IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA809/2023
[2024] NZCA 685

BETWEEN	GAUTAM JINDAL Appellant
AND	CHERAG MINOO DARUWALLA Respondent

Hearing:	30 September 2024
Court:	Mallon, Gwyn and Moore JJ
Counsel:	Appellant in person D H McLellan KC and S O H Coad for Respondent
Judgment:	19 December 2024 at 12 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] Mr Jindal completed a law degree in July 2020 and in August 2020 applied to the New Zealand Law Society for a certificate of character, a necessary requirement for his application for admission as a barrister and solicitor of the High Court.[1] As part of the Law Society's enquiries, it received emails from Mr Daruwalla about Mr Jindal's character. The Law Society declined to issue Mr Jindal the certificate which delayed his application for admission.

[2] Mr Jindal later filed a claim against Mr Daruwalla in the High Court alleging that Mr Daruwalla's emails defamed him and seeking declaratory relief and damages. He subsequently filed amended statements of claim with three further additional causes of action.

[3] Mr Daruwalla applied to strike out part of Mr Jindal's claim against him on the basis that two of the causes of action were not reasonably arguable because they were barred by the Limitation Act 2010 and two of the other three causes of action were

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1 Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008 [Admission Rules], r 5(1)(b). See also Lawyers and Conveyancers Act 2006, ss 49(2)(b) and 50(1).

made on an occasion of absolute privilege and so he had a complete defence to those causes of action.[2] Associate Judge Taylor in the High Court granted the application.[3]

[4] Mr Jindal now appeals. He contends the Judge was wrong to find two of his causes of action as time barred and two others as protected by the defence of absolute privilege.

Background[4]

[5] As noted, Mr Jindal completed his law degree in July 2020. He completed his professional legal studies course in September 2020. Hoping to be admitted to the bar in 2020, Mr Jindal applied for a certificate of character from the Law Society on about 26 August 2020. Mr Jindal was interviewed by the Law Society in connection with his application on 28 October 2020.

[6] Applicants for a certificate of character are required to disclose if they had been a director of a company that had been put in liquidation.[5] Mr Jindal disclosed that he was a director of Orange Capital Ltd (Orange) which was in liquidation. This led to the Law Society contacting the liquidator of Orange (Mr Kamal) who in turn contacted Mr Daruwalla, of Adon Holdings Ltd (Adon), with whom there had been business dealings in 2017. This led to an exchange of emails that became the subject of Mr Jindal's intended defamation claim.

[7] Specifically, in response to Mr Kamal forwarding the Law Society's email asking Mr Kamal as to the circumstances of the liquidation, Mr Jindal's role in that and whether Mr Jindal had been cooperative in the liquidation process, Mr Daruwalla responded to Mr Kamal on 6 November 2020 saying:

> … I would very much like to take up your offer of addressing Gautam Jindal's character to the bar association.

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2 High Court Rules 2016, r 15.1(1).

3 *Jindal v Daruwalla* [2023] NZHC 3315 [judgment under appeal].

4 A strike out application proceeds on the basis of the pleaded facts and any uncontested affidavit evidence: see *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267 per Richardson P, Thomas and Keith JJ, 285 per Henry J and 291 per Tipping J; and *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

5 Section 55(1)(b) of the Lawyers and Conveyancers Act provides whether a person has been a director of a company that has been put into liquidation may be taken into account in assessing whether a person is a fit and proper person to be admitted.

> As we know the person is fraudulent and has a very snake like character, he should never become a lawyer.

[8] Mr Kamal responded by providing Mr Daruwalla with the Law Society's contact details and the questions that the Law Society had asked. Mr Daruwalla then emailed the Law Society on 16 November 2020 saying:

> … I have severe reservations to Mr. Gautam Jindal being admitted as a barrister and Solicitor of the High Court of New Zealand.
>
> I have attached a copy of the Police complaint which I had made and the circumstances surrounding Mr. Jindal liquidating his company, along with a heap of other related material.
>
> It is our firm opinion that Mr. Jindal who portrays a persona of a very refined, polished young gentleman is actually a Viper in disguise.
>
> He has committed fraud against my family / company to the tune of $95,000 with no remorse. I have What's app chat history which I can share as well.
>
> Please contact me for further details if required.
>
> Awarding him a Barrister and Solicitor role will bring shame and dishonour to a great institution.

[9] The Law Society responded to Mr Daruwalla on 17 November 2020 seeking details as to the claimed $95,000 loss. On the same day, Mr Daruwalla replied by email saying:

> ….
>
> As per the agreement Adon would invest $100,000 with Orange to use their proprietary automated trading system to trade on the markets.
>
> The losses should have been limited to a maximum of $20,000[.]
>
> Gautam Jindal of Orange, committed fraud when he exceeded trading losses to the tune of $95,000 by giving false and misleading assurances.
>
> - It was later identified … that Gautam Jindal did not even have an automated trading system, he was speculating manually using our money. …
>
> …
>
> In summary:
>
> - Gautam tricked us into believing he was going to use an Automated Trading System which he claimed produced excellent results.

- There never was an automated system. He was manually trading the markets using our monies!

  …

- He's been running side scams with Property markets, which he tried to get us to invest.

- He is an extremely smooth talker with a baby face persona which he uses to trick people.

- He also tried to swindle 'Oriana Share Club' members.

You should also be aware that Gautam Jindal was running other scams as was outlined by the Liquidator …

[10] Following these emails, the Law Society did not issue a certificate of character, but rather referred the matter to the Practice Approval Committee (PAC) which in turn declined to issue the certificate of character. Mr Jindal made a request under the Privacy Act 2020 for information in relation to his application. As a result of this request, on 20 April 2021, he learned of the above three emails as well as an earlier email Mr Daruwalla had sent to Mr Kamal on 1 May 2020.[6] This 1 May 2020 email does not appear to be included in the case on appeal. However, the proposed amended statement of claim pleads that in this email Mr Daruwalla said of Mr Jindal: "this crook has stolen money".

[11] As a result of the Law Society's decision not to issue a certificate of character, Mr Jindal was not admitted in October or November 2020 High Court ceremonies as he had intended. We do not have details of what happened after this except that Mr Jindal obtained legal advice, further engaged with the Law Society, and was later issued a certificate of character. He was admitted as a barrister and solicitor on 22 October 2021. Mr Jindal says that his delay in being able to be admitted meant that he could not seek employment as a lawyer during this period to his financial detriment and caused him significant mental stress.

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6 On 30 April 2021 the Law Society explained in an email to Mr Jindal that it had not disclosed to him adverse information about him so as to give him an opportunity to respond due to what appeared to have been an administrative error. It explained that much of that information had also not been provided to the Practice Approval Committee (PAC) in considering his application. The Law Society provided Mr Jindal with the opportunity to reapply for a certificate of character before a differently constituted PAC. He ultimately received a good character certificate and was admitted as a barrister and solicitor.

