

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

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

**CIV-2018-404-198
[2020] NZHC 696**

BETWEEN GEORGE WHICHMAN
 Plaintiff

AND TVNZ
 First Defendant

DEPARTMENT OF CORRECTIONS
Second Defendant

Hearing: 16 March 2020

Counsel: No appearance for Plaintiff
 D Wakefield and D Nilsson for First Defendant
 J Watson for Second Defendant

Judgment: 6 April 2020

JUDGMENT OF WHATA J

*This judgment was delivered by me on 6 April 2020 at 1:00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Lee Salmon Lang, Auckland
 Crown Law, Wellington

[1] The plaintiff, Mr Whichman, claims that he has been defamed by TVNZ and the Department of Corrections (Corrections). The alleged defamation relates to TVNZ's coverage of an event where private details of prison officers were disclosed to prisoners at Paremoremo Maximum Security Prison. Mr Whichman's complaint appears to be that he was made out as being responsible for that disclosure and connected to gang intimidation.

[2] TVNZ and Corrections seek orders striking out the claim and/or summary judgment in their favour. They claim, in short, that Mr Whichman has no tenable action against them.

Background

[3] Mr Whichman filed an amended statement of claim in September 2018. In that claim he provides, what he calls, a case summary. In that case summary he states that he was asked by another prisoner to "return some criminal disclosures which belonged to another inmate who was a sentenced prisoner out in the yards separate from remand detainees". He states that he did this by handing the documents to a Corrections Officer. Five days later, he states that One News reported:

GUARDS AT THE COUNTRY'S TOUGHEST PRISON ARE CONCERNED ABOUT THEIR SAFETY AFTER PERSONAL DETAILS, INCLUDING PHONE NUMBERS AND ADDRESSES, ENDED UP IN THE HANDS OF GANG MEMBERS FOLLOWING A SERIOUS PRIVACY BREACH BY POLICE. THE PRISON OFFICERS ARE WITNESSES IN AN UPCOMING TRIAL INVOLVING INMATES. POLITICAL REPORTER ANDREA VANCE WITH THIS EXCLUSIVE INVESTIGATION

[...]

PAREMOREMO MAXIMUM SECURITY PRISON. HOME TO SOME OF THE COUNTRY'S MOST DANGEROUS PRISONERS. NOW SIX GUARDS THERE ARE FEARING FOR THEIR LIVES AFTER A POLICE PRIVACY BUNGLER.

TUSHA PENNY – WAITEMATA DISTRICT COMMANDER: "we deeply regret and are very sorry that we have put our Corrections colleagues in this position"

THE GUARDS ARE KEY TRIAL WITNESSES AFTER THEY WERE ATTACKED BY INMATES IN OCTOBER. BUT NOW, FILES CONTAINING THEIR NAMES, ADDRESSES, PHONE NUMBERS - AND

THOSE OF THEIR PARTNERS - WERE FOUND IN GANG MEMBERS CELLS, INCLUDING THAT OF KILLER BEEZ KING PIN JOSH MASTERS WHO WAS NOT INVOLVED IN THE ATTACK ON GUARDS. CHILLINGLY, THE OFFICERS' PERSONAL INFORMATION HAD BEEN HIGHLIGHTED IN THE COURT FILES

ALAN WHITLEY – CORRECTIONS ASSOCIATION NZ: “just a general message to the staff that look we’ve got your information, you know – you’re going to tangle with us and we’re going to tangle with you”

THE INFORMATION WAS PART OF EVIDENCE COLLECTED BY POLICE TO PROSECUTE THE CASE. IDENTIFYING DETAILS WERE MEANT TO BE DELETED BEFORE THE FILES WERE PASSED TO INMATES' LAWYERS.

TUSHA PENNY: “so every week we disclose, successfully, thousands of documents as part of the prosecution process – in this instance, because of human error, we have failed to redact some personal information”

[...]

IT'S UNCLEAR HOW THE FILES ENDED UP IN PRISON OR WHO WAS RESPONSIBLE, BUT LAST THURSDAY ONE FILE WAS HANDED TO A GUARD BY GANG ASSOCIATE GEORGE WHICHMAN - AND THE CORRECTIONS UNION SAYS THAT WAS MEANT AS A THREAT

ALAN WHITLEY: “it is a type of intimidation”

CORRECTIONS MET WITH THEIR OFFICERS TODAY TO SORT OUT EXTRA SECURITY, BUT THE UNION SAYS THAT SHOULD HAVE HAPPENED IMMEDIATELY

ALAN WHITLEY: “they’re concerned about their families. they’re concerned about what’s gonna happen if they’re at work, if they’re away, are their families safe?”

