

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

**CIV-2016-404-001312
[2016] NZHC 2415**

UNDER the Defamation Act 1992

BETWEEN JOHN DOUGLAS SELLMAN
First Plaintiff

BOYD ANTHONY SWINBURN
Second Plaintiff

SHANE KAWENATA FREDERICK
BRADBROOK
Third Plaintiff

AND CAMERON JOHN SLATER
First Defendant

CARRICK DOUGLAS MONTROSE
GRAHAM
Second Defendant

... cont

Hearing: 5 October 2016

Appearances: D M Salmon and D Nilsson for Plaintiffs
B P Henry for First Defendant
E J Grove for Second Defendant
W Akel for Proposed Fourth and Fifth Defendants

Judgment: 11 October 2016

JUDGMENT OF PALMER J

This judgment is delivered by me on 11 October 2016 at 11 am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
Lee Salmon Long, Auckland
B P Henry, Barrister, Auckland
E J Grove, Barrister, Auckland
Simpson Grierson, Auckland

FACILITATE COMMUNICATIONS
LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD & GROCERY
COUNCIL INCORPORATED
Fifth Defendant

Summary

[1] The three plaintiffs are suing three defendants for defamation. They seek to join two more defendants. New Zealand courts take a liberal approach to joinder. Plaintiffs can generally bring proceedings against all the defendants they wish to sue in relation to the same matters and defendants can apply to strike out proceedings if they wish. I consider the general rule should apply here. The effective administration of this proceeding requires joinder of the proposed two additional defendants. I order accordingly.

Facts

The parties

[2] The plaintiffs, Dr John Sellman, Dr Boyd Swinburn and Mr Shane Bradbrook are medical professionals. They have brought defamation proceedings against Mr Cameron Slater the first defendant, Mr Carrick Graham the second defendant and Facilitate Communications Ltd (FCL) the third defendant.

The claims

[3] An Amended Statement of Claim was filed on 3 August 2016. In it the plaintiffs say that, from 2009 onwards, Mr Slater and Mr Graham published defamatory blog posts and user comments about them on the Whale Oil website. They say Mr Graham was acting on behalf of, and as agent for, FCL. They also say Mr Graham and FCL were paid by Ms Katherine Rich and the New Zealand Food and Grocery Council Inc (FGC), named as the fourth and fifth defendants, to publish the blog posts and comments. The plaintiffs seek general damages and aggravated or punitive damages from the defendants for forty one causes of action.

The proposed joinder of Ms Rich and the FGC

[4] On 12 September 2016, by memorandum of counsel, the plaintiffs sought an order confirming Ms Rich and the FGC were properly added as defendants to the proceedings under r 4.56 of the High Court Rules.

[5] In a memorandum of 13 September 2016 Mr Akel, for Ms Rich and the FGC, pointed out that no formal application for joinder had been made and that the 3 August 2016 Amended Statement of Claim is of no effect until such an order is made. Mr Akel submitted that the allegation that Ms Rich and the FGC published the blogs by procuring the defendants to publish them is novel in the law of defamation. He also submitted that an important legal question would concern whether blogs posted in 2009 were published then or whether publication was ongoing due to the blog posts remaining on the website.

[6] On 27 September 2016 Courtney J declined to order joinder of Ms Rich and the FGC without an application and supporting affidavit.

[7] On 30 September 2016 the plaintiffs filed a formal application, and supporting affidavit, seeking an order under r 4.56 confirming joinder and an urgent half day hearing of the application. At the call of the matter in the duty list on 5 October 2016 Mr Salmon sought the matter to be determined forthwith. He suggested he had advised Mr Akel of his intention to do so on Monday, though Mr Akel appears to have understood that was only a possibility. I heard argument from all parties on joinder.

