NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2024-485-000210
[2024] NZHC 3598

IN THE MATTER	of an appeal of Reserved Decision of Judge B Davidson
BETWEEN	SARAH SMITH Appellant
AND	JENNIFER BLACK Respondent

Hearing: 29 October 2024

Counsel: Appellant in person
E C Copeland and I R Black for Respondent

Judgment: 28 November 2024

JUDGMENT OF LA HOOD J

Appeal against strike out of a defamation proceeding

[1] Ms Smith says that Ms Black, the principal of her daughter's primary school, defamed her by making false statements to the police and to a lawyer appointed to represent her daughter in a Family Court dispute relating to the child's care.

[2] Ms Smith appeals against the District Court decision striking out her defamation proceedings as untenable and an abuse of process.[1]

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[1] *[Smith] v [Black]* [2024] NZDC 4687 [Decision under appeal]. I have adopted fictitious names to protect the identity of the child.

[3] For the reasons that follow, I consider the appeal should be dismissed. In summary, the Judge did not err striking out the claim because:

(a) The statements made to counsel for the child (Rachael Dewar) in February and May 2022 are not capable of bearing a defamatory meaning about Ms Smith.

(b) While it is reasonably arguable that the statement to Ms Dewar in September 2022 may bear a defamatory meaning about Ms Smith by implying that she is not complying with Court orders, an affirmative defence is unanswerable.

(c) The affirmative defence of absolute privilege is unanswerable in respect of disclosure by Ms Black to Ms Dewar about compliance with the child's care arrangements and the parents' behaviours in respect of the child.

(d) In any event, the defence of qualified privilege is unanswerable, and the appellant has failed to establish a reasonably arguable basis for a claim of malice.

The allegedly defamatory statements

[4] Ms Smith and, her ex-partner, Mr Jones's daughter attends primary school. There is an ongoing Family Court dispute over the child's care arrangements. Ms Dewar was appointed as lawyer for the child.

[5] In early 2022 there was a parenting order in place under which Mr Jones collected the child from school fortnightly on Thursdays and cared for her until the following Monday morning school drop-off.

[6] On 24 February 2022, Mr Jones was scheduled to collect the child from school. The principal and two staff saw the child running away from the school with a woman they say was unknown to them. The principal, out of concern, informed Mr Jones of this (who was waiting at the other gate to the school), and contacted the police saying,

"a woman dragged [the child] and ran away from the school when school finished …". The child was located later that day at Ms Smith's family home, not far from the school. Ms Black's statement to police on 24 February 2022 is the first allegedly defamatory statement.

[7] The remaining alleged defamatory statements are the three following statements by Ms Black to the lawyer for the child, Ms Dewar:

(a) On 28 February 2022, Ms Black informed Ms Dewar of her account of the 24 February incident by email:

> Hi Rachael,
>
> Myself, the deputy principal and the classroom teacher were all standing at the school gate. We saw her go through the gate and run through the parents congregated on the pavement along with an unknown (to us) woman.
>
> We were very concerned and immediately informed dad who we found waiting at the other gate.
>
> Regards,
>
> [Jennifer]

(b) On 20 May 2022, Ms Black replied to an email from Ms Dewar requesting information about Mr Jones for the purposes of the Family Court proceedings. Ms Black wrote:

> Hi Rachael,
>
> 1. [The child's] attendance records for this year are attached.
>
> 2. Any observations you wish to make about [Mr Jones's] engagement with the school
>
>   [Mr Jones] has been an exemplary parent to work with at school. He is approachable, engaged and clearly shows a deep love and concern for his daughter. We see him to be a good and supportive parent who always puts his daughters welfare first.
>
> 3. Any observations of [the child's] presentation, either at the time of going into contact with [Mr Jones] or upon return from that contact.

