elected) to decide whether they in fact did so.

Truth - the DHB's contention

[41] The DHB invokes the defence of truth as contained in s8(1) Defamation Act 1992.

[42] The DHB's application for summary judgment puts it in this way:

> ...the words complained of, taken as a whole, are in substance true, or are in substance not substantially different from the truth.

Discussion

[43] As I have indicated, extensive evidence was filed as to the way in which the Aoraki/Temuka Family Practice contract was performed. I also heard extensive submissions from counsel as to whether or not the Temuka Family Practice had met the eligibility requirements for the additional funding of the 25 – 44 year age group. In the event, I do not need to determine whether it is beyond argument that the Temuka Family Practice failed to meet those criteria because I find that there are other aspects of the alleged defamation on which there is arguable evidence which would mean that a truth defence would fail.

[44] This bar to the DHB's summary judgment application arises for the following reasons.

[45] Understandably, the truth defence under s8 Defamation Act does not give rise to a complete defence where the defendant simply establishes the truth of the literal words used in the publication. Section 8(3) of the Act allows the defendant to prove that the imputations contained in the matter that is the subject of the proceeding were true or not materially different from the truth.

[46] In its defence to the defamation claims, the DHB has pleaded the following particulars of truth in relation to the two publications:

> 1 July 2007 press release –
>
> A. The first defendant received additional funding from the Ministry of Health to subsidise the costs of consultations with General Practitioners for patients within the 25 to 44 year age group, such funding to be made available after 1 July 2007.
>
> B. All of the contracted providers to the Aoraki PHO that applied for the additional funding (including the Temuka Family Practice) were required to provide information confirming that there was to be a reduction in the fees charged for this age group which would allow the contracted provider to obtain the additional funding available through the PHO/DHB Agreement.
>
> C. The information provided by the Temuka Family Practice in support of its application did not satisfy the first defendant that the means of the proposed fee reduction, and the amount of the fees reduction, would meet the eligibility criteria agreed by the PHO Agreement Amendment Protocol Group ("PSAAP") to qualify for the increased funding.
>
> D. Of the 28 practices that were contracted to the PHO and that applied for increased funding, only the Temuka Family Practice failed to meet the qualifying criteria.
>
> 10 December 2007 press release
>
> A The first defendant decided that, notwithstanding the Temuka Family Practice did not meet the PSAAP criteria to receive additional funding to subsidise consultations for patients within the 24 to 44 year age group from 1 July 2007, that any such patient of the Temuka Family Practice should receive the benefit of the proposed reduced fees by being refunded the appropriate amount directly from the first defendant.

B The first defendant implemented this plan on a temporary basis as a goodwill gesture to allow the Temuka Family Practice more time to amend its fee structure in order to comply with the PSAAP criteria, which would place the Temuka Family Practice in a position to apply for increased funding that would be available for the 25 – 44 year age group from 1 January 2008.

C The Temuka Family Practice did not apply for any such funding in respect of the 25 to 44 year age group to commence from 1 January 2008.

D It is not compulsory for the contracted provider to a PHO to apply for any such funding. If a contracted provider does wish to obtain additional subsidy funding in relation to its patients within the 25 – 44 year age group, it must demonstrate that any such funding will be passed onto the contracted provider's patients, through a reduction in patient fees in accordance with the PSAAP criteria.

E There are several mechanisms by which an applicant for increased funding can demonstrate that this funding will effectively "flow through" to its patients and therefore meet the criteria agreed by PSAAP; including reducing fees by at least $27.50 per consultation, setting fee levels that meet the "low fee" threshold criteria determined by the Ministry of Health or by setting a fee that does not exceed 45% of the contracted provider's previous fee for this age group.

[47] In other words, the particulars relied upon as establishing the truth of the DHB's publications is primarily focused upon establishing that the Temuka Family Practice did not meet the eligibility criteria for funding.

[48] In s 8 of the Act, the term "imputation" must be taken to have its normal meaning in the context of the action of imputing or attributing something, usually a fault, to a person. "Imputation" in s 8 covers both those matters literally stated in s 8 of the Act and those representing the natural and ordinary meaning of the publication read as a whole.

[49] With the arguable exception of the plaintiffs' first particularised defamatory meaning (that the second and third plaintiffs had failed, refused or were unwilling to pass on the benefit of the increased funding to its 25 – 44 age patients) and the second particular (that the Temuka Family Practice was acting or intended to act in breach of its funding agreements with the DHB and Aoraki), the DHB did not set out to establish by evidence that the other alleged defamatory meanings were true. That is, the DHB did not seek to establish:

(a) That the second and third plaintiffs had acted or intended acting to put their own financial interests before the interests of their patients; or

(b) That the second and third plaintiffs had acted dishonourably.

[50] Dr Moore provided an affidavit in opposition on behalf of the plaintiffs. She is a director of the first plaintiff and the wife of the third plaintiff. Her evidence provides a detailed explanation as to the way in which the plaintiffs conducted their business and why they regarded their conduct as appropriate. She observes:

> It is an integral part of a doctor's ethical code that patients' interests are paramount. For a medical practitioner to put his or her own financial interests before his or her patients well being (sic) would be both unprofessional and unethical behaviour.

[51] Because the DHB's statement of defence and notice of opposition do not directly address the third and fourth particulars of defamatory meaning as pleaded by the plaintiffs, it should be taken from the pleadings at this point that the DHB does not intend to seek to establish the truth of the third and fourth particulars of meaning. As it is, even were the Court to take the possibility of amendment to pleadings into account (which I doubt that I should do at this point), the DHB at this point on the evidence before the Court would have failed to establish what they need to establish in a summary judgment context. They would not have demonstrated that the plaintiffs cannot succeed in proving that it would be untrue to say that they had put their own financial interests before the interests of their patients or that they had acted dishonourably.

Result

[52] In these circumstances, the summary judgment application in relation to both causes of action in defamation must fail.

Different outcome on aspects of the summary judgment application

[53] The conclusions the Court has reached are that the grounds for summary judgment against the first plaintiff are made out but that the grounds for summary judgment against the second and third plaintiffs are not made out.

[54] Mr Jones for the plaintiffs did not submit that the Court cannot order summary judgment in relation to one plaintiff's cause or causes of action when declining summary judgment in relation to another plaintiff's cause or causes of action. The argument proceeded upon the basis that the Court was entitled to give summary judgment as against one plaintiff while refusing summary judgment as against another. I am satisfied that that is in accordance with the High Court Rules.

[55] High Court Rule 12.2(2) precludes the giving of 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.

[56] The rule is addressed towards multiple causes of action within a plaintiff's statement of claim. It is not addressed to a statement of claim where there is more than one plaintiff and each plaintiff has distinct causes of action (except to the extent that in the case of each plaintiff considered separately r 12.2(2) applies).

Orders

[57] I order:

(a) There will be summary judgment for the defendant against the first plaintiff on the first plaintiff's first cause of action.

(b) The defendant's interlocutory application for summary judgment against the second and third plaintiffs on the defamation causes of action is dismissed.

Costs

[58] The defendant is entitled to costs on the first plaintiff's first cause of action as against the first plaintiff. I am of a tentative view that costs should be on a 2B basis. If the parties cannot agree on that, leave is reserved to file submissions (no more than five days apart – limited to four pages).

[59] So far as the costs of the unsuccessful application for summary judgment against the second and third plaintiffs are concerned, the appropriate order is that those costs be reserved, pursuant to the approach taken in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA). I therefore reserve those costs.

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