IN THE HIGH COURT OF NEW ZEALAND
bn REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-000801
[2022] NZHC 649

BETWEEN	JOHN KENYON CLARKE First Plaintiff
	CHARLOTTE MARIE CLARKE Second Plaintiff
AND	FOURTH ESTATE HOLDINGS (2012) LIMITED First Defendant
	MARIA SLADE Second Defendant

Hearing:	18 November 2021
Appearances:	D Salmon QC and D Nilsson for the Plaintiffs L O'Gorman QC and F Khan for the Defendants
Judgment:	1 April 2022

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 1 April 2022 at 2.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date......................................

Solicitors:

Lee Salmon Long, Auckland
Couch Harlowe Kovacevich, Auckland

L O'Gorman QC, Auckland
D Salmon QC, Auckland

Introduction

[1] Kenyon and Charlotte Clarke (**the Clarkes**) bring defamation proceedings against Fourth Estate Holdings (2012) Ltd, publisher of the National Business Review (**NBR**), and Maria Slade, a journalist at the NBR. They claim that an article written by Ms Slade and published on 19 April 2021 by the NBR on its website, titled "Unholy advertising of unregulated property offers" (the **article**), defames them.

[2] The Clarkes control the Du Val Group, a property development business based in South Auckland. The Du Val Group also offers a range of investment products to "wholesale" or "eligible" investors, promising returns between 8 and 10 per cent. Additionally, the Clarkes are the settlors of the Du Val Foundation, a registered charitable trust founded to bring awareness to mental health issues and suicide, and to relieve poverty through education.

[3] The article is one in a series of investigative reports on the promotion of unregulated property investment products. Most of the article concerns the Du Val Group's property investment business.

[4] One sentence concerns the Du Val Foundation. It reads:

> Then there is the Du Val Foundation, a charitable entity which raised $26,000 in 2019 (the last year for which accounts are available), incurred $18,000 in expenses, and gave away just $2,300.

[5] The Clarkes allege that the sentence, when read in the context of the whole article, including its tone, contains defamatory meanings.[1]

[6] The NBR and Ms Slade have applied under r 10.15 of the High Court Rules for a preliminary determination of whether the sentence is capable of bearing the alleged defamatory meanings pleaded by the Clarkes. The Clarkes oppose the application.

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[1] Amended statement of claim, 28 May 2021 at [11].

The alleged defamatory meanings and defences

[7] The Clarkes plead that when read in the context of the article as a whole, including its tone, the ordinary and natural meaning of the sentence is that:

(a) There are reasons to *suspect* that the Clarkes operated the Du Val Foundation *unlawfully* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(b) There are reasons to *investigate* whether the Clarkes operated the Du Val Foundation *unlawfully* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(c) There are reasons to *suspect* that the Clarkes operated the Du Val Foundation *improperly or unethically* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(d) There are reasons to *investigate* whether the Clarkes operated the Du Val Foundation *improperly or unethically* by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

[8] The parties agree that, in terms of the *Chase* levels of meaning, (a) and (c) are tier two meanings and (b) and (d) are tier three meanings.[2]

[9] By statement of defence dated 15 June 2021, the NBR and Ms Slade deny the alleged defamatory meanings.[3] They have not yet filed their affirmative defences.

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[2] *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 2018.

[3] Statement of defence to amended claim, 15 June 2021, at [11].

Legal principles

[10] High Court Rule 10.15 provides:

> **10.15 Orders for decision**
>
> The court may, whether or not the decision will dispose of the proceeding, make orders for—
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> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
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> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[11] The starting point is the presumption that all issues should be determined in one hearing. That is normally the most expeditious and efficient way of dealing with a proceeding.[4] The burden to displace this presumption rests with the party making the application.[5] That burden has been described as "heavy";[6] however, every case for a split trial must be considered on its merits and should not automatically be dismissed.[7]

[12] In the High Court case *Haden v Attorney-General*,[8] Kós J reviewed the list of factors stated in *Turners & Growers* to be considered before granting an application under r 10.15.[9] He restated the list into five questions:[10]

(a) Will there be difficult demarcation questions between those issues to be addressed at the first trial and those left for the second?

(b) Will the separate question bring the proceedings to an end?

(c) What potential time saving does the separate question offer?

(d) How will appeals be dealt with?

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4 *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [10].
5 *Clear Communications Ltd v Telecom Corporation of NZ Ltd* (1998) 12 PRNZ 333 (HC) at 334.
6 At 335.
7 At 335.
8 *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC).
9 *Turners v Growers Ltd*, above n 4, at [11].
10 *Haden*, above n 8, at [50].

