IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-5218
[2018] NZHC 2781

BETWEEN	MATTHEW JOHN BLOMFIELD Plaintiff
AND	CAMERON JOHN SLATER First Defendant
AND	SOCIAL MEDIA CONSULTANTS LIMITED Second Defendant

Hearing:	26 September, 8, 10, 11, 12 October 2018
Appearances:	F E Geiringer for Plaintiff G Little SC & D B Beard for Defendants
Judgment:	26 October 2018
Reissued:	18 February 2019

REASONS JUDGMENT OF PAUL DAVISON J
[Re application by defendants to file fourth and fifth amended affirmative statement of defence, security for costs and admissibility of evidence]

This judgment was reissued by me on 18 February 2019 at 3:30 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Bytalus Legal, Auckland
Legal Street, Auckland

Introduction

[1] The trial of this now longstanding defamation proceeding was scheduled to commence on 8 October 2018. However, commencement of the trial has been delayed by the defendants' late filing of interlocutory applications, including applications for leave to file first a fourth amended statement of defence, and then a fifth amended statement of defence.

[2] On 26 September 2018, I heard two interlocutory applications by the defendants in which they applied for leave to make a further application for an order for security for costs, and for leave to file a fourth amended affirmative statement of defence. I declined both these applications and issued a results judgment on 27 September 2018.[1]

[3] On the first day of the scheduled trial on 8 October 2018, and prior to opening the case for the plaintiff, counsel for the plaintiff applied for a ruling as to the admissibility of evidence sought to be introduced by the defendants. He submitted that the defendants' third amended statement of defence filed on 15 June 2018 did not satisfy the requirements of proper pleading of the defences of truth and honest opinion, and that much of the evidence that the defendants are seeking to adduce is therefore irrelevant and inadmissible. He also made submissions as to other aspects of the defendants' pleadings and submitted that the defendants should not be permitted to advance a defence based on asserting the truth of the publications taken as a whole, or produce evidence directed at the issue of the plaintiff's bad reputation. After hearing submissions from both counsel that occupied the first scheduled day of the trial, I reserved my decision on the application and adjourned the commencement of the trial pending release of my reserved judgment.

[4] After the hearing concluded on 8 October, the defendants' counsel filed an "Urgent Memorandum" stating that the defendants would seek leave to file a fifth amended affirmative statement of defence, and seeking adjournment of the trial for a day to enable counsel time to prepare it. I convened a judicial telephone conference on the morning of 9 October, confirmed that the application was opposed by the

---

1 *Blomfield v Slater* [2018] NZHC 2538.

plaintiff, and directed that the application for leave to file a fifth amended statement of defence be heard the next morning. I accordingly heard argument over three days on 10, 11, and 12 October 2018 at the conclusion of which I reserved my decision. On 16 October 2018, I delivered a results judgment dismissing the defendants' application for leave to file a fifth amended affirmative statement of defence.[2]

[5] In this judgment I now set out my reasons for dismissing the defendants' applications for leave to file the fourth and the fifth amended statements of defence, and for dismissing the defendants' application for leave to apply for a further order for security for costs and an order to stay the proceeding. I also give reasons for my ruling regarding the admissibility of evidence.

Background

[6] In this proceeding the plaintiff, Mr Matthew Blomfield, sues the defendants, Cameron Slater (the first defendant) and Social Media Consultants Limited (the second defendant),[3] alleging that they defamed him in a series of nine articles which the first defendant wrote and the second defendant published on the Whale Oil blog website between 3 May 2012 and 6 June 2012. The plaintiff commenced the proceeding in the District Court at Manukau in June 2012. On 19 December 2014, the proceeding was transferred to this Court.[4] It has taken almost six years since the proceeding was commenced for the matter to get to trial. A four-week trial commencing on 8 October 2018 was scheduled over a year ago by Heath J on 31 August 2017.[5]

[7] On 14 and 15 May 2018 Lang J heard a number of outstanding interlocutory applications. He delivered three separate judgments on 18 May in which he:

(a) declined an application by the plaintiff for summary judgment as to liability in relation to each of the nine publications, or alternatively

---

2 *Blomfield v Slater* [2018] NZHC 2679.

3 The plaintiff's claim was originally brought only against Mr Slater. Social Media Consultants Ltd was joined as a second defendant pursuant to an order of Brewer J on 7 December 2017.

4 *Slater v Blomfield* [2014] NZHC 3272.

5 *Blomfield v Slater* Minute of Heath J (No 2), 31 August 2017. At the time the fixture was scheduled by Heath J, the estimated trial duration was six weeks.

seeking an order that each defence be struck out on the grounds that it has been improperly pleaded and/or discloses no tenable defence;[6]

(b) granted the plaintiff's application for an order that the case be tried before a Judge sitting without a jury;[7] and

(c) determined four interlocutory applications relating to: the costs categorisation of the proceeding; the fixing of costs for the plaintiff's applications seeking orders adding the second defendant, and requiring the defendant to provide further and better particulars; an application by the plaintiff for the trial to proceed in two stages; an application by the defendant for an order requiring the plaintiff to provide security for costs; and an application by the plaintiff for "unless orders" to compel the first defendant to comply with directions for discovery.[8]

[8] The plaintiff's application to strike out the defences and for summary judgment was founded on two propositions. First it was submitted that the statement of defence wrongly advances the defences of truth and honest opinion in tandem, when they are required to be pleaded and particularised separately. Secondly, the plaintiff submitted that such particulars as had been provided failed to fairly inform the plaintiff of the precise nature of the allegations being made by the defendants and which he will be required to meet. Mr Geiringer for the plaintiff submitted that as the proceeding had been underway for over six years, during which the inadequacy of the defendants' pleading and particulars had been raised by the plaintiff on a number of occasions, the defendants had had ample time and opportunity to put their statement of defence in order and the time had come for the defence to be struck out.

[9] Although he dismissed the plaintiff's application to strike out the first defendant's defence, Lang J said:[9]

> [75] I take Mr Geiringer's point, but I note that Mr Slater was represented by counsel in 2012 and that is not the case now. I am prepared to accept that

---

6 *Blomfield v Slater* [2018] NZHC 1099.
7 *Blomfield v Slater* [2018] NZHC 1100.
8 *Blomfield v Slater* [2018] NZHC 1101.
9 *Blomfield v Slater* [2018] NZHC 1099.

as a lay litigant, and even as an experienced lay litigant, Mr Slater may not have been aware of the pleading requirements in relation to this issue. For that reason I am prepared to give him a final opportunity to re-plead his defences separately.

[76] Mr Slater needs to be aware, however, that the defences comprise different elements. For that reason the same particulars may not support both defences. In order to establish the defence of truth, for example, it is necessary for the defendant to set out the facts and circumstances relied upon to prove either that the pleaded imputations are true or substantially true, or that the publication as a whole is substantially true.

[77] A pleading of this nature will permit Mr Blomfield to understand the facts Mr Slater is relying upon and to counter them if he believes them to be incorrect. Mr Slater is not restricted to relying on the facts set out in the publication. He is also entitled to rely on other facts and circumstances that are capable of proving the facts in the publication that he says are true. This is so even though the other facts and circumstances may not have existed at the time of the publication. Mr Slater may therefore plead facts that have come into existence after the date of the publication.

[78] The defence of honest opinion requires the defendant to establish that, reading the publication as a whole, such imputations as the fact finder has found to exist were conveyed by the publication as expressions of opinion rather than as statements of fact. It is for the Judge in the first instance to determine whether the imputations are capable of being opinion rather than fact. Importantly, the facts in the publication must have existed at the time of the publication and must either have been alleged or referred to in the publication. Alternatively, they must have been generally known at the time. The defendant may not go outside these parameters in establishing the defence of honest opinion. Furthermore, the defendant may not call evidence at trial that is outside the ambit of the permitted particulars. For that reason the particulars "serve to focus and confine the evidence which may be given in support of defences of truth and honest opinion."

[79] Mr Slater needs to re-plead his statement of defence and particulars bearing in mind these principles. He also need to be aware that he will not be permitted to call evidence at trial if it falls outside the pleadings in their final form.

(footnotes omitted)

[10] Lang J also made timetable orders on 18 May 2018, in which he directed that:

(a) Any amended statement of defence was to be filed and served no later than 8 June 2018.

(b) The plaintiff's witness briefs were to be served no later than 13 July 2018.

(c) The close of pleadings date was to be 13 July 2018.

(d) The defendants' witness briefs were to be served no later than 13 August 2018.

(e) The plaintiff's reply witness briefs dealing only with affirmative defences were to be served no later than 20 September 2018.

(f) The electronic bundle was to be filed and served, together with a synopsis of opening submissions, no later than 1 October 2018.

[11] On 5 June 2018, the plaintiff filed and served a third amended statement of claim. The amended statement of claim removed four of the 13 causes of action previously pleaded, and reduced the pleaded defamatory allegations in relation to the remaining causes of action. The first defendant thereupon filed a memorandum expressing concern that the timetable order made by Lang J required him to file an amended statement of defence by 8 June, leaving him only two working days to do so. In his memorandum Mr Slater stated that he was preparing a 1200-page affidavit to accompany his statement of defence. Deciding the matter on the papers, in a Minute dated 7 June 2018, Fitzgerald J granted the first defendant an extension of time for the filing and service of a statement of defence to the plaintiff's third amended statement of claim to 5.00pm on Friday 15 June 2018. The other timetable orders made by Lang J on 18 May 2018 were unchanged.

[12] On 15 June 2018, the defendants filed the "Third Affirmative Statement of Defence to Second Amended Statement of Claim" (the 3ASOD).[10] On 20 June 2018 the defendants filed four affidavits sworn by the first defendant. The affidavits were in each case described as "disclosing evidence in support of the Third Affirmative Statement of Defence to the Second Amended Statement of Claim". Annexed as exhibits to these four affidavits are a large number of documents relied on by the defendants as supporting and relevant to the 3ASOD.

---

[10] Although bearing the date 20 May 2018, the Third Affirmative Statement of Defence was filed on 15 June 2018.

[13] Following receipt of service of the 3ASOD on 15 June 2018, the plaintiff in a memorandum dated 27 June 2018 applied to the Court for orders excluding and limiting the evidence proposed to be relied on by the defendants in support of the affirmative defences. Counsel for the plaintiff submitted that contrary to the directions of Lang J, the defendants had not pleaded the two affirmative defences separately, and there were no particulars provided in relation to either of the affirmative defences. Instead the defendants had pleaded that they would be relying on evidence to be called at trial and the documents annexed as exhibits to Mr Slater's affidavits. Each party filed a written memorandum, and Woodhouse J issued a Minute dated 5 July 2018 in which he said:

> Notwithstanding the fact that the leave granted to the defendants to file a further amended statement of defence was an indulgence, and there was an extension of time for the filing of that defence (Minute of Fitzgerald J of 7 June 2018), I am not persuaded that the plaintiff's application should be determined on the papers as they stand.

