DISTRICT COURT OF QUEENSLAND

CITATION:	*Smith v Lucht* [2014] QDC 302
PARTIES:	**BRETT CLAYTON SMITH (plaintiff)** **v** **KENNETH CRAIG LUCHT (defendant)**
FILE NO/S:	D1983/2013
DIVISION:	
PROCEEDING:	Application
ORIGINATING COURT:	District Court Brisbane
DELIVERED ON:	17 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2014
JUDGE:	McGill SC DCJ
ORDER:	**Application dismissed with costs**
CATCHWORDS:	PRACTICE – Stay of proceeding – defamation action – limited publication – whether damages likely to be nominal – whether cost of proceedings disproportionate to matters in dispute – stay refused. *District Court of Queensland Act* 1967 s 69(2)(c). *Belbin v McLean* [2004] QCA 181 – cited. *Bleyer v Google Inc* (2014) 311 ALR 529 – not followed. *Bristow v Adams* [2012] NSWCA 166 – considered. *Cerutti v Crestside Proprietary Limited* [2014] QCA 33 – considered. *Jameel v Dow Jones & Co Inc* [2005] QB 946 – considered. *Rich v CGU Insurance Ltd* [2005] HCA 16 – applied. *Roberts v Prendergast* [2013] QCA 47 – considered.
COUNSEL:	C K Copley for the plaintiff P J McCafferty for the defendant
SOLICITORS:	

[1] This is an application seeking an order that the plaintiff's action be stayed. The application is made under section 69(2)(c) of the *District Court of Queensland Act*

1967, specifically on the basis that the action is an abuse of process. It is, however, not based on the traditional approach to the concept of an abuse of process, that is, a proceeding brought for a collateral purpose, but rather it is based on the proposition that the damages to be awarded, and therefore the substantial matter in issue, is wholly disproportionate to the amount that would be involved in litigating the issues and would involve an inappropriate use of the resources of the Court and, for those reasons, the approach should be that the proceedings should be stayed and the plaintiff should not be permitted to litigate the matter further.

[2] Reliance is placed on a decision of a single Judge of the New South Wales Supreme Court in *Bleyer v Google Inc* (2014) 311 ALR 529. I am told the matter has not gone to the Court of Appeal in New South Wales. In that case, it was held that the Court had power in an appropriate case to stay or dismiss an action on the ground that the resources of the Court and the parties that will have to be expended to determine the claim are out of all proportion to the interest at stake: [62]. Her Honour added that such disproportionality can properly be regarded as a species of abuse of process.

[3] Her Honour was, to some extent, influenced by an English decision in the Court of Appeal, *Jameel v Dow Jones & Co Inc* [2005] QB 946. However, her Honour considered that the matters about the disproportionality between the interests at stake and the costs of litigating the matter were something which was supported, even apart from the provisions of the English Rules dealing with those matters, and, indeed, the statutory provisions in New South Wales dealing with the concept of proportionality.

[4] The English Rules do enshrine such a concept in part 1 of the Civil Procedure Rules 1998, where clause 1.1 provides in paragraph (2)(c) that the overriding objective of the procedural code established by those rules is that a case be dealt with in a way which includes dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, and also dealing with the case in a way which includes allotting to it an appropriate share of the Court's resources while taking into account the need to allot resources to other cases. These are the concepts of proportionality which have been recognised in various areas in England, at least since then, though, to some extent these were matters to which some regard was had in certain circumstances beforehand.

[5] The concept has been, to some extent, picked up in the provisions of the New South Wales *Civil Procedure Act* 2005, where s 60 provides:

> "In any proceedings, the practice and procedure of the Court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute."

[6] That picks up the proportionality between cost and importance so far as the parties are concerned, but it does not expressly pick up the issue about allocating an appropriate share of the Court's resources. Nevertheless, as far as s 60 goes, there is no equivalent in Queensland, nor is there any equivalent in Queensland to the extracts of the English Civil Procedure Rules to which I have referred earlier.

