

Forrest v Chlanda & Anor [2011] NTSC 64

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 (2033396)

DELIVERED: 25 August 2011

JUDGMENT OF: KELLY J

REPRESENTATION:

Counsel:

Plaintiff: J Stirk
Defendants: E Chlanda

Solicitors:

Plaintiff: Povey Stirk
Defendants:

Judgment category classification: C

Judgment ID Number: KEL11016

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Forrest v Chlanda & Anor [2011] NTSC 64
No. 8 of 2010 (2033396)

BETWEEN:

DAVID FORREST
Plaintiff

AND:

ERWIN CHLANDA
First Defendant

AND:

ERWIN CHLANDA PTY LTD
Second Defendant

CORAM: KELLY J

**DECISION ON APPLICATION TO STRIKE OUT PARTS OF THE
AMENDED DEFENCE**

(Delivered 25 August 2011)

- [1] In paragraph 7 of the amended defence, the defendants have denied that the article complained of bears the defamatory imputations pleaded in paragraphs 10(b) and (c) of the amended statement of claim, and have pleaded that “the article in its natural and ordinary meaning conveyed the following imputation: there are grounds to inquire into the possibility of fraud on the part of Framptons First National Real Estate, of which the plaintiff is one of the principals.”

- [2] Paragraph 9 of the amended defence pleads that the defamatory imputation pleaded by the defendants in paragraph 7 is substantially true. Particulars of material facts said to support that plea are set out in the following sub-paragraphs 9.1 to 9.11.
- [3] The plaintiff has applied to strike out sub-paragraphs 9.1.1, 9.1.2, 9.2.2, most of 9.3, 9.4, 9.5, 9.6, 9.10 and 9.11 on the ground that those paragraphs do not plead material facts which are relevant to proving the truth of the pleaded imputation.
- [4] The following sub-paragraphs of paragraph 9 of the amended defence are struck out, on the ground that they do not allege facts which are material to proving the truth of the imputation pleaded by the defendants in paragraph 7:
- (a) sub-paragraph 9.1.1,
 - (b) sub-paragraph 9.2.2 , and
 - (c) sub-paragraph 9.3 insofar as it repeats sub-paragraphs 4.4 to 4.17 inclusive.
- [5] In sub-paragraph 9.4, the words “or ought reasonably to have known” are struck out, and sub-paragraph 9.4.1 is struck out. The balance of that sub-paragraph remains.
- [6] The only matters in the pleaded material which would be capable of supporting an allegation that “there are grounds to inquire into the

possibility of fraud on the part of Framptons” is the suggestion that Framptons persuaded people into contracting with Carey Builders, knowing that Carey Builders was not a registered builder, and that they were instrumental in providing documents to the certifier falsely certifying that Damien Golding was the builder. (This comment is made in the context of an application to strike out parts of the defence. It should not be taken as a finding that such an allegation would be sufficient to justify the pleaded imputation (that are grounds to inquire into the possibility of fraud on the part of Framptons) or that the balance of paragraph 9 pleads sufficient material facts which, if proven, would in fact justify the pleaded justification.)

- [7] The terms of the contract between Framptons and the home buyers (pleaded in sub-paragraph 9.1.1) are not relevant to any such allegation. Mere carelessness, or failure to enquire whether Carey Builders was a registered builder (as suggested by the words “or ought reasonably to have known” in sub-paragraph 9.4) could not be relevant to such an allegation; nor could the fact that Carey was an undischarged bankrupt (pleaded in sub-paragraph 9.4.1).
- [8] Sub-paragraph 9.3 simple repeats the matters pleaded in paragraphs 4.3 to 4.17 of the amended defence. The plaintiff’s application is to strike out this sub-paragraph insofar as it repeats sub-paragraphs 4.4 to 4.17. No exception is taken to the repetition of sub-paragraph 4.3. Sub-paragraphs 4.4 to 4.17 where they first appear are pleaded as particulars of public interest and

proper material for the purposes of a defence under s 28 of the *Defamation Act*.

- [9] Sub-paragraphs 4.4 and 4.5 refer to a group of people calling themselves the “Framptons New Home Broken Promises Group”. Its existence and their complaint to the Agents Licensing Board can have no bearing on the issue of whether there are grounds to inquire into the possibility of fraud on the part of Framptons; such grounds must arise, if at all, from what Framptons did, not what the members of this group have done.
- [10] Sub-paragraph 4.6 pleads that the police conducted an investigation into Carey Builders which, again, is of no relevance to the question of whether there are grounds to inquire into the possibility of fraud on the part of Framptons.
- [11] Sub-paragraph 4.7 talks about the second defendant and other “Alice Springs media”. Sub-paragraph 4.8 asserts that certain things are of interest to the residents of Alice Springs. Neither is relevant to the plea of justification in paragraph 9.
- [12] Sub-paragraph 4.9 simply refers to the paragraphs in the amended statement of claim identifying the parties. Sub-paragraphs 4.10 and 4.11 repeat the particulars of public interest. Sub-paragraphs 4.12 to 4.15 talk about the functions of the REINT and the defendants’ dealings with the REINT. Sub-paragraph 4.16 talks about another article published by the defendants. None of these say anything about the plaintiff or Framptons and none can

possibly be relevant to whether there are grounds to inquire into the possibility of fraud on the part of Framptons. The fact that the article referred to in sub-paragraph 4.16 made certain assertions about an employee of Framptons and an assertion that “two investigations were underway into events surrounding the collapse of Carey Builders and the involvement of Framptons Real Estate”, does not make that paragraph an allegation about Framptons. The subject matter of the sub-paragraph is the article published by the defendants.

[13] Sub-paragraph 4.17 simply pleads that Framptons initially spoke to the defendants but later declined to comment. That, too, is not relevant to the question of whether there are grounds to inquire into the possibility of fraud on the part of Framptons.

[14] The application to strike out sub-paragraphs 9.1.2, 9.5 and 9.6 is dismissed.

[15] Sub-paragraph 9.1.2 pleads that Framptons made arrangements to obtain quotes but told a number of home buyers that Carey Builders had provided a quote and that other builders were too expensive. That, it seems to me is capable of being relevant to an allegation that Framptons persuaded people into contracting with Carey Builders, knowing that Carey Builders was not a registered builder, and that they were instrumental in providing documents to the certifier falsely certifying that Damien Golding was the builder and that, therefore, there are grounds to inquire into the possibility of fraud on

the part of Framptons. Sub-paragraphs 9.5 and 9.6 are directly relevant to such an allegation.

[16] Sub-paragraphs 9.10 and 9.11 plead that information was provided and statements made to the police about the matters pleaded in sub-paragraphs 9.6 to 9.9. Although sub-paragraphs 9.10 and 9.11 are of peripheral relevance at best, I do not think that they can be said to be utterly incapable of supporting the plea of justification of the imputation pleaded in paragraph 7, and I decline to strike them out. The application to strike out sub-paragraphs 9.10 and 9.11 is therefore also dismissed.