

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2024-404-002574
[2025] NZHC 1530**

UNDER the Defamation Act 1992

BETWEEN DONALD THOMAS BRASH
Plaintiff

AND MATTHEW OWEN HOOTON
Defendant

Hearing: 4 June 2025

Appearances: P A McKnight / A J Romanos for the Plaintiff
B H Dickey / C S A Jordan for the Defendant

Judgment: 11 June 2025

JUDGMENT OF ASSOCIATE JUDGE BRITTAIN

*This judgment was delivered by me on 11 June 2025 at 4 pm.
Pursuant to Rule 11.5 of the High Court Rules.*

.....
Registrar/Deputy Registrar

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CONTENTS

Introduction	[1]
Legal principles — strike-out.....	[8]
When can the Court strike out a defamation claim?	[10]
The Jameel principle	[10]
New Zealand law.....	[14]
The relevance of an apology	[32]
Should the proceeding be struck out because the threshold of seriousness is not met?	[37]
The context and nature of the defamatory statements.....	[40]
The extent of publication	[47]
The apology.....	[51]
Conclusion on the threshold of seriousness	[59]
Is the proceeding an abuse of process because it is brought for a predominant improper purpose?.....	[61]
Legal principles	[61]
Dr Hooton’s argument.....	[65]
The alleged purpose that the proceeding is a vehicle for Dr Brash to defame Dr Hooton while protected by privilege.....	[70]
The alleged purpose that the proceeding is to advance the political agenda of Dr Brash and Hobson’s Pledge, and to obtain funding for that agenda	[74]
Conclusion on improper purpose	[79]
Are the costs and burden of this proceeding likely to be disproportionate to the benefit or vindication that Dr Brash might achieve from the proceeding?	[80]
If Dr Brash’s claim is upheld, what damages are likely to be awarded?	[84]
Mitigation by the apology	[86]
Defaming Dr Hooton.....	[93]
Pursuing the proceeding to further the interests of Hobson’s Pledge	[94]
Conclusion on the likely award of damages and proportionality.....	[95]
Orders.....	[97]

Introduction

[1] The plaintiff, Donald Brash (Dr Brash), is a well-known New Zealander. He has been a Governor of the Reserve Bank of New Zealand, a Member of Parliament and the Leader of the Opposition in Parliament. Dr Brash is the founder and a trustee of Hobson's Pledge Trust, a political advocacy group (Hobson's Pledge).

[2] The defendant, Matthew Hooton (Dr Hooton), is a well-known political commentator with extensive experience in public relations. On 29 August 2025, Dr Hooton was a guest on "The Working Group" political podcast (the podcast). The topics discussed by the hosts and guests included Māori customary rights to the foreshore, and an advertisement that Hobson's Pledge had placed in the New Zealand Herald (the advertisement).

[3] During the discussion on the podcast, Dr Hooton made statements about Dr Brash that Dr Brash considers defamed him. Later in the evening of 29 August 2024, the podcast was removed from all podcast platforms controlled by the producer of the podcast.

[4] On 24 September 2024, Dr Hooton published an apology. Dr Brash remains dissatisfied, and he has commenced this proceeding against Dr Hooton seeking damages for the alleged defamation.

[5] Dr Hooton has not filed a statement of defence. Dr Hooton's counsel submits that Dr Hooton does not intend to plead a defence of truth. Dr Hooton applies for an order striking out the proceeding on the ground that it is an abuse of process. The application for strike-out is opposed and determined in this judgment.

[6] Dr Hooton argues that any award of damages to Dr Brash would be nominal, and the costs of the proceeding are disproportionate to any vindication that Dr Brash can achieve by the proceeding. Dr Hooton alleges that Dr Brash is bringing the proceeding for a collateral purpose, which is to promote and fund the agenda of Hobson's Pledge.

[7] For the purpose of strike-out, Dr Hooton does not argue that the statements relied on by Dr Brash are incapable of bearing the pleaded defamatory meanings. The application for strike-out raises the following issues:

- (a) When can the Court strike out a defamation claim?
- (b) Should the proceeding be struck out because the threshold of seriousness is not met?
- (c) Is the proceeding an abuse of process because it is brought for a predominant improper purpose?
- (d) Are the costs and burden of the proceeding likely to be disproportionate to the benefit or vindication that Dr Brash might achieve from the proceeding?

Legal principles — strike-out

[8] Pursuant to r 15.1(1) of the High Court Rules 2016, the Court may strike out all or part of a pleading if it:

- (a) discloses no reasonably arguable cause of action; or
- (b) is likely to cause prejudice or delay; or
- (c) is frivolous or vexatious; or
- (d) is otherwise an abuse of the process of the Court.

[9] The principles governing strike-out applications are summarised in the Court of Appeal decision in *Attorney-General v Prince and Gardner*:¹

¹ *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

- (a) A strike-out application is to proceed on the assumption that the facts pleaded in the statement of claim are true unless those pleaded facts are entirely speculative and lack any foundation.
- (b) It is only where, on the facts alleged in the statement of claim, however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage.
- (c) The threshold for strike-out is high. Before a proceeding may be struck out, the causes of action must be so clearly untenable that they cannot possibly succeed.
- (d) The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material.
- (e) The fact that an application to strike out raises difficult questions of law, and requires extensive argument, does not exclude the jurisdiction.

