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

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

**CIV-2022-404-2218**
**[2023] NZHC 3315**

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| BETWEEN | GAUTAM JINDAL<br>Plaintiff |
| AND | CHERAG MINOO DARUWALLLA<br>Defendant |

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| Hearing: | 18 September 2023 |
| Appearances: | Plaintiff is self-represented<br>Daniel H McLellan KC and Sam Coad for the Defendant |
| Judgment: | 24 November 2023 |

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**JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR**
**[Application for strike-out and for security for costs]**

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*This judgment was delivered by me on* ***24 November 2023*** *at* ***3:00pm***
*pursuant to Rule 11.5 of the High Court Rules*

.....
*Registrar/Deputy Registrar*

***Solicitors:***
Gautam Jindal, GreenLane, Auckland, the Plaintiff
Anthony Harper Lawyers, Auckland, for the Defendant

***Copy for:***
Daniel H McLellan KC/Sam Coad, Shortland Chambers, Auckland, for the Defendant

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## Introduction

[1] Mr Cherag Daruwalla (**Mr Daruwalla**) applies for strike out and security for costs, and Mr Gautam Jindal (**Mr Jindal**) opposes the application and applies to object to the contents of an affidavit.

## Background

[2] Mr Jindal sought a Certificate of Character (**Certificate**) from the New Zealand Law Society (the **Law Society**) as part of his application to be admitted as a barrister and solicitor of this Court. He was required to disclose the liquidation of his former company as part of that process.

[3] The Law Society subsequently denied Mr Jindal a Certificate allegedly in partial reliance on emails by Mr Daruwalla as to Mr Jindal's character. In the substantive proceedings Mr Jindal is seeking to recover for what he alleges is defamatory content in those emails.

[4] On 26 May 2023, Mr Daruwalla filed an application to partially strike out Mr Jindal's claim and for security for costs. In support of that application Ashley Williams (**Ms Williams**) filed an affidavit dated 10 March 2023. On 22 March 2023, Mr Jindal filed an application objecting to some of the contents of that affidavit as privileged without prejudice material and impermissible belief and opinion evidence.

## Mr Daruwalla's application for strike out and security for costs

[5] Mr Daruwalla seeks orders:[1]

> (a) The plaintiff's claims in his first to fourth causes of action of his amended statement of claim dated 9 March 2023 (amended statement of claim) be struck out;

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[1] Amended interlocutory application by the defendant for strike out and security for costs dated 26 May 2023 at [1].

(b) In any event, the plaintiff give security for the defendant's costs for this proceeding in a manner as may be determined by the Court to be just and reasonable;

(c) The proceeding is stayed until any order as to security for costs has been complied with; and

(d) The plaintiff pay the defendant's costs of and incidental to this application.

[6] The grounds on which the orders are sought are:[2]

**Application for strike out — Affirmative defences**

(a) The plaintiff's first and second causes of action in defamation (paragraphs 22–27 of the amended statement of claim) are not reasonably arguable by reason that they are time barred by the Limitation Act 2010:

(i) The first and second causes of action rely on emails sent by the defendant to Imran Kamal on 1 May 2020 and 6 November 2020 (the Kamal emails);

(ii) The first and second causes of action were first pleaded by the plaintiff in the amended statement of claim filed in this Court on 24 April 2023 (notwithstanding that the document is dated 9 March 2023);

(iii) The claims in the first and second causes of action were therefore filed at least two years after the date of the Kamal emails and accordingly they are barred by ss 11 and 15 of the Limitation Act 2010;

(iv) The plaintiff's assertion (paragraph 43 of the amended statement of claim) that he became aware of the statements on 20 April 2021 and is therefore entitled to rely on the late knowledge period prescribed by ss 11(3)(a) and 15 is not reasonably arguable:

(A) The late knowledge period expired on 20 April 2023, being two years after the date on which the plaintiff asserts that he first became aware of the statements comprising the first and second causes of action;

(B) The Kamal emails were first pleaded by the plaintiff in the amended statement of claim which was filed on 24 April 2023; and

(C) Accordingly, the first and second causes of action were filed outside the late-knowledge period and are therefore time barred;

(b) The statements complained of in the third and fourth causes of action (paragraphs 28–33 of the amended statement of claim) were made on an

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2 At [2].

occasion of absolute privilege and accordingly the defendant has a complete defence to those claims:

(i) The plaintiff's third and fourth causes of action concern emails sent by the defendant to the New Zealand Law Society (NZLS) on 16 November 2020 and 17 November 2020 respectively (the NZLS emails);

(ii) The NZLS emails were sent to the NZLS in order that it may discharge its statutory obligation to determine whether or not the plaintiff, an applicant for admission as a barrister and solicitor of the High Court of New Zealand, was "fit and proper" for admission having regard to the criteria listed in s 55(1) of the Lawyers and Conveyancers Act 2006;

(iii) Performance of that statutory responsibility is a quasi-judicial function and is undertaken on behalf of and as a necessary part of the process of the High Court of approving candidates for admission;

(iv) The basis for the absolute privilege defence is set out in paragraph 57 of the statement of defence to the amended statement of claim and is relied upon for the purposes of the application for strike out; and

(v) Accordingly, the NZLS emails are subject to absolute privilege and the third and fourth causes of action have no prospect of success;

**Application for security for costs**

(c) There is reason to believe the plaintiff will be unable to pay the defendant's costs if the plaintiff is ultimately unsuccessful in this proceeding:

(i) The plaintiff is the joint registered proprietor of a property which is mortgaged and on lease-hold land. There is no evidence that the plaintiff has any equity or value in the land;

(ii) The plaintiff has been recorded in judgments as being unable to pay an adverse cost award if he were to be unsuccessful in the relevant proceeding;

(iii) It is just in all the circumstances that the plaintiff gives security for costs;

(iv) Upon the grounds set out in the affidavit of Ashley Rosetta Williams dated 10 March 2023, filed and affirmed herein; and

(v) Since that affidavit was filed, the plaintiff has been the subject of further adverse costs orders made in the following decisions:

(A) Jindal v Jarden Securities Ltd [2023] NZCA 117; and

(B) Jindal v Orange Capital Ltd (in liq) [2023] NZSC 36;

(d) The plaintiff's proceeding is highly unlikely to succeed in circumstances where:

(i) The plaintiff's first and second causes of action are time barred under the Limitation Act 2010, as recorded above at paragraph 2(a);

(ii) The defendant has multiple defences to the third and fourth causes of action, namely:

(A) Under the Limitation Act 2010, the third and fourth causes of action are time barred because the statements complained of occurred more than two years before the filing of the statement of claim and the plaintiff has not substantiated the assertion of late knowledge, as required by s 14(2) of the Act;

(B) The defendant has a complete defence on the basis that the relevant statements were made on an occasion of absolute privilege, as recorded above at paragraph 2(b); and/or

(C) In the alternative, the defendant has a complete defence on the basis that the relevant statements were made on an occasion of qualified privilege;

(iii) The defendant has a complete defence to the fifth cause of action on the basis that the relevant statements were made on an occasion of qualified privilege; and

(iv) Even if the statements complained of in the first to fifth causes of action bear the defamatory meanings contended by the plaintiff (which is denied), any loss or harm to the plaintiff's reputation as a result of the statements was of such a trivial nature that no action lies on the statements complained of or any damages awarded are likely to be negligible relative to the costs of the proceeding.

## Mr Jindal's opposition

[7] Mr Jindal opposes strike out and security for costs on the following grounds:[3]

(a) The threshold for a strike out is high and has not been met.

**Strike Out - First and Second Causes**

(b) My first and second causes of action are within late knowledge period prescribed in sections 11 and 15 of Limitation Act 2010.

(c) The amended statement of claim was filed after leave being allowed under rule 7.77(4) of HCR and hence the date of filing is the date on which an application (in this case a joint memorandum) seeking leave was filed i.e., 09 March 2023.

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3 Notice of opposition to defendant's amended interlocutory application for strike out and security for costs dated 6 June 2023 at [3].

(d) Assuming that the amended statement of claim was filed on 24 April 2023 (which is denied) the essential nature of my claim, as pleaded in the amended statement of claim, remains the same.

i. The defendant was made aware of the facts forming the first and second cause of action pleaded in the amended pleading when he was served the original pleading on 13 Dec 2022;

ii. These facts must be considered at highest level of abstraction;

iii. There is no alteration of facts, or law; nor is a new relief being sought. The legal consequences of the amended pleading are exactly the same as the original pleading.

iv. The analysis of whether there is a fresh cause of action is objective and must be based on substance rather than form.

**Strike Out - Third and Fourth Causes**

(e) The statements complained in my third and fourth causes of action are not protected by absolute privilege because:

i. The Law Society's function in issuing a Certificate of character is clerical and/or administrative.

ii. In issuing a Certificate of character, the Law Society is not undertaking a judicial function on behalf of the High Court.

iii. The statements were at least two steps away from a judicial or a quasi-judicial process; even then the statements would not be subject to absolute privilege protection and were not admissible.

iv. The plaintiff was not subject to any disciplinary function of the Law Society unless he was admitted.

v. Where the Parliament wanted to give statutory privilege protection within the Lawyers and Conveyancers Act 2006, it has expressly done so in ss 186 – 187 of the Act.

vi. Any application to the High Court for Admission under rules 6(3) and 6(4) of Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008 is not an appeal to the Law Society's refusal to issue a Certificate of character and must be considered de novo.

