IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2015-404-1536
[2017] NZHC 1914

BETWEEN	MARTIN VICTOR LYTTELTON Plaintiff
AND	NZME PUBLISHING LIMITED Defendant

Hearing: 7 July 2017

Counsel: M V Lyttelton, in person, Plaintiff
D H McLellan QC and A L Ringwood for Defendant

Judgment: 11 August 2017

JUDGMENT OF HEATH J

This judgment was delivered on 11 August 2017 at 3.00pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Bell Gully, Wellington
Copy to:
M V Lyttelton, Plaintiff

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The applications

[1] Mr Martin Lyttelton is suing NZME Ltd, the publisher of the *New Zealand Herald* newspaper, for defamation.[1] A number of interlocutory applications require determination:

(a) NZME seeks an order for security for costs, and a stay of the proceedings pending posting of security;

(b) NZME seeks an order that Mr Lyttelton provide more particulars of various allegations in his statement of claim; and

(c) Mr Lyttelton seeks an order that the statement of defence be amended to provide further particulars; alternatively, either an order striking out the defence or granting summary judgment in his favour. This application rests primarily on pleading points relating to the defences of qualified privilege and honest opinion.

[2] Although, strictly speaking, I would not need to deal with the applications for particulars, strike out or summary judgment if the proceeding were stayed pending the giving of any security for costs, the parties agreed that it would be helpful for me to dispose of those applications now. I shall do so.

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1 See para [6] below.

[3] All applications are opposed. I heard all three applications on 7 July 2017. I deal with them in the order set out above.[2]

Context

[4] Having pleaded guilty to one count of attempted murder, one of causing grievous bodily harm with intent to injure, and one of aggravated burglary, Mr Martin Lyttelton was convicted, and on 31 March 2010, sentenced to a term of imprisonment of 5 years and 11 months.[3] After completing his sentence, Mr Lyttelton sought an extension of time to appeal against conviction. On the ground that Mr Lyttelton had not appreciated the existence of an available defence of lack of intent at the time he entered his pleas of guilty, the Court of Appeal, on 11 December 2014, allowed his appeal against conviction, and ordered a retrial.[4]

[5] Mr Lyttelton was retried in early 2016. The jury rejected his defence. Again, he was convicted on all three charges. The trial Judge, Asher J, proceeded to sentence afresh. Having regard to the absence of pleas of guilty, as distinct from the first sentencing, Mr Lyttelton was sentenced to a period of imprisonment of seven years.[5] As that was more than the sentence imposed by Wylie J following the first trial, Mr Lyttelton was required to return to prison. Subsequently, he was released on parole without serving the whole of the additional period of imprisonment.

[6] In his defamation proceedings against NZME, Mr Lyttelton claims that he was defamed in a series of articles published between 14 November 2009 and 10 April 2010. The articles dealt both with certain business activities undertaken by Mr Lyttelton before the offences were committed, and the criminal proceedings that followed.

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2 See para [1] above.
3 *R v Lyttelton* HC Auckland CRI-2008-044-9465, 30 March 2010 (Wylie J).
4 *Lyttelton v R* [2014] NZCA 638.
5 *R v Lyttelton* [2016] NZHC 1041 (Asher J).

Background facts

[7] I take my summary of relevant background facts from the sentencing notes of Asher J that followed the second trial.[6] As that Judge had an opportunity to hear and see the witnesses give evidence of what occurred, that is the most reliable summary available to me.

[8] The following passages of Asher J's sentencing remarks put the offending into perspective:

> [9] So going back to the start of all this. It began when you entered into a business relationship with Mr Ord in the early 1990s. That relationship, which involved amongst other things the construction of some significant health facilities, seems to have been successful. You had a good working relationship. However, in about 2000 it started to sour badly. You fell out and extensive litigation followed. There were arbitrations. There were court hearings. There were at least two Court of Appeal hearings. By early 2008 you had become depressed and preoccupied with your dispute. You were taking the view that Mr Ord had ruined your life. Indeed, as I will explain later, by the time of these events you were suffering from a serious mental illness.
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> [10] Two days before the events in question, which took place on 10 April 2008, you purchased a .410 single action shotgun, two boxes of ammunition and a skinning knife. The shotgun, which could take only a single shotgun cartridge, had to be broken open, then the cartridge had to be manually inserted, it then had to be shut, and finally manually cocked. Only then when these steps had been taken could it be fired.
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> [11] The knife had a blade of approximately 10 centimetres. It was a wide strong blade and came to a very sharp point at the end. Needless to say both the gun and the knife were well able to inflict a fatal wound.
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> [12] On the same day after you had purchased these items you met a friend for coffee. You told your friend that you were feeling suicidal. The friend took you to a doctor who prescribed an antidepressant, Paroxetine, and Zopiclone sleeping pills. The sleeping pills were not to be taken with alcohol. That night you went home. You wrote a suicide note. You then consumed 14 Zopiclone and six Paroxetine tablets. You also consumed a considerable quantity of wine. You went to bed expecting to die. This was a genuine suicide attempt.
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> [13] The following morning your wife tried to wake you. You were later visited by the same friend who had been with you the day before. Unsurprisingly given what you had consumed, you were groggy and unable to converse or function. You largely slept through that day and the next night. You finally came to when you were woken by your wife at about 7 am on Thursday, 10 April 2008.

