IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1923
[2017] NZHC 874

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: 1 May 2017

Appearances: CG Craig, representing himself
BP Henry and C Foster counsel for Defendants

Judgment: 4 May 2017

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 4 May 2017 at 9.30 am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Mr Colin Craig is the plaintiff and counterclaim defendant in defamation proceedings initiated by him against the first and second defendants. Mr Craig's claims and the counterclaim by Mr Slater are set down for a three-week trial before me, sitting without a jury, commencing on 8 May 2017.

[2] This judgment concerns an application by Mr Craig for permission to be assisted in Court by a McKenzie friend; that is, a support person who may attend as a friend and sit beside an unrepresented party to civil litigation to provide support, take notes, make suggestions and give advice.[1] A McKenzie friend does not have the right to take part in the proceedings as an advocate, although the Court has a discretion to allow the friend to play a greater role, such as speaking for the party, if that is thought appropriate. That discretion is exercised sparingly.

[3] The unusual feature of this case is that the McKenzie friend from whom Mr Craig wishes to obtain assistance throughout the trial of the proceeding is a practising barrister, Mr Thomas Cleary.

[4] Although the defendants do not object in principle to the appointment of a McKenzie friend for Mr Craig, they oppose the granting of permission for Mr Cleary to act in that capacity.

Result and order

[5] After hearing from Mr Craig and from Ms Foster on behalf of the defendants, I granted Mr Craig permission to use Mr Cleary in court as a McKenzie friend. The order I made was in these terms:

> (a) Until the further order of the Court, I grant permission for Mr Thomas Cleary, Barrister, to sit in court as a support person/McKenzie friend for Mr Craig in respect of all matters before the Court in this

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[1] *Mihaka v Police* [1981] 1 NZLR 54 (HC); and *McKenzie v McKenzie* [1970] 3 WLR 472 (CA).

proceeding, with immediate effect. The conditions applying to the grant are that Mr Cleary may:

(i) sit beside Mr Craig in court;

(ii) take notes;

(iii) quietly make suggestions to Mr Craig and give advice;

(iv) propose questions and submissions to Mr Craig who may put the same before the Court; and

(v) in rare circumstances, and only with the further leave of the Court, address the Court.

(b) Mr Cleary will not be permitted to ask questions of any witness.

[6] I told the parties I would set out the reasons for my decision in a written judgment. This is that judgment.

The nature and complexity of the proceeding

[7] To explain the nature of the proceeding, I adopt the following summary from a judgment dated 12 April 2017,[2] in which I granted an application by Mr Craig for an order under s 19A(5) of the Judicature Act 1908 that the case be tried before a judge without a jury:[3]

> [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

2 *Craig v Slater* [2017] NZHC 735.

3 Despite the repeal of the Judicature Act 1908 by the Senior Courts Act 2016, the proceeding continues under the 1908 Act pursuant to clause 10(1) of Schedule 5 of the repealing statute. Mr Slater had previously given timely notice under s 19A(2) of the Judicature Act requiring that the trial be held before a judge and jury.

> 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.
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> [3] The proceeding concerns allegedly defamatory statements published by Mr Slater and [the second defendant] about Mr Craig, and by Mr Craig about Mr Slater. In defence of Mr Craig's claims, Mr Slater and [the second defendant] 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.

[8] In ordering that the case be tried before a judge without a jury, I held that the defences of qualified privilege which are advanced in the case "will involve mainly the consideration of difficult questions of law",[4] particularly relating to the respective functions of judge and jury in addressing the defence.[5] I relied, in part, on observations to the same effect by Katz J in an interlocutory judgment in the separate but related case of *Williams v Craig*,[6] a proceeding issued in the Auckland Registry of the Court under CIV-2015-404-1845, in which Mr Craig is sued by a Mr Jordan Williams, a former Conservative Party colleague of Mr Craig.

[9] I held also that this case 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. [7] That view was based on:

(a) the knowledge that around 50 possible defamatory meanings are asserted in the claim and counterclaim;

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4 Judicature Act 1908, s 19A(5)(a).
5 *Craig v Slater* above n 2, at [38].
6 *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569.
7 *Craig v Slater* above n 2, at [40].

