IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA690/2020
[2021] NZCA 226

BETWEEN	KRISTIN PIA CATO Appellant
AND	MANAIA MEDIA LIMITED First Respondent
	ROWAN DIXON Second Respondent
	JANE THOMPSON Third Respondent

Hearing:	20 May 2021
Court:	Goddard, Venning and Peters JJ
Counsel:	S J Mills QC and E D Nilsson for Appellant F A King and M A Dempster for Respondents
Judgment:	3 June 2021 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents costs for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

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REASONS OF THE COURT

(Given by Goddard J)

Introduction and summary

The issues before this Court

[1] The appellant, Ms Cato, has brought defamation proceedings against the respondents. A three-week trial is scheduled to begin on 6 September 2021.

[2] A trial was previously scheduled to take place in October 2019. The High Court made timetable orders on 15 March 2019 leading up to that trial date. Those orders required the respondents to give notice by 10 May 2019 if they sought a trial before a jury, rather than a Judge alone. Under s 16 of the Senior Courts Act 2016 the respondents were entitled to a jury trial, provided they gave a timely notice in accordance with the High Court Rules 2016. The respondents, who at that time

expected to be self-represented at the trial, chose not to give a jury notice by the 10 May 2019 deadline.

[3] The October 2019 fixture was subsequently vacated at the parties' joint request. In December 2019 the respondents, who had obtained legal representation for the trial, applied for an extension of time to give a jury notice. Hinton J granted that application (High Court extension judgment).[1]

[4] Ms Cato applied for leave to appeal to this Court from the High Court extension judgment. The Judge granted leave.[2]

[5] Ms Cato argues that an extension of time should not have been granted to file a jury notice. The respondents say that an extension of time was not required. Alternatively, if they did need an extension of time, the Judge was right to grant it.

Summary

[6] We do not accept the respondents' argument that an extension of time was not required. The date for filing a jury notice fixed by the High Court on 15 March 2019 did not lapse automatically as a result of the vacation of the October 2019 trial date. Nor was the jury notice date vacated by the directions given by the High Court on 23 July 2019, when the October 2019 fixture was vacated, expressly or by implication.

[7] However, we consider that the Judge was right to grant an extension of time to file a jury notice, in the circumstances of this case. The appeal must therefore be dismissed.

Relevant legislation

[8] Section 16 of the Senior Courts Act provides:

> **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

[1] *Cato v Manaia Media Ltd* [2020] NZHC 1240 [High Court extension judgment] at [105]–[106].
[2] *Cato v Manaia Media Ltd* [2020] NZHC 2961 [High Court leave judgment] at [51].

> High Court Rules, require the proceeding to be tried by a High Court Judge with a jury.
>
> (2) Any party to a counterclaim in a proceeding for defamation, false imprisonment, or malicious prosecution may, on giving notice in accordance with the High Court Rules, require the counterclaim 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.
>
> (5) A proceeding for defamation, false imprisonment, or malicious prosecution that also contains other causes of action may be tried only before a High Court Judge without a jury.
>
> (6) No civil proceeding other than for defamation, false imprisonment, or malicious prosecution may be tried by a High Court Judge with a jury.

[9] It is common ground that it was open to the respondents to give a notice requiring a jury trial under s 16(1), provided that notice was given in accordance with the High Court Rules. It is also common ground that s 16(4), which identifies certain circumstances in which a Judge may direct a Judge-alone trial even though a notice has been given under s 16(1), was not relevant here. So the respondents had a right to require a jury trial, provided they gave a timely notice.

[10] Rule 7.16 of the High Court Rules prescribes the date by which a jury notice must be given:

> **7.16 Jury notice**
>
> If either party to a proceeding to which section 16 of the Act applies requires the proceeding to be tried before a Judge and a jury, the party

> must give notice to that effect to the court and to the other party not 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.

[11] The default deadline for a jury notice in r 7.16(a) is set by reference to the close of pleadings date. The close of pleadings date is usually fixed by a Judge at a case management conference. If a Judge does not fix a close of pleadings date, the close of pleadings date is the later of the date that is 60 working days before the allocated trial date, and the date on which the trial date is allocated.[3] Rule 7.7 of the High Court Rules provides that after the close of pleadings date leave is required to file an amended pleading or interlocutory application, or to take any other step (with certain limited exceptions).

[12] The rationale for the default deadline for filing a jury notice — five working days before the close of pleadings date — appears to be two-fold:

(a) by this date, the proceedings should be in final form, enabling each party to make an informed decision about whether to seek trial before a jury; and

(b) this date leaves a short window (one week) before the close of pleadings date, within which any other party can file an application under s 16(4) of the Senior Courts Act in response to a jury notice, without needing leave to do so.

[13] The respondents' application for an extension of time was made under r 1.19 of the High Court Rules, which provides:

> **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.

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3 High Court Rules 2016, r 7.6(4) and (4A).

> (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.

[14] Rule 1.19 must be interpreted in light of the objective of the High Court Rules set out in r 1.2:

> … to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.

