

Forrest v Chlanda & Anor [2012] NTSC 14

PARTIES: FORREST, David
v
CHLANDA, Erwin
and
ERWIN CHLANDA Pty Ltd

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 8 of 2010 (21033396)

DELIVERED: 6 MARCH 2012

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JUDGMENT OF: KELLY J

CATCHWORDS:

CIVIL LAW – Defamation – *Defamation Act 2006* – Newspaper publication and on-line publication – Whether imputations conveyed – Defence of fair comment – Defence of qualified privilege – Damages – Aggravated damages

Defamation Act 2006, s 27, s 28

Rogers v Nationwide News Pty Limited (2006) 216 CLR 327, followed.

REPRESENTATION:

Counsel:

Plaintiff: T Molomby SC with C Dobb
Defendant: Self Represented

Solicitors:

Plaintiff: Povey Stirk
Defendant: Self Represented

Judgment category classification: B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Forrest v Chlanda & Anor [2012] NTSC 14
No. 8 of 2010 (21033396)

BETWEEN:

DAVID FORREST
Plaintiff

AND:

ERWIN CHLANDA
First Defendant

AND:

ERWIN CHLANDA PTY LTD
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 6 March 2012)

- [1] The plaintiff, Mr David Forrest, is a director and principal of a company which trades as First National Real Estate Framptons from premises in Hartley Street in Alice Springs. At the times relevant to this proceeding he was the southern regional representative of the Real Estate Institute of the Northern Territory Inc (REINT).
- [2] The first defendant, Mr Erwin Chlanda is a director and shareholder of the second defendant, Erwin Chlanda Pty Ltd, a company which publishes a

newspaper known as the Alice Springs News, and a journalist who writes stories for the Alice Springs News.

- [3] It is admitted by the defendants that in volume 17 issue 31 of the Alice Springs News on 2 September 2010 the first and second defendants published the following article concerning the plaintiff, Mr Forrest, written by Mr Chlanda.

“Real Estate Institute silent on role of Framptons boss as probes by police & govt. board continue. By ERWIN CHLANDA.

The Real Estate Institute of Northern Territory Inc (REINT) has failed to respond to three enquiries from the Alice Springs News about whether David Forrest has been stood aside as the organization’s southern region representative.

Mr Forrest is a principal of Framptons First National Real Estate which is the subject of a fraud investigation by the police and an enquiry by the NT Government’s Agents Licensing Board <<http://www.alice-springsnews.com.au/1720.html>>.

The probes follow the collapse of Carey Builders, causing losses estimated in the millions to several home buyers in Alice Springs.

Framptons had close links with the failed company, promoting its services and offering performance and completion guarantees, according to documents provided to the Alice Springs News by the home buyers.

The REINT says on its website that it is “a cohesive representative voice for the Real Estate Industry in the Northern Territory”.

It says it is the peak body representing the Real Estate profession across the Northern Territory.

It claims to be “a politically non-aligned organisation that provides research and well-informed advice to the government, opposition, professional members of the real estate sector, media and the public on a range of issues affecting the property market.

“The REINT also provides a comprehensive representative voice for the Real Estate profession in the Northern Territory when it comes to lobbying Government on legislative issues and regulatory matters,” says the website.

The REINT is linked with the Real Estate Institute of Australia whose website says it seeks “to promote a high standard of ethical practice by REI members and their employees in their dealings with the public, other REI members and all other real estate practitioners.”

Framptons, after initially providing information, have told the Alice News they will not comment further on matters relating to Carey Builders and their responsibilities towards their clients.”

- [4] It is admitted by the defendants that the Alice Springs News has a circulation of 11,500.
- [5] The article also appeared in the on-line edition of the paper published on the second defendant’s website, and remained available on the website in the above form until 21 October 2010.
- [6] On 9 September 2010 the defendants published another article in the Alice Springs News in which they reported (*inter alia*) a police spokesman as saying, “Our comprehensive reply is: No, Framptons is not under criminal investigation for the Randall Carey matter, nor have they been.”
- [7] Also on 9 September 2010, the defendants amended the on-line version of their 2 September 2010 edition by adding a link to the 9 September on-line

edition and the words, “See also our September 9 edition: Framptons not under investigation by police.”