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6 Ibid.

[14] At about 9.15 am that morning you left home taking in your car the shotgun, the full box of cartridges and the skinning knife. You told your wife that you were going to clear the mail and do some errands. It was your evidence at the trial, which I accept, that you went to the Auckland Domain, apparently intending to commit suicide there. You went down to a private part of the domain, but once you were there you changed your mind. It was at this fateful point that the events immediately leading to the offending began. You decided to drive to Mr Ord's residence in Browns Bay on the North Shore. You drove to his home. You found the front door and garage to be open. Mr Ord and his partner Ms Fenton were upstairs at the time.

[15] You proceeded to take the shotgun, six cartridges and the knife you had just purchased. You entered the house. Having done so you proceeded to walk slowly up the stairs holding the shotgun. At this stage, given the events that followed, the shotgun was clearly loaded and able to be fired, although I am not certain whether it would have been cocked at that point. Ms Fenton became aware that someone had entered the house, and looking down into the stairwell. She could see you coming up. You did not see her. She quietly and immediately explained to Mr Ord that you were there and they both went into the office, which was above the stairs on that higher floor, and shut the door. The office contained a computer and was used by them for office work. Ms Fenton was positioned near the door handle holding the door to resist entry. Mr Ord was also near the door but further into the room, and rang 111.

[16] When you got to the top of the stairs it seems that you walked around through some rooms before deciding that Mr Ord must be inside the office. There is opaque glass for part of the wall and shadowy shapes can be seen on the inside of the room from the outside hallway. You proceeded to try and open the door by turning the door handle but found that there was resistance and you could not do so.

[17] At this point you took the shotgun and fired a shot from it through the door. The shotgun had either been cocked at an earlier time, or was cocked immediately before you fired that shot. The shot punched a considerable hole through the door in a position some inches below the door handle. It hit Ms Fenton, blowing a major hole in her thigh and significantly damaging her femoral artery. She fell to the floor, bleeding profusely. You then, standing by the door in the hallway, proceeded to reload the shotgun. It is clear from what followed that you successfully reloaded the shotgun and cocked it.

[18] In the meantime Mr Ord decided that he would not stand there and wait for you, and he opened the door and you fell together and a struggle commenced. You stumbled into the room. There was grappling to control the gun. A shot went off hitting the wall. You and Mr Ord proceeded to wrestle and came out of the room and into the area above the stairs, and then partly smashing through the balustrade, fell or tumbled down the stairs into the front entrance area. Mr Ord throughout managed to keep a grip on the gun. The position arose whereby you were being held by him against the doorframe and wall, and he was directly behind you pinning you there. You both had a grip on the gun. You were both at a physical impasse.

[19] At that point, you reached down into your right trouser pocket letting go of the gun. You pulled out the skinning knife. Using a stabbing

> movement going around your front, stabbing backwards, you directed three or four stab thrusts towards Mr Ord's stomach area. The thrusts missed Mr Ord but he described them going closely past his side. The struggle then turned into a struggle to control the knife. Mr Ord suffered a number of cuts to his hands. Eventually you stopped struggling as Mr Ord held you and you relinquished the knife. During the struggle and the following conversations you told Mr Ord that he had ruined your life. When the fight ended and you stopped struggling you said you had to leave now.
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> [20] Mr Ord received several cuts to his left hand and a deep laceration of 20 – 30 millimetres in length to his right forefinger. Ms Fenton received significant damage to her leg, which I will refer to shortly.
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> [21] Ms Fenton was in a critical condition and losing large amounts of blood. Fortunately a medical team arrived promptly. Her condition was too serious for her to be moved, so they stabilised her bleeding on the spot. Her injuries were life threatening. Both she and Mr Ord were taken to hospital by ambulance. Ms Fenton there underwent emergency surgery.

[9] Mr Lyttelton's most recent statement of claim was filed on 4 November 2016. It followed a consent judgment of 2 November 2016, by which Toogood J struck out part of an earlier version to remove inappropriate pleadings.[7] Although the Judge observed that it is "particularly important in a civil case to be tried by a jury that the formal pleadings be kept within the prescribed limits",[8] Mr Lyttelton confirmed, at the hearing before me, that he does not seek a jury trial.

[10] Although the order of 2 November 2016 was made by consent, when dealing with an application by NZME for costs, Toogood J expressly absolved Mr Lyttelton from an allegation that he had acted with intent to cause unnecessary inconvenience to NZME.[9] On 1 March 2017, costs were awarded against Mr Lyttelton. Inclusive of disbursements, these totalled $13,468.50.[10] They have not yet been paid. Mr Lyttelton wishes to revisit the appropriateness of the order made by Toogood J.[11]

[11] The live statement of claim details a series of allegations that articles written by Ms Anne Gibson and Mr Brian Gaynor in the *New Zealand Herald* defamed Mr Lyttelton. Four of the articles were published before Mr Lyttelton was sentenced on 31 March 2010; on 14 November 2009, 25 November 2009, 12 December 2009

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7 *Lyttelton v NZME Publishing Ltd* [2016] NZHC 2628.
8 Ibid, at para [5].
9 Ibid, at paras [13]–[14].
10 *Lyttelton v NZME Publishing Ltd* HC Auckland CIV-2015-404-1536 1 March 2017 (Minute of Toogood J).
11 See para [21] below.

and 17 March 2010.[12] A further article was published on 31 March 2010, immediately after sentencing.[13] The four remaining articles were published on 1 April, 4 April, 5 April and 10 April 2010.[14] The final article was written by Mr Gaynor; the others were authored by Ms Gibson.

