IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-3091
[2020] NZHC 1240

UNDER	the Defamation Act 1992
BETWEEN	KRISTIN PIA CATO Plaintiff
AND	MANAIA MEDIA LIMITED Defendant
AND	ROWAN DIXON Second Defendant
AND	JANE THOMPSON Third Defendant

Hearing (by telephone):	13 May 2020
Appearances:	P King and S McKenna for the Plaintiff S Mills QC and D Nilsson for the Defendants
Judgment:	12 June 2020

JUDGMENT OF HINTON J
[Defendants' Interlocutory Application for Extension of Time to Elect Trial by Jury]

This judgment was delivered by me on 12 June 2020 at 4:30 pm pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

Solicitors/Counsel:
Lee Salmon Long, Auckland
S Mills QC, Auckland
McKenna King

[1] The defendants apply for an order granting them leave to elect trial by jury out of time. The plaintiff, Ms Cato, opposes the grant of leave, saying it would prejudice her for leave to be granted and there is no good reason for the late election.

Background: Procedural History

The genesis of the dispute

[2] The proceeding concerns an article published by the defendants on the *Horse & Pony Magazine* website on 2 December 2017 and promoted by them on social media. The plaintiff alleges the article defamed her. The defendants deny the defamation and say a clarification and apology was attached to the article when they became aware of the plaintiff's complaint, and the article was then removed from online publication.

[3] It has already been established the article is capable of bearing the defamatory meanings pleaded by Ms Cato.[1] Remaining issues arising for determination are whether the article did in fact defame Ms Cato and, if so, the measure of damages.

Chronology

[4] The plaintiff's claims as to prejudice and overall delay on the part of the defendants make it necessary to detail the lengthy chronology of this proceeding.

[5] Ms Cato filed her statement of claim on 22 December 2017, the defendants filed defences on 20 February 2018 and on 6 March 2018 the plaintiff filed replies and a notice of particulars under ss 39 and 41 of the Defamation Act 1992 (the Act).

[6] On 16 May 2018, the plaintiff filed a first amended statement of claim incorporating a new prayer for a recommendation that a correction be published under s 26. She also filed an interlocutory application seeking determination of whether the article was capable of bearing the defamatory meanings she had pleaded (the meanings application) and for an order for a conference under s 35 of the Act to determine whether a s 26 recommendation should be made (the s 35 conference).

---

1 *Cato v Manaia Media Ltd* [2019] NZHC 440, reversed in part [2019] NZCA 661.

The defendants filed a notice of opposition on 30 May 2018 to the meanings application.

[7] A first case management conference was held on 20 June 2018. The parties were agreed a s 35 conference should be convened to consider a s 26 remedy. The plaintiff wanted a contemporaneous hearing of the meanings issue, saying that would promote a settlement. The defendants opposed, saying determination of that issue at the same time as the s 35 conference would artificially increase the costs incurred by both parties, affect the application of s 26, generally reduce the likelihood of settlement and defeat the just, expeditious, and economical disposal of the proceeding. The parties agreed that each "hearing" would take half a day. In a Minute that day I recorded that quick resolution of the proceeding was mutually desired, and I did not consider (wrongly as it turned out) making pre-trial determinations as to meaning would add materially to the parties' costs. I directed as sought by the plaintiff that the two matters be considered together at a one-day hearing to be allocated at the earliest possible opportunity.

[8] On 17 July 2018 the registry notified the parties of a date on 21 September 2018. That date could not be maintained due to unavailability of Ms Goatley, then counsel for the defendants. Anticipating difficulty in finding a date, on 26 July counsel filed memoranda indicating available dates and requesting that, if the hearing was not until 2019, directions be made to progress the proceeding in the interim. The registry then advised that the one-day hearing would be convened on 22 March 2019. By memorandum dated 16 August 2018, Mr Mills QC, for the plaintiff, indicated dissatisfaction with that date. He noted the primary remedy pursued by the plaintiff was a recommendation for publication of a correction under s 26, the benefit of which would fade significantly with delay. (I note the plaintiff had not however sought that remedy until five months after the proceeding was filed.) If an earlier one-day fixture could not be found he sought directions and a trial date, as well as maintaining the one day March 2019 fixture. On 17 August Ms Goatley said that timetabling of steps down to and including allocation of a trial fixture was premature. Too many further steps prior to a s 35 conference would reduce the likelihood of the conference achieving an economical disposal of the proceeding. She said both parties had indicated a s 35 conference could resolve the proceeding, pleadings had not yet been

finalised, neither discovery nor inspection had been undertaken, the form of trial had not yet been determined, and no realistic estimate of the length of the trial could be made.

[9] At my urging, the registry redoubled their efforts to secure an earlier hearing date, which led to the 22 March 2019 one-day hearing being vacated in favour of a one-day hearing on 17 December 2018, the last sitting day of the year.

[10] A month later, on 12 October 2018, the plaintiff filed a memorandum asking that I still make timetable directions pending the 17 December 2018 hearing. The defendants again opposed the making of timetable directions until after the December 2018 settlement conference, for the same reasons as before.

[11] By Minutes dated 26 October 2018 and 8 November 2018 I made the timetable directions requested by the plaintiff including directions setting the close of pleadings date at 31 March 2019 and setting down a three week trial commencing on 21 October 2019. I said it seemed (wrongly as it turned out) that all parties had "significant legal resources behind them", the directions did not require much work before the December 2018 hearing and also the one-day hearing would have been in September were it not for counsel for the defendants' earlier unavailability. I noted that there was a reasonable chance of the trial being shorter than three weeks in duration.

[12] On 27 November 2018 the defendants filed defences to the first amended statement of claim. The plaintiff filed her replies and a second notice of particulars on 13 December 2018.

[13] The two interlocutory hearings (the s 35 conference and the meanings application) were heard on 17 December 2018, but unfortunately not concluded. A further half-day had to be allocated which, again with my intervention, was able to be promptly fixed for 13 February 2019 and the parties were so advised (at least that it was a February date).

[14] On 4 February 2019 Ms Goatley filed a memorandum pointing out (correctly) that it would be impossible for the then close of pleadings date of 31 March 2019 to be adhered to.

[15] On 7 February 2019 the plaintiff advised the Court she wished to withdraw her application for a recommendation under s 26, and was abandoning the s 35 conference. Due to "the apparently unavoidable delays that have occurred in progressing the application", the plaintiff regarded the utility of a recommendation under s 26 as having been greatly diminished. Mr Mills sought orders that the continued hearing for 13 February 2019 be limited to the plaintiff's reply submissions on capability of meaning, and that the plaintiff file and serve an amended statement of claim removing the prayer for relief under s 26. The plaintiff also sought that the question of costs consequent on her withdrawal be reserved.