When can the Court strike out a defamation claim?

The Jameel principle

[10] Dr Hooton relies on the *Jameel* principle, which emanates from a decision of the Court of Appeal of England and Wales.² Lord Phillips held that it is an abuse of process to prosecute a defamation proceeding that does not serve the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.³

[11] The Court held that it may be appropriate to strike out a defamation claim as an abuse of process in the rare case where a claimant's reputation has suffered no or minimal actual damage. The defamation action may constitute an interference with freedom of expression that is unnecessary to protect the claimant's reputation.⁴

² *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

³ At [55].

⁴ At [40].

[12] Lord Phillips stated a principle of proportionality:

[69] If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The gain will not merely not have been worth the candle, it will not have been worth the wick.

[13] The approach to striking out defamation claims in the United Kingdom evolved after *Jameel*. A threshold of seriousness was adopted in case law.⁵ The threshold of seriousness was then codified in s 1(1) of the Defamation Act 2013 (UK), which provides:

A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

New Zealand law

[14] There is no corresponding statutory provision in New Zealand law. The Defamation Act 1992 (the Act) does not include a threshold of seriousness, or any reference to a broader principle of proportionality in defamation litigation.

[15] In *Opai v Culpan*,⁶ Katz J reviewed the New Zealand cases that had applied the *Jameel* principle. Katz J held that the principle applies in New Zealand to prevent the Court's processes from being abused by the bringing of defamation claims where the costs of the litigation are likely to be grossly disproportionate to any reputational harm suffered.⁷

[16] Katz J considered that the principle can be applied consistently with the presumption of reputational harm if defamation is proved, now found in s 4 of the Act, which provides:

4 Defamation actionable without proof of special damage

In proceedings for defamation, it is not necessary to allege or prove special damage.

⁵ For example, see *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] WLR 1985.

⁶ *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142.

⁷ At [58], [63] and [90].

[17] Katz J stated:⁸

The law does not make any presumption regarding the amount of damage, as that is an issue for the fact-finder. It merely contemplates that there will be some damage. The damage, however, might be nominal. Notwithstanding the presumption of damage, it is open to a defendant to argue that the likely *amount* of damage, relative to the *costs* of pursuing the proceedings, renders the claim an abuse of process. The presumption of harm simply relieves the plaintiff of the obligation to prove pecuniary loss in order to bring a claim in defamation. It does not insulate a plaintiff, however, from scrutiny over the proportionality of their claim.

[18] Katz J confirmed that a defamation proceeding will only be dismissed on proportionality grounds in rare cases, given that it impacts on a litigant's right of access to justice.⁹

[19] In *X v Attorney-General (No 2)*,¹⁰ Simon France J agreed with Katz J's reasoning in *Opai*, confirming that the *Jameel* principle applies in New Zealand.¹¹ Simon France J described the principle as permitting strike-out or a stay of an otherwise tenable claim that potentially meets the requirements for a defamation cause of action because the litigation is not justified. The harm allegedly involved, the damages likely to be awarded, and the vindication likely to be achieved will be minimal. The proceeding would pose a disproportionate burden on the defendant and absorb a disproportionate share of limited public resources.¹²

[20] In *Sellman v Slater*,¹³ Palmer J re-examined abuse of process in the context of a defamation proceeding. The defendants sought an order striking out the proceeding on various grounds, including that it was an abuse of process.

[21] Palmer J contrasted the proportionality principle with the threshold of seriousness, holding that the latter constitutes an element of the tort of defamation. Some level of existing or anticipated damage to reputation is required to complete the tort. A presumption of damage remains, but that presumption is rebuttable if the publisher of the defamatory statement establishes that the defamation has caused "less

⁸ At [58] (footnote omitted).

⁹ At [63]–[64].

¹⁰ *X v Attorney-General (No 2)* [2017] NZHC 1136, [2017] NZAR 1365.

¹¹ At [18].

¹² At [12].

¹³ *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218.

than minor harm” to the claimant’s reputation. If the presumption is rebutted, the tort is not established and no question of abuse of process arises.¹⁴

[22] Palmer J accepted that there may be a residual role for the proportionality principle in extreme circumstances.¹⁵ The principle did not apply on the facts of *Sellman*.

[23] On Palmer J’s approach, the cause of action accrues when a defamatory statement is published to others and the threshold of seriousness is met, which requires more than minor harm to the claimant’s reputation. In assessing the level of reputational harm caused by a statement, the character of that statement will be a primary factor.¹⁶ The extent of publication is also relevant.¹⁷

[24] The principle of proportionality has been applied since *Sellman*. In *Craig v Stiekema (No 2)*,¹⁸ Fitzgerald J allowed an appeal of a decision of the District Court striking out a defamation claim on the grounds of proportionality. Fitzgerald J considered the High Court’s decisions in *Opai, X v Attorney-General* and *Sellman*. The Judge accepted that the proportionality principle can apply in New Zealand, without expressing a concluded view on a distinction between the proportionality principle and the threshold of seriousness.¹⁹ The appeal would have succeeded on either approach.²⁰

[25] In *Craig v Slater*,²¹ the Court of Appeal confirmed a threshold of “more than minor” harm in New Zealand law is an element of the tort of defamation, endorsing the reasoning of Palmer J in *Sellman*.²² Since the Court of Appeal’s decision in

¹⁴ At [62]–[69], drawing on the analysis of the Court of Appeal of England and Wales in *Lauchaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594.

