IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1790
[2018] NZHC 838

UNDER	Section 124 of the District Court Act 2016
BETWEEN	COLIN GRAEME CRAIG Appellant
AND	JACQUELINE STIEKEMA Respondent

Hearing: 23 November 2017

Counsel: LC Bercovitch and J Marcetic for appellant
AJ Romanos for respondent

Judgment: 27 April 2018

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 27 April 2018, at 4 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date...............

Solicitors: Chapman Tripp, Wellington
Langford Law, Wellington

Introduction

[1] Colin Craig sues a former employee, Jacqueline Stiekema, for what he says are defamatory publications made by her about him. The claim was originally brought in the High Court, but was later transferred to the District Court. In July 2017, the District Court Judge struck out Mr Craig's claim in its entirety.[1]

[2] Mr Craig now appeals that decision. He argues the Judge erred in two principal respects in striking out his claim:

(a) First, in striking out the claim on the basis of "the *Jameel* principle". Under this principle, a prima facie actionable claim may be struck out as an abuse of process, because the harm allegedly involved, the damages likely to be awarded and/or the vindication likely to be achieved will be minimal, even if the claim were successful.[2] Mr Craig says his claim falls well outside the principles discussed in *Jameel.*

(b) Secondly, the District Court Judge made findings of fact on the basis of contested affidavit evidence, when to do so is inappropriate on a strike-out application.

[3] Ms Stiekema supports the District Court judgment and opposes the appeal.

Background

[4] Mr Craig and Ms Stiekema were formerly colleagues. From 2003 to 2007, Ms Stiekema worked for a company operated by Mr Craig. An employment dispute arose between the parties after Ms Stiekema's resignation, which was resolved by the Employment Relations Authority in 2007.

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1 *Craig v Stiekema* [2017] NZDC 15914.

2 A reference to the principles established in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, as summarised by France J in *X v Attorney General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365 at [12]. This is discussed further below.

[5] The statements giving rise to Mr Craig's defamation claim occurred in or around September 2015. There are three causes of action, each relating to an alleged defamatory publication. The total quantum of damages sought is $240,000 plus costs.

[6] Mr Craig's first cause of action relates to an interaction between Ms Stiekema and Mr John Stringer on Facebook. Mr Stringer is a former board member of the Conservative Party, a political party formerly led by Mr Craig. On 3 September 2015, Ms Stiekema and Mr Stringer engaged in the following dialogue on Mr Stringer's Facebook page:

> **Ms Stiekema**: We support you John – you are one of the very few that stands up against him! Well done! I did it and it caused me lots of pain and I did not even manage to stop him with what he does!!!!!!
>
> **Mr Stringer**: Thank you Jacky, I really appreciate your email. What was your experience? (IM me privately if you prefer).
>
> **Mr Stringer**: I remember the Zacchaeus thing, and your suit. You were very brave.
>
> **Ms Stiekema**: And I bet he never told you the full story?
>
> **Mr Stringer**: No, never did.

[7] Mr Craig's second cause of action relates to an email he says Ms Stiekema sent to Mr Stringer on or about 28 September 2015. In part of that email, Ms Stiekema allegedly wrote:

> You are quite correct in your descriptions of Mr Craig's behaviour in dealing with people who oppose him in any way. His fraudulent activities chiefly rely on blackmail and other tactics are to discredit, isolate and threaten any opposition.

[8] Ms Stiekema denies being the author or sender of the email concerned.[3]

[9] Mr Craig's third cause of action relates to several publications made leading up to, or around, 18 September 2015. As pleaded, Mr Craig says that Ms Stiekema wrote that:

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3 I note that there is no such positive denial in Ms Stiekema's statement of defence as presently pleaded. However, her affidavit evidence filed on the strike-out application makes it clear she denies sending the email. Mr Craig's opposition to the strike-out application, and this appeal, proceeded on the basis that a live issue is whether Ms Stiekema did send the email.

> (a) "The CP [Conservative Party] has been funded with stolen money, thousands and thousands every month";
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> (b) She [Ms Stiekema] was so badly bullied by Mr Craig that "he bullied her to ill-health";
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> (c) She [Ms Stiekema] was so badly bullied by Mr Craig she "couldn't even drive past the castle for years"; and
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> (d) "The documents I have in my possession … evidence fraud … I consider this offending to be serious".

[10] Ms Stiekema also denies making these statements.

[11] In relation to the publications underpinning each of the second and third causes of action, Mr Stringer (to whom the publications were sent) says (in affidavits filed on the strike-out application) that he knows who authored the publications complained of and says it was not Ms Stiekema.

[12] The alleged defamatory meanings of the statements giving rise to each cause of action have been pleaded. Mr Craig alleges the statements suggest, inter alia, that he:

(a) is unethical;

(b) is dishonest;

(c) has committed fraud;

(d) has blackmailed people in order to get away with fraud; and

(e) is corrupt.

[13] Mr Craig filed his statement of claim against Ms Stiekema on 30 November 2015, in order, he says, to restore his reputation. On 11 October 2016, Ms Stiekema applied to strike out Mr Craig's claim. That application was later amended (and filed on 24 March 2017) following amendments to the pleadings. Though the claim and

application were originally filed in the High Court, the proceedings were, as noted, transferred to the District Court in March 2017.[4]

[14] Ms Stiekema's strike-out application pleaded:

(a) Mr Craig's claim as a whole is an abuse of process under the *Jameel* principle;

(b) The claim is otherwise frivolous, vexatious or an abuse of process;

(c) The words pleaded under the first cause of action were not capable of giving rise to the pleaded meanings;[5]

(d) If the words in the first cause of action were capable of defamatory meanings, they could not have caused serious reputational harm to the plaintiff; and

(e) The second and third causes of action are speculative, unfounded and otherwise defective.

