IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2008
[2015] NZHC 1996

BETWEEN	EBR HOLDINGS LTD (IN LIQUIDATION) Plaintiff
AND	MCLAREN GUISE ASSOCIATES LTD First Defendant
	NIGEL DALE HARRISON Second Defendant

Hearing: 27 July 2015

Counsel: P Murray and J O'Connell for Plaintiff
J N Bierre and L G Cox for Defendants

Judgment: 21 August 2015

JUDGMENT OF BREWER J

This judgment was delivered by me on 21 August 2015 at 4:30 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors: Meredith Connell (Auckland) for Plaintiff
Morgan Coakle (Auckland) for Defendants

Introduction

[1] The defendants apply for review of a decision by Associate Judge Christiansen refusing to strike out the plaintiff's claim against them.[1]

[2] The defendants were the plaintiff's accountants prior to it going into liquidation. They prepared its annual accounts for the 2008 year. The accounts showed that the plaintiff's shareholders had significant current account debts. The plaintiff (under the control of its liquidators) applied for summary judgment against the shareholders for the debts as shown in the 2008 accounts. The second defendant (Mr Harrison) swore an affidavit in support of the shareholders' opposition to the application for summary judgment to the effect that the 2008 accounts were wrong. He annexed to his affidavit an updated financial statement summary which concluded that the shareholders collectively owed very little to the plaintiff. The summary judgment application failed.

[3] Subsequently, Mr Harrison was examined under oath by the plaintiff's liquidators.[2] He affirmed the contents of his affidavit and the annexed updated financial statement summary.

[4] The plaintiff claims that material statements made by Mr Harrison in his affidavit were false and that he knew they were false.[3]

[5] Likewise, the plaintiff claims that when Mr Harrison repeated or affirmed the statements under examination he knew them to be false.[4]

[6] The plaintiff pleads that it incurred significant costs as a result of what it says were the false representations. It had to investigate them, pursue the substantive claim when the summary judgment application failed, address the false representations during the course of the summary judgment proceeding and extend the period of the liquidation. It wants to recover these costs from the defendants.

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1 *EBR Holdings Ltd (In liq) v McLaren Guise Associates Ltd & Harrison* [2015] NZHC 607.

2 Companies Act 1993, s 261.

3 Or that he did not believe them to be true, and/or was reckless as to their truth (amended statement of claim, para 90).

4 Or that he did not believe them to be true, and/or was reckless as to their truth (amended statement of claim, para 92).

[7] The plaintiff also pleads that the defendants misused confidential company information by providing it to the shareholders so that the plaintiffs would have no or a reduced claim against the shareholders.

[8] The defendants say that they cannot be sued by the plaintiff. That is because the affidavit sworn by Mr Harrison was for the purpose of a civil Court proceeding. At common law, witnesses in civil proceedings have immunity from being sued because of what they said in their testimony, or evidential statements. Likewise, the evidence given at the examination was either sufficiently connected to a civil proceeding in its own right (the liquidation proceeding) such as to give rise to witness immunity, or was so connected to the summary judgment proceeding as to fall within the witness immunity arising from it.

[9] The defendants also say that the plaintiff's misuse of confidential information allegations are insufficiently pleaded, there is no breach of confidence on the facts and any misuse of confidential information could not have caused loss.

[10] Associate Judge Christiansen did not agree with the defendants.

The nature of review

[11] A party can apply to the High Court for review of a decision by an Associate Judge.[5] The High Court's jurisdiction is appellate in nature. The onus is on the applicant to prove on the balance of probabilities that the Associate Judge's decision was wrong.

The Associate Judge's decision

[12] Associate Judge Christiansen had to consider the defendants' strike out application against well known principles:[6]

> For this court's purposes these include:
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> (a) Pleaded facts are assumed to be true.

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5 Judicature Act 1908, s 26P(1).

6 *EBR Holdings Ltd (In Liq) v McLaren Guise Associates Ltd & Harrison*, above n 1, at [13].

(b) A cause of action must be clearly untenable if it is to be struck out.

(c) Difficult questions of law should not preclude a strike out option.

(d) The Court should be wary of striking out a claim in a developing area of law.[7]

[13] The causes of action to be considered were the torts of deceit/injurious false representations, misuse of confidential information, and negligence.

[14] The Associate Judge reviewed the law relating to witness immunity. He accepted that the leading New Zealand authority is *Dentice v Valuers Registration Board*.[8] There, Eichelbaum CJ held the rationale for witness immunity is to ensure the free and unfettered availability of witnesses in any cause by providing absolute immunity from civil action whether or not the evidence given was true or false, or given in good faith, or with malice.[9]

[15] However, what was new was a decision of the United Kingdom Supreme Court in *Jones v Kaney*.[10] The plaintiff argued that this case abolishes witness immunity for expert witnesses, in which category Mr Harrison lay.

[16] It seems that Associate Judge Christiansen agreed with the plaintiff:[11]

> It appears, as Mr Murray has submitted, that *Jones v Kaney* does not only partially abolish witness immunity for claims in negligence by the party that retained the expert but rather that it appears clear from the judgment that all immunity from suit for expert witnesses was abolished and in this respect is consistent with the evolution of barristerial immunity.

[17] In declining the application, Associate Judge Christiansen concluded:

> [76] In this case distinct causes of action are connected to what was contained in an affidavit and what was later said in a liquidator's examination, and in between what was done by the defendants in breach of obligations to the company. Witness immunity is claimed to provide a defence to these claims because the affidavit was offered as evidence in a District Court proceeding and the examination evidence was provided in response to a direction given as part of a Court supervised process.

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7 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
8 *Dentice v Valuers Registration Board* [1992] 1 NZLR 720.
9 At 724.
10 *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398.
11 *EBR Holdings Ltd (In Liq) v McLaren Guise Associates Ltd & Harrison*, above n 1, at [61].

> [77] In this Court's view a factual enquiry is needed which the present affidavits do not adequately provide for.
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> [78] Witness immunity is a longstanding principle. It is not now quite the same as it has been. Documented change is evidenced by relatively recent English decisions suggesting that principles are not clear enough for our present purposes.

