IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-816
[2014] NZHC 1597

UNDER	the Defamation Act 1992
BETWEEN	RAZDAN RAFIQ Plaintiff
AND	MEREDITH CONNELL sued as a firm Defendant

Hearing: 2 July 2014

Appearances: Plaintiff in person
B Tompkins for Defendant

Judgment: 2 July 2014

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors:
Gilbert Walker (B Tompkins), Auckland, for Defendant

[1] Mr Rafiq sues Meredith Connell for defamation. At relevant times one of the partners of Meredith Connell was the Crown Solicitor for Auckland. The firm prosecutes on behalf of the Crown and it also carries out work for a number of government departments. That means that in the course of their work, the lawyers in Meredith Connell make many defamatory statements about other people. They say that other people commit the most dreadful crimes and act in other ways that would draw the disapproval of members of society. Of course, these lawyers would not be doing their job properly if they did not. Generally, Meredith Connell is not exposed to claims for defamation, because in carrying out their work the lawyers make defamatory statements on occasions which the law regards as privileged.

[2] In this case Mr Rafiq is testing the limits of privilege. He is suing Meredith Connell for five matters generally:

(a) Statements made by Meredith Connell in a proceeding between Mr Rafiq and the Chief Executive of the Ministry of Business, Innovation and Employment.[1]

(b) Statements made in a prosecution against Mr Rafiq.[2]

(c) The publication of a report of the judgment of Priestley J in Mr Rafiq's claim against the Chief Executive of the Ministry of Business, Innovation and Employment.

(d) Communications between Meredith Connell's IT manager and the Police.

(e) An email sent by one of the partners of Meredith Connell to Mr Rafiq on 20 March 2013 which was copied to other lawyers in Meredith Connell.

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1 *Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment* [2013] NZHC 1134.

2 *Police v Rafiq (aka Khan)* DC Auckland, CRI-2011-004-14731, 3 September 2012.

[3] Mr Rafiq seeks compensatory damages of $3m, aggravated damages of $1m and exemplary damages of $1m.

[4] Initially, Mr Rafiq applied for summary judgment. In response, Meredith Connell applied to strike out Mr Rafiq's claim. Venning J directed that Meredith Connell's strike out application was to be heard before Mr Rafiq's summary judgment application. Today, I am dealing only with the strike out application.

[5] In addition to applying to strike out Mr Rafiq's statement of claim, Meredith Connell asks for security for costs. It also asks for a direction that the Registrar not accept the filing of any documents in this proceeding that contain abusive material or that otherwise do not comply with the High Court Rules.

[6] Mr Rafiq does not have a lawyer. He has so far filed four statements of claim, the last of them on 27 June 2014. Mr Rafiq is not legally qualified and he shows no intention of obtaining legal assistance in this proceeding. His pleadings are amateurish – that is not surprising because he is, after all, not a lawyer. His pleadings are not to be struck out just because they are amateurish. If his pleadings could be repaired, the court would be reluctant to strike out the proceeding.

[7] Meredith Connell has applied to strike out on more substantive grounds. It says that Mr Rafiq's claim discloses no reasonably arguable cause of action. It also says that his claim is frivolous and vexatious and an abuse of process. I will treat its application as encompassing three general matters:

(a) Mr Rafiq has not shown any reasonable cause of action against Meredith Connell;

(b) even if Mr Rafiq has a cause of action against Meredith Connell, it has clear-cut defences which can be decided now; and

(c) the proceeding is overall vexatious and an abuse of process.

[8] By way of preliminary comment, as to the first aspect, Meredith Connell argues that some of Mr Rafiq's allegations are fanciful and I should therefore reject

the claim as not being reasonably arguable. I caution that in strike-out applications the courts are reluctant to resolve factual conflicts but Mr Tompkins submits that the court should be wary of accepting speculative allegations.

[9] The general approach when an application is made on the grounds that there is no reasonably arguable cause of action has been laid down by the Court of Appeal in *Attorney-General v Prince and Gardner*[3] and the Supreme Court in *Couch v Attorney*-General:[4]

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

(b) The cause of action or defence must be clearly untenable. In *Couch* Elias CJ and Anderson J, at [33], said:

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.

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

(d) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation.

