SUPREME COURT OF QUEENSLAND

CITATION:	*Walker v Veda Advantage Information Services & Anor* [2011] QSC 316
PARTIES:	**John Edmond WALKER** **(Plaintiff)** **and** **VEDA ADVANTAGE INFORMATION SERVICES AND SOLUTIONS LTD (ACN 000 602 862)** **(First Defendant)** **and** **DEBT PURCHASE AUSTRALIA (ACN 077 935 329)** **(Second Defendant)**
FILE NO/S:	TS601 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Townsville
DELIVERED ON:	28 October 2011
DELIVERED AT:	Townsville
HEARING DATE:	1 August 2011
JUDGE:	North J
ORDER:	**1. That the application filed by the plaintiff on 3 March 2011 be dismissed.** **2. That the amended claim and amended statement of claim filed 23 March 2011 and the further amended claim and further amended statement of claim filed 31 March 2011 be struck out.** **3. That the applicant(plaintiff) pay the respondent's (first defendant's) costs of the application to be assessed.** **4. That the application filed by the first defendant on 5 May 2011 be allowed.** **5. That there be judgment for the first defendant against the plaintiff in the claim.** **6. That the plaintiff pay the first defendant's costs of and incidental to both the application and the claim to be**

assessed.

7. **That the application filed by the plaintiff on 29 April 2011 be dismissed.**

8. **That the applicant (plaintiff) pay the second defendant's costs of and incidental to the application to be assessed.**

9. **That all parties have liberty to apply in writing and make submissions for different costs order or a variation of any order as to costs.**

10. **Direct that any written submission for an order concerning costs be served on any other party and delivered to the Registry within 14 days.**

CATCHWORDS: NEGLIGENCE - DUTY OF CARE - where plaintiff an applicant for credit - where defendant a credit reporting agency - whether duty of care owed - whether duty of care owed concerning defamatory publication - coherence of the law

DEFAMATION - QUALIFIED PRIVILEGE - MALICE

PRACTICE - PROCEDURE - SUMMARY JUDGMENT - PLEADING - PARTICULARS

Privacy Act 1988 (Cwth), section 11A, section 11B, section 18J.

Defamation Act 2005 (NSW), section 30, section 37

Defamation Act 2005 (Qld), section 30, section 37

UCPR, rule 293

Headley Byrne v Heller [1964] AC 465

Lange v Australian Broadcasting Company (1997) 189 CLR 250

*General Steel Industries Inc v Commissioner for Rail*ways (NSW) (1964) 112 CLR 125

Sattin v National News Pty Ltd (1996) 39 NSWLR 32

Gould v TCN Channel 9 & Ors [2000] NSWSC 707

Sullivan v Moody (2001) 207 CLR 562

Cornwall & Ors v Rowan (2004) 90 SASR 269

Dale v Veda Advantage Information Services & Solutions Ltd [2009] FCA 305 (1 April 2009)

Spencer v The Commonwealth (2010) 241 CLR 118

Fancourt v Mercantile Credits Ltd (1980-1982) 154 CLR 87

Theseus Exploration NL v Foyster (1972) 126 CLR 507

Dow Jones & Company Inc v Gutnick (2002) 201 CLR 573

Adam v Ward [1917] AC 309

Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366

Roberts v Bass (2002) 212 CLR1

COUNSEL: Mr Walker appeared on his own behalf

M.S. White for the first defendant

R.N. Sheehy (solicitor) for the second defendant

SOLICITORS: Roberts Nehmer McKee Lawyers for the first defendant

Wilson/Ryan/Grose Lawyers for the second defendant

[1] These applications were heard before me on 1 August 2011 in a civil sittings consequent upon orders made by Cullinane J at an applications day on 9 May 2011.[1] Respectively they were:

(a) an application by Mr Walker, the plaintiff, to amend the claim (and consequently the statement of claim) to add a cause of action[2];

(b) an application by the first defendant under UCPR 293 for summary judgment[3]; and

(c) an application by Mr Walker for particulars of the amended defence of the second defendant.[4]

[2] It is convenient to deal with the applications in that order[5] but first it is necessary to make some introductory observations.

Introduction

[3] Mr Walker, the plaintiff, acts for himself in this proceeding.[6] He sues Veda Advantage Information Services and Solutions Ltd ("the first defendant") and Debt Purchase Australia ("the second defendant") and claims damages for defamation subject to his application to add a cause of action in negligence. In his current amended statement of claim he claims $250,000 "non economic loss" and "future economic loss" of $1,980,000 for "loss of income from machinery hire."[7] For

[1] Transcript 1-4 line 25-48 on 17 June 2011, Mr Walker appeared before Cullinane J in applications and sought to agitate at least one application but his Honour confirmed his order of 9 May that all applications then on foot be heard on 1 August. See further transcript 1-13 line 42 to 1-14 line 21.

[2] Filed 3 March 2011 (document 93 court file).

[3] Filed 5 May 2011 (document 104 court file).

[4] Filed 29 April 2011 (document 99 court file).

[5] Which is the order in which I heard argument, transcript 1-29 line 1-10; transcript 1-36 line 20-40.

[6] Consequently he is at a comparative disadvantage when opposed by experienced professionals. But he was able to coherently represent himself and, as is apparent from the pleadings and the various manoeuvrings he is not without some insight into the law.

[7] Amended statement of claim filed 19 May 2010 (document 48 court file).

present purposes[8] it is sufficient to say that Mr Walker alleges he was defamed by the actions of the defendants when the first defendant ("a credit reporting agency") recorded and published information about him provided by the second defendant. Mr Walker alleges the information was false and untrue, that it was defamatory of him and that its publication caused him loss and damage.

