IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA312/2019
[2020] NZCA 260

BETWEEN	COLIN GRAEME CRAIG First Appellant	
	HELEN RUTH CRAIG Second Appellant	
	ANGELA MARIA STORR Third Appellant	
	KEVIN ERIC STITT Fourth Appellant	
	STEPHEN DYLAN TAYLOR Fifth Appellant	
AND	JOHN CHARLES STRINGER Respondent	

Hearing:	28 April 2020 (further submissions received 4 and 7 May 2020)
Court:	Kós P, Gilbert and Goddard JJ
Counsel:	S J Mills QC and T F Cleary for Appellants Respondent in person W Akel and E A Keall as counsel assisting
Judgment:	26 June 2020 at 2 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order made in the High Court staying the proceeding is set aside.

C The respondent is to pay costs to the appellants for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] The central issue on this appeal is whether the High Court was correct to stay the present defamation proceedings indefinitely on the basis that their pursuit would be oppressive to a prospective witness and therefore an abuse of process of the Court.[1] The witness had already given evidence three times on the same topic in other defamation proceedings involving different parties (the other defamation proceedings) and Palmer J considered it would be oppressive to require her to do so again.[2]

[2] The present defamation proceedings comprise a proceeding by Colin Craig against John Stringer[3] and a proceeding by Mr Stringer against Mr Craig and the other four appellants.[4] These separate proceedings were filed in September and October 2015 and were due to be heard together at a trial commencing in August 2019. However, on 17 June 2019, two months prior to the scheduled trial date, the High Court, of its own motion, made an order staying indefinitely Mr Craig's claim against Mr Stringer and part of Mr Stringer's claim against Mr Craig and the other appellants.[5] This meant that the time, effort and cost expended by Mr Craig over a four-year period to prepare his claim for trial were all for nothing.

[3] Although no question of issue estoppel or res judicata arose out of the other defamation proceedings, and no one other than Mr Craig had sought consolidation of any of the proceedings, the Judge concluded that Mr Craig's continued pursuit of his claim against Mr Stringer was an abuse of the process of the Court.[6] The Judge considered it would be "inequitable" to stay Mr Craig's claim and not Mr Stringer's, so he stayed Mr Stringer's claim as well to the extent it would require the same prospective witness to give evidence again.[7]

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1 *Craig v Stringer* [2019] NZHC 1363, [2019] 3 NZLR 743 [High Court judgment].
2 At [31].
3 *Craig v Stringer* CIV-2015-409-575.
4 *Stringer v Craig* CIV-2015-404-2524.
5 High Court judgment, above n 1, at [67(b)]–[67(c)].
6 At [31].
7 At [36].

Factual background

[4] Mr Craig was the leader of the Conservative Party from 2011 until 2015. Two days before the general election in September 2014, Mr Craig's press secretary, Rachael MacGregor, suddenly resigned. Ms MacGregor privately alleged that Mr Craig had sexually harassed her during the three-year period she had been his press secretary. She also claimed that she had not been fully paid. After Mr Craig denied these allegations, Ms MacGregor promptly filed a claim with the New Zealand Human Rights Commission.

[5] In November 2014, Ms MacGregor confided in Jordan Williams that Mr Craig had sexually harassed her. Mr Williams was a lawyer, the co-founder and executive director of the New Zealand Taxpayers' Union and a supporter of the Conservative Party. Ms MacGregor disclosed to him in confidence some of the letters and cards Mr Craig had sent to her. Mr Williams assured Ms MacGregor that he would keep this information confidential as if he were her lawyer. However, in breach of that undertaking, Mr Williams made various statements to a number of leading figures associated with the Conservative Party, including that Mr Craig had sexually harassed Ms MacGregor and had sent sexually explicit text messages to her.

[6] Ms MacGregor's sexual harassment claim was not determined by the Human Rights Commission because the parties reached a confidential settlement of their disputes at a mediation in May 2015. This settlement was intended by Mr Craig and Ms MacGregor to be the end of the matter.

