

SUPREME COURT OF QUEENSLAND

CITATION: *Erglis v Buckley & Ors* [2003] QSC 394

PARTIES: **Erglis**
(plaintiff / respondent)
v
Buckley & Ors
(defendants / applicants)

FILE NO/S: SC No 2867 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 11 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 5, 6 November 2003

JUDGE: Philippides J

ORDER: **The application for summary judgement is dismissed**

COUNSEL: R V Hanson QC with P A Freeburn for the applicants
P J Favell with R J Anderson for the respondent

SOLICITORS: Crown Law for the applicants
Messrs Drakopoulos Black for the respondent

PHILIPPIDES J:

The application for summary judgment

- [1] The plaintiff brings an action for defamation against the defendants. The plaintiff was employed as a nurse in the Bone Marrow Transplant Unit (Ward 9D) of the Royal Brisbane Hospital during 1989 to 2001. The twelfth defendant owned and operated the hospital and the other defendants (“the nursing defendants”) were nursing staff who worked in Ward 9D as employees of the twelfth defendant.
- [2] The plaintiff bases her claim on the publication of a letter dated 5 December 2001, signed by the nursing defendants and addressed to the Minister for Health, the Honourable Wendy Edmond, on Queensland Health letterhead, which it is alleged contained defamatory imputations concerning the plaintiff. It is common ground that the letter was sent by facsimile to the Minister on 5 December 2001 and was read and tabled by the Minister on that day during a debate about Ward 9D. The plaintiff relies on the publication of the letter to various persons prior to its being

tabled and the publication of a similar document¹ over a period of several weeks thereafter. The twelfth defendant is sued on the basis of vicarious liability.

- [3] The defendants admit most of the defamatory imputations, but raise a number of defences of qualified privilege pursuant to s 16 of the *Defamation Act* 1889. Shortly before the trial of the action was due to be heard, the defendants obtained leave to amend their defence to plead that the plaintiff's action was not maintainable because of the application of the *Parliament of Queensland Act* 2001 ("the Act").
- [4] The defendants now bring an application for summary judgment pursuant to rule 293 of the *Uniform Civil Procedure Rules* ("UCPR"), seeking an order that the plaintiff's action be struck out "on the grounds that litigation of the claim will impeach or question the freedom of speech, debates and/or proceedings in the Legislative Assembly of Queensland, contrary to sections 8 and 9 of the *Parliament of Queensland Act* 2001".²
- [5] Pursuant to s 293 of the *UCPR*, the defendants must show that the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim and that there is no need for a trial of the claim or the part of the claim. The purpose of the rule is to distinguish fanciful prospects of success. It directs the Court to ascertain whether there is a realistic as opposed to a fanciful prospect of success.³ While the test in Rule 293 of the *UCPR* calls for a more robust approach by the Courts than was the case under the previous rule, consistent with the overriding purpose of the *UCPR*, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense, the Court should only give judgment where the prospects of succeeding on the claim are so slim as to be fanciful.⁴
- [6] The issue that arises is whether the defendants can show that the provisions of sections 8 and 9 of the Act are attracted in respect of the impugned conduct, with the result that the plaintiff's action has no real prospect of success in respect of all or part of the claim. This involves a consideration of the issue of whether, in the circumstances of this case, the impugned conduct of the defendants concerning the publication of defamatory imputations contained in the letter of 5 December 2001 comes within the meaning of "proceedings in the Assembly" for the purposes of the Act.
- [7] The hearing of this application proceeded solely on the basis on the facts admitted on the pleadings and the documents incorporated into the pleadings. The following facts were not in dispute:

¹ Although the allegations in the amended Statement of Claim in its present form are based on the document subsequently published being the same, counsel for the plaintiff indicated that the pleading requires further amendment, because it will be alleged that the document left in the ward was in fact another document in similar form to that sent to the Minister.

² It was accepted for the purposes of the present application that the current Act and not its predecessor, the *Parliamentary Papers Act* 1992, was the relevant legislation, although the current Act came into force after the acts of publication.

³ See *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 Qd R 249, *Khartri v Wilson* [2003] QCA 188.

⁴ See *McPhee v Zarb* [2002] QSC 004.

