IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2019-419-000037
[2019] NZHC 2017

BETWEEN	GORDON MITCHELL Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 15 July 2019

Appearances: G Harvey for the Appellant
M Mortimer for the Respondent

Judgment: 16 August 2019

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 16 August 2019 at 3:30 pm

Registrar/Deputy Registrar

Date:

Solicitors / Counsel:
Meredith Connell (Office of the Crown Solicitor), Auckland
Public Defence Service, North Shore City

[1] Following a Judge-alone hearing on 16 January 2019, Judge MLSF Burnett convicted Gordon Marcus Mitchell on four charges of contravening a restraining order. On 21 March 2019, the Judge fined Mr Mitchell $780 on each of the first three charges and $980 on the fourth charge. She also ordered Mr Mitchell to pay $2,000 to the complainant as emotional harm reparation. Mr Mitchell now appeals. Initially he appealed against both conviction and sentence, but now says that if the convictions are upheld the sentence will not be challenged.

Facts

[2] Mr Mitchell and the complainant are neighbours who share a sub-divided property in Mt Roskill. A restraining order with five special conditions was granted in the Auckland District Court on 3 February 2016. On 13 October 2016, the restraining order was varied, with special conditions amended, in accordance with a judgment delivered by Judge G M Harrison on 26 September 2016. Both the initial and the amended orders were stated under the heading "Duration of restraining order" to "Remain in force until further order of the Court".

[3] The contraventions allegedly took place on 28 February, 4 and 5 March, and 8 October 2017, all over a year after the original grant of the order. Prior to the Judge-alone hearing on 16 January 2019, Mr Mitchell made an application under s 147 of the Criminal Procedure Act 2011 on the basis that the restraining order on which the charges were founded had expired. Mr Mitchell submitted that the District Court lacked jurisdiction to make an order for an indefinite or unspecified duration and if no period was specified, the order would expire after a year.

[4] In a pre-trial judgment on 17 April 2018, Judge AM Manuel dismissed Mr Mitchell's application under s 147 as she found that there was jurisdiction for both the initial order and the variation to be made on the basis that they would continue in force, pending further order of the Court.

[5] Mr Mitchell sought to appeal to the High Court against the pre-trial ruling of Judge Manuel. In a decision of 18 July 2018, Lang J determined that a decision declining to discharge a defendant under s 147 was not amenable to appeal in the High

Court under s 296 of the Criminal Procedure Act.[1] He said that instead the matter must proceed to trial in the District Court. He further said that if the trial resulted in conviction, Mr Mitchell could file an appeal against conviction incorporating, if appropriate, the argument that did not find favour with Judge Manuel.

Appellant's submissions

[6] Section 21 of the Harassment Act provides:

> **21 Duration of restraining order**
>
> (1) A restraining order may be made for such period (whether longer or shorter than 1 year) as the court considers necessary to protect the applicant from further harassment.
>
> (2) A restraining order continues in force until—
>
> (a) it is discharged under section 23; or
>
> (b) where the court directs that the order is to be in force for a specified period, the expiry of that period; or
>
> (c) in the absence of such a direction, the expiry of 1 year from the date on which the order is made.

[7] Counsel for Mr Mitchell submits that s 21 does not allow for making an order of indefinite duration and that in the absence of a specified expiry date, the default length of one year would apply. The charges against Mr Mitchell were therefore a nullity as all charges fell outside the default one year period. The amended restraining order of 13 October 2016 does not remedy the one year issue because no consideration was given to extending the duration of the order as required by s 22(4) of the Harassment Act, which provides:

> **22 Power to vary restraining order**
>
> …
>
> (4) The court must not extend the duration of a restraining order under this section unless the court is satisfied that the extension is necessary to protect the applicant from further harassment.

[8] Counsel has, however, made it abundantly clear that the question is not whether an indefinite order was necessary in the circumstances, but whether it is possible to grant such an order under s 21.

---

[1] *Mitchell v New Zealand Police* [2018] NZHC 1773.

Discussion

[9] The sole issue in this appeal is therefore one of statutory interpretation. Can the term "period", as used in s 21 of the Act, be interpreted as encompassing an indefinite duration.

