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

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

**CIV-2016-404-1312
[2017] NZHC 2392**

UNDER	the Defamation Act 1992	
BETWEEN	JOHN DOUGLAS SELLMAN First Plaintiff	...cont
AND	CAMERON JOHN SLATER First Defendant	...cont

Hearing: 9 - 10 February 2017 with further submissions on 9, 17 March,
14, 16 June and 5, 11, 15, 25 September 2017

Appearances: E D Nilsson and J P Cundy for Plaintiffs
B P Henry for First Defendant
C T Patterson for Second and Third Defendants
W Akel and K R Teague for Fourth and Fifth Defendants

Judgment: 2 October 2017

JUDGMENT OF PALMER J

This judgment is delivered by me on 2 October 2017 at 10.00 am pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Solicitors/Counsel:
Lee Salmon Long, Auckland
B P Henry, Barrister, Auckland
Andrew Walter Graham & Co, Auckland
C T Patterson and E J Grove, Barrister, Auckland
Simpson Grierson, Auckland

AND

BOYD ANTHONY SWINBURN
Second Plaintiff

SHANE KAWENATA FREDERICK
BRADBROOK
Third Plaintiff

AND

CARRICK DOUGLAS MONTROSE
GRAHAM
Second Defendant

FACILITATE COMMUNICATIONS
LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD & GROCERY
COUNCIL INCORPORATED
Fifth Defendant

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Summary

[1] Dr Doug Sellman, Dr Boyd Swinburn and Mr Shane Bradbrook are public health professionals. They allege they have been defamed in a series of blog posts by Mr Cameron Slater and comments on the posts by Mr Carrick Graham. They sue Mr Slater, Mr Graham and Mr Graham's company Facilitate Communications Ltd (FCL). They also sue Ms Katherine Rich and the New Zealand Food and Grocery Council Inc (NZFGC) for allegedly procuring Mr Slater, Mr Graham and FCL to publish the substance and sting of the alleged defamations. 161 meanings of the statements are pleaded to be defamatory in 41 causes of action. The defendants seek to strike out the proceeding as a whole as well as specific aspects of it.

[2] First, I consider the multiple publication rule is part of the law of defamation in New Zealand. A statement is considered to be published to the person by whom it is read or heard each time it is read or heard. The law presumes it is read, and damage to reputation occurs, on production to the public. In relation to a blog, that is while it is posted. The presumption is rebuttable but has not been rebutted here. So I do not strike out the claims as being time-barred.

[3] Second, I decline to strike out the claims as an abuse of process on the basis there has been no substantial or significant tort and the cost of the proceeding is disproportionate to its benefit. But I do consider the law of defamation includes a requirement for a minimum threshold of harm to reputation. The law presumes harm to reputation to have occurred on publication of a defamation. But a defendant may rebut the presumption by showing any harm to reputation is less than minor. I apply that threshold to the meanings pleaded here as outlined in the annex to this judgment.

[4] Third, a statement is defamatory if it causes a reasonable person reading or hearing it to think worse of the person concerned, in a more than minor way. Blog posts are subject to the same legal tests as other media though they must be read in context. The law of defamation must not be applied so enthusiastically as to chill genuine political and policy debate. Those who engage in public political and policy debate must expect robust public responses. But defendants cannot expect to make false unsubstantiated personal attacks with legal impunity. In particular, here, the

terms “trougher”, “rorter” and “ripping off” have pejorative connotations of wrongdoing in the use of funding that are capable of being defamatory. Otherwise, as detailed in the annex, I strike out 21 of the 161 pleaded meanings, in whole or part, because they are not capable of being defamatory.

[5] Fourth, I do not consider the pleadings against Ms Rich and the NZFGC are self-evidently speculative or false, on the basis of the little information before me. Neither do I strike out the claim against them on the basis that procuring defamation in the way alleged is incapable of founding legal liability. Procuring defamation can attract liability. The allegations will need to be considered at trial.

[6] I also make other orders regarding pleadings, defences and the next steps in the trial. I emphasise that this judgment should not be taken to indicate any view of the outcome of the case. The trial is yet to be held, the alleged defamations may or may not be proven and the defences may or may not succeed.

The proceeding

The parties

[7] The plaintiffs are:

- (a) Dr Doug Sellman, the first plaintiff, Professor of Medicine and Director of the National Addiction Centre at the University of Otago.
- (b) Dr Boyd Swinburn, the second plaintiff, Professor of Population Nutrition and Global Health at the University of Auckland and Professor and Co-Director of the World Health Organisation Collaborating Centre for Obesity Prevention at Deakin University in Melbourne.
- (c) Mr Shane Bradbrook, the third plaintiff, a Senior Public Health Adviser at Regional Public Health and, between 2000 and 2009, Director of Te Reo Mārama, the Māori Smokefree Coalition.

[8] The defendants are:

- (a) Mr Cameron Slater, the first defendant, who edits and writes the blog website Whale Oil.
- (b) Mr Carrick Graham, the second defendant, a public relations professional and sole director of FCL, the third defendant.
- (c) Ms Katherine Rich, the fourth defendant, the Chief Executive of the NZFGC, the fifth defendant.

The cases

[9] In their Amended Statement of Claim of 3 August 2016 the plaintiffs allege the defendants defamed them in 31 blog posts on the Whale Oil website, and in nine comments on the posts, from 3 November 2009 to 23 February 2016. The annex to this judgment details the statements and pleaded meanings. In general they are personally abusive about the plaintiffs as well as their positions on matters of public policy relating to the regulation of alcohol, tobacco, sugar and fat.

[10] The plaintiffs allege Mr Slater published the posts. They allege Mr Graham authored one of the posts, authored, commissioned or procured Mr Slater to publish the others and authored and published the comments on the posts himself. The plaintiffs allege Mr Graham's involvement was concealed and could not reasonably have been known until the publication of the book *Dirty Politics* on 13 August 2014. The plaintiffs allege Mr Graham and FCL paid Mr Slater to publish the posts. They allege Ms Rich and the NZFGC paid Mr Graham and FCL to publish the posts.

[11] In 31 causes of action the plaintiffs seek general damages, aggravated and punitive damages and costs from Mr Slater, Mr Graham and FCL in various combinations for defaming them in different combinations in the 31 posts. In nine more causes of action (numbers 32 to 40) the plaintiffs allege Mr Graham and FCL defamed them in various combinations in comments on the posts. In one cause of action, number 41, all plaintiffs seek general damages, aggravated and punitive

damages and costs from Ms Rich and the NZFGC for procuring Mr Graham, FCL and Mr Slater to publish the substance and sting of the defamatory statements.

[12] The defendants deny the allegations against them and offer several affirmative defences:

- (a) a number of the causes of action are time-barred;
- (b) all statements on all causes of action are true and statements of honest opinion;
- (c) all statements attract qualified privilege as part of robust political debate about matters of legitimate public interest regarding the regulation of alcohol, sugar, fat and tobacco.

[13] The plaintiffs oppose the defendants' affirmative defences and give notice, under ss 39 and 41 of the Defamation Act 1992 (the Act), of the following:

- (a) if the posts were expressions of opinion, the opinions were not genuine in that they were published by Mr Slater, Mr Graham and FCL without an honest belief in the truth of the facts underlying them or with recklessness or indifference as to their truth; and
- (b) if the posts attract qualified privilege, the defendants were predominantly motivated by ill-will towards the plaintiffs or otherwise took improper advantage of the occasion of publication or they were published as part of campaigns to discredit them and, in the case of the first defendant, were motivated by or aggravated by racism.

The Issues

[14] The defendants all apply to strike out the proceeding as a whole as well as specific aspects of it. There are also other applications. I deal with the applications in terms of five issues:

- (a) Are some causes of action time-barred? Multiple v single publication
- (b) Is there a substantial or significant tort?
- (c) Can the statements have defamatory meanings?
- (d) Is the claim against Mr Rich and the NZFGC speculative or untenable?
- (e) Other applications and next steps.

Law of strike-out

[15] The law governing the striking out of proceedings is well established and not disputed. Rule 15.1 of the High Court Rules provides:

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; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1) it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1) the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[16] As summarised by the Court of Appeal in *Attorney-General v Prince and Gardner* and a minority of the Supreme Court in *Couch v Attorney-General*:¹

¹ *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 264. Approved by Elias CJ and Anderson J in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

- (a) the facts pleaded are assumed to be true;
- (b) the causes of action must be so untenable the court is certain they cannot possibly succeed;
- (c) the jurisdiction is to be exercised sparingly and only in a clear case;
- (d) the jurisdiction is not excluded by the need to decide difficult questions of law; and
- (e) particular care is required in areas where the law is confused or developing.

[17] In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* the Court of Appeal also stated:²

The grounds of strike out listed in r 15.1(1)(b)-(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. 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 proceeding that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[18] In order to strike out a cause of action for being time-barred, the applicant must demonstrate that the cause of action:³

... is so clearly statute barred that it can properly be regarded as frivolous, vexatious or an abuse of process.⁴ There must be no reasonable possibility that the Commission's application was brought within time. If there is, the

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

³ *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 at [39].

⁴ *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) at [33].

matter must go to trial, with the limitation point being a defence to be assessed on the basis of all the evidence led at trial.

Issue 1: Are causes of action time-barred? Multiple v single publication

Applications

[19] Mr Slater, Mr Graham and FCL apply to strike out the first to 14th causes of action as being time-barred. Mr Graham and FCL also apply to strike out causes of action 32 to 40 (except 38). In their application to strike out the 41st cause of action, Ms Rich and NZFGC say causes of action one to 15 and 32 to 40 (which are effectively incorporated into the 41st) are time-barred against them. The plaintiffs oppose the applications.

General law of limitation

[20] Under s 59 of the Limitation Act 2010, the Limitation Act 1950 applies to causes of action based on an act before 1 January 2011. Section 4(6A) of the Limitation Act 1950 provides that “a defamation action shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.” Section 4(6B) provides that any person may apply to the Court for leave to bring a defamation action within six years from the date on which the cause of action accrued. The Court may grant leave “if it thinks it just to do so”, subject to conditions it thinks just to impose, where it considers the delay was occasioned by mistake of fact or law or “by any other reasonable cause”. Professor Ursula Cheer comments that “[c]ourts would not accept flimsy arguments made in support of applications to extend the limitation period, nor would they readily infer that mistakes have been made.”⁵

[21] For causes of action accruing after 1 January 2011, the Limitation Act 2010 applies. Section 11(1), as modified for defamation claims by s 15, provides it is a defence if the defendant proves the date on which the claim is filed is at least two years after the date of the act on which the claim is based (the primary period). Alternatively, under the “late knowledge” provisions ss 11(3) and 14, it could be two

⁵ Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) [*Burrows and Cheer*] at 209.

years after the date the claimant gained knowledge, or ought reasonably to have gained knowledge, of the fact the act on which the claim is based had occurred and was attributable to the defendant. Under s 14(2) the onus is on the plaintiffs to prove, at the close of the start date of the primary period, they neither knew nor ought reasonably to have known those facts.

