

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV2023-409-436
[2024] NZHC 1069**

UNDER the Defamation Act 1992
IN THE MATTER of a claim for defamation
BETWEEN DANNY JOHN CANCIAN
Plaintiff
AND RHYS CAIN
Defendant

Hearing: 22 April 2024

Appearances: D G Chesterman for Plaintiff
D H McLellan KC, M O Fee and S O H Coad for Defendant

Judgment: 3 May 2024

**JUDGMENT OF ASSOCIATE JUDGE LESTER
(Strike out application)**

[1] The plaintiff, Mr Cancian, was formerly the sole director of five related companies that carried out residential property development in the Bay of Plenty region. The principal company, for want of a better name, was Bella Vista Homes Limited (**BVHL**). BVHL and the other related companies have now been removed from the Companies Office Register. I will refer to the other four companies as the “related companies”.

[2] BVHL was placed into voluntary liquidation on 30 November 2017. The liquidators appointed were replaced by the defendant, Mr Cain, and another on 18 January 2018. The related companies were put into liquidation later that year in November 2018 by BVHL with Mr Cain and another, being the liquidators.

[3] By early 2021, Mr Cain was the only remaining liquidator.

[4] Running alongside the company liquidation was that on 16 July 2021, Carters, a supplier of building products, filed an application seeking the bankruptcy of Mr Cancian based on a judgment it had obtained for approximately \$1,100,000.00. Mr Cancian opposed the bankruptcy which was halted in July 2022 and remains halted.

[5] Mr Cain’s final liquidation report for BVHL incorrectly referred to Mr Cancian as an undischarged bankrupt. It referred to Mr Cancian as follows: “We note that the director is an undischarged bankrupt” and that Mr Cancian was the director of BVHL. The liquidators’ final report was dated 23 June 2022 and on the same date, final reports were issued for the related companies which also referred to Mr Cancian being bankrupt.

[6] The liquidators’ report was sent to BVHL’s 66 creditors. Each of the related companies had three or four creditors who also received the report in respect of that particular company.

[7] The reports containing the incorrect statement as to Mr Cancian’s status as a bankrupt remained on the Companies Register from 23 June 2022 until 18 August 2022 when it was corrected at the request of Mr Cancian.

[8] The above summary is not substantially in dispute.

[9] Mr Cancian has commenced defamation proceedings against Mr Cain. Mr Cancian pleads at para 28 of his statement of claim:

28. In its natural and ordinary meaning the **defendant's statement** meant and was understood to mean and infer in the context of the **BVHL Report ('Natural Meaning')**:

Particulars

- a. The plaintiff was bankrupt as at 23 June 2022;
- b. The plaintiff was subject to bankruptcy laws including the oversight of the Official Assignee;

[10] The statement of defence, as I have said, does not seriously challenge the core allegations of Mr Cancian up to when the liquidators' reports were corrected. As a first affirmative defence called "mitigation of damages" it pleads:

50. In the event that the defendant is liable to the plaintiff (which is denied), he says that his liability to the plaintiff ought to be reduced, as the plaintiff had no valuable reputation, or alternatively a bad reputation, prior to publication of the defendant's statement.
51. The defendant gives notice that he intends to adduce evidence of misconduct by the plaintiff to establish that he is a person whose reputation is generally bad pursuant to section 42 of the Defamation Act 1992.

Particulars

- (a) The plaintiff was responsible for the Bella Vista Development, which was a catastrophic failure;
- (b) The plaintiff was convicted of obtaining by false pretences and fraud approximately \$32,000 from his employer's trading accounts for his own personal use in 1999;
- (c) The plaintiff was convicted of offences under the Building Act 2004;
- (d) The plaintiff was subject to a successful substantial debt Claim by Carters, which the plaintiff has failed to satisfy;
- (e) The plaintiff has no assets.

I note it is accepted that particulars are required of para [50] which have been tabled in draft.

Mr Cancian applies to strike out the affirmative defence

[11] The affirmative defence set out above, challenged by Mr Cancian on the basis that the pleaded grounds of “existing bad reputation”, are not admissible as they do not relate to “...the sector of the plaintiff’s character and reputation that is relevant to the defamation complained of in the proceeding”.

