**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CRI-2017-404-000402**
**[2018] NZHC 596**

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| UNDER | the Criminal Procedure Act 2011 |
| BETWEEN | DERMOT GREGORY NOTTINGHAM<br>Applicant |
| AND | APN NEWS & MEDIA LTD<br>First Respondent |
| | KELVIN LYNN PRENTICE<br>Second Respondent |

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| Hearing: | 27 March 2018 |
| Appearances: | D G Nottingham in person (with McKenzie friend – R E McKinney)<br>A L Ringwood and J M Cole for First Respondent<br>N Tabb for Second Respondant |
| Judgment: | 29 March 2018 |

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**JUDGMENT OF WYLIE J**

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This judgment was delivered by Justice Wylie
On 29 March 2018 at 4.30pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
Bell Gully, Auckland
N Tabb, Auckland

Copy to: D G Nottingham

## Introduction

[1] Mr Nottingham applies for:

(a) an extension of time within which to file a notice of application for leave to appeal two rulings[1] and a costs judgment[2] given by Judge Collins in the District Court at Auckland under s 298(4) of the Criminal Procedure Act 2011 (the Act); and

(b) leave to appeal the rulings and costs judgment under s 296(2) of the Act.

[2] Both applications are resisted by the respondents – APN News & Media Ltd (APN) and Mr Prentice.

## Background

[3] Mr Nottingham brought a private prosecution against APN and Mr Prentice. Mr Nottingham alleged that APN had breached s 211(1) and (2) of the Act by publishing material which enabled him to be identified, when his name had been suppressed.

[4] Mr Nottingham also brought two charges against Mr Prentice under the same provisions.

[5] The charges proceeded to a joint hearing before Judge Collins.

[6] At the end of the prosecution case, counsel acting for APN applied for the two charges against his client to be dismissed on the basis that there was no case to answer. It was submitted that insufficient evidence had been adduced by Mr Nottingham as prosecutor to prove that APN had published the article which was the subject of the prosecution.

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1 *Nottingham v APN News & Media Ltd* [2016] NZDC 11154 [*Ruling 2*]; *Nottingham v APN News & Media Ltd* [2016] NZDC 11198 [*Ruling 3*].

2 *Nottingham v Prentice* [2017] NZDC 18603.

[7] Judge Collins dealt with this application in a ruling given on 17 June 2016.[3] The Judge:

(a) reviewed the relevant evidence. He noted that the offending was said to have occurred on 8 April 2015, and noted that Mr Nottingham was asserting that the offending article had been published in the New Zealand Herald.[4] He found that there was no evidence as to the publisher of the Herald at the relevant date;[5]

(b) noted that Mr Nottingham resisted the application by suggesting that the name of the defendant should be amended to New Zealand Media and Entertainment Ltd.[6] The Judge accepted that he had the ability to amend the charging documents.[7] He recorded that when he had asked Mr Nottingham whether or not he was applying for amendment, Mr Nottingham's position was "more equivocal".[8] The Judge recorded that Mr Nottingham acknowledged that there was insufficient proof that APN was the publisher.[9] He went on to say that even if there was an application to amend before him, he would decline it;[10]

(c) noted that the conduct of the prosecution by Mr Nottingham had been unsatisfactory, that there had been an almost complete disregard of timetabling orders, and of directions that the defendants be advised of the prosecution case prior to trial;[11] and

(d) went on to note that even if Mr Nottingham had charged the right defendant, he had very real doubt "that the prosecution would have been made out".[12]

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3 *Ruling 2*, above n 1.
4 At [6].
5 At [6].
6 At [3].
7 At [10].
8 At [8].
9 At [9].
10 At [10].
11 At [10].
12 At [13].