[4] This proceeding was commenced in 2009 and it appears from the court file there have been a number of interlocutory applications and pleadings have been amended by all parties but the matters have not progressed substantially beyond the pleadings as is evident from the applications I must deal with.

Application to add a cause of action in negligence

[5] The following documents were read before me upon this application:

1. Application filed 3 March 2011[9]

2. Affidavit JE Walker filed March 2011[10]

3. Amended claim and statement of claim filed 23 March 2011[11]

4. Further amended claim and statement of claim filed 31 March 2011[12]

[6] Technically the application by Mr Walker was for leave to further amend the statement of claim filed on 19 May 2010[13], the amended proceedings listed third and fourth above somehow came on to the court file but not as a consequence of an order granting leave. In substance the application which was argued before me was whether Mr Walker should have leave to amend the claim and statement of claim in terms of the documents filed on 31 March 2011, those filed on 23 March being an early and incomplete version.[14]

[7] The paragraphs of the further amended statement of claim that directly raise a claim in negligence against the first defendant are from 37 to 44:

> "**Defendants Duty of Care to Plaintiff**
>
> 37. In reliance on the facts set out at paragraphs 8, 9, 10 and 11 herein, the First Defendant owed a duty of care to the Plaintiff:
>
> (a) to carry out its duties and responsibilities with due care, skill and diligence;
>
> (b) to make adequate inquiry as to those facts, or to inquire about information complained of by the Plaintiff; and

[8] More detailed references will be made to this pleading later when ia ddress the first defendant's application for summary judgment.
[9] Document 93 court file.
[10] Document 94 court file.
[11] Document 97 court file.
[12] Document 98 court file.
[13] Document 48 court file.
[14] See transcript 1-26 line 2 to 1-28 line 30 and 1-29 line 41 to 1-30 line 55.

(c) to exercise proper care and implementing of appropriate procedures for such information which was the subject of complaint by the Plaintiff.

PARTICULARS

(d) The duty of care owed to the Plaintiff by the First Defendant arose from and on the day that the Plaintiff advised the First Defendant that the 'application' and 'default' listings were false;

(e) The First Defendant acknowledged that the Plaintiff had made a complaint by adding to the CIF that 'the entries are disputed from 10th May 2006;' and

(f) pursuant to provisions of the 'Privacy Act' and the 'Code of Conduct' the First Defendant was required to make inquiries to the information provider (the subscriber) to correct mistakes, remove false information and report the matter to the Privacy Commissioner.

Vulnerability of the Plaintiff

38. In reliance on facts set out at paragraphs 4, 5, 6 & 7 herein, the First Defendant was in control of information which:

(a) would or could be requested by Credit Providers in the course of their daily business when assessing a credit application made by the Plaintiff to them;

(b) would determine the success of such an application because credit providers are dependant almost entirely on such information, contained on the First Defendant's database; and

PARTICULARS

(c) since May of 2006 the Plaintiff relied on the First Defendant's professionalism for reasons as set out in paragraph 37 (a), (b) and (c) herein;

(d) further and in the alternative, the Plaintiff relied on the First Defendant to rectify any unlawful and false entries on his CIF in a way as particularised at paragraph 37(f) herein; or

(e) further and in the alternative, the First Defendant has the largest database of its kind in Australia which has created an 'information monopoly' removing freedom of choice from credit providers or depriving credit providers of a balanced or informed decision making process.

Reasonable foreseeability of economic loss

39. The First Defendant's actions or decisions as set out in paragraphs 9 and 10 herein were its actions or decisions alone and not that of others and were negligent acts on the part of the First Defendant.

40. The First Defendant knew, or ought have known that, as the largest and most accessed data base of its kind in Australia its content would be relied on by credit providers for information and that such information should be accurate and not misleading.

41. The proximate cause in providing information from its data base to subscribers should have been reasonably foreseeable by the First Defendant,

    (a) that if it provided information to a credit provider which was supplied by the Second Defendant, not being a Credit Provider pursuant to the Privacy Act and such information was not accurate or was false, the information would be injurious to the Plaintiff and likely to cause economic loss; or

    (b) further and in the alternative, if the Second Defendant was an authorised subscriber, the foreseeability of economic harm arose from a failure of the First Defendant to take certain steps by way of training or warning or monitoring subscribers with a view to ensuring that they enter or only accurate date into its database; and

    (c) the foreseeability of economic harm arose from a failure of the First Defendant, once informed by the Plaintiff of false entries on his CIF, to respond in a way as set out and particularised at paragraph 37(f) herein.

    (d) Because of the First Defendant's negligent act the Plaintiff was/is unable to secure finance.

Assumption of responsibility coupled with known reliance

42. The First Defendant, as editor of its data base did not assumed any responsibility to the Plaintiff from May 2006 to June 2009, the time at which access of the database was made by enquiring credit providers.

PARTICULARS

    (a) In reliance on matters set out in paragraph 9 the First Defendant acquired knowledge of the application listing, and of the listing of the default and clear out from May 2006, continuing to the period of the Plaintiff making applications for credit;

(b) the First Defendant acquired knowledge that the Plaintiff advised it that such information was false;

(c) The First Defendant's acquired knowledge was such that when the database was accessed by the first enquiring credit provider by an ORA, such acquired knowledge extended to the accessing of the Plaintiff's CIF and it was therefore not 'blind or passive' in its role of providing information or access to its data base.

The terms of any relevant contract bearing on the duty of care

43. The First Defendant is in a contractual relationship with each subscriber. The contractual relationship between the First Defendant and subscribers must be founded within the limits of the Privacy Act 1988.