Background

The proceedings

[15] Ms Cato's proceedings relate to an article published by the respondents on the *New Zealand Horse & Pony Magazine* website on 2 December 2017, and promoted by them on social media. Ms Cato claims the article defamed her. The respondents deny the defamation, and say a clarification and apology was attached to the article when they became aware of Ms Cato's complaint. The article was then removed from online publication.

[16] It has already been established that the article is capable of bearing the defamatory meanings pleaded by Ms Cato.[4] The issues that remain for determination at trial are whether the article did in fact defame Ms Cato and, if so, the damages or other relief that should be awarded.

[17] The statement of claim was filed on 22 December 2017. The respondents filed defences on 20 February 2018. Ms Cato filed replies on 6 March 2018. Ms Cato sought a recommendation under s 26 of the Defamation Act 1992 that a correction be published. The parties agreed that a conference should be convened under s 35 of the Defamation Act to determine that application. Ms Cato also applied for a determination of whether the article was capable of bearing the defamatory meanings she had pleaded (the meanings application). A hearing date of 17 December 2018 was allocated to deal with these two matters.

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4 *Cato v Manaia Media Ltd* [2019] NZHC 440 [High Court meanings judgment], reversed in part in *Cato v Manaia Media Ltd* [2019] NZCA 661 [Court of Appeal meanings judgment].

[18] Prior to that hearing, the Judge made certain timetable directions requested by Ms Cato, including directions setting the close of pleadings date at 31 March 2019, and setting down a three-week trial to commence on 21 October 2019.

[19] The s 35 conference and the meanings application were heard on 17 December 2018, but the hearing was not completed on that day. A further hearing took place on 13 February 2019. On 7 February 2019 Ms Cato advised the Court that she wished to withdraw her application for a s 26 recommendation, so the s 35 conference was no longer required. The hearing of the meanings application was completed on 13 February 2019, and the judgment on that application was delivered on 13 March 2019 (High Court meanings judgment).[5] The Judge concluded, in summary, that some of the meanings pleaded by Ms Cato were not available, but the article was otherwise capable of bearing the defamatory meanings pleaded. The Judge directed that Ms Cato would need to re-plead to take account of her findings, and should give further particulars of certain remaining aspects of the pleading.[6]

The jury notice date is fixed as 10 May 2019

[20] By joint memorandum dated 14 March 2019, the parties sought timetable directions, including directions as to filing and service of amended pleadings and particulars. They requested that a new close of pleadings date of 10 May 2019 be fixed, with "any jury notice [to] be filed and served by the same date". The directions sought also included various pre-trial steps, including service of briefs of evidence and bundle nominations. By minute dated 15 March 2019 the Judge made timetable orders in terms of the parties' joint memorandum.

Further steps in the proceedings

[21] As contemplated by the directions made on 15 March 2019, Ms Cato filed a second amended statement of claim on 29 March 2019. The respondents filed their second amended statements of defence on 12 April 2019. Ms Cato filed her reply to the first respondent's second amended defence on 26 April 2019.

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5 High Court meanings judgment, above n 4.
6 At [48]–[52].

[22] On 10 April 2019, Ms Cato filed an appeal to this Court against parts of the High Court meanings judgment. This appeal meant that the timetable directions made on 14 March 2019 were superseded in certain respects.

[23] On 29 April 2019, Ms Cato filed a third amended statement of claim, adding a claim for punitive damages, and replies to the second amended statement of defence of the second and third respondents. The respondents filed third amended statements of defence on 3 May 2019. These steps had not been timetabled, but were permitted without leave as the close of pleadings date had not yet been reached.

The respondents decide not to give a jury notice by 10 May 2019

[24] The respondents gave evidence that by early May 2019 they were in disarray, could not afford to pay their legal fees, and decided they would represent themselves in the proceedings. The advice they were given by the solicitor acting for them at that time was that, if they would be self-representing at trial, a Judge-alone trial would be preferable. But if they were represented at trial, a jury trial would be preferable. Because the respondents expected to be self-represented at trial, they decided not to give a jury notice by the deadline of 10 May 2019.

[25] On 14 May 2019, the High Court registrar wrote to counsel asking whether they would be seeking a trial before a jury, and pointing out this would require leave. Both Ms Cato and the respondents confirmed that they would not be seeking a trial before a jury.

The respondents cease to be represented, then obtain legal representation again

[26] The respondents ceased to be legally represented in the High Court on 30 May 2019. They were self-represented until 23 September 2019, when their current lawyers agreed to assist them. The second respondent had applied for, and obtained, legal aid to fund that representation.

The October 2019 trial date is vacated

[27] On 5 June 2019, the respondents filed a memorandum seeking allocation of a judicial settlement conference, saying they lacked the means to adequately put

forward their case. In response to that proposal, Ms Cato filed a memorandum dated 20 June 2019 proposing that another s 35 conference be convened to explore possible settlement, and make any necessary timetable directions if settlement was not achieved. The respondents agreed to a s 35 conference. On 8 July 2019, a joint memorandum was filed seeking a one-day s 35 conference before Hinton J. The parties asked that the timetable directions made on 15 March 2019 be vacated, on the basis that the likelihood of settlement would be reduced if Ms Cato was put to significant further trial preparation costs ahead of the s 35 conference. No reference was made in that memorandum to vacating the October 2019 hearing. Ms Cato filed a further memorandum on 10 July 2019, again asking that the pre-trial directions be vacated, and also seeking vacation of the October 2019 fixture.

