IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-2524
[2020] NZHC 1021

BETWEEN	JOHN CHARLES STRINGER Plaintiff
AND	COLIN GRAEME CRAIG First Defendant
	HELEN RUTH CRAIG Second Defendant
	ANGELA MARIA STORR Third Defendant
	KEVIN ERIC STITT Fifth Defendant
	STEPHEN DYLAN TAYLOR Sixth Defendant

Hearing:	On the papers
Appearances:	J C Stringer in person C G Craig, H R Craig, A M Storr, K E Stitt and S D Taylor in person W Akel, Counsel assisting the Court
Judgment:	18 May 2020

JUDGMENT NO 4 OF PALMER J
(Costs)

This judgment was delivered by me on Monday 18 May 2020 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

All parties in person
W Akel, Barrister, Counsel assisting the Court

Summary

[1] The New Zealand legal system gives litigants incentives to bring and defend litigation according to the expected merits of their cases by directing a losing party to pay a winning party a contribution towards their legal costs and reasonable disbursements. That is in the interests of all litigants and in the interests of the legal system. Mr John Stringer was unsuccessful in bringing defamation proceedings against five defendants. He must pay the reasonable disbursements of the defendants. The defendants were not legally represented but paid fees for legal advice and assistance. I order Mr Stringer to pay part of these fees up to and including 29 July 2019. But from then on, he can fairly be regarded as having been on notice of the strength of the defendants' case and the likelihood that they would seek payment of their disbursements. So, after 29 July 2019, Mr Stringer must pay the full amount of their legal fees, as reasonable disbursements.

Judgment

[2] I issued the substantive judgment in this proceeding on 3 April 2020.[1] The summary was:

> [1] In July 2015, after the implosion of the Conservative Party, Mr Colin Craig and Mrs Helen Craig said Mr Craig had been the victim of dirty politics as the Party's former leader. They named three individuals as responsible, including Mr John Stringer, a former Conservative Party Board member. They gave a press conference and published a booklet saying so and distributed it to 1.63 million households in New Zealand. Mr Craig made other public statements saying so. The booklet was moderated, anonymously, by Mr Stephen Taylor. Party officials, Mrs Angela Storr and Mr Kevin Stitt, emailed updates to Conservative Party members about Mr Stringer and Mr Craig's booklet and legal proceedings.
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> [2] Mr Stringer sues the five of them for defamation. All six parties represent themselves. The defendants fairly characterise their statements as falling broadly into six categories of meanings regarding Mr Stringer, that he: lied or is a liar; engaged in attack politics; coordinated with others to target Mr Craig; seriously breached the Conservative Party's rules; acted unlawfully (by defaming Mr Craig); and betrayed others. The defendants did publish the statements complained of, most of which were defamatory of Mr Stringer. But, I hold:
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> (a) Mr and Mrs Craig have qualified privilege for all of their defamatory statements because they were made in response to Mr Stringer's attacks on them. The force and vigour of their responses

[1] *Stringer v Craig (No 3)* [2020] NZHC 644 [*Substantive Judgment*].

were not out of proportion to his, were not made in bad faith and were made for the purpose for which the privilege is accorded. With one exception, Mr and Mrs Craig's defamatory statements of fact were also true or not materially different from the truth. Their defamatory statements of opinion were their genuine opinions and based on facts that were true or not materially different from the truth.

(b) Mr Taylor knew his moderation of the booklet would encourage its publication and he had the opportunity to influence, significantly, whether the statements were published. So, at law, he also published the defamatory statements. But the defences of qualified privilege for response to attack, truth and honest opinion protect him as they do the Craigs.

(c) Mrs Storr and Mr Stitt's statements were made in discharge of their duty to communicate with party members and therefore benefit from the defence of qualified privilege of a duty to publish. They were also either true or their honest opinions.

[3] Accordingly, Mr Stringer's claims all fail. The suit was misconceived. I invite submissions as to costs. I thank Mr Akel, as counsel assisting the court, for his significant assistance.

[3] About Mr Stringer continuing to pursue the proceeding, after I stayed Mr Craig's suit against Mr Stringer,[2] I said:

> [49] The defendants sought an adjournment of the proceeding until their appeal of the *Stay Judgment* was determined. Mr Stringer opposed that. I did not consider the defendants were particularly prejudiced by the trial proceeding. I said their defences of truth and qualified privilege could fairly be characterised as strong, as indeed Mr Stringer submitted the defence of qualified privilege was.[3] I did not consider it was in the interests of justice to adjourn the trial and determined Mr Stringer's proceeding should be tried as scheduled.[4]
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> [50] After the *Stay Judgment*, in a case management teleconference on 19 June 2019, I specifically asked Mr Stringer to consider whether he wished to pursue his proceeding.[5] Mr Stringer advised he did. After assessing the defendants' defences as strong, in my decision not to adjourn the trial on 29 July 2019, I observed "[g]iven all this, and the availability of an award of disbursements to the victor, it would not have been surprising had Mr Stringer abandoned his proceeding".[6] That did not deter Mr Stringer either.

