IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-409-575
[2019] NZHC 1363

BETWEEN	COLIN GRAEME CRAIG Plaintiff
AND	JOHN STRINGER Defendant

CIV-2015-404-2524

BETWEEN	JOHN CHARLES STRINGER Plaintiff
AND	COLIN GRAEME CRAIG First Defendant
	HELEN RUTH CRAIG Second Defendant

cont'd: … /2

Hearing:	2 May 2019
Appearances:	J C Stringer in person C G Craig, H R Craig and K E Stitt in person Appearances excused for A M Storr and S D Taylor W Akel, Counsel assisting the Court
Judgment:	17 June 2019

JUDGMENT NO 2 OF PALMER J
(Abuse of process and interlocutory issues)

This judgment is delivered by me on 17 June 2019 at 2.15 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

ANGELA MARIA STORR
Third Defendant

KEVIN ERIC STITT
Fifth Defendant

STEPHEN DYLAN TAYLOR
Sixth Defendant

Summary

[1] Mr Colin Craig sues Mr John Stringer in defamation for saying Mr Craig sexually harassed Ms Rachel MacGregor. In response, Mr Stringer sues Mr Colin Craig and others in defamation, including for saying Mr Stringer lied about the sexual harassment. There are four other proceedings about the same subject: Mr Craig has defended himself in a defamation suit by Mr Jordan Williams and Mr Craig has brought three separate defamation suits, against Mr Cameron Slater, Mr Williams and Ms MacGregor herself. There have been three trials in these other proceedings in the High Court, in September 2016, May 2017 and September/October 2017. The nature of defamation law means that, on each occasion, to defend themselves, the defendants must call evidence of whether Mr Craig sexually harassed Ms MacGregor.

[2] It cannot be right that a litigant can sue any number of defendants in defamation, in separate proceedings over a period of years, for publishing substantially the same allegations concerning sexual harassment of a person, requiring each of those defendants to call evidence about that alleged harassment in order to defend themselves. Enough is enough. Allowing Mr Craig to pursue the defamation proceeding he initiated against Mr Stringer would either require Ms MacGregor to give evidence and be cross-examined for a fourth time about whether Mr Craig sexually harassed her or would put Mr Stringer at a significant disadvantage in his defence. It would be oppressive to either Ms MacGregor or Mr Stringer. Mr Craig has had, and continues to have, plenty of access to justice on this subject, in other

proceedings. I consider it would be an abuse of the High Court's processes for Mr Craig to be able to pursue his defamation proceeding against Mr Stringer. I stay Mr Craig's proceeding against Mr Stringer and the aspect of Mr Stringer's proceeding in response about the same issue.

[3] In addition, Mr Craig makes three applications in relation to the remainder of Mr Stringer's proceeding, in respect of which I order:

(a) Mr Stringer must make further and better discovery of specified documents.

(b) In the interests of access to justice and the smooth running of the hearing, I grant Mr Craig's request to have a lawyer as a McKenzie friend, subject to specified conditions. I leave the same option open to Mr Stringer and grant his request for a lay McKenzie friend.

(c) Mr Stringer must pay security for costs of $5,000.

Context and applications

[4] The context for these proceedings was outlined in a previous interlocutory judgment in November 2018.[1] In summary, in 2015, Mr Stringer made various public allegations against Mr Craig, including that Mr Craig had sexually harassed Ms Rachel MacGregor. Mr Craig denied them and, with his wife Mrs Helen Craig, held a press conference, launched a booklet and made other statements containing allegations against Mr Stringer on 29 July 2015.

[5] On 10 September 2015, in the Christchurch High Court, Mr Craig filed his defamation proceeding against Mr Stringer. That proceeding was settled by consent with judgment being entered for Mr Craig.[2] But on Mr Stringer's application, part of the judgment, relating to the alleged sexual harassment of Ms McGregor, was recalled and re-opened by Associate Judge Osborne, as he then was, on the basis of new

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1 *Stringer v Craig* [2018] NZHC 3076 at [2]–[8].
2 *Craig v Stringer* [2017] NZHC 50.

information.[3] Mr Craig now wishes to pursue the suit. In October 2015, Mr Stringer filed his defamation proceeding against Mr Craig. The date of the last publication sued upon by Mr Stringer is 6 October 2015. Both proceedings are set down to be tried concurrently in the Auckland High Court for four weeks commencing Monday 19 August 2019.[4]

[6] There is a wider context of several other defamation proceedings about the same subject matter. The first to be tried was the suit by Mr Jordan Williams against Mr Craig for allegedly defaming him, including for saying Mr Williams had lied about Mr Craig sexually harassing Ms MacGregor. The jury trial was held over nearly four weeks in September 2016.[5] Ms MacGregor was called to give evidence. Liability and damages are both now subject to a re-trial.[6] Apparently, Mr Williams is now seeking recall of the Supreme Court's judgment ordering that.

[7] In addition to suing Mr Stringer, Mr Craig sued three other defendants, including for saying he had sexually harassed, or had lied about sexually harassing, Ms MacGregor:

(a) On 19 August 2015, Mr Craig sued Mr Cameron Slater and Social Media Consultants Ltd. The judge-alone trial was held over almost four weeks in May 2017. Ms MacGregor was called to give evidence. That proceeding, and Mr Slater's counter-claim, was determined by Toogood J but is now under appeal to the Court of Appeal.[7].

