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This is the author's version of a work that was submitted/accepted for publication in the following source:

Jackson, Sheryl & , (2009) UCPR 229 - defamation proceedings – damages to be assessed – application to interrogate as to defendant's motive - implications of Defamation ACT 2005 - application to interrogate before action - when in the interests of justice. *Proctor*, *29*(8), pp. 53-54.

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UCPR 229 – defamation proceedings – damages to be assessed – application to interrogate as to defendant's motive – implications of Defamation Act 2005 - application to interrogate before action – when in the interests of justice

In *Hogan v Ellery* [2009] QDC 154 McGill DCJ considered two applications for leave to deliver interrogatories under r 229 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR). The judgment provides useful analysis of the circumstances in which a plaintiff may obtain leave to deliver interrogatories to a defendant in defamation proceedings, and also to a non-party before action.

Facts

The plaintiff's claim was for damages for defamation in respect of the publication of a document identified as a letter to shareholders. The defendant did not file a notice of intention to defend, and default judgment was entered against him for damages to be assessed.

The plaintiff brought two applications for leave under r 229 of the UCPR to deliver interrogatories. One application related to the defendant, and the second was for leave to deliver interrogatories to a proposed additional defendant, or a proposed defendant to a proposed proceeding. The applications were brought to the attention of each the respective respondents before the hearing but neither appeared at the hearing.

Legislation

Rule 229 of the UCPR provides, so far as is relevant:

229(1) With the court's leave, a person may, at any time, deliver interrogatories –

(a) to a party to a proceeding, including a third party under chapter 6, part 6, or
(b) to help decide whether a person is an appropriate party to the proceeding or would be an appropriate party to a proposed proceeding – to a person who is not a party.

Application to interrogate defendant

The only interrogatory proposed to be delivered to the defendant that was pressed at the hearing identified an email from the defendant to another person. It sought confirmation that the person referred to in the email as "Luke" was the plaintiff, and asked the defendant what was meant by certain words in the email.

It was submitted for the plaintiff that the interrogatory went to eliciting information about whether or not the publication was motivated by ill will or an improper motive, and so was relevant to the question whether aggravated damages should be awarded.

McGill DCJ accepted that r 229 was wide enough to authorise the delivery of interrogatories after default judgment has been signed. His Honour cautioned, however, that as the issues have been confined as a result of the signing of the judgment, the question of whether they are directed to something relevant must be approached with some care.

The judge referred to a number of authorities which he said suggested it was legitimate to interrogate a defendant about the meaning of an expression used by the defendant in another document, with a view to showing that document is evidence of ill will or an improper motive in the publication of the material the subject of the action: *Norton v Hoare (No 2)* (1913) 17 CLR 348 at 352; *Erwin v Southdown Press* [1976] VR 353 at 355; *Storer v Smiths Newspapers Ltd* [1939] VLR 347 at 351.

His Honour noted, however, that as the defamatory material was published on 1 July 2007, the action was covered by the *Defamation Act 2005* (Qld). Section 36 of that Act provides:

> In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.

Reference was made to decisions on the similar provision in New South Wales (*Defamation Act 1974*, s 43(b)): *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 805; *Andrews v John Fairfax and Sons Ltd* [1980] 2 NSWLR 225.)

McGill DCJ said that in light of those authorities, it could not be relevant to the assessment of aggravated damages simply to prove that the defendant was in fact actuated by ill will or improper motive in the publication of the defamatory material. Rather, any demonstration that the defendant was actuated by malice of which the plaintiff was unaware could not be taken into account under s 36 unless the harm sustained by the plaintiff was aggravated in some way as a result of the disclosure of that information.

The judge concluded it was not a proper purpose of interrogatories to seek to enlarge the plaintiff's damages by causing him to suffer more harm. He dismissed the application for leave to interrogate the defendant.

Application to interrogate non-party

The second application was for leave to deliver interrogatories to the defendant's wife, directed to whether she republished the defamatory material allegedly published to her by the defendant. It was submitted that the purpose of the interrogatories was to

determine whether the plaintiff should proceed against the defendant's wife for damages in respect of the republication.

McGill DCJ first observed that the plaintiff did not come within the traditional scope of discovery before action in equity, because that would require the plaintiff to establish a cause of action against the person whose identity was sought to be disclosed in this way, with a view to pursuing an action against that person. His Honour referred in that context to the decision in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, and discussed several Australian decisions which have considered the circumstances in which the relief in equity is available.

McGill DCJ then noted there were some similarities between the provision for interrogatories before action in r 229 and preliminary discovery under the rules in other states, and in the Federal Court, and he examined a number of decisions interpreting those rules. He referred with approval to the approach of Sheppard J in *Stewart v Miller* [1979] 2 NSWLR 128, to the effect that there must be evidence of a case for relief to make it proper in the interests of justice to order preliminary discovery.

Reference was also made to the decision in *Pacific Century Production Pty Ltd v Netafirm Australia Pty Ltd* [2004] QSC 063. In that case Douglas J provided a useful discussion of the background of r 229(1)(b), and exercised his discretion under the subrule to grant the order sought. Douglas J had stated in the course of his judgment that the ordinary reluctance of the court to allow interrogatories which were fishing in nature was not as appropriate to interrogatories which were to be used to help decide whether a person would be an appropriate party to a proposed proceeding. Though acknowledging this view, McGill DCJ said there must nevertheless be some proper basis to think that there may well be a cause of action against the "person" first mentioned in paragraph 1(b)

It was accepted that the evidence showed that the defendant's email, which was alleged to be defamatory, was sent to the respondent. In the judge's view, however, the proposition that the respondent republished the email or its substance was merely speculative. His Honour said that ultimately the issue under r 229 was whether it was appropriate in the interests of justice to allow the interrogatories to be delivered. He was not satisfied that it had been shown that it was necessary in the interests of justice for the order to be made, and he dismissed the second application.

Comment

Prior to the decision in *Hogan* it appeared the only other decision in which r 229(1)(b) had been considered was that of Douglas J in *Pacific Century Production Pty Ltd v Netafirm Australia Pty Ltd* [2004] QSC 063, to which McGill DCJ referred.

However, in *Wilkinson v Wilkinson* [2009] QSC 191 (14.7.09), Douglas J again considered an application for pre-litigation interrogatories, along with an application for pre-litigation disclosure, and made the made orders sought. It was apparent in that case that the respondent was contractually bound to perform certain obligations under a deed and the purpose of both applications was to determine whether she had performed those obligations. Douglas J did not think the application could be characterised simply as a fishing expedition but rather was a genuine attempt to determine whether or not the applicant's rights under the deed had been vindicated by performance by the respondent of her obligations. His Honour was satisfied that was a real grievance which, in the interests of justice, the applicant should be allowed to pursue.

Rule 229(1)(b) is a novel subrule that departs from the original Chancery practice permitting interrogatories to be delivered only for the examination of an opposite party.

The application under this subrule was unsuccessful in *Hogan* because of the absence of any proper basis for thinking that a cause of action may be available against the respondent to the application.

Although it is not commonly relied upon, the subrule is a useful one which should be kept in mind by practitioners. Provided there is some evidence of a case for relief, it may well provide an applicant with an appropriate mechanism to obtain the information necessary to determine whether a proceeding should be commenced.