DEFTEROS v GOOGLE INC and Another

John Dixon J
1 March, 4 April 2017
[2017] VSC 158

Defamation — Pleadings — Publication — Internet search engine — Primary publication — Secondary publication — Participation in a business — Joint tortfeasors — Conducing publication.

Practice and procedure — Summary judgment application — Whether cause of action pleaded had any real prospect of success — Civil Procedure Act 2010 (Vic) s 63 — Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 23.01.

The plaintiff claimed damages for defamation against Google Inc and Google Australia Pty Ltd (**Google Australia**) in relation to the alleged publication of a search result in response to the search term 'George Defteros' conducted on Google Inc's internet search engine, and an article displayed by following a link provided in the search results.

The plaintiff pleaded that Google Australia was liable for the defamatory matter as primary publisher, by participating in the business of Google Inc conducted in Australia; alternatively that it was liable as a secondary publisher, by participating in that business and by its failure then to remove the matter when on 'notice' of the web results.

The plaintiff pleaded that Google Inc had complete control over the content of search results appearing on the Google sites, and made editorial decisions and programmed algorithms that determined the indexation, importance, ranking, removal, and blocking of web page content in response to user queries. The plaintiff pleaded that Google Australia participated in the business of Google Inc conducted in Australia, and was thereby liable as a publisher of material produced by Google Inc. Google Australia adduced evidence that the extent of its involvement in the business of Google Inc was providing sales, marketing, advertising, research and development services, and receiving remuneration for those services.

Google Australia applied for summary dismissal. Google Australia submitted it did not own or control the Google search engine, and was incapable of preventing similar search result from being returned in response to queries by Google search engine users.

Held, allowing the application:

(1) The pleaded facts could not establish that Google Australia was a joint tortfeasor with Google Inc.

(a) To constitute joint tortfeasors, two or more persons must engage in concerted action to a common end in committing the tort. The critical element was that those participating in the tort were acting in furtherance of a common design. There must be a concurrence in the acts causing damage, not a mere parallel coincidence of separate acts causing damage. [46]–[48].

The Koursk [1924] P 140, 152, 156, 159–60; *Thompson v Australian Capital Television Pty Ltd* (2009) 238 CLR 460, 580–1 applied.

(b) In defamation proceedings, the inquiry as to whether defendants acted in concert was focused on the act of publication as the act at the

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heart of the tortious conduct. The term 'published' is used without reference to the precise degree to which the defendant has been instrumental in publication. A defendant is instrumental in publication only if he or she intentionally lent assistance to its existence for the purpose of it being published. [49]–[53].

Webb v Bloch (1928) 41 CLR 331; *Dow Jones v Gutnick* (2002) 210 CLR 575 applied.

(2) The pleaded facts could not establish that Google Australia was a secondary or subordinate publisher with Google Inc.

(a) A simple provider of an internet search engine could only be liable as a subordinate publisher who, having unwittingly participated in the chain of communication or distribution of defamatory material from its originator to the person who perceived it, received notice of the allegedly defamatory material and, being in a position of control to alter or remove it, did not do so. At that point, a search engine provider might be taken to have ratified or acquiesced in the further dissemination of the material. [58]–[60].

Google Inc v Trkulja [2016] VSCA 333 applied.

Trkulja v Google (No 2) [2010] VSC 490 distinguished.

(b) The plaintiff did not plead material facts that, if proved at trial, showed that Google Australia participated in any degree as an accessory to the publication, or by any means whatever contributed or conduced in the chain of communication by which defamatory material passed from its originator to a third party who perceived it, in furtherance of a common design with Google Inc. The mere involvement of Google Australia in the business of Google Inc could never, without something more, amount to participation in the publication of allegedly defamatory matter because participation in a business does not equal participation in an act of publication by that business. [62]–[73].

Tamiz v Google Inc and Google UK Ltd [2012] EWHC Civ 449; *A v Google New Zealand* [2012] NZHC 2352; *Rana v Google Australia Pty Ltd* [2013] FCA 60 referred to.

Dar al Arkan Real Estate Development [2013] EWHC Civ 1630; *Dank v Whittaker (No 1)* [2013] NSWSC 1062; *Dank v Cronulla* [2014] NSWCA 288 distinguished.

Application for summary judgment

This was an application by the second defendant for summary judgment, dismissing the claims against it on the ground that the claims had no real prospect of success. The relevant facts are set out in the judgment.

E J Batrouney for the plaintiff.

W A Harris QC with *L De Ferrari* for the defendants.

Cur adv vult.

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1 The plaintiff, Mr George Defteros, claims damages for defamation against Google Inc and Google Australia Pty Ltd in relation to the alleged publica-

tion of search results pages by Google Inc's internet search engine.[1] The second defendant, Google Australia Pty Ltd (**Google Australia**), applied for summary dismissal of the claims against it.

2 The allegedly defamatory publications are defined as two web pages. The first publication is a reproduction of the first page of the search results displayed by the Google search engine in response to the search term 'George Defteros' when that search was performed on 22 November 2016. The second publication is an article dated 18 June 2004 entitled 'Underworld loses valuable friend at court' and making reference to the plaintiff that was displayed by following the link provided in the search results. These two web pages are defined by the plaintiff's statement of claim as **the Web Matter**.

