

SUPREME COURT OF QUEENSLAND

CITATION: *McVicker v Australian Broadcasting Corporation* [2026] QCA 179

PARTIES: **ROBERT McVICKER**
(applicant)
v
AUSTRALIAN BROADCASTING CORPORATION
(respondent)

FILE NO/S: Appeal No 5895 of 2025
DC No 1542 of 2022

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane – [2025] QDC 182 (Jarro DCJ)

DELIVERED ON: 22 September 2026

DELIVERED AT: Brisbane

HEARING DATE: 16 June 2026

JUDGES: Brown JA, Bradley JA, Doyle JA

ORDERS: **1. Leave granted for the application to appeal.**
2. Appeal dismissed.
3. The parties to file and serve submissions as to costs of no more than five pages and supporting material within seven days of delivery of judgment with costs to be determined on the papers.

CATCHWORDS: DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – IN GENERAL – where the applicant claims an article on the respondent’s website was defamatory of him – where the subject matter of the article was the failure of a company owned by the applicant – where the article reported statements of the company’s founder, who had sold the company to the applicant – where the applicant contends that the article contained defamatory imputations that the company’s failure was due to the applicant’s poor and inefficient management – where the primary judge found the article did not convey the defamatory imputations contended by the applicant to the ordinary reasonable reader – whether the article contained the defamatory imputations alleged by the applicant – whether the primary judge erred in concluding that the article did not convey the defamatory imputations alleged

DEFAMATION – OTHER DEFENCES – MISCELLANEOUS DEFENCES – where, notwithstanding his finding that the article was not defamatory, the primary judge further considered that in any event the respondent had a defence under s 18 *Defamation Act 2005* (Qld) as the applicant had rejected a reasonable offer to make amends (OTMA) made by the respondent – whether the primary judge erred in concluding that the OTMA contained an offer to make a genuine and unqualified apology – whether the primary judge erred in finding the OTMA was reasonable – whether the primary judge erred in concluding that the defence in s 18 *Defamation Act* applied

Defamation Act 2005 (Qld), s 15, s 18

District Court of Queensland Act 1967 (Qld), s 118(3)

Bazzi v Dutton (2022) 289 FCR 1; [2022] FCAFC 84, cited

Corby v Allen & Unwin Pty Ltd (2014) 108 NSWLR 431;

[2014] NSWCA 227, cited

Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575; [2002]

HCA 56, cited

Hockey v Fairfax Media Publications Pty Ltd (2015)

237 FCR 33; [2015] FCA 652, cited

John Fairfax Publications Pty Ltd v Obeid (2005)

64 NSWLR 485; [2005] NSWCA 60, cited

Karageozis v Sherman (2023) 17 QR 341; [\[2023\] QCA 258](#), cited

Pedavoli v Fairfax Media Publications Pty Ltd (2014)

324 ALR 166; [2014] NSWSC 1674, considered

Trkulja v Google LLC (2018) 263 CLR 149; [2018] HCA 25, cited

Wagner v Harbour Radio Pty Ltd [2018] QSC 201, considered

Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

Zoef v Nationwide News Pty Ltd (2016) 92 NSWLR 570;

[2016] NSWCA 283, considered

COUNSEL: J P Hastie for the applicant
L E Barnett SC, with J J Forbes, for the respondent

SOLICITORS: Mills Oakley for the applicant
ABC Legal for the respondent

[1] **BROWN JA:** Mr McVicker seeks leave to appeal the decision of the learned primary judge pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld) dismissing his defamation claim and issuing judgment in favour of the respondent. The applicant contends that he will suffer substantial injustice unless leave is given and that there is a reasonable argument that there is an error to be corrected. He contends that the trial judge was in error in not accepting that the article in question contained defamatory imputations and finding that even if the pleaded defamatory imputations were made out, the respondent had a defence under s 18 of the *Defamation Act 2005* (Qld) (Act).

The publication

- [2] On 5 January 2019, the respondent, the Australian Broadcasting Corporation (ABC), published an article on its website entitled “Bestjet founder breaks silence after company’s collapse” (the Article).¹ Bestjet was an online travel agency purchased by the applicant two months prior to the Article in November 2018 and was placed into voluntary administration by the applicant in December 2018. The Article reported statements made by Bestjet’s former director, Ms Rachel James, which the applicant contends conveyed that Bestjet had collapsed, leaving thousands of customers out of pocket, due to the applicant’s poor and inefficient management.² That article is annexed to this judgment marked A.
- [3] During the period between 28 June 2021 and 30 June 2021, the ABC published the Article in the same terms.
- [4] On 26 August 2021, the applicant by his solicitors issued the ABC with a concerns notice, which sought that the ABC remove the Article and publish a retraction and an apology.
- [5] The Article was not removed, but was updated on 14 September 2021 in an amended form. The amended article is annexed to this judgment at Annexure B. The “Editor’s note” at the end of the Article was in terms of the following:
- “Editor’s note September 14, 2021: On 5 January 2019, the ABC reported on claims made by the founders of Bestjet following its collapse including in relation to Robert McVicker Jnr. The ABC did not adopt or endorse those claims, nor did it intend to make any adverse suggestion regarding Robert McVicker Jnr. Should any such suggestion have been unintentionally conveyed, the ABC withdraws it, and apologises to Mr McVicker Jnr.”³
- [6] On 23 September 2021, the ABC provided the applicant an offer to make amends (OTMA). The OTMA broadly provided that the ABC would:
- (a) do what it had already resolved to do by issuing the updated article;
 - (b) publish the “Editor’s note” on a part of its website styled as “Corrections and Clarifications”;
 - (c) communicate the editor’s note to persons nominated by the applicant; and
 - (d) pay the applicant the sum of \$5,000 in respect of his legal costs, but left open the possibility of paying a higher amount if the applicant proved he had incurred higher costs.
- [7] The applicant did not accept the OTMA.
- [8] On 29 June 2022, the applicant issued a claim and statement of claim in which he alleged that the Article was defamatory of him and sought damages and an injunction preventing the ABC from publishing what he alleged were defamatory imputations.

¹ AB Vol 1 p 25.

² AB Vol 1 p 26, p 62.

³ AB Vol 1 p 27.

- [9] The ABC filed a notice of intention to defend and defence on 6 April 2023 denying that the Article conveyed defamatory imputations and pleading it had a defence both by reason of its OTMA and on the basis of the defence of triviality. On 31 May 2023, the ABC filed an application seeking summary judgment and strike out orders relating to aspects of the statement of claim. That application was later amended to also seek a stay of the proceeding as an abuse of process. The application was heard by Andreatidis KC DCJ on 22 August 2023 (the summary judgment decision).⁴ Judge Andreatidis KC gave summary judgment to the extent he dismissed any claim for defamation from 1 July 2021, and otherwise limited the actionable period of the applicant's claim to any publication of the Article that occurred on 28, 29 or 30 June 2021. The stay was not granted.
- [10] The applicant's claim in its more confined form proceeded to trial before the primary judge, Jarro DCJ and was heard on 16 and 17 October 2025. Only the applicant was cross-examined. On 21 November 2025, the primary judge published judgment in favour of the ABC.

