IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-092-1026
[2017] NZHC 1036

BETWEEN	MELISSA JEAN OPAI
	Plaintiff
AND	LAURIE CULPAN
	Former First Defendant
	THE ATTORNEY-GENERAL OF NEW ZEALAND
	Second Defendant

Hearing:	28 March 2017
Counsel:	N W Woods for plaintiff H B Rennie QC for former first defendant M F McClelland QC and Ms N Ridder for second defendant
Judgment:	18 May 2017

JUDGMENT OF KATZ J

This judgment was delivered by me on 18 May 2017 at 3.30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] Melissa Opai seeks to review a decision of Associate Judge Bell in which he struck out aspects of her claims as an abuse of process.[1] At its heart, this application raises the issue of whether the concept of abuse of process, in a defamation context, extends to situations where the resources necessary to determine a claim are likely to be out of all proportion to the interests at stake.

[2] Associate Judge Bell found that the Court did have the power to stay a defamation proceeding (or part of it) in such circumstances.[2] In reaching that conclusion he relied on principles espoused by the English Court of Appeal in *Jameel v Dow Jones & Co Ltd*.[3] Associate Judge Bell's decision is the first case in which the High Court has applied what is commonly referred to as "the *Jameel* principle".[4] He struck out Ms Opai's defamation claim against Senior Sergeant Laurie Culpan as an abuse of process.[5] He held that it was disproportionate for Ms Opai to sue both Mr Culpan and the Attorney-General when she could obtain the full redress she seeks from the Attorney-General alone.[6] Aspects of Ms Opai's remaining claims against the Attorney-General were also struck out as disproportionate.[7]

[3] Ms Opai seeks to review the Judge's decision. She argues that he was wrong to strike out parts of her claims as an abuse of process. Her application raises the following key issues:

(a) Does the *Jameel* principle apply in New Zealand?

(b) Can the *Jameel* principle be advanced on a strike-out or stay application?

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1 *Opai v Culpan* [2016] NZHC 3004.
2 At [78].
3 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.
4 The *Jameel* principle has previously been applied in one District Court case: *Russell v Matthews* [2016] NZDC 17743.
5 At [87] and [128](b).
6 At [86]-[87]. The Attorney-General does not dispute that the Crown, as Mr Culpan's employer, is vicariously liable for his actions.
7 At [128].

(c) Can the *Jameel* principle be used to strike out only *part* of a plaintiff's claim?

(d) If the *Jameel* principle does apply in New Zealand, was it appropriate to apply it in the particular circumstances of this case?

Background

[4] Ms Opai is an administrative employee of the police. Her claims against Mr Culpan relate to four occasions over a one year period when Mr Culpan was Ms Opai's manager. During that period he allegedly defamed Ms Opai by:

(a) Providing a draft performance appraisal document to her and others.[8]

(b) Preparing and issuing an internal review paper for a proposed restructuring of Ms Opai's work area, which does not name her, but which she says identifies her.

(c) Actioning an internal complaint from another staff member about Ms Opai and the team she managed by completing an internal document ("a 258 Report") setting out the complaint and his evaluation of it and forwarding it to the relevant manager.

(d) Providing two brief diary notes regarding Ms Opai to his successor, as part of his handover.

[5] The Attorney-General (sued on behalf of the Commissioner of Police) is the second defendant. He accepts that every claim that Ms Opai makes against Mr Culpan is a claim in respect of which (if proven) he is vicariously liable, as Mr Culpan's employer.

[6] The defendants say that all of the allegedly defamatory documents were made solely in the performance of Mr Culpan's workplace duties and read (if at all) by persons within that workplace as part of their duties. The defences include that the

[8] Mr Culpan denies publishing the document to anyone other than Ms Opai.

words complained of were not published (in one case), were not defamatory of Ms Opai, were published on occasions of qualified privilege, and were not of such seriousness as to engage a defamation remedy.

The performance appraisal document

[7] Mr Culpan was required to prepare a performance appraisal in respect of Ms Opai for the year ending 30 June 2013. He was required to consult with her about the contents of the appraisal, which he did. Ms Opai alleges that Mr Culpan defamed her in comments he made in the first draft of the document. Although the overall tenor of the appraisal was positive, Ms Opai takes exception to the following statement in the concluding passage:[9]

> Melissa has a strong sense of responsibility to the police and her team. This sense of responsibility ensures that Melissa and her team are up to date with all training, leave balances are within required levels, files are generally prepared to a high standard and completed on time.
>
> *Unfortunately this sense of responsibility can be misdirected and be viewed by other*[*s*] *as malevolence, or ill will.* This is evidenced on a number of occasions where Melissa has circumvented her supervisor and taken issues direct to senior management. On each occasion this has been explained as happenstance and backed up by assurances there was no intent to [bypass] her supervisor, rather it was a matter of circumstance.

[8] In the pleading that was before the Judge (now struck out), Ms Opai claimed that the italicised sentence bears the defamatory meaning that she has a misdirected sense of responsibility and that she has acted malevolently.

The briefing paper

[9] On or about 1 November 2013 Mr Culpan wrote a briefing paper as part of a staffing review. Ms Opai alleges that the following parts of that paper defamed her:[10]

> 3. There is a culture where casual employees are engaged as a matter of course as opposed to having an actual requirement.
>
> 4. Management style and expectations differ between sections (Watchhousr officers) causing poor communication, disruption to

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9 (Emphasis added).

10 Spelling and grammar as per the original.

service delivery and silos which contribute to unnecessary friction and disfunction.

5. The root cause of this tension appears to have been through a power struggle by some supervisors, a void leadership and management from the previous O/C Station, and a truncated investigation into two employment complaints.

6. This "culture" is disproportionately impacted upon by two of the remaining supervisors.

7. Through the better use of existing supervisors (a proposed change to the supervisors rosters), the use of existing supervision within the wider work groups (FMC, DCU, DCC, ASN) I believe there is opportunity to achieve:

- Two supervisors' positions can be freed up for use elsewhere

- FTE hours can be better matched to demand

- Existing service delivery can be maintained and standards improved

- The culture can be positively impacted

- The remaining Officers can be performance-managed or exited.

[10] Ms Opai's current pleading is that these statements mean that her performance was substandard and that there were grounds to suspect that her misconduct justified an inquiry in relation to her continued employment.

