IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-3194
[2017] NZHC 141

UNDER	the Defamation Act 1992
BETWEEN	PENELOPE MARY BRIGHT Plaintiff
AND	STEPHEN TOWN Defendant

Hearing: 20 May 2016

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

Judgment: 13 February 2017

JUDGMENT OF ASSOCIATE JUDGE SMITH

Introduction

[1] In a judgment given on 10 March 2016 in this defamation case, I directed the plaintiff (Ms Bright) to provide certain further particulars of a notice she had given under s 39 and s 41 of the Defamation Act 1992 (the Act). I adjourned an application Mr Town had made for summary judgment based on the defence of qualified privilege, pending service of the further particulars of the s 39 and s 41 notice. I dismissed an alternative application made by Mr Town for security for his costs.[1]

[2] In adjourning Mr Town's application for summary judgment, I allowed Mr Town a period of ten working days after service of Ms Bright's amended particulars notice to file any memorandum he may wish to file asking for his applications to strike out the particulars notice, and for summary judgment, to be brought back on for hearing.

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1 *Bright v Town* [2016] NZHC 411.

[3] Ms Bright filed notices setting out further particulars of her s 39 and s 41 notice within the time allowed in my judgment of 10 March 2016, and Mr Town filed a memorandum asking for his strike out/summary judgment applications to be brought back on for hearing. Mr Town and Ms Bright both filed further written submissions on the resumed hearing.

[4] The resumed hearing took place on 20 May 2016. As with the hearing on 5 November 2015, Ms Bright elected not to appear.

[5] After the 20 May 2016 hearing, Mr Town sought leave to file brief supplementary submissions directed to the Court of Appeal decision in *Alexander v Clegg,*[2] an authority which had not been referred to by either party in their submissions. By minute dated 19 June 2016 I allowed each party to file brief supplementary submissions, limited to the effect of *Alexander v Clegg* on the issues presently before the court. I have subsequently received and considered these supplementary submissions.

[6] I now give judgment on Mr Town's applications to strike out Ms Bright's s 39 and s 41 notices (as supplemented by the further particulars supplied by her on 31 March 2016), and for summary judgment.

Background — the defamation proceeding

[7] The background of Ms Bright's defamation claim is set out in my judgment given on 10 March 2016, and it is not necessary to repeat in this judgment everything that was said there. But in brief summary, Ms Bright (who describes herself as a fulltime public watchdog, particularly on the affairs of the Auckland Council) has sued Mr Town (the Chief Executive of the Council) for damages for allegedly defamatory statements made by Mr Town in a Press Release (the Press Release) authorised by Mr Town and issued by the Council in the afternoon on 10 October 2014.

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2 *Alexander v Clegg* [2004] 3 NZLR 586 (CA).

[8] The Press Release was broadly concerned with actions taken by the Council in an attempt to recover rates payable by Ms Bright on a property owned by her at Kingsland. The Council had obtained judgments against Ms Bright for unpaid rates, and had set in train a process for the sale of the Kingsland property by public auction or public tender under the Local Government (Rating) Act 2002.

[9] Ms Bright had made a number of media statements prior to the issue of the press release. Some of them are set out at paragraph [16] of my judgment given on 10 March 2016. Others are set out in an appendix to that judgment. Media statements made by Ms Bright between 30 August 2014 and 10 October 2014 included the following:

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 details" 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 which 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 home" – "[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 her 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 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 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".*

[10] The Press Release issued in the afternoon of 10 October included the following:[3]

> **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 actions which is both disappointing and frustrating". …

[11] In December 2014 Ms Bright filed a claim in this Court, alleging defamation by Mr Town in the press release. In her statement of claim, she contends 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.

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

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3 The Press Release is set out in my previous judgment at [18].

(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.

[13] 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. She says that although she promptly advised Mr Town of the inaccuracy of the statements at [11] above, he has refused to give the matter his full consideration, and has refused to issue a public retraction or apology.

[14] 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.

[15] Ms Bright further alleges that the Press Release, and in particular the passage quoted in paragraph [11] 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.

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

[17] In his statement of defence, Mr Town pleads the defences of honest opinion under s 9 of the Act, and common law qualified privilege.

Statutory requirements

[18] Certain statutory requirements apply when a plaintiff contends:

(1) that a defendant's defence of honest opinion should be rejected because the opinion was not genuinely held, or

(2) that a defendant's defence of qualified privilege should be rejected because the defendant was motivated by ill will directed to the plaintiff, or otherwise took improper advantage of the occasion of the publication.

[19] Where (a) applies (plaintiff alleging defendant's opinion not genuinely held), the plaintiff is required to serve a notice under s 39 of the Act. That section 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.

(3) The notice required by subsection (1) shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.

[20] Where (b) applies (plaintiff alleging that qualified privilege has been lost because of the defendant's ill will or the taking of an improper advantage of the occasion of publication), the plaintiff is required to serve notice on the defendant under s 41 of the Act. Section 41 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.

(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.

…

Ms Bright's notices under ss 39 and 41

[21] In this case, Ms Bright filed a "combined" notice under s 39 and s 41 of the Act. As originally filed, the notice stated:

> 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

[22] Mr Town applied to strike out this notice, on the grounds that it did not adequately provide particulars sufficient to rebut either the honest opinion defence or the qualified privilege defence. He also applied for summary judgment, relying on the qualified privilege defence only.

The orders made on 10 March 2016

[23] In my judgment of 10 March 2016 I directed Ms Bright to provide the following further particulars of her notice under s 39 of the Act:

> 1. 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 paragraph 1 of her s 39 notice.
>
> 2. Identifying the particular part or parts of Mr Town's statement of defence she is referring to in paragraph 2 of her s 39 notice, and
>
> 3. 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 sate 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 comments was allegedly made.

[24] I indicated that paragraph 2 of the particulars notice would be struck out insofar as it purported to provide particulars under s 41 of the Act, and I directed Ms Bright to provide the following further particulars of paragraphs 1 and 3 of the s 41 notice:

> 1. 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.
>
> 3. 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 sate 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 comments was allegedly made.

The further particulars of her s 41 notice provided by Ms Bright

[25] Ms Bright provided the following further particulars of ill will and/or the taking of an improper advantage, in a document filed on 31 March 2016 (the amended s 41 notice):

> *Amended Particulars Notice to Defendant under s 41 of the Defamation Act 1992*
>
> …
>
> i) The particular parts or aspects of "the publication" referred to in para 1 [of the amended s 41 notice], which is the "Press Release" for which Mr Town admits he approved the dissemination thereof on 10 October 2014; are:
>
> "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."
>
> ii) Identifying each "action" and "comment" referred to in para 3 of [the amended s 41 notice]:
>
> (1) The lack of evidence produced by the Defendant making a connection between the Plaintiff's refusal to pay her rates and the Council's probity, in the "press release" for which Mr Town admits he approved the dissemination thereof on 10 October 2014.
>
> (2) The lack of evidence produced by the Defendant showing the Plaintiff has made "wild and inaccurate accusations about the council and its probity", in the "press release" for which Mr Town admits he approved the dissemination thereof on 10 October 2014.
>
> (3) The evidence discovered which does show the Plaintiff's refusal to pay her rates was in response to a lack of transparency concerning how Council spends ratepayers' money, as outlined in para (e)(i) – (v) of SCHEDULE 1 – FACTS AND CIRCUMSTANCES RELIED ON IN DEFENCE OF TRUTH, of the Defendant's Statement of Defence:
>
> "(e) The plaintiff has publicly stated that she refuses to pay her rates until:

(i) Auckland Council discloses full details of its spending on private sector contractors;

(ii) Auckland Council is transparent or accountable;

(iii) She knows where her money is going;

(iv) Auckland Council carries out its statutory duties and complies with the law;

(v) Auckland Council opens the books and acts in a democratically accountable matter."

