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COMMERCIAL LAWYERS

Madden v Seafolly: check the facts before hitting "send" or "post"

Summary

1. *Madden v Seafolly* [2014] FCAFC 30 provides yet another reminder of the legal dangers in being able to quickly and easily publish statements through social media forums.

2. The case concerns a series of statements made by a swimwear designer, Madden, alleging that a competitor, Seafolly, had copied her designs. The statements were later held to be incorrect. Seafolly then responded in two press releases denying it had copied the designs and asserting that Madden had made her comments knowing they were false and with malicious intent to harm Seafolly.

3. The protracted litigation which followed resulted in both parties being found liable for misleading or deceptive conduct.

4. The case demonstrates the importance of "getting the facts right" before posting, tweeