EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2016-044-000329
[2016] NZDC 24911

BETWEEN	COLIN CRAIG Plaintiff
AND	SOCIAL MEDIA CONSULTANTS LIMITED JORDAN WILLIAMS Defendants

Hearing: 6 December 2016

Appearances: Plaintiff appears in Person
B Henry for the Defendant Social Media Consultants Limited
A Romanos for the Defendant Williams

Judgment: 6 December 2016

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] Colin Craig sues Social Media Consultants Limited as first defendant and Jordan Williams as second defendant for breach of copyright. He seeks damages against each for the unauthorised infringement of the copyright which vests in him in a poem which he wrote to Rachel MacGregor who was working for him at the time. I have heard two applications today from each of the defendants, alternatively, for a strikeout of the statement of claim on the basis that it is an abuse of process and also for summary judgment by the defendants against the plaintiff. I shall deal firstly with the summary judgment applications by the defendants and in doing so, will give a short history of the matter.

Short history

[2] The plaintiff was an aspiring politician. He claims also to be an author of creative writing. The first defendant has a blog known as Whale Oil which generates income from advertising revenue or payment, or posts supporting or opposing social views as well as media content related consultancy services. The second defendant, although qualified as a lawyer, I understand it does not work as such as a lawyer but rather is a director of the Taxpayers Union. As I understand it, Mr Craig and others formed the Conservative Party which contested the last general election. Mr Craig as I understand it funded that party. It of course had a board to which he was responsible and he stood as a candidate for election in his electorate.

[3] For the few years leading up to the events in question in this proceeding, Ms Rachel MacGregor worked for him and I use that term loosely given that she was actually a contractor in public relations to him. It appears from everything that I have read on this file that the relationship between Mr Craig and Ms MacGregor became close. I say no more than that. However, the relationship broke down for a variety of reasons. The defendants say that it broke down because she was sexually harassed by the plaintiff. The plaintiff denies that and says that it broke down because of money issues.

[4] To cut to the chase, she brought a claim before the Human Rights Tribunal for sexual harassment. There was a mediation held. The parties settled their differences. Unfortunately that was not the end of the matter because for reasons which I do not feel the need to go into here and given that on the whole they have already been the subject of substantial evidence in the High Court in a defamation trial where Mr Williams sued Mr Craig, the confidentiality of that settlement agreement was not respected by Mr Craig who by his own candid admission breached it on a number of occasions.

[5] He applied to the Human Rights Tribunal to set the agreement aside on the basis that he appeared to consider that Ms MacGregor had breached the confidentiality that they had reached. The Human Rights Tribunal in fact found that she had not but that Mr Craig's own breaches were sufficiently deleterious for it to

impose a substantial sum in damages against him. There were various suppression orders in existence. They have now lapsed and everything that is before the Court now has been the subject of evidence before the High Court in the Defamation proceeding in which Mr Craig was ordered to pay a very substantial sum of damages to Mr Williams whom he was found to have defamed.

[6] As I understand it, that proceeding is not yet at an end and that particular matter comes back before the trial Judge very shortly. As I also understand it there are a number of other proceedings before different Courts: Defamation, this time with Mr Craig as the plaintiff and Mr Williams as the defendant, this proceeding, another Defamation proceeding against a Mr Stringer whom I have permitted with the consent of all counsel and parties to sit in the back of the Court for the duration of this hearing; there may be another one or two proceedings.

[7] All stem from the publication by the first defendant, through Mr Williams the second defendant, of a poem which has been colloquially referred to in the press I understand it as "The Love Poem." This was a poem written to Ms MacGregor during the course of her working relationship with Mr Craig. It was actually written as part of what has been described by Mr Craig to me as an 11 page letter to her. Whilst that letter was not exhibited in the proceeding until this hearing commenced, by consent I have read it in its entirety on Mr Romano's (who appears for the second defendant) iPad.

