DISTRICT COURT OF QUEENSLAND

CITATION:	*Mitchell v Jobst* [2023] QDC 219
PARTIES:	**WILLIAM JAMES MITCHELL** (plaintiff) **v** **KARL JOBST** (defendant)
FILE NO:	B136/21
DIVISION:	Civil
PROCEEDING:	Application by the defendant to strike out the Further Amended Statement of Claim and Cross Application by the plaintiff to strike out two subparagraphs of the third Further Amended Defence and Disclosure
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2023
JUDGE:	Kent KC, DCJ
ORDER:	**1. The defendant's application to strike out the Further Amended Statement of Claim is dismissed.** **2. The plaintiff is to provide further and better particulars of the further amended statement of claim, in accordance with a request to be delivered by the defendant.** **3. I will hear the parties as to the final form of the orders and costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where the defendant has applied to strike out the entirety of the further amended statement of claim on the basis of deficiency in pleading – consideration of the relevant principles which apply on an application under *Uniform Civil Procedure Rules* 1999 (Qld) r 171 – whether the deficiency in pleading can be cured through the provision of particulars
LEGISLATION:	*Defamation Act 2005* (Qld) s 4 *Uniform Civil Procedure Rules 1999* (Qld) rr 5, 171, 376, 444
CASES:	*Amalgamated Television Services Pty Ltd v Marsden* [2002]

NSWCA 419

Dow Jones & Co. Inc v Gutnick (2002) 210 CLR 575

Equititrust Ltd v Tucker (No. 2) [2019] QSC 248

Firstmac Ltd v Hunt & Hunt [2018] QSC 258

Gordon v Amalgamated Television Services Pty Ltd (1980) 2 NSWLR 410

Ratcliffe v Evans (1892) 2 QB 524

Rogers v Nationwide News Pty Ltd [2003] HCA 52

Toomey v Mirror Newspapers Ltd (1985) 1 NSWLR 173

COUNSEL: P Somers for the plaintiff
M de Waard for the defendant

SOLICITORS: Bennett & Philp Lawyers for the plaintiff
Mills Oakley for the defendant

Introduction

[1] The defendant applies to strike out the entirety of certain paragraphs of the Further Amended Statement of Claim filed on 9 October 2023 ("FASOC") pursuant to r 171 of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*"). The plaintiff cross applies to strike out two subparagraphs of the third Further Amended Defence ("Defence") and for disclosure.

Background

[2] The plaintiff is a competitive video gamer resident in Florida in the United States of America. The defendant resides in Brisbane and is a publisher of YouTube videos. Between May and June 2021, the defendant published a video on YouTube called "The Biggest Conmen in Video Game History Strike Again", said to be referable to the plaintiff, who has previously been broadly known for his involvement with the video game "Donkey Kong"; he was a subject of the broadly published 2007 documentary "King of Kong".

[3] These proceedings, for damages for defamation, were issued in September 2021 in Cairns, however, were subsequently transferred to Brisbane. There have previously been orders for security for costs by the plaintiff (who does not reside in the jurisdiction) which have been complied with. The matter was transferred to the District Court at Brisbane in August 2023.

[4] The pleadings have been amended to reach their present state and there has previously been correspondence pursuant to *UCPR* 444.

[5] It is convenient to begin by setting out the nature of the defendant's complaints.

[6] The FASOC sets out the background facts and pleads, in relation to the YouTube video, a number of words which are defined as "the Words". There is reference to amended versions of this publication and republication and it is said that by reasons of the words in the publication and republication there are a number of imputations which are defamatory causing the plaintiff to have been injured and giving rise to a claim for damages.

[7] The defendant refers to the power in r 171 of the *UCPR* to strike out pleadings. Essentially, he claims that the problems with the FASOC are numerous and varied, so that in its current form it tends to prejudice or delay the fair trial of a proceeding and needs to be amended so significantly that the appropriate remedy is that it be struck out with leave to replead. The complaints are dealt with in turn as follows.

Paragraph 1 (b)

[8] Firstly, in paragraph 1(b) it is pleaded that the plaintiff is a well-known competitive video game player in Queensland "and elsewhere". The complaint is of the words "and elsewhere" which is said to be vague and unparticularised; it is said to be quite problematic in the context of paragraph 15(c) of the FASOC, which is a claim for damages to reflect the fact the defamation of the plaintiff occurred in a place in which he is known. Thus, without knowing where exactly the plaintiff is said to have been known, it is argued to be impossible for the defendant to properly defend himself. The suggestion is that the plaintiff seeks damages for alleged damage occurring outside of just Queensland. Thus, the plaintiff must properly define with precision where exactly he says he is well-known outside of just Queensland. This is not merely a request for particulars, according to the defendant's argument; rather it refers to a primary fact which is a central element of the cause of action.