POLICE MINISTER PAULA BENNET SAYS SHE'S DISAPPOINTED

PAULA BENNET – POLICE MINISTER: “I accept that it’s human error, and I think it’s important that they do an internal investigation to make sure they do learn from the mistakes”

THE UNION SAYS AN INVESTIGATION'S COLD COMFORT. THEY WANT ASSURANCES, NOW, THEIR MEMBERS WILL BE SAFE.

ANDREA VANCE, ONE NEWS.

[4] He also refers to a further publication by TVNZ's Breakfast show on 28 March 2017, as follows:

POLICE ARE CONSIDERING EXTRA SECURITY FOR PRISON GUARDS WHOSE PERSONAL INFORMATION HAS ENDED UP IN THE HANDS OF SOME INMATES. A ONE NEWS INVESTIGATION REVEALED PERSONAL FILES, BELONGING TO SIX GUARDS AT

AUCKLAND'S PAREMOREMO PRISON, WERE FOUND IN GANG MEMBER'S CELLS. THE INFORMATION, WHICH WAS SUPPOSED TO BE CENSORED, WAS DISCLOSED IN COURT DOCUMENTS AFTER AN ATTACK ON THE GUARDS BY INMATES IN OCTOBER. POLICE MINISTER PAULA BENNETT SAYS AN INTERNAL INVESTIGATION INTO HOW THE MISTAKE HAPPENED IS NEEDED.

[...]

THE MISTAKE HAS BEEN DESCRIBED AS 'HUMAN ERROR'. [...]

[5] That same report by Breakfast was then repeated on the midday broadcast that same day.

[6] Mr Whichman complains that as a result of TVNZ and Corrections' "ill and impulsive actions", he has been defamed to the nation through false allegations. He claims that those actions have breached:

- (a) Sections 9, 19, 21, 23(5), 25(a) and 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA);
- (b) the United Nations Convention Against Torture;
- (c) the Defamation Act 1992; and
- (d) the Privacy Act 1993.

[7] He states that Corrections and TVNZ have disregarded the fact that he was on remand as an accused detainee still awaiting trial and that, because of the publications, he has been perceived and treated as an enemy and target by Corrections. He states that the coverage has also affected his family because his name and surname have been tied up with the false allegations by Corrections and TVNZ. He states it has jeopardised his right to a fair trial. Lastly, he states:

Overall this whole case has resulted in my having to live with immense grief and suffering, the pain TVNZ and Corrections have caused me is a direct attack.

[8] In terms of relief, he seeks:

- (a) \$2M as exemplary damages;
- (b) an injunction; and
- (c) a request under the Official Information Act for all emails sent by Corrections and TVNZ regarding him in the period 25 March 2017 and 30 March 2017.

Process

[9] Mr Whichman did not appear before the Court to defend the present applications. Ordinarily, I would not proceed in the absence of a respondent to strike out. But, he has been indulged considerably by this Court already. Therefore, I consider it is in the interests of justice to move to judgment. It is necessary to set out the background to the present applications in some detail to demonstrate why that is so.

[10] Helpfully, Counsel explained the background to the present applications in their joint memorandum of 11 June 2019, set out as follows:

Background

4. The purpose of the hearing is to hear argument in respect of two applications currently before the court:

- (a) an application by TVNZ for orders striking out the statement of claim and security for costs; and

- (b) an application by Corrections for defendant's summary judgment.

5. Both applications were originally filed on 18 May 2018. They have subsequently been amended in light of changes to the plaintiff's pleadings.

6. There have been significant delays in bringing the applications to a hearing. Those delays have primarily been occasioned by repeated requests by the plaintiff for additional time to obtain legal advice and representation.

7. Both the Court and the defendants have been accommodating in this regard:

(a) On 14 June 2018, Associate Judge Bell, at the plaintiff's request, adjourned the proceeding for two months to allow the plaintiff time to find a lawyer.

(b) On 14 August 2018, his Honour made generous timetabling directions, allowing the plaintiff the opportunity to amend his claim to address concerns raised in TVNZ's strike out application, as well as directing TVNZ to furnish information to the plaintiff to assist in his re-pleading. A hearing was subsequently scheduled for 12 February 2019.

(c) On 12 October 2018, his Honour further assisted the plaintiff by issuing a minute to the parties annexing a copy of an amended statement of claim that had been filed by the plaintiff, but not served on the defendants.

