IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000575
[2016] NZHC 362

BETWEEN	COLIN GRAEME CRAIG Plaintiff and First Counterclaim Defendant
AND	JOHN CHARLES STRINGER Defendant and Counterclaim Plaintiff
AND	HELEN RUTH CRAIG Second Counterclaim Defendant

Hearing: 2 March 2016

Appearances: C G Craig in person
J C Stringer in person
(H R Craig excused)

Judgment: 4 March 2016

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
as to strike out application

Introduction

[1] On its face, the application before the Court is a relatively ordinary application by a plaintiff to strike out the defendant's statement of defence and, at the same time, to strike out the counterclaim. The application is opposed by the defendant. It is to be dealt with by the application of established principles, to which I will come.[1]

[2] Beyond these matters, the ordinariness of the application ceases. The pleadings are complex. The pleading of the plaintiff, Mr Craig, runs some 311 paragraphs with many sub-paragraphs, occupying 80 pages. Thirty-one causes of action, all in defamation, are pleaded.

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[1] Below at [7] and subsequent.

[3] The defendant, Mr Stringer, in turn, initially filed a statement of defence and counterclaim. It is a 78-page document comprising partly a statement of defence and partly a counterclaim which appears to contain 31 causes of action. Mr Craig and his wife were named as counterclaim defendants.

[4] After Mr Craig filed his strike out application, Mr Stringer filed an amended statement of defence and counterclaim. It is a 46-page document but annexes a 28-page "Defence Schedule" containing 13 documents. The amended statement of defence in its pleading is a more succinct document than the original statement of defence in that Mr Stringer has endeavoured to meet the requirement to admit or deny allegations in the statement of claim.

[5] Beyond the pleadings themselves, there is a complexity to the proceeding because its subject-matter has been played out on the national stage in the course of a General Election through a range of events (including press conferences) and media (including emails, blog posts and Facebook entries). As I will come to, a defamation proceeding has also been issued by Mr Stringer against Mr Craig and others out of the Auckland Registry.

[6] Finally, this proceeding is now complicated by the fact that already complicated matters of litigation are to be conducted by individuals who have no legal qualifications. Mr Stringer has indicated to Mr Craig that he is likely to request trial by jury.

Striking out a pleading

The principles

[7] High Court Rule 15.1 makes provision for orders striking out all or part of a pleading. It provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
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> (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.

[8] I will adopt the following as principles applicable to the consideration of this application:[2]

(a) The Court is to assume that the facts pleaded are true (unless they are entirely speculative and without foundation).

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

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

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

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

[10] Reference may also be made to the judgment of Tipping J in *Marshall Futures Ltd (in liquidation) v Marshall,* in which his Honour drew upon the motor vehicle insurance world to make a distinction between a pleading which is a total write-off and one which is deficient but is capable of repair.[3]

[11] In this case, Mr Craig's notice of application is for an order striking out the entirety of Mr Stringer's pleading. Mr Craig invoked r 15.1 as a whole, without specific reference to any sub-rule.

[12] In Mr Craig's synopsis of submissions, the application for an immediate order striking out the statement of defence was not pursued. It was replaced with an application that the Court order the statement of defence to be struck out unless an

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

3 *Marshall Futures Ltd (in liquidation) v Marshall* [1992] 1 NZLR 316 (HC) at 324.

amended defence is filed within a prescribed period. Mr Craig still pursued an order that the counterclaim be struck out as an abuse of process (pursuant to r 15.1(1)(d)).

The requirements of pleading

[13] Requirements of pleading exist both in terms of the High Court Rules and as a matter of the Court's inherent jurisdiction to regulate its own processes.

[14] The requirements in relation to pleading a claim and a defence have a commonality of purpose although some particular requirements necessarily vary according to whether the Court is considering a claim or a defence.

Pleading a claim

[15] I adopt the observations of the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* where the Court observed:[4]

> [84] The procedural requirements for statements of claim are spelled out in the HCR. For present purposes r 5.17 (distinct matter to be stated separately), r 5.26 (statement of claim to show nature of claim) and r 5.27 (statement of claim to specify relief sought) describe the key principles. In summary they are:
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> - The pleading must be accurate, clear and intelligible.
> - Sufficient particulars must be given to enable the defendant to be fairly informed of the case to be met.[5]
> - While adequate particulars are required, the statement of claim must not stray into setting out the evidence relied upon.
> - Separate causes of action must be separately stated.
> - The pleading should set out all the elements of the cause of action …
> - The relief sought must be clearly pleaded in respect of each cause of action and, where there is more than one plaintiff and multiple defendants, the relief sought by each plaintiff against each defendant must be clearly stated.
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> [85] This Court in *Hopper Group Ltd v Parker* put it as follows:[6]

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4 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [84] – [85].

