IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-132
[2020] NZHC 481

BETWEEN	MĀUI ASHLEY SOLOMON Plaintiff
AND	DAVID JAMES PRATER Defendant

Hearing: 31 August 2020

Appearances: A J Romanos for Plaintiff
Defendant in Person

Judgment: 12 March 2021

JUDGMENT OF CLARK J

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Overview

[1] The Hokotehi Moriori Trust (the Trust or HMT) represents the Moriori people, in New Zealand and elsewhere. HMT gained charitable trust status in 2003 to manage the taonga of the Moriori people.[1] The plaintiff, Maui Solomon is the executive chair of the HMT.

[2] The defendant, David Prater, is an Australian citizen. His wife, Debbie King is of Moriori descent and related to Mr Solomon. Mr Prater was employed by the Trust in August 2016 as its General Manager of Operations.

[3] Personal and professional relationships between Mr Solomon and Mr Prater deteriorated. In his affidavit evidence, Mr Solomon gives a detailed account of the escalation of the difficulties, tension and conflict. In May 2017, the Board gave written notice to Mr Prater of his temporary suspension on full pay pending confirmation from a medical practitioner that he was able to attend work. Mr Prater had earlier requested leave due to stress.

[4] In July 2017, the Board (excluding Mr Solomon) decided to terminate Mr Prater's employment. Mr Prater was formally dismissed in 2017 for serious misconduct. Aaron Donaldson, the vice-chair of HMT deposed to Mr Prater "bad mouthing" Mr Solomon and his wife around the Rēkohu (Chatham Island) community, "using language and referring to his CEO within the community that was unbecoming of a person in his position".

[5] In August 2018, an email was sent to a number of people from a pseudonymous email address: *allmoriori@gmail.com*. Attached to the email was a letter addressed

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1 *Solomon-Rehe v Hokotehi Moriori Trust* [2015] NZHC 46, [2015] NZAR 776, at [1].

to members of the Trust. Throughout the proceeding this letter has been referred to as the "anonymous letter". In this judgment I do likewise.

[6] The anonymous letter accused Mr Solomon of a range of behaviours going to the heart of his responsibilities as a trustee. The letter encouraged the recipients to oust Mr Solomon at the upcoming election for the HMT chair position and instead, to support Debbie King who readers were invited to contact through the email address.

[7] Mr Solomon filed defamation proceedings in March 2019 seeking substantial damages. A second amended statement of claim was filed on 13 August 2020. This is the statement of claim to which I refer in this judgment.

Formal proof

[8] The matter ultimately proceeded by way of formal proof. Mr Prater filed and served a statement of defence in April 2019 but thereafter seems not to have participated in any aspect of the proceeding. He did not appear at the hearing of Mr Solomon's application to strike-out his affirmative defences. Notwithstanding Mr Prater's failure to oppose the application and his non-appearance at the hearing, Associate Judge Johnston did not strike out the affirmative defences. He ordered instead that the statement of defence would be struck out unless an amended pleading was filed by a stipulated date.[2]

[9] By November 2019, Mr Prater had failed to discharge his obligations in relation to either discovery or the plaintiff's notice to answer interrogatories. Mr Solomon sought a further "unless" order debarring Mr Prater from defending the proceeding if he had not complied with his obligations within ten working days. The Associate Judge recorded Mr Prater as being "in flagrant breach of a direction from the Court" both in relation to discovery and answers to interrogatories".[3] Having regard to an earlier memorandum in which Mr Prater made it "entirely clear that he ha[d] no intention of complying with either obligation" the Court could "have little confidence that [he would comply] with any order that was made.[4] Against that

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2 *Solomon v Prater* [2019] NZHC 1711 at [36].
3 *Solomon v Prater* [2019] NZHC 3024 at [10].
4 At [3] and [10].

backdrop Associate Judge Johnston made unless orders in default of which after 15 days, the statement of defence would be struck out.

[10] On 4 February 2020 Mr Prater's statement of defence was formally struck out from 12 December 2019, that being the expiry date of the period within which Mr Prater was to comply. The matter was to proceed by way of formal proof. Although the registry was directed not to accept any documents from Mr Prater other than a properly made application for leave to file further documents, and that direction was ignored, Mr Solomon did not oppose Mr Prater filing written submissions or making oral submissions at the hearing in line with the Associate Judge's original decision making unless orders. In the event, Mr Prater neither attempted to appear nor file submissions.

[11] In a formal proof context such as this, the Court's role is to assess whether Mr Solomon has established the elements of his claim and, if he has, to consider the issue of remedies. The standard to which the Judge is required to be satisfied in relation to the plaintiff's evidence "is much the same as it would be if the proceeding had gone to trial".[5] Specifically, in a formal proof setting, the Court is not required to consider hypothetical affirmative defences.[6] Accordingly, all issues for determination are to be determined against the standard of the balance of probabilities.

Issues for determination

[12] Mr Solomon must establish the essential ingredients of his claim, namely that—[7]

(a) a statement has been made;

(b) the statement was defamatory of Mr Solomon; and

(c) the defamatory statement was published by the defendant.

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5 *Ferreira v Stockinger* [2015] NZHC 2916 at [35].
6 *Booth v Poplar Road Farms Ltd* [2019] NZHC 807.
7 *Kim v Cho* [2016] NZAR 1771 (HC) at [15]–[17].

[13] If I am persuaded these elements of the claim are established, Mr Prater will be liable for defamation. I will then assess the plaintiff's claims for:

(a) general damages (including aggravated damages);

(b) punitive damages;

(c) interest;

(d) a permanent injunction; and

(e) costs.

Evidence on behalf of Mr Solomon

[14] Ten affidavits were filed in support of Mr Solomon's claim.

(a) Mr Solomon himself filed an extensive affidavit outlining his personal and professional background, particularly his longstanding efforts to advance the recognition and rights of the Moriori people and his corresponding role with the HMT; his dealings with Mr Prater; his observations of the publication of the letter and how it circulated through the Rēkohu and offshore communities; the hurt and distress he suffered as a result of the publication and the course of events following the publication including the steps taken to establish that the email was sent from an account set up by Mr Prater.

(b) Susan Thorpe, Mr Solomon's wife deposes to her own dealings with Mr Prater, her observations of the harm Mr Solomon suffered as a result of the dissemination of the letter and her own investigations into the owner of the Gmail account from which the email and letter were sent.

(c) John Langford is Mr Solomon's solicitor. He has provided a narrative of his dealings with Stuff prior to the commencement of the proceeding and steps taken when information was received from Google in relation to the Gmail account.

(d) Aaron Donaldson, the Vice-Chair of HMT and Mr Solomon's nephew, deposes to his dealings with Mr Prater, his response to the anonymous letter and actions taken by HMT trustees.

(e) Cameron Hansen is an expert in data recovery and digital forensics. He has filed expert evidence in relation to the metadata extracted from the anonymous letter and the email by which it was sent. Mr Hansen's evidence is that it is highly likely that the operating system with the name "David Prater" was used to create the anonymous letter. Mr Hansen also gave evidence identifying similarities between the anonymous letter and other 'control' documents emanating from Mr Prater.

(f) Porsha Meo deposed to receiving the unsolicited email and anonymous letter directly from *allmoriori@gmail.com* on 23 September 2018 and forwarding it to Ms Thorpe.

(g) Eric Solomon, to whom Maui Solomon is first cousin, deposes to receiving messages from his nephews and nieces in Australia who had received the unsolicited email and letter directly from *allmoriori@gmail.com* and who sought the advice of their uncle in relation to their concerns.

(h) Raiha Kahukore, a resident of the Chatham Islands deposed to receiving the unsolicited email and anonymous letter and forwarding it to her mother to send to HMT. Ms Kahukore was concerned by the fact the letter-writer had somehow obtained her email address.

(i) Greg Preece of the Chatham Islands, but a Dunedin resident, also

received the unsolicited email and letter.

(j) Alfred Preece, the Mayor of Chatham Islands in September 2018, received the unsolicited email and letter. He also deposed to telling Stuff journalists who "seemed to be digging around for a story about Moriori", to leave when they turned up at his house.

The anonymous letter

[15] The anonymous letter, as originally sent, is reproduced below. The bracketed paragraph numbering was added by the plaintiff in his statement of claim. The only other change to the original is in the plaintiff's underlining. The plaintiff pleads that the underlined statements, whether read in isolation or in the context of the letter as a whole, are untrue and defamatory of the plaintiff.

[1] LETTER TO MEMBERS AUGUST 31 -2018

[2] Tena Kotou

[3] A group of members on Rekohu have pooled their knowledge and put the following information together

[4] This information is nothing like to propaganda that is being fed to you by Maui Solomon and Susan Thorpe at Hokotehi Moriori Trust

[5] It is very difficult to work out where to start therefore we have decided to go no further back than the 2012 Trustee elections

[6] As branded by Mr. Solomon the so called "Rogue Trustees" were ordinary Moriori people just like yourselves.

[7] One of their mistakes was to underestimate the patience, cunning and manipulation of Mr. Solomon

[8] It all started during the election when the then GM – Maui Solomon was accused by the Executive Chair Shirley King of having undue influence over the result of the election. There is no doubt from the evidence put forward and the court case that ensued some 2 years later that Mr Solomon was in fact manipulating the voting to the advantage of his chosen candidates.

[9] Ms. King and her fellow Trustees did what was constitutionally correct and cancelled the election.

[10] It was at this point the Trustees made their big error of judgement. They should have immediately called another election and this time

had an independent returning officer. Independent of the influence of Mr Solomon.

[11] Instead they tried to investigate the goings on themselves however as Mr. Solomon had several Trustees (In his pocket) the investigation kept getting stalled. (His Nephew Aaron Donaldson and Tom Lanauze) After more than 12 months they ran out of time and all sitting Trustees had their terms expired and were unconstitutionally holding their positions.

[12] If anyone bothered to read the court transcript it was very evident that this was their first mistake and should have vacated their positions immediately hence earning the tag "Rogue Trusttees". Once they ran out of time the court had no option other than to dismiss them.

[13] The court did however point out that from the evidence put forward it appeared that Mr Solomon was manipulating the results however in the courts opinion the election was invalid and therefore Mr. Solomon's actions were never investigated by the correct Authorities.

[14] This then brings us to the "Interim Trustees" and the 2015 election. It was at this election that Mr Solomon stood as a Trustee.

[15] Prior to the election Mr Solomon wrote to the Interim Trustees-(Letter was still on the HMT Website up until 6 months ago)

[16] In that letter he advised that as GM and if elected he would resign as GM as soon as a suitable person could be found

[17] By early 2016 no such person had been found largely because the position had not been advertised. Mr Solomon continues on as Executive Chair.