[14] Woodhouse J dealt with the matter by making a timetable order directing the defendants to file and serve a memorandum by 13 July 2018, containing submissions in support of their opposition to the plaintiff's application and explaining how the 3ASOD complied with the principles of pleadings and the directions of Lang J of 18 May 2018. The plaintiff was directed to file any memorandum in reply by 20 July 2018, and thereafter the matter was to be referred to a judge.

[15] On 22 August 2018, the first defendant filed an application for orders for security of costs and a stay until any security sum ordered was paid. On 13 September 2018, the defendants' application was called in the Duty Judge List before Wylie J. During this hearing, counsel for the defendants advised that the first defendant wished to file a further amended statement of defence, although no written application for leave had been filed. Wylie J noted that an earlier application by the first defendant seeking an order for security for costs had recently been dealt with by the Court, and that the further application had been filed some considerable time after the close of pleadings date, and that leave to bring a further application would be required. His Honour further noted that the first defendant was grossly in breach of the timetable orders made by Lang J on 18 May 2018, and had been required by the timetable order

to file his briefs of evidence by 13 August 2018. Wylie J then made the following further timetable directions:

(a) Any applications by the first defendant for leave and any further applications by the first defendant were to be filed and served by no later than 5.00pm on 18 September 2018.

(b) Any notices of opposition and supporting affidavits were to be filed and served by 5.00pm on 21 September 2018.

(c) Any applications filed were listed for hearing on 26 September 2018.

(d) The first defendant was directed to file the briefs of evidence on which he proposes to rely by 5.00pm 21 September. Wylie J added:

> I also make an unless order given the delays which have occurred and the pending trial. If the evidence is not filed by the time and date fixed, Mr Slater's defence is struck out without further order from the Court.

(e) In the event that the plaintiff wished to raise any issues with the evidence to be filed by the first defendant, they were to be raised at the interlocutory hearing scheduled for 26 September 2018.

[16] On 18 September 2018, the defendants[11] filed two further interlocutory applications. In the first application the first defendant sought leave to apply for security for costs for a second time and leave to apply for security for costs after the close of pleadings. In the second application, the first defendant sought leave to file a fourth amended affirmative statement of defence. The plaintiff filed notices of opposition to both applications, which were then heard before me on 26 September 2018.

[17] The defendants also served two briefs of evidence, one by the first defendant himself and another by Marc Spring. The witness briefs were accompanied by a notice

---

[11] Both applications referred solely to the first defendant as being the applicant, however the second defendant is also necessarily treated as an applicant.

pursuant to r 9.7(6) of the High Court Rules 2016 which set out a list of the names of 27 persons the defendants proposed to call as witnesses at the trial.

The further application for security for costs

[18] The first defendant's further application for leave to apply for security for costs is dated 18 September 2018. While this application is described in its title as an application for leave to apply for security for costs for a second time, it appears that it is in fact the third application.[12]

Submissions

[19] The first defendant advanced this application on the grounds that his circumstances had changed since Lang J declined his earlier application, at which time he was self-represented. He has since engaged counsel and is now to be represented by Mr Beard. The first defendant submits that having regard to this history, and relying on r 7.52 of the High Court Rules, special circumstances exist that justify leave being granted to him to bring this further application for security for costs. He submits that although the plaintiff was formerly an undischarged bankrupt, he has since claimed that he is a person of financial substance and the interests of justice are best served by the making of an order requiring him to give security for the defendants' costs and thereby putting him to the test.

[20] In an affidavit sworn in support of the application, the first defendant says that at the conclusion of the hearing before Lang J in May, his Honour commented that if the first defendant engaged counsel the Court could consider making an order for security.

[21] Mr Beard for the defendants submits that the plaintiff has failed to provide any documentary evidence confirming or supporting his claim to have assets or means with which to meet an order for costs. Counsel also takes issue with the affidavit evidence of Natalie Tabb filed in support of the plaintiff's notice of opposition, in

---

[12] An application for security for costs was declined by Judge Mathers in the Manukau District Court on 16 May 2013. A second application for security was made in December 2017, and dismissed by Lang J on 18 May 2018. The current and third application was filed on 22 August 2018.

which she says that she has recently prepared documents on behalf of the plaintiff's business to settle a claim from which it is expecting to receive substantial funds. Mr Beard submits that this evidence amounts to nothing more than an uncertainty as to the receipt of funds, and falls short of establishing that the plaintiff does have sufficient funds or means with which to satisfy an order for costs against him should one be made.

[22] The plaintiff opposes the application on the grounds that no special circumstances exist as would justify granting the first defendant leave to bring a further application for security for costs. Mr Geiringer says that Lang J did not say that the security for costs application would be granted should the defendants engage counsel, but explained that because the defendants did not have counsel, it was unnecessary to deal with the substance of the security for costs application.

[23] Mr Geiringer submits that there is no basis upon which leave should be granted to apply following the expiry of the close of pleadings date, and that in any event the first defendant has not and cannot satisfy the requirement of r 5.45(1)(b) that there is reason to believe that the plaintiff will be unable to pay the costs of the defendants if the plaintiff is unsuccessful in his claim.

[24] In his submissions, Mr Geiringer says that the plaintiff's situation has changed since the first application for security was determined by Judge Mathers in the District Court, at which time Mr Blomfield was an undischarged bankrupt. In an affidavit sworn in opposition to the present application, the plaintiff in his sworn affidavit says that he is financially able to satisfy an award of costs should he be unsuccessful in his claim. The plaintiff further says that he has interests in a home and a business which he would be able to apply to meeting any award of costs, and he anticipates that he will also be in a position to apply income he expects to derive from his business, as described in the affidavit of Ms Tabb. The plaintiff further says that while he has access to funds by reason of his interest in the house and business, he would prefer not to liquidate assets to provide funds to pay security, especially at this very late stage shortly before trial. Mr Geiringer submits that the defendants have not presented any evidence to establish that the plaintiff will be unable to satisfy an award of costs.

[25] Mr Geiringer submits that the late attempt by the plaintiff to obtain an order for security for costs, coupled with an order staying the plaintiff's claim pending the provision of security, is properly to be seen as an attempt by the first defendant to yet again delay progress of the proceedings, and frustrate the plaintiff's endeavour to have his claim determined. Counsel submits that the defendants have failed to provide any adequate explanation for their delay in complying with the timetable orders and says that their delay in bringing the application shortly before trial is prejudicial to the plaintiff.

Decision on application for leave to apply for security costs

[26] The application seeking leave to apply for security for costs was filed on 18 September 2018, well after the date set by the Court as the close of pleadings on 13 July 2018.

[27] In dismissing the defendants' second application for security for costs, Lang J noted that as the first defendant had previously applied for an order for security, he needed leave to apply again.[13] He further observed that as the first defendant was intending to represent himself at the trial, he would not be entitled to an award of costs if he was successful. Lang J concluded by saying that it was therefore pointless to consider the application for security at that stage, commenting that the first defendant could renew the application if he engaged counsel to act on his behalf at the trial. His Honour further observed that any renewed application would obviously be dealt with on its merits at that time.[14] In his remarks Lang J provided no indication that any such application would necessarily be successful.

[28] For a period following the hearing before Lang J in May 2018, the first defendant remained self-represented. Apart from referring to having only very recently engaged counsel, the defendants have not provided any explanation for the late filing of the application. The recent engagement of a solicitor and counsel does not justify or excuse the defendants' non-compliance with the Court's timetable order, which required any further applications to be filed by 13 July 2018. Compliance with

---

13 High Court Rules 2016, r 7.52.
14 *Blomfield v Slater* [2018] NZHC 1101 at [19] and [20].

the timetable order would have enabled any applications to be dealt with well in advance of the scheduled fixture. The delay in bringing the further application for security and the prejudice to the plaintiff caused by the delay is, in my view, an insurmountable hurdle so far as obtaining leave is concerned.

[29] Furthermore, I am satisfied that the application for an order for security for costs is without merit. The defendants have not produced any evidence to show that there is reason to believe the plaintiff will be unable to pay the defendants' costs if he is unsuccessful in his claim against them. In this regard it is also relevant to note that in his judgment of 18 May 2018, Lang J observed that on the pleadings as they then stood, it appeared that the first defendant had no arguable defence to the plaintiff's claims regarding two of the publications. While those remarks were clearly not intended to express a concluded view, they nevertheless inform my assessment of the merit of the defendants' application seeking leave to bring an eleventh-hour application for security for costs.

[30] In my view, the defendants have failed to identify any special circumstances such as would warrant the Court granting leave to bring the application seeking an order for security for costs. For these reasons I declined the application.

The law regarding late amendments to pleadings

[31] Before turning to the applications for leave to file a fourth and fifth amended statement of defence, it is necessary to discuss the law regarding late amendments to pleadings as well as the pleading requirements for the defences of truth and honest opinion.

[32] Rule 7.7(1) of the High Court Rules 2016 requires the defendant to seek the leave of the Court if a statement of defence is to be filed after the close of pleadings date. Accordingly unless leave of the court is obtained to file further pleadings, the effect of the rule requires the parties to proceed to a hearing based on the pleadings in the form in which they stand at the close of pleadings date.[15]

---

15 *EBR Holdings Ltd (in liq) v van Duyn* [2016] NZHC 1169 at [59].

[33] To succeed in an application for leave, the applicant must surmount "the three formidable hurdles" of showing that the amendment is in the interests of justice and will not significantly prejudice the other party or cause significant delay.[16] As Heath J put it in *EBR Holdings Ltd (in liq) v van Duyn*:[17]

> … in determining where the "interests of justice" lie, the Court is entitled to take account of public interest factors, as well as those pertaining to the particular litigants. All things being equal, parties to litigation should have legitimate expectations that they:
>
> (i) will be able to present an arguable case to a judicial tribunal for determination; and
>
> (ii) will not be put to additional cost through undue delay in the hearing of the case, or in responding to new (and late) points raised against it.

[34] The merit (or absence thereof) of the proposed amended pleading is an additional factor that the courts will consider in determining whether to grant leave under r 7.7.[18] The courts will usually allow the parties an opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding.[19]

[35] However, there will be cases where the applicant's delay and non-compliance with the High Court Rules are such that it is not in the interests of justice to allow an amended pleading. Where a party seeks to raise a new and significantly different case at the opening of a trial for example, a heavy burden falls on that party to justify the amendment.[20] When dealing with an application for leave in that context, the English Court of Appeal has observed:[21]

> … if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if

---

16 *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA) at 385; recently applied in *Signal v Berry* [2017] NZHC 2466 at [11].

17 *EBR Holdings Ltd (in liq) v van Duyn* [2016] NZHC 1169 at [59].

