

CITATION: *Fitzmaurice v Muinos* [2010] NTMC 043

PARTIES: Louise Fitzmaurice

V

Danila Muinos

TITLE OF COURT: Local Court

JURISDICTION: Northern Territory

FILE NO: 20836531

DELIVERED ON: 2 July 2010

DELIVERED AT: Darwin

HEARING DATE: 28 May 2010

JUDGMENT OF: Morris SM

**CATCHWORDS:**

DEFAMATION -- ACTIONS FOR DEFAMATION -- LIMITATION OF ACTIONS -  
- limitation period for defamation claims -- circumstances in which period may be  
extended -- test to be applied -- meaning of “not reasonable in the circumstances”

*Limitation Act 2008 (NT), s 12(2)(b), s 44A*

*Murphy v Lewis* [2009] QDC 37

*Noonan v MacLennan & Anor* [2010] QCA 50, considered

**REPRESENTATION:**

*Counsel:*

Plaintiff: Mr O’Loughlin

Defendant: Mr Grove

*Solicitors:*

Plaintiff: De Silva Hebron

Defendant: Ward Keller

Judgment category classification: B

Judgment ID number: [2010] NTMC 043

Number of paragraphs: 33

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20836531

BETWEEN:

**Louise Fitzmaurice**  
Plaintiff

AND:

**Danila Muinos**  
Defendant

REASONS FOR JUDGMENT

(Delivered 2 July 2010)

Ms MORRIS SM:

1. The Plaintiff has applied for an extension of the limitation period applicable to her defamation action, filed on 24 December 2008. The application is opposed by the Defendant.
2. An action for defamation is “not maintainable unless commenced within a limitation period of one year from the date of publication of the defamatory matter;” *Limitation Act 2008 (NT)* s 12 (b).
3. However s 44A of the *Limitation Act 2008 (NT)* allows for a court to grant an extension of the limitation period in a defamation action.

“(1) A person claiming to have a cause of action for defamation may apply to a court of an order extending the limitation period for the cause of action.

(2) If the court is satisfied it was not reasonable in the circumstances for the Plaintiff to have commenced an action in relation to the matter

complained of within one year from the date of the publication, the court must extend the limitation period mentioned in section 12(1A) to a period of up to 3 years from the date of the publication.

(3) A court must not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).”

4. The Plaintiff’s defamation action relates to alleged actions by the defendant on three occurrences; an email of 22 August 2007, a further email of 28 August 2007 and words spoken at the annual general meeting of the Northern Territory Quarterhorse Association (NTQA) on 1 September 2007. The limitation period for each alleged occurrence is 22 August 2008, 28 August 2008 and 1 September 2008.
5. The Plaintiff commenced action on 24 December 2008, outside the one year limitation for all alleged occurrences.

### **Plaintiff’s Submissions**

6. The Plaintiff submits that for the five months prior to the expiration of the limitation period the Plaintiff was receiving and following the advice of a solicitor. That solicitor failed to properly advise the Plaintiff of the 12 month limitation period, and indeed advised her incorrectly of a 3 year limitation period. The Plaintiff also submits that it was not reasonable to commence proceedings whilst she was waiting for an auditor’s report relevant to the allegations and it was also not reasonable to commence proceedings during a period where the Plaintiff was attempting to resolve the matter by other means, including mediation.

### **Defendant’s Submissions**

7. The Defendant submits that the advice provided to the Plaintiff was not an impediment to commencing the action within time and that the incorrect

legal advice did not make it unreasonable to sue in time. The advice being rather an explanation as to why she did not. The Defendant also submits that the evidence shows that the parties were not engaged in a process of mediation or negotiation, but instead shows that the Plaintiff was resolved on a course of litigation. Even if there is evidence to show that the Plaintiff herself thought that the matter would resolve, this does not make it reasonable for her not to comply with the limitation period. The Defendant submits there is no evidence that the Plaintiff's then solicitor's advice was causative of her not commencing within the limitation period. The Defendant considers the 'audit' irrelevant as the actions complained of by the Plaintiff do not concern the 2007 audit.