> When going to leave with her father it is always a struggle to get her to go. Last week was particularly difficult and involved the DP and AP having to support dad to get [the child] to go with her father to the car. She always comes back happy, smiling and having had a nice time. It is the fear of going initially that seems to be an issue for her. Over time I think this will improve as she sees time with her father and her stepsister is enjoyable. Dad's patience and support is admirable.
>
> Best wishes,
>
> [Jennifer]

(c) On 15 September 2022, Ms Black emailed Ms Dewar with an update regarding the child. This statement was put in evidence at the resumed Family Court proceeding on 23 September 2022, following an earlier direction from the Court on 30 March 2022 that Ms Dewar file an updating report including relevant material from the child's school.[2] Ms Black wrote in the 15 September 2022 email:

> Hi Rachael,
>
> I hope you are well.
>
> We have a resurgence of incidents with [the child's] mum again.
>
> This week she has made accusations against other girls in [the child's] class which no one else has seen or knows anything about. This was around being invited to a birthday party with another child in her class which mum doesn't appear to want her to attend.
>
> Today [Mr Jones] came as usual to pick up [the child] and she slipped away out of a different gate and went to mums house.
>
> We rang mums house to see if we could locate her as she was missing after school. I went around to the house with the Assistant principal to check she was safely home.
>
> [The child's] grandparents opened the door, they were very agitated and didn't appear to speak English. I asked if I could see and talk with [the child], they didn't agree to that. It seemed that mum was out at work ([redacted]).

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2 Decision under appeal, above n 1; and *[Jones] v [Smith]* [2022] NZFC 2904 at [5(e)].

> We recorded the interaction, for our own safety with the grandparents if it would be useful for you to see (it will need translating).
>
> We left without seeing [the child]. [Mr Jones] waited at school until we returned without his daughter. He was calm but upset this has happened again.
>
> I am of the strong opinion [the child] was told to go to mums home without meeting her dad and one of the grandparents could have met her on the way home.
>
> It is very sad that [Mr Jones] continues to be denied his parental rights by mum.
>
> Let me know if you need any documents from us.
>
> Best wishes,
>
> [Jennifer]

Overview of the District Court decision

[8] Ms Black applied under r 15.1 of the District Court Rules 2014 for the proceeding to be struck out on the basis it disclosed no reasonably arguable cause of action and was otherwise an abuse of the Court's process.

[9] The Judge struck out the proceedings because:[3]

(a) The statement to police on 24 February 2022, and the email to Ms Dewar recounting the events on 28 February 2022, refers to an "unknown woman" taking the child. Neither were statements about an identified person and neither contended Ms Smith was the kidnapper.[4] In any event, both statements would be protected as qualified privilege and truth (being a truthful account to the police and to Ms Dewar).[5]

(b) The statement to Ms Dewar of 20 May 2022 could not be said to be defamatory of Ms Smith as it solely involved comments about Mr Jones.[6]

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3 Decision under appeal, above n 1.
4 At [14].
5 At [15].
6 At [19].

(c) The statement to Ms Dewar on 15 September 2022 concerned two issues: that Ms Smith was alienating the child from other students, and that there had been an uplift problem after school. The statement objectively might have the capacity to lower Ms Smith in the estimation of others, though that capability is weak and highly unlikely when seen contextually.[7] But even if it were defamatory, the defences of absolute and qualified privilege available to Ms Black would be unanswerable.[8] The Judge noted:

> [24] I can see absolutely no ill-will or malice on Ms [Black's] part such that might deprive her of these defences. After all this was an email from a school principal as requested by lawyer for the child and as required by the Family Court. It was relevant information requested of Ms [Black] who had a moral, and perhaps even legal, duty concerning issues around [the child's] custody/contact arrangements. Ms [Black] was entitled to expect that the information would be given by her without the fear or risk of a defamation proceeding.

(d) None of the contended statements, either individually or collectively, are capable of supporting a claim in defamation.[9]

(e) In any event, the proceeding was regarded as both vexatious and an abuse of process, being a collateral attack on Family Court decisions and designed to annoy Ms Black.[10]

Approach on appeal

[10] This is a general appeal governed by the principles set out in *Austin, Nichols & Co Inc v Stichting Lodestar*. The appellant is entitled to judgment in accordance with the independent opinion of the appellate court.[11] If the appeal court forms a different view to that of the original decision maker, the decision under appeal is wrong and the appeal must be allowed, even if it was a conclusion on which reasonable minds

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7 At [22].
8 At [23].
9 At [25].
10 At [26].
11 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 [*Austin, Nichols*] at [16].

might differ.[12] However, the appellant bears the onus of persuading the court to reach a different conclusion and must identify the respects in which the judgment under appeal is said to be in error.[13]

The issues on appeal

[11] The issue on appeal is whether the Judge erred in determining that the proceeding should be struck out for disclosing no reasonably arguable cause of action or for otherwise being an abuse of process. The sub-issues arising are whether the Judge was wrong to conclude that:

(a) the statements were incapable of being defamatory;

(b) in any event, the statements would be protected by an affirmative defence of qualified or absolute privilege; and

(c) in any event, the proceeding was an abuse of process.

