IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000575
[2016] NZHC 2808

BETWEEN	COLIN GRAEME CRAIG Plaintiff
AND	JOHN CHARLES STRINGER Defendant

Hearing: 21 November 2016

Appearances: Plaintiff Appears in Person
Defendant Appears in Person

Judgment: 23 November 2016

JUDGMENT OF GENDALL J

Introduction

[1] In this proceeding the plaintiff sues the defendant in defamation. The trial is scheduled to take place in March 2017 and three weeks have been allowed for the hearing.

[2] Two interlocutory issues have been raised here which need to be resolved without delay. They are:

(a) An application by the defendant filed on 19 September 2016 seeking review of a decision of Associate Judge Matthews in this Court relating to refusal of a discovery order sought by the defendant; and

(b) An application by the defendant brought in a formal notice of application filed on 8 November 2016 seeking a direction that the trial of this matter be before a jury.

[3] Both applications are opposed by the plaintiff.

Background

[4] The plaintiff is the former leader of the Conservative Party which participated in the New Zealand General Election in 2014. The defendant is a former member of the Board of the Conservative Party.

[5] In his pleading in this matter, now represented by an amended statement of claim, the plaintiff says that the defendant defamed him in June, July and August 2015 in what he describes as a relentless succession of publications in various media.

[6] From the amended pleadings it seems that in mid 2015 a serious disagreement had arisen between the plaintiff and the defendant and also between the plaintiff and other members of the Board of the Conservative Party. Significant altercations arose, some of which at least it appears were linked to the plaintiff's association with his former press secretary, Ms Rachel McGregor (Ms McGregor).

[7] A particular issue which surfaced from this turmoil within the Conservative Party was whether the plaintiff should remain as its leader. During the time the issue was under consideration, the plaintiff decided to send out a form of ballot paper to members of the Conservative Party seeking their response on whether he should continue or step down. The ballot paper asked particularly for the recipient to tick one of two boxes, the first reading:

> Colin, please continue.

and the second reading:

> Colin, time to give it away.

Boxes to tick either "Yes" or "No", alongside diagrams of a hand with a raised thumb in one case or with a thumb pointing downwards in the other case, were to be completed. The ballot papers were then to be returned to an address which appeared to be that of the plaintiff.

[8] In the present proceeding, the plaintiff alleges that the defendant made various defamatory comments about him in relation to his taking this particular step. The essence of this part of the plaintiff's complaint seems to be that the defendant made statements alleging that the ballot was rigged in that it was sent only to selected members of the Conservative Party who were thought to support, or certainly not to oppose, the plaintiff. It is suggested that members of the Party, who were known to oppose the plaintiff continuing as leader, were excluded from the list of persons to whom ballot papers were sent.

[9] In response to these allegations Mr Craig issues a firm denial, and sues in relation to Mr Stringer's statements which he maintains were defamatory.

[10] Turning now to the discovery matter before me, for some time the defendant has maintained that the plaintiff must discover all the ballot papers that were completed and returned to him from members of the Conservative Party. On this it does seem that each ballot paper, although anonymous, contained a coded notation at the bottom left corner which corresponded to the recipient's identifying membership number with the Conservative Party. From this, at an early point it was suggested by

the defendant that he would be able to ascertain whether in fact the ballot papers were sent to all members of the Conservative Party or only to a handpicked selection. Originally, the defendant contended that this provided a means whereby he would be able to establish an aspect of his defence to the plaintiff's claims in defamation against him. This was to the effect that the statements he had made about the ballots being sent out only selectively, were actually true.

[11] In addition, it does seem that the pleadings in this matter also raise an issue over statements that the defendant is said to have made about the number of ballot papers in question here.

[12] On all these matters, up to now the plaintiff has refused to discover the ballot papers. As a result, the defendant commenced an application in this Court which, amongst other things, sought an order requiring their discovery.

