

SUPREME COURT OF QUEENSLAND

CITATION: *Erglis v Buckley & Ors* [2004] QSC 380

PARTIES: **WENDY ERGLIS**
(plaintiff)
v
MELISSA BUCKLEY & ORS
(defendant/applicant)
and
MARGARET WENHAM
(respondent)

FILE NO: S2867 of 2002

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 29 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 26 October 2004

JUDGE: Douglas J

ORDER:

Order that pursuant to rule 247(2)(b) of the *Uniform Civil Procedure Rules*, the stay of the notice of non-party disclosure directed to the respondent, Margaret Wenham, filed on 27 September 2004 be lifted.

Further order that the respondent comply with the notice of non-party disclosure within 7 days of today.

Further order that pursuant to rule 247(3) of the *Uniform Civil Procedure Rules*, each party is to bear the party's own costs of this application.

CATCHWORDS: PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - Other matters before trial - Disclosure of documents - Non-party disclosure - Objection to disclosure of a newspaper reporter's notes concerning impugned publications in a defamation action - Where the notes are directly relevant to facts in issue and there is no other demonstrated reasonably simple and inexpensive way of proving the matter sought to be proved - *Uniform Civil Procedure Rules 1999* (Qld), r

242.

Uniform Civil Procedure Rules 1999 (Qld), rr. 242, 245 & 247

Lebon v Lake Placid Resort Pty Ltd [1995] 1 QdR 24, applied

COUNSEL: P A Freeburn SC for the defendant/applicant
D C Spence for the respondent

SOLICITORS: C W Lohe, Crown Solicitor for the defendant/applicant
Thynne & Macartney for the respondent

- [1] **DOUGLAS J:** The defendants to this defamation action issued a notice of non-party disclosure on 27 September 2004 directed to a reporter for *The Courier-Mail*, Margaret Wenham, seeking the production of “all notes, including diary entries, records of telephone conversations and interviews” relating to eight articles published in *The Courier-Mail* between 30 October 2001 and 11 November 2003. Three of the articles, published on 31 October 2001, 2 November 2001 and 10 November 2001, related to the availability of hospital beds in the ward at the Royal Brisbane Hospital used for bone marrow transplant patients, Ward 9D. The defamation alleged in the action is said to have occurred on or about 5 December 2001 by the publication of a letter signed by the first 11 defendants who worked in Ward 9D as employees of the State of Queensland, the twelfth defendant. That letter was critical of the plaintiff and of her work in that ward as a nurse.
- [2] The other five articles in respect of which Ms Wenham’s diary entries, records of telephone conversations and interviews are sought, were published on 5 April 2002, 4 October 2003, 13 October 2003, 6 November 2003 and 12 November 2003. They deal mainly with the institution and conduct of this action. Two of them, published on 5 April 2002 and 4 August 2003, on their face report information apparently supplied by the plaintiff to Ms Wenham.
- [3] Ms Wenham is required to produce the documents if they are directly relevant to an allegation in issue in the pleadings, are in her possession or under her control and are documents she could be required to produce at the trial of the matter. If another reasonably simple and inexpensive way of proving the matter sought to be proved by the documents is available then the applicants may not require their production; see *Uniform Civil Procedure Rules* r. 242. She responded to the request by contending that the documents are not relevant to the issues pleaded in the action.
- [4] The defendants argue that the documents are relevant for 5 reasons.

Reason 1

- [5] Paragraph 15 of the second further amended statement of claim (“the statement of claim”) alleges that the plaintiff has been hurt by the knowledge that the defamatory matter referred to in the pleading has continued to be a matter of public discussion. That paragraph is denied in the defence, the denial being explained in part by the defendant’s belief that any injury to the plaintiff’s reputation was caused by the publication of the nurses’ letter in parliament and because the defendants believe the allegations to be untrue. They will also wish to argue and explore with the plaintiff in evidence whether she has “courted” the press leading to the allegations about her continuing to be a matter of public discussion.