[18] By this stage he held 3 positions

Chairman of HMT Board – Estimate $30,000
GM – CEO of HMT – Estimate $250,000
Chief Negotiator for the Office of Treaty Settlements (OTS)–
Waitangi Tribunal Claim – Estimate $100,000

[19] We point out that these amounts are only estimates as the true amounts are carefully camouflaged within the Financial Records of HMT.

[20] We understand that the OTS became vocal about these positions and advised Mr Solomon that he should divest himself of at least one.

[21] It was then that a new position was created. Not a GM or a CEO but a GM of Operations.

[22] To the uninformed, which included most of us on the Island, we believed that the new appointee a Mr David Prater was the GM. Again, Mr. Solomon was very cunning. At the AGM in Auckland in late 2016 he introduced Mr Prater as the GM.

[23] We were shocked to hear that Mr. Prater was not replacing Mr. Solomon and was merely there as a smoke screen. Mr. Prater has since been dismissed and has taken a Personal Grievance claim against HMT.

[24] We understand there has been as many as 8 Personal Grievance claims against HMT and there is also dubious transactions that require investigation such as those mentioned below

[25] We believe that a "Forensic Audit" would disclose these transactions.

[26] In our Trust Deed it states that the members must nominate and appoint Auditors

[27] For many years these appointments have been made by the Board and ratifies (sometimes) by the members.

[28] We need all members to stand up and be counted. Do not accept the status quo as being the whole truth and nothing but the truth as it is not.

[29] We call on all members to consider these points

[30] Just a few instances of inappropriate use of HMT or Te Keke Tura funds

[31] 2016-17 – approx. $40,000 paid to Solomon family members to attend the unveiling celebrations of the Tommy Solomon statue – No Disclosure of Interest by Mr. Solomon

[32] Mr Donaldson was a recipient and as a Trustee of HMT should have made a Disclosure

[33] ***"the trustees act is very clear in stating that any transaction that a Trustee could gain a benefit directly or indirectly his/her interest should be disclosed"***

[34] The current Trustees are treating the funds in Te Keke Tura as their own private "piggy bank" to dip into whenever they feel like it without any disclosures. Trust Board minutes of HMT and TKT will prove this claim as correct.

[35] 2017 – Education grants paid to Tama and Hene Solomon (Maui's Son and Daughter) No Disclosures

2017 – Mr Solomon sold equipment to HMT – No Disclosures

The New Trust to hold the OTS – Waitangi Tribunal Settlement funds

[36] The Trust deed shows that the Trustees nominated are the present Trustees

[37] They can spend up to 50% of the funds without consulting members – That is $9,000,000

[38] ?? Does that seem like a lot of freedom without going back to the members??
?? Are we the only ones concerned??

[39] It Appears that Mr. Solomon has already bought or contracted to buy a $3,000,000 property in Wellington on behalf of HMT.

[40] WHY

[41] It is a commonly held belief that this fits Mr. Solomon's grand Plan
1. Get Premises in Wellington
2. Build units and office space
3. Amend the HMT Trust Deed so the Chair does not have to reside on Rekohu.
4. If successful with (3) move the HMT office to Wellington and set himself up with a job for life.
5. Has moved the Office Manager position "Off Island" already thus taking employment away from the Island and more importantly a Moriori as the OM is not of Moriori descent.

6. Mr Solomon surrounds himself with "minions" – People who will never challenge his absolute control.
7. Be recognized as the person who brought the Moriori People back from extinction
8. Get a knighthood for himself

9. ST and MS having been using "rent a crowd" to make the Marae look like it is being used and frequented by Moriori people. It is a well-known fact that most visitors to the Marae have no Moriori connection. The Marae is a glorified tourist attraction or used as a hotel to house family and friends of Maui and Susan.

10. Fishing quota is used as a bargaining chip against the Island based Moriori people. Mr. Solomon chooses who gets what but cleverly disguises this by lodging it with ACE. Be under no illusions as to who controls this. Those who offer the most "koha" back to the Marae get looked after the best.

[42] Mr. Solomon and Mr. Lanauze are coming up for re-election in October/November of this year.
[43] Our group will be fielding candidates to run against Mr. Solomon and seek your support.

[44] Debbie King has been nominated and her nomination has been accepted.
[45] Debbie is the Great Granddaughter of Tommy Solomon through her paternal line to Auntie Boo (Tommy's daughter.)

[46] We ask you all to support Debbie as her honesty and Integrity is beyond reproach. Among other things she has promised to return the Marae back to the people (all Moriori)

[47] Feel free to contact Debbie through this email address.
[48] We will ensure she gets your contact details.

[49] Kind Regards to All Moriori

[16] Four witnesses have deposed to being sent directly the anonymous letter: Ms Meo, Mr Greg Preece, Mr Alfred Preece and Ms Kahukore.

[17] Ms Thorpe also adduced the list she created in the weeks following the date the email and anonymous letter were sent. She recorded those who had reported to the HMT office their receipt of the email and those who apparently withdrew their support for Ms King's candidacy for election as a trustee. Ms Thorpe also deposed to being aware, following her inquiries, that none of Mr Solomon's siblings or immediate family received the email.

[18] The evidence shows that, statements were made and published. The statements identified Mr Solomon. Not only is Māui Solomon's name repeated throughout the anonymous letter, he is clearly identified as the key trustee against whom the author's slurs were directed. As well, in light of Mr Solomon's leadership of the HMT, and given the context of the letter read as a whole, it can reasonably be inferred that the disparagement of HMT and its operations would be understood by readers to reflect on Mr Solomon personally.

Are the challenged statements defamatory of the plaintiff?

[19] In relation to each allegedly defamatory statement, Mr Solomon must prove on the balance of probabilities that the statement had a defamatory meaning. In *Craig v Slater* the Court of Appeal stated that:[8]

> [15] For a statement to bear a (defamatory) meaning alleged, two fundamental pre-conditions must be met. First, it must be the meaning an ordinary, reasonable person would draw or infer from the words, taken in their context and in light of generally known facts. Secondly, that meaning must be pleaded.
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> [16] Whether a statement is capable of bearing a particular meaning is a question of law; whether it in fact conveys that meaning is a question of fact.

[20] Both tasks will fall to the Judge where the trial is a Judge-alone trial.

[21] A defamatory meaning is one that tends to affect the claimant's reputation adversely, and in more than a minor way.[9]

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8 *Craig v Slater* [2020] NZCA 305.
9 At [44].

[22] Mr Solomon pleads that in its natural and ordinary meaning the anonymous letter meant, and was understood to mean the following:

9.1. The plaintiff committed electoral fraud in the 2012 trustee elections by manipulating the voting and the results.
(Anonymous Letter at [5]–[13])

9.2. In order to avoid an investigation into his conduct in the 2012 trustee elections, the plaintiff abused his influence over trustees.
(Anonymous Letter at [5]–[11])

9.3. A court has pointed out that, from the evidence put forward, it appeared the plaintiff had manipulated the 2012 trustee election results.
(Anonymous Letter at [5]–[13])

9.4. The plaintiff misled the interim trustees of HMT by falsely advising that if he was elected as a trustee he would resign as the General Manager, which is demonstrated by the fact that by early 2016 the position had not been advertised.
(Anonymous Letter at [14]–[17])

9.5. The plaintiff has been involved in the careful camouflaging of his remuneration within the financial records of HMT.
(Anonymous Letter at [18]–[19])

9.6. The plaintiff hired the defendant under false pretences.
(Anonymous Letter at [20]–[23])

9.7. The plaintiff has caused as many as 8 personal grievance claims against HMT.
(Anonymous Letter at [23]–[24])

9.8. The plaintiff has been involved in several dubious transactions, which a forensic audit would disclose.
(Anonymous Letter at [24]–[25], [30]–[31], [34]–[35] and [39]–[41])

9.9. The plaintiff has, among others, treated the funds in Te Keke Tura as his own private "piggy bank" to dip into whenever he feels like it without making any disclosures, an allegation the Trust Board minutes of HMT and TKT would prove to be correct.
(Anonymous Letter at [34])

9.10. In 2016-2017, $40,000 was paid to the plaintiff's family members to attend the unveiling celebrations of the Tommy Solomon statue, in respect of which transaction the plaintiff failed to make a disclosure of interest and engaged in nepotism.
(Anonymous Letter at [30]–[31] and [33]–[34])

9.11. In 2017, education grants were paid to the plaintiff's children, in respect of which transaction he failed to make a disclosure of interest and engaged in nepotism.

(Anonymous Letter at [30] and [33]–[35])

9.12. In 2017, the plaintiff sold equipment to HMT, in respect of which transaction he failed to make a disclosure of interest.
(Anonymous Letter at [30] and [33]–[35])

9.13. The plaintiff is corrupt.
(Anonymous Letter at [5]–[11], [13]–[31] and [33]–[41])

9.14. The plaintiff has embezzled HMT funds.
(Anonymous Letter at [24]–[31] and [33]–[41])

9.15. The plaintiff has used his positions to advance his own selfish agenda, which has come at the expense of the interests of the Moriori people.
(Anonymous Letter at [24]–[31] and [33]–[41])

9.16. The plaintiff has breached the trust vested in him by the Moriori people.
(Anonymous Letter at [4]–[11], [13]–[31] and [33]–[41])

9.17. The plaintiff is unfit to lead HMT.
(Anonymous Letter at [4]–[11], [13]–[31]and [33]–[46])

9.18. The plaintiff is a manipulative and conniving person.
(Anonymous Letter at [4]–[11], [13]–[31], [33]–[41] and [46])

9.19. The plaintiff is a dishonest person.
(Anonymous Letter at [4]–[11], [13]–[31], [33]–[41] and [46])

[23] Mr Solomon relies on the anonymous letter in its entirety but draws the Court's attention to the passages underlined in the statement of claim.[10] His counsel, Mr Romanos explained that the imputations have been structured "so as to step through the various passages of the Anonymous Letter, and at the end provide the overall general impression a reader would have taken from it — the underlying 'stings'".

[24] In determining whether the passages complained about are capable of bearing the pleaded meanings I apply the well-known principles identified by Blanchard J in *New Zealand Magazines Ltd v Hadlee (No 2)*:[11]

(a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

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10 See [15] above.

11 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

(b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

(c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

(e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.

(f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65; [1995] 2 All ER 313 (HL) at p 72; 318.