The law of multiple or single publication

[22] As the Court of Appeal of England and Wales recently restated in *Lachaux v Independent Print Limited*, the long-standing approach of the common law of defamation is that a cause of action accrues when a defamatory statement is published to others.⁶ The Court cited Lord Denning's statement that:⁷

I would go by the principle, which is well-established, that in defamation – be it libel or slander – the cause of action is the *publication* of defamatory words of and concerning the plaintiff. The cause of action arises when those words are *published* to the person by whom they are read or heard. The cause of action arises then: and not later.

[23] Each individual publication gave rise to a separate cause of action under this “multiple publication rule”. So, publication could occur not only when a newspaper was first issued but also when a back copy is purchased and delivered 17 years later, as occurred in the *Duke of Brunswick v Harmer* in 1849.⁸

[24] In the United States, by contrast, since the 19th century and in most states, any one edition of a book, newspaper, broadcast or similar aggregate communication is viewed as a single publication under which one action for damages can be maintained. This “single publication rule” is set out, for example, in the United States *Restatement of Torts*.⁹ This has been United States common law for some time, avoiding the potential complications of a multiplicity of suits in different states in respect of a single libel and curtailing effects on sale of back copies.

⁶ *Lauchaux v Independent Print Limited* [2017] EWCA Civ 1334 at [63].

⁷ At [63] citing *Grappelli v Derek Block (Holdings) Limited* [1981] 1 WLR 822 at 825 (emphasis in *Grappelli*).

⁸ *Duke of Brunswick v Harmer* (1849) 14 QB 185.

⁹ *Restatement (Second) of Torts* (American Law Institute, 1977) at § 577A. And see Lori A Wood “Cyber-defamation and the Single Publication Rule” (2001) 81 Boston University Law Review 895.

[25] The question has arisen whether publication of a statement on the internet should be taken to occur only the first time it is posted (under the single publication rule) or each time it is accessed by a reader (under the multiple publication rule). English courts held onto the multiple publication rule. In *Loutchansky*, the Court of Appeal of England and Wales did not accept the multiple publication rule amounted to a disproportionate restriction on freedom of expression.¹⁰ The Court considered the scale of resulting damage was likely to be modest.¹¹ The European Court of Justice then observed, in proceedings between the same parties, that libel proceedings brought after a significant lapse of time “may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.”¹² Subsequently, the United Kingdom adopted a form of the single publication rule for limitation purposes, in s 8 of the Defamation Act 2013.

[26] In *Dow Jones & Co Inc v Gutnick*, the Australian High Court considered the multiple publication rule in a choice of laws case involving defamation.¹³ The Court cited *Loutchansky*, and the reflection of the multiple publication rule in Australian legislation, concluding “it would be a large step now to depart from it”.¹⁴ The Court stated:¹⁵

Because publication is an act or event to which there are at least two parties, the publisher and a person to whom material is published, publication to numerous persons may have as many territorial connections as there are those to whom particular words are published. It is only if one starts from a premise that the publication of particular words is necessarily a *singular* event which is to be located by reference *only* to the conduct of the publisher that it would be right to attach no significance to the territorial connections provided by the several places in which the publication is available for comprehension.

[27] Even Kirby J considered reform of the multiple publication rule as it related to the place of publication, based on settled and long-standing principles of defamation law, “would exceed the judicial function”.¹⁶

¹⁰ *Loutchansky v Times Newspapers Ltd (Nos 2, 3, 4, 5)*, 2001] EWCA Civ 1805, [2002] QB 783 at [74].

¹¹ At [75].

¹² *Times Newspapers Ltd v United Kingdom* [2009] EMLR 14, 254 at 268.

¹³ *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, (2002) 210 CLR 575.

¹⁴ At [27].

¹⁵ At [40].

¹⁶ At [138].

[28] There is little New Zealand authority on the point. In the context of contempt of court, rather than defamation, the Supreme Court in *Siemer v Solicitor-General* cited *Loutchansky* and *Dow Jones & Co Inc* for the proposition there is a new publication of a contempt on the internet every time access to the item is permitted.¹⁷ In *Wishart v Murray* Courtney J relied on that in concluding “[d]espite the attraction of a single publication rule in New Zealand I am satisfied that the multiple publication rule either applies or it is arguable that it does so.”¹⁸ In doing so, Courtney J noted the multiple publication rule “poses problems for internet publications which can be stored and retrieved indefinitely” which “exposes online publishers to seemingly indefinite liability”.¹⁹ Indeed, Professor Cheer has described the multiple publication rule as “zombie defamation” – libels that never die.²⁰

Submissions

[29] Mr Henry, for Mr Slater, submits the first to 14th causes of action are time-barred under the Limitation Act 1950 and the Limitation Act 2010 because they refer to posts made more than two years before the first statement of claim. Mr Henry submits the United Kingdom’s legislative adoption of the single publication rule should be the law in New Zealand. He submits that would be consistent with rejection of *Loutchansky* by an Indian court because the policy behind limitation would be defeated if the continued existence of defamatory material were to provide a continuous cause of action, allowing plaintiffs to sleep on their rights.²¹

[30] Mr Patterson, for Mr Graham and FCL, supports Mr Henry’s submissions. He also submits the first to 14th causes of action are barred against Mr Graham and FCL even if the multiple publication rule applies, because there is no pleaded allegation they procured or were responsible for any continued publication of the blog posts. Mr Patterson also submits the plaintiffs have not proven they could not have known of the second to fifth defendants’ involvement until after the limitation period expired and there is no credible evidence of any involvement of the second to

¹⁷ *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at n 82.

¹⁸ *Wishart v Murray*, [2015] NZHC 3363, [2016] 2 NZLR 565 at [77].

¹⁹ At [74].

²⁰ *Burrows and Cheer*, above n 5, at 69 or Stephen Todd *The Law of Torts in New Zealand* (Wellington, Thomson Reuters, 2016), at [16.5]. [*Todd on Torts*].

²¹ *Khawar Butt v Asif Nazir Mir & Ors* [2013] CS (OS) 290/2010.

fifth defendants in any publication of the blog posts. Although they were not formally the subject of his application for strike out, Mr Patterson submits the 32nd to 37th and the 39th causes of action are also time-barred as relating to comments posted in or about November 2009 and between September and early November 2013. He submits there is no evidence anyone other than the plaintiffs read the comments.

[31] Mr Akel, on behalf of Ms Rich and the NZFGC, submits the proceedings against them were too late as they began when the application to join them was filed on 30 September 2016. He submits the single publication rule should apply, which means the first to 15th, and 32nd to 40th causes of action are time-barred against Ms Rich and the NZFGC. Mr Akel stresses the potential for unlimited liability and adverse impact on limitation regimes behind the United Kingdom's adoption of the single publication rule. Mr Akel also submits that, even if the multiple publication rule applies, the alleged procurement can only logically be prior to or at the time of the publication and is therefore time-barred.

[32] Mr Cundy, on behalf of the plaintiffs, submits there are no limitation issues because each of the Blog posts and comments remain live on the Whale Oil website. He submits:

- (a) The courts have consistently held each communication of defamatory material is a separate publication giving rise to a separate cause of action. Adoption of the United Kingdom legislative approach would be inconsistent with the express terms of s 11(1) of the 2010 Act.
- (b) In any case, the plaintiffs plead Mr Slater, acting on behalf of the other defendants, republished a number of the posts within the limitation period. The second to fifth defendants are liable as publishers for republications because they must have known the posts and comments would remain available.
- (c) The plaintiffs could not reasonably have known of the second to fifth defendants' publication until the publication of *Dirty Politics* on 13

August 2014 so the late knowledge limitation period in the 2010 Act runs from then and the limitation period under the 1950 Act should be extended to six years. The plaintiffs commenced proceedings against Mr Slater, Mr Graham and FCL on 13 June 2016 and against Ms Rich and NZFGC on 3 August 2016, so he submits they were in time.

- (d) The plaintiffs specifically pleaded in reply to affirmative defences that the second to fifth defendants had the power to procure removal of the blog posts and comments. The pleadings could be amended to deal with the objection that responsibility for ongoing publication is not pleaded.

Should some causes of action be struck out as time-barred?

[33] The proceeding against the first to third defendants was first filed on 13 June 2016. Causes of action one to 14 relate to blog posts that were first posted on or before 27 February 2014. They would therefore be time-barred under the Limitation Acts of 1950 and 2010 if the single publication rule applies and they were not re-published.

[34] The weight of authority in the United Kingdom and Australia, and Courtney J's judgment in *Wishart v Murray*, supports the multiple publication rule. The law of defamation has always considered publication to be more than just an act of the publisher. To change Lord Denning's emphasis: the cause of action arises when defamatory words are published *to the person by whom they are read or heard*. If a reputation falls in a forest, but no one hears of it, it does not sound in defamation.

[35] It would be possible for the New Zealand courts to change the common law to adopt a single publication rule. That could conceivably extend to the sort of approach the United Kingdom Parliament has endorsed in legislation. I do not consider that would be inconsistent with s 11(1) of the 2010 Act. The reference there to "the date of the act or omission on which the claim is based" seems to me to be capable of referring to the date of first publication. And it would be easier to change the common law of New Zealand than the common law of Australia which is

reinforced by state statutes. There are legitimate questions, including those raised by the defendants, about whether the single or multiple publication rule is better.

[36] But it is not clear to me that modifying the common law of New Zealand to replace the multiple publication rule with the single publication rule is so clearly desirable as to justify a change in the common law. In particular, I consider there are policy considerations which support the multiple publication rule applying to blog posts on the internet.

[37] The law seeks to influence the behaviour of those considering whether to publish or to take down a defamatory statement. When a blog is posted it is available for all who visit the website to see and for anyone to find in a search at any point in the future, until it is taken down (and sometimes after that, in caches). A blog post is available for discovery and perusal on individuals' phones and in their homes in a more direct and accessible way than is a newspaper or book before purchase. And a blog post continues to be so available in a much more direct and accessible way than was the back copy of the newspaper featuring the Duke of Brunswick. In a very real sense, posting a blog represents offering a continuing publication to the world.

