JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	POLAND -v- FAIRFAX DIGITAL AUSTRALIA & NEW ZEALAND PTY LTD [2023] WASC 383
CORAM	**:**	TOTTLE J
HEARD	**:**	15 JUNE 2023
DELIVERED	**:**	5 OCTOBER 2023
FILE NO/S	**:**	CIV 1932 of 2021
BETWEEN	**:**	GREGORY DAVID POLAND Plaintiff AND FAIRFAX DIGITAL AUSTRALIA & NEW ZEALAND PTY LTD Defendant

Catchwords:

Practice and procedure - Pleading - Defamation - Application to strike out paragraphs in the amended statement of claim that plead publication - Where allegedly defamatory statements are constituted by comments on Facebook posts - Whether facts pleaded establish publication of comments - Whether matters pleaded disclose no reasonable cause of action - Whether matters pleaded would prejudice, embarrass or delay the fair trial of the action - Turns on own facts

Legislation:

Limitation Act 2005 (WA), s 15
Rules of the Supreme Court 1971 (WA), O 1 r 4A, O 1 r 4B, O 20 r 19(1)(a), O 20 r 19(1)(c)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Plaintiff : M L Bennett & A J Tharby
Defendant : C Chenu

Solicitors:

Plaintiff : Bennett
Defendant : Banki Haddock Fiora

Case(s) referred to in decision(s):

Cronau v Nelson (No 2) [2018] NSWSC 1905
David Clarke Air Conditioning Pty Ltd v Quann [2016] WASC 73
DM Drainage & Constructions Pty Ltd v Karara Mining Ltd [2014] WASC 170
Dow Jones & Co Inc v Gutnick [2002] HCA 56; (2002) 210 CLR 575
Duffy v Google LLC [2022] SASC 40
English v Vantage Holdings Group Pty Ltd [2021] WASCA 47
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27; (2021) 392 ALR 540
Favell v Queensland Newspapers Pty Ltd [2005] HCA 52; (2005) 221 ALR 186
General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125
Hart-Roach v Public Trustee (Unreported, WASC, Library No 980044, 11 February 1998)
Kidd v Artus [2013] WASC 264
Knowles v Robert (1888) 38 Ch D 263
Lorbek v King [2022] VSC 218
Massarani v Kriz [2022] FCA 80; (2022) 400 ALR 718
Newman v Whittington [2022] NSWSC 249
Randell v McLachlain [2022] NSWDC 506

Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd [1971] 1 NSWLR 472
Sims v Jooste [No 2] [2016] WASCA 83
Stoltenberg v Bolton [2020] NSWCA 45
Vantage Holdings Group Pty Ltd v Donnelly [No 4] [2019] WASC 398

TOTTLE J:

Introduction

1 In this defamation action the defendant has applied to strike out those paragraphs of the amended statement of claim that plead publication of allegedly defamatory comments about the plaintiff.[1] Those comments were not made by the defendant but were made by third parties on the defendant's Facebook page.

2 The comments were posted under, and in respect of, links posted by the defendant to two articles published by the defendant about the plaintiff. The articles are the subject of separate defamation proceedings commenced in this court to which reference is made in the statement of claim.

3 The short point raised by the defendant is that the facts pleaded by the plaintiff are not sufficient to establish publication as that term is understood for the purposes of the law of defamation. That is, the defendant contends that the facts relied on by the plaintiff do not establish the comments were downloaded and comprehended by anyone and thus, so the defendant contends, the pleas disclose no reasonable cause of action. Alternatively, the defendant contends the pleading may prejudice, embarrass or delay the fair trial of the action.[2]

4 The case involves a timing issue that presents a particular challenge for the plaintiff. The links to the articles to which the comments relate were posted on 27 and 28 February 2019. The plaintiff commenced his action in respect of the comments on 10 September 2021 two days after the High Court handed down its decision in ***Fairfax Media Publications Pty Ltd v Voller***.[3] The limitation period for defamation actions is one year.[4] This means the plaintiff is confined to suing in respect of publication of comments posted between 10 September 2020 and 10 September 2021. The defendant contends that both common experience of, and judicial observations on, the workings of social media suggest that comments on a link will be both posted and read shortly after the link is posted. Further, any form of engagement with the link and the comments will

