IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-006349
[2013] NZHC 735

BETWEEN	FRANCISC CATALIN DELIU Plaintiff
AND	BOON GUNN HONG Defendant

Hearing: 4 and 5 October 2012
(with further written submissions 22 February 2013, 15 March 2013, 27 March 2013 and 4 April 2013)
(Heard at Auckland)

Appearances: F C Deliu (Plaintiff/Respondent) in person
A D Banbrook for Defendant/Applicant

Judgment: 12 April 2013

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to defendant's application to strike out claim]

This judgment was delivered by Associate Judge Osborne
on 12 April 2013 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] This is a defendant's application for an order striking out the plaintiff's statement of claim.

[2] Mr Deliu practises as a barrister. Mr Hong practises as a conveyancing solicitor.

[3] Mr Deliu sues Mr Hong in tort for things said and done in mid-2010. Since then a substantial body of litigation has grown out of the issues between them. The background is captured at the start of the judgment of Winkelmann J in a judicial review proceeding, *Deliu v Hong*[1] which records:

> [1] In May 2010 two junior barristers in Mr Deliu's chambers, were retained as counsel in proceedings issued against a conveyancing solicitor, Mr Hong. Mr Hong responded to service of those proceedings upon him by sending a letter to the two barristers asserting that the proceedings were without merit, and threatening he would take various steps if they did not withdraw the action against him. Mr Deliu regards himself as the senior member of the chambers, and so took it upon himself to respond to Mr Hong, and to lay a complaint with the New Zealand Law Society (the Law Society) about the contents of Mr Hong's letter. Sometime later, Mr Hong laid a complaint with the Law Society about Mr Deliu.
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> [2] There ensued a period of months during which Mr Deliu and Mr Hong exchanged insults and threats in correspondence with each other, often copying the Law Society into their correspondence and seeking to enlarge the scope of their respective complaints. The Law Society continued to receive the correspondence and, on occasion, forward it to the other party to other party for comment.

[4] The Schedule to this judgment contains references to some of the items of Mr Hong's correspondence and particular content which Mr Deliu says were defamatory. The Schedule (including with typographical errors) is as attached to the first judgment issued in this proceeding – by Venning J on an injunction application in October 2010.[2]

[5] Three other proceedings are relevant to this proceeding:

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1 *Deliu v Hong* [2012] NZHC 158.

2 *Deliu v Hong* HC Auckland CIV-2010-404-006349, 27 October 2010 (Venning J).

1. **The clients' District Court proceeding** – the 2010 proceeding referred to by Winkelmann J, in which clients of Amicus Lawyers Limited ("Amicus") sued Mr Hong and others for negligence on a property purchased.[3]

2. **Disciplinary proceeding** – pursuant to a written complaint made to the New Zealand Law Society Lawyers Complaints Service, by Mr Deliu against Mr Hong, dated 6 May 2010 in which Mr Deliu made complaint that Mr Hong had treated fellow practitioners in a disrespectful manner and had threatened and improperly sought to coerce Mr Deliu's colleagues into abandoning legal processes; a complaint responded to by Mr Hong on 23 May 2010 with responses and a "cross complaint"; a decision of the Standards Committee dated 24 November 2010, resolving to take no further action on Mr Deliu's complaint; a determination dated 3 June 2011 by the Legal Complaints Review Officer confirming the determination of the Standards Committee; a hiatus while Mr Deliu pursued judicial review proceedings, in which the review officer's decision was quashed – see below at[6](c); a further review by the Legal Complaints Review Officer dated 25 June 2012 reversing the determination of the Standards Committee and referring Mr Hong's conduct to the Lawyers and Conveyancers Disciplinary Tribunal for consideration; disciplinary charge laid by the Legal Complaints Review Officer in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal on 10 September 2012; and, since the hearing of the present application, a decision of the Tribunal dated 22 March 2013.[4]

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3 *Ma v Ho* DC Auckland CIV-2010-004-000956, 20 December 2010 – this was a judgment by Judge M B Sharp granting a strike out of Mr Hong's counterclaim with an order for indemnity costs against Mr Hong. The proceeding was subsequently discontinued. Mr Hong unsuccessfully appealed against the quantification of indemnity costs: see *Hong v Zhao* HC Auckland CIV-2011-404-1838, 11 August 2011.

4 *In the matter of Boon Gunn Hong* [2013] NZLCDT 9.

3. **The Judicial Review proceeding** – in which Winkelmann J quashed the decision of the Legal Complaints Review Officer. The review application was remitted back to a Review Officer for reconsideration.[5]

[6] In this proceeding three judgments have been delivered to date, namely:

(a) A judgment of Venning J on 27 October 2010 dismissing Mr Deliu's application for injunctive relief in relation to publication of certain information by Mr Hong.[6]

(b) A judgment of Associate Judge Bell on 17 June 2011 striking out the claims of both Mr Deliu and a second plaintiff (his legal practice company, Amicus and Mr Hong's counterclaim.[7]

(c) A judgment of Courtney J on 5 April 2012 granting Mr Deliu's application for review and reinstating his claim (but declining a parallel application by Amicus) and dismissing Mr Hong's cross application.[8]

The parties and the pleadings

[7] Mr Deliu remains in the proceeding (reinstated) as sole plaintiff. Mr Hong is the defendant.

[8] The current pleading is a second amended statement of claim dated 29 October 2010 filed at a time when both Mr Deliu and Amicus were plaintiffs. I will refer to it for convenience as "the statement of claim".

[9] By the statement of claim, Mr Deliu alleges that Mr Hong in writing published to third parties a number of scandalous allegations concerning Mr Deliu.

[10] Mr Deliu pleads four causes of action against Mr Hong, namely:

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5 *Deliu v Hong*, above n 1.
6 *Deliu v Hong*, above n 2.
7 *Deliu v Hong* HC Auckland CIV-2010-404-006349, 17 June 2011 (Associate Judge Bell).
8 *Deliu v Hong* [2012] NZHC 679.

1. the tort of abuse of process, alleging Mr Hong's misuse of the processes of the New Zealand Law Society Lawyers Complaints Service;

2. the tort of malicious prosecution, alleging that Mr Hong maliciously instituted with the New Zealand Society Lawyers Complaints Service and pursued complaints against Mr Deliu;

3. under the rule in *Wilkinson v Downton*,[9] alleging that Mr Hong intentionally inflicted emotional harm on Mr Deliu;

4. a final cause of action explained as either as the tort of injurious (also known as malicious) falsehood or as defamation.

Mr Hong's defence

[11] Mr Hong filed an amended defence in response to Mr Deliu's second amended statement of claim. I will refer to this document for convenience as "the statement of defence".

[12] The statement of defence takes issue with a number of facts and allegations in the statement of claim.

[13] Mr Hong's statement of defence, in addition to pleading to factual allegations contains statements relating to legal principles associated with the various torts. He also asserts affirmative defences.

[14] The statement of defence by way of affirmative defences says:

> **STATEMENT OF DEFENCE TO THE SECOND CAUSE OF ACTION BY THE PLAINTIFFS - MALICIOUS PROSECUTION**
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> 21. In response to the Plaintiff's second cause of action, at **Paragraph 21** the Defendant repeats the pleading above at paragraphs 2, 5, 6, 9, 11, 13, 15, 19 and 20 above and further states the pleaded action of malicious prosecution is:
>
> (a) not available in civil proceedings; and

[9] *Wilkinson v Downton* [1897] 2 QB 57.

(b) not available in disciplinary proceedings.

- and it follows that the second cause of action in malicious prosecution is untenable.

STATEMENT OF DEFENCE TO THE THIRD CAUSE OF ACTION BY PLAINTIFF- INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

22. In response to the Plaintiff's third cause of action, at **Paragraph 22** the Defendant repeats the pleading above at paragraphs 1-21 hereof inclusive and states:

(a) the Defendant denies that the correspondence which was in any event privileged, either under s 14 of the Defamation Act or litigation privilege, was intended to cause or did cause the Plaintiff emotional distress;

(b) that, on the contrary, the conduct of the Plaintiff has at all material times been belligerent, forceful and threatening to the Defendant:

(c) that in any event the cause of action in intentional infliction of emotional distress is untenable on the facts alleged in the pleading of the Plaintiff.

STATEMENT OF DEFENCE TO THE FOURTH CAUSE OF ACTION BY PLAINTIFF - DEFAMATION/MALICIOUS FALSEHOOD

23. In response to the Plaintiff's fourth cause of action, at **Paragraph 23** the Defendant repeats the pleading at paragraphs 1-22 hereof inclusive and states that:

(a) the correspondence complained of by the Plaintiff insofar as it relates to the complaints procedure of the NZLS is privileged under s 14 of the Defamation Act and cannot support the fourth cause of action in that event.

(b) That insofar as the correspondence complained of consists of communications in the context of the MAs' and Wang's actions is privileged in the context of the litigation and cannot support the cause of action pleaded in defamation/malicious falsehood by the Plaintiff.

24. By way of alternative defences, the Defendant relies upon:

(i) the defence of truth - s 8 of the Defamation Act - that the matters set out in the correspondence from the Defendant to other parties, including the Plaintiff, are truthful;

(ii) the defence of honest and genuine opinion - ss 9 and 10 of the Defamation Act - that the subject matter of

the correspondence from the Defendant to the Plaintiff and other parties are honest opinions and conclusions based on reasonable grounds and genuinely held;

(iii) the defence of consent to publication - s 22 of the Defamation Act - that in copying the parties' correspondence to third parties, the Plaintiff has consented to publication; and

(iv) the defence of freedom of expression - s. 14 of the NZ Bill of Rights Act 1990 - the Defendant's observations and conclusions from published articles such as news and judicial decisions in relation to the Plaintiff and shared by the Defendant with his fellow colleagues are so protected.

Striking out a claim – the principles

[15] High Court Rule 15.1 makes provision for orders striking out all or part of a pleading. Rule 15.1(a) permits striking out, if (amongst other grounds) the pleading does not disclose a reasonably arguable cause of action or defence.

[16] I adopt the following as principles applicable to the consideration of this application for an order striking out a statement of claim:

(a) The Court is to assume that the facts pleaded (in this case, by the plaintiff) are true (unless they are entirely speculative and without foundation);

(b) The claim must be clearly untenable in the sense that the Court can be certain that it cannot succeed;

(c) The jurisdiction is to be exercised sparingly and only in clear cases;

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

(e) The Court should be slow to rule on novel categories of duty of care at the strike out stage.[10]

Relevance of previous decisions in this proceeding

[17] In the course of the three interlocutory judgments previously delivered in this proceeding, observations were made as to the conduct of the parties in the proceeding. As Mr Banbrook for Mr Hong placed some emphasis on those decisions and comments made in the course of them, I will summarise the decisions.

Judgment of 27 October 2010 – Venning J

[18] In the first, Venning J declined injunctive relief. Focusing on the defamation and injurious falsehood claims, his Honour found that Mr Deliu had failed to satisfy the Court that there were clear and compelling reasons to support the issue of an injunction to protect him from those torts. Defences of absolute privilege, honest opinion and truth were potentially available to Mr Hong. His Honour found that Mr Deliu had no arguable case in relation to his remaining causes of action. Even had Mr Deliu had arguable causes of action, injunctive relief was to be denied on the balance of convenience.

[19] Matters of background which were reviewed by his Honour included what his Honour described as "an inappropriate and unprofessional message" which Mr Deliu had left on Mr Hong's answer phone on 9 June 2010. As Venning J recorded, the message stated inter alia:

> I am just letting you know I am going to sue you now.
>
> I am going to file proceedings against you and they are going to be serious proceedings.
>
> You have crossed the line way too far and you know unfortunately you are just another Kiwi lawyer and I am going to show you how I deal with you. ...
>
> Your complaint I have no doubt will be defamatory and I am going to sue you in defamation and I just won a defamation judgment against another

[10] See *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).

> Kiwi..eh..Chinese...eh... wannabe lawyer ... eh... and effectively I will send you a copy of that judgment Mr. Hong.
>
> You should know very seriously that I have gone to war with Bell Gully, Russell McVeagh, with Judges of New Zealand, I am really not afraid of any of you, I can take all of you on, because frankly ..... eh ..... you are not competent lawyers, as a group ... eh ...., so anyway feel free to make any complaint you want, but, first ...eh... know that there will be retaliation for what you do, I am not going to sit idly by and let you do what you have been doing, there will be consequences and you will be sorry for what you done in the end and I am leaving you this personal word on purpose, which you can send Law Society 'cos I told them how corrupt they are too..