[4] About costs, I said:

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2 *Craig v Stringer (No 2)* [2019] NZHC 575 [*Stay Judgment*].
3 Minute No 13, 29 July 2019, at [24].
4 At [17]-[27].
5 Minute No 10, 24 June 2019, at [8].
6 Minute No 13, 29 July 2019, at [25].

> [160] All parties represented themselves. But Mr Craig submitted that, due to interactions between the parties over costs, they should be the subject of further submissions in light of the judgment. Mr Stringer did not disagree. I therefore give the defendants 10 working days from the date of this judgment to file and serve a memorandum on costs. Mr Stringer has 10 working days from receipt of that memorandum to file and serve a similar memorandum in reply.

Relevant law of costs

Rules about costs

[5] Usually, when parties to litigation are legally represented, the court makes an award of costs to the successful party under pt 14 of the High Court Rules 2016 (the Rules). By this means, a losing party pays a winning party a contribution towards their legal costs. Rule 14.2(a) provides that "the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds". It is characterised by the Supreme Court as a "fundamental principle".[7] By this means, the New Zealand legal system gives litigants incentives to bring and defend litigation according to the expected merits of their cases. That is in the interests of all litigants and in the interests of the legal system. I consider the same principle underlies payment of disbursements.

[6] Costs are awarded at different amounts for cases of different complexity and length according to a scale and at amounts less than actual costs. But r 14.6(4)(a) provides for the award of indemnity or actual costs if "the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding".

[7] As I explore further below, r 14.7 empowers the court to reduce costs otherwise payable in certain circumstances. Rules 14.10 and 14.11 provide that a party may make a written offer to another party that is expressly stated to be "without prejudice except as to costs", which, at the discretion of the court, entitles the offering party to costs if the judgment results in a higher or lower figure than that in the offer.

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7 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8].

[8] Rule 14.12 provides that disbursements must be included in the costs award to the extent they are approved by the Court, specific to the conduct of the proceeding, reasonably necessary for its conduct and reasonable in amount. Disbursements may be disallowed or reduced if they are "disproportionate in the circumstances of the proceeding". A disbursement is "an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs" and includes court fees, service, photocopying and teleconference fees but not counsel's fees.

Disbursements for litigants in person

[9] In 1996, in *Re Collier (A Bankrupt)*, the Court of Appeal observed that "[f]or more than a hundred years it has been the practice not to award costs to a litigant in person".[8] It quoted a previous Court of Appeal decision, *Lysnar v National Bank of New Zealand Ltd (No 2)* which considered English authorities and said:[9]

> The most that can be said of the English cases as applied to our scale is that they can be looked at as indicating that the Court will provide to a successful layman litigant: (a) An indemnity for his Court disbursements; (b) a possible partial indemnity for any fees he pays by way of professional assistance; and (c) nothing for his own time and trouble.

[10] It is clear from *London Scottish Benefit Society v Chorley, Crawford and Chester,* also quoted by the Court in both *Lysnar* and in *Re Collier,* that fees paid to solicitors for assistance in litigation came within category (b).[10] The Court made clear that the reason the indemnity for fees was partial only was because actual costs were ignored in awarding scale costs in New Zealand.[11] In *Jagwar Holdings Ltd v Julian,* another case cited in *Re Collier,* Thorp J said the court should take a "reasonably liberal approach" to assessing disbursements claimed by a litigant in person.[12]

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8 *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 at 439, approved by the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400 at [162].

9 *Lysnar v National Bank of New Zealand Ltd (No 2)* [1935] NZLR 557 at 562.

10 At 440 citing *London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872 (CA) at 875.

11 At 562.

12 *Jagwar Holdings v Julian* (1992) 6 PRNZ 496 at 499.

[11] The Court in *Re Collier* was careful to describe the non-payment of litigants in person for their time as a "practice" rather than a rule. It said:[13]

> There are obvious difficulties in a policy that would allow a lay litigant to be paid for his time and trouble, not least the basis on which such expenses should be calculated. But there may arise cases where such a course is justifiable remembering always that the present rule is a rule of practice and not a rule of law. For example, it could happen that the litigant might involve himself in an action without hope of any personal gain or advantage but purely out of the concern for the welfare of the general public . . .
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> The general question as to whether a litigant in person should be paid for his time and trouble raises many important considerations of both policy and practice, and as the High Court of Australia has observed, is not really a matter that can be solved by a Court. There may be the exceptional case when the discretion to award costs could justify a departure from the present rule of practice, but we are satisfied that the case before us is not one of them.