**Security for Costs**

(f) My claim is meritorious, well founded, and has excellent prospects of success. Contrarily, the defendant's defence is weak and likely to fail.

(g) Ordering security will deny me an opportunity to bring this 'first instance' proceeding to vindicate my legal rights; this must be considered especially when it relates to my standing & reputation as a lawyer. This is a litigation which any lawyer in my position will wish to pursue.

(h) An order of security will terminate this matter and act as a strike out. It will be akin to using the security for costs as a means of keeping this claim out of Court.

(i) The defendant's conduct has consistently been one of avoiding, delaying, and frustrating this proceeding. The defendant continues his tortious behaviour.

(j) The defendant's actions have deprived me from getting a practising Certificate from the NZLS for nearly 12 months which has consequently prevented me from being employed.

(k) It will be contrary to the interests of justice if security is ordered against me as access to justice for a genuine plaintiff must not lightly be denied.

(l) My financial position is improving and there is no prospect that costs if any will remain unpaid.

## Mr Jindal's application objecting to affidavit's contents

[8] Mr Jindal seeks orders:[4]

(a) The communication produced as Annexure A of the affidavit of Ashley Rosetta Williams dated 10 March 2023 (the ARW Affidavit) be excluded on account of privilege.

(b) Corresponding paragraph number 6 in the ARW Affidavit (which refers to privileged communication) be redacted.

(c) Statements at paragraphs 4 and 15 of the ARW Affidavit not be accepted.

[9] The grounds on which the orders are sought are:[5]

(a) The communication between the parties (produced as Annexure A of ARW Affidavit) is protected by privilege. The respondent should not be allowed to unilaterally waive privilege re. this communication.

(b) There exist no good reasons as to why privilege should be disallowed by the Court.

(c) Adducing this communication, as annexure A, is in breach of r 14.10 of HCR 2016. It is also contrary to the policy reasons to protect such communications by privilege.

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4 Interlocutory application objecting to contents in affidavit of Ashley Rosetta Williams affirmed 10 March 2023 dated 22 March 2023 at [1].

5 At [2].

(d) The deponent of the ARW Affidavit merely asserts his/her beliefs and opinions (at para 4 and 15) without explaining any basis or rationale for the same. It will be against interests of justice and prejudicial to the plaintiff if 'Annexure A' is admitted and/or the beliefs and opinions in paragraphs 4 and 15 are accepted.

**Mr Daruwalla's opposition**

[10] Mr Daruwalla opposes the objection to the affidavit's contents on the following grounds:[6]

*Without prejudice except as to costs communication:*

3.1. The affidavit evidence of Ashley Rosetta Williams at Annexure A and the corresponding paragraph referencing Annexure A are admissible pursuant to s 57(3) of the Evidence Act 2006:

(a) The communication is solely being used for the purposes of an award of costs, in circumstances where that communication:

(i) Expressly states the communication is made without prejudice except as to costs; and

(ii) Relates to an issue in the proceeding.

*Opinion evidence:*

3.2. The affidavit evidence of Ashley Rosetta Williams at paragraphs 4 and 5 is superseded by the defendant's amended interlocutory application for strike out and security for costs dated 26 May 2023. Accordingly, those paragraphs are no longer relied upon.

3.3. The affidavit evidence of Ashley Rosetta Williams at paragraph 15 is admissible under s 23 of the Evidence Act 2006:

(a) The statement made is not being used to prove the truth of what is believed or inferred as the affidavit contains direct evidence of Ashley Rosetta Williams' perception of the facts.

**Affidavits**

*Affidavit of Ashley Rosetta Williams dated 10 March 2023*

[11] Ms Williams, a solicitor at Mr Daruwalla's lawyers **(Anthony Harper Lawyers)** has made an affidavit in support of Mr Daruwalla's application for security for costs.[7] It is parts of this affidavit to which Mr Jindal's opposition relates.

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6 Notice of opposition to the plaintiff's interlocutory application dated 22 March 2023 at [3].

7 Affidavit of Ashley Rosetta Williams in support of the interlocutory application by the defendant for leave to apply for orders that plaintiff pay security for costs dated 10 March 2023.

[12] Ms Williams deposes that Mr Jindal's claim is unlikely to succeed. She says he alleges two emails sent by Mr Daruwalla are defamatory, which Mr Daruwalla denies are defamatory and for which in the alternative he pleads two defences (qualified privilege and honest opinion). She further says the claim may be time barred.

[13] Ms Williams then says Antony Harper made an open settlement offer as a full and final settlement with no costs issue on 9 February 2023. She appends the offer and says Mr Jindal declined the offer.

[14] Ms William deposes that Anthony Harper has conducted extensive searches in respect of Mr Jindal's assets, property and business interests which have demonstrated Mr Jindal jointly owns a Cornwall Park property which is subject to a mortgage of $300,000 — the property's total value being unknown.

[15] Upon searches of proceedings in which Mr Jindal has been a party, Ms Williams deposes previous adverse judgments show Mr Jindal admitting on multiple occasions that he does not have the ability to pay costs if he were unsuccessful. She cites *Jindal v OM Finance Ltd* [2020] NZHC 2444, *Jindal v Jarden Securities Ltd* [2022] NZHC 572, *Jindal v OM Securities Ltd* [2020] NZDC 2162, *Jindal v Liquidation Management Ltd* [2022] NZHC 2292 and says there is no suggestion that Mr Jindal's inability had changed since the last of those judgments was issued on 9 September 2022.

[16] Ms Williams expresses concern that Mr Jindal is extremely litigious and has a habit of commencing proceedings with little prospect of success. She says in addition to this proceeding, on 16 February 2023, he filed defamation proceedings against four other parties seeking $250,000 against them.

[17] Finally, she appends a schedule estimating Mr Daruwalla's estimated recoverable costs on a staged basis to the completion of discovery and inspection.

*First Affidavit of Gautam Jindal dated 22 March 2023*

[18] Mr Jindal has made an affidavit in support of his application objecting to the content of Ms Williams' affidavit.

[19] First, Mr Jindal deposes that all settlement discussion between him and Mr Daruwalla's solicitors are privileged, including the 9 February 2023 email annexed as exhibit A to Ms Williams' affidavit. He says it is clearly marked "without prejudice except as to costs". Mr Jindal confirms he has not waived privilege in settlement communications and says that any open basis communication was clearly marked as such.

[20] Second, Mr Jindal deposes that [6] and [15] of Ms Williams' affidavit contain Ms Williams' unsupported belief and opinions and make bare and unfounded assertions that he has a habit of commencing legal proceeding without prospects of success. He says she lacks any details or basis to make these statements and to the extent she relied on past litigation there is insufficient evidence to form a belief or opinion credible enough to be accepted by the Court. He therefore requests the statements and privileged information be excluded.

*Second Affidavit of Gautam Jindal dated 31 March 2023*

[21] Mr Jindal has made an affidavit in support of his opposition to Mr Daruwalla's security for costs application.[8]

[22] On the case's merits, Mr Jindal deposes his case has excellent merits and he intends to file an affidavit from another lawyer to that effect. He says Mr Daruwalla's defences are weak, and he is pleading as many defences as possible in the hopes one will be successful. Mr Jindal says that as an admitted lawyer he has sworn an oath of true and honest conduct which he complies with in this proceeding.

[23] On legal aid, Mr Jindal says he qualifies for legal aid and has attempted to obtain legal aid representation for this proceeding, with six providers turning him

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8 First affidavit of Gautam Jindal in support of notice of opposition to security for costs dated 31 March 2023.

down based on their current full schedules so far. He therefore says there is no alternative other than to continue proceedings as a lawyer-litigant in person. He further claims in a former proceeding it took him about 10–12 months to find legal aid representation. In that matter, security for costs were set aside after Duffy J granted legal aid.[9]

[24] Mr Jindal acknowledges he is unable to deposit any security due to his limited financial means, which means if security is ordered it will terminate his proceeding and deny access to justice, or at least delay it until a legal aid provider can be found. He claims to be a genuine aggrieved litigant seeking to vindicate his reputation and obtain relief partially so as to clear his name before the Law Society.

[25] On Mr Daruwalla's conduct, Mr Jindal says Mr Daruwalla has constantly attempted to frustrate the proceeding by refusing to accept or acknowledge service, continuing to defame Mr Jindal, contesting every possible point and threatening Mr Jindal, his wife and children via Facebook messages (which he reported to Police but was closed without further action).

[26] On Mr Daruwalla's contribution to Mr Jindal's weak finances, Mr Jindal deposes he was expected to be an employed lawyer by the end of 2020, but due to Mr Daruwalla's emails he was denied a Certificate by the Law Society for nearly 12 months — his eventual admission taking place on 22 October 2021. He says his savings were depleted due to his unemployment during the 12 month delay.

[27] On assets, liability, income and access to funding, Mr Jindal says he had no external or familial funding and does not have access to loans. He deposes as at 23 March 2023, his assets were $614.73 from his bank account and an Auckland family home. However, the family home is owned by the Sira Trust, of which he was only a trustee for KiwiSaver first home grant purposes. Mr Jindal has recently removed himself from that role. Mr Jindal now says his wife is the settlor and trustee and he and his family are discretionary beneficiaries. He says the property was purchased for about $305,000 and the vendors financed some $265,000 plus interest as a loan. He says the household's expenses are met from his wife's income. Mr Jindal

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9 *Jindal v Jarden Securities Ltd* [2022] NZHC 572.

is currently an LLM student and has been an employed lawyer since 20 March 2023. He still has a student loan of $38,505 and overdue credit cards and other debt, estimated to total between $80,000 to $90,000.