(b) Mr Craig's explanation to the Court that the common bundle of documents in preparation by the parties would exceed 1,500 pages; and

(c) the estimates of the parties about the very large number of issues to be determined in the trial.[8]

[10] It is relevant to the present application that there are at least two other defamation proceedings arising from events related to the matters referred to above at [2]. One is *Williams v Craig*,[9] the trial of which resulted in a jury awarding Mr Williams a total of $1.27 million in damages, said by the trial Judge to be the highest sum of damages ever awarded for defamation in New Zealand by a significant margin.[10] In that proceeding, Mr Craig was represented by Queen's Counsel and a litigation partner in Chapman Tripp, a major law firm; Mr Williams was represented by a very experienced barrister who has specialised in defamation law for over 40 years, and junior counsel who is also a defamation specialist.

[11] The other related proceeding is *Craig v Stringer*, issued in the Christchurch Registry of the Court under CIV-2015-409-575, in which Mr Craig sued a former member of the Board of the Conservative Party, Mr John Stringer. In concluding that the trial of that proceeding should be heard by a Judge without a jury, Gendall J was influenced by the complexity of the relevant law and the factual matrix and by the complications likely to arise from the fact that neither Mr Craig nor Mr Stringer would be represented by counsel at a trial in which "reasonably complex legal matters" would arise.[11] The case, however, settled before trial.

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8 Since that judgment was delivered, Mr Craig has filed a draft statement of the issues which identifies 304 separate questions for determination.

9 *Williams v Craig*, above at [8].

10 In a recent judgment, however, Katz J set aside the jury's verdicts on the grounds that the damages award is well outside the range that could reasonably have been justified in all the circumstances of the case and that a miscarriage of justice has occurred: *Williams v Craig* [2017] NZHC 724.

11 *Craig v Stringer* [2016] NZHC 2808 at [36] – [39].

Mr Craig's reasons for wanting to use a practising barrister as a McKenzie friend

[12] In support of his application to use Mr Cleary as a McKenzie friend, Mr Craig explained that Mr Cleary's instructing solicitors had acted as Mr Craig's legal advisers in the *Williams v Craig* proceeding. He described Mr Cleary as being a junior barrister who, nevertheless, is experienced in defamation cases. In particular, Mr Cleary assisted with the preparation of Mr Craig's case for trial in *Williams v Craig*, and appeared as junior counsel to Mr Mills QC on the application before Katz J for orders setting aside the jury's verdicts in that case.

[13] Mr Craig's memorandum in support of his application contains a number of factual assertions which are not verified by admissible evidence, but I do not understand the statements of fact to be disputed. In essence, the position appears to be that Mr Craig is paying Mr Cleary on an hourly basis for his services in assisting him with the preparation of the case for trial and will pay Mr Cleary for any assistance provided as a McKenzie friend. Formal instructions for Mr Cleary have been given by Chapman Tripp and Mr Mills QC, a senior member of Shortland Chambers where Mr Cleary is also a member, has undertaken to supervise Mr Cleary's work on Mr Craig's behalf. Mr Craig explained that he wished to obtain cost effective assistance from a lawyer experienced in defamation cases and said that he has valued Mr Cleary's assistance to date. I observe that the written material presented by Mr Craig in relation to interlocutory matters which have arisen so far has the stamp of a qualified and knowledgeable lawyer rather than that of a lay person and I have found the material helpful.

[14] Because Mr Cleary has not had the requisite three years' legal experience before being permitted to practice as a barrister sole as of right,[12] he received a special exemption to do so from the Law Society,[13] provided he gave an undertaking to receive instructions only from barristers within Shortland Chambers. Under the Chambers Junior Programme, Mr Cleary is supervised by an instructing barrister.

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12 Lawyers and Conveyances Act (Lawyers: Practice Rules) Regulations 2008, r 12.
13 Rule 12A.

[15] Given Mr Cleary's limited practical experience, Shortland Chambers was not prepared to allow him to be instructed to represent Mr Craig in the proceeding beyond providing mere assistance. Mr Craig noted that there could be no objection to Mr Cleary sitting in the back of the Court throughout the trial and providing him with assistance intermittently. The only real difference between that arrangement and Mr Cleary being authorised to assist as a McKenzie friend is that Mr Cleary would be sitting beside him in court.

The defendants' objections

[16] Ms Foster confirmed that the defendants were unable to point to any unfairness or prejudice to the conduct of their case by Mr Cleary acting as a McKenzie friend. The defendants' opposition is based on two propositions:

(a) The perceived ethical "difficulties" of such an arrangement which have been referred to by the Law Commission, the New Zealand Law Society and the New Zealand Bar Association in the opposition to the appointment of a practising lawyer as a McKenzie friend.

