DISTRICT COURT OF QUEENSLAND

CITATION:	*Asbog Veterinary Services Pty Ltd & Anor v Barlow* [2017] QDC
PARTIES:	**ASBOG VETERINARY SERVICES PTY LTD (ACN 010 316 248) TRADING AS ALBION VETERINARY SURGERY AND EATONS HILL VETERINARY SURGERY** (first plaintiff) and **ALAN STANISLAUS BRIAN O'GRADY** (second plaintiff) **v** **CARRIE BARLOW (AKA CARRIE PARKER-KLEIN)** (defendant)
FILE NO/S:	4809/2014
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2017
JUDGE:	Butler SC DCJ
ORDER:	**1. The application is dismissed.** **2. The plaintiffs have leave to amend the statement of claim in respect of the pleading at para 1(c).** **3. The plaintiffs will file and serve any amended statement of claim on or by 4:00 pm, 3 May 2017.** **4. The costs of the application to be costs in the cause.**
CATCHWORDS:	PROCEDURE – DISTRICT COURT PROCEDURE – Procedure under the Uniform Civil Procedure Rules – defamation action - whether first plaintiff an exempt corporation under the Defamation Act 2005 – application to strike out – application for summary judgement.

COUNSEL:	AJ Newman for the first plaintiff
	J Nott for the defendant
SOLICITORS:	Ferguson Cannon Lawyers for the first plaintiff
	Jason Nott Solicitors for the defendant

[2] By amended application filed 10 April 2017, the defendant seeks orders pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the UCPR") striking out para 1(c) of the plaintiffs' statement of claim and giving judgement against the first plaintiff. Alternatively the defendant seeks summary judgment against the first plaintiff.

[3] The basis upon the orders are sought is that the statement of claim discloses no reasonable cause of action by the first plaintiff and has a tendency to prejudice or delay the fair trial of the proceeding. The application in that regard can be best understood as a submission that the first plaintiff, a corporation, failed to adequately plead its claim to be an excluded corporation under s 9 of the *Defamation Act* 2005 (Qld) ("the Act").

Background

[4] The first plaintiff operated two veterinary surgeries, the Albion Veterinary Surgery and the Eatons Hill Veterinary Surgery. In October 2014 the defendant attended at the Albion Surgery with her dog, which had been attacked and injured by other dogs. The dog was treated and dispensed medications at that surgery.

[5] The first plaintiff invoiced the defendant in the sum of $427 for the services provided. The defendant was dissatisfied with the amount charged. In the period 14-25 October 2014, the defendant made comment on a number of occasions on internet sites including Facebook, Twitter and True Local. The plaintiff maintains that those online comments were defamatory.

The pleadings

[6] In the statement of claim filed 8 December 2014, para 1 reads as follows:

> "1. At all material times in this proceeding, the first plaintiff:
>
> (a) was, and is, a duly incorporated company capable of suing;
>
> (b) operated veterinary practices at Albion, known as Albian Veterinary Surgery ("the Albion Vet Surgery"), and Eatons Hill, known as the Eatons Hill Veterinary Surgery;
>
> (c) was, and is, an excluded corporation pursuant to s 9(2)(b) of the *Defamation Act* 2005 (Qld)."

[7] The further amended defence filed 18 January 2017 at para 1 reads as follows:

> "1. As to paragraph 1 of the statement of claim, the defendant:
>
> (a) …
>
> (b) …
>
> (c) in respect of the allegations pleaded at paragraph 1(c):
>
> (i) does not admit the allegations and believes they cannot be admitted because despite

reasonable enquiries the defendant remains uncertain as to their truth or falsity;

(ii) says in October 2014, at the date of the alleged defamatory publications, the first plaintiff operated two veterinary practices at both Albian and Eatons Hill such that it is likely the first plaintiff employed 10 or more persons."