[28] In concluding, Mr Jindal confirms he will not be able to pay any security and has attempted to seek legal aid representation but has no choice but to proceed in this action in the meantime as reasonable and meritorious claim.

*Reply affidavit of Cherag Minoo Daruwalla dated 2 June 2023*

[29] Mr Daruwalla has made an affidavit in reply to Mr Jindal's 31 March affidavit.[10]

[30] In respect of Duffy J's decision in *Jindal v Jarden Securities Ltd*, Mr Daruwalla says Mr Jindal incorrectly stated that the judgment set aside security for costs, instead stating it was simply reduced, and Mr Jindal had to pay a further $1,200 in addition to the $4,000 already paid.

[31] On frustration of the proceedings, Mr Daruwalla disagrees he constantly frustrated proceedings as effective service only occurred on 13 December 2022. Mr Daruwalla states that his legal representation did not contest "every possible point argued", and when counsel engaged with Mr Jindal it was to ensure compliance with court rules and processes. Mr Daruwalla claims Mr Jindal has misrepresented to the Registry his position when filing a joint memorandum of counsel.

[32] On his contribution to Mr Jindal's impecuniosity, Mr Daruwalla deposes he has not contributed and says that Mr Jindal is yet to provide any evidence of the Law Society denying his Certificate based on his allegedly defamatory emails, including in initial disclosure. Finally, he says Mr Jindal has omitted to mention his involvement with a restaurant by the name Foodlab NZ Limited ((t/a) Scandal) which was incorporated on 18 February 2019 and was put into liquidation on 12 March 2021.

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[10] Reply affidavit of Cherag Minoo Daruwalla to affidavit of Gautam Jindal dated 31 March 2023 (dated 2 June 2023).

*Third affidavit of Gautam Jindal dated 7 August 2023*

[33] Mr Jindal has made a further affidavit updating the court as his financial position has significantly improved.[11]

[34] Mr Jindal now deposes he has been able to secure employment as a solicitor with Ormiston Legal Limited and expects to earn between $80,000 and $90,000 from this job in this financial year.

[35] Mr Jindal deposes he has settled and closed other litigation, meaning he was able to have refunded substantial security from the Court of Appeal, High Court, and District Court. This, alongside a retainer refund, amounts to a total of $40,641.07.

[36] Mr Jindal says he has at 7 August 2023 a bank balance of over $125,000 meaning he is able to pay all his debts and legal costs as they become due. He now says he is not impecunious and has sufficient liquidity to meet any costs. He is able to raise additional funds to satisfy any costs award and reiterates there is no prospect of costs not being paid by him.

[37] On Mr Daruwalla's contribution to his impecuniosity, Mr Jindal maintain his defamatory emails delayed his Certificate for 12 months and consequently his employment.

[38] On further Privacy Act disclosures, Mr Jindal says he has sought disclosures from the Ministry of Business, Innovation and Employment, Financial Markets Authority, and Police about complaints Mr Daruwalla made against him, all of which were closed without action. He says there is no truth in any of these complaints.

[39] Overall, Mr Jindal now contends the significant improvements in his finances mean the r 5.45 threshold is not met as he is not impecunious.

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11 Second affidavit of Gautam Jindal in support of notice of opposition to security for costs dated 7 August 2023.

*Fourth affidavit of Gautam Jindal dated 4 September 2023*

[40] Mr Jindal has made a fourth affidavit to support his opposition to Mr Daruwalla's amended application seeking strike out and security for costs.[12]

[41] First, Mr Jindal deposes that his bank balance continues to grow and as at 23 August 2023 his balance was $146,662.45. He and his wife have also settled a significant portion of their vendor finance.

[42] Second, on late knowledge, Mr Jindal deposes that he applied for his Certificate on or about 26 August 2020 and made full disclosure of Orange Capital Limited being placed into liquidation. He says he was interviewed on 28 October 2020 in relation to his liquidation and the Law Society subsequently refused to issue the Certificate on 8 March 2021. Mr Jindal says it was only after releasing their final decision that he realised the Law Society had relied on communications from Mr Daruwalla which had not been shared with him.

[43] Mr Jindal says he sought Privacy Act disclosure on 22 March 2021 and was provided with the communications on 20 April 2021. Ms Christine Schofield of the Law Society confirmed on 30 April 2021 that Mr Jindal was not provided with Mr Daruwalla's 16 and 17 November 2020 emails and attachments and the attachments to Mr Kumal's 6 November 2020 email. Mr Jindal therefore said his knowledge arose on 20 April 2021 and therefore filing by 22 November 2022 means he is within the late limitation period set under ss 11(3)(a) and 15 of the Limitation Act 2010.

[44] Third, on the delay in granting leave under r 7.77(4), Mr Jindal deposes he filed an amended statement of claim on 1 March 2023, which included the fresh cause of action. He says that on 6 March 2023 Mr Daruwalla's lawyers filed opposition to filing as leave was required under r 7.77(4). Mr Jindal says he wrote to Mr Daruwalla's lawyers on 8 March 2023 advising he would send a corrected statement of claim once leave was granted and reconfirmed on 24 March that he was still awaiting leave.

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12 Third affidavit of Gautam Jindal in support of notice of opposition dated 4 September 2023.

[45] Subsequently, Mr Daruwalla neither consented nor opposed leave in a joint 9 March 2023 memorandum and Mr Jindal says he liaised with the Registry to get leave sorted on 17 March and 17 April 2023. He then says he filed an interlocutory application on 18 April 2023 and was granted leave on 21 April 2023. Having been granted leave he filed this first amended statement of claim on 24 April 2023, with 9 March 2023 on the intituling reflecting the rule. He then explains how regardless of the eventual date of filing, the application remains live and has not been withdrawn. He says this means the first and second causes of action in the amended statement of claim are not time barred as the joint memorandum was filed on 9 March 2023 and application filed on 18 April 2023.

*Fifth affidavit of Gautam Jindal, dated 18 September 2023*

[46] Mr Jindal has filed a fifth affidavit dealing with the bankruptcy proceedings in which he is involved, and also deposing further information regarding his financial position.

[47] Mr Jindal deposes that the amount sought in the bankruptcy proceedings (in which he is the judgment debtor) by the judgment creditor, the liquidator of Orange Capital Limited (in liquidation), is $53,000, and that the proceedings were called before the Court on 31 August 2023 with no appearance from the judgment creditor. Mr Jindal deposes he has filed a defence/opposition with a supporting affidavit in respect of the bankruptcy matter. He reproduces paragraph [51] from his submissions.

[48] Mr Jindal deposes he has sufficient funds to meet this demand and attaches an affidavit he has filed in the bankruptcy proceedings.

[49] Mr Jindal reiterates that he has sufficient funds to satisfy the amount sought in the bankruptcy matter and the issue between the parties is purely a dispute on the quantum of the amount owed by him to the liquidator.

[50] As to his financial position, Mr Jindal also deposes that his spouse runs a company under the name of Ingenious Limited which is in the business of providing consultancy services related to project management. He deposes that the business has

earned $270,918.50 in revenue for the period from 1 April 2023 to 31 August 2023. He deposes that he has full access to any income earned by the company Ingenious Limited, and by his spouse, Dr Deepika Jindal.

[51] He reiterates he has no issues in meeting any costs in these proceedings and no risk of bankruptcy in the bankruptcy proceedings brought by the liquidator of Orange Capital Limited (in liquidation).

## Legal principles

*Strike out*

[52] Rule 15.1 of the High Court Rules 2016 provides, relevantly:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading[.]

[53] There are established criteria for strike out:[13]

(a) A strike out application proceeds on the assumption the pleaded facts are true, unless those pleaded facts are entirely speculative or without foundation.

(b) The cause of action or defence must be clearly untenable.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law.

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

(e) The Court should be slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation.

*Security for costs*

[54] Rule 5.45 provides:

> **5.45 Order for security of costs**
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff—
>
> (i) is resident out of New Zealand; or
>
> (ii) is a corporation incorporated outside New Zealand; or
>
> (iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
>
> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
>
> (i) by paying that sum into court; or
>
> (ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
>
> (b) may stay the proceeding until the sum is paid or the security given.
>
> (4) A Judge may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.
>
> (5) A Judge may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.
>
> (6) References in this rule to a **plaintiff** and **defendant** are references to the person (however described on the record) who, because of a

> document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[55] In determining applications under r 5.45, the Court will generally follow these steps:[14]

(a) Has the applicant satisfied the court of the threshold under r 5.45(1)?

(b) How should the court exercise its direction under r 5.45(2)?

(c) What amount should security for costs be fixed at?

(d) Should a stay be ordered?

[56] Further general principles can be summarised as follows:

(a) The court must consider whether it is "just in all of the circumstances" to make an order for the security for costs.

(b) The overriding consideration is balancing the respective interests of the parties.

(c) As far as possible, the Court will endeavour to assess the merits and prospects of success of the claim, bearing in mind the early stage of the proceeding.[15]

(d) Delay in applying for security for costs may also be relevant to the Court's exercise of its discretion, if it causes unfairness to a plaintiff.[16]

(e) The quantum of any order of security is at the discretion of the Court.

