IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA725/2017
[2019] NZCA 67

BETWEEN	LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INCORPORATED Appellant
AND	JOHN BERNARD BRETT First Respondent
	ANTHONY PETER JOHNSON Second Respondent

Hearing:	20 September 2018
Court:	Kós P, Clifford and Williams JJ
Counsel:	R J Gordon and D P MacKenzie for Appellant and Second Respondent P A McKnight for First Respondent
Judgment:	26 March 2019 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is dismissed.

C A permanent injunction is granted to the Association prohibiting Mr Brett from any further breach of the June 2014 settlement agreement.

D The case is remitted to the High Court for reconsideration in accordance with [76].

E The first respondent is to pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Brett formerly was an approved certifier of low volume vehicles.[1] The Low Volume Vehicle Technical Association is the body responsible for setting standards and procedures for certification of low volume vehicles.[2] Mr Johnson is chief executive of the Association. Mr Brett's certification was revoked by the New Zealand Transport Agency in December 2012. A District Court appeal against revocation failed.[3] Mr Brett then embarked on a campaign of public criticism of both the Association and Mr Johnson on his website.[4]

[2] After legal action was threatened, a settlement agreement was entered between the Association and Mr Brett. After further statements were published by Mr Brett, the Association and Mr Johnson brought defamation proceedings against him, and the Association also claimed for breach of the settlement agreement. These claims were determined in the High Court by Palmer J.[5] This appeal and cross-appeal concern the Judge's determinations that:

(a) As to the settlement agreement: (1) portions of the agreement should be struck out for inconsistency with the New Zealand Bill of Rights Act 1990; but (2) Mr Brett had otherwise breached that agreement.[6]

(b) As to defamation: (1) Mr Brett had defamed both the Association and Mr Johnson; (2) there was no defence of truth available on the facts; (3) a defence of honest opinion was available in relation to one

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1 The meaning of low volume vehicles is explained at [3] below.
2 The Association is also referred to as "the LVVTA".
3 *Brett v New Zealand Transport Agency*, DC Manukau CIV-2013-055-93, 27 December 2013 [District Court judgment].
4 Mr Johnson is nominally a respondent, but as one of the two plaintiffs, his interests align with those of the Association.
5 *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587 [High Court judgment].
6 At [108], [110].

statement only; and (4) all defamatory statements concerning the Association only were protected by qualified privilege.[7]

(c) As to remedy: (1) declaring that Mr Brett was liable to Mr Johnson for 12 defamatory statements; (2) granting Mr Johnson a permanent injunction against further publication of the defamatory statements; and (3) ordering that Mr Brett pay Mr Johnson $100,000 in compensation, together with costs.[8]

Background

[3] The essential facts are not in issue. We draw upon Palmer J's account.[9] Low volume vehicles are vehicles manufactured, modified or customised in numbers of 500 or less (in any one year), where the construction of the vehicle may affect its compliance with vehicle standards or safety performance requirements. The design and construction of such vehicles is regulated under s 152(a) of the Land Transport Act 1998 by the Low Volume Vehicle Code, which is given effect as a Land Transport Rule under that provision.[10]

[4] The Association is an incorporated society comprising nine member associations. There is an operating agreement between the New Zealand Transport Agency (NZTA) and the Association.[11] Under that agreement the Association is responsible for:[12]

> a. establishing Low Volume Vehicle Standards (the Standards) necessary for the safe modification, construction, and certification of low volume vehicles; and
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> b. establishing operational and procedural requirements (the Operation Requirements Schedule) necessary for the efficient operation of the low volume vehicle certification system; and
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> c. communicating these requirements to the Low Volume Vehicle Certifiers (the Certifiers) authorised by the Agency, the motoring public, and participating organisations; and

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7 At [57], [63]–[64], [89]–[90].
8 At [120].
9 At [8]–[27].
10 Land Transport Rule: Vehicle Standards Compliance 2002.
11 Low Volume Vehicle Certification System Operating Agreement, Issue #4, 1 July 2012.
12 At [2.2].

d. providing to the Agency specialised technical and operational advice and support, in order to assist the Agency in fulfilling its responsibility relating to the application of the Code; and

e. issuing a low volume vehicle certification plate (the plate) for each certified vehicle.

[5] The NZTA appoints persons to issue low volume vehicle certifications. It assesses certifiers' performance, and may suspend or revoke their appointments. There were at the time of judgment 42 certifiers in New Zealand. Approximately 6,500 certification plates are issued each year.

[6] Mr Brett was an approved certifier from April 1999 until December 2012. Mr Johnson gave evidence that the Association became concerned about aspects of his performance in the early 2000s. As Palmer J noted, his evidence was that:[13]

(a) In the year ended June 2011, Mr Brett ranked as the worst certifier in New Zealand measured by technical, administrative and procedural errors recorded.

(b) In the year ended June 2012, Mr Brett ranked as the worst certifier in New Zealand in terms of technical errors and third worst in terms administrative and procedural errors.

(c) Mr Brett made 32 times more safety-related technical errors than the average of all other LVV certifiers.

[7] Mr Brett's appointment as certifier was revoked by the NZTA on 3 December 2012. He appealed, but his appeal was dismissed by Judge Andree Wiltens in December 2013.[14] Judge Andree Wiltens held:

> [107] Given Mr Brett's benchmarked performance as the lowest performing certifier in terms of technical competence for 2011 and 2012, and the number and the nature of the complaints that have been raised regarding his competence and compliance, I could not be satisfied that Mr Brett was a fit and proper person to remain as an LVV certifier.

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[13] High Court judgment, above n 5, at [14].
[14] District Court judgment, above n 3.

> [108] Mr Brett submitted that he was not required to be subjected to the desk-top review process by LVVTA.
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> [109] The evidence showed numerous examples of Mr Brett trying to find any excuse possible for not complying with LVV Regulatory Documents and the written instructions of the LVVTA. This was clearly not the conduct of a diligent and competent inspector complying with the applicable requirements – that being the overarching requirement provided for in s 2.1(2) of the Rule.
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> [110] Not only was that conduct a breach of the conditions of Mr Brett's conditions of appointment and the regulatory regime, but it ignored the fact that it was the desk-top review process that has detected errors on his part.