[38] There is therefore a good argument the law should seek to focus a blogger's mind on whether it is defamatory not only at the initial moment of posting a defamatory publication but on the same ongoing basis that the post remains live on the internet. The law of multiple publication does not condone zombie defamation but attempts to combat it.

[39] I do appreciate some of the nooks and crannies of the internet may go unexplored, in the same way that more traditional publications come to adorn only fish and chips. The law of defamation takes that into account by presuming that a newspaper or book is read on its production to the public. I consider, for a blog on the internet, that is while it is posted. But a defendant may be able to disprove the reading or listening that is essential to publication, as Mr Patterson submits. That would mean an element for defamation is not present, as reputation would not be harmed. That can be raised at trial, on the basis of evidence, as I explain in Issue

Two below. There is no evidence before me that demonstrates the blogs here have not been read.

[40] In relation to defamation proceedings Parliament reconfirmed in 2010 that a standard limitation period of two years is appropriate – less than for other claims. That reflects a policy that a person who has been defamed ought to take legal steps to vindicate his or her rights relatively quickly after the defamation has been published, or after he or she reasonably becomes aware of its publication. That may be two years after a blog is first posted. But if the blog is still up on the web, and the publisher cannot show the post has not been accessed in the past two years, I see no reason why a defamed person should not be able to sue for the continuing publication of a blog in order to vindicate their reputation. Accordingly, I consider the multiple publication rule is the law in New Zealand.

[41] In addition, paragraph 10(d) of the Amended Statement of Claim pleads Mr Slater republished several of the posts by re-publishing hyperlinks to them as specified in schedule 32 of that document. The schedule provides details of allegations that the posts that found causes of action one to three, five, seven to 10 and 13 have been re-published. I accept those hyperlinks, in the context of the text of the posts, mean that the later posts are sufficiently closely connected to those earlier posts as to amount to re-publications of them. That is an additional reason not to strike out those causes of action.

[42] Mr Patterson and Mr Akel submit that, even if the multiple publication rule applies, it is not pleaded that their clients procured or were responsible for any continued publication of the posts. However, if the procuring claim succeeds, it seems likely that there would have been knowledge of the enduring nature of blog posts. The plaintiffs' reply to the Amended Statement of Defence pleads procuring of continued and re-publication of the first and other blog posts by the second to fourth defendants, whose role could not reasonably have been known to them until the publication of *Dirty Politics*.²² If the same pleading needs to be made in the Statement of Claim, that can be done by amendment. It is not a basis for strike out.

²² Plaintiffs' Reply to Amended Statement of Defence by Second and Third Defendants, of 6 December 2016, at [22](a)(ii)–(iii) in relation to the first cause of action, and subsequent such

[43] Mr Patterson’s submission the plaintiffs have not proven they could not have known of the second to fifth defendants’ involvement until after the limitation period expired, and there is no credible evidence of their involvement, also fails. An application for strike out assumes the facts pleaded are true and here, as I explain in Issue Four, these pleadings are not self-evidently speculative or false on the basis of information before me.

[44] Mr Akel’s submission that the application to join Ms Rich and the NZFGC was made after the limitation period expired also fails. *Dirty Politics* was published on 13 August 2014. On 3 August 2016 the plaintiffs filed and served an Amended Statement of Claim including Ms Rich and the NZFGC. In an exchange of memoranda in September 2016 Mr Nilsson submitted (correctly) that r 4.56 of the High Court Rules permitted an order for joinder without an application. Mr Akel acknowledged that but submitted there should be a formal application and hearing. On 27 September 2017 Courtney J agreed the plaintiffs would need to file an application. On 11 October 2016, I issued judgment granting the application for joinder that was made. In the circumstances, I consider “the date the claim was filed”, for the purposes of s 11(1) of the Limitation Act 2010, is satisfied by the filing and serving of the 3 August 2016 Amended Statement of Claim.

[45] If, contrary to my conclusion, the single publication rule is the law of New Zealand, I would consider the plaintiffs would qualify for the late knowledge limitation period.

[46] Accordingly, I decline the applications for strike out on the basis of limitation. I do not consider the causes of action are so untenable that I can be certain they cannot possibly succeed or so clearly statute-barred that they can properly be regarded as frivolous, vexatious or an abuse of process.

Issue 2: Is there a substantial or significant tort?

Applications

[47] All the defendants apply to strike out the proceeding as an abuse of court process, in terms of *Jameel (Yousef) v Dow Jones & Co Inc*,²³ in that there has been no real, substantial or significant tort and it would be a disproportionate waste of resources for it to proceed.

Law of abuse of process and Jameel

[48] I outlined above the grounds for striking out proceedings for abuse of process under the High Court Rules in New Zealand. They may have been extended by adoption of English case law.

[49] In *Jameel (Yousef) v Dow Jones & Co Inc* in 2005 the Court of Appeal of England and Wales considered a defamation proceeding against the publisher of the Wall Street Journal online in the United Kingdom. It suggested the plaintiff was suspected of being involved in funding Al-Qaeda. Dow Jones established only five subscribers within the United Kingdom had followed the hyperlink that accessed the defamatory statement. Three were associated with the plaintiff, and the other two had no recollection of reading his name.²⁴ The Court noted damage to reputation is presumed to flow from defamation and considered it will not be possible for the publisher to prove no damage had occurred by showing a reader did not know the defamed individual (since publication may simultaneously create and besmirch a reputation).²⁵ Accordingly it considered, prior to the Human Rights Act 1998 coming into effect in the United Kingdom, the presumption a defamatory publication caused some damage to its victim “was, in practice, irrebuttable”.²⁶

[50] After the Human Rights Act came into effect, the Court in *Jameel* considered, where there was no or minimal actual damage, the defendant could seek to strike out the action as an abuse of process.²⁷ It stated the court’s concern “to ensure that

²³ *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75 (QB) 946.

²⁴ At [17].

²⁵ At [26]–[29].

²⁶ At [32].

²⁷ At [40].

judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice”.²⁸ It considered the *Duke of Brunswick* case could not have survived an application to strike out for abuse of process.²⁹ The Court considered neither the plaintiff’s objective of vindication nor of an injunction restraining repetition of the libel justified continuance of the action.³⁰ It considered “[t]he game will not merely not have been worth the candle, it will not have been worth the wick”.³¹ It stayed the proceedings. Subsequently, s 1(1) of the Defamation Act 2013 (UK) provided a statement is not defamatory unless its publication has caused, or is likely to cause, serious harm to a claimant’s reputation.

[51] In December 2016, in *Opai v Culpan*, Associate Judge Bell reviewed consideration of *Jameel* in New Zealand to that point, noting only one rejection of it, in obiter comments.³² Associate Judge Bell concluded “[t]he *Jameel* principle is a basis for strike out for abuse of process of New Zealand, so long as the power is used with due care”.³³ He struck out a claim against one defendant because it was disproportionate when she could obtain full redress from the other defendant, the Attorney-General, alone. In a review of Associate Judge Bell’s decision in May 2017, Katz J held:³⁴

- (a) New Zealand courts should not decline to apply *Jameel* on the basis there is less emphasis placed on proportionality in litigation in New Zealand than in the United Kingdom.³⁵
- (b) No specific differences between the Human Rights Act 1998 (UK) and the Bill of Rights in New Zealand would make it inappropriate to apply *Jameel* in New Zealand.³⁶

²⁸ At [54]

²⁹ At [56].

³⁰ At

³¹ At [69].

³² *Opai v Culpan* [2016] NZHC 3004 at [77] citing *Deliu v Hong* [2013] NZHC 735 at [143]–[194].

³³ At [78].

³⁴ *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142.

³⁵ At [48].

³⁶ At [53].

- (c) The application of *Jameel* in New Zealand would not be inconsistent with the presumption of harm in defamation cases and in s 4 of the Defamation Act 1992. It concerns the likely amount of damage relative to the costs of pursuing the proceedings.
- (d) Free speech concerns and the implications for court resources of litigation proportionality support the availability of the *Jameel* principle in New Zealand.³⁷
- (e) Courts will need to “proceed with caution” and “a stay or dismissal of proceedings on proportionality grounds is likely to be granted only in rare cases, given that it impacts directly on a litigant’s right of access to justice” but Katz J was satisfied the *Jameel* principle applies in New Zealand and could be applied at a strike out stage.³⁸

[52] Later in May 2017, relying on *Opai*, Simon France J also applied *Jameel* in striking out a defamation claim in *X v Attorney-General (No 2)*.³⁹ The claim was based on a Navy poster within Navy settings of an imagined happy officer, using X’s image even though she had resigned in dissatisfaction with sexual assaults and harassment in the Navy. Simon France J stated:⁴⁰

I consider the defamation proceeding should be struck out pursuant to r 15.1 (1)(d) of the High Court Rules and the *Jameel* principle. The group of potential publishees is already very small, and will then be reduced further to those who actually saw these materials. If any did, in my view it is quite unlikely they would view the material from the alleged innuendo viewpoint. They are far more likely to have considered the RNZN made a mistake. The pleaded damage to X's reputation, if established, will not be significant. There is no prospect of any further publication. Although X may be insulted and annoyed by what she says is unauthorised use, I do not consider the matter merits defamation proceedings.

[53] In September 2017, the Court of Appeal of England and Wales revisited *Jameel*, in relation to defamation, in *Lachaux v Independent Print Limited*.⁴¹ Lord Justice Davis, for the Court:

³⁷ At [62]–[63].

³⁸ At [64] and [66].

³⁹ *X v Attorney-General of New Zealand* [2017] NZHC 1136.

⁴⁰ At [21].

⁴¹ *Lachaux v Independent Print Limited*, above n 6.

- (a) started from the point that “the law of defamation is there to protect a person’s reputation”;⁴²
- (b) noted that damage is presumed in defamation cases, citing *Jameel*;⁴³
- (c) noted that Tugendhat J in *Thornton v Telegraph Media Group Limited* significantly developed the law in 2010 in finding defamation claims subject to a threshold of seriousness of whether it “substantially affects in an adverse manner the attitude of other people towards him or has a tendency to do so”;⁴⁴
- (d) contrasted that approach, where the claim was not actionable as it could not meet the “substantially affecting” test, with the Court in *Jameel* striking out a serious and actionable claim as an abuse of process because it was no longer serving the purpose of protecting the claimant’s reputation;⁴⁵
- (e) observed the broad intention of s 1(1) of the Defamation Act 2013 (UK) was to build on such cases as *Thornton* and *Jameel* to “raise the bar” for bringing a claim in defamation;⁴⁶ and
- (f) interpreted s 1(1) as not removing the presumption of damage, which is compatible with a raised threshold per *Thornton* (to which s 1 gave statutory status),⁴⁷ but which may be rebutted by a defendant at a threshold hearing or at trial or at a summary judgment or strike out hearing.⁴⁸

⁴² At [26].