[8] It is a substantial letter and it does contain several poems. It is only one poem which is the subject of this proceeding. The first defendant considered that Mr Craig had been dishonest with the Conservative Party's board and had failed to advise them honestly that at one stage he faced serious allegations of sexual harassment from Ms MacGregor; thus considering that both Mr Craig, the Conservative Party and indeed Mr Craig's relationship with Ms MacGregor whom it did not name were the subject of public interest and indeed current affairs determined when Mr Williams disclosed the poem in question to Mr Slater (of the first defendant) to publish it.

[9] The blog on Whale Oil, being the blog name run by the first defendant says this underneath a photograph of Mr Craig and with the heading, "Exclusive. The poem Colin Craig doesn't want you to see." It was published on June 19 2015 at 3.15 pm:

> Whale Oil media can reveal that Colin Craig failed to tell the Conservative Party's board that he previously faced serious allegations of sexual harassment from a former staff member in a complaint made with the Human Rights Commission. It is understood that the claim led to a confidential payout which until recently the Board were unaware of.
>
> We've been told by members of the Board that they were assured on multiple occasions by Colin Craig that no allegations of a sexual or moral nature were involved and it relied on one element of the claim on a series of unpaid invoices or a dispute in relation to the employee's hourly rate, to hide the more serious allegations.
>
> Whale Oil Media understands that no sexual relationship resulted, but Colin Craig is alleged to have pursued the staff member including sending a large volume of text messages, letters and inappropriate touching.
>
> A source which was supporting the victim as the events unfolded last year has provided Whale Oil Media with some of the letters and text messages.
>
> We are still working through the material.
>
> To give you a flavour, here is a poem and the end of one of the letters.

[10] And there beneath is a copy (which it turns out was actually a photograph sent by Mr Williams to the first defendant) entitled "A Poem. Okay, well I have decided to share a little glimpse of the 'Creative Colin.' Here is a very short poem."

> 'Two of me'
> There is only one of me, it's true
> But I wish this were not the case, because I wish that I could have you
> If instead one man, I was two
> That would be one for all the others and one of me, for you.

[11] Underneath, Whale Oil wrote "Free Political advice for the next Conservative Party leader. When you are writing letters you might be pseudo but don't sign the end of the letter. That way you can at least claim it's fake." And over the page, (as it has been copied bearing in mind that this is a blog on a website) there is what is obviously a copy of an extract from a letter of which not everything can be read but what is legible appears to read, "I should like to discuss this letter and our

friendship." Next line, "As much as I'm able and you are willing to let me I will continue to be your friend. Colin," with a signature beside it.

[12] And underneath, "Editor's note. Comments on this article will be moderated carefully. Remember that we are dealing with an innocent victim which Whale Oil Media will not be naming." For the ease of reading this judgment, I shall annex to it the post on the blog.

The claim against the first defendant

[13] So Mr Craig found that his communications with Ms MacGregor and indeed his communications with the board of the Conservative Party, as well as apparently his moral integrity, became the subject of public appetite. In this proceeding, as I have said, he has sued the first and second defendants in breach of copyright, seeking a declaration that the first defendant breached his copyright in the poem, that it did so to garner notoriety and/or derive revenue, it refused to withdraw the blog post from Whale Oil or make payment for a licence to exhibit the poems on the terms offered by Mr Craig.

[14] He wants an investigation into and accounting of the revenue generated by the first defendant, as a direct and indirect result of exhibiting the article including the unauthorised photographic copy of the poem (or reference) to it to the public. I have not explained that the way in which first defendant came upon the letter in question and the poem was through Mr Williams who, as I understand the evidence, either showed or transmitted a photograph of it to the first defendant and then allowed others to take notes of the same.

[15] So the first publication of the letter containing the poem was by Mr Craig to Ms MacGregor and the second publication was by Mr Williams to Social Media Consultants Limited who then made the third publication. The plaintiff also seeks an award of damages in a sum equivalent to the total amount of revenue generated by the first defendant as a direct and indirect result of exhibiting every article, including the unauthorised copy of the poem, interest, an award of damages in the amount of $3000 plus GST per calendar month from 19 June 2015 until such date that all

copies of the poem whether in whole or in part are withdrawn from Whale Oil, an award of exemplary damages for the first defendant's flagrant infringements of the copyright of the poem.