[12] Mr Chesterman, counsel for Mr Cancian, submits:

The sector of the plaintiff’s reputation relevant to the Defamatory Statement is the plaintiff’s reputation as a bankrupt, subject to bankruptcy laws including the oversight of the of the Official Assignee (**Relevant Sector of Reputation**). Mr Cancian had filed an affidavit in support of his notice of opposition to the strike out. Mr Cain opposed that affidavit being read, essentially on the basis that it was contrary to strike out principles to accept evidence on disputed matters. The disputed matters here being the substance of the matters contained in the positive defence. Counsel were content to leave that admissibility issue to be addressed by me. It was not a feature of the hearing. I reached the view that the affidavit should not be read as it would not have assisted me in resolving this application.

Strike out principles

[13] Not surprisingly, these are not in dispute and have been summarised by Mr Chesterman as follows:

11. Under r 15.1(a) of the High Court Rules 2016, the Court may strike out part of a pleading if it discloses no reasonably arguable cause of action or defence. The criteria for striking out a pleading on this ground were summarised by the Court of Appeal in *Attorney-General v Prince*.¹ (1) The application proceeds on the assumption that the facts pleaded are true; (2) The cause of action or defence must be so clearly untenable that it cannot possibly succeed; (3) The jurisdiction is to be exercised sparingly and only in a clear case.
12. Under r 15.1(b), the Court may strike out part of a pleading if it is likely to cause prejudice or delay. This rule requires an element of impropriety and abuse of the Court’s processes. Under r 15.1(c), the Court may strike out part of a pleading if it is frivolous or vexatious. A frivolous pleading is one that trifles with the Court’s processes. A vexatious one contains an element of impropriety.

¹ *Attorney-General v Prince and Gardner* [1988] 1 NZLR 262 (CA) (1997) 16 PRNZ 258 at 267; endorsed by the Supreme Court in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146].

[14] Mr McLellan KC, counsel for Mr Cain, in his written submissions says:

8. Although the plaintiff's written submissions suggest otherwise, in fact the parties are in broad agreement on the legal framework. Bad reputation can be established in two ways.
 - (a) Specific instances of misconduct — ss 30 and 42 of the Defamation Act 1992 (**the Act**) abolished the historic prohibition on tendering evidence of particular misconduct to substantiate the plaintiff's bad reputation.²
 - (b) General bad reputation — the Act preserves the rule affirmed in *Speidel* that a defendant can call evidence of a plaintiff's general bad reputation (including by calling witnesses who know the plaintiff) in mitigation.³
9. Each pathway is subject to the requirement that evidence of bad reputation is only admissible if directed to the 'relevant sector' of the plaintiff's reputation.⁴

The relevant sector principle and defamation principles generally

[15] Mr Chesterman's submissions refer to general defamation principles. Again, these are not in dispute. A defamatory statement is one that tends to injure the reputation of another person. Mr Chesterman, with reference to the *Laws of New Zealand* submitted:⁵

15. The test is whether, *under the circumstances* in which the words were published, a reasonable person to whom the publication was made would be likely to understand it in a defamatory sense.

(emphasis added)

[16] Also with reference to *Laws of New Zealand*:⁶

Before it is possible to determine whether or not particular words bear a defamatory meaning, it is necessary to determine their meaning. *The words must be considered in their context, and the publication viewed as a whole.*

(emphasis added)

² See the leading discussion in *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA); and *Talley's Group Ltd v Television New Zealand Ltd* [2023] NZHC 696.

³ Defamation Act 1992, s 32; and *Plato Films Ltd v Speidel* [1961] 1 All ER 876 (HL) [*Speidel* (HL)].

⁴ Section 30 of the Defamation Act refers to the "aspect to which the proceeding relates". This is synonymous with the common law test: *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 524.

⁵ Ian McKay "What is Defamatory" *Laws of New Zealand* (online ed, Lexis Nexis) at (3) para 41.

⁶ *Laws of New Zealand*, above n 5, para 42.

The purpose of paragraphs 50 and 51 of the defence

[17] Mr McLellan does not submit that paras [50] and [51] mean the false statement that Mr Cancian was bankrupt is not capable of being defamatory. Rather, as the heading to the positive defence shows, it is said that those paragraphs go to the quantum of any damages.

