IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 75/2018
[2019] NZSC 23

BETWEEN	HAYLEY DAWN YOUNG Applicant
AND	ATTORNEY-GENERAL First Respondent
	MINISTRY OF DEFENCE (UNITED KINGDOM) Second Respondent

Court:	Glazebrook, O'Regan and Winkelmann JJ
Counsel:	J L Bates for Applicant A L Martin, M Majeed and J C Catran for First Respondent A S Butler and M W McMenamin for Second Respondent
Judgment:	6 March 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the second respondent costs of $2,500.

REASONS

Introduction

[1] The applicant is a former member of the Royal New Zealand Navy. She was selected for officer training and posted to the Royal Navy, the navy of the United Kingdom, for further training. During the time she spent with the Royal Navy, she says she was subjected to sustained serious sexual harassment, was indecently assaulted (on a Royal Navy ship) and was raped (at a Royal Navy base).

[2] The applicant commenced proceedings in the High Court of New Zealand against the Attorney-General of New Zealand (the NZ Attorney-General) and the Ministry of Defence of the United Kingdom (the UK Ministry). Her claims against the UK Ministry were for breach of a duty of care to ensure her safety while in the United Kingdom and vicarious liability (with the NZ Attorney-General) for the tort of battery (the indecent assault and rape). Her separate claims against the NZ Attorney-General are for breach of a duty of care, breach of statutory duty and breach of contract. She claims there was a lack of action and support from the Royal New Zealand Navy in relation to the complaints she made about her treatment in the Royal Navy and that she was subjected to unfair working conditions and further sexual harassment after she returned to New Zealand.

[3] The respondents both protested the jurisdiction of the High Court to deal with the applicant's claims. Both argued the claims should be made in the courts of England and Wales.

[4] In the High Court, Simon France J upheld the UK Ministry's protest to jurisdiction and dismissed the applicant's claim against the UK Ministry.[1] However, in relation to the applicant's claims against the NZ Attorney-General, he upheld the applicant's application to set aside the NZ Attorney-General's protest to jurisdiction, ruling that the High Court did have jurisdiction in relation to those claims.[2]

[5] The applicant appealed to the Court of Appeal against the dismissal of her claims against the UK Ministry. That Court dismissed her appeal.[3] She now seeks leave to appeal to this Court.

[6] The applicant sought an oral hearing in respect of this application. The Court has considered the extensive submissions received from counsel for the applicant (including further submissions addressing the forum non conveniens issue that the

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1 *X v Attorney-General* [2017] NZHC 768, [2017] 3 NZLR 115 [*Young* (HC)] at [62].

2 At [101]. This aspect of the case was not the subject of the appeal to the Court of Appeal or the present application and we say no more about it.

3 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 (Cooper, Brown and Williams JJ) [*Young* (CA)].

Court requested) and has concluded that it can address the issues raised by the applicant on the basis of the written material before the Court.

The proposed appeal

[7] The issue that was before the High Court, and remains the issue in this Court, is whether the applicant's case against the UK Ministry can be pursued in the courts of New Zealand or the courts of England and Wales.[4] The effect of the Court of Appeal decision is to prevent the claims against the UK Ministry from being pursued in the New Zealand courts. But it does not prevent those same claims being advanced in the courts of England and Wales.

[8] The UK Ministry's protest to jurisdiction in the High Court was founded on both state immunity and forum non conveniens. Simon France J held that the UK Ministry could object to the jurisdiction of the High Court on the basis of state immunity.[5] He indicated that, if it had been necessary to decide the forum non conveniens issue, he would have concluded that the courts of England and Wales were the appropriate forum for the applicant's claims against the UK Ministry.[6]

[9] The Court of Appeal upheld the High Court's findings on both issues.

State immunity

[10] On the state immunity issue, the applicant does not suggest that the alleged conduct of those in the Royal Navy to which the claim relates comes within one of the established exceptions to state immunity. She wishes to argue for a new exception. The essence of her proposed argument is that the New Zealand state has a duty not to deprive an individual of the right to an effective remedy in a domestic forum for a breach of his or her human rights and that a foreign state cannot rely on state immunity where this duty applies. The duty is said to apply to a breach that occurs outside New

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4 The NZ Attorney-General has offered to accept service and waive state immunity in the courts of England and Wales in relation to the joint battery cause of action. That would allow this joint claim to be dealt with in one court, and would reduce the disadvantages associated with two proceedings in different jurisdictions. As the Court of Appeal observed, the offer has not, however, been accepted and the applicant has indicated that she will not pursue her claims if she cannot do this in the courts of New Zealand: *Young* (CA), above n 3, at [108].

5 *Young* (HC), above n 2, at [51].

6 At [58].

Zealand, where the breach occurs subject to New Zealand jurisdiction, in this case arising from the fact that the applicant remained an officer of the Royal New Zealand Navy when serving in the Royal Navy. The applicant argues that the duty arises from the New Zealand Bill of Rights Act 1990 and international law.

[11] We accept that the issues related to the existence and/or scope of such a duty may be worthy of leave in a suitable case. But this is not that case. Even if the duty were found to apply in the present circumstances, it would then be necessary to establish that the duty would override state immunity and subject a foreign state to the jurisdiction of the New Zealand domestic courts. While the arguments the applicant wishes to advance are novel, we do not consider they have sufficient prospects of success to justify the grant of leave. Nor do we consider there is any appearance of a miscarriage of justice in the way the Court of Appeal addressed the issue.

Forum non conveniens

[12] In relation to the forum non conveniens issue, the Court of Appeal noted there was no dispute about the applicable principles recognised and applied by Simon France J.[7] The Court of Appeal agreed with the way Simon France J had applied those principles to the facts of the case. It saw the fact that the witnesses that the UK Ministry wished to call at trial were compellable in the courts of England and Wales but not in the courts of New Zealand as particularly significant.[8]

[13] The focus of the argument that the applicant wishes to advance on this issue is her contention that international human rights instruments were not properly considered in the Courts below. She says if they had been, the Courts would have concluded that the courts of New Zealand were the appropriate forum for the trial.

[14] Again, we accept that the place of international human rights instruments in the assessment of a claim of forum non conveniens may be an issue worthy of consideration in an appropriate case. But there is nothing in the material submitted by the applicant that provides an indication that the outcome in this case could be affected

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7 *Young* (CA), above n 3, at [103].
8 At [107].

by that consideration. And, in any event, the issue of forum non conveniens would arise for consideration only if the state immunity issue were resolved in the applicant's favour.

Result

[15] We therefore decline leave to appeal. We award costs of $2,500 to the second respondent.

Solicitors:
Brown & Bates Limited, Napier for Applicant
Crown Law Office, Wellington for First Respondent
Russell McVeagh, Wellington for Second Respondent