

BETWEEN: MILORAD TRKULJA (aka MICHAEL TRKULJA)
Appellant

and

GOOGLE INC
Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Certification for publication on the internet

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

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2. The appeal presents one issue. Did the Court of Appeal err in setting aside originating process and its service, on the basis that the matters complained of were not capable of conveying any of the pleaded defamatory meanings?

Part III: Certification in respect of section 78B of the *Judiciary Act 1903* (Cth)

3. The Respondent considers that notice under section 78B is not required.

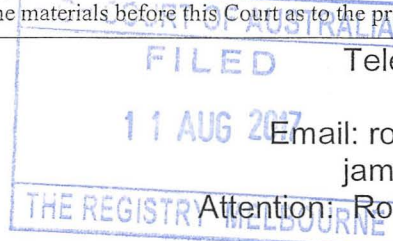
Part IV: Material Facts

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4. On 20 June 2014, the Appellant filed in the Supreme Court of Victoria an amended writ and an amended statement of claim, both dated 13 June 2014.¹
5. On a date after 20 June 2014,² the Appellant served the amended writ and amended statement of claim on the Respondent, relying upon the long-arm jurisdiction of the Supreme Court of Victoria, as provided by rule 7.01(1)(i) and (j) of Chapter 1 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (the **Supreme Court Rules**).

¹ A judge of the Supreme Court had earlier given the Appellant leave to file an amended statement of claim only. See Reasons of the Court of Appeal at [12], [14] and fn 8.

² The Appellant, in the chronology filed in this Court, has said that the date of service of the Writ was 15 July 2014. There is no evidence in the materials before this Court as to the precise date.



6. The amended statement of claim as filed differed in some respects from the document as served. This fact became apparent only after the judge at first instance had handed down judgment. It was only at that point that the Respondent could see, by comparing Annexures A and B of the document with which it had been served with Annexures A and B as reproduced in the reasons for judgment, that the Appellant had made certain changes to the amended statement of claim as filed before serving it out of the jurisdiction.³

10 7. As a consequence of the Respondent having been served with a different document from that which had been filed, the evidence filed on its behalf included some references to some pages of the Annexures that are incorrect when judged against the amended statement of claim. The Respondent accepted before the Court of Appeal, and accepts in this Court, that the case is to be determined having regard to the amended statement of claim as filed.

8. The amended statement of claim pleads:

8.1 at a paragraph numbered 16,⁴ that the Respondent ‘*published Defamatory images, of concerning the plaintiff, the matter set out in Annexure A to this Statement of Claim (“the Google Images matter”)*’; and

20 8.2 at a paragraph numbered 17, that the Respondent ‘*published, of concerning the plaintiff, the matter set out in Annexure B to this Statement of Claim (“the Google Web matter”)*’.

9. The Google Images matter, Annexure A of the amended statement of claim as served (for convenience, and following the Court of Appeal’s approach, ‘the images matter’), consists of 20 pages that are printouts of results from different searches made, at different times, by some unidentified users of the Respondent’s search engine.⁵

10. The Google Web matter, Annexure B of the amended statement of claim as served (for convenience, and following the Court of Appeal’s approach, ‘the web matter’),

³ Some pages in the Annexures to the amended statement of claim as filed were not reproduced in the Annexures to the document that was served. Some pages in the Annexures to the amended statement of claim as filed appear in different places in the Annexures to the document that was served, including in some instances in the other of the two Annexures. Some new pages were included in the Annexures to the document that was served.

⁴ The paragraph numbering contains various errors.

⁵ See also subparagraph (c) of the second paragraph numbered 1, and the first sentence of particular (i) to the paragraph numbered 16.

consists of seven pages that are printouts of various matters presented, at different times, in the browser of some unidentified users of the Respondent's search engine.⁶

11. The amended statement of claim pleads at a paragraph numbered 18 that (a) the images matter; and (b) the web matter, convey the following imputations:

11.1. 'The plaintiff is a hardened and serious criminal in Melbourne';

11.2. 'The plaintiff is a hardened and serious criminal in Melbourne in the same league as convicted murderer Carl Williams, hardened notorious underworld killer Andrew "Benji" Veniamin, hardened and serious and notorious murderer Tony Mokbel and the Mafia Boss Mario Rocco Condello';

11.3. 'The plaintiff is an associate of underworld killer Andrew "Benji" Veniamin';

11.4. 'The plaintiff is an associate of Carl Williams Melbourne Notorious convicted criminal murderer and drug trafficker';

11.5. 'The plaintiff is an associate of Tony Mokbel, the Australian notorious convicted murderer and drug supplier and trafficker';

11.6. 'The plaintiff is such a significant figure in the Melbourne criminal underworld that events involving him are recorded on a website that chronicles crime in Melbourne criminal underworld'.⁷

12. The amended statement of claim pleads at a paragraph numbered 19 that the images matter conveys, as true innuendos, the same imputation as set out above.⁸

⁶ See also subparagraph (c) of the second paragraph numbered 1, and particular (i) to the paragraph numbered 17.

⁷ The last imputation appears to have been copied from an earlier pleading, relating to a different alleged publication. See *Trkulja v Google Inc (No.5)* [2012] VSC 533 at [5(c)].

⁸ There are some minor, inconsequential differences between the imputations as pleaded in the paragraph numbered 18 and in the paragraph numbered 19.