[16] On 12 February 2019 Ms Goatley filed a memorandum opposing the plaintiff's proposed orders. She noted that the plaintiff had been aware since 17 December 2018 that the continued hearing of the applications would take place in February 2019 and contended that the plaintiff's suggestion that resolution under s 26 was impossible as at February 2019, when it had clearly remained in play in December 2018, was "contrived". Ms Goatley said it was similarly contrived for the plaintiff to suggest that her costs in respect of the proceeding or the application would have increased so materially between December 2018 and February 2019 so as to make settlement that much less likely to follow from the resolution of a s 35 conference. She submitted that the Court should continue the s 35 conference on 13 February 2019, the defendants remaining of the view that there was a real prospect of consequential resolution. In the alternative, the defendants sought immediate determination of costs in their favour.

[17] At the 13 February 2019 hearing, Ms Goatley acknowledged that this was not a case where, applying r 15.22 of the High Court Rules 2016, I could require that the s 26 application and s 35 conference proceed. I agreed and allowed the plaintiff to withdraw her application. There was then something less than an hour of submissions by Mr Nilsson, who appeared for the plaintiff that day, in reply on the meanings point.

[18] I fixed costs in the defendants' favour following the plaintiff's withdrawal,[2] on the basis there had been no change or delay that justified her abandonment of the application at that point, "particularly as compared to before the hearing on 17 December 2018." Ms Goatley had sought increased costs on the basis of *Calderbank* correspondence, but there was an issue whether that could properly be put before me at that juncture so she instead sought 2B scale costs, with the issue of increased costs reserved.[3] In a costs judgment of 18 February 2019, I recorded partial agreement with Ms Goatley's submission that the plaintiff's election to have a s 35 conference had occupied much of the time spent by the parties in relation to the first case management conference and on subsequent timetabling issues,[4] and awarded scale costs to the defendants consequential on the withdrawal of the s 26 application in the sum of $6,355.[5] The issue of increased costs remains outstanding.

[19] At the end of the February 2019 costs judgment I vacated the March 2019 close of pleadings date, leaving the October 2019 trial and timetable directions in place pending a case management conference on 15 March 2019, by which date my meanings judgment was estimated to be available. I referred to Ms Goatley having raised again a difficulty with the October 2019 fixture because of a conflict. I declined nonetheless to vacate the fixture saying even though the plaintiff could be said to have wasted time it was still important the proceeding be disposed of as promptly as possible. I noted that it was not yet known whether the matter would proceed to a jury trial or a Judge-alone hearing.

[20] My judgment on the meanings issue was released on 13 March 2019.[6] I concluded, in summary, that certain of the meanings pleaded by Ms Cato were not available but held that the article was otherwise capable of bearing the defamatory meanings pleaded. I directed that the plaintiff would need to re-plead to take account of my findings but also that the plaintiff had to properly particularise the remaining pleading.[7]

---

2 *Cato v Manaia Media Ltd* [2019] NZHC 186.
3 At [9].
4 At [13].
5 At [17].
6 *Cato v Manaia Media Ltd* [2019] NZHC 440.
7 At [48]-[52].

[21] By joint memorandum dated 14 March 2019 the parties sought timetable directions including directions as to filing and service of amended pleadings and particulars; fixing a new close of pleadings date of 10 May 2019 with "any jury notice to be filed and served by the same date"; and pre-trial steps beginning with service of briefs of evidence and bundle nominations by the plaintiff on 21 June 2019. In a Minute of 15 March 2019 I made timetable orders in terms of the parties' 14 March joint memorandum.[8]

[22] The directions also included a one-hour interlocutory hearing for resolution of a discovery dispute, which the registry set down for 9 May 2019. On 7 May 2019, I vacated that hearing because the parties had managed to narrow the unresolved discovery issues to the point they could be resolved by negotiation or, at worst at a telephone conference.

[23] Pursuant to the directions made on 15 March 2019, the plaintiff filed a second amended statement of claim on 29 March 2019, the defendants filed their second amended statements of defence on 12 April 2019, and the plaintiff her reply to the second amended defence of the first defendant on 26 April 2019.

[24] On 10 April 2019, the last day for doing so, the plaintiff filed an appeal in the Court of Appeal against parts of my judgment of 13 March 2019. The defendants filed a cross-appeal on 29 April 2019. An appeal had not been included in the timetable and the filing of it on 29 April rendered the timetable clearly inapt, given the plaintiff's briefs and bundle nominations were to be served by 21 June 2019.

[25] On 29 April 2019 the plaintiff filed a third amended statement of claim (this time adding a claim for punitive damages) and replies to the second amended statement of defence of the second and third defendants. She also filed a second amended notice of particulars. None of these pleadings had been timetabled. The

---

[8] These included orders timetabling the making of submissions in respect of all parties' applications for costs in respect of the meanings judgment. By judgment dated 8 July 2019, I held that the plaintiff had been substantially successful, as the meanings I had concluded were not available were amongst the less serious pleaded, but also acknowledged that reasonable portions of the plaintiff's claim had been struck out on her own application, and so awarded 2B scale costs in the plaintiff's favour but reduced the amount of the award by a little over 50 per cent: *Cato v Manaia Media Ltd* [2019] NZHC 1574.

defendants then had to each file third amended defences which they did on 3 May 2019.

[26] The defendants depose that by early May 2019 they were in disarray, could not afford to pay their legal fees and would have to self-represent. Ms Dixon says she was suffering from medical issues that made her unable to communicate with counsel and Ms Thompson says she found the legal proceeding and its requirements overwhelming particularly as she was also caring for her ill husband. The advice they were given by Ms Goatley was that, if self-representing at trial it was preferable to pursue a judge-alone trial whereas (by reasonable inference) if represented at trial they would be better advised to proceed by jury trial.

[27] On 10 May 2019 the plaintiff filed and served notices to the second and third defendants requiring them to answer interrogatories. On 17 May 2019 the plaintiffs filed a reply to the third amended statement of defence.

[28] On 14 May 2019 the Court registrar wrote to counsel asking whether they would be seeking a trial before a jury and pointing out it would require leave. On 15 May 2019 she asked the plaintiff to confirm her position while "confirming receipt of the defendants' position". There does not seem to be any record of the latter.

[29] On 29 May 2019, according to an affidavit by Ms Cato in relation to the present application she filed a memorandum in the Court of Appeal seeking a half-day hearing and to strike out the cross-appeal because the defendants had failed to prosecute it.

[30] At the same time, on 30 May 2019 the defendants became formally unrepresented. A notice of change of representation and address for service was filed by Ms Goatley. The defendants were self-represented from then until 23 September 2019, when present counsel for the defendants, Mr King and Mr McKenna agreed to assist the defendants.

[31] On 5 June 2019 the defendants in person filed a memorandum seeking allocation of a judicial settlement conference, saying they lacked the means to

adequately put forward their case. That memorandum was sent to the plaintiff by the Court on 16 June.