- [6] The defendants point to the fact that Ms Wenham has reported on many of the interlocutory and appeal hearings in this matter where no person from the defence team has contacted the press about the hearings. I would not infer from a reporter's attendance on hearings in this Court that she would necessarily have been informed of them by a party to the proceedings. The names of matters to be heard each day in this Court are published in the law list and, as was correctly submitted by Ms Spence for the respondent, Ms Wenham, there is every reason to expect that the press would be interested in reporting issues related to defamation proceedings.
- [7] Ms Spence also criticised the pleadings by the defendant as not directly raising the issue whether the defamatory matter continued to be a matter of public discussion because of the plaintiff's own behaviour in seeking publicity and for containing no allegation that, if she did so, the damages should be thereby reduced. In that context she drew my attention to r. 149(1)(c) dealing with the requirement that pleadings state specifically any matter that, if not stated specifically, may take another party by surprise.
- [8] The main issue for me to consider is, however, whether the documents sought are directly relevant to an allegation in issue in the pleadings. It seems to me that the allegation in paragraph 15(c) of the statement of claim is in issue and that its reference to the plaintiff being hurt by the knowledge that the defamatory matter has continued to be a matter of public discussion makes it likely that the documents sought after the publication on 5 December 2001 the subject of this action are relevant to that issue. Perhaps the point is best illustrated by an extract from an article published in *The Courier-Mail* apparently on 4 August 2003 which includes the following passage referring to a then impending hearing:

“Wendy Erglis, a nurse formerly employed in the Royal Brisbane Hospital's bone marrow transplant unit, said yesterday she was steadfast in her commitment to recover her reputation which she believed had been shattered by Ms Edmond on December 5, 2001.

‘Your personal and professional integrity is everything,’ she said.

The Brisbane mother and nurse of 21 years' experience who had hoped to stand in the next State election as Liberal Party candidate in Ms Edmond's Mt Coot-tha electorate, said the matter had been set down for a 10-day hearing starting on November 3.”

- [9] That passage is, to my mind, relevant to the allegation in para 15(c) which leads me to the conclusion that the documents sought in respect of each publication after 5 December 2001 will also be relevant.

Reason 2

- [10] Paragraph 19 of the Statement of Claim claims compensatory damages for the plaintiff's distress and embarrassment caused to her by the defamation and to reflect the extent of the publication and that the defamation may be spread. That claim is also in issue because it is denied by paragraph 13 of the defence and, for similar reasons as apply to the allegation in paragraph 15(c), leads me to the conclusion that the documents sought since the date of the alleged defamation are relevant to the

issue of who was responsible for the extent of the publication as between the defendants and the plaintiff.

Reason 3

- [11] Paragraph 16(f) of the statement of claim alleges that the defamation complained of and the imputations pleaded arising from it were a reprisal against the plaintiff for speaking to the media about certain matters referred to in that paragraph. They were that the plaintiff had pursued a formal grievance process against a former chief nurse, had made allegations of staff bullying, professional misconduct and theft from patients within Ward 9D, had given evidence at an independent inquiry into the allegations in the paragraph and into the death of a Jason Haddad and had given information to the Queensland opposition leader about the matters referred to in the paragraph.
- [12] Those allegations are also denied in paragraph 13 of the defence which means that there is a live issue about the extent to which the plaintiff spoke to the media about the matters referred to in paragraph 16.
- [13] The article published on 2 November 2001 refers to a confidential investigation into allegations of staff harassment and abuse in Ward 9D and an inquest into the death of a young man being treated in the ward. The article published on 5 April 2002 refers to claims by the previous opposition leader, Mr Horan, in Parliament the day before the alleged defamation, that staff shortages in Ward 9D could be attributable to poor management practices and not a shortage of nurses. It goes on to say:

“Mr Horan referred to a damning, confidential report into ward 9D management practices generated in 2000 after Mrs Erglis, who had worked in the ward for 12 years, blew the whistle on the unprofessional conduct of a head nurse.”

