

SUPREME COURT OF QUEENSLAND

CITATION: *Jones v Aussie Networks Pty Ltd* [2014] QSC 126

PARTIES: **RHYS EDWARD JONES**
(applicant)

v

AUSSIE NETWORKS PTY LTD
ABN 44 124 401 734
(respondent)

FILE NO/S: 12056/13

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 12 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2014

JUDGE: Alan Wilson J

- ORDERS:
- 1. Australian Shareholder Centre Pty Ltd be added as a second plaintiff in the proceeding;**
 - 2. Joseph Keith Eiby be added as a second defendant in the proceeding;**
 - 3. The applicant and Australian Shareholder Centre Pty Ltd have leave to amend the claim and statement of claim conformably with the draft that was included in the affidavit material before this proceeding to reflect the addition of these parties to the proceeding;**
 - 4. The applicant and Australia Shareholder Centre Pty Ltd file and serve any amended claim and statement of claim on or by 4 pm 26 June 2014; and**
 - 5. The costs of the application be costs in the cause.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES – PARTIES – OTHER MATTERS – where the applicant seeks leave to add parties to a defamation action – where the respondent agrees to the joinder of an individual as a second defendant – where the respondent disputes the joinder of a corporation as a second plaintiff – where the respondent alleges that the proposed

second plaintiff is not an ‘excluded corporation’ under the *Defamation Act 2005* (Qld), with reference to the *Corporations Act 2001* (Cth), and therefore has no right to bring an action in defamation – where the respondent further alleges that numerous evidentiary and procedural issues should preclude the addition of the proposed second plaintiff – whether the corporation should be joined as a second plaintiff

Corporations Act 2001 (Cth), s 9, s 46, s 48, s 50

Defamation Act 2005 (Qld), s 9, s 35

Limitation of Actions Act 1974 (Qld), s 10AA

Property Law Act 1974 (Qld), s 45

Uniform Civil Procedure Rules 1999 (Qld), r 69, r 377

Australian Pipeline Ltd [2006] NSWSC 1316

Edward Brewer Homes Pty Ltd v Home Builders Australia Pty Ltd [2010] WASC 257

Hemmingway v Intico (WA) Pty Ltd [2006] AIRC 603

COUNSEL: Charles Wilson for the applicant
Peter Somers for the respondent

SOLICITORS: Attwood Marshall Lawyers for the applicant
Potts Legal for the respondent

- [1] **Wilson J:** Mr Rhys Edward Jones commenced a defamation action against Aussie Networks Pty Ltd in December 2013. He alleges that the company, which owns and controls an online interactive stockmarket forum, published defamatory comments on its website concerning him on 18 June 2013.
- [2] Following disclosure, Mr Jones seeks to join two new parties to this proceeding under the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*) r 69. He also seeks leave to amend his claim and statement of claim under *UCPR* r 377 to reflect the addition of these parties. He is within time to amend the claims: the limitation period will expire on 18 June 2014.¹
- [3] Aussie Networks does not oppose the application for leave to join a Mr Joseph Keith Eiby as a new second defendant. Mr Eiby is the single director and sole shareholder of Aussie Networks, and he has informally admitted since the action commenced, through his solicitors, that he was the pseudonymous author of the allegedly defamatory comments.
- [4] However, the respondent does oppose the joinder of the company of which Mr Jones is a director, Australian Shareholder Centre Pty Ltd (*ASC*), as second plaintiff. The respondent contends that ASC cannot be joined to the proceeding on the basis that it is a corporation, and is therefore prohibited under s 9(1) of the *Defamation Act 2005* (Qld) from bringing proceedings
- [5] There is, under that provision, an exception allowing a company to bring defamation proceedings if it is an ‘*excluded corporation*’. The respondent argues

¹ *Limitation of Actions Act 1974* (Qld), s 10AA.

the exception does not apply. Mr Jones and ASC say it does. The respondent refers to the Western Australian Supreme Court decision of *Edward Brewer Homes Pty Ltd v Home Builders Australia Pty Ltd* [2010] WASC 257 to support its argument that the onus lies on the applicant to positively plead and prove that ASC is an ‘*excluded corporation*’ for the purpose of bringing an action under the uniform Defamation Acts.

Is ASC an ‘excluded corporation’ ?

