IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-1805
[2017] NZHC 1728

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: 25 July 2017

JUDGMENT OF FOGARTY J

This judgment was delivered by Justice Fogarty on
25 July 2017 at 3.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Jones Law, Auckland

Introduction

[1] The plaintiffs to these defamation proceedings seek judgment from the Court that certain published websites contain content defaming them. It is unclear who published that content and therefore the first defendant, John Doe, is fictional. The plaintiffs suspect, however, that the second defendant, Mr Dermot Nottingham, was the author of the defamation. Without affirming or denying that speculation, Mr Nottingham opposes judgment being entered in favour of the plaintiffs.

[2] One of the grounds on which Mr Nottingham defends this action is limitation. He argues the content was live for more than two years and is therefore unable to be determined by the Court.[1] This judgment addresses whether or not the plaintiffs have brought their proceedings within time.

Background

[3] This is my second judgment concerning Maltese Cat Ltd. The first, issued on 14 July 2017, resolved issues around the way in which these proceedings were brought (in a form seeking declaratory judgment) and about the admissibility of several volumes of documents filed by the second defendant, Mr Nottingham.[2] I had heard argument on the limitation defence, and was minded to decide against Mr Nottingham and wrote accordingly. I then decided I had not had sufficiently full argument, so I reviewed the reasoning and adjourned the proceedings for further call before me on 20 July 2017. The judgment then delivered contained in the summary my intended finding on limitation. I recalled the judgment and deleted the finding on limitation. At the following hearing, however, Mr Nottingham advised he would like the limitation point determined without further argument. He informed me he had appealed the first judgment and that he would appeal the limitation point. He also informed me that other cases are pending in the Court of Appeal on the same limitation issue. Mr Nottingham took no issue with the possibility that judgment on the limitation point would be against him — it is his intention to appeal any such finding. He considered that it had been fully argued.

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1 Limitation Act 2010, ss 11 and 15.
2 *Maltese Cat Ltd v Doe* [2017] NZHC 1634.

[4] It is against this procedural background that this judgment addresses and determines the limitation point.

The Limitation Point

[5] In late 2013, the plaintiffs were the subject of several allegedly defamatory articles on laudafinem.com (the offending website), hosted by GoDaddy LLC (GoDaddy). A related company, Domains by Proxy LLC (DBP) is the domain name registrant. GoDaddy and DBP are based offshore and have not been served in these proceedings. It is understood, however, that both will ensure content that has been determined, by a New Zealand Court, to be defamatory will remain off its hosted websites.

[6] The plaintiffs filed their statement of claim in these proceedings on 2 August 2016. At that time, the publications complained of were still accessible on the offending website. I have been informed that they have since been taken down, though the plaintiffs still wish to obtain a declaration.

Submissions

[7] Mr Nottingham argues that the proceedings, having been brought a little more than two and a half years from the date of first publication, are time-barred by the Limitation Act 2010. He cites the following provisions:

> **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".

[8] Mr Nottingham's primary submission is that the claim has been filed more than two years since publication, the "act" on which the claim is based.[3] On 24 July 2017, four days after the hearing, Mr Nottingham filed submissions, titled "Memorandum Bringing to the Court's Attention". He directed me to s 15 of the Limitation Act 2005 (WA), along with the limitation periods attaching to defamation actions in a number of American States. I consider these submissions further, below.

[9] Counsel for the plaintiffs argued the action was not time-barred. Reliance was placed upon the "multiple publication rule" — a principle commented upon by Courtney J in *Wishart v Murray*.[4] In that case, her Honour offered the following exposition of the principle:

> [74] The defendants' argument assumes that publication occurs on the day the material is first published on the internet and no later. Generally, however, publication occurs every time a reader accesses the defamatory material. This is sometimes referred to as the "multiple publication rule". Under this rule, time starts running with each and every publication. However, the rule poses problems for internet publications which can be stored and retrieved indefinitely. The multiple publication rule exposes online publishers to seemingly indefinite liability. Other jurisdictions have adopted a single publication rule. In New Zealand, however, the multiple publication rule still applies even in the context of internet publications.
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> [75] In *Solicitor-General v Siemer*, which involved alleged contempt of court through published information on a website in breach of an interim injunction, Chisholm and Gendall JJ said that:

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3 Limitation Act 2010, s 11(1).

4 *Wishart v Murray* [2015] NZHC 3363, [2016] 2 NZLR 565.

> [70] With the arrival of the internet, Courts have been alive to the scope for continuing, and continuous, publication of material on the electronic facility. Some cases have dealt with when and where publication via the internet takes place, and they all point in the same direction – publication occurs where, and when, the offending statement is downloaded and read. While that is not the law in many States of the USA where the "one publication" principle applies, it is the law in England, Australia, and, we hold, New Zealand.
>
> [76] The Supreme Court endorsed that approach, albeit without analysis. In a footnote the Court observed that:
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> > In the case of a contempt committed on the internet it seems there is a new publication every time access to the item is permitted: *Loutchansky v Times Newpapers Ltd (No 2)* at [51]–[76] and *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [42]–[44], [128] and [191]–[196].
>
> (References omitted).

[10] Courtney J concluded she was satisfied "the multiple publication rule either applies or it is arguable that it does so" in New Zealand.[5] This conclusion was not subject to examination on appeal, nor was it disturbed.[6]

[11] The plaintiffs argue that at the date of the statement of claim being filed (2 August 2016), the offending website was still accessible. Thus fresh causes of action were occasioned under the multiple publication rule each time it was accessed and the action is not time-barred.