- (a) On 5 December 2001 the letter dated 5 December 2001 and typed on “Queensland Health” letterhead was signed by the defendants and addressed to the Minister.⁵
- (b) The letter was sent by fax to the Minister at approximately 4pm on 5 December 2001.⁶
- (c) On the preceding day, 4 December 2001, and earlier on 5 December 2001 there had been debate about Ward 9D and allegations had been made concerning the staff of the Ward.⁷
- (d) The Parliamentary debate concerning Ward 9D continued on 6 December 2001.⁸
- (e) The letter of 5 December 2001 refers to “the comments made in parliament yesterday” and to Mr Horan who, it is admitted, made the allegations in Parliament.⁹
- (f) The letter contained subject matter which responded to the allegations made in parliament the previous day.¹⁰
- (g) When they sent the letter to the Minister, the defendants knew that it was likely that it would be re-published in a public forum (presumably Parliament).¹¹
- (h) Before the letter was composed, there was an ongoing debate in Parliament and in that debate the allegations about Ward 9D and its staff were made.¹²
- (i) The plaintiff was the source of those allegations.¹³
- (j) Reports of the allegations were widely reported in the media.¹⁴
- (k) There was a meeting involving some staff at the hospital.¹⁵

[8] The nature of the involvement of the Minister in initiating the drafting of the letter is in dispute. The defendants allege that the letter was sent to the Minister at the invitation of the Minister.¹⁶ However, the plaintiff disputes this, asserting that the letter was sent to the Minister at the instigation of the defendants.¹⁷ By way of particulars of that assertion, the plaintiff refers to statements made by the Minister in the Assembly on 5 and 6 December 2001 and to a letter by the Clinical Nurse Consultant of Ward 9D and the tenth defendant. The defendants seek in this application to rely on those statements and the statements in the letter, on the basis that they are relied on by the plaintiff in her pleading for the purpose of asserting the truth of the statements. In this regard the following statements are relied upon:

⁵ See para 4(a) of the Amended Statement of Claim and para 4 of the Further Amended Defence.

⁶ See admission in para 7(a) of Further Amended Defence adopted by para 1 of Further Amended Reply.

⁷ See extracts of Hansard referred to in para 14(a) of the Further Amended Defence and exhibited to affidavit of Ms Kasmer filed 15 October 2003; para 3 of the Further Amended Reply.

⁸ See Further Amended Reply para 7(c).

⁹ See Amended Statement of Claim para 4(e); Further Amended Defence para 4.

¹⁰ See the content of the letter; para 8 of the Further Amended Reply.

¹¹ See Amended Statement of Claim para 12(a) and the extent of the admission in Further Amended Defence para 11(a).

¹² See Further Amended Defence para 14(a); Further Amended Reply para 3.

¹³ See Further Amended Defence para 14(b); Further Amended Reply para 4 (only 3 matters are not admitted).

¹⁴ See Further Amended Defence para 14(c); Further Amended Reply para 5.

¹⁵ See Further Amended Defence para 14(d); Further Amended Reply para 6.

¹⁶ See Further Amended Defence para 14(f).

¹⁷ See Further Amended Reply para 7.

- (a) The Minister said to Parliament that she had met with the staff of Ward 9D who unanimously asked her to respond on their behalf to allegations from the Opposition.¹⁸
- (b) A letter from the CNC of Ward 9D on 10 December 2001 said that at the meeting the Minister asked what she could do to show support and the nursing staff asked if they could write a letter in response.¹⁹
- (c) The Minister said to Parliament that she gave the nurses “a guarantee that if they gave me something to present to Parliament I would do it. This [the letter] was sent to me”.²⁰

[9] Sections 8 and 9 of the Act relevantly provide:

“8 Assembly proceedings cannot be impeached or questioned

- (1) The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.
- (2) To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.

9 Meaning of “proceedings in the Assembly”

- (1) **“Proceedings in the Assembly”** include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.
- (2) Without limiting subsection (1), **“proceedings in the Assembly”** include –
 - (a) giving evidence before the Assembly, a committee or an inquiry; and
 - (b) evidence given before the Assembly, a committee or an inquiry; and
 - (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
 - (d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; and
 - (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
 - (f) preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and
 - (g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee.

¹⁸ See Further Amended Reply para 7(a).

¹⁹ See Further Amended Reply para 7(b).

²⁰ See Further Amended Reply para 7(c).

- (3) Despite subsection (2)(d), section 8 does not apply to a document mentioned in subsection (2)(d) –
- (a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or inquiry; and
 - (b) if the document has been authorised by the Assembly or the committee to be published.”