[1] Unless indicated otherwise, references to statement of claim in the balance of these reasons are references to the amended statement of claim filed 10 March 2023.
[2] Defendant's outline of submissions filed 2 September 2022 [1]. *Rules of the Supreme Court 1971* (WA) O 20 r 19(1)(a) and O 20 r 19(1)(c).
[3] ***Fairfax Media Publications Pty Ltd v Voller*** [2021] HCA 27; (2021) 392 ALR 540.
[4] *Limitation Act 2005* (WA) s 15.

diminish over time. In this case over 17 months elapsed between the posting of the links in February 2019 and the commencement on 10 September 2020 of the period during which the allegedly defamatory comments were made. On the other hand the plaintiff contends he has pleaded a platform of facts from which inferences supporting the fact of publication can be drawn and the issue should be determined at trial.

Applicable principles - strike out

5 The principles governing strike out applications, including the caution with which the power to strike out a pleading is to be exercised, are well established. The principles were summarised by Smith J in ***Vantage Holdings Group Pty Ltd v Donnelly [No 4]***.[5] The Court of Appeal approved her Honour's summary of those principles in ***English v Vantage Holdings Group Pty Ltd***.[6]

6 Pleadings may be struck out on the ground that they may prejudice, embarrass or delay the fair trial 'because they are evasive, they conceal or obscure the real questions in controversy, they are ambiguous or not reasonably intelligible, they raise immaterial or irrelevant issues, they fail to confine the issues or state the case of the party in question with reasonable particularity, or they raise a case in terms which are simply too general',[7] or because they contain unnecessary material.[8]

7 The goals stated in the *Rules of the Supreme Court 1971* (WA) O 1 r 4A (the elimination of delay beyond that reasonably required for the fair and just determination of the issues bona fide in contention) and the case management objects identified in O 1 r 4B(1) (in short - the just, efficient and timely determination of business, using resources proportionate to the value and complexity of the subject matter of the dispute), are also relevant to this strike out application.

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[5] ***Vantage Holdings Group Pty Ltd v Donnelly [No 4]*** [2019] WASC 398 [60].
[6] ***English v Vantage Holdings Group Pty Ltd*** [2021] WASCA 47 [55] - [56] (Murphy & Vaughan JJA).
[7] ***Hart-Roach v Public Trustee*** (Unreported, WASC, Library No 980044, 11 February 1998) 8 - 9 (Murray J); ***Kidd v Artus*** [2013] WASC 264 [26] (Allanson J); ***DM Drainage & Constructions Pty Ltd v Karara Mining Ltd*** [2014] WASC 170 [34] (Beech J); ***David Clarke Air Conditioning Pty Ltd v Quann*** [2016] WASC 73 [15] (Allanson J).
[8] ***Knowles v Robert*** (1888) 38 Ch D 263, 270 - 271 (Bowen LJ); ***Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd*** [1971] 1 NSWLR 472, 477 (Asprey JA).

8 The jurisdiction to strike out a pleading should only be exercised sparingly.[9] The test has a high threshold and caution is exercised by courts on strike out applications.

Leave to bring the application to strike out

9 The defendant seeks leave to bring the application out of time. The defendant has further sought an order extending the time for making the application under O 20 r 19.[10]

10 The *Rules of the Supreme Court 1971* require the application to strike out parts of the statement of claim to have been brought on or before 30 November 2021, being 21 days after the statement of claim was served. The application was filed on 15 March 2022.

11 The delay in bringing the application has been satisfactorily explained by the affidavit evidence of Ms Norman[11] and no specific prejudice has been demonstrated. I grant leave to the defendant to bring the application out of time.

