SUPREME COURT OF QUEENSLAND

CITATION:	*Inserve Australia Ltd & Ors v Kinane* [2018] QCA 116
PARTIES:	**INSERVE AUSTRALIA LTD** **ACN 147 747 859** (first applicant) **MICHAEL SYDNEY BYRNE** (second applicant) **PAUL BENEDICT BYRNE** (third applicant) **MARK JOHN WILSON** (fourth applicant) **v** **NIGEL KINANE** (respondent)
FILE NO/S:	Appeal No 5433 of 2017 DC No 1983 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2017] QDC 92
DELIVERED ON:	8 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2017
JUDGES:	Fraser and Gotterson and Philippides JJA
ORDERS:	**1. Application for leave to appeal is refused.** **2. The applicant pay the respondents costs of the application.**
CATCHWORDS:	COURTS AND JUDGES – CONTEMPT – POWER OF COURT TO PUNISH FOR CONTEMPT – where the respondent published defamatory material on his public Facebook account concerning the applicants – where the applicants made an ex parte application for both a prohibitory injunction to restrain the respondent from publishing defamatory material and a mandatory injunction requiring the respondent to remove the defamatory material – where during the hearing it became apparent the respondent had deactivated his Facebook account and as such a mandatory injunction was not made – where the primary judge made a prohibitory order restraining the defendant from publishing to the general public words that impute or imply that the second, third, fourth and fifth applicants are incompetent, deceptive, greedy, venal, dishonest or that they have engaged in

blackmail or bullying – where before the making of the prohibitory order the respondent reactivated his Facebook account and deleted some of the complained of posts – where after the prohibitory order was made and served on the respondent he sent a LinkedIn message to a potential client of the first applicant making imputations against the applicants – where the applicants sought an order that the respondent be charged with contempt of court for not removing the remaining defamatory Facebook posts and for his conduct in sending the LinkedIn message – whether the primary judge erred in dismissing the application for contempt of court – whether leave should be granted to the applicants to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) to prevent a substantial injustice – whether the primary judge erred in finding that the LinkedIn message constituted a publication to only one person and was not sufficient to support an order for contempt – whether the trial judge erred in finding the terms of the prohibitory order were not clear and unambiguous – whether the trial judge erred in finding the respondent did not breach the order by failing to remove the remaining Facebook posts

District Court of Queensland Act 1967 (Qld), s 118(2), s 118(3)

Corporate Affairs Commission (SA) v Australian Central Credit Union (1985) 157 CLR 201; [1985] HCA 64, considered
Culleton v Kershaw [2016] WASC 334, cited
Dow Jones and Co Inc v Gutnick (2002) 210 CLR 575; [2002] HCA 56, considered
Emmanuel College v Rowe [2014] QSC 238, cited
Hinchcliffe v Commissioner of Australian Federal Police (2001) 118 FCR 308; [2001] FCA 1747, cited
Mahmoud v Australian Broadcasting Corporation (No 3) [2017] NSWSC 764, cited
McDonald v Dods [2017] VSCA 129, cited
Nash v Lynde [1929] AC 158, cited
Sims v Jooste (No 2) [2016] WASCA 83, considered
Toben v Jones (2012) 298 ALR 203; [2012] FCA 1193, considered

COUNSEL: T Matthews QC for the applicants
The respondent appeared on his own behalf

SOLICITORS: Merlo Law for the applicants
The respondent appeared on his own behalf

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the orders proposed by her Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Philippides JA and with the reasons given by her Honour.

PHILIPPIDES JA:

[3] The applicants are officers and shareholders of Inserve Australia Ltd, trading under the business name "Construct Services". The respondent was an employee, unit holder and shareholder of Inserve, from November 2007 until January 2013, when he was declared not to be an eligible shareholder due to unsatisfactory conduct. Inserve provides services for major Australian insurance companies and their adjusters Australia-wide.

[4] The applicants seek leave to appeal against the dismissal[1] by the primary Judge (Farr DCJ) of their application for the committal of the respondent for contempt of court by allegedly breaching an interlocutory order made by Jones DCJ on 2 June 2016 ("the Order").

