EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2017-004-000281
[2019] NZDC 15848

[SCOTT KIRBY]
Plaintiff

v

[NIAMH WATSON]
[CAITLIN KERR]
[CHELSEA HART]
Defendants

Date of Ruling:	15 August 2019
Appearances:	J Burt and S Cassidy for the Plaintiffs R Marchant and J Olsen for the Defendants
Judgment:	15 August 2019

RULING 1 OF JUDGE G M HARRISON

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[1] Again this is a preliminary decision. It is subject to considered reasons being given at a later time. In this matter the applicant has concluded his evidence. Following that the defendants now apply to strike out significant parts of his application.

[2] The application seeks rulings under the Harmful Digital Communications Act 2015. At my earlier request when this matter was first heard in May of last year the applicant has provided particulars to support his application. Those particulars specify

120 individual postings that he now seeks rulings on either as to directions to the defendants to remove those posts and further orders that no further postings of a similar nature should be made.

[3] The application to strike out the proceeding is advanced on four bases. The first is that a number of the posts were not made by the defendants. It seems axiomatic that if the post complained of were not made by the defendants in these proceedings then they should be struck out. Mr Burt for the applicant submits that even though those postings may not have been made by the defendants there were, nevertheless, "likes" posted ostensibly in support of those postings.

[4] My view is that postings by non-parties have no relevance to the defendants. A "like" might indicate support for the particular post, but it is the post itself that can be the subject of orders. "Likes" in my view stand or fall on the status of the posting. If it offends the Act there can be an order that it be taken down. If so, as I understand it, any "likes" would go with it. If the posting was held not to offend the Act then a "like" cannot be the subject of any order under the Act. And so for those brief reasons the postings relied upon but made by non-parties are struck out. You have identified those I think, Mr Olsen, at paragraph 9. [Yes, Sir] Those are numbers 30, 46, 47, 59, 60 and 61 of what we have termed in this hearing as the "Communications Summary".

[5] The next ground of the application to strike out relates to the coming into force of the Harmful Digital Communications Act. It first came into force on 27 November 2015, but only in respect of criminal proceedings that might have been brought pursuant to the Act as then in force. The right to bring proceedings in the Civil jurisdiction of this Court did not come into force until 21 November 2016.

[6] The defendants apply to strike out all of the postings that occurred essentially before 21 November 2016 on the ground that the statutes do not have retrospective effect unless positively expressed, which is not the case here. The defendants refer in particular to the decision of Court of Appeal in *R v Kelly* [1923] NZLR 234.[1] The Court there confirmed that amendment to the Crimes Act could not be construed retrospectively and although amendment to the Crimes Act gave the appellant the right

[1] *R v Kelly* [1923] NZLR 234.

to, as I understand it, make submissions on the sentence passed before the coming into force of that amendment Act it could not be done. By that same token in this case numerous of the postings were made here before 21 November 2016.

[7] Mr Olsen's submission is that on that basis this Court has no jurisdiction to consider those postings and that only posts made after that date can be considered. For the plaintiff, Mr Burt submits that the posts have a continuing and/or ongoing effect and even though they may have been originated before the statute came into force they can, nevertheless, be considered after that date.

[8] In my view the law is quite clear, the statute operates as of the date it came into force and refers to postings made subsequent to that date. While there may be some continuing effect on those postings that continuation does not in my view confer jurisdiction on this Court to consider posts made before the date that the statute came into force.

[9] Mr Burt submits that that could mean that some grossly offensive posts could have been made on the day before the statute came in force and there would be nothing that the victim of that post could do in that regard. Certainly at the time a proceeding in defamation could have been taken. I rather gather that the passing of the Act was to make a process of complaint about offensive posts that much easier than bringing a claim in defamation, but for all that the right to take action in respect of such an offensive post existed and could have been availed of.

[10] Consequently, as I see it, I have no option but to strike out the postings that occurred before 21 November 2016, simply because this Court does not have jurisdiction to consider them. This Court does not have an inherent jurisdiction to consider substantive matters. Its only inherent jurisdiction is to regulate its own procedure, but that would not permit this Court to consider the posts that originated before the critical date. That has the effect that posts 1 to 81 must be struck out, if not earlier struck out, under the first ground of the strike out application.

[11] The last ground of the strike out relates to the provisions of s 12 of the Act which provided that before any application may be made to this Court for orders under

the Act the applicant must first refer the concerns to the approved agency which in this country is Netsafe. Section 12(1) of the Act provides that an applicant referred to in s 11(1)(a)(b) and (c) may not apply for an order under s 18 or s 19 in respect of a digital communication unless the approved agency has first received the complaint about the communication and had a reasonable opportunity to assess the complaint and decide what action, if any, to take.

[12] This is a complicated issue. The application in this case first came before Judge Doherty on an ex parte basis. It had been to Netsafe prior to his first consideration of it. He directed that the matter should be referred back to Netsafe and be made on notice to the defendants. That ultimately occurred. Having had the matter referred back to it Netsafe took no action, which was an option open to it, and consequently this proceeding continued.

[13] I am not prepared to strike out the remaining applications on the basis that they should have been referred to Netsafe in the first instance. There is some doubt as to what posts were referred to that agency and I am of the view that the remaining posts of those are the ones that occurred after 21 November 2016, namely posts 82 to 124 may continue to be addressed and are not struck out at this juncture of the proceedings.

G M Harrison
District Court Judge