[12] The approach in *Lysnar* and *Re Collier* has been applied by the High Court in ordering a contribution to the reasonably necessary costs of legal assistance to a litigant who conduct their own actual litigation.[14] In *Knight v Veterinary Council of New Zealand*, that extended to the costs of legal advice and assistance and the travel costs of a McKenzie friend, but not a claim for the litigant's time which was "a claim for costs in everything but name".[15]

[13] In *McGuire v Secretary for Justice*, the Supreme Court noted that, in *Re Collier,* the Court of Appeal upheld the primary rule that a litigant in person is entitled to disbursements but not costs.[16] It noted the Court's qualification that there may be an "exceptional circumstances exception", left open whether there is such an exception and explicitly expressed no opinion as to the disbursements allowed for expenses incurred by a McKenzie friend in *Knight*.[17] It said "the practice of the High Court has been regulated by rules of court".[18] The Court concluded reform of the law should be effected by Parliament or the Rules Committee, rather than the courts.[19]

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13 At 441-442.

14 *Working Capital Solutions Holdings Ltd v Pezaro* [2014] NZHC 2480 at [19]-[20] also citing *Malloch v Aberdeen Corp (No 2)* [1973] 1 All ER 304, [1973] 1 WLR 71.

15 *Knight v Veterinary Council of New Zealand* HC Wellington, CIV-2007-485-1300, 31 July 2009 at [5].

16 *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55].

17 At footnote 42, citing *Knight v Veterinary Council of New Zealand*, above n 15.

18 At [62].

19 At [88].

[14] The Rules Committee has recently invited submissions on a Consultation Paper on costs for litigants-in-person.[20] The Committee proceeds on the basis that "litigants in person may currently receive an award of disbursements, including any sums paid to a solicitor for helping in preparing their case, and possibly the travel costs of McKenzie friends."[21]

Submissions on costs

[15] The defendants submit the outcome of this proceeding was not unforeseeable and the strength of their case was identified for Mr Stringer by themselves and by the Court. They identify three approaches they made to Mr Stringer offering to settle the case, on 1 August 2017, 26 October 2018 and 11 April 2019 (seeking payments of $1,000, $3,000 and $3,000 respectively toward their costs). They seek orders, calling on the security paid to the Court, that Mr Stringer pay them:

(a) $7,509.43 for filing fees, courier fees, printing and compilation of bundles and travel costs they have paid for as part of the proceeding; and

(b) $69,303.50 in disbursements, being some of the costs they have paid for legal assistance from Chapman Tripp as part of the proceeding, which they submit are well below scale costs, are below what they actually incurred and are available on the basis of case law; or alternatively

(c) $110,585.05 in indemnity costs for legal assistance from Chapman Tripp and lost income by Mr Taylor and Mrs Storr. This is on the basis the claim was entirely misconceived, unnecessary, claimed an excessive amount by analogy with s 43 of the Defamation Act 1992 and rejected three reasonable settlement offers.

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20 Rules Committee *Consultation Paper: Costs of Litigants-in-Person* (Judicial Office for Senior Courts, Wellington, 5 May 2020).

21 At [8], citing to *Re Collier*, above n 8, *Knight,* above n 15 and *McGuire,* above n 16.

[16] Mr Stringer submits that his claim both succeeded and failed because the defendants were ruled to have made multiple defamatory statements, but the claim was dismissed under qualified privilege defences. He relies on *Craig v Slater* where both parties succeeded and failed to varying degrees and costs lay where they fell.[22] He questions whether, "setting aside" his attacks on the defendants, it is fair that he faces further costs when the Craigs sent a substantial magazine to every home in New Zealand as a "justified" counter-punch. Mr Stringer submits several of the costs claimed by the defendants relate to Mr Craig's suit against him. And he says, without providing evidence, that he is of constrained means, he and his wife exhausted all their savings with legal costs and they are likely to have no income. He considers Mr Craig is using costs to destroy people financially, having not succeeded in doing so at trial. Mr Stringer also submits costs should be reduced on various grounds under r 14.7, as I detail below.

[17] Mr Akel, as counsel assisting the Court, submits:

(a) The case law indicates it is open to me to consider afresh whether solicitors' costs can be recovered by a litigant in person as a disbursement. If so, it may be considered that allowing legal costs under r 14.12(1)(a) is far too strained when considering the purpose and text of the rule relating to disbursements.

