Supreme Court
New South Wales

Case Name:	Munsie v Dowling (No. 7)
Medium Neutral Citation:	Munsie v Dowling (No. 7) [2015] NSWSC 1832
Hearing Date(s):	30 November 2015
Date of Orders:	4 December 2015
Date of Decision:	4 December 2015
Jurisdiction:	Common Law
Before:	Davies J
Decision:	1. The Defences filed by the Defendant on 31 March 2015 and 24 July 2015 are struck out. 2. Leave is refused to the Defendant to re-plead. 3. Direct the parties to approach the Listing Manager for a final hearing on the basis of a two day hearing. 4. The Defendant should pay the Plaintiffs' costs of the Motion.
Catchwords:	DEFAMATION – pleading – application to strike out defence – unrepresented defendant - second application to strike out– failure of defendant to comply with rules relating to pleading defences to defamation proceedings – inclusion of evidence in defence – reliance on reasons for judgment contrary to s 91 Evidence Act – whether defendant should be permitted to re-plead – failure to comply with earlier judgment on strike-out application – making of scandalous and irrelevant allegations – defendant refuse leave to re-plead
Legislation Cited:	Defamation Act 2005 (NSW) Evidence Act 1995 (NSW) Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Aon Risk Services Australia Limited v Australian National University [2009] HCA 27; (2009) 239 CLR 175 Dennis v Australian Broadcasting Corporation [2008]

	NSWCA 37 Ebner v Official Trustee [2000] HCA 63; (2000) 205 CLR 337 Fairfax Media Publications Pty Ltd v Kermode [2011] NSWCA 174; (2011) 81 NSWLR 157 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 Munsie v Dowling [2014] NSWSC 458 Munsie v Dowling [2014] NSWSC 598 Munsie v Dowling [2014] NSWSC 1508 Munsie v Dowling (No. 4) [2015] NSWSC 37 Munsie v Dowling (No. 5) [2015] NSWSC 789 Munsie v Dowling (No 6) [2015] NSWSC 808 Seven Network Ltd v News Ltd [2009] FCAFC 166; (2009) 182 FCR 160 Webb v R (1994) 181 CLR 41
Texts Cited:	
Category:	Procedural and other rulings
Parties:	Justine Munsie (First Plaintiff) Kerry Stokes (Second Plaintiff) Ryan Stokes (Third Plaintiff) Shane Dowling (Defendant)
Representation:	Counsel: A Dawson (Plaintiffs) In person (Defendant) Solicitors: Addisons (Plaintiffs) Self-represented (Defendant)
File Number(s):	2014/114469
Publication Restriction:	

JUDGMENT

1 The Plaintiffs sue the Defendant for defamation. They do not claim damages. They seek a permanent injunction restraining the Defendant from publishing a number of matters more particularly set out in Prayer 1 of the Third Further Amended Statement of Claim filed 29 June 2015.

2 The First Plaintiff is a solicitor and partner of the law firm Addisons. The First Plaintiff is retained by the Second and Third Plaintiffs as their solicitor. The Second Plaintiff is the chairman of Seven West Media whose media assets include the Seven Network which broadcasts news, current affairs and other programs throughout Australia. The Third Plaintiff is the Chief Operating Officer of Seven Group Holdings Ltd, a director of Seven West Media, Chairman of the National Library of Australia, and the son of the Second Plaintiff.

3 The Defendant is the Registrant of the domain name kangaroocourtofaustralia.com and the publisher of the website connected to that domain name called Kangaroo Court of Australia.

4 There have been a number of earlier judgments within the proceedings including some which have set out the factual background to the proceedings: *Munsie v Dowling* [2014] NSWSC 458 (Harrison J); *Munsie v Dowling* [2014] NSWSC 598 (Hall J); and *Munsie v Dowling* [2014] NSWSC 1508 (Adams J).