[18] The real contest between the parties is what does application of the relevant sector principle require here? In short, how narrow is the assessment of the relevant sector? Both counsel referred to the same authorities: *Plato Films Ltd v Speidel* and *Talley's Group Ltd v Television New Zealand Ltd*.⁷

[19] Associate Judge Gardiner in *Talley's Group Ltd* adopted the explanation of the relevant sector principle as set out in the *Speidel* decision:⁸

... inconvenience and injustice would certainly follow ... If allegations of specific instances of misconduct were allowed to be proved in evidence in mitigation of damages, it would open the door to issues which were truly collateral, and which had but an indirect bearing on the main question in the case. It would inevitably prolong the trial and tend to confuse the minds of the jury by distracting their attention from the main issue. The result might be that a trial in which the truth or falsity of one allegation was being investigated might degenerate into trials of the truth or falsity of a dozen other allegations, whether or not relevant to the subject matter of libel, introduced by the defendants for the purposes of mitigating damages.

[20] Mr McLellan emphasised that determining the relevant sector is a fact sensitive enquiry to be undertaken by the trial Judge within the full factual setting. Mr McLellan noted that in the *Speidel* decision, Lord Denning stated that it is “for the Judge to rule which is the relevant sector”.⁹ Mr McLellan also referred to a passage from the Court of Appeal *Speidel* decision, that of Lord Justice Devlin that the scope of material that can legitimately be tendered in mitigation turns on questions of admissibility which are for the trial Judge.¹⁰ The Judge said:¹¹

⁷ *Speidel* (HC), above n 3; and *Talley's Group Ltd v Television New Zealand Ltd*, above n 2.

⁸ *Talley's Group Ltd v Television New Zealand*, above n 2, at [79], citing *Speidel* (HL), above n 3, at 1148.

⁹ *Speidel* (HL), above n 3, at 890.

¹⁰ *Plato Films Ltd v Speidel* [1960] 3 WLR 391 (CA), 391 (CA) at 396 [*Speidel* (CA)], affirmed in *Speidel* (HL).

¹¹ *Speidel* (CA), above n 10 at 396.

The question we have to decide is whether paragraph 5 of the defence, which sets out the matters I have indicated in support of the plea in mitigation of damages, should be struck out. *In a decision which we gave recently in this court, we said that we would not, on an application of this sort, ordinarily decide arguable questions on the admissibility of evidence; they are for the judge at the trial.* Following the [established] principle[s] ... we should strike out matters as inadmissible only if it is plainly inadmissible; if it can reasonably be argued at the trial that the matter is relevant, it cannot, as a general rule, be scandalous or embarrassing or otherwise harmful to the opposite party pleading it.

(emphasis added).

[21] Mr McLellan's submission is that the relevant sector is determined by applying a relevancy test which asks if the evidence given in mitigation is relevant to the part of the plaintiff's reputation capable of being harmed by the defamatory statement. Relevance and admissibility ought to be resolved in their full factual context.

Breadth of the relevant sector

[22] Mr Chesterman, not surprisingly, frames the relevant sector narrowly. He submits that the bad reputation defence is confined to evidence of a person's reputation in the sector of the plaintiff's reputation relevant to the defamation complained of. Evidence of generally bad reputation and other sector's reputation is inadmissible.

[23] Mr Chesterman submits that the relevant sector of reputation in this case is Mr Cancian's reputation as a bankrupt. He submits the only admissible evidence to that sector would have been evidence of Mr Cancian having been a bankrupt in the past, but, as that is not the case, there is no evidence that can be led by Mr Cain concerning the relevant sector.

[24] Mr Chesterman goes on to submit that bankruptcy has a unique stigma that places it in a narrow sector of a person's reputation. He submits that accordingly, a broad approach to the relevant sector and admissible evidence is inappropriate. Mr Chesterman's written submissions state:

A bankrupt is someone who has a diminished legal status, faces a unique set of punitive measures and stigma and who has breached moral obligations by avoiding debts.

[25] Mr Chesterman also submits:

Bankruptcy status has a stigma that is well understood by the reasonable person and that is distinct from a judgment debtor or a poor business manager or someone with no assets. A Bankrupt is a failure, a person to be avoided, not to associate with or to employ, while a judgment debtor is not.

[26] Mr McLellan, referring to *Hotchin v Sheppard*, said it was for Mr Cancian to specify what meanings were to be attributed to the words pleaded, and the areas of reputation attacked by the defamatory statement can be identified by review of the meanings Mr Cancian says the incorrect allegation of bankruptcy conveyed.¹² As Mr Cancian's pleading of the defamatory meaning is narrow, as set out at [9] above, such defines the extent of the relevant sector.

