SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Woolworths Limited & Ors* [2018] QSC 82
PARTIES:	**OLGA DAY** (plaintiff) **v** **WOOLWORTHS LIMITED** (ACN 000 014 675) (first defendant) **CPM AUSTRALIA PTY LTD** (ACN 063 244 824) (second defendant) **RETAIL ACTIVATION PTY LTD** (ACN 111 852 129) (third defendant)
FILE NO/S:	BS No 6016 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 November 2017 with further written submissions on 1 and 4 December 2017
JUDGE:	Douglas J
ORDER:	**1. Order that Mrs Day be restrained from:** **(a) contacting or communicating with Zurich Australian Insurance Limited ACN 000 296 640, Zurich Financial Services Australia Limited ACN 008 423 372, Zurich Australia Ltd ACN 000 010 195 or Zurich Insurance Group Ltd (hereinafter jointly and severally referred to as 'Zurich') or any director, officer, employee or agent of Zurich, other than Mills Oakley Lawyers, Zurich's solicitors, in relation to this proceeding, or any matter connected with this proceeding, by any means whatsoever; and/or** **(b) allowing, causing, encouraging, permitting or suffering any person on her behalf to contact or communicate with Zurich or any director, officer, employee or agent of Zurich, other than Mills Oakley Lawyers, Zurich's solicitors, in relation to this proceeding, or any matter**

connected with this proceeding, by any means whatsoever,

until the conclusion of these proceedings or further order.

2. Order that costs be reserved.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR PARTICULAR PURPOSES – OTHER CASES – where plaintiff sent emails about these proceedings to second and third defendants' insurers – where second and third defendants characterised those emails as menacing, intimidating or harassing – where second and third defendants sought injunction to restrain plaintiff from contacting or communicating with their insurer or their insurer's directors, officers, employees or agents about these proceedings other than through their solicitors – whether injunction should be granted

Australian Solicitors Conduct Rules 2012, r 33
Defamation Act 2005 (Qld), s 9

Attorney-General v Times Newspapers Ltd [1974] AC 273, applied
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, applied
Chappell v TCN Channel Nine Pty Ltd (1988) 14 NSWLR 153, cited
Legal Services Commission v Bradshaw [2008] LPT 9, considered
Perfection Fresh Australia Pty Ltd v Melbourne Market Authority (No 2) [2013] VSC 342, followed
R v Dunn [2015] 2 Qd R 407; [2014] QCA 254, followed
Thunder Studios Inc (California) v Kazal [2016] FCA 1598, cited
Waterhouse v Australian Broadcasting Corporation (1986) 6 NSWLR 716, considered
Y & Z v W (2007) 70 NSWLR 377; [2007] NSWCA 329, followed

GE Dal Pont, *Lawyers' Professional Responsibility*, (Law Book Co, 6th ed, 2017)
Young, Croft and Smith, *On Equity*, (Law Book Co, 2009)

COUNSEL: Olga Day in person
R C Morton for the second and third defendants

SOLICITORS: Olga Day in person
Mills Oakley for the second and third defendants

[1] This is an unusual application for an interlocutory injunction. The second and third defendants, CPM Australia Pty Ltd and Retail Activation Pty Ltd, seek to restrain the plaintiff, Mrs Olga Day, from contacting or communicating with their insurer, Zurich Australia Insurance Limited and three other associated Zurich companies ("Zurich"), about this proceeding except through their solicitors, Mills Oakley. Mrs Day commenced proceedings against those defendants seeking damages for personal injuries she claims to have suffered in an accident at premises operated by the first defendant, Woolworths Limited. The solicitors and counsel

engaged on behalf of the second and third defendants also hold instructions to appear for the four Zurich companies to support the application.

Background

[2] The conduct complained of by Mrs Day was supported by a significant body of evidence. It was summarised, it seemed to me accurately, in the applicant's submissions to the following effect:

(a) The plaintiff's husband, on her behalf, has threatened to report employees of Zurich to the Legal Services Commission in Queensland and the corresponding body in New South Wales, the Office of Fair Trading in Queensland and the corresponding body in New South Wales and has threatened the directors of the defendants with personal liability.

(b) The plaintiff communicated to Zurich, including its directors, allegations of unethical and improper conduct by the solicitors for the second and third defendants.