[16] He seeks $5000 and an order permanently injuncting the first defendant from the continued exhibition of the poem. An order that the first defendant deliver up any physical copy of the poem in their possession or control and permanently deleting the electronic copy of the poem as well of course as interest, costs and disbursements.

The claim against the second defendant

[17] Is on the same basis, that is breach of copyright in the poem and seeks exactly the same relief.

Statement of Defence

[18] The second defendant, on the same day, filed both a statement of defence which contained affirmative defences and a summary judgment application. The affirmative defences pleaded in the second defendant's statement of defence are that the disclosure or any copying of the poem was in the public interest and was thus protected by s 225(3) Copyright Act 1994. I interpolate that there is a typographical error at para 43 of the second defendant's statement of defence because s 255(3) rather than 225(3) is claimed. However, I do not consider that error (which is clearly typographical only in my view) should adversely affect the second defendant's affirmative defence or pleading of it, given that the words, "The public interest," are clearly maintained. In addition, the second defendant affirmatively defends at para 44 on the basis that the disclosure or any copying of the poem are protected by s 42(2) Copyright Act 1994.

First defendant

[19] The first defendant has not filed a statement of defence but nevertheless has filed an application to strike out the plaintiff's statement of claim (as did the second

defendant) as well as an application for summary judgment against the plaintiff. The bases are identical for both defendants.

Summary Judgment

[20] I shall deal firstly with the defendants' various applications for summary judgment. As Associate Judge Osborne said in the Dunedin High Court case of *Van de Klundert v Clapperton*[1] (which comments I endorse with respect), at para 13, "I summarise the general principles which I adopt in relation to this application" (he was there dealing with a plaintiff summary judgment application on a claim in defamation).

(a) Common sense, flexibility and a sense of justice are required. *Haines v Carter*[2].

(b) The onus is on the plaintiff seeking summary judgment (I interpolate here the defendants) to show there is no arguable defence (I interpolate here, no arguable reply to the affirmative defences pleaded). The Court must be left without any real doubt or uncertainty on the matter. *Pemberton v Chappell*[3].

(c) The Court will not hesitate to decide questions of law where appropriate. *European Asian Bank AG v Punjab and Sind Bank*[4].

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits. *Harry Smith Car Sales Pty Limited v Claycomb Vegetable Supply Co Pty Limited*[5].

(e) In determing whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically

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[1] *Van de Klundert v Clapperton* [2015] NZHC 425 at [13]
[2] *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97]
[3] *Pemberton v Chappell* [1987] 1 NZLR 1 (CA)
[4] *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 (CA) at [516]
[5] *Harry Smith Car Sales Pty Limited v Claycomb Vegetable Supply Co Pty Limited* (1978) 29 ACTR 21

every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements or inherently probable. *Attorney-General v Rakiura Holdings Limited*[6].

(f) In assessing a defence, the Court will look for appropriate particulars and a reasonable level of detailed substantiation. The defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the notice of opposition. *Middleditch v NZ Hotel Investments Limited*[7].

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of defence is plain on the material before the Court. *Jowada Holdings Limited v Cullen Investments Limited*[8].

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude with matters called for by the particular facts of the case. Where last minute, unsubstantiated defences raised and an adjournment be required, a robust approach may be required for the protection of the integrity of the summary judgment process. *Bilbie Dymock Corporation Limited v Patel and Bajaj*[9].

(i) Once the Court is satisfied that there is no defence, the Court retains the discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings (for High Court Rules substitute District Court Rules which to all intents and purposes regarding summary judgment are identical)."

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[6] *Attorney-General v Raikura Holdings Limited* (1986) 1 PRNZ 12 (HC)
[7] *Middleditch v NZ Investments Limited* (1992) 5 PRNZ 392 (CA)
[8] *Jowada Holdings Limited v Cullen Investments Limited* (CA) 248/02, 5 June 2003 at [28]
[9] *Bilbie Dymock Corporation Limited v Patel and Bajaj* (1987) 1 PRNZ 84 (CA)

[21] I deal firstly with the second defendant's application for summary judgment because he is in a slightly different position from the first defendant, given that he has filed a statement of defence containing affirmative defences which have not been answered.