[12] Mr Lyttelton is primarily concerned with the accuracy of some of the content of the articles. While he expressed himself at times by reference to whether those parts were "truthful", no defence of "truth" has been pleaded. His primary complaint is that NZME has not acknowledged specified errors of fact. He alleges that they ought to have been acknowledged in the statement of defence, as part of the factual narrative on which they rely for their pleaded defences of honest opinion and qualified privilege.

[13] NZME puts forward four substantive defences. These defences are each made in relation to some of the pleaded publications, with the effect that the whole claim is defended:

(a) First, it asserts that some of the words of which complaint is made do not carry any defamatory meaning.

(b) Secondly, it invokes the statutory qualified privilege that protects publishers when fair and accurate reports of proceedings in a New Zealand Court are made.[15]

(c) Thirdly, it invokes the defence of honest opinion.[16]

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12 Anne Gibson "Would be killer earned millions from property" *The New Zealand Herald* (14 November 2009); Anne Gibson "Record management deals revealed" *The New Zealand Herald* (25 November 2009); Anne Gibson "What it must feel like to die" *The New Zealand Herald* (12 December 2009); and Anne Gibson "Healthy profit puts trust ahead of pack" (17 March 2010).

13 Anne Gibson "Six years jail for attack too short: victim" *The New Zealand Herald* (31 March 2010).

14 Anne Gibson "Survivor slams attempted murderers sentence" *The New Zealand Herald* (1 April 2010); Anne Gibson "Couple relive night of terror" *The New Zealand Herald* (4 April 2010); Anne Gibson "Rich businessman jailed for vicious home attack" *The New Zealand Herald* (5 April 2010); and Brian Gaynor "Trust wrangle led to murder attempt" *The New Zealand Herald* (10 April 2010).

15 Defamation Act 1992, ss 9–12.

16 Ibid, s 16 and sch 1.

(d) Fourthly, it states that even if the words are capable of a defamatory meaning, there is no causative link between publication and loss of Mr Lyttelton's reputation. NZME's case on this point is that Mr Lyttelton lost his reputation as a result of his own criminal actions. The statement of defence is replete with references to observations made by Wylie and Asher JJ, when Mr Lyttelton was sentenced on 31 March 2010 and 18 May 2016 respectively.

[14] Annexed as a Schedule to its statement of defence of 2 March 2017, NZME reproduced the words published, of which complaint is made by Mr Lyttelton. Without criticising Mr Lyttelton, the schedule captures the alleged defamatory words in a manner that is more readily reproduced than the form of his pleading. I annex that schedule to this judgment as Appendix 1.

[15] NZME annexed another schedule to its statement of defence, in which it set out the "facts and circumstances relied on in respect of [its] defence" of honest opinion. Having regard to the views I have formed on the pleading points, there is no need to reproduce that schedule.

[16] At this point, I can dispose of Mr Lyttelton's submission that the two schedules should be struck out as being prolix. To the contrary, I take the view that they are helpful. For that reason, that aspect of the strike out application must, in any event, fail.

Should security for costs be given?

[17] Relevantly, r 5.45 of the High Court Rules 2016 states:

> **5.45 Order for security of costs**
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> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident out of New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or

(iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or

(b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

(2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

(3) An order under subclause (2)—

(a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—

(i) by paying that sum into court; or

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

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

…

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

….

[18] The leading authority is *AS McLachlan Ltd v MEL Network Ltd*.[17] That case was determined by reference to r 60 of the then operative High Court Rules. There is no material difference between the old r 60 and the present r 5.45.

[19] In *AS McLachlan Ltd*, the Court of Appeal considered the principles on which security ought to be ordered. Delivering the judgment of the Court of Appeal, Gault P eschewed a rigid approach that considered a series of factors of the type listed by Master Williams QC, in *Nikau Holdings Ltd v Bank of New Zealand*.[18] While acknowledging that the factors collected in that judgment could be of assistance in other cases, the President added:

> [14] ... they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a

[17] *AS McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).
[18] *Nikau Holdings Ltd v Bank of New Zealand* (1992) 5 PRNZ 430 (HC).

> checklist of so-called principles. That creates a risk that a factor accorded weight in a particular case will be given disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.

