**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2014-404-3194**
**[2016] NZHC 411**

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| UNDER | The Defamation Act 1992 |
| BETWEEN | PENELOPE MARY BRIGHT<br>Plaintiff |
| AND | STEPHEN TOWN<br>Defendant |

Hearing: 5 November 2015

Counsel: No appearance for the Plaintiff
W Akel and T J Walker for the Defendant

Judgment: 10 March 2016

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## JUDGMENT OF ASSOCIATE JUDGE SMITH

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## Introduction

[1] Ms Bright describes herself as a full-time public watchdog, particularly on the affairs of Auckland Council and its predecessor, Auckland City Council. Mr Town is the Chief Executive of the Auckland Council (the Council).

[2] Ms Bright has sued Mr Town for damages for allegedly defamatory statements made by Mr Town in a Press Release (the Press Release) authorised by him and issued by the Council on 10 October 2014.

[3] Mr Town says that he has good defences to Ms Bright's defamation claim on a number of grounds. Relevant to this judgment, he says that he has a complete defence on the basis that the statements made in the Press Release were protected by qualified privilege. This is a common law defence based generally on the proposition that the maker of the relevant statement had a duty to make it, or a legitimate interest in making it, and those to whom it was published had a corresponding interest in receiving it.

[4] Mr Town now applies for summary judgment. He says that it is clear that Ms Bright has no answer to the qualified privilege defence, and that the proceeding can be determined in his favour now.

[5] The defence of qualified privilege will be defeated if the plaintiff shows that the defendant was predominately motivated by ill-will towards the plaintiff, or otherwise took improper advantage of the occasion of the publication of the

allegedly defamatory material.[1] A plaintiff who wishes to meet a defence of qualified privilege by alleging that the defendant *was* predominately motivated by ill-will towards the plaintiff (or otherwise took improper advantage of the occasion of publication), is required to serve on the defendant a notice to that effect under s 41 of the Defamation Act 1992 (the Act). Any such notice is required to include particulars specifying the facts or circumstances relied upon by the plaintiff, and must be filed within 10 working days after the plaintiff receives the defendant's statement of defence (or within such further time as the Court may allow).[2]

[6] A similar notice is required under s 39 of the Act when a plaintiff wishes to rebut the defendant's affirmative defence of honest opinion by alleging that the opinion was not genuinely held by the defendant.

[7] In this case, Ms Bright did not serve notices under ss 39 and 41 within the time allowed by those sections, but she was granted an extension of time to do so. She filed a notice under both sections on 18 June 2015, within the extended period allowed by the Court.

[8] Mr Town says that the particulars notice is defective. He asks the Court for an order striking it out.

[9] Whether or not the particulars notice is struck out, Mr Town says that the qualified privilege defence gives him a complete answer to Ms Bright's claims, and that he is on that basis entitled to summary judgment. If Mr Town is successful with his summary judgment application, that will be the end of Ms Bright's case. But if the summary judgment application does not succeed, Mr Town asks for an order requiring Ms Bright to provide security for his costs in the proceeding. He says that security is necessary because Ms Bright will not be able to pay his costs if she fails with her claim.

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1 Defamation Act 1992, s 19(1).
2 Section 41.

**The background to the defamation claim**

[10] In or about 2007, Ms Bright refused to pay the Council's rates levied on a property she owns in Kingsland, Auckland. She has continued to refuse to pay Council rates, and also water rates and charges levied by bodies associated with the Council, namely Watercare Services Ltd and Metrowater.

[11] Ms Bright has publicly stated that she will not pay her rates unless and until the Council discloses full details of its spending on private sector contractors: she says that she wants the Council to "open the books" and act in a democratically accountable manner.

[12] The Council obtained a judgment against Ms Bright for unpaid rates on 14 November 2008 in the sum of $5,660.04 (including costs and interest). It obtained a second judgment against Ms Bright on 24 February 2012 for unpaid rates and costs. The amount of the second judgment was $8,807.31. When Ms Bright failed to satisfy those judgments, the Council lodged a charging order against her property.

[13] In October 2013, the Council implemented a policy relating to the sale of properties in its territory on which rates have not been paid. On 31 March 2014 it applied to this Court for an order directing that Ms Bright's property be sold. It has taken (or is taking) similar action with seven other properties on which rates have not been paid.

[14] On 9 April 2014, this Court issued a notice that the property would be sold or leased by public auction or public tender under the provisions of the Local Government (Rating) Act 2002, after six months from the date of the notice, unless the amount of the judgment given in the District Court on 24 February 2012 had been paid.

[15] That six month period expired on 9 October 2014, and on that date Ms Bright lodged an application to set aside the February 2012 District Court judgment. She was successful with that application, and that put paid to the Council's wish to continue with the rating sale process (at least for the time being).

[16] Ms Bright was reported as having made a number of public statements in the period leading up to the expiry of the six months' notice of sale period. Media reports of public statements made by Ms Bright between 30 August 2014 and 10 October 2014 include the following:[3]

1. **Waikato Times** – 30 August 2014 – *"Auckland facing 10 straight years of rate increases" – [Ms Bright] vowed she would not pay rates until the Council revealed the "devilish detail" of who Council were borrowing money from".*

2. **NZ Herald** – 9 October 2014 at www.herald.co.nz – *"[Auckland Council] is taking the draconian and unprecedented step of attempting to force a rating sale on a freehold property. They have never done this before and I am in the first batch. There are another two people that are in this batch but I think the real reason is they have to be seen not just to pick on me but that is exactly what they are doing...When this house is sold will be on my terms when I choose to leave and quite simply I have learnt in life that faint heart never won fair go and when your rights are under attack you must stand up and fight back and that's exactly what I'm doing today".*

3. **Radio NZ** – 8.01am – *"Auckland Activist may be about to lose her house" – "[Ms Bright] owed more than $33,000 which she says she won't pay until the council discloses how much of Aucklanders' rates are paid to private contractors".*

4. **Radio NZ** – 10 October 2014 – *"Auckland activist faces losing home over rates stoush" – "She's got colourful views on what she sees as alleged corruption in the Council. She regularly airs them in public input segments of Council meetings. I couldn't repeat some of the stuff on air that she says".*

5. **Stuff.co.nz** - 10 October 2014 – 8.45am – *"Penny Bright to fight forced house sale" – "I believe the actions of the CEO are not only a draconian abuse of council power but are personally malicious and vindictive against me" said Bright".*

6. **Radio NZ** – 10 October 2014 – 4.27pm – *"Mora says anti-corruption activist Penny Bright may be forced to sell her Kingsland..."[Ms Bright] asserts that commercial sensitivity equates to political sensitivity, adding that Auckland Council CEO Stephen Town is a member of an organisation called the Committee for*

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[3] More media reports, referred to by Mr Town in his statement of defence, are set out in Appendix 1 to this judgment.

*Auckland, which contracts the council and council-controlled organisations. Bright says she has consulted with international anti-corruption experts, telling Mora that "they can't believe it". She argues that it is a "corrupt conflict of interest".*

[17] Ms Bright does not deny that she made the statements set out above which are attributed to her.

[18] The Press Release was in the following terms:

> **Court action is a last resort, says frustrated council chief**
>
> Auckland Council says it has exhausted all attempts to secure rates payment from Penny Bright and moves to recover the outstanding amount through the courts are a last resort. This follows a seven and a half year process that is being driven by an ideological point of view, seemingly not financial hardship.
>
> "Ms Bright has made wild and inaccurate accusations about the council and its probity and is using this as the basis for not paying her fair share to the ongoing running of Auckland. These assertions are completely unfounded and her actions are at the expense of all Aucklanders", says council chief executive Stephen Town.
>
> "I personally tried to contact Ms Bright yesterday in a last ditch effort to secure a resolution to this situation. Instead, she has resorted to further legal action which is both disappointing and frustrating.
>
> "The council goes out of its way to assist many Aucklanders to meet their rates obligations. Last year, 20,051 Auckland ratepayers qualified for a rates rebate and we also agreed to 337 rates payments being postponed. Ms Bright has not taken up any of our offers to work with her on a suitable repayment plan.
>
> "It's the council's responsibility to ensure fairness and equity for all Aucklanders and rates are the lifeblood of the effective running of the city. While I respect Ms Bright's right to a point of view, her extreme perspective should not be at the expense of everyone else", says Mr Town.
>
> Similar court action is being initiated for a total of eight cases of long-standing unpaid rates and Ms Bright was second on the list of historical long-standing debts. There are currently approximately 179 ratepayers who are being reviewed with a total of approximately $2.5 million outstanding rates.
>
> ...
>
> **Background:**
>
> - It is the court that is involved in the sale process, not Auckland Council. The court appoints a real estate agent to action the sale.

