IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY CP 192/99

1056

BETWEEN TECHNIC BITUMEN PACIFIC LIMITED

Plaintiff

AND SHELL NEW ZEALAND LIMITED

First Defendant

AND W H GROVE & SONS LIMITED

Second Defendant

Hearing: 22 August 2000

Counsel: J B M Smith and J D Palmer for the Plaintiff
J E Sutton for the First Defendant

Judgment: 31 AUG 2000

JUDGMENT OF WILD J

Introduction

[1] The plaintiff ("Technic") applies to review a decision of Master Thomson given on 3 December 1999. In that decision the Master, on the application of the first defendant ("Shell"), joined the second defendant ("Grove") as a defendant. He did so under both "legs" of Rule 97(1)(b), that is, both on the grounds that Grove ought to have been joined and on the ground that Grove's presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceeding.

Review principles

[2] As the amendment of r 61C effective 1 January this year, the position is clear:

[a] Since the decision under review is a reasoned one made following a defended hearing, the review proceeds by way of re-hearing, rather than de novo. The hearing is essentially appellate in character.

[b] Technic must therefore satisfy me that the Master's decision is wrong i.e. that the Master erred in legal principle, or has taken account of irrelevant, or overlooked relevant, considerations.

This proceeding

[3] Technic is a small Fijian bitumen company. In 1998 it tendered successfully to the Western Samoan Government for a bitumen supply contract. It alleges Shell also tendered, through Grove in Auckland and a company called Breckwoldt Samoa Indent & Merchandising Co. Ltd ("BSIM") in Western Samoa. Technic alleges that, after the contract had been awarded to it, Shell defamed it or slandered its bitumen product by publishing defamatory statements to Grove and through Grove to BSIM and Ministers and officials in the Western Samoan Government. Technic holds Shell liable for all these publications.

[4] Pleading the now customary array of causes of action (defamation, breach of the Fair Trading Act, slander of goods, interference in contractual relations and interference with trade by unlawful means), Technic's statement of claim claims $500,000 general and $600,000 exemplary damages.

[5] In its statement of defence Shell denies that it tendered to the Western Samoan Government for the bitumen supply contract, either directly or through Grove or BSIM. It denies making to Grove any publication defamatory of Technic, or procuring any of the subsequent defamatory publications.

[6] Shell indicated that it is likely to seek leave to join Grove as a third party.

Rule 97

[7] Relevantly, this provides:

> "**97. Striking out and adding parties** – (1) The Court may at any stage of a proceeding, either upon or without the application of any party, and on such terms as appears to the Court to be just, order –
>
> (a) ...
>
> (b) That the name of any person who ought to have been joined, or whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceeding be added, whether as plaintiff or defendant."

The Master's decision

[8] Key points are that the Master:

[a] States that the opening words of r 97 give the Court an "unfettered discretion" to add a defendant.

[b] Follows *Knight v Attorney-General* 29.10.92 HC Wellington CP566/92 Master Williams QC and *Paccar v Four Ways Trucking Inc.* [1995] 2 NZLR 492, rejecting a submission by Technic that the statement of principles laid down by Master Williams QC in *Knight* is too wide.

[c] Holds that the Court, subject to overall justice, will ensure its time is effectively managed and utilised. Such an approach harmonises both with the Case Management regime and the modern approach that, if jurisdiction exists, Courts should tend to exercise it in favour of joinder: *Mainzeal Corporation Ltd v Contractors Bonding Ltd* (1989) 2 PRNZ 47.

[d] Outlines earlier interlocutory steps, in particular an unsuccessful pre-commencement discovery application by Technic against Shell, supported by a draft statement of claim naming both Shell and Grove as defendants, and holding both liable for the defamatory publications.

[e] States that the Court could join Grove over the opposition of both Technic and Grove, and despite Grove not having been joined as a third party.

[f] Records Technic's argument that "the ordinary rule that it is for the plaintiff to decide who it will choose to sue" should apply "in all but the most exceptional circumstances".

[g] Observes that Grove cannot strongly resist joinder, and that its "innocent disseminator" defence under s 21 Defamation Act 1992 is highly arguable.

[h] States that Grove and BSIM are involved, because Technic's claim alleges publication by or through them, and in some instances orally.

[i] Is dismissive of Technic's point that joinder of Grove may give Shell unwarranted protection in any award of exemplary damages, because English law provides that an award of exemplary damages against multiple defendants in a defamation case must be set at the lowest sum for which any of those defendants could be held liable. (That rule arises from the House of Lords' decision in *Broome v Cassell* [1972] AC 1027, 1090 to which the Master did not specifically refer.) The Master states that this rule does not necessarily apply in New Zealand "because English law is not necessarily New Zealand law".