5 Rule 5.26(b) specifically requires particulars of "time", "place" and "plaintiff's cause of action".

6 *Hopper Group Ltd v Parker* (1987) 1 PRNZ 363 (CA) at 366.

> One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the defendant has to meet. If that is not done, it is difficult for a defendant to prepare for trial and questions such as payment into Court or offers of settlement can hardly be considered. Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a defendant might be taken by surprise when the real issue not previously stated clearly suddenly emerges.

Pleading a defence

[16] The requirements for pleading a claim, as set out in the Court of Appeal's first four bullet points in *Chesterfields,* apply also to statements of defence. Rule 5.48 identifies additional requirements which apply specifically to a statement of defence:

> **5.48 Requirements of statement of defence**
>
> (1) The statement of defence must either admit or deny the allegations of fact in the statement of claim, but a defendant does not have to plead to an allegation that does not affect that defendant.
>
> (2) A denial of an allegation of fact in the statement of claim must not be evasive. Points must be answered in substance. If for example, it is alleged that the defendant received a sum of money, it is not sufficient to deny receipt of the particular amount. Rather, the defendant must deny receipt of that sum or any part of it, or set out how much was received. When a matter is alleged with circumstances it is not sufficient to deny it as alleged with those circumstances. In all cases a fair and substantial answer must be given.
>
> (3) An allegation not denied is treated as being admitted.
>
> (4) An affirmative defence must be pleaded.
>
> …

[17] The final sub-rule applicable to statements of defence (r 5.48(5)) parallels the r 5.26(b) requirement for adequate particulars.

Pleadings in relation to defamation

[18] The authors of *McGechan on Procedure* have correctly observed:[7]

> Pleading requirements in defamation have not had their own specific rules since 1993 [with the coming into force of the Defamation Act 1992]. Nevertheless, there are fact-specific requirements for the technical ingredients of this cause of action.
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> …In *Moodie v Ellis*[8] the Court observed that the need to "fairly inform" the other parties of the case being advanced is particularly important in defamation cases because the specifics of publication, and the words used, are a significant factor in the defences that may be available and will determine what the defendants need to plead and prove for their defences.

[19] In *APN New Zealand Ltd v Simunovich Fisheries Ltd,* Tipping and Wilson JJ, delivering the judgment of the Supreme Court, emphasised the importance of particulars of a defence both where a defence of truth is pleaded and where a defence of honest opinion is pleaded.[9] Sections 38 – 40 of the Defamation Act 1992 require such defences to be particularised and pleaded separately. (Under s 39 of the Act the plaintiff, in turn, has an obligation to serve a notice and particulars if intending to allege that an opinion was not genuinely held by the defendant: hence the importance of a clear and distinct pleading of honest opinion by the defendant).

[20] A defence of qualified privilege under ss 16 – 19 of the Act must be distinctly pleaded with proper particulars of the context which created the privilege.

[21] A defendant who intends to adduce evidence of bad reputation in the aspect to which the pleadings relate must include in the statement of defence a statement of such intention with particulars of the "specific instances of misconduct" to be invoked in support.[10]

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7 A C Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR 5.26.08(3)].

8 *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 19 March 2009.

9 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [17] – [18].

10 Defamation Act 1992, s 42.

[22] One aspect of the importance of a defendant's proper pleading of defences is that the plaintiff is obliged in reply to some defences, such as honest opinion[11] and qualified privilege,[12] to give notice and particulars of certain responses.

Pleadings likely to cause prejudice or delay (r 15.1(1)(b))

[23] In *Chesterfields,* the Court of Appeal observed that if a statement of claim is drafted in compliance with the stated requirements of pleading, then both the Court and other parties will have a clear understanding of what is being alleged and against whom.[13] The Court continued:[14]

> …verbose, ill-drafted pleadings may defeat the purpose of a statement of claim to such an extent that it is an abuse of process. This principle is intended, as *Odgers* suggests, to "prevent the improper use of [the court's] machinery".[15] Pleading should not be permitted to be a means of oppressive conduct against opposing parties.

