

# SUPREME COURT OF QUEENSLAND

CITATION: *Weatherup v Krayem* [2018] QCA 247

PARTIES: **JOADY LARISSA WEATHERUP**  
(applicant)  
v  
**RABIEH KRAYEM**  
(respondent)

FILE NO/S: Appeal No 3210 of 2018  
DC No 3178 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane – Unreported: Date of Orders: 19 February 2018, Date of Reasons: 21 February 2018 (Reid DCJ)

DELIVERED ON: 28 September 2018

DELIVERED AT: Brisbane

HEARING DATE: 17 July 2018

JUDGES: Sofronoff P and Gotterson JA and Boddice J

ORDERS: **1. Leave to appeal be granted.**  
**2. The appeal be allowed.**  
**3. The orders made on 19 February 2018 be set aside.**  
**4. The statement of claim be struck out.**  
**5. The respondent have liberty to re-plead within 21 days of these orders.**  
**6. Costs of application and appeal be reserved to the trial judge.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS – where the applicant sought summary judgment against the respondent in the proceedings below – where the respondent, as the plaintiff in those proceedings, brought a claim for defamation against the applicant – where the respondent claimed the applicant was liable for defamatory material published on a website of which she was the “registrant” – where the applicant sought, as respondent in those proceedings, summary judgment, or in the alternative, that the defamation claim be struck out –

where the applicant submitted below that her position as a “registrant” did not of itself constitute a “publisher” for the purposes of the *Defamation Act* 2005 (Qld) – where the primary judge dismissed the application for summary judgment, and the alternative application to strike out the claim

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – where the applicant seeks leave, pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld), to appeal the dismissal of the summary judgment application – where the applicant submits the trial judge erred in fact and in law in: (1) finding the applicant could be considered a “publisher” for the purpose of the Act, and (2) failing to find that the respondent had no real prospect of succeeding in the proceeding – whether the primary judge had so erred – whether the pleadings below were sufficient for the primary judge to conclude the applicant was a “publisher” – whether the respondent had no real prospect of succeeding in the claim, with no need for a trial – whether the primary judge failed to properly consider the applicant’s alternate claim for relief, namely the striking out of the statement of claim

*Defamation Act* 2005 (Qld), s 32

*District Court of Queensland Act* 1967 (Qld), s 118

*Uniform Civil Procedure Rules* 1999 (Qld), r 293(2)

*Bunt v Tilley* [2007] 1 WLR 1243; [2006] EWHC 407 (QB), applied

*Deputy Commissioner of Taxation v Salcedo* [2005]

2 Qd R 232; [\[2005\] QCA 227](#), cited

*Google Inc v Duffy* (2017) 129 SASR 304; [2017]

SASCFC 130, cited

COUNSEL: A J Moon for the applicant  
R J Anderson QC, with R M De Luchi, for the respondent

SOLICITORS: Connolly Suthers for the applicant  
Emanate Legal for the respondent

- [1] **SOFRONOFF P:** I agree with the reasons of Boddice J and the orders his Honour proposes.
- [2] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.
- [3] **BODDICE J:** The applicant is the defendant in proceedings commenced by the respondent in the District Court at Brisbane, claiming damages for defamation.
- [4] In that proceeding, the respondent pleads that the applicant is the registrant of a website on which there have been published, on several occasions, matter defamatory of the respondent. Proceedings seeking similar relief against the applicant’s father, as publisher of the website, have also commenced by the respondent in the District Court at Townsville.

- [5] On 29 September 2017, the applicant sought summary judgment on the respondent's claim against her, or alternatively, that the respondent's statement of claim be struck out.
- [6] On 19 February 2018, the application for summary judgment was dismissed, for reasons published on 21 February 2018. Costs were reserved to the trial judge.
- [7] The applicant seeks leave to appeal the dismissal of the summary judgment application. Leave is sought, pursuant to s 118 of the *District Court of Queensland Act 1967* (Qld), on the basis that a grant of leave will result in a just and expeditious resolution of the proceeding at minimum expense and without undue delay. Further, the appeal raises an important question of general application, namely, whether a person can be a publisher of defamatory material on a website by virtue of being no more than that website's registrant.
- [8] In the event that leave is granted, the proposed grounds of appeal are that the primary judge erred in fact and law in finding that the applicant could be a publisher in such circumstances, and that it was fairly arguable the applicant could be liable for material placed on that website without her knowledge. A further proposed ground is that the primary judge erred in failing to find that the respondent had no real prospect of succeeding in the proceeding.

