ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR ANY IDENTIFYING PARTICULARS OF THE PARTIES TO THIS PROCEEDING.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-004701
[2014] NZHC 863

UNDER	the District Courts Act 1947
BETWEEN	NR Appellant
AND	MR Respondent

Hearing: 5-6 March 2014

Appearances: Appellant in person
R Hollyman and A Holmes for Respondent

Judgment: 30 April 2014

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 30 April 2014 at 4pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors:
Solicitors/Counsel:
Wilson Harle, Auckland
R Hollyman Barrister, Auckland
A Holmes, Barrister, Auckland
Copy to:
Appellant

Contents

Introduction

[1] The appellant has appealed against a judgment of the District Court at Auckland, in which the Judge struck out the appellant's pleadings in a proceeding filed in that Court ("the strike-out judgment").[1]

[2] Orders have been made for the permanent suppression of the names of the appellant and the respondent, and of any particulars that may lead to their identification. Accordingly, the parties will be referred to in this judgment as "the appellant" and "the respondent", and no details which could lead to their identification are included, or are permitted to be published.

Background

[3] The appellant alleges that between about mid-December 2011 and 8 February 2013 he and the respondent were in a commercial relationship, the nature of which was that the respondent was a sex worker and provided commercial sexual services to her client, the appellant.[2] Services were provided at an Auckland club ("the club") and, on occasion, outside the club when the respondent accompanied the appellant as a paid escort. The appellant paid the respondent in cash for each hour of services, and made a separate payment to the club for hire of a room. The respondent used an assumed name when providing services to the appellant.

[4] On 8 February 2012, the appellant met the respondent at the club. The appellant paid the respondent $240 for two hours of her services, and paid the club $190 for two hours room hire. During this period the appellant gave the respondent a mobile telephone, and the respondent opened the package to look at it.

[5] The appellant then paid the respondent $215 cash, for a further hour of her services, and a further hour of room hire. The room hire fee ($95) was given to the manager of the club. At about this time, the respondent became upset when she noticed the registration plate number of her car on the recent internet searches on the appellant's own mobile telephone. The respondent asked the appellant to leave the

---

1 *R v R* DC Auckland CIV 2012-4-1388, 11 November 2013.

2 In relation to the terms "sex worker", "commercial sexual services", and "client", the appellant refers to the definition of these terms in s 4 of the Prostitution Law Reform Act 2003.

club and he left shortly afterwards. The respondent attempted to return the payment for the additional hour for her services, and the mobile telephone, but the appellant refused to accept either. The events of 8 February 2012 are referred to as "the incident".

[6] At about 3 pm the same day, the appellant returned to the club and asked to see the respondent. When told she was not there, he left her a typed letter. A few days later, on 11 or 12 February 2012, the appellant rang the club and asked to make a booking with the respondent. He was told that he could not do so. On 14 February 2012 the appellant met with the owner of the club. During that meeting he gave the owner a handwritten letter to give to the respondent.

[7] On two occasions after the meeting with the owner of the club, the appellant waited in his car outside the club, in an attempt to see the respondent and to talk to her. On 5 and 9 March 2012, he sent emails to the club about the respondent. On 2 May 2012, the appellant contacted a private investigation agency, from which he obtained the respondent's real name and contact details. On 5 May 2012, he sent the respondent an email. He made calls to the respondent's mobile telephone, and on 10 May 2012 sent a text message to her.

Applications for orders under the Domestic Violence Act 1995 and the Harassment Act 1997

[8] On 15 May 2012, the respondent filed an application for a protection order under the Domestic Violence Act 1995 in the Family Court at Auckland ("the DVA application"). At the same time, the respondent filed an application for a restraining order under the Harassment Act 1997 in the District Court at Auckland ("the Harassment Act application"). The respondent swore one affidavit in support of both applications. The respondent said that she was applying for a protection order under the Domestic Violence Act, and, in the alternative, a restraining order under the Harassment Act. A Deputy Registrar of the Family Court directed that the DVA application should not proceed.

[9] The Harassment Act application was pursued by the respondent, and opposed by the appellant. The appellant asserted that his attempts to contact the respondent

after the incident were for a lawful purpose; namely, recovering damages from her. He also asserted that the respondent suffered from a delusional disorder. The Harassment Act application was heard in the District Court at Auckland on 9 May 2013, before Judge Sharp. Her Honour gave an oral judgment in which she concluded that a restraining order was justified ("the Harassment Act judgment").[3] An order was made restraining the appellant from making any contact with the respondent or her family, for a period of five years. On 22 May 2013, the appellant filed an appeal to this Court against the Harassment Act judgment. That appeal has been heard and the Judge's decision is reserved.

The civil proceeding

[10] On 3 July 2012, the appellant filed civil proceedings against the respondent in the District Court at Auckland, claiming breach of contract, defamation, breach of confidence and aggravated damages ("the civil proceeding"). Subsequently, the appellant filed an amended statement of claim and a second amended statement of claim. The respondent filed a statement of defence, and a statement of defence to the amended statement of claim, then an amended statement of defence to the amended statement of claim.

[11] On 13 March 2013, the respondent filed an application to strike out the civil proceeding, on the grounds that it is an abuse of process. That application was heard in the District Court at Auckland on 21 August 2013, before Judge B A Gibson, and the strike-out judgment was delivered on 11 November 2013.[4]

[12] It is relevant to note that pursuant to a direction recorded by Judge Mathers in a Minute dated 20 December 2012, the affidavits filed in the Harassment Act application could be admitted as evidence in the civil proceeding. That evidence was therefore before the Judge at the hearing of the respondent's strike out application.

[13] The appellant filed his appeal to this Court from the strike-out judgment on 31 October 2013.

---

3 *R v R* DC Auckland CIV 2012-4-1034, 9 May 2013.

4 *R v R* DC Auckland CIV 2012-4-1388, 11 November 2013.The strike out judgment was initially delivered on 16 October 2013, then recalled on 17 October 2013 for counsel to make submissions as to suppression of the parties' names, and reissued on 11 November 2013.

The contempt proceeding

[14] On 9 January 2013, the appellant filed a proceeding in this Court, alleging that the respondent, her solicitors, and a partner and solicitor of that firm were in contempt of Court ("the contempt proceeding"). On 13 March 2013 the respondent and her solicitors applied to this Court for an order striking out that proceeding, on the basis that it is an abuse of process. That application was heard in this Court on 29 August 2013, before Woodhouse J. In his judgment delivered on 21 February 2014, his Honour ordered that the application for contempt orders was struck out in its entirety ("the contempt judgment").[5]

The strike out judgment

[15] After setting out the background facts, and referring to the principles relating to applications to strike out proceedings, Judge Gibson considered each of the appellant's causes of action, as set out in the second amended statement of claim.