(4) The evidence which does show the Defendant and Council were aware that this alleged lack of transparency is the impetus behind the Plaintiff's refusal to pay rates, (see 3 above).

(5) The evidence in the form of the Defendant's and Councils' recently published actions which verify the Plaintiff's refusal to pay her rates were founded in fact, if not instrumental in compelling Council to become more transparent in how it spends ratepayers' money.

(Auckland Council press release 8 May 2015)

Council moves to improve transparency

8/05/2015

Auckland Council has launched a section on its website providing information on a variety of council activities as part of a commitment to more openness and transparency.

The proactive publication of information on the More about the Council webpage, which can be found via the Auckland Council Media centre helps to provide Aucklanders with better, timelier and more accurate information about how council works.

The first release of information includes Auckland Council Group staff numbers, information about annual average rates increases, debt, efficiency savings and progress updates on the NewCore project.

It also includes contracts awarded by the Council with a value of $100,000 and greater from 1 July to 31 March 2015 and spends with suppliers with a value of $100,000 and more from 1 October 2014 to 31 March 2015. All of the information in the section will be updated regularly to ensure it remains relevant and current.

Auckland Council CEO Stephen Town says the proactive publication of information aims to strengthen Aucklanders' trust in the Council.

"Central government and other local authorities already have similar initiatives, meaning Auckland Council will now be aligned with best practice across the public sector in New Zealand in making information more accessible to the public," he says.

(6) Evidence which goes to the Defendant's credibility on the issue before the Court in this matter, including his offer of rates postponement to the Plaintiff after the Defendant's alleged defamatory statements, in a written letter dated 23 October 2014, to which he made reference to in a widely-distributed Press Release that same day.

Auckland Council CEO details options to prevent forced house sale

23/10/2014

Auckland Council CEO Stephen Town has today written to Penny Bright making it clear that the forced sale of her house because of her long-term overdue rates arrears was not the Council's preferred course of action.

Legal proceedings to recover the $33,288.25 of her outstanding arrears would result in the sale of her Kingsland house. Ratings sales are rare as most ratepayers with overdue rates make suitable arrangements with Council to pay.

Mr Town says that in her case, as with other outstanding rate arrears cases, the Council would prefer to resolve the payment without having to resort to legal action. In his letter, Mr Town has reminded Ms Bright of the options available to pay her rates which includes a rates postponement.

Council has provisionally assessed her rates arrears situation against the criteria for a postponement of rates and concluded that this option would be available to Ms Bright. This would be on the basis that she applies and is willing to meet and adhere to the requirements of a repayment scheme.

"Ms Bright has today indicated her interest in a rates postponement option. We have provided her with a way forward and the name of a senior council staff member who can assist. The ball is now in her court," says Mr Town.

"The Council has a responsibility to ensure there is a fairness and equity in the payment of rates for all ratepayers and we have tried for over seven years to encourage Ms Bright to pay her rates."

To date 20,051 Auckland ratepayers have qualified for a rates rebate and council has agreed to a rates postponement for 337 households."

(7) Evidence showing the Plaintiff's allegations that the Defendant and Council were not being open and transparent regarding the spending of ratepayers' monies were:

7.1 Accurate and supported by documentation and research.

7.2 Successful in creating positive changes which made the Defendant and Council more accountable and the Defendant arguably unhappy.

(8) And, on this basis, the pleaded defamatory words were designed by the Defendant to create an improper advantage by falsely attacking the Plaintiff's credibility in order to improperly discredit her accurate critiques.

[26] Ms Bright also filed an amended notice setting out further particulars of her contention that Mr Town is not entitled to rely on the defence of honest opinion (the amended s 39 notice). Paragraphs 1 and 3 of the amended s 39 notice were identical to paragraphs 1 and 3 of the amended s 41 notice (set out at paragraphs [25] of this judgment). The amended s 39 notice also contained a paragraph 2, identifying various pleadings in Mr Town's statement of defence which Mr Bright relies on in opposition to his honest opinion defence. Paragraph 2 of the amended s 39 notice is reproduced in the appendix to this judgment.

The Issues

[27] The following issues fall to be decided:

(1) Has Ms Bright now provided adequate particulars of ill will / taking improper advantage, such that Mr Town's application to strike out the amended s 41 notice should be dismissed (in whole or in part)?

(2) Whatever might be the answer on issue (1) above, is it clear that qualified privilege affords Mr Town 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?

(3) If the answer to issue (2) is "no", has Ms Bright now provided adequate particulars in support of her contention that the opinions expressed in the press release were not the genuine opinions of Mr Town, such that his application to strike out the amended s 39 notice should be dismissed (in whole or in part)?

[28] I will address each of those issues in turn.

Issue 1 – Has Ms Bright now provided adequate particulars of ill will/taking improper advantage, such that Mr Town's application to strike out the amended s 41 notice should be dismissed (in whole or in part)?

Applicable principles

[29] In my judgment of 10 March 2016, I summarised the relevant principles as follows:

> [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*,[4] 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.

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4 *Young v TVNZ Ltd and Ors* [2012] NZHC 2738 at [51] – [52], footnotes omitted.

> [75] That summary of the law was expressly affirmed by the Court of Appeal on appeal.[5]

[30] The learned authors of *Gatley*, note (in respect of the concept of malice, which is similar to ill will under s 19 of the Act) that "the plea must be more consistent with malice than with its absence; if it is not, it is liable to be struck out.[6]

Ms Bright's submissions

[31] Ms Bright submits that the particulars provided in the amended s 41 notice are adequate and provide a reasonable foundation upon which the trier of fact could infer ill will or the taking of an improper advantage of the occasion giving rise to the qualified privilege.

[32] First, she submits that the evidence confirms that the rates dispute which she has been engaged in with the Council concerns a dispute over an alleged lack of transparency in how ratepayers' money was being spent. She submits that there can be no question over her probity or the accuracy of her research.

[33] Ms Bright then submits that Mr Town's own statement of defence demonstrates that he understood Ms Bright's basis for not paying her rates was to compel the Council to disclose full details of its spending on private sector contractors, and for the Council to "open the books" and act in a democratically accountable manner. She submits that the alleged defamation is plain in its attack on her ability to be factually correct on matters of Council's probity. She submits that "…. it will be plain to a jury that [Mr Town] cannot reasonably hold the belief that [Ms Bright] is wild and inaccurate with her facts when it comes to Council's probity".

[34] She submits that it would a denial of natural justice if the court were to strike out her particulars of ill will/improper advantage at this stage.

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5 *Young v TVNZ and Ors* [2014] NZCA 50 at [42].

6 Professor Alastair Mullis and Richard Parkes QC *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell London, 2013) at [28.6].

[35] In her supplementary submissions directed to the Court of Appeal decision in *Alexander v Clegg*, Ms Bright notes that the individual circumstances of the publication in a particular case will be critical. She submits that the full circumstances of this case will not be known until the case goes to trial.

[36] Secondly, Ms Bright seeks to distinguish *Alexander v Clegg* on the basis that the plaintiff in that case did not file any s 41 notice.

[37] Ms Bright submits that the alleged defamation in this case was not a rebuttal of an attack, but instead part of a double-barrelled attack upon her. She describes the first part of that attack (Council's court application to bring about a forced sale of her property) as being "lawful albeit unprecedented", but the second part of the attack (the impugned statements in the Press Release) as being personally defamatory and unlawful.

[38] Ms Bright emphasises that it is clear from Mr Town's statement of defence that he understood before the Press Release was issued that Ms Bright's refusal under protest to pay her rates was on the grounds of lack of transparency in how the Council spends ratepayers' monies. She says that this is "disconnected from [Mr Town's] accusations that [she] is wild and inaccurate on her facts concerning Auckland Council's probity".