(e) Are there any other practical considerations tending one way or the other?

What question does the applicant want determined?

[13] Before answering those questions, I consider the issue that arose at the outset: what question do the defendants want the preliminary hearing to determine? The interlocutory application applies for a separate hearing to determine whether the sentence in the article "gives rise to one or more of the following meanings".

[14] The Clarkes submit that they understood from the application that the defendants want a separate hearing to determine whether the sentence *in fact* bears one or more of the alleged defamatory meanings. They said that this understanding was consistent with the defendants' case review memorandum dated 30 July 2021. In that memorandum the defendants recorded that the Clarkes, in their own earlier case review memorandum, had correctly identified that "the defendants proposed the determination of meanings as a preliminary issue".[11]

[15] The Clarkes oppose a "preliminary final determination of meaning" by a Judge (rather than a preliminary determination of whether the sentence *is capable of* bearing the pleaded meanings) because the parties have not yet elected the mode of trial. Specifically, the Clarkes reserve their right to elect trial by Judge and jury once the defendants have pleaded their affirmative defences.

[16] Parties to defamation proceedings have the right to require the proceeding to be tried by a High Court Judge with a jury.[12] If that route is chosen, the Judge will first determine whether the statement in issue *is capable of* bearing the pleaded meanings.[13] That is a question of law. The parties make their submissions on this issue and the Judge gives their ruling in the absence of the jury.[14]

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11 Defendants' case review memorandum, 30 July 2021.

12 Senior Courts Act 2016, s 16. That election does need to be made until 5 working days before the close of pleadings date: HCR 7.16.

13 Defamation Act 1992, s 36; *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [56]; and *Young v Television New Zealand Ltd* [2014] NZCA 50 at [25(a)].

14 Defamation Act 1992, s 36.

[17] The jury will then, as the trier of fact, decide whether the statement *in fact* bears any of the surviving meanings. [15]

[18] Thus, the Clarkes argued, a "preliminary final determination of meanings" could usurp a significant aspect of the jury's role.

[19] At the hearing, Ms O'Gorman QC (for the defendants) accepted that, in view of the Clarkes' reservation of the right to elect a jury hearing, the application must accordingly be amended to an application for a determination of whether the sentence *is capable of* giving rise to the alleged defamatory meanings.

[20] Mr Salmon QC, for the Clarkes, submitted that an amended application should be filed. He also submitted that the application should have been brought promptly by the defendants as a strike out application. He submitted that substantively it makes no difference which procedure is used; but, by taking the approach they have, the defendants have delayed the proceeding by six months.

[21] Ms O'Gorman responded that the Court may, under r 10.15(b), formulate the question for determination. Furthermore, if the Clarkes want to avoid cost and delay, it makes no sense to refuse this application and require a new one or an application for strike out.

[22] In the interests of efficiency and avoiding any further delays I will consider the application as one for a preliminary determination of whether the sentence *is capable of* giving rise to the alleged defamatory meanings. The parties anticipated that outcome and made oral submissions on that basis.

[23] I note that this late change did somewhat disadvantage the Clarkes: they had prepared their written submissions on the basis that the application was for a preliminary final determination of meanings. Necessarily, one of the Clarkes' grounds for opposition — that it would interfere with their statutory right to have the question of whether in fact the sentence bears the contended meanings determined by a jury —

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15 Alastair Mullis and Richard Parks (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [34.5].

fell away. Having said that, had both parties been clearer with each other about their respective positions through the case management process this situation might have been avoided.

[24] I will now consider the parties' submissions within the framework articulated by Kós J in *Haden*.

Will there be difficulties with demarcation questions?

[25] The defendants contend that no demarcation issues arise. A determination of whether the sentence is capable of the alleged defamatory meanings is an objective test that requires an analysis of, under the circumstances in which the words were published, what the ordinary reasonable person would understand by them.[16]

[26] Further, there is no evidence required to determine this question other than the article itself, meaning there will be no evidential overlap between the preliminary meanings hearing and the second hearing.

[27] In terms of the evidence that will be required for the second hearing, Ms O'Gorman explained the affirmative defences that will be pleaded if the matter progresses:

(a) truth under s 8(3)(b) of the Defamation Act 1992; and

(b) qualified privilege (in the form of the new responsible public interest communication defence set out in *Dune v Gardiner*).[17]

[28] The defendants do not presently intend to plead truth under s 8(3)(a) of the Act because they deny that the sentence, in light of the article, is capable of bearing the alleged defamatory meanings. However, that position may change if the pleaded defamatory meanings change.