- Where a ratepayer is experiencing financial hardship, they are encouraged to contact Auckland Council to discuss their situation and different payment options. The council has a rates customer service and credit control team set up to deal with such customer situations. Last year, 20,051 Auckland ratepayers qualified for a rates rebate and we also agreed to 337 rates payments being postponed.

- Since the creation of Auckland Council, the new council reviewed the approaches of the various legacy councils and developed a rating sale policy that was approved by councillors at a Strategy and Finance Committee meeting of Auckland Council in March 2013. It was implemented in October 2013. That policy states that rates are critical to the financial sustainability of local government. In keeping with that principle, Parliament granted local authorities broad powers under the Local Government (Rating) Act 2002 to assess, levy and collect rates.

- The policy states that the process is used only as a last resort where the ratepayer can pay but refuses to do so or where the ratepayer refuses to respond to efforts to collect the arrears.

- Four rates invoices are sent throughout the year along with about seven reminder letters if rates are not cleared by the four instalment due dates.

**Ms Bright's statement of claim**

[19] Ms Bright filed her statement of claim in December 2014. In it, she refers to her "watchdog role", and states that her personal credibility, and public confidence in that credibility, are essential to her role.

[20] She alleges that Mr Town at all relevant times had both a personal and a pecuniary motive in discrediting critics of the Council's affairs and his own role as principal administrative officer. She states that Mr Town was seeking to counter her accurate criticisms of Council affairs by verbally attacking her personal credibility when he authorised the (broadly disseminated) Press Release.

[21] Ms Bright says that the following passage in the Press Release is defamatory:

> Ms Bright has made wild and inaccurate accusations about the Council and its probity and is using this as the basis for not paying her fair share to the ongoing running of Auckland. These assertions are completely unfounded and her actions are at the expense of all Aucklanders.

[22] Ms Bright pleads that, in their natural and ordinary meaning, the words used in that passage meant and were understood to mean the following:

(1) Ms Bright's factual statements concerning Council affairs and its probity were, in general, not truthful or accurate.

(2) Ms Bright's criticisms of Council affairs and Council probity were personally reckless and crazy.

(3) Ms Bright is not worthy of the public's trust when it comes to information about Council affairs or Council probity.

(4) Ms Bright's recklessness with facts and actions based upon inaccurate facts is costing (harming) all Aucklanders.

[23] Ms Bright says in her statement of claim that the Press Release was broadcast through national media, and that one of its objectives was to discredit her personally. Although she promptly advised Mr Town of the inaccuracy of the statements at [21] above, he has refused to give the matter his full consideration, and has refused to issue a public retraction or apology.

[24] Ms Bright says that the passage in the Press Release levelled serious allegations against her motives in disputing and not paying her rates, and sought to convince the broadest possible audience that that was the case. She refers to Mr Town's position of "high authority" at the Council, contending that his position carries significant weight in convincing the New Zealand public of his message.

[25] Ms Bright further alleges that the Press Release, and in particular the passage quoted in para [21] above, was designed to cause maximum distress and damage to her reputation, and that Mr Town either knew that the message in the passage was false or was reckless as to its truth or falsity. She says that Mr Town's objective was to derive a personal and professional benefit from the resulting defamation.

[26] Ms Bright claims general damages of $250,000, and aggravated and punitive damages of $100,000.

**Mr Town's statement of defence**

[27] Mr Town denies liability. He admits he was responsible for the issue of the Press Release, and that an objective of the Press Release was to reach the broadest possible audience. He says that the Press Release was issued in response to the media comments about the Council's application to the High Court for the sale of Ms Bright's property.

[28] Mr Town pleads a number of affirmative defences. These include a contention that the Press Release and/or the particular passage referred to by Ms Bright in her statement of claim did not have, and were not capable of having, the defamatory meanings Ms Bright has pleaded. Mr Town also pleads the defences of truth, and honest opinion under s 10 of the Act.

[29] Mr Town's honest opinion defence is relevant to Ms Bright's notice under s 39 of the Act, which Mr Town now applies to have struck out. The defence is pleaded in the following terms:

> As a further or alternative defence, the defendant repeats the foregoing and says:
>
> 25. In so far as the Press Release and/or the words referred to in paragraph 7 of the Claim had any of the meanings alleged in paragraph 14 of the Claim (which is denied), then such meaning or meanings were conveyed by the Press Release as expressions of opinion; alternatively, the words referred in paragraph 7 of the claim (with the exception of the words "Ms Bright has made...accusations about the Council and its probity") are an expression of opinion.
>
> 26. The opinion expressed in the Press Release was the defendant's genuine opinion.
>
> 27. The particulars of fact relied on in support of the defence of honest opinion, and which are true or not materially different from the truth, are set out in Schedule 2.

[30] In a schedule to his statement of defence, Mr Town pleads the particulars of fact which are said to support his contention that opinions expressed in the Press Release were his own genuine, honest opinions. The particulars include allegations that Ms Bright had made accusations against the Council and its probity, and that she was (without justification) using allegations against the Council as a basis for not paying her share to the ongoing running of Auckland. The particulars also refer to a

statement allegedly made by Ms Bright that her right to effective, open and transparent government was violated by a failure by the Council to provide details of rates paid to contractors which meant that she was not liable to pay rates. With the possible exception of a pleading in the schedule that "there is no justification for Ms Bright's refusal to pay rates", the particulars do not appear to state any facts which would provide support for the opinion (if it was an opinion) that Ms Bright's accusations about the Council and its probity have been "wild and inaccurate".

[31] The defence of (common law) qualified privilege is pleaded in the following terms:

> As a further or alternative defence [Mr Town] repeats the foregoing and says:
>
> 28 In the circumstances particularised [in sch 3 to the statement of defence] [Mr Town] was under a duty, and/or it was his proper and legitimate interest, to communicate Auckland Council's response to the public to explain why Council was taking the step of a forced rates sale.
>
> 29 The public had a corresponding and legitimate interest in receiving such communications.
>
> 30 The Press Release was therefore published on an occasion of qualified privilege.

[32] Schedule 3 to Mr Town's statement of defence refers to a number of matters already described in this judgment, including Ms Bright's refusal to pay rates because of the Council's alleged refusal to "open the books and act in a democratically accountable manner", the judgments against Ms Bright in November 2008 and February 2012, and the subsequent application by Ms Bright to set aside the February 2012 judgment. The schedule also refers to an attempt made by Mr Town to telephone Ms Bright on 9 October 2014, and to the media reports referred to at para [16] of this judgment.

[33] Mr Town's statement of defence also includes, as an alternative affirmative defence, a pleading that the Press Release taken as a whole was in substance true, or was in substance not materially different from the truth. Mr Town relies in support on various matters pleaded in schedule 1 to the statement of defence. These matters include a number of matters going to the allegedly unreasonable nature of

Ms Bright's refusal to pay her rates, and to the allegedly reasonable nature of the Council's response to that refusal.

**No reply**

[34] Under the High Court Rules, a plaintiff who does not admit any affirmative defence pleaded by the defendant in his or her statement of defence is required to file and serve a reply, setting out which parts of the affirmative defence are admitted and which are denied, and setting out such other facts as may be necessary to ensure that the defendant and the Court are fairly informed of the basis on which the plaintiff says that the affirmative defence should not be upheld.[4]

[35] Although Mr Town has pleaded a number of affirmative defences, Ms Bright has not filed any reply. However she has stated (in her particulars notices given under ss 39 and 41 of the Act) that she rejects the defences of honest opinion and qualified privilege.