[39] Ms Bright then refers to statements made by the Local Government and Environment Committee in a report on a petition presented by Ms Bright to Parliament.[7] Ms Bright reproduced extracts from this report in her submissions, in support of a contention that there was 'no discernable duty for [Mr Town] to attack [Ms Bright's] credibility as factually wild and inaccurate on Council probity other than to *obscure* the lack of transparency on public spending by Council which [Mr Town] admits was the (legitimate) issue. It follows there was no duty (benefit) of the intended recipients to receive [Mr Town's] red herring attack where those recipients would not reasonably disagree with [Ms Bright's] actual goal of furthering transparency on public spending if not her tactics".

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[7] Petition 2014/33 of Penelope Mary Bright and 55 others, and Report from the Controller and Auditor-General Governance and Accountability of Council Controlled Organisations.

[40] Ms Bright quotes the following from the Report of the Local Government and Environment Committee (at 6):

> We also would like to thank the petitioner [ie Ms Bright] for coming down from Auckland to speak to us about her petition.
>
> We agree that ratepayers should be able to easily access information about how public money collected through rates is spent. We support the petition's plea for transparency and standardisation of the information that Auckland [Council controlled Organisations (CCOs)] provide to the public.
>
> We note the petition's desire for legislative change, as well as for an enquiry into the cost-effectiveness, transparency and democratic accountability of Auckland CCOs.

[41] Ms Bright goes on to submit that the "lawful range" of what is defamatory in this context will depend upon the ordinary meanings which are not disputed by Mr Town. The determination of that "lawful range" will be a question for the jury at trial.

[42] Ms Bright further submits that Mr Town's actions were methodical, deliberate and concerted in publishing the allegedly defamatory wording. She points to the fact that he had counsel at his disposal who would have advised on the form of the Press Release before it was issued. She submits that that is another factor which distinguishes this case from the position in *Alexander v Clegg*. She submits that the evidence will show that Mr Town was reckless, and that he sought an improper advantage by attacking Ms Bright's credibility in the broadest manner possible.

[43] Ms Bright submits that Mr Town's contention that he genuinely believed the allegedly defamatory statements were true, can only be properly examined at a hearing where Mr Town can be cross-examined.

Submissions for Mr Town

[44] Mr Akel submits that the amended s 41 notice inappropriately focuses on the "transparency" issue, overlooking other allegations Ms Bright has made, including that the Council was not complying with the law.[8]

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[8] Referring to the allegation in schedule 1 to Mr Town's statement of defence, in which it is alleged that "(e) [Ms Bright] has publicly stated that she refuses to pay her rates until: …. (v) Auckland Council carries its statutory duties and complies with the law". Mr Akel also refers to

[45] Mr Akel further submits that Mr Town does not have to establish that Ms Bright has in fact made wild and inaccurate accusations before the defence of qualified privilege can succeed.

[46] In respect of the Council's press release issued on 8 May 2015 (headed "Council moves to improve transparency"), Mr Akel submits that the article does not provide any reasonable basis for an inference that, because the Council was altering its practices on transparency in May 2015, approximately seven months after the Press Release was issued, Mr Town could not have believed in the truth of the impugned statements when the Press Release was issued in October 2014.

[47] In respect of the other particulars included at paragraph 2 of the amended s 41 notice, Mr Akel submits generally that the particulars provide inadequate or no specifics, with no bearing on the question of whether or not Mr Town genuinely believed that Ms Bright was making wild and inaccurate accusations. Broad, general allegations, without specifics which have the capacity to say something about Mr Town's state of mind when he issued the Press Release, do not meet the requirements of s 41.

[48] Mr Akel strongly emphasises that Mr Town was responding to public attacks made on him and the Council by Ms Bright. He refers specifically to Ms Bright's allegation that the Council was singling her out for rates enforcement action, in an unjustifiable response to her anti-corruption campaign (that in itself being an allegation of corruption by Ms Bright). Mr Akel submits that the level of responsibility to be expected of Mr Town in the issue of the Press Release must be calibrated with regard to the strongly worded criticisms Ms Bright had been making of the Council and himself. That context (response to strongly worded criticism from Ms Bright) makes this case different from the facts in *Lange v Atkinson*,[9] where the Court of Appeal noted that, where allegedly defamatory matter has been published to a wide audience, the question of whether the defendant has improperly

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a New Zealand Herald article published on 18 March 2014, in which Ms Bright was quoted as saying: "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 detail of where exactly rates monies are being spent on private sector consultants and contractors.

9 *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

taken advantage of the occasion of publication will warrant "close scrutiny". That part of the decision in *Lange v Atkinson* was not dealing with a "response to attack" situation.

[49] In summary, Mr Akel submits that Ms Bright has failed to put forward any particulars from which it could be reasonably inferred that Mr Town did not believe in the comments made in the Press Release. No particulars been provided from which it could be reasonably inferred that Mr Town had an improper motive or did not believe in the truth of what he said. Mr Akel submits that "cogent particulars" of ill will or improper advantage, extrinsic to the words used in the defendant's response to the plaintiff's attack, are needed before there can be a tenable rebuttal of the defendant's defence of qualified privilege.

[50] Mr Akel's submissions on *Alexander v Clegg* also draw attention to the wide latitude given to a defendant who is responding to defamatory attacks (while acknowledging that the response to the attack must be *bona fide*). Mr Town's response is not to be measured in niceties, and the facts and circumstances which must be pleaded by Ms Bright under s 41 of the Act have to be correspondingly compelling.

Discussion and conclusions – the particulars provided in the amended s 41 notice

[51] Questions of whether a defendant was predominately motivated by ill will, or otherwise took improper advantage of the occasion of publication, are "jury" questions, to be determined by the trier of fact. However the question ought not to go to the jury unless there is a reasonable basis to infer that the defendant has misused the occasion of publication. The question of whether there is any evidential basis for such a finding is one for the judge.[10]

[52] Whether particulars of the alleged ill will or the taking of an improper advantage comply with the requirements of s 41 of the Act, is also a matter for the judge. If they do, it will be a matter for the judge to decide whether the particulars

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[10] *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC) at [59].

provided set out a reasonable basis on which a jury could infer that the defendant has misused the occasion of publication.

[53] Those, then, are the matters for my determination on this part of the application: do the particulars in the amended s 41 notice sufficiently comply with s 41 of the Act, and if they do, should they nevertheless be struck out because they do not provide a reasonable basis on which a jury could infer the misuse of the occasion of publication which Ms Bright has pleaded?

[54] I will address each of the particulars in the amended s 41 notice in turn.

Requested particular (1) — What are the parts or aspects of "the publication" to which Ms Bright was referring in her s 41 notice?

[55] As Gilbert J noted in *Young v TVNZ*, a plaintiff wishing to defeat a qualified privilege defence must provide particulars of the matters from which ill will or improper advantage may reasonably be inferred.

[56] Ms Bright has simply repeated in paragraph 1 of the amended s 41 notice the words of the press release which she contends were defamatory. I take from that response that Ms Bright is not placing any reliance on the particular circumstances, or the manner, of the publication: the reference to "the publication" in paragraph 1 of her original s 41 notice was simply a reference to the allegedly defamatory words in the press release. The argument appears to be that the Court is to infer from the allegedly defamatory words themselves that Mr Town was motivated by ill will towards Ms Bright, or was otherwise taking improper advantage of the occasion of publication.

