SUPREME COURT OF SOUTH AUSTRALIA

(Magistrates Appeals: Civil)

FERGUSON v STATE OF SOUTH AUSTRALIA & ANOR (No 2)

[2019] SASC 10

Judgment of The Honourable Justice Stanley

8 February 2019

MAGISTRATES - APPEAL AND REVIEW - SOUTH AUSTRALIA - APPEAL TO SUPREME COURT - COSTS

LIMITATION OF ACTIONS - EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS - GENERALLY - POWER OF COURT TO EXTEND LIMITATION PERIOD

This Court allowed the plaintiff's appeal against the orders of a Magistrate dismissing his defamation action against the first and second defendants and refusing his application for an extension of time. Rather than remitting the matter to the Magistrates Court, the Court determined to exercise its discretion as to the length of the extension of time to be granted. The parties put further evidence before it relevant to the application. The Court also heard argument in relation to the costs of the appeal.

Held:

1. The time within which to issue proceedings in respect of the action for defamation for the publication of the email of 4 June 2014 be extended to 25 May 2017.

2. The plaintiff have 80 per cent of his costs of the appeal and of the application for the extension of time to be paid by the first defendant on a party/party basis.

3. There be no order as to the costs of the cross-appeal by the first and second defendants.

Limitation of Actions Act 1936 (SA) s 37; *Limitation Act 1969* (NSW) s 56A, referred to.
Barrett v TCN Channel Nine Pty Ltd [2017] NSWCA 304, applied.
York v Morgan [2015] NSWDC 109, distinguished.

On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE FAHEY) AMCCI-17-1815

Appellant: FERG FERGUSON Counsel: MR P JAKOBSEN - Solicitor: BEGER & CO LAWYERS
First Respondent: STATE OF SOUTH AUSTRALIA Counsel: MS L GAVRANICH - Solicitor: CROWN SOLICITOR (SA)
Second Respondent: NGAIRE ENID-LOUISE BENFELL Counsel: MS L GAVRANICH - Solicitor: CROWN SOLICITOR (SA)

Hearing Date/s: 23/10/2018

File No/s: SCCIV-18-199

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Noonan v MacLennan (2010) Qd R 537, not followed.
Ferguson v South Australia [2018] SASC 90; *Barrett v TCN Channel Nine Pty Ltd* [2017] NSWCA 304; *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175; *Casley v ABC* (2013) 39 VR 526; *State of Queensland v O'Keefe* [2016] QCA 135; *Houda v State of New South Wales* [2012] NSWSC 1036; *Rasch Nominees & Anor v Bartholomaeus & Ors* [2013] SASCFC 105, considered.

FERGUSON v STATE OF SOUTH AUSTRALIA & ANOR (No 2) [2019] SASC 10

STANLEY J.

Introduction

1 This is an appeal from an order for the summary dismissal of the plaintiff's action in defamation against the first and second defendant.

2 For reasons published by me on 26 June 2018[1] I allowed the plaintiff's appeal against the order made for summary judgment dismissing the defamation action against the first and second defendant. However, the action for defamation is out of time. The magistrate refused an application for an extension of time. I set aside that order and listed the matter for further hearing on the application for an extension of time, and in relation to the costs of the appeal.

3 The exercise of the magistrate's discretion in deciding the application for an extension of time miscarried. In his reasons the magistrate declined to extend the time on the basis that the plaintiff did not plead any reason for the delay. The magistrate also referred to the plaintiff's application for pre-action discovery being made in September 2016 but the claim not being issued until 25 May 2017. However, the magistrate failed to refer to the relevant fact that a decision on the application for pre-action discovery was not given until April 2017. In addition, the magistrate appears to have overlooked the terms of the plea in paragraph 19 of the statement of claim seeking an extension of time. That explains the failure to bring the proceedings within time. The plaintiff did not have knowledge of the publications until more than one year after publication. The plaintiff did not receive a copy of the email of 4 June 2014 until 13 November 2015. That was more than five months after the limitation period expired. He was not able to ascertain some of the persons involved in the publication until the same time and he was not able definitively to establish that the third respondent was a relevant publisher despite applying for pre-action discovery. That was sufficient to set aside the order refusing an extension of time on the basis that I was satisfied it was not reasonable in the circumstances for the plaintiff to have commenced the action within one year from the date of publication. The magistrate also refused to extend time on the basis of prejudice to the State. However, there was no evidence of prejudice before the magistrate. On that basis I set aside the order of the magistrate refusing to extend time.