Factual background

[5] The Order made on 2 June 2016 was obtained in the context of the following factual background. In April 2013, the respondent engaged in the circulation of fraudulent documentation concerning Inserve to Suncorp-Metway Ltd (then a major client of Inserve)[2] in the form of a letter, purportedly from Paul Byrne of Inserve to its shareholders, stating, amongst other things, that they had installed a "hidden multiplier" in its invoicing software. This subsequently caused Suncorp to cease business with Inserve. In August 2014, the respondent pleaded guilty to charges of fraud and forgery and uttering in respect of his conduct in circulating that letter.[3]

[6] The applicants alleged that the respondent had simultaneously commenced what was said to be a defamatory campaign against them through his social media account on Facebook. This concerned the publication between August 2013 and May 2016 of allegedly false, derogatory and defamatory statements relating to the applicants on the respondent's online Facebook account (which was open to the public at large) relating to Inserve and the applicants. The statements attacked the personal characteristics of Michael Byrne and Paul Byrne and imputed that members of the board of directors of Inserve were deceptive, greedy and dishonest and had engaged in acts of blackmail and bullying.[4]

[7] Notwithstanding requests to remove the material from his Facebook account and to cease and desist in his behaviour from the applicants' solicitors, the respondent refused to do so.[5]

[8] On 20 May 2016, an *ex parte* application was brought for interlocutory orders in the nature of a prohibitory injunction "to restrain the respondent from publishing defamatory material" and a mandatory injunction requiring the respondent to "remove published defamatory material".[6]

[9] That application was ultimately heard on 2 June 2016, before Jones DCJ. The respondent did not appear at the hearing, and communicated by email that he had been informed that the application had been adjourned to 26 June 2016. Nevertheless, he

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1 [2017] QDC 92.
2 Reasons at [6].
3 Reasons at [6]-[7].
4 Reasons at [8].
5 Reasons at [9].
6 Reasons at [10].

did not seek an adjournment and indicated he did not wish to participate.[7] During the hearing, senior counsel informed the Court that the applicants' solicitors had learned that the respondent had deactivated his Facebook account. It was indicated that, in those circumstances, the mandatory injunctive relief for removal of the Facebook posts was not required and that the only order sought was an injunction restraining the respondent from publishing defamatory material to the general public.[8] Jones DCJ was satisfied,[9] given the intent and maliciousness of the imputations in the published material, and notwithstanding that the Facebook account had been deactivated, that it was appropriate to make a prohibitory interlocutory order in the terms sought and made the Order:

> "Until judgment in this action or earlier order, the defendant is restrained by himself, his servants and agents, from publishing to the general public, words that impute or imply that the second, third, fourth and fifth applicants are incompetent, deceptive, greedy, venal, dishonest or that they have engaged in blackmail or bullying."

[10] The Order was served personally on the respondent on 5 June 2016.

[11] On 6 June 2016, the respondent sent a message to Mr Darren Walker, who was at the time an employee of Insurance Australia Group Limited (a potential client of Inserve) via the online networking platform known as "LinkedIn" repeating assertions that Inserve used hidden multipliers in its software. It stated:

> "Hi Darren,
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> I was the VVIC Operations Manager and an employee/shareholder of Inserve Aust. Ltd for seven years and they have a District Court Application 1983/16 to prevent me from whistleblowing on how they have hidden multipliers in their software to show and audit the contractual pricing is correct margin but reality the underlying margin meets their 30% profit model demanded by the board. They allege the Suncorp and Comminsure contracts were lost due to my whistleblowing on their practice and lost the contract after both insurers commenced audits of the system using the evidence I provided. (Screenshots from their software). … If you can pass this onto the relevant IAG persons involved I am happy to explain via mobile in depth … They have openly stated in court this action is to prevent me from contacting IAG as a very important contract is about to be signed. ..."

[12] On 13 June 2016, the applicants filed a further application seeking the removal of five Facebook posts.[10] The applicants' affidavit material deposed to searches of Facebook made on 9 June 2016 which revealed that the respondent had reactivated his Facebook account on 2 June 2016 sometime after the Order had been made. Inspection revealed that the respondent had removed some of the posts but that some five posts of which the applicants had previously complained remained on the account.[11]

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7 Reasons at [16].
8 AB at 12.
9 Reasons at [19].
10 AB at 790.
11 Reasons at [23]. See affidavit of Mr Tweedale filed 13 June 2016 at para [10], [14]; AB at 476-477.