The pleadings

[12] Mr Jindal filed a statement of claim against Mr Daruwalla on 22 November 2022.[7] The statement of claim had two causes of action: the first relating to Mr Daruwalla's email to the Law Society dated 16 November 2020 and the second relating to his email to the Law Society dated 17 November 2020.

[13] On 1 March 2023 Mr Jindal filed an amended statement claim. This statement of claim added a third cause of action alleging that Mr Daruwalla made defamatory statements over a LinkedIn communication with a Mr Alden on 9 December 2022 a few days after Mr Jindal attempted to serve the original statement claim on Mr Daruwalla. Mr Jindal was a director of a company, Project X51 Ltd, alongside Mr Alden between January 2022 and March 2023. This amended statement of claim pleaded that in the LinkedIn communication Mr Daruwalla said in relation to Mr Jindal that:

(a) "Gautam will most likely not give you the truth";

(b) "[p]lease be very very careful in your dealings";

(c) "[s]ee the dealings he has been [sic] with other directors of FoodLabs particularly one Mr Singh, who was also bankrupt at one stage and has put multiple companies himself into liquidation";

(d) "I am sure as a co director with a company you strive to turn profitable you would like to do associate with people of good standing and character";

(e) "[p]lease be extremely diligent in your dealings with him";

(f) "I see you have a constitution upload for your company, hopefully that's not drafted by Gautam himself, as if it is search for loopholes"; and

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[7] Mr Jindal has separately filed a claim against Mr Kamal alleging that he made defamatory statements of Mr Jindal.

(g) "[h]e has a tenacity for making life very difficult for everyone."

[14] On 8 March 2023 Mr Jindal emailed Mr Daruwalla's solicitors asking them to "ignore" the amended statement of claim, advising that "[o]nce the above issue of Leave [was] resolved" Mr Jindal would send a corrected copy of the amended statement of claim,[8] and expressing the hope that leave could be agreed by consent with the parties filing a joint memorandum and seeking the Court's approval to the granting of leave.

[15] On 9 March 2023 the parties filed a joint memorandum in which Mr Jindal sought leave under r 7.77(4) of the High Court Rules 2016 to amend his claim to add "the cause of action which has arisen after the date of filing" and that Mr Daruwalla have 10 working days to file his statement of defence to the amended statement of claim. Mr Daruwalla neither consented to nor opposed the application.

[16] On 17 April 2023 Mr Jindal filed an interlocutory application seeking leave to amend his pleading. Specifically it stated that Mr Jindal would:

> … apply for leave under r 7.77(4) of [the High Court Rules] to amend his pleadings and include a cause of action which has arisen since the filing of the statement of claim.

[17] The grounds for the application were that:

(a) "[t]here is a fresh cause of action which has arisen in Dec 2022. This is approx. one month after the initial proceedings were filed";

(b) the respondent neither consented to nor opposed the grant of leave;

(c) the parties had filed a joint memorandum on 9 March 2023 but no directions or minute had been received at the date of making the application; and

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[8] For reasons that are unclear, whatever was the "above issue of Leave" has been redacted. It appears that the email may have contained a settlement proposal but any redaction for that reason should have been confined to that proposal.

(d) costs were not sought on the application if the respondent did not oppose it.

[18] On 21 April 2023 the Judge issued a minute granting the requested order set out in the joint memorandum dated 9 March 2023 by consent.

[19] On 24 April 2023 Mr Jindal filed an amended statement of claim (which he dated 9 March 2023). This claim added two new causes of action to the three causes of action that were in the amended statement of claim filed on 1 March 2023. It now pleaded five causes of action:

(a) the first cause of action concerned Mr Daruwalla's email to Mr Kamal on 1 May 2020;

(b) the second cause of action concerned Mr Daruwalla's email to Mr Kamal on 6 November 2020;

(c) the third cause of action concerned Mr Daruwalla's email to the Law Society dated 16 November 2020;

(d) the fourth cause of action concerned Mr Daruwalla's email to the Law Society dated 17 November 2020; and

(e) the fifth cause of action concerned Mr Daruwalla's LinkedIn communication with Mr Alden on 9 December 2022.

[20] In addition to the loss claimed for the delay his admission caused for his ability to work as a lawyer, the claim pleaded that the communication with Mr Alden required Mr Jindal to resign from a directorship of Project X51 Ltd and to lose income as a result.

[21] Mr Daruwalla then applied to strike out the first to fourth causes of action.[9] As noted, the strike out was on the basis that the first two causes of action were time

[9] The application also sought security for costs. For his part, Mr Jindal applied for affidavit evidence filed in support of the security for costs application be excluded as inadmissible. Neither

barred and that the first to fourth causes of action were made on an occasion of absolute privilege. The strike out application succeeded in the High Court on both bases.

Limitation Act

[22] The Judge struck out the first and second causes of action in Mr Jindal's amended statement of claim filed on 24 April 2023 on the basis that they were time barred under the Limitation Act.[10]

[23] Under the Limitation Act, the primary limitation period to bring a defamation claim is two years from the date of the defamatory statement on which the claim is based.[11] This two year period for the first and second causes of action therefore expired on 2 May 2022 (two years from the 1 May 2020 email) and 7 November 2022 (two years from the 6 November 2020 email) respectively.[12]

[24] However, where the claimant gained knowledge that the defamatory statement had been made after the close of the start date of the primary two-year period (here after 1 May 2020 and 6 November 2020 respectively), the Limitation Act provides a late knowledge period for bringing the claim. For a defamation claim, the late knowledge period is two years after the date on which the claimant gained knowledge of the defamatory statement (the late knowledge period).[13] Here, Mr Jindal says he gained knowledge of the 1 May 2020 and 6 November 2020 emails on 20 April 2021 when he received the response from the Law Society to his Privacy Act request. This means that Mr Jindal had until 21 April 2023 to file his claims in respect of these two emails.

[25] The amended statement of claim filed on 24 April 2023 for the first time included the causes of action based on the 1 May 2020 and 6 November 2020 emails. This was outside the two-year late knowledge period. On the face of it, therefore, these two causes of action are time barred. However, Mr Jindal contends that leave

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application is relevant for present purposes.

10 Judgment under appeal, above n 3, at [94].

11 Limitation Act 2010, ss 11(1) and 15.

12 See s 54 of the Legislation Act 2019.

13 Limitation Act, ss 11(3), 14 and 15.

had been granted on 21 April 2023 to file the amended claim that included these two additional causes of action.

[26] Mr Jindal's submission is that, having filed an amended claim on 1 March 2023, he asked Mr Daruwalla to ignore it because he would file a corrected copy once leave had been granted. The joint memorandum seeking leave on an uncontested basis was filed on 9 March 2023 pursuant to r 7.77(4) of the High Court Rules. Mr Jindal says he anticipated that obtaining leave would be simple as it was uncontested. He followed this up with the Registry several times. Because leave was delayed, he then filed the interlocutory application on 18 April 2023 to preserve his position.

