IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-2050

BETWEEN	GRACE HADEN First Plaintiff
AND	VERISURE INVESTIGATIONS LTD Second Plaintiff
AND	NEIL EDWARD WELLS First Defendant
AND	WYN HOADLEY Second Defendant
AND	GRAEME JOHN COUTTS Third Defendant
AND	AUCKLAND DISTRICT COURT Fourth Defendant

Hearing: 17 June 2010

Appearances: E Orlov and S Malaviya for plaintiffs
N D Wright for first to third defendants
No appearance for fourth defendant

Judgment: 25 November 2010

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3 pm on Thursday 25 November 2010.

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Introduction

[1] The first defendant (Mr Wells) brought proceedings in the Auckland District Court against the plaintiffs in the present proceeding, alleging that they had defamed him. Following certain interlocutory proceedings in the District Court, the plaintiffs were debarred from defending the defamation claim, by reason of their default in respect of orders for costs made against them, and in particular, by reason of their failure to comply with an unless order.

[2] Subsequently, Mr Wells obtained an award of general damages of $50,000 against the plaintiffs, and $7,500 in exemplary damages against the first plaintiff (Mrs Haden). That followed a hearing before Judge Joyce QC. Mr Wells also obtained injunctive relief.

[3] In a decision released at the same time as the substantive defamation judgment, Judge Joyce refused Mrs Haden's application for review of the unless order.

[4] The District Court decisions to grant the unless order and to uphold Mr Wells' defamation claim, were both the subject of separate unsuccessful appeals to this Court.

[5] In the present proceeding the plaintiffs seek judicial review. In summary, their contentions are that:

a) The making of the unless order and the subsequent striking out of the plaintiffs' statement of defence was erroneous in law in that it amounted to a denial of natural justice. Alternatively the decision was manifestly unfair and/or unreasonable;

b) In making the decision to grant the unless order, the learned District Court Judge failed to take into account relevant considerations, and took into account irrelevant considerations;

c) The substantive decision of Judge Joyce in the defamation proceeding was erroneous in law, in that it took into account irrelevant considerations and failed to take into account relevant considerations;

d) In the process of reaching his decision in the substantive defamation proceeding, Judge Joyce failed to observe the principles of natural justice;

e) The substantive judgment in the District Court was tainted by apparent bias and predetermination.

[6] In respect of all causes of action the plaintiffs seek an order setting aside the substantive District Court judgment. In addition, they seek in respect of claims related to the decisions debarring them from defending the claim in the District Court, an order remitting the substantive defamation proceeding to the District Court for rehearing.

[7] The defendants now seek an order striking out the judicial review proceeding. They contend that in the light of the history of the litigation between the parties, the present claim amounts to an abuse of process.

[8] Subsequent to the filing of the defendants' application to strike out the proceeding, the plaintiffs filed an amended statement of claim in which the fourth defendant, the District Court at Auckland, appeared for the first time as a party. The amended statement of claim was filed without the leave of the Court. Once a proceeding has been commenced it is not open to a plaintiff to add a defendant simply by filing an amended statement of claim naming that defendant. An order of the Court is required.[1]

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[1] High Court Rules, r 456, *Westfield Freezing Co Ltd v Sayer & Co (NZ) Ltd* [1972] NZLR 137 (CA) at 143.

[9] Mr Wright for the remaining defendants raised no objection to the making of an order joining the District Court as a party. The Court ought to have been joined at the outset.[2]

[10] Accordingly I make an order by consent joining the District Court at Auckland as fourth defendant in the proceeding. Counsel for the fourth defendant has filed a notice of appearance, reserving rights. The fourth defendant abides the decision of this Court on the present application.

[11] When the hearing of the strike out application commenced, Mr Orlov indicated to the Court that he had received only late notice of the fixture. Although I was satisfied that proper notice of the hearing date had been given by the Court, I permitted Mr Orlov to address the Court to the extent to which he was able to do so. I also granted him leave to file further submissions in response to the material placed before the Court by Mr Wright. In turn, Mr Wright was granted leave to file submissions in reply.

[12] Thereafter matters became somewhat untidy. Mr Orlov sought leave to reply to Mr Wright's reply. I granted leave but with the proviso that his reply submission should run to no more than five pages. In reliance on the grant of leave he filed submissions which ran to 15 pages.

[13] Moreover, a month after the hearing, Mrs Haden filed a 10 page affidavit to which she annexed more than 100 pages of exhibits. I had advised Mr Orlov that there would be no objection to a brief formal affidavit annexing matters of record in the District Court. Mrs Haden's affidavit went very significantly beyond those boundaries. Mr Wright objected to the receipt by the Court of the late affidavit that appeared to go well beyond normal strike out evidence and which in places simply amounted to a fresh challenge to the substantive decision in the District Court.

[14] I have read all of Mr Orlov's submissions and the whole of Mrs Haden's affidavit. On the view I take of the present application it has been unnecessary to

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[2] Judicature Amendment Act 1972, s 9(4).

afford Mr Wright an opportunity to develop his argument that the Court ought not to consider such wide-ranging and arguably irrelevant material.

[15] Regrettably, the exchange of memoranda of further submissions occupied several months. As recently as 1 October 2010, without leave, Mr Orlov filed a further two page submission. The thrust of this last memorandum was that:

> The sheer multiplicity of issues and differences and (sic) interpretation of the facts and the law … shows that this is not a matter that is amenable to Judicial Review Strike Out.

[16] I turn to a consideration of the extensive procedural background.

Background

[17] Mrs Haden and Mr Wells were formerly colleagues in a voluntary organisation known as the Auckland Air Cadet Trust. Regrettably, differences emerged between them and there was a falling out. Mrs Haden made inquiries into a trust with which Mr Wells was involved. He had been instrumental in securing the passage of the Animal Welfare Act 1999. The trust was an approved organisation under the Act, and in that capacity had an arrangement with the Waitakere City Council for animal welfare purposes. Mrs Haden considered that Mr Wells had been using the trust to advance his own interests.

[18] She in turn formed a competitor trust. It maintained a website upon which Mrs Haden published certain statements defamatory of Mr Wells. There were other defamatory comments in e-mails sent to a wide variety of recipients, including those involved in local government, board members of the Auckland Air Cadet Trust (of which Mrs Haden had formerly been a trustee), and the staff of the animal welfare section of the Waitakere City Council.

[19] Mr Wells issued proceedings in the District Court at Auckland. He alleged that certain statements in Mrs Haden's communications or those of her company (the second plaintiff in this proceeding), were to the effect that Mr Wells:

a) was dishonest and had taken charitable funds for himself;

b) had deliberately misled a Minister of the Crown in seeking to have his own trust accepted as an approved organisation;

c) had misappropriated funds from his own trust;

d) was corrupt, untruthful and untrustworthy.

[20] There were also allegations of passing off, and of breach of the Fair Trading Act 1996.

[21] The present plaintiffs filed a counterclaim in the District Court. They alleged five causes of action including defamation. The counterclaim ran to 55 pages. Damages of $250,000 were sought.

[22] In a judgment given on 7 February 2007, Judge Sharp struck out the counterclaim on the basis that none of the causes of action could be sustained.

[23] On 19 March 2007, Judge Sharp delivered a further decision in which an application filed by the present plaintiffs against the present defendants to strike out the District Court defamation proceeding was dismissed. In each judgment, Judge Sharp urged Mrs Haden to obtain legal assistance.

[24] Also on 19 March 2007, Judge Sharp ordered Mrs Haden personally to pay indemnity costs of $6,806.72 to the counterclaim defendant, the Auckland Air Cadet Trust, and further directed the present plaintiffs, jointly and severally, to pay the costs of the present defendants, amounting to $9,000 (a sum in excess of scale).

[25] On 10 May 2007, in a further judgment, Judge Sharp directed the present plaintiffs to pay scale costs of $3,200 in relation to the unsuccessful application to strike out the statement of claim.

[26] On 28 June 2007 there was a judicial telephone conference in the course of which the Judge made timetabling directions. The first direction was as follows:

> Within 14 days the defendants [the present plaintiffs], or one of them shall pay in full all outstanding Costs awards payable to the plaintiffs failing

> which the defendants will be debarred from further defending the claims against them and statement of defence will be struck out.

