



Supreme Court
New South Wales

Case Name: Strata Plan 47027 v McGinn

Medium Neutral Citation: [2018] NSWSC 1228

Hearing Date(s): 12, 30 July 2018; 6 August 2018

Date of Orders: 6 August 2018

Decision Date: 6 August 2018

Jurisdiction: Equity

Before: Parker J

Decision:

1. The cross-claimant's notice of motion of 18 December 2017 is dismissed.
2. The Statement of Cross-Claim is struck out.
3. Order that the proceedings on the first cross-claim be transferred to the Common Law Division and direct that they be entered in the Defamation List.
4. Order that the cross-claimant pay the costs of the cross-claimant's motion dated 18 December 2017; the first, second and third cross-defendants' costs of their notice of motion dated 8 March 2018, and the fourth cross-defendant's costs of his notice of motion dated 26 February 2018.

Catchwords:

PRACTICE AND PROCEDURE – applications – default judgment – defamation – failure to file defence – failure to plead essential element in cause of action – application dismissed

PRACTICE AND PROCEDURE – applications – default judgment – discretionary considerations – applicant using default judgment as a tactic to pressure

defendant in circumstances where it is known that proceedings will be defended

PRACTICE AND PROCEDURE – applications – strike out application – defamation – statement of cross-claim struck out for not pleading publication

PRACTICE AND PROCEDURE – jurisdiction – transfer of proceedings – transfer defamation cross-claim from Equity Division to Common Law Division

PRACTICE AND PROCEDURE – costs – special costs orders – indemnity costs – costs payable forthwith - order for indemnity costs to be payable forthwith refused where both applicant and cross-defendants responsible for bringing and prolonging hopeless application

Legislation Cited:	Supreme Court Act 1970 (NSW), s 54(1)
Cases Cited:	Dow Jones and Co Inc v Gutnick (2002) 210 CLR 575
Texts Cited:	Nil
Category:	Procedural and other rulings
Parties:	Sophia McGinn (Cross-Claimant/Defendant) Peter Clisdell Pty Ltd (First Cross-Defendant) Peter Miller (Second Cross-Defendant) Marie Cregan (Third Cross-Defendant) James Moir (Fourth Cross-Defendant)
Representation:	Counsel: A Campbell (First and Third Cross-Defendants) DP Sibtain (Second Cross-Defendant) GR Rubagotti (Fourth Cross-Defendant) Solicitors: Self-represented – 12 July 2018 (Cross-Claimant/Defendant) Madison Marcus Law Firm (First, Second and Third Cross-Defendants) Gilchrist Connell (Fourth Cross-Defendant) No Appearance: S McGinn – 30 July; 6 August 2018 (Cross-

Claimant/Defendant)

File Number(s): 2017/331810

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JUDGMENT – EX TEMPORE

Revised and reissued 8 August 2018

- 1 Before the Court are three interlocutory applications in the cross-claim in this matter. The cross-claimant, Sophia McGinn, applies for default judgment against each of the cross-defendants to the cross-claim. Each of the cross-defendants applies to have Ms McGinn's Statement of Cross-Claim struck out (between them, the cross-defendants move on two separate notices of motion, one which was filed for the first to third cross-defendants and the other for the fourth cross-defendant).
- 2 The principal proceedings concern the affairs of the body corporate for a strata title building at Hurstville, New South Wales. Ms McGinn is the owner of one of the units. It appears that in August 2016 she was elected as a member of the Owners Committee and Secretary of the Owners Corporation. Subsequently, Ms McGinn came into conflict with the first cross-defendant, Peter Clisdell Pty Ltd, to which I will refer as Clisdell, which is the strata manager for the building.
- 3 Ms McGinn also came into conflict with Peter Miller, the second cross-defendant, who is another owner. These conflicts in 2017 resulted in a number of proceedings involving those parties in the New South Wales Civil and Administrative Tribunal (NCAT).
- 4 Since 2017 there have been two groups claiming to constitute the committee of the Owners Corporation, one including Ms McGinn and the other including Mr Miller. In June 2017 Ms McGinn's group resolved, purportedly on behalf of the Owners Corporation, to establish a new bank account for the Owners Corporation with Westpac Banking Corporation and also to appoint Ms McGinn as treasurer of the Owners Corporation.

