FEDERAL COURT OF AUSTRALIA

McCrae v Reynolds [2015] FCA 529

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| Citation: | McCrae v Reynolds [2015] FCA 529 |
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| Parties: | **WAYNE MICHAEL MCCRAE v EDWIN REYNOLDS**  WAYNE MICHAEL MCCRAE v REPORT CARD PTY LTD (ACN 092 598 859) |
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| File number(s): | QUD 454 of 2014  QUD 496 of 2014 |
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| Judge(s): | **GREENWOOD J** |
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| Date of judgment: | 28 May 2015 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – consideration of an application under rule 7.22 of the *Federal Court Rules 2011* and an application under rule 7.23 of those Rules |
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| Legislation: | *Federal Court Rules 2011*, Div 7.3 |
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| Cases cited: | *Reeve v Aqualast Pty Ltd* [2012] FCA 679 – cited  *Clarke v Sandhurst Trustees Limited* [2014] FCA 580 – cited  *Sandhurst Trustees Limited v Clarke* [2015] FCAFC 21 – cited |
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| Date of hearing: | 24 November 2014 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 33 |
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| Counsel for the Prospective Applicant: | Mr M Williams |
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| Solicitor for the Prospective Applicant: | Taylors Solicitors |
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| Counsel for the Prospective Respondent, Report Card Pty Ltd (ACN 092 598 859): | Mr R Anderson |
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| Solicitor for the Prospective Respondent, Report Card Pty Ltd (ACN 092 598 859): | Ms C Galati |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 454 of 2014 |

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| BETWEEN: | WAYNE MICHAEL MCCRAE  Prospective Applicant |
| AND: | EDWIN REYNOLDS  Prospective Respondent |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 28 MAY 2015 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. Pursuant to rr 1.32 and 1.36 of the *Federal Court Rules 2011*, the orders in this proceeding are made from Chambers.
2. Report Card Pty Ltd give discovery, by affidavit, within 30 days, of all documents relating to identifying the description by name and address of the person or persons placing entries (otherwise called “posts”) under the username “zzedzz” into or on an internet chat room or chat forum described as “HotCopper” operated by Report Card Pty Ltd.
3. Report Card Pty Ltd give discovery, by affidavit, within 30 days, of all documents directly relevant to the posting of entries to an internet chat room or chat forum described as “HotCopper” by a person or persons using the username “zzedzz”, for that purpose, during a period of six years prior to the making of this order including all posts in that period in respect of which Report Card Pty Ltd caused any degree of editing or moderating of any post to be made in the exercise of its supervision and operation of the HotCopper internet chat room or chat forum.
4. Discovery required by Orders 3 and 4 are to be given in accordance with rr 7.24 to 7.28 of the *Federal Court Rules 2011*.
5. The question of whether an order ought to be made that Wayne Michael McCrae pay the costs and expenses of Report Card Pty Ltd in complying with Orders 2 and 3 herein is reserved for later determination.
6. The parties are required to file and serve submissions within 30 days in relation to the question of costs as contemplated by Order 5 and in relation to the costs of and incidental to the applications.
7. The disposition of the costs referred to in Order 6 will be addressed on the papers as filed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 496 of 2014 |

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| BETWEEN: | WAYNE MICHAEL MCCRAE  Prospective Applicant |
| AND: | REPORT CARD PTY LTD (ACN 092 598 859)  Prospective Respondent |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 28 MAY 2015 |
| WHERE MADE: | BRISBANE |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| GENERAL DIVISION | QUD 454 of 2014 |

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| BETWEEN: | WAYNE MICHAEL MCCRAE  Prospective Applicant |
| AND: | EDWIN REYNOLDS  Prospective Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 496 of 2014 |

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| BETWEEN: | WAYNE MICHAEL MCCRAE  Prospective Applicant |
| AND: | REPORT CARD PTY LTD (ACN 092 598 859)  Prospective Respondent |

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| JUDGE: | GREENWOOD J |
| DATE: | 28 MAY 2015 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