[25] These principles were applied in the relatively recent Court of Appeal decision in *Fourth Estate Holdings [2012] Ltd v Scott*.[12] The Court also cited the further observation from *Hadlee* namely, Barker J's description of the notional reasonable person as:[13]

> … fair-minded, not avid for scandal, not unduly suspicious, nor one prone to fasten on to one derogatory meaning when other innocent or at least less serious meanings could apply.

[26] I consider that the reasonable person who, it is to be remembered, has "considerable capacity for reading between the lines" would read the identified statements in the context of the letter and take from them the meanings the plaintiff has pleaded.[14] I make two exceptions, however. I do not agree that an ordinary reasonable person would take from the associated statements the meaning pleaded at 9.4.[15] Even reading between the lines, a strained interpretation is required in order to

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12 *Fourth Estate Holdings [2012] Ltd v Scott* [2020] NZCA 479 at [69].
13 At [70], citing *New Zealand Magazines Ltd v Hadlee (No 2),* above n 11 at 630.
14 *New Zealand Magazines Ltd v Hadlee (No 2)*, above n 11, at 625(d).
15 Set out at [22] above.

infer from the statements that Mr Solomon's advice to HMT trustees was false. Nor do I agree that the statements marked [30]–[31] and [39] would lead the reasonable reader to consider that Mr Solomon was being accused of corruption. That observation does not detract from my overall conclusion that the remaining pleaded meanings (at 9.13) do impute corruption on the part of Mr Solomon.

[27] I had considered whether the pleaded imputation at 9.14 that Mr Solomon had embezzled HMT funds was a species of corruption and therefore an effective repleading or repetition of 9.13. But embezzlement is a very specific kind of behaviour describing the theft or misappropriation of an employer's funds. An allegation of corruption is an allegation of moral deterioration. It goes to the very essence of character. It may have nothing to do with embezzling. The point is, the two pleaded imputations are quite distinct.

[28] Mr Solomon says the meanings are untrue. I accept they are defamatory of Mr Solomon in their tendency to reflect adversely on his reputation and that they do so in more than a minor way.

Is the defendant liable for the publication?

[29] I turn now to what Mr Romanos described as the "crux issue for determination": whether the defendant published the anonymous letter. Mr Romanos points out that while Mr Prater has denied he published the letter, he has not been prepared to deny this under oath (refusing to provide sworn answers to interrogatories) and has failed to give discovery which would have required him to swear an affidavit deposing to the fact that relevant documents had never been in his control.

[30] I have determined that the statements identified Mr Solomon and were published to someone other than Mr Solomon.[16] But to succeed in his claim Mr Solomon must also prove that Mr Prater was responsible for the publication.[17]

[31] The plaintiff's case is that Mr Prater's involvement goes beyond mere participation in the publication and that he was responsible for:

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16 See [18] above.
17 *Kim v Cho*, above n 7, at [15].

(a) setting up the Gmail account *allmoriori@gmail.com* in July 2017;

(b) planning and writing the anonymous letter; and

(c) distributing it by email on 23 September 2018.

The approach in analogous cases

[32] Counsel was unable to identify analogous New Zealand cases of real utility beyond *Ross v Hunter*.[18] In *Ross v Hunter* the defendant did not contest the claim. The Judge was satisfied that the defamatory publication, although not authored by the defendant, was published by him because there were documents that linked him to the website, in particular an email authored by the defendant stating that the plaintiff might be interested in the defendant's website because it had "been very successful in creating a culture, particularly with the local plods, that they are inclined to behave for fear of having their photos plastered on the internet".[19] While the District Court decision was upheld on appeal, including the general and punitive damages awards, there was no issue on appeal as to the defendant's responsibility for the publication.[20]

[33] Where a defendant denies responsibility for publication, inquiry into whether the defendant was in fact responsible is necessarily intensely factual. Mr Romanos cited three decisions where liability for publication was found in circumstances that are similar to Mr Solomon's case.

[34] In *Jon Richard Ltd v Gornall* the defendant left her employment following a disciplinary investigation.[21] At around the time she left her employment the defendant mentioned to others that she had information and was prepared to use it. Several months later, Debenhams (one of the department stores to whom the defendant's employer sold goods) received several anonymous letters headed "Whistleblowing". The contents were defamatory of the plaintiff. The defendant denied any involvement. Upon the plaintiff's application for an interim injunction the defendant was ordered to

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18 *Ross v Hunter* [2017] NZDC 22579.
19 At [5].
20 *Hunter v Ross* [2019] NZHC 2489.
21 *Jon Richard Ltd v Gornall* [2013] EWHC 1357.

disclose her computer for examination by an expert who concluded there was substantial evidence linking the defendant's computers with the creation of the letters. The Judge said it was clear from the expert's evidence that the defendant's two computers were associated with the letters but that did not show conclusively she was responsible for the publication. Nor was it conclusive of her responsibility for the publication that, given the circumstances in which she left her employment, she appeared to have a motive to be vindictive towards the plaintiff company. The fact the defendant had chosen not to defend the proceedings was thought to be explicable by her wish not to involve those close to her in litigation. But there were two further considerations which seemed to the Judge to be adequate reason to set aside "the perhaps unrealistic possibilities" to which he had referred:

(a) The first was a letter attached to the communication to Debenhams about which the Judge observed:[22]

> … that the similar phraseology of the first and second letters make it clear that the second letter was sent by the same person.

(b) The second conclusive point, to the Judge's mind, was that there were errors in the second letter which were characteristic of the defendant's typing —[23]

> … specifically a tendency to write "where" rather than "were" and a misspelling of the word "defence".

[35] The Judge concluded that it was as clear a case "as there could possibly be that the Defendant's denial that she published the two letters was, in the case of each, untrue …".[24]

[36] The second case is the United Kingdom Court of Appeal decision in *Takenaka (UK) Ltd v Frankl*.[25] The defendant was a former employee of the first claimant and had had dealings with the second claimant. The defendant left his employment to work in Turkey. The emails apparently emanated from Turkey. Expert evidence

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22 At [18].
23 At [19].
24 At [20].
25 *Takenaka (UK) Ltd v Frankl* [2001] EWCA Civ 348.

showed the defamatory emails had been sent from a laptop to which the defendant had access. The defendant denied any involvement. He suggested that someone with physical access to the laptop had deliberately intended to make it appear as though he were responsible for sending the emails. The expert witness said:[26]

> To make this hypothesis viable
>
> (a) the individual responsible must have been in Turkey at the relevant times.
>
> (b) would have had to have had physical access to the machine at the relevant times.
>
> (c) would need a motive to incriminate Mr Frankl, or
>
> (d) have a grudge against Takenaka (UK) Limited.
>
> (e) would have knowledge of the password in 'davidfrankl' Hotmail account, and finally
>
> (f) have the necessary expertise and foresight to carry out such a convoluted plan.
>
> I do not consider this likely, and I cannot conceive of any alternative hypothesis which would fit the observed facts.

[37] In relation to the expert's evidence, the Court of Appeal could—[27]

> … only agree with that, as the judge evidently did. It was on its face a powerful point against the hypothesis on which the defendant's case must be based, namely that somebody else was setting him up and interfering with his computer in order to make it appear as if he had sent three defamatory e-mails.

[38] The Court of Appeal dismissed the application to appeal, Lord Mance (who delivered the judgment) stating:[28]

> Like much of the defendant's case that postulates a most extraordinary, ingenious and persistent individual who was prepared and able to create not only that document but also a whole series of bogus Hotmail e-mails in proximity to the three defamatory e-mails in order to make it appear that this defendant was the sender of the defamatory e-mails. He must in some way have planted all of that material on the defendant's computer. But he did so in order, presumably, that the defendant should at some point be exposed to obloquy or to litigation such as the present, although it could only be, and was only, by the taking of very considerable steps and with considerable

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26 At [16].
27 At [17].
28 At [23]–[24].

> determination that the actual origin of the three defamatory e-mails was ever discovered.
>
> It seems to me that the improbability of this scenario is compelling when one comes to weigh the overall probabilities. …

[39] The third analogous case which Mr Romanos cited is the decision of the Court of Queen's Bench of Alberta in *Vaquero Energy v Weir*.[29] The first plaintiff was an oil and gas company. The second plaintiff was its president and CEO. The claim concerned defamatory messages about the plaintiffs posted on a chat room of a website which provided financial information to its subscribers.[30] On discovering the extent of the postings, the second plaintiff consulted counsel who undertook investigations to identify the author.

[40] At trial, the defendant's evidence was that he was not responsible for the postings. He adduced expert evidence to support the proposition that his IP address had been 'spoofed' that is, appropriated by a third party who, perhaps, 'framed' the defendant to make it appear that he posted the messages.

[41] The Court was satisfied the defendant had posted the messages:[31]

> I am satisfied that the postings were done by Mr. Weir. There is no evidence that a Trojan had been installed. I agree that it is highly unlikely that a thief would know when the IP address changed so as to know when to re-enter the Currah offices and obtain the new IP address. Mr. Weir made much of the fact that the Plaintiffs had originally planned to apply to have his computer seized for evidence but then never did. If the computer would have proven exculpatory, it was open to Mr. Weir to offer it as proof. This is not to suggest that there was any burden on Mr. Weir to disprove the allegations. That burden, of course, stayed with the Plaintiffs. There is no doubt that most of the alec6 postings came from Mr. Weir's computer and it is clear that those are of the same type and style of the napo9 postings. Accordingly, I am satisfied that all of the postings were made by Mr. Weir.

[42] The issue in common to these three decisions was whether the defendant was responsible for the defamatory publication. The cases show that, although the evidence varies depending upon the context, the courts tend to test the evidence against two propositions: that the defendant had some motive to harm the plaintiff and that the

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29 *Vaquero Energy v Weir* 2004 ABQB 68, [2004] AJ No 84.
30 At [1]–[2].
31 At [13].

person responsible may have been a third party. In this proceeding Mr Solomon has put before the Court extensive evidence to show Mr Prater's role in, if not his sole responsibility for, the publication of the anonymous letter.

Creation of the Gmail account

[43] Pursuant to orders for non-party discovery, Mr Solomon obtained from Google LLC information relating to the Gmail account from which the email and anonymous letter were sent. The information shows the Gmail account was created on 7 July 2017 at 03:03:46 UTC. Chatham Island observes Chatham Island Standard Time (CHAST) which is 12 hours and 45 minutes ahead of Coordinated Universal Time (UTC). Thus, the Gmail account was created on 8 July 2017 at 15:48 (CHAST).

[44] Mr Solomon's case is that the Gmail account was created at a time proximate to Mr Prater's dismissal from HMT and his communications to island residents who have signed statements describing Mr Prater's statements to them.