[20] Venning J recorded the subsequent degeneration of correspondence between the parties. He noted the issuing of complaints and counter complaints to the Law Society, the lodging of a complaint by Mr Deliu with the police as to alleged blackmail on the part of Mr Hong and what his Honour referred to as Mr Deliu's declining to accept an offer of mediation from the New Zealand Law Society, whom Mr Deliu accused of "dereliction of statutory duty and corruption".

[21] Later in his judgment, Venning J noted a further passage in Mr Deliu's telephone message which his Honour indicated exemplified the "direct and forceful" correspondence and dealings of Mr Deliu:

> Well feel free Mr Hong, nothing you do scares me and I am going to show you what I am going to do ... eh ... if you can't take a case like a man and like a professional ... acting completely unprofessionally now it is time to pay and you will see how you will pay ...
>
> the more you escalate ... the more I will respond.

Judgment of 17 June 2011 – Associate Judge Bell

[22] In the second judgment, Associate Judge Bell was dealing with an application by Mr Hong to strike out the claim by Mr Deliu's law company, Amicus. In his oral judgment, his Honour made a striking out order on the grounds that the proceeding was frivolous, notwithstanding that neither Mr Deliu nor Mr Banbrook had referred to that ground in their submissions.[11] His Honour resorted to the power of the Court,

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[11] *Deliu v Hong* above n 7, at [36].

of its own motion, to bring an end to a proceeding when a case is frivolous.[12] His Honour concluded that:[13]

> ... to allow this proceeding to continue will be wasteful of the Court's time and it will reflect adversely on the parties, on the law and on the legal profession.
>
> The arguing between these parties has to be brought to an end. The Court's message to the parties is: stop it.

[23] Earlier, his Honour had observed:[14]

> Both men would complain if I tarred them with the same brush. To that extent, it is necessary to record that there are differences between the way Mr Hong has conducted himself and the way that Mr Deliu has conducted himself. Mr Hong has made an attack on Mr Deliu that goes beyond Mr Deliu's professional capacity and attacks him in a general way that casts a slur on the character of Mr Deliu. Mr Deliu, on the other hand, has concentrated his attack simply on the professional conduct of Mr Hong. Mr Deliu has taken a consistently combative stance. He is unrepentant and unforgiving. For his part, Mr Hong has shown a distinct lack of judgment.

[24] Apparently overlooking the fact that there was no application to strike out Mr Deliu's statement of claim, Associate Judge Bell made orders striking out the claims both of Amicus and of Mr Deliu, a matter remedied in the subsequent judgment of Courtney J. Turning to the arguments as to reasonable cause of action, Associate Judge Bell noted on the defamation (and presumably injurious falsehood) claim Mr Banbrook's submission for Mr Hong. Mr Banbrook had submitted that to the extent that anyone had been defamed, it was only Mr Deliu and not Amicus.[15]

[25] Associate Judge Bell then briefly reviewed the sustainability of each of the causes of action. In relation to the defamation/injurious falsehood claims, the "somewhat obsessive" nature of Mr Hong's letters appears to have led the Associate Judge to conclude that such letters may not have caused any real harm to Mr Deliu's reputation.

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12 At [36].
13 At [37]-[38].
14 At [9].
15 At [12].

[26] Turning to the malicious prosecution claim, his Honour found that the general exclusion of civil proceedings (other than bankruptcy and winding up) from the scope of that tort under *Jones v Forman*,[16] meant that that claim could not succeed.[17]

[27] In relation to the claim of intentional infliction of emotional distress, his Honour concluded on the basis of the evidence of Mr Deliu's "robust and combative" character that a *Wilkinson v Downton* claim could not be established.[18]

[28] Finally, turning to the abuse of process claim, the Associate Judge would have found that the mutual use of "combative tactics" by both sides fell short of the ingredients of the tort of abuse of process.[19] His Honour concluded that both parties were seeking relief directed at challenging the competence of the other to be a lawyer.

[29] In conclusion, Associate Judge Bell observed that he did not say that all Mr Deliu's (or Mr Hong's) causes of action were completely untenable but added:[20]

> Their cases are very weak. They are contrived simply as vehicles in which to deliver attacks against each other.

Judgment of 21 December 2011 – Courtney J

[30] Courtney J was dealing with an application for review made by Mr Deliu. (Mr Hong did not seek review and accepted that his counterclaim had been properly struck out).

[31] Her Honour granted Mr Deliu's application for review upon the basis that his personal claim ought not to have been struck out without his being given the opportunity to be heard.

[32] Courtney J then turned to consider whether to review the striking out of Amicus's claim. Her Honour elected not to consider the reasoning adopted by

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16 *Jones v Forman* [1917] NZLR 798 (NZSC).
17 *Deliu v Hong*, above n 7, at [27].
18 At [28].
19 At [30].
20 At [33].

Associate Judge Bell for striking out the claim as frivolous, because her Honour found the causes of action by Amicus not tenable in any event.

[33] Her Honour first found the cause of action for abuse of process untenable. Although it would have been an abuse of process to lodge a complaint with the Law Society for an ulterior purpose, Mr Hong had initially complained as part of his response to the earlier complaint by Mr Deliu about Mr Hong. Subsequent complaints were to be regarded as part of the "ongoing and escalating war of words" between Mr Deliu and Mr Hong.[21]

[34] Courtney J found the malicious prosecution claim untenable for the same reason as Associate Judge Bell had, namely that the tort is unavailable in respect of civil proceedings (except in specific exceptional circumstances which did not apply).[22]

[35] Her Honour then held, contrary to Associate Judge Bell's finding, that the defamation/malicious falsehood causes of action were untenable with one exception.[23] The exception was the letter dated 23 September 2010, an email unrelated to the Ma litigation, which her Honour found capable of supporting the pleaded cause of action by Mr Deliu. Her Honour found that that cause of action was untenable for Amicus, because Amicus was not mentioned. In relation to all remaining items of correspondence, there were various elements missing such as an absence of reference to Amicus or in some cases to Mr Deliu. Her Honour found that there was a defence of privilege under s 14 Defamation Act insofar as some letters were sent to the Lawyers Complaints Service.[24]

Approach taken to the earlier decisions to this application

[36] Mr Banbrook's written synopsis of submissions filed for this hearing was relatively brief. I will return to his submissions on the four causes of action below. Perhaps predictably, Mr Banbrook in his synopsis sought to emphasise some of the

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21 *Deliu v Hong* HC Auckland CIV-2010-404-006349, 21 December 2011 (Courtney J) at [14].
22 At [15].
23 At [16].
24 At [16]-[28].

earlier judicial observations as to the general merit or otherwise of Mr Deliu's claims. Mr Banbrook relied particularly on passages in the judgment of Associate Judge Bell.

[37] From the perspective of the parties' and the Court's interest in having decisions which bind the parties, the application process adopted by the defendant in this case has proved unfortunate. Mr Banbrook, while referring me to passages such as those in the judgment of Associate Judge Bell, had to accept that those conclusions (although binding as between Amicus and Mr Hong) did not create an issue estoppel as between Mr Deliu and Mr Hong. Mr Deliu was entitled to have me consider the strike out application afresh, not bound in his case by the prior judicial observations and decisions.

[38] It is appropriate, particularly as a matter of comity, that I have regard to the analysis contained in the earlier judgments. But the Court's task on this particular application is to reach its own analysis, which may involve in whole or in part, the adoption of earlier analysis. I deal with the application as it came before the Court, with the particular evidence as adduced for this application, and in the light of the submissions as developed on this application.

The fate of the disciplinary process

[39] By the time this application was heard, there had been a substantial change in Mr Hong's fortunes before the Lawyers Complaints Service. I have referred to the stuttering complaints process.[25] By June 2011, Mr Deliu's complaint appeared to be at an end. Through the judgment of Winkelmann J on 15 February 2012, which quashed the decision of the Legal Complaints Review Officer, Mr Deliu's complaint was given fresh life. A disciplinary charge of misconduct was subsequently in September 2012 laid against Mr Hong. After I reserved my decision on this application, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal delivered a reserved decision dated 22 March 2013 on the charge of misconduct against Mr Hong.[26] Breaches of the Lawyers and Conveyancers Act (Lawyers:

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25 See above at [5](2).

26 *In the matter of Boon Gunn Hong*, above n 4.

Conduct on Client Care) Rules 2008 were found to be established but the Tribunal, found that the conduct fell short of the required level of seriousness and dismissed the misconduct charge. The Tribunal left the parties to meet their own costs.

[40] For the hearing, I was provided with not only the February 2012 judgment of Winkelmann J but also the subsequent 25 June 2012 decision of the Legal Complaints Review Officer in which Mr Hong's conduct was referred to the Lawyers and Conveyancers Disciplinary Tribunal for consideration. Among the matters taken into account by the Legal Complaints Review Officer in the decision he came to were Mr Hong's 9 June 2010 letter written "in an attempt to discredit Mr Deliu's ability, presumably seeking to influence Mr Baker to withdraw instructions from Amicus Chambers" and Mr Hong's 17 June 2010 letter to the New Zealand Law Society in which he stated that he considered Mr Deliu to be mentally unstable.

[41] The fact that there have been disciplinary proceedings, with breaches of the Conduct and Client Care Rules found to be established, does mean that any previous suggestion that Mr Deliu's complaints to the Lawyers Complaint Service were frivolous has not been borne out by the decisions reached in that jurisdiction.

[42] The judgment of Winkelmann J in the judicial review proceeding,[27] included the following findings:

> He [Mr Hong] engaged in offensive and intemperate correspondence. His conduct could not reasonably have been described as trivial, nor the complaint frivolous or vexatious. Nor could it properly be characterised as a dispute "personal to parties", because it drew others into the dispute, including other lawyers and former clients of both Mr Hong and Mr Deliu, and the District Court. It wasted court resources.[28]
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> ... in this particular case the administration of justice has been adversely affected through wasted court time. Mr Hong did not limit himself to trading verbal blows, but rather involved the professional body and the Court. On his own account he has approached others to collect information and evidence against Mr Deliu.[29]

[43] Those findings are reflected in material ways in Mr Deliu's pleadings, which are taken to be correct for strike out purposes.

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27 *Deliu v Hong*, above n 1.
28 At [49].
29 At [52].

Issue estoppel

[44] The observations made in the course of the disciplinary process, even through the judicial review judgment of February 2012, do not constitute matters of issue estoppel in this proceeding.

[45] The authors of *Spencer Bower and Handley, Res Judicata*,[30] identify the elements of what is referred to as "res judicata estoppel", a term which covers both cause of action estoppel and issue estoppel. The elements, as accepted by the Court of Appeal, are:

(a) the decision was judicial in the relevant sense;

(b) it was in fact pronounced;

(c) the tribunal had jurisdiction over the parties and the subject matter;

(d) the decision was –

(i) final, and

(ii) on the merits;

(e) it determined the same question as that raised in the later litigation; and

(f) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.[31]

[46] It is unnecessary to examine these elements comprehensively as the fifth and sixth elements are clearly lacking in this case. In relation to subject matter (element (e)), this is a civil proceeding in tort. The issues in the disciplinary proceeding and

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30 K R Handley *Spencer Bower and Handley, Res Judicata* (4th ed, LexisNexis, London, 2009) at [1.02].

31 See *Chean v De Alwis* [2010] NZCA 30 at [21] (adopting the six elements from the third edition of *Spencer Bower*).

even in the judicial review proceeding are of a different nature to the issues in this case. The questions are not the same. In relation to the parties (element (f)), there is not the identity of parties required for issue estoppel.

[47] The New Zealand Lawyers and Conveyancers Disciplinary Tribunal gave its decision in relation to the disciplinary proceeding against Mr Hong in March 2013, after I reserved my decision in this case. Additional submissions were filed by the parties. Mr Deliu, adopting the six-fold criteria of *Chean v De Alwis*, submitted that all six elements were present. He submitted that the same question was involved in each decision as each case involved an allegation of ulterior motive. But even accepting that Mr Hong's intentions will be in issue in relation to some causes of action, such does not turn all issues in each case into one and the same. The issues associated with the four torts pleaded in this case are substantially different to the issues in the disciplinary proceeding. Secondly, Mr Deliu submitted that the same parties are involved. Again, that is not so. Mr Deliu sought to justify the "same parties" submission by an assertion that the Legal Complaints Review Officer, who brought the charges in the Tribunal, acted as Mr Deliu's proxy by law, given that he (Mr Deliu) was required to be served with copies of the relevant proceedings by regulation under the Lawyers and Conveyancers Act.[32] Mr Deliu's submission in this regard does not bear scrutiny. He was not in any relevant sense a party to the disciplinary proceeding.