(b) Mr Stringer could be said to have been successful in the stay of Mr Craig's proceeding, but costs are at the discretion of the Court and that was a separate but concurrent proceeding.

(c) There is no indication rr 14.6 and 14.7 are intended to refer to indemnity disbursements, rather than indemnity costs, in which case the settlement offers made by Mr Craig may have little relevance to costs. Otherwise, Mr Stringer may be at risk of indemnity costs when he was put on notice by the Court that at least the qualified privilege response to attack defence appeared to be strong, and Mr Stringer acknowledged

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22 *Craig v Slater* [2019] NZHC 1269 at [55].

that. The real issue regarding the offers made by Mr Stringer may be whether Mr Craig's refusal was reasonable in the circumstances.

[18] In response, the defendants submit:

(a) Mr Craig's proceeding against Mr Stringer is entirely separate and does not impact on costs in this proceeding;

(b) the defendants succeeded entirely in this proceeding and Mr Stringer knew in advance he was unlikely to succeed;

(c) they object to Mr Stringer's appending of documents to his memorandum marked "without prejudice" and another used in a judicial settlement conference;

(d) Mr Stringer was seeking $803,522.10 from the defendants to settle the proceeding;

(e) it would be unfair to the defendants not to recover reasonable legal costs, which would substantially undermine access to justice in New Zealand for litigants in person;

(f) the costs decision in *Craig v Slater* should not be followed;

(g) the defendants did comply with discovery but Mr Stringer did not;

(h) it is only just and fair that Mr Stringer now pay the reasonable cost of his decision to go to court, against the urging of the defendants and the Court, rejecting very fair settlement offers, acknowledging the defendants' case was strong and knowing they would incur expenses and loss of income.

What costs should be awarded?

[19] It is clear that the defendants entirely succeeded in defending the defamation proceedings Mr Stringer brought against them. I do not accept Mr Stringer's submission that it matters that the defendants' statements were defamatory. The statements were true, honest opinion and/or protected by qualified privilege. The defences were successful. The defendants were not liable. Reasonable disbursements should follow the event.

[20] I proceed on the understanding that the disbursements claimed are related to Mr Stringer's proceeding, not Mr Craig's proceeding. The defendants will need to check that is so. I do not deal in this judgment with the separate question of costs and disbursements for Mr Craig's suit against Mr Stringer. The costs award in *Craig v Slater,* which concerned suits by each party against the other, is also not relevant here.

[21] Mr Stringer must therefore pay the defendants' costs of filing fees, courier fees, printing and compilation of bundles and travel costs disbursements, totalling $7,509.43. He must also pay the cost of the legal assistance the defendants received as a reasonable disbursement, in some measure, for the proceeding brought by Mr Stringer. The case law is currently clear these are allowable disbursements and I can see no reason not to order them paid here. This half-way house is less expensive for Mr Stringer than it would have been if the defendants had engaged legal representation.[23] The disbursements sought are specific to the conduct of the proceeding, reasonably necessary for its conduct, reasonable in amount and not disproportionate. But I do not consider the lost income claimed by Mr Taylor and Mrs Storr should be payable, for the reasons given in *Knight.*

[22] Strictly speaking, r 14.7 applies to costs and not disbursements. I accept the elements of the rule can be relevant to exercising the discretion to approve reasonable disbursements under r 14.12, and in assessing what disbursements are reasonable. But I do not consider there are any grounds on which I should reduce the disbursements awarded. In brief:

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23 *Stay Judgment*, above n 2, at [60].

(a) Rule 14.7(d) allows reduction if the successful party failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs. Mr Stringer submits this applies because he spent five years seeking to prove defamatory statements, the court ruled the statements were defamatory and he initiated several attempts at settlement, of which he bore all the costs.[24] But it does not apply because the defendants did not fail in a cause of action or issue.

(b) Rule 14.7(e) allows reduction if the proceeding concerns a matter of public interest and the party opposing costs acted reasonably in the conduct of the proceeding. Mr Stringer submits this applies because the proceeding has been a matter of public interest and he acted reasonably, albeit the proceeding was misconceived. But it does not apply because Mr Stringer did not act reasonably in the conduct of the proceeding as I explain below.