(b) On 10 November 2016, Mr Craig sued Ms MacGregor herself. The judge-alone trial was held over two weeks in September/October 2018. Ms MacGregor gave evidence. She also counterclaimed against Mr Craig alleging he defamed her by saying she had brought a false claim of sexual harassment against him and she was a liar.[8] The trial has been held but judgment has yet to issue.

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3 *Craig v Stringer* [2017] NZHC 3221.
4 *Craig v Stringer* [2018] NZHC 2281.
5 *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215.
6 *Craig v Williams* [2018] NZSC 38.
7 *Craig v Slater* [2018] NZHC 2712.
8 *Craig v MacGregor* [2018] NZHC 1172 at [6].

(c) On 29 May 2017, Mr Craig sued Mr Williams. Associate Judge Smith held issue estoppel and/or abuse of process prevented re-litigation of the conclusive determination in *Williams v Craig* of whether Mr Craig sexually harassed Ms MacGregor, before the Supreme Court ordered the re-trial.[9]

[8] On 2 May 2019, I heard argument about whether any aspects of these two proceedings involving Mr Craig and Mr Stringer are estopped or are an abuse of process, as well as three interlocutory applications by Mr Craig. The parties are all self-represented. I am grateful to counsel assisting the court, Mr Akel, for his valuable assistance.

Issue 1: Estoppel and abuse of process

How the issue was raised

[9] In a memorandum of 26 February 2019, Mr Stringer raised the question of whether factual findings in other judgments involving Mr Craig raised an issue estoppel against Mr Craig's proceeding against him. I put the issue on the agenda of a conference, held under s 35 of the Defamation Act 1992, between the parties to this proceeding and Mr Craig's proceeding, on 8 March 2019. At that conference, as I subsequently recorded in a minute:[10]

> [4] Mr Stringer raised the question of whether the *Craig* proceeding might be estopped by findings in other proceedings regarding the issue of whether Mr Craig sexually harassed Ms Rachel MacGregor and whether he can rely on those facts as proven without calling Ms MacGregor as a witness.[11] He filed and served a will-say statement dated 20 February 2018 that she declined to sign. The defendants in the *Stringer* proceeding raised the question of whether Mr Stringer's proceeding against Mr Craig and Mr Stitt might be estopped or otherwise impacted by the judgment of Associate Judge Osborne of 19 December 2017.[12] Mr Stringer raised issues about concessions he made that were recorded in that judgment, and their confidentiality.
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> [5] As I indicated at the conference, these issues will be dealt with as an interlocutory matter . . .

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9 *Craig v Williams* [2018] NZHC 2520 at [99], citing *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1.

10 *Craig v Stringer* Minute No 8, 11 March 2019, at [4].

11 *Craig v MacGregor* HC Auckland CIV-2016-404-2915 (judgment pending).

12 *Craig v Stringer,* above n 3.

[10] In preparation for the interlocutory hearing and at my invitation, Mr Akel filed and served a memorandum about the law relating to estoppel and abuse of process which was circulated to the parties. None of the parties sought to make interlocutory applications. However, as I noted in a minute of 16 April 2019, "these issues are close to the core of the integrity of the justice system" so I proposed to consider them at the 2 May 2019 hearing and invited the parties to make submissions about them, if they wished.[13]

Relevant law of not relitigating issues

[11] "Res judicata" is a latin expression used by lawyers to describe a legal doctrine which means "the matter has been adjudicated".[14] The community needs judicial decisions to be final and conclusive. And individuals need to be protected from repeated law suits for the same cause. There are two forms of res judicata. Cause of action estoppel prevents someone from bringing a cause of action against someone else if precisely the same cause of action has been previously determined between them. Issue estoppel prevents a litigant in one proceeding questioning a necessary legal holding or factual finding about an issue in a previous proceeding between them. Its purpose is "to preclude a party from repeated argument of the same substantive issue".[15]

[12] The effect of res judicata is preserved by s 50 of the Evidence Act 2006 which provides, relevantly:

> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in … another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given".
>
> (2) This section does not affect the operation of—
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> (a) a judgment *in rem*; or
>
> (b) the law relating to *res judicata* or issue estoppel; or

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13 *Craig v Stringer* Minute No 9, 16 April 2019, at [7]. See *Siemer v Stiassny* [2011] NZCA 1 at [14]–[15].

14 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at [40]. See generally K R Handley *Spencer Bower and Handley: Res Judicata* (4th ed, LexisNexis, London, 2009).

15 *Dotcom v Attorney-General* [2018] NZCA 220, [2018] NZAR 1298 at [36].

(c) the law relating to an action on, or the enforcement of, a judgment.

[13] The Law Commission, in its report leading to this section, noted the common law doctrine of res judicata did not absolutely bar re-litigation of matters previously litigated between different parties.[16] It cited the report of the Law Reform Committee of Great Britain in 1967 that one civil proceeding can differ substantially from another even if the same issues are in dispute. So, s 50 provides that findings of fact from previous proceedings are not even admissible to prove facts in a subsequent proceeding. In *APN New Zealand Ltd v Simunovich Fisheries Ltd*, the Supreme Court confirmed that s 50 reinforces the requirement on parties to civil litigation to establish facts independently of findings in other litigation.[17]

[14] In relation to defamation proceedings, the Defamation Act 1992 provides:

(a) Section 46: If a person commences a proceeding for defamation they may not commence any other proceedings for defamation in respect of any other prior publication of the same or substantially the same matter, unless they are commenced within 28 working days (or such longer period as the court may allow). Otherwise a defendant may adduce evidence of that fact by way of defence.