- [14] Similar reference appear in the articles dated 4 August 2003, 6 November 2003 and 12 November 2003. The first article in the series, dated 31 October 2001, is perhaps only marginally relevant but it does refer to statements by the opposition leader dealing with the professionalism of treatment of patients in Ward 9D and later articles indicate that he had been provided with information by the plaintiff; see the articles of 5 April 2002, 4 August 2003 and 6 November 2003.
- [15] On that evidence it seems to me that all of the documents sought in the notice of non-party disclosure are relevant to the issue of the extent and nature of the plaintiff’s contact with the media alleged in paragraph 16(f) of the statement of claim.

Reason 4

- [16] Paragraph 17 of the statement of claim pleads that the words published and the imputations were to discourage the plaintiff from providing material to the media and the opposition leader about the inefficient operation of Ward 9D and to discredit her to her nursing peers, the opposition, the media and the public.
- [17] Again, that allegation is in issue. The extent to which the plaintiff had provided material to the media seems to me to be relevant to the issue whether the defamation alleged was designed to discourage her from continuing to do that. The result is that

the request for disclosure is relevant to that issue at least for the period before the defamation alleged was published. The information sought thereafter may be marginally relevant to the motive the defendants had for publishing the alleged defamation but that is speculation and not enough to justify an order merely on that basis.

Reason 5

- [18] Paragraph 15(e) of the defence alleges that the publications were made in good faith in order to answer or refute defamatory matter published by the plaintiff concerning the defendants. That is put in issue by paragraph 9(d) of the reply.
- [19] The evidence of the stories published makes it clear that the plaintiff had spoken to Ms Wenham concerning the defendants; see, in particular, the article of 2 November 2001 coupled with those of 5 April 2002, 4 August 2003 and 6 November 2003 dealing with information supplied by her to the opposition leader about an internal investigation and the management practices in Ward D after a complaint she had lodged about a senior supervisor on the ward. That evidence seems to relate directly to the particulars of the defamatory matter alleged in paragraph 15(e) of the defence; see the particulars provided which refer to the allegations contained in paragraphs 14(a)(i)-(xiii) and 14(b)(ii) of the defence.
- [20] In those circumstances it seems to me that the documents sought are all relevant to the issue of identifying the defamatory matter allegedly published by the plaintiff concerning the defendants.

The respondent's contentions

- [21] I have referred to the respondent's contention concerning the relevance of the documents sought and am of the view that they are relevant for the reasons I have already set out. Ms Spence also submitted that the disclosure should be limited to the records of communications with the plaintiff. In my view, however, it is not only records of communications with the plaintiff that would necessarily be directly relevant to the issues raised in the pleadings. Communications with other people relevant to the issues in the pleadings discussed in the articles are also likely to be directly relevant for present purposes. In that context it may be significant that there has been no objection to the production of any of the documents by any other person who would be affected by the notice using the procedure available under r. 245(2).
- [22] I am told that no documents relevant to these issues were disclosed by the plaintiff. Nor would the delivery of interrogatories have been another reasonably simple and inexpensive way of proving the matter sought to be proved by these documents, particularly in the absence of the documents themselves. The questions would necessarily have been general and probably time-consuming and expensive to frame.
- [23] In that event it seems to me that there is no other demonstrated reasonably simple and inexpensive way of proving the matter sought to be proved by these documents other than the process allowed by r. 242.
- [24] Bearing in mind the fact that this application was not brought on notice to the plaintiff and my obligation to be sensitive to her interests, *Lebon v Lake Placid*

Resort Pty Ltd [1995] 1 QdR 24, 29, I am persuaded that it is appropriate to dismiss the objection to the order sought for non-party disclosure. It seems to me that these are documents that Ms Wenham could have been required to produce at the trial by subpoena. As the notice otherwise complies with r. 242 I shall make the orders sought namely that:

- (1) Pursuant to rule 247(2)(b) of the *Uniform Civil Procedure Rules*, the stay of the notice of non-party disclosure directed to the respondent, Margaret Wenham, filed on 27 September 2004 be lifted.
- (2) The respondent comply with the notice of non-party disclosure within 7 days of today.
- (3) Pursuant to rule 247(3) of the *Uniform Civil Procedure Rules*, each party is to bear the party's own costs of this application.