

SUPREME COURT OF QUEENSLAND

CITATION: *Dorante-Day v Dailymail.com Australia Pty Ltd* [2026]
QCA 167

PARTIES: **SIMON CHARLES DORANTE-DAY**
(appellant)
v
DAILYMAIL.COM AUSTRALIA PTY LTD
(first respondent)
JONICA BRAY
(second respondent)

FILE NO/S: Appeal No 4175 of 2025
SC No 14488 of 2024

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 22 August 2025
(Johnstone J)

DELIVERED ON: 4 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 31 July 2026

JUDGES: Mullins P, Bond JA, Doyle JA

ORDERS: **1. The Order made 22 August 2025 is varied by amending Order 2 so that it provides as follows, that:**

(a) Strike out paragraphs 1, 2 and 4 of the Claim filed on 25 October 2024;

(b) Strike out paragraph 5 of the Claim filed on 25 October 2024 but with leave granted to the appellant to amend the Claim to seek damages or other relief consequent upon the breach of copyright identified in paragraph 3 of the Claim.

2. The appeal is dismissed.

3. The appellant pay the respondents' costs of the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FOR BIAS IN JUDICIAL PROCEEDINGS – where the appellant alleged actual bias, apprehended bias and denial of procedural fairness arising from the conduct of the hearing – where the primary judge required leave for the appellant's McKenzie Friend, continued the hearing in the appellant's absence and made costs orders after the appellant failed to

return – whether the appellant was denied procedural fairness
– whether actual or apprehended bias established

DEFAMATION – ACTIONS FOR DEFAMATION – where
purported concerns notice did not identify defamatory
imputations – where defamation proceedings commenced
before expiry of applicable period for offer to make amends
and without leave – whether concerns notice complied with
s 12A of the *Defamation Act 2005* (Qld) – whether the
appellant was entitled to commence proceedings – whether the
defamation claims liable to summary dismissal

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND
TERRITORY COURTS – PLEADINGS – where the primary
judge entered judgment on part of the claim and struck out
parts of the amended statement of claim – where the claim
included allegation of defamation and breach of copyright –
whether the orders should be varied to preserve any copyright
claim

Adoption Act 2009 (Qld), s 315

Criminal Code (Cth), s 417.17

Criminal Code (Qld), s 365

Defamation Act 2005 (Qld), s 10A, s 12A, s 12B, s 14,
s 18(1)

Uniform Civil Procedure Rules 1999 (Qld), r 293

Aguasa v Hunter [2026] WASCA 37, applied

Anderson v Attorney General for NSW (1987) 10 NSWLR 198,
cited

Cavar v Campbelltown Catholic Club Ltd [2024] NSWCA 126,
cited

Chu v Huynh [2026] QCA 106, cited

Coffey v State of Queensland [2010] QCA 291, applied

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337;
[2000] HCA 63, cited

Fairfax Media Publications Pty Ltd v Voller (2021)
273 CLR 346; [2021] HCA 27, cited

*Gayed v Virgin Mary & St Markorious Coptic Orthodox
Church* [2024] NSWSC 1232, cited

Gindy v Capital Lawyers Pty Ltd (2022) 374 FLR 1; [2022]
ACTCA 66, considered

Hayes v Pioneer Credit Acquisition Services Pty Ltd [2019]
FCA 1260, cited

HT v The Queen (2019) 269 CLR 403; [2019] HCA 40, cited
McKenzie v McKenzie [1970] 3 All ER 1034; [1971] P 33,
considered

Michael Wilson & Partners Ltd v Nicholls (2011)
244 CLR 427; [2011] HCA 48, cited

*Minister for Immigration and Multicultural Affairs v Jia
Legeng* (2001) 205 CLR 507; [2001] HCA 17, cited

Palmer v Gibson [2026] QCA 60, cited

QYFM v Minister for Immigration, Citizenship, Migrant

Services and Multicultural Affairs (2023) 279 CLR 148;
 [2023] HCA 15, cited
Schagen v The Queen (1993) 8 WAR 410; [1993] WASC 133,
 cited
Smith v The Queen (1985) 159 CLR 532; [1985] HCA 62,
 cited
*SunshineLoans Pty Ltd v Australian Securities and
 Investments Commission* (2026) 100 ALJR 489; [2026]
 HCA 8, cited
Thorpe v Head, Transport for Victoria (2021) 66 VR 56;
 [2021] VSC 750, cited

COUNSEL: The appellant appeared on his own behalf
 P L Somers for the respondent

SOLICITORS: The appellant appeared on his own behalf
 Mark O'Brien Legal for the respondent

- [1] **MULLINS P:** I agree with Doyle JA.
- [2] **BOND JA:** I agree with the reasons for judgment of Doyle JA and with the orders proposed by his Honour.
- [3] **DOYLE JA:** This is an appeal from orders made on 22 August 2025, namely:
- (a) On the application by the respondents, striking out particular paragraphs of the appellant's amended Statement of Claim and entering judgment for the respondents on specific paragraphs of the Claim;
 - (b) Dismissing an application filed by the appellant on 3 July 2025;
 - (c) On both applications making orders for costs against the appellant including in some respects, on an indemnity basis.

Background

- [4] On 19 October 2024, the first respondent published online an article concerning the appellant. The second respondent is alleged to be its author. Save in limited respects it is unnecessary to distinguish between the respondents and I will generally refer only to the first respondent. The appellant alleges that that article was defamatory of him.
- [5] That article was first published at 1:43 AEST. It has been the subject of comments by others posted on the first respondent's webpage. The article stated amongst other things:

“EXCLUSIVE Royal minders on red alert over Charles and Camilla's
 ‘secret lovechild’- after he sends them an ominous warning for their
 trip to Australia

...

Royal security services are on high alert this weekend to protect **King
 Charles** and **Queen Camilla** from an Australian who claims to be
 their secret love child.

British-born Simon Charles Dorante-Day, 58, is convinced he is their illegitimate son who was given up for adoption soon after birth and taken in by Royal palace staff.

He has been demanding a DNA test to prove his claim for years – but has now been put on a security watch list after a warning he may take matters into his own hands.

...

Now close protection experts have confirmed the Australian will be closely watched by Royal bodyguards while the King and Queen are in the country.

‘There is probably around 20 names on that watchlist already,’ one protection expert – who can’t be named for security reasons – told Daily Mail Australia.

‘And certainly anyone making a noise publicly will be of high interest.

...

But Royal minders will have briefed police and ASIO to keep him well away from Charles and Camilla while in Australia.”¹

- [6] Later that same day, 19 October 2024, the appellant sent the first respondent what purports to be a “concerns notice”. That notice stated:

“To Whom It May Concern,

I bring your attention to the article entitled ‘Royal minders on red alert over Charles and Camilla's 'secret lovechild' - after he sends them an ominous warning for their trip to Australia’ published online at <https://www.dailymail.co.uk/news/article-13964637/Charles-Camillas-lovechild-Australia.html> on Saturday the 19th of October at 01:43 AEDT.