[13] Also on 13 June 2016, the applicants filed an application seeking a charge of contempt arising from the reactivation of the respondent's Facebook account and failure to remove the remaining Facebook posts.[12] The charge alleged that, having been restrained by the Order from publishing to the general public words that imputed or implied that the second, third, fourth and fifth applicants were incompetent, deceptive, greedy, venal, dishonest or that they have engaged in blackmail or bullying, "the respondent did publish words and/or allowed words to remain published" in breach of the Order. The particulars of the charge provided were, firstly, that the respondent had on 2 June 2016 reactivated his previously deactivated Facebook account, and, secondly, that as at 6 June 2016 some of the publications previously on the account remained on the Facebook profile.

[14] On 16 June 2016, the respondent filed "response to application" and a supporting affidavit by which he sought to defend the charges of contempt.[13] The respondent admitted reactivation of his Facebook account and that five publications remained posted on his Facebook page after he was served with a copy of the Order. However, he disputed that he had breached the Order and that the remaining posts breached the Order.[14] The respondent deposed to the fact that he permanently deleted the particular Facebook page.[15]

[15] On 23 June 2016, the matter came before McGill DCJ. The respondent was present on that occasion. After dealing with procedural issues, orders were made, *inter alia*, restraining the respondent from communicating with 36 named persons and entities and adjourning the application for committal for contempt to the civil list.[16]

[16] On 8 July 2016, the applicants filed an amended application for contempt, to separately particularise as a charge the allegation of breach of the Order arising from the LinkedIn communication occurring on 6 June 2016.[17]

[17] On 5 August 2016, the respondent filed a "defence"[18] in which he asserted he had deactivated and reactivated his Facebook account and that he did not intentionally breach the Order. The respondent admitted that he sent the LinkedIn communication.

[18] The hearing of the application for committal for contempt took place before the primary judge on 31 March 2017.[19] At the outset of the hearing, leave was sought, by the applicants to file a second amended application which also charged two further contempts alleged to have arisen from material filed by the respondent in the proceeding. The primary judge refused leave in relation to those two further alleged contempts but granted leave in respect of the alleged contempt arising from the LinkedIn communication (identified as charge 2).

[19] The respondent appeared in person. He did not give or call any further evidence in addition to his affidavit evidence.

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12 AB at 785.
13 Reasons at [26].
14 Reasons at [27].
15 Reasons at [24]. See Affidavit of Mr Kinane filed 16 June 2016 at para 16; AB at 592.
16 Reasons at [32].
17 Reasons at [35].
18 AB at 800.
19 It was heard together with an application by the respondent to set aside the order of 2 June 2016 and the orders of McGill DCJ of 23 June 2016, which the primary judge dismissed.

[20] In seeking orders for committal of the respondent for contempt, the applicants submitted that there was no factual contest in relation to the events that alleged to constitute to the breaches arising from the Facebook and LinkedIn communications and that a *prima facie* case was thus demonstrated.

Leave to appeal

[21] The applicants accepted that they require leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) (the Act), as the decision is arguably not one which falls within s 118(2) of the Act. In that regard, it was submitted that the primary judge made an error of fact or law requiring correction and that leave should be granted so as to prevent a substantial injustice.

[22] The grounds of appeal the applicants seek to raise are that the primary judge erred in finding that:

(a) In relation to the Facebook posts:

(i) publication to only one person was not sufficient to support an order for contempt;

(ii) there was no publication made to the general public by the respondent due to Mr Tweedale's proximity to the applicants; and

(iii) the terms of the order were not clear and unambiguous so that the respondent did not know what he should refrain from doing.

(b) In relation to the LinkedIn communication sent by the respondent to Mr Walker, it was not published to the general public.

[23] In addition, it is contended that the primary judge erred in failing to consider the actual content of the five remaining Facebook posts in the context of the original posts when dismissing the first charge of contempt.