(b) Section 47: Where the same person has commenced two or more proceedings for defamation in respect of publication of the same or substantially the same matter, the plaintiff must, as soon as practicable, give every defendant such notice of the other proceedings "as is reasonably sufficient to enable each defendant to apply for the consolidation of the proceedings" under s 48. Otherwise, on application by the defendant, the court may dismiss or stay the proceedings.

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16 Law Commission Evidence (NZLC R 55 vol 1, 1999) at [244]–[247].

17 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [33].

(c) Section 48: The High Court may consolidate two or more defamation proceedings commenced by the same person in respect of publication of the same or substantially the same matter.

(d) Section 49: Where any defamation proceedings have been determined, the plaintiff may not, except by leave of the court, commence or continue other defamation proceedings against any of the same defendants in relation to the same publication or any other publication of the same matter.

[15] The 1977 report of the Committee on Defamation, that led to the 1992 Act, makes clear ss 46 to 48 represented an extension of the Defamation Act 1954 that was limited to multiple defamations in different newspapers.[18] The intention was to enable applications for the consolidation of actions involving the same defamation whatever the medium. Section 49 was intended to cover the situation where a plaintiff brings further proceedings against the same defendant in respect of the same matter.[19]

[16] In relation to abuse of process, r 15.1 of the High Court Rules 2016 provides a Court may strike out a pleading if it:

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

[17] Rule 15.1(3) provides that, instead of striking out a pleading under cl (1), "the court may stay all or part of the proceeding on such conditions as are considered just". Rule 15.1(4) states r 15.1 does not affect the Court's inherent jurisdiction, which must also include the power to prevent abuses of its processes.

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18 *Committee on Defamation Recommendations on the Law of Defamation* (December 1977) at ch 14.

19 At [320].

[18] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* the Court of Appeal stated:[20]

> The grounds of strike out listed in r 15.1(1)(b)-(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or [is] an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[19] In defamation proceedings, the Court of Appeal of England and Wales held, in *Goldsmith v Sperrings Ltd,* that a litigant pursuing an ulterior purpose, unrelated to the subject matter of the litigation and but for which the litigation would not be commenced, may be an abuse of process.[21] In *Williams v Spautz*, the High Court of Australia considered, even if a litigant had a prima facie case, in exceptional circumstances a court could strike out a proceeding for abuse of process if it resulted in oppression, such as where proceedings were used only as a means of extorting a pecuniary benefit from the defendant.[22] That has been applied in New Zealand.[23] In a previous interlocutory judgment in this proceeding, I considered Mr Stringer's conduct, in threatening joinder of Mr Taylor as a means of pressuring him to give evidence for him, had come close to constituting abuse of process.[24] But, "by a fine margin", I declined to strike it out because a line call should be decided in favour of preserving freedom of access to the courts.

[20] In 2005, in *Jameel (Yousef) v Dow Jones & Co Inc*, the Court of Appeal of England and Wales considered, where there was no or minimal damage to a plaintiff's

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20 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89] (citations omitted).

21 *Goldsmith v Sperrings* [1977] 2 All ER 566 (EWCA) at 582.

22 *Williams v Spautz* (1992) 174 CLR 509 (HCA) at 522.

23 *Tomanovich Holdings Ltd v Gibbston Community Water Company 2014 Ltd* [2018] NZHC 990 at [42]; see also *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602 at [31].

24 *Stringer v Craig*, above n 1, at [42].

reputation in a defamation proceeding, the defendant could seek to strike it out as an abuse of process.[25] That has been applied in New Zealand.[26] In *Sellman v Slater,* I preferred the approach of a 2017 decision of the Court of Appeal of England and Wales in *Lachaux v Independent Print Ltd* in determining some level of damage to reputation is required as an element of the tort of defamation, rather than as a basis for the judiciary to deem its absence to be an abuse of process.[27] But I agreed "it is conceivable there may be some extreme circumstances in which legal proceedings place such a disproportionate 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".[28] In 2018, in *Craig v Stiekema*, Fitzgerald J overturned the striking out of Mr Craig's defamation claim against Ms Jacqueline Stiekema on the basis of *Jameel,* because doing so would not be proportionate overall.[29]

[21] Similarly, I consider it is conceivable that, a litigant may abuse the court's processes by suing several different defendants, for essentially the same defamations, in different proceedings at different times, even if doing so is not subject to the doctrine of res judicata. The legislative policy behind ss 46 to 49 reinforces this in New Zealand. And it is supported by statement of the Court of Appeal of England and Wales, in *Bradford & Bingley Building Society v Seddon,* that abuse of process may arise where there is no res judicata but where, for example, "liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings" or "where there is such an inconsistency between the two [proceedings] that it would be unjust to permit the latter one to continue".[30] As *Gatley* states, in relation to defamation law in the United Kingdom:[31]

> The Court will be alert to ensure that its process is not abused by attempts to litigate issues which have been or should have been previously determined, or to undermine existing decisions by flank attack. Hence, an action may be

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25 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

26 *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142; *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365.