[57] The Court should assess whether there is:[17]

> … credible (that is, believable) evidence of surrounding circumstances from which it may reasonably be inferred that the [party] will be unable to pay the

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14 *Busch v Zion Wildlife Gardens Ltd (In Rec and In Liq)* [2012] NZHC 17 at [2].

15 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [37].

16 *Oxygen Air Ltd v LG Electronics Australia Pty Ltd* [2018] NZHC 945 at [26].

17 *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1997] 1 NZLR 516 (HC) at 519; *NZ Kiwifruit Marketing Board v Maheatataka Coolpack Ltd* (1993) 7 PRNZ 209 (HC); *Stephenson v Jones* [2013] NZHC 638.

costs. This does not, of course, amount to proof that the [party] will, in fact, be unable to pay them.

[58] A plaintiff's unwillingness to pay previous judgment debts weighs in favour of an order for security.[18] But whether a plaintiff has been a responsible litigant is secondary to the issue of whether the lack of merit of the claim justifies security that would prevent the claim from proceeding.[19]

[59] Quantum of security is discretionary and is assessed in the round. It need not be fixed by reference to likely cost awards.[20] It is to be what the Court thinks fit in all the circumstances.[21]

[60] A Court will generally stay a proceeding until the security ordered is given.[22]

*Privileged communications*

[61] Rule 7.30 states:

> **7.30 Statements of belief in affidavits**
>
> (1) A Judge may accept statements of belief in an affidavit in which the grounds for the belief are given if—
>
> (a) the interests of no other party can be affected by the application; or
>
> (b) the application concerns a routine matter; or
>
> (c) it is in the interests of justice.
>
> ...

[62] Rule 14.10 states:

> **14.10 Written offers without prejudice except as to costs**
>
> (1) A party to a proceeding may make a written offer to another party at any time that—

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18 *Taylor v Adair* [2018] NZHC 1975 at [30]–[31], citing *Burden v Dixie Cummings New Zealand* [2016] NZHC 729 at [22] and *Mawhinney v Auckland Council* [2014] NZHC 3207.

19 *Wright v Attorney-General* [2019] NZHC 3046 at [26].

20 *Sharp v Pillay* [2017] NZHC 647; *Red 9 Ltd v The Learning Ladder Ltd (in liq)* [2021] NZCA 284, (2021) 25 PRNZ 780 at [30].

21 *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13] and [14].

22 *Tomanovich Holdings Ltd v Gibbston Community Water Co 2014 Ltd* [2018] NZHC 990 at [68] and [85].

(a) is expressly stated to be without prejudice except as to costs; and

(b) relates to an issue in the proceeding.

(2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.

**Analysis**

[63] This judgment deals with the following issues in the following order:

(a) Mr Jindal's application for exclusion of evidence;

(b) Mr Daruwalla's application for strike-out of Mr Jindal's first to fourth causes of action;

(c) Mr Daruwalla's application for security for costs.

*Exclusion of evidence*

[64] Mr Jindal, self-represented, has made an application for exclusion of parts of the affidavit of Ms Ashley Rosetta Williams, affirmed on 10 March 2023 (the **affidavit**) that was filed in support of Mr Daruwalla's application seeking security for costs. Mr Jindal submits that:

(a) paragraphs [4]-[5] of the affidavit contain inadmissible opinion evidence;

(b) paragraph [6] refers to a privileged communication; and

(c) paragraph [15](c) contains inadmissible expert opinion evidence.

[65] Mr Daruwalla no longer relies on paragraphs [4]-[5] and consequently these paragraphs in the affidavit are not discussed further and are excluded from evidence.

*Privileged communications*

[66] Mr Jindal submits the email communication of 9 February 2023 was exchanged between the parties expressly on a "without prejudice except as to costs" basis, and as such is protected by privilege. He submits that the email can only be put before the Court when the Court is considering the issue of costs and the substantive issues between the parties have already been decided. He submits that the present fixture is a security for costs hearing, which is quite different from a costs determination. Mr Jindal says that the privileged email was sent before any of the interlocutory applications filed, and the privileged email concerned settling the substantive matter and this is not in issue in the security for costs determination.

[67] Mr Jindal also refers to ss 53 and 57(3)(c) of the Evidence Act 2006 (**Evidence Act**).

[68] Mr McLellan KC, for Mr Daruwalla, on the other hand submits that reliance on the privileged email relating to the settlement offer in the security for costs application does not breach s 57 of the Evidence Act. He submits that settlement negotiations are only privileged so far as is necessary to facilitate the policy justification underlying s 57, and the privilege permits evidence of settlement negotiations for non-liability focused issues such as costs in certain interlocutory applications to prove mitigation and to substantiate estoppel. He submits relying on "without prejudice" correspondence in those circumstances does not breach privilege – there is no invocation of the substance of the negotiations to assist in determining liability.

[69] Mr McLellan submits that consistent with those settled principles, paragraph [6] of the affidavit does not breach s 57:

(a) The purpose for which the evidence is offered is merely to show the fact of a discontinuance without costs proposal having been made by Mr Daruwalla. That is relevant to the Court's determination of the reasonableness of awarding security for costs.

(b) Mr Daruwalla has waived privilege over his own solicitor's email by referring to it in the affidavit. The affidavit does not include Mr Jindal's

own offer of settlement which was redacted from the exhibit and merely notes the self-evident point that Mr Jindal did not agree to discontinue (that is self-evident because the proceeding is continuing). The affidavit discloses no admissions on disputed issues of law or fact.

*Conclusion in respect of paragraph [6] of the affidavit*

[70] I am of the view that paragraph [6] of the affidavit should be excluded from the evidence. The communication was "without prejudice except as to costs", and is being used in support of Mr Daruwalla's application for security for costs not in a determination of costs after the substantive issues have been determined. While the paragraph in the affidavit does not disclose any admissions on disputed issues of law or fact, nevertheless, being used in support of the application to impose a security for costs order on Mr Jindal, in my view, is contrary to r 14.10.

[71] Accordingly, paragraph [6] of the affidavit is excluded from evidence.

*Opinion and expert evidence*

[72] Mr Jindal submits that paragraph [15] of the affidavit should be ruled inadmissible as it constitutes an impermissible opinion or expert opinion evidence, namely:

(a) that Mr Jindal is litigious; and

(b) he has a habit of commencing legal proceedings with little prospects of success.

[73] Mr Jindal refers to ss 23-26 of the Evidence Act and submits that there is a general rule against allowing opinion evidence and expert evidence in summary judgment procedures, because there exists no opportunity for the counter-party to test the expert's evidence or opinion by way of cross evidence. He submits that this rule is a fundamental rule of fairness – if there is no fair opportunity to cross-examine, the expert evidence and opinion evidence must not be admitted.

[74] Mr Jindal submits that Ms Williams, who tenders evidence on the legal issue of her opinion on the merits of the case, has not complied with code of conduct for expert witnesses prescribed in r 9.43 of the Rules. He further submits that Ms Williams makes a statement of belief/opinion without asserting any solid grounds for such belief, which is contrary to r 7.30 of the Rules. He cites the decisions of *Banks v Farmer,*[23] and *HSK Trading Ltd v Carter Building Supplies Ltd (t/a Carters)* as authority for the proposition that in an interlocutory application a statement of belief can only be accepted if the grounds are set out.[24]

[75] Mr Jindal submits that Ms Williams relies on cases which are not related to the present case and are inadmissible by operation of s 50 of the Evidence Act. He submits that facts from other unrelated cases are irrelevant and ought to be ignored and introducing facts and findings from other cases is inadmissible under s 50 of the Evidence Act.

[76] Mr McLellan, on the other hand, submits that the statements in paragraph [15] of the affidavit are not opinion, for the purposes of the Evidence Act. He refers to the definition of "opinion" under s 41 of the Evidence Act which states:

> "a statement of opinion that tends to prove or disprove a fact".

[77] Mr McLellan submits that the statements in paragraph [15] do not meet the definition of opinion evidence:

(a) Both statements are explicitly supported by the judgments referred to in the preceding paragraphs. As a result, statements are not being used to prove the truth of their contents but are instead Ms Williams's conclusions drawn from the facts.

(b) The direct evidence in support consists of other legal proceedings in which Mr Jindal has been, or is currently, a party. The affidavit attests to the fact that Ms Williams conducted searches for the proceedings involving Mr Jindal.

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23 *Banks v Farmer* [2017] NZHC 1596 at [65].

24 *HSK Trading Ltd v Carter Building Supplies Ltd (t/a Carters)* [2021] NZHC 1897 at [6].

(c) Several of the judgments referred to describe Mr Jindal's causes of action in the relevant proceedings as unmeritorious.

[78] As to the submission that Ms Williams has held herself out as an expert, Mr McLellan submits that she has not held herself out as an expert and did not provide expert evidence in paragraph [15]. As such, there has been no attempt made to provide expert opinion.

[79] As to s 50 of the Evidence Act, Mr McLellan submits that Mr Jindal's reliance on s 50 is misplaced as the affidavit does not rely on the factual findings made in judgments in other proceedings, the challenged evidence in paragraph [15] does not relate to any factual matters that were in dispute in the other proceedings, and accordingly s 50 is not engaged. He submits the purpose of referring to the earlier decisions is to support the statement in the affidavit that Mr Jindal is litigious and is engaged in numerous different disputes.