1. These proceedings concern two applications for orders under Div 7.3 of the *Federal Court Rules 2011* which addresses the topic of “Preliminary discovery”.
2. The first application (“Application 496”) is brought under r 7.23. In that application, Mr McCrae as the prospective applicant seeks an order that Report Card Pty Ltd (“RCPL”) give discovery to Mr McCrae of “copies of all posts made by user ‘zzedzz’ including posts which have been moderated, in relation to Wayne McCrae or CuDeco Limited in the previous five (5) years”. The second application (“Application 454”) is brought by Mr McCrae as the prospective applicant under r 7.22 for an order that RCPL attend before the Court to be “examined orally about the description of EDWIN REYNOLDS, the Prospective Respondent” and to produce to the Court any document or thing in RCPL’s control relating to the “description” of Mr Reynolds.
3. Mr McCrae also seeks an order that RCPL give discovery to him “of all documents that are or have been in [RCPL’s] control relating to the Prospective Respondent’s description”.
4. In Application 496 under r 7.23, RCPL is the prospective respondent and in Application 454 under r 7.22, Mr Reynolds is the prospective respondent.
5. Rule 7.23(1) provides, relevantly, that Mr McCrae *may apply* to the Court for an order contemplated by r 7.23(2), **if**, *first*, he *reasonably believes* that he *may* have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained (that is, RCPL as the nominated prospective respondent); *second*, after making *reasonable enquiries* he does not have *sufficient* information to decide whether to *start* a proceeding in the Court for that relief; *third*, he *reasonably believes* that RCPL has (or is likely to have or has had) control of documents *directly relevant* to the question of whether Mr McCrae has a right to obtain relief; and, *fourth*, inspection of the documents by him would *assist* in his making a decision to start a proceeding.
6. If the Court is satisfied that those integers have been made good, the Court may order under r 7.23(2) RCPL to give discovery to Mr McCrae of the documents in its control directly relevant to the question earlier described.
7. Rule 7.22(1) provides, relevantly, that Mr McCrae may apply to the Court for an order contemplated by r 7.22(2) *if* he satisfies the Court that, first, there *may be* a right for him to obtain relief against a prospective respondent; second, Mr McCrae is unable to *ascertain* “the description” of the prospective respondent; third, another person (called the “other person”) knows or is likely to know the prospective respondent’s description or has (or is likely to have or has had or is likely to have had) a document that would *help ascertain* the prospective respondent’s description.
8. If the Court is satisfied that those integers have been made good, the Court may order the other person:

(a) to attend before the Court to be examined orally only about the prospective respondent’s description; and

(b) to produce to the Court at that examination any document or thing in the person’s control relating to the prospective respondent’s description; and

(c) to give discovery to the prospective applicant of all documents that are or have been in the person’s control relating to the prospective respondent’s description.

1. The legal principles governing the operation of rr 7.22 and 7.23 are well understood and uncontroversial: see *Reeve v Aqualast Pty Ltd* [2012] FCA 679; *Clarke v Sandhurst Trustees Limited* [2014] FCA 580; and *Sandhurst Trustees Limited v Clarke* [2015] FCAFC 21.
2. Mr McCrae has filed three affidavits in support of these two applications. An affidavit of Ms Galati, the solicitor for RCPL as prospective respondent in Application 496, is relied upon by RCPL in resisting the order sought in that application.
3. The relevant facts deposed to by Mr McCrae are these.
4. On or about 15 April 2002, Mr McCrae was appointed a Director of CuDeco Limited (“CuDeco”), an Australian Securities Exchange (“ASX”) listed mining company with activities in Cloncurry in Queensland. Mr McCrae currently holds the position of Chairman and Chief Executive Officer of CuDeco. RCPL is a company duly incorporated under the *Corporations Act 2001* (Cth). It carries on, in trade and commerce, the business of operating an “internet chat forum” under the registered business name “HotCopper”. Mr Edwin Reynolds is a non‑executive Director of Prophecy International Holdings Limited (“Prophecy”) which is also an ASX listed company. Mr Reynolds holds a Bachelor of Science degree. Mr McCrae says that he believes that Mr Reynolds places entries (comments) into the HotCopper internet chat room or chat forum by posting those entries to the website under the username “zzedzz” rather than his own name.
5. Mr McCrae has undertaken a number of enquiries described at paras 6 to 17 of his affidavit filed on 21 August 2014 to seek to identify with some degree of certainty and accuracy whether the person posting comments to the HotCopper chat room under the “zzedzz” username is, in fact, Mr Reynolds. He has thus sought to identify the description properly attributable to the person posting comments as “zzedzz”.
6. It is not necessary to recite in these reasons the detail of the enquiries Mr McCrae has caused to be made to try and identify whether Mr Reynolds is chat room user “zzedzz”. However, these four things should be mentioned.
7. *First*, the enquiries described at paras 10 to 18 of Mr McCrae’s affidavit filed on 21 August 2014 give rise to a reasonable suspicion that Mr Reynolds is likely to be user “zzedzz” although, of course, Mr McCrae cannot be certain about that matter.
8. *Second*, the use of usernames like “zzedzz” is no doubt designed to obfuscate and hide the identity or *description* of the person placing posts into the chat room presumably so that things can be said “at large” within the chat room user audience with a view to avoiding any accountability to those persons who might be affected by things said in the posts. If that were not so, no doubt, Mr or Ms “zzedzz” would use his or her actual name, or put another way, his or her proper description.
9. *Third*, RCPL operates and manages for reward the HotCopper chat room service for subscribers and thus prescribes the rules of the forum and facilitates postings into the chat room enabling anonymised entries by subscribers.
10. *Fourth*, Mr McCrae has caused his solicitor, Mr Taylor, to write to RCPL to request the disclosure of the identity (or description) of the user posting to the website under the username “zzedzz”. Mr Taylor said this in his letter to RCPL:

We write to you to seek:

1. What is the registered name of the user “zzedzz”;

2. What is the registered email address of the user “zzedzz”;

3. What is the recorded IP address associated with the user “zzedzz”;

4. What are the other identifying details of the user “zzedzz”;

5. Copy of all posts made by user “zzedzz” in relation to Wayne McCrae or CuDeco Limited in the previous three years;

6. Did you alter, amend, delete or otherwise change any of the content of your website as posted by “zzedzz”.

1. RCPL responded by Ms Galati and said that RCPL was under no obligation to voluntarily provide the requested information. Mr Taylor again wrote to RCPL requesting it to reconsider its position on that matter. RCPL responded saying that it could see no reason why it ought to change its position.
2. Thus, Mr McCrae has attempted to determine the proper description of user “zzedzz” by making enquiries of the operator of the chat room, without any success.
3. In Mr McCrae’s further affidavit material he says that he has been aware of the existence of the HotCopper website for at least six years. He says that his earliest recollection of persons making reference to comments about him posted to that website is in early 2008. He says that he was advised by a shareholder in CuDeco, Mr Holterman, in early January 2013, that a person under the name “zzedzz” had been posting material to the HotCopper forum “which was derogatory in respect of my management of CuDeco and statements I had made about the company”. Mr McCrae says that he was informed by Mr Holterman that the comments made by user “zzedzz” suggested that Mr McCrae had “attempted to mislead shareholders in [CuDeco] in various statements [he had made] in speeches or ASX releases”; Mr McCrae had attempted to “exaggerate the mining potential of [CuDeco] in pursuit of increasing the value of [Mr McCrae’s] shareholding”; Mr McCrae was “reckless in [his] management style” and “had contributed to a decline in the share price”.
4. Mr McCrae says that in late January 2013 he instructed Mr Taylor to write to the operator of HotCopper to seek its cooperation in the termination of the user’s account and to forward information to Mr Taylor about the identity of the “zzedzz” user. Mr McCrae says that he did not take any further notice of the posts by “zzedzz” and continued to focus on fundraising activities of CuDeco associated with the “Rocklands Copper Project”. Mr McCrae says that that project is a large copper project with projected 10 year revenue of $3.99 billion according to preliminary financial model.
5. Mr McCrae says that in early February 2014 he received a telephone call from a shareholder in CuDeco, Mr Gary Needham, concerning comments made about Mr McCrae and CuDeco on the HotCopper site. The statements were posted by user “zzedzz”. Although Mr McCrae does not quote in his affidavit filed 28 October 2014 the text of the posting, he says that the statements suggest that Mr McCrae had “misled the Australian Stock Exchange in respect of announced deadlines” and that Mr McCrae “was intentionally withholding [the] ore grade of the stockpiles which no other company would do”. Mr McCrae says that having received that information from Mr Needham he then went onto the HotCopper forum site and reviewed the material posted concerning remarks made about him and CuDeco posted by the user “zzedzz”. Mr McCrae says that since the correspondence of early 2013, a large number of posts have been made to the HotCopper site by user “zzedzz” containing remarks about Mr McCrae and CuDeco.
6. Mr McCrae says that on 20 August 2013, user “zzedzz” made a post which mentioned Mr McCrae and described himself as a “CuDeco commentator”.
7. Mr McCrae says at para 13 of his affidavit that he has conducted a basic search of the posts to the site that he has been able to access. He says that some of the statements are “defamatory and false” and they include:

(a) On 3 July 2013, the user alleged in a post [that] I was responsible for the fall in the share price [of CuDeco] by drafting [and] releasing a “shocking” letter to the Australian Stock Exchange;

(b) On 28 July 2013 the user suggested that I was undertaking in “dreamtime”;

(c) On 15 May 2014 that I had failed to make proper disclosure to the Australian Stock Exchange; and

(d) On 17 May 2014 that I had engaged in a “new blindfold technique” which was due to the overall copper percentage being poor.

