

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2022-404-2170
[2023] NZHC 3583**

IN THE MATTER of a claim under the Defamation Act 1992

BETWEEN PAUL CHUNG CHE YOUNG
Plaintiff

AND MORGAN ZHIHONG XIAO
Defendant

Hearing: On the papers

Appearances: K J Crossland and B Bycroft for the Plaintiff
D Z Q Tan for the Defendant

Judgment: 8 December 2023

JUDGMENT OF ASSOCIATE JUDGE SUSSOCK

*This judgment was delivered by me on 8 December 2023 at 4 pm
pursuant to r 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Solicitors:
Shieff England, Auckland
ACS Lawyers, Auckland

Introduction

[1] The plaintiff, Paul Chung Che Young, filed these defamation proceedings in November 2022 in relation to multiple online posts by the defendant, Morgan Zhihong Xiao, between 10 August 2021 and July 2023.

[2] Mr Xiao applies for leave to issue third party notices against:

- (a) NZME Publishing Limited (**NZME**);
- (b) Radio New Zealand Limited (**RNZ**);
- (c) Target Advertising Limited (**Target Advertising**);
- (d) AUSNZ.net International Limited (**AUSNZ**);
- (e) Lincoln Tan; and
- (f) Maurice Williamson.

[3] The plaintiff filed a memorandum saying he does not formally oppose the delayed application for leave. The memorandum records however that the plaintiff anticipates the Court will consider the issues of delay to the trial being set down and the material extension of trial duration as part of its assessment on whether to grant leave or not.

[4] Despite no formal opposition, the Court is still required to determine whether it is appropriate to grant leave.

Developments

[5] Since the application for leave to issue third party notices was filed in respect of the six parties above, third party notices and statements of claim in respect of four additional third parties have been filed:

- (a) The Vision Times Limited;
- (b) Central News Agency;
- (c) Taiwan, Province of China; and
- (d) New Zealand Epoch Times Group Limited.

[6] No application for leave has been filed in respect of the four further intended third parties.

[7] A memorandum was filed on behalf of the plaintiff dated 11 October 2023 advising the Court that the plaintiff had been served with third party notices and statements of claim against all 10 of the intended third parties on 12 September 2023.

[8] Two of the four further intended third parties for whom leave has not been sought have now filed statements of defence.

[9] In the defendant's submissions filed in respect of leave for the original six intended third parties, the defendant submits that leave is in fact not required because the third party notices were served within 10 working days of the filing of the statement of defence to the second amended statement of claim. This may explain why the defendant has now filed and served all ten third party notices and statements of claim. However in circumstances where counsel for the defendant was aware the defendant's application for leave to issue third party notices against the original group of six third parties was still before the Court for determination, counsel should have filed a memorandum together with the ten third party notices explaining this for the Court and for the parties.

[10] I briefly outline the plaintiff's claim before first considering whether leave is required.

Nature of claim and defence

[11] The plaintiff, Mr Young, by his second amended statement of claim dated 26 July 2023, is bringing a claim in defamation currently in relation to 16 online posts by Mr Xiao between 10 August 2021 and 6 July 2023.

[12] The original statement of claim was filed on 9 November 2022 and only related to seven online posts. Since the proceedings were filed however the defendant has continued to publish allegedly defamatory posts about the plaintiff online. The second amended claim therefore now relates to 16 posts. Leave has been reserved for the plaintiff to file a further amended statement of claim 60 working days in advance of the substantive hearing as a way of ensuring a fair and efficient process for including all posts in the claim. A substantive hearing has not yet been scheduled as the outcome of this application for leave will impact on the likely duration of the substantive hearing.