[8] Mr Brett publishes a website on low volume vehicles, called www.lowvolumevehicle.co.nz. From about September 2012, Mr Brett published an increasing number of attacks on the Association and Mr Johnson personally on that website. Lawyers were engaged. Mr Brett undertook to remove certain statements from his website and did so in December 2012. But from January 2014, after his appeal failed, Mr Brett published yet more statements on his website and on his Facebook page asserting that alleged incompetence on the part of the Association had resulted in deaths and injury. The lawyers were re-engaged.

[9] In June 2014 the Association and Mr Brett entered a settlement agreement. Palmer J annexed it to his judgment.[15] The agreement states at cl 2:

> The intention of this agreement is to record an understanding between [the Association] and Mr Brett which allows Mr Brett to exercise a right to express his opinion, about [the Association]and the low volume vehicle certification system in general, and to make public statements about same, in a collaborative and co-operative manner with [the Association], based only on truthful and accurate information and evidence, such that Mr Brett's statements are not knowingly or unknowingly incorrect, defamatory, or a personal attack on any individual persons or the [the Association].

[10] In cl 4 of the agreement, the Association undertakes not to commence formal legal action against Mr Brett for defamation or to make substantive claims for reputational damage. It also undertakes not to post certain information about Mr Brett (in particular about his failed appeal) on its own website, and to take down any references to the appeal (including a copy of the judgment). Clause 4(g) provides that the Association undertakes to:

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15 High Court judgment, above n 5, at Annex 1.

> Continue to operate in a consultative and collaborative manner, incorporating the combined knowledge and experience of Mr Brett and other industry experts to continuously improve the low volume vehicle certification system, and as a result, the safety of modified and individually constructed motor vehicles.

[11] Clause 5 of the agreement contains Mr Brett's particular obligations. We set it out in full:

> 5. By signing this agreement, Mr Brett agrees and undertakes that he will:
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> (a) immediately remove, and desist from making any further such comments or statements in the future on the Website or within any other public medium, any comments or statements that:
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> (i) *are incorrect*; or
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> (ii) are, or may be perceived to be, in any way defamatory toward LVVTA; or
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> (iii) are, or may be perceived to be, in any way defamatory toward any person(s) employed by and/or associated with LVVTA;
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> and
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> (b) immediately remove, and desist from making any further such comments or statements in the future on the Website, or within any other public medium, any comments or statements that are not accompanied by clear and relevant documented evidence that supports the comments or statements being made; and
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> (c) provide an LVVTA staff-member of Mr Brett's choice with on-going registration as an 'author' to the Website; and
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> (d) prior to publishing any comments or statements about LVVTA on the Website or within any other public medium, provide an LVVTA staff-member of Mr Brett's choice with the opportunity to review the intended comment(s) or statement(s), and he will either:
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> (i) *refrain from making the comment or statement if the LVVTA staff member can demonstrate that the comment or statement is incorrect*; or
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> (ii) *in the case that the comment or statement is correct, allow the LVVTA staff member's written response to be provided immediately after the comment or statement without rejection, filtering, or editing*;

and

> (e) immediately remove all comments and/or statements from his website that state, imply, or may lead a person to believe that Mr Brett is a low volume vehicle certifier, and refrain from making any further such comments or statements in the future on his website or within any other public medium.
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> (Emphasis added.)

[12] The settlement agreement, it turned out, did not settle things at all. Mr Brett continued to post things about the Association and Mr Johnson on his website in a way that offended them. Soon the Association's lawyers were writing to Mr Brett again. They complained about these statements on his website.[16] A selection of statements found by the Judge to be defamatory will suffice:[17]

> LVVTA incompetence endangers lives
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> …
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> Lives are on the line, dangerous LVV certified vehicles HAVE KILLED AND INJURED PEOPLE, more deaths and injuries are predicted unless changes are made.
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> …
>
> The big danger is the incompetence of the LVVTA
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> …
>
> NOTHING HAS BEEN DONE TO PREVENT THE NEXT LVV DISASTER!
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> …
>
> No-body at the LVVTA is competent to make any judgment about the safety of such Certifications.
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> …

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[16] Per cl 8 of the Settlement Agreement, the parties were required to bring any alleged breach of the settlement agreement to the other's attention promptly and to "engage" before undertaking more formal dispute resolution.

[17] All statements complained of are set out in a table annexed to the High Court judgment, above n 5, at Annex 2.

> Time for [Mr Johnson] to be got off the potty to make way for competent, practical people.

It may be noted that in due course the Judge expressly rejected Mr Brett's efforts to justify these statements as truthful, or defend them on the basis that they were honest opinion.[18]

[13] In response to the approach from the Association's lawyers, Mr Brett stated that the agreement had now been "rendered null and void" by the Association because it had not removed the District Court judgment from its website, and because *it* had made defamatory statements about him.

[14] Proceedings were issued by the Association and Mr Johnson in August 2015. They sought an interim injunction in relation to 25 statements. The statement of claim concerned 34 statements in total. An apology was then published by Mr Brett on his website. It said he had now taken down the offending statements. The Association demurred. Subsequently Mr Brett filed a memorandum in the High Court undertaking that all statements complained of by the Association were no longer published on his website, and that no statements similar to those complained of would be published by him until further order of the Court. On that basis the Court considered an interim injunction unnecessary.[19]

[15] Ultimately, the second amended statement of claim asserted defamation arising from 35 published statements. The Association also claimed injunctive relief and damages equating to its legal costs for breach of the agreement. The unusual course taken by the pleadings, particularly by way of defence, is discussed later in this judgment.[20]

Issues on appeal

[16] The issues on appeal are these:[21]

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18 High Court judgment, above n 5, at [63]–[64].
19 *Low Volume Vehicle Technical Association Inc v Brett* [2015] NZHC 3038.
20 At [47]–[68].
21 Issue 3 arises on Mr Brett's cross-appeal.

(a) **Issue 1**: Breach of agreement: was the Judge's evaluation of the Association's claim for breach correct — and what remedy should have been granted?

(b) **Issue 2**: Defamation: was the Judge correct to find qualified privilege protected defamatory statements concerning the Association?

(c) **Issue 3**: Defamation: was the Judge correct to find qualified privilege did *not* extend to defamatory statements concerning Mr Johnson?

Issue 1: Breach of agreement: was the Judge's evaluation of the Association's claim for breach correct — and what remedy should have been granted?

