IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1088
[2015] NZHC 2739

BETWEEN	HUMAN RESOURCES INSTITUTE OF NEW ZEALAND INCORPORATED Plaintiff
AND	ELEPHANT TRAINING & HR LIMITED First Defendant
	ANGELA ATKINS Second Defendant

Hearing: 5 November 2015

Appearances: C J Griggs for Plaintiff
S C Dench for Defendants

Judgment: 6 November 2015

JUDGMENT OF ASSOCIATE JUDGE R M BELL

This judgment was delivered by me on ***6 November 2015*** *at* ***4:30pm***
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Franks Ogilvie, Wellington, for Plaintiff
Dyer Whitechurch, Auckland, for Defendants

Counsel:
Christopher Griggs, Wellington, for Plaintiff
Simon Dench, Auckland, for Defendants

[1] The defendants apply under s 46(1) of the District Courts Act 1947 to transfer this proceeding to the District Court. The section says:

> **46 Transfer of proceeding from High Court to District Court**
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> (1) If, where a proceeding has been commenced in the High Court,—
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> (a) An agreement is made under the provisions of section 37 of this Act that a District Court shall have jurisdiction; or
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> (b) The subject-matter of the proceeding is within the jurisdiction of District Courts,—
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> the High Court or a Judge of that Court may, on the application of any party to the proceeding, order that the proceeding be transferred to a District Court.
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> (2) Where the subject-matter of a proceeding that has been commenced in the High Court is within the jurisdiction of District Courts, the High Court or a Judge of that Court may, of its or the Judge's own motion, order that the proceeding be transferred to a District Court unless, in the opinion of the High Court or the Judge, some important question of law or fact is likely to arise in the proceeding.

[2] The plaintiff, the Human Resources Institute, is a professional body for people working in the human resources field. The first defendant, Elephant Training, carries on business as a human resources consultancy. The second defendant, Mrs Atkins, is one of its directors.

[3] The Human Resources Institute's claim is based on a letter signed by Mrs Atkins on behalf of Elephant Training sent to members of the human resources profession in April this year. The letter included this:

> … I think the strategic part of what we do is starting to change radically. The innovative companies are experimenting with people strategies and HR people are stepping out of just being "HR" into being business leaders.
>
> The traditional HR thinkers seem to be very scared of this. I think HRNZ's legal action against me and my colleagues is a good illustration of this.

[4] The reference to "HRNZ's legal action" is a reference to an earlier proceeding in this court.[1] The Human Resources Institute sued the first defendant and its directors in connection with the proposed establishment of a new organisation apparently to be called "Chartered Human Resources Institute". The causes of action were for passing off and misleading and deceptive conduct in breach of s 9 of the Fair Trading Act 1986. That proceeding has been resolved by the defendants giving undertakings, although costs were not agreed. Courtney J has now given a costs decision.[2]

[5] In this proceeding, the Human Resources Institute alleges that the statement in the letter of 22 April 2015 is misleading and deceptive in breach of the Fair Trading Act. It also alleges that the statement is defamatory. To bring itself within s 6 of the Defamation Act 1992, it says it has suffered damage to its goodwill which will affect its revenue from membership subscriptions and the purchase of products and services. For each of its causes of action it claims damages of $20,000.

[6] The defendants admit the publication of the letter. For the Fair Trading Act claim, they admit that Elephant Training published the letter in trade, but deny that Mrs Atkins did. They say that the letter was self-evidently a statement of opinion. In response to the defamation cause of action they deny that the words have the meaning claimed by the Human Resources Institute, namely that it is "yesterday's man". They also rely on defences of truth and honest opinion.

[7] In *Moodie v Lane*, Thomas J identified six relevant factors on applications under s 46:[3]

[a] The nature of the case;

[b] the complexity of the case;

[c] whether the case is of general or public importance;

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1 *Human Resources Institute of New Zealand Inc v Elephant Training and HR Ltd* HC Auckland CIV-2014-485-011269.

2 *Human Resources Institute of New Zealand Inc v Elephant Training and HR Ltd* [2015] NZHC 2636.

3 *Moodie v Lane* HC Auckland, CP1484/87, 18 September 1990 at 4.

[d] the amount in issue;

[e] the likely length of the hearing; and

[f] the financial resources of the parties.