This article is defamatory, inaccurate, and tarnishes my reputation publicly. If it is not removed from publication within 48 hours and an apology published to myself in its place online, where the article would be located, then I will bring Court action by filing on Monday 21st October seeking damages and costs of bringing the action.

Moreover, this is the second time the Daily Mail has breached copyright on my photos and despite promising to correctly identify the author as © Facebook/PrinceSimonCharles in future you have failed to do so. Additionally, you have incorrectly identified one image of mine as © Daily Mail. I also seek damages for this.”

- [7] The following day (20 October 2024) the first respondent sought particulars from the appellant as to those parts of the article that he contended were inaccurate. He responded that same day, referring to “the whole article”. His response continued:

“If I was on the watch list you have breached my privacy globally by revealing this and publishing this, which defames my reputation.

¹ The article tendered comprised text and photographs over 5 pages. The bold emphasis was in the article as published.

If I am not on the list you have totally defamed me globally anyway.

As far as I am aware I am NOT on the list neither have I had any conversation or visit from Authorities in regards to this.

Last night I wrote to the Police Minister of Queensland, the Queensland Premier, and the Queensland Fixated Threat Team to find out if I am on the list.

It is total harassment and breach of copyright, which you don't mention nor query me on - again!"

[8] On 25 October 2024, the appellant commenced his proceedings in the Supreme Court.

[9] The Claim sought the following relief:

- “1. That the first defendant published defamatory material about the plaintiff on the internet at 01:45am on 19 October 2024, which was subsequently re-published globally within 24 hours.
2. That the second defendant, the author, has criminally defamed the plaintiff by showing no regard to whether the issue was true or false, and no regard for the damage publication would bring upon the plaintiff and his family.
3. That the first defendant has breached the plaintiff’s copyright; by not identifying the source of his images they used in the article.
4. By way of relief the plaintiff seeks an immediate redaction of all forms of the article and a published apology to the plaintiff in its place, and
5. The plaintiff seeks damages of \$560,114.40 which includes costs of bringing this action.”

[10] The amended Statement of Claim (not substantially different from the original statement of claim) does not set out the terms of the initial article as such but identifies it by its headline and does likewise for other publications of the same article. So at [6] it is identified that the first respondent published an article entitled “Royal minders on red alert over Charles and Camilla’s ‘secret lovechild’ - after he sends them an ominous warning for their trip to Australia” identifying the link to the article and adding “naming and defaming the plaintiff directly”. The defamatory imputations are not pleaded.

[11] The pleading states:

- “20. Firstly, the article doesn’t just suggest the plaintiff is on the ‘Watch list’ it clearly states he is, and that close protection ‘experts’, ‘have confirmed’ this. For this Undisclosed non-public list to be in the hands of the defendant, demonstrates that a breach of security and privacy has occurred, yet the protection ‘expert’ allegedly can’t be named for ‘security reasons’. If the plaintiff were on the watchlist this would not only be defamation but total breach of privacy, breach of his human rights, and release of non-public material without just cause.

21. Secondly, the article makes a number of statements that aren't factual in regard to the plaintiff's claims, portraying him falsely, and intentionally in a bad light.
22. Thirdly, the article is written to sensationalise the plaintiff's issue in a derogatory and negative manner to attract traffic over the Royal visit and does not emphasise the truth about the plaintiffs' claims, that he has a legal right to pursue, without being arbitrarily interfered with or unlawfully attacked.
23. Fourthly, the defendant's argument that the plaintiff's comments have placed him as a high alert threat to security are fictitious and sensationalising at best. The comments made by the plaintiff quoted in the article were made in early April 2024, referred to legal issues, and was published by 7 News at the time. Both Royal Protection, QFTAC, and even QPS have had some six months to approach the plaintiff, knowing the Royal visit was in October, and they did not. Moreover, the defendant's statement that '[the plaintiff] has now been put on a security watch list after a warning he may take matters into his own hands' is factually incorrect and is misleading at best paying no regard to the legal action(s) already pursued by the plaintiff, that he has a human right to undertake. This doesn't make the plaintiff 'a threat' to security and grossly overstates the situation defaming the plaintiff and his intent in their misrepresentations.
24. Finally, the 'watch list' has been used as a weapon against the plaintiff for some 12 years now by various bodies. He went to great extent to get himself removed from the list, to get the illegitimate actions justified, and to stop the offensive harassment and defamation that this has caused. This is further use of the 'watch list' to abuse, defame, and harass the plaintiff, this time globally, and this time, publicly at the hands of the media.
25. If the defendant intends to rely on public interest as a defence, then the plaintiff would have every right to insist on the global publication of the private information and naming of the other 19 people they allege are on the list. Give them the equal global attention and maltreatment that has been given the plaintiff."

[12] On 14 November 2024 the respondents to those proceedings sent an offer, which six days later the appellant refused.

[13] Various directions hearings took place in relation to the proceedings and ultimately the two applications to which I have referred above were filed.

The Respondents' Application

[14] The respondents' application, relevantly, sought:

- "1. That, pursuant to rule 293 of the *Uniform Civil Procedure Rules (UCPR)*, judgment be given for the first defendant and the second defendant on the following parts of the plaintiff's Claim:

- (a) paragraphs 1, 2, 4 and 5 of the Claim filed on 25 October 2024; and
 - (b) paragraphs 2, 4, 5, 7 to 18 inclusive, 20 to 28A inclusive, and 30 to 38 inclusive of the Amended Statement of Claim filed on 25 November 2024.
2. In the alternative, that pursuant to rule 171(2) of the UCPR, paragraphs 2, 4, 5, 7 to 18 inclusive, 20 to 28A inclusive, and 30 to 38 inclusive of the Amended Statement of Claim filed on 25 November 2024 be struck out.
 3. In the further alternative, that pursuant to rule 223(1) of the UCPR, the plaintiff disclose to the defendants the documents and categories of documents identified in Annexure A within 14 days.”

The Appellant’s Application

[15] The appellant’s application sought:

- “1. That leave of the Court is sought under r337 of the UCPR to amend the Claim and Statement of Claim to add Felicity Hetherington as a defendant, for the reasons outlined in the affidavit of *Simon Charles Dorante-Day* Nr1.
2. That, in the interests of r5 of the UCPR, the Court order the defendant(s) to comply with their obligations under practice direction 18 of 2018, as outlined in the affidavit of *Simon Charles Dorante-Day* Nr2.
3. That, pursuant to r319 of the UCPR, the Court directs the resolution registrar to give written notice to parties that the dispute be referred to pro-bono mediation under practice direction 17 of 2022, for the reasons outlined in the affidavit of *Simon Charles Dorante-Day* Nr2.
4. That, pursuant to r 223 of the UCPR, the Court order the defendant(s) to fully disclose the documents referred to, and for the reasons outlined, in the affidavit of *Simon Charles Dorante-Day* Nr3.”