- [8] On 21 October 2010, the on-line edition of the 2 September 2010 edition was further amended by removing the link referred to in the last paragraph and removing the words, “A fraud investigation by the police and” from the second paragraph of the article. On or about 17 November 2010 the original version of the 2 September report again appeared on the second defendant’s website and remained there for some time before it was replaced by the 21 October 2010 version. The reappearance of the original article was apparently due to a technical error by the defendants.
- [9] The defendants admit that approximately 12,000 people a month visit the second defendant’s website.
- [10] The plaintiff complains that the article conveys the following defamatory imputations in relation to him:
- “(a) he has behaved in such a way as principal of First National Real Estate Framptons as to deserve to be stood aside as southern region representative of the Real Estate Institute of Northern Territory Inc;
 - (b) he is suspected by police of having engaged in fraud as principal of First National Real Estate Framptons;
 - (c) he has conducted the business of First National Real Estate Framptons in such a way as to allow it to be suspected by police of engaging in fraud.”

[11] The first defendant denies that the article bears the imputations pleaded by the plaintiff and pleads that the article in its natural and ordinary meaning conveys the following imputation which is defamatory of the plaintiff:

“There are grounds to enquire into the possibility of fraud on the part of Framptons First National Real Estate, of which the plaintiff is one of the principals.”

The defendants have sought to justify that imputation.

[12] In the alternative, in relation to the imputation referred to in paragraph [10](a) above (i.e. that Mr Forrest has behaved in such a way as principal of First National Real Estate Framptons as to deserve to be set aside as southern region representative of the Real Estate Institute of the Northern Territory Inc) the defendants have pleaded that this was an honest opinion relating to a matter of public interest and rely on s 28 of the *Defamation Act* 2006 (“the Act”).

[13] The defendants have also pleaded in relation to each of the imputations alleged by the plaintiff that the article was published on an occasion of qualified privilege in reliance of s 27 of the Act.

The imputation/s conveyed by the Article

[14] While capable of bearing the imputation pleaded by the defendants, I find that the article goes further than that. The first paragraph of the article says that the REINT has failed to respond to three enquiries from the Alice Springs News about whether David Forrest has been stood aside as the organisation’s southern region representative. That paragraph raises in the

mind of the ordinary reader the inference that there is some reason why the REINT should stand him aside or at least consider standing him aside. The ordinary reader is then primed to look to the rest of the article to find out what those reasons might be. Immediately following, there is an assertion that Mr Forrest is a principal of First National Real Estate Framptons which is the subject of a fraud investigation by the police and an enquiry by the NT Government's Agents' Licensing Board. There follows a suggestion in the next two paragraphs that the fraud investigation and the enquiry by the Agents' Licensing Board have something to do with the collapse of Carey Builders which caused losses estimated in the millions to home buyers in Alice Springs, and with Framptons "close links" with that failed company. The ordinary reader is therefore left with the clear impression that Mr Forrest's behaviour as principal of First National Real Estate Framptons in connection with the collapse of Carey Builders, was such as to warrant his being stood aside as the southern region representative of the REINT.

[15] For essentially the same reasons I find that the imputation pleaded in paragraph (c) above (i.e. that Mr Forrest conducted the business of First National Real Estate Framptons in such a way as to allow it to be suspected by police of engaging in fraud) is conveyed by the article.

[16] I found more difficulty with the imputation pleaded in paragraph (b) (i.e. that Mr Forrest is suspected by police of having engaged in fraud as principal of First National Real Estate Framptons). The article refers to Framptons as the subject of a fraud investigation by police and enquiry by

the Agents' Licensing Board. It does not state that Mr Forrest personally was the subject of any fraud investigation. However, the headline to the article speaks specifically of "the Role of Framptons Boss" signalling that the subject matter of the article is "Framptons Boss" named in paragraph 1 as David Forrest. Moreover the inference conveyed by that headline is that the subject matter of the "probes by police and government board" is "Framptons Boss". The article mentions only Mr Forrest. There is no indication that anyone else in Framptons might be the subject of any investigation by police, and the suggestion that Mr Forrest should be stood aside as the REINT representative for the southern region leads the reader to infer that Mr Forrest is the subject of the police fraud investigation. Why else would it be suggested that he be stood aside? I find that all three pleaded imputations have been made out. All three imputations are defamatory of the plaintiff.

[17] This makes it unnecessary to decide whether the alternative (less serious) imputation pleaded by the defendants was true in substance. If it had been necessary to determine that, I would have found that the defendants had failed to prove that there are (or were) grounds to enquire into the possibility of fraud on the part of First National Real Estate Framptons.