3 The key issue on this application was whether the plaintiff's claim that Google Australia is a publisher of the Web Matter is one which has a real prospect of success.

4 For the reasons that follow, Google Australia is entitled to summary dismissal.

The pleadings

5 The plaintiff relied on the statement of claim as filed for the application. The plaintiff's pleaded claim against the first defendant, Google Inc, as owner and operator of the Google search engine and associated websites, was not put in issue. As the Court of Appeal has recently confirmed in *Google Inc v Trkulja*,[2] that Google Inc may be held liable as a publisher of search results on its websites,[3] that claim is not fanciful.

6 The plaintiff alleged, and it may be assumed for the purposes of this application, that in its natural and ordinary meaning the Web Matter carried three imputations that were defamatory of the plaintiff.

7 It is convenient to now set out the relevant parts of the statement of claim.

> 2. The First Defendant [Google Inc] is and was at all material times:
>
> (a) ...
>
> (b) the owner and operator of a global internet business, including search engines accessible at the following websites (collectively, the Google Sites):
>
> (i) http://www.google.com.au and associated search results webpages; and

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1 The plaintiff has foreshadowed an application to amend his pleading to refer to 'Google Inc' as the first defendant, having become aware that 'Google Inc LLC' is not the correct name of the corporate entity in question.

2 [2016] VSCA 333.

3 Ibid [348]–[349], [352]–[353], [357]. Earlier cases have established that Google Inc can be liable as a publisher of material on the Internet accessible via the Google search engine after notification by a complainant and the lapse of a reasonable amount of time to allow for removal: *Duffy v Google Inc* (2015) 125 SASR 437, 496–7 [207], [210]; *Trkulja v Google Inc (No 5)* [2012] VSC 533 [30]–[31].

(ii) http://www.google.com and associated search results web-pages.

3. The Second Defendant [Google Australia] is and was at all material times:
   (a) a company incorporated in Australia and capable of being sued; and
   (b) a proprietary company that is wholly owned by Google International LLC itself a wholly owned subsidiary of the First Defendant.

8 The plaintiff's claim against Google Inc as publisher is set out in paragraphs 5 and 6:

5. In operating the Google Sites, the First Defendant:
   (a) uses automated computer programs to navigate the World Wide Web;
   (b) by means of its computer programs causes to be copied and stored on the First Defendant's servers an index of the World Wide Web and, when a user performs a search on the Google Sites, the index is searched and the results are downloaded by the user's internet browser;
   (c) has complete control over the content, in the form of search results, that appears on the Google Sites;
   (d) makes editorial decisions about what content will be indexed on the Google Sites in response to search queries;
   (e) provides its determination and opinion about the relative importance to users of the Google sites (relevance) of webpages in response to such queries;
   (f) makes editorial decisions about the ranking of websites on its search results pages;
   (g) makes editorial decisions about what content will be removed from the Google Sites;
   (h) makes editorial decisions about what content will be blocked from the Google Sites;
   (i) programs its algorithms to alter the page rank of websites on [the] local Google Sites; and
   (j) programs its algorithms to block specific terms or phrases from producing content on the Google Sites.
6. Between at least 1 March 2016 and 29 November 2016, the First Defendant published, of and concerning the Plaintiff, the matters set out in Annexure A to this Statement of Claim (the Web Matter).

[Particulars of the web pages complained of follow.]

The plaintiff then pleads notification to Google Inc of the allegedly defamatory material, and Google Inc's subsequent failure to remove it from identification by the search engine.

9 Only four paragraphs plead a case against Google Australia. Extracted in full, the key paragraphs read as follows:

4. At all material times, [Google Australia] participated in the business of [Google Inc] conducted in Australia and is thereby liable as a publisher of material published by [Google Inc] in Australia.

Particulars

(a) [Google Australia] provides its search engine facility and other services to internet users in Australia on www.google.com.au/images and www.google.com.au;

(b) [Google Australia] facilitates the operation of [Google Inc] in Australia, including by arranging advertising, monitoring removals, providing technical assistance locally, and marketing [Google Inc]'s operations and products;

(c) Full particulars will be provided following discovery given by the Defendants.

...

8. By reason of the matters pleaded in paragraph 4 above, [Google Australia] was a publisher of the Web Matter.

...

13. [Google Australia] was notified of the publication of the Web Matter by no later than 1 August 2016.

Particulars

The plaintiff refers to the concerns notice addressed to the First and Second Defendants dated 1 August 2016.

14. Further and/or alternatively to paragraph 8 above, by reason of the matters pleaded at paragraphs 4 and 13 above, after [Google Australia] received notification of the Web Matter and failed to arrange its removal within a reasonable time, it became a publisher of the Web Matter.

10 In summary, the plaintiff pleads that Google Australia is liable for the defamatory matter:

(a) as primary publisher, on the basis of participation in the business of Google Inc conducted in Australia; and

(b) in the alternative, as a secondary publisher, on the basis of participation in the business of Google Inc conducted in Australia, 'notice' of the Web matter, and failure to arrange its removal.