5 The present judgment concerns principally an application by the Plaintiffs for an order that defences filed 31 March 2015 and 24 July 2015 be struck out the basis that:

a. no reasonable defence is disclosed; and/or

b. the defence has a tendency to cause prejudice, embarrassment or delay in the proceeding.

6 Ancillary orders are sought enabling the parties to approach the Listing Manager for the allocation of a hearing date for the final hearing of the proceedings and, in the alternative, that an order be made pursuant to *Uniform Civil Procedure Rules 2005* (NSW) r 28.2 that there be a separate trial of the following questions of fact:

a. Whether the imputations alleged to have been conveyed by the matters complained of in the Third Further Amended Statement of Claim were conveyed; and

b. Whether any imputation found to have been conveyed is defamatory of the relevant Plaintiff.

The proceedings

7 Proceedings were first commenced by the First and Second Plaintiffs by the filing of a Statement of Claim on 15 April 2014. The Statement of Claim has been amended a number of times to plead further defamatory material subsequently published by the Defendant. On 17 June 2015 Campbell J ordered that the Third Plaintiff be added as a Plaintiff to the proceedings: *Munsie v Dowling (No. 5)* [2015] NSWSC 789.

8 On 25 July 2014 the First and Second Plaintiffs filed an Amended Statement of Claim. On 18 August 2014 the Defendant filed an Amended Defence. In that Defence he said in paragraph 4 that he would be relying on a number of sections of the *Defamation Act 2005* (NSW). Paragraph 6 to 13 listed sections 25 to 33 of the *Defamation Act (*being sections identifying particular defences to a claim of defamation) with a brief summary of what each defence was.

9 On 14 October 2014 the Plaintiffs by Notice of Motion filed on that date sought the same first prayer for relief sought in the present Notice of Motion, that is, that the defence should be struck out as disclosing no reasonable defence or that it had a tendency to cause prejudice, embarrassment or delay in the proceeding. On 11 February 2015 Hoeben CJ at CL struck out the defence filed 18 August 2014 and granted leave to the Defendant to file a further amended defence: *Munsie v Dowling (No. 4)* [2015] NSWSC 37. I record this matter because the reasons given by Hoeben CJ at CL for his orders are directly apposite to the matter I now have to determine in relation to the present defence. I shall return to that matter presently.

10 The present iteration of the Statement of Claim is a Third Further Amended Statement of Claim filed 29 June 2015. It pleads a number of publications commencing February 2014 to 14 June 2015. The substance of the defamatory material is, in the first instance, to be found in the earlier judgments to which I have referred. In addition, the material published since the judgment of Hoeben CJ at CL on 11 February 2015 includes material asserting professional misconduct and other inappropriate behaviour on the part of the First Plaintiff, corrupt and inappropriate behaviour on the part of the Second and Third Plaintiffs which is said to include wrongdoing on the part of Judges of this Court with which the Plaintiffs are involved. I am not prepared to go any further in this judgment in setting out a summary of the published material because it is clearly defamatory and scandalous.

11 The two defences sought to be struck out are what was described as an Amended Defence filed 31 March 2015 and what was also described as an Amended Defence filed 24 July 2015. At the time the Defence was filed on 31 March 2015 the relevant iteration of the Statement of Claim was a Further Amended Statement of Claim filed 6 March 2015. At the time the Defence filed 24 July 2015 was filed the final form of the Statement of Claim, that is, the Third Further Amended Statement of Claim had been filed on 29 June 2015.

12 The Defence filed 24 July 2015 said this in paragraph 1:

> This Amended Defence is in addition to the Amended Defence I filed in March 2015. They should be read together for the full Amended Defence because I will not repeat what I have already written in the March Defence in this Defence. The reason for doing it this way is because at least two judges have mentioned that the file is getting too large and the additional issues are also covered by the same defences as outlined in the March Defence.

13 No point was taken that it was inappropriate for the Defence to the Third Further Amended Statement of Claim to be contained within two documents.

14 I said at the outset that this judgment principally concerned the application by the Plaintiffs to strike out these two defences and for ancillary orders.

