IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1923
[2017] NZHC 735

IN THE MATTER	of the Defamation Act 1992
BETWEEN	COLIN GRAEME CRAIG Plaintiff
AND	CAMERON JOHN SLATER Defendant
AND	SOCIAL MEDIA CONSULTANTS LIMITED Second Defendant

Hearing:	7 April 2017 (further submissions, 12 April 2017
Appearances:	CG Craig, representing himself BP Henry and C Foster for Defendant
Judgment:	12 April 2017

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 12 April 2017 at 4.30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Background

[1] Mr Colin Craig is the plaintiff in defamation proceedings against the first defendant, Mr Cameron Slater, and the second defendant, Social Media Consultants Limited (SMC) (together, the publishers of the Whale Oil blog). Mr Slater counterclaims in defamation.

[2] During the 2014 general election campaign, Mr Craig was leader of the Conservative Party and a parliamentary candidate. Shortly before the election, his press secretary, Rachel MacGregor, resigned. Ms MacGregor subsequently made a complaint that she had been sexually harassed by Mr Craig. Sexual harassment proceedings before the Human Rights Review Tribunal between Ms MacGregor and Mr Craig were settled in May 2015. As a result of public controversy about Mr Craig's relationship with Ms MacGregor and the reasons for her resignation, members of the board of the Conservative Party raised questions about Mr Craig's continued leadership of the party. In June 2015, Mr Craig resigned as leader. He made public statements about the matter, including at press conferences on 22 June 2015 and 29 July 2015 and in a booklet which was distributed to members of the public. The publications contained allegations about Mr Slater's and Whale Oil's involvement in a campaign to force Mr Craig's resignation as party leader. In June and July 2015, Mr Slater made numerous statements on radio and television, and in blog posts on the Whale Oil blogsite, about Mr Craig's relationship with Ms McGregor; the settlement of the sexual harassment proceedings; Mr Craig's resignation and related matters.

[3] The proceeding concerns allegedly defamatory statements published by Mr Slater and SMC about Mr Craig, and by Mr Craig about Mr Slater. In defence of Mr Craig's claims, Mr Slater and SMC plead denials of allegedly defamatory meanings and the affirmative defences of truth, honest opinion and qualified privilege. Mr Craig pleads similar defences in response to the counterclaim.

[4] Mr Slater gave timely notice under s 19A(2) of the Judicature Act 1908 requiring that the trial be held before a judge and jury. This judgment addresses an

application by Mr Craig seeking an order under s 19A(5) of the Act that the case be tried before a Judge without a jury.[1]

[5] The application has come very late. Jurors have been summoned for the trial, which is scheduled to occupy three weeks, beginning on 8 May 2017. It is essential that the parties and the Court registry know as soon as possible how the trial is to proceed.

Result

[6] I have decided that the application should succeed and that the proceeding should be tried by a judge without a jury. Of necessity, I express my reasons for that view only briefly.

Legal principles

[7] Section 19A of the Judicature Act 1908, so far as is relevant, provides:

> **19A Certain civil proceedings may be tried by jury**
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> (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.
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> …
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> (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—
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> (a) that the trial of the civil proceedings or any issue therein will involve mainly the consideration of difficult questions of law; or

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[1] Despite the repeal of the Judicature Act 1908 by the Senior Courts Act 2016, the application continues under the 1908 Act pursuant to clause 10(1) of Schedule 5 of the repealing statute.

(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.

[8] Section 19B is also relevant:

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

[9] At the time Mr Slater gave notice requiring that the case be tried before a jury, Mr Craig agreed with that course. His application under s 19A(5) signals a change of view.

[10] As applicant, Mr Craig bears the onus of proving that one of the grounds under s 19A(5) (a) or (b) is satisfied. Although they may overlap in some cases, each limb forms a distinct, specific ground on which a Judge alone trial can be ordered. It is appropriate to address each separately.

Section 19A(5)(a): consideration of difficult questions of law

[11] Section 19(5)(a) permits the Judge to order a trial without a jury where the trial, or any issue raised in the trial, will mainly involve the consideration of difficult questions of law.

