IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1818
[2021] NZHC 2834

UNDER	the Defamation Act 1992
BETWEEN	GRAHAME CHRISTIAN Plaintiff
AND	MURRAY IAN BAIN Defendant

Hearing: On the papers

Appearances: C T Patterson for the Plaintiff
Third Defendant in person

Judgment: 22 October 2021

JUDGMENT OF GAULT J

This judgment was delivered by me on 22 October 2021 at 10:00 am pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr C T Patterson and Mr E J Grove, Chris Patterson Barrister Ltd, Auckland
Mr R Horsley (plaintiff's instructing solicitor), Maxim Legal, Auckland
Mr M I Bain

[1] In this defamation proceeding scheduled for a three week trial before a Judge and jury in the Auckland High Court commencing on 8 February 2022, Mr Christian applies to change the mode of trial to Judge alone.[1]

[2] I made timetable directions by consent for the filing of submissions in order to determine this issue on the papers, together with an issue as to the costs of Mr Christian's application for leave to discontinue against other defendants.[2]

Background

[3] For present purposes, it is sufficient to summarise the factual background briefly. Mr Christian is the founder of a waste disposal and recycling company which, following acquisition, is now Smart Environmental Ltd (Smart). Mr Christian was managing director from incorporation of the predecessor company in 2007 until 2019. He remains a director.

[4] Mr Bain was an employee of Smart until December 2017. In January 2018 Mr Bain founded a commercial waste company, Coastal Bins Ltd, of which he is a director and majority shareholder.

[5] Mr Christian alleges that Mr Bain was the source of information for media articles authored by Mr Valintine and published by NZME Publishing Ltd, the former defendants, on 3 August 2019:

(a) an article entitled "Waste 'rort' may cost $1m: Claim"; and

(b) an article entitled "Waste firm's dirty secret".

[6] Mr Christian claims that the articles are defamatory of him as each means, and has been understood to mean, that he as founder and former managing director of Smart and as its current director either directed or was complicit in Smart's environmental action.

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1 Mr Bain, the only remaining defendant, has also applied for a change of venue to the Hamilton High Court. That application is not before me.

2 Minutes dated 31 August and 1 September 2021. As a result of leave to discontinue, the intituling now omits the former defendants.

[7] Mr Bain denies the statements attributed to him as insufficiently particularised, denies they were defamatory and also pleads honest opinion.

[8] Mr Christian has settled with and discontinued against the former defendants.[3]

Mode of trial

[9] On 2 December 2020 Mr Christian gave notice electing to have his claims determined before a Judge and jury.[4] On 17 December 2020 the defendants at the time, including Mr Bain, consented to the trial proceeding with a jury.

[10] Now that the claim only involves one defendant, Mr Christian wishes to rescind his election.

Issues

[11] Two issues arise on mode of trial:

(a) Can Mr Christian rescind his jury notice election?

(b) Whether the Court should order that the proceeding be heard before a Judge alone.

Legal principles – mode of trial

[12] Section 16 of the Senior Courts Act 2016 (the Act) provides:

> **16 Certain civil proceedings may be tried by High Court Judge with jury**
>
> (1) Any party to a proceeding for defamation, false imprisonment, or malicious prosecution may, on giving notice in accordance with the High Court Rules, require the proceeding to be tried by a High Court Judge with a jury.
>
> (2) Any party to a counterclaim in a proceeding for defamation, false imprisonment, or malicious prosecution may, on giving notice in

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3 Mr Bain's submissions on this application are filed without prejudice to his argument that as a joint tortfeasor he is able to rely on the release given to the former defendants.

4 High Court Rules 2016, r 7.16.

accordance with the High Court Rules, require the counterclaim to be tried by a High Court Judge with a jury.

(3) If a notice is given under subsection (1) or (2), the proceeding or counterclaim must be tried in accordance with the subsection that applies.

(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—

(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.

(5) A proceeding for defamation, false imprisonment, or malicious prosecution that also contains other causes of action may be tried only before a High Court Judge without a jury.

(6) No civil proceeding other than for defamation, false imprisonment, or malicious prosecution may be tried by a High Court Judge with a jury.

Rescission/withdrawal of jury election

[13] Although Mr Christian's interlocutory application sought an order that the proceeding be heard by a Judge alone, Mr Patterson's submissions focused on rescission of Mr Christian's jury notice. Mr Patterson acknowledged the High Court Rules 2016 are silent as to rescinding an election, but submitted that the Court has allowed parties to alter their election and extended time for it, relying on *Cato v Manaia Media Ltd*.[5] However, in that case Hinton J extended time to elect trial by Judge and jury. The case did not involve rescinding such an election.