First cause of action: "Breach of contract, unjust enrichment, Prostitution Reform Act 2003"

[16] The Judge held that the respondent was entitled to refuse to provide further commercial sexual services to the appellant.[6] He further held that as the appellant had not accepted the respondent's offer to refund the money the appellant had paid for the additional hour, no claimable loss had arisen.

[17] Regarding the mobile telephone, the Judge held that the appellant's pleading that it was a term of the contract between himself and the respondent that she would accept the telephone, and that by rejecting it and attempting to return it she had breached the contract, was untenable and must be struck out. He held that once the appellant's gift was accepted by the respondent, it was hers to do as she wished.

[18] The Judge held that the respondent had attempted to return the money and the telephone, and as the respondent would not accept them, he could not sue for their value on the basis of a breach of contract. The Judge considered the claim for unjust

---

5 *N v M* [2014] NZHC 239.

6 Referring to s 17 of the Prostitution Reform Act 2003.

enrichment to be equally untenable as the respondent offered to return the phone and money, and there is no such cause of action in New Zealand.

Second cause of action: "Defamation Act 1992"

[19] The Judge said that the appellant had alleged that the respondent had published ten defamatory statements, made in an affidavit sworn by the respondent in support of her DVA and Harassment Act applications, in an email sent by the respondent to a manager at the club, and in communications between the respondent and other managers at the club.

[20] The Judge noted that the appellant had not identified, in the second amended statement of claim, the respondent's affidavit as being the source of alleged defamatory statements, but held that it was plain that the alleged defamatory statements had been taken from the affidavit sworn by the respondent on 15 May 2012. The Judge noted that pursuant to s 14(1) of the Defamation Act 1992, anything said, written or done in judicial proceedings is subject to absolute privilege.

[21] The Judge held that any publication of the affidavit by virtue of it having been seen by a process server (serving the DVA and Harassment Act proceedings on the appellant) was also protected by absolute privilege, as service was part of the Court's process, and necessary for the administration of justice.

[22] The Judge held that absolute privilege did not apply where the affidavit had been emailed to a manager of the club, as the manager was not a party to either the DVA or the Harassment Act proceeding. However, the Judge held that to allow the civil proceeding to be founded on passages from the respondent's affidavit (which was evidence in the Harassment Act proceeding) would be to countenance a collateral attack on the findings in the Harassment Act judgment. He held that to allow the Defamation Act claim to continue, following the determination of the Harassment Act proceeding, would amount to re-litigation of the truth and accuracy of passages in the respondent's affidavit, when those issues had been determined.

[23] Regarding the respondent's communications to other managers at the club, the Judge held that these were protected by qualified privilege, as the club had a

clear interest in ensuring that the respondent, and any other prostitute working at the club, was not harassed. The Judge observed that defences of honest opinion would also be available to the respondent, as a result of the Harassment Act judgment. Accordingly, the Judge held that the appellant's claim in defamation was so untenable that it was a clear case where the claim should be struck out.

Third and fourth causes of action: "Malicious proceeding under the Domestic Violence Act and the Harassment Act"

[24] The Judge observed, first, that the DVA proceeding had not proceeded beyond the application being filed. The Judge then held that the appellant's claim in respect of the Harassment Act proceeding was untenable and could not succeed, as the respondent had succeeded in that proceeding. As the respondent had succeeded, the proceeding could not be described as malicious.

[25] The Judge further observed that there is no tort of malicious prosecution of a civil proceeding. Accordingly, the third and fourth causes of action were held to be untenable, and struck out.

Fifth cause of action: "Breach of confidence, breach of privacy"

[26] In this cause of action, the appellant alleged that he volunteered information to the respondent about his personal circumstances to support "commercial offers" that he made to her, and that he had an expectation that the information would be kept confidential. The appellant alleges that the respondent breached an implied term of the relationship between them, by disclosing this information to managers at the club, the process server, and the Court.

[27] The Judge accepted that in the ordinary course of events, a term could be implied into a commercial arrangement between a prostitute and her client of a reasonable expectation of privacy or confidence, but held that the appellant's claims on the facts as pleaded were plainly untenable. The Judge observed that some of the respondent's statements referred to in the statement of claim had been made in the respondent's affidavit in support of the Harassment Act application. He further said that in the circumstances where the appellant had come to the club in an attempt to

see the respondent, had written notes for her, and emailed and written to the club to try and arrange a meeting, there could be no expectation that information imparted by the appellant would remain confidential. The Judge concluded that any suggestion that the respondent was prevented by an obligation of confidentiality from using that information in support of her Harassment Act application was specious.

[28] Accordingly, the Judge was satisfied that the fifth cause of action was untenable and, as were other causes of action, an abuse of the Court's process, and struck out.

Sixth cause of action: "Consumer Guarantees Act 1993"

[29] The appellant alleged that the respondent had supplied commercial services to him, and had failed to exercise the reasonable care and skill guaranteed by s 28 of the Consumer Guarantees Act, by "exhibiting unreasonably excessive emotions" towards the appellant during the incident. The appellant further alleged that the respondent's alleged failure was aggravated by "the very object of the service being provided by the [respondent] was to provide pleasure to the plaintiff".

[30] The Judge noted that the appellant sought, under this cause of action, general damages of $120, and said that this was an amount so small that even if the appellant had a tenable cause of action, the principle *de minimis non curat lex* would apply.

[31] The Judge further noted that the respondent had no obligation to continue to supply sexual services, and that she had a right under the Prostitution Reform Act to refuse to do so. The Judge held that the alleged facts were so untenable that they could not support a claim, even if the appellant could be considered a consumer in terms of the definition of "consumer" under the Consumer Guarantees Act. Accordingly, the Judge concluded that the sixth cause of action also constituted an abuse of process, and must be struck out.

Alternative ground: frivolous and vexatious proceeding

[32] Having determined that the appellant's claim disclosed no tenable causes of action, the Judge went on to consider the alternative ground advanced by the respondent, which was that the proceeding was frivolous and vexatious. The Judge held that there were no genuine interests in the proceeding for the appellant to try to protect or recover losses for, under the various heads of claim. The Judge concluded that the proceeding was a more sinister use of the Court's processes, for the further harassment of the respondent through the use of legal procedures. For that reason, the Judge concluded that the proceedings were frivolous and vexatious.

Approach on appeal

[33] This appeal is brought under s 72 of the District Courts Act. Section 75 of the Act provides that the appeal is to be by way of re-hearing, and s 76 provides that, having heard the appeal, this Court may make any decision it thinks should have been made, or may direct that the application be re-heard in the District Court.