The Defamatory imputations

- [11] The applicant pleaded that the Article contained defamatory imputations that:⁵
- (a) the applicant was to blame for the collapse of Bestjet due to the applicant's poor and inefficient management;
 - (b) the applicant was to blame for the collapse of a profitable business in solid financial health that followed stringent operational, financial and industry protocols due to the applicant's poor and inefficient management;
 - (c) the applicant was to blame for customers losing money and having their travel plans ruined due to the applicant's poor and inefficient management.⁶
- [12] The applicant pleaded that the publication of the imputations caused damage consisting of harm to his reputation both personally and professionally and emotional harm including embarrassment and stress.

The key findings of the primary judge

- [13] The primary judge first considered whether the Article had been published. There were two instances where the Article was pleaded in the Fifth Amended Statement of Claim (FASOC) to have been published during the actionable period. No person was identified as being the relevant party to whom the article was published. The timing that the article was accessed was the subject of admissions based on the defence. The first occasion of alleged publication involved the article being read by a user for only 10 seconds. His Honour considered that short period the Article was accessed was not sufficient to demonstrate that the article was published. The second occasion involved a user based in Sydney using an IP address associated with Regional Express Airlines accessing the article on 30 June 2021 for 1 minute and 45 seconds. His Honour considered that was a relevant publication consistent with the principles in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.⁷

⁴ *McVicker v Australian Broadcasting Corporation* [2023] QDC 167.

⁵ Fifth Amended Statement of Claim [6] (AB vol 1 p 73).

⁶ *McVicker v Australian Broadcasting Corporation* [2025] QDC 182 at [12] (Reasons).

⁷ Reasons at [7], [11].

- [14] In determining whether the Article contained the defamatory meaning contended by the applicant, the primary judge applied the well established test of considering whether the article would have conveyed the asserted (or substantially the same) meanings to an ordinary reasonable person and the principles relevant to that test.⁸ The applicant at trial identified six reasons why the defamatory imputations were conveyed by the Article. The applicant emphasised that the Article, after referring to Ms James being “distraught” and “devastated” at the collapse of Bestjet given her efforts to grow the business, contained the following statement of Ms James:

“During the last eight weeks, under new ownership and management, Bestjet has gone from a profitable business that followed stringent operational, financial and industry protocols, to one that has devastated thousands of customers and hundreds of staff.”

- [15] The applicant submitted that the above extract in particular was plainly apt to convey to the reader that Bestjet had failed because its new owner and manager, the applicant, had failed to deploy appropriate, skilful and efficient management resulting in “devastation” suffered by customers and hundreds of staff which was immediately linked to that failing.
- [16] The primary judge rejected all of those contentions in determining that no defamatory meaning would have been conveyed by the Article. Those reasons included:
- (a) first, he did not consider that the ordinary reasonable reader would draw the suggested causal link between the failure of Bestjet and the applicant and his poor and inefficient management by the words adopted in the article either alone or in combination with other matters;⁹
 - (b) secondly, a statement under the header “Key Points”, which stated that Ms James had “...laid blame at the feet of the new director and said her family was distraught” did not, as contended by the applicant, reinforce the above comments of Ms James. Rather, the primary judge considered that an ordinary reasonable reader would view that statement as merely reporting Ms James’ opinion in an effort for Ms James to portray herself in the most favourable light. It did not reinforce that Bestjet had failed because of the applicant;¹⁰
 - (c) thirdly, while the primary judge did accept that a statement that Bestjet had been sold to “McVicker International” just six weeks before it was placed into administration, and a statement that Bestjet’s failure involved a “chaotic demise” were not qualified nor attributed to Ms James and were apt to impress upon the reader that the failure of a long running business had occurred, chaotically, shortly after it had assumed new management, his Honour did not accept that those statements gave rise to an impression that Bestjet’s failure was due to the applicant’s management;¹¹
 - (d) fourthly, the primary judge rejected a complaint that none of the statements were countered by any comment from the applicant which truly responded to what was said by Ms James. His Honour recognised that the ABC never properly sought or waited for any comment to be made by the applicant. The primary judge observed that the only comment attributed to the applicant was

⁸ Reasons at [14], citing *Taylor v Nationwide News Ltd (No 2)* [2022] FCA 149 at [62] (Katzmann J).

⁹ Reasons at [17].

¹⁰ Reasons at [18].

¹¹ Reasons at [19].

a reference to his report to ASIC which recorded him as having said he was only director of Bestjet for 39 days, and which went on to quote the applicant as saying “It would be prudent to make enquiries to the previous director regarding the balance of the time that this business was in operation”.¹² The trial judge considered that those comments did counter Ms James’ statements, even though they were directed only to the period prior to Bestjet’s “chaotic demise” and did not speak at all to what had happened since the applicant had assumed management of Bestjet. He considered that the applicant’s quote was “expressive that he is encouraging enquiries to be directed to Ms James, in other words, that he is not at fault”.¹³ His Honour found that a reasonable reader of fair intelligence would view a period of 39 days as exceptionally swift to create Bestjet’s chaotic demise. In his view, a direct comment was not required from the applicant in response to Ms James’ comments as his quote spoke for itself and the article “...merely aroused Ms James’ opinionated view”,¹⁴

- (e) fifthly, the primary judge did not consider that it was significant that the Article did not cast any doubt over the statements attributed to Ms James in so far as they were not framed as “allegations” or “accusations”. The primary judge accepted that while the ABC perhaps could have been more precise by framing Ms James’ statements as allegations or assertions, it was not necessary for it to have done so given the way her opinions were reported. The primary judge considered that the effect or impression was that Ms James alone held certain opinions or beliefs as to Bestjet’s collapse;¹⁵
- (f) lastly, the primary judge rejected a submission that statements about Ms James’ husband’s previous involvement in a failed company, Air Australia, and Mr James’ employment at Bestjet were not effective to “change the position” or undermine the statements attributed to Ms James about the collapse of Bestjet. Rather, the primary judge considered “If anything, a more impressionistic reaction by an ordinary reasonable reader ... is suggestive that there was involvement by Ms James’ husband, as the architect, to cause Bestjet’s demise”,¹⁶ especially given the applicant’s limited tenure before Bestjet went into administration and where the applicant had sought voluntary administration of the company shortly after acquiring it.¹⁷

[17] While the primary judge noted the “somewhat balanced” nature of the matter, his Honour determined that upon consideration of the Article as a whole, through the prism of the ordinary reasonable reader, he was “...unable to reach the concluded view that the imputations contended for by [the applicant] were conveyed...”.¹⁸ No reference was made in the Article that the collapse was caused by the applicant’s poor and inefficient management, as there was no comment on the applicant’s management style.¹⁹ The primary judge concluded that at its highest, the ordinary reasonable reader may have understood the Article to convey that there was a question as to where the blame for the collapse of Bestjet lay.²⁰ He considered an alternative view

¹² Reasons at [20].

¹³ Reasons at [21].

¹⁴ Reasons at [21].

¹⁵ Reasons at [22].

¹⁶ Reasons at [23].

¹⁷ Reasons at [23].

¹⁸ Reasons at [24].

¹⁹ Reasons at [26].