PARTICULARS

(a) The First Defendant operates a credit reporting business which is regulated by the Privacy Act 1988;

(b) The First Defendant's business involves entering into contracts with subscribers for provision to them of the services provided by the First Defendant, pursuant to which the subscribers are obligated to report credit defaults to the First Defendant by posting such reports on the First Defendant's database for the benefit of other subscribers;

(c) The Privacy Act places restrictions on who or the type or function of an entity who may be a Credit Provider and identifies 'unauthorised access' as access to a CIF by a person or entity who is not a Credit Provider which is an offence against the Act;

(d) the Privacy Act places restrictions on the type of credit information which subscribers are permitted to post onto the database and imposes certain editorial obligations on both the First Defendant and the subscribers to take steps to ensure the credit information on the credit file is accurate;

(e) the First Defendant ordinarily had no contractual or other pre-existing relations with the Plaintiff or his credit files on the database, and had no knowledge of information contained therein until the Plaintiff informed the First Defendant that false and unlawful information was placed on his CIF;

(f) Section 18R(1) imposes an absolute editorial obligation on the First Defendant not to make available to its enquiring subscribers information contained in its database that is 'false or misleading';

(g) the First Defendant as editor, once informed by the Plaintiff of false entries on his CIF, was required to respond in a way as set out and particularised at paragraph 37(f) herein, and pursuant to the relevant terms of its contract with its subscribers; and

(h) because of the First Defendant's negligence in not enforcing its contractual responsibilities and negligent failure to edit its data base the Plaintiff was/is unable to secure finance."

[8] Following paragraph 44, the further amended statement of claim claims $1,995,000 "economic loss" and some particulars of its calculation is set out. There follows a claim for interest and thereafter there is a new paragraph 45 which claims "aggravated" or "exemplary damages." These damages are said to arise, in part, because of the conduct complained on in paragraphs 37 to 44.[15]

[9] At a first reading the pleas set up in paragraphs 37 to 44 has the appearance of a plea claiming economic loss consequent upon the negligent mis-statement (or mis-statements) akin to that recognised in *Headley Byrne v Heller* [16] of which it is trite to observe has and continues to provoke judicial and academic comment.[17] Mr Walker may be self-acting but he is not without some legal insight, the paragraphs are replete with familiar phrases or terms: "duty of care"[18], "vulnerability"[19], "reasonable forseeability"[20], "proximate cause"[21] and "assumption of responsibility coupled with known reliance"[22].

[10] But there is more to this pleading. It expressly relies upon the allegations in paragraphs 4, 5, 6 and 7[23] and 8, 9, 10 and 11[24] of the further amended statement of claim which set up the allegations concerning the "false and untrue information" provided by the second defendant to the first defendant[25] which "would or could be required by credit providers…when assessing a credit application made by [Mr Walker]"[26]. In my judgment at the heart of this pleading asserting a cause of action and negligence it is a complaint that the reputation of the plaintiff was damaged by the first defendant. In other words, the plaintiff is claiming damages in negligence for the economic harm suffered by him as a consequence of conduct injurious to his reputation.[27] Just how the loss of $1,995,000 asserted in paragraph 44 was caused by the plaintiff being unable to secure finance as asserted in paragraph 43(h) is not entirely clear but it is clear it is asserted to flow from reputational damage suffered.

---

[15] See paragraph 45(a) of the document filed on 31 March 2011. I infer that the plaintiff has made this claim and depending upon his cause of action and negligence because he apprehends difficulty in recovering these damages in defamation because of s 37 of the *Defamation Act* 2005.
[16] [1964] AC 465.
[17] Sappindeen & Vines, "Fleming's: The Law of Torts", Thomson Reuters, 2011 at [8.250].
[18] Paragraph 37.
[19] Sub heading introducing paragraph 38.
[20] Sub heading introducing paragraph 39.
[21] Paragraph 41.
[22] Sub heading introducing paragraph 42.
[23] Paragraph 38.
[24] Paragraph 37.
[25] Paragraph 4.
[26] Paragraph 38.
[27] Consider paragraph 40 with paragraph 43(h) and paragraph 44.

[11] In the circumstances of the application to amend and the first defendant's resistance to a grant of leave based upon the submission that the cause of action was not maintainable in law, I assumed the correctness of every allegation of fact made by Mr Walker in the further amended statement of claim.[28]

[12] It follows therefore that in my discussion that follows I have assumed that the conduct alleged by Mr Walker in the further amended statement of claim occurred.

[13] In *Lange v Australian Broadcasting Company*[29] the High Court observed:[30]

> "A person who is defamed must find a legal remedy against those responsible for publishing defamatory matter either in the common law or in a statute which confers a right of action."

[14] The claim sought to be introduced by Mr Walker under the guise of a cause of action in negligence is one for damages recoverable at common law in defamation subject to the defences that tort provides.

[15] Counsel for the first defendant referred me to the judgment of Levine J in *Sattin v National News Pty Ltd*[31] as authority for the proposition that, so far as the damages sought to be recovered for reputational harm, (and consequential loss) a cause of action did not exist in negligence.[32] That judgment was followed by Kirby J in *Gould v TCN Channel 9 & Ors*[33]. The decision of Levine J in *Sattin* might have been regarded as controversial at the time[34] but subsequent case law in this country has vindicated his Honour. In *Sullivan v Moody*[35], the High Court decisively confirmed that the "Caparo Test" did not represent the law in Australia.[36] One consequence of that, for present purposes is the authority of the reasoning of the House of Lords in *Spring v Guardian Assurance PLC* can be doubted. More to the point, in the reasons for judgment in *Sullivan v Moody* the High Court indicated that the law in this country should not develop to allow the tort of negligence to operate where the tort of defamation applied, that is in respect of representational harm suffered by one as a consequence of a publication by another to others[37]:

> "[54] The present cases can be seen as focussing as much upon the communication of information by the respondents to the appellants and to third parties as upon the competence with which examinations or other procedures were conducted. The core of the complaint by each appellant is that he was injured as a result of what he, and others, were told. **At once then, it can be seen that there is an intersection with the law of**