[34] The approach to a general appeal from a judgment of the District Courts is as set out in the judgments of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*,[7] and *Kacem v Bashir*.[8] The appellate court has the responsibility of considering the merits of the case afresh, and must substitute its own decision if it reaches a different conclusion from that reached in the court below. As the Supreme Court said in *Austin Nichols*, where the lower court had a particular advantage such as technical expertise and the opportunity to assess the credibility of witnesses, the appellate court might hesitate to find that findings of fact and degree are wrong.[9] However, the weight given to the lower court's reasoning is a matter for the appellate court's assessment.[10]

---

7 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 (SC).
8 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 (SC).
9 *Austin, Nichols*, above n 7, at [5].
10 See also *Kacem v Bashir*, above n 8, at [32].

Strike out principles

[35] The jurisdiction to strike out pleadings in the District Court is set out in r 2.50 of the District Courts Rules 2009. As relevant to this appeal, r 2.50.1 provides that the court may order that the whole or any part of a pleading be struck out if the pleading discloses no reasonable cause of action, or is otherwise an abuse of the process of the Court. Further, r 2.50.3 provides that the Court may order that a proceeding be stayed or dismissed generally, if the Court considers that no reasonable cause of action is disclosed, the proceeding is frivolous or vexatious, or the proceeding is an abuse of the process of the Court.

[36] The approach to be taken to applications to strike out pleadings on the ground that no reasonably arguable cause of action is disclosed is well established by the judgments of the Court of Appeal in *Attorney-General v Prince & Gardner*,[11] the Supreme Court in *Couch v Attorney-General*,[12] and in *North Shore City Council v Attorney-General*.[13] Briefly summarised, the principles are:

(a) Pleaded facts are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The pleaded cause or causes of action must be clearly untenable. A claim should not be struck out summarily unless 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 issues of law.

(e) The Court should be particularly slow to strike out a claim in any developing area of the law.

---

11 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267.
12 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 25 (SC) at [33].
13 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (SC) at [146].

[37] A court is entitled to receive affidavit evidence on a strike out application. It will not normally consider evidence which is inconsistent with the pleading, but "there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further."[14] In the present case, as noted at [12], above, an order had been made that evidence filed in the Harassment Act proceeding was admissible in the civil proceeding. That evidence was, therefore, before the Judge at the hearing of the strike out application

[38] Regarding striking out a statement of claim on the ground that it is otherwise an abuse of process, the Court of Appeal in *Commissioner of Inland Revenue Department v Chesterfields Pre Schools Ltd* observed that this ground is intended to prevent the improper use of the court's machinery.[15] The ground of being "otherwise an abuse of process of the court" captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or is an attempt to obtain a collateral benefit. The Court in *Chesterfields* also noted that the power to strike out on this ground is to be used properly and for bona fide purposes, and if a defect in the pleadings can be cured, then the Court would normally order an amendment of the statement of claim.

First cause of action – breach of contract and unjust enrichment

The pleading

[39] The appellant pleads that he asked the respondent whether she would accept a mobile phone as a gift from him, to which she agreed. He purchased a phone as a gift. On 8 February he paid for 2 hours of her services, during which he gave her the phone and she accepted it as a gift. Around 12 pm he paid $215 for an additional hour of services, including $95 for room hire. At about this time the respondent's mood changed from normal to upset after she noticed that her car's registration plate number was in the recent searches on his phone. She asked the appellant to leave. She attempted to return the money paid for the additional hour of services, and the

---

[14] *Attorney-General v McVeagh* [1995] 1 NZLR (CA) at 566, confirmed as applying to r 15.1 by *Pharmacy Care Systems Ltd v Attorney-General* (2001) 15 PRNZ 465 (CA).

[15] *Commissioner of Inland Revenue Department v Chesterfields Pre Schools Limited* [2013] NZCA 53, [2013] 2 NZLR 679 (CA) at [87]-[89].

mobile phone. She did not provide services for the additional hour. The appellant refused to accept the return of the phone and money.

[40] The appellant alleges that the respondent breached the contract between them by attempting to return the gift, by essentially refusing the gift, and by not providing him with compensation for it. Alternatively, the appellant pleads that the act of accepting the gifted phone was a term of the contract for provision of sexual services, an implicit term of which was that the respondent was to provide him with compensation for the gift in the form of acceptance of the gift and expressions of appreciation and gratitude. The appellant claims $215 for the service that was not provided (including room hire), expenses of $758.90 (being the cost of the mobile phone), and general damages of $1,403.90 for mental distress and humiliation.

The appellant's submissions

[41] The appellant submitted that for the purposes of the strike out application, it should be assumed that the appellant would prove that the mobile phone was a term of a contract between himself and the respondent. He submitted that it is common for gifts to be conditional, and it is not nonsensical for him, playing the role of "boyfriend", to "donate a gift" to the respondent playing the role of his "girlfriend". He submitted that he did not intend to transfer the phone to the respondent for nothing. The "gifting" activity took place during the time he paid the respondent, and she provided services. The gift was therefore part of those services. He submitted that part of the respondent's role was to accept "gifts", and that the respondent had clearly not accepted the phone as a gift, but as a term of a contract between the parties, and the compensation he sought was for her to please him by "accepting" the "gift".

[42] The appellant further submitted that even if the mobile phone were a gift in a legal sense, it is not appropriate for this cause of action to be struck out, as there was a mistake and misrepresentation. He submitted that he would not have gifted the phone if he had known that the respondent was concerned about his behaviour, and if he had known that she was engaged in misleading conduct while in trade by spying on him by passing on personal information she received from him. He submitted

that whether there was a gift of the mobile phone is a question of fact, which cannot be determined at strike out. He submitted that when he said to the respondent that it was a gift, it did not mean it was a "true" gift.

[43] The appellant submitted that unjust enrichment was claimed as an alternative to the claim for breach of contract.

[44] The appellant accepted that the respondent could refuse to provide further sexual services. He submitted that he did not sue for her refusal, but instead sought damages, as the amount the respondent offered to return to him was less than the amount he had paid (in that it did not include the amount for room hire). He submitted that his refusal to accept the return of money was because it was inappropriate to accept the return or settle the dispute due to the respondent's mental state. He further submitted that even if there was a refund, it was a partial refund at best, and did not prevent his claiming for mental distress.

The respondent's submissions

[45] On behalf of the respondent, Mr Hollyman submitted that the claim for breach of contract is incapable of success given that the appellant admits he gave the mobile phone to the respondent, it did not have value to him, the respondent attempted to return it but he refused to accept it, and the appellant later wrote to the respondent saying she should keep it and give the money to charity. He submitted that the appellant's characterisation of having entered into a contract to give a gift is untenable. He submitted that the $95 (for room hire) was not claimable from the respondent as it was a payment to the , not the respondent.