[27] Mr McLellan submitted, with reference to *Australian Broadcasting Corporation v McBride*, that:¹³

... the relevant sector should not be limited "by the artificial construct we now know as an imputation" (per Levine J in *Marsden v Amalgamated Televisions Services Pty Ltd* [1999] NSWSC 1119, as applied in *O'Hagan v Nationwide News Pty Ltd* by Stein JA and Brownie A-JA).

The essential question in determining the relevant sector remains: what is the scope of the plaintiff's reputation capable of being harmed by the defamatory material?

[28] Associate Judge Doogue in *Hotchin* said of the relevant sector of the person's reputation which the proceedings bring into question:¹⁴

Detailed and hair-splitting distinctions about what sector of the plaintiffs' reputations has been damaged should not, in my view, be embarked upon.¹⁵ If that occurs, there is a danger of the plaintiffs being put in a position where they can exclude from the Court's attention material that is relevant to the plaintiffs' reputations and, as a result, lead to undeserving plaintiffs being compensated for loss of reputation which they did not in fact have.

¹² *Hotchin v Sheppard* [2012] NZHC 2527 at [28].

¹³ *Australian Broadcasting Corporation v McBride* [2001] NSWCA 322, (2001) 53 NXWLR 430 at 437.

¹⁴ *Hotchin v Sheppard*, above 12 at [33].

¹⁵ See caution in *Television New Zealand Ltd v Prebble*, above n 4, at 547 against attempts "to compartmentalise reputation into overly refined segments".

[29] Section 30 of the Defamation Act 1992 provides:

In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad *in the aspect to which the proceedings relate*.

(emphasis added)

[30] Further, as submitted by counsel for the defendant in *Hotchin* in relation to s 30, the relevant sector:¹⁶

...does not require the instances of misconduct proved by the defendant to be identical to the defamatory meanings alleged...

[31] The misconduct relied on must be directed to the *sector* or aspect of the plaintiff's character that is relevant to the alleged defamatory comment, not the precise or specific subject of that comment.

[32] Mr Chesterman submits that none of the misconduct pleaded in [51] set out at [10] above is within the relevant sector as he defines it and that Mr Cancian's damages should not be reduced because of any reputation he may have for any of the pleaded misconduct.

Decision

[33] I am satisfied the matters raised by Mr Chesterman are not suitable for a strike out application. Mr Chesterman's characterisation of what a reasonable person would understand from someone being bankrupt, that is, the pleaded imputation set out at [9] arguably does not fully address the aspect, or sector of Mr Cancian's reputation to which the proceedings relate. It is artificial to say that a false claim of bankruptcy does not impact on Mr Cancian's reputation relating to his financial affairs, business management skills or his skill as a builder. The incorrect claim of bankruptcy came in the liquidators' report where the matters just mentioned would have been, if not expressly canvassed, then implicitly so. Context is all important. A person whose company was wholly dependent on the tourism industry for example, may have become bankrupt essentially through no fault of their own and, if anything, is likely to

¹⁶ *Hotchin v Sheppard*, above n 12, at [22].

be the object of some sympathy through being bankrupt as a result of matters beyond their control. At the other end of the continuum is someone who has been bankrupted because they have been fraudulent.

[34] The types of damage claimed by Mr Cancian arguably presuppose that the effect of the incorrect statement that he was bankrupt was much wider than him simply being seen as someone subject to the statutory restrictions set out in the Insolvency Act 2006. For example, Mr Cancian pleads loss of a particular employment opportunity as a result of the incorrect statement but pleads that since the withdrawal of that employment offer on 25 June 2022, he has been and remains unemployed despite his efforts to seek employment and as a consequence has lost income which he quantifies from 1 August 2022 through to 31 March 2023 and ongoing — his statement of claim being filed in August 2023.