18 *Oraka Technologies Ltd v Geostel Vision Ltd* [2015] NZHC 991 at [17]; *Body Corporate 325261 v McDonough* [2014] NZHC 1821 at [12].

19 See *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA) at 309.

20 *Body Corporate 325261 v McDonough* [2014] NZHC 1821 at [13], citing *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735.

21 *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735 at [73].

> requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules.

[36] *Ashcroft v Foley* is an example of a defamation case where a late amendment to the statement of defence was not permitted, as it was put forward very late and still did not comply with pleading requirements. The defendants sought to rely on the substantive defences of truth and honest opinion, among others. They had filed multiple versions of the statement of defence, each of which suffered from deficiencies in relation to the particulars. The plaintiff applied to strike out the defence on that basis. On the second day of the hearing of the plaintiff's strike-out application, the Judge was invited to consider a third draft of the defence produced by the defendants. The Judge observed that the plaintiff was being confronted with a "moving target". He declined the defendants' application to amend, and struck out the defences.[22] In doing so he made the following comments:[23]

> There is no doubt that *if* there is a viable defence of justification or fair comment in relation to these very important and serious allegations, then it is in everyone's interests that it sees the light of day and can be properly addressed on a fair and open basis. What is not, however, either in the public interest or to the advantage of either of the parties is for the case to proceed on a muddled basis, with the Claimant and his advisers not being aware of the case they have to meet, either at the stage of disclosure of documents or at the trial itself. That is why the current pleas of justification and fair comment should be struck out.

[37] The defendants then appealed the Judge's decision to strike out the defences, and applied to amend the statement of defence again by reference to a further draft. In considering this draft statement of defence, the Court of Appeal noted that it still did not comply with the requirements of pleading either truth or honest opinion. The Court observed:[24]

> We are surprised at the failure of the defendants to particularise their pleadings sufficiently. The defence is now in a fifth incarnation. We assume, in the absence of a different explanation, that there were tactical reasons for keeping it as general as possible. We are also somewhat surprised at the tolerance of the claimant towards the making of repeat applications and, with respect, to the judge for permitting them …

---

22 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 622.
23 Recorded in *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 623.
24 At 630.

> However, repeated satellite litigation on pleadings for tactical reasons is not, in our view, the best use of court resources and we would expect that to be recognised in this as in other areas of the law. There must come a point at which repeated attempts at amendment, necessary because of the defendants' wish to keep the pleading as general as they can, become an abuse of the process of the court.

[38] After setting out the deficiencies in the proposed amended statement of defence, the Court of Appeal dismissed the appeal. In doing so, the Court observed that the importance of proper pleadings in a defamation case is "difficult to overstate".[25] Proper pleadings will ensure the success and expedition of a hearing,[26] while loose and ineffective pleadings inevitably give rise to difficulties in managing the case at every stage, including during discovery, when witness statements are prepared, and at the trial itself.[27]

Legal requirements for pleading truth

[39] Section 8 of the Defamation Act 1992 provides for the defence of truth:

> **8 Truth**
>
> (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.
>
> (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
>
> (3) In proceedings for defamation, a defence of truth shall succeed if—
>
> (a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[40] There are therefore two ways in which truth may be pleaded under s 8(3): the defendant may plead (a) that the imputations are true (or not materially different from

---

25 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 627.
26 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 630.
27 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 631.

the truth); and/or (b) that the publication taken as a whole was in substance true (or in substance not materially different from the truth). If both are pleaded, each ought to have its own clearly defined (and if necessary, separate) set of particulars.[28]

[41] A plea of truth without sufficient particulars is invalid and at risk of being struck out.[29] Particulars in support of the defence of truth serve the following purposes:[30]

(a) to enable the plaintiff to check the veracity of what is alleged;

(b) to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth;

(c) to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on; and

(d) to confine the scope of permissible evidence at trial, as a defendant is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars.

[42] The provision of particulars requires the defendant to identify the primary facts and circumstances it relies on as establishing the truth of the statement(s) claimed by the plaintiff to be defamatory. Those primary facts and circumstances must be relevant and clearly tied to the defamatory statements that the defendant says are true. In pleading those facts and circumstances, the defendant must respond to the defamatory meanings or imputations put forward by the plaintiff.[31] Defamatory meanings or imputations may take different forms. In the English case of *Chase v News Group*

---

28 *Simunovich Fisheries Ltd v Television New Zealand Ltd (No 7)* HC Auckland CIV-2004-404-3903, 3 August 2007 at [43].

29 *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA) at [17].

30 *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA) at [17], cited in *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [17].

31 See *Broadcasting Corp of New Zealand v Crush* [1988] 2 NZLR 234 (CA): in pleading truth the defendant is confined to the plaintiff's imputations or defamatory meanings; he or she may not attempt to justify a lesser meaning than that alleged by the plaintiff.

Newspapers Ltd, the Court distinguished between tier one, tier two, or tier three meanings.[32] As the Supreme Court explained in *APN New Zealand Ltd v Simunovich Fisheries Ltd*:[33]

> A "tier one" meaning imputes to the plaintiff actual misconduct; a "tier two" meaning asserts that there are grounds to believe or suspect the plaintiff is guilty of misconduct; and a "tier three" meaning asserts that there are grounds for investigating whether the plaintiff is guilty of misconduct.

Whatever tier of meaning is alleged by the plaintiff, the defendant must respond to it in its plea of truth by providing particulars that are capable of proving the truth of the defamatory meaning sought to be justified.[34] Whether this requirement is met is to be judged not by the number of particulars provided, but by the pleading of a succinct and clear summary of the essential (and relevant) facts relied on, enabling the plaintiff to know the exact nature of the case against them, and providing the plaintiff with sufficient detail so they can meet it.[35]

[43] Particulars must accordingly be thorough, detailed and precise. They may be struck out if they are irrelevant, vague, or embarrassing, or so prolix that they are likely to delay the fair trial of the proceeding.[36] If the defendant has raised an imputation of misconduct against the plaintiff, the defendant must specify the acts which it is alleged that the plaintiff has committed and upon which the defendant intends to rely as justifying the imputation.[37] *Gatley on Libel and Slander* gives the following examples:[38]

> … where the claimant is accused of incompetence, administrative or financial mismanagement and dereliction of duty, the defendant must give a clear indication of what he suggests the claimant did or did not do. Similarly, where the defendant says that the claimant's workmanship is shoddy, he must provide examples of specific work claimed to be shoddy.
>
> (footnotes omitted)

---

32 *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 11.
33 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15].
34 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 631.
35 At 631.
36 *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 250 at [59].
37 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 633, citing from *Wootton v Sievier* [1913] 3 KB 499 at 503.
38 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2013) at [27.11].

[44] The Supreme Court in *Simunovich* noted the distinction between pleadings and evidence: evidence is concerned with the method of proof of facts in issue; while pleadings, including particulars, identify what is in issue.[39] Primary facts relied upon as showing the truth of a statement may be established by circumstantial evidence at trial.[40] But the defendant may not plead the items of circumstantial evidence on which it intends to rely at trial; it must plead as a particular the primary fact which justifies the truth of the publication.

[45] Further, the defendant may not plead as a primary fact the subjective views or opinions of others about the truth of the defamatory statement. The defendant may adduce hearsay evidence at trial to assist in establishing a primary fact (subject of course to the rules of evidence), but in its pleadings it must set out the primary fact itself that establishes the truth of the defamatory statement.[41]

Legal requirements for pleading honest opinion

[46] The defence of honest opinion applies to statements which are recognisable as expressions of opinion, rather than assertions of fact.[42] Section 10(1) of the Defamation Act requires the defendant to prove that the opinion expressed was the defendant's genuine opinion. Alternatively, if the defendant was not the author of the matter containing the opinion, s 10(2) indicates that the defence of honest opinion will fail unless:

> (a) where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that—
>
> (i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and
>
> (ii) the defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion:

---

39 At [20].
40 At [21].
41 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [22]–[35].
42 *Templeton v Jones* [1984] 1 NZLR 448 (CA) at 455.

(b) where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—

(i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and

(ii) the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

[47] A defendant who pleads honest opinion must clearly set out in the particulars the facts on the basis of which it is said a person could honestly express the relevant opinion.[43] As the English Court of Appeal observed in *Ashcroft v Foley*, it does not follow from the breadth of the defence of honest opinion that a defendant is entitled to advance a loose and ineffective pleading.[44]

[48] The facts on which the defendant relies must have been known to the defendant at the time of publication, and they must have been stated in the publication or generally known, so that the reader or viewer can judge for himself or herself whether the opinion is genuine.[45] At trial, the defendant must prove those facts to be true.[46] A limited exception exists whereby a fact need not be independently proved if it is referred to as a fact in a fair and accurate report which attracts privilege and upon which the defendant is commenting.[47]

The application for leave to file a fourth amended affirmative statement of defence

[49] The first defendant's second interlocutory application dated 18 September 2018 sought leave to file a fourth amended affirmative statement of defence (the 4ASOD). The application is made on the grounds that the defendants' current pleadings contained defects and errors, and that it is in the interests of justice that the defendants be granted leave to file and serve a fourth amended statement of defence

---

43 *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 634 and 637.
44 At 637.
45 *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 250 at [110]–[111] and [117].
46 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [36]–[37].
47 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [36].

in terms of the draft filed with the application. The defendants also rely on the further grounds that it would cause them extreme difficulty and embarrassment if they were not able to file the 4ASOD. They say that the proposed new pleading will not cause any prejudice or hardship to the plaintiff. A further ground relied on by the defendants is that the fourth amended statement of defence "establishes that the plaintiff has no defence to the Affirmative [sic] defence of the defendants".

[50] Although there are a large number of alterations and amendments introduced by the proposed 4ASOD as compared to the 3ASOD, the most significant change is the addition of an affirmative defence claiming that publication of the statements complained of by the plaintiff was a matter of public interest; the communication was responsible; and the defendants reasonably believed that publishing the statements was in the public interest. This public interest defence is pleaded together with the defences of truth and honest opinion to all of the nine causes of action set out in the plaintiff's 3ASOC.

[51] The 4ASOD also includes new pleadings regarding the defences of truth and honest opinion, a new pleading alleging the defence of truth of the publications as a whole, and a new pleading that the plaintiff could not claim injury to a reputation that he did not possess as he was an undischarged bankrupt and banned company director during the relevant period when the publications were made.

The defendants' submissions

[52] Mr Beard for the defendants submits that notwithstanding the lateness of the application, it is in the interests of justice that the defendants be granted leave to file the proposed 4ASOD. He says that the defendants' 3ASOD was prepared by the defendants during a time when the first defendant was self-represented, and was prepared with the assistance of a McKenzie friend and without professional legal advice.