[46] With regard to unjust enrichment, Mr Hollyman submitted that there is no cause of action for unjust enrichment recognised in New Zealand and the facts as pleaded do not show an arguable case of unjust enrichment, given the appellant's refusal to accept the return of mobile phone and money. He submitted that the appellant's submission that the gift was an "imperfect gift" is contradicted by the evidence and pleadings.

Discussion

(a) The mobile phone

[47] The appellant pleaded that he "expressly asked [the respondent] whether [she] would accept a mobile phone as a gift". The fact that a person says they will accept a gift does not mean that there is a contract to that effect. Asking whether a person will accept a gift is not an offer to give the gift in a contractual sense. Viewed as a whole and objectively from the point of view of the reasonable person on both sides, assuming pleaded facts to be true, the appellant's pleading does not show a concluded bargain.[16] An objective bystander would not consider that the parties must each have considered that some contractual nexus had been established.[17] There was no intention to create legal relations with regard to the phone. The commercial relationship between the parties does not change this analysis as gifts are commonly given within commercial relationships.

[48] In *Law of Contract in New Zealand*, the authors say:[18]

> The refusal of the courts to discuss the adequacy of consideration may make it difficult, on occasion, to distinguish between a gift and a sale. If A promises B to give B A's new Rolls-Royce car for nothing, there is obviously no consideration and no contract. If A promises B to give B A's new Rolls-Royce car if B will fetch it from the garage, there is still no consideration and no contract. The requirement that B is to fetch the car is not the price of the promise, but the condition precedent to the operation of A's generosity. The transaction is not a sale, but a conditional gift. However, if A promises B to give B A's new Rolls-Royce car if B will give A 10 cents, there is consideration and there is a contract.

[49] In the present case, on the facts as pleaded, the appellant promised to give the respondent the phone for nothing – there was no consideration and no contract. The appellant pleads that he expressly asked the respondent whether she would accept the phone as a gift. For a contract to have arisen, he would have to have said something akin to "will you accept this phone and in exchange will you give me gratitude and appreciation". On a straight application of contractual principles, this would then be a contract for the gift of the phone. However, when the appellant

---

16 See *Meates v Attorney-General* [1983] NZLR 308 (CA).

17 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 41.

18 At 129-130.

asked the respondent if she would accept a phone as a gift, there cannot have been certainty on her part as to what her obligations were. No contract arose and the cause of action is untenable.

[50] Even if there were a valid offer and acceptance, and certainty as to obligations, it was not a term of the contract that the respondent would not attempt to return the phone. On the facts as pleaded, the respondent did accept the phone and therefore fulfilled the contract, if there were one. I have concluded that this part of the first cause of action for breach of contract is untenable.

[51] The alternative cause of action of unjust enrichment is also untenable. In the light of the pleading that the respondent attempted to return the mobile phone, she cannot be found to have been unjustly enriched.

(b) The money

[52] The respondent refused to provide the third hour of services, as she was entitled to do under s 17(1) of the Prostitution Reform Act 2003. Section 17(3) provides that the appellant may sue to recover damages for a contract for the provision of commercial sexual services that was not performed. However, a plaintiff (or, as here, the appellant) is not entitled to recover damages to compensate for loss which would not have been suffered if he or she had taken reasonable steps to mitigate the loss.[19] A defendant must prove that the plaintiff has failed in his or her duty of mitigation.

[53] The appellant could have mitigated his loss by accepting the refund offered by the respondent, notwithstanding that it did not include the $95 for room hire. The mitigation rule imposes on the appellant an obligation to take all reasonable steps to mitigate his loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take that step.[20] Any breach of contract by the respondent was not causative of all of the appellant's loss – he is debarred from

---

19 *Law of Contract in New Zealand*, above n 17 at 874, citing *British Westinghouse Electric and Manufacturing Co v Underground Electric Railway Co of London* [1912] AC 673 at 689.

20 H G Beale (ed) *Chitty on Contracts: General Principles* (31st ed, Sweet & Maxwell, London, 2012) at 26-079.

claiming the money he did not accept in refund. He would be entitled to sue for only that amount of money which the respondent did not offer him back.

[54] However, once the respondent exercised her right under s 17 of the Prostitution Reform Act to refuse to provide services, it was no longer possible to achieve the substantial purpose of the contract.[21] The contract was frustrated and the appellant cannot recover the room hire.

[55] I have concluded that this part of the first cause of action is untenable. Again, the alternative claim for unjust enrichment with regard to the money is also untenable, for the same reasons as set out above in respect of the mobile phone.

[56] Accordingly, I conclude that the Judge did not err in holding that the whole of the first cause of action for breach of contract, and the alternative claim for unjust enrichment, must be struck out.

Second cause of action – defamation

The pleading

[57] The appellant pleads that the respondent published untrue and defamatory statements about him in a document attached to an email sent by her to a manager of the club; published the same statements in an affidavit given to a process server for service on the appellant; published untrue and defamatory statements in the email to the manager; and made defamatory statements about the appellant to her duty manager and to the owner of the club. The appellant pleads that any opinion contained in the defamatory statements was not a genuine opinion, and that the respondent was motivated by ill will and took improper advantage of the occasions of publication.

[58] The appellant pleads that the defamatory statements have caused mental distress, insult and humiliation and have resulted in damage in the form of a lifetime ban from the . He claims for a declaration that the respondent is liable to him for

---

[21] *Law of Contract in New Zealand*, above n 17, at 784.

defamation, general damages of $5,000 for each defamatory statement, and punitive damages under s 28 of the Defamation Act 1992.

The appellant's submissions

[59] The appellant submitted that the onus is not on him, at strike out, to show that the alleged defamatory statements are capable of a defamatory meaning. He submitted that the Judge in the District Court erred in fact and in law in finding that the defamatory statements contained in the respondent's attachment were contained in an affidavit (sworn by the respondent in support of the Harassment Act application) served on the appellant by a process server. He submitted that as the respondent had breached discovery orders directing her to provide the attachment for inspection, he could only guess as to the content of the defamatory statements so in pleading them relied on the respondent's affidavit.

[60] In any event, the appellant submitted, it is irrelevant whether the statements were published in an affidavit. He submitted that it would be premature to strike out the proceeding in circumstances where the respondent had breached discovery orders and failed to reply to interrogatories. He submitted that there are exceptions from the general requirement to plead actual words.

[61] The appellant further submitted that a process server does not need to be aware of the content of a document he or she serves, so absolute privilege does not apply. It is enough for a process server to be aware of the nature of the document. He submitted that the process server was effectively a postman, and no different from a complete stranger, to whom the affidavit could have been given with a request to effect personal service on the appellant. He submitted that the Judge had erred by finding that it was unlikely that the process server was aware of the content of the affidavit without any evidence. He further submitted that the Judge failed to take into account his pleading that the affidavit was given to the process server without an envelope, and in such circumstances he was not required to prove that the process server was actually aware of the affidavit's contents.

