IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-5218
[2018] NZHC 1100

BETWEEN	MATTHEW JOHN BLOMFIELD Plaintiff
AND	CAMERON JOHN SLATER Defendant

Hearing:	14 and 15 May 2018
Appearances:	F Geiringer for Plaintiff Defendant in person
Judgment:	15 May 2018
Reasons:	18 May 2018

JUDGMENT OF LANG J
[on application for Judge alone trial]

This judgment was delivered by me on 18 May 2018 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] Mr Blomfield sues Mr Slater in defamation in relation to 13 publications posted over a period of approximately one month on the website Whaleoil.co.nz. The trial is currently scheduled to heard before a jury on 8 October 2018, and has been allocated six weeks.

[2] Mr Blomfield now applies for an order under s 19A(5) of the Judicature Act 1908 that the case before tried before a Judge without a jury.[1]

[3] During the hearing on 14 and 15 May 2018 I advised Mr Slater and Mr Geiringer for Mr Blomfield that I proposed to grant the application. I did not take Mr Slater to be greatly opposed to that being done. I now give reasons for my decision.

Relevant principles

[4] Section 19A of the Judicature Act 1908 relevantly 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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> (3) Notwithstanding anything in subsection (2) of this section, in any case where, after notice has been given pursuant to that subsection but before the trial has commenced, the debt or damages or the value of the chattels claimed is reduced to $3,000 or less, the civil proceedings shall be tried before a Judge without a jury.
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> (4) If, in any civil proceedings to which this section applies, the defendant sets up a counterclaim, then, unless pursuant to this section the civil proceedings and the counterclaim are both to be tried before a Judge without a jury, the following provisions shall apply:
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> (a) on the application of either party made with the consent in writing of the other party, both the civil proceedings and counterclaim shall be tried before a Judge without a jury, or

[1] Although the Judicature Act 1908 has now been repealed and replaced by the Senior Courts Act 2016, the present application is to be dealt with under the 1908 Act by virtue of cl 10(1) of sch 5 of the Senior Courts Act.

before a Judge with a jury, whichever is specified in the application:

(b) if no such application is made, the civil proceedings and the counterclaim shall, subject to any direction of the Court or a Judge under section 19B of this Act, be tried in accordance with the foregoing provisions of this section:

Provided that if the Court or a Judge orders that the civil proceedings and the counterclaim be tried together, they shall be tried before a Judge with a jury.

(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—

(a) that the trial of the civil proceedings or any issue therein will involve mainly the consideration of difficult questions of law; or

(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.

…

[5] Up until recently Mr Blomfield appears to have considered that the trial could conveniently be held before a jury. His present application suggests he has changed his mind. He bears the onus of establishing that one of the grounds under s 19A(5) will be satisfied.

[6] Mr Blomfield relies on s 19A(5)(a), which permits the Court to order a case to be tried before a Judge alone where it will involve consideration of difficult issues of law. It is now well established, however, that the sub-section is not concerned with whether the questions of law that arise are difficult. Rather, 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.

[7] In *Guardian Assurance Company Limited v Lidgard*, the Court of Appeal observed:[2]

> 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.*
>
> 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….*
>
> (emphasis added)

[8] In this proceeding Mr Slater proposes to advance defences based on both truth and honest opinion. He will also argue that several of the impugned publications are also not defamatory.

[9] Part of the difficulty in the present case arises from the fact that the plaintiff has pleaded up to 26 separate imputations in relation to each publication. This will require the jury to consider a wide range of allegations and to apply them to 13 separate publications. After satisfying themselves of the imputations to be drawn from the publications, the jury will be required to determine whether the defences of truth and honest opinion are made out on the facts.

[10] The publications in themselves are not straightforward because they do not solely comprise statements by Mr Slater. Rather, some are lengthy documents that include copies of emails apparently downloaded from a hard drive that formerly

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2 *Guardian Assurance Co Ltd v Lidgard* [1961] NZLR 860 (CA) at 863-864.

belonged to Mr Blomfield. The publications also include messages posted on the website by persons who have read the initial blog and wish to comment on material within it. This adds to the difficulty of the jury's task because liability for this aspect of the publication may lie with the second defendant as the party operating the website. I consider the proceeding potentially raises some very difficult issues of mixed fact and law.

[11] I therefore consider that jurisdiction exists under s 19A(5) to make the order sought. It is then necessary to consider whether to exercise the discretion in favour of trial by Judge alone.

[12] I acknowledge that the importance of the right to a jury trial is not to be undervalued. The Court is required to balance the entitlement of a party to seek a trial by jury against the extent to which the trial process can be managed to meet the overall justice of the case.[3]

[13] I am influenced in exercising my discretion by the fact that I have just concluded a hearing of two days' duration dealing with several interlocutory applications that needed to be determined before the trial. It took considerable time for me to understand and become familiar with the material on which the parties rely. I have no doubt that it will be much more difficult for a jury to undertake that task. The pleadings are voluminous. On my count Mr Blomfield has pleaded a total of 138 separate but overlapping imputations, each of which will need to be considered. Defences of truth and honest opinion are advanced. My experience with the case persuades me that it is of such factual and legal complexity that it would be asking too much of a jury to spend six weeks of their time considering it.

[14] The position is not made easier by the fact that Mr Slater is representing himself. Mr Slater is undoubtedly a seasoned litigant with considerable experience in cases of this type. It is clear from the current state of his pleadings, however, that he is not familiar with the technical requirements of claims based in defamation. I have

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3 *Craig v Slater* [2017] NZHC 735, [2017] NZAR 637 at [23], citing *McInroe v Leeks* [2000] 2 NZLR 721 (CA) at [21].

no doubt that a jury will be required to spend considerable periods of time away from the courtroom while points of evidence and procedure are resolved.

[15] All of these factors point clearly in my view to the fact that trial by jury will be a highly impracticable exercise in the present case.

Result

[16] The application is granted. The case is to be tried by a Judge sitting without a jury.

Costs

[17] Although Mr Blomfield has been the successful party I took Mr Slater to largely accept the practicality of the case being tried before a Judge alone. Little time was spent in argument dealing with the application. Furthermore, it is Mr Slater who has been required to relinquish his entitlement to a trial before a jury. The application has also been made very late in the piece. I therefore make no order as to costs.

Lang J

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