[10] The meaning of a provision is to be ascertained from its text and in light of its purpose.[2]

Text

[11] The term "period" is defined by the Oxford English Dictionary as a "course or extent of time".[3] This definition does little to clarify the matter as "until further order of the court" is indeed a course of time, albeit an indefinite one. The question, however, is whether s 21 requires the course of time to be finite. The term "period" has not previously been defined by the court in the context of the Harassment Act, but in other unrelated contexts has been held by the court to be capable of encompassing an indefinite amount of time.[4] As such, textual definitions do little more than highlight that "period" may refer to either a definite or indefinite duration. On the words alone, in isolation from the remainder of the section, either is a reasonable interpretation of the term.

[12] Recourse to the remainder of s 21 aids in curing the ambiguity that persists on an isolated textual interpretation of "period". Counsel for Mr Mitchell suggests a linkage between ss 21(1) and (2), and that "period" in subsection (1) should be interpreted in light of subsection (2), which sets out the default period of one year that is to apply when no time is specified in the order. As such, counsel contends that s 21 contemplates either a specified duration, or the application of the default one year period, and that accordingly, an interpretation that allows for an indefinite order is inconsistent with a reading of the section as a whole. This submission has significant force, as to read subsection (1) in isolation from the remainder of s 21 would be to

---

2 Interpretation Act 1999, s 5.

3 *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) at vol 2, 2162.

4 *Needham v Director of Land Transport Safety* [2000] DCR 790 held that disqualification from driving for an indefinite duration was a "period" for the purpose of the Land Transport (Driver Licensing) Rule 1999.

give an artificial meaning to the term in question. The interpretation contended for by counsel for Mr Mitchell essentially requires reading in the word finite so that s 21(1) reads: "a restraining order may be made for such [finite] period as the court considers necessary".

[13] A finite interpretation of "period" in s 21(1) is supported by reference to s 21(2)(b). This paragraph provides that a restraining order will continue in force until the "expiry" of the period specified in the order. The term "expiry" naturally refers to a finite period of time, where upon a specified date the time simply runs out, or, expires. In contrast, a restraining order that continues in force until further order of the Court cannot be said to expire. Rather, the restraining order is discharged by subsequent order of the Court. To read s 21 as a consistent whole, an interpretation of "period" as requiring a finite duration, is favourable.

[14] The wording of s 21 may also be compared to that of s 107 of the Family Violence Act 2018 (formerly s 45 of the Domestic Violence Act 1995), which provides the court with the power to grant a temporary protection order. Section 107 provides that the temporary protection order remains in force until the order becomes final, and the final order only comes to an end when discharged by the court. This mechanism clearly envisions the granting of indefinite orders. Such an approach can be justified on the basis that protection orders are issued against intimate partners or family members, which may often create circumstances where the victim needs greater and sustained protection, typically from the unlawful acts of the offender. The same does not apply to restraining orders under the Harassment Act 1997. Although harassment must cause the recipient distress, it is often of a different degree to the conduct captured by family violence legislation and typically involves lawful conduct.

[15] This distinction between the Harassment Act and the Family Violence Act – whereby the latter act envisions the granting of orders for an indefinite duration – is consistent with the proposition that Parliament intended "period" in s 21 of the Harassment Act to refer only to a finite duration. This interpretation is supported by a reading of s 21 as a whole, and is consistent with the notion that, had Parliament intended a restraining order under the Harassment Act to endure indefinitely,

Parliament could have legislated for this expressly, as was done in the case of family violence law.

Purpose

[16] In ascertaining the meaning of "period", reference must also be had to the purpose of the legislation. The purpose of the Harassment Act is to provide greater protection to victims of harassment by recognising that behaviour that may appear trivial when viewed in isolation, may amount to harassment when viewed in context.[5] The Act is also intended to supplement the legislation addressing domestic violence by providing an avenue to obtain orders where the harassing behaviour is not in the context of an intimate or familial relationship.

[17] The Act was initially introduced as part of the Harassment and Criminal Associations Bill 1997 which aimed to crack down on gang violence and on gang intimidation of members of the public. Parliamentary debate also acknowledged the role of the Bill in assisting individuals who were harassed by other members of the public when attending abortion clinics, and in addressing the growing number of women who had been the victims of stalking.[6]

[18] Overall, the purpose of the Act may be summarised as providing the necessary protection for those who have been the subject of harassment. An interpretation of "period" that requires a finite duration is consistent with this purpose of the Act and with the task the court is required to perform under s 21(1). Pursuant to this subsection the court is required to assess, presently, the duration of the restraining order that is deemed necessary to protect the victim from further harassment. This type of assessment can be distinguished from other instances where the Court may grant an indefinite order, as being situations where an assessment is deferred to a later point in time. To allow the granting of indefinite orders would be inconsistent with the nature of the task under s 21(1) and would detract from the purpose of providing protection, but only for the time that it is deemed necessary.

