

DR ANNE WEBSTER (FEDERAL JUDGE
HONORARY JUDGE)
V. KAREN BREWER
(NEW ZEALAND)

FEDERAL COURT OF AUSTRALIA

Webster v Brewer (No 2) [2020] FCA 727

File number: VID 293 of 2020

Judge: GLEESON J

Date of judgment: 19 May 2020

Date of publication of reasons: 28 May 2020

Catchwords: **DEFAMATION** – application for interlocutory injunction in relation to alleged publication of defamatory material – circumstances in which Court will grant an interlocutory injunction – serious question to be tried – damages not an adequate remedy – balance of convenience favour injunction and take-down order – interlocutory injunction granted and take-down order made

Legislation: *Trans-Tasman Proceedings Act 2010* (Cth)
Defamation Act 2005 (Vic)

Cases cited: *Capilano Honey v Dowling (No 2)* [2018] NSWCA 217
Chappell v TCN Channel Nine (1988) 14 NSWLR 153
Nationwide v Furber [1984] FCA 104; (1984) 3 FCR 19
The School for Excellence Pty Ltd v Trendy Rhino Pty Ltd & Ors [2018] VSC 514

Date of hearing: 19 May 2020

Registry: New South Wales

Division: General Division

National Practice Area

Other Federal Jurisdiction

Category:

Catchwords

Number of paragraphs:

45

Counsel for the Applicants:

J Hooper

Solicitor for the Applicants:

Norton Rose Fulbright Australia

Counsel for the Respondent:

There was no appearance for the Respondent

Table of Corrections

1 June 2020

In paragraphs 29 and 32, "Ms Richardson" has been replaced with "Ms Robertson".

1 June 2020

All references to the first applicant as "Ms Webster" have been replaced with "Dr Anne Webster"

1 June 2020

All references to the second applicant as "Dr Webster" have been replaced with "Dr Philip Webster"

ORDERS

VID 293 of 20

BETWEEN:

ANNE WEBSTER

First Applicant

PHILIP WEBSTER

Second Applicant

ZOE SUPPORT AUSTRALIA (ABN 76161029705)

Third Applicant

AND:

KAREN BREWER

Respondent

JUDGE:

GLEESON J

DATE OF ORDER:

19 MAY 2020

THE COURT ORDERS THAT:

PENAL NOTICE

TO: KAREN BREWER

IF YOU (BEING THE PERSON BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

IN THESE ORDERS:

1. the respondent's Facebook account is accessible at the URL address

'<https://www.facebook.com/karen.spiers.336>'.

2. the "First Post" is the post uploaded to the respondent's Facebook account on or about 26 April 2020 at 6.21am.

100. the "First Video" is the video post uploaded to the respondent's Facebook account on or about 26 April 2020 at 2.01pm.

4. the "Second Post" is the post uploaded to the respondent's Facebook account on or about 27 April 2020 at 5.14am.

5. the "Second Video" is the video uploaded to the respondent's Facebook account on or about 30 April 2020 at 6.13pm.

6. the "Third Post" is the post uploaded to the respondent's Facebook account on or about 8 May 2020 at 5.42am.
7. the "Third Video" is the video uploaded to the respondent's Facebook account on or about 8 May 2020 at 6.00am.
8. the "Fourth Video" is the video uploaded to the respondent's Facebook account on or about 8 May 2020 at 7.44am.

THE COURT ORDERS THAT:

1. Upon the applicants giving the usual undertaking as to damages (see Practice Note GPN-UNDR), until further order, the respondent by herself or by her servants or agents, or howsoever, be restrained from publishing or causing to be published in any form, or maintaining online for downloading, or uploading so as to make available for publication online:

1. the First Post;
2. the First Video;

100. the Second Post;

4. the Second Video;
5. the Third Post;
6. the Third Video;
7. the Fourth Video; and

any other matter to the same purport or effect as any of the above matters to the extent that such other matters identify the applicants, whether expressly or by implication.

2. The order in paragraph 1 shall not operate to preclude the respondent from publishing the matters referred to therein to a legal practitioner retained by her for the sole purpose of advising or acting for her in connection with this proceeding.

3. Upon the applicants giving the usual undertaking as to damages (see Practice Note GPN-UNDR), the respondent by herself or by her servants or agents, or howsoever, remove each of the Third Post, the Third Video and the Fourth Video from the respondent's Facebook account.

4. Pursuant to section 13(1)(b) of the *Trans-Tasman Proceedings Act 2010* (Cth), the time for the respondent to file an appearance be abridged to 26 May 2020. at

5. By 4pm on 9 June 2020, the respondent file and serve any defence. 9 June 2020.

6. By 4pm on 16 June 2020, the applicants file and serve any reply. 16 JUNE 2020

7. These orders be served on the respondent personally as soon as practicable, and in any event before 5pm on 22 May 2020.