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16 *Fourth Estate Holdings (2021) Ltd v Joyce* [2020] NZCA 479 at [69]; and *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 2415 at [42].

17 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [61]–[63].

[29] Ms O'Gorman described the evidence that will be involved in proving the s 8(3)(b) affirmative defence. The defendants' position is that the article as a whole is true, including the contested sentence, in that the Clarkes *did* only give away $2,300 for the 2019 financial year. That position is based on the Du Val Foundation's reported summary of accounts and its full financial accounts. Expenses were $18,000 and donations were $2,300. Ms O'Gorman said that the Clarkes will claim that its expenses included items that also amounted to gifts or donations and as such, the Du Val Foundation actually gave away more than $2,300. That is a matter that will require discovery of documents relevant to the nature of those expenses contrasted with those listed as donations, and their proper classifications (or descriptions). Expert evidence will be called to assist on the accounting issues involved.

[30] In terms of the new responsible public interest communication defence, the defendants will adduce evidence of the approach made by Ms Slade to Du Val's communications manager, some of which took place over the phone. A key issue will be whether Ms Slade's approach was reasonable or not. The issue of reportage will also arise i.e. whether Ms Slade was merely reporting what a document prepared by the Clarkes recorded.

[31] The Clarkes accept that no demarcation issues arise.

[32] I conclude that there are no difficult demarcation issues that weigh against a separate determination.

Will the separate question bring the proceedings to an end?

[33] This was the defendants' main basis for maintaining that there should be a preliminary hearing on meanings. Ms O'Gorman submitted that if the Court determines that the contested sentence is not capable of bearing the alleged defamatory meanings, the Clarkes' cause of action will be struck out and this proceeding will end. This will have the benefit of minimising the use of the Court's and parties' time and resources. The defendants will not need to prepare affirmative defences, nor will the parties have to go through the costly exercises of discovery and trial preparation.

[34] The Clarkes accept that if the Court deems the article incapable of bearing any of the alleged meanings, and if that finding is upheld on appeal, that will be the end of the proceeding.

What potential time saving does the separate question offer?

[35] Kós J stated that:

> There are two aspects to this enquiry. First, the potential hearing time saved. A mathematical approach is called for. The applicant should be able to demonstrate (by reference to reasoned time estimates) the potential time saved if the question is answered affirmatively. The applicant also needs to address the counterfactual: what total time will be taken if the question is answered negatively? The absence of significant potential time savings will be a consideration against granting an application under Rule 10.15.
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> Secondly, any potential delay to final resolution of the whole case, and any associated inefficiencies resulting from splitting trial into two parts. An affirmative answer to the separate question cannot of course be assumed. An important consideration will be how long the gap is likely to be between hearing the separate question and the hearing of the remaining issues. Will final resolution now be later than if everything proceeded at once? Associated inefficiencies may include duplication of preparation for counsel (reacquainting themselves with issues from the earlier trial), and time spent re-traversing matters at the second trial. Similarly, duplication of evidence. An interregnum delay (and the need to "restart" counsel) is inefficient and costly. It may result in loss of momentum, increased costs and reduced prospects of settlement.

[36] The parties disagree on the answer to this question.

[37] Ms O'Gorman estimates that a preliminary meanings hearing alone could be dealt with in half a day. Indeed, the defendants consider that the matter could be dealt with by a High Court Judge on the papers.

[38] Ms O'Gorman estimates that a full hearing on meanings and the affirmative defences would lead to a three-day trial. She suggested that if a jury election is made, longer may be required. If the defendants are successful in the separate question, the three-day trial will not be required.

[39] In the alternative, if the defendants are unsuccessful in the preliminary meanings hearing, the ultimate trial can be reduced by the amount of time involved in the preliminary meanings hearing. Nothing is lost because the determination of

whether the words can bear the meanings at law needs to occur at some stage, either as a separate hearing as the defendants seek, or as part of the ultimate trial.

[40] In terms of whether a preliminary meanings hearing would delay final resolution of the whole proceeding, Ms O'Gorman submitted that given the relatively short length of hearing time, there was unlikely to be any delay in securing a trial date.

[41] Against that, Mr Salmon submits that a split trial will result in limited time savings if the proposed question is answered in the defendants' favour and significant delay if not.

