IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-3091
[2020] NZHC 2961

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

On the papers: Memoranda 6 and 17 August 2020

Appearances: S Mills QC and S Humphrey for the Plaintiff
F King for the First, Second, and Third Defendants

Judgment: 17 November 2020

JUDGMENT OF HINTON J
[Application for Leave to Appeal]

This judgment was delivered by me on 17 November 2020 at 4.30 pm
pursuant to r 11.5 of the High Court Rules 2016

……
Registrar/Deputy Registrar

Solicitors/Counsel:
Stephen Mills QC, Barrister, Auckland
Lee Salmon Long, Auckland
McKenna King, Hamilton

[1] On 12 June 2020, pursuant to r 1.19 of the High Court Rules 2016, I allowed the defendants' interlocutory application for an extension of time to file a notice requiring that the trial of the outstanding issues in this proceeding be conducted before a jury.[1] The plaintiff had opposed that application. She now applies for leave to appeal my decision to the Court of Appeal. That application is opposed, and memoranda have been filed.

[2] At the parties' request, and having determined doing so is appropriate,[2] I proceed to deal with the application on the papers.

Background

[3] Because of the way in which the plaintiff resisted the defendants' application for an extension of time, it was necessary for me to set out in considerable detail the protracted litigation history of this matter.[3] Here I set out only a very brief overview of the circumstances of that application.

[4] The genesis of this proceeding resides in 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.

[5] Whether the article is capable of bearing the pleaded defamatory meanings has already been the subject of judgments in this Court and the Court of Appeal.[4] The remaining issues arising for determination are therefore whether the article did in fact defame the plaintiff and, if so, the measure of damages.

[6] The decision at issue concerned the mode of trial of those questions. Section 16(1) of the Senior Courts Act 2016 relevantly provides that a party to a defamation proceeding may, on giving notice in accordance with the High Court Rules 2016, require the proceeding to be tried before a High Court Judge sitting with a jury. The relevant provision of the High Court Rules is r 7.16, which provides that any such

---

1 *Cato v Manaia Media Ltd (Extension of Time to Elect Trial by Jury)* [2020] NZHC 1240.
2 High Court Rules 2016, rr 7.33 and 7.43A.
3 See *Cato v Manaia Media Ltd (Extension of Time to Elect Trial by Jury)* [2020] NZHC 1240 at [2]-[52].
4 *Cato v Manaia Media Ltd (Meanings)* [2019] NZHC 440, reversed in part [2019] NZCA 661.

notice must be given no later than five working days before the close of pleadings date for the proceeding, or a date fixed by a Judge for the purpose.

[7] By joint memorandum dated 14 March 2019 the parties had sought timetable directions including, inter alia, fixing the close of pleadings date at 10 May 2019 with "any jury notice to be filed and served by the same date". I made timetable orders in terms of the parties' 14 March joint memorandum on 15 March 2019.

[8] As it was, events began to overtake the timetabling orders I had made on 15 March 2019. On 23 July 2019 I directed that "the three-week trial scheduled to commence on 21 October 2019, and related pre-trial timetable directions" were vacated. This was at the parties' request, as they had then each explained they wished to pursue the possibility of settlement at a conference to be convened pursuant to s 35 of the Defamation Act 1992. That conference was held before me on 2 December 2019. No resolution was achieved at the conference but there was some modest progress in that direction. I adjourned the matter to a telephone conference before me on 9 December 2019. Settlement 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.

[9] At the 9 December 2019 telephone conference, Mr Mills QC, counsel for the plaintiff, said the defendants were out of time in giving their jury notice. Counsel for the defendants, Mr King, said he did not consider the defendants were in fact out of time, given my Minute of 23 July 2019 vacating the pre-trial timetable directions. I directed that I would deal with the matter informally, but that was objected to by the plaintiff and following further correspondence, by Minute of 5 March 2020, I timetabled a formal application, submissions and hearing. The matter eventually proceeded to a telephone hearing on 13 May 2020.