[53] Mr Beard says that the defendants' wish to plead a defence of public interest in relation to all of the publications alleged by the plaintiff as containing defamatory statements. He explains that the first defendant did not plead a public interest defence when preparing the 3ASOD as he did not have a lawyer to advise and assist him to

draft his pleadings. He says that although a public interest defence has not been pleaded, it was foreshadowed by the first defendant in the course of previous hearings of interlocutory matters. Mr Beard explains that the Court of Appeal's judgment in *Durie v Gardiner* had not been delivered at the time the defendants filed the 3ASOD,[48] and says that he is instructed by the defendants that they wish to add a public interest defence now that it has been recognised in the Court of Appeal's judgment.

[54] Mr Beard says that the public interest defence is based on the same evidence as will be relied on by the defendants for the other defences of truth and honest opinion. Similarly, the defendants also want to advance a defence of truth as a whole in respect of each of the publications, and again he submits that the defence will be based on the same evidence as will be relied on by the defendants for their truth and honest opinion defences.

[55] In relation to their defences of truth and honest opinion, Mr Beard says that now that the defendants have engaged counsel they wish to amend their pleadings to add particulars. He says that the new and further particulars which are set out in the draft 4ASOD are all details "teased out" of the evidence that is already before the Court as exhibits annexed to the affidavits of the first defendant and otherwise in documents discovered by the defendants to the plaintiff.

[56] Mr Beard further says that the defendants' allegation that the plaintiff is a person of bad character and reputation has been evident in its pleadings and case from the outset of the proceedings, and accordingly the bad character pleading in the proposed 3ASOD does not amount to a material or significant change.

[57] Mr Beard further submits that the first defendant also wishes to amend his pleadings to now deny the allegation made by the plaintiff in the 3ASOC regarding an aspect of the first publication. He explains that although the defendants have previously admitted the plaintiff's allegation that the first publication contained the statement, "Who really ripped off KidsCan – The real story of Matt Blomfield's rip off of KidsCan and how he blamed Warren Powell", the defendants now wish to deny that allegation.

---

[48] *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

[58] Mr Beard submits that the issue of delay and non-compliance with procedural timetables is of diminishing significance to the courts, and the focus is on ensuring that the real issues between the parties are before the court to be determined. He submits that the amended pleadings introduced by the 4ASOD will not cause any prejudice to the plaintiff, and that leave to file the amended pleading should be granted to enable the real issues in dispute between the parties to be put before the court.

[59] Mr Beard concluded by submitting that the late filing of the 4ASOD would not necessitate an adjournment of the trial scheduled to commence on 8 October.

The plaintiff's submissions

[60] The application for leave to file a fourth amended statement of defence is firmly opposed by the plaintiff on a number of grounds, the principal grounds being:

(a) There would be significant prejudice to the plaintiff if the 4ASOD was admitted. The 4ASOD contains dozens of amendments and additions which make it substantially different from the case pleaded in the 3ASOD, on the basis of which the plaintiff has prepared for the trial due to commence in less than a fortnight.

(b) Although it has always been clear that the defendants are seeking to rely on both truth and honest opinion as defences, the 4ASOD does not plead adequate particulars of those defences. As a result the plaintiff is not fully and fairly informed of the facts and circumstances which are to be relied on by the defendants to support their defence of truth.

(c) A public interest defence is an entirely new and substantial defence which would require evidence to be adduced on the issues arising, and the process of discovery has been undertaken without these issues being in contemplation. It is now too late for the defendants to add a new defence so close to the trial date and at a time when it will be impossible for the plaintiff to respond to the new defence before trial:

(i) Despite being given a final opportunity by Lang J to replead their defences, the defendants subsequently filed the 3ASOD in which they made no mention of relying on the defence of public interest.

(ii) Despite the defendants' claim that the public interest defence has only recently been recognised by the Court of Appeal in *Durie v Gardiner*, decided after the close of pleadings date, the public interest defence was not created by the Court of Appeal's decision, and the defendants have been well aware of the defence since at least July 2017, at which time the first defendant advised the Court that he intended to file an amended pleading to include the defence. However, when the first defendant thereafter filed his amended pleading he failed to include a public interest defence.

(iii) In any event the public interest defence is not tenable or arguable in this proceeding as the Court has previously held that the publications were not in the public interest, and moreover the defendants made no attempt to contact the plaintiff or seek to publish the plaintiff's response to the allegations.

(d) Even if there were a basis for allowing the defendants to introduce a public interest defence at this late stage, that would not provide any basis for the defendants to also extensively amend their pleadings, and to add a pleading of bad reputation and a defence of truth of the publications as a whole:

(i) The defence of truth of the publications as a whole is a new and distinctly separate defence which must be pleaded separately and be accompanied by particulars. The defendants have not offered any explanation as to why a truth as a whole defence has not previously been pleaded, and in any event it adds nothing that could be seriously argued by the defendants in the

circumstances of the present case, as the plaintiff does not rely on a selection of unrepresentative statements taken from the publications such as would engage or require a publication as a whole defence.

(ii) There is no pleading in the 3ASOD alleging the plaintiff is of bad character, and the pleading in the 4ASOD which refers to the plaintiff's reputation does not comply with the requirements of s 42 of the Defamation Act 1992 for pleading bad reputation. The plaintiff would not now have a fair opportunity to respond to any evidence adduced by the defendants alleging the plaintiff has a bad reputation, or to respond to the pleading as to truth of the publications as a whole.

(e) The proceeding has already been underway for six years and any further delay of the plaintiff's claim will be at significant cost to the plaintiff and further deny him justice by delaying determination of his claim. Should the court grant leave to the defendants to file the 4ASOD at this very late stage, the plaintiff would be unable to undertake the further pleading, preparation and briefing of evidence that would be required to be ready to proceed with the trial on 8 October. An adjournment of the trial would be likely to result in substantial delay, with a new four-week fixture unlikely to be available until well into next year.

Discussion

[61] This proceeding had already had an extended and unduly lengthy history prior to August 2017, when the current trial fixture was set by Heath J. Subsequently, in his judgment dismissing the plaintiff's application to strike out the defences and to enter summary judgment, Lang J granted the defendants leave to re-plead their defences notwithstanding that the matter was set down for trial, describing it as a "final opportunity".[49]

---

[49] *Blomfield v Slater* [2018] NZHC 1099 at [75].

[62] It is clear from the history of the proceeding that the defendants have to date been afforded considerable leniency in terms of compliance with timetable orders and the requirement of pleading their defences in such a manner as to fully and fairly inform the plaintiff of the case he is to meet. The defendants were granted an indulgence by the Court in May this year and the opportunity to re-plead their defences. I note also that Lang J even summarised the essential requirements of pleading the defences of truth and honest opinion in his judgment of 18 May 2018. Despite the opportunity to do so and despite the unambiguous language used by the Court to emphasise that this would be a final opportunity, the defendants' belated attempt to introduce entirely new defences and particulars by filing the 4ASOD – which, if allowed, would inevitably require the scheduled trial to be adjourned and delayed for a considerable period – is in my view appropriately regarded as being a last-minute attempt to prevent the plaintiff's claim from being heard and determined by the Court, which should not be permitted.

[63] This objective is also evident from the defendants' application seeking leave to file a further application for an order for security for costs together with an order to stay the proceedings pending the provision of security. As the issue of security for costs had only recently been considered by the Court in May 2018, and as the application was made after the close of pleadings date, the bringing of this late application is appropriately viewed as an attempt by the defendants to further delay the proceedings.

[64] There are limits to the courts' preparedness to tolerate non-compliance with timetable orders and procedural rules, especially where the failure to comply with those requirements causes delay and prejudice to other parties to the proceeding. This is a clear instance of a party which has already been granted an indulgence to enable them to correctly plead their defences applying again for yet another indulgence, and where the granting of such an application would merely serve to compound an already egregious delay in the resolution and determination of the plaintiff's claim.

[65] The first defendant has been self-represented at various stages during the course of the proceedings, leading the Court to make appropriate allowances to recognise the difficulties self-representation can cause, especially in relation to the

level of detail required of a defendant in defamation proceedings. However, the Court's timetable orders, the High Court Rules, and the substantive rules of pleading must nevertheless be complied with if proceedings are to be determined efficiently and fairly. Where time limits and timetable orders are not complied with, the party who has failed to do so must overcome the formidable hurdle of showing that the granting of their late application is in the interests of justice.

[66] As the English Court of Appeal has observed, it is relevant in this context to consider whether the proposed amended text satisfies "to the full" the requirements of proper pleading.[50] I consider that the 4ASOD falls far short of these requirements. As Mr Geiringer points out, the 4ASOD seeks to add a very large number of particulars in relation to the defences of truth of the pleaded imputations and honest opinion. However, the particulars are discursive and unspecific, and do not relate clearly to the plaintiff's pleaded imputations. The defendants do not identify the primary facts and circumstances they rely on as establishing the truth of the statements; rather, they plead large amounts of evidence and in several instances rely on and repeat a third party's allegations about the plaintiff.

[67] Moreover, the defendants do not provide separate particulars for the defence of honest opinion, but simply repeat the same particulars as were provided for the defence of truth. That does not meet the requirements of particularising a defence of honest opinion, which requires the defendant to demonstrate the opinion was genuinely that of the defendant as author and that it was recognisable as an opinion, and furthermore to clearly set out the facts and basis on which it is said a person could honestly express the relevant opinion. Further, the defendant must show that the facts on which the defendant relies were known to the defendant at the time of publication, and that they were stated in the publication or generally known. For these reasons I do not consider that the 4ASOD meets the requirement of informing the plaintiff from the moment that the amendment is made of the amended case that he has to meet, with as much clarity and detail as he is entitled to.

---

50 *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735 at [73].

[68] Furthermore, as Mr Geiringer submits, the addition of a public interest defence at this late stage would cause substantial further delay, as it would require the plaintiff to adduce evidence on the issues arising and possibly to retain expert witnesses. The first defendant signalled to the Court that he intended to plead the public interest defence in 2017, but then did not do so in his third amended statement of defence. There is no adequate explanation for his failure to do so, even taking into account the fact he was self-represented at the time of filing the third amended statement of defence.

[69] As for the merits of the proposed public interest defence, I accept that a public interest defence may be prima facie arguable in relation to the first cause of action. The operation of a registered charity such as KidsCan is a matter of wider interest than that of the immediate parties as the public is legitimately interested in the performance of charities and their funding. However, I note Mr Geiringer's submission that the other requisite elements of the defence could not be made out by the defendants as no steps were taken to inform Mr Blomfield of the proposed publication or to give him an opportunity to comment or respond. Whether or not such steps were taken is not a matter I can form any conclusion on, nor is it appropriate for me to do so at this stage of the proceedings. There is some evidence that the first defendant spoke to the plaintiff about matters arising from the contents of the hard drive, but whether or not that consultation would meet the requirements of the public interest defence, is not a matter that needs determination at this stage. Suffice to say that while a public interest defence may be arguable in relation to the first cause of action, that of itself does not warrant granting leave to file the 4ASOD at this extremely late stage of the proceedings where the consequences are so prejudicial both to the plaintiff, and to the conduct of the trial and disposition of the proceeding.