[10] As McPherson JA explained in *Rowley v O’Chee*:²¹

“The enactment of the Bill of Rights was the culmination of a long struggle with the executive over the right to freedom of speech in Parliament in England. Its primary purpose was to ensure that members were not subjected to pains or penalties for what they said in the course of debate or other proceedings in either of the Houses. To that extent, it has always been considered a bulwark of representative government ...”

[11] Article 9 of the Bill of Rights 1688 is reproduced in s 8 of the Act. Section 9(2) of the Act, as McPherson JA said in *O’Chee* of the equivalent Commonwealth provision, proceeds to clarify, or “it may be to redefine and perhaps extend”, the expression “proceedings in the Assembly” for the purposes of article 9 of the Bill of Rights.

[12] The defendants contended that their conduct in composing the letter and in publishing the contents of the letter to others came within the extended meaning of the term “proceedings in the Assembly” in s 9(1) of the Act and the inclusive meaning in s 9(2)(e).²² The defendants referred to authority that the privilege belongs to Parliament, not to a Member of Parliament, nor to a member of the public.²³ It was argued that the privilege was not confined to acts done by a Member and enures for their benefit. There is no authority directly on point. However, reliance was placed on *Hamilton v Al Fayed*,²⁴ as authority recognising that the privilege extends beyond acts done by the Member.

[13] The plaintiff maintained that in suing on the publication of defamatory matter outside of parliament by a non Member, the plaintiff was not seeking to impeach or question the freedom of proceedings in the Assembly. In submitting that the privilege does not extend to a non Member, the plaintiff argued that the mischief sought to be addressed by the Act is to “ensure that members were not subjected to pains and penalties for what they said in the course of debate or other proceedings” in the Assembly and thus to protect Parliamentary Members.²⁵ Reliance was placed on the following statement by Allen J in *R v Grassby*:²⁶

²¹ [2000] 1 Qd R 207 at 218.

²² The defendants do not seek to rely on s 9(2)(d) of the Act as of protecting any prior or subsequent acts of publication upon the mere presentation of the letter in the Assembly.

²³ *Rowley v O’Chee* [2000] 1 Qd R 207 at 224-225.

²⁴ [2001] 1 AC 395 at 404, 407.

²⁵ *Rowley v O’Chee* [2000] 1 Qd R 207 at 218.

²⁶ (1991) 55 A Crim R 419 at 428.

“Thus it is appropriate that a parliamentarian has absolute immunity in respect of what he does in the exercise of his duties in the course of proceedings in the House. There is no warrant to give such an absolute immunity to any person who seeks to persuade him to say something in the house. To the extent that immunity to such person is appropriate and recognised by the law it is one of qualified privilege - that privilege is defeasible by malice.”

- [14] Reliance was also placed on *Rowley v Armstrong*,²⁷ where Jones J found that “an informant in making a communication to a parliamentary representative is not regarded as participating in ‘proceedings in Parliament’.” However, the defendants sought to distinguish *Grassby* and *Armstrong* from the present case, on the basis that in those cases there was no business being transacted or proceedings in Parliament to which the statement made by the non Member to the Member was referable. (This point of distinction was made by McPherson JA in *O’Chee*.²⁸)
- [15] For the purposes of the application of s 9 (1) of the Act, counsel for the defendants argued that the defendants’ conduct preliminary to the faxing of the letter to the Minister, including showing the letter to other hospital staff and others, and the conduct of displaying the letter in the ward, constituted acts which were done in the course, or for the purpose of or incidental to, the transacting the business of the Assembly. The authorities of *O’Chee*, *Armstrong* and *Grassby* indicate that there is no support in the case law for the proposition that merely volunteering information to a Member is sufficient to attract the privilege. Indeed, Counsel for the defendants conceded that the privilege does not arise in those circumstances.
- [16] However, the defendants contended that this was not a case where they have merely volunteered information to a Member in a private capacity. The defendants relied on the circumstances of the debate in the Assembly from 4 to 6 December 2001 and contended that by the time the defendants responded to the allegations in the Assembly, they had been drawn into and were engaged in the proceedings of the Assembly and that were providing information concerning them to the Minister on matters which were already before the Assembly. It was argued that in so doing, the defendants were doing acts which were “in the course of, or for the purposes of, or incidental to transacting the business of the Assembly” within s 9(1) of the Act.
- [17] The plaintiff argued that even if the privilege is capable, in an appropriate case, of extending to the conduct of a non Member, it is not possible, on the material presently before the Court, to determine whether the privilege extends to the defendants. The plaintiff referred to the following observations of McPherson JA in *O’Chee*:²⁹

“It is not ... possible for an outsider to manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian The privilege is not attracted to a document by s 9(2) until at the earliest the Parliamentary member or his or her agent does some act with respect to it for the purposes of transacting business in the House.”