[57] While one can imagine some defamatory statements where, for example, ill will may be apparent from the choice of the defamatory words themselves, I do not think this is such a case. For example, I do not consider that the use of the expression "wildly inaccurate" to describe certain statements of Ms Bright, without more, comes close to supporting an inference that Mr Town was predominantly motivated by ill will towards Ms Bright, (or that he was otherwise taking an improper advantage of the occasion of the publication). I bear in mind Mr Town's

clear entitlement to respond robustly to the attacks Ms Bright had made on the Council and himself,[11] and that merely repeating the statement and asserting that it was defamatory is not normally enough to defeat a defence of qualified privilege. As was the case in *Hubbard v Fourth Estate Holdings Ltd*, this particular "falls into the trap of simply restating the pleading that the article published by the defendant contained defamatory remarks that affected the plaintiff's character".[12]

[58] I conclude that the particulars provided under this head are insufficient. Paragraph 1 of Ms Bright's particulars notice original s 41 notice (and of the amended s 41 notice) will accordingly be struck out.

Requested particular (3) — identify each "action" or "comment" of Mr Town that is relied upon in support of Ms Bright's ill will / taking improper advantage argument

[59] Ms Bright has set out eight separate paragraphs of particulars purporting to respond to this direction. The first two of these paragraphs refer only to an alleged lack of evidence produced by Mr Town on certain parts of the case. These cannot amount to particulars of any "action" taken by Mr Town, or "comment" made by him, and to the extent Ms Bright still seeks to rely on "actions" or "comments" allegedly made by Mr Town these particulars will be struck out.

[60] The fourth paragraph refers only to "evidence" which allegedly shows that Mr Town and the Council were aware that a concern with an alleged lack of transparency on the Council's part was behind Ms Bright's refusal to pay rates. Again, the paragraph does not identify any "action" or "comment" of Mr Town, and to the extent Ms Bright still wishes to rely on actions or comments of Mr Town it too will be struck out.

[61] The same point applies in respect of the seventh and eighths paragraphs, neither of which identifies any action of Mr Town, or any comment made by him.

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11 As discussed by the Court of Appeal in *Alexander v Clegg*, above n 2, at [58] – [63].

12 *Hubbard v Fourth Estate Holdings Ltd* HC Auckland CIV 2004-404-5152, 13 June 2005 at [29].

[62] That leaves the third, fifth and sixth paragraphs of purported particulars, each of which arguably does refer to some action or comment of Mr Town. I will address each of these paragraphs in turn.

[63] The third paragraph quotes the following statements made in Mr Town's statement of defence filed in this proceeding:

> "(e) The plaintiff has publicly stated that she refuses to pay her rates until:
>
> (i) Auckland Council discloses full details of its spending on private sector contractors;
>
> (ii) Auckland Council is transparent or accountable;
>
> (iii) She knows where her money is going;
>
> (iv) Auckland Council carries out its statutory duties and complies with the law;
>
> (v) Auckland Council opens the books and acts in a democratically accountable matter."

[64] That pleading comes from Schedule 1 to Mr Town's statement of defence, which sets out a number of alleged facts and circumstances relied upon by him in support of a pleaded truth defence.

[65] The statement of defence was filed on or about 2 February 2015, almost four months after the press release was issued, and there is a question as to how it could provide evidence of Mr Town's state of mind when the press release was issued. It is the case that subsequent behaviour can, in certain circumstances, be relevant to indicate a party's state of mind at the time of publication — the timing of the acts and their connection to the defamation are matters going to weight rather than admissibility.[13] But on the face of it, these statements appear to do no more than accurately record what Ms Bright had in fact publicly stated. In those circumstances I am of the view that these statements, to the extent that they are advanced as "actions" or "comments" of Mr Town, are not capable of providing a basis upon which a properly directed jury could infer that the press release was published out of ill will towards Ms Bright, or otherwise took improper advantage of the occasion of

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[13] *Hubbard v Fourth Estate Holdings Ltd*, above n 12, at [46], citing *Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 and *Simpson v Robinson* (1848) 12 QB 511.

publication. To the extent this particular is advanced as an "action" or "comment" of Mr Town supporting Ms Bright's ill will / improper advantage argument, it too will be struck out.

[66] Ms Bright's fifth paragraph pleaded in response to my direction that she provide further particulars of Mr Town's "actions" or "comments", refers to "recently published actions" of the Council which are said to verify that Ms Bright's refusal to pay her rates was a factor, if not instrumental, in causing the Council to become more transparent about how it spends ratepayers' money.

[67] She refers specifically to an Auckland City Press Release dated 8 May 2015, headed "Council moves to improve transparency", which reported on the Council's launch of a new section on its website providing information on a variety of its activities. The new website section was said to reflect a commitment by the Council to more openness and transparency. It would include, for example, details of larger contracts awarded by the Council, and the Council's expenditure with individual suppliers where that expenditure exceeded $100,000. This press release quoted Mr Town as saying that the "proactive publication of information aims to strengthen Aucklanders' trust in the council", and that "Auckland Council will now be aligned with best practice across the public sector in New Zealand in making information more accessible to the public".

[68] The Council's 8 May 2015 press release certainly contained "comments" made by Mr Town. Those comments were concerned with the level of transparency of the Council's relationships with its private contractors, and Mr Town's statement that the website initiative would ensure that the Council would "now be aligned with best practice across the public sector in New Zealand" arguably suggests that that was not the position at the time the press release was issued in October 2014. Many of Ms Bright's public statements made before then were concerned with her concerns over an alleged lack of transparency in the Council's dealings with its contractors, and if those were among the statements described in the press release as "wild and inaccurate", I cannot rule out the possibility that a properly directed jury might regard the 8 May 2015 press release as supportive of Ms Bright's claim that

(at least) certain accusations she had made about the Council and its probity were *not* "wild and inaccurate".

[69] If a hypothetical jury did conclude that Ms Bright's statements were not "wild and inaccurate", it might find that the words complained of were defamatory. However that does not necessarily mean that it would also be open to the jury to conclude that Mr Town was predominantly motivated by ill will towards Ms Bright, or that he otherwise took improper advantage of the occasion of publication. This is an issue to which I return below.

[70] In the meantime, I find that this particular does sufficiently answer my direction to Ms Bright to provide further particulars.

[71] Ms Bright's sixth paragraph written in response to the direction that she provide further particulars of Mr Town's "actions" or "comments", referred to a Council press release issued on or about 23 October 2014, in which Mr Town said that the Council would prefer to resolve the question of payment of Ms Bright's outstanding rates without having to resort to legal action, and that Ms Bright might qualify for relief by way of rates postponement (at least if she applied for a postponement and was willing to adhere to the requirements of the repayment scheme). This press release referred to a letter Mr Town had sent to Ms Bright reminding her of the options available to pay her rates, including rates postponement.

[72] I accept that Mr Town's statements in the letter and press release were "actions" or "comments" taken or made by him, but I do not see the statements as being capable of providing a basis on which a properly directed jury could infer that Mr Town was predominantly motivated by ill will towards Ms Bright in making the statements he made in the press release, or that he otherwise took advantage of the occasion of publication. As far as ill will is concerned, a plaintiffs' plea must be more consistent with the presence of ill will (malice) than its absence; if it is not, the plea is likely to be struck out. There must be something from which a jury, ultimately, could rationally infer malice, in the sense that the relevant person was

either dishonest in making the defamatory communication or had a dominant motive to injure the claimant.[14]

[73] In this case, there is nothing to suggest that the Council's expressed willingness to consider other options for Ms Bright, including a rates postponement arrangement, was in any way indicative of ill will on the part of Mr Town in the making of the statements he made in the press release. Indeed, the reverse appears to be the case — the Council appears to have been offering Ms Bright every opportunity to avoid the sale of her property by paying her rates over time.