However, the Defendant made four oral applications. The first was that I should recuse myself for bias. The second was that the proceedings should be transferred to the Federal Court. The third was that an order should be made for discovery and interrogatories before the Defendant was required to file any further defence. The fourth was that the proceedings should be dismissed.

The application to recuse

15 After hearing submissions from the Defendant on this matter I indicated that I would not recuse myself from dealing with the application and would give reasons later. These are my reasons.

16 The basis put forward by the Defendant is that I granted an ex parte injunction on 5 June 2015 to restrain the Defendant from continuing to publish online two web articles that made defamatory allegations against the Second and Third Plaintiffs. At the time the Third Plaintiff had not been joined to the proceedings and that is one reason the Defendant says that I acted improperly in granting an ex parte injunction.

17 Mr Dawson of counsel, who appeared on the present application, appeared for the Plaintiffs on the application for the ex parte injunction before me on 5 June 2015. I was informed at the time that Ryan Stokes was not yet a plaintiff but that it was intended to join him as a plaintiff. The content of the material in respect of which orders were sought referred to both Kerry Stokes and Ryan Stokes. That the published material connected the actions of Kerry and Ryan Stokes is apparent from what is now pleaded in paragraphs 7AE to 7AG of the Third Further Amended Statement of Claim.

18 Mr Dawson informed me at the time that he accepted, as a condition of getting the injunction, that he would need to bring Mr Ryan Stokes in as a party to the proceedings. On the return date of the Summons for the ex parte injunction (11 June 2015) the Plaintiffs filed a Notice of Motion seeking to join Ryan Stokes as the third plaintiff in the proceedings and sought leave to amend the Statement of Claim.

19 There was nothing improper about issuing the injunction ex parte. I considered that the evidence provided to me amply justified an injunction and justified it being granted ex parte. It was open to the Defendant when served with the injunction and the other material to apply to set the injunction aside if he considered I had improperly granted it. That was not done.

20 A further basis upon which the Defendant sought that I recuse myself was that I had not given reasons for the making of the ex parte injunction. I did not give reasons because it is the practice of the Court where an ex parte injunction is sought as matter of some urgency that reasons are not given. It is apparent, in any event, from the transcript of the hearing on 5 June 2015 the basis upon which I thought it appropriate to grant such an injunction. I did not grant the injunction on the basis of any credit findings but on acceptance only of the evidence provided to me and a reading of the published material which was prima facie defamatory.

21 Further reasons advanced by the Defendant that I should recuse myself can only be regarded as scandalous. Baseless allegations were made about New South Wales Judges who are said to have been taking bribes and, somewhat irrelevantly one might have thought, that there was a police file that named some paedophile judges. The Defendant informed me that he had published matters about me and other judges which, on an objective reading, might be thought to be offensive and scandalous, and he informed me that he had made a complaint about me to ICAC, to the Chief Justice and to the Attorney-General. It was not said what the basis of the complaints were, although I inferred from his somewhat discursive oral submissions that it related to the granting of the ex parte injunction.

22 All of this is said to amount to perceived bias, actual bias and corruption on my part.

23 There was no evidence for the allegations made. I do not consider that granting an ex parte injunction against the Defendant not based on any credit findings comes even close to establishing what is required to demonstrate

apprehended bias, let alone actual bias, in accordance with *Webb v R* (1994) 181 CLR 41 and *Ebner v Official Trustee* [200] HCA 63; (2000) 205 CLR 337.

Transfer to the Federal Court

24 The basis put forward by the Defendant was that it would be inappropriate for any judge of this Court to sit in judgment of a case which involved a consideration of the corruption of other judges of this Court. Of course, no judge of this Court is a party to the proceedings. The Plaintiffs sue (inter alia) because defamatory statements have been made alleging that they have engaged in wrongdoing and bribe-paying to judges of this Court.

25 I asked the Defendant what legislative basis he relied upon for the transfer of the proceedings to the Federal Court. He said that he did not know but he supposed that it would be under the Cross Vesting legislation. The only possible section that could be relevant in the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) would be s 5 and the requirements for transfer to the Federal Court are not made out.