- 5 Relying on this resolution, Ms McGinn began collecting or attempting to collect levies from owners of units in the building. As a result, monies were deposited into an account with Westpac which had been opened for the purpose.
- 6 The principal proceedings were commenced on 2 November 2017. The first plaintiff is named as the Owners Corporation. Later, Mr Miller was added as the second plaintiff and a representative order was made whereby he is to represent the interests of the other owners in the building, apart from Ms McGinn. The first defendant is Ms McGinn and the second defendant is Westpac.
- 7 The plaintiffs seek orders restraining Ms McGinn from purporting to act as treasurer of the Owners Corporation and seek to obtain control of the monies which have been deposited in the Westpac Bank account. On 9 November the plaintiffs obtained from Lindsay J interlocutory orders freezing that bank account until the proceedings are resolved. I understand that they were heard by Darke J on 16 July.
- 8 The cross-claim with which I am concerned was filed on 16 November. Ms McGinn is the cross-claimant. She claims damages for defamation from Clisdell, Mr Miller and two other cross-defendants. The third cross-defendant is Marie Cregan, who signed an allegedly defamatory piece of correspondence on behalf of Clisdell and is, I assume, an employee of that company. The fourth defendant is James Moir, who is a solicitor. In 2017 he was employed by a firm known as Polczynski Lawyers, who acted for Clisdell in the proceedings in the Tribunal. Mr Moir appears to have had carriage of the proceedings on Clisdell's behalf.
- 9 The allegedly defamatory matter appears in four letters, each of which is addressed to the owners of the units in the building and each of which refers to the dispute in which Ms McGinn, Mr Miller, Clisdell and others have been involved.
- 10 The first is a letter dated 28 November 2016 on the letterhead of Clisdell. The letter begins:

The purpose of this letter is to bring you the truth which will contradict the current barefaced misinformation which is currently being peddled to you by the secretary of your strata scheme, Sophia McGinn.

- 11 The letter goes on to dispute various claims that Ms McGinn had apparently made about the way in which the strata property had been managed by Clisdell, including allegations that Clisdell had “defrauded” the Owners Corporation by failing to deduct GST from building manager invoices.
- 12 The second allegedly defamatory letter is written on the letterhead of an organisation described as Sydney Access Consultants, apparently a firm of architects. It was signed by Gary Finn, described as an architect principal of the firm. Apparently Mr Finn is or was another owner of a unit in the strata building in question. The letter refers to proceedings brought by Ms McGinn in NCAT which apparently (at least at that stage) had been unsuccessful.
- 13 The third letter is one signed by Ms Cregan, on behalf of Clisdell, concerning another determination by NCAT as part of the dispute involving Ms McGinn where, again, an application by Ms McGinn had been dismissed.
- 14 The final letter is one on the letterhead of Polczynski Lawyers dated 5 September 2017. It also referred to litigation in NCAT. After recounting some of the background, the letter asked owners to ensure that they attended general meetings convened by Clisdell under its delegation and to pay money to the accounts which Clisdell controlled so as to ensure that they participated in the running of the scheme. The letter was apparently signed by Mr Moir.
- 15 As I have mentioned, Ms McGinn’s cross-claim seeks damages for loss allegedly suffered as a result of these allegedly defamatory publications. The damages claimed included aggravated damages. The prayers for relief also include an order that the cross-defendants issue a letter of apology (the form of which is unspecified) to be circulated to the owners of units in the building. No defence to the Statement of Cross-Claim has been filed by any of the cross-defendants.
- 16 Ms McGinn’s application for summary judgment is made by notice of motion which was filed on 18 December 2017. A notice of motion to have the proceedings struck out was filed on behalf of Mr Moir on 26 February. A motion in similar terms for the first to third cross-defendants followed on 8 March. At

the time, the first to third cross-defendants were all represented by one firm. They are now separately represented, the first and third cross-defendants (namely, Clisdell and its employee, Ms Cregan) by one firm and the second cross-defendant (namely, Mr Miller) by another firm.

- 17 The issues on the cross-claim are quite separate from those raised in the principal proceedings. In February 2018 Darke J made an order that the cross-claim proceedings be heard separately from the principal proceedings. Ultimately, the three applications with which I am concerned were fixed for hearing in the General List of the Equity Division and they came before me on 12 July. On that day, Ms McGinn appeared self-represented. The first and third cross-defendants, the second cross-defendant and the fourth cross-defendant were represented by counsel.
- 18 After the evidence had been read and there had been some debate about admissibility, Ms McGinn sought an adjournment of the hearing. She said that she had not had a fair opportunity to respond to written submissions which had been filed by the cross-defendant parties in advance of the hearing. Had Ms McGinn been represented by a legal practitioner this application would not have been successful. In my view, the written submissions did nothing out of the ordinary. All they did was to provide a legal basis for the contentions which had previously been notified as being the foundation of the applications by the cross-defendants. But purely as a matter of expediency, I decided that I would grant Ms McGinn the adjournment which she sought. Proceedings were fixed to resume before me on the morning of Monday 30 July.
- 19 The day before, Ms McGinn sent an email to the Court stating that she had been admitted urgently to hospital and asking for the hearing on Monday to be adjourned. She did not provide any indication of how long she was likely to be in hospital or suggest any date which would be suitable for the resumed hearing. Ms McGinn's email was not sent to the legal representatives for the cross-defendants. I mention this because in this matter there has been a long history of Ms McGinn communicating with the Court without the prior leave of the Court or the consent of the opposing parties. This has happened as part of the preparation for the current hearing. It has also happened as part of an

