# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Bureya P/L v The Mackay Printing & Publishing Co P/L* [2003] QCA 284 |
| PARTIES: | **BUREYA PTY LTD** ACN 008 294 540 (plaintiff/respondent/cross-appellant)<br>**v**<br>**THE MACKAY PRINTING AND PUBLISHING COMPANY PTY LIMITED** ACN 009 657 550 (defendant/appellant/respondent) |
| FILE NO/S: | Appeal No 10806 of 2002<br>SC No 282 of 2000 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Townsville |
| DELIVERED ON: | 11 July 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 2 July 2003 |
| JUDGES: | Davies, Williams and Jerrard JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Dismiss the appeal**<br>**2. Allow the cross appeal**<br>**3. Appellant to pay the respondent's costs of and incidental to the appeal and the cross appeal, to be assessed on the standard basis** |
| CATCHWORDS: | DEFAMATION – ACTIONS FOR DEFAMATION – PARTICULARS – OF STATEMENT OF CLAIM – PUBLICATION – where appellant sought determination in court below as to whether words in statement of claim were capable of bearing the defamatory imputations as pleaded by the plaintiff – where learned judge below held that only some of the words were capable of bearing the imputations pleaded and struck out those that did not – where appellant contends that the learned judge should have struck out all paragraphs of the statement of claim complained of – whether ordinary and natural meaning of the publication was capable of conveying the imputations pleaded<br><br>DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – INNUENDO – IMPUTATION – where learned judge below found that the words complained of were |

capable of conveying the pleaded imputations – where learned judge did not find that those imputations were defamatory – where respondent cross-appeals against the striking out of those words in its statement of claim – whether learned judge erred in ruling that the imputations were not capable of being defamatory of the plaintiff

*Defamation Act* 1889 (Qld), s 18(2)

*Burrows v Knightley & Nationwide News Pty Ltd & Anor* (1987) 10 NSWLR 651, considered
*Hayward v Thompson & Ors* [1982] 1 QB 47, considered
*Jones v Skelton* [1963] SR (NSW) 644, referred to
*Lewis v Daily Telegraph Ltd* [1964] AC 234, cited
*Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, referred to
*Ware v Associated Newspapers Ltd* (1969) 90 WN (Pt 1) (NSW) 180, considered

COUNSEL: M E Pope for the appellant
S L Doyle SC, with R A Quirk, for the respondent

SOLICITORS: Connolly Suthers for the appellant
Suthers Taylor for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of Jerrard JA and with the orders he proposes.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by Jerrard JA. I agree with all that he has said therein and with the orders proposed.

[3] **JERRARD JA:** This matter is an appeal from orders made in an application by the defendant (Mackay Printing) pursuant to Chapter 13, Part 5 of the UCPR, in proceedings brought in this court for defamation. Mackay Printing had asked that the court determine whether the words referred to in paragraphs 7, 11B and 16 of the second amended Statement of Claim were capable of bearing the imputations pleaded, and whether those imputations were capable of being defamatory. It sought orders striking out those paragraphs if either question was answered in the negative.

[4] The learned trial judge hearing the application held that the words pleaded in paragraphs 7 and 11B were capable of giving rise to the imputations pleaded respectively concerning those words, and were capable of being defamatory of the plaintiff Bureya Pty Ltd. The learned judge held that while the imputations pleaded in paragraph 16 could arise from the publication relied on, there was nothing in the literal meaning, or in any implied or inferred or indirect meaning[1] of those words, (their natural and ordinary meaning, being what ordinary people would think the

[1] *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258, 265 and 280; *Radio 2UE Sydney P/L v Parker* (1992) 29 NSWLR 448 at 468; *Jones v Skelton* [1963] SR (NSW) 644 at 650

words meant)[2] which was defamatory. His Honour accordingly ordered that paragraph 16 be struck out. Mackay Printing contends on this appeal that the learned judge should also have struck out paragraph 11B, submitting that the ordinary and natural meaning of the publication complained of in that paragraph would not be capable of conveying the imputations pleaded, nor capable of being defamatory in that ordinary and natural meaning. For its part Bureya cross appeals against the order striking out paragraph 16.