8. The matter is listed for a Case Management Hearing on a date not before 9:30am on 18 June 2020.

9. Costs reserved.

10. Liberty is reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*. at

REASONS FOR JUDGMENT

GLEESON J:

1. On 19 May 2020, on the applicants' undefended application, I made an interlocutory order having the effect of extending, and expanding the scope of, an interim injunction ordered by Wheelahan J on 8 May 2020: *Webster v Brewer* [2020] FCA 622 (**first judgment**).
2. I also made an order requiring the respondent (**Ms Brewer**) to remove a post and two videos from her Facebook account.
3. Each of those orders was made upon the applicants giving the "usual undertaking as to damages", which is an undertaking:

(1) to submit to such order (if any) as the Court may consider to be just for the payment of compensation, (to be assessed by the Court or as it may direct), to any person, (whether or not that person is a party), affected by the operation of the order or undertaking or any continuation (with or without variation) of the order or undertaking; and

compensation.

(2) to pay the compensation referred to in (1) to the person affected by the operation of the order or undertaking: see cl 2.2 of Federal Court Practice Note "Usual Undertaking as to Damages" Practice Note (GPN-UNDR).

4. I also made orders for case management with a view to an early final hearing that would minimise the duration of the interlocutory orders.
5. These are my reasons for making those orders.

BACKGROUND AND ALLEGED DEFAMATORY PUBLICATIONS

6. Background facts concerning the applicants are set out in the first judgment at [7] as follows:

politician

The first applicant [Dr Anne Webster] is a member of the Australian Parliament in the House of Representatives. She has a background in social work, working with vulnerable young families, and she is a founder of the third applicant, Zoe Support. She has lived in Mildura with her husband [Dr Philip Webster], who is the second applicant, for 42 years. The second applicant is a medical practitioner who practises in Mildura. He has a number of positions with institutions and community organisations in the Mildura area. He is a director of the third applicant. The third applicant, Zoe Support, is a company limited by guarantee that operates as a not for profit community based organisation operating within Mildura and surrounding districts. It provides benevolent relief of social isolation, poverty, ill health, destitution and distress of pregnant women and new mothers who lack support and resources. It targets disadvantaged and welfare-dependant young mothers aged between 13 and 25, and provides pathways to education, training and employment. It has four centres in Mildura from which it provides its services.

my wife

#

7. Wheelahan J noted that Zoe Support Australia (**Zoe Support**) appears to be an "excluded corporation" within the meaning of the Defamation Act 2005 (Vic) and corresponding provisions in the other states and territories of Australia. By s 9(1) of that Act, a corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the relevant publication.

8. By their amended statement of claim dated 18 May 2020, the applicants claim damages from Ms Brewer in respect of the publication of seven items on the Facebook social media platform, on an account alleged to be operated and controlled by Ms Brewer (**Facebook account**). The seven publications are:

#

(1) A post uploaded to the Facebook account on or about 26 April 2020 at 6.21am (**first post**).

DEFAMATION Act 2005 (Vic)

(2) A video uploaded to the Facebook account on or about 26 April 2020 at 2.01pm
(**first video**).

(3) A post uploaded to the Facebook account on or about 27 April 2020 at 5.14am
(**second post**).

(4) A video uploaded to the Facebook account on or about 30 April 2020 at 6.13pm
(**second video**).

(5) A post uploaded to the Facebook account on or about 8 May 2020 at 5.42am (**third post**).

(6) A video uploaded to the Facebook account on or about 8 May 2020 at 6.00am
(**third video**).

(7) A video uploaded to the Facebook account on or about 8 May 2020 at 7.44am
(**fourth video**).

9. The first applicant (**Dr Anne Webster**) is named in the first post.

10. All of the applicants are named in the first video, the second post and the second video.

11. Dr Anne Webster and Zoe Support are named in the third post, the third video and the fourth video.

Alleged defamatory imputations

12. The alleged defamatory imputations are extremely serious. In the first judgment at [14], Wheelahan J described the first four of the publications as "vile". I respectfully agree with his Honour that, on the available evidence, it would serve no good purpose to reproduce the publications or to set out the alleged imputations in this judgment in any detail: cf. *Chappell v TCN Channel Nine* (1988) 14 NSWLR 153 at 156F. I also agree with his Honour that the publications are clearly capable of conveying many of the serious imputations that are alleged.

Interim injunction

13. The 8 May 2020 interim injunction was expressed to restrain Ms Brewer from publishing or causing to be published in any form, or maintaining online for downloading the first four of the seven publications. It was also expressed to restrain Ms Brewer, relevantly, from maintaining online any other matter to the same purport or effect as any of the first four publications to the extent that such other matters identified the applicants whether expressly or by implication.

