

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

**CIV-2013-404-005202
[2014] NZHC 814**

UNDER Section 4(6B) of the Limitation Act 1950
and Limitation Act 2010

IN THE MATTER OF an application for leave to commence
defamatory litigation out of time

BETWEEN RAZDAN RAFIQ
Applicant

AND COMMISSIONER OF NEW ZEALAND
POLICE
Respondent

Hearing: 1 April 2014

Appearances: Plaintiff in person
S M Kinsler for Respondent

Judgment: 16 April 2014

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 16 April 2014 at 4.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] Mr Rafiq is seeking leave to commence defamation proceedings against the Commissioner of Police out of time. He filed an application for leave and a draft Statement of Claim on 16 December 2013, though the application was ultimately advanced in respect of a third draft amended statement of claim. For present purposes the differences between the draft pleadings are immaterial. Three instances of publication are alleged, which I treat as separate causes of action. These instances are said to have occurred in 2008, 2009 and 2011.

[2] The Commissioner opposes the application on the ground that the causes of action in 2008 and 2009 are time-barred. These causes of action fall to be determined under the Limitation Act 1950.¹ The third publication is said to have occurred in 2011. The question of limitation on that cause of action falls under the more recent Limitation Act 2010.

The 2008 and 2009 causes of action

[3] The 2008 cause of action is based on the alleged disclosure by the Police to the Department of Internal Affairs of information about Mr Rafiq, including that he had been guilty of obtaining by deception and that he was a “habitual liar”. The allegation is based on an interview between Mr Rafiq and Internal Affairs in which it was put to Mr Rafiq that he was a “habitual liar” and that according to “police dossier information” Mr Rafiq had committed the offence of obtaining by deception.²

[4] According to Mr Rafiq he became aware of these alleged defamatory statements on 19 June 2008. His explanation for not acting sooner was that he was occupied with his studies. This explanation was contained in the amended application for leave and offered during Mr Rafiq’s oral submissions. He did not swear an affidavit about this issue and gave no explanation as to the nature of his studies.

¹ The Limitation Act 2010 came into force on 1 January 2011, repealing the Limitation Act 1950 but the latter continues to apply to causes of action based on acts occurring prior to 1 January 2011: s 59 Limitation Act 2010.

² Mr Rafiq provided a copy of the extract from the transcript with his submissions.

[5] The 2009 cause of action alleges that the Police provided confidential information to the Department of Labour accusing Mr Rafiq of being involved in “fraud-related activities”. Mr Rafiq relied on a copy of a letter from the Police responding to his enquiry whether the Police had made the alleged statements. The Police advised that they had provided information to the Department of Labour but no longer had a record of what that information was. Mr Rafiq gave the same explanation for failing to act sooner in relation to this issue, namely that he was occupied with his studies.

[6] Section 4 (6A) and (6B) of the Limitation Act 1950 provides that:

6A Subject to subsection (6B) of this section a defamation action shall not be brought after the expiration of two years from the date on which the cause of action accrued.

6B Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court after notice to the intended defendant, for leave to bring a defamation action at any time within six years from the date on which the cause of action accrued; and the Court may, if it thinks just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it just to oppose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section) or by any other reasonable cause.

[7] It is apparent that Mr Rafiq’s delay in bringing an action for defamation was not occasioned by any mistake of fact. He plainly knew from an early stage the facts he now asserts as the basis for his proposed claims. Nor is any mistake of law evident; a mistake of law exists when there is an erroneous belief that one law exists when in fact it does not. Ignorance or a failure to consider the legal position does not amount to a mistake of law for the purposes of the limitation period.³ The only question can be whether the delay was occasioned by any other reasonable cause.

[8] Mr Rafiq’s explanation for the delay does not make out a reasonable cause. There is simply insufficient information on which I could conclude that being occupied with (unspecified) studies would justify taking no action for a period of six and seven years. The application in relation to the first two causes of action fails.

³ *Moot v Crown Crystal Glass Ltd* [1976] 2 NZLR 268 at 275.

The 2011 cause of action

[9] The 2011 cause of action is based on the release of information to the Privacy Commissioner and Commissioner of Inland Revenue about Mr Rafiq's use of aliases. Mr Rafiq was unable to identify the exact date in 2011 on which the information was released but said in submissions that he first learned of it when he received the summary of facts relating to charges laid against him under the Postal Services Act 1998 and the Harassment Act 1997. Although he provided a copy of the relevant summary, it was undated and neither he nor Mr Kinsler could say when he received it.

[10] Mr Kinsler subsequently filed a memorandum advising that initial disclosure on the Postal Act charges, which included the summary of facts, was sent to Mr Rafiq on 11 November 2011. The same summary of facts was provided again on 14 December 2011 when Mr Rafiq was arrested on the Harassment Act charges and again on 12 March 2012.

[11] Under the Limitation Act 2010 it is a defence to a claim for monetary relief at common law if the defendant proves that the date on which the claim is filed is at least six years after the date of the act on which the claim is based but in the case of claims for defamation that period is reduced to two years.⁴ There is no provision for leave to bring proceedings outside the limitation periods specified. However the limitation period is extended where the plaintiff did not discover that the relevant act or omission had occurred until after the expiry of the usual limitation period.⁵

[12] On the information provided by Mr Kinsler Mr Rafiq knew of the relevant acts from the summary of facts provided to him on 14 December 2011. It is possible that he knew a month or so earlier, though that is not clear from the information before me. In either event, the time for bringing the claim expired at least a year after he knew of the relevant facts. To the extent that the claim is a money one the Commissioner has a defence to it.

⁴ Limitation Act 2010 ss 11(3) and 15.

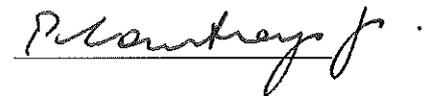
⁵ Section 14.

[13] To the extent that declaratory relief is sought, however, there is no specific limitation period; the Limitation Act 2010 does not contain a prescribed defence to a claim for declaratory relief, regardless of the nature of the claim. This would seem to be an unintended gap; under the Limitation Act 1950 the same limitation period applied for all defamation claims, regardless of the relief sought.

Result

[14] The application for leave to bring the 2008 and 2009 causes of action is refused.

[15] Mr Rafiq does not need leave to bring the 2011 cause of action to the extent that he seeks declaratory relief. His claim for damages is, however, time-barred.

A handwritten signature in black ink, appearing to read "P Courtney J", with a horizontal line underneath the name.

P Courtney J