⁴³ At [28].

⁴⁴ At [30] citing *Thornton v Telegraph Media Group Limited* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985.

⁴⁵ At [32].

⁴⁶ At [36].

⁴⁷ At [58] and [78].

⁴⁸ At [70], [79]

[54] Finally, I note that in New Zealand in 2015, in *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*, Dobson J also drew on *Thornton* in obiter comments.⁴⁹ He indicated, although it was not decisive there:⁵⁰

I would be minded to adopt the analysis exemplified in *Thornton* and other recent United Kingdom authorities by recognising a minimum threshold of seriousness. That would require a claimant to meet an objective seriousness threshold as an element of making out the actionability of alleged defamatory statements. The approach suggested in *Gatley* appears appropriate. This threshold would apply across the various common law definitions of defamation. For instance, in the present case, CPAA would need to establish not only that the statements were to its discredit, but that these discrediting statements caused serious harm to its reputation.

Submissions

[55] Mr Henry relies on *Jameel* in submitting these proceedings are a waste of the court's resources and seek to muzzle the defendants inconsistently with their right to freedom of expression. He suggests the delay in issuing proceedings indicates they do not concern a real tortious event and the plaintiffs are seeking to use the Court as a forum for maintaining political debate. He submits, just as political debate is protected by the defence of qualified privilege in New Zealand, it is equally important that those who consider themselves impacted by policy change can exercise their freedom of speech without the imposition of strict liability defamatory rules to inhibit debate. He submits that requires extension of the principle in *Lange v Atkinson* and application of Katz J's decision in *Opai*.

[56] Mr Akel submits the cost of the proceedings to the parties and the Court's resources, are disproportionate to any benefit gained. Mr Akel submits the approach mandated by s 1 of the 2013 Act (UK) should be adopted, citing Dobson J's recommendation of a "minimum threshold of seriousness" in *CPA Australia Ltd*. He submits that is similar to *Jameel* and this is the sort of trivial and pointless claim to which Katz J, in *Opai*, considered *Jameel* applies. He suggests the plaintiffs' receipt of public funding calls for public scrutiny, the plaintiffs have maintained a high public profile, they are not averse to using emotive and pejorative language in public debates themselves, and it is difficult to see how they have suffered any loss of

⁴⁹ *CPA Australia Ltd v New Zealand Institute of Chartered Accountants*[2015] NZHC 1854, (2015) 14 TCLR 149.

⁵⁰ At [120].

reputation in any real sense. Alternatively, he submits the 41st cause of action against Ms Rich and the NZFGC should be struck out as a *Jameel* abuse of process or under r 15.1(1)(d) or 15.1(4) since the plaintiffs have insufficient foundation for the cause of action in *Dirty Politics*.

[57] Mr Cundy, for the plaintiffs, emphasises the importance of preserving a plaintiff's right to access the court. He accepts *Jameel* may apply where a defamation claim does not serve the legitimate purpose of protecting or vindicating reputation. He submits that jurisdiction, created by r 15.1(d), should be exercised only in exceptional circumstances, with the defendant bearing a heavy onus. Mr Cundy does not accept *Jameel* stands for the broader proposition that a defamation claim may be struck out on proportionality grounds. He submits the facts of this case do not come anywhere close to those in *Jameel*, are quite different from *Opai* or *X*. He submits *Lachaux* is of limited relevance because no minimum threshold of seriousness has been adopted in New Zealand, there is a presumption of damage and an inference of substantial reputational harm is available here. In this case he submits there are 40 defamatory publications which still appear prominently when the plaintiffs' names are searched on Google and are indexed on the Whale Oil site. He submits Mr Slater's failure to provide data showing when and by whom the posts have been accessed prevents any conclusions being drawn at the strike-out stage. He submits the plaintiffs seek to vindicate and protect their reputations.

Should the proceeding be struck out as an abuse of process?

[58] I do not consider this case is similar to *Jameel*, *Opai* or *X*. There is no evidence before me to sustain the propositions that the defamatory statements were not read or that the defamation claim as a whole did not advance the legitimate purpose of protecting or vindicating the plaintiffs' reputations.

[59] In terms of the general applicability of the *Jameel* principle in New Zealand law, I agree it is conceivable there may be some extreme circumstances in which legal proceedings place such a disproportionate burden on the litigants and the court system in terms of time and resources that they should not be allowed to proceed as an abuse of court process. The cost of the New Zealand court system is met by

taxpayers who expect it not to be abused. In a strike-out context, that could fit under the general words of r 15.1(1)(d) that empower strike out, outlined at the beginning of this judgment: “otherwise an abuse of process of the court”. That would provide a basis, for example, for the strike-out in *Opai*.

[60] But I have difficulty with the notion, that seems implicit in *Jameel*, that a court can routinely use its ability to deal with abuses of process to stop a proceeding properly founded in law, because of something the law does not require (insufficient damage to reputation). The right of a person or group to access the courts in order to vindicate their legal rights has a high constitutional value in New Zealand, against however powerful or popular a defendant. As the United Kingdom Supreme Court stated in July 2017 in *Unison v Attorney-General* “[t]he constitutional right of access to the courts is inherent in the rule of law”.⁵¹ The Court traced the right from c 29 of the Magna Carta of 1297, which is part of the laws of New Zealand.⁵² The Court stated “People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them.”⁵³

[61] In 1982 the New Zealand Court Appeal stated “we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights”.⁵⁴ Similarly, I consider the rule of law requires that, except in the rarest of circumstances where it is clearly justified, the courts themselves should not override the right of an individual to access the courts to vindicate their actionable legal rights; society’s collective financial interests notwithstanding.

[62] In the context of defamation law, I consider the analysis by the English Court of Appeal in *Lachaux* this month is useful in contrasting the *Jameel* principle with Tugendhat J’s approach in the High Court of England and Wales in *Thornton*. Both aimed to uphold the ultimate purpose of defamation law of protecting the claimant’s

⁵¹ *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 at [66]. And see Tom Bingham *The Rule of Law* (London, Allen Lane, 2010) at ch 8.

⁵² Imperial Laws Application Act 1988, s 3(1) and sch 1.

⁵³ At [71].

⁵⁴ *New Zealand Drivers’ Assoc v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390 per Cooke, McMullin and Ongley JJ.

reputation. *Jameel* struck out an actionable claim of serious defamation as an abuse of process because there was insufficient damage to reputation. But *Thornton* treated the presumption of damage to reputation as a rebuttable element of the tort of defamation. If it is not satisfied, the tort is not actionable. No question of abuse of process need arise. The *Thornton* approach was approved by Dobson J in New Zealand in *CPA Australia Ltd*, and effectively applied by the English Court of Appeal in *Lachaux* in the context of s 1 of the 2013 Act (UK).

[63] Whatever may be the status of the general *Jameel* principle in terms of abuse of process, I consider the *Thornton/CPA Australia Ltd/Lachaux* approach is preferable in shaping defamation law. If some level of existing or anticipated damage to reputation is required for a defamation claim to proceed, that suggests it is an element of the tort of defamation. The law is then clear and everyone can consider their potentially defamatory statements on the basis of it. If, contrary to that, damage to reputation is not an element of the actionable tort then it is unsatisfactory for the judiciary to deem its absence to be an abuse of process.

[64] For the reasons given by Lord Justice Davis in *Lachaux*, the presumption of damage remains a sensible element of the law of defamation. In New Zealand, an aspect of the presumption in relation to “special damage” (or actual temporal losses) is confirmed by s 4 of the Defamation Act 1992.⁵⁵ At common law an action for slander, for words or gestures could not be maintained unless special damage was suffered. The Defamation Act 1954, carried on in this section, abolished the distinction between slander and libel (defamation in permanent form) in New Zealand.

[65] Further change to the resulting merged requirement seems desirable in the age of the internet and blog posts, to confirm the presumption but make it rebuttable. It is the publisher of defamation, rather than the defamed, who can establish, most easily and at least cost, whether a defamatory statement in a blog post has actually been read. The publisher should bear the burden of rebutting the presumption that it has been. But the presumption should be rebuttable, consistent with the holding in

⁵⁵ See Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [5.1] [*Gatley on Libel and Slander*].

Lachaux and contrary to the assumption in *Jameel*. If the publisher can show there is not, and is not likely to be, sufficient damage to reputation, above a certain threshold, then that should be able to be raised as a defence to a claim of defamation.

[66] The rebuttability of the presumption of damage follows naturally in New Zealand from the right to freedom of expression upheld by s 14 of the Bill of Rights, which the defendants invoke. The right to freedom of expression expressed in the Bill of Rights has had a significant effect on the law of defamation. That was particularly so in the creation in New Zealand common law, in *Lange v Atkinson*, of the defence to defamation of qualified privilege in respect of political discussion.⁵⁶

[67] Ordinarily, defamation law is a reasonable limit on the right to freedom of expression, that is demonstrably justified in a free and democratic society, because it upholds the legitimate interest of protecting peoples' reputations. But if the interest protected by the limit on freedom of expression that is defamation law is insufficient, then it is not a reasonable or justified limit. The judiciary has an obligation to formulate the common law of defamation in such a way to uphold only reasonable and justified limitations on fundamental rights.⁵⁷ This underlies my conclusion that there should be, in the common law of defamation in New Zealand, a minimum threshold of seriousness of damage to reputation.

[68] There is a question about what the threshold of seriousness should be. Tugendhat J put it in terms of whether the statement does, or tends to, "substantially affect" reputation. The Court of Appeal in *Lachaux* considered that "serious harm" by s 1 of the UK Act, was "something rather more weighty".⁵⁸ Dobson J also followed the UK Act in using the term "serious harm". I am concerned a threshold of "serious harm" is too high. The level of harm to reputation is assessed in a defamation proceeding, on the basis of evidence at trial and reflected in damages. It is possible for an actionable defamation that causes less than serious but more than minor harm to reputation to be reflected in a nominal award of damages, combined

⁵⁶ *Lange v Atkinson* [1997] 2 NZLR 22 (HC); *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

⁵⁷ *Lange v Atkinson* (HC) at 32; *Lange v Atkinson* (CA) at 451; and see *Hosking v Runting* [2005] 1 NZLR 1 (CA).

