

AUSTRALIA / JUDGMENT

Chompuchan v Srimongkol

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District Court New South Wales Amendment notes Medium Neutral Citation: Chompuchan v Srimongkol [2025] NSWDC 161 Hearing dates: 17 April 2025 Date of orders: 17 April 2025 Decision date: 17 April 2025 Jurisdiction: Civil Before: Gibson DCJ Decision:

- (1) Grant leave pursuant to s 23 of the Defamation Act 2005 (NSW) for the plaintiffs to commence proceedings against the defendant for the First Matter Complained Of.
- (2) The defendant is to file a defence 28 days from today, namely 7 May 2025.
- (3) Stood over for further directions on 8 May 2025, for further hearing on the application for summary judgment and assessment of damages.
- (4) The plaintiffs are to serve the defendant personally at her home address and through her email with a copy of these orders by Tuesday 22 April 2025 at 5:00PM.
- (5) Reserve costs. Catchwords: TORT – defamation – application for leave under s 23 of the Defamation Act 2005 (NSW) to commence fresh proceedings against the same party for the same subject matter – leave granted Legislation Cited: Defamation Act 2005 (NSW), ss 10A, 12A and 23 Uniform Civil Procedure Rules 2005 (NSW), r 29.7 Cases Cited: Altarama Ltd v Forsyth [1981] 1 NSWLR 188 Feldman v Huf (Ruling) [2023] VCC 743 Flanagan v Urban Publishing Group Pty Ltd [2012] NSWDC 238 French v Triple M Melbourne Pty Ltd [2006] VSC 36 Graham v Powell (No 3) [2014] NSWSC 185 Hockey v Fairfax Media Publications Pty Ltd (No 2) (2015) 237 FCR 127 Ivory v Howard [2024] FCA 1416 Rastogi v Nolan [2010] NSWSC 735 Whittington v Newman [2025] NSWSC 275 Woods v Baxter [2021] NSWDC 265 Texts Cited: Nil Category: Procedural rulings Parties: Kedchada Chompuchan (First Plaintiff) Peejay Capati (Second Plaintiff) Homeland Realty Pty Ltd trading as Paragon Realty Group (Third Plaintiff) Puttarawadee Srimongkol (Defendant) Representation: Counsel: T Senior (Plaintiffs) Defendant (no appearance) Solicitors: Origo Law (Plaintiffs) Defendant (no appearance) File Number(s): 2025/00134364 Publication restriction: Nil

Judgment

Introduction

This is an application by the plaintiffs for leave to commence defamation proceedings against the defendant in respect of the first of four matters complained of. The plaintiffs bring proceedings against the defendant for a further three publications in their Statement of Claim, filed 8 April

2025. The application is supported by the affidavit of Mr Hao (David) Fan, affirmed 27 March 2025, which sets out the circumstances in which the plaintiffs commenced and then discontinued a claim for the first matter complained of. The defendant did not attend or participate in the hearing. As set out below, I have satisfied myself, pursuant to the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) that the defendant has been informed of this application and of the date and location for these proceedings.