[13] Mr Young alleges that the statements contained in the online posts had various meanings (or intended meanings) including that the plaintiff:

- (a) is a sympathiser and supporter of Taiwanese independence from the People's Republic of China and as such betrays New Zealand;
- (b) supports Taiwan's entry into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which in turn brings diplomatic and economic risks to New Zealand;
- (c) is dishonest, deceptive, untrustworthy and incompetent;
- (d) is a traitor to New Zealand and a risk to its foreign policy;
- (e) is disrespectful and disparaging towards the Chinese community;
- (f) is a bully who misuses his influence and position;
- (g) is mentally unstable;

- (h) is delusional and has persecutory delusions;
- (i) is duplicitous and an unworthy political candidate;
- (j) is a liar and a cheat;
- (k) is vindictive and a lawbreaker who is misusing the court process;
- (l) is a puppet of Taiwan;
- (m) is corrupt;
- (n) betrays the Chinese community and New Zealand; and
- (o) has been rejected by his own political party and should be shunned by “right thinking” people.

[14] Mr Young pleads that the posts are defamatory because the statements:

- (a) are untrue;
- (b) tend to lower the plaintiff in the estimation of the Chinese community generally and particularly in the Howick Ward;
- (c) are made without justification and have injured the reputation of the plaintiff, in particular in the eyes of Chinese people in New Zealand; and
- (d) have exposed the plaintiff to hatred, contempt or ridicule and tend to make others shun and avoid him.

[15] The statement of claim includes allegations that some of the posts were made with the malicious intent of ruining the plaintiff's chances of re-election to the Auckland City Council.

[16] Mr Young also says the statements made caused him tremendous physical and psychological pressure, troubles in his daily life, and serious damage to his reputation, election and business.

[17] Mr Xiao by his statement of defence, dated 11 August 2023, denies that the statements in the online posts had or were intended to have the meanings at paragraph [13] above, save for some exceptions expressly set out by Mr Xiao.

[18] Mr Xiao further denies that the meanings are defamatory or that the publication of the online posts caused Mr Young to suffer reputational loss, mental hurt, injuries to his feelings and ongoing anxiety, or were made with the malicious intent of ruining the plaintiff's chances of re-election to the Auckland City Council and denies that any remedies are appropriate. In addition, Mr Xiao pleads affirmative defences of truth, honest opinion, qualified privilege and responsible public interest communication.

Is leave required for the third party notices?

[19] Counsel for the defendant submits that leave is not required on the basis that r 4.4(2) of the High Court Rules 2016 requires a third party notice to be issued within 10 working days of the expiry of the time for filing the defendant's statement of defence or, if later, with leave. The defendant submits that each time a defendant files a statement of defence to an amended statement of claim, the defendant has 10 working days to file any third party claim. In this case, the time for filing Mr Xiao's statement of defence to the second amended statement of claim was directed in my minute of 10 August 2023 as being 11 August 2023. The defendant submits therefore that pursuant to r 4.4(2) he was entitled to issue third party notices without the court's leave until 25 August 2023.

[20] The defendant relies on *Davey v Baker* where the defendant filed and served third party notices within 10 working days of filing a statement of defence to the

plaintiffs' second amended statement of claim.¹ The defendant says no issue was taken by the Court or the parties to the proceeding in relation to the third party notices being issued without leave of the Court.

[21] However, in *Davey v Baker*, leave had been granted for the filing of the second amended statement of claim to include a cause of action based on rectification of an easement. Within 10 working days of the statement of defence being filed, the defendant filed and served third party notices against the party who owned the defendant's property at the time the easement was created and against the surveyor who acted in relation to the creation of the easement. The need to join the third parties therefore arose as a result of the amendment of the statement of claim. Here, the claims made against the intended third parties relate to allegations that were included in the original statement of claim. Furthermore, the question of whether the defendant required leave does not appear to have been raised in the proceeding. The plaintiffs instead applied to set aside the third party notices pursuant to r 4.16(2).

[22] Consistent with this, *Sim's Court Practice* states:²

Where an amended statement of claim is filed raising a third party issue for the first time, the defendant can issue a third party notice as of right within 10 working days of the time allowed (by r 7.77) for filing a defence.

