IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-003311

BETWEEN	WINSTON RAYMOND PETERS Plaintiff
AND	TELEVISION NEW ZEALAND First Defendant
AND	RADIO NEW ZEALAND Second Defendant
AND	YVONNE TERESA DOSSETTER Third Defendant
AND	DAVID CARTER Fourth Defendant
AND	KENNETH SHIRLEY Fifth Defendant

Hearing: 13 November 2006

Appearances: B P Henry for Plaintiff
JWS Baigent for First Defendant
S M Dwight for Fourth Defendant

Judgment: 1 May 2007

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
1 May 2007 at 4.00 p.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

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Introduction

[1] The plaintiff applies first for leave to apply out of time to review the decision of Christiansen AJ dated 30 August 2006, secondly, to/ review the decision and thirdly, for an order transferring the application for review to the Court of Appeal. By agreement between the parties, the first and third applications have been argued before me, with the question of the substantive review delayed for consideration at a later date if the application for leave to apply out of time is successful.

[2] The plaintiff's claim against all of the defendants is in defamation. The first defendant, Television New Zealand ("TVNZ"), is sued in respect of an item that it broadcast on its programme *One News* on 22 June 2004, in respect of an item broadcast on the *Holmes* programme on 23 June 2004 and in respect of a website publication on that day.

[3] The fourth defendant is sued in respect of statements that he made on *One News* on 22 June 2004, and observations that he made on *Morning Report*, Radio New Zealand's early morning news programme, on 23 June 2004.

[4] TVNZ applied to strike out the claim as it related to its broadcast of the *Holmes* show on 23 June 2004. Mr Carter sought that the claim against him be struck out in its entirety. In his judgment on those applications, Christiansen AJ held that:

a) The words alleged to have been said by Mr Carter were incapable, as a matter of law, of bearing any of the meanings pleaded by Mr Peters. On this basis, the claim against the fourth defendant was held to disclose no reasonable cause of action and it was struck out.

b) The words broadcast by TVNZ in its *Holmes* programme on 23 June were also not reasonably capable of bearing the meanings that had been alleged. The relevant parts of the plaintiff's pleading were struck out.

The claims made in respect of the 22 June news bulletin and the content of the website remained on foot, no argument having been addressed to those causes of action.

[5] Christiansen AJ's judgment was delivered on 30 August 2006. The present application was not filed until 25 September 2006. It is common ground that Christiansen AJ's decision was one made in chambers, on the hearing of an interlocutory application. That meant that, under s 26P of the Judicature Act 1908 there was a right to apply to the Court to review the decision, in accordance with the High Court Rules. Under r 61C(2), notice of such an application must be filed and served (if it is made by a party who was present or represented), within seven days after the decision was given. In the present case, the notice was filed 26 days after the Judge's decision and consequently, was out of time by 19 days.

[6] The notice of application was accompanied by a memorandum from counsel in which an explanation was given by Mr Henry for the circumstances that had arisen. In his memorandum, also dated 25 September 2006, Mr Henry wrote:

> 1. I am counsel retained by the Plaintiff in these proceedings.
>
> 2. After the decision was rendered I had difficulty contacting my client due to illness. I diarised the procedure as an appeal as I overlooked that the matter had been heard by an Associate Judge.
>
> 3. A draft application to appeal was prepared and held on the file.
>
> 4. I met with my client last Wednesday and discussed the decision and received instructions to appeal the decision to the Court of Appeal.
>
> 5. On Friday 22 September 2006 I began to finalise the appeal document when I realised the application had been determined by an Associate Judge which meant I was out of time for the filing of the review.
>
> 6. This application was immediately prepared and filed.
>
> 7. I do not believe any party will be prejudiced by this delay. The First Defendant is involved in the proceeding still as only a part of the pleaded allegations was struck out.
>
> 8. The proceedings against the Fourth Defendant have been completely struck out, however, given the nature of this dispute, I do not believe his circumstances will have changed by the delay of two weeks.

[7] I did not understand there to be any challenge to Mr Henry's explanation in that memorandum and I proceed on the basis that it is accepted by the other parties. However, both Ms Baigent for TVNZ and Ms Dwight for Mr Carter submitted that the delay that had occurred should be one of the considerations on which the Court should conclude that leave should not be granted to allow the application to review to proceed.