[7] I also note that the New South Wales Court of Appeal in *Bristow v Adams* [2012] NSWCA 166, when invited to have regard to the significance of the decision of the Court of Appeal in England in *Jameel*, declined to do so for various reasons, which included that the language of the applicable statutory provisions differed, that the New South Wales statute applicable to defamation included a specific defence of triviality, as it is referred to, which, indeed, the Queensland statute does as well, and that the English decision was influenced by other provisions in England of the *Human Rights Act* – although the New South Wales Court of Appeal seems to have regarded that as a factor which may have militated against a stay. In any event, the Court of Appeal in New South Wales at that stage did not, for those and other reasons, consider the applicability in New South Wales of the decision in *Jameel*.

[8] What concerns me is that there are established areas where a Court can and, in an appropriate case, will summarily determine a proceeding. If a plaintiff's claim is bad enough or hopeless enough it may be struck out, though it is necessary to satisfy the fairly rigorous test in the *General Steel* case before that will be achieved. More importantly, there are provisions in the rules for summary judgment in favour of the defendant, but, again, the test provided in rule 293 reflects the fact that it is only in a case where it is sufficiently clear that the plaintiff will fail if the matter goes to trial that such a power should be exercised. There is a High Court decision cautioning trial Courts against too ready determination on a summary basis of matters: *Rich v CGU Insurance Ltd* [2005] HCA 16 at [18]. Again, the approach there is quite different from the approach that is to be adopted when a matter is being determined at a trial.

[9] The particular proceeding in this case is an action for defamation which arises in rather unusual circumstances, because of the existence of a family relationship between the various parties and witnesses. The plaintiff, who is a solicitor, alleges that the defendant has referred to him as Dennis Denuto, which was understood as a reference to the fictional solicitor in the Australian film "The Castle", a film which I think is fairly well-known in Australia. It might be described as one of the classics of the Australian film industry. It is repeated on television from time to time.

[10] The pleading alleges that on occasions when various relatives of the plaintiff have been present, and perhaps one or two other people on one occasion, the defendant used the term Dennis Denuto to describe the plaintiff, and that this was defamatory of him.

[11] I should say that I am not being asked to dismiss the proceeding on the ground that the publication was not defamatory, and I would not do so. I am not deciding it on that basis. The application, therefore, necessarily proceeds on the assumption that there was a defamatory publication. I am, however, expressly asked in the submissions on behalf of the defendant to proceed on the basis that the damages the plaintiff might expect to receive must be nominal – or at least that is the submission on behalf of the defendant. The circumstances are that only a handful of people are identified by the plaintiff as the persons to whom the publication was made and most of these are persons who would be related to the plaintiff or who would be likely to be on the plaintiff's side, rather than the defendant's side, bearing in mind that the matter is complicated by the existence of a family law dispute between the defendant and his former wife, who is now the daughter-in-law of the plaintiff.

[12] It appears that the initial impetus for the defamatory publication was a letter sent by the plaintiff, as his daughter-in-law's solicitor, to the defendant in relation to the family law dispute between the defendant and his former wife. This is the sort of context where it is not surprising that certain intemperance in language is experienced between parties. It would be perhaps a context where it would be unlikely that the various persons referred to by the plaintiff as persons to whom the publication was made would actually change their view of the plaintiff as a result.

[13] There is some English authority that publication to such persons should be essentially disregarded, but it seems to me that there is recent Court of Appeal authority in Queensland which would not provide any particular support for that approach.

[14] Certainly, on the face of it, the circumstances might well justify a submission for the defendant at a trial that the damages award ought to be nominal, and if one had been considering the matter a couple of years ago, one might well even have gone so far as to express the view that they would probably be nominal.

[15] There have, however, been two recent decisions of the Court of Appeal which have, in my view, changed the landscape in relation to defamation damages in Queensland. The first was the decision of *Roberts v Prendergast* [2013] QCA 47 where the Court of Appeal increased an award of damages which up until then might have been regarded as fairly generous anyway, and, more recently, the decision of *Cerutti v Crestside Proprietary Limited* [2014] QCA 33 where, again, damages which had originally been awarded on quite a modest basis were substantially increased.