The 258 report form

[11] On 5 November 2013 Mr Culpan authored a 258 report form. These forms are used to forward complaints about staff on to the appropriate person for handling. The complaint in issue related to apparent discrepancies in the timesheets for Ms Opai and her staff, and the times actually worked by them. The concern was that staff were leaving work early yet claiming to have worked a full day.

[12] In the report, titled "Melissa Opai: Breach of the Code of Conduct", Mr Culpan made the following remarks:

> It would appear that these issues have reached a tipping point resulting in the attached email and formal complaint. It is noted that Miss OPAI was herself the author of a similar complaint in 2013 made against Ms [REDACTED] for almost identical behaviour.

…

> It is my opinion that if the staff named in the email/complaint have left early without correctly filling out timesheets, it will have been sanctioned by Miss OPAI although I have not traversed this point with those identified.
>
> …
>
> I believe these actions fall under the general headings of Honesty and Integrity and dependent upon interview with Miss OPAI, may be viewed as misconduct in that they represent repeated absence from duty or place of work without proper reason or authorisation.

[13] Ms Opai pleads that the report is defamatory in that it implies that she was dishonest; that she is a hypocrite (in that she had previously authored a similar complaint about someone else); that she lacks integrity; and that there were grounds, dependent upon interview with Ms Opai, justifying an inquiry into her continued employment.

Diary notes

[14] Various files were handed over to Mr Culpan's successor in 2014. These included diary notes entitled "Melissa OPAI 2013-14 performance year". Ms Opai says she was defamed by two particular entries in those notes:[11]

> 12 July — Took a complaint to [name] in what has been described as an attempt to scuttle [two persons] police enrolements – Email conformation from [name]
>
> …
>
> 5 Nov — Complaints about timekeeping
>
> This has been resulted however is listed for your reference

[15] Ms Opai's current pleading (amended following the hearing before Associate Judge Bell) is that the 12 July note bears the meaning that she has acted maliciously. The Judge struck out the claim relating to the 5 November note as *Jameel* disproportionate.[12] Ms Opai has not sought to review that decision.

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11 Spelling and grammar as per the original, excluding redactions.

12 Above n 1, at [91].

The *Jameel* decision and subsequent developments in the United Kingdom

The Jameel *decision*

[16] The *Jameel* decision is widely recognised as one of the most important contemporary defamation decisions in the United Kingdom, and possibly the Commonwealth. Mr Jameel, a Saudi Arabian national, issued defamation proceedings in the United Kingdom regarding an article posted on the online version of the Wall Street Journal (a United States-based publication). He alleged that the article bore the defamatory meaning that he had provided financial support to Osama Bin Laden and Al-Qaeda. Only five United Kingdom subscribers had accessed the hyperlink to the relevant article, however. Three of those people were associated with Mr Jameel. While there was a reasonable cause of action (because of the presumption of damage in defamation cases), the claim was nevertheless struck out as an abuse of process on the basis that the costs of the litigation would have been out of all proportion to whatever benefit or vindication might have been achieved.[13]

[17] Associate Judge Bell referred in particular to the following passages of the decision:[14]

> [40] We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process.
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> …
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> [54] … An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.
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> …
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> [55] There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure

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13 Above n 3, at [69].
14 Above n 1, at [74].

> Rules. Pursuit of the overriding objectives requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right to freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting that claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.
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> …
>
> [58] … If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

[18] The Court in *Jameel* further noted that while the claimant was pursuing the action for the legitimate purpose of vindication, the particular vindication sought could not be achieved by the action.[15] Mr Jameel's aim of achieving worldwide vindication would have likely failed, due to the unenforceability of the judgment in other jurisdictions. Further, even if he succeeded in obtaining judgment, it could never amount to a "declaration to the entire world that the allegation was false".[16] Taking all of these matters into account, the claim was stayed as an abuse of process.

[19] The *Jameel* principle has been applied in numerous subsequent cases in the United Kingdom, in a wide range of contexts.[17] Courts have had regard to a number of different factors in deciding whether a proceeding should be struck out as an abuse of process on *Jameel* grounds, including the likelihood of more than nominal damages being awarded at trial and the extent to which the particular vindication sought is likely to be achieved. The *Jameel* principle has proved to be a particularly

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15 Above n 3, at [61].

16 At [71].

17 See for example *Lait v Evening Standard Ltd* [2011] EWCA Civ 859, [2011] 1 WLR 2973 at [40]-[44]; *Cammish v Hughes* [2012] EWCA Civ 1655 at [52]-[56]; and *Bezant v Rausing* [2007] EWHC 1118 (QB) at [129]-[130] and [144]. See also *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985 at [62].

useful tool for dealing with the unique challenges posed by communications on the internet which, by their nature, are "often uninhibited, casual and ill thought out."[18]

Legislative reform – the Defamation Act 2013 (UK)

[20] In 2013 defamation legislation in the United Kingdom was overhauled and modernised with the enactment of the Defamation Act 2013 (UK). The new Act was intended to:[19]

> ameliorate the "chilling effect" of libel law; to address the dysfunctionality that "imposes unnecessary and disproportionate restrictions on free speech", and that "does not reflect the interests of a modern democratic society".

[21] Two of the factors that were identified as key contributors to the "chilling effect" of libel law were its burdensome process and the high costs of defamation litigation.[20] The Act was intended to address such concerns by ending the presumption of trial by jury in defamation cases, and also by introducing a "seriousness" threshold that provides that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".[21] This provision is based on the common law principles developed in *Jameel* and subsequent cases.

Judicial consideration of the *Jameel* principle in New Zealand

[22] The *Jameel* principle has been considered in a number of recent New Zealand cases. In *Karam v Parker*,[22] which concerned defamation on the internet, the self-represented defendants cited *Jameel* as a ground for strike-out. Associate Judge Sargisson distinguished the case on its facts, noting in particular the "forum shopping" context in which *Jameel* arose.[23] As will be apparent from the above discussion, however, the reasoning in *Jameel* is not confined to such a context. As Associate Judge Bell stated in the judgment under review, "[a]n application does not

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18 *Smith v ADVFN Plc* [2008] EWHC 1797 (QB) at [14]-[17], referred to in *Rana v Google Australia Pty Ltd* [2013] FCA 60 at [71].

