IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-1805
[2017] NZHC 1634

UNDER	the Defamation Act 1992 and Part 18 of the High Court Rules
IN THE MATTER	of a Declaration under s 24 Defamation Act 1992 concerning the nature and status of certain web publications
BETWEEN	MALTESE CAT LIMITED First Plaintiff
	CLYDE ALEXANDER MACLEAN Second Plaintiff
	ELIZABETH MAY CURRIE Third Plaintiff
AND	JOHN DOE AND/OR JANE DOE Defendants
	DERMOT NOTTINGHAM Second Defendant

Hearing: 24 May 2017

Appearances: D Huang for Plaintiffs
Second Defendant in Person

Judgment: 14 July 2017

JUDGMENT OF FOGARTY J

This judgment was delivered by Justice Fogarty on
14 July 2017 at 4.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Jones Law, Auckland

Introduction and Factual Background

[1] The plaintiffs, Mr MacLean and Ms Currie were at one time in a close personal relationship. While no longer together, they are on amicable terms. The first plaintiff, Maltese Cat Ltd (Maltese Cat), is a family company related to Mr MacLean.

[2] The claim contends that all three were victimised by defamatory publications on the website, www.laudafinem.com (the offending website). The offending website and its domain name, laudafinem, are hosted by GoDaddy LLC (GoDaddy). A related company, Domains by Proxy, LLC (DBP) is the domain name registrant.

[3] Mr MacLean is married to Ms Joanne MacLean. They have been separated since 2011. Their separation was acrimonious. Three separate legal proceedings instituted by Ms MacLean against Mr MacLean or Maltese Cat have been struck out or discontinued.

[4] At around the same time in 2011, Ms Currie was a witness in a police prosecution of her former partner, Matthew Crann, for an alleged domestic violence assault. That prosecution succeeded at first instance before a judge alone. Mr Crann appealed successfully for re-trial before a jury. He was then acquitted.

[5] The plaintiffs claim that near the times of Ms MacLean's third loss in bringing her legal proceedings and Mr Crann's successful appeal, Ms MacLean engaged the defendant, Mr Dermot Nottingham, to be, it is submitted, "something of an 'equaliser'". He met the lawyer for Mr MacLean and other plaintiffs, Mr Jones, and threatened a "campaign" against them unless they paid money.

[6] The plaintiffs claim that such a campaign was mounted on the offending website in late 2003: the publication of four key articles of defamatory, abusive and obscene materials, victimising Mr MacLean, Ms Currie and Maltese Cat. These four key articles are hereafter called Schedules 1 to 4. They carried the following titles:

Date of First Publication		*Webpage*
Schedule 1	22 September 2013	"The Ugly Face of Intimate Partner Abuse – Elizabeth May Currie"
Schedule 2	24 September 2013	Judge Ryan Confides – Jury Right on Money when Assessing Jilted Partners' Credibility
Schedule 3	31 October 2013	The Maltese Cat and the Polo Pony they came in from the cold, a scam that sought out LF-Ah facebook you've done it again.
Schedule 4[1]	1 November 2013	Elizabeth Currie aka Kathy Brown threatens to "fuck us" all here at LF.

[7] The plaintiffs want these four webpages to be declared defamatory. They have good reason to believe that if the declaration is made by this Court then GoDaddy and DBP will no longer host the pages. At the present time they have been taken down. A declaration is sought under s 24 of the Defamation Act 1992. By the terms of that Act they have to seek defamation against a person and hence the proceedings were commenced against John and Jane Doe. The plaintiffs, however, believe the offending material was put together by Mr Dermot Nottingham.

Form of the Proceedings

[8] These proceedings were commenced through an application to the High Court that they be brought by way of an originating summons under Part 18 of the High Court Rules. The plaintiffs stated they were intent only on obtaining the declaration in order to get the material kept off the internet. However, given their belief that the material was the result of activity of Mr Nottingham, they appropriately advised the Court that the application should be served on him.

[9] The plaintiffs' argument that they were entitled to proceed by way of originating summons, rather than by a simple common law action, was subtle. The argument was that the proceedings had to be under Part 18 because of rule 18.1(b)(v)

[1] Schedule 4 is predominantly referring to Elizabeth Currie, the third plaintiff, and on two occasions to Clyde MacLean.

— being proceedings in which the relief is claimed solely under the Declaratory Judgments Act 1908.