---

5 Harassment Act 1997, s 6(1).

6 (20 November 1997) 565 NZPD (Harassment and Criminal Associations Bill – Consideration of Report of Justice and Law Reform Committee, Lianne Dalziel).

Bill of Rights Act consistency

[19] The New Zealand Bill of Rights Act 1990 is of relevance in questions of interpretation. Where possible, an enactment is to be interpreted consistently with fundamental human rights.[7] The principle of legality further provides that fundamental rights ought not be overridden by general or ambiguous words.[8] Thus, unless the words of a statute expressly or by necessary implication curtail a fundamental right, the words of the act will be read subject to the basic rights of the individual.

[20] The granting of a restraining order infringes on the fundamental rights of the subject of the order, curtailing their right to freedom of association[9] and freedom of movement.[10] Section 21 of the Act determines the extent of time an order may curtail these rights for. However, s 21 does not expressly provide for the ability to grant an indefinite restraining order nor does an indefinite order arise as a necessary implication of s 21. As such, a rights consistent interpretation would not support an interpretation of the term "period" that encompasses an indefinite duration. Rather, in the absence of such express wording, s 21 ought to be read as infringing on fundamental rights to the minimal extent.

[21] Counsel for the New Zealand Police argues that a rights consistent interpretation only goes so far, and that if read as a whole, the Act provides for sufficient rights protections. These protections include s 22 of the Act which provides for a mechanism to vary a restraining order, and s 23 which provides a way to discharge a restraining order; both of which can be drawn on if an individual believes their rights have been unduly infringed. In addition, s 21(1) espouses the requirement that the restraining order only endure for the period necessary to prevent further harassment, minimising any infringement on the individual's rights.

[22] Although counsel correctly identifies the protections that an individual can draw on, such an approach is inconsistent with the principles governing statutory

---

7 New Zealand Bill of Rights Act 1990, s 6.
8 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25].
9 Section 17.
10 Section 18.

interpretation that require a right to be upheld where it is not sufficiently clear that it was intended to be infringed. It would be contrary to this principle to permit a greater infringement of a fundamental right in the expectation that additional provisions could be utilised to remedy the infringement. Moreover, to adopt this logic would not be pragmatic.

[23] A rights centred approach establishes an appropriate balance between the protection of the victim (and the purpose of the Act in providing to the victim the protection that is necessary) and the rights of the subject of the restraining order. This interpretation does not unduly limit the use of s 21, as the same duration that could be achieved by an indefinite order remains capable of being achieved by an order of a specific duration, so long as it can be established that the duration is necessary. Requiring a finite period ensures adequate rights protection while upholding the overall purpose of the enactment.

New Zealand case law

[24] The New Zealand Courts are yet to directly address whether a "period" under s 21 may be of an indefinite nature. Counsel referred to a number of cases, none of which are binding or decisive on the question. In the current proceedings concerning Mr Mitchell, the District Court relied on *Toreson v Murphy*, a High Court decision that Judge Manuel believed to be binding.[11] *Toreson* allowed a restraining order, by way of consent, to be extended for an indefinite period of time. The Judge was clear that the power to vary the order was available on the basis that the proceeding was classified as an application to vary a court order by way of consent.[12] Accordingly, Judge Manuel was incorrect to believe this decision provided the authority to grant an indefinite order, as the matter before the Court was of a substantially different nature to that in *Toreson*.

[25] Counsel also referred to *Bleckman v O'Reilly*[13] and *MJF v Sperling*[14]; two cases that adopted differing approaches to the duration of a restraining order pursuant

---

11 *New Zealand Police v Mitchell* [2018] NZDC 10341 followed *Toreson v Murphy* [2016] NZHC 1549.
12 At [6].
13 *Bleckman v O'Reilly* DC North Shore CIV-2010-044-1647, 30 September 2011.
14 *MJF v Sperling* [2013] NZFLR 715.

to s 21 of the Act. *Bleckman* granted an extension of a restraining order, favouring a finite duration as opposed to an indefinite extension as was requested by counsel. This decision turned partly on the basis that an indefinite order was not necessary in the circumstances.[15] In contrast *Sperling* considered an application for a restraining order in regard to a number of blog posts. The nature of online material led the Judge to favour an indefinite order as it was viewed as necessary to prevent future posting of the material.[16] These cases adopt contradictory interpretations of "period" and neither is binding on this Court. At best this case law operates as an aid in guiding the interpretation question currently before the Court.

