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Supreme Court of the ACT Decisions

Windschuttle v Acp Publishing Pty Ltd [2002] ACTSC 64 (12 July 2002)

Last Updated: 18 July 2002

Jurisdiction of Courts (Cross-Vesting) Act 1987 **(Cth)**

KEITH WINDSCHUTTLE v ACP PUBLISHING PTY LIMITED [2002] ACTSC 64

(12 July 2002)

CATCHWORDS

COURTS AND JUDICIAL SYSTEM - cross-vesting legislation - defamation action commenced in Australian Capital Territory - application to transfer proceedings to Supreme Court of New South Wales - whether in interests of justice.

Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), s 5

Bourke v State Bank of NSW (1988) 85 ALR 61

Arrowcrest Group Pty Ltd v Advertiser [1993] ACTSC 23; (1993) 113 FLR 57

John Pfeiffer Pty Ltd v Rogerson (2000) 172 ALR 625 [2000] HCA 36

Waterhouse v ABC (1989) 86 ACTR 1

No. SC 157 of 2002

Judge: Gray J

Supreme Court of the ACT

Date: 12 July 2002

IN THE SUPREME COURT OF THE)

) No. SC 157 of 2002

AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **KEITH WINDSCHUTTLE**

Plaintiff

AND: **ACP PUBLISHING PTY LIMITED**

ACN 053 273 546

Defendant

ORDER

Judge: Gray J

Date: 12 July 2002

Place: Canberra

THE COURT ORDERS THAT:

1. The application for transfer is dismissed.

1. This is an application by the defendant for an order that these proceedings be transferred to the Supreme Court of New South Wales.

2. The proceedings were commenced by originating application filed on 25 March 2002. The statement of claim accompanying that application alleges that on 12 February 2002, the defendant published matter defamatory of the plaintiff in The Bulletin magazine, a magazine published in each of the States and Territories of Australia. The statement of claim alleges that the article in the defendant's publication contains various imputations concerning the plaintiff's competence, qualifications and professionalism as an historian.

3. The defendant has filed an appearance but has not filed any grounds of defence.

4. The application is made pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). That subsection provides in s 5(2)(iii) of that Act for the transfer of pending proceedings where,

"... it is otherwise in the interests of justice that the [pending] proceeding be determined by the Supreme Court of another State or Territory".

5. A number of cases were cited to me by counsel in relation to the approach that I should adopt. I take the approach which commended itself to Wilcox J in *Bourke v State Bank of NSW* (1988) 85 ALR 61 at 78. In referring to the provision, he referred to the wide and vague terms that the term "otherwise in the interests of justice" referred to. He said,

"I take this to be a charter for the court to take the course which appears to be more than just interpreting that word widely. However, for an applicant's choice of forum to be overridden, there must be some subjective factor which makes it possible to say that the interests of justice will be better served by a transfer than by non-transfer."

6. In *Dawson v Baker* (1994) 123 FLR 194 Higgins J with whose reasons for judgment Gallop J expressed agreement noted that the only requirement imposed by the Cross-Vesting Act is that it "appeal" to this Court that it is in the interests of justice that the proceedings be transferred to another court. There is no onus on an applicant other than an "onus of persuasion" as there was on any party seeking to persuade any court to a particular conclusion (see pp 200, 201). Matters of significance in determining whether it is in the interests of justice to order a transfer were said to include; forensic advantage or detriment conferred by the procedural law, the choice made by the plaintiff and the reasons for that choice, substantive connections with the forum, balance of convenience to parties and witnessing convenience to the court system.

7. I also bear in mind the remarks of Miles CJ in *Arrowcrest Group Pty Ltd v Advertiser [1993] ACTSC 23;* (1993) 113 FLR 57 at 67 that,

"The applicant does not have to show that justice cannot be obtained in the court in which the proceedings commenced, nor that the court to which transfer is sought is the only court in Australia to which justice may be obtained."

8. Since *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 [2000] HCA 36, it can be said that there is nothing as far as jurisdiction or choice of law is concerned, which would indicate a transfer to another court.

9. I also accept that I am not called upon to evaluate what are said to be differences in law and procedure between the Territory and New South Wales. As the matter was put to me, I am unable to say that there would be sufficient differences or delays which would call for one jurisdiction to prevail over the other. However, some weight can be given to the plaintiff's expressed desire to invoke the procedures of this court.