[17] We first address the judgment appealed and the submissions on appeal. We then discuss whether s 3(b) of the Bill of Rights Act was engaged; whether the contractual abrogation of protected rights was lawful; and what remedy was appropriate in respect of any remaining obligations that were breached.

Judgment appealed

[18] Palmer J held that the Association was a body that performed public functions, powers and duties in terms of s 3(b) of the Bill of Rights Act when it entered into the agreement.[22] Consistent with the decision of the Supreme Court in *Cropp v Judicial Committee*, it performed regulatory functions exercised for the purpose of public safety and the public interest.[23] Breaches of the Code it administers could constitute criminal offending. Public functions and powers were obtained under the operating agreement with NZTA, a Crown entity.[24] The Judge also concluded that the Association entered into the agreement "primarily to impose sanctions on criticisms of its performance of its public functions".[25] The Judge therefore concluded that the Association was exercising a public power conferred upon it pursuant to law for the purposes of s 3(b) of the Bill of Rights Act.

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22 High Court judgment, above n 5, at [97]–[99].
23 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.
24 High Court judgment, above n 5, at [97].
25 At [98].

[19] Next, the Judge found that s 14 of the Bill of Rights Act guarantees the freedom to impart information and opinions of any kind in any form, subject only to such reasonable limits prescribed by law as can be demonstrably justified in free and democratic society. The Judge accepted that the law of defamation was a reasonable limit on the right of freedom to expression.[26] The Judge concluded that: [27]

> To the extent that cl 5 of the agreement prevents Mr Brett or [the Association] making defamatory statements to which there are no defences, I consider it is consistent with the Bill of Rights and is not illegal.

But the Judge concluded that certain provisions — cls 5(a)(i), 5(d)(i) and 5(d)(ii) — were not demonstrably justified limits on Mr Brett's right to freedom of expression:[28]

> Mr Brett's right to freedom of expression includes the freedom to be wrong — to express incorrect statements unless they are defamatory or otherwise unlawful. It also includes the freedom not to be compelled to express information. These clauses limit those freedoms without rational justification.

Drawing on contracts containing clauses void as contrary to public policy, the Judge severed those clauses from the contract.[29] Alternatively, the Judge would have severed those provisions under s 76 of the Illegal Contracts Act 1970.[30]

[20] Thirdly, the Judge concluded that Mr Brett nonetheless breached the remaining clauses of the agreement that continued in force. In particular, cl 5(a), by failing to take down defamatory statements and by posting further defamatory statements.[31] By way of remedy the Association and Mr Johnson had sought a permanent injunction restraining Mr Brett from making the offending statements and damages comprising their legal costs "because the breach of contract was flagrant".[32] The Judge declined the latter remedy altogether.[33] He did grant Mr Johnson a permanent injunction, but as he had not mounted any claim under the agreement (not being a party to it), that relief was responsive only to the defamation cause of action.[34]

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26 At [100].
27 At [101].
28 At [104]. These provisions are set out at [11] above.
29 At [108], relying on *Triggs v Staines Urban District Council* [1969] 1 Ch 10 (Ch).
30 At [109].
31 At [110].
32 At [111].
33 At [113].
34 At [114]–[115].

Submissions

[21] The Association challenged the basis for the Judge's conclusion as to the purpose and effect of the agreement. Mr Gordon submitted that the purpose was simply to obtain Mr Brett's undertaking not to defame the Association and its staff, and to avoid litigation. He submitted, further, that s 3(b) was not engaged. The Association's entry into a contract with Mr Brett was not an act in the performance of a public or governmental function, but rather a private bargain in which it gave concessions in return for his promise to cease his continuing defamation of the Association and its staff. And even if s 3(b) was engaged, the contract was a justified limit on Mr Brett's protected right to freedom of expression. The contract simply bound him to remove (and cease publishing further) untrue statements defamatory of the Association and its staff. The Association further submitted that the judgment failed to provide any remedy to the Association for Mr Brett's proven breach of the lawful obligations remaining under the settlement agreement. Although a range of other remedies had been sought at trial, the appropriate course was for the grant of a permanent injunction to restrain Mr Brett's defamatory publications, together with costs.

[22] Mr Brett retained counsel on the appeal. Mr McKnight relied very much on the Judge's reasoning. He submitted the Judge was correct to void portions of the agreement. If the Association was discharging a public function, so too was Mr Johnson (though he was not a party to the agreement). Because it was an agreement not to defame, the essential question was really whether he had a defence of qualified privilege.

Discussion: whether s 3(b) of the Bill of Rights Act was engaged

[23] The first question we must address is whether the Bill of Rights Act applies to the act of the Association entering into the agreement. That depends on whether that act was done "in the performance of any public function, power or duty conferred or imposed on that … body by or pursuant to law".[35] The question is not whether the body has public functions. Plainly the Association does — as Mr Gordon accepted.

[35] New Zealand Bill of Rights Act 1990, s 3(b).

[24] Bodies with public functions can nonetheless undertake acts which fall outside the terms of s 3(b), even given the generous interpretation this Court has said should apply to that provision.[36] Professor and Dr Butler give two examples of this: employment contracts and purchases of supplies.[37] The former example is supported by the decision of this Court in *Ioane v R*.[38] In that case Mr Ioane had been employed by New Zealand Post Limited as an on-call postman. In conducting an employment investigation into complaints about undelivered mail, New Zealand Post searched his property (with his consent). The evidence was passed onto the police. Mr Ioane was prosecuted for theft of mail. A question arose as to whether, for the purposes of s 30(5)(a) of the Evidence Act 2006, the evidence had been obtained as a consequence of a breach of any enactment or rule of law by a person to whom s 3 of the Bill of Rights Act applied. Thus the further question arose as to whether s 3(b) applied to New Zealand Post in these circumstances. We held that the proper approach was to focus on the specific function undertaken by that body when it conducted the investigation. We found the investigation was, in essence, an employment investigation. In consequence, we found New Zealand Post was not performing a public function, power or duty when it conducted that investigation, so s 21 of the Bill of Rights Act, dealing with unreasonable search, was inapplicable.[39]