*Conclusion in respect of paragraph [15]*

[80] I am of the view that paragraph [15] should not be excluded from evidence. In my view, the statements made by Ms Williams are not being used to prove the truth of their contents, but instead are Ms Williams' conclusions drawn from the searches in respect of litigation in which Mr Jindal is involved. In my view, they are therefore not "opinion" within the meaning of s 4 of the Evidence Act. I am also of the view that Ms Williams has not held herself out as an expert and therefore the opinions do not purport to be expert opinions.

[81] I am also of the view that s 50 does not apply and paragraph [15] does not rely on any factual findings made in judgments in other proceedings and does not relate to factual matters that were in dispute in any other proceeding.

[82] Paragraph [15] of the affidavit is admitted into evidence.

**Strike-out application**

[83] Mr Daruwalla applies for strike-out on two grounds:

(a) Mr Jindal's first and second causes of action are not arguable because they are time-barred under the Limitation Act 2010 (the **Limitation Act**);

(b) Mr Jindal's third and fourth causes of action relate to statements made on the occasion of absolute privilege.

[84] Mr McLellan submits that Mr Jindal's first and second causes of action concern emails sent by Mr Daruwalla to Mr Imran Kamal on 1 May 2020 and 6 November 2020 (the **Kamal emails**). He submits the first and second causes of action are statute-barred because under s 15 of the Limitation Act, the primary period for claims in respect of the Kamal emails expired on 20 May 2022 and 7 November 2022 respectively; the late knowledge period expired on 21 April 2023; and the second amended statement of claim (**ASOC**), which pleads the Kamal emails, was filed on 24 April 2023.

[85] Mr McLellan submits that neither the statement of claim filed by Mr Jindal on 22 November 2022 nor the first amended statement of claim filed by Mr Jindal on 1 March 2023 pleads the Kamal emails as giving rise to a cause of action. He submits neither statement of claim pleads the statements made in the Kamal emails, nor identifies the alleged defamatory meanings or claims relief in respect of those alleged defamatory statements. He submits the Kamal emails were first pleaded in the ASOC filed by Mr Jindal on 24 April 2023, which is outside the late knowledge period.

[86] Mr McLellan refers to the defences put forward by Mr Jindal to this part of the striking-out application, namely:

(a) the Kamal emails are not a fresh case of action that fundamentally alters the nature of the claim as pleaded on 1 March 2023; and/or

(b) the filing date of the ASOC must be backdated to 9 March when Mr Jindal sought leave under r 7.77(4) of the Rules to amend his claim.

[87] Mr McLellan submits neither argument is tenable. In relation to the assertion by Mr Jindal that the Kamal emails are not a fresh cause of action, Mr McLellan submits, relying on *Transpower New Zealand Ltd v Todd Energy Ltd*,[25] that the Kamal emails give rise to a fresh claim, and the substance of the claim is fundamentally altered for the following reasons:

(a) for the first time, the ASOC formally pleaded the Kamal emails and labelled them as the first and second causes of action;

(b) the Kamal emails claim differs substantially from Mr Jindal's other claims, as it involves statements made in a different publication and issued to a different person (Mr Kamal, rather than the Law Society). Those facts, if proven, give rise to a separate cause of action with its own accrual date and damage;

(c) the ASOC identified six defamatory meanings which allegedly arise from the Kamal emails, and none of those defamatory meanings have been identified in earlier statements of claim; and

(d) to reflect the new allegations, Mr Jindal increased the quantum of general damages sought from $126,000 to $150,000.

[88] As to Mr Jindal's reliance on r 7.77(4), back dating the filing of the ASOC to 9 March 2023, Mr McLellan submits that Mr Jindal's reliance on r 7.77(4) is misplaced.

[89] Mr McLellan points out that the rule states that if a cause of action has arisen since the filing of the statement of claim, it may only be added with leave of the Court and, if leave is granted, for the purposes of limitation, the filing date is treated as the date of the application for leave under r 7.77(4). Mr McLellan acknowledges that while Mr Jindal, by interlocutory application on 17 April 2023, applied for leave to add a "fresh cause of action" that arose in December 2022, the cause of action related to the LinkedIn messages sent by Mr Daruwalla. While leave was granted and

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25 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302.

accordingly the filing date for the cause of action relating to the LinkedIn messages was backdated to 9 March 2023, neither the r 7.77(4) application nor the earlier memorandum of counsel referring to the application for leave, sought leave in respect of the causes of action relating to the Kamal emails. Therefore, r 7.77(4) does not back-date the Kamal emails claim to within the limitation period.

[90] Mr Jindal, on the other hand, submits that the first and second causes of action included in the 24 April 2023 ASOC do not differ in a substantive manner from the previous pleadings. He refers to the Court of Appeal decision of *Commerce Commission v Visy Board Pty Ltd* for the proposition that an amendment must alter the legal basis for the claim for it to amount to a new cause of action.[26] In the present case he submits that the fundamental claim against Mr Daruwalla remains the same, being that of defamation.

[91] Mr Jindal submits that the facts around the Kamal emails were pleaded in the original statement of claim filed on 22 November 2022 and there is no new factual enquiry. The Kamal emails were also forwarded on to the Law Society on 16 and 17 November 2022 and are, in any event, caught in the third and fourth causes of action which are not time-barred.

[92] In relation to r 7.77(4), Mr Jindal submits that this Court accepted the ASOC as being filed on 9 March 2023. He also submits that his interlocutory application filed on 18 April 2023which is pending, could be amended to request the Court to amend the pleadings under r 1.9 to deal with the fact that the amended statement of claim was lodged two working days after the late knowledge period expired.

[93] Mr Jindal submits that the first and second causes of action should be allowed to proceed to trial, and Mr Daruwalla may argue that the limitation defence at that time, but should not be struck out under the present application.

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26 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383.

*Conclusion in respect of the strike-out of causes of action one and two*

[94] I am of the view that the first and second causes of action in the ASOC should be struck out. The reasons for this are:

(a) The causes of action in respect of the Kamal emails are new causes of action, and therefore required leave under r 7.77(4) to be added to the statement of claim. The emails are different in substance to those previously pleaded and are to a different person, namely Mr Imran, not the Law Society. They contain allegedly fresh defamatory statements, with freshly pleaded defamatory meanings. In my view these are clearly new causes of action.

(b) While leave was granted on 21 April 2023 to add new causes of action to the ASOC filed on 24 April 2023 (and it is accepted that the filing date in respect of those causes of action is deemed to be 9 March 2023), the new causes of action only related to the LinkedIn messages. There is no reference in the application for leave to add the Kamal emails as fresh causes of action. Consequently there can be no backdating of the date of filing in respect of the Kamal emails claim to the date of the application for leave which was granted in respect of adding the LinkedIn messages to the claim.

[95] The submission by Mr Jindal that he could amend his amend his interlocutory application of 18 April 2023 to request the Court to correct the time period for filing the statement of claim under r 1.9 is not accepted. The power to correct errors in r 1.9 is aimed at minor errors which do not go to the substance of the pleadings and in particular, in my view, would not extend to allowing time periods to be altered to comply with the Limitation Act.

*Strike-out of the third and fourth causes of action*

[96] Mr Jindal's third and fourth causes of action concern emails sent by Mr Daruwalla to the Law Society on 16 November and 17 November 2020

respectively (the **NZLS emails**). Mr McLellan submits that both causes of action are untenable because the NZLS emails were sent on occasion of absolute privilege. He submits that following receipt of the NZLS emails, the Law Society conducted a quasi-judicial process on behalf of the judiciary to determine if Mr Jindal qualified for admission and processes of that nature are privileged.

[97] As to the applicable law, Mr McLellan submits that absolute privilege provides a complete and indefeasible defence in respect of any statements to which the privilege attaches. He refers to ss 13 to 15 of the Defamation Act 1992 which he submits provide a partial codification of the categories of absolute privilege well recognised at common law, and relevantly s 14(1)(b), which confers privilege upon proceedings conducted before a "tribunal or authority with a duty to act judicially". Mr McLellan submits that the Law Society's function in determining and certifying that a candidate qualifies for admission falls within s 14(1)(b) and, even if that section is not applicable, the common law categories of absolute privilege are not closed, and fresh occasions can recognise by analogy where policy justifications support the privilege.

*Bases for recognition of absolute privilege defence*

[98] Mr McLellan puts forward three grounds to support the application of s 14(1)(b) to the NZLS emails:

(a) the privilege is necessary for the Law Society to discharge its statutory function protecting the public interest;

(b) certifying candidates for admission is a quasi-judicial function; and

(c) analogy to existing categories of absolute privilege.

[99] Mr McLellan submits that extensions to, or recognition of new categories of "absolute privilege" are justified where privilege is "necessary":

(a) to protect an important societal interest where both the scale and risk of damage to the interest creates a pressing need for protection;

(b) where the importance of public interest that the privilege seeks to protect outweighs the plaintiff's right to bring proceedings; and

(c) where the breadth of the privilege is required to protect the interest is not over-broad.

[100] As to paragraph [99](a), Mr McLellan submits that the interests sought to be protected are listed in s 3(1) of the Lawyers and Conveyancers Act 2006 (**LCA 2006**) as:

(a) maintaining public confidence in the provision of legal services; and

(b) protecting consumers of legal services.

[101] Mr McLellan submits that to protect those societal interests, Parliament vested the Law Society with a statutory responsibility for regulating the profession,[27] and one of the principal means by which the Law Society accomplishes its protective function is by judging whether prospective and current practitioners are and remain of suitably good character.[28] He submits that no person can be admitted to the bar without satisfying the "fit and proper" person requirement and for the purposes of paragraph [99](a) this reflects Parliament's express appreciation of the scope and risk of the danger posed to the wider public interest.