[27] Once leave was granted on 21 April 2023, Mr Jindal filed the amended statement of claim which included the three causes of action additional to the original two. He contends that the Registrar accepted that the date of filing was deemed to be 9 March 2023 and that this decision stands. This contention is based on his email to the Registry case officer dated 24 April 2023 and their subsequent exchanges.

[28] Specifically, by email dated 24 April 2023, Mr Jindal attached the amended statement of claim (described by Mr Jindal as "First Amended SoC") for filing, noting that it was dated 9 March 2023. Mr Jindal stated that he had "set the date" at 9 March 2023 since this was the date the memorandum seeking leave under r 7.77(4) was sent. Mr Jindal asked the Registry acknowledge receipt.

[29] Mr Jindal followed this email up with a further email dated 4 May 2023 asking if the amended statement of claim had been accepted for filing with the filing date of 9 March 2023. Mr Jindal said that, once the amended statement of claim was accepted, he could file a memorandum withdrawing his 18 April 2023 application. He sent a further email on 9 May 2023 saying "[m]ay we have confirmation that the First ASOC is accepted for filing".

[30] On 15 May 2023 Mr Jindal sent a further email to the Registry saying:

> We met last week and you verbally confirmed that the Amended pleading filed after the grant of leave under r7.77 is accepted for filing without any issue.
>
> I would appreciate if you could send me a written confirmation on the same.

[31] Mr Jindal sent a further email on 21 May 2023 saying that he was awaiting a response. That day the Registry replied saying: "No worries, I confirm your amended statement of claim has been accepted for filing."

[32] Mr Jindal submits that there has been no challenge to the Registrar's decision to accept the amended statement of claim with a deemed filing date of 9 March 2023. He submits the Associate Judge's decision to strike out the first and second causes of actions as time barred does not constitute an appeal because an associate judge's jurisdiction does not extend to reviewing or overturning a decision of the Registrar.

[33] This submission is misconceived. The Registry officer confirmed only that the amended statement of claim had been accepted for filing. The Registry officer did not decide, nor could he have, that the amended statement of claim was to be treated as though it had been filed on 9 March 2023. There was no decision of the Registry officer determining whether Mr Daruwalla had a Limitation Act defence to the first and second causes of action on the basis that they had been brought outside the primary period and the late knowledge period under that Act.

[34] The second basis on which Mr Jindal contends that the Associate Judge erred in striking out the first and second causes of action is on the basis of the Supreme Court's decision in *Almond v Read*.[14] He says that if these causes of action were brought out of time, the delay in bringing them was minor (two days after the late notice period), promptly cured and readily explained. This submission is also misconceived. *Almond v Read* is concerned with an extension of time for the filing of an appeal under r 29A of the Court of Appeal (Civil) Rules 2005. That rule specifically permits a party to apply for an extension of time to appeal where the appeal period has expired. The decision has no application to whether a cause of action is time barred under the Limitation Act.

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[14] *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

[35] The third basis on which Mr Jindal contends that the Associate Judge erred in striking out his first and second causes of action relies on r 7.77(4) of the High Court Rules. Rule 7.77 provides:

> **7.77 Filing of amended pleading**
>
> (1) A party may before trial file an amended pleading and serve a copy of it on the other party or parties.
>
> (2) An amended pleading may introduce, as an alternative or otherwise,—
>
> (a) relief in respect of a fresh cause of action, which is not statute barred; or
>
> (b) a fresh ground of defence.
>
> (3) An amended pleading may introduce a fresh cause of action whether or not that cause of action has arisen since the filing of the statement of claim.
>
> (4) If a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the court. If leave is granted, the amended pleading must be treated, for the purposes of the law of limitation defences, as having been filed on the date of the filing of the application for leave to introduce that cause of action.
>
> (5) Subclause (4) overrides subclause (1).
>
> (6) If an amended pleading introduces a fresh cause of action, the other party must file and serve that party's defence to it within 10 working days after the day on which the amended pleading is actually served on the other party.
>
> (7) When an amended pleading does not introduce a fresh cause of action, the other party may, within 5 working days after the day on which the amended pleading is served on that other party, file and serve an amended defence to it.
>
> (8) If an amended pleading has been filed under this rule, the party filing the amended pleading must bear all the costs of and occasioned by the original pleading and any application for amendment, unless the court otherwise orders.
>
> (9) This rule does not limit the powers conferred on the court by rule 1.9.
>
> (10) This rule is subject to rule 7.7 (which prohibits steps after the close of pleadings date without leave).

[36] The first and second causes of action were new causes of action as they each sue on a different defamatory statement. Mr Jindal submits that r 7.77(4) applies because his application for leave to amend his claim was filed on 9 March 2023. It

was therefore treated for the purposes of the Limitation Act as having been filed on that date.

[37] This submission reflects a misreading of the rule. It seeks to read r 7.77(4) on its own rather than in the context of the rule as a whole. Nowhere does the rule permit the introduction of a fresh cause of action that is time barred. Interpreted in its context, the rule provides a series of sequential steps as to what may be done. So:

(a) Rule 7.77(1) is the starting point. It permits a pleading to be amended before trial. If the amendment does not include a fresh cause of action then r 7.77(2) to (4) are not relevant. If the amendment introduces a cause of action, then r 7.77(2) is relevant.

(b) Rule 7.77(2) provides that the amendment may introduce a fresh cause of action which is not time barred. Where a fresh cause of action that is not time barred is introduced, r 7.77(3) is relevant.

(c) Rule 7.77(3) provides that the fresh cause of action may be one that had arisen before the statement of claim was filed or which only arose after the cause of action arose. If it is the latter, then it requires leave under r 7.77(4).

(d) In that case, r 7.77(4) provides that, if leave is granted to add the new cause of action, the date of filing the application for leave to introduce that cause of action is treated as the date the amended pleading was filed.

[38] There is a further problem with Mr Jindal's submission on this point. That is because in fact neither the joint memorandum nor his interlocutory application sought leave to amend the claim to add the first and second causes of action. As set out earlier, the joint memorandum and the interlocutory application related to the cause of action that arose in December 2022 (that is, the fifth cause of action in the amended statement of claim filed on 24 April 2023). Mr Jindal could amend his claim to include this fresh cause of action because it was still within the primary period under the Limitation Act

and so was not statute barred (r 7.77(2)). He needed leave to amend his claim to add this cause of action, because it arose after the statement of claim was filed (r 7.77(3)). Pursuant to r 7.77(4), this cause of action would be treated as having been filed when the joint memorandum seeking leave was filed, that is on 9 March 2023, but this is of no moment because the claim was not time barred by 24 April 2023 in any event.

[39] None of this, however, enabled Mr Jindal to file two further causes of action (the first and second causes of action) on 24 April 2023 when they were time barred as at that date and no application for leave to amend the claim to include them had been made before 22 April 2023.

[40] We therefore conclude that the Judge was correct to strike out the first and second causes of action as statute barred.