---

[28] See generally the test proposed in General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 129-30. This was made clear to Mr Walker, who was disposed to defend the pleading on the ground that the facts asserted were true. See transcript 1-38 line 1 to 1-41 line 40.
[29] (1997) 189 CLR 250.
[30] 189 CLR at 562, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ.
[31] (1996) 39 NSWLR 32.
[32] See the reasons of Levine J at 39 NSWLR at page 43-45.
[33] [2000] NSWSC 707 at [23]-[27].
[34] His Honour distinguished and doubted *Spring v Guardian Assurance PLC* [1995] 2 AC 296 which in turn applied the "Caparro Test." (See Caparro Industries PLC v Dickman [1990] 2AC 605) preferring instead the reasoning of New Zealand Courts.
[35] (2001) 207 CLR 562.
[36] See *Sullivan v Moody* 207 CLR at [49].
[37] See *Sullivan v Moody* 207 CLR at [54].

> **defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis. It would allow recovery of damages for publishing statements to the discredit of a person where the law of defamation would not.**"
>
> (emphasis added and citations omitted)

[16] It might be observed however that in the passage quoted above the High Court cited the judgment of the House of Lords in *Spring v Guardian Assurance PLC* when making the comment that were the tort of negligence to apply the law would resolve the claim on an altogether different basis than had hitherto applied.

[17] In the South Australian case of *Cornwall & Ors v Rowan*[38] the Full Court said[39]:

> "It seems to us that the High Court in *Sullivan v Moody* said that the Courts should proceed carefully before finding that a duty of care exists in a case where there is an intersection with the law of defamation. In this case the qualified privilege that arises in the case of inquiries and reports of the kind in question here is well known, and we do not think we should impose a duty of care which allows recovery of damages for publishing statements to the discredit of a person where the law of defamation would not.
>
> We recognize that a different view was taken by Harper J in *Wade v Victoria*, but that was before *Sullivan v Moody*. A different view has also been taken, but not without dissent, in the *United Kingdom Spring v Guardian Assurance PLC*. Nevertheless we prefer the reasoning of the Supreme Court of New Zealand in *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 and *Balfour v Attorney General* [1991] 1 NZLR 519. That approach has also been taken by Levine J in *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32. The approach taken by those cases is consistent with what the High Court said in *Sullivan v Moody*."

[18] The common law has a well-established remedy for recovery of damages for reputational harm in the tort of defamation. To permit the possibility of parallel recovery in a cause of action in negligence would be to introduce an incoherence into the law. Different principles of law would apply to each cause of action and to the defences available. The potential for this incoherence is manifest when it is appreciated that were the law to take such a step it would be possible for the law to hold simultaneously that an alleged tort feasor was acting lawfully and acting unlawfully. It is for this reason that I am persuaded, following the judgments in the High Court and the other Courts in this country that the contention by the first defendant should be upheld[40].

---

[38] (2004) 90 SASR 269.
[39] 90 SASR at 427.
[40] These considerations lead Lindgren J to conclude in *Dale v Veda Advantage Information Services & Solutions Ltd* [2009] FCA 305 (1 April 2009), that a duty of care was not owed to applicants for credit. See [2009] FCA 305 at [373] - [418] particularly at [406] - [417].

[19] In the result I hold that the amendments sought to be made by the further amended claim and further amended statement of claim filed on 31 March 2011 (and for that matter the amended claim and amended statement of claim filed on 23 March 2011) should be struck out as they seek to introduce a cause of action contrary to law and the orders I would make are:

1. The application filed 3 March 2011 be dismissed.

2. The amended claim and amended statement of claim filed 23 March 2011 and the further amended claim and further amended statement of claim filed 31 March 2011 be struck out.

3. The applicant (plaintiff) pay the respondent's (first defendant) costs of the application to be assessed.

Application by first defendant for summary judgment

[20] The following documents were read before me on this application:

Item 1 Application filed 5 May 2011[41]

Item 2 Affidavit R A Barbour filed 6 May 2011[42]

Item 3 Affidavit P S Askin filed 22 November 2010[43]

Item 4 Amended statement of claim filed 19 May 2010[44]

Item 5 Amended defence of first defendant filed 29 July 2011

Additionally the first defendant tendered particulars of the amended statement of claim[45] and relied upon a written outline of argument.

[21] The plaintiff pleads that in 2004, he had fallen into arrears on a credit account provided to him by Australian Guarantee Corporation (AGC).[46] He pleads that the second defendant, to whom the debt had been assigned in about April 2004, lodged two reports onto a data base conducted by the first defendant on or about 16 August 2004 which he alleges were false or inaccurate.[47] The plaintiff alleges that on 3 June 2009 and 6 June 2009, after he had applied for credit to City Bank and Flexi Rent Capital respectively, those credit providers accessed the first defendant's data base and because of information on the first defendant's data base that had been entered by the second defendant, those credit providers declined to accept his application for credit.[48]

---

[41] Document 104 Court file.
[42] Document 105 Court file.
[43] Document 74 Court file.
[44] Document 48 Court file.
[45] See exhibit 1 on the application, being particulars dated 3 January 2011 to a request made by the first defendant on 24 March 2010 (see further transcript 1-6 line 15-38).
[46] Amended statement of claim paragraph 5A(a).
[47] See paragraphs 4, 5 and 5A of the amended statement of claim.
[48] See paragraph 7, 8, 9, 10, 11 and 12 of the amended statement of claim.