[18] The substance of the pleading of justification of this alternative meaning by the defendants seemed to be that there were grounds to believe that someone in Framptons had deliberately encouraged people to sign contracts with Carey Builders, knowing that the principal, Randall Carey, was an

undischarged bankrupt and was not a registered builder, and was later involved in the fraudulent alteration of documents by Carey Builders to falsely show the builder to be a third party. However, the defendants adduced no evidence to support this pleading. The evidence they did adduce was to the contrary.

[19] The evidence established that the owner of “Carey Builders” was not Randall Carey, but in fact a company, Carey Builders Pty Ltd, the sole director and shareholder of which was Bronwyn Carey.

[20] The defendants adduced evidence from a building certifier, Mr David Cantwell. Mr Forrest and his partner at Framptons asked Mr Cantwell’s company to be the building certifier on homes to be built under a new division of Framptons business known as “Framptons New Homes”. He was given building permit applications and proof of contract forms signed by Mr Hardyman, (an employee of Framptons who had a role in that division of the company) as the agent of the owners, and Mr Carey as the builder. His evidence was that, at that stage, it was the accepted industry standard for an individual builder to be registered and nominated as the builder on the documentation rather than the building company. He said that in late 2008 or early 2009, Mr Carey’s registration as a builder expired. Mr Cantwell advised Mr Carey to stop work on the homes under construction until he either sorted out his own registration or found another builder to agree to take over his position as registered builder. Within a week, Mr Carey delivered to Mr Cantwell, as the certifier, fresh evidence of building

contract forms showing the appointment of Mr Damien Golding as the new registered builder. Mr Golding told Mr Cantwell that he had an arrangement with Mr Carey whereby Mr Golding would be paid \$5,000 for every house for which his builder's registration would be used, and that he would be the nominated registered builder and would engage Mr Carey as the project manager.

[21] The defendants also tendered a statement by Mr Hardyman (by that stage an ex-employee of Framptons), to the effect that when he found out that Mr Carey had lost his registration, he spoke to Mr Carey who explained to him that a builder from Darwin, Damien Golding would be supervising the contracts from then on. Mr Carey gave him the impression that he had just forgotten to pay for renewal of his registration and that the arrangement would be temporary until the new registration was issued. Mr Hardyman assumed that Mr Carey had advised his clients and that the process he had undertaken was legitimate. He said he also spoke to Mr Cantwell who advised him that he was aware of the arrangement and that Mr Carey was operating inside the building licensing law. Mr Hardyman's statement annexed a number of documents which he said appeared to have been altered after his signature had been placed on them. He said that he had not signed any documents with the name Damien Golding on them. He said that Mr Carey had deliberately deceived him (and the building certifier) by later inserting Damien Golding's details into documents he had signed. His statement essentially denied any involvement by him in the fraudulent

alteration of documents by Carey Builders Pty Ltd or anyone else. This evidence was uncontradicted; indeed it was adduced in the defendants' own case.

[22] The defendants also tendered a series of emails between Mr Hardyman and the building certifier's office in which Mr Hardyman sought assurances that the arrangement was legal in the NT, and, if so, what position Mr Carey was in with his company. He received a reply from the certifier advising him, among other things, that Damien Golding had signed a number of contracts to allow him to become the registered builder for those of Mr Carey's jobs for which Mr Cantwell's company was the certifier, that this was permitted under the NT Building Act and Regulations, that Mr Carey had become the project manager for those jobs and would continue to be the contact person, and that it is common practice to have a project manager and team of builders working on constructions sites under the auspices and insurance of a registered builder.

Defence of Fair Comment

[23] This defence is pleaded only in relation to the imputation pleaded in paragraph (a).

[24] Pursuant to s 28 of the Act it is a defence to the publication of defamatory matter if the defendant proves that:

“(a) the matter was an expression of opinion of the defendant rather than a statement of fact; and

(b) the opinion related to a matter of public interest; and

(c) the opinion is based on proper material.”¹

[25] Insofar as the second defendant is concerned a similar defence applies upon proof that the matter was an expression of opinion of an employee or agent of the defendant on the same conditions.² It is not disputed that Mr Chlanda, who wrote the article, was a servant or agent of the second defendant.

