**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2015-404-1925**
**[2019] NZHC 2936**

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| BETWEEN | LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INC<br>First Plaintiff |
| AND | ANTHONY PETER JOHNSON<br>Second Plaintiff |
| AND | JOHN BERNARD BRETT<br>Defendant |

Hearing: 11 November 2019

Appearances: D P MacKenzie for the plaintiffs
J B Brett in person

Judgment: 11 November 2019

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**ORAL JUDGMENT (NO 3) OF PALMER J**

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*Solicitors/Parties:*
MinterEllisonRuddWatts, Wellington
J B Brett in person

**What happened?**

[1] On 20 November 2017, I issued judgment in this proceeding.[1] In summary, I held that Mr Brett defamed the Low Volume Vehicle Technical Association (LVVTA) but succeeded in a defence of qualified privilege. I held Mr Brett also defamed Mr Anthony Johnson and had no defences for that. I ordered Mr Brett to pay Mr Johnson $100,000 in damages as well as costs and issued a permanent injunction that Mr Brett not repeat the defamatory statements.

[2] The LVVTA appealed. Mr Brett appealed in relation to Mr Johnson. Mr Johnson did not appeal. On 26 March 2019, the Court of Appeal upheld the LVVTA's appeal in part and dismissed Mr Brett's appeal.[2] Relevantly, the Court:

(a) overturned the finding that Mr Brett succeeded in his defence of qualified privilege against the LVVTA;[3]

(b) remitted to the High Court the issue of whether Mr Brett's defence of qualified privilege was defeated by ill will;[4] and

(c) declined to determine Mr Brett's cross-appeal that the defence of qualified privilege did not apply to Mr Johnson, dismissing it.[5]

[3] On remission of the proceedings to the High Court, the parties repleaded. Mr Brett's amended statement of claim of 5 June 2019 included a pleading of the new defence of public interest in relation to Mr Johnson's claim. He also made a counterclaim. The plaintiffs applied to strike out the counterclaim and the pleading of the public interest defence against Mr Johnson and they sought costs. Mr Brett eventually discontinued his counterclaim but resists the strike-out of the public interest defence against Mr Johnson and resists paying any costs.

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1 *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587.
2 *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808.
3 At [74].
4 At [75].
5 At [80].

## Law of strike-out

[4] Under r 15.1(1) of the High Court Rules 2016 (the Rules), the Court may strike out part of a pleading if it discloses no reasonably arguable defence, is likely to cause prejudice or delay, is frivolous or vexatious or otherwise an abuse of process. The defence must be so untenable that I must be certain it cannot possibly succeed.[6]

## Submissions

[5] Mr MacKenzie, for the plaintiffs, submits Mr Johnson has already succeeded in his defamation claim against Mr Brett, and the High Court expressly rejected his defence of qualified privilege. He submits the 20 November 2017 judgment stands. He also submits the question of whether Mr Brett's defamation of Mr Johnson was in the public interest has already been determined.

[6] Mr Brett submits that when he came to prepare his evidence, he found it impossible to distinguish between actions of Mr Johnson as the LVVTA and as an individual. He says he is confused about what the Court of Appeal remitted back.

## Should Mr Brett's pleading of the defence against Mr Johnson be struck out?

[7] In the case management of the remitted proceeding, I expressed a preliminary view to the parties that the defence of public interest remitted by the Court of Appeal to the High Court might relate to Mr Brett's defamatory statements about Mr Johnson.[7] I also indicated Mr Brett cannot undo the findings in the judgment regarding Mr Johnson, including the lack of public interest in attacking Mr Johnson.[8] For that reason, I said it would be difficult to conceive of how Mr Brett could succeed. On 22 May 2019, Mr Brett considered prudence to suggest he would not attempt to make a defence of public interest in relation to Mr Johnson.[9] But he did. At today's hearing we have had a similar conversation about the distinction between Mr Johnson and the LVVTA as we had in past teleconferences.

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6 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267 (cited approvingly by Elias CJ and Anderson J in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]).

7 Minute, 11 April 2019, at [12].

8 Minute No 7, 19 July 2019, at [6].

9 Minute No 6, 22 May 2019, at [2](b)(ii).

[8] I consider Mr MacKenzie is correct that Mr Johnson's claim against Mr Brett was determined in the judgment of 20 November 2017. The matter is not particularly clear but, on balance, my interpretation of the Court of Appeal's dismissal of Mr Brett's appeal is that the suit against Mr Johnson was not included in the remission to the High Court. In the judgment of 20 November 2017, I found that "[t]here is no public interest in attacking the person rather than the institution".[10] Although made for a different purpose, the High Court cannot revisit that finding in hearing the remitted proceeding. That appears to be fatal to Mr Brett's public interest defence against Mr Johnson.

[9] Accordingly, Mr Brett's public interest defence against Mr Johnson is so untenable I am certain it cannot possibly succeed. I strike it out.

**Costs**

[10] Mr MacKenzie submits Mr Brett should pay costs on a 2B basis for his discontinuance of the counterclaim, uplifted by 50 per cent, and costs on a 2B basis for opposing the strike-out. Mr Brett acknowledges his counterclaim was baseless. He submits the LVVTA is spending public money and his income is only as a beneficiary, so costs should lie where they fall.

[11] Mr Brett is required to pay costs for his discontinuance of the counterclaim, under r 15.23 of the Rules. I agree that they should be on a 2B basis, uplifted by 50 per cent under r 14.6(3)(b)(ii), as sought. The counterclaim was hopeless. Mr Brett was given plenty of opportunity to discontinue it but refused to do so. In a teleconference on 19 July 2019, Mr Brett maintained his claim was well-justified despite Mr Gordon setting out his arguments and me urging him to get legal advice.[11] He maintains his opposition to paying costs at all. Mr Brett must also pay costs on a 2B basis, as sought, for his unsuccessful opposition to the strike-out.

Palmer J

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[10] *Low Volume Vehicle Technical Association Inc v Brett*, above n 1, at [88].

[11] Minute No 7, 19 July 2019, at [3].