[13] This discovery application was opposed by the plaintiff and was heard in this Court before Associate Judge Matthews. In a judgment issued on 22 August 2016, Associate Judge Matthews declined the defendant's discovery application. It is that aspect of Associate Judge Matthews' judgment that the defendant seeks to review here.

[14] Some two days later on 24 August 2016 the plaintiff and the defendant filed in this Court a memorandum concerning two errors of fact which Associate Judge Matthews had made in his judgment. The first related to the accidental switching of names which was acknowledged and amended immediately. The second however, which is of relevance here, related to the question of the ballot papers. In Associate Judge Matthews' 22 August 2016 original decision he noted what he understood to be the position, which was that the ballot papers were not in the plaintiff's possession or control, and this fact alone meant that the discovery application failed. The 24 August 2016 memorandum from the parties confirmed that this was incorrect and, indeed, the ballot papers in question were in the plaintiff's possession, although he did not have the database of the Conservative Party's membership that was used to send out the postal ballot response forms. That

database was held by the Conservative Party and, as I understand it, the Party has refused to release the database here.

[15] An issue which was before Associate Judge Matthews in his 22 August 2016 decision was whether the ballot paper responses were discoverable on the grounds of relevance. On this, Associate Judge Matthews recorded at paras [8] – [10] of his decision:

> [8] Mr Craig has not discovered the ballot papers. He says they are not discoverable because, first, he has them neither in his possession nor control, as they are held and owned by the Conservative Party, with which he is no longer involved. Secondly, he says that the ballot papers will not provide to Mr Stringer the information he seeks, namely the persons to whom the ballot was circulated. This is for two reasons, first because the ballot papers do not bear names, but only numbers, and the numbers are meaningless without access to the Conservative Party membership database which again is neither in Mr Craig's possession nor control. Secondly, the ballot papers sought are only those which were returned, not those which were sent out, and they will not therefore disclose to Mr Stringer (nor would they disclose to anyone else) whether ballot papers were sent to all members.
>
> [9] In my opinion, Mr Craig is right in this contention. I am unable to see how viewing the ballot papers that were returned could assist in any way with establishing either who ballot papers were sent to or, more relevantly given the issue under review, who they were not sent to. Nor can Mr Craig discover documents that he does not have or control.
>
> [10] I therefore decline Mr Stringer's application.

The review application

[16] The first application before me therefore is one brought pursuant to s 26P Judicature Act 1908 to review this one aspect of the decision of Associate Judge Matthews. Section 26P Judicature Act 1908 relevantly states:

> **26P Review of, or appeals against, decisions of Associate Judges**
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> (1) Any party to any proceedings who is affected by any order or decision made by an Associate Judge in chambers may apply to the court to review that order or decision and, where a party so applies in accordance with the High Court Rules, the court—
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> (a) must review the order or decision in accordance with the High Court Rules; and
>
> (b) may make such order as may be just.

[17] The approach to be taken on such a review is described in *McGechan on Procedure* at para HR2.3.02 as follows:

> **HR2.3.02 Approach to review**
>
> (1) Overview
>
> (a) If the Associate Judge's decision is a reasoned one, following a defended hearing (ie full argument from opposing parties), the approach is essentially appellate (r 2.3(4)): Perriam v Wilkes [2014] NZHC 2192 at [4]. The starting point is the Associate Judge's decision. The applicant has the burden of persuading the Court that the decision was wrong — that it rested on unsupportable findings of fact and/or applied wrong principles of law: Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd (2002) 16 PRNZ 107 (HC) at [13]. The Court will apply the approach in Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103, (2007) 18 PRNZ 768 (SC), which involves the Court making its own assessment as to whether the original decision is wrong: Burmeister v O'Brien [2008] 3 NZLR 842, (2009) 9 NZBLC 102,415 (HC) at [29].The Judge has the discretion to rehear all or part of the evidence and to hear further evidence (r 2.3(4)).
>
> (b) If the Associate Judge's decision involves exercising a discretion, the appellant must show the Associate Judge acted on a wrong principle or failed to take into account some relevant matter or took into account some irrelevant matter. The Court will not repeat the weighing exercise unless the Associate Judge gave excessive weight to some factor or patently inadequate weight to another, as to be "plainly wrong": Alex Harvey Industries Ltd v CIR (2001) 15 PRNZ 361 (CA) at [12]–[15].
>
> …