District Court decision

[15] The Judge heard the strike-out application on 12 July 2017 and issued a reserved judgment on 31 July 2017. In his judgment, he provided a detailed background and set out the defamatory statements as pleaded. The Judge then assessed the *Jameel* principle and its application in New Zealand.

[16] In *Jameel*, the claimant complained that an online publication of the Wall Street Journal had implied he had funded Al-Qaeda.[6] Evidence established that only five online subscribers had read the publication in issue and, of those five, three were

4 *Craig v Stiekema* [2017] NZHC 614.
5 The Judge found it arguable that the words pleaded under the first cause of action were capable of giving rise to the pleaded meanings (at [34]). There is no cross-appeal by Ms Stiekema against that finding.
6 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

associated with Mr Jameel. The Judge summarised the decision of the Court of Appeal of England and Wales as follows:[7]

> [16] The Court struck out the claim as an abuse of process. It acknowledged the obligation of the Court in dealing with cases justly and keeping a proper balance between the right to freedom of expression and the protection of individual rights. The Court held that it was required to stop, as an abuse of process, defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation which included compensating the claimant only if that reputation had been unlawfully damaged; the test was whether a "real and substantial tort" had been established. The Court held that the publication within the jurisdiction was minimal and did not amount to a real and substantial tort, that the damage to the claimant's reputation was insignificant and the facts did not justify the grant of an injunction prohibiting further publication. It concluded that it was disproportionate and an abuse of process for the claimant to proceed with his claim.

[17] The District Court Judge then discussed *Opai v Culpan*,[8] in which Katz J had concluded the *Jameel* principle applies in New Zealand, and *X v Attorney-General (No 2)*,[9] in which Simon France J adopted Katz J's reasoning.

[18] The Judge then outlined the relevant principles for strike-out generally. He noted the case must be so clearly or certainly bad that it should not proceed,[10] and although the evidence was generally not considered alongside the pleadings, "there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further."[11]

[19] The Judge's summary of the evidence drew on four affidavits filed by Ms Stiekema, two affidavits from Mr Stringer and at least one affidavit filed by Mr Craig. Aspects of Mr Craig's evidence were called into question, for example, for being circumstantial[12] and for conflicting with the affidavits of Mr Stringer and Ms Stiekema. The Judge stated that he chose not to reach a final conclusion on the issue of conflicting evidence,[13] preferring to reach his decision on the basis of the *Jameel* principle. However, in the course of examining the evidence, the Judge

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7 *Craig v Stiekema* [2017] NZDC 15914.
8 *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142.
9 *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365.
10 Citing *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
11 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.
12 *Craig v Stiekema* [2017] NZDC 15914 at [25].
13 At [32].

expressed considerable doubt about the evidential strength of Mr Craig's case in any event:

> [31] Mr Craig's response, though counsel in submission, was that the allegedly conflicting evidence between Mr Craig and Ms Stiekema must be tested at trial for the issue to be resolved. **I can see little point in him doing so.** While admitting the statements on which the first cause of action is based were made by her, Ms Stiekema has steadfastly denied making the statements on which the second and third causes of action are based. She is supported in that by Mr Stringer who has produced compelling evidence that another person altogether is the author of those statements. **I regard it as highly unlikely that any different conclusion would be reached at trial.** I have serious misgivings that it would be appropriate to keep these proceedings alive, merely to provide an opportunity to test this evidence by cross-examination.
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> (Emphasis added)

[20] As noted, the Judge's final conclusion on the strike-out application was reached on the basis of the *Jameel* principle. The Judge considered that the statements on which the first cause of action was based had been the subject of "extremely limited" dissemination and "within the scope of dissemination in the *Jameel* case."[14] The Judge further accepted that Ms Stiekema's statements on the first cause of action had been "no more than a drop in the ocean'" and their effect on Mr Craig's reputation was regarded as minimal.[15] The Judge concluded:

> [35] Taking all of these matters into account **and** further the unlikelihood of Mr Craig establishing that Ms Stiekema made the statements upon which the second and third causes of action are based, in my view no serious tort has been established that would justify the claim proceeding to trial. The costs associated with a trial that would occupy of the order of five days, perhaps more, are simply not justified.
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> (Emphasis added)

[21] The proceedings were therefore struck out in their entirety "particularly because of the extremely limited dissemination of the admitted statements and the unlikelihood that they would have any effect whatsoever on Mr Craig's reputation."[16]

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[14] At [33].
[15] At [34].
[16] At [36].

Submissions on the appeal

For Mr Craig

[22] Mr Marcetic submits on behalf of Mr Craig that the Judge erred in his approach to the *Jameel* principle, because recent High Court authority suggests the principle must be approached with considerable caution before a litigant's access to justice should be denied.[17] He argues the Judge fell into error in four respects, by:

(a) Concluding that dissemination of the relevant statements in relation into the first cause of action "has been extremely limited and within the scope of the dissemination in the *Jameel* case";[18]

(b) Concluding that the relevant statements would have had a minimal effect on Mr Craig's reputation;

(c) Determining "the unlikelihood of Mr Craig establishing that Ms Stiekema made the statements upon which the second and third causes of action are based";[19] and

(d) Concluding that the costs of a potential trial of the issues was disproportionate to the harm caused to Mr Craig's reputation.