[20] The nature of the jurisdiction was also considered by the Court of Appeal in *AS McLachan Ltd*. In the context of a discussion of competing public policy goals, the Court of Appeal said:

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
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> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[21] The order for costs made by Toogood J on 1 March 2017 remains unpaid. Mr Lyttelton contends that the Judge ought not to have made the order. In his notice of opposition on the security for costs application, he sought to have the order varied. Any issue involving variation or discharge of that order should be referred in the first instance to Toogood J. It is not appropriate for me to deal with that aspect. I propose to deal with the issue in a manner which will preserve rights to Mr Lyttelton to challenge the order should he wish to do so.[19]

[22] The grounds on which Mr Lyttelton opposes security of costs are that:

(a) He does not have the ability to pay costs;

(b) Any order would stifle his defamation claim;

(c) The defendants have failed to make out a viable defence;

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[19] On 12 and 14 July 2017, Mr Lyttelton filed further memoranda (without leave) seeking to adduce additional evidence on the costs issue, and to identify "misrepresentations" made by counsel for NZME at the hearing before me. In a Minute issued on 19 July 2017, I declined to read that memorandum on the present applications. Instead, I have allowed time for Mr Lyttelton to challenge the order: see also, paras [35] and [64](b) below.

(d) Through their defamation the defendants have impacted on his ability to gain paid employment;

(e) He believes the defendants are delaying the proceedings; and

(f) He is a litigant in person.

[23] In an affidavit in opposition to the application for security for costs, Mr Lyttelton deposed that he and his wife "own our house in a family trust". That property, situated in Kaukapakapa, is said to be freehold. No money is owed by way of mortgage. A search of the title undertaken by a solicitor employed by the firm acting for NZME reveals that, contrary to his deposition, Mr Lyttelton is not a registered proprietor of the land. The registered proprietors are Mrs Lyttelton and Mr Stephen Dudding, whom I infer are trustees of a family trust associated with the Lyttelton family. There is no legal basis on which, if an order for costs were made, NZME could enforce judgment against that property.

[24] Mr Lyttelton also deposed that he had recently sold land in his own name. The solicitor's affidavit has established that a property at Island Bay Road, Beachhaven was in fact registered in the name of Mr Lyttelton until 25 November 2016, when it was transferred to VRD Developments Ltd. So, there is no asset against which any judgment for costs could be enforced.

[25] Mr Lyttelton states that he is currently involved "in consulting work". He has "three main clients". He charges for his time at $90 per hour, "generally on retainer". No detail is given of Mr Lyttelton's monthly or annual income based on the consulting work. The evidence is too vague to infer that Mr Lyttelton has a source of income from which any order for costs in this proceeding could be met.

[26] Mr Lyttelton expresses a concern that the articles published by NZME destroyed his professional reputation and that the proceeding is being progressed by NZME in a manner unlikely to result in resolution. He says that "NZME need to move to a Court led settlement conference with me in order to attempt to resolve this case without further cost to both parties".

[27] I am satisfied:

(a) Mr Lyttelton has no personal assets against which any judgment for costs might be executed.

(b) Mr Lyttelton has not disclosed any significant income stream from which payment of any order for costs could be made.

(c) Mr Lyttelton has not paid costs ordered by Toogood J on 1 March 2017.

[28] Mr Lyttelton sought to persuade me that his loss of reputation had been caused by the articles of which complaint is made. That, he submitted, was sufficient to deny an order for security for costs; particularly when NZME does not acknowledge errors made in the articles that rendered them inaccurate. I deal with this issue when discussing Mr Lyttelton's application to strike out certain portions of the statement of defence.[20]

[29] I am not persuaded that the merits or otherwise of the proceeding are sufficient to impact on the question whether security for costs should be ordered. Many of the allegations in respect of which inaccurate facts formed part do not affect the pleaded defamatory meanings. For example, in respect of an allegation arising out of an article published on 5 April 2010, Mr Lyttelton complains that the words "Rich businessman jailed for vicious home attack" was "factually incorrect" because he "was not charged or convicted with home invasion" and "in fact … had walked in through the open garage door". With respect to Mr Lyttelton that is beside the point. The description "home attack" is apt to refer to circumstances in which a person enters another's home uninvited carrying a loaded firearm.

[30] Leaving questions of merit to one side, I am satisfied that Mr Lyttelton will not be shut out of prosecuting his claim, if security for costs were ordered. He acknowledged that moneys could be raised by way of mortgage of the Kaukapakapa

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[20] See para [63] below.

property that is owned by the trustees of a family trust. On the basis of his evidence, that property is not subject to any mortgage on which any debt is due.

[31] Given the unavailability of assets against which NZME could execute any judgment for costs, I am satisfied that I should exercise my discretion to require security in cash to be given. NZME has made a broad assessment of the costs likely to be awarded if it were successful in defending the claims. It seeks an order for security in the sum of $75,000, which includes the outstanding costs ordered by Toogood J.

[32] On balance, I am satisfied that an order for security should be made. However, I intend to direct staged security. I also consider that, subject to one exception, the proceeding should be stayed until such time as security is given. The exception relates to Mr Lyttelton's desire to challenge the order for costs made by Toogood J. I indicated at the hearing that the circumstances in which that order was made required Toogood J to reconsider whether the order was appropriate. Any application must be made formally, with an affidavit in support. As the amount of security I propose to order will include a sum sufficient to meet those costs, it is appropriate to give Mr Lyttelton an opportunity to challenge the order before the appropriate Judge.

[33] I shall direct that a sum of $40,000 be paid to the Registrar of this Court. Save for Mr Lyttelton's ability to challenge Toogood J's order for costs, the proceeding will be stayed pending provision of security.