[23] Here, the second amended statement of claim has only been filed as a result of further allegedly defamatory posts being made by the defendant that do not involve the intended third parties. The third party claims relate to matters that were included in the original claim.

[24] In order to protect the position of the plaintiff in terms of ongoing posts, directions have been made allowing a further amended statement of claim to be filed 60 working days prior to the hearing. This is so the plaintiff is not put to the expense of constantly amending his pleading while ensuring the plaintiff has an opportunity to include all allegedly defamatory posts in his claim. I note that the plaintiff has chosen not to bring an application for interim orders.

¹ *Davey v Baker* [2014] NZHC 1574 at [2].

² Matthew Casey and others *Sim's Court Practice* (online ed, LexisNexis) at [HCR4.4.4].

[25] In my view it would be inconsistent with the objective of the High Court Rules, to ensure the just, speedy and inexpensive determination of any proceeding, to interpret r 4.4 as allowing third party notices to be issued without leave within 10 working days of every statement of defence filed where pleadings are amended. It would not be workable from the court's or the parties' perspectives if this was the case.

[26] In any event, the third party notices against the four additional intended third parties were not filed until 29 August 2023 (despite being dated 25 August 2023) and so not within 10 working days of the statement of defence filed on 11 August 2023. Leave is therefore required in respect of these four additional third parties no matter what the position. No application for such leave has however been made.

[27] As mentioned above, two of the four additional intended third parties have already filed statements of defence. Those parties may seek costs for the filing of those defences. I expect that increased costs may be appropriate given the third party notices were not issued within 10 working days of the defendant's statement of defence, no application for leave was filed and the defendant was aware that I was still determining whether leave ought to be granted in respect of the first six intended third parties.

[28] I make orders below in respect of the documents filed without leave and costs.

[29] I turn now to whether leave ought to be granted in respect of the original six intended third parties.

Legal principles relating to leave to issue third party notices

[30] Rule 4.4 of the High Court Rules 2016 provides:

4.4 Third parties

- (1) A defendant may issue a third party notice if the defendant claims any or all of the following:
 - (a) that the defendant is entitled to a contribution or an indemnity from a person who is not a party to the proceeding (a **third party**):

- (b) that the defendant is entitled to relief or a remedy relating to, or connected with, the subject matter of the proceeding from a third party and the relief or remedy is substantially the same as that claimed by the plaintiff against the defendant:
 - (c) that a question or issue in the proceeding ought to be determined not only between the plaintiff and the defendant but also between—
 - (i) the plaintiff, the defendant, and the third party; or
 - (ii) the defendant and the third party; or
 - (iii) the plaintiff and the third party:
 - (d) that there is a question or an issue between the defendant and the third party relating to, or connected with, the subject matter of the proceeding that is substantially the same as a question or an issue arising between the plaintiff and the defendant.
- (2) A third party notice must be issued within—
- (a) 10 working days after the expiry of the time for filing the defendant’s statement of defence; or
 - (b) a longer time given by leave of the court.
- (3) A third party notice may be issued only with the leave of the court if an application for judgment is pending under rule 12.2 or 12.3.

[31] The principles for granting leave were summarised by Osborne J³ in *Westwood Group Holdings Ltd v Rilean Construction (South Island) Ltd*:⁴

- (a) The defendant’s claim against the third party must be covered by one of the four grounds set out in r 4.4(1). A defendant may join the third party as of right within the time limit set down in r 4.4(2)(a). An application outside this time limit requires leave of the Court (r 4.4(2)(b)).
- (b) Where leave is sought, the Court must consider firstly whether one of the grounds in r 4.4(1) exists and secondly whether to exercise its discretion to join the third party: *ANZ Banking Group (NZ) Ltd v Dairy Containers Ltd*.⁵
- (c) In exercising its discretion, the Court must have regard to all relevant circumstances, including delay to the plaintiff (r 4.8).