26 As I will discuss when dealing with the Defendant's defence of justification, no particulars have been identified, let alone evidence put forward, to point to the truth of the imputations involving bribery and corruption of judges. There is, therefore, no basis for an assertion that a judge of this Court could not hear the matter.

27 The application is refused.

Discovery and interrogatories

28 The Defendant puts forward ten interrogatories and seeks discovery of documents referred to in those interrogatories. He says that these are clearly needed to help determine the matter given the claim against him by the Plaintiffs.

29 Ordinarily discovery is given after pleadings have closed. Rule 21.2(4) provides that an order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue. That Rule highlights the fact that it is necessary that the issues be first defined. Those issues are defined by the completion of pleadings. For reasons to which I will come later in this judgment, the defences filed by the Defendant do not comply with the Rules of Court and proper pleading practice. It cannot be ascertained from those defences what the factual issues in the case are.

30 Part 22 UCPR deals with the provision of interrogatories. They may only be served if the Court so orders, and r 22.1(4) provides that an order is not to be made unless the court is satisfied that the order is necessary at the time it is made. As with discovery, until the issues in the case are properly identified by appropriate pleading it cannot be known what is in dispute to justify interrogatories being ordered. It would be a rare case where the Court could be satisfied that an order for interrogatories was necessary before the pleadings were closed. Nothing in this case would justify an order either for discovery or interrogatories at least until the pleadings have closed.

31 The Defendant made the same application to Hoeben CJ at CL. The application was refused for precisely the reasons I have given: see *Munsie v Dowling (No 4)* at [39] and [40].

Dismissal of the proceedings

32 The precise basis for this application was not made clear. The Defendant submitted that the proceedings should have been "thrown out of court" long ago. However, no application has been filed by the Defendant to dismiss the proceedings. The Defendant suggested that the proceedings were an abuse of process because the Plaintiffs had failed to prosecute their case and had engaged in delaying tactics. The principal reasons for delay appear to have been the ongoing publication by the Defendant of further defamatory material necessitating amendments to the Statement of Claim, and the failure of the

Defendant to plead a proper defence necessitating motion by the Plaintiffs such as the present one.

33 On the face of the material there can be little doubt but that the publications, or most of them, are defamatory. The only question was whether the Defendant could establish any defence to the claim.

34 The application is misconceived. It is refused.

The Plaintiffs' Motion

35 I will deal first with the Defendant's Amended Defence filed 31 March 2015.

36 Paragraphs 1 and 2 contain discursive material that do not demonstrate any defence to the claim.

37 Paragraph 3 says that the legal defences the Defendant will be relying on are (1) defence of justification, (2) defence of contextual truth, (3) defence of qualified privilege (both statutory and common law defences) and (4) defence of honest opinion.

38 Paragraph 4 then deals with the defence of justification provided in s 25 of the *Defamation Act 2005* (NSW). That section provides a defence if the defendant proves that the defamatory imputations are substantially true. The Third Further Amended Statement of Claim pleads in a number of paragraphs referable to each publication complained of the imputations said to be carried by the publications. Paragraph 4 of the Defence sets out s 25 and then goes on to say that the Defendant pleads that everything that he has written and the imputations are substantially true. He says that this complies with UCPR 14.32(2) according to what Hoeben CJ at CL said in *Munsie v Dowling (No. 4)* at [32]. The Defendant then deals with the imputations set out in paragraph 5(g) of the Third Further Amended Statement of Claim. He purports to rely on parts of the judgment of the Full Court of the Federal Court in *Seven Network Ltd v News Ltd* [2009] FCAFC 166; (2009) 182 FCR 160 to show that those imputations in paragraph 5(g) are true.