[10] These proceedings, however, also depend upon the application of the Defamation Act 1992. Section 24 of that Act provides that the plaintiff can seek a declaration that the defendant is liable to the plaintiff in defamation. There is nothing in s 24 that provides for such declarations to be litigated under Part 18. High Court Rule 18.1(b) begins "proceedings in which the relief is claimed solely under the following enactments". Yet the "following enactments" do not include the Defamation Act. Without these points being made to the Court, the High Court granted an ex parte application that the proceedings be under the Defamation Act 1992 and Part 18 of the High Court Rules.

Mr Nottingham's Role

[11] The application for the proceedings to be brought under Part 18 also suggested that Mr Nottingham be given the opportunity to defend this proceeding, even though he has denied involvement.

[12] Mr Nottingham is now described in the intituling as a defendant in these proceedings and has been since at least 11 April 2017. However, because the proceedings are brought by way of originating application, Mr Nottingham has never been obliged to file a statement of defence. This is because there has not been a statement of claim. Mr Nottingham has gone out of his way to avoid using the term defendant. He seems himself as an intervenor.

[13] Had this begun as an ordinary proceeding there would have been a statement of claim naming Mr Nottingham as a defendant. He would have been obliged to file a statement of defence. In that statement of defence, he would have had to admit or deny being the maker of the offending material in the four schedules and to plead in defence, if he made the statements, that they were true.

[14] Nonetheless, the proceedings have proceeded by way of originating summons, where evidence is received principally by way of affidavit. Either side can call on the deponents to affidavits to be cross-examined. Mr Nottingham does

not appear to be intending to be a witness himself. In response to Court orders that Mr Nottingham file his evidence by 23 December, he served documents totalling 233 pages and then a further 51 and 493 pages. None of this material is by affidavit. All the documents have been obtained from other proceedings, namely:

(a) A Family Court proceeding involving the third plaintiff Ms Currie;

(b) A criminal proceeding involving the third plaintiff's former partner Mr Crann; and

(c) An inidentifiable criminal proceeding involving Mr Nottingham himself.

[15] This is not all, by any measure. Freed from the formal filing constraints in these proceedings, Mr Nottingham has been very active, filing hundreds of pages of documents. These documents consist of statements being made by other persons than Mr Nottingham. For example, Mr Nottingham has filed an "affidavit" of Matthew Roy Crann which runs to hundreds of pages. Mr Crann sets out his point of view of the complaint against him, made by his then-partner Ms Currie, of male assaults female. He attaches notes of evidence taken before Judge Ryan and a jury. Mr Nottingham has filed numerous other "affidavits". They are, in summary, argumentative and replete with hearsay.

[16] The content of all of the filings by Mr Nottingham are now far removed from the original basis upon which the invocation of Part 18 was put to the High Court; namely, that all that was required was an interpretation of the material appearing on the website as to whether or not it was defamatory. Based on the hundreds of documents filed, not the least these last *volumes* of affidavits, I think the time has come to review whether or not these proceedings can continue to be conducted under Part 18.

[17] I am also concerned that Mr Nottingham has neither denied he is responsible for the subject defamatory publications on the website, nor expressly pleaded that they are true.

[18] I have considerable concerns about the justice of this dispute being litigated under the constraints of an originating summons. I am quite satisfied that an application at this stage to convert otherwise ordinary defamation proceedings into Part 18 originating summons proceedings would have been turned down.

[19] Essentially Mr Nottingham's evidence is a collection of other evidence in different Court proceedings. It is two, three or more hands away. For instance he justifies a bundle of documents that he has filed in the following way:

> I am not going to annex as an exhibit and re-file the same documents. I have attested as to the manner they were obtained or produced and to their integrity and relevance. I was of the opinion that I was to notify the Court of a bundle of documents that would be relied upon, and would not be contested by the plaintiffs as being relevant [sic]. I have done this in the past and nothing has been said unless a document is clearly not relevant.
>
> My evidence is going to be largely subpoenaed witnesses, who can testify viva voce and be cross-examined. I cannot force such witnesses to make a statement as such and can only rely on what they have previously supplied. Somehow the plaintiffs thought this was not going to occur.

[20] Only one of Mr Nottingham's contentions can clearly be defined as an interlocutory application: his challenge to whether these defamation proceedings are within the two-year limitation period.

[21] This application relies on ss 11 and 15 of the Limitation Act 2010:

> **11 Defence to money claim filed after applicable period**
>
> (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's primary period).
>
> (2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—
>
> (a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (see section 14); and
>
> (b) the claim is made after its primary period.
>
> (3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—

(a) 3 years after the late knowledge date (the claim's late knowledge period); or

(b) 15 years after the date of the act or omission on which the claim is based (the claim's longstop period).