[18] Turning back to these discovery issues and questions of relevance, it is clear, from decisions such as *NSK Limited v General Equipment Co Limited*,[1] that documents are required to be discovered if they are relevant to proceedings as directed by the pleadings. Thus their relevance is determined by reference to the issues which will actually be required to be decided before the Court.

[19] In considering that matter, the plaintiff says the relevant defamatory statements made by the defendant here relate to suggestions that the plaintiff has been entirely selective in the Party members to whom he has sent out ballot forms to

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1 *NSK Limited v General Equipment Co Ltd* [2015] NZHC 1979.

"skew" the ballot in favour of his remaining as leader of the Party. The plaintiff's position is that there is no dispute here that the ballot did take place and there were a large number of responses estimated to be about 2000. However, the plaintiff contends that, even if these ballot papers were discovered to the defendant, he would have no evidence that the database used to send out the ballot papers was selective, nor would he have any evidence that the ballots would be used by the plaintiff to build his own selective database. According to the plaintiff, this is not only because he says these events never occurred, but also because the ballot responses themselves simply cannot provide evidence for or against the contentions pleaded in the amended statement of claim and therefore they are not relevant to matters put at issue in the pleadings. Thus the plaintiff maintains they cannot be discoverable.

[20] In response, the defendant says at the outset, that he does not accept that the plaintiff himself does not have proper access to or control over the membership database of the Conservative Party. Notwithstanding this and in any event, the defendant goes on to maintain that, the thrust of his defence to the allegations of defamation the plaintiff makes against him is that the plaintiff is simply dishonest and does not tell the truth. On this, the defendant contends that the plaintiff's repeated statements in all forms of media at the time were that over 2000 ballot papers had been returned to him and 75 per cent of these voiced support and wished the plaintiff to remain as leader of the Conservative Party. It is that contention which the defendant says he challenges, and simple discovery of the ballot papers without more could well assist his defence on that aspect.

[21] On all these matters, I agree with that position advanced by the defendant. The ballot papers, which the plaintiff acknowledges he does hold are relevant to a possible defence the defendant raises and, as such, they are clearly discoverable.

[22] It may be also that, even given the plaintiff does not hold or control the Conservative Party membership database, so that matching of ballot paper answers with membership names could be possible, some non-party discovery application involving the Conservative Party could be brought. Issues of confidentiality relating to the ballot papers might well arise in that event but that is, of course, not a matter before me here.

[23] For these reasons I find that the defendant has done sufficient here to satisfy the burden upon him of persuading this Court that the decision of Associate Judge Matthews declining his discovery application relating to the ballot papers was wrong. Associate Judge Matthews did not have the benefit of the further and somewhat redirected arguments by the defendant before me. That discovery decision is quashed.

[24] An order is now made that within 10 working days of the date of this judgment the plaintiff is to provide discovery of the ballot papers in question by way of tailored discovery pursuant to r 8.8 of the High Court Rules and then to make these available for inspection by the defendant in terms of r 8.27 of the High Court Rules.

Application by the defendant seeking a jury trial

[25] On 8 November 2016 the defendant filed in this Court an application in terms of s 19B(2) Judicature Act 1908 that this proceeding be heard before a jury.