[9] The plaintiff refers to the relevant principles as described in *Equititrust Ltd v Tucker* (No. 2) [2019] QSC 248 at [8]-[15]. Relevantly, if the effect of the exercise would be summary dismissal of part of the plaintiff's claim, there should obviously be a cautious approach and the power only exercised in clear cases.

[10] The plaintiff points out that the challenged subparagraph (1)(b) was previously admitted in earlier versions of the defence and leave has not been sought to withdraw the admission. The present version of the defence seeks to plead that "and elsewhere" is vague, confusing and liable to be struck out. The plaintiff argues that "elsewhere" is understood by the pleading stating that the plaintiff was well known in Queensland, which establishes jurisdiction. "Elsewhere" is pleaded to denote the notoriety of the plaintiff and that he was known outside of Queensland, as well as in Queensland. This is permissible; *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173. Thus, the defendant argues that the case is at worst an example of a need for particulars, rather than strikeout.

[11] In my view the plaintiff's argument should be accepted; there is need for precision, but the problem is not sufficiently grave to warrant strike out. Clearly enough the nature, scope and thus value of the plaintiff's reputation would be central to arguments about damages, which the plaintiff must plead and prove.

Paragraph 1(c)

[12] The next challenge is to paragraph 1(c) of the Statement of Claim. The attack is on the phrase "certain video game records" which is said to be vague and confusing and requiring definition. The complaint here is that, again, the claim for damages to vindicate the plaintiff's reputation necessarily relates to the plaintiff's alleged reputation as being recognised by the Guinness Book of World Records. Thus, the relevant records should be defined so that the defendant has fair warning of the case he is to meet at trial as to the plaintiff's reputation.

[13] The plaintiff argues that this complaint is without merit in the context that paragraph 1(c) of the Defence engages in relation to some records both from the Guinness Book of World Records and also records from Twin Galaxies LLC, a company apparently associated with the video games Donkey Kong and Pac-man. Thus, the plaintiff argues that the defendant is well aware of the relevant facts; at worst the complaint is one which goes to particulars. Again, in my view this is correct.

Paragraph 2(c)

[14] The defendant next complains of paragraph 2(c) of the Statement of Claim, however, primarily of paragraph 4 which pleads that the defendant published "the video on YouTube". This is defined in the pleading as "the publication". The defendant argues that publication of defamatory matter by a defendant is an essential part of the cause of action and in this case cannot be said to be complete unless and until the material (published on the internet) is downloaded onto the computer of a third person, using a web browser to access it; see *Dow Jones & Co. Inc v Gutnick* (2002) 210 CLR 575 at [26] and [44]. Thus, the pleading does not properly plead publication which is a material fact required to establish the cause of action.

[15] In response the plaintiff argues that the publication is clear and not truly in issue.

[16] Paragraph 2(c) of the FASOC, which pleads that the defendant was at relevant times the publisher of the video, is admitted. There is, however, presently no explicit pleading of access of the material by a third party (although I note the contents of paragraph 11, discussed below). The plaintiff's pursuit of disclosure may relate to this aspect of the case. There should be, however, at this stage, a proper pleading of the access; as the High Court said, harm to reputation is done when the defamatory publication is comprehended by the reader, listener, or observer; until then, there is no harm. So this essential element should be pleaded. However the pleading in its present form, as far as it goes, is not objectionable; the problem is rather that it should be added to in order to make the pleaded cause of action complete and understandable. If it were struck out, there would be leave to re-plead and presumably the repleaded version would be in the same terms as the present, with the missing element added. Thus it is not appropriate to strike out the existing portion of the pleading.

Paragraph 4A

[17] The defendant next complains of paragraph 4A of the FASOC, which refers to the publication containing certain commentary, described as "the Words". The defendant complains that the pleading does not include all of the words alleged to have been published and the plaintiff is obliged to plead the whole matter which substantiates the cause of action. The term "matter" is defined broadly and non-exhaustively to include a number of different forms of communication; *Defamation*

Act at s 4, Sch 5. The defendant argues that the plaintiff is obliged to plead the whole matter, which has not been done.

[18] He relies on *Gordon v Amalgamated Television Services Pty Ltd* (1980) 2 NSWLR 410 at 412-3. The complaint there was that the plaintiff had extracted the matter complained of from its proper context to the extent that the effect produced by what was pleaded was “unfair” to the defendants. Justice Hunt observed that where the publication sued upon is in written form, a plaintiff is obliged to include within his pleading every passage which materially alters or qualifies the complexion of the imputation complained of. Notwithstanding the lack of unqualified application of that principle in the case of oral defamation, the rule remains that the capacity of the matter complained of to convey particular defamatory imputations of and concerning the plaintiff must be judged by what the ordinary reasonable viewer or listener of average intelligence would have understood from the broadcast as a whole. His Honour continued at page 414, paragraph [15]:

> “Thus, if in the agreed context of what has been complained of by the plaintiff, there are passages not pleaded which materially alter or qualify the complexion of the imputations complained of, the plaintiff is, in my opinion, obliged to plead those additional passages in oral as well as in written defamation.”