earlier application before me in the principal proceedings where I dealt with an application by Ms McGinn to set aside a subpoena. It happened again in a subsequent application Ms McGinn made to me to recuse myself from the hearing on 12 July. Time and again, the Court has told Ms McGinn that she should not communicate with the Court unless the Court has authorised her to do so beforehand or she has the prior consent of the parties, and time and again she has ignored the Court's requests.

- 20 When the matter came before me on 30 July none of the cross-defendants sought to proceed to hearing, although they might have had grounds for doing so. Instead, they invited me to adjourn the hearing for a further week, that is, until today, and I acceded to this application, directing that Ms McGinn be notified of today's date. She has not appeared today and the Court has received no further communication from her.
- 21 I therefore proceed to determine the applications on the basis of the written submissions which have been filed, the evidence which was admitted on 12 July and the supplementary submissions made by the cross-defendants' representatives today.

Default Judgment

- 22 There is a technical problem with Ms McGinn's application for default judgment in that she was unable to demonstrate that the Statement of Cross-Claim was formally served in accordance with the requirements of the *Uniform Civil Procedure Rules 2005* (NSW) for personal service. At the time Ms McGinn's cross-claim was filed (16 November 2017) Polczynski Lawyers were acting for the plaintiffs in the proceedings. Counsel instructed by Polczynski Lawyers appeared before the Registrar on 20 November 2017 at a directions hearing. The second cross-defendant, Mr Miller, was of course the second plaintiff and therefore already represented by Polczynski Lawyers in the proceedings. It was accepted on behalf of the first and third cross-defendants (namely, Clisdell and Ms Cregan) that in November 2017 Polczynski Lawyers also held instructions to act for them. Counsel for Clisdell and Ms Cregan said expressly at the hearing on 12 July that there was no point taken concerning service on Clisdell, although no formal Notice of Appearance had been entered at this

stage. Although counsel did not include Ms Cregan in this concession, I think it inevitably follows that no point can be taken about service on Ms Cregan, but Mr Moir is in a different position. An appearance was formally entered for him on 21 December 2017. There is no evidence that he was formally served in accordance with the Rules before that date. Ms McGinn's application was filed before 21 December and on no view could Mr Moir have been in default as at that point. Ms McGinn's application for default judgment against Mr Moir must fail for this reason alone but there are also substantive problems with her claim.

- 23 In her Statement of Cross-Claim Ms McGinn pleads that each of the allegedly defamatory letters was a letter "sent by" the writer of the letter. The Statement of Cross-Claim does not expressly identify who the letters were allegedly sent to. In the case of the second letter, which was sent under the name of Mr Finn, the Statement of Cross-Claim pleads that it was "sent by" Mr Miller "with his particularised contentions prepared by" Mr Finn. The thrust of this allegation appears to be that Mr Finn sent the letter at Mr Miller's instigation.
- 24 A critical element of the tort of defamation is that the allegedly defamatory matter is published. The fact of publication, and in particular to whom the material is published on the occasion on which it is published, is an important aspect of the tort (see generally *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 600-601 [25]-[27]). If there is no publication, there can be no tort; and if there is publication, then the people to whom it is published and the occasion of its publication may be relevant to the existence of defences as well as to the quantum of damages.
- 25 The proper pleading of publication is particularly important where authority to make allegedly defamatory statements may be in issue or somebody who has not directly made the statement is sued. This applies to the second, third and fourth cross-defendants in these proceedings.
- 26 In my view, the failure of the Statement of Cross-Claim squarely to allege publication and to provide proper particulars identifying the occasion of publication and the identity of those to whom the letters were published is a significant flaw in the pleading.