11 The pleadings in respect of loss and damage refer only to Google Inc.

Summary judgment: Applicable principles

12 The test for summary judgment is whether the respondent to the application, in this case the plaintiff, has no real prospect of success: *Civil Procedure Act 2010* (Vic), s 63.

13 In *Lysaght Building Solutions v Blanalko Pty Ltd*, the Court of Appeal stated the applicable principles —

(a) the test for summary judgment is whether the respondent to the application has a 'real' as opposed to a 'fanciful' chance of success;

(b) the test is to be applied by reference to its own language and without paraphrase or comparison with the 'hopeless' or 'bound to fail' test

essayed in *General Steel Industries Inc v Commissioner for Railways (NSW)*,[4] although it should be understood that there might be cases which although not hopeless or bound to fail do not have a real prospect of success; and

(c) the power of summary dismissal is to be exercised with caution unless it is clear that there is no real question to be tried, regardless of whether the application is made on the basis that the pleadings fail to disclose a reasonable cause of action, or on the basis that the action is frivolous or vexatious or an abuse of process, or where the application is supported by evidence.[5]

Evidence relied upon by the parties

14 Google Australia relied upon two affidavits of its solicitor, Mr Kevin Lynch. The plaintiff relied upon an affidavit of his solicitor, Mr Kevin Dorey. Neither deponent was cross-examined.

15 Mr Lynch deposed almost exclusively on the basis of information and belief. The plaintiff objected that Mr Lynch's evidence ought not be viewed as uncontested, complaining that he had been deprived of the opportunity to cross-examine the sources of the information. Further, Mr Lynch's second affidavit was late-served. An adjournment was not sought.

16 Evidentiary issues of this kind not infrequently arise on strike out and summary judgment applications. The prospect of contested facts was foreseeable and the plaintiff could have taken steps in advance of the hearing to put relevant facts in issue. If the application turned on contested facts, summary judgment would be inappropriate. The question was rather one of whether there was any proper basis for alternative allegations of material facts to be made by amendment. In the circumstances of the plaintiff expressing no intention to amend the pleading and putting no different allegations about facts that appear to be exclusively in the knowledge of the Google Australia employees who were the source of Mr Lynch's belief, I was satisfied that I ought to permit Google Australia to rely on the statements of fact set out in Mr Lynch's affidavit.[6]

Google Australia's submissions

17 Google Australia submitted that the plaintiff's claim as against it has no real prospect of success, because Google Australia does not own or control the Google search engine and does not have any capacity to prevent a similar search result from being returned in response to a given query by a user of the Google search engine. In substance, the plaintiff alleged in paragraph 5 of its pleading that Google Inc had those rights and capacities.

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4 (1964) 112 CLR 125.
5 (2013) 42 VR 27, 40 [35] (Warren CJ and Nettle JA, Neave JA agreeing).
6 See r 22.04(3).

18 Mr Dorey deposed to matters solely directed to the particulars given of the allegation in paragraph 4 of the statement of claim, that Google Australia 'participated in the business of [Google Inc] conducted in Australia'. At its highest, the plaintiff might establish that Google Australia —

(a) provides sales and marketing support services to Google Inc;

(b) provides advertising services which, when made use of, may result in AdWords Ads being presented to a user of the Google search engine;

(c) provides research and development services to Google Inc; and

(d) receives remuneration in respect of the provision of those services from its parent company.

19 Google Australia, by Mr Lynch's second affidavit, accepted these four matters for present purposes, but it contended that on no view could such matters establish a foundation for its liability as a publisher — either primary or subordinate — of the Web Matter. Relying on *Google Inc v Trkulja*,[7] to demonstrate that at most a search engine's liability can only be as a secondary publisher, that part of the plaintiff's case that alleged Google Australia was a primary publisher was fanciful.

20 Google Australia further submitted that there was, in any case, no authority in the context of more traditional methods of publication for the proposition that when a person provides either goods (eg ink, paper, typewriters, sound or video equipment) or services (eg financial, marketing, legal, payroll, leasing of offices or of equipment, resale of advertising) to a primary publisher (eg a newspaper, a film producer, a television station), that person thereby becomes liable for what is published by the entity that received those goods and services. Mere involvement in the publisher's business could never, without something more, amount to participation in the publication of allegedly defamatory matter, because participation in a business is not to be taken as participation in an act of publication by that business.[8]

21 Notice to Google Australia is accepted for present purposes, but it is the fact, consistently with the plaintiff's allegations against Google Inc, that Google Australia —

(a) does not in any way own, operate or control the Google web search;

(b) is a subsidiary of Google Inc; and

(c) has no capacity to remove or block a URL, such as to prevent any future search result for the webpage with that URL being returned.