[8] On the same day, the Judge gave a separate ruling in respect of the other defendant – Mr Prentice.[13] Mr Nottingham, as the prosecutor, was alleging that Mr Prentice had breached the suppression orders between the dates of 10 April 2015 and 24 April 2015. The Judge:

(a) referred to his earlier ruling regarding the unsatisfactory way in which the prosecution had proceeded;[14]

(b) noted that Mr Nottingham as prosecutor was required to prove as an essential element that Mr Prentice had published, or that he had intentionally assisted, aided, abetted, counselled, or procured somebody to publish, the offending article;[15]

(c) referred to the evidence adduced in some detail;

(d) recorded that it was for Mr Nottingham to prove that on the given dates, Mr Prentice was the owner of the website on which the article was published;[16]

(e) held that the evidence fell well short of proving either that Mr Prentice was the author or guiding hand of the website in issue, or that he had published the offending material;[17] and

(f) ruled that there was no case to answer.[18] The two charges against Mr Prentice were also dismissed.[19]

[9] There was no application for costs by APN, but Mr Prentice applied for costs. On 8 September 2017, Judge Collins issued a judgment in which he awarded costs

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13 *Ruling 3*, above n 1.
14 At [2].
15 At [3].
16 At [14].
17 At [15].
18 At [15].
19 At [15].

against Mr Nottingham in favour of Mr Prentice.[20] The Judge held that Mr Prentice was entitled to indemnity costs and the eventual award was for $32,150.[21]

[10] The Judge recorded that he had earlier advised Mr Nottingham that he had to put his case into an acceptable form. He referred to various difficulties which had been confronted in the lead up to the case and at the hearing. He recorded the submissions of counsel for Mr Prentice, and of Mr Nottingham, as follows:

> Mr Cullen submits that the prosecutor's failings can be summarised in this way:
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> - failure to prosecute the case in a manner consistent with the rights of the defendant pursuant to New Zealand Bill of Rights Act 1990; being a failure to be tried without undue delay, the failure to properly inform a defendant of the nature of the case against him, and providing the defendant with an adequate time within which to prepare a defence;
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> - successive failures by the prosecutor to comply with the directions of the Court to provide witness briefs and a witness list;
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> - obstruction by the prosecutor to the defendants having access to relevant information held on the Court record;
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> - the failure of the prosecutor to define the scope of the prosecution to relevant issues;
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> - utilising the proceedings to pursue a variety of unrelated and/or irrelevant allegations against people and/or entities other than the defendant;
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> - calling a witness who had not been brief, Mr Slater. The detail and nature of this evidence had not been provided to the defence prior to the presentation of the witness to the Court;
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> - seeking to produce diverse exhibits which were palpably inadmissible;
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> - seeking to illicit an admissible or irrelevant evidence within the actual hearing;
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> - endeavouring to summons a witness who was subject to legal professional privilege, namely the solicitor for the defendant;
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> - failure to comply with the provisions of the Evidence Act 2006;

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20 *Nottingham v Prentice*, above n 2.
21 At [31].

- failure to address himself to adducing evidence on two key elements of defence, namely the fact of non-publication orders and breach of non-publication orders, even after having been advised by the Court repeatedly of the necessity for the same in successive hearings;

- displaying a confrontational and argumentative approach to the Court including; indications to the Court that an application would be made to have the presiding Judge recuse himself, repeatedly indicating to the Court during the taking of evidence that an appeal would be brought against decisions of the Judge prior to the same being determined and or delivered, entering into disrespectful, confrontational communications with the Court during proceedings, and conducting proceedings in a manner which was tantamount to prosecuting the defendant in a manner which was "vexatious", oppressive and abuse of the Court's process.

In response to those submissions and the application for costs Mr Nottingham provided a one page statement in opposition. He asserted that I had acted in such a manner to be in contempt of Court and brought the administration of justice into disrepute and disregard. He stated:

> The allegations of impropriety are supported by admissible and cogent evidence and will ultimately be decided in other vastly superior jurisdictions. This Court need only turn its mind to its actions, and the actions of the wrongfully acquitted defendants that will be proven by other evidence an act to add insult to injury to give indemnity cost to a perjurer would surely be a contempt of Court.

**The proposed appeals**

[11] Section 298(3) of the Act provides that a notice of application for leave to appeal must be filed within 20 working days after the date of the ruling to which the appeal relates.