First cause of action – abuse of process

Mr Deliu's pleading

[48] In the initial part of the statement of claim, Mr Deliu pleads numerous items of Mr Hong's correspondence, including the 23 May 2010 letter by which Mr Hong lodged a "cross-complaint and/or request for the Law Society's urgent intervention".

[49] For the abuse of process cause of action Mr Deliu pleads –

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[32] See Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008, r 6.

(I) FIRST AND SECOND PLAINTIFFS' FIRST SET OF CLAIMS AGAINST THE DEFENDANT - ABUSE OF PROCESS

20. The plaintiffs repeat and re-plead (especially) paragraphs 2, 5, 6, 9, 11, 13, 15 and 19, rely on the extracts of evidence annexed to this amended statement of claim, and say further that on or about 23 May 2010, 25 May 2010, 17 June 2010,20 August 2010,15 September 2010 and/or 20 September 2010 the defendant committed the tort of abuse of process on the plaintiffs by filing and pursuing frivolous and/or vexatious law society complaints against the first and/or second plaintiff (employees) in NZLS for ulterior motives unrelated to the regulation of the legal profession and/or for improper purposes to gain collateral advantages and this has caused the plaintiffs damage.

PARTICULARS OF ALLEGED ULTERIOR MOTIVES/IMPROPER PURPOSES

- The defendant wanted to use the law society complaints as a way to collaterally attack the rightful claims brought against him by the Ma and Wang counsel.
    - The defendant wanted to coerce the first plaintiff and/or second plaintiff employees into withdrawing the Ma and/or Wang claims against him and thus prevent those clients from having their lawful day in Court against him.
    - The defendant also or alternatively wanted to cause a conflict of interest as between the plaintiffs' and their clients such that the plaintiffs would be required by their ethical obligations to withdraw from representing their clients and/or bully the plaintiffs into withdrawing their representation of the Ma and/or Wang clients, such that their lack of counsel would mean that their claims against him could no longer, or not as readily, be pursued.
- The defendant also or alternatively wanted to harass the first plaintiff and/or second plaintiff (employees).
- The defendant also or in the alternative wanted to attack the first plaintiff and second plaintiff employees as revenge for being sued by the Ma (and subsequently Wang) litigant(s).

The ingredients of the tort of abuse of process

[50] Abuse of process involves:

(a) The use of a legal process,

(b) in order to accomplish an ulterior purpose,

(c) which is the predominant purpose, and

(d) which causes damage to the plaintiff.[33]

[51] Venning J, in the injunction judgment,[34] gave an example of this tort –

> It would thus be an abuse of process to lodge a complaint with the NZLS where the purpose was not to prosecute it to conclusion but to use it as a means of obtaining a collateral advantage: *Gordon v Treadwell Stacey Smith*.

Basis of the strike out application

[52] In Mr Hong's strike out application it was asserted that:

> The first cause of action framed as abuse of process relates to the complaints procedure of the New Zealand Law Society and the communications referred to cannot in law amount to an abuse of process in the circumstances of the pleading.

[53] That rather bare and unsatisfactory statement of grounds was added to in Mr Banbrook's brief synopsis in which it was stated:

> The first cause of action **abuse of process** refers to a sequence of correspondence that relates to the complaints procedure of NZLS. The communications referred to cannot in law amount to an abuse of process in the circumstances of the pleading – see *Land Securities Limited v Fladgate Fielder*. That the cause of action in abuse of process is not tenable is confirmed by the findings of Courtney J in *Francisc Catalin Deliu v Boon Gunn Hong* ...

[54] In his submissions at the hearing, Mr Banbrook expanded upon the synopsis and heavy relied on all three earlier judgments (of Venning J, Associate Judge Bell and Courtney J). Mr Banbrook noted and invited me to follow particularly:

- the finding by Venning J[35] that Mr Hong was entitled to respond to Mr Deliu's complaints and that when such a response is at least partly by defence it cannot be said to amount to an abuse of process; and

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33 Stephen Todd (ed.), *The Law of Torts in New Zealand*, (5th ed., Brookers, Wellington) at 18.4.01; *Laws of New Zealand*, Tort (online ed.) at [179].

34 *Deliu v Hong* above n 2.

35 At [43].

- the adoption by Associate Judge Bell of Venning J's approach (as above); and

- Associate Judge Bell's identification of the tort as one, following the recent England and Wales Court of Appeal in *Land Securities Ltd v Fladgate Fielder*,[36] is to be narrowly confined: - in the case of *Grainger v Hill*[37] in which the tort was established, the defendant had taken steps to enforce a judgment solely with a view to obtaining a register, something which could not be obtained by legal process. The tort is also to be confined so as to avoid parallel litigation and relitigation of matters.

- the adoption by Courtney J of the approaches of Associate Judge Bell and of Venning J, in finding that there was no arguable cause of action, because Mr Hong initially complained as part of his response to the earlier complaint made by Mr Deliu about Mr Hong.

[55] Mr Banbrook submitted that his client was simply responding to Mr Deliu's complaint. He submitted that it is not open to Mr Deliu to invoke the tort of abuse of process. Mr Banbrook suggested that the result may be different, if it was Mr Hong who initiated hostilities. Mr Banbrook submitted that that was not what occurred in this case – rather "Mr Deliu started it".

Mr Deliu's submissions

[56] Mr Deliu submitted that when the ingredients of the tort are considered in the light of his pleading,[38] the cause of action is clearly tenable. He submitted that each of the ingredients of the tort is pleaded as being present and that the allegation of damage (which is a bare allegation in the statement of claim) is a matter properly for trial. Mr Deliu focused his submissions on the various ingredients of the tort. I now undertake a similar analysis.

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36 *Land Securities Ltd v Fladgate Fielder* [2009] EWCA Civ 1402, [2010] 2 All ER 741 (EWCA).
37 *Grainger v Hill* (1838) 4 Bing NC 212, 132 ER 769 (Common Pleas).
38 Above at [49].

Use of a legal process

[57] Both parties accepted, correctly, that the disciplinary process is a legal process within the meaning of the tort.

[58] To the extent that previous judicial discussion of the application of the tort has involved a proposition that the lodging of a complaint might constitute the tort, but that the filing of "complaints" at least partly by way of defence cannot, Mr Deliu invited the Court to accept that at least in a strike out context, there is a tenable basis for asserting that Mr Hong was in terms of the first ingredient "using a legal process".

[59] Mr Deliu submitted that what Mr Hong had done was to make cross-complaints. The Lawyers Complaints Service had recognised as much by opening file 2671 to deal with Mr Deliu's complaints against Mr Hong and opening file 3445 to deal with Mr Hong's complaints against Mr Deliu. The convenor of the National Standards Committee in November 2010 succinctly stated –

> Mr Hong in his responses to complaint 2671 made cross-complaints and complaints against Mr Deliu.

[60] The deliberate focus of Mr Deliu's complaints against Mr Hong on 6 May 2010 had been upon Mr Hong's 5 May 2010 warning to Messrs Zhao, Ram & Baker of certain steps if their clients' proceeding was not withdrawn immediately. The extent to which Mr Hong's 23 May 2010 letter to the Law Society dealt with matters beyond the extent of Mr Deliu's complaint is reflected in the 13 allegations summarised from that letter of 23 May 2010 in the attached Schedule.

[61] Mr Deliu pointed to Mr Hong's subsequent letter of 17 June 2010 as evidencing the distinct nature of Mr Hong's cross-complaint against Mr Deliu and the distinct nature of the legal process that followed from those complaints. Mr Deliu referred for instance to Mr Hong's endeavour to illustrate what he alleged to be Mr Deliu's incompetence by reference to an analysis which Mr Hong had made of all the 57 High Court and higher courts' cases in which he said Mr Deliu had been involved.

[62] I find it at least arguable that there was a distinct nature to the "cross claims" made by Mr Hong and, in keeping with the way the Lawyers Complaints Service treated the cross complaints, they gave rise to a distinct legal process. Mr Hong's letters in relation to the complaints and cross complaints often ran together, and the specific matters of defence to Mr Deliu's complaints sat alongside Mr Hong's cross complaints. I find that those matters do not beyond argument render the tort of abuse of legal process inapplicable.

Collateral purpose

[63] I remind myself that this is a strike out application. Mr Deliu pleads motives such as Mr Hong's intention to use the complaints process as a collateral means of attacking the Ma and Wang proceedings; forcing the withdrawal of those proceedings or the withdrawal of representation; and of harassing Mr Deliu or Amicus's employees.

[64] Those pleadings of fact are taken to be correct. Whether they are ultimately made out is a trial matter. So too is the conclusion as to whether (if made out) any of these purposes amounted to Mr Hong's predominant purpose in initiating the complaints process.

[65] I accept and respect what has been said by other judges in the course of this proceeding as to the appropriateness of confining the tort of abuse of process, particularly in order to discourage re-litigation. It may be that there has been something of an evolution in this proceeding. I have before me specific particulars of alleged ulterior or improper purposes. Venning J did not have such before him in October 2010.[39] That said, I accept there remains a tension between the conclusion which I have come to – as to an arguably distinct nature to Mr Hong's cross complaints – and the conclusions reached previously by other judges dealing with interlocutory proceedings in this case.

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[39] *Deliu v Hong*, above n 2, at [43].

Conclusion

[66] I find that the abuse of process cause of action is tenable on the pleadings, in the sense that it may succeed.

Second cause of action – malicious prosecution

Mr Deliu's pleading

[67] Mr Deliu's pleading as to malicious prosecution is as follows:

> **FIRST AND SECOND PLAINTIFFS' SECOND SET OF CLAIMS AGAINST THE DEFENDANT - MALICIOUS PROSECUTION**
>
> 21. The plaintiffs repeat and re-plead (especially) paragraphs 2,5,6,9,11, 13, 15, 19 and 20, rely on the extracts of evidence annexed to this amended statement of claim, and say further that on or about 23 May 2010, 25 May 2010, 17 June 2010, 20 August 2010, 15 September 2010 and/or 20 September 2010 the defendant committed the tort of malicious prosecution against the plaintiffs by maliciously instituting and pursuing law society complaints with NZLS against the first and/or second plaintiff (employees) without cause, those complaints having been dismissed without even an investigation by NZLS, and this has caused the plaintiffs damage.
>
> **PARTICULARS OF ALLEGED MALICE**
>
> - The complaints were dismissed without even so much as a hearing because they were so flagrantly unmeritorious.
> - The defendant lacked evidence in support.
> - The defendant repeatedly and on a number of different occasions indicated his disrespect of the plaintiffs.
> - The defendant was virulent over the second plaintiff (employees) bringing legal proceedings against him which he felt was extremely wrongful.
> - The defendant was livid that his concerns were not being addressed by the second plaintiff (employees), e.g., that it was wrong for him to be sued without being consulted in the process.
> - The defendant lodged a "counter-claim" against the second defendant (employees) in the District Court even though he admitted it could not succeed and was intended to attack counsel.

- The defendant's language was extreme, vituperative and became more extreme over time.
- The defendant was, at times, personally attacking the first plaintiff as opposed to focusing only on professional issues.
- The defendant expressed hatred, spite, ill-will or veniality towards the first plaintiff especially, but also the second plaintiff (employees).
- The defendant effectively accused one of the second plaintiff employees of being a fraudulent lawyer.
- The defendant copied his allegations to the first plaintiffs colleagues.
- The defendant had no previous dealings with the first plaintiff and therefore had no real interest in the first plaintiff's litigation or other history as counsel.
- The defendant does not have a history of being an ombudsman of the legal profession.
- The complaints were of a harassing nature.
- The defendant's behaviour and actions were of a very disturbing nature.
- The defendant enjoyed vexing the first and second plaintiff employees.
- The defendant has indicated a desire to continue making such complaints, but has refrained from doing so once the instant proceedings were issued against him.

The elements of the tort of malicious prosecution

[68] As applied to criminal prosecution, a plaintiff must prove that:

(a) The defendant prosecuted the plaintiff on a criminal charge;

(b) The criminal proceedings terminated without the plaintiff being incriminated;

(c) The defendant had no reasonable and probable cause for bringing the proceedings;

(d) The defendant acted maliciously; and

(e) The plaintiff suffered damage as a consequence of the proceedings.[40]

Grounds of strike out application

[69] In Mr Hong's strike out application, he asserted that the malicious prosecution cause of action could not succeed, because it is not available in civil proceedings or in disciplinary proceedings.

