IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-1089
[2024] NZHC 3044

BETWEEN	BEING AI LIMITED First Plaintiff
	SEAN ROBERT JOYCE Second Plaintiff
	KATHERINE ALLSOPP-SMITH Third Plaintiff
	EVAN RUSSELL CHRISTIAN Fourth Plaintiff
	DAVID JONATHAN MCDONALD Fifth Plaintiff
AND	CLARE CAPITAL LIMITED First Defendant
	MARK NORMAN CLARE Second Defendant
	ALEXANDER GORDON Third Defendant

Hearing: On the papers

Counsel: JWJ Graham and TF Cleary for the Plaintiffs
VL Heine KC and O Gascoigne for the Defendants

Judgment: 18 October 2024

JUDGMENT OF ASSOCIATE JUDGE SUSSOCK

This judgment was delivered by me on 18 October 2024 at 10 am pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The plaintiffs have brought defamation proceedings against the defendants, Clare Capital Ltd, Mark Clare and Alexander Gordon.

[2] The statements in issue were included in a weekly "Tech Insights" newsletter and covering email sent by Mr Gordon on 8 April 2024 to a subscriber list and to the National Business Review (NBR). The following day the NBR published an article that republished some of the allegedly defamatory statements with additional commentary from the NBR.

[3] The first-named plaintiff, Being AI Ltd, elected to file the proceedings in the Auckland Registry pursuant to r 5.1(2) of the High Court Rules 2016. This rule allows a plaintiff to file a proceeding in a Registry nearer to the place the first-named plaintiff resides if the place where the cause of action sued on arose, or some material part of it, is nearer to the place where the first-named plaintiff resides. If a plaintiff so elects, an affidavit needs to be filed together with the statement of claim providing such evidence.

[4] The defendants have applied to transfer the proceedings to the Wellington Registry on the basis that the statement of claim has been filed in the wrong registry or that a different registry would be more convenient to the parties.

[5] Following the filing of the defendants' application I asked the parties to confer to see whether agreement could be reached. The parties have agreed that the application can be determined on the papers, but no agreement has been reached otherwise. I therefore now determine the application for transfer on the papers as requested.

Relevant legal principles

[6] The default position under r 5.1(1)(a) of the High Court Rules is that the registry in which a proceeding is filed is the closest registry to the first defendant's principal place of business.

[7] However r 5.1(2) continues:

> (2) Despite subclause (1)(a), if the place where the cause of action sued on, or some material part of it, arose is nearer to the place where the plaintiff or the plaintiff first-named in the statement of claim resides than to the place where the defendant resides, the proper registry of the court for the purposes of subclause (1) is, at the option of the plaintiff or the plaintiff first-named, as the case may be, the registry nearest to the residence of the plaintiff or the plaintiff first-named, as the case may be.

[8] Rule 5.1(3) requires a plaintiff who proposes to exercise the option conferred by r 5.1(2) to file together with the statement of claim and notice of proceeding an affidavit either by the plaintiff or the plaintiff's solicitor providing evidence of the place where the cause of action or the material part of it arose, and showing that the place is nearer to the place where the first-named plaintiff resides than to the place where the defendant resides.

[9] Rule 5.1(4) provides that if it appears to a Judge, on an application made, that the statement of claim has been filed in the wrong registry then the Judge may direct that the proceedings are transferred to the proper registry.

[10] Rule 5.1(5) further provides that if it appears to a Judge, again on an application made, that a different registry of the court would be more convenient to the parties then the Judge may direct that the proceedings are transferred to that registry and that registry becomes the proper registry.

Background

[11] The plaintiffs filed proceedings in the Auckland Registry on 10 May 2024.

[12] As required by r 5.1(3) of the High Court Rules, an affidavit was filed together with the proceedings sworn by Thomas Cleary, a solicitor for the plaintiffs. Mr Cleary's evidence is that the cause of action sued on, or at the very least a material part of the cause of action, has arisen in Auckland for two reasons.

[13] First, that the email and NBR article were published in Auckland because some of the recipients of the email were based in Auckland and the NBR is based in

Auckland. Mr Cleary explains that the tort of defamation is committed each time a defamatory statement is "published" and that publication occurs when a third party reads, sees, hears, or comprehends the defamatory statements, not when the words are written, spoken, or transmitted. Mr Cleary says, therefore, that "given publication occurred in Auckland (and elsewhere), a substantial part of the tort of defamation has arisen in Auckland."

[14] The second reason is because loss is an element of the plaintiffs' claim in defamation and the plaintiffs' loss has occurred in Auckland. Mr Cleary explains:

> 8.1 Being AI Limited, the first plaintiff, has its registered office in Auckland and that is where any pecuniary loss has been or is likely to be suffered. Under s 6 of the Defamation Act 1992, such a loss is an element that the first plaintiff must establish in order to have a cause of action against the defendants; and
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> 8.2 the second to fifth plaintiffs are all based in Auckland … and their reputation has been impacted in Auckland.