[45] The following timeline is said to illuminate Mr Prater's motive, and intention, to harm Mr Solomon.

(a) By May 2017 the employment relationship with Mr Prater had broken down.

(b) Shortly after a meeting with Mr Solomon on 13 May 2017, Mr Prater was placed on leave for medical reasons.

(c) Subsequently, HMT undertook an employment investigation into Mr Prater's conduct regarding statements he was said to have made to Rēkohu residents. Those communications were on 11 May, 1 June, 6 June, and 10 June 2017. I address the content of the communications in the next main paragraph.

(d) Following HMT's investigation, Mr Prater was dismissed from employment on 28 July 2017. I accept the evidence leaves little doubt Mr Prater's employment with HMT was unhappy. The evidence

> includes Mr Prater's interview with Stuff. The Court was invited to view the interview which I did. Mr Prater acknowledged several times he had called Mr Solomon a [expletive 'bleeped' in the interview]. He claimed the investigation was by a kangaroo court and the predetermined outcome "for near six or eight months" was to get rid of him. Mr Prater described himself as not "the easiest person to employ".

[46] A signed statement from Stephen Carr was exhibited to Mr Solomon's affidavit. Mr Carr moved to the Chathman Islands in June 2015 with his wife when she was appointed to the position of manager of two properties owned by HMT. Mr Carr described Mr Prater visiting the building site where Mr Carr was working on 1 June 2017. Mr Carr is explicit about Mr Prater's abusive description of Mr Solomon and that it was overheard by another who, Mr Carr, said was willing to verify what he had heard

[47] I initially placed little weight on Mr Carr's signed statement as it was neither sworn nor in the form of a declaration. However, having listened to Mr Prater's interview, and Mr Prater's own description of being dismissed for bringing the trust into disrepute by "having a private conversation with a mate where I called my boss a [bleep]", I see that Mr Carr's description of the "disturbing" nature of Mr Prater's comments to him, his "slagging off" about Mr Solomon and his verbal attacks on Mr Solomon, are consistent with what Mr Prater himself narrates about his private conversations.

[48] Mr Solomon also relies on a signed statement from Graeme Hoare of Chathams Automotive and Marine Ltd, to similar effect. Mr Hoare describes Mr Prater coming into the workshop on 10 June 2017. While he was there he told Mr Hoare he had been suspended by Mr Solomon. Mr Hoare narrates Mr Prater's verbal attack on Mr Solomon and his surprise at the abuse. Mr Hoare's statement is exhibited to Mr Solomon's affidavit but is not, itself, sworn.

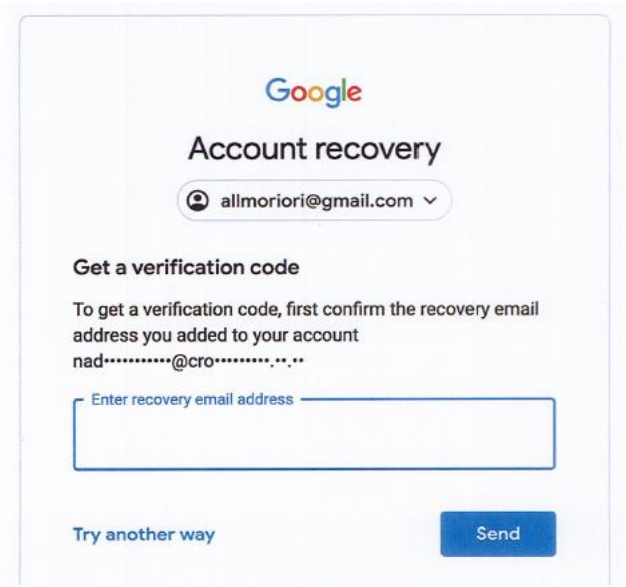
[49] The Gmail account was created on 7 July 2017. Mr Prater was dismissed on 20 July 2017, a fortnight later. Counsel invites the Court to conclude that the timing of the account's creation and the purpose for which it was ultimately used, is consistent

with Mr Prater's recorded actions and statements at around the same time. While there is a proximity in timing, its significance is to be considered in light of the fact that the account was created prior to Mr Prater's dismissal. The proximity of the narrated events to the creation of the Gmail account is not such that one is immediately drawn to an inference of a retributive and hot-headed response to being suspended. I do accept, however, that the creation of the Gmail account was proximate to Mr Prater's suspension on full pay on 26 May 2017 and his reported communications with Mr Carr and Mr Hoare between 1 and 10 June 2017, but the proximity is not such as to compel, of itself, a conclusion that Mr Prater was responsible for the publication.

[50] The information from Google is said to contain a further indicator of Mr Prater's responsibility for its creation. The following recovery email address was given by the creator: *Nadhira.indris@crowehorwath.co.nz.* Crowe Horwath provided accountancy and auditing services to HMT. Crowe Horwath changed its name to that of its parent company, Findex. Findex continues to provide accountancy and auditing services to HMT. Ms Thorpe, who has been working for HMT since 2011 as the cultural and research projects coordinator, and is Mr Solomon's wife, gave affidavit evidence. In relation to the recovery email address Ms Thorpe deposed to contacting Findex on receipt of the information from Google. Ms Thorpe asked when Nadhira Indris had left the business. The last email Ms Thorpe had received from Ms Indris was in May 2017. Findex confirmed that Ms Indris had left the business on 26 May 2017, over a month prior to the creation of the Gmail account.

[51] Ms Thorpe also deposed to Mr Prater returning his laptop and keys on 19 July 2017 when he was dismissed but that until that time he had full access to HMT's email contacts which included Ms Indris' email address.

[52] As part of the plaintiff's discovery, a web page was disclosed. The web page is reproduced below:



[53] In a memorandum filed on 3 February 2020 Mr Prater addressed this document. He stated:

> This was apparently an attempted [sic] by a representative of Crowe Horwath – the HMT Accountants.
> Totally irrelevant filler and there is nothing that points to defamation or defamatory loss.
> **The Defendant does question the integrity of the Plaintiff in attempting to or getting another party to access an e mail account he knows full well does not belong to him.**
>
> (emphasis in original)

[54] Mr Romanos submitted Mr Prater's comment is telling because it is plain on the face of the web page that it was not an attempted login, let alone an attempted login by a representative of Crowe Horwath. Secondly, Mr Prater was able to identify Crowe Horwath's expurgated recovery email address when neither the plaintiff nor his advisers were able to do so. Those factors along with what is described as Mr Prater's "obsession" with Crowe Horwath provide a basis, it is said, for drawing an inference that he created the account. The obsession is said to be evidenced in pleadings in Mr Solomon's original statement of defence.

[55] I have reviewed the pleadings referred to but see no particular obsession. Mr Prater stated (more than once) that should the case proceed he would be seeking particular documents from Mr Solomon in the discovery process. The documents included correspondence between Mr Solomon and his accountants.

[56] I accept that, at the least, the timing of the creation of the Gmail account, and the purpose for which it was ultimately used, is consistent with Mr Prater's recorded hostility towards Mr Solomon around this time.

Metadata evidence

[57] Cameron Hansen, a computer forensic analyst and managing director of Datalab has sworn an affidavit. Mr Hansen was asked to assess whether the anonymous letter emanated from the defendant's computer system.

[58] Mr Hansen's evidence is detailed and technical. In short, Mr Hansen extracted and reviewed the anonymous letter attached to the email "FW Letter to All Moriori from concerned Moriori.eml". The anonymous letter was a Microsoft document in relation to which Mr Hansen reported on available metadata. Mr Hansen was also given "control" emails sent by Mr Prater to Mr Solomon when Mr Prater was employed by HMT. Mr Hansen extracted the metadata from the Microsoft Word documents attached to these emails and compared the results. The metadata in relation to the anonymous letter records —

> Last Modified By: David Prater
>
> Creator : David Prater

[59] Mr Hansen explained how a system applies a "Creator" or "Last Modified By" username to a document. Such details are drawn from the operating system itself. Specifically, the system applies the name attached to the user of the operating system nominated when the system is installed.

[60] There were three control, or comparator, documents:

(a) A two-page document in which Mr Prater reported to Mr Solomon his concerns arising out of a conversation with "Cheryl" in early May 2017. Mr Prater emailed the document to Mr Solomon on 4 May. His email asked Mr Solomon if he would mind giving Mr Prater his thoughts. I call this document "A".

(b) The next document was emailed from Mr Prater to Mr Solomon on 23 May 2017. The email subject line is "GMO update". The attached document is a two-page document responding to a discussion at a meeting on 22 May 2017 about Mr Solomon not knowing what Mr Prater was doing in his position as GMO. I refer to this email and document as document "B".

(c) The third comparator document is a seven-page document in the nature of a detailed timesheet reporting on GMO duties. Mr Prater emailed it to Mr Solomon on 26 April 2017 under the subject line Timesheet Analysis as requested. I call this document "C".

[61] I address these documents in the order in which Mr Hansen addressed them rather than in their chronological sequence.

[62] First, the user of the three control documents and the anonymous letter are either "David Prater" or "Sellsmart" which apparently was the name of the defendant's real estate business.

[63] All three comparator documents were emailed from Mr Prater from an email address david@copinga.co.nz.

[64] In common with the anonymous letter, the metadata lists the "creator" and "last modified by" user of document "C" as "David Prater". From this information it was clear to Mr Hansen that if Mr Prater did indeed send the "Timesheet Analysis as requested" email with the attached document "C".

[65] Then Mr Prater, at least at one time, used a system whereby the username of the operating system was "David Prater". That is the same username assigned to the operating system of the creator of the anonymous letter.

[66] Finally, the metadata lists in relation to both document "C" and the anonymous letter their parent application (company, product and version) as Microsoft Office 2016 install version.

[67] When the metadata evidence was disclosed to Mr Prater he claimed it was "so inclusive it is totally useless" and that "anyone could have doctored the 'Letter' to make it look like Mr Prater was involved". But as with the expert testimony in *Takenaka (UK) Ltd v Frankl,*[32] to make the hypothesis viable the individual who doctored the anonymous letter so as to frame Mr Prater would have required physical access to his computer at the relevant times, would have needed a motive to incriminate him or hold a grudge against him and would have needed the required expertise and foresight to carry out such a convoluted plan.

[68] On the basis of the metadata evidence I find on the balance of probabilities that Mr Prater created the anonymous letter. I reach that conclusion while acknowledging Mr Hansen's evidence that it is possible for a person with an intermediate level of IT knowledge, to change the username assigned to an operating system.