Background

The defendant published allegations about the plaintiffs in a Facebook post on 3 June 2024. On 19 June 2024, the solicitors for the plaintiffs, Origo Law, sent a letter to the defendant that was identified as and intended to be a concerns notice for the purposes of s 12A of the Defamation Act 2005 (NSW): Mr Fan’s Affidavit, at paragraphs 5 and 6 and Exhibit HDF-1 at pages 2-5 (First Concerns Notice). The defendant did not reply, so on 19 July 2024, the first and third plaintiffs commenced defamation proceedings against the defendant in respect of the matters identified in the First Concerns Notice. The Statement of Claim in the First Proceedings identified five matters complained of which are set out by Mr Fan in his Affidavit at paragraphs 8 and 9 and Exhibit HDF-1 at pages 6-56. On 6 August 2024, Origo Law sent a second letter to the defendant in respect of further matters published by the defendant (Second Concerns Notice). There was no reply to the Second Concerns Notice, and orders were made timetabling an application to seek interim injunctive relief. On 21 August 2024, Mistry Fallahi Lawyers & Business Advisors (“MF Lawyers”) sent a letter on behalf of the defendant asserting, inter alia, that the First Concerns Notice did not comply with s 12A of the Defamation Act, in that it did not specify the serious harm that the plaintiffs considered to be caused or likely to be caused to their reputations by the publication of the relevant matters. MF Lawyers invited the plaintiffs to discontinue the First Proceedings on the basis that there would be no order for costs. On 2 September 2024, Origo Law sent a letter to MF Lawyers proposing that the First Proceedings be discontinued with no order for costs and proposing that leave pursuant to s 23 of the Defamation Act to bring fresh proceedings for defamation in respect of the matters sued over, once a compliant concerns notice had been issued, which should be the subject of agreement inter partes. On 3 September 2024, MF Lawyers advised that their client agreed to the proceedings being discontinued with no order as to costs, adding that the defendant would consider consenting to an application for leave pursuant to s 23 of the Defamation Act once a valid concerns notice had been given and upon consideration of any application. The First Proceedings were discontinued with no order as to costs on 4 September 2024. On 27 September 2024, Origo Law sent a fresh concerns notice on behalf of the plaintiffs to the defendant (Third Concerns Notice). This Notice identified four publications, the first of which consists of the post and comments by the defendant on her Facebook Page on or about 3 June 2024. That matter is the same publication as the second matter in the First Proceedings. On 4 October 2024, Origo Law received a request for further particulars in respect of the Third Concerns Notice. It responded to that request on 18 October 2024 and on 1 November 2024. MF Law advised that they would respond to the Third Concerns Notice by 8 November 2024. No response was received. On 12 November 2024, Origo Law wrote to MF Law, noting that no

response to the Third Concerns Notice had been received. After further desultory contact, MF Lawyers ceased to respond at all and eventually disclosed that they were no longer advising or acting for the defendant. The plaintiffs seek leave pursuant to s 23 of the Defamation Act to commence fresh defamation proceedings in respect of the 3 June 2024 Publication. The 3 June 2024 Publication is the First Matter Complained Of in the new Statement of Claim at Exhibit HDF-1 at pages 95-240, which was filed on 8 April 2025. There is a degree of similarity between the remaining publications now sued upon and this publication, but I do not regard these publications as being caught by any requirement for leave under s 23 by reason of them being made after the publication for which leave is required. The relevant statutory provisions The first issue is whether the defendant has been made aware of this application. As the defendant has not appeared in court, regard must be had to r 29.7 of the Uniform Civil Procedure Rules 2005 (NSW), which sets out the procedure to be followed if a party is absent. Rule 29.7 provides that: 29.7 Procedure to be followed if party is absent (cf SCR Part 5, rule 9, Part 13, rule 5A, Part 34, rule 5; DCR Part 26, rule 5A; LCR Part 21, rule 2)

- (1) This rule applies when a trial is called on.
- (2) If any party is absent, the court--
 - (a) may proceed with the trial generally or so far as concerns any claim for relief in the proceedings, or
 - (b) may adjourn the trial.
- (3) If, in relation to a liquidated claim, the plaintiff appears, but a defendant does not appear, the court may, without proceeding to trial, give judgment against that defendant on evidence of--
 - (a) the amount then due to the plaintiff in respect of the cause of action for which the proceedings were commenced, and
 - (b) any payments made or credits accrued since the commencement of the proceedings in reduction of the amount of the plaintiff's claim or costs.
- (4) If, in relation to any proceedings, the defendant appears, but the plaintiff does not appear, the court may dismiss the proceedings.
- (5) Subrules (3) and (4) do not limit the court's powers under subrule (2). The affidavit of service tendered in these proceedings confirms that the defendant has been fully and fairly informed of the application before the Court. The second issue is the application for leave pursuant to s 23 of the Defamation Act to commence defamation proceedings against the defendant in respect of the first of the four matters complained of. Section 23 provides that: 23 Leave required for multiple proceedings in relation to publication of same defamatory matter

- (1) This section applies to a person who has brought defamation proceedings for damages, whether in this jurisdiction or elsewhere, against a person (a previous defendant) in relation to the publication of a matter.
- (2) The person may not bring further defamation proceedings for damages against a previous defendant or an associate of a previous defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.
- (3) A person is an associate of a previous defendant if, at the time of the publication to which the previous defamation proceedings related, the person was—
 - (a) an employee of the defendant, or
 - (b) a person publishing matter as a contractor of the defendant, or
 - (c) an associated entity of the defendant (or an employee or contractor of the associated entity).