14. There is evidence that, at the request of the applicants' solicitor, Mr Cash, on about 9 May 2020 Facebook removed the first four publications from its platform for violating Facebook, Inc's Terms of Service and breaching Facebook, Inc's Community Standards.

15. Mr Cash has also requested that Facebook remove the other three publications but is yet to receive a response.

16. As at 3.05 pm on 18 May 2020, none of the other three publications had been removed from Ms Brewer's Facebook account.

17. The applicants contend that, by failing to remove the other three publications, Ms Brewer failed to comply with the 8 May 2020 interim injunction on the basis that she had maintained online matter to the same purport or effect as one or more of the first four publications which identified Dr Anne Webster and Zoe Support.

EVIDENCE AND NOTICE TO MS BREWER OF HEARING

18. The evidence in support of the application comprised the following affidavits:

(1) affidavit of Dr Anne Webster sworn 12 May 2020, being a sworn version of her affidavit filed 7 May 2020;

(2) affidavit of the second applicant (**Dr Philip Webster**) sworn 12 May 2020, being a sworn version of his affidavit filed 7 May 2020;

(3) affidavit of Merinda Robertson, Manager of Zoe Support sworn 12 May 2020, being a sworn version of Ms Robertson's affidavit filed 7 May 2020.

(4) two affidavits of Peter Cash, the applicants' solicitor, filed 8 May 2020 and 18 May 2020 respectively; and

(5) affidavit of Michael Sabin, private investigator, sworn 12 May 2020.

19. Based on Mr Sabin's affidavit, I am satisfied that Ms Brewer has been served with:

(1) the originating application;

(2) the statement of claim dated 1 May 2020;

(3) the interlocutory application dated 7 May 2020 by which the applicant sought orders including:

1. An interlocutory injunction requiring the respondent to remove each of the Defamatory Publications from the Facebook Account and not to author and upload to the internet any further matter to the same purport or effect as any of the Defamatory Publications, as those terms are defined in the applicants' statement of claim.

(4) the applicants' evidence and submissions in support of the interlocutory application;

(5) the orders made by Wheelahan J on 8 May 2020; and

(6) the first judgment.

20. On 14 May 2020, Mr Cash sent an email to Ms Brewer notifying her of the time of the 19 May 2020 hearing and of the Court's details, so that she could participate in the hearing by telephone or video link.

21. Mr Cash also sent Ms Brewer the applicant's proposed amended statement of claim.

22. On 18 May 2020, Mr Cash sent Ms Brewer a revised proposed amended statement of claim.

23. By mid-afternoon on 18 May 2020, Mr Cash had not received any communication from Ms Brewer.

LEGAL FRAMEWORK

24. At [11] and [12] of the first judgment, Wheelahan J set out the basis of the Court's jurisdiction in this matter and, more particularly, in respect of Ms Brewer who is located in New Zealand.

NEW ZEALAND

Interlocutory injunction

25. At [13], his Honour set out the source of the Court's power to grant interlocutory injunctive relief and the relevant principles as follows:

The Court has statutory power under s 23 of the *Federal Court Australia Act 1976* (Cth) to grant an interim injunction, including an interim injunction to enjoin the commission of a tort: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1 at [30] (Brennan CJ, McHugh, Gummow, Kirby and

Toar

ACT

Hayne JJ), That jurisdiction extends to enjoining the publication of a defamatory matter. However, as a question of discretion, the power to enjoin publication is ordinarily exercised only with great caution, and only in very clear cases: *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 at [16]- [18] (Gleeson CJ and Crennan J), citing *Stocker v McElhinney [No 2]* [1961] NSW 1043 at 1048 (Walsh J). That is because of the regard which the law has for the value of freedom of speech. Accordingly, in practice, if there is any real ground for supposing that a respondent may succeed at trial, an injunction would ordinarily be refused. The organising principles for considering whether to grant an injunction are well known. "[I]n all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction": *Australian Broadcasting Corporation v O'Neill* at [19] (Gleeson CJ and Crennan J). See also, Gummow and Hayne JJ at [65]-[72] and [85]. The organising principles are to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed.

26. See also *The School for Excellence Pty Ltd v Trendy Rhino Pty Ltd & Ors* [2018] VSC 514 at [34].

27. There is evidence that Ms Brewer is the publisher of the publications.

28. As I have already noted, the publications are clearly capable of conveying at least many of the serious imputations that are alleged.

29. Dr Philip Webster, Dr Anne Webster and Ms Robertson on behalf of Zoe Australia have sworn that the alleged imputations are false.

30. The applicants allege that Ms Brewer's Facebook account has approximately 8,410 followers. There is evidence that, as at 7 May 2020, the account had 7,694 followers.

31. They allege that each of the seven publications have been widely viewed. There is evidence, for example, that the first video has been "viewed" on 2,400 occasions. Dr Anne Webster's evidence also supports an inference that the first post was read by local Mildura residents, and that the first four publications were read by an individual located in the Australian Capital Territory.