[8] Both defendants oppose the present applications. They refer to a history of delay which they say should disentitle the plaintiff to any leniency from the Court in respect of the delay in filing the notice of application for review and, in particular, they rely on the fact that Christiansen AJ's decision was made on what was the third amended statement of claim. Insofar as the application for transfer to the Court of Appeal is concerned, counsel for both the first and fourth defendants maintain that reference to the Court of Appeal of an application to review should only occur in exceptional circumstances which do not exist in the present case.

Background

[9] The plaintiff's claims arose out of an affidavit that had been sworn by a Ms Dossetter, the third defendant, in January 2004. Ms Dossetter was the former partner of one Ross Meurant, formerly a Member of Parliament and at one time engaged as an advisor to both the plaintiff and to the Simunovich group of companies, involved in the fishing industry. Ms Dossetter stated in her affidavit that a substantial sum of money had been paid to Mr Peters and to Mr Meurant by the Simunovich companies so that their interests would be looked after in the context of a Parliamentary Select Committee inquiry into the scampi industry. Ms Dossetter also gave an interview to TVNZ in which she expressed concerns about the impartiality of the Select Committee inquiry due to the relationships between the plaintiff, Mr Meurant and the Simunovich companies.

[10] Ms Dossetter's allegations formed the subject of an item on *One News* on 22 June 2004. That item included the following made by Mr Carter, who was the chairperson of the Select Committee:

> I immediately passed it [Ms Dossetter's affidavit] to the Speaker. The allegations contained in the signed affidavit were very, very serious and I felt the Speaker of Parliament had to be aware … The Speaker has now come back to me and said that if I think the allegations are serious then I should formally write to him suggesting that he investigate."

[11] In the same item, the announcer said:

> Mr Carter wrote back to the Speaker today calling for such an investigation. The document causing such sensitivity is an affidavit Yvonne Dossetter gave to TVNZ alleging her former partner Ross Meurant, a former MP, was working for both Simunovich Fisheries and New Zealand First.
>
> The Dossetter affidavit did however contain other more serious allegations about what she says Ross Meurant told her about substantial payments made by Simunovich to Ross Meurant for Winston Peters.
>
> Those allegations made by Yvonne Dossetter in an affidavit have not been independently verified. The allegations are at this stage unsubstantiated.

[12] Mr Carter was then asked:

> Isn't there a risk that this is playing into someone's political agenda?

[13] He replied:

> It's not for me to determine whether the allegations are correct or not. It is a signed affidavit and on that basis it cannot simply be buried. It has to be resolved one way or the other.

[14] The following morning there was a reference on *Morning Report*, on Radio New Zealand's national programme to the fact that the Speaker had been asked to consider a breach of privilege complaint against Mr Peters in connection with the scampi inquiry. The item noted that TVNZ had reported allegations that had been contained in Ms Dossetter's affidavit and there was the comment that:

> It is the latest in a series of allegations, scandals and top-level inquiries into the $100M a year scampi fishery.

[15] During that programme, Mr Carter said:

> I sent it [the affidavit] to the Speaker seeking his advice as to what to do with this affidavit. The response I got from him gave me no choice but to formally lodge it with the Speaker for him to determine whether it is in fact a breach of standing orders.

[16] In the third amended statement of claim, the pleading that was before Christiansen AJ, it was alleged that the various statements of the fourth defendant conveyed the meaning that:

a) The plaintiff was involved in very, very serious misconduct.

b) The very, very serious allegations warranted investigation by the Speaker of the House of Representatives.

c) The fourth defendant thought the allegations were very, very serious and warranted the investigation by the Speaker of the House of Representatives.

d) The very, very serious allegations were backed by credible affidavit evidence.

e) The fourth defendant, as the chairman of the Select Committee involved with the Dossetter allegations, due to the very, very serious nature of the allegations had no choice but to formally lodge a complaint to the Speaker of the House of Representatives.

f) The very, very serious allegations were cause for the suspicion that the plaintiff was a party to serious misconduct in the course of the Select Committee.

g) There was cause for the suspicion that the plaintiff was in contempt of Parliament due to the very, very serious allegations of misconduct in the course of the business in the Select Committee.