[5] The respondent/plaintiff was described in the judgment under appeal as a land developer at Mackay, and its pleading contends that at all material times it was the proprietor and developer of, and traded as, Greenfields at Mackay, and was the "Developer" of Greenfields, that being an area of land concerning which it carried on the business of developing it for sale. The appellant/defendant was described in the judgment as the printer and publisher of a Mackay daily newspaper, "The Daily Mercury".

[6] In January 1999 the defendant published a five part series of articles in The Daily Mercury, on the threat and effects of flooding in the Mackay area. It also published a follow up article on 26 March 1999. The first of the five articles was published on 13 January 1999 and the fifth on Monday 18 January 1999. On 15 January 1999 it published Part 3, under the heading "Flood Safety is up to Residents". That publication included the words the subject of paragraph 7 in the pleading, which were:

> "*Australian geological survey researcher Ken Grainger has been surveying and modelling the numbers and types of buildings that would be inundated under various flood circumstances.*
>
> *Mr Grainger said Mackay was extremely vulnerable because large areas of urban housing land were prone to flooding from the river and storm surge. He said large areas of north Mackay, including Greenfields, were at risk.*
>
> *Certainly a repeat of the 1918 event would put water through much of it*."

[7] The pleading contended in paragraph 7:

> "The First Words in their natural and ordinary meaning meant and were understood to mean:
>
> 7.2 That Mr Grainger, as an expert, believed that the Plaintiff's development at Greenfields was:
>
> 7.2.1 prone to flooding;
>
> 7.2.2 prone to storm surge;
>
> 7.2.3 extremely vulnerable to flooding from the river and storm surge;

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[2] See footnote 1

7.3 That the Plaintiff's development at Greenfields was:

7.3.1 prone to flooding;

7.3.2 prone to storm surge;

7.3.3 extremely vulnerable to flooding from the river and storm surge;

7.7 The Plaintiff had developed property at Greenfields that was

prone to flooding, prone to storm surge and extremely vulnerable to flooding from the river and storm surge.

7.8 The Plaintiff was developing property at Greenfields that was prone to flooding, prone to storm surge and extremely vulnerable to flooding from the river and storm surge.

[8] The next day, 16 January 1999, Mackay Printing published Part 4 under the caption "Insurance little help in flood-prone areas". The pleaded words in that publication complained of in paragraph 11A were:

"11A. In the Daily Mercury distributed on 16 January 1999, the Defendant published Part 4 entitled "Insurance little help in flood-prone areas" (the Second Words). The Second Words included the following words of and concerning the Plaintiff:

*"Houses on high ground were a sure bet – and they were usually granted flood insurance. Houses on low ground were an unsafe bet and were usually rejected.*

*He said most homes in Mackay would not be eligible for cover against storm surge or flood."*

[9] Bureya pleaded that those words in their natural and ordinary meaning meant and were understood to mean:

"11B.1 The Plaintiff had developed property at Greenfields that was

unsafe.

11B.2 The Plaintiff was developing property at Greenfields that was unsafe.

11B.3 The Plaintiff had developed property at Greenfields that would be rejected for flood insurance.

11B.4 The Plaintiff was developing property at Greenfields that would be rejected for flood insurance.

11B.5 The Plaintiff had developed property at Greenfields that would not be eligible for cover against storm surge or flood.

11B.6 The Plaintiff was developing property at Greenfields that would not be eligible for cover against storm surge or flood.

[10] On 26 March 1999 Mackay Printing published an article under the title "Developers deny claims", which article included the following words pleaded in paragraph 14:

"***Developers Deny Claims***

*Greenfield developers, the Keam Group, have hit back at perception the area was susceptible to flooding ahead of the release of the final 22 allotments today.*

*-"Development supervising engineer Peter McLean, of Johnstone and Associates, said Greenfields was at a higher level than many other well known parts of the city.*

*He said Greenfields was at RL8:15, a level significantly higher than the Sydney-Victoria Street intersection (RL6) and Macrossan Street and Evans Avenue (RL7).*

*Mr McLean said the development was designed to be two centimetres above peak 50 year flood levels and drainage could also handle a one in five year storm.""*

[11] Bureya pleaded that those words in their natural and ordinary meaning meant and were understood to mean:

"16.1 That the Plaintiff's development at Greenfields was only two centimetres above peak fifty year flood levels;

16.6 The Plaintiff had developed property at Greenfields that was only two centimetres above peak fifty year flood levels.

