ORDER PERMANENTLY FORBIDDING PUBLICATION OF THE NAMES OR PARTICULARS LIKELY TO LEAD TO THE IDENTIFICATION OF THE APPLICANT OR THE RESPONDENT PURSUANT TO S 39(1) OF THE HARASSMENT ACT 1997.

NOTE: LOWER COURT ORDERS PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE APPLICANT OR RESPONDENT PURSUANT TO S 39 OF THE HARASSMENT ACT 1997 REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA532/2014
[2015] NZCA 81

BETWEEN	NR Applicant
AND	MR Respondent

Hearing:	9 February 2014
Court:	Ellen France, Randerson and White JJ
Counsel:	Applicant in Person R J Hollyman and A J B Holmes for Respondent
Judgment:	19 March 2015 at 2:30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay costs to the respondent for a standard application on a band A basis with usual disbursements.

C Order permanently forbidding publication of the names or particulars likely to lead to the identification of the applicant or respondent pursuant to s 39(1) of the Harassment Act 1997.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant seeks leave under s 67(1) of the Judicature Act 1908 to appeal against a judgment of Andrews J in which she dismissed the applicant's appeal from a decision of the District Court striking out a claim brought by the applicant against the respondent.[1] Andrews J subsequently dismissed an application for leave to appeal.[2]

[2] The grounds upon which the applicant seeks leave to appeal are numerous but may be broadly categorised as:

(a) Andrews J is said to have exhibited actual or apparent bias.

(b) The High Court failed to address allegations of bias made by the applicant in respect of the District Court Judge.

(c) The High Court committed errors of law.

[3] Certain allegations against counsel for the respondent have repeatedly been made by the applicant in this and other appeals but the Supreme Court has since declined leave to appeal in cases involving allegations of this type.[3]

Preliminary points

[4] There are three preliminary matters to be dealt with. First, the applicant sought to challenge an order made by Wild J on 3 February 2015 in which the Judge declined an application to stay six appeals currently before this Court and refused an application to adjourn the hearing of this application for leave to appeal.

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1 *NR v MR* [2014] NZHC 863.
2 *NR v MR* [2014] NZHC 2045.
3 *N v M* [2015] NZSC 15.

[5] Before us, the applicant renewed his request for stay and adjournment. We were satisfied there was no proper basis for a stay or adjournment and proceeded to hear the application for leave to appeal. In brief, our reasons are that the applicant had full opportunity to present submissions in support of the application for leave to appeal; the fact that the applicant had applied to the Supreme Court for leave to appeal in a related judgment did not justify a stay or adjournment;[4] and any question about the jurisdiction of Wild J to consider the applications as a single Judge was cured by our consideration of the applications afresh.

[6] The second issue raised by the applicant was that the application for leave to appeal should not be heard before this Court had heard two other appeals brought by the applicant.[5] These appeals challenge decisions made by Andrews J declining to disqualify herself from hearing the application for leave to appeal in the High Court. We see no need to delay a decision on the application for leave to appeal on this ground since we are considering the application for leave to appeal afresh.

[7] The third preliminary matter relates to additional affidavits filed in the courts below. We asked counsel for the respondent to file these and they were received after the hearing. The applicant objected to our receiving further affidavits. We have decided the better course is to proceed on the material placed before us in the case on appeal without considering the affidavits. We have focused in particular on the second amended statement of claim relied upon by the applicant in both courts below.

Factual context

[8] For a period of two months prior to the incident we shortly describe, the respondent provided sexual services on a commercial basis to the applicant. The respondent used an assumed name to protect her identity. The services were provided at an Auckland club, the applicant paying the respondent for her services at the rate of $120 per hour and making a separate payment of $95 to the club per hour

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4 The applicant had sought leave to appeal against the judgment of this Court in *NR v MR* [2014] NZCA 623 as well as at least one other judgment of this Court, *NR v M* [2014] NZCA 526. The applications for leave to appeal have since been dismissed by the Supreme Court: see *N v M,* above n 3.

5 *NR v MR* CA443/2014 and *NR v MR* CA522/2014.

for room hire. The applicant pleads that on 8 February 2012, he and the respondent met at the club. According to the pleading, the applicant paid for and received sexual services from the respondent for approximately two hours.