4 In the circumstances I was prepared to exercise the discretion afresh rather than remitting the matter to the Magistrates Court. Before I could do so, however, the plaintiff sought the opportunity to put further material before the Court on the basis that he had been taken by surprise before the magistrate. The

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[1] [2018] SASC 90.

plaintiff had not anticipated that the magistrate would deal with the application for an extension of time. As a consequence he did not put evidence before the magistrate relevant to the application.

5 I gave the parties leave to put further evidence before me relevant to the application.

6 Given my conclusion that it was not reasonable in the circumstances for the plaintiff to have commenced the action within the one-year period the Court is obliged to extend the limitation period. In these circumstances there is no discretion whether or not to extend time.[2] What is now in issue is the length of the extension of time the Court is prepared to grant, not whether the plaintiff is entitled to an extension of time. The Court's discretion as to the length of the period of the extension is unfettered save that it cannot exceed three years from the date of publication.

7 In addition, I heard argument in relation to the order the Court should make in respect of the costs of the appeal.

Extension of time

8 The plaintiff claims to have been defamed by the first and second defendants in separate publications made, first, in or about July and August 2013 and, second, on 4 June 2014. The basis of the claims in defamation concern allegations of serious misconduct made by the third defendant to the second defendant, who was the principal of the school at which the plaintiff was employed, who in turn published those allegations in an email to three officers of the Department of Education and Child Development (the Department).

9 The proceedings were issued on 25 May 2017. The plaintiff seeks an extension of time to that date.

10 Section 37 of the *Limitation of Actions Act 1936* (SA) (LOA Act) provides:

> (1) An action on a cause of action for defamation is not maintainable if brought after the end of a limitation period of 1 year running from the date of the publication of the matter complained of.
>
> (2) However, a court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in subsection (1) to a period of up to 3 years running from the date of the publication (but no further extension is to be allowed under any other provision of this Act).

11 The principles applicable to the exercise of the Court's discretion to extend time pursuant to s 37 of the LOA Act are set out in the judgment of the Court of

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[2] *State of Queensland v O'Keefe* [2016] QCA 135 at [35]-[37].

Appeal of New South Wales in *Barrett v TCN Channel Nine Pty Ltd.*[3] In *Barrett* the Court of Appeal had to consider the cognate provisions to s 37 of the LOA Act in the *Limitation Act 1969* (NSW). These are provisions forming part of a uniform national legislative scheme enacted in all of the States except Western Australia.

12 This Court should follow decisions of intermediate appellate courts in other jurisdictions on the interpretation of uniform national legislation unless convinced that interpretation is plainly wrong.[4]

13 In *Barrett* the Court held that s 56A(2), which is the equivalent of s 37(2), confers a general discretion as to the length of any extension of limitation period confined only by an outside limit of three years from the date of publication. The discretion is to be exercised having regard to the scope and purposes of the limitation legislation.

14 Limitation periods are enacted on the basis of the law's recognition that undue delay can be productive of injustice. A limitation period represents the Parliament's judgment that the welfare of society is best served by causes of action being litigated within the limitation period notwithstanding that the enactment of that period may result in a good cause of action being defeated. Limitation legislation balances the interests of justice in particular cases by providing for an extension of time so as to permit a plaintiff's claim to proceed where the strict application of the limitation period would occasion injustice. But whether injustice has occurred must be evaluated by reference to the rationales for the limitation period itself. Those rationales include the law's recognition of the need to commence actions promptly, the fact that with the effluxion of time the quality of relevant evidence deteriorates and that it is oppressive to defendants to allow actions to be brought long after the circumstances which gave rise to them have elapsed.[5]

15 These considerations inform the construction of s 56A(2) and hence s 37(2). The not reasonable test confines the Court's consideration to the circumstances of the plaintiff's failure to commence the defamation action within the one-year limitation period. Once that test is satisfied, there is no focus on any particular act or date. Rather, the period of the extension which the Court must grant is at large, save to the extent that it must not exceed three years from the date of publication. The discretion as to the length of the period of the extension to be granted is to be exercised in the context of the rationales of the existence of limitation periods.[6] That discretion leaves scope for the judge who is investigating the facts and considering the general purpose of the legislation to give effect to his or her view of the justice of the case.[7] On this basis the Court of

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3 [2017] NSWCA 304.
4 *Casley v ABC* [2013] VSCA 182 at [73], (2013) 39 VR 526 at 541-2.
5 [2017] NSWCA 304 at [65]-[67].
6 [2017] NSWCA 304 at [82].
7 [2017] NSWCA 304 at [87].