The purpose of s 23 is to prevent the bringing of multiple or successive claims for the same or similar matter against the same defendant: *Hockey v Fairfax Media Publications Pty Ltd* (No 2) (2015) 237 FCR 127 at [122] – [123]. The question of whether a publication is “like” is one of degree and evaluation: *Rastogi v Nolan* [2010] NSWSC 735 at [7]. On the facts as set out above, there is no question of this kind of misuse of proceedings. The plaintiffs were obliged to discontinue the earlier proceedings because of a technicality and seek now to continue them. The limitation period has not yet expired. The defendant has initially responded favourably to the plaintiffs’ request for consent to an order under s 23. The order should therefore be made. What procedure should be followed if the defendant does not defend? As it seems likely that the defendant will continue not participating in these proceedings, it is necessary for me, having regard to my obligations under UCPR r 29(7), to take into account the orders that the defendant would be entitled to expect if he or she were in fact present. Mr Senior initially sought no order for the filing of a defence, on the basis that failure to file a defence for 28 days is sufficient for judgment to be entered (I apprehend that orders of this kind are made in the Federal Court of Australia). However, in New South Wales courts, default judgment of this kind has never been available at all in defamation actions, for the reasons set out in *Altarama Ltd v Forsyth* [1981] 1 NSWLR 188. As Hunt J explains (at 191), the nature of the cause of action was not generally amenable to default judgment without a consideration of the imputations (the cause of action at that time). That changed in 2005, but the Defamation List has continued to operate outside the usual court rules providing for status conferences, defences in 28 days and other case management directives set out in this Court’s Practice Notes for non-defamation actions. This approach has been endorsed in other jurisdictions even though the imputation was never the cause of action outside New South Wales: *French v Triple M Melbourne Pty Ltd* [2006] VSC 36. This is in part because of the potential for abuse of process and in part because of the acknowledged technicality of defamation proceedings. The Court must exercise particular care where the defaulting party is unrepresented. In *Graham v Powell* (No 3) [2014] NSWSC 185 at [6], Beech-Jones J warned

of the "risk of oppression" in entering default judgment against a litigant in person unfamiliar with the complexities of defamation law. The approach taken by Hunt J and Beech-Jones J has been followed not only in this Court (Flanagan v Urban Publishing Group Pty Ltd [2012] NSWDC 238; Woods v Baxter [2021] NSWDC 265) but also in Victoria (Feldman v Huf (Ruling) [2023] VCC 743 at [22]). This is even more the case now that there is a jurisdictional requirement for serious harm findings to be made, by reason of s 10A (which in turn requires that the imputations be found to have been conveyed). While some judges have been prepared to enter default judgment without taking any of these steps (Ivory v Howard [2024] FCA 1416), I consider the better approach to be that the Court makes findings as to the imputations, as well as serious harm, as Chen J did in Whittington v Newman [2025] NSWSC 275. Accordingly, I have factored these requirements into the orders that will be made in the event that the defendant takes no further steps to defend this action. Concluding remarks and orders A timetable has been set down which requires the defendant to file and serve a defence in 28 days. If the defendant does not do so, the plaintiffs are entitled to seek a hearing for the determination of all aspects of the claims they bring against the defendant, including injunctive relief.

Orders

Grant leave pursuant to s 23 of the Defamation Act 2005 (NSW) for the plaintiffs to commence proceedings against the defendant for the First Matter Complained Of. The defendant is to file a defence 28 days from today, namely 7 May 2025. Stood over for further directions on 8 May 2025, for further hearing on the application for summary judgment and assessment of damages. The plaintiffs are to serve the defendant personally at her home address and through her email with a copy of these orders by Tuesday 22 April 2025 at 5:00PM. Reserve costs.

Amendments 05 May 2025 - Cover sheet - typographical error Orders - typographical error
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