Absolute privilege

Introduction

[41] The Judge struck out the third and fourth causes of action on the grounds that they were made on occasion of absolute privilege.[15] Mr Jindal submits this was an error and that qualified privilege adequately protects communications made to the Law Society when considering whether to issue a certificate of character.

Statutory admission process

[42] The purposes of the Lawyers and Conveyancers Act 2006 (the Act) include "to maintain public confidence in the provision of legal services and conveyancing services" and "to protect the consumers of legal services and conveyancing services".[16] Part 3 of the Act provides for the admission of barristers and solicitors of the High Court. Admission qualifies the person for entry on the roll of barristers and solicitors, which in turn enables the person to obtain a practising certificate and to provide legal services.[17]

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15 Judgment under appeal, above n 3, at [129].
16 Lawyers and Conveyancers Act, s 3(1)(a)–(b).
17 Section 6 definitions of "lawyer" and "legal services", and ss 21, 39 and 56–57.

[43] A person is admitted by the High Court.[18] A person seeking admission must make an application to the High Court.[19] The High Court must make an order for admission if it is "satisfied that the candidate is qualified for admission" and (except where the person qualifies for admission under the Trans-Tasman Mutual Recognition Act 1997) the candidate has taken the oath to truly and honestly conduct themselves in the practice of a barrister and solicitor to the best of their knowledge and ability.[20]

[44] There are three categories of persons who may qualify for admission.[21] It is the first category that is presently relevant. For that category a person is qualified for admission if they:[22]

(a) have all the qualifications for admission prescribed by the New Zealand Council of Legal Education (the NZCLE); and

(b) are fit and proper persons to be admitted as barristers and solicitors of the High Court; and

(c) meet the criteria prescribed by rules made under s 54.

[45] Evidence of (a) is by way of a certified document by an authorised person.[23] Evidence of (b) and (c) is also by way of a certificate, in this case by the executive director of the Law Society or a person authorised by the Council of the Law Society, certifying that the person is a fit and proper person to be admitted and that the person meets the criteria prescribed by rules made under s 54.[24] In each case, the certificate is sufficient evidence of the matters in (a) and of (b) and (c) absence proof to the contrary.

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18 Sections 48(1) and 52.
19 Section 52(1).
20 Section 52(2)–(5).
21 Section 49. The second category relates to a person who has been admitted in another country. The third category is for persons who have a certificate issued under the Trans-Tasman Mutual Recognition Act 1997.
22 Lawyers and Conveyancers Act, s 49(2).
23 Section 50.
24 Section 51.

[46] Section 54(1) of the Act provides that rules, not inconsistent with the Act, may be made in respect of "the evidence of the qualifications, character, and fitness of candidates" and "generally in respect of any matter relating to the admission of candidates as barristers and solicitors". The Lawyers and Conveyancers Act (Lawyers: Admission) Rules 2008 (the Admission Rules) were made pursuant to s 54 of the Act.

[47] The Admission Rules provide that the person seeking admission must first apply to the NZCLE for a certificate of completion and to the Law Society for a certificate of character.[25] An application for admission must then be filed in the High Court and include an originating application made by counsel who moves the admission, an affidavit in support sworn by the candidate and the required filing fee.[26] The affidavit from the candidate must attach:[27]

(a) a certificate of completion or a copy of the refusal by the NZCLE to issue a certificate of completion;

(b) a certificate of character or other responses from the Law Society to the candidate's application for a certificate of character; and

(c) a copy of the receipt for the fee payable to the Law Society for the application for a certificate of character.

[48] Where the application does not include a certificate of completion, the candidate must serve the application for admission on the NZCLE, which must file a notice of opposition setting out the grounds on which the application for admission is opposed and any affidavits in support of the notice of opposition.[28] The candidate's application must then be determined at a hearing at which the NZCLE must be represented.[29]

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25 Admission Rules, r 5(1).
26 Rule 5(2).
27 Rule 5(4).
28 Rule 6(1) and (2)(a)
29 Rule 6(1) and (2)(b).

[49] Similarly, where the application does not include a certificate of character, the candidate must serve the application on the Law Society, which must serve a notice of opposition setting out the grounds on which the application is opposed and any affidavits in support of the notice of opposition.[30] The candidate's application must be determined at a hearing and the Law Society must be represented.[31]

[50] In short, there are two pathways for admission depending on whether the required certificates of completion and of character have been given or refused. Where the certificates are provided, the application is determined by the High Court without opposition. The determination is made by a judge of the High Court at a hearing in chambers or elsewhere as decided by the judge.[32] Where they are not provided, the application is determined by a judge of the High Court on an opposed basis at a hearing.[33]

[51] The Act sets out a non-exhaustive list of matters that the High Court and the Law Society may take into account for the purposes of determining whether a person is a fit and proper person to be admitted as a barrister and solicitor.[34] They include, for example, whether a person is of good character, whether the person has been a director of a company that has been put into liquidation and whether the person has been convicted of an offence.[35]

[52] Practising lawyers are subject to certain "fundamental obligations" and the code of professional conduct and care.[36] They must remain "fit and proper" and obtain or renew a practising certificate.[37] They are subject to the High Court's inherent jurisdiction to discipline enrolled barristers and solicitors and to the disciplinary regime administered by the Law Society under the Act.[38]

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30 Rule 6(3) and (4)(a).
31 Rule 6(4)(b).
32 Rule 8(1).
33 Rule 8(2)(b) and (4)(b).
34 Lawyers and Conveyancers Act, s 55.
35 Section 55(1)(a)–(c).
36 Sections 4 and 95. See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
37 Sections 55 and 41.
38 Section 268 and pt 7. This inherent jurisdiction is long-standing and has its origins in English common law: see *Attorney-General of the Gambia v N'Jie* [1961] AC 617 (PC) at 630.

Law Society process

[53] The Act sets out the regulatory functions of the Law Society. They include "to control and regulate the practice in New Zealand by barristers and by barristers and solicitors of the profession".[39] The Law Society's powers include all powers, rights, and authorities as are necessary or expedient for or conducive to the performance of its regulatory functions.[40] Those functions include "to oppose any application made for admission as a barrister and solicitor".[41]

[54] The Law Society has a published application process for a certificate of character. This sets out the enquiries it makes on receipt of an application. This includes obtaining the applicant's criminal conviction history and requesting any disciplinary history from the candidate's tertiary institution and professional course provider. It may also include, at the Law Society's discretion, advertising the applicant's name so that any person wishing to comment on the applicant's conduct or fitness may do so directly to the branch to whom the application has been made.

[55] The Law Society reviews the information it has obtained and, if there are any issues that require further consideration, the application may be referred to the National Office for review. The National Office may refer the application to a PAC for consideration and the PAC may require an interview. Except where the application is referred to the National Office and a PAC for further consideration, the applicant is advised to allow eight weeks for the process to be completed. Where there are issues that require further consideration, the applicant is advised that it may take longer to process the application.