[10] As to the second aspect, where it is alleged that the defendant has clear-cut defences (which seems to be the most important part of the application), the court does not deal with the matter on the basis that the plaintiff does not have a reasonable cause of action. Instead, it enquires whether the proceeding can be

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3 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

4 *Couch v Attorney-General* [2008] NZSC 45. [2008] 3 NZLR 725.

categorised as vexatious and an abuse of process because of the strength of the defence. Guidance for taking this approach can be found in two judgments of Tipping J: a decision at first instance, *Matai Industries v Jensen*,[5] and a decision of the Supreme Court, *Murray v Morel & Co Ltd*.[6] In *Murray v Morel & Co Ltd* Tipping J said:

> [33] I consider the proper approach, based essentially on *Matai* is that, in order to succeed in striking out a cause of action that is statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.
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> [34] In the end, the judge must assess whether, in such a case, the plaintiff has presented enough by way of pleadings and particulars (and evidence, if the plaintiff elects to produce the evidence), to persuade the court that what might have looked like a claim which was clearly subject to a statute bar is not, after all, to be viewed in that way, because of a fairly arguable claim for extension or postponement. If the plaintiff demonstrates that to be so, the court cannot say that the plaintiff's claim is frivolous, vexatious or an abuse of process. The plaintiff must, however, produce something by way of pleadings, particulars, and, if so advised, evidence, in order to give an air of reality to the contention that the plaintiff is entitled to an extension or postponement which will bring the claim back within time. The plaintiff cannot, as in this case, simply make an unsupported assertion in submissions that s 28 [of the Limitation Act 1950] applies. A pleading of fraud should, of course, be made only if it is responsible to do so.

[11] While that was directed at limitation defences, I regard it as offering useful guidance for strike-out applications where defendants assert other affirmative defences. There is an initial onus on the defendant to show that there is a clear case for the affirmative defence. Once that is established, the defendant will be entitled to a strike out order unless the plaintiff shows a clearly arguable basis for saying that the defence is defeasible. In *Murray v Morel & Co Ltd* Tipping J was concerned with whether a limitation defence could be defeated by allegations of fraud under s 28 of the Limitation Act. In a similar way, Meredith Connell will be raising defences of qualified privilege and I will need to consider whether there is a basis for Mr Rafiq to say that that defence is defeasible under s 19 of the Defamation Act.

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[5] *Matai Industries v Jensen* [1989] 1 NZLR 525 (HC) at 532.

[6] *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.

[12] On the third aspect, whether the proceeding is otherwise an abuse of process, Associate Judge Abbott considered that strike-out ground in *Air National Corporate Ltd v Aiveo Holdings Ltd*.[7] He referred to a decision of the High Court of Australia, *Williams v Spautz*[8] and said:

> [31] … The policy considerations identified in *Williams v Spautz* included the following:
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> a) In general, the Courts should exercise their jurisdiction on matters properly brought before them.
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> b) It is important to preserve a freedom of access to the Courts.
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> c) The Courts need to be vigilant that abuse of process claims are not advanced other than in clear and appropriate cases, and are not brought for tactical reasons.
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> d) Equally fundamentally, however, the Court should be alert to misuse of its processes, and be prepared to exercise its power to stay where the interests of justice are demanded.
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> [32] The Courts have identified several matters which guide their approach to whether a proceeding has been brought for an improper purpose:
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> a) The improper purpose need not be the sole purpose, as long as it is the predominant purpose.
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> b) A stay will not be granted to debar a litigant from pursuing a genuine cause of action that is to be pursued in any event because there is an ulterior purpose as the desired by-product.
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> c) The onus is on the party alleging the abuse of process to show that the proceeding is brought for an improper purpose. It is a "heavy onus" and one to be exercised only in exceptional circumstances…
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> d) It is unnecessary to prove commission of an improper act to justify the exercise of the power to stay; however, save in the clearest of cases, it will be necessary to point to some separate manifestation of the defendant's intent in the form of an overt act such as a demand which identifies the true collateral purpose.
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> [Footnotes omitted]

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7 *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602.

8 *Williams v Spautz* [1992] HCA 32, (1992) 174 CLR 509.

Rafiq v Chief Executive of Business, Innovation and Employment
[2013] NZHC 1134.

[13] In this proceeding, Mr Rafiq sued the Ministry of Business, Innovation and Employment (in respect of the New Zealand Immigration Service) for defamation. He alleged that it held false and defamatory information about him on its computer files in its application management system. The Ministry instructed Meredith Connell to act for it. Mr Rafiq applied for leave under s 4(6A) of the Limitation Act 1950 to bring the defamation proceeding out of time. The Ministry opposed and applied for security for costs. Priestley J heard the application and gave a reserved decision. Mr Rafiq complains about statements made by Meredith Connell in the course of that proceeding: in written submissions, in a memorandum, in oral submissions and information disclosed to clients (specifically, the Ministry and officers within the Ministry). He also complains about Meredith Connell's use of a decision of the Human Rights Review Tribunal, which made adverse statements about Mr Rafiq.[9]

[14] There are two aspects to Mr Rafiq's complaints: first, statements made in the course of the proceeding, and second, statements made by Meredith Connell to its client. Those matters are the subject of two forms of absolute privilege under s 14 of the Defamation Act 1992:

> (1) Subject to any provision to the contrary and any other enactment, in any proceedings before-
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> > (a) A tribunal or authority that is established by or pursuant to any enactment that has power to compel the attendance of the witnesses; or
> >
> > (b) A tribunal or authority hat has a duty to act judicially – anything side, 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.
>
> (2) A communication between any person (in this subsection referred to as the client) and a barrister or a solicitor for the purpose of enabling the client to seek or obtain legal advice, and a communication between that solicitor and any barrister for the purpose of enabling legal advice to be provided to the client, are protected by absolute privilege.