[22] The plaintiff alleges that the words or information provided by the second defendant were defamatory of him with the result that the publication of that information by the first defendant to the credit providers in June 2009 was defamatory and caused him loss and damage.[49]

[23] On the hearing of the application Mr Walker did not tender any evidence either in support of his claim or to rebutt the evidence relied upon by the first defendant. He did not challenge the first defendant's evidence by contrary evidence or by cross-examination of any deponent.[50] The first defendant's submission in essence was that even assuming that Mr Walker could make out a claim for the publication by the first defendant of defamatory statements that caused him harm, the first defendant had a complete defence by reason of qualified privilege arising under sections 30 of the *Defamation Act 2005 (Qld)* and the *Defamation Act 2005 (NSW)*[51] and that accordingly, Mr Walker's claim in defamation against it must fail.[52] In support of this argument, the first defendant relied substantially upon the evidence contained in the affidavit of R A Barbour[53] and to the judgment of Lindgren J in the Federal Court in *Dale v Veda Advantage Information Services & Solutions Ltd*[54]. In essence it submitted that the business of the first defendant as a credit reporting agency entitled it to a defence of qualified privilege in the event that information (which in the first place had been provided to it by another credit provider) conveyed by it to credit providers who might access its data base to check on the creditworthiness of persons or companies that might apply for credit, was defamatory.

[24] It might be observed that this juncture that there are formidable objections to determining a defence of qualified privilege summarily. Usually the issues raised in the litigation involves disputed facts and substantial questions of law which require determination only after a trial where the evidence is considered and the questions of law are ventilated and considered in the light of the evidence.[55] To this objection the first defendant submitted that the judgment of Lindgren J in *Dale v Veda Advantage Information Services & Solutions Ltd* decisively determined the status of the first defendant under the law and consequently the questions of law concerning the availability to the first defendant of a defence of qualified privilege in the circumstances that apply to Mr Walker's claim. It submitted that the business of the first defendant that was subjected to detailed examination by Lindgren J was the identical business conducted by the first defendant in this case, with the

---

[49] See paragraph 13, 16 and 17 of the amended statement of claim.

[50] He was given an opportunity to not only make submissions in response to the argument advanced by the first defendant for summary judgment but also to place before me evidence (or evidence indicating the possible or likely existence of evidence) which would indicate that there were tribal issues concerning the basis for the first defendant's claim that it had not only a defence to the plaintiff's claim but that in the circumstances that applied it was entitled to summary judgment. See transcript 1-54 line 48 - transcript 1-60 line 17.

[51] Hereafter "the Qld Act" and "the NSW Act" respectively.

[52] See the plea of qualified privilege in the amended defence of the first defendant filed 29 July 2011 at paragraph 14.

[53] Filed 6 May 2011 (document 105).

[54] [2009] FCA 305 (1 April 2009).

[55] See particularly the recent discussion of the tests and approach to be adopted by Courts when an application for summary judgment is made in *Spencer v The Commonwealth* (2010) 241 CLR 118, in the reasons for judgment of French CJ & Gummow J at [24], page 131-2 and in the joint reasons of Hayne, Crennan, Kiefel and Bell JJ at [53] page 139. See further *Fancourt v Mercantile Credits Ltd* (1980-1982) 154 CLR 87 and *Theseus Exploration NL v Foyster* (1972) 126 CLR 507.

consequence that the substantial questions of fact and law dealing with the availability of a defence of qualified privilege had been determined. I will come back to this submission after addressing some of the legal issues that arise.

[25] The place of publication is the place where the imputations are conveyed to the reader or listener.[56] It is evident from particulars provided by the plaintiff that the two credit applications were made in Queensland, but the available evidence suggests that the receipt of information may have occurred in either Queensland or New South Wales. The publications are pleaded to have occurred in 2009 with the consequence that either the *Qld Act* or the *NSW Act* may apply.[57]

[26] Before considering the evidence in detail, it is convenient to say something of the defence of qualified privilege in the circumstances of communications by one to another where they have a common interest (whether legal, social or moral) to share information and for one to make a communication and the other to receive it. In *Adam v Ward*[58] Lord Atkinson said:

> "… it was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion when the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

[27] To like effect in *Bashford v Information Australia (Newsletters) Pty Ltd*[59] Gleeson CJ, Hayne and Heydon JJ said:

> "An occasional qualified privilege?
>
> [9] The principles to be applied in determining whether the occasion of publication of matter about which complaint is made was an occasion of qualified privilege are well known. The authorities that state those principles are equally well known. Frequent reference is made to the statement of Parke B in *Toogood v Spyring*:
>
> > 'In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency,

---

[56] *Dow Jones & Company Inc v Gutnick* (2002) 201 CLR 573 at [26] and [44].
[57] Nothing turns on that. Both Acts are materially identical, they commenced on 1 January 2006 and apply to all publications made after that date (Sch 4, section 2(1)) of the *NSW Act*; section 49(1) of the *Qld Act*.
[58] [1917] AC 309 at 334.
[59] (2004) 218 CLR 366, 372 at [9]-[10].

> and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.'
>
> Reciprocity of duty or interest is essential.
>
> [10] These principles are stated at a very high level of abstraction and generality. 'The difficulty lies in applying the law to the circumstances of the particular case under consideration.' Concepts which are expressed as 'public or private duty, whether legal or moral' and 'the common convenience and welfare of society' are evidently difficult of application. ?? of this recognise, as it must be, that 'the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact', it is clear that in order to apply the principles, a Court must 'make a close scrutiny of the circumstances of a case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication'."
>
> (Citations omitted)

[28] The first defendant pleaded the defence of qualified privilege under both section 30 of the *Qld Act* and section 30 of the *NSW Act* at paragraph 14 of the amended defence. The terms of these sections are identical. The cases referred to, though not dealing with the sections specifically, nevertheless give guidance to the interpretation and application of the section. The principles as discussed are not inconsistent with the sections.