(d) On 5 December 2018, his Honour again, at the plaintiff's request, extended the timetable for the plaintiff's written submissions until 28 January 2019 to allow the plaintiff the opportunity to obtain legal advice and representation.

(e) On 17 December 2018, the plaintiff filed a memorandum requesting the assistance of the Court to obtain legal representation. In response, his Honour issued a further minute dated 20 December 2018, which was copied to the Auckland Community Law Centre.

(f) On 7 February 2019, the plaintiff sought an adjournment of the 12 February 2019 fixture on the basis that he was in the process of seeking bail. The adjournment was granted, and the hearing re-scheduled, in consultation with counsel, to 24 May 2019. The plaintiff was to file his written submissions five working days in advance.

(g) However, on Thursday 23 May 2019, the plaintiff notified the court that he would be unable to attend the 24 May 2019 hearing in this Court due to a conflicting bail application hearing in the Manukau District Court. On receipt of Mr Whichman's unavailability Justice Whata accordingly vacated the 24 May fixture and directed the registry to allocate an alternative date on which the defendant's applications would be dealt with.

8. On 27 May 2019, the registry advised the parties that an alternative hearing date had been set down for 31 October 2019. The allocation was made without consultation with counsel for either of the defendants.

9. Neither of counsel for TVNZ with carriage of this file are available on that date. Mr Salmon, solicitor on the record, is scheduled to be in a four day hearing between 29 October and 1 November 2019. Mr Nilsson, who has primary responsibility for the matter, is scheduled to be at trial in the High Court at Auckland between 21 October and 8 November 2019. Those conflicting fixtures have been in place for some time. Counsel for TVNZ informed the registry accordingly.

10. On 29 May 2019, the registry advised that the fixture would not be moved absent a consent memorandum or a formal interlocutory application.

(Footnotes omitted.)

[11] The defendants then sought vacation of the fixture and an alternate date. A fixture was then set down for hearing on 2 December 2019. Mr Whichman appeared via video link from prison. The defendants accepted that, because Mr Whichman had recently been placed in prison, a further adjournment was necessary. Davidson J therefore adjourned the hearing date as follows:

[4] In the circumstances I consider that the interests of justice require the matter to be adjourned to a date following Mr Whichman's release from prison, such as will afford him a reasonable opportunity to prepare to oppose the present applications. However, I make it clear that the matter will proceed on the date to be set and that there will be no further adjournment other than for some extraordinary reason to justify it.

[5] Accordingly I adjourn the hearing of the applications to **Monday, 16 March 2020 at 10:00 am** and I direct Mr Whichman to file and serve a synopsis of his submissions in opposition to the present applications by **5:00 pm, Friday 6 March 2020**.

[6] Mr Nilsson notes that the first defendant has encountered some difficulty arranging service on Mr Whichman. Mr Watson advises that service on Mr Whichman can be effected via a designated Corrections Officers' email address which is to be provided or confirmed to Mr Nilsson on behalf of the first defendant. It is anticipated that future service of documents on Mr Whichman is to be effected via this email address.

[7] I reserve leave to the parties to file memoranda should any issues arise in relation to the 16 March 2020 hearing and its readiness to proceed.

[12] No further correspondence from Mr Whichman has been received. He did not file submissions by 6 March 2020 as required, nor did he otherwise seek an adjournment of fixture. Counsel were initially concerned that Mr Whichman may have been taken back into custody, but further enquiries suggest he has been released on bail.

[13] Given this background, I am satisfied that I should proceed to hear and determine the applications. They are longstanding,¹ and Mr Whichman has had ample opportunity to respond.

The applications

[14] The following applications are before the Court:

- (a) an application for strike out and security of costs (by TVNZ); and
- (b) an application for strike out and/or summary judgment (by Corrections).

¹ First filed in May 2018 by both defendants, with further applications filed in October and December 2018 by TVNZ and Corrections respectively.

[15] TVNZ argues the plaintiff's amended statement of claim is an abuse of court process because:

- (a) it does not inform the defendants or the Court of the claims and their essential ingredients;
- (b) it fails to comply with the rules of the Defamation Act 1992, the High Court Rules 2016 and lacks necessary particulars;
- (c) it is prolix and includes irrelevant material in evidence; and
- (d) it discloses no reasonable or arguable cause of action against the first defendant.