Similarities in syntax, grammar and style

[69] Mr Romanos identified some 16 stylistic and linguistic commonalities between the anonymous letter and the three control documents created by Mr Prater and provided to Mr Hansen for his analysis. Mr Hansen's evidence was that in many cases of forensic analysis conducted by their laboratories, the analysts are asked to review systems and large data repositories for key words or strings of text. Apparently, this work extends to tasks where syntax and language analysis is required. On that basis Mr Hansen gave evidence of three particular features common to both the anonymous letter and the control documents. They were the use of hyphenation where a full stop or colon would normally be used, the use of bracketed thoughts and notes and the use of capitalisation.

[70] I agree, however, with Mr Romanos' submission. A Judge is possibly as well placed to observe idiosyncrasies in syntax, grammar and style. Of the 16 stylistic idiosyncrasies identified by counsel, I propose to address only those four that I was persuaded had some probative value.

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[32] See [36]–[38] above.

[71] The Court's attention was drawn to seven of Mr Prater's documents. They included documents filed in this proceeding and emails. The documents show Mr Prater's use of full stops following abbreviations such as "Mr". Mr Prater employs a mixed use of the period. For example, Mr Prater's statement of defence dated 15 April 2019 has abbreviations without periods (e.g "Mr Solomon") but then consistently in the final page of that document all the abbreviations are followed by a full stop (e.g "Mr. Solomon"). The same mixed use is apparent in the anonymous letter for example "Ms. King" and "Mr David Prater".[33]

[72] I observe that the use of a period after "Mr" is unusual these days. Even more unusual is a mixed use of a period such as is displayed in Mr Prater's documents as well as the anonymous letter.

[73] Other idiosyncrasies would be inconsequential on their own but where their use is such that a pattern is discernible in relation to one author, an inference as to authorship may be drawn where that same pattern is evident in other documents. In that regard I note the consistent capitalisation of the first letter of the first word inside parentheses when a capital letter would otherwise be out of place. For example, in the anonymous letter this occurs twice on the first page: "(In his pocket)" and "(Letter was still on the HMT Website …)".

[74] The anonymous letter shows a haphazard capitalisation of the words "Letter", "Personal Grievance", "New Trust", "Integrity" and so on. That same haphazard employment of capitalisation is apparent in Mr Prater's other documents. As between the anonymous letter and documents unquestionably authored by Mr Prater there are similarities which appear to be more than coincidental.

Similarities in content

[75] Mr Romanos emphasised the use of the "conspicuous" term "Forensic Audit" in the anonymous letter and referred to other documents in which that term was also used. One such document is a notice of registration from Mr Prater's wife, Ms King. The three-page email letter is signed: Yours sincerely Debbie King (Prater nee Barris).

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[33] See at [15] above, statements [9] and [22].

By this letter Ms King gives two weeks' notice of her resignation as a member of staff of HMT.

[76] I take two points of some significance from the letter:

(a) Ms King urges trustees to insist on a "FORENSIC AUDIT" of the Trust and the Te Keke Tura Trust.

(b) The email is sent "From: David Prater<sellsmartonline@gmail.com>.

[77] I consider the sender information links Mr Prater to Sellsmart in such a way as to make more compelling the inference available from the metadata that Mr Prater and Sellsmart operated interchangeably in terms of electronic document creation and email identity.

[78] There is further evidence potentially identifying Mr Prater as the author of the anonymous letter. The anonymous letter states "2017 – Mr Solomon sold equipment to HMT – No Disclosures". There was no further detail in the anonymous letter contained no further detail about that allegation. In his statement of defence dated 15 April 2019 Mr Prater requested disclosure of documentation including:

> All emails between Mr Solomon and the Trustees in regard to the purchase by HMT of machinery being offered by Mr Solomon. Quad Bike and generator. Minutes of TKT involving this purchase.

[79] Mr Carr's statement records his discussion with Mr Prater on 1 June 2017:

> He asked me if I would reply to an email that he had sent me at least a week prior about the value of a quad motor cycle that the CEO wished to sell to the Station as a back up quad. When we discussed this further he stated that he was trying to gather ammunition against Maui the CEO …

[80] It seems an unlikely coincidence that Mr Prater's preoccupation with machinery being allegedly sold by Mr Solomon to HMT, would happen to be shared by the author of the anonymous letter.

[81] Other evidence shows that Mr Prater shares the same views as the author of the anonymous letter. In his original statement of defence Mr Prater stated:

> Should the Court decide I have a case to answer I will then defend it on the basis that to the best of my knowledge and understanding that some of the claims made in the letter although not being 100% accurate definitely point to some kind of impropriety by Mr Solomon.

[82] Mr Romanos argued that at times during the proceeding, Mr Prater has been "dancing on the head of a pin" to differentiate himself from the author of the anonymous letter. In his application to have the case dismissed dated 19 December 2019 Mr Prater stated:

> In short the Memorandums to the court by Mr Solomon and his Legal team are little more than a child whining to his parent or teacher that:
>
> "Tommy did this to me"
>
> OR
>
> "Tommy did not share"
>
> OR
>
> "Tommy called me names"
>
> A Bully has been called to account, be that "anonymously," but, called to account all the same, and he does not like getting some of his own medicine back.

[83] Mr Romanos argued that in his later documents Mr Prater has appeared to confuse his denial of responsibility for the anonymous letter with his early rigorous defence of the proceeding. For example, in a memorandum dated 3 February 2020 Mr Prater states:

> What Mr Maui Ashley Solomon thinks as important is money and control.
>
> I challenged him for both. I stood for everything he aspired to be yet I achieved it honestly.
>
> My integrity was not for sale, not even to him.
>
> He could not stand that I could oppose his corruption so he has used his playing field the Courts to Humiliate and discredit me.
>
> I fear nothing that he can throw at me.
>
> If the courts are so gullible as to accept his lies then – God Help New Zealand

[84] The point arising from these comparisons is that on the one hand Mr Prater claims to have had no part in the publication of the anonymous letter yet, while not

raising an affirmative defence, has levelled the same serious accusations at Mr Solomon as are contained in the anonymous letter. That seems to be another unlikely coincidence.

Evidence regarding the email itself

[85] Four points are made about the email to which the anonymous letter was attached. I find one of the points particularly persuasive as to the authorship of the anonymous letter. According to the metadata, the anonymous letter was last modified at 6.32 pm on 23 September 2018 and the email was sent at 6.42 pm on 23 September 2018. I am invited to infer, and I do infer, that the sender of the email, created the anonymous letter that was attached. Control document "C" was sent by email from Mr Prater to Mr Solomon on 26 April 2017. The email's subject line read "Timesheet Analysis as requested". The attached document was a breakdown, or analysis, of Mr Prater's HMT activities between 2–14 April 2017. Mr Hansen's metadata analysis revealed, compellingly, that it was created on the same system as the anonymous letter. Both the anonymous letter and the "analysis" letter were created on an operating system having a username of "David Prater" and incorrectly set by 12 hours. The operating system under the username "Sellsmart", Mr Prater's real estate business, similarly shows it was set incorrectly by 12 hours.

Counterfactuals

[86] Mr Romanos argued that it cannot be credibly suggested that someone other than Mr Prater created and published the anonymous letter. In order for Ms Indris (the former Crowe Horwath employee whose business email address was used as the Gmail account recovery email even after she had left her employ) to be responsible she would have to have:

(a) set up a Gmail account for "all Moriori" two months after she concluded her employment and two months after presumed deactivation of her business email address;

(b) sat on the account for 14 months before sending out a defamatory letter about Mr Solomon (whose own evidence is that he regarded her as a

"lovely young woman");

(c) written the anonymous letter in such a way as to adopt Mr Prater's linguistic and stylistic idiosyncrasies;

(d) sought to frame Mr Prater as the author, not by signing the letter in his name, but by changing the username connected with the operating system so as to give the appearance it was created and modified by Mr Prater, including resetting the clock on the operating system incorrectly by 12 hours;

(e) known how Mr Prater was allegedly announced at HMT's 2016 AGM;

(f) called for a "forensic audit" the same wording Mr Prater had previously used;

(g) decided to embroil herself in the local politics of an Island she had never visited; and

(h) lastly, ultimately advocated for Mr Prater's wife to be elected to the HMT Board.

[87] The hypothesis lacks any sense of reality.

[88] Stuff interviewed three people who were reported to have contentious relationships with Mr Solomon for a variety of different reasons. For example, Barrie Eyles did not want the settlement with the Crown to occur and described his relationship with Mr Solomon as "20 years of open warfare". The same hypothesis that I have set out in subparas (a)–(h) would have to be made out in order for the Court to be satisfied on the balance of probabilities that Mr Eyles, to the exclusion of Mr Prater, was the author and publisher of the anonymous letter. Further, for Mr Eyles to have any responsibility in the creation or publication of the anonymous letter flies in the face of his reported claim to the Stuff journalist that he had stepped back because "you decide you've got better things to do with your life".

[89] Stuff also interviewed Mana Cracknell and Lois Croon. Mr Cracknell was reported to have been sacked in 2010 as HMT's cultural development manager following a dispute over payments for articles for the School Journal. He was said to have been close to Mr Solomon before that time.

[90] Ms Croon's reported comments were confined to her doubts that a particular family's lineage should properly be regarded as Moriori.

[91] For largely similar reasons to those explained at [86]–[88] above, I discount the possibility that Mr Cracknell or Ms Croon had any involvement in the creation and publication of the letter.

[92] I deal finally with the potential that Ms King, Mr Prater's wife, prepared and sent the anonymous letter. There are two primary reasons for discounting this speculative proposition. While Ms King may have been motivated to create the Gmail account and write and send the anonymous letter on behalf of her husband the indicators against that are the positive evidence from Ms King herself. On 28 September 2018 Ms King emailed Heather Beaton, Office Manager, HMT to advise that it had come to her attention that an email was circulating making reference to her nomination for the HMT trustee position. Ms King stated she had been advised to distance herself from the email but wanted to take the opportunity "to notify your office that I had no knowledge of this email until the matter was raised with me on Tuesday".

[93] On 10 December 2018 Mr Langford received an email from Mr Prater's wife, Debbie King who reiterated her disassociation from the anonymous letter. Not that Mr Prater verified his answers to interrogatories, but he did state that to his knowledge "Debbie King had no knowledge of the creation of the letter, the creation of the email account or sending the email".

[94] Mr Solomon does not resist the possibility that Ms King had some involvement. But as he stated in his affidavit, whatever suspicions he may have he has no evidential basis for looking past Ms King's repeated claims that she knew

nothing about it and her formal disassociation from the letter as conveyed to the Kopinga Marae.