[29] In *Dale v Veda Information Services & Solutions Ltd* Lindgren J heard claims brought by nine plaintiffs against the first defendant who claimed they had been defamed by the publication of default reports that had been placed on their credit file by credit providers who subscribed to the first defendant's service. Applying the principles mentioned above, his Honour found that the credit providers using the first defendant's service had a legitimate interest in receiving particulars of listed defaults as relevant to their assessment of the creditworthiness of applicants for credit, that the first defendant had a social, moral and legal duty to pass on this information to credit providers, that it was in the interest of would-be borrowers, credit providers and society at large that the first defendant's service allowed applications for credit to be determined in an informed, speedy and efficient manner and that it was for the convenience and welfare of society that particulars of defaults were supplied by the first defendant to credit providers.[60] I have read and considered his Honour's reasons for judgment they are, in his Honour's customary way careful, extensive and learned. I agree with his Honour's analysis of the law and of its application to the facts that were before him.[61]

---

[60] His Honour's judgment is lengthy, the relevant consideration of this aspect of the matters before him can be found at [2009] FCA 305 at [278] to [328], the relevant findings or conclusions summarised above can be found at [286].

[61] I have not found any authority suggesting that his Honour's analysis of the law and conclusions of the law is to be doubted and no submission to that effect was made by Mr Walker.

[30] His Honour's judgment was delivered in April 2009. It concerned the business of the first defendant and the actions of the first defendant which occurred some years prior to the publications about which Mr Walker complains. His Honour's findings of fact neither bind me nor as a matter of law determine these issues, and it is necessary for me to consider whether the evidence material to those publications raises issues that should be tried or suggests that a different conclusion might be reached concerning the question of qualified privilege.

[31] The evidence concerning the business of the first defendant at the times relevant to the publications Mr Walker complains of and concerning the relationship between the first defendant and the second defendant is found in the affidavit of R A Barbour. Her affidavit demonstrates that in 2009 the first defendant's business did not differ from the business as it operated in the period when the publications considered by Lindgren J in *Dale v Veda Advantage Information Services & Solutions Ltd* occurred. Her affidavit exhibits the first defendant's standard terms and conditions applying in 2009 and a copy of the subscription agreement between the first defendant and the second defendant which is in substantially identical terms to those considered by Lindgren J as do the memorandum and articles of association of the first defendant's predecessor.[62]

[32] The evidence from Ms Barbour's affidavit establishes that, accepting for the purposes of the application there was a publication in 2009 by the first defendant to the credit providers as alleged by Mr Walker in his statement of claim, it was to employees of those companies which were subscribers to the first defendant's service. Those employees, it can be safely inferred, would have accessed the file concerning Mr Walker for the purposes of assessing an application made by him for credit, as is consistent with his case. Moreover, each time a subscriber posted information to the first defendant's data base it was doing so pursuant to its contractual entitlement as, each time the first defendant supplied information or permitted a subscriber to access its data base, it was doing so pursuant to a contractual obligation with subscribers. In the upshot, subject to the matters I mentioned below, the evidence establishes that the publications which Mr Walker complains about occurred upon an occasion of qualified privilege.

[33] The issues agitated by Mr Walker concern the businesses of both the first defendant and the second defendant, whether they were respectively a credit purporting agency or a credit provider within the *Privacy Act 1988 (Cwth)* and assuming that first issue, whether the conduct of the first defendant in its continuing to post the second defendant's notification concerning Mr Walker breached that Act. Concerning the first issue, there was no dispute between Mr Walker and the first defendant that the first defendant was a credit reporting agency within the meaning of that term as provided in section 11A.[63] In paragraph 3 of the amended defence, Mr Walker alleged that the second defendant was "not a credit provider" within section 11B of the said Act. The first defendant denied that allegation[64] alleging that the second defendant was an assignee of a debt with the consequence that it was a credit provider and in turn pointed to a determination by the Privacy

[62] See generally paragraphs 3 to 9 of the affidavit of R A Barbour, with particular reference to "RAB-1" and "RAB-3" and to the terms of the documents considered by Lindgren J at [284] and [310]-[311]of his Honour's reasons.
[63] See paragraph 2 of the amended statement of claim and paragraph 2 of the defence of the first defendant.
[64] See paragraph 3 of the amended defence of the first defendant.

Commissioner and also to the subscription agreement between the first defendant and the second defendant. It was not in issue (in fact Mr Walker alleged the fact) that the second defendant had taken an assignment of the debt owing by Mr Walker to AGC in or about April 2004.[65] Section 11B of the Privacy Act has the effect of including within the class of credit providers corporations determined by the Privacy Commissioner to be credit providers for the purposes of the Act.[66] Exhibited to the affidavit of R A Barbour (exhibit RAB-5) are copies of two determinations by the Federal Privacy Commissioner which materially provide:

> "1. A corporation which requires the rights of a credit provider with respect to the repayment of the loan (whether by assignment, subrogation or other means) shall, in relation to that loan, be regarded as a credit provider for the purposes of the *Privacy Act*.
>
> 2. A corporation deemed to be a credit provider by virtue of paragraph 1, above, shall, for the purposes of the *Privacy Act*, be regarded as the credit provider to whom the loan application was submitted, or who provided the loan."[67]

The consequence of the second defendant being an assignee of a debt is that the second defendant was at material times a credit provider within the meaning of that Act.

[34] Therefore the combination of the admitted facts and the evidence (uncontradicted by any other evidence) satisfies me that the first defendant and the second defendant were relevantly at material times a credit reporting agency and a credit provider as submitted by the first defendant.