[70] In his written synopsis of submissions, Mr Banbrook added to those grounds the contention that (even assuming the availability of malicious prosecution in the context of disciplinary proceedings) the communications themselves were privileged. He also suggested in oral submissions that Mr Deliu had failed to plead, with particularity, a corrupt notice on Mr Deliu's part.

Mr Deliu's ground of opposition

[71] In his notice of opposition (framed in response to the single proposition that the tort of malicious prosecution is unavailable in relation to civil or disciplinary proceedings) Mr Deliu referred to a line of authority which indicates that the law is not settled against recognition of the tort in relation to disciplinary proceedings.

Possibility of privilege

[72] Although Mr Banbrook's written synopsis suggested that the documents relevant to a malicious civil proceeding might be protected by privilege, Mr Banbrook did not refer to or develop that submission at the hearing. No authority was cited for the concept in the written synopsis. It is as a matter of principle a difficult concept to contemplate as a matter of principal. Given that it was not pursued, I do not consider it further.

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[40] Todd, above n 33, at 18.2.02; *Laws of New Zealand*, Tort (online ed.) at [153].

The ingredient of corrupt motive

[73] Venning J noted that Mr Deliu had failed to plead particulars of the corrupt motive other than by making a general allegation that Mr Hong was acting maliciously.[41] (Venning J in relation to the ingredient identified in *The Law of Torts in New Zealand* as malicious conduct had referred to "corrupt motive".) Mr Banbrook adopted this criticism of Mr Deliu's case.

[74] Mr Deliu's amended pleading now includes 17 short paragraphs as "particulars of alleged malice".[42]

[75] There is no longer (because of the second amended claim) the "general allegation the defendant is acting maliciously" as there was at the hearing before Venning J. Malice is now pleaded and particularised. The pleaded facts are assumed. If one adopts as a definition of malice:

> Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice

as supported by authority,[43] then at least some of the particulars pleaded by Mr Deliu are capable of being found to involve malice.

A tort of malicious civil proceedings?

[76] It is settled law that the malicious institution of bankruptcy or winding up proceedings may give rise to an action in the tort of malicious prosecution. This category of case was recognised in *Jones v Foreman.*[44]

[77] For Mr Hong, Mr Banbrook placed weight on the earlier judgments of Associate Judge Bell and Courtney J in this proceeding. Mr Banbrook referred particularly to the following discussion by Associate Judge Bell:[45]

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41 *Deliu v Hong*, above n 2, at [47].

42 Above at [67].

43 *Stevens v Midland Counties Railway Co* (1854) 10 Exch 352 at 356; (1854) 156 All ER 480 at [356] per Alderson B (Exch); *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187 at 202 (CA).

44 *Jones v Foreman*, above n 16, at 808, 817 and 823; *Laws of New Zealand*, Tort (online ed.) at 173.

> Both sides have alleged malicious prosecution against the other. Under the present state of the law, a claim for malicious prosecution of a civil proceeding is not available except for petitions in bankruptcy and proceedings for a company to be put into liquidation. That is a result of the full court of the Supreme Court, as it was, in *Jones v Foreman*. It has sometimes been suggested that the Court of Appeal might review that decision. That possibility was referred to in *NZ Social Political League v O'Brien* and *Rawlinson v Purnell Jenkinson Roscoe.* On the other hand, in *Gregory v Portsmouth City Council* the House of Lords ruled that, with some exceptions, English law does not allow a claim for malicious prosecution of a civil claim. That decision was given in the context of a claim made by someone who had been the subject of unsuccessful disciplinary proceedings. No doubt any New Zealand appellate court would have regard to that. This case is certainly not the test case to decide whether the decision in *Jones v Foreman* should be changed.
>
> (footnotes omitted).

[78] In her later judgment, Courtney J referred to Associate Judge Bell's discussion before concluding:[46]

> The Associate Judge's assessment that this cause of action was not tenable must be correct.

[79] I remind myself that this is a strike out application. In *Attorney-General v Prince & Gardner*[47] the Court of Appeal refused to strike out a pleading in negligence on the basis that it would be premature to rule out the possibility that a duty of care, albeit in a novel category, might arise. In doing so, the Court apparently appears to have accepted the submission of counsel for the respondents that the Court should be very slow to rule on novel categories of duty at the striking out stage, particularly where public policy issues arise.[48]

[80] Whether there is a sustainable tort of malicious civil proceedings (beyond the insolvency cases) has become something of a vexed issue. There is a helpful review of the cases in Professor Todd's text, which begins with the observation:[49]

> There seems to be no compelling reason founded on history or public policy why a person who maliciously institutes civil proceedings without any reasonable and probable cause should not be held liable in the same way as the malicious prosecutor in criminal proceedings.

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45 *Deliu v Hong*, above n 7, at [27].
46 *Deliu v Hong* HC Auckland CIV-2010-404-006349, 21 December 2011 (Courtney J) at [15].
47 *Attorney-General v Prince* , above n 10.
48 At 267-268, per Richardson P, delivering the judgment of the majority.
49 Todd, above n 33, at 18.3.

[81] Mr Deliu predictably began his submissions to me by referring me to what I had said in *Chesterfields Preschools Ltd v The Commissioner of Inland Revenue.*[50] Although in that case, on the facts, I found there to be a clear case for exercising the jurisdiction to strike out most of the pleadings, I observed:[51]

> The plaintiffs are entitled to the benefit of an assumption that a tort may exist in relation to malicious civil proceedings.

[82] In the judgment I reviewed the conflicting authorities and had noted that academic writing tends to be in favour of the availability of the tort in relation to civil proceedings.

[83] In *Jones v Foreman,*[52] a full Court of the then-Supreme Court non-suited a plaintiff upon the basis that a complaint in relation to maintenance payments was a civil proceeding for which the tort of malicious prosecution could not arise. While that decision, as a decision of a full Court, is entitled to substantial respect, it does not bind this Court. This Court (or indeed the Court of Appeal as contemplated by Associate Judge Bell in his judgment) might review the decision in *Jones v Foreman.*

[84] For Mr Hong, Mr Banbrook placed his emphasis upon two decisions, *Jones v Foreman* decided in 1917 and the more recent decision of the House of Lords in *Gregory v Portsmouth City Council.*[53] Mr Banbrook submitted correctly that the latter decision indicates that in the United Kingdom there is to be no extension of the tort to civil proceedings generally.[54]

[85] Mr Deliu submitted (correctly in my view) that the tort may not be so confined in New Zealand. In his judgment in the Court of Appeal's 1983 decision in *New Zealand Social Credit Political League Inc v O'Brien*, Cooke J found there to be "quite a strong argument" that the tortious damages should be recoverable in relation to maliciously instituted civil proceedings.[55] His Honour noted the wide

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50 *Chesterfields Preschools Ltd v The Commissioner of Inland Revenue* [2012] NZHC 394.
51 At [47].
52 *Jones v Foreman*, above n 16.
53 *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL).
54 See Todd, above n 33, at 18.3.
55 *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 89.

criticism of the restricted tort by text writers and the availability of an action for malicious civil proceedings in most of the United States. Cooke J would have favoured allowing what was a malicious civil proceedings claim in *O'Brien's* case to go to trial.

[86] On a later strike out application in *Rawlinson v Purnell Jenkison & Roscoe (No 3),*[56] Hammond J refused to strike out a claim for malicious prosecution of a civil proceeding, saying:[57]

> These issues could only be resolved by the appropriate appellate Courts, but I took the view that a claim of this kind should not be dismissed ex ante.

[87] There is also some (although not unanimous) Australian judicial support for recognising the tort in relation to malicious civil proceedings.[58]

[88] In the circumstances, in a strike out context, I adopt the approach of Hammond J in *Rawlinson's* case. It is informed by the approach to novel categories of duty of care in *Attorney-General v Prince.* It would be inappropriate, on the ground that the tort is not recognised, to strike out the claim in malicious prosecution.

Third cause of action - intentional infliction of emotional distress

Mr Deliu's pleading

[89] Mr Deliu's pleading in relation to emotional distress is:

> **FIRST PLAINTIFF'S THIRD SET OF CLAIMS AGAINST THE DEFENDANT - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**
>
> 22. The first plaintiff repeats and re-pleads paragraphs 1 - 21, relies on the extracts of evidence annexed to this amended statement of claim, and says further that on or about 5 May 2010, 13 May 2010, 23 May

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56 *Rawlinson v Purnell, Jenkinson & Roscoe* (No. 3) [1999] 1 NZLR 479 (HC).

57 At 493.

58 *Chapel Road Pty Ltd v Australian Securities & Investments Commission* (ASIC) [2006] NSWSC 1014 at [21]-[22] and [77]; *Kinghorn v HKAC Asset Management Services (AFFL) Pty Ltd* [2010] NSWDC 232 at [28]-[32], [35]-[36]. But, see the contrary conclusion in *Beach Club Port Douglas Pty Ltd v Page* [2005] QCA 475 (adopting *Gregory v Portsmouth City Council).*

> 2010, 25 May 2010, 9 June 2010, 10 June 2010, 17 June 2010,5 August 2010, 20 August 2010, 24 August 2010, 15 September 2010, 17 September 2010,20 September 2010,23 September 2010 and/or 27 September 2010 the defendant committed the tort of intentional infliction of emotional distress against the first plaintiff by intentionally or recklessly engaging in extreme and outrageous conduct which caused the first plaintiff damage in the form of long term and severe emotional distress, ultimately also manifested as physical symptoms such as depression, anxiety, stress, sleeplessness, dizzy spells, loss of appetite, nausea, vomiting, bloating, abdominal pain and shaking.

[90] Mr Hong in his pleading in response states:

> **STATEMENT OF DEFENCE TO THE THIRD CAUSE OF ACTION BY PLAINTIFF- INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**
>
> 22. In response to the Plaintiff's third cause of action, at Paragraph 22 the Defendant repeats the pleading above at paragraphs 1-21 hereof inclusive and states:
>
> (a) the Defendant denies that the correspondence which was in any event privileged, either under s 14 of the Defamation Act or litigation privilege, was intended to cause or did cause the Plaintiff emotional distress;
>
> (b) that, on the contrary, the conduct of the Plaintiff has at all material times been belligerent, forceful and threatening to the Defendant:
>
> (c) that in any event the cause of action in intentional infliction of emotional distress is untenable on the facts alleged in the pleading of the Plaintiff.

The principles

[91] What is often referred to as the rule in *Wilkinson v Downton*[59] represents a residual category of liability for intentional harm inflicted indirectly. The indirect nature of the harm has usually been taken to distinguish it from cases involving trespass to the person, although there is some academic support that even the tort of trespass may no longer require direct infliction of harm.[60]

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59 *Wilkinson v Downton*, above n 9.

60 See Todd, above n 33, at 4.2.

[92] The formulation of the ingredient of this tort by Wright J in *Wilkinson v Downton* was in these terms:[61]

> The defendant has ... wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act.

[93] The authors of *Laws of New Zealand, Tort* observe:[62]

> Recovery extends to severe emotional distress leading to bodily injury, or psychiatric harm that is more than transient and translates into something physical.

[94] Neither counsel addressed me as to any implications of the accident compensation regime upon the tort in New Zealand. As is clear from the discussion by Gallen J in *Bradley v Wingnut Films Ltd*[63] the infliction of emotional distress which is recognised by the authorities requires proof of something more than a transient reaction of emotional distress, regardless of initial severity. The reaction must translate into something physical which also had a duration beyond the transient. But the plaintiff must also show that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff.

[95] I respectfully adopt in relation to the relevance of the Accident Rehabilitation Compensation Insurance Act 1992 the following commentary by the authors of *Laws of New Zealand, Tort:*[64]

> Claims in respect of psychiatric injury standing alone are generally not covered by the [Act], and to this extent it seems that common law proceedings based on *Wilkinson v Downton* are maintainable.

Mr Deliu's submissions

[96] Mr Deliu submits that he has amply pleaded physical reactions. He has also deposed to the evidence he intends to adduce at trial. This includes various

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61 *Wilkinson v Downton*, above n 9, at 58-59.
62 *Laws of New Zealand*, Tort (online ed.) at 152.
63 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC).
64 *Laws of New Zealand, Tort* (online ed.) at 152, footnote 4.

emotional and physical effects. He deposes that he will adduce evidence at trial from "a registered and practicing psychologist". He has (understandably in this jurisdiction) not produced an affidavit from that person for the purposes of the strike out application.