[27] The unless order was not the subject of a prior written application; neither was there any reference to it in a memorandum filed by counsel for the plaintiffs for the purpose of the conference. But it is not in dispute that Mrs Haden participated in the telephone conference.

[28] The costs remained unpaid. On 19 July 2007 Judge Sharp made an order (without further argument or appearance) striking out the statement of defence in the defamation proceeding of the present plaintiffs. The minute of Judge Sharp, distributed to the parties by e-mail, read as follows:

> The directions that I made on 29.06.07 were clear: by 13 June 2007 the defendants were to have paid in full the outstanding awards of costs against them in favour of the plaintiffs or their statement of defence would be struck out. The defendants offer no adequate excuse for their failure to comply with that direction. The plaintiffs now seek an order in terms of the direction made.
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> I can see no reasonable ground not to make one as the defendants' failure to meet the costs awarded by the due date constitutes an abuse of the process of the Courts.
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> Accordingly under r 209(c) I strike out the defendants' statement of defence.

[29] On 13 March 2008, Judge Joyce QC presided over the trial of the defamation proceeding. It was conducted as a formal proof hearing. The present plaintiffs were entitled to participate in the hearing in respect of quantum and in relation to mitigation, despite the striking out of their statement of defence. In practice, they were permitted substantial latitude and were able to place before the Court a great deal of material. I return to this point below.

[30] Written submissions followed the hearing. They were complete by 16 April 2008.

[31] On 3 July 2008, while the substantive decision was reserved, Judge Joyce heard further applications by the present plaintiffs. The background to these applications lay in bankruptcy proceedings launched against Mrs Haden by Mr Wells in respect of the unpaid costs. Mrs Haden appeared before Associate Judge Abbott

in this Court on 6 May 2008. Following discussion before the Associate Judge, Mrs Haden filed applications in the District Court both for a stay of execution in respect of the costs awards, and for a review of the costs orders themselves. Those applications were dated 12 and 14 May 2008 respectively.

[32] Mrs Haden prepared a 19 page written synopsis of argument for the review hearing on 3 July 2008. Little of it seems to have been directly concerned with the award of costs as such. Sections of the synopsis bear headings such as "Abuse of Process", "Standing of the Plaintiffs", "Harassment", "Ulterior Purpose unrelated to the Subject Matter", "Concealment of Corruption", "Public Accountability", and "Integrity". The supporting affidavit by Mrs Haden, which runs to 10 pages, contains little reference to the costs orders or the subsequent orders debarring the present plaintiffs from defending the defamation proceedings. Rather, it concentrates upon a discussion of corruption in other Court cases and then makes allegations of misleading and fraudulent behaviour on the part of Mr Wells and his counsel.

[33] At the review hearing itself, Mrs Haden presented further detailed written submissions running to 12 pages. The thrust of those submissions can be gauged from the following passages:

> 61. This has been a dirty fight, it has not been a level playing field and while I am being accused of defamation the plaintiffs have not hesitated in dragging my good name through the mud, whilst manipulating the process so that I could be immobilised by the huge costs – their reward for using dirty tactics.
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> 62. $6,800 fine for the immediate withdrawal of a claim is exorbitant. $12,200 for being defamed is insult to injury. To have to pay these sums with no right of defence so that crime can be concealed is a gross injustice.
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> …
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> **84. We ask the court to consider**
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> a. The vexatiousness of these proceedings and ask the court to consider if the purpose was to conceal Criminal offending. (to the civil standard of proof) If so we ask the court to refer this matter to the police or SFO for further investigation against the plaintiffs and Nick Wright who I believe in his extreme action must be close to being party to the offence.

b. The costs, stress, effect on income and health that these proceedings have had on the defendant Mrs Haden.

c. The damage to the Business of Verisure Investigations Ltd.

d. These proceedings have come at a high cost to me. I ask the court to consider a stay and the review of orders so that I can come out of this litigation financially unscathed.

e. I did not enter into these proceedings to seek to make money from it, I sought justice, not only for myself but for others and to seek accountability for a very public organisation.

85. I request the court to make an example of the plaintiffs and release me from these proceedings so that I have not suffered any costs and that the sums sought by the plaintiffs and counterclaim defendants to bankrupt me are addressed.

a. I would like some compensation for the time this has taken me, the damage it has done to my business but that desire is secondary only to being free to be able to get on with my life and to be there for my family again. I want this stress, this injustice, this nightmare gone.

b. While I cannot supply accounts of what I could have earned, I wish the court to consider costs in proportion to what the plaintiffs have received ($6,800 and $12,200 = $19,000) and Mr Wells claimed as loss of earnings. ($18,612) He claimed that for a mere six months I ask the court to consider this for the two year period, to cover costs incidentals, investigations, research and disbursements.

c. I would like to see this negative turned into a positive and see this case used as an example to others who seek to use the court in this manner.

[34] Mrs Haden addressed her own financial position only very briefly. She advised the Court that her weekly income before expenses was $500, largely by reason of the time spent by her in managing the litigation.

[35] But Mrs Haden also presented to the District Court on 3 July 2008, a copy of an affidavit filed in this Court in the bankruptcy proceedings, and sworn on 2 May 2008. In that affidavit she disclosed that, together with her husband, she owned four houses, mortgage free, with a combined value of over $3 million. Readily available cash resources exceeded $30,000.

[36] Importantly for present purposes she then said:

> Solvency is not an issue for me, I am solvent, I can pay my debts and will pay my debts but in line with natural justice I expect fair play, honesty and integrity.

[37] Judge Joyce reserved his decision at the conclusion of the review hearing on 3 July 2008, but dismissed the application when he released his substantive defamation judgment. Reasons for his decision on the review application were released on 1 August 2008. The review judgment was detailed and lengthy. Judge Joyce noted that the costs decision of 19 March 2007 had been given in Mrs Haden's presence, and that the time for any review had expired seven days later on 26 March 2007. He upheld Mr Wright's submission to the effect that the present plaintiffs had failed to provide any substantive basis at all for review of Judge Sharp's orders, and concluded that she had failed to pay the costs simply as a matter of principle. The reality, he said, was that:

> … because she considers that the Court's orders were and remained unprincipled and unjust, Mrs Haden has regarded herself (and Verisure) as entitled to disregard them.

[38] He found also that the review application was prompted solely by reason of the pressure imposed by the issue and service of the bankruptcy notice on Mrs Haden in respect of the unpaid costs.

[39] On 1 October 2008, the present plaintiffs sought special leave to extend the time for bringing appeals against the costs judgments of 19 March and 10 May 2007, the unless order made on 28 June 2007, and the judgment of Judge Joyce refusing review of the orders.

[40] The application was heard by John Hansen J on 24 November 2008. This time the present plaintiffs were represented by counsel, Mr P D Finnegan. Mrs Haden had earlier been urged by both Judge Sharp and Associate Judge Abbott to retain counsel in the context of the complex legal proceedings in which she was involved.

[41] John Hansen J delivered a reserved judgment on 4 December 2008. He dismissed the application for special leave. In summary, he held that:

a) when special leave extending time is sought, a proper explanation of the delay must be provided. Here there was no explanation at all for the delay;

b) the fact that Mrs Haden had been self-represented made no difference. It was plainly her choice since her evidence in bankruptcy proceedings in this Court demonstrated that she had access to funds that would have allowed her to employ a lawyer;

c) Mrs Haden was plainly sufficiently familiar with the District Court Rules to justify the assumption that she was aware of her appeal rights, but chose not to exercise them at the time;

d) the application for special leave was hopelessly out of time, and in the absence of a proper explanation it must accordingly fail;

e) however, because there had been a timeous appeal of the substantive judgment, and because the costs orders were interlocutory orders to which s 76(5) of the District Courts Act 1947 applied, the Court retained jurisdiction to deal with the question of costs insofar as costs issues were relevant in the substantive appeal;

f) Judge Sharp plainly had jurisdiction to make the unless order under r 433 of the District Court Rules 1992, and that no case having been made for the grant of special leave, the appeal against that aspect of the rulings of the District Court must also be dismissed.