[70] As the Court of Appeal observed in *Ashcroft v Foley*, "[t]here must come a point at which repeated attempts at amendment, necessary because of the defendants' wish to keep the pleadings as general as they can, become an abuse of the process of the court".[51] In the present case, the defendants' failure to plead their case as required by the Act and with requisite particulars does not appear to be a deliberate means by

---

[51] *Ashcroft v Foley* [2012] EWCA Civ 423, [2012] EMLR 25 at 630.

which to keep their pleading general. Rather, it appears that the defendants' failure to adequately plead their case is likely due to the first defendant being self-represented, and not initially appreciating the requirements of pleading. However, those requirements were clearly signalled by Lang J in his 18 May 2018 judgment, and despite that clear signal, the defendants thereafter failed to make any attempt to satisfy the pleading requirements which they clearly must have known about.

[71] Whether the defendants' non-compliance with pleading requirements is due to deliberate tactical decisions, a choice to simply ignore the requirements for proper pleading, or simply a failure to appreciate and therefore to comply with the requirements of properly pleading their case, the prejudicial effect upon the opposing party is nevertheless the same, as is the effect upon the just conduct of the proceeding. In *Ashcroft* the Court of Appeal commented:[52]

> As Lord Woolf pointed out in *McPhilemy v Times Newspapers Ltd* [1999] All E.R. 775 at 793c, a loose and ineffective pleading can achieve directly the opposite effect from that which is intended by obscuring the issues rather than providing clarification …
>
> There are difficulties in managing a case justly to which a loose and ineffective pleading will give rise at every stage of the litigation. These include the reply stage when a claimant must specifically admit or deny the allegations against him, giving the facts on which he relies … when disclosure takes place, when witness statements are prepared, and at the trial itself which may take place before a jury. Time and money will almost inevitably end up being wasted over matters which have little to do with the overall merits of the litigation.

[72] Were the defendants in the present case to be permitted to file the 4ASOD, in my view the trial of the plaintiff's claim could not be conducted, managed or determined in a manner that would be fair to the plaintiff and consistent with the interests of justice, having regard to the interests of both of the parties, and of maintaining the integrity and purpose of the procedural rules. As was noted in *Ashcroft*, it is not in the interests of the public or to the advantage of the parties for the case to proceed on an uncertain and muddled basis, in which the plaintiff is unsure of the case he is required to meet, and the Court is also unable to adjudicate between the parties by reference to clearly pleaded and particularised cases. I therefore consider that the granting of leave to the defendants to file the 4ASOD is clearly contrary to the

---

[52] At 631.

interests of justice, and would cause substantial prejudice to the plaintiff and his ability to present his case fully and effectively as well as resulting in further and unacceptable delay of the proceeding. Such a situation would, in my view, be wholly inconsistent with the principles of justice and fairness.

[73] For these reasons, by my results judgment of 27 September 2018, I declined the defendants' application for leave to file the 4ASOD.

Defendants' application to file an amended fifth affirmative statement of defence

[74] As noted in the introduction to this judgment, on the evening of what had been scheduled to be the first day of the trial of this proceeding, but which had been taken up by the hearing of argument regarding the admissibility of evidence proposed to be adduced by the defendants, counsel for the defendants filed an "Urgent Memorandum" stating that the defendants would apply for leave to file a fifth amended affirmative statement of the defence (5ASOD). In his memorandum Mr Little SC for the defendants sought a day to amend the 4ASOD so as to produce a document that would "facilitate resolution of the real dispute between the parties." Counsel advised that it was proposed to "strip back" the defendants' pleadings in the 4ASOD and have a "shortened/particularised document filed and served by 5:00pm … Tuesday 9 October 2018."

[75] A judicial telephone conference with counsel was convened on the morning of 9 October, at the conclusion of which I directed the defendants to file the proposed 5ASOD by 5.00pm that evening, and that the application seeking leave to file it was to be heard at 10:00 am the next day. As it happened the hearing of the arguments in support and opposition of the application occupied the next three days. At the conclusion of argument shortly after 5.00pm on Friday 12 October I reserved my judgment and adjourned the trial to a date to be fixed following the release of my decision regarding leave to the defendants to file the proposed 5ASOD. On Tuesday 16 October 2018, I delivered a results judgment in which I dismissed the defendants' application for leave to file the proposed 5SAOD, and I directed that the trial was to resume on Tuesday 23 October 2018.[53]

---

[53] Monday 22 October 2018 being the Labour Day public holiday.

The proposed amended fifth affirmative statement of defence

[76] The proposed 5ASOD seeks to amend the plaintiff's pleadings as set out in the 3ASOD, and includes further amendments to the defendants' pleadings set out in the 4ASOD. As I have declined the application for filing of the 4ASOD, it is necessary to compare the proposed 5ASOD with the 3ASOD filed by the defendants on 15 May 2018, which sets out their defences and upon which the case has proceeded to trial.

[77] Accordingly, by comparison to the 3ASOD, the proposed 5ASOD maintains the pleadings of the defences of truth and honest opinion in response to each of the nine causes of action in the 3ASOC, but also introduces a new pleading that the plaintiff has a bad reputation and cannot claim an injury to a reputation that he did not possess. This pleading is accompanied by particulars set out in 29 subparagraphs.

[78] The 5ASOD also contains a large number of further amendments in relation to each cause of action. For example, in pleading to the first cause of action that relates to the first publication dated 3 May 2012 and entitled, "Who really ripped off KidsCan?", the 5ASOD:

(a) Introduces particulars set out in 33 sub-paragraphs to support the defence that the allegedly defamatory statements made in the first publication were the truth.

(b) Introduces and pleads a defence of truth of the first publication, taken as a whole.

(c) Retracts the admissions made in the 3ASOD, by which the defendants admitted each and all of the 14 imputations alleged by the plaintiff as being the defamatory meanings of the statements made in the first publication. The defendants now deny all of the imputations alleged by the plaintiff in relation to the first publication.

(d) Introduces and pleads that the defendants had reasonable grounds for suspicion in relation to the statements made in the first publication.

(e) Retracts the admission made in the 3ASOD that the first publication included the words: "The real story of Matt Blomfield's rip off of KidsCan and how he blamed Warren Powell".

(f) Changes admissions to denials in the pleadings regarding the statements contained in the first publication relating to KidsCan.

The defendants' submissions

[79] Mr Little for the defendants says that although the 5ASOD pleadings and particulars set out in it are considerably more detailed than appears in the 3ASOD, the pleadings are all based on documents that have been discovered by the defendants and they therefore refer to documents and information already known by the plaintiff. He says that there can be no argument or dispute over whether the documents exist or existed, as they are all derived from the plaintiff's documents and computer hard drive.

[80] Mr Little submits that the 5ASOD now sets out the defences in a form that satisfies the requirement of fully and fairly informing the plaintiff and the Court of the defences relied on by the defendants and the relevant particulars.

[81] Mr Little then took the Court through the documents referred to in the 5ASOD particulars in relation to each cause of action, and submitted that they provide support and justification for the defences of truth and honest opinion in each case.

[82] In dealing with the first cause of action, Mr Little acknowledged that the emails referred to in the defendants' particulars did not establish or support the existence of a conspiracy to "rip off" or defraud the KidsCan charity involving the plaintiff. However, Mr Little says the documents do support a conclusion that the plaintiff acted to put Mr Powell into a position that made him look so bad in relation to the KidsCan donation that he had to resign from the Hell Pizza company.

[83] Mr Little's submissions were directed at supporting the proposition that in relation to each of the causes of action, the documents exhibited to the first defendant's affidavits and contained in the parties' common bundle support the defences of truth or honest opinion. Mr Little submits that the documents he referred to enable

inferences to be drawn and conclusions to be reached that the statements made in the publications were correct. He submits that the defendants' proposed pleading in the 5ASOD are in accordance with Lang J's directions of 18 May 2018, and in accordance with the requirements for pleading as described in *Simunovich*. He submits that the issues are clearly raised and the facts upon which the defendants rely are clearly stated. He further submits that if the Court finds that it is unreasonable to require the plaintiff to respond to the 5ASOD within the time currently allocated for the trial, the alternative is for the trial to be adjourned and consideration given to an award of costs against his client.

The plaintiff's submissions

[84] Mr Geiringer commenced by saying that the defendants are attempting via the 5ASOD essentially to replead all of their case at a stage which was scheduled to be the third day of the trial. He submits that the reason for the defendants' extensive amendment to their statement of defence is because almost all of the evidence they propose to adduce in relation to their defences of truth and honest opinion is inadmissible having regard to the 3ASOD. He says that the 5ASOD is in fact the tenth attempt by the defendants to plead their defences. Mr Geiringer was critical of the first defendant's conduct and management of the defendants' case as a self-represented litigant, saying that there had been a history of delay of the proceedings as a result.

[85] Mr Geiringer reviewed the history of the proceedings and noted that in a hearing before Brewer J on 7 December 2017, the first defendant acknowledged to the Court that his pleadings were deficient and informed the Court that he intended to instruct counsel. Mr Geiringer says that following the repleading of the defence, the plaintiff applied to strike out the defence on the basis of specified and detailed deficiencies of the defendants' pleading. Mr Geiringer notes that the deficiencies in the defendants' pleadings were recognised by Lang J in his judgment of 18 May 2018, and the defendants were given one last chance to replead their defence. The defendants were subsequently given an extension of time for filing their amended statement of defence. Counsel submits that during the time within which they were required to file their amended statement of defence, the defendants chose not to engage

counsel or to heed the clear warning of the Court that they had been given a final chance to get their pleadings in order.

[86] Mr Geiringer notes that the first defendant did, however, engage counsel for the purposes of two other proceedings that were current during the relevant period, and that the defendants have offered no explanation as to why they chose not to engage counsel in relation to this proceeding.

[87] Mr Geiringer submits that against that background, the defendants would need to show that the proposed 5ASOD was now in an immaculate form so that it could be used as a completely accurate basis for the parties and the Court to conduct the case, and that the scope and effect of the proposed 5ASOD was such as would enable the hearing to be conducted and completed within the time allocated for the current fixture and without substantial prejudice to the plaintiff.

[88] Mr Geiringer says that the pleadings in the 5ASOD remain in a disorganised and messy state and are consequently difficult to follow. He makes the following criticisms of the pleadings.

(i) Lack of specificity

[89] In relation to the defence of truth, Mr Geiringer submits that the defendants are required to provide particulars of the facts and circumstances they rely on to prove the truth of each of the plaintiff's pleaded imputations. However, the 5ASOD does not satisfy this requirement. He submits that instead of pleading specifically to each of the plaintiff's pleaded imputations, the defendants in most cases plead one set of what are purported to be particulars, and then assert that these same particulars apply to all pleaded imputations irrespective of whether or not they relate to those pleaded imputations. Counsel refers to the defendants' pleading in relation to the fourth cause of action and fourth publication by way of example.

