

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA572/2017  
[2019] NZCA 641**

BETWEEN	DERMOT NOTTINGHAM Appellant
AND	MALTESE CAT LIMITED First Respondent
	CLYDE ALEXANDER MACLEAN Second Respondent
	ELIZABETH MAY CURRIE Third Respondent

Hearing: 14 November 2019

Court: Courtney, Brewer and Gendall JJ

Counsel: Appellant in Person  
K M Connor and KCE Chow for Respondents

Judgment: 12 December 2019 at 2.30 pm

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by Courtney J)

## Introduction

[1] The issue in this appeal is whether a defamation claim seeking declaratory relief and costs is a money claim for the purposes of s 11 of the Limitation Act 2010.

[2] The respondents brought the proceedings alleging that defamatory statements had been published about them on the website [www.laudafinem.com](http://www.laudafinem.com).<sup>1</sup> The host of the website, Godaddy.com LLC, has advised that it is contractually entitled to take down defamatory, obscene or lewd material and will abide any order of this Court declaring publications on the [laudafinem.com](http://www.laudafinem.com) website to fall into those categories.

[3] Mr Nottingham brought a number of interlocutory applications, including an application to strike out the proceeding on the ground that it was time barred. Rule 15.1 of the High Court Rules 2016 permits the court to strike out all or part of a pleading on specified grounds, including that it is an abuse of the process of the court.<sup>2</sup> In order to succeed on a strike-out application brought on the ground that the cause of action is statute-barred, the applicant must show that the claim is properly regarded as frivolous, vexatious or an abuse of process.<sup>3</sup> The threshold for striking out a pleading is a high one; the jurisdiction is to be exercised sparingly and only in clear cases and the cause of action must be clearly untenable.<sup>4</sup>

[4] Fogarty J found that the proceedings were not time barred.<sup>5</sup> Mr Nottingham appeals.

## The High Court decision

[5] The statement of claim alleges that the defamatory statements were published on 22 September 2013, 24 September 2013, 31 October 2013 and 1 November 2013,

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<sup>1</sup> The proceedings were brought by way of originating application, initially against defendants named as John Doe and/or Jane Doe because of the uncertainty as to the identity of the publisher of the statements. The appellant, Dermot Nottingham, was subsequently joined as a defendant on the basis that he may be the publisher

<sup>2</sup> Although proceedings were filed before the High Court Rules 2016 came into effect, those rules apply to the current proceedings by operation of pt 2, sch 5 of the Senior Courts Act 2016.

<sup>3</sup> *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33].

<sup>4</sup> *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; and *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) at [55]–[59].

<sup>5</sup> *Maltese Cat Ltd v John Doe and/or Jane Doe* [2017] NZHC 1728, (2017) 24 PRNZ 254 at [22].

and continue to be accessible. The statement of claim was filed on 2 August 2016. The basis for Mr Nottingham's strike out application was that the statement of claim was time-barred by virtue of ss 11 and 15 of the Limitation Act.

[6] Section 11 of the Limitation Act provides that:

**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**).

[7] For defamation claims however, the relevant period under s 11(1) and (3) is two years:

**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] Fogarty J recorded Mr Nottingham's argument as being that the claim was time barred because it had been filed more than two years after the statements were published.<sup>6</sup> The argument turned on 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, which would treat publication as occurring for limitation purposes with each publication.<sup>7</sup> In the context of publication

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<sup>6</sup> At [8].

<sup>7</sup> At [9]; citing *Wishart v Murray* [2015] NZHC 3363, [2016] 2 NZLR 565.

on the internet that would mean a fresh publication each time the subject statement was accessed.

[9] The Judge considered that the limitation issue could be disposed of on the basis that the defence provided under s 11 on which Mr Nottingham relied was not available, because s 11 applies only to “money claim[s]” and the respondents were seeking only declaratory relief, which is not a money claim. The Judge relied on the following statement from *Zamir & Woolf: The Declaratory Judgment*.<sup>8</sup>

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.

[10] The Judge concluded that:

[14] ... 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.

(footnote omitted)

## Appeal

[11] On appeal, Mr Nottingham modified his argument in relation to s 11. He submitted that, because the statement of claim seeks costs (and indeed indemnity costs would likely be payable by virtue of s 24(2) of the Defamation Act 1992), as well as declaratory relief, the proceedings do constitute a “money claim” for the purposes of s 11 of the Limitation Act.

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<sup>8</sup> Lord Woolf and Jeremy Woolf *Zamir & Woolf: The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [1–02] (footnotes omitted).

[12] Mr Nottingham also maintained the argument that the multiple publication rule should not apply and that the proceedings are time barred because they were filed more than two years after the first date of publication and the respondents had knowledge of the publication within that period.

[13] We consider that the Judge was right in his conclusion that the proceeding is not a money claim and that the fact costs are sought makes no difference. The starting point is the definition of “claim” in the Limitation Act:<sup>9</sup>

**claim** means a claim (whether original or ancillary)—

- (a) that may be made in a court or tribunal (other than in a criminal or disciplinary proceeding); or
- (b) the dispute relating to which may be referred to arbitration

[14] “Money claim” is separately defined in s 12:

## **12 Money claim defined**

- (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.

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<sup>9</sup> Limitation Act 2010, s 4.

[15] A claim for declaratory relief is clearly not a money claim for the purposes of s 11 and Mr Nottingham did not seek to argue otherwise. Nor is it tenable to argue that a claim for costs could, in itself, constitute a money claim. A claim for costs under the High Court Rules is essentially a claim for a contribution to litigation costs incurred, that being the basis upon which claims are allowed. It is well recognised, however, that proceedings cannot be brought where legal costs are the only relief sought.<sup>10</sup> It is therefore self-evident that a claim for costs cannot transform a claim for declaratory relief, which is not a money claim, into a money claim. We agree with Mr Connor's point, for the respondents, that treating costs as a form of relief would have the potential to turn virtually every claim into a money claim for the purposes of the Limitation Act.

[16] Our conclusion that the proceeding in this matter is not a money claim means that whether the publication is to be treated as having occurred on the first day of publication or subsequently, under the multiple publication rule, cannot affect the respondents' position. It is therefore unnecessary to consider the merits and application of that rule.

[17] Nor is it necessary to consider the other aspects of Mr Nottingham's extensive written submissions, which rest on factual matters not before the Court.

## **Result**

[18] The appeal is dismissed.

[19] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
DB Law, Auckland for Respondents

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<sup>10</sup> *Chick v Blackwell* [2013] NZHC 1525 at [151]–[153].