[42] In his substantive judgment of 30 July 2008, Judge Joyce upheld the claim of the defendants in the present proceeding. He awarded general damages of $50,000 against each of the present plaintiffs and a further $7,500 for exemplary damages against Mrs Haden alone. He also granted injunctive relief.

[43] The appeal of the present plaintiffs against that decision was heard by Rodney Hansen J on 25 February 2009 and dismissed in a reserved judgment delivered on 20 November 2009. Mrs Haden was once more self-represented.

[44] The question of the unless order was again an issue in the appeal. Rodney Hansen J held that Mrs Haden had been unable to point to any basis upon which it would be proper for him to go behind the judgment of John Hansen J and give her "…a second bite of the cherry as an incident of the substantive appeal". He was prepared to interfere with the interlocutory unless order only if it was necessary to do so to give effect to a decision on the merits.

[45] Mrs Haden also raised before Rodney Hansen J the issue of judicial conduct in respect of Judge Joyce's substantive judgment. She argued that numerous passages in that judgment were unfair and gratuitously denigratory of her.

[46] Although noting that "… Judge Joyce expressed his decidedly unfavourable view of Mrs Haden and her conduct in trenchant and often colourful terms" Rodney Hansen J held that Mrs Haden should not allow the language employed by Judge Joyce to obscure the reality that the District Court findings were unassailable as a matter of fact and law.

[47] The appeal having been dismissed, Mrs Haden sought leave to appeal to the Court of Appeal. Leave was refused in a judgment given on 23 June 2010. Mrs Haden subsequently applied to the Court of Appeal for special leave to appeal. The judgment of the Court of Appeal is not yet available.

Strike-out principles

[48] There is no dispute as to the proper approach to an application to strike out a proceeding. It must be shown that the plaintiffs have no tenable argument on the basis of which they might succeed at trial. A useful summary of the relevant principles appears in the judgment of Andrews J in *Kerikeri Village Trust v Nicholas*[3] at [7]-[11]:

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[3] *Kerikeri Village Trust v Nicholas* HC Auckland CIV-2006-404-5110, 27 November 2008.

[7] The principles applying to an application to strike out pleadings are well-established:[4]

a) The Court proceeds on the assumption that the facts pleaded in the statement of claim are true.

b) Before the Court may strike out proceedings the causes of action must be so clearly untenable they cannot possibly succeed.

c) The jurisdiction is one to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material before it.

d) The fact that applications raise difficult questions of law and require extensive argument does not exclude jurisdiction.

[8] Although exercising caution, the Courts have struck out claims pleading novel duties of care such as is alleged, in the present case, to be owed by the Council to the Trust. In particular, the Courts have struck out claims against public regulatory bodies where novel duties of care are alleged.[5]

[9] In its recent judgment in *Couch v Attorney-General*[6] the Supreme Court considered an application to strike out a proceeding against the Probation Service alleging a novel cause of action. In their minority judgment Elias CJ and Anderson J observed at [2] that:

> … Whether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care is the question before the Court. If a duty of care cannot confidently be excluded, the claim must be allowed to proceed. It is only if it is clear that the claim cannot succeed as a matter of law that it can be struck out.
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> [Original emphasis.]

[10] *Couch* therefore reaffirms the need for caution in exercising the jurisdiction to strike out a pleading alleging a novel cause of action.

[11] There are, however, competing considerations, as noted by the Court of Appeal in *Attorney-General v Body Corporate 200200* (the *Sacramento* judgment)[7] at [51]:

> On the one hand, the Courts should not lightly deny plaintiffs the opportunity to proceed to trial on novel issues of law. Moreover, a trial will present a more favourable forum to assess the issues involved in establishing a duty of care. On the other hand, however, defendants ought not to

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4 See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

5 See, for example, *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) and *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

6 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC).

7 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA).

> be subjected to the substantial costs, much of which is usually unrecoverable, in defending untenable claims.

[49] To the same general effect is the judgment of the Court of Appeal in *Queenstown Lakes District Council v Charterhall Trustees Ltd*:[8]

> [15] The principles applicable on a strike-out application under r 186(a) of the High Court Rules were summarised by this Court in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267. They are well-known, and do not require repetition.
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> [16] However, Mr Hunt drew our attention to the observations of Elias CJ and Anderson J in *Couch v Attorney-General* [2008] 3 NZLR 725 at [32] (SC), where the need for caution in summarily disposing of cases involving allegations of duties of care in novel situations was recognised. Caution is required "both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations, undisciplined by facts". The point is not a new one, and obviously we bear it in mind. But we are also conscious that defendants should not be subjected to substantial costs, often only partially recoverable, in defending untenable claims: see *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [51] (CA) (*Sacramento*).

The statement of claim

[50] Five separate causes of action are pleaded, although there is a degree of overlap between them. The first two are each concerned with the circumstances in which the unless order was made and the subsequent decision to strike out the defence of the present plaintiffs in the defamation proceeding. The plaintiffs allege that those decisions were erroneous in law, in that they were denied natural justice, or that they were manifestly unfair or unreasonable.

[51] The plaintiffs plead the following particulars in support of the first cause of action:

a) They were not given an opportunity to make submissions on either the unless order or the strike out;

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[8] *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 (CA) at [15]-[16].

b) The Court failed to provide adequate reasons for its decision in either case;

c) The plaintiffs were not forewarned of the Court's intention to make the unless order, and later to strike out;

d) The plaintiffs in the District Court were also in breach of the Court's order in that they had failed to file an amended statement of claim within 21 days as directed;

e) The decisions were contrary to the District Court Rules, and to strike out principles;

f) There was no application to strike out and no hearing;

g) Striking out of the defence of an "impecunious self-represented party unable to afford [a] lawyer simply because of non-payment of costs orders is draconian and manifestly unfair and contrary to justice".

[52] It is convenient to dispose of this last particular now. Such a claim could never be sustained in the light of Mrs Haden's own evidence that she had a joint one-half interest in four mortgage free properties valued at a total of $3 million, and of her sworn evidence in this Court that she was solvent and able to pay her debts.

[53] On the first cause of action, the present plaintiffs seek a ruling that the striking out of their defence in the District Court was unlawful and in breach of their right to natural justice, together with a direction that the District Court proceeding be remitted back to that Court for rehearing.

[54] The second cause of action is closely related to the first. It alleges that in making the unless and strike out orders, the District Court failed to take into account relevant considerations, namely the principles applicable to strike out applications, Mrs Haden's impecuniosity, the failure of the plaintiffs in the District Court to file an amended statement of defence as directed, certain alleged pleading shortcomings

on the part of the plaintiffs in the District Court, and the existence of a legitimate and arguable defence.

[55] It is alleged that Mrs Haden's claimed impecuniosity rendered the strike out order a breach of s 27 of the New Zealand Bill of Rights Act 1990. The present plaintiffs seek the same relief on their second cause of action as is sought on the first. For completeness I observe again that no review argument based on impecuniosity could possibly succeed in the present case.

[56] The remaining three causes of action relate to the substantive judgment of Judge Joyce in the District Court. The first cause of action pleads that the learned Judge was in error of law, in that he took into account irrelevant considerations and failed to take into account relevant considerations.

[57] The particulars provided comprise a series of challenges to the substance of Judge Joyce's decision. Some are concerned with pleading points, others with claims that the Judge had failed to take into account certain aspects of the evidence and argument. On this cause of action the plaintiffs simply seek that the substantive judgment in the District Court be set aside.

[58] The second cause of action relating to the substantive judgment alleges a denial of natural justice. For the most part the particulars complain of the inability of the present plaintiffs to participate fully in the hearing in the District Court, by reason of the strike out of their statement of defence. Against that background, the plaintiffs rely on the taking of evidence on matters arising subsequent to the commencement of the proceeding; of the finding that Mrs Haden was well able to pay costs and had simply elected not to do so; of judicial resort to the internet following the hearing in order to determine whether certain defamatory statements attributable to Mrs Haden remained visible on the web; of reliance upon an affidavit filed by Mrs Haden in the substantive proceeding while denying her the right to argue the truth of her statements, and of taking evidence on certain matters without providing her an opportunity to address such matters "… in a proper Court hearing".

