FEDERAL COURT OF AUSTRALIA

Rush v Nationwide News Pty Limited No. 2

[2018] FCA 550

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at the Court's website. This summary is also available there.

Mr Geoffrey Rush has commenced defamation proceedings against Nationwide News Pty Ltd and Mr Jonathan Moran. Like many applicants in defamation proceedings, he is anxious to have his claim dealt with quickly so that, if successful, he may be publicly vindicated while the impugned publications are still fresh in the mind of the public. He has made that clear from the outset. Perhaps more significantly, like any litigant in this Court, be they an asylum seeker, a Minister of the Crown, a regulatory body, a large media corporation or any ordinary Australian citizen, he is entitled to expect that his claim will be resolved as quickly, inexpensively and efficiently as possible. Regrettably, the approach that Nationwide and Mr Moran have taken to their defence of Mr Rush's claim threatens to stymie or frustrate the achievement of that overarching objective of the Court's civil practice and procedure.

It would be fair to say that while Nationwide and Mr Moran were quick to publish, they have been slow to defend.

There are before the Court two interlocutory applications. Both of them were filed by Nationwide and Mr Moran. Both were opposed by Mr Rush.

In the first application, Nationwide and Mr Moran sought leave to file a further amended defence. The proposed further amended defence was effectively Nationwide and Mr Moran's fourth attempt at filing the defence that they wish to take to trial. In the second interlocutory application, Nationwide and Mr Moran sought leave to file a notice of cross-claim outside the time period prescribed in the Federal Court Rules 2011 (Cth). The cross-respondent named in the draft notice of cross-claim is the Sydney Theatre Company Limited (STC).

I have decided that both of the interlocutory applications must be dismissed.

The proposed amended defence

The proposed further amended defence made two substantive and substantial additions to the Nationwide and Mr Moran's defence.

The first addition was to effectively re-introduce paragraphs of the qualified privilege defence that I struck out in my earlier judgment (*Rush v Nationwide News* [2018] FCA 357), but this time as particulars of facts and matters that were said to be relevant to the mitigation of damages, rather than as particulars of the defence of qualified privilege. This addition to the defence was said to be justified by a decision of the Court of Appeal in England & Wales in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579. Nationwide and Mr Moran submitted that the paragraphs that they sought to reintroduce into the defence were "directly relevant background context" to the alleged defamatory publications and were relevant to Mr Rush's reputation and the damages properly payable to him should he succeed in proving that he was defamed.

The second substantive addition to the proposed further amended defence was to reintroduce parts of the paragraphs previously struck out as particulars of the pleaded qualified privilege defence. The only basis upon which it was said to be appropriate to reintroduce those paragraphs was that, if they were permitted to be included as facts relevant to the mitigation of damages, then as a matter of discretion they should be permitted to be included in the defence as particulars of the qualified privilege defence.

I have found that neither of those proposed changes to Nationwide and Mr Moran's defence are justified or justifiable.

The paragraphs that Nationwide and Mr Moran sought to be reinserted in the defence do not fall within the principles in *Burnsten's Case*. The facts in those paragraphs do not directly concern any conduct on the part of Mr Rush that could relevantly adversely affect his reputation. Rather, they comprise little more than hearsay statements about allegations that have been made about Mr Rush, or rumor or innuendo, or facts about things that do not bear at all on Mr Rush's reputation. None of the facts in the relevant paragraphs, if proved, could rationally diminish the harm to Mr Rush's reputation from the alleged defamatory imputations.

As for the second substantive change, I have already found that the paragraphs that Nationwide and Mr Moran sought to have reinserted in the defence are irrelevant to their pleaded defence of qualified privilege and are otherwise ambiguous and likely to cause prejudice and delay in the future conduct of the proceedings. Nothing has changed. If Nationwide and Mr Moran wish to demonstrate that I was wrong in so finding, they must pursue their application for leave to appeal.

Importantly, I have also found that there are powerful discretionary considerations for refusing Nationwide and Mr Moran's application for leave to further amend their defence. First, their conduct of the proceedings to date has already been productive of delay. Further amendments to the defence would simply result in further delay. Second, Nationwide and Mr Moran have failed to provide an adequate or acceptable explanation for their delay in bringing forward these proposed amendments. Moreover, despite what their solicitor has said, there are at least reasonable grounds to suspect that the real reason for Nationwide and Mr Moran's zealous, if not desperate, pursuit of these amendments was to justify a further subpoena to the Sydney Theatre Company in the hope that documents produced pursuant to that subpoena might support a defence of justification.