[9] *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12.

[15] As to the first, the decision of the Court of Appeal in *Teletax Consultants Ltd v Williams* gives helpful guidance on the scope of the privilege.[10] The Court quoted Devlin LJ in *Lincoln v Daniels*;[11] at 701:

> The rule of absolute privilege, as has so often been pointed out, has not been devised so as to protect malicious persons but to ensure that judges and others engaged in the administration of justice should be free from the fear of proceedings and 'the vexation of defending actions'

[16] The Court of Appeal in *Teletax* cited Devlin LJ as identifying three categories where absolute privilege applied:[12]

(a) to what is done in the course of the hearing before the court or tribunal;

(b) to what is done from the inception of proceedings including all pleadings and other documents brought into existence for the purpose of the proceedings; and

(c) to the briefs of evidence and what is said in the course of interview of potential witnesses.

And the Court went on to quote Devlin LJ further, as saying:[13]

> . . . experience shows that here are many prudent people who are not in the least malicious but who are nevertheless unwilling to put forward a complaint if there is any danger that it will involve them in litigation. The practical value of absolute privilege is that it encourages such people to come forward. Where, as with the Bar, the honour of a profession is of the first importance to the administration of justice, it is desirable that every complaint should be entertained and scrutinised even at the price that occasionally absolute privilege will be used as a shield for malice.

That goes to illustrate the absoluteness of the privilege.

[17] Mr Rafiq submits that Meredith Connell had made improper use of the occasion to make unnecessary, damaging statements about him. But that submission

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10 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA).
11 *Lincoln v Daniels* [1962] 1 QB 237, 256.
12 At 699.
13 At 701, quoting *Lincoln v Daniels* at 263-264.

is misdirected. It does not recognise that the privilege is absolute and it cannot be defeated by allegations that the person making the statement has made improper use of the occasion or that the person is knowingly abusing the occasion.

[18] The short point is that regardless of the merits of what Meredith Connell said, it was making statements on the occasion of absolute privilege under s 14 in preparing and presenting its case in court. I hold that all these matters, which involve Meredith Connell's preparation of the case and its appearance in court, were on occasions of absolute privilege, for which Meredith Connell cannot be sued in defamation.

[19] Mr Rafiq also complains about statements that Meredith Connell made to the ministry. The statements appear to be documents that were in fact used in the proceeding. Those documents are covered by the absolute privilege under s 14(1) of the Defamation Act. Moreover, insofar as Meredith Connell communicated with the ministry in the course of the proceeding for the purpose of conducting the proceeding – including receiving requests for advice from the ministry and giving advice back to the ministry – those are matters that are clearly covered under s 14(2), and absolute privilege applies to those communications as well. Mr Rafiq has no ability to get around the absolute privilege under s 14 for statements made by Meredith Connell in the course of proceeding CIV-2013-404-2.

The criminal proceeding against Mr Rafiq

[20] One of the lawyers in Meredith Connell was engaged to appear for the Crown in a prosecution against Mr Rafiq in the District Court. Mr Rafiq complains about statements made by that Meredith Connell lawyer in court. Just as with the statements made by Meredith Connell in the proceeding in this court, similarly statements made by Meredith Connell while representing the Crown in a criminal prosecution in the District Court are also subject to absolute privilege under s 14(1) of the Defamation Act.

Publication of Priestley J's decision

[21] A report of Priestley J's decision in CIV-2013-404-2 was published on a website, lawfuel.co.nz. Mr Rafiq alleges that Meredith Connell was responsible for putting the report on the website. Copies of the report have been included in the evidence. Under the heading for the decision, the webpage says, "Posted by Lawfuel editors on June 26". Meredith Connell says that none its lawyers are editors of Lawfuel or have any association with the site and none of them moonlight in that job.

[22] I asked Mr Rafiq what basis he had for alleging that Meredith Connell was involved in publishing the report of the decision on that website. He has nothing in the way of evidence to support the allegation that it was Meredith Connell rather than the editors of Lawfuel who put the report on the website. I regard the allegation that Meredith Connell was responsible for putting this report of the decision as coming within that narrow range of categories where the allegations in the statement of claim are simply so speculative that they can be disregarded. Accordingly, in respect of this matter I find that Mr Rafiq does not have a reasonable cause of action, because Meredith Connell did not publish the statement.