### **Pleadings**

- [9] The respondent's statement of claim alleged that between 22 October 2016 and 23 July 2017 there had been 15 separate defamatory publications on a blog website, by the name of "Townsville Magpie". The defendant was alleged to have "published or caused to be published" on the website each of those defamatory statements.
- [10] The basis for the allegation that the defendant published or caused to be published each such statement on the website, was pleaded in paragraph 2:
- "The defendant is and was at all material times:
- (a) The registrant of the website with the host name [www.townsvillemagpie.com](http://www.townsvillemagpie.com) (the website);
  - (b) Thereby the publisher of the matters set out herein, each of which was published at the website."
- [11] In her defence, the applicant did not admit that she was the registrant of the website, the basis thereof being that absent an explanation as to what is, or a definition of, a registrant, she was unable to plead to the allegation.
- [12] Further, the applicant denied she was, as a consequence of being the registrant of the website, the publisher of any of the complained of matters, on the basis that she was not at any time, either as a matter of fact or law, the publisher of those matters. The applicant relied on admissions made by her father, in the separate proceedings instituted against him for defamation, that he was the publisher of each of the defamatory statements, in support of the denial that she was the publisher of that material.

### **The application**

- [13] At the hearing of the application, the respondent relied upon an affidavit exhibiting material relevant to the registration of the website. According to the affidavit,

searches revealed the applicant was the registrant of the website and that the applicant had, in response to a request for the defamatory material to be removed from that website, advised that material would be removed. It was not removed from the website. Instead, the name of the registrant changed from the applicant to the applicant's father.

- [14] Exhibits to that affidavit recorded the following relevant information. First, the applicant had her own ABN number. Second, the registration of the website was with a provider whose requirements for registration were that the registrant be a sole trader and that the registrant be closely and substantially connected to the host name in the provider's domain.
- [15] The respondent also relied upon an aspect of the applicant's defence in the proceeding, in which the applicant had pleaded that she "was involved in the publication of the matter in the capacity of an operator of, or a provider of access to, a communication system (that is to say the website), by means of which the matter was transmitted, or made available, by another person over whom the defendant, as operator or provider, had no effective control", as particulars of a defence that if she was found to be the publisher of defamatory material, she relied on the defence of innocent dissemination, either at common law or pursuant to section 32 of the *Defamation Act 2005 (Qld)*.

### **Decision**

- [16] Relevantly, the primary judge held "that the fact of the defendant being the registrant of the domain name, in the circumstances in which she applied for that registration, including, in particular, her attesting to being 'closely and substantially connected' with the website justify my dismissing the claim of the defendant for summary judgment and/or for striking out the claim or statement of claim."
- [17] In reaching this conclusion, the primary judge noted that ultimately the respondent "may wish to plead that by reason of the defendant's being the registrant of and so supervising the site, and more particularly herself posting comments on the site, means she had actual or constructive knowledge of her father's comments." But, as that was not pleaded, it was not an issue to be determined before the primary judge.
- [18] The primary judge found the allegation that the applicant was the registrant, meant the respondent should be found to have sufficient prospects of succeeding with his action for defamation against the applicant to justify ordering that the application of the applicant be dismissed.

### **Applicant's submissions**

- [19] The applicant submits the primary judge erred in fact and in law, in finding that an allegation that the applicant was the registrant of the website, founded sufficient prospects of the respondent succeeding in his claim for defamation against the applicant. There is no such thing as a "registrant" of a website. The term "registrant" relates to a domain name. Any website created subsequent to the establishment of that domain name is separate.
- [20] In any event, that registrant cannot be the publisher of material placed on that website in the absence of an allegation that the registrant in some way had knowledge of, gave consent or authority to, or otherwise approved, adopted, consented,

promoted or ratified the publication of that defamatory material on the website. Publication could not be established by a mere assertion that the applicant was the registrant of the website.

- [21] Finally, the applicant submits that the primary judge erred in having regard to the contents of the affidavit material relied upon by the respondent upon the application. The summary judgment application was properly to be determined on the respondent's pleaded case.