[25] The essential focus of the Court's enquiry here is on the act undertaken, and whether it was "in the performance of a public function, power or duty" conferred by law. As Randerson J observed in *Ransfield v The Radio Network Limited*, in a broad sense the issue is how closely the particular function, power or duty is connected to or identifies with the exercise of the powers and responsibilities of the State.[40] In other words: "Is [the power, function or duty] 'governmental' in nature or is it essentially of a private character?"[41] Randerson J went on to suggest certain non-exclusive indicia: ownership (public or private); economic purpose (for profit or not); whether the source of the function, power or duty is statutory; the extent of governmental control; any public funding for the function, power or duty; whether the entity is "effectively

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36 *R v N* [1999] 1 NZLR 713 (CA) at 721.
37 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [5.7.4].
38 *Ioane v R* [2014] NZCA 128.
39 At [33]–[35].
40 *Ransfield v The Radio Network Limited* [2005] 1 NZLR 233 (HC) at [69].
41 At [69].

standing in the shoes of the government in exercising the function, power or duty"; whether it is exercised in the broader public interest (as opposed to simply being of benefit to the public); whether coercive powers analogous to those held by the State are conferred; whether the functions, powers or duties affect the rights, powers, privileges, immunities, duties, or liabilities of any person; whether the powers are extensive or monopolistic; and whether the entity is democratically accountable.[42]

[26] Palmer J appears to have been persuaded ultimately that although entering into agreement with an individual is prima facie a private act, the Association entered into the agreement "primarily to impose sanctions on criticisms of its performance of its public functions".[43] He therefore concluded that the Association was exercising a public power for the purposes of s 3(b) in entering the agreement.

[27] We agree, in part. We make two points.

[28] First, we do not think the Judge correct to conclude that the primary purpose of the Association entering into the agreement was "to impose sanctions on criticisms of its performance of its public functions". We would accept, however, that a material purpose behind entry into the agreement was to restrain Mr Brett from making defamatory remarks about the performance of public functions. It is however another question again whether the Association's entered that agreement "*in* the performance of any public function, power or duty conferred or imposed on that … body by or pursuant to law" for the purposes of s 3(b).

[29] Secondly, it may be arguable whether either the issue of defamation proceedings by the Association in these circumstances, or the entry into an agreement settling them, necessarily would engage s 3(b). On that topic the panel has divergent views. But that theoretical dissensus makes no difference in this case. That is because it is clear that the present agreement went further than simply settling a claim based on Mr Brett's defamation of the Association. The Association also agreed to limit the exercise of certain functions and powers. Those obligations included not posting information in relation to Mr Brett on the Association's website and extended to

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42 At [69].
43 High Court judgment, above n 5, at [98].

agreeing to operate in a collaborative manner to improve the low volume certification system. These must properly be described as public functions, relating as they do to obligations assumed by the Association under the agreement with the NZTA. Entry into the agreement was thus an exercise of a public power for the purposes of s 3(b). It was not argued that a predominance test should apply.[44] Nor are we convinced that one should. Where a body holding public powers or functions enters an agreement that compromises those functions or powers, we take the view s 3(b) is engaged without more. We therefore agree with the conclusion reached by the Judge on this point.

Discussion: whether the contractual abrogation of protected rights was lawful

[30] While entry into the agreement engaged s 3(b), it does not follow automatically that the contractual abrogation of protected rights renders the agreement or parts of it unlawful.

[31] That individuals may self-limit their rights as a matter of private law is trite. Let us imagine D commits a tort against P. P gains a right to remedies for the harm caused by D. But in an effort to avoid litigation, D and P enter into a compromise. P promises not to enforce the right he has arising from D's wrong and D promises to give something of value in exchange (usually a money payment). The right arising in tort has been abrogated and replaced with one in contract. While in theory the right in tort may subsist and be revived, access to it is prevented by the entry into the compromise agreement which has created new rights. An ordered and efficient civil society depends on the capacity of those in dispute to end those disputes by agreement, rather than resolving them only by protracted and destructive litigation.

[32] It may be recalled that in this instance the Judge had found 26 of the 35 statements complained of to be defamatory. And of those 26, 21 were defamatory of the Association. Mr Brett was entitled, of course, to submit to judicial determination, rather than enter a settlement agreement.

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[44] Such that, for s 3(b) to be engaged, the predominant purpose of the agreement be to control a public function, power or duty.

[33] If that agreement had been between two wholly private entities, no question as to its legality would arise. The question is whether the public law dimension of s 3(b) being engaged makes a material difference to the enforceability of the agreement.

[34] Rights protected by the Bill of Rights Act are not per se absolute. As the Judge observed, the protected right of freedom of expression in s 14 of the Bill of Rights Act is qualified by the permission given in s 5 to reasonable limits prescribed by law as are demonstrably justified in a free and democratic society.[45] And as the Judge also observed, the law of defamation itself represents such a permissible limitation. It proscribes only false statements, injurious to reputation, and is impressed with defences which exclude liability for false and injurious statements in some cases (for instance, where honest opinion or qualified privilege applies).[46] Another related but permissible limitation on freedom of expression is the law of contempt.

[35] Furthermore, protected rights may be lawfully qualified or surrendered in part where the actor perceives a benefit may be obtained from an exchange of rights. The right in s 23(4) not to make a statement on arrest may of course be waived, so long as the person has been advised of their right and the waiver is not extorted. Many persons on arrest prefer to give an account of their actions rather than assert a right to silence. There are other examples, as Tipping J noted in *Christchurch International Airport Ltd v Christchurch City Council* (a case concerning the lawfulness of noise conditions which landowners proposed to agree to in order to secure land use consents):[47]

> The Bill of Rights gives individual citizens particular rights and freedoms. It would seem somewhat contradictory to say that such rights and freedoms may not be given up for what the person concerned regards as valid reasons. The concept of freedom presupposes not only that you are free to enforce your right but that you are free not to enforce it and to waive it, if you choose to do so. For example the right to legal advice under s 23(1)(b) may be waived. There seems to me to be something inherently unsound in saying that a person's rights have been breached when that person has voluntarily indicated that he/she does not wish pro tanto to assert them. Why should those concerned be deprived of their freedom to express themselves in that way?
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> ...

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45 High Court judgment, above n 5, at [100].

46 At [100].

47 *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (FC) [*Christchurch International Airport Ltd*] at 583–585.