Mr Hong's case

[97] For Mr Hong, Mr Banbrook in relation to this, as other, issues appeared content largely to fall back on what had been said by the Judges who have previously dealt with interlocutory applications in this proceeding. He relied particularly on their observations as to the facts. In addition, Mr Banbrook submitted that the communications complained of were privileged in relation to this cause of action in parallel to a privilege said to exist in relation to the defamation cause of action which I will consider shortly.

Discussion of the factual allegations

[98] Courtney J does not appear to have dealt with this cause of action. Discussion is to be found in the judgments of Venning J on the injunction application and of Associate Judge Bell on the second plaintiff's successful strike out application.

[99] Venning J accepted a submission of Mr Paterson, who appeared for Mr Hong at the time of the injunction application. His Honour found that the plaintiff's pleaded and deposed assertions as to the effect on him of Mr Hong's correspondence were in stark contrast to the public face presented by Mr Deliu in his own correspondence and dealings with Mr Hong and with the New Zealand Law Society.[65]

[100] The content of Mr Deliu's correspondence and other communications were taken to cut across Mr Deliu's pleaded and deposed assertions. Venning J referred to

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[65] *Deliu v Hong*, above n 2, at [48].

a particular answer phone message left by Mr Deliu for Mr Hong as being an example of the "direct and forceful" dealings which Mr Deliu had:[66]

> Well feel free Mr Hong, nothing you do scares me and I'm going to show you what I'm going to do... eh... if you can't take a case like a man and like a professional... acting completely unprofessionally now it is time to pay and you will see how you will pay...
>
> The more you escalate... the more I will respond.

[101] Against that background, Venning J concluded that Mr Deliu had again failed to satisfy the Court that this cause of action (intentional infliction of emotional distress) could support the issue of an interim injunction.

[102] Associate Judge Bell in dealing with the strike out application in relation to Amicus's claims did not directly analyse the case in terms of sustainable causes of action. His Honour dismissed Amicus's claims (and at the same time, Mr Deliu's proceeding) on the basis that the claims were frivolous.[67] His Honour had earlier commented:[68]

> I do not say that all Mr Deliu's or Mr Hong's causes of action are completely untenable but their cases are very weak. They are contrived simply as vehicles in which to deliver attacks against each other...

[103] Associate Judge Bell discussed the *Wilkinson v Downton* pleading to this extent:[69]

> As regards Mr Deliu's claim for intentional infliction of emotional distress, I share Venning J's view that Mr Deliu has shown himself to be robust and combative. While the statements made about Mr Deliu are certainly hurtful, the matter falls far short of giving rise to a claim of the *Wilkinson v Downton* sort, which Mr Deliu seems to be raising.

[104] I respect the scepticism expressed by other Judges as to Mr Deliu's assertions of long term and severe emotional distress and physical symptoms caused by Mr Hong's conduct.

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66 At [49].
67 *Deliu v Hong*, above n 7, at [36].
68 At [33].
69 At [28].

[105] I referred Mr Deliu in the course of his submissions to his "you don't scare me" telephone message. I put it to him that for a trial Court to accept that he had been so severely affected by Mr Hong's conduct, the Court might have to find or come close to finding that he (Mr Deliu) had been lying when he deliberately left the message for Mr Hong that he was not scared by Mr Hong. Mr Deliu's response in submissions was simply to point out the distinction between something which causes a person to be fearful and something which the person finds extremely distressing. There may be room for a valid distinction of the kind Mr Deliu drew in his submissions. There will remain a very significant issue of fact as to whether a person of Mr Deliu's self-proclaimed and self-evident robustness succumbed to the pleaded state of health.

[106] Neither counsel addressed me in terms of a requirement of forseeability. That is understandable. The tort is primarily concerned with intentional conduct. I recognise as indicated by the authors of *Laws of New Zealand, Tort*, that there may be circumstances in which conduct is regarded as calculated where the intention is to frighten or alarm and the defendant should have foreseen the resulting harm.[70] Given the pleading of intentional harm in this case, I remind myself that the focus at trial may be upon whether the conduct in fact caused harm to Mr Deliu as alleged, rather than on any proposition that Mr Deliu was the least likely person to suffer such harm.

Discussion of privilege

[107] Before examining the ingredients of the rule in *Wilkinson v Downton* against the pleadings, I will deal with Mr Hong's defence based on privilege. Mr Banbrook did not develop the suggestion of privilege as a proposition separate to the privilege claim in relation to defamation. What is suggested is that there was an absolute privilege in relation to all words used (and thereby the conduct in making those communications). For the reasons I come to in relation to the defamation cause of action, it is at least arguable that privilege does not apply in relation to this tort.[71] Having not had submissions from counsel as to whether or not absolute privilege

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70 *Laws of New Zealand*, Tort (online ed.) at 152.
71 Below at [120]-[130].

applicable under the Defamation Act can apply to intentional torts, such as in *Wilkinson v Downton,* I refrain from considering the issue from that perspective.

[108] I therefore return to the ingredients of the rule in *Wilkinson v Downton.*

Intention

[109] Findings as to Mr Hong's intention are a trial matter. To the extent that the Court may consider what Mr Hong's actions were objectively calculated to achieve, it is not beyond reasonable possibility that a lawyer who catalogues and analyses another's 57 reported cases and then proceeds (as did Mr Hong) to characterise the other lawyer as insane, unethical and criminal may have had the other's harm as a calculated outcome.

Causation

[110] Mr Deliu pleads that Mr Hong's conduct caused him harm. I accept that Mr Deliu may struggle to persuade a trial Judge that a person of his character has sustained the pleaded harms. That said, there may be found in the sustained counter-attack launched by Mr Hong such a focused and orchestrated attack on the professional and general reputation of another lawyer that such attack did have one or more of the severe effects pleaded by Mr Deliu. History provides examples of people who in calmer times appeared to have a resilience which either left them or was severely dented when tested. Mr Deliu deposes that he will call expert evidence as to the harm he alleges he suffered. I cannot rule out the possibility that Mr Deliu will prove his pleaded case on at least one of his pleaded harms. In relation to the various illnesses and other conditions that he pleads, Mr Deliu must know that he is embarking on a course replete with opportunities for self-embarrassment if he fails. But, Mr Hong's own conduct opened the door to Mr Deliu's pleading.

Harm

[111] Mr Hong has not established that the third cause of action (intentional infliction of physical harm) is not arguable. I refer to my discussion of the factual allegations.[72]

Fourth cause of action - defamation and malicious falsehood

Mr Deliu's pleading

[112] Under the heading "defamation/malicious falsehood" Mr Deliu pleads:

> **FIRST PLAINTIFF'S FOURTH AND SECOND PLAINTIFF'S THIRD SET OF CLAIMS AGAINST THE DEFENDANT - DEFAMATION/MALICIOUS FALSEHOOD**
>
> 23. The plaintiffs repeat and re-plead paragraphs 1 - 22, rely on the extracts of evidence annexed to this amended statement of claim, and say further that the defendant, on a number of discrete occasions in 2010 those being on or about 13 May, 23 May, 6 June, 9 June, 17 June, 20 August, 24 August, 15 September, 17 September, 20 September, 23 September and 27 September, committed the tort of defamation against the plaintiffs by publishing statements to third parties that: (i) tended to lower the plaintiffs in the estimation of right thinking members of society and the legal profession, (ii) caused the plaintiffs to be shunned or avoided by others, (iii) was calculated to expose the plaintiffs to public hatred, contempt or ridicule, (iv) was false and ridiculed the plaintiffs, or (v) was otherwise libelous and/or committed the tort of malicious falsehood against the plaintiffs by: (a) maliciously (b) publishing to third parties (c) false statements about the plaintiffs (d) that caused damage to the plaintiffs.
>
> …

[113] Mr Deliu in his second amended statement of claim provides nine pages of particulars, being statements contained in communications from Mr Hong between 13 May 2010 and 27 September 2010.

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[72] Above at [98] – [106].

Mr Hong's response

[114] Mr Hong in his statement of defence primarily invokes the defence of absolute privilege under s 14 Defamation Act. Additionally, he pleads litigation privilege. Finally, he pleads alternative defences of truth, honest and genuine opinion, consent to publication, and a defence under s 14 New Zealand Bill of Rights Act 1990 ("freedom of expression").

[115] In his amended notice of application in this strike out proceeding, Mr Hong says:

> The fourth cause of action is framed in defamation/malicious falsehood is untenable as the communications complained of are either privileged or to which the Defendant can rely on them being his honest opinion and his right to freedom of expression (sic).

Mr Deliu's opposition to strike out

[116] In his notice of opposition, Mr Deliu highlighted two points:

(a) Affirmative defences are to be left for trial and are not amenable to strike out;

(b) If privilege may be claimed in relation to communications involving the disciplinary process, then Mr Hong waived such privilege by copying the relevant documents to others (outside the scope of the privilege).

Amenability of a defence of privilege to a strike out application

[117] Mr Deliu relied upon *TTAH Limited v Koninklijketenkate NV*[73] as establishing a proposition that a cause of action ought not to be struck out on the grounds of a positive defence such as a limitation period (in that case) or a claim of privilege (as in this case). I do not read the judgment of Associate Judge Bell in the *TTAH* case as supporting Mr Deliu's proposition. Rather, his Honour emphasises that statements of

[73] *TTAH Limited v Koninklijke Ten Cate NV* [2012] NZHC 1402.

claim will be struck out only in clear cases when it is obvious and inevitable that the claim will fail.[74] On the other hand, the decision of the Court of Appeal in *Teletax Consultants Ltd v Williams*[75] illustrates with specific reference to privilege under s 14 Defamation Act 1992 that in appropriately clear cases, a proceeding may be struck out on the basis that an affirmative defence will inevitably succeed.

Availability of privilege in disciplinary proceedings

[118] Section 14(1)(b) Defamation Act 1992 provides:

> **14 Absolute privilege in relation to judicial proceedings and other legal matters**
>
> (1) Subject to any provision to the contrary in any other enactment, in any proceedings before—
>
> (a) …
>
> (b) A tribunal or authority that has a duty to act judicially,—
>
> anything said, written, or done in those proceedings by a member of the tribunal or authority, or by a party, representative, or witness, is protected by absolute privilege.

[119] Mr Deliu did not develop detailed submissions to suggest that privilege under s 14 Defamation Act was unavailable in relation to Law Society disciplinary proceedings. But his submissions implicitly invited that conclusion. I do not accept such a submission. The Court of Appeal's judgment in *Teletax Consultants Ltd v Williams*[76] (decided before the 1992 Defamation Act was passed) remains authority for the proposition that absolute privilege applies not only to judicial proceedings before a court of justice, but also to tribunals exercising functions equivalent to those of an established court of justice. The Lawyers Complaints Service established under the Law Practitioners Act 1982 continues to be "a tribunal or authority that has a duty to act judicially" as provided for under s 14(1)(b) of the Act.

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74 At [47].
75 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA).
76 At 1.

Availability of absolute privilege when material published to "outsiders"

[120] The absolute privilege provided by s 14 of the Defamation Act is expressly in relation to:

> Anything said, written or done *in those proceedings.*
>
> (emphasis added)

[121] Mr Deliu submits that it is at least arguable that absolute privilege may not be available on the facts of this case, when the Court examines the extent to which Mr Hong elected to publish his written material in relation to the Law Society complaints.

[122] Mr Deliu illustrated the factual issue by reference to the letter sent by Mr Hong to the Law Society on 23 May 2010 with an email cover sheet. This was the letter by which Mr Hong responded to Mr Deliu's complaint of 6 May 2010 and Mr Hong made his own cross-complaint.

[123] It is to be borne in mind that this is correspondence in the context of complaints of professional misconduct by one practitioner (Mr Deliu) against another (Mr Hong) and vice versa. There was no complaint against other practitioners.

[124] The email coversheet indicates that the 23 May 2010 letter was sent not only to the professional standards solicitor of the Lawyers Complaints Service. It was sent also to Mr Deliu; Tony Ram and Richard Zhao (two junior barristers employed at Amicus and involved as counsel in the Hong proceeding) and Fred Baker (the barristers' instructing solicitor in that proceeding).