[15] Mr Cleary further confirms that the High Court's Auckland Registry is closer to where Being AI (and the other plaintiffs) reside as compared to where the defendants reside. A company extract for Being AI annexed to Mr Cleary's affidavit records Being AI's registered office as in Takapuna, Auckland and the residential addresses of the remaining plaintiffs as including the Auckland suburbs of Hauraki, Remuera, Orakei and Paremoremo.

[16] In addition, Mr Cleary attaches the company extract for Clare Capital Ltd which records that its registered office is The Terrace, Wellington and that the remaining defendants' residential addresses are in Hataitai and Te Aro, Wellington.

[17] I am satisfied that the plaintiffs have established that the Auckland Registry is closer to where Being AI resides as compared to where the defendants reside. The issue for determination therefore is whether the plaintiffs have established that a material part of the cause of action arose in Auckland.

Did a material part of the cause of action arise in Auckland?

[18] The plaintiffs have pleaded two causes of action, both for defamation:

(a) First cause of action: the publication of Clare Capital's Tech Insights newsletter and report (First Publication).

(b) Second cause of action: the republication of Clare Capital's statements by the NBR (Second Publication).

Publication

[19] As the plaintiffs submit, "publication" in defamation refers to a third party receiving, seeing or hearing the defamatory communication rather than the act of sending, making or transmitting the defamatory communication.[1] The plaintiffs rely on the famous statement in *Hebditch v MacIlwaine*, by Lord Esher MR:[2]

> It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel.

[20] Furthermore, the plaintiffs submit that under the "multiple publication rule":[3]

(a) each receipt of a defamatory email message or bulletin board posting is a separate publication;[4] and

(b) each time a defamatory statement is accessed, such as a library book being retrieved or a website looked at, there is a separate publication.[5]

[21] The plaintiffs have provided evidence, in the form of an affidavit in reply by Paul Denham Shale, the co-founder and Chief Marketing Officer of Being AI Limited, that the First and Second Publications were received in Auckland. The plaintiffs say that this evidence establishes that a material part of the cause of action occurred in Auckland as publications occurred in Auckland.

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1 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [2].
2 *Hebditch v MacIlwaine* (1894) 2 QB 54 (CA) at 58.
3 *Sellman v Slater*, above n 1, at [22]–[46] noting that at [34] Palmer J explains that "If a reputation falls in a forest, but no one hears of it, it does not sound in defamation."
4 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 (VSC).
5 *The Duke of Brunswick v Harmer* (1849) 14 QB 185.

[22] The defendants accept that the First and Second Publications were received and read by people in Auckland but say that Tech Insights' subscribers live throughout New Zealand and are not solely based in Auckland. The third defendant, Mr Gordon, deposes that Clare Capital does not know where the recipients of the Tech Insights newsletter reside but anecdotally that a significant portion of NBR's recipients are based in Wellington. The defendants point to the fact that the NBR is an online-only publication, read nationwide (including in Wellington), and that the NBR is not a party to the proceeding.

[23] The defendants say that the more logical factor when analysing where the email was published is to consider where the email was sent from, which in this case is Wellington.

[24] The plaintiffs respond that considering where the email was sent from ignores what "publication" means in defamation, referring to Lord Esher MR's statement set out above. Furthermore, any claim around relative proportions of subscribers in Auckland and Wellington is unsupported by any admissible evidence and anecdotal claims are inadmissible hearsay given that the defendants admit they do not have any record of where recipients of the First Publication reside.

Assessment

[25] It is clear from the evidence filed that the statements were published in Auckland — the defendants accept this. In *Equiticorp Holdings Ltd v Wellington Newspapers,* the defendant submitted that the cause of action arose in Wellington (where the newspaper in issue was printed) saying it necessarily followed that once the newspaper was printed it was immediately published because it was from the printing office that the paper was distributed to the public at large.[6] After reviewing other defamation cases, Sinclair J held:[7]

> It is not the publication of the newspaper itself which constitutes the libel. It is the publication of the libel itself which constitutes the tort … The question to be answered is, where was the libel published? If it is published in Auckland as well as other places, then it can be said that the cause of action, or a material part thereof arose in Auckland.

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6 *Equiticorp Holdings Ltd v Wellington Newspapers* HC Auckland A864/85, 4 March 1986.
7 At 11.

[26] The defendants point to the commentary in *McGechan on Procedure* and the citation of *Katavich v TV Works Ltd* where Associate Judge Matthews held that a plaintiff must:[8]

> …demonstrate with precision how publication in the region of that Registry justifies its selection as the proper Registry for the proceeding. To require anything less would allow plaintiffs to select any Registry at will. That would not accord with either the intention of the rule, nor the approach to its application by Quilliam J.