1. Mr McCrae says this at para 14:

14. The following posts have been removed;

(a) On 23 May 2014 a post was moderated in thread titled “dso announcement” because of Flaming or Bating.

(b) On 27 May 2014 a post was moderated in the thread titled “dso” with the comments “I sent you an email which you’ve ignored”.

(c) On 2 June 2014 a post was moderated in the thread titled “dso” with the comments “you’re adding nothing to the debate on the stock with this. Again, I’ve asked you to contact me via support”.

1. Mr McCrae believes that there are “numerous more posts” which have been “moderated and/or removed” although he is unable to “find them via the forum search function”. Mr McCrae says that he has been unable to obtain “all posts made by ‘zzedzz’ in respect of CuDeco or myself via the search function” and that he has been unable to see posts which have been moderated by the operator of the HotCopper site after publication of those posts.
2. Mr McCrae says that he believes that he has a strong claim against the user “zzedzz” for defamation and against RCPL for failing to delete access of the user to the chat room site once notice had been given to RCPL in early 2013.
3. So far as RCPL is concerned, Mr McCrae seeks orders that by affidavit RCPL provide copies of all “threads” in which the user “zzedzz” has posted comments to the HotCopper forum while a member of the forum to the extent that those posts concern Mr McCrae and CuDeco; that RCPL provide an affidavit as to whether RCPL or user “zzedzz” has edited posts after publication of the post; and copies of any posts made by user “zzedzz” to the forum and then subsequently moderated by RCPL.
4. Having regard to the affidavit material filed by Mr McCrae, I am satisfied that the statements posted by user “zzedzz” to the HotCopper chat forum, as described in those affidavits, may be either inaccurate and wrong and/or defamatory of Mr McCrae and/or CuDeco and that Mr McCrae reasonably believes that he may have a right of action against that user in respect of those matters. I also accept that Mr McCrae may have a right of action against RCPL in respect of its conduct in either facilitating the chat room exchanges or in failing to act in relation to posts by user “zzedzz” once put on notice about the conduct of that user and the content of the posts. Moreover, some posts by user “zzedzz” have been moderated by RCPL and thus it must be on notice that there are questions alive concerning the content of posts by user “zzedzz”. I am satisfied that not only does Mr McCrae reasonably believe that he may have a right of action against user “zzedzz” and RCPL (at least for the purposes of rr 7.22 and 7.23, relevantly) but that he reasonably believes that he has the right to obtain relief in this Court from those prospective respondents in respect of those causes of action.
5. I note from the exchanges that the site is capable of access throughout the Commonwealth and thus in all States and Territories and that the site is accessed through a telecommunications service. By operation of the extended application of the *Competition and Consumer Act 2010* (Cth), a question arises as to whether the conduct of the individual described as user “zzedzz” is conduct which might be characterised as misleading or deceptive conduct in contravention of that Act. RCPL is a trading corporation. The Federal Court of Australia thus has jurisdiction in the relevant “matters” which carries with it jurisdiction in relation to the contended causes of action in defamation so far as user “zzedzz” (whoever that may prove to be) is concerned.
6. Accordingly, I propose to make an order requiring RCPL to give discovery by affidavit of all documents directly relevant to identifying the “description” of user “zzedzz” consisting of the full name and address of that user. I also propose to make an order that RCPL give discovery of all documents in its control relating to all entries or posts made by the person or entity described as user “zzedzz” to a chat forum described as “HotCopper” in the period six years prior to the date of these orders and all posts “moderated” by RCPL, in that period, as the operator of that site. Discovery is to be given within 30 days. The orders I propose to make are, of course, subject to rr 7.25 to 7.29 of the *Federal Court Rules 2011*.
7. As to the question of whether Mr McCrae ought to be subject to an order that he pay the costs and expenses of RCPL in giving discovery as ordered, that question will be reserved for later determination upon receipt of submissions as to that question.

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| I certify that the preceding thirty‑three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 28 May 2015