[16] Corrections makes the same application for strike out on the following bases:

- (a) There is no arguable cause of action because the amended statement of claim:
 - (i) Pleads breach of an international instrument (namely, the United Nations Convention Against Torture), which does not confer legal rights in New Zealand's domestic law;
 - (ii) pleads breach of the Privacy Act 1993 which, apart from the procedure provided for under that Act, does not confer any person any legal right that is enforceable in a Court of law; and
 - (iii) alleges defamation for a statement which does not breach ss 19, 20, 21, 23(5), 25(a) or 25(c) of NZBORA.

[17] Corrections states the pleadings are an abuse of process, noting that Mr Whichman has already brought other claims of mistreatment by prison guards in relation to his detention conditions. Corrections also states that the damages sought are exaggerated and disproportionate.

Strike out

[18] The principles for strike out are well settled:²

- (a) pleaded facts are assumed to be true, whether or not admitted (with exception to pleaded allegations which are entirely speculative and without foundation);
- (b) the cause of action must be clearly untenable for the Court to strike it out, in other words, the Court must be certain it cannot succeed;
- (c) the jurisdiction must be exercised sparingly and only ever in clear cases as the courts are generally reluctant to terminate any claim short of trial;
- (d) the jurisdiction may still be engaged where difficult questions of law arise requiring substantial argument; and
- (e) the Court should be slow to strike out a claim in any developing area of law, especially if a novel duty of care is alleged.

Defamation

[19] Section 37 of the Defamation Act 1992 relevantly reads:

37 Particulars of defamatory meaning

- (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
- (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.

[...]

² See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[20] As stated by Associate Judge Abbot in *Moodie v Ellis*, the specifics of publication and the words used will be a significant factor in the defences that may be available and will determine the need for defendants to plead and prove their defences.³ And further, that:

[46] It should not be for the defendants to have to decide which parts support a particular meaning. The defendants are entitled to have meanings identified for specific words or phrases. One meaning for a particular passage of words should be identified, although it is permissible to plead alternative meanings.

[21] In the present case, as best as I can make out, Mr Whichman's defamatory claim relates to linkages drawn in the publications between his alleged role and gang intimidation of Corrections officers. The following passage appears to be key (with the underlining included in the pleadings):

It's unclear how the files ended up in prison or who was responsible, but last Thursday one file was handed to a guard by gang associate George Whichman – and Correction Union says that was meant as a threat.

[22] Further, the claim states:

3.24 The stigma that was attached to my name – George Whichman “the guy detained in Auckland's Maximum Security Prison who threatened Correction Officers by disclosing their personal information to them as a threat, he's with the Killer Bee Gang” or [...]

[23] Additionally:

4.2 That I was some dangerous gang member detained in Auckland's Maximum Security Prison threatening Correction Officers.

4.3 It's definitely damaged my character and future prospects of employment and public re-integration back into the community, it's damaged my name and family surname and my self confidence to trust people in prison and society.

[24] But, as Mr Nilsson submitted, there are no specific pleadings as to which parts of the identified passages are defamatory. Put another way, there is no express pleading of defamatory imputations, let alone particulars of every meaning. This lack of specificity is important because TVNZ cannot sensibly respond to the claim, nor plead affirmative defences. In addition, the claim for damages contains no particulars

³ *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 19 March 2009 at [26].

specifying the facts or circumstances to justify an award of punitive damages, let alone the sum of \$2M.

[25] In exceptional cases, the sting of the matter can be properly derived from the entirety of the article.⁴ But the sting here remains unclear. Indeed, it is not at all clear which part is the sting, whether it is:

- (a) the attribution of gang affiliation;
- (b) the allegation that he delivered the file;
- (c) the assertion that it was meant to be a threat; or
- (d) the inferred connection to the Killer Beez.

[26] It is also unclear which parts are said to be untrue. I am not prepared to speculate about these matters, nor do I invite the defendants to do so in order to save the pleadings.

[27] Ordinarily, this Court affords a large measure of indulgence to unrepresented litigants. The reason for that is securing proper access to justice. There is a particular need for caution given Mr Whichman has been in and out of prison over the course of the present proceedings. However, in this case, given the indulgence already afforded to Mr Whichman, the time has come to bring some finality to the present applications.

No (other) tenable cause of action

[28] It is unclear whether the reference to breaches of NZBORA, the United Nations Convention Against Torture, or the Privacy Act are separate causes of action, or whether they merely form the background to the defamation claim. TVNZ and Corrections have proceeded on the basis that they are separate, and therefore need to be addressed accordingly.

