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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 361 of 1992

ANTHONY STEPHEN BROWN	Plaintiff
and	
THE AUSTRALIAN BROADCASTING CORPORATION	First Defendant
and	
DOUGLAS MURRAY	Second Defendant
and	
DOUGLAS GRAHAM MACLENNAN	Third Defendant

BRISBANE

..DATE 07/03/2003

ORDER

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HER HONOUR: The principal proceedings are brought by Dr Anthony Brown against the Australian Broadcasting Corporation and a reporter, Mr Douglas Murray, for defamation in respect of a program which was put to air on the 7th of September 1990 in the "Countrywide" program.

Dr Brown is a veterinarian surgeon and a koala researcher and the defamatory nature of the material is said to relate to aspersions or inferences that can be drawn from the material that Dr Brown was a poor researcher and lacked ethical standards in dealing with koalas when carrying out his research work and in effect had caused the public and people outside Australia to contribute large amounts of money to the research programs when the need for such programs, namely the imminent extinction of koalas, was quite unjustified.

That is a very brief summary which certainly does not do justice to the pleadings but it allows sufficient to be known for the purposes of this application which is an application brought by the ABC seeking directions as to whether the plaintiff is required to seek the leave of the Court to proceed pursuant to rule 389(2) of the Uniform Civil Procedure Rules. It requires that if no step has been taken in a proceeding for two years from the time the last step was taken a new step may not be taken without the order of the Court.

In the alternative, the ABC seeks that the plaintiff's action be struck out for want of prosecution. In the further alternative, the ABC seeks orders that the action be stayed

pending the plaintiff's payment to the defendants of the costs awarded against him on the 8th of December 1999 and an order that the plaintiff pay security for costs in the sum nominated of $25,000 and some further orders by direction.

The provision in the rules relating to notice being given before a further step can be taken is in somewhat different terms to the earlier rules of the Supreme Court in order 90. An extensive chronology in respect of this matter is to be found set out in the affidavit of Mr Mark Jones, the solicitor for the ABC in paragraph 2, and it is further developed in the chronology handed up by Ms Downes.

I do not propose to recite the chronology into these reasons but it is an important factor when looking at the alternative relief which is claimed, that is that the action be struck out for want of prosecution.

The action was not commenced by Dr Brown until about a year and a half after the alleged defamatory television program. Thereafter proceedings moved forward with the exchange of document lists and further and better particulars requests being satisfied and so on.

The matter was listed for a 10 day trial to commence on the 9th of February 1998 but within a week of the trial the ABC sought leave to amend its defence and those trial dates were vacated. That was to allow the ABC to plead truth and public benefit.

Thereafter the pleadings were put in order with requests for further and better particulars of both the amended defence and the amended reply. There was an application to strike out the amended defence in December 1999 which was unsuccessful and there were other communications between the parties over 2000, including the ongoing obligation with respect to disclosure.

The order that the plaintiff pay interlocutory costs was at the end of December 1999 and those costs were assessed at $14,286.39. They have remained unpaid since with requests for payment being made shortly after the assessment but not renewed.

On the 10th of November 2000 certain documents were delivered and on the 15th of March 2001 the plaintiff's solicitor served on the defendants an affidavit deposing to the plaintiff's possession of certain specific categories of documents. This affidavit was forthcoming because the defendants had required the plaintiff to do so.

In July 2001 there was a notice of change of solicitors filed on behalf of the plaintiff and Mr Whiting took over the running of the proceedings on behalf of the plaintiff. On the 4th of November 2002 the plaintiff's solicitors delivered an updated list of documents to the defendants. On the 17th of December 2002, as can be seen some six weeks later, the ABC's solicitor required the applicant to make application for leave to proceed pursuant to rule 389.

On the 23rd of December 2002 the plaintiff's solicitors delivered a notice of intention to proceed pursuant to that rule.

On the 31st of January 2003 the plaintiff served a notice to admit facts on the ABC. There was a response by the ABC. And then the plaintiff's solicitors delivered a request for particulars of the amended further and better particulars.

There are two things to say about these alleged steps. Documents were produced which had previously been disclosed in Citycorp Australia Limited v. Metropolitan Public Abattoir Board [1992] 1 Queensland Reports 592. Mr Justice McPherson held in respect of the previous rules of the Supreme Court that the production of documents for inspection was a proceeding but not the inspection itself. It has been suggested that the present rule is of slightly wider compass than the earlier order 90, rule 9.

Because of the view that I take about a subsequent activity it is probably unnecessary to characterise that event, but if I were required to do so I would characterise it as a step in the proceedings.

On the 15th of March the serving of the affidavit concerning the documents seems to me to be a step in the proceedings for the purposes of the rules.

The other thing to say is that the ABC has only recently taken the view that the solicitors are required to deliver a notice of intention to proceed.