[12] Before dealing with the issues in turn, I will set out the legal principles to be applied in broad terms and will return to some of them in more detail later.

Legal principles

[13] 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 Court of Appeal in *Attorney-General v Prince* summarised the criteria for a strike out on this ground as follows:[14]

(a) The application proceeds on the assumption that the facts pleaded are true.

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12 *Green v Green* [2016] NZCA 486 restating the relevant principles in *Austin, Nichols.*

13 At [30].

14 *Attorney-General v Prince and Gardner* (1998) 1 NZLR 262 (CA) at 267 endorsed by the Supreme Court in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146].

(b) The cause of action or defence must be so clearly untenable that it cannot possibly succeed.

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

[14] The cause of action or defence must be clearly untenable. In *Couch v Attorney-General,* the Court stated "[i]t is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."[15]

[15] Under r 15.1(c)–(d), the Court may strike out part of a pleading if it is frivolous or vexatious, or otherwise an abuse of process. The Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* summarised these grounds as follows:[16]

> ... In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) — "otherwise an abuse of process of the court" — extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings (sic) that has been brought with an improper motive or are an attempt to obtain a collateral benefit. ...

[16] The claim might properly be regarded as vexatious or an abuse of process because of the strength of the defence.[17] Where a foundation for an affirmative defence is raised, the burden is on the plaintiff, Ms Smith in this case, to produce something to give "an air of reality" to the contention that the defence is defeasible.[18] This Court in *Rafiq v Meredith Connell* stated the approach as follows:[19]

> ... There is an initial onus on the defendant to show that there is a clear case for the affirmative defence. Once that is established, the defendant will be entitled to a strike out order unless the plaintiff shows a *clearly arguable basis* for saying that the defence is defeasible. ...

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15 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

16 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89] (footnotes omitted).

17 *Rafiq v Meredith Connell* [2014] NZHC 1597 at [11 *(Rafiq)*].

18 See *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [34] in the context of a Limitation Act defence, discussed in *Rafiq*, above n 17, at [10].

19 *Rafiq*, above n 17, at [11] (Emphasis added).

[17] It is also useful at this juncture to briefly set out the elements of the tort of defamation. In order to progress a claim in defamation, the plaintiff must establish:

(a) a defamatory statement has been made;

(b) the statement was about the plaintiff; and

(c) the statement has been published by the defendant.

Issue (a): Was the Judge wrong to conclude that none of the statements were capable of being defamatory?

[18] For the purposes of strike out, the question is whether the statements were capable of bearing a defamatory meaning about Ms Smith (such that the cause of action is reasonably arguable).

[19] There is no legislative definition of a defamatory statement, however, the Courts have variously framed a defamatory statement as, for example, one which may tend to lower the plaintiff in the estimation of right-thinking members of society generally; is to the plaintiff's discredit; or which tends to make others shun and avoid the plaintiff.[20] In determining whether words are capable of bearing a defamatory meaning the test is what would the ordinary reasonable person understand by them, including by inference, and with regard to the context.[21]

[20] I agree with the Judge that there is a more fundamental issue with the statements of 24 and 28 February 2022 regarding identity. Ms Smith has provided no evidence that Ms Black's statement to police on 24 February identified her as the woman who ran away with the child. The account of Ms Black in her email to Ms Dewar on 28 February that "We saw [the child] go through the gate and run through the parents congregated on the pavement along with an unknown (to us) woman" does not identify Ms Smith.

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20 Ursula Cheer "Defamation" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [15.3.1] [*Todd on Torts*].