(b) An objection asserting that, by choosing to represent himself with the aid of a qualified barrister who will be present in court under the guise of a McKenzie friend supervised by a Queens Counsel, Mr Craig is "expatiating" or magnifying the stress of Ms MacGregor, his former press secretary, whom he is alleged to have sexually harassed. It is said that, although Mr Craig has the ability to have counsel appear for him, he is choosing to take the opportunity to cross-examine Ms MacGregor himself in "a blatant attempt by a wealthy man to re-victimise and intimidate the victim", a course which is "entirely inappropriate".

[17] The defendants rely on statements at 15.25 and 15.26 of the Law Commission's *Review of the Judicature Act 1908: Towards a new Courts Act*.[14] In that report, the Commission said:

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[14] Law Commission *Review of the Judicature Act 1908: Towards a new Courts Act* (NZLC R 126,

> 15.25 One submitter supported the idea of lawyers acting as McKenzie friends, although no reasons for this were provided. On the other hand, the Law Society and the Bar Association did not, although the former would allow it in exceptional cases.
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> 15.26 The Commission concurs with the view expressed by the Law Society that, as lawyers are subject to ethical obligations to their client and have duties to the court, combining the two could blur the roles and lead to confusion. The Law Society suggested that, if practising lawyers wished to support a person who cannot afford legal representation, the better approach would be for the lawyer to represent the party by acting pro bono as a lawyer, rather than as a McKenzie friend. The Commission agrees.

[18] Although recommending that new legislation on the courts should recognise a self-represented litigant's general entitlement to a support person, the Commission also recommended that a barrister and/or solicitor of the High Court of New Zealand should not be permitted to be a support person to a self-represented litigant.[15]

[19] In view of the Commission's reference to the submissions made to it by the New Zealand Law Society and the New Zealand Bar Association, I provided both organisations with an opportunity to indicate that they wished to intervene in the application for Mr Cleary's appointment as a McKenzie friend to Mr Craig, if they wished to do so. Neither organisation accepted the opportunity to make submissions.

Discussion

[20] It is common ground that Parliament did not include a provision adopting the Law Commission's recommended prohibition in R78 when it enacted the important legislation which reformed and updated the conduct of the business of the Supreme Court, Court of Appeal, High Court and, to a lesser degree, District Court. Courts, therefore, retain a discretion to permit recourse to the services of a McKenzie friend who is a practising barrister and/ or solicitor. The reference at 15.26 of the report to the possible blurring of the lawyer's role as a practitioner having ethical duties to his or her client and also a duty to the Court reflected observations by the Court of

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26 November 2012) at 150.

15 At [R76] and [R78].

Appeal in *R v Hill* of "obvious difficulties" with permitting a lawyer to act as a McKenzie friend:[16]

> For example, would legal professional privilege apply as between the accused and a lawyer acting as a McKenzie friend? What duties would a lawyer acting as a McKenzie friend owe to the Court as distinct from any duties that might be owed to the accused? What liability might the lawyer have to the accused; and what control would the Court have over a lawyer acting as a McKenzie friend rather than an advocate in the usual sense?

[21] The issues raised by the Court of Appeal militate against the automatic approval by the courts of McKenzie friends who are practising lawyers and suggest reasons why the practice may be unlikely to become widespread. The question raised in *Hill* was whether the judge in a criminal trial should have appointed the defendant's former counsel as a McKenzie friend and, moreover, whether the lawyer would have been under an ethical duty to accept the appointment. The Court firmly rejected the latter proposition, so its observations about the "difficulties" were speculative and did not reflect a considered decision following focussed argument. Although the Court of Appeal observed in *R v Hill* that there was no authority for allowing lawyers to act as McKenzie friends,[17] it is equally true that there is no authority holding that there are ethical or other reasons why a practising barrister and/or solicitor may never act in such a capacity.

[22] The examples given in *R v Hill* are issues which might arise in the course of a hearing in which a practising lawyer is acting as a McKenzie friend. Mr Craig indicated through his submissions that Mr Cleary accepts that legal professional privilege applies as between Mr Craig and him in terms of the communication of information and advice. I do not see any difficulties which might arise from a conflict between Mr Cleary's duty to Mr Craig and his duty to the Court in any sense that would not be just as likely to arise as if Mr Cleary was acting as counsel. Indeed, the opportunities for such conflicts may well be reduced in circumstances where the legal practitioner is not authorised to make representations to the Court or conduct the examination or cross-examination of witnesses.