²⁰ Reasons at [25].

would have required him to adopt an “overly zealous impression of the article and one of suspicious mind”.²¹ The primary judge considered that in fact, the Article contained a number of features which, in the primary judge’s view, conveyed to the ordinary reasonable reader that Ms James and/or her husband were more likely to blame for Bestjet’s collapse.²²

“(a) the fact that:

- (i) Ms James’ husband, Michael James, had previously been involved in a significant corporate failure in the travel industry which it[sic] left many ticketholders out of pocket;
 - (ii) Michael James had been banned from managing companies for three years by ASIC;
 - (iii) there were questions as to whether Michael James was breaching that disqualification by being involved in the day to day running of Bestjet;
 - (iv) in 2016 Bestjet had been stripped of its accreditation by the Australian Federation of Travel Agents (AFTA) because of Mr James’ involvement in the company; and,
 - (v) the Supreme Court had upheld AFTA’s decision;
- (b) Mr McVicker was a director for only 39 days;
- (c) Mr McVicker’s statement is more measured and reasonable when compared to Ms James’ statement, and as such would likely be given greater weight by the reader. Ms James is described as the founder of Bestjet, and her statement indicates that she is emotional about its collapse, especially given the highly emotive language that she employs. The ordinary reasonable reader would accordingly treat the views of Ms James with some caution; and,
- (d) Mr McVicker placed the company into voluntary administration, as opposed to trading insolvent, which suggests he is a careful and prudent director.”

[18] The primary judge stated that “a fair reading of the article would not lead such a reader to conclude that the blame in fact rests with Mr McVicker, such that the asserted imputations arise”.²³

[19] Notwithstanding the defamatory imputations were not demonstrated, the primary judge went on to find that in any event the ABC had a defence under s 18 of the Act, as it then applied, as the applicant had rejected a reasonable offer to make amends made by the ABC in September 2021.²⁴

[20] In particular the primary judge found that the apology was sufficient for the circumstances of the matter because:

²¹ Reasons at [24].

²² Reasons at [24].

²³ Reasons at [25].

²⁴ Reasons at [27], [38].

- (a) the words “should any suggestion have been unintentionally conveyed, the ABC withdraws it and apologises to Mr McVicker Jnr” were an apology and the ABC had identified in the editor’s note that it did not adopt or endorse the claims made by the founders of Bestjet;
- (b) the OTMA was made as soon as the ABC was first notified that the Article may be defamatory and the updated Article had equal prominence as the original Article with the editor’s note also being prominent in the Article;
- (c) there was a significant period of time which had elapsed between January 2019 when the Article first appeared and August 2021 when the concerns notice was issued such that the ABC was “objectively entitled to consider the harm to be minor or insubstantial and the terms of the offer to make amends was proportionate to that harm in light of the seriousness of alleged defamatory imputations”;²⁵
- (d) there were reasonable prospects of the ABC defending the action and the terms to make amends in the circumstances was reasonable. Although his Honour considered it disappointing that the Article was still on the ABC website and that ideally it ought have offered to remove it, he found “...that in my view is not a necessary ingredient to form the view that the offer to make amends was reasonable”.

[21] Given the primary judge’s findings above, his Honour did not consider it necessary to determine whether the defence of triviality applied.²⁶ The primary judge stated that in the event his findings were incorrect he would be inclined to award damages of \$7,500, inclusive of aggravated damages, given the circumstances of the publication.²⁷ However, the primary judge stated that he would not have granted the injunctive relief sought by the applicant, as to do so would effectively circumvent the summary judgment decision and the ABC may have had other defences²⁸ open to it in relation to the updated Article.²⁹

Contentions on Appeal

- [22] The applicant requires leave to appeal the decision of the District Court pursuant to s 118(3) of the *District Court of Queensland Act 1967*. The notice of appeal identifies six grounds by which the applicant contends the primary judge erred in making the orders below:
- (a) in concluding that the Article did not convey to an ordinary reasonable reader the defamatory imputations alleged;
 - (b) in concluding that the ABC had demonstrated that it was ready, willing and able to carry out the OTMA when no evidence supported that finding;
 - (c) in concluding that the OTMA contained an offer to make a genuine and unqualified apology because the “editor’s note” did not contain any statement of contrition or regret by the ABC about the publication of the Article and did not unreservedly state that any statements which were defamatory of the applicant were untrue;

²⁵ Reasons at [37(b)].

²⁶ Reasons at [39].

²⁷ Reasons at [40]-[41].

²⁸ The primary judge noted as an example the public interest defence in s 29A of the Act.

²⁹ Reasons at [42].

- (d) in concluding that the OTMA was reasonable in all of the circumstances and the ABC therefore had a defence under s 18 of the *Defamation Act*;
 - (e) in failing to consider the merits of the defence of triviality under s 33 of the Act (as it then applied), and in therefore failing to conclude that the defence failed; and
 - (f) in concluding that it would be inappropriate to grant the injunctive relief sought by the applicant in circumstances where such relief was appropriate.
- [23] The ground outlined in (b) above was abandoned during the hearing. As to (e) above the applicant conceded that wasn't an error but included it in light of the fact it was a matter relied upon by the ABC below in the event the defamatory imputations were made out.
- [24] The ABC contends that the errors are misconceived and that there are no arguable grounds of appeal and leave to appeal should be refused or, in the circumstance leave be granted, the appeal should be dismissed. The ABC has also filed a notice of contention, in which it contends that the primary judge should have determined that the ABC had established the defence of triviality pursuant to s 33 of the Act.

Basis of appeal

- [25] It is uncontentious between the parties that the correctness standard identified in *Warren v Coombes*³⁰ would apply to the appeal if leave to appeal was granted. That is because the questions of whether the Article conveyed defamatory imputations and whether the OTMA was reasonable for the purposes of s 18 of Act permit only one correct answer. I agree that the relevant standard is the correctness standard.

Did the article convey defamatory imputations

- [26] The approach to be carried out by a court was summarised by the majority of the High Court in *Trkulja v Google LLC*:³¹

“...that exercise is one in generosity not parsimony. The question is not what the allegedly defamatory words or images in fact say or depict but what a jury could reasonably think they convey to the ordinary reasonable person; and it is often a matter of first impression. The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose thinking. He or she may be taken to ‘read between the lines in the light of his general knowledge and experience of worldly affairs’, but such a person also draws implications much more freely than a lawyer, especially derogatory implications, and takes into account emphasis given by conspicuous headlines or captions. Hence, as Kirby J observed in *Chakravarti v Advertiser Newspapers*, ‘[w]here words have been used which are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject’.” (footnotes omitted)

³⁰ (1979) 142 CLR 531 at 532; *Bazzi v Dutton* (2022) 289 FCR 1; *Karageozis v Sherman* [2023] QCA 258 at [9].

³¹ (2018) 263 CLR 149 at [32].