[95] In the end, I accept Mr Romanos' submission that Ms King's role can only be a matter of speculation. Essentially, I find it highly unlikely that Ms King conspired to adopt Mr Prater's writing characteristics.

[96] On the basis of all the evidence that I have discussed, Mr Solomon has proved on the balance of probabilities that Mr Prater was the author and publisher of the anonymous letter. That brings me to the issue of remedies.

Remedies

[97] Mr Solomon seeks:

(a) general damages of $550,000;

(b) punitive damages of $45,000;

(c) interest pursuant to ss 9(a)(i) and 10 of the interest on Money Claims Act 2016;

(d) a permanent injunction; and

(e) costs.

General damages

[98] A substantial award of general damages is sought to take account of all the points of aggravation in the case and one that meaningfully vindicates Mr Solomon's reputation.

[99] General, or compensatory, damages are awarded to restore the plaintiff to the position the plaintiff would have been in had the defamation not occurred.[34] The complexity of the estimate is captured by the Court of Appeal in *Siemer v Stiassny*:[35]

> … at common law general damages are an estimate, however rough, of the probable extent of actual loss a person has suffered and will likely suffer in the future. That is so despite the fact that such loss cannot be identified in terms of, say, advantageous relationships lost, whether from a monetary or what might be termed enjoyment of life standpoint. And, since the interests served by way of protecting a good reputation are of a dignitary and peace of mind character it is relatively obvious that such damages are very difficult to measure in monetary terms.

[100] In support of his claim for a substantial award of general damages, Mr Solomon relies on the following statement of principle by the Court of Appeal in *Williams v Craig*:[36]

> The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's person or personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place.

[101] The Court added:[37]

> … [general damages] may be aggravated where a jury is satisfied the defendant has acted towards the plaintiff in a manner which compounds or increases the effect of the original defamation. The defendant's behaviour after the original publication, including in conducting his or her defence, can operate in this way.

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34 Stephen Todd (ed) *The Law of Torts in New Zealand*, (5th ed, Brookers, Wellington, 2008) at 886.
35 *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [48].
36 *Williams v Craig* [2018] NZCA 31; [2018] 3 NZLR 1 at [31], adopting *John v MGN Ltd* [1997] QB 586 (CA) at 607–608.
37 At [33].

[102] The following observation about the value of a favourable verdict on liability was made:[38]

> … a favourable verdict on liability is the successful plaintiff's primary vindication. Its primacy is acknowledged in the introduction by s 24 of the Defamation Act 1992 of the plaintiff's right to seek only a declaration of liability with a consequential right to indemnity for an award of solicitor and client costs. The liability verdict is itself public recognition that a statement or statements made by a defendant is false and defamatory. It is that verdict which restores the plaintiff's reputation (which may explain the tradition, followed at least by politicians, of donating damages awards to charity).

[103] Mr Romanos submitted this last observation was overstated. For example, in *Craig v Slater*, the Court considered the trial Judge had been wrong as a matter of principle not to award damages to Mr Craig having found Mr Slater liable for defamation. The declaration made under s 24 of the Defamation Act 1992 was insufficient.[39] Counsel's primary point is that Mr Solomon's is a case amply justifying a substantial award of damages. Having regard to the nature and purpose of an award of general compensatory damages as summarised by the Court of Appeal in *Williams v Craig*,[40] I briefly address the following considerations:

(a) the gravity of the liable;

(b) the extent of publication;

(c) the harm suffered by Mr Solomon; and

(d) whether there were aggravating features to Mr Prater's conduct justifying an award of aggravating damages.

The gravity of the libel

[104] Mr Romanos submitted the gravity and nature of the defamation are of the most serious kind and that the Court may reasonably infer a "significant width of publication to persons whose estimation of Mr Solomon is central".

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38 At [32].
39 *Craig v Slater*, above n 8 at [116].
40 See [100] above.

[105] The anonymous letter makes serious allegations against Mr Solomon. The whole tenor of the letter is that Mr Solomon is not trustworthy and that he engaged in electoral manipulation (if not fraud) and financial impropriety (if not corruption).

[106] Mr Romanos drew a comparison with the defamation of Mr Karam who, in 2014, was awarded $535,000.[41] Relevant to the Court's assessment of the appropriate level of damages was the significant and positive reputation Mr Karam enjoyed before "becoming involved in the Bain case", his high public profile as a result of his sporting career, his business success and the evidence attesting to his integrity, generosity and altruism.[42] As well, the Judge accepted Mr Karam's evidence of the great distress the defamatory statements caused him and that the period during which the statements were posted were the worst four years of his life.

[107] The defamation was described as a "full scale assault on Mr Karam's reputation … [f]ew aspects of Mr Karam's reputation were left untouched".[43] Further aggravating the defamation was the scale and persistency of the defendant's efforts to discredit and undermine Mr Karam.[44]

> … Not content with merely expressing their views and indulging in online discussion about a topic that interested them, Mr Parker and Mr Purkiss took steps to raise the profile of the Facebook page and the Counterspin site by giving an interview with the Sunday Star Times newspaper about the purpose of the site. The result, inevitably, would have been a greater number of people than previously visiting the site. In addition, by his own admission, Mr Parker took steps to ensure that Counterspin's profile was raised even higher by ensuring that it appeared earlier in Google searches than other sites dealing with the Bain case.

[108] Matters were made worse by the defendant's pleaded affirmative defence of truth, but having pleaded it one of the defendants did nothing further until the point of trial when he confirmed he would not attempt to sustain his defence. Even worse was the other defendant's assertion of truth up to the point of cross-examination when he accepted he could not prove the truth of the assertions.

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41 *Karam v Parker* [2014] NZHC 737 at [242]–[243].
42 At [227].
43 At [229].
44 At [230].

[109] The *Karam* Court referred to *Lee v The New Korea Herald*[45] and noted the similarity in the nature of the defamatory meanings. But the more limited scope both in terms of the content and reach of the publications in *Lee* meant the defamation in *Karam* was "significantly worse".[46]

[110] I consider the gravity of the libel in this case is most similar to the serious suggestions in *Lee* that he had been engaging in corrupt and dishonest practices. As with *Lee* (and the cases I discuss in the next part) the extent of the anonymous letter's publication was more limited than in *Karam v Parker.*

Extent of publication

[111] Mr Solomon submits that given HMT has 2000 members a wide publication can be inferred. Counsel cited the English case of *Dhit v Saddler* in which the Court observed:[47]

> In my judgment, the authorities demonstrate that it is the *quality* of the publishees not their *quantity* that is likely to determine the issue of serious harm in cases involving relatively small-scale publication. What matters is not the extent of publication, but to whom the words are published.

[112] Mr Romanos contended it was a matter of weighing not counting. Mr Solomon was leading the settlement negotiations with the Crown. The estimation of Mr Solomon in the minds of Trust members is understandably of importance to Mr Solomon. Mr Romanos contrasted this with the publication of a defamatory newspaper article or Facebook thread where a reader may only have an idle curiosity in the identification of a person not known to the reader.

[113] Even accepting evidence that Mr Prater had obtained a database of HMT's email addresses, and Ms Thorpe's evidence that the only staff who had access to such contact details were herself, the office administrator and Mr Prater from his time working at the HMT office, I propose to proceed on the basis that the publication was within a community as compared to widespread dissemination.

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45 *Lee v The New Korea Herald*, HC AK CIV 2008-404-5072 9, cited in *Karam v Parker*, above n 41, at [235].

46 At [235].

47 *Dhit v Saddler* [2017] EWHC 3155 (QB) at [55] — emphasis in the original.

[114] I proceed on that basis notwithstanding counsel's contention that it would be wrong to deprive Mr Solomon of a substantial award of damages because his inability to show precisely the width of the dissemination is due to Mr Prater's failure to give discovery. Mr Romanos argued good gossip travels fast and it can be assumed the publication was widely disseminated consistent with Mr Prater's intention at the time. This is referred to as the "grapevine" effect.[48]

[115] I proceed on my proposed basis for two primary reasons:

(a) The letter is addressed "LETTER TO MEMBERS AUGUST 31–2018" and the email forwarding the letter had in the subject line "Letter to All Moriori from concerned". It may be inferred that the subject line had a self-limiting effect.

(b) Notwithstanding the subject line in the email and that the letter was addressed to members, Mr Solomon's own cousin, Eric Solomon did not receive the letter directly. It was forwarded to him. Neither did Mr Solomon's immediate family receive the letter.

[116] In *Lee v Lee* the defendant wrote a defamatory article also published by the defendant in a weekly Korean language newspaper, the Sunday Times[49] With a print run of 3000 copies, and also available online, the Sunday Times is targeted at the Korean community in New Zealand. The plaintiff was a senior member of the Korean community in Auckland and the co-chair of the Foundation Committee of the Korean Society of Auckland Inc. The article alleged the plaintiff "sought to hide matters from the Korean community, misled or deceived the Korean community, was not honest or honourable in his conduct, was looking to benefit himself in actions taken on behalf of the Korean community, was looking to avoid paying money he owned to someone else and was a hypocrite".[50]

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48 For example, *Bauer Media Pty Ltd v Rebel Wilson (No 2)* [2018] VSCA 154 at [167], citing *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69, (2001) 208 CLR 388. See also *Dhit v Saddler* [2017] EWHC 3155 (QB) at [55](ii).

49 *Lee v Lee* [2018] NZHC 3136.

50 At [64].

[117] The plaintiff was awarded compensatory damages of $150,000.

[118] Mr Lee had suffered considerable personal distress and became the subject of gossip and speculation in his community. The Court considered the article would have received a limited circulation and was unlikely to expand beyond the Korean community.

[119] In *Lee v The New Korea Herald Ltd* eight articles were published containing defamatory statements about the plaintiff. The publication of the defamatory material was limited to the local Korean community, with a circulation of around 3,000 people. The Court awarded $250,000 in compensatory damages, and declined to award exemplary damages.[51] The factors justifying the award were the serious and ungrounded allegations along with the fact that multiple articles escalated in their attempts to destroy Mr Lee's character.

[120] In *Kim v Cho*[52] the defamation was similar in the sense it was confined to the "relatively small" Korean community, although in *Lee v The New Korea Herald Ltd* eight articles were published and in *Kim v Cho*, only one.[53] Compensatory damages of $100,000 were awarded. Punitive damages were declined.

[121] In *Newton v Dunn* a letter was circulated to around 50 people within the small Rai Valley community — home to the plaintiff and defendants. The letter containing the defamatory statements was sent on the defendant's behalf to collect information about the plaintiff for a book which the would-be author had been commissioned by the defendant to write on the defendant's behalf.[54] It was noted that most people in this rural community knew each other and many were related.[55] The relief sought by the plaintiff was an apology or correction of the defamatory statements. Alternatively, damages were sought in the sum of $100,000.[56] The Judge considered the defamatory passages meant the defendant was responsible for the worst instance of workplace bullying in New Zealand.