[62] The appellant submitted that the cause of action in defamation does not constitute a collateral attack on the Harassment Act judgment. He then submitted

that no form of privilege is available to the respondent, and that no defence of honest opinion is available to her. He submitted that the respondent had failed to plead to the second amended statement of claim and failed to plead any particulars in support of her defence of truth or honest opinion. He submitted that a defence of qualified privilege either was not pleaded or should be struck out.

The respondent's submissions

[63] Mr Hollyman submitted that the contents of the respondent's affidavit, served on the appellant by the process server, are protected by absolute privilege. He submitted that the process server had an obligation to know what document he was serving and the defence of qualified privilege is a complete answer to the appellant's claim. He further submitted that the allegation that the respondent was motivated by ill will is untenable. Additionally, he submitted that the appellant had accepted the truth of the statements in the respondent's affidavit by failing to cross examine her on them.

[64] Mr Hollyman further submitted that publication by the respondent to her manager at the was protected by qualified privilege. He submitted that there was a clear common interest between the respondent and the in respect of her application for restraining order, and the publication was analogous to accusations of wrongdoing made to a business associate for which qualified privilege has been upheld.

[65] Mr Hollyman then submitted that the appellant's claim with regard to the statements in an email from the respondent to her manager cannot succeed as they, too, are protected by qualified privilege and the statements go no further than what is stated in the affidavit. Even if they did go further, they could only be the respondent's honest opinion. He submitted that the claim in relation to statements that the appellant had breached the respondent's privacy cannot succeed as the Harassment Act proceeding establishes that he did in fact do so.

Discussion

(a) Statements in affidavit served on the appellant

[66] While not pleaded in the second amended statement of claim, it cannot be disputed that the document referred to by the appellant was the respondent's affidavit in support of her Harassment Act application. Statements made in judicial proceedings enjoy absolute privilege. Section 14(1) of the Defamation Act 1992 provides that in any judicial proceeding "anything said, written, or done in those proceedings … by a party, representative, or witness, is protected by absolute privilege". The privilege protects what is said and done in the course of the hearing, and what is done from the inception of proceedings including all pleadings and documents brought into existence for the purpose of the proceedings, and briefs of evidence.[22]

[67] I am satisfied that publication of the respondent's affidavit in support of the Harassment Act application to a process server, for the purpose of service on the appellant, is protected by absolute privilege. Such publication was properly incidental to the Harassment Act application, and necessary for the administration of justice. The appellant's claim in defamation, based on statements made by the respondent in her affidavit in support of her application for a restraining order, is as a matter of law untenable.

(b) Statements in document given to the club manager

[68] Again, the appellant did not plead that the document given to the club manager was the respondent's affidavit. However, it is clear from a comparison with the respondent's affidavit that the alleged defamatory statements pleaded by the appellant were taken from that affidavit. He pleads that these statements were published to the club manager.

[69] Publication of the affidavit to the respondent's manager may be protected by qualified privilege. An occasion of qualified privilege is one where the person who makes the communication has an interest or duty to make the communication to the

---

[22] Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington 2013) at [16.10.03].

person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.[23] Whether the occasion was one of qualified privilege is a question of law, and the onus is on the defendant (in this case, the respondent). A defence of qualified privilege may be defeated if the plaintiff (here, the appellant) proves that by publishing the material in question, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.[24]

[70] I accept Mr Hollyman's submission that in this case, the respondent and her manager at the club had a common interest in the material communicated by the respondent. As a matter of law, the occasion was one of qualified privilege.

[71] The appellant alleges that the respondent was motivated by ill will, and took improper advantage of the occasions of publication. Whilst pleaded facts are assumed to be true for the purposes of a strike out application, this does not extend to pleaded allegations which are entirely speculative and without foundation.[25] The appellant's pleadings that the respondent was motivated by ill will, and improperly used an occasion of privilege are not statements of fact.

[72] I have found that the respondent was communicating with the manager on an occasion of qualified privilege. The respondent had an interest in disclosing the affidavit and the manager had a corresponding interest in receiving it. The publication to the manager was of the respondent's affidavit in support of the Harassment Act application. I have also found, later in this judgment, that the appellant's claim that the Harassment Act application, which was determined in favour of the respondent, cannot be a malicious proceeding. In the light of those findings, the appellant's allegations that the respondent was motivated by ill will and took improper advantage of the occasion of qualified privilege are without foundation. The respondent is entitled to claim qualified privilege.

---

23 *Adam v Ward* [1917] AC 309 (HL) at 334.
24 Defamation Act 1992, s 19.
25 See *Wilkins v Housing New Zealand Corporation* [2014] NZHC 507 at [14].

(c) Oral and email statements made to club managers

[73] I am satisfied that these statements are protected by qualified privilege. The appellant's second amended statement of claim includes a general pleading that when publishing defamatory statements about the appellant, the respondent was motivated by ill will, and took improper advantage of an occasion of qualified privilege. The appellant also pleads that the oral statement to the club manager was not the respondent's honest opinion. For the same reasons as set out above, I am satisfied that the appellant's pleadings are without foundation, and the respondent is entitled to claim qualified privilege.

[74] I therefore conclude that the Judge did not err in holding that the appellant's claim in defamation must be struck out as untenable. I do not permit the appellant to make his proposed amendments to the statement of claim.

Third and fourth causes of action – malicious civil proceedings

The pleading

[75] The appellant claims damages from the respondent on the grounds that the respondent's DVA and Harassment Act applications are actionable under the tort of "malicious quasi-criminal proceeding, or malicious civil proceeding, or abuse of process". He pleads that the applications had no reasonable and probable cause, contained false and contradictory statements, and were not factually supported. In respect of the DVA application, he claims general damages of $10,000. In respect of the the Harassment Act application, he claims general damages of $15,000.

The appellant's submissions

[76] The appellant submitted that the tort of malicious prosecution applies to civil as well as criminal proceedings.[26] He submitted that the elements of the tort of malicious civil proceeding are that the defendant (the respondent) has advanced a civil case against the plaintiff (the appellant); the proceeding terminated in a way that did not incriminate the plaintiff; the defendant had no reasonable and probable

[26] Citing *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17.

cause for bringing the proceeding; the defendant acted maliciously in instituting the proceeding; and damage has been caused.