[42] Mr Salmon considers that a full trial of all issues is unlikely to take more than two days, even if a jury is empanelled. Assuming the defendants' more generous estimate, and the defendants' half-day estimate for a hearing on meanings, the preliminary hearing would, at best, save 2.5 days. However, that does not account for the time required to hear the likely appeal of this Court's meanings determination, which would require at least another half day of hearing time (and the time costs involved in preparing for it). Mr Salmon submits that such a potential time saving falls significantly short of justifying a departure from the ordinary course, particularly given the potential for a significant delay to ultimate resolution.

[43] Furthermore, Mr Salmon submits that the defendants' estimate needs to be treated with caution. He says the defendants have refused to plead their affirmative defences at this stage, despite nothing preventing them from doing so. Until the defendants provide particulars of their foreshadowed defences, no "reasoned time estimates" of a hearing of the defences can be given. Mr Salmon submits that bare assertions as to potential time savings based on possible future amendments to the defence must be disregarded. In addition, without particulars, neither the Court nor the Clarkes can assess the extent to which the foreshadowed defences are tenable or vulnerable to being struck out and may therefore not be pursued at trial at all.

[44] Bearing in mind these submissions I reach the following conclusions on the potential time saving of a preliminary hearing on meanings. Putting aside the question of potential appeals for the moment, if the defendants are completely successful at the

preliminary hearing and the proceeding comes to an end, there is a potential time saving of the ultimate trial less the time the preliminary hearing will take. That will equal 1.5 to 2.5 days depending on whose estimate is accepted. That does not include the time and cost saving to the parties of avoiding unnecessary procedural steps through to trial.

[45] If the defendants are not completely successful in the first instance and the proceeding continues to trial, it will not increase the overall hearing time involved. A determination of whether the words can bear the pleaded meanings at law needs to be made at some point, either at an early separate hearing, or as part of the ultimate trial. If that issue has already been determined on a preliminary basis, the length of the ultimate trial will be reduced accordingly.

[46] As Mr Salmon emphasises, the prospect of an appeal of a preliminary determination of meanings must be considered. If the Judge were to determine that some or all of the alleged defamatory meanings were not tenable, that may well result in an appeal. Similarly, if the Clarkes are successful, the defendants might appeal.

[47] However, such an appeal may follow whether the issue is determined on a preliminary basis or as part of the ultimate hearing. It is difficult to anticipate the difference, if any, on hearing time under each scenario. That may depend in part on whether there is an appeal on other findings of law, such as whether the *Durie* defence is established.

[48] I find the plaintiffs' submission about the unreliability of the defendants' trial duration of no great moment. The point is that the preliminary meanings determination, if answered in the defendants' favour, will (subject to an appeal) finally dispose of the matter and avoid any further time or cost from that point onwards.

How will appeals be dealt with?

[49] The defendants submit that the circumstances of this matter are different to those in *Turners & Growers*. There the Court held that the most compelling argument against a split trial is likelihood of delay to the trial of the remaining causes of action

resulting from appeals to the higher courts.[18] Here, if the defendants are successful in striking out the Clarkes' sole cause of action in the preliminary meanings hearing, and the Clarkes appeal that decision, there will be no remaining causes of action for the Clarkes to pursue.

[50] The plaintiffs disagree, submitting that a preliminary hearing is likely to significantly delay a final resolution. Any preliminary judgment on the meaning issue is, given that issue's centrality, likely to be appealed. That appeal would need to be determined prior to preparation for a stage two trial. If the Clarkes ultimately prevail on meanings, a stage two trial will need to be scheduled. The outcome of that trial will then be separately appealable. The result is a proliferation of hearings and delay in the final resolution in a manner directly contrary to the express objectives of the High Court Rules and the interests of justice.

[51] My conclusions on this consideration are these. If the defendants are successful, at the preliminary hearing and after any appeal by the Clarkes, the proceeding will have been concluded in the fastest and most cost-effective way possible, consistent with the High Court Rules 2016.[19]

[52] On the other hand, if the preliminary determination of meanings is answered in the Clarkes' favour, there will have been a delay to the stage two trial amounting to the time it takes for the determination of the preliminary question and any subsequent appeal. In this respect, I note that the parties will not need to wait long for a High Court hearing of the preliminary question; and it could potentially be dealt with on the papers if both parties consented. An appeal will involve a more material delay.