A number of extrinsic facts are pleaded, at a paragraph numbered 20, in respect of the imputations alleged to be conveyed by the images matter as true innuendos. (But see Reasons of the Court of Appeal at [46], considering that the extrinsic facts are also intended to be relied upon to support an allegation of true innuendos conveyed by the web matter.)

For the purposes of an application to set aside originating process and service, those extrinsic facts may be taken as established. Those extrinsic facts are that among the photographs appearing in the Google Images matter are those of:

(a) Carl Williams, who is a notorious convicted murderer;

(b) Andrew 'Benji' Veniamin, who is an underworld killer / notorious hardened underworld killer;

13. By way of relief, the Appellant sought not only an award of damages, but also a permanent injunction that, in substance, required the Respondent to respond to any search by any user of its search engine that contained the name ‘Milorad Trkulja’ or ‘Michael Trkulja’, by not returning any material concerning him and not returning any of his photographs, and/or to never return a photograph of him when a search query was entered with terms ‘melbourne’ and ‘criminal’ and ‘underworld’.⁹
14. On 13 August 2015, the matter came on for hearing before Justice McDonald on the application by the Respondent to have originating process and service set aside.¹⁰
- 10 15. It is correct (AS at [6]) that the Respondent filed five affidavits in support of that application.¹¹ The Appellant did not seek to have any of the deponents available for cross-examination, nor did he file any affidavits in response.¹² The Appellant has, to this date, not identified any matter said to be factually wrong in any of those affidavits.
16. Save for one matter (see the following paragraph), the Appellant’s identification of the relevant facts as found (see AS at [7]), is not contested. Notably, none of the findings are said by the Appellant to be wrong.
17. The statement that it was ‘*not contentious that the material was not thereafter removed or blocked*’ by the Respondent (AS at [7(j)]) is not accepted. The
20 statement presumes identification by the Appellant of what ‘*the material*’ in question is and that it has some form of permanence.
18. If what the Appellant wants to contend is that, after 3 December 2012, there was a possibility that, if a user entered a query for terms such as ‘melbourne’ and ‘underground’ and ‘crime’ using the Image Search functionality, there would be

(c) Tony Mokbel, who is an underworld killer / hardened notorious murderer;

(d) Mario Rocco Condello, who is a Melbourne Mafia Boss;

(e) Judy Moran, who is a convicted murderer.

⁹ See prayer for relief ‘C’ in the amended statement of claim, and endorsement in the amended writ.

¹⁰ Further Amended Summons dated 12 February 2015. See rules 7.05 and 8.09 of the Supreme Court Rules.

¹¹ Rule 40.02 of the Supreme Court Rules provided that, except as otherwise provided by any Act or the Rules, on an interlocutory or other application, evidence is to be given by affidavits.

¹² As at the date of the hearing before McDonald J, part 3 of Order 22 of the Supreme Court Rules applied to an application, under section 62 of the *Civil Procedure Act 2010* (Vic), by a defendant in a civil proceeding for summary judgment. Rule 22.19(1) provided that the plaintiff could show cause against the application, including by affidavit. Rule 22.21 provided that the Court could order any party, or any maker of any affidavit, to attend and be examined and cross-examined, or to produce any document.

returned a collection of images which included a photograph of the Appellant (together with photographs of people such as victims of crime, journalists who specialise in crime reporting, judges, barristers and so on), that is so. It would have amounted to an extreme chilling of free speech if the Respondent, in answer to the communication of 3 December 2012, had somehow made it impossible to locate (via its search engine) materials uploaded on the Web by third parties that included a photograph of the Appellant in the context of reporting on defamation actions brought by him against Yahoo! Inc¹³ and against the Respondent.¹⁴ However, that hypothetical future collection of images is not, nor could it be, what was ‘notified’ by the Appellant on 3 December 2012 and it is not, nor could it be, part of the matters complained of.

19. The Respondent does not understand the chronology filed by the Appellant. It may be noted, however, that all the compilations of images in Annexure A are, in this chronology, dated after the communication of 3 December 2012, and that the ‘*First search result in Annexure B*’ is, in this chronology, dated on the same day as the order made by Justice Beach in the earlier defamation action.¹⁵

Part V: Constitutional provisions, statutes and regulations

20. The Appellant’s statement is incomplete, in that it fails to include:

20.1. rules 7.01, 22.19, 22.21 of the Supreme Court Rules; and

20.2. sections 7, 8(1) and 62 of the *Civil Procedure Act 2010* (Vic).

Part VI: Respondent's argument

Introduction

21. The issue that was presented to the Court of Appeal was whether or not the Appellant’s amended writ and amended statement of claim, and their service on the Respondent, a foreign defendant who has not submitted to the jurisdiction of the Supreme Court of Victoria, should be set aside on jurisdictional grounds.

¹³ *Trkulja v Yahoo! Inc* [2012] VSC 88 (Kaye J), assessment of damages after jury’s verdict. The date of this decision is 15 March 2012.

¹⁴ *Trkulja v Google Inc (No.5)* [2012] VSC 533 (Beach J), ruling on application for judgment notwithstanding jury’s verdict and assessment of damages. The date of this decision is 12 November 2012.

¹⁵ There is no evidence before this Court as to the date of an order. See also previous footnote.

22. The Respondent argued before the Court of Appeal that there were three independent bases upon which it could be satisfied that originating process and its service should be set aside.¹⁶

22.1. There was no tort committed in the jurisdiction, because the Respondent is not the publisher of the matters complained of.

22.2. There was no tort committed in the jurisdiction, because the matters complained of were not capable of conveying any defamatory meaning.