Appeal in *Barrett* rejected a submission that once the not reasonable test has been satisfied the Court is obliged to extend the limitation period to the time when the action was commenced save only for the three-year limit. The Court concluded that the conferral of an unfettered discretion as to the length of any extension of the limitation period, save for the outer limit of three years, once the not reasonable test has been satisfied, does not mean that it is never open to a court to consider as a relevant factor the period within which it was thought unreasonable for a plaintiff to have sued, by reference to when the proceedings were actually commenced. The basis of the exercise of the discretion is the objective circumstances the court finds to exist.[8]

16 The reasoning of the Court of Appeal in *Barrett* is consistent with other intermediate appellate court authority on the construction of the relevant provisions, namely: *Pingel v Toowoomba Newspapers Pty Ltd*,[9] *Casley v Australian Broadcasting Corporation*,[10] and *State of Queensland v O'Keefe.*[11] The exception is the judgment of the Queensland Court of Appeal in *Noonan v MacLennan*[12] which the Court in *Barrett* declined to follow. In *Noonan* Chesterman JA, in obiter remarks, considered that the not reasonable test extended to the exercise of the discretion as to the length of the period of extension. As I have said, I am bound to follow *Barrett* unless I consider it plainly wrong. Not only do I not consider it plainly wrong, I consider it to have been correctly decided.

The defendants' submissions

17 The defendants submit that in deciding the length of the extension to be granted the Court should weigh two considerations. First, at what point the plaintiff had sufficient knowledge of the publication to plead his claim. Second, whether the plaintiff acted promptly after becoming aware of the publication. The defendants submit that the plaintiff had sufficient particularity to plead his claim in defamation on 13 November 2015 when he obtained a copy of the email of 4 June 2014. He did not issue proceedings for a further 18 months. This was only just within the three-year limitation period. Further, the plaintiff knew from June 2016 that the defendants denied liability and were not prepared to make any offer of amends. In these circumstances the defendants submit the plaintiff failed to act promptly. They submit that even on a generous view, three months after having received the publication was a reasonable and sufficient time within which to commence proceedings. That would justify an extension of time to about 14 February 2016 but no longer period. Accordingly, the Court should not grant an extension of time to 25 May 2017.

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8 [2017] NSWCA 304 at [70].
9 [2010] QCA 175.
10 [2013] VSCA 182, (2013) 39 VR 526.
11 [2016] QCA 135.
12 [2010] QCA 50, (2010) Qd R 537.

Consideration

18 I do not accept the defendants' submission. To adopt that submission would be to fetter impermissibly what is an unfettered discretion. That is not to suggest that in the exercise of that unfettered discretion the promptness with which a plaintiff commences proceedings is not a relevant consideration. However, that is merely one of a myriad of factors to be considered by the Court in the exercise of the discretion which must be exercised judicially. The requirement that the discretion be exercised judicially requires the discretion be exercised by reference to the rationales for the existence of the limitation period prescribed. In that context, I do not accept that the time when the plaintiff had sufficient knowledge of the publication to plead his cause of action is a decisive consideration in the exercise of the discretion.

19 In *Houda v State of New South Wales*[13] McCallum J held that what is reasonable in deciding whether to issue proceedings for defamation requires consideration of more than just the known existence of the elements of the cause of action. Her Honour said:[14]

> A publication is actionable if it conveys meanings defamatory of a person. However, that says little about the wisdom of pursuing such an action, which requires careful consideration of any likely defences.

20 While that observation was made in the context of deciding whether the not reasonable test was satisfied in that case, I consider the judge's reasons are equally applicable to the rationale for the existence of the limitation period in respect of proceedings for defamation. The prudently self-funded potential plaintiff in an action for defamation would be ill advised to issue proceedings without assessing his or her prospects of success in the litigation. That requires more than the identification of the elements of the cause of action. It requires an assessment of the defences that might be raised and the merits of those defences.