Decision at Issue

[10] My judgment on the defendants' application for an extension issued on 12 June 2020. I began by accepting it was arguable that I had, in my Minute of 23 July 2019, vacated the timetable directions setting the close of pleadings date at 10 May 2019 and

requiring any jury notice be given by that same date. However, I did not consider the language of my Minute sufficiently clear to dispose of the matter on that basis.[5]

[11] I considered it material nonetheless that, because the plaintiff had appealed my meanings decision to the Court of Appeal, the shape of the parties' cases could not be definitively known until the decision on appeal issued and any consequential amended pleadings filed. All of this was to happen after 10 May 2019, and in fact after 6 December.[6] In those circumstances, on a purposive interpretation of the Rules, I considered pleadings to have effectively reopened.[7] Moreover, because of the procedural history, I considered that when the defendants purported to give their jury notice on 6 December 2019, the proceeding was still at the same 'interlocutory' phase that had prevailed at 10 May 2020. I considered this informed the excusability of the "delay" and the degree to which the plaintiff could say she has been prejudiced by the defendants' technically late election.[8]

[12] Turning to consider the application of r 1.19, I began with Mr Mills' submission that I should proceed on the basis of there being a presumption against an extension of time in respect of the giving of a jury notice.[9] He referred me to two English cases in support of that proposition. I identified that the English courts are averse to allowing jury trials to proceed in defamation matters because of appellate authority that emphasises the perceived case management advantages of judge alone trials.[10] I determined that there is no similar trend of appellate authority in New Zealand, and noted that, in particular, the plaintiff's submission was incompatible with the wording and policy of s 16 of the Senior Courts Act 2016.[11] Accordingly, I considered the ordinary principles applicable to applications under r 1.19 should apply.[12]

---

5 *Cato v Manaia Media Ltd (Extension of Time to Elect Trial by Jury)* [2020] NZHC 1240 at [53]-[61].
6 At [62]-[63].
7 At [64].
8 At [66]-[67].
9 At [68]-[69].
10 At [70]-[71].
11 At [73]-[77].
12 At [78].

[13] Having set out those principles,[13] I considered in terms of the application of r 1.19 that, for the reasons summarised above, the defendants' delay was technical.[14]

[14] Moreover, I accepted that the defendants' not giving notice in May 2019 had been based on legal advice premised on the then-operative assumption they would not be represented at trial. They were in fact unrepresented between May and September 2019. That changed when their current solicitors agreed to act. I considered it reasonable for them to seek to change their position when they became represented, and their further delay between September and December 2019 also excusable as that had flowed from a combination of new counsel being focused on the prospect of settlement, counsel error, and the illness or mental incapacity of the second and third defendants.[15]

[15] As to whether prejudice to the plaintiff would result from the delay in the election, I found that, whatever the greater costs or delay associated with a jury trial, that would have applied whether notice was given in time or not.[16] The same applied with regard to the plaintiff's concerns about the defendants' financial position.[17] I therefore did not consider there was relevant prejudice.

[16] I did not consider the defendants needed to show prejudice but said it would be to their prejudice to not be able to pursue a jury trial, as they had by that stage obtained legal assistance and had been advised that, if represented, pursuing a jury trial would be more favourable.[18]

[17] Weighting up these matters, I granted the extension.

[18] Subsequent to my judgment, a three-week jury trial was allocated, beginning on 6 September 2021.

---

13 At [79]-[85].
14 At [87]-[88].
15 At [89]-[90].
16 At [98].
17 At [99] and [104].
18 At [103].

The Proposed Appeal

[19] If granted leave, the plaintiff proposes to argue on appeal that I wrongly exercised my discretion under r 1.19 as I erred in fact and law, including in respect of my weighting of various matters. I address each point below.

