

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA571/2017
CA572/2017
[2018] NZCA 387**

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

Hearing: 17 September 2018

Court: Kós P, Miller and Williams JJ

Counsel: Appellant in person
DJD van Hout for Respondents

Judgment: 24 September 2017 at 3.00 pm

JUDGMENT OF THE COURT

The application for an extension of time to file the case on appeal is declined.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Nottingham moves for an extension of time for dispensing with security for costs under r 35(6) and for seeking a hearing and filing the case on appeal under r 43 of the Court of Appeal (Civil) Rules 2005.

[2] The proceeding is an action for defamation to which Mr Nottingham has been joined as a defendant. This appeal is brought against two interlocutory decisions of Fogarty J.¹ The only relevant decision made in those decisions was a ruling that the statement of claim is not time-barred.

[3] The appeal was brought on 17 August 2017, though that was not confirmed until 4 October 2017 when Cooper J directed that it should be accepted for filing as at 17 August. The appeal was then deemed abandoned on 20 November 2017 as Mr Nottingham had neither sought a hearing date nor paid security, which had been set at \$6,600. He had however sought an application for dispensation from security and an extension of time to pay it. For this reason a fresh application for extension was granted on 31 January, with Miller J writing that: “I extend time to seek a hearing and to seek waiver of security for costs. Both steps must be taken by 27 March 2018.”

[4] Mr Nottingham moved for dispensation from security before 27 March, but that application had not been determined by that date. He did not seek a hearing date or prepare a case on appeal. His appeal was accordingly deemed abandoned on 28 March 2018. He brought the present r 43 application on 23 April 2018.

[5] Mr Nottingham accounts for the delay by saying there was no point in applying for a hearing date because he would not progress the appeal unless security was waived. This is not an adequate explanation. He was obliged to progress the case by filing a case on appeal and seeking a hearing date in the time allowed. He had already had many months since filing his appeal. Further, this is an interlocutory appeal and the case on appeal ought not be large or complex.

[6] Before us Mr Nottingham argued that his appeal has merit. We accept that the limitation point is arguable, but limitation is ordinarily a trial issue because it turns on the facts, and the limitation defence remains available to him in an appeal after trial

¹ *Maltese Cat Ltd v Doe* [2017] NZHC 1634; and *Maltese Cat Ltd v Doe* [2017] NZHC 1728.

on the merits. He argued in the alternative that the present appeal ought to be permitted to continue because the claim against him is an abuse of process. There is no finding below on that question, however, and we would not be prepared to decide it without a first instance decision on the point.

[7] Lastly, Mr Nottingham pleaded that the court also ought to extend an indulgence to him as a lay litigant and he asserted that health problems have affected his ability to prepare. We are not prepared to extend time on this ground. He appears regularly enough in the courts to eliminate any claim to dispensation for limited resources or unfamiliarity with process. There was an element of indulgence in the decision of 31 January, and it was not open to him to decide unilaterally to fail to comply with it.²

[8] The application for an extension of time to file the case on appeal is declined. It follows that the appeal is deemed abandoned and it is not necessary to deal with the application under r 35.

Solicitors:
Jones Law, Auckland for Respondents

² *Erwood v Official Assignee* [2015] NZCA 620 at [9].