²⁷ [2000] QSC 088 at [34].

²⁸ [2000] 1 Qd R 207 at 225.

²⁹ [2000] 1 Qd R 207 at 221.

- [18] The plaintiff thus argued that *O'Chee* indicates that, in any event, the privilege under the Act “attaches when, but only when, a member of parliament does some act with respect to documents for the purposes of, or incidental to, the transacting of House business.”³⁰ It was contended that a resolution of that issue requires an analysis of the factual background to the defendants’ conduct, including evidence as to any relevant “act” by a Member. It was said that, without further evidence, the issue of the extent of the protection afforded by s 8 and s 9 of the Act cannot be determined. In addition, it was argued that the publication by the defendants was not just to the Minister and subsequently to the Assembly, but also to senior nursing staff and medical staff outside of the meeting held on 5 December 2001 and other employees and visitors to the ward and as such was not protected by the Act.
- [19] There is no direct authority for the proposition that the provision of information to a Member in respect of a matter before the Assembly is itself sufficient to attract the privilege for the benefit of a non Member. In so far as *O'Chee's case* touches on the protection of information provided to a Member, it proceeded on the basis that some act by the Member is required. Counsel for the plaintiff referred to this as the “timing issue” and submitted that in order to determine that issue, evidence was required as to the nature of the involvement of the Minister. There is also a related issue as to whether, if such privilege does extend to the communication between the defendants and the Minister, it also embraces the alleged publication to other persons, the circumstances concerning which the plaintiff contends should be the subject of evidence. That requires a consideration of what the defendants in fact did in circulating the letter. In the circumstances, even if the protection afforded by s 9 is capable, in an appropriate case, of enuring for the benefit of a non Member, it is not possible to conclude on the material currently before the Court that s 9(1) of the Act applies in the present case so as to render the plaintiff’s action in whole or in part unmaintainable on the basis that there is no real prospect of success.
- [20] The defendants’ alternative contention was that the protection in s 9(2)(e) extends to communications from a non Member, which are done for the purpose of presenting or submitting a document in the Assembly. In this regard they also rely on *O'Chee*. It was said that the defendants’ conduct, in preparing the letter and in publishing the contents thereof as alleged, fell within s 9(2)(e) of the Act. The defendants contended that it could be inferred from the facts admitted on the pleadings and the documents incorporated into the pleadings that the defendants’ conduct prior to the sending of the letter to the Minister was done for the purpose of or incidental to the letter being presented or submitted to the Assembly.
- [21] The defendants contend that the letter was prepared to inform the Member in respect of a matter which had been and was then the subject of debate in the Assembly. It was argued that it can be inferred as a matter of objective inference from the circumstances of the debate and the terms of the letter and other facts not in dispute that the letter was also written for the purpose of its being presented or submitted to the Assembly. The defendants pointed to the fact that the authors were aware that the document would be or was likely to be so used by the Member and the statements made by the Minister in the Assembly. They also pointed to the statements of the Minister and the CNC referred to in the Further Amended Reply.

³⁰ [2000] 1 Qd R 207 at 225.