¹⁵ At [59].

¹⁶ See Richard Parkes and Godwin Busuttill (eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022) at 28.

¹⁷ For example, see *Driver v Radio New Zealand Ltd* [2019] NZHC 3275, [2020] 3 NZLR 76.

¹⁸ *Craig v Stiekema (No 2)* [2018] NZHC 838, [2018] NZAR 1003.

¹⁹ At [51].

²⁰ At [52].

²¹ *Craig v Slater* [2020] NZCA 305.

²² At [45].

Craig v Slater, the High Court has applied the threshold of seriousness as an element of the tort.²³

[26] The proportionality principle has also been applied since *Craig v Slater*,²⁴ although, in *Nicol v Douglas*, Associate Judge Paulsen considered that an ongoing role for the principle is unclear.²⁵

[27] In *Television New Zealand Ltd v Talley's Group Ltd*,²⁶ the Court of Appeal confirmed the “more than minor harm” threshold of seriousness.²⁷ Talley's Group alleged that it had been defamed by TVNZ. The High Court had struck out part of TVNZ's statement of defence that pleaded that Talley's Group had an existing bad reputation in respect of the matters that were the subject of the alleged defamatory statements. TVNZ appealed. The Court reinstated TVNZ's pleading.

[28] Cooke J confirmed that application of the threshold of seriousness permits a multi-factorial approach:²⁸

A defendant is also entitled to say at trial that the apparently defamatory publication had only a minor impact on the plaintiff's existing reputation as a matter of fact, and/or that no likely pecuniary loss was caused. The harm caused by untrue statements is not ascertained by the meaning of the statements alone.

[29] In most cases, strike-out of a plaintiff's claim now depends on a defendant establishing that the actual reputational harm to the plaintiff was minor, so that the threshold of seriousness is not met, and a cause of action has not accrued. The principle that the costs and burden of a defamation claim should be proportionate to the award of damages likely to be achieved continues to underpin the threshold of seriousness. The threshold of seriousness enquiry includes the sting of the defamation and the extent of publication. Other factors may be relevant.

²³ *Talley's Group Ltd v Television New Zealand Ltd* [2023] NZHC 696; *Wilson Parking New Zealand Ltd v DLA Piper New Zealand* [2023] NZHC 2705; and *Nicol v Douglas* [2024] NZHC 250.

²⁴ *Adamson v Hutt Valley District Health Board* [2022] NZHC 1403 at [26].

²⁵ *Nicol v Douglas*, above n 23, at [45] and [79].

²⁶ *Television New Zealand Ltd v Talley's Group Ltd* [2024] NZCA 502.

²⁷ At [27].

²⁸ At [42].

[30] However, in my view, there remains a further limited role for the principle of proportionality in New Zealand defamation law, where a cause of action has accrued because the claimant has suffered more than minor harm. It is conceivable that an abuse of process may still occur in that situation, where factors exist which will result in only nominal damages being awarded, and the vindication the claimant can achieve from the proceeding is disproportionate to the costs and burden of the proceeding.

[31] Such cases would be rare and exceptional given that more than minor harm will have been suffered. Strike-out would require the existence of compelling mitigating factors and other factors that reduce damages in a defamation claim, to the extent that pursuit of the claim serves no useful purpose and is an abuse of process. One issue is whether the present case falls into that category.

The relevance of an apology

[32] An apology may amount to an admission that statements are defamatory and make the defence of truth untenable.²⁹ An apology must be taken into account in assessing damages. Section 29 of the Act relevantly provides:

In assessing damages in any proceedings for defamation, the following matters shall be taken into account in mitigation of damages:

- (a) in respect of the publication of any correction, retraction, or apology published by the defendant, the nature, extent, form, manner, and time of that publication:

...

[33] Section 35 of the Act permits a judge at any time during the course of a proceeding to direct the holding of a conference of the parties or their counsel. The provision confers broad powers on the judge, including to:³⁰

- (a) identify the matters in issue between the parties, and ascertain whether those issues may be resolved, in whole or in part, by means (including the publication of a correction or a voluntary apology) acceptable to the parties, and, if the parties agree, the Judge may make such order as is necessary to give effect to the agreement between the parties:

²⁹ Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [15.15].

³⁰ Section 35(2)(a).

[34] While ordering a defendant to apologise is not a remedy available under the Act, s 35 permits the Court to initiate a negotiation of an apology (or a further apology) and to make orders giving effect to an agreement between the parties for a voluntary apology.³¹

[35] An effective apology will withdraw or disclaim the defamatory statement and express the publisher's regret.³² It may reduce the damages a defendant is ordered to pay because it can reduce the injury to the plaintiff's feelings.³³ An immediate apology is more likely to reduce the extent of the injury to the plaintiff than an apology tendered at the door of the court.³⁴

[36] In my view, the existence of an apology can be relevant to an application for strike-out in two respects:

- (a) First, in determining whether the claimant has suffered more than minor harm. For example, a comprehensive apology that is published quickly and broadly might be a factor relevant to an assessment of whether the claimant has suffered, or will suffer, more than minor harm.
- (b) Secondly, where the claimant has suffered more than minor harm, in determining whether the vindication the claimant might achieve from the proceeding is disproportionate to the costs and burden of the proceeding. For example, an apology could sufficiently mitigate damages for the plaintiff's more than minor harm to a point that damages would be nominal.