**Mr Town's evidence in support of his applications**

[36] Mr Town says that the Press Release was the Council's response to Ms Bright's public accusations that the Council was acting improperly in taking enforcement proceedings against her to collect rates which had remained unpaid for many years. He refers to the importance of a territorial authority collecting rates which have been duly levied, and to "the entitlement of rate-payers to understand how we deal with refusal or inability to pay rates and subsequent recovery of rates arrears". He says that it is critically important that Councils have robust policies for dealing with non-payers, and describes the need for such a policy as a matter of fairness and equity for all rate-payers.

[37] Mr Town refers to the development of the Council's rating sale policy, which is only to be exercised as a last resort when a rate-payer can pay but refuses to do so, or where the rate-payer refuses to respond to efforts to collect rate arrears. He states that Ms Bright's default fell squarely within Council's rating sale policy, and that it was being dealt with as one of seven long-standing debt situations the Council was

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4 Rules 5.62 and 5.63, High Court Rules.

dealing with at the time. Ms Bright's case was being handled strictly in chronological order, based on the period of arrears.

[38] Mr Town acknowledges that at the time the Press Release was issued he was aware of various reasons Ms Bright had publicly given for her refusal to pay her rates. He refers to Ms Bright's contention that she should not have to pay rates until the Council has disclosed full details of spending on private sector contractors, and she knows where her money is going. He also refers to her refusal to pay until the Council carries out its statutory duties, complies with the law, opens its books and acts in a democratically accountable manner.

[39] Mr Town says that the Council was more concerned with the link Ms Bright has sought to make between her campaign activities and the Council's later decision to take enforcement action against her. He refers in particular to an article published in the New Zealand Herald of 18 March 2014, in which the following statements were attributed to Ms Bright:

> It is Auckland Council that is breaking the law by not upholding its statutory duties...for open, transparent and democratically accountable local government and by not providing the devilish (sic) details of where exactly rates monies are being spent on private sector consultants and contractors.
>
> ...So, as a New Zealand anti-corruption whistle-blower, I have been censored, assaulted and now Auckland Council has threatened to sell my house to enforce disputed rates payments.

[40] Mr Town says that, in the same New Zealand Herald report, Ms Bright was reported as saying that a letter from the Council notifying her of its intention to enforce judgments of the Court was only sent after she complained four times to the police about the Council.

[41] Mr Town says that the clear inference from the article was that Ms Bright had been singled out as a result of her complaints to police, implying a corrupt practice on the part of the Council. Mr Town says that this is completely wrong.

[42] Mr Town then refers to an interview given by Ms Bright to a New Zealand Herald reporter, on or about 9 October 2014. He says that the interview included the following statement:

> [Auckland Council] is taking the draconian and unprecedented step of attempting to force a rating sale on a freehold property. They have never done this before and I am in the first batch. There are another two people that are in this batch but I think the real reason is they have to be seen not just to pick on me but that is exactly what they are doing...

[43] Various media are said to have picked up on the issue, and there were reports on Radio New Zealand's *Morning Report*, NewsTalk ZB, TVNZ, RadioLive, and the website at stuff.co.nz. Mr Town says that some media reported Ms Bright's direct attack on Council's probity, stating for example that Ms Bright was refusing to pay rates because of corruption in the Council. Other media, including the stuff.co.nz website, reported Ms Bright as saying that she believed the actions of Mr Town were not only a draconian abuse of Council power but were personally malicious and vindictive against her.

[44] Overall, Mr Town says that the Council's concern in issuing the Press Release was to ensure that the public properly understood that enforcement proceedings for failure to pay rates were proceedings of last resort only. He says that the Council had to reassure the public that the Council was doing all it could to achieve fairness for all Auckland rate-payers, rather than singling out Ms Bright from some ulterior motive. He says that the Press Release was distributed to meet that objective.

**Ms Bright's notice of opposition to the applications**

[45] Ms Bright opposes all of the applications. She says that the application for summary judgment or strike-out is an abuse of the Court's processes, particularly having regard to what she contends are admissions in Mr Town's statement of defence (inter alia at para 25[5]) which would have to be improperly ignored if the application were granted.

[46] More generally, Ms Bright contends that Mr Town's evidence and argument do not reach the threshold level of proof required by the Supreme Court in *Couch v Attorney General*.[6]

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5 Noted at [29] of this judgment.

6 *Couch v Attorney General* [2008] NZSC 45, [2008] 3 NZLR 725.

[47] In response to the alternative application for security for costs, Ms Bright accepts that an order for security in the total amount sought by Mr Town ($50,000) would effectively bring her case to an end. She says that would result in a deprivation of Court access, in violation of the Magna Carta, the New Zealand Bill of Rights Act 1990, and New Zealand's commitments to individual rights under the International Covenant on Civil and Political Rights (Articles 2, 14 and 26).

**Leave to apply for summary judgment**

[48] A defendant who wishes to apply for summary judgment is required to obtain the leave of the Court to make the application if it is not filed within the time allowed for filing a statement of defence.[7] In this case Mr Town's summary judgment application was not filed within that period, and he omitted to file any formal application for leave. Ms Bright did not take any point over that however, and the parties and the Associate Judge who presided at the 3 August 2015 conference at which Mr Town's summary judgment application was set down for hearing all appear to have proceeded on the basis that no formal leave application was required.

[49] In the absence of any apparent prejudice to Ms Bright, I made a ruling at the commencement of the hearing on 5 November 2015 granting leave to Mr Town to proceed with his summary judgment application.

**The issues to be determined**

[50] The following issues arise:

(1) Is Ms Bright's notice under s 39 of the Act so deficient that it should be struck out?

(2) Is Ms Bright's notice under s 41 of the Act so deficient that it should be stuck out?

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7 Rule 12.4(3), High Court Rules.

(3) (Whether or not the s 41 notice is struck out) has Mr Town shown that qualified privilege provides him with a complete defence to all of Ms Bright's claims, so that the proceeding should be determined summarily in his favour? Alternatively, is Ms Bright's cause of action so clearly untenable (because of Mr Town's qualified privilege defence) that it should be struck out?

(4) If Mr Town is not entitled to summary judgment, should Ms Bright be required to provide security for Mr Town's costs in the proceeding? If so, in what amount?

**Issue 1: Is Ms Bright's notice under s 39 of the Defamation Act 1992 so lacking in particulars that it should be struck out?**

[51] Section 39 of the Act materially provides:

> **39 Notice of allegation that opinion not genuinely held**
>
> (1) In any proceedings for defamation, where—
>
> (a) the defendant relies on a defence of honest opinion; and
>
> (b) the plaintiff intends to allege, in relation to any opinion contained in the matter that is the subject of the proceedings,—
>
> (i) where the opinion is that of the defendant, that the opinion was not the genuine opinion of the defendant; or
>
> (ii) where the opinion is that of a person other than the defendant, that the defendant had reasonable cause to believe that the opinion was not the genuine opinion of that person,—
>
> the plaintiff shall serve on the defendant a notice to that effect.
>
> (2) If the plaintiff intends to rely on any particular facts or circumstances in support of any allegation to which subsection (1)(b)(i) or (ii) applies, the notice required by that subsection shall include particulars specifying those facts and circumstances.
>
> ...

*The s 39 notice and the strike-out application*

[52] The notice states:

> Take NOTICE that the Plaintiff, under sections 39 and 41 of [the Act] rejects the Defendant's reliance upon qualified privilege and honest opinion as a defence and will expressly rely upon:
>
> 1. The publication as pleaded in the Statement of Claim.
>
> 2. The Defendant's Statement of Defence as filed and served.
>
> 3. The Defendant's actions and comments preceding and following filing of this claim.

[53] On 23 June 2015 Mr Town's solicitors requested further particulars of the particulars notice. They asked Ms Bright to file an amended notice, setting out details of the alleged actions and comments referred to at paragraph 3, by 30 June 2015. Ms Bright did not respond to that request, and on 21 July 2015 Mr Town made his application to strike out the particulars notice.

[54] Alternatively, Mr Town says that the notice is otherwise an abuse of process.