[35] This claim raises causation issues as to why Mr Cancian has been unable to obtain employment. In my view, it is reasonably arguable that Mr Cain is entitled to say Mr Cancian has been unemployable because of the matters Mr Cain pleads by way of positive defence set out in his submissions at paras 50 and 51 (set out at [10] above). In a similar vein is Mr Cancian's pleading as to aggravating factors in relation to damages. Mr Cancian pleads that the Companies Register has a wide readership base, particularly in relation to liquidators' reports and would have been read by persons with an interest in the company, including creditors and "people in the same industry", that is the building industry. There is a further pleading:

- c. There was public interest within the Bay of Plenty Region in the plaintiff and the **Companies** as a consequence of newspaper articles and the Tauranga City Council's prosecution of the plaintiff under the Building Act, and this public interest would have increased the readership of the **BVHL Report**;

[36] Paragraphs 29 and 30 of the statement of claim provide:

Particulars

...

29. The **defendant's statement** and **Natural Meaning** were false, to the plaintiff's discredit and defamatory.

General Damage

30. By reason of the **BVHL Internet Publication** of the **defendant's statement**, the plaintiff's reputation has been or is likely to be injured and the plaintiff has suffered hurt, distress and embarrassment.

[37] The above pleadings suggest that the harm to Mr Cancian's reputation is wider than the narrow imputation he pleads, set out at [9] above.

[38] The statements said to be defamatory here were made in final liquidators' reports. Those reports are not before the Court given my ruling on the admissibility of Mr Cancian's affidavit. I have not referred to them but have seen enough final liquidator's reports to know that they often contain a thumbnail sketch of why a liquidation occurred, a precis of the conduct of the liquidation and a statement of recoveries and creditors.

[39] The liquidators' report was sent to creditors who were owed money by Mr Cancian's company. How someone owed money by Mr Cancian's company would view the incorrect statement that he was a bankrupt will depend on the circumstances in which that creditor's debt arose, its value and potentially Mr Cancian's and his company's conduct in respect of that debt up to liquidation and the outcome of the liquidation.

[40] The primary cohort of people to whom the incorrect statements were made were creditors of Mr Cancian's company. Mr Chesterman disputed that the creditors of BVHL and the related companies could be said to be the principal recipients of the incorrect statement but accepted no work had been done to try and learn how many times the liquidators' reports were accessed while they contained the incorrect statement. A reasonable person to whom the publication was made, may be taken to have knowledge of the affairs of the related companies given such would have been in the liquidators' reports. The whole publication, that is the whole report, must be considered.

[41] The effect of a false claim of bankruptcy on an apparently insolvent rogue with a string of judgment debts and a history of not honouring repayment arrangements would be very different from a false claim of bankruptcy on a solvent business person.

Of course, I am not saying that Mr Cancian falls into either of these categories or somewhere in the middle. That is the point, that assessment is a matter for trial.

[42] That said, I will comment briefly on the particular matters in para [51(a)] of the statement of defence (set out at [10] above).

Plaintiff responsible for BVHL being a “catastrophic failure”

[43] Mr Chesterman submits the failure of BVHL is outside the sector of Mr Cancian’s reputation regarding bankruptcy. Mr Chesterman suggests that the failure of BVHL concerns project management, compliance with the Building Act 2004 and expertise of a builder, all of which are unrelated to the sector of reputation relating to bankruptcy. This is arguably too narrow a focus on behalf of Mr Cancian. Again, the alleged defamation was in the context of the final liquidators’ report of BVHL and the related companies.

[44] Mr Cancian has issued proceedings against the Local Authority where BVHL was carrying out its development; Mr Cancian being of the view that the responsibility for the failure lies with the Local Authority.

[45] The responsibility, if any, of the Local Authority for the failure of the project may well be relevant both ways. That is, if it is determined that the Local Authority was substantially responsible for the failure, then that determination would be an answer to some extent to the pleading that Mr Cancian was responsible for the failure of BVHL. The converse is true. If it is held that the Local Authority did nothing wrong, responsibility will have been Mr Cancian’s given he was sole director and project manager of the project.

False Pretences Conviction

[46] The next point in para [51] of the defence is that Mr Cancian was convicted of obtaining by false pretences \$32,000.00 in 1999. Mr Chesterman submits that this conviction is not in the relevant sector of Mr Cancian’s life and did not take place in a relevant period such as to affect his current reputation. Mr Chesterman submits: “The conviction relates to reputation for probity, not to bankruptcy.” This is a more

borderline factor but the circumstances of the failure of the company, the circumstances in which the company continued to incur debt (if indeed that is the case), may speak to Mr Cancian's probity. I simply do not know — such are matters for trial.

