IN THE SUPREME COURT OF NEW ZEALAND

SC 121/2017
[2018] NZSC 13

BETWEEN	EARL RAYMOND HAGAMAN Applicant
AND	ANDREW JAMES LITTLE Respondent

Court:	Elias CJ, O'Regan and Ellen France JJ
Counsel:	R J B Fowler QC for Applicant J W Tizard for Respondent
Judgment:	13 February 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The personal representatives of Mr Hagaman must pay costs of $2,500 to the respondent.

REASONS

[1] The late Earl Hagaman and his wife, Lianna-Merie, sued the respondent, the Hon Andrew Little MP, for defamation in relation to statements made by Mr Little when he was Leader of the Opposition. The matter went to trial before Clark J and a jury in April 2017. Clark J ruled that the statements that were alleged to have defamed Mr and Mrs Hagaman were protected by qualified privilege.[1] The jury agreed that all of Mrs Hagaman's claims failed and that two of the six claims made by Mr Hagaman failed. They could not agree on the other four of Mr Hagaman's claims.

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1 *Hagaman v Little* [2017] NZHC 813, [2017] 3 NZLR 413.

[2] No judgment was entered in the High Court in relation to Mr Hagaman's claims. Mr Hagaman appealed to the Court of Appeal against the qualified privilege ruling made by Clark J. The appeal related only to one of the four undecided causes of action, namely the second cause of action. The appeal was filed in April 2017, but Mr Hagaman died in May 2017. Although formal steps were not taken to substitute Mr Hagaman's personal representatives as appellants, they were responsible for the conduct of his appeal in the Court of Appeal and the same applies in relation to the present application.

[3] The parties agreed that the Court of Appeal would deal with the preliminary issue of whether the appeal survived Mr Hagaman's death. The Court of Appeal found it did not.[2] Mr Hagaman's personal representatives (the applicants) seek leave to appeal against that decision.

[4] In the High Court, the jury was provided with a question trail. In relation to the second cause of action, the questions and answers were as follows:

> **First named plaintiff (Earl Hagaman): Second cause of action**
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> 5. Do the words set out in paragraph 10 of the second amended Statement of Claim carry any of the meanings set out in paragraph 11? **[YES]**
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> 6. If the answer to any of issue 5 is "Yes", is that meaning defamatory of the first named plaintiff (Earl Hagaman)? **[YES]**
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> 7. If the answer to issue 6 is "Yes" was the defendant (Andrew Little) motivated by ill-will towards the fist named plaintiff (Earl Hagaman) or, did the defendant take improper advantage of the occasion of publication? **[NO ANSWER]**
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> 8. If the answer to issue 7 is "Yes", then assess: **[NO ANSWER]**
>
> (iii) General damages $
> (iv) Exemplary damages $

[5] The applicants wish to argue on appeal that the answers given by the jury to the questions set out above were sufficiently complete to amount to a special verdict. The Court of Appeal found that the answers given by the jury did not amount to a special verdict, because, having answered the first two questions affirmatively, they

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2 *Hagaman v Little* [2017] NZCA 447, [2018] 2 NZLR 140 (Kós P, Miller and Winkelmann JJ).

had to go on and answer the third, on which they could not agree.[3] The Court found that, as no verdict had been given, the cause of action abated with the death of Mr Hagaman.[4] The applicants argue that the point is a significant question about the character and definition of a special verdict, an issue that arises in a range of contexts. While we accept that there may be an issue of significance in relation to the nature of special verdicts, we do not see this case as raising the issue, because of the intensely factual nature of the Court of Appeal's assessment of the jury's answers to the questions in the question trail. Nor do we see any indication of a miscarriage of justice in the manner in which the Court of Appeal dealt with this question.

[6] The applicants also wish to challenge on appeal the Court of Appeal's conclusion that the appeal abated with the death of Mr Hagaman. They wish to argue that the proviso to s 3(1) of the Law Reform Act 1936 should be interpreted to allow appeals in defamation cases because the appeal becomes a cause of action vested in the deceased that survives for the benefit of his or her estate.[5] We do not see this argument as having sufficient prospects of success to justify the grant of leave.

[7] The third proposed appeal point is that the common law rule that personal actions die with the person (now modified by the Law Reform Act but not in relation to defamation) should be refashioned so that it does not apply to prevent the continuation of an appeal in circumstances such as the present. Given Parliament's intervention in the Law Reform Act and its clear decision to preserve the rule in relation to defamation, we do not see this as an argument that has sufficient likelihood of success to justify the grant of leave.

[8] The application for leave to appeal is dismissed.

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3 At [18].
4 At [19].
5 Section 3(1) of the Law Reform Act 1936 provides that all causes of action subsisting against or vested in a deceased person survive against or for the benefit of his or her estate, but this is subject to the proviso "this subsection shall not apply to causes of action for defamation".

[9] The applicants must pay costs to the respondent of $2,500.

Solicitors:
Meares Williams, Christchurch for Applicant
Oakley Moran, Wellington for Respondent