[59] The final cause of action alleges both unlawfulness and bias. But it appears that the main thrust of this cause of action is the contention that the substantive defamation decision is flawed by reason of apparent bias.

[60] Detailed particulars are pleaded. There are complaints that Judge Joyce made certain findings (including as to Mrs Haden's deliberate decision not to pay costs), when there was no evidence to support the findings, that he found passing off when that cause of action had not been pursued, and that he had made certain findings in the face of Mrs Haden's claim that a trust associated with Mr Wells did not exist "in fact or in law".

[61] The final allegation appears to be concerned with a conventional claim of apparent bias. It asserts that Judge Joyce's "prolix judgment largely addressed … a denigration of the plaintiff's character, such being neither necessary nor desirable to the ends of justice…". There are 14 particulars of this allegation. It is necessary to set them out in full:

> (i) That the plaintiff was on a righteous mission to heap calumny [at para 116].
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> (ii) Referred in highly uncomplimentary terms to the plaintiff's influence on these issues being raised in Parliament without any evidence as to such, without such being pleaded and with disregard to the concept of Parliamentary privilege [at 124].
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> (iii) Ruled that the court proceeding became a platform for the plaintiff's campaign without any evidence or argument on the point and without even giving the plaintiff an opportunity to address such matters [at 128].
>
> (iv) Referred to questions that the Judge had found on the internet, which could not be anything but fair comment or truth [at 132] as 'sarcastic and disparaging?'
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> (v) Called the plaintiff a liar by stating that she had an 'economy with the truth' [at 135] on the basis of his own internet research, on which the plaintiff was given neither an opportunity to reply or to comment.
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> (vi) Referred to the requirement to now 'stop Mrs Haden in her ill-laid tracks' by quoting from internet material that was not put into evidence and that was not pleaded [at 143].
>
> (vii) Allowed Mr Wells' lawyer to include without prejudice communications, without censure [at 145].

(viii) Found that the plaintiff has 'lost all balance in her life' [at 148].

(viii)(sic) Referred to her assertions (despite the evidence in support) as being 'claims of criminality which bereft of any such evidence, self-identify as wicked' [at 169].

(ix) Referred to her statement of truth or honest opinion as 'the facile nature of that last assertion will, by now, be altogether too obvious' [at 173] whilst at the same timing (sic) preventing her from having a hearing on truth by virtue of the strike out.

(x) Referred to her views in the witness box [which in any event she was prevented from proving due to the strike out] as 'asserted to be sincere, but in fact hollow-sounding, personal views and beliefs' [at 174].

(xi) Denigrated her personal opinion (even if incorrect) as 'no better than her own, idiosyncratic preconceptions and misconceptions. Logic does not enter it. Instead she allows her emotions unchecked rein'.

(xii) Justified breaching the obvious rules of evidence and procedure by allowing in asserted facts found on the web not put into evidence simply by stating that 'at no point has Mrs Haden disclaimed authorship of the world wide web materials which in fact self identify as her work: in fact it is work she would have acclaimed, rather than seek to disclaim' [at 183].

(xiii) Denigrated her layperson's (mis)understanding of court procedures as 'I am afraid in this respect that she only hears or reads that which she sees to suit her book'.

[62] In respect of this last cause of action the plaintiffs seek an order setting aside Judge Joyce's substantive judgment.

Abuse of process

[63] Mr Wright for the defendants seeks an order striking out the present proceeding in its entirety, upon the ground that it constitutes an abuse of process. He points out that the present plaintiffs applied to the District Court to stay and/or review the unless and strike out orders, and then unsuccessfully sought leave to appeal to this Court against those same orders, and the refusal of the District Court to review them. Finally they challenged the District Court defamation judgment during the course of the substantive appeal to this Court, heard by Rodney Hansen J.

[64] On each occasion, substantially the same arguments were addressed to the Courts concerned. Although Mr Orlov maintains that the focus of the judicial review proceeding is that of process, and in particular of an alleged failure to afford Mrs Haden an opportunity to address the Court before the challenged orders were made, there is no material difference Mr Wright argues, between the issues that were before the Court on earlier occasions, and those now raised for determination under a judicial review umbrella.

[65] The relevant legal principle requires little explanation. It will be an abuse of process of the Court where there are two proceedings which are identical or sufficiently similar and where the remedies sought in each are equally effective.[9] An abuse of process argument was considered by the Court of Appeal in *Fraser v Robertson*.[10] That was also a judicial review case. There the appellant, having succeeded on judicial review in respect of her dismissal by the State Services Commission, sought in a second judicial review proceeding to review a subsequent dismissal. In the later proceeding she sought also to review her suspension without pay at a time preceding the dismissal with which the first judicial review proceeding was concerned. Cooke P, writing the judgment of the Court of Appeal, explained that:

> In New Zealand the judicial review jurisdiction under the Judicature Amendment Act 1972, Part I, is discretionary and it is established practice that, although the jurisdiction expressly extends by s 4(1) to cases where the applicant has a right of appeal in relation to the subject-matter of the application, relief under the Act will be refused if the remedy of appeal is more appropriate: see for instance *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94, 103. Further, there are no time limits on applications under the New Zealand Act. This contrasts with the position in England, where there is a requirement of leave and a prima facie limit of three months: see Wade, *Administrative Law* (6th ed, 1988) at pp 671-676. The absence of any rigid time limit for invoking the jurisdiction in this country is salutary, but it is a position that could not sensibly be maintained unless the Court continues to insist on reasonable promptness in all the circumstances of the particular case and declines to entertain truly stale claims.
>
> In the present case, as regards the original suspension, the delay of more than four years in mounting a challenge to its validity is exacerbated by the fact that its validity was allowed to go unchallenged in both Courts in the first judicial review proceeding. Although the Secretary for Justice was not a

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9 *Bank of New Zealand v Rada Corporation Ltd*. (1989) 2 PRNZ 147 (HC) at 150.

10 *Fraser v Robertson* [1991] 3 NZLR 257 (CA) at 260.

> party to that proceeding, so that the doctrine of res judicata in its narrower sense does not apply, it is settled that there is a wider sense in which the doctrine is available, covering issues so clearly part of the subject-matter of earlier litigation that they could and ought to have been raised therein. It is treated as an abuse of process to raise such issues for the first time by a new proceeding: see for example *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Shiels v Blakeley* [1986] 2 NZLR 262, 270; *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8. The only argument regarding the suspension raised for the appellant in the first judicial review proceeding was that it should be treated as at an end when the Court held the first dismissal invalid. This argument was not accepted; and it was also pointed out in the judgments that, if the Court had held otherwise, the permanent head could have imposed a fresh suspension while the rehearing of the charges was pending: see [1984] 1 NZLR 116 at pp 117-118 and p 128.

[66] In *Donnelly v Auckland District Court*[11] the plaintiff in judicial review proceedings was dissatisfied with the decision of the District Court in respect of a claim under the Family Protection Act 1955. An earlier appeal had been held by the High Court to be out of time. The judicial review proceeding was struck out by Salmon J as an abuse of process. In order to bring herself within the ambit of judicial review, the plaintiff had sought to argue that the District Court decision was unreasonable and irrational, such that the principles discussed in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*[12] applied. Salmon J said at 306-307:

> In truth the plaintiff has attempted to appeal under the guise of judicial review. This case does not reach the point of the exercise of discretion but it is perhaps worth reiterating there is high authority for the view that where an alternative remedy exists, judicial review is not available except in exceptional circumstances.

[67] That same principle was reaffirmed in the context of tax challenge proceedings by the Privy Council in *Miller v Commissioner of Inland Revenue.*[13] There Lord Hoffman, delivering the reasons of the Judicial Committee, said that[14]:

> It will only be in exceptional cases that judicial review should be granted where the challenges can be addressed in the statutory objection procedure. Such exceptional circumstances may arise most typically where there is an abuse of power.

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11 *Donnelly v Auckland District Court* [2002] NZAR 303 (HC).
12 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
13 *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC).
14 At [18].