22.3. The common law should recognise that the operator of a search engine has an immunity in respect of actions for defamation founded on automatically returned materials.

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23. The Notice of Appeal contains two grounds. Ground 1 is addressed to the first basis.¹⁷ Ground 2 is addressed to the second basis.¹⁸ There is no appeal, and no notice of contention or of cross-appeal, addressed to the third basis.

24. In respect of the first basis, the Court of Appeal reasoned as follows:

24.1. on the originating process as served outside of the jurisdiction, which only alleges liability of the Respondent as a primary publisher, service might be set aside because that case was not arguable;¹⁹

24.2. however such an outcome would be unsatisfactory because, had the Appellant alleged liability of the respondent as a secondary (or subordinate) publisher, *'such basis would have been fairly arguable'*;²⁰

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24.3. there were other difficulties with the case, which meant that in respect of resolution of the question of publication *'the situation is unsatisfactory'*;²¹

¹⁶ It is incorrect to say (see AS at [2]) that the third basis was not pressed in the Court of Appeal. Counsel for the Respondent said at the hearing that, on that basis, the Respondent relied on the written submissions.

¹⁷ *'The Court of Appeal erred in law by holding that the Plaintiff had no real prospect of success (and hence setting aside service) in proving that Google Inc was a publisher in the circumstances of the case as pleaded'*.

¹⁸ *'The Court of Appeal erred in determining that the material the subject of complaint was incapable of conveying a defamatory meaning and incapable of conveying any of the defamatory imputations pleaded'*.

¹⁹ Reasons of the Court of Appeal at [370].

²⁰ Reasons of the Court of Appeal at [370].

²¹ Reasons of the Court of Appeal at [358]-[369], [371].

24.4. however, the identified difficulties were ‘*not a live issue*’, because the Respondent succeeded on the second basis, as the matters complained of were not capable of conveying the defamatory meanings.²²

25. The Court of Appeal did not set aside service of the Appellant’s amended writ and amended statement of claim because the Appellant had no real prospect of proving that the Respondent was the publisher of the matters complained of. Ground 1 of the Notice of Appeal is misconceived.²³

26. An appeal is against orders, not reasons.²⁴ For the Appellant to succeed on Ground 2 of the Notice of Appeal, he must show error in the Court of Appeal’s conclusion that the matters complained of were not capable of conveying the pleaded defamatory meanings. The Appellant must also persuade this Court, which is in as good a position as the Court of Appeal, that they are capable of conveying at least one of those pleaded defamatory meaning.

The Agar v Hyde Test

27. In arriving at its decision, the Court of Appeal applied the test stated by this Court in *Agar v Hyde*.²⁵ There, this Court identified, as one of the bases upon which a court will not exercise jurisdiction, that ‘*the claims made have insufficient prospects of success to warrant putting an overseas defendant to the time, expense and trouble of defending the claims*’.²⁶ The Court said that ‘*the same test should be applied in deciding whether originating process served outside Australia makes claims which have such poor prospects of success that the proceeding should not go to trial as is applied in an application for summary judgment by a defendant served locally*’.²⁷

28. At the time *Agar v Hyde* was decided, in New South Wales the test in an application for summary judgment by a defendant served locally was that found in

²² Reasons of the Court of Appeal at [372].

²³ At the hearing of the application for special leave to appeal, His Honour Justice Nettle stated that the parties’ submissions ought to be directed to the special leave questions: [2017] HCATrans 129 at lines 677-679. There were five questions in the Appellant’s special leave application. The first four questions related to Ground 1.

²⁴ *Driclad Pty Ltd v Commissioner of Taxation (Cth)* (1968) 121 CLR 45 at 64 (Barwick CJ and Kitto J).

²⁵ (2000) 201 CLR 552.

²⁶ (2000) 201 CLR 552 at 575 [55] (Gaudron, McHugh, Gummow and Hayne JJ).

²⁷ (2000) 201 CLR 552 at 576 [60] (Gaudron, McHugh, Gummow and Hayne JJ).

this Court's authorities of *Dey v Victorian Railways*²⁸ and *General Steel Industries Inc v Commissioner for Railways (NSW)*.²⁹

29. As a result of changes that have been made in most jurisdictions since this Court's decision in *Agar v Hyde*, the test in an application for summary judgment by a defendant served locally is 'no real prospect of success'.³⁰ It must now be easier for a foreign defendant to succeed in an application to set aside service and originating process than was the case when *Agar v Hyde* was decided.³¹

10 30. Procedurally, if the applicant on the motion for summary judgment has established a prima facie case for grant of the relief sought, it is for the respondent to the application to show a specific factual or evidentiary dispute that would make the trial necessary.³² Were it not so, the evident purpose behind the legislative changes³³ would be easily subverted by generic statements to the effect that, if the matter were permitted to go to trial, something else might eventuate. A trial is not necessary (necessity being a high threshold) where there are limited facts upon which the question of jurisdiction can be determined. An application to show lack of jurisdiction against a foreign defendant, prosecuted in the manner in which it was done in this case, is consistent with the efficient, cost effective and just resolution of disputes.

Not capable of conveying defamatory meanings

20 31. The question for the Court of Appeal was whether the images matter and the web matter were capable of conveying any of the pleaded defamatory meanings. If the answer was 'No', it followed that the Appellant had no cause of action against the

²⁸ (1949) 78 CLR 62 at 91 (Dixon J).

²⁹ (1964) 112 CLR 125 at 130 (Barwick CJ).

