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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY **CIV-2015-404-1845**

UNDER	the Defamation Act 1992
BETWEEN	JORDAN HENRY WILLIAMS
	Plaintiff
AND	COLIN GRAEME CRAIG
	First Defendant

Hearing:	15 September 2016
Counsel:	P A McKnight and A Romanos for plaintiff S J Mills QC and J Graham for first defendant
Date of Ruling:	15 September 2016
Date of Reasons:	29 September 2016

REASONS FOR RULING NO. 2 OF KATZ J

Solicitors:	Langford Law, Wellington Chapman Tripp, Auckland
Counsel:	S J Mills QC, Barrister, Auckland P A McKnight, Quayside Chambers, Wellington A Romanos, Barrister, Wellington

[1] On Thursday, 15 September 2016, the plaintiff filed an application for an extension of time to close the plaintiff's case and/or for leave to lead evidence after the closure of the plaintiff's case. I declined the application, with written reasons to follow. Those reasons are set out below.

[2] This trial commenced on Monday 5 September 2016. The estimated hearing time was up to five weeks, although I was advised by counsel that it would probably be shorter, as the plaintiff, Mr Williams, had discontinued against three of the four defendants shortly before trial.

[3] At the outset of the trial both parties read out the names of their proposed witnesses for the jury. Although the defendant, Mr Craig, had served a witness brief for Mr Michael Chappell, his name was not called out. Mr Chappell runs a company that provides forensic IT services. Given that Mr Craig no longer proposed to call Mr Chappell as a witness, it was then open to Mr Williams to subpoena him. He did not do so, at least at that stage.

[4] On Monday 12 September, I received, via email, a memorandum from Mr McKnight recording "an incident of concern" that had arisen the previous Friday evening when he, Mr Romanos and Mr Williams had returned, after Court, to the chambers counsel had rented for the purposes of the trial (counsel are Wellington based). The memorandum records that counsel had entered the building, taken the lift to their chambers and stayed there for approximately five minutes before leaving. When exiting the building they noticed "a man with black square sunglasses (at dusk) and a black jacket, peering into the foyer, seemingly attempting to read the tenant information".

[5] This struck Mr Williams, Mr McKnight and Mr Romanos as highly suspicious. To add to their concerns, the man appeared "alarmed" to see them and quickly turned and began walking away. Mr McKnight called out to the person, "can I help you?" The man turned and mumbled something to the effect that he was looking for something. Mr Williams and Mr Romanos followed him to try and get a photograph of his face. They were unable to do so. The next day, John Stringer (a former member of the Conservative Party Board who appeared as a witness for Mr Williams) supplied the plaintiff with two photographs of Michael Chappell. Mr McKnight's memorandum recorded that both Mr Williams and Mr Romanos

were confident that the person they had seen on the Friday evening was Mr Chappell. Mr McKnight's memorandum concluded:

> We do no more than raise this with your Honour; and record that consideration is being given whether there is a need to take this further.

[6] On Wednesday, 14 September 2016, Mr Mills informed me that the plaintiff had issued a subpoena to Mr Chappell. In the ensuing discussion with counsel it became apparent that Mr McKnight's underlying concern was, in effect, that Mr Chappell had been engaged by Mr Craig to spy on Mr Williams' legal team (although the word "spy" is mine, and not Mr McKnight's). Mr Mills took strong exception to any attempt to link Mr Craig to the "so called lurking incident," in circumstances where there was absolutely no evidential foundation for any such linkage. He advised that Mr Craig would be willing to swear an affidavit confirming that he had not engaged Mr Chappell to spy on the plaintiff's legal team (or engage in any conduct of a similar nature). Mr Mills expressed serious concern at the potentially prejudicial effect of making such serious, but entirely unfounded, accusations in the presence of the jury.

[7] Mr McKnight's position (which was predicated on Mr Chappell being the lurker) was that evidence in relation to the "lurking" incident was highly relevant to the issue of aggravated damages, because the defendant's conduct of the trial is relevant in that context. I concluded that it was premature to consider the relevance and admissibility of evidence of the "lurking" incident, because it was not yet known what Mr Chappell's evidence on that issue would be. Mr Chappell was, however, being briefed the next morning. A more informed assessment of the relevance of his evidence could then be made.