22 The plaintiff's case is based on a misconception that the matters identified at paragraph 18 above provide a sufficient basis to establish Google Australia's

7 [2016] VSCA 333 [349], [354], [357].
8 Citing *Webb v Bloch* (1928) 41 CLR 331, 363; *Google Inc v Trkulja* [2016] VSCA 333 [348]–[349].

liability as a secondary publisher. Plainly however, none of those matters demonstrate the requisite capacity to prevent search results being returned, nor do they support an inference that such capacity exists. The plaintiff pleaded elsewhere that Google Inc has complete control of the search engine. In fact, the uncontested evidence shows that Google Australia does not have any capacity to prevent results such as those complained of from being returned by the search engine. The plaintiff's alternative basis that Google Australia is a secondary publisher has no real prospect of success. JOHN DIXON J

23 Google Australia noted recent cases where courts, presented with an application for summary judgment or equivalent interlocutory relief, have found that a subsidiary of Google Inc was not the publisher of any allegedly defamatory content returned by the Google search engine.[9]

24 In *Rana v Google Australia Pty Ltd*,[10] the Federal Court resolving essentially the same question against the plaintiff[11] and relying on NZ and UK authority,[12] held that there was no reasonable prospect of a plaintiff proving that Google Australia owned the domains in question or that it had the ability to control or direct the conduct of Google Inc.[13]

25 In *A v Google New Zealand*,[14] Google New Zealand summarily defeated a claim in respect of allegedly defamatory statements accessible through the search engine domain google.co.nz on the basis that it was the wrong defendant. The court concluded that Google Inc, not Google New Zealand, operated the search engine,[15] and that the plaintiff had failed to show that the defendant had the ability to terminate the continued publication of the material.[16]

26 In *Tamiz v Google Inc and Google UK Ltd*,[17] the plaintiff sued in defamation for publications of statements on a blogging platform which formed part of a service provided by Google Inc. Dismissing the claim as against Google UK Ltd, Eady J held that:

> Google UK Ltd simply carries on a sales support and marketing business within this jurisdiction. It does not operate or control Blogger.com and therefore has been joined in these proceedings inappropriately. This was explained in a defence served on 8 December 2011. The English company takes no part in the application before me.[18]

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9 In Australia, *Rana v Google Australia Pty Ltd* [2013] FCA 60 (***Rana***); *Ghosh v Google Australia Pty Ltd* [2013] NSWDC 146; in New Zealand, *A v Google New Zealand* [2012] NZHC 2352; and the UK, *Tamiz v Google Inc and Google UK Ltd* [2012] EWHC Civ 449.

10 [2013] FCA 60.

11 Ibid [30]–[41].

12 See n 9 above.

13 [2013] FCA 60 [40].

14 [2012] NZHC 2352.

15 Ibid [44].

16 Ibid [45].

17 [2012] EWHC Civ 449.

18 Ibid [4].

The plaintiff's submissions

27 The plaintiff submitted that it would be premature to order summary dismissal of its claim against Google Australia at this early stage in the proceeding. In cases such as the present, involving difficult questions of publication on the internet the appropriate approach is to apply first principles and the appropriate starting point is *Webb v Bloch*.[19]

28 First, the plaintiff accepted that the relevant domain names, search engine and related products belonged to Google Inc, but he submitted that Google Australia's participation in the work of the search engine server was a separate and distinct question, as Callinan J identified in *Dow Jones v Gutnick,* when his Honour stated:

> They described the Internet as a set of interconnections among computers all over the world to facilitate an exchange of messages. Using their computers, people can communicate with one another, and gain access to information. They claimed that it was a unique telecommunications system defying analogy with pre-existing technology. The description however, by the appellant of the server as passive is inaccurate. It also overlooks the legal significance, indeed the essential role of all participants in, and enablers of, the dissemination of defamatory matter which is to be found in longstanding jurisprudence of this country.[20]

29 Secondly, taking issue with Google Australia's characterisation of the primary/secondary publisher distinction, the plaintiff submitted that Google Australia's ability or capacity to assert 'control' over the publication of the Web Matter was part of, but not the sole touchstone for, establishing its liability as a publisher. Something less than total control could amount to participation in a tortious activity for the purposes of establishing joint liability. The plaintiff disputed that it was an established proposition that control over publication is necessary and that question ought to be decided on evidence following a trial.

30 The plaintiff submitted that while Google Australia contended it had no control over the operation of the search engine, the appropriate test is as stated by Isaacs J in *Webb*, when his Honour refers to 'conducing' in the publication.[21]

31 The plaintiff relied on a number of additional cases on this question. He submitted that the approach taken in the English case of *Dar al Arkan Real Estate Development*[22] was instructive. In that case, Smith J refused to grant summary dismissal of a defamation and malicious falsehood proceeding because it was arguable that the respondent was a joint tortfeasor by virtue of its alleged participation by the provision of public relations services in the creation and publication of a website and an email. Smith J applied general principles in holding that there are two requirements for participation in a

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19 (1928) 41 CLR 331 (***Webb***).
20 (2002) 210 CLR 575, 647 [180].
21 See [49] below.
22 [2013] EWHC Civ 1630.

tort (including defamation), namely —

(a) a common design that one of the participants should do the act(s) said to be tortious; and

(b) the participator must join in an act or acts in furtherance of the common design which are more than de minimus and do not merely facilitate the tort, without it being necessary that the participator do something 'essential' or of 'real significance'.[23]

32 In *Dank v Whittaker (No 1)*,[24] McCallum J accepted as correct the statement that:

> In order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent.[25]

33 On appeal, in *Dank v Cronulla*,[26] Ward JA observed:

> The difficulty with these proposed grounds of appeal is that they are predicated on her Honour having applied some new form of control test, whereas, properly understood, what her Honour was doing was applying the test in *Webb v Bloch* and *Theiss;* namely that, for there to be liability as a publisher of defamatory material, the defendant must in some way knowingly 'conduce' and be responsible for the publication complained of.[27]

34 The plaintiff submitted that, applying first principles, the requirement for control, or capacity to remove after notice, was not strictly necessary. Although unable to offer a practical example, the plaintiff contended that even if a defendant has no control over a publication they might still knowingly conduce or be responsible for it by somehow participating more broadly in the act of publication.

