SUPREME COURT OF QUEENSLAND

CITATION:	*Wyatt & Anor v Cutbush* [2016] QSC 253
PARTIES:	**PETER ALBION WYATT** (first plaintiff/first respondent) **AUSCRIPT AUSTRALASIA PTY LTD ACN 110 028 825** (second plaintiff/second respondent) **v** **PAUL CUTBUSH** (defendant/applicant)
FILE NO/S:	SC No 6876 of 2015
DIVISION:	Trial Division
PROCEEDING:	Interlocutory Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	10 November 2016
DELIVERED AT:	Brisbane
HEARING DATES:	5 & 15 September 2016
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – JURISDICTION AND GENERALLY – SETTING ASIDE JUDGMENTS – where the plaintiffs commenced the present proceeding against the defendant for defamation arising out of emails sent by the defendant – where default judgment was entered – where the defendant has not given a satisfactory explanation for his failure to appear in the proceeding and delay in bringing the application to set aside default judgment – where the defendant claims the defamatory statements constitute public interest disclosures and therefore provide him with immunity from civil action – whether a *prima facie* defence is disclosed – whether the default judgment should be set aside *Uniform Civil Procedure Rules* 1999 (Qld), r 290 *Embrey v Smart* [2014] QCA 75, cited *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441, applied

COUNSEL:	M J May for the plaintiffs/respondents The defendant/applicant appeared on his own behalf
SOLICITORS:	Thomson Geer for the plaintiffs/respondents The defendant/applicant appeared on his own behalf

[1] On 3 August 2016, the defendant applied to set aside the default judgment entered in this proceeding on 18 September 2015. The application also sought other ancillary relief. The plaintiffs oppose the granting of any relief.

[2] At issue is whether the defendant has provided any satisfactory explanation for delay in bringing the application and whether there is any basis to conclude the defendant has a defence on the merits or there is other good reason for a trial of the issues in the proceeding.

Background

[3] The first plaintiff is the Managing Director and Chief Executive Officer of the second plaintiff. The second plaintiff provides transcription services to various organisations including State and Federal Courts.

[4] The defendant is a former employee of the second plaintiff. His employment ceased some time before the sending of the communications the subject of this proceeding.

Proceeding

[5] On 14 July 2015, the plaintiffs filed a claim and statement of claim in this Court claiming damages and injunctive relief in relation to allegedly defamatory and misleading statements published or caused to be published by the defendant of and concerning the plaintiffs.

[6] The statements in question were contained in email communications sent by the defendant to officers of the Family Court of Australia and the Australian Federal Police on 14 December 2014 and on 2 January 2015. The emails had also been sent to an officer of the second plaintiff.

[7] The proceeding also concerned email communications sent to officers of the University of Queensland on or about 11 June 2015 and 9 July 2015. The latter email was also sent to an officer of the Auditor General of Queensland.

[8] The statement of claim pleads that each of the offending communications was defamatory of the plaintiffs. Further, the sending of them by telecommunication constituted misleading and deceptive conduct.

[9] The first tranche of email communications, in general terms, dealt with assertions the defendant made as to the conduct of the plaintiffs in the provision of transcripts for the Family Court of Australia and that the defendant had been the subject of bullying and abuse as a consequence of his raising concerns about the conduct of the provision of transcription services by the plaintiffs. The second tranche, in general terms, dealt with

the defendant's concerns about the process by which the plaintiffs had acquired a contract for the provision of transcription services for Queensland Courts.

[10] On 28 July 2015, the plaintiffs obtained an order for substituted service of the claim and statement of claim on the defendant. That order provided for the documentation to be served by posting a sealed copy thereof by prepaid ordinary post to a specified address and transmitting a sealed copy thereof by email to a specified email address. The order provided that the claim and statement of claim would be taken to be served on the day that is two days after the latter of the date by which delivery would be expected to have been completed in the ordinary course of post and the date the email was transmitted to the defendant.

[11] No defence was filed by the defendant within 28 days of the date upon which it was taken service had been effected pursuant to that order. Accordingly, on 7 September 2015 the plaintiffs applied for the Registrar to give judgment against the defendant in default of filing of a notice of intention to defend in response to the claim.

[12] The request for default judgment noted the claim was deemed to be served on the defendant on 6 August 2015. Default judgment was granted in accordance with that request on 18 September 2015. It gave the plaintiffs judgment for damages to be assessed, together with costs.

