IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-003878
[2013] NZHC 2203

BETWEEN	R CAMERON AND SHORTTS ENGINEERING AND PLUMBING SUPPLIES LIMITED (FORMERLY GSE GROUP LIMITED) Plaintiff
AND	TELECOM NEW ZEALAND LIMITED First Defendant
	SIETEC (NZ) LIMITED Second Defendant

Hearing: 22 February 2013

Appearances: C J Tennet for plaintiff
S E Fitzgerald/S A Cunliffe for first defendant
P Mills/T J P Gavigan for second defendant

Judgment: 28 August 2013

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 28 August 2013 at 1pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Peter C Gilbert, Wellington
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Counsel:
C J Tennet, Wellington
P Mills/T J P Gavigan, Auckland

[1] This proceeding concerns a dispute over the supply of telephone services to the plaintiff (I will call the plaintiff RC&S). RC&S alleges that its business has collapsed as a consequence of trading losses suffered due to problems firstly with the first defendant (Telecom) over re-location of telecommunications to new premises in 2007, and secondly as a result of a transfer of services from Telecom to the second defendant (Sietec) in 2010.

[2] RC&S claims that its losses were caused by wrongful conduct of the defendants, in the case of Telecom comprising negligent misstatement (in 2007), breach of contract (in 2007 and in 2010) and negligence (again in 2007 and in 2010), and in the case of Sietec comprising inducement of Telecom to break its contract with RC&S or alternatively unlawful interference with that contract (both in 2010). It claims special damages of $105,000, general damages of $100,000 and aggravated damages of $25,000 from Telecom in respect of the events in 2007, and special damages in excess of $3.75 million, general damages of $75,000 and aggravated damages of $25,000 from Telecom and the same special aggravated damages but $50,000 general damages for Sietec in respect of the events in 2010.

[3] In general, the defendants deny that they have breached any duties (whether contractual or tortuous), and say that they acted at all times in accordance with their obligations (both contractual and statutory) and RC&S's instructions.

[4] Telecom has applied to strike out the causes of action for a breach of contract and negligence in 2010, the claims for general and aggravated damages in respect of all causes of action against it, claims for special damages in excess of a sum stated in limitation clauses in the parties' contract, and claims advanced on behalf of other entities associated with RC&S's director Harry Memelink. In addition, both Telecom and Sietec have applied for security for costs. RC&S has opposed all applications.

Background

[5] RC&S (then named GSE Group Limited) opened an account with Telecom in mid-February 2005[1] for the supply of telephone services to its premises at 63B Great South Road, Penrose, Auckland. The nature of its services required several telephone lines.

[6] In early 2007, RC&S looked at moving its premises. This necessarily involved transferring some of its telephone lines. It engaged a consultant, Mr Dewsnap of OpalNet Limited, to project manage the move, and also spoke to Telecom about moving to a property at 47 Huia Road, Otahuhu. There is a dispute as to what Telecom was asked, and what it told RC&S, but for the purpose of its strike out application, Telecom accepts the following matters alleged:

(a) In February 2007 the director of RC&S, Harry Memelink, had a conversation with a service representative of Telecom.

(b) Telecom's service representative assured Mr Memelink that there would be no problem with transfer of all numbers to the premises at 47 Huia Road, Otahuhu.

(c) RC&S then leased the premises at 47 Huia Road (from a related entity).

(d) The transfer of services, which took place on 11 April 2007, did not go smoothly.[2] Customer linking[3] was put in place (on RC&S's instructions) for RC&S's previous numbers. Due to the problems encountered when setting up services in the new premises, additional temporary linking was put into place for lines going into a "DDI block" in the new premises to divert telephone lines to

[1] The account was opened under the name GSE Limited, but nothing turns on that.

[2] Telecom says that RC&S's telephone numbers could not be transferred directly to the new premises as there was insufficient capacity at the Huia Road premises to accommodate the services to be transferred.

[3] A system whereby calls to a number can be forwarded to another number, commonly used where a customer transfers its premises to an addresses served by a different exchange.

RC&S's sales representatives' mobile phones, and fax lines to an "outside" number nominated by RC&S.[4]

(e) The difficulties at time of transfer were never resolved to RC&S's satisfaction.

[7] In February 2010 RC&S's consultant, Mr Dewsnap, acting on behalf of another company within Mr Memelink's group of companies, approached Sietec Wholesale Networks Ltd (SWN), a subsidiary of Sietec, initially to discuss provision of telecommunication services to the other company. RC&S says that it was looking to bring in new services (including computer based telephone calling) and intended to extend those services to all companies within Mr Memelink's group of companies. RC&S says that it did not agree to proceed with the supply of any services at that time (it was merely seeking information from SWN).

[8] SWN provided RC&S with a contract setting out the services to be provided. It would not proceed with supply of services to the other company until it had the signed contract (which RC&S's consultant Mr Dewsnap) provided. However, RC&S says that it did not instruct Sietec to take over as its communications and internet supplier generally, and in particular for its office at Huia Road. It alleges that Sietec, of its own accord and without RC&S's authority, advised Telecom that it (Sietec) was to take over RC&S's entire communications lines and internet services.

[9] Although there is the dispute as to whether RC&S authorised Sietec/SWN to request a transfer of its lines, there is no dispute that a transfer was requested, or that as a consequence Telecom disconnected a total of nine telephone lines (being four lines specifically nominated in the request, one of which was a "pilot" for other numbers associated with it in a "DDI block"), but leaving some lines/numbers with Telecom. Records from Telecom's OO&T system[5] show:

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[4] Telecom says that the diversions to mobile phones were cancelled, again at RC&S's request, on 17 April 2007 but that RC&S did not request cancellation of the linking of previous numbers or of the four fax numbers within the DDI block. The previous numbers were subsequently cancelled, but the fax numbers were still linked in March 2010.

[5] The system is known as Wireline Online Order and Tracking (and the acronym OO&T). The system records information about requests that other providers make to Telecom, communications between them about the requests, and the action taken by Telecom in response to the requests.

(a) On 29 March 2010 Telecom received from Sietec/SWN[6] a request for information about RC&S's telephone lines at Huia Road, to which Telecom responded with advice as to the specific lines into the premises, including the lines within the "DDI block" (four of which were the fax lines that were still "customer linked", and were identified as such).

(b) On 7 April 2010, pursuant to a further request from Sietec/SWN, Telecom transferred nominated telephone lines (which excluded the "customer linked" fax lines within the "DDI block") to Sietec/SWN.

[10] RC&S alleges that as a result of the transfer of the nominated lines from Telecom to Sietec some of its telephone numbers ceased functioning, and internet communication service was lost. It says that customers were unable to place orders because calls and faxes intended for RC&S were diverted to a Telecom "holding number". RC&S contends that because customers were unable to place orders or get any response to them, they stopped placing orders or refused to pay.

[11] RC&S says that by September 2010 it had become aware of difficulties with its telephone lines, but had not been informed of the transfer by either Telecom or Sietec/SWN. It alleges that Telecom had the ability to transfer the lines back. In the meantime, both Telecom and Sietec/SWN were invoicing RC&S for services, which RC&S was questioning.

[12] In October 2010 Telecom permanently disconnected all lines for credit reasons.

The procedural history

[13] When it commenced this proceeding in June 2012, RC&S pleaded a claim for breach of contract against Telecom, and wrongful interference in that contract against Sietec (on the basis that there was no contract between it and Sietec). As an

[6] There is a dispute as to whether RC&S approached Sietec or SWN.

alternative (in the event that it was found that there was a contract between it and Sietec) RC&S pleaded breach of that contract.

[14] After both defendants had filed statements of defence, Telecom filed an application to strike out the claim against it, or in the alternative for an order for security of costs. Sietec also indicated an intention to apply for security for costs.