³⁰ See sections 62 and 63(1) of the *Civil Procedure Act 2010* (Vic). See also *Madden International Limited v Lew Footwear Holdings Pty Ltd* [2015] VSCA 90.

At the federal level, the test on an application by a defendant is 'no reasonable prospect of successfully prosecuting the proceeding', and the proceeding 'need not be (a) hopeless; or (b) bound to fail, for it to have no reasonable prospect of success'. See section 25A(2) and (3) of the *Judiciary Act 1903* (Cth), and section 31A(2) and (3) of the *Federal Court of Australia Act 1976* (Cth).

³¹ See *Spencer v The Commonwealth* (2010) 241 CLR 118, in particular at 141 [60] (Hayne, Crennan, Kiefel and Bell JJ).

³² See eg *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* (2008) 167 FCR 372 at [127] (Gordon J); *Upaid Systems Ltd v Telstra Corporation Ltd* (2016) 122 IPR 190 at 203 [47] (Perram, Jagot and Beach JJ), citing *Spencer v The Commonwealth* (2010) 241 CLR 118 at 130-131 [22] (French CJ and Gummow J).

³³ See sections 7, 8(1), 62 and 63(1) of the *Civil Procedure Act 2010* (Vic).

Respondent. If the answer was ‘No’, the Respondent’s application to set aside originating process and its service had to succeed.

32. The Respondent’s case was (and is, in this Court) that the materials the Appellant complained of³⁴ were not capable of conveying any defamatory meaning to the ordinary, reasonable user of its search engine. It followed that neither the images matter nor the web matter was capable of conveying any of the pleaded defamatory meanings. The Respondent’s case is developed further below.

10 33. It is for the plaintiff to frame the cause of action, by defining what is the defamatory matter.³⁵ In this case, the Appellant pleaded two causes of action, one in respect of the images matter, and one in respect of the web matter.³⁶ Contrary to the Appellant’s submission below,³⁷ repeated in this Court,³⁸ there is no authority for the proposition that the tribunal of fact would be entitled to look at just one page in the images matter, or just one page in the web matter, disregarding the remainder of the matter sued upon, and conclude that that one page was defamatory of the Appellant. It is trite law that the ordinary, reasonable reader is taken to have read the whole of the alleged publication.³⁹

20 34. In this case, the Appellant himself, consistently with the form of relief that he was seeking, chose to rely upon composite matter to show that his photograph was capable of being returned among a range of other photographs and images when a user of the search engine entered a query using terms such as ‘melbourne’ and ‘criminal’ and ‘underworld’. His photograph was also capable of not being returned. So much is demonstrated by looking at two of the pages included in the web matter: page 2 does not include his photograph, page 4 does.

³⁴ Compilation of images, and sets of autocompletions of search queries.

³⁵ See eg *Phelps v Nationwide News Pty Ltd* [2001] NSWSC 130 at [22]; approved in *Australian Broadcasting Corp v Obeid* (2006) 66 NSWLR 605. Under section 8 of the Defamation Act 2005 (Vic), a plaintiff has a cause of action for defamation in relation to the publication of defamatory matter about the person. A ‘matter’ is defined, in section 4, broadly and non-exhaustively.

³⁶ See Reasons of the Court of Appeal at [387].

³⁷ See Reasons of the Court of Appeal at [382]. *Burrows v Knightley* (1987) 10 NSWLR 651, relied upon by the Appellant below, is, if anything, authority against the proposition being advanced by the Appellant.

³⁸ AS at [11], [12], [17], last sentence of [34] (which picks up the finding of McDonald J about one single page from the web matter).

³⁹ See *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 83 [26] (McHugh J), citing *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646; *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510; *Morosi v Broadcasting Station 2GB* [1980] 2 NSWLR 418(n). Existence of this rule does not mean that the ordinary, reasonable reader must give equal weight to every part of the publication: (2003) 201 ALR 77 at 83 [26] (McHugh J).

35. Looking at the images matter as a matter of substance, the Appellant's complaint is that:

35.1. the Image Search functionality of the Respondent's search engine would, when a user entered a query searching for images by using the terms 'melbourne' and 'criminal' (or 'crime') and 'underworld',⁴⁰ return compilation of photographs and other images;

35.2. those compilations included a photograph of the Appellant and of some notorious criminals;⁴¹

10 35.3. such a compilation of images is defamatory of the Appellant because it conveys that he is '*a hardened and serious criminal in Melbourne*' and each of the other imputations.

36. The web matter is more of a mixed bag of printouts. Looking at it as a matter of substance, the Appellant's complaint is twofold.

Smaller compilation of images, included among other search results

36.1. When a user of the Web Search functionality, part of the Respondent's search engine, enters a query for webpages using the terms 'melbourne' and 'criminal' and 'underworld', among the automatically returned results, mostly snippets and hyperlinks to webpages, there would be a section that consisted of a compilation of photographs and other images;

20 36.2. those compilations included a photograph of the Appellant and other persons, including some notorious criminals;⁴² and

36.3. such a compilation of images is defamatory of the Appellant because it conveys that he is '*a hardened and serious criminal in Melbourne*', etc.

Autocompletions

36.4. When a user of the Respondent's search engine had commenced entering a search query consisting of his first name (either 'Michael' or 'Milorad') and

⁴⁰ Or, in one instance, 'killing'. The searches did not include the Appellant's name. Cf Reasons of the Court of Appeal at [23].

⁴¹ Page 14 of Annexure A does not fit this description. It is more in the nature of some of the printouts included in Annexure B.