…

15 Defamation claims: primary period and late knowledge period each 2 years

For a claim for defamation, "6 years" in section 11(1) and "3 years" in section 11(3) (a) must each be read as "2 years".

[22] Mr Nottingham has filed two recent memoranda, the first dated 5 April 2017 and the second following the hearing on 22 June 2017. His principal argument appears to be that the Court has no jurisdiction to intervene because there is a limitation period of two years from publication. Secondly, and similarly, he argues the material has been taken down due to proceedings in another case called *Blomfield v Unknown.* Within this context his memorandum of 22 June was filed with the backing name:

> MEMORANDUM OF LAY INTERVENOR [now, Second Defendant] IN ANSWER TO PLAINTIFFS COUNSELS URGENT MEMORANDUM DATED 21 JUNE 2017 SEEKING INDULGENCE TO FURTHER MISLEAD THE COURT, INJURE THE SECOND DEFENDANT, AND WRONGLY ACCESS THE CURIAL PROCESS.

[23] He submits:

> 2. The determination of these proceedings is imminent. <u>They are time barred as accepted by counsel for the plaintiffs</u>. There argument of no limitation is risible by their own admission. The plaintiff's counsel should by their own duty to the Court, discontinue as Mr Rooke did in the Family Court. If they do not, their joint and several intentions are proven to beyond reasonable doubt as being dishonest and a clear breach of their obligations to the administration of justice.
>
> 3. They misled the High Court that defamation had no limitation because it was an ongoing tort. Such submission is blantantly false and intended to mislead, and they have no operational defence. …
>
> 5. The latest supplementary memorandum is yet another attempt to "re-litigate" that which they know must be decided in the second defendants favour – that being the proceedings were brought out of time, and otherwise should be struck out for inherent dishonesty in bringing them to the curial process.

(Emphasis added)

The Limitation Point

[24] I cannot resolve in this judgment the limitation point, which I think Mr Nottingham clearly regards as his principal argument. This point requires further argument. It would be inappropriate to resolve it at this stage of the proceedings.

Admissibility of statements made by other persons in other litigation

[25] The hundreds of documents that Mr Nottingham has filed seek to take advantage of Part 18 of the High Court Rules, as discussed earlier in this judgment. I now go through the "applications", as they have been analysed into separate items by counsel for the plaintiffs. I say "applications" in quotes as there is no formal application, complaint with the High Court Rules. There is no proposal to call witnesses to give evidence. The intent is to rely on records of past evidence, in other Courts, between other parties.

DNApp1, 1(f)

[26] Mr Nottingham seeks to obtain a declaration that there exists a strong prima facie case to lay criminal charges against those involved in these proceedings where false allegations and fraud have been committed (in the Family Court proceedings). This is opposed on the grounds that it is not an interlocutory application. I agree. False allegations in the Family Court let alone fraud are not an issue in these proceedings.

DNApp1, 1(b)

[27] This is a statement of an intention to prove perjury by the plaintiffs and others under cross-examination etc. This is not an interlocutory application, contemplated in a Part 18 High Court Rules hearing.

DNApp1, 1(c)

[28] This application intends to prove that others have sought to promote, assist, and fund the litigation in order to subvert the due process. Similarly this is an abuse of a Part 18 hearing.

DNApp1, 1(f)

[29] This application intends to obtain declarations that there exists a prima facie case to lay criminal charges against the plaintiff. This is not an interlocutory application, relevant to the purposes of the Part 18 hearing.

DNApp1, 1(g)

[30] This application conveys an intent to have all other interested parties associated with the website material to be named. This does not appear to be a relevant matter as to the question as to whether or not the material published on the website is defamatory the original scope of the Part 18 hearing. I received a submission that the owners of the website have confidentiality arrangements to avoid being identified and that the plaintiff/respondents have no interest in slowing the proceeding to conduct this peripheral investigation. In any event, the owners of the website know what is going on because they were served with a notice when the preliminary orders of Thomas J were made on 19 October 2016.

DNApp2, 1(i) and DNApp2, 2

[31] There are two vague applications for further discovery. One for further and better discovery, the other for third party discovery. There is insufficient detail in support of the application to warrant their consideration.

DNApp2, 3

[32] This is a proposal for subpoenaing witnesses for the hearing, should a hearing of the plaintiffs' application be determined necessary. That was not contemplated when the litigation was to be conducted under Part 18. Had it been, it is very

unlikely the Court would have agreed these proceedings to be regulated by Part 18 of the High Court Rules.

[33] This issue is postponed pending the hearing as a continuation of Part 18.