[23] There is, however, a further ground for striking out the allegations for that publication. That is because I find that the publication is protected by qualified privilege under s 16 of the Defamation Act 1992. Under clause 6 of the First Schedule to Part 1 of that Act, qualified privilege extends to:

> The publication of a fair and accurate report of a proceeding of any court in New Zealand (whether those proceedings are preliminary, interlocutory, or final and whether in open court or not) or of the result of those proceedings.

[24] Mr Rafiq criticises the report as not being "fair and accurate." The decision of Priestley J has been put in evidence. I have been able to compare his judgment and the report. I cannot see any arguable basis for contending that the report on the lawfuel.co.nz site was not a fair and accurate report of the decision of Priestley J. In his decision, Priestley J referred to the fact that Mr Rafiq had used insulting and contentious terms, had made scurrilous allegations against judicial officers and attacks on the integrity of the court. A journalist might be tempted to sensationalise

that aspect. While the report does make some reference to that part of the decision, it is not highlighted or by any means unfairly reported. Accordingly I have no difficulty in finding that the report comes within clause 6 of the Schedule and was made on an occasion of qualified privilege.

[25] Under s 19 of the Defamation Act a defence of qualified privilege may be defeated if the plaintiff proves that in publishing the matter that is the subject of the proceeding the defendant was predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication. Under the approach taken by Tipping J in *Murray v Morel & Co Ltd*, it is for Mr Rafiq to show some arguable basis for rebutting the qualified privilege. As Tipping J said in *Murray v Morel & Co Ltd*, "mere assertion is not enough". There is nothing in the nature of the case, in the pleading or evidence from Mr Rafiq to show any arguable basis for suggesting that publication of the report of the decision of Priestley J could be defeated under s 19. Accordingly the allegations in respect of the publication of that report must be struck out.

Communication between Meredith Connell's IT manager and the Police

[26] Paragraph 14 of Mr Rafiq's third amended statement of claim refers to communications by Meredith Connell to the Police. Meredith Connell has tried to identify the particular communication. It has identified an email sent by its IT manager to the police. Meredith Connell says that as far as it is aware that employee only communicated by email to the Police and did not communicate with the Police orally. An email by that employee dated 20 December 2013 has been put in evidence. That email has a string of attachments, being emails sent by Mr Rafiq. The email sent by the IT manager addressed to the Police says this:

> Kylie Mooney of our office has requested I send you all communications we have intercepted from Razdan Rafiq. Please find attached the 43 emails received to date.

[27] The statements made in that email are, by themselves, harmless. They simply pass on information without comment. However, the disclosure of the emails that Mr Rafiq had sent would, I believe, make ordinary people think less of Mr Rafiq. This is a case of self-inflicted defamation. Mr Rafiq's emails to Meredith Connell

were not made on occasions of confidence or in circumstances where he can complain about these statements being published on further occasions. The fact that those statements in his emails may reflect adversely on him is a matter that he has brought upon himself. He cannot have any cause for complaint if they are re-published.

[28] Meredith Connell says also that forwarding the emails to the Police was absolutely privileged under s 14 of the Defamation Act. Again, it relies on *Teletax*. It says that just as in that case, this is a complaint of offending made to an authority responsible for prosecutions. It wants me to read the email as a complaint intended to start a criminal prosecution so that it can be held to be subject to absolute privilege under s 14 of the Defamation Act.

[29] *Teletax* involved lay people making a complaint about a lawyer to the Law Society. They did not use a lawyer. They did not know how to use the right words. Nevertheless the Court of Appeal took a generous view of the way they went about framing their complaint. If Meredith Connell had intended the Police to act on a complaint of criminal misconduct by Mr Rafiq, Meredith Connell of all people would know how to couch such a complaint appropriately. Rather than leave the matter to their IT manager, I would expect them to get one of their lawyers to deal with the matter. For Mr Rafiq, it is arguable that the email falls well short of a complaint of criminal misconduct, which may be covered by absolute privilege under s 14 of the Defamation Act. That cannot be a basis for strike out.

[30] I find, however, that the email was sent on an occasion of qualified privilege at common law. When a court is required to consider whether a publication is made on an occasion of qualified privilege at common law, it is normal to consider the matter with reference to four matters: [14]

(a) the identity of the publisher;

(b) the readership;

(c) the context; and

(d) the subject matter.

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14 *Cabral v The Beacon Printing & Publishing Company Ltd* [2013] NZHC 2684 at [31].

[31] In considering whether privilege applies, the court takes into account the fact that the privilege will apply even if the statements are false. That is in contrast with the defence of honest opinion, where there must be a factual foundation for the airing of any opinion. The power of the defence of qualified privilege is that it may be applied even if statements are false. The importance of communicating the matter must prevail over any damage to a plaintiff's reputation.

