IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2018-441-86
[2019] NZHC 1414

BETWEEN	DAMON JOHN HARVEY Plaintiff
AND	MEDIAWORKS HOLDINGS LIMITED Defendant

Hearing: 10 June 2019

Appearances: A Romanos for plaintiff/respondent
J Graham and L Fraser for defendant/applicant

Judgment: 20 June 2019

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

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[1] The plaintiff, Mr Damon Harvey, is a Hastings District Councillor and a local businessman. The defendant, Mediaworks Holdings Ltd, is a broadcaster and amongst other activities broadcasts the TV3 evening news show *Newshub*.

[2] On 20 January 2018, Newshub featured a news item related to the aborted launch by a concern known as Rocket Lab of a rocket from Mahia Peninsular in Northern Hawkes Bay. The following day, Newshub broadcast a second news item on the same subject.

[3] The plaintiff commenced this proceeding a little over eight months later, on 4 October 2018. He pleads that, properly understood, either on the ordinary meaning of the words used, or by implication, the articles, which identified him by name, meant that he was responsible for the launch having to be aborted, or at least that there were

grounds for suspecting this. He says that is untrue and defamatory. He claims general, aggravated and punitive damages.

[4] Section 43(1) of the Defamation Act 1992 provides that a plaintiff in defamation proceedings commenced against a broadcasting organisation may not identify the quantum of his or her claim in the statement of claim. Accordingly, the plaintiff has not done so. That leaves the quantum of his claim at large.

[5] Having commenced his claim in this Court, the plaintiff has filed and served a jury notice pursuant to s 16(1) of the Senior Courts Act 2016, which provides:

> A party to a proceeding for defamation, false imprisonment, or malicious prosecution may, on giving notice in accordance with the High Court Rules, require a proceeding to be tried by a High Court Judge with a jury.

[6] By interlocutory application dated 1 March 2019, the defendant applies for:

(a) an order pursuant to s 16(4) of the Senior Courts Act that the case be tried by a judge sitting alone (without a jury);

(b) an order pursuant to s 94(1) of the District Court Act 2016 for the transfer of this proceeding to the District Court.

[7] A word or two about the orders sought. First, it appears to me that they must necessarily be addressed in the order I have summarised them (which reverses the order in which Mr Graham addressed them before me) because only in this Court can there be a trial by a judge and jury. Such trials do not occur in civil cases in the District Court. Accordingly, if, in terms of s 16(4), the plaintiff is entitled to have his claim tried by a judge and jury, the transfer of the proceeding to the District Court would deprive him of that entitlement. Second, the issue of the transfer of the proceeding to the District Court is complicated by the inability of the plaintiff to plead the quantum of damages sought. The jurisdiction of the District Court is limited to claims for $350,000 or less.[1] In a formal pleadings sense, we do not know what damages the plaintiff is claiming. I will need to return to this.

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[1] District Court Act 2016, s 74(1)(a).

Judge and jury or judge alone

[8] In the past, most substantial civil litigation was tried before a judge and jury.[2] In the United States, that is still the case.[3] But in this country, like most of the common law world, the overwhelming majority of civil litigation is tried before a judge alone.

[9] Section 15 of the Senior Courts Act provides:

> (1) A civil proceeding must be tried before a High Court Judge sitting alone.
>
> (2) This section is subject to section 16.

[10] Under s 16, only cases in which the cause of action involves the torts of defamation, false imprisonment or malicious prosecution can be tried before a judge and jury, and then only when one of the parties "require[s]" this under s 16(1) or (2), as the plaintiff has done here.

[11] In the course of argument, Mr Romanos referred to the "right" of a party in such litigation to have it tried before a judge and jury. While there is a right to trial by jury in criminal cases where the maximum penalty for the offence is two or more years imprisonment, that right does not extend to civil matters.[4] Nevertheless, when proposing the provision now contained in s 16, the Law Commission recommended that civil jury trials be available "as of right" in the specified categories of cases.[5] If it is correct to describe this as a right, then at most it is a qualified one because it is a right that exists only so long as a Judge does not conclude otherwise under s 16(4), which provides:

> (4) A High Court Judge may, on the application of either party, order that a proceeding for defamation, false imprisonment, or malicious prosecution or any issue in the proceeding be tried before a Judge without a jury if it appears to the Judge before the trial that the trial of the proceeding or the issue will—

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2 See Conor Hanly "The Decline of Civil Jury Trial in Nineteenth-Century England" (2005) 26 J Legal Hist 253. The demise of civil jury trials in England is often traced to the enactment of the Common Law Procedure Act 1854 (UK), which allowed parties in civil cases before the Royal Courts to opt for a judge-alone trial.

3 See United States Constitution, amend VII.

4 New Zealand Bill of Rights Act 1990, s 24(e).

5 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 121.