DNApp2, 4

[34] This is a reference to the strike out application on the basis the application is time barred by the limitation period of two years – already dealt with above.

DNApp2, 5

[35] This is an application for disclosure to include privileged discovery pursuant to s 67 of the Evidence Act 2006. This too is postponed, awaiting a consideration of Part 18.

DNApp2, 6

[36] The defendant seeks leave to cross-examine the plaintiffs or the director of the first plaintiff. This too is postponed.

DNApp2, 7

[37] This is an application to have the Court hold the deponents for the plaintiffs in contempt for perjury and conspiring by order to obtain a fraudulent means.

[38] It is premature for this Court prior to the substantive hearing to make any findings of perjury.

DNApp2, 8 – Use and potential abuse of Family Court documents

[39] This is an application by Mr Nottingham for search orders of the providers of the emails and phone services to the plaintiffs, to prove a collateral purpose. There is no basis for such an order. The Family Court proceedings are between Ms Currie and Mr Crann, as respondent, and Mr Nottingham. In document "R3" of Mr Nottingham's bundle 43, Mr Nottingham is described as having done work for Mr Crann and his occupation is described as a justice campaigner. Much of the material

is statements of other people who will not give evidence. Mr Nottingham had no standing in the Family Court proceedings. This application is misconceived, in a Part 18 procedure at least.

The most recent affidavits

[40] Just before the hearing on 24 May 2017, Mr Nottingham filed three more affidavits in breach of the timetable. On 11 May an affidavit of Leighton Crann; on 17 May an affidavit of Matthew Crann; and on 18 May an affidavit of Joanne MacLean. The purpose of these affidavits appears to be in support of the proposition that the statements are not defamatory because they are true. But, again the affidavits contain much inadmissible hearsay. For example, in the affidavit of Matthew Crann: "My barrister Mr Russell Fairbrother QC, submitted to the jury that the allegations were false and that Ms Currie and Ms Hill had no credibility given their evidence and admissions made under cross-examination". That is in reference to the trial in which Mr Crann was charged with male assaults female. That affidavit has numerous exhibits and runs to hundreds of pages. It cannot be sensibly dissected into admissible and irrelevant evidence in an interlocutory process such as this. The affidavit of Joanne MacLean again runs to hundreds of pages, it is discursive, contains a lot of irrelevant material and contains many exhibits containing statements made by other persons.

[41] The shortest affidavit is by Paula Cox, six pages. It appears to be a character witness statement and encloses a statement she made to the police. That statement included, for example, this observation: "Elizabeth Currie is a very aggressive and assertive person and I know was physically and emotionally abusing my cousin as I have seen the damage caused by the abuse firsthand". This is not direct evidence and it is arguably irrelevant.

[42] Without reading the hundreds of pages, again there are a huge number of admissibility issues in admitting this material. I would note that the position of the plaintiffs' counsel is that this case should be set down to proceed by way of formal proof; inferentially, with the Court not reading or otherwise admitting any of the

materials sought to be adduced by Mr Nottingham. I do not agree with that proposition.

[43] Mr Nottingham is a lay litigant. I think he should be given one more chance to give evidence himself, if he wants to, as to whether or not he was the author of the contentious material. Secondly, Mr Nottingham should be given a chance to determine whether or not he can call direct evidence in support of the statements, if he can find such witnesses. These are witnesses who have firsthand knowledge and are available to be cross-examined.

Result

[44] [Deleted]

[45] This litigation is in a form far removed from that contemplated when the Court was asked and agreed that the proceedings should continue as an application under Part 18 of the High Court Rules. It is not possible in interlocutory proceedings to resolve all issues of admissibility of the hundreds of pages of "evidence" Mr Nottingham intends to rely on.

[46] I am also concerned that Mr Nottingham apparently does not intend to give evidence himself when there is a live suspicion that he is the person who is the source of the defamatory material on the internet.

[47] I have very considerable concerns about the justice of this dispute being litigated under the constraints of an originating summons. I am quite satisfied that had an application been made at this stage to convert an ordinary defamation proceedings into a Part 18 originating summons proceedings it would have been turned down.

[48] These proceedings are adjourned to be called before me on 20 July 2017 so that the parties can advise whether or not they:

(a) Consent to these proceedings no longer being confined by Part 18 of the High Court Rules and rather, continue as an ordinary action.

(b) Seek a hearing as to whether or not these proceedings should remain under Part 18 of the High Court Rules.

(c) Discuss whether it was outside the limitation period to join Mr Nottingham as a party, in 2015, or otherwise.

(d) Set a timetable, depending on (a), (b), and (c).