[34] Unless, within seven days of the date of this judgment, Mr Lyttelton applies to Toogood J to discharge or vary the order for costs, the Registrar shall pay those costs to NZME if security were given. Leave will be reserved for either party to apply to vary or discharge the order, if a material change in circumstances occurs. It is open for NZME to apply to increase the level of security once the proceeding is set down for hearing.

[35] In his notice of opposition to NZME's application for security for costs Mr Lyttelton suggested that "misrepresentations" made by counsel for NZME as to

the basis on which the order for costs had been obtained were sufficient to justify refusal of the application. I do not take into account that aspect. Mr Lyttelton has made unproved allegations of misrepresentation. If he wishes to pursue that aspect, he should do so before Toogood J. If that Judge were to find that some misrepresentations were made, it would be open to Mr Lyttelton to apply to vary or discharge the order for security for costs that I am making.

NZME's application for particulars

[36] NZME's application for particulars is within a narrow ambit. It responds to an alleged failure on the part of Mr Lyttelton to particularise properly three paragraphs in the live statement of claim. Mr Lyttelton opposes on the grounds that they have been provided by a notice under s 41 of the Defamation Act 1992 (the Act), or are otherwise available to NZME through the discovery process.

[37] I am satisfied that the relevant particulars have not been provided in the s 41 notice. It is inappropriate to require NZME to forage through extensive discovery to determine answers to the requests for particulars. They are entitled to have them set out clearly in the statement of claim, or a separate document providing the particulars.

[38] I shall direct that, on or before 29 September 2017,[21] Mr Lyttelton shall:

(a) In respect of paragraph 4 of the statement of claim, specify which "articles in relation to CHPT" were allegedly "sourced" from Ms Dianne Forman and Dr Lester Levy;

(b) In respect of paragraph 17 of the statement of claim, identify the articles to which he refers in the first bullet point and those documents which he says comprise the "long documented history" to which reference is made in the fourth bullet point; and

(c) In respect of paragraph 22 of the statement of claim, specify the headings to the articles to which he refers.

[21] This date is fixed to allow time for security for costs to be given.

Mr Lyttelton's applications

(a) The nature of the applications

[39] Mr Lyttelton seeks an order requiring NZME to file an amended statement of defence. Alternatively, he seeks an order either striking out parts of the defence or granting summary judgment in his favour. Mr Lyttelton accepted that if I were to find in his favour on this application, a direction should be made to require an amended pleading in the first instance. That would require the application to be adjourned for further consideration after the amended pleading had been filed.

[40] Whether summary judgment or strike out is in issue, the need for an adjournment for any defective pleading to be cured arises. In those circumstances, all of Mr Lyttelton's applications, if successful, would require an amended statement of defence to be filed. On that basis, I deal with all of his applications by reference to the question whether an amended statement of defence is needed.

(b) Pleading – honest opinion and qualified privilege

[41] Mr Lyttelton's applications primarily arise from what he submits is an inadequate pleading of facts to NZME's defences of qualified privilege and honest opinion. In short, he asserts that the statement of defence fails to plead accurately the facts on which each of those defences is put. Mr McLellan QC, for NZME, submits that particulars of the type for which Mr Lyttelton contends are not required.

[42] The defence of "honest opinion" reflects the former common law defence known as "fair comment". Section 10 of the Act puts the emphasis on proof of a genuine opinion, based on facts known to the person against whom the defamation claim is made. In relation to the need to establish the correctness of relevant allegations of fact, s 11 of the Act provides:

> **11 Defendant not required to prove truth of every statement of fact**
>
> In proceedings for defamation in respect of matter that consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion shall not fail merely because the defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to—

(a) those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or

(b) any other facts that were generally known at the time of the publication and are proved to be true.

[43] Understandably, the focus is on the substance of the allegations of fact, as opposed to an inquiry into the correctness of each of its component parts. Hence, the emphasis on materiality in s 11(a).

[44] There are statutory and other types of qualified privilege defences. Not only do ss 16–19 of the Act deal with this defence specifically, but "any other rule of law relating to qualified privilege" is expressly preserved by s 16(3).[22]

[45] The general nature of the particulars required to support defences of honest opinion and qualified privilege have been discussed by both the Court of Appeal[23] and the Supreme Court.[24] I shall consider the relevance of those authorities when analysing Mr Lyttelton's specific complaints about the current statement of defence.

(c) Is the statement of defence adequate?

(i) The honest opinion defence

[46] Mr Lyttelton's position is that NZME must acknowledge the correct facts in any pleading that raises the defences of qualified privilege and honest opinion. In short, Mr Lyttelton is focussing on the correctness of individual statements within the factual narrative on which NZME relies, as opposed to the substance of the allegations. Whether particulars are required in relation to the honest opinion defence depends on the application of s 11 of the Act.[25]

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22 An example is the use of the defence in cases involving media publications and political expression: see *Lange v Atkinson* [2000] 1 NZLR 257 (PC) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

23 For example, *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA).

24 For example, *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315.

25 Set out at para [42] above.

[47] To give context to his application, I set out three examples from Mr Lyttelton's written submissions.

[48] The first is taken from paragraph 12 of the statement of claim and the response in paragraph 13 of the statement of defence. The statement of claim pleaded that the article stated:

> Lyttelton first tried to force his way through the door of their home before firing a round from the shotgun into the door hitting Ms Fenton in the thigh.