Grounds for review

[18] The defendants' principal submission is that Associate Judge Christiansen erred in law in holding that *Jones v Kaney* abolished all immunity for expert witnesses. Particular reference is made by Mr Bierre to the judgment of Lord Collins:

> [71] This appeal is concerned only with the liability of the so-called "friendly expert" to be sued by the client on whose behalf the expert was retained.
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> …
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> [73] Nor of course is there anything in the present decision which affects the position of the adverse expert. It is not sufficient to say that the adverse expert presents no problem because the expert owes no duty to the client on the other side. There are wider considerations of policy which ought to prevent adverse experts from being the target of disappointed litigants, even if the scope of duty in tort were to be extended in the future. It is true, as McHugh J said in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, para 100 that except for the purpose of classification it may not matter whether the lack of legal liability stems from characterising it as an immunity or as an absence of duty of care. But it would be preferable to treat it as an immunity to emphasise the strong element of policy involved.

[19] Mr Bierre made the submission that Associate Judge Christiansen appeared to treat this statement as being a minority view, preferring to rely on the judgment of Lord Phillips.

[20] Mr Bierre relies on the subsequent decision of *Baxendale-Walker v Middleton*, a decision of the High Court of England and Wales,[12] and *Chief Constable of South Wales Police v Daniels*,[13] a further decision of the Court of Appeal of England and Wales, in support of the proposition that the change to the

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12 *Baxendale-Walker v Middleton* [2011] EWHC 998 (QB).

13 *Chief Constable of South Wales Police v Daniels* [2015] EWCA Civ 680.

law does not relate to the immunity of an expert witness from civil suit by an opposing party.

[21] There are seven different judgments in *Jones v Kaney*. It is not at all clear whether Lord Phillips intended his judgment to apply beyond the scope of the case he was deciding, and on my reading the majority limits the abolition of immunity to "friendly" experts. The weight of subsequent authority also favours this interpretation. However, the point will be relevant only if I have to apply *Jones v Kaney* as part of the law of New Zealand.

Issues

[22] The issues I have to decide are:

(a) Does witness immunity protect the defendants from the claims in the first and third causes of action relating to the summary judgment proceeding?

(b) Does witness immunity protect the defendants from the claims in the first and third causes of action relating to the s 261 examination?

(c) Does witness immunity protect the defendant from the claims in the second cause of action?

Does witness immunity protect the defendants from the claims in the first and third causes of action relating to the summary judgment proceeding?

[23] This issue requires me to identify the law in New Zealand on witness immunity. The findings will be relevant to the other issues also. I start by observing that *Jones v Kaney* is not law in New Zealand unless it is adopted by the Courts of New Zealand. It has not previously been considered by a Court in this country. This Court is bound by the decisions of the Court of Appeal and of the Supreme Court of New Zealand. Therefore, I cannot import the dicta of *Jones v Kaney* into New Zealand law unless to do so is consistent with the relevant decisions of the Court of Appeal and the Supreme Court of New Zealand.

[24] The most recent decision on witness immunity binding on me is *New Zealand Defence Force v Berryman*.[14] It was not referred to by counsel or by Associate Judge Christiansen. The case concerned (inter alia) liability for statements made to a Coroner's inquest. The Coroner was inquiring into the death of a person as a result of the collapse of a bridge built by the Army. A written statement by the designer of the bridge was put into evidence by the Army. The owners of the bridge, the Berrymans, in seeking to sue the Army on various grounds, claimed that a statement in the written statement was false.

[25] The Court of Appeal reflected on the nature and scope of witness immunity, and its relationship with the strike-out or summary judgment jurisdiction. The Court held:

> [67] Those who give evidence or make submissions to a court enjoy immunity from suit. The purpose of this immunity is not to encourage dishonest or defamatory submissions or perjury; rather it is to protect parties to litigation, along with their counsel and witnesses, from vexatious litigation. There is also an associated purpose of limiting the scope for re-litigation. All of this, along with the metes and bounds of the immunity, is discussed at length in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL) and *Meadow v General Medical Council* [2007] 1 All ER 1 (CA).
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> [68] We recognise that the immunity is limited. It is confined to what is said in court and necessary preliminaries to that (see *Darker*). It is also merely an immunity from civil suit. *Thus an expert witness may face professional sanctions in respect of evidence, see for instance Meadow.* And obviously criminal prosecution for perjury may result from the deliberate giving of false evidence. Claims of malicious prosecution are maintainable even though such a claim might necessarily involve impugning the evidence given during the preceding criminal proceedings. Likewise these principles do not now prevent counsel being sued for negligence, see for instance, *Chamberlains v Lai* [2007] 2 NZLR 7 (SC). In marginal cases, where there is uncertainty as to which side of the line a particular claims falls, the courts should be slow to resort to the strike out or summary judgment jurisdiction.
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> [69] That said, where the claim is clearly within the immunity, summary determination is appropriate. As to this we endorse the remarks of Lord Clyde in *Darker* at 457, where, after referring to the need for caution as to the extension of immunities, went on to say:
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> > On the other hand there has to be some degree of certainty about the existence of an immunity for it to be effective. The matter cannot be entirely left as one to be determined on each and every occasion. For the immunity of a witness to be effective it is necessary that the person concerned should know in advance with some certainty that what he

[14] *New Zealand Defence Force v Berryman* [2008] NZCA 392.

> or she says will be protected. So even although the matter may depend in any case upon a balancing of interests it ought to be possible to predict with some confidence whether or not an immunity will apply. The law has sought to achieve this by making it clear that the substance of the evidence presented to the court in judicial proceedings will be immune from attack.
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> [70] This case falls squarely within the immunity. It involves an attempt to impose a civil liability in relation to evidence given and submissions made in the course of judicial proceedings. The policy factors underlying the immunity are engaged. This is particularly so of the second of the policy factors mentioned because, as we have already indicated, the Berrymans are very largely seeking to re-litigate the Coroner's findings and to do so by way of a case which they were largely in a position to run at the inquest had they chosen to do so.
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> …
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> [72] In the circumstances, we are satisfied that the claim against the Army, to the extent to which it is based on evidence given and submissions made to the Coroner, is inconsistent with the immunity.
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> [My emphasis]

[26] *Berryman* was applied in *Slavich v Judicial Conduct Commissioner*[15] and *Rafiq v Commissioner of New Zealand Police.*[16]

[27] The leading authority recognised by counsel and Associate Judge Christiansen was the earlier decision of *Dentice v Valuers Registration Board,* where Eichelbaum CJ discussed the witness immunity rule in the context of expert evidence and held that "Witnesses are immune from civil proceedings. Each attempt to whittle that rule down by reference to some form of action not covered by previous authority has failed."[17]

[28] His Honour said:[18]

> The rationale of the rule appears sufficiently from the judicial statements quoted. As Starke J put it, broadly it is the advancement of public justice. As a matter of policy, in order to ensure the free and unfettered availability of witnesses in any cause, it has been thought best to provide an absolute immunity from civil action, regardless of the nature of the proceeding, and irrespective of whether the evidence was true or false, or given in good faith or with malice.