⁴² Pages 3 and 4 of Annexure B. At least some of those compilations also included images such as part of the logo of the Respondent, and the photograph of a crime journalist. Page 2 of Annexure B, which is of the same kind as pages 3 and 4, does not include a photograph of the Appellant.

surname, a number of possible auto-completions of that query would be returned;

36.5. those possible auto-completions included ones with, for example, the words ‘melbourne crime’ or ‘criminal’ after his name and surname;⁴³ and

36.6. any set of possible auto-completions that also contains one with, for example, the words ‘melbourne crime’ after his name and surname, is defamatory of the Appellant because it conveys that he is ‘*a hardened and serious criminal in Melbourne*’, etc.

10 37. The question of whether the matter complained of is capable of giving rise to any of the pleaded imputations is for the judge, not the jury.⁴⁴ There can be no doubt that the Court of Appeal had jurisdiction to determine that question with respect to each of the images matter and the web matter, and to do so in an application to set aside originating process and service.⁴⁵

38. The question had to be determined on the pleadings as served outside of the jurisdiction, not on some hypothetical variant of them. The Appellant is thus wrong to contend that it is relevant to speculate as to:

38.1. publication ‘by accident’ to a person intent on entering a query such as ‘melbourne cricket club’ (AS at [27]);⁴⁶

20 38.2. publication to a person (other than the Appellant) who reads a printout of the images matter (or even just one page from it) as reproduced in a dossier prepared about the Appellant as a job applicant (AS at [32]).

No such hypothetical cases are pleaded.⁴⁷

⁴³ Pages 1, 5, 6 and 7 of Annexure B. With respect to page 1, the auto-completions are part of a screenshot which also include a comment of one ‘Picklesworth’ about the Appellant being ‘*Streisand’d*’: see Reasons of the Court of Appeal at [35]. Page 14 of Annexure A is also, broadly speaking, of this nature. The auto-completions included also ones such as ‘*michael trkulja v google*’, and ‘*milorad trkulja lawyer*’, among others: see Reasons of the Court of Appeal at [39].

⁴⁴ *Stubbs Ltd v Russell* [1913] AC 386 at 393-394 (Lord Kinnear); *Sim v Stretch* [1936] 2 All ER 1237 at 1240 (Lord Atkin); *Jones v Skelton* [1964] NSW 485 at 491 (PC).

⁴⁵ The Appellant never contended to the contrary.

⁴⁶ Such hypothetical publication would not, in any event, convey any defamatory meaning to the ordinary, reasonable user of the search engine – even when that user is curious to explore suggested completions for his/her query.

⁴⁷ At a paragraph numbered 13, the Appellant pleaded publication of the images matter to people who searched for his name.

39. In determining that question, it was proper for the Court of Appeal to take into account the manner and occasion of the alleged publication, and all other facts properly in evidence.⁴⁸ Those matters are relevant to the application of the test by reference to the ordinary, reasonable reader / viewer / perceiver of the kinds of material in question. The abstraction by reference to the hypothetical person is a control mechanism by which hopeless cases do not go forward to the jury. In the present context, and consistently with the authorities of this Court,⁴⁹ it applied as a control mechanism by which the Appellant's hopeless case against a foreign defendant would not go any further.

10 40. The Court of Appeal found that the Appellant had no real prospect in establishing that the images matter, as a composite, conveyed any of the pleaded imputations.⁵⁰ The Court of Appeal also found that the Appellant had no real prospect in establishing that the web matter, as a composite, conveyed any of the pleaded imputations.⁵¹ Because of the more mixed nature of the printouts making up the web matter, the Court of Appeal was also prepared to consider it as other than a single composite matter,⁵² but again found that none of the pleaded imputations were conveyed.

Search results are but abstract indicia of what materials may exist on the Web

20 41. In this case, unlike in his previous litigation against the Respondent,⁵³ the Appellant did not plead any of the underlying materials as part of the matters complained of.

42. The search results returned in this case, in respect of both the images matter and pages 2, 3 and 4 of the web matter, are compilations of images.⁵⁴

43. Each of those images is selected by using word-based algorithms.⁵⁵ For each image in the compilation, it is possible for the user who has entered the query to find out

⁴⁸ *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at 744 (Lord Selborne). See also *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at 63 [26] (McHugh J): 'The reasonable reader considers the context as well as the words alleged to be defamatory', citing *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 72, 78; *English and Scottish Co-operative Properties Mortgage & Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440 at 452.

⁴⁹ *Agar v Hyde* (2000) 201 CLR 552; *Spencer v The Commonwealth* (2010) 241 CLR 118.

⁵⁰ Reasons of the Court of Appeal at [391].

⁵¹ Reasons of the Court of Appeal at [404].

⁵² Reasons of the Court of Appeal at [397]-[402].

⁵³ See Reasons of the Court of Appeal at [63]-[68].