- [6] An ‘*excluded corporation*’ is defined in s 9(2) as covering two classes of corporations that are not public bodies. The first is where ‘*the objects for which it is formed do not include obtaining financial gain for its members or corporators*’: s 9(2)(a)). The applicant does not suggest that ASC falls within this category. However, the applicant contends that ASC is an ‘*excluded corporation*’ under s 9(2)(b). This second category allows a corporation to sue if it ‘*employs fewer than 10 persons and is not related to another corporation*’.
- [7] Although the evidence does not yet conclusively prove that ASC does have fewer than 10 employees, some evidence about this by way of affidavit has been provided and, in any event, the respondent does not admit or contest this in relation to satisfying the first requirement of s 9(2)(b).
- [8] The central issue is rather whether ASC is, in the words of s 9(2)(b), related to another company called Torque Securities Pty Ltd (‘*Torque*’), which holds all of ASC’s issued share capital of 100 ordinary class shares in its capacity as trustee for the beneficiaries of a trust called the Jinx Trust.
- [9] Section 9(4) of the *Defamation Act* says that, for the purpose of determining whether corporations are related for the purposes of s 9(2)(b), s 50 of the *Corporations Act 2001* (Cth) applies. That section sets out three discrete questions or tests: whether the corporation is a holding company of another body corporate (s 50(a)); or, a subsidiary of another body corporate (s 50(b)); or, a subsidiary of a holding company of another body corporate (s 50(c)).
- [10] A ‘holding company’ is defined in s 9 of the *Corporations Act* as ‘*a body corporate of which the first body corporate is a subsidiary*’. ASC does not, on the available evidence, hold property for Torque as a subsidiary company to meet this definition under ss 9 and 50(a); indeed, the converse appears to be the case. The applicant has also adduced evidence to show that there is no relationship falling within s 50(c): namely, that ASC is not a subsidiary of a holding company, in terms of s 9, or of another body corporate.
- [11] The remaining question is whether ASC is a *subsidiary* of Torque under s 50(b). Section 46 of the *Corporations Act* provides that a corporation is a subsidiary of another corporation if:
- (a) the other body:
 - (i) controls the composition of the first body’s board; or
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or

(iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first body is a subsidiary of a subsidiary of the other body.

- [12] The applicant has produced evidence that s 46(b) is not a matter for concern: there is no evidence that ASC and Torque are in a corporate structure with another company acting as ultimate holding company.
- [13] This leaves the applicant with the onus of showing that s 46(a) does not apply. Although the three limbs of s 46(a) are independent, they are all satisfied because Torque holds all of ASC's share capital – i.e., in excess of the minimum amount of share capital, set at 50%, required under s 46(a)(iii). Further, Torque's 100% ownership would theoretically allow it to control ASC's board and the voting at its general meeting (s 46(a)(i)-(ii)). ASC must therefore be seen as a subsidiary of Torque under the *Corporations Act*, which in turn means that it is a related corporation for the purposes of s 9 of the *Defamation Act*.
- [14] But the applicant says that is not the end of the matter, and points to s 48 of the *Corporations Act* as containing an important qualification to the definition of related corporations in s 46. Section 48 relevantly provides:
- (1) This section applies for the purposes of determining whether a body corporate (in this section called the *first body*) is a subsidiary of another body corporate.
 - (2) Any shares held, or power exercisable, by the other body in a fiduciary capacity are treated as not held or exercisable by it.
- [15] The applicant submits that this section should apply where the shares are held by the corporation in a '*fiduciary capacity*' for any party, rather than strictly to the related entity – and that, it says, is the case here. A stricter interpretation, it is argued, would impermissibly read words of limitation into the provision.
- [16] Section 48 has not been extensively considered. It was mentioned in *Australian Pipeline Ltd* [2006] NSWSC 1316 but in circumstances satisfying the stricter view, namely that the entity for which the shares were held on trust was a related entity. However, there is nothing in that decision to suggest that a broader interpretation is not available. Plainly, s 48 expands the circumstances in which a company may avoid qualification, under s 46, as a 'subsidiary' of another. The section was construed in that way in *Hemmingway v Intico (WA) Pty Ltd* [2006] AIRC 603, which also concerned a corporation that held all of the relevant corporation's share capital on trust for a separate family trust.
- [17] On this basis, s 48 should apply to qualify the finding that ASC is a subsidiary of Torque. This in effect requires that Torque's 100% share ownership and, as the applicant suggests, its power potentially derived from that through voting rights be disregarded because those shares and that power is held in a purely non-beneficial capacity for the Jinx Family Trust. The effect of this is that ASC should not be properly regarded as a subsidiary by virtue of being related to Torque, and therefore falls within the definition of '*excluded corporation*' in the *Defamation Act*.
- [18] The test under *UCPR* r 69 is whether it would be '*desirable, just and convenient*' to add ASC as a plaintiff. For the present purposes of the discretion available under