[74] In my view a properly instructed jury could not properly regard the statements in the press release of 23 October 2014 as being more consistent with the presence of ill will towards Ms Bright (in the publication of the allegedly defamatory words in the press release) than with its absence, and this particular cannot stand alone as an "action" or "comment" of Mr Town sufficient to support Ms Bright's ill will contention. Nor is there anything in the press release of 23 October 2014 that might conceivably support an inference that Mr Town otherwise improperly took advantage of the occasion of the publication of the press release. The 23 October 2014 press release spoke only to a possible way of resolving matters with Ms Bright; it is not in my view possible to draw from it any inference about Mr Town's reasons for making the statements in the press release which are alleged to have been defamatory, or inference that the circumstances in which those statements were made were such as to provide a possible basis for a jury finding of improper taking advantage of the occasion of publication. For those reasons, the sixth paragraph of Ms Bright's particulars given in response to the direction that she supply further particulars of Mr Town's "actions," and "comments" will be struck out.

[75] I have so far addressed the amended s 41 notice on the basis that Ms Bright has particularised her original s 41 notice, as she was required to do, rather than amend this notice by adding completely new particulars. On that basis, I have come to the view that all but one paragraph of the amended s 41 notice failed to comply with the further particulars order, and/or should be struck out as being incapable of

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[14] *Gatley on Libel and* Slander, above n 6, at [28.6], referring to *Henderson v London Borough of Hackney* [2010] EWHC 1651(QB) at [34] – [35].

supporting the ill will / taking of an improper advantage for which Ms Bright contends.

[76] In fact, the amended s 41 notice appears to contain new allegations which go beyond the scope of the original s 41 notice. For example, Ms Bright's pleadings in the amended s 41 notice which refer to a "lack of evidence produced by the defendant" clearly could not qualify as a part of "the publication as pleaded in the statement of claim" (paragraph 1 of the original s 41 notice), or as part of "the Defendant's Statement of Defence as filed and served" (paragraph 2), or as "the Defendant's actions or comments preceding and following the filing of the claim" (paragraph 3).

[77] That said, Mr Akel did not take any point about Ms Bright widening the scope of her case on the ill will / taking improper advantage issue, and in those circumstances I think it is appropriate to look at the amended s 41 notice as a new notice, unconstrained by the wording of the original notice or the order for particulars of the original notice made on 10 March 2016.

[78] Approaching the matter afresh in that way, the result is the same on paragraph 1 of the amended s 41 notice. In the circumstances of this case, merely restating the pleading of the allegedly defamatory words is insufficient. I confirm that paragraph 1 of the amended s 41 notice is to be struck out.

[79] The new tack taken by Ms Bright in the amended s 41 notice is apparent from paragraph 8 of the amended s 41 notice where, on the basis of the earlier paragraphs 1-7, she says:

> "… the pleaded defamatory words were designed by [Mr Town] to create an improper advantage by falsely attacking [Ms Bright's] credibility in order to improperly discredit her accurate critiques."

[80] The plea, then, appears to be a combination of an improper taking advantage of the occasion of publicity, and ill will in the publication by improperly discrediting Ms Bright's critiques.

[81] I will therefore consider first whether sub-paragraphs 1 – 8 at paragraph (ii) of the amended section 41 notice may arguably provide particulars from which a properly instructed jury could infer that Mr Town took improper advantage of the occasion of publication.

[82] The first point to be made is that there is no doubt that Mr Town was responding to attacks made against him or his employer by Ms Bright in the morning of 10 October 2014. By way of example only, Ms Bright was reported on the stuff.co.nz website as saying of Mr Town:

> "I believe the actions of the CEO are not only a draconian abuse of council power but are personally malicious and vindictive against me."

[83] The actions referred to were the steps then being taken by the Council to initiate through the court a sale of Ms Bright's property.

[84] Ms Bright was also reported by Radio New Zealand on the morning of the issue of the Press Release, to have alleged that there was "corruption" in the Council. And in the New Zealand Herald edition of 9 October 2014 Ms Bright was reported as having contended that the real reason the Council had elected to take rating sale action against other individuals (as well as Ms Bright) was that the Council could not be seen to just picking on Ms Bright, "but that is exactly what they are doing …".

[85] The law is clear that a person who has been subject to a personal attack of that nature (or who is properly acting in defence of an employer who has been so accused) is entitled to robustly defend his or her position.

[86] In *Alexander v Clegg* the Court of Appeal referred to the decision of the High Court of Australia in *Penton v Calwell*, where Latham CJ said:[15]

> Statements which are made in self-defence are privileged when they are made in reply to attacks upon the character or conduct of the defendant, or in protection of an employer against attacks on the employer, or in protection of the proprietary interests of a defendant or his employer against attacks upon such interests.

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[15] *Alexander v Clegg*, above n 2, at [57] citing *Penton v Calwell* (1945) 70 CLR 219 at 242 – 243.

[87] And in *Alexander v Clegg* the Court of Appeal referred to "another facet of the jurisprudence of qualified privilege which is apt in this case. That is the privilege to hit back when ones reputation is attacked".[16]

[88] In *Penton v Calwell* Dixson J noted that the "right to reply to an attack" covered:[17]

> … any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion.

[89] In the recent case of *Williams v Craig*, Katz J summarised the right of counter-attack, also citing *Penton v Calwell*, as follows:[18]

> It may be conceded that to impugn the truth of the charges contained in the attack and even the general veracity of the attacker may be a proper exercise of the privilege, if it be commensurate with the occasion. If that is a question submitted to or an argument before the body to whom the attacker has appealed and it is done bona fide for the purpose of vindication, the law will not allow the liability of the party attacked to depend on the truth or otherwise of defamatory statements he so makes by way of defence.

[90] And in *Mowlds v Fergusson* the High Court of Australia noted that, where defamatory matter is published in self defence, the conception of a corresponding duty or interest in the recipient must be very widely interpreted.[19] A wide level of protection is generally afforded to a defendant's response or counter-attack.

[91] However, the privilege extends only to communications concerning the subject with respect to which the privilege exists: it does not extend to anything that is not relevant and pertinent to the discharge of the relevant duty or the exercise of the right or the safeguarding of the interest which creates the privilege.[20] In *Alexander v Clegg* the Court of Appeal noted that defamatory statements made in response to an attack must be relevant to the allegations made in the attack, or to the vindication of the defendant's reputation. Statements which seem excessive in their language or content go to malice, on which the plaintiff bears the onus of proof.

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16 *Penton v Calwell*, above n 15, at 233.
17 *Alexander v Clegg*, above n 2, at [61].
18 *Williams v Craig,* [2016] NZHC 2496 citing *Penton v Calwell*, above n 15, at 234.
19 *Mowlds v Fergusson* (1940) 64 CLR 206 (HCA) at 214 – 215.
20 *Alexander v Clegg*, above n 2, at [54], referring to *Laws of New Zealand Defamation* at [101].

[92] In this case, Mr Town pleads that the duty or interest relied upon as the basis for the qualified privilege was to communicate the Council's response to the public on why the Council was taking the step of a forced rates sale. Mr Town says that the public had a corresponding interest to receive communications on that subject.

[93] In *Alexander v Clegg*, the Court of Appeal found that the words complained of were "sufficiently relevant to and connected with the circumstances giving rise to the privileged occasion".[21] Dealing expressly with counter-attack, the court said that the defendant's response to an attack is "not [to be] judged to a nicety".[22] The protection would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right on which the privilege was founded.[23]

[94] The question of excess is accordingly not to be examined narrowly, and without keeping in mind the policy justification for recognising privilege at all.

[95] In "response to attack" situations, the Court of Appeal considered that the fact that an assessment of whether a response to an attack was excessive is not to be measured in niceties, and I think that must carry with it the implication that the facts and circumstances required under s 41 must clearly point to ill will or the taking of an improper advantage; otherwise the defence would be illusory.