Applicable Principles

[20] Section 56(3) of the Senior Courts Act 2016 applies, such that the plaintiff requires leave to appeal. This leave requirement is, as Fitzgerald J put it in *Finewood Upholstery Ltd v Vaughan*, a "filtering mechanism" designed to ensure that unmeritorious appeals of interlocutory orders do not unnecessarily delay proceedings.[19] Following a decision of Dobson J, she summarised the considerations relevant to applications for leave as follows:[20]

> (a) A high threshold exists for the granting of leave. An allegation of error of law or fact is generally insufficient. An applicant should raise an arguable error.
>
> (b) Leave should only be granted where the circumstances warrant incurring further delay.
>
> (c) The alleged error should be of general or public importance that requires determination, or otherwise be of sufficient importance to the applicant to outweigh the lack of any general or precedential importance.

[21] In *Ngai Te Hapu Incorporated*, the Court of Appeal cited the above statement with approval,[21] adding that "there is no doubt that s 56(3) was intended to reduce the volume of appeals to this Court from interlocutory decisions in the High Court."[22]

Discussion

Would granting leave delay the resolution of substantive proceedings?

[22] I accept that granting leave is unlikely to delay the resolution of the substantive proceeding, given the trial fixture is not until September 2021.

---

19 *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [9]-[14]. See also *Western Joinery Ltd v Commissioner of Inland Revenue* [2017] NZHC 3297 at [9], citing *Sandle v Stewart* [1982] 1 NZLR 708 (CA) at 715.

20 At [9], citing *A v Minister of Internal Affairs* [2017] NZHC 887.

21 *Ngai Te Hapu Incorporated v Bay of Plenty Regional Council* [2018] NZCA 291 at [17].

22 At [15].

[23] As follows, I agree with Mr Mills that this is not a case of balancing the prospect of error correction against the risk of delay. Rather, the question is whether the proposed appeal discloses arguable errors of sufficient importance, either generally or publicly, or to the plaintiff, to merit appellate consideration.

Does the proposed appeal concern arguable errors of fact?

[24] As to the alleged factual errors identified by the plaintiff in her affidavit in support of the leave application, these are either not in my view errors or they are immaterial, and do not support leave issuing. In particular:

(a) First, the plaintiff says I ought to have recorded that the parties were notified of the first case management conference on 30 May 2018 and that this was after she filed her first amended statement of claim seeking (as she then did) a recommendation under s 26 of the Act. She says this contextualises her not seeking that remedy until five months after she filed her initial statement of claim. I do not consider the date on which the parties were notified of the first case management conference to be material to the defendants' application for an extension of time. The point remains that a recommendation under s 26 would ordinarily be sought at the outset, and counsel would presumably have then pressed for an earlier case management conference, in respect of which I have no doubt they would have prevailed.

(b) Second, the plaintiff correctly notes I recorded in error that my Minute following the first case management conference on 20 June 2018 was of that same date when it was in fact dated 13 July 2018. That is not a material point. Also, as the plaintiff notes in her affidavit, at that point the proceeding was at its initial stages.

(c) Third, the plaintiff alleges that I erred in recording her as having filed her notice of appeal against my meanings judgment on 29 April 2019. In fact, I correctly recorded that the plaintiff had filed her notice of

appeal on 10 April 2019 and that the defendants had filed their subsequently abandoned cross-appeal on 29 April 2019.[23]

(d) Fourth, the plaintiff asserts that I was wrong to record that at a telephone conference on 23 July 2019 I said I would not be the trial judge, such that the vacation of the then-allocated October 2019 trial fixture did not open up free time before me to preside at a s 35 conference. She says she was advised by her lawyers that day I had agreed that a s 35 conference could be allocated during the original trial period, and that only subsequently was it identified that I was not scheduled to be the trial Judge. Whatever was said at the teleconference itself, the position I have recorded was clearly known that same day, as I advised in my Minute of 23 July 2019 that a one-day fixture would be called before me on 2 December 2019 as "the first full day currently available before me." Moreover, I expressly noted in that Minute that I was not scheduled to be the hearing Judge. The position therefore remains that either at the telephone conference, or immediately following it, the plaintiff could have requested the s 35 conference be before the first available Judge, not me.