[68] In *Butler v Removal Review Authority*[15] Wild J observed that it was an abuse of process to raise, in a subsequent proceeding, matters which could and therefore should, have been litigated in the earlier proceeding. He referred to both *Fraser v Robertson* and to *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd.*[16]

[69] But it is necessary also to consider the judgment of the Court of Appeal in *RL v Chief Executive of the Ministry of Social Development.*[17] In that case the appellants sought to challenge by judicial review a series of procedural decisions which had led to their children being removed into the protective custody of the state. One of the issues raised in the proceeding was the existence of an appeal right. It was argued that an appeal ought to have been pursued instead of judicial review.

[70] The Court of Appeal was uncertain as to the existence of appeal rights in respect of all of the issues before the Court, but was inclined to think that an appeal did lie. In such circumstances the Court considered that an appeal would have been more sensible, but nevertheless held that the availability of an appeal on the merits did not necessarily exclude an administrative law remedy in appropriate cases.[18] The Court also referred to s 4(1) of the Judicature Amendment Act 1972 which expressly preserves the discretionary right of review "notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application". That right is confirmed by s 22(2) of the New Zealand Bill of Rights Act 1990.

[71] The Court noted that it had, on a number of earlier occasions, stressed the "desirability" of the appellate route where it is available,[19] citing in support *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd,*[20] *Fraser v Robertson,* and *Rajan v Minister of Immigration.*[21]

[72] At the heart of the appellant's complaint in *RL v Chief Executive of the Ministry of Social Development* lay the contention that a Family Court Judge had wrongly declined to consider relevant affidavits, or to allow an adjournment so that

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15 *Butler v Removal Review Authority* [1999] NZAR (HC) 68 at 72.
16 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 (PC) at 590.
17 *RL v Chief Executive of the Ministry of Social Development* [2009] NZCA 596.
18 *L v M* [1979] 2 NZLR 519 (CA); *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 222.
19 At [21].
20 *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA).

the appellants had time to prepare complying affidavits. There was an alternative argument that they ought to have been given an opportunity to attend in person to give evidence. Finally, there was a complaint that the appellants had been afforded no opportunity to cross-examine a social worker.

[73] These were all process complaints and in combination they persuaded the Court of Appeal to decide that the High Court had been wrong to strike out the judicial review proceeding. The Court did so for four reasons:

a) Whether the appellants had a substantive right of appeal was in doubt;

b) The nature of the challenge – a procedural attack on the way the hearing in the Family Court was conducted – was classic judicial review fodder (although the Court of Appeal accepted that process arguments can be argued on an appeal);

c) Harrison J in this Court had not relied on the existence of appeal rights when he struck out the High Court proceeding;

d) The appellants should not suffer by reason of a wrong procedural choice (if it was wrong) made by their counsel.

[74] Taylor[22] suggests that this case might represent something of a retreat from the full rigour of the principle that a failure to exercise available appeal rights will usually be fatal in a judicial review context. But it seems that the decision of the Court of Appeal was very much based upon the particular facts of the case before it.

[75] The facts of the present case are, in my view, materially different. In the first place, the Court of Appeal in *RL* entertained a doubt as to the availability of an appeal right. In the present case there were no such doubts. Indeed, the plaintiffs have exercised their rights of review and appeal in full.

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21 *Rajan v Minister of Immigration* [1996] 3 NZLR 543.

22 G D S Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington,2010) at [5.28].

[76] Second, the grounds of complaint in the case before the Court of Appeal were entirely procedural in character, and were accordingly well suited to judicial review. In the present case, the argument is that the unless order and the following strike out were wrong in principle; that insufficient attention had been paid to Mrs Haden's claimed impecuniosity, and that justice and free speech considerations had been overlooked.

[77] Those are matters which plainly fall within the compass of Mrs Haden's appeal rights, which she duly exercised. With one exception, all the particulars provided in respect of the challenge to the unless and strike out orders fitted comfortably within the ambit of an appeal, and not judicial review.

[78] The exception relates to Mrs Haden's complaint that she was given no warning of the Judge's intention to make an unless order, nor any opportunity to make submissions. Neither was she able to advance submissions to the Court in respect of the succeeding strike out order.

[79] The unless order was made by Judge Sharp following a judicial telephone conference in which Mrs Haden participated. Thereafter, she chose not to pay the costs concerned. She has argued since that she was impecunious and unable to do so; however that contention is demonstrably incorrect. As Judge Joyce subsequently found, she simply chose not to pay the costs orders as a matter of principle. So, on the merits, the unless order was well justified. The subsequent strike out order reflected the consequences of the making of the initial unless order. The grant of that order was the subject of an appeal heard by John Hansen J, but the appeal was out of time and was declined on that ground. The plaintiffs are not entitled to judicial review simply because their exercise of appeal rights proved barren by reason of their own default: *Donnelly v Auckland District Court*[23].

[80] Mrs Haden addressed a detailed argument in respect of the unless order to Rodney Hansen J at the hearing of the substantive appeal. Her argument is covered at length in her synopsis of argument and is the subject of detailed treatment by the Judge in his appeal judgment. In order to record the precise basis upon which

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[23] Ibid.

Mrs Haden's argument as to the unless order was presented and determined on appeal, it is appropriate to set out the relevant passage from the judgment of Rodney Hansen J of 20 November 2009:

> [18] Mrs Haden's challenge to the interlocutory orders was confined to the unless order which led to her being debarred from defending the proceeding. She said that her inability to defend the proceeding, in particular to advance the defences of truth and honest opinion, placed her at a crippling disadvantage. She argued that the unless order should not have been made, relying on *Hytec Information Systems Limited v Council of City of Coventry* [1996] 1 WLR 1666 at [18] where it was said:
>
> > It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the excusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.
>
> [19] As mentioned earlier, John Hansen J refused special leave to appeal against the unless order and the interlocutory orders that led up to it on the ground of delay and, in the case of the unless order, on the further ground that r 433(7) of the District Court Rules gave the Judge clear jurisdiction to make the order. Of particular relevance is subpara (e) which provides:
>
> > (e) In particular, but without limiting the powers of the Court or the Registrar under this rule, the Court or the Registrar may:
> >
> > ...
> >
> > where any party is in default in complying with these rules or any order made thereunder, order that the proceedings if commenced by that party be stayed, or that the pleading of the party in default be struck out either at the time when the order is made or at such time thereafter and subject to such terms and conditions as may be specified in the order.
>
> [19] However, as recognised by John Hansen J, s 76 of the District Courts Act 1947 appears to provide the appellants with a further opportunity to challenge the order. Section 76 provides as follows:
>
> > **Powers of High Court on appeal**
> >
> > (1) Having heard an appeal under section 72, the High Court may—
> >
> > (a) make any decision or decisions it thinks should have been made:

(b) direct the District Court in which the decision appealed against was made—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the High Court directs; or

(iii) to enter judgment for any party to the proceedings concerned the High Court directs:

(c) make any further or other orders it thinks fit (including any orders as to costs).

(2) The High Court must state its reasons for giving a direction under subsection (1)(b).

(3) The High Court may give the District Court any direction it thinks fit relating to—

(a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The High Court may act under subsection (1) in respect of a whole decision, even if the appeal is against only part of it.

(5) Even if an interlocutory decision made in the proceedings concerned has not been appealed against, the High Court—

(a) may act under subsection (1); and

(b) may set the interlocutory decision aside; and

(c) if it sets the interlocutory decision aside, may make in its place any interlocutory decision or decisions the District Court could have made.

(6) The powers given by this section may be exercised in favour of any respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.]