- [27] A defendant may be still be liable even though no injury to reputation was intended.³² Similarly as was stated by McColl JA in *John Fairfax Publications Pty Ltd v Obeid*, “in the case of the republication of defamatory hearsay, the republisher will be prima facie liable in defamation without any requirement that the defamatory hearsay was adopted. That liability may be qualified by the context in which the hearsay was republished”.³³ Justice McColl stated that the nature of the liability “will turn upon the context in which the republication occurred”.³⁴ As was stated by Bathurst CJ in *Corby v Allen & Unwin Pty Ltd*,³⁵ while mere publication of defamatory hearsay suffices to attract liability “the context in which the defamatory hearsay was published, including whether it was, in fact ‘adopted’ by the republisher, may be relevant to the nature and quality of the republisher’s liability”.
- [28] It was uncontroversial that the primary judge accurately summarised the principles to determine whether the Article contains defamatory imputations.
- [29] The applicant contends that the primary judge erred in finding that:
- (a) the Article did not establish a sufficient “causal link” between the failure of Bestjet and any failure or mismanagement by the applicant;
 - (b) the statement in the Article concerning the involvement of Ms James’ husband in the previous failed companies were such that the ordinary reasonable reader of the Article was more likely to think that Mr and Ms James were to blame for the collapse of Bestjet.
- [30] The applicant contends there were a number of features of the Article which were apt to cause the reader to think that the failure of Bestjet was linked to its change of ownership when the applicant took over management of the business.
- [31] He contends that the fact that there was no express statement linking the applicant to the failure does not matter because readers are able to “read between the lines” and are prone to a degree of loose thinking. Nor does the fact that the Article conveys Ms James’ opinion mean it is less defamatory since republication of a third party can be enough.³⁶
- [32] The applicant further contends that the statements about Mr James and his wife’s refusal to answer questions about his involvement in Bestjet and that as a result of his involvement with Bestjet it lost accreditation were not sufficient to negate the impression conveyed earlier in the Article that the applicant was responsible for the travel agency’s demise. While the applicant accepts that there is a balancing exercise involved in the assessment of what the Article conveys, he contends that the statements in the second half of the Article pertaining to Mr James did not outweigh the prominence and statements pertaining to the applicant made earlier in the Article. In particular he submits the references to Mr James were generally historical and none of the statements directly engaged with the reasons for the failure of the business.
- [33] The ABC however contends that when read as a whole the Article does not contain imputations that either the applicant was to blame for the collapse of Bestjet and in

³² (2002) 210 CLR 575 at [25].

³³ *John Fairfax Publications Pty Ltd v Obeid* (2005) 64 NSWLR 485 at [91].

³⁴ (2005) 64 NSWLR 485 at [96].

³⁵ (2014) 108 NSWLR 431 at [141].

³⁶ (2014) 108 NSWLR 431 at [139]-[141].

particular, as pleaded, that the collapse was due to the applicant's poor and inefficient management. It contends that at its highest the ordinary reasonable reader might understand the Article to convey that there is a question as to where the blame for the collapse of Bestjet lies. Even if the Article may have raised a suspicion in the ordinary reasonable reader, the ABC contends a fair reading of the Article as a whole would not lead an ordinary reasonable reader to conclude that the blame in fact rests with the applicant, bearing in mind that an ordinary reasonable reader will be taken to have read the whole of the Article.³⁷ Nor according to the ABC was any temporal connection made in the Article between the taking over of Bestjet by McVicker International and its collapse within six weeks, before it went into voluntary administration, sufficient to convey to an ordinary reasonable reader that the demise of Bestjet was caused by the applicant and his poor and inefficient management.

- [34] The ABC contends that an ordinary reasonable reader would have read the article as presenting two conflicting points of view. The claims of Ms James that the applicant was to blame for the collapse and the statements reported to have been made by the applicant to ASIC that McVicker International had owned Bestjet for only 39 days and questions should be directed to the previous owners and management. The balance of the Article was directed to Mr James' history, and Ms James' refusal to answer questions about his role in Bestjet cast aspersions on the claims made by her.

Consideration

- [35] The statements of Ms James do attribute the company's demise to Bestjet being under new ownership, as evident from the statement under the photo and the Key Points including that "Bestjet Founder Rachel James laid blame at the feet of the new director and said her family was 'distraught'" and her further statement that "During the last eight weeks, under new ownership and management, Bestjet has gone from a profitable business that followed stringent operational, financial, and industry protocols, to one that has devastated thousands of customers and hundreds of staff". Those attributions are not qualified in any way as being allegations or accusations in the Article. The article does identify McVicker International as having bought Bestjet some six weeks before its collapse, which was described as its "chaotic demise". It identifies the applicant as the director of McVicker International who took over from Ms James.
- [36] While the question of whether the defamatory imputations alleged were established by the applicant was a finely balanced question in the present case, I do not consider that the primary judge was in error in determining the Article did not contain the defamatory imputations alleged. Reading the Article as a whole, an ordinary reasonable person would have considered that Bestjet's collapse may have been the result of mismanagement but not that it was due to the applicant's poor and inefficient management.
- [37] Taking into account the sequence and proximity of the statements which the applicant contends gave rise to the defamatory imputations, there are a number of matters which support this conclusion.
- [38] First, the Article would not have conveyed to an ordinary reasonable reader that there was a causal link between the collapse of Bestjet being due to the applicant and the applicant's poor and inefficient management. Temporally, the Article links the collapse of Bestjet to the change of ownership and raises the possibility that it was

³⁷ *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at [66].

due to some fault of the new owners through the statements of Ms James by reference to the "...defiant founders of Bestjet say that they are 'devastated' to see customers out of pocket, claiming the business was in solid financial health before it was sold..." and that "During the last eight weeks, under new ownership and management, Bestjet has gone from a profitable business that followed stringent operational, financial, and industry protocols, to one that has devastated thousands of customers and hundreds of staff" and quoting Ms James as laying the blame at the feet of the new director, which could be fairly be taken to be a reference to the applicant. However, the Article does not identify the cause of the collapse, either expressly or implicitly, nor how the new director was to blame. Of course, a matter does not need to be stated expressly for it to convey a particular meaning to the ordinary reasonable reader, but the Article leaves open the actual cause of the demise.

[39] While suggesting that something dramatic happened after Bestjet's ownership changed to McVicker International and potentially suggesting it may have been due to a failure to comply with various protocols which Ms James asserted were complied with before, the Article leaves the question open. While Ms James was a founder, her statements have an emotional and personal tone in referring to her being "distraught" and "devastated" and her laying the blame at the feet of a new director and would be treated with some circumspection by an ordinary, reasonable reader particularly given the short period the new owners had been in place. Reading between the lines, an ordinary reasonable reader may have been suspicious that Bestjet's failure was due to something that the applicant may have had some involvement in when McVicker International took ownership but the Article goes no further. However, it requires an over-zealous reading of the Article to attribute Bestjet's demise to the poor and inefficient management of the applicant. The Article was silent as to the role of the applicant in Bestjet beyond his being a director and part of the new ownership. While an ordinary reasonable reader may have regarded him as having ultimate control, given he was a director, an ordinary reasonable reader would not have equated that role to being one of management, particularly when the Article conveys that Bestjet is a sizeable company with thousands of customers and hundreds of staff. The submission of the applicant that the primary judge was led into error in his conclusions by being influenced by the fact that there was no express statement that the applicant's management was to blame for Bestjet's demise in the Article is not correct.

[40] It may be accepted, as contended by the applicant, that the ABC cannot escape responsibility on the basis of it relaying statements attributed to Ms James, as liability of the ABC will depend, as was stated in *Obeid* and *Corby*, on the context of those statements. While the Article leads with opinions and statements of Ms James, it proceeds to present matters which bring into question the credibility of her views in the mind of an ordinary reasonable reader and raise a counterpoint to her attributing blame to the applicant and her statement that Bestjet had been previously profitable due to its stringent compliance with protocols prior to new ownership. While no specific response was obtained from the applicant, an ordinary reasonable reader would have interpreted the statement of the applicant to ASIC that "his time as director was 'limited' lasting just 39 days" and that it would be "prudent to make enquiries to the previous director regarding the balance of the time that this business was in operation" as a reasonable and rational statement bringing into question the views expressed by Ms James. That was reinforced by the Article proceeding to raise matters, albeit historical, about Mr James and linking him to having a role in Bestjet, including in its management and Ms James being unresponsive to questions about his role.