*The need for particulars in pleadings – general principles*

[55] The purpose of the requirement that a party provide adequate particulars of his or her pleading has been described as being:[8]

> (a) To inform the other party of the nature of the case he or she has to meet, as distinguished from the mode in which the case will be proved;
>
> (b) To prevent the other party from being taken by surprise;
>
> (c) To enable the other party to know with what evidence he or she ought to be prepared;

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8 *Hubbard v Fourth Estate Holdings Ltd* HC Auckland CIV-2004-404-5152, 13 June 2005 at [8].

(d) To limit and define the issues. A certain amount of detail is necessary in order to ensure clearness. What particulars need to be stated depends on the facts of each case.

[56] In *Price Waterhouse v Fortex* the Court of Appeal said:[9]

> Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. They are the documents against which the briefs of evidence are or should be prepared. They are the documents which establish parameters of the case, not the briefs of evidence.
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> ...
>
> ...a pleading must, in the individual circumstances of the case, state the issue and inform the opposite party of the case to be met. As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[57] A notice under s 39 is a "pleading", and is amenable in an appropriate case to being struck out, applying normal strike-out principles.[10]

[58] Normal strike out principles are principles which the Court may apply either in the exercise of its inherent jurisdiction, or under the express provisions of r 15.1 of the High Court Rules. Under that rule, the Court may strike out all or part of a pleading if it:

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

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

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9 *Price Waterhouse v Fortex Group Limited* (CA 179/98), 30 November 1998 at 17-19.

10 *Young v TVNZ Ltd and ors* [2012] NZHC 2738, at [52]. Although *Young* was concerned with a notice given under s 41 of the Act, a s 39 notice performs a substantially similar function in that it is intended to give the defendant notice of particular facts which the plaintiff says will defeat an affirmative defence pleaded by the defendant.

[59] In *Couch v A-G*, the Supreme Court affirmed that the normal strike-out principles include the following as summarised in *McGechan on Procedure*:[11]

(i) The cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.

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

*Submissions*

[60] Mr Akel notes that the particulars notice merely states that Ms Bright will rely on the publication as pleaded, the statement of defence, and Mr Town's actions and comments preceding and following the filing of this claim.

[61] Addressing Ms Bright's reliance on the "publication as pleaded", Mr Akel submits there is nothing in the Press Release that suggests ill will or improper purpose. The Press Release was a measured and responsible response to Ms Bright's public attacks on the Council, and was designed to "disabuse the public of any notion that Auckland Council has singled Ms Bright out unfairly to enforce payment of rates because of her criticism of [the Council]".

[62] Mr Akel further submits that Ms Bright's reliance on Mr Town's statement of defence is too vague. He says that the defences pleaded are standard defences, and cannot be said to point to any ill will or improper purpose existing at the time of publication of the Press Release.

[63] With reference to paragraph 3, Mr Akel submits that Mr Town is left in the dark as to what actions before and after the publication Ms Bright relies on.

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[11] *Couch*, above n 6, in *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR15.1.02(1)].

[64] Ms Bright submits that the legal threshold for strike-out is high – strike-out decisions of this Court are frequently overturned by the Court of Appeal. And it cannot be said that her claim has no prospect of success. Ms Bright submits that no amendment to the particulars notice is necessary, but if the Court does consider there is insufficient particularity, that is something which is capable of being remedied. The appropriate order in those circumstances is an order for amendment, not an order striking out the particulars notice.

*Discussion and conclusions on issue 1*

[65] Ms Bright's s 39 notice might perhaps be criticised because there is no express statement in it that Ms Bright will be contending at trial that the defence will fail because opinions were not Mr Town's *genuine* opinions.[12] However I do not think that criticism on its own could justify the making of a striking out order. The stated rejection of Mr Town's honest opinion defence, and the reference to s 39 of the Act, together make it clear enough that Ms Bright does wish to contend at trial that the honest opinion defence will fail because the relevant opinions were not Mr Town's genuine opinions.

[66] Paragraph 1 of the s 39 notice, referring to the publication as pleaded in the statement of claim, might conceivably be capable of being cured by the provision of appropriate further particulars. The question is what Ms Bright meant by "the publication" as pleaded in the statement of claim. Whatever she was referring to was said to be "as pleaded in the statement of claim", but the statement of claim does not refer to the Press Release as "the publication". Nor does it refer to that part of the Press Release which she says was defamatory of her as "the publication" – that part of the Press Release is referred to in the statement of claim as "the message". A further pleading is required stating the particular parts or aspects of "the publication", which are pleaded in the statement of claim, Ms Bright relies upon.

[67] A general reference to Mr Town's statement of defence is insufficient to inform him what Ms Bright may or may not contend on the "genuine opinion" issue.

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[12] Mr Town does not contend in his statement of defence that any of the opinions expressed in the Press Release were the opinions of others, which he had reasonable cause to believe. The issue is therefore whether relevant opinions expressed by him in the Press Release were genuine opinions held by him.

Mr Town clearly pleads in his statement of defence that opinions expressed in the article *were* his genuine opinions,[13] and it is not clear what part of the defence Ms Bright is referring to. She does refer in her notice of opposition to para 25 of the statement of defence, apparently in the belief that the paragraph contains an admission of her claims. I do not read the paragraph that way.

[68] The pleading in the second part of para 25, which is expressed in the alternative to the pleading in the earlier part of the paragraph, appears to have been intended to do no more than acknowledge that the Court might regard the words "Ms Bright has made accusations about the Council and its probity" as a simple statement of fact, and not a statement of opinion. The pleading does not imply any acknowledgment that the words "wild and inaccurate", when applied to the accusations, were not expressions of Mr Town's genuine opinion.

[69] However I am not prepared to strike out para 2 of the s 39 notice without giving Ms Bright one further opportunity to clarify precisely which part or parts of Mr Town's defence she relies upon in contending that relevant opinions expressed by Mr Town were not his honest, genuine opinions. In coming to that view I take into account the fact that Mr Town has elected not to provide in his statement of defence (whether in schedule 3 or elsewhere) any particulars of statements allegedly made by Ms Bright about the Council's probity which are said to have been "wild and inaccurate". Mr Town does say in his affidavit supporting the applications that Ms Bright's allegation that Council has singled her out for rates enforcement action because of her anti-corruption claims against the Council is false, but the relevant part of the Press Release says that Ms Bright has used the subject matter of her allegedly "wild and inaccurate accusations" *as the basis for not paying her rates.* The point was not argued, and I make no finding on it, but it seems at least arguable for Ms Bright that readers of the Press Release would understand the reference to "wild and inaccurate accusations" as a reference to accusations concerned with Ms Bright's reasons for deciding to withhold payment of her rates, rather than as a reference to accusations later made by her about the Council's response to her decision not to pay.

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[13] Statement of defence, para 26.

[70] Paragraph 3 of Ms Bright's s 39 notice is defective in that, in breach of 39(2) of the Act, it fails to "specify" any facts or circumstances relied upon. However this paragraph may also be capable of being cured by the provision of further particulars, and a plaintiff in these circumstances is normally to be given an opportunity to re-plead if his or her pleading is capable of being saved by amendment.[14] It might be said that Ms Bright has had ample time to amend her pleadings, and there is some merit in that. However she now appears to be running her case without the benefit of the legal assistance which appears to have been available to her when her statement of claim was prepared, and in those circumstances I am prepared to allow her one further opportunity to properly specify any facts or circumstances on which she relies in support of her allegation that the relevant opinions expressed in the Press Release were not Mr Town's genuine opinions.

[71] In the result, there will be orders directing Ms Bright to file and serve particulars of her s 39 notice, within 21 days of this judgment, identifying (i) what is meant by "The publication as pleaded in the statement of claim" in para 1 of the notice, (ii) which parts of Mr Town's statement of defence are relied upon in para 2 of the notice, and (iii) the "actions and comments" referred to in para 3 of the notice. The exact form of the orders is set out in para [135] at the end of this judgment.

**Issue 2: Is Ms Bright's notice under s 41 of the Defamation Act 1992 so lacking in particulars that it should be stuck out?**

[72] Section 41 of the Act materially provides:

> 41 Particulars of ill will
>
> (1) Where, in any proceedings for defamation,—
>
> (a) the defendant relies on a defence of qualified privilege; and
>
> (b) the plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication,—
>
> the plaintiff shall serve on the defendant a notice to that effect.