[24] If leave was granted, the applicants seek orders that the primary judge's Order dismissing the amended application be set aside, and that in lieu thereof, it be ordered that the respondent be found guilty of contempt on both the first and the second charges in the second amended application and that the proceeding be remitted to the District Court so that the respondent may be punished for his contempt.

The decision of the primary judge

Applicable principles

[25] His Honour noted the nature of civil contempt, and its dual purpose in vindicating judicial authority and its remedial or coercive purpose in protecting the interests of those having the benefit of a court order.[20] His Honour referred to the relevant principles concerning charges of contempt and in particular, that the applicants bore the onus of proving all charges beyond reasonable doubt, that the terms of the order in question must be worded in clear and unambiguous terms and that the breach must be shown beyond reasonable doubt to have been wilful and not casual or accidental or unintentional.[21]

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20 Reasons at [49] referring to *Emmanuel College v Rowe* [2014] QSC 238 at [18]-[25].

21 Reasons at [50].

Charge 1 - the remaining Facebook posts

[26] The primary judge observed that the first charge was particularised as having two distinct aspects; the respondent's reactivation of the Facebook account and the respondent's leaving some five of the offending Facebook posts on his account for a period thereafter.[22]

[27] His Honour found[23] that reactivation of the respondent's account with the Facebook posts required a deliberate act by the respondent and that the respondent knew that his reactivated Facebook account was publicly viewable and did not take any steps to make it private prior to after activation. However, given that the act of reactivation had occurred *prior* to the respondent being notified of the terms of the Order, his Honour found that the reactivation did not constitute a breach of the Order.

[28] As to the respondent's conduct in leaving the posts the remaining posts on the Facebook account after having been served with the order, his Honour considered[24] that a question arose as to what was meant by the words "published to the general public" that appeared in the Order. That had two components; the meaning of "publish" and of "the general public".

[29] As to the first component, in considering the meaning in the Order of the word "publish", his Honour had regard to the fact that the Order was made in the context of a defamation action and therefore to the concept of publication in defamation law. His Honour referred to *Dow Jones and Co Inc v Gutnick*,[25] where Gleeson CJ, McHugh, Gummow and Hayne JJ, observed that, for the purposes of the law of defamation, the focus is on reputational harm by publication, that harm being "done when a defamatory publication is comprehended by the reader, the listener, or the observer". His Honour concluded that:[26]

> "Notwithstanding that the word "publish" may generally be thought to mean the issuing or causing to be issued of printed material for sale or distribution or to announce or proclaim or to make publicly or generally known, such definitions are not apt in the circumstances of this matter, given that the claim in this matter is one of defamation, and that the order in question was made for the express purpose of protecting the applicants' reputations. In other words, *the order was made in an attempt to prevent the respondent from defaming the applicants. In such circumstances, the definition for the word "publish" is that which applies in cases of defamation. Therefore, publication has not occurred until the matter complained of is read or seen by a recipient*." (emphasis added)

[30] As to the second component, the primary judge observed[27] that the publication that the Order restrained was publication to "the general public" but that what was meant by that expression was "most unclear" and "imprecise". His Honour

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22 Reasons at [62].
23 Reasons at [63].
24 Reasons at [64].
25 (2002) 210 CLR 575; [2002] HCA 56 at [26].
26 Reasons at [66].
27 Reasons at [67].

observed that,[28] there was evidence in the hearing before Jones DCJ, that a small number of people had viewed the posts, but that there was no evidence in the contempt application before the Court as to whether anyone other than Mr Tweedale (the law clerk in the employ of the applicant's solicitors) had seen or read the remaining posts said to constitute the breach. Given the very small number of people who had indicated they had seen the earlier posts, the primary judge was "unable to infer from that fact that others would have read or at least seen the subject posts".[29]

[31] His Honour then considered whether Mr Tweedale would fall within the expression "the general public". In relation to that question, the primary judge had regard[30] to *Corporate Affairs Commission (SA) v Australian Central Credit Union*,[31] where, for the purposes of the *Companies (South Australia) Code*, consideration was given to whether an offer of shares to members of the Credit Union was one made to a "section of the public":[32]