[23] On the first of the above points, Mr Marcetic submits that the effect of the Judge's decision was to reverse the burden of proof. A publisher of a defamatory statement bears the burden of rebutting the presumption that a defamatory statement has been read.[20] It is submitted therefore that, in a *Jameel* context, and in the context of an application to strike-out, it was for Ms Stiekema, not Mr Craig, to show that there has been limited dissemination. Mr Marcetic argues that the Judge considered the post on Mr Stringer's Facebook page meant it was clear only two people saw the comments, but in truth, this allows countless others to receive the publication. As

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[17] Citing *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218. I note that this decision came out a little over two months after the District Court's judgment in these proceedings.

[18] *Craig v Stiekema* [2017] NZDC 15914 at [33].

[19] At [35].

[20] Mr Marcetic relies on *Sellman v Slater* [2017] NZHC 2392 at [65] as authority for this proposition.

such, the only appropriate conclusion was that *at least* two people read the relevant post and it was not clear how many other people may have read it. Mr Stringer says that he had around 200 Facebook friends at that time. The post would also have been visible, it is submitted, to Ms Stiekema's Facebook friends, and all the friends of the individual who liked Mr Stringer's post on Facebook. It is acknowledged Mr Craig would have the burden of proving at trial the extent of the dissemination. But at the strike-out stage, it was submitted that it was for Ms Stiekema to show the dissemination was not extensive.

[24] Secondly, Mr Marcetic argues that the damage to Mr Craig's reputation was not minimal. In his submission, there are two aspects to this point: first, whether the statements are capable of bearing a defamatory meaning; and, secondly, whether the effect of the statements was more than minimal. As noted, the Judge found for the purposes of strike-out that the words could be defamatory. It is submitted, however, that the Judge gave insufficient weight to the broader context in which the statements were made (a multilateral attack on Mr Craig's reputation). Additionally, counsel argues existing negative publicity surrounding Mr Craig was not relevant — evidence of a plaintiff's bad reputation goes to the mitigation of damages but should not, it is submitted, prevent the defamation claim from being brought.

[25] Thirdly, and in the context of the second and third causes of action, it is submitted that it was inappropriate for the Judge to have reached conclusions on the evidence at the strike-out stage. Extensive written submissions have been made addressing why the Judge could not rightly, in counsel's submission, conclude that there was "incontrovertible evidence" establishing Ms Stiekema did not make the statements in issue in the second and third causes of action.

[26] Lastly, Mr Marcetic argues that application of the *Jameel* principles does not warrant striking out the claim. The proceeding is said to be a necessary step to vindicate Mr Craig's reputation and counsel anticipates that a two to three-day trial is necessary to do so. That would not, it is submitted, incur costs that are grossly disproportionate to the harm involved.

For Ms Stiekema

[27] Addressing the first of the four points made in submissions for Mr Craig, Mr Romanos submits on behalf of Ms Stiekema that it was inexorable for the Judge to infer that any dissemination of the statements forming the first cause of action was "extremely limited". It is submitted the arguments advanced for Mr Craig simply speculate on who *could* have read the posts and that such information about who could view the Facebook post amounts to evidence from the bar. Rather, it is submitted that obtaining accurate data on who read the posts would require third-party discovery and likely expert evidence, taking the prosecution of the first cause of action into the realm of being "grossly disproportionate", as the Judge concluded.

[28] On the second point, Mr Romanos argues that, taking into account the gravity of the words (which in his submission is very minor, if bearing a defamatory meaning at all), the minimal dissemination and other evidence before the Judge relating to Mr Craig's reputation (some 600 news articles), it was open to the Judge to find the damage to Mr Craig's reputation was minimal.

[29] In this context, Mr Romanos raises on appeal what is submitted to be a "closely related" principle to the *Jameel* principle, namely the "threshold of harm" that should be recognised before a defamation suit is able to proceed. The principle, which originated in the United Kingdom before it was superseded by statute,[21] has been subject to conflicting obiter in New Zealand. Putting aside *Jameel* (which proceeds on an assumption of an *actionable* claim, but one which is disproportionate to the effort and cost to prosecute it), several New Zealand cases are advanced by Mr Romanos which illustrate different approaches to the necessary level of harm to be met for a defamation proceeding to be actionable in the first place. Mr Romanos submits the Judge's decision was consistent with even the lowest of these thresholds.

[30] Mr Romanos submits that Mr Craig has produced no evidence to support his contention that Ms Stiekema sent the emails complained of under the second and third causes of action. By comparison, Mr Stringer and Ms Stiekema have both repeatedly

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[21] See *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985 (QB) and, subsequently, s 1(1) of the Defamation Act 2013 (UK).

deposed that the statements were not made by Ms Stiekema. Analogies are made between the test for an application for summary judgment and the test for strike-out, which Mr Romanos submits support finding that there was a lack of any proof that Ms Stiekema had published the emails. Accordingly, Mr Romanos submits the Judge was right to conclude that there was little likelihood of Mr Craig establishing that the material which is the subject of the second and third causes of action had been written and published by Ms Stiekema, and to take this view into account when striking out the claim as a whole on the basis of *Jameel.*

[31] Mr Romanos further submits the estimated trial length put forward by Mr Craig should be rejected and that a trial lasting more than five days is a more accurate estimate. As such, the Judge's view that the harm caused to Mr Craig is disproportionate to the costs of proceeding to trial should be upheld. Reliance is placed on *Russell v Matthews*, in which Judge Ingram found that a two-day trial was disproportionate to the harm suffered.[22] Coupled with the delay in bringing the proceeding to trial and Mr Craig's other litigation commitments, Mr Romanos submits it is highly doubtful a trial would be possible before 2019.