[28] The Judge held a telephone conference on 23 July 2019. In a minute issued that day, the Judge allocated a one-day fixture for the s 35 conference on 2 December 2019, which was the first full day available before her. She also directed that the "three-week trial fixture scheduled to commence on 21 October 2019, and related pre-trial timetable directions" were vacated.

[29] The s 35 conference took place on 2 December 2019. In her minute dated 3 December 2019 the Judge recorded that no resolution had been achieved at the conference, but there had been progress in that direction. She adjourned the proceedings to a telephone conference 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 proceeding was to be timetabled through to a two-week hearing. A settlement did not eventuate.

Extension of time to give jury notice

[30] On 6 December 2019, the respondents filed a memorandum advising that they sought trial by jury under s 16 of the Senior Courts Act. Counsel for Ms Cato responded that the jury notice was out of time, and submitted that a formal application for leave to extend time was required. After some procedural back and forth, the Judge directed that a formal application be filed and set a timetable for submissions.

[31] On 18 December 2019 this Court allowed the appeal in relation to the meanings issue.[7] This Court held that the article was capable of bearing a number of pleaded meanings that the High Court had found were not available. Orders were made reinstating those meanings and permitting Ms Cato to plead them in her statement of claim.[8]

[32] On 14 February 2020, Ms Cato filed her fourth amended statement of claim, in which those meanings were reinstated. A fourth amended statement of defence was filed on 17 December 2020.

[33] The respondents' application for an extension of time to give a jury notice was heard on 13 May 2020 (by telephone, due to the COVID-19 pandemic). On 12 June 2020, the Judge delivered her judgment granting an extension of time.[9]

[34] The Judge also directed, by minute dated 29 May 2020, that the proceeding be set down for a three-week trial. The Judge made a number of pre-trial timetable directions. The minute made it clear that the allocation of a trial was without prejudice to the question of mode of trial. The Court has since allocated a three-week fixture commencing on 6 September 2021.

High Court extension judgment

[35] The Judge considered that it was arguable that the time for giving a jury notice had not in fact elapsed.[10] It was arguable that at the parties' joint request, the Judge had vacated the timetable directions she made in the 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 the Judge had used the term "pre-trial" directions in the minute dated 23 July 2019, that was not the language used in the parties' joint memorandum dated 8 July 2019. That memorandum asked the Judge to vacate "the timetable directions". Further, the Judge considered that it would logically follow from r 7.6 of the High Court Rules that where no hearing date was allocated

7 Court of Appeal meanings judgment, above n 4.
8 At [40].
9 High Court extension judgment, above n 1.
10 At [53].

and the timetable orders had been vacated, there would be no close of pleadings date and hence no date for jury election.[11]

[36] However, because of the ambiguity in the minute of 15 March 2019, the Judge considered that it was not appropriate to dispose of the matter on that basis alone. She therefore went on to consider the application for extension of time.[12]

[37] The Judge considered that the close of pleadings date had necessarily fallen away, as a result of the appeal of the High Court meanings judgment, as that meant that pleadings remained a live issue pending resolution of that appeal. Consistently with that, this Court's judgment on 18 December 2019 granted leave to file a further amended statement of claim pleading the reinstated meanings. Ms Cato did so on 14 February 2020.[13]

[38] Until the Court of Appeal meanings judgment was issued, the pleadings remained at large. There were a number of possible outcomes including the pleadings remaining unchanged, reinstatement, and partial reinstatement. It was also a necessary consequence of this Court allowing Ms Cato to file an amended statement of claim that the respondents would be allowed to file an amended statement of defence in response, which would not necessarily be identical to the previous pleading. The short point, the Judge said, is that the shape of the parties' cases could not be finally defined until the Court of Appeal issued its decision and any consequential amended pleadings were filed.[14]

[39] The Judge observed that the High Court Rules do not clearly provide for what happens where a case needs to be re-pleaded 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, so far as timetabling directions predicated on that trial date are concerned.

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11 At [60].
12 At [61].
13 At [62].
14 At [63].

Applying the High Court Rules purposively, the Judge considered that in the circumstances of this case, the pleadings had effectively reopened.[15]

[40] The Judge accepted that this was not dispositive of the present application, as she had fixed a specific date for giving jury notices, albeit the same as the close of pleadings date. The jury notice date "remains nominally in place, with the result that the [respondents], at least technically, were out of time in filing their jury notice … and require an extension".[16]

[41] The Judge said she used the word "technically" not just because the jury notice date was the same as the close of pleadings date, but also because, as a matter of substance, the jury notice was filed during the same interlocutory phase of the proceedings that prevailed as at 10 May 2020.[17] These matters informed the excusability of the delay in giving the jury notice, and the extent to which Ms Cato could say she had been prejudiced by the respondents' "technically late election".[18]

[42] The Judge therefore went on to consider the application for an extension of time under r 1.19 of the High Court Rules. The Judge did not consider that the application for an extension of time should be approached on the basis that there was a presumption against extending time to give a jury notice.[19] Nor did the Judge accept that the application should be approached on the basis that a jury trial would greatly increase the cost and time taken, and was inconsistent with the expeditious resolution of proceedings required under the Defamation Act.[20] The Judge considered that s 16 of the Senior Courts Act makes it clear that Parliament considered that jury trials should remain available in respect of defamation cases. The default position is that a jury trial is available on demand.[21] Nor was there any trend in New Zealand appellate authority "requiring generalised hostility towards civil jury trials".[22]

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15 At [64].
16 At [65].
17 At [66].
18 At [67].
19 At [78].
20 At [76].
21 At [73].
22 At [74].