Law

[8] Rule 4.56 of the High Court Rules deals with striking out and adding parties:

4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
 - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
 - (b) the name of a person be added as a plaintiff or defendant because—
 - (i) the person ought to have been joined; or
 - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.
- (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[9] When the application is to add a defendant, r 4.56 should be read in conjunction with r 4.3:

4.3 Defendants

- (1) Persons may be joined jointly, individually, or in the alternative as defendants against whom it is alleged there is a right to relief in respect of, or arising out of, the same transaction, matter, event, instrument, document, series of documents, enactment, or bylaw.
- (2) It is not necessary for every defendant to be interested in all relief claimed or every cause of action.
- (3) The court may make an order preventing a defendant from being embarrassed or put to expense by being required to attend part of a proceeding in which the defendant has no interest.
- (4) A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining—
 - (a) which (if any) of the defendants is liable; and
 - (b) to what extent.

[10] The New Zealand courts take a liberal approach to joinder, especially to joinder of defendants by plaintiffs.¹ Plaintiffs can bring proceedings against all the defendants they wish to sue in relation to the same matters. Defendants can apply to strike out proceedings if they wish. Richardson J (as he then was) encapsulated the position for the Court of Appeal in *Auckland Regional Services Trust v Lark*:²

The purpose of joinder rules is to secure the determination of all disputes relating to the same subject-matter without the delay and expense of separate proceedings. The general test is whether the proposed party will be directly affected by any order which may be made in the proceedings and the general rule is that it is for the plaintiff to decide who he or she will sue and for any person named as defendant to take striking-out proceedings if it is considered by them that there is no arguable cause of action.

[11] There is good reason for this approach. Otherwise the substance of a dispute could be the subject of shadow litigation, over whether there should be joinder, delaying substantive resolution of proceedings. Or litigation over related issues against different parties could proliferate in separate proceedings, causing coordination problems and, potentially, injustice.

¹ *Chan v Seyip Assn of NZ Inc* [2008] NZAR 37 (HC) at [11]-[12].

² *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135, 138 (CA).

Should Ms Rich and the FGC be joined?

Submissions

[12] Mr Salmon for the plaintiffs submits that the ordinary position should apply here where the defendants are joined and may apply for strike out if they wish. He says there is no prejudice to Ms Rich and the FGC but there is a risk of serious prejudice to the plaintiffs if joinder is not ordered. That is because they think Ms Rich and the FGC will argue limitation is still running. They submit they could simply file fresh proceedings against Ms Rich and the FGC which would inevitably be consolidated with these proceedings.

[13] Mr Akel, for Ms Rich and the FGC, repeated his submissions in the memorandum of 13 September 2016, emphasising the novelty of the cause of action and the significance of the limitation issue. He says full argument over the joinder application is required, for half a day. Mr Akel also offered to suspend limitation until my decision in this judgment is released.

[14] Mr Henry, for Mr Slater, supported Mr Akel. He also advised he will shortly apply to strike out the Amended Statement of Claim on limitation grounds which are similar to those raised by Mr Akel and should be heard together with the joinder application. Mr Grove, for Mr Graham, abides the court's decision on the joinder application. He notes he would support the others' arguments on limitation.

Decision

[15] I agree that the effective administration of this proceeding requires joinder of Ms Rich and FGC as defendants. It would be undesirable for separate proceedings to be issued against them when the issues to be traversed are so close to those in this proceeding. The interests of the first three defendants here and Ms Rich and the FGC are closely aligned. Each set of defendants would be directly affected by orders made in the other proceedings, whether that be discovery orders or strike out for limitation reasons. The foreshadowed application by Mr Henry illustrates that.

[16] I consider the merits of joinder are so clear that no useful purpose would be served by having another half day of argument about the matter. The general rule should apply here that it is for the plaintiffs to decide who they will sue and the defendants to take striking-out proceedings if they wish.

Result

[17] I order that Ms Rich and FGC be joined as fourth and fifth defendants. The Amended Statement of Claim of 3 August 2016 is valid.

[18] I also direct the parties to submit a joint memorandum of counsel to the Court within 10 working days of the date of this judgment, proposing a timetable that includes proposed dates for: a conference under s 35 of the Defamation Act 1992; a deadline for filing interlocutory applications; a close of pleadings date; and any other steps that can be usefully timetabled now.

Palmer J