³ Or Associate Judge Osborne as his Honour then was.

⁴ *Westwood Group Holdings Ltd v Rilkean Construction (South Island) Ltd* [2013] NZHC 1739 at [15].

⁵ *ANZ Banking Group (NZ) Ltd v Dairy Containers Ltd* CA156/92, 17 December 1992.

- (d) The interest of justice between all parties, however, is paramount. While any delay to the plaintiff is regrettable, the attainment of justice by the most efficient means is an overriding consideration: *KPMG Peat Marwick v Cory-Wright & Salmon Ltd (in rec and liq)*.⁶
- (e) Where the defendant has not been guilty of unreasonable delay, a factor in favour of exercising the discretion will be whether the defendant could have joined the third party as of right if it had applied within the time limit: *ANZ Banking Group (NZ) Ltd v Dairy Containers Ltd*.⁷
- (f) Equally, unexplained or unacceptable delay by the defendant may result in leave being refused: *Meroiti v National Australia Finance Ltd*.⁸
- (g) In cases of serious delay that risk prejudicing the plaintiff, the court may be prepared to make an order for joinder on conditions designed to preserve the hearing date for the plaintiff's claim against the defendant: *Total Air Supply Company Ltd v Total Air Supply Company (2007) Ltd*.⁹
- (h) Avoiding duplicity of proceedings and preventing the same question being tried with different results militate in favour of allowing the application. The overriding purpose of the third party rules is to enable all the issues to be dealt with in one action: *Turpin v Direct Transport Ltd*.¹⁰
- (i) There is, however, a need to strike a balance between all the parties' interests. The extent to which the plaintiff is necessarily involved in the issues between the defendant and the third party is a consideration. Equally, it can be oppressive and unjust to involve a third party in a proceeding where much of the proceeding will not involve that third party.
- (j) The Court may have regard to the relative strengths and weaknesses of the parties' cases, including the case against the proposed third party and the likelihood of recovery: *Dairy Containers Ltd v NZI Bank Ltd*.¹¹

[32] The defendant submits that at the first step, all the Court needs to do is see whether the defendant *claims* any of the grounds listed under rule 4.4(1). If the defendant does so, then the Court moves to the second step of considering whether it should exercise its discretion to grant leave. The defendant submits that whether the

⁶ *KPMG Peat Marwick v Cory-Wright & Salmon Ltd (in rec and liq)* CA77/94, 20 May 1994.

⁷ *ANZ Banking Group (NZ) Ltd v Dairy Containers Ltd*, above n 5.

⁸ *Meroiti v National Australia Finance Ltd* CA128/90, 6 December 1990.

⁹ *Total Air Supply Company Ltd v Total Air Supply Company (2007) Ltd* HC Auckland CIV-2008-404-7627, 10 January 2011.

¹⁰ *Turpin v Direct Transport Ltd* [1975] 2 NZLR 172 (SC).

¹¹ *Dairy Containers Ltd v NZI Bank Ltd* [1993] 1 NZLR 160 (HC) at 167.

claims made by the defendant are reasonably arguable ought to be reserved for determination at the second step, when considering the relative strengths and weaknesses of the parties' case and the extent to which the parties are involved in the proceeding.

[33] I am prepared to proceed on that basis as the factors relevant to the exercise of the Court's discretion, as stated above, include whether the defendant could have joined the third party as of right, which requires a consideration of whether the claim against the intended third party falls within one of the categories in r 4.4(1) in any event, as well as the relative strengths and weaknesses of the parties' cases.

[34] I therefore consider the intended claims against the six proposed third parties and whether the defendant could have joined the third parties as of right.

Could the defendant have joined the intended third parties as of right?

[35] The categories in r 4.4(1) are relatively broad, including at 4.4(1)(d) that there is a question between the defendant and the third party relating to or connected with the subject matter of the proceeding that is substantially the same as a question or an issue arising between the plaintiff and the defendant.