19 Alastair Mullis and Andrew Scott "Tilting at Windmills: the Defamation Act 2013" (2014) 77 MLR 87 at 87 (footnotes omitted).

20 At 104.

21 See s 1(1).

22 *Karam v Parker* HC Auckland CIV-2010-404-3038, 29 July 2011.

23 At [52]-[54].

have to show that there is some other more appropriate forum. An abuse of process may be shown in a case with no foreign element".[24]

[23] The applicability of the *Jameel* principle was also considered in *Deliu v Hong*,[25] which involved litigation between two lawyers, Mr Deliu and Mr Hong, both of whom claimed that the other had defamed them. Associate Judge Bell struck out the claims as frivolous.[26] He did not refer to *Jameel* in his decision.[27] He noted in the judgment under review, however, that he was not aware of *Jameel* when he gave his decision in that case.[28] Mr Deliu succeeded in a review application. Courtney J upheld other parts of the Judge's decision, but for different reasons.[29] On a later strike-out application by Mr Hong, Associate Judge Osborne held that *Jameel* did not apply in New Zealand and, even if it did, he would not have applied it to strike out Mr Deliu's claim.[30]

[24] The application of *Jameel* in New Zealand was next considered by Ronald Young J in *Moodie v Strachan*.[31] His Honour stated:

> [60] I see no reason why New Zealand courts would not be prepared to stay (or strike out) civil proceedings that cannot serve the legitimate purpose of the cause of action pleaded. In defamation this is typically the protection of the plaintiff's reputation. But real caution would need to be exercised where it was proposed to end a litigant's access to the Courts.

On the particular facts of the case before him, however, he held that the *Jameel* principle did not apply.

[25] In *Ware v Johnson* Associate Judge Sargisson found that the relevant publications were protected by qualified privilege (and that there was no real prospect of that privilege being rebutted under s 19 of the Defamation Act 1992).[32] She accordingly concluded that she did not need to apply the *Jameel* principle. She

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24 Above n 1, at [75](e).
25 *Deliu v Hong* [2011] NZAR 681 (HC).
26 At [22] and [40].
27 Associate Judge Bell later released a postscript to the judgment in which he recognised the *Jameel* decision and, in particular, its consistency with the approach he took in that case: at [42]-[43].
28 Above n 1, at [77](c).
29 *Deliu v Hong* HC Auckland CIV-2010-404-6349, 21 December 2011 at [35].
30 *Deliu v Hong* [2013] NZHC 735 at [192]-[194].
31 *Moodie v Strachan* [2013] NZHC 1394 at [54]-[68].
32 *Ware v Johnson* [2014] NZHC 892 at [35]-[39].

observed, however, that it may otherwise have been an appropriate case in which to apply the *Jameel* principle.[33] She stated:[34]

> [46] I consider that *Jameel* serves a valuable objective in terms of preventing the defamation action's use for illegitimate purposes, and may help counteract some of the problems entailed by the fact that defamation is often easy to establish and difficult to defend … the New Zealand High Court Rules are similar enough to the English Civil Rules to justify striking out proceedings that cannot serve the legitimate purpose of the cause of action pleaded. … The overarching consideration – the essence of the issue – is abuse of process. The essential question should be, as it was in *Jameel*, whether the action was really aimed at protection of the plaintiff's reputation, which is the interest that defamation protects; or whether the action served some other objective, or was so insignificant and ineffective that it would be a waste of the Court's resources to hear the claim.
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> …
>
> [48] … I consider that a Judge dealing with the issue in future might need to address the balance between preventing abuse of process and preserving plaintiffs' right to be heard; and the potential effects of the introduction of the *Jameel* rule on the rule that special damage is not required for an action in defamation.

[26] In *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* Dobson J relied on English authority[35] to recognise and endorse a minimum threshold of seriousness.[36] His observations were obiter, however, as the plaintiff failed due to its inability to establish pecuniary loss as required under s 6 of the Defamation Act.[37]

[27] Prior to the present case, the only case in which the *Jameel* principle had been applied in New Zealand was a District Court decision of Judge T R Ingram: *Russell v Matthews.*[38] That case involved what the Court described as:[39]

> … indubitably defamatory remarks about the plaintiff in correspondence with a professional standards body which had a supervisory jurisdiction over the plaintiff's professional conduct, and [where] publication was also made to the plaintiff's father.

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33 At [47].
34 (Footnotes omitted).
35 In particular, see *Thornton v Telegraph Media Group*, above n 17.
36 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, (2015) 14 TCLR 149 at [120] and [222].
37 At [222].
38 *Russell v Matthews*, above n 4.
39 At [1].

[28] Notwithstanding the prima facie defamation of the plaintiff, Judge Ingram applied the *Jameel* principle to strike out the claim in its entirety as an abuse of process. His Honour accepted the defendant's submission as to the "infinitesimally small reputation loss" associated with the publications at issue.[40] It was held that r 15.1(1)(d) of the District Courts Rules 2014 (which mirrors r 15.1(1)(d) of the High Court Rules 2016) was a "suitable jurisdictional platform" on which to adopt *Jameel*.[41] In effect, the open texture of r 15.1(1)(d) leaves room for the courts to incrementally adopt new grounds of abuse of process, as required.

[29] In summary, it has been recognised in New Zealand case law to date that there may well be circumstances in which the application of the *Jameel* principle would be appropriate. However, with the exception of *Russell v Matthews*, it has either not been necessary to apply the principle (because, for example, proceedings were struck out on other grounds) or application of the principle was unwarranted on the facts of the case. In only one case (*Deliu v Hong*) does the Court appear to have expressly rejected the application of the *Jameel* principle. The observations in that case were obiter, however, given that the Judge was not satisfied that the principle applied on the facts of that case, in any event.[42]

The decision under review

[30] In the decision under review, Associate Judge Bell concluded that the *Jameel* principle applies in New Zealand, and relied on it to strike out aspects of the proceeding. He observed that:[43]

> The English reliance on the Human Rights Act and the Civil Procedure Rules is echoed in New Zealand: by reducing an unnecessary restriction (not demonstrably justifiable in a free and democratic society – s 5) on the freedom of expression under the New Zealand Bill of Rights Act 1990 and by the objective of the High Court Rules of securing the just, speedy and inexpensive determination of any proceeding. Access to the court to obtain vindication is not to be taken away lightly. The *Jameel* principle is a basis for strike out for abuse of process in New Zealand, so long as the power is used with due care.