[32] In response to the defendants' proposal, on 20 June 2019 counsel for the plaintiffs filed a memorandum proposing another s 35 conference be convened to explore possible resolution and make timetable directions if necessary. The memorandum refers to not having answers to interrogatories from one of the defendants. It makes no mention of the timetable order requiring the plaintiff to serve briefs by 21 June 2019, which I presume the plaintiff failed to do. The defendant who had not complied, responded immediately saying she would reply to the interrogatories that day.

[33] On 25 June 2019 Clifford J in the Court of Appeal issued a Minute requiring, inter alia, Ms Cato to file submissions in support of the strikeout by 8 July 2019.

[34] By letter to the Court dated 26 June 2019, the defendants agreed to a second s 35 conference. On 8 July 2019 a joint memorandum (drawn up by the plaintiff's solicitors) was filed seeking a one-day s 35 conference be set down before me and that the timetable directions made on 15 March 2019 be vacated, anticipating that the likelihood of settlement would be dissipated "if the plaintiff [was] put to significant further trial preparation costs" ahead of the conference. The memorandum makes no mention of also vacating the October 2019 hearing, presumably in error. By Minute later that day, Lang J offered the parties a one-day fixture for a judicial settlement conference before Sargisson AJ on 2 September 2019, it being "unlikely that any other dates will be able to be offered prior to the commencement of the trial."

[35] The plaintiff filed a further memorandum on 10 July 2019 seeking again to vacate the pre-trial directions and now also seeking to vacate the October 2019 fixture. She also sought allocation of a s 35 conference before me specifically, during the window provided by the vacated trial fixture (that is, in the three weeks between 21 October and mid-November 2019). The memorandum asserts that the conduct of the defendants in respect of the cross-appeal meant that the plaintiff's appeal against the meanings judgment would not be able to be determined in advance of the then

allocated trial fixture and as a consequence the trial had to be vacated also. I do not agree with this characterisation of the reason the October 2019 fixture had to be vacated, as I set out later.

[36] Given the plaintiff's reiteration that the second s 35 conference be before me, Lang J directed that the joint application for that conference be considered by me at a further telephone conference.

[37] On 16 July 2019 the defendants abandoned their cross-appeal. Some time later, the Court of Appeal granted costs of about $4,000, an uplift of about 20 per cent on scale, "reflecting that there is substance in each of the three points made by the appellant" while also intending to reflect "the difficulties outlined by the respondents"[9] which as I understand it related to their self-representation. Based on Ms Cato's affidavit her three points seem to have been non-payment of security, not taking steps required on an appeal and ignorance of the law by an unrepresented person being no excuse.

[38] I held the further telephone conference directed by Lang J on 23 July 2019. The parties referred interchangeably to a s 35 conference and to a judicial settlement conference. I repeated Lang J's recommendation that the one-day conference be a judicial settlement conference before Sargisson AJ and also his advice that the Associate Judge is particularly experienced at settlement conferences. I explained that vacating the trial did not free up time before me, as I would not be the trial judge. Mr Mills (and the defendants) held to their position that I preside at the conference, despite the knowledge that meant it would not proceed until much later than if it proceeded before another Judge or as a judicial settlement conference before Sargission AJ. In a Minute that same day I allocated a one-day fixture for the s 35 conference for 2 December 2019 "the first full day currently available before me".

[39] Also on 23 July 2019 I directed, as the parties had jointly sought in their earlier memorandum, that "the three-week trial scheduled to commence on 21 October 2019, and related pre-trial timetable directions" were vacated.

---

9 [2019] NZCA 661, above n 1 at [43].

[40] Despite having refused only days earlier to proceed with another Judge, and obviously having been content with a date between 21 October and mid-November 2019, by memorandum dated 25 July 2019, Mr Mills expressed concern at the fact the settlement conference would not take place until 2 December 2019. He sought allocation of a two-week trial fixture, with new pre-trial directions to be made at the s 35 conference. In their 29 July memorandum in reply the defendants (in person) said that it was the plaintiff's suggestion the trial be vacated, to which they agreed. They observed that on 10 July, counsel for the plaintiff had indicated he agreed with the defendants that a 35 conference was the most effective way to progress matters, including vacating the trial and pre-trial directions, so as to minimise further preparation costs and increase the likelihood of settlement. The defendants expressed concern that the 25 July memorandum from the plaintiff showed the plaintiff's attitude was hardening well in advance of the s 35 conference, as the plaintiff's proposal would involve significant further preparation work being required in advance of the s 35 conference.

[41] I responded to the memoranda of 25 and 29 July 2019 by Minute of 30 July 2019. I noted that, if the parties were concerned to have the earliest possible date for a settlement conference, they might reconsider having it before Sargisson AJ, which could proceed earlier. I said I did not think it appropriate in the circumstances to re-allocate a trial date when one had just been vacated by agreement. If the matter did not settle following the s 35 conference a trial date could then be allocated and pre-trial directions made. By further Minute of 5 August 2019, I assured the parties they would be consulted if an earlier hearing date for the s 35 conference became available.

[42] In September 2019 the defendants ceased to be self-represented.

[43] The second s 35 conference was held before me on 2 December 2019. Mr King advised at the outset that both the second and third defendants now had grants of legal aid. One of these had been communicated earlier. By Minute dated 3 December 2019 I recorded that no resolution had been achieved at the conference but that there had been progress in that direction. I adjourned the matter to a telephone conference before me on 9 December 2019 and directed that, in the

meantime, the parties were to do their utmost to conclude a pragmatic settlement. If that was not possible, the matter was then to be timetabled through to a two-week hearing.

[44] Settlement unfortunately did not result and on 6 December 2019 the defendants advised by memorandum that they sought trial by jury pursuant to s 16 of the Senior Courts Act 2016.

[45] At the 9 December 2019 telephone conference, Mr Mills said that the defendants were out of time with their jury notice and formal application for leave to extend was required. Mr King said that he did not consider the defendants were out of time as pleadings had not closed nor were they within five days of closing. Mr Mills did not dispute that at the time. Mr King said that the order dated 15 March 2019 fixing 10 May 2019 as the date by which a jury trial notice had to be given was no longer in force. My initial view was that Mr King was probably correct given that the hearing and directions had been vacated by consent. I said I would treat Mr King's memorandum as an application to extend and gave Mr Mills time to file submissions in response.

[46] The Court of Appeal gave judgment on 18 December 2019 (after a hearing on 14 November) reversing in part my decision as to the meanings issue and holding that the defamatory meanings previously pleaded were reinstated and could be pleaded in the statement of claim.

[47] On 10 December 2019, Mr Mills filed a memorandum seeking that a formal application for an extension of time be filed by the defendants. He also submitted that the issue of whether leave should be granted was a "substantive trial issue" that should be determined by the trial judge, which was to be someone other than me, as I had convened the settlement conference.