[32] Arguing in the alternative, Mr Romanos seeks to support the Judge's decision on other grounds. He submits that the Judge did not address the other grounds on which Ms Stiekema sought strike-out (for the proceedings being frivolous, vexatious or an abuse of process) and that these alternative grounds equally support Mr Craig's claim being struck out. In particular, it is submitted the proceedings are an abuse of process in two respects: first, it is submitted "Mr Craig has been motivated to sue Ms Stiekema to avenge his defeat in the [Employment Relations Authority]"; and, secondly, it is submitted this is a fishing expedition in order to further Mr Craig's proceedings against Mr Stringer.

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22 *Russell v Matthews* [2016] NZDC 17743.

Discussion

Approach to appeal

[33] This appeal is by way of rehearing.[23] An appellate court must reach its own view on both the facts and law. If the opinion of the Court differs from the conclusion reached by the District Court, the appeal must be allowed.[24] The Court should also reach its opinion by applying the law as it stands at the time of the appeal, not at the time of the original hearing.[25]

[34] This latter point means that Palmer J's recent decision in *Sellman v Slater*, delivered after the District Court decision, may be taken into account, though I am of course not bound by it.[26]

Approach to strike-out application

[35] There is no dispute as to the proper approach to be taken to a strike-out application. A claim should only be struck out where a court can be certain that it cannot succeed[27] because, for example, it is "so clearly untenable".[28] The jurisdiction to strike out is therefore exercised only in clear cases where the court has the requisite material.[29] And as Elias CJ observed in *Couch v Attorney-General*, "[p]articular care is required in areas where the law is confused or developing."[30]

[36] It is also clear that a court is entitled to receive affidavit evidence on a strike-out application, as the Judge did in this case. However, strike-out applications are determined "on the assumption that the facts pleaded in the statement of claim are true"[31] and, as the Court of Appeal observed in *Attorney General v McVeagh*:[32]

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23 High Court Rules 2016, r 20.18.
24 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
25 *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (SC) at 490.
26 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218.
27 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.
28 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.
29 At 267 per Richardson P.
30 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
31 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267 per Richardson P.
32 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

> [The court] will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleadings, for a striking-out application is dealt with on the footing that the pleaded facts can be proved. But there may be a case where an essential factual allegation is so **demonstrably contrary to indisputable fact** that the matter ought not to be allowed to proceed further.
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> (Emphasis added)

The Jameel principle

[37] The *Jameel* principle has been considered in three recent New Zealand decisions: Katz J's decision in *Opai v Culpan*;[33] Simon France J's decision in *X v Attorney-General*;[34] and Palmer J's decision in *Sellman v Slater*.[35]

[38] In terms of an overview of the *Jameel* principle, I can do no more than respectfully adopt Katz J's summary as set out in *Opai v Culpan*:[36]

> [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.
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> (Emphasis added, footnote omitted)

[39] The decision of Sharp J in the High Court of England and Wales provides a useful summary of the law in the United Kingdom and its developments subsequent to *Jameel*:[37]

> [30] As both counsel accepted, the Court is being asked to exercise a draconian power and should only do so in an exceptional case. When considering whether that power should be exercised, it is not normally helpful to make detailed reference to the facts of other cases in which the court was invited to strike an action out as abuse. As Mr Justice Eady pointed out in

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33 *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142.

34 *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365.

35 *Sellman v Salter* [2017] NZHC 2392.

36 *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142.

37 *Haji-Ioannou v Dixon* [2009] EWHC 178 (QB).

Mardas v New York Times Company [2008] EWHC 3135 at [15] "what matters is whether there has been a real and substantial tort within the jurisdiction (or arguably so). This cannot depend upon a numbers game, with the court fixing an arbitrary minimum according to the facts of the case."

[31] **Publication of a libel or indeed a slander, to one person may be trivial in one context, but more serious than publication to many more in another.** Much depends on the nature of the allegation, and the identity of the person about whom and the person or persons to whom it is made. To that extent, the decision in each case is "fact sensitive". **However, the court should not be drawn into making its decision on the basis of contested facts material to the issue of abuse which ought properly to be left to the tribunal of fact to decide.**

…

[43] I bear in mind the expense this case will undoubtedly take to try. But it would not be right to strike out an action as an abuse, merely because the costs are high, or considerably higher than the amount that might be recovered at trial. That is, unfortunately, commonplace in libel litigation. The matter must be looked at "in the round." Adopting that approach, I am unable to conclude as matters stand at this stage, applying the principles identified by the Court of Appeal in *Jameel,* that Sir Stelios has nothing to gain from this action, or that the potential benefits to Sir Stelios of continuing with his claim are so outweighed by the expense and time which the case will undoubtedly take to try it that the court should strike the action out now.

[44] On the other hand, the court is under a duty to actively manage cases in accordance with the overriding objective of enabling the court to deal with cases justly. Questions of proportionality and costs are material to that objective. Active case management includes the court helping the parties to settle the whole or part of a case. Here, the parties are, or appear to be actively engaged in the process of negotiating for the purposes of settlement (I assume that the flurry of correspondence to which I have referred was engaged in for that purpose, and not merely to improve either sides' position for the purposes of this application). In the circumstances of this case, I consider that it will assist that process if proceedings were to be stayed for a short period, so that negotiations can continue without the pressure and cost that continuing the litigation process itself necessarily involves. I should add that neither side invited me to take this course, although it was raised as an option by me during the course of argument.

(Emphasis added)

[40] In 2013, the law of defamation in the United Kingdom was substantially amended by the Defamation Act 2013 (UK). Again, I respectfully adopt Katz J's summary of the purpose and effect of the legislative developments in the United Kingdom:[38]

[38] *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142.