[7] However, Mr Williams, who by then had become romantically involved with Ms MacGregor, decided to mount a campaign to remove Mr Craig as leader of the Conservative Party. In further breach of his confidentiality undertaking, Mr Williams told various leading figures associated with the Party, including Mr Stringer, a board member, that Mr Craig had sexually harassed Ms MacGregor and he showed them some of Mr Craig's letters to her. He also said that Mr Craig had sent sexually explicit text messages to Ms MacGregor and falsely claimed he had copies of these. Mr Williams also claimed that Mr Craig had made a large payment to Ms MacGregor to settle her claim.

[8] Following these disclosures, on 19 June 2015, Mr Craig agreed to stand down as Party leader to enable the board to undertake an investigation. That same day, Mr Williams sent a draft blog post to Cameron Slater for publication on his "Whale Oil" website. This draft contained allegations of sexual harassment by Mr Craig, including inappropriate touching and stated that a pay-out had been made to a former staff member. Without Ms MacGregor's knowledge or consent, Mr Williams, using the pseudonym "Concerned Conservative", sent Mr Slater copies of some of Mr Craig's communications with Ms MacGregor. This blog was immediately published on the Whale Oil website.

[9] Mr Slater subsequently published a number of further defamatory statements about Mr Craig, some of which were instigated or drafted by Mr Williams. Mr Slater published these statements on the Whale Oil website and various other media platforms. The statements included that Mr Craig had sexually harassed Ms MacGregor, sent her numerous "dirty" sexually explicit text messages, "begged" her for an affair, put her under financial pressure to sleep with him, paid her a large sum of money running into six figures to settle her claims and seriously sexually harassed a woman other than Ms MacGregor. Mr Stringer made similar allegations as well as allegations of financial misconduct and electoral fraud. These were published on his own blogsite *CoNZervative* and through various media. Mr Stringer was also one of Mr Slater's sources of information for his Whale Oil website.

[10] On 29 July 2015, Mr Craig held a press conference and announced that he intended to "fight back" against what he described as "the Dirty Politics Brigade" who had been "running a defamatory strategy" against him. He provided media representatives with copies of a 12-page booklet entitled "*Dirty Politics and Hidden Agendas*" (the booklet). He said he was preparing separate claims in defamation against Mr Williams, Mr Stringer and Mr Slater, all members of the so-called "Dirty Politics Brigade". He said they had mounted a "campaign of defamatory lies" against him, including that he had sexually harassed one or more persons, made pay-outs to silence supposed victims, and sent sexually explicit text messages. Mr Craig subsequently arranged for copies of this booklet to be delivered to some 1.6 million homes throughout New Zealand.

The defamation proceedings

[11] Six separate defamation proceedings (the present defamation proceedings and the other defamation proceedings) arising out of these various publications followed:

(a) *Williams v Craig* CIV-2015-404-1845 — filed by Mr Williams in August 2015. This proceeding was heard before a jury in September 2016 (the *Williams* proceeding). Verdicts were returned in Mr Williams' favour, with damages being awarded in the sum of $1.27 million. In a judgment delivered on 12 April 2017, the High Court made a conditional order setting aside these verdicts and ordering a retrial of Mr Williams' claims on both liability and damages.[8] Mr Williams appealed to the Court of Appeal. This Court allowed the appeal in part, restoring the jury's verdict on liability, entering judgment for Mr Williams on liability and limiting the retrial to damages.[9] In a judgment delivered on 11 April 2019, the Supreme Court allowed Mr Craig's appeal and ordered a general retrial on liability and damages.[10] These proceedings, and Mr Craig's claim against Mr Williams referred to at (f) below, were subsequently settled on the basis that Mr Williams retracted his statements about Mr Craig, apologised to him and agreed to pay a confidential settlement sum.