(e) Fifth, the plaintiff correctly notes I recorded in error that Mr King advised at the s 35 conference on 2 December 2019 that both the second and third defendants then *had* grants of legal aid. As both the plaintiffs and defendants have advised, he in fact said that legal aid was being applied for on behalf of the second and third defendants. Again however, this is immaterial.

[25] I would therefore not grant leave to appeal in respect of any of the above alleged factual errors.

---

[23] *Cato v Manaia Media Ltd (Extension of Time to Elect Trial by Jury)* [2020] NZHC 1240 at [24].

Does the proposed appeal concern arguable errors of law?

[26] I turn then to the seven errors of law alleged by the plaintiff, as set out in the proposed notice of appeal. These can be divided into three groupings.

[27] The first relate to my finding that the defendants' delay was technical. Here, the plaintiff's three proposed grounds of appeal are, first, that I was wrong to conclude that the pleadings were "at large" at the time the jury notice was filed because of the subsequent filing of the plaintiff's fourth amended statement of claim; second, that I was wrong to say that pleadings had "effectively reopened"; and, third, that I was wrong to regard these points as relevant to exercising my discretion under r 1.1.9.

[28] As to the first of these points, the plaintiff notes, as she did before me, that all she did in her fourth amended statement of claim, filed on 14 February 2020 in response to the Court of Appeal's decision, was reinstate her pleading as it stood before my meanings decision. As a result, she proposes to say on appeal, I was wrong to hold that the fact she filed an amended statement of claim on 14 February 2020 meant pleadings were still at large on 10 December 2019. That was not my point however. My point was that, until the Court of Appeal's judgment issued, and any consequential amended pleadings were filed, which were both after the defendants' jury notice was filed, the parties' cases were not finally defined, and the pleadings were still at large. The pendency of that appeal was the reason I considered that pleadings were still at large on 10 December 2019.

[29] Turning to the second proposed argument, it is incorrect to say I held that pleadings had effectively reopened because the original trial had been adjourned. As above, my point was instead that the close of pleadings had fallen away as a consequence of the appeal against my meanings judgment. The appeal in turn meant the trial date had fallen away. As a consequence, on a purposive construction of the Rules, the defendants' jury notice was filed during the same 'interlocutory' phase of the proceeding that had prevailed as at 10 May 2019. Again, the pendency of the appeal was the reason I considered that pleadings had effectively reopened.

[30] Addressing the third proposed argument, it is well established, and was in fact a point relied on by the plaintiff, that whether prejudice has resulted or will result to

other parties if an extension is granted, and whether the delay is justifiable, is a material consideration in applying r 1.19.[24] As noted above, at the time the defendants filed their jury notice, the proceeding was still at the same stage as it had been on 10 May 2019, such that the defendants' delay was technical in nature, and, in turn, the prejudice to the plaintiff negligible.

[31] I accept however that these three proposed grounds of appeal are sufficiently arguable to warrant appellate consideration.[25]

[32] I turn then to the second grouping, which relates to my conclusions as to the correct approach to applications under r 1.19 where jury notices in defamation proceedings are concerned. In particular, these proposed grounds of appeal relate to my conclusions as to the applicability of English law.

[33] The plaintiff's first proposed ground of appeal under this heading is that I erred in saying the default position in England has been against jury trials when she asserts that before 2013 the opposite was the case. The plaintiff's own argument before me was that there was a trend in England "against trial with juries".[26] The formal position was that, under s 69 of the Senior Courts Act 1981 (UK), an English Court could allow a jury trial to proceed in a defamation matter on application. But there was a clear trend of English appellate authority, dating from the 1980s onwards, averse to allowing a jury trial to be conducted. I do not consider there is any arguable error in this regard. Also, the submission runs counter to the position argued in this Court.

[34] Second, the plaintiff proposes to say I erred in identifying a contrary trend of appellate authority in New Zealand. I was wrong in that, she asserts, because the cases I identified as part of that trend concerned applications to set aside a jury notice under s 19A(5) of the Judicature Act 1908,[27] or applications for orders that certain

---

24 At [81], citing *Day v Ost (No 2)* [1974] 1 NZLR 714 (SC) and *Ratnam v Cumarasamy* [1964] 3 All ER 933 (PC) at 935 per Lord Guest.