Should the proceeding be struck out because the threshold of seriousness is not met?

[37] Dr Hooton primarily advances his application for strike-out on the proportionality principle. However, in oral submissions, it was argued for the first

³¹ *Deliu v New Zealand Police* [2021] NZHC 1744 at [6].

³² Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, LexisNexis, Wellington, 2021) at [3.8].

³³ Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [13.6].

³⁴ *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015 at [24].

time that the threshold of seriousness is not met because Dr Brash has suffered only minor harm.

[38] I will address the argument for Dr Hooton based on the threshold of seriousness, even though it was not squarely raised in the notice of application, on the ground that it will not cause prejudice to Dr Brash to do so. That is because the argument relies on the same facts and produces the same result as the argument based on the proportionality principle.

[39] The most important factors in assessing the threshold of seriousness in this case are:

- (a) the context and nature of the defamatory statements;
- (b) the extent of publication; and
- (c) the apology.

The context and nature of the defamatory statements

[40] In *Sellman*, the defendant contended that the alleged defamatory statements were part of a robust political debate, and the meanings of the statements needed to be viewed in that context.³⁵ Palmer J accepted that the context included publication of the statements on a blog on the internet, holding that statements made in robust political and policy debate need to be read in that context to uphold the right to freedom of expression. However, the tendency of political debate on the internet to be expressed in hyperbolic and sarcastic terms does not lower the legal threshold for what is capable of being defamatory.³⁶

The law of defamation, that protects peoples' reputations, is a reasonable limit as long as it is not applied so enthusiastically as to chill political and policy debate. Plaintiffs cannot expect courts to uphold thin-skinned reactions to attack on political or policy grounds. Those who engage in genuine public political and policy debate must expect robust public responses. But defendants cannot expect to make false, un-substantiated personal attacks, in a political and policy context, with legal impunity.

³⁵ *Sellman v Slater*, above n 13, at [78].

³⁶ At [83].

[41] The seriousness of the defamation must be assessed by reference to the reaction of reasonable people reading or hearing the statements.³⁷

[42] The podcast was hosted by Martyn Bradbury and Damien Grant. The guests were Dr Hooton and an economist. The discussion that is relevant began when one of the hosts introduced the issue of Māori customary rights to the foreshore, and the advertisement. The discussion that followed was lively.

[43] Dr Brash relies on the following statements made by Dr Hooton during the discussion, as pleaded in the statement of claim:

- 9.1. “I think it’s fair to say that ... Hobson’s Pledge is ... a profoundly dishonest organisation ... based on a lie. I think that’s all true”.
- 9.2. “And so it seems quite pathetic and indicates that the whole ... campaign is in fact based upon racism and white supremacy”.
- 9.3. “And the only reason you would do that is because you were dishonest and you were wanting to, in a Trump-like way, create racial division and hatred in New Zealand for your own personal ... gain, which does seem to have been what Don Brash has sought to do sadly, ever since I made him leader of the National Party, on the grounds he was one of the world’s top monetary economists”.
- 9.4. “And right from his own racist, despicably racist, Orewa speech that he gave only to try and, you know, fuel the worst things in New Zealand society”.
- 9.5. “Well, get some reality here. These people [the plaintiff and Hobson’s Pledge] are not acting with integrity. They [the plaintiff and Hobson’s Pledge] do not act with integrity”.
- 9.6. “I said that to his [the plaintiff’s] face, and I’ve had lunch with him [the plaintiff], and I’ve had lunch with his [the plaintiff’s] creepy friends”.
- 9.7. “So why would you make them ... your number one issue for so long and spend hundreds of thousands of dollars on advertising and all your energy when you [the plaintiff] are one of the world’s greatest monetary ... economists, unless you [the plaintiff] had an obsession with these issues that is unhealthy and revealing of something very, very disturbing”.
- 9.8. “No, he [the plaintiff] constantly lies about it and misrepresents it, and he’s [the plaintiff] not so stupid that he [the plaintiff] can believe what he’s [the plaintiff] saying”.

³⁷ At [75].