(b) *Craig v Slater* CIV-2015-404-1923 — filed by Mr Craig in August 2015 against Mr Slater and his company, which owned the Whale Oil website. Mr Slater counterclaimed against Mr Craig, alleging Mr Craig defamed him in the booklet, and seeking damages of over $8 million. This proceeding was heard in May and June 2017 (the *Slater* proceeding). In a judgment delivered on 19 October 2018, Toogood J made a declaration that Mr Slater and his company were liable to Mr Craig in defamation for the untrue statements that Mr Craig had placed Ms MacGregor under financial pressure to sleep with him

8 *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215.
9 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1.
10 *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457.

and had sexually harassed at least one other victim.[11] The Judge declined to award any damages to Mr Craig.[12] Mr Craig's other claims in defamation were dismissed, as were Mr Slater's counterclaims against Mr Craig.[13] This judgment is presently under appeal by Mr Craig to this Court.

(c) *Craig v Stringer* CIV-2015-409-575 — filed by Mr Craig in September 2015 and forming one of the present defamation proceedings, the subject of this appeal. This proceeding was initially settled at a judicial settlement conference held on 30 January 2017. Consent orders were made entering judgment for Mr Craig against Mr Stringer for alleging that he had sexually harassed Ms MacGregor and one or more other women, had been fraudulent in his business dealings and had committed electoral fraud. Mr Stringer retracted his statements to this effect, apologised to Mr Craig and paid a confidential sum in settlement.[14] Following the *Slater* trial referred to at (b) above, this judgment was recalled and varied by excluding reference to the statements made by Mr Stringer that Mr Craig had sexually harassed Ms MacGregor.[15] We note in passing there is a dispute between the parties as to the effect of this judgment and the scope of the issues that it reinvigorated. We are not called upon to determine that issue and it would be wrong for us to express any view about it in this judgment.

(d) *Stringer v Craig* CIV-2015-404-2524 — filed by Mr Stringer in October 2015 against Mr Craig, his wife and the other three appellants and seeking damages of over $3.5 million. This proceeding, other than those aspects of the claim that were stayed by the High Court judgment, proceeded to trial in August and September 2019. Judgment was delivered by Palmer J on 3 April 2020 dismissing all of Mr Stringer's claims against Mr Craig and the other appellants, which were founded

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11 *Craig v Slater* [2018] NZHC 2712 at [654].
12 At [653].
13 At [654].
14 *Craig v Stringer* [2017] NZHC 50.
15 *Craig v Stringer* [2017] NZHC 3221.

on 52 allegedly defamatory statements.[16] The Judge considered Mr Stringer's suit was misconceived.[17]

(e) *Craig v MacGregor* CIV-2016-404-2915 — filed by Mr Craig in November 2016 but not served until Ms MacGregor found out about the claim and filed a defence and counterclaim in about August 2017. This proceeding was heard by Hinton J in September and October 2018 (the *MacGregor* proceeding). In a judgment delivered on 6 September 2019, the Judge dismissed most of the claims and counterclaims but found that each had defamed the other to a limited extent.[18]

(f) *Craig v Williams* CIV-2017-404-1065 — filed by Mr Craig in May 2017 against Mr Williams following revelations in the *Williams* trial. As noted, this proceeding was settled along with the *Williams* proceeding referred to at (a) above.

[12] It can be seen from this summary that by the time Mr Craig's proceeding against Mr Stringer was stayed in June 2019, there had been three trials — the *Williams* proceeding in September 2016, the *Slater* proceeding (including Mr Slater's counterclaim) in May and June 2017 and the *MacGregor* proceeding (including Ms MacGregor's counterclaim) in September and October 2018. Ms MacGregor gave evidence at each of these trials. She was called by Mr Craig as a witness in the first, by Mr Slater in the second, and she chose to give evidence in support of her own claims in the third. While there had been three trials, by the time the High Court judgment was delivered only the claims arising in the *Slater* proceeding had been determined, and that judgment was under appeal. The verdicts in the *Williams* proceeding had been set aside. The claims and counterclaims in the *MacGregor* proceeding had been heard but no judgment given when the present order for stay was made.

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16 *Stringer v Craig* [2020] NZHC 644.
17 At [161].
18 *Craig v MacGregor* [2019] NZHC 2247.

High Court judgment

[13] Palmer J's reasons for finding that Mr Craig's defamation claim against Mr Stringer was an abuse of process of the Court in all the circumstances are encapsulated in the following passages of his judgment:[19]

> [21] … 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 [of the Defamation Act 1992] 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". …
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> …
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> [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.
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> [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.
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> [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

[19] High Court judgment, above n 1.