The statement of claim

12 The strike out application was brought originally in respect of the statement of claim filed on 9 November 2021. In response to the application and following the defendant's provision of discovery of documents relevant to publication the plaintiff filed and served a minute of proposed amended statement of claim,[12] and an amended statement of claim.[13] The application was argued by reference to the amended statement of claim.

13 Relevantly, in the amended statement of claim the plaintiff alleges:

(a) He is a prominent Western Australian businessman and is the Chairman of the Strzelecki Group, one of Western Australia's biggest tourism and restaurant operators which also conducts a wholesale seafood processing and packaging plant and he was until 27 February 2019 the Deputy Chair of the Peel Development Commission (PDC).

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[9] ***Favell v Queensland Newspapers Pty Ltd*** [2005] HCA 52; (2005) 221 ALR 186 [6] (Gleeson CJ, McHugh, Gummow & Heydon JJA).
[10] Defendant's outline of submissions filed 2 September 2022 [1].
[11] Affidavit of Leanne Norman affirmed 15 March 2022.
[12] Minute of proposed amended statement of claim filed 3 October 2022.
[13] Amended statement of claim filed 10 March 2023.

(b) The defendant is the publisher of news and current affairs content posted to a website known as the WAtoday Website.

(c) The defendant maintained a Facebook page, the 'WAtoday' Facebook page, on which it published posts and comments.

(d) On 27 February 2019 the defendant posted links on its Facebook page to a WAtoday article entitled 'Big Donor Quits Board after Plan to Dump Millions of Tonnes of Toxic Soil in Peel Region Revealed' (the first article).

(e) On 28 February 2019 the defendant posted links on its Facebook page to a WAtoday article entitled 'Political Donor: Labor's Lobster Plan was mine, but Minister Botched it' (the second article).

(f) Between 27 February 2019 and 10 September 2021, various users of Facebook posted comments in relation to the links to the first article (First Comments) and the second article (Second Comments).

(g) Between 10 September 2020 and 10 September 2021 the defendant published and continued to make available the First Comments and the Second Comments.

(h) The First Comments and the Second Comments conveyed various defamatory imputations. It is unnecessary to recite the imputations pleaded by the plaintiff.

14 Before setting out the impugned publication pleas it is necessary to refer to a further matter of background that is relevant to the manner in which publication has been pleaded. At the time the proceedings were commenced the comments remained available to be downloaded on the defendant's Facebook page. There was no conferral between the parties before the writ was issued. The relief sought by the plaintiff in the writ included an injunction to restrain the defendant from continuing to publish the comments. As referred to above the defendant has given discovery of documents relevant to publication. In an affidavit sworn for the purposes of discovery on 27 January 2023 by Mr David Kim, one of the defendant's solicitors, he provided the following explanation of the consequences flowing from the deletion of the comments:

> 3 I am instructed, by Ms Larina Alick, Executive Counsel of Nine Publishing, a division of Nine Entertainment Co Pty Ltd, the parent company of the Defendant, and believe it to be, true that:

(a) the Defendant was and is the Facebook page administrator of the WAtoday Facebook page (Page);

(b) in the normal course, the Defendant is able to:

(i) use the tools made available by Facebook to Facebook page administrators to generate reports displaying data relating to impressions, engagement and reach of the Page and posts made to that Page; and

(ii) generate reports displaying data relating to reach and impressions of particular posts, limited by reference to specific selected timeframes;

(c) a Facebook page administrator loses the ability to generate page administrator documents in respect of a Facebook post once that Facebook post has been removed;

(d) on 13 September 2021, the Facebook posts the subject of these proceedings (Posts) were removed. The Defendant can no longer use the page administrator tools available to it to generate reports in respect of those Posts;