27 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [63], citing *Lauchaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594. The United Kingdom Supreme Court has recently upheld an appeal of the Court of Appeal's judgment, in relation to the United Kingdom statutory threshold of serious harm, *Lachaux v Independent Print Ltd* [2019] UKSC 27.

28 At [59].

29 *Craig v Stiekema* [2018] NZHC 838, [2018] NZAR 1003 at [76].

30 *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 (CA) at 1490–1491.

31 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [30.46].

> stayed as an abuse of process where the claimant has already instituted proceedings in another forum against the same defendant in respect of the publication of the same material. A claim may also be struck out where the essential facts and matters going to liability would be the same as those already raised in earlier proceedings which were brought by the same claimant against another defendant in respect of a similar publication and which either failed or were abandoned by the claimant, or where a fresh action has been brought against a joint publisher on the same publication as has been found not defamatory of the claimant in an action brought by him against another of the publishers.

Submissions

[22] Mr Craig submits there is no proper basis for finding that he or Mr Stringer are issue estopped, based on findings in different proceedings, not involving Mr Stringer or the other defendants. Nor, he submits, is there any proper basis for finding their claims are abuses of process as there is no evidence the proceedings are oppressive towards Mr Stringer.

[23] Mr Stringer submits it is a question for the court in regard to the allocation of resources whether justice is served by re-litigating a matter well-covered in other proceedings: the sexual harassment of Ms MacGregor. He submits Mr Craig is an exceptional serial litigant who has abused the procedures of the court to engage in protracted "lawfare". He submits the repeated cross-examination of Ms MacGregor is poignant and lies at the heart of his reticence to call her yet again for cross-examination by Mr Craig. Mr Stringer also objects to any suggestion by the defendants of estoppel on the basis of a confidential settlement of part of Mr Craig's proceeding.

Is there issue estoppel or abuse of process here?

[24] In these two proceedings:

(a) Mr Craig's proceeding against Mr Stringer is now confined to the single allegation that Mr Stringer defamed Mr Craig on 25 occasions by saying he had sexually harassed Ms MacGregor. Other issues have been settled. Mr Stringer pleads the defence of truth, among others, that Mr Craig did sexually harass Ms MacGregor. He must prove that on the balance of probabilities. He also pleads defences of honest

opinion and what was qualified privilege but is now responsible communication.

(b) Mr Stringer, in his proceeding against Mr Craig, alleges, among other things, that Mr and Mrs Craig and Mr Taylor defamed him by saying he lied and made false allegations including about Mr Craig sexually harassing Ms MacGregor. Mr Stringer alleges defamation by Mrs Storr and Mr Stitt in saying Mr Stringer lied and attacked. Mr Craig and the other defendants plead defences of truth, honest opinion and qualified privilege in responding to attacks.

[25] The issue of whether Mr Craig sexually harassed Ms MacGregor has been litigated in the other proceedings:

(a) In *Williams v Craig,* a jury held Mr Craig sexually harassed Ms MacGregor.[32] This is now subject to re-trial.[33]

(b) In *Craig v Slater*, in the course of determining Mr Slater's defence of truth, Toogood J found Mr Craig engaged in moderately serious sexual harassment of Ms MacGregor on multiple occasions in 2012 to 2014, but not in 2011.[34] The judgment is currently under appeal.

(c) In *Craig v MacGregor,* the same issue arose as Mr Craig alleged Ms MacGregor defamed him by saying he sexually harassed her.[35] One of Ms MacGregor's defences is truth. The trial has been held but judgment in this proceeding has yet to issue.

[26] So Mr Craig's proceeding against Mr Stringer concerns the publication of statements with substantially the same meaning, as did his defence against Mr Williams, his proceeding against Ms MacGregor herself, his proceeding against Mr Slater and his proceeding against Mr Williams.

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32 *Williams v Craig*, above n 5; *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [26].
33 *Craig v Williams* [2018] NZSC 61.
34 *Craig v Slater* [2018] NZHC 2712 at [424], [443], [468], [469].
35 *Craig v MacGregor* HC Auckland CIV-2016-404-2915 (judgment pending).

[27] Issue estoppel because of these other proceedings does not apply to either of the proceedings here because the parties are different. Mr Stringer was not and is not a party to any of the other proceedings. Neither are co-defendants in Mr Stringer's proceeding. Accordingly, they are not bound by the determination of issues or the factual findings in them. The doctrine of res judicata, preserved by s 50(2) of the Evidence Act 2006, does not apply. Neither does s 49 of the Defamation Act 1992, for the same reason. Section 50(1) of the Evidence Act 2006 means evidence of a finding in the other proceedings, regarding whether Mr Craig sexually harassed Ms MacGregor, is not admissible to prove that in these proceedings. Mr Stringer must prove his defence of truth to Mr Craig's suit, and Mr Craig must prove his defence of truth to Mr Stringer's suit. If it were necessary, further argument may be required as to whether the transcript of the evidence in those cases may be admissible for those purposes. It is not necessary, given the conclusion I reach below.

[28] However, the issues which were settled in Mr Craig's suit against Mr Stringer, and which were not re-opened by Associate Judge Osborne, do create an issue estoppel between those two parties here. Those issues are whether Mr Craig: sexually harassed other women; was fraudulent in his business dealings; and committed electoral fraud. Those issues have been determined between Mr Craig and Mr Stringer, by the resolution of Mr Craig's proceeding. Mr Stringer may not relitigate them in his proceeding against Mr Craig.