[90] In the fourth cause of action the plaintiff alleges that the fourth publication entitled "Blomfield Files: Free to a Good Home" contains among other things the statement:

> Drugs, fraud, extortion, bullying, corruption, collusion, compromises, perjury, deception, hydraulic-ing … it's all there.
>
> I have taken the liberty of excluding the large amount of illegal movies and home made porn that he had collected. (yuk).

[91] In the 3ASOC the plaintiff alleges that the fourth publication would have been understood to mean:

> 34.1 the plaintiff was engaged in criminal activity;
>
> 34.2 the plaintiff was engaged in a criminal conspiracy with several other people;
>
> 34.3 the plaintiff is involved in illegal drugs;
>
> 34.4 the plaintiff has committed fraud;
>
> 34.5 the plaintiff is violent;
>
> 34.6 the plaintiff is corrupt;
>
> 34.7 the plaintiff has committed perjury;
>
> 34.8 the plaintiff has engaged in the criminal act of hydraulic-ing (where a buyer immediately on-sells a property to a third-party at a greatly and artificially inflated price);
>
> 34.9 the plaintiff was in the possession of pornography on his hard drive that had been made by the plaintiff;
>
> 34.10 that the plaintiff was a collector of 'home-made porn' and that there was a large amount of it on his hard drive; and/or
>
> 34.11 that the plaintiff is a deviant.

[92] In the 5ASOD the defendants plead as follows:

> **34**. The Defendants deny **Paragraph 34** and say that the Fourth Publication is not understood to mean any of the meanings set out in P**aragraphs 34.1** to **34.11** of the Statement of Claim, or any meaning defamatory (in the common law sense) to the Plaintiff.
>
> **35.** Further or in the alternative the Defendants repeat the facts at **Paragraph 31** hereinabove and say further that:
>
> (a) Based upon the circumstances and the facts it is true that the Plaintiffs electronic files contained information verifying criminal activity.
>
> (b) Based upon the circumstances and/or the facts it is true that the Plaintiffs electronic files contained information relating to the Plaintiff conspiring with others.

(c) Based upon the circumstances and/or the facts it is true that the Plaintiff's electronic files contained information verifying that the Plaintiff knew drugs were being sold from his retail stores and that the Plaintiff knowingly associated with persons that used drugs;

(d) Based upon the circumstances and/or the facts it is true that the Plaintiff's electronic files contain information verifying fraud.

(e) Repeat the relevant facts at **Paragraph 4(b)**, and **Paragraph 16 (a) and (b) Particulars**. Based upon the circumstances and/or the facts it is true that the Plaintiff is violent.

(f) Based upon the circumstances and/or the facts it is true that the Plaintiff's electronic files contain information verifying corrupt and/or underhanded activity.

(g) Based upon the relevant circumstances and/or the relevant facts referred to in the facts set out in **Paragraph 4(b), 6, 16, 24, 31, 37, 45, 53, 61** and **72** it is true that the Plaintiff's [sic] has committed perjury.

(h) Based upon the circumstances and/or the facts in the facts set out at **Paragraph 4(b), 6, 16, 24, 31, 37, 45, 53, 61** and **72** it is true that the Plaintiff's electronic files contain information about hydraulic-ing 18 Doment Crescent, Orewa and the Plaintiff will adduce witness evidence at trial.

(i) Based upon the relevant circumstances and/or the facts set out at **Paragraph 4(b), 6, 16, 24, 31, 37, 45, 53, 61** and **72** it is true that the Plaintiff's electronic files contained home made pornographic images.

(j) Based upon the relevant circumstances and/or the relevant facts set out at **Paragraph 4(b), 6, 16, 24, 31, 37, 45, 53, 61** and **72** it is true that the Plaintiff's electronic files contain a large amount of illegal movies and home made porn.

(k) Based upon the relevant circumstances and/or the relevant facts set out at **Paragraph 4(b), 6, 16, 24, 31, 37, 45, 53, 61** and **72** it is true that the Plaintiff's electronic files contain information that would lead a reasonable person to the suspicion of deviancy.

(l) Alternatively the relevant conduct of the Plaintiff referred to in the facts set out at **Paragraph 4(b), 6, 16, 24, 31, 37, 45, 61** and **72** establishes the primary facts to support the Defendants having reasonable grounds for suspicion of the statements referred to at **Paragraphs 34.1 to 34.11** [of] the Statements of Claim when objectively judged.

[93] As is apparent in subparagraphs (g), (h), (i), (j), (k) and (l), the defendants in each case refer to "the relevant circumstances and/or the relevant facts referred to in

the facts set out in paragraph 4(b), 6, 16, 24, 31, 37, 45, 53, 61 and 72", thus referencing the same paragraphs in each of the pleadings notwithstanding that the paragraphs referred to contain particulars and references to matters that can have no relevance whatsoever to the imputations alleged by the plaintiff at paragraph 34 of its 3ASOC.

[94] I accept Mr Geiringer's submission that this is an example of imprecise pleadings that fall well short of fully and fairly informing the plaintiff of the defendants' defence and the factual basis upon which it relies.

(ii) Reliance on opinions and allegations of third parties

[95] Mr Geiringer submits that the defendants are not permitted to support their defences of truth and honest opinion by relying upon the opinions and allegations of third parties as opposed to primary facts.

[96] By way of example, Mr Geiringer refers to the defendants' pleading to the plaintiff's second cause of action, which alleges the defendants' second publication included the defamatory and untrue statement that the plaintiff is a "psychopath". In the particulars set out by the defendants in the 5ASOD in support of their defence of truth of the statement, they refer to email correspondence from an accountant in which the plaintiff is described as a psychopath with a pattern of behaviour fitting the text book description. The author is not a medical clinician or psychiatrist and is expressing what is a lay opinion. I accept Mr Geiringer's submission that the repetition of a third party's opinion or allegation in this context does not meet the requirement of pleading the primary facts that establish the truth of the defamatory statement.

(iii) Failure to engage with the plaintiff's imputations

[97] Mr Geiringer further submits that the defendants' pleadings in relation to their defence of truth also fail to engage with the plaintiff's pleaded imputations of meaning, with the result that the defendants' pleaded particulars in support of the defence of truth refer to matters that are entirely unrelated to the plaintiff's pleaded imputations. As an example, Mr Geiringer notes that rather than pleading particulars to show the

truth of the alleged defamatory statements, the defendants have pleaded that the statements in the publications meant that there were reasonable grounds for them to suspect that the allegations made in the statements were true. He submits that it is not sufficient for a defendant to plead lesser meanings than the meanings pleaded by the plaintiff, and that to succeed with a defence of truth, the defendants must establish that the statements were true. I note there are a number of examples of this form of pleading throughout the 5ASOD.[54]

(iv) Pleading evidence as particulars

[98] Mr Geiringer further submits that many of the matters pleaded as particulars are not particulars at all. Rather, they are statements by the defendants of their intention to rely on and refer to evidence at trial in order to establish their defence. There are a number of examples of this type of pleading throughout the 5ASOD. At paragraph [4](b)(xii), the defendants plead the following as a particular supporting the bad reputation plea:

> On or about 8 April 2008 the plaintiff signed a Police Adult Diversion Scheme accepting responsibility for assaulting a person. Physically assaulting a person is violent conduct. The Defendant will adduce witness evidence at trial as to the nature of the assault by the plaintiff and his violent conduct.

[99] I agree with Mr Geiringer's submission that the defendants' references to an intention to adduce witness evidence at trial do not satisfy the requirement of providing particulars. Another example, of which there are a large number in the 5ASOD, appears at paragraph (6)(a)(viii) which is pleaded as a particular supporting the defence of truth in relation to the statements made in the first publication. The particular reads:

> The content of the emails, other media coverage, recorded interviews with the Plaintiff, the Official Assignee and witness testimony verify that each of the statements complained of at Paragraphs 10.0 to 10.10 of the Statement of Claim are the truth, or that the words as expressed as a whole are not materially different to the truth.

---

[54] See the proposed fifth affirmative statement of defence at [6](a) particulars (ix), [12](b), [19](g), [24](c), [27](g), and [31](c).

[100] Once again references to emails, media coverage or recorded interviews without specificity do not amount to adequate particulars to be relied upon by the defendants.

(v) Failure to properly plead the honest opinion defence

[101] Mr Geiringer further submits that in pleading their defence of honest opinion, the defendants have failed to provide particulars of either the publication facts or any generally known facts upon which they say their honest opinion was based. Rather than pleading or providing particulars of any such publication or generally known facts, the defendants' particulars in relation to the defence of honest opinion in each case are simply a repetition of the particulars they rely upon for their defence of truth. As the email correspondence referred to and relied upon by the defendants refers to matters that could not have been generally known, they cannot provide any justification or support for this defence.

[102] Further, says Mr Geiringer, rather than simply pleading that the statements made in the publications were the defendants' honest opinion, as pleaded by them in response to the first eight causes of action, the defendants are required to provide particulars to show that each of the plaintiff's pleaded imputations was conveyed by the words of the publication as being an expression of the first defendant's opinion. As an example of this Mr Geiringer refers to paragraph [6](d)(iv) in which the particular of honest opinion in relation to the first publication reads:

> The statements complained of are contained in the remarks and commentary and are a statement of opinion.

[103] I agree with Mr Geiringer that the particulars expressed in those terms do not satisfy the requirement of identifying what parts of the publication are relied upon to show that the statements were expressed in a way that would convey to an ordinary reader that the statements were the opinion of the author and publisher rather than being statements of established fact.

(vi) New defence of truth as a whole

[104] Mr Geiringer also notes that the 5ASOD introduces the new defence of truth of the publication as a whole. He submits that such a defence is required to be pleaded separately.[55] Although this is a new and separate defence, the defendants simply repeat the particulars pleaded for the truth of the imputations and do not separately address the different issues that arise in relation to a pleading of truth as a whole. Mr Geiringer submits, and I agree, that for this reason the defendants' pleadings of this defence are inadequate.

(vii) New pleading of bad character

[105] Mr Geiringer also refers to the new pleading of bad character introduced in the 5ASOD. He submits that the addition of the 29 particulars of bad character set out in the 5ASOD represents a major change to the scope of the proceeding, as a plaintiff would wish to answer and respond to the bad character and/or bad reputation allegations made against him.

[106] Further, Mr Geiringer says that the particulars set out by the defendants are not legitimate particulars. Rather, they are allegations. Some examples are as follows:[56]

> The Plaintiff regularly sends abusive, obscene and threatening correspondence that would tend to cause a reasonable person to fear for their safety and well-being.
>
> The Plaintiff has issued written threats threatening to destroy family relationships and threatening to drive people out of New Zealand.
>
> The Plaintiff's threats coerced John Price into producing an untrue document.
>
> The Plaintiff has destroyed other people's reputations.
>
> The Plaintiff has threatened violence.
>
> The Plaintiff has conspired with others to disadvantage his creditors.