39 The pleading in paragraph 4 falls foul of r 14.7 UCPR which requires only a summary of material facts and not evidence, r 14.9 which prohibits the precise terms of a document or spoken words being set out unless they are themselves material (and here they are not) and r 15.22 in relation to particulars for the defence of justification. The last of these rules was a matter to which Hoeben CJ at CL directed attention in *Munsie v Dowling (No. 4)* at [34]. It is necessary for r 15.22 to be complied with in respect of each imputation pleaded. This has not been done. Only the imputation in paragraph 5(g) is identified.

40 Further, the reliance on the reasons of the Full Court of the Federal Court is contrary to s 91 of the *Evidence Act 1995* (NSW).

41 Paragraph 5 of the Defence deals with contextual truth. The Defendant first sets out the full terms of s 26 of the Act and says this:

> 4.1 In my defence it is easily provable that Kerry Stokes is a perjurer. Any other claim or imputations whether right or wrong would not do any further harm to his reputation.

42 Except for the quoted section above the Defendant's pleading of contextual truth is the same as that struck out by Hoeben CJ at CL at [34]. The Defendant has not complied with r 14.33(2) except insofar as what is set out in 4.1 (at [41] above) can be considered to be a compliance. That relates, however, to one imputation only. It is not clear if this defence is relied upon in respect of any other imputations.

43 Further, what is expressed in 4.1 can be seen to be entirely derivative to the defence of justification in respect of that imputation. For reasons given earlier, that defence has not been properly pleaded.

44 Finally, s 26 of the *Defamation Act* does not permit a defendant to plead back any of a plaintiff's imputations: *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174; (2011) 81 NSWLR 157 at [82].

45 Paragraph 6 deals with the statutory defence of qualified privilege. The Defendant quotes in full s 30 of the *Defamation Act* interspersed with assertions that do not appear to have regard to r 15.27(2). Mere assertions of having satisfied the matters in sub-s (1) to (3) of s 30 do not amount to facts, matters and circumstances to establish that the imputation or matter complained of was published under qualified privilege.

46 Paragraph 7 deals with the common law defence of qualified privilege. Contrary to the Rules the Defendant first sets out part of the judgment from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The Defendant appears to misunderstand what was decided in *Lange* and other cases to which he makes reference. The publications by him could not be defended on the basis of that common law privilege. Campbell J had already so held in *Munsie v Dowling (No 6)* [2015] NSWSC 808 at [28] – [31]. In any event, the Defendant fails to plead the facts, matters and circumstances that could conceivably bring the matters within that privilege.

47 Paragraph 8 of the Defence returns to the defence of justification. It also sets out at length extracts from publications concerning Schapelle Corby. Setting out those extracts is not in accordance with the Rules. In any event the material is irrelevant. The Defendant has failed to plead properly the defence of justification as discussed earlier.

48 Paragraph 9 identifies no defence and contains scandalous material.

49 Paragraph 10 refers to the defence of honest opinion. The paragraph simply sets out s 31 of the *Defamation Act*. It would be necessary to show at least that the factual basis for the opinion was true. There are no particulars to that effect.

50 Paragraph 10 also contains the defence of triviality under s 33 of the Act. It does not plead material facts nor does it provide particulars to identify how the defence applies.

51 Paragraph 11, although difficult to understand, appears to return to the defence of justification. The material contained within the paragraph has no place in a defence.

52 The Defendant submitted that the appropriate way for the Plaintiffs to proceed was to request further and better particulars of the Defences. I reject that submission. The obligation is on the party pleading to do so clearly and in accordance with the Rules so that the issues to go to trial can be clearly identified.

53 In *Munsie v Dowling (No. 4)* Hoeben CJ at CL said of the defence filed 18 August 2014 that he was considering:

> [29] The nature of the Amended Defence as pleaded is such that it fails to inform the plaintiffs, let alone the Court, of the case to be put forward by the defendant. For example, there is no reference to the individual paragraphs of the amended statement of claim. There is no indication as to whether the relevant defences are raised in relation to every matter complained of or only some. It is insufficient merely to refer to each of those defences in the manner pleaded, e.g. the justification defence does not reveal to which imputations it is directed and the contextual truth defence does not plead a single contextual imputation said to be conveyed in addition to the plaintiffs' imputations. Finally, there are no particulars of the facts, matters and circumstances on which the defendant relies to prove any of these defences.