[26] Both sections 19A and 19B of the Judicature Act 1908 are relevant here. They read as follows:

> **19A Certain civil proceedings may be tried by jury**
>
> (1) This section applies to civil proceedings in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels.
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> (2) If the debt or damages or the value of the chattels claimed in any civil proceedings to which this section applies exceeds $3,000, either party may have the civil proceedings tried before a Judge and a jury on giving notice to the court and to the other party, within the time and in the manner prescribed by the High Court Rules, that he requires the civil proceedings to be tried before a jury.
>
> (3) Notwithstanding anything in subsection (2), in any case where, after notice has been given pursuant to that subsection but before the trial has commenced, the debt or damages or the value of the chattels claimed is reduced to $3,000 or less, the civil proceedings shall be tried before a Judge without a jury.
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> (4) If, in any civil proceedings to which this section applies, the defendant sets up a counterclaim, then, unless pursuant to this section the civil proceedings and the counterclaim are both to be

tried before a Judge without a jury, the following provisions shall apply:

(a) on the application of either party made with the consent in writing of the other party, both the civil proceedings and counterclaim shall be tried before a Judge without a jury, or before a Judge with a jury, whichever is specified in the application:

(b) if no such application is made, the civil proceedings and the counterclaim shall, subject to any direction of the court or a Judge under section 19B, be tried in accordance with the foregoing provisions of this section:

Provided that if the court or a Judge orders that the civil proceedings and the counterclaim be tried together, they shall be tried before a Judge with a jury.

(5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any civil proceedings to be tried before a jury, if it appears to a Judge before the trial—

(a) that the trial of the civil proceedings or any issue therein will involve mainly the consideration of difficult questions of law; or

(b) that the trial of the civil proceedings or any issue therein will require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation which cannot conveniently be made with a jury,—

the Judge may, on the application of either party, order that the civil proceedings or issue be tried before a Judge without a jury.

(6) Nothing in this section shall apply in respect of any civil proceedings to be heard by the court in its admiralty jurisdiction.

19B All other civil proceedings to be tried before Judge alone, unless court otherwise orders

(1) Except as provided in section 19A of this Act, civil proceedings shall be tried before a Judge alone.

(2) Notwithstanding subsection (1), if it appears to the court at the trial, or to a Judge before the trial, that the civil proceedings or any issue therein can be tried more conveniently before a Judge with a jury the court or Judge may order that the civil proceedings or issue be so tried.

[27] This particular application is opposed by the plaintiff who seeks that the trial of this matter should be before a Judge alone. In advancing that opposition, before me the plaintiff accepted that the onus is on him to satisfy the Court where (as here), the defendant has given notice that this proceeding be tried before a jury, that at least one of the factors referred to in s 19A(5)(a) or (b) noted above at [26] is made out. If it transpires that one or more of those factors exists, then it is for this Court in the particular circumstances of the case to determine whether to direct a trial by Judge alone.

[28] As to these issues, *McGechan on Procedure*[2] at para J19B.01, in discussing the general principles relating to ss 19A and 19B, states:

> **J19B.01 General principles**
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> These can be summarised as follows:
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> (a) The scheme of ss 19A and 19B is to give a prima facie right to trial by jury in the situations stipulated in s 19A(1) and (2), providing the requirements as to value of claim and notice are met.
>
> (b) That prima facie right is subject to judicial discretion where the circumstances set out in s 19A(5) exist.
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> (c) The grounds for making an order under s 19A(5) are precisely defined, and the Court must be satisfied that the ground in either para (a) or (b) has been made out before it can go on to consider the desirability of a Judge alone trial.
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> (d) By contrast, the ground for an order under s 19B(2) is more broadly defined as the greater convenience of a jury trial.
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> (e) To the extent that a proceeding is clearly within the s 19A(1) and (2) categories, the Court should not read down the prima facie right to a jury trial by adopting a restrictive interpretation of its language, based upon considerations such as a Judge alone trial occupying relatively less time, and therefore requiring relatively less scarce judicial resources, and not involving citizens in jury service.
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> The authorities are well summarised in M v L [1998] 3 NZLR 104; (1998) 11 PRNZ 630 (HC). A recent decision is *Couch v Attorney-General* [2012] NZHC 2186 (HC).

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2 *A C Beck and Others McGechan on Procedure* (online looseleaf ed, Thomson Reuters).