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40 At [4].
41 At [5].
42 Above n 30, at [194].
43 Above n 1, at [78] (footnotes omitted).

[31] The Judge noted that a claim may be struck out as disproportionate even if the plaintiff otherwise has an arguable case.[44] The proceeding may also be struck out on an interlocutory application.[45] Further, the circumstances for finding that a claim is trivial under *Jameel* are not limited, and go beyond the circumstances of limited publication that arose in *Jameel* itself.[46] Nor is some element of "forum shopping" required.[47] A court must, however, exercise particular care before striking out an arguable case.[48]

[32] Applying the *Jameel* principle to this case, the Judge concluded that continuance of the claim against Mr Culpan was disproportionate, given that Ms Opai will be able to obtain full vindication (if warranted) by pursuing her claim against the Attorney-General, who has accepted that the Crown is vicariously liable as Mr Culpan's employer.[49]

[33] The Judge also struck out the claim relating to the draft performance appraisal (see [7] to [8] above) as *Jameel* disproportionate, for reasons set out further at [84] below. He declined to strike out the claims relating to the briefing paper, the 258 report and the 12 July diary note as *Jameel* disproportionate.[50] The Judge did, however, find that some of the pleaded defamatory meanings were not available, but granted leave to re-plead those aspects of the claim (which Ms Opai has now done).[51]

[34] His Honour also struck out the claim in relation to the 5 November diary note (see [14]-[15] above) as *Jameel* disproportionate. He considered that if all that Ms Opai can properly allege is that the statement means she is a poor timekeeper, then the matter is trivial. Even if she could overcome the defence of qualified privilege, "the effort of proving it would not be worthwhile".[52]

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44 At [75](a).
45 At [75](b).
46 At [75](f).
47 At [75](e).
48 At [75](g).
49 At [87].
50 At [92].
51 At [128](d)-(f).
52 At [91].

[35] The present application challenges the Judge's decision to strike out as an abuse of process all claims against Mr Culpan, and also his decision to strike out the claim against the Attorney-General relating to the draft performance appraisal.

Does the *Jameel* principle apply in New Zealand?

[36] Rule 15.1(1)(d) of the High Court Rules provides that the court may strike out all or part of a pleading if it is an abuse of the process of the court. I must determine whether, in this jurisdiction, the concept of abuse of process extends to the particular species of abuse identified by the English Court of Appeal in *Jameel.*

[37] As set out in the extract from *Jameel* quoted at [17] above, the English Court of Appeal was influenced by two particular developments in English law in reaching its decision:[53]

(a) the introduction of the Civil Procedure Rules 1998 (UK); and

(b) the enactment of the Human Rights Act 1998 (UK).

[38] Mr Woods, for Ms Opai, submitted that the Judge erred in concluding that the *Jameel* principle applies in New Zealand. He argued that New Zealand's procedural rules and human rights legislation differ materially from those which influenced the Court in *Jameel*, rendering the application of the *Jameel* principle inappropriate in this jurisdiction. He further argued that application of the *Jameel* principle in New Zealand would be inconsistent with the presumption of damage in defamation proceedings. I will consider each issue in turn.

Do the High Court Rules place less emphasis on litigation proportionality than the Civil Procedure Rules (UK)?

[39] The "overriding objective" of the United Kingdom's Civil Procedure Rules ("CPR") is to enable the court to deal with cases justly.[54] Dealing with a case justly includes ensuring that it is dealt with expeditiously and fairly;[55] allotting to it an

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53 Above n 3, at [55].
54 Rule 1.1(1).
55 Rule 1.1(2)(d).

appropriate share of the court's resources;[56] and dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party.[57] The court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules or interprets any rule.[58]

[40] Mr Woods submitted that there is no similar focus on litigation proportionality in the High Court Rules. Such an argument found favour with the Court in *Deliu v Hong*. Associate Judge Osborne held that although the High Court Rules do provide for the principle of proportionality, this is only in the limited context of discovery and inspection of documents.[59]

[41] Mr McClelland QC, for the Attorney-General, submitted that Associate Judge Osborne had overlooked r 1.2 of the High Court Rules, which provides that the objective of the Rules is to "secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application". Further, the broad similarity between the High Court Rules and the CPR was noted by Ronald Young J in *Moodie v Strachan*. He pointed out, with reference to the CPR that "[f]lexibility and active judicial management of civil litigation are also the hallmarks of the current [High Court] Rules".[60]

[42] In my view, the general aim and trajectory of civil procedure in both jurisdictions has been to improve the overall efficiency and cost-effectiveness of litigation. For example a new Part 7 ("Case management, interlocutory applications, and interim relief"), Subparts 1 to 4, of the High Court Rules came into force on 4 February 2013. Those rules form a critical part of the case management regime that now operates in the High Court. A specified purpose of the case management conference is to ensure that the costs of the proceeding are proportionate to its subject matter.[61]

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56 Rule 1.1(2)(e).
57 Rule 1.1(2)(c).
58 Rule 1.2.
59 Above n 30, at [183]-[187]. These references to proportionality are found in rr 7.1 and 8.2.
60 Above n 31, at [58].
61 Rule 7.1(3)(d).

[43] The new rules were introduced to the legal profession by Justice Winkelmann (then Chief High Court Judge), Justice Fogarty (then Chair of the Rules Committee), Justice Asher and Justice Miller, through a New Zealand Law Society Continuing Legal Education Seminar. In the introduction to the seminar booklet their Honours stated that:[62]

> An underlying objective of the Rules is to ensure that adjudication in the Courts remains the accepted and practical means by which civil disputes may be resolved. This objective is important to ensure that the courts in their civil jurisdiction remain at the heart of our system of civil justice. A necessary condition for a society that exists under the rule of law is that we have a just and efficient court system which deals with civil as well as criminal cases.
>
> The rules are designed to facilitate this objective by achieving *targeted and proportionate case management*, assisting the parties in managing the costs of litigation by focusing case management on discovery and identification and refinement of issues, and by providing prompt hearing dates.

[44] In addition it is stated in the booklet that case management should be:[63]

> … *proportionate* to the subject matter of the proceeding, and in particular its complexity. The type of case management appropriate for ordinary non-complex proceedings may not be the type of case management appropriate for complex proceedings[.]