[16] On the day before the hearing the judge had his associate email a request to the parties to provide written submissions for the hearing the following day. The respondent did so by email that day. The applicant did not because he had not read the email until he arrived home late that evening. By the next morning the judge had read the only written submissions which had been provided to him. The primary judge proceeded to hear the respondents’ application first (without any objection from the appellant) and concluded making the orders to which I have adverted above. Having done so his Honour did not proceed to deal with the respondents’ application in the alternative for discovery. In circumstances dealt with below, his Honour dismissed the appellant’s application.

Notice of Appeal

[17] There are 24 numbered paragraphs in the Notice of Appeal identifying what are said to be grounds of appeal.

- [18] Paragraphs 1–9 contend for errors made at various directions hearings. The orders made on those occasions are not the subject of appeal in the notice of appeal. It is unnecessary to consider them further.
- [19] Grounds 11 to 18 identify matters said to be relevant to the substance of the primary judge’s determination of the respondents’ application.
- [20] Grounds 10, and 19 to 24 contain assertions principally of various denials of procedural fairness to the appellant, both in the conduct of the hearing of the respondents’ application but also in respect of the appellant’s application.

Procedural Fairness Issues

- [21] I will deal first with the procedural fairness and related contentions. The grounds of appeal which give rise to these issues are Grounds 19 to 24, and Ground 10 which gives rise to a related issue. They state as follows:

- “10) The learned primary judge erred in law in his interpretation and application of *McKenzie v McKenzie* [1971] P 33...
- 19) The learned primary judge erred by denying natural justice in failing to afford the appellant a fair hearing through his biased, intimidating, unlawful, threatening, and unprofessional behaviour directed towards the appellant and his McKenzie friend.
- 20) The learned primary judge erred by denying natural justice in failing to afford a fair hearing by creating bias through only reading the respondents documentation and version of events prior to hearing.
- 21) The learned primary judge erred by denying natural justice in constantly seeking the approval, favour, and advice of respondent's legal counsel throughout the hearing.
- 22) The learned primary judge erred by denying natural justice in awarding costs without the argument or presence of the appellant.
- 23) The learned primary judge erred by denying natural justice in accepting a handed-up document without the presence nor approval of the appellant.
- 24) The learned primary judge erred by denying procedural fairness in not activating the video camera link so that the respondents could be observed by the Court.”

- [22] These grounds call for consideration of a contention that: the primary judge was biased; that his conduct gives rise to an apprehension of bias; or alternatively that he denied procedural fairness in the conduct of the applications.

Tests

- [23] Actual bias exists when a judge is not able to bring an impartial mind to the resolution of the matter before the judge. This can be based, inter alia, on firmly held prejudices

or beliefs, or fixed animosity. Actual bias will be established “where the accusations are distinctly made and clearly proved” such that they are “firmly established”,² necessitating an assessment of the judge’s state of mind.³

- [24] As to apprehended bias, the applicable test was authoritatively stated in this country in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 by Gleeson CJ, McHugh, Gummow and Hayne JJ at [6] where their Honours said:

“...the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity... a judge is disqualified if a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.”

- [25] In its application, this requires the consideration of at least these three steps: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [38] (Kiefel CJ and Gageler J). These are:

- “(1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits;
- (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and
- (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.”

- [26] These principles have been referred to with approval (with some exposition of the knowledge properly attributed to the lay observer and how that attributed knowledge informs the third step in *Ebner*) in the more recent High Court decision of *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* (2026) 100 ALJR 489.

- [27] Finally, quite apart from these considerations, courts are obliged to afford procedural fairness to the parties: *HT v The Queen* (2019) 269 CLR 403 at [17]–[18]. The content of that obligation is to afford the party a reasonable opportunity of being heard.

Aspects Complained of

- [28] One aspect complained of by the appellant is that the primary judge read some of the respondents’ material prior to the commencement of the application.

- [29] In the course of the addresses, the appellant asserted the primary judge was biased in respect of having read the respondents’ submissions before coming to court.

- (a) At one point counsel for the respondents took the primary judge to the statement of claim where reference was made to Royal Protection and QFTAC.

² *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 546 [127] (Kirby J).

³ *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 437-438 [33] (Gummow ACJ and Hayne, Crennan and Bell JJ). See more recently, *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148, 186 [115] (Edelman J).

The primary judge indicated he did not know what they were. The appellant interrupted and said:

“PLAINTIFF: QFTAC is well established, is well – and they know about it. You should know about it if you’re taking this case. You obviously haven’t read the documents before you came to court, have you? You read theirs. There’s a considerable amount of bias going on here, particularly for a self-represented litigant, your Honour.”⁴

- (b) The reference to the primary judge having “read theirs” is a reference to the primary judge having read the respondents’ written outline of submissions, as his Honour explained. The primary judge having explained that he has read the only written submissions provided to him the appellant continued:

“PLAINTIFF: Have you heard of the words ‘bias’, your Honour? That’s all I’m hearing.”⁵

[30] The suggestion that this indicated actual bias is without merit. It is entirely orthodox for a judge to read some material before coming into court. That aids the efficient use of court time. This having occurred does not suggest bias, apprehended bias or any form of procedural unfairness to the appellant.

[31] The second matter relied upon concerns the exchanges between the primary judge and the appellant, and his wife, over the latter attending as a “McKenzie Friend”.

[32] It is appropriate to detail some of those exchanges:

- (a) The appellant announced his appearance and also introduced Dr Dorante-Day (his wife) as his McKenzie Friend.⁶ He sought to hand up a sheet of her qualifications. The primary judge took the view that the appellant had to first seek leave to have a McKenzie Friend with him.
- (b) In the course of the following exchanges Dr Dorante-Day is recorded as addressing the primary judge saying “That’s okay. That’s fine”, possibly arising out of the primary judge’s requirement that the appellant first seek permission to have a McKenzie Friend. The primary judge then took issue with Dr Dorante-Day addressing the court directly and she is recorded as stating she would not talk ‘anymore’. Then followed this exchange:

“HIS HONOUR: Sorry, you’re not to talk at all.

DR DORANTE-DAY I know that.

HIS HONOUR: Well, why are you speaking to me?

DR DORANTE-DAY Sorry?

HIS HONOUR: Why are you speaking to me?

DR DORANTE-DAY Just to clarify that I don’t care about the fact that I’m not supposed to be here, then; that the process wasn’t followed. That’s what I meant. It’s okay. He’ll have it by himself.