[20] On its face, s 76(5) appears to give this Court jurisdiction to set aside an interlocutory decision made in proceedings which have been appealed, even though the interlocutory decision itself has not been appealed against. As Mr Wright acknowledged, the plain words of s 76(5) do not appear to limit the jurisdiction of the court to revisit earlier decisions. However, it would seem extraordinary if the power could be invoked in circumstances such as the present where, having initially failed to appeal the orders and unsuccessfully sought leave to do so out of time, the appellants seek to challenge an interlocutory decision which was fundamental to the way in

which the proceedings had been conducted. A successful challenge would not only run counter to a decision of this Court on the application for leave to appeal but could potentially dispose of the substantive appeal

[21] As Mr Wright submitted, that cannot be what is intended by s 76(5). Its function and purpose is to ensure that interlocutory decisions can be set aside if required in order to give effect to the decision on appeal, not to expand the right of appeal to permit a party to alter the basis of the case they presented at trial. As observed in *Paper Reclaim Limited v Aotearoa International Limited* [2007] 2 NZLR 124 at [15]:

[22] There are strong policy reasons why the courts should take a restrictive approach to applications by parties to litigation who seek to alter the basis of the case that they presented at trial, after judgment has been given. They reflect a strong societal interest in the final determination of concluded litigation. This interest must be balanced against the individual interests of particular litigants who, having received an adverse judgment, consider that the approach they took at the trial of their dispute was based on an incorrect premise and that a new approach is necessary to achieve the right result. It has been said that part of the societal interest lies in the risk that a liberal approach would lead to temptation by dissatisfied litigants to commit perjury. Another consideration is the unfairness to a successful litigant in allowing the protraction of proceedings by its opponent because its witnesses now say their evidence was mistaken. To these ends courts are required to function within prescribed limits framed to ensure there is an end to litigation.

[23] Considerations of fairness and justice point strongly against permitting the right of appeal in this case to be used to undermine the basis on which the substantive hearing was conducted. The potential prejudice to the plaintiffs (of whom only one is a party to the appeal) is obvious. The unless order shaped the way in which the case proceeded to a hearing. A successful challenge at this stage would effectively require the entire proceeding to be relitigated.

[24] No reasons for the failure to appeal in time or to explain the lengthy delay were put before John Hansen J. The appellants applied unsuccessfully for leave to adduce further evidence on appeal but that did not include evidence relevant to the issue of the unless order and the order debarring the appellants from defending at the trial – see judgment of Asher J in this proceeding of 13 February 2009 at [19].

[25] Mrs Haden sought to explain from the bar the reasons why no steps were taken to appeal at the time. Her version of events was not accepted by Mr Wright. Even if I had the power, there is no evidential basis which would permit me to conclude that the delay in challenging the interlocutory orders could be justified.

[26] John Hansen J rejected a submission by counsel for the appellants (who were represented for the purpose of the application for leave) that Judge Sharp was not entitled to make the unless order. He said at paras [19]-[20]:

> [19] Given the way in which these proceedings had been conducted by the appellants, in particular Mrs Haden, it is

> clear that Judge Sharp considered it was necessary to make orders ensuring that earlier orders made by the Court were complied with. In my view, r 433 clearly empowers the Judge to make the unless order that she did and I do not accept Mr Finnigan's submission that the only course available to a party in whose favour a costs order has been made is to pursue it as a civil debt.
>
> [20] Given the power invested in the District Court Judges by r 433, there was, in my view, clear jurisdiction to make an unless order.

> [27] The appellants have been unable to point to any basis on which I should go behind the judgment of John Hansen J and give them a second bite of the cherry as an incident of the substantive appeal. I would interfere with the interlocutory order only if it is necessary to give effect to the decision reached on the merits of the appeal.

[81] Rodney Hansen J's refusal to give the present plaintiffs " … a second bite of the cherry as an incident of the substantive appeal" was, with respect, a thoroughly understandable outcome. But this Court is now asked for the second time to accommodate a second bite of the cherry, albeit in the context of a subtly different argument which essentially attacks not the making of the unless order itself, but the failure of the District Court to accord the plaintiffs a discrete opportunity to be heard on the topic before the order itself was made.

[82] Mr Orlov told the Court at the hearing of the present application that the process point was not taken before Rodney Hansen J because Mrs Haden, a lay litigant, did not appreciate the distinction between substantive and process arguments. He says that having now taken advice from counsel she should be given an opportunity of running in the present proceeding an argument which could have been advanced before Rodney Hansen J but was not.

[83] I do not accept that the plaintiffs are entitled to special consideration, simply because they chose not to be represented by counsel at the hearing of the earlier appeal. Mrs Haden was by no means impecunious. She could have instructed counsel if she wished. The Court will not ordinarily grant self-represented litigants additional latitude, because the interests of justice encompass also the interests of opposing parties.

[84] The process argument could and should have been raised before Rodney Hansen J. It would be artificial and unjust to the present defendants to permit the plaintiffs to draw a distinction between procedural and substantive arguments in respect of the making of an unless order. The topic having been directly before Rodney Hansen J on appeal, all aspects of the available arguments could and should have been run before him. In my view it is not appropriate to permit the plaintiffs a second bite of the cherry. To do so would be to countenance an abuse of process.

Materiality of error

[85] Mr Wright submits that even if Mrs Haden ought to have been given an opportunity to make submissions about the making of an unless order, the error is not material for judicial review purposes.

[86] It is well established that in the context of judicial review proceedings, a remedy will be refused in the discretion of the Court if the error relied upon has not been carried forward into the ultimate decision of the Court. That consideration is of relevance at two separate procedural levels in this case.

[87] First, the present proceeding ought not to be permitted to proceed if, had Mrs Haden been permitted to argue against the making of an unless order, such an order would clearly have been made in any event. The second level concerns the hearing of the defamation proceeding itself. By reason of the striking out of her statement of defence Mrs Haden was unable to rely upon the pleaded defences, but nevertheless she participated fully in the formal proof hearing and was able to place a great deal of material before the Court. If the striking out of her defence did not ultimately make any difference to the outcome of the defamation proceeding, then this Court would not grant the relief sought in the amended statement of claim.

[88] The first of these questions concerns the circumstances in which the unless order was made. It is not suggested that the present plaintiffs were not heard in respect of the original costs orders. Judge Sharp heard argument and gave detailed reasons in a judgment dated 19 March 2007 in respect of the striking out of the counterclaim which had been filed by the present plaintiffs.

[89] In a supplementary decision of 10 May 2007, she fixed costs in respect of the unsuccessful application by the present plaintiffs to strike out the defamation proceeding.

[90] On 3 July 2007, following a judicial conference, Judge Sharp made the unless order with which the present plaintiffs failed to comply. On 19 July 2007, the statements of defence of the present plaintiffs were struck out in consequence. The present procedural challenge is to the making of the unless and strike out orders without hearing from the present plaintiffs.

[91] Later, bankruptcy proceedings were commenced against Mrs Haden in respect of the unpaid costs. That generated a degree of activity on Mrs Haden's part. She applied to the District Court for both a stay of the costs orders and for a review of the unless order and the order striking out her defence. Both applications were very significantly out of time. They were heard by Judge Joyce on 3 July 2008, several months after the hearing of the defamation proceeding itself, but before the substantive defamation judgment was delivered.

[92] Although the applications were very late, Judge Joyce nevertheless considered them on their merits; so the present plaintiffs were eventually accorded an opportunity to place before the Court the arguments which they would have addressed to the Court against the making of an unless order, had they been given an opportunity to do so.

[93] The hearing before Judge Joyce of the review application took place at a time when bankruptcy proceedings remained on foot in this Court. The Judge noted the comments of Associate Judge Abbott in the bankruptcy proceedings, to the effect that the failure of the present plaintiffs to pay the outstanding legal fees appeared to be a matter of choice, rather than ability, given Mrs Haden's very substantial capital assets, and more modest cash savings. Judge Joyce also noted that she had made the same point in an affidavit filed by her in support of the review application.

[94] A great many points were made to Judge Joyce by the present plaintiffs in support of their argument that the unless order ought to be reviewed. Judge Joyce

characterised them as "obviously quite extraneous". By way of example only, I mention Mrs Haden's contention that she was entitled to a set off against some or all of the amount of the costs because she had been assaulted in 2006 by an associate of Mr Wells. She also contended that the costs ought not to be payable by reason of a failure of the plaintiffs in the District Court to file an amended statement of claim as directed in an order made at the same time as the unless order.

[95] Such arguments plainly stood no chance of success. Judge Joyce dismissed the review application on the merits.

[96] For present purposes, the significance of the review application and the review judgment is that Mrs Haden had an opportunity on that occasion to place before the District Court the materials which she would have wished to rely upon, had she been given an opportunity to address the Court prior to the making of the unless order. Nothing in those submissions (which I have read) would have justified a different outcome. Given Mrs Haden's stance in relation to costs, the making of an unless order would have been inevitable in any event.