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15 *Slavich v Judicial Conduct Commissioner* HC Hamilton CIV-2010-419-975, 14 July 2011 at [35].

16 *Rafiq v Commissioner of New Zealand Police* [2014] NZHC 813 at [14].

17 *Dentice v Valuers Registration Board,* above n 8, at 723.

18 At 724.

> It is clear that the immunity is limited to exemption from "civil" proceedings. Here, in relation to Court proceedings another facet of policy becomes evident. No witness is immune from prosecution for perjury, where false evidence is knowingly given with intent to mislead.

[29] *Dentice* was considered and approved in a number of subsequent High Court cases.[19] In *Paragon Services Ltd v Stiassny*, Associate Judge Doogue applied witness immunity to affidavit evidence.[20] In *Keesing v Davison*, Associate Judge Faire applied the witness immunity rule to expert evidence.[21]

[30] I consider that all these cases are consistent with *Berryman* and paint a picture of New Zealand law in which expert witnesses are shown as enjoying the same level of witness immunity as any other witness.

[31] There are three other appeal decisions mentioned by counsel. All pre-date *Berryman* and, in my view, are consistent with it. I refer to them for completeness. The first is *B v Attorney General*, which concerned the liability in negligence of the Minister and Department of Social Welfare, a clinical psychologist and a social worker.[22] In obiter comments, Keith J said:[23]

> That contention leads into the related submission by the respondents that they were protected by witness immunity. That protection is not limited to evidence actually given in Court but extends to statements and documents made for the purpose of pending or contemplated litigation. That is to say, investigatory and preparatory stages may be protected along with the trial (*Watson v M'Ewan* [1905] AC 480). The proceedings may be criminal or civil or indeed relate to an administrative tribunal, eg *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA) and *Thompson v Turbott* [1962] NZLR 298. The justification for the protection is the public interest in facilitating full and frank disclosure for the purposes of the litigation. In the absence of this extension of protection, the absolute privilege of a witness giving evidence could be simply outflanked. It follows from the justification that the protection may be available even although proceedings are not

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19 *Frankel Consultants Ltd v Enviro Waste Services Ltd* [2012] NZHC 2142 at [132]; *Angland v Mower* HC Christchurch CIV-2008-409-1990, 17 December 2010 at [10]; *Prince v Attorney-General* [1996] 3 NZLR 733 (HC) at 740-741 and 744;*Palmer v Telecom New Zealand Ltd* HC Auckland CP176/02, 28 November 2002, at [22]-[25]; *Katavich v Meltzer* HC Auckland CIV-2006-404-5968, 24 March 2011 at [46]. Witness immunity was also considered in *RIG v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2008-404-003461, 27 July 2009 at [74]; and *H v Chief Executive of the Department of Child Youth & Family Services* HC Auckland CIV-2004-404-5757, 3 October 2005 at [35]-[37].

20 *Paragon Services Ltd v Stiassny* HC Auckland CIV-2006-404-593, 9 August 2006. See also *Angland v Mower*, above n 19. .

21 *Keesing v Davison* HC Auckland CIV-2005-404-38, 23 June 2005 at [21]-[30].

22 *B v Attorney-General* [1999] 2 NZLR 296 (CA).

23 At [32].

> brought and, if they are, even although the person giving the information does not give evidence (*Taylor v Serious Fraud Office* at p 1052). There are plainly limits to this protection as appears from recent decisions of the English Court of Appeal, *Mond v Hyde* [1998] 3 All ER 833 and *Stanton v Callaghan* [1998] 4 All ER 961 but, as with the protective provisions, we do not take this matter any further…

And Tipping J said:[24]

> These then are the two bases upon which I agree that none of the plaintiffs has a tenable cause of action against any of the defendants. As this is sufficient to dispose of the appeal, I prefer to leave open the question of the so-called witness immunity. Normally such immunity is invoked for statements, whether written or oral, made as a witness or preparatory to giving evidence. In order to reflect the rationale for the immunity there must be a testimonial dimension. It is difficult to see investigatory conduct, even with a greater or lesser degree of likelihood of giving evidence, as being sufficiently testimonial to qualify. After all, the policy reason for the immunity is to enable witnesses, actual or potential, to speak frankly and fearlessly without the risk of being sued for what they say. The judicial process is thereby assisted and enhanced. I make these observations because in this case the ``witnesses'' are the social worker and the clinical psychologist. The plaintiffs are trying to sue them as much for what they did not do as for what they did.

[32] The second judgment is the Supreme Court's decision in *Lai v Chamberlains*, which abolished the immunity of barristers from civil suit.[25] Elias CJ mentioned the immunity of witnesses in two paragraphs early in her judgment. They were cited by counsel in this case, but only in the context of discussing other decisions which were about the immunity of barristers.[26] I do not consider them to be support one way or another for the principle of immunity for witnesses. However, I note that the Chief Justice also said:[27]

> The advocate's duties to the Court can never conflict with the duty to the client because they are the rules by which litigation must be conducted. Other professions have similar ethical obligations. The duties are supported by the disciplinary powers of the Court and the legal profession. They are unlikely to wilt if the immunity is removed. There is no indication that the standard of observance of the duty to the Court has been eroded in jurisdictions without immunity for advocates. The cab-rank principle is an important ethical obligation imposed on legal practitioners, but its practical importance in the administration of justice in New Zealand should not be exaggerated. The obligation to provide services to all is an ethic shared with other professions, which enjoy no immunity. The absolute privilege which

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24 At [51].
25 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.
26 At [17] and [25].
27 At [54].

> precludes defamation liability is limited to what is said in Court and is directed to a different policy: the candour of participants in Court proceedings. *The immunities of other participants in Court proceedings are not analogous because witnesses and the Judge do not assume duties of care to a party. (It is unnecessary to express any view on the liability of the professional witness for negligence in the preparation of reports which may form the foundation of evidence; witness immunity may well not extend so far.) The case of the advocate who assumes the conduct of litigation on behalf of a client to whom he owes duties of care (often as a matter of contractual undertaking) is entirely different.*
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> [My emphasis]

Tipping J said:[28]

> Nor am I persuaded that barristers should have the automatic and absolute protection that other participants in the judicial system enjoy. Judges, jurors and witnesses are obvious examples. Their duties, and their need for protection in the interest of doing justice in the particular case, cannot be equated with the position of barristers. The duties of barristers to the Court and to their clients are not inconsistent with each other. They are complementary. The duties of barristers to their clients and allegations of breach thereof must always be assessed in the light of their duties to the Court. There can be no valid suggestion of a breach of duty to a client if the conduct of the barrister has been in accordance with a duty to the Court or a reasonable perception of what that duty is.