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51 *Lee v The New Korea Herald Ltd*, above n 45, cited in *Karam v Parker,* above n 41, at [235].
52 *Kim v Cho*, above n 7.
53 At [46].
54 At [4].
55 *Newton v Dunn* [2017] NZHC 2083 at [11].
56 At [253].

[122] I consider *Newton v Dunn* provides a useful comparison when assessing the extent of publication. As in *Newton v Dunn* a letter containing defamatory statements about Mr Solomon was distributed within a confined community and to a limited number of recipients. The impact of the distribution in *Newton v Dunn* was greater, however. The Judge described the dispute as dividing the community.[57] From the affidavit evidence filed in support of Mr Solomon, including from HMT trustees, it seems there was no such division in the Chatham Islands or indeed within the Moriori community as a result of the defamatory statements. In *Newton* the dispute between the plaintiff and defendant had simmered for considerably longer.

Harm suffered

[123] In this case, the anonymous letter targets Mr Solomon as head of HMT but unlike *Karam* does not touch every aspect of his reputation. I unhesitatingly accept the evidence Mr Solomon has given of the distress he felt when the letter was brought to his attention. Mr Solomon worked hard since moving to the Island in 2010 to establish trust in the community. He observed that "on the Chathams, when you come from 'outside' to live here it takes locals a long time to feel they can trust you". The added layer Mr Solomon describes as existing for him was his high public and political profile connected with his advocacy on behalf of Moriori. That did not always make him popular with some locals who opposed the renaissance of Moriori culture and identity on the Island. By the time Mr Prater and his wife came to live on the Island in 2016 Mr Solomon believed he had established himself in the community as someone who keeps his word and for being trustworthy. Mr Solomon describes the pressure the circulation of the letter placed on himself and his wife and family as "a most unpleasant and difficult time." And, as head of HMT it was "a particularly difficult pill to swallow" because Mr Solomon's behaviour had to be not only beyond reproach but seen to be so.

[124] Even accepting all that Mr Solomon has said about the effects of the defamatory statements on him, the defamation was neither as persistent nor as serious as the defamations in *Karam v Parker* and *Siemer v Stiassny*.[58]

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57 At [1].
58 *Siemer v Stiassny*, above n 35.

[125] It must also be noted that Mr Solomon won the election for which the anonymous letter had proposed Mr Prater's then wife, Debbie King, as the main contender. Ms King has since resigned. Mr Prater has left for Australia and there is no evidence the reputation of HMT has been affected. Hurt feelings are difficult to quantify yet they are central to defamation claims. The harm from the defamatory statements has been in the form of hurt and distress to Mr Solomon. Although the allegations in the letter are indisputably serious, it seems that Mr Solomon's excellent reputation withstood the potential adverse effects from the defamatory statements.

[126] The damages to be awarded must compensate Mr Solomon for the damage to his reputation (which I have suggested appears to be negligible), vindicate his good name and take account of the distress, hurt and humiliation the defamatory publication caused.[59] While recognising that the cases have their own distinct facts and that awards of damages recognise a range of features, I consider an award of general damages in the sum of $100,000 sits with awards made in comparable defamation cases. Mr Romanos helpfully provided a schedule of all damages awards for defamation since 2000. That schedule is attached to my judgment.

[127] I turn now to consider whether there are features that aggravate the defamation such that an award of aggravating damages is justified.

Aggravated damages?

[128] Aggravated damages are awarded where the injury caused to the plaintiff's feelings or dignity is exacerbated because of the defendant's behaviour towards the plaintiff, particularly after the defamatory act.[60]

[129] In *Karam v Parker* the Court took the view that:[61]

> The recognition of additional harm done through the defendant's manner or motive, although sometimes treated as separate head of "aggravated damages", is more usually viewed as enlarging the quantum of damages rather than justifying a separate head of damages.

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59 *Williams v Craig*, above n 36, at [31].
60 *Siemer v Stiassney,* above n 35, at [51], cited in at *Craig v* Slater, above n 8, at [51].
61 *Karam v Parker,* above n 41, at [226].

[130] In support of his submission that the Court should make a large award of aggravated damages, Mr Romanos relied on the Court of Appeal's observation in *Williams v Craig* that a defendant's behaviour following publication may be such as to compound or increase the effect of the original defamation.[62]

[131] Mr Romanos also relied on the approach in *Siemer v Stiassney* where the Court of Appeal said that as a general proposition:[63]

> … aggravated damages are additional damages which are award to compensate for the injury to the plaintiff's feelings of dignity where that sense of injury has been exacerbated by the manner in which, or the motive with which, the defendant committed the defamatory act, or by how the defamation defendant behaved towards the injured plaintiff, particularly after the tort had been committed.

[132] I summarise the factors which it is said justify a large award of aggravated damages in this case:

(a) Mr Prater's motive in publishing the anonymous letter was to harm Mr Solomon's reputation (and in doing so, assist his wife's chances of election to HMT).

(b) There is no evidence to suggest anyone was involved except Mr Prater and the Court is invited to find that he acted alone.

(c) After publishing the anonymous letter, Mr Prater assaulted Mr Solomon.

(d) Mr Prater sought to further disseminate the allegations through the media and the Court should take into account the fact Mr Prater sought to elevate the Anonymous Letter's allegations to the national stage.

(e) The "sheer falsity" of the allegations is highlighted including Mr Prater's claim that he was unsupported during his time at HMT, that there was evidence Mr Solomon was manipulating the result of the 2012 trustee election, that Mr Solomon and other trustees treated trust funds improperly,

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62 *Williams v Craig*, above n 36, at [31].
63 *Siemer v Stiassney*, above n 35, at [51].

and that Mr Solomon used the fishing quota as a bargaining chip.

(f) Mr Solomon sought to avoid these proceedings and provided Mr Prater a reasonable offer by which they could be avoided – to which Mr Prater did not respond.

(g) Mr Prater significantly inflamed the defamation by his conduct of this proceeding. He took every opportunity to file a document, as a chance to ridicule and disparage the plaintiff, and accuse him of the most serious allegations.

(h) Mr Prater's failed to give discovery or provide sworn answers to interrogatories and made wrong claims about non-receipt of discovery, and cast aspersions on Mr Solomon, his family, advisers, court staff and the judiciary.

[133] Counsel likens these factors to the conduct in *Siemer*. But, of course, the conduct in *Siemer* overall was considerably worse and of a different nature in that it was both vengeful and persistent. Mr Siemer openly proclaimed defamatory comments without attempting to hide his identity, ignored court injunctions, constructed a website in order to defame the respondent even after the imposition of injunctions, failed to pay the costs orders of the High Court and Court of Appeal and was given a six weeks' term of imprisonment because he "had flaunted his offending conduct to the plaintiffs and their advisers".[64] The Court said its attention had not been drawn "to any worse case of defamation in the British Commonwealth, and [its] own researches have not disclosed one".[65] In the High Court the aggravated damages, standing alone, gave rise to an award of $150,000. The Court of Appeal considered the better approach would have been simply to award a lump sum for general damages without particularising the portion that accrued as a consequence of Mr Siemer's aggravating conduct. If the Court of Appeal's preferred approach had been taken it would have meant an award of general damages in the order of $800,000.

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64 At [15].
65 At [85].

[134] Mr Prater has certainly made these proceedings difficult for Mr Solomon but his conduct does not come close to the seriousness of Mr Siemer's. In fact, I am not persuaded that the defamation is aggravated by the factors counsel identifies. Mr Prater's high-handed indifference to court orders did not have the effect of aggravating the defamation as in *Siemer*. I propose to address that aspect of Mr Prater's conduct when I determine costs.

Punitive damages?

[135] Mr Solomon seeks an award of punitive damages in the sum of $45,000 on the basis that Mr Prater has acted in flagrant disregard of Mr Solomon's rights. Mr Solomon relies on the same points as have been raised in support of aggravated damages, as demonstrating Mr Prater's increased damage to Mr Solomon's reputations and feelings and his flagrant disregard of Mr Solomon's rights.

[136] I decline to award punitive damages. The purpose of punitive damages is to punish and deter.[66] Punitive damages are rarely granted and "are only justified where there is a need to punish the defendant beyond the award for general damages".[67] Mr Solomon's claim is extravagant in that he seeks not only $550,000 which includes aggravated damages but also punitive damages. The Court of Appeal's observation in *Siemer v Stiassney* is entirely relevant here:[68]

> … if general damages are awarded which somehow shade into aggravated damages which in turn somehow shade into exemplary damages, there is a distinct possibility that there will be double or even triple compensation. The problem is not unlike the conceptual problems in the criminal law in sentencing: it is the *totality* of the award which matters at the end of the day, not how the individual component parts are made up.

[137] Even in the two flagrant cases, *Karam* and *Siemer*, punitive (or exemplary) damages of $10,000 and $25,000 were awarded respectively. As against those contexts, Mr Solomon's claim for $45,000 is quite out of step.

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66 *Karam v Parker*, above n 41, at [245].
67 *Williams v Craig*, above n 36, at [34].
68 *Siemer v Stiassney*, above n 35, at [56].

Permanent injunction?

[138] Mr Solomon seeks a permanent injunction "enjoining Mr Prater from repeating the meanings expressed". It is said that in view of Mr Prater's inability to refrain from disparaging Mr Solomon, such relief is appropriate and necessary. In support, Mr Romanos relies upon *Karam v Parker*.[69] The Court was satisfied an injunction was necessary in *Karam v Parker* because it was of considerable concern to the Judge that following Mr Parker's statement in open court that the website would be taken down he had since resurrected it. The terms of the injunction did not require either site to be taken down but did require the removal from them of all defamatory material.

[139] The "delicate nature" of the question whether to grant an injunction in defamation cases is discussed in the Law of Torts.[70] While the commentary to which I refer is directed at interlocutory injunctions, nevertheless the principle that freedom of expression, protected by the New Zealand Bill of Rights Act 1990 should not readily be curtailed by an injunction is one that applies to both permanent and interim injunctions. Arguably the principle has greater weight where a permanent injunction is sought because the curtailment of the freedom is greater.[71]

[140] There is little comparison between *Karam v Parker* and the present case. Two and a half years have passed since the publication of the defamatory statements and there has been no suggestion of any repetition of the statements since that time. I put to one side the allegation that Mr Prater repeated his allegations to journalists from Stuff who visited the Chatham Islands and made inquiries of Mr Solomon for an investigative piece it was proposed to write. I have carefully read the article that was ultimately written following Mr Solomon's engagement with the senior journalist. No inference can be taken from the article that Mr Prater repeated his defamatory comments.