[29] How does the Defamation Act 1992 apply here? Under s 46(2) of the Act, Mr Craig could only commence the proceedings against Mr Stringer, Mr Slater, Ms MacGregor and Mr Williams within 28 working days of each other, or within a longer period if allowed by the court. He commenced the proceeding against Mr Stringer 16 working days after he commenced the proceeding against Mr Slater, so within the required time. He commenced proceedings against Ms MacGregor and Mr Williams out of time, on 10 November 2016 and 29 May 2017 respectively, but that does not bear on his proceeding against Mr Stringer.

[30] I cannot locate evidence Mr Craig give Mr Stringer formal notice of the other proceedings for the purpose of s 47. If he did not, on application by Mr Stringer, I could strike out the proceeding under that section. However, the purpose of s 47 has

been effectively met by the length of time these proceedings have been on foot and all parties' awareness of the other proceedings. Mr Stringer has had ample opportunity to apply for consolidation of the proceeding against him with the other proceedings. Indeed, in argument before me, he stated he did not wish to do so.

[31] I conclude above that suing several defendants for essentially the same defamations, in different proceedings at different times, could be an abuse of process even if doing so is not subject to the doctrine of res judicata. Mr Craig submits there is no evidence the proceeding is oppressive towards Mr Stringer. But I consider there is a clear basis, in the five proceedings identified above, upon which I can infer Mr Craig's proceeding is oppressive towards Ms MacGregor, who is the subject of the allegedly defamatory material.

[32] Mr Craig initiated proceedings against Mr Slater and Mr Stringer in August and September 2015, Ms MacGregor herself in November 2016 and Mr Williams in May 2017. There have been trials of the proceedings brought by Mr Williams against Mr Craig in September 2016, by Mr Craig against Mr Slater in May 2017 and by Mr Craig against Ms MacGregor in September/October 2018. If Mr Craig's proceeding against Mr Stringer is tried in August 2019, it would be the fourth defamation trial about essentially the same question to be held in the High Court over three years.

[33] The nature of defamation law means that, on each occasion, to defend themselves, the defendants must call evidence of whether Mr Craig sexually harassed Ms MacGregor. The best evidence is that of Ms MacGregor herself. Mr Craig would have the opportunity to cross-examine her. Mr Stringer has indicated he does not wish to call Ms MacGregor as a witness in these proceedings, for the understandable reason of not wanting to put her through a trial for a fourth time. But, by doing so, Mr Stringer puts himself at a significant disadvantage in defending the claim that he lied when he said Ms MacGregor was sexually harassed, on the basis that was true or not materially different from the truth. It cannot be right that a litigant can sue any number of defendants in defamation, in separate proceedings over a period of years, for publishing substantially the same allegations concerning sexual harassment of a person, requiring each of those defendants to call evidence about that alleged harassment in order to defend themselves.

[34] Enough is enough. Allowing Mr Craig to pursue the defamation proceeding he initiated against Mr Stringer would either require Ms MacGregor to give evidence and be cross-examined for a fourth time about whether Mr Craig sexually harassed her or would put Mr Stringer at a significant disadvantage in his defence. It would be oppressive to either Ms MacGregor or Mr Stringer. Mr Craig has had, and continues to have, plenty of access to justice on this subject, in other proceedings. I consider it would be an abuse of the High Court's processes for Mr Craig to be able to pursue his defamation proceeding against Mr Stringer.

[35] I stay Mr Craig's suit against Mr Stringer. If Mr Craig's other defamation proceedings about the same issue were all to end without resolution of this issue, or there is some other good reason in the interests of justice, he could apply to end the stay. I grant leave to either party, or Ms MacGregor, to apply to lift the stay if circumstances change. They must all be served with such an application. Otherwise the stay will be indefinite.

[36] For the same reasons and on the same terms, I stay the element of Mr Stringer's defamation claim that Mr Craig and other defendants defamed Mr Stringer by saying he lied when he said Mr Craig sexually harassed Ms MacGregor. Mr Stringer's proceeding is not affected by ss 46 to 48 of the Defamation Act because he is not a party to the other proceedings. But his proceeding is essentially a response to Mr Craig's suit on the same issue. Issue estoppel applies between those two parties in each proceeding. Continuing it would entitle Mr Craig to try to prove he did not sexually harass Ms MacGregor. It would be inequitable to stay Mr Craig's claim and not Mr Stringer's. As things currently stand, the issue is being more than adequately ventilated, and Mr Stringer's reputation effectively vindicated or not, in the other proceedings.

Issue 2: Discovery

Law

[37] Rule 8.19 of the High Court Rules 2016 allows me to order a party to file and serve an affidavit stating whether particular documents are or have been under his or her control and to make the documents available for inspection. This applies if it

appears to me there are grounds for believing a party has not discovered documents that should have been discovered. The documents must be relevant and discovery must be proportionate to the issues in the case. There must be credible evidence which objectively indicates the documents exist and the party seeking discovery must establish that what has been discovered already is incomplete.

[38] In Mr Stringer's proceeding, Mr Craig applies for further and better discovery from Mr Stringer of documents I treat in four categories.