(c) The plaintiff's husband, on her behalf, has accused the directors of Zurich of misusing shareholders' funds by encouraging the solicitors for the second and third defendants to drag her claim through the courts. Those accusations were also communicated to Zurich's auditors. The communication also included allegations of breach of the *Corporations Act* 2001 (Cth) by Zurich's directors.

(d) The plaintiff and her husband have in correspondence to Zurich's Australian General Counsel and Secretary, who happens to be a lawyer, also copied to Zurich's Chief Executive Officer and directors, accused Zurich's General Counsel "or your other officers" of using the court process for improper purposes, professional misconduct and breach of the *Corporations Act*. In that correspondence, the plaintiff and her husband also threatened to go to the media to disclose "your appalling practices", accused two solicitors from the firm acting for the second and third defendants of corrupt conduct in breach of the *Crime and Corruption Act* 2011, threatened to report Zurich's General Counsel to "the relevant authorities" and sought information, said to be potentially privileged, as to the name of the person employed by Zurich providing instructions to the second and third defendants' solicitors, the identification of the person or persons authorising the funding of legal costs in the matter and the amount of money spent by Zurich in defending the matter.

(e) The plaintiff and her husband accused Zurich's General Counsel of authorising or instructing criminal conduct in fraudulently forging and uttering a certificate of readiness by the second and third defendants' solicitors. They also asked for her confirmation that she engaged in such conduct and threatened to refer the matter to the Law Society of New South Wales and/or the Legal Services Commission in New South Wales in the event of an "unsatisfactory response".

(f) On 15 November 2017, after the plaintiff had been served with the application to restrain her from communicating with Zurich, the plaintiff's husband, on her behalf, again wrote to Zurich's General Counsel and Secretary and to Zurich's directors complaining about the conduct of the solicitors, among other things, in acting to support Woolworths. He also asked for advice as to whether the second and third defendants had notified the incident complained of by the plaintiff at Woolworths on 18 December

2014 pursuant to the *Work Health and Safety Act* 2011 (Qld), which the second and third defendants assert they were not obliged to do. She is also said to have again threatened that some form of personal responsibility would attach to the recipients of the correspondence.

[3] On 27 November 2017 I dealt orally with submissions about the effect or lack of effect of two certificates of readiness in one of several other interlocutory proceedings heard at the same time as this application. I concluded that, if the certificates of readiness were irregular, which I did not decide, that had no legal effect on the future conduct of the proceedings on behalf of the second and third defendants.

Submissions

[4] Mr Morton for the defendants characterised the communications by the plaintiff and those said to have been made on her behalf as, on their face, made in an attempt to menace, intimidate and harass Zurich and to influence it in relation to the conduct of this litigation. He submitted that the communications could have no other legitimate purpose than that. He likened the conduct to behaviour intended to interfere with the administration of justice.

[5] He sought to draw an analogy with the rules preventing a lawyer from contacting an opposing client directly rather than through the client's lawyer under the so-called "no contact rule". Rule 33 of the *Australian Solicitors Conduct Rules* 2012 provides:

> "**33. Communication with another solicitor's client**
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> 33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:
>
> 33.1.1 the other practitioner has previously consented;
>
> 33.1.2 the solicitor believes on reasonable grounds that:
>
> (i) the circumstances are so urgent as to require the solicitor to do so; and
>
> (ii) the dealing would not be unfair to the opponent's client;
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> 33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or
>
> 33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact."

[6] A predecessor to that rule was explained in *Legal Services Commission v Bradshaw*.[1] The chief rationale was described in the Legal Practice Tribunal's reasons, delivered by Justice White, Mr Peter Lyons QC and Dr Susan Dann, in Professor Dal Pont's language as "to prevent a

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[1] [2008] LPT 9 at [26]; see also now GE Dal Pont, *Lawyers' Professional Responsibility* (Law Book Co, 6th ed, 2017) at pp 724-725, [21.235].

lawyer from circumventing the protection that legal representation provides to a client. The lawyer may by reason of the lawyer's legal knowledge and position secure damaging admissions, or access to privileged material, or undermine the opponent's client's trust in that person's lawyer … The no contact rule may also involve the lawyer becoming a witness if there is any dispute about the content of the communications. The no contact rule applies where the opposite party is a corporation …".

[7] In this case, although Mrs Day is a litigant in person, she is close to completing a law degree, has worked in the legal profession for a firm of lawyers and has been involved in litigation on several occasions in the past.