[15] In response, on 3 December 2012 RC&S filed an amended statement of claim (dated 30 November 2012), providing further particulars of the background to the claim and amending its causes of action:

(a) It added three causes of action against Telecom in relation to the transfer of telephone lines from its Great South Road premises to the Huia Road premises (negligent misstatement in relation to what was needed to effect the transfer, breach of contract on the basis of failure to provide the agreed services, and alternatively negligence in the provision of the services) and two causes of action arising out of the transfer of lines to Sietec in 2010 (breach of terms as to the agreed services, and negligence).

(b) It removed the alternative claim for breach of contract by Sietec and pleaded a single cause of action instead alleging inducement of breach of RC&S's contract with Telecom as well as unlawful interference with that contract.

[16] Telecom's response to the amended claim was to file the present application asking the Court to strike out allegations based on the allegedly unauthorised transfer of telephone lines to Sietec (in the fourth and fifth causes of action) together with the claims for general and aggravated damages, and any damages in excess of the limits of liability stated in the contract. In addition, Telecom sought an order for security for costs.

[17] Sietec's response to the amended statement of claim was to file its application for security for costs.

[18] Since the applications were filed RC&S has provided the defendants with (but not filed) a further version of its amended statement of claim indicating further amendments it is intending to make, in part to answer the issues raised by Telecom over its pleading (where necessary I refer will to it as the proposed amended statement of claim).

The application to strike out

[19] Telecom seeks to have the following aspects of the causes of action against it struck out on the grounds that the pleaded claims do not disclose a reasonably arguable cause of action or are otherwise untenable:

(a) The allegations[7] that the transfer in 2010 of some of RC&S's telephone lines was in breach of contract or in breach of a duty of care. Telecom says that these claims are not reasonably arguable given the undisputable evidence that it transferred the lines in accordance with its contract and as required by an industry code for transfer of services (the customer transfer code)[8] that has been approved under the Telecommunications Act 2001.

(b) The claims for aggravated damages[9] and general damages,[10] and for special damages in excess of the limitation of liability in RC&S's contract with Telecom.[11] Telecom says that: RC&S has not pleaded any valid basis for an award of general damages; RC&S's allegation that Telecom acted in a "highhanded and insolent manner" is not a tenable basis for awarding aggravated

[7] Paragraphs 50 – 57 of the proposed amended statement of claim (the pleading of the fourth cause of action, which is repeated in the fifth cause of action); being paragraphs 49 to 56 of the amended statement of claim.

[8] The Telecommunications Carriers' Forum's Code for the Transfer of Telecommunications Services, approved by the Commerce Commission on 12 October 2006.

[9] Advanced in paragraphs 35, 42, 48, 56 and 61 of the amended statement of claim (being 36,43,49,57, 62 of the proposed amended statement of claim), and in prayer for relief C in all five causes of action against Telecom.

[10] Advanced in paragraphs 34, 41, 47, 55 and 60 of the amended statement of claim (being 35, 42, 48, 56, 61 of the proposed amended statement of claim), and in prayer for relief B in all five causes of action against Telecom.

[11] Advanced in paragraphs 33, 40, 46, 54 and 59 of the amended statement of claim (being 34, 41, 47, 55, 60 of the proposed amended statement of claim), and in prayer for relief C in all five causes of action against Telecom.

damages, and the claims for special damages are all in excess of a limitation of liability clause in the parties' contract and there is no reason not to enforce that clause.

(c) Claims made on behalf of other entities, which may or may not have been related to RC&S or Mr Memelink.12 Telecom says that no basis has been pleaded for RC&S to claim losses suffered by those other entities and they are untenable given a term of the contract that Telecom's services could not be used by anyone other than RC&S without Telecom's written consent.[13]

Legal principles on strike out

[20] The Court has power to strike out all or part of a pleading if it discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading.[14]

[21] The principles that the Court applies when assessing whether to strike out a pleading on this ground are stated in the often quoted decision of the Court of Appeal in *Attorney-General v Prince & Gardner*.[15] The principles of particular application in the present case are:

(a) The pleaded facts, whether they are admitted or not, are assumed to be true.

(b) The Court can depart from that primary principle if the pleaded allegations are entirely speculative and without foundation.[16]

(c) Before a Court will strike out a cause of action, it must be confident that the cause of action is so clearly untenable it cannot

[12] Claims in respect of lines for all telephone numbers identified in paragraph 4 of the amended statement of claim as being for entities other than RC&S (numbers connected to lines into the Great South Road premises before the transfer in 2007) and in respect of lines for six numbers connected to the DDI dialling block at the Huia Road premises, identified in paragraph 10 of the amended statement of claim as being for other entities.
[13] Clause 4 of Telecom's standard terms and conditions.
[14] High Court Rules, r 15.1(1)(a).
[15] *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267 – 268.
[16] *Collier v Panckhurst* CA136/97, 6 September 1999 at [19].

possibly succeed. A pleading (or part of a pleading) should be struck out if the Court is satisfied that, even on the most favourable interpretation of the facts pleaded or available, the plaintiff could not succeed in law.[17]

(d) The jurisdiction to strike out is not excluded by the need to decide difficult questions of law, provided that the question of law can be decided on the material before the Court.

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

(f) The Court should be particularly cautious before striking out a claim in a developing area of law.[18]

Unauthorised transfer of lines

[22] RC&S's claims for breach of contract and breach of duty of care (negligence) rely on the following alleged breaches:[19]

(a) Failing to maintain services to the plaintiff as it had contracted to;

(b) Purporting to take the transfer notice from the second defendant without any further enquire as to its validity of *bona fides*;

(c) Ensuring that the transfer notice applying to certain lines of the plaintiff did not affect (in any way whatsoever) the other numbers that it was supposed to continue to administer (and for which it billed the plaintiff);

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[17] *Telecom New Zealand Ltd v Clear Communications Ltd* (1997) 6 NZBLC 102,325 at 102,330 (HC).
[18] *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) at [33].
[19] Paragraph 53 of the amended statement of claim (the claim in contract), repeated by paragraph 57 for the alternative claim for breach of duty of care (both of which have been carried over into the proposed amended statement of claim).

(d) Failing to notify the plaintiff of the purported transfer of numbers to the second defendant;

(e) Failing to notify the plaintiff of the loss of any other phone services as a result of the interference of the network by the first defendant (in purportedly transferring these numbers); and

(f) When the interference by the second defendant was finally established by the plaintiff and communicated to the first defendant the first defendant failed or neglected to "slam" the phone lines so that they were returned and (in the alternative) failed to reconnect all the phone lines so that the plaintiff's original 'arranged' network was operative and functioning again.

[23] RC&S pleads[20] that it is unaware of the nature and extent of the communication between Sietec and Telecom, but nonetheless says:

(a) Telecom did not comply with the customer transfer code;

(b) If, notwithstanding that starting point, the communication did comply, Telecom was obliged to enquire into that request, including checking the request with it;

(c) The request was "contaminated" by the arrangement of the numbers in the "DDI block", meaning that a request to take over a part only of the numbers would disrupt and disable the entire phone network; and

(d) Once any numbers were taken out of the "DDI block" the listed phone numbers would not connect to the Huia Road premises, regardless of whether Telecom or Sietec was responsible for provision of the services..

[20] Paragraph 20 of the amended statement of claim (not changed in the proposed amended statement of claim).