- 9.9. “No, no, no I shouldn’t be doing that, because, he [the plaintiff] cannot, because I have discussed this with him over many years he cannot believe the things he says”.
- 9.10. “No, no, there is a failure of character ... , no, no, no, he [the plaintiff] is bad, these people [the plaintiff and Hobson’s Pledge] are bad”.
- 9.11. “He [the plaintiff] is a fundamentally bad person. He’s [the plaintiff] divided this country for no apparent reason despite being certainly intelligent enough to know the things that he [the plaintiff] says are not true. He [the plaintiff] cannot possibly just as David Seymour cannot possibly believe that his racist Treaty principles bill reflects in any way whatsoever either the text or the, the case law over the Treaty of Waitangi. He [the plaintiff] isn’t that stupid. He’s [the plaintiff] doing it to inflame hatred in New Zealand”.
- 9.12. “It’s not because I disagree. It’s because they [the plaintiff and Hobson’s Pledge] must be lying. They [the plaintiff and Hobson’s Pledge] cannot believe those things because they are so far divorced, from – it is like as if Don Brash all of a sudden or some socialist decided to say that printing money in the absence of ... potential output in the economy doesn’t cause inflation. These things aren’t there’s no discussion to be had here. These people [the plaintiff and Hobson’s Pledge] aren’t wishing to have a discussion. They [the plaintiff and Hobson’s Pledge] don’t have a discussion. They [the plaintiff and Hobson’s Pledge] say things which they know to be untrue in order to create a reaction usually from the liberal left in order to inflame hatred in New Zealand. Because that is their path to getting further votes.”
- 9.13. “These are the worst people [the plaintiff and Hobson’s Pledge]”.
- 9.14. “These things are untrue”.
- 9.15. “They would after 20 years, come up with some evidence other than the fact that Hobson might have stuttered at his halting Māori that we are one people. That’s the only piece of evidence that has been given by that racist and corrupt group [the plaintiff and Hobson’s Pledge]”.
- 9.16. “ ... and they’re [the plaintiff and Hobson’s Pledge] doing it in order to raise their [the plaintiff and Hobson’s Pledge] profile based upon things they [the plaintiff and Hobson’s Pledge] know not to be true ... all it has ever been about, is for a group of people [Hobson’s Pledge] to try and position people as radicals and it is somehow dangerous to the mainstream and that has always been a lie. Those people [the plaintiff and Hobson’s Pledge] have always known it is a lie. And I’ve sat with them [the plaintiff and Hobson’s Pledge] when they have conspired to decide to tell those lies”.

[44] Dr Brash pleads that the statements mean that Dr Brash is profoundly dishonest, lacks integrity, is corrupt and is fundamentally a bad person of the worst kind. The pleaded defamatory meanings are not challenged at this stage of the

proceeding, and for the purpose of this judgment are referred to as “the defamatory statements”.

[45] The sting of the defamation is that Dr Brash does not honestly hold the views that he propounds on the Treaty of Waitangi / Te Tiriti o Waitangi (Te Tiriti), and that he propounds his views for the purpose of creating racial division and hatred in New Zealand to gain political support. As noted, at this stage of the proceeding, Dr Hooton does not advance a defence of truth.

[46] The pleaded statements and their defamatory meanings go well beyond an attack on Dr Brash’s politics or policies. The defamatory statements are an attack on Dr Brash’s character.

The extent of publication

[47] It is difficult to determine the extent of publication at this summary stage of the proceeding. Counsel for Dr Hooton characterises the extent of publication as limited. That characterisation is not justified by the evidence currently available.

[48] Dr Hooton says that the podcast received 4,218 views on authorised platforms before it was taken down. The podcast was republished by another podcaster known as Big Hairy News (BHN). The evidence for Dr Brash is that the BHN podcast remains available on the internet, where it has received over 3,200 views.

[49] BHN also re-posted Dr Hooton’s statements on social media, including YouTube, Facebook and X (formerly Twitter). There is evidence of further re-posting. The reality is that it is not possible to remove the defamatory statements from all corners of the internet.

[50] The issue of the extent of publication cannot be resolved on the affidavit evidence as it stands.

The apology

[51] On 5 September 2024, Dr Brash’s solicitors wrote to Dr Hooton requesting an apology and payment of Dr Brash’s legal costs.

[52] From 7 September 2024 to 25 September 2024, Dr Brash’s solicitors and Dr Hooton’s then counsel corresponded regarding the form of an apology and the issue of costs. It is not necessary to traverse the correspondence in detail. The parties were unable to agree on the form of an apology.

[53] During this period of negotiation, which occupied just over two weeks, it was open to Dr Hooton to unilaterally publish an apology on terms that he considered to be adequate, notwithstanding that Dr Brash had not approved the form of an apology. Dr Hooton did not take that step until 24 September 2024, when Mr Bradbury read the following apology (the apology) during an episode of “The Working Group” podcast:

I have been asked to read an apology to Dr Don Brash from Matthew Hooton:

Four weeks ago on The Working Group, Matthew Hooton made certain comments about Dr Don Brash. These comments were made in discussions with Damien Grant and others about the role of the Treaty of Waitangi in New Zealand, the foreshore and seabed issue, and the advocacy group Hobson’s Pledge.

In his comments, Matthew accused Dr Brash of dishonesty and of advocating his views solely to drive racial division in New Zealand.

Matthew accepts that in fact Dr Brash holds those views sincerely and not for the reasons he gave.

Matthew does not agree with Dr Brash’s position in relation to the Treaty, and the remarks came as part of a vigorous debate on a subject he is particularly passionate about – as are many New Zealanders, including Dr Brash.

But Matthew accepts he was not justified in making – and sincerely apologise for – those statements, which he unreservedly retracts.

[54] By 29 November 2024, the episode of the “The Working Group” podcast, which includes the apology, had been downloaded more than 3,000 times on podcast platforms, and more than 3,000 times on YouTube. Dr Hooton says that he also posted the apology on his social media channels. It received more than 6,700 views on LinkedIn, and further views on Dr Hooton’s Facebook and Patreon pages.

