

[1] We are now in the fourth week of a four week defamation trial. The evidence has been completed and counsel are due to deliver their closing addresses to the jury tomorrow. The plaintiff seeks leave to amend the third amended statement of claim and also the notices filed by the plaintiff providing the particulars required by ss 39 and 41 of the Defamation Act 1992.

[2] No amended pleading may be filed after the close of pleadings without the leave of a Judge.¹ Previous case law has identified a number of factors that should be taken into account in determining whether it is appropriate to grant leave to file an amended pleading. It is generally recognised that the paramount consideration is that the parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding.² Due regard must also be had to whether the proposed amendment will cause significant delay or prejudice to another party.³ Even where serious prejudice and significant delay will arise an amended pleading may nevertheless be permitted if the proposed claim has substantial merit and will not cause injustice to the defendants.⁴ The Court of Appeal in *Elders Pastoral Limited v Marr* stated that an applicant must surmount three hurdles in order for leave to amend pleadings to be granted:⁵

- a) The amendment must be in the interests of justice.
- b) The amendment must not significantly prejudice the other party.
- c) The amendment must not cause significant delay.

[3] Another relevant factor in considering whether to grant leave or not is the merit or absence thereof of a proposed amended pleading. The timing of an application for leave to amend is also relevant.

¹ High Court Rules, rule 7.7.

² See *Shanton Apparel Ltd v Thornton Hall Manufacturing Ltd* [1989] 3 NZLR 304 (CA) at 309; *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 272-273; *Marr v Arabco Traders Ltd (No 8)* HC Auckland A1195/77, 12 March 1987 affirmed on appeal in *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA).

³ *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA).

⁴ *Body Corporate 177519 v Auckland City Council* HC Auckland CIV-2005-404-5563, 24 May 2011.

⁵ At 385 and as set out by Ellis J in *Body Corporate 177519 v Auckland City Council* HC Auckland CIV-2005-404-5563, CIV-2006-404-3267, 24 May 2011 at [12].

[4] I will consider the proposed amendments to the ss 39 and 41 notices first.

[5] The proposed amendment at paragraph 1.5 of the draft dated 27 September 2016 was not pursued and accordingly no ruling is required in respect of it. It follows that the cross-reference in paragraph 3.1 should be to 1.1 to 1.4.

[6] In respect of the proposed new paragraph 3.6, I decline to allow that amendment on the basis that Mr Craig's decision to breach his confidentiality obligations to a third party is not objectively relevant to the issue of whether he bore ill-will to Mr Williams.

[7] Paragraphs 3.7 to 3.9 are, in my view, directly relevant to the real controversy between the parties. It is therefore in the interests of justice that leave be granted to amend those paragraphs. Mr Mills did not submit that doing so would cause any real prejudice to the defendant.

[8] Paragraph 3.10 was not pursued.

[9] Paragraph 3.11 raises a relevant matter in my view. The amendment is allowed.

[10] Paragraphs 3.12 to 3.14 are not pursued.

[11] Paragraphs 3.15 raises a relevant matter and is allowed, up to the end phrase "Serious Fraud Office".

[12] Paragraphs 3.16 to 3.25 are not pursued.

[13] To the extent that paragraph 3.26 is relevant at all, I accept the submission that the defendant is prejudiced by this particular matter not having been pleaded prior to trial. The amendment is not allowed.

[14] I now turn to the draft fourth amended statement of claim. I am satisfied that paragraph 22.22 is relevant to the issue of aggravated damages. It is also "fresh" in the sense that it could not have been pleaded previously. The amendment is therefore allowed.

[15] In respect of paragraph 22.23, in all of the circumstances of the case, including the nature of the cross-examination, I am not satisfied that Mr Craig referring to the plaintiff having lied constitutes misconduct that is relevant to the issue of aggravated damages.

[16] Paragraphs 22.4 and 22.5 were not pursued.

[17] Paragraph 22.6 is relevant and not prejudicial up to the end of the phrase "Serious Fraud Office." The amendment is therefore allowed, to that extent.