[24] Telecom says that paragraphs 53 (b), (c), (d) and (e) (paragraphs 54(b), (c), (d) and (e) of the proposed amended statement of claim) should all be struck out as they assume that Telecom breached its contract with RC&S or its duty of care by acting on the transfer request made by Sietec. Counsel for Telecom submitted that that claim was clearly untenable because Telecom was entitled, and indeed obliged, to transfer the lines upon receiving Sietec's transfer request, under both the terms of contract[21] and pursuant to its statutory obligation to comply with the customer transfer code.[22] She argued that the comparable pleading in respect of the fifth cause of action should also be struck out as the allegations in the negligence claim are co-extensive with those for breach of contract, and there is no reason for there to be any greater duty in negligence.[23]

[25] Counsel for RC&S submitted that it was reasonably arguable that Telecom had a duty to require Sietec to produce a copy of its authorisation to make the transfer request, because not all of the lines were being requested, and Telecom knew of "the complicated nature" of the lines (given Telecom's knowledge of the customer linking of some of the lines in the "DDI block" and the history of difficulties generally). He argued that it was a breach of both an implied term not to transfer some of the lines only (if this could cause difficulties with remaining lines), and of Telecom's duty of care, for Telecom to comply with Sietec's request without making enquiries as to RC&S's authorisation or notifying RC&S of the request and proposed transfer.

[26] In support of this submission, counsel referred to clause 16.2 of the customer transfer code under which Telecom was entitled to request a copy of the customer authorisation that Sietec was required to obtain before making a request for transfer. He also submitted that the arrangements in respect of the lines, put in place after the difficulties in 2007, put the request into the category of a complex transfer which required greater consultation, or at least justified Telecom approaching RC&S on the basis that it was a processing or technical issue (which is permitted under the customer transfer code).

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[21] Under clause 14 of the terms and conditions, Telecom is entitled to assume that a request is valid if accompanied by suitable verification.

[22] Under clause 14.1 of the customer transfer code, Sietec (as gaining service provider) has sole responsibility for ensuring that it has a valid authorisation.

[23] *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA) at [12] and [22].

[27] I am not persuaded that this is a case where it should be assumed that RC&S will be able to prove facts to establish a reasonable cause of action based on Telecom having a contractual or tortuous duty to question and enquire into Sietec's authority to request the transfer. RC&S's pleading (paragraph 53(b) to (e) of RC&S's amended statement of claim) cannot succeed having regard to the information in Telecom's contemporaneous records in the OO&T system (which have not been challenged, and which do not appear to be capable of challenge), and the terms of contract of the customer transfer code. I find the following facts are established from the OO&T system, as clarified by Telecom's compliance investigation manager, Ms T M Beynon, in an affidavit in support of Telecom's notice of opposition:

(a) Telecom received a properly verified "site lookup" request from Sietec.

(b) The verification included RC&S's account number, and the telephone numbers on that account that were the subject of the request, supporting (from Telecom's perspective) both Sietec's authorisation in terms of clause 14 of the customer transfer code and the validation for a simple transfer request in terms of clause 23 of the customer transfer code.

(c) Telecom's response to the site look up request was to inform Sietec of the lines serving the Huia Road premises, including several fax numbers (originally part of the 10 number "DDI block") that were "customer linked" Ms Beynon explains that the "customer link" had the effect that those numbers were disassociated from the pilot number and the "DDI block" and were instead treated as individual customer linked numbers.

(d) Sietec then made a transfer request (in accordance with the customer transfer code) for four specified lines, including the pilot number, and accordingly the further five numbers of the "DDI block" that were not customer linked. It clearly treated the request

as a "simple transfer" rather than a "complex transfer" in terms of the categorisation in the customer transfer code.[24]

(e) The OO&T record of completion shows transfer of the four originally nominated numbers, including the pilot, and five numbers from the "DDI block" (all being for phone lines). In other words, it shows that four fax lines that had been identified as customer linked in response to the site look up request had not been transferred.

(f) Telecom's invoice issued subsequent to completion of the transfers shows disconnection of the four main lines requested by Sietec and pro-rata credits for the lines transferred.

(g) RC&S's director, Mr Memelink, produced email correspondence from RC&S's consultant, Mr Dewsnap, to Sietec on 5 August 2010. This correspondence makes it clear that Mr Dewsnap was aware that the fax numbers that had been attached to the "DDI block", but which Telecom's OO&T system had reported as customer linked, were not transferred. It also makes it clear that he did not wish for that to happen as he was planning to terminate those numbers.

(h) The contract between RC&S and Telecom is subject to Telecom's standard terms and conditions. Clause 14 of those terms entitle Telecom to assume that any request or instruction that it receives is authorised by the customer if it is accompanied by suitable verification. It is not in question that the customer's account number is acceptable verification. Both the site lookup request and the transfer request provided the customer number.

[24] Under the customer transfer code the "gaining service provider" initially nominates the category of transfer, although the "losing service provider" can disagree, and if they cannot resolve the difference, it is treated as a complex transfer: clauses 18 – 20. Clearly both parties saw this as a simple transfer.

(i) Further, under the customer transfer code, it was solely Sietec's responsibility (as the gaining service provider) to ensure that it had valid customer authorisation. There has been no challenge to, and there is no reason to doubt, Ms Beynon's evidence that under the customer transfer code, it is the losing service provider's (in this case Telecom's) obligation to transfer lines promptly upon receiving a request. Under s 156O and Schedule 2 of the Telecommunications Act 2001, Telecom is obliged to comply with the customer transfer code.

[28] Against that background, where Telecom has acted in accordance with its contractual and statutory obligations, it can neither be in breach of the contract or a duty of care co-extensive with the duties imposed by contract.

[29] I also take into account the equivocal pleading of duties by RC&S, in which it acknowledges that it does not know the nature of the communications between Sietec and Telecom. In that context it is not in a position to challenge the documentary evidence as to that communication, as clarified by Ms Beynon. It has agreed as a matter of contract with Telecom that Telecom is entitled to assume that any request or instruction is authorised by RC&S if accompanied by suitable verification (which it was).

[30] I do not accept that there is anything in the argument of counsel for RC&S that Telecom was on notice of matters which imposed some greater obligation. First, that cannot be an implied term in the contract, as it is inconsistent with the express terms of clause 14, as well as the general prohibition under the customer transfer code against contact with customers for whom a request transfer is received. I do not accept that the request to transfer part only of the lines, set against the background to the contract and the issues that occurred in 2007, make this a processing or technical issue. As counsel points out, Telecom has an entitlement under the code to request a copy of Sietec's authorisation, but I see no reason to elevate that into an obligation in the context of this case.

[31] Lastly, and to the extent that the counsel for RC&S was advancing a case for a wider duty of care, there are no allegations which give rise to a wider duty of care than the duties in contract.[25] The negligence claim repeats the pleading in contract.[26] The two causes of action are clearly co-extensive, so that the claim in negligence falls with the claim for breach of contract.

[32] In summary, I find that there is no reasonably arguable basis for RC&S's pleadings against Telecom based on an unauthorised transfer of the lines (paragraph 54(b) to (e) of the amended version of the statement of claim and the comparable provisions imported into the negligence cause of action). Those parts of the amended statement of claim (paragraph 53(b) – (e) of the version currently on the Court file), are struck out.

The damages claims

[33] Telecom challenges RC&S's claims for damages generally (as overstated, inconsistent, and overlapping) but takes particular exception to its claims for aggravated and general damages, and to its claims for pecuniary losses to the extent that they exceed the limits on liability provided stated in the parties' contract. I will deal with the claims on general and aggravated damages before coming back to the effect of the limitation clauses in the contract.

General damages

[34] General damages are usually awarded to compensate for non-pecuniary losses that cannot be quantified objectively in money terms. Typically they are awarded for mental harm such as pain and suffering, humiliation and mental distress. However, damages for emotional stress and anguish as a result of breach of contract cannot be recovered unless the contract provides for peace of mind or freedom from distress. Hence, general damages are not recoverable for breach of a purely

[25] *Frost & Sutcliffe v Tuiara*, above n 23.
[26] Paragraphs 57 and 58 of the amended statement of claim (repeated in paragraphs 58 and 59 of the proposed amended statement of claim).

commercial contract.[27] The rationale for this principle can be found in the following statement of the Court of Appeal in England:[28]

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.
>
> But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.