25 Being those set out at paragraphs 2(a)-(c) of the draft notice of appeal

26 In this respect, Mr Mills cited in this Court, *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. See also *Fiddes v Channel Four Television Corporation* [2010] EWCA Civ 730, [2010] 1 WLR 2245; *Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49 (EWCA) at 58, to which I referred in my judgment.

27 See, now, s 16(4) of the Senior Courts Act 2016.

proceedings would be more conveniently tried before a jury pursuant to s 19B(2) of the 1908 Act,[28] rather than under s 16(1) or its predecessors.

[35] I do not think this is a material point of distinction. The inquiries directed by those provisions clearly require consideration of the comparative efficiency of jury and judge alone trials in defamation matters, which is the point on which the plaintiff seeks to rely. If there was any generalised aversion to conducting jury trials in defamation matters on the basis that judge alone trials are more efficient, that would have emerged even more clearly in cases decided under ss 19A(5) or 19B(2) of the Judicature Act 1908 or s 16(4) of the Senior Courts Act 2016 than in cases under s 16(1) or its predecessors, given s 16(1) is less clearly directed towards these considerations than those provisions. That no such aversion emerges reinforces that the position in New Zealand is different to that in England.

[36] The plaintiff's third proposed point under this heading is that I was wrong to say Parliament has determined as a matter of policy that justice can be best done in defamation matters by allowing jury trials where requested. However, as I noted, that seems a fair conclusion to draw from Parliament's having adopted the Law Commission's recommended approach in enacting s 16.[29] The Commission, while clearly alive to the perception that jury trials are comparatively inefficient, had thought jurors better suited than judges to "gauge current societal views and the value of a loss of reputation"; those issues being the crux of a defamation trial.[30]

[37] More generally, the plaintiff's three proposed points under this heading do not engage with my observation that s 16 of the Senior Courts Act 2016 requires, simply, that a jury notice is to be given "in accordance with the High Court Rules". The Rules include r 1.19 and, therefore, the potential for an extension of time to be granted. There is nothing to suggest Parliament intended defamation cases to sit in a special category for the purposes of r 1.19, and certainly not that the English approach should

---

28 There is no corresponding provision in the Senior Courts Act 2016.

29 *Cato v Manaia Media Ltd (Extension of Time to Elect Trial by Jury)* [2020] NZHC 1240 at [73], citing *Harvey v Mediaworks Holdings Ltd* [2019] NZHC 1414 at [11], referring to *Law Commission Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R 126, 2012) at [11.2]-[11.3].

30 At [11.6].

apply. Absent any such indication, I see no basis in the Act or rules to adopt a sui generis approach to jury trials in defamation matters.

[38] For these reasons, I do not consider these three proposed grounds of appeal sufficiently arguable to warrant appellate consideration

[39] The plaintiff's final proposed ground of appeal is that I gave insufficient weight to five matters in determining whether to grant an extension pursuant to r 1.19. As she couches them in her notice of opposition, these are:

(a) the efficiencies and costs savings gained by proceeding by judge alone trial;

(b) the need to ensure the swift, efficient and economical disposal of defamation proceedings;

(c) the prejudice caused to the plaintiff, including in the form of additional and likely irrecoverable costs, from being required to prosecute her claim before a jury;

(d) the fact that the defendants' failure to file a jury notice on time was the result of a positive election made on legal advice, rather than an inadvertent failure to comply with the High Court Rules 2016; and

(e) the lack of prejudice to the defendants from a judge alone trial.