[17] Insofar as the claim against TVNZ in respect of the *Holmes* programme is concerned, the statement of claim sets out what appears to be a verbatim record of the item, the flavour of which may perhaps be represented by the opening remarks of the presenter (Mr Holmes):

> Serious allegations were made in Parliament today under the Protection of Parliamentary Privilege. The Act MP Ken Shirley read some of an affidavit. The affidavit, the sworn affidavit says that a proposal was made at a meeting at the Simunovich olive farm that a payment of $300,000 to Ross Meurant would be a good investment for the Simunovich business. Mr Shirley said, in Parliament, the affidavit says, at the meeting were Ross Meurant and Winston Peters. The affidavit was originally sworn and provided to the *Holmes* programme by Yvonne Dossetter. She is the former partner of Ross Meurant. Mr Meurant worked for both Mr Peters and Simunovich fisheries during the scampi inquiry.

[18] Ms Dossetter was interviewed for the purposes of the programme, stating that she had some major concerns as to the impartiality of the Select Committee inquiry on scampi due to the relationships between Mr Peters, Mr Meurant and the Simunovich companies. She stated that Mr Meurant would often talk to Peter Simunovich and then talk to Mr Peters in relatively quick succession. Examples were given of occasions when that had occurred. The fifth defendant, Mr Shirley was then shown making a statement in Parliament about the olive farm meeting. There was reference also to a statement that had been issued, immediately prior to the 6 o'clock news bulletin, by Mr Peter Simunovich, refuting any allegation that the company had acted inappropriately, whether in relation to Mr Peters or any other politician. He was also reported as having said in his statement that previous allegations of corrupt and illegal behaviour made against Simunovich Fisheries had been dismissed and the latest allegation was no different.

[19] The item concluded with the presenter interviewing Mr Shirley, the fifth defendant. The interview included the following exchanges:

> Q Let me ask you this way, what concerns do you have about what you saw in the affidavit might indicate?
>
> A They were very serious allegations, which I'm sure you're aware of. We can't just leave those unresolved. They've been swirling round. It actually reflects on the Parliament as whole and I think there is a number of courses of action required. Possibly Winston Peters needs to make a personal statement to the Parliament, perhaps it needs to go before the Privileges Committee, perhaps it needs a Commission of Inquiry, perhaps it needs to be referred to the Police. I think all of those are courses of actions that need to be considered.
>
> Q Did you spell out in Parliament, however, what the principal allegation that concerns you was?
>
> A I read out and revealed the contents of the affidavit.

> Q The affidavit of course, albeit a sworn affidavit, therefore to lie in such an affidavit is perjury, the affidavit is one person's word. Why put it in the public domain?
>
> A Well I think it's been swirling round, TVNZ has actually put it in the public domain previously as recently as last night again. It is swirling round. It's very serious allegations that do need clarifying.

[20] At one stage during the item, it was said by a reporter that Ms Dossetter stood by her claims in the affidavit. The plaintiff alleges that the public would have understood that the reporter had been referring to the allegations concerning the meeting at which it had been agreed that $300,000 would be paid to Mr Peters and Mr Meurant so that the interests of Simunovich Fisheries would be "looked after" in the Select Committee hearing.

[21] On the basis of the content of the *Holmes* programme, the plaintiff alleged in paragraph 12 of the third amended statement of claim that the first defendant had published defamatory allegations made by the fifth defendant (although he expressly disavowed any intent to rely on what the fifth defendant had said in Parliament). Then, in paragraph 14 he alleged against TVNZ:

> That the public would further understand from the words published in paragraph 9 that the first defendant was alleging that:
>
> (a) That [sic] the select committee enquiry which involved the plaintiff as a member of the committee "cleared" Simunovich Fisheries of any wrong doing.
>
> (b) The Simunovich family companies offered to bribe the plaintiff to affect the outcome of the Parliamentary Select Committee investigating the allocation of scampi quota and that bribe was accepted.
>
> (c) The plaintiff accepted the bribe in return for influencing the outcome of the said Select Committee inquiry.
>
> (d) The plaintiff did consequent on the payment of the said the [sic] bribe influence the outcome of the Select Committee to "clear" Simunovich Fisheries of any wrong doing.
>
> (e) The plaintiff was paid a substantial sum of money as a bribe.
>
> (f) The plaintiff was involved in serious misconduct.
>
> (g) The plaintiff's conduct was potentially criminal.
>
> (h) The plaintiff's conduct was a contempt of Parliament.