Facebook and blog posts

[39] Mr Craig applies for discovery of Mr Stringer's Facebook posts and blogposts concerning Mr Craig or the Conservative Party from 1 June 2015 to 31 December 2017. He estimates there are 178 blog posts and 208 Facebook posts at issue. He could live with 31 December 2016 as an end date. He submits the defendants are pleading a defence of qualified privilege in responding to Mr Stringer's attacks on Mr Craig and these documents are evidence of those attacks on him and his co-defendants. He is not sure that any relate purely to the Conservative Party. He submits the posts after October 2015 are relevant to Mr Stringer's honesty and earlier motive.

[40] Mr Stringer disputes Mr Craig's estimates of numbers of posts, which include irrelevant posts. He submits the Facebook posts, which are links, are still accessible. He submits Mr Craig discovered many of the blogposts himself and that Mr Stringer has already indexed 60 of the posts in an affidavit. He submits the date range is disproportionate given Mr Craig's booklet was released in July 2015. And he submits posts about the Conservative Party do not assist.

[41] I consider Facebook posts and blogposts, by Mr Stringer about Mr Craig or the other defendants from 1 June 2015 to 6 October 2015, are relevant to the defendants' defence of qualified privilege in responding to attacks. I do not consider such posts concerning only the Conservative Party, and none of the defendants, are relevant. Mr Stringer must discover the posts and blogposts that are relevant, **as soon as possible**.

Whaleoil and other media communications

[42] Mr Craig applies for all Mr Stringer's communications, by text, email, posting of comments, or any other form, with the Whaleoil Beefhooked website or its staff or employees, or with other media concerning Mr Craig or the Conservative Party from 25 August 2014 to 31 December 2018. Mr Craig does not object if the end-date is narrowed to 31 December 2016. He seeks communications with other media because he does not know what Mr Stringer has not discovered.

[43] Mr Craig alleged in his proceeding, as a matter of aggravation, that Mr Stringer colluded with the Whaleoil website, which Mr Stringer denies, so the nature of his communications with Whaleoil are relevant to his honesty. Mr Craig points to a passage in a judgment by Associate Judge Matthews in the proceeding he brought where Mr Stringer submitted these documents are relevant in this proceeding.[36] He submits other court proceedings have discovered some communications and indicate there are more. He also submits there are a number of references to Whaleoil in the publications Mr Stringer claims are defamatory. He submits the truth of those allegations depends on what Mr Stringer was saying to Whaleoil and vice versa.

[44] Mr Stringer submits this is relevant only to Mr Craig's proceeding, in which a similar application was declined, discovery for which is complete and the close of pleadings date passed. He submits the application is an abuse of process. He submits the date range is disproportionate and he has already discovered all his emails to Whaleoil, all the relevant emails with a Whaleoil contractor and with other media.

[45] On the basis of the information before me, there is only one aspect of Mr Stringer's communications with Whaleoil or the media that appears relevant to the issues that need to be decided in this proceeding. The alleged defamatory meanings of a number of Mr Craig's publications refer to Mr Stringer:[37]

(a) being part of a coordinated attack conspiracy with Mr Cameron Slater and Whaleoil against Mr Craig;

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36 *Craig v Stringer* [2016] NZHC 1956 at [39].
37 Fifth Amended Statement of Claim of 15 January 2019 at [14](a), [15].

(b) being associated with Mr Slater;

(c) feeding confidential information to Mr Slater and receiving false allegations from Mr Slater about Mr Craig; and

(d) writing for Whaleoil.

[46] Mr Craig pleads a defence of truth to Mr Stringer's suit. Communications between Mr Stringer and Mr Slater, or others associated with Whaleoil, from 25 August 2014 to 6 October 2015 may be relevant in tending to prove Mr Craig's statement is true, or not materially different from the truth. They must, therefore, be discovered by Mr Stringer **as soon as possible**.

Emails to Mr Dobbs

[47] Mr Craig applies for full and unredacted copies of emails Mr Stringer copied and sent to Mr Dobbs on 18 June 2015. These appear to refer to a strategy to attack Mr Craig. Mr Craig submits the emails will verify with whom Mr Stringer was colluding and what was being said.

[48] Mr Stringer submits the emails to Mr Dobbs were discovered, the redactions in the attachments were made by someone else and he does not possess an unredacted version. He submits all his emails have already been searched by an independent IT company and assessed by an independent legal firm nominated by Mr Craig.

[49] The redacted information appears to be relevant to Mr Craig's defences of truth and qualified privilege in responding to an attack. If Mr Stringer does possess an unredacted version, he must discover it **as soon as possible**.

Emails and complaints regarding referral to Police

[50] In a post on 6 October 2015, Mr Stringer referred to emails of anonymised allegations from others and stated "… the Police will investigate, it's their call". Mr Craig applies for full and unredacted copies of the emails or communications, and any police complaint or email to Police, referred to in Mr Stringer's blogpost dated 6

October 2016, entitled "80. New Fraud Allegations v Craig sent to Police". Mr Craig submits they are relevant to establishing whether Mr Stringer was attacking Mr Craig, was reckless in his publication (which is relevant to aggravated damages) and whether he was being truthful.

[51] Mr Stringer submits Mr Craig has all the emails in another proceeding and there is no police complaint in his possession and he does not know who the complainants were.

[52] The existence of the emails with the allegations are relevant to the defence of truth. Mr Stringer must discover them **as soon as possible**. Because the post does not say he made a complaint to the Police, Mr Stringer does not have to discover that (which he says does not exist anyway).