[43] The Judge concluded that s 16 refers to a requirement to give a jury notice "in accordance with the High Court Rules". The scheme of the High Court Rules includes r 1.19, and thus includes the potential for an extension of time to be granted where the justice of the case so requires. There was no reason to treat defamation cases differently, and there was no presumption against an extension of time being available for the giving of a jury notice under r 7.16.[23]

[44] The Judge proceeded on the basis that claims of prejudice to Ms Cato as a result of having to pursue her claim before a jury, rather than before a Judge alone, were of limited relevance. That prejudice would have been suffered if a timely jury notice had been given: it was not attributable to the delay in giving such a notice. Rather, the question was whether there was any prejudice to Ms Cato stemming from the late election.[24]

[45] In this case, the Judge said, the delay was technical and was excusable. She was somewhat concerned that this was a case not of oversight, but of a change in position as a result of the respondents' changed circumstances. But this point was rendered redundant by the technical nature of the delay.[25] Ms Cato had not identified any prejudice that was fairly attributable to the lateness of the jury notice. The Judge was not persuaded that Ms Cato might have taken different steps to bring the matter on earlier, had the jury notice been given earlier. It was very unclear what those steps would have been, and the point was not even raised in the written submissions for Ms Cato.[26]

[46] The Judge was satisfied that it was just to exercise her discretion to grant an extension of time under r 1.19. The notice given in December 2019 was accepted for filing.[27]

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[23] At [78].
[24] At [85].
[25] At [92].
[26] At [99]–[101].
[27] At [105]–[106].

High Court leave judgment

[47] Ms Cato needed leave to appeal from the High Court judgment, because it was an interlocutory decision.[28] Ms Cato applied to the High Court for leave to appeal to this Court. That application was opposed. The Judge dealt with it on the papers, issuing a decision granting leave on 17 November 2020.[29]

[48] In her leave application Ms Cato identified a number of alleged errors of fact in the High Court extension judgment, and seven alleged errors of law, which in her submission justified the grant of leave to appeal. The Judge did not consider that the alleged factual errors justified the grant of leave to appeal.[30] However the Judge considered that three of the alleged errors of law were sufficiently arguable to warrant appellate consideration. These three grounds related to the Judge's finding that the respondents' delay was "technical". The Judge accepted that it was arguable that she was wrong to conclude that the pleadings were "at large" at the time the jury notice was filed because of the subsequent filing of Ms Cato's fourth amended statement of claim; she was wrong to say that pleadings had "effectively reopened"; and she was wrong to regard these points as relevant to the exercise of discretion under r 1.19.[31] The Judge also accepted that it was arguable that she had given insufficient weight to the following matters in determining whether to grant an extension under r 1.19:[32]

(a) the efficiencies and costs savings from a Judge-alone trial;

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

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

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28 Senior Courts Act 2016, s 56(3).
29 High Court leave judgment, above n 2.
30 At [24]–[25].
31 At [27]–[31].
32 At [39].

(d) the fact that the respondents' 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.

[49] The Judge did not consider that the other proposed grounds of appeal were seriously arguable.

[50] The Judge did not consider that the issues raised by the proposed appeal that she had identified as arguable were of wider or public importance. But she accepted (with some hesitation) that the amounts at stake were of sufficient private significance to Ms Cato that appellate determination was warranted.[33]

[51] The Judge granted leave to appeal in respect of the grounds of appeal she had identified as arguable.[34]

Issues on appeal

[52] The central issue raised by Ms Cato's appeal is whether the Judge erred in the approach she adopted to the respondents' application for an extension of time to file their jury notice.

[53] The respondents did not give a notice of intention to support the judgment on other grounds. But at the hearing before us, they sought to argue that they did not require an extension of time as the direction setting the jury notice date had been set aside by the High Court minute of 23 July 2019. Because the effect of that minute was treated by the Judge as a relevant factor in her r 1.19 analysis, and would need to be considered in any event, we permitted the respondents to advance that argument.

[54] We note that where leave to appeal is granted under s 56 of the Senior Courts Act, the appeal is not confined to the grounds that were identified as justifying the grant of leave. Rather, the appeal proceeds as an appeal by way of rehearing that is not restricted to the question(s) identified as justifying the grant of leave.[35] In this

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33 At [49]–[50].
34 At [51]–[52].
35 *Horsfall v Potter* [2017] NZSC 196, [2018] 1 NZLR 638 at [70]–[72]. See also *Norman v Attorney-General* [2021] NZCA 78 at [104]–[105].

case, it would be artificial to consider some factors bearing on whether an extension of time should have been granted in isolation from other relevant factors. We therefore approach the appeal on the basis that the question for determination by us is whether the Judge erred in granting an extension of time under r 1.19 to file a jury notice.