[18] Paragraphs 22.7 and 22.8 were not pursued.

[19] Paragraph 22.9 was re-worded during oral argument as follows:

The cross-examination of Mr Williams, when he was recalled on the basis of material discovered during the course of the hearing, was offensive and embarrassing.

[20] In my view, as re-worded the particular is relevant. It raises a fresh issue that could not have been pleaded prior to trial. The amendment is therefore allowed.

[21] Paragraph 22.30 relates to a forensic IT consultant, Mr Chappell, who had been engaged by Mr Craig prior to trial. I am not satisfied that the matter pleaded is sufficiently relevant and probative to aggravated damages, in part for the reasons I identified in my separate ruling declining to grant the plaintiff an extension to close his case. Any connection appears to me to be extremely tenuous. Mr Chappell's convictions, as I understand it, are historic and date back a number of years. He is a recognised expert in his field. Any objections to his involvement should have been resolved pre-trial. It appears that it was not necessary to do so, however, because the application for him to inspect the plaintiff's phone was not pursued once the plaintiff raised concerns. Mr Chappell did not give evidence at trial. The decisions not to pursue the application for Mr Chappell not to inspect Mr Williams' phone, and to not call him at trial, appear to me to be quite proper judgment calls on the part of counsel. I do not accept that it is aggravating in itself for a party to use a consultant, with recognised expertise in an area, who has historic criminal convictions. Every person is entitled to try and move on from their past and endeavour to earn a living in their chosen profession. If their previous convictions arguably make them unsuitable for use in an expert role then that matter can be raised and ruled on by the

Judge at the appropriate time. Simply using a consultant with historic criminal convictions cannot, without more, be an aggravating factor.

[22] In relation to paragraph 22.31, it is alleged that Mr Craig has caused Mr Williams further hurt and distress by Mr Mills conduct in re-examining Mr Craig on the election night incident needlessly and gratuitously, so as to embarrass Ms McGregor. The re-examination that was undertaken was neither needless nor gratuitous. It was quite clear from the course of the evidence why it became necessary for experienced senior counsel to embark on that course. It did not constitute misconduct of the trial. Indeed Mr Mills would likely have failed in his duty to his client had he not put the relevant matters to him, which went to a critical issue in the case (whether the election night incident was consensual). I note that, prior to that, Mr Mills had been extremely cautious about the way this highly sensitive evidence was dealt with at trial. This does not constitute misconduct of the trial that is potentially relevant to aggravated damages.

[23] Paragraph 22.32 and 22.33 relates to a bundle of documents that was produced during the course of trial and was allegedly misleadingly titled by the defendant's solicitors. In my view this is not an issue that is relevant to the issue of aggravated damages. The document was ultimately admitted by consent. If exception was taken to the way it was titled, then formal objection should have been taken to that. I would have ruled on the issue and, if necessary, required that the bundle be re-named before it was used or given to the jury. I am not satisfied that it is an issue that is materially relevant to aggravated damages.

[24] In terms of paragraph 22.34, I am not satisfied that the matter pleaded is aggravating vis-a-vis Mr Williams. It relates to potential hurt that may have been caused to Ms MacGregor. The amendment is not allowed.

[25] Paragraph 22.35 was not pursued.

[26] Paragraph 22.36 is in my view relevant and permissible and the amendment is allowed.

[27] Paragraph 22.37 is in my view relevant and permissible and the amendment is allowed up to the end of the words "he did not do so".

[28] Paragraph 22.38 is in my view is of marginal relevance. It does not accurately summarise the evidence adduced at trial. Furthermore, it is prejudicial to introduce this new allegation at this stage, once the evidence has been completed. It is a matter that could, and quite likely would, have been further explored at trial if it had been pleaded.

[29] Finally, I make an order prohibiting publication of this ruling in news media or on the internet or other publicly available database until final disposition of trial. This is to protect the parties' fair trial rights.



Katz J