> There is nothing inherently inimical in surrendering pro tanto one's freedom of expression. Commercial documents and settlements of litigation frequently contain clauses whereby each party pro tanto surrenders his/her freedom of expression. They do so because the parties regard it as commercially advantageous or appropriate for other reasons to do so. It would be a bizarre conclusion to hold that a confidentiality agreement of this kind was unenforceable because it fell foul of s 14 of the Bill of Rights Act. I can see no difference in principle between a pro tanto surrender of one's rights in the context of a confidentiality agreement and a pro tanto surrender of one's rights for the purpose of securing a resource management consent. It would be unduly paternalistic and precious to say that this is a kind of right which people should not be allowed to surrender for what they see as their own advantage.

[36] A number of points of importance arise. The first is that rights protected under the Bill of Rights Act are not absolute. They are capable of being abrogated either unilaterally (by waiver) or consensually (by agreement).

[37] The second is that abrogation by waiver or agreement is capable of falling within the description of a limitation "prescribed by law". We construe that expression as extending to a voluntary abrogation (such as one by waiver or agreement), to the extent enforceable by law. The Judge did not analyse it in such terms, but it is implicit in his conclusion and in the decision in the *Christchurch International Airport* case. This particular application of the "prescribed by law" requirement does not appear to have been directly considered by New Zealand courts before.[48] But to read that expression as embracing a limitation otherwise enforceable at common law is consistent with the reasoning in the *Christchurch International Airport* case in the passages quoted above. It appeals to us also, the alternative being perverse (or "bizarre", as Tipping J put it). This is the kind of right which people should be allowed to surrender "for what they see as their own advantage".[49] And it must still clear the further hurdle we are about to turn to.

[38] The third is that for a limitation by abrogation to be lawful, it must also pass muster as being demonstrably justifiable in a free and democratic society.[50] Context will of course be important. We have noted already the beneficial worth in a

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[48] Per Butler and Butler, above n 37, at [6.12.10] to [6.12.20], the focus has been on discretionary powers, implicit operational limits imposed by statutory schemes, common law limits and instances where the Crown is relying upon a general permission to act rather than a specific law giving express authorisation to that limit.

[49] *Christchurch International Airport*, above n 47, at 583.

[50] New Zealand Bill of Rights Act, s 5.

civil society of upholding compromises to litigation. But that could not, for instance, outweigh consent obtained by unconscionable means. The question in Mr Brett's case, therefore, is whether the agreed limitation to his protected s 14 rights can be demonstrably justified in a free and democratic society.

[39] The Judge considered that s 14 protected Mr Brett's rights (1) to express wrong views and (2) not to be compelled to express information at the behest of others.[51] He struck out cls 5(a)(i), 5(d)(i) and 5(d)(ii) on the basis they limited those rights "without rational justification".[52] We disagree. We make two points.

[40] First, as Tipping J observed in *Christchurch International Airport*, provided the limitation is entered into voluntarily for the surrendering party's perceived advantage, it is difficult to see why such a limitation on one's freedom of expression ought not to be effective.[53] Here, the limitation imposed was assumed contractually in a compromise of threatened litigation. There was no suggestion the agreement was illegal other than in terms of the Bill of Rights Act. The limitations here were entered voluntarily by Mr Brett. The benefits to him were manifest. Differing from the Judge, we conclude that the contractual abrogation of rights was lawful, and the agreement was valid in its entirety.

[41] Secondly, had it been necessary to do so, we would not have concluded that the three clauses lack rational justification. Mr Brett had engaged in a prolonged attack against both the Association and Mr Johnson. As the Judge found, much of what he had published about them was false.[54] His legal position was perilous, and his pocket was at significant risk in what seemed to be inevitable litigation. Instead of defending his actions, with all the risk that brought with it, he elected to enter into the settlement agreement. As to the three clauses:

(a) Clause 5(a)(i) does not preclude Mr Brett making statements about the Association (or Mr Johnson) altogether. It precludes only his making statements (impliedly, about them) that are incorrect. As to those

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51 High Court judgment, above n 5, at [102].
52 At [104]. The offending provisions are set out at [11] above.
53 *Christchurch International Airport,* above n 47, at 583.
54 High Court judgment, above n 5, at [63]

already made, Mr Brett was in the best position to assess his capacity to defend what he had said, and at that juncture he chose not to do so. As to the assumed restraint on the *future* publication of incorrect statements (again, impliedly about the Association or Mr Johnson), the concession is modest given the already-present limitation represented by the law of defamation.

(b) Precisely the same observations may be made about cl 5(d)(i), which substantially overlaps cl 5(a)(i). We need not discuss that clause further.

(c) Clause 5(d)(ii) requires that, where statements made by Mr Brett about the Association are found (after an agreed evaluative process) to be *correct* that Mr Brett nonetheless will also publish a response from the Association. By implication, the response must be a reasonable one.[55] This provision does not of itself restrict Mr Brett's rights to publish, but it does compel publication an addendum authored by the Association where it is the subject matter of the publication. We do not think this concession can be described as lacking rational justification in the peculiar context of the making of the agreement. It is a proportionate response to the dispute that had arisen as a result of a string of inaccurate publications authored by Mr Brett. It was an obligation he preferred to assume rather defend his actions in the threatened proceedings. In our view it has very modest impact on Mr Brett's ability to self-express; rather it is better viewed as an agreement to also express the Association's views. Although the clause itself is unusual, an obligation freely entered to publish material at the request of another is not.

55 The Judge reached a similar view about other sub-clauses within cl 5: High Court judgment, above n 5, at [105].

Discussion: what remedy was appropriate

[42] The Association had sought damages in the amount of its legal costs. That remedy was denied and the Association does not challenge the Judge's conclusion thereon. But it does still seek the grant of a permanent injunction by way of remedy.

[43] The Judge did not deal explicitly with the Association's claim for injunction, although he granted one to Mr Johnson, prohibiting Mr Brett republishing the 12 statements he had found to be defamatory of Mr Johnson.[56]

[44] We have found the agreement lawfully imposed restraints on Mr Brett's rights of expression. We heard no argument suggesting that Mr Brett was not in breach of the terms of the agreement. Nor could such argument responsibly have been advanced. Formally, we find that he was in breach of the settlement agreement. In accordance with the limited remedial request of the Association, we grant it a permanent injunction prohibiting Mr Brett from further breach of the agreement.

Conclusion

[45] In agreement with the Judge, we find s 3(b) of the Bill of Rights Act was engaged by the Association entering the settlement agreement. In disagreement, however, we find the contractual abrogation of Mr Brett's protected right of freedom of expression was lawful. We grant a permanent injunction in favour of the Association prohibiting Mr Brett from further breach of that agreement.