35 Pausing here, these NSW decisions are not addressing the issue of whether in the context of secondary publication, a person receiving notice of alleged defamatory matter has the capacity to exercise control over its continuing publication. The issue was whether the defendant was complicit as a primary publisher.

36 Finally, the plaintiff strongly submitted that I should follow an interlocutory decision of Beach J, as he then was, in *Trkulja v Google (No 2)*.[28] Google Australia brought a similar application for strike out and summary judgment of a plaintiff's defamation claim against it. Although the application was abandoned, Beach J considered its merits, suggesting that Google Australia would not have been entitled to summary judgment, rather the plaintiff needed to provide further and better particulars of the publication allegations against Google Australia.

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23 Ibid [30].
24 [2013] NSWSC 1062.
25 Ibid [22].
26 [2014] NSWCA 288 [127]–[142].
27 Ibid [137] (Emmett and Gleeson JJA agreeing).
28 [2010] VSC 490.

37 The plaintiff relied on a passage where, after reviewing *Webb*, Beach J stated:

> In essence, subject to the defence of innocent dissemination available to distributors, all those who might be described as in 'any degree accessory' to the publication are liable in defamation. This includes all participants in, and enablers of, the dissemination of defamatory material.
>
> The plaintiff contended that this line of authority showed a sufficient basis for the allegation of publication made against Google Australia, so that Google Australia was not entitled to summary judgment. There was force in this submission. However, there was also some force in Google Australia's submission that this line of authority is not presently relevant because the plea of publication in this case is based on an allegation of ownership of Google and/or the Google site — rather than some form of accessorial conduct which is capable of being described as a form of publication. The plaintiff's answer to this submission was that the allegation of publication against Google Australia was not limited to one involving the ownership or operation of Google or the Google Site. The plaintiff contended that his allegation of publication was also based upon the allegation that Google Australia operated and provided on-line services including web text searches and web image searches and made available and provided the results of web searches.
>
> Whilst it might have been contended that the allegations that Google Australia owned or operated Google and/or the Google site are untenable on the fact of the [affidavit relied upon by Google Australia], the same cannot be said about the broader allegation of publication. The real difficulty with the statement of claim is the lack of a plea of any facts which might establish that Google Australia was an enabler or 'in any degree accessory' to the publications.[29]

38 The plaintiff submitted that by parity of reasoning, Google Australia's reliance on *Rana* and similar decisions was misplaced. Those cases had been decided on the basis that there was no reasonable prospect of proving that Google Australia 'owns the domains in question, or that it has the ability to control or direct the conduct of Google Inc'.[30] The allegations in the present case were of a different kind and the plaintiff submitted the particulars substantiate the allegation that Google Australia participates in the provision of content via the Google search engine in a broader way than was considered in those cases. The extent of Google Australia's participation in the dissemination of material via the Google search engine demonstrated by the particulars to paragraph 4 of the statement of claim is sufficient to show that the contention that it acted in furtherance of a common design has a real prospect of success at trial.

39 The plaintiff submitted that this conclusion was more readily drawn because Google Australia failed to address a number of relevant matters. Google Australia —

(a) only went so far as to state that it does not 'own, control or operate' the Google search engine function, and did not deny that Google Australia participated in the provision of content via that function;

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29 Ibid [23]–[25] (citations omitted).

30 See *Rana* [2013] FCA 60 [40].

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(b) did not address sufficiently or at all the particulars of participation in the business of Google Inc in paragraph 4, namely that Google Australia:

(i) arranges advertising for and on behalf of Google Inc;

(ii) provides technical assistance to Google Inc locally; and

(iii) markets Google Inc's operations and products;

(c) did not completely disavow a role for itself in the removal process, even if only as an advisory role providing information to Google Inc to make its decision; and

(d) did not address whether, or if so how, Google Australia responded to the plaintiff's notification on 1 August 2016.

40 These criticisms of Google Australia's evidence on the application miss the point. The focus must be on the allegations made by the plaintiff on the basis that it is assumed such allegations can be proved at trial.

41 The plaintiff submitted that Google Australia operates a substantial business in Australia and earns significant revenue from Google Inc's operations in Australia including by way of AdWords and AdSense advertising, as well as providing marketing, research and development, and service support for Google Inc locally. The plaintiff's essential proposition was that Google Australia participates in the business of Google Inc in the ways particularised in paragraph 4, and by that participation it acted together with Google Inc in the provision of content via the Google search engine function. In these circumstances, it is not fanciful to contend that Google Australia is a publisher of the allegedly defamatory material because it participated in the search engine function in that broad way.