[9] During this time, the applicant gave the respondent a new mobile phone as a gift. At the expiry of the two hour period, the applicant says he paid the respondent $215 cash for an additional hour's service which included $95 for the additional room hire. The applicant further pleads that the respondent became very upset immediately after she noticed the registration number of her car on recent internet searches on the applicant's own mobile phone. Thereafter, she asked the applicant to leave and declined any further sexual services. She attempted to return some of the money provided by the applicant and also attempted to return the mobile phone given to her. The applicant told the High Court Judge that the respondent had offered to repay the money for the extra hour's service but not the $95 room hire. According to his pleading, the applicant refused to accept either the money or the mobile phone offered. Despite further attempts by the applicant to make contact with the respondent, she refused to have any further dealings with him.

The ensuing litigation

[10] This apparently insignificant incident has given rise to extensive litigation. The respondent filed an application for a protection order under the Domestic Violence Act 1995 in the Family Court at Auckland along with an application for a restraining order under the Harassment Act 1997. A Deputy Registrar of the Family Court did not accept the Domestic Violence Act application for filing and it did not proceed. However, the respondent pursued the application under the Harassment Act. This was opposed by the applicant but a restraining order of five years duration was made nevertheless and indemnity costs ordered against him.[6] On appeal to the

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[6] *[MR v NR]* DC Auckland CIV-2012-004-1034, 9 May 2013 and *[MR v NR]* DC Auckland CIV-2012-004-1034, 14 June 2013.

High Court, the duration of the order was reduced to 12 months and the indemnity costs orders removed.[7]

[11] The applicant then launched the civil proceeding in the District Court which is the subject of this application for leave to appeal. The second amended statement of claim is detailed and alleges a number of causes of action:

(a) Breach of contract and unjust enrichment;

(b) Defamation;

(c) Malicious prosecution of a civil proceeding and abuse of process;

(d) Breach of confidence;

(e) Breach of privacy; and

(f) Breach of the Consumer Guarantees Act 1993.

[12] In the District Court, Judge Gibson made an order striking out the proceeding on the grounds that it did not disclose a reasonable cause of action, constituted an abuse of process and was frivolous and vexatious.[8]

[13] Other proceedings were also issued by the applicant but these are not relevant to the present issue.

The High Court judgment

[14] Andrews J accepted she was obliged to consider the merits of the case afresh. She was required to substitute her own decision if she reached a different conclusion

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[7] The applicant appealed to the High Court against: all decisions relating to the making of a restraining order, the indemnity costs order and applied for judicial review against both interlocutory decisions made by the District Court as well as the making of the restraining and costs orders. Duffy J dismissed all the judicial review proceedings and the appeal against the making of the order but reduced the duration to 12 months and reversed the order for indemnity costs against the appellant: *NR v District Court at Auckland* [2014] NZHC 1767. The applicant and the respondent have both appealed and cross-appealed that decision to this Court in CA461/2014. To the extent leave to appeal may be required, it has not yet been given.

[8] *[NR v MR]* Auckland CIV-2012-004-1388, 16 October 2013 (reissued 11 November 2013).

from that reached in the court below.[9] In a careful judgment she found that none of the causes of action pleaded was tenable. If necessary, she would also have found that the District Court had not erred in holding that the proceeding should be struck out as frivolous and vexatious.

[15] The Judge adopted the well-established approach to be taken in applications to strike out pleadings.[10] In particular, the pleaded facts are assumed to be true. The claim should not be struck out unless the court is certain it cannot succeed and the court should be slow to strike out a claim in an area where the law is developing. Before reaching her conclusions on each cause of action, the Judge summarised the submissions made by both parties. We deal briefly with the salient points found by the Judge.

Breach of contract

[16] The applicant claimed $215 for the extra hour of services and room hire; $758.90 for the cost of the mobile phone and $1,403.90 for mental distress and humiliation. The Judge found that the claim for breach of contract must fail since, on the facts as pleaded, there was no consideration for the gift of the mobile phone; the pleading did not establish a concluded bargain; and there was no intention to create legal relations such as would be necessary to support the formation of a contract.

[17] As to the additional hour of services, the respondent was entitled to refuse to provide the services under s 17(1) of the Prostitution Reform Act 2003. Although s 17(3) of the Act would enable the applicant to sue to recover damages for the provision of commercial sexual services not performed, any such claim must fail on the pleadings because the applicant did not accept the refund offered and had not therefore mitigated his loss. Additionally, in respect of the amount paid for room

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9 Applying *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 (SC).