[22] There are a plethora of affidavits that have been filed in this proceeding. Without a doubt, there are some contests of fact such as what Mr Craig revealed to the board of the Conservative Party after his difficulties with Ms MacGregor blew up. But for the purposes of this application, I do not consider that they are particularly apposite. It does appear uncontested that the work in which copyright is claimed, being "The Poem," was Mr Craig's, that copyright does vest in him, that it had not previously been published to the public, only to Ms MacGregor although it has to be said that she is unlikely to have been bound by the alleged confidential nature of the poem as expressed by Mr Craig to her in the letter in question.

[23] It is also uncontested that the defendants did publish the work to the public without permission and that in the case of the first defendant, he is in the course of running a blog for profit. Both the first and the second defendants argue that in providing the poem for publication, they were acting as "whistle blowers" to alert the public to a matter of public interest, essentially because it revealed what the board of the Conservative Party did not know and which the public also did not know (that Mr Craig had been sexually harassing Ms MacGregor and she had made a claim to the Human Rights Tribunal in respect of that harassment).

[24] And so both argue (although as I have said only the second defendant does so by way of affirmative defence), that their actions constituted "fair dealing" with a work (other than a photograph) for the purpose of reporting current events by means other than those referred to in s 42(2) which does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement. It is also not in question here that there was a sufficient acknowledgement. Indeed, that was the point of the publication by the first and second defendants, to attribute the work to the plaintiff. So the issue between the parties is whether or not the publications by the defendants were a "fair dealing" and if so, for the purpose of reporting current events.

Arguments

[25] Mr Craig has argued succinctly that whether or not a Court is likely to find that the purpose of the publication was reporting current events, they did not deal fairly with his work. The authorities show that when looking at fair dealing, each case must be judged on its own merits and generally that there are three factors identified in assessing whether a dealing is fair:

(a) Whether the alleged fair dealing is commercially competing with the copyright proprietor's exploitation of the copyright work.

(b) Whether the work has already been published.

(c) The amount and the importance of the work that has been taken.

(d) Each such case and question is to be determined on its own facts. *Copyright Licensing Limited v The University of Auckland and Ors*.[10]

[26] In his affidavits and submissions Mr Craig argues that by making first publications of the work to the public (this is arguable given that the first publication was actually to Ms MacGregor who I doubt could be bound by confidentiality) the defendants took from Mr Craig all rights as to if, how, when and in what context he would have published the work, that Mr Craig was paid nothing for it whereas the first defendant would have derived profit from it (I also interpolate that Mr Craig indicates that if offered money he would not have accepted it so I find that argument specious).

[27] He also argues that because he is a poet and an author, a published one at that, that he wanted the opportunity either not to publish this work – and in particular to evaluate it and its merit – so that his authorship and poetic abilities could be fairly and properly evaluated by the public. But most of all, he strongly argues that the manner in which the work was obtained and used bears largely on the issue of whether there was a fair dealing by the defendants.

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[10] Copyright Licensing Ltd v University of Auckland & Ors [2002]3 NZLR 76, 82

[28] It is trite that Ms MacGregor spoke in confidence to Mr Williams, the second defendant, when showing him the poem, that he provided an undertaking to her lawyer that he would hold the matter confidential as if he were her lawyer and that she gave him correspondence including the poem for safe keeping in his safe at work. She gave him written instructions that the documents were to be returned to her and not used against Mr Craig. But against that backdrop the second defendant, Mr Williams, took the poem and published it to the first defendant which then published it publically.

[29] The plaintiff relies on several decisions of note but in particular *Nora Beloff v Prestrand Limited*[11], a British case, where the Court rejected the argument that the leaking and subsequent publishing of a political memorandum was in the public interest, instead finding that the publication of that political memo was a breach of copyright because it was not a fair dealing. And then again, the plaintiff argues that the affidavits of Mr Slater contain statements of fact which are untrue.