⁵⁴ In respect of pages 2 and 3 of the web matter, the Appellant's handwriting indicates that his complaint was in respect of the images returned as search results. In respect of page 4 of the web matter, it is the Appellant's highlighting that indicates that his complaint was in respect of the images.

the webpage where the image is located, and navigate to that webpage, by clicking on the image.⁵⁶

44. The inclusion of a particular image within a compilation of images that is returned by the Image Search functionality signifies nothing more than that there is a webpage on the Web that contains that image and that webpage also contains the text of the search query (or closely related text).⁵⁷
45. The Appellant does not contend, nor could he seriously contend, that any of above matters, which were the subject of evidence by Mr Madden-Woods, was capable of being controverted.⁵⁸ This is how a search engine works.⁵⁹

10 Autocompletions present some queries that other users have made

46. Autocompletions are possible ways of completing a search query that are presented to a user of the search engine as he/she types, character by character, a particular query in the search box.⁶⁰ Those possible ways of completing the query are based on previous queries by that user and by other users of the search engine.⁶¹
47. A simple way of entering a search query is to enter one or more terms.⁶² The search engine locates materials on the Web by using word-based algorithms, matching the terms entered with words found somewhere in the text of certain webpages.⁶³
48. The Appellant cannot seriously contend that any of above matters, which were the subject of evidence by Mr Herscovici and by Mr Madden-Woods, was capable of
20 being controverted.⁶⁴ This is how a search engine works.

⁵⁵ Affidavit of Vaughn Beckett Madden-Woods affirmed on 19 December 2014 at [71], [74], [91]-[122]. See also *Google Inc v Australian Competition and Consumer Commission* (2012) 249 CLR 435 at 447 [20] (French CJ, Crennan and Kiefel JJ), 474-475 [127] (Heydon J).

⁵⁶ Affidavit of Madden-Woods at [75]-[76].

⁵⁷ Affidavit of Madden-Woods at [116].

⁵⁸ The only aspect of the evidence of Madden-Woods which, the Appellant contends, was wrongly accepted by the Court of Appeal, is his evidence that the search engine of the respondent had, by mid-2013, located over 60 trillion unique URLs. Consistently with the authorities cited in footnote 32 above, it is for the Appellant to show why there is a factual dispute about this evidence that would render a trial necessary.

⁵⁹ See also *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at 458-459 [67]-[69] (French CJ, Crennan and Kiefel JJ).

⁶⁰ Affidavit of Michael Herscovici affirmed on 18 January 2015 at [10].

⁶¹ Affidavit of Herscovici at [12], [20]-[21], [24]-[26].

⁶² Affidavit of Madden-Woods at [63].

⁶³ See previously referred to parts of the affidavit of Madden-Woods.

⁶⁴ The only aspect of the evidence of Mr Herscovici which, the Appellant contends, was wrongly accepted by the Court of Appeal, is his evidence that the completions that are presented depend on the query being entered by the user, and on what that user and other users of the search engine have done in the past, in terms of completed

The ordinary, reasonable user of a search engine

49. The ordinary, reasonable reader⁶⁵ in defamation law is one of the many passengers on the Clapham omnibus.⁶⁶ It is an abstraction.⁶⁷

50. It is the court that defines what are the characteristics of that hypothetical person. In doing so, it is not only permissible, but at times necessary, for the court to be informed about relevant context.⁶⁸ Were it not so, a judge who knows nothing about that particular context would be applying a legal test by reference to himself or herself, on a possibly false assumption that the judge can be assumed to be a suitable stand-in for the reasonable person.

10 51. In *Google Inc v Australian Competition and Consumer Commission*,⁶⁹ the issue on appeal required consideration of whether ordinary and reasonable members of the class of recipients of the representations would consider that the Appellant in that case (the Respondent here) had, by its search engine, engaged in misleading or deceptive conduct. Without any disapproval, Chief Justice French and Justices Crennan and Kiefel quoted the passage from the primary judge setting out what was the relevant abstraction:⁷⁰

20 The relevant class will consist of people who have access to a computer connected to the internet. They will also have some basic knowledge and understanding of computers, the web and search engines including the Google search engine. They will not necessarily have a detailed familiarity with the Google search engine but they should be taken to have at least some elementary understanding of how it works. It is not possible to use a

search queries. Consistently with the authorities cited in footnote 32 above, it is for the Appellant to show why there is a factual dispute about this evidence that would render a trial necessary.

⁶⁵ Or viewer, in the case of a television program or an image. Or user, in the case of a search engine displaying materials in that user's browser.

⁶⁶ *Healthcare at Home Ltd v The Common Services Agency* [2014] 4 All ER 210 at 249, [1]-[3] (Lord Read, for the Court).

⁶⁷ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506 (Brennan J, with whom Gibbs CJ and Stephen and Wilson JJ agreed).

⁶⁸ 'The court has to be able to put itself in the position of the RWIND tenderer, and evidence may be necessary for that purpose': *Healthcare at Home Ltd v The Common Services Agency* [2014] 4 All ER 210 at 255, [27] (Lord Read, for the Court). The RWIND tenderer is the reasonably well-informed and normally diligent tenderer, born in Luxembourg as a result of a number of EU directives concerned with public procurement: at [3].

⁶⁹ (2013) 249 CLR 435.

⁷⁰ (2013) 249 CLR 435 at 455 [56].

search engine in any meaningful way without knowing something about how it operates.

52. Their Honours also referred, without any disapproval, to the primary judge's findings about how ordinary and reasonable members of this class would have understood what was being shown to them by the search engine, in particular how they would not have understood the Appellant in that case (the Respondent here) '*to have endorsed or to have been responsible in any meaningful way for the content of the advertisements*'.⁷¹ That finding depended on evidence about how sponsored links came to be generated, including the respective roles of employees of the Appellant and of third-party advertisers.

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53. A similar approach is legally required here. It is the approach that was taken by the Court of Appeal. It would not be possible to hypothesise a person using the search engine by entering a query in the searchbox who would be ignorant of the matters identified at paragraphs [39]-[40] and [42]-[43] above, but could still be said to be an ordinary, reasonable reader of what is presented in response by the search engine.