> [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:
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>> 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. 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". This provision is based on the common law principles developed in Jameel and subsequent cases.
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> (Footnotes omitted)

[41] A useful summary of how the *Jameel* principle has been applied in practice, and which is considered by commentators also to provide guidance on the application of the new "serious harm" test in the United Kingdom legislation, is provided in the leading English text, *Collins on Defamation*:[39]

> [7.59] Another circumstance in which defamation actions will not be permitted to proceed because of the serious harm threshold in section 1 of the 2013 Act will be **where, having regard to the extent of publication of the statement complained of, the claimant has not suffered and is not likely to suffer serious reputational harm or, in the case of a body corporate, serious financial loss. Apart from the number of publications of the statement in question, other relevant factors will include the seriousness of the imputation conveyed by the statement and the nature of the recipients**.
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> [7.60] Useful guidance in relation to the likely application of section 1 in such cases can be derived by considering the circumstances in which courts have applied the principle derived from *Jameel v Dow Jones & Co Inc.* In that case, the Court of Appeal stayed defamation proceedings in respect of a seriously defamatory statement that had been accessed by **only five persons in England and Wales, three of whom were 'members of the claimant's camp',** on the ground that the cost involved in achieving vindication of the claimant's reputation would be out of all proportion to what would be achieved**.**
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> [7.61] Other cases in which the Jameel principle has been applied to end proceedings include cases based on an e-mail and a letter that had been published **only to the claimant's accountant and daughter**; 101 publications to **only one or two recipients**; a comment posted by the defendant on the claimant's own website which had been relevantly accessible for only four hours and nineteen minutes, with **no evidence that any person had accessed**

[39] Matthew Collins, *Collins on Defamation*, (Oxford University Press, Oxford, 2014).

> **the comment during that time**; an oral statement made by the defendant that could have been overheard by **no more than seven people** and an article appearing in the online edition of a South African magazine in relation to which there was **no satisfactory evidence of publication in England or Wales**; a letter that had been published to **an associate of the defendant and four members of the claimant's camp**, where the recipients were unlikely to have altered their evaluation of the reputation of the claimant as a result of its contents; a blog posting published to **five persons at most**, none of whom knew the claimant; blog postings that, although still accessible, had been commented upon and had **'receded into history'** by the time the defendant was put on notice of their existence; and a statement made by a former employee of the defendant **to a single person** in the course of an 'over-enthusiastic, misguided and ill-intentioned piece of salesmanship' that had caused no apparent damage, and where there was no likelihood of repetition.
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> (Emphasis added, footnotes omitted)

[42] As can be seen from the above summary, the extent of publication features predominantly in determining whether a proceeding ought to be struck out. Unlike more qualitative factors such as the seriousness of the imputations alleged and the likely effect on the plaintiff's reputation, the extent of publication will often be clearly defined. For that reason, it is unsurprising this factor features predominantly in the strike out context.

[43] In New Zealand, in *Opai v Culpan*, Katz J concluded that there was no reason why the *Jameel* principle should not apply in New Zealand. In considering whether the *Jameel* principle was inconsistent with the presumption of harm codified in s 4 of the Defamation Act 1992, Katz J said:[40]

> 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. 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.

[44] Katz J upheld Associate Judge Bell's decision to strike out the claim against the first defendant in that case (at the relevant time a serving police officer), leaving the claim to proceeding against the second defendant (the Attorney-General on behalf of the Commissioner for Police). This was in circumstances where the second

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[40] *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142 at [58].

defendant accepted he was vicariously liable for any statements made by the first defendant in the course of his employment. Katz J concluded that given the claim was to proceed against the second defendant in any event, there was "little or no vindicatory purpose" in retaining the first defendant in the proceeding, particularly when compared to the costs he would be forced to incur.[41]

[45] In *X v Attorney-General (No 2)*, Simon France J adopted Katz J's reasoning and also struck out the proceedings in that case. His Honour noted that on the facts before him, the group of *potential* recipients of the alleged defamatory statements was already very small (potential readers of a recruitment brochure for the Royal New Zealand Navy, who would have background knowledge of the plaintiff), and was reduced even further to those who actually saw the materials in question.[42]

The threshold of harm

[46] In his more recent decision in *Sellman v Slater*, Palmer J also examined the application of the *Jameel* principle in New Zealand. In accepting that the *Jameel* principle *could* apply in New Zealand, his Honour observed:[43]

> [I]t is conceivable there may be some extreme circumstances in which legal proceedings place such a proportionate burden on the litigants and the court system in terms of time and resources that they should not be allowed to proceed as an abuse of court process.

[47] However, he went on to state:

> [60] But I have difficulty with the notion, that seems implicit in *Jameel*, that a court can routinely use its ability to deal with abuses of process to stop a proceeding properly founded in law, because of something the law does not require (insufficient damage to reputation). The right of a person or group to access the courts in order to vindicate their legal rights has a high constitutional value in New Zealand, against however powerful or popular a defendant. …
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> [61] … I consider the rule of law requires that, except in the rarest of circumstances where it is clearly justified, the courts themselves should not override the right of an individual to access the courts to vindicate their actionable legal rights; society's collective financial interests notwithstanding.

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41 At [92].
42 *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365 at [21].
43 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [59].