[26] Counsel further referred to *Beadle v Allen*.[17] *Beadle* concerned whether a restraining order amounted to a justified infringement on an individual's right to freedom of expression, and whether the duration and special conditions of the order were necessary in the circumstances. As such, the issue in *Beadle* is of little relevance to the current interpretation question, though the case provides recognition of the fact that there is a legitimate interest in ascertaining a meaning of "period" that is consistent with fundamental rights.

Comparative jurisdictions

[27] The United Kingdom and Australia have enacted similar laws to protect against harassment, empowering the court to issue orders to protect victims of harassment. The provisions adopted by these jurisdictions provide assistance in ascertaining the appropriate meaning of the term "period" in s 21 of the Act.

[28] The equivalent United Kingdom enactment is the Protection from Harassment Act 1997 (UK). Section 5 provides that upon conviction of an offence the Court may grant a restraining order that may have effect "for a specified period or until further order".[18] Section 5A provides for orders of the same nature and duration in the alternative that the individual is acquitted. Sections 5 and 5A apply where the order is sought by a public official. Under s 3A a private individual may apply for an

---

15 At [10].
16 At [83].
17 *Beadle v Allen* [2000] NZFLR 639.
18 Section 5(3).

injunction, which is to have the same effect as a restraining order, but s 3A makes no reference to the time an injunction may endure. Despite this omission as to duration, due to the inherent nature of injunctions – that they tend to operate until a future determination or event – I see no reason why an injunction under s 3A would not also endure indefinitely.

[29] The Protection from Harassment Act 1997 (UK), pursuant to ss 5 and 5 A, specifically provides for the provision of an indefinite order of the exact nature utilised in Mr Mitchell's case, whereby the order is to remain in effect until further order of the Court. And under s 3A an order of indefinite duration would also be permissible given the nature of the order. The express ability to grant an indefinite order and the adoption of an injunction-based mechanism can be distinguished from the position adopted in New Zealand. The Harassment Act 1997 neither explicitly provides for an indefinite order nor utilises injunctions, which by their nature tend to operate on an indefinite basis. This distinction supports the contention that, had Parliament intended the Court to be able to grant an indefinite restraining order, they would have explicitly provided this power.

[30] In Australia the law governing harassment is managed at a state level and varies from state to state. Across the various states there appears to be three distinct methods of addressing harassment. The first involves the provision of an interim order that expires upon an award of a final order, the second method prevents any limitation being imposed on the duration of the order, and the third reflects s 21 of the Harassment Act 1997.

[31] The first mechanism referred to above is reflected in the New South Wales Crimes (Domestic and Personal Violence) Act 2007 (NSW). The enactment allows the Court to grant an order referred to as an apprehended personal violence order, or an AVO. Section 22 of this act provides that an interim order may be granted where it is necessary and appropriate to do so, and s 24 further provides that the interim order will remain in force until it is revoked, or until a final order is made. Similar provisions

operate in Victoria[19] and the Northern Territory.[20] The regime in the Australian Capital Territory is also broadly similar. However, if a final order is not granted an interim order shall come to an end after 12 months, putting in place a maximum duration.[21]

[32] This mechanism operates in the same way that family violence laws operate in New Zealand; potentially because many of these jurisdictions address harassment through domestic and personal violence laws, as opposed to standalone harassment legislation. The significance of this, is that similar to the domestic violence provisions in New Zealand, an indefinite order is more readily justified in light of the additional protection required to address domestic or physical violence, over and above that of harassment.

[33] The second mechanism implemented in Australia is of an entirely different nature to that in operation in New Zealand. In South Australia the Intervention Orders (Prevention of Abuse) Act 2009 (SA), provides that an intervention order may be granted to protect an individual from acts of abuse.[22] The intervention order is described as ongoing and continuing in force until it is revoked. Most relevantly, the Act provides that the issuing authority may not fix a date for expiry of an intervention order or otherwise limit its duration.[23] The express ability to grant an indefinite order and the inability to limit that order is inherently different from the regime in New Zealand and lacks relevance in interpreting the New Zealand legislation.