[45] Similarly, Part 9, subpart 1 of the High Court Rules (as replaced on 4 February 2013), entitled "Briefs, oral evidence directions, common bundles, and chronologies", includes the following overarching objective and scope:[64]

> **9.1 Objective and scope**
>
> (1) When applying the rules in this subpart to a proceeding, the court and the parties must pursue the *just, speedy, and inexpensive determination of that proceeding.*
>
> (2) The parties must also ensure that the briefs and the common bundle are commensurate with the goal of *keeping the cost of the proceeding proportionate to the subject matter of the proceeding*.
>
> (3) The documents to be produced at the trial or hearing and the evidence-in-chief of witnesses must be prepared, produced, and led in accordance with this subpart.

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62 Winkelmann, Asher, Fogarty and Miller JJ "The New High Court Case Management Regime" (paper presented to the New Zealand Law Society, February-March 2013) at 1 (emphasis added).

63 At 2 (emphasis added).

64 (Emphasis added).

[46] I also note that the Rules Committee has recently sought public feedback on proposed amendments to the High Court Rules that would systematise the striking out of claims identified by Registry staff as being potentially abusive or falling within one of the grounds contained in r 15.1(1). Those amendments set out a procedure for such a statement to be referred to a judge prior to being served on the other party. The judge may then decide to strike out the statement of claim, or make other orders disposing of the proceedings or ensuring that the proceeding continues in the normal manner.[65]

[47] The coming into force of the Senior Courts Act 2016 has further enhanced the just, speedy and inexpensive determination of civil proceedings by, amongst other things, introducing a leave requirement in respect of interlocutory appeals from the High Court to the Court of Appeal.[66] Going forwards, the High Court (or Court of Appeal, if leave is refused by the High Court) will be able to consider whether the costs, delay and expense associated with an interlocutory appeal is proportionate to what is at stake. If it is not, then leave may well be declined.

[48] Taking all of these procedural developments into account, I am not persuaded that the courts here should decline to apply the *Jameel* principle on the basis that there is significantly less emphasis placed on the concept of litigation proportionality in New Zealand than in the United Kingdom.

Does New Zealand's differing human rights framework make the application of Jameel *inapt?*

[49] In *Jameel* the Court was influenced by the coming into effect of the Human Rights Act 1998 (UK), which required the courts to administer the law in a manner compatible with the European Convention on Human Rights, insofar as it was possible to do so.[67] Article 10 of the Convention confers a right to freedom of expression.

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65 The Rules Committee *Consultation on Striking out Statements of Claim before Service* (December 2015).

66 Section 56(3).

67 Section 6.

[50] In essence, the Court in *Jameel* held that allowing trivial defamation claims to proceed to trial may be an impermissible infringement of Article 10. A proper balance between the right to freedom of expression and the protection of individual reputation requires courts to stop defamation proceedings that are not serving the legitimate purpose of protecting a claimant's reputation.[68]

[51] Mr Woods submitted, however, that:

> There is no equivalent in New Zealand to the Human Rights Act 1998 (UK). There is no mandatory or prescriptive requirement on New Zealand Courts, as applies in the UK with regards to the EU Conventions. Associate Judge Bell relied upon the New Zealand Bill of Rights Act. He suggests the New Zealand Bill of Rights Act did "echo" the English reliance on the Human Rights Act. This is erroneous for the NZBRA is at the very least a distant cousin.

[52] As Associate Judge Bell observed, however, there are significant similarities between the Human Rights Act (UK) and the New Zealand Bill of Rights Act ("NZBORA"). The right to freedom of expression in s 14 of NZBORA mirrors the right to freedom of expression in Article 10 of the European Convention. Both the Human Rights Act (UK) and NZBORA require courts to interpret law, so far as it is possible to do so, in a way that is compatible with the relevant rights.[69] It is only where Parliament has plainly and unambiguously sought to unjustifiably erode a right or freedom that a court will adopt Parliament's intended meaning.[70] If legislation breaches human rights, the courts in either jurisdiction can declare the legislation to be incompatible with the relevant right. This does not affect the validity of the law, however. Parliamentary sovereignty is maintained.

[53] There do not appear to be any specific differences between the Human Rights Act (UK) and NZBORA that would make it inappropriate to apply the *Jameel* principle in New Zealand. On the contrary, human rights legislation in both jurisdictions places a high value on freedom of expression. Obviously, however, the right to freedom of expression has to be balanced against any competing rights or interests that may arise. This includes, in a defamation context, the right of an

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68 Above n 3, at [55].

69 This is enshrined in s 6 of the New Zealand Bill of Rights Act.

70 New Zealand Bill of Rights Act, s 4. See further *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92] per Tipping J; and Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 1259-1260.

individual to protect their reputation. The *Jameel* principle recognises that in rare cases (involving claims that are trivial or pointless) the right to free speech might take precedence over a person's legitimate interest in protecting their reputation. As Tugendhat J observed in *Lonzim Plc v Sprague*, applying *Jameel*:[71]

> [33] It is not enough for a claimant to say that a defendant to a slander action should raise his defence and the matter go to trial. The fact of being sued at all is a serious interference with freedom of expression …

Is the Jameel *principle inconsistent with the presumption of damage in defamation cases?*

[54] Section 4 of the Defamation Act 1992 codifies the common law position (in libel cases) that it is not necessary to allege or prove special damages (financial losses that the plaintiff can show are directly attributable to the defamation). Reputational harm is presumed to have occurred if defamation is proved.

[55] Mr Woods submitted that the *Jameel* principle is inconsistent with the requirement that there is no need to prove special damages in defamation cases. He submitted that, in effect, the principle puts an evidential burden on the plaintiff in relation to the nature and extent of damage, contrary to established law.

[56] Whether the *Jameel* principle is inconsistent with the presumption of damage is an issue that was squarely before the Court in *Jameel* itself. The Court in that case was asked to abandon the common law presumption of harm on the basis that it was incompatible with the right to freedom of expression. The Court held, however, that a claim being actionable per se (because of the presumption of harm) ought to remain a separate issue from whether a claim is an abuse of process. The presumption of harm should remain, but proceedings where a claimant brings an action for defamation in circumstances where his or her reputation has suffered little or no actual damage should be treated as a form of abuse of process.[72]

[57] Although courts may have historically allowed a plaintiff to take a case to trial even in order to obtain only nominal damages, the Court in *Jameel* recognised

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71 *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB).