> harassment of a person, requiring each of those defendants to call evidence about that alleged harassment in order to defend themselves.
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> [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.
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> (Footnote omitted.)

Was Mr Craig's claim against Mr Stringer an abuse of process?

General principles

[14] The starting point is that citizens are entitled to have access to the courts to resolve their differences. This is fundamental to the preservation of the rule of law. As Lord Bingham observed in *Johnson v Gore Wood & Co*, the court must be vigilant in the exercise of its duty to protect this right:[20]

> Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court[.]

[15] However, consistent with this principle of preserving access to the courts for the resolution of genuine disputes, access is properly denied where the litigant seeks to misuse the court's processes for an improper purpose such as to vex, harass or embarrass the other party rather than for the genuine purpose of seeking to vindicate legal rights. The court has a duty to prevent its processes from being abused in any such manner as Lord Diplock explained in his celebrated speech in *Hunter v Chief Constable of the West Midlands Police*:[21]

> [Abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed

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20 *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) at 22.

21 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536.

> categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[16] Access to the courts will be denied where a litigant seeks to reopen a dispute that has already been determined. This is precluded by the doctrine of res judicata which serves the public interest in finality in litigation and upholds the principle that a party should not be vexed twice in the same matter.[22] Res judicata applies where a cause of action has been determined in earlier proceedings between the same parties or their privies — cause of action estoppel. The doctrine prevents re-litigation of the same cause of action in any subsequent proceedings. Res judicata can also apply where there has been a determination in earlier proceedings between the same parties or their privies of an issue that was essential to the determination of the claim such that the judgment could not stand without it — issue estoppel.[23] Issue estoppel is narrower, and less absolute in its application than cause of action estoppel.[24]

[17] A related principle is that the parties are required to bring forward their whole case and will generally be prevented from later attempting to re-open the same subject on a different basis. This principle was first recognised by Wigram V-C in *Henderson v Henderson*:[25]

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

[18] The authorities referred to by the Judge at [21] of his judgment (quoted above at [13]) are based on the *Henderson v Henderson* principle. The underlying policy is to promote finality in litigation and ensure a defendant is not oppressed by successive

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22 *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7 at [58].

23 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266.

24 *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL) at 108–109 per Lord Keith and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [17]–[26] per Lord Sumption.

25 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch) at 115.

suits.[26] The objection is not that the law will not contemplate or tolerate apparently inconsistent decisions.[27]

[19] Lord Sumption explained the juridical difference between the doctrine of res judicata and the *Henderson v Henderson* principle in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*:[28]

> Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.

[20] The doctrine of res judicata and the principles of abuse of process operate to prevent parties from exercising what would otherwise be their right to have access to the court. There are other mechanisms for ensuring that proceedings, once properly filed and disclosing a reasonable cause of action, are managed to trial efficiently. In particular, the High Court Rules 2016, the objective of which is to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application,[29] contain provisions for case management, consolidation of proceedings where appropriate, and pre-trial determination of a question in issue in any proceeding.[30]

[21] The Judge noted that in *Jameel (Yousef) v Dow Jones & Co Inc* the Court of Appeal of England and Wales considered the defendant could apply to strike out a defamation proceeding as an abuse of process where there was no, or minimal, damage to a plaintiff's reputation and that this decision has been applied in New Zealand.[31] However, it was not suggested that Mr Craig's claim should be struck out or stayed on this basis, so we need not address this line of cases.

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26 *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 (CA) at 260 per Sir Thomas Bingham MR and Johnson *v Gore Wood & Co*, above n 20, at 31 per Lord Bingham and 59 per Lord Millett.

27 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 (HL) at 751 per Lord Hobhouse.

28 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, above n 24, at [25].

29 High Court Rules 2016, r 1.2.

30 See pt 7 subpt 1 and pt 10 subpt 3.

31 High Court judgment, above n 1, at [20], referring to *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946. *Jameel* was also applied in *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142 and *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365.