[48] On 14 February 2020, following the Court vacation, the plaintiff filed her fourth amended statement of claim together with an expanded memorandum requesting inter alia allocation of the trial judge. On 20 February 2020, the defendants said the matter is still not ready to proceed to trial as the form of trial has

not been determined, they had filed applications for legal aid, and interlocutory matters remained outstanding.[10]

[49] The first case of COVID-19 in New Zealand was reported on 28 February 2020, with second and third cases reported on 4 and 5 March 2020, and over 500 cases reported before the end of March. A national state of emergency was declared on 25 March 2020. As a precautionary measure, jury trials were suspended on 18 March 2020, now resuming on 1 August 2020, New Zealand having on 9 June 2020 moved into COVID-19 Level One.[11]

[50] In a Minute of 5 March 2020 I stated that no trial judge would be assigned until after a hearing date is allocated. (In fact a trial judge is not usually assigned until well after that date.) I also said that the question of election of the form of trial is not, as a matter of principle and logic, a trial issue, and that I would proceed to determine the application for extension of time. However in light of Mr Mills' submissions I revisited my earlier directions, saying the application for an extension of time was to still be treated as having been made on 6 December 2019, but I timetabled a formal application and submissions. I said I would deal with the matter on the papers unless counsel wanted a hearing.

[51] On 19 March 2020, Mr Mills filed a memorandum saying that the defendants had failed to file the formal application in accordance with the timetable. Mr King immediately explained that he had not seen my 5 March 2020 Minute until served with Mr Mills' memorandum on 19 March 2020. My Minute had been sent in error by the Court registry to an unmonitored email address, not that contained in the Notice of Change of Representation dated 23 September 2019. (This seems to have related to counsel having changed practice.) Mr Mills filed a further opposing memorandum. However in a Minute dated 23 March 2020 I accepted Mr King's explanation and also noted that "the practical reality, given current circumstances with the Covid-19 virus, is that all proceedings are going to take longer to progress in any event". I gave the defendants seven days to file their formal application, with

---

10 I note it now seems unlikely any further interlocutory matters will need to be resolved.

11 Dame Helen Winkelmann, Chief Justice of New Zealand "Letter to the Legal Profession: COVID-19 – Movement to Alert Level 1" (Judicial Office For Senior Courts, Wellington, 8 June 2020).

Mr Mills having fourteen days to reply. These directions were complied with and on 21 April I set the matter down for a one-hour hearing by telephone, on 13 May 2020. The plaintiff had requested that there be a hearing by memorandum of 6 April, and in fact contested the hearing being by telephone, but ultimately it proceeded in that manner.

[52] By Minute dated 29 May 2020 I directed, at the plaintiff's request, that a three week trial be set down and made pre-trial timetable directions. I made it clear this was without prejudice to the issue as to mode of trial. The Court registry is yet to allocate a new fixture date such that the timetable is not yet practically speaking on foot.

Has the time for giving a jury notice in fact elapsed?

[53] It is arguable that the time for giving a jury notice has not yet in fact elapsed. This was the position adopted by counsel for the defendants in written submissions but was not, it is fair to say, a focus of Mr King's oral submissions.

[54] The ability to require civil proceedings to be tried by Judge and jury arises from s 16 of the Senior Courts Act 2016, which relevantly provides that:

> **16 Certain civil proceedings may be tried by High Court Judge with jury**
>
> (1) Any party to a proceeding for defamation, false imprisonment, or malicious prosecution may, on giving notice in accordance with the High Court Rules, require the proceeding to be tried by a High Court Judge with a jury.
>
> […]
>
> (3) If a notice is given under subsection (1) or (2), the proceeding or counterclaim must be tried in accordance with the subsection that applies.
>
> […]
>
> (4) A High Court Judge may, on the application of either party, order that a proceeding for defamation, false imprisonment, or malicious prosecution or any issue in the proceeding be tried before a Judge without a jury if it appears to the Judge before the trial that the trial of the proceeding or the issue will—
>
> (a) involve mainly the consideration of difficult questions of law; or

(b) require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation that cannot conveniently be made with a jury.

[…]

[55] The relevant provision of the High Court Rules 2016 (the Rules) is r 7.16 which requires that any jury notice be given no later than:

(a) 5 working days before the close of pleadings date for the proceeding; or

(b) a date fixed by a Judge for the purpose.

[56] The close of pleadings date is determined in accordance with r 7.6, which provides that a Judge must allocate the close of pleadings date for a proceeding at the time a hearing or trial date is allocated,[12] and, if a Judge does not do so, the close of pleadings date is the later of:[13]

(a) the date that is 60 working days before the hearing or trial date allocated; and

(b) the date on which the hearing or trial date is allocated.

[57] As noted above, in my Minute of 15 March 2019, I made timetabling directions in terms of the joint memorandum of counsel dated 14 March including a direction that "the close of pleadings date be set at 10 May 2019, and that any jury notice be filed and served by the same date", with leave reserved to the parties to make an interlocutory application on or before that date to vary the close of pleadings or jury notice date. No application was made, and, Mr Mills submits, that jury notice date remains in place.

[58] However, in paragraph 3(a) of their further joint memorandum dated 8 July 2019, counsel sought orders vacating "the timetable directions made on 15 March 2019" and shortly afterwards, in her memorandum of 10 July 2019, the plaintiff sought an order that the October 2019 fixture be vacated.

---

12 High Court Rules 2016, r 7.6(4).
13 Rule 7.6(4A).

[59] On 23 July 2019, I directed that "the three-week trial fixture scheduled to commence on 21 October 2019, and related pre-trial timetable directions" were vacated.

[60] It arguably follows that at the parties' joint request I vacated the timetable direction I made in my Minute of 15 March 2019 setting the close of pleadings date at 10 May 2019 and requiring any jury trial notice to be filed and served by that same date. Although I happen to have used the language "pre-trial" directions in my Minute of 23 July, which language also appears as a heading below the close of pleadings/jury notice date nominated in counsel's joint memorandum of 14 March 2019, that was not in fact the language used in the joint memorandum of 8 July. There, the parties had sought purely to vacate "the timetable directions". Further, it would logically follow from r 7.6 that where no hearing date was allocated and the timetable orders had been vacated, there would be no close of pleadings date and hence no date for jury election.

[61] Because of the ambiguity, I do not consider it appropriate to dispose of the matter on this basis alone. Nonetheless, I consider the matters noted above to be relevant.

[62] In any event I consider that the close of pleadings date has necessarily fallen away. The plaintiff's appeal of my meanings judgment meant that pleadings remained a live issue pending resolution of that appeal. Consistently with that, when the Court of Appeal gave judgment on 18 December 2019 reversing in part my decision as to the meanings issue and reinstating the particular pleadings I had struck out, leave was granted to file a further amended statement of claim pleading the reinstated meanings, which Ms Cato subsequently did on 14 February 2020.