[19] In the present case, it is not clear what the defendant argues are passages not pleaded which materially alter or qualify the complexion of the imputations complained of.

[20] In relation to this complaint, the plaintiff says that the basis for the attack on paragraph 4A is not clear.

[21] I agree. If there are passages of the broader publication which are said by the defendant to be missing from the pleaded extract and which materially alter or qualify the complexion of the imputations complained of, that issue can be ventilated, and the further context pointed out, giving rise to a clearer attack on the pleading. The further context could also be referred to in the defence and/or grappled with in the evidence. I do not conclude that the present form of the pleading is apt to be struck out.

Paragraph 6

[22] The next complaint is in relation to paragraph 6 of the FASOC. This refers to the publication of an amended version of the relevant video on or about 5 June 2021 where part of the complained of words had been removed. The defendant complains that the contents of paragraph 6 do not appear to serve any particular purpose in pleading the plaintiff's cause of action, and if so the paragraph is unnecessary and confusing and should be struck out.

[23] The plaintiff's response is that the paragraph pleads the factual happening of that publication of the amended version. As I understand the submissions and the pleading, the plaintiff argues that the publication referred to in paragraph 6 is simply part of a narrative. That amended publication is bracketed by the publication of the defamatory matter on 26 May 2021 and the republication of it on 11 June 2021, and among other things the plaintiff argues that it is acknowledged as being part of the relevant narrative by being pleaded by the defendant in paragraph 4 (c) of the defence. Moreover, it is relevant to an available inference that the defendant was aware of the defamatory nature of the matter, certainly by the time of the republication on 11 June. Again, in my conclusion the plaintiff's argument should be accepted on this issue.

Paragraph 7

[24] The defendant complains of paragraph 7 of the FASOC which, he argues, attempts to plead a new cause of action by way of the republication without pleading what the further amended version of "the video" actually is. The complaint is that the nature of the amendments referred to is not made clear. Secondly, the republication is also attacked on the same basis as the publication, namely that the actual publication (in the sense of being downloaded by people who viewed it) is not pleaded. Nor, the defendant argues, is the whole of the matter pleaded.

[25] In relation to this, the plaintiff argues that paragraph 7 is not a new fact or a new cause of action, referring to analysis of this question in *Firstmac Ltd v Hunt & Hunt* [2018] QSC 258 at [15] – [26]; the analysis should not be too pedantic, may be a question of degree and may involve an exercise of discretion. The plaintiff argues that paragraph 7 is simply more detail of a defamatory publication without giving rise to a new cause of action. Alternatively, if it was concluded that there is a new cause of action, the plaintiff seeks leave to make the relevant amendments under

UCPR 376(4) applying to a cause of action being added by amendment after the expiration of the limitation period.

[26] In my conclusion, the pleading – which seems to have been in previous versions of the statement of claim, albeit in a previously slightly different form – is really a description of the defamatory matter being published in two separate tranches separated by the incident in paragraph 6. This might theoretically give rise to different claims of quantum, for example, if the second tranche was viewed by more or less or different viewers than the first. But if both were viewed – which, as discussed above, would need to be pleaded – in my view the plaintiff's characterisation of the pleading is correct. Paragraph 7 does not represent a new cause of action. If it did, it seems not to require leave under r 376 in any case, in the sense it was always in the pleading.

Paragraph 11

[27] The defendant next raises paragraph 11 of the FASOC. This is a pleading that the video received a number of public comments. The defendant's criticism is that it is difficult to understand what is referred to by "the video". Apart from this, the purpose of the pleading is said to be unclear, in the sense of whether it relates to liability or damages.

[28] In response, the plaintiff says that paragraph 11 demonstrates that people making comments watched the video; that is, it goes to publication (this might be the kind of thing the plaintiff could refer to in addressing the problem with paragraph 1(c) above). Secondly, the evidence of the content of the comments will demonstrate what a reasonable person has understood the video to be imputing about the plaintiff, and that such imputations are consistent with those pleaded in paragraph 8 of the statement of claim. In my view, these purposes are proper. They could be made more explicit in the pleading.

Paragraph 12

[29] The defendant next complains about paragraph 12 of the FASOC. It refers to a publication on Twitter (as it then was) on 5 June 2021, the purpose of which is said to be unclear.