- [22] The plaintiff argued that *O'Chee* points to the need for there to be a relevant act by the Member and that *O'Chee* only extended the protection to the acts of the Member. It was disputed that it could be inferred on the material before the Court that it could be inferred that it was the author's *purpose* that it be presented to the Assembly. The plaintiff also pointed to other related issues which arise in respect of the application of s 9(2)(e). What acts of the defendants can be said to have been done in preparation of the document? Do the acts of preparation extend to the publication to the ward staff, the other hospital staff and to others? It was argued that evidence was required as to the nature of the defendants' conduct in order for those matters to be determined.
- [23] A further matter arises concerning the publication of defamatory matters by the circulation and display of at least one other letter which, it emerged during argument, the plaintiff maintains was left in the ward and the extent of any prospective protection. The defendants contended that the alleged defamation arising from the letter being circulated to staff and others after it was tabled is covered by the protection given in s 9 of the Act, because of the possibility of further debate. In this respect the defendants pointed to the fact that the debate in the Assembly ensued on the day after the tabling of the letter. Reference was made to *O'Chee* where documents retained for 2 to 3 months were held to be protected.³¹ However, counsel for the plaintiff indicated that the Statement of Claim requires further amendment, because it is intended to be asserted that there was a separate but similar document, other than the document faxed to the Minister, which was left in the ward. In fact, it is now said that there were two additional documents, one which was left on the bench in the ward and another that was left in a day book in the ward. There are therefore live issues as to the nature of those additional documents and whether those documents can be protected by virtue of s 9 of the Act. Any prospective protection which might arise is one of degree to be determined in the light of the circumstances of the case. Further evidence is necessary for the determination of these issues.
- [24] In the circumstances, it cannot be said that, because of the issue of parliamentary privilege raised by the defendants, the plaintiff's claim has no real prospects of success and is not maintainable.
- [25] It was urged by counsel for the defendants that, leaving aside the question of the summary judgment application, the issue of whether the protection afforded by sections 8 and 9 of the Act is capable of extending to a non Member should be determined. However, the circumstances and extent of protection afforded by the Act to a non Member cannot be determined in a vacuum. It is not possible on this application to dispose finally of the issue of parliamentary privilege. There are a number of aspects in respect of which evidence is required, such as the ambit of the acts comprehended as being for the preparation of the document and the publication arising from the other documents left in the ward and the circumstances surrounding any relevant "act" by the Minister in, for example, requesting information for use in the Assembly. It is not appropriate that these issues be deal with in a piecemeal fashion.

³¹ [2000] 1 Qd R 207 at 221- 222.

The meaning of the words “for the purposes of” in s 9(2)(e) of the Act

- [26] An issue of construction arises concerning s 9(2)(e) of the Act in respect of which both parties have sought a ruling. That concerns the question of whether the definition of “proceedings in the Assembly” as stated in s 9(2)(e) of the Act is limited to the preparation of a document, the *sole* purpose of which is for transacting the business of the Assembly or whether the section also applies where “a purpose” of the preparation of the document is transacting business of presenting or submitting a document to the Assembly.
- [27] The only authority which the defendants were able to point to in respect of this issue was *CJC v Parliamentary Commissioner*,³² where the Court rejected the contention that unlawful conduct abrogated the privilege. The plaintiff contended that to interpret the provision so that the privilege was only attracted where the sole purpose was the parliamentary business was also tantamount to abrogating the privilege. It was submitted that the true analogy for parliamentary privilege was the protection afforded by s 10 of the *Defamation Act* which is not lost by proof of ulterior motive.
- [28] The plaintiff argued s 9(3) of the Act was of relevance. It was said that the effect of the s 9(3) of the Act is that where there are dual purposes for the preparation of the document, s 8 does not apply in relation to a document mentioned in s 9(2)(d), in respect of the purpose for which it was brought into existence, which is not the purpose of its being tabled in, or presented or submitted to the Assembly. In this regard, counsel referred to paragraph 5.2 of the Report of the Members Ethics and Parliamentary Privileges Committee³³ reviewing s 3 of the *Parliamentary Papers Act 1992* as supporting the contention that s 9(3) indicated that the words “the purposes” in s 9(2)(e) should be read as meaning the sole purposes.
- [29] I am unable to accept the plaintiff’s submission. Section 9(3) of the Act only has application to documents referred to in s 9(2)(d) of the Act. It has no application to s 9(2)(e) of the Act which is concerned with the preparation of documents. It simply recognises that documents tabled, presented or submitted to the Assembly may include dual purpose documents or documents initially prepared for other purposes. It ensures that, in certain circumstances, such document can still be used for the purpose which is other than the purpose of tabling, presenting or submitting the document to the Assembly.
- [30] The approach contended for by the plaintiff would result in parliamentary privilege being treated not as one affording absolute privilege, but as one which could be defeated by proof of bad faith and thus as one equated with qualified privilege. I cannot accept that proposition.

Order

- [31] The application for summary judgment is dismissed. I shall hear submissions as to costs.

³² [2002] 2 Qd R 8 at 24, 25.

³³ Report No 26.