[55] A letter from Dr Brash's solicitors to Dr Hooton's counsel on 9 October 2024 confirms that Dr Brash was dissatisfied with the apology for the following reasons:

- (a) the defamation is irretrievably available on the internet;
- (b) the apology came too late;
- (c) the defamatory statements were not made as part of a vigorous debate;
- (d) the apology attempted to cast a personal attack as if it was an understandable incident in an ongoing debate;
- (e) the apology left the inference that Dr Hooton might have had grounds to believe his statements at the time that they were made; and
- (f) authoritative vindication for Dr Brash required a clear statement that Dr Hooton was wrong and was himself being untruthful.

[56] Dr Hooton was invited to offer a more comprehensive apology, in a form to be agreed, together with payment of all of Dr Brash's costs and public disclosure of that payment. Dr Hooton did not accept the invitation.

[57] The apology addressed the sting of the defamation and included an unreserved retraction. However, even if the apology was reasonable, it came after extensive publication of the defamatory statements. It is arguable that Dr Brash suffered more than minor harm before the apology, and a cause of action accrued.

[58] It is not possible, on the affidavit evidence before the Court, to determine the extent of publication of the apology and whether it is likely to have permeated the internet to reach the public who read or viewed the defamatory statements. I will consider the apology further as a factor mitigating damage when the proportionality principle is assessed later in this judgment.

Conclusion on the threshold of seriousness

[59] Factual findings at a summary stage of a defamation claim are only appropriate when “an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.”³⁸

[60] This is not a case where the Court can conclude, at a summary stage, that Dr Brash suffered only minor harm. It is arguable that the elements of the tort of defamation are made out.

Is the proceeding an abuse of process because it is brought for a predominant improper purpose?

Legal principles

[61] To establish an improper purpose, the defendant must show that the plaintiff has an ulterior motive, seeking a collateral advantage beyond what the law offers;³⁹ something not properly available to the plaintiff in the course of properly conducted proceedings.⁴⁰

[62] In *M v H*,⁴¹ the Court of Appeal recently reviewed the leading authorities⁴² and summarised the principles to apply:⁴³

- (a) the improper purpose alleged to be the motivation for the relevant proceedings need not be the sole purpose, as long as it is the predominant purpose;
- (b) qualifying abuse will not be found, and a litigant will not be barred from pursuing a genuine cause of action, if the cause of action would be pursued *despite* the collateral purpose, notwithstanding that the collateral purpose is a consciously desired by-product of the claim;
- (c) the onus on the party alleging abuse of process is a heavy one, and the power to grant a remedy (such as a stay) is to be exercised only in exceptional circumstances; and

³⁸ *Talley's Group Ltd v Television New Zealand Ltd*, above n 26, at [43], citing *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

³⁹ *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (EWCA) at 498–499 per Scarman LJ.

⁴⁰ *Broxton v McClelland* [1995] EMRL 485 (EWCA) at 498.

⁴¹ *M v H* [2024] NZCA 243, [2024] 3 NZLR 44.

⁴² Including *Re Majory* [1955] Ch 600 (EWCA); *Williams v Spautz* (1992) 174 CLR 509; and *Goldsmith v Sperrings Ltd*, above n 39.

⁴³ *M v H*, above n 41, at [138].

- (d) it is unnecessary to prove the commission of an improper act to justify a remedy but, other than in the clearest of cases, it will be necessary to point to some separate manifestation of intent, in the form of an overt act (such as a demand) which is indicative of the true (collateral) purpose.

[63] Ascertaining a plaintiff's true purpose is a difficult task, particularly when undertaken on a pre-trial application without the benefit of cross-examination. The Court is asked to rely on adverse inferences drawn from surrounding circumstances.⁴⁴ That is why the burden on a defendant seeking strike-out on this ground is a high one.

[64] The plaintiff's purpose must be assessed objectively, by reference to what a reasonable person placed in the plaintiff's situation would have in mind when initiating the proceeding.⁴⁵ The "but for" approach of the Court of Appeal in its principle (b) in *M v H* aids the analysis.⁴⁶ Would the plaintiff have commenced the proceeding absent the collateral purpose?

Dr Hooton's argument

[65] Counsel for Dr Hooton submits that Dr Brash has an improper purpose in bringing this proceeding of publicly promoting the political agenda of Dr Brash and Hobson's Pledge, and to obtain funding for that agenda.

[66] Dr Hooton argues that Dr Brash's publicity of the defamatory statements and this proceeding is intended to create further media attention, and Dr Brash is using the proceeding to "contest the truth or otherwise of political issues relating to race relations".

[67] Dr Hooton invites the Court to draw these inferences, relying on:

- (a) a delay by Dr Brash in making a formal allegation of defamation;

⁴⁴ *Goldsmith v Sperrings Ltd*, above n 42, at 498–499 per Scarman LJ.

⁴⁵ At 498.

⁴⁶ *M v H*, above n 41, at [138].

- (b) Dr Brash declining an offer from “The Working Group” to exercise a right of reply;
- (c) Dr Brash making unreasonable demands that delayed Dr Hooton’s apology;
- (d) Dr Brash repeating the defamatory statements, including in a Hobson’s Pledge press release and in an interview with The Spinoff;
- (e) a Hobson’s Pledge newsletter on 27 September 2024, which called for recipients to donate to a fund to cover Dr Brash’s legal fees;
- (f) a post published by Hobson’s Pledge on its website on 9 October 2024, making a similar request;
- (g) Dr Brash issuing a press release when the proceeding was commenced; and
- (h) Dr Brash giving notice of this proceeding, including a copy of the statement of claim, to an email group of supporters of Hobson’s Pledge.