(i) The plaintiff received the sum of $300,000 as a bribe.

[22] Christiansen AJ held that the statements that had been made by the fourth defendant meant only that he had received an affidavit which contained serious allegations, that he had referred the affidavit to the Speaker for inquiry because there was a possibility that the plaintiff may or may not have been guilty of a breach of privilege and/or misconduct, and that the fourth defendant could not say whether the allegations were correct or not. He held that there was nothing to suggest that Mr Carter had adopted the allegations and that he had passed no comment about the merit of them. He had specifically stated that it was not for him to judge whether the allegations were correct or not. He pointed out further that at the time the statements had been made there had been no disclosure of the contents of the Dossetter affidavit. He observed at [19]:

> Neither was there, from the words of the statement, any meaning which could reasonably be inferred as suggesting that Mr Carter adopted the allegations contained in the affidavit.

On this basis, he concluded that the claim against Mr Carter should be struck out in its entirety.

[23] Insofar as the *Holmes* programme is concerned, his key conclusions were set out at paragraphs [28] - [31] of the judgment:

> [28] As pleaded, it does not appear to me that the Holmes show broadcast is capable of meaning that TVNZ itself has adopted the allegations as true and is itself alleging the conduct reported on. The only link which appears to serve an alternative view of matters lies in the affidavit and allegations in it. That link is at best tenuous to assist Mr Peters' claim. In fact the allegations in the affidavit were raised in Parliament. Viewers would not expect or take from the broadcast that TVNZ has adopted and is making the allegations itself.
>
> [29] The broadcast makes it clear that the allegations are expressly reported as coming from the affidavit and not from TVNZ. In fact, the third amended statement of claim expressly recognises it was the fifth defendant who was making the allegations which were reported on the programme.
>
> [30] Allegations of guilt, or statements supporting claims that the conduct alleged actually occurred, are not supported or supportable for the following reasons:

i) Constant repetition of the word "allegations" put the conduct into a category of "suspicion" rather than guilt or actual involvement;

ii) The Holmes show clearly reported the rebuttal and denial by Mr Simunovich of the allegations or any connection by Mr Peters to them;

iii) Merely because the affidavit deponent expressed concerns of the Government select committee's impartiality;

iv) Because Mr Shirley stressed he was not making allegations but rather because of their serious nature was looking for a process for resolution of them;

v) Mr Shirley said Mr Simunovich's denial may well be the truth, and that is why a process of clarification was needed.

> [31] I consider these other parts of the programme, taken together with the full text of Mr Simunovich's denial and rejection, provide proper context in consideration of which claims of guilt of unlawful conduct or contempt of Parliament are not supportable by reference to any meaning contained in the Holmes show. TVNZ at no time said it adopted the allegations, much less that it was making them.

[24] I mention at this point that the pleading in an earlier form had been the subject of a previous application by the fourth defendant to strike out the claim against him. That application was successful. In a judgment delivered on 5 November 2004, Paterson J held that the same statements made by Mr Carter that were relied on before Christiansen AJ were not capable of meaning that the plaintiff had been a party to serious misconduct and that he was in contempt of Parliament. Paterson J pointed out that nowhere in the statements did Mr Carter state that Mr Peters was a party to serious misconduct, or was in contempt of Parliament (at [32]). Paterson J could not read into the first statement (made on *One News* on 22 June 2004) "any suggestion that Mr Carter was adopting the allegations or in any way suggesting that Mr Peters has been guilty of them" (at [33]). He held (at [34]) that Mr Carter's second statement on *One News* had not in fact made any serious allegations because Mr Carter had made it perfectly clear that it was not for him to judge Mr Peters by determining whether the allegations were correct or not. He observed, also at [34]:

> Even if there were subsequently suggestions in the news items in which the clips were played suggesting impropriety on behalf of Mr Peters, there was nothing in the words uttered by Mr Carter which suggested he was guilty of such impropriety.