Ms Cato's submissions on appeal

[55] Mr Mills QC, counsel for Ms Cato, emphasised that the Judge's decision to extend time for filing a jury notice would cause Ms Cato substantial additional costs. A jury trial, he said, will be more complex and will require more hearing time. This means higher hearing fees and increased legal costs. In this case, those costs are unlikely to be recovered by Ms Cato if she is successful, because the respondents claim to be impecunious. One of them has been granted legal aid.

[56] Mr Mills emphasised that the respondents were resiling from an earlier procedural election in order to obtain a perceived tactical advantage. They had made a tactical choice not to seek a jury trial, at a time when they expected to be self-represented at trial. Since then, their circumstances had changed and they wanted to make a different choice.

[57] Mr Mills also submitted that the respondents were making a (belated) tactical choice in light of a point he had made at the s 35 conference on 2 December 2019. He had expressed the view that in circumstances where this Court had found that the article was capable of conveying the pleaded meanings, a trial Judge was likely to find that the article did in fact convey those meanings. In order to manage this risk the respondents had decided to seek a jury trial, hoping that (in the words of their previous lawyer):

> [A] jury may be likely to be sympathetic to [the respondents'] position (ie regardless of what the law really says) …

[58] Mr Mills said that if Ms Cato had known that the respondents would be entitled to revisit their previous procedural elections, she would not have agreed to incur the cost and inconvenience of attending a facilitated settlement discussion, which included a transparent presentation of argument, the result of which was to give the respondents a tactical advantage.

[59] Mr Mills submitted that the Judge made a number of fundamental errors in her approach to the r 1.19 application. First, the Judge was wrong to proceed on the basis that the failure to file a jury notice by the date set was a "technical" failure because the relevant directions had effectively fallen away and pleadings reopened as a result of the appeal to this Court. This conclusion was wrong because:

(a) It was contrary to the Judge's own finding that the relevant directions had not been set aside or fallen away.

(b) It mischaracterised the effect of Ms Cato's meanings appeal, which simply sought to reinstate meanings struck out by the High Court and had no effect on the scope of the trial.

(c) It also mischaracterised the reasons why the respondents had failed to file a jury notice when it was due. That failure was deliberate, not "technical".

[60] Second, in reliance on her finding that the late filing was "technical", the Judge failed to consider the respondents' actual reasons for failing to comply with the earlier directions, and the absence of a good reason for seeking to revisit their election. The respondents hoped to obtain a tactical advantage at trial. They were not seeking to avoid a procedural prejudice. The Judge placed no, or insufficient, weight on this.

[61] Third, the Judge erred in disregarding the importance of procedural efficiency in the determination of civil claims. That goal is reflected in r 1.2 of the High Court Rules, and is given particular weight in defamation proceedings by s 35 of the Defamation Act. In this case:

(a) The respondents had lost their right to a jury trial because they had not exercised that right by the date fixed by the Court for doing so. Rule 1.2 was an important factor in determining whether they should be permitted to have a jury trial. Declining the application would not involve curtailing the respondents' right to a jury trial.

(b) Efficiency has been recognised as an important factor in considering whether to grant extensions of time for jury election in England and Wales.[36] The importance of procedural efficiency in the context of defamation jury trials has been recognised by this Court.[37]

(c) There had been previous delays in the determination of the proceeding, including the loss of a trial date, caused by the respondents.

[62] Fourth, the Judge erred in dismissing as irrelevant the fact that granting the respondents' late application would result in substantial additional costs to Ms Cato that would likely be unrecoverable.

[63] Mr Mills submitted that important lessons can be drawn from recent English and New Zealand decisions in relation to the complexities, risks and inefficiencies of jury trials in defamation cases. Section 16 of the Senior Courts Act reflected the approach adopted by the Law Commission in a report in 2011.[38] In the intervening 10 years, significant lessons have emerged from the experience of the English courts, and also the New Zealand courts, in relation to the inefficiencies associated with jury trials of defamation cases.

[64] In these circumstances, Mr Mills said, the Judge should have asked "what is the correct decision now?", that is, at a time when the respondents no longer had a right to a jury trial. The inefficiencies and costs associated with a jury trial were highly relevant to that question. Mr Mills accepted, in the course of the hearing, that the right conferred by s 16(1) was a relevant factor in determining whether to grant an extension of time. But he submitted that it had been given too much weight by the Judge.

[65] Mr Mills also emphasised a number of factors which he submitted the Judge had overlooked: the seriousness of the allegations, and the significant advantage of a reasoned judgment from a Judge-alone trial. That was particularly important here

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36 *Cook v Telegraph Media Group Ltd* [2011] EWHC 763 at [83] and [114]–[116]; *Thornton v Telegraph Media Group Ltd* [2011] EWCA Civ 748; and *Bento v Chief Constable of Bedfordshire Police* [2012] EWCA Civ 956, [2012] All ER (D) 189.

