IN THE COURT OF APPEAL OF NEW ZEALAND

CA699/07
[2008] NZCA 568

BETWEEN	MICHAEL GREGORY Appellant
AND	THOMAS PATRICK JOSEPH GOLLAN First Respondent
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Second Respondent
AND	JOHN BERNARD MARIE FURLONG Third Respondent
AND	MILES EDWARD FINLAISON SUTHERLAND Fourth Respondent
AND	NIGEL JAMES TURNBULL Fifth Respondent

Hearing: 22 October 2008

Court: William Young P, Chambers and Arnold JJ

Counsel: G Little and C S Henry for Appellant
M T Davies for Second Respondent

Judgment: 19 December 2008 at 2.15 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent:

(a) costs on the application for special leave to appeal in the sum of $1,500;

(b) costs for a standard appeal on a band A basis; and

(c) usual disbursements.

REASONS OF THE COURT

(Given by Chambers J)

Alleged wrongful arrest

[1] Michael Gregory, the appellant, has brought a claim in the High Court at Auckland against four police officers (the first, third, fourth, and fifth respondents) and the Attorney-General (the second respondent). The Attorney-General has been sued in respect of acts of the named police officers and other unnamed police officers. Mr Gregory alleges that, on 24 June 2001, a number of police officers entered his home uninvited, sprayed him with pepper spray, restrained him, and handcuffed him. They subsequently took him to the Papakura Police Station, where he was required to remain until he appeared in court. The police charged Mr Gregory with a number of offences, including aggravated burglary, assaulting a police officer, and resisting arrest.

[2] Mr Gregory's father instructed a private inquiry agent. That agent investigated the burglary police thought Mr Gregory had committed. As a result of the information the agent obtained, another person altogether was later charged and ultimately convicted of the burglary. About two months after Mr Gregory's arrest, the police withdrew all charges against him. It is common ground now that Mr Gregory had no involvement at all in the burglary.

[3] Mr Gregory is now suing for the wrongful entry into his home, his arrest, and his subsequent prosecution. His latest statement of claim contains no fewer than seven causes of action: assault and battery; trespass to land; unlawful arrest; false imprisonment; malicious prosecution; conspiracy to injure by unlawful means; and

misfeasance in a public office. He seeks with respect to each cause of action substantial damages, including aggravated and exemplary damages.

[4] What is currently in dispute is who should determine this case: a judge alone or a judge and jury? Mr Gregory wants a judge and jury, a course strongly opposed by the Attorney-General. Under s 19A(2) of the Judicature Act 1908, either party can, in "any civil proceedings to which this section applies", apply for trial by jury. Mr Gregory did so apply. Under subs (5) of that section, however, the other party can seek an order to the contrary, a right the Attorney-General exercised. At first instance, Associate Judge Doogue agreed with the Attorney-General's stance: HC AK CIV 2005-404-3485 21 September 2006. Mr Gregory applied to have that decision reviewed. Allan J upheld Associate Judge Doogue's decision: 19 February 2007. This court subsequently gave special leave to appeal.

Issues on the appeal

[5] Messrs Little and Henry, for Mr Gregory, raise three issues on this appeal.

[6] The first is whether the judges below were correct in finding one of the jurisdictional criteria had been met. The relevant subsection of s 19A reads as follows:

> (5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any civil proceedings to be tried before a jury, if it appears to a Judge before the trial–
>
> (a) that the trial of the civil proceedings or any issue therein will involve mainly the consideration of difficult questions of law; or
>
> (b) that the trial of the civil proceedings or any issue therein will 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 which cannot conveniently be made with the jury,–
>
> the Judge may, on the application of either party, order that the civil proceedings or issue be tried before a Judge without a jury.

[7] It is para (a) which is relevant. Both judges below concluded that this proceeding would involve mainly the consideration of difficult questions of law. It is that conclusion which Messrs Little and Henry now challenge.

[8] The second issue arising is the role of Magna Carta 1297 (Imp), if any, in this area. Mr Henry, who argued this part of the appeal on Mr Gregory's behalf, referred to c 29 of Magna Carta, which reads as follows:

> No freeman shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs … but by lawful judgment of his peers or by the law of the land. …

[9] Mr Henry complained that neither judge below took into account the constitutional impact of that clause on the underlying issue in this case. He was not dogmatic as to when Magna Carta required consideration: was it at the time of determining whether a jurisdictional criterion was met or was it at the time of a subsequent exercise of discretion or both? Indeed, Mr Henry left open the possibility that c 29 conferred "a constitutional statutory right, separate from s 19A of the Act" to trial by jury.