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16 *R v Hill* [2004] 2 NZLR 145 (CA) at [52].
17 At [54].

[23] It is conceivable that a lawyer acting as a McKenzie friend might become aware of dishonest or misleading conduct by the self-represented litigant or a proposal that the litigant should act in such a manner, but it seems obvious that the proper course would be for the practitioner to voluntarily relinquish the role at least. Whether there would be an overriding obligation to the Court to inform the Court of what was intended or what was happening would need, I think, to be determined on a case by case basis.

[24] The question of what control the Court would have over a lawyer acting as a McKenzie friend rather than an advocate in the usual sense seems to me, with respect, generally to be straightforward. The Court would have the same powers to control the conduct of the McKenzie friend whether or not he or she was a practising lawyer, including the ability to ensure that the McKenzie friend did not step outside the boundaries of his or her responsibility as drawn by the Court.

[25] Legal practitioners have been permitted to act as McKenzie friends in several New Zealand cases:

(a) *Lee v The New Korea Herald Ltd*:[18] a defamation case before a judge sitting without a jury. The former counsel for the defendant agreed to stay and assist the defendant in a role akin to a McKenzie friend with the permission of the Court. The Judge thanked the lawyer for his assistance in the case.[19]

(b) *Re Cellar House Ltd*:[20] a civil case involving allegations of breaches of duties by a company director. The Judge noted that, although an issue had been raised at the commencement of the hearing about the McKenzie friend's ability to appear because he was a practising lawyer (relying on *R v Hill*), the objection was not pursued. The practitioner was permitted to act after the Court advised of the "potential issues" for the McKenzie friend and the defendant.[21]

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18 *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010.
19 At [4].
20 *Re Cellar House Ltd (in liq)* HC Nelson CP13/00, 18 March 2004.
21 At [244] – [245].

(c) *R v Crichton*:[22] a case in which a defendant was permitted to have an enrolled but suspended legal practitioner act as his McKenzie friend in a criminal jury trial in which he faced 11 counts of drug dealing. In granting permission for the appointment, Hugh Williams J noted that the argument in favour of the arrangement was that the trial involved a long-standing matter which had been adjourned on previous occasions, had been the subject of a lengthy interlocutory history and where the trial had begun by the empanelling of the jury. The Judge considered that difficult areas of law may come to the fore during the trial and held that, in fairness to the defendant and to safeguard the integrity of the trial process, the defendant should have somebody endeavour to look after his legal interests as the trial proceeded. The Judge stressed that the appointment had no value as a precedent and, applying *Mihaka v Police*,[23] limited the role of the McKenzie friend to sitting alongside the defendant, taking notes, quietly making suggestions or proposing submissions.[24]

[26] Ms Foster referred me to *Torbay Holdings Ltd v Napier,* a case in which Fogarty J declined a self-represented defendant permission to have a practising solicitor assist him as a McKenzie friend.[25] That was a civil case involving significant claims for damages based on causes of action which included alleged breach of directors' duties, moneys had and received, knowing receipt of misappropriated moneys and negligence. The essence of the claims was an allegation that Mr and Mrs Napier had treated the funds of a company which operated a rest home business as their own and misappropriated $1.9 million for their own purposes and the purposes of the family trust of which they were beneficiaries. Fogarty J referred to both *Cellar House* and *Crichton*. He agreed with the summation of the Law Commission set out at 15.26 of its report, noting that the Commission's recommendation that practising lawyers should be prevented from acting as McKenzie friends had not been adopted by the Legislature. The Judge determined that, although Mr Napier was an intelligent man capable of making

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22 *R v Crichton* HC Auckland CRI-2009-404-251, 19 July 2010.
23 *Mihaka v Police* above n 1.
24 At [33].
25 *Torbay Holdings Ltd v Napier* [2015] NZHC 1290.

decisions under stress, he had little knowledge of the procedure of the Court. The Judge considered, however, that the trial judge could be vigilant to assist the lay litigant, to prevent any breaches of the rules of evidence by the lay litigant and to prevent him from being taken advantage of. He declined to permit the appointment.