[8] In *Tapp v Elders Real Estate*, Tompkins J said:[4]

> The section does not set out any criteria to be applied to such an application. Some of the factors relevant to the exercise of the Court's discretion would be the size of the claim, the complexity of factual or legal issues likely to arise, the convenience of the parties and whether or not the action is more likely to be more expeditiously heard in the District Court. A further relevant factor is the general policy, as evidenced by the increase in the District Court's jurisdiction to $50,000, the recommendations in the Law Commission's report on the Courts, and the proposal in the Bill currently before Parliament to increase that Court's jurisdiction again to $200,000, or encouraging more suitable civil litigation to be heard in the District Court than has hitherto been the case. I recognise that the ability of the District Court to handle a significantly increased volume of civil litigation will depend upon whether the facilities and ancillary support that Court will require to enable it to do so is made available. But I consider that this Court should act on the assumption that, the general policy being to increase the civil jurisdiction role of the District Court, the Justice Department will make available to that Court the facilities and other support it will require.

[9] The dicta of Thomas J and Tompkins J have been followed a number of times in later cases considering applications under s 46.

[10] I note some additional matters:

[a] Because the defendants have applied, the transfer decision is made under s 46(1), not 46(2).

[b] Section 46 and the authorities do not suggest that a plaintiff's decision to sue in the High Court should carry any particular weight. Nor should a defendant's wish to transfer to the District Court.

[c] Although not mentioned in other cases, appeal rights may bear on the transfer decision. Appeals from a District Court in its civil jurisdiction come to this court as of right.[5] Further appeals are only

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4 *Tapp v Elders Real Estate* HC Whangarei CP70/90, 15 October 1990.

5 District Courts Act 1947, s 72.

by leave.[6] Appeals from this court to the Court of Appeal are as of right.[7] While both the High Court and the Court of Appeal are intermediate appellate courts, whose main function is correction of error, greater resources are required for appeals in the Court of Appeal (three judges as opposed to one in the High Court). Given the current heavy workload of the Court of Appeal, it may be relevant to consider whether appeals would be better heard in this court.

[d] Under the Judicature Modernisation Bill now before Parliament, the civil jurisdiction of the District Court will be increased to $350,000.[8] That reflects a confidence in the ability of the District Court to hear civil cases where increased sums are in issue.

[11] The District Courts currently have jurisdiction to hear claims in tort for up to $200,000 – s 29 of the District Courts Act 1947. Under the Fair Trading Act they can hear claims for monetary orders up to $200,000 – ss 38 and 43B. A District Court is therefore able to hear the claims in this proceeding. Even by District Court standards, this is a claim for a relatively small amount. By contrast, the monetary limit of claims in the Disputes Tribunal is $15,000, except where extended by agreement.[9]

[12] It is also relevant that the amount of the claim in this case is less than the threshold sum of $50,000 under s 43 of the District Courts Act. A defendant sued for $50,000 or more in the District Court may use s 43 to require the proceeding to be transferred to this court as of right. That reflects a legislative view that ordinarily claims for less than $50,000 will not need to be heard in the High Court, all other things being equal.

[13] The usual practice is to start a proceeding in the lowest court with jurisdiction. Mr Dench submitted that that gives rise to a presumption in favour of the District Court where a claim is within that court's jurisdiction. The fact that a

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6 Judicature Act 1908, s 67.
7 Section 66.
8 Judicature Modernisation Bill 2013 (178-2), cl 256.
9 Disputes Tribunal Act 1988, ss 10 and 13.

claim is within the jurisdiction of the District Court meets the condition under s 46(1)(b) for the exercise of the discretion, but that aside the decision is made without applying any presumptions. The amount of the claim is relevant because claims for smaller amounts may be heard more conveniently in the District Court. Requiring a claim for a small amount to stay in this court may impose excessive costs on the parties.

[14] Mr Griggs explained that Human Resources Institute had claimed $20,000 for damages to avoid overreaching. At the outset it was aware of publication to only one person, although Mr Dench acknowledged that publication of the letter was wider. Discovery might show a basis for amending to claim increased damages. Even so, the alleged defamation was published to a relatively small audience – human resources professionals. It is improbable that any damages could come close to the District Court jurisdiction limit. Because of the likely lower costs in a District Court, the amount of the claim favours transfer.

[15] It was not submitted that there were any factors of general or public importance requiring the case to stay in this court. There is no evidence as to the financial resources of the parties.

[16] Instead, Human Resources Institute relies primarily on the alleged nature and complexity of the case. It says that defamation law is inherently complex and there are factors this case that go to particular complexity.

[17] The primary facts do not appear to be in dispute. Human Resources Institute will need to prove any monetary loss. That aside, the contest is likely to be how the provisions of the Fair Trading Act and the rules of defamation apply to the facts. Human Resources Institute does not suggest that the issues under the Fair Trading Act claim are difficult or complex. On defamation it says that these factors go to complexity in this case:

[a] The meaning of the words on which it relies are matters of inference;

[b] it is an incorporated society, not a natural person;

[c] the assessment of damages will require the Judge to assess how much is required to compensate for lost goodwill; and

[d] the defences of truth and honest opinion.