42 The plaintiff also submitted that Google Australia participates in a business model that allows all decisions on removals to be made by Google Inc in the USA, from which it may tenably be suggested that Google Australia has 'assented' to the continuing publication of the allegedly defamatory material.

43 To the extent that uncertainty remains about the actual extent of Google Australia's role in the operation of Google Inc's search engine, the plaintiff requires discovery and other pre-trial processes to be completed before he is able to identify and particularise the full extent of its participation in the publication of the allegedly defamatory material in this case. The court should not presently conclude that the plaintiff has no real prospects of success until those processes are complete and the plaintiff has the opportunity to identify his best case. Consistently with the finding of Beach J in *Trkulja (No 2)*, this is a clear case where evidence needs to be tested under proper trial conditions after the provision of discovery and other pre-trial processes

have been completed.

44 Finally, the plaintiff raised concerns that Google Inc may not consider itself amenable to the jurisdiction of Australian courts, based on earlier cases and some earlier correspondence between the parties.[31] Google Inc had not proffered any undertaking to satisfy any judgment against it in the proceeding. The plaintiff submitted that the Court ought not, by acceding to the application for summary judgment, allow a situation whereby an Australian plaintiff would be potentially denied a remedy in respect of an actionable defamation under Australian law.

Analysis

45 The plaintiff's written submissions belatedly suggested that the defendants were sued as joint tortfeasors, a claim that is not expressed in the pleadings. On this submission, paragraph 4 of the statement of claim lies at the core of the allegations against Google Australia in this case. By that paragraph, it is said that because at all material times Google Australia 'participated in the business' that Google Inc conducted in Australia, it is thereby liable as a co-publisher of the Web Matter with Google Inc, which is to say that Google Australia is a joint tortfeasor.

46 In defending the pleading against Google Australia, the plaintiff misunderstands the concept of joint liability in tort. The business conducted by Google Inc cannot be described as its conduct that can establish publication of the Web Matter. The inquiry is more focused and thus more limited. So much becomes clear when the applicable principles are identified.

47 In *Thompson v Australian Capital Television Pty Ltd*,[32] Brennan CJ, Dawson and Toohey JJ explained what is meant by that concept:

> The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage. As was said in *The 'Koursk'*, for there to be joint tortfeasors, 'there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage ...' [T]o constitute joint tortfeasors two or more persons must act in concert in committing the tort. Torts of all kinds may be joint and defamation is no exception.[33]

48 A tort may be imputed to several persons or entities as joint tortfeasors where there is evidence of concerted action, that is, 'concerted action to a common end',[34] and not mere parallel activity or 'a coincidence of separate acts by which their conjoined effect cause[d] damage'.[35] The critical element is that those participating in the commission of the tort acted in furtherance

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31 In *Bleyer v Google* [2014] NSWSC 897 [14], [89], Google Inc advanced an argument that any judgment obtained against it could not be enforced in the US.

32 (1996) 186 CLR 574 (***Thompson***).

33 Ibid 580–1.

34 *The Koursk* [1924] P 140, 152 (Bankes LJ), 156 (Scrutton LJ).

35 Ibid 159–60.

of a common design. Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, although it is not necessary that they should realise they are committing a tort.[36] All persons acting in pursuance of a common end, being so identified with each other, are responsible for the entire consequences of their concerted action. JOHN DIXON J

49 The seminal explanation of the notion of concerted action in the act of publication in the context of the tort of defamation is that given by Isaacs J in *Webb v Bloch*:

> The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrumental to such publication; since, *if he has intentionally lent his assistance to its existence for the purpose of it being published,* his instrumentality is evidence to show a publication by him.[37]

And later:

> All who are, are to be considered as *principals in the act of publication*: thus if one *suggest[s]* illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.[38]

Isaacs J concluded that it was a third party who was, in fact:

> the 'real author', the master mind, and the defendants, for their own independent objects, no doubt, were the real 'intermediate agents' to disseminate the libel. They cannot employ the master mind for the very purpose, accept its suggestions, approve and disseminate its production, and then disclaim its malice.[39]

50 Isaacs J was focusing the inquiry on the act of publication, because it is the act of publication that lies at the heart of defamation as tortious conduct. In *Dow Jones v Gutnick*, the High Court stated:

> Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act — in which the publisher makes it available and a third party has it available for his or her comprehension.[40]

51 The leading textbooks also address liability for co-publication in broad and straightforward terms. For example, *Collins on Defamation* states:

> Publication occurs when a person intentionally or negligently takes part in or authorises the communication of material.
>
> ...
>
> At common law, responsibility for publication extends beyond the authors of defamatory statements to all those who composed and participated in the preparation and communication of the statement, such as typists, editors, media pro-

36 *Thompson* (1996) 186 CLR 574.
37 (1928) 41 CLR 331, 363–4 (emphasis in original).
38 Ibid 364.
39 Ibid 365.
40 (2002) 210 CLR 575, 600 [26] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

prietors, the moderators of online content, printers and television affiliates.[41]

52 *Gatley on Libel and Slander* states:

> The person who first spoke or composed the defamatory matter (the originator) is of course liable, provided he intended to publish it or failed to take reasonable care to prevent its publication. However, at common law liability extends to any person who participated in, secured or authorised the publication …
>
> In accordance with general principle, all persons who procure or participate in the publication of a libel, and who are liable therefore, are jointly and severally liable for the whole damage suffered by the claimant. Thus in the case of the publication of the newspaper journalist, editor and publisher are all joint tortfeasors.[42]

53 Thus, a publisher is one who makes defamatory material available to another who comprehends or perceives it. The text writers also focus correctly on 'the communication of material' and procuring or participating 'in the publication of a libel'. There will be many aspects of the business of a publisher that are unrelated to the actions of communication or publication, a point well made by Google Australia in submissions. Those other aspects are irrelevant.