[30] Were this a case of a summary judgment application being brought by the plaintiff against the defendants, the Court would have to be satisfied that there was no arguable defence available to the defendants and then exercise its discretion to enter summary judgment. Here, the tables are turned because the defendants seek summary judgment. In the case of the second defendant, where affirmative defences have been pleaded, as Associate Judge Osborne said in *Van der Klundert v Clapperton*, the plaintiff's failure under the Rules to file a reply to the affirmative defences pleaded in the statement of defence within the 10 day period required under District Court Rule 5.64 (in the *Van der Klundert v Clapperton* case there was a failure to file a s 41 notice to the defamation, qualified privilege defence) is a defect in the plaintiff's case.

[31] In the judgment the learned Associate Judge said that there is no exception for the rare case in which a plaintiff pursues summary judgment that he should not have to comply with the provisions of s 41(1) Defamation Act by filing a s 41 notice in respect of defence of qualified privilege for example. Even in the situation where the plaintiff pursues summary judgment, the plaintiff is required to file that notice.

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[11] *Nora Beloff v Prestrand Limited* [1973] FSR 33 (1972)

In that case, the Associate Judge found that the absence of the filing of a s 41 notice by the plaintiff was a matter which in his judgment was relevant to the exercise of the discretion which he must exercise on the summary judgment application.

[32] Turning that around to apply to the second defendant's application for summary judgment, whilst on the one hand I am unable to say specifically that the second defendant has proved on the balance of probabilities that the plaintiff has no arguable reply to the statutory defences pleaded and argued by the second defendant given the issue about whether the defendants dealt fairly with the work, I am however taken to a different conclusion when looking at the lack of reply to the affirmative defences raised. The lack of reply, in my view, is determinative of the summary judgment application in this case.

[33] By his lack of reply to the affirmative defences raised, the plaintiff in effect is saying (notwithstanding his legal argument to the contrary today) that he accepts that those affirmative defences pertain. That is the same thing as acknowledging that he has no arguable reply to those defences and that, it seems to me, is where the summary judgment application must end. In other words, in my view I should exercise my discretion to grant summary judgment to the second defendant for that lack.

First defendant

[34] I will however, for the sake of clarity and completeness go on to consider the application to strikeout in a moment when I have dealt with the summary judgment application of the first defendant. I have already said that the first defendant is in a different position because the second defendant has not filed a statement of defence and has not raised by way of pleading, the affirmative defences, however the same affirmative defences have certainly been argued in support of both the summary judgment application filed by the first defendant and the application to strike out the claim for abuse of process.

[35] Given that I have already said that the evidence and the arguments indicate to me that there is a real question over whether there was fair dealing or not by the

defendants with the work in which copyright vests in the plaintiff, it seems to me that the first defendant is not therefore entitled to summary judgment bearing in mind all of the principles which I have already espoused. The onus is on the party seeking summary judgment to show that there is no arguable reply to an affirmative defence argued and the Court must be left without any real doubt or uncertainty on the matter.

[36] I am left with doubt on the issue of the fairness or otherwise of the dealing, not the latter part of the statutory proposition which is the purpose of reporting current events. That seems to me to be a matter which is indisputable. And so I consider that the summary judgment application by the first defendant should not succeed.

Applications to strike out

[37] I now turn to the applications to strike out and I shall begin with the first defendant. The first defendant argues that this proceeding is an abuse of process, that the plaintiff's work, although having no literary quality, is not relevant to the fact of ownership and infringement, but becomes very important when the Court looks at remedy. The plaintiff is asking the Court for a remedy in respect of a work that is part of a sequence of correspondence between himself and a young female he employed. It is the "classic boss with power and control abusing their power and control" situation.

[38] The first defendant argues that copyright protects copying and not the confidentiality of the message; that the real issue here for the plaintiff is to protect his own reputation and is for breach of confidence, not for copyright or breach of copyright. Putting aside for a moment whether the way in which the first and second defendants dealt with the poem was fair dealing and was for the purposes of reporting current events, I must be satisfied that the plaintiff would be entitled to some of the relief which he seeks in the event he was able to prove an infringement which was not met by the statutory defences.