[125] The emails in evidence indicate that Mr Hong may have also copied later correspondence in relation to the Law Society complaint to other lawyers (such as Ms Cato, Ms Strauss and Mr Kirkland). It is this course of correspondence in relation to the Law Society complaints which Mr Deliu, by his statement of claim, alleges contains material which constitutes defamation and malicious falsehood.

[126] The exhibited emails indicate on their face that some at least were copied to the people I have mentioned. Given Mr Hong's apparent pattern of copying such emails to persons not directly involved in the complaints process, it is only evidence at trial which will establish whether Mr Hong in relation to any particular item of correspondence is able to establish that it was not copied to an "outsider". As it is, there is before me sufficient evidence to make it at least arguable that Mr Hong copied the correspondence containing the allegedly defamatory statements to outsiders.

[127] Mr Deliu, in his notice of opposition and in his submissions, developed a proposition that Mr Hong's copying of correspondence to outsiders amounted to a waiver of any privilege. Mr Deliu took the concept of waiver of privilege by analogy from s 65(2) Evidence Act 2006. For present purposes, I find it unnecessary to categorise the argued occurrence as a waiver of privilege. That terminology may not be apposite. It is sufficient, by reference to the wording of s 14 of the Defamation Act itself, to characterise the copying of correspondence to outsiders as at least arguably an act not:

> done in those proceedings

as required by s 14(1)(b) of the Act.

[128] Mr Banbrook, responding to the submissions on the unavailability of absolute privilege, gave me his formulation of the circumstances in which absolute privilege will continue to attach. He submitted that under s 14(1)(b) of the Defamation Act absolute privilege will continue to attach to what would otherwise be a defamatory publication, if the recipient has or had an involvement in the subject-matter of the communication. Mr Banbrook referred also to a concept of "legitimate interest", submitting that the recipients of Mr Hong's correspondence had a legitimate interest in the subject matter of the correspondence.

[129] Mr Banbrook did not refer me to any authority for his formulation of the circumstances in which absolute privilege will continue to attach.

[130] I refrain from concluding that Mr Banbrook's formulation is incorrect. It is sufficient that I find, as I do, that it is at least arguable that privilege under s 14(1) became unavailable to Mr Hong when he chose to copy his correspondence to those whom I have referred to as "outsiders". At the very least, on Mr Banbrook's own formulation, it would be a matter of mixed law and fact whether particular individuals to whom the correspondence was copied had "an involvement in the subject matter of the communication" or a "legitimate interest". Such matters can only properly be determined at trial. This is not a case where the success of the positive defence (privilege) is so obvious and inevitable that an otherwise available tenable claim in defamation must fail.

Availability of litigation privilege

[131] Set out in the Schedule to this judgment are the statements of Mr Hong alleged by Mr Deliu to be defamatory, as summarised by Venning J from the pleadings as they stood in October 2010.

[132] Since that time, Mr Deliu has included in his now Second Amended Statement of Claim additional particulars of defamatory statements. The particulars include statements made in correspondence concerning the civil litigation and not directly in the context of the Law Society complaints processes. It is this civil litigation context which gives rise to what Mr Banbrook has referred to as "litigation privilege".

[133] I deal with litigation privilege only briefly as Mr Banbrook mentioned it simply in his written submissions on the basis that all the communications were privileged, either because they arose in the context of litigation or as part of the Law Society Complaints Service. He did not develop the litigation privilege submission in his oral submissions.

[134] Any attempt to invoke litigation privilege as some form of defence to a claim of defamation would be fraught with difficulty. Mr Deliu's complaint is that Mr Hong published the statements complained of to numerous people who had no part in a solicitor/client relationship with Mr Hong. Section 56 of the Evidence Act

2006 codifies the privilege which was known at common law as "litigation privilege".[77] By s 56(1) of the Act, the communication to be privileged has to have been prepared for the dominant purpose of preparing for the proceeding or the apprehended proceeding. If Mr Hong is to advance that proposition, it is debatable at best.

[135] Furthermore, s 65(1) of the Act, dealing with waiver, provides:

> A person who has a privilege conferred by any of sections 54-60 and 64 may waive that privilege either expressly or impliedly.

[136] Section 65(2) of the Act goes on to provide that waiver arises when the privilege holder voluntarily produces or discloses any significant part of the privilege communication in circumstances that are inconsistent with a claim of confidentiality. It is at least arguable that Mr Hong waived any privilege by publishing to some of the people who Mr Deliu alleges were the recipients of the defamatory material. It is arguable that this was a deliberate publication.

[137] In these circumstances, it is unsurprising that Mr Banbrook did not seek to develop oral submissions concerning the litigation privilege defence. Even were I to find the defence arguable, the application of the alleged litigation privilege in this case is far removed from the circumstances in *Teletax Consultants Ltd v Williams*[78] in which the Court found it could be satisfied that the affirmative defence would clearly succeed.

A defence of truth, honest and genuine opinion

[138] Although such a defence is referred to in Mr Hong's pleading, Mr Banbrook did not develop it in his written submissions in support of the strike out application. Nor did he do so in his oral submissions.

[139] To the extent the defence of truth is asserted, it cannot prevail in a strike out context given the express pleading by Mr Deliu of falsehood. Similarly, in the context of a defence of honest and genuine opinion, Mr Deliu has in his statement of

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77 *Adams on Criminal Law*, Evidence (online ed.) at EA56.01.

78 *Teletax Consultants Ltd v Williams*, above n 75.

claim pleaded malice. These aspects of defence are therefore for trial and not suitable for a strike out application.

A defence of a right to freedom of expression

[140] In his statement of defence, Mr Hong asserts a right of freedom of expression under s 14 New Zealand Bill of Rights Act 1990. The concept is also invoked in his strike out application as an alternative ground.

[141] As in relation to some other grounds stated in the application, Mr Banbrook did not make written or oral submissions in relation to this ground. Without having heard submissions as to how the ground might be developed, I am left to view it as a very difficult argument to pursue. Mr Deliu is pursuing damages for a clearly recognised tort. There is no demonstrated basis on which to strike out this defamation claim on the basis of an asserted right of freedom of expression.

Summary as to defamation and malicious falsehood

[142] Mr Deliu's cause of action is arguable. It cannot be said that any of Mr Hong's affirmative defences will inevitably succeed.

The proceeding as frivolous and vexatious and an abuse of the process of the Court

The jurisdiction

[143] High Court Rule 15.1(1)(c) provides:

> (1) The court may strike out all or part of a pleading if it—
>
> (a) …
>
> (b) …
>
> (c) is frivolous or vexatious;
>
> (d) is otherwise an abuse of the process of the Court.

Mr Banbrook's submissions

[144] Although the notice of opposition referred to the concept of abuse of process in addition to the allegation that the proceeding was frivolous and vexatious, Mr Banbrook focused his submissions on the latter allegation. Mr Banbrook urged me to adopt particular conclusions of Associate Judge Bell in the judgment of 17 June 2011, namely:

> [22] The claims by Mr Deliu and by Mr Hong are frivolous. The parties are using the pleadings to direct insults at each other. This proceeding is not being used to uphold interests which the law of torts sets out to protect. In the eyes of the law, the matters in issue in this proceeding are trivial. This proceeding lacks the seriousness required of matters for the Court's determination.
>
> [23] This decision that the pleadings are frivolous does not turn on whether Mr Deliu or Mr Hong have tenable causes of action for their claims, although that is a relevant consideration …
>
> [33] I do not say that all Mr Deliu's or Mr Hong's causes of action are completely untenable but their cases are very weak. They are contrived simply as vehicles in which to deliver attacks against each other. The point remains that this proceeding is not being run to serve any useful purpose.
>
> [38] The arguing between these parties has to be brought to an end. The Court's message to the parties is: stop it.
>
> [39] I need to indicate, however, that if either of the parties were to indulge further in the kind of silly conduct that has given rise to this proceeding, this decision would not necessarily stand as a precedent against further action being taken against that party in future.

[145] Mr Banbrook referred also to the judgment of Courtney J of 21 December 2011, in which the order striking out Mr Deliu's claim was set aside. Mr Banbrook noted that the setting aside of the Associate Judge's decision in that regard was not by reason of any flaw in the Associate Judge's analysis. Rather, the original strike out application was expressly in relation to the Amicus claims and not Mr Deliu's claims.

Mr Deliu's submissions

[146] Mr Deliu's submissions in response to the "frivolous and vexatious" assertion began against an assumed background that the causes of action had been upheld as arguable and were not to be struck out on that basis. Focusing on the substance of what he alleges against Mr Hong, he noted the professional context – one practitioner making allegations against another as to professional incompetence, a lack of integrity to the point of criminality, unethical behaviour and poor mental health.

[147] Mr Deliu then turned to the question of remedy, submitting that his litigation has a real prospect of significant remedy. He referred to the damages awarded by this Court in *Korda Mentha v Siemer*.[79] In that case, the plaintiffs were Korda Mentha and Michael Stiassny. Cooper J describes Mr Stiassny as a:[80]

> *well known professional person, an accountant practising as a principal in [Korda Mentha], and a specialist in receiverships and liquidations*.

[148] Mr Stiassny was appointed receiver of a company. Mr Siemer challenged the receivership in the High Court. The receivership of the company was terminated. A dispute over fees became the subject of a settlement agreement. Mr Siemer thereafter pursued complaints against Mr Stiassny and his firm, including to the Institute of Chartered Accountants and the Institute of Directors. Mr Siemer pursued a series of public complaints against Mr Stiassny and his firm. This included a billboard and a web-site. Mr Stiassny and his firm initially obtained injunctive relief. They later sued for breach of the settlement agreement and for defamation. Korda Mentha was awarded damages for defamation of $75,000. Mr Stiassny was awarded $650,000 general damages, $150,000 aggravated damages and $25,000 exemplary damages, all in respect of the defamation claim.

[149] Mr Deliu did not suggest that, in the circumstances of the present case, he would likely obtain damages at the level awarded to Mr Stiassny. Rather, he emphasised that significant damages are available in relation to defamatory material

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79 *Korda Mentha v Siemer* HC Auckland CIV-2005-404-001808, 23 December 2008.
80 At [6].

which seriously impugns a person's professional and personal character. Mr Deliu noted the resurrection of complaint proceedings against Mr Hong as a result of the judgment of Winkelmann J in the judicial review proceeding. An important passage in the judgment of Winkelmann J contains reasoning as to why the original determination that Mr Deliu's complaint was trivial, frivolous and vexatious was incorrect:

> [48] The Standards Committee based its decision on both s 138(1)(b) (the subject matter of the complaint is trivial) and s 138(1)(c) (the complaint is frivolous, vexatious or is not made in good faith). In proceeding on the basis of s 138(1)(b), the Standards Committee had to be satisfied that that the subject matter of the complaint, that is the conduct complained of, was trivial. And though s 138(1)(c) focuses on the complaint, it is difficult to conceive that this would be invoked by a Standards Committee in circumstances where there was compelling evidence of significant misconduct by the practitioner complained of.
>
> [49] Both the Standards Committee and the Review Officer should have considered the evidence in relation to Mr Hong's conduct. If they had they would have seen that there was ample cause for concern. Mr Hong told the Law Society that he had hired a private investigator to investigate another practitioner, Mr Deliu. He issued a meritless and vexatious counterclaim in the District Court thereby extending the unseemly and abusive dispute that had developed over the original District Court proceedings. He engaged in offensive and intemperate correspondence. His conduct could not reasonably have been described as trivial, nor the complaint frivolous or vexatious. Nor could it properly be characterised as a dispute "personal to the parties," because it drew others into the dispute, including other lawyers and former clients of both Mr Hong and Mr Deliu, and the District Court. It wasted court resources. It had the potential at least to undermine public confidence in the profession.

[150] While the necessary focus of the judicial review judgment was upon the administrative process involved with the Law Society complaints, with the concluding focus on public confidence in the profession, the thrust of Mr Deliu's submission was that the reasoning of Winkelmann J (against the Standards Committee's and the Review Officer's findings of trivial, frivolous and vexatious complaints) is applicable to Mr Banbrook's similar characterisation of Mr Deliu's claims in this proceeding.

Discussion

[151] Mr Banbrook clearly drew some measure of confidence for his submission that Mr Deliu's proceeding was frivolous and vexatious from the finding of Associate Judge Bell on that point.

[152] It is convenient to briefly re-examine how the Associate Judge reached his conclusions.