(a) involve mainly the consideration of difficult questions of law; or

(b) 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 that cannot conveniently be made with a jury.

[12] The defendant's primary contention as to why this proceeding should be tried by a judge alone is that it involves "mainly the consideration of difficult questions of law". In this regard, the defendant points to the fact that it has pleaded the affirmative defence of public interest communication recently articulated by the Court of Appeal in *Durie v Gardiner*.[6] The public interest communication defence essentially requires the defendant to establish that the publication concerned a matter of public interest and that its reporting of it was in all respects responsible.

[13] As Mr Graham submitted, the Court of Appeal held that the public interest communication defence raises subtle mixed questions of fact and law that must be determined by one decision maker — that is to say, a Judge. He went on to argue that, as this constitutes the defendant's primary affirmative defence, the trial will therefore involve "mainly the consideration of difficult questions of law". I do not accept this submission.

[14] The Court of Appeal in *Durie v Gardiner* did not say — or even suggest — that cases in which the affirmative defence is pleaded cannot be tried by a judge and jury, or are unsuitable for determination by a judge and jury. All the Court said was that, where the defence is raised, that defence must be determined by a judge because the issues of fact and law that it raises are so interwoven.[7]

[15] Standing back from the matter, it does not appear to me that this case will, as Mr Graham contended, involve mainly difficult issues of law. It will involve the usual range of issues in defamation cases, some of which are issues for the Judge (whether the language used is capable of being defamatory and the merits or otherwise of the

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6 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.
7 At [62]–[63].

defendant's affirmative defence), and some of which are quintessentially jury issues (whether the plaintiff was in fact defamed and the quantum of any award of damages).

[16] The defendant also says that this proceeding should not be tried before a judge and jury but before a judge sitting alone because that will "reduce the complexity and length of the trial". It will not affect the complexity of the case. The same issues will arise. Simply, it will mean that they must all be determined by a judge. Assuming that it is relevant to this issue, I accept that it would likely mean that the trial would be shorter.

[17] Mr Graham continued by submitting that, if the matter were to be tried before a judge and jury, the jury would have to be stood down in order to enable the judge to rule on the public interest communication defence, which would give rise a fragmented and lengthy decision-making process.

[18] There is something in this. However, in the end, I do not see this as being very different from a criminal trial in which a judge has to rule on the admissibility of evidence in the absence of a jury.

[19] In support of this aspect of his argument, Mr Graham produced a table in which he compared the time that would be occupied by a trial in this Court before a judge and jury and a trial before a judge alone. Mr Graham's analysis also extended to a truncated judge alone trial in the District Court. I have not had regard to this as I do not feel able to assess at this stage what form of trial might be directed in that Court. On his analysis, trial in this Court before a judge and jury would take seven days whereas a trial before a judge alone would take four — 43 per cent less. That is probably not unrealistic, although I have to say that aspects of Mr Graham's analysis surprise me. One example is that he allows two sessions (the entire Monday morning) for the empanelling of a jury, which I would have thought would be unlikely to occupy any more than an hour). Be that as it may, even on Mr Graham's analysis, I do not see the difference between the time likely to be occupied by a trial before a judge and jury and by a trial before a judge sitting alone as being a decisive factor.

[20] There is a reason why trial by a judge and jury has been retained in a narrow area of civil law. The decision to retain it in the case of defamation, false imprisonment and malicious prosecution is not a mere matter of caprice. The common denominator of these causes of action is that they are proceedings where, in the words of the Law Commission, "the loss relates to reputation, liberty, or sanctity of the person, where damages are 'at large'".[8] In the case of defamation, the core remedy being sought by a plaintiff is vindication of an "injury to the esteem in which the plaintiff is held by his or her fellow citizens".[9] In all three cases, a jury is better placed to determine the appropriate remedy because that will depend on how society values reputation and liberty at the time.[10] That explains the observations made by Harrison J in Williams v Craig that the primary remedy for a plaintiff in defamation proceedings is a determination that any cloud cast over his or her reputation is wrong; compensatory damages are a secondary element.[11] There is an understandable sense in which a plaintiff seeking that primary remedy may wish vindication to come from twelve of his or her peers in the form of a jury rather than from a determination made by a puisne judge.

[21] Against that background, in my view, a Court should not lightly deprive a party — perhaps particularly a plaintiff, though of course the same principles apply in the case of a defendant — of the prima facie entitlement to have his or her case tried by a judge and jury, unless it is clear that such a mode of trial is inappropriate having regard to the considerations set out in s 16(4) of the Senior Courts Act. In the course of argument Mr Graham referred me to the judgment of Associate Judge Bell in *Craig v Stiekema.*[12] There is a sense in which the approach I take to this issue is different from that adopted by the Associate Judge in that case. It is probably fair to say that I am inclined to place considerably more emphasis on the importance of the so called right to elect trial by a judge and jury. But, in any event the circumstances of the two cases appear to me to be materially different, not least because in *Craig v Stiekema* the quantum of damages were pleaded and fell with jurisdiction of the District Court.