[97] So Mrs Haden's inability to address the Court prior to the making of the unless order was not material, and cannot in my view serve as the foundation for a successful judicial review claim.

[98] The second aspect of the materiality argument concerns the course of the formal proof hearing in the District Court. Because her statement of defence had been struck out she was unable to advance her honest opinion defence. But that did not mean that she was significantly constrained in her participation at the hearing.

[99] As to the procedure followed, Judge Joyce said in his substantive judgment:

> [42] As contemplated by the relevant Rules, evidence in chief was exchanged in affidavit form prior to the hearing. Thus, although I allowed some additional oral evidence in chief on each side, the hearing was largely occupied with cross-examination arising out of the affidavits.
>
> [43] Despite the technical parameters (procedurally speaking) and given that Mrs Haden was a litigant in person, I made clear at the outset of the hearing that, speaking generally, I would not encourage any

> sustained endeavours to contain or restrain the nature of the cross-examination. But I remained fully conscious that it would fall to me ultimately to determine, when necessary, where the boundaries lay.
>
> [44] Thus it was possible for the hearing to proceed (as in fact it did) with little by way of interruption or diversion.
>
> [45] In that process, and as a matter of fact, Mrs Haden was actually able to give, or allude to, all of the evidence she apparently had that might have been adduced at a defended hearing – although, of course, she could not run her originally pleaded defences as such.
>
> [46] In my view, that pragmatic approach has been advantageous to the ends of justice.

[100] I consider it largely inevitable also that a Court hearing the present proceeding would hold that the strike out order against the present plaintiffs did not ultimately affect the outcome of the defamation proceeding. A reading of Judge Joyce's very long defamation judgment makes it clear that the proposed honest opinion defence could not have succeeded. For present purposes it is sufficient to hold (as I do) that, had the present plaintiffs been given an opportunity to address the District Court in respect of the making of an unless order, they could not have succeeded in persuaded that Court to refrain from doing so.

[101] In summary, I consider the present proceeding to amount to an abuse of process, insofar as it is concerned with the circumstances surrounding the making of the unless order. Further, any procedural error was not material, because the unless order would have been made even if the Court had heard from Mrs Haden beforehand. That being so, those causes of action which rely upon an alleged breach of natural justice in respect of the making of the unless order cannot succeed and ought to be struck out.

Delay

[102] Mr Wright argues that the causes of action resting on the unless orders ought to be struck out on the separate ground of undue delay and consequent prejudice to the defendants. The unless order and the subsequent strike out order were made in mid-2007. The substantive defamation judgment and the accompanying review judgment of Judge Joyce were delivered in mid-2008.

[103] This proceeding was not commenced until 2010. The delay has been significant. But there has been a good deal of activity during the intervening period, in that the appeal to Rodney Hansen J has been heard and determined. I have some sympathy for the argument that the defendants ought not to be put through a further round of debilitating litigation. And although Mr Orlov submits that there is no proof of prejudice, the mere existence of such litigation, especially in the context of an on-going attack on Mr Wells' reputation, is of itself prejudicial.

[104] Nevertheless, I do not consider the delay to justify of itself an order striking out the statement of claim or any part of it. Delay will ordinarily count as a discretionary factor when relief is considered.

Challenge to defamation judgment

[105] I turn to the remaining causes of action which are concerned with the defamation judgment itself. At paragraph 33 of the amended statement of claim the plaintiffs plead that Judge Joyce's substantive defamation judgment of 30 July 2008 was erroneous in law, in that it took into account irrelevant considerations and failed to take into account relevant considerations.

[106] In the supporting particulars to paragraph 33 it is alleged that Judge Joyce:

> (a) Failed to take into account that the plaintiff's own statements proved on a civil standard that the trust had not existed. Consequently, the defence of truth or fair comment was available in support of assertions that AWINZ was not a legal entity at the time. Nonetheless, it was described as an organisation.
>
> (b) Failed to take into account that assertions made by Mr Wells to the Minister, the public and third parties as to the existence of the trust could be argued as either misleading or false and this prima facie was evidence in support of the defence of truth or fair comment.
>
> (c) Failed to take into account that claims against the plaintiff for raising trustee matters in her perceived view in the public interest via defamation proceedings was contrary to s 14 and s 27 of the New Zealand Bill of Rights Act 1990. It was an unacceptable restriction on the liberty of free speech in democratic society.
>
> (d) Failed to take into account that anything stated in Parliament or raised with Parliament could not be the subject of defamation

proceedings or considered as such and hence was an irrelevant consideration.

(e) Failed to take into account that the plaintiffs had been directed to file an amended pleading and had not done so.

(f) Failed to take into account that the defamatory matters raised in the evidence were not pleaded and allegedly occurred after the statement of claim was filed and hence the plaintiff was entitled to full procedural rights of hearing and defence on these matters.

(g) Found that she had breached a trademark whereas she was the registered owner of the trademark, such being contrary to the Trademarks Act 2002 and not having been pleaded as a claim against her.

[107] The allegation appearing at paragraph 33(f) was the subject of argument before Rodney Hansen J. He deals with it at [34]-[37] of his judgment of 20 November 2009. The plaintiffs are not entitled to relitigate an issue already determined.

[108] The remaining particulars pleaded under paragraph 33 are all matters which could, and should, have been raised on appeal. In my view it is an abuse of process to relitigate them now. Beyond that, it is appropriate to observe that:

a) The particulars alleged in paragraph 33(a)-(c) appear to overlook large tracts of the judgment of Judge Joyce, which extensively review a number of considerations, including those pleaded;

b) The allegation in paragraph 33(d) is misconceived. Judge Joyce was entitled to refer to the fact that a particular topic had been raised in Parliament. Evidence may be led and relied upon as to the proceedings of Parliament provided the purpose is not to question or impeach those proceedings;[24]

c) Paragraph 33(e), which refers to the fact that the present defendants had not filed an amended pleading in the District Court, despite an order requiring them to do so, could not possibly form the basis for an application for judicial review;

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[24] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

d) Likewise, Judge Joyce's remarks concerning trademark infringement are incapable of founding a successful judicial review application. The Judge made no express findings on the point.

[109] Paragraph 33 of the amended statement of claim amounts to an abuse of process and must accordingly be struck out.

[110] Paragraph 34 alleges a denial of natural justice. The pleaded particulars assert that Judge Joyce:

> (a) Heard evidence of matters occurring after the statement of claim was filed to which the plaintiff was denied a proper hearing with right of reply, cross-examinations and calling evidence.
>
> (b) Made [a] decision that the plaintiff was well able to pay costs and elected not to do so without giving the plaintiff an opportunity to file evidence on or to address this issue.
>
> (c) Trawled the internet during deliberation after hearing, without giving the plaintiff an opportunity to comment on or address what he had seen relating to the plaintiff or to address whether such matters had any consequences for the plaintiff's case.
>
> (d) Denied the plaintiff the right to argue the truth of her statements whilst using her affidavit in the formal proof proceedings as further evidence of untruth and defamation. Therefore there was a presumption of untruth via strike out which denied her the opportunity of arguing that her subsequent statements were true.
>
> (e) Heard and accepted evidence on and made findings on matters such as trademark breaches, unlawful incorporation of a company and other matters without providing the plaintiff an opportunity to address such matters in a proper court hearing.

[111] Paragraph 34(a) is the same point as appears in paragraph 33(f), and was the subject of argument before Rodney Hansen J. It cannot now be relitigated. Paragraph 34(b) is irrelevant to the substantive defamation judgment. Paragraph 34(c) was raised on appeal and was expressly dealt with at [59]-[61] of the judgment of Rodney Hansen J. It cannot now be relitigated.

[112] Paragraphs 34(d) and (e) plead matters that were directly before Rodney Hansen J at the time of the appeal. He addressed them at [28]-[33]. Again, it is an abuse to reventilate these arguments by way of judicial review. Accordingly, paragraph 34 must also be struck out in its entirety.

