

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1225/92

BETWEEN

ALISON ANGUS

Plaintiff

A N D

J Z ROBINSON

First Defendant

A N D

BRIAN ELLIS

Second Defendant

Hearing: 14 July 1997

Counsel: J N Bierre for the plaintiff
J C LaHatte for the second defendant

Judgment: 14 July 1997

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

Solicitors for the plaintiff
Morgan Coakle
DX CP20504

Solicitors for the second defendant
Wadsworth Ray
DX CP 32519

Counsel for the second defendant
JC LaHatte
PO Box 6286 Wellesley St

The plaintiff applies, first, for leave under r426A to proceed against the second defendant and, secondly, for an order joining a second plaintiff.

No issue is taken as to the second order being made, should the first be made.

Summary judgment has been already been granted against the first defendant.

The plaintiff's claim against the second defendant arises out of the second defendant's failure to account to her for the proceeds of a sale of her property received by him. It is accepted by Mr LaHatte, for the second defendant, that there is a proper issue to be tried. Mr LaHatte has, however, sought to persuade me that, in the exercise of the Court's discretion, I should refuse the plaintiff leave under r426A. He does so on the ground of the facts that, having commenced this proceeding, the plaintiff thereafter:

- (a) went to "*Fair Go*"; and
 - (b) went to her Member of Parliament;
- to complain of the defendant's conduct.

Whether it was her fault or not, in the sense of her providing information going beyond the bald facts, the limited facts, which I summarised above, both "*Fair Go*" and her Member of Parliament went or, in the case of "*Fair Go*", proposed to go, far beyond the simple facts which I have outlined above. Mr LaHatte submits that in these circumstances the history of this litigation is so bad that, in terms of the decision of the Court of Appeal in *McEvoy v Dallison* (unreported, 15/04/1997, CA 163/96) the plaintiff can be said to have forfeited her right to proceed.

I have considered the arguments advanced by Mr LaHatte and I am not persuaded by them.

Given the clear direction by the Court of Appeal in *McEvoy v Dallison*, ubi supra, that r426A is to be understood and applied in the context of, and with a view to the achievement of the objective of, case management and that matters going to the merits of a proceeding or to the question of whether there is an abuse of the procedure of the Court are more properly to be dealt with under other rules of the Court, I am unable to accept Mr LaHatte's argument.

Furthermore, Mr LaHatte has been unable to point to any evidence before me which shows that the wider enquiry conducted into, and the wider publicity given to, the actions of the defendant by "*Fair Go*" and by the plaintiff's Member of Parliament were the result of information given by her. She undoubtedly gave information as to the second defendant's failure to account to her; but there is no evidence before me that she went beyond that. That being so, I do not think that she can be said to be responsible for the extension of the criticism of the defendant which "*Fair Go*" and her Member of Parliament embarked on or proposed to embark on.

I therefore grant leave to the plaintiff to take the necessary further steps in this proceeding and I make an order joining the firm of Morgan Coakle as second plaintiff.


I also make the following consequential orders:

- (1) the plaintiffs are to file and serve their amended statement of claim by 21 July 1997;
- (2) the second defendant is to file and serve his statement of defence to the amended statement of claim by 28 July 1997;
- (3) all parties are to make supplementary discovery as necessitated by the amended pleadings or as specifically requested by counsel for the other party, by 4 August 1997;
- (4) all parties are to complete inspection by 11 August 1997;
- (5) any further interlocutory applications are to be filed and served by 25 August 1997;
- (6) any notice by the plaintiffs to the defendant to admit facts is to be filed and served by 25 August 1997;
- (7) any further interlocutory applications filed and served by 25 August 1997 in terms of (5) to be listed in the Chambers List on 12 September 1997 before me, with notices of opposition being filed and served by 5 September 1997 and affidavits in reply being filed and served by 1.00 pm on 11 September 1997 ;
- (8) the second defendant's response to the notice to admit facts is to be given by 5 September 1997.

The parties seek the scheduling of settlement conference after 1 October 1997 and also a fixture for 2 days. Orders to that effect will be made on

12 September 1997, once the preceding steps have been taken and disposed of.

The costs of this application are fixed at \$400 plus disbursements to be fixed and are made costs in the cause


MASTER T KENNEDY-GRANT