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[14] *Young v TVNZ Ltd & Ors*, above n 10 at [52].

> (2) If the plaintiff intends to rely on any particular facts or circumstances in support of that allegation, the notice required by subsection (1) shall include particulars specifying those facts and circumstances.
>
> ...

[73] Mr Town applies for an order striking out the s 41 notice on the basis that it does not provide any or sufficient facts to allege and establish that:

> ...
>
> (1) that the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication of the media release.

[74] The principles relating to the particulars of pleadings and striking out discussed at paras [55]-[59] above are equally applicable to Ms Bright's s 41 notice. Those principles were applied by Gilbert J in *Young v TVNZ*,[15] where his Honour set out the relevant legal principles regarding an application to strike out a plaintiff's notice giving particulars of ill will. His Honour stated:

> [51] A defence of qualified privilege will be defeated if the plaintiff can establish that the defendant was predominantly motivated by ill will or otherwise took improper advantage of the occasion of publication. The concepts of ill will and improper advantage are different. Improper advantage involves the misuse of an occasion of qualified privilege and is wider than the common law concept of malice. It extends to defendants who are reckless in failing to give such responsible consideration to the truth or falsity of the publication as is demanded by the nature of the allegation and the width of the intended publication.
>
> [52] A plaintiff seeking to defeat a qualified privilege defence must provide particulars of the matters from which ill will or improper advantage may reasonably be inferred. Generalised assertions will not suffice. A notice giving such particulars is a pleading and is amenable to being struck out in appropriate cases, applying normal strike out principles. The discretion should be exercised sparingly, and only in clear cases. A plaintiff will normally be given an opportunity to re-plead if the pleading is capable of being saved by amendment.

[75] That summary of the law was expressly affirmed by the Court of Appeal on appeal.[16]

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15 *Young v TVNZ Ltd & Ors*, above n 10 at [51]-[52], footnotes omitted.

16 *Young v TVNZ Ltd and ors* [2014] NZCA 50 at [42].

*Discussion and conclusions on issue 2*

[76] Looking at paragraph 1 of the notice, the general point considered at para [66] above also arises here. It is not clear what is meant by the expression "The publication as pleaded in the statement of claim". A further pleading is required stating the particular parts or aspects of the publication, which are pleaded in the statement of claim, which Ms Bright relies upon.

[77] As for para 2 of the s 41 notice, the statement of defence was completed in early February 2015, and it contains denials by Mr Town of the allegations made by Ms Bright in her statement of claim[17] which might perhaps be relevant to an "ill will" or "taking improper advantage" case. By its nature, a particular should add something to the pleadings that is not yet apparent from the statements of claim and defence. Para 2 of the s 41 notice appears to add nothing which could be read as particulars of ill will on the part of Mr Town, or of him having taken improper advantage of the occasion of publication. Insofar as it is concerned with the qualified privilege defence, paragraph 2 of the s 41 notice should be struck out.

[78] For the reasons set out in para [70] above in respect of s 39, paragraph 3 of Ms Bright's particulars notice is clearly inadequate to fully and fairly inform Mr Town of the case he will have to meet on Ms Bright's ill will/improper advantage claims. As the particulars notice presently stands, he is left to guess which of his actions and comments Ms Bright will rely upon. As Gilbert J noted in *Young v TVNZ*, generalised assertions will not suffice. However for the reasons set out above in para [70], I will allow Ms Bright one further opportunity to provide the level of particularity the rules require.

[79] There will be orders striking out para 2 of the notice insofar as it relates to s 41 of the Act, and directing Ms Bright to file and serve, within 21 days of this judgment, further particulars identifying (i) what is meant by "The publication as pleaded in the statement of claim" in para 1 of the s 41 notice, and (ii) the "actions

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[17] For example, the allegations that the Press Release was authorised by Mr Town knowing that the part of it which is alleged to have defamed Ms Bright was false (or that Mr Town was reckless as to its truth or falsity), and that his objective was to derive a "personal and professional benefit" from the alleged defamation.

and comments" referred to in para 3 of the notice. The exact form of the orders is set out in para [135] at the end of this judgment.

**Issue 3: (Whether or not Ms Bright's s 41 notice is struck out) has Mr Town shown that the qualified privilege defence provides him with a complete defence to all of Ms Bright's claims, so that the proceeding should be determined summarily in his favour? Alternatively, is Ms Bright's cause of action so clearly untenable (because of Mr Town's qualified privilege defence) that it should be struck out?**

*The law - summary judgment and defendants' strike-out applications*

[80] Rule 12.2(2) of the High Court Rules provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> ...
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[81] In *Westpac Banking Corporation v M M Kembla New Zealand Ltd*, the Court of Appeal discussed the principles which apply to application for summary judgment by a defendant.[18] The following principles are stated in that case:

(1) The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim.[19]

(2) The Court must be satisfied that none of the claims can succeed: it is not enough that they are shown to have weaknesses.[20]

(3) Summary judgment is suitable for cases where the abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues.[21]

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18 *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298.
19 At [61].
20 At [64].

(4) The procedure may be inappropriate if the case is likely to turn on a judgment which can only be reached properly after hearing all the evidence at trial.[22]

(5) Developing points of law may require the added context and perspective provided by a full trial.[23]

*Law on qualified privilege*

[82] Qualified privilege is a common law defence. It arises on:[24]

> ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[83] This definition is wide – as is the nature of the defence.[25] It can apply where the allegedly defamatory statement is where the audience is large, including situations where the publication is in (or by) mainstream media to the public at large.[26]

[84] Common law qualified privilege used to be defeated by proof of "malice" on the part of the defendant. In *Horrocks v Lowe*,[27] Lord Diplock stated that the qualified privilege defence required a positive or honest belief in the truth of the statement. Knowledge of falsity constituted malice, as did recklessness as to whether the statement was true or false.[28] His Lordship said the following on recklessness:[29]

> If [a defendant] publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this as in other branches of the law, treated as if he knew it to be false. But indifference to

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21 At [62].
22 At [62].
23 At [62].
24 *Adams v Ward* [1917] AC 309 (HL) at 334 per Lord Atkinson, cited in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at 884.
25 Todd, above n 24, at 885.
26 Todd, above n 24, at 886-887.
27 *Horrocks v Lowe* [1975] AC 135 (HL).
28 At 150.
29 At 150.

> the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.

[85] Malice, which would have been sufficient under the common law to defeat a defendant's claim of qualified privilege, has been replaced by the concept of ill will, or the taking of an improper advantage of the occasion of publication. Section 19 of the Act provides:

> **19 Rebuttal of qualified privilege**
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1), a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[86] In *Lange v Atkinson*, the Court of Appeal referred to the purpose of the s 19 rebuttal provisions in the following terms:[30]

> The purpose of the [privilege] is to facilitate responsible public discussion of the matters which it covers. If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion.

[87] On the meaning of taking "improper advantage of the occasion of publication", the Court said:[31]

> The idea of taking improper advantage of the occasion is important when one is considering the appropriate balance between freedom of expression and protection of reputation. Its connotations are potentially wider than the traditional concept of malice which included excess of publication and improper purpose. To that extent we are able to take a more expansive approach to defining the ability in s 19 to take a correspondingly more expansive approach to what constitutes misuse of the occasion. One development is therefore capable of being matched by another so that the overall balance is kept right...

[88] The Court in *Lange* went on to state that recklessness as to truth or falsity must depend on the nature of the occasion of publication:[32]

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30 *Lange v Atkinson* [2000] 3 NZLR 385 at [42].
31 At [39].
32 At [47[.

> If it is reckless not to "consider to care" whether a statement be true or false, as Lord Diplock indicated [in *Harrocks v Lowe*], it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of publication) can also be reckless.