16.7 The Plaintiff was developing property at Greenfields that was only two centimetres above peak fifty year flood levels.

16.8 The Plaintiff had developed land that was susceptible to flood.

16.9 The Plaintiff was developing land that was susceptible to flood.

16.10 The Plaintiff had developed land that was susceptible to storms.

16.11 The Plaintiff was developing land that was susceptible to storms."

[12] The plaintiff also pleaded that that article incorrectly described its development at Greenfields as being two centimetres above peak 50 year flood levels, when it was in fact 20cm above those levels. That pleaded error, if an error, was not made relevant to any of the applications under appeal.

[13] Section 18(2) of the *Defamation Act* 1889 (Qld), and the common law[3] both provide that it is a question of law whether any words alleged to be defamatory are, or are not, capable of bearing a defamatory meaning. Section 18(1) of the Act makes the question of whether any matter is or is not defamatory a question of fact. The two questions posed for the learned trial judge in respect of each described publication was firstly whether the published words were capable of bearing, as their natural and ordinary meaning, the imputations pleaded in paragraph 7, 11B, and 16, and secondly whether those pleaded imputations were capable of bearing a defamatory meaning concerning Bureya.

[14] There is no appeal against the rulings in Bureya's favour on both questions for paragraph 7. The learned judge considered there could be no question but that the published words complained of there did give rise to the pleaded imputations (at [15]), and the judge considered those imputations alleged were capable of being defamatory in the sense that they were imputations concerning Bureya by which it was likely to be injured in its profession or trade (at [22]). Mackay Printing did not contest before the learned judge that the articles were capable of being understood by persons reading them as referring to Bureya, who of course was undertaking the Greenfields Development, which Mr Grainger was quoted in the defendant's article of 15 January 1999 as describing as an area at risk from flooding. The defendant had contended to the learned judge that the pleaded imputations were not capable of being defamatory since they did not allege that Bureya knew that area was prone to flooding or storm surge. That argument was rejected by the learned judge, in reliance on the majority[4] decision in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

[15] The learned judge held that the words pleaded in paragraph 11A were innocuous on their face, but that when viewed with the other publications in the series they were capable of giving rise to the imputations pleaded in 11B. The judge further held that those imputations were capable of being defamatory for the same reasons expressed by the judge about the imputations pleaded in paragraph 7.

[16] The appellant Mackay Printing contends in its Notice of Appeal, and briefly contended in oral argument, that the learned judge impermissibly used the other publications in the series to derive the natural and ordinary meaning of the words published on 16 January 1999 as capable of conveying the imputations pleaded in 11B. The appellant also contends that the pleaded imputations are simply not capable of arising from the words when construed in their natural and ordinary meaning. The latter is the argument advanced in the appellant's written outline of argument, which does not per se complain of the "impermissible" use of the earlier publications in that six day series, to derive those natural and ordinary meanings pleaded. As to that asserted "impermissible" use, it seems likely that an ordinary

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3 *Jones v Skelton* at 650

4 McTiernan ACJ at 6, Gibbs J at 10-11, and Mason J at 24-25

reader of the Daily Mercury might well have some recall of earlier articles by the publication of the third, in a series on a topic of interest and relevance to Mackay residents. The subject of exposure of residential property to flood water and storm damage is likely to be a matter of general interest in a city community. The context in which the third article published on 16 January would be read would be likely, on the part of at least some readers, to be as part of a series, in which series the development at Greenfields had been specifically nominated as an at risk area.

[17] In *Hayward v Thompson* [1982] 1 QB 47 Sir Stanley Rees dealt (at page 72) with an argument that it was not open in law in any circumstances to rely upon a subsequent publication in order to provide evidence of a defamatory meaning or of identification in an earlier article. Counsel referred the court hearing that argument to a number of authorities, in which an original publication was of innocent material which only became defamatory upon the publication of subsequent material. Counsel had submitted that the principle derived from the cited cases was that a writer of innocent matter could not, by reason of facts which came into existence subsequent to the original innocent publication, become liable in damages for libel because the subsequent material attributed a defamatory meaning to the innocent publication.

[18] Sir Stanley Rees wrote:

> "The question we have to consider is whether that well-established principle applies to a case such as the instant one when (1) the original publication is defamatory; (2) when the second publication relied upon explicitly identifies the person defamed; and (3) it is published by the same party who published the original libel."