[34] The third and final mechanism implemented in Australia engages a procedure and wording that is most similar to the regime under the Harassment Act 1997 in New Zealand. In Western Australia the Restraining Orders Act 1997 (WA) provides for the

---

19 Personal Safety Intervention Orders Act 2010 (Vic). Section 35 allows the court to grant an interim order where satisfied on the balance of probabilities the order is necessary pending a final order. Section 43 subsequently provides that an interim order expires upon the making of a final order.

20 Personal Violence Restraining Orders Act 2016 (NT). Section 19 allows the court to grant an interim order and provides that the order will expire either upon the grant of a personal violence restraining order or when ordered by the court.

21 Personal Violence Act 2016 (ACT), ss 20 and 21.

22 Section 6 provides that an order may be issued where there are reasonable grounds to suspect that the defendant will, without intervention, commit an act of abuse, and where the issuing of an order is appropriate in the circumstances. Section 8 defines an Act of abuse as an act that is intended to result or does result in physical injury or emotional or psychological harm (including distress, anxiety or fear that is more than trivial). This is broad enough to extend to harassment (under s 12(1)(e) an intervention order may prohibit a defendant from harassing a protected person).

23 Section 11(2).

granting of a violence restraining order.[24] Upon the issuing of a final order it will remain in force until the "period (of whatever duration)" specified in the order comes to an end, or if no period is specified, after two years.[25] This mechanism is most similar to s 21 of the Harassment Act 1997 as it provides for an order that may endure for a "period" and subsequently identifies a default period. This enactment introduces the same ambiguity that is evident in s 21, namely, whether a "period (of whatever) duration" requires an order to be granted for a finite amount of time. Similar to New Zealand this question appears to have generated little focus in Western Australia, with no cases directly addressing this issue. Of limited relevance is *Baron v Walsh* which referenced an earlier tribunal decision in the proceeding's history that considered granting an indefinite order.[26] The tribunal stated that an indefinite order was possible, but not appropriate in the circumstances of the case.

[35] This final mechanism although of a very similar nature to that in s 21, offers little guidance in this exercise of interpretation. The lack of relevant case law indicates that this is a question best resolved by reference to the New Zealand law and principles of interpretation.

[36] The preceding analysis of both the harassment law in the UK and Australia, is illustrative of the various different legal mechanisms that have been adopted in order protect victims of harassment, and that by and large,[27] each mechanism has adopted an express ability for the Court to grant an order restraining such behaviour for an indefinite duration. None of these mechanisms have been adopted in New Zealand. Rather, Parliament adopted a stand-alone enactment – the Harassment Act 1997 – that only allowed for orders to be granted for the "period" deemed necessary by the court. In contrast to the approaches adopted in these comparative jurisdictions, the New Zealand approach is of its own nature.

---

24 This extends only to stalking and not to harassment more broadly.
25 Section 16B.
26 *Walsh v Baron* [2014] WASCA 124 at [104].
27 With the exclusion of the civil mechanism in the UK under s 3A of the Protection from Harassment Act 1997 (UK), and the restraining order procedure in Western Australia under the Restraining Orders Act 1997 (WA).

Conclusion

[37] With regard to the plain meaning of the words, the purpose of the statute, the desirability to interpret the section consistently with fundamental rights and the distinction that can be drawn between s 21 and the explicit availability of indefinite orders under the family violence regime and the regimes in other jurisdictions, an interpretation of "period" that requires an order to be of a finite nature is most appropriate, although I concede that it is a question on which reasonable minds may differ. As such, a restraining order granted under the Harassment Act must specify a *finite* period of time for which it will endure, otherwise it will expire after a year.

[38] The appeal is allowed on the basis that the original restraining order granted on 3 February 2016 had expired prior to the dates of the alleged contraventions. The variation to the restraining order made by Judge Harrison on 26 September 2016 did not have the effect of extending the duration of the order as the Judge did not turn his mind to the necessity for any such extension. As a result the conduct for which Mr Mitchell was convicted occurred after the restraining order expired and cannot form the basis of a conviction.

[39] The four convictions entered against Mr Mitchell on 18 January 2019 for breach of the restraining order are quashed as are the sentences imposed on 21 March 2019.

_____

Woolford J