[29] And, in addressing the proviso outlined at s 19A(5), in this Court, Brewer J in *Couch v Attorney General*[3] at page 8 stated:

> This proviso allows a Judge to make a commonsense decision as to whether a civil proceeding is suitable for trial by jury.

[30] There are two limbs to s 19A(5) that identify factors to be considered which might militate against trial by jury. The first limb concerns matters of legal complexity. It is widely accepted that defamation cases by themselves are not by default necessarily legally complex. Indeed there is a long tradition of defamation cases being the subject of jury trials. It is not correct to say, however, that all defamation cases have similar degrees of complexity. Cases such as *Hotchin v Shepherd*[4] do provide examples of unusually complex defamation cases where applications for trial by jury have been declined.

[31] Turning to the present case, the defendant has raised a number of affirmative defences to the plaintiff's various claims against him. These include claims in his statement of defence that the comments in question he made about the plaintiff were true. A number of the comments made by the defendant appear to relate specifically to offences he alleges the plaintiff has committed under various pieces of legislation. Some of these which may require consideration here are:

(a) Possible breach of employment laws – was Ms McGregor as the plaintiff's press secretary an employee or contractor, and did the plaintiff breach his obligations to her as an employer or, alternatively, in contract?

(b) Possible breach of the Human Rights Act 1993 – in the sense as to what does constitute sexual harassment, and was Ms McGregor sexually harassed here, such that a decision of the Human Rights Tribunal were justified?

(c) Possible breaches of electoral law – insofar as what the reporting obligations, definitions and legal requirements under the applicable

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3 *Couch v Attorney-General* [2012] NZHC 2186 (HC).
4 *Hotchin v Shepherd* [2013] NZHC 960.

legislation may be, such that did the plaintiff commit offences under the Electoral Act or be guilty here of corrupt practice?

(d) Possible contractual liability and fraud – what constitutes fraud and was the plaintiff guilty of fraud in business or contractual dealings with clients and/or others?

[32] The plaintiff maintains here that any jury would need to be instructed and directed at regular intervals on the law that relates to these differing claims, claims that the defendant contends are true. This, it is said, would lead to conceptual difficulties for the jury in separating matters of fact and law in considering the overarching questions of defamation in this case. In large measure I agree.

[33] I turn now to consider briefly the second limb of s 19A(5). At the outset, I need to say there is no real doubt in my mind that the circumstances of the present case also satisfy this limb, such that this is a case which, in my view, cannot conveniently be conducted by way of trial by jury. I reach this conclusion for a number of reasons.

[34] First, the general size of the present proceeding and the number of documents which would need to be considered by a jury are substantial. There are 41 causes of action in the plaintiff's pleading. These involve 41 publications, each of which contains multiple allegations to consider. In total, as I understand it, there are nearly 200 pages of pleadings.

[35] I am told too that the number of documents in the common bundle will run to several thousand pages. A prolonged examination of many of these documents may well be required at trial.

[36] In response to the plaintiff's claim, Mr Stringer denies many meanings, pleads defences of honest opinion, truth, qualified privilege and allegations as to the plaintiff's existing (bad) reputation. Considerable complexity will be required with these defences when considered next to the significant number of publications and documents that need to be addressed.

[37] So far as the weight and complexity of this case is concerned, I am also told that the jury question trail in this matter will need to be well in excess of 100 pages. It has been suggested that as a result of this complexity, any proper consideration by a jury of the matters which will arise in this proceeding will require a deliberation of well over a week. It is unreasonable to expect a jury to engage in complex matters over this length of time and thus it is said the Court needs to avoid final decisions which may prove to be unsafe.