[48] Palmer J also referred to the decision of the Court of Appeal of England and Wales in *Lachaux v Independent Print Ltd*, which had reviewed and commented on *Jameel*.[44] In that case, Davis LJ for the Court referred to Tugendhat J's earlier judgment in *Thornton v Telegraph Media Group Ltd*, in which the Judge had found that defamation claims were subject to a threshold of seriousness. As Davis LJ cited the test, it was necessary that the statement concerned "(*substantially*) affects in an adverse manner the attitude of other people towards [the plaintiff] or *has a tendency to do so*".[45] Davis LJ contrasted that approach, where the claim was not actionable because it did not meet that test, with the Court in *Jameel* striking out a serious and actionable claim as an abuse of process because it was no longer serving the purpose of protecting the claimant's reputation.[46]

[49] Palmer J did not consider the case before him to be similar to *Jameel, Opai* or *X v Attorney-General,* concluding that there was no evidence to sustain the propositions that the defamatory statements in *Sellman v Slater* had not been read or that the claim as a whole did not advance the legitimate purpose of protecting or vindicating the plaintiff's reputation.[47] His Honour noted that he preferred the approach taken in *Thornton* (as discussed in *Lachaux*) and carried through into the Defamation Act 2013 (UK), over that in *Jameel*.[48] Palmer J also noted that this approach was consistent with earlier observations (albeit obiter) of Dobson J in New Zealand in *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, in which Dobson J had commented that:[49]

> [120] I would be minded to adopt the analysis exemplified in *Thornton* and other recent United Kingdom authorities by recognising a minimum threshold of seriousness. That would require a claimant to meet an objective seriousness threshold as an element of making out the actionability of alleged defamatory statements.

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44 *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594.

45 At [30], citing *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985 (QB) at [96].

46 At [32]; see Palmer J's discussion in *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [53](d).

47 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [58].

48 At [63].

49 *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854, (2015) 14 TCLR 149.

[50] In *Sellman v Slater*, Palmer J preferred a minimum threshold of a defendant showing that "their statement has caused less than minor harm to the plaintiff's reputation", which, if demonstrated, would defeat a defamation claim.[50]

[51] Given the conclusions I have reached on this appeal, I do not consider it necessary or appropriate to express any concluded view on the applicability of the *Jameel* principle in New Zealand or, alternatively, whether a threshold test for an actionable defamation claim should be applied, whether it be serious harm (as per Dobson J) or more than minor harm (as per Palmer J). The District Court Judge in this case struck out the claim on the basis of the *Jameel* principle, and I respectively agree with the approach taken by Katz and Simon France JJ, that this principle can apply in New Zealand (as also ultimately recognised by Palmer J). I must therefore consider whether the Judge was wrong to have struck out the claims in accordance with that principle. And while I may consider the law as it applies as at the date of the appeal, in large respects, the *Jameel* principle and the minimum threshold (whatever it may be) could be said to be a "flip side" of one other. Under the *Jameel* principle*,* the plaintiff's claim is strictly actionable, but will be struck out on proportionality grounds because of the minimal harm involved (often because of very limited dissemination of the alleged defamatory statements). Under a minimum threshold test, the claim is simply not actionable, given the requisite degree of harm has not been established. The residual application of *Jameel* may therefore be where the defendant can demonstrate that the defamation claim as a whole will not advance the legitimate purpose of protecting or vindicating the plaintiff's reputation.

[52] Ultimately, I am satisfied the outcome on this appeal would be no different under either the *Jameel* principle, or a minimum threshold of harm, adopting (for present purposes only) the lower standard set out by Palmer J in *Sellman v Slater*.

Application to first cause of action

[53] The District Court Judge's decision to strike out Mr Craig's first cause of action was heavily influenced by the Judge's conclusion that only two people had read the

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50 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [69].

statements in question. I accept counsel for Mr Craig's submission that this had the effect of "reversing the onus of proof" on a strike-out application.

[54] As can be seen from the above summary of cases in which the *Jameel* principle has been applied, claims have been struck out where there is clear and uncontroverted evidence of the very limited dissemination of the statements in question. Applying this in the context of a minimum threshold of harm approach, given the extremely limited dissemination, a defendant will be able to show that it is not arguable the statements have caused more than minor harm to the plaintiff's reputation.

[55] In this case, however, there is no conclusive evidence advanced by the defendant demonstrating how many people were able to and did read the statements in question. What is accepted is that *at least* two people read the statements. However, on the evidence before the Court, it is not possible to conclude that was the full extent of dissemination.

[56] Mr Romanos, for Ms Stiekema, highlighted the extent of expert evidence which will be required to determine the full extent of dissemination, and the time and cost involved in doing so. I accept these are factors which can be taken into account under the *Jameel* principle.

[57] Similar issues were considered by Eady J in *Mardas v New York Times Co*.[51] In that case, the New York Times had published an online article alleging the plaintiff was a conman and trickster, had made up sexual assault allegations about a Hindu philosopher called Maharishi, and that those false allegations may have precipitated the break-up of the Beatles. A Master in the High Court had struck out the claim and Eady J was required to an appeal. One of the main reasons for the Master's strike out of the claim was that he had found there had only been 177 hard copy publications of the article in the United Kingdom. But Eady J noted that the evidence for this was incomplete:

> [24] Against this background, the Claimant is not prepared to accept that the number of copies of the print version published within this jurisdiction was confined to 177.

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51 *Mardas v New York Times Co* [2008] EWHC 3135 (QB).