[30] In response, the plaintiff points out that the relative publication is admitted. The relevance of the pleading is said to be that it goes to the circumstances and "mindset" of the defendant in removing some words from the video on 5 June 2021 and republishing them on 11 June. It is thus said to be relevant to the allegation of malice and aggravated damages. Again, these purposes are proper but should be made explicit.

Paragraph 13

[31] The defendant next complains about paragraph 13 of the FASOC. It pleads that as a result of the publications the plaintiff has been injured. This is argued to be unparticularised and vague, particularly in the context of the complaints as to subparagraphs 1(b) and 1(c).

[32] In response, the plaintiff argues that he need not show actual damage to reputation in order to be entitled to compensation, rather only that he had a settled reputation prior to publication in order to be entitled to compensation for the harm done or likely to have been done to his reputation; see *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1367]. Damage to reputation is presumed to flow from the defamatory publication; *Ratcliffe v Evans* (1892) 2 QB 524 at 528. Damages are "at large" and are a matter of subjective rather than objective analysis and no two cases are exactly the same alike; *Rogers v Nationwide News Pty Ltd* [2003] HCA 52 at [69]. Thus, the plaintiff complains of general loss and damage from the defamation from publication of the video on the two occasions identified. The plaintiff argues that paragraph 13 is adequately particularised. In my view this is correct. The assessment of damages will fall to be conducted in the context of the evidence and arguments at trial.

Paragraph 14

[33] Paragraph 14 of the FASOC is attacked by the defendant because it refers to "the imputations" being false. It is said that it should be make clear that this refers to those imputations pleaded at paragraph 8.

[34] The plaintiff points out that the substance of paragraph 14 is admitted on the pleadings and paragraph 14 pleads the facts relied on to allege the imputations are

false. The fact that the imputations in paragraphs 8 and 14 are identical could be made explicit.

Paragraph 15

[35] The defendant argues that in relation to paragraph 15 of the FASOC, paragraph 15(c) refers to damages to reflect the fact that defamation of the plaintiff occurred in a place in which he is known. Again, the criticism of paragraph 1(b), referring to Queensland and elsewhere, is referred to, as discussed above.

[36] The plaintiff's response is as outlined above. Again, in my view, precise particulars are necessary.

Paragraph 16

[37] In relation to paragraph 16, the defendant complains as to the plea of aggravated damages. The first complaint is to the lack of definition of "defamatory matter". This should be clarified. Further, there is criticism of a pleading of the defendant's "evident intention" and the fact that this is an unparticularised allegation; if it is said to be a matter of inference, the primary facts from which it is to be inferred are not identified. There is also criticism of an unparticularised allegation of a "pecuniary benefit" arising from the publication of the defamatory matter.

[38] In response, the plaintiff argues that the intention can arise as a matter of inference. However, the underpinning facts are not presently identified. Where an inference is said to be open, the facts from which it is to be inferred should be identified. As to the pecuniary benefit which is said to have been derived, even if the quantum is not presently able to be quantified, the way in which it is said to have been obtained – for example, from subscribers to the defendant's YouTube channel – ought be identified.

Plaintiff's application

[39] The plaintiff applies for orders striking out some parts of the defence, however that issue has apparently been resolved. He also seeks disclosure relating to some documents identifying numbers of viewers of the publication. The defendant says this is premature on the present state of the pleadings; this is likely technically correct. In light of the resolution of the other issues dealt with, that question may be best deferred until the settled version of the pleadings is known.

Conclusion

[40] I consider that the above problems with the plaintiff's pleading ought be addressed, but they do not, individually or collectively, amount to a situation where a strike out of the pleading with leave to re-plead is necessary or appropriate. Apart from many of the issues simply not being egregious and being more in the nature of further particulars or simply greater precision and consistency of language, there is also the consideration of the efficient, expedient and co-operative conduct of litigation, avoiding undue delay, expense and technicality and facilitating the purpose of the rules; r 5. If the FASOC were struck out and the plaintiff had to start again, he would be informed by the issues and arguments which have arisen in this application, but that is not to assume that an entirely new pleading would completely satisfy the defendant (who is entitled to have a clear pleading to respond to). As the plaintiff concedes, some aspects of the pleading could have been better.

[41] Thus it is, in my conclusion, best to address the issues by delivery by the defendant of a request for further and better particulars, but perhaps also aided by information as to any amendments – not in the form of further and better particulars – which the plaintiff will or should make in any event, in light of the hearing of the application, and these reasons.

[42] Therefore I will hear the parties as to the final form of orders, but they would include delivery within a certain time frame of a request by the defendant for further and better particulars of the FASOC, with the plaintiff to respond in a reasonable time, probably 14 days. I will also hear the parties as to costs.