[33] These comments were obiter and made in the context of distinguishing the immunity of barristers from the immunity of witnesses. They are not particularly helpful in determining the current law of New Zealand on witness immunity, other than that they are consistent with *Berryman.* I note that the Court of Appeal in *Berryman* considered *Lai* in its discussion of witness immunity.

[34] The final appellate authority referred to during the course of the hearing is the Court of Appeal's decision in *Teletax Consultants Ltd v Williams*.[29] Here, the Court of Appeal held that no action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a Court or Tribunal, as such statements are subject to absolute privilege. This decision is limited to the context of absolute privilege in respect of defamation claims. It is not directly applicable to witness immunity for civil claims generally. However, the two rules are broadly analogous, at least in terms of justification. Both rules reinforce the need

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28 At [157].

29 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA). See also *Thompson v Turbott* [1962] NZLR 298 (SC), a case also raised during the hearing.

for testimony to be given free from risks of harassment, collateral challenges and threats to independence.[30] They reinforce the existence of witness immunity in New Zealand.

The summary judgment proceeding

[35] The law in New Zealand, in my view, is that witness immunity applies to the affidavit evidence given by Mr Harrison in the summary judgment proceeding. It is arguable that *Berryman* can be distinguished on the basis that it did not concern evidence given by an expert,[31] and it can be argued that there is no Court of Appeal or Supreme Court authority directly on the point of contention in *Jones v Kaney*: namely, whether witness immunity applies to "friendly" expert witnesses, or to expert witnesses at all However, in light of the acknowledgment of the position of experts in *Berryman*, and the direct application of immunity to expert witnesses in *Dentice* and other High Court decisions, it is clear that the law in New Zealand is settled to the extent that the plaintiff's claims, as far as they relate to the affidavit evidence and updated summary used in the summary judgment proceeding, should be struck out.

[36] It is unnecessary in this discussion to consider the English and other overseas authorities on the issue. Undoubtedly the decisions in *Jones* and later English cases have changed the law in England and Wales. In time they may also change the New Zealand approach to witness immunity. However, a consideration of the continued application of witness immunity to expert witnesses must be left to Courts superior to this one. As far as claims in the High Court are concerned, *Berryman* is binding. The law is settled in New Zealand unless and until the superior Courts reassess the line of New Zealand authority in support of witness immunity for expert witnesses.

Steps taken in preparation

[37] The plaintiff submits that whether steps taken in preparation are covered by witness immunity is a matter of fact which should be determined at trial rather than

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30 At 701.

31 The witness, Major Armstrong, was a military engineer. However, his evidence was about what he did and the decisions he made, rather than offering expert opinion.

at strike-out level. This submission requires me to consider when a Court may strike out a cause of action.

[38] The Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action.[32] A Court should not strike out a cause of action lightly. It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.[33] The factual allegations pleaded are assumed to be true for the purposes of a strike-out. It is not for the Court to resolve factual disputes, unless an essential factual allegation is plainly wrong.[34]

[39] The test is whether on the material before the court and in light of the current state of the law it has been demonstrated that the causes of action alleged are so clearly untenable they cannot succeed.[35] If the claim depends on a question of law capable of decision on the material before the Court, the Court may determine the question even though extensive argument might be necessary to resolve it.[36] The application should be determined in the light of the present state of evolution of the common law.[37] On the other hand, the Court should be wary of striking out a claim in a developing area of law.[38]

[40] Where a defect in pleadings can be cured by amendment, the party should be given the opportunity to make the amendment. The defective parts of pleading should normally be struck out and leave given to file a further amended statement of claim,[39] though a plaintiff cannot make generalised and imprecise allegations in the hope that at some later stage it will be in a better position to plead.[40]

[41] Accordingly, strike-out in this case will be appropriate if it is clear that witness immunity applies to the preparatory events alleged. On my reading of the amended statement of claim, all of the plaintiff's allegations under the first and third

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32 High Court Rules, r 15.1.
33 *Couch v Attorney General*, above n 7, at [32]-[33].
34 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA).
35 *Takaro Properties Ltd (in rec) v Rowling* [1978] 2 NZLR 314 (CA) at 316-317.
36 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 305 and 311.
37 At 305.
38 *Couch*, above n 7, at [33].
39 *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC).
40 *Commerce Commission v Fletcher Challenge Ltd* (1999) 6 NZBLC 102,752 (HC).

causes of action concern alleged injurious falsehood in statements actually contained within the affidavit, or within the updated summary, or during the subsequent examination, or as part of a failure to correct a false statement after the Court proceedings. For deceit and negligence, for example, the plaintiff claims that the false representations made in the affidavit and updated summary were intended to make the plaintiff and the Court act in reliance on the affidavit, the summary judgment application to be unsuccessful and the plaintiff to have no, or a reduced, claim against the shareholders. I do not consider there to be any tenable argument that preparation as pleaded is not covered by witness immunity.

[42] Moreover, the elements of deceit and injurious falsehood do not lend themselves to application to statements made prior to the summary judgment application. Deceit requires:

- a false representation as to a past or existing fact made by a defendant who knew it to be untrue or who had no belief in its truth or who was reckless as to its truth;

- intention that the plaintiff should have acted on the representation;

- an action by the plaintiff in reliance on the representation; and

- loss suffered by the plaintiff.[41]

[43] For injurious falsehood a plaintiff must prove a false statement about him or herself, or about his or her business or property; that it was published to a third person; malice on the part of the defendant; and that it caused damage.[42] There are no pleaded acts prior to the statements made in the affidavit and updated summary to which these torts can apply. Given the facts pleaded, I do not see that a re-pleading could alter this conclusion.

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41 *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA) at [46] and [55].
42 *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69, (2001) 208 CLR 388 at [52].

[44] A trial is not required to assess the facts of preparation, which do not appear to be relevant. The first and third causes of action, as they relate to preparation for and evidence given in the District Court proceedings, will be struck-out.

Does witness immunity protect the defendants from the claims in the first and third causes of action relating to the s 261 examination?