[36] The defendant filed draft statements of claim against the original six intended third parties together with his submissions on leave as directed. It appears that the third party notices and draft statements of claim against the intended third parties have now been filed and served as if they are final versions (as discussed above), but until leave is granted they are to be treated as drafts.

[37] In the draft statements of claim filed, the defendant claims against three of the intended third parties, NZME, Lincoln Tan (a journalist for the New Zealand Herald), and Maurice Williamson (quoted in the article), that they are joint and/or concurrent tortfeasors in respect of an article published on the New Zealand Herald website on or about 7 September 2022. The defendant pleads that if he is found liable, he is entitled to equitable contribution or, alternatively, contribution and/or an indemnity pursuant to s 17 of the Law Reform Act 1936 from those parties.

[38] The claim against RNZ is not clearly pleaded but it appears to be for republishing the New Zealand Herald article on 7 September 2022 with a similar but not identical title. It is brought on the same basis as in respect of the first three intended third parties. I note that the New Zealand Herald article and the RNZ article are separate articles to the posts by the defendant that the plaintiff's pleadings relate to.

[39] The draft statements of claim against the two remaining intended third parties of the original six, Target Advertising and AUSNZ, are brought on the same basis but in Target Advertising's case, in relation to the post by Mr Xiao on mpages.co.nz on or about 9 September 2022, and regarding AUSNZ, Mr Xiao's post on AUSNZ.net.com on or about 10 August 2021. By contrast to the claims against NZME, Mr Tan, Mr Williamson and RNZ, these claims do relate to posts that are the subject of the amended statement of claim, the third and fifth posts referred to in the plaintiff's pleading.

[40] When directing the defendant to file submissions in respect of his leave application, I asked counsel to focus on third party claims in the context of defamation proceedings. Despite that there is no discussion of contribution in the context of defamation proceedings (or leave to join third parties in defamation proceedings).

[41] Defamation claims are claims in tort and the law is clear that contribution may not be sought in equity against a joint tortfeasor.¹² Any claim for contribution therefore needs to be brought pursuant to s 17 of the Law Reform Act. The defendant could not therefore have brought a claim as of right against the intended third parties for equitable contribution.

[42] The defendant's draft pleadings do rely in the alternative on "contribution and/or indemnity" pursuant to s 17 of the Law Reform Act.

[43] Section 17(1)(c) provides a right to claim contribution against joint or concurrent tortfeasors in respect of the same damage. However whether the damage alleged here in respect of NZME, Mr Tan, Mr Williamson and RNZ would be

¹² Stephen Todd "Multiple Tortfeasors and Contribution" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [23.3.1]; see also *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 at [133].

considered to be the same damage as the plaintiff alleges against the defendant when it arises from a different article may be an issue. In *Todd on Torts* it states:¹³

Where several publications, although independent, are to similar defamatory effect, and harm is caused by the joint consequence of all or a number of publications, the tortfeasors are deemed to have caused indivisible damage and are classified as joint tortfeasors... However, where defamatory publications are made independently of each other, each publisher is liable only for the damage done by its own publication.

[44] *Television New Zealand Ltd v Ah Koy* was referred to in support of the second proposition.¹⁴ In that case the Court of Appeal held:¹⁵

When various publications are made independently of each other, and each is defamatory of the plaintiff, the publishers are several rather than joint tortfeasors and liable only for the damage done by their own publication... the position becomes more complicated if the publications are to the same or similar defamatory effect.

[45] Although a number of questions arise, for the purposes of this leave application I proceed on the basis that the defendant would have been able to bring a third party claim as of right.

Will granting leave cause delay and should the defendant's prior delay factor into the leave decision?

[46] Four of the *Westwood* factors set out above address delay, paragraphs (c), (d), (e) and (f). I consider these together in terms of where the interests of justice ought to lie as far as delay is concerned.