> [25] **I am quite satisfied that it was inappropriate for a finding of fact to be made on the scale of publication on the basis of incomplete evidence. It is a matter which should be left to trial**. Furthermore, and in any event, even if the publications were confined to the Defendant's figure, there was no basis for concluding that there was no real and substantial tort.
>
> (Emphasis added)

[58] Eady J went on to state that costs considerations alone do not justify striking out for abuse of process:

> [32] I can understand that investigating the scale of publication further could be very expensive. If this has to be carried out and yields no evidence of a wider readership than the two Defendants currently admit, **then it may well be that the Claimant will have to bear the cost of it – which will almost certainly exceed any sum awarded in damages**. **That is a risk he will have to take.**
>
> [33] More generally, I can also understand the Master's dismay at the cost and effort likely to be involved in a full scale trial of the issues in this case. As he pointed out, the events took place a long time ago and with the passage of time there may be difficulties in obtaining the evidence that would be required for a definitive outcome. The fact remains, however, that allegations of charlatanism and of lying cannot be dismissed as trivial. Moreover, even if defamatory allegations do relate to events of long ago, that cannot be a ground in itself for refusing access to justice: see e.g. *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637, HL. The author clearly thought the allegations to be of topical interest to the readers.
>
> [34] As to the Master's other concerns, Mr Browne invited my attention to the comments of Thomas LJ in *Aldi Stores Ltd v WSB Group Plc* [2007] EWCA Civ 1260 at [24]:
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> > "I do not see how the mere fact that this action may require a trial and hence take up judicial time (which could have been saved if Aldi had exercised its right to bring an action in a different way) can make the action impermissible. If an action can be properly brought, it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim (for which he in any event pays under the system which operates in England and Wales) on the basis that he could have acted differently and so made more efficient use of the court's resources. … The problems which have arisen in this case should have been dealt with through case management."
>
> [35] It is plainly desirable that some sensible accommodation should be reached, so as to avoid a time-consuming and expensive trial, but that is in the hands of the parties. I am satisfied that the circumstances here cannot be characterised as an abuse of process: nor can it be said that it is appropriate to come to a conclusion on the merits of the litigation, at this early stage, on the basis that a jury would be perverse to resolve the contested issues of fact in the Claimant's favour or to find that he has been defamed.

[59] Like in *Mardas v New York Times Co*, the evidence in this case of the extent of dissemination of the statements on which the first cause of action is based is

incomplete. If there is a significant cost to proving a wider dissemination (the burden of proof falling on Mr Craig) that alone does not itself justify striking the claim out as an abuse of process.

[60] In striking out this aspect of Mr Craig's claim, the Judge also took into account the likely minimal effect the statements would have had on Mr Craig's reputation. As noted, he described them as "drop in the ocean".[52] While for present purposes only, I proceed on the assumption that the words complained of bear the defamatory meanings pleaded,[53] I agree with Mr Romanos that, given the generality of the words used by Ms Stiekema, that is a "line call". I agree the comments in question are at the lower end of the spectrum, in terms of their potentially defamatory effect.

[61] Had the first cause of action been the only matter in issue in Mr Craig's claim, this may have been a case where striking out the claim, either on the basis of the *Jameel* principle or because it did not reach the minimum threshold of harm required, would have been appropriate. That may have been so based on the significant time and cost involved in proving and responding to the evidence of the extent of dissemination and the length of trial likely to be required, compared to the likely low level of harm to Mr Craig's reputation as a result.

[62] However, and as Katz J made clear *Opai v Culpan*, the ability to strike out a claim, or part of a claim, on the basis of the *Jameel* principle is ultimately a question of proportionality. Katz J observed, and I respectfully agree, that the fact it is necessary for *some* parts of the claim to proceed to trial may well have an impact on the overall proportionality assessment required.[54] For this reason, I go on to consider the Judge's decision to also strike out the second and third causes of action.

Second and third causes of action

[63] There is no suggestion that the statements which are the subject of the second and third causes of action do not carry the defamatory meanings pleaded. Nor is there any dispute they are serious allegations, of fraud, for example.

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52 *Craig v Stiekema* [2017] NZDC 15914 at [34].
53 A finding of the Judge in respect of which there has been no cross-appeal.
54 *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142 at [70].

[64] Despite the Judge stating he reached no concluded view in relation to whether Ms Stiekema was responsible for these statements, it is clear from [35] of his judgment that he was heavily influenced by what he considered to be a very low likelihood of Mr Craig being able to prove Ms Stiekema authored the statements in question. Ultimately, the only analysis in relation to the second and third causes of action was directed to whether Ms Stiekema authored the statements.

[65] It is apparent from the evidential materials filed before the District Court, and the content of the Judge's decision, that the parties focussed heavily on the factual question of authorship. In addition, on the appeal, substantial aspects of the parties' written and oral submissions were devoted to the same question.

[66] I accept that, to date, Mr Craig has provided no clear evidence that Ms Stiekema was the author of the statements. However, the burden is not on him to do so on a strike-out application. The fundamental basis upon which a strike-out application proceeds is that the facts pleaded in the statement of claim are taken to be true. Moreover, while a court will receive affidavit evidence inconsistent with the pleaded facts, that is only where the pleaded facts are demonstrably contrary to indisputable evidence.[55]

[67] I do not consider Ms Stiekema and Mr Stringer's affidavit evidence falls into this category. That evidence will ultimately turn on matters such as credibility and reliability. No doubt discovery, and possibly third-party discovery, will also be required to determine authorship of the material in question. Further, while there is apparently an email which is said to conclusively demonstrate who provided the information to Mr Stringer, none of the District Court, this Court or the plaintiff has seen that evidence.[56]

[68] I accordingly conclude that the Judge erred in striking out the second and third causes of action on the basis it was unlikely Mr Craig would ultimately be able to

55 See [35] and [36] above.
56 I note, however, that Mr Craig has apparently declined an invitation to take up an opportunity, via his counsel, to view the evidence in question.

prove Ms Stiekema authored the statements upon which those causes of action are based.