[j] Declines to follow the judgment of Giles J in *Steelmasters Auckland Limited v Ngavaevae* 10.2.99 HC Auckland CP255/98, distinguishing

it as a case decided on its own facts, without reference to *Knight*, and "contrary to the liberal approach to joinder which is generally adopted by the Courts". The Master also pointed out that in *Steelmasters* the plaintiff, unlike Technic here, had given an explanation as to why it did not wish to sue the defendant in question.

[k] Concludes:

> "[18] I think however that Rule 75(1)(c) illustrates the wisdom of joining Grove as a defendant rather than as a third party, because if Shell proves that Grove was not an innocent disseminator of the material in respect of the second publication, then the plaintiff, I imagine, would wish to be n a position where it could have judgment entered against Grove in respect of that allegation. So would Shell. It would surely be a waste of Court time to have such an issue as that determined in this proceeding, as presently constituted, or with Grove as a third party, but not be able to give appropriate remedies.
>
> [19] Furthermore, it appears that the plaintiff's claim will go to a Jury. That is a very good reason in itself in my view why all the parties involved in this matter should be before the Court as parties. I consider the plaintiff has really only advanced technical arguments against the joinder of Grove as a defendant rather than as a third party. It has shown no merits.
>
> [20] I conclude as submitted by Ms Sutton, that both legs of Rule 97(1)(b) have been made out, namely that Grove ought to have been joined, or alternatively whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceeding. I order that Grove be added as a defendant accordingly. ..."

Why Technic says the Master was wrong

[9] Technic argues that the Master's decision is in error in five main respects:

[a] Technic's statement of claim contains no allegation and seeks no redress against Grove, and none is intended. Accordingly, the joinder of Grove was not appropriate within either limb of r 97(1)(b).

[b] The law is that it is for a plaintiff to decide who it should sue, and not for the Court paternalistically to direct it. The Master erred in holding to the contrary. *Steelmasters* and *Walton Security Systems Ltd v Applied Engineering Technology Ltd* 1.12.86 HC Wellington A144/85, Eichelbaum J correctly state the law and *Knight* is wrong. *Paccar* is also wrong insofar as it endorsed *Knight* but in fact it did not apply *Knight.*

[c] The Court's discretion under r 97(1) is not unfettered, as the Master said. The discretion is circumscribed by the rule.

[d] The case management regime cannot supplant legal principle or the requirements of s 97(1). The Master was wrong to introduce, as a relevant factor, "the case management regime".

[e] The Master was doubly wrong in saying that Technic had not given an explanation as to why it did not wish to sue Grove. No explanation was due, but one had been given. Technic had explained that it did not see Grove as the primary culprit and had therefore decided not to sue it, in particular because of the possible application of the rule in *Broome v Cassell.*

[f] The Master was wrong to dismiss Technic's concern arising from the rule in *Broome v Cassell* on the basis that it might not be the law in New Zealand.

Is the Master's decision wrong?

[10] The correctness of the Master's decision depends on whether he correctly interpreted and applied r 97(1)(b).

[11] The starting point is the wording of the rule. Applied to the parties and circumstances here, it has these aspects:

[a] The Court may add a party of its own motion, or on the application of any party. Inherent in this is that a party may be added against Technic's wishes.

[b] The words "ought to have been joined" bear the connotation that Technic ought to have joined Grove. Ought to have, in the sense that Grove is the party necessary to enable liability for the wrong(s) complained of by Technic to be correctly sheeted home by the Court i.e. correctly apportioned amongst those responsible.

[c] "... necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceeding ..." are words having much the same meaning. They can be summarised by the phrase "necessary to enable the Court to resolve all matters". The words "all questions involved in the proceeding" are deliberately wider than "all issues raised by the pleadings". They encompass claims/defences not presently made/raised – because a proper party is missing. They empower the Court to bring before it all those who are necessary to enable the Court to clean the whole matter up.

[12] Whilst not necessarily disagreeing with Master Williams QC in *Knight*, I think deriving principles from precedent is apt to divert attention away from the wording of r 97. I say that because decided cases tend to be no more than applications of r 97 to their particular circumstances. I include in that *Knight, Pacar, Steelmasters* and

Walton. For example, in *Knight* the particular facts which I think influenced Master William QC in his decision were:

[a] An unusual and sad factual situation. Mr Knight was a soldier. When he consulted the Army doctor about a lump on his thigh, he was referred to a Mr Shatwell, an orthopaedic surgeon. Mr Shatwell diagnosed the lump as non-malignant. It was in fact incurably cancerous. By the time of the joinder application, Mr Knight had outlived the most optimistic estimate of his life expectancy.

[b] The Army had joined Mr Shatwell as a third party, and as a positive defence had pleaded that Mr Shatwell was an independent consultant for whose conduct the Army was not vicariously liable. Mr Shatwell was sticking doggedly to a deliberate decision on his part not to join Mr Shatwell as a defendant "in the realisation that if, at trial, the Crown was successful in persuading the Court that it was not vicaroiusly liable for Mr Shatwell's actions then he, Mr Knight, would probably lose his case and in circumstances where he may have no opportunity of issuing fresh proceedings against Mr Shatwell".