Conclusions

[27] I put to one side as groundless the allegation that Mr Craig is a wealthy person who is seeking the Court's approval for an unusual arrangement which will see him having the benefit of legal advice while leaving him free to continue alleged harassment of Ms MacGregor; there is simply no merit in that submission. I do not know whether Mr Craig is wealthy – there is no evidence of his financial circumstances before the Court – but I infer that he incurred substantial costs in the *Williams v Craig* proceeding. It is unsurprising that he has sought affordable assistance from a person qualified to provide it, at least to the extent of giving advice on legal and procedural matters. There is no evidence that Mr Craig is likely to abuse his position as a lay litigant entitled to cross-examine Ms MacGregor and the other witnesses called on behalf of the defendants. The Court is well placed to ensure that Mr Craig conducts himself with propriety and that his questioning of the witnesses is conducted appropriately.

[28] I am not persuaded, either, that there is any reason in principle why Mr Cleary's appointment should be disapproved merely because he holds a practising certificate as a barrister. It has not been suggested that ethical issues of the kind referred to by the Court of Appeal in *R v Hill* will necessarily arise in this case and there is no reason to think that they could not be addressed if they do arise. The cases referred to indicate that the decision whether to grant permission to a practising lawyer to appear as a McKenzie friend is one which should be made by reference to the particular circumstances of the case.

[29] The tort of defamation is a somewhat arcane area of the law which is unfamiliar to many judges and senior legal practitioners. Defamation trials are usually conducted by senior and experienced counsel having some expertise in the subject. Mr Craig's proposal to use Mr Cleary meets his need to have valuable legal

assistance in representing himself in what is an important and complex civil proceeding. Given that there is no dispute that Mr Craig would be entitled to the assistance of a lay person as a McKenzie friend, it makes no sense to suggest that such a person should be preferred over a qualified barrister who has had some experience in defamation cases generally and who is particularly well acquainted with this case and the related proceeding in *Williams v Craig*.

[30] As Mr Craig argued, if Mr Cleary is able to provide Mr Craig with expert assistance to present his case effectively and in compliance with the law of evidence and the Court's procedural rules, the Court will benefit. I note, for example, that Mr Cleary will be available to provide valuable assistance to Mr Craig in dealing with objections to the admissibility of evidence which have been signalled by the parties.

[31] I am satisfied that my decision to grant permission in this case is one which turns very much on its particular and unique facts and that the decision is unlikely to lead to a flood of applications of a similar kind in other cases. For most litigants able to afford the assistance of counsel, there is no benefit in limiting the services of the practising lawyer to the provision of advice in the role of McKenzie friend. The real advantage of having a legal practitioner represent a litigant is in the presentation of the case to the Court, the examination and cross-examination of witnesses and the advantage of an experienced and objective approach to the conduct of the proceeding.

[32] While it is true that McKenzie friends commonly assist in cases where a litigant has been refused legal aid but considers he or she cannot afford the cost of counsel, the litigant's ability to pay for legal counsel is immaterial. And it is no answer to say that if a lawyer is willing to assist as a McKenzie friend he or she should undertake the work pro bono. In this case, Mr Craig's choice as support person is unable to appear as counsel. In any event, that proposition seems to me to be outdated.

[33] In delivering the annual Ethel Benjamin Commemorative Address for 2014,[26] Justice Helen Winkelmann discussed concerns about access to justice and quoted the observation of the Law Commission in its report that increasingly the role of McKenzie friend was "evolving to mirror the end-to-end service provided by lawyers".[27] Justice Winkelmann said the Commission noted that, although rights of audience were meant to be granted to fee-charging McKenzie friends only in exceptional circumstances, some McKenzie friends had told the Commission that that was the rule rather than the exception. The Judge concluded her thought-provoking address by suggesting that it was for the legal profession to pay a critical part in meeting the challenge to provide access to justice for all and that to meet that obligation, the profession would have to innovate. The Judge said that the legal profession would "have to be prepared to initiate and engage in debate about these issues and to question, and if necessary change, its current way of doing business."[28] I am inclined to think that the courts must facilitate such developments rather than stand in the way of them.

[34] Subject to imposing proper constraints on the role, I was satisfied it was appropriate to grant Mr Craig permission to use Mr Cleary as a McKenzie friend.

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Toogood J

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26 Helen Winkelmann "Access to Justice - Who needs lawyers?" (2014) 13 Otago LR 229.
27 At 241.
28 At 242.