21 At [15.3.6] citing New *Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

[21] Ms Smith submits that Ms Black made a defamatory statement by suggesting Ms Smith was the woman who took away or "kidnapped" the child from school on 24 February 2024. I accept that it is not necessary for Ms Smith to be named. The question is whether reasonable persons acquainted with Ms Smith would reasonably believe that the words referred to her.[22] In the absence of direct evidence as to the exact words Ms Black expressed to police on 24 February, or what description she offered, if any, beyond an "unknown woman", I do not accept that there is a clear inference available that Ms Black was referring to Ms Smith.

[22] It is true that the child was located at Ms Smith's home, but that is the obvious first port of call given its proximity to the school and that Ms Smith is the primary caregiver. The 28 February email also goes no further in terms of identifying Ms Smith or implying that Ms Smith was the unknown woman. Whether or not the words are capable of bearing a defamatory meaning, I agree with the Judge that they are not capable of bearing such a meaning about Ms Smith. Even if I am wrong about this, for reasons to follow, I conclude that strike out is appropriate as there is a clear case for an affirmative defence and no clearly arguable basis for saying it is defeasible.

[23] In respect of the statement on 20 May 2022, I agree with the Judge that "[n]othing in this statement is defamatory of Ms Smith whatsoever, either directly or by inference. It is not even about Ms Smith; these comments are about Mr [Jones]."[23] Ms Black's statements about Mr Jones's engagement with the school and her observations of Mr Jones as a parent are incapable of carrying a defamatory meaning about Ms Smith. In any event I did not understand Ms Smith to pursue a challenge against the Judge's findings about this statement.

[24] Ms Black's statement on 15 September 2022, is less clear cut. The "sting" or the implication of the statement is that Ms Smith, identified in the email as the child's

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22 *Todd on Torts*, above n 20, at [15.4.1].
23 Decision under appeal, above n 1, at [19].

mum, is not complying with the Family Court order around the school pick up arrangements. That is especially imputed by the statements:

> I am of the strong opinion [the child] was told to go to mums home without meeting her dad and one of the grandparents could have met her on the way home.
>
> It is very sad that [Mr Jones] continues to be denied his parental rights by mum.

[25] I consider that such an implication is one which may tend to lower Ms Smith in the estimation of right-thinking members of society generally. Putting to one side the possible defences, I would not be prepared to rule out that the 15 September 2022 statement would be capable of bearing a defamatory meaning about the appellant. I consider it is reasonably arguable and therefore not dispositive for the purposes of strike out. Likewise, the Judge accepted that the statements "viewed objectively ... might be capable of lowering Ms Smith in the estimation of others showing her to be [an] unfit parent",[24] although the Judge doubted the strength of that capability.[25]

Issue (b): Was an affirmative defence available to Ms Black?

[26] Ms Black relies on the defences of truth, honest opinion, qualified privilege and/or absolute privilege. The issue is whether, in the face of Ms Black raising an affirmative defence, Ms Smith can show a clearly arguable case that the defence is defeasible.

[27] The defences of truth and honest opinion raise some difficulty on a strike out application given the lack of evidence as to what exactly occurred on 24 February and on the occasions discussed in Ms Black's 15 September email. And whether Ms Black's beliefs were genuinely held and based on facts proven to be true or not materially different from the truth.

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24 At [22].

25 At [22]–[23]. The Judge noted at [23] that he was not confident that the evidence would show that, on the balance of probabilities, it was a defamatory statement. I note this is not strictly an accurate depiction of the test, which is rather, whether the statements are *capable* of bearing a defamatory meaning. In order words, is it reasonably arguable. However, nothing turns on the Judge's misstatement, as in any event, the Judge found, as I do, that an affirmative defence is unanswerable.

[28] However, I consider the strike out application is conclusively determined by the defence of absolute privilege, but if I am wrong about that, the defence of qualified privilege is also indefeasible.

Absolute privilege

[29] I have not had the benefit of detailed or focused argument on the applicability of absolute privilege, but it is clearly in issue.

[30] The Judge accepted that "the defences of absolute and qualified privilege available to Ms Black would be unanswerable".[26] However, he did not elaborate on the scope or application of either privilege.