[40] I do not consider the last of these points reasonably arguable. First, I do not think it can be said that the defendants would suffer no prejudice if not allowed an extension. The defendants received advice from their previous solicitors that a jury trial would be advantageous to them if they were represented at that trial. In any case, the principles relating to the application of r 1.19 are well established and there was no need for the defendants to in fact point to any prejudice. The authorities do not, as the plaintiff would seek to argue on appeal, establish prejudice as a precondition of

being able to allow an extension.[31] I do not consider it arguable that I gave too little weight to the issue of prejudice to the defendants.

[41] The first three points can be grouped together. I query whether the plaintiff will in fact, as is submitted, have to pay an additional $66,000 in counsel and court fees for a jury trial. While it is guesswork I would be surprised if the trial were lengthened by more than two or three days. I noted that was Mr Mills' earlier estimate.[32] More importantly, I consider, as I found, that any prejudice flows not from the delay but from the differences between judge alone and jury trials, which I did not consider especially relevant.

[42] Nonetheless, I accept these three points (which I view as one) arguably should have been given more than a "little" weight.

[43] I also accept it is arguable that more weight should have been afforded to the fact the defendants' late election was not an inadvertent failure to comply with the rules.

[44] Despite the relatively significant hurdles facing appellants challenging the exercise of a discretion,[33] I accept the proposed grounds of appeal set out at [37](a)–(d) above,[34] but not that set out at [37](e) above,[35] may disclose an arguable error of law.

Is the alleged error of sufficient significance to warrant appellate determination?

[45] Mr Mills submits that each of the proposed errors of law is of sufficient significance to the plaintiff personally and of wider importance to warrant leave issuing.

---

31 *Cato v Manaia Media Ltd (Extension of Time to Elect Trial by Jury)* [2020] NZHC 1240 at [81]-[85].
32 See [97].
33 *May v May* [1982] 1 NZFLR 165 (CA) at 170.
34 Being those set out at paragraphs 2(g)(i)–(iv) of the draft notice of appeal.
35 Being that set out at paragraph 2(g)(v) of the draft notice of appeal.

[46] Counsel submits the proposed appeal raises three questions as to the correct approach to applications for extensions under r 1.19, each of wider and public importance. This on the basis, he says, the case is unusual in several respects. In summary, these are:

(a) first, that allowing an extension following a positive change of position raises floodgates concerns and represents a change in approach to when applications can be made under r 1.19;

(b) second, that the defendants have not pointed to any specific prejudice that they would suffer if an extension were not granted; and

(c) third, that applications for extensions of time to file jury notices are a special subcategory of applications under r 1.19 in which a presumption against an extension being available applies, as in England.

[47] The second and third of these points relate to proposed grounds of appeal that, for the above reasons, I do not consider reasonably arguable. For the same reasons, I do not consider there is anything unusual about the election in this case in these respects.

[48] As to the other point, I do not accept that floodgate concerns are engaged. The circumstances and reasons for the change of position are highly particular.

[49] I therefore do not consider the issues raised are of wider or public importance.

[50] I am also doubtful as to whether the proposed appeal is of sufficient significance to the plaintiff personally. As I have said, I am somewhat sceptical as to what her increased Court and counsel costs from a jury trial would be. Also, if her estimate of $66,000 is correct, extrapolating from that, her overall costs to date in this matter would be some multiples of that amount. Nonetheless, I am not prepared to conclude the sum at stake is of such insufficient private significance to the plaintiff that appellate determination is not warranted.

Result

[51] For all the above reasons, the plaintiff's application for leave to appeal is granted in part, to the extent that leave is granted in respect of the grounds of appeal noted at paragraphs [27] and [39](a)-(d) above only.[36]

[52] The plaintiff's interlocutory application for leave to appeal is otherwise dismissed.

[53] As follows, the plaintiff has succeeded only in part in this interlocutory application. Also, the merits of this application are closely related to the eventual fate of the substantive appeal. Given these matters, I consider there is good reason in this case to reserve the determination of costs on this application pending determination of the plaintiff's appeal.[37]

Hinton J

[36] Being those set out at paragraphs 2(a)–(c) and 2(g)(i)–(iv) of the draft notice of appeal only.
[37] High Court Rules 2016, r 14.8(1).