[8] Because of the public interest in the right of free speech, I was concerned as to the appropriateness of granting such an injunction in these circumstances.[2] I requested the parties to provide me with further written submissions particularly in respect of that issue. Mrs Day provided an undertaking in the terms sought by the applicants pending my delivery of reasons in the matter.

[9] Mr Morton's written submissions were that the effect of the communications so far was to harass the recipients and to attempt to obtain an advantage in the litigation by undermining the relationship among Zurich, the second and third defendants and the solicitors. He submitted that Mrs Day's behaviour affected the integrity of the court process on the basis that her communications were made in an attempt to influence Zurich in the conduct of the litigation as those defendants' insurers. That conclusion is fairly available on an objective analysis of the evidence whatever Mrs Day's intentions were in communicating in this fashion. It is also apparent that she is aware of the fact that, if she were a lawyer, she would not be able to behave in this fashion.

[10] Nor, as Mr Morton submitted, is there any detriment to her in being required to communicate through the solicitors. They have to act on their client's instructions and if there are legitimate complaints to be made about the solicitors' conduct or Zurich's conduct, then there are other possible avenues open to Mrs Day. He argued that a requirement that she communicate with the solicitors and not otherwise communicate with Zurich or its associated companies in relation to this proceeding or any matter connected with it, does not interfere with her right of free speech to any significant degree but does serve to protect the integrity of the court's conduct of this proceeding.

[11] By analogy with the cases illustrating that it is only in exceptional circumstances that a court would exercise its power to grant an interlocutory injunction in defamation cases, Mrs Day argued that I should not grant the injunction sought. She submitted that she had realistic prospects of success in establishing the allegations she made of professional misconduct, breach of directors' duties and of corrupt conduct. She said that she was simply trying to bring to the attention of the directors and the General Counsel of Zurich information about the conduct of the solicitors acting for the parties insured by them.

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[2] See, eg, *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 163-164 and *Australian Broadcasting Corporation v O'Neill* [2006] 227 CLR 57, 66-67 at [16].

Consideration

[12] The interlocutory injunctions proposed seek to restrain Mrs Day from communicating with Zurich or its directors, officers, employees or agents in relation to this proceeding except through their solicitors. The analogy with the use of injunctions to restrain defamatory publications is not completely appropriate. As Spigelman CJ said in *Y & Z v W*:[3]

> "There is a significant line of authority which applies the restrictive approach to interlocutory injunctions in the case of defamatory publications identified in *Bonnard v Perryman* [1891] 2 Ch 269, to restraints upon publication based on other causes of action. (See, for example, *Australian Broadcasting Corporation v O'Neill* (at 132 [210]), per Heydon J.) However, that approach is not appropriate in the case of a contempt of court, at least where the person to be restrained can identify neither a public interest nor a private interest in any publication (cf *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554 at 558-562; 566; *Attorney-General v News Group Newspapers Ltd* [1987] QB 1 at 7-8, 12-16, 19-20; *Attorney-General v Newspaper Publishing plc* [1988] Ch 333 at 371). In this context matters of this character will fall to be considered with reference to the *Bread Manufacturers* defence. (See *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242; 54 WN (NSW) 98.)"

[13] One of the issues, therefore, is to identify the interest that the defendants and Zurich seek to protect and any countervailing interest in Mrs Day.

[14] Mrs Day's concern was to bring to the attention of the directors and the General Counsel of Zurich information about the conduct of the solicitors acting for the parties insured by them. She has done that in a way that raises contentious issues about how to characterise their behaviour. So far I am not persuaded that what she says they have done deserves the criticism she levels at them but that is not a matter to resolve at this stage of the proceedings.

[15] The lawyers, Zurich's General Counsel and its directors and officers who have been attacked may well have an interest in being protected against defamation but they are not applicants and are not likely to be able to obtain injunctive relief against any defamation in the absence of exceptional circumstances.

[16] The second and third defendant companies may not be excluded corporations for the purposes of s 9 of the *Defamation Act* 2005 and so have no cause of action for defamation in relation to the publication of defamatory matter about them. There was no evidence about their status in that respect. In any event the publications complained of have, generally speaking, been made to Zurich rather than to the outside world and do not seem likely to have affected their reputation with Zurich to a significant extent so far. Nor do those defendants have an obvious proprietary or personal right not to be bombarded with aggressive letters or other communications of the type complained of.[4] They would also appear unlikely to be

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[3] (2007) 70 NSWLR 377, 384, 379 at [5].