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

hire, the contract was frustrated and the applicant could not recover the amount of the hire.[11]

[18] The Judge found that an associated claim for unjust enrichment must also fail on the ground of the applicant's refusal to accept the offer to refund the money and to return the mobile phone.

Defamation

[19] The applicant relied on various alleged defamatory statements made by the respondent. These were found to be based on an affidavit she filed in the harassment proceeding; a document given to the club manager; and oral and email statements made to club managers. As to the first, the Judge found that any statements made in the applicant's affidavit were the subject of absolute privilege. The other statements were made on an occasion of qualified privilege since the respondent and the club managers had a common interest in the material communicated by the respondent.

[20] The Judge found that the applicant's pleading that the respondent was motivated by ill will was without foundation. She said the general requirement to assume pleaded facts to be true for the purposes of a strike out application did not extend to pleaded allegations which were entirely speculative and without foundation.[12] She noted that the bringing of the harassment application in the District Court was determined in favour of the respondent and could not therefore be said to be a malicious proceeding or to support the pleading of ill will.

Malicious civil proceeding/abuse of process

[21] The Judge accepted it was doubtful whether there was a tort of malicious civil proceeding.[13] Nevertheless, if there were such a tort, then she adopted the

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[11] The applicant challenged the Judge's conclusion on the issue of frustration but we note that this part of the claim could also have been struck out on the ground that if anyone was responsible for a refund of the room hire, it was the club not the respondent.

[12] Citing *Wilkins v Housing New Zealand Corporation* [2014] NZHC 507 at [14].See also Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR15.1.02].

[13] Citing the judgment of Courtney J in *Deliu v Hong* HC Auckland CIV-2010-404-6349, 21 December 2011 at [15] referring to *Jones v Foreman* [1919] NZLR 798 (SC) and *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL).

elements described by Hammond J in *Rawlinson v Purnell Jenkison & Roscoe*.[14] On that footing, the applicant's claim that the respondent had maliciously issued the harassment proceeding was clearly untenable since the application was not resolved in the applicant's favour. It could not be said that the respondent had no reasonable or probable cause for bringing the proceeding in those circumstances.

[22] The application under the Domestic Violence Act had not been determined since it did not proceed. However, given the close relationship between that application and the harassment proceeding, the Judge was satisfied it was not tenable to argue that the respondent did not have reasonable and probable cause for making the application under the Domestic Violence Act.

[23] For similar reasons, the Judge found the claim for alleged abuse of process was also untenable.

Breach of confidence and privacy

[24] The Judge held these claims could not succeed. In the case of breach of privacy, disclosure in the court proceeding did not meet the requirement that the publicity be considered highly offensive to a reasonable person.[15] Disclosure to persons in authority at the respondent's place of work to avoid harassment could only have been in the public interest.[16]

[25] For breach of confidence, the Judge similarly found it was untenable that the respondent's conscience should have been troubled by disclosing the relevant information in the context of an application to the court or by disclosing it to persons in authority at the club.[17] She also held that disclosure of emails from the applicant could not be the subject of privilege as claimed by the applicant since they did not contain any offer of compromise or any admission against the applicant's interests.

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14 *Rawlinson v Purnell Jenkison & Roscoe* [1999] 1 NZLR 479 (HC) at 484.
15 See *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117].
16 See *Hosking v Runting,* above n 15, at [129]–[134] and *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 at [80]–[94].
17 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [14.5.03(2)].

The claim under the Consumer Guarantees Act

[26] The Judge found that a claim for breach of s 28 of the Consumer Guarantees Act for failure to exercise reasonable care and skill in the provision of commercial services could not apply to the applicant's refusal to provide services after the initial two hours had expired. The respondent was entitled under s 17 of the Prostitution Reform Act to refuse to provide services and no services had been provided in that period that could form the basis of a claim under s 28 of the Consumer Guarantees Act.