72 Above n 3, at [40].

that such cases may now be regarded as an abuse of process – one such example is the 1849 case of *Duke of Brunswick v Harmer*,[73] discussed by the Court in *Jameel*.[74]

[58] I am not persuaded that application of the *Jameel* principle in New Zealand would be inconsistent with the presumption of harm. The law does not make any presumption regarding the amount of damage, as that is an issue for the fact-finder. It merely contemplates that there will be some damage. The damage, however, might be nominal.[75] Notwithstanding the presumption of damage, it is open to a defendant to argue that the likely *amount* of damage, relative to the *costs* of pursuing the proceedings, renders the claim an abuse of process. The presumption of harm simply relieves a plaintiff of the obligation to prove pecuniary loss in order to bring a claim in defamation. It does not insulate a plaintiff, however, from scrutiny over the proportionality of their claim.

Conclusion on whether the Jameel *principle applies in New Zealand*

[59] In my view Associate Judge Bell was correct to conclude that the *Jameel* principle applies in New Zealand. Permitting the court to manage its own processes by reference to litigation proportionality, in rare and exceptional cases, is not an unjustifiable abrogation of a litigant's access to the courts. As in the United Kingdom, increased recognition of the importance of freedom of expression in recent years, combined with procedural reforms which have increasingly focussed on concepts of litigation proportionality, weigh in favour of recognition of the *Jameel* principle in this jurisdiction.

[60] The law of defamation is of ancient origin, with roots dating back to at least the thirteenth century, and probably well beyond.[76] Consistently with its historical

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73 *Duke of Brunswick v Harmer* (1849) 14 QB 185.

74 Above n 3, at [56].

75 In *Reynolds v Times Newspapers Ltd* the jury at first instance awarded Mr Reynolds zero damages in respect of the defamatory statements made by the defendant. The trial Judge, French J, substituted a nominal award of damages of one penny. The jury's verdicts, and the award by French J, were recounted in the Court of Appeal report: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, [1998] 3 WLR 862 (CA) at 876.

76 The Statute of Westminster 1275 (UK) 3 Edw I c 34 provided that:

> … from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm.

antecedents, the law of defamation places an extremely high value on "good name" or reputation. Defamation law developed at a time when there was considerably less focus on individual rights (including the right to freedom of expression) than is now the case. As a result it is relatively easy for a plaintiff to establish a cause of action in defamation. Indeed defamation is a rare example of a strict liability tort, as the burden rests on the defendant to rebut the presumption of falsity. There is no requirement that the statement-maker intended to defame (or that they did so negligently). Once publication is proved the onus shifts to the defendant to prove an available defence, such as truth, honest opinion, or qualified privilege.[77] The plaintiff's position is further bolstered by the presumption of damage.

[61] In recent years, however, there has been increasing recognition that the right to reputation must be carefully balanced against the right to freedom of expression. The United States led the way in 1964 in *New York Times Co v Sullivan* which, for the first time, subjected the law of defamation to the regulation of the First Amendment.[78] Given its differing constitutional framework, developments in New Zealand have proceeded more cautiously. Nevertheless there has been an increasing recognition of the need to carefully balance the right to reputation against the right to freedom of expression. This is evident, for example, in the Court of Appeal's decision in *Lange v Atkinson*, which extended the ambit of qualified privilege so as to encompass political discussion.[79]

[62] Free speech concerns also underpin *Jameel*. Influenced by the enactment of the Human Rights Act 1998 (UK), the English Court of Appeal in *Jameel* recognised that allowing a trivial or pointless defamation case to continue could constitute an impermissible interference with freedom of expression. Indeed, as the learned authors of *Gatley on Libel and Slander* observe:[80]

The Supreme Court of Canada identified that the criminal offence was enforced by the King's Council, and later by the Court of Star Chamber. In the 17th century its enforcement was taken over by the common law courts: *R v Zündel* (1992) 2 SCR 731 at [7].

77 Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Thomson Reuters, NSW, 2011) at 629-631.

78 *New York Times Co v Sullivan* 376 US 254 (1964).

79 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 467-468. See also the Court of Appeal's reconsideration of the matter: *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

80 Alistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [30.48], n 280.

> The question that lies at the heart of the *Jameel* jurisdiction is whether, if the court were to allow the proceedings to continue, it would be sanctioning an interference with freedom of expression which was unnecessary for the protection of reputation, since it was plain that the claimant could not have suffered more than minimal damage to reputation … On their face, such considerations are of course only relevant to defamation, but … the *Jameel* principle has been considered in the context of other causes of action.

The same reasoning applies under NZBORA.

[63] In parallel with the increasing recognition of the importance of freedom of expression in recent years have been the developments in civil procedure that I have referred to above. The concept of litigation proportionality takes into account not only that the resources of the parties are finite, but so are the resources of the court. Preventing trivial or pointless defamation cases from proceeding through the court system enhances overall access to justice, by ensuring the most efficient use of court resources. The *Jameel* principle recognises the important role the court can play in preventing its processes from being abused by the bringing of defamation claims where the costs of the litigation are likely to be grossly disproportionate to any reputational harm suffered. As McCallum J observed in the New South Wales case of *Bleyer v Google Inc LLC*, applying the *Jameel* principle in that jurisdiction:[81]

> [57] Once it is recognised that proportionality between the resources required to determine a claim and the interest at stake is relevant to the exercise of the court's procedural powers, it is a small and logical step to conclude that there will be cases in which the disproportion is so vast as to warrant the stay or dismissal of the proceedings.

[64] Taking all of these matters into account, I am satisfied that the Judge did not err in concluding that the *Jameel* principle applies in New Zealand. Courts will obviously need to proceed with caution, however, as they have done to date. A stay or dismissal of proceedings on proportionality grounds is likely to be granted only in rare cases, given that it impacts directly on a litigant's right of access to justice.

Is it appropriate to apply the *Jameel* principle in a stay or strike-out context?