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39 Section 65(a).
40 Section 67(1).
41 Section 67(1).

Absolute privilege

[56] The Defamation Act 1992 provides for two occasions of absolute privilege. The first relates to proceedings in Parliament.[42] The second relates to judicial proceedings and legal advice. The latter privilege is set out in s 14 as follows:

> **14 Absolute privilege in relation to judicial proceedings and other legal matters**
>
> (1) Subject to any provision to the contrary in any other enactment, in any proceedings before—
>
> (a) a tribunal or authority that is established by or pursuant to any enactment and that has power to compel the attendance of witnesses; or
>
> (b) a tribunal or authority that has a duty to act judicially,—
>
> anything said, written, or done in those proceedings by a member of the tribunal or authority, or by a party, representative, or witness, is protected by absolute privilege.
>
> (2) A communication between any person (in this subsection referred to as the client) and a barrister or a solicitor for the purpose of enabling the client to seek or obtain legal advice, and a communication between that solicitor and any barrister for the purpose of enabling legal advice to be provided to the client, are protected by absolute privilege.

[57] These provisions do not limit any other rule of law that relates to absolute privilege.[43]

Qualified privilege

[58] The Act also sets out matters that are subject to qualified privilege. As with absolute privilege, these specified matters do not limit any other rule of law that relate to qualified privilege.[44] These include:[45]

> …
>
> 4 Subject to any provision to the contrary in any other enactment, the publication, in any proceedings before a tribunal or authority established by or pursuant to any enactment (other than proceedings to which section 14(1) applies), of any matter by a member of the

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42 Defamation Act 1992, s 13.
43 Section 15.
44 Section 16(3).
45 Schedule 1 pt 1.

tribunal or authority, or by a party, representative, or witness in those proceedings.

5 The publication of a fair and accurate report of the pleadings of the parties in any proceedings before any court in New Zealand, at any time after,—

(a) in the case of proceedings before the High Court, a *praecipe* has been filed in those proceedings:

(b) in the case of proceedings before the District Court, the filing of an application for a fixture for the hearing of those proceedings.

6 The publication of a fair and accurate report of the proceedings of any court in New Zealand (whether those proceedings are preliminary, interlocutory, or final, and whether in open court or not), or of the result of those proceedings.

…

[59] In contrast with absolute privilege, a defence of qualified privilege based on any of the matters that are subject to qualified privilege will fail if the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.[46]

High Court

[60] The Judge's reasons for finding that Mr Daruwalla's communications to the Law Society were protected by absolute privilege were as follows:[47]

(a) In my view, the Law Society, in issuing the Certificate is acting in a quasi-judicial function. As noted earlier in this judgment, the two pathways for admission of a candidate to the bar are the first pathway where the Law Society issues a Certificate or, if that does not happen, the second pathway which involves a judicial hearing in the High Court. On that basis I think it is correct that the High Court has delegated its judicial function in determining whether the candidate is a fit and proper person, and whether to issue the Certificate, to the Law Society as the first instance decider.

(b) The Law Society process, including the PAC, involves a quasi-judicial process where evidence is gathered by the Law Society or the PAC and considered, and the candidate has [a] right to be heard.

(c) The imposition of absolute privilege is necessary to protect the Law Society in discharging its statutory function to protect the public

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46 Section 19(1).

47 Judgment under appeal, above n 3, at [129].

interest. As is made clear by the [Act], the duty to protect the confidence in legal services and protecting consumers of legal services is an important public interest and in my view outweighs the plaintiff's right to bring proceedings. Consequently, even if s 14(1)(b) of the Defamation Act does not apply, the common law categories of absolute privilege should apply given the importance of the Law Society being able to receive all information in respect of a candidate without the providers of that information being concerned about retaliatory defamation actions.

(d) I do not accept Mr Jindal's submission that the Law Society's process is purely administrative or analogous to the issue of a certificate as to completion of qualifications by the NZCLE. While obviously initial processing of applications of candidates by the Law Society will be administrative, the decision as to whether a person is fit and proper for the purposes of s 55(1) assessment is carried out in lieu of the High Court making that assessment under pathway two, and therefore is in my view a quasi-judicial function.

Submissions

[61] Mr Jindal submits that whether the communications were protected by absolute privilege should be left for full argument at trial. He notes that the issue is significant and it is not one that has been brought before the courts.

[62] Mr Jindal refers to the principles this Court referred to in *S v W* which guide a court in assessing whether an occasion attracts absolute privilege, and says a necessity-driven approach is to be taken.[48] He says the required analysis is to consider whether the Law Society was acting in a quasi-judicial manner, whether qualified privilege is sufficient to serve the purposes of the Law Society, and whether recognising absolute privilege would be contrary to New Zealand's commitment to the International Covenant on Civil and Political Rights.[49] He also refers to the comprehensive test for whether a body was acting as a tribunal or in a quasi-judicial manner set out by Lord Diplock in the House of Lords in *Trapp v Mackie* and adopted in *Commissioner of Inland Revenue v B*.[50]

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48 *S v W* [2022] NZCA 181 at [31]–[36].

49 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). Article 17(1) and (2) provides that "[n]o one shall be subjected to … unlawful attacks on [their] honour and reputation" and "[e]veryone has the right to the protection of the law against such … attacks".

50 *Trapp v Mackie* [1979] 1 WLR 377 (HL) at 383; and *Commissioner of Inland Revenue v B* [2001] 2 NZLR 566 (HC) at [21]. See also *Tertiary Institutes Allied Staff Assoc Inc v Tahana* [1998] 1 NZLR 41 (CA) at 47.

[63] Mr Jindal submits that it was an error to treat the Law Society's function as quasi-judicial on the basis that the High Court has delegated its function of assessing whether a person is fit and proper through the Law Society certification process. He submits that the NZCLE and Law Society's certification roles are similar and it cannot be said that the NZCLE is acting in a quasi-judicial role. He submits that Parliament has expressly protected those who give information or evidence before a standards committee and for those who appear before a legal complaints review officer or the Disciplinary Tribunal. He submits it can be inferred that privilege for persons providing information to the Law Society when a candidate for admission applies for a certificate of good character was not intended to have the same protection. He also makes a comparison with fitness for practice determinations made in respect of health professional graduates which he says are not quasi-judicial as determined by the Court of Appeal division of the Supreme Court of Queensland in *Akbari v Queensland*.[51]

[64] Mr Jindal says that it is not necessary to protect communications to the Law Society in the good character certification process with absolute privilege as qualified privilege is sufficient. He also says that absolute privilege would render s 272 of the Act useless.[52]

[65] Mr Daruwalla submits that the protection of absolute privilege is necessary. He says the Law Society protects an important societal interest, namely maintaining public confidence in the provision of legal services and protecting consumers of legal services. He says the risks and potential scale of damage associated with that interest creates a pressing need for protection. He says the importance of this societal interest outweighs a plaintiff's right to bring proceedings and the scope of the privilege is narrow. It would only apply to confidential communications to the Law Society in the context of an application for a good character certificate. Should the allegations prove false, there is no risk of harm to the candidate's reputation as the information is not publicly disseminated. Further, the Law Society is obliged as a public authority determining a person's admission to observe natural justice principles.