[16] The publication in at least the latter case was quite limited and might well have been in the circumstances thought to have been made to someone whose views of the plaintiff would not have been greatly affected by it, but that seems to have been an issue not considered, at least in great detail, by the Court of Appeal.

[17] The analysis of Applegarth J, with whom the other members of the Court agreed, contains a general discussion on damages for defamation which reflects his Honour's considerable breadth of learning in this area, but which might be seen as generally supporting the notion that successful plaintiffs in defamation actions should be given a lot of money.

[18] One matter that his Honour referred to in paragraph [35] was the factor that a publication may receive additional publicity from the fact that it is brought into the public domain by the plaintiff's having sued on it; a feature which was said to be relevant to the need for vindication of the plaintiff's reputation by way of a damages award.

[19] No authority was cited by his Honour for this proposition, which appears in paragraph [35] of his Honour's judgment, which is too long to quote, but of course it stands as a proposition included in a general statement of the law in relation to damages for defamation endorsed by the Court of Appeal in Queensland, so it is deserving of appropriate weight.

[20] Counsel for the defendant applicant before me has submitted that that decision or that that proposition is contrary to a decision of the Court of Appeal in Queensland, *Belbin v McLean* [2004] QCA 181, though he concedes that what was said about the

matter in that case was strictly obiter. It may mean of course that, at trial, it will be necessary to determine whether the more recent statement, which may well also technically be obiter, is to be followed rather than the earlier decision of the Court of Appeal.

[21] However, it seems to me that a decision on a point of that nature is not one which should be made when the Court is being asked summarily to determine an action on an application of this nature, that is to say, where the Court is being asked to decide on a summary basis that the plaintiff's case cannot proceed.

[22] The upshot of all this is that it seems to me that it would be dangerous for me to decide on a summary basis that, at a trial, the damages the plaintiff would receive must be nominal. In the light of the approach of the Court of Appeal in Queensland in the two cases to which I have referred, I consider that it is impossible to come to that conclusion even in this case.

[23] It seems to me, therefore, that the plaintiff has at least potentially a claim for more than nominal damages for defamation which, on the face of it, he is entitled to pursue. It is, I think, a strong thing to say that such a claim involves such a disproportionality between the costs to the parties and to the community of litigating the claim and the interest at stake that the pursuit of it would amount to a kind of abuse of process.

[24] However, in my view, the authority supporting the proposition that such a disproportionality can properly be regarded as a species of abuse of process is unpersuasive, at least in Queensland. I do not find the analysis in *Bleyer* particularly persuasive. It is, I think, not an encouraging sign that the analysis begins, in paragraph [51], with a rhetorical question. The significance of the statutory provisions in England and in New South Wales should not, I think, be overlooked.

[25] In my view, there is no requirement in Queensland for proportionality in relation to costs or expense either for the parties or for the community; what matters is whether the plaintiff has a good cause of action or not. A plaintiff who has a good cause of action according to the law in Queensland is entitled to pursue it.

[26] If the damages awarded fall below certain limits, the plaintiff may be confined to costs on the Magistrates Court Scale. The defendant may obtain some protection by making offers to settle under the rules and indeed there may be some protection available under the provision of the statute specifically in relation to the law of defamation. But subject to that, in my view, the plaintiff is entitled to pursue his case at least so long as it can survive an application to strike out the proceeding or an application for summary judgment, neither of which has been brought.

[27] Accordingly, I would not follow the decision in *Bleyer* in Queensland, because it seems to me that there is an absence of the necessary statutory foundation for it. Insofar as it purports to rely on the position at common law, I do not think it provides a proper justification for that reliance. I would, in any case, not be prepared in the light of the recent decisions of the Court of Appeal in Queensland to come to the conclusion on a summary basis that the plaintiff would only receive an award of nominal damages in this matter.

[28] Accordingly, for those two reasons it is not appropriate to make an order for a stay, and the application is dismissed, with costs.