[45] A preliminary issue is whether it is appropriate for the Court to determine whether immunity for the purposes of answering this issue applies at the strike-out stage. In particular, factual issues, including what Mr Harrison actually said at the examination, may be necessary to determine whether witness immunity applies. If so, determining the issue at a strike-out level would be inappropriate. This was the view of Associate Judge Christiansen. The defendants, however, argue that whether immunity applies is an issue of principle which the Court can resolve at this point. Whether the case can be decided on this basis depends in turn on whether the examination is, in principle, subject to witness immunity. In other words, if Mr Harrison's statements made during the course of the examination are subject to witness immunity because they can be said to be "said in Court" then what he actually said is irrelevant: the witness immunity applies. If, on the other hand, statements made during the examination are not, by nature, subject to the immunity then the statements themselves are likely to be relevant, particularly as there may need to be an assessment of what the statements were and how they relate to the District Court proceeding.

[46] I have decided that the actual comments made by the second defendant during the examination are not important. Whether or not immunity applies can be considered as a matter of principle. Witness immunity either applies to statements made in the examination, or it does not.

Does the summary judgment witness immunity extend to the s 261 examination?

[47] The first question is whether statements made during the examination attract the same witness immunity that applies to the summary judgment proceedings. In other words, are Mr Harrison's statements during the liquidator's examination

connected to the summary judgment proceedings to the extent that witness immunity applies?

[48] In *Berryman*, the Court of Appeal said that the immunity is limited, and is "confined to what is said in court and necessary preliminaries to that". This is orthodox. The general approach in New Zealand and overseas extends witness immunity to statements made for the "purpose of giving evidence",[43] and the evidence given itself, but not beyond this. It is unlikely, for example, to extend to "protect an expert who has been retained to advise as to the merits of a party's claim in litigation from a suit by the party by whom he has been retained in respect of that advice."[44] The immunity also does not extend to an instigator of a criminal inquiry process if that person acts with malice and without probable cause (malicious prosecution). It does not prevent prosecutions for perjury or professional disciplinary sanctions.[45] Indeed, the immunity is deliberately limited. In *Darker v Chief Constable of the West Midlands Police*, Lord Hope said that immunity should not extend to things said or done by police that do not "form part of their participation in the judicial process as witnesses."[46]

[49] The scope of immunity has also been described in similar terms to the scope of the (now abolished) barristerial immunity, an "intimate connection" test.[47] The actual meaning of "intimately connected with" or "preliminary to" litigation is, as Lord Phillips said in *Jones*, "fuzzy".[48] However, there is no suggestion that statements made after the Court proceedings, even affirmations of the same evidence as given in Court, realistically fall within the immunity. It is clear that the defendants' argument that the test is statements made "in respect of" a proceeding is far too wide.

[50] I have not found any case law in New Zealand or overseas which applies witness immunity to statements made subsequent to the Court proceedings in question. In any event, any such application would contradict what was said in

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43 *Meadow v General Medical Council* [2006] EWHC 146 (Admin), [2006] 1 WLR 1452 at [9].
44 *Stanton v Callaghan* [2000] QB 75 (CA) at 100.
45 *New Zealand Defence Force v Berryman*, above n 14, at [68].
46 *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (HL), at 448.
47 *Rees v Sinclair* [1974] 1 NZLR 180 (PC) at 187, *Stanton*, above n 44 at 94-95
48 *Jones v Kaney,* above n 10, at [43].

Berryman; that the immunity is confined to what is said in court and necessary preliminaries. Indeed, the policy justifications for applying witness immunity to subsequent statements are limited.

[51] The policy reasons in favour of an immunity include:

(a) Independence – expert witnesses have an overriding duty to assist the court impartially.[49] The Court relies on their evidence, particularly since expert evidence usually involves information outside the ordinary expertise of the Court. It is, therefore, of central importance that expert witnesses are completely impartial and neutral. It is therefore crucial that expert witnesses are free from fear of future lawsuits, both in the evidence they present to Court and in their preparation.[50]

(b) Collateral challenges – a lack of immunity is a well recognised danger to the finality of proceedings.[51] The risks of collateral challenges are two-fold. First, they question the decisions of the Courts and as such risk bringing the justice system into disrepute. Second, they have the effect of depriving the successful litigant of the moral vindication of his claim by seeking indirectly to overturn the result as invalid. The immunity is distinct, in this respect, from the (now abolished) barristerial immunity because the challenges will involve the Court's findings of fact and the evidence given in Court, rather than litigation strategy.

(c) Vexatious claims – immunity allows vexatious claims against witnesses to be struck out. This is cost effective for prospective defendants. Without immunity, vexatious claims will be encouraged.[52]

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49 High Court Rules, sch 4(1).

50 *Palmer v Durnford Ford (a firm)* [1992] QB 483 (QB) at 487. *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1 at [37]-[42]; *Darker*, above n 46, at 457.

51 *Palmer v Durnford Ford*, above n 50, at 489.

52 *Marrinan v Vibart* [1963] 1 QB 234 (QB) at 237 *Lai v Chamberlains*, above n 25, at [77].

(d) Chilling effect – immunity helps prevent prospective expert witnesses from refusing to give evidence out of fear of recriminations. Potential witnesses may be forced to seek insurance against claims, increasing the cost of expert witnesses and litigation generally.[53]

[52] The main policy reason in favour of not having immunity is that every wrong should have a legal remedy.[54] Immunity from suit should only apply where it is "absolutely necessary in the interests of the administration of justice."[55] In *Lai v Chamberlains*, in respect of the immunity of barristers, Elias CJ said that access to the Courts for vindication of one's legal rights is part of the rule of law, that immunity from suit is exceptional, and that cases of immunity require justification in public policy sufficient to outweigh public policy in vindication of legal right.[56] As a result, witness immunity should not be readily extended.[57]

[53] A related point is the importance of accountability for professionals. Of course, many expert witnesses will be subject to potential professional discipline, as well as criminal sanction for perjury. On the other hand, expert witnesses not subject to professional discipline may be more susceptible to losing their independence if sued. Arguably, in any case, there is no inconsistency between the duty to the court and the duty to the client. A duty to take reasonable care is consistent with a duty to assist the Court impartially. By extension, an expert who is negligent in fulfilling his duties to his client is also negligently fulfilling his duty to assist the Court.[58] Actionable duties of care may actually encourage best practice in witnesses.