[68] Counsel for Dr Hooton submits that Dr Brash has a further improper purpose, which is to put Dr Hooton’s honesty in issue in the proceeding as a platform to defame Dr Hooton in the proceeding under the protection of absolute privilege.

[69] Dr Brash has given affidavit evidence that his only purpose in bringing the proceeding is to seek vindication of his reputation.

The alleged purpose that the proceeding is a vehicle for Dr Brash to defame Dr Hooton while protected by privilege

[70] By way of context, Dr Hooton says that Dr Brash defamed him in an email to supporters of Hobson’s Pledge on 27 September 2024, repeated in a post on Dr Brash’s blog “Bassett, Brash & Hide” on 28 September 2024. The communications that Dr Hooton says defamed him were directed to supporters of Hobson’s Pledge for the

purpose of soliciting crowd funding for this proceeding (the Hobson's Pledge communications).

[71] Dr Hooton says that the Hobson's Pledge communications infer that he was being paid by an iwi to complete a "hit job" on Dr Brash and Hobson's Pledge, which Dr Hooton says is untrue. Counsel submits that the imputation is that Dr Hooton is dishonest and/or corrupt. I consider these allegations further when I consider the damages that Dr Brash might be awarded if his claim succeeds.

[72] Against that background, Dr Hooton now complains that the proceeding is being used as a platform to further defame him under the protection of absolute privilege.

[73] The nub of Dr Brash's claim is that the defamatory statements made by Dr Hooton are untrue. Dr Brash is entitled to allege that Dr Hooton had knowledge of the falsity of the defamatory statements, or otherwise acted in a way that aggravated the damage. There is no evidence that justifies an inference that Dr Brash is conducting the proceeding so he can defame Dr Hooton with impunity.

The alleged purpose that the proceeding is to advance the political agenda of Dr Brash and Hobson's Pledge, and to obtain funding for that agenda

[74] The Hobson's Pledge communications and the surrounding circumstances relied on by Dr Hooton do not support the inferences that Dr Hooton asks the Court to draw.

[75] There is no evidence of a separate manifestation of intent by Dr Brash to use the proceeding to gain publicity for his views on Te Tiriti. Even if that collateral purpose exists, and Dr Brash and Hobson's Pledge wish to take advantage of publicity generated by the proceeding, I am satisfied that Dr Brash would pursue the proceeding despite that collateral purpose. I find that Dr Brash's predominant purpose in bringing the proceeding is to restore any damage done to his reputation by the defamatory statements.

[76] The Hobson's Pledge communication on 27 September 2024 called for recipients to donate to a fund to cover Dr Brash's legal fees, including a link to a donations page on the Hobson's Pledge website. The donations page included the statement:

Any funds not needed for Don's legal defence will be diverted to advancing the Hobson's Pledge mission.

[77] Dr Hooton also relies on a post on the Hobson's Pledge website on 9 October 2024, made in conjunction with a request for crowd funding for the proceeding:

So the compensation awards have to be large now. That is the only way to ensure that even winners are not losers. They get vindicated when the court establishes that lies have been spread about them. But they need to win both compensation and the legal cost award, to cover costs and the risks of the action. **Don has made it clear that when he gets vindication, anything left over will go to Hobson's Pledge.**

[78] I do not accept that the predominant purpose of the proceeding is to raise funds for Hobson's Pledge. No issue has been taken with Dr Brash's approach to funding the proceeding, in terms of maintenance or champerty. It is a matter for Dr Brash how he chooses to apply any damages recovered, and the expressed intent does not support an inference that the predominant purpose of the proceeding is to promote or fund the advocacy of Hobson's Pledge.

Conclusion on improper purpose

[79] I do not accept that Dr Brash is bringing this proceeding for a predominant improper purpose. The proceeding is not an abuse of process on that ground.

Are the costs and burden of this proceeding likely to be disproportionate to the benefit or vindication that Dr Brash might achieve from the proceeding?

[80] This issue must be determined on the assumption that the threshold of seriousness is met and Dr Brash has suffered, or is likely to suffer, more than minor harm. The focus shifts to the vindication that Dr Brash might achieve from the proceeding, and whether that vindication is out of proportion to the costs and burden of the proceeding.

[81] Dr Hooton must establish that an award of damages will be nominal, and the vindication from the proceeding insufficient to justify the proceeding continuing. That is a heavy burden given the assumptions I have just stated.

[82] The law does not permit a court to make a declaration that a defamatory statement was false where the defendant does not plead justification (i.e. truth). That is because the jury will be directed to proceed on the presumption that the alleged defamatory statement is untrue, and the jury assesses damages on that basis. In those cases, vindication comes from an award of damages and not from a declaration that a statement is false.⁴⁷

[83] Dr Hooton says that he will not plead truth. Therefore, in this case, the proceeding might result in vindication for Dr Brash by one or more of the following means:

- (a) if Dr Hooton pleads a defence of honest opinion, a finding of fact that any of the defamatory statements that were Dr Hooton's opinions were not honestly held;
- (b) a further apology, if one is agreed following a conference convened under s 35 of the Act; or
- (c) an award of damages that is more than nominal.