[77] The appellant submitted that the DVA application had terminated in a way that did not incriminate him, and the Harassment Act application is subject to appeal so it could not be said that the respondent will finally succeed. He submitted that had he been permitted to admit the "judicial admissions" of the respondent, she would have failed in the Harassment Act application. In any event, he submitted, the respondent had by way of the "judicial admissions" effectively admitted that the application was commenced without reasonable and probable cause. He submitted that the respondent had no reasonable and probable cause for making the Harassment Act application, as his acts were done with a lawful purpose.

[78] The appellant further submitted that the respondent had no reasonable and probable cause for making the DVA application as she failed to meet the criteria for a protection order and her claims as to "alternative filing" are untenable. He submitted that if the respondent's solicitors truly had doubts as to whether the parties were in a domestic relationship, they should have applied to the Family Court or District Court to have the matter determined on a preliminary basis.

The respondent's submissions

[79] Mr Hollyman submitted that there is no tort of malicious prosecution of civil proceedings in New Zealand, and that there was no malicious prosecution in any event. The Harassment Act application was successful and the claim that it had no reasonable or probable cause is unsustainable in light of that. With regard to the DVA application, he submitted that there was legitimate uncertainty as to whether the relationship between the parties fit the definition of "close personal relationship". He submitted that Giles J in *Dudley v Brooks* had said that "wise counsel will doubtless apply in the alternative to ensure that, in the event of the Court holding that there is no close personal relationship [for the purposes of an application under the Domestic Violence Act], the [Harassment Act 1997] can be invoked".[27] In the present case, he noted, the Deputy Registrar had declined to accept the application

[27] *Dudley v Brooks* [1999] 2 NZLR 234 (HC) at 634.

under the Domestic Violence Act for filing. A case number was given but no proceeding initiated. Mr Hollyman submitted that there is therefore no proceeding to which the appellant's allegation of malicious prosecution of a civil proceeding could attach.

Is there a tort of malicious civil proceeding?

[80] The tort of malicious civil proceeding is not yet recognised in New Zealand.[28] In *Deliu v Hong*, Courtney J upheld Associate Judge Bell's decision to strike out a pleading of malicious prosecution of a civil proceeding, noting that:[29]

> The second cause of action was for malicious prosecution. It also rests on the complaints by Mr Hong to NZLS. The Associate Judge considered that the law in New Zealand was correctly represented by *Jones v Foreman*,[30] which is consistent with the recent clear statement by the House of Lords in *Gregory v Portsmouth City Council*.[31] The tort of malicious prosecution is not available in respect of civil proceedings save for very specific exceptions (which do not apply in this case). The House of Lords specifically rejected the extension of the tort to quasi-criminal disciplinary proceedings. The Associate Judge's assessment that this cause of action was not tenable must be correct.

[81] However, in a later judgment between the same parties, Associate Judge Osborne declined to strike out a pleading of prosecution of a malicious civil proceeding, on the ground that the court should be slow to strike out the pleading on the basis that the tort is not recognised.[32]

[82] I accept that the Court should be slow to strike out a claim in any developing area of the law. However, it is not necessary in this case to decide whether there is a tort of malicious civil proceeding. I am satisfied that even if there is such a tort, the appellant's claim could not succeed. I adopt the elements discussed by Hammond J in *Rawlinson v Purnell Jenkinson and Roscoe*:[33]

---

28 *Angland v Mower* HC Christchurch CIV-2008-409-1990, 17 December 2010 at [18].
29 *Deliu v Hong* HC Auckland CIV 2010-404-6349, 21 December 2011, at [15].
30 *Jones v Foreman* [1917] NZLR 798 (SC).
31 *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL).
32 *Deliu v Hong* [2013] NZHC 735, at [76]–[88].
33 *Rawlinson v Purnell Jenkinson and Roscoe* (1999) 1 NZLR 479 (HC), cited in *Angland v Mower*, above n 28, at [18].

a) The defendant must have advanced a civil cause against the plaintiff.

b) The application must have been ultimately resolved in the plaintiff's favour.

c) The defendant must have had no reasonable or probable cause for bringing the civil proceeding.

d) The defendant must have acted maliciously in instituting or continuing the civil proceeding.

e) Damage of a kind for which the law will allow recompense must have been caused to the plaintiff.

Discussion

(a) The Harassment Act application

[83] The appellant's allegation that the respondent's Harassment Act application is a malicious civil proceeding is clearly untenable. That application was not resolved in the appellant's favour. The respondent succeeded, and a restraining order was made. As she was successful it cannot be said that the respondent had no reasonable or probable cause for bringing the proceeding.

[84] The appellant is misguided in arguing that as he has appealed against the decision on the Harassment Act application the decision is not final. Pursuant to r 20.10 of the High Court Rules, an appeal does not operate as a stay of the proceedings appealed against. In the absence of an order from the court, the successful party is entitled to enforce the judgment given, so the respondent is entitled to the benefit of the restraining order.[34]

(b) The DVA application

[85] In *S v C,* Heath J adopted the statement of Giles J in *Dudley v Brooks*, referred to by counsel for the respondent.[35] In *S v C*, the District Court Judge had made a restraining order under the Harassment Act. Ms S's counsel submitted that the Judge had no jurisdiction and the order should have been made under the

---

[34] *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR20.10.01].
[35] *S v C* HC Auckland CIV-2009-404-4304, 18 September 2009.

Domestic Violence Act. His Honour's discussion of *Dudley v Brooks* was as follows:

> [20] … He commented that that statute is designed to protect the "very people" who cannot be brought within the framework of the Domestic Violence Act. He suggested that in cases of doubt, alternative applications could be brought so that, in either event, the Court would have jurisdiction to make either a protection order or a restraining order under the appropriate statute.
>
> [21] Although the Family Court exercises primary jurisdiction under the Domestic Violence Act, s 2 of that statute also confers jurisdiction on a District Court. The fact that a District Court can deal with both Domestic Violence Act and Harassment Act applications lends weight to the sensible suggestion made by Giles J in *Dudley v Brooks.*

[86] I am satisfied that it cannot be said that the respondent did not have reasonable and probable cause for making the DVA application. Further, whilst that application did not proceed, the application under the Harassment Act (relying on the same grounds) did proceed, supported by the respondent's affidavit filed in support of both applications. The appellant cannot therefore be said to have ultimately succeeded in the DVA application.

[87] It is necessary to comment briefly on the appellant's submission as to the respondent's "judicial admissions". This referred to the respondent's failure to plead to two paragraphs (194 and 195) relating to this cause of action, in her statement of defence (served on 11 October 2012) to the appellant's amended statement of claim. These paragraphs alleged that the appellant had treated the respondent courteously and with respect at all times, and that the appellant had not wronged the respondent, other than by being too kind to her and paying her too much.

[88] On 22 November 2012, the respondent served an amended statement of defence, which included a denial of the two paragraphs. On 16 January 2013, the appellant filed a second amended statement of claim, following which the respondent's strike out application was filed. The appellant submitted that having not pleaded to the two paragraphs, the respondent was deemed to have admitted them, and could not subsequently deny them.