[54] Issues of independence, collateral challenges, vexatious claims and a chilling effect are of considerably less significance when the witness has already been able to give evidence in court in circumstances of immunity. Witness immunity is important to protect the efficacy of the judicial process. Immunity is provided for preparation of evidence and for statements in Court so that the Court process is not unduly

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53 *Jones v Kaney*, above n 10, at [52].
54 *Lai v Chamberlain*, above n 25, at [1].
55 *Rees v Sinclair*, above n 47, at 187.
56 *Lai v Chamberlains*, above n 25, at [1].
57 *Darker v Chief Constable of the West Midlands Police*, above n 46, at 457; *Jones v Kaney*, above n 10, at [51].
58 *Jones v Kaney*, above n 10, at [49]; see *Lai v Chamberlains*, above n 25, at [54].

impacted by the pressure of potential litigation. The same concerns do not apply to subsequent statements. I do not accept that a lack of protection for subsequent affirmations of the same evidence, or related statements, will threaten the independence of witnesses or prevent expert witnesses from offering their services to any significant extent. Further, the threat of collateral and vexatious litigation is mitigated by the fact that such litigation cannot attack the Court proceedings or fact-findings made in Court. If witnesses wish to restate false evidence or make defamatory statements, even statements they have already made in Court, they do so at their own risk.

[55] The plaintiff cited *Jennings v Buchanan*, where the subsequent affirmation, in an interview, of a statement made in Parliament was held to not be subject to privilege.[59] This decision concerned different circumstances with different justifications, as well as particular issues associated with defamation and parliamentary privilege. I do not think it is applicable to the present context, but it does suggest that a remedy should not be denied to a wronged plaintiff simply because a statement made is an affirmation of an earlier statement to which immunity applied.

[56] In sum, I do not find that the statements made by Mr Harrison during the examination are covered by the witness immunity related to the District Court summary judgment proceeding.

Do liquidator examinations attract witness immunity?

[57] The fact that the subsequent statements were made in the context of an examination under s 261 of the Companies Act does, however, raise a further issue. The question is whether the examination itself can be considered as a Court proceeding for the purposes of witness immunity, or be so intimately connected to the liquidation proceedings as a whole to attract it. The examination provisions of s 261 provide:

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[59] *Jennings v Buchanan* [2004] UKPC 4, [2005] 2 NZLR 577.

Power to obtain documents and information

(2) A liquidator may, from time to time, by notice in writing require—

(a) a director or former director of the company; or

(b) a shareholder of the company; or

(c) a person who was involved in the promotion or formation of the company; or

(d) a person who is, or has been, an employee of the company; or

(e) a receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or

(f) a person who is acting or who has at any time acted as a solicitor for the company—

to do any of the things specified in subsection (3).

(3) A person referred to in subsection (2) may be required—

(a) to attend on the liquidator at such reasonable time or times and at such place as may be specified in the notice:

(b) to provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests:

(c) to be examined on oath or affirmation by the liquidator or by a barrister or solicitor acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company:

(d) to assist in the liquidation to the best of the person's ability.

…

(6A) A person who fails to comply with a notice given under this section commits an offence and is liable on conviction to the penalty set out in section 373(3).

[58] The penalty under s 373(3) is a maximum of two years' imprisonment or a fine not exceeding $50,000. If a person fails to comply with the requirements under s 261, a Court, under s 266(1), may require them to comply. A person is not excused from answering a question on grounds of self-incrimination (s 267(1)), though the testimony of a person is not admissible in a criminal proceedings except on a charge of perjury (s 267(2)). Legal professional privilege also applies if the documents

involved are not the company's documents.[60] The requirement to submit to questioning has been treated as a detention under an enactment for the purposes of ss 22 and 23 of the New Zealand Bill of Rights Act 1990, meaning that notification of the right to legal representation is required.[61]

[59] The purpose of the provision is to allow a liquidator to gain access to information about the company in order to perform their duties and protect company assets. The provision provides wide powers for the liquidators to achieve this. In *Re Rolls Razor Ltd (No 2)*, Megarry J said:[62]

> The [s 266(2)] process … is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.

[60] The liquidator, or a barrister or solicitor acting on his or her behalf, administers the oath or takes the affirmation of the person examined. They must also record the examination. The person examined is entitled to legal representation (s 265). The examinee is not a witness in the ordinary sense of the word, but provides information to the liquidator for the purposes of the liquidation, rather than giving evidence in a legal proceeding.[63]

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60 *Foley's Transport Ltd v Weddel New Zealand Ltd (in rec and liq)* (1996) 7 NZCLC 261,126 (HC).

61 *Re Hunt (a bankrupt); Official Assignee v Murphy* [1993] 3 NZLR 62 (HC) at 69-72. The decision of Thomas J was criticised by Paul Heath in "Bankruptcy and the Bill of Rights" [1993] NZLJ 347.

62 *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 (Ch) at 591-592. Cited in *ANZ Banking Group (NZ) Ltd v Official Assignee* (1988) 4 NZCLC 64,151 (HC) at 64,158;

63 *Re Rolls Razor Ltd (No 2)*, above n 62, at 592; *Re Hartley and Riley Consolidated Gold Dredging Co Ltd* [1931] NZLR 977 (SC) at 980.

[61] The Court supervises the examination process.[64] The reasonable requirements of the liquidator need to be balanced against the need to avoid unreasonable, unnecessary or oppressive orders.[65] The Court is particularly concerned about the possibility of liquidators using their powers to obtain an unfair or improper advantage for the purposes of litigation. This may be considered an abuse of process.[66] The Court strikes a balance between the liquidator's rights to acquire information and rights of silence or privacy that the examinee may have.[67] As long as a liquidator is not seeking to bring pressure to bear on a potential litigant for an ulterior purpose he will be allowed to examine.[68] The public interest in the integrity of liquidations has also been held to ensure that the confidential nature of information obtained by a liquidator is maintained.[69] It will likely be considered oppressive to require third parties to give information and expose themselves to liability, or require persons suspected of wrongdoing to prove the case against themselves on oath before separate proceedings are brought against them.

[62] A liquidator examination is not a court proceeding so does not fall under the witness immunity rule as prescribed in *Berryman*. On the other hand, witness immunity has been applied more broadly than "Court" proceedings. The immunity in *Dentice* was applied in the context of arbitration proceedings, for example.[70] It also applies to tribunals which have similar attributes to Courts.[71]

[63] Another example, which the defendants cited, is *Mond v Hyde*, where the Court of Appeal of England and Wales held that an official receiver, as an officer of the Court, was immune from suit in respect of statements made in the course of bankruptcy proceedings within the scope of his powers and duties, having regard to

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64 Companies Act 1993, s 284,

65 *Re Pepi Holdings (in liq)* HC Christchurch M170/98, 4 June 1998 at 4.

66 *Laing v KPMG Peat Marwick* (1989) 4 NZCLC 65,180 (HC) at 65,182.