[12] It is now well established that s 19A(5)(a) is not concerned with whether the questions of law arising are difficult ones:

> The issue is whether the questions of law are such that it is difficult to keep the respective functions of judge and jury separate from one another, such as where matters of law so merge into one another that the task of the jury becomes complicated in the application of the facts to the law.[2]

[13] It is helpful to be reminded of the explanation and application of this principle in *Guardian Assurance Company Limited v Lidgard*:[3]

> Paragraph (a) speaks of "the consideration of difficult questions of law". The word used is "consideration" and not "determination". Therefore it seems to us that the paragraph is dealing with practical problems likely to arise during the progress of the trial … There are cases where matters of law and matters of fact so merge into one another that the task of the jury becomes complicated in the application to the facts of questions of law which it is difficult for the Judge to explain in language they could be expected to appreciate and apply.
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> … it is not possible to describe exhaustively any category of cases in which the power conferred by the paragraph might properly be exercised, but we have said enough to show that, in our opinion, *the principal matter for consideration under the paragraph must be the extent to which the exposition and application of matters of law may cause difficulty to the Judge and the jury in the discharge of their respective functions.*
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> We think this construction of para. (a) enables effect to be given to the word "difficult" in the phrase "difficult questions of law". If …, as we think, the paragraph contemplates the effect which questions of law may have on the convenient discharge of their respective tasks by both Judge and jury in the course of a trial, then *the more difficult the questions of law become the more complex those tasks may become, especially when matters of law and matters of fact are inextricably mingled….*
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> (emphasis added)

[14] A trial of the defamation proceedings in *News Media (Auckland) Ltd v Young* by judge alone was rejected by the Court of Appeal.[4] In *Buchanan v Jennings*, however, Heron J ordered a defamation trial to be tried by a judge without a jury. The Judge held that the issue of whether what was said outside Parliament amounted to a publication of defamatory words was a mixed question of fact and law of such a nature that it becomes difficult to keep the respective functions of Judge and jury

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2 *Television New Zealand Ltd v Haines* CA 96/06, 6 September 2006 at [10] (a defamation case), applying *Guardian Assurance Company Limited v Lidgard* [1961] NZLR 860 (CA). This view was reinforced more recently in *Gregory v Gollan* [2008] NZCA 568, (2008) 19 PRNZ 450 at [13].

3 *Guardian Assurance Company Limited v Lidgard* above, n 2 at 863 – 864.

4 *News Media (Auckland) Ltd v Young* [1989] 2 NZLR 173 (CA) at 175.

separate from one another, and matters of law and matters of fact merged into one another.[5]

[15] In this proceeding, the defendants rely on the qualified privilege founded on the principles recognised in *Lange v Atkinson*[6] and developed recently in *Durie v Gardiner*.[7] The privilege protects the publication of political discussion about government and individuals in public office, including those who aspire to public office. Mr Craig relies on what is called the "reply to attack" qualified privilege, which entitles a person to reply to an attack on their character or reputation, even by making statements which themselves may be defamatory.[8]

[16] It will necessary for the decision-maker or decision-makers in this case to determine:

(a) whether an occasion of qualified privilege existed at the time of publication of the allegedly defamatory statement relied upon; and, if so,

(b) whether a defence of qualified privilege fails because Mr Craig or the defendants, as the case may be, prove that, in publishing the matter that is the subject of the proceedings, the statement maker was predominantly motivated by ill will towards the subject of the defamation, or otherwise took improper advantage of the occasion of publication.[9]

Section 19A(5)(b): prolonged examination or investigation which cannot conveniently be made with a jury

[17] Section 19A(5)(b) permits the Judge to make an order if it appears to the Judge that the trial or any issue will require any prolonged examination of

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5 *Buchanan v Jennings* HC Wellington CP 109/98, 25 August 2000

6 *Lange v Atkinson (No 1)* [1998] 3 NZLR 424 (CA); *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA)

7 *Durie v Gardiner* [2017] NZHC 377at [105].