[53] However, as already noted, the defendants may elect to appeal a meanings determination by the Judge in the Clarkes' favour regardless of when that determination is made. Thus, while it is correct to say that having this issue determined on a preliminary basis may delay the stage two hearing, it will not necessarily delay the ultimate resolution of the proceeding. In short, it simply brings forward the determination of meanings (at law), including any appeal.

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[18] *Turners v Growers Ltd*, above n 4, at [19].
[19] High Court Rules 2016, r 1.2.

Other factors

[54] Having submitted (correctly) that a preliminary meanings determination in the defendants' favour would end proceedings, Ms O'Gorman submits that a preliminary determination in the Clarkes' favour would also be beneficial as it will allow the defendants to fully plead their affirmative defences.

[55] Against that, Mr Salmon submits that an early determination of the possible defamatory meanings would not be beneficial in that way.

[56] He essentially argues that the defendants have all information necessary to plead a truth defence pursuant to s 8(3)(b) of the Defamation Act 1992. He says the defendants have indicated their intention to defend the claim on the basis that the "publication taken as a whole" is in substance true. They will, for the purposes of s 8(3)(b), have to show that the sentence — even if defamatory — made no difference given the reputations of the Clarkes were so harmed by the other, substantially true, aspects of the article.[20] Effectively, the plaintiffs' pleaded meanings set the bar for what the defendants must prove regarding s 8(3)(b). The defendants need not wait for a preliminary meanings determination to fully plead their s 8(3)(b) defence now. He distinguishes this case from the scenario in *Young v Television New Zealand*[21] where the plaintiff pleaded extreme and unsustainable tier 1 meanings, thereby depriving the defendant of an available truth defence.

[57] In making that point, he notes that the possible defamatory meanings in a New Zealand defamation proceeding are largely confined to those alleged by the plaintiff. He compared that to defamation proceedings in England, where defendants in defamation proceedings may proffer alternative meanings to those alleged by the plaintiffs.[22] Mr Salmon submits that is not possible here, citing the Court of Appeal's judgment in *Television New Zealand v Haines*.[23] He admits that the Court has some right to reformulate meanings. However, he notes that right is very limited: the Court

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20 See *Ansley v Penn* [1998] BCL 1114 (HC); and *CPA Australia Ltd v New Zealand Institute of Chartered Accountants* [2015] NZHC 1854 at [136]–[139].

21 *Young v Television New Zealand Ltd* [2012] NZHC 2738.

22 The defendants' meanings are generally referred to as *Lucas-Box* meanings, after *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177 (CA).

23 *Television New Zealand Ltd v Haines*, above n 13, at [56]–[57].

cannot adopt a meaning that is substantially different from those pleaded by the plaintiff.[24]

[58] That is correct, but I note that a Judge might, on finding that the words are incapable of bearing the pleaded defamatory meanings, allow the plaintiff to amend their statement of claim to plead alternative defamatory meanings. Indeed, Gilbert J did as such in *Young v Television New Zealand*.

[59] In that case, TVNZ applied for a determination that words were not capable of bearing defamatory meanings pleaded by Mr Young. Gilbert J found that some of the words were not reasonably capable of bearing such meanings, but that other words could. He gave Mr Young leave to file and serve an amended statement of claim. In doing so, he made the following statement,[25] with which the Court of Appeal agreed:[26]

> … [T]he Associate Judge should not have criticised TVNZ for proposing that the correct approach was to begin by determining whether the words used in the publications are capable of the defamatory meanings alleged in the claim. This is a common practice and there is clearly merit in it. I also consider that the Associate Judge should not have required TVNZ to plead "*all*" of the defences it intended to rely on at trial. *TVNZ should not be required, for example, to decide whether to plead truth before the alleged meanings are settled. As Mr Tizard submitted, the defences that the defendants might properly and responsibly plead will depend on the meanings that the words in the publication could convey to a reasonable viewer.* I also accept the defendants' submissions that they may be put to unnecessary cost in having to give discovery before the meanings pleaded in the statement of claim are settled and the issues defined.

[60] The Court of Appeal also cited the following passage from *Gatley and Bercow* with approval:[27]

> … in very many libel actions, furthering the overriding objective requires that the actual meaning of words complained of be determined at as early a stage in the litigation as is practical.

[61] Thus, in my view, and consistent with Gilbert J, there is still benefit in determining whether the words are capable of bearing the alleged meanings at an early

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24 *Fourth Estate Holdings (2012) Ltd v Joyce*, above n 16, at [77]; and *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234.