[25] Finally, Paterson J did not consider that there was anything in Mr Carter's statement on *Morning Report* which suggested, when the words were taken in their plain and ordinary meaning, that Mr Peters was a party to serious misconduct or in contempt of Parliament. Consequently, it was his view that taken individually or cumulatively, the fourth defendant's statements were not capable of conveying to an ordinary person the meaning that Mr Peters had committed serious misconduct or that he was in contempt of Parliament.

[26] He concluded, therefore, that the causes of action against the fourth defendant should be struck out. However, he then went on to note that the claim might be re-pleaded. He observed at [37]:

> As noted, statements imputing suspicion that a person may have committed an offence are capable of being defamatory. Also a statement that there is to be an inquiry may be defamatory in certain contexts and circumstances. While there may be a defence to such allegations, whether it be qualified privilege or truth, those are matters which are not currently before me. On the material before me, I can see no objection to the matter being repleaded on the basis that the statements conveyed the meaning that there was a suspicion that Mr Peters had been a party to serious misconduct, and was in contempt of Court, and that in the circumstances such statements were in themselves defamatory. There could be a similar pleading in respect of the inquiry.

[27] I have summarised the allegations that were made against the fourth defendant in the third amended statement of claim, filed subsequent to Paterson J's decision. They appear to have been an attempt to bring the pleading within the ambit of what Paterson J thought might be a viable pleading. But the pleading was rejected by Christiansen AJ, for the reasons that I have already described.

Leave to apply out of time

[28] Against that background I turn to consider the question of whether leave should be given to apply to review Christiansen AJ's decision out of time. In support of the application, Mr Henry pointed out that the application was only necessary due to a mistake of counsel in having overlooked that the decision had been made by an Associate Judge, and not a High Court Judge. The error had been realised when preparing the appeal to the Court of Appeal. As soon as the error had

been appreciated, counsel had filed the present application and a memorandum confessing to the error.

[29] Mr Henry referred to *Sutton v New Zealand Guardian Trust* (1989) 2 PRNZ 111. In that case, a Master had made an order striking out the proceeding for failure by the plaintiffs to prosecute the claim. Counsel erroneously filed an appeal in the Court of Appeal against the decision, when the proper course would have been to file a notice of application for review. When opposing counsel pointed out the error, application was made to the Court for an order enlarging the time for applying for review. Gault J held that the correct approach, to the exercise by the Court of its discretion to enlarge the time for applying to review a decision of a Master, should be no different to that generally adopted on applications to extend the time for an appeal. That would involve considering the lapse of time since the expiry of the prescribed period, the explanation of the failure or delay in taking the step for which the enlargement of time was required, and ensuring that there is substance or merit in the proposed appeal.

[30] There had been a history of delays by the plaintiff in the prosecution of the claim which had been commenced only nine days before expiry of the limitation period, and had relied on events going back some 12 years. Coupled with that, there had been no explanation for the delay in prosecuting the proceeding, nor had the plaintiff made any attempt to satisfy the Court that if given leave all further steps would be taken expeditiously. Further, the Court was satisfied that the application for review of the Master's decision was unmeritorious, while any revival of the proceeding would result in further difficulties for the first defendant in defending the claim, having regard to the lapse of time since the relevant events occurred. Nevertheless, the nature of the claim (the allegations were of breach of trust), the Court's general reluctance to deprive litigants of their rights because of the mistakes of their advisors and the principle that a proceeding should not be struck out if it was possible to do justice between the parties by taking a different course, led the Court to the view that the discretion to enlarge the time should be exercised in favour of the plaintiff.

[31] In the present case, Mr Henry submitted that, as in *Sutton* the delay in seeking to review the Associate Judge's decision was not a lengthy one and there would be little prejudice arising from the short additional delay occasioned by his failure to follow the correct procedure at the proper time. An explanation had been given of the reason for the failure. Further, he argued that the amended statement of claim had been a proper attempt to plead the case in the manner that Paterson J had thought would be possible. Accordingly, although the Court should not make any detailed inquiry into the merits, there was sufficient substance or merit in the proposed review for the present application to be granted. Mr Henry also referred to the fact that, insofar as the fourth defendant is concerned, Christiansen AJ's decision would finally determine the plaintiff's claim as against the fourth defendant.