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51 *Akbari v Queensland* [2022] QCA 74, (2022) 405 ALR 384.

52 See below at [86].

[66] Mr Daruwalla submits the Law Society's certification function attracts absolute privilege under s 14(1)(b) of the Defamation Act. He says this is because the certification function is carried out on behalf of the judiciary and is inextricably connected to judicial proceedings and the Law Society is acting in a judicial manner. He notes that, if the applicant's good character proceeds to a hearing (because the Law Society has declined to provide the certification), the evidence filed by the applicant and the Law Society would have absolute privilege because it forms part of judicial proceedings before the High Court. He submits that, by parity of reason, the information provided to the Law Society by referees or members of the public which the Law Society considers when granting a certificate must also be privileged. He says that certificate is evidence in a judicial proceeding and the material preparatory to its issue must also be privileged.

[67] Mr Daruwalla submits that the Law Society carries out the certification process on behalf of the judiciary noting several features of the process. First, he notes that rules may be issued prescribing how the admission process operates only with the concurrence of the Chief Justice and, relevantly, a High Court judge.[53] In this way the court controls the Law Society's role and process. Secondly, the Admission Rules prohibit a candidate from applying directly to the High Court for admission without having first sought a certificate of character from the Law Society.[54] In this way, the judiciary has in substance appointed the Law Society as the first-instance decision maker. Thirdly, by issuing a certificate of character, the Law Society resolves what otherwise would have been a legal and evidential question for the High Court to determine in a judicial proceeding.

[68] Mr Daruwalla further submits that the Law Society performs its function in a judicial manner. It has a legal obligation to adjudicate on whether the candidate is "fit and proper", and that adjudication can involve parties who oppose the application and file evidence or information to that effect. The Law Society makes its determination

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53 Section 54 of the Lawyers and Conveyancers Act provides that rules governing admission may be made in the manner prescribed by the Senior Courts Act 2016. Section 185 of the Senior Courts Act provides that the Admission Rules may be amended, revoked or replaced under s 148, which permits the Governor-General to do so by Order-in-Council with the concurrence of the Chief Justice and two or more members of the Rules Committee (one of whom must be a High Court judge).

54 Admission Rules, r 5(1)(b).

addressing the same statutory criteria as the High Court addresses in a contested application. It makes its assessment on the basis of evidence and allegations of character defects are investigated by a PAC, which also gathers and considers evidence. If necessary, the candidate is interviewed and has the opportunity to comment on adverse material (albeit that did not happen in this case). If the Law Society refuses to issue a certificate, the legal effect is that the applicant is not qualified for admission to the bar, absent a successful challenge being made to that decision. The ability to challenge the refusal is akin to an appeal right and any abuse of absolute privilege can be corrected through the High Court's processes.

[69] Next Mr Daruwalla submits that the scheme's legislative history supports the judicial nature of the certification function. Under the Law Practitioners Act 1861, the prerogative of the High Court to control admission was devolved to a Board of Examiners appointed by the High Court. The Board's members included High Court judges and lay persons. The Board was required to examine and certify that a candidate was of good character.[55] The Law Society now performs the role previously carried out by the Board, and, before that, the High Court.

[70] Lastly, Mr Daruwalla relies on authorities in the United States as supporting its position.[56] And he says recognising absolute privilege in this case is analogous to this Court's decision in *Teletax Consultants Ltd v Williams* holding that a complaint by a member of the public alleging misconduct by an already-practising lawyer was protected by absolute privilege.[57]

Assessment

[71] We consider the email communications from Mr Daruwalla to the Law Society dated 16 and 17 November 2020 are protected by absolute privilege. However, in our view that privilege does not arise from s 14(1)(b) of the Defamation Act because the Law Society was not under a "duty to act judicially". Rather, absolute privilege arises

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55 Law Practitioners Act 1861, ss 6–7.

56 *Bufalino v Teller* 209 F Supp 866 (SD PA 1962); *Morisseau v Southern Center for Human Rights* United States District Court 1:06-CV-2003-WSD-AJB (ND GA 7 July 2008); *Rothman v Emory University* 123 F 3d 446 (7th Cir 1997); and *Kalish v Illinois Education Assoc* 510 NE 2d 1103 (Ill App Ct 1987). See also *Morisseau v Southern Center for Human Rights* United States District Court 1:06-CV-2003-WSD (ND GA Atlanta Division 19 September 2008).

57 *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA).

from the long-established common law position that anything said, written or done in judicial proceedings is absolutely privileged.[58] The Law Society's investigations for the purposes of providing or declining to provide a certificate of good character were integrally connected to judicial proceedings, namely Mr Jindal's application to the High Court for admission as a barrister and solicitor of the High Court, so as to be covered by this common law privilege.

[72] Our reasons for this conclusion start with the common law position. As it was put by Lord Esher MR in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson*:[59]

> It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes.

[73] As this passage makes clear this immunity applied to courts of justice but also to tribunals acting judicially.[60] And, as it also makes clear, the immunity is founded on public policy. The risk that an individual's reputation may be impugned in the course of judicial proceedings is considered to be outweighed by the desirability of ensuring that no participant is inhibited in what they say.[61]

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58 Richard Parkes and Godwin Busuttil (eds) *Gatley on Libel and Slander* (13th ed, Thomson Reuters, London, 2022) at [14-005]; and Ursula Cheer "Defamation" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [15.10.3].

59 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 432 per Lord Esher MR.

60 See also *Trapp v Mackie*, above n 50, at 378–379 per Lord Diplock and 385–386 per Lord Fraser.

61 Committee on Defamation *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, Wellington, December 1977) [McKay Committee report] at [167].

[74] The scope of that privilege at common law was discussed in *Lincoln v Daniels*, a seminal case on this topic. The speech of Lord Devlin identified the following three categories of absolute privilege:[62]

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M'Ewan*, in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White*, the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[75] In relation to tribunals acting judicially, the scope of the immunity was complicated by legislation in New Zealand. As discussed by the Committee on Defamation (typically referred to as the McKay Committee), whose 1977 report led to the Defamation Act 1992, the Commissions of Inquiry Act 1908 granted immunity to members so long as they were acting bona fide in the discharge of their duty.[63] This seemed to correspond with qualified privilege and so the issue was whether this superseded absolute privilege for tribunals which acted judicially. If it did, this was also at odds with the position of parties and witnesses who under the common law (as preserved in that Act) would still have had the benefit of absolute privilege.[64]

[76] The other issue was that at common law it was not always clear when a decision maker was acting judicially so as to have the benefit of absolute privilege or was of a different character, for example as having an administrative or investigative

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62 *Lincoln v Daniels* [1962] 1 QB 237 (CA) at 257–258 (footnotes omitted). These categories were summarised by this Court in *Teletax*, above n 57, at 701 as: "(1) to what is done in the course of the hearing before the Court or Tribunal; (2) to what is done from the inception of proceedings including all pleadings and other documents brought into existence for the purpose of proceedings; and (3) to the briefs of evidence and to what is said in the course of interview of potential witnesses".