54 In the ways demonstrated, the same thing could be said of this Defence of 31 March 2015. It fails to comply with the Rules in Div 6 of Pt 14 and Div 4 of Pt 15 as well as rules 14. 7, 14.8 and 14.9. It cannot be seen from it what the issues are that need to go to trial.

55 The Defence filed 24 July 2015 can simply be described as a defence in name only. It consists of extracts of articles from publications that make irrelevant and scandalous attacks on Judges of the Court, and newspaper articles concerning the Second and Third Plaintiffs. It does not in any sense comply with the Rules of Court and the practice of pleading. No defence can be discerned from the material.

56 The Defences filed 31 March 2015 and 24 July 2015 will be struck out.

Leave to re-plead?

57 The question arises whether in the circumstances leave should again be given to the Defendant to re-plead any defences that he may have.

58 Hoeben CJ at CL said that, given that the Defendant was legally unrepresented, leave would be given to him to file and serve a further Amended Defence. Hoeben CJ at CL expressed the hope that if a third defence was to be filed the Defendant would comply with the *Uniform Civil Procedure Rules* relating to defences in defamation matters – see at [37]. In the course of his judgment Hoeben CJ at CL identified a number of Rules which needed to complied with. In any event, the Rules are conveniently contained in Pts 14 and 15 UCPR.

59 So far from attempting to comply with these Rules the Defendant appears to have used the two further defences filed to publish further scandalous material concerning not only the Plaintiffs but Judges of this Court. The allegations are baseless and are, in any event, irrelevant to the subject matter of the proceedings.

60 It is entirely clear to me from having heard what the Defendant said during the hearing of this Motion that he will simply use the opportunity, if given leave to file further defences, to continue to make further defamatory remarks and further scandalous allegations. Despite my asking him on a number of occasions to desist from doing so in Court he continued to make those allegations. It is also clear that, notwithstanding the suggestions made by Hoeben CJ at CL about Rules that needed to be complied with, those remarks were not heeded. He persisted with his justification of the defence of qualified privilege in the face of what Campbell J has held in an earlier hearing.

61 Whilst I accept that every consideration must be given to unrepresented litigants, it is clear that the Defendant has no interest in trying to bring his pleadings within the Rules so that the issues between the parties can be properly identified. Application of ss 56 and 58 of the *Civil Procedure Act 1995* (NSW), together with what was said by the High Court in *Aon Risk*

Services Australia Limited v Australian National University [2009] HCA 27; (2009) 239 CLR 175 at [102], and by the Court of Appeal in *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 at [26], leads me to the conclusion that no further indulgence should be given to the Defendant.

62 For those reasons, I do not consider that leave should be granted to the Defendant to file any further defence.

63 The proceedings have been on foot since 15 April 2014. It has been necessary to amend again and again the form of the Statement of Claim because of fresh publications made by the Defendant. Delay has been occasioned on two occasions by the failure of the Defendant to plead defences properly. Defamation proceedings should be conducted expeditiously and be heard within a reasonably short period of time after their commencement.

64 Accordingly, the parties are directed to approach the Listing Manager for a hearing date for the final hearing of the proceedings.

65 Mr Dawson for the Plaintiffs submitted that prayer 3 in the Notice of Motion ought to be considered only if I granted leave to the Defendant to re-plead. Further consideration of prayer 3 does not, therefore, arise.

Conclusion

66 Accordingly, I make the following orders:

1. The Defences filed by the Defendant on 31 March 2015 and 24 July 2015 are struck out.

2. Leave is refused to the Defendant to re-plead.

3. Direct the parties to approach the Listing Manager for a final hearing on the basis of a two day hearing.

4. The Defendant should pay the Plaintiffs' costs of the Motion.

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