[32] For the first defendant, Ms Baigent emphasised delays that have characterised the proceeding to date. The proceeding was commenced in June 2004. Both the first and fourth defendants made application for orders that that the plaintiff file and serve a more explicit pleading, and a first amended statement of claim was filed on 10 August. TVNZ elected not to pursue its application, but the fourth defendant's application came on for hearing before Paterson J on 15 October.

[33] After delivery of the judgment on 5 November, the plaintiff filed an appeal to the Court of Appeal on 22 November 2004. The case on appeal was not filed until 20 April 2005. In May 2005, a fixture was allocated for the hearing of the appeal, on 11 October 2005. The date by which Mr Henry's submissions were due to be served came and went, and on 28 September, the appeal was abandoned. Costs of $3,000 were awarded on the abandonment of the appeal. The first and fourth defendants complain that, in the meantime, no progress was able to be made in the High Court, because of the outstanding appeal.

[34] Both Ms Baigent and Ms Dwight referred to further delays since that point. The second amended statement of claim was filed on 15 December 2005, in breach of timetable orders requiring that to be done 14 days after the disposal of the appeal to the Court of Appeal. In the event of continuing issues raised by the defendants in relation to the adequacy of the second amended statement of claim, a third amended statement of claim was ordered to be filed and served by 10 March 2006. While a

draft was provided on that day, the formal document was not in fact filed and served until 21 March. In the meantime, there were outstanding costs left unpaid until bankruptcy notices were served on the plaintiff. Counsel relied on these previous delays to submit that the plaintiff should not be granted the indulgence that he now seeks.

[35] In addition, Ms Baigent maintained that, although the delay in making the present application had not been inordinate, it was significant and she referred to *Arkley v Fraser Mill Properties Ltd* [1989] 2 NZLR 57 where a four week delay in making application to review a decision of a Master on an interlocutory application was held to be fatal. She also relied on the judgment of Richmond J in *Avery v Number Two Public Service Appeal Board and Others* [1973] 2 NZLR 86 (CA) to submit that lack of material prejudice should not be decisive. In the case of TVNZ, of course, the claim is in any event proceeding against it in respect of the *One News* and website statements. It cannot be said that TVNZ would be prejudiced if the present application were granted.

[36] Ms Baigent contended also that there was no merit in the proposed review. She argued that Christiansen AJ had applied the correct principles, properly understanding the hierarchy of meaning of "guilt" and "suspicion" to be derived from cases such as *Lewis v Daily Telegraph Ltd* [1964] AC 234 and *Hyams v Peterson* [1991] 3 NZLR 648.

[37] For the fourth defendant, Ms Dwight also pointed out that the application had been made about three weeks out of time, in the context of a proceeding that had been characterised by a history of delays. She relied on the same cases to which I had been referred by Ms Baigent, referring in addition to the Court of Appeal's decision in *Belling v Belling* (1996) 9 PRNZ 469. In that case, however, the Court of Appeal was dealing with an application for leave to appeal lodged some seven and a half months after the delivery of judgment in circumstances where the only reason proffered for the delay was that the appellant (acting for himself) had been unaware of the requirement to seek leave for a second appeal in respect of a relationship property matter. Those circumstances are very different from the present.

[38] Nevertheless, Ms Dwight maintained that there would be significant prejudice to the fourth defendant should the plaintiff be granted leave to review Christiansen AJ's decision out of time. She referred to the fact that the proceeding had been on-going for over two years, with the fourth defendant having to endure resulting stress, mounting legal costs and uncertainty, whilst the claim remained unresolved. There was an issue as to whether, leave being granted, the plaintiff would pursue the application for review with any haste or indeed, at all, in light of his last minute abandonment of the appeal against Paterson J's decision. As with Ms Baigent, Ms Dwight argued that the proposed review was unmeritorious and that Christiansen AJ had properly applied the correct principles.

[39] Notwithstanding the comprehensive submissions made by Ms Baigent and Ms Dwight, I have decided that it is appropriate for leave to be granted in this case. The situation has arisen because of the error of counsel. Mr Henry has explained the position. It is perhaps surprising that counsel as experienced as Mr Henry overlooked that the matter had been heard by an Associate Judge, as he said in his memorandum of 25 September 2006. Nevertheless, that is what he said occurred, and neither counsel for the first nor fourth defendant has questioned that statement. As Gault J said in *Sutton v New Zealand Guardian Trust*, the Court is reluctant to penalise parties for errors made by their legal advisors.