[24] Turning to the strike out jurisdiction under r 15.1(1)(b), the Court observed, "Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible".[16]

Frivolous or vexatious pleadings (r 15.1(1)(c))

[25] Turning to the strike out jurisdiction under r 15.1(1)(c), the Court continued, "a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety".[17]

Abuse of process (r 15.1(1)(d))

[26] Finally, turning to the strike out jurisdiction under r 15.1(1)(d), which arises where a pleading "is otherwise an abuse of the process of the Court", the Court of Appeal observed that the sub-rule:[18]

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11 Defamation Act 1992, s 39.
12 Defamation Act 1992, s 41.
13 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd,* above n 4, at [87].
14 At [87].
15 Simon Goulding, D B Casson and William Blake Odgers *Odgers on Civil Court Actions* (24th ed, Sweet & Maxwell, London 1996) at [10.15].
16 At [89].
17 At [89].
18 At [89].

> …extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

Mr Stringer's pleadings

The original statement of defence

[27] Mr Craig's strike out application related to Mr Stringer's original statement of defence, briefly described at [5] above.

[28] The original statement of defence (and counterclaim) was a poorly conceived and constructed document which breached most, if not all, the requirements of pleading which I have earlier identified. But for Mr Stringer's subsequent endeavour, through his amended statement of defence, to identify his grounds of defence, I would have had no hesitation in striking out the original document.

[29] In speaking to his submissions, Mr Stringer explained that as a lay-man he had intended to set out through the statement of defence and counterclaim a "synopsis" which contained an exposure of the issues which would come out if Mr Craig's defamation proceedings were pursued to trial. Mr Stringer explained that his focus through the original document was on having both parties focus on resolution rather than pursuit of pleading points.

[30] Through the exchanges which occurred in Court, Mr Stringer will now appreciate that pleadings have the purpose identified in the various authorities referred to in this judgment. They may become a background against which the parties subsequently agree a resolution. But the basis of their drafting is to be on the succinct defining of issues and not as a tool to achieve a negotiated outcome. An agenda of the latter kind, as Mr Stringer apparently had in mind, is likely to cause the diversion into extensive pleading of evidence which so marked Mr Stringer's original statement of defence.

Mr Stringer's amended statement of defence (and counterclaim)

[31] As I have already described it, the amended statement of defence which Mr Stringer filed is a more succinct document than the original. In it Mr Stringer endeavoured particularly to meet the requirement to admit or deny allegations in the statement of claim.

[32] As a response to Mr Stringer's amended pleading, Mr Craig responsibly presented his written submissions upon an amended basis. While observing that the amended pleading retained serious deficiencies, Mr Craig submitted that the Court might appropriately give Mr Stringer a further period in which to file a compliant pleading. Mr Craig submitted that the Court should impose an unless order in that regard.

[33] In both his written synopsis and his oral submissions, Mr Craig took the Court through the numerous instances of defective pleading within the amended statement of defence. I will presently record examples of those as it is important that Mr Stringer, as a self-represented litigant, understands clearly the particular matters which a further amended pleading needs to address. For his part, Mr Stringer, in his submissions, accepted that there were identified matters which he needed to deal with by amendment. The focus turned instead to a reasonable period for amendment to which I will return.

[34] Mr Stringer also advised the Court that, for the purpose of re-pleading his statement of defence, he intends to retain a lawyer whom he has already approached for assistance. The period I will allow for an amended pleading was that which emerged from discussion between Mr Stringer and myself.

The amended statement of claim – continuing defects

Attachment of a Schedule of documents

[35] Mr Stringer attached, as part of his amended statement of claim, what was entitled "Defence Schedule 1-13". It comprises a number of documents, some of which are referred to in the pleading.

[36] Such "a schedule" (more correctly described as a bundle of documents) ought not to be included with pleading as it is more appropriately a discovery exercise. If the content of any of the documents is material to the pleading, it is that content which ought to be referred to.

Footnotes and hyper-links

[37] Mr Stringer adopted in the amended pleading a practice of including footnote and hyper-link references. In some cases the footnotes and hyper-links would appear to take the reader to the source of particular words attributed to a particular person. Such references are matters of evidence and ought not to be included in the pleading.

