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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:	20 September 2016
Counsel:	P A McKnight and A J Romanos for plaintiff S J Mills QC and J Graham for first defendant
Date of Ruling:	20 September 2016

RULING NO. 3 OF KATZ J
[Application to amend ss 39 and 41 notices]

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] We are currently in the third week of what is likely to be a four week defamation trial. The plaintiff, Mr Williams, has closed its case. Mr Mills QC has opened the case for the defendant, Mr Craig. Mr Craig has completed his evidence is chief and is about to enter his third part day of cross-examination.

[2] Mr Williams seeks leave to amend notices he has previously filed pursuant to ss 39 and 41 of the Defamation Act 1992.

[3] Section 39 applies where a defendant relies on the defence of honest opinion. It requires a plaintiff who asserts that the defendant's opinion is not genuinely held to specify the particular facts or circumstances that are said to support that assertion, within 10 working days after service of the statement of defence.

[4] Section 41 is the comparable provision for the defence of qualified privilege. If the plaintiff intends to allege that the defendant was predominantly motivated by ill will, or otherwise took improper advantage of the occasion of publication, he is required to specify the facts and circumstances on which he relies in support of that assertion, within 10 working days after service of the statement of defence.

[5] Mr Williams has previously filed notices within the required time period, but now seeks to substantially amend those notices by including further particulars and, to some extent, commentary. Leave is required to amend the notices as the close of pleadings date is well past. Leave has previously been given to amend the statement of claim, statement of defence, and reply in order to reflect that the plaintiff has discontinued its claims against the second defendants. There is no suggestion that the proposed amendments to the ss 39 and 41 notices arise out of any recent amendments to the statement of defence.

Relevant legal principles

[6] Rule 7.7 of the High Court Rules provides that no amended pleading may be filed after close of pleadings date without the leave of the Court. Given that the trial is now well underway, leave is required. As result, Mr Williams must

"surmount the formidable hurdles" of showing that an amendment at such a late stage is:[1]

a) in the interests of justice;

b) will not significantly prejudice Mr Craig; and

c) will not cause significant delays.

[7] The key issues that bear on these matters in this case are the relevance of the proposed amendments to establishing either a lack of genuine opinion or ill will, and the overall interests of justice, given the current stage of the proceedings.

Should leave be granted to allow the proposed amendments?

[8] The first key point is that the application for leave to amend, coming as it does during the third week of what will likely be, at most, a four week trial, is extremely belated. That would, of course, be inevitable in relation to any proposed amendments that arose out of the conduct of the trial. However, none of the proposed amendments, in my view, relate specifically to the conduct of the trial. Rather, they all relate to matters that could have been pleaded well in advance of trial and indeed prior to the close of pleadings date. They are not new matters.

[9] While some of the proposed amendments appear to raise matters that are relevant, I note that a number of them raise matters that appear to be of fairly marginal relevance to the particular proposition that they are intended to support. Further, some of the proposed new particulars are not factual, but are more in the nature of submission.

[10] No explanation has been provided as to why the amendments were not made prior to the close of pleadings date or, at the very least, why an application for leave to amend was not made prior to trial. The plaintiff has now closed his case. Mr Mills has completed his cross-examination of Mr Williams and all of the plaintiff's other witnesses. The defendant has opened his case and Mr Craig has given evidence-in-chief. He is now many hours into his cross-examination. Given that he is currently under cross-examination he is, obviously, not able to discuss any of the proposed amendments to the ss 39 and 41 notices with his counsel. In such

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1 *Elders Pastoral v Marr* (1987) 2 PRNZ 383 (CA) at 385.

circumstances there is, in my view, a very real risk of prejudice to the defence in allowing the proposed amendments. The defence has prepared its case on the basis of the currently pleaded particulars and has opened and called evidence from the defendant on that basis.

[11] It is accordingly not, in my view, in the overall interests of justice to allow the proposed amendments at this late stage and the application is accordingly declined. Leave is, however, granted to make those amendments that simply delete particulars previously provided, or which are of a "tidying up" nature, such as those amendments that update paragraph references and so on. Leave is reserved to seek further direction in the event that counsel are unable to agree which amendments fall within this category and which do not.

Katz J