The ordinary, reasonable user will not ascribe any defamatory meaning to compilations of images

54. The legal principles on capacity to convey, most recently considered by this Court in *Favell v Queensland Newspapers Pty Ltd*,⁷² need not be traversed in great detail. The essential point is that the court will not leave to the jury '*those meanings which can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation*'.⁷³ The issue is application of the principles in a specific context.

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55. The ordinary, reasonable user of the search engine (or reader of what is presented in his/her browser in response to the search query just entered) would not ascribe any defamatory meaning to the images matter, as a composite, or to any of the individual compilation of images.

56. That person would know that the Respondent, by its search engine, is not representing that the meaning of each of the images is that which the terms of the

⁷¹ (2013) 249 CLR 435 at 455-456 [57].

⁷² (2005) 221 ALR 186.

⁷³ *Jones v Skelton* [1964] NSW 485 at 491 (PC).

search query, read as if a literal sentence, might convey. That person would know that the collection of images is being returned because there are webpages containing in some fashion both the search terms and the images (but not necessarily in the same context). Further, the hypothetical ordinary, reasonable person knows that the Respondent is simply transmitting information published by a third party content creator without adopting or endorsing it; passing it on for what it is worth.⁷⁴ That person would also know that each image operates similarly to a hyperlink, and that by clicking on an image it is possible to explore what are the webpages containing the search terms and images.

- 10 57. When the hypothetical ordinary, reasonable person is using the Image Search functionality, he/she expects to be presented with a range of images from webpages that contain the search terms. He or she understands that those images (and the webpages where those images are) have been automatically transmitted because the Respondent's algorithms have identified words contained in the user's search query (or similar words) on the webpage and that the images may be unrelated (or only tangentially related) to the search query.
58. Given that context, if a user of the search engine were to ascribe a defamatory meaning to a compilation of images returned in response to his/her search query (such as, for example, a query for 'melbourne' and 'underworld' and 'criminal'), that person would be impermissibly making an inference upon an inference.⁷⁵
20 A reasonable user of the search engine would not do so.
59. The first inference would be that each of the webpages from which the images have been located and returned, contains text that includes the words 'melbourne' and 'underworld' and 'criminal' (or close variants). This is a permissible inference.
60. The second, but impermissible inference upon inference, is that each of those webpages describes the individual depicted in the image (or, in some cases, the thing depicted, for example the logo 'Google') as being a Melbourne underworld criminal. Further, given that, for example, judges, barristers, victims of crime,

⁷⁴ *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at 455-456 [57] (French CJ, Crennan and Kiefel JJ), 482-485 [148] and [151] (Heydon J).

⁷⁵ *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 167A-E (Hunt CJ at CL, with whom Mason P and Handley JA agreed).

journalists, police officers, and company logos appear, such an inference would be absurd in the circumstances of this case.

61. This Court should accept that abstract indicia of what materials may be present on the Web, in the form of images returned as a collection, do not of themselves convey any defamatory meaning. To so conclude would be in conformity with the approach that this Court took in *Google Inc v Australian Competition and Consumer Commission*.

The ordinary, reasonable user will not ascribe any defamatory meaning to a set of auto completions

- 10 62. The ordinary, reasonable user will know that:
- 62.1. a search engine locates materials on the web by using word-based algorithms, matching each of the terms entered with text in webpages; and
 - 62.2. other users, knowing the same as he/she does about how a search engine operates, will enter search queries that may, in their simplest form, consist of one or more terms without any connectors.⁷⁶
63. By way of example, a user of the search engine may have entered the term 'JFK' followed by the term 'killer' seeking to find webpages that contain both words as part of the text. Such a search query might become one that is later returned as a possible auto completion to another user after he/she has entered the text 'JFK'.
- 20 64. The ordinary, reasonable user who is presented with a possible auto completion 'JFK killer' for the text 'JFK' he/she has so far typed in the search box, will know that this occurs because they or other users have entered the query 'JFK' and 'killer' in the past. The only inference they would ascribe to such an auto completion is: "Here are some phrases previously searched by users". They would not thereby think that President Kennedy was a killer.
65. Even if some users of the search engine may have held the view that President Kennedy was a killer, and were seeking to find materials on the Web confirming (or even disputing) that view, the ordinary, reasonable user would not jump to

⁷⁶ Someone who knew that the Appellant had brought defamation actions against the Respondent and Yahoo!, and had won those cases because juries had found conveyed some imputation about him being involved with Melbourne underworld criminals (or something to that effect), may easily consider that a query for 'michael' and 'trkulja' and 'criminal' (see for example the 'picture' of auto completions reproduced as part of page 1 of the web matter) would be likely to turn up materials discussing that case.

conclusions about what might have been the intention of those other users in framing the search queries in that particular way. It would be a ‘*strained, or forced, or utterly unreasonable interpretation*’ to ascribe a defamatory meaning to one completion for a query, returned as a part of a set of suggested completions. It follows that Justice Blue was correct to conclude, in *Duffy v Google Inc*,⁷⁷ that sets of possible autocompletions are incapable of being defamatory.