(e) on 13 September 2021, immediately prior to removal of the Posts, the Defendant generated, for the first time, reports for the Posts (Reports). The Reports were generated for the sole purpose of these proceedings, the Plaintiff by his lawyers having commenced proceedings in respect of comments made by third parties about the Posts by a writ of summons filed 10 September 2021. The Reports are, for that reason, privileged, and the Defendant maintains its claim of privilege in respect of them;

(f) the Reports displayed impressions, engagement and reach for the period 27 February 2019 to 13 September 2021 (in the case of the Post posted on 27 February 2019 (First Post)) and 28 February 2019 to 13 September 2021 (in the case of the Post posted on 28 February 2019 (Second Post)). The Defendant did not generate any of those Reports by reference to any other timeframes;

(g) the Reports did not identify any of the reported impressions, engagement or reach as occurring within

> the period from 10 September 2020 to 10 September 2021 (Relevant Period); and

15 Against that background, the plea of publication of the First Comments was as follows:

> 7 Between 10 September 2020 and 10 September 2021 (the Relevant Period), the defendant published and continued to make available the First Comments on its Facebook page to persons who accessed, downloaded and understood them.
>
> **Particulars of publication**
>
> Given the defendant deleted the Link to the First Article on about 13 September 2021, and thereby caused or permitted relevant data to be deleted by Facebook, the best particulars the plaintiff can give are that the fact of publication of the First Comments is evidenced by alternatively may be inferred from the following facts:
>
> (i) the First Comments were available to be accessed and read by the world at large;
>
> (ii) other Facebook users publicly commented on and 'liked' the Link to the First Article;
>
> (iii) the matters pleaded in paragraph 1 above [summarised at [13(a)] of these reasons];
>
> (iv) on 1 March 2019 the plaintiff commenced proceedings in the Supreme Court of Western Australia against the defendant and others;
>
> (iva) on 30 July 2021, this Honourable Court heard an application made by the plaintiff in those proceedings to join as defendants the Hon. Andrew Hastie MP and two of his Parliamentary staff members which application was the subject of media articles, including an article entitled, *"High-profile Perth businessman claims federal MP Andrew Hastie part of 'conspiracy'"* published on about 2 August 2021 on The Sydney Morning Herald website;
>
> (v) on 19 August 2021, this Honourable Court published reasons for decision in relation to those proceedings which were the subject of public comment by the Hon. Andrew Hastie MP, each of which were the subject of media articles, including:

(a) an article entitled, "'*Bring it on': Federal MP Andrew Hastie to face court over conspiracy claims*" published on about 19 August 2021 on:

(A) the WAtoday Website;

(B) The Age website; and

(C) The Sydney Morning Herald website;

(b) an article entitled, "*Andrew Hastie drawn into Greg Poland's defamation claim against WAtoday*" published by The West Australian on 19 August 2021;

(c) an article entitled, "*Federal MP Andrew Hastie dragged into defamation case with businessman Greg Poland and WAtoday over recording*" published by The West Australian on 21 August 2021;

(vi) during the Relevant Period, the Link to the First Article was 'clicked' 3 times;

(vii) from 19 August 2021 to 10 September 2021, the media article referred to in particular (v)(a)(A) above received 7,928 views;

(viii) from 19 August 2021 to 10 September 2021, a Facebook link to the media article referred to in particular (v)(a)(A) above:

(a) reached 5,026 people;

(b) had 81 engagements, comprised of 3 'likes', 67 link 'clicks' and 11 other 'clicks'; and

(c) was hidden by two users from their feeds;

(ix) prior to the Link to the First Article being deleted, searches undertaken in the Relevant Period on the Facebook platform or using an internet search engine for the plaintiff's name and/or 'Peel Development Commission' would have returned results including hyperlinks to the Link to the First Article;

(x) since the Link to the First Article was posted, it had:

(a) approximately 5,000 views;

(b) 134 'reactions'; and

(c) 89 'shares';

(xi) at all material times the WAtoday Facebook account had in excess of 100,000 followers; and

(xii) in respect of the publication of the Link to the First Article, it may and is to be inferred that those persons to whom it was published were in Western Australia alternatively Australia at the time of publication given:

(a) the WAtoday Website is based in Western Australia, has journalists employed by the defendant based in Western Australia and its target audience is Western Australians;

(b) the WAtoday Facebook account's followers are predominantly Western Australian; and

(c) the subject matter of the First Article and the Link to the First Article related to the plaintiff who resides in Western Australia and the Peel Development Commission which is based in Western Australia.