⁴ *Karam v Australian Consolidated Press NZ Ltd* HC Auckland CIV-2003-404-000497, 12 September 2003 at [18].

[29] I step through each of those claims below and assess their validity, with regard to the defendants' submissions and Mr Whichman's statement of claim as currently pleaded.

NZBORA

[30] I address first TVNZ's preliminary argument that the NZBORA does not apply to TVNZ. As I indicated to Mr Nilsson, unless necessary to do so, this is not a matter that should be dealt with summarily, especially in the absence of an active litigant. However, because there is no merit to the NZBORA claims, it is unnecessary for me to resolve this issue.

[31] The basic argument for TVNZ is that, while it is a Crown entity, it is not part of the Government of New Zealand and, accordingly, NZBORA cannot apply to TVNZ unless its activities involve "the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".⁵

[32] This contention is supported by the reasoning of Lang J in *Mangu v Television New Zealand Ltd* wherein the Judge noted:⁶

[19] I have reached the clear view in the present case that, at the micro level of gathering news and presenting the new item that is the subject of this proceeding, TVNZ was carrying out a function that is not amenable to judicial review. Had it been necessary for me to do so, I would also have held, and for essentially the same reasons, that in carrying out that function TVNZ is not carrying out a public function in terms of s 3(b) of the New Zealand Bill of Rights Act 1990.

[33] While an attractive starting point, this is not an issue amenable to cursory examination. I draw support for this caution from the observations of Randerson J in *Ransfield v Radio Network Ltd*. In that case he dealt with a claimed breach by Radio Network New Zealand, and considered whether NZBORA applied to the defendant's conduct on talk-back radio programmes. Exemplifying the complex nature of the

⁵ New Zealand Bill of Rights Act 1999, s 3.

⁶ *Mangu v Television New Zealand Ltd* [2006] NZAR 299 (HC).

central issue, the Judge identified the following non-exhaustive indicia of public function:⁷

- i) Whether the entity concerned is publicly owned or is privately owned and exists for private profit;
- ii) Whether the source of the function, power, or duty is statutory;
- iii) The extent and nature of any governmental control of the entity (the consideration of which will ordinarily involve the careful examination of a statutory scheme);
- iv) Whether and to what extent the entity is publicly funded in respect of the function in question;
- v) Whether the entity is effectively standing in the shoes of the government in exercising the function, power, or duty;
- vi) Whether the function, power, or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public;
- vii) Whether coercive powers analogous to those of the State are conferred;
- viii) Whether the entity is exercising functions, powers, or duties which affect the rights, powers, privileges, immunities, duties, or liabilities of any person (drawing by analogy on part of the definition of statutory power under s 3 Judicature Amendment Act 1972);
- ix) Whether the entity is exercising extensive or monopolistic powers;
- x) Whether the entity is democratically accountable through the ballot box or in other ways.

[34] He also said:

[70] I emphasise that a decision in any particular case as to the applicability of NZBORA will be fact dependent. The suggestions I have made are no more than a range of possible considerations. There may well be others. A flexible and generous approach is required. However, it must also be recalled that a private organisation (whether or not it is providing services to the public) is entitled to manage its business as it sees fit. Unless it is exercising public functions, powers, or duties conferred or imposed by or pursuant to law in terms of s 3(b), the only constraints upon its freedoms are those imposed by the general law.

[35] While, therefore, there is a strong case in finding TVNZ was not performing a public function when it covered the disclosure incident, there are several complicating factors. These include, TVNZ's statutory base and remit; the fact it is owned by the

⁷ *Ransfield v Radio Network Ltd* [2004] 1 NZLR 233 at [69](g).

Crown; and the inherently public nature of its functions in covering criminal matters.⁸ I only wish to point out that this is a legally contentious matter, and because it does not presently require resolution, I make no finding on this point.

[36] Turning still to the NZBORA claims, the alleged violations include:

- (a) breach of s 9, which protects against torture and cruel treatment;
- (b) breach of s 19, which protects against discrimination on prohibited grounds;
- (c) breach of s 21, which protects against unreasonable search and seizure;
- (d) breach of s 23(5), which provides that everyone deprived of liberty shall be treated with humanity and respect to the inherent dignity of the person; and
- (e) breach of s 25, which protects fair trial rights.

[37] As Mr Nilsson submitted, there are no pleaded particulars going to these alleged breaches (with exception perhaps to the alleged breach of Mr Whichman's fair trial rights). They are mostly bare allegations and even taking a generous approach to them, I cannot discern any pleaded action that involves a breach of any of the rights listed above.