[39] Mr Henry who appears for the first defendant has said at para 12 of his written submissions, "Plaintiff is a wealthy man trifling both the victim of his misbehaviour (Ms MacGregor) and by using the Court process to continue this behaviour is also trifling with the Court's process. Rule 15.1(2) of the District Court Rules 2014 sets out that the Court may strike out all or part of the proceeding on the basis that it is frivolous or vexatious or is otherwise an abuse of the process of the Court."

[40] He goes on to say, "Similarly, Rule 14.6 of the High Court Rules set out it is enough if the plaintiff has acted 'Improperly,' or unnecessarily in commencing continuing a proceeding. See *Bradbury v Westpac* [2009] 3 NZLR 400 and *Paper Reclaim v Aotearoa International* [2006] 3 NZLR 188, both cited at para HR40N.6.02 in McGechan on Procedure."

[41] The first defendant argues that copyright is designed to protect the literary works of creative genius not the attempt to cover up a wrongdoing when the media successfully exposes it. The real argument of the first defendant is that the work in fact has no value, that the purpose of the proceeding by the plaintiff is to protect his reputation by suppressing the salacious context of the authorship, not the poem itself, that the article publication has interest not due to the literary genius of the author but due to the newsworthiness and the genuine public interest in knowing how the plaintiff (who is the leader of the Conservative Party) behaves in private with the young woman in his employ over whom he has power and control.

[42] Mr Henry goes on to argue that breach of copyright damages are compensatory and that the plaintiff's work has no commercial value, that there is no compensatory basis for a copyright based award of damages in this case. Now, copyright damages are established generally on two bases, one, in account for profit, two, for loss of income, business et cetera, that is on a compensatory basis and as an extension of that, possibly on a notional royalty basis.

[43] There is no evidence before me of any sort that there is any value in this work or that either of the defendants has derived any income at all from it, from publishing it. It is obvious to me that the plaintiff would fail at substantive trial in establishing

that in fact either of the defendants had monetarily profited from their publications of this work.

[44] Or, a better way of putting that proposition is that even if at substantive trial the Court was to determine that there had not been a fair dealing with the work for the purposes of reporting current events, the breach was so minimal and the plaintiff so entirely lacking in evidence to substantiate the monetary loss to him which could be compensated or put another way, the profit to the defendants, that the claim would not elicit any relief except possibly the declaration sought.

[45] The first defendant says that the plaintiff is using this proceeding based on copyright not to protect the work but his reputation and used suppression orders re the Human Rights Tribunal including frivolous appeals to suppress the behaviour that he accuses others of. He used the High Court trial to continue that suppression but after the jury decided he was liable for defaming the second defendant the suppression ran out. The first defendant's article has substance as the Human Rights Tribunal finding is now a final determination that there was a sexual harassment complaint and that the plaintiff vilified the victim.

[46] In *New Zealand Private Prosecution Limited v John Key*[12] where Mr Graham McCreedy via his company sought to prosecute the Prime Minister for sexual harassment in relation to the ponytailgate saga, the Human Rights Review Tribunal surveyed the relevant authorities on abuse of process. Counsel for the second defendant, Mr Romanos, helpfully repeats that passage of the judgment in full. I shall recite in extenso from that passage:

> It is clearly established (and confirmed by High Court Rules, Rule 15.1(1)(a)) that abuse of process extends to proceedings where there is no arguable case. See *Waterhouse v Contractors Bonding Limited* [2013] NZSC 89 (2014) 1 NZLR 91 at [30-32].
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> 30. We accept the submission of Mr Harrison that the power under the High Court Rules or the inherent powers of the Court (I interpolate that the District Court has the inherent power to prevent the abuse of its own processes) to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process. In any event, Mr Mills accepts the abuse of process ground would also be available in the circumstances set out by Lord Dickrock and Hunter v Chief Constable of the West Midlands Police.

[12] *New Zealand Private Prosecution Limited v John Key* [2015] NZHRRT 48

The inherent power which any Court of Justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied. It would in my view be most unwise if this house were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the Court has a duty (I disavow the word discretion) to exercise the salutary power.

31. In Australia, the majority of the High Court in *Jeffery Katauskas Pty Limited v SST Consulting Pty Limited* identified the following categories of conduct that would attract the intervention of the Court on abuse of process grounds.