[40] In the present case also, although the seven day period by which the application should have been filed was exceeded by 19 days I was not referred by counsel to any particular prejudice arising out of the delay that has occurred. Ms Dwight has referred, of course, to prejudice that will follow for the fourth defendant from the resurrection of the claim against him. I accept that that is the case, but in the end he would have been in a very similar position had the notice of application to review been lodged within time. TVNZ cannot properly assert prejudice, because there were claims made against it other than that which Christiansen AJ struck out.

[41] I accept that the progress of this proceeding has been unsatisfactory. However, it would also be unsatisfactory to finally determine the plaintiff's claim against the fourth defendant on the basis of a simple error committed by counsel,

where the delay has not been significant and not such as to cause prejudice. There is no suggestion here of any difficulties with the memory of witnesses, or evidence having become unavailable with the passage of time, so that it is still possible to do justice between the parties at a substantive hearing. Those considerations, in my view, are the most important ones, but it is necessary on the authorities to consider also whether there is substance or merit in the proposed review.

[42] In that respect, I am satisfied that there is sufficient substance in the application for the matter to be properly the subject of further argument. I have already discussed at some length Paterson J's decision, and the terms on which he held out the possibility that the claim against the fourth defendant might be able to be recast in an acceptable way. On the face of it, the third amended statement of claim was an attempt by the plaintiff to bring himself within the ambit of what Paterson J thought might be appropriate. I doubt whether it is appropriate for me to say anything further at this stage. The merits of the review will have to be determined on another day. At that point, Christiansen AJ's decision may well be upheld. But it is not appropriate now to inquire further into the merits.

[43] For the reasons that I have given, I have decided that leave should be granted to the applicant to apply out of time to review the decision of Christiansen AJ.

Transfer to the Court of Appeal

[44] Section 64 of the Judicature Act 1908 provides for the transfer of civil proceedings from the High Court to the Court of Appeal. The section provides:

> **64 Transfer of civil proceedings from High Court to Court of Appeal**
>
> (1) If the circumstances of a civil proceeding pending before the High Court are exceptional, the High Court may order that the proceeding be transferred to the Court of Appeal.
>
> (2) Without limiting the generality of subsection (1), the circumstances of a proceeding may be exceptional if—
>
> > (a) A party to the proceeding intends to submit that a relevant decision of the Court of Appeal should be overruled by the Court of Appeal:

(b) The proceeding raises 1 or more issues of considerable public importance that need to be determined urgently, and those issues are unlikely to be determined urgently if the proceeding is heard and determined by both the High Court and the Court of Appeal:

(c) The proceeding does not raise any question of fact or any significant question of fact, but does raise 1 or more questions of law that are the subject of conflicting decisions of the High Court.

(3) In deciding whether to transfer a proceeding under subsection (1), a Judge must have regard to the following matters:

(a) The primary purpose of the Court of Appeal as an appellate court:

(b) The desirability of obtaining a determination at first instance and a review of that determination on appeal:

(c) Whether a Full Court of the High Court could effectively determine the question in issue:

(d) Whether the proceeding raises any question of fact or any significant question of fact:

(e) Whether the parties have agreed to the transfer of the proceeding to the Court of Appeal:

(f) Any other matter that the Judge considers that he or she should have regard to in the public interest.

(4) The fact that the parties to a proceeding agree to the transfer of the proceeding to the Court of Appeal is not in itself a sufficient ground for an order transferring the proceeding.

(5) If the High Court transfers a proceeding under subsection (1), the Court of Appeal has the jurisdiction of the High Court to hear and determine the proceeding.

[45] In *Vector v Transpower NZ Ltd* (2000) 14 PRNZ 240, it was held by Williams J that "proceeding" in s 64(1) can apply to either the whole or any part of a proceeding. In *Lai v Chamberlains* (2002) 16 PRNZ 628, Heath J was of the same view. That is also my opinion. Neither Ms Baigent nor Ms Dwight submitted to the contrary.

[46] Mr Peters sought to advance the case for transfer on the basis that the issues to which the application for review gives rise are simply legal argument on an application to strike out the statement of claim. He argued that the case is unusual in that the issue for the Court of Appeal would be in respect of the meaning of words

which have now been the subject of two judicial decisions, by Paterson J and Christiansen AJ respectively. He contended that "the issue" is appropriate and ready for Court of Appeal determination without the added cost of a third hearing of the legal arguments in the High Court.