[96] In this case, I think the first question on the issue of "improper advantage" must be whether the words complained of were sufficiently relevant and connected with the circumstances which gave rise to the privileged occasion. The privileged occasion for which Mr Town contends, and which in my judgment of 10 March 2016 I accepted existed, was the Council's duty or interest to communicate the Council's response to Ms Bright's public statements to explain why the Council was taking the step of a forced rates sale.[24]

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21 *Alexander v* Clegg, above n 2, at [54].

22 At [58].

23 At [58] citing *Harrocks v Lowe*, [1975] AC 135 at 151.

24 Statement of defence [28] – [30]. And in para [9] of his statement of defence Mr Town says that the purpose of the Press Release was to explain why court action was being taken as a last resort and to assure the Auckland public that it was doing what it could to achieve fairness for all Auckland ratepayers.

[97] Mr Town is of the view that the words in the Press Release which are the subject of Ms Bright's complaints ("wild and inaccurate accusations about the Council and its probity", and "these assertions are completely unfounded" …) were concerned with accusations or assertions made by Ms Bright about the Council taking legal action to sell her property. In my judgment of 10 March 2016, I questioned whether a jury might not read the words complained of as referring to accusations or assertions by Ms Bright about earlier acts or omissions of the Council, including allegations or assertions of corruption and an alleged lack of transparency in the Council's dealings with its contractors, which led to her decision to stop paying her rates.

[98] Mr Akel submits that any such distinction would be artificial: the Press Release should be read against the background of the overall course of dealings between Ms Bright and the Council, including Ms Bright's public statements of 9 and 10 October 2014 which immediately preceded the issue of the Press Release.

[99] Having reviewed the decision of the Court of Appeal in *Alexander v Clegg*, and the more recent decision of Katz J in *Williams v Craig*, I am satisfied that, even if the words complained of were read as references to accusations or assertions made by Ms Bright on the topics of alleged Council corruption and/or lack of transparency (and not as accusations or assertions directed only to the Council's actions in commencing proceedings for sale of Ms Bright's property), the words complained of were sufficiently connected to the circumstances giving rise to the privileged occasion that it is not reasonably arguable for Ms Bright that the qualified privilege should be lost for want of a sufficient connection between the use of the defamatory words and the circumstances giving rise to the privilege.

[100] In *Williams v Craig* Katz J noted that "statements made in response by a defendant will be regarded as irrelevant if it is both plain and obvious that they were entirely irrelevant and extraneous material or unrelated or insufficiently related to the attack".[25] Her Honour noted that that is a "fairly high threshold". A defendant's response to an attack *can* be directed to a plaintiff's credibility,[26] but I doubt

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[25] *Williams v Craig*, above n 18, at [17] (footnotes omitted).

[26] *Williams v Craig*, above n 18, at [67], where her Honour noted that: "Where the strength of an

Mr Town's response in this case could be characterised as a general attack on Ms Bright's character.

[101] In my view the words used were relatively measured when considered against the strength of some of the language used by Ms Bright in her attacks on the Council and Mr Town, and they were directed only to statements made by Ms Bright on a particular topic. Mr Town did not say Ms Bright was lying, merely that what she said was (wildly) wrong. But even if the words used by Mr Town can be regarded as a counter-attack on Ms Bright's general character or veracity, Ms Bright has herself highlighted her reputation for accuracy in her performance of her "public watchdog" function. It seems to me that that aspect of her character or veracity must have been inextricably linked with the strength of the attacks she made on Mr Town and the Council.

[102] The purpose of issuing the Press Release is said to have been to explain why court action was being taken as a last resort, and to assure the Auckland public that the Council was doing what it could to achieve fairness for all Auckland ratepayers. Clearly relevant to that purpose, and specifically on the question of whether Ms Bright had been unfairly singled out by the Council for rates enforcement action, was the question of whether there was any merit in her allegations of corruption against the Council and or Mr Town, or in her allegations of an unlawful or improper lack of transparency in the Council's dealings with its contractors. If there was nothing in those allegations, I think that must have been at least *relevant* to the question of whether Ms Bright had been unfairly singled out. Ms Bright had herself been advancing the truth of her accusations about Council corruption and lack of transparency as reasons why the Council had elected to proceed against her.

[103] In those circumstances I do not think it arguable that a challenge to the credibility of Ms Bright's accusations and assertions about Council corruption or lack of transparency (if that were how a jury interpreted the relevant parts of the Press Release) was so unrelated to the circumstances giving rise to the occasion of the privilege that a jury could reasonably find that the privilege had been lost. In

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attack is tied in some way to the veracity or character of the person who made it, attacking those characteristics is relevant."

making that finding, I bear in mind that the relationship between what Mr Town said by way of counter-attack and the circumstances giving rise to the privilege, are not to be judged to a nicety. And I accept Mr Akel's submission that Mr Town was clearly entitled to respond robustly to Ms Bright's accusations.

[104] In my judgment given on 10 March 2016, I noted that, in circumstances where the publication had been distributed as widely as it was in this case, the motives of Mr Town, and whether he had a genuine belief in the truth of the statements which Ms Bright were defamatory, would warrant close scrutiny.[27] In his supplementary submissions, Mr Akel submits that the Court of Appeal's statement in *Lange v Atkinson* relating to material published to a wide audience warranting closer scrutiny by the court, was not made in the context of a defendant responding to an attack (as is the case here). I think that is correct, and the statement made in *Lange v Atkinson* must be read subject to that qualification. It is also relevant that Ms Bright's attacks were similarly made through media avenues of wide dissemination and Mr Town was simply responding through the same media. Cases such as *Alexander v Clegg* and *Williams v Craig* make it clear that a defendant will be allowed a fair degree of latitude in responding to an attack, and I accept that to set the "close scrutiny" bar at the level which may have been contemplated by the Court of Appeal in *Lange v Atkinson*, could risk rendering illusory the protection afforded to a defamation defendant who is responding to a plaintiff's attack.

[105] Against that background, I do not consider it arguable for Ms Bright that the requested particulars provided in the amended section 41 notice at paragraph (ii) 1 and 2, are capable of supporting an argument that Mr Town took improper advantage of the occasion of publication by including the impugned statements in the Press Release. Nor is there anything in the remaining sub-paragraphs 3 – 8 of the amended section 41 notice which in my view could support an arguable case of improper taking advantage by adding (defamatory) material which was irrelevant, or insufficiently connected with either Ms Bright's attack or the nature of the occasion giving rise to the privilege.

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[27] *Bright v Town*, above n 1, at [104], referring to *Lange v Atkinson*, above n 9.

[106] Sub-paragraphs 3 – 5 of paragraph (ii) of the amended section 41 notice are all generally concerned with Ms Bright's "lack of transparency" argument. Put broadly, the first two limbs of that argument are that the "wild and inaccurate" and/or "completely unfounded" statements in the Press Release were directed at accusations Ms Bright had made in the past about Council's lack of transparency, and that Ms Bright's accusations were in fact correct — there *was* a lack of transparency of the kind her accusations had identified. The third limb of the argument is that Mr Town and the Council knew that Ms Bright's accusations about lack of transparency were correct, but they wilfully and falsely described those accusations as "wild and inaccurate", and "completely unfounded", in the Press Release.

[107] Those allegations are clearly at the heart of Ms Bright's ill will/improper advantage case, but I do not think they are capable of supporting a case that the allegedly defamatory words were irrelevant or immaterial to Mr Town's defence to the public attacks made by Ms Bright. Rather, the case appears to be one of alleged ill will by knowingly making false and defamatory statements in response to an attack.