[26] For the purposes of a defence under s 28 an opinion is based on proper material if it is based on material that is substantially true.³

[27] The plaintiff admits that the circumstances surrounding the collapse of Carey Builders constitute a matter of public interest within the meaning of the section. Therefore, to establish this defence, the defendants must prove, first that the imputation would be understood by the ordinary reasonable reader as being conveyed as an opinion rather than as a statement of fact, and secondly that the opinion is based on material that is substantially true.

[28] The first question is whether an ordinary reader would construe the imputation contained in the article that Mr Forrest had behaved in such a way as principal of Framptons as to deserve being stood aside as the REINT

¹ *Defamation Act 2006 s 28(1)*.

² *Ibid s 28(2)*.

³ *Ibid s 28(5)(a)*. A defence may also be available under s 28 even if the material is not substantially true if the opinion was published on occasion of absolute or qualified privilege [s 28(5)(b)] or was published on occasion that attracted the protection of a defence under s 25 or s 26 of the Act [s 28(5)(c)]. Neither s 25 nor s 26 is relevant to the present case. The question of privilege will be considered separately below.

representative, to be an expression of the author's opinion rather than a fact.

On balance, I am inclined to the view that the ordinary reader would construe this as an opinion expressed by the author on the basis of the factual assertions set out in the following paragraphs of the article.

[29] The second question then is whether the defendants have established on the balance of probabilities that the opinion was based on material which is substantially true. In my view the defendants have failed to establish this.

[30] The two major "facts" on which the opinion is based are those set out in the second paragraph of the article, namely that Framptons is the subject of a fraud investigation by NT Police and that Framptons is the subject of an enquiry by the Agents' Licensing Board. The defendants have not proved either of those two things to be true.

[31] In an article in the Alice Springs News on 9 September 2010 the defendants admitted that Mr Chlanda had been told by police that Framptons was not the subject of any police investigation. This was confirmed by Mr Chlanda in cross examination. The defendants called no evidence to suggest that there had ever been an enquiry into Framptons by the Agents' Licensing Board. The sum total of the evidence was that several people who had had dealings with both Framptons Real Estate and Carey Builders had made complaints about Framptons to the Agents' Licensing Board. There is no evidence about what, if anything, the Agents' Licensing Board was doing at the time in relation to the complaints and no evidence of any "enquiry".

[32] The defence of honest opinion related to a matter of public interest under s 28 of the Act must therefore fail.

Qualified Privilege

[33] For the defence under s 27 of the Act to apply, the defendants must prove that:

- “(a) the recipient has an interest or apparent interest in having information on some subject; and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.”⁴

[34] It was not contended by the plaintiff that the conditions in paragraphs (a) and (b) had not been made out, that is that each recipient of the publication of the article had an interest in having information on the subject of the article⁵ and that the article was published to those recipients in the course of giving them information on that subject. The plaintiff’s contention was that the defendants have not established that their conduct in publishing the defamatory material concerning the plaintiff in the article was reasonable. I agree. The defence under s 27 must fail.

⁴ *Defamation Act 2006* s 27(1).

⁵ (Mr Forrest’s status as REINT representative in light of the collapse of Carey Builders)

[35] In determining whether the conduct of the defendants in publishing the defamatory matter about the plaintiff was reasonable in the circumstances, the court may take into account:

- “(a) the extent to which the matter published is of public interest; and
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
- (c) the seriousness of any defamatory imputation carried by the matter published; and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
- (f) the nature of the business environment in which the defendant operates; and
- (g) the sources of the information in the matter published and the integrity of those sources; and
- (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
- (i) any other steps taken to verify the information in the matter published; and
- (j) any other circumstances that the court considers relevant.”⁶

⁶ *Defamation Act 2006 s 27(3)*.

[36] In this case, as has been conceded by the plaintiff, the circumstances surrounding the collapse of Carey Builders was of public interest (although, to my mind that was not the central subject matter of the story); the story relates to the plaintiff's fitness to be the REINT representative, which is at least a quasi-public position; and there is evidence from Mr Chlanda that he attempted to obtain a comment from the plaintiff and from someone in the office of the REINT. However, all of the other factors point in the opposite direction.