[10] The third issue arising is whether, on the assumption the judges below were correct in finding s 19A(5)(a) to be engaged, they correctly exercised their discretion in determining this proceeding be tried before a judge without a jury.

[11] We shall address those issues in turn.

[12] At the time of the application for special leave to appeal, Mr Gregory had also signalled he intended to advance a submission that, "given the importance of the right to a jury, the application should not have been heard by an Associate Judge": [2007] NZCA 528 at [7]. As it turned out, Mr Gregory's counsel did not pursue this argument. They were right not to do so, as it is clear a s 19A decision is within the jurisdiction of an Associate Judge. It would be quite inappropriate to put the decision under closer scrutiny simply because it was made by an Associate Judge rather than a High Court Judge.

Were the judges below correct in finding the subs (5)(a) criterion met?

[13] It is well established that the underlying matter para (a) is concerned to address is not so much whether the questions of law that arise are difficult ones but more the difficulties the trial judge may face with interlocking questions of law and fact which can render problematic the discharge of the respective functions of judge and jury. This court has articulated the concern and set out the correct approach to the para (a) criterion in a number of cases, most recently in *Television New Zealand Ltd v Haines* CA96/06 6 September 2006 at [10]:

> The next issue, therefore, is whether ascertaining the correct legal position involves difficult questions of law in the sense that phrase is used in s 19A(5)(a) of the Judicature Act. In *Guardian Assurance Co Ltd v Lidgard* [1961] NZLR 860 at 863-4 (CA), this Court said that the issue under s 19A(5)(a) is not so much whether the questions of law that arise are difficult ones. The issue is whether the questions of law are such that it is difficult to keep the respective functions of judge and jury separate from one another, such as where matters of law so merge into one another that the task of the jury becomes complicated in the application of the facts to the law. The Court said that it was not possible to give an exhaustive list of those cases where s 19A(5)(a) applied. The principal matter for consideration under the paragraph, however, is the extent to which the exposition and application of matters of law may cause difficulty to the Judge and the jury in the discharge of their respective functions. This approach was affirmed by this Court in *McInroe v Leeks* [2000] 2 NZLR 721 at [11] (CA). In that case the prospect of the jury being faced with a series of interlocking and hypothetical questions was held to come within s 19A(5)(a) – see at [21].

[14] Both judges below concluded the Crown had satisfied them this was a case within para (a). Messrs Little and Henry said the judges were wrong. They submitted the case involved very few questions of law; the case was essentially a dispute on the facts. Mr Davies, for the Attorney-General, strongly challenged that submission. He said the case bristled with legal difficulties as the crux of the case would be the legal justification for the police officers' actions. The issues arising from this legal justification involved mixed questions of fact and law, which would be difficult to disentangle in the event a jury were to be the finders of fact. We refer to these problems as "interlocking problems"; by this, we mean the circumstances where the jury will have to make findings of fact, following which the trial judge will have to determine the legal consequences of such findings. Sometimes, once those legal consequences are fixed, the judge then may have to return to the jury for

more fact findings (based on legal conclusions to date), followed by yet more legal findings.

[15] In *Haines*, this court had strongly suggested that, in cases where there is a dispute about how difficult it would be to instruct a jury, it is desirable that counsel provide the court with a list of suggested questions for the jury: at [45]. This is the best guide as to how real the alleged difficulties will be. Associate Judge Doogue bemoaned the fact counsel had not done that for him and commented how "helpful" it would have been "in a case of this kind where there are a large number of issues and intermingling of issues of fact and law": at [24]. Notwithstanding that plea, counsel had still not turned their minds to this question by the time the case reached us on second appeal.

[16] During the hearing before us, after Mr Gregory's counsel had continued to insist there would be little difficulty in formulating issues for the jury and that there were few, if any, interlocking problems, we took an adjournment so that Mr Gregory's counsel could draw up a list of jury questions based on the current pleadings. Counsel did that and came up with a list of just ten questions – for seven causes of action. The list suggested there would be no interlocking problems. It immediately became obvious, especially after Mr Davies's submissions, that the list was very incomplete.

[17] After the hearing, we decided we should get counsel to undertake this task more comprehensively. We sent out a minute, asking Mr Gregory's counsel to tackle the task afresh. We asked Mr Davies to respond, indicating amendments he would seek. The idea was not to prepare a definitive question trail for use at the trial (assuming a jury trial) but rather to get a better feel for how the trial, and in particular the deliberation part of it, would proceed if a jury were employed.