- [41] Similarly, the reference to Ms James being a founder conveyed to the ordinary reasonable reader that she had an intimate knowledge of the business, and an ordinary reasonable reader would expect that she had knowledge of who operated Bestjet and how it was operated. Yet she was reported as refusing to answer questions about her husband's role in Bestjet's management. A fair reading of the Article would have raised the possibility, in the mind of the ordinary reasonable reader, that the demise of Bestjet may have been the result of the previous management of Bestjet and potentially Mr James' involvement in the company. The fact that the Article referred to a company associated with him being owed money by Bestjet and referred to him being listed as an employee of Bestjet implied that his role had been an ongoing one up until the time of the sale of the business to the applicant. While not proximate in time to the collapse, the reference to Mr James' previous association with a failed company, albeit an airline, which was reported as resulting in his disqualification "from managing corporations" for three years cast aspersions on his credentials to be involved in management of any corporation. There were further references to him being involved in Bestjet between 2013-2016 as an employee, which was revealed in a Supreme Court case, that his involvement in day to day operations in Bestjet was denied by his wife and that the judge considered the precise service provided by Mr James to Bestjet was unclear. It was also reported that the court upheld the decision of the Australian Federation of Travel Agents to strip Bestjet of accreditation over its concerns about Mr James helping run the business. Thus an ordinary reasonable reader would consider there was at least sufficient evidence of Mr James' involvement for the upholding of that decision.
- [42] The statements made about Mr James fairly implied to an ordinary reasonable reader that there was evidence that he had in fact been involved in the management of Bestjet and his management credentials were tarnished, not only by his involvement in the failure of a previous company but also by referring to an industry body withdrawing Bestjet's accreditation due to its association with Mr James. An ordinary reasonable reader would consider these matters conveyed the possibility that the reason for Bestjet's collapse was due to matters which occurred while Ms James was a director and not due to the matters to which she attributed the collapse of the company and brought into question the veracity of her views. In addition, an ordinary reasonable reader would have had regarded the short six week period for which McVicker International owned Bestjet prior to its demise as being an astonishingly short period to bring down the company. On a fair reading of the Article as a whole, an ordinary reasonable reader would not have concluded that the Article conveyed the imputation that the demise of Bestjet was due to the applicant's poor and inefficient management and that he was to blame for its collapse, even if questions regarding whether the applicant may have played some role in Bestjet's demise remained.
- [43] The reference to Mr McVicker placing Bestjet in voluntary administration, to which the primary judge attributed some weight in finding that it would have reinforced the impression in the mind of the ordinary reasonable reader that Mr and Ms James were responsible for Bestjet's failure, was only one factor considered by his Honour. Bestjet being placed into voluntary administration by the applicant is not a matter to which an ordinary reasonable reader would have attributed great significance in the context of the imputations complained of, save that an ordinary reasonable reader would have sufficient knowledge to know that placing a company into administration is the result of serious concerns as to its financial longevity. The reference to the applicant's actions would have created the impression in the mind of the ordinary reasonable reader that the applicant, who had only become involved in Bestjet six

weeks before, was prepared to take responsible action when he recognised that Bestjet was in financial trouble, notwithstanding the short period of time in which his company had taken ownership. That impression can be contrasted to someone who was acting in a cavalier manner in relation to the financial position of Bestjet.

- [44] Notwithstanding the prominence of the statements about the applicant early in the Article, an ordinary reasonable reader would have considered why Bestjet collapsed and who was responsible to be open questions, the answers to which may have lied in the actions of management prior to the change of ownership, or after, but not that it had collapsed due to the poor and inefficient management of the applicant.
- [45] The submission of the applicant that the whole tenor of the Article was to present Ms James' version of events is ill-founded as is the contention that the ordinary reasonable reader would have given greater weight to the earlier part of the Article as opposed to the latter more lengthy part of the Article. The latter, lengthier part of the Article changed focus from the earlier statements to the applicant's statements to ASIC and then focussed on the veracity of Ms James' statements by raising matters where she deflected away any comment on Mr James and his role in Bestjet and then focussed on Mr James' earlier conduct and past mismanagement of another corporation and questionable reputation in the industry.
- [46] The primary judge was not in error in finding that the Article did not convey the defamatory imputations pleaded to an ordinary reasonable reader.
- [47] While that conclusion is sufficient to dispose of the appeal, I would also have dismissed the appeal in any event on the basis that the ABC established that its OTMA was sufficient to provide a defence under s 18 of the Act, as was accepted by the primary judge.

The Offer to Make Amends

- [48] Sections 15 and 18 of the Act, as it then applied, provide:

“15 Content of offer to make amends

- (1) An offer to make amends—
 - (a) must be in writing; and
 - (b) must be readily identifiable as an offer to make amends under this division; and
 - (c) if the offer is limited to any particular defamatory imputations—must state that the offer is so limited and particularise the imputations to which the offer is limited; and
 - (d) must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; and
 - (e) if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge—must include an offer to take, or join in

taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person; and

- (f) must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer; and
 - (g) may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to)—
 - (i) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; or
 - (ii) an offer to pay compensation for any economic or non-economic loss of the aggrieved person; or
 - (iii) the particulars of any correction or apology made, or action taken, before the date of the offer.
- (2) Without limiting subsection (1)(g)(ii), an offer to pay compensation may comprise or include any 1 or more of the following—
- (a) an offer to pay a stated amount;
 - (b) an offer to pay an amount to be agreed between the publisher and the aggrieved person;
 - (c) an offer to pay an amount determined by an arbitrator appointed, or agreed on, by the publisher and the aggrieved person;
 - (d) an offer to pay an amount determined by a court.
- (3) If an offer to make amends is accepted, a court may, on the application of the aggrieved person or publisher, determine—
- (a) if the offer provides for a court to determine the amount of compensation payable under the offer—the amount of compensation to be paid under the offer; and
 - (b) any other question that arises about what must be done to carry out the terms of the offer.
- (4) The powers conferred on a court by subsection (3) are exercisable—
- (a) if the aggrieved person has brought proceedings against the publisher in any court for defamation in relation to the matter in question, by that court in those proceedings; and

- (b) except as provided in paragraph (a), by the Supreme Court.

...

18 Effect of failure to accept reasonable offer to make amends

- (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 practicable after becoming aware that the matter is or may be defamatory; and
 - (b) at any time before the trial 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.
- (2) In determining whether an offer to make amends is reasonable, a court—
 - (a) must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question taking into account—
 - (i) the prominence given to the correction or apology as published in comparison to the prominence given to the matter in question as published; and
 - (ii) the period that elapses between publication of the matter in question and publication of the correction or apology; and
 - (b) may have regard to—
 - (i) whether the aggrieved person refused to accept an offer that was limited to any particular defamatory imputations because the aggrieved person did not agree with the publisher about the imputations that the matter in question carried; and
 - (ii) any other matter that the court considers relevant.”

[49] As is set out above, the primary judge considered that the defence under s 18 of the Act was established.