> "The question whether a particular group of persons constitutes a section of the public for the purposes of s 5(4) of the Code cannot be answered in the abstract. For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public. In a case where an offer is made by a stranger and there is no rational connexion between the characteristic which sets the members of a group apart and the nature of the offer made to them, the group will, at least ordinarily, constitute a section of the public for the purposes of the offer. If, however, there is some subsisting special relationship between offeror and members of a group or some rational connexion between the common characteristic of members of a group and the offer made to them, the question whether the group constitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any particular characteristic which identifies the members of the group and any connexion between that characteristic and the offer…"

[32] His Honour concluded:[33]

> "Those comments, when considered in conjunction with the fact that in this matter the only evidence is that the posts were viewed by one person, who was, no doubt, instructed to look for them in the course of his employment at the law firm representing the applicants, lead

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28 Reasons at [67].
29 Reasons at [68].
30 Reasons at [71].
31 (1985) 157 CLR 201.
32 (1985) 157 CLR 201 at 208; [1985] HCA 64.
33 Reasons at [72].

> me to conclude that Mr Tweedale does not fall within the meaning of 'the general public'. Hence, it follows that there is no evidence before the court that the respondent breached the order made on 2 June 2016 by publishing those posts to 'the general public'".

[33] In so finding, his Honour emphasised that he was not satisfied that the terms of the Order were clear and unambiguous, and contrasted it with the more specific terms of the order made by McGill DCJ.[34]

[34] His Honour held that the applicants had not established a *prima facie* case of contempt and in those circumstances, found that it was not necessary to consider the content of the posts themselves, nor to refer to any submission by the respondent (which was effectively that truth was a defence to the charge of contempt).

The applicant's submissions

Grounds (a) and (b)

[35] The applicants challenged the primary judge's finding that a *prima facie* case of contempt had not been established because reactivation of the remaining posts occurred prior to the respondent being notified of the terms of the Order and the remaining posts were not published to the general public. It was submitted that the reactivation of the Facebook account, in circumstances where the respondent made a deliberate choice not to take the simple and reasonable step to make his Facebook "private" prior to or after reactivation, constituted a "publication" upon one person downloading and reading them. There was thus a flagrant disregard of the Order for a period before 9 June 2016.

[36] The applicants further argued that, notwithstanding the primary judge's acknowledgment that there was evidence in the hearing before Jones DCJ that the Facebook posts, "resulted in responses from readers indicating that, at different times, for different posts, three, four, five, or even seven different people had viewed the post in question",[35] his Honour failed on the face of the reasons to consider the content of the non-deleted posts which remained open for view by the public at large.

[37] The applicants also submitted his Honour erred in failing to find that, as at 9 June 2016, the respondent was in breach of the Order by not removing the defamatory content after becoming aware on 5 June 2016 of the terms of the Order. The applicants submitted that, although the primary judge found that the reactivation occurred before the respondent was served with the Order, and the remaining defamatory posts were not newly written by the respondent after the Order was served, they remained open and accessible to any member of the general public in consequence of the reactivation of the Facebook account with a "public" rather than ''private" setting. It was argued that the respondent showed "no regard to the terms of the order, which required him to refrain from making available for public viewing any defamatory words in relation to the applicants".

[38] Further, the applicants submitted that by posting the offensive material on Facebook, the respondent "made it likely to be viewed" by all of the respondent's Facebook "friends" and potentially further connected Facebook users, and even if the posts did not draw a proven online response, that could be inferred. The

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34 Reasons at [73].

35 [2017] QDC 92 at [67] (AB at 857).

applicants submitted that, as the Facebook system did not provide details of the viewing information a post received, it could not be said that Mr Tweedale was the only user who accessed the posts. The applicants submitted since the respondent accepted that he had "friends" or followers on Facebook, an inference beyond reasonable doubt could and should have been drawn by the primary judge that the reactivation of the Facebook page had been published to such friends or followers in terms of the proposition stated in *Sims v Jooste (No 2)*.[36]

[39] It was submitted that, in any event, all that was necessary was that one person download, see and understand the harm published. Citing *Culleton v Kershaw*,[37] *McDonald v Dods*[38] and *Mahmoud v Australian Broadcasting Corporation (No 3)*,[39] it was submitted that, in order to establish publication in a case involving the internet, there was no need to provide evidence of more than one person downloading and reading the internet posts. Such evidence demonstrated a defamation and thus a contempt of the Order.