[c] In those circumstances Master Williams QC said:

> "This Court should not allow Mr Knight's claim to fail for want of parties, particularly in the unfortunate circumstances of this case where it is conceivable the evidence may demonstrate that Mr Knight's view of responsibility is misdirected, that the current defendant is not liable to him and that he then has no opportunity to redress the effect of the decision which he has currently taken."

[13] I agree with Giles J in *Steelmasters* and Eichelbaum J in *Walton* that it is generally for a plaintiff to choose who it sues, and for what. Indeed, Master Williams QC said just that in *Knight*. That stems from the very nature of litigation in the Courts. But, the plaintiff having made its initial choice of defendant(s), the Court does have power to add a necessary (or to remove an unnecessary) party(s). Rule 97

gives the Court that power and thus overrides or modifies any underlying principle of law.

[14] I think the Masters' references in *Knight* and in this case to case management tend to confuse rather than enlighten. The focus of case management is different from that of r 97. Rule 97 is about ensuring that there are before the Court all the parties necessary to enable the Court completely to dispose of all questions involved in the proceeding. Case management is about ensuring that the proceeding moves toward final disposal as quickly, efficiently and economically as is commensurate with justice.

[15] Under either leg or limb of r 97(1)(b), it seems to me that Grove ought to be joined and is a necessary party to this proceeding. Technic's case is that Shell published defamatory statements to Grove, which Grove disseminated or "on-published" to BSIM, which in turn further published them to ministers and officials of the Western Samoan Government. Given that Shell denies tendering for the bitumen contract with the Samoan Government either directly or through Grove and/or BSIM, and denies publishing defamatory statements to Grove, the result at trial could be that Grove will be found to have been the originator of the allegedly defamatory statements.

[16] If that is the result, then Technic's claim will fail, because Grove is not a defendant. Grove therefore ought to have been joined, or is a necessary party, in the respects I have outlined in paragraph [11] above.

[17] Technic rightly raised some practical difficulties stemming from the joinder of Grove. Technic will now be directed to file an amended statement of claim including any claim it now wishes to make against Grove. Mr Smith made it clear that Technic does not wish to make any claim against Grove. I do not think the Court can or should oblige it to do so. If Technic declines to amend its statement of claim, or if its amended claim contains no claim against Grove, then Grove could apply under r 9, by analogy with r 465, for the entry in its favour of judgment against Technic. Presently, I cannot see any basis on which that application could fail. That

course would appear to meet Technic's objection to joinder of Grove as a defendant, Shell's reason for seeking it, and also the Court's concern to ensure that it can adjudicate upon all issues in a single trial. As to Technic's position, entry of judgment for Grove against Technic is consistent with Technic's desire not to sue Grove. It also overcomes Technic's concern that the rule in *Broome v Cassell* may operate against it: it would leave Shell as the only defendant at trial. Further, having been joined at Shell's instance, and Technic having declined to make any claim against Grove, it seems inevitable that Shell would be ordered to pay Grove's costs (likely to be minimal). As to Shell's position, Ms Sutton explained that Shell had applied to join Grove because it did not want to be involved in any subsequent proceeding brought by Technic against Grove (having failed against Shell), which might lead to Grove joining Shell as a third party. Judgment for Grove against Technic in this proceeding would render all matters relating to the allegedly defamatory publications res judicata insofar as they involve Grove and/or raise cause of action estoppels against Grove. At the very least, in view of the joinder of Grove as a defendant in this proceeding, any subsequent proceeding by Technic against Grove would promptly be struck out as an abuse of the Court's process. In *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411, 425; [1978] All ER 30, 35-26, Lord Wilberforce explained this type of situation thus:

> "The second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 and its existence has been reaffirmed by this Board in *Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56. A recent application of it is to be found in the decision of the Board in *Yat Tung Co v Dao Heng Bank* [1975] AC 581. It was, in the judgment of the Board, there described in these words (at 590): '... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.' This reference to 'abuse of process' had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine

> and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."

[18] I make the point, I hope not too obvious, that what I have said in the previous paragraph argues for joinder of Grove, not against it. The course I outlined cannot occur if Grove is not a defendant.

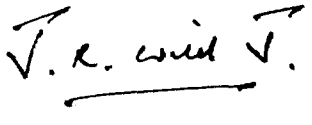
Result

[19] For the reasons given I consider the Master's decision was the correct one or, at least, I am far from persuaded that it was wrong, or that the Master failed to consider relevant considerations or was distracted by irrelevant ones.

[20] Accordingly, I decline to review the Master's decision.

Costs

[21] Shell is entitled to its costs based, as agreed by the parties, on category 3 band B. The hearing took half a day (2 pm – 4.50 pm). I leave the parties to make their own calculations.



Signed at 9 a.m. on 31 August 2000

Solicitors

Russell McVeagh, Wellington for the Plaintiff

Rudd Watts & Stone, Wellington for the First Defendant