They have not sought to set aside as irregular the steps which have been taken towards the end of 2002 and subsequently, and indeed have positively joined issue in respect of some of them. I need only refer to the observations of Mr Justice Lucas in Perez v. Transfield Queensland [1979] Queensland Reports 444, to deal with that point.

Accordingly the conclusion is that the plaintiff is not required to seek leave to proceed pursuant to rule 389(2) of the Uniform Civil Procedure Rules.

Of more importance in this application is the alternative relief sought by the ABC, namely that the plaintiff's action be struck out for want of prosecution. The matter, as is quite clear, has been on foot for a very long time and it is a factor which the Court of Appeal in Tyler v. Custom Credit Corporation Limited, an unreported decision of the Court of Appeal of the 19th of May 2000, regarded as an important factor.

It is unnecessary to set out the various factors which Justice Atkinson describes in paragraph 2 of her reasons that a Court will be interested in considering, but the length of time, namely some 12 and a-half years since the alleged defamatory

program was published, of course leads to real concern as to whether a fair trial of the proceedings can be had.

There is the natural passage of time. Whilst this is to a large extent a documentary case, nonetheless there is a great deal of oral evidence which will be required to be given.

No person has said that he or she is hampered by that passage of time and there is nothing in the material from which I could draw any strong inference that that would be the case, rather to the contrary that, although it's dragged on for a very long time, nonetheless there have been detailed particulars, up to 30 pages in length, relating to the various matters which will be the subject of evidence at trial from quite an early stage continuing up until relatively recently.

It is a matter that, although having long periods of inactivity, nonetheless has steadily progressed. It is now virtually ready for trial.

The one factor that is concerning is the situation of the gentleman who was the executive producer of the program who is afflicted with a terminal illness, and who may, even if he survives to the time of the trial, be in no fit state to give evidence.

His evidence can certainly be made in statement form and produced to the Court at the time. There are, of course, down sides to that, but it doesn't seem to me that that goes to the

heart of these proceedings. It is a factor to take into account.

Otherwise, the matter, as I have said, is almost ready for trial, and that was a factor which influenced the Court of Appeal in Quinlan v. Rothwell, a defamation case where the lapse of time was almost a decade since the defamatory publication. But there the Chief Justice said at paragraph 9 of his reasons for judgment, "A powerful residual circumstance is that the proceedings are substantially ready for trial."

Dr Brown is a person, it would appear, of rather modest means. His solicitor deposes that he has already expended something in the vicinity of $100,000 prior to engaging his present solicitors in fees associated with this litigation.

There are, however, some concerning features about the readiness of Dr Brown to engage in bringing this matter to a conclusion. And I particularly refer to the latter paragraphs of Mr Whiting's larger affidavit filed by leave this morning.

> "32. The plaintiff carries on a tourism business in Western Samoa, but the business is not hugely profitable. The plaintiff is often out on a tour through the islands of Western Samoa and it may be that he is out of email contact for weeks at a time. During this time the plaintiff is running his business in taking tourists on tours of the Samoan islands.
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> 33. As I have said above, in part any delay on the part of the plaintiff is due to the fact that the plaintiff needs to run his business in order to accrue sufficient funds to proceed with this legal action.
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> 34. The plaintiff believes that he can afford and that he intends to conduct this matter to trial if necessary, but he is also of the view that if, in addition to his own costs, he was required to pay the outstanding

> costs order to the defendants and the security for the defendants' costs up to and including the trial, he is unlikely to be able to proceed with the action."

That gives rise to this concern: that the plaintiff will continue to run this proceeding in his own way and in his own time. And that, I think, is not permissible, apart from the implied undertaking that every litigant gives in participating in litigation in this Court to proceed expeditiously. It has now reached the stage where the matter has been around far too long.

I am not persuaded that this is a matter which ought to be struck out for want of prosecution for the reasons that matter has proceeded for so long and so many costs have been incurred and that it is, as I have said, almost ready for trial.

Neither am I persuaded that it is an appropriate case for security for costs for much the same reason that the plaintiff has been permitted to run up these large costs without security for costs being raised earlier in the proceedings.

However, I am persuaded that it is appropriate that Dr Brown does pay the interlocutory costs order of some $14,000 which has been incurred by him and he has been required to pay for some years before this matter proceeds. It is, in a sense, a sign of goodwill that he should pay but he is also required to comply with the orders of the Court and cannot hide behind the fact that he an individual and the defendant is a corporation with at least sufficient means to run its trial.

Accordingly, the orders which I would make are these; that the application to strike out the action for want of prosecution be dismissed, but that the action be stayed until the plaintiff pays the defendant the costs awarded on the 8th of December 1999.

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HER HONOUR: The application was substantially unsuccessful, in my view, and while it was not inappropriate to bring it to test the matters that the ABC wish to test, having lost, I think the ABC will have to pay the costs of and incidental to the application.