[40] It was submitted that, in finding that a "publication" did not occur until the posts were read or seen by a recipient, his Honour erroneously proceeded on the basis that the posts that remained after reactivation had not been published "to the general public", because only Mr Tweedale had read the Facebook posts. The applicants challenged the conclusion that publication to Mr Tweedale was not publication to the general public as based on the primary judge's erroneous and irrelevant finding that Mr Tweedale had a "special characteristic" as an employee of the applicant's solicitors who was instructed to find the Facebook posts. It was submitted that his Honour was wrongly influenced by reliance on *Central Credit Union*. That case was distinguishable because it concerned the construction of the expression "to the public" in the context of a statutory definition that specified it included "any section of the public". The relevance of the legislative context in which an expression arises for consideration was emphasised in *Hinchcliffe v Commissioner of Australia Federal Police*,[40] where the words "to the public or to a section of the public" were required to be considered in the context of the *Family Law Act* 1975 (Cth).

[41] The applicants argued that a finding that Mr Tweedale had a special characteristic such as to exclude him from being a member of the public elided the context of the publication. A publication on a "public" Facebook account was not restricted to viewing by Mr Tweedale only or members of a special group, notwithstanding the circumstances that lead Mr Tweedale to the respondent's Facebook. His Honour's approach, it was said, amounted to a finding that a member of a special group cannot also be a member of the general public.

[42] It was submitted that the presence in the Order of the words "general public" were directed at restraining the respondent from making defamatory posts available to be viewed by the downloading by any person from a public internet website. In that regard, the applicants referred to dictionary definitions of "general public", in particular to the definitions in the *Macquarie Dictionary, Australia's National Dictionary*,[41] where the word was defined as "the population at large" and the word

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36 [2016] WASCA 83 at [18].
37 [2016] WASC 334 at [18]-[20].
38 [2017] VSCA 129.
39 [2017] NSWSC 764.
40 (2001) 118 FCR 308; [2001] FCA 1747 at [54]-[55].
41 6th Ed, 2013.

"public" has, as two of its meanings, "open to all the people" and "open to the view or knowledge of all". Reference was also made to the definition in the *Australian Oxford Dictionary*[42] as "open to or shared by all the people" or "existing openly".

Ground (c)

[43] The applicants submitted that the primary judge's dismissal of the first charge was informed by his Honour's erroneous finding that the Order was not so clear and unambiguous such that it could be concluded that the respondent knew what he was being restrained from doing.[43] That conclusion, it was said, was influenced by his Honour's reliance on the specific terms of the subsequent further orders made by McGill DCJ on 23 June 2016, which specifically listed 35 persons and/or entities with whom the respondent was restrained from communicating. It was submitted that, although the further orders were narrower in their terms than the Order in question, that approach was adopted in circumstances where the respondent had threatened to "torpedo" prospective business relationships of the first applicant.[44] The approach adopted by McGill DCJ was to specify a list of entities with which the respondent was restrained from communicating, so as to protect the business relations with the first applicant, and to prevent the respondent from doing malice and damage by communication to the general public. The applicants submitted that the terms of the restraint from publication in the Order, for which the respondent's committal for contempt was sought, were clear and unambiguous and purposefully made wide, so to diminish the threat of detriment to all the applicants by the respondent.

The respondents outline of argument

[44] The respondent argued referring to *Central Credit Union* that the primary judgment correctly held that Mr Tweedale's "specialised characteristic" as an employee representing the appellants precluded him from inclusion in the term "general public". Furthermore, the specialised characteristic of Mr Tweedale as an employee, tasked with paid observation and the seeking out of the posts, precluded him from being characterised as a person who was a third party. In addition, it was said that the Facebook posts were not able to be comprehended, even by the respondent's "friends".[45]

[45] On the matter of publication, the respondent referred to *Toben v Jones*,[46] where it was emphasised that, for the purpose of defamation law, publication is not established merely by proving that an article containing alleged defamatory material is made available. Publication requires communication to a third party who is capable of understanding the alleged defamatory matter. Reliance was also placed on the following statements in *Sims v Jooste (No 2)* in respect of material made available on the internet:[47]

> "Because of the vast number of internet sites, and the vast number of web pages accessible through those internet sites, *in the absence of*

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42 2nd Ed, 2004.
43 Reasons at [67].
44 See transcript of proceeding on 23 June 2016, page 27 (AB at 42.17-18).
45 Affidavit of Daniel Tweedale exhibit "E" (AB at 493).
46 (2012) 298 ALR 203; [2012] FCA 1193 at [16].
47 [2016] WASCA 83 at [17].

