

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

**CIV-2014-404-003194  
[2017] NZHC 1027**

UNDER the Defamation Act 1992  
IN THE MATTER of a civil claim for damages  
BETWEEN PENELOPE MARY BRIGHT  
Plaintiff  
AND STEPHEN TOWN  
Defendant

Hearing: 17 May 2017

Appearances: No appearance for Plaintiff  
W Akel for Defendant

Judgment: 18 May 2017

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**JUDGMENT OF COURTNEY J**

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This judgment was delivered by Justice Courtney  
on 18 May 2017 at 12 noon  
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

## **Introduction**

[1] Ms Bright commenced these proceedings in 2014 seeking damages against Mr Town in defamation. Mr Town applied for summary judgment on the ground that there was no answer to his defence of qualified privilege. Alternatively he sought an order striking out the proceedings on the ground that Ms Bright's notices under ss 39 and 41 of the Defamation Act 1992 did not plead sufficient facts or circumstances. Associate Judge Smith granted the summary judgment application.<sup>1</sup> In doing so, he made it clear that he was not striking out the statement of claim but rather entering summary judgment in favour of Mr Town.

[2] Ms Bright has applied to review Associate Judge Smith's decision. Because this proceeding was commenced prior to March 2017 and costs on the summary judgment application are still unresolved Ms Bright's application for review falls to be determined in accordance with the Judicature Act 1908 rather than the Senior Courts Act 2016.

[3] The matter was listed in the Duty Judge List on 17 May 2017. Mr Akel appeared for Mr Town, prepared to provide oral argument. Ms Bright filed written submissions indicating that she would not appear. In the circumstances I decided that the matter was best dealt with on the papers without hearing oral argument.

## **Application for review**

[4] I am satisfied that the application for review must be dismissed because review is not the permissible method of challenging an Associate Judge's decision to enter summary judgment. The appropriate course is appeal to the Court of Appeal, for the reasons that I explain next.

[5] Under the Judicature Act 1908 an Associate Judge's power to determine an application for summary judgment arose under s 26I. The High Court Rules require such applications to be heard in open court.<sup>2</sup> Under s 26P(2) any party to a proceeding may appeal to the Court of Appeal against any order or decision of an

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<sup>1</sup> *Bright v Town* [2016] NZHC 411 and *Bright v Town* [2017] NZHC 141.

<sup>2</sup> High Court Rules, r 7.36

Associate Judge in those proceedings “other than on order or decision made in chambers”. Because the summary judgment application must be determined in open court a challenge to summary judgment entered by an Associate Judge must be by way of appeal to the Court of Appeal, not review by a High Court Judge. The Court of Appeal made this clear in *Talyancich v Index Development Ltd*.<sup>3</sup>

We think it is clear that where a Master is exercising the jurisdiction of the Court under s 26I of the Judicature Act 1908, the Master must do so in Court and not in chambers, and an appeal from the decision lies to this Court under s 26P(2).

[6] The time for bringing an appeal against summary judgment is governed by the Court of Appeal (Civil) Rules 2005. Rule 29(1)(a) requires the appeal to be brought within 20 working days after the date of the decision that is the subject of the appeal. Under r 31(1) an appeal is brought only when the appellant files the notice of appeal in the Registry by delivering it by hand to the Registry or by sending it by mail to a postal address published by the Registrar.

[7] Ms Bright therefore had a right of appeal from Associate Judge Smith’s decision but she had to exercise it within 20 working days of the decision being delivered. The decision was delivered on 13 February 2017, which required Ms Bright to file her notice of appeal in the correct mode by 13 March 2017.

[8] Ms Bright did, in fact, seek to file a notice of appeal with the Court of Appeal on 13 March 2017. But she did not comply with the requirements of r 31; she sought to fax and email her documents rather than deliver or post them as required. Also, as a result of the terminology Ms Bright used in her notice of appeal the Registrar of the Court of Appeal, understandably, perceived the subject of the appeal to be a decision striking out the proceedings, which it was not. His advice to Ms Bright that the appropriate course was a review application to the High Court was therefore incorrect but since Ms Bright had failed to comply with r 31 this could not have made any difference to the situation.

[9] Rule 29A of the Court of Appeal (Civil) Rules provides for a party to apply for an extension of time within which to bring an appeal. That is a matter for Ms

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<sup>3</sup> *Talyancich v Index Development Ltd* [1992] 3 NZLR 28 at 36.

Bright. It cannot affect the current application before me. The application for review of Associate Judge Smith's decision is dismissed. Mr Town is entitled to costs on a 2B basis on the application. Costs will include Mr Akel's appearance in the Duty Judge List on 17 May 2017.

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P Courtney J