21 In this case I have found that it was not reasonable for the plaintiff to have commenced proceedings within one year from the impugned publication of 4 June 2014. As I have noted earlier, the plaintiff was provided with a copy of the email on 13 November 2015. I find the plaintiff was then off work on stress leave until he returned to work at Ernabella in the APY Lands in late January 2016. He instructed solicitors on 7 April 2016. On 13 May 2015 the solicitors acting for him at the time sent concerns notices to the second defendant and Mr Rainsford.[15] On or about 15 June 2016 the plaintiff's then solicitors received a response from the Crown Solicitor advising that any claim by the plaintiff would be defended, *inter alia,* on the basis of qualified privilege. The plaintiff gave instructions immediately to commence proceedings. That did not occur and the

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[13] [2012] NSWSC 1036.
[14] [2012] NSWSC 1036 at [29].
[15] Mr Rainsford was the third defendant in the proceedings until the claim against him was dismissed by orders made on 26 June 2018.

plaintiff terminated his instructions on 2 August 2016. On 9 August 2016 the plaintiff instructed his current solicitors. The plaintiff's solicitors wrote to the Department seeking the identification of the persons identified in the email of 4 June 2015 who made accusations of improper conduct against the plaintiff. On 31 August 2016 the Crown Solicitor responded declining to provide the information sought. On 31 August 2016 the plaintiff's solicitors received his file from the plaintiff's former solicitors.

22 On 15 September 2016 the plaintiff brought interlocutory proceedings for pre-action disclosure. As I have indicated, that application was not decided until 28 April 2017 when the magistrate refused the application. In my view that application was relevant to the assessment by the plaintiff of the strength of any defence to his claim on the basis of qualified privilege. As I have noted, the plaintiff issued proceedings on 25 May 2017.

23 In my assessment, given all these circumstances, the plaintiff acted with reasonable promptitude in issuing proceedings. His approach cannot be characterised as evidencing dilatoriness or lassitude in protecting his own interests.

24 The defendants seek to rely upon the reasoning of Gibson DCJ in *York v Morgan*[16] that s 56A of the *Limitation Act 1969* (NSW) does not permit the Court in the exercise of its discretion to take into account the fact that the plaintiff lives in a remote rural location, many hours travel from the office of the solicitor, or his ill health. I do not accept this submission. *York v Morgan* is a decision on its own facts. In any event, the submission does not properly reflect the approach taken by the judge in that case. *York v Morgan* was concerned with whether the plaintiff had satisfied the not reasonable test. The judge found he had not. It was in that context that the judge identified those factors as irrelevant to whether the not reasonable test was met. The judge was not concerned with factors relevant to the exercise of the discretion as to the length of any period of extension of time in circumstances where the not reasonable test had been met. In my view the factors identified by Gibson DCJ might be relevant to the exercise of that discretion.

25 Taking into consideration all relevant factors I would extend the time within which to issue proceedings to 25 May 2017 in respect of the action for defamation for the publication of the email of 4 June 2014. Any action in respect of the publications in July and August 2013 is statute barred as the action was not commenced until more than three years after the dates of those publications.

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[16] [2015] NSWDC 109 at [21].

Costs of the appeal

26 The plaintiff submits that he should have 80 per cent of his costs of the appeal paid by the first defendant on a party/party basis with no order as to the costs of the cross-appeal by the first and second defendants.

27 The defendants submit that there should be no order as to the costs of the appeal and the cross-appeal.

28 The plaintiff submits that he was wholly successful on appeal except in respect of the appeal against the refusal to order the provision of better particulars. Further, the plaintiff was successful on the cross-appeal in resisting the appeal from the refusal to order the strike out of his pleadings, but unsuccessful on the cross-appeal from the refusal to order summary judgment in the action for injurious falsehood against the defendants. Subsequently the plaintiff has succeeded on the application for the extension of time.

29 The plaintiff submits that approximately 80 per cent of the time occupied by the Court in the appeal and cross-appeal involved grounds on which the plaintiff succeeded. The plaintiff submits that the orders as to costs he proposes would fairly reflect a broad-axe approach to the respective rights and liabilities of the parties in respect of the costs of the appeal and cross-appeal. It would further avoid the need for an adjudication of the costs of the defendant.