[50] The applicant asserts that the primary judge was in error in determining that the defence was established, due to the failure by the primary judge to consider a number of factors caused the offer to be unreasonable, namely:

- (a) the failure to remove the Article as opposed to publishing a modified Article;
- (b) that the OTMA did not involve any offer to pay compensation, only costs;

- (c) the apology was not unqualified, contained no expression of regret and was not in a prominent location;
 - (d) assessing the offer by reference to the ABC having reasonable prospects of defending the action;
 - (e) the OTMA raised defences that were not ultimately relied upon by the ABC and matters which were legally contentious.
- [51] The ABC however contends that the primary judge's conclusions were reasonable given that:
- (a) the Article did not remain in the same form once the editor's note was added and the matters which could have suggested that Ms James' statements were accurate removed;
 - (b) while the OTMA didn't offer compensation, the applicant's concerns notice did not seek any form of compensation and instead contended the damage to the applicant was embarrassment, inconvenience and stress;
 - (c) the applicant did not raise his concerns until some 30 months after the original article was published such that the ABC could take that into account in assessing any harm caused to the applicant to be relatively minor;
 - (d) section 18 refers to the court considering "any correction or apology" not just an apology. The apology in the editor's note has to be seen in conjunction with the modified Article and as expressing regret if the statements made were construed adversely to the applicant, which had been unintended, and stating that if such adverse inference was raised "the ABC withdraws it, and apologises to Mr McVicker...";
 - (e) the legal arguments in the letter with the OTMA were not a relevant matter but nevertheless supported the reasonableness of the OTMA.
- [52] The OTMA complied with the mandatory requirements in s 15 of the Act. As stated above, the applicant, quite properly, did not pursue the ground of appeal challenging the finding that there had been compliance with s 18(1)(b) of the Act. The question for this appeal is whether the court erred in determining the OTMA was reasonable under s 18 of the Act.
- [53] In *Zoef v Nationwide News Pty Ltd*,³⁸ Gleeson JA (with whom Ward and Payne JJA agreed) considered this defence. Justice Gleeson stated that the reasonableness of an offer of amends is determined objectively. His Honour agreed³⁹ with the observation of McCallum J in *Pedavoli v Fairfax Media Publications Pty Ltd*:⁴⁰

"The reasonableness of any monetary offer is necessarily informed by the reasonableness of the correction, including the extent of its reach. To adopt any different approach would subvert the object of the Act of encouraging the non-litigious resolution of defamation disputes."

- [54] Justice Gleeson further stated that:⁴¹

³⁸ (2016) 92 NSWLR 570, referred to by Flanagan J in *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201 at [719]-[720].

³⁹ (2016) 92 NSWLR 570 at [72].

⁴⁰ (2014) 324 ALR 166 at [100].

⁴¹ (2016) 92 NSWLR 570 at [73].

[73] Nonetheless, as McCallum J also noted (at [100]), this is not to deny that ‘the seriousness of the defamation undoubtedly remains a relevant factor in assessing the reasonableness of the monetary component of an offer.’

[74] It should be accepted that the assessment of the adequacy of the sum offered is informed by the seriousness of the defamation and the other components of the offer, including any proposed apology, and the fact that acceptance of it would have made amends and obviated the need for a trial. In addition, the adequacy of the monetary offer is informed by the risk of the proceedings being successful, taking into account the defences raised by the defendant.”

[55] It is uncontentioned that the OTMA was made in a timely manner after the concerns notice was served. The question of timeliness is relevant to the satisfaction of the criteria in s 18(1)(a) of the Act, rather than the reasonableness of the offer.

[56] The ABC did not remove the Article but modified it in a number of respects. In determining the reasonableness of the OTMA, one must examine the modifications made, which included:⁴²

- (a) removal of a reference to the change of ownership under the photograph;
- (b) deletion of the reference to Ms James laying blame at the feet of the new director feet in the “Key points” section;
- (c) deletion of the reference to new ownership and management and the statement that the company “followed stringent operational, financial and industry protocols” so that paragraph stated:

~~“During the Last eight weeks, under new ownership and management, Bestjet has gone from a profitable business that followed stringent operational, financial and industry protocols,~~ to one that has devastated thousands of customers and hundreds of staff,’ Ms James said.”

- (d) a statement that “No detail has been provided to the ABC by Ms James regarding the reasons for sale, or evidencing the company’s financial health prior to sale”.

[57] The applicant contends that it was unreasonable for the Article not to be removed and the ABC presented no proper argument as to why it should be maintained some 30 months after its initial publication. The applicant further contends that by maintaining statements about the sale of the business to McVicker International six weeks before it was placed in administration, and referring to the applicant as a director, the amendments failed to remove the suggestion of a causal link between the applicant and the failure of the business.

[58] The question is not whether the ABC should have removed the Article but whether the modifications to the Article were not a sufficiently reasonable response to the alleged imputations and harm caused to the applicant. I consider the modified Article did provide a correction which addressed the matters which could have linked the applicant to the collapse of the Bestjet.

⁴² AB Vol 3 p 618.

- [59] Key statements of which the applicant complained were removed, particularly the reference to the demise of the company under new ownership and the reference to up until the change of ownership and management, the company “had followed stringent operational, financial and industry protocols”. It also removed reference to Ms James attributing blame to the new director. To the extent that the applicant contended that there was a causal link to the collapse of Bestjet and the applicant’s poor and inefficient management, it was due to a suggestion that the change of ownership inferentially resulted in a change to Bestjet following protocols.
- [60] Further, the editor’s note made clear the ABC did not attribute any blame to the applicant in relation to Bestjet’s demise in stating: “The ABC did not adopt or endorse those claims, nor did it intend to make any adverse suggestion regarding Robert McVicker Jnr”. The Article had been published some 30 months before and lacked currency in terms of the news cycle. The collapse of Bestjet was said to have affected many members of the public. The ABC contended it was, as a public broadcaster, appropriate for it to maintain the Article in a modified form as a matter of record. As a public broadcaster, maintaining a record of events is not unreasonable, particularly if those events affected members of the public and given the medium on which the Article was published. Given that the applicant did not raise a complaint about the Article until some 30 months after it was initially published and the updated Article sought to remove the matters which could be suggested to have attributed any responsibility to the applicant for Bestjet’s demise, the modified article removed the matters causing the applicant harm or embarrassment and was reasonable in the circumstances. Maintaining the reference to the sale of the Bestjet business to McVicker International and to the applicant being a director was not unreasonable. Even if those inclusions meant there was a temporal proximity of the sale to the collapse of Bestjet, there was no link between the applicant and the collapse in the modified Article, expressly or “reading it loosely”.
- [61] The lack of reference to the administrator’s report to creditors as to investigations which had shown there were issues with Bestjet prior to its sale to McVicker International did not make the OTMA unreasonable. There was a clear statement that the ABC did not adopt or endorse Ms James’ claims. It did not have to go beyond that and seek to discredit Ms James’ statement by reference to investigations of the administrators, notwithstanding that the administrator’s report to creditors was available to the ABC in January 2019. It was not reasonable in 2021 to require the ABC to go back and look for further information that it may have received in 2019, given the time that had passed before the Applicant raised his concerns. In any event, the administrator’s report was not relied upon before the primary judge in this regard and was relied upon only in seeking aggravated damages, nor was it a matter pleaded by the applicant. It is a matter which should have been specifically pleaded in relation to the OTMA and it is unfair to raise it now upon appeal.
- [62] Even if it was proper to raise the administrator’s report as a relevant circumstance making the OTMA unreasonable, by 2021 liquidators had been appointed, overtaking the role of the administrators. Nor was the report only directed to the deficiencies in the operations of Bestjet pre-sale. It was also evident from the administrators’ report that the financial position of Bestjet and the reasons for its collapse was part of an ongoing investigation and, given the appointment of liquidators, may have been overtaken by further investigations. Nor could Ms James (or the applicant) be taken to have accepted the findings. When the ABC asked Ms James’ for comment about the report in 2019, she responded that she would not comment on the basis of legal advice.