[35] Section 18J[68] obliges a credit purporting agency and a credit provider to take reasonable steps to make appropriate corrections, deletions and additions to ensure that personal information is accurate and not misleading. The evidence from Ms Barbour's affidavit is that the first defendant had, at the time of the publications, a "Default Information Guide" that was available to subscribers such as the second defendant and other prospective credit providers. It contained definitions of the various terms used when listing "a default." Thus for subscribers the meaning of the terms used in the listing concerning Mr Walker had a meaning given by the guide. Further the first defendant had a practice of notifying a dispute that might be raised by a consumer in the position of Mr Walker. Her evidence explains that practice and shows that the first defendant responded following complaints by Mr Walker and in May 2006 added a notification that the listing was disputed.[69] It is with that factual background in response to the statutory regime established by the *Privacy Act* that I turn to in consideration of the basis of Mr Walker's claim that the defence of qualified privilege cannot be made out by the first defendant.

[36] Mr Walker, as I understood his submissions, contended that the defence of qualified privilege could not be made out because the first defendant could not satisfy either

---

[65] See particulars alleged in paragraph 5A of the amended statement of claim.
[66] See section 11B(1)(iv)(B) *Privacy Act 1988 (Cwth)*.
[67] See relevantly the determination dated 21 August 2006 and the previous determination dated 14 February 2003 exhibited at "RAB-5" to the affidavit of R A Barbour.
[68] Which is contained in Part IIIA of the *Act* which deals with "Credit Reporting".
[69] See generally paragraphs 14-31 of the affidavit of R A Barbour, the exhibit "RAB-6" and "RAB-7."

section 30(1)(a) and (b) (combined with ss (2)) and neither could it prove that its conduct was "reasonable" within section 30(1)(c) (as elaborated upon in section 30(3))[70].

[37] The first submission relied upon Mr Walker's contention that neither the first defendant nor the second defendant could prove they acted within the *Privacy Act* as either a credit reporting agency or a credit provider. I have dealt with that above. Further I am satisfied that the first defendant has proven its actions and operations came within section 30(1)(a) and (b) following the uncontested evidence lead by the first defendant and the reasoning of Lindgren J in *Dale.*

[38] Further the evidence satisfies me that the first defendant's conduct was reasonable in the circumstances within section 30(1)(c) and section 30(3). The manner and extent of the publication was, following the reasoning of Lindgren J, reasonable in the public interest and in the interests of credit providers and prospective credit providers. The first defendant conducted its business within the requirements of the regulatory or legislative framework established by the *Privacy Act.* In short Mr Walker lead no evidence nor made any submission pointing to the existence of evidence suggesting an arguable case to the contrary.

[39] The final matter relied upon by Mr Walker was the question of malice. This arises because section 30(4) of both the *Qld Act* and the *NSW Act* provide that a defence of qualified privilege can be defeated if the publication was actuated by malice.

[40] Mr Walker pleaded malice in paragraphs 15 and 16 of the amended statement of claim. In submissions before me counsel for the first defendant correctly pointed out that conventional pleading practice indicates that malice ought to be pleaded not in the statement of claim, in anticipation of a plea of qualified privilege, but rather in a reply. Notwithstanding the first defendant did not apply to strike the pleading out but has sought particulars of the allegations pleaded in the amended statement of claim.[71]

[41] Counsel for the first defendant pointed out that for the most part the allegations contained in paragraphs 15 and 16 merely allege matters that, in a general sense, are categories of circumstances when ill will or malice might be indicated. In other words, the assertions in paragraphs 15 and 16 constitute no more than a recitation of the usual contentions made in this context. Despite requests the exhibits show that Mr Walker has been unable to particularise any facts or matters suggesting evidence of malice or ill will. It is not suggested that any employees, agents or persons connected with the business of the first defendant knew or had any prior dealings with Mr Walker. As I have indicated the evidence demonstrates that when Mr Walker disputed the listing the first defendant acted promptly to list that the default was disputed. The first defendant has conducted itself at all times within the terms of the mandate and charter as set out in its memorandum and articles of association and contractual practices that it has with credit providers. The language used in the listing was language falling within defined terms as set out in the information guide exhibited to the affidavit of Ms Barbour. This proves that the assertions as to the

[70] Referring to the provisions of section 30 of the *Qld Act* and the *NSW Act.*

[71] See for example the affidavit of P S Askin at "PSA1" and the particulars given exhibited at "PSA2." See further the further particulars which were exhibit 1 on the application.

meanings to be given to those words as pleaded by Mr Walker[72] would not be so understood by subscribers to the first defendant's business.

[42] In *Roberts v Bass*[73] Gaudron, McHugh and Gummow JJ said[74]:

> "[84] In exceptional cases, the sheer recklessness of the defendant in making the defamatory statement, may justify a finding of malice. In other cases, recklessness in combination with other factors may persuade the court that the publication was actuated by malice. In the law of qualified privilege, as in other areas of the law, the defendant's recklessness may be so gross as to constitute wilful blindness, which the law will treat as equivalent to knowledge. "When a person deliberately refrains from making enquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth", said this Court in *R v Crabbe*, "he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring." In less extreme cases, recklessness, when present with other factors may be cogent evidence that the defendant used the occasion for some improper motive. This is particularly so when the recklessness is associated with unreasoning prejudice on the part of the defendant. …"
>
> "[87] Further, mere lack of belief in the truth of the communication is not to be treated as if it was equivalent to knowledge of the falsity of the communication and therefore as almost conclusive proof of malice. The cases contain many statements to the effect that the privilege will be lost if the defendant did not honestly believe in the truth of a defamatory statement made on a privileged occasion. If those statements mean no more than that qualified privilege is lost when the defendant knows or believes the defamatory statement is false, they are in accord with several principles in authority. But if they mean that the defendant loses the privilege unless he or she has a positive belief in the truth of the publication, it is not easy to reconcile them with basic principles. They are not reconcilable, for example, with the principle that recklessness as to the truth or falsity of a publication, short of wilful blindness, will not destroy an occasion of qualified privilege unless it appears that the recklessness is accompanied by some other state of mind. …"

[43] There is no evidence of recklessness or wilful blindness on the part of the first defendant by its servants or agents. There is no evidence suggesting that such a state may exist or that there is even a shadow of a chance that such evidence might emerge.