[65] Mr Woods submitted that, even if the *Jameel* principle does apply in New Zealand, it would be inappropriate to strike out aspects of Ms Opai's claim as *Jameel*

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[81] *Bleyer v Google Inc LLC* [2014] NSWSC 897, (2014) 88 NSWLR 670.

disproportionate. To do so, he submitted, would be contrary to the Supreme Court's observations in *Couch v Attorney-General* that particular care ought to be taken "in areas where the law is confused or developing".[82]

[66] I reject this submission. The Court in *Couch* had been asked to uphold the strike-out of a claim based on negligence, on the basis that there could not have been a duty of care owed to the plaintiff and therefore no reasonable cause of action available. The *Jameel* principle, however, contemplates a valid cause of action, but asks whether pursuing it might nevertheless constitute an abuse of process on the basis that the costs of doing so would be grossly disproportionate.

[67] The *Jameel* principle is predicated on the fact that it is an application to be made by a defendant at an early stage if the proceeding.[83] The very purpose of striking out proceedings at an interlocutory stage is to avoid the costs and delay of proceeding to trial. Rule 15.1(1)(d) of the High Court Rules expressly provides for the interlocutory stay or strike-out of proceedings on abuse of process grounds.

[68] Obviously, as I have already noted, caution is necessary when considering striking out a claim as *Jameel* disproportionate. It is clear, however, that New Zealand courts *have* been cautious about striking out claims on proportionality grounds. The necessary caution has been observed thoroughly.

Can *part* of a claim be struck out as an abuse of process in reliance on the *Jameel* principle?

[69] Mr Woods submitted that it is not appropriate to strike out only part of a pleading (such as the claim relating to the performance appraisal) on abuse of process grounds. However, the ability to strike out part of a plaintiff's claim is enshrined in r 15.1 itself. It provides that the court "may stay all *or part* of the proceeding on such conditions as are considered just".[84] I note that the *Jameel* principle has been used in the United Kingdom to strike out only part of a cause of action.[85]

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82 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
83 Alistair Mullis and Richard Parkes, above n 80, at [30.48].
84 (Emphasis added).
85 *Lokhova v Longmuir* [2016] EWHC 2579 (QB) at [78].

[70] Each case will turn on its own merits. The fact that it is necessary for some parts of a claim to proceed to trial, however, may well impact on the overall proportionality assessment.

Did the Judge err in concluding that it was appropriate to apply the *Jameel* principle in this case?

[71] I now turn to consider whether Associate Judge Bell erred in finding that it was appropriate to apply the *Jameel* principle in the particular circumstances of this case.

Did the Judge err in striking out the claims against Mr Culpan?

[72] The Judge struck out the entire claim against Mr Culpan as "*Jameel* disproportionate".[86]

[73] Ms Opai sought only compensatory damages from Mr Culpan, but compensatory *and* exemplary damages from the Crown, on the basis of its vicarious liability as Mr Culpan's employer. There was accordingly no relief sought against Mr Culpan personally that Ms Opai could not obtain from the Crown.

[74] The Judge found that the exemplary damages claim against the Crown was untenable. Such a claim could only be made against Mr Culpan personally.[87] The Judge considered a belated application (during the hearing) from Ms Opai to amend her pleading to include a claim for exemplary damages against Mr Culpan, seemingly for the sole purpose of keeping him in the proceeding. He concluded, however, that such a course was not appropriate. To obtain an award of exemplary damages Ms Opai would first have to overcome numerous obstacles to establishing liability, including the defence of qualified privilege. She would then need to establish that punitive damages were warranted, in addition to compensatory damages (including aggravated damages). The prospect of achieving this was described as "very much a long shot."[88]

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86 Above n 1, at [87].

87 This was apparently pointed out to Ms Opai repeatedly by the defendants' solicitors prior to the strike-out hearing, but she declined to amend her claim.

88 At [87].

[75] The Judge concluded that keeping Mr Culpan in the proceeding on the remote chance that Ms Opai might be able to make out a case for exemplary damages against him would be *Jameel* disproportionate. It would be unnecessary and inefficient and would add to the overall costs, steps to be taken, and work required by all parties and by the Court.[89]

[76] I find no error in the Judge's reasoning on this issue. Mr Woods relied on Ms Opai's affidavit of 15 March 2017 (filed subsequent to the hearing before Associate Judge Bell) in support of the submission that she had a strong claim to exemplary damages. The contents of that affidavit do not, in my view, support that submission.[90]

[77] Mr McClelland submitted that Ms Opai "seems intent to drag the first defendant through the proceeding as a named party". He questioned her motives for doing so. He noted that Mr Culpan will likely be required as a key witness in any event, given the Attorney-General's affirmative defence of honest opinion. Ms Opai will therefore have the opportunity to cross-examine him.

[78] Mr Rennie QC argued that the only thing that removal of Mr Culpan from the proceeding does is thwart Ms Opai's wish to use these proceedings as a vehicle for her personal grievances against him. He submitted that it is evident from her pleadings, affidavits, and submissions that the proceeding is being used to pursue a personal vendetta against him, founded in her view that he is an intentional architect of her workplace troubles and misfortunes.

[79] The primary reason advanced by Mr Woods for seeking to maintain Mr Culpan as a party to the proceedings in his own right was so that Ms Opai could obtain additional "vindication" from him. Mr Woods submitted that an award of damages against the Crown on the basis of vicarious liability "is no vindication against Mr Culpan at all". This submission overlooks, however, that the aim of

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89 At [86].

90 I provisionally admitted this affidavit during the course of the hearing. It was filed after the due date for filing submissions, without leave. Having now reviewed the affidavit I am not persuaded that it is sufficiently relevant to justify its admission. Further, it would be prejudicial to the defendants to admit it in circumstances where they have not had an opportunity to respond to it, and wish to do so (if it is admitted). The application to admit the affidavit is accordingly declined.

vindication is not punishment of the defendant. Rather, it is the plaintiff's *reputation* that is vindicated. In this case, Ms Opai's reputation will be vindicated (if it was wrongfully harmed in the first place) by a judgment in her favour and an associated damages award. Ms Opai's reputation will not be *more* vindicated if Mr Culpan is also a party to the proceedings.[91]

[80] At this preliminary stage at least, it appears that Ms Opai is likely to face considerable hurdles at trial, including in overcoming the qualified privilege defence. Nevertheless, the Attorney-General's application to strike out the entirety of the claim as an abuse of process on triviality/disproportionality grounds was declined by the Judge. The Attorney-General has not challenged that decision. Ms Opai will therefore have her day in Court. If judgment is entered in her favour, her reputation will be vindicated.