Issue 2: Defamation: was the Judge correct to find qualified privilege protected defamatory statements concerning the Association?

[46] We consider here the procedural history of the proceeding so far as it concerns a defence of qualified privilege; the judgment appealed and submissions on appeal; the appropriate approach to be taken to pleadings in defamation proceedings (particularly where defendants are unrepresented); and whether the Judge was right to consider qualified privilege in the way he did.

[56] High Court judgment, above n 5, at [114]–[115].

Procedural history — qualified privilege

[47] Mr Brett was acting for himself. He filed his own statements of defence. They bear little relation to a conventional pleading. Nor were the first two efforts remotely adequate to meet the requirements of the High Court Rules. In due course an Associate Judge took him to task over this and required him to file a proper pleading.

[48] The first statement of defence, filed in August 2015, was a one paragraph exercise. The operative part read:

> The alleged defamation comprises verifiable factual material, and justifiable opinion, and that it is strongly in the public interest for this material to remain available.

It was met with a notice requiring further and better particulars of defence, including the particular statements pleaded by the plaintiff for which a defence of qualified privilege was asserted.

[49] The particulars then supplied, and subsequently the second statement of defence filed in July 2016, clearly invoked qualified privilege as a defence. At various points it stated:

> QUALIFIED PRIVILEGE
>
> All the above statements are I believe defensible as qualified privilege, in that I cannot in conscience allow a dangerous system to continue without scrutiny.

At another point Mr Brett stated:

> FREE SPEECH
>
> I am proud to be a citizen of a country which espouses the right to free speech in the Bill of Rights, unlike other countries where any criticism of the government or its agencies can result in intimidation, arrest, imprisonment or seizure of assets.

Other pleas were made under the headings of "Factual Items" – invoking the defence of truth – and "Honest Opinion Items". We infer that Mr Brett had some understanding of the nature of these various defences.

[50] Section 41 of the Defamation Act 1992 provides that where a defendant relies on a defence of qualified privilege and a plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication, that plaintiff must serve a notice to that effect within 10 working days after the statement of defence is served. That course was not taken here. Instead the plaintiffs complained that the statement of defence was defective, did not meet the requirements of the High Court Rules, and that Mr Brett should file an amended pleading. We observe that that complaint was properly made, and in due course sustained. Had the plaintiffs then sought leave to file a s 41 notice to respond to a compliant statement of defence invoking qualified privilege, such leave would inevitably have been granted.

[51] In September 2016, a case management conference took place before an Associate Judge.[57] The Judge explained to Mr Brett that he must address paragraph by paragraph each assertion contained in the statement of claim. An order was made requiring an amended statement of defence to be filed.

[52] What followed, the third statement of defence filed by Mr Brett, is a curious amalgam of assertion, evidence and pleading. It expressly invoked defences of truth ("factual material can be supported with evidence") and honest opinion. It then made a rather curious assertion that the defendant was subject to s 3(b) of the Bill of Rights Act. The reference to "the defendant" was presumably intended to be a reference to the Association (which was in fact the first plaintiff). The express invocation of qualified privilege in the previous pleading and particulars provided had been removed.

[57] *Low Volume Vehicle Technical Association Inc v Brett* HC Auckland CIV-205-404-1925, 1 September 2016 [Minute of Associate Judge Christiansen].

[53] However, in evidence filed a month ahead of trial, Mr Brett did expressly assert that he was claiming the protection of qualified privilege. He referred expressly to the decisions in *Lange v Atkinson*.[58]

[54] Counsel for the plaintiffs at trial was not Mr Gordon but Mr MacKenzie. He referred in his opening submissions to asserted defences by Mr Brett of "truth, honest opinion and qualified privilege", but complained that no particulars were given. Mr Brett's closing submissions (delivered on 31 July 2017) relied on qualified privilege. Neither the plaintiffs' counsel nor the Judge seems to have taken the point that this had not clearly been pleaded by Mr Brett.

Judgment appealed

[55] The judgment does not suggest qualified privilege had been adequately pleaded by Mr Brett. The Judge said there were technical inadequacies in both parties' pleadings.[59] But the Judge decided he should consider whether Mr Brett had such a defence regardless. He did so because he considered that given Mr Brett was then unrepresented, he needed to address the substance of his submissions rather than the adequacy of their legal form. So, the Judge said, "… I have considered whether he had a defence of qualified privilege even when he thought he had no defence".[60]

[56] The Judge was critical of counsel for the Association and Mr Johnson at trial. Although he had just noted that Mr Brett had not pleaded qualified privilege he said:[61]

> Surprisingly, the plaintiffs did not even try to defeat qualified privilege by pleading Mr Brett was predominantly motivated by ill-will towards it under s 19 of the [Defamation] Act.

He also said:[62]

> I also note, for Mr Brett's benefit, that if the plaintiffs had pleaded and proved that he had ill-will towards the [Association] in making his defamatory statements about it that would have defeated his defence of qualified privilege.

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58 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) [*Lange (No 2)*]; *Lange v Atkinson* [2000] 1 NZLR 257 (PC); and *Lange v Atkinson* [1998] 3 NZLR 424 (CA) [*Lange (No 1)*].

59 High Court judgment, above n 5, at [30].

60 At [30].

61 At [31].

62 At [114].

[57] In terms of the substance of a defence of qualified privilege, the Judge discussed the constitutional qualified privilege defence identified in *Lange v Atkinson* but held it did not apply to Mr Brett's statements, because they did not concern an actual or aspiring member of Parliament.[63]

[58] The Judge assessed whether another form of qualified privilege was available. He concluded it was by analogy with *Lange v Atkinson* in relation to broadcast comments made about entities which discharge s 3(b) public functions, powers and duties. Accordingly, the defence could apply to the Association, but not Mr Johnson.[64] As noted above, the Judge remarked that the privilege might have been defeated by ill will, had the Association pleaded and proved ill will.