⁴ T1-32 lines 1 to 5.

⁵ T1-32 lines 22 to 23.

⁶ T1-2 lines 8 to 13.

HIS HONOUR: You're not to address me; you're not a party. So I asked you why you're speaking to me, and you're telling me that you don't care. Well, if you don't care, you can leave the courtroom."⁷

- (c) The primary judge then asked the appellant to tell his McKenzie Friend to either not address the court or leave the court. The appellant refused to do so. The primary judge then asked, and in turn directed, the McKenzie Friend to leave the courtroom in response to which the appellant said in substance that if she left then so would he. Dr Dorante-Day is recorded as saying "Let's leave".⁸
 - (d) In fact neither left the court room. The primary judge is recorded saying "You can come back to the bar table" presumably referring to Dr Dorante- Day.⁹ In response to that the appellant stated to the primary judge "Well, you can stop the attitude" which was unhelpful but did not divert the further hearing of the matter.
- [33] The primary judge then asked the parties to proceed; the material relied on was read and submissions then made.
- [34] The description McKenzie Friend finds its origin in the Court of Appeal decision in *McKenzie v McKenzie* [1971] P 33. The petitioner husband in a contested divorce proceeding attended with an Australian barrister (not admitted in the UK) to sit with him at the bar table and prompt the husband as needed. The judge made a direction which was understood to be that the friend must not assist the husband by prompting at all and accordingly the friend left. That was held to be an irregularity in the proceedings warranting a new trial. It was held that the trial judge was wrong to prevent the friend from giving his advice and assistance to the husband during the hearing: per Davies LJ at 40; per Sachs LJ at 41; per Karminski LJ at 42.
- [35] The primary judge's direction that Dr Dorante-Day leave the courtroom because she had addressed the court, while within his power, would be outside the usual form of orders considered appropriate for the management of the case or the administration of justice. But it was retracted by the primary judge in short order. None of this however in my view shows either actual or apparent bias. The subject matter of the controversy (the presence of the McKenzie Friend) was remote from the merits of the applications to be heard. In fact she was allowed to remain and to assist the appellant. The applications then proceeded in the usual way.
- [36] Quite apart from the issue of bias, Ground 10 raises a related issue concerning the decision in *McKenzie v McKenzie*. Passages in the reasons in that case suggest the litigant had the *right* to have the friend sit with him and provide assistance to the litigant. It is doubtful if in Australia in criminal cases it can be said there is such a right, as distinct from the presiding judge being entitled to require that leave first be sought for the friend to attend as a McKenzie Friend: *Smith v The Queen* (1985) 159 CLR 532 at 534; *Schagen v The Queen* (1993) 8 WAR 410 at 412.
- [37] However, in *Coffey v State of Queensland* [2010] QCA 291 at [37], Fraser JA (Muir JA and Cullinane J agreeing) said:

"In civil cases the general position is different. It was confirmed in the decision which gave rise to the term "McKenzie friend", *McKenzie v*

⁷ T1-2 lines 34 to T1-3 line 1.

⁸ T1-3 lines 10 to T1-5 line 5.

⁹ T1-5 line 11.

McKenzie, that, in Lord Tenterden CJ's words in *Collier v Hicks*, 'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.'" (footnotes omitted)

[38] At [38], his Honour said:

"That remains the general rule in civil proceedings."

[39] The Court was referring to civil proceedings in the trial division (and a different approach may be warranted on appeal). On the facts in *Coffey*, the proposed assistance by the McKenzie Friend (Mr Bradshaw) was not merely clerical, administrative or moral support. It involved legal advice from a barrister who had been refused a practising certificate. The primary judge was therefore entitled to refuse it: [38]–[39]. Consistently, in *Gindy v Capital Lawyers Pty Ltd* [2022] ACTCA 66 at [146], Charlesworth J said that "[t]he nature and scope of that assistance is a matter for the judge to determine", and that "a McKenzie friend has no general right of audience".

[40] In *Hayes v Pioneer Credit Acquisition Services Pty Ltd* [2019] FCA 1260 at [30], Rangiah J understood *Coffey* to establish:

"In Australia, the prevailing view is that in criminal cases, the court has a discretion as to whether to allow a litigant a McKenzie friend: ... The position is different in civil cases. I understand the Queensland Court of Appeal to have held in *Coffey v State of Queensland* [2010] QCA 29 at [37]–[38] that in a civil case, an unrepresented litigant may have a person attend as a McKenzie friend, subject to the power of the court to disallow such assistance where that becomes necessary."

[41] His Honour went on to find at [31]:

"In the present case, the primary judge peremptorily directed Mr Welch to leave the area behind the bar table where he was seated near the applicant and move into the public gallery. There is no suggestion that Mr Welch was disrupting or otherwise abusing the processes of the Court. The appellant was entitled to such assistance as Mr Welch could provide by taking notes, quietly making suggestions and advising him. There was no basis for the primary judge to deprive the appellant of that assistance by requiring Mr Welch to leave. In my respectful opinion, the appellant was denied procedural fairness."

[42] It was therefore an irregularity for the primary judge to require that leave had first to be sought and obtained for Dr Dorante-Day to be at the bar table to provide assistance privately to the appellant. His Honour was correct that, in the substantive hearing, the McKenzie Friend had no right of appearance and so no right to address the court on behalf of the appellant.

[43] This issue might have had relevance in this appeal save that the issue of the need for leave was rendered immaterial when his Honour granted leave, and in the conduct of the applications the appellant was not deprived of the presence and assistance of his

wife, Dr Dorante-Day. It cannot be said that the effect was to deprive the appellant of an opportunity to present his case.

- [44] The third aspect referred to is the suggestion that the primary judge sought the approval of the respondents' counsel throughout the conduct of the applications. I have read the transcript of the proceedings, and that ground finds no support in it.
- [45] The fourth aspect of these grounds concerns events occurring in the absence of the appellant (both receiving a document from the respondents and making costs orders). At the hearing of the appeal the appellant clarified that the document being referred to was a letter dated 14 November 2024 from the solicitors for the respondents to the appellant. That letter was marked 'Without prejudice save as to costs'.
- [46] The circumstance that this took place in the absence of the appellant arises in this way. On the respondents' application, counsel for the respondents had addressed the primary judge after which the appellant commenced to make his submissions. The matter was adjourned for lunch with the primary judge stating that the Court would resume at "2:15".
- [47] At 2.15 pm when the Court resumed, there was no appearance by the appellant in person or by someone on his behalf. The bailiff called the matter outside the Court but there was no appearance. Thereafter, the hearing of the matter proceeded in the absence of the appellant. The respondents then made brief submissions in reply. The primary judge gave reasons for the orders he made on the respondents' application, to which I shall return in relation to the substantive challenges in this appeal.
- [48] The appellant absented himself. He has not sought to offer an explanation that might suggest his doing so arose outside his control. In those circumstances, the course adopted by the primary judge is not one in my view which raises any arguable contention of actual bias, apprehended bias or amounts to the Court not affording the appellant a reasonable opportunity to be heard. In particular:
- (a) proceeding to decide a case where a party absents himself without completing whatever submissions might have been sought to be made does not suggest the judge was not able to bring an impartial mind to the resolution of the matter.
 - (b) similarly, there is in adopting that course no basis to conclude a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial mind to the resolution of the question the judge is required to decide.
 - (c) finally, the court afforded the appellant the opportunity to be heard. He chose not to persist in the exercise of that opportunity.
- [49] As to the appellant's application, it was read (as was the material in support of it), but the respondents' application was heard first.¹⁰ When submissions had concluded on that application the appellant did not appear or seek to make submissions in support of his application which his Honour accordingly dismissed with costs. Again, there is nothing irregular in the primary judge proceeding to dispose of an application which had been listed for hearing but which the moving party did not appear to support.

