IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 139/2019
[2020] NZSC 36

BETWEEN	DERMOT GREGORY NOTTINGHAM Applicant
AND	MALTESE CAT LIMITED First Respondent
	CLYDE ALEXANDER MACLEAN Second Respondent
	ELIZABETH MAY CURRIE Third Respondent
	JOHN DOE AND/OR JANE DOE Fourth Respondent

Court:	O'Regan and Ellen France JJ
Counsel:	Applicant in person D M Connor and K C E Chow for Respondents
Judgment:	17 April 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay one set of costs of $2,500 to the respondents.

REASONS

Introduction

[1] The respondents filed proceedings alleging that defamatory statements had

been published about them on a website.[1] Mr Nottingham was joined as a defendant on the ground that he may be the author. Mr Nottingham applied to strike out the proceedings on the basis they were time-barred. In the High Court, Fogarty J rejected this claim.[2] Mr Nottingham's appeal against that decision was dismissed by the Court of Appeal.[3]

[2] In dismissing the appeal, the Court of Appeal noted that a claim for costs under the High Court Rules 2016 was "essentially a claim for a contribution to litigation costs incurred" and on its own, could not constitute a money claim.[4] The Court also made the point that a "money claim" is defined in the Limitation Act 2010 as "a claim for monetary relief at common law, in equity, or under an enactment".[5] The Court said the claim for costs could not "transform a claim for declaratory relief, which is not a money claim, into a money claim".[6]

[3] Because the Court of Appeal concluded the claim was not a money claim, the Court said it was not necessary to consider Mr Nottingham's argument based on the multiple publication rule. The issue in relation to that rule was "whether the date of publication should be treated as the date on which the statements were first published or whether, as the respondents argued, the 'multiple publication' rule applied".[7] If the rule applied, publication would be treated as "occurring for limitation purposes with each publication".[8] The Court said that in this case, which involved publication on a website, "that would mean a fresh publication each time the subject statement was accessed".[9]

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1 We were advised that the first and second respondents have discontinued their claims.

2 *Maltese Cat Ltd v John Doe and/or Jane Doe* [2017] NZHC 1728, (2017) 24 PRNZ 254 at [22] [HC judgment].

3 *Nottingham v Maltese Cat Ltd* [2019] NZCA 641 (Courtney, Brewer and Gendall JJ) [CA judgment]. Application for recall dismissed: *Nottingham v Maltese Cat Ltd* [2020] NZCA 31.

4 CA judgment, above n 3, at [15].

5 Limitation Act 2010, s 12(1).

6 CA judgment, above n 3, at [15].

7 At [8] in reference to arguments made in the High Court.

8 At [8] in reference to arguments made in the High Court.

9 At [8]. Fogarty J in the High Court noted that the publications complained of were accessible at the time the respondents filed their statement of claim on 2 August 2016. The Judge had been told that they had since been taken down: HC judgment, above n 2, at [6].

The proposed appeal

[4] On the proposed appeal it would be argued that the fact the claim is for a declaration and costs means the claim is a money claim under the Limitation Act and so is time-barred if brought outside of the two year limitation period.[10] This argument relies primarily on s 24 of the Defamation Act 1992 which provides, amongst other matters, that where a plaintiff seeks only a declaration and costs and a declaration is made, "the plaintiff shall [generally] be awarded solicitor and client costs against the defendant".[11] The submission is essentially that costs above the standard are part and parcel of the relief or remedy sought which makes this a money claim.[12]

[5] In addition, Mr Nottingham wishes to argue that s 9 of the Limitation Act applies. That section states that the Act may apply "by analogy to a claim in equity to which no defence prescribed by [the] Act applies".

[6] Mr Nottingham also says the Court was wrong not to address his argument that the multiple publication rule should not apply.

[7] Finally, Mr Nottingham raises various other factual matters including perceived procedural unfairness and says Courtney J should have recused herself from hearing the appeal.

Assessment

[8] The application or otherwise of the Limitation Act indirectly (by analogy) to a claim for declaratory relief under the Defamation Act may be a question the Court may wish to consider at some point.[13] However, as we explain, when the proposed appeal is considered in the round this case is not the appropriate case to address that issue.

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10 Limitation Act, ss 11, 12 and 15.

11 Defamation Act 1992, s 24(2).

12 Mr Nottingham notes s 24 is in pt 3 of the Defamation Act which is headed "Remedies" and the word "remedies" means "relief". He would also challenge the approach to s 43 of the Limitation Act (a successful defence bars "relief" not the underlying right) taken by Fogarty J.

13 Mr Nottingham's argument about s 9 of the Limitation Act draws on *Driver v Radio New Zealand Ltd* [2019] NZHC 3275, a judgment delivered on the same day as the judgment of the Court of Appeal in the present case. In that case, limitation was applied by analogy to claims for declaratory relief in the context of a proceeding which also included claims for monetary relief.

[9] First, we consider the first of the arguments Mr Nottingham wishes to make, namely, that the provision for a costs award in s 24 of the Defamation Act means the present claim is a money claim for limitation purposes has insufficient prospects of success to justify a further appeal. As the Court of Appeal noted, were it otherwise, any claim in which costs were sought would potentially be a money claim. Second, a ruling by this Court on the effect of either s 24 of the Defamation Act or s 9 of the Limitation Act would not, in any event, dispose of the case. That is because there would be a further question about the application of the multiple publication rule. That question would be whether, on the basis of the multiple publication rule, limitation is relevant at all where publication was via a website. Finally, neither of the Courts below addressed the multiple publication rule or the question of the application of s 9 of the Limitation Act. We consider that it would be preferable for this Court to have the views of the Court of Appeal rather than this Court dealing with both of these matters as effectively a court of first, and last, instance.

[10] There is also nothing in the various factual matters raised by Mr Nottingham that would justify a grant of leave. Nor do we see any basis for the claim that Courtney J should have recused herself.[14] The criteria for leave to appeal are not met.[15]

[11] The application for leave to appeal is dismissed. The applicant must pay one set of costs of $2,500 to the respondents.

Solicitors:
DB Law, Auckland for Respondents

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[14] Amongst other matters, Mr Nottingham refers to a minute on 11 May 2017 issued by Courtney J. That minute followed on from a case management conference at which the decision was made, amongst other matters, that the present first, second and third respondents were to have costs on a 2B basis for the conference. The minute set out the amount of costs awarded.

[15] Senior Courts Act 2016, s 74(2).