[141] For these reasons I decline to grant an injunction.

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69 *Karam v Parker*, above n 41, at [247].
70 At 16.6.02.
71 See *Todd on Torts*, above n 34 and the cases and papers referred to at 16.6.02.

Interest

[142] Interest must be awarded in a money judgment in accordance with the Interest on Money Claims Act 2016.[72]

[143] It is plain from the rule that interest is payable as of right, the element of discretion being as to the rate of interest. Previously, interest awarded under the rule was prescribed by s 87 of the Judicature Act 1908. Section 87 of the Judicature Act was repealed on 1 January 2018 when the interest on Money Claims Act 2016 came into force.

[144] A court may not award interest pursuant to a section in the Interest on Money Claims Act, for a period unless the party who claims interest specifies the section pursuant to which interest is claimed.[73] In his statement of claim Mr Solomon claims interest pursuant to ss 9(1)(a)(i) and 10 of the Act. Section 9 provides:

> **9 Period for mandatory award of interest**
>
> (1) When giving a money judgment, a court must award interest under this Act for the period that—
>
> (a) begins either—
>
> (i) on the day on which the cause of action arose; or
>
> (ii) if the amount on which interest is to be awarded was not quantified at the day on which the cause of action arose, on a later day that the court specifies in the judgment as the day at which that amount was quantified; and
>
> (b) ends on the day on which the judgment debt (including all interest payable under this Act) is paid in full.
>
> (2) Subsection (1) applies unless—
>
> (a) this Act expressly provides that interest cannot be awarded under this Act; or
>
> (b) the court, in accordance with this Act, specifies in the judgment any 1 or more shorter periods as the period or periods for which interest is to be awarded under this Act.

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72 High Court Rules 2016, r 11.27.

73 Interest on Money Claims Act 2016, s 25.

> (3) Despite subsections (1) and (2), interest under this Act does not accrue after the date of payment on an amount paid,—
>
> (a) after the proceeding has been commenced but before the date of judgment, in or towards satisfying a party's liability; or
>
> (b) after the date of judgment, towards satisfying a judgment debt.

[145] As the amount on which interest is to be awarded was not quantified on the day the cause of action arose I determine that the date on which interest begins to accrue is the date of this judgment as that is the day on which the sum attracting interest is quantified. In other words, I take the view that s 9(1)(a)(ii) applies, not s 9(1)(a)(i).

[146] Mr Romanos was unaware of any New Zealand proceedings where interest had been awarded or even sought in relation to damages awards for defamation. A court must award interest under s 9(1) unless either of the exclusionary circumstances set out in subs (2) applies.

[147] As there is no statutory provision inhibiting the application of s 9(1) in this case I propose to award interest. In doing so I bear in mind that the primary purpose of the Act —[74]

> (1) Provide for the award of interest as compensation for a delay in the payment of debts, damages, and other money claims in respect of which civil proceedings are commenced.
>
> (2) That purpose is to be achieved by the award of interest in accordance with the following principles:
>
> (a) interest is to be awarded on all money claims except those expressly excluded by this Act:
>
> (b) interest is to be paid from the day on which the money claim is quantified until the day of payment:
>
> (c) the interest rate to be used for the purposes of this Act is to reflect fairly and realistically the cost to a creditor of the delay in payment of a money claim by a debtor and, in particular,—
>
> (i) the rate is to be capable of fluctuating in accordance with changes in the retail 6-month term deposit rate published by the Reserve Bank of New Zealand; and

[74] Section 3.

(ii) interest is to be compounded so that it yields the per annum simple interest rate over the period of a year; and

(iii) interest is to be calculated using a calculator that is publicly available on an Internet site maintained by or on behalf of the Ministry:

…

[148] Mr Prater was on notice that interest was claimed. The amount to be paid by way of interest is able to be determined by Mr Prater. The longer the damages award remains unpaid, the longer the period of accruing interest.

[149] Interest is awarded and it will be for Mr Prater to calculate the interest using the online calculator the Ministry of Justice has established for the purpose of the Act.[75]

Costs

[150] Mr Solomon seeks an award of scale costs uplifted by 50 per cent in relation to some steps that would not have been necessary if Mr Prater had complied with his discovery obligations or admitted publication.

[151] I accept that Mr Solomon's non-party discovery application against Google was necessitated by Mr Prater's non-compliance with his discovery obligations and his refusal to provide verified answers to interrogatories (which were specifically directed to Mr Prater's involvement in the creation of the email account *allmoriori@gmail.com*, his knowledge of that account and whether he had any involvement in sending from that email account the email to which the anonymous letter was attached). I accept therefore that costs in relation to the non-party discovery application are appropriately uplifted by 50 per cent.

[152] The scale costs in relation to five steps taken between the commencement of the proceeding on 8 March 2019 and the filing of a notice on 31 May 2019 have been calculated on the basis of the daily recovery rate operating prior to the amendment of

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75 Section 13. See www.justice.govt.nz/fines/civil-debt-interest-calculator/.

the High Court Rules on 1 August 2019.[76] Scale costs of $51,134.50 are appropriately calculated and claimed. The question is whether there should be a total uplift of 50 per cent as sought by Mr Solomon.

[153] Relevant to the claimed uplift is the written offer of settlement which Mr Solomon's solicitor made on 29 November 2018. The letter included the following demands:

> 9 However, we wish to provide you with an opportunity to resolve this matter at this early stage. Our client seeks that you:
>
> 9.1. sign the retraction and apology **attached** to this letter, which our client will be free to use at his discretion in order to ameliorate the harm you have caused to his reputation; and
>
> 9.2 agree to make a token payment towards our client's costs, in the sum of $5,000 plus GST.

[154] Mr Prater did not reply. A few hours after Mr Langford sent his letter to Mr Prater Mr Solomon received from Mr Wall, Senior Investigative Journalist with Stuff, what Mr Langford characterised as "two rather bullish emails in relation to … a forthcoming story".

[155] Mr Solomon submits the proceeding might well warrant an award of indemnity costs but in support of his claim for increased costs relies on Mr Prater's:

(a) failure to give discovery, verified answers to interrogatories or comply with Associate Judge Johnston's "unless orders";

(b) "pursuit of his false claim that he did not publish the anonymous letter"; and

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[76] Schedule 2 was replaced, as from 1 August 2019, by r 11 High Court Amendment Rules 2019. The effect was to increase the daily recovery rate for category 2 proceedings from $2230 to $2390.

(c) failure to accept, or even respond to, the offer to resolve the dispute made on 29 November 2018.

[156] I agree costs are to be uplifted by 50 per cent except for the claim of $8365 in relation to two items: the preparation of the notice to answer interrogatories and the list of documents. I do not see that those steps were affected by the defendant's conduct which undoubtedly was unreasonable and would have unquestionably contributed to increased costs. The most obvious areas are in relation to the communications with Google concerning the form of order it was prepared to act upon, the analysis of the Google information, and the extensive affidavit evidence and the painstaking analysis in counsel's written submissions in relation to the issue of publication.

[157] Costs and disbursements in the sum of $81,695.58 will be awarded. The sum represents:

(a) scale costs of $64,153.50 (being claimed costs of $42,769 uplifted by 50 per cent); and

(b) scale costs (which I have declined to uplift) of $8,365; and

(c) disbursements totalling $9,177.08.

Result

[158] Mr Solomon has succeeded in his claim for damages for defamation against Mr Prater.

[159] I award:

(a) general damages in the sum of $100,000.

(b) interest under the Interest on Money Claims Act 2016 in accordance with para [147] above; and

(c) costs and disbursements in the sum of $81,695.58.

Karen Clark J

Solicitors:
Langford Law, Wellington for Plaintiff

SCHEDULE: DAMAGES AWARDS SINCE 2000

Year	Amount	Case	Judge or Jury	Nature of allegations	Width of publication	Comments
2019	$10,000	Wiremu v Ashby	Judge	Cheating Dishonesty	Social media	
2018	$150,000	Lee v Lee	Judge	Dishonesty Hypocrisy	Newspaper (print and online)	
2018	$84,000	Ross v Hunter	Judge	Dishonesty Laziness Incompetency	Defendant's website	$50000 awarded to the first plaintiff $34,000 to the second plaintiff
2017	$100,000	LVVTA v Brett	Judge	Incompetency Criminal conduct Dishonesty	Defendant's website Social media	
2017	$100,000	Newton v Dunn	Judge	Bullying	Letter	Award contingent on defendant not complying with apology and correction recommended by the Court
2016	$100	Memelink v Grindlay	Judge	Dishonesty	Social media	
2016	$100,000	Kim v Cho	Judge	Criminal conduct	Newspaper (print and online)	
2014	$535,000	Karam v Parker	Judge	Dishonesty Lack of ethics Criminal conduct	Defendant's website Social media	Apportioned $350,500 against the first defendant and $184,500 to the second defendant
2013	$270,000	S v L	Jury	Sexual misconduct	Book	
2010	$104,000	Jones v Lee	Jury	Dishonesty	Newspaper	
2010	$140,000	Hallett v Williams	Judge	Criminal conduct	Book	
2010	$250,000	Lee v New Korea Herald	Judge	Criminal conduct Dishonesty Lack of ethics	Newspaper	
2008	$900,000	Korda Mentha v Siemer	Judge	Criminal conduct Dishonesty	Defendant's website	$75000 awarded to the first plaintiff $825,000 to the second plaintiff
2008	$85,000	Ahn v Lee	Judge	Criminal conduct	Newspaper print and online)	
2008	$57,500	Wells v Haden	Judge	Criminal conduct Dishonesty	Defendant's website Emails	
2008	$57,500	Wells v Haden	Judge	Criminal conduct Dishonesty	Defendant's website Emails	
2006	$40,000	Court v Aitken	Judge	Paedophilia	Loud conversation	
2004	$780,000	Idour v INL Publications	Jury	Unprofessional criticism	Newspaper	Damages awarded to three plaintiffs in equal portion
2004	$150,000	Chinese Herald v New Times Media	Judge	Anti-Democracy Dishonesty Lack of ethics	Newspaper	$125,000 awarded to second plaintiff $25,000 to third plaintiff
2002	$25,000	Heptinstall v Francken	Judge	Unreliable Mental instability Infidelity Malicious gossip	Letter	
2001	$50,000	Jennings v Buchanan	Judge	Dishonesty	Newspaper	