(a) Proceedings which enfold the deception on the Court or those which are fictitious or constitute a mere sham.

(b) Proceedings where the process of the Court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way.

(c) Proceedings which are manifestly groundless or without foundation or which serve no useful purpose, and;

(d) Multiple of successive proceedings which cause or are likely to cause improper vexation or oppression.

32. The majority also said that although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unclear to a party. It does however extend to proceedings that are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment.

41. As noted in *Parahinig (v Yellow Pages Group Limited* strikeout application 2) [2015] NZHRRT 14 at [30 and 31], two important qualifications must be added:

First, the jurisdiction to dismiss is to be used sparingly. If the defect in the pleadings can be cured, an amendment of the statement of claim will normally be ordered. See *Commissioner of Inland Revenue v Chesterfields Preschools Limited* 2013 NZCA 53 (2013) 2 NZLR 679 at [89].

Second, the fundamental constitution and importance of the right of access to courts (and tribunals) must be recognised. Such right of access must however be balanced against the desirability of friend dependents from the burden of litigation which is groundless of an abuse of process. See *Heenan v Attorney-General* [2011] NZCA 9 2011 NZAR 200 at [22].

42. The ordinary rule is that a strikeout application proceeds on the assumption that the facts pleaded in the statement of claim are true. See *Attorney-General v Prince & Gardner* 1998 1 NZLR 262 (CA) at [267]. However, where the factual allegations are plainly incorrect, it is not

appropriate to assume their truth. There must be an objective factual basis for the allegations. A Court or Tribunal is not required to assume the correctness of factual allegations obviously put forward without any foundation. See *Collier v Pankhurst* CA 136/97, 6 September 1999 at [19].

Vexatious:

43. In the context of the present case, it is not necessary to engage in a comprehensive survey of the case law interpreting the term vexatious. Is it well established that a vexatious proceeding is one which contains an element of impropriety. See *Commissioner of Inland Revenue v Chesterfields Preschools Limited* at 89 and *Burchell v Auckland District Court* [2012] NZHC 3413 2013 NZAR 219 at [16]. To this may be added:

43.1 A proceeding may be vexatious notwithstanding that it may contain the germ of a legitimate grievance or may disclose a cause of action or a ground for institution. See *Attorney-General v Hill* 1993 7 PRNZ CA at [23].

43.2 The subjective intention of the party is not determinative of vexatiousness which is a matter to be objectively assessed. See *Attorney-General v Collier* 2001 NZAR 1378 35.

43.3 The issue is not whether the proceeding was instituted vexatiously but whether it is a vexatious proceeding. See *Attorney-General v Brolden* [2001] NZAR 158 at [58]. Appeal dismissed in *Brolden v Attorney-General* [2001] NZAR 809.

All are not brought in good faith:

44. The ground for striking out proceedings captures other circumstances in which the Tribunals processes are misused and are perhaps best understood as a different way of expressing the grounds for striking out, set out in the High Court Rules, Rule 15.1(1) namely circumstances where there is no reasonably arguable cause of action or whether proceedings are otherwise an abuse of the process of the Tribunal.

Abuse of process:

45. The scope of this ground in High Court Rules, Rule 15.1(1)(d) were set out in *Air National Corporate Limited v AVO Holdings Limited* [2012] NZHC 602 at [30] as follows: The ground of abuse of process is said to extend beyond the other grounds set out in Rule 15.1(1) to catch all other instances of misuse of the Court's process including where a proceeding has been brought with an improper motive or to seek a collateral advantage beyond that legitimately gained from a Court proceeding.

[47] The first defendant submits that Mr Craig has sought inappropriately to import other grievances that he has against Mr Williams which are matters that may bear on claims for breach of confidence or defamation but do not serve a claim for compensation and declaratory relief for alleged breach of copyright. I agree with the

first defendant. This is a vexatious proceeding. It has been brought for a collateral purpose.

[48] This Court does have the inherent power to prevent misuse of its procedure. It would be manifestly unfair to the first defendant or would otherwise bring the administration of justice into disrepute among right thinking people to permit this proceeding to continue, given that I am quite sure that the real argument that the plaintiff has is in respect of breach of confidence and his concern to protect his reputation (although I would have thought subsequent to the defamation proceeding in the High Court that perhaps it is too late for that in any event).