### **Respondent's submissions**

- [22] The respondent submits that leave to appeal ought not to be granted as the primary judge did not err in dismissing the application for summary judgment. The issue for the primary judge was whether the respondent had no reasonable prospect of success and whether there was a need for a trial. The primary judge properly identified relevant evidence as set out in the affidavit, as supporting a conclusion that it was arguable the registrant may be a publisher of the defamatory statements and there was a need for a trial on that issue.
- [23] Further, it was unnecessary for the respondent to allege in the pleading consent, authority or ratification by the applicant. Those matters are unnecessary to prove publication, the respondent's cause of action is based on the applicant being a publisher. Her position as registrant meant she had the ability to keep the website operating or to close it down.

### **Discussion**

- [24] The primary judge correctly identified, insofar as the application for summary judgment was concerned, that the issue for determination was whether the respondent had no real prospect of succeeding in the claim and there was no need for a trial.<sup>1</sup> Further, the primary judge correctly identified that a determination of that issue required a consideration whether the respondent had established some real prospects of succeeding at trial.<sup>2</sup>
- [25] The imposition of legal responsibility for publication of the defamatory matter required the establishment of an involvement by the applicant in the publication. Whilst an internet provider who performed no more than a passive role in facilitating postings on the internet had been found not to be a publisher at common law,<sup>3</sup> a distinction is to be drawn between a person who manages and maintains a website on which others post content and a mere passive host of internet services and internet service engines. The former may be attributed with notice, or treated as a primary publisher of defamatory comments the person has knowingly or recklessly encouraged or allowed. However, the latter generally has the inability to exercise any form of editorial control over publications on that site.<sup>4</sup>
- [26] The primary judge found that the applicant's involvement as registrant of the website meant the alleged defamatory material had at least been arguably published by her. This conclusion was based on a finding that the applicant had sufficiently participated in the publication by registering the domain name and making the

---

<sup>1</sup> *Uniform Civil Procedure Rules*, r 293(2).

<sup>2</sup> *Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227 at [17].

<sup>3</sup> *Bunt v Tilley* [2006] EWHC 407 at [36].

<sup>4</sup> See generally *Google v Duffy* [2017] SASFC 130 at [146].

website available to users of it, in circumstances where, in making application for registration, the applicant attested to being “closely and substantially connected” with the website.

- [27] In reaching this conclusion, the primary judge expressly acknowledged there was presently no pleading of actual or constructive knowledge of the contents of the website on the part of the applicant. However, this did not render the claim as having no reasonable prospect of success. The affidavit material gave rise to inferences which might support a finding of involvement in the publication, sufficient to found the applicant’s liability. These inferences prevented a conclusion that there was no need for a trial of the proceeding. On that basis, the application for summary judgment was properly dismissed.
- [28] Whilst reliance on that material supported the primary judge’s conclusion that it was arguable on the available evidence that the applicant could be liable as a publisher of the allegedly defamatory statements, that reliance also highlighted a glaring insufficiency in the respondent’s pleaded case. The primary judge failed to properly consider the applicant’s alternate claim for relief, namely a striking out of the statement of claim.
- [29] A determination of the alternate relief sought by the applicant, required a consideration of whether the statement of claim pleaded sufficient facts to found a cause of action reasonably open on those facts. A consideration of the statement of claim supported a conclusion that it did not plead sufficient facts to found a reasonable cause of action.
- [30] The pleaded basis for the applicant’s liability as a publisher amounted to no more than a bald assertion of liability with no supporting factual basis. The additional facts set out in the affidavit material highlighted the deficiencies in the pleaded factual basis. The statement of claim ought properly to have been struck out, with leave to replead.
- [31] In failing to properly consider the applicant’s alternate claim for relief, the primary judge erred in law. That error warrants a grant of leave to appeal. It is in the interests of justice for the respondent’s claim to only proceed on the basis of pleadings sufficient to found the claimed cause of action.

## **Orders**

- [32] I would order:
1. Leave to appeal be granted.
  2. The appeal be allowed.
  3. The orders made on 19 February 2018 be set aside.
  4. The statement of claim be struck out.
  5. The respondent have liberty to re-plead within 21 days of these orders.
  6. Costs of application and appeal be reserved to the trial judge.