[63] Mr Mills says that Ms Cato did little more in filing her fourth amended statement of claim on 14 February 2020 than reinstate her pleading as it stood at the time of my meanings judgment, and that this cannot be said to have reopened pleadings. It happens that only reinstatement was required but that is not the point. Until the Court of Appeal judgment issued the pleadings were at large. There were a number of possible outcomes including the pleading remaining unchanged,

reinstatement, partial reinstatement or otherwise. Furthermore, while the Court of Appeal did not expressly address whether the defendants could file further amended pleadings in response, it is a necessary consequence of the Court's allowing Ms Cato leave to file an amended statement of claim that the defendants must be allowed to file an amended statement of defence in response, which would not necessarily be identical to before.[14] The short point is that the shape of the parties' cases could not be finally defined until the Court of Appeal decision issued and any consequential amended pleadings were filed, all of which was and will be after 6 December 2019.

[64] The Rules do not clearly provide for what happens where a case needs to be repleaded after the close of pleadings date because of a successful appeal of a pre-trial decision affecting the pleadings. Nor do they expressly provide for what happens where the trial date is vacated at the parties' request, but not necessarily all timetabling directions predicated on that trial date. In this respect, I consider it salient that the purpose of fixing a close of pleadings date is to ensure that all pleadings are completed and interlocutory matters resolved a certain distance in advance of trial, so that the parties can get on with preparing for the hearing without disruption.[15] Where the shapes of the parties' cases remain unclarified well past the close of pleadings date because of an appeal from an interlocutory decision on pleadings, especially where a previously fixed trial date also has fallen away, there is no need, nor would it be appropriate, to prioritise trial preparation. Accordingly, applying the rules purposively,[16] I consider that, in circumstances such as those, pleadings have effectively reopened.

[65] I accept that is not dispositive of the present application. I fixed a specific date for the giving of jury notices, albeit clearly, both in terms of the parties' memorandum and my Minute, it was to be the same as the close of pleadings date. The jury notice date remains nominally in place, with the result that the defendants, at least technically, were out of time in filing their jury notice on 6 December 2019 and require an extension.

---

14 As I understand it they have not yet done so.
15 *RHH Ltd v Anderson (No 3)* [2018] NZHC 2045 at [9].
16 High Court Rules 2016, rr 1.2 and 1.6.

[66] I say technically not just because the two dates were clearly to be the same but because, as a matter of substance, for the reasons discussed above, the jury notice was filed during the same 'interlocutory' phase of the proceeding as prevailed at 10 May 2020. That is, before trial preparation was required to begin in earnest.

[67] These matters inform the excusability of the "delay" and the degree to which Ms Cato can say she has been prejudiced by the defendants' technically late election compared, say, to a situation in which the late election had arrived deep into the parties' progress through a pre-trial timetable.

How should the jurisdiction to grant an extension of time be exercised?

There is no presumption against the grant of an extension of time to file a jury notice

[68] The defendants' application for leave is made in reliance on r 1.19, which provides that:

> **1.19 Extending and shortening time**
>
> (1) The court may, in its discretion, extend or shorten the time appointed by these rules, or fixed by any order, for doing any act or taking any proceeding or any step in a proceeding, on such terms (if any) as the court thinks just.
>
> (2) The court may order an extension of time although the application for the extension is not made until after the expiration of the time appointed or fixed.

[69] Mr Mills submits that s 16 was intended to curtail a party's ability to make a late election, which together with the emphasis under the Defamation Act 1993 on expeditious resolution of proceedings means I should proceed on the basis there is a presumption against an extension of time under r 1.19 being available. In support, he refers me to two English cases.

[70] In the first, *Cook v Telegraph Newspapers Ltd*, Tugendhat J determined the appropriate mode of trial in a libel action following a late application by the plaintiff for a jury trial. Applying s 69 of the Senior Courts Act 1981 (UK), he refused the application. Tugendhat J said there are "very great case management advantages"[17]

---

[17] *Cook v Telegraph Newspapers Ltd* [2011] EWHC 763 (QB) at [83] and [112].

associated with judge alone trials compared to jury trials. These included, the Judge thought, a judge's ability when sitting alone to try issues in the most convenient order and rule on meanings in advance of trial. (Obviously, the position is different here where a judge can nonetheless rule on meanings and in this case has.) Tugendhat J also referred to, and followed, English appellate authority stating that "the emphasis now is against trial by juries"[18], and that this was a relevant consideration for trial courts in determining the method of trial.

[71] In *Gregory v Commissioner of Police for the Metropolis*, the other English authority to which Mr Mills referred me, Cranston J traced the development of the relevant legislative provisions and identified that the right to a jury trial in English civil cases had progressively narrowed over time. The Judge noted that with enactment of the 1981 statute applied by Tugendhat J, the English Court of Appeal determined the statutory policy had become set "against trial with juries"[19]; particularly in respect of defamation cases.[20] By 2006, the discretion under the 1981 statute to allow a jury trial was rarely exercised. Eventually, the Westminster Parliament adopted this same attitude. The Defamation Act 2013 (UK) removed litigants' statutory right to apply for trial by jury in slander and libel cases in English and Wales. Rather, following concurrent amendments made to the English Civil Procedure Rules, an application for a jury trial became purely a matter of case management wholly within the trial court's discretion.[21] This change was justified on the basis the jury trial format "greatly increased the cost and time taken"[22] to try a matter and was seen as part of what had rendered defamation a tool of attrition warfare.

[72] As in England, the trend in New Zealand has similarly been away from civil jury trials as a matter of fact, in terms of the number of civil jury trials actually being

---

18 At [89], referring to *Fiddes v Channel Four Television Corporation* [2010] EWCA Civ 730, [2010] 1 WLR 2245.

19 *Gregory v Commissioner of Police for the Metropolis* [2014] EWHC 3922 (QB) at [17], citing *Goldsmith v Pressdram* [1988] 1 WLR 64 (EWCA) at 68.

20 At [17] and [18], referring to *Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49 (EWCA) at 58; and *Aitken v Preston* [1997] EMLR 415 (QB).

21 At [22].

22 At [22].

conducted.[23] Similarly, s 16 of the Senior Courts Act 2016 excludes the possibility of a jury trial in civil actions other than in defamation, false imprisonment, and malicious prosecution. Conversely the predecessor provision to s 16, s 19A of the Judicature Act 1908, had allowed from 1986 to 2016 for any civil matter to potentially be tried with a jury subject to the Court's being satisfied that was appropriate in the given case.[24]

[73] Importantly however, the terms of s 16 make it clear that Parliament considered that jury trials should remain available in respect of, inter alia, defamation cases.[25] While this right is qualified by the notice requirement in s 16(2) and the Court's discretion under s 16(4) (not suggested to be applicable here), the 'default' position, unlike under s 69 of the 1981 English statute, is that a jury trial is available on demand. I note that the Law Commission, in its report that led to the Senior Courts Act 2016 was of the view that, of all civil matters, defamation actions are the most suited to jury trials as jurors are better positioned than judges to "gauge current societal views and the value of a loss of reputation";[26] those issues being the crux of a defamation trial. It follows that juries are better placed to provide the primary remedy for defamation which the Court of Appeal has recently said is "a determination that any cloud cast over [the plaintiff's] reputation is wrong."[27] Equally, it would follow, juries are best placed to determine where relief is not required.