[8] The amended reply filed on behalf of the plaintiffs on 13 April 2017 relevantly reads as follows at para 2(d):

> "(d) as to paragraph 1(c)(ii) of the further amended defence, the plaintiffs deny the allegation and repeat and rely on paragraph 1(c) of the statement of claim."

Submissions

[9] The applicant submits that the first plaintiff bears the onus of establishing it is an excluded corporation and, if it fails to do so, it has no cause of action in defamation. The applicant relies on an affidavit by Jason Michael Nott filed 10 April 2017 as raising the possibility that the first plaintiff employed 10 or more persons and asserts that the first plaintiff has failed to disclose any documents in the proceedings to establish it is an excluded corporation for the purposes of the Act. In the circumstances, it is argued that the first plaintiff's pleadings disclose no reasonable cause of action or have a tendency to prejudice or delay the fair trial of the proceedings.

[10] It is submitted on behalf of the first plaintiff that the statement of claim clearly pleads the allegation that the first plaintiff was, and is, an "excluded corporation." It is submitted that pleading is sufficient. It is argued there is no basis in law for the defendant seeking to strike out para 1(c) of the statement of claim as that mode of pleading adopted by the plaintiffs is entirely orthodox.

[11] Furthermore, at the hearing of the application the first plaintiff sought and received leave to file an affidavit of Lindy Jane O'Grady, a director of the first plaintiff, stating that as at October 2014 and, in particular on 14, 15 and 24 October 2014, the first plaintiff had fewer than 10 full-time equivalent employees.[1]

[12] The affidavit refers to 13 employees, detailing how many hours per week they worked. It is submitted on behalf of the first plaintiff that this evidence is compelling and in light of it the relevant paragraph from the statement of claim should not be struck out.

[13] Neither counsel was in a position to make detailed submissions as to exactly how many full-time equivalent employees the affidavit purported to claim the company had at the relevant time. In asserting that its employees fell below the limit of 10 persons, the first plaintiff relies upon s 9(3) of the Act which reads as follows:

> "(3) In counting employees for the purposes of subsection (2)(b), part-time employees are to be taken into account as an appropriate fraction of a full-time equivalent."

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1 Affidavit of Lindy Jane O'Grady filed 18 April 2017, para 8.

[14] I am not aware of any authority on how the assessment of full-time equivalents might be arrived at. There is authority for the proposition that the word "persons" in s 9(2)(b) refers not only to those in a master and servant contractual relationship but extends to all those persons who provide services, whether or not on a paid basis.[2] Given the late provision of the information in the affidavit, the applicant had been unable to review the supporting material at the time of argument. I proceed on the basis that the material is likely, when properly assessed, to establish that throughout the relevant period the first plaintiff had fewer than 10 persons providing services for it.

Consideration

[15] It is correct to observe that the power to strike out under r 171 of the UCPR and the power to grant summary judgment under r 293 should both be exercised sparingly. The plaintiff should not be denied the opportunity to pursue issues which justify investigation at trial.

[16] On this application, the primary issue relates to the provision in s 9 of the Act which denies a corporation a cause of action for defamation unless the corporation is an excluded corporation at the time of the relevant publication.

[17] The Act provides in s 9(2) as follows:

> "(2) A corporation is an excluded corporation if—
>
> (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators; or
>
> (b) it employs fewer than 10 persons and is not related to another corporation;
>
> and the corporation is not a public body."

[18] The applicant defendant has only put in issue whether or not the first plaintiff employed fewer than 10 persons.

[19] In the circumstances of this case, for this court to act to strike out a paragraph of the statement of claim it is necessary for the applicant to satisfy the court that the pleadings are deficient. Rule 149 of the UCPR requires that pleadings "contain a statement of all material facts on which the party relies". Here the plaintiff has merely pleaded that it "was, and is, an excluded corporation pursuant to s 9(2)(b) of the *Defamation Act 2005* (Qld)". It is questionable whether that pleading complies with the requirement in r 149.