[38] Other footnotes relate to matters of evidence which Mr Stringer had seen fit to plead. They ought not to have been included. At least one footnote purports to be a definition of a word said to have been used by someone. It is again a matter for evidence or submission and not for inclusion in a pleading.

Denials of defamation

[39] At various points of his pleading, Mr Stringer denies that the particular meanings of statements alleged in the statement of claim were defamatory as pleaded. In some places, Mr Stringer's amended pleading contains a bare denial. In other places Mr Stringer includes unparticularised allegations as to truth, honest opinion, qualified privilege or otherwise.

[40] If, in any instance of such bare denials, Mr Stringer intends to assert something beyond the proposition that the meanings involved are not of themselves defamatory, then Mr Stringer's precise point of intended defence needs to be pleaded.

[41] Several times in his pleading Mr Stringer has included a bundle of affirmative defences such as in this instance:

> The Defendant denies these claims [paragraphs 4, 5] pleading that his statements are true, and/or honest opinion, and/or qualified privilege, and therefore not defamatory …

The pleading is defective for failing to set out the defences distinctly and in each case, to plead the required particulars or other supporting detail.

Pleading of bad reputation

[42] Mr Stringer's pleading contains allegations that appear intended to constitute notice of evidence of bad reputation for the purposes of s 42 of the Defamation Act. An example is introduced by the words, "The media at this time reported voters generally as having the reasonable opinion C Craig was …" The pleading goes on to identify various adjectives and nouns.

[43] Section 42 of the Act requires that a defendant give notice of an intention to establish the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, with the evidence to relate to "specific instances of misconduct by the plaintiff".

[44] The example of the pleading to which I have referred does not identify the aspect of character for which the plaintiff is said to have a bad reputation nor does it particularise the specific instances of alleged misconduct which are said to establish the generally bad reputation.

Material in the nature of evidence and submissions

[45] There are repeated examples in the amended pleading of extensive passages of evidential material and submission. Having heard Mr Stringer's explanation of the intention behind his original pleading, it is evident that even the amended pleading carried some of Mr Stringer's aspiration to lay on the table details of the case he would be presenting. It is Mr Stringer's responsibility to eliminate the purely evidential material and the submissions from his pleading.

Frivolous and vexatious material

[46] There are repeated examples of frivolous or vexatious material in the amended pleading. An example of the former is a quotation attributed to a long-dead American. Examples of the latter are numerous references to what other people are alleged to have said about the plaintiff.

[47] The inclusion of such passages in a pleading which is meant to assist the definition of the issues before the Court is a practice which "trifles" with the Court's processes, to adopt the expression used by the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*.[19] It is Mr Stringer's responsibility to eliminate such trifles.

[48] Another way of describing such passages in Mr Stringer's pleadings is that they are gratuitously offensive, in that, as pleadings, they are both uncalled for and calculated to offend.

Pleadings likely to cause prejudice or delay

[49] I adopt the examples of pleadings likely to cause prejudice or delay as identified by the authors of *McGechan on Procedure.*[20] The examples include pleadings which are unnecessarily prolix, scandalous and irrelevant, unintelligible, or incorporating purely evidentiary material.

[50] Mr Stringer's pleading contains repeated instances of these examples. Such pleadings are likely to cause delay, as they already have, in the ordinary case management of a proceeding. They are also prejudicial and, if allowed to stand, would become particularly prejudicial in the event there is a jury trial and they form the basis of the pleadings at that time.

Division into paragraphs

[51] Rule 5.14 of the High Court Rules contains requirements in relation to the use of paragraphs:

> **5.14 Division into paragraphs**
>
> (1) Every document presented for filing must be divided into paragraphs which must be numbered consecutively, starting with the number 1.
>
> (2) Each paragraph must so far as possible be confined to a single topic.

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19 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd,* above n 4, at [89].

20 A C Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR 15.1.03(2)].

[52] While Mr Stringer, in his amended defence, made an endeavour to respond by paragraph number to Mr Craig's statement of claim, he has failed to meet the requirements of r 5.14. In particular, he has still failed to number consecutively (starting with number 1) his paragraphs and has failed to confine all his paragraphs, so far as possible, to single topics. Observance of these requirements is particularly important in a defamation proceeding if a defendant pleads affirmative defences to which the plaintiff will need to file a Reply.