[37] The nature of the defamatory imputations in the article concerning Mr Forrest are extremely serious; the article does not in any way distinguish between suspicions, allegations and proven facts, but states as a fact a matter which Mr Chlanda admitted in evidence he simply assumed without checking, namely that Framptons was under investigation by police for fraud. Mr Chlanda took no steps to verify those suspicions by checking with the police; and there is no evidence of any need for urgency in publishing the article which would have made it unreasonable to take time to verify Mr Chlanda's suspicions.

[38] The defendants have failed to prove that their conduct in publishing the article was reasonable and the defence under s 27 of the Act fails.

[39] It follows that there must be judgment for the plaintiff.

Damages

[40] The principles to be applied in assessing damages for defamation have been discussed by the High Court in *Rogers v Nationwide News Pty Limited*.⁷

“[60] The three purposes to be served by an award of damages for defamation are identified in the joint reasons in *Carson v John Fairfax & Sons Ltd*: (i) consolation for the personal distress and hurt caused to the appellant by the publication; (ii) reparation for harm done to the appellant's personal, and in this case, professional reputation; and (iii) the vindication of the appellant's reputation. As pointed out in *Carson*: the first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant; vindication looks to the attitudes of others.

.....

[67] Defamation may cause identifiable economic consequences for the person who is defamed. This was not said to be the case in this matter. In the present, as in so many cases of defamation, the wrong that was done to the appellant was alleged to have caused him personal distress and hurt and to have caused harm to his personal and his professional reputation; it was not alleged that his professional earnings had diminished by an identified amount. Assigning a money sum as sufficient to remedy those harms and to vindicate the appellant's reputation translates losses which have no market value into amounts of money. Of course, defamation is not the only area of the law in which this is done. Damages for pain and suffering suffered in consequence of personal injury or for the loss of liberty brought about by wrongful imprisonment are two other cases in which this is done. But in neither defamation nor in other cases of non-pecuniary loss can any standard of evaluation be employed except one that is described in qualitative and therefore necessarily imprecise terms. The damages that may be awarded ‘are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man’”. (*references omitted*)

[41] The plaintiff called evidence of his good reputation and high standing in the community. He also gave evidence of the hurt and distress he suffered as a result of the publication of the defamatory article. There is evidence that he

⁷ [2003] HCA 52; (2006) 216 CLR 327.

became more irritable, less healthy, less cheery, more stressed and more withdrawn. He was cross examined about his distress at the losses suffered by Framptons as a result of the collapse of Carey Builders Pty Ltd and no doubt that contributed to his overall distress at the relevant time. However, I have no reason to doubt the plaintiff's evidence – and that of others who knew him, that the article caused him considerable distress. In a small town such as Alice Springs, and in an industry such as real estate where a reputation for honesty and integrity is so important to business success it is also clear that the plaintiff will have suffered some actual damage to his reputation. Mr Darryl Pearce of the Alice Springs Native Title group gave evidence to this effect.

[42] I accept the submission by the plaintiff that the damage has been aggravated by the conduct of the defendants since the publication. The defendants refused to withdraw the publication from the second defendant's website, contending that it was sufficient for them to insert a reference and a link to the subsequent article of 9 September 2008 quoting a police spokesman as saying, "No, Framptons is not under criminal investigation for the Randall Carey matter, nor have they been." Mr Chlanda attempted to characterise the article of 30 September as an apology but, despite the headline, "Framptons boss makes demands from Alice News under Defamation Act, gets apology", I do not read it as such. There is nothing apologetic about the article. I accept the submission of counsel for the plaintiff that the tone of that article suggests a rather grudging admission that a "mistake" had

been made – and a rather lengthy justification of the author’s actions. There was no expression of regret or remorse for the damage done to the plaintiff’s feelings and reputation. Further, the defendants published on the second defendant’s website the whole of their first defence which contained (*inter alia*) a statement that there would be “further evidence of a fraud investigation into Framptons, and not just into Mr Carey”. In the witness box Mr Chlanda candidly admitted that he still believed that police were investigating Framptons for fraud, despite being assured by police that they were not and never had been.

[43] In the circumstances, and having regard to the fact that the plaintiff is entitled to aggravated damages, I consider that a sum sufficient to console the plaintiff for the personal distress and hurt caused by the publication; provide reparation for harm done to the plaintiff’s personal and professional reputation; and (importantly) to vindicate the plaintiff’s reputation, would be \$100,000.

[44] There will be judgment for the plaintiff against the first and second defendants in the sum of \$100,000 plus interest at the rate of 4% per annum from the date of publication to the date of judgment.