[8] By this stage, however, the plaintiff had only two remaining witnesses. It was anticipated that their evidence would be concluded by the morning adjournment the next day, Thursday 15 September 2016. Mr McKnight advised that Mr Chappell had been subpoenaed to give evidence the following Monday (as three working days notice was required) but he would be available to give evidence on Friday.

[9] The next morning, Mr McKnight filed an application to (briefly) adjourn the trial to enable Mr Chappell to attend Court to give evidence prior to the plaintiff closing its case. In the alternative, an order was sought to enable Mr Chappell to be interposed during the defendant's case.

[10] The grounds in support of the application were that, in order for the plaintiff to fully put his case, it was necessary to call Mr Chappell to give evidence on three specific issues, which can be summarised as follows:

a) Mr Chappell's involvement in the lurking incident (and whether this was at the instruction of Mr Craig);

b) the fact that Mr Craig continued to use Mr Chappell's services as an expert witness in the proceeding, including filing two affidavits sworn by him and a signed brief of evidence, after Mr Craig had become aware that Mr Chappell had previous convictions; and

c) why documents have been included in the common bundle (including a report prepared by Mr Chappell) that had been exhibited to Mr Chappell's previous affidavits, in circumstances where Mr Chappell is not being called as a witness.

[11] The application was supported by affidavits from both Mr Romanos and Mr Williams. Mr Romanos' affidavit in support of the application set out the details of the "lurking incident" in considerable detail. Having described the incident in some detail, Mr Romanos deposed as follows:

> 26. Mr Williams and I both commented how creepy the man was and how the situation "didn't feel right".
>
> 27. The following day we received photographs of, purportedly, Michael Anthony Chappell.
>
> 28. I was quite amazed when I saw the photographs. The resemblance with the man from the evening before was striking.

[12] Under the heading "One final matter", Mr Romanos deposed that counsel had borrowed a trolley from Bruce Stewart QC, who works in the same building, for the purposes of the trial. During at least two days of the first week of the trial, the trolley was parked on the gallery side of the jury box. The trolley apparently has a very clear label, which indicates quite clearly that it belongs to Mr Stewart QC. Further, the trolley, with its label facing outward, was said to have been parked close to Mr Craig, "and well within his line of sight". I infer that this evidence was included to suggest to the Court that Mr Craig knew that counsel for the plaintiff

were operating out of chambers in the same building as Mr Stewart QC and must have provided this information to Mr Chappell, presumably with instructions to "spy" on the plaintiff's counsel (for what purposes, it is not clear). Obviously, this is a very serious allegation.

[13] Mr Williams' affidavit in support of the application also set out the details of the "lurking incident" in some detail. In respect of the two photographs of Mr Chappell that Mr Stringer had emailed through, Mr Williams deposed that:

> While the man had dark glasses on, I am very confident that the man in the photographs is the same man described above.

[14] Mr Williams also deposed that, on 1 August 2016, a brief of evidence of Mr Chappell had been served on the plaintiff. Following Mr Williams' affidavit on the same date, however, which had raised concerns regarding Mr Chappell's previous convictions, a decision was apparently made not to call Mr Chappell.

[15] I heard argument in respect of the application at 11.30 am on Thursday 15 September 2016, by which time all of the plaintiff's other witnesses had completed giving evidence.

[16] I had some concerns that considerable sitting time had been lost over the previous two days due to jury issues and that the ongoing disruptions to the progress of the trial may have been causing the jury some frustration. In particular, Court had commenced an hour late on Tuesday, 13 September 2016, due to a juror having child care issues. The following day (Wednesday), the jury was unable to sit in the morning due to a juror having a hospital appointment. As a result, the jury had not been able to resume sitting until 2:15pm. I was reluctant to lose another three-quarters of a day of sitting time the very next day (Thursday) to accommodate Mr Chappell's availability, unless:

a) Mr Chappell could provide relevant evidence that was reasonably probative of issues arising in the case; and

b) there were good reasons why Mr Chappell could not have been subpoenaed earlier, in relation to that particular evidence.

