

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
DEFAMATION LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-18-05805

KIM WELLS

Plaintiff

v

GUISEPPE JOE COSSARI

Defendant

JUDGE: HER HONOUR JUDGE TSALAMANDRIS
WHERE HELD: Melbourne
DATE OF HEARING: 29 April 2020
DATE OF RULING: 1 May 2020
CASE MAY BE CITED AS: Wells v Cossari
MEDIUM NEUTRAL CITATION: [2020] VCC 512

REASONS FOR RULING

Subject: CIVIL PROCEDURE
Catchwords: Mode of trial – Jury Trial – Where Court has suspended all new Jury Trials until further notice due to COVID-19 pandemic – Whether proceeding should proceed as a Cause
Legislation Cited: *Supreme Court (General Civil Procedure) Rules 2015 (Vic); Civil Procedure Act 2010 (Vic).*
Cases Cited: *Trevor Roller Shutter Service Pty Ltd v Crowe* [2011] VSCA 16; *Gunns Ltd v Marr (No 5)* [2009] VSC 284; *Birti v SPI Electricity* [2011] VSC 566; *Mulquiney v Reynolds & Anor (No 1)* [2020] VSC 119; *Capic v Ford Motor Company of Australia Limited* [2020] FCA 486
Ruling: Matter to proceed as a cause

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Hoyne	Carbone Lawyers
For the Defendant	Mr D Gilbertson QC with Ms S Whiteman	Burch & Co Lawyers

HER HONOUR:

- 1 Mr Wells is an elected member of the Legislative Assembly of Victoria, who seeks damages for what he alleges were defamatory statements made about him by Mr Cossari on Facebook, during the November 2018 state election campaign. Mr Cossari denies these allegations.
- 2 This case is currently listed to commence on 3 June 2020 as a jury trial, with an estimate of 8 days. This is an application by Mr Wells for the case to proceed on that date as a cause.
- 3 From 16 March 2020, due to health concerns arising from COVID-19, it was announced that, until further notice, no new jury trials would commence in the Supreme Court or County Court of Victoria.
- 4 The Common Law Division of the County Court is currently hearing causes of 1-2 days, as remote eTrials. It is intended that from 1 June 2020, the County Court will hear longer causes, irrespective of the length, as remote eTrials, unless satisfied that such a case is unsuitable to be heard via video. In the interim, some longer causes are being accommodated by the court, where it is satisfied the court has the capacity to hear such cases as remote eTrials.
- 5 In support of his application, Mr Wells filed an affidavit sworn on 21 April 2020. In this affidavit, Mr Wells expressed his desire for the claim to proceed on the scheduled trial date, as he considers that until the case is determined, the damage to his reputation continues. Further, Mr Wells stated that the proceedings have caused him ongoing stress and inconvenience. It was noted that the case had been previously adjourned in October 2019 and thus this is the second trial allocated.
- 6 Mr Cossari submitted that this case was well suited to a jury trial, and that a delay arising from the suspension of jury trials was an insufficient reason to disentitle him from defending this claim before a jury. Further, it was noted

that Mr Wells, if successful, will recover compensation to vindicate him for the alleged damage to his reputation up until the time of trial, whenever that may be.

7 Subject to compliance with the Rules of Court, a party is entitled as of right to seek trial by jury provided the claim is founded in contract or in tort. This right was enlivened in this case by Mr Cossari filing a jury notice in this matter on 25 January 2019 and the jury fees have been paid.

8 Where a party has given proper notice that a trial by jury is required, that will be the prescribed mode of trial unless the court is persuaded to dispense with the jury. This power is provided for under 47.02 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*.

9 The Court of Appeal in *Trevor Roller Shutter Service Pty Ltd v Crowe*¹ noted that a party who gives notice in accordance with the Rules has a prima facie entitlement to trial by jury and that party should not be deprived of such an entitlement in the absence of good cause².

10 The onus in persuading a court to dispense with a jury trial rests with the party making the application, in this case the plaintiff. A court will not lightly make such an order unless it is warranted by the “dictates of justice”.³

11 In *Gunns Ltd v Marr (No 5)*⁴ and *Birti v SPI Electricity*⁵, J Forrest J summarised the factors relevant to the court exercising its discretion to dispense with a jury trial, which included matters such as complexity of factual matters and legal issues.

¹ [2011] VSCA 16

² *Ibid* at [38]; see also *Belbin v Lower Murray Urban and Rural Water Corporation (Ruling No 1)* [2012] VSC 359, [8]

³ *Gunns Ltd v Marr (No 5)* [2009] VSC 284 at [9]

⁴ [2009] VSC 284

⁵ [2011] VSC 566

12 The factors usually considered by a court in deciding whether to dispense with a jury are irrelevant to this application, which arises solely as a consequence of the indefinite suspension of new jury trials in this state.

13 The time that we find ourselves in is unique. On the day that new jury trials were suspended, Macaulay J, in the matter of *Mulquiney v Reynolds & Anor (No 1)*,⁶ considered the court's power under 47.02 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* and whether the court has power to determine if the trial proceed by judge alone.

14 The case of *Mulquiney* involved an institutional liability proceeding against an alleged perpetrator of sexual abuse and the State of Victoria. The case had previously been expedited due to the nature of the plaintiff's injuries and the adverse effects of the litigation process upon him.

15 In deciding that the "dictates of justice" warranted the exercise of his discretion to order trial by judge alone, Macauley J considered the following matters:

- it was in the interests of the plaintiff to have the matter expedited and not subject to delay;
- there was nothing about the case which would make it unjust to either party to have it heard by a judge rather than a jury;
- it was in the public interest for cases before the courts to be disposed of in an orderly, timely and cost-effective way.

16 Since the time of the Ruling in *Mulquiney*, the State Government has passed laws restricting the movement of people in response to COVID-19. These restrictions will be reviewed in early May 2020. However, even if those restrictions are eased, at the current time it cannot be confidently assumed that a jury trial can proceed this year.

⁶ [2020] VSC 119

17 As was recently noted by Perram J in *Capic v Ford Motor Company of Australia Limited*,⁷ in an adjournment application for a class action in the Federal Court due to commence in June 2020 :

“...there is simply no guarantee that the situation will be any better in six months’ time. It may be that this is a state of affairs which persists for a year or so. It is not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period...”⁸

18 Relevant to the exercise of my discretion in this case, I note the following:

- I am not satisfied that there is a particular reason as to why the case should proceed before a jury;
- I am satisfied that Mr Wells will suffer ongoing stress and concern about ongoing damage to his reputation until this matter is determined. If, as I accept, it is not likely that a jury trial can commence before the end of 2020 there will be a delay of eight months or more. I am mindful of the maxim “justice delayed is justice denied” in considering the application before me;
- A lengthy adjournment would be inconsistent with the overarching purposes of the *Civil Procedure Act 2010 (Vic)*, to achieve just, efficient, timely and cost-effective resolution of the real issues in dispute in a case;
- The court has the capacity to hear this trial as a cause on 3 June 2020. This mode of trial will enable the case to be heard “equally justly”⁹, and without the need for a lengthy adjournment.

19 In exercising my discretion to dispense with a jury, I must be satisfied as to what the dictates of justice demand in this particular case. For the reasons

⁷ [2020] FCA 486

⁸ Ibid at [23]

⁹ [2020] VSC 119 at [8]

stated, I am satisfied that the jury in this matter be dispensed with and the case now proceed as a cause.