27 The Statement of Cross-Claim quotes extensively from the four allegedly defamatory letters. The pleading concerning the first of the letters begins as follows:

The first matter is a letter sent by the licensee of the first cross-defendant...with the following defamatory imputations:

(a) The purpose of this letter is to bring you the truth which will contradict the current barefaced misinformation which is currently being peddled to you by the secretary of your strata scheme, Sophia McGinn.

28 The letter goes on to extract five other passages from the letter which it quotes verbatim. A similar pattern is followed with the other three letters.

29 What Ms McGinn's pleading does, therefore, is simply to quote from the allegedly defamatory letters. Although the passage from the Statement of Cross-Claim which I have quoted refers to defamatory imputations, the pleading does not identify those imputations in the proper way. That is, the pleading does not identify the sting or stings in the letter which are said to have held Ms McGinn up to hatred, ridicule or contempt. Again, the requirement of identifying the imputations is a fundamental one in the pleading of a defamation claim.

30 It is true that the first, second and third cross-defendants failed to file any defence (and have still filed no defence) and that twenty-eight days had elapsed between 28 November 2017, when each of the first, second and third cross-defendants must be taken to have received the Statement of Cross-Claim, and 17 December, when Ms McGinn filed her application for default judgment. Strictly speaking, the failure to file a defence amounted to an admission on the part of each of the cross-defendants and that the factual allegations in the Statement of Cross-Claim were true.

31 The idea behind default judgment is that if no defence is filed to the statement of claim and the allegations therein are taken to be admitted, then the Court can, simply by looking at the statement of claim, determine whether liability is established and, in a liquidated claim, can proceed to determine the amount of the liability. But where, as in this case, the pleading is defective, that idea breaks down. Failure to file a defence to a pleading which does not plead the

essential elements of a cause of action does not give rise to the admissions necessary to proceed to default judgment or the assessment of damages.

32 In this case, the failure to file defences still leaves the occasions of publication unidentified and the defamatory imputations in the letters unspecified. In my view, it would be quite inappropriate to make an order for judgment for damages to be assessed on the basis of such an inadequate pleading. The application for default judgment should be refused for this reason alone.

33 There is a further relevant discretionary consideration. While it was poor practice by the cross-defendants not to file a defence or to seek an order suspending the timetable while they pursued their challenge to the pleading, that does not justify Ms McGinn's conduct in making the application. In my view, default judgment should not be used as a tactic to put pressure on a defendant party where it is obvious that the proceedings will be defended. To do so is only likely to increase the costs of all parties and to waste the time of the Court, as has happened in this case. For these reasons, Ms McGinn's default judgment application will be dismissed.

Strike Out

34 I have already referred to two of the deficiencies in Ms McGinn's Statement of Cross-Claim. The problems do not end there.

35 In general, the pleading is a discursive one, setting out Ms McGinn's version of the dispute and the resulting NCAT proceedings. The Statement of Cross-Claim annexes various judgments and minutes of meetings as well as all of the four publications. It also goes on to plead, in relation to each of the allegedly defamatory letters, facts which are said to show the falsity of what was stated in the letters. This is an inappropriate approach in a defamation pleading. The cause of action is constituted by the publication of the defamatory matter. Untruth is not an element which needs to be pleaded by the plaintiff in chief. Rather, in certain circumstances it may give rise to defences. There may also be other defences based on qualified privilege and the like. The proper course is to plead the publication of the defamatory matter and the imputations arising from it, leaving it for the defendant to raise truth and other defences, as well as privilege.

- 36 For those reasons, there is no point in striking out some parts of the Statement of Cross-Claim and allowing Ms McGinn to supplement it. The Statement of Cross-Claim should be struck out in whole, allowing Ms McGinn an opportunity, if she is able, to replead it from scratch in a proper way.
- 37 The defendants argued that this should happen, and any further proceedings should take place, in the Defamation List in the Common Law Division of this Court. On the face of it, that is correct. It is not the practice of this Division to entertain defamation claims and the Defamation List has been established as a specialist list for the precise purpose of entertaining claims involving allegations of defamation.
- 38 In their submissions the cross-defendants suggested various ways in which Ms McGinn could be required to pursue the cross-claim in the Defamation List. At one point, it was suggested that the proceedings could be wholly dismissed, leaving Ms McGinn to commence fresh proceedings which would then be allocated to the Defamation List.
- 39 One difficulty with this, however, is that Ms McGinn is entitled to the protection of the filing date for the cross-claim against any limitation defence which may be raised. But it is not necessary to consider the cross-defendants' original suggestions for how Ms McGinn could be required to continue the proceedings in the Defamation List. Section 54(1) of the *Supreme Court Act 1970* (NSW) empowers the Court to transfer proceedings or part of proceedings from one Division to another. The appropriate order is that the cross-claim proceedings be transferred to the Common Law Division, where no doubt they will be allocated to the Defamation List.