[89] The Court also observed that where a false and defamatory statement (which otherwise qualifies for the protection of qualified privilege) is made to a wide audience, the motives of the publisher, and whether the publisher had a genuine belief in the truth of the statement, will warrant close scrutiny.[33]

[90] In *Hubbard v Fourth Estate Holdings Ltd*, Venning J noted that:[34]

> In [*Lange*] the Court of Appeal qualified the re-statement of malice by Lord Diplock in *Horrocks v Lowe* by suggesting that Lord Diplock's statement that carelessness, impulsiveness or irrationality are not equated to indifference must be read in context.
>
> > Thus while carelessness will not of itself be sufficient to negate the defence, its existence may well support an assertion by the plaintiff of a lack of belief or recklessness. In this way the concept of reasonable or responsible conduct on the part of a defendant in the particular circumstances becomes a legitimate consideration.
>
> ...
>
> However, the Court of Appeal confirmed that the improper advantage must be of a misuse of the occasion of qualified privilege which would require recklessness at least.

[91] The defence of qualified privilege may be wider where the defendant's defamatory statement was made in response to an attack by the plaintiff on the defendant. The learned authors of *Gatley* state:[35]

> A person whose character or conduct has been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged.

[92] However, the right to respond to an attack is still subject to the "ill will" and "taking improper advantage" limitations. The sole purpose of the privilege is to allow the defendant to justify himself or herself to the people who read the original

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33 At [43].

34 *Hubbard v Fourth Estate Holdings Ltd* above n 8, at [24]-[25], citations omitted.

35 P Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London 2008) at [14.48], cited in Todd, above n 24, at 899.

attack. If the defendant goes too far beyond defence and proceeds to offence, he or she exceeds the privilege.[36]

*Submissions*

[93] The only defence Mr Town relies on in his summary judgment and strike-out applications is the defence of qualified privilege. He submits that the defence provides him with a complete answer to all of Ms Bright's claims.

[94] Mr Akel relies on the classic formulation of the qualified privilege defence, submitting that Mr Town had a right to answer Ms Bright's statements in the public interest. He submits that the focus should be on the occasion of publication rather than the statements at issue. A victim of a defamatory attack has a right to reply publicly, including a right to impugn the attacker's credibility and motives.

[95] Mr Akel submits that Ms Bright's failure to file a reply means that there is no challenge to Mr Town's contention that the Press Release was published on an occasion of qualified privilege. He then submits that there is no basis on which a reasonable trier of fact could infer ill-will (let alone that ill-will was Mr Town's predominant motive), or the taking of an improper advantage by Mr Town.

[96] Mr Akel submits that Mr Town's defence falls squarely within the classic duty/interest formulations, for the following reasons:

(1) The Council had a duty to explain its rating enforcement policy to the public, an issue which was squarely in the public domain at the time as a result of Ms Bright's own actions.

(2) The public, otherwise at risk of misunderstanding the Council process and motivation because of Ms Bright's allegations, had a corresponding interest in learning of the Council's position.

(3) Alternatively, the Council had a legitimate interest in explaining to the public its position on its rating sales enforcement policy, and the

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36 *Todd*, above n 24, at 899.

public, through the media, had a separate interest as a consequence in the subject matter.

(4) Alternatively, the Council was responding to Ms Bright's public attack, and those to whom the Press Release was published had a corresponding interest in knowing the Council's response.

[97] Mr Akel submits that the Court need not be concerned with the precise meaning of the statements complained of in a case of qualified privilege. The precise meaning is not central to a determination of the question of whether the occasion was privileged.[37]

[98] Mr Akel notes that Ms Bright started the public debate herself, and made serious allegations of bad faith against the Council and Mr Town. He submits that the response in the Press Release was a necessary and proportionate response to Ms Bright's attacks on the propriety of the Council's enforcement action against her, and to her campaign of non-payment of her rates. The Press Release did not contain anything about Ms Bright's private life; it responded only to her public allegations. Ms Bright's claims that the Council has singled her out in taking enforcement action against her, essentially in retaliation for her anti-corruption campaign, is submitted to be "palpably inaccurate". Mr Akel refers to Mr Town's right to counter-attack (while acknowledging that the reply must be proportionate, relevant, and appropriate for the defendant to obtain the benefit of the privilege).

[99] Mr Akel submits that there is nothing in the language of the Press Release that could be construed as taking advantage of the occasion of publication to produce extraneous material. There must be a desire to injure on the part of the defendant (which must be the defendant's dominant motive for publishing), before the privilege is defeated.

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37 Citing Brian Neill and others *Duncan and Neill on Defamation* (4th ed, Butterworths, London, 2015) at [17.05], n 4.

[100] In summary, Mr Akel submits that there are no pleaded material disputes of fact, and that a sufficient factual foundation is present for the Court to uphold the qualified privilege defence at summary judgment stage.

[101] In her written submissions, Ms Bright does not specifically respond to the applications for summary judgment and/or strike-out, beyond submitting that the defendant's "no ill will or improper advantage" submission is not a matter that can be dealt with properly by the Court without a full hearing.

*Discussion and conclusions on issue 3*

[102] I accept Mr Akel's submission that the public had an interest in hearing the Council's response to Ms Bright's public allegations against it and Mr Town, and that the occasion was one of qualified privilege. The issue is whether Ms Bright has a reasonably tenable argument that the defence of qualified privilege is defeated by ill will, or the taking of an improper advantage of the occasion of publication, on the part of Mr Town.

[103] I do not consider that that issue can be resolved on the present summary judgment and/or strike-out applications, at least in advance of Ms Bright providing the particulars I have directed her to provide.

[104] Looking at the dicta cited above from both *Horrocks v Lowe* and *Lange*, it is clear that answering the question of whether Ms Bright may be able to defeat the qualified privilege defence will require consideration of Mr Town's belief or otherwise in the truth of the statements made in the Press Release. In circumstances where the publication has been distributed as widely as it has in this case, the motives of Mr Town, and whether he had a genuine belief in the truth of the statements which are said to be defamatory, will warrant close scrutiny.[38]

[105] Mr Town's pleadings and submissions focus heavily on Ms Bright's statements about the forced rating sale process, and the need for the Council to respond to those statements. His arguments do not sufficiently address the possible

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38 *Lange v Atkinson*, above n 30 at [43].

interpretation of the Press Release[39] that "wild and inaccurate" was a descriptor of Ms Bright's reasons for deciding not to pay her rates, not to her later statements alleging a connection between her "anti-corruption" campaign and the Council's decision to take steps to sell her house. There is presently nothing in the pleadings or submissions that adequately addresses Mr Town's belief in the truth of the "wild and inaccurate" statement interpreted in that way.

[106] Mr Akel submits that the Court need not be concerned with the contents of the Press Release at this stage. That might be so if the issue was simply whether the occasion was one of qualified privilege, but I see no basis for disregarding the contents of the publication where the issue is whether the defendant has misused the occasion of publication. Particularly where the "improper advantage" issue is whether something defamatory has been added to the publication, going beyond what needed to be said in the relevant duty/interest context, the words of the publication must be relevant.

[107] For those reasons I do not consider that Mr Town has made out his case for summary judgment on the qualified privilege defence, at least at this stage. However I have found that the occasion *was* one of qualified privilege, and the reasons Mr Town has not made out a case for summary judgment at this point are solely concerned with his ability to overcome Ms Bright's rebuttal under s 19 of the Act. That rebuttal has not been properly pleaded, and I have now granted Ms Bright a final opportunity to properly particularise it. If she fails to do so, or fails to do so sufficiently, it is possible that her s 41 notice may yet be struck out.

[108] In those circumstances I consider the appropriate course is to adjourn the summary judgment and strike-out applications, to be brought back on for hearing (at Mr Town's option) when Ms Bright's further particulars have been served.

[109] The strike-out and summary judgment applications based on the qualified privilege defence will accordingly be adjourned, to be brought back on for hearing on Mr Town filing a memorandum advising that he wishes to pursue one or both of those applications. Any such memorandum is to be filed and served within 10

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[39] Discussed at para [69] of this judgment.

working days after Ms Bright has provided the particulars of her s 41 notice which I have directed her to provide (or in the event of Ms Bright failing to provide the particulars within the period allowed in this judgment, within 10 working days of the expiry of that period).