[89] I reject the appellant's submission. First, whether the respondent admitted or denied the appellant's allegations is irrelevant for the purposes of a strike out application. Secondly, there is no basis on which the respondent could be said to be estopped from amending her pleading, as pleadings had not closed. It follows that I also reject the argument in relation to the defamation claim that the respondent is estopped from pleading any wrongdoing on the part of the appellant due to her "judicial admissions".

[90] I have concluded that the Judge did not err in holding that the appellant's claims of malicious civil proceeding in relation to the respondent's DVA application and the Harassment Act application must be struck out.

Alleged abuse of process

[91] The appellant submitted that claims that the DVA and Harassment Act applications were an abuse of process were included in the second amended statement of claim, as an alternative to the third and fourth causes of action. He submitted that the District Court Judge had failed to make any findings on those two claims, so that those two causes of action had not been struck out. He further submitted that, in the event that the Judge's conclusion (at [53] of the strike out judgment) that "the causes of action in the plaintiff's statement of claim must be struck out" was intended to cover the two abuse of process causes of action, the judgment was irrational.

[92] The appellant submitted that the DVA and Harassment Act applications were an abuse of process, because there was blackmail and a predominant ulterior purpose in them. He submitted that the Harassment Act judgment was itself evidence of a predominant collateral purpose on the part of the respondent, as the respondent and her solicitors had successfully manipulated the Judge into making illegal findings on the merits of the appellant's civil proceeding.

[93] It is apparent from the strike out judgment that the Judge did not make an express finding as to the appellant's claims of abuse of process. However, in light of the fact that the respondent's Harassment Act application (which was pursued on the same grounds as the DVA application) was determined in favour of the respondent, a

claim that those applications were an abuse of process could not succeed. Thus, for exactly the same reasons that the appellant's causes of action alleging malicious prosecution of civil proceedings are untenable, his causes of action alleging abuse of process are also untenable.

[94] I am satisfied that the appellant's causes of action alleging abuse of process were struck out by the Judge, and that the Judge did not err in doing so.

Fifth cause of action – breach of confidence and privacy

The pleading

[95] The appellant pleads that the fact that he visits a club and uses the services of a sex worker, the intimate private details of the services, his real name and fact that he has a wife and child, his business card, a letter he left for the respondent at the after the incident, and a handwritten note he left with the manager to give to respondent were disclosed by him to the respondent. He pleads that this was confidential information that the respondent disclosed by making the DVA and Harassment Act applications, providing copies of her affidavit in support of the applications to the process server and the manager, advising the manager of the incident and the appellant's identity after the incident, and advising the owners of the of those facts after the incident.

[96] The appellant further alleges that it was implicit in the nature of the relationship between the respondent and himself that this information was to be kept confidential, yet the respondent disclosed it to third parties, breaching his confidence and privacy. He claims $5,000 general damages for breach of confidence and in the alternative, $5,000 general damages for breach of privacy.

The appellant's submissions

[97] The appellant submitted that it was an implied term of the contract between the parties that a party would keep in confidence the personal information received from the other party. He submitted that the information was privileged; he had not waived privilege, but had required that it not be disclosed in any proceeding,

pursuant to s 53(3) of the Evidence Act 2006. The respondent had not made any application to set aside his claim for privilege.

[98] Accordingly, the appellant submitted, the appellant's evidence was inadmissible, and her application to strike out should on this ground, alone, have been struck out as being vexatious, an abuse of process, or likely to cause prejudice or delay.

The respondent's submissions

[99] Mr Hollyman submitted that the information was not confidential and the appellant could not have had a reasonable expectation that it would be kept confidential and not disclosed to the club managers and the owner. He submitted that the appellant himself gave a copy of his business card to the club, left a letter with the club to give the respondent, and left a handwritten note with the owner to give to the respondent. He submitted that the appellant's marital and parental status is a matter of public record. He further submitted that if the information were confidential, any disclosure was protected by the absolute defence of disclosure in the public interest.

[100] With regard to breach of privacy, Mr Hollyman submitted that the filing of an affidavit in a Court proceeding is not highly offensive publicity and, in any event, attracts absolute privilege. Further, there can be no publicity of details of the appellant's private life, due to suppression orders.

Breach of confidence

[101] The elements for a claim of breach of confidence are:[36]

(a) that the information has the necessary quality of confidence about it;

(b) that the information has been imparted in circumstances importing an element of confidence; and

---

[36] *Earthquake Commission v Krieger* [2014] 2 NZLR 547 (HC) at [31], citing *Coco v AN Clarke (Engineers) Ltd* [1969] RPC 41 (Ch), which was endorsed by *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1.

(c) that there has been an unauthorised use of the information.

[102] Personal information can have the necessary quality of confidence to be protected by a duty of confidence:[37]

> Personal information is often characterised as intimate aspects of a claimant's personal life, such as their medical information or details of their personal relationships. However, personal information does not have to be about a particularly intimate subject matter to qualify as confidential. I consider that details associated with insurance claims for damage to a person's residential home is personal information that is analogous to the traditional categories of private information that have been classed as confidential.

[103] The traditional categories are trade secrets, personal confidences, government information, and artistic and literary confidences.[38] It is arguable that the fact that a person has visited a club and used the services of a sex worker is information that has the necessary quality of confidence about it. The test to determine whether confidential information has been misused is "whether the conscience of the recipient of the confidential information should have been troubled by disclosing the information in question."[39]

Breach of privacy

[104] The elements are:[40]

(a) The existence of facts in respect of which there is a reasonable expectation of privacy; and

(b) Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[105] It is again arguable that a person who has visited a club and used the services of a sex worker has a reasonable expectation of privacy as to those facts.

---

37 *Earthquake Commission v Krieger*, above n 36, at [46].
38 At [44].
39 At [56].
40 *Hosking v Runting* [2005] 1 NZLR 1 (CA)

[106] The appellant's claim in relation to information published during "malicious proceedings" cannot succeed under either a breach of confidence or breach of privacy analysis. For breach of confidence, it is untenable that the respondent's conscience should have been troubled by disclosing that information in the context of an application to the court. For breach of privacy, for similar reasons, disclosure in an application to the court is not "publicity which would be considered highly offensive to the reasonable person".

[107] The appellant's claim in relation to information the respondent disclosed to the owner and her manager at the , is also untenable. First, I accept Mr Hollyman's submission that the respondent's disclosures to persons in authority at her place of work, necessary to prevent the appellant's harassment of the respondent, can only have been in the public interest. The respondent's conscience could not have been troubled by disclosing that information to them in the context of her employment at the .