10. The substantial matter that the defendant relies upon is what it points to as being the substantial connections that the matter has with New South Wales and, in particular, Sydney. The plaintiff resides in Sydney and the issues in the case relate significantly to the plaintiff's academic qualifications and standing including that referrable to Sydney University. The writer of the impugned article is the Director of the Media Studies Program at that University. It is claimed that the injury to the plaintiff's reputation substantially relates to where he resides and is employed.

11. For his part, the plaintiff refers to his links with government and national institutions in the Australian Capital Territory. He refers to his participation in national forums and the importance of his reputation to his involvement in matters of this kind. Mr McClintock SC, counsel for the applicant/defendant, was critical of these connections considering that they were tenuous props upon which to claim that the matter should be heard in this jurisdiction. Whilst there is some force in Mr McClintock's observations, I cannot discount the plaintiff's desire to vindicate his reputation in this jurisdiction. In that regard, I give weight to the national publication of the defendant's magazine and the fact that although in comparison its circulation in Canberra is proportionately much less, it nonetheless has a substantial presence in the Territory.

12. In his submissions, Mr McClintock puts that there is nothing in the matter complained of pointing to national interests of a kind inappropriate to litigate in the New South Wales Supreme Court. That does not appear to me to put the matter entirely fairly. The plaintiff says

that the alleged defamation was published nationally and that he has a reputation outside New South Wales that he wishes to protect. In that respect the substantive connections to New South Wales as the place of the events which are the subject of the publication do not rest only on matters referable to that State. The article is concerned with what the defendant itself considers are matters of debate throughout Australia. The issues are placed in a national context by reference to a national television program. In those respects it may be said that the connection with New South Wales is less significant. They are, in my view, certainly not as significant as the Sydney events which formed the background to the alleged defamation considered by Crispin J in *Packer v John Fairfax Publications & Hilmer* [2000] ACTSC 74 (24 August 2000). In addition the plaintiff points to some witnesses resident in the ACT that he might call.

13. The defendant maintains that as far as the costs and convenience of the matter are concerned, they are matters which favour the transfer to New South Wales. As has been often said, if the expense and inconvenience are of such a character that to allow the action to go on would result in real injustice to a litigant, that is clearly a very material factor (see *Waterhouse v ABC* (1989) 86 ACTR 1 at 18).

14. In this case, I am faced with the submission from the Bar table that there will be considerable additional costs to the defendant as a consequence of the matter proceeding in this court. The defendant puts the additional legal costs associated with retaining Canberra agents, costs of airfares and accommodation for witnesses, counsel and solicitors. On the other hand, the plaintiff's solicitor and his Canberra agents have expressed the view that defamation litigation in the Australian Capital Territory by clients and solicitors from Sydney, taking into account travel and witness expenses, is usually cheaper than in Sydney. Mr Lucas, a solicitor employed by the plaintiff's Canberra agents was cross-examined on this aspect before me and expressed the view that overall the costs of conducting defamation proceedings are less in the ACT where a Sydney plaintiff is involved and that whilst that generalisation does not hold true in some cases, "by and large I would say that the costs are substantially less". Admittedly, these views are based to some extent on comparisons of practice and procedure which I have refrained from comparing. Nevertheless, the views expressed by Mr Lucas do not enable me to say that the defendant would suffer real injustice by proceedings being continued in this court simply because the defendant has initially chosen to instruct legal practitioners based in Sydney.

15. In the end, the matter is a value judgment on whether it is in the interests of justice that the proceedings be decided by the court of another State or Territory (see *Arrowcrest Group Pty Ltd v Advertiser* (supra) at 61-62). I am not persuaded that there exists a factor which enables me to say that the interests of justice would be better served by acceding to the defendants application to transfer these proceedings.

16. The application for transfer is dismissed.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of his Honour, Justice Gray.

Associate:

Date: 12 July 2002

Counsel for the plaintiff: Mr B Connell

Solicitor for the plaintiff: Colquhoun Murphy as agents for Bush Burke & Company

Counsel for the defendant: Mr B Mc Clintock SC with Mr Richardson

Solicitor for the defendant: Phillips Fox as agents for Gilbert & Tobin

Date of hearing: 7 June 2002

Date of judgment: 12 July 2002