Issue 3: McKenzie Friend

Law

[53] There is no dispute about the law regarding McKenzie friends. Toogood J granted Mr Craig's request for a lawyer to act as his McKenzie friend in *Craig v Slater* on these terms:[38]

> (a) Until the further order of the Court, I grant permission for Mr Thomas Cleary, Barrister, to sit in court as a support person/McKenzie friend for Mr Craig in respect of all matters before the Court in this proceeding, with immediate effect. The conditions applying to the grant are that Mr Cleary may:
>
> (i) sit beside Mr Craig in court;
>
> (ii) take notes;
>
> (iii) quietly make suggestions to Mr Craig and give advice;
>
> (iv) propose questions and submissions to Mr Craig who may put the same before the Court; and
>
> (v) in rare circumstances, and only with the further leave of the Court, address the Court.

[54] As Toogood J outlined:

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[38] *Craig v Slater (McKenzie friend)* [2017] NZHC 874, [2017] NZAR 649 at [5].

(a) The Court of Appeal in *R v Hill* observed there are "obvious difficulties" with permitting a lawyer to act as a McKenzie friend, in terms of: the lawyer's respective duties to the court and the party; the lawyer's liability; and the Court's control of the lawyer.[39]

(b) In its review of the Judicature Act 1908, the Law Commission agreed with the Law Society that a lawyer acting as a McKenzie friend could blur the roles and lead to confusion.[40] But Parliament did not adopt that recommended prohibition.

(c) In *Craig v Slater*, where Mr Craig's opponents were legally represented and opposed his application, Toogood J considered the difficulties identified by the Court of Appeal and Law Commission were manageable. He noted defamation law is a "somewhat arcane" area of law, usually conducted by senior and experienced counsel.[41] He considered it would make no sense for a lay person to be preferred as a McKenzie friend over a qualified barrister well acquainted with the case and with some experience of defamation cases. He agreed to the request, satisfied it turned on its particular and unique facts as a means of improving access to justice.

(d) In particular, Toogood J noted calls for innovative solutions to concerns about access to justice and said "I am inclined to think that the courts must facilitate such developments rather than stand in the way of them".[42]

[55] Mr Craig made the same request in the hearing of proceedings between him and Ms Rachel MacGregor, who was legally represented and did not oppose the request.[43] Hinton J granted it.

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39 At [20], citing *R v Hill* [2004] 2 NZLR 145 (CA) at [52].
40 At [17]-[18], citing Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 150.
41 At [29].
42 At [33].
43 *Craig v MacGregor* HC Auckland CIV-2016-404-2915 (judgment pending).

Application and submissions

[56] Mr Craig applies for permission to have a McKenzie friend in Court at the substantive hearing, Mr Thomas Cleary a lawyer, on the same terms Toogood J granted in *Craig v Slater*. Mr Craig also wants Mr Cleary to assist the other defendants. He submits Mr Cleary's assistance will benefit the defendants and the smooth running of the trial. He points to the importance of the proceeding and large amounts of damages sought, the complexity of defamation law and this particular proceeding and Mr Cleary's familiarity with the details of the case. He submits the Court should not be concerned with levelling the playing field and each party must look to its own interests.

[57] Mr Stringer submits there is no application for Mr Cleary to be a group McKenzie friend. He submits Mr Cleary would be some sort of substitute for earlier more expensive legal representation of Mr Craig. He submits that would be an unfair advantage and the circumstances are not the same as in Mr Craig's proceedings against Mr Slater and Ms MacGregor, who were legally represented. Mr Stringer requests that his sister in law, a layperson Mrs Hills, be allowed to act as McKenzie friend for him (instead of his wife who had previously been approved in such a capacity for the trial of Mr Craig's proceeding). He has no objection to Mr Craig having a lay McKenzie friend.

Decision on McKenzie friends

[58] I understand and agree with the decisions of Toogood and Hinton JJ to allow Mr Cleary to act as Mr Craig's McKenzie friend in two other defamation proceedings brought by Mr Craig and defended by legally represented defendants. Defamation law is tricky and there are traps for unrepresented litigants which can derail proceedings.[44] That is why I have appointed Mr Akel as counsel assisting the Court, an appointment he has already proved to be worthwhile.

[59] What makes me hesitate is that, in both of the other proceedings, Mr Craig was opposed by legally represented defendants. Here Mr Stringer is representing himself,

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[44] For example, see *Low Volume Vehicle Technical Association v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587; *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 3281; *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67.

as are all of Mr Craig's co-defendants (subject to this application). I initially had a sense of disquiet about making a legally qualified McKenzie friend available to Mr Craig when one is not available to Mr Stringer. That might appear to involve the Court in tilting the playing field. However, it would always be possible for Mr Craig to engage full legal representation in court. That is his right even though it would tilt the playing field even more. And Mr Stringer has the same right to be legally represented and the same opportunity to request a lawyer be appointed as a McKenzie friend.

[60] In general, the playing field of litigation is inherently tilted to the advantage of those with the money and inclination to buy the more expensive, and often (but not always) better, legal assistance. There is not much I can do about that, generally. But I can allow Mr Craig to pursue a less expensive option than full engagement of a lawyer. Conceptually, that makes available to litigants a half-way house of legal advice but not representation in court. To the extent that opens up a wider range of options in the market for legal services, that seems to me to be in the interests of justice, if not necessarily that of lawyers. In the context of these proceedings, I consider the smooth running of the hearing is likely to be enhanced by Mr Cleary fulfilling the proposed role on the terms requested, for all the defendants in this proceeding. The only additional condition I impose is that, if Mr Cleary considers the Court is being misled by any of the defendants, deliberately or accidentally, I require him to advise the Court of that immediately.