[102] As to paragraph [99](b), Mr McLellan submits that the interests protected by absolute privilege outweigh the plaintiff's right to protection of his reputation. He submits the Law Society has primary statutory responsibility for deciding whether a candidate is fit and proper and whether to issue a Certificate to that effect. He submits that before granting the Certificate, the Law Society must consider if the candidate meets the "fit and proper" person test in s 55(1) of the LCA 2006 and that for the purposes of a s 55(1) assessment, the Law Society is entirely reliant upon third parties offering full and frank information regarding any matters relevant to its enquiry. He

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27 Lawyers and Conveyancers Act 2006, s 65.
28 Sections 48–55.

submits without full information, the Law Society cannot discharge its responsibility to protect those interests listed in s 3(1) of the LCA 2006.

[103] Mr McLellan submits privilege is necessary because:

(a) Third parties must be able to freely communicate their views to the Law Society as to the character of the candidates in an unhampered, frank, candid and unfettered manner. Without access to counterbalancing material, the Law Society's s 55(1) assessment may be skewed by the favourable information from the candidate.

(b) Free communication (and the Law Society's ability to receive helpful evidence as to character) will be hindered or reduced if informants risk being exposed to retaliatory defamation claims by disgruntled applicants.

(c) The Law Society has a legitimate interest in learning information that may impact the s 55(1) assessment even if the person giving the information cannot substantiate their claims. Following receipt of information which suggests a character defect in the candidate, the Law Society can inquire through the specialist Practice Approval Committee (**PAC**) system, and were absolute privilege not available, there would be a material risk that such information would no longer be provided.

(d) Recognising absolute privilege in this context is highly analogous to the privilege accorded to witnesses in judicial proceedings.

[104] As to paragraph [99](c), Mr McLellan submits the scope of privilege is narrow as it only applies to confidential communications of the Law Society and, if allegations prove false, there is no risk of harm to the candidate's reputation given the lack of public dissemination. He submits that the PAC process protects against false allegations.

*The second basis: quasi-judicial function of the Law Society*

[105] Mr McLellan submits that the Law Society certification function falls within s 14(1)(b) of the Defamation Act because it is:

(a) performed on behalf of the judiciary and is inextricably connected to the judicial proceedings; and

(b) when carrying out the certification function the Law Society acts in a judicial manner justifying the application of the privilege.

[106] Mr McLellan submits that there are two pathways for the High Court to be satisfied that a candidate is a "fit and proper" person:

(a) if the Law Society has granted the Certificate, it must be appended to an affidavit sworn and filed by the applicant. In that situation the Court is relieved of the obligation to address the s 55 test, and the LCA 2006 deems the Certificate to be conclusive evidence that the candidate qualifies as a "fit and proper" person;

(b) conversely, if the Law Society has refused to issue a Certificate, the candidate is required to file an affidavit with supporting evidence as to why the candidate is of good character. The application is then determined at a hearing in which the High Court must determine, by reference to s 55(1) whether the candidate is "fit and proper". The Law Society can oppose the application.

[107] Mr McLellan submits that under the second pathway, any evidence filed by the applicant and the Law Society attracts absolute privilege because it forms part of judicial proceedings and, by parity of logic, material underpinning the Certificate under the first pathway must also be privileged. He submits the Certificate is itself evidence in the judicial proceeding and the underlying information was material preparatory to the issuing of the Certificate, and preparatory materials are protected by privilege.

[108] Mr McLellan submits the Law Society's certification function is undertaken on behalf of the judiciary, thereby engaging s 14(1)(b) as follows:

(a) under s 54 of the LCA 2006 the Court can issue rules describing how the admission process operates, and therefore the Court can control or influence the Law Society's certification functions;

(b) the rules prohibit a person from applying directly to the High Court for admission before seeking a Certificate from the Law Society, meaning effectively the judiciary has appointed the Law Society as the first instance decision-maker as to character; and

(c) successful certification means that the High Court is not required to consider the "fit and proper" requirement afresh as it relies on the Law Society's determination. Consequently, the effect of issuing the Certificate pre-emptively resolves what would otherwise have been a legal and evidential question for the Court to resolve in the judicial admission proceedings.

[109] Mr McLellan submits that the Law Society performs its function in a judicial manner, as evidence by the following:

(a) The Law Society is a public authority exercising its statutory powers and upon receiving a Certificate application it has a duty to adjudicate that the candidate is fit and proper.

(b) When considering whether a person is fit and proper, the LCA 2006 requires the Law Society to address the same statutory criteria that the High Court must consider in resolving whether a candidate is qualified in a contested admission proceeding.

(c) Pursuant to s 55(2) of the LCA 2006, both the High Court and the Law Society enjoy an identical statutory discretion to determine that a

person qualifies as "fit and proper" although they do not meet the s 55(1) criteria.

(d) The Law Society's character assessment under s 55(1) is founded on evidence (e.g. provided by way of statutory declaration) and any allegations of bad character are investigated using the PAC system which includes gathering of further evidence for consideration. The candidate is afforded the right to be heard.

(e) The effect of the Law Society's refusal to issue a Certificate is that the candidate is not legally qualified to be admitted to the bar, and, absent a challenge to that finding, the Law Society's decision is binding.

(f) Objection to a Certificate can be subject to scrutiny in the High Court and subsequent judicial proceedings, which is akin to a right of appeal, itself indicating the original decision is judicial.

[110] Mr McLellan submits that history supports the judicial nature of the Law Society's certification function. He submits that previously it was the sole prerogative of the High Court to control admission to the bar, but under the Law Practitioners Act 1861 the role was devolved to a Board of Examiners appointed by the Court, which included High Court judges and lay persons. Following amendments, the Law Society now performs the function on behalf of the High Court.

[111] Finally, Mr McLellan refers to decisions in the United States which he says recognise the existence of absolute privilege in the same circumstances as the present case.[29]

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[29] *Bufalino v Teller* 209 F Supp 866 (MD Pa 1962); *Rothman v Emory University* 123 F 3d 466 (7th Cir 1997); *Kalish v Illinois Education Association* 510 NE 2d 1103 (Ill App 1 Dist 1987); and *Morrisseau v Southern Centre for Human Rights* ND Ga No 1:06-CV-2003-WSD-AJB, 7 July 2008.

*Third basis: analogy to existing categories of absolute privilege*

[112] Mr McLellan argues that the absolute privilege contended for in the present case is analogous to that recognised by the Court of Appeal in *Teletax Consultants Ltd v Williams*.[30] Mr McLellan submits that in that case the Court held, on the same strike-out jurisdiction as the present case, that a complaint made by a member of the public to the Law Society alleging misconduct by an enrolled practitioner and seeking disciplinary action, was privileged. He submits that lawyers subject to disciplinary action before the Lawyers and Conveyancers Disciplinary Tribunal (the **Tribunal**) can be struck off the roll if they are no longer a fit and proper person, and the *Teletax* privilege safeguards the public interest in s 3(1) of the LCA 2006 by ensuring that the Law Society is fully informed of any misconduct that may impugn a person's fitness to practice. He submits there can be no distinction between privilege recognised by the Court of Appeal in *Teletext* and the privilege put forward in the present case, as both are directed towards securing the same public interest using a quasi-judicial process. He submits that in both cases the inquiry is the same: whether the candidate or lawyer is a fit and proper person.

[113] Mr Jindal commences his submissions by referring to the statement of the Court in *Attorney-General v Leigh*:[31]

> Where the claim for absolute privilege would result, if successful, in depriving citizens of their common law rights [to sue for defamation], the Courts will be astute to ensure the claim of absolute privilege is **truly necessary**... (Emphasis added).

[114] Mr Jindal submits that absolute privilege is not necessary to protect Mr Daruwalla in this case and qualified privilege would suffice.

[115] Mr Jindal's submits that Parliament did not intend the Certificate issuing process of the Law Society to be protected by absolute privilege. He submits that where Parliament has intended privilege to apply, it is expressly stated thus, for example:

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30 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA).

31 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [7].

(a) Section 186 of the LCA 2006, where those giving information or evidence before the Standards Committee are protected by the privilege that witnesses have in a Court of law.

(b) Section 8 of Schedule 3 and s 9 of Schedule 4 of the LCA 2006, where privilege applies to those who appear before the Legal Complaints Review Officer (**LCRO**) or Disciplinary Tribunal (respectively). He submits where Parliament has not expressly provided for privilege, it should be excluded.

[116] Mr Jindal submits that s 272 of the LCA 2006 protects members, officers or employees of the Law Society from any civil or criminal liability unless it is proved to the satisfaction of the Court that the defendant in those proceedings acted in bad faith. He submits that Parliament intended such people to be protected by qualified privilege, and the same must apply for the purposes of the NZLS emails.

[117] Mr Jindal submits that the Law Society's process in issuing the Certificate is not within the scope of ss 13-15 of the Defamation Act, as while issuing a Certificate the Law Society does not have powers to compel the attendance of a witness and, unlike the Standards Committee, the PAC is not recognised under the LCA 2006. He submits the committees like the PAC are vaguely described in the Law Society's constitution, which is neither law nor a statute.

[118] Mr Jindal submits the Law Society's processes are not quasi-judicial, nor does the Law Society act as a tribunal at the time of processing or issuing a Certificate. He submits the front line staff processing the Certificate are employees of the Law Society and they usually are in clerical/administrative positions and acting on delegated authority is a "ticking the checklist" process.