Submissions

[59] Mr Gordon submitted that qualified privilege was never properly pleaded in the first place. Initially it appeared as an assertion but, following the Associate Judge's requirement that a proper statement of defence be filed, the assertion of qualified privilege was removed altogether in the second statement of defence of September 2016. It could not be treated as an available defence. To be asserted, it needed to be pleaded formally as an affirmative defence, under r 5.48(4) of the High Court Rules 2016. It was neither pleaded nor particularised. The Judge was unfair to suggest that a rebuttal should have been filed by the plaintiffs under s 19 of the Defamation Act. In any case, ample evidence of ill will was already before the Court. Mr Gordon submitted that to be even-handed the Court ought either to have determined the case only on the basis of the defences pleaded, or, if concerned about an injustice, granted leave to Mr Brett to file a third amended statement of defence but also allowed the Association fair opportunity to respond to a properly pleaded defence of qualified privilege, both by way of a s 19 rebuttal notice and evidence.

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63 At [83], citing *Lange (No 1),* above n 58. We note that both counsel disclaimed any application to the case of the new public interest defence identified by this Court in *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 (CA). As a matter of law, that defence was theoretically applicable: *Taylor v R* [2018] NZCA 498, [2019] 2 NZLR 38. However it too would have required to be invoked by pleading.

64 High Court judgment, above n 5, at [90].

[60] Mr Gordon also submitted that the Judge's analysis had conflated qualified privilege and s 3(b) the Bill of Rights Act. It was not appropriate to analyse the qualified privilege defence (if before the Court) on the basis of *Lange v Atkinson* or its analogues (including the new defence subsequently identified by this Court in *Durie v Gardiner*).[65] The scope of public dissemination by Mr Brett vastly exceeded persons having a genuine interest in receiving a communication. What was more, Mr Brett was entirely reckless, as the publication did not investigate the truth of what he was publishing and was simply broadcasting his own pejorative views to the world. Such issues meant that even if the privilege could be established, it could not be used by Mr Brett in this case.

[61] For Mr Brett, Mr McKnight sought to uphold the reasoning of the Judge. Indeed he sought to extend it, in his cross-appeal, to apply the defence of qualified privilege not only to the Association but also to Mr Johnson. Mr McKnight submitted that the Judge was right to have found that the defence of qualified privilege was "on the table" as between the parties. Qualified privilege had been raised as from the first amended statement of defence, and the plaintiffs had never served their notice under s 41 of the Defamation Act advising its intent to allege that the defendants had been motivated by ill-will or taken proper advantage of the publication.[66] That notice was required to be served within 10 working days after the statement of defence asserting qualified privilege. It had not been. Having made a tactical decision not to do so, the Association and Mr Johnson must suffer the consequences. Mr McKnight, no stranger to this area of practice, submitted:

> In defamation cases pleadings are foremost. They fully and clearly identify the issues for trial; the evidence to be presented. Importantly they allow the parties to consider and take advice on the strengths or weaknesses of their respective cases. So many defamation cases are settled upon receipt of a defence; and others when the plaintiff responds to that defence with a notice in terms of s 41 of the Act. The defendant is on notice as to the evidence that will [be] presented to establish his or her predominance of ill-will or their recklessness; or both as was the case in *Williams v Craig* and *Smallbone v London*.

[65] *Durie v Gardiner*, above n63.
[66] Defamation Act 1992, s 41(1)(b).

Discussion: the appropriate approach to be taken to pleadings in defamation proceedings (particularly where defendants are unrepresented)

[62] As Mr McKnight submitted, proper pleadings are of foremost importance in defamation proceedings.[67] There are a number of reasons why that is so. A statement of claim must properly inform a defendant of the words relied on as constituting the defamation, the meanings inferred from those words and the events said to constitute publication, so the defendant may (1) know what exactly is said to have been published illegitimately; and (2) marshal an available defence to meet that allegation. The ultimate function of pleadings is to identify the contest fairly. It requires allegation and counter-allegation to be defined with reasonable precision.

[63] As this Court held in *Price Waterhouse v Fortex Group Limited*, properly drawn and particularised pleadings are an essential road map for the Court and for the parties.[68] It is those documents that establish the parameters of the case, not the briefs of evidence. We went on to observe:[69]

> What is required is an assessment based on the principle that a pleading must, in the individual circumstances of the case, state the issue and inform the opposite party of the case to be met. As so often is the case in procedural matters, in the end a common-sense and balanced judgment based on experience as to how cases are prepared and trials work is required. It is not an area for mechanical approaches or pedantry.

[64] In the case of a statement of defence, that requires (amongst other things) that an affirmative defence is properly pleaded. Rule 5.48(4) also requires that be done. To state the obvious, qualified privilege is an affirmative defence. Proper pleading of qualified privilege as an affirmative defence serves two functions. First, it serves notice to the plaintiff that it will have to meet or manoeuvre past that defence. In that respect, the underlying purpose is similar to that for a statement of claim. Secondly, it prompts an obligation on the part of the plaintiff, under s 41 of the Defamation Act, to then give due notice of any intention to meet that defence by alleging ill will or improper advantage taken.

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67 See the extract from Mr McKnight's submissions quoted in the preceding paragraph.
68 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998 at 17.
69 At 19.

[65] The need to plead properly an affirmative defence has been restated without significant variation by this Court on many occasions.[70] Those decisions have cited the observations of Buckley LJ in *Re Robinson's Settlement* from over a century ago now:[71]

> The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy.

[66] As we said in *Manukau Golf Club v Shoye Venture Ltd*:[72]

> If an affirmative defence is not pleaded in the statement of defence, a plaintiff will have no notice of it and not be able to answer it. Further, if there is no pleading setting out the nature of the affirmative defence, there is nothing defining the issue so it can be properly understood and determined by the Court. … Only if such affirmative defences are pleaded can they be defined, answered and properly analysed. It is possible for an affirmative defence that has not been pleaded to arise and be considered in the course of a hearing, but only if leave is granted to amend and add that defence.

[67] The failure to plead an affirmative defence properly does not mean the defence cannot be considered at all. Where justice requires that it be considered, there is room to do so. But justice must be done to <u>both</u> sides, as the passage quoted above from *Manukau Golf Club* makes clear.

[68] In our view, an unpleaded affirmative defence should seldom be considered without an application to amend. The same is likely to be the case where the pleading is so deficient as to mislead or fail to comply with the rules of court. Where the deficiency is identified by the Court, it has a discretion to raise the matter of its own motion. Fairness may require exercise of the discretion where a defendant is self-represented and is proceeding in ignorance of the legal defences available. But in considering whether to then permit amendment, so that the defence is considered, the

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70 See, for example, *James v Wellington City* [1972] NZLR 978 (CA) at 982; and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [21]–[22].