Reframing of meanings advanced by the plaintiff

[53] Mr Craig has appropriately pleaded the meanings which he alleges are conveyed by identified statements of Mr Stringer. Instead of simply pleading in response to those meanings, Mr Stringer has reframed some of the meanings and has responded to the reframed formulation. The Court of Appeal, in *Television New Zealand Ltd v Haines*[21] held, applying its earlier decision in *Broadcasting Corporation of New Zealand v Crush,*[22] that a defendant may not set up meanings different from those pleaded by a defendant and then seek to prove the truth of those alternative meanings. The Court in *Crush* ordered the defendant to file and serve an amended statement of defence which omitted, as part of any defence of truth, different meanings from those advanced by the plaintiffs.

[54] Mr Stringer must similarly omit from his pleading any alternative meanings.

Mr Stringer's counterclaim

[55] Mr Craig also applied for an order striking out the counterclaim. He relied on the same pleading issues as applied in relation to the statement of defence. He relied also on the additional ground that the counterclaim duplicates a claim issued by Mr Stringer in the Auckland Registry of this Court. Mr Craig asserted abuse of process in terms of r 15.1(1)(d) of the Rules.

[56] Mr Stringer's notice of opposition extended to the strike out application relating to the counterclaim. Both parties filed submissions concerning the

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21 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [52] – [67].
22 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA).

counterclaim. Following the presentation of Mr Craig's oral submissions, Mr Stringer saw fit to indicate to the Court that he wished to withdraw the counterclaim. I treated Mr Stringer's indication as an oral discontinuance. I therefore record that Mr Stringer's counterclaim was discontinued on 2 March 2016.

[57] Accordingly, when Mr Stringer files his amended statement of defence, he is not to include any matter of counterclaim.

Costs

[58] I heard from the parties as to costs at the conclusion of their submissions.

[59] It is appropriate that costs and disbursements follow the event pursuant to r 14.2(a) of the Rules.

[60] As Mr Craig was legally represented only to the point of the filing of his application, the costs to be awarded should appropriately relate to that item.[23] In relation to subsequent steps, there are no exceptional circumstances to justify departure from the established rule that a lay-litigant is not entitled to recover costs.[24]

[61] Disbursements should be awarded in relation to the usual items. The disbursements recoverable by Mr Craig are to include filing fees in relation to the interlocutory application, any disbursements paid by Mr Craig in relation to the preparation of bundles for the hearing, and Mr Craig's reasonable costs of travel and accommodation for the hearing. The latter items are recoverable as the term "disbursement" is defined by r 14.12 to mean an expense paid or incurred for the purposes of a proceeding which would ordinarily be charged or separately from legal professional services in a solicitor's bill of costs. While the incurring of such disbursements by a litigant in person is an unusual event, it falls within the definition of disbursement and may be recovered when appropriately incurred.

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23 *Transit New Zealand v Cook* HC Greymouth CP 6/93, 30 June 1994.

24 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24, 500 at [162].

The unless order – time to be allowed for amendment

[62] Mr Craig submitted that any opportunity granted to Mr Stringer to amend his pleadings should be, because of their repeated deficiencies, the subject of an unless order. He referred me to the judgment of Associate Judge Sargisson in *Karam v Parker*.[25] In that proceeding, the statement of defence to a defamation claim suffered many of the same defects as Mr Stringer's pleadings in this case. Her Honour imposed an unless order which allowed the defendants a month to amend their defence so as to rectify its deficiencies.

[63] In this case, the plaintiff's progress of his claim has been held up first by the deficiencies of the original statement of defence and subsequently by the continuing deficiencies of the amended pleading. The amended pleading was filed at a time when the defendant was on notice (through the grounds set out in the strike out application) of the nature and extent of deficiencies. The effect of the earlier part of this judgment is to recognise the correctness of the plaintiff's complaints concerning the pleadings. Certain aspects of the defects in Mr Stringer's pleadings exhibit a willingness to misuse the pleading process.