Mr Lyttelton states that these "claims are factually incorrect and defamatory" because he "walked into the house through the open garage door" and "never fired a round through the front door of the house".

[49] The second is taken from an article published on 1 April 2010. It is pleaded as untrue and defamatory in paragraph 13 of the statement of claim. The article stated:

> Mrs Ord, named Colleen Fenton at the time of the attack, was the victim of the Remuera businessman who mounted a frenzied home invasion armed with a shotgun and a skinning knife.

Mr Lyttelton challenges the correctness of that statement and alleges that it is defamatory because he "was never charged or convicted of home invasion".

[50] The third is taken from an opinion piece written by Mr Gaynor and published on 10 April 2010. In paragraph 15 of the statement of claim, Mr Lyttelton alleges that the statement was untrue and defamatory. The article stated:

> Lyttelton's crime demonstrates once again that the management structures of these property trusts are flawed and have the potential to create disputes between the parties involved.

Mr Lyttelton says that the article was "factually incorrect and defamatory" because there "was no evidence in Court in support of these assertions". Apart from reliance on the absence of evidence to that effect in Court, he does not challenge the statement of opinion.

[51] Mr Lyttelton referred to a number of authorities in support of the pleading point raised. In particular, I refer to *APN New Zealand Ltd v Simunovich Fisheries Ltd*,[26] *van Gog v Grauman*[27] and *Craig v Stringer*.[28] In addition, Mr Lyttelton referred to two authorities which addressed a similar pleading point before the Defamation Act 1992 was enacted.[29] Mr McLellan submitted that those authorities do not assist Mr Lyttelton. He relied on a decision of the Court of Appeal in *Television New Zealand v Haines*.[30]

[52] In *APN New Zealand Ltd*, the Supreme Court considered questions of practice and pleading in relation to defences of honest opinion and truth. The passages to which Mr Lyttelton referred deal generally with the nature and purpose of particulars in the context of defamation cases.

[53] Delivering the judgment of the Supreme Court in *APN*, Tipping and Wilson JJ said:[31]

> [17] It is therefore helpful to consider the nature and purpose of particulars. The Court of Appeal said in *Television New Zealand Ltd v Ah Koy*:
>
> > [17] One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on . . . It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars. In *Zierenberg v Labouchere* [1893] 2 QB 183 at p 186 Lord Esher MR said that a plea of justification (now of truth) without sufficient particulars was invalid and that this had been the law "from the earliest times". As Gatley [on Libel and Slander (9th ed, 1998)] says at para 27.10, it is arguable that in these circumstances there is no plea of justification on the record. On that basis a plea of truth without sufficient particulars would be at risk of being struck out.

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26 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315.
27 *van Gog v Grauman* [2013] NZHC 406.
28 *Craig v Stringer* [2016] NZHC 362.
29 *Leersnyder v Truth NZ Ltd* [1963] NZLR 129 (SC) and *Stredwick v Wiseman* [1966] NZLR 263 (SC).
30 *Television New Zealand v Haines* [2006] 2 NZLR 433 (CA).
31 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315.

> [18] These observations, which the parties accepted as an accurate statement of the law, apply with equal force to particulars of the facts relied on in support of a defence of honest opinion. *The defendant is required to identify a sufficient factual basis for its opinion, so that readers or viewers may assess the validity of the opinion for themselves against the relevant facts truly stated*.
>
> (Emphasis added; footnotes omitted).

[54] I do not consider that *van Gog v Grauman* is relevant to the present issue. That case concerned particular discovery of documents, in the context of a defamation proceeding. The passage to which Mr Lyttelton referred me goes no further than to hold that it is impermissible "for a defendant to reserve his or her position on [an affirmative defence of truth] with a view to adding more particulars after discovery".[32]

[55] In *Craig v Stringer*, Associate Judge Osborne dealt with an application to strike out a statement of defence in defamation proceedings. The Associate Judge said:[33]

> [18] The authors of *McGechan on Procedure* have correctly observed:
>
> > Pleading requirements in defamation have not had their own specific rules since 1993 [with the coming into force of the Defamation Act 1992]. Nevertheless, there are fact-specific requirements for the technical ingredients of this cause of action.
> >
> > …In *Moodie v Ellis* the Court observed that the need to "fairly inform" the other parties of the case being advanced is particularly important in defamation cases because the specifics of publication, and the words used, are a significant factor in the defences that may be available and will determine what the defendants need to plead and prove for their defences.
>
> [19] In *APN New Zealand Ltd v Simunovich Fisheries Ltd*, Tipping and Wilson JJ, delivering the judgment of the Supreme Court, emphasised the importance of particulars of a defence both where a defence of truth is pleaded and where a defence of honest opinion is pleaded. Sections 38 – 40 of the Defamation Act 1992 require such defences to be particularised and pleaded separately. (Under s 39 of the Act the plaintiff, in turn, has an obligation to serve a notice and particulars if intending to allege that an opinion was not genuinely held by the defendant: hence the importance of a clear and distinct pleading of honest opinion by the defendant).
>
> (Footnotes omitted).

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32 *van Gog v Grauman* [2013] NZHC 406, at para [39].
33 *Craig v Stringer* [2016] NZHC 362.

