

SUPREME COURT OF QUEENSLAND

CITATION: *Mather v Smith (No 2)* [2014] QCA 66

PARTIES: **GLEND A MARY MATHER**
(applicant)
v
JOHN THOMAS SMITH
(respondent)

FILE NO/S: Appeal No 12200 of 2013
DC No 704 of 2009

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 4 April 2014

DELIVERED AT: Brisbane

HEARING DATE: 25 February 2014

JUDGES: Margaret McMurdo P and Fraser JA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Application for leave to appeal refused, with costs.**

CATCHWORDS: INTEREST – RECOVERABILITY OF INTEREST – IN
GENERAL – where an unsuccessful defendant in a defamation
action was ordered to pay damages with interest – where
interest on general damages accrued from the date of the
claim and interest on aggravated damages accrued from the
first day of trial – whether the primary judge erred in the
exercise of her discretion to award interest

DEFAMATION – ACTIONS FOR DEFAMATION –
COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT
– COSTS OF ISSUES – where the applicant was ordered to
pay costs on the standard basis – where the applicant argued
he successfully defended six of the nine imputations pleaded
and therefore costs should be awarded according to the issues
– whether the primary judge’s discretion as to costs had
miscarried

Uniform Civil Procedure Rules 1999 (Qld), r 681, r 684

Greig v Win Television NSW Pty Ltd [2009] NSWSC 877,
cited

*Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld)
Pty Ltd (No 3)* [2003] 1 Qd R 26; [\[2001\] QCA 191](#), cited
John Fairfax & Sons Ltd v Kelly (1987) 8 NSWLR 131, cited

COUNSEL: P J Favell for the applicant
N H Ferrett for the respondent

SOLICITORS: Jonathan C Whiting & Associates for the applicant
M+K Lawyers for the respondent

- [1] **MARGARET McMURDO P:** I agree with Fraser JA’s reasons for refusing this application for leave to appeal with costs.
- [2] **FRASER JA:** The unsuccessful defendant in a defamation action has applied for leave to appeal from orders concerning interest on damages and costs. The proceedings are described in my reasons in the related application CA6982/2013, in which judgment is also given today.

Interest

- [3] The primary judge ordered the defendant (the applicant in this matter) to pay interest on the damages awarded to the plaintiff (the respondent in this matter) at five per cent per annum, calculated on general damages from 13 March 2009 to 27 November 2013 and calculated on aggravated damages from 11 March 2013 until 27 November 2013. The application for leave to appeal and the draft notice of appeal seek instead an order that the defendant pay the plaintiff interest on general damages at three per cent per annum for a period of one year.
- [4] The period of one year was selected on the basis of arguments that, although the publication occurred on 14 March 2008, the claim was not commenced until 13 March 2009 and the plaintiff thereafter did not prosecute the claim with expedition. The defendant also referred to authority for the propositions that “except in special circumstances, an award of damages in a defamation action... is to be treated as containing... no award for loss after verdict” and interest should be assessed on the basis that the verdict represents loss spread over the whole of the period from the date of the publication to the date of the trial,¹ and that because “... the primary damage to a plaintiff’s reputation and injury to feelings is occasioned at the time of publication and shortly thereafter with both elements diminishing over time... it is common to award interest at a rate which allows for the diminishing impact of the published libel...”.²
- [5] The same arguments were advanced to and considered by the primary judge. It was also a relevant consideration, as the primary judge observed, that a result of the plaintiff’s claimed delay was that the defendant had “the advantage of longer use of the money at the plaintiff’s expense”. There was no error in that observation.³ The order for interest made by the primary judge was favourable to the defendant in that instead of interest running when the date for the cause of action arose, it ran from a date which was one year later in the case of general damages and three years later in the case of aggravated damages. Nor, contrary to another submission by the defendant, was there any error in ordering interest to run up until the date upon which judgment was given on 27 November 2013, rather than until the date upon which the jury answered questions which were put to it.

¹ *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 142–143 (McHugh JA, with whom Kirby P agreed).

² *Greig v Win Television NSW Pty Ltd* [2009] NSWSC 877 at [5] (McClellan CJ).

³ See *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26 at [52] (McPherson JA).

- [6] The order for interest involved a discretionary decision by the primary judge. The defendant has not identified any error of principle or otherwise in the exercise of the discretion. So far as the order for interest is concerned, the application for leave to appeal should be refused on the grounds that the appeal would lack substance.

Costs

- [7] The primary judge ordered the defendant to pay the plaintiff's costs of and incidental to the action (excluding costs the subject of an order for the amendment of the plaintiff's pleading made on 13 February 2012) on the standard basis. The application for leave to appeal and the draft notice of appeal seek instead an order that the plaintiff pay one-third of the defendant's costs of and incidental to the action on the standard basis. The essence of the defendant's argument is that costs should have been awarded according to issues (with reference to *Uniform Civil Procedure Rules* 1999, r 684 read together with r 681). The defendant contended that she had "successfully defended six of nine imputations pleaded"⁴ and referred to decisions in which costs orders had been made in defamation actions.
- [8] The primary judge considered the same argument presented by the defendant and made the following points: the action was restricted to a single broadcast lasting only a few minutes; the pleaded imputations were intertwined and overlapping; the same defences were litigated for each imputation, and only one imputation was withheld from the jury; the jury found that the other eight imputations did arise, but five of them were substantially true; those five imputations were limited to matters of process, whereas the three imputations found to be defamatory were more serious, having connotations of corruption. The primary judge also took into account her assessment that, had the case been limited to the three most serious imputations, it is likely that the same evidence would have been adduced and the same defences argued, there was no contention that the pursuit of the additional imputations added to the burden of preparation or length of trial, and two defences pleaded by the defendant were abandoned only when the evidence demonstrated them to be untenable.
- [9] Those were relevant considerations for the exercise of the discretion and I did not understand the defendant to contend otherwise. I am not persuaded that the defendant has a seriously arguable case that the discretion as to costs miscarried. I would refuse the application for leave on that basis.
- [10] It may be that the proposed appeal is incompetent in any event because, the issues about interest having no possible bearing upon the order for costs, the proposed appeal should be regarded as an "appeal only in relation to costs" for which the applicant did not obtain the necessary leave to appeal from the primary judge: *District Court of Queensland Act* 1967, s 118B(1).⁵ It is unnecessary to decide that question.

Proposed Order

- [11] I would refuse the application for leave to appeal, with costs.
- [12] **DAUBNEY J:** I agree with Fraser JA.

⁴ Applicant's amended outline of submissions, para (i) on p 2.

⁵ Cf *Re Golden Casket Art Union Office* [1995] 2 Qd R 346 at 349, in which the Court referred to the differently worded provision in s 9 of the *Judicature Act* 1876 (Qld) (see now s 64 of the *Supreme Court of Queensland Act* 1991 (Qld) which is in the same form as s 118B(1) of the *District Court of Queensland Act* 1967 (Qld)).