[47] Plainly, it cannot be said that the circumstances of this proceeding are exceptional in terms of either s 64(2)(a) or (b). The consideration mentioned in s 64(2)(a) simply does not arise. As to paragraph (b), Mr Peters is clearly in no position to assert the need for urgency and I do not consider that there are any issues of "considerable public importance" that would engage the paragraph.

[48] Nor do I consider that s 64(2)(c) applies in the circumstances of this case. The decisions of Paterson J and Christiansen AJ are decisions based on the pleadings as they stood when those decisions were made. Neither judgment purports to determine a pure question of law; there are not conflicting decisions in the sense of different expositions of the law. Although, as I have said above, the pleading in the third amended statement of claim, insofar as the fourth defendant is concerned, might be said to be an attempt to plead in a manner that Paterson J suggested would be acceptable, Christiansen AJ's decision striking out the amended pleading cannot properly be described as proceeding on the basis of a different view of the law.

[49] The pleading against TVNZ was, of course, not before Paterson J at all. Insofar as the fourth defendant is concerned, Paterson J's decision was plainly in relation to a different pleading. Essentially, the issues before Christiansen AJ were whether the statements made by Mr Carter were capable of meaning (as pleaded in the third amended statement of claim) that:

a) the allegations made against Mr Peters were of a very, very serious nature, warranting further investigation; and

b) they gave cause for suspicion that Mr Peters was party to serious misconduct and/or was in contempt of Parliament.

[50] Christiansen AJ held that the meaning referred to in paragraph (a) did not comply with s 37(2) of the Defamation Act (no particulars as to meaning were given, and the allegations simply replicated the words that Mr Carter had used). In relation to the second meaning pleaded, Christiansen AJ held simply that the words used by Mr Carter were not capable of bearing the meaning alleged.

[51] For these reasons, I do no think it can be said that there are conflicting decisions of the High Court and consequently none of the circumstances set out in s 64(2) apply. Section 64(2), of course, is not intended to limit the generality of subs (1). However, I do not consider that there are any other circumstances which make this case an "exceptional" one. Mr Henry in the course of argument pointed to Williams J's reference to "the winnowing down and clarification of issues" in *Victor Ltd v Transpower NZ Ltd*, at [44]. Williams J used the phrase in the course of discussing s 64(3)(a) of the Judicature Act and its requirement to have regard to the primary purpose of the Court of Appeal as an appellate court. Mr Henry's point was to assert that there had already been a winnowing down and clarification of issues having regard to the decisions of Paterson J and Christiansen AJ with the result that the matter was now ripe for determination by the Court of Appeal. That argument, however, depends upon his contention that the issues canvassed in both decisions were essentially the same. For reasons I have already given, I do not agree with that proposition.

[52] It was not suggested that this case was exceptional for any other reason. I do not find it necessary in the circumstances to consider the requirements of s 64(3) other than to observe that paragraphs (a) to (c) would all, in my view, militate against a transfer to the Court of Appeal.

[53] I have decided, therefore, that the plaintiff's application for transfer of the application for review to the Court of Appeal should be declined.

Result and consequential orders

[54] The plaintiff's application for leave to apply out of time for a review of the decision of Christiansen AJ given on 30 August 2006 is granted. His application to transfer the application for review to the Court of Appeal is declined.

[55] I direct the Registrar to set the application to review down for hearing before a Judge of this Court as soon as convenient. As presently advised, I consider that one day should be allowed. If any counsel is of the view that a shorter or longer term will be required, he or she should advise the Registrar within seven days of the date of delivery of this judgment.

[56] I further direct that counsel for the plaintiff should file and serve submissions in support of the application to review three weeks prior to the hearing date and that counsel for the first and fourth defendants should file and serve their submissions one week prior to the hearing date.

[57] As the application has been partly successful and partly unsuccessful, it may be appropriate for costs to lie where they fall. However, if any party seeks costs and costs cannot be agreed, I will receive memoranda on that issue filed by the party or parties seeking costs within 14 days of the delivery of this judgment, and by the party or parties against whom costs are sought within 14 days after that.