[108] Further, the appellant said in an affidavit in opposition to the Harassment Act application that he gave his business card to the manager, he left a letter at the to be given to the respondent, and he left a handwritten note with the manager to give to the respondent. On the evidence before the District Court, the respondent did not publish the letter and note, the appellant did. The appellant's claim in respect of disclosure of his marital and parental status is also untenable, as that is a matter of public record.[41]

[109] The appellant submitted at the appeal hearing that his claim against the respondent could be amended to include an allegation of unlawful disclosure of privileged confidential information contained in communications in the course of settlement negotiations. He referred to an affidavit filed in support of his application for an order striking out the respondent's strike out application. In that affidavit, the appellant referred to emails sent to the respondent's solicitors.

[110] I accept Mr Hollyman's submission that any privilege attaching to his emails was waived by the appellant when he exhibited and commented on the original letter

---

41 *The Law of Torts in New Zealand*, above n 22, at [14.5.02(1)].

from the respondent's solicitors (to which the emails were the appellant's replies) in affidavits filed in the civil proceeding and the contempt proceeding. I also accept Mr Hollyman's submission that each email, taken separately, cannot be privileged, as none contains an offer of compromise, or any admission against the appellant's interest. Further, I accept Mr Hollyman's submission that the emails contain threats by the appellant to take certain actions which cannot be privileged,[42] and statements the exclusion of which would act as a cloak for serious impropriety.[43]

[111] I am satisfied that the fifth cause of action is untenable and that the Judge did not err in holding that it must be struck out.

Sixth cause of action - Consumer Guarantees Act claim

The pleading

[112] In the second amended statement of claim, the appellant claims that the respondent supplied commercial services to him. He pleads that he was a consumer. He pleads that the respondent "failed to exercise the reasonable care and skill, guaranteed by s 28 of the Consumer Guarantees Act 1993, by exhibiting unreasonably excessive negative emotions towards [him]". He seeks general damages of $120.

[113] Section 2 of the Consumer Guarantees Act defines "consumer" as follows:

> *consumer* means a person who—
> (a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
> (b) does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—
> (i) resupplying them in trade; or
> (ii) consuming them in the course of a process of production or manufacture; or
> (iii) in the case of goods, repairing or treating in trade other goods or fixtures on land

[114] It is also necessary to refer to the definition of "supplier":

---

42 See *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [80]–[85].

43 See *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44 at [19] and *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [15](c) (as to the application of common law exceptions to privilege).

supplier—
(a) means a person who, in trade,—
…
(ii) supplies services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person); and

[115] "Services" is defined as follows:

services—
(a) includes any rights (including rights in relation to, and interests in, personal property), benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier; and
(b) includes (without limitation) the rights, benefits, privileges, or facilities that are, or are to be, provided, granted, or conferred by a supplier under any of the following classes of contract:
(i) a contract for, or in relation to, the performance of work (including work of a professional nature), whether with or without the supply of goods:
(ii) a contract for, or in relation to, the provision in trade of facilities for accommodation, amusement, the care of persons or animals or things, entertainment, instruction, parking, or recreation:
…

[116] Section 28 states:

28 Guarantee as to reasonable care and skill
Subject to section 41, *where services are supplied* to a consumer there is a guarantee that the service will be carried out with reasonable care and skill.

(emphasis added)

The appellant's submissions

[117] The appellant submitted that he was a "consumer" and the respondent was a "supplier" supplying commercial sexual "services" to him. He submitted that there is no law excluding the jurisdiction of the Commercial Guarantees Act over the provision of commercial sexual services.

[118] He also submitted that the District Court Judge erred by failing to take into account that the very object of the services was to provide pleasure and the respondent had exhibited unreasonably excessive negative emotions toward him, verbally abused him and caused him to suffer mental distress and humiliation. Not only was the "fruit of the contract" not provided, but the opposite occurred. He submits that whether the respondent failed to carry out her services with reasonable care and skill is a matter for trial and cannot be determined on strikeout. He

submitted that the Judge erred in fact and law by imputing to him an allegation that the respondent failed to exercise reasonable care and skill by the act of refusing to continue to provide sexual services to him; he says he never made such an allegation.

The respondent's submissions

[119] Mr Hollyman submitted that even if the appellant could be considered a "consumer", and the respondent a "supplier", the cause of action is untenable. He submitted that the alleged breach is not in respect of any failure in respect of the services provided, but is in respect of the non-provision of services. The guarantee in s 28 only applies where services "are supplied" and there cannot be a claim under the Consumer Guarantees Act for failure to carry out services with reasonable care and skill when there is a statutory right to refuse to continue to provide those services in the Prostitution Reform Act.

Discussion

[120] Even if the appellant was a "consumer" (acquiring from a supplier services of a kind usually acquired for personal consumption), and the respondent a "supplier", the claim that s 28 has been breached is untenable. On the facts as pleaded, services were not supplied for the additional hour. On the facts as pleaded, this was the point when the respondent "became emotional". For there to have been a breach of s 28, the respondent had to have supplied services but failed to carry them out with reasonable care and skill.

[121] A person who has contracted to provide commercial sexual services but refuses to supply such services under s 17 Prostitution Reform Act 2003 cannot be said to have breached s 28 when those services are not provided. The Consumer Guarantees Act 1993 is not a code,[44] and does not supersede the Prostitution Reform Act.

[122] I am satisfied that the sixth cause of action is untenable. The Judge did not err in holding that it must be struck out.

---

[44] Consumer Guarantees Act 1993, s 4.

Result

[123] I am satisfied that none of the causes of action pleaded by the appellant is tenable. The Judge did not err in holding at [53] of the District Court judgment that the causes of action in the appellant's second amended statement of claim must be struck out. All causes of action must be struck out. The appellant's appeal is dismissed.

[124] In the light of that decision, it is not necessary to consider the appellant's appeal against the Judge's finding that the appellant's proceeding could also be struck out on the respondent's alternative ground for strike out that the civil proceeding was frivolous and vexatious. It suffices to say that I accept Mr Hollyman's submissions for the respondent, and would find that the Judge did not err in holding that the proceeding could be struck out as frivolous and vexatious.

[125] Nor is it necessary to consider the appellant's appeal against the Judge's order that the appellant pay costs to the respondent and the respondent's solicitors. That appeal was to be pursued only in the event that the appellant succeeded in whole or in part in his appeal against the strike out judgment.

[126] The appeal having been determined in favour of the respondent, the respondent is entitled to an award of costs. The appeal has been categorised as category 2 for costs purposes. Memoranda as to costs may be filed: that for the respondent within 15 working days of the date of this judgment, and that for the appellant within a further 15 working days. I anticipate then making a decision on the papers.

Andrews J