25 At [79] (emphasis added).

26 *Young v Television New Zealand Ltd*, above n 13, at [73]–[74].

27 Mullis and Parkes, above n 15, at [30.14], citing *Bercow v Lord McAlpine of West Green (No 1)* [2013] EWHC 981 (QB) at [40].

stage of the proceeding. Doing so would enable the defendants to decide how to plead their affirmative defences. In particular, Ms O'Gorman notes that although the defendants do not presently plead a truth defence pursuant to s 8(3)(a), they might do so if the Clarkes are permitted to amend the alleged defamatory meanings following a preliminary meanings hearing.

[62] The Clarkes draw attention to two other factors. In *Haden*, the Court noted the concern about duplication of costs arising out of counsel needing to prepare twice for trial in the same proceeding. The Clarkes submit that those concerns apply with some force here.

[63] Furthermore, the Clarkes say that a preliminary determination is unlikely to increase the likelihood of settlement. Previous settlement attempts have failed. The Clarkes submit that the increased costs caused by a splitting of a narrow proceeding will increase the Clarkes' incentive to seek full recovery of costs under s 24 of the Act.

[64] As to the first submission, I do not agree that a hearing of the preliminary question will result in significant duplication of costs. It is a narrow issue that involves the Judge applying an objective test to determine whether the reasonable person would consider that the words used can bear the defamatory meanings alleged. I would not expect the submissions to be extensive and there will be no evidence apart from the article. The decision could be made on the papers

[65] The Clarkes' second submission is noted.

Conclusion

[66] Weighing heavily in favour of a preliminary determination of whether the words are capable of bearing the alleged defamatory meanings is the fact that if the defendants are successful (including on appeal), it will dispose of the proceeding entirely. It is plainly preferable for both parties and the Court if that happens before affirmative defences, discovery, preparation for trial and (potentially) empanelling a jury.

[67] Also in favour of a preliminary determination of meanings is the desirability of the defamatory meanings being "settled" before the defendants are required to plead their affirmative defences. This consideration is relevant here: the defendants do not presently intend to plead s 8(3)(a) truth because they deny that the words can bear the alleged defamatory meanings. That stance may change if the Clarkes are given leave to amend their alleged meanings following the preliminary meanings determination.

[68] There are no difficult demarcation issues. Further, such a determination by a Judge needs to take place at some point, so it does not add to overall hearing time. The duplication in work and therefore cost to the parties is likely to be modest.

[69] The strongest factor weighing against a preliminary hearing is the delay to the second hearing should the Clarkes ultimately prevail on the preliminary question. The preliminary hearing could be brought on relatively quickly, so the delay at first instance will not be considerable. However, if there is an appeal the delay could be material. Against that, an appeal might follow the ultimate hearing in any case, in which case an appeal of a preliminary meanings determination would not delay the final resolution of the proceeding overall.

[70] Balancing all these considerations, I conclude that it is in the interests of justice that there is a preliminary hearing.

Result

[71] **I order** that there will be a separate hearing under r 10.15 of the High Court Rules 2016 to determine whether, in the full context of the article, which is the subject of the proceeding, the sentence:

> Then there is the DuVal Foundation, a charitable entity which raised $26,000 in 2019 (the last year for which accounts are available), incurred $18,000 in expenses, and gave away just $2,300.

is capable of giving rise to one or more of the following meanings:

(a) There are reasons to suspect that the Clarkes operated the Du Val Foundation unlawfully by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(b) There are reasons to investigate whether the Clarkes operated the Du Val Foundation unlawfully by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(c) There are reasons to suspect that the Clarkes operated the Du Val Foundation improperly or unethically by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

(d) There are reasons to investigate whether the Clarkes operated the Du Val Foundation improperly or unethically by spending the vast majority of the funds collected on unspecified expenses unconnected to its purported charitable purposes.

[72] **I further order** that:

(a) the half-day hearing will take place on **23 June 2022 at 10:00 am**;[28]

(b) the defendants are to file their synopsis of submissions, authorities and a bundle for the hearing **10 working days** beforehand;

(c) the plaintiffs are to file their synopsis of submissions **five working days** beforehand;

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28 This is the first available date before a High Court Judge. If this date is not suitable to counsel, they have leave to liaise with the case officer to find a suitable alternative.

(d) if the parties agree to the question being determined on the papers, they may file a consent memorandum to that effect which will be placed before the Duty Judge to consider.

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Associate Judge Gardiner