[22] There are also special provisions in the Defamation Act 1992 restricting the time within which a person may commence multiple proceedings for defamation in respect of the publication of the same or substantially the same matter in any newspaper, by a broadcaster or by any cinematographic film in a cinema open to the public.[32] The person alleging defamation must commence all such proceedings no later than 28 working days after the commencement of the first proceeding or within such longer period as the Court may allow. Where two or more proceedings for defamation are commenced by the same person in respect of the same publication (being a publication of the type coming within s 46 and described above), the plaintiff is required to give notice as soon as practicable under s 47 to every defendant in each of the proceedings to enable them to apply for consolidation of the proceedings under s 48.

Res judicata

[23] The Judge accepted that the other defamation proceedings could not give rise to either species of res judicata — cause of action estoppel or issue estoppel.[33] That was plainly right. Apart from anything else, the parties are different. Mr Stringer was not a party to any of the other defamation proceedings. Further, the only determination of any issue arising out of the numerous publications by the various parties was in the *Slater* proceedings. Mr Craig's claim against Mr Stringer was therefore clearly not an abuse of process of the High Court in the sense that it sought to re-litigate causes of action or issues already determined between the same parties or their privies.

Abuse of process

[24] There can be no suggestion that when Mr Craig brought his claim against Mr Stringer in August 2015, soon after the defamatory statements were made, he did so for any purpose other than for the genuine purpose of vindicating his legal rights against Mr Stringer. The Judge did not find that the proceeding was abusive when it was commenced, nor could there be any basis for such a finding. The proceedings could not have been struck out or stayed as an abuse of process at that time.

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32 Defamation Act 1992, s 46.

33 High Court judgment, above n 1, at [27].

[25] While not an abuse of process when filed, the Judge considered that the continued pursuit of the present defamation proceedings became an abuse of the Court's processes given the other defamation proceedings that had proceeded to trial in the interim.[34] It appears the only way Mr Craig could have avoided this unwelcome and unanticipated trap (which gave Mr Stringer a free pass) would have been to sue all defendants in the same proceeding at the outset or, somehow, arrange for the proceedings to be consolidated after they were filed. We turn now to examine these possibilities.

[26] Mr Craig was not obliged to sue all defendants in the one proceeding. There is nothing in the Defamation Act to require this and the proceedings would have been extremely complex and unwieldy had Mr Craig done so. One way of illustrating this is by considering how long it took to hear each of the cases. The *Williams* proceeding took four weeks for a jury to hear; the *Slater* proceeding took another four weeks to hear before a judge sitting alone and resulted in a 250-page judgment; the claims and counterclaims in the *MacGregor* proceeding took two weeks to hear; and Mr Stringer's slimmed down proceeding against Mr Craig and the other four appellants, which still concerned 52 allegedly defamatory publications, took another three weeks to hear.

[27] There were other obstacles to any attempt by Mr Craig to have everything dealt with together. The first proceeding in time was issued by Mr Williams against Mr Craig and was tried by a jury. Mr Craig made no claim in those proceedings and could not have pursued his claims against other parties in the context of them. And yet, that was effectively strike one on the Judge's count, edging Mr Craig's pursuit of his proceedings against Mr Stringer towards the category of abuse of process.

[28] Mr Craig could have sued Mr Slater and Mr Stringer in the one proceeding. Had he done so, his claim against Mr Stringer could not have been stayed applying the Judge's reasoning. However, combining these claims in the one proceeding and hearing them all together would have added considerably to their scope, complexity and expense. It would also have meant that Mrs Craig, Ms Storr, Mr Stitt and Mr Taylor (the additional defendants to Mr Stringer's claims) would have been

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[34] At [34].

obliged to participate in an extended trial to accommodate Mr Craig's claims against Mr Slater and Mr Slater's counterclaims against Mr Craig. No party sought joinder, nor did the Court, which was case managing all the proceedings, suggest this. But there was an even more fundamental obstacle. Mr Craig settled his claim with Mr Stringer at the judicial settlement conference on 30 January 2017, before the trial of the claims involving Mr Slater commenced on 8 May 2017. For that reason alone, it was simply not possible for Mr Craig to have pursued his claims against Mr Stringer at the *Slater* trial. The judgment partially recalling the consent settlement judgment with Mr Stringer was not issued until after that trial concluded. Nevertheless, on the Judge's analysis, the *Slater* trial was strike two, moving Mr Craig's claim against Mr Stringer a step closer to the category of abuse, because Ms MacGregor gave evidence at this trial in response to a subpoena served by Mr Slater.