Further particulars may be provided following discovery and inspection, the administering of interrogatories, the issue of subpoenas and in any event prior to trial.

16 The plea of publication of the Second Comments is materially the same as the publication plea in respect of the First Comments save that the particulars did not include a particular (vi) and particular (viii) (which corresponded to particular (x) of the particulars in respect of the First Comments) is as follows:

(viii) since the Link to the [Second] Article was posted, it had:

(a) approximately 5,000 views;

(b) 7 'reactions'; and

(c) 10 'shares';

Principles relating to publication

17 In ***Dow Jones v Gutnick***,[14] the High Court was concerned with the jurisdiction within which the tort of defamation occurred when

[14] ***Dow Jones & Co Inc v Gutnick*** [2002] HCA 56; (2002) 210 CLR 575.

defamatory matter was made available on the internet. In their joint judgment, Gleeson CJ, McHugh, Gummow and Hayne JJ, said:[15]

> In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the world wide web it is not available in comprehensible form until downloaded onto the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then that will be the place where the tort of defamation is committed.

18 An inference of publication will not be drawn from the mere fact that material has been posted on the internet and is available for download for the reasons explained by Martin CJ (with whom Buss and Mitchell JJA agreed) in ***Sims v Jooste [No 2]***:[16]

> Because of the vast number of internet sites, and the vast number of web pages accessible through those internet sites, *in the absence of evidence it cannot be inferred that one or more persons has undertaken the steps required to identify and access any particular web page available through the internet merely from the fact that material has been posted on an internet site*. There is a real prospect that many of the billions of web pages accessible via the internet have never been seen by anyone other than the person who posted the page on an internet site. This has been recognised in the cases to which I will now refer.
>
> In England, it has been consistently held that a plaintiff claiming to have been defamed in material posted on the internet cannot rely upon an inference of publication analogous to that customarily drawn in cases involving publication via the mass media of print or broadcast in order to establish that there has been substantial publication within the jurisdiction. Rather, the plaintiff must plead and prove that the material of which complaint is made has been accessed and downloaded. The

[15] ***Dow Jones & Co Inc v Gutnick*** [44].

[16] ***Sims v Jooste [No 2]*** [2016] WASCA 83 [17] - [19]. See also ***Stoltenberg v Bolton*** [2020] NSWCA 45 [56] (Gleeson JA); ***Newman v Whittington*** [2022] NSWSC 249 [10] - [28] (Sackar J); ***Massarani v Kriz*** [2022] FCA 80; (2022) 400 ALR 718 [53] (Katzmann J); ***Duffy v Google LLC*** [2022] SASC 40 [19] - [23] (Nicholson J); ***Cronau v Nelson (No 2)*** [2018] NSWSC 1905; ***Lorbek v King*** [2022] VSC 218 [43] - [49] (McDonald J).

> English cases recognise however that publication, in the legal sense, may be established by pleading and proving a platform of facts from which an inference of download can properly be drawn. However, such an inference will not be drawn from the mere fact that the material complained of has been posted on an internet site.
>
> With one apparently anomalous exception, the same approach has consistently been taken in Australia. So, in ***Toben v Jones*** and ***MacDonald v Australian Broadcasting Corporation*** it was held that a plaintiff claiming to have been defamed by material posted on the internet must plead and prove facts which established that the material of which complaint was made had been downloaded and viewed by somebody, without necessarily having to provide particulars of the identity of the person or persons who downloaded the material. The cases also establish that *an inference to the effect that the material of which complaint is made has been downloaded by somebody might be drawn from a combination of facts, such as the number of 'hits' on the site on which the allegedly defamatory material was posted and the period of time over which the material was posted on the internet*. For example, in ***Scali v Scali*** screenshots of the defendant's YouTube posts, which appeared to demonstrate the number of times the allegedly defamatory videos had been viewed as at the date of the screenshot, were relied upon as evidence of the fact that the videos of which complaint was made had been downloaded and comprehended by third parties. (emphasis added and footnotes omitted)