(c) Rule 14.7(f) allows reduction if the party claiming costs has contributed unnecessarily to the time or expense of the proceeding or step in it for certain reasons. But none of these apply because the defendants did not contribute unnecessarily to the time or expense of the proceeding or a step in it. Mr Stringer submits:

(i) Rules 14.7(f)(i) and (iv) apply because Mr Craig never discovered contested cellphones and Mr Craig is the subject of three separate court orders to pay discovery costs with which he has still not complied. But there is no evidence Mr Craig failed in his discovery obligations to Mr Stringer; though I concluded Mr Stringer deliberately attempted to conceal evidence that was particularly unfavourable to him.[25]

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24 I do not have regard to the without prejudice correspondence or the document used at a judicial settlement conference which Mr Stringer exhibits.

25 *Substantive Judgment*, above n 1, at [58]-[59].

(ii) Rule 14.7(f)(ii) applies because Mr Craig applied to subsume his proceeding with this one despite having previously resisted that. But Mr Craig's proceeding is not the subject of this judgment.

(iii) Rule 14.7(f)(v) applies because the Craigs declined to apply themselves to settlement conferencing, Mr Taylor refused to attend another conference and all defendants declined to settle. But the defendants' failure to settle was reasonable, as the judgment proves.

(d) Rule 14.7(f) allows reduction if some other reason exists which justifies the court refusing or reducing costs. Mr Stringer submits he technically succeeded (in establishing statements were defamatory). But Mr Stringer did not succeed, even technically.

[23] The primary issue is whether Mr Stringer should fully indemnify the defendants for their disbursements for legal advice and assistance, or make only a contribution towards them. The Court of Appeal in *Lynsar* indicated that fees paid by way of professional assistance are usually subject only to a possible partial indemnity.[26] But that was said to be because actual costs were ignored in awarding scale costs. Rule 14.6(4) now provides explicitly for indemnity costs in certain circumstances. I consider the same principles are relevant to deciding whether disbursements for legal advice and assistance should be fully or partially indemnified.

[24] It is relevant that Mr Stringer is a litigant in person concerned to vindicate his reputation. He may well have lacked informed advice about the merits of his case, at least initially. Giving Mr Stringer the benefit of the doubt, that may even have lasted past 11 April 2019, the date of the defendants' last settlement offer to him. But:

(a) The *Stay Judgment,* issued on 17 June 2019, required Mr Stringer to pay security for costs and disbursements and referred to Mr Craig's

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[26] *Lysnar v National Bank of New Zealand Ltd,* above n 9, at 562.

submission that the defendants' disbursements exceeded $20,000 and the cost to them of legal advice exceeded $25,000, at that time.[27]

(b) At a case management conference on 19 June 2019 Mr Akel indicated he saw difficulties for Mr Stringer in his proceeding, I asked Mr Stringer to consider whether he proposed to pursue it but he indicated he saw no difficulty and he would pursue it anyway. [28]

(c) On 17 July 2019, in making submissions on adjournment, Mr Stringer himself characterised the defendants' defences of qualified privilege as strong.[29]

(d) My minute of 29 July 2019 stated the defences of truth and qualified privilege could fairly be characterised as strong.[30] It stated:[31]

> Given all this, and the availability of an award of disbursements to the victor, it would not have been surprising had Mr Stringer abandoned his proceeding. However, Mr Stringer says he wishes to pursue it irrespective of whether Mr Craig's proceeding is stayed. That is his right. And I have not yet heard his substantive evidence and submissions.

[25] So from 29 July 2019, at the latest, Mr Stringer could fairly be regarded as having been on notice of the strength of the defendants' case and the likelihood that the defendants would seek payment of their disbursements. He elected to continue nevertheless. Accordingly, from 29 July 2019, I consider Mr Stringer acted unnecessarily, perhaps even recklessly, in continuing the proceeding, by analogy with r 14.6(4) of the Rules. He must pay the a reasonable proportion of the defendants' disbursements for legal advice and assistance until 29 July 2019 and indemnity disbursements after that.

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27 *Stay Judgment,* above n 2, at [64].
28 Minute No 10, 19 June 2019, at [8].
29 Minute No 13, 29 July 2019, at [13].
30 Minute No 13, 29 July 2019, at [24](a) and (b).
31 At [25].

Result

[26] Accordingly, under r 14.12, I order Mr Stringer to pay, as reasonable disbursements:

(a) the defendants' filing fees, courier fees, printing and compilation of bundles and travel costs disbursements, totalling $7,509.43;

(b) the proportion of the defendants' disbursements for legal advice and assistance relating to Mr Stringer's proceeding in schedule 2 to the defendants' memorandum of 14 April 2020, up to and including 29 July 2019; and

(c) the defendants' disbursements for legal advice and assistance relating to Mr Stringer's proceeding in schedule 3 to the defendants' memorandum of 14 April 2020, after 29 July 2019, but not the lost income claimed by Mr Taylor and Mrs Storr.

Palmer J