[29] Mr Craig was effectively the defendant in the *MacGregor* proceedings. Although he filed that proceeding against her, he did not serve it. Ms MacGregor filed her counterclaim when she found out about the proceeding some nine months later and she was the sole driving force behind the proceeding by the time of the trial in September 2018. During 2018, Mr Craig made a number of open offers that both parties withdraw their claims. He also offered to pay $30,000 towards Ms MacGregor's costs. Hinton J confirmed this in her judgment issued in September 2019 saying "this is really Ms MacGregor's proceeding".[35] It is most unlikely Mr Craig would have been permitted to join his claims against Mr Stringer (or the separate claim by Mr Stringer against Mr Craig and the other four appellants) to the *MacGregor* proceeding after the former claims were reinstated by the recall judgment in December 2017. Nevertheless, because Ms MacGregor chose to give evidence in support of her own claims, this was, on the Judge's reasoning, the third and final strike rendering any further pursuit by Mr Craig of his claims against Mr Stringer an abuse of process.

[30] For the reasons we have given, Mr Craig could not reasonably have been expected to pursue his claims against Mr Stringer in any of the other three proceedings

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35 *Craig v MacGregor*, above n 18, at [6].

that were found to bar their further pursuit. Nor can Mr Craig be criticised for the fact that the various proceedings were not consolidated. Ironically, he was the only one out of all the parties to the various proceedings who attempted any form of consolidation (*Craig v Stringer* and *Stringer v Craig*). This was resisted by Mr Stringer but granted by the High Court.[36] At no stage did the High Court, which was case managing all these proceedings, suggest that they should be consolidated or dealt with in some other manner, such as by the pre-trial determination of a preliminary issue in a way that would bind all the parties.

[31] The Judge referred to no authority for the proposition that continued pursuit of a proceeding would be an abuse of process if it required a witness to give evidence on the same topic on multiple occasions. That is not surprising because abuse of process is generally concerned with frivolous claims brought for an improper purpose or claims which improperly seek to vex another party twice on the same subject, not with distress or inconvenience to prospective witnesses. Indeed, evidence of a judgment or a finding of fact in one civil proceeding is not even admissible in another civil proceeding to prove a fact that was in issue in the proceeding in which the judgment was given.[37] This exclusionary rule of evidence contemplates that witnesses may be obliged to give evidence on the same topic on more than one occasion.

[32] In any case, as the Judge noted, Mr Craig does not intend to call Ms MacGregor as a witness in the present proceedings involving Mr Stringer. Nor does Mr Stringer.[38] The possibility that the proceedings were an abuse of the process of the Court because their true purpose was to harass or embarrass Ms MacGregor can be ruled out. The prospect of Ms MacGregor being oppressed by the present proceedings is minimal and could not justify the proceeding being halted as being an abuse of the Court's process. However, to address the Judge's concern that Mr Stringer would be disadvantaged unless he called Ms MacGregor, Mr Craig formally advised following the hearing of the appeal that he would agree to her evidence in the *Williams*, *Slater* and *MacGregor* proceedings being admitted into evidence in the *Stringer* proceeding.

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36 *Craig v Stringer* [2018] NZHC 2281.
37 Evidence Act 2006, s 50(1).
38 High Court judgment, above n 1, at [33].

This concession removes any potential for prejudice to Ms MacGregor, or unfairness to Mr Stringer.

[33] In summary, there is no question of Mr Stringer being oppressed or vexed twice. His related claim against Mr Craig was able to proceed to trial so there would have been comparatively little saving in overall cost by staying Mr Craig's claim. The principle in *Henderson v Henderson* is not concerned with the position of witnesses. We do not consider any question of abuse of process of the Court arises.