[27] The reference to Quilliam J is to his Honour's decision in *Colman v Attorney-General* where a proceeding had been filed in Wellington in respect of allegedly defamatory statements in the *Wanganui Chronicle*.[9] The evidence before Quilliam J was that 11,654 copies of the *Chronicle* were distributed in the Wanganui District and only 138 copies were distributed elsewhere going "almost entirely to public libraries, advertising agencies and newspaper cutting services".[10] Quilliam J accepted that there must be a dividing line in the particular circumstances of any given case, but he was not prepared to hold that the distribution of 38 copies in Wellington constituted a material part of the plaintiff's cause of action.[11]

[28] In *Katavich*, the plaintiffs filed proceedings in Nelson in respect of alleged defamatory statements made on the web pages of TV3 *Campbell Live* and on the programme itself. The plaintiff had deposed that a material part of the cause of action arose in Nelson because the statements in issue were published on his and other computers in Nelson and were broadcast on televisions in Nelson and throughout New Zealand. Associate Judge Matthews granted the application to transfer the proceeding to Auckland, noting that if he was wrong in finding that it was the wrong registry, that it would be more convenient for the parties if the proceeding was in the Auckland Registry. In *Katavich*, the defendant, its legal advisers and witnesses were all based in Auckland, counsel for the plaintiff lived two hours north of Wellington, and none of the proposed witnesses apart from the plaintiff were associated with Nelson.

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8 Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.1.09]; and *Katavich v TV Works Ltd* HC Nelson CIV-2011-442-116, 20 July 2011 at [11].

9 *Colman v Attorney-General* (1978) 3 PRNZ 577 (HC).

10 At 2.

11 At 4.

[29] The circumstances in this case are distinguishable from those in *Colman* or in *Katavich*. Although the defendants "anecdotally" suggest that a significant portion of the Tech Insights recipients are based in Wellington, there is no evidence that a significant portion of recipients are also not based in Auckland.

[30] Furthermore, I do not consider there is a risk of forum shopping because, as counsel for the plaintiffs points out, under rr 5.1(1) and (2) the plaintiffs have a binary choice. They can either file the statement of claim in the Registry closest to where:

(a) the defendants reside (r 5.1(1)); or

(b) the first named plaintiff resides, if a material part of the cause of action arose closer to that location compared to where the defendants reside (r 5.1(2)).

[31] I am therefore satisfied that the plaintiffs have established that a material part of the cause of action arose in Auckland. As a result the proceedings were not filed in the wrong registry.

Loss

[32] Because of the view I have come to in respect of publication, I do not need to consider where the loss alleged by the plaintiffs arose. However I do so briefly for completeness.

[33] The defendants submit that the plaintiffs have suffered no real harm and that if real harm was suffered, any heads of loss are not Auckland-centric, pointing to the fact Being AI is a listed company.

[34] The plaintiffs say that this submission ignores the legal reality that the primary harm in defamation is to the plaintiffs' reputation, and damages do not depend on proving special damages.[12] In defamation, general damages are designed to compensate the plaintiffs for the damage to their reputation, vindicate their good name,

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[12] Defamation Act 1922, s 4.

and take into account the distress, hurt and humiliation caused by the defamation.[13] In assessing these matters, there is no need to prove harm to the reputations as the law presumes harm to have occurred on the publication of a defamation.[14]

[35] The plaintiffs say further that the defendants' submission also ignores the factual reality that the plaintiffs are all based in Auckland and carry on business in Auckland, including, but not limited to, business through the first plaintiff. The plaintiffs point to the fact that the second plaintiff is a lawyer who provides commercial legal services and that, as the evidence of Mr Shale shows, the defamation has led to a business ending discussions and a possible investor indicating they would not invest.

[36] It appears that if loss has occurred, it is likely that some of that loss has occurred in Auckland. This supports a finding that a material part of the cause of action has arisen in Auckland.

Is Wellington the more convenient Registry?

[37] The defendants further submit that Wellington is the more convenient Registry, although accepting that this is not a decisive factor. This submission is made on the basis that the defendants, their counsel and their witnesses are all based there but also that an earlier hearing date would be available in Wellington. The plaintiffs respond that the Wellington Registry is not more convenient for them, their counsel, or witnesses and that a trial is likely to be available at the same time.

[38] I have made enquiries of the Fixtures Registrar, and it appears that a trial is likely to be available at least six months earlier in Wellington than in Auckland and that is before considering delays that may be associated with electing trial by jury.

[39] Given the opposition and location of the plaintiffs, however, I do not consider that in terms of r 5.1(5) it would be more convenient to the parties to transfer the proceedings to Wellington. Earlier decisions have made clear that "convenience" is

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13 *Williams v Craig* [2018] NZCA 31, [2018] NZLR 1 at [31].
14 *Sellman v Slater*, above n 1, at [3], [49], [64]; *Craig v Slater* [2020] NZCA 306 at [45].

not convenience to the Court but convenience to all parties, with the onus on the defendant.[15]

Result

[40] The defendants' application to transfer the proceeding to Wellington is declined.

Costs

[41] The plaintiffs have succeeded and are entitled to costs.

[42] I ask the parties to confer and only if costs cannot be agreed for memoranda to be filed of no more than three pages (excluding schedules) on behalf of the plaintiffs within 15 working days and on behalf of the defendants within 25 working days. A decision will then be made on the papers.

Associate Judge Sussock

[15] *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 7 October 2011 at [56].