⁵⁸ At [44].

with a declaration of defamation. Such an outcome may still constitute a reasonable limitation on the right to freedom of expression. But protecting reputations against harm that is less than minor, in my view, unjustifiably chills the proper exercise of the right to freedom of speech. I consider a threshold of more than minor harm to reputation should be required to found an action for defamation in New Zealand.

[69] So I consider the common law of defamation in New Zealand is that damage to reputation is presumed to occur on publication of a defamatory statement. But that presumption is rebuttable. If a defendant can show their statement has caused less than minor harm to the plaintiff's reputation, that will defeat a defamation claim. It may therefore be a basis for showing a cause of action is clearly not tenable in a strike-out application. I apply this to the causes of action here, in the attached table, on the basis of the submissions of the parties.

Issue 3: Can the statements have defamatory meanings?

Applications

[70] The first to third defendants apply to strike out all 40 causes of action against them on the basis the defamatory statements are not capable of bearing the meanings pleaded. In submissions, Mr Slater agreed some of the statements are pleaded are capable of bearing the meanings pleaded in relation to causes of action one to 31. In submissions, Mr Graham and FCL relied on Mr Slater's submissions for those causes of action and made additional submissions regarding causes of action 32 to 40. The results is that the defendants challenge all but five of 161 pleaded meanings in the first 40 causes of action on the basis the statements at issue do not, and are not capable of, bearing the defamatory meaning pleaded or any defamatory meaning. The plaintiffs oppose the applications.

Law of defamatory meaning

[71] The Court of Appeal, in *New Zealand Magazines Ltd v Hadlee (No 2)*, helpfully encapsulated the principles relevant to assessing defamatory meaning.⁵⁹ Blanchard J stated "[i]n deciding whether words are capable of bearing a defamatory

⁵⁹ *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621.

meaning the Court examines what meaning is expressly stated therein or can reasonably be inferred without looking at any surrounding material and without knowledge of further facts”:⁶⁰ Blanchard J stated, approvingly, relevant principles:⁶¹

... In determining whether words are capable of bearing an alleged defamatory meaning:

- (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
- (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
- (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
- (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
- (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
- (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them.

[72] In relation to the last point, about construing the meaning of words in the context of mode of publication and surrounding circumstances, the Court of Appeal in *Murray v Wishart* agreed that Twitter statements should be read in the context of a Facebook page with which they were closely connected and in light of general knowledge of a criminal trial of general notoriety.⁶²

⁶⁰ At 624.

⁶¹ At 625 (citations omitted).

⁶² *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [32]–[37].

[73] Courtney J in *Karam v Parker* stated that, as a matter of law, “there is no principled basis on which internet fora and blogs should attract a different test for what constitutes a defamatory statement”.⁶³ In *Wu v Moncur* Woolford J considered the nature of the internet forum entitled “Fuck My Life”, on which allegedly defamatory statements were posted, “has an important bearing on the issue of whether the words used had a defamatory meaning”.⁶⁴ He considered those who participated in the forum were aware of its nature in expressing strong opinions in a forthright, rude or confrontational manner.⁶⁵ In that context Woolford J did not consider a post by the defendant, suggesting the plaintiff was a madman, was defamatory.

[74] Professor Cheer, in *Media Law in New Zealand*, identifies four English attempts to define what is defamatory, which are relatively old but still in reasonably common currency in the case law:⁶⁶

- (a) a statement that may tend to lower the plaintiff in the estimation of right-thinking members of society generally;⁶⁷
- (b) a false statement about a person to his or her discredit;⁶⁸
- (c) a publication without justification that is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule;⁶⁹ or
- (d) a statement about a person that tends to make others shun and avoid him or her.⁷⁰

⁶³ *Karam v Parker* [2014] NZHC 737 at [29].

⁶⁴ *Wu v Moncur* [2016] NZHC 3017 at [41].

⁶⁵ At [44].

⁶⁶ Burrows and Cheer, above n 5, at 17.

⁶⁷ *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 (per Lord Atkin).

⁶⁸ *Youssupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 (CA) at 584 per Scrutton LJ (adjusted to gender-neutral language).

⁶⁹ *Parmiter v Coupland* (1840) 6 M&W 105 at 108 per Parke B.

⁷⁰ *Youssupoff v Metro-Goldwyn-Mayer*, above n 68, at 587 per Slessor LJ (adjusted to gender-neutral language).

[75] Alternatively, adding the above threshold for harm, it might suffice to say, generally, that a statement is defamatory if it causes the reasonable person reading or hearing it to think worse of the person concerned in a more than minor way.

[76] In the context of this case, it is relevant to note that the sorts of allegations that have been held to be defamatory include:⁷¹

- (a) a person is a cheat or a liar or otherwise dishonest;
- (b) dishonest conduct or abusing one's position or excessive use of funds, even when a person acted within the letter of the law; and
- (c) honest incompetence or misuse of a position for personal benefit.

Submissions on defamatory meaning

[77] Mr Henry, for Mr Slater, challenges the defamatory meanings alleged in specific causes of action as detailed in the table annexed to the judgment. Mr Henry accepts the meanings alleged in many of the statements are capable of being defamatory. But, in relation to some, he submits the alleged defamatory meanings are lawyers' extensions of other alleged defamatory meanings and should be struck out accordingly. He makes other arguments about other statements as recorded in the annex to this judgment.

[78] Mr Henry says Mr Slater wrote the relevant articles as part of a robust political debate about public health outcomes regarding sugar, fat, tobacco and alcohol, and how to achieve them. He says the meanings of the statements need to be viewed in that context. He makes a general submission that the word "trougher", which is used in many of the statements, "is used (as it commonly is) to describe someone who is funded lawfully by the public purse". He cites *McEvoy v Michael* suggesting the term "trough" did not carry the defamatory connotation claimed.⁷² He submits the criticism is not one of illegal wrongdoing or misusing public funds or motivation for personal enrichment but a description that the plaintiffs are funded by

⁷¹ *Burrows and Cheer*, above n 5, at 20 and 33.

⁷² *McEvoy v Michael* [2014] EWHC 701 (QB).

the public purse which is a legitimate criticism in robust political debate. In response to a question from me, Mr Henry was so adventurous as to say that judges could be called troughers without it being defamatory, if they were to enter political debate.

[79] Mr Patterson, for Mr Graham, largely adopts Mr Henry's submissions. He also addresses, specifically, the meanings in the blog post comments that are the subject of causes of action 32 to 40. In particular, like Mr Henry's submissions on "trougher", Mr Patterson submits "rort" is an imprecise slang term which does not convey illegality, as opposed to sharp practice or taking advantage of the system to one's own benefit but within the law. He makes a similar submission regarding "ripping off". He submits many of the words complained of are, at their worst, mere insults based on value judgments.

[80] Mr Nilsson, for the plaintiffs, submits all the publications are capable of bearing their pleaded meanings and caution should be taken in exercising the strike-out jurisdiction. He submits Mr Henry's submission that "trougher" is not capable of implying misuse of public funds lacks merit. He submits *McEvoy v Michael* was concerned with whether legal entitlement was at issue which is not alleged here and is not the only manner in which the term can be defamatory. He points to other English authorities and to the dictionary definition of "trougher" as implying misuse or improper use of funds for personal gain. Mr Nilsson submits use of the internet does not allow the defendants greater freedom than they are entitled to offline. He submits the fact political debate on the internet often includes hyperbole and sarcasm does not lower the threshold for what is defamatory. And he says insults and humorous words sometimes will be defamatory and sometimes will not, depending on the circumstances.

Are the words capable of defamatory meaning?

[81] In assessing these issues I examine whether the words identified, read in their context, are capable of bearing their pleaded meanings and whether those meanings are capable of being defamatory. I do so by applying the principles identified by Blanchard J above, in accordance with the general observations I make immediately

below. I note that sometimes, where the Amended Statement of Claim incorporates hyperlinks, it is not always clear exactly which other post the hyperlink links to. For the purposes of this strike out application, I assume that can be addressed by amending the pleadings to make that clear.

[82] First, the mode of publishing a statement on a blog on the internet is part of the context in which the statement complained of must be read, according to point (f) of Blanchard J's principles. That mode of publishing is relevant to determining the meaning conveyed by the words chosen by the publisher.⁷³ Hyperlinked statements in the relevant posts are only a click away, having been effectively highlighted by the author as relevant context. As the Court of Appeal has found, hyperlinking can closely connect statements,⁷⁴ and may even involve promotion of the hyperlinked material for the purposes of publication.⁷⁵ As such they are part of the context in which they must be read, as Woolford J in *Wu v Moncur* found. Other than as an element of the context in which defamatory meaning is determined as a matter of fact, I agree with Courtney J in *Karam v Parker* that there is no difference in the legal test applied to blogs and other media.

[83] Second, I agree that the tendency of political debate on the internet often to be expressed in hyperbolic and sarcastic terms does not lower the legal threshold for what is capable of being defamatory.⁷⁶ But, irrespective of the medium, statements which engage in robust political and policy debate need to be read in that context, in such a way as to uphold the right to freedom of expression. As s 5 of the Bill of Rights makes clear, that right is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The law of defamation, that protects peoples' reputations, is a reasonable limit as long as it is not applied so enthusiastically as to chill political and policy debate. Plaintiffs cannot expect courts to uphold thin-skinned reactions to attack on political or policy grounds. Those who engage in genuine public political and policy debate must

⁷³ Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, Oxford, 2010) at [8.15]; *Burrows and Cheer*, above n 5, at ch 2(b)(v).

⁷⁴ *Murray v Wishart*, above n 62, at [31]–[32].

⁷⁵ *Wishart v Murray*, above n 18, at [58]–[64].

⁷⁶ *Baglow v Smith* [2015] ONSC 117 at [206]–[208].

expect robust public responses. But defendants cannot expect to make false, unsubstantiated personal attacks, in a political and policy context, with legal impunity.

[84] Here, the general existence of robust political debate about issues to do with the regulation of sugar, fat, alcohol and tobacco is an important aspect of the context of the statements. But the precise content of specific statements about those issues, which are not generally notorious, nor closely connected to the statements complained of, are not part of the context in which they must be read. The meaning of an allegedly defamatory statement is a matter of fact to be determined in all its context and circumstances.