- [63] As to the applicant's assertion that the ABC's refusal to remove the Article was unreasonable where Ms James had disavowed the statements attributed to her in pleadings she filed in other proceedings to which the applicant was party, there was no evidence that was a matter of which the ABC was aware and thus could not be a circumstance undermining the reasonableness of the OTMA.
- [64] The apology is also a source of complaint, in not being sufficiently direct in acknowledging the defamatory imputations of the Article, not apologising for not verifying the contents of the Article and for not seeking comment from the applicant.
- [65] Consistent with s 18(2) of the Act, the Court must have regard to both the correction and apology. While the editor's note did not contain an apology that was a "full and frank withdrawal of the charges or suggestions conveyed",⁴³ the Article as corrected made clear that Ms James' statements were not endorsed and that any adverse inference in relation to the applicant was unintentional. The editor's note provided an apology if any adverse inference was drawn against the applicant. Justice Applegarth in *Wagner v Nine Network*⁴⁴ did not exclude the possibility that such an apology could be sufficient. The apology must be judged together with the modifications to the Article. While there was no clear statement of regret, the editor's note implicitly expressed regret, insofar as it referred to any adverse inference being unintentional and stating that if such an adverse inference was drawn against the applicant the ABC apologised. The primary judge did not err in regarding the apology as sufficient. The apology's location at the end of the Article was sufficiently prominent.
- [66] The applicant's submission that the apology should have extended to apologising to the applicant for not obtaining his response before publishing the Article was not required. The ABC had made some attempt, albeit that that attempt was insufficient, to contact him to obtain comment. Further, the updated Article removed any harm caused by leaving Ms James' statements in the Article without qualification. The modified Article made it explicit the ABC were not endorsing the veracity of Ms James' claims or supporting any adverse inference against the applicant.
- [67] As to the failure to offer compensation, the OTMA did not offer compensation. It was not mandatory for it to do so but of course the failure is a circumstance which can be taken into account in the reasonableness of the OTMA. While the offer was not generous the applicant had not, in the concerns notice, suggest that he had suffered any economic or non-economic loss. Nor did he seek any compensation in his response to the OTMA provided some six months later. Notwithstanding the applicant's evidence that the Article was a source of angst and he thought it affected his ability to obtain employment, given the passage of time, the publication of the modified Article and editor's note and the relative ambiguity of the alleged defamatory imputations, the failure to offer compensation was not unreasonable. I have found that the imputations complained of were not established but in any event, given their ambiguity, even if the Article did convey defamatory imputations, they were not sufficiently serious to warrant any monetary compensation.
- [68] As to the remaining complaints of the applicant as to the OTMA, there is nothing in those complaints. They were background to the OTMA, not a part of it. While the

⁴³ To use the words of Applegarth J in *Wagner v Nine Network Australia* [2019] QSC 284 at [125]. An appeal from that decision was allowed in part (see *Nine Network Australia Pty Ltd v Wagner* (2020) 6 QR 64), but not in relation to this aspect of his Honour's reasons.

⁴⁴ [2019] QSC 284.

ABC raised defences in the OTMA which were not pursued, the matters complained of by Mr McVicker as being defamatory also changed from those raised in the concerns notice to those that were pleaded. The OTMA was reasonable in all of the circumstances. There was no error by the trial judge.

Defence of triviality and injunction

- [69] As stated above, the applicant clarified that there was no error in this regard as the trial judge did not consider the defence, given his other findings, and it was raised in anticipation of the matters to be raised by the ABC. It is however the subject of the notice of contention filed by the ABC. Given the findings above, it is unnecessary to consider the notice of contention and the defence of triviality. It is also unnecessary to consider the grant of an injunction.

Leave and Costs

- [70] While the applicant has been unsuccessful in his appeal, the appeal was not inarguable. There is a real question of whether the applicant would suffer substantial injustice if leave was not granted, given he has other proceedings on foot seeking damages in relation to similar complaints to the present and given the small amount of compensation the primary judge determined would be awarded if he was successful. However, given that the application was directed to the applicant's reputation, leave to appeal should be granted but the appeal dismissed. As requested by the parties, directions will be made so they may make submissions as to costs in light of these reasons for judgment, with the question of costs to be determined on the papers.

Orders

- [71] The Orders of the Court should be:
1. Leave granted for the application to appeal.
 2. Appeal dismissed.
 3. The parties to file and serve submissions as to costs of no more than five pages and supporting material within seven days of delivery of judgment with costs to be determined on the papers.
- [72] **BRADLEY JA:** I agree with Brown JA.
- [73] **DOYLE JA:** I agree with the reasons of Brown JA and with the orders proposed by her Honour.

Annexure A

8/26/2021

Bestjet founder breaks silence after company's collapse - ABC News

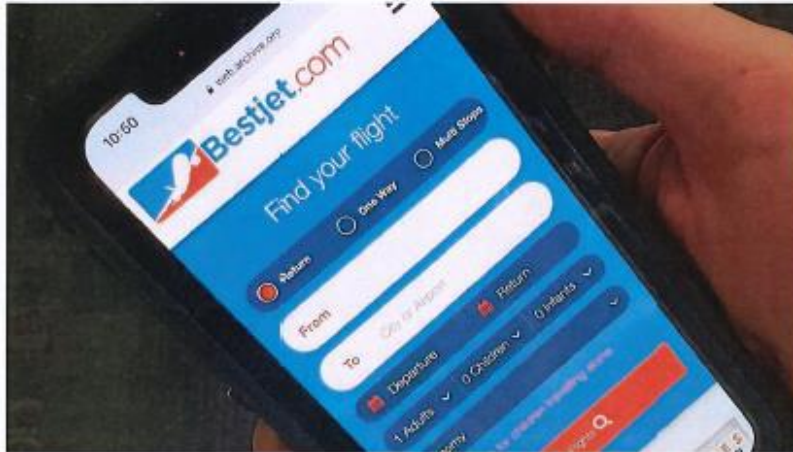
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ABC NEWS

Bestjet founder breaks silence after company's collapse

By Jamie McKinnell

Posted Sat 5 Jan 2019 at 2:53pm, updated Sat 5 Jan 2019 at 4:11pm



The founder of Bestjet says the company's demise under new ownership is "heartbreaking". (ABC News)

1. The defiant founders of Bestjet say they are "devastated" to see customers out of pocket, claiming the business was in solid financial health before it was sold six weeks before it collapsed.
2. The online booking portal [entered voluntary administration on December 18](#), leaving customers scrambling for reimbursements from banks and uncertain about the validity of upcoming flight tickets.
3. The company was sold to McVicker International about six weeks before it went into administration.
4. The fallout over the company's chaotic demise has taken another twist, with founder Rachel James breaking her silence.
5. In a statement to the ABC, Ms James, who helped set up Bestjet in 2012, claimed her family was "distraught" and "devastated" after growing the business

Key points:

- 1A. Bestjet collapsed in December leaving thousands of customers uncertain about their holiday plans
- 1B. The company was sold six weeks before it entered voluntary administration
- 1C. Bestjet founder Rachel James laid blame at the feet of the new director and said her family was "distraught"

and seeing it fold.