32. The evidence of Dr Anne Webster, Dr Philip Webster and Ms Robertson supports an inference that the first four publications have been read by members of the Mildura local community.

33. As Ms Brewer did not appear at the 19 May 2020 hearing, and has not otherwise indicated any arguable defence to the alleged defamations, I accepted that there is a serious question to be tried as to the applicants' claims for damages.

34. I accepted that damages would not be an adequate remedy in the cases of Dr Anne Webster and Dr Philip Webster because of the irremediable harm that they could be expected to suffer as a result of such serious defamations, particularly where they are presently senior, active and apparently well-respected members of their local community of Mildura: cf. *Nationwide v Furber* [1984] FCA 104; (1984) 3 FCR 19 at 22, 25 and 30.

35. I also accepted that damages would not be an adequate remedy in the case of Zoe Support because the defamatory material has the capacity to destroy its integrity as a provider of charitable works and, consequently, its reason for existence.

36. As to the balance of convenience, I did not consider that Ms Brewer is likely to suffer serious harm if she is prevented from publishing or maintaining the publications the subject of the proceeding. The applicants' undertaking as to damages also weighed in their favour although not strongly where there is no particular reason to think that Ms Brewer will suffer any monetary harm as a result of an interlocutory injunction of the kind sought.

37. Noting "as a question of discretion, the power to enjoin publication is ordinarily exercised only with great caution, and only in very clear cases", as set out above, in the absence of evidence of any justification for the publications, I was satisfied that the likely harm to the applicants strongly favoured the grant of injunctive relief in the terms sought. In particular, there is no evidence that there is any legitimate public interest or concern in relation to Ms Brewer's statements concerning the applicants. Although there has been no further publication since

8 May 2020, there is also no evidence that Ms Brewer will not publish further similar material. In the light of the fact that the more recent publications remain accessible on the Facebook account, and the defiant terms of those publications (including a proposal to publish statements on an alternative MeWe account if blocked by Facebook), there is reason to believe that Ms Brewer has chosen not to comply with the interim order which arguably required her to take down those publications. In turn, these matters provide reason to believe that Ms Brewer will publish similar allegations against the applicants in the future unless restrained from doing so.

38. Ms Brewer's apparent location in New Zealand was not a factor which caused me to consider that I should not grant the interlocutory injunction: cf. first judgment at [17] and [18].

NEW ZEALAND,

Restraining Ms Brewer from "maintaining online" the publications and requiring their removal from the Facebook account

39. In the first judgment at [20], Wheelahan J said:

... Should the respondent have any arguable defence to the claims made against her, she will have a proper opportunity to submit to the Court that the injunction should not be continued, or should be discharged. In that way, any legitimate interests the respondent has in publishing this material will be accommodated.

40. As earlier noted, the interim injunction required Ms Brewer to refrain from "maintaining online", the first four publications or any publications to similar effect. The three publications uploaded on 8 May 2020 are to similar effect to the earlier publications, in that they seek to take issue with Facebook's decision to remove the earlier posts and video and reiterate the substance of the earlier posts, at least in relation to Dr Anne Webster and Zoe Support.

41. On the available evidence, I accepted that the Facebook account was within Ms Brewer's control. Ms Brewer did not participate in the 19 May 2020 hearing and there was no evidence that she sought to do so. There was no evidence that Ms Brewer made any attempt to inform the Court of any legitimate interest that she has in publishing or maintaining on line the seven publications.

42. In *Capilano Honey v Dowling (No 2)* [2018] NSWCA 217 at [105], Basten JA (Beazley P and McColl JA agreeing) noted, concerning take-down orders, that "at least arguably, where it is likely that relevant damage has already been done, there will be greater reluctance to provide interlocutory relief in essentially the same form as final relief, absent some indication that only limited damage has been done and much more is likely to follow".

43. In this case, there is good reason for concern that significant damage may yet be done by the later publications, principally by the claims in the publications that are antithetical to the stated aims of the Zoe Support charitable organisation and its supporters, including Dr Anne Webster. I was satisfied that those exceptional circumstances warranted the mandatory aspects of the injunctive orders that I made.

CASE MANAGEMENT

44. The possibility remains that Ms Brewer may seek to defend the proceeding. Accordingly, it is appropriate to seek to manage the proceeding towards an early final hearing, in order to limit the duration of the interlocutory injunctive orders.

45. For this reason, pursuant to s 13(1)(b) of the *Trans-Tasman Proceedings Act 2010* (Cth), I abridged the time for Ms Brewer to file an appearance to 26 May 2020. I also made orders for Ms Brewer to file and serve any defence, for the applicants to file and serve any reply and for the matter to be listed for a case management hearing on 18 June 2020.

18 June 2020.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:

28 May 2020 (DATE)

Dated: 28 May 2020