[17] As will be apparent from the sequence of events I have outlined above, the key reason why the plaintiff subpoenaed Mr Chappell to give evidence was that Mr Williams, Mr McKnight and Mr Romanos believed that he had been spying on them, and that he was likely doing so on Mr Craig's instructions. During the course of hearing Mr McKnight's submissions, however, I was informed that Mr Chappell had just signed a witness statement (in Christchurch, where he is based) confirming that he was not the lurker. The only remaining issues in respect of which it was proposed that Mr Chappell give evidence were then those that I identify at [10](b) and (c) above.

[18] Pursuant to s 7 of the Evidence Act 2006, evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[1] Evidence that is not relevant is not admissible.[2] The threshold for admissibility set by s 7 is, however, relatively low. The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency.[3]

[19] The fact that Mr Craig continued to use an expert witness once he became aware of his historic criminal convictions was said to be relevant to the issue of aggravated damages. (I note, as an aside, that leave would be required to amend the pleadings to include this as a particular of aggravated damages). In any event, it is my view that any link between Mr Craig's use of Mr Chappell as a forensic IT expert and Mr William's claim for aggravated damages is a highly tenuous one. It is well recognised that the defendant's conduct of litigation can aggravate either the injury to the plaintiff's reputation or the injury to the plaintiff's feelings. There is no suggestion here, however, that Mr Craig's use of Mr Chappell as a consultant and expert witness has aggravated any injury to Mr William's reputation. Rather, the plaintiff's argument appeared to be that the use of Mr Chappell as a forensic IT consultant has aggravated the injury to the plaintiff's feelings (although Mr Williams gave no evidence to that effect).

[20] Mr Chappell is a recognised expert in computer forensics who has appeared as an expert witness in previous cases. His convictions are serious, but historic. Whether that precludes him from consulting or giving expert forensic IT evidence in a particular case is a matter for determination if and when an objection is raised. In this case, the plaintiff did not seek a pre-trial ruling to prevent Mr Chappell giving

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1 Evidence Act, s 7(3).
2 Section 7(2).
3 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

expert evidence. Ultimately, however, Mr Craig elected not to call him. Whether that was due to his convictions or some other issue (such as the fact that his evidence was not seen as necessary) is not known. It is difficult to see, however, that the defendant's use of Mr Chappell is particularly relevant to aggravated damages. Further, and significantly, it is the conduct of Mr Craig in using Mr Chappell as a forensic IT consultant that is said to be aggravating. The most appropriate person to give evidence on that issue is Mr Craig (through cross-examination), not Mr Chappell.

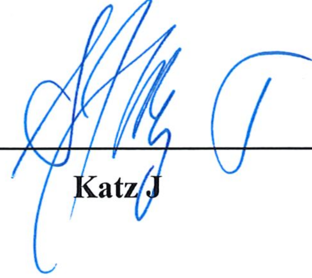
[21] The final matter that the plaintiff wished to call Mr Chappell to address related to the fact that documents had been included in the common bundle which had previously been exhibited to Mr Chappell's affidavits. Counsel had previously referred to this matter (in passing) at an earlier Chambers hearing. At that time, matters were left on the basis that if exception was taken to the inclusion of the relevant documents in the common bundle, a formal objection should be made and I would then rule on the admissibility of the relevant documents. The matter was not pursued.

[22] Ultimately, the issue of why documents emanating from Mr Chappell were included in the common bundle is a matter for counsel to address and, possibly, Mr Craig. It is not an issue on which Mr Chappell could give relevant evidence. Further, I note that calling him as a witness would have the result of "curing" any admissibility issues in relation to his documents in any event, which does not appear to be the plaintiff's wish or intention.

[23] For all of the reasons I have outlined, I concluded that Mr Chappell's proposed evidence was of little or no relevance to the issues in the case and did not justify delaying the defendant's opening by a day or so. Even if I were wrong in that conclusion, the matters raised could be directed to Mr Craig in cross-examination and he was better placed to address them than Mr Chappell.

[24] The final matter I took into account was that the proposed evidence (once the "lurking" issue fell away) was not new and a subpoena could therefore have been issued to Mr Chappell as soon as the plaintiff became aware that the defendant was not calling him as a witness. There would have then been no need to seek to delay the trial.

[25] Taking all of these matters into account, I declined the application for an extension of time to close the plaintiff's case or, in the alternative, for leave to lead evidence after closure of the plaintiff's case.



Katz J