[153] His Honour began his examination of the "frivolous and vexatious" ground with the wording of r 15.1(1)(c) High Court Rules. He quoted the New Shorter Oxford Dictionary definition of "frivolous" as:[81]

> 1. Of little or no value or importance, paltry; (of a claim, charge, etc), and for a claim or charge having no reasonable grounds.
>
> 2. Lacking seriousness or sense; silly.

[154] His Honour then found the claims of both Mr Deliu and Mr Hong frivolous and this proceeding trivial, lacking the seriousness required of matters for the Court's determination.[82] His Honour observed that such findings did not turn on whether there are tenable causes of action but his Honour then turned to review those briefly. He reached a number of different conclusions as to the arguability of the four causes of action than I have. His Honour then continued:[83]

> [31] Both parties have sought relief directed at challenging the competence of the other to be a lawyer and haves [sic] sought remedies under the Lawyers & Conveyancers Act. This Court does have a power to strike lawyers off the rolls, but the parties need to bear in mind that the Law Society has already considered the complaints that each has made against the other. The Law Society has already determined that those complaints should not be taken further. That is a clear signal, I suggest, that any proceeding in this Court to have any of the lawyers struck off by order of this Court is, to put it mildly, extremely optimistic.
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> (footnotes omitted)

and

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81 *Deliu v Hong*, above n 7, at [21].
82 At [22]-[23].
83 At [31] and [35].

> [35] It is well established that the Court should exercise its power to strike out pleadings sparingly and only in clear cases. It is a serious step to rule at an interlocutory stage that a proceeding is not fit to be heard in this Court. But to allow this proceeding to continue would only prolong a dispute that should be put to rest. It is a dispute in which none of the parties can hope to obtain any advantage and in which they may do themselves harm.

[155] His Honour then noted that whereas his decision was based on the conclusion the proceeding was frivolous, neither Mr Deliu nor Mr Banbrook had made submissions on that proposition.[84]

[156] The hearing before me took place at a point when the complaint proceedings had, by virtue of the judicial review judgment, been resurrected. Mr Hong, instead of facing no complaint process, because Mr Deliu's complaints had been regarded as trivial, frivolous and vexatious, now faced a disciplinary charge before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. I have referred to the Tribunal's subsequent decision.[85]

[157] I view the fluctuating fate of the disciplinary processes as essentially a matter of background. I must exercise the strike out jurisdiction, without the benefit of ultimate conclusions of fact, in the light of the evidence as it stands and in accordance with the jurisdictional rules.

[158] Mr Deliu may ultimately be found on the evidence to succeed on one or more of his causes of action. He may obtain damages of substance.

[159] It is a reality, particularly of the modern climate of civil litigation, that Court resources are relatively scarce and there is not an unlimited right to carry on litigation.[86]

[160] Such considerations must be balanced against the need to protect access to justice. The importance of that concept was emphasised in the judgment by Casey J in his judgment in the Court of Appeal decision in *New Zealand Social Credit*

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84 At [36].
85 Above at [39].
86 Andrew Beck, *Principles of Civil Procedure* (3rd ed., Brookers, Wellington, 2012) at 3.31.

Political League Inc v O'Brien,[87] which his Honour (concurring with Cooke and Somers JJ in the outcome) found to be one of those rare cases when the Court is under an obligation to step in and say "enough" and to dismiss a proceeding for abuse of process. In that case, Mr O'Brien's first proceeding, in relation to the facts on which he was suing, had failed after a jury trial. A second proceeding had been struck out. It was a third proceeding with which the Court of Appeal was dealing. Jeffries J had refused an application to strike out the statement of claim in the third proceeding. The defendants appealed successfully. Casey J observed:[88]

> If there was anything in the present proceedings, they should have been brought years ago not kept as the third shot in the locker after the first two missed their target. Three successive actions about the same subject-matter spread over so many years pile up a burden on the defendants which can only be described as oppressive.

[161] This feature in O'Brien's case of multiplicity of litigation is a repeated feature of many successful strike out applications (including in some more recent English cases to which I will come).

[162] The present case is in a different category. Mr Deliu has brought his alternative causes of action together in a single proceeding which he wishes to pursue.

[163] The observations of Casey J in *New Zealand Social Credit Political League Inc v O'Brien* in introducing his Honour's final conclusion are more applicable to this case than is the specific conclusion on the facts of that case. His Honour observed:[89]

> It is important that citizens should have the fullest access to the Courts to have their disputes resolved. In an ideal system, this would happen with speed and competence, but we must accept and compromise with delays in the stakes (I speak in general terms). We must also accept that litigation and its threat is a burden in time, worry and cost to all parties.

[164] I find helpful also reference to the practice in some Australian states. Most Australian states, as does New Zealand, have express provision for the striking out of

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87 *New Zealand Social Credit League Inc v O'Brien*, above n 55.
88 At 100.
89 At 99.

a frivolous or vexatious pleading.[90] In his text *Australian Civil Procedure*, Bernard Cairns summarises practice in Australian states in this way:[91]

> A frivolous pleading or allegation is something that is not worth serious attention. A vexatious pleading or allegation is for the purpose of harassment. A pleading is therefore vexatious if it cannot succeed, or is put forward simply for the purpose of wasting time or for causing delay. A pleading that is not intended to be taken seriously is frivolous, in the same way as a claim that has no foundation: *Tampion v Anderson* [1973] VR 321. In *Chaffers v Goldsmid* [1894] 1 QB 186 the court struck out an action against a member of parliament for refusing to present a petition, and an action for the revocation of letters of administration 90 years after the grant was struck out in *Willis v Earl Beauchamp* (1886) 11 PD 59. There is thus an avenue for the court to terminate actions or defences that are plainly hopeless or not bona fide. The applicant must show that the claim or defence cannot succeed. Any hope of success the action may have is fatal to an application to show that a pleading is frivolous or vexatious: *Rajski v Powell* (1987) 11 NSWLR 522.

[165] For the reasons earlier stated, I am not persuaded that each of the causes of action in this proceeding will fail. The causes of action are not plainly hopeless. Equally, I am satisfied that the evidence points to Mr Deliu's bona fides in bringing this proceeding for remedies. To the contrary, it is clear that he is prepared to expend considerable time and analysis in the pursuit of those remedies. Whether that time will ultimately be wasted is not a determination open to me on the affidavit evidence in this summary jurisdiction. There is a temptation, based on how I might personally regard this litigation, to characterise it as a waste of time. But even a modestly successful outcome in relation to torts such as defamation may be of greater significance for one individual than another. In my judgment, the Court must be hesitant to dismiss a proceeding either on the "frivolous and vexatious" or the abuse of process jurisdiction where the plaintiff has a reasonable hope of success.

The Jameel doctrine or principle – proportionality

[166] In a post-script to his judgment of 17 June 2011, Associate Judge Bell referred to the English Court of Appeal decision in *Jameel (Yousef) v Dow Jones &*

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90 Bernard Cairns, *Australian Civil Procedure* (6th ed., Thomson LawBook Co, Sydney, 2005) at 402: Such rules exist in the Australian Capital Territory, the Northern Territory, Tasmania, Victoria and Western Australia.

91 At 402.

Co Inc.[92] In that case (a claim for defamation through the internet), the Court of Appeal struck out the claim saying:[93]

> If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

[167] In its candle and wick metaphors, the Court of Appeal enlarged on an observation of Eady J five years earlier in *Schellenberg v BBC.*[94] As inviting as the "candle" metaphors adopted by Eady J in *Schellenberg* may be, Eady J subsequently disavowed it as an "off the cuff remark in an *ex tempore* judgment ... specifically with reference to the very unusual facts of the case" which:[95]

> …would not be right to elevate … into a general principle of some kind to be applied in other libel actions.

[168] I ignore neither that observation nor the understandable concern as to the waste of resources which drives it, but context is critical. In the *Jameel* case, the publication in question was a worldwide internet publication with evidence of only five subscribers in England, three of whom were associates of the plaintiff and the other two who had never heard of the plaintiff. The decision is underpinned by the fact that there was not a substantial tort committed in the United Kingdom.

[169] The approach to abuse of process issues taken by the Court of Appeal in *Jameel's* case has been referred to subsequently by English Courts variously as the *Jameel doctrine*[96] and as the *Jameel principle.*[97] The Courts recognise that there may be justification to strike out a proceeding for abuse of process where a

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92 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75.

93 At [69].

94 *Schellenberg v BBC* [2000] EMLR 296 (QB) at 318. Fully: "I am here taking those matters into account not in the context of damages but for the purposes of applying at a pre-trial stage the overriding objective at Part 1 of the C.P.R. I am therefore not only entitled, but indeed bound, to ask whether, in the old colloquial phrase, the game is worth the candle."

95 *Howe v Burden* [2004] EWHC 196 (QBD) at [5]. (At [6] Eady J explained that in *Schellenberg* the plaintiff (who had abandoned his first proceeding after a lengthy trial) had already had one opportunity of having his case heard on its merits.)

96 *Kaschke v Osler* [2010] EWHC 1075 (QB) at [26] and [31].

97 *Khader v Aziz* [2010] EWCA Civ 716 at [48] per Carnwath LJ.

claimant's reputation has suffered no or minimal actual damage[98] and where, put another way, when the alleged infringement is shown not to be real or substantial.[99] Courts have asked themselves whether or not a "real and substantial tort" has been committed and whether any damages recovered might be so small as to be totally disproportionate to the high costs of a libel action.[100] Thus, the *Jameel* approach involves a consideration of the alleged tort at two levels. Was there real substance to the publication of the defamatory material in the first place? If so, could a jury properly be directed to award other than very modest damages, far outweighed by the cost of the proceeding?

[170] The jurisdictional basis upon which the Court of Appeal struck out Mr Jameel's claim as an abuse of process was by reference to two principal matters:[101]

(a) The Civil Procedure Rules 1998, which the Court said required it to be both more flexible and more proactive in its approach to litigation; and

(b) The Human Rights Act 1988 (UK) which, the Court said, required it to administer the law in a manner compatible with the rights created by Article 10 of the European Convention on Human Rights.

[171] As has been observed by Garling J in the New South Wales Supreme Court in *Barach v University of New South Wales*:[102]

> The [*Jameel*] decision is one clearly based upon, and perhaps mandated by, the provisions of the European Convention on Human Rights and the Human Rights Act (UK). Neither of these pieces of legislation are applicable in this [NSW] jurisdiction or else these proceedings. There is a clear distinction between the legislation and the principles to be applied here, and the legislation applicable in *Jameel.*

[172] Garling J therefore declined to apply *Jameel* in *Barach.* He did so both for the jurisdiction-based reason and also because the facts were not really comparable.

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98 *Jameel (Yousef) v Dow Jones & Co Inc*, above n 92, at [40].
99 At [71].
100 *Kaschke v Osler*, above n 96, at [22]; *Williams v MGN Ltd* [2009] EWHC 3150 (QB); *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB).
101 *Jameel (Yousef) v Dow Jones & Co Inc*, above n 92, at [55].
102 *Barach v University of New South Wales* [2011] NSWSC 431 at [128].

In *Barach's* case, there were a larger number of defamatory publications (17 in all) to a broader group of people. Dr Barach alleged loss of national and international reputation, unlike the situation in *Jameel.* Garling J noted that it appeared to have been accepted in *Jameel* that the damages recoverable in that case were minimal whereas the damages in *Barach's* case were said to be substantial.

[173] In declining to follow *Jameel,* Garling J noted that his decision accorded with a similar conclusion reached by Kirby J in the New South Wales Supreme Court in *Manefield v Child Care NSW*.[103] In that decision, Kirby J referred to the jurisdictional discussion in *Jameel* at [55], before concluding that the *Jameel* discussion had no relevance to Mr Manefield's claim.[104] Kirby J noted that Mr Manefield had certainly sustained damage to his reputation and that although the audience was limited, the damage was considerable, because it was the audience he needed to impress if he was to have a future in the childcare industry.[105]

[174] It is at least arguable that the facts of the present case are substantially dissimilar to those of the *Jameel* case – Mr Hong appears to have sent directly to people practising in the legal profession in Auckland his very focused allegations about the allegedly unprofessional, unsound and even criminal conduct of Mr Deliu who was practising in the same profession in the same city.

[175] New Zealand is the only appropriate forum for this proceeding. There can be no suggestion of an alternative forum to which Mr Deliu might resort for the vindication of his character. The decision in *Jameel* turns on a balancing exercise, with the balance coming out very strongly in favour of suit in a foreign jurisdiction as the appropriate place for any vindication. In this regard, I respectfully adopt the grounds for distinguishing *Jameel* which are identified in the judgment of Associate Judge Sargisson in *Karam v Parker.*[106]

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103 *Manefield v Child Care NSW* [2010] NSWSC 1420.
104 At [186]-[187].
105 At [186]-[187].
106 *Karam v Parker* HC Auckland CIV-2010-404-3038, 29 July 2011 at [52]-[54].