Those discretionary considerations weighed heavily against the grant of leave.

The proposed cross-claim against the Sydney Theatre Company

In their proposed cross-claim against the STC, Nationwide and Mr Moran claimed, in various different ways, that the STC defamed Mr Rush. In those circumstances, Nationwide and Mr Moran contended that if they are held liable to pay damages to Mr Rush, the STC should contribute to the payment of those damages.

In the proposed cross-claim, Nationwide and Mr Moran claimed that the STC defamed Mr Rush when they made three statements concerning Mr Rush. The first statement was made in an email to Mr Moran in response to Mr Moran's request for an "official comment". The second statement, rather curiously, was said to have been made when an employee of the STC remained silent after Mr Moran read the contents of the second Telegraph article to her. It was alleged that, in remaining silent, the STC employee communicated that the contents of that article were accurate. The third statement was made in a conversation between Mr Moran and another employee of the STC. The employee requested that part of what he said not be attributed to him.

Nationwide and Mr Moran claimed that the STC was liable for any damage suffered by Mr Rush that might be found to have flowed from the republication of the STC's statements in the two Daily Telegraph articles and the billboard. They also claimed that the STC participated in and was an accessory to those publications.

The claims in the proposed cross-claim were, on just about any view, novel. The notion of a major media organisation and one of its journalists joining one of its sources for a story is, to say the least, unusual.

More importantly, I have found that, upon close analysis, the claims in the proposed cross-claim face a number of major legal and factual hurdles. Those hurdles are examined at length in my reasons. For present purposes it is sufficient to say no more than that the proposed cross-claim is very weak, if not tenuous. The weakness of the cross-claim militates against the grant of leave.

I have also found that, there are other powerful discretionary reasons for refusing Nationwide and Mr Moran's application for leave to file the cross-claim. In particular, if Nationwide and Mr Moran are permitted to file the cross-claim, it will almost inevitably result in further delay and prejudice to Mr Rush.

As I have already said, Mr Rush wants an early hearing of his claim. He has filed evidence which strongly suggests that since the publications he has continued to suffer tremendous emotional and social hardship, including as a result of the continuing coverage of this case. If the cross-claim against the STC is not filed, Mr Rush's claim will be ready for hearing as early as this August. If the cross-claim is filed, it is in my view highly unlikely that the case could be heard this year. That is because the cross-claim introduces a new party, the STC, and raises new and complex issues of fact and law. The STC would have to be given time to consider the cross-claim, file its defence, and take whatever interlocutory steps it considers appropriate. A hearing which included the claims against the STC would also almost certainly take longer.

I consider that the further delay and the prejudice that would be suffered by Mr Rush as a result of that further delay would be unacceptable.

I have also found that Nationwide and Mr Moran have not provided an adequate or acceptable explanation for their delay in filing the cross-claim. According to their solicitor, Nationwide and Mr Moran initially considered whether they should file a cross-claim but

decided against it, no doubt for their own forensic or tactical reasons. They have now changed their mind, largely because of the findings in my earlier judgment. That is hardly an acceptable explanation. There is good reason to hold Nationwide and Mr Moran to their earlier tactical decision, particularly where the result of granting them leave would be to visit delay and substantial prejudice upon Mr Rush.

I also consider that Nationwide and Mr Moran's change of mind in relation to the cross-claim is again very much connected with their intent to obtain documents from the STC which might provide them with a justification defence to Mr Rush's claim. There could be little doubt that if the cross-claim was permitted to be filed, and the STC was joined as a party, one of the first things that Nationwide and Mr Moran would do would be to seek discovery from the STC.

It should be emphasised that, in refusing Nationwide and Mr Moran leave to file the proposed cross-claim, I am not denying them the right to pursue the STC for contribution should they wish to do so. The refusal of leave simply means that they would have to do that in separate proceedings against the STC. I accept that it is generally undesirable for claims for contribution, like Nationwide and Mr Moran's claim against the STC, to be dealt with separately. I also accept that if the claim for contribution against the STC is pursued separately, there is a risk of inconsistent findings. That again is undesirable, though on my assessment the risk of inconsistent findings in this matter is very small indeed. In any event, I have found that these considerations do not outweigh the delay and prejudice that will be suffered by Mr Rush if Nationwide and Mr Moran are permitted, at this late stage, to file the proposed cross-claim.

Once all the relevant considerations are weighed in the balance, the balance comes down firmly in favour of refusing leave to file the cross-claim.

JUSTICE MICHAEL WIGNEY

19 April 2018