8 *Adams v Ward* [1917] AC 309 (HL); *Alexander v Arts Council of Wales* [2001 EWCA Civ 514, [2001] 1 WLR 1840; *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569 at [3].

9 Defamation Act 1992, s 19(1).

documents or accounts, or any investigation in which difficult questions are likely to arise in relation to technical, business, or professional matters, being an examination or investigation which cannot conveniently be made with a jury.

[18] *Guardian Assurance Company Limited v Lidgard* also illuminated the relevant principles when considering under s 19A(5)(b) whether the appropriate mode of trial is judge alone or with a jury:[10]

> Paragraph (b) of the subsection refers to cases requiring prolonged examination of documents or accounts or investigations into other specified matters, and the words used in relation thereto are "cannot conveniently be made with a jury". It is, of course, clear that the onus is on an applicant, and we would think that the Judge, in considering questions of convenience, would have regard to "the interests of the parties, of the Court and jury whose time is occupied, and the general interests of the administration of justice": *Moore v Commercial Bank of Australia* [1934] NZLR 106, 111; [1934] G.L.R. 103. The selection of the word "with" rather than the word "by" indicates, we think, that *in cases coming within para. (b), regard is required to be had not only to the position of the jury in such a trial, but also the position of the Judge, on whom would fall the responsibility of giving the jury an adequate direction to enable them to proceed with the "examination" or "investigation" as the case might be.* There are no similar words in para. (a), but we think it is plain that the guiding considerations must be somewhat the same.
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> (emphasis added)

[19] In *Television New Zealand Ltd v Prebble*,[11] a full Bench of the Court of Appeal unanimously allowed the appeal against an order for trial by judge and jury, as the complexity of the case dictated trial before a judge alone.[12] The members of the Court noted that the trial would concern difficult business matters, including the sale of major state assets, and would require prolonged examination of documents such as could not conveniently be made with a jury.

[20] As a counterclaiming defendant, Mr Slater has made it clear that he wishes to have his reputation vindicated in front of a jury. Members of the Court in *Prebble* considered of the role of the jury in vindicating honour and reputation in a defamation trial. Casey J noted that s 19A(5)(b) is not balanced by the need to have

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10 At 863.

11 *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA); reversed but not on this point in *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, [1994] 3 All ER 407 (PC).

12 At 540.

regard to the vindication of the plaintiff's honour by jury, although that is normally a strong factor favouring trial by jury for defamation suits.[13]

[21] More recently, in *Television New Zealand Ltd v Haines*, the Court of Appeal rejected the argument that, where a defendant's integrity has been challenged and actual malice alleged, a defendant is entitled to a trial by jury even if the case may involve prolonged examination of documents.[14] The Court held that the views of the English Court of Appeal in *Rothermere v Times Newspapers Ltd*[15] was authority only for the proposition that the fact a party's integrity may have been challenged is a strong factor in favour of a jury trial where issues of public importance are at stake.[16]

Discretion

[22] Once the jurisdictional grounds under either (a) and/or (b) has been established, s 19A(5) confers a residual discretion on the judge whether to order a judge alone trial or to continue with trial by judge and jury.[17]

[23] The Court of Appeal in *McInroe v Leeks* characterised this overall process as a "balancing exercise". The Court reinforced that the increasing rarity of jury trials should not unduly impact their value, stating:[18]

> "The importance of the right to a jury trial is not to be undervalued, even in today's conditions where such trials are, comparatively speaking, not common in the civil jurisdiction of the High Court. At issue is a balancing exercise, under which if the threshold requirements are made out the Court must give careful consideration to how best the trial process and its management can meet the overall justice of the case, placing due weight on the entitlement of a party to seek trial by jury. The significance of the jury influence on standards of behaviour, and of vindicating in an appropriate way those who have been wronged and also vindicating those who have been wrongly charged with infringing another's rights, must be kept firmly in mind."

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13 *Prebble*, above n 11, at 537.
14 *Television New Zealand Ltd v Haines* above n 2, at [41].
15 *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013.
16 *Television New Zealand Ltd v Haines,* above n 2, at [43].
17 *Gregory v Gollan,* above n 2, at [25].
18 *McInroe v Leeks*, above n 4, at [21].