[12] The relevant District Court rulings were given on 16 June 2016. The time for filing an application for leave to appeal expired on 14 July 2016. Mr Nottingham did not file the application for leave to appeal until some 17 months later – 6 December 2017. Further, service was not effected by Mr Nottingham on APN until 2 February 2018.

[13] Mr Nottingham's appeal against the costs decision was filed on 20 November 2017 – 19 working days after the appeal period expired.

[14] Before considering the applications, there is one preliminary issue I need to address.

**Late affidavit from Mr McKinney**

[15] Mr Nottingham sought to file an affidavit from his McKenzie friend, Mr McKinney, in support of the application for leave to appeal.

[16] The affidavit was long – some 12 closely typed pages. It had a large number of exhibits. It was filed the evening before the hearing. It was not served on the respondents until after the close of business hours. Both opposed its receipt.

[17] After hearing from the parties, I declined to allow the late affidavit to be filed. First, there was no adequate explanation offered for the delay in filing the affidavit. Mr Nottingham simply said that he had had a number of other things to attend to. Secondly, and more importantly, the content of the affidavit was fundamentally flawed and much, if not all of it, was inadmissible. It was replete with irrelevant material, opinion evidence, and pontification by Mr McKinney as to what he thinks the law is, or perhaps more precisely, should be. In part, the affidavit comprised of prejorative comments about Judge Collins and how he ran the trial. It also contained prejorative comments about other persons, in particular a Mr Presland, who was not a party to the trial, but rather was Mr Prentice's solicitor.

[18] The attempt to file such an affidavit was an abuse of the Court's processes.

**The application for leave to appeal out of time**

[19] Section 298(4) of the Act provides that an appeal Court may, at any time, extend the time allowed for filing a notice of application for leave to appeal.

[20] The Courts have recognised that the discretion is not unfettered and that the touchstone is the interests of justice in any particular case.[22] The Court of Appeal has noted as follows:[23]

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22 *R v Knight* [1998] 1 NZLR 583 (CA) at 587.
23 At 589.

> … Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice …

[21] The obligation is on an applicant to prove that it is in the interests of justice to extend the time allowed for filing the notice of appeal.[24] There are a number of situations where delay might properly be excused, for example, if an appellant is young, where there have been difficulties in obtaining adequate, competent and independent legal advice, where the filing of an appeal has been delayed pending the receipt of expert advice, or where the importance of the legal point in issue did not become apparent until after other appellate proceedings.[25]

[22] The Court of Appeal has summarised the applicable law as follows:[26]

> [26] For an application for an extension of time to appeal to be granted, it must be in the interests of justice to do so … extension of time applications will invariably reduce to two questions. First, why the appeal was filed late. Second, what merit, if any, the prospective appeal point appears to have.
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> (Citations omitted)

In another case,[27] the Court of Appeal noted as follows:

> [4] We have considered first the extent of the delay and any explanation for it. A delay of nearly three and a half years is extraordinary. The longer the period that has elapsed since all those involved with the proceeding were entitled to assume it had been finally determined, the greater the requirement for an applicant for an extension of time to justify the delay …

[23] I turn to consider first why the appeals were filed late and, secondly, what merit, if any, the prospective appeals appear to have.

**The reason for the late appeals**

[24] Nothing has been filed by Mr Nottingham to explain the late filing of the notices of appeal. His application for leave simply states:

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24 *R v Davis* [2007] NZCA 577 at [13].
25 Simon France (ed) *Adams on Criminal Law – Procedure* (online looseleaf ed, Thomson Reuters) at [CPA231.02(3)].
26 *Mikus v R* [2011] NZCA 298.
27 *Neilson v R* [2015] NZCA 469.

3. That there are reasonable grounds, inclusive of medical, for the delay.

[25] When I raised this issue with Mr Nottingham in the course of the hearing, his response was simply to assert that "the delay falls into the category of being insignificant, given the behaviour of counsel in the case" (he asserts that counsel's behaviour has been egregious). Mr Nottingham went on to argue that the matters he wishes to raise "go to the proper administration of justice and that that is more important than any unexplained delay".