[35] General damages can be awarded in a commercial context, however, to compensate for pecuniary loss where the plaintiff cannot prove the specific loss (for example for business interruption).[29] Awards to reflect such losses can be made both in contract and in tort. In contract they can reflect injury to credit and reputation, the pecuniary losses for which may be difficult to estimate with any accuracy. In tort they can reflect, for example, loss of business profits caused by inducement of breach of contract or passing off.[30]

[36] Telecom contends that RC&S's claim for general damages (made in all causes of action) cannot meet the legal criteria for general damages and should be struck out. It says that this was a purely commercial contract, and it did not "provide for peace of mind or freedom from distress",[31] and, as a corporation, it cannot suffer injury to feelings.[32] Counsel for Telecom also submitted that RC&S had not pleaded any facts on which an award for non-quantifiable pecuniary loss could be sustained in either contract or tort.

[37] RC&S contends that general damages are available for non-pecuniary losses other than pain and suffering, including loss of reputation, and contends that this is an available argument based on its pleading that its lines were disconnected, and its proposed evidence that customers thought it had gone out of business. It also says

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[27] *Bloxham v Robinson* [1996] 7 TCLR 122 (CA) at 137.
[28] *Watts v Morrow* [1991] 1 WLR 1421 at 1445.
[29] *Laws of New Zealand* General Damages at [35].
[30] Harvey McGregor *McGregor on Damages* (18th ed,, Sweet & Maxwell, London 2009) at [1]-[31].
[31] *Bloxham v Robinson*, above n 27.
[32] *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [57].

that general damages are available where there is difficulty proving specific pecuniary loss. It contends that this applies in the present case because it is unable to prove for the full amount of its loss if the Court finds that it is bound by the limits on liability in the contract.

[38] I am satisfied that the claims for general damages in respect of the causes of action in contract cannot succeed. I accept that this is a purely commercial contract. Its object is not to provide for peace of mind or freedom from distress. Further, a corporation cannot suffer injury to feelings. As such general damages for non-pecuniary loss are not available. Although a claim for general damages for non-quantifiable pecuniary loss is potentially available for loss of reputation (the only possible matter advanced by counsel for RC&S) there is no pleading of such loss, nor any evidence to suggest that there may be a factual basis for such pleading. I do not accept counsel's submission that it can claim under this head for losses which it may be denied because of the limitation of liability clause. That is not a matter of difficulty of proof but a matter of agreement and law.

[39] On this basis, I find that the claims for general damages should be struck out.

Aggravated damages

[40] Although counsel for RC&S's submissions blurred the distinction at times, RC&S's damages claims are compensatory rather than punitive in nature (at least as they are currently pleaded). There is a view that the expression "aggravated damages" is not a helpful one as it suggests that this is a discrete category of damages rather than a factor to be taken into account when assessing the appropriate amount of compensation.[33] Leaving nomenclature to one side, compensatory damages payable to a successful plaintiff are intended to reflect the loss or harm suffered, and that may be economic or in the form of damage to reputation or feelings (this latter form of loss has been referred to as "harm which is felt in the mind rather than in the pocket").[34]

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[33] See observations of Tipping J in *Attorney-General v Niania* [1994] 3 NZLR 106 (HC) at 111, repeated in *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd*, above n 32, at [59] – [62].

[34] *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* at [60].

[41] Aggravated damages are available as additional compensation for injured feelings resulting from a wrongful act which have been increased by the conduct of the defendant.[35] The focus for aggravated damages is on increased harm suffered by the plaintiff due to the defendant's conduct that needs to be compensated, rather than punishment for wrongful behaviour (as in the case of exemplary damages).

[42] Because the damages are given to compensate for aggravation of harm to feelings or loss of reputation, it has been said that:[36]

> It may be doubted whether aggravated damages can be claimed by a corporation since it can have no feelings and cannot recover for loss of reputation.

[43] The courts in this country have been reluctant to award aggravated damages in commercial contract cases.[37]

[44] Although there is disagreement amongst leading authorities as to whether aggravated damages can be awarded for negligence, the balance of authority currently is that they cannot be awarded because they require conduct going beyond lack of reasonable care by the defendant.[38]

[45] RC&S advances its claims for aggravated damages on the alleged ground of "highhanded and insolent actions and attitude of [Telecom]"[39] in relation to its response to RC&S's complaints over the transfer of lines to its new premises in 2007, and makes the same general allegation (save for omission of "insolent")[40] in relation to its response to the transfer of lines to Sietec in 2010.

[46] RC&S has pleaded the following particulars in support of this claim against Telecom in the 2007 causes of action:[41]

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[35] Andrew McIntyre "Aggravated damages" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (Brookers, Wellington, 2011) at 13.1.
[36] *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd*, above n 31, per Blanchard J at [57].
[37] *Bloxham v Robinson*, above n 27 and *Anderson v Davies* [1997] 1 NZLR 616 (HC) at 626.
[38] Andrew McIntyre "Aggravated damages", above n 35, at 13.3.2(2).
[39] Paragraphs 35, 42 and 48 of the amended statement of claim (repeated in the corresponding paragraphs in the proposed amended statement of claim).
[40] Paragraphs 56 and 61 of the amended statement of claim (repeated in the corresponding paragraphs in the proposed amended statement of claim).
[41] Above n 39.

(a) The "obviousness" of the mistake and the failure by the plaintiff to carry out any enquiry in circumstances where the employee concerned knew that it was an important question;

(b) The first defendant's failure to assist the plaintiff to reinstate the phone lines;

(c) Even when the lines were "arranged", the first defendant's failure to monitor the lines or to attempt to sort matters out beyond the 'arranged mess' that had been created; and

(d) In 2010 its failure to see that the "arranged" system was responsible for the plaintiff's difficulties; and

(e) Its failure to adequately refund the plaintiff for costs incurred when the phone lines were down, and its insistence that that plaintiff pay bills and then obtain credits afterwards (which were either incorrect and/or derisory).

[47] RC&S pleads the following particulars in support of this claim in the 2010 causes of action:[42]

(a) The failure between April and September 2007 to adequately respond to e-mail and phone queries from the staff of the plaintiff, Allan Dewsnap and Harry Memelink;

(b) The continued billing by the first defendant of lines it purported to give away;

(c) The failure to recognise the previous difficulties (from 2007) and the sub-standard state of the network provided to the plaintiff so that any changes would adversely affect the whole system;

(d) Its failure to compensate the plaintiff at all by way of invoices;

[42] Above n 40.

(e) Its continued billing of the plaintiff for lines it had purportedly given away to the second defendant; [sic]

(f) Its failure to address payment disputes over portions of the bill with the plaintiff and other entities controlled by Mr Memelink; and

(g) Its reliance (at trial) on clause 10 which permitted it to suspend services for non-payment of bills when in fact it had not done so in 2010.

[48] In oral submissions counsel referred to other alleged aspects of Telecom's aggravating conduct, including "playing hardball" with its billing, refusing to accept merit in complaints, and cutting off telephone lines.

[49] Counsel for RC&S accepted in submissions that it could not claim aggravated damages for itself, but argued that a claim was available in respect of the distress caused to its officers and employees in having to try to manage the dispute arising out of Telecom's breaches. He also accepted in relation to the claims in contract that the courts are reluctant to grant aggravated damages in a commercial context, but submitted again that this aspect of the claim was still arguable. He contended (without citing specific authority) that such awards have been made against insurance companies, and as a matter of policy should be available where there is a substantial imbalance in the respective power of the parties, and particularly where (as here) the contractual terms have limited compensation so that it can be said there is no compensation for the conduct that caused the distress.

[50] In relation to the claims in the causes of action for negligent misstatement and negligence, he accepted that the authorities stated that aggravated damages were not generally available, but submitted that it was arguable that they could be available in this case on the basis that Telecom's conduct was malicious or grossly negligent and therefore reckless.

[51] He submitted that these were matters for trial, and that Telecom had not shown that the claim could not succeed.