¹⁰ T1-9 line 25 to T1-10 line 10.

- [50] Moreover, having regard to the Orders entering judgment made by the primary judge on the respondents' application, the foundation for the appellant's application would in any event have been removed so as to make it almost inevitable it would be dismissed.
- [51] The final matter raised in the Notice of Appeal concerns an asserted failure by the primary judge to activate a video so that the parties could see the respondents. I assume this is a reference to persons representing the respondents attending the hearing by audio visual link but with the camera not engaged. It is not clear on the material if the court or the persons (if any) so attending were in command of the camera function. But if this occurred, the appellant made no mention of it on the day before the primary judge.
- [52] In any case, there is nothing irregular in parties, with the permission of the Court, attending a hearing remotely and doing so in a way where they can hear but neither be seen nor heard. But more fundamentally, none of this supports an arguable contention of bias, apprehended bias or want of procedural fairness.

Costs and Indemnity Costs

- [53] No challenge is made to the costs order (either on the standard or the indemnity basis) other than because they were made without the argument or presence of the appellant.
- [54] None of these grounds, in my view, has been made out.

“Merits Grounds”

- [55] The Notice of Appeal by Grounds 11 to 18 provides as follows:

“Hearing Errors of Law

- 11) The learned primary judge erred in his interpretation and application of section 365 of the *Criminal Code Act 1899*.
- 12) The learned primary judge erred in law in his application of section 315 of the *Adoption Act 2009* and his interpretation and application of the High Court's ruling in *Fairfax v Voller* [2021] HCA 27.
- 13) The learned primary judge erred in law in his interpretation and application of section 474.17 of the *Criminal Code Act 1995* (Cth.).

Hearing Errors of Fact

- 14) The learned primary judge erred in finding that the appellant 'didn't know if he was on a watch list', which was contrary to what the appellant had stated orally and evidenced in submissions.
- 15) The learned primary judge erred by failing to identify firstly, what 'watch list' was being discussed, and secondly, the legalities of an 'undisclosed list'.
- 16) The learned primary judge erred in finding that no ground's existed to enact section 12B(3) of the *Defamation Act 2005*

when the appellant had provided grounds orally and in written submissions.

- 17) The learned primary judge erred in considering whether the applicable period for an offer to make amends had expired as per section 14(2)(a) of the *Defamation Act 2005*.
- 18) The learned primary judge erred by taking irrelevant considerations into account while overlooking relevant considerations, on several occasions, that were not in the interests of justice, erroneous, and criminal in nature.”

The Defamation Act

[56] Section 12B of the *Defamation Act 2005* (Qld) provides, relevantly, as follows:

“12B Defamation proceedings can not be commenced without concerns notice

- (1) An aggrieved person can not commence defamation proceedings unless—
 - (a) the person has given the proposed defendant a concerns notice in respect of the matter concerned; and
 - (b) the imputations to be relied on by the person in the proposed proceedings were particularised in the concerns notice; and
 - (c) the applicable period for an offer to make amends has elapsed.
- (2) Subsection (1)(b) does not prevent reliance on—
 - (a) some, but not all, of the imputations particularised in a concerns notice; or
 - (b) imputations that are substantially the same as those particularised in a concerns notice.
- (3) The court may grant leave for proceedings to be commenced despite non-compliance with subsection (1)(c), but only if the proposed plaintiff satisfies the court—
 - (a) the commencement of proceedings after the end of the applicable period for an offer to make amends contravenes the limitation law; or
 - (b) it is just and reasonable to grant leave....”

[57] Section 12A defines a “concerns notice” as follows:

“12A Concerns notices

- (1) For the purpose of this Act, a notice is a **concerns notice** if—
 - (a) the notice—
 - (i) is in writing; and

- (ii) specifies the location where the matter in question can be accessed (for example, a webpage address); and
 - (iii) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question; and
 - (iv) informs the publisher of the harm that the person considers to be serious harm to the person's reputation caused, or likely to be caused, by the publication of the matter in question; and
 - (v)
- (b) a copy of the matter in question is, if practicable, provided to the publisher together with the notice.

Note—

Section 12B requires a concerns notice to be given before proceedings for defamation can be commenced.

- (2) For the avoidance of doubt, a document that is required to be filed or lodged to commence defamation proceedings cannot be used as a concerns notice.
- (3) If a concerns notice fails to particularise adequately any of the information required by subsection (1)(a)(ii), (iii), (iv) or (v), the publisher may give the aggrieved person a written notice (a **further particulars notice**) requesting that the aggrieved person provide reasonable further particulars as specified in the further particulars notice about the information concerned.
- (4) An aggrieved person to whom a further particulars notice is given must provide the reasonable further particulars specified in the notice within 14 days (or any further period agreed by the publisher and aggrieved person) after being given the notice.
- (5) An aggrieved person who fails to provide the reasonable further particulars specified in a further particulars notice within the applicable period is taken not to have given the publisher a concerns notice for the purposes of this section.”

[58] For completeness certain other provisions should be noted.

[59] First, by section 10A it has been made an element of the cause of action for defamation that the publication of defamatory material has caused or is likely to cause “serious harm to the reputation of the person”¹¹.

[60] Second, section 14 dealt with offers to make amends and states:

“(1) An offer to make amends can not be made if—

¹¹ This meaning of this expression was considered in *Chu v Huynh* [2026] QCA 106.

- (a) the applicable period for an offer to make amends has expired; or
 - (b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.
- (2) For the purposes of this Act, the ***applicable period*** for an offer to make amends is—
- (a) if the aggrieved person has provided further particulars in response to a further particulars notice about a concerns notice after 14 days have elapsed since the concerns notice was given—14 days since the publisher was given the further particulars; or
 - (b) in any other case—28 days since the publisher was given a concerns notice by the aggrieved person.
- (3) If a publisher gives more than 1 further particulars notice, subsection (2)(a) applies only in respect of the first notice.”