[32] Meredith Connell had been receiving a number of emails from Mr Rafiq. The nature of the emails would give rise to concern. The content of the email was such that once the Harmful Digital Communications Bill comes into force it might be caught by its provisions. There was an element of harassment about some of Mr Rafiq's emails. The Police were an appropriate body to whom Meredith Connell could pass on their concerns about Mr Rafiq's behaviour. There was reciprocity of interest between Meredith Connell and the Police in sending and receiving these communications. The matter was not broadcast any further beyond Meredith Connell and the Police. It was not broadcast to the wider public.

[33] In these circumstances, even if Meredith Connell made any false statements in those emails – and it seems to me implausible to contend that it did make any false statements, because it was simply passing on emails sent by Mr Rafiq - the matter was an occasion of qualified privilege.

[34] Mr Rafiq has not shown any basis for suggesting that the defence of qualified privilege can be rebutted under s 19. Accordingly, I hold that Mr Rafiq cannot claim defamation by Meredith Connell's email.

[35] Mr Rafiq's pleadings suggest that there were other publications beside that particular email. His pleading refers to statements made by the Police which led him to believe that what the Police said about him had come from Meredith Connell. He has not specified what was said or when. For the moment I assume that if this case were to continue, Mr Rafiq may be able to prove further statements by Meredith Connell to the Police. Even so, I would still regard any other statements that Meredith Connell made to the Police complaining about Mr Rafiq's conduct, as

made on occasions of qualified privilege, and I would similarly reject the possibility that any such communications could be defeated under s 19 of the Defamation Act.

Meredith Connell's email of 20 March 2013

[36] On 20 March 2013 one of the partners of Meredith Connell sent an email to Mr Rafiq:

> I am in receipt of your email below to Ms Longdill. I am her supervising partner at Meredith Connell. The email below is plainly inappropriate. Any future emails of this nature will be forwarded to the Police.

[37] Ms Longdill was an associate at Meredith Connell at the time. She has since become a partner. It is not necessary to record the email which Mr Rafiq had written to Ms Longdill. I regard the description of the email as "plainly inappropriate" as something of an under-statement. Other emails that Mr Rafiq has sent to other women working at Meredith Connell have also been put in evidence. There was, in my view, something "creepy" about the way that Mr Rafiq has communicated with women who work at Meredith Connell. They are entitled to be protected from his emails. Mr Rafiq's email to Ms Longdill had nothing to do with any of the legal issues involving Mr Rafiq or any of the clients of Meredith Connell or Meredith Connell itself.

[38] It was not of course, an act of defamation for the partner to communicate directly with Mr Rafiq. There can only be defamation if the email is published to any other persons. The relevant publication that Mr Rafiq relies on is that it was forwarded to other people inside Meredith Connell. Meredith Connell say that there are two people who received Mr Flanagan's email – they were Mr Moore (the Crown Solicitor) and Ms Longdill.

[39] Mr Rafiq says that it was unnecessary for the email to be sent. The matter could have been dealt with by Ms Longdill simply putting up a block against receiving emails from him and it was unnecessary for her to deal with the matter in the way that she did.

[40] That submission misses the point. Ms Longdill was entitled to deal with the email as she thought fit. She is not to be criticised for referring the matter to her supervising partner. Equally, Meredith Connell is not to be criticised for dealing with the matter in the way that it did. It replied to Mr Rafiq in appropriate terms, to indicate that what he had done was not acceptable. There was an internal communication to record the way that it had been dealt with. The matter did not go beyond that.

[41] Meredith Connell says that the email is not defamatory. However, I regard the email as capable of meaning that Mr Rafiq is a person who sends inappropriate emails. To that extent it may lower him in the estimation of ordinary members of society. I do not accept that the meaning of the email is not defamatory.

[42] Meredith Connell is on stronger ground in contending for affirmative defences. It says that it has a defence of honest opinion under ss 9 and 10 of the Defamation Act. There is one slight uncertainty with that defence. There is a question whether the subject matter of the opinion must be a matter of public interest. There is a school of thought that because the Defamation Act simply gave the old defence of "fair comment" a new name, the requirement that any statement of honest opinion must still be a matter of public interest has been saved.

[43] In response, Mr Tompkins has pointed out that the trend of decisions, at least in the Court of Appeal,[15] is the other way and it is no longer a requirement that a statement of honest opinion should be on a matter of public interest. On that, I will follow the Court of Appeal.

[44] Further, I also accept Meredith Connell's submission that sending the email to Mr Moore and Ms Longdill was subject to common law qualified privilege. Generally it is unusual to strike out a defamation proceeding on the grounds of an affirmative defence of qualified privilege. When qualified privilege pleadings are the subject of strike-out applications, it is normally because plaintiffs want to have the defence removed ahead of trial. The courts act cautiously on such applications.

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[15] *Awa v Independent News Ltd* [1997] 3 NZLR 590 (CA) at 595, *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 436, *Television New Zealand v Haines* [2006] 2 NZLR 433 (CA) at [87]–[93].

But there are occasions where a defendant's strike-out application relying on qualified privilege has succeeded. The case I have in mind is the decision of Harrison J in *Osmose New Zealand Ltd v Wakeling*.[16] In that case, media defendants had been joined as third parties in a defamation proceeding. They successfully applied to have the third party notices against them set aside on the grounds of qualified privilege. Harrison J noted that normally the question of malice under s 19 is a matter to be decided by the jury, but he went on to hold that whether or not there was any evidential basis to rebut the defence can be determined by a judge. He held that simply hoping that something might materialise was not enough to allow allegations under s 19 to persist. I regard him as taking an approach similar to that set out by Tipping J on limitation defences in *Murray v Morel & Co Ltd*.

[45] For this case, going by the subject matter, the identity of the publisher, the context, and the readership, I regard the communication to Mr Moore and Ms Longdill as easily satisfying the requirements for qualified privilege, and I see no reasonable basis for contending that there could be a rebuttal under s 19 of the Defamation Act.

[46] At this point I have considered all of Mr Rafiq's defamation allegations in his third amended statement of claim. I have found that none of them can survive. In one respect I have found that he does not have a reasonable cause of action because the report of the decision of Priestley J was not published by Meredith Connell. For all other matters I have found that Meredith Connell has affirmative defences by way of absolute privilege under s 14, qualified privilege under s 16, common law privilege and honest opinion. Mr Rafiq has not shown any arguable way around any of these defences. Accordingly all the allegations of defamation in the statement of claim can be struck out.

Vexatious in any event

[47] There is, moreover, the third general basis for Meredith Connell's strike-out application – that this proceeding was, in any event, vexatious. I uphold that submission.

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16 *Osmose New Zealand Ltd v Wakeling* [2007] 1 NZLR 841 (HC).

[48] There is a combination of factors that make this proceeding vexatious and an abuse of process.

[49] First, there is the overall lack of merit in the proceeding.

[50] The next matter is that aside from this proceeding Mr Rafiq is a vexatious litigant. He has identified himself as such. That appears from some of the emails which he sent to Meredith Connell. In an email of 25 November 2013 he said:

> At the outset of next year, I am going to flood judicial review proceedings in all the High Court of New Zealand against the Court of Appeal, Supreme Court, Judicial Conduct Commissioner, Attorney-General, Justice Minister, Minister for Courts, each and every Judge in the High Court, Court of Appeal and Supreme Court …

[51] In an email of 20 May 2014 he responded to statements by others that he was a "serial litigant" and a "painful plaintiff". That email includes the following:

> It is not my fault that I cannot control filing litigations. It has become my disease. The Ministry of Justice should get the blame. … In this criminal proceeding process I was given a disease of litigation. Since then I could not stop myself from filing litigations and if someone Googles my name will see the evidence.
>
> Without litigations I cannot survive. Since Ministry of Justice gave me this litigation disease everyone will face litigation who shall stand in my life.
>
> With litigations I really want to secure my life as well. Let's see?
>
> In light of the above people should never complain that I am "serial litigant" or a "painful litigant".

[52] That shows his general litigious nature. That also appears from the wide range of proceedings that he has started. In this proceeding Meredith Connell has put in evidence copies of decisions of the higher courts in which Mr Rafiq has been a party. They are considerable. I have listed them at the end of this judgment. By and large they show a consistent lack of success by Mr Rafiq, an inability to appreciate that his proceedings are ill-founded and hopeless, and a tendency never to take "No" for an answer. I regard the present proceeding as typical of other proceedings by Mr Rafiq that are pointless and hopeless.

[53] Another aspect is that Mr Rafiq appears to be targeting Meredith Connell. There seems to be a ready explanation why he is targeting the firm. That is because it has acted for government departments whom he has also pursued fruitlessly. It became his target because it appeared on instructions against him. In my view, it is abusive for a litigant to pursue the lawyers of parties he is proceeding against. That in itself shows a vexatious tendency.

[54] Mr Rafiq has made his motivation clear. He has a web-page which carries this:

> Favourite Quote:
>
> Meredith Connell is one of my biggest enemies in the World and I shall file multiple litigations in the High Court and appeal to Supreme Court.

[55] Another matter of concern is the damages that Mr Rafiq has sought. They are grossly exaggerated. They are intended to have an intimidatory effect. Of course, I would not expect Meredith Connell to be intimidated by it, but it shows an intention to indulge in inappropriate hyperbole in proceedings. The reality of the matter is that if there were anything at all in Mr Rafiq's allegations, any damages he could recover would be well within the jurisdiction of the District Court. It is totally unnecessary for him to bring this proceeding in this court.

[56] A further compounding factor is that Mr Rafiq is bankrupt. He was adjudicated bankrupt on 1 August 2013. That means that he has no fear of orders for costs being made against him. Ordinary litigants will be constrained in running cases by the prospects of costs orders if they are unsuccessful. That induces a sense of responsibility in the conduct of litigation. But Mr Rafiq is not deterred by that. That is clear from the reckless way in which he has undertaken proceedings and from the fact that orders for costs have really not had any restraining effect on his conduct.

[57] This combination of factors leads me to believe that this proceeding overall is vexatious and an abuse of process. I must strike it out on that additional ground as well.

Application for security for costs

[58] As a back-up, Meredith Connell also asks for an order for security for costs. Because I am going to strike out the proceeding in its entirety, I do not need to make an order for security for costs. But I do indicate that Meredith Connell has established a proper basis for seeking security for costs if the proceeding had survived at all. There is clear evidence of Mr Rafiq's inability to pay any order for costs that might be made against him. He is bankrupt. In this court he has asked for waivers from paying filing fees on the basis of his impecuniosity. In other cases he has challenged decisions by Registrars not to waive security for costs on appeal, relying on his fraught financial state. I regard it as abundantly clear that any order for costs made against Mr Rafiq in this proceeding would be fruitless. In short, Meredith Connell has established the threshold under r 5.45 for the court to exercise its discretion whether to order security.

[59] When the court exercises its discretion, it needs to weigh the plaintiff's right of access to the court against the defendant's interest in being protected against a barren order for costs. In that balancing exercise, the matter comes down strongly in favour of Meredith Connell. For reasons I have already given, this proceeding is unmeritorious. The merits of a case do influence the way that the court exercises the discretion as to security. In my view Meredith Connell have a strong case to be protected against a barren order for costs.

[60] If this proceeding were to continue, it would be necessary to take a view as to costs likely to be incurred. Mr Rafiq says that he has applied for summary judgment but it is reasonably plain that even if the proceeding were not struck out, he would not get home on a summary judgment application because of a number of arguable defences available to Meredith Connell. The case would have to run its full course. Litigants in person seem to generate more work for the other parties than those parties with legal representation. Cases are likely to require more case-management and more intensive case-management because litigants in person are generally unfamiliar with the processes and rules of this court.

[61] Meredith Connell sought security for costs of $20,000. I regard that sum as being somewhat on the light side. In fixing security for costs I would be inclined to come close to the anticipated actual costs ordered after a final hearing. That is, I would not make much of a discount because I regard the merits as so strongly in favour of Meredith Connell. Accordingly, if required, I would fix security for costs at $20,000, being the amount sought, and I would stay the proceeding until Mr Rafiq paid those costs into court.

[62] Because Mr Rafiq is a bankrupt, I would also fix a time within which Mr Rafiq was to pay the security, after which Meredith Connell would be entitled to apply to strike out the proceeding for non-compliance. I would fix that time for the security to be paid into account at six months from the date of this decision.

Costs

[63] Meredith Connell seeks costs and increased or indemnity costs. This case probably could qualify for indemnity costs under r 14.6 because of its clear lack of merit, but in the interests of keeping matters simple, I am going to order increased costs only. I award increased costs with a 50 per cent uplift. This is a category 2 proceeding. The steps taken come within band B.

[64] Because this proceeding is now at an end, it is not necessary to make an order that the Registrar not accept the filing of any documents in this proceeding that contain abusive material or that otherwise do not comply with the High Court Rules.

Outcome

[65] I make these orders:

(a) Mr Rafiq's statement of claim is struck out;

(b) Mr Rafiq is to pay Meredith Connell costs on a 2B basis with an uplift of 50 per cent plus disbursements approved by the Registrar.

…………………………………
Associate Judge R M Bell

SCHEDULE

1 *Razdan Khan (aka Rafiq) v NZ Police* [2012] NZHC 2884, 1 November 2012, Courtney J
Appeal against conviction in District Court for criminal harassment and two charges of posting indecent articles under the Postal Services Act.
Appeal against Harassment Act conviction *successful*. *Rehearing ordered*.
Appeal against Postal Services charges *unsuccessful*.

2 *Razdan Khan (aka Rafiq) v NZ Police* [2013] NZHC 169, 12 February 2013, Rodney Hansen J.
Appeal against conviction by two JPs in the Auckland District Court for using words in a public place with intent to offend or insult.
Appeal *unsuccessful*.

3 *Razdan Rafiq v APNZ Ltd* [2013] NZHC 553, 20 March 2013, Brewer J.
Application to appeal out of time the oral judgment of Judge Gittos in the Auckland District Court on 6 November 2012 striking out Mr Rafiq's claim in defamation against *The Herald on Sunday* for an article of 20 November 2011.
Application *unsuccessful*.

4 *Razdan Khan (aka Rafiq;) v NZ Police* [2013] NZHC 664, 23 March 2013, Rodney Hansen J.
Application for leave to appeal to the Court of Appeal against decision of Rodney Hansen J.
Application *dismissed*.

5 *Razdan Rafiq v APNZ Ltd* [2013] NZHC 733, 12 April 2013, Brewer J.
Application for an order prohibiting publication of any part of the proceeding.
Application *unsuccessful*.

6 *Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment*
[2013] NZHC 1134, 17 May 2013, Priestley J.
Leave to sue out of time *granted*.
Security for costs ordered.

7 *Razdan Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment*
[2013] NZCA 243, 20 June 2013, Stevens J.
Appeal against decision of Priestley J requiring him to pay security for costs.
In the Court of Appeal, the Registrar declined to waive payment of the filing fee.
Application to review the Registrar's decision is *dismissed.*

8 *Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment*
[2013] NZSC 72, 18 July 2013, Glazebrook J.
Application to Supreme Court for leave to appeal against decision of Stevens J dismissing application by the Registrar to waive filing fee for his application for leave.
Application *dismissed.*

9 *Razdan Rafiq v Auckland District Court*
[2013] NZHC 2640, 10 October 2013, Venning J
Mr Rafiq had brought judicial review proceedings against the Auckland District Court. Various decisions of District Court Registrars and Judges were attacked. Mr Rafiq applied for summary judgment, applied to review a Registrar's decision declining to allocate a hearing date for the summary judgment application and the defendant's application to strike out. Venning J held the proceeding to be misconceived and also frivolous, vexatious, and an abuse of process. It was *struck out*.

10 *Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment*
[2013] NZHC 2731, 18 October 2013, Venning J.
Mr Rafiq had started new proceedings after not having paid security for costs ordered by Priestley J on 17 May 2013. Venning J found that the new proposed proceeding was an abuse of process and upheld the decision of the Registrar not to allow the proceedings to be filed.

11 *Rafiq v District Court*
[2013] NZHC 2843, 29 October 2013, Venning J
Application to review. Mr Rafiq wished to appeal against the decision of the District Court given on 24 September 2013, and applied for a fee waiver which the Registrar reviewed.
Venning J *upheld* the Registrar's decision.

12 *Rafiq v Registrar*
[2013] NZHC 2860, 30 October 2013, Venning J.
Application for review of the Registrar's decision declining his application to refund fees.
Application *dismissed*.

13 *Rafiq v Registrar*
[2013] NZHC 2861, 30 October 2013, Venning J.
Further application to review a decision of the Registrar declining an application to refund fees in respect of another proceeding.
Application *unsuccessful*.

14 *Rafiq v District Court at Auckland*
[2013] NZCA 585, Harrison J.
Application to review decision of Registrar of Court of Appeal refusing to waive security for costs. Application *unsuccessful.*

15 *Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment*
[2013] NZCA 586, 27 November 2013, Harrison J
A further decision by Harrison J *dismissing* an application by Mr Rafiq to review a decision of the Registrar refusing to waive security for costs.

16 *Rafiq v Chief Executive of the Ministry of Business, Innovation & Employment and Commissioner of Police*
[2013] NZHC 3138, 28 November 2013, Venning J.
The Police applied for strike-out of a proceeding against them alleging assault and other misconduct. The assault allegation was not struck out but all other matters were.

17 *Rafiq v Registrar*
[2013] NZHC 3440, 17 December 2013, Venning J.
Dismissal of Mr Rafiq's second application for a refund of filing fees he had previously paid.

18 *Rafiq v Chief Executive of Ministry of Business, Innovation & Employment and Commissioner of Police*
[2014] NZCA 4, Harrison J.
Dismissal of application to review decision of Registrar to refuse to dispense with the security for costs.

19 *Rafiq v Chief Executive of Ministry of Business, Innovation & Employment*
[2014] NZSC 7, 19 February 2014.
Refusal of leave to appeal against the decision of Harrison J in [2013] NZCA 586.

20 *Rafiq v Privacy Commissioner*
[2014] NZHC 325, 28 February 2014, Lang J.
Refusal of leave to begin a defamation proceeding out of time.

21 *Rafiq v Google NZ Ltd*
[2014] NZHC 551, Associate Judge Doogue
Order for security for costs in defamation proceeding.

22 *Rafiq v Privacy Commissioner*
[2014] NZCA 137, Harrison J.
Dismissal of application to review decision of Registrar to dispense with security for costs.

23 *Rafiq v Commissioner of NZ Police*
[2014] NZHC 814, 16 April 2014, Courtney J.
Defamation proceeding – leave to sue on cause of action in 2008 and 2009 not given leave. Able to sue on 2011 cause of action but not able to claim for damages.

24 *Rafiq v Commissioner of NZ Police*
[2014] NZHC 813, 16 April 2014, Courtney J.
Defamation proceeding- application by Mr Rafiq for summary judgment *dismissed*. Partial strike-out of Mr Rafiq's pleadings. Security for costs ordered.

25 Although it is not a decision of a higher court, *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12, a decision of the Human Rights Review Tribunal of 23 May 2012, also falls into the same pattern.