Applicant's submissions

[24] Mr Craig submits that the grounds under both ss 19A(5)(a) and (b) are satisfied.

[25] As to s 19A(5)(a), he says that the trial will involve considerations of difficult questions of law involving qualified privilege. These questions are said by Mr Craig to be ones where matters of fact blur with matters of law and there is some difficulty separating the role of Judge and jury. Among other things, he relies on observations to that effect made by Katz J in a judgment ruling on matters of qualified privilege arising in a related but separate defamation proceeding in which Mr Craig was the defendant, *Williams v Craig*.[19]

[26] He also submits that the requirements of s 19A(5)(b) are met in that the proceeding will require the fact finder to engage in a prolonged examination of many documents and factual issues, something which a jury cannot conveniently do. Drawing on his experience in *Williams v Craig*, Mr Craig suggests that the question trail designed to assist the jury to identify and decide the issues in this case will run to as many as 100 pages and says that the time, effort and expertise required to follow it should not reasonably be required of a jury.

Respondent's submissions

[27] On behalf of Mr Slater, Mr Henry notes that, in a judicial conference in the early stages of this proceeding, the parties agreed that it was appropriate for the case to be tried by a judge with a jury.

[28] Mr Henry argues first that the case is not nearly as complex as Mr Craig submits: the directions on legal matters which the trial judge will be required to give the jury are not controversial and the factual issues the jury will be required to decide fall within a narrow compass. Mr Henry says there is a singular question for the jury to decide: whether or not Mr Craig sexually harassed his press secretary, Ms MacGregor. The answer, counsel submits, will turn predominantly on the jury's

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[19] *Williams v Craig* [2016] NZHC 2496 at [4], [5], [59]–[60] and [88].

views of the credibility of Mr Craig and Ms MacGregor and it will determine the outcome of the trial.

[29] Mr Slater's position is whether Mr Craig sexually harassed Ms MacGregor is appropriate for a decision by a jury, contending that the jury "is used in the New Zealand constitution to set the appropriate levels of behaviour regarding sexual indiscretions by senior politicians and the damages consequences that flow if the media gets it wrong". Mr Henry does not cite authority for that broad proposition.

[30] As to the asserted difficulties with the defences of qualified privilege, Mr Henry submits that, on the particular facts of this case, they do not exist and, if so, certainly not to the extent that would justify a trial by Judge alone. He submits that it is inarguable that Mr Slater (and SMC) are journalists and entitled to claim the qualified privilege available in accordance with *Lange v Atkinson* principles. He submits that the nature of the privilege can easily be explained to a jury and that on the pleadings and undisputed facts the Court will have no difficulty determining whether the privilege applies. Whether the defence of qualified privilege should fail, in terms of s 19 of the Defamation Act, is essentially a question of fact well able to be determined by a jury which has received appropriate directions on matters of law from the trial Judge.

[31] Mr Henry also submits that the qualified privilege relied upon by Mr Craig, as arising because he was replying to at attack, is obviously available. At the time of the publications which are the subject of the proceeding, Mr Craig was plainly under attack from a substantial number of journalists, politicians and members of the public. Whether the defence should fail because Mr Craig was predominantly motivated by ill will towards the defendants or otherwise took improper advantage of the occasion of publication are matters of fact well within the province of a jury.

[32] Mr Henry also submits that Mr Craig's assertion that employment laws, the scope of the Human Rights Act, Electoral law and the financing of political parties and matters of contractual liability and fraud do not arise in the case. He says that the evidence contained in the proposed witness briefs provided by Mr Craig in accordance with the pre-trial disclosure regime do not refer to or raise any such

issues, and there are no complex questions of law or fact on such matters within the compass of the case.