[31] Ms Smith submits that absolute privilege should not be afforded to Ms Black as she is not a party, representative, or witness in the Family Court case, nor is she a client of Ms Dewar, and the statements were not made in the course of a court or tribunal hearing.

[32] The statements to Ms Dewar on 28 February and 15 September may be subject to absolute privilege developed at common law and recognised by s 14 of the Defamation Act 1992, which states:

> (1) Subject to any provision to the contrary and any other enactment, in any proceedings before—
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> (a) A tribunal or authority that is established by or pursuant to any enactment that has power to compel the attendance of the witnesses; or
>
> (b) A tribunal or authority that has a duty to act judicially,—
>
> anything said, written, or done in those proceedings by a member of the tribunal or authority, or by a party, representative, or witness, is protected by absolute privilege.
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> ...

[33] This section does not broaden the scope of the privilege at common law and merely recognises its application in respect of "all those who take part ... in judicial

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[26] At [23].

processes".[27] Absolute privilege applies to what is done in the course of the hearing before the court or tribunal; what is done from the inception of proceedings including all pleadings and other documents brought into existence for the purpose of the proceedings; and to the briefs of evidence and what is said in the course of interview of potential witnesses.[28] Absolute privilege has in the United Kingdom, for example, been held to extend to a psychiatric report prepared for the purposes of family law proceedings.[29] Absolute privilege covers those providing evidence to the police, whether as a witness or as a complainant,[30] as well as statements made by persons assisting in an inquiry to investigators.[31]

[34] Absolute privilege cannot be defeated by malice; it protects even those statements made which are dishonest or knowingly false, irrelevant or relevant, malicious or bona fide. It operates to protect free and frank communications in furtherance of the administration of justice.[32] As the learned authors of *Gatley on Libel and Slander* observe, the privilege is established "not for the benefit of malicious witnesses but of the public benefit to prevent honest witnesses being deterred from telling the truth by fear of action."[33] The authors go on to note that:[34]

> ... the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.

[35] The privilege extends not only to evidence given by a witness orally but to evidence provided in an affidavit,[35] a witness statement,[36] and beyond what is said or

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27 *Gray v M* [1998] 2 NZLR 161 (CA) at 164; and *W v S* [2020] NZHC 3418.

28 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA) at 699 citing *Lincoln v Daniels* [1962] 1 QB 237 (EWCA) at 256.

29 *Tufano v Vincenti* [2006] EWHC 1496 (QB), [2006] All ER (D) 260.

30 *Buckley v Dalziel* [2007] EWHC 1025 (QB), [2007] 1 WLR 2933. See also *Mahon v Rahn (No 2)* [2000] 4 All ER 41, [2000] 1 WLR 2150 (CA) (A financial regulator sought evidence in connection with a hearing as to whether a person was fit and proper to carry on investment business. Absolute privilege applied irrespective of whether the maker of the statement ended up giving evidence at any trial or hearing.).

31 *Taylor v Serious Fraud Office* [1999] 2 AC 177, [1998] 4 All ER 801 (HL) at 215 (Absolute privilege applied to general out of court statements made by or to investigators which could be fairly said to be part of the process of investigating a crime with a view to prosecution).

32 *Lincoln v Daniels*, above n 28, at 256.

33 *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, 2022) at [14-011].

34 At [14-011].

35 At [14-012] citing *Munster v Lamb* (1883) 11 QBD 588 at 601; *Kennedy v Hilliard* (1859) 10 IrCLR 195 at 211; and *Smeaton v Butcher* [2000] EMLR 985 (CA).

36 At [14-012] citing *Darker v CC West Midlands* [2001] 1 AC 435 (HL) at 468.

done in Court.[37] That includes statements made by persons who *may* be called at trial.[38] Whether or not a statement is covered by absolute privilege is to be assessed at the time of publication.[39] The later deployment of a statement in judicial proceedings is not determinative, and it is a necessary condition of absolute privilege for statements made in advance of judicial proceedings by prospective witnesses that the statement was made for the purpose of such proceedings.[40]

[36] Ms Dewar's report to the Family Court squarely falls within the ambit of absolute privilege as recognised by s 14 of the Act. The more difficult issue is whether absolute privilege extends to Ms Black's statement to Ms Dewar, as a source of the content of that report. Under s 14 that may depend on whether she is properly classified as a "witness" in the Family Court proceedings.