37 *Young v Television New Zealand Ltd* [2014] NZCA 50 at [73]–[74].

38 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at [11.11]–[11.19].

because Ms Cato is a barrister, and the article attacked her professional conduct. The question of whether she had fallen short of the professional standards required of a barrister was best determined by a Judge, rather than a jury. That would achieve vindication for her within the audience among which she had been most damaged: her professional peers, and the judiciary.

[66] In response to the argument that an extension of time was not required, Mr Nilsson, junior counsel for Ms Cato, took us through the relevant procedural history and submitted that:

(a) The minute of 23 July 2019 only referred to vacating "pre-trial timetable directions".

(b) The vacation of the trial date did not mean that the jury notice date also fell away. The High Court Rules do not provide for this consequence, and it is not a necessary implication that vacation of the trial date should have that effect.

Discussion

An extension of time was required

[67] Mr King, counsel for the respondents, accepted at the hearing before us that his argument that no extension of time was needed depended on establishing that the directions given in the 23 July 2019 minute issued by the Judge vacated the direction previously given in the 15 March 2019 minute fixing the jury notice date. It is therefore necessary to look at those minutes in more detail, to understand the effect the second minute had on the first.

[68] On 15 March 2019, the Judge made directions sought by the parties by reference to para 10 of the joint memorandum they had filed on 14 March 2019. That joint memorandum set out at para 10 a list of 16 directions sought, grouped under five headings: "Costs on the meanings judgment", "Amended pleadings",

“Discovery”, “Close of pleadings date and jury notice”, and “Pre-trial steps”. Under the heading “Close of pleadings date and jury notice” the memorandum read:

> (j) 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.
>
> (k) Leave is reserved for any party to apply, by memorandum, to alter the close of pleadings date in the event any interlocutory maters remain unresolved as at 10 May 2019.

[69] Under the heading “Pre-trial steps” the memorandum set out a number of steps leading up to trial, beginning with service of Ms Cato’s briefs of evidence and bundle nominations by 21 June 2019.

[70] The parties’ joint memorandum dated 8 July 2019 confirmed that the parties were committed to exploring the possibility of settlement, and agreed that the Court’s involvement might be of assistance. It continued:

> 3. However, the parties anticipate that the likelihood of a settlement being reached will be reduced if the plaintiff is put to significant further trial preparation costs in advance of the s 35 or settlement conference. For these reasons, the following directions are respectfully sought by consent:
>
> (a) That the timetable directions made on 15 March 2019 be vacated.
>
> …

[71] As already mentioned, this was followed by Ms Cato’s memorandum dated 10 July 2019 seeking a number of directions, including a direction “[t]hat the current trial fixture and pre-trial timetable directions are vacated”. A telephone conference took place before the Judge on 23 July 2019. The Judge made a direction by consent, as noted above, that “[t]he three-week trial fixture scheduled to commence on 21 October 2019, and related pre-trial timetable directions, are hereby vacated”.

[72] We consider that the better view, reading the Judge’s 23 July 2019 minute in the context of the directions and memoranda that preceded it, is that the pre-trial timetable directions that were set aside were the “Pre-trial steps” set out in the joint memorandum dated 14 March 2019. The focus of the July 2019 memorandum was on avoiding incurring further costs by taking further trial preparation steps, until

a further attempt had been made to settle the proceedings. The possibility of setting aside the close of pleadings date and jury notice date, dates which had already passed, does not appear to have been adverted to. The minute of 23 July 2019 does not expressly set aside the directions given on 15 March 2019 in relation to the close of pleadings date and jury notice date, and we do not consider that it is implicit in the minute that those were also set aside.

[73] We also accept Mr Nilsson's submission that nothing in the High Court Rules provides, expressly or by implication, that the result of vacating a trial date is that a close of pleadings date and jury notice date previously set by a Judge fall away. Where a trial date is vacated the Judge can give consequential directions in relation to matters such as the close of pleadings date. But in the absence of such directions, any dates previously fixed by a Judge remain operative.

[74] It follows that the respondents did require an extension of time in order to be able to file a jury notice after 10 May 2019.

Approach to extension of time application

[75] As Mr Mills accepted at the hearing, the starting point for considering an application to extend time to file a jury notice must be the right to elect a jury trial conferred on each party by s 16 of the Senior Courts Act. In circumstances where s 16(4) was not engaged, it was open to the respondents to require trial by jury at any time up to the jury notice date fixed by the High Court.

[76] In conferring that right, Parliament has proceeded on the basis that the advantages of allowing a party to elect a trial by jury in the cases identified in s 16(1) outweigh the disadvantages of trial by jury. The balance has been struck in favour of jury trial, if desired by any party, subject only to the limits in s 16(4), and procedural requirements in the High Court Rules designed to ensure that a jury notice is given sufficiently in advance of trial to enable preparation to occur in an orderly manner.