[52] I am satisfied that the claims for aggravated damages are not reasonably arguable in this case, for the following reasons:

(a) RC&S itself clearly cannot suffer an injury to feelings, and counsel did not advance any reasonable basis on which it could claim for injury to the feelings of its officers or employees. Further, it has not pleaded any basis for advancing the claim for loss of reputation.

(b) This is plainly a commercial contract, so aggravated damages are generally unavailable. Further, as the object of the contract is not to provide anything other than telecommunications services, it does not fall within the exceptional category of cases where the contract contemplated compensation for "injury to the mind as distinct from injury to the pocket".[43]

(c) Telecom's allegedly "high-handed and insolent actions and attitude" are simply indicative of Telecom taking a different view to RC&S of the parties' respective obligations under the contract. They cannot, in any event, amount to conduct warranting additional compensation in a commercial context. In particular I note that Telecom says that it cut off RC&S's lines from time to time for credit reasons. Whether or not Telecom was right about the state of the contract, there is no pleading , nor suggestion of grounds for pleading, that the lines were cut off maliciously.

(d) The particulars given are either inconsistent with RC&S's own pleading (for example, it has also pleaded that Telecom took steps in 2007, within four weeks, to address the alleged difficulties) or go no further than demonstrating that Telecom did not accept RC&S's complaints.

[43] Above n 34.

(e) RC&S's director, Mr Memelink, has given evidence of RC&S's view of matters, but has not shown the possibility of any further conduct by Telecom, or loss and harm suffered by RC&S, which would not be properly compensated without an award of aggravated damages.

(f) RC&S has had opportunity to amend and give particulars. It can be inferred from its failure to do so that it is unable to advance anything further.

Sietec's position on general and aggravated damages

[53] In her oral submissions, counsel for Sietec sought to have any determination in respect of Telecom's application to strike out flow through to RC&S's claim for Sietec for general damages and aggravated damages. I do not consider it appropriate to make orders to that effect, but it would be prudent for RC&S to review its pleading in light of the findings I have made, rather than put Sietec to the cost of bringing a formal application (I note particularly that the claim for aggravated damages echoes the pleading against Telecom of "insolent and high-handed behaviour").

Damages in excess of contractual limitation on liability

[54] The parties' relationship is governed by Telecom's standard terms and conditions. These include the following clauses limiting or excluding liability (material parts only):

> 16. YOUR RIGHTS TO COMPENSATION FROM US
>
> We set out here your rights to compensation from us.
>
> Reasonable Expenses Where a service we provide to you is affected because we do not meet our responsibilities to you, and you reasonably incur expenses as a result, please let us know. Where we consider it appropriate, we will refund to you all or part of those expenses.
>
> Where we do not meet our responsibilities relating to any equipment or other goods we sell to you, the refund of expenses is limited to:
>
> - $1,000 or 1% of the purchase price, whichever is less, for any month during which we do not meet our responsibilities

- a total of $2,000 or 2% of the purchase price, whichever is less, in any 12 month period. This refund is in addition to all your rights under our warranty on the equipment or other goods

- Where we do not meet any other responsibility we have to you, the refund is limited to an amount equal to our standard monthly charge for the affected service or the maximum amounts set out in clause 18, whichever is less.

For us to consider your claim, you must tell us within six months after the service is affected.

....

17. EXCLUSION OF OUR LIABILITY

We have set out your rights to claim a refund of rental charges for disrupted service and to claim compensation from us. We now exclude all other liability we may have to you.

....

This exclusion applies:

- whatever you are claiming for (including loss of profits or business)

- however liability arises or might arise if it were not for this clause

This exclusion does not prevent you getting a court order requiring us to do anything we have agreed to do for you.

18. LIMITATION OF OUR LIABILITY

Where you do not meet your responsibilities to us, you must pay any reasonable expenses we incur in collecting any monies. We have set out your rights to claim compensation from us and excluded all other liability we or any of the people listed in clause 17 may have to you. If:

- you are ever entitled to compensation from us, or

- we or any of the people listed in clause 17 are ever liable to you and, for any reason whatever, any of us cannot rely on the exclusion of liability set out in clause 17 the maximum combined amount all of us (together) will have to pay you and anyone else who uses the services we provide to you (together) is:

- $50,000 for any event or for any series of related events

- A total of $100,000 in any 12 month period

[55] For the purposes of the present application, Telecom relies solely on the limitation of liability in clause 18. It contends that the clause is clear, and limits Telecom's liability to $50,000 for any event or any series of related events, and to a

total of $100,000 in any 12 month period. Counsel submitted that this limitation is in wide enough terms to limit liability in both contract and tort (the negligence claims). Counsel submitted that RC&S's claims should be limited to $50,000 for both the 2007 and the 2010 causes of action, on the basis that in each case the matters pleaded were either just one event or a series of related events within a 12 month period.

[56] RC&S says that this matter turns on whether the clause is properly construed as an exclusion or a limitation clause, and that this is not a matter for strike out but should be determined at trial (and with the benefit of findings of fact at trial). Counsel relied on the comments of the Court of Appeal in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, where the Court was addressing a clause that excluded liability for indirect or consequential damages:[44]

> [154] We do not consider that we should deal with the proper interpretation of cl 10.3...in the abstract. Even if we decided that Genesis' interpretation were the correct one, it would not be appropriate, without evidence, to decide which of the categories of damages claimed fell outside the clause. As this is the case, the correct interpretation of the clause is much better addressed after full evidence and in the context of the trial. Strike-out is inappropriate.

[57] In oral submissions, counsel for Telecom submitted that *Rolls-Royce* could be distinguished on the basis that the clause purported to exclude **all** liability for **any** consequential losses (the emphasis is mine). Counsel also noted the Court's comments that even if Genesis' interpretation[45] of the clause was correct, evidence was needed to determine whether the categories of loss being claimed fell outside the clause. She submitted that the same concerns do not apply under clause 18, as it plainly sets a monetary cap on all claims. She submitted that in general parties should be able to limit potential liability, and this applied to claims for damages.[46] She accepted that the Court will look harder at clauses excluding all liability (as was the case in *Rolls-Royce*) but says that clause 18 does not do that and is therefore closer by analogy to the clause in *SGS (NZ) Ltd v Quirke Export Ltd*[47] where the

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[44] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [154].
[45] Genesis being the applicant for strike out.
[46] *Frost & Sutcliffe v Tuiara*, above n 23 at [22].
[47] *SGS (NZ) Ltd v Quirke Export Ltd* [1988] 1 NZLR 52 (CA).

clause limited liability to 10 times the fees or commissions charged by the appellant firm (and was found to be binding).

[58] I do not see that there is any uncertainty or ambiguity in interpretation. Clause 18 is clear that liability is limited to $50,000 per event (although there may be an issue as to whether RC&S's matters of complaint comprise a single event or a series of related events, or are separate events: in the latter case the cap moves to $100,000 in a 12 month period). This is a clear allocation of risk by the parties. I see no reason for them not be bound by their agreed terms.

[59] Counsel for RC&S argued that the clause was linked to clause 17 (an obvious exclusion clause) so it could not be said that clause 18 was clearly just a limitation clause. He said that it should be construed contra properentum, and there is sufficient room for argument to leave it to trial (when again it could be argued in context of the Court's findings on material facts).

[60] I am not persuaded by this argument. Whilst it is true that clause 18 only applies if liability is not excluded under clause 17, Telecom is not seeking in this application to exclude all liability, but merely to have it capped in accordance with clause 18.[48]

[61] I adopt, with respect, the comments of Cooke P in *SGS (NZ) Ltd v Quirke Export Ltd*:[49]

> In my opinion the plain meaning of the limitation provision is that, as it says, in no case will the company's responsibility under the certificate be more than 10 times fees or commissions. I think that attempts to force some other meaning out of it - and there were others in the course of the argument - go beyond anything that could fairly be called interpretation.

