IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-3091
[2021] NZHC 2696

UNDER	The Defamation Act 1992
BETWEEN	KRISTIN PIA CATO Plaintiff
AND	MANAIA MEDIA LIMITED First Defendant
	ROWAN DIXON Second Defendant
	JANE THOMPSON Third Defendant

On the papers

Counsel: S J Mills QC and E D Nilsson for the Plaintiff
S A McKenna and R G Scott for the Defendants

Judgment: 8 October 2021

JUDGMENT OF CAMPBELL J
(Application for leave to serve replacement brief)

This judgment was delivered by me on 8 October 2021 at 3:00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

[1] In my judgment dated 2 September 2021, I ruled that the expert brief of evidence by Paul Collins, which the plaintiff had served in advance of trial, was not admissible. My judgment dealt with several other admissibility challenges made by the parties.

[2] Two days before I delivered that judgment, I vacated the jury trial that had been scheduled to commence 6 September 2021. That reflected the inability to conduct a jury trial under a COVID-19 lockdown. A new trial has been scheduled for 1 August 2022.

[3] By memoranda dated 22 and 24 September 2021, the plaintiff applies for leave to serve another brief of evidence by Mr Collins. The plaintiff proposes the replacement brief would comply with observations made in my judgment about Mr Collins' earlier brief and therefore be admissible. The plaintiff accepts the defendants should then have an opportunity to serve a brief in response to the replacement brief.

[4] The defendants oppose the application.

Submissions

[5] The plaintiff sought leave under r 9.8, or alternatively r 1.19, of the High Court Rules 2016. Rule 9.8 provides that a party wishing to offer a supplementary brief must serve it as soon as possible. The acceptance and use of the supplementary brief is at the discretion of the trial judge. Rule 1.19 allows the court, in its discretion, to extend the time for any step in a proceeding, on such terms as the court thinks just.

[6] Mr Mills QC, for the plaintiff, submitted I should exercise my discretion to grant leave allowing service of a supplementary brief by Mr Collins because:

(a) Granting leave will not cause material prejudice to the defendants. They will have ample time to consider the replacement brief and to prepare any brief in response, given the trial is not until August 2022;

(b) That the replacement brief might improve the plaintiff's case is not, without more, a basis on which to decline leave.

[7] Mr McKenna, for the defendants, submitted the plaintiff was attempting to work around my ruling that Mr Collins' brief is inadmissible. He said any replacement brief would be artificially produced.

Decision

[8] Rule 9.8 is not applicable. To engage that rule a party must serve the supplementary brief. The trial judge then decides, by reference to the content of the brief, whether it may be accepted and used. The rule does not contemplate the court granting leave in advance of the brief being served and in the abstract. In my view the application falls for consideration under r 1.19. The plaintiff is effectively seeking an extension to the timetable for the service of briefs (though only in respect of a brief on a particular topic).

[9] Nonetheless, there are analogies between the plaintiff's application and an application under r 9.8. In both, a party is applying for leave to serve a further brief after the directed date for service of briefs. For this reason, in this instance the exercise of the discretion to extend time under r 1.19 is informed by the principles that govern applications under r 9.8.

[10] The court has a wide discretion under r 9.8 to accept a supplementary brief. The touchstone is the interests of justice.[1] The principles guiding the exercise of the discretion include (as relevant here):[2]

(a) A balancing of where the overall justice of the case lies is required, weighing the prejudice to the party that served the supplementary brief if leave is refused against that to other parties if leave is granted;

(b) That the supplementary brief improves the case of the party seeking to offer it is not, without more, a basis for refusing leave;

(c) The prejudice may be especially significant where the supplementary brief is provided at a late stage in the proceeding;

1 *Western Park Village Ltd v Baho* [2013] NZHC 1909 at [12].
2 *Body Corporate 384825 v Queenstown Lakes District Council* [2021] NZHC 1207 at [32].

(d) Granting an adjournment to allow more time to respond and/or ordering costs that reflect the extra work required in responding to the supplementary evidence may minimise prejudice resulting from a grant of leave;

(e) Leave to adduce further evidence that improves a party's position may be allowed if the trial date is a sufficient time away.

[11] In light of these principles I am of the view I should extend the time for the parties to serve briefs of evidence, so that the plaintiff may serve a replacement brief by Mr Collins and the defendants may serve a brief in response. If I were to refuse leave, the plaintiff would be prejudiced by being unable to lead Mr Collins' evidence. By granting leave, the only substantial prejudice the defendants will suffer is potentially facing an improved case. That prejudice should be discounted given the defendants will have ample time to consider and, if they wish, respond to the replacement brief.

[12] I appreciate that a key reason the plaintiff has been able to apply for leave to serve a replacement brief is the recent adjournment of the trial. Without that adjournment the prejudice to the defendants from a late brief would have been considerably greater and the application likely declined. The plaintiff might therefore be thought to be enjoying some good fortune from the adjournment. But that is not a reason to decline the application. Parties have obtained leave under r 9.8 to rely on supplementary briefs even where the late service of those briefs was the cause of an adjournment that then avoided any prejudice that the other party would otherwise have suffered from the late briefs.[3] The case for leave being granted is greater when, as here, the applicant was not the cause of the adjournment.

[13] As noted, Mr McKenna submitted the plaintiff was attempting to work around my admissibility ruling. That is true in a general sense but is not a reason for declining leave. Admissibility objections, when upheld, are sometimes able to be cured by a witness clarifying evidence or filling in gaps in evidence. Such workarounds are not, in themselves, objectionable. In this case, whether the replacement brief is admissible

[3] *Signal v Berry* [2016] NZHC 1126.

will depend on its content, which is yet to be seen. Once the brief has been served, the defendants will be at liberty to challenge the admissibility of the brief in the usual way.

[14] As to Mr McKenna's submission that any changes to the brief would be artificially produced, that is a matter he can pursue through cross-examination at trial.

Result

[15] I extend the time for the parties to serve briefs of evidence, so that the plaintiff may serve a replacement brief by Mr Collins and the defendants may serve a brief in response, as follows:

(a) The plaintiff is to serve any replacement brief by Mr Collins by 5 November 2021;

(b) The defendants are to serve any brief in response by 17 December 2021.

[16] The plaintiff has been granted an indulgence. There is no order as to costs on the application. Any expense associated with any extra work that may arise from the replacement brief itself can be reflected in the order for costs following trial.[4]

Campbell J

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[4] *Signal v Berry* [2016] NZHC 1126 at [27].