[49] Everything that I have cited from the *New Zealand Private Prosecution Service Limited v John Key* Human Rights Review Tribunal case (even though dealing with the High Court rules) deals equally and is apposite to the District Court Rules. I consider, taking a leaf from the Australian High Court's book in *Jeffery and Katauskas Pty Limited v SST Consulting Pty Limited*[13], that this is a proceeding which involves a deception on the Court. I do not consider the process of the Court has been fairly or honestly used. It is being employed for an ulterior and improper purpose which I have already named. It is manifestly groundless and without foundation.

[50] It serves no useful purpose, even if there has been a technical infringement by the defendants and I am not reaching a final view on that, given that they may in fact have completely open to them the statutory defences because they may in fact have fairly dealt with the work under the circumstances which are revealed in the evidence.

[51] The categories of abuse of process are not closed. The fact that this strikeout application has to proceed on the assumption that the facts pleaded in this statement of claim are true, is immaterial given all the circumstances that I have already enumerated and in particular, that even if the plaintiff succeeded in my view there would be no relief open to him from the Court apart perhaps from a declaration

[13] *Jeffery and Katauskas Pty Limited v SST Consulting Pty Limited*

which would be a pyrrhic victory only for him and a complete waste of Court time and public money.

[52] This is a vexatious proceeding containing an element of impropriety, notwithstanding that it perhaps contains the germ of a legitimate grievance. I have objectively assessed the matter and I consider that I am correct to grant the first defendant's application. I do not consider that this is a proceeding brought in good faith. It is an abuse of process and I grant the first defendant's application, the claim against the first defendant is struck out.

[53] I turn now to the second defendant's application to strikeout. This is brought on the same basis as the first defendant and in fact I have attributed some of Mr Romanos' excellent submissions as arguments for the first defendant. However, the same justification for striking out the claim against the second defendant remains. Had I not already granted summary judgment to the second defendant against the plaintiff and in the event that I should have been wrong to do so, I would have struck out the claim against the second defendant for all of those reasons. This was and is a vexatious claim. It is an abuse of process.

Costs

[54] Section 130 Copyright Act 1994 provides that where a person brings proceedings alleging an infringement of copyright or a contravention of s226A, the Court may on the application of any person against whom the proceedings are brought make an order for the payment of damages for any loss suffered by the person against whom the proceedings are brought. Section 130(2), a Court shall not grant relief under this section if the person who brought the proceedings proves that the acts in respect of which proceedings were brought constituted or would have constituted if they had been done, an infringement of the copyright concern.

[55] Both the defendants in this proceeding seek indemnity costs and the first defendant cites s 130 Copyright Act as relevant to his application. The second defendant cites as relevant to his application the fact that on Thursday or Friday of last week senior counsel for him wrote to the plaintiff inviting – this is after his

submissions had been filed and served – inviting him to discontinue the proceeding against the second defendant in which case there would be no costs sought. If he failed to do so and therefore also because of the abuse of process, that this application should be granted.

[56] As the plaintiff requires time to answer the defendants' claims for indemnity costs, I now note a timetable order for the filing of submissions.

ADDENDUM:

[57] I have a serious doubt that "The Poem" could be said to constitute a "substantial part" of the literary work in which copyright vests in the plaintiff. He argues that the several poems which are contained within the 11 page letter are in fact separate original works in each of which copyright vests in him. I doubt very much that that is so. I view the letter as a whole and the fact that it contains a poem or two seems to me to be irrelevant.

[58] The one document from which the approximately eight line poem was taken and published, I doubt would be seen as anything but literary work and whilst it is a matter of fact for each particular case and a matter of the judgment of the Court, I fail to see that the one poem which was published could be said to be a substantial part of that literary work; therefore by law there could not be any infringement of copyright. Whilst I did not name that as a ground either for the grant of summary judgment to the second defendant or a basis for striking out the plaintiff's claim, it is a matter which I did take into account.

M-E Sharp
District Court Judge