[69] Counsel for Ms Stiekema further submits that even if it were subsequently proved Ms Stiekema sent the relevant material to Mr Stringer, the claim pleads that there was publication to Mr Stringer only. I note, however, that the pleadings are somewhat at large on this issue and further amendments have already been flagged. In addition, in her first affidavit filed on the strike-out application, Ms Stiekema says she read the posts (or key aspects of them) on Mr Stringer's Facebook page. By definition, therefore, even on Ms Stiekema's evidence, the posts must have been available to a wider audience than Mr Stringer only. Mr Stringer has said that he has (or had at the relevant time) 200 Facebook friends. It is not clear whether Ms Stiekema was one of those Facebook friends, but that evidence suggests at least another 199 people may have viewed the posts, perhaps more.

[70] Further, it appears on the evidence to date that aspects of the material were republished to Conservative Party board members. Accordingly, while this issue does not appear to have been raised before the District Court Judge, I do not consider it would have been appropriate to strike out the second and third causes of action on the basis that there is indisputable evidence that the statements were published to or read by Mr Stringer only.

[71] As noted, Mr Romanos further submits the claim ought to be struck out because it is bought for a collateral purpose, namely to avenge Mr Craig's earlier defeat in Employment Relations Authority. I do not consider this to be an appropriate ground to strike out the proceedings. As noted, the defamatory statements (at least on the second and third causes of action) are serious. Further, Mr Craig states in his affidavit that he is not bringing the claim for collateral purposes. These disputed factual matters are not an appropriate basis to determine a strike-out application.

[72] Mr Romanos also submits that the proceedings were brought for the collateral purpose of a fishing expedition, to further Mr Craig's proceedings against Mr Stringer. This allegation is based on a request made of Ms Stiekema in settlement discussions to provide Mr Craig with copies of her correspondence with Mr Stringer. Mr Romanos

notes that in his costs judgment, the District Court Judge inferred there was an ulterior motive to that request.

[73] However, even accepting for present purposes there was an ulterior motive in connection with a potential settlement offer, that does not necessarily translate into an ulterior motive in bringing the proceedings. Again, nor do I consider these very factual issues to be an appropriate basis to strike out a claim.

[74] Finally, Mr Romanos submits it was appropriate to strike out the second and third causes of action given Mr Craig has already been publicly vindicated in relation to a similar attack on his reputation by Mr Stringer himself. Mr Stringer had made allegations, inter alia, that Mr Craig was fraudulent in his business dealings. Proceedings concerning those and other allegations were settled and Mr Stringer made a public retraction and apology in relation to the statements in issue. Mr Romanos is correct in submitting that a claim in defamation is to protect a person's reputation, rather than to punish particular individuals. Katz J made similar observations in *Opai v Culpan*.[57] On the basis that Mr Craig's reputation has already been vindicated through his settlement with Mr Stringer, Mr Romanos submits Mr Craig's continued pursuit of the second and third causes of action is an abuse of process.

[75] However, the allegations which underpin the second and third causes of action are wider than those for which Mr Craig has already received an apology from Mr Stringer. The relevant aspect of Mr Craig's claim against Mr Stringer was that he had allegedly been fraudulent in his business dealings. The statements in question in the second and third causes of action suggest that Mr Craig is not only fraudulent in his business dealings, but is fraudulent in relation to the funding of the Conservative Party; that he engages in blackmail; that he is corrupt; that he isolates and threatens any opposition to get away with unethical or fraudulent behaviour; and that he is a serious bully. Accordingly, I do not consider that the vindication Mr Craig received from the resolution of his proceedings against Mr Stringer means the second and third causes of action are an abuse of process.

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[57] *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142 at [79].

[76] For these reasons, I therefore conclude the Judge was wrong to have struck out the second and third causes of action. Given these matters will proceed to trial, I do not consider it would be proportionate under the *Jameel* principle to strike out the first cause of action.

Result

[77] The appeal is allowed. The Judge's order at [36] of his judgment striking out the claim in its entirety is quashed.

[78] Costs ought to follow the event on this appeal in the ordinary way.

[79] It follows that the costs orders made in the District Court on 1 September 2017 are also quashed.

[80] Given experienced counsel now represent both parties, I would hope and expect the parties can agree costs (both in the District Court and the High Court), rather than incur further costs in resolving any residual issues in this regard. I flag my preliminary and non-binding view that there does not appear to be any basis for ordering anything other than scale costs.

[81] If costs cannot be agreed, memoranda may be filed (no longer than five pages); Mr Craig's within 15 working days of this judgment, Ms Stiekema's within a further five working days. I will thereafter determine costs on the papers.

Concluding observations

[82] I should emphasise that the result on this appeal is not necessarily a reflection of the merits of the underlying claim. I have concerns as to the cost and time already incurred in relation to this proceeding, and the cost and time no doubt to be incurred. The result on this appeal reflects the high bar for a strike-out application and the cautious approach to be taken when applying the *Jameel* principle.

[83] Mr Craig will no doubt be advised of the costs implications if his claims are ultimately unsuccessful, including on the basis of both this and the District Court's observations in relation to his claim.

[84] Finally, and as I canvassed with the parties at the hearing, I urge them, with counsel, to consider the most efficient means of resolving the matters in issue. Active case management in claims of this type was at the forefront of both Sharp and Eady JJ's observations in *Haji-Ioannou v Dixon* and *Mardas v New York Times Co*. It may be the case, for example, that a preliminary hearing on whether Ms Stiekema was the author of the publications which are the subject of the second and third causes of action would be an efficient way forward.

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Fitzgerald J