[85] Third, I consider the terms “trougher”, “rorter” and “ripping off”. Where these terms are used in the statements complained of here, the plaintiffs plead that, in its natural and ordinary meaning, the statement means and has been understood to mean, that the relevant plaintiff “has misused public funds”, “has misappropriated public funds”, and “has used public funds for his own benefit, to ‘enrich’ his own life and not in the public interest”. The defendants offer more innocuous meanings, as noted above.

[86] I consider an ordinary reasonable person would understand references to “troughing” and “troughers” to have connotations going beyond the meaning of being funded publicly. The same is true of “rort” and “rorter” and “ripping off”. I consider the ordinary reasonable person, with the attributes identified by Blanchard J, would infer those terms to carry a pejorative connotation of wrongdoing in the use of funding; being, in some sense, morally or legally illegitimate. That meaning can include the meanings generally pleaded by the plaintiffs as identified above. It does not emerge as a result of strained interpretation or speculation as the Oxford Dictionary Online definitions of each term suggest:

trougher

Noun. *British informal*

1 A person who eats heartily or greedily.

1.1 *derogatory* A person who makes ample use of opportunities afforded by their position in order to benefit themselves, especially financially.

Origin: Mid 19th century (in reference to a pig); from trough

rort

Noun. *Australian informal*

1 NZ A fraudulent or dishonest act or practice.

2 *dated* A wild party.

Verb. Australian, NZ

1 Engage in sharp practice.

1.1 [*with object*] Manipulate (a ballot or records) fraudulently; rig.

1.2 [*with object*] Work (a system) to obtain the greatest benefit while remaining within the letter of the law.

Origin: back-formation from rorty.

rip-off

Noun. *informal*

1 A fraud or swindle, especially something that is grossly overpriced.

1.1 An inferior imitation of something.

[87] These terms do not take their meanings only from the tone or adjectives that qualify them.⁷⁷ And their meanings are not altered by, or an ordinary part of, a context of the robust political debate. The dictionary definitions suggest “rorter” and “rip-off” may have a more fraudulent connotation than “trougher”. Rort, for example, can support a meaning of fraudulent or dishonest. For each, a derogatory meaning is part and parcel of the ordinary meaning of these terms in New Zealand. That seems likely to be why they were used. The reader is likely to think worse of their subject, in a more than minor way.

[88] The case of *McEvoy v Michael* does not assist Mr Henry’s argument. There, the English High Court determined the natural and ordinary meaning of a passage with the headline “Snouts in the Trough” was an imputation of hypocrisy for taking full advantage of an expenses regime after criticising others for taking rather less advantage of it.⁷⁸ Keyser J did not consider there was any imputation in the relevant passage that the claimant had taken moneys unlawfully. But that was a different passage than the passages at issue here. The plaintiffs here are not alleging the passages here bear a meaning of unlawful behaviour so even if the passage was exactly the same, the case is not on point. And, as Mr Nilsson submits, the High Court of England and Wales has recognised in other cases that allegations of having noses or “snouts in the trough” can be to a person’s discredit, and be defamatory, irrespective of whether there was illegality.⁷⁹

⁷⁷ *Ralston v Fomich* [1992] 4 WWR 284 at [7].

⁷⁸ At [57]–[60].

⁷⁹ *Miller v Associated Newspapers Ltd* [2010] EWHC 700 (QB) at [18]; *Cook v Telegraph Media Group* [2011] EWHC 1134 (QB) at [31]–[35].

[89] The terms “trougher”, “rort” and “rip-off” are capable of bearing the meanings alleged by the plaintiffs here, in the specific passages identified in the annex. Whether they are, here, is a question for trial.

[90] The annexed table sets out my decisions in relation to the specific causes of action and, briefly, the reasons for them. There are 161 pleaded defamatory meanings of the 31 posts and nine comments in the first 40 causes of action. The first, second and third defendants apply to strike out all but five of the pleaded meanings. In summary, as explained in the annex, I decline the strike-out application in relation to all but 21 meanings.

Issue 4: Is the claim against Ms Rich and the NZFGC speculative or untenable?

Application

[91] In relation to the 41st cause of action, against Ms Rich and the NZFGC, the plaintiffs plead:

- 193 Ms Rich and the FGC published some or all of the Blog Posts and the Graham Comments, including the Gone Mad Blog Post, by procuring Mr Graham, FCL and/or Mr Slater to publish the substance and the sting of those Blog Posts and Graham Comments.

Particulars

Particulars are known by Ms Rich, FGC, Mr Graham and Mr Slater and will be provided following discovery.

- 194 Ms Rich and FGC were paid and/or funded and/or procured by FGC's members to:

- (a) challenge or take issue with certain public health research and concerns that were contrary to the interests of the FGC's members;
- (b) conduct campaigns against public health researchers and public health advocates, including the plaintiffs; and
- (c) publish the Blog Posts and the Graham Comments.

Particulars

Particulars are known by Ms Rich and FGC and will be provided following discovery.

- 195 Ms Rich and FGC's publication of the Blog Posts and the Graham Comments was unknown, and could not reasonably have been known, to the plaintiffs until the publication of the book *Dirty Politics* on 13 August 2014.
- 196 The plaintiffs are entitled to aggravated and punitive damages, including because:
- (a) The Blog Posts and the Graham Comments form part of a campaign by Ms Rich and FGC on their own behalf and/or on behalf of FGC's members to:
 - (i) discredit the plaintiffs;
 - (ii) damage their reputations;
 - (iii) undermine their research and efforts to promote public health; and/or
 - (iv) prevent regulation of the alcohol, food and beverage, and tobacco industries.
 - (b) Ms Rich and FGC were aware that the statements in the Blog Posts and the Graham Comments were untrue or were reckless as to their truth.

[92] Ms Rich and the NZFGC have denied each of these paragraphs, saying they had no knowledge of Mr Bradbrook or his position prior to the statement of claim and that Dr Swinburn and Mr Bradbrook are not even referred to in *Dirty Politics*. Ms Rich and the NZFGC apply to strike out the cause of action on the grounds that it is speculative without factual foundation and there is no legal basis for it. The plaintiffs oppose the application.

Submissions on strike out as speculative

[93] Mr Akel submits some paragraphs of the Amended Statement of Claim ([194](a) and (b)) should be struck out as displaying no cause of action. But they are pleadings of contextual facts, which may support the cause of action pleaded. Mr Akel submits the claim Ms Rich and the NZFGC published the posts and comments is bold speculative assertion without factual foundation. Mr Akel agrees a strike-out application proceeds on the basis the facts pleaded are true except, under r 15.1, if speculative allegations are made without foundation. He says no particulars, such as references to dates, times, places or documents are provided and the plaintiffs should have applied for pre-commencement discovery to found their claim. Mr Akel says

Dirty Politics, which is pleaded by the plaintiff, does not support the claim being advanced and Dr Swinburn and Mr Bradbrook are not even mentioned in the book.

[94] Mr Cundy, for the plaintiffs, submits a strike-out application must proceed on the basis the facts pleaded are true and so there is no basis for striking out the 41st cause of action against Ms Rich and the NZFGC. He submits the defendants are effectively seeking to conduct a mini-trial without evidence. He submits I can draw an inference, from the failure of the defendants to provide evidence, that any evidence would not assist the strike-out application. He also submits there is a factual basis for the claim and identifies the passages in *Dirty Politics* on which the plaintiffs rely. He seeks to adduce an affidavit exhibiting material supporting that, which the defendants' counsel oppose as inadmissible.

Should the claim against Ms Rich and NZFGC be struck out as speculative?

[95] It is elementary a strike-out application proceeds on the basis the facts as pleaded are true.⁸⁰ Even so, however, it is possible a cause of action could be struck out under r 15.1 if “self-evidently speculative or false”.⁸¹ Such a cause of action would be a misuse, or abuse, of the Court's processes in terms of the Court of Appeal's observations in *Chesterfields*. The courts will not provide a boat for a deep sea fishing expedition without bait.

[96] But Mr Akel's complaint that the plaintiffs should have applied for pre-commencement discovery is a bit rich. In November 2016 the plaintiffs sought orders and a timetable for standard discovery. Mr Akel submitted that discovery and inspection should await the outcome of the strike-out applications, that discovery would not impact on any of his four strike-out grounds and that costs would not remedy the disruption and intrusion of discovery which is a fishing expedition.⁸² I agreed not to order discovery before resolution of the strike-out applications by the High Court on the basis that strike-out applications proceed on the assumption the

⁸⁰ *Attorney-General v Prince and Gardner*, above n 2, at 267; *Couch v Attorney-General*, above n 2, at [33] (per Elias CJ and Anderson J) and [114] (per Blanchard, Tipping and McGrath JJ).

⁸¹ *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [13].

⁸² Minute No 2 of 10 November 2016 at [7].

facts pleaded are true.⁸³ Similarly, the defendants have refused to answer interrogatories before the strike-out applications are resolved.

[97] Furthermore, in response to the defendants' complaints about the basis for the plaintiffs' claims, the plaintiffs sought to adduce an affidavit providing supporting material, in opposition to the defendants' strike-out applications, dated January 2017. That includes, in particular in relation to this issue, chapter seven of the book *Dirty Politics* and documents said to be leaked to the public including emails of Mr Slater's. The plaintiffs had previously adduced an affidavit in support of the application to join Ms Rich and the NZFGC in September 2016 and another in support of the application against Mr Slater in November 2016. The defendants had previously adduced three affidavits by Mr Slater (with six volumes of exhibits). But the defendants objected to the admissibility of aspects of the plaintiffs' January 2017 affidavit on the basis the authenticity of the documents has not been tested and on the basis of hearsay.

[98] If I follow the usual course of assuming the truth of the plaintiffs' pleadings, Mr Akel's submission would be simply assumed away. To take his submission seriously, I consider fairness requires me to examine chapter seven of *Dirty Politics* and Mr Slater's leaked emails exhibited to the plaintiffs' affidavit in response. The defendants cannot have it both ways. If they are mounting a strike-out application on the basis of lack of factual foundation they can hardly object to a factual foundation being supplied in response, particularly the precise factual foundation which they say does not support the claim being advanced. Accordingly, I review the material exhibited to the affidavit for this limited purpose. That should not be taken to be a ruling as to admissibility of the affidavit and exhibits at trial. And, in undertaking this review, I do not make findings as to the authenticity or truth of the contents of *Dirty Politics*, just whether it may provide a factual foundation for the plaintiffs' allegations.

[99] The plaintiffs submit chapter seven of *Dirty Politics* contains the following allegations relevant to this aspect of the proceeding:⁸⁴

⁸³ At [10].