Not a publisher of the matters complained of

66. The only basis upon which the Appellant seeks to have this Court engage with the first ground of appeal is expressed as follows (AS at [36]): ‘*If the matter was remitted solely on a successful appeal on the “capacity” issue the trial judge would be hampered in the conduct of the trial by what the Court of Appeal has said on “publication”*’.
67. If the matter were to go to trial, what the Court of Appeal said on ‘publication’ would not bind the trial judge because it does not form part of the ratio of the Court’s decision.
68. The Appellant appears to take issue with the Court of Appeal’s conclusion⁷⁸ that the amended statement of claim does not plead material facts to found a case of liability by failure to remove the images matter and/or the web matter from somewhere,⁷⁹ or failure to prevent certain materials⁸⁰ from being potentially included in response to a user of the search engine entering a search query. Plainly, however, the amended statement of claim does not plead those material facts. Further, the Court of Appeal extended an opportunity to the Appellant to further amend his statement of claim to plead to that effect, which was not taken up.⁸¹
69. Assuming the Appellant were to succeed on ground 2, with the consequence that the Respondent would be required to enter a defence and then the matter would proceed to trial, there would be no ‘*hampering*’ by the conclusion of the Court of

⁷⁷ (2015) 125 SASR 437 at [375].

⁷⁸ Reasons of the Court of Appeal at [368].

⁷⁹ It is not easy to see from where they would need to be removed. Each of the images matter and the web matter is a composite of many different things. Even at the level of granularity of just one of the printouts in the images matter, that material is also a composite of many different things.

⁸⁰ It is not easy to see what those materials could be, or how they could be specified. One is taken back to the fact that the Appellant was in effect seeking relief by way of a mandatory injunction in respect of, effectively, any depiction of his photograph.

⁸¹ Reasons of the Court of Appeal at [367].

Appeal that, as regards the images matter and the web matter, liability of the Respondent could only arise (if at all) once it had a relevant form of notice and it failed to act.⁸²

70. Insofar as the Appellant seeks to agitate factual matters, which he appears to suggest could only be determined after discovery (AS at [40]), he is again thrown back to a case of liability after notice and failure to act. The only possible ‘*editing*’ at the crawling or indexing stages that could be suggested (assuming it could be done, which is disputed), would be in respect of some defamatory matter about the Appellant, which matter would have to have been identified to the Respondent before it could take any action. Alternatively, the Appellant is contending that the Respondent is liable for having failed to fashion some pre-emptive action to remove / block / prevent every possible way in which users of the search engine could find material on the Web relating to the Appellant.⁸³ However that contention is untenable. The law of defamation has never protected such an interest. The chilling effect on freedom of speech would be extreme.

71. In conclusion in relation to ground 1, the Appellant points to no error in the reasoning of the Court of Appeal, arrived at from first principles as expounded in *Webb v Bloch*,⁸⁴ that in respect of materials returned in response to a user’s search query, a search engine operator:

71.1. is not liable as a primary publisher;⁸⁵

⁸² The Appellant appears to concede (AS at [41]) that he would want to run the case on this basis, which he describes as ‘*post-notification*’. There is a further, unclear reference to this effect in the Appellant’s contention that ‘*Google’s state of mind is that of a publisher post notification*’ (AS at [50]). Given that paragraph also includes reference to the decision of Justice Blue in *Duffy v Google Inc* (2015) 125 SASR 437, where the plaintiff had squarely (and solely) pleaded a case of liability for failure to remove after notice of the alleged defamatory matters being returned to a user of the search engine who entered a query for her name, the Appellant’s submission appears, again, to be consistent with an intention to run the case on a ‘*post-notification*’ basis, if he were successful on ground 2.

⁸³ A contention that would be consistent with the relief sought.

⁸⁴ (1928) 41 CLR 331.

⁸⁵ Reasons of the Court of Appeal at [319], [323], [349], [354]-[357]. It is implicit in the Court of Appeal’s decision that it found error with McDonald J’s conclusion that it was arguable the Respondent was liable ‘*from the moment when the search results and autocomplete predictions respectively were displayed on the searcher’s screen*’ (at [366]). The Court of Appeal also must be taken to have found that, insofar as the reasoning by Beach J, on the application for judgment notwithstanding verdict in *Trkulja v Google Inc (No.5)* [2012] VSC 533, depended on a conclusion that the Respondent was liable from the moment materials are displayed (that is, prior to and independently of any notice), that reasoning was also incorrect. On balance, it appears that the Court of Appeal considered that the first *Trkulja* case was founded on liability as a secondary publisher: See Reasons at [319(2)] and [362]. On the first *Trkulja* case, see also Reasons at [343]-[346].

71.2. could only be liable as a secondary publisher,⁸⁶ provided the facts establish the requisite intention to publish.⁸⁷

Conclusion

72. On the basis upon which the Court of Appeal proceeded, namely that the materials of which the Appellant complains were incapable of conveying the pleaded defamatory meanings, the Appellant had no real prospect of success. The Court of Appeal was correct in setting aside originating process and its service. The same conclusion can also be justified on the wider basis that the kinds of materials of which the Appellant complains are incapable of conveying any defamatory meaning.

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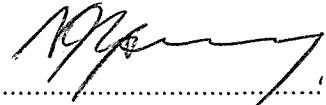
Part VII: Notice of contention or of cross-appeal

73. There is no notice of contention or of cross-appeal.

Part VIII: Estimate of time

74. The estimate for the presentation of the Respondent's oral argument is 1.5 hours.

Dated 11 August 2017



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⁸⁶ Reasons of the Court of Appeal at [347]-[349].

⁸⁷ Intention to publish (see Reasons of the Court of Appeal at [325]) is a different matter from intention to defame (see AS at [51], citing paragraphs from *Gatley*).