[74] Correspondingly, in New Zealand there is no trend of appellate authority taking s 19A (and now s 16) as requiring generalised hostility towards civil jury trials. The position is captured in Thorp J's 1993 decision in *Lindon v James Hardie & Co Pty Ltd*. The Judge followed the Court of Appeal in *Lidgard v Guardian Assurance Co Ltd* in accepting that s 19A "was not intended to deprive litigants of their right to

---

23 See Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R 126, 2012) at [11.2]-[11.3].

24 See *Wyatt v Iversen* HC Napier CP15/98, 30 June 2000 per Heron J for an example of the application of these principles to determining whether a negligence action was suitable to be tried by a judge sitting with a jury, as referred to in *O'Regan v The Radio Network Ltd* [2001] 1 NZLR 568 at [30].

25 As noted by Johnston AJ in *Harvey v Mediaworks Holdings Ltd* [2019] NZHC 1414 at [11], referring to Law Commission, above n 23 at 121.

26 Law Commission, above n 23, at [11.12].

27 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [32].

trial by jury to a greater extent than was necessary"[28] because of the terms of the statute itself. He considered Barker J had been wrong in two other cases not to follow *Lidgard*. In those cases, Barker J had treated the "thrust" of s 19A as having been to discourage civil jury trials because of "the additional calls on Court time and resources involved in jury trial".[29] This approach was inconsistent with *Lidgard* and with the Court of Appeal's later reiteration in *Green v Matheson* that s 19A was concerned with, and only with, removing overly complex matters from juries (as with s 16(4) of the 2016 Act) and was not meant to signify a wider change in policy.[30]

[75] This appellate attitude clearly influenced Robertson J in *McGrory v Ansett NZ Ltd*, to which counsel referred me. There, the parties were presented with a second opportunity to give a jury notice following the falling away of the first allocated trial date. No notice had been given on the first available opportunity but Robertson J allowed the notice to be given. In *Shattock v Devlin* (one of the cases criticised by Thorp J in *Lindon*) Barker J had arrived at the contrary view. Robertson J departed from Barker J in treating an application to file a jury notice out of time as being governed by the rules concerning extensions of time generally.[31] This, the learned authors of *McGechan* suggest, is "the predominant, and preferable"[32] view, as opposed to that taken by Barker J in *Shattock v Devlin*. Certainly, except for *Shattock v Devlin*, which appears to have been decided per incuriam the decision in *Lidgard*, an extension was allowed in each case to which I was referred. Mr Mills has suggested these cases can be distinguished: I return to that submission shortly.

[76] First though, I conclude my evaluation of the relevance of the English cases by noting that I am not persuaded by Tugendhat J's prioritising efficiency in case management above all else. Promoting the expeditious and inexpensive resolution of

---

28 *Lindon v James Hardie & Co Pty Ltd* (1993) 7 PRNZ 325 (HC), following *Lidgard v Guardian Assurance Co Ltd* [1961] NZLR 860 (CA).

29 At 328, referring to *Shattock v Devlin* (1988) 1 PRNZ 271 at 276 and *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187 at 202.

30 At 328, referring to *Green v Matheson* [1989] 3 NZLR 564 (CA) at 569 and 571 per Cooke P.

31 *McGrory v Ansett New Zealand Ltd* [7999] 2 NZLR 328 (HC) at [14]-[18], following *Willis v Katavich* HC Auckland A547/85, 19 November 1987 and *Smith v TVNZ Ltd* (1994) 7 PRNZ 456 (SC), distinguishing, on the basis of the new statutory provisions adopted in 1986, *Kemble v Bedogni* [1961] NZLR 118 (SC).

32 AC Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR7.16.03].

proceedings is an objective of civil procedure,[33] and of the Defamation Act 1993.[34] It is not, however, the sole objective. The ultimate aim is doing justice in each case. What parties seek in going to court "is to use the machinery of justice to obtain a just result, and what the clients seek to avoid is unnecessary and prejudicial expense, delay, and technicality *in the process of attaining that just result*."[35] Parliament has determined that, as a matter of policy, justice can best be done in defamation matters by allowing jury trials where requested; the inefficiencies of jury trials notwithstanding. It follows that purporting to prioritise justice being done expediently by presumptively inclining against jury trials may actually undermine the interests of justice.

[77] For all of these reasons, I do not consider that the English authorities to which Mr Mills referred me espouse the law as it stands in New Zealand today.

[78] I consider the matter put beyond doubt by the precise wording of s 16. The requirement to give a jury notice is stated as an obligation to give a notice "in accordance with the High Court Rules." The scheme of the Rules includes r 1.19 and, therefore, the potential for an extension to be granted where the justice of the case so requires. Absent any indication Parliament intended defamation cases to be treated differently, such that the full rules of court except for r 1.19 should apply, and I have found none, the same degree of flexibility should be afforded to parties that seek leave to make a late election as is afforded to other parties seeking to rely on r 1.19. It follows I do not consider there is a presumption against an extension of time being available for the giving of a jury notice under s 16 and r 7.16.

The jurisdiction to grant an extension should be applied using the general principles applicable to applications for an indulgence under r 1.19

[79] Mr Mills strongly emphasised in oral submissions that the discretion to grant an extension has been exercised only where there is no ascertainable prejudice to the respondent from the late jury notice and the late notice had resulted entirely from counsel error/inadvertence. I accept that, in the cases to which Mr Mills referred me

---

33 High Court Rules 2016, r 1.2.
34 *Gillespie v McKay* (1999) 13 PRNZ 90 (HC) at 93.
35 Above n 32 at [HR1.2.02] (emphasis added).

where leave to file a late notice was granted, the Court placed weight on the fact that there was no prejudice to the recipient of the notice in granting an extension, and that the delay had been occasioned entirely by counsel error.[36] However, I consider it clear that, in each case, these factors were treated as meaning there was no impediment to an extension being granted. Nowhere was lack of prejudice (or inadvertence) stated to be a precondition for exercise of the jurisdiction to extend in the applicant's favour.

[80] There is of course no presumption in favour of an extension being granted. As noted above, while there is a presumptive right to a jury trial in a defamation matter, Parliament has clearly provided in s 16(2) that the right must be exercised as directed in the rules of court. Specifically, it must be exercised in accordance with r 7.16, subject to an extension being available under r 1.19.