19 In ***Stoltenberg v Bolton***,[17] the trial judge drew an inference of publication from a platform of facts relied on by the plaintiff. Gleeson JA's recounting of the trial judge's approach provides a useful illustration of the application of the principle:[18]

> Second, and in any event, his Honour held that Mr Bolton was entitled to rely on 'a platform of facts' from which inferences of downloads could properly be drawn in order to establish publication and found that there were abundant facts from which the inference that each of the matters complained of was downloaded and read could properly be drawn: Judgment at [136]. Those facts comprised:
>
> (1) answers to interrogatories provided by Mr Stoltenberg concerning the number of hits the Narri Leaks Facebook page received in the first week from 17 June 2015, and the number of readers of the Narri Leaks website for the period June 2015 to January 2016;
>
> (2) Facebook posts by Mr Stoltenberg referring to the wide readership of Narri Leaks;

[17] ***Stoltenberg v Bolton***.
[18] ***Stoltenberg v Bolton*** [33] - [34], [113].

(3) Facebook activity logs which were eventually tendered without objection; and

(4) evidence of the readership of Narri Leaks given by Mrs Bolton that people in Queensland, Wellington, Adelaide and Singleton had spoken to her indicating that they had read items on the Narri leaks website, and evidence given by Mr Webb that the Narri Leaks website was discussed at local government conferences outside the Narrabri Shire at a state and national level, including at a particular mayoral function on the Gold Coast.

His Honour found that Mr Stoltenberg published each of the matters complained of: Judgment at [159].

…

The 'platform of facts' from which his Honour drew an inference that the five matters complained of were downloaded by somebody have been referred to above at [33]. Taken together, the admissions by Mr Stoltenberg as to the number of 'hits' on the Narri Leaks site - 9,800 in the first week and 21,000 in the first 10 days, that the estimated number of readers in the period June 2015 to January 2016 depending on the story varied between 5,000 and up to 35,000, that Narri Leaks was being watched all over the State, that $400 was spent 'boosting' posts all over the State for all of the second week of publication in June 2015, that on 2 July 2015 719 'locals' out of a 'total reach' of 2,414 hit the 'Like' button; the inferences drawn from the Facebook records as to 'reach' of the posts; and the evidence of Mrs Bolton and Mr Webb of readership of the Narri Leaks website by persons outside the Narribri Shire, amply support his Honour's findings that the matters complained of were published by Mr Stoltenberg.

20 In ***Lorbek v King***,[19] citing ***Sims v Jooste [No 2]*** and ***Stoltenberg v Bolton***, McDonald J said:[20]

Although publication will not be inferred from the mere fact that material complained of has been posted on a website, an inference that the material has been downloaded by someone might be drawn from a combination of facts such as the number of 'hits' on the relevant website and the period of time over which the material was posted on the internet. Screenshots or other evidence demonstrating that certain material has been the subject of 'likes' or otherwise responded to or interacted with may also support an inference of publication. (footnotes omitted)

[19] ***Lorbek v King***.
[20] ***Lorbek v King*** [46].