[44] This application was argued on notice to Mr Walker. The orders made by Cullinane J were designed to afford the parties sufficient time to marshal the evidence and materials prior to the hearing date and a day was set aside in a civil sittings to hear

---

[72] See for example, the so called particulars at paragraph 16 of the amended statement of claim.
[73] (2002) 212 CLR1; [2002] HCA57.
[74] 212 CLR at [84] & [87]

argument. Mr Walker has simply failed to produce any evidence pointing to the possibility of any evidence of malice on the part of the first defendant. The first defendant has lead evidence explaining its business and its conduct. Its business in the context of claim of defamation has been vindicated after an extensive consideration and review following a lengthy trial in the Federal Court in the recent past. In all the circumstances I am satisfied that it has demonstrated it has a defence to Mr Walker's claim in defamation.

[45] I have acknowledged that it is very unusual for a defamation claim to be determined summarily. Were it not for the reasoned judgment of Lindgren J in *Dale v Veda Advantage Information Services & Solutions Ltd* I would have exercised my discretion to decline the first defendant's application and order that the claim proceed to trial on the grounds that, at the very least, it involved complex questions of law which indicated that a trial should be held.[75] But there has been a trial of and concerning the first defendant's business and the first defendant has been vindicated. That reasoned judgment together with the uncontested and uncontradicted evidence of the first defendant and the failure by Mr Walker to satisfy me that there are or there possibly are facts justifying a trial persuade me that the first defendant should have judgment.

[46] Accordingly I order that:

1. There be judgment for the first defendant against the plaintiff in the claim.

2. The plaintiff pay the first defendant's costs of and incidental to the application and to the claim to be assessed.

Application for particulars

[47] The following documents were read before me along with this application:

Item 1	Application filed 29 April 2011[76]
Item 2	Affidavit J E Walker filed 29 April 2011[77]
Item 3	Exhibits, being JEW51 to JEW56, filed 29 April 2011[78]
Item 4	Further amended defence of second defendant filed 16 February 2011[79]
Item 5	Affidavit R N Sheehy 10 December 2010[80]
Item 6	Affidavit R N Sheehy sworn 1 August 2011[81]

In addition, the second defendant relied upon a written outline of argument.

---

[75] Consider *Theseus Exploration N L v Foyster* (1972) 126 CLR 507.
[76] Document 99 Court file.
[77] Document 100 Court file.
[78] Document 101 Court file.
[79] Document 89 Court file.
[80] Document 81 Court file.
[81] Filed by leave given 1 August 2011.

[48] The correspondence from Mr Walker seeking particulars demonstrates that he has difficulty in understanding the role of particulars and the distinction between particulars and interrogatories. He seems to understand particulars as a method of gathering evidence to facilitate proof of matters at trial rather than the identification of the facts or matters relied upon in support of a contention raised on the pleadings.[82]

[49] The first of the requests concerns paragraph 3 of the amended statement of claim filed 19 May 2010[83] and paragraph 3 of the further amended defence of the second defendant filed 16 February 2011. In part this controversy arises because Mr Walker pleaded a negative conclusion, probably because he was trying to set up an answer in advance of a defence that he anticipated may be pleaded by one or both defendants. In argument, Mr Walker was disposed not to press this request and also not to press the second request concerning paragraph 4(b) of the further amended defence.[84]

[50] The request Mr Walker pressed in argument concerned paragraph 5Ab of the further amended defence and Mr Walker's insistence that the second defendant particularised "the particular of which address did I leave without forwarding some form of notice".[85] Now at once it appears that Mr Walker seeks evidence of the address he was said to have left, or in terms of the paragraph of the defence the address the correspondence referred to in paragraph 5Ab was forwarded to. This seems to me to be a request for evidence not a request for particulars. More importantly, in open correspondence the solicitors for the second defendant have disclosed all documents and information in their client's possession or power.[86] This correspondence and documentation demonstrates the extent of the records and any information held by the Second Defendant concerning Mr Walker. The request for particulars is misguided, it is in form a request for evidence, that in any event Mr Walker has the information within the second defendant's knowledge[87] and consequently Mr Walker knows what a case he has to meet on this issue.

[51] Consequently, for the reasons that the request for particulars is misguided and also on discretionary grounds I dismiss the application.

[52] The orders I would make on this application are:

1. Application dismissed.

2. The plaintiff pay the second defendant's costs of and incidental to the application to be assessed.

---

[82] The correspondence and argument before me suggests that he is attempting to gather evidence for admissions that might be put into evidence rather than identifying the matters in issue thereby limiting the scope of evidence required as proof of those matters.

[83] Document 48 Court file.

[84] Transcript 1-63 line 15-20 and transcript 1-65 line 10. This action was also in part prompted by the more recent correspondence exhibited to the Affidavit of R N Sheehy filed by leave on 1 August 2011.

[85] Transcript 1-63 line 15.

[86] Letter 13 October 2010 - Wilson Ryan Grose to Mr Walker, at paragraphs 5 & 6, being exhibit "RNS5" to the Affidavit of R N Sheehy filed 10 December 2010.

[87] See further the submissions made by the solicitors for the second defendant at transcript 1-65 line 45 - transcript 1-66 line 12.

Conclusion

[53] For the reasons given above the orders should be as indicated in respect of each of the three applications. Because the parties have not had an opportunity to address me upon the question of costs, and because it may be that there are circumstances that might indicate a different order or a variation of the orders might be warranted I propose to make orders and directions permitting that.