Sections 46–48 of the Defamation Act

[34] As noted, s 46 of the Defamation Act restricts the time (28 working days) within which a person, who has already commenced proceedings for defamation in respect of specified types of publication (newspaper, broadcaster or cinematographic film in a cinema), may commence further proceedings in respect of any such publication of the same or substantially the same matter. This provision applies to claims against multiple media defendants who have published the same, or substantially the same, article prior to the commencement of the first proceedings. Section 47 requires a plaintiff who has commenced two or more such proceedings to give notice to every defendant in each proceeding of the existence of the other proceedings. Section 48 is of more general application and empowers the High Court to order consolidation of defamation proceedings, but only on the application of the defendants in any two or more proceedings.

[35] The Judge appears to have considered that these sections applied in this case. However, he noted that Mr Craig commenced his proceedings against Mr Stringer 16 working days after he commenced his proceeding against Mr Slater. Although Mr Craig's proceedings against Ms MacGregor and Mr Williams were filed outside the 28 working day period provided for in s 46, this had no bearing on his claim against Mr Stringer. The Judge considered that the purpose of s 47 of the Act (the notice requirement) had been met given the length of time proceedings had been afoot and all parties' awareness of the other proceedings. Mr Stringer had had ample time to apply for consolidation of the proceeding against him with the other proceedings under s 48 and had not done so. Indeed, the Judge recorded that

Mr Stringer was opposed to the proceedings being consolidated with any other proceedings.[39]

[36] In the result, we are satisfied Mr Akel, as counsel assisting the Court, is correct in saying the Judge did not purport to apply these statutory provisions directly in staying the proceedings. He merely sought to draw support from the legislative policy underpinning these provisions for his general proposition that it "cannot be right" that Mr Craig could pursue his various proceedings and the time had come to call a halt to them — "[e]nough is enough".[40]

[37] The question as to whether these provisions of the Defamation Act had any application in this case is therefore something of an aside. However, we accept the submissions made by Mr Mills QC, for the appellants, that ss 46 and 47 do not apply at all. They only apply to the kinds of publications referred to in s 46, namely publications of any matter in any newspaper or by a broadcaster or by any cinematographic film in any cinema open to the public.[41] They do not apply to all publications involving the same defamation "whatever the medium", as stated by the Judge.[42] Additionally, as a plaintiff, Mr Craig was unable to apply for consolidation under s 48; only defendants can make such an application.[43]

Conclusion

[38] Mr Craig was not only entitled to commence his proceedings separately, there were good reasons for him to do so in this case. Mr Craig could not thereafter have joined the proceedings together unless the High Court ordered consolidation, which no other party sought and which there were good reasons not to require. Mr Craig's proceeding against Mr Stringer involved no element of oppression of him as it was the only proceeding brought against him arising out the subject matter giving rise to the dispute. There is no risk of oppression to Ms MacGregor in the circumstances described above. We are satisfied there was no basis for staying the proceeding as

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39 At [29]–[30].
40 At [21] and [33]–[34].
41 Defamation Act, ss 46(1) and 47(3).
42 High Court judgment, above n 1, at [15].
43 Defamation Act, s 48(1).

an abuse of the process of the Court. The appeal must accordingly be allowed and the order for stay set aside.

Mr Craig's defence to Mr Stringer's claim

[39] After delivering his stay judgment, Palmer J issued a minute clarifying that the effect of the judgment was to prevent the parties from putting in issue, whether in their pleadings (claim, defence or reply) or in the notices served under ss 39 or 41 of the Defamation Act, the question of whether Mr Craig sexually harassed Ms MacGregor.[44] Mr Mills submits that the Judge was wrong to prevent Mr Craig and the other appellants from relying fully on their pleaded grounds of defence to Mr Stringer's claims. Mr Stringer's claims against all defendants having failed, this issue falls away subject to any appeal.

Result

[40] The appeal is allowed.

[41] The order made in the High Court staying the proceeding is set aside.

[42] The respondent is to pay costs to the appellants for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Chapman Tripp, Auckland for Appellants

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[44] *Stringer v Craig* HC Auckland CIV-2015-404-2524, 24 June 2019 (Minute No 10).