[37] The context of the Family Court proceedings must also be relevant to the interpretation of a "witness" for the purpose of such proceedings. The Family Court is to operate in a way that avoids unnecessary formality,[41] and while the Evidence Act 2006 applies, the Court may receive any evidence, whether or not admissible under the Evidence Act, that the Court "considers may assist it to determine the proceeding".[42]

[38] As noted above, the overseas authorities suggest that absolute privilege is not contingent on the statement maker giving evidence at any trial or hearing,[43] and extends to documents created in the course of, or for the purposes of, the proceedings.

[39] The interest to be protected by the potential application of absolute privilege is the Family Court's interest in the lawyer for the child adducing all relevant evidence about the suitability of the child's care arrangements. That interest prompted the

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37 At [14-012].

38 At [14-012]. The authors cite *Beresford v Jones* (1914) 30 TLR 591; and *Robinson v Dowling* (1916) OPD 161: "If a person who is approached by a solicitor collecting evidence is liable to an action for defamation for any statements which he makes and which may turn out to be defamatory, it is clear that no information would be obtained and that the administration of justice would be brought to a standstill".

39 *Stocker v Stocker* [2016] EWHC 147 (QB) at [29].

40 At [29] and [32].

41 Family Court Rules 2002, s 3(1)(b) (purpose).

42 Family Court Act 1980, s 12A.

43 *Mahon v Rahn (No 2)*, above n 30.

Court's request for an updating report including relevant material from the child's school in its direction on 30 March 2022.[44] As the Family Court proceedings were ongoing as of September 2022, the interest was a live one. As a matter of principle, the privilege necessary to protect that interest should extend to the school principal's communications to Ms Dewar, which were later incorporated in her report to the Family Court. The flow of information to the lawyer for the child may be seriously impeded, as might the lawyer in her role of advancing the child's best interests, if potential witnesses feared that they might be subject to later action by the parties in the dispute.

[40] On the other hand, Ms Smith, and the public generally, have a substantial interest in having an opportunity to vindicate their position and protect their reputation in the Family Court proceedings where their care rights are at stake. But I consider the appropriate avenue for Ms Smith to protect her position was and is to challenge the information provided to the Court within the Family Court proceedings.

[41] Ms Black is compellable as a witness in the proceeding.[45] Had Ms Black provided a formal witness statement or an affidavit in connection with the proceeding, that would have undoubtedly attracted absolute privilege. I consider no distinction should be drawn on the basis that her statement was provided through Ms Dewar's report rather than as a separate witness statement, given the flexibility in which the Family Court is empowered to receive evidence.

[42] The opportunity for the evidence to be subject to examination by the Court is an important safeguard against careless, malicious or untruthful evidence.[46] The interest of the Family Court in receiving all potentially relevant information, which can be tested at a hearing, must give way to Ms Smith's interest in access to the courts to vindicate her position or protect her reputation through a defamation claim.

[43] The opportunity for Ms Smith to challenge the evidence in the Family Court proceedings raises the concern that these proceedings are a collateral attack on the

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44 *[Jones] v [Smith],* above n 2, at [5(e)].
45 David Rolph *Defamation Law* (Thomson Reuters, Sydney, 2016) at [10.30] (Whether a witness is compellable is a relevant consideration).
46 See *Roy v Prior* [1971] AC 470 (HL) at 480.

Family Court's interim parenting order. Ultimately, Ms Smith did call evidence at the interim parenting order hearing. Only after an adverse finding was made that Ms Smith had breached the parenting order did she commence these collateral proceedings to pursue Ms Black to whom she attributes the Judge's findings.

[44] The purpose of absolute privilege, in this context, is to encourage free and frank provision of information to the Court without fear of collateral civil proceedings. That concern is particularly acute for interim parenting orders in the Family Court in light of the regime under which such orders are made. In *Fox v Fox*, Isac J struck out a judicial review proceeding challenging an interim parenting order of the Family Court, noting that Parliament intended to ensure that interim judgments are not subject to routine challenges, as such would undermine the Court's focus on the merits of the children's interests.[47] For that reason, under s 143(3) of the Care of Children Act 2004, a party requires the Court's leave to appeal an interlocutory or interim order. Isac J noted:[48]

> The restriction on interlocutory appeals emphasises that a child's welfare and best interests will be promoted by the expeditious and final determination of applications concerning care arrangements between parents. Extensive pre-trial appeals are likely to delay the final resolution of those arrangements, and create uncertainty for the child likely to be contrary to their welfare. It may also adversely affect their development by delaying resolution of appropriate arrangements for their care.