[108] If the impugned statements in the Press Release were in fact false, and Mr Town knew that that was so, I think it is clear that there *would* be an arguable case of ill will sufficient to defeat the privilege. The learned authors of *Gatley* say that if the defendant is responding to an attack which he knows to be justified he is guilty of malice.[28] See also the decision of Katz J in *Williams v Craig*, where Her Honour said, citing *Penton v Calwell*:[29]

> If that is a question submitted to or an argument before the body to whom the attacker has appealed and it is done *bona fide* for the purpose of vindication, the law will not allow the liability of the party attacked to depend on the truth or otherwise of the defamatory statements he so makes by way of defence.
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> (emphasis added).

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[28] *Gatley*, above n 14, at 14.51.

[29] *Williams v Craig*, above n 18, at [12] citing *Penton v Calwell* above n 15, at 234.

[109] Clearly if Mr Town was aware at the time that the impugned statements in the Press Release were incorrect, he could not have been acting *bona fide* in making them.

[110] The question, then, is whether Ms Bright has pleaded enough in sub-paragraph (ii), sub-paragraphs 1-8 of the amended s 41 notice, that (assuming the particulars were proved at trial) a jury might find that the impugned statements were not made *bona fide* by Mr Town for the purposes of vindicating his or the Council's position, but were motivated by ill will, predominately directed at Ms Bright, in the respects alleged in those sub-paragraphs.

[111] The first point to note is that the plaintiff must allege specific facts from which it is alleged the inference is to be drawn: generalised or formulaic statements will not be permitted[30].

[112] Secondly, I bear in mind the comment of Gilbert J in *Young v TV NZ Ltd and Ors* that the nature of the particulars provided must be "as is demanded by the nature of the occasion".[31] Where the allegedly defamatory statements have been made by the defendant in response to an attack, I think that must be regarded as a significant part of the "nature of the occasion" which (given the relatively wide latitude given to a defendant responding to an attack) should be reflected in a correspondingly higher degree of specificity in the particulars than might otherwise have been sufficient. I also bear in mind the statement of Ealy J in *Henderson v London Borough of Hackney* that:[32]

> Allegations of malice must go beyond that which is equivocal or merely neutral. There must be something from which a jury, ultimately, could rationally infer malice, in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the plaintiff.

[113] While that statement was directed to the concept of "malice", and not to the concept of ill will predominantly directed to the plaintiff (to which s 19 of the Act refers), I think the approach will nevertheless be the normal starting point in

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30 *Gatley*, above n 14, at [28.6].
31 *Young v TVNZ & Ors* [2012] NZHC 2738 at [74].
32 *Henderson v London Borough of Hackney* [2010] EWHC 1651 (QB) at [34].

considering particulars of ill will under the Act. Consideration will then need to be given to the higher standard of particulars which is required where the defendant was responding to an attack by the plaintiff.

[114] Thirdly, I bear in mind that ill will is not concerned with what a reasonable person would have done — it is solely concerned with the actual state of mind of the individual who made the impugned statement.[33]

[115] In my view the particulars pleaded by Ms Bright at paragraphs (ii) 1 – 8 of the amended s 41 notice do not go beyond the level of being speculative. There is nothing pleaded in the particulars which could lead a properly directed jury to conclude that Mr Town was either dishonest in making the statements Ms Bright complains of, or that his predominant motive was to injure Ms Bright (by falsely attacking her credibility) in making the statements.

[116] First, I do not see anything in paragraphs (ii) 1 or 2 of the amended s 41 notice which provides any facts which might support an inference that Mr Town was either dishonest in issuing the Press Release, or had the predominant motive of injuring Ms Bright in the manner alleged. As for sub-paragraph 1, the public was already well aware of Ms Bright's contentions that she was justified in refusing to pay her rates because of her concerns about the Council's probity, and I do not think Mr Town's failure to include a statement to that effect in the Press Release could be regarded as saying anything about his honesty in issuing the Press Release, or as supporting a contention that his predominant motive at the time was to injure Ms Bright.

[117] The particular at paragraph (ii) (2) of the amended s 41 notice simply asserts that Mr Town has failed to produce evidence showing that Ms Bright has made "wild and inaccurate accusations about the Council and its probity" in the Press Release. That is merely repeating the alleged defamation and pointing to the absence of evidence from Mr Town of the truth of the impugned statements (understood in the sense Ms Bright says they should be understood). I am not on this application concerned with Mr Town's defence of truth or (in this part of the judgment) his

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[33] *Horrocks v Lowe* [1975] AC 135 (HL).

defence of honest opinion: I proceed on the hypothetical basis that what was said in the Press Release *was* defamatory. The issue is whether Ms Bright has put forward sufficient by way of particulars that a properly instructed jury might conclude (the particulars having been proved) that Mr Town was predominantly motivated by ill will towards Ms Bright when he included the impugned statements in the Press Release. I do not believe the particular provided at paragraph (ii) (2) of the amended s 41 notice could provide the basis for any reasonable inference on that issue.

[118] Paragraphs 3 – 5 of the amended s 41 notice set out Ms Bright's contentions based on the Council's alleged lack of transparency in its dealings with its contractors. I think it is common ground that at least one of Ms Bright's claimed justifications for refusing to pay her rates was the alleged lack of transparency which is detailed at paragraph (ii) (3) of the amended s 41 notice. And I do not understand Mr Town or the Council to be suggesting that they were not aware that the alleged lack of transparency was a substantial reason, if not the only reason, behind Ms Bright's refusal to pay her rates (paragraph (ii) 4 of the amended s 41 notice).

[119] The problem is that it is not apparent from the Press Release that Mr Town's "wild and inaccurate", and "completely unfounded" statements were restricted to accusations or assertions Ms Bright had made in the past about lack of transparency in the Council's dealings with its contractors. Which particular statements of Ms Bright were said to be "wild and inaccurate", and "completely unfounded" are not identified in the Press Release, except to the extent the accusations were said to have been about the Council and its probity. Ms Bright had certainly made accusations to the effect that the Council had acted unlawfully, but there is nothing in the amended s 41 notice which identifies any particular breaches of the law which would support those accusations. If anything, the report of the Local Government and Environment Committee on Ms Bright's petition to Parliament,[34] referring to Ms Bright's desire to see "legislative change" in the area of Council transparency, suggests that the then current position (while it may have been unsatisfactory, and while it appears to have been substantially improved by the measures adopted by the Council in May of 2015) may not have involved illegality on the Council's part. I also accept Mr Akel's submission that the changes made by the Council in May 2015

[34] Referred to in para [40] of this judgment.

which Ms Bright relies upon at paragraph (ii) 5 of the amended s 41 notice do not necessarily say anything about Mr Town's subjective thoughts concerning the accuracy or otherwise of Ms Bright's accusations about "corruption", and an improper lack of transparency, back in October 2014.

[120] But more fundamentally, I think on closer examination that Mr Town's statements about "wild and inaccurate", and "completely unfounded", accusations about the Council and its probity, were broad enough to encompass Ms Bright's very recent accusations that she had been unfairly singled out by the Council as the target for a rating sale, because of the accusations of corruption and lack of transparency she had made against the Council in the past. That accusation was certainly about the "probity" of the Council — on any view, a suggestion that the Council was motivated by a desire for revenge, or perhaps to silence Ms Bright (and was prepared to commence similar action against two other ratepayers purely for the purpose of "window dressing" — to make it appear that Ms Bright was not the real and only target of the action), called into question the Council's probity.

[121] In my view a reasonable juror would note first that Ms Bright was seriously in default in payment of her rates. The juror would also probably accept the proposition in the Press Release that Ms Bright's refusal to pay her rates was, to some extent, an action taken at expense of those Auckland ratepayers who were paying their rates. The hypothetical juror might reasonably conclude that the Council was doing no more than taking what was clearly a "last resort" step in discharging its statutory duties to levy and recover rates from ratepayers.

