

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



C PLYMOUTH BRETHREN (EXCLUSIVE BRETHREN) CHRISTIAN CHURCH V THE AGE COMPANY LTD; PLYMOUTH BRETHREN (EXCLUSIVE BRETHREN) CHRISTIAN CHURCH V FAIRFAX MEDIA PUBLICATIONS PTY LTD [2018] NSWCA 95

Court of Appeal New South Wales, Beazley P, McColl, Basten JJA, 7 May 2018

Finding that references made in articles to rebranded church undertaking charity work would reasonably be capable of identifying appellant.

Key words: Defamation, New South Wales Court of Appeal, Church, Imputations, Capacity to Convey, Indirect Identification

1. This case concerned alleged defamation of the appellant, a registered charity. Under the *Defamation Act 2005* (NSW), a person has a cause of action for defamation when defamatory matter is published ‘about the person’: section 8. A corporation may equally have a cause of action when defamatory matter is published ‘about the corporation’, provided it is the kind of corporation that is otherwise entitled to bring an action for defamation: section 9.
2. The proceedings concerned allegedly defamatory publications by the respondent media companies in their newspapers about the appellant, published on 18 June 2016. The appellant is not a church, but a company. It came into existence in 2012, many years after the sexual abuse allegations discussed in the relevant newspaper article. It was incorporated for the purposes of advancing the Christian religion and acting as the secretariat of the church in Australia.
3. The church in question is defined in the company’s constitution as follows:

...the worldwide Christian fellowship that commenced in 1827 at a meeting for the celebration of the Lord’s Supper at which Mr John Nelson Darby was in attendance and has continued since and become variously known as “Brethren”, “Plymouth Brethren”, “Plymouth Brethren IV”, “Exclusive Brethren” or “Plymouth Brethren Christian Church”.
4. As a registered charity, the company is permitted to omit ‘Limited’ from its name: section 150(1) *Corporations Act 2001* (Cth). Its company name is ‘Plymouth Brethren (Exclusive Brethren) Christian Church’.

5. The respondent newspapers had contended in the court below that none of the matters complained of was capable of identifying the appellant company and that the proceedings should accordingly be dismissed, since without identification there could be no defamation. Whether the words could reasonably in the circumstances lead persons acquainted with the appellant to believe that it was the person referred to was a matter for the jury. However, it was for the judge to decide whether the evidence was capable of establishing that fact. The court below decided the matter in favour of the newspapers.
6. The article sued on by the appellant discussed the manner in which allegations of child sex abuse were dealt with by the Exclusive Brethren over a lengthy period dating back to 1966. A whistle-blower had come forward and given the newspapers details of various cases of abuse which he had dealt with as a 'strategist' employed by the church from 2006-2009. There was discussion of the fact that the Royal Commission into Institutional Responses to Child Sexual Abuse did not hear evidence about the Plymouth Brethren Christian Church (formerly the Exclusive Brethren) even though there had been allegations and legal proceedings relating to those allegations in 2005, and the Commission had investigated so many other churches and other bodies.
7. There were four imputations alleged. The appellant company was not named in the matters complained of, but the appellant had contended that even though only the word 'church' was referred to and not the company itself, the church was clearly identifiable with the company. The test of identification was objective. What did the words mean and to whom?
8. The court below held that the article could not reasonably lead persons acquainted with the appellant to believe it was the entity referred to because such persons would know it did not exist at the time of the conduct described. In that circumstance, any identification of the appellant as the entity referred to would necessarily be based on an erroneous belief on the part of the reader (at [45] of the decision at first instance). Therefore, the court concluded that the matters complained of were not reasonably capable of identifying the appellant company.
9. On appeal, the main question was again whether the matter complained of was reasonably capable of identifying the corporation. The Court of Appeal (per Beazley P and McColl JA, Basten JA dissenting) allowed the appeal and remitted the case to the court below. The court held that an erroneous belief could be relied upon for the purposes of identification, where that belief is the product of the matter complained of (at [63]-[68]). Further, a mistaken identification may be drawn by a reasonable reader, so long as it is a product of the matter complained of (at [93]).
10. The question of whether the matter complained of was reasonably capable of identifying the corporation needed to be approached with great caution (at [2], [70]-[74]). Though the article referred to events that occurred prior to the corporation's registration, it intertwined those events with the present, suggesting that the rebranded 'Plymouth Brethren Christian Church' was involved in a continuing cover up (at [92] [98]). Various permutations of the corporation's name appeared in the article, including the trademarked name under which it conducted its business. Further, references to the 'rebranded' Church undertaking charity work would reasonably be capable of identifying the corporation to classes of persons referred to in their particulars of identification (at [102]-[105]). It would therefore not be perverse for the jury to find that the article identified the corporation (at [109]).

11. Basten JA (dissenting) held that the corporation was a separate legal entity, distinct from the individuals making up the Church. For the matter complained of to be reasonably capable of identifying the corporation, allegations must be reasonably attributable to persons acting on the corporation's behalf (at [147], [156]). A reasonable reader could not have inferred that any of the allegations in the matter complained of were about the corporation. Read as a whole, the matter complained of plainly referred to the Church and its elders, rather than the corporation. With the exception of possible references to a continuing cover-up, the events described in the articles occurred before the corporation's registration (at [153]-[160]).
12. Therefore, although the full name of the appellant, the Plymouth Brethren (Exclusive Brethren) Christian Church, did not appear as such in the matter complained of defamation was capable of being established because of the various permutations of the name which were used in the article, and the connections that could be made from those usages. It was interesting that the court referred to the spike in new users to the appellant's website as evidence of readers' ability to connect the church with the company name (at [107]). This was held to be evidence that could be laid before a tribunal of fact on the issue.

IMPLICATIONS



Churches often have a legal structure of an unincorporated association of believers and a corporate entity that holds the property of the church for the use of its members. This is because an unincorporated association has no standing as such in law or before the courts apart from all its members from time to time. This structure is not commonly understood by the public and is not a straight forward as a corporate association of members that calls itself a church.

VIEW THE CASE



The case in the court below may be viewed at:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2017/214.html>

This appeal may be viewed at:

<https://www.caselaw.nsw.gov.au/decision/5aeb9050e4b074a7c6e1eeee>

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