[119] Mr Jindal refers to *Commissioner of Inland Revenue v B,*[32] where the Court adopted a 10-point test to ascertain whether a body was acting as a tribunal, and the Court endorsed the test laid down by Diplock LJ in *Trapp v Mackie*.[33] At [17] of his

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32 *Commissioner of Inland Revenue v B* [2001] 2 NZLR 566 (HC) at [20]–[21].
33 *Trapp v Mackie* [1979] 1 WLR 377 (HL) at 383.

submissions, Mr Jindal then applies the 10-point test to the Law Society and submits that the answer is that the Law Society is not acting as a tribunal. He submits that in *The Commissioner of Inland Revenue v B* the Court held that answers (to seven out of the 10 tests) point to the determination function being administrative rather than judicial. In the present case nine out of the 10 tests point to the processes managed by the Law Society while the processing and issuing of a Certificate are administrative in nature.

[120] Mr Jindal submits that the process of the Law Society in issuing the Certificate is two steps away from a judicial hearing and therefore should not be accorded absolute privilege as a quasi-judicial process. He submits, in respect of the two pathways for a candidate to be admitted, that the first pathway managed by the Law Society is administrative, and the second pathway of seeking to be admitted before the High Court is an adversarial and judicial process. He submits that these are separate pathways, the second one being triggered only after the first fails and that the first pathway and the second pathway, while having a common outcome, does not mean that the first pathway adopts the nature of the second pathway.

[121] Mr Jindal submits that only where there is an immediacy of oral response should absolute privilege apply, such as attaches to members of Parliament for debate and in a courtroom setting where lawyers may need to argue and make oral submissions in the process of advocating for their clients. He submits that when someone has sufficient time to consider the written communications, the appropriate standard is that qualified privilege which should apply to the NZLS emails. He submits that the NZLS emails do not attract absolute privilege of protection as they were:

(a) not submitted before a court, quasi-judicial body or a tribunal;

(b) not tendered under oath or as an affidavit such that Mr Daruwalla was liable for perjury;

(c) not amenable to cross-examination or rebuttal; and

(d) not a spontaneous oral argument or a comment as in the courts or Parliament.

[122] Mr Jindal refers to the case of *S v W*,[34] where the Court of Appeal adopted a necessity-driven approach towards expanding the occasions of absolute privilege, and, in Mr Jindal's submission, held that expanding the occasions of absolute privilege must be developed in line with arts 17(1) and 17(2) of the International Covenant on Civil and Political Rights (**ICCPR**).

> 1. No one shall be subjected to arbitrary … nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to protection of the law against such … attacks.

[123] Mr Jindal relies on the decision of *S v W* for authority for the proposition that, where qualified privilege provides adequate protection there is no need to extend the scope of absolute privilege, especially where doing so will deprive the plaintiff of a significant right to a defamation action. He submits this logic applies in the present case and there are no reasons why the well-thought and written email communications by Mr Daruwalla needs absolute privilege protection when qualified privilege provides an adequate safeguard. In my view, *S v W* is readily distinguishable from the present case, as the communications were to the complainant's employer (the DHB) not to the relevant tribunal being the body who would make the decision. In that case it is correct that only qualified privilege should apply as the DHB was clearly not a tribunal or authority carrying out a quasi-judicial function.

[124] Mr Jindal makes the following further submissions:

(a) The common law categories of absolute privilege should align with the relevant legislation. In this case those provisions only allow statutory privilege protection for the LCRO and the Standards Committee, and if Parliament had intended submissions in respect of Certificates made by members of the public to be protected by absolute privilege, they would have done so.

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[34] *S v W* [2022] NZCA 181 at [32]–[33].

(b) It is not necessary to give communications to the Law Society in respect of issuing the Certificate more than qualified privilege.

[125] Mr Jindal distinguished the *Teletax* case on the basis that:[35]

(a) the letter sent to the Wellington Law Society was a disciplinary complaint which could only be handled by the Standards Committee, but when Mr Daruwalla sent the NZLS emails, Mr Jindal was not a lawyer and hence not subject to the disciplinary jurisdiction of the Law Society;

(b) the *Teletax* letter clearly stated that the complainant was organising a private criminal prosecution against the lawyer – but in the present case Mr Daruwalla did not threaten or advance any legal proceedings and he lacked any standing to bring a proceeding; and

(c) the only possible purpose of the NZLS emails was to embarrass Mr Jindal before the Law Society, and the emails could not reasonably have achieved anything more than that.

[126] Mr Jindal submits that in the *Teletax* decision the Court of Appeal held that there were three categories where absolute privilege would apply:

(a) to what is done in the course of the hearing before a court or a tribunal;

(b) to what is done from the inception of the proceedings, including all pleadings and other documents brought into existence for the purpose of the proceedings; and

(c) to the briefs of evidence and to what is said in the course of interviewing potential witnesses.

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35 *Teletax Consultants Ltd v Williams*, above n 30.

[127] Mr Jindal submits that, in issuing the Certificate, the Law Society does not act in a quasi-judicial or tribunal-like manner. There was no inception of proceedings and hence the *Teletax* case is distinguishable. In my view, the distinctions raised by Mr Jindal are not valid as they are irrelevant to the issue of whether the Law Society, in carrying out its certification process, was undertaking a quasi-judicial function.

[128] In his final point, Mr Jindal compares the Certificate to the qualifications completion certificate issued by the New Zealand Council of Legal Education (**NZCLE**), and makes the point in that capacity that the NZCLE is not acting in a quasi-judicial manner. He submits the issue of the Certificate is no different. In my view, this is incorrect and the two certificates are entirely different. The NZCLE is simply performing an administrative task of confirming the candidate has obtained the relevant qualifications, whereas the Law Society is making an assessment under s 55(1) of the person's fitness to be admitted to the bar.

*Conclusion in respect of strike-out of causes of action (3) and (4)*

[129] I am of the view that Mr Jindal's causes of action (3) and (4) should be struck out. In my view the NZLS emails are protected by absolute privilege. Mr Jindal's claims under these causes of action cannot succeed. The reasons for this are as follows:

(a) In my view, the Law Society, in issuing the Certificate is acting in a quasi-judicial function. As noted earlier in this judgment, the two pathways for admission of a candidate to the bar are the first pathway where the Law Society issues a Certificate or, if that does not happen, the second pathway which involves a judicial hearing in the High Court. On that basis I think it is correct that the High Court has delegated its judicial function in determining whether the candidate is a fit and proper person, and whether to issue the Certificate, to the Law Society as the first instance decider.

(b) The Law Society process, including the PAC, involves a quasi-judicial process where evidence is gathered by the Law Society or the PAC and considered, and the candidate has as right to be heard.

(c) The imposition of absolute privilege is necessary to protect the Law Society in discharging its statutory function to protect the public interest. As is made clear by the LCA 2006, the duty to protect the confidence in legal services and protecting consumers of legal services is an important public interest and in my view outweighs the plaintiff's right to bring proceedings. Consequently, even if s 14(1)(b) of the Defamation Act does not apply, the common law categories of absolute privilege should apply given the importance of the Law Society being able to receive all information in respect of a candidate without the providers of that information being concerned about retaliatory defamation actions.

(d) I do not accept Mr Jindal's submission that the Law Society's process is purely administrative or analogous to the issue of a certificate as to completion of qualifications by the NZCLE. While obviously initial processing of applications of candidates by the Law Society will be administrative, the decision as to whether a person is fit and proper for the purposes of s 55(1) assessment is carried out in lieu of the High Court making that assessment under pathway two, and therefore is in my view a quasi-judicial function.

**Security for costs**

[130] Mr Daruwalla is seeking an order for security for costs under r 5.45 of the High Court Rules, noting that if the application for strike-out succeeds the fifth cause of action will remain as Mr Jindal's sole extant cause of action. Mr McLellan addresses the two aspects of r 5.45:

(a) there must be reason to believe that Mr Jindal will be unable to pay an adverse costs award; and

(b) if the impecuniosity threshold is met, the Court may order security for costs where in its discretion an order is just and reasonable.

**Mr Daruwalla's submissions**

*Mr Jindal's impecuniosity*

[131] Mr McLellan points to the affidavit evidence of Ms Williams recording:

(a) LINZ searches show that Mr Jindal jointly owns a property on leasehold land in Auckland which is the subject of a $300,000 mortgage and its value is unknown, as is Mr Jindal's equity in the property.

(b) Extensive searches of assets, property and business records did not reveal any other interests associated with Mr Jindal.

(c) Mr Jindal has admitted in several publicly recorded decisions that he lacks sufficient funds to pay an adverse costs award, the most recent being the judgment in *Jindal v Liquidation Management Ltd* in which Mr Jindal conceded he had met the r 5.45 and impecuniosity threshold.[36]

[132] Mr McLellan also points to Mr Jindal conceding in his notice of opposition that r 5.45 impecuniosity threshold was met, and also points to the statements in Mr Jindal's affidavit supporting his notice of opposition to security for costs (March 2023).

[133] Mr McLellan points to two further matters that, in his submission, mean the impecuniosity threshold has met, namely that Mr Jindal has sought a fee waiver in relation to certain interlocutory applications filed in this proceeding and secondly, Mr Jindal was involved in another company (FoodLab NZ Ltd) which went into liquidation on 12 March 2021.

