IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M88 of 2017**

BETWEEN: **MILORAD TRKULJA**
Appellant

and

GOOGLE INC
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification for publication on the internet

10 1. The Respondent certifies that this outline is suitable for publication on the internet.

Part II: Outline of propositions

No error on the test for setting aside service on a foreign defendant

2. The test applied by the court was '*no real prospect of success*'. (Respondent's Submissions (**RS**) at [27]-[29].) The *Civil Procedure Act* and the *Supreme Court Rules* permit a foreign defendant (including without entering an appearance) to (RS at [14]-[15], fn 10-12):

   2.1. bring a summary application to set aside service, in the same manner as an application for summary judgment by a local defendant; and

   2.2. rely upon affidavit evidence in support of that application.

   The plaintiff can resist the application, including by other affidavit evidence. The court may
20 order any deponent to attend and be examined and cross-examined. Even before the test changed to '*no real prospect of success*', evidence could be led by either party on the question of whether a tort in the jurisdiction could be established.

Ground 1 of the Notice of Appeal

3. Ground 1 is misconceived. The Court of Appeal did not set aside service on this basis. Nor did it find there was no real prospect of success in showing that the Respondent was a publisher of the matters complained of. (RS at [24]-[25].)

4. In addition, the Court of Appeal was correct to conclude (Reasons at [368]) that the amended statement of claim did not plead material facts to found liability by failure to remove the matters complained of. The Court of Appeal extended an opportunity to the Appellant to
30 further amend his statement of claim (Reasons at [367]), and it was not taken up. (RS at [68].)

Ground 2 of the Notice of Appeal

5. The question for the Court of Appeal was whether:

   5.1. the images matter (i.e., Annexure A) was capable of conveying any of the pleaded defamatory meanings, either as false or true innuendos (paragraphs 18 and 19 of the amended statement of claim);

   5.2. the web matter (i.e., Annexure B) was capable of conveying any of the pleaded defamatory meanings, as false innuendoes (paragraph 18 of the amended statement of claim).

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6. If the answer was 'No', the Appellant had no cause of action against the Respondent, and the application to set aside originating process and its service had to succeed. (RS at [31].)

7. Capacity to convey is a question of law. (RS at [37], [54].)[1]

8. The Court of Appeal had jurisdiction to determine the question of capacity, with respect to both the images matter, and the web matter, in an application to set aside originating process and service. The Appellant has never contended to the contrary (including in Reply). (RS at [37].)

9. The Court of Appeal found (Reasons at [391]) that the Appellant had no real prospect of establishing that the images matter conveyed any of the pleaded imputations. (RS at [40].)

10. The Court of Appeal also found (Reasons at [404]) that he had no real prospect of establishing that the web matter conveyed any of the pleaded imputations. (RS at [40].)

11. The Appellant must show error with these conclusions. He has not done so.

12. The Appellant's complaints, so far as they are able to be discerned, appear to be that the court should have considered each of the pages in Annexures A and B as a separate publication, and should not have considered the question of capacity by reference to the ordinary reasonable user of the search engine. The complaints are misguided.

13. It is for the plaintiff to frame the cause of action, by defining what is the defamatory matter. In this case, the Appellant pleaded two causes of action: one for the images matter; and one for the web matter: RS at [33]; Reasons [387].

14. The case made on the pleadings as served out of the jurisdiction was the only one which the Court of Appeal had to consider.[2] (RS at [38].)

15. When the pages comprising the images matter are considered as a whole, and likewise when the pages comprises the web matter are considered as a whole, it is clear they are not capable of conveying any of the defamatory imputations that are alleged. Even if the matters complained of were considered page by page, they are not capable of conveying the pleaded defamatory meanings. The Appellant has failed to identify any sound reason why this Court should reverse the Court of Appeal's decision on this issue.