[47] The authorities provide that the evidence of bad conduct in effect cannot be stale. In *Speidle*, Viscount Simonds referred to:¹⁷

... the cruelty of an attack on a plaintiff for offences real or imaginary which, if they were committed, may have been known to few and by them have been forgotten.

[48] In *Hotchin*, the defendants wished to refer to insider trader allegations, that was some 10 years before the events alleged defamatory comment.¹⁸ Here, the convictions are over 20 years old, dating back to 1999.

[49] I remind myself that this is a strike out application. I adopt the approach taken by Associate Judge Doogue to this issue, where he said:¹⁹

As to the issue of time lase, I consider that this is not a case where the court on a summary application can conclude that it is unarguable that any effect that the share trading events might have had on the reputations of the plaintiffs must have been exhausted by the date when the defamatory statements were made.

Convictions under the Building Act

[50] Mr Chesterman submits the convictions were for non-compliance with building consents and relate to the sector as reputation regarding building work, not bankruptcy. Mr Chesterman notes that the judgment in which these convictions are recorded is over 80 pages long and involved multiple defendants. He submits:

If the defendant can plead these convictions the trial evidence will need to address the specific charges and their factual background which would be time intensive, complicating or distract from the real issues.

[51] That may well be the case, but this conviction was in 2020 and related to the Bella Vista development which, as noted at [35] is pleaded by Mr Cancian as being

¹⁷ *Speidel* (HL), above n 3, at 881.

¹⁸ *Hotchin v Sheppard*, above n 12.

¹⁹ *Hotchin v Sheppard* HC AK CIV-2011-404-7120 at [39].

a matter for public interest. Again, the contents of the incorrect statements mean this issue may be relevant, that is, admissible. That explaining the charges and their background may be involved does not found a ground for them to be struck out.

The Carter's debt

[52] Mr Chesterman submits: "The judgment debt is not in the same sector as bankruptcy ...". It is said that Mr Cancian is attempting to take steps to pay the judgment debt through bringing his claim against the Local Authority. The fact is the judgment debt exists, it is substantial, it arose during Mr Cancian's management of the Bella Vista project albeit he says his management was not the reason why BVHL failed.

[53] Self-evidently the debt is substantial. The circumstances in which the debt was incurred are, in my view, arguably relevant to assessing the impact of the incorrect statement of bankruptcy would have on someone of knowledge of the circumstances. If Mr Cancian allowed the debt to build over an extended period with no reasonable basis for expecting it to be paid, that would be quite different from if it was the case that the debt arose over a relatively short time and that Mr Cancian had reasonable grounds for believing the company could pay the debt but that it was thwarted through the actions of the Local Authority. Again, context will be everything.

No assets

[54] Mr Chesterman submits:

The plaintiff's lack of assets is no relevance to the sector of his reputation regarding bankruptcy. It is perhaps relevant to wealth or asset ownership, but not to bankruptcy.

[55] I do not accept that. If Mr Cancian has no assets, yet he allowed a guarantee debt of over \$1,000,000 to be incurred, presumably knowing that Carters was relying on his guarantee. I note s 26 of the Insolvency Act provides:

26 Return that sufficient goods not found under execution process

A debtor commits an act of bankruptcy if, under an execution process issued against the debtor or the debtor's property, a return is made that

sufficient goods and chattels of the debtor could not be found on which to levy the debt.

[56] In short, in my view, the sting of a false allegation of bankruptcy cannot be separated from the circumstances in which that incorrect statement was made or the commercial and business reputation of Mr Cancian. Such are factual matters for trial. They require the type of factual review unsuitable for a strike out application.

[57] It follows the application to strike out is *declined*.

Costs

[58] There would usually be reason why costs should not follow the event save that I note that Mr Cancian was granted Legal Aid on 10 September 2023. This application was filed after that date. If counsel wish to be heard on costs, a memorandum should be filed *within five working days*.

Further particulars

[59] As briefly touched on, Mr McLellan had provided Mr Chesterman with draft particulars for para [50] of the statement of defence. Such are required given the general nature of para [50]. Those particulars in general terms overlap with those in para [51]. But for the intention to provide those particulars, I would have considered para [50] to be too general and directed particulars. Mr Cain is to provide particulars in respect of para [50] *within 15 working days*.

Associate Judge Lester

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