[61] Finally, section 18(1) provides:

- “(1) If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if—
- (a) the publisher made the offer as soon as reasonably practicable after the publisher was given a concerns notice in respect of the matter (and, in any event, within the applicable period for an offer to make amends); and
 - (b) the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer; and
 - (c) in all the circumstances the offer was reasonable.”

[62] The respondents contended that the document provided by the appellant to the first respondent, even as supplemented by the further particulars provided on 20 October 2024, was not a “concerns notice that satisfied the definition in s 12A”. There were various reasons for this including: it was not given to the second respondent at all; it did not identify the imputations; it did not identify harm said to be serious harm. The topic of whether the concerns notice was given to the second respondent (separately from the first respondent) did not feature in the primary judge’s reasons and no issue as to that arises in the appeal.

[63] Alternatively, whether or not the document provided the appellant with a concerns notice, the proceedings were commenced before the period identified in s 12B(1)(c) had expired, such that for that reason as well the appellant was precluded from commencing defamation proceedings.

[64] The respondents contended in consequence of both of these matters, that the appellant was not authorised to commence and was precluded from commencing defamation proceedings by force of s 12B(1).

- [65] As will be clear from s 12B(3) the Court was able to grant leave for proceedings to commence, despite noncompliance with the time requirement in s 12B(1)(c) but that is limited to circumstances where “the proposed plaintiff satisfies the court” as to certain things and “...it is just and reasonable to grant leave”.

The Primary Judge’s Reasons

- [66] The primary judge dealt with the time requirement of s 12B(1)(c) first. His Honour stated:

“In this case Mr Dorante-Day, by email, issued what he contended to be the concerns notice on 20 October 2024, to which he received a response that day from the second defendant, which for present purposes can be regarded as a request for – sorry. It can be regarded as a further particulars notice, and Mr Dorante-Day responded to that email also on 20 October 2024. The next thing that occurred was five days later, on 25 October 2024, Mr Dorante-Day commenced this proceeding by filing a claim and statement of claim. Clearly enough, by operation of the Act, Mr Dorante-Day was not permitted to take that step, because he had failed to wait for the 14 days to elapse after the provision of his response to the further particulars notice.

As I have mentioned, section 12B(1)(c) is express in its terms and operates in such a manner that Mr Dorante-Day had not waited for the applicable period for an offer to make amends to elapse, and as a consequence, he was not permitted to commence the proceeding.”¹²

- [67] His Honour noted the operation of s 12B(3) but reasoned:

“Mr Dorante-Day did not make any submission to that effect, nor did he make any application for leave. Mr Somers submitted that there was no limitation issue associated either with the – sorry, I will withdraw that. Mr Somers submitted that there was no obvious limitation issue which presents on the facts before me, and I agree.”¹³

- [68] The primary judge returned to consider the form of the concerns notice and reasoned:

“I am not satisfied that they inform the publisher of the defamatory imputations that Mr Dorante-Day considers are or may be carried about the – about him. And I do not consider them to be sufficient to inform the defendant of the serious harm to Mr Dorante-Day’s reputation that he claims has been caused or will likely be caused.

For this reason as well, I am satisfied that by operation of section 12B(1)(a) and (b), Mr Dorante-Day was not permitted to commence this proceeding.”¹⁴

- [69] Given this view, the primary judge entered judgment for the respondents on paragraphs 1, 2, 4 and 5 of the Claim and struck out the associated paragraphs of the amended statement of claim.

¹² T1-5 lines 16 to 29.

¹³ T1-5 line 45 to 50.

¹⁴ T1-9 lines 45 to T1-10 line 2.

Discussion

[70] As to each of these alleged deficiencies in the course followed by the appellant the issues arise:

- (a) Was it correct to conclude the course followed was defective;
- (b) Is the consequence that the proceedings are incompetent and that it was correct to enter judgment on the claims?

Contents of Concerns Notice

[71] The requirements of s 12A(1) are not onerous. The notice is to be in writing and specify the location where the published matter can be accessed. That was done in this case.

[72] The remaining two relevant requirements are expressed as a requirement in part defined by what “the aggrieved person considers”.

[73] The letter sent by the appellant on 19 October 2024 did not identify any imputation about him carried by the published article. It merely referred to the headline of the article and directed where it could be accessed. Whatever it might be said to do, it does not satisfy the language of s 12A(1)(a)(iii) to inform the first respondent of the defamatory imputations the appellant considered conveyed about him by that article.

[74] The respondents did not make a request for the appellant to give particulars of those imputations. In any event none were provided. The position then is that the document was not a concerns notice which satisfied s 12A(1)(a)(iii) and the response the next day from the appellant to the first respondent’s request did not alter that.

[75] It is also doubtful that it satisfies the language of s 12A(1)(a)(iv) of informing the first respondent of the harm which the appellant considers to be serious harm to his reputation. It asserts the article is defamatory, inaccurate and tarnishes his reputation. None of these in my view identifies the harm. One possible exception is the reference to tarnishing his reputation which suggests some reduction in the sheen of his reputation. It was identified as made publicly and perhaps that too is relied on to identify the harm. For present purposes, I propose assuming, without deciding, that this is a sufficient compliance with the requirement of s 12A(1)(a)(iv).

Consequence of defective Concerns Notice

[76] What follows from the non-compliance with s 12A(1)(a)(iii)?

[77] The objects of the *Defamation Act* include the promotion of “speedy and non-litigious methods of resolving disputes about the publication of defamatory matter”: s 3(d). This, the Act does, in Part 3 which is entitled “Resolution of civil disputes without litigation”. That Part includes ss 12A and 12B, as well as s 18. Concerns Notices play a central role in achieving that object. Before proceedings are to be commenced, a concerns notice must be given. Moreover, if they are to be commenced at least some of the imputations relied on must have been included in the concerns notice or are substantially the same as those in the notice: s 12B(2).

[78] The specified and required content of the notice is designed to facilitate the publisher formulating and making an offer to make amends: s 13. That offer cannot be made if

a period, identified as the applicable period, has expired: s 14. That period is relevantly defined by reference to the passage of time from the receipt of the concerns notice, or if a request for particulars of the concerns notice has been made, a period after that request is made. If that offer is accepted and performed it precludes any cause of action for defamation: s 17.

