

RAY v WALLIS — BC9907203

SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS

OWEN J

CIV 1207 of 1998

26 February 1999, 3 November 1999

Ray & Ors v Wallis [1999] WASC 216

24 Paragraphs

Defamation — Pleadings — Application to strike out amended defence — Application for further and better particulars of defence

Case(s) cited:

Bailey v Federal Commissioner of Taxation (1977) 136 CLR 214

Bruce v Oldhams Press Ltd [1936] 1All ER 287

Dare v Pulham (1982) 148 CLR 658

Foamlite Australia Pty Ltd & Anor v Campbell & Anor, unreported; FCt SCt of WA; Library No 7686

Lord v Sunday Telegraph Ltd [1970] All ER 504

John Carruthers Ray, Bruce Jackson, Timothy David Wallis, Terrence Arthur Jackson, Kimberley Brian Ray, Arthur William Wallis (Plaintiffs)

Owen J

[1] This is an application by the plaintiffs to strike out the defence, or paragraphs of the defence, or alternatively for further and better particulars of defence in a defamation action.

Background

[2] This action has had a long history and I can refer very briefly to the background. The plaintiffs are farmers or business proprietors in the Dalwallinu area. They are members of a religious sect called the Brethren or the Exclusive Brethren. The defendant is, or in the past has been, a member of the sect. An internecine dispute has erupted within the sect.

[3] The defendant prepared a letter dated 19 February 1998, which is set out in full in para9 of the amended statement of claim. Publication took the form of the letter being placed on a public noticeboard in Dalwallinu and sent to each plaintiff and another person. I will not, at this stage, refer to the text of the letter. The plaintiffs say it carries the imputation that the plaintiffs, in their capacity as leaders of the sect, were guilty of various acts of immorality, breaking up of families and harming of children. The statement of claim has survived a strike-out application and is in a form to which the defendant must plead.

[4] In the defence the defendant admits publication but denies the letter contains the defamatory imputations contended for by the plaintiffs. He then describes the imputations he says arise and raises a "Polly Peck" defence by pleading that those imputations are true. There is an alternative defence of fair comment.

[5] The plaintiffs sought further and better particulars of the defence. The defendant delivered particulars on 23 December 1998. The plaintiffs now say the particulars, as delivered, do not cure the defects that they contend exist within the pleading. This is the basis of the current application.

Legal Principles

[6] I do not understand the legal principles governing applications of this nature to be in issue. I adopt, without repeating them, the enunciation of those principles set out in para1 of the plaintiffs' written outline of submissions.

The Substance of the Dispute

[7] In para5(b) of the defence the defendant contends that:

- (a) the plaintiffs are members of the sect;
- (b) the sect is involved in breaking up families;
- (c) the activities of the sect in breaking up families is evil;
- (d) because the plaintiffs are members of the sect, they are associated with the evil activities of the sect.

[8] These are the imputations that the defendant says arise from certain nominated parts of the letter and that the imputations are true.

[9] In para7(b) and para8(b) of the defence the defendant contends that the plaintiffs, as members of the sect, were involved in tormenting children and taking them away from their families and causing psychological harm by wrongfully taking them away from their families. These are the imputations that the defendant says arise from certain nominated parts of the letter and that the imputations are true.

[10] Para9(b) is similar, although the mischief to which it refers is the plaintiffs failing to return children to their families.

[11] The defence of fair comment in para10 sets up as the matter of public interest to which the defence extends the assertion that the sect, including the plaintiffs, has been keeping some members of families apart from other members of their families.

[12] The further and better particulars provided by the defendant are voluminous. The plaintiffs say that the particulars do not enable them to know the case they will have to meet. The defendant does not deny (although he does not admit) the allegation in the statement of claim that the plaintiffs were well-known as leaders of the sect and as carrying out functions as priests within the sect. Nor does he really deny that the letter would be understood to refer to the plaintiffs. As a general statement the plaintiffs say the essence of the defendant's allegations against them is "guilt by association". I think that is right.