[38] However, as I have alluded to, one right that might be said to be engaged is the right to a fair trial under s 25. It appears arguable that publishing Mr Whichman's name in association with alleged gang intimidation of Corrections Officers could have impacted his then pending trial on domestic assault allegations. However, I am advised that Mr Whichman in fact pleaded guilty and then had the convictions overturned. Thus, any argument based on fair trial rights has since become moot.

⁸ See generally *R v Liddell* [1995] 1 NZLR 538 (CA) and *Rogers v Television New Zealand Ltd* [2007] NZSC 9; [2008] 2 NZLR 277 (NZSC).

[39] Given that analysis, I accept the arguments by TVNZ and Corrections that the pleadings in respect of NZBORA are misconceived and must be struck out.

Privacy Act 1993

[40] I agree with TVNZ and Corrections that the claims in respect of the Privacy Act are unsustainable as pleaded. The amended claim contains no particulars of any alleged breach of the Privacy Act. It is unclear which principles or provisions of that Act are breached, nor is it clear which actions give rise to the breach. I also accept the Privacy Act does not confer on any person any legal right enforceable in a Court of law, as set out in s 11:

11 Enforceability of principles

- (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.
- (2) Subject to subsection (1), the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

[41] TVNZ makes an ancillary argument that the Privacy Act does not apply to it. I accept that the Privacy Act applies to private information held by an agency and the definition of agency excludes, in relation to news activities, any news medium. News medium means:⁹

[...] any agency whose business, or part of whose business, consists of a news activity; but, in relation to principles 6 and 7, does not include Radio New Zealand Limited or Television New Zealand Limited

[42] Problematically, I do not know whether principles 6 and 7 are engaged, which might mean TVNZ is not exempt. But that simply serves to highlight the inadequacy of the pleading.

[43] Accordingly, the claims of a breach of the Privacy Act against TVNZ and Corrections, as currently pleaded, have no prospect of success and must be struck out.

⁹ Privacy Act 1993, s 2; see definition of 'news medium'.

United Nations Convention Against Torture

[44] This claim also has no merit. Not only is there a complete lack of particularisation of the breach, but stipulations of a treaty duly ratified by the Executive do not ordinarily, by virtue of ratification alone, have the force of law.¹⁰ Nothing in the current pleadings encourages me to revisit that long-standing orthodoxy. Accordingly, the claims based on the United Nations Convention Against Torture must be struck out.

[45] Given the foregoing, and the comments I have already made about the inadequacy of the pleadings, I am satisfied and re-iterate that all present claims must be struck out.

[46] I note, for completeness, that Corrections raised an issue of abuse of process on the grounds that Mr Whichman had made claims in relation to NZBORA in separate proceedings. There is something to that, but for my part it is only relevant in recording that the present strike out does not affect those claims.

Summary judgment

[47] It is unnecessary for me to examine the case for summary judgment at great length. The basic point made by Corrections is that, to the extent that the claim is based on statements by Mr Alan Whitley, those statements were made in his capacity as the President of the Corrections Association of New Zealand (CANZ). As Mr Watson noted (and as deposed by Ms Alexander of Corrections), CANZ is a registered union which stands independently of Corrections. While Mr Whitley is an employee of Corrections, his statements were clearly made in his capacity as President of CANZ.

[48] I agree that a pleaded action based on Mr Whitley's statements cannot succeed against Corrections. Therefore, summary judgment in favour of Corrections in respect

¹⁰ Though some caution is needed here because it is now accepted that an international treaty may inform interpretation of statutory powers and or form part of the broader factual matrix against which to assess the legality or correctness of the exercise of statutory power. See *Tavita v Ministry of Immigration* [1994] 2 NZLR 25 (CA) at 266 per Cooke P; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]-[25]; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [143]-[145].

of those statements is justified. However, to be clear, had Mr Whichman's other claims survived strike out, I observe that nothing in this summary judgment would have affected the relevance of Mr Whitley's statements to the extent that they formed part of the factual matrix relevant to those claims.

Relief

[49] Mr Whichman's defamation claims are struck out. Assuming he separately claimed breaches of NZBORA, the Privacy Act and the United Nations Convention Against Torture, those claims are also struck out. Finally, Corrections shall have summary judgment in relation to any claim of defamation, to the extent that any such claim is based on the statements made by Mr Whitley in his capacity as CANZ President.

[50] TVNZ and Corrections are entitled to their costs on a 2B basis together with their reasonable disbursements. Quantum is to be fixed by the Registrar.