[113] I turn to paragraph 35. Earlier I set out at [60] of this judgment the particulars pleaded in paragraph 35(h). They are intended to support an allegation of apparent bias. The remaining particulars (said to support an allegation of unlawfulness and apparent bias) assert that Judge Joyce:

> (a) Made [a] decision [at 26] that 'in a practical sense it (Verisure) is often the operational instrument or alter ego of Mrs Haden' without any evidence.
>
> (b) Made [a] decision that her non-payment of costs was 'a deliberate (in some way even seen by her, perhaps as tactical) decision on the part of Mrs Haden rather than one born, for example of impecuniosity' without hearing any evidence.
>
> (c) Found [at 51] that Mrs Haden's legal charity had never pursued a charitable purpose, nor that she had ever had a special interest in charities, without adducing evidence from either party.
>
> (d) Found passing off when that cause of action was not pursued by the plaintiffs [at 53-58].
>
> (e) At paragraph [99] of his judgment, found that the defendant had made a misleading statement, yet precluded this defence from being run.
>
> (f) Made the decision that the plaintiff had published material designed to discredit AWINZ 2000 when in reality the said entity did not exist in fact or in law.
>
> (g) Made decisions that the plaintiff had deliberately interfered with the legitimate business activities of AWINZ 2000 and caused damage when that organisation did not exist in fact or in law at the relevant times.

[114] Paragraph 35(a) is unsustainable. Judge Joyce's finding is amply supported by evidence that Verisure was Mrs Haden's company, and the corporate vehicle for her private investigation practice.

[115] Likewise, there is ample evidence to support the comments referred to at 35(b). The allegation appearing at 35(c) is not available to the plaintiffs. At [51] Judge Joyce simply found that Mrs Haden had proffered no evidence that her charity had pursued a charitable purpose, or that she had ever had a special interest in charities. He made no express finding to that effect.

[116] Paragraph 35(d) is likewise unsustainable. It is plain from the record that the plaintiffs were indeed pursuing a passing off cause of action, although they sought only declaratory and injunctive relief.

[117] I am unable to understand para 35(e) which refers to [99] of the judgment. It reads:

> [99] The end point here is that the clear impression created by the correspondence and the associated application is of a trust having been formally set up by the time Mr Wells sent off the original application.

[118] The paragraph relied upon makes no reference, even by implication, to a misleading statement by Mrs Haden, and certainly contains no finding to that effect.

[119] Paragraphs 35(f) and (g) amount to an attack on the Judge's substantive findings. As such they ought to have been raised by the plaintiffs at the hearing of the appeal before Rodney Hansen J. They cannot now be revisited.

[120] Finally I turn to para 35(h) which pleads some 14 particulars in support of a claim of apparent bias. These complaints (or some of them at least) were also before Rodney Hansen J. He referred to them at [69]-[71] of his judgment, concluding that the trenchant criticism of Mrs Haden, which appears at times throughout Judge Joyce's judgment, should not be allowed to "… obscure the realities which lay behind them. His findings are unassailable as a matter of fact and law".

[121] It is nevertheless arguable that the apparently generalised complaint made by Mrs Haden at the hearing of the appeal about Judge Joyce's derogatory comments do not preclude a separate challenge on bias grounds in judicial review proceedings. Assuming, in the plaintiffs' favour, that this aspect of the claim is not an abuse of process, the particulars provided nevertheless fall far short of constituting a tenable cause of action.

[122] In *Muir v Commissioner of Inland Revenue*,[25] the Court of Appeal resolved differences between two lines of authority as to the test for apparent bias. Hammond J, delivering the judgment of the Court said:

> [62] In our view, the correct inquiry is a two-stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.

[123] The *Muir* test has subsequently been approved by the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd.*[26] In *Muir* the Court was principally concerned with the question of judicial recusal. Towards the end of its judgment it considered an argument that the Judge concerned ought not to sit in circumstances where, on a previous occasion, the Judge had made adverse comments concerning a litigant. As to that, the Court said:

> [102] Turning now to adverse comments, Judges are duty bound to refrain from making unnecessary comments. The various codes of judicial conduct – including the Australasian ones – call on Judges to be courteous to the litigant, observe proper decorum, and to be particularly cautious and circumspect in their language. And Judges should not issue oral condemnations that are unrelated to the furtherance of the cause to be decided or are simply gratuitous.
>
> [103] Comments as such will ordinarily not suffice to warrant recusal. What is important is that commentary should not however demonstrate that the Judge has formed a fixed opinion as to the ultimate merits of the matter pending before him or her. It has to be shown, in short, that the Judge does not have an open mind.
>
> [104] In this case the criticism seems to be that comments about Dr Muir's evidence were unnecessary, gratuitous and unduly severe.
>
> [105] As to relevance, the Judge's findings based on the evidence of Dr Muir were directly relevant to significant issues in the substantive income tax challenge.
>
> [106] The Judge's findings were undoubtedly firm, but they were in measured terms. And as the Judge correctly noted, he was under a duty to

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25 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495.

26 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35.

> give reasons for rejecting Dr Muir's evidence, particularly given the importance of the evidence to issues in the case.

[124] There can be no doubt that Judge Joyce formed an unfavourable view of Mrs Haden, both as a witness and as a litigant. He expressed his views to that effect in unmistakably direct language. Some judges might perhaps have adopted a somewhat softer approach. But his criticisms have a solid foundation in his factual and legal findings. Indeed, as Rodney Hansen J concluded, those findings are unassailable as a matter of fact and law.

[125] In an immensely long decision (exceeding 300 paragraphs), the Judge investigated the defamation claims of the plaintiffs, and Mrs Haden's response, in great detail. On a careful reading of the judgment, it is evident that his criticisms of Mrs Haden sprang from those findings. I am satisfied that this was not a case in which the Judge has impermissibly allowed his unfavourable view of Mrs Haden as a litigant to colour the findings. In my view also, that would be the view reached by an intelligent, fair-minded lay observer, reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case.[27]

[126] It is to be remembered that Judge Joyce was required to determine a claim for exemplary damages, and was accordingly required to focus on the behaviour of the present plaintiffs and in particular that of Mrs Haden. Exemplary or punitive damages are available where a defendant's conduct has been high-handed to an extent calling for punishment beyond the direct consequences of an award of compensatory damages. In other words, a plaintiff must show that a defendant has acted in flagrant disregard of the plaintiff's rights before an award of exemplary damages will be justified.

[127] So Judge Joyce was obliged to explore Mrs Haden's conduct, and to make adverse findings (if he thought them to be warranted), couched in direct and condemnatory terms. He found that the plaintiffs in the defamation proceeding had established an entitlement to exemplary damages, and in so doing had of necessity to express himself in a manner that reflected no credit on Mrs Haden.

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[27] To use the language of Blanchard J in *Saxmere* at [5].

[128] It is to be observed that he noted (at [333]) that the claim for exemplary damages was made out on Mrs Haden's own evidence, and that the ultimate outcome would have been no different had her statement of defence not been struck out.

[129] In these circumstances there is simply no basis upon which it would be proper to permit a claim of apparent bias to go to trial. Paragraph 35 of the statement of claim will accordingly be struck out also.

Conclusion

[130] In relation to the causes of action questioning the unless order and Judge Sharp's striking out of the plaintiff's defence, I have made the following findings:

a) The striking out of the plaintiffs' defence was not unlawful or in breach of natural justice;

b) The present proceeding amounts to an abuse of process, insofar as it is concerned with the circumstances surrounding the making of the unless order;

c) Any procedural error of Judge Sharp was not material, because the unless order would have been made even if the Court had heard from Ms Haden beforehand;

d) No review argument based on Ms Haden's alleged impecuniosity could succeed in the present case.

[131] In relation to the causes of action questioning Judge Joyce's substantive decision, I have made the following findings:

a) The matters of which the plaintiffs complain were either addressed in Rodney Hansen J's judgment or should properly have been raised during that appeal. It would be an abuse of process to relitigate them now;

b) The same considerations apply to the issue of whether there was a denial of natural justice in the substantive proceedings;

c) The cause of action raising issues of unlawfulness or apparent bias by Judge Joyce cannot succeed. The Judge's criticisms of Ms Haden were solidly founded in his factual and legal findings.

[132] The plaintiffs' claim is accordingly struck out in its entirety.

Costs

[133] The defendants are entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J