[107] In the case of each of these particulars, Mr Geiringer submits that they are simply allegations and not particulars relevant to the issue of the plaintiff's character

---

55 Relying on *Simunovich Fisheries Ltd v Television New Zealand Ltd (No 7)* HC Auckland CIV-2004-404-3903, 3 August 2007 at [43]–[44].

56 Paragraph 4(b) of the proposed fifth affirmative statement of defence.

and expressed in a way that gives him proper notice of what is being alleged and relied upon by the defendants. I accept this submission. Section 42 of the Defamation Act states that where the defendant intends to adduce evidence of specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, the defendant shall include in the defendant's statement of defence a statement that the defendant intends to adduce that evidence. The defendants' pleadings of bad character, which contain a range of unspecific allegations, do not comply with this requirement.

(viii) Underlying merit of the defences

[108] Mr Geiringer also addressed the issue of the merit of the defences advanced by the defendants, as evident from the documents they are relying upon. Mr Little has taken me through a large number of those documents. As the proceeding is at an early stage and the Court has not heard direct and detailed evidence on the matters traversed by Mr Little, I do not consider it necessary or appropriate to form any concluded view in relation to the merits of the matters that the defendants now seek to raise in the 5ASOD, and I am cautious in attributing any significant weight to my impressions after reviewing the documents with counsel. However, in my view the documents relied on by the defendants do not provide cogent support for the propositions and conclusions they seek to draw from them in relation to the defences of truth and honest opinion, or the bad reputation of the plaintiff. They therefore do not establish a sufficient basis for the defences of truth or honest opinion such as to be a significant factor in the assessment of whether admission of the 5ASOD is necessary in the interests of justice.

(ix) Large-scale amendments to the defendants' case

[109] Mr Geiringer submits that quite apart from the numerous deficiencies and inadequacies of the defendants' pleadings in the 5ASOD, the proposed amendments to the defendants' case completely change the scope of what would be admissible evidence in the proceeding. He notes that the new pleadings contain a large number of accusations levelled against the plaintiff said to be relevant to bad reputation. Most of these allegations are new matters that were not included in any of the nine

publications. As a result the plaintiff would wish to brief and call evidence directed at rebutting these allegations.

[110] Mr Geiringer tendered to the Court a list of 38 witnesses that the plaintiff would wish to call if the 5ASOD is allowed to be filed. Even if the plaintiff intended to call a reduced number of witnesses, it would not be possible for him to either prepare his case or conclude his case within the time allocated for the present fixture.

[111] Mr Geiringer submits that the defendants are effectively asking the Court to permit them to completely recast their case on what was supposed to be the third day of the trial. He submits that the draft proposed 5ASOD contains large numbers of impermissible pleadings and particulars, and that the effect of admitting the 5ASOD for filing would be to expand the scope of the evidence at trial and the length of the trial into one considerably longer than that presently contemplated.

Conclusions

[112] I agree with and accept Mr Geiringer's submissions regarding the defendants' pleadings as set out in the 5ASOD. The proposed document represents a substantial and widespread repleading of the defendants' case and introduces new defences and a large number of particulars that do not respond with precision and particularity to the statement of claim. Coming as it does even later than the 4ASOD, the delay and prejudice to the plaintiff are even more significant in this context than was the case with the 4ASOD.

[113] It would be simply impossible for the trial to proceed within the current fixture on the basis of the 5ASOD being admitted and accepted for filing. The consequence would be a hearing based on a pleading which lacks focus and precision and in which new defences and new allegations are raised for the first time, which inevitably would expand the scope of the evidence so that a trial during the current fixture period would be wholly impracticable. As I noted in the context of dismissing the application to file the 4ASOD, the plaintiff has already suffered an unacceptable and egregious delay in having his claim heard.

[114] Furthermore, the plaintiff would be placed in the impossible position of having to respond to the new defences and fresh but inadequately particularised allegations with a wholly inadequate opportunity to prepare his case, assemble witnesses, or gather relevant supporting documents. The alternative, namely adjournment of the trial, would cause considerable prejudice to the plaintiff by delaying resolution of his claim and also by reason of the wasted legal costs he has incurred preparing for a trial which would not take place. Neither a trial conducted on the basis of the 5ASOD nor an adjournment is in the interests of justice. In my view, the only option that is consistent with the interests of justice is that which requires the defendants to proceed on the basis of the 3ASOD which they filed on 15 June 2018, and which they had been clearly told would be their final opportunity to amend their pleadings.

[115] For these reasons I declined the defendants' application for leave to file the 5ASOD.

Admissibility of evidence

[116] Prior to opening his case, Mr Geiringer applied for a ruling regarding the admissibility of much of the evidence proposed to be called by the defendants.

[117] The defendants have filed two briefs of evidence and a notice pursuant to r 9.7(6) of the High Court Rules setting out a list of names of witnesses proposed to be subpoenaed and called to give evidence notwithstanding that in each case those persons have, according to the contents of the notice, declined to provide witness statements. The two witness briefs filed by the defendants are from the first defendant himself and from Marc Spring. Mr Geiringer further submits that a large proportion of the documentary exhibits sought to be presented by the defendants are inadmissible as they relate to matters that are not relevant to the affirmative defences as pleaded in the defendants' 3ASOD.

Submissions

[118] The principal objection to the admissibility of the defendants' evidence raised by Mr Geiringer is based on relevance and relates to the defendants' pleadings in the 3ASOD. Counsel submits that the defendants' evidence in support of the affirmative

defences of truth and honest opinion must be relevant to prove the truth of the particulars pleaded by the defendants in relation to their defences. He submits that in the absence of any particulars pleaded by the defendants, none of the evidence they propose to adduce in support of those defences can be relevant.

[119] Mr Geiringer further submits that the defendants have failed to plead their defences of truth and honest opinion separately. Rather, they have included the plea of honest opinion coupled with the plea of truth. He submits that the defendants' approach of combining the two defences is contrary to the requirements of s 40 of the Defamation Act, and that the defendants have thereby pleaded a "rolled up plea" which is only effective in raising a defence of honest opinion and not one of truth. He says that this leaves the defendants with an untenable honest opinion defence, as no particulars have been pleaded setting out the publication or generally known facts upon which they rely for having formed the honest opinion. As a result, Mr Geiringer submits that although both the defence of truth and honest opinion are raised by the 3ASOD, the defendants' failure to plead the defences properly leaves both defences wholly unarguable. As a consequence of this inadequate pleading, he says that the proposed evidence of the defendants directed at those defences is inadmissible.

[120] Mr Geiringer also challenges the admissibility of those parts of the briefs of evidence of the first defendant and Mr Spring which refer to the opinions of other persons as a basis or support for the defendants' truth and honest opinion defences. He submits that the opinions of other persons are irrelevant and inadmissible.

[121] Mr Geiringer also challenges the admissibility of the documents sought to be relied upon by the defendants where they relate to matters which are not the subject of pleaded particulars of the defences of truth or honest opinion. He submits that many of these documents relate to allegations which were not part of the original publication.

[122] In addition to those grounds, Mr Geiringer also objects to the admissibility of:

(i) documents which contain confidential communications between the plaintiff and legal advisers which are privileged and for which there has been no waiver of privilege by the plaintiff;

(ii) without prejudice documents prepared and communicated in an attempt to resolve civil disputes;

(iii) documents containing excerpts from a transcript of a Family Court proceeding;

(iv) documents obtained from a judicial settlement conference;

(v) documents relating to an electronic covert recording made at Court prior to the commencement of a hearing; and

(vi) documents redacted by the defendants.

[123] Mr Geiringer identified examples of documents in each of those categories.

[124] Finally, in relation to the defendants' proposed evidence, Mr Geiringer takes issue with the admissibility of the evidence of witnesses listed by the defendants in the notice given pursuant to r 9.7(6). Mr Geiringer submits that the notice falls well short of complying with the requirements of the rule: in particular, no sufficient will-say details have been provided such as would inform the plaintiff of the evidence intended to be led from those witnesses. Moreover, as the evidence of the proposed witnesses in each case appears to relate to aspects of the defences of truth and honest opinion, Mr Geiringer submits that their evidence would in any event be inadmissible because it is irrelevant.

Discussion

[125] I have previously noted the importance of pleadings generally and especially pleadings by a defendant seeking to advance defences of truth and honest opinion in a defamation proceeding. As the Supreme Court observed in *Simunovich*, the particulars must give appropriate details of the facts and circumstances relied on to support the defences and generally a defendant may not give evidence outside the ambit of permitted particulars. As the Supreme Court noted in relation to particulars:[57]

---

[57] *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [1].

> They therefore serve to focus and confine the evidence which may be given in support of defences of truth and honest opinion.

[126] Despite Lang J's very clearly expressed remarks as to the necessity of the defendants setting out particulars of the defences of truth and honest opinion, in the 3ASOD the defendants did not set out any particulars of those defences at all. Rather, the defendants referred to the contents of affidavits and evidence to be called. For example, in relation to its pleading in respect of the first publication and first cause of action, the defendants state:

> 10. The first defendant admits writing, and the second defendant admits publishing, the "Kids Can" (First Publication), and say further that the defendants rely upon the evidence contained in the third affidavit of Cameron Slater, wherein a series of emails and other documents are annexed to paragraph 1 and marked Appendix "A". Furthermore –
>
> a. The defendants rely upon the affidavit of Cameron John Slater.
>
> b. The defendants rely upon Appendix "A" annexed thereto.
>
> c. The defendants rely upon the evidence of the Official Assignee (9 *supra)*
>
> d. The defendants intend to adduce the evidence from the relevant participants in the emails disclosed in Appendix "A".

[127] The four affidavits of the first defendant filed on 20 June 2018, which are each described as "disclosing evidence in support of" the 3ASOD, collectively annex several hundred documents upon which the defendants intend to rely. No attempt has been made to identify which or what parts of the numerous documents are relied upon, or what they are relied upon for.

[128] In paragraph 10(b) of the 3ASOD, the defendants refer to appendix A annexed to the first defendant's affidavit. Appendix A to the first defendant's third affidavit comprises a series of emails covering the period 21 July 2009 to 13 August 2009, contained on 20 pages. Some of the emails comprised within appendix A are also reproduced in the first publication entitled "Who really ripped off KidsCan?" The defendants have not provided particulars other than this general reference to the emails contained in appendix A.

[129] At paragraph 10(d) of the 3ASOD, the defendants state their intention to adduce evidence from "the relevant participants in the emails disclosed in appendix A". There are no particulars of what the evidence from those persons would be or what facts or circumstances are intended to be relied upon that would be established by that evidence.