[81] Generally, the jurisdiction to grant an extension of time under r 1.19 has been held to be unfettered,[37] subject to the need for the party seeking an extension or shortening of time to lay a proper foundation for the Court's permitting a departure from the Rules.[38] Practically speaking, this will require the applicant to provide suitable evidence of a good reason for their delay warranting the granting of an indulgence.[39] That onus stems from the fact that, absent the applicant offering that good reason, the rules of court ought to have been obeyed.[40] Also relevant to the assessment is whether prejudice has resulted or will result to other parties if an extension is granted, including, in particular, because of any unwarranted delay.[41]

[82] Additionally, I accept Mr Mills' submission that, at least in general terms, my exercise of r 1.19 here should be informed by the Defamation Act 1993 having been intended to "facilitate the prompt commencement and disposal of defamation causes of action."[42]

---

36 *McGrory,* above n 31, at [24]; *O'Regan*, above n 24 at [17]; *Smith*, above n 31, at 459.
37 *Caltex Oil (NZ) Ltd v Hughes* (1986) 1 PRNZ 235 (HC).
38 *Day v Ost (No 2)* [1974] 1 NZLR 714 (SC), applying *Ratnam v Cumarasamy* [1964] 3 All ER 933 (PC) at 935 per Lord Guest.
39 *Spicers Paper (NZ) Ltd v BPK&GA Buckley Ltd* (1993) 6 PRNZ 16 (HC).
40 *Day v Ost,* above n 38, applying *Ratnam v Cumarasamy*, above n 38.
41 See the discussion in *Day v Ost*, above n 38; *Ongley v Brdjanovic* [1975] 2 NZLR 242 (HC); and *McGory v Ansett*, above n 31.
42 *Gillespie v McKay* (1999) above n 34, at 93.

[83] I have found it useful in applying these principles to consider Millet J's summary of the factors relevant to the grant of an extension under the English rules in *Mortgage Corp Ltd v Sandoes*, as adopted by Robertson J in *McGrory v Ansett*, which captures many of the above points.[43] The Judge's summary is as follows:

> 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed.
>
> 2 At the same time the overriding principle was that justice must be done.
>
> 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation.
>
> 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice.
>
> 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort.
>
> 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed.
>
> 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose.
>
> 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits.
>
> 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.
>
> 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.

[84] Here, considerations five through seven are not directly relevant except to emphasise that no trial date had been allocated when the defendants gave notice of jury election, which made the timing of the election inherently much less significant.

[85] One final point under this heading, which emerges from the above, is the importance of clarifying the scope of the inquiry called for under r 1.19. Several of

---

[43] *McGrory v Ansett*, above n 31, at 54, adopting *Mortgage Corp Ltd v Sandoes* [1996] TLR 751 (EWHC) at 752.

the objections the plaintiff has raised to the defendants' application for an extension are in fact objections to the perceived disadvantages, in terms of costliness and inefficiency, of jury trials as compared to judge alone trials. These concerns have motivated the English legislature and courts to hostility towards allowing jury trials in defamation actions as a matter of case management. As noted above, that is not the position in New Zealand law. Parliament, in the 2016 legislative reforms, decided that for better or worse, either party to a defamation proceeding can request a jury trial as of right. Neither s 16(2),[44] nor r 7.16, invites revisiting of the merits of judge alone as opposed to jury trials generally in the face of this clear expression of legislative policy. As a result, claims of prejudice stemming from having to prosecute or defend a claim before a judge sitting with a jury, as opposed to before a judge alone, as a consequence of a jury trial election being made, are of limited relevance to weighing the overall justice of whether to grant an indulgence in the form of an extension. The question is rather whether there has been prejudice relating to, and stemming from, the late timing of the election.

How should the discretion to grant an extension of time be applied here?

[86] Having clarified the scope of the inquiry, I now turn to address the application of r 1.19 to the present case.

Is the delay excusable?

[87] First, and most importantly, the delay is this case is technical for the reasons expressed above. It is not generally contemplated, and was not contemplated by the parties here, that the jury notice be other than at close of pleadings (that is before trial preparation begins in earnest). Pleadings have not closed and in any event were clearly not complete until after 18 December 2019 when the Court of Appeal judgment issued. At the point of the defendants' election on 5 December 2019 there was no fixture and no pre-trial timetable in place. The proceeding was behind the point it was at when the May 2019 jury notice date was fixed on 15 March 2019. At that point there was a fixture in October 2019 and timetabled directions. It was in my view an error that the 10 May 2019 date was not vacated when the appeal was

---

[44] Nor, I note for completeness, does s 16(4), which invites only an inquiry into whether the matter is too complex to go to a jury: *Green v Matheson*, above n 30, at 569 and 571.

filed, and at least after the fixture and timetable were vacated in July 2019. The temporal "delay" must be seen in that light.

[88] In my view this point substantially answers the excusability of the delay, but if I am wrong in placing reliance on this, I go on to consider all of the points and in the order raised by Mr Mills.

[89] The plaintiff says the delay is not excusable because:

(a) In absolute terms the delay was seven months from 10 May 2019 to 5 December 2019, which well exceeds any case where an extension has been granted.

(b) Even if the first five months is explained because the defendants had remained unrepresented until September 2019, nonetheless that changed in September and there was still a delay of two months which could not be excused.

(c) This is not a case of oversight or legal error but of a decision being made following legal advice and now changed.

(d) The defendants' election was made following the s 35 conference and as a consequence of without prejudice communications made by the plaintiff's counsel at that conference. The defendants either deliberately delayed their election, to trap the plaintiff's counsel into making without prejudice communications at the second s 35 conference which he would not otherwise have made, or are simply acting tactically to now take advantage of those comments.

[90] The defendants say, and I accept, that their not giving notice in May 2019 was based on legal advice premised on their having to self-represent through inability to pay their lawyers. That position changed in September 2019 when their current solicitors agreed to act. I consider that was reasonable. Mr Mills says even if that is excusable, there can be no excuse for the delay in the period between September

2019 and December 2019, during which the defendants were represented but still did not give notice. However, I accept on the basis of the defendants' submissions and evidence, that the delay between September and December flowed from a combination of counsel focusing on the s 35 conference settlement (in which case no trial would follow), counsel error and the illness or mental incapacity of the second and third defendants. I consider the "delay" is excusable in that context. I should add I accept from the defendants' evidence and my own observation that they were stressed by the proceeding to the point of being unable to express themselves, or overcome with emotion. In addition, Mr King volunteered at the settlement conference that he has no experience in proceedings of this nature.

[91] While the temporal delay has been shorter in the New Zealand cases where an extension has been granted, these were also cases where the jury notice date was set in accordance with the intention of the rules and the parties, rather than a nominal date that had effectively become redundant. I note also that I have not had referred to me a case in New Zealand where an extension of time has been refused, with the exception of *Shattock v Devlin* which as noted above appears to have been wrongly decided.

[92] It does concern me somewhat that this is a case not of oversight but of a change in position as a result of the changed circumstances of the defendants, but I consider this point is made redundant by the technical nature of the delay.