[122] The hypothetical juror would look in vain for any particulars of the alleged "unfair singling out", and might conclude (depending on the evidence) that this particular allegation of Ms Bright was indeed "wild and inaccurate". But that is not something to be decided on the present application. What matters here is whether Ms Bright has put forward particulars which suggest that it is more likely than not that Mr Town was predominately motivated by ill will directed towards her when he

issued the Press Release. In other words, whether the particulars are more consistent with ill will than its absence.[35]

[123] In all the foregoing circumstances I do not think the particulars of ill will/improper advantage set out by Ms Bright at paragraphs (ii) 1–5 of the amended s 41 notice *are* more consistent with ill will than not. Those sub-paragraphs of the amended s 41 notice are therefore deficient, and will be struck out accordingly.

[124] Paragraph (ii) 6 of the amended s 41 notice cites the Council's Press Release of 23 October 2014, in which Mr Town was reported as having said that the Council would prefer to resolve the rate payment issues without resort to legal action, and that he had written to Ms Bright reminding her of the options available to her to pay the rates, including making an application for a rates postponement. The amended s 41 notice asserts that the offer of a rates postponement "goes to Mr Town's credibility on the issue before the court".

[125] Again, I do not think any inference of ill will towards Ms Bright could reasonably be drawn from this particular, whether alone or in conjunction with the other particulars in the amended s 41 notice. Indeed, the apparently conciliatory tone of Mr Town's statements as reported appear to point against any inference of ill will. This particular will be struck out accordingly.

[126] Nor do paragraphs (ii) 7 or 8 of the amended s 41 notice (whether alone or in conjunction with the other paragraphs) provide any basis on which an inference of ill will on the part of Mr Town could reasonably be drawn. I have already addressed Ms Bright's arguments on the "lack of transparency" issue, and paragraph (ii) 7 of the amended s 41 notice adds nothing to the earlier Paragraphs (ii) 3–5, which addressed that topic. Paragraph (ii) 8 is conclusory, or in the nature of submission, and adds no new factual material from which an inference of ill will could reasonably be drawn.

[127] I am conscious of the need for caution on any strike-out application, and of course any striking out order will have the effect of denying Ms Bright a trial, but I

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[35] In accordance with the passage from *Gatley* cited at para [30] of the judgment.

think those concerns need to be tempered by Mr Town's entitlement to have very serious allegations against him properly pleaded, and the fact that Ms Bright *has* had the opportunity to put forward particulars of her ill will/improper advantage case, and to be heard in support of that case.

[128] In the result, I am of the view that none of the particulars in the amended s 41 notice can stand. Ms Bright has already had one opportunity to amend her original s 41 notice, and there is no basis for allowing her yet another opportunity to amend. The amended s 41 notice is accordingly struck out in its entirety. For the avoidance of any doubt, I record that all of Ms Bright's pleadings under s 41 have now been struck out — while I did not refer to it in the summary of orders made at paragraph [135] of my judgment of 10 March 2016, paragraph 2 of Ms Bright's original s 41 notice was earlier struck out, as stated at paragraph [79] of that judgment.

Issue 2 — whatever might be the answer on issue (1) above, is it clear that qualified privilege affords Mr Town 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?

[129] In my judgment of 10 March 2016 I held that the Press Release was issued on an occasion of qualified privilege. That was sufficient to provide Mr Town with a complete defence to Ms Bright's claims, subject only to the question of whether Ms Bright's claims of ill will/improper taking of advantage were reasonably arguable. I have now found that those claims, as articulated in the amended s 41 notice, are not reasonably arguable.

[130] In those circumstances Mr Town must succeed on his qualified privilege argument, and that is sufficient to dispose of Ms Bright's claims. As Mr Town's application for summary judgment has been based entirely on an affirmative defence which I have held must succeed, summary judgment in his favour is the appropriate remedy: this is not a case for striking out Ms Bright's statement of claim. I enter summary judgment for Mr Town accordingly.

If the answer to issue (2) is "no", has Ms Bright now provided adequate particulars in support of her contention that the opinions expressed in the press release were not the genuine opinions of Mr Town, such that his application to strike out the amended s 39 notice should be dismissed (in whole or in part)?

[131] In the view to which I have come on issues (1) and (2), there is no need for me to address this issue.

Result

[132] I enter summary judgment for Mr Town.

[133] I did not hear fully from the parties on the question of costs. If the parties are unable to agree, Mr Town may file a memorandum seeking costs within 15 working days of the date of this judgment. Ms Bright may file any reply memorandum within 15 working days of her receipt of Mr Town's memorandum.

Associate Judge Smith

Solicitors:
Simpson Grierson, Wellington for the defendant

Appendix

Paragraph 2 of the amended s 39 notice

…

ii) The particular part or parts of Mr Town's statement of defence to which I am referring in para 2 of my s 39 notice are:

(1) "He has no knowledge of and therefore denies paragraph 1 of the Statement of Claim, as corrected on 9 December 2014 (the Claim).

(3) "With reference to paragraph 3 of the Claim, he says that the plaintiff has made numerous allegations relating to financial matters, including alleged financial impropriety within Council, in person, at Council and Council Committee meetings as well as in public, on social media and to media.

Except as admitted, he denies paragraph 3 of the Claim."

(4) "He has no knowledge of and therefore denies paragraph 4 of the Claim.

(5) "He denies paragraph 5 of the Claim."

(6) "With reference to paragraph 6 of the Claim, he admits that he approved dissemination of a press release on 10 October 2014 (Press Release) but otherwise denies paragraph 6 of the Claim."

(7) "(b) the Press Release was issued in response to media comment on or about 9 and 10 October 2014, including comment in the New Zealand Herald, about Auckland Council's application to the High Court for the sale of the plaintiff's property as a result of her refusal to pay rates over many years."

(8) "With regard to paragraph 8 of the Claim, he admits that an objective of the Press Release was to reach the broadest possible audience. He has insufficient knowledge of and accordingly denies the remainder of paragraph 8 of the Claim."

(9) "He denies paragraph 9 of the claim and further says that the purpose of the Press Release was to explain why court action was being taken as a last resort and to assure the Auckland public that it was doing what it could to achieve fairness for all Auckland rate-payers."

(10) "He denies paragraph 10 of the Claim."

(11) "He denies paragraph 11 of the Claim."

(12) "He does not plead to paragraph 12, being the accompanying affidavit of the plaintiff. For the avoidance of doubt, he denies any allegation that the plaintiff may seek to rely on in the Affidavit as part of her Statement of Claim."

(13) "He denies paragraph 13 of the Claim."

(14) He denies paragraph 14 of the Claim."

(15) He denies paragraph 15 of the Claim."

(16) "He denies paragraph 16 of the Claim."

(17) "(b) He denies holding a position of high authority within central Government.

(c) Otherwise he has insufficient knowledge of and therefore denies paragraph 17 of the Claim."

(18) "He denies paragraph 18 of the Claim."

(19) "He denies paragraph 19 of the Claim."

(20) "He denies paragraph 20 of the Claim."

(21) "He denies paragraph 21 of the Claim."

(22) "The Press Release and/or the words referred to in paragraph 7 of the Claim did not have, (have) were not capable of having the defamatory meanings pleaded in paragraph 14 of the Claim."

(23) "The Press Release taken as a whole was in substance true, or was in substance not materially different in truth."

(24) "The facts and circumstances on which the defendant relies are set out in Schedule 1."

(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 to in paragraph 7 of the Claim (with the exceptions 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."

(28) "In the circumstances particularised in Schedule 3, the defendant 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 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."

(31) "By reason of the matters pleaded, it is denied that the defendant is liable to compensate the plaintiff for any damages or hurt she may have suffered (which is denied) by reason of the words complained of as alleged in paragraph 14 of the statement of claim or at all."

(32) "If and insofar as it is necessary, the defendant will rely at trial on the facts and matters set out in support of the defence of qualified privilege."