[130] The defendants also refer to the evidence of the Official Assignee.[58] There are no particulars provided as any facts or circumstances that would be established by the evidence of the Official Assignee relevant to the defences.

[131] In further pleadings by the defendants throughout the 3ASOD they refer to paragraph 10(a), (b), (c) and (d) as being relevant to the defences of truth with the result that those subparagraphs are relied upon in all the defendants' pleadings in response to the first cause of action and there are no particulars provided in any of the pleadings other than references to the matters set out in paragraph 10(a)–(d).

[132] The defendants also adopt a similar approach in their pleadings to the second cause of action. At paragraph 17 of the 3ASOD, the defendants plead as follows:

> 17. The defendants deny that the statements in paragraph 17 are defamatory as they are ***true*** and are based on the evidence disclosed in the third affidavit of Cameron John Slater. In particular, those documents marked B1 to B15, and all other documents filed by the defendants; who further say that, the evidence establishing the ***truth***, or that the words expressed ***are not materially different from the truth***, are disclosed in appendices B1 to B15 (*supra*) and will be also adduced from witnesses at trial.
>
> a. Or further, and in the alternative, the words expressed are an ***honest opinion*** which are supported by the evidence disclosed in appendices B1 to B15 and other documents annexed to the affidavit of Cameron John Slater; and from evidence which will be adduced at trial.
>
> 17.1 The defendants admit paragraph 17.1, and repeat paragraph 17 herein.
>
> 17.2 The defendants admit paragraph 17.2 and repeat paragraph 17 herein.

[133] The appendices B1 to B15 annexed to the first defendant's affidavit (sworn 15 June 2018) comprise 60 pages containing a series of emails. Beyond referring to the

---

[58] Third affirmative statement of defence at 10(c).

materials by reference to their exhibit number in the first defendant's affidavit, no further particulars or circumstances are identified in the 3ASOD. The defendants repeatedly refer to the contents of appendices B1 to B15 throughout their pleading in relation to the second cause of action without providing any more specific particulars.

[134] The defendants adopt the same approach in their pleadings in reply to each of the remaining causes of action. For example, in relation to the third cause of action, the defendants again refer to the "evidence disclosed in the third affidavit of Cameron John Slater" and refer to documents contained in appendices to that affidavit.

[135] As a result of the approach adopted by the defendants, and in the absence of any particulars setting out the facts and circumstances relied upon by the defendants to support and establish the defences and truth and honest opinion, the plaintiff and the Court are left in the position of being confronted with a significant number of documents without identification of any facts or circumstances upon which the defences are based.

[136] Section 40 of the Defamation Act requires a defendant intending to rely on a defence of truth and on a defence of honest opinion to plead each of those defences separately. The manner in which the defendants have pleaded their defences of truth and honest opinion throughout the 3ASOD is exemplified by paragraph 10.1 which reads:

> The defendants admit paragraph 10.1 and say further that the evidence establishing the ***truth***, or that the words expressed are ***not materially different from the truth***, are disclosed in paragraphs 10a, 10b, 10c and 10d (*supra*) and will be adduced from witnesses at trial.
>
> a. Or further, and in the alternative, the words expressed are an ***honest opinion*** which is supported by the evidence disclosed in paragraphs 10a, 10b, 10c and 10d (supra) and adduced from witnesses at trial.

[137] As is evident, the defence of truth is separated from the defence of honest opinion although in each case the very same evidence and materials (being those set out at paragraph 10(a) – 10(d)) are referred to and relied upon to support the defences.

[138] I consider that while the requirement of separate pleading pursuant to s 40 of the Act is satisfied by the manner in which the defendants have pleaded the defences

as alternatives, the pleading nevertheless fails in other respects to satisfy the requirements for pleading the defence of honest opinion. Specifically, the defendants fail to particularise any publication facts or general facts on the basis of which the opinion could honestly be expressed, or provide anything to support the claim that the statements in the publication would be understood by a reader to be expressions of opinion. By relying on the same evidence and materials for both their defence of truth and their defence of honest opinion, the defendants further demonstrate their failure to provide the particulars required to support the defence of honest opinion.

[139] It is therefore apparent that the defendants took no heed whatsoever of the description provided by Lang J in his judgment of 18 May 2018 as to the pleading requirements for the defences of truth and honest opinion. In the circumstances it is clear that the defendants have chosen to adopt the general and unspecific approach later taken in the 3ASOD pleading those defences.

[140] By adopting this approach, the defendants have entirely failed to plead any facts and circumstances relied on to support their defences of truth and honest opinion. As a consequence none of the documents annexed to the first defendant's affidavits filed on 20 June 2018 or any other documents included in the parties' common bundle and which the defendants intend to adduce in evidence can be related to any particulars, and consequently they are neither relevant nor admissible. Similarly those parts of the first defendant's and Mr Spring's witness statements which refer to the documents annexed to the first defendant's affidavits or to the opinions of other persons regarding the plaintiff are also inadmissible.

[141] As I have previously noted, in the absence of properly pleaded particulars by the defendants, the plaintiff would be put in an impossible position of having to speculate as to the basis of the defendants' case, and the Court would similarly be put in the position of being unable to focus its attention and that of the parties in terms of the relevance of evidence to the facts and circumstances which were required to be established in order to prove the defences.

[142] Accordingly, in the absence of any proper particulars that would enable the trial to proceed in a focused and orderly manner, I ruled that the defendants may not

adduce any evidence directed at advancing the defences of truth and honest opinion, including the evidence contained in the four affidavits of the first defendant sworn on 15 June and filed on 20 June 2018. Furthermore, as a consequence of the defendants' failure to comply with the requirement to give notice pursuant to s 42 of the Act of any specific instances of misconduct by the plaintiff which are intended to be relied on to show him to be a person of bad reputation, no evidence relating to those matters referred to in the 29 particulars set out in the 5ASOD or otherwise shall be admitted as evidence at the trial. However, as there may be other evidence that the defendants seek to adduce that indirectly also relates to the reputation of the plaintiff, I have reserved leave to the defendant to apply to adduce any such evidence.

[143] As noted above, the plaintiff raises further arguments directed at the admissibility of documents and the proposed evidence to be led from the first defendant himself and Mr Spring, as well as other witnesses whose names are set out in the defendants' r 9.7(6) notice. Having regard to the ruling I have made to exclude evidence directed at supporting the defences of truth and honest opinion, it is not necessary to determine the admissibility of all the contents of the first defendant's and Mr Spring's witness statements,[59] as much of the contents of the witness statements is directed at the defences, and any other challenges to admissibility are best left to be addressed and determined at the trial. However, taking the first defendant's witness statement as an example, the contents of the paragraphs dealing with the first cause of action contain the type of evidence to which the plaintiff objects, on the grounds that it contains inadmissible hearsay; that it is not relevant by reason of being unrelated to any particulars of the defences (there being no particulars); that it repeats the opinions of other persons; and that it expresses the opinions of the first defendant himself. In his witness statement the first defendant states:

(a) his opinion that certain emails relating to the Hell Pizza sponsorship of KidsCan showed that the situation was manipulated by the plaintiff to force Warren Powell to resign when he was damaged by news media reports;

---

[59] Brief of evidence of Cameron John Slater (dated 11 September 2018, filed 26 September 2018); Brief of evidence of Marc Spring (filed 26 September 2018).

(b) that the plaintiff was a bankrupt at the time and impoverished, but says there is some "contention" about that due to the establishment of several trusts and suspicious property transfers prior to his bankruptcy;

(c) that he discovered in his investigations that it was Mr French who obtained the plaintiff's computer hard drive and files; and

(d) that a series of emails sent by the plaintiff portrayed Warren Powell as responsible for KidsCan not receiving the sponsorship money from Hell Pizza, and he believes the plaintiff masterminded a "massive negative publicity attack against the Hell Pizza brand and Warren Powell directly", and that this resulted in Mr Powell being removed as a director of the Hell Pizza company.

[144] The proposed evidence clearly contains opinions and conclusions that the first defendant cannot offer as admissible evidence. The statements refer to investigations being conducted and conclusions reached as a result of the investigations by the first defendant and his "investigation team". Opinion evidence is not generally admissible unless falling within the exceptions in ss 24 and 25 of the Evidence Act 2006.[60]

[145] The first defendant has adopted the same approach in his evidence regarding the second cause of action which is evident from the following:

> 26 The publication
>
> It was a genuine article regarding the background of the plaintiff so that readers could form their own views based on material information. The article is also based on numerous other emails that weren't published but provided me with a more complete understanding of the poor and often violent impression that the plaintiff liked to portray to people he was victimising. [EX 16 emails]. The article contains hyperlinks and each of those links supports the use of the words complained about [EX hyperlinks folder].

[146] The statements in this section of the first defendant's witness statement include a number of conclusions and opinions. Reference is made to numerous other emails that were not published and to a number of hyperlinks to other material which is not relevant. At [26.3], the first defendant says that the plaintiff escaped a conviction for

---

[60] Evidence Act 2006, s 23.

assaulting a court bailiff by referring to documents relating to the police diversion scheme. That proposed evidence is hearsay and inadmissible as it does not fall within any of the permissible exceptions to the general exclusionary rule. At [26.4] the first defendant comments on the contents and purpose of an email sent by the plaintiff to Paul Shale. Here again the first defendant's evidence is an inadmissible expression of his opinion as to the purpose and implications of the email. Mr Geiringer disputes the first defendant's interpretation and says that he is instructed by the plaintiff that the contents of the email were written by the plaintiff as a jocular response to an invitation to speak at a business function the date of which had closely coincided with him being adjudicated bankrupt.

Conclusion

[147] The effect of my judgments is to preclude the defendants from adducing any evidence directed at supporting the defences of truth and honest opinion, as well as any evidence directed at showing the plaintiff to be a person of bad reputation. This unusual situation is the direct consequence of the defendants' failure to plead their case in accordance with the requirements for pleading the defences of truth and honest opinion and the requirements for adducing evidence directed at establishing bad reputation. The defendants have had considerable time and a number of opportunities to get their pleadings in order, leading to the Court giving them a final opportunity to replead their defences in May 2018. Despite this leniency, and the impending trial fixture, the defendants failed to properly plead their defences in the 3ASOD and it was not until the trial was a fortnight or so away that they took steps to apply to file a further amended pleading that significantly recast their case yet still failed to comply with the requirements of pleading. Then, when that application was dismissed and the trial was to commence, they applied again to file a yet further amended pleading which also significantly recast their case and contained numerous deficiencies in pleading.

[148] Although the effect of my rulings and judgments may appear harsh, this outcome underlines the importance of proper pleading and of compliance with procedural rules and timetable orders. In this case the defendants' failure to comply with those requirements have resulted in them placing themselves in the situation in which they now find themselves.

_____

Paul Davison J