Costs

- 40 All of the cross-defendants sought orders for costs in their favour and that the costs be assessable and payable forthwith and assessed on an indemnity basis. In order to evaluate these submissions, it is necessary to say something more about the history of the proceedings.
- 41 Ms McGinn's cross-claim was first foreshadowed at the hearing on 9 November 2017 before Lindsay J when the plaintiff applied for interlocutory injunctions freezing the bank account in the principal proceedings. At that

hearing Ms McGinn handed to his Honour a document in the form of a Cross-Summons initiating cross-claim proceedings. The cross-defendants named in the Cross-Summons were Clisdell, as first cross-defendant, Polczynski Lawyers, as second cross-defendant, and Macquarie Bank Ltd, as the third cross-defendant.

- 42 The relief claimed included orders restraining Clisdell from making any representation that it was the strata manager and from disbursing any moneys held in the trust account operated by the rival faction which was apparently held with Macquarie Bank. It also sought orders restraining Polczynski Lawyers from making any representation that it was the solicitor for the body corporate and an order that the Bank close the account and deliver the proceeds to Ms McGinn.
- 43 Lindsay J made some observations in the course of the hearing about the difficulties with some aspects of this proposed cross-claim and Ms McGinn did not press for leave to file that particular document. Instead, leave was granted to Ms McGinn to file a cross-claim in due course. It was pursuant to this leave that Ms McGinn filed the Statement of Cross-Claim with which I am concerned, on 16 November.
- 44 As I have mentioned, on 20 November the matter was before the Registrar in Equity. According to an affidavit of Ms McGinn, which was not disputed, counsel retained for Polczynski Lawyers and therefore acting on behalf of the first, second and third cross-defendants, made some observations, the details of which are not clear, about Ms McGinn's cross-claim and indicated that defences would be filed in accordance with the Rules. The Registrar was invited to adjourn the proceedings for further directions in early February 2018.
- 45 As I have said, no defences were filed and there is no evidence to explain why that was not done. Instead, as I have described, at various points after the directions hearing in early February the cross-defendants made application to have the Statement of Cross-Claim struck out.
- 46 The cross-defendants have been successful in these proceedings and orders for costs must be made in their favour on the various applications with which the Court has dealt. But I do not consider that the issues raised by those

applications are sufficiently distinguishable from those which arise on the cross-claim to warrant an order that the costs be assessable forthwith. Many of the arguments advanced on behalf of the cross-defendants concerning the way in which the cross-claim has been conducted would be equally applicable to the costs of the cross-claim as a whole.

47 It is true that on the conclusions which I have now reached, the Statement of Cross-Claim was in a hopeless form and the filing of that document has caused nothing but prejudice and delay resulting in wasted costs, but I do not think it appropriate to award indemnity costs against Ms McGinn.

48 It is clear in retrospect that Lindsay J did not have in mind anything like the defamation claim which was filed by Ms McGinn when his Honour granted leave to her to file a Statement of Cross-Claim on 9 November. His Honour would have contemplated a cross-claim claiming relief along the lines of that in the proposed document which Ms McGinn showed his Honour, albeit that that particular formulation probably could not have been sustained. Had the matter been raised with his Honour, I have no doubt that his Honour would have disallowed the cross-claim. Alternatively, an order could have been made under s 54 of the *Supreme Court Act* such as I now propose to make.

49 Ms McGinn is at fault for having brought an inappropriate cross-claim which is not properly pleaded but the costs could equally have been avoided, or at least minimised, if the cross-defendants had taken the steps that I have suggested. Instead, as I have described, the first, second and third cross-defendants expressly indicated that they would file defences in accordance with the Rules and they did not do so. For those reasons, I consider that special costs orders against Ms McGinn on the applications are unwarranted.

50 The orders of the Court are:

- (1) The cross-claimant's notice of motion of 18 December 2017 is dismissed.
- (2) The Statement of Cross-Claim is struck out.
- (3) Order that the proceedings on the first cross-claim be transferred to the Common Law Division and direct that they be entered in the Defamation List.

(4) Order that the cross-claimant pay the costs of the cross-claimant's motion dated 18 December 2017; the first, second and third cross-defendants' costs of their notice of motion dated 8 March 2018, and the fourth cross-defendant's costs of his notice of motion dated 26 February 2018.

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