### **Case Law**

8. Counsel for both parties have referred the Court to two relevant cases, *Murphy v Lewis [2009] QDC 37* and *Noonan v MacLennan & Anor [2010] QCA 50*. Both of these cases consider a similar test under Queensland statute for the extension of the limitation period in defamation actions.
9. In *Murphy v Lewis* at [7] Kingham DCJ paraphrases the broad rationales for limitation periods identified by Justice McHugh in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 554, being
  - i) Relevant evidence may be lost with the passage of time;
  - ii) It is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed;
  - iii) People should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them;
  - iv) Insurers, public institutions and businesses, particularly limited liability companies have a significant interest in knowing they have no liabilities beyond a definite period: and

v) The public interest requires disputes be settled as quickly as possible.

10. In *Noonan v MacLennan* at [15], Keane JA states “The burden is on a plaintiff to point to circumstances which make it not reasonable to seek to enforce his or her legal rights in the way required by the law.”
11. Examples are given as to the matters which may be sufficient circumstances, such as if the parties have a prospect of resolving the dispute or where the extent of the defamation is unable to be established at that point in time.
12. During the hearing of the matter I asked Counsel whether or not it is unreasonable to rely on the advice of your lawyer, however after consideration this is not the correct test or question. Chesterman JA in *Noonan v MacLennan* at [48] says;

“an applicant must demonstrate that it would have been unreasonable for him in the particular circumstance to have commenced an action within the first year after publication. That is to say an applicant must demonstrate affirmatively that he would have acted unreasonably in suing within time.”

13. At [65] Chesterman JA goes on to say,

“The test...is an objective one. It must have been unreasonable for the respondent to have commenced proceedings in time. The test is not satisfied by showing that an applicant believed he had good reason not to sue.”

14. Earlier in *Noonan v MacLennan* at [22] Keane JA said

“Mere ignorance of the strict time limits fixed by the Act cannot afford a reasonable basis for not complying with them. Generally speaking ignorance of the law has never been thought to be a reasonable basis to relieve a person of the consequences of non-compliance with the law.”

15. I respectfully agree with these views. The burden is on the plaintiff, the test is an objective one and ignorance of the limitation period does not afford of itself a reasonable basis. What objective circumstances were there that made it unreasonable for the Plaintiff to commence her action within twelve months?

### **Summary of Evidence**

16. The Plaintiff retained the legal firm “Withnalls” on or about 11 March 2008 to advise her in relation to the alleged defamatory comments. She retained these solicitors through to December 2008. The Plaintiff claims in her affidavit that she received advice from Ms Farmer of Withnalls, to the effect that the limitation period for commencing proceedings for defamation was three years from the publication of the defamatory statement.
17. In support of this assertion, the Plaintiff annexed a letter from Ms Farmer dated 12 February 2009 in which is advised;

“In that regard I confirm you have a 3 year time limit within which to commence proceedings and such time limit expires from the date falling 3 years after the alleged defamatory comments, namely on or before 16 September 2009.”
18. It is noteworthy that the date asserted is only 2 years after the events alleged by the Plaintiff to be defamatory, despite the advice of the 3 year time period.
19. The letter from Ms Farmer also encloses an itemised bill for professional services rendered in relation to the matter to date.
20. Also attached to the Plaintiff’s affidavit is a letter dated 14 February 2008 from the Plaintiff to the Defendant which commences “Re: Defamation proceedings”;

“I am advising you that I will be instructing my solicitors to lodge an application to the courts to seek damages for the defamatory financial reports and statements you presented at the Northern Territory Quarter Horse Association Annual General Meeting on the 1<sup>st</sup> September 2007.....(the letter continues and then the penultimate paragraph)...You have left me with no other option now but to have this matter put before the courts so that I may clear both my name and that of my husband”.

21. A further letter from the Plaintiff to the Defendant is attached, dated 4 December 2008 (and outside the limitation period), “That being the case I now formally withdraw my offer so that I may continue any legal proceedings against you regarding the defamatory statements and publications you made against me at the 2007 AGM”
22. On 12 December 2008 another letter is sent, offering to resolve the dispute with an independent mediator. The Plaintiff writes “If you chose to agree to the terms, please advise me before close of business 19<sup>th</sup> December 2008 so that arrangements can be made. Should I not hear from you my intension (sic) is to commence with the filing of a *statement of claim* in the courts.”
23. A further similar offer and letter was sent on 14 December 2008. “If you are not in agreement I will commence to file my statement of claim in the courts against you weather (sic) you oppose it or not.”
24. I am satisfied, both from her affidavit evidence, and her evidence in court, that the Plaintiff did not herself know that the limitation period was 12 months. I also find that she was incorrectly advised, at some stage, that the limitation period was 3 years. She was at least made aware of this on or around 12 February 2009 when advised in writing by Ms Farmer. The Plaintiff claims that this written advice confirmed earlier oral advice from Ms Farmer of a 3 year limitation period. The plaintiff states in her affidavit at [10];