67 *Carrow Holdings Ltd (in liq) v Sadiq* HC Auckland CIV-2007-404-2855, 5 June 2008 at [27].

68 *ANZ National Bank Ltd v Sheahan* [2012] NZHC 3037, [2013] 1 NZLR 674 at [59]-[62].

69 *R v Brady* [2004] EWCA Crim 1763, [2004] 1 WLR 3240 at [23].

70 See also *Berryman*, where immunity was applied to a coroner's inquest. A coroner's inquest is a judicial hearing presided over by a warranted judicial officer. So a Coroner's inquest should be considered a judicial exercise in a "court" but this at least demonstrates that the boundaries are somewhat flexible: *Burns v Legal Services Board* [1995] 1 NZLR 594 (HC) at 600.

71 The doctrine was applied to a Council meeting concerning a "licence for music and dancing" in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 (CA) at 442;and to a military court of inquiry in *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 (HL).

the extensive inquiries which he had to make as an officer of the Court, and the need to speak with the greatest frankness about the matters he may have to ascertain.[72] The Court in *Mond* relied on an earlier decision in *Burr v Smith* where immunity from defamation was applied to a statement made by an official receiver in his capacity as official receiver. Fletcher Moulton LJ held:[73]

> I have no doubt that official receivers are officers of the Court which has to deal with the liquidation of companies, that is to say, of this Court, and that, in cases of the compulsory liquidation of a company, as these were, the official receiver is acting as an officer of the Court in performing the statutory duty imposed on him by s 3 of the First Schedule. It would be a perilous duty, if the contention for the plaintiff were well founded, because it necessitates his stating with the greatest frankness all the matters which he may have ascertained of the kind referred to by the section. In doing that he is performing his duty as an officer of the Court in connection with an inquiry which may, in my opinion, rightly be termed a judicial inquiry for the purposes of the law of libel. I have no doubt that the performance of such a duty is a matter which is absolutely privileged."

[64] In *Mond*, Beldam LJ noted that bankruptcy proceedings are long and protracted with many of the procedures carried out under the control and direction of the Court rather than in Court itself.[74] The decision was upheld in the European Court of Human Rights.[75]

[65] *Mond* is clearly distinct from the present context because the immunity there was given to an official receiver performing acts as officers of the Court, not as witnesses.

[66] However, there are, I think, significant policy reasons which point towards extending immunity to liquidator examinations. First, the examination is analogous to a Court proceeding. Examinees are compelled under oath, are entitled to legal representation, are detained so far as the Bill of Rights Act is concerned, and are subject to criminal penalties for non-compliance. Legal professional privilege may also apply. The process is carried out by Court-appointed liquidators and is supervised by the Court to prevent abuses of process. It is also clear that the Court is

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72 *Mond v Hyde*, [1999] QB 1097 (CA) at 1114-1115.
73 *Burr v Smith* [1909] 2 KB 306 (CA) at 311.
74 *Mond*, above n 72, at 1112.
75 *Mond v United Kingdom* (2003) 37 EHRR CD129 (ECHR).

concerned to prevent examinees being interrogated for the ulterior purpose of exposing them to civil liability.

[67] To ensure that the liquidation can be carried out as efficiently as possible, and to provide as much information to liquidators as necessary, examinees should be able to give free and independent statements without the spectre of civil liability threatening their independence and without the threat of collateral or vexatious challenges being lodged in respect of their statements. It is obviously important to ensure that examinees are willing to provide assistance.

[68] On the other hand, liquidator examinations can be useful tools for examining relevant parties, under oath, to ascertain whether they have committed any civil or criminal wrongdoing in relation to the company – in particular financial mismanagement by directors. Whether this extends to being able to sue parties on the basis of statements made in the proceedings is debateable. Court supervision allows deliberate or abusive questioning by a liquidator to induce civil liability through statements made during the examination to be controlled. This, to some extent, may answer the defendants' submission that a liquidator could get around witness immunity in Court by asking the witness to affirm their statements in a subsequent examination. Further, in those circumstances, it is open for the examinee to admit that a statement made in earlier court proceedings was negligent or deliberate false, if that is the case, without incurring liability.

[69] The plaintiff's view is that s 267(2) of the Companies Act, by excluding the use of statements as evidence in a criminal proceeding against a person examined, impliedly suggests that civil witness immunity does not apply to examinations. Otherwise, if common law witness immunity applied, s 267(2) would be redundant. I do not accept this argument. It draws a long bow to suggest that Parliament's express exclusion of evidence obtained in an examination being used against an examinee in a criminal proceeding (justified under the privilege against self-incrimination) impliedly excludes an entirely separate immunity in civil proceedings. The difference between self-incrimination in criminal proceedings, where (aside from perjury) the criminal acts would not be related to the statement itself, and civil

proceedings based on alleged liability arising entirely out of the statement, is too significant to suggest that immunity is excluded under s 267.

[70] The plaintiff also cites *Mayo-Smith v Rosenberg*.[76] In *Mayo-Smith*, Goddard J held that statements made in an examination which would be self-incriminating in a criminal proceeding were admissible in a civil proceeding. However, this decision concerns admissibility, not immunity. It also is not relevant to situations in which the examinee's statement *itself* is the basis of a civil action. It is not helpful.

[71] In my view, witness immunity should apply to persons being examined by a liquidator. I have already given examples of witness immunity being applied to situations beyond the formal courtroom setting. *Berryman* did not address those situations and cannot be taken to have excluded them.

[72] I consider that the reasons for conferring witness immunity, which I have just discussed, apply to liquidator examinations. Further, witness immunity is not contrary to the purpose of a liquidator examination. It does not prevent a liquidator using statements made by an examinee against the examinee in any related civil proceeding. For example, if an examinee (a director) is asked, "Did you breach your fiduciary duties?", and the answer is "Yes", that answer can be used as evidence by the liquidator in a suit for breach of fiduciary duties. The answer does not engage witness immunity. There is ample authority for s 261 statements themselves being used in evidence.[77]

[73] For the sake of completeness, I reiterate that witness immunity comes into question only when the statement *itself* is the basis for a cause of action. If the liquidator asks, "Did you breach your fiduciary duties?" and the examinee answers "No, but X did", then the immunity may apply if X sues the examinee for defamation or negligent misstatement. It may also apply if the liquidator sues on a cause of action similarly based on the statement itself.

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[76] *Mayo-Smith v Rosenberg* [2013] NZHC 2741, [2014] NZAR 23.