[45] The same considerations apply in relation to an attempt to undermine the Family Court Judge's "clear view that the parenting order has been breached by Ms Smith",[49] through defamation proceedings against a person providing information to be used in evidence in that proceeding.

[46] I therefore find that Ms Black's statement to Ms Dewar, in this context, is protected by absolute privilege under s 14 of the Defamation Act as either being "anything said, written, or done" by "a representative (Ms Dewar)" or "a witness" (Ms Black).

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47 *Fox v Fox* [2022] NZHC 2834.
48 At [11].
49 *[Jones] v [Smith],* above n 2, at [3].

[47] It follows that I agree with the Judge's view that the defamation proceedings should be regarded an abuse of process and a collateral attack on the Family Court proceedings.[50] But I do not think this conclusion can be separated from my finding that absolute privilege applies (an issue on which the Judge did not make a conclusive finding). The proceedings are abusive because, as a matter of absolute privilege, Ms Black should not be subject to harassment through defamation proceedings for providing evidence to the Family Court (through Ms Dewar) about the care arrangements for a child at her school.

[48] I therefore consider that it is not reasonably arguable that the defence of absolute privilege is capable of being defeated, and find that the proceeding should be struck out. While this finding is sufficient to dispose of the appeal, for completeness, I will address the application of qualified privilege.

Qualified privilege

[49] Qualified privilege protects from liability in defamation because the law regards it as desirable and in the public interest in certain situations that a person be able to speak his or her mind without fear.[51]

[50] The common law defence of qualified privilege is preserved by s 16(3) of the Defamation Act 1992. I gratefully adopt Katz J's summary of the relevant principles in *Williams v Craig*:[52]

> Generally speaking, common law qualified privilege arises in circumstances where the person who makes the communication has an interest or a duty (legal, social or moral) to make it to the person to whom it is made, and the person to whom the communication is made has a corresponding interest or duty to receive it. In such circumstances, the law places a particularly high value on the right to free speech, essentially as a matter of public policy. As Tipping J observed in *Vickery v McLean*:
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> > "All occasions of qualified privilege are based on an identified public interest in allowing people to speak and write freely, without fear of proceedings for defamation unless they misuse the privilege. On occasions of privilege the public interest is seen as prevailing over the protection of individual reputations."

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50 At [26].
51 *Todd on Torts,* above n 20, at [15.10].
52 *Williams v Craig* [2016] NZHC 2496 at [9] (Footnotes omitted).

[51] Katz J went on to give the examples of someone reporting suspected criminal behaviour to the appropriate authorities and someone providing an employment reference to a prospective employer.[53] There is a high public interest in protecting free and frank communications in such contexts.

[52] As school principal, Ms Black has a social, moral, and legal, duty to report to the police, any matter which might be reasonably thought to implicate the safety or welfare of her students. Regarding the 24 February report to the police, I consider Ms Black had a legal duty to report to the police the concern the child was being taken away by an unknown person under s 152 of the Crimes Act 1961. That section imposes a duty on persons in place of a parent who have care or charge of a child, which includes school teachers,[54] to take reasonable steps to protect the child from injury. Even if I am wrong that s 152 applied, any right-minded person in Ms Black's position would have considered it their duty under the circumstances.[55] The police had a high interest in receiving such information for the purposes of investigating and ensuring the child's safety.

[53] In relation to the matters described in the 15 September email, I consider that Ms Black had a social and moral obligation to provide to Ms Dewar information reasonably thought to be relevant to Ms Dewar's role as lawyer for the child in the Family Court proceedings. Ms Dewar, and the Court, certainly had an interest in receiving the information.[56]

[54] A defence of qualified privilege can be defeated by proof of ill will on the part of the statement maker. This common law rebuttal is enshrined in s 19 of the Defamation Act:

> **19 Rebuttal of qualified privilege**
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly

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53 At [10].