“I had received advice during May 2008 at various conferences with Ms Farmer to the effect that, among other things, the limitation period for commencing proceedings for defamation was three (3) years from the publication of the defamatory statement(s).”

25. There is little evidence that supports this assertion. In cross examination Counsel put to the Plaintiff that there were no items on Withnalls account that referred to an attendance by the Plaintiff during May 2008. Whilst the phrase in Ms Farmer’s letter “...I confirm you have a three year time limit...” indicates that the advice was previously given, I am unable to find exactly when the advice was passed.
26. Whether the Plaintiff knew or did not know the correct limitation period is not definitive as to the test to be applied, it is but one of the circumstances surrounding the question of whether it was unreasonable for her to have commenced action in the 12 months following the alleged comments.
27. The other circumstances include the stated intention of the Plaintiff in the letters addressed to the Defendant, indicating on several occasions, the first being 14 February 2008 and well within the limitation period that the Plaintiff intended to commence an action in the courts. In that letter the Plaintiff states;  
  
“You have left me with no other option now but to have this matter put before the courts so that I may clear both my name and that of my husband.”
28. There is then no produced written correspondence from the Plaintiff to the Defendant for some 10 months, when a series of three letters within 10 days are sent, all indicating an intention to pursue legal proceedings. Having received the first letter, the Defendant was entitled to expect that legal proceedings would be shortly forthcoming. The subsequently produced correspondence, including an email from Ms Farmer to the Plaintiff, support



that negotiations with the Defendant were in relation to the jurisdiction in which proceedings should be commenced.

29. There is little evidence before me to indicate that the Plaintiff did anything between February 2008 and December 2008 to progress, negotiate or mediate any kind of settlement directly with the Defendant. It appears from the itemised bill from her then solicitor, that various correspondence was prepared during this period. However none of that correspondence has been produced. From the copies of correspondence provided after the hearing of this matter, it appears that a letter was written for the Plaintiff to send the Defendant, and was attached to the letter by Ms Farmer, but this letter was not provided to the Court. There is an offer to mediate the dispute in letters sent in December 2008; however these offers are outside the limitation period.
30. The Plaintiff in her affidavit at [17] says “Since the time of the defamatory publication in September 2007 it was never my intention to escalate the matter wherein I would take legal action but believed it would be in everyone’s best interests if the matter could be settled without recourse to litigation”. But this assertion is contradicted by the letter sent to the Defendant in February 2008.
31. I do not accept the Plaintiff’s assertion that she did not know the strength of her case until December 2008 as she was waiting for the 2007 audit of the organisation to be completed and then passed by the membership of the association. It is clear from her correspondence to the Defendant in February 2008 that the Plaintiff thought she had been defamed and that her reputation and capacity to earn an income had suffered accordingly.
32. I am not satisfied that it was not reasonable for the Plaintiff to commence proceedings within time. The circumstance of having the wrong information as to the limitation period (similar to a situation where a Plaintiff may be ignorant of any limitation period) is not always a sufficient circumstance of

itself to prove it was unreasonable to commence. The Plaintiff wrote to the Defendant advising that she would institute proceedings as early as February 2008. The Plaintiff did not do so. There is insufficient evidence of any hindrance or impediment to the Plaintiff in commencing her claim. Merely because the Plaintiff herself believed that she had further time to lodge her claim is not sufficient reason for her not to do so within the twelve months. The onus of proving that it was unreasonable to commence within the limitation period is on the Plaintiff. The plaintiff has not discharged that onus.

33. Not being thus satisfied I refuse the Plaintiff's application for an extension of the limitation period. I invite submissions from the parties as to costs.

Dated this 2nd day of July 2010

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**Elizabeth Morris**  
STIPENDIARY MAGISTRATE