[14] Mr Bain submitted that if a jury notice is given under s 16(1) of the Act, subject to the discretion in s 16(4), s 16(3) provides that the proceeding must be tried in accordance with s 16(1), that is by a Judge with a jury. He submitted the mandatory wording of s 16 is inconsistent with the Court maintaining an inherent jurisdiction to

5 *Cato v Manaia Media Ltd* [2020] NZHC 1240. Upheld on appeal: *Cato v Manaia Media Ltd* [2021] NZCA 226.

change the mode of trial once an election has been made. He relied on the more recent judgment in *Cato v Manaia Media Ltd*,[6] where Campbell J dismissed an application by the plaintiff for an order for a Judge alone trial so that a trial could proceed despite COVID-19 restrictions. The trial was only just over a week away. The application was brought on the basis of the Court's inherent power. Campbell J considered that s 16 had removed the Court's inherent power to govern its own procedures, referring to the Court of Appeal's decision in *News Media (Auckland) Ltd v Young*.[7] Campbell J also concluded that, even if there were inherent power, he would not have exercised it given the defendant's right to a jury trial and timing considerations – the risk the trial could not proceed anyway given COVID-19 restrictions, the extensive preparation for a jury trial and the need to know the mode of trial a reasonable time in advance.

[15] In *News Media (Auckland) Ltd v Young* the defendants in a defamation proceeding gave notice requiring a jury trial. The plaintiff applied for an order that the proceeding be tried before a Judge without a jury primarily on the ground set out in the predecessor to s 16(4)(a) of the Act but also on the basis of the Court's inherent jurisdiction. The Court rejected the argument there was room for inherent jurisdiction to operate. As Campbell J accepted in *Cato*, based on *Siemer v Solicitor-General*,[8] the question now is whether the statutory wording clearly precludes the Court from resorting to its inherent jurisdiction.

[16] I agree there is no scope for the operation of the inherent jurisdiction to override a party's election. The mandatory wording in s 16(3) reflects the party's *right* to elect trial by a Judge with a jury, and the Court may only override that right where s 16(4) applies. But it is a different question whether a party who has given a jury notice, but no longer wishes to exercise its *right*, can withdraw its own election. I do not consider the mandatory wording in s 16(3) was intended to address that question and remove the Court's power even to consider allowing a party to withdraw its own jury notice. That is materially different from *ordering* a Judge alone trial, as Campbell J was asked to do. I consider that, in the absence of a clear restriction in the Act, there is scope for an election to be withdrawn at least with leave. That would

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6 *Cato v Manaia Media Ltd* [2021] NZHC 2240.
7 *News Media (Auckland) Ltd v Young* [1989] 2 NZLR 173 (CA) at 176.
8 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

accord with the statutory purpose, which is to provide a right to elect trial by jury in purely defamation cases as an exception to the general rule that civil cases are tried by Judge alone. Circumstances may change after giving a jury notice and, subject to the need for leave to address any issue of prejudice, I see no reason in principle why the Court should not permit the party to revert to the default position of a Judge alone trial. Prejudice warranting refusal of leave may well arise, for example, where another party seeks to retain trial by jury but would need an extension of time to make its own election or where a late attempt to change threatens the trial date or prejudices the other party's preparation. Such considerations led Campbell J to conclude in *Cato* that, even if there were a power, he would have declined to exercise it.

[17] The factual position here is quite different. Mr Patterson accepts that Mr Bain should have the opportunity to make his own election for trial by Judge and jury. Indeed, he submitted, it might be open to the Court to treat Mr Bain's submissions as a jury notice. The trial is still over three months away. Mr Bain's claimed prejudice relates to his preparation for a jury trial over the last nine months, which will not be affected if he is able to elect trial by Judge and jury.

[18] Finally, I consider the parties' tactical concerns are a neutral factor. Mr Christian's primary concern is not to be on record as responsible for the need for a jury trial. Mr Bain wants a jury trial but submits Mr Christian's change of position is to put pressure on him, presumably in relation to costs. Costs normally follow the result. Scale costs will likely be higher if a jury trial takes longer. But the scope for costs to be increased from scale depends essentially on whether a party acts unreasonably. I doubt that merely exercising a party's right to elect trial by jury would be considered unreasonable.