Mr Xiao's submissions

[47] Mr Xiao accepts that the third party notices will cause further delay to a trial being set down. This will include both delay leading up to the trial and the length of the trial itself. Mr Xiao also accepts that he has previously caused delays in these proceedings. He has filed an affidavit in support of his application explaining the reasons for his delay. These reasons include that at the early stage of the proceeding, Mr Xiao was a freelance journalist and did not have fulltime employment, causing his

¹³ At [23.3.1].

¹⁴ *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA).

¹⁵ At [31].

income to fluctuate. He says that he has resorted to seeking donations online to fund his legal battle. Mr Xiao's evidence is that in order to save costs, many of the initial court documents filed were drafted and finalised by him with limited input by his lawyers. He also refers to further delay caused when he returned to China in June 2023 to attend to his grandfather's passing. Mr Xiao says he has learnt his lesson to request an extension if he is not able to meet court deadlines and has paid costs to Mr Young which Mr Xiao says are in relation to the delay caused.

[48] Mr Xiao says that Mr Young is no longer standing for public office at the 2023 general election and so the delays will not materially prejudice Mr Young.

Discussion

[49] Although no trial has yet been set down, adding six (let alone 10) third parties is likely to at least double the length of the trial. This is particularly the case here where the issues arising in respect of the third parties appear to be different to those between the plaintiff and defendant, as discussed further below.

[50] Furthermore, there is no reason why the intended third parties could not have been joined at the beginning, as the intended third party claims relate to matters in the original pleading.

[51] As noted in *Westwood Group Holdings*, unexplained or unacceptable delay by the defendant may result in leave being refused.¹⁶ In this case, this principle is particularly relevant as the way in which Mr Xiao has responded to the proceeding so far could fairly be described as relatively chaotic and very difficult to case manage. An award of costs against the defendant has already been made for failure to comply with the court timetable which resulted in wasted costs for the plaintiff.

[52] Despite this costs award, the defendant has continued to act inconsistently with the High Court Rules and the directions of the Court including by filing and serving the ten third party claims without leave, knowing that leave was still being determined in respect of six of the intended third parties and that leave had not been

¹⁶ Referring to *Meroiti v National Australia Finance Ltd*, above n 8.

applied for in respect of the further four. The latter four were not filed within ten working days of the filing of the statement of defence so the defendant cannot argue that he thought leave was not required.

[53] When the third party claims were served on the plaintiff, the memorandum filed by the plaintiff updating the court also advised that the defendant had published a further article on WeChat repeating allegedly defamatory statements about the plaintiff titled “Taiwan is involved in Paul Young’s case against Demon King for Defamation”. An affidavit was filed together with the memorandum providing a translation of the article. The defendant has not filed any memorandum in response and so I presume the defendant accepts the translation of the article provided on behalf of the plaintiff (although I note that the defendant has raised an issue previously with the translation “Demon King”).

[54] In the recent article, the defendant has included a photograph of a passage from my minute of 10 August 2023. The directions photographed clearly state that the defendant needs to file submissions in support of his application for leave to issue third party notices and that the leave application would then be determined on the papers. However the lengthy post states a number of times that the third parties have already been joined, including referring to them at one stage as defendants. The article includes the comments that there will be “no options for [Mr] Young but to give away all he has to battle against the third parties” and that Mr Xiao will become a bystander and will “basically be off the hook”. The article includes a photograph of the third party notices and draft statement of claims with the caption “The ‘more than three hundred pages of indictment’ Paul Young gave to me counts nothing. Look at the package, prepared by our side, of ‘Third Party Notices’ of more than 1,300 pages.”

[55] I note that the reason that the statement of claim is so lengthy is because it attaches copies of the 16 posts that the plaintiff alleges are defamatory which are all relatively lengthy, together with their translations.