[38] Secondly, as I have noted already, this case will involve a consideration of allegations that the defendant claims in his defence are true. These include allegations against the plaintiff of financial fraud, electoral fraud, trickery with GST and loans, and in broad terms that the plaintiff used the Conservative Party finances to his own advantage. Of necessity these may well involve a detailed consideration of a number of complex documents in addition to statutory and common law concepts including those noted at para [31] above. In addition, the plaintiff signals here that he will need to call expert witnesses, in particular on matters involving significant and intricate financial detail. The involvement of these experts in addition suggests in my view this matter can more appropriately and conveniently be dealt with through a trial by judge alone.

[39] Thirdly, both parties here are lay litigants. Before me they also confirmed that they will not be represented by counsel at trial, a trial which has been set down for three weeks. That will inevitably complicate matters if this matter is to be conducted by way of a jury trial, given the obvious lack of professional training and legal knowledge of each party. I am satisfied in this case reasonably complex legal matters will arise. This, together with general factual concerns linked too with considerations of convenience, the administration of justice, and proper utilisation of the Court's time, must suggest that a trial by judge alone is the most appropriate course in this case.

[40] Fourthly, the plaintiff suggests that similar related issues to those which arise in the present case, recently arose in a trial by jury in *Williams v Craig*.[5] This was a highly publicised case involving the plaintiff here who was sued for defamation as

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5 *Williams v Craig* Auckland High Court, CIV-2015-404-1845.

the defendant in that proceeding. The plaintiff suggests it is difficult to see how the publicity surrounding that case (given that it also involved similar parties and events to those here) would not have a bearing upon, or in some way prejudice, the present proceeding if it is tried by jury. The plaintiff even went on before me to suggest that the jury verdict in the *Williams* case was punitive against him (as the defendant there) and he considered it to be unsafe. I make no comment on that and leave those matters on one side, however.

[41] Lastly, it is not insignificant that it is the plaintiff who is seeking a judge alone trial in this case. While that is not decisive, in previous cases it has been given some weight. In *Hotchin v Shepherd*[6] the Court commented:

> (The defendant's concern for reputation to be considered by jury)…can have less significance in that setting when the plaintiffs, allegedly defamed in remarks given wide circulation on television, seek trial before judge alone.

[42] Finally, in *Ti Leaf Productions Ltd v Neil*[7] Panckhurst J, in ordering trial by judge alone, made certain comments which I am satisfied to some extent apply in the present case:

> …This case is one of unusual complexity, where the interests of court resources and ultimately the administration of justice will be best served by trial before a judge sitting alone. Given the multiplicity and complexity of the issues there would, I think, be every possibility of a confused outcome if a jury was involved.

[43] Finally, it is my view that, if this matter is to be the subject of a jury trial, this is likely to place significant strain on the resources, patience and effective operation of the Court, jurors, and the parties. Whilst this is not definitive (as *McGechan on Procedure* notes at J.19B.01), it might well create an unsatisfactory situation where, because of complexities here, the parties run a very real risk if this matter proceeds by way of jury trial that, in the end, the interests of justice overall are not properly served.

[44] I am satisfied therefore first, that the grounds for making an order for a judge alone trial in this case under s 19A(5)(a) and (b) have been made out and secondly,

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6 At n 4 above.

7 *Ti Leaf Productions Ltd v Neill* [1999] 14 PRNZ 100.

that it is without question desirable and of far greater convenience for this proceeding to be tried by judge alone rather than by a judge and jury.

[45] For all these reasons I decline the defendant's application to have this matter heard by a jury and I direct that the trial is to be before a judge alone.

Conclusion

[46] The defendant's application for review of Associate Judge Matthews' decision declining the discovery order sought is successful.

[47] The new orders for discovery outlined at para [24] are confirmed.

[48] And, as to the trial in this matter, I order that this proceeding is to be tried before a judge alone.

[49] Both parties here are self represented. Issues of costs in this matter therefore, it would seem, do not arise. If, however, any issues concerning disbursements on these applications may be alive, then leave is reserved for any party to approach the Court further on 48 hours' notice for any directions required.

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Gendall J

Copy to:
Mr Craig - Plaintiff
Mr Stringer - Defendant