[4] As to the need to show some such interest to justify the grant of an injunction see Young, Croft and Smith, *On Equity*, (Law Book Co, 2009) at pp 1026-7, [16.140].

entitled to injunctive relief for any such defamation of them to Zurich in the absence of exceptional circumstances.

[17] If there is another cause of action available to them, for example, for injurious falsehood, it is not likely to give rise to significant damage such as to justify the grant of an injunction at this stage.

[18] Nor can the analogy with the requirements of the professional conduct rules be taken too far. Although Mrs Day does have some legal experience she is not a lawyer. The authorities suggest that litigants have the right to communicate directly with each other, although that may not be absolute. As Elliott J said in *Perfection Fresh Australia Pty Ltd v Melbourne Market Authority (No 2)*:[5]

> "Obviously once solicitors are on the record, unless one of the exceptions to the usual position exists, the solicitors should communicate directly with the opposing solicitors. However*, absent some form of improper or inappropriate behaviour on the part of a party or parties*, I can see no good reason why the parties should be prevented from communicating directly with each other. Indeed, there are likely to be good reasons why, in many cases, an order preventing direct communication would be contrary to the interests of the parties, and the interests of justice."

[19] No doubt that is why Mr Morton likened Mrs Day's conduct to behaviour intended to interfere with the administration of justice. The authorities do support the grant of injunctions to restrain threatened contempts of court. As Young J said in *Waterhouse v Australian Broadcasting Corporation*:[6]

> "The plaintiffs' real claim is that they reasonably have such a strong fear that unless restrained the administration of justice in this State will be so affected by the actions of the defendant, as to make it just and equitable for this Court to restrain the proposed action. Such a claim, if valid, (and I will come to that later) is a classic case that comes before a court of equity for determination."

[20] Those principles were expressed more fully by Ipp JA in the New South Wales Court of Appeal in *Y & Z v W* in these terms:[7]

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5 [2013] VSC 342 at [184] (emphasis added). The passage is discussed in Dal Pont, op cit, at p 726, [21.245].

6 (1986) 6 NSWLR 716, 720D-E.

7 *Y & Z v W* (2007) 70 NSWLR 377, 384 at [35]-[39]. Spigelman CJ agreed; 378-379 at [1] and [9]. See also *Thunder Studios Inc (California) v Kazal* [2016] FCA 1598 at [95] where Rares J, relying on *Y & Z v W*, said: "There is a species of contempt that involves the bringing of improper pressure on a party to proceedings. The bringing of such improper pressure amounts to a contempt involving the obstruction of the administration of justice, irrespective of whether or not the pressured party, in fact, is deterred from litigating."

"[35] First, the court has jurisdiction to grant an interlocutory injunction restraining a threatened contempt of court: see *Attorney-General v Times Newspapers Ltd* [1974] AC 273; *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554; *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716; *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775.

[36] Secondly, misusing the court's processes, at least where other parties are thereby prejudiced, may amount to a contempt: *R v Gregory* (1843) 1 Cox CC 31; Nigel Lowe and Brenda Sufrin, *Borrie & Lowe, The Law of Contempt* (Butterworths: London, 3rd ed, 1996) at 459, 461.

[37] Thirdly, it is a contempt of court to obstruct the due administration of justice by attempting to induce a settlement of an action by improper threats or intimidation. In *Attorney-General v Times Newspapers Ltd*, Lord Simon said the following on this point (at 318):

> 'It is a contempt even privately to threaten…a party (*In re Mulock* (1864) 3 Sw & Tr 599). The threat there, by someone who "had no interest whatever in the matter," was to "publish the full truth" unless a petition were withdrawn. Sir James Wilde, Judge Ordinary, said, at p 601: "…she [the petitioner] claims the right to approach this court, free from all restraint or intimidation. It is a right that belongs to all suitors."'

Lord Cross said (at 326):

> 'To seek to dissuade a litigant from prosecuting or defending proceedings by threats of unlawful action, by abuse, by misrepresentation of the nature of the proceedings or the circumstances out of which they arose and such like, is no doubt a contempt of court…'

[38] Fourthly, the bringing of improper pressure on a party to collateral proceedings amounts to a contempt of court (involving the obstruction of the due administration of justice) irrespective of whether or not the pressured party is, in fact, deterred from litigating. In *Smith v Lakeman* (1856) 26 LJ Ch 305, the plaintiff sent a letter to the defendant pending the suit. Stuart V-C said (at 306):

> '[The letter] was a threat for the purpose of intimidating [the defendant] as a suitor, and, therefore, whether it had had that effect or not, it was unquestionably a contempt of court.' See also *Harkianakis v Skalkos* (1997) 42 NSWLR 22 and *Resolute Ltd & Anor v Warnes* [2000] WASCA 359 at [13].