[18] As to the general desirability of keeping defamation proceedings in this court, Human Resources Institute refers to a Practice Note issued by Lane CJ in England, setting criteria for the allocation of work between the High Court and the County Courts under the High Courts and County Courts Jurisdiction Order 1991 (UK), article 7(5). In his practice note, Lane CJ said that actions "including one or more of the following types of case, whether by claim or counterclaim, may be considered important and therefore suitable for trial in the High Court:

[i] Professional negligence;

[ii] fatal accidents;

[iii] fraud or undue influence;

[iv] defamation;

[v] malicious prosecution or false imprisonment; and

[vi] claims against the police."

[19] Human Resources Institute submits that there are no distinguishing local factors that require a different approach in New Zealand. Therefore, New Zealand should follow the English approach of keeping defamation in the High Court. It points out that there are no known cases where this court has transferred a defamation proceeding to a District Court.

[20] I disagree. The principles of defamation law are clearly established. I do not regard defamation law as too hard for District Court Judges. It is important that the District Court be able to hear claims for defamation. In many cases damages awards in defamation are relatively modest and within the $200,000 jurisdiction of the District Courts. District Courts should therefore be able to deal with them. It would be unfortunate if a practice were to develop that defamation claims had to be heard

in the High Court. The extra costs involved in coming to this court may impose an unacceptable barrier to access to the courts in modest defamation claims. Further, any reluctance to transfer low-level defamation cases to a District Court may operate unfairly on defendants with limited means. That leads to a gagging risk.

[21] Besides, there is nothing in the issues in this case that makes the defamation claim particularly difficult for a District Court judge. The primary facts do not appear to be in dispute. Ascertaining the meaning of alleged defamatory statements is little different from finding the meaning of words in other contexts. The fact that Human Resources Institute is incorporated requires it to prove monetary loss under s 6 of the Defamation Act, but that is little different from proving monetary loss under other claims that routinely come before the District Courts. It would also be required to prove monetary loss in the claim under the Fair Trading Act, but that cause of action is not said to be complex. The principles for the defences of truth and honest opinion are well established and should not be difficult to apply in this case.

[22] Human Resources Institute also objects to the matter going to the District Court because of its passing off proceeding in this court. It contends that both proceedings should be heard in the same court for reasons of practicality and judicial propriety. It refers to the desirability of keeping all matters in dispute between the same parties in the same court. It cites *Buzowsky v Buzowsky*:[10]

> It is generally desirable that all related matters between the parties be dealt with by one Court, but the mere fact that there is concurrent litigation between the same parties is not a ground for removal if the two sets of proceedings are not directly interrelated.

[23] The only outstanding issue in the earlier proceeding was costs, but Courtney J has given a decision on that.[11] Human Resources Institute has appealed against the costs decision, but the outcome of that appeal can have little bearing on this case. The issues in the two proceedings are discrete. While there has been a separate proceeding involving the same parties in this court, that factor alone is not an argument for keeping this proceeding in this court. The proceedings can be

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10 *Buzowsky v Buzowsky* [1991] NZFLR 439 (HC) at 443

11 *Human Resources Institute of New Zealand Inc v Elephant Training and HR Ltd*, above n 2.

determined separately. The passing off proceeding is background for the current proceeding, nothing more than that.

[24] There may be procedural advantages in this case being heard in a District Court rather than the High Court. Under s 57(2) of the District Courts Act, a corporation may appear by any officer attending or agent of the corporation. That is in contrast to the rule under *Re GJ Mannix Ltd*[12] under which a company can only be represented in the High Court by a lawyer – see *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*.[13]

[25] For this case, in the District Court the parties may dispense with the lawyers and appear on their own behalf and, in the case of the plaintiff and first defendant, appear through their directors. The amounts in issue may make that course attractive.

[26] The District Court Rules provide for varying modes of trial: a short trial, a simplified trial and a full trial. Given that the primary facts do not appear to be in dispute this case may be suitable for a short trial or a simplified trial. That opportunity will not be available in the High Court. This is not a case where this court's resources are required for a long hearing.

[27] The possibility of appeal cannot be dismissed out of hand. After all, Human Resources Institute has appealed against the costs decision in the passing off proceeding, a relatively uncommon matter for appeal. For this proceeding, correction of any errors can be conveniently carried out in this court without having to trouble the Court of Appeal.

[28] In summary, the relevant factors favour this case being transferred to the District Court. The appropriate court is the District Court at Auckland. I make a transfer order accordingly.

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12 *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA).

13 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [34].

[29] The defendants will have costs on the application on a category 2 basis fixed under the High Court Rules.

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Associate Judge R M Bell