If Dr Brash's claim is upheld, what damages are likely to be awarded?

[84] The factors relevant to an award of damages will include, inter alia:

- (a) the context and the nature of the defamatory statements;
- (b) the extent of publication;
- (c) mitigation by publication of the apology; and

⁴⁷ *Jameel v Dow Jones & Co Inc*, above n 2, at [67].

- (d) any relevant conduct by Dr Brash.

[85] I have already discussed factors (a) to (c) when considering the threshold of seriousness. Dr Hooton argues that the other conduct by Dr Brash relevant to an award of damages is:

- (a) defaming Dr Hooton in the Hobson's Pledge communications; and
- (b) pursuing the proceeding to further the interests of Hobson's Pledge, which I have already discussed when considering improper purpose.

Mitigation by the apology

[86] The extent to which an apology mitigates damage requires a fact-specific enquiry.⁴⁸ Previous decisions of the courts are of limited assistance.

[87] Dr Hooton argues that Dr Brash acted unreasonably during the negotiation of an apology, particularly in respect of the form of an apology. His counsel submits that Dr Brash unreasonably requested that the defamatory statements be repeated as part of an apology together with unreasonable statements from Dr Hooton speaking positively about Dr Brash. It is argued that this conduct delayed the apology.

[88] It was open to Dr Brash to seek statements from Dr Hooton affirming Dr Brash's character and reputation beyond a simple apology and retraction.⁴⁹ This was part of a strategy by Dr Brash designed to repair what he perceived to be the damage to his reputation.

[89] In terms of the mitigation of damage by the apology, the issues include:

- (a) whether any of the various forms of an apology offered by Dr Hooton were reasonable, making Dr Brash's refusal to accept them unreasonable;

⁴⁸ For example, see *Truth (NZ) Ltd v Bowles* [1966] NZLR 303 (CA); *Thode v Coastline FM Ltd* HC Tauranga CP31/96, 1 October 1997; *Mickle v Farley* [2013] NSWDC 295; *Haden v Wells* HC Auckland CIV-2008-404-5500, 20 November 2009; and *Ha v Dinh* [2024] NZHC 2358.

⁴⁹ *Goldsmith v Sperrings Ltd*, above n 39, at 499–500 per Scarman LJ.

- (b) if Dr Brash acted unreasonably, whether that caused a delay in Dr Hooton's apology; and
- (c) if so, whether that exacerbated the extent of publication of the defamatory statements before the apology was published.

[90] Dr Hooton offered different forms of an apology on 7, 10 and 23 September 2024. It is arguable that the form of those apologies was inadequate.

[91] Whether Dr Brash's conduct during the negotiation of an apology, including any counter-demands he made regarding the form of an apology, was unreasonable and material to the delay in the apology and the damage that he suffered are matters that should be determined at trial.

[92] It is not possible, on the available evidence, to determine whether the apology has sufficiently mitigated any harm to Dr Brash's reputation to the point where he can only recover nominal damages. The adequacy of the apology is best assessed at trial in the context of the other factors that are relevant to damages.

Defaming Dr Hooton

[93] It is unlikely that the alleged defamatory statements in the Hobson's Pledge communications will have any material impact on an award of damages to Dr Brash, for two reasons:

- (a) the impugned statements were posed as questions, and are speculation on whether Dr Hooton was attacking Dr Brash on behalf of a client, including the possibility the client might be an iwi; and
- (b) the statements were published by Elliot Ikilei as a spokesperson for Hobson's Pledge, and not by Dr Brash.

Pursuing the proceeding to further the interests of Hobson's Pledge

[94] I do not accept that Dr Brash's republication of defamatory statements and publication of this proceeding contributed to damage that Dr Brash suffered.

If Dr Brash had republished the defamatory statements without any qualification or comment, then counsel might have a point. That was not the case. Dr Brash repeated the statements that he considered to be defamatory together with his own assertion that the statements were untrue and defamatory. Again, this was part of a strategy by Dr Brash designed to repair what he perceived to be the damage to his reputation.

Conclusion on the likely award of damages and proportionality

[95] The effectiveness of the apology should be considered at trial and in the context of all evidence relevant to damages. It is not possible at this summary stage of the proceeding to rule that any award of damages to Dr Brash would be nominal.

[96] The costs of this type of proceeding to the parties and the required allocation of judicial resources are well understood. This is not a case where it is safe to conclude that those matters are out of proportion to the benefit and vindication that Dr Brash might achieve from the proceeding. Access to justice is not lightly denied. This is not one of those rare and exceptional cases that should be struck out as an abuse of process on an application of the proportionality principle.

Orders

[97] The defendant's application for an order striking out the proceeding is declined.

[98] The plaintiff is entitled to costs. If the parties are unable to agree on costs, then:

- (a) the plaintiff may file and serve submissions on costs of no more than five pages by 27 June 2025;
- (b) the defendant may file and serve submissions on costs of no more than five pages by 11 July 2025; and
- (c) I will determine costs on the papers.

Associate Judge Brittain