[56] In my view, the complaints made by Mr Lyttelton about the correctness of facts do not warrant any further pleading. Section 11 of the Act applies.[34] It will be for the trier of fact to determine whether, having regard to any inaccuracies that might be demonstrated, the statements are nevertheless substantively defamatory. The examples I have given from Mr Lyttelton's application amply demonstrate the differences between the parties on this point.[35]

[57] No amendments are required to the current statement of defence to comply with pleading requirements. I am not prepared to make any order in respect of the honest opinion pleading.

(ii) The qualified privilege

[58] NZME sets out its qualified privilege defence in para 25 of its statement of defence. The basis on which "statutory qualified privilege" is claimed is that the alleged defamatory statements "were published in [the *New Zealand Herald's*] court reports and constitute fair and accurate reports of proceedings in a New Zealand Court". No other basis for asserting the defence of qualified privilege is pleaded. Mr Lyttelton's ability to meet this defence on the existing pleading is illustrated by his plea that at least one of the articles was not based on evidence given in Court.[36]

[59] Mr Lyttelton contends that NZME must plead "the context which created the privilege". I do not consider any further pleading is required. The defence is anchored firmly on the reporting of relevant Court proceedings, to which the defence presumptively applies. Section 16(1) of the Act and cl 6 of pt 1 of sch 1 to the Act provide:

> **16 Qualified privilege**
>
> (1) Subject to sections 17 and 19, the matters specified in Part 1 of Schedule 1 are protected by qualified privilege.
>
> …

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34 Set out at para [42] above.
35 See paras [48]–[50] above.
36 See para [50] above.

Schedule 1

Publications protected by qualified privilege

Part 1

Publications not subject to restrictions in section 18

…

(6) The publication of a fair and accurate report of the proceedings of any court in New Zealand (whether those proceedings are preliminary, interlocutory, or final, and whether in open court or not), or of the result of those proceedings.

(iii) General criticisms of pleadings

[60] Finally, I deal briefly with other grounds on which Mr Lyttelton appears to rely but which, in my view, do not warrant a direction for an amended statement of defence to be filed.

[61] Mr Lyttelton has referred to a number of paragraphs in the statement of defence which he contends do not answer his allegations adequately. I disagree. In my view, NZME has complied with relevant pleading requirements. I am satisfied that the pleading complies with r 5.48 of the High Court Rules.

[62] In relation to para 24 of the statement of defence, Mr Lyttelton takes issue with NZME's pleading that asserts that the words of which he makes complaint "did not have the [defamatory] meanings" he has attributed to them in his statement of claim. That pleading is made in the context of a defence which alleges simply that the words are not capable of having a defamatory meaning. I do not consider it is necessary for NZME, in the circumstances of this case, to suggest alternative meanings. The words speak for themselves and can either be construed in a defamatory sense, or not. That is for a trier of fact to determine.

[63] The statement of defence provides sufficient information for Mr Lyttelton to address defences based on existing bad reputation or lack of causation. The defence really goes no further than to say that, if it were found that the words were defamatory, Mr Lyttelton had no reputation to lose because he had pleaded guilty to

attempted murder, causing grievous bodily harm with intent to injure and aggravated burglary.

Result

[64] For those reasons:

(a) I grant the application for security for costs. Security shall be given to the satisfaction of the Registrar in the sum of $40,000. Subject to (b) below, until such time as that sum is paid into Court, the proceeding is stayed. Leave to apply to any party to vary or discharge the order is reserved, if there were a sufficient change in circumstances to justify such an order. For the avoidance of doubt, an application to vary may be made at the time the proceeding is set down for trial.

(b) Mr Lyttelton shall file and serve any application to discharge or vary the order for costs made by Toogood J within seven days of the date of delivery of this judgment. If no application has been made by that time, the Registrar shall pay the costs ordered by Toogood J out of the sum of $40,000 to be deposited as security for costs.

(c) NZME's application for particulars is granted. I direct that, on or before 29 September 2017, Mr Lyttelton shall file and serve a document that:

(i) In respect of paragraph 4 of the statement of claim, specifies which "articles in relation to CHPT" were allegedly "sourced" from Ms Dianne Forman and Dr Lester Levy;

(ii) In respect of paragraph 17 of the statement of claim, identifies the articles to which he refers in the first bullet point and those documents which he says comprise the "long documented history" to which reference is made in the fourth bullet point; and

(iii) In respect of paragraph 22 of the statement of claim, specifies the headings to the articles to which he refers.

(d) Mr Lyttelton's applications for orders requiring the filing of an amended statement of defence, striking out the statement of defence or summary judgment in his favour are dismissed.

[65] There is no reason why costs should not follow the outcome of the applications. NZME has been successful on all. Costs are awarded in its favour on a 2B basis, together with reasonable disbursements, both to be fixed by the Registrar. I certify for second counsel. If not paid before deposit of the $40,000 as security for costs, these costs shall be paid by the Registrar out of that security.

[66] I make it clear that I am not placing restrictions on any other method of enforcement of the costs orders that NZME might choose to adopt.

_____

P R Heath J

Delivered at 3.00pm on 11 August 2017

APPENDIX 1

The words complained of by the plaintiff

1. "Would be killer earned millions from property"

2. "After trying to force his way into intended victims North Shore home with a shotgun and a knife."