Analysis

Qualified privilege - s 19A(5)(a)

[33] It is sufficient for present purposes to adopt the helpful analysis of Katz J in her ruling in *Williams v Craig,*[20] where the Judge said:

> [4] Determining whether a defence of qualified privilege arises in any given case requires a two stage analysis. The first stage is to identify whether the relevant statements were made "on an occasion of privilege". This is an issue for the Judge, on which the defendant bears the onus of proof. If an occasion of privilege exists, then the second stage of the analysis is to consider whether it has been lost (hence the phrase "qualified" privilege). This is an issue for the jury, on which the plaintiff bears the onus of proof. Qualified privilege will be lost if the plaintiff proves that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
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> [5] Although it is for the Judge to determine whether the statements were made on an occasion of privilege, he or she may only do so (where the trial proceeds before a jury) on the basis of undisputed facts. If factual issues need to be resolved in order for the Judge to determine the issue, then those factual issues must be put to the jury for determination. Only then can the Judge determine whether the occasion was one of qualified privilege. As is apparent from the case law there are difficult demarcation issues between the role of the Judge and the role of the jury in cases where the defence of qualified privilege is raised, and that has certainly proved to be the case here.
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> (footnotes omitted)

[34] In that case the Judge held that it was possible on the basis of undisputed facts to determine whether the statements were published on occasions of qualified privilege. It is by no means clear to me that it would be possible for the trial Judge in the present case to make the necessary determination without requiring the jury to make relevant findings of fact upon which it may be based. To illustrate by one example noted by Mr Craig in argument, his resignation as leader of the Conservative Party in June 2015 gives rise to an argument, at least, that the *Lange v Atkinson* privilege was no longer available to Mr Slater and SMC after that event.

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[20] *Williams v Craig* above n 19.

[35] I have regard also to the complication of differing views about whether issues of justification should be considered by the Judge at the first stage of the inquiry (whether the occasion is one of qualified privilege), or by the jury at the second stage of the inquiry (whether the previous has been lost). At [60] of her judgment, Katz J cited the learned authors of *Gatley on Libel and Slander* as saying that if a defendant has responded to an attack which he knows to be justified (a proposition I understand which is made here, about Mr Craig) he is guilty of malice, though there is also a view that the case might equally be one in which the occasion was not privileged. Katz J noted that it was suggested by counsel for the plaintiff in *Williams v Craig* that the issue of justification should be put to the jury for determination as a preliminary issue with the jury then determining whether the occasion was one of qualified privilege in light of their answers.[21] As the Judge said, that course appeared to be unduly cumbersome and unnecessary in all of the circumstances.

[36] Consistently with the suggestion made by the Court of Appeal in *Television New Zealand Limited v Haynes* and in *Gregory v Gollan,*[22] I invited Mr Henry to submit for consideration a draft question trail which he would submit should be the basis of the question trail presented by the trial Judge to the jury in the course of summing up the case and giving directions on matters of law. Mr Craig had already provided a draft question trail as an attachment to an affidavit sworn by Mr JWG Graham, who was second counsel for him during the *Williams v Craig* proceeding. The question trail used in that case comprised 30 pages. Acknowledging that the issues were not identical to the issues which arise in the present case, Mr Craig nevertheless submitted that the matters addressed by the question trail in *Williams v Craig* dealt only with issues which arise in relation to the defendant's counterclaim in the present proceeding.

[37] Mr Henry helpfully provided his draft question trail shortly before the release of this judgment. It is telling, in my view, that notwithstanding Mr Henry's submission that this is a straightforward case, the draft he proposes runs to 63 pages. That a document of something like that length would be necessary to adequately identify the issues for determination by the jury and to guide them along a pathway

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21 At [61].
22 Above n 2.

or orderly decision-making arises not merely from the scope of the factual inquiry the jury will be required to undertake but also from the complexity of the legal issues, especially concerning the defences of qualified privilege.

[38] I am satisfied, therefore, that the defences of qualified privilege which are advanced in this case, "will involve mainly the consideration of difficult questions of law"[23] as that expression was defined by the Court of Appeal in *Guardian Assurance Company Limited v Lidgard*[24] and quoted above at [13], because of "the extent to which the exposition and application of matters of law may cause difficulty to the Judge and the jury in the discharge of their respective functions."