[56] The article further reveals that the defendant appears to be seeking leave to join the third parties essentially to disrupt the proceedings and apparently to make political points in relation to Taiwan.

[57] In this case I consider that the delay that will be caused if leave is granted not only as a result of the number of intended third parties, but also as a result of the likely conduct of the claims by the defendant, as has been demonstrated already, strongly counts against granting leave.

Avoiding duplicity of proceedings

[58] Counsel for Mr Xiao submits that granting leave will avoid duplicity of proceedings because the issues in the proceedings ought to be determined between Mr Young, Mr Xiao and the third parties, and between Mr Young and the third parties.

[59] The defendant sets out the the issues for determination in the proceeding, as agreed between the plaintiff and the defendant in a joint memorandum dated 4 August 2023, being:

- (a) Do any one or more of the first to sixteenth posts pleaded by Mr Young convey the meanings pleaded?
- (b) If yes to (a), can Mr Xiao avail himself of the defences of truth, honest opinion, qualified privilege or responsible public interest communication?
- (c) If yes to (a), has Mr Young suffered harm to his reputation because of Mr Xiao's publication of all or any of the pleaded posts?
- (d) If yes to (c), what remedies, including monetary compensation and punitive damages, are appropriate?

[60] None of the issues above however involve the third parties and nor does counsel for the defendants explain how they do.

[61] The joint memorandum referred to by the defendant further records that the the parties agree on the following issues:

- (a) the defendant published the posts and (subject to limited exceptions pleaded by the defendant in his amended statement of defence);
- (b) the translations of the posts appended to the amended statement of claim are true and correct; and
- (c) that Chinese people, including Chinese New Zealanders, regard supporters of Taiwanese independence to be disloyal to China and any such supporter would be held in lower esteem by the Chinese community generally.

[62] The issues agreed between the plaintiff and defendant (as set out in [61]) appear to be the only real issues arising in the pleadings between the defendant and intended third parties that are substantially the same as those arising between the plaintiff and the defendant but these appear to have been agreed.

[63] Therefore, although granting leave may avoid duplicity of proceedings to a certain extent, it does not appear to be likely to prevent questions being tried twice with the potential for different results, other than potentially in respect of the defence of truth. If this defence is raised by NZME, RNZ, Mr Tan and Mr Williamson, however, it will be in the different context of the New Zealand Herald and RNZ articles rather than the posts by the defendant.

[64] The remaining questions raised in the intended third party claims appear to be different than the questions raised in the claim between the plaintiff and the defendant. These include the intended claims against Target Advertising and AUSNZ where the claims arise through publishing the posts on their platforms. These claims raise issues in relation to the potential liability of social media platforms and potentially the relatively new defence of innocent dissemination. The issues may also include whether the protections provided by the Harmful Digital Communications Act 2015 are available.

[65] It is not a situation either where the plaintiff has chosen to sue some but not other publishers of allegedly defamatory material. The plaintiff's claim against the

defendant, in relation to the second post, alleges that the defendant “enmeshed his comments” into his translation of a New Zealand Herald article and “used six paragraphs of own comments about the plaintiff as if they were the accurate translated conclusion of the NZ Herald article”. The plaintiff’s claim pleads that the defendant wrongly portrayed to WeChat consumers of his post that the defendant’s conclusion about the plaintiff was one that was accurately translated and held by a reputable New Zealand media outlet, the New Zealand Herald, and further that the defendant knew that such consumers would believe the same.

[66] The defendant’s statement of defence includes a bare denial to this pleading. The draft third party claims against NZME, Mr Tan, Mr Williamson and RNZ simply allege that if the defendant is liable then the intended third parties ought to be liable as joint or concurrent tortfeasors because their publication caused or contributed to the same loss and damage without further particulars.

[67] In the end this factor appears only to provide weak support for leave given the matters on which the parties have agreed.

Will granting leave appropriately balance all parties’ interests?