[81] The proceedings are likely to be complex and lengthy, as is common with defamation cases. There has already been an extensive interlocutory and procedural history and a further interlocutory hearing is scheduled to take place shortly. Unfortunately even fairly wealthy litigants can find involvement in defamation proceedings to be financially ruinous.

[82] Taking all the matters I have outlined into account, it is my view that Associate Judge Bell was correct to conclude that this is one of those rare cases where the *Jameel* principle should be applied to strike out the claims against Mr Culpan as an abuse of process. The costs of continuing the proceeding against him (and particularly any further costs that he will have to incur) cannot be justified in circumstances where his involvement in the proceeding will not advance the legitimate purpose of protecting or vindicating Ms Opai's reputation in any material way. Continuance of the proceeding against Mr Culpan is therefore disproportionate in all the circumstances, and is an abuse of process.

[83] For completeness, I note that Mr Rennie also submitted that Mr Culpan could be removed from the proceeding on more traditional grounds, namely that while he

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[91] I note that Ms Opai also has the option of pursuing employment related personal grievances in the Employment Relations Authority, where she also has extant proceedings. The proper ambit of the present proceedings is significantly more limited in scope.

is a possible defendant he is not a *necessary* defendant. His joinder to the proceeding was therefore an abuse of process and he should be struck out as a party. While there may (or may not) be merit in this argument, it is not a matter raised by Ms Opai's review application. I do not therefore propose to address this argument further.

Did the Judge err in striking out the claim relating to the performance appraisal?

[84] The Judge struck out the claim relating to the draft performance appraisal (see [7] to [8] above) as *Jameel* disproportionate, because any injury to Ms Opai's reputation could only have been "fleeting".[92] Further, he held that the appraisal was clearly prepared on an occasion of qualified privilege, which means that liability would only attach if it could be established at trial that Mr Culpan was predominantly motivated by ill will or otherwise took improper advantage of the occasion.[93] In the broader context of an otherwise favourable appraisal, such a claim would be implausible. His Honour concluded:[94]

> Giving Ms Opai the opportunity to show that Mr Culpan was malicious is *Jameel* disproportionate. Her claim based on the performance appraisal should be struck out.

[85] Mr McClelland submitted that the Judge was correct to strike out this aspect of the claim. The performance appraisal was not a publication capable of carrying a defamatory meaning, particularly given that it was only an initial draft. Alternatively, at the very least, the potential defamatory effect of such communication is so diminished that any publication does not cross the triviality threshold.

[86] In my view the relevant passage is capable of bearing a defamatory meaning, although very much at the lower end of the scale. Even so, this aspect of the claim faces formidable obstacles. It was not unfair of the Judge to characterise the claim relating to the performance appraisal as trivial. That is not the end of the matter, however. It must then be considered whether the resources necessary to determine the performance appraisal claim are out of all proportion to the interests at stake. It

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92 Above n 1, at [88]-[90].
93 As per s 19 of the Defamation Act 1992.
94 At [90].

is not clear to me that this requirement is met. That is because the remaining claims will need to proceed to trial, in any event. Given the nature of those claims it is possible, and perhaps likely, that issues relating to the performance appraisal will need to be traversed in evidence. In such circumstances, dealing with an additional (and fairly narrow) cause of action, relating to the performance appraisal, is not likely to add materially to the overall costs of the trial. The incremental costs associated with litigating this claim are unlikely to be sufficiently significant to justify striking it out as *Jameel* disproportionate.

[87] I accordingly find that the Judge did err in striking out the claim relating to the performance appraisal as *Jameel* disproportionate.

Summary and conclusions

[88] In her review, Ms Opai has sought to challenge the applicability of the *Jameel* principle in New Zealand. I have found that the principle does apply. I do not consider that the *Jameel* principle rests uneasily within New Zealand's existing legal and procedural framework.

[89] Developments in recent years, such as the increased focus on litigation proportionality in the High Court Rules and the increasing recognition of the importance of freedom of speech, favour recognition of the *Jameel* principle in this jurisdiction. While a person clearly has a legitimate interest in protecting their reputation, this interest may be subordinated to the right to free speech, where the resources (of both the court and the parties) required to determine a claim are grossly disproportionate to any vindicatory benefit on offer. A strike-out on the basis of *Jameel* abuse of process is likely to be rare, however, given that a litigant's right of access to justice is at stake.

[90] The presumption of damage in defamation cases is not an impediment to recognition of the *Jameel* principle. Rather, such a presumption simply relieves a plaintiff of the obligation to prove pecuniary loss in order to bring a claim. It does not insulate a plaintiff, however, from scrutiny over the proportionality of their claim.

[91] I have also concluded that an application under the *Jameel* principle can be made at the interlocutory stage and can be applied to strike out part of a claim.

[92] Associate Judge Bell was correct to strike out the entire claim against Mr Culpan as *Jameel* disproportionate. There is little or no vindicatory purpose in retaining him in the proceeding. His presence, in addition to the Attorney-General (on behalf of the Commissioner of Police), who accepts he is vicariously liable as Mr Culpan's employer, adds nothing to the proceeding. The costs of continuing the proceeding against Mr Culpan (and particularly the costs that he would be forced to incur) are disproportionate.

[93] I have concluded, however, that the Judge did err in striking out the aspect of Ms Opai's claim relating to the performance appraisal. While it was not unfair of the Judge to characterise this aspect of the claim as trivial, I am not satisfied that pursuing it is *disproportionate.* The additional costs associated with pursuing this aspect of the claim to trial are likely to be minimal, given that the performance appraisal is likely to form part of the background context to the other claims, in any event.

Result

[94] The application to quash the order made at [128](b) of the judgment under review (removing Mr Culpan as a defendant and striking out the proceeding against him) is dismissed.

[95] The application to quash the order made at [128](c) of the judgment under review (striking out Ms Opai's claim regarding the performance appraisal) is granted and that aspect of the claim is reinstated accordingly.

[96] Leave is reserved to file memoranda on costs, if agreement cannot be reached between counsel. Any memoranda by parties seeking costs are to be filed by 9 June 2017. Any memoranda in response are to be filed by 23 June 2017.

Katz J