The factual complexity of the case - s 19A(5)(b)

[39] In the pleadings filed in this case, there are 18 separate publications of allegedly defamatory statements relied upon by Mr Craig and two publications relied upon by Ms Slater in his counterclaim. Arising out of the allegations, 50 possibly defamatory meanings are asserted. The factual background to each of the publications is extensive. In particular, what Mr Henry described as the central question of the relationship between Mr Craig and Ms MacGregor and whether it included the sexual harassment of Ms MacGregor is likely to be wide-ranging, both as to the nature of the relationship and as to what occurred in the months following Ms MacGregor's resignation. Mr Craig says that the common bundle of documents in preparation by the parties exceeded 1,500 pages at the time of the hearing of the application and may be significantly larger than that.

[40] I am satisfied that this is a case which will be of such legal and factual complexity as to make it unreasonable to require a jury of lay people drawn from all corners of the community, to undertake the rigorous and methodical exercise of working their way through questions of fact against what will at times be a complex legal background. To explain my view I adopt gratefully the succinct explanation given by Brewer J in *Couch v Attorney-General* as follows:

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23 Section 19A(5)(a).
24 Above at n 2.

> [10] The point of subs (5)(b) is that some cases will simply be too long and/or the issues too complex to be conveniently tried with a jury. In my view the emphasis of subs (5)(b) is on "conveniently". A jury is presumed competent to determine any factual issue, just as a Judge sitting alone is presumed competent to determine any factual issue. However, some issues may take a very long time to define. Some issues require the parties to take considerable care to educate the tribunal of fact, be it Judge or jury, on the area of specialist expertise involved so it will be in a position to determine the issues of fact properly.
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> [11] A jury consists of 12 members of the public chosen by ballot. Jurors have to suspend the normal passage of their lives to serve on a jury. Once a trial starts they have to continue serving until they have delivered their decision. There is a limit to what they can be expected to do in order to decide a dispute about liability to pay money. There is also a limit to what the parties and the Judge can be expected to do to assist the jury so as to ensure that its decisions on the facts are made on a proper basis.
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> [12] On the other hand, a Judge's job includes sitting on lengthy and complex civil cases. It includes working outside sitting hours as the trial progresses to ensure he or she is abreast of the evidence and understands it. Crucially, the Judge can reserve his or her decision at the conclusion of the trial and take whatever time he or she needs to review the materials and the arguments of counsel. Once the Judge has reached a view on the facts, the law can be applied and written judgment given. The judgment, of course, gives reasons for the decisions reached.
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> [13] There is a broad interests of justice criterion in the evaluation of whether, against the statutory criteria, a case can be tried conveniently with a jury.[25]

[41] For these reasons, I am satisfied that the trial of this proceeding will involve a prolonged examination of documents which cannot conveniently be made with a jury and that the test under s 19A(5)(b) is therefore satisfied.

Result

[42] I order that this proceeding be tried before a Judge without a jury, commencing on Monday, 8 May 2017 at 10.00 am.

Addendum

[43] After I had completed the drafting of this judgment, but about two hours before its delivery, the judgment of Katz J in *Williams v Craig* [2017] NZHC 724 was delivered. The outcome of the judgment is that the jury's award of damages has

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[25] *Couch v Attorney-General* [2012] NZHC 2186.

been held to be well outside the range that could reasonably have been justified in all the circumstances of the case, that a miscarriage of justice has been found to have occurred, and that the jury's verdicts must be set aside and a re-trial ordered unless both parties are willing to consent to the Judge substituting a new damages award in place of the jury's award.

[44] Such reasons in that judgment as are relevant to the issues arising on this application are consistent with Katz J's views in her earlier ruling on qualified privilege to which I have referred. They are consistent with the reasons which I had already prepared. I did not consider it necessary, therefore, to invite the parties to comment on this very recent development.

[45] I have noted with interest that, on reflection, Katz J is satisfied that there was a misdirection in her summing up to the jury, relating to the demarcation line between Judge and jury on qualified privilege issues. For the benefit of the parties, I refer to the judgment at [24] - [25], [81] - [84] and [100].

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Toogood J