[19] I do not consider that Mr Bain's submissions should be treated as a jury notice. Mr Bain should have an opportunity to consider his position. In the circumstances, however, I consider that Mr Christian should be given leave to withdraw his jury notice on the condition that he consents to an extension of time for Mr Bain to give a jury notice in accordance with r 7.16 by no later than 8 November 2021.

Application for Judge alone trial

[20] Mr Patterson indicated that so long as Mr Christian's jury notice is allowed to be withdrawn, he does not actively oppose Mr Bain's wish for a jury trial. While Mr Christian now considers a jury trial is unnecessary and undesirable, as indicated his primary concern is not to be on record as responsible for the need for it.

[21] Although expressed as not actively opposing Mr Bain's wish for a jury trial, more accurately Mr Christian's position is that he does not pursue his application for an order that the proceeding be tried without a jury if he is allowed to withdraw his jury notice. Under s 16(4) of the Act, such an order can only be made if it appears to the Judge before the trial that the trial of the proceeding or the issue will:

(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.

[22] Since I have concluded that Mr Christian may withdraw his jury notice on a condition reflecting Mr Patterson's concession that Mr Bain should have the opportunity to make his own election, it is unnecessary to determine whether the Court could or should order that the proceeding be heard before a Judge alone pursuant to s 16(4).

[23] Since Mr Christian's interlocutory application sought an order that the proceeding be heard by a Judge alone, which has not been pursued, I consider there should be no issue as to costs in relation to the mode of trial application.

Costs in relation to leave to discontinue

[24] Mr Christian seeks a proportion of 2B costs on his successful application for leave to discontinue against the former defendants on the basis that Mr Bain initially

opposed leave – first on the basis that he needed time to seek legal advice and then while seeking disclosure of the settlement agreement – and thus put Mr Christian to the cost of an application. Mr Bain ultimately consented to the application, and opposes an award of costs on the basis the application was premature and unnecessary.

[25] As indicated, costs normally follow the result. Where an order is made by consent but following initial opposition, the Court may award costs reflecting the steps required prior to consent. But I do not consider that is appropriate here. Mr Christian's lawyers sought Mr Bain's consent on 24 August 2021, seeking his response within three days. Mr Bain responded within one day saying that he would need to seek legal advice and that the timeframe was unrealistic given the COVID-19 lockdown. The application was filed the same day. The next day Mr Bain indicated he wanted disclosure of the settlement agreement, and Mr Christian's lawyers advised that would need to be approved by the other defendants. Mr Bain sought their approval the same day. The next day, 27 August 2021, Mr Bain advised Mr Christian's lawyers that he would consent provided the settlement agreement was made available. Counsel for the other defendants agreed to that later that same day. In these circumstances, I do not consider that Mr Bain should pay costs for the application for leave filed on 25 August 2021. Also, the same application sought an order that the proceeding be heard by a Judge alone. That would have been filed irrespective of Mr Bain's consent to the discontinuance. I decline to order Mr Bain to pay costs on the application to discontinue.

[26] Finally, Mr Bain submits that he should be awarded costs on Mr Christian's costs application on an indemnity or increased basis, having unnecessarily been put to the trouble of seeking legal advice. I also decline to award Mr Bain costs, for the following reasons:

(a) While the Court has power to award costs in relation to costs, costs are often dealt with by way of exchange of memoranda and the Court is reluctant to award costs on costs.[9]

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[9] *Jeffreys v Morgenstern* [2013] NZHC 1361 at [40]; *Barry Park Investments Ltd v Body Corporate Number 95388* [2016] NZHC 1527 at [25]; *Epsom Woods Ltd v Waitakere Farms Ltd* [2020] NZHC 3137 at [4]; and *Combined Property Maintenance Ltd v Singh* [2021] NZHC 621 at [19].

(b) Mr Bain is self-represented. The primary rule is that a lay litigant in New Zealand is not entitled to recover costs against an unsuccessful party.[10]

(c) There is no evidential basis for the costs incurred in taking legal advice on the costs issue.

(d) The onus is on an applicant for indemnity or increased costs to persuade the Court that such an award is justified.

Result

[27] I grant Mr Christian leave to withdraw his jury notice on the condition that he consents to an extension of time for Mr Bain to give a jury notice in accordance with r 7.16 by no later than 8 November 2021.

[28] I make no order as to costs.

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Gault J

[10] *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55].