IN THE DISTRICT COURT
AT TAURANGA

CIV-2015-070-000425
[2016] NZDC 17743

UNDER	The Defamation Act 1992
BETWEEN	S M RUSSELL Plaintiff
AND	J B MATTHEWS Defendant

Hearing: 26 August 2016

Appearances: T Braun / N Smith for the Plaintiff
A Romanos for the Defendant

Judgment: 15 September 2016

RESERVED JUDGMENT OF JUDGE T R INGRAM

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[1] The defendant is sued in defamation. The circumstances are relatively unusual. The defendant made some indubitably defamatory remarks about the plaintiff in correspondence with a professional standards body which had a supervisory jurisdiction over the plaintiff's professional conduct, and publication was also made to the plaintiff's father. There has been no publication to any other person.

[2] The plaintiff has not sought damages, and instead seeks a declaration under s 24 of the Defamation Act. That section provides:

> **24 Declarations**
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
> (2) Where, in any proceedings for defamation,—
> (a) the plaintiff seeks only a declaration and costs; and
> (b) the court makes the declaration sought,—
> the plaintiff shall be awarded solicitor and client costs against the defendant in the

proceedings, unless the court orders otherwise.

[3] The present application to strike out is made in reliance on a developing common law doctrine extensively adopted in the United Kingdom and Australia, widely known as the "Jameel" doctrine; see *Jameel v Dow Jones* [2005] EWCA CIV 75. The doctrine can be succinctly expressed as a branch of the Court's power to prevent abuse of its process. The Court can prevent trivial claims of defamation from consuming a disproportionate share of private and public resources where the Court is satisfied that the defendant has not committed a "real and substantial tort"; a wholly disproportionate expenditure of money and scarce Court resources is to be prevented in cases where the vindication received will be minimal or non-existent.

[4] The defendant submits that this case could fairly be considered an archetype of the "Jameel" doctrine. Publication has been so narrow that the plaintiff's reputational loss must be infinitesimally small. It is further submitted that publication to the plaintiff's own father could not produce a real reputational loss in any circumstances, and further publication to a member of a professional conduct organisation must necessarily produce an infinitesimally small reputational loss. It is further submitted that the real purpose of seeking a declaration is to take advantage of the costs provisions under s 24.

[5] The 'Jameel' doctrine has not yet been expressly adopted as the law of New Zealand, although there are obiter dicta in several cases approving the rationale underpinning the doctrine. For the purposes of adoption of the doctrine in the District Court, a suitable jurisdictional platform can be found in the provisions of Rule 15.1(d) of the District Courts Rules 2014 which provides:

> "The Court may strike out all or part of a pleading if it … is otherwise an abuse of the process of the Court."

[6] In *Karam v Parker* HC Auckland CIV-2010-404-3038 Associate Judge Sargisson declined to apply the "Jameel" doctrine to broadly published material appearing on Facebook and a private website, because of the breadth of publication.

[7] In *Deliu v Hong* [2013] NZHC 73, Associate Judge Osborne declined to apply the "Jameel" doctrine on the basis of a perceived difference between the applicable High Court Rules in New Zealand and the Civil Procedure Rules [UK].

[8] The matter was further considered by Ronald Young J in *Moodie v Strachan* [2013] NZHC 1394, where he said that he could see "... no reason why New Zealand Courts would not be prepared to stay (or strike out) civil proceedings that cannot serve the legitimate purpose of the cause of action pleaded. In defamation this is typically the protection of the plaintiff's reputation." He declined to apply the "Jameel" doctrine on the basis that the facts of that case precluded the application of the doctrine.

[9] The plaintiff's response has been to point out that the law jealously guards the rights of members of society to protect and preserve their reputations from defamatory attack. It is accordingly submitted that the "Jameel" doctrine is not yet the law in New Zealand, and has no application. It is submitted that the purpose of s 24 is to permit plaintiffs to obtain vindication in cases where there is limited publication which would not otherwise sound in substantial damages. It is further submitted that the expense of trial would be justified in this case because the material is so clearly defamatory.

[10] The resources required to hear and determine a claim of this nature are substantial. The legal costs involved will run to tens of thousands of dollars on each side, and the case would indubitably require at least two full days of hearing time, together with at least another day for the Judge to write a decision. The inconvenience to witnesses would be no greater than any other trial, but it would not be minor.

[11] The District Court file so far contains a stack of documentation that is nearly a foot high. If it is to proceed further, a number of briefs of evidence will need to be prepared, together with written submissions and lists of authorities. Both sides will likely spend something in the order of five days in preparation for the hearing.

[12] The principles concerning the striking out of a pleading were restated in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267. It is well settled that before the Court may strike out proceedings the causes of action must be untenable to the extent that they cannot possibly succeed. The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied that it has the requisite material. It is important to consider the case for the plaintiff as high as he can make it, and the allegations made in the statement of claim are presumed correct. A strike out application must be scrutinised with great care.

[13] The criteria for determining an application to strike out can be summarised, as follows:

(a) The application proceeds on the assumption that the facts pleaded in the statement of claim are true, regardless of whether they are admitted or not;
(b) The discretion to strike out is to be exercised sparingly and only in clear cases where the Court is satisfied it has the requisite material before it;
(c) The Court will not exercise its discretion unless the case as pleaded is clearly so untenable that the plaintiff cannot possibly succeed; and
(d) If a claim depends upon a question of law, which is capable of decision on the material before the Court, the Court should determine the question, even though extensive argument may be necessary to resolve it.
(e) It may be a question of degree as to whether the statement of claim is so defective as to require striking out; a total write-off will be struck out while a repairable but defective statement of claim may be amended. (*Marshall Futures Limited v Marshall* (1991) 3 PRNZ 200.

[14] I accept the defendant's submission that if ever there was a case which demonstrated the utility of the "Jameel" doctrine, it is this case. In my view, it would simply be a waste of resources for this case to proceed to a judgment.

[15] The very limited publication, the identity and relationship in which the recipients of the defamatory material stood to the Plaintiff, and the absence of a claim for damages, collectively, in my view, justify the application of the "Jameel" doctrine in this case. I am satisfied that there is no "real and substantial tort" here. Defamatory material has been published, but the reputational damage to the plaintiff is infinitesimally small, if there was any at all.

[16] If vindication be required, it is clear from the affidavits provided to me that the defendant has defamed the plaintiff. The defendant has not sought to argue otherwise before me. The very limited publication of that material however, means that no "real and substantial" reputational damage could have occurred. To expand the pool of persons informed of the defamatory remarks by continuing with the proceedings is in my view completely unjustifiable. Incurring substantial costs in order to recover an award of costs, with the concomitant consumption of scarce Court resources on such an exercise has no redeeming feature, in my view. That is exactly the situation that the "Jameel" doctrine is designed to cover.

[17] The Plaintiff has sought leave to file notices under the provisions of s 39 and s 41, challenging the defences of honest opinion and qualified privilege. The statutory provisions required that the notices be served by 11 November 2015. The delay has been substantial. Even if an allegation of malice was proved, which I must accept for the purposes of this application, in view of the conclusion I have reached on the strike out application, I do not consider that any useful purpose would be served by allowing a reply to a pleading that is out of time. The plaintiff's application to file s 39 and s 41 notices is refused.

[18] I accordingly order that the proceeding be stayed as an abuse of the process of the Court. Counsel may file memoranda as to costs within 21 days of the date of this judgment if they are unable to agree on costs. I may need some persuasion to depart from a preliminary view that costs might perhaps best lie where they fall.

T R Ingram
District Court Judge