21 In ***Newman v Whittington***,[21] Sackar J made the general observation that in some cases the difficulties in proving publication of materials made available on the internet may prove insurmountable,[22] and then, of the one plea of publication in the plaintiff's pleading, observed:[23]

> At the moment it is clear that the plaintiff is simply unable to indicate who, if anyone, downloaded those publications and if they have there is then no specificity as to which jurisdiction they have been downloaded in. *That level of detail is vital both in terms of determining the elements of the cause of action, but also in fairness to the defendant by way of indicating what, if any, defences might be available depending upon the jurisdiction in which it can ultimately be proved such publication took place.* (emphasis added)

22 In ***Randell v McLachlain***,[24] Gibson DCJ observed:[25]

> In any event, a day is a long period of time in social media, and the plaintiff clearly had a copy of the relevant pages from about a day or two after publication. A copy of the relevant Facebook pages appears as an annexure to Mr Fine's affidavit. It appears to have been printed off about 19 hours after it was posted. There is no record of any "like" or reply to any of the relevant entries. It is unknown what would have been the case after that, but such posts tend to be responded to immediately; as any social media user knows, the time of the most activity is the first day or days after posting. Readers of social media do not scroll back to last month's, or even last week's, posts, unless they are searching for a particular post.

The sufficiency of the plaintiff's platform of facts

23 I intend no disrespect to the submissions advanced by both sides in relation to this application but I will do no more than provide a very brief outline of the opposing arguments. The defendant's approach is to consider the particulars individually and explain why each does not support the inference that the comments were downloaded between 10 September 2020 and 10 September 2021. The defendant's submissions may be distilled into these propositions. First, the availability of comments for download and the fact they could be found using a search engine is not sufficient to establish publication. Secondly, that the plaintiff was a prominent businessman in Western Australia and that his defamation action against Mr Hastie and others

[21] ***Newman v Whittington***.
[22] ***Newman v Whittington*** [15].
[23] ***Newman v Whittington*** [19].
[24] ***Randell v McLachlain*** [2022] NSWDC 506.
[25] ***Randell v McLachlain*** [57].

had featured in newspapers and other news outlets in August 2021 does not increase the likelihood that comments posted in February 2019 were downloaded and read. Thirdly, clicking the link to the first article or viewing the first article does not mean that comments beneath the link were read. Fourthly, given the nature of social media it is inherently very unlikely that anyone viewing the links to either article from 10 September 2020 would have unearthed comments made 17 months earlier. Fifthly, the plaintiff must establish where publication took place because that is critical to the defences on which the defendant may rely.

24 The plaintiff makes these points. First, each particular should not be considered in isolation. It is the cumulative effect of the particulars which the court must consider for the purposes of determining the question of publication. Secondly, the particulars are sufficient to plead a case on publication that should be allowed to go to trial. This point is best encapsulated by the plaintiff's contention that the particulars provided are similar in nature to those provided by the plaintiff in ***Stoltenberg v Bolton***. Thirdly, that the plaintiff is prepared to confine his case to publication within Western Australia to deal with the defendant's concern about the necessity to plead separate defences by reference to the law in each jurisdiction in which publication might be found to have occurred.

25 In my view there is force in the defendant's contentions, however, the issue of publication is a factual one. The defendant's contentions about the way in which elements of its online presence work together and the manner in which members of the public engage with its Facebook page rely, to a certain extent at least, on assertion. Although I have come to this conclusion with some hesitation, I am not satisfied that the plaintiff's case on publication is so clearly untenable that it cannot possibly succeed and that it should be dismissed on a strike out application.[26] That said, the references to 'alternatively Australia' in pars 7(xii) and 14(ix) should be deleted to confine the plaintiff's case on publication to publication within Western Australia.

26 In the course of the argument on this application I raised the possibility of the issue of publication being determined as a preliminary issue. I will provide the parties with an opportunity to address me in relation to that course but, alive as I am to the dangers inherent in determining preliminary issues, the determination of publication in this

[26] ***General Steel Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125, 130 (Barwick CJ).

case as a preliminary issue, accords closely with the case management principles expressed in O 1 r 4B of the *Rules of the Supreme Court of Western Australia 1971*.

Conclusion

27 The defendant's application will be dismissed. I will hear the parties on costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

OK
Associate to the Honourable Justice Tottle

5 OCTOBER 2023