[18] Mr Gregory's counsel's list this time had 41 questions! Mr Davies countered that the list was still far from complete. In particular, he submitted it omitted a number of interlocking problems, where the judge would have to rule on the legal effect of certain findings of fact before further relevant factual questions could be posed. Most of the difficulties stemmed from the various affirmative defences the

police would be running. These differed from cause of action to cause of action but all of them involved, in one way or another, the extent of police powers. The interlocking problems stemmed from the application of legal tests to findings of fact as to the circumstances in which the alleged powers came to be exercised.

[19] We found this a most instructive and revealing exercise. Now that it has been done, we have no doubt the Crown has shown the s 19A(5)(a) criterion to have been met. That is not to say a jury trial would not have been possible: anything is possible and, of course, a question trail could be devised which would contain all the permutations and combinations. And indeed it might even be possible to devise a way in which the jury could fulfil their role in a single bite. But there is no doubt the exercise would be difficult.

[20] Many of the difficulties stem from the large number of causes of action Mr Gregory wishes to pursue. We would have thought the gist of his complaint could have been addressed in two or three causes of action. Almost certainly, he would receive, if successful, as much by way of damages from two or three causes of action as he would receive from seven. Mr Little acknowledged the jury would have to be instructed in some sort of global way – still not precisely defined – as otherwise there would be a great risk of double-counting, if not treble- or quadruple-counting. While the issues underlying each cause of action are different, the facts of each cause of action overlap to a significant extent. We are not saying that Mr Gregory cannot succeed on all seven causes of action; all we are saying is that, by pursuing the police on so many fronts, he has greatly complicated what could be essentially a fairly simple case and he has thereby significantly reduced the chance of securing a trial by jury.

[21] In our view, the judges below were correct in finding the subs (5)(a) criterion met.

What is the role of Magna Carta?

[22] Neither judge below referred to Magna Carta expressly. It may be Mr Henry had not thought of this argument at the time of the earlier hearings.

[23] Be that as it may, we are happy to deal with the point. With respect to Mr Henry, there is nothing in it. The sole remaining provision of Magna Carta is concerned with the criminal law, not the civil law. Its broad effect is that no one should be imprisoned except "by lawful judgment of his peers". That might have had some relevance to the criminal proceeding brought against Mr Gregory for burglary, but it has no relevance whatever to Mr Gregory's civil action against the police. Neither he nor the respondents are at risk of being "taken or imprisoned" or deprived of their "liberties" in the present proceeding.

[24] If Magna Carta was cited in the lower courts, the judges were right to ignore it.

Did the judges below correctly exercise their discretion?

[25] Counsel on both sides accepted that, even if a s 19A(5) jurisdictional criterion was met, the first instance judge still had a discretion whether or not to order trial by judge alone. This court has emphasised that it is a two-step inquiry in a number of cases: see, for example, *McInroe v Leeks* at [21], *Haines* at [28], and *Siemer v Fardell* [2007] NZCA 530 at [29]. Likewise, those same cases emphasise that the first instance judge's second stage decision, being discretionary, will be upset on appeal only if the appellant can show the judge acted upon a wrong principle, failed to take into account a relevant matter, took into account some irrelevant matter, or was otherwise plainly wrong.

[26] Mr Henry, who also argued this part of the appeal for Mr Gregory, submitted the judges below had gone wrong in three respects.

[27] First, he submitted Allan J had wrongly taken into account irrelevant material, namely the fact that some of the harm in respect of which Mr Gregory was claiming could not sound in damages because of the accident compensation legislation. Mr Henry took issue with what His Honour had said at [44] of his judgment:

> As in that case, it is important to bear in mind here the cumulative difficulties which are likely to arise from the need to exclude damages for

> personal injury which may be covered under the Accident Compensation legislation, the different bases for awarding and assessing exemplary or aggravated damages, and the need to ensure that there is no element of overlap in any award of damages.

[28] We do not accept this submission. Allan J did not make this observation in the context of the exercise of discretion. This was a factor he was considering when assessing whether the subs (5)(a) criterion had been met. His Honour did not "turn to the question of the exercise of the Court's discretion" until [49] of his judgment. In our view, complexities surrounding the question of damages were relevant to the subs (5)(a) analysis, while not perhaps of fundamental importance.