[62] I regard clause 18 as being clear that it provides a cap on the damages that may be claimed. However, I consider it remains open to RC&S to argue whether the events pleaded comprise a single event, so that the cap is $50,000, or more than one, in which case the cap is $100,000.

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[48] *Rolls-Royce*, above n 44, is distinguishable on this basis.
[49] *SGS (NZ) Ltd v Quirke Export Ltd*, above n 47, at [57].

[63] Counsel for RC&S argued that the cap had to be a minimum of $100,000 as it was arguable in respect of the 2007 claims that the negligence applied to each line that was affected, and in respect of the 2010 claim that the alleged unauthorised transfer and alleged refusal to reverse it were separate events. I do not see any merit in the argument in respect of the 2007 claims (the alleged representation that the new premises were within the same exchange and complaints about the complex arrangements applied to the lines generally), and it is difficult to see how the events in 2010 would not fall under the provision for a series of related events. However, the level of the cap in a particular 12 month period will be a matter for trial.

[64] I do not see any need to treat the contract and tort claims differently. The comments of the Court of Appeal in *Frost & Sutcliffe v Tuiara* are apposite:[50]

> ...in general, parties should be able to limit the scope of their potential liability by the terms of their contract. It would not normally be appropriate for that express or implied limitation to be outflanked by an unlimited application of general tortious liability.

[65] I find that clause 18 is effective to cap RC&S's claims to $50,000 per event or series of related events, and to a total of $100,000 within a 12 month period. Its present claims (for $105,000 damages in respect of the 2007 causes of action and in excess of $3.75 million in respect of the 2010 causes of action) are untenable as pleaded. I will allow RC&S opportunity to re-plead taking into account the caps on liability under clause 18.

The claims in respect of other entities

[66] Telecom seeks to strike out RC&S's pleading to the extent that it refers to losses allegedly suffered in respect of lines used by other (related) entities. It says that RC&S has not pleaded any basis for this loss. It also relies on clause 4 of the standard terms and conditions which stipulates that the services being provided are for RC&S's own internal business use and are not to be provided to anyone else without Telecom's written consent. It contends that RC&S should be required to re-plead its claim to include only losses that it has suffered.

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[50] *Frost & Sutcliffe v Tuiara*, above n 23, at [22].

[67] RC&S contends that the other entities identified with the various lines (Shortts Engineering & Industrial Supplies, Global Enterprise and Ritec Tooling Technology Limited are all subsidiaries[51] of RC&S, and Telecom has known from the outset that they were using the lines. Counsel argued that in those circumstances, and if clause 4 of the terms and conditions does apply as Telecom contends, Telecom has waived any entitlement to rely on it by arranging the transfer of the lines linked to those entities, and treating all lines as coming under a single entity (RC&S) for billing purposes.

[68] I do not see anything in the point as to lack of written consent for the use of the lines. I consider it a matter for trial whether RC&S has suffered any loss in respect of those lines. However, I consider that RC&S ought to amend its pleading if it is in fact claiming losses suffered by the other entities, to plead the basis on which it says those losses are suffered by it.

Security for costs

[69] The Court has a power to order a plaintiff to provide security for costs of a defendant if there is reason for the Court to believe that the plaintiff may be unable to meet a likely award of costs in the event it is unsuccessful.

[70] There are three steps in the process. First, the defendant seeking security must put material before the Court to satisfy it on the question of the plaintiff's inability to meet any award (the threshold test). Once it is satisfied on the threshold test, the Court has a discretion whether or not to make an award, and then as to the quantum of any award. It may also make an order on terms, including a stay pending payment and as to the timing for providing the security.

[71] The principles relating to exercise of the discretion are sufficiently stated, for the purposes of the present application, by the Court of Appeal in *AS McLaughlin Ltd v MEL Network Ltd*.[52] The key aspects are:

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[51] The first two are not pleaded as limited liability companies, but I will assume that this is a matter of oversight.

[52] *AS McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13] – [16].

(a) The discretion is to be exercised having regard to the circumstances of the case, with no predisposition one way or the other;[53]

(b) The Court has to assess what is just and reasonable having regard to the competing interests of plaintiff and defendant;[54]

(c) As an order for substantial security may have the effect of preventing a plaintiff from pursuing a claim, such an order will be made only after careful consideration and in a case where a claim has little chance of success. A genuine plaintiff's right to access to the Court is not lightly denied, but that right must be balanced against the interest of a defendant who is entitled to protection from unjustified litigation, particularly litigation that is overly complicated or unnecessarily protracted;[55]

(d) The amount of any security is to be what the Court thinks fit in all the circumstances.

[72] Telecom seeks an order that RC&S provide security in the sum of $62,000, representing its assessment of the costs that would be payable to it on a scale 2B basis. Sietec seeks an order of $100,000, representing its estimate of the costs that will be awarded on a scale 2B basis together with an allowance for costs of experts that will be required (an expert forensic accountant and a stock valuer). Both say that an order for staged security is appropriate, and that a stay should be ordered pending security being paid for the first stage. They say that there is no question that the threshold test has been met (there is reason for the Court to believe that RC&S will be unable to meet the cost in the event that it is unsuccessful), and that it is appropriate for the Court to exercise its discretion to award security at the levels they are seeking.

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[53] *Lunn v Fourth Estate Holdings Ltd* (1997) 11 PRNZ 316 (HC) at 318.
[54] *AS McLachlan Ltd v MEL Network Ltd*, above n 52, at [14].
[55] At [15] and [16].

[73] RC&S does not accept all that has been argued by the defendants as to its inability to pay, but accepts (through counsel) that the threshold test is met. It is an appropriate concession given, amongst other matters, its pleading that the business was in "dire straits" in late 2010,[56] Mr Memelink's evidence that it has stopped trading and "was not viable at present", its pleading that it has been unable to sell the stock that is its only significant asset and that the stock is worthless,[57] its accounts up to 2010 (no accounts are available since then) which Sietec's accountant has analysed and says demonstrate that RC&S is insolvent, and its failure to pay costs ordered both in an earlier unrelated proceeding and in this proceeding (in very modest amounts).

[74] Further, although he submitted that there are factors that count both for and against exercise of the Court's discretion to award security, counsel for RC&S accepted in the hearing that a balancing of relevant factors is likely to result in the Court making an order, and hence the principal consideration for the Court is the level of costs to award and the staging for any award. RC&S does not oppose an order for stay pending any order being met.

[75] The Court must still satisfy itself that it is appropriate to award security (which requires a brief review of material factors), but the main question will be what quantum is appropriate and how it should be paid.

Merits of the case

[76] The Court will have regard to the apparent merits of the case, so far as that is possible at an interlocutory stage. Where the matter is complex, that assessment may be no more than an impression, and cannot be a definite indicator of ultimate outcome at trial.[58]

[77] There is a strong contest between RC&S and Telecom over liability, in relation to both the 2007 and the 2010 claims. The 2007 claims are likely to turn on credibility. It is not possible to make an assessment at this stage as to the strength or

[56] Paragraph 26 of the amended statement of claim.
[57] Paragraph 54(a) of the amended statement of claim and its prayer for relief: meaning that a proposal that security be met from the proceeds of sale of stock can be discounted.
[58] *AS McLachlan v MEL Network Ltd*, above n 52, at [21].

weakness of RC&S's claims that Telecom misrepresented the transferability of the lines. Nor at this point can any worthwhile assessment be made about Telecom's liability under the residual aspect of the 2010 claim (failing to maintain services or to "slam" or recapture the lines after RC&S informed it that there is a dispute over authority to transfer), although the impression I get from the information before the Court is that the merits on these residual claims probably lie with Telecom. However, overall merits on liability are neutral at best for RC&S.