[77] *Mayo-Smith v Rosenberg*, above n 76, at [23]; *Fisk v Galvanising (HB) Ltd* [2013] NZHC 3543 at [66]-[96] ; *Reynolds v Calvert* [2013] NZHC 1159 at [34]-[39]. *Island View Estates Ltd v Mainline Contracting Ltd* HC Auckland CIV-2008-404-003840, 12 November 2009 at [6].

[74] I see no compelling reason in policy why an examinee should not have witness immunity. Neither have I found any precedent against it. Indeed, if the purpose of a liquidator examination is to obtain information for genuine purposes, then to allow an examinee to speak freely about the actions of others involved in the affairs of the company in question, without fear of civil suit by those others, is entirely appropriate.

[75] Pleadings based on what Mr Harrison said during the s 261 examination will be struck out.

Failure to correct false evidence given in Court

[76] The plaintiff also argues that Mr Harrison's failure to correct the affidavit and updated summary does not fall within the immunity and may give rise to liability. The plaintiff argues that evidence of the failure to act requires careful consideration of the facts. I disagree. An acknowledgment that a statement made in Court proceedings is false, and a failure to correct it, still relies on causes of action based on the statement made in Court. Regardless of whether a failure to correct gives rise to liability, it is intimately linked to the statement made in Court and falls within the scope of the immunity in *Berryman*. A failure to correct a negligent or false statement made in Court is still a claim based on the negligent or false statement itself. To hold otherwise would be to fundamentally undermine witness immunity. Witnesses would be able to be sued in any case where they failed to subsequently correct a wrongful statement made in Court. Pleadings based on the acknowledgment and failure to correct should be struck out.

Damage

[77] The defendants submit that there is no causation between the alleged false statements made during the liquidator examination and the loss claimed. Given my conclusion that witness immunity applies to statements made during the liquidator examination, an analysis of loss and causation is unnecessary.

Conclusion

[78] I conclude that the first and third causes of action, as they relate to the statements made in the s 261 examination, should be struck out.

Does witness immunity protect the defendant from the claims in the second cause of action?

[79] There are three elements to the defendants' argument.

Sufficiently pleaded

[80] First, the defendants argue that the breach of confidence cause of action was insufficiently pleaded, in that the plaintiffs have not pleaded any particulars.

[81] The plaintiff, on the other hand, argues that the misuse of confidential information concerns the defendants' conduct as a whole, particularly using confidential information to assist the shareholders in attempting to defend or defeat the company's claim.

[82] From the plaintiff's submissions, and from the context as a whole, it is clear that the breach of confidence cause of action concerns the defendants assisting the shareholders in attempting to defeat the company's claim. These are events allegedly occurring before the summary judgment proceeding. The relevant evidence is the correspondence between the second defendant and the shareholders set out in the amended statement of claim between [32] and [37]. This is not specified within the particulars for the breach of confidence cause of action. As a result, the alleged breaches of confidence are not clear. There may need to be re-pleading, but the existing pleading is not so vague as to fail to support a cause of action. Strike-out on this ground is not warranted.

Confidential information

[83] The defendants argue that there is no reason to think that the company's financial statements had to be kept secret and confidential from people who were shareholders and directors. Breach of confidence requires that:[78]

(a) The information must "have the necessary quality of confidence about it";

(b) The information must have been imparted in "circumstances importing an obligation of confidence"; and

(c) There must have been (or there must be threatened to be) an "unauthorised use of that information".

[84] In my view, resolving whether a relationship in the nature of confidence existed between the defendants and the plaintiff, whether imparting that information to the shareholders breached that obligation, and whether that disclosure of information was unauthorised are matters better suited for determination at trial. It may depend largely on the nature of the information and the relationships involved.

[85] It is questionable whether an accountant can breach a company's confidence by disclosing information to the company's directors. However, some of the people involved were merely shareholders, so different considerations may apply. Further, some of the apparently impugned correspondence between the defendants and the shareholders/directors may have occurred subsequent to the company being placed into liquidation. Given that, under s 248(1)(b) of the Companies Act, directors cease to have the majority of their powers, functions or duties, it may be that the advice about interim accounts given to the shareholders/directors after liquidation breached an obligation of confidentiality owed to the company. Accordingly, strike-out is not appropriate on this ground.

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[78] *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47; *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at 141.

[86] The defendants argue that the shareholders would have had access to the relevant information via discovery in the summary judgment proceedings or through the liquidator's affidavit. This is unconvincing. The claims for breach of confidence concern events that occurred before the summary judgment proceedings. Arguably, if breach of confidence is established, the breaches may have caused, or at least catalysed, the need for the summary judgment proceedings. The information that the shareholders had access to subsequent to the alleged breaches of confidence is not relevant to whether there was a breach in the first place.

Covered by witness immunity

[87] The defendants argue further that the breach of confidence claim can only relate to the affidavit and updated summary or their preparation, thereby falling within the witness immunity rule.

[88] I disagree. The advice allegedly given by the defendants to the shareholders and potentially involving company information was not a statement in court nor was it part of the preparation for the affidavit or updated summary. It involved advice, entirely distinct from the Court proceedings. The witness immunity rule is limited to evidence given in Court and its necessary preliminaries. The provision of confidential information to the shareholders cannot be said to be part of Mr Harrison's participation in the judicial proceedings.[79]

Damage

[89] The defendants submit that there is no causation between the pleaded breach of confidence and the loss allegedly suffered. They argue that the loss claimed arises solely from the evidence given in the summary judgment proceeding. In my view, the pleadings clearly envisage loss caused by the defendants' actions before the summary judgment proceeding. Indeed, the plaintiffs plead that they incurred loss in commencing the summary judgment proceeding. Confidential company information may have, for example, been used by the shareholders to recast accounts to obfuscate their debts to the plaintiff. This could have resulted in the commencement of the

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[79] See *Meadow v General Medical Council*, above n 43, at [11]-[13].

summary judgment proceeding. Causation issues are therefore better suited for trial. The second cause of action should not be struck out.

Conclusion

[90] I conclude that the second cause of action should not be struck out.

Decision

[91] The application for review is successful in part:

(a) The first and third causes of action are struck-out.

(b) The review in respect of the second cause of action is unsuccessful.

[92] I direct that the case be called in the first available Duty Judge list after 4 September 2015 so that timetabling and other case management issues can be addressed.

Costs

[93] The parties should file memoranda on costs if agreement cannot be reached. The defendants are to file their memorandum (if any) by 21 September 2015 and the plaintiff (if any) by 19 October 2015.

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Brewer J