- [79] Importantly, if the offer to make amends is made and not accepted it is (subject to a variety of conditions, including that it was in all the circumstances reasonable) a defence to the action for defamation: s 18.
- [80] This scheme cannot operate if no concerns notice is given. The failure to give a concerns notice means the proceedings are liable to be struck out: *Cavar v Campbelltown Catholic Club Ltd* [2024] NSWCA 126 at [31], [34]; *Aguasa v Hunter* [2026] WASCA 37 at [42], [45] per Mitchell JA and Cobby J; at [76], [115] and [260] per Vaughan JA.
- [81] However, provision is made, in s 12A(3), dealing with a notice that failed to ‘particularise adequately’ any of the required matters. In that subsection such a notice is referred to as a concerns notice notwithstanding that failure.
 - (a) The publisher may then ask for reasonable particulars and if they are not provided then the aggrieved person is taken not to have given a concerns notice.
 - (b) The section leaves unspecified what happens if the notice originally lacked some particulars of a matter but the publisher did not seek any further particulars.
 - (c) Section 12A(3), however, does not obligate the publisher to seek particulars to cure a deficiency in the purported concerns notice.
- [82] The section, in my view, ought to be construed in such a way that a purported notice where there is no identification of the imputations cannot be said to be one where there is a failure to adequately particularise the imputations. Such a notice does not then fall within s 12A(3) so as to be an inadequately particularised concerns notice. I would not characterise a document which does not substantially comply with those requirements as a concerns notice as referred to in the Act. In this respect I agree with the remarks in *Gayed v Virgin Mary & St Markorious Coptic Orthodox Church* [2024] NSWSC 1232 at [46].
- [83] There is no incongruity in this construction. It gives effect to the important role played by the concerns notice in the Act. If a document does not substantially comply with the requirement to identify the imputations, the regime for the publisher to seek and the aggrieved person to provide *further particulars* under s 12A would not apply according to its terms because there would be no document meeting the description of a concerns notice which fails to provide adequate particulars. But should ‘particulars’ be sought and provided it seems at least fairly arguable that the initial document when taken with the further particulars would comprise a concerns notice.
- [84] It follows that in my view the primary judge was correct to conclude that no concerns notice satisfying the requirement of s 12A(1)(a)(iii) had been provided and accordingly there was no entitlement to commence proceedings.
- [85] It was right therefore to summarily dismiss those parts of the Claim which related to the proceedings for defamation. That did not include the prayer for relief in

paragraph 3 of the Claim which related to the alleged contravention of the appellant's copyright. It seems at least arguable that the prayer for damages in paragraph 5 ought not to have been dismissed because damage might be sought for breach of copyright. A difficulty concerning paragraph 2 of the Claim is mentioned below.

The Premature Commencement

- [86] In the circumstances it is unnecessary to determine the alternative basis upon which the respondents sought to have the proceedings dismissed. That is that the proceedings were commenced other than in the time frame contemplated by s 12B(1)(c), subject to s 12B(3).
- [87] The chronology is that the publication took place on 19 October 2024, the document claimed to be (and for this purpose I assume was) a concerns notice was given 20 October 2024 and the proceedings commenced 25 October 2024. This was before the elapsing of the applicable period: s 14(2). In those circumstances s 12B(1) provides that the appellant "can not commence defamation proceedings...". The section does not explicitly provide that proceedings commenced in contravention of that prohibition are a nullity. However, the scheme of Part 3 as discussed above, and the object of seeking to promote non-litigious resolution of defamation disputes supports a construction that proceedings commenced in contravention of s 12B(1) are capable of being summarily dismissed.
- [88] The court is expressly given the power to grant leave to depart from this time limitation for proceedings to be 'commenced' but expressed as something available to a 'proposed plaintiff' not for the continuation of extant proceedings by a current plaintiff. It does not in terms contemplate leave granted to validate proceedings already commenced in contravention of the limitation. I would leave open determination of whether that leave (had it been sought) could be granted nunc pro tunc.

Expiry of Applicable Period

- [89] By Ground 17 the appellant contends that the primary judge erred in considering whether the applicable period for an offer to make amends had expired in accordance with s 14(2)(a) of the *Defamation Act 2005*.
- [90] In my view no error is shown. The proceedings were commenced within 6 days of the publication of the article and the concerns notice. When the proceedings were commenced clearly no defence had been served nor had the 28 day period contemplated by s 14(2)(b) expired.

Grant of Leave

- [91] As already mentioned, the court has power under s 12B(3) to grant leave to a proposed plaintiff. No leave was sought by the appellant. There were factual matters to which the appellant referred which might have provided a foundation for him to have sought leave. In particular in his oral submissions he referred to the speed of the spread of the article and reposting of it, together with the potential for vindictive behaviour directed to him and his family. But as no application for leave was sought there can be no error in the primary judge's proceedings on the basis that s 12B(3) was not sought to be engaged.

Other Grounds of Appeal

- [92] The notice of appeal includes other grounds of ‘merits’ appeal which I can deal with briefly.

The Criminal Code: Ground 11

- [93] It is contended the primary judge erred in his interpretation and application of “section 365 of the *Criminal Code Act 1899*”.

- [94] Section 365 of the *Criminal Code* (Qld) makes it an offence to publish defamatory material in certain circumstances. A prosecution can only occur with the consent of the Director of Public Prosecutions: s 365(7).

- [95] The Claim, by paragraph 2, provides:

“2. That the second defendant, the author, has criminally defamed the plaintiff by showing no regard to whether the issue was true or false, and no regard for the damage publication would bring upon the plaintiff and his family.”

- [96] The amended statement of claim refers to section 365 and the need for the consent of the DPP as well as asserting that the conduct of the second respondent (alleged to be the author) would fall within the section. The relief sought in that document is stated to be “that the [second respondent], the author, be charged with Criminal Defamation under” that section: at [34] of the amended statement of claim.

- [97] The allegations in the amended statement of claim cannot be sustained. If the required consent is obtained, (and it has not been) then a prosecution might be commenced if otherwise the facts support doing so.

- [98] The primary judge dealt with this issue as follows:

“Here, there is obvious contention between the prayer for relief at paragraph 34 and the relief sought in paragraph 2 of the claim. At its most generous, the relief sought in paragraph 2 seems to be a declaration to the – seems to be a claim for a declaration that the second defendant has criminally defamed the plaintiff, whereas section 34 seems to be a claim for relief to the effect that the court order that the second defendant be charged with criminal defamation under section 365 of the *Criminal Code*.

Clearly, a declaration to the effect sought in paragraph 2 of the claim is not relief that this court would grant. And the relief sought in section 34, if made, would not be a proper exercise of this court’s jurisdiction in that it would, in effect, be a direction to the Director of Public Prosecutions to charge the second defendant with criminal defamation.