the rule, the evidence adduced for ASC is sufficient to conclude, at this early stage, that the company may have a right of action, may find a path through the provisions discussed above, and should not be kept out as a party.

Evidentiary and Procedural Issues

- [19] Aussie Networks, the respondent, has also raised a number of evidentiary and procedural issues which in its view should (despite any finding that ASC may bring a claim under the Act in principle) prevent the company being joined as a plaintiff.
- [20] Firstly, the respondent argues that because the evidence as it stands suggests that the trust deed allegedly establishing the Jinx Family Trust was not properly executed, the shares cannot properly be said to be held on trust for the purposes of s 48. The formality that has not been complied with is, it is said, the requirement of a witness to the deed.² Ultimately this is an evidentiary matter for the applicant to meet once the proceeding reaches trial, and for the purposes of this application there is a prima facie case based on other evidence that the shares were held in a fiduciary capacity so as to satisfy s 48. This conclusion also applies to the respondent's linked contention that the other evidence the applicant relies on in relation to the trust deed and its constitution is contradictory.
- [21] The respondent also argues that the proposed amended statement of claim does not adequately set out the case for ASC, in addition to Mr Jones, having a cause of action. The proposed amendments on this point are as follows:

2A. At all such times, ASC:

- (a) employed fewer than 10 people;
- (b) was not related to another corporation within the meaning of that expression as used in s 9(2)(b) of the *Defamation Act 2005 (Qld)*;
- (c) was not a 'public body' within the meaning of that expression as defined by s 9(6) if the said Act;
- (d) accordingly was an 'excluded corporation' within the meaning of that expression as used in s 9(2) of the Act.

The respondent is right in asserting that this sets out the grounds on which ASC has a cause of action under the *Defamation Act*, and does not refer to the sections of the *Corporations Act* relevant in relation to this. However, understanding s 9(2) and (6) in isolation on the basis of the pleading necessarily involves reading the section as a whole, and the relevance of the *Corporations Act* in determining whether s 9(2) applies is explicitly set out in s 9(4). As such, the preconditions for ASC's cause of action are succinctly but adequately set out. The applicant also makes the reasonable submission that the respondent is at liberty to seek particulars to expand on this part of the pleadings.

- [22] Thirdly, the respondent submits that the matter should be remitted to the District Court on the basis that the statutory cap for defamation actions prescribed under the authority of the *Defamation Act* s 35 is considerably below the Supreme Court jurisdictional threshold, and that the pleadings as they stand do not articulate aggravated damages or damages for economic loss. I am satisfied, however, with the applicant's assertion that they intend to plead a claim for economic loss, and that

² *Property Law Act 1974 (Qld)*, s 45(1), (2)(b).

although they are uncertain as to its quantum they believe at this stage that it will be at least close to the Supreme Court jurisdictional amount. The question of remitter can always be revisited.

- [23] For these reasons, the applicant is given leave to join ASC as a second plaintiff to the proceeding, and Mr Eiby should be joined as a second defendant on the basis of the parties' consent. The applicant and ASC are also given leave to amend the claim and statement of claim conformably with the draft that was included in the affidavit material before this proceeding to reflect the addition of these parties to the proceeding. The applicant and ASC are ordered to file and serve any amended claim and statement of claim on or by 5 pm 26 June 2014.
- [24] Each party seeks costs. The applicant's material excited the respondent's interest and concern, and it cannot be said that was unjustified or that its arguments around the legislation were not open. That said, the applicant was not fully alive to the need to consider adding parties until after disclosure, and it has succeeded. Those circumstances dictate that the costs of the application should be costs in the cause.