[61] I grant Mr Stringer's request that Mrs Hills act as McKenzie friend for him. I reserve leave for Mr Stringer to apply for a lawyer to act as his McKenzie friend on the same terms as Mr Clearly will act for Mr Craig.

Issue 4: Security for costs

[62] Mr Stringer's claim was filed in 2015. On 8 March 2019 Mr Craig signalled an application for security for costs. He applies for Mr Stringer to post security for costs of $10,000.

[63] Under r 5.45 of the High Court Rules 2016, I have a discretion to order Mr Stringer to pay security for costs if I am satisfied there is reason to believe he will be unable to pay Mr Craig's costs if Mr Stringer is unsuccessful. Such an order may only

be made if it is just in all the circumstances, balancing the interests of a plaintiff's access to the courts and the defendant to be protected from barren costs orders in unjustified litigation.[45] Delay in making such an application may matter if it causes unfairness.[46]

[64] Mr Craig submits there are substantial court fees of $16,000 for the hearing and more for further filing of pleadings required of the defendants. He points to what he says is an independent assessment of Mr Stringer's net worth that he owes more than he owns. Mr Craig submits disbursements across the defendants now exceed $20,000 and the cost to them of legal advice exceeds $25,000. He submits the proceeding was on hold at the direction of the Court until last year and this is the first real opportunity the defendants have had to make the application. He submits the chances of Mr Stringer winning his case are slim.

[65] Mr Stringer submits the net worth assessment reflected all his assets being jointly owned with his wife and earthquake damage. But he has adduced no evidence. He asks, rhetorically, why Mr Craig pursues him for security for costs when there is independent evidence he cannot and when Mr Craig did not so pursue another litigant in another proceeding who said she had no money but who offered no evidence to support that claim. Mr Stringer disputes his chances are slim.

[66] The only evidence I have of Mr Stringer's financial position is that it was negative in 2016. Peculiarly, Mr Stringer relies on that. But, as it is all I have to go on, I am persuaded it is just, in all the circumstances, to require Mr Stringer to pay $5,000 as security for costs. I so order.

Results

[67] I order:

(a) In his proceeding against Mr Craig, Mr Stringer may not relitigate the issues of whether Mr Craig sexually harassed other women, was fraudulent in his business dealings and committed electoral fraud

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45 *Clear White Investments Ltd v Otis Trustee Ltd* [2016] NZHC 2837 at [4].
46 *Oxygen Air Ltd v LG Electronics Australia Pty Ltd* [2018] NZHC 945 at [26].

because they have been determined between Mr Craig and Mr Stringer by the resolution of Mr Craig's proceeding.

(b) Mr Craig's defamation proceeding against Mr Stringer is stayed. I reserve leave to Mr Craig, Mr Stringer or Ms Rachel MacGregor, with service to each other, to apply to lift the stay if circumstances change.

(c) The causes of action in Mr Stringer's defamation proceeding against Mr Craig, relating to Mr Craig stating he did not sexually harass Ms MacGregor, are stayed. I reserve leave to Mr Craig, Mr Stringer or Ms Rachel MacGregor, with service to each other, to apply to lift the stay if circumstances change.

(d) In his proceeding against Mr Craig, **as soon as possible,** Mr Stringer must provide discovery of:

(i) Facebook posts and blogposts, by Mr Stringer about Mr Craig or the other defendants from 1 June 2015 to 6 October 2015;

(ii) Communications between Mr Stringer and Mr Slater, or others associated with Whaleoil, from 25 August 2014 to 6 October 2015;

(iii) full and unredacted copies of emails Mr Stringer copied and sent to Mr Dobbs on 18 June 2015.

(iv) full and unredacted copies of the emails or communications referred to in Mr Stringer's blogpost dated 6 October 2016, entitled "80. New Fraud Allegations v Craig sent to Police".

(e) If Mr Stringer has already discovered any of the above documents, or they are not, or are no longer, under his control, he should file and serve an affidavit to that effect **as soon as possible.**

(f) Until the further order of the Court, I grant permission for Mr Thomas Cleary to sit in court as a support person/McKenzie friend for Mr Craig in respect of all matters before the Court in this proceeding, with immediate effect. The conditions applying to the grant are that Mr Cleary may:

(i) sit beside Mr Craig in court;

(ii) take notes;

(iii) quietly make suggestions to Mr Craig and give advice;

(iv) propose questions and submissions to Mr Craig who may put the same before the Court;

(v) in rare circumstances, and only with the further leave of the Court, address the Court; and that

Mr Cleary must:

(vi) advise the Court immediately if he considers the Court is being misled by any of the defendants, deliberately or accidentally.

(g) Until the further order of the Court, I grant permission for Mrs Hills to act as McKenzie friend for Mr Stringer on the same conditions as (e)(i) to (v). I reserve leave for Mr Stringer to apply for a lawyer to act as his McKenzie fried on the same terms as Mr Cleary is acting for Mr Craig.

(h) Mr Stringer must pay $5,000 as security for costs if he wishes to continue to pursue his claim against Mr Craig and the other defendants.

Palmer J

Parties/Counsel:
The Parties in person
W Akel as Counsel Assisting