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36 *Jindal v Liquidation Management Ltd* [2022] NZHC 2292 (leave to appeal declined in *Jindal v Liquidation Management Ltd* [2023] NZCA 413).

[134] Mr McLellan, in his submissions at [71] to [75], reviewed Mr Jindal's affidavit of 7 August 2023 relating to the improvement Mr Jindal asserts has occurred in relation to his financial position. He submits that the matters set out in Mr Jindal's affidavit do not offer sufficient improvement in his financial position to displace Mr Jindal's earlier concession that he is impecunious for the purposes of r 5.45. Mr McLellan also submits that improvement in Mr Jindal's financial position is not a deciding factor in determining the threshold for the purposes of r 5.45 as being met and, if it has improved, it must be likely to improve further. He relies on *Rivendell Mushrooms Ltd v Horowhenua Electric Power Board* in this respect.[37]

*Exercise of the Court's discretion*

[135] Mr McLellan submits that the relevant factors for the exercise of the Court's discretion under r 5.45(2), which requires a balancing of the interests of the plaintiff and the defendant, are:

(a) the merits and prospects of success for the plaintiff 's claim;

(b) whether the defendant has caused the plaintiff 's impecuniosity;

(c) whether there was delay in applying for security for costs; and

(d) general considerations.

[136] Mr McLellan then reviews each of these factors.

*Merits of the case*

[137] Mr McLellan submits that Mr Jindal's claims lack merit. The Court has reached the view that on the first four causes of action of Mr Jindal's should be struck out, which leaves only the fifth cause of action. Mr McLellan submits that the fifth cause of action relates to a statement made to a single person, Mr Robin Alden, who had a legitimate interest in receiving the information from Mr Jindal, and this single

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37 *Rivendell Mushrooms Ltd v Horowhenua Electric Power Board* HC Wellington, CP844/92, 13 November 1998 at 6 citing *Edwards v Epplett* HC Napier CP77/91, 23 February 1993 at 5.

statement is subject to qualified privilege. In any case he submits that the single statement is unlikely to have caused non-trivial damage. Mr McLellan further submits that even if the statements complained of in the fifth cause of action bear the defamatory meanings alleged, any losses or harm to Mr Jindal's reputation are likely to be of such a trivial nature that no action will lie and a damages award is likely to be negligible relative to the costs of the proceeding.

*Cause of the impecuniosity*

[138] Mr McLellan rejects Mr Jindal's allegation that by sending the NZLS emails, Mr Daruwalla caused the impecuniosity because the Law Society delayed granting Mr Jindal his Certificate for 12 months which, in turn, stopped Mr Jindal from obtaining work as a legal practitioner during that time. Mr McLellan rejects this argument for three reasons:

(a) section 55 of the LCA 2006 confers a statutory discretion on the Law Society to judge whether a candidate is a "fit and proper" person, and any delay to Mr Jindal's admission to the bar was caused by the Law Society's delay in, or the adverse exercise of its discretion, to award Mr Jindal with a Certificate;

(b) Mr Jindal has not adduced any evidence to substantiate his assertion that the NZLS emails caused or materially contributed to the Law Society's delay in granting the Certificate; and

(c) even if the NZLS emails contributed to the delay in obtaining a Certificate, Mr Jindal was only delayed in obtaining employment as a legal practitioner and he could work in other fields as an interim measure in mitigation of his alleged losses.

*Conduct of the parties to the proceeding*

[139] Mr McLellan rejects Mr Jindal's allegation that misconduct by Mr Daruwalla in relation to the proceedings indicates the Court should not exercise its discretion to

award security for costs. He rejects Mr Jindal's allegation that Mr Daruwalla has delayed and frustrated the proceeding.

**Mr Jindal's submissions**

*Impecuniosity*

[140] Mr Jindal submits that the impecuniosity threshold, for the purposes of r 5.45, is not met and evidence before the Court shows that:

(a) he has a significant amount of liquidity in the amount of approximately $146,000;

(b) his income and his financial position improved in the last five months and has continued to improve;

(c) he settled litigation with Jarden Securities Limited and Rice Craig advantageously; and

(d) he and his spouse have paid $200,000 out of the $265,000 vendor finance for the property situated at 66 Wheturangi Road, Auckland.

[141] Mr Jindal submits that his earlier affidavit, filed on 31 March 2023, reflected his financial position as it stood then and should be read keeping in mind that his financial position has improved as a result of employment and settlement of two litigation matters.

*Income, assets and debts*

[142] Mr Jindal deposes that he expects to earn between $80,000 and $90,000 during 2023 from his employment with Ormiston Legal, and his spouse, an academic at the University of Auckland, earns $120,000 per annum, bringing the total household income to a little over $210,000. He submits his immediate debts are $53,000 which he can meet from cash balances on hand, and a student loan of $38,500 which will be paid off over the next several years from earnings.

*Mr Daruwalla's actions have contributed to impecuniosity*

[143] Mr Jindal submits that the NZLS emails caused the Law Society to take a negative view of whether Mr Jindal was a fit and proper person, and accordingly refused the Certificate. He submits that it took 12 months to obtain the Certificate and he was left without employment for that period. He rejects the suggestion that he could have obtained alternative employment in other areas.

*Merits of the case*

[144] As to the merits of the causes of action, Mr Jindal refers to his submissions in relation to strike-out in respect of the first four causes of action. In relation to the fifth cause of action, he submits that the defence of qualified privilege is likely to be defeated by evidence of Mr Daruwalla's ill-will towards Mr Jindal.

*No actionable damage*

[145] Mr Jindal submits that the NZLS emails caused a delay of 12 months or more in his law career which is a substantial tort. A loss of employment opportunities for a year is not to be considered insignificant. He refers to the decision in *Newton v Dunn* and *Solomon v Prater*, the latter case citing a passage from the English case of *Dhir v Saddler*:[38]

> 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 publications. What matters is not the extent of the publication, but to whom the words are published.

[146] Mr Jindal also refers to the decision in *Ware v French,*[39] where he submits that the Court dealt with a similar matter where the defendant published defamatory statements to a selected few on whom the plaintiff depended for his profession and livelihood. He submits that the LinkedIn messages sent by Mr Daruwalla, his co-director, caused him detriment as he was forced to resign from the directorship by his fellow directors.

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38 *Newton v Dunn* [2017] NZHC 2083, (2017) 14 NZELR 621; *Solomon v Prater* [2021] NZHC 481 at [111] citing *Dhir v Saddler* [2017] EWCA 3155 (QB) at [55] (emphasis in original).

39 *Ware v French* [2022] EWHC 3030 (KB).

**Quantum of security for costs**

[147] Mr McLellan submits that if a reasonable sum for costs is ordered it would be $20,000 for the commencement of the proceeding and interlocutory stages through to completion of discovery, with Mr Daruwalla at liberty to apply for further security for the remainder of the proceeding (being preparation for trial and the hearing). As Mr Jindal's first four causes of action have been struck out, the length of trial should be assessed on the basis that only the fifth cause of action will go to trial.

[148] Mr McLellan submits that a trial of a week's duration would be required if all the causes of action remain extant or a 3-day trial if only the fifth cause of action continues. Attached to Mr Daruwalla's submissions are calculations of 2B category costs in respect of the various stages of the proceeding.

[149] Mr Jindal submits the matter can be argued in a 3-day trial as most of the issues are legal. He attaches as an appendix to his submissions a summary of recent decisions in respect of security for costs. He sets out at [75] of his submissions what he considers are the principles to be extracted from these cases.

*Conclusion in respect of security for costs*

[150] I am of the view that security for costs should not be ordered against Mr Jindal. I am unconvinced that the threshold in r 5.45(1), that there is reason to believe that Mr Jindal will be unable to pay an adverse costs award, has been met. From his evidence it appears his financial position has improved significantly since he acknowledged impecuniosity in March 2023, and the evidence put forward by Mr Daruwalla as to Mr Jindal's financial situation is largely historical.

[151] As the initial threshold in r 5.45(1) is not met, I do not go on to consider the exercise of the discretion in r 5.45(2).

**Result**

[152] As a result of the conclusions I have reached:

(a) at [70], [80] to [82], paragraph [6] of Ms Williams' affidavit should be excluded from the evidence and paragraph [15] should be admitted into evidence;

(b) at [94] and [95], Mr Jindal's first and second causes of action should be struck out;

(c) at [129], Mr Jindal's third and fourth causes of action should be struck out;

(d) at [150], no order for security for costs should be made against Mr Jindal.

**Orders**

[153] I make the following orders:

(a) Paragraph [6] of the affidavit of Ms Williams, affirmed on 10 March 2023 is excluded from the evidence, and paragraph [15] of that affidavit is admitted into evidence;

(b) Mr Jindal's first and second causes of action in his amended statement of claim dated 9 March 2023 be struck out;

(c) Mr Jindal's third and fourth causes of action in his amended statement of claim dated 9 March 2023 be struck out;

(d) Mr Daruwalla's application for an order for security for costs against Mr Jindal is dismissed.

[154] Counsel are directed to agree costs within **20 working days** of the date of this judgment. If costs cannot be agreed within that 20 working day period, counsel for Mr Daruwalla will file a memorandum as to costs (not exceeding five pages) within **5 working days** of expiry of the 20 working day period. Mr Jindal will file a memorandum in response (not to exceed five pages) within **5 working days** of receipt of counsel for Mr Daruwalla's memorandum. A decision as to costs will then be made on the papers.

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**Associate Judge Taylor**