6. "During the last eight weeks, under new ownership and management, Bestjet has gone from a profitable business that followed stringent operational, financial and industry protocols, to one that has devastated thousands of customers and hundreds of staff," Ms James said.
7. Calling the demise "heartbreaking", she said it had "rattled" her family, which was coming to terms with unemployment.
8. In a report to corporate regulator ASIC on Christmas Eve, the director who took over from Ms James, Robert McVicker, said his time as director was "limited", lasting just 39 days.
9. "It would be prudent to make enquiries to the previous director regarding the balance of the time that this business was in operation," he wrote.
10. Ms James is the wife of Michael James, who helped run the failed budget airline Air Australia.
11. Air Australia folded in 2012 about a fortnight before Bestjet was founded, leaving debts of nearly \$100 million — including about \$36 million that was owed to ticket holders.
12. Mr James was banned by ASIC from managing corporations for three years.
13. Mr McVicker's report to ASIC lists a company related to Mr James, OTAlab, as being owed almost \$97,000.
14. Mr McVicker told ASIC he had no access to Bestjet's accounting package. His report lists Michael James as an employee.
15. Ms James did not answer specific questions about what role Mr James played in Bestjet's management and whether he had breached his ASIC disqualification earlier during the company's operation.
16. In 2016 a Brisbane Supreme Court case revealed Mr James was employed by the company between November 2013 and December 2015, but his wife insisted he had no role in the day-to-day operations.
17. Bestjet had been stripped of its accreditation from a scheme run by the Australian Federation of Travel Agents (AFTA), which was concerned Mr James was helping run the business, and fought the move in court.
18. The judge said the precise service Mr James provided to the company was unclear and upheld AFTA's decision to remove the accreditation.



Bestjet customers are now uncertain about the validity of flight tickets. (Unsplash)

8/26/2021

Bestjet founder breaks silence after company's collapse - ABC News

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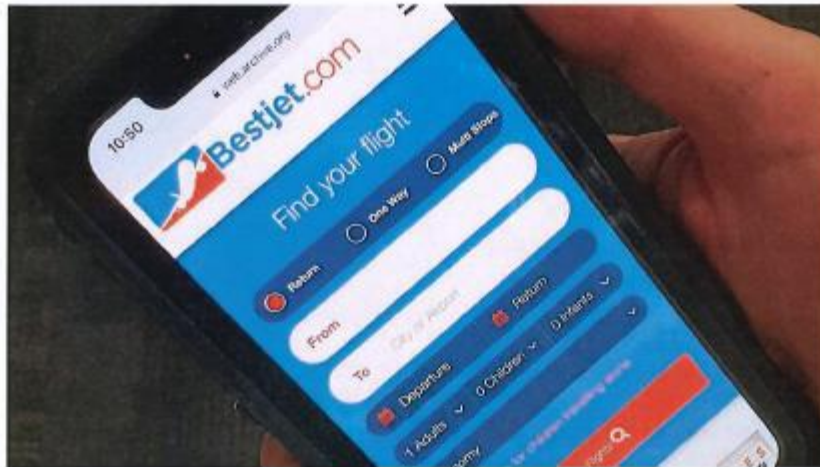
19. In the wake of Bestjet's collapse, customers have begun chasing reimbursement through their banks.
20. Some remain uncertain of whether their flight tickets are still valid, and others have paid increased costs to re-book.
21. One customer, Cheryl Hendy, [fears she has lost a \\$16,500 business class trip to Paris for her family.](#)
22. Affected customers have been sharing information through a Facebook support group, the Bestjet Fiasco Action Group.

Annexure B

Bestjet founder breaks silence after company's collapse

By [Jamie McKinnell](#)

Posted Sat 5 Jan 2019 at 2:53pm, updated Tue 14 Sep 2021 at 2:21pm



The founder of Bestjet says the company's demise is "heartbreaking". (ABC News)

The defiant founders of Bestjet say they are "devastated" to see customers out of pocket, claiming the business was in solid financial health before it was sold six weeks before it collapsed.

The online booking portal [entered voluntary administration on December 18](#), leaving customers scrambling for reimbursements from banks and uncertain about the validity of upcoming flight tickets.

The company was sold to McVicker International about six weeks before it went into administration.

The fallout over the company's chaotic demise has taken another twist, with founder Rachel James breaking her silence.

In a statement to the ABC, Ms James, who helped set up Bestjet in 2012, claimed her family was "distracted" and "devastated" after growing the business and seeing it fold.

Key points:

- Bestjet collapsed in December leaving thousands of customers uncertain about their holiday plans
- The company was sold six weeks before it entered voluntary administration
- Bestjet founder Rachel James said her family was "distracted"

"Bestjet has gone from a profitable business ... to one that has devastated thousands of customers and hundreds of staff," Ms James said.

Calling the demise "heartbreaking", she said it had "rattled" her family, which was coming to terms with unemployment.

No detail has been provided to the ABC by Ms James regarding the reasons for sale, or evidencing the company's financial health prior to sale.

In a report to corporate regulator ASIC on Christmas Eve, the director who took over from Ms James, Robert McVicker, said his time as director was "limited", lasting just 39 days.

"It would be prudent to make enquiries to the previous director regarding the balance of the time that this business was in operation," he wrote.

Ms James is [the wife of Michael James](#), who helped run the failed budget airline Air Australia.

Air Australia folded in 2012 about a fortnight before Bestjet was founded, leaving debts of nearly \$100 million — including about \$36 million that was owed to ticket holders.

Mr James was banned by ASIC from managing corporations for three years.

Mr McVicker's report to ASIC lists 32 creditors, including a company related to Mr James, OTAlab, which was reportedly owed almost \$97,000.

Mr McVicker told ASIC he had no access to Xero — Bestjet's accounting package — and directed enquiries regarding payroll to Mr James.

The report lists Michael James as an employee.

Ms James did not answer specific questions about what role Mr James played in Bestjet's management and whether he had breached his ASIC disqualification earlier during the company's operation.

In 2016 a Brisbane Supreme Court case revealed Mr James was employed by the company between November 2013 and December 2015, but his wife insisted he had no role in the day-to-day operations.

Bestjet had been stripped of its accreditation from a scheme run by the Australian Federation of Travel Agents (AFTA), which was concerned Mr James was helping run the business, and fought the move in court.



Bestjet customers are now uncertain about the validity of flight tickets. (*Unsplash*)

The judge said the precise service Mr James provided to the company was unclear and upheld AFTA's decision to remove the accreditation.

In the wake of Bestjet's collapse, customers have begun chasing reimbursement through their banks.

Some remain uncertain of whether their flight tickets are still valid, and others have paid increased costs to re-book.

One customer, Cheryl Hendy, [fears she has lost a \\$16,500 business class trip to Paris for her family](#).

Affected customers have been sharing information through a Facebook support group, the Bestjet Fiasco Action Group.

Editor's note September 14, 2021: On 5 January 2019, the ABC reported on claims made by the founders of Bestjet following its collapse including in relation to Robert McVicker Jnr. The ABC did not adopt or endorse those claims, nor did it intend to make any adverse suggestion regarding Robert McVicker Jnr. Should any such suggestion have been unintentionally conveyed, the ABC withdraws it, and apologises to Mr McVicker Jnr.