For those reasons alone, paragraph 2 of the claim and paragraphs 26 to 28A and 34 of the statement of claim ought be struck out. And if it were not for the orders I proposed to make in relation to the non-compliant – non-compliance with the requirements of the Defamation Act, I would have made those orders as well. In addition, there is a futility as to the relief sought notwithstanding the incomprehensibility

with which it has been pleaded, given that Mr Dorante-Day tendered a document – sorry, given that in the course of his submissions to me, Mr Dorante-Day seemed to concede that the Director of Public Prosecutions had not given his consent as would be required under section 365(7) of the code in any event.”¹⁵

- [99] The only challenge made on appeal is that the primary judge erred in his interpretation and application of s 365. There is no error identified in the primary judge’s interpretation of the section.
- [100] No ground of appeal was directed to whether, nor did the appellant submit that, some other error was made by the primary judge in striking out the Claim even if it was to be viewed as seeking a declaration.¹⁶ In light of the terms of paragraph 34 of the amended statement of claim it may be that the appellant should be understood as not seeking a declaration at all. In any event, no error of the nature identified in the notice of appeal has been established.

The Adoption Act and Fairfax v Voller: Ground 12

- [101] It is then contended the primary judge “erred in law in his application of section 315 of the *Adoption Act 2009* and his interpretation and application of the High Court’s ruling in *Fairfax v Voller* [2021] HCA 27.”
- [102] The *Adoption Act* makes it an offence to publish “identifying material”: s 315. There is no reference to it in the amended statement of claim and no relief said to arise from it is identified in the Claim. It does not form any part of the primary judge’s reasoning leading to the orders made. Accordingly, no error as to the application of that section is made out.
- [103] *Fairfax v Voller* establishes that an entity “facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments”: at [55]. In this way the appellant contends the first respondent published the comments on the article made by others posted on its webpage. The fact of this occurring is pleaded in the amended statement of claim at [15]–[16] and that those comments were themselves defamatory, harassing and insulting. But proceedings in this respect may not be commenced because of the operation of s 12B of the *Defamation Act* and the non-compliance with the requirement to give a proper concerns notice.

Commonwealth Criminal Act: Ground 13

- [104] Then it is urged that his Honour “erred in law in his interpretation and application of section 474.17 of the *Criminal Code Act 1995* (Cth.)”.
- [105] This section makes it an offence to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. There is no specific reference to it in the amended statement of claim (though paragraph 28A of the amended statement of claim pleads the facts no doubt said to enliven the operation of the section). More importantly, no relief said to arise from it is identified in the Claim. It was not referred to by the appellant in his

¹⁵ T1-7 lines 5 to 27.

¹⁶ *Thorpe v Head, Transport for Victoria* (2021) 66 VR 56 at [44], [71]; *Anderson v Attorney General for NSW* (1987) 10 NSWLR 198; *Palmer v Gibson* [2026] QCA 60.

submission to the primary judge and nor is it mentioned in the reasons of the primary judge.

[106] This ground of appeal is irrelevant.

The Watch List issues: Grounds 14 and 15

[107] The appellant urges the primary judge erred:

- (a) in finding that the appellant ‘didn’t know if he was on a watch list’; and
- (b) by failing to identify firstly, what ‘watch list’ was being discussed, and secondly, the legalities of an ‘undisclosed list’.

[108] The primary judge, in his reasons, referred to the appellant’s email of 20 October 2024 which discussed the watch list.¹⁷ Then his Honour continued:

“It is at least clear that Mr Dorante-Day, from his response, did not know whether he was in – whether he had, in fact, been placed on a security watch list or not. That is the extent of the correspondence purporting to be the concerns notice and further particulars provided by Mr Dorante-Day. In my view, they are deficient to meet the requirements of section 12A(1)(a)(iii) and (b)(iv). I am not satisfied that they inform the publisher of the defamatory imputations that Mr Dorante-Day considers are or may be carried about the – about him. And I do not consider them to be sufficient to inform the defendant of the serious harm to Mr Dorante-Day’s reputation that he claims has been caused or will likely be caused.”¹⁸

[109] His Honour there explicitly is referring to what appeared from the appellant’s response of 20 October 2024. That response, by referring to “If I was on the watchlist”, “if I am not on the list”, and “As far as I am aware I am not on the list” might be said to some degree to equivocate as to whether the appellant knew he was or was not on a watch list. His Honour is not to be understood as expressing a finding as to the appellant’s state of mind at the time of the hearing (or indeed when he sent the response). Rather he was addressing the extent to which the concerns notice when read with that response met the requirements of s 12A(1).

[110] These grounds of appeal are not made out.

Relevant and Irrelevant Considerations: Ground 18

[111] Finally the appellant contends the primary judge erred by taking irrelevant considerations into account while overlooking relevant considerations. None have been identified by the appellant. Nothing was pointed to which affects the central consideration by the primary judge of the operation of s 12B(1)(a) of the *Defamation Act*. This ground of appeal is not made out.

The Orders Made as to Claim

[112] The respondents relied on rule 293 of the UCPR to seek the order that the primary judge made, namely that judgment be entered for the respondents on paragraphs 1, 2, 4 and 5 of the Claim. This was intended to be confined to the claims for defamation.¹⁹

¹⁷ T1-8 lines 22-43.

¹⁸ T1-9 lines 41 to 49.

¹⁹ See Reasons at T1-10 lines 12-48.

- [113] On the hearing of the appeal counsel for the respondents accepted that given the nature of the foundation for their application being that the proceedings were to some degree incompetent, it would be appropriate to strike out the relevant paragraphs of the Claim rather than enter judgment.
- [114] That said, as already mentioned, both the Claim and the amended statement of claim referred to an alleged breach of copyright. Damages might be awarded for such conduct. It is far from clear from the Claim or amended statement of claim that damages are sought for that breach. But there was no basis to strike out of any claim for damages arising from the claim for breach of copyright. The Order should be modified to make this clear.
- [115] The primary judge also struck out paragraphs 2, 4, 5, 7 to 18, 20 to 28A and 30 to 38 of the amended statement of claim. It is apparent from the primary judge's reasons that this was consequential on the view taken as to the appellant being precluded from commencing the proceedings for defamation. There is no separate challenge to this course.
- [116] Having said that, so little of the pleading remains, and what remains would not include any claim for relief, that it would have been preferable to strike out the whole pleading even if the appellant was to be given leave to replead his breach of copyright claim.

Conclusion

- [117] In my view as set out above the appeal fails. There is no reason why costs should not follow the event. The alterations to the Orders which I consider appropriate do not affect the result that the appellant has been unsuccessful in the appeal.
- [118] Accordingly, in my view the appropriate orders are:
1. The Order made 22 August 2025 is varied by amending Order 2 so that it provides as follows, that:
 - (a) Strike out paragraphs 1, 2 and 4 of the Claim filed on 25 October 2024;
 - (b) Strike out paragraph 5 of the Claim filed on 25 October 2024 but with leave granted to the appellant to amend the Claim to seek damages or other relief consequent upon the breach of copyright identified in paragraph 3 of the Claim.
 2. The appeal is dismissed.
 3. The appellant pay the respondents' costs of the appeal.