16. Capacity to convey is a question of law for this Court as well. See eg *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293. In his written submissions (see at [18], [34]), the only ways in which the Appellant argues against the conclusion of the Court of Appeal are:

    16.1. the perspective should not be that of the ordinary reasonable user of the search engine;

    16.2. in a general sense, by pointing to the trial judge having concluded otherwise; and

    16.3. adoption of the trial judge's view about the fourth page of Annexure B that "*a reasonable internet search engine user would look at this compilation of images and assume that Mr Trkulja was also a convicted criminal*" (Reasons of trial judge at [16], [71]) .

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1 See: *Jones v Skelton* [1963] SR (NSW) 644 at 650; *Farquhar v Bottom* [1980] 2 NSWLR 380 at 385; *Sungravure Pty Ltd v Middle East Airlines Airliban SA* (1975) 134 CLR 1 at 7-8; *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293; *Lloyd v David Syme & Co Ltd* (1985) 3 NSWLR 728 at 729; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [45]; *John Fairfax Publications v Gacic* (2007) 230 CLR 291 at [20].

2 The Court of Appeal was also prepared to consider each of the 7 pages in Annexure B separately, and found against the Appellant (Reasons at [397]-[402]).

17. However:

    17.1. the correct perspective, for the question of law, is that which was applied both by the trial judge and the Court of Appeal, namely the ordinary reasonable user of the search engine;

    17.2. the fact that courts at different levels come to different conclusions on capacity does not, of itself, show error: see eg *Mirror Newspapers v Harrison*;

    17.3. the 'assumption' which the trial judge assigned to the reasonable search engine user is not one of the pleaded imputations, and it disregards other material comprising the web matter.

18. The ordinary, reasonable user of a search engine is the correct abstraction to be applied. It is no more than a principled and logical extension, to a new technology, of well-accepted law that it is necessary to construe the alleged defamatory matter in context, and to have regard to the mode and manner of publication, which includes how the matter is communicated (book, sensationalist newspaper, radio, etc) and the class of persons to whom it is communicated.[3]

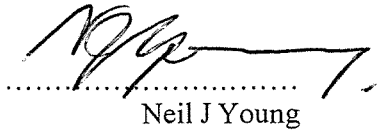
19. How a search engine works is now part of the '*general knowledge and experience of worldly affairs*' of the ordinary reader (the expression used in *Lewis* at 258; and *Mirror Newspapers v Harrison* at 301). The characteristics that the Court of Appeal ascribed to the ordinary, reasonable user of a search engine were both accurate and modest,[4] and wholly consistent with this Court's description of the reasonable search engine user in *Google Inc v ACCC*. (RS at [51]-[53].) To the extent that the Court of Appeal had regard to the evidence before it concerning the operation of the Google search engine, there was no error in doing so. In particular, there was no error in using that evidence as legitimate background to allow a court to determine what general knowledge and experience of search engines should be attributed to the reasonable user when determining the question of capacity to defame (RS at [49]-[50].) Further, the evidence is uncontroversial, having been accepted in a number of cases.

20. The Court of Appeal did not err in taking into account the manner and occasion of publication. (RS at [39].) The Appellant pleaded the publication of materials returned by the Respondent's search engine to a user of that search engine. See e.g. paragraphs 1 and 13 (AB at 6, 8).

21. As capacity to defame is a question of law, it is of no consequence that the trial judge arrived at a different conclusion, as *Mirror Newspapers v Harrison* illustrates.

22. There is no seriously arguable (as distinct from fanciful) factual or evidentiary dispute that would have made a trial necessary. (RS at [30].)

Dated: 20 March 2018



Neil J Young

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3 See: *Capital & Counties Bank v George Henty & Sons* (1882) 7 App Cas 741 at 745 (Lord Selborne LC); *Nevill v Fine Art & General Insurance Co Ltd* [1897] AC 68 at 72 (Lord Halsbury LC); *Farquhar v Bottom* [1980] 2 NSWLR 380 at 385-6 (Hunt J); *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165-7 (Hunt CJ at CL, Mason P and Handley JA agreeing); *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 467 [6] (French CJ, Gummow, Kiefel and Bell JJ).

4 Reasons at [147]-[151], [177]-[178] and [390]-[391].