[77] There is considerable force in Mr Mills' submission that the experience of the New Zealand courts and the English courts over the last 10 years has underscored the difficulties, including increased cost and delay, that can result from trying defamation

cases before juries.[39] Defamation law has evolved over that period, becoming more complex and more nuanced, in response to both legal developments (in particular, the influence of human rights legislation) and social developments (in particular, the rise of online media). It is increasingly common for defamation cases to raise mixed questions of fact and law. That gives rise to difficulties in relation to the respective roles of Judge and jury. Recent years have also brought an increased awareness of the benefits of obtaining a reasoned judgment in defamation cases. The availability of reasons where a Judge sits without a jury assists with public understanding of the result reached by the court. It facilitates the exercise of appeal rights. Where an appeal succeeds, a retrial is less likely to be required if the trial took place before a Judge alone, and there is a reasoned judgment which sets out the factual findings made and the reasons for those findings. And where the law is uncertain or developing, a Judge, unlike a jury, can make findings in the alternative to assist appellate courts to resolve any appeals without the need to send the proceeding back for a retrial.

[78] However, we consider that it would be inconsistent with the policy underpinning s 16 of the Senior Courts Act for the courts to proceed on the basis that once the jury notice date has passed, significant (perhaps, decisive) weight should be given to the disadvantages of jury trials in defamation cases. It may well be desirable for Parliament to revisit the balance struck by s 16 in light of the concerns identified by Mr Mills, as has occurred in the United Kingdom where the right to a trial by jury in defamation cases was removed by the Defamation Act 2013 (UK). But unless and until similar reform occurs in New Zealand, we take as our starting point the right to a jury trial under s 16(1) of the Senior Courts Act, and the policy in favour of a right to trial by jury which that provision reflects.

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[39] Mr Mills referred us to a number of cases which identify the disadvantages of jury trials in defamation cases, and corresponding advantages of Judge-alone trials, including this Court's decision in *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 esp at [62], and English decisions such as *Cook v Telegraph Media Group Ltd*, above n 36; *Thornton v Telegraph Media Group Ltd*, above n 36; *Bento v Chief Constable of Bedfordshire Police*, above n 36; *Yeo v Times Newspapers Ltd* [2014] EWHC 2853, [2015] 1 WLR 971 (QB); and *Gregory v Commissioner of the Police for the Metropolis* [2014] EWHC 3922, [2015] 1 WLR 4253 (QB).

[79] Mr Mills correctly points out that this right is expressly limited by the requirement in s 16(1) that notice must be given in accordance with the High Court Rules. But as the Judge observed, that reference to the High Court Rules brings into play the Rules as a whole, including not only the time limit in r 7.16, but also the power to extend time limits conferred by r 1.19.[40] It could not sensibly be suggested that r 1.19 does not apply to defamation proceedings, and to the time for giving jury notices prescribed under r 7.16.

[80] It follows that the appropriateness of granting an extension of time to give a jury notice must be considered under r 1.19, read in light of r 1.2, and against the backdrop of the right to give such a notice conferred by s 16(1).

[81] An analogy can be drawn with the well-established framework for considering whether an extension of time to appeal to this Court should be granted under r 29A of the Court of Appeal (Civil) Rules 2005. As the Supreme Court confirmed in *Almond v Read*, the ultimate question in that context is what the interests of justice require.[41] That inquiry takes place against the backdrop of a right to a first appeal to this Court.[42] Factors which are likely to require consideration in that context include the length of the delay; the reasons for the delay; the conduct of the parties, particularly of the applicant; any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and the significance of the issues raised by the proposed appeal, both to the parties and more generally.[43] The underlying merits of the proceeding will not generally be relevant.[44]

[82] Similarly, the ultimate question under r 1.19 of the High Court Rules must be whether granting an extension of time is in the interests of justice. Will it advance the r 1.2 objective: "the just, speedy, and inexpensive determination of any proceeding"? At the risk of stating the obvious, the references in r 1.2 to speed and expense should not be understood as independent goals to be pursued at the expense of the interests of

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40 High Court extension judgment, above n 1, at [78]. See also Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR7.16.03].
41 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].
42 At [36]–[38].
43 At [38].
44 At [39].

justice; rather, they serve as a reminder that these factors are relevant to determining where the overall balance of justice lies.

[83] The factors relevant to the question whether an extension of time is in the interests of justice will include the length of the delay, the reasons for the delay, and the consequences of that delay: essentially the same factors that are relevant in the context of an extension of time to appeal under r 29A. The nature and extent of any prejudice that an extension would cause to the plaintiff (or others with a legitimate interest in the outcome) will often be a factor of particular importance. The nature of the proceedings may be a relevant factor, in particular where that has a bearing on the consequences of delay. We accept Mr Mills' submission that it is important that defamation proceedings be resolved promptly. The importance of early resolution of defamation proceedings has long been recognised, and is reflected in the provisions of the Defamation Act.[45] If an extension of time is likely to cause material delay in the final determination of defamation proceedings, that will count against granting an extension.