[78] The merits on quantum are equally uncertain at best. What does appear certain, however, is that the quantum currently pleaded is overstated. In respect of the 2007 claims (which were not initially made but appear to have been added to sure up the 2010 claims) there are no particulars to show the detail of the losses. At best disruption was only for a short period (Telecom says the lines were operating within a few days and even RC&S acknowledges that all lines were operating within four weeks). There are even greater concerns about the quantum of the 2010 claims, but as that is now more significant for Sietec, I will address that in relation to its position.

[79] Sietec raises three broad aspects in relation to the merits of the claim against it. First, it says that it is not the proper defendant (its subsidiary SWN was the party with whom RC&S contracted). Secondly it strongly disputes RC&S's claim that it (or SWN) transferred the lines without authority. Thirdly, it says that the losses alleged are grossly exaggerated (at best), RC&S's accounts show it was insolvent from as early as 2006, and based on the fact that it ceased trading before the lines were transferred, it is unlikely it will be unable to prove any loss in any event.

[80] There is clearly a significant issue over whether Sietec is the correct party. However, for present purposes that is not overly significant as counsel for RC&S says that it is likely that it will add SWN as a party. The issue over Sietec's authority is neutral at best for RC&S. It is not clear what will happen with regards to this claim in light of this decision. As pleaded the claim is not for breach of any contract between RC&S and Sietec but for interference with its contract with Telecom. The issues may become clearer with discovery, but at this early stage it is impossible to make any worthwhile assessment. Clearly there was contact between the parties,

and RC&S must have authorised some transfer (Sietec started invoicing for its services immediately after the transfer without demur from RC&S until it felt that customers' calls were not reaching it). The impression I get is that the critical factual question will be what was the extent of the authority, and did Sietec act within it? I do not see that the merits as to liability point strongly one way or another at this point.

[81] The most significant hurdle that RC&S faces on the merits (and also its contention that its impecuniosity was caused by the defendants, to which I will return) will be to establish the quantum of its claim. RC&S has now had three attempts at producing a viable statement of claim, yet even now it has not given clear, let alone compelling, particulars as to the losses it has suffered. On top of that there is evidence in the form of an email by its accountant, Mr P J Renshaw, that RC&S ceased trading in the financial year ending 31 March 2010, and the transfer of lines took place in April 2010 (the evidence from the OO&T system is that it was on 21 April 2010).

[82] Mr Renshaw's email was a response to a request by Sietec for copies of management accounts (there being no financial accounts subsequent to 31 March 2010). Mr Renshaw said that there were no subsequent management accounts, again supporting the lack of trading alleged by Sietec.

[83] Sietec's finance director, Mr D F Hattaway, is a chartered accountant of many years experience who would appear to be qualified to provide expert evidence. He has reviewed the financial accounts that have been provided by RC&S and expressed the view that they show that RC&S was insolvent from 2006 onwards. I accept that the accounts cast doubt on whether RC&S ever operated profitably. Mr Hattaway has provided an affidavit in which he refers to falling turnover and expenses leading up to what he says is a "moribund" position as at the end of the 2010 financial year. He is also critical of the financial accounts for 2009/2010, which he says have not been prepared in accordance with proper accounting standards, so that even the deteriorating position that they indicate cannot be relied upon. Critically, he points to the stock figure having stayed the same in 2009 and 2010, which he says is very unusual, and which suggests little sale of stock in those two years. There seems little

room for doubt that RC&S's impecuniosity was due to factors occurring before the start of its relationship with Sietec or SWN.

[84] It is also significant that there is no pleading of the calculation of the alleged loss of future profits, and particularly as to how RC&S was to turn around its present moribund position to achieve the profit claimed. There is neither pleading, nor was I told any initial disclosure, of a future business proposal, a marketing plan, a stock list or a customer list which could support the allegation that the alleged profits would be achievable but for the defendants' actions.

[85] Counsel for RC&S accepted in the hearing that its pleading of loss of profits ($1.4 million) was not supported on the accounting material provided to date. However he maintained that there was still a basis for a substantial claim related to the allegedly worthless stock. That will need considerable further examination, but at this stage I have the impression that the quantum of RC&S's claim is significantly overstated, the prospects of proving a substantial loss of profits claim are minimal, and in this respect the merits appear to favour the defendants.

Impecuniosity

[86] It may be unjust to make an order for security if there is a reasonable possibility that the defendant's actions have caused the plaintiffs impecuniosity.[59] However the Court must take care to avoid the circular argument that because the defendant does not accede to the claim and pay damages, the impecuniosity is its fault.[60]

[87] RC&S initially (in its notice of opposition) contended that the Court should decline an order because impecuniosity had been caused by the actions of the defendant. It will be apparent from the matters I have addressed in relation to merits of the case that RC&S has not shown clearly that its impecuniosity has been caused by the actions of the defendant. RC&S's financial statements, the evidence of Sietec's financial director, the short window of time when lines were affected in 2007, and the fact that RC&S had ceased trading by 31 March 2010 all point away

[59] *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC).
[60] *Birnie Capital Property Partnership v Birnie* [2010] BCL 872 (HC) at [49].

from a reasonable likelihood that RC&S's impecuniosity has been caused by the defendant's actions. If Mr Memelink's evidence is accepted, in 2007 RC&S had a substantial number of customers and a very high turnover. There are no particulars or evidence to show how the alleged billing issues (after the lines were made operational in 2007) affected RC&S's turnover. Even so, the claimed loss of $70,000 for loss of lines in April 2007 cannot explain the subsequent demise of the company. Further, that claim takes the point as to cause of impecuniosity nowhere when put against the fact that there were losses in that year in excess of $300,000. Indeed, Mr Memelink acknowledges that it was badly affected by the economic downturn in the 2009/2010 years. In short, there is nothing compelling to justify declining to make an order for security.

Parties' conduct

[88] The conduct of either party may be taken into account in the exercise of the discretion.[61] This can include failure to put up evidence relevant to the security inquiry, where the party seeking has put up a case to answer.[62]

[89] The defendants say that the way in which RC&S has advanced its case (or perhaps more appropriately has not done so) should count against it. They point to the inadequacy of the initial pleading, the attempt to sure it up in the amended statement of claim, and the continued failure to present a clear and cogent case in the proposed amended statement of claim. They point to lack of proper initial disclosure, failure to meet timetable orders, and failure to pay costs orders.

[90] Counsel for RC&S accepted that a substantial re-pleading had been required, but says that that was undertaken, and was sufficient to allow the defendants to file statements of defence. He says RC&S has also attempted to address the issues raised on the amended pleadings. He accepted that cost orders had been made and were unpaid, but said that it would do so.

[91] RC&S had ample time to investigate and identify viable causes of action and a realistic quantification of its claim. Its filing of this proceeding before doing so has

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[61] *Sharda Holdings Ltd v Gasoline Alley Services Ltd* HC Auckland CIV 2008-004-539, 13 November 2007 at [7].

[62] *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288 at [24].

undoubtedly contributed substantially to the cost for the defendants to respond to the claim, and has led to the applications now before the Court. Counsel for RC&S has indicated that it is pursuing the claim with the assistance of finance from outside sources (presumably Mr Memelink as its director and shareholder) but its attitude towards the costs orders suggests that any funding has been provided on a selective basis. I regard this as a factor warranting an order for security.

Balancing of interests

[92] The overriding consideration in the exercise of the Court's discretion is the balancing the interests of the plaintiff and the defendant.[63]

[93] There is a tension in this case between RC&S's claim that it is impecunious because of the defendants' actions, and the defendants' interest in not being drawn into an unnecessarily protracted and uncertain claim. I have already found that the relevant factors are in favour of a grant of security, and I note that there is no explicit statement by Mr Memelink to the effect that the plaintiff will be unable to continue the claim if security is granted (to the contrary, I drew from counsel's submissions that the main concern was to set security at a level which RC&S could raise from external sources, without indicating any level of that support). The balancing of interests, as counsel for RC&S correctly anticipated in his oral submissions, does favour the making of an award of security in favour of both defendants.