63 McKay Committee report, above n 61, at [172], citing s 3 of the Commissions of Inquiry Act 1908.

64 At [173], citing s 6 of the Commissions of Inquiry Act.

function.[65] Case law had developed characteristics to assist with this assessment. The McKay Committee discussed difficulties with the common law as it had developed but concluded that it was not practicable to formulate a statutory test that defined "judicial proceedings" which would be clear in its application.[66] It considered that courts should be left to determine whether a tribunal did exercise a judicial function and so attracted absolute privilege, or did not and therefore only had the benefit of qualified privilege.[67]

[77] This background explains ss 14 (tribunals or other authorities that attract absolute privilege) and 16, and sch 1(4) (tribunals or other authorities that attract qualified privilege) of the Defamation Act which followed from the McKay Committee's recommendations. As discussed by this Court in *Tertiary Institutes Allied Staff Association Inc v Tahana* the purpose of s 14 was to retain the common law as to the tribunals which were to attract absolute privilege and to confer that privilege on all those who take part in those judicial processes.[68] In other words, ss 14 and 16 were not directed at proceedings before the senior courts which already had immunity at common law. Rather, the sections were directed to the privilege, either absolute or qualified, that applied to tribunals or other authorities and ensure that this privilege uniformly covered the tribunal or authority, parties, representatives and witnesses.

[78] As to the characteristics of a tribunal that attract absolute privilege, the House of Lords decision in *Trapp v Mackie* provides guidance.[69] That case concerned a headmaster of a school who was dismissed from his post.[70] The Secretary of State set up an Inquiry into whether the headmaster's dismissal was reasonably justifiable.[71] The commissioner appointed to undertake the Inquiry reported to the Secretary of State that the headmaster's dismissal was reasonably justified.[72] The Secretary of

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65 At [176].
66 At [183].
67 At [183].
68 *Tertiary Institutes Allied Staff Assoc Inc v Tahana*, above n 50, at 53.
69 *Trapp v Mackie*, above n 50. The relevant events occurred in Scotland but, as Lord Diplock observed at 378, there was no difference between the laws of Scotland and England.
70 At 378 per Lord Diplock.
71 At 380 per Lord Diplock.
72 At 384 per Lord Fraser.

State accepted the report and upheld the dismissal.[73] The headmaster sued the respondent who had given evidence to the Inquiry. He alleged the respondent had given evidence that was maliciously false. The respondent applied to strike out the headmaster's claim contending that he had the benefit of absolute privilege in giving his evidence.

[79] Lord Diplock noted that there was no "single touchstone" for determining whether a tribunal has similar attributes to a court of justice or acts in a similar manner.[74] This reflected that the privilege involved balancing conflicting public policies: the policy that the law should provide a remedy to a citizen whose good name and reputation is impugned by malicious falsehoods; and the policy that witnesses before tribunals recognised by law should give their testimony free from any fear of being harassed by an action or an allegation, whether true or false, that they acted from malice.[75] To decide whether a tribunal acted in a manner similar to courts of justice, in Lord Diplock's view it was necessary to consider: first, under what authority the tribunal acted; secondly, the nature of the question into which it had a duty to inquire; thirdly, the procedure adopted in carrying out the inquiry; and fourthly, the legal consequences of the conclusion reached by the tribunal as a result of the inquiry.[76]

[80] Addressing these questions, Lord Diplock identified 10 characteristics that cumulatively were "more than enough" to justify the conclusion that the Inquiry had the necessary attributes for absolute privilege.[77] These characteristics were as follows:[78]

> (1) It was authorised by law; it was constituted pursuant to an Act of Parliament. (2) It was inquiring into an issue in dispute between adverse parties of a kind similar to issues that commonly fall to be decided by courts of justice. (3) The inquiry was held in public. (4) Decisions as to what oral evidence should be led and what documents should be tendered or their production called for by the adverse party were left to the contending parties. (5) Witnesses whom either of the adverse parties wished to call were compellable, under penal sanctions, to give oral evidence or to produce documents as havers; and were entitled to the same privilege to refuse to answer a question or to produce a document as would apply if the inquiry were

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73 At 384 per Lord Fraser.
74 At 379.
75 At 379, quoting *Dawkins v Lord Rokeby* (1873) LR 7 HL 744 at 753 per Kelly CB.
76 At 379.
77 At 384.
78 At 383.

> a proceeding in a court of law. (6) The oral evidence was given upon oath; if it were false to the knowledge of the witness he would incur criminal liability for the offence of perjury. (7) Witnesses who gave oral testimony were subject to examination-in-chief and re-examination by the party calling them and to cross-examination by the adverse party, in accordance with the normal procedure of courts of law. (8) The adverse parties were entitled to be, and were in fact, represented by legally qualified advocates or solicitors and these were given the opportunity of addressing the tribunal on the evidence that had been led. (9) The opinion of the tribunal as reported to the Secretary of State, even though not of itself decisive of the issue in dispute between the adverse parties, would have a major influence upon his decision either to require the education committee to reconsider its resolution to dismiss the [headmaster] or to let the matter rest. (10) As a result of the report either of the parties to the inquiry might be ordered by the Secretary of State to pay the whole or part of the expenses of appearing at the inquiry incurred by the adverse party; and such expenses would be recoverable in the same manner as expenses incurred in a civil action in a court of law.

[81] In New Zealand, this Court in *Teletax* accepted that a letter complaining about a solicitor written to the President of the Wellington District Law Society was protected by absolute privilege because it was connected to the initiation of judicial or quasi-judicial proceedings.[79] The issue was whether the letter was on its proper interpretation a complaint.[80] The District Law Society had treated it as one, seeking a response from the solicitor as to its contents.[81] The Court considered the letter could only be construed as a complaint and therefore was protected by absolute privilege with the result being that the solicitor's claim against the writer of the letter was struck out.[82]

[82] Similarly, in *Hercules v Phease*, the Appeal Division of the Supreme Court of Victoria held that absolute privilege applied to a complaint of alleged misconduct by a solicitor lodged under the Victorian legislation regulating legal practitioners.[83] Fullager and Ormiston JJ reasoned that the complaints were properly characterised as initiating the process for proceedings in a quasi-judicial tribunal, even though after investigation they did not proceed to refer the complaint for a hearing, as the making

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79 *Teletax Consultants Ltd v Williams*, above n 57. A similar position was reached in respect of a complaint against a solicitor in *Lilley v Roney* (1892) 61 LJQB. That case concerned a letter and an affidavit sworn with it about a solicitor's professional conduct to the Registrar of the Law Society. The letter was in the statutory form as prescribed by the relevant rules but this Court in *Teletax* at 702 noted about the letter at issue before it that "[s]uch a letter need not be in any particular form". See also *Addis v Crocker* [1961] 1 QB 11 (CA).