[64] In my judgment in *Victoria Cottages Ltd v FMR Group Ltd* I identified principles applicable to the imposition of an unless order.[26] I listed these matters, which I adopt:[27]

> (a) The objective of the rules is to secure the just, speedy and inexpensive determination of a proceeding: rr 1.2 and 7.2(2) High Court Rules.
>
> (b) The significant consequences (striking out, stay or the like) of a failure to comply with an unless order are so significant that they influence when an unless order should properly be made: *Anderson v Mainland Beverages Limited* (2005) 17 PRNZ 757 at [45] (CA); *Zhao v Wallace* [2009] DCR 55 (HC) Stevens J at [28].
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> (c) An unless order may be justified
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> - where default is intentional or contumelious: *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 (CA) per Diplock LJ at p259; *Zhao v Wallace* [2009] DCR 55 (HC)

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25 *Karam v Parker* HC Auckland CIV-2010-404-3038, 29 July 2011.
26 *Victoria Cottages Ltd v FMR Group Ltd* HC Blenheim CIV-2009-406-38, 2, 8 September 2009.
27 At [9].

Stevens J at [29] – or contumacious: *Lees Trading Co. (NZ) Limited v Loveday* HC Christchurch CP70/96 36.98 William Young J; *Commonwealth Reserves I*, *LC v Chodar* HC Auckland CP 73-SW/00, 18.7.09 Glazebrook J at [25]. Disobedience of an unless order will of itself generally be regarded as contumelious conduct: *Re Jokoi Tea Holdings Limited* (Note) [1972] 1 WLR 1196 at pp 1202 – 1203 per Sir Nicolas Browne-Wilkinson VC; *Zhao v Wallace* at [32]. In that event the conduct amounts to an abuse of process of the Court rendering the merits of the defaulting party's proceeding irrelevant; or

- where there is substantial prejudice to the innocent party through inexcusable non-compliance: *Allen v Sir Alfred McAlpine & Sons Ltd* at p 259: *Zhao v Wallace* at [29] – [33]. Prejudice will be substantial if the inexcusable delay gives rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date the proceeding will come to trial if allowed to continue.

(d) Where non-compliance with a timetable has been inexcusable but not intentional and the consequences of an unless order are to be weighed, any sense of injustice to the defaulting party is of secondary consideration to injustice to the innocent party or to the public interest in the administration of justice: the *Hytec* case at 1674 – 1675.

(e) While considerations applicable to decisions to strike out a pleading may inform the decision to make an unless order, the Court should not equate the two decisions – the first is draconian in that the pleading (with its claim or defence) comes to an end, whereas the second involves the provision of additional time to the defaulting party to remedy its breach. While in a procedural context it may be appropriate to refer to an unless order as a "last resort" (per Ward LJ in *Hytec* at 1674 – 1675) it is equally correct to refer to it as a "first step" in relation to the act of striking out (per Glazebrook J in the *Commonwealth Reserves* case at [25].

(f) Once the decision is made to impose an unless order, the obligations imposed by the order must be unmistakably clear: *Anderson v Mainland Beverages Limited* at [45]. (For an example of a clear unless order see the *Commonwealth Reserves* case at [43]).

(g) Ultimately a Judge exercises a judicial discretion, to be exercised on the facts and circumstances of each case on its merits and according to justice.

[65] In relation to a defamation claim such as this, the first of the listed matters – the objective of the High Court Rules to secure the just, speedy, and inexpensive determination of the proceeding – is reinforced through s 35(1) Defamation Act, in that Parliament has referred to the role of a Judge in "ensuring the just, expeditious, and economical disposal of any proceedings for defamation".

[66] I am satisfied in this case that it is just that an unless order be made in relation to Mr Stringer's pleading.

Orders

[67] I order:

(a) there is an unless order as follows:

Unless the defendant within 30 working days from date of judgment files and serves an amended statement of defence which rectifies the deficiencies contained in the current (amended) statement of defence so as to comply with the statutory and regulatory provisions and other requirements referred to in this judgment, then an order striking out the defence of the defendant is made;

(b) the defendant is to pay to the plaintiff in any event the costs of the strike out application in the sum of $1,338;

(c) the defendant is to pay to the plaintiff in any event the plaintiff's reasonable disbursements incurred in relation to the interlocutory filing fee, the preparation of bundles for the interlocutory hearing, and the plaintiff's reasonable travel and accommodation costs incurred for the hearing, to be fixed by the Registrar;

(d) costs as between the defendant and Helen Ruth Craig, upon the discontinuance of the counterclaim, are reserved;

(e) I adjourn the plaintiff's strike out application with leave to the plaintiff to have the same brought on five working days notice should any further issue of defective pleading of defence arise.

Associate Judge Osborne

Copy to: C G Craig, Auckland
J C Stringer, Christchurch
H R Craig, Auckland