[84] It is well established in the context of a r 29A application to extend time to bring an appeal that the prejudice that will be caused by an appeal in and of itself is not relevant. That prejudice would have been suffered even if the right to appeal had been exercised in a timely way. The only prejudice that is relevant is prejudice caused by the delay in filing the appeal. That reasoning is equally applicable in the present context. Any prejudice that Ms Cato would suffer as a result of the trial of her claim before a jury is not relevant to the question whether an extension of time should be granted. That prejudice would have been suffered if the s 16(1) right had been exercised in a timely way. The Judge was right to put to one side the disadvantages for Ms Cato of a jury trial, and focus on whether she would suffer any incremental prejudice as a result of the delay in giving the notice.

[85] It follows that we do not accept Mr Mills' argument that the Judge should have approached the application for an extension of time by asking what the appropriate mode of trial is now. As we said above, the starting point in New Zealand remains the

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[45] See *Gillespie v McKay* (1999) 13 PRNZ 90 (HC) at 93.

right to a jury trial conferred by s 16(1). The approach contended for by Mr Mills gives insufficient weight to that starting point.

Should an extension of time be granted in this case?

[86] We turn to consider the factors relevant to whether an extension of time should be granted, focusing on the length of the delay, its causes, and its consequences.

[87] Whether the delay in giving a jury notice is seen as significant in this case depends on the lens through which it is viewed. Focusing on the date set by the Judge in March 2019, the delay was significant: some seven months from 10 May 2019 to 6 December 2019.

[88] But importantly, delay in this pre-trial step will not cause any delay in relation to the trial of the proceeding. The trial had already been deferred for other reasons.

[89] We do not think it is especially illuminating to attach labels such as "technical" to the delay. Nor do we consider that the close of pleadings date automatically fell away as a result of the vacation of the trial, as explained above. Pleadings did not automatically reopen as a result of the vacation of the trial, or as a result of this Court's meanings judgment. But we agree with the Judge that the vacation of the October 2019 trial date meant that a deferral of the date for giving a jury notice had none of the adverse consequences that might otherwise flow from that step.

[90] The reason for setting a jury notice cut off date at 10 May 2019 was, plainly, to enable the parties to prepare for trial over the following five or so months. In order to prepare for trial, the parties needed to know a reasonable time in advance whether the trial was to take place before a jury, or a Judge alone. The parties proceeded on the basis that around five months' notice would be sufficient for that purpose. As matters have developed, the respondents' notice was given more than a year before the rescheduled trial date. There has been (and still is) plenty of time to prepare for trial before a jury.

[91] Put simply, the original reasons for setting the cut off date for a jury notice as 10 May 2019 had fallen away. In those circumstances, the rationale for requiring

compliance with that date also fell away. There was no relevant "delay", bearing in mind the purpose which the r 7.16 deadline serves.

[92] We accept Mr Mills' submission that this is not a case where a deadline was missed through inadvertence. In May 2019 the respondents made a conscious choice not to seek a jury trial. However, their circumstances changed in a way that was directly relevant to that choice, when they obtained legal representation in September 2019. At that point, it was reasonable for them to re-evaluate the choice they had made about mode of trial. And it was reasonable for them to seek to change tack, provided this could be done without causing any relevant prejudice to Ms Cato.

[93] For the reasons we explained above, any additional cost and inconvenience associated with a jury trial is not a relevant form of prejudice when considering whether an extension of time should be granted. The focus is on prejudice caused by the delay in giving the notice. We consider that the Judge was right to find that there was no material prejudice to Ms Cato as a result of the jury notice being given in December 2019 rather than May 2019, in circumstances where the original trial date had been vacated, the prospect of further pleadings being filed remained live, and no new trial date had been set.

[94] We are not persuaded that Ms Cato's agreement to participate in the s 35 conference held on 2 December 2019 was attributable to the mode of trial anticipated at that stage. Nor are we persuaded that there is any relevant prejudice arising out of Mr Mills' observations at that settlement conference, pointing out the risks to the respondents at a trial before a Judge alone. Whether the trial takes place before a Judge or a jury, the decision-maker will need to determine what meanings the article bore. That is not the same as the question determined by this Court, which was whether the article was capable of bearing certain meanings.

[95] And it seems to us, with respect to Mr Mills, that the potential differences in approach between a jury and a Judge in addressing questions such as meaning were readily apparent in late 2019, and were likely to be identified by any competent counsel instructed by the respondents. Indeed the advice given to the respondents by their former legal advisers in May 2019 suggested that the respondents should seek

a jury trial (provided they had legal representation) because of differences in approach of this kind. In these circumstances, it seems most unlikely that the respondents' decision to seek trial by jury, a few months after they obtained legal representation for that trial, was attributable to Mr Mills' comments at the s 35 conference.

[96] In summary, we do not consider that the delay in giving the jury notice was material, bearing in mind the purpose of the deadline. The respondents' change of tack was deliberate, but was not unreasonable given their change in circumstances. The delay did not cause any relevant prejudice to Ms Cato. In these circumstances, it was in the interests of justice to extend the time within which the respondents could exercise their right to require a jury trial. The Judge did not err in granting the extension of time.

Result

[97] The appeal is dismissed.

[98] Costs should follow the event in the usual way. Ms Cato must pay costs to the respondents for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

Solicitors:
Lee Salmon Long, Auckland for Appellant
McKenna King, Hamilton for Respondents