Analysis

[12] Section 11 of the Limitation Act 2010 is titled "Defence to money claim filed after applicable period" and the first subsection reads:

> 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*).

[13] The term "money claim" is defined by s 12 of the Act. It states:

> **12 Money claim defined**

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5 *Wishart v Murray* [2015] NZHC 3363, [2016] 2 NZLR 565 at [77].
6 *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.

(1) *Money claim* means a claim for monetary relief at common law, in equity, or under an enactment.

(2) A claim for monetary relief includes a claim—

(a) for money secured by a mortgage; or

(b) for, or for arrears of, or for damages in respect of arrears of, interest in respect of a judgment debt; or

(c) for monetary relief for a breach of the New Zealand Bill of Rights Act 1990; or

(d) to have imposed, or recover, a civil penalty; or

(e) to enforce a surety's or other person's obligations under, or to obtain through forfeiture, a bond or recognisance (for example, a bail bond).

(3) A claim for monetary relief does not include a claim—

(a) for damages in respect of any trespass or injury to Maori customary land (*see* section 28); or

(b) for an account if, and only insofar as, the claim seeks relief that is not monetary relief (*see* section 32); or

(c) for contribution from another tortfeasor or joint obligor (*see* section 34); or

(d) on a judgment, or to enforce an arbitral award (*see* sections 35 and 36); or

(e) under the Criminal Proceeds (Recovery) Act 2009; or

(f) under the Terrorism Suppression Act 2002.

[14] With respect to Mr Nottingham and counsel for the plaintiffs, though I found the submissions before me helpful on the application of the limitation defence, I do not consider it necessary to determine whether the multiple publication rule applies in New Zealand. This question can be determined on a far simpler point, namely that the relief sought in this proceeding is not subject to the limitation defence provided for by s 11(1).

[15] The plaintiffs in this case do not bring a money claim as defined. Rather, their application is for declarations that each of the publications pleaded defames them. Declarations are not money claims, though they can be pleaded in conjunction

with such claims.[7] Lord Woolf and Jeremy Wolf observe in *Zamir & Woolf: The Declaratory Judgment*:[8]

> A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the *claimant's* rights … A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant.

[16] I am satisfied that s 11 of the Limitation Act 2010 does not contemplate a time-bar to declaratory relief. The question then turns to whether any other part of that Act, or other statute, provides Mr Nottingham with a limitation defence to the declarations sought.

[17] I am reinforced in my view that the Limitation Act does not contemplate time-barring declaratory judgments, by s 43 of that Act. Located beneath a heading titled "Pleading, and effect of establishing, defences", s 43 provides:

> **43 Established defence bars relief, not underlying right**
>
> If the defendant establishes a defence under this Act against a claim, and no order under section 17, 35(5), 36(4), or 50 applies to the claim,—
>
> (a) a court or tribunal must not grant the relief sought by the claim; but
>
> (b) the establishment by the defendant of the defence does not extinguish, as against the defendant or any other person, any entitlement, interest, right, or title of the claimant on which the claim is based.

[18] The effect of this section is to provide that, even where a limitation defence may be established, the *rights* upon which the claim is based are not extinguished. The Act provides for defences where the plaintiff has not been sufficiently prompt in claiming, inter alia, the monetary relief they seek. The defence does not, however, pronounce on the validity or otherwise of the claim that, but for the limitation defence, the plaintiff may have established.

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7 Declaratory Judgments Act 1908, s 2.

8 Lord Woolf and Jeremy Woolf *Zamir & Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [1-02].

[19] That analysis is particularly applicable to pleadings for declaratory relief, where it is simply the rights of the claimant that are pronounced upon. Section 43 reinforces the view that the Act is not intended to curtail any pronouncement on the underlying rights; it is merely intended to prevent tardiness in obtaining executory relief.

[20] I have not been made aware of any other New Zealand legislation that provides a limitation defence to applications for a declaration. With respect to Mr Nottingham, nor am I able to obtain assistance from his submissions on enactments in Western Australia or some of the jurisdictions in the United States of America. Those enactments are of a different nature to our own. The Western Australian Act provides an example. It provides:[9]

> **15. Defamation — one year from publication**
>
> An action relating to the publication of defamatory matter cannot be commenced if one year has elapsed since the publication.

[21] The Western Australian Act applies to "an action relating to the publication". The New Zealand Act, by comparison applies to *money claims* in respect of defamatory publications. Without addressing whether or not a declaration could be obtained under the Western Australian Act after more than one year, on which I make no comment, I am satisfied that these Acts are sufficiently distinct as to render a comparison between the two unhelpful. The Acts cited by Mr Nottingham cannot affect the rights of the first plaintiff to seek declaratory relief.

Conclusion on the Limitation Point

[22] As the pleaded limitation defence does not apply to applications for a declaration, I am satisfied that the plaintiffs' statement of claim was filed in time and is not affected by the Limitation Act 2010.

Amendment of First Judgment: Statement of Claim

[23] Paragraph [12] of the first judgment records the following:

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[9] Limitation Act 2005 (WA), s 15.

> [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.

[24] The sentence emphasised was inserted in error. The reason Mr Nottingham has not filed a statement of defence is rather that he has been joined to the proceedings as the second defendant late in the proceedings. They have, rightly or wrongly, continued without any statement being filed.

[25] I exercise my inherent jurisdiction, confirmed by the High Court Rules,[10] to correct paragraph [12] of the first judgment, by removing the offending sentence.

Outcome

[26] I find that the statement of claim giving rise to these proceedings is not time-barred.

[27] The first judgment, dated 14 July 2017, is amended in accordance with paragraph [25] above.

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[10] High Court Rules 2016, r 11.9.