[26] I note that the delay in the present case is long in relation to the two rulings – just over a year and a half. Given the length of this delay, there was a correspondingly greater onus on Mr Nottingham to explain it. He has not discharged that onus. The delay in filing the appeal against the costs decision is very much less – only 19 working days – but again, there is simply no explanation for the delay. Again, Mr Nottingham has failed to discharge the onus which rested on him.

[27] I turn to deal briefly with the merits of the proposed appeals.

**The merits of the proposed appeals**

[28] The proposed appeal against Judge Collins' decision in respect of APN is pointless.[28] Mr Nottingham concedes that APN was not the publisher of the relevant article. He was the prosecutor, acting in a private prosecution. Inter alia, Mr Nottingham had to satisfy the Court, beyond reasonable doubt, that APN published the offending article. There was simply no evidence of that, and it has since been confirmed in an affidavit filed on behalf of APN in opposition to the applications filed. Mr Nottingham has not responded to that affidavit. The simple fact is that Mr Nottingham charged the wrong company. He was therefore not able to establish at trial that APN had published the relevant article. Judge Collins was plainly correct to dismiss the charges against APN. None of the convoluted and repetitive questions which Mr Nottingham set out in his notice of application for leave to appeal can change that inevitable outcome.

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[28] *Ruling 2*, above n 1.

[29] Similarly, the proposed appeal against Judge Collins' decision in relation to Mr Prentice is without merit and cannot succeed.[29] Mr Nottingham's notice of application for leave to appeal, inter alia, asserts that:

(a) the prosecution should not have been required to bring the best available evidence to the Court; and/or

(b) the prosecution should not have been required to prove every element of the charge; and/or

(c) counsel for a defendant has an obligation to advise the prosecution if there is an error in the charging documents.

[30] None of these grounds can succeed. It is trite law that a prosecutor has to prove all elements of a charge against the defendant beyond reasonable doubt before a guilty verdict may be returned. Defendants are entitled to remain silent and to put the prosecution to proof. If the prosecution does not bring the best available evidence to the Court, and the Court finds that an element of the charge is not proved, then that is the end of the matter and the charge must be dismissed.

[31] None of the other matters Mr Nottingham says he wants to raise can alter the fundamental inadequacies in the prosecution he undertook.

[32] Mr Nottingham was given every opportunity to present his case. He was warned by Judge Collins of the onerous obligations he was assuming by bringing a private prosecution. He ignored that warning. In the event, Mr Nottingham's case was a shambles. He now seeks to try again. That would be quite unfair to the respondents, and it is not in the interests of justice to allow Mr Nottingham to proceed with these fruitless appeals.

[33] Similarly, there is no merit in the proposed costs appeal. In his notice of appeal in relation to the costs decision, Mr Nottingham asserts simply that Judge Collins was biased against him and that the charges against Mr Prentice should not have been dismissed.

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[29] *Ruling 3*, above n 1.

[34] Mr Nottingham provides no basis for his allegation of bias. He overlooks that costs are at the discretion of the Court.[30] He ignores the fact that Judge Collins issued a reasoned and careful decision. Mr Nottingham does not even try to point to any error in the Judge's reasoning. Judge Collins concluded, and in my view properly so, that Mr Prentice had been put to considerable costs in defending criminal charges in circumstances where Mr Nottingham was not able to support the charges with sufficient evidence, and where Mr Nottingham's conduct as prosecutor unnecessarily increased the costs for Mr Prentice. Again, the proposed appeal against the costs decision has no merit.

[35] Mr Nottingham's application for leave to appeal out of time is dismissed.

[36] It follows that his application for leave to appeal is also dismissed.

**Costs**

[37] Both APN and Mr Prentice are entitled to seek costs against Mr Nottingham. In that regard, I make the following directions:

(a) any applications for costs are to be filed within 10 working days of the date of this judgment;

(b) any memorandum in opposition is to be filed within a further 10 working days; and

(c) memoranda are to be limited to five pages.

I will then deal with the issue of costs on the papers, unless I require the assistance of Mr Nottingham and counsel.

Wylie J

[30] High Court Rules, r 14.1(1).