> *evidence it cannot be inferred that one or more persons has undertaken the steps required to identify and access any particular web page available through the internet merely from the fact that material has been posted on an internet site*. There is a real prospect that many of the billions of web pages accessible via the internet have never been seen by anyone other than the person who posted the page on an internet site. This has been recognized in the cases to which I will now refer." (emphasis added).

Consideration

[46] Contempt requires a deliberate act intentionally contravening an order. Here the deliberate act is leaving the posts on the account. The respondent's conduct in reactivating his Facebook account before notice was given of the Order clearly could not constitute a contempt.

[47] The other conduct relied on as a deliberate act done in wilful disregard of the Order was the respondent's conduct in leaving the posts on his Facebook account (with a public setting). However, that overlooked the nature of the Order made, which was not a mandatory injunction requiring the respondent to remove defamatory material available for viewing on the internet. Rather, it was a prohibitory order restraining the respondent from publishing defamatory material to the general public. In those circumstances, the primary judge's finding that the Order was not worded in clear and unambiguous terms cannot be said to have been erroneous. The terms of the Order did not clearly and unambiguously require the respondent to remove the remaining posts and it could not be concluded that on service of the Order the respondent should have understood that that was what the Order required him to do. That the Order did not by its terms clearly require the respondent to remove the remaining posts, but rather enjoined him from publishing defamatory material, was a relevant and significant matter which the primary judge was entitled to consider in determining that a *prima facie case* of contempt had not been made out. Nor did his Honour err in contrasting the terms of the Order with that made on 23 June 2016. His Honour was merely identifying that the latter very specifically stated what was prohibited. It included any communication of a particular type to identified individuals and entities.

[48] Further, the primary judge did not err in concluding that an additional basis, for his not being satisfied that a *prima facie case* had been made out was that there was no evidence that the respondent breached the Order by publishing the posts in question to the general public. Since the Order was made in the context of an application for interlocutory injunctive relief in a defamation action, the primary judge's preference for a narrower construction of the term "publish", derived from defamation law, over the more general dictionary meaning of the word put forward by the applicants was an appropriate one. Further, given the nature of a proceeding for contempt, it was appropriate that that issue of construction be resolved in favour of the narrower meaning of "publish". Adopting that meaning of "publish", what was required to be proved was that the respondent made the defamatory material available to the general public and in addition that is seen read and comprehended by another.[48] In

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48 See *Dow Jones* (2002) 210 CLR 575; [2002] HCA 56.

the context of publication on the internet, it was necessary that there was evidence that the material had been downloaded.[49]

[49] It is significant that the Order by its terms qualified the word "publish" by the word "general". The Order did not by its terms direct the prohibition against publication to "a section of the public" or any individual person or entity.

[50] Clearly, the expression "general public" did not encompass publication to the respondent. The primary judge was not prepared to draw an inference of publication, not being satisfied that there was a factual basis for such an inference. In that regard, his Honour was entitled to find that the fact the respondent's Facebook posts had previously been accessed by a small group, did not of itself provide a factual basis for inferring the same had occurred in respect of the remaining posts. The primary judge was entitled to conclude that there was no evidence that anyone (other than Mr Tweedale) had downloaded the posts in question.

[51] Furthermore, in the circumstances of this case, the primary judge was also correct to find that the downloading and viewing of the material by Mr Tweedale did not establish that there was a publication to "the general public". In so finding, the primary judge did not proceed on an incorrect premise that evidence that material was made available for viewing on the internet and was downloaded by a single person could not constitute evidence of publication to the general public. His Honour did not find that there was no publication that could constitute contempt by reason that there was proof of publication to only one member of the public. Rather, the primary judge's finding was premised on the fact the relevant evidence of downloading of the internet communication was by a person who was "instructed to look for [the posts] in the course of his employment at the law firm representing the applicants. It was not that there was an antecedent relationship which excluded Mr Tweedale from coming within the definition of "the general public" but the nature of the relationship. In the circumstances of this case, the finding that Mr Tweedale did not come within the meaning of "the general public" in the terms of the Order was correct. The applicants' reference to the position in *Emmanuel College v Rowe*[50] does not assist given the terms of the order there under consideration were different.