[29] Mr Henry's second complaint concerned a comment made by Associate Judge Doogue in his decision. At [59] of his judgment, His Honour set out "the principal discretionary matters" that weighed with him. In the following paragraphs, he articulated those matters. He then concluded his judgment in this way:

> [66] I conclude that there is jurisdiction to make the order that the defendants seek. I conclude that the defendants have established this by a narrow margin. Once jurisdiction is assumed to make the order, then the questions of delay and inconvenience to jurors, length of trial, and other matters persuade me that the discretion must be exercised in favour of making the order that the defendants seek.

[30] Mr Henry's complaint was that the judge had referred to "other matters" but had not stipulated what they were. He submitted that, in these circumstances, Allan J could not have known what had influenced Associate Judge Doogue. He therefore should have undertaken a weighing of the discretion afresh, but he had not done so.

[31] With respect to Mr Henry, we do not accept this submission. First, Associate Judge Doogue did make clear the principal discretionary matters that weighed with him. These were, in summary form:

(a) The difficulties in instructing the jury: at [59];

(b) The difficulties in directing on damages: at [60]-[61];

(c) The time-consuming task of settling the questions for the jury following the close of evidence: at [62];

(d) The extra length of the trial if a jury is involved, with added expense for the defendants: at [64];

(e) The fact that court time is a public resource that is under pressure and court time needs to be used efficiently: at [65].

[32] When then His Honour, in [66], referred to "the questions of delay and inconvenience to jurors, length of trial, *and other matters*" as persuading him that the discretion should be exercised in favour of trial by judge alone, it is clear that, by "other matters", he was referring to those factors he had just listed *other than* questions of delay and inconvenience to jurors and length of trial. In our view, there is no doubt whatever as to what Associate Judge Doogue meant by that term.

[33] In any event, the next part of Mr Henry's submission is also wrong. He submitted Allan J did not undertake a review of the discretion from scratch. That is plainly inaccurate. Allan J said at [56]:

> But, as did the Court of Appeal in *McInroe v Leeks*, I have carried out for myself the balancing exercise that s 19A(5)(a) requires. While I might have given somewhat different emphasis to the various discretionary factors, I am satisfied that the Associate Judge was right to make an order.

[34] He then went on to summarise the reasons why he thought the discretion should be exercised in favour of a judge-alone trial. In effect, this was a summary of the discussion which preceded [56]: see [49]-[55].

[35] Mr Henry's third complaint was that the judges below had failed to take into account sufficiently the fact that Mr Gregory was bringing a claim against the State for alleged wrongful State action. We accept this is a powerful factor in favour of trial by jury. We also accept it received little recognition in Associate Judge Doogue's analysis, save for his more generalised reference to Mr Gregory's "right to trial by jury" being a right "not to be lightly taken away from him": at [63]. The judge also referred to the right as "an ancient one". Allan J, however, when he

carried out the balancing exercise afresh, certainly did take into account "the desirability of jury trials where the alleged abuse of police powers is in issue": at [56]. It was overborne, however, in His Honour's view by countervailing factors.

[36] This was undoubtedly Mr Henry's strongest point. Like Allan J, we have some concern about the factors Associate Judge Doogue took into account and did not take into account when exercising his discretion. But Allan J undertook the balancing exercise afresh. It is clear on the face of his judgment that he did take into account the desirability of jury trials where the alleged abuse of police powers was in issue. So the submission that he failed to take into account a relevant matter cannot be sustained. What Mr Henry is really attacking is *the weight* the judge accorded to that factor. But the weight to be accorded conflicting relevant factors is essentially a matter for the first instance court (as Allan J had in effect become on this issue), not an appellate court. Perhaps we would have accorded this factor slightly more weight than Allan J did, but it cannot be said that he acted upon a wrong principle or that the resulting decision was plainly wrong.

[37] In these circumstances, Mr Gregory has not established that Allan J exercised his discretion wrongly.

Result

[38] It follows that we dismiss the appeal.

[39] The Attorney-General is entitled to costs on this appeal. He is also entitled to costs on the application for special leave to appeal, in respect of which costs were reserved. The new costs regime was not in force at the time that application was heard and determined. We have fixed costs in that respect on what was then the standard rate. The current principle in these circumstances is expressed in r 53G of the Court of Appeal (Civil) Rules 2005 in these terms:

> (4) If the Court gives leave to appeal but the appeal is subsequently dismissed, the respondent will normally be entitled to costs with respect to the application for leave to appeal (if reserved).

[40] Although that subclause does not directly apply, it is simply a restatement of the relevant principle we used to apply in these circumstances under the previous costs regime.

Solicitors:
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