54 Beach J in *Trkulja (No 2)* was not suggesting otherwise. His Honour observed that the issue was that publication as pleaded in that case was based on an allegation of ownership of Google and/or the Google site, rather than some form of accessorial conduct that was capable of being described as a form of publication. Mr Trkulja submitted that publication against Google Australia could be alleged by reference to its conduct in operating and providing on-line services including web text searches and web image searches and making available the results of web searches. Beach J considered that the real difficulty with the statement of claim in that case was the lack of a plea of any facts which might establish that Google Australia was 'an enabler or in any degree accessory' to the publications. On the basis of the material before him, Beach J ordered further particulars be provided of publication by Google Australia and plainly intended that such further particulars identify how it was to be said that Google Australia participated, whether in a primary or an accessory way, in the publication.

55 The UK case upon which the plaintiff relied, *Dar al Arkan Real Estate Development*,[43] also does not assist the plaintiff, as it involved a public relations firm found to be joint tortfeasor in the publication of material which was calculated to harm the plaintiff, based on findings that the firm had participated in an orchestrated campaign for that purpose, including via the creation of a website. That is a classic example of participants acting in furtherance of the wrong by a concerted effort in furtherance of a common design.

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41 Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) 69–70 [4.02], 79–80 [4.36].

42 Clement Gatley, *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) 199 [6.10], 200 [6.11].

43 [2013] EWHC Civ 1630.

56 Three things must be established to identify a publisher of defamatory material. JOHN DIXON J

57 First, a publisher must participate in the act of publication, that is, participate in any degree accessory to the publication or by any means whatever lead or contribute (conduce) in the chain of communication by which the defamatory material is passed from its originator to a third party who receives or perceives it. Secondly, a publisher must intend to publish the material to third parties or be reckless as to whether his or her conduct will cause that to occur. Thirdly, there is a well-established distinction between primary and secondary (or subordinate) publishers, the latter intending to publish material but being potentially unwitting as to its content.

58 A subordinate publisher becomes liable when put on notice of the existence of defamatory material and, being in a position to exert control over its further dissemination, fails to do so, at which point that person may be taken to have ratified or acquiesced in the further dissemination of the material, thereby becoming a participant in publication originated by somebody else.

59 The scope of a search engine's liability in these circumstances was recently considered by the Court of Appeal in its decision in *Google Inc v Trkulja*:

> On first principles, we consider that a search engine, when it publishes search results in response to a user's enquiry, should be accounted a publisher of those results — and in this we include autocomplete predictions. It is a participant in a chain of distribution of material.
>
> We also consider that a search engine should be accounted a secondary publisher. It is true that its automated response picks up words used in the search term and in identified webpages. But that adds nothing to what has already been published. So far as the repetition rule has any part to play, it does not lead to a conclusion that the search engine is a primary publisher of content produced by a word search in response to a searcher's inputted query. Google's knowledge of that content is essentially confined to an understanding that the content will have some connection with the inputted search terms. It lacks the characteristics of a primary publisher which Ribeiro PJ described in *Fevaworks*.[44]

60 The question of complicity in the actions or operation of the search engine in response to an inputted search term does not arise. Following on what the Court of Appeal said in *Trkulja,* Google Australia's liability can only be by complicity as a subordinate publisher who, having participated in the chain of communication or distribution of the Web Matter, received notice of the allegedly defamatory material and, being in a position of control to alter or remove it, did not do so.

61 To plead that a defendant was complicit as a subordinate publisher, the plaintiff must allege material facts that, if proved at trial, have real prospects of successfully establishing that Google Australia participated in any degree in the chain of communication or distribution of the Web Matter acting

44 [2016] VSCA 333 [348]–[349] (citations omitted).

in furtherance of a common design, or in pursuit of a common end, with Google Inc.

62 As I will now explain, the pleading does not, and cannot, make those allegations with the consequence that the contention that Google Australia was complicit in the publication by Google Inc of the Web Matter is fanciful.

63 The problem with this pleading is immediately evident.[45] It is not framed in terms of participation in the relevant publication, but rather participation in the business of Google Inc more broadly. Subparagraph (a) is plainly erroneous, inconsistent with paragraph 5 when the allegations are not made in the alternative. That particular cannot be made out. As to subparagraph (b), there are presumably thousands of people and myriad companies participating in the business of Google Inc worldwide in the areas of advertising, marketing, technical assistance, and revenue collection. That aspect of participation cannot render any of them a publisher of material published by Google Inc's search engine because they are not participants in the chain of communication by which allegedly defamatory material passes from its originator to the person who perceives it.