[13] It is important to bear in mind that each of the plaintiffs brings a personal action against the defendant. The action is not brought by the sect as an entity separate and apart from those who are its leaders. It is brought by the plaintiffs as individuals. It must also be borne in mind that the present dispute arises in the context of the defendant's defence of justification. It would not be sufficient for the defendant to establish, for instance, that the sect was guilty of all or most or even some of the serious conduct alleged in the letter. There must be something more. That "something" must sheet home to the plaintiffs, or one or more of them, responsibility of one type or another for the impugned conduct. In the context of this pleading the defendant seeks to do so by saying that the plaintiffs were "involved" in the impugned conduct. That is not in itself objectionable but it must be filled out by appropriate particulars.

[14] Counsel for the defendant pointed out that the letter goes much wider than the plaintiffs. It refers to the sect "breaking up families", exposing "the evil doctrines of [the sect]", "exposing groups like yours" and "enlightening the public (the community) of the bizarre practices of your group". I acknowledge that fact and it may well have a bearing on the overall defence of fair comment. But I wonder whether it addresses the concern raised by the defence of justification of truth.

[15] Again as a general statement I think that if the defendant wishes to defend the claim brought against him by justifying the imputations he must do so by establishing not only that the sect is involved in the impugned conduct but also that each plaintiff was "involved" in a relevant sense. It is against this background that the adequacy of the particulars delivered on 23 December 1998 falls to be considered.

The Issues in the Defence

[16] This is the allegation that the plaintiffs are members of the sect and that the sect is involved in breaking up families. The request for particulars asks for details of which of the plaintiffs were involved in breaking up families, which families were broken up and when and what conduct of the plaintiffs constitutes them being involved.

[17] In my view answer 1(i) is unobjectionable in so far as it sets out the general practices of the sect. However, it cannot stand in so far as it alleges that the plaintiffs "as members, leaders and priests of the [sect] have authorised, encouraged, acquiesced, directed or caused [sect] members to do certain things". That is embarrassing.

[18] The plaintiffs complain that answer 1(ii) should not include reference to families from outside the Dalwallinu area. I am not sure why. The letter does not seem to have a geographical limitation. There may be a question whether the reputation of the plaintiffs as leaders of the sect extends beyond the local area. That aside, I cannot see why the defendant should be so confined. But it leads on to another matter. In the particulars actually included in the defence (para5) the defendant nominated six families. It raises the question whether the defendant really needs to go to the extent that seems to be implicit in the pleading in order to establish the defence that he wishes to advance.

[19] This is not, and must not be allowed to become, some commission of inquiry into the activities of the sect. That is not the purpose of the civil courts. Sense must prevail. If justice is to be done, the parties must limit the issues so that the public resources of the court are not unduly taxed. I say this advisedly: I have grave concerns whether there could be a proper trial on the pleadings and particulars as they currently stand. The potential breadth of the issues is enormous.

[20] Answer 1(iii) seems to me to be part of the narrative rather than a substantive particular and so calls for no particular comment. Answer 1(iv) contains the crux of the allegation but in many instances it is deficient in its specificity. It is another example of the mischief to which I have just referred. Arguably, it goes wider than is necessary to achieve the principal aim. In so doing it fails to comply with the purpose for which particulars are required. I comment as follows, using the paragraph numbering system in the document:

(a) unobjectionable - in the overall conditions referred to in 1(i) it is arguable that non-communication could contribute to a family break-up;

(b), (c) and (d) for reasons already advanced these paragraphs do not have the requisite degree of particularity;

(e) unobjectionable;

(f) this contains conclusions - what did the named plaintiffs do to "shut up" and "bar" the defendant and how is it said that Sharpe acted on behalf of the plaintiffs;

(g) what are the facts, matters and circumstances to support the assertion that Bloomfield and Davies acted on behalf of the plaintiffs;

(h), (k) and (l) it is difficult to see how these assertions could be relevant to a plea of justification concerning conduct of the plaintiffs;

(i) and (j) unobjectionable;

(m) and (o) what is the conduct of the plaintiffs that is said to be relevant to these excommunications;

(n) and (p) unobjectionable;

(q) unobjectionable, save for the reference to "priests" in the second last line, unless they are the plaintiffs or some one or more of them;

(r) and (s) unobjectionable;

(t), (u) and (v) what is the conduct of the plaintiffs that is said to be relevant to these excommunications or separations?