Quantum of award

[94] The quantum of security is again a matter for discretion of the Court. It is fixed at what the Court regards as fit in the circumstances of the case, and not necessarily by reference to likely costs award.[64] Matters that the Court will take into account include the amount or nature of the relief being sought, the complexity and novelty of issues, the estimated duration of trial and the probable costs payable if the plaintiff is unsuccessful.[65]

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[63] *AS McLachlan v MEL Network Ltd*, above n 52, at [24](c).
[64] *AS McLachlan Ltd v MEL Network Ltd*, above n 52, at [27].
[65] *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430 at 438 – 439 and *Bell v AMPLife Ltd* [2012] NZHC 2785 at [36].

[95] Both defendants submit that the Court should use scale 2B costs as the appropriate yardstick. Telecom has provided an estimate of those costs for an estimated five day hearing of $62,000. It also seeks to include the costs of fees paid on its pleadings (currently just under $1,600). It invites the Court to make an order close to those costs on the basis that the five day estimate is a conservative one. At this point Telecom is not seeking any provision in respect of possible expert fees, but notes that those will have to be incurred for trial.

[96] Sietec has not provided an overall assessment of likely scale costs, but has given an estimate of approximately $45,000 for costs up to trial (which roughly equates to Telecom's estimate based on a five day trial). However, Sietec contends that the five day estimate for trial is insufficient, and ten days should be anticipated for the purpose of the calculation. It seeks an order now for all of the costs up to time of trial (including anticipated costs for expert witnesses) in the sum of $100,000.

[97] RC&S accepts Telecom's assessment of scale costs, save for the inclusion of a claim for second counsel, and its estimate of a five day trial. However it says that security is not intended to be compensation for all of those costs, and invites the Court to consider provision of $30,000 each.

[98] The parties also differed on the timing for payments. All parties accepted that RC&S should have six weeks in which to raise the necessary security, but Telecom and RC&S saw that as merely for a first stage, with the balance to be paid prior to trial, and Sietec seeking an order that all of the order should be paid within that time.

[99] Before addressing the different positions, I will deal briefly with a proposal advanced shortly before the hearing that RC&S could put up security through a trust related to Mr Memelink. Counsel for RC&S sought time after any order was made for RC&S to put evidence of this proposal before the Court. I am not prepared to follow that path. If there is support from such other entity, RC&S has had ample time before the hearing to put evidence of that before the Court. If the support is available, I see no reason why it could not be used to raise the cash amount.

[100] The defendants have already incurred a significant amount of cost in responding to this claim. Some of that cost has been addressed by cost orders already made, or to be made on this application, but the costs of commencing the defences, and generally participating in conference have not been the subject of orders, and it is likely there will be need for reasonably significant discovery.

[101] Further, Telecom's costs will be higher than normal given the historical nature of some of the claims against it, the five separate causes of action, the period that the claims cover and the potential difficulties of briefing evidence given the time that has passed. Conversely, because the scope of the claim is narrowed by my decision on this application, scope of trial and hence the estimated costs will be less.

[102] I do not accept that I should make allowance for second counsel (particularly now that substantial parts of the claim against Telecom are to be struck out).

[103] The claim against Sietec is far more limited in terms of the period of time covered, but is likely to require a reasonably significant amount of expert evidence. The scope of discovery will be similarly narrower in time, but I suspect will still be reasonably significant, particularly in relation to the losses being claimed and given the poor state of RC&S's accounts. Given the nature of the claim against Sietec (inducing breach and unlawful interference with RC&S's contract with Telecom), Sietec will have to examine the 2010 claim for breach of contract against Telecom as part of its defence. Nevertheless, I regard the estimate of 10 days for trial as a little generous.

[104] Weighing all of these matters, I consider that a sum of $50,000 is appropriate for each defendant, with $30,000 to be paid within six weeks of this judgment, and the balance to be paid within four weeks of the close of pleadings date.

[105] Given the uncertain state of the pleadings, and particularly the pleading of losses, it is difficult to assess what expert evidence will be required. I reserve leave to the defendants to seek further security in respect of anticipated experts' costs once pleadings are settled, discovery is obtained and the issues requiring expert evidence are known. If the evidence that will be needed from experts is such that the defendants' costs are indeed likely to be in the order of the costs suggested by Sietec

(which, in the absence of detail as to what has to be covered, seem on the high side), a further order may be considered.

Decision

[106] I make the following orders in respect of Telecom's application to strike out:

(a) The pleading of breach of duty on the basis of unauthorised transfer of the lines (paragraph 53(b) to (e) of the fourth cause of action, and as carried over into the fifth cause of action by paragraph 59) are struck out.

(b) The claims for general damages[66] and aggravated damages[67] are struck out.

(c) The claims for special damages are limited to the amounts available in terms of clause 18 of Telecom's standard terms and conditions.

[107] I make an order that RC&S provide security for the costs of the defendants as follows:

(a) It is to pay into Court, or into an agreed solicitor's trust account, within six weeks of this decision, the sum of $30,000 for each defendant.

(b) It is to pay a further sum of $20,000 for each defendant (in the same manner) within four weeks of the close of pleadings date (which is still to be set).

(c) Leave is reserved to the defendants to seek a further order in respect of costs of experts, any such application to be made no later than the close of pleadings date.

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[66] Paragraphs 34, 41, 47, 55 and 60 of the amended statement of claim and in prayer for relief B in each of the five causes of action.

[67] Paragraphs 35, 42, 48, 56 and 61 of the amended statement of claim and in prayer for relief C in each of the five causes of action.

[108] The proceeding is stayed pending payment of the first stage of security, and will again be stayed if the second stage is not paid as ordered.

[109] RC&S is to file and serve a further amended statement of claim within 10 working days of paying the first stage of security, with the struck out portions removed but otherwise containing changes put forward in its proposed amended statement of claim. It is to limit the claims for damages against Telecom in terms of clause 18 of the terms and conditions, and amend its claims for losses to plead the basis on which it says it has suffered the loss in respect of lines said to have been used by Shortts Engineering and Industrial Supplies, Global Enterprise and Ritec Tooling Technology Ltd.

[110] Telecom and Sietec are to file and serve amended statements of defence within 15 working days of the filing and service of the further amended statement of claim.

[111] The Registrar is to allocate a further case management conference as soon as time is available after the filing of the amended statements of defence, at which directions will be given for any further interlocutory steps (including discovery) and consideration will be given to allocating a trial date. RC&S is to file and serve a memorandum three working days in advance, Telecom and Sietec are to file memoranda two working days in advance.

Costs

[112] The defendants have succeeded on their respective applications, and are entitled to costs. Scale 2B is the appropriate level.

[113] Counsel for Telecom sought an order for increased costs on the basis that RC&S had contributed unnecessarily to the time and expense of the hearing by failing to comply with timetable orders, filing the amended statement of claim after Telecom had filed its application and by filing Mr Memelink's second affidavit late.

[114] I do not accept that increased costs are appropriate on the grounds advanced, but I will allow a claim for Telecom's amended application, as a second allocation of

time under item 22 of schedule 3 (together with the second filing fee). Telecom is also entitled to claim for costs of preparation of the bundle of documents for the hearing (item 25).

[115] Both defendants sought costs for second counsel. I disallow that claim. It is not warranted by the nature or content of the application.

[116] Counsel for Sietec has provided a schedule of costs on a scale 2B basis. I allow costs to each defendant as set out in that schedule. In addition, Telecom is entitled to the extra costs under items 22 and 25, and to the additional filing fee paid.

[117] RC&S is to pay costs as follows:

(a) Costs of $7,562 plus disbursements of $1,450 to Telecom; and

(b) Costs of $5,174 plus disbursements of $725 to Sietec.

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Associate Judge Abbott