64 Participation in the 'business' of Google Inc, without more, cannot equal participation in publication, without which Google Australia cannot be liable as publisher. Paragraph 8 of the statement of claim, which contains the bare plea of publication against Google Australia is not attended by a single particular. The particulars provided to paragraph 4 and the additional material relied on in the plaintiff's solicitor's affidavit provide no further assistance.

65 Accepting that the plaintiff can establish at trial the allegations in paragraph 4 as particularised, it is not open to then say that such allegations could demonstrate that Google Australia participated in the chain of communication or distribution of the Web Matter acting in furtherance of a common design, or in pursuit of a common end, with Google Inc. It would not be open to conclude that Google Australia participated, in any degree, as an accessory to the publication or by any means whatever contributed or conduced in the chain of communication by which the defamatory material passed from its originator to a third party who received or perceived it.

66 The tendentious nature of additional material deposed to by the plaintiff's solicitor, much of which appeared irrelevant,[46] served to further illustrate

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45 I had reservations about an antecedent issue — whether paragraph 4 complies with the basic rules of pleading. It failed to adequately identify the published material to which it relates. The pleader does not make clear whether the material complained of was, on one hand, everything published by Google Inc or just the Web Matter. The application proceeded on the assumption that the pleader intended the phrase 'material published by the first defendant in Australia' to specifically refer to the publication of the 'Web Matter' later alleged, in paragraph 6 of the statement of claim.

46 It included an extract from the Bloomberg news website, a Senate Economics Reference Committee report, and an article published by the *Sydney Morning Herald*.

why the claim was fanciful. If there was evidence to show a connection between Google Australia and the relevant process of publication that might support the contention that Google Australia was, in some way complicit in that process, it could have been included on an information and belief basis. Material that addresses issues such as how the Google entities manage revenue coming from Australia and the locus of taxation of that revenue, is irrelevant to an allegation that Google Australia participated in the publication of the Web Matter. JOHN DIXON J

67 Google Australia addressed the issue of whether the claim against it as a publisher has a real prospect of success at both a pleading and evidentiary level. It was necessary that it do so because the plaintiff also relied on a promise to provide full particulars after completing interlocutory processes. The thrust of Google Australia's contentions was that the legal and commercial relationship between Google Inc and its Australian subsidiary was such that the plaintiff would be able to show relevant complicity. Doubtless further particulars of the way in which a wholly-owned subsidiary participated in the business of its parent might emerge. But such particulars would be irrelevant to the issue.

68 The plaintiff was unable to contradict any of the key assertions made in Mr Lynch's affidavit, and in fact did not dispute any of them. They included the proposition that Google Australia has no ownership of, role in, or control of the relevant provision of the Google search engine function or the domains at which they reside, and has no direct role in the generation of search results or associated URLs, nor any direct ability to correct or remove anything from the material published by Google Inc. The evidentiary basis for the dismissal of the claims in *Rana,* and *A v Google New Zealand* was substantially the same.

69 The plaintiff submitted that Google Australia, by its involvement in procuring advertising revenue, is effectively facilitating Google Inc's operation in Australia and is therefore participating in the search engine function itself. I reject this submission. It cannot sit with the concept that joint tortfeasors act in furtherance of a common design in relation to the tortious wrong, which in defamation is the act of publication. Contributing to the economic environment of profitability in which the search engine is operated cannot advance that connection between the common design and the tortious wrong.

70 Google Australia submitted, and I accept, that such an interpretation could lead to inappropriate consequences. For example, on the plaintiff's contention, if a vendor were to place an advertisement to sell a car in a newspaper, and in the same newspaper an unrelated defamatory article was published, the car vendor, like the newspaper employee who sold the advertising space, would have arguably participated in earning advertising revenue for the newspaper, thereby participating in its business and, at a stretch, in the publication of the defamatory material. Such a result would be plainly

absurd but it is a result avoided on a proper understanding of the applicable principles governing complicity in the act of publication.

71 It is not necessary to delve into the possibility of evidentiary disputes between the parties at trial. The difference between the parties on this application was not a factual contest per se. The parties disagreed about whether it is sufficient to determine that because there is a business relationship between Google Australia and Google Inc of the kind asserted, even taken at its highest, that could, as a matter of law, render it liable as a co-publisher in the circumstances. There is no reasonable basis to suppose that allowing, as the plaintiff puts, for its claim to be further explored and prepared by interlocutory process will produce any different result because the plaintiff's focus on establishing Google Australia's involvement in the business of Google Inc is misplaced.

72 In conclusion, having regard to the role alleged against Google Australia, I am satisfied that the pleadings cannot expose a claim with a real prospect of success that it participated in the chain of communication which constitutes the relevant publication and the allegation that Google Australia published the Web Matter has no real prospect of success.

73 Finally, I do not accept as relevant the plaintiff's concerns as to his ability to enforce any potential judgment against Google Inc if it is eventually found liable in this proceeding.

Conclusion

74 I will allow the second defendant's application for summary dismissal of the plaintiff's claim against Google Australia. I will hear from the parties as to costs.

Solicitors for the plaintiff: *Defteros Lawyers.*
Solicitors for the defendants: *Johnson Winter & Slattery.*

J P WHEELAHAN
BARRISTER-AT-LAW