[21] In relation to answer 2, I think the gravamen lies in (i). What is said to be "evil" is the practice of breaking up families. From there, it would be relatively easy to incorporate by reference the answers in item 1 (as amplified or corrected in accordance with these reasons) because they would then be specific as to the families concerned and the activities of the plaintiffs individually said to constitute the wrongdoing. I think the same will apply to answer 3, where the complaint is that the conduct of the plaintiffs "destroyed" families. The same should also go for answers 4 to 8. There, the contentious points related to the effect that the impugned conduct is said to have had on children in the process of taking them from, and not returning them to, their families. It may be that not all of the families subject to break-up and referred to in answer 1 will be relevant here. It depends on whether children were involved.

Conclusion

[22] I think the proper course is to order that the defendant's answer dated 23 December 1998 to the plaintiffs' request for further and better particulars be withdrawn with leave to file a substitute set of answers in accordance with these reasons. The orders that I suggest are these:

1. The defendant's answer dated 23 December 1998 to the plaintiffs' request for further and better particulars be withdrawn.
2. The defendant have leave to file a substitute set of answers on the conditions set out in the subsequent paragraphs of this order.
3. Within [] days the defendant is to serve on the plaintiffs a minute of the proposed substituted answers prepared in accordance with these reasons.
4. Within [] days after receipt of the minute the plaintiffs are to advise the defendant whether the proposed answers are objected to and, if so, giving full details of the grounds of objection.
5. Within [] days after receipt of the plaintiffs' response the defendant is to advise the plaintiffs whether the objections are conceded and, if so, serving a fresh minute.
6. If there are no matters outstanding the defendant shall within 7 days after replying to the plaintiffs' response file and serve the substituted answers.
7. If there are matters outstanding the solicitors for the parties shall, within [] days, confer in an effort to limit the areas of difference (called "the conference").
8. If, following these procedures, the parties resolve their differences the defendant shall, within [] days after the conference file and serve the substituted answers.
9. If, following these procedures, there are matters outstanding the defendant shall within [] days after the conference deliver to the Associate to Owen J and serve on the plaintiffs:
 - (a) the minute of proposed substituted answers; and

(b) a memorandum setting out, in detail, the efforts made to resolve the points of difference and the points which have not been agreed;

(c) a note indicating whether the parties are prepared to have a final decision made on the papers without oral submissions or whether a further hearing is required;

(d) if a further hearing is not required, written submissions in relation to the outstanding issues.

10. If a further hearing is not required the plaintiffs shall, within [] days after the conference, deliver to the Associate to Owen J written submissions in relation to the outstanding issues.

11. If a further hearing is required the parties shall approach the Listing Co-ordinator to fix a date and written submissions shall be lodged in accordance with the applicable Practice Direction.

12. There be liberty to apply generally.

[23] The parties should attempt to agree a minute of proposed orders along the lines suggested. If agreement can be reached the minute can be delivered to my Associate and I will make the orders without the need for an appearance.

[24] In relation to costs, I suggest they be reserved for the moment. At the end of this entire procedure the question of costs (including costs incurred in the process following delivery of judgment) could be dealt with or an order made reserving them to the trial Judge.

Order

Defendant's answers to plaintiff's request for further and better particulars be withdrawn. Leave granted to defendant to file a substitute set of answers.

Counsel for the plaintiffs: Mr R E Birmingham QC

Solicitors for the plaintiffs: Patrick Gethin & Co

Counsel for the defendant: Mr J G Hanly

Solicitors for the defendant: Hotchkin Hanly

END OF JUDGMENT