54 Matthew Downs (ed) *Adams on Criminal Law — Offences and Defences* (looseleaf ed, Thomson Reuters) at [CA152.03].

55 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [19] citing *Stuart v Bell* [1891] 2 QB 341 (EWCA) at 350.

56 See further discussion above at [39].

> motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[55] At common law, malice could be found in the absence of a positive or honest belief in the truth of the statement.[57] Knowledge of falsity or recklessness to whether the statement was true amounts to malice.[58] "Ill will" captures conduct qualifying as malice at common law.[59] Improper advantage in s 19 has been said to potentially capture a wider range of conduct than ill will, and is a lower threshold than knowledge of the statement being false or recklessness as to its truth or falsity.[60] The more serious the allegations are, and the wider the audience of the publication, generally the higher the standard of care expected of the statement maker.[61]

[56] The question for the purposes of strike out is whether Ms Smith can show a reasonably arguable case that Ms Black was predominantly motivated by ill will, or otherwise had an improper motive, in making the statements.

[57] Ms Smith submits that Ms Black distorted facts and was malicious. She relies on the fact that Ms Black did not contact Ms Smith (the primary caregiver) before contacting the police on 24 February upon sighting the child with an "unknown woman". Ms Smith says Ms Black possibly desired police involvement to exacerbate the situation, would have known it would impact the Family Court case, and showed a bias against Ms Smith. Ms Smith suggests that the 24 February incident was a fictitious and contrived incident, which in reality involved the child going home on her own.

[58] Ms Smith says that Ms Black's actions in disseminating false statements which are not substantiated, in circumstances where they will have a great impact on the custody dispute, shows an intention to influence the custody dispute, and was "driven by malice and an ambition to be seen as a "potential witness". Ms Smith says that

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57 *Horrocks v Lowe* [1975] AC 135, [1974] 1 All ER 662 (HL) at 150, per Lord Diplock.
58 At 150.
59 *Karam v Parker* [2014] NZHC 737 at [216].
60 *Todd on Torts,* above n 20, at [15.11(2)]; *Lange v Atkinson*, above n 55, at 399.
61 See generally, *Todd on Torts,* above n 20, at [15.11(2)].

Ms Black was not solicited for information beyond the emails about Mr Jones in May 2022, but proceeded to inform Ms Dewar on her own accord of unsubstantiated matters about Ms Smith. Ms Smith says that Ms Black was *aware* her statements were incorrect and continued to disseminate them.

[59] I consider Ms Smith's claims are generalised assertions of ill will or improper advantage. Bare allegations of improper conduct are not pleaded facts that a court is required to accept on strike out. They are conclusory inferences; and whether such inferences can properly be drawn is a question of law.[62] It is not reasonably arguable that Ms Black was motivated by personal ill will towards Ms Smith or utilising the disclosure to the police or Ms Dewar to obtain an improper advantage. The claim is that Ms Black is seeking to involve herself in the care of children matters between Ms Smith and Mr Jones. There is no evidence that Ms Black has any interest in doing so beyond performing her professional obligations. She made disclosures in attempts to further and protect the welfare and interests of the child. The language employed and the content of the disclosures did not go further than what would reasonably be expected of a school principal in the circumstances.

[60] There is simply no basis to draw the inference that Ms Black was predominantly motivated by ill will or sought to obtain an improper advantage in making the disclosure.

[61] Accordingly, I consider the defence of qualified privilege is unanswerable.

Conclusion

[62] For these reasons, I am not persuaded that the Judge erred in striking out the appellant's defamation claim.

[63] I dismiss the appeal.

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62 *Stockman v Health and Disability Commissioner* [2020] NZCA 588 at [81].

Costs

[64] If the parties cannot agree on costs, Ms Black is to file a memorandum addressing costs (limited to five pages) within 10 working days of receipt of this judgment, and Ms Smith is to file a memorandum in reply (limited to five pages) 10 working days after receipt of Ms Black's memorandum. I will then determine costs on the papers.

La Hood J

Solicitors:
Wotton + Kearney, Wellington for Respondent