**Issue 4: If Mr Town is not entitled to summary judgment, should Ms Bright be required to provide security for Mr Town's costs in the proceeding?**

[110] Mr Town seeks security for costs in the following terms:

(1) $10,000 to be paid within 20 working days of the making of the orders;

(2) A further $10,000 to be paid on a date directed by the Court, as security for steps in the proceeding after completion of discovery and to the commencement of trial;

(3) A further $30,000 to be paid thereafter as security for Mr Town's trial costs.

[111] Rule 5.45 of the High Court Rules governs applications by a defendant for security for his or her costs. That rule materially states:

> **5.45 Order for security of costs**
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> ...
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
>
> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—

(i) by paying that sum into court; or

(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given.

...

(5) A Judge may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.

(6) References in this rule to a plaintiff and defendant are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[112] Awarding security for costs, and the quantum to be awarded, are both discretionary matters. The Court of Appeal has said that this discretion should not be restrained by looking at previous cases and drawing on perceived principles.[40]

[113] The approach the Court should take was set out in *Busch v Zion Wildlife Gardens Ltd* as follows:[41]

(1) Has the applicant satisfied the court of the threshold under r 5.45(1)?

(2) How should the court exercise its discretion under r 5.45(2)?

(3) What amount should security for costs be fixed at?

(4) Should a stay be ordered?

[114] The words "will be unable" in r 5.45(1)(b) have been the subject of some judicial consideration. In *Highgate on Broadway*, Kós J stated that the phrase did not apply to financially capable but constitutionally unwilling persons.[42] His Honour invited the Rules Committee to consider expanding the threshold.

[115] The High Court has also stated that the Court should decline to order security where the plaintiff, although cash-poor, is asset-rich or potentially asset-rich.[43] And

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40 *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13] and [14].

41 *Busch v Zion Wildlife Gardens Ltd (in rec and in liq)* [2012] NZHC 17, at [2].

42 *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [8].

43 *Keeys v Peterson* HC Whangarei CIV-2003-488-145, 20 April 2004.

in *Mu v Body Corporate 312421* Associate Judge Bell noted that r 5.45 is directed at people who are unable to pay, not people who are unwilling to pay.[44]

*Submissions*

[116] For Mr Town, Mr Akel submits that there is credible evidence from which it can be inferred that Ms Bright will be unable to pay costs. He refers to the following:

(1) Ms Bright's failure to pay costs orders in the past, including an order for security for costs of $800 in a proceeding involving the Council;

(2) Ms Bright's long-standing history of non-payment of rates to the Council;

(3) Ms Bright's previous public comments that she did not have enough money to pay her rates bill;

(4) Ms Bright's unsatisfactory responses to requests to provide information about her ability to pay costs in these proceedings; and

(5) Ms Bright's notice of opposition to this application (which implies that she is unable to pay the security applied for).

[117] Mr Akel acknowledges that Ms Bright owns the (freehold) property in Kingsland which has been the subject of the Council's rate demands, but submits that without any other information as to the plaintiff's net equity, indebtedness, means, income and "potential equitable interest in the property", that ownership is too uncertain to rely on as evidence that Ms Bright will be able to meet a costs award. He further submits that a "theoretical but uncertain" ability to enforce costs through sale or other disposition of property, combined with Ms Bright's repeated refusal to pay costs even when Court ordered, at the expense of rate-payers, should not prevent the making of an order for security.

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[44] *Mu v Body Corporate 312421* HC Auckland CIV-2011-404-4768, 8 December 2011 at [11].

[118] Mr Akel submits that the evidence shows Ms Bright *is* unable to pay in the rule 5.45 sense, but if that is not proved, rules 1.2 and 1.6 of the High Court Rules may justify the making of an order for security. Rule 1.2 provides generally that the objective of the Rules is to ensure just, speedy and inexpensive determination of any proceedings, and r 1.6 provides that if a case arises for which no form of procedure is prescribed by the rules (or by the Judicature Act 1908 or any other rules or regulations), the Court is to dispose of the application as nearly as practicable in accordance with the provisions of the High Court Rules affecting any similar case. Mr Akel refers in support to the decision of Fogarty J in *Queenstown Community Strategic Assets Group Trustee Ltd v Queenstown Lakes District Council.*[45] In that case, the Court was not satisfied that the r 5.45(2) threshold had been met in circumstances where the plaintiff incorporated society, although itself without sufficient assets to pay a costs award, had a mechanism in its rules under which it could levy members, and there was no doubt that the members had the ability to provide security. The learned Judge considered that r 5.45(1)(b) did not have in contemplation a plaintiff who was in practice able to pay costs, but could not be pursued on any adverse costs award because of a lack of assets. In those circumstances his Honour considered it appropriate to apply rr 1.6 and 1.2, and made an order for security notwithstanding the plaintiff's failure to meet the r 5.45(1)(b) threshold.

[119] Mr Akel also submits that in this case the situation is one where the enforcement of a costs order against Ms Bright's assets would likely lead to expenditure of ratepayer money which exceeded the amount of costs sought.

[120] Ms Bright submits that Mr Town's application for security is an attempt to thwart her claim. She says she is unable to pay the $50,000 security which Mr Town seeks, and Mr Town knows that her inability to pay the amount sought would effectively bar her claim.

[121] Ms Bright further submits there is a public interest in allowing her claim to be heard. She says she is a self-funded anti-corruption and anti-privatisation watch-

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[45] *Queenstown Community Strategic Assets Group Trustee Ltd v Queenstown Lakes District Council* (2011) 20 PRNZ 349.

dog, well known for her diligent research (which she says has exposed numerous violations by the Council of its statutory requirements in the past).

[122] On the issue of quantum (if the Court is minded to order security), Ms Bright submits that assessing security on the basis of a five day hearing would produce an excessive figure.

[123] Ms Bright provided a copy of a response to a request made under the Official Information Act, showing that Mr Town's defence is being funded by ratepayers (described by Ms Bright as "unwitting litigation funders"). Mr Town has not himself incurred any legal costs, nor is he likely to. She submits that reliance on a litigation funder is a factor that weighs against the Court granting security. Further, she contends that the resources of Mr Town and the Council are so high as to create a disparity between the parties, such that Ms Bright's right to a fair trial is at risk.

*Discussion and conclusions on issue 4*

[124] I am not satisfied that Mr Town has shown that there is reason to believe that Ms Bright will be unable to pay Mr Town's costs if she is unsuccessful in the proceeding.

[125] I accept Mr Akel's submission that Ms Bright appears to acknowledge inability to pay costs in her notice of opposition, where she says that "granting the orders sought [by Mr Town in respect of security for costs] would result in a deprivation of Court access based solely upon the plaintiff's inability to pay $50,000 security towards the defendant's defence". But I think that statement must be read in the context of Ms Bright's insistence that she will not sell her home. For example, Ms Bright is reported to have said in an article in the *New Zealand Herald* edition of 9 October 2014 "when this house is sold will be on my terms when I choose to leave...". And of course she has been fighting tooth and nail to resist the Council's attempts to sell the property under the rating sale process. In my view, Ms Bright's statements in her notice of opposition suggesting that she would be unable to post security of $50,000 towards Mr Town's defence are insufficient to confer on the Court a jurisdiction to make a security order under r 5.45, which the evidence suggests does not exist.

[126] The evidence fairly clearly shows that a sale of Ms Bright's home would produce sufficient not only to cover the outstanding rates, but also to meet any award of costs Mr Town might reasonably obtain in the event that he is successful in this proceeding. Mr Akel referred to an earlier judgment in proceedings between the Council and Ms Bright, in which Asher J stated:[46]

> In relation to Ms Bright's financial circumstances, I note that she owns her own home and she informed me from the bar that she owns the freehold. She is not on a benefit but she stated that her sole source of income was rent from a flatmate. Given her unencumbered ownership of a home, it is not possible to regard her as impecunious and therefore unable to pay security for costs. It might be inconvenient to require her to borrow or sell an asset, but there is nothing to show that it could not be done.

[127] Ms Bonilla, a legal executive employed by the Council, produced a copy of the certificate of title to Ms Bright's property. The title confirms that there is no registered mortgage, although there are a number of charging orders registered by the Council, Metro Water Ltd, and Watercare Services Ltd.