[68] As Osborne J said in *Westwood*, there is a need to strike a balance between all parties’ interests. The extent to which the plaintiff is necessarily involved in the issues between the defendant and the third parties is a consideration.

[69] In this case, the plaintiff would not be involved in the main issues between the defendant and the intended third parties because they are likely to focus on whether the separate statements made by the first four intended third parties in their separate contexts were defamatory and whether the defences pleaded by the intended third parties are able to be established. These defences are likely to include responsible communication on matters of public interest by members of the established news media and, in the case of Target Advertising and AUSNZ, innocent dissemination by social media platform providers or possibly under the Harmful-Digital Communications Act.

[70] Furthermore, the intended third parties will not be involved in much of the proceeding between the plaintiff and defendant with the draft claim against each intended third party only relating to one publication, whereas the claim against the defendant currently includes sixteen posts and by the time of the trial is likely to include over 20 (there have already been 18 posts).

[71] In addition, there will be difficulties in terms of who is required to pay the hearing fee. If leave is granted, the length of the hearing is likely to double (at least) because of the number of parties even though only relatively few posts are the subject of the intended third party claims. In those circumstances it would be appropriate for the defendant to pay a portion of the hearing fee. However the factors relevant to the proportion that the defendant ought to pay are complex.

[72] It may also complicate the award of costs following determination. This is because even if the defendant succeeds it may still be appropriate, for example, for the defendant to pay the hearing fee given that he sought to join the third parties.

Do the relative strengths and weaknesses of the parties' cases justify leave?

[73] Counsel for Mr Xiao submits that the alleged defamatory meanings (including the core concern) in the article published in the New Zealand Herald and by RNZ and Mr Xiao's second online post, and the damage caused by those publications, are similar. Counsel submits that given that, and the proximity in the time of the publications that are the subject of Mr Xiao's claims against the intended third parties, the claims for contribution pursuant to s 17 of the Law Reform Act are reasonably arguable.

[74] In my view it is difficult to assess the relative strengths and weaknesses at this stage. The draft claims against the intended third parties are skeletal and include contradictions, including that posts that the defendant himself has published are defamatory without reservation. In addition, the claims raise a number of novel issues. Although the defendant refers to himself as a freelance journalist the "articles" he has posted do not appear to follow the usual verifications steps that journalists undertake

as discussed recently by the Court of Appeal in *Christian v Bain*,¹⁷ including giving Mr Young an opportunity to comment before the blogs were posted. Blog posts are subject to the same legal tests as other media for the purpose of defamation proceedings though they must be read in context.¹⁸

Conclusion on leave

[75] In conclusion, although there is some overlap and ordinarily a relatively liberal approach to leave ought to be taken, the likely delay and disruption that would be caused by granting leave and the skeletal pleading of the draft claims mean that it is not in the interests of justice for leave to be granted.

[76] No leave application has been filed in respect of the four further intended third parties but I indicate my preliminary view that the same result would be reached. The critical factors in deciding leave are the delay and disruption that would be caused and the fact that the draft claims against the intended third parties are skeletal. Those same factors would arise in respect of the four further intended third parties.

Result

[77] Mr Xiao's application for leave to issue third party notices is declined.

[78] The third party notices and accompanying statements of claim filed by the defendant against the third parties as well as any statements of defence or associated documents are to be removed from the court's file.

Costs

[79] The plaintiff did not take a formal position in respect of the application so no costs award can be made in its favour.

[80] The third parties who have filed statements of defence, including The Vision Times Limited and New Zealand Epoch Times Group Limited, are entitled to costs. If costs cannot be agreed, memoranda of no more than three pages (excluding

¹⁷ *Christian v Bain* [2023] NZCA 579, at [103].

¹⁸ *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [4], [73] and [82]–[83].

schedules) may be filed, by the intended third parties within **30 working days** of this judgment and the defendant, a **further 10 working days**.

Associate Judge Sussock