Charge 2 - The LinkedIn communication

The primary judge's decision

[52] As to the LinkedIn communication, the primary judge found[51] that publication had clearly occurred, since it had been read by Mr Walker and also found, given the content of the message, that the words imputed or implied that the applicants were deceptive, greedy, dishonest and have engaged in bullying. The only issue was whether the communication would constitute a publication to "the general public". His Honour stated[52] that, while Mr Walker would be a member of the general public, there was "a real issue as to whether he alone, would satisfy the term 'the general public'." Returning to the *Credit Union* Case, his Honour referred to the following passage from that case:[53]

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49 *Sims v Jooste (No 2)* [2016] WASCA 83.
50 [2014] QSC 238 at [31].
51 Reasons at [75].
52 Reasons at [77].
53 Reasons at [76].

> "No particular number of persons can be designated as being, of itself, necessarily sufficient or inadequate to constitute the public or a section of the public for every purpose. 'Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole': *Nash v Lynde* [1929] AC 158, at 169."

[53] The primary judge found[54] that there was no evidence that the communication to Mr Walker was intended as the first in a series, notwithstanding that the respondent did ask Mr Walker in the communication if he could pass it on to "the relevant IAG persons involved" (which Mr Walker did not do). In those circumstances, his Honour was not satisfied beyond reasonable doubt that "the singular communication to Mr Walker" constituted a publication to "the general public". Moreover, his Honour considered that, "At the very least, a significant ambiguity exists, and, in accordance with established principle, the respondent should not be convicted of contempt".

[54] Accordingly, while satisfied that a *prima facie* case existed against the respondent in relation to this charge, his Honour was not satisfied that all essential elements have been proved to the requisite standard.

The applicants' submissions

[55] The applicants challenged the proposition that the LinkedIn communication to Mr Walker was not a publication to "the general public". It was submitted that communication of material to a single person could constitute publication to "the general public" for the purposes of the order, since it did so for the purposes of the law of defamation and the Order was obtained to restrain defamatory posts and the like. The LinkedIn message was received and comprehended by at least, Mr Walker. The primary judge ought to have held that the publication, via the LinkedIn platform to Mr Walker, was a publication in breach of the terms of the Order and that the same had been proved to the requisite standard of proof as a contempt of that order.

[56] Moreover, even one person could constitute "the general public", if Mr Walker was intended to be the first of a series of subscribers to the LinkedIn communication. In the present case the respondent intended the defamatory message to be passed on in furtherance of his threat referred. Accordingly, the primary judge ought to have been satisfied that the elements of this charge of contempt were also satisfied.

The respondent's submissions

[57] The respondent's submission was that the LinkedIn communication did not constitute a publication to the "general public" because of the pre-existing relationship held by the respondent and Mr Walker. It was submitted that LinkedIn by definition is a paid subscription service and so differs from Facebook. Parties to a LinkedIn communication must have a pre-established relationship to be able to send and receive a communication via the private message service. Mr Walker possessed a "special characteristic which precludes him from coming within the term "general public".

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54 Reasons at [77].

Conclusion

[58] Although Mr Walker can be said to be a member of the public, the LinkedIn communication to Mr Walker was not a publication to "the general public". It was a publication to an *individual* and, while the possibility that the invitation in the communication could have been acted on, it cannot be said to the requisite degree that the publication was intended as the first in a series of publications. In contempt proceedings it is essential that careful regard is had to the language used in the order. The terms of the Order restraining publication to the general public were not breached by the conduct particularised as charge 2.

Order

[59] For the reasons given, the grounds of appeal lack merit. In those circumstances leave to appeal should be refused. The respondent was not represented but costs should follow the event. The orders I would make are:

1. Application for leave to appeal is refused.

2. The applicant pay the respondents costs of the application.