80 At 702.

81 At 700.

82 At 702–703.

83 *Hercules v Phease* [1994] 2 VR 411 (VICAD).

of a complaint was the only way in which a complainant could bring a matter for a hearing.[84]

[83] In contrast, in *Lincoln v Daniels* an unsolicited complaint of professional misconduct about a Queen's Counsel made to a secretary of the General Council of the Bar of England and Wales did not have absolute privilege. This was because the Bar Council was an elected body of barristers which acted in General Meeting. It had no disciplinary powers but in practice investigated complaints against its members and in appropriate cases referred them to the Benchers of the relevant Inn of Court for the barrister concerned. Each Inn of Court had authority to exercise disciplinary powers over the barrister.[85] As it was put by Devlin LJ, "when the body to whom the letter is addressed has many other functions besides that of investigating complaints, it may not be easy to say when 'proceedings' begin".[86] In that case, the communications sent to the Bar Council were not a step in the Inquiry by an Inn of Court. The Bar Council was in no sense the agent of the Benchers and did not derive its authority from them.

[84] In this case, we are not concerned with the Law Society's disciplinary jurisdiction under pt 7 of the Act. Part 7 establishes a Standards Committee which can determine to refer the complaint to the Disciplinary Tribunal, determine that there has been unsatisfactory conduct or determine to take no action.[87] The jurisdiction provides for a Standards Committee to exercise its functions consistent with natural justice, to receive evidence and take evidence on oath and to have a hearing on the papers, and sets out the persons who make submissions for that hearing.[88] The Act authorises a Standards Committee to make orders (for example to censure a practitioner, to reduce their fees, to pay a fine and to pay costs to the complainant).[89] The Act also provides that every person who gives information, evidence or documents to a Standards Committee has "the same privileges … as witnesses have in a court of law".[90] It also provides that counsel appearing before a Standards Committee has "the same

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84 At 412 per Fullager J and 450 per Ormiston J. Marks J, with particular reference to American authorities, considered initiating complaints required protection in the circumstances of the statutory process and in light of public policy in protecting such complaints: see at 421–423.

85 *Lincoln v Daniels*, above n 62, at 265 per Lord Danckwerts.

86 At 259 per Lord Devlin.

87 Lawyers and Conveyancers Act, ss 126 and 152.

88 Sections 142, 151 and 153.

89 Section 156.

90 Section 186.

privileges and immunities as counsel in a court of law".[91] The position is different for members of Standards Committee or an agent, employee, or delegate of a Standards Committee. They are "not under any civil or criminal liability … unless that person has acted in bad faith".[92]

[85] Similarly, pt 7 of the Act provides for the Disciplinary Tribunal to, amongst other things, hear and determine a charge against a practitioner.[93] It requires the Disciplinary Tribunal to observe the rules of natural justice, sets out who is entitled to appear and be heard and be represented by counsel, provides for evidence to be taken on oath, permits the issuing of summons, sets out the orders the Tribunal may make, and provides for an appeal to the High Court and, on a point of law with leave, to the this Court.[94] Similar privileges and immunities as those that apply in relation to Standards Committees are provided.[95] Hearings are typically conducted in public.[96]

[86] Additionally, in respect of the Law Society's involvement in the pt 7 jurisdiction, it (and any member, officer, or employee) does not have any criminal or civil liability unless it has acted in bad faith.[97]

[87] These pt 7 provisions for the discipline of practising lawyers are in contrast with the Law Society's role in applications to the High Court for admission of barristers and solicitors under pt 3 of the Act. Although the Admission Rules set out the procedural steps for an application for admission, how the Law Society goes about deciding whether to issue a certificate of character or to decline to do so are not set out to the same extent anywhere in either the Act or the Admission Rules. Rather, the steps it takes are primarily derived from its authority under its constitution.[98] In deciding whether to issue a certificate of character or to decline to do so, the Law Society does not have the power to summons witnesses or administer oaths.

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91 Section 187.
92 Section 185.
93 Section 227. The Disciplinary Tribunal is established by s 226.
94 Sections 236–237, 239, 242, 253–254, 260 and sch 4.
95 Schedule 4.
96 Sections 238, 238A and 240.
97 Section 272.
98 Section 70 requires the Law Society to have a constitution, which is deemed by s 72 to be secondary legislation. Clause 14 of the Lawyers and Conveyancers Act (Lawyers) Constitution 2008 empowers the Society to appoint committees to conduct its affairs.

Nor is its decision on whether to issue a certificate of character determinative. Rather, if one is issued, it is evidence that a person is fit and proper absent proof to the contrary. If one is declined, and if the applicant pursues an application, it is for the High Court to determine the matter on the evidence, including the evidence the Law Society relies upon in support of its opposition to an application for admission.

[88] When investigating whether to issue a certificate of character, the Law Society is not acting as a tribunal or other authority with characteristics similar to a court of law. It has an investigatory role rather than one in which has a duty to act judicially. This means that it does not have the protection of absolute privilege under s 14(1)(b) of the Defamation Act. Rather, we consider the correct analysis is that the Law Society's role is part of judicial proceedings in the High Court, namely a candidate's application to the High Court for admission as a barrister and solicitor. The Act authorises the Law Society to perform this investigatory role for the purpose of such judicial proceedings. As discussed, the procedure under the Admission Rules requires that the applicant must first apply for the certificate of character before making their application to the High Court. An application to the Law Society for a certificate of character is therefore the initiating step to applying to the High Court (along with the application for a certificate of completion from the NZCLE) and integral to an application to the High Court. The Law Society's role is to provide evidence to the Court whether by a certificate or, if a certificate is not given, by affidavit.

[89] In short, the communications made to the Law Society as part of its enquiries are evidence brought into existence for the purpose of a judicial proceeding. It can either be said to be within the second or third categories discussed by Lord Devlin in *Lincoln v Daniels*.[99] If the communications end up as part of the evidence before the High Court, they will be in the first category. Either way, such communications are protected by the common law absolute privilege that applies to witnesses, judges, counsel, parties and every document produced in the course of judicial proceedings.

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[99] *Lincoln v Daniels*, above n 62, at 257–258.

[90] This conclusion is consistent with the public policy underpinning absolute privilege. In the context of the Law Society's disciplinary jurisdiction, it is well established that the public policy that the law should provide a remedy to a person who is maliciously defamed should yield to the need for persons to give their testimony about the conduct of a barrister or solicitor without fear of action against them, whether their testimony is true or false. The public interest in the need for free and frank testimony of a person's character for the purposes of admission to the High Court as a barrister and solicitor is as comparably strong as in the Law Society's disciplinary jurisdiction and should be appropriately recognised in this case.

Result

[91] The appeal is dismissed.

[92] The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
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