Applicable principles

[13] A judgment by default may be set aside in the exercise of this Court's discretion under such terms as the Court considers appropriate.[1]

[14] Relevant considerations include whether the defendant has given a satisfactory explanation for the failure to appear, whether there has been delay in the bringing of the application to set aside the default judgment, whether the defendant has shown a defence on merits and whether there would be prejudice to the plaintiff if the judgment by default is set aside.[2]

Defendant's submissions

[15] The defendant submits that the default judgment ought to be set aside as each of the email communications the subject of the proceeding constituted public interest disclosures under the relevant State and Federal legislation. As such, he is absolutely protected from liability in relation the contents thereof. He also submits the actions taken by the plaintiffs constitute reprisal action in respect of those disclosures and are prohibited by provisions of the relevant legislation properly to be struck out as an abuse of process.

[16] The defendant further submits the claim as particularised did not support a finding the plaintiffs had suffered damage in any event.

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 290.

2 *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441 at 449; *Embrey v Smart* [2014] QCA 75 at [42].

Plaintiffs' submissions

[17] The plaintiffs submit the default judgment was entered regularly in accordance with the Rules. The order for substituted service deemed the service effective for the purposes of supporting a default judgment.

[18] The plaintiffs submit the defendant has not given any satisfactory explanation for the failure to appear. Further, the defendant has unreasonably delayed in bringing the application, as a consequence of which they have suffered prejudice including instituting other court proceedings in reliance upon the judgment, at substantial cost.

[19] A letter sent by the plaintiffs' solicitors on 4 November 2015, enclosing copies of the claim, statement of claim and the default judgment, was specifically acknowledged by email by the defendant on the evening of 4 November 2015. The defendant therefore had notice of the existence of the proceeding and of the default judgment some eight months before the filing of this application.

[20] Finally, the plaintiffs submit the defendant's material does not disclose any viable defence on the merits. The defendant's proposed defence asserts defences of truth and immunity on the basis of public interest disclosures in circumstances where there is no factual basis to support a finding of truth or that the communications were in fact public interest disclosures such as to attract the protection of the relevant legislation.

Discussion

[21] Whilst the defendant asserts he only became aware of the proceedings shortly prior to the filing of this application, the affidavit material and his submissions support a conclusion that the defendant was aware of the existence of the proceeding many months before the filing of this application. Notwithstanding that knowledge, the defendant chose to ignore the proceeding, concentrating on other issues in his life. As the defendant acknowledged in his affidavit, he was aware the plaintiffs were attempting to sue him for defamation but "ignored these … claims".[3]

[22] Further, the defendant acknowledged receipt of a communication enclosing the relevant documentation on 4 November 2015. That documentation included details of the judgment by default obtained by the respondent. I do not accept the defendant's assertion that his acknowledgement of that communication did not mean that he was aware of its contents. His acknowledgement was in the following terms:

> "Ok so I will now meet with … the CCC".[4]

The reference to meeting with an officer of the Crime and Corruption Commission is only consistent with the defendant being aware the plaintiffs had brought these proceedings against him, and had received judgment in respect of those proceedings, and he wished to speak to relevant authorities in response thereto.

[23] The defendant contends that his lack of response to that communication by way of taking steps to set aside the default judgment is explicable by reason of what he asserts

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3 Affidavit of the Paul Cutbush, Court doc # 14 at [28].

4 Affidavit of Bentley Sean Coogan, Court doc # 15 at [7] and BSC-2, page 7.

had been a campaign of threatening communications or threatening of actions by the plaintiffs in the months and years before receipt of that communication. However, the only reasonable conclusion is that the defendant chose to ignore the fact the plaintiffs had obtained judgment against him in relation to the relevant communications, for many months.

[24] The defendant has not provided a satisfactory explanation for his failure to take steps to appear once he became aware of the existence of these proceedings. I am also satisfied the defendant has unreasonably delayed in bringing the application to set aside the default judgment.

[25] I am also satisfied that as a consequence of the defendant's delay, the plaintiffs reasonably took steps to pursue its lawful entitlements pursuant to the judgment entered by default. To set aside such a judgment at this late stage would cause the plaintiffs prejudice. That prejudice is not only monetary. The reactivation of a proceeding determined in the plaintiffs' favour will also result in stress and take an emotional toll upon the first plaintiff.

[26] Those factors however, do not of themselves necessarily determine the application. To determine whether the defendant has otherwise shown good reason to set aside the default judgment, it is also necessary to consider the defendant's asserted bases for a defence to the claim.

[27] The proposed defence is poorly drafted, not in accordance with the UCPR. It is in many respects confusing and inconsistent. However, it is clear the defendant asserts two primary defences to the plaintiffs' claim. First, that the pleaded imputations do not arise and if they do, they were true. Second, each email communication was a public interest disclosure protected from civil action by reason of the relevant legislation.