[19] The learned judge held that it was open to find that, as from the second publication, the plaintiff had been publicly named as the person referred to in the first article, which was defamatory. The underlying logic of the judgment is the common sense proposition[5] that there would be some retention by the time of publication of the second article of the defamatory content of the original publication, in which the plaintiff was now identified by the later one. In this matter it appears a common sense proposition that an ordinary reader of the Daily Mercury on 16 January 1999 might well recall the identification the day before of the plaintiff's development at Greenfields.

[20] Similar enough observations were made by Walsh JA in *Ware v Associated Newspapers Ltd* (1969) 90 WN (Pt.1) (NSW) 180, in a case involving publications on consecutive days in a Sydney newspaper. The topic there related to the suspension by the Australian Swimming Union of swimmers who had been members of the Australian team at the Olympic Games in Tokyo. The first article did not name any of the swimmers, and the second did. Walsh JA observed (at 184-185):

> "I do not think that an inquiry, whether or not a reader of the first article would reasonably take it to refer to the plaintiff, could be limited strictly in the circumstances of the present case to a

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[5] As to which, see too the judgment of Hunt J in *Burrows v Knightley & Nationwide News P/L* (1987) 10 NSWLR 651 at 654-657, where his Honour held that a plaintiff complaining of related material published on different occasions could plead all of the material in one paragraph, and identify the imputations said to have been conveyed by the material as a whole. That is the effect of what the plaintiff has done here.

> consideration of what would come to the mind of a reader on the day of its publication, or that the tribunal must exclude as irrelevant the fact that the defendant itself on the very next day informed its readers, including, no doubt, many who had read the first article, that the plaintiff was one of the persons to whom it referred."

[21] Reading the two articles as a series[6] the words published on 16 January 1999 are capable of conveying, as their natural and ordinary meaning, at least some of the imputations pleaded in 11B. I consider that those pleaded in 11B.3 – 11B.6 were capable of being conveyed but have more difficulty with those pleaded in 11B.1 and 11B.2. In the original publication the pleaded words quoted a representative of local insurance brokers, who described insurance companies as being "much like bookies at the race track" in that they were "betting on people's houses remaining undamaged."[7] The words quoted in the pleading, which refer to "sure" and to "unsafe" bets, read in the context of the published article and as part of that series, are (just) capable of being understood in their natural and ordinary meaning in the manner pleaded in 11B.1 and 11B.2, (because the bet is whether the house will be undamaged); and those words complained of are certainly capable of bearing the imputations alleged in the remainder of 11B. Those words concerning the respondent are capable of being defamatory of it. The appellant's appeal should be dismissed.

[22] With respect to the cross appeal, the learned judge was satisfied that the words complained of were capable of conveying the pleaded imputation. Bureya, by its cross appeal, argued the learned judge erred in ruling that those imputations were not capable of being defamatory of it. The defendant argued that the ruling was correct with respect to 16.1, 16.6 and 16.7; and that the judge had erred in holding that the words complained of could convey the imputations pleaded in 16.8-16.11.

[23] With due respect to the learned judge, I consider the pleaded imputations are all capable of being defamatory of Bureya. Those pleaded in 16.8 to 16.11, are if anything, more capable of being defamatory of Bureya than the imputations pleaded in 7.2 and 7.3 in respect of the publication two and a half months earlier. The imputations pleaded in 16.8 to 16.11 are really inferences (or innuendos or indirect meanings inherent in the words complained of),[8] or the "implied or inferred" or "an indirect meaning"[9], derived from either the words published themselves or the imputations pleaded in 16.1 and 16.6-16.7. Those latter statements about the plaintiff are capable of damaging it in its business; to describe a development as so fractionally above flood level is capable of making it sound very unattractive to potential buyers. I respectfully consider his Honour was in error in striking out that pleading and would accordingly allow the cross appeal.

[24] I would order that the appellant pay the respondent's costs of and incidental to the appeal and the cross appeal, to be assessed on the standard basis.

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6 The plaintiff pleaded the publications occurred as part of a series

7 At AR 79

8 *Lewis v Daily Telegraph* at 280, judgment of Lord Devlin

9 *Jones v Skelton* at 650