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8 Law Commission, above n 5, at [11.11].
9 At [11.4].
10 At [11.12]–[11.14].
11 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [32].
12 *Craig v Stiekema* [2017] NZAR 633.

[22] Whilst this case will involve the consideration of the (relatively) difficult questions of fact and law associated with its affirmative defence, and a trial before a judge and jury will certainly take longer than would a trial before a judge sitting alone, I do not accept that the case will "involve mainly the consideration of difficult questions of law". Certainly, the scope of this proceeding appears to be relatively contained compared with other recent defamation proceedings, some of which were tried before a judge and jury.[13]

[23] Accordingly, I am not prepared to order that the trial take place before a judge sitting alone.

Transfer of proceeding

[24] For the reasons referred to earlier, declining the application for an order that this case be tried by a judge sitting alone makes it inappropriate to grant the second component of the application — to transfer the proceeding to the District Court. To do so would be to render nugatory the plaintiff's prima facie entitlement to a trial by a judge and jury, and the associated importance of that election, as addressed above.

[25] In any case, there is a further reason why it would be inappropriate to grant the defendant's application to transfer the proceeding to the District Court. As already said, the jurisdiction of the District Court is limited to claims for $350,000 or less. That jurisdictional limit is based on the amount of the plaintiff's claim, not on whether the plaintiff's claim is a realistic one.

[26] In the course of argument, Mr Graham referred me to the schedule appended to the Supreme Court's decision in *Craig v Williams* and submitted that even if the plaintiff were to be entirely successful, the damages he might expect to recover would be in the order of tens of thousands.[14] He submitted that I should make an assessment of the probable outcome in terms of damages in the event of the plaintiff being

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13 See, for instance, *Arnold v Stuff Ltd* [2018] NZHC 1641, where the Question Trail was 63 pages long. By contrast, Mr Romanos estimates that the Question Trail in the present case is likely to be only one page long.

14 *Craig v Williams* [2019] NZSC 38.

successful and, if I concluded that that would be likely to be less than $350,000, I should treat that as the quantum of the claim.

[27] As it happens, I am inclined to agree that any damages award in this case is likely to be in the range Mr Graham suggests, though I only feel able to say so because my view as to that is neither here nor there.

[28] The position is that the plaintiff is precluded from identifying in his pleadings what amount of damages he claims. In the course of argument, Mr Romanos told me that the plaintiff's case would be opened on the basis that he was seeking in excess of $350,000. He went on to explain why the plaintiff took the view that he was entitled in this case to substantial damages by reference to various aspects of the case that it is unnecessary to go into here. I treat that unequivocal statement from counsel as something that I am unable to look beyond, and I accept that the case will be opened on that basis.

[29] That being so, whatever view I might take of the likely outcome in terms of damages in this case, I must proceed on the basis that the plaintiff is claiming in excess of $350,000. Accordingly, it does not seem to me that there is any room for an order for a transfer.

[30] This conclusion, to which I regard myself as compelled, may of course be relevant to costs issues at a later stage in this proceeding.

[31] Before turning from this topic, I wish to make it clear that, at least in cases where neither party seek trial before a judge and jury, I align myself entirely with the observations made by Associate Judge Bell in *Human Resources Institute of New Zealand v Elephant Training and HR Ltd* that the High Court should not be seen as the sole venue for defamation litigation and that there is no reason whatsoever why defamation litigation cannot to be dealt with in the District Court.[15]

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[15] *Human Resources Institute of New Zealand Inc v Elephant Training & HR Ltd* [2015] NZHC 2739.

[32] However, in this case, because of the plaintiff's wish for trial before a judge and jury, and because of the particular circumstance of the plaintiff being precluded from identifying the quantum of his claim against this defendant, and counsel's express indication to the Court that the case will be opened on the basis that it is a claim for in excess of $350,000, I cannot see that it would be appropriate to transfer the proceeding.

[33] For those reasons, I am not prepared to grant the defendant's application for a transfer of this proceeding to the District Court.

Summary of conclusions

[34] Accordingly:

(a) The defendant's application for an order that this matter be tried by a judge sitting alone is dismissed.

(b) The defendant's application for an order transferring this proceeding to the District Court is dismissed.

[35] I reserve costs, not having heard from counsel in relation to them. If counsel are unable to agree on costs — as I would expect them to be able to do — then they may refer the matter back to me by memorandum and I will deal with costs on the papers.

Associate Judge Johnston

Solicitors:
Brown & Bates, Napier for plaintiff/respondent
Chapman Tripp, Auckland for defendant/applicant