⁸⁴ Nicky Hager *Dirty Politics: How attack politics is poisoning New Zealand's political*

- (a) Mr Slater was paid to publish articles on Whale Oil written by Mr Graham and others as if they were Mr Slater's own work (page 78 of *Dirty Politics*).
- (b) A flow of articles written by Mr Graham arrived to Mr Slater by email. Every one of them was then published by Mr Slater on Whale Oil at the time Mr Graham requested (pages 78-79).
- (c) An email headed "December hits coin" shows that Mr Slater was paid \$6,555 (including GST) by Mr Graham for his services during December 2013 (page 87). The obvious inference is that the payment was for publication of the Blog Posts written by Mr Graham.
- (d) On 26 February 2014 Mr Slater received an email from Mr Graham containing the text of an article about Dr Sellman under the heading "Confirmed: Doug Sellman has gone mad". The article was published as a Blog Post on Whale Oil on the following day in Mr Slater's name (page 79). The 14th cause of action in the proceeding is based on that Blog Post.
- (e) Mr Graham commented on Whale Oil blog posts using the pseudonyms "Naylor" and "Lion King" (pages 81-82). Those Comments routinely attacked the plaintiffs. The 32nd to 40th causes of action are based on some of them.
- (f) Ms Rich and FGC were clients of Mr Graham's and used Mr Graham and Mr Slater to defend FGC's members and attack those those threatened their interests (page 83).
- (g) Mr Graham sent Mr Slater a number of articles with "KR" or "KR hit" in the subject line, including articles defending Fonterra, Coca-Cola and Frucor, as well as the article "Confirmed: Doug Sellman has gone made" referred to above. Those articles (or "hits") were published on Whale Oil by Mr Slater, unchanged, under his own name (pages 84-85 and 152-153). The obvious inference is that "KR" was Katherine Rich and that she was acting on behalf of FGC's members.
- (h) On 21 January 2014 Mr Slater sent an email to Mr Graham with a link to a news story. Mr Graham's reply stated "Coke keeps sending stuff to KR expecting her to do something (where we come in). Hit pending" (pages 85 and 153). Ms Rich and Mr Graham had been in email contact on the same day (page 153).

[100] The plaintiffs say chapter seven of *Dirty Politics* and Mr Slater's leaked emails support a number of inferences:

- (a) Each of the plaintiffs was engaged in research or advocacy that was contrary to the interests of FGC and its members. FGC and its

members stood to benefit from publications that attacked the plaintiffs and damaged their reputations.

- (b) Mr Graham was a public relations professional. He and FCL must have been paid by their clients for the services they provided, including writing the Blog Posts, paying Mr Slater to publish them, and posting the Comments. Mr Graham and FCL would not have been working for free.
- (c) Ms Rich and FGC were clients of Mr Graham and FCL's. Indeed, Ms Rich and FGC have specifically confirmed in correspondence that FGC paid FCL for (unspecified) services and attendances on a variety of issues.⁸⁵
- (d) Ms Rich and FGC would have known what services their agents Mr Graham and FCL were carrying out on their behalf, including writing and publishing the Blog Posts. As such, they would have procured or authorised those publications.⁸⁶

[101] I have examined chapter seven of *Dirty Politics* and Mr Slater's leaked emails, as exhibited to the January 2017 affidavit. I agree *Dirty Politics* makes the allegations the plaintiffs say, above, it does. I agree *Dirty Politics* and the emails could support the inferences the plaintiffs say, above, they do. The most tenuous part of the plaintiffs' pleadings, on the basis of the information before me, is whether there is a link between Ms Rich and the NZFGC and Dr Swinburn and Mr Bradbrook. But, on balance, I consider the allegations in *Dirty Politics* are capable of supporting an inference they were.

[102] I cannot, and do not, find those allegations and inferences are supported by any other evidence or are correct or that the causes of action will succeed. And it would be better if the inferences and supporting particulars put by the plaintiffs in argument were part of the pleadings. But that can be fixed by amendment, which will probably be necessary after discovery anyway. I consider the pleadings are not self-evidently speculative or false. I decline to strike out the 41st cause of action against Ms Rich and the NZFGC as speculative and a misuse of process.

⁸⁵ Letter from Simpson Grierson to LeeSalmonLong dated 1 July 2016 at [5].

⁸⁶ Notably, Ms Rich and the NZFGC have used careful language in correspondence, stating that they "deny they have requested and paid Mr Graham or FCL, or Mr Slater, to conduct defamatory campaigns against [the plaintiffs]" See Letter from Simpson Grierson to LeeSalmonLong dated 1 July 2016 at [5]. (Footnote in the original).

Law of procuring or being an accessory to defamatory publication

[103] The second basis for the application to strike out the 41st cause of action is that it is not capable of founding legal liability against Ms Rich or the NZFGC. In particular, for defamation to be available it is essential that the defamatory statement is published. There is little New Zealand authority on the outer limits of responsibility for publication by procuring, or being an accessory to, the making of defamatory statements.

[104] The learned authors of *Gatley on Libel and Slander* explain “at common law liability extends to any person who participated in, secured or authorised the publication”.⁸⁷ As Eady J stated in *B v N*, “[t]here are various acts that can give rise to legal responsibility, for example, encouraging the primary author, supplying him with information intending or knowing that it will be re-published, or, if one is in a position to do so, instructing or authorising him to publish it.”⁸⁸ In *Bunt v Tilley* in 2006, Eady J stated:⁸⁹

In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant’s knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the Claimant’s words) responsible for “corporate sponsorship and approval of their illegal activities”.

[105] *Gatley* also refers to general principles of tort liability in identifying who may be a tortfeasor in defamation:⁹⁰

Joint and several liability. In accordance with general principle, all persons who procure or participate in the publication of a libel, and who are liable therefor, are jointly and severally liable for the whole damage suffered by the claimant.

[106] The authority for that proposition regarding procuring is an Australian case, *De Jong v State of Victoria*.⁹¹ Applications for summary dismissal and strike out of a

⁸⁷ *Gatley on Libel and Slander*, above n 55, at [6.10] (citations omitted).

⁸⁸ *B v N* [2002] EWHC 1692 (QB) at [25].

⁸⁹ *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1243 at [21].

⁹⁰ At [6.11].

defamation claim based on accessorial liability were declined based on authority from the High Court of Australia in 1923 in *Webb v Bloch*.⁹² There, one defendant instructed a solicitor to publish a circular in the way he thought most advisable, knowing its contents. The instruction was confirmed by other defendants who did not know the circular's contents or whether the defamatory statements were true. Isaacs J quoted counsel in *Parkes v Prescott* who had referred to an 1830 text, *Starkie on Libel*: "All who are in any degree accessory to publication of a libel, and by any means whatever conduce to the publication, are to be considered as *principals in the act of publication*."⁹³ Isaacs J characterised the defendants as "intermediate agents" and said "[t]hey cannot employ the master mind for the very purpose, accept its suggestions, approve and disseminate its production, and then disclaim its malice."⁹⁴

[107] *Newton v Dunn*, the most similar New Zealand case to the present case, was also founded on the authority of *Webb v Bloch*.⁹⁵ The plaintiff sued a defendant for publishing allegedly defamatory statements under a commercial agreement carried out at the direction or with the knowledge of two second defendants. Collins J rejected an argument that *Webb v Bloch* was modified by the Supreme Court of Queensland.⁹⁶ He cited the passage of *Gatley* quoted above, concluding "it is a question of fact in each case as to whether or not a defendant 'procured' or 'participated' in the publication of the statements in question so as to render him or her liable as a co-publisher for any defamation."⁹⁷ On the facts there, Collins J concluded the first defendant was acting as the agent of the second defendants and the second defendants were also responsible as joint or co-publishers because they authorised and participated in relevant statements being published.⁹⁸

⁹¹ *De Jong v State of Victoria* [2006] VSC 274.

⁹² *Webb v Bloch* (1928) 41 CLR 331.

⁹³ At 364 (emphasis in the original) quoting *Parkes v Prescott* (1869) LR, 4 Ex 169 at 173 which quoted Thomas Starkie *Treatise on the law of slander and libel, and incidentally of malicious prosecutions* (2nd ed, J & W T Clarke, London, 1830) vol 2 at 225. Among the other cases relied up on was *R v Cooper* (1846) 8 QB 533 at 536.

⁹⁴ At 365.

⁹⁵ *Newton v Dunn* [2017] NZHC 2083 at [81]–[88].

⁹⁶ At [85]–[88] citing *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 (QSC) at 194.

⁹⁷ At [88] citing *Gatley on Libel and Slander*, above n 55, at [6.11].

⁹⁸ At [128] and [130].

[108] The key case cited in the *Gatley* quotation for the proposition regarding participating in publication is *Dar Al Arkan Real Estate Development Co v Al Refai*.⁹⁹ This is one of two closest fact situations to the present case I have been able to locate. A former chief executive was alleged to have waged a campaign to injure the reputations of the plaintiffs, engaging a public relations firm, FTI Consulting Group Ltd, for that purpose. FTI was alleged to have “caused” defamatory material to be published. Smith J in the English High Court declined applications by FTI for strike out and summary judgment. He relied on the same precedents as did the Court in *Webb v Bloch: R v Cooper* and *Parkes v Prescott*, for the proposition that FTI did not have knowledge of the precise words complained of before they were published.¹⁰⁰ These cases are discussed by *Gatley* as follows:¹⁰¹

Alteration of defamatory matter: Where it is alleged that the defendant is liable as a publisher, on the ground that he has authorised another to publish, he is not necessarily protected because the material has been altered. The correct principle is that:

“where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language be to some extent his [the agent’s] own, the man making the request is liable to an action as the publisher.¹⁰² If the law were otherwise, it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents.”¹⁰³

The question is whether the defendant authorised the substance and the sting.¹⁰⁴

[109] Smith J also relied on the more general statement of accessory liability in tort, in a non-defamation context, by the Court of Appeal of England and Wales in

⁹⁹ *Dar Al Arkan Real Estate Development Co v Al Refai* [2013] EWHC 1630 (Comm). The other case is *Berezovsky The Russian Television and Radio Broadcasting Co* [2010] EWHC 476 at [60], [61] in which Eady J held a defendant was not liable because he could not be shown to be “a party to the overall message” conveyed by” a television programme or “the overall plan [of the television programme].”

¹⁰⁰ At [34], citing *R v Cooper* (1846) 8 QB 533 and *Parkes v Prescott* (1869) LR4 Ex 169 and cited by *Stocker v Stocker* [2015] EWHC 1634 (QB) at [28]. *Parkes v Prescott* was also relied upon by Harrison J in *Osmose New Zealand v Wakeling* HC Auckland, CIV 2005-404-7195, 19 December 2006 at [78] and [80].