[93] I accept Mr Mills' submission that the defendants were likely affected in making the election because of "without prejudice" statements made by him at the settlement conference (which statements he does not identify). I do not accept these statements were made in the secure knowledge that there would be no jury trial. As I pointed out at the hearing of this application, Mr Mills said at the settlement conference that he "thought" he and Mr King were agreed that the matter would go to a judge alone trial. He said that in the manner of a question, to which Mr King did not reply. Given Mr Mills relies on these "statements", to consider his argument it is necessary for me to record the statements to which I understand he refers. Mr Mills said at the s 35 conference, which followed shortly after the Court of Appeal hearing, that he expected the plaintiff to win the appeal. This was significant

in his view because on the basis of all of the alleged meanings being found to be available, judgment was likely to follow in a judge-alone trial. I do not consider his having expressed that view, whether correct or not, goes against extending time. Rather it supports my point that the jury election date needed to remain in line with close of pleadings which in turn followed the Court of Appeal's decision.

[94] I do not see the defendants as having acted either "deliberately" or "tactically". If anything, without meaning any disrespect, I would describe their conduct as having been hapless. I do not consider points such as this relevant in this context.

Will prejudice result from delay in election?

[95] As the plaintiff relies mainly on delay it is relevant, as emerges from the convoluted procedural history set out above, that the resolution of this proceeding in terms of the matter progressing to trial has been delayed on a number of occasions. Both parties brought about delays. Some delays, as Mr Mills described them in an earlier memorandum, were unavoidable.

[96] The plaintiff says she is prejudiced by the defendants' delay in giving notice, because it has caused her to:

(a) face a longer trial than otherwise, which will be more difficult to schedule, that difficulty being exacerbated by delays resulting from the COVID-19 pandemic, particularly as affecting jury trials; and

(b) the defendants are impecunious and will be unable to meet the extra costs if unsuccessful following a longer trial, and are already in default on a costs award.

[97] I accept that a jury trial will take longer to hear than a judge-alone trial. It is questionable what the greater length of trial would be. Mr Mills suggested in submissions it may be three weeks as opposed to two, but in an earlier conference he said a jury trial in this proceeding would take two days longer than otherwise. In my view, that is more plausible than it requiring an additional week. The decision to

which Mr Mills referred me of Johnson AJ where the Associate Judge discusses a four day trial and a likely increase to seven days if before a jury, is not authority on this point, nor of any assistance.[45]

[98] It does not seem in fact that a jury trial, or even a three week trial will take longer to schedule than a judge-alone trial of say two weeks. I am advised by the Judicial Resource Manager that the wait time for a trial date, while likely to be further away than before COVID-19, is likely to be very similar whether the trial is for two weeks or three weeks, jury or judge alone. A new fixture has only just been directed and jury trials are scheduled to recommence on 1 August, the country having been placed on 9 June into COVID-19 Level One.

[99] But in any event, as I have already set out, the prejudice has to be fairly attributable to the default. The matters relied on do not flow from the "lateness" of the jury notice. COVID-19 is a pandemic, not created by the defendants. Whatever the greater length of a jury trial, that would have applied at whatever time notice was given. The same applies with regard to the defendants' impecuniosity. They were or would have become impecunious regardless of the timing of a jury notice. This is not prejudice that flows from the breach.

[100] Counsel for the plaintiff refined this point a little further in oral submissions saying that, had the defendants' election been made as at 10 May 2020, he would have moved more quickly to get a trial date set and would have taken a different tack in the settlement conference. He did not suggest that had he done this, the hearing could have been completed in 2019 or before COVID-19, and nor would I accept that. Presumably he was suggesting that the matter may have been further up in the list of trials to be scheduled. However, in my view, Mr Mills did not view the jury trial as a closed possibility as I have noted earlier. Also, Mr Mills *did* ask for a new trial date to be allocated after the October 2019 date had been vacated at his request, and I declined to do so. I said he would have to wait until after the settlement conference in December 2019. Also, the plaintiff did not treat speed as a driver in a number of respects during 2019, including in declining to have the second s 35

---

[45] *Harvey v Mediaworks Holdings Ltd* [2019] NZHC 1414 at [19].

conference before anyone other than me with the resulting long wait for that conference. In short, I do not accept the suggestion that the plaintiff may have taken different steps had the jury notice been given in May 2019 and is therefore prejudiced. It was very unclear what those steps would have been and the point was not even raised in written submissions.

[101] For the above reasons I do not consider the plaintiff will suffer prejudice brought about by the late jury notice if an extension is allowed.

Other considerations relevant to overall justice

[102] The plaintiff says the defendants caused the October 2019 fixture and timetable to be abandoned and also have caused delay overall. It will be clear that I do not agree with these propositions. The plaintiff filed her appeal to the Court of Appeal on the last day she could do so. As soon as she did so, it was clear that the timetable which did not provide for the appeal, could not be met. While there was delay arising out of non-prosecution of the cross-appeal, it is incorrect to say that caused the fixture to be vacated. In fact, apart from what Ms Cato says regarding the cross-appeal, and the issues early on regarding Ms Goatley's availability, I consider the defendants have acted both promptly and properly in this proceeding.

[103] The plaintiff says it is very material that the defendants have not proved any prejudice to themselves in the event the application is denied. Mr Mills did not point me to any authority that such prejudice is relevant in this context and I do not consider it is.[46] As addressed earlier, the ability to elect a jury trial is a (qualified) "right". But if prejudice is required then I consider it exists. I infer from the Bell Gully letter referred to earlier that a jury trial would be preferable for the defendants if represented, and more so when legally aided. I draw that conclusion also from the plaintiff's opposition to this application and Mr Mills statements at the s 35 conference referred to above.

[104] Finally I have been somewhat concerned by Mr Mills' point that the defendants are in breach of the Court of Appeal order to pay costs and should not be

---

[46] Wild J has referred to a s 26 recommendation as a "quick fix"; *O'Regan*, above n 24, at [25].

granted an indulgence in those circumstances nor, in particular, should the plaintiff have to face a longer and more expensive trial in those circumstances. However, the plaintiff has served bankruptcy notices on the second and third defendants and has served a statutory demand on the first defendant. That will result either in payment being made or the defendants being liquidated or bankrupted in which event there will be no trial – the plaintiff will succeed by default. I should also note in this context that I do not consider it relevant in terms of overall justice that the plaintiff will not be able to recover costs of a longer trial because the defendants are impecunious or, now, legally aided. Justice does not differ between those who are legally aided or impecunious and those who are not.

Conclusion and Result

[105] For all of the above reasons, and in particular the lack of any delay in a substantive sense or any real prejudice to Ms Cato, and the fact that the defendants acted promptly to inform the plaintiffs of their election following the failed s 35 conference and before a trial date or timetable had been fixed, I am satisfied that it is just to exercise my discretion to grant an extension of time under r 1.19 in favour of the defendants.

[106] The defendants' application for an extension of time is granted, with the result that the defendants' notice given in December 2019, requiring that the trial of the outstanding issues in this proceeding be conducted before a jury, pursuant to s 16 of the Senior Courts Act 2016, is accepted for filing.

[107] The defendants are to file a memorandum as to costs within 14 days and the plaintiff any reply within seven days of receipt. The defendants' counsel will need to address the cases regarding costs following an indulgence, and whether they are applicable here.

Hinton J