[128] Mr Akel also referred in his submissions to a report in the *New Zealand Herald* on 18 March 2014 stating (in respect of Ms Bright):

> [She] said she did not have cash to settle the rates bill, which was $2,197 last year, based on the capital value of $530,000. Her only income was a flatmate's contribution. "I've been working full-time in the public interest since 2000".

[129] Ms Bright has not denied that those statements were accurately attributed to her in the report.

[130] The *Herald* report of 18 March 2014 might suggest that Ms Bright would have difficulty borrowing money to pay any costs award Mr Town might obtain, and I accept that there may be cases where the defendant would have a legitimate argument that the length of time a plaintiff would need to realise assets to meet a costs award is so great that the plaintiff should be regarded as "unable to pay" for the purposes of r 5.45(1)(b). But the evidence does not show that this is such a case.

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46 *Bright v Auckland City Council*, HC Auckland CIV-2008-404-8468, 20 February 2009, at [16].

[131] The likelihood is that if and when Ms Bright's Kingsland property is sold she *will* have sufficient money to pay any costs Mr Town might be awarded. Ms Bright clearly has a very substantial equity in the property, which will be more than sufficient to cover Mr Town's costs, the outstanding rates and any amounts which may be owing to Metro Water Ltd or Watercare Service Ltd. And the Council is itself actively pursuing a sale of the property under its statutory powers in that regard. No fixture has yet been allocated for this proceeding, and I have no evidence on when Mr Town and the Council believe they will be able to have Ms Bright's property sold under the Local Government (Rating) Act 2002.

[132] In the end, this seems to me to be a clear case of unwillingness to pay costs, rather than inability to pay. In that regard, I agree with the decisions of Kós J in *Highgate on Broadway Ltd v Devine*[47] and Associate Judge Bell in *Mu v Body Corporate 312421*,[48] that r 5.45(1)(b) is concerned only with the plaintiff's ability to meet a costs award; it is not directed to "constitutionally unwilling" persons who simply do not want to pay.

[133] This is not a case where recourse can properly be had to rr 1.2 and 1.6 in order to achieve a different result. The decision of Fogarty J in *Queenstown Community Strategic Assets Group Trustee Ltd* is distinguishable, as in that case it appears that any award of costs in the defendant's favour would have been unenforceable. That is not the position here, where it appears Ms Bright has an unencumbered property worth in excess of $500,000, and the Council has already set in train steps to achieve a sale of that property under the provisions of the Local Government (Rating) Act 2002.

[134] For the foregoing reasons, Mr Town's application for security for costs is dismissed.

**Orders**

[135] I make the following orders:

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47 *Highgate on Broadway Ltd v Devine*, above n 42.
48 *Mu v Body Corporate 312421* above n 44.

(1) Within 15 working days of the date of this judgment, Ms Bright is directed to file and serve an amended particulars notice under s 39 of the Defamation Act 1992, stating the following further particulars:

(i) Identifying the particular parts or aspects of "the publication", being parts or aspects which are pleaded in Ms Bright's statement of claim, she is referring to in para 1 of her s 39 notice.

(ii) Identifying the particular part or parts of Mr Town's statement of defence she is referring to in para 2 of her s 39 notice, and

(iii) Identifying each "action" and "comment" referred to in para 3 of her notice. In respect of each alleged "action", Ms Bright is to state the nature of the action, and where and when it allegedly took place. In respect of each alleged "comment", Ms Bright is to state whether the comment is alleged to have been made orally or in writing. For each comment which is alleged to have been made in writing, she is to identify the document in which the comment is said to have been made. For each comment which is alleged to have been made orally, Ms Bright is to state when, where, and to whom the comment was allegedly made.

(2) Within 15 working days of the date of this judgment, Ms Bright is directed to file and serve an amended particulars notice under s 41 of the Defamation Act 1992, stating the following further particulars:

(i) Identifying the particular parts or aspects of "the publication", being parts or aspects which are pleaded in Ms Bright's statement of claim, she is referring to in para 1 of her s 41 notice.

(ii) Identifying each "action" and "comment" referred to in para 3 of her notice. In respect of each alleged "action", Ms Bright is to state the nature of the action, and where and when it allegedly took place. In respect of each alleged "comment", Ms Bright is to state whether the comment is alleged to have been made orally or in writing. For each comment which is alleged to have been made in writing, she is to identify the document in which the comment is said to have been made. For each comment which is alleged to have been made orally, Ms Bright is to state when, where, and to whom the comment was allegedly made.

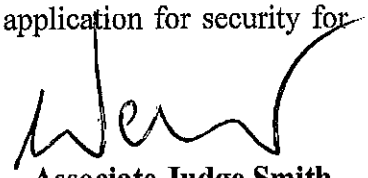
(3) Mr Town's applications for orders striking out Ms Bright's ss 39 and 41 particulars notice, and for summary judgment and/or an order striking out Ms Bright's claims on the basis of his qualified privilege defence, are adjourned for further hearing if necessary.

(4) Not later than 10 working days after service of Ms Bright's amended particulars notice or notices under ss 39 and 41 (or if she does not file any such notice or notices, not later than 10 working days after the expiry of the period allowed to her to file such notices under this judgment), Mr Town is to file and serve any memorandum he may wish to file asking for his applications to strike out the ss 39 and 41 particulars notice(s) and/or his applications for summary judgment or strike-out, to be brought back on for hearing. Any such memorandum is to set out any proposed directions for the resumed hearing of those applications. On receipt of any such memorandum I will give such further directions for the disposal of the applications as may then be appropriate.

(5) Mr Town's application for an order for security for costs is dismissed.

(6) Costs on Mr Town's applications for orders striking out the ss 39 and 41 particulars notice, and his application for summary judgment or

strike-out, are reserved. As Ms Bright has been self-represented, there will be no order for costs on Mr Town's application for security for costs.



**Associate Judge Smith**

Solicitors:
No appearance for the plaintiff
Simpson Grierson, Auckland for the defendant

**Appendix 1**

1. **NZ Herald** – 10 October 2014 *"D-Day for rates activist's home as bailiffs threaten to move"* – *"Ms Bright says she is being picked on by Auckland Council. A hard boiled activist from Springbok Tour days, she is council's loudest and most determined critic. Her campaign against the council is linked to her refusal to pay rates – Ms Bright says she won't pay a penny until the council discloses how much is paid to private contractors".*

2. **Radio NZ** – 7.29am – *"Activist Penny Bright is in a court battle with the Auckland Council over $33,000"* – *"Reporter Todd Niall says Bright has refused to pay her rates and alleges there is corruption in the council".*

3. **TVNZ** – One Breakfast – 10 October 2014 – 7.43am – *"Auckland activist Penny Bright may lose home today, as she owes the Auckland Council..."*

4. **Newstalk ZB** – 10 October 2014 – 8am – *"Activist Penny Bright could be set to lose her home for her refusal to pay over $33k in..."*

5. **RadioLive** – 10 October 2014 – 8.30am – *"Veteran activist Penny Bright is attempting to stop the forced sale of her home..."*

6. **Newstalk ZB** – 10 October 2014 – 9.02am – *"Activist Penny Bright could lose her home due to her refusal to pay rates to the Auckland Council..."*

7. **RadioLive** – 10 October 2014 – 9.04am – *"Activist Penny Bright is vowing to stop Auckland Council selling her home".*

8. **TVNZ One News website** – 10 October 2014 – 12.56pm – *"Penny Bright to fight "draconian abuse of power".*

9. **TVNZ** – One News – 10 October 2014 – 6.26pm – *"Activist faces personal struggle".*

10. **3 News** – 10 October 2014 – 6.24pm – *"Veteran Auckland activist Penny Bright may have property recovered by the Auckland...*

11. **RadioNZ** – 10 October 2014 – 10.11pm – *"Auckland Council says it has tried every alternative to the court ordered sale of activist..."*

12. **TVNZ** – One News – 10 October 2014 – 10.44pm – *"Auckland political activist Penny Bright may lose her home due to her refusal to pay..."*