¹⁰¹ *Gatley on Libel and Slander*, above n 55, at [6.54]. Citations included.

¹⁰² This sentence was cited with approval in *Boston v Bagshaw*, *The Times*, November 27, 1965 affirmed [1966] 1 WLR 1126 (CA).

¹⁰³ *Parkes v Prescott* (1869) LR4 Ex 169 at 179.

¹⁰⁴ *Payton v Daily Sketch*, *The Times*, May 2, 1967. The same principle applies to broadcasts: *Boston v Bagshaw*, *The Times*, November 27, 1965; [1966] 1 WLR 1126 (CA).

Fish & Fish Ltd v Sea Shepherd UK.¹⁰⁵ That judgment was subsequently overturned by the United Kingdom Supreme Court in *Sea Shepherd UK v Fish & Fish Ltd*.¹⁰⁶ A majority of the Supreme Court each endorsed the statement by *Clerk and Lindsell on Torts* that “persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design.”¹⁰⁷ The Court largely agreed on the legal principles but not on their application to the facts. In a passage relied upon by Associate Judge Bell in New Zealand, Lord Toulson stated:¹⁰⁸

To establish accessory liability in tort it is not enough to show that [a defendant] D did acts which facilitated [the principal tortfeasor] P’s commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further.

[110] While similar in substance, Lord Sumption used different wording which was, in turn, very similar to that used by Lord Neuberger:¹⁰⁹

The effect of these statements is that the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious.

[111] The leading New Zealand text, *Todd on Torts*, cites the United Kingdom Supreme Court’s judgments in *Sea Shepherd UK v Fish & Fish Ltd* as a leading authority.¹¹⁰ *Todd* also states there is no general rule that a principal is vicariously liable for the tort of an agent committed in the course of the agency (which, in tort can be a person authorised to act on behalf of the principal).¹¹¹ But a principal will clearly be liable as joint tortfeasor when the principal hires an independent contractor to commit an act which is in itself tortious.¹¹² As the Privy Council said in a New Zealand case, *New Zealand Guardian Trust v Brooks*, quoting from an 1873 English case, “[f]or the principal is not liable for the torts or negligences of his agent in any

¹⁰⁵ *Fish & Fish Ltd v Sea Shepherd UK* [2013] EWCA Civ 544 (CA) at [45]–[47].

¹⁰⁶ *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, [2015] AC 1229.

¹⁰⁷ At [22] (Lord Toulson), [37] (Lord Sumption), [55] (Lord Neuberger).

¹⁰⁸ At [21], applied in *ASB Bank Ltd v Ward* [2015] NZHC 2909 at [66].

¹⁰⁹ At [37] cf [55].

¹¹⁰ *Todd on Torts*, above n 20, at [24.2.01].

¹¹¹ At [22.5.02].

¹¹² At [22.6.01].

matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.”¹¹³

Submissions on procuring publication

[112] Mr Akel submits the plaintiffs’ allegation that Ms Rich and the NZFGC procured “the substance and sting” of the publications is a novel claim, for which there is no legal authority, which would chill freedom of expression, contrary to ss 6 and 14 of the Bill of Rights and contrary to statutory reform in the United Kingdom. He submits it should be struck out as displaying no reasonable cause of action. He submits the accessorial liability alleged here goes beyond *Webb v Bloch* and *Newton v Dunn* by relating to the substance and sting of the posts and comments rather than their actual publication. He submits such an extension of liability is a disproportionate response to any complaint of defamation. He submits there is force in the submission, rejected by Collins J in *Newton*, that the Court in *Thiess v TCN Channel 9 Pty Ltd (No 5)* limited the application of *Webb v Bloch* to situations where a defendant approved the final form of the defamatory statements.¹¹⁴

[113] Mr Cundy submits anyone participating in publication of defamation will be liable jointly and severally as a joint tortfeasor. He relies on *Parkes v Prescott* and *Dar Al Arkan* for liability deriving from procuring the “substance and sting” of a defamatory publication. Alternatively, Mr Cundy submits the pleading is capable of being amended to refer to Ms Rich and the NZFGC procuring or commissioning the publications, approving or authorising them or being vicariously liable for Mr Graham’s and FCL’s statements or as agents in terms of s 20 of the Act. He submits, if there is uncertainty about the extent of liability in this regard, that is best addressed at trial, in light of all the evidence, and that *Newton v Dunn* demonstrates that.

Should the claim against Ms Rich and NZFGC be struck out for lack of publication?

[114] On a straightforward reading, if they were sustained at trial, the pleadings could mean Ms Rich and NZFGC were accessories to the publication of defamatory statements in the sense identified by *Gatley* as constituting joint liability for

¹¹³ *New Zealand Guardian Trust v Brooks* [1995] 1 WLR 96 (PC) at 99, citing *McGowan v Co v Dyer* (1873) LR8 (QB) 141, 145.

¹¹⁴ *Thiess v TCN Channel 9 Pty Ltd (No 5)* [1994] 1 Qdr 156.

defamation. They may have procured or participated in the publication of a defamatory statement. They may have instructed, authorised or encouraged Mr Slater and/or Mr Graham. *De Jong and Webb v Bloch* in Australia, *Dar Al Arkan* in England, and *Newton v Dunn* in New Zealand, all suggest such actions can found liability for defamation.

[115] I agree with Collins J in *Newton v Dunn* that the principle in *Webb v Bloch* is not necessarily limited to situations where the final words of a defamatory statements are approved. The line of cases deriving from *Parkes v Prescott*, as endorsed by *Gatley*, indicate that requesting publication of the sense and substance, or sting, of defamatory statements may attract liability irrespective of alteration of the wording of what is published. Whether there is liability is a matter for consideration at trial. If proved at trial, the pleading at [193] of the Amended Statement of Claim may be capable of sustaining such liability. To the extent there is an element of novelty in the claim that is additional reason for caution before striking it out.

[116] If the pleadings are sustained, Ms Rich and the NZFGC may have assisted Mr Slater and/or Mr Graham, pursuant to a common design with them, to do an act which turns out to be defamatory. Liability would be consistent with general principles of tortious liability as expounded by the United Kingdom Supreme Court in *Sea Shepherd UK*. That appears to me, consistent with the views of Associate Judge Bell in *ASB Bank Ltd v Ward* and of *Todd on Torts*, to be an accurate statement of New Zealand legal principle. It is consistent with the Privy Council's decision in *New Zealand Guardian Trust*.

[117] As I have noted above, the law of defamation must be a reasonable limit on the right to freedom of expression that is demonstrably justified in a free and democratic society. I do not consider extension of the law of defamation to those who procure, or are accessories to, the publication of defamatory statements, whether or not they know their final form, necessarily transgresses that requirement any more than the application of the law to those who directly publish such statements themselves.

[118] Accordingly, I consider it is possible that liability is tenable on the basis of these pleadings, if made out at trial. It is important to note that in no way am I determining that Ms Rich and the NZFGC are liable in relation to the defamations alleged here. That is not established by the assertions in the pleadings. It may not be established at all. But, if the pleadings are borne out at trial, I consider it is possible liability may be able to be established. So I am not willing to strike out the claim as untenable on the basis liability cannot possibly be established.

Issues 5: Other applications and next steps

The plaintiffs' ss 39 and 41 notices

[119] Mr Slater, Mr Graham and FCL apply to strike out the plaintiffs' notices under ss 39 and 41 of the Defamation Act as premature. Mr Henry submits that, until the Court has determined whether the meanings claimed are defamatory, it is a waste of resources to respond to those notices. But he accepts that once the issues dealt with in this judgment are determined, Mr Slater will file an amended statement of defence as appropriate. Mr Patterson submits the notices must give sufficient particulars so Mr Graham can respond. The plaintiffs oppose the applications, submitting the notices were required to be served now and are based on the information available to them.

[120] I regard the application to strike out these notices as misconceived. A response to the notices is not required of the defendants who are required to give notice if they wish to challenge a defence of honest opinion or qualified privilege. No sustainable ground on which to strike them out has been identified. Further particulars of the claims may be required in due course, in light of discovery, as Mr Nilsson acknowledges.

Mr Slater's affirmative defences

[121] The plaintiffs also applied to strike out Mr Slater's affirmative defence relating to the political nature and context of the statements at issue,¹¹⁵ and requiring him to give particulars of the affirmative defences of truth and honest opinion. Mr

¹¹⁵ At [197]-[210] of the First Defendant's Amended Statement of Defence of 16 August 2016.

Slater opposes the applications as they are a basis for defences of qualified privilege and public interest. Mr Henry, on his behalf, submits particulars should await determination to the applications determined in this judgment.

[122] While it may not be appropriately labelled as an affirmative defence, I decline the application to strike out the paragraphs of Mr Slater's Amended Statement of Defence relating to the political nature and context of the statements at issue. The points made in this part of the pleading underlie a number of aspects of Mr Slater's defence. Some of those aspects have been upheld in this judgment. I see no reason why those paragraphs should be struck out. But Mr Slater may wish to review their place and point in any further Amended Statement of Defence. He will need to specify more particulars of the defences of truth and honest opinion as well.

Next steps

[123] Prior to the hearing I had directed the parties to propose further timetabling directions for the substantive hearing. The defendants indicated they would seek a stay pending the outcome of any appeal of this judgment, if the strike-out applications were declined. The plaintiffs indicated they would press for their proposed timetable to be ordered.

[124] I direct the parties to file any applications, and accompanying submissions on the applications sought and on the next steps in the timetable of the proceedings of no more than 10 pages, within 15 working days of the date of this judgment. Any submissions in response, of no more than 10 pages, are to be filed within 10 working days of that. The parties are to indicate whether they seek to be heard on the applications/timetable. If I do hear them, my determination will not be delayed by a three month trial, unlike this judgment.

Result

[125] I decline the applications to strike-out the causes of action except in relation to the pleaded meanings identified in the table annexed to this judgment.

[126] I am inclined to let costs lie where they fall, since each party has had a measure of success. If, despite that indication, any party wishes to apply for costs, they have leave to file submissions within 15 working days and any responses are to be filed within 10 working days of that.

[127] Because this proceeding could be the subject of a jury trial, and it is important the jury's minds not be prejudiced, as the parties requested, the contents of the allegations in pleadings should not be publicly reported. The contents of the allegations are largely contained in the table annexed to this judgment.

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Palmer J