The concept of proportionality generally

[176] The concept of proportionality, as invoked by the England and Wales Court of Appeal in *Jameel*, was recognised most clearly through the introduction of the Civil Procedure Rules in April 1999. The expressed overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly.[107] That in turn expressly includes, so far as practicable:

> …
>
> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party
>
> …
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[177] Under r 3.4 Civil Procedure Rules the Court may strike out a statement of case (or part thereof) if it appears to the Court:

> that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;[108]

[178] It is under this concept of abuse of the Court's process that considerations as to the frivolous nature of a proceeding now appear to be dealt with – as observed by the authors of *Defamation: Law, Procedure and Practice*:[109]

> The concept of abuse of process ties in neatly with general CPR considerations of allocating appropriate resources to a claim.

[179] On an application to strike out a frivolous claim, the linking may be seen in ascending order thus:

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107 Rule 1.1 (1) Civil Procedure Rules (UK).

108 Rule 3.4 (2) (b) Civil Procedure Rules (UK).

109 David Price, Korieh Duodu and Nicola Cain, *Defamation: Law, Procedure and Practice* (4th ed., Thomson Reuters, London, 2009) at 359.

- Frivolous
- Disproportionate
- Abuse of process
- Unjust

[180] The New Zealand High Court Rules have to date not adopted in the same way as the Civil Procedure Rules an overriding objective to enable the Court to deal with the case justly.

[181] Similarly, the High Court Rules do not expressly contain as a ground for striking out a claim (alongside abuse of process) the United Kingdom formula of:[110]

> *Otherwise likely to obstruct the just disposal of the proceeding.*

The catch-all in New Zealand is therefore simply that contained in r 15.1(d) High Court Rules. After listing grounds such as no reasonably arguable cause of action and frivolousness, the remaining ground of objection is:

> (d) is otherwise an abuse of the process of the court.

[182] The High Court Rules do not contain a list parallel to that in r 1.1(2) Civil Procedure Rules of the components for "dealing with a case justly". Similarly, the concepts of proportionate litigation and proportionate allocation of Court resources are not at present spelt out in the High Court Rules in the way they are in the United Kingdom equivalent.

[183] The discovery and inspection reforms introduced in New Zealand from 1 February 2012[111] identified the principle of proportionality expressly in relation to discovery and inspection:

> **8.2 Co-operation**
>
> (1) The parties must co-operate to ensure that the processes of discovery and inspection are—

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110 Rule 3.4 (2) (b) Civil Procedure Rules (UK).
111 High Court Amendment Rules (No. 2) 2011.

(a) proportionate to the subject matter of the proceeding; and

(b) facilitated by agreement on practical arrangements.

(2) The parties must, when appropriate,—

(a) consider options to reduce the scope and burden of discovery; and

(b) achieve reciprocity in the electronic format and processes of discovery and inspection; and

(c) ensure technology is used efficiently and effectively; and

(d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

[184] To this extent, in relation to an aspect of case management (discovery and inspection) the Rules Committee in 2012 introduced a requirement of proportionality in civil litigation.

[185] The subsequent case management reforms in New Zealand which came into force on 4 February 2013[112] have thus been explained:[113]

> In the light of material collected, the High Court resolved that case management should have the following features:
>
> (a) It should be proportionate to the subject matter of the proceeding, and in particular its complexity. The type of case management appropriate for ordinary non-complex proceedings may not be the type of case management appropriate for complex proceedings;
>
> …

[186] Rule 7.1 High Court Rules was amended by the 2013 Case Management Reforms to include this provision as to proportionality:[114]

7.1 Proceedings subject of case management

(1) …

(2) …

(3) The purpose of a case management conference is to enable the Judge to assist the parties—

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112 High Court Amendment Rules (No. 2) 2012.

113 Winkelmann, Asher, Fogarty and Miller JJ Hon., "The New High Court Case Management Regime" (paper presented to the New Zealand Law Society, February-March 2013) at 2.

114 High Court Rules, r 7.1 (3)(d).

…

(d) to ensure that the costs of the proceeding are proportionate to the subject matter of the proceeding

[187] The two areas in which the New Zealand High Court Rules can be said to be focussed upon proportionality (discovery and inspection on the one hand, and case management streams on the other) are both in the context of litigation which is proceeding before the Court. The plaintiff (together with other parties) is being permitted to pursue a proceeding albeit with constraints which proportionality may potentially require.

[188] It may well be that there is a policy debate yet to be had or worked through in New Zealand as to the extent to which considerations of proportionality should apply to the right to commence litigation in the first place. A concept of proportionality has not been identified in the High Court Rules as expressly applying to such a consideration in the same way as the courts in the United Kingdom have construed the Civil Procedure Rules in their jurisdiction.

[189] I have referred to cases illustrating the rejection of *Jameel* by Judges of the Supreme Court in New South Wales.[115] The Court of Appeal of New South Wales in another defamation case, *Habib v Radio 2UE Sydney Pty Ltd*[116] had cause to review the Court's principled approach to strike out applications on the basis of abuse of process. The Court emphasised that the power to stay proceedings permanently on the ground that they are an abuse of process should be exercised with caution and only in the most exceptional or extreme case. The onus of satisfying the Court that there is an abuse of process lies upon the party alleging it, it is "a heavy one".[117]

[190] Then coming to the jurisdiction to strike out proceedings for abuse of process, the Court noted:[118]

> Only in the most clear case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a

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115 See above at [171] – [173].
116 *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231.
117 At [79].
118 At [204].

> plaintiff from bringing an apparently proper cause of action to trial: *Broxton v McClelland & Anor* [1995] EMLR 485 (at 497-498). Where jurisdiction exists, access to the Courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances: *Oceanic Sunline Special Shipping Co Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197 (at 252) per Deane J.

[191] I have referred earlier to similar observations of Casey J in *New Zealand Social Credit Political League Inc v O'Brien* in which his Honour recognised the importance that citizens should have the fullest access to the Courts to have their disputes resolved.[119]

[192] Having regard to the present state of the High Court Rules, I do not find that the High Court has departed from what may be considered the traditional approach in this jurisdiction to access to justice (as exemplified in the *O'Brien* decision and in the New South Wales cases to which I have referred). I do not find that questions of disproportionately low recovery should drive conclusions of abuse of process as a matter of inevitability. That must be particularly so in relation to a tortious claim which has a remedial focus as much on preservation or restoration of reputation as it may have on pecuniary compensation.

[193] For these reasons, I do not find the approach in *Jameel* to be applicable in this case.

Conclusions in relation to proportionality

[194] Even had the *Jameel* principle applied in this case, I would not have found Mr Hong entitled to have Mr Deliu's proceedings struck out on the basis that it is frivolous or otherwise an abuse of process of the Court. The possibility of damages beyond a nominal level cannot be ruled out in this case.

[195] The High Court Rules recognise and provide for disciplines of proportionality in the active case management of proceedings before the Court. There is an obligation upon the Court and the parties, now reinforced by the February 2013 case management reforms, to ensure that the proceeding is given only

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[119] See above at [163].

the resources which are proportionate to the case and fair to the other users of the Court.

[196] I did not receive any submissions from either party as to the interlocutory directions which might appropriately flow, if these claims are not struck out. Nor did I receive any indication as to the length of an anticipated trial.

[197] What must be clear to the parties is this. Both interlocutory and trial resources will be proportionate. The Court will look to the parties largely, if not wholly, to agree the historical narrative. Many factual matters, save perhaps matters of Mr Hong's alleged intention and matters relating to Mr Deliu's alleged harm, should be capable of agreement. One can expect that few witnesses will be required. The Court will equally look to the parties to identify and narrow the legal issues for trial. An issues conference under r 7.5 will ensure that this occurs. The allocation of proportionate resources to this proceeding will entail the allocation of a trial of modest length.

[198] At a case management conference to be convened shortly the Court will make timetable and other directions calculated to ensure that this litigation proceeds to trial with a strict observance of the proportionality principle.

[199] Such an approach is consistent with the case management principles of proportionality. At the same time, it preserves the plaintiff's right of access to the Courts when the plaintiff has arguable claims.

Outcome

[200] Mr Hong has not discharged the heavy onus upon him of satisfying me that Mr Deliu's case against him is frivolous or is otherwise an abuse of process of the Court.

[201] This residual ground of application having failed, Mr Hong's application will be dismissed in its entirety.

[202] Mr Deliu has elected to appear in person in this proceeding and not pursuant to his practice as a barrister and solicitor representing himself. Given that he made that election, my provisional view is that this is a case in which costs should lie where they fall. If that position is not accepted by Mr Deliu, he is to file a memorandum as to costs (four pages limit) within 10 working days to be followed by Mr Hong's memorandum within five working days thereafter. The Court will then rule on costs on the papers. In the meantime, costs will be reserved.

Orders

[203] I order:

(a) The application of the defendant to strike out the plaintiff's statement of claim is dismissed;

(b) Costs are reserved.

Associate Judge Osborne

Solicitors

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B G Hong Law Firm, PO Box 233, Shortland Street, Auckland 1010
Counsel: A D Banbrook, PO Box 105870, Auckland 1140

SCHEDULE

The alleged defamatory statements pleaded are:

Letter of 23 May:

- the plaintiff exhibited lack of due care and skill an lack of courtesy to a fellow practitioner;
- the plaintiff failed to properly consider all legal issues;
- the plaintiff was not competent in the areas and fields of the law;
- the plaintiff issued proceedings that was to the detriment of clients;
- the plaintiff intended to prevent the defendant from communicating with counsel with junior counsel and the instructing solicitors to avoid embarrassment;
- the plaintiff and his junior counsel did not have an in-depth knowledge of conveyancing matters and legal precedent;
- the plaintiff had failed to act with courtesy to a fellow practitioner;
- the plaintiff had no idea what a fiduciary was;
- the plaintiff had failed in obligations to his clients;
- the plaintiff was an amateur (lawyer);
- the plaintiff had breached a number of rules by allowing the proceedings to issue through barristers in his chambers;

- the plaintiff's actions would cause financial harm to his client;

- in addition, although not strictly defamatory, the plaintiff also complains the defendant indicated when the proceedings were completed he intended to seek out the plaintiff's clients and advise them of their right to have independent counsel address any concerns with the Law Society.

10 June letter:

- inviting the parties to revisit any decision holding the plaintiff in high regard;

- the plaintiff was unfit to be head of any barrister's chambers or to provide advice to junior barristers;

- in addition, although not defamatory, the plaintiff complains the defendant stated he had reviewed all actions taken by the plaintiff.

17 June letter:

- the plaintiff holds utter contempt for Judges;

- the plaintiff holds utter contempt for the Law Society;

- the plaintiff holds utter contempt for fellow practitioners;

- the plaintiff has no respect for legal practitioners;

- the plaintiff is racist;

- the plaintiff does not have good standing to be a practitioner;

- the plaintiff refuses to accept judgments of the Court to the detriment of his clients;
- that the plaintiff should be restricted or restrained from heading the barrister's chambers;
- that the plaintiff has shown thuggery towards others previously;
- the plaintiff was mentally unstable;
- the plaintiff's admission to the Law Society was a mistake;
- the plaintiff was unfit to practise as a legal practitioner;
- the plaintiff had breached his fiduciary duty to his clients;
- the plaintiff had undertaken unwinnable, unmeritorious and vexatious proceedings in order to generate fees and/or utilise such cases for his marketing and promotional purposes to the detriment of clients and legal aid authorities;
- he had breached his duty to the Court as an officer of the Court and had misled it;
- he had intentionally subverted the barrister's intervention rule;
- he undertook briefs on behalf of clients that went beyond his level of scope and experience;
- he enticed junior barristers to his chambers to utilise there, in his persona in their names;
- had brought the profession into disrepute and it was necessary to protect members of the public from the plaintiff;

- it was necessary to protect junior solicitors from the plaintiff;
- the website of the plaintiff's chambers was misleading;

The 15 September statements:

- the plaintiff was unfit to practise and should not have been admitted;
- the plaintiff showed he had no basic understanding of the way the New Zealand legal system works;
- that emails to one of the plaintiff's instructing solicitors may have been subverted.