30 The defendants submit that it would be unfair to award the plaintiff the costs of the appeal in circumstances where he has been afforded an indulgence by the extension of time.

31 The principles relevant to an award of costs were considered in *Rasch Nominees & Anor v Bartholomaeus & Ors*[17] where the Court said:[18]

> The Court has an absolute and unfettered discretion as to costs, subject only to the requirement that the discretion be exercised judicially, not arbitrarily or capriciously, and that it cannot be exercised on grounds unconnected with the litigation.
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> Section 40(1) of the *Supreme Court Act 1935* (SA) provides:
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> > (1) Subject to the express provisions of this Act, and to the rules of court, and to the express provisions of any other Act whenever passed, the costs of and incidental to all proceedings in the court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid.
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> 6SCR 263(1) provides that as a general rule, costs follow the event. It then prescribes exceptions to the general rule. In *Copping v ANZ McCaughan Ltd* King CJ rejected an argument that r 101.02 of the 1987 *Supreme Court Rules,* the predecessor to 6SCR 263,

[17] [2013] SASCFC 105.
[18] [2013] SASCFC 105 at [55]-[60].

fettered the operation of s 40. King CJ, with whom Mohr and Nyland JJ agreed, said of s 40:

> ... the legislative intention is plainly to confer on courts and judges an unfettered discretion as to costs. A construction of a rule of court which practically negates the statutory provision is not lightly to be adopted.

The Chief Justice went on to contemplate that a rule which purported to limit the Court's unfettered discretion as to costs might be invalid as it would be repugnant to s 40. In my view, 6SCR 263 should not be construed so as to limit the court's unfettered discretion as to costs conferred by s 40. 6SCR 263 is to be construed as identifying the general approach to awarding costs and identifying specific exceptions to the general approach, but it is not to be construed as defining the exceptions to the general rule exhaustively. In this context, I note the judgment of Perry J in *Settlement Wine Co Pty Ltd v National and General Insurance Co Ltd (No. 3)* where his Honour held that because s 40(1) is expressed to be subject, *inter alia,* to the Rules of Court, this means that the breadth of the discretion conferred by s 40 is confined to that defined by the rules. Curiously, Perry J did not refer to the Full Court's judgment in *Copping.* In any event, I am satisfied that the approach of Perry J can be reconciled with the Full Court's judgment in *Copping* on the basis that I have explained.

In *Advance Resource Services v Charlton,* Doyle CJ considered the principles relevant to the exercise of a statutory costs provision such as s 40 in the light of the High Court's judgment in *Oshlack v Richmond River Council.* He said:

> In relation to statutory provisions that confer on a court a general discretion as to costs, certain general principles have emerged. One is that the discretion should be exercised judicially, not by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation: see Gaudron and Gummow JJ in *Oshlack* (at [34]). Another general principle is that ordinarily a wholly successful defendant will receive that defendant's costs unless there is a good reason to order otherwise: see Gaudron and Gummow JJ in *Oshlack* (at [35]). However, it needs to be emphasised that these are but general principles, and should not be treated as if they are rules of law.

Another well recognised principle was identified by McHugh J in *Oshlack.* Although his was a dissenting judgment, the principle to which he referred is well established: see *Latoudis v Casey* (1990) 170 CLR 534 and *Ohn v Walton* (1995) 36 NSWLR 77 at 79. The principle is that the purpose of an order for costs is to indemnify or compensate the person in whose favour it is made, not to punish the person against whom it is made: *Oshlack* (at [82]).

Although guiding rules of principle and practice have developed, the discretion remains unfettered and each case must be decided on its own facts...

[Citations omitted].

32 I do not accept the submission of the defendants.

33 The only indulgence that could possibly exist is the application for an extension of time. The plaintiff succeeded on a number of other grounds. There is no reason that the general principle of costs following the event should not apply in this case. In all the circumstances I would adopt the approach for which

the plaintiff submits. It fairly reflects the basis upon which the appeal was decided.

34 In relation to the cross-appeal the first and second defendants rode on the coat tails of the third defendant.

35 I would order that the plaintiff have 80 per cent of his costs of the appeal and of the application for the extension of time to be paid by the first defendant on a party/party basis and there be no order as to the costs of the cross-appeal by the first and second defendants.