71 *In Re Robinson's Settlement* [1912] 1 Ch 717 (CA) at 728.

72 *Manukau Golf Club Inc v Shoye Venture Ltd,* above n 70, at [22].

Court must also consider prejudice to the plaintiff. The degree of prejudice arising may be so great that the amendment should not be permitted. Or, if it is not of that order, then the amendment may proceed with such arrangements as needed to mitigate the plaintiff's prejudice. Only by following this precautionary approach is the question of prejudice by amendment likely to be properly evaluated.

Discussion: whether the Judge was right to consider qualified privilege in the circumstances of this case

[69] We turn from abstract principle to the particular circumstances of this case. We make six points.

[70] First, we observe that Mr Brett did not overlook the existence of a defence in the nature of qualified privilege. He cited it in each pleading prior to the final (and, for trial purposes, operative) second amended statement of defence.

[71] Secondly, it is arguable that by referring to s 3(b) of the Bill of Rights Act in a defamation context, he was referring obliquely to qualified privilege. Mr McKnight did not quite put it that way in argument. He put it a different way. He said it had "always been on the table" in the case. The Judge saw it a third way again, saying that he would consider the defence "even when [Mr Brett] thought he had no defence".[73] As a later judgment on a recall application makes clear, the reason the Judge did so was not that the defence was properly pleaded but because Mr Brett thereafter reasserted it in evidence and submissions, and without adequate protest by trial counsel for the plaintiffs.[74] Our assessment is that as a pleading of qualified privilege, the operative statement of defence was at best misleading and wholly deficient. Taken in the context of its predecessor pleadings, it did not put the plaintiffs on proper notice that that defence was pursued.

[72] Thirdly, we consider the plaintiffs were therefore entitled to take the pleadings at face value. Qualified privilege had been expressly advanced previously, but had now been replaced with something else — the exact import of which was unclear.

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73 High Court judgment, above n 5, at [30].

74 *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 3281.

We do not consider, in these circumstances, any criticism can be made of the plaintiffs for not filing a s 41 notice.

[73] Fourthly, when Mr Brett then sought to resurrect qualified privilege in affidavit evidence (where it had no place being) and in submissions, the position in terms of the pleadings called to be reconsidered. It is regrettable that trial counsel for the plaintiffs did not seek a direction at the outset of the trial. But by no means did he acquiesce in consideration of the defence. To the contrary, he objected strenuously to the bald and unparticularised assertion of the defence at that point. We think there is much force in the objection he advanced.

[74] Fifthly, it may well be that fairness here demanded that Mr Brett be allowed to resurrect qualified privilege. But fairness also dictated that, if that was to occur, the prejudice to the plaintiffs be assessed first. This was an unusual case. Mr Brett's defence succeeded eventually not on conventional common law duty-and-interest qualified privilege or *Lange v Atkinson* political subject matter qualified privilege, but on a novel extension of the latter. We have something to say about that under the third issue, below.[75] Moreover, there was a very strong possibility on the facts before the Court that ill will or improper advantage would defeat the privilege. If Mr Brett was to be allowed in all these circumstances to advance qualified privilege, the plaintiffs had to be allowed to give notice out of time under s 41 and lead evidence (and cross-examine Mr Brett) on ill will and improper advantage. We agree with Mr Gordon that in criticising the plaintiffs for not filing such a notice, the Judge was setting an impossible standard. The Association was required to predict that an apparently abandoned defence would be resurrected after close of pleadings; predict that despite leave being neither sought nor granted to add that defence, the Court would nevertheless consider it; predict what particular facts might give rise to the privilege (and prepare its evidence and opening submissions accordingly); and (appreciating all this) file a rebuttal under s 19 of the Defamation Act though at that point there was nothing sufficiently pleaded to rebut.

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[75] See [77] below.

[75] Sixthly, in the ordinary course this Court would if at all possible resolve the merits between the parties. Here, however, that is impossible. While the defence is a stretch on any view, it is not incapable of being advanced. Moreover, if it is to be advanced, the plaintiffs must have the opportunity to rebut it on the basis of ill will or improper advantage. We therefore see no option here but to remit the case to the High Court to consider rather more formally (and on notice) an amendment of the defence, the filing of a rebuttal and new evidence on the issues then engaged by those pleadings. As the trial was a judge-alone one, that path is more readily available than in the usual run of defamation cases. We consider that course is the only proper one available.

[76] We direct accordingly.

Issue 3: Defamation: was the Judge correct to find qualified privilege did *not* extend to defamatory statements concerning Mr Johnson?

[77] This issue concerns the cross-appeal. Given the conclusions reached under Issue 2, which place the application of any defence of qualified privilege in somewhat greater doubt, we can be brief. We make two points.

[78] The first is that all counsel before us disclaimed reliance on the decision of this Court in *Durie v Gardiner.*[76] That was understandable. First, the *Durie v Gardiner* public interest defence is doctrinally distinct from qualified privilege. Secondly, it was not of course pleaded in this case. However, given the orders now made, the second objection is not necessarily fatal to the application of that defence on remittal.[77]

[79] Secondly, we note the terms of the extended *Lange v Atkinson* qualified privilege defence drawn by the Judge.[78] There is much to be said for an extended defence in those terms, applying to broadcast statements (beyond the scope of duty-and-interest privilege) bearing on the performance of public functions, powers and duties. In our view, however, a defence in these terms does not exist separately from the new public interest defence but is instead subsumed by it. As

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76 *Durie v Gardiner,* above n 63.
77 As to this, see *Taylor v R,* above n 63.
78 High Court judgment, above n 5, at [84].

Durie v Gardiner makes clear, the burden of proof of a public interest defence (to show both public interest and responsibility of publication) lies wholly on the defendant.[79]

[80] Given the conclusions reached under Issue 2, and the direction made in [76], we decline to determine the cross-appeal. Formally, it will be dismissed.

Result

[81] The appeal is allowed.

[82] The cross-appeal is dismissed.

[83] A permanent injunction is granted to the Association prohibiting Mr Brett from further breach of the June 2014 settlement agreement.

[84] The case is remitted to the High Court for reconsideration in accordance with [76].

[85] The first respondent is to pay the appellant costs on a standard appeal on a band A basis together with usual disbursements.

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79 *Durie v Gardiner*, above n 63, at [59].