[28] As to the first, whilst the defendant asserts the pleaded imputations cannot arise on the material, there is no proper basis to conclude that none of the pleaded imputations are incapable of arising. Whether some or all do arise is ultimately a matter for the tribunal of fact.

[29] The defendant's pleas of truth do not descend into sufficient particularity to support a conclusion that findings of truth to the imputations must succeed. The defendant's pleading fails to recognise it is the imputation which must be established to be true, not merely the contents of the communication.

[30] The defendant submits that latitude ought to be given in respect of the pleading as he is self-represented and is not familiar with court proceedings. Whilst some latitude may be given in such circumstances, the defendant unreasonably delayed in bringing this proceeding and was given an opportunity by the Court to prepare his best defence. The application is properly to be determined on the basis the document represents his best defence.

[31] In such circumstances, there is no proper basis, in the exercise of my discretion, to conclude that the judgment by default obtained by the plaintiffs ought properly to be set aside on the basis the defendant may be able to establish the pleaded imputations do not arise or, if they do arise, they are true. There would be a significant unfairness to the

plaintiffs to adopt that course. Accordingly, I would not set aside the default judgments on that basis.

[32] The remaining issue in the defence is whether the offending communications the subject of the proceeding were public interest disclosures entitled to protection by the relevant legislation.[5] If they were, that fact would amount to a viable defence on the merits to the plaintiffs' claim. The relevant legislation provides immunity to the maker of a public interest disclosure from civil or criminal liability. Such a person also has a defence of absolute privilege for publishing that information, and is protected from reprisal.

[33] The central question in determining this issue is whether the defendant has established a basis to conclude the offending communications were public interest disclosures. In determining this issue it is relevant to consider that the relevant legislation provides that a person may make a public interest disclosure to a proper authority in any way, including anonymously, although if that authority has a reasonable procedure for the making of such a disclosure the person must use that procedure.

[34] Each of the communications the subject of the proceeding was published to an entity to which a public interest disclosure would properly be made. The contents of such communications also arguably contain material which could properly be designated public interest disclosures. Whether they are would ultimately require a detailed consideration of all of the evidence. It is not appropriate for such an analysis to be undertaken in the present application. The question is whether the material properly raises a reasonable basis for concluding that such a finding is open.

[35] A consideration of the nature of the disclosures and the entities to which they were made, in the context of the defendant's background, satisfies me it is reasonably open on the material to conclude the offending communications may properly be found to be public interest disclosures. That being so, the defendant has established a viable defence is open on the merits.

[36] In considering that aspect, it is important to have regard to the provisions of the relevant legislation. They enshrine the principle that the maker of a public interest disclosure has absolute immunity from any action, civil or criminal. That includes having absolute privilege from claims in defamation. Against that background, it is therefore a significant step for a court to deny a litigant the opportunity to pursue such a defence.

[37] Once that conclusion is reached there is a basis for this Court to set aside the judgment by default. However, the granting of such an order is ultimately in the Court's discretion. There are a number of factors favouring a refusal to exercise the discretion in the defendant's favour. First, there is the unreasonable delay. Second, there is the prejudice to the plaintiffs in the setting aside of a default judgment in circumstances where the plaintiffs are entitled to move on with their lives on the basis the litigation had been concluded in their favour. Third, there is the prejudice to the plaintiffs in respect of the significant legal costs expended by them to date on subsequent proceedings brought in reliance upon the judgment by default.

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[5] *Public Interest Disclosure Act* 2010 (Qld), s 36; *Public Interest Disclosure Act* 2013 (Cth), s 10.

[38] There are also a number of factors in favour of exercising the discretion in the defendant's favour. First, if the defendant is successful in establishing that the offending communications constituted public interest disclosures he is entitled to immunity from suit and a defence of absolute privilege to any defamatory imputations. Second, there is a public interest in people who make public interest disclosures receiving the full benefit of the protections afforded by the relevant legislation, having regard to the public interest in the making of such disclosures.

[39] Balancing all of those factors, I am satisfied it is appropriate, in the exercise of my discretion, to set aside the default judgment. The need to ensure that persons making public interest disclosures receive the protection afforded by the legislation outweighs the factors in favour of refusing an order setting aside the default judgment.

[40] In coming to this conclusion, I have given careful consideration to the substantial prejudice to be occasioned to the plaintiffs by the making of such an order. I am satisfied that prejudice, to the extent it involves financial considerations, can be adequately addressed by the making of appropriate costs orders in the plaintiffs' favour. The other prejudice, including the stress associated with the reactivation of proceedings reasonably considered as concluded, is not addressed by such orders. However, I am satisfied the factors favouring the grant of the application outweigh those prejudicial factors.

Orders

[41] I shall hear the parties as to the form of orders and costs.