3. "He shot Mr Ord's partner, Colleen Fenton, in the thigh as he tried to enter."

4. "Record management deals revealed."

5. Those charges were laid after a home invasion attack on his former business partners Richard Ord and Colleen Fenton, where he repeatedly screamed "you ruined me".

6. "Lyttelton's attack came after a long running court action bought by Ord and Fenton against him over Calan management matters."

7. "This is what it must feel like to die."

8. "Martin Lyttelton had it all."

9. "But for Lyttelton, none of that was enough. He wanted far more. He particularly wanted revenge."

10. "The story of Lyttelton's downfall starts two decades ago …"

111. Ord's deposition told how he and Freestone paid half each to set up Calan. Lyttelton paid nothing, Ord said."

12. "It was around this time that Lyttelton demanded to meet the Herald's business editor at the time, Chris Niesche, to complain about critical coverage of the deal."

13. "By then, Ord and Lyttelton had fallen out, mainly over Calan and money Ord said was his."

14. "The Ord/Fenton v Lyttelton battle was to be expensive, long, litigious and very bitter."

15. "First it went to the High Court, then the Court of Appeal and finally the Supreme Court."

16. "Where the Courts had failed him, Lyttelton decided a knife and a fun would serve him better."

17. “Ord and Fenton may have beaten him at the bar but, armed and dangerous, he decided he would attempt to deprive them of something far more important, more precious.”

18. “His attempt to extract revenge came in a bloodthirsty, almost murderous, way.”

19. “She is expected to return to court early next year for the final saga of this strange and bloody episode.”

20. “Healthy profit puts trust ahead of pack.”

21. “Survivor slams attempted murderer’s sentence.”

22. “He said Lyttelton had got off lightly and the sentence was not long enough.”

23. “Mrs Ord suffered life-threatening injuries in the attack, and said she did not believe Lyttelton’s apology was genuine.”

24. “I don’t accept it one bit. I’ll never forgive him.”

25. “Lyttelton first tried to force his way through the door of their home before firing a round from the shotgun into the door, hitting Ms Fenton in the thigh.”

26. “As Lyttelton was reloading his shotgun, Mr Ord released his grip on the door handle, allowing Lyttelton entry to the house.”

27. “Six years’ jail for attack too short: victim.”

28. “I’m very, very lucky to even have my leg,” she said, criticising Martin Victor Lyttelton’s sentence as far too short.”

29. “Mrs Ord, named Colleen Fenton at the time of the attack, was the victim of the Remuera businessman who mounted a frenzied home invasion armed with a shotgun and a skinning knife.”

30. “Couple relive night of terror.”

31. “the couple say the incident has forced them to consider leaving their home – and they are furious with the length of Lyttelton’s sentence.”

32. “Rich businessman jailed for vicious home attack.”

33. “A successful, wealthy businessman who tried to kill the wife of his business partner believed he could read minds.”

34. “Martin Victor Lyttelton, who lived in a $3 million Portland Rd home in Remuera and drove a Mercedes, was more mad than bad, a court was told last week.”

35. “The 52 year old shot Colleen Ord (then Colleen Fenton) during a frenzied home invasion.”

36. “It began to unravel after he and Mr Ord, co-founder of Calan, fought for years in the courts over the business and Lyttelton lost.”

37. “On April 10 2008, armed with a shotgun and a skinning knife, he mounted a vicious home invasion attack on the Ords.”

38. “Brian Gaynor: Trust wrangle led to murder attempt.”

39. “the crime, for which Lyttelton received a jail term of five years and 11 months, had its foundation in a bitter dispute over the listed entity Calan Healthcare Properties Trust.”

40. “Lyttelton’s crime demonstrates once again that the management structures of these property trusts are flawed and have the potential to create disputes between the parties involved.”

41. “Thus Lyttelton and Freestone seemed to receive most of the additional costs paid by the trust and were the sole owners of the Australian management company with Ord excluded from this entity.”

42. “No progress was made on this issue and the trust performance remained anaemic, even though the management team received a Rolls-Royce remuneration.”

43. “This created a conflict of interest between Calan Healthcare Properties Trust and the management company.”

44. “It appears that Lyttelton and Freestone had decided that about 50 per cent of the $7.8 million sale proceeds were due to the Australian operations with the other 50 per cent represented by New Zealand assets.”

45. “This determination, which was difficult to reconcile because the Australian assets represented only 40 per cent of the trusts total assets …”

46. “A retired High Court judge was appointed to arbitrate the dispute but it appears that Lyttelton was hoping to resolve the issue in his favour without going to formal arbitration.”

47. “However the arbitrator finally decided that the formal process should go ahead and 10 days later, on April 10, 2008, Lyttelton drove from Remuera to Ord’s North Shore home with a shotgun and a hunting knife with the intention of killing his former Calan Healthcare Properties Trust partner.”

48. “Independent directors of listed entities have enough to worry about without having to consider potential murder attempts.”

49. “However, if the independent directors of Calan Health Care Properties Trusts management company had insisted that the trust’s Australian assets were under the control of the original management company rather than a company controlled by Lyttelton and Freestone, then the murder attempt two years ago to this day probably would not have occurred.”