[20] It is clear from the language of s 9 that a corporation has no cause of action in defamation, and therefore cannot bring a claim, unless by way of exception it falls within the category of being an excluded corporation. The matters which might bring a corporation within the category of being excluded corporation are self-evidently within the knowledge of the company. They are not matters that will usually be within the knowledge of a defendant, particularly a customer of the business such as the present defendant. In this regard I find the reasoning of Le Miere J in *Edward Brewer Homes Pty Ltd v Home Builders Australia Pty Ltd*[3] to be pertinent. His Honour said:

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2 *Redeemer Baptist School v Galassop* [2006] NSWSC 1201 at [20]-[24].

3 [2010] WASC 257.

> "The fact that a matter is 'peculiarly within the knowledge of one party', or that it will be easier for that party to prove the matter than her or his opponent, may be significant: see *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. The objects for which a corporation was formed and the number of employees of a corporation and whether the corporation was related to another corporation are matters within the knowledge of the plaintiff corporation and easier for the plaintiff corporation to prove than for a defendant to disprove. Those considerations support the conclusion that it is for the plaintiff corporation to plead and prove those matters.
>
> It is therefore incumbent on the plaintiff to plead the facts and matters necessary to show that it has a cause of action, that is, that it is an 'excluded corporation' under the Act."[4]

[21] Whether the first plaintiff was an excluded corporation at the relevant time is obviously fundamental to whether it has any cause of action. The statement of claim pleaded that the first plaintiff was an excluded corporation. It is submitted that pleading was sufficient. It was forcefully argued that further specificity would merely be pleading as to evidence. In my view that submission cannot be accepted. All material facts must be pleaded: r 149. The number of persons whose services the corporation used in its business and the way in which that number is calculated are material facts that should have been pleaded. Deficiency in the pleading of this crucial issue has contributed to the need for the defendant to bring this application.

[22] It appears from the affidavit placed before the court on the hearing of the application that in all likelihood the first plaintiff does fall within the definition of an exempt corporation. I sense that better communication between the parties could have resolved this issue without the need for appearances before the court. It would have been apparent to the plaintiff from the defendant's earliest pleadings that this issue was in dispute and that the defendant was in no positon to be able to determine whether the bland assertion in the statement of claim was sustainable. On the other hand, the plaintiff could have approached the matter more appropriately by seeking particulars of the basis upon which the exemption was claimed.

[23] As the first plaintiff has now advanced material which is "strongly suggestive"[5] of it being an excluded corporation, I am of the view that it would be inappropriate to exercise a discretion to strike out the pleading or to grant summary judgment. The material is at least sufficient to provide a basis at trial for a factual dispute about the status of the corporation, should that be necessary. However, given that I consider the pleadings to be deficient, leave should be granted to the first plaintiff under r 375 to amend the statement of claim at para 1(c) to plead the material facts relied upon to establish the first plaintiff was an excluded corporation.

[24] Once there has been an opportunity for the defendant to consider the material provided in the affidavit of Lindy Jane O'Grady, the defendant may be satisfied that the material resolves concerns about the plaintiff corporation's entitlement to bring the action. Alternatively, the defendant may choose to apply for further and better

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4 [2010] WASC 257 at [14]-[15].

5 Plaintiff's outline of submissions, para 32.

particulars on that issue. As I have no application for an order for particulars before me, there is no need to consider that aspect at this time.

Costs

[25] Each party seeks costs. Neither party has been wholly successful. The applicant failed to obtain the orders that it sought. The deficiency in the first plaintiff's pleadings and the late provision of relevant material contributed to the matter coming before the court at this time. In these circumstances the costs of the application should be costs in the cause.

Orders

[26] The orders of the court will be:

1. The application is dismissed.
2. The plaintiffs have leave to amend the statement of claim in respect of the pleading at para 1(c).
3. The plaintiffs will file and serve any amended statement of claim on or by 4:00 pm, 3 May 2017.
4. The costs of the application to be costs in the cause.