[39] Fifthly, in a contempt involving obstruction of the administration of justice, the plaintiff must prove, according to the criminal standard of proof, that the material in question has, as a matter of practical reality, a tendency to interfere with the course of justice in a particular case: see *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372 per Dixon CJ, Kitto, Fullagar and Taylor JJ; *Harkianakis v Skalkos* at 27 per Mason P; *Resolute v Warnes* at [13]. The test was put succinctly by O'Loughlin J in *Willshire-Smith v Votino Bros Pty Ltd* (1993) 41

> FCR 496 where his Honour said (at 505) that the court must determine 'whether the conduct complained of amounted to improper pressure to induce a litigant to withdraw from proceedings or to settle them on terms that he regarded as inadequate'."

[21] The Queensland Court of Appeal has also recently commented in *R v Dunn*[8] on the role of the law of contempt in vindicating the public interest in the due administration of justice – "that is, in the resolution of disputes, not by force or by private or public influence, but by independent adjudication in courts of law according to an objective code" such "that a case pending in a court 'ought to be tried in the ordinary course of justice …'", where the ordinary course of justice meant "the ordinary and unimpeded course of legal proceedings".

[22] On the evidence obtained so far it is clear to me that there is a serious question to be tried as to the applicants' right to obtain relief of the type sought.[9] There is a real issue whether the communications complained of constitute an attempt to dissuade Zurich from supporting the second and third defendants in their defence of the proceedings by threats, by abuse, by misrepresentation of the nature of the proceedings or the circumstances out of which they arose, to paraphrase Lord Cross in *Attorney-General v Times Newspapers Ltd*.[10]

[23] Those defendants may suffer injury for which damages will not be an adequate remedy if they are impeded in defending the litigation by the need to deal with further communications of this type or if their insurers are, for example, persuaded to settle the action to the disadvantage of those defendants.

[24] The balance of convenience goes all one way. Mrs Day has made the points she wishes to make in her correspondence already and can continue to communicate with the solicitors. I am not satisfied that she has demonstrated a clear public or private interest she may have in continuing to communicate with Zurich that is sufficient to override the second and third defendants' rights to an unimpeded defence of this personal injuries damages claim. That the restraint sought by the second and third defendants is supported by the insurers is also a relevant issue in a case of this nature.

[25] Mrs Day gave an undertaking in terms of paragraph 1 of the application at the end of the oral hearing. In the circumstances, it seems appropriate to me to extend those undertakings by making orders in the same terms until the conclusion of this proceeding or further order.

Orders

[26] Accordingly, I order that Mrs Day be restrained from:

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[8] *R v Dunn* [2015] 2 Qd R 407, 431-432 at [77]-[78]; [2014] QCA 254 per Peter Lyons J adopting the language of Lord Simon of Glaisdale in *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 315-316. See also the reference by McMurdo P at 419, [21]-[22] to *Witham v Holloway* (1995) 183 CLR 525, 538-539 where McHugh J included threats to parties as an example of criminal contempt.

[9] Generally see *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 68 at [19].

[10] [1974] AC 273, 326.

(a) contacting or communicating with Zurich Australian Insurance Limited ACN 000 296 640, Zurich Financial Services Australia Limited ACN 008 423 372, Zurich Australia Ltd ACN 000 010 195 or Zurich Insurance Group Ltd (hereinafter jointly and severally referred to as 'Zurich') or any director, officer, employee or agent of Zurich, other than Mills Oakley Lawyers, Zurich's solicitors, in relation to this proceeding, or any matter connected with this proceeding, by any means whatsoever; and/or

(b) allowing, causing, encouraging, permitting or suffering any person on her behalf to contact or communicate with Zurich or any director, officer, employee or agent of Zurich, other than Mills Oakley Lawyers, Zurich's solicitors, in relation to this proceeding, or any matter connected with this proceeding, by any means whatsoever,

until the conclusion of these proceedings or further order.

[27] I order that costs be reserved.