Applications for leave to appeal – principles

[27] The principles applicable to an application for leave to appeal under s 67 are well established. The proposed appeal must raise some question of law or fact capable of bona fide or serious argument in a case involving some issue of public or private importance sufficient to outweigh the cost and delay of a further appeal. On a second appeal, this Court is not engaged in the general correction of error. It is not every alleged error of law that is of such importance, either generally or to the parties as to justify further pursuit of litigation already twice considered and ruled upon by a court.[18]

Analysis

Actual or apparent bias

[28] We are not persuaded there is any substance in this proposed ground of appeal. Consideration of the High Court judgment shows plainly that the applicant's submissions were carefully considered. The judgment does not indicate any appearance of bias, still less actual bias. The applicant's complaint about the approach of the High Court Judge during the hearing does not assist his case. Robust exchanges between the bench and litigants are expected in the normal course of argument. They do not give rise to any appearance of bias.

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[18] *Waller v Hider* [1998] 1 NZLR 412 (CA); *Snee v Snee* [1999] 13 PRNZ 609 (CA); *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* [2008] 2 NZLR 591 (CA).

Failure to address allegations of bias on the part of the District Court Judge

[29] We are not satisfied that the failure by the Judge to address the applicant's allegations of bias on the part of the District Court Judge affords any arguable ground of appeal. If there were any bias exhibited on the part of the District Court Judge (which we are not persuaded occurred), the approach of Andrews J to the High Court appeal cured any such defect. This was a general appeal against an order striking out a statement of claim and the High Court Judge made it clear that she effectively approached the matter afresh. That she did so is apparent from her judgment.

Errors of law

[30] We have not been able to identify any arguable error of law on the part of the High Court Judge. We comment briefly as follows.

[31] In relation to the contract claim, the applicant's attempt in his pleading to somehow convert a gift into a contract is contrived to say the least. We instance the applicant's pleading that the giving of the mobile phone was not a true gift because he expected the respondent to accept it and express appreciation and gratitude. Allied to this is the pleading that the mobile phone was a "disposable accessory to the service of accepting the gift". We agree with the Judge that there was a lack of any valid consideration for the gift and, most importantly, the pleaded facts could not give rise to an intention to create legal relations in the context. Moreover, since the respondent offered to give back the mobile phone and to pay back the money paid for the extra hour's services, the applicant has not suffered any loss or alternatively has failed to mitigate his loss. To the extent that he might have been able to recover the room hire, any such claim ought to have been brought against the club not the respondent.

[32] For similar reasons, the claim for unjust enrichment could not succeed.

[33] As to defamation, the defence of absolute privilege applied to the contents of the respondent's affidavit filed in the harassment proceedings.[19] To the extent that the respondent may have made statements to the managers at the club, they would be subject to defences of qualified privilege and honest opinion.[20] Arguably, the applicant's plea of ill will on the respondent's part may have meant that those defences were not available.[21] However, it appears that the essence of all of the allegedly defamatory statements made by the respondent was effectively captured in the affidavit in the harassment proceedings. Not only were these statements subject to absolute privilege but they were found to justify the making of the restraining order under the Harassment Act. It follows that the truth or otherwise of the defamation allegations would effectively re-open and re-litigate the findings of the District Court in the harassment proceedings. As such, as the District Court Judge said, this would amount to a collateral attack on the findings in that proceeding and would amount to an abuse of process accordingly.[22]

[34] We agree with the High Court Judge that the remaining causes of action could not succeed for the reasons the Judge gave.

[35] We conclude that none of the proposed grounds affords any arguable question of appeal. As well, even if there were an arguable ground of appeal, we are satisfied that leave should be refused on the grounds that there is no issue of fact or law of sufficient importance, public or private, to outweigh the cost and delay of a further appeal. The applicant himself acknowledged that the incident involving himself and the respondent was "fairly trivial". We agree.

[36] None of the matters raised is of general importance. While we acknowledge that the applicant personally is concerned to protect his reputation, the non-publication orders already made should ensure that any undue publicity is minimised.

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19 Defamation Act 1992, s 14.
20 Defamation Act, s 9 and *Adam v Ward* [1917] AC 309 (HL) at 334.
21 Defamation Act, s 19 and *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [42].
22 See *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1 at [99]-[108]; leave to appeal declined in *Bradbury v Commissioner of Inland Revenue* [2014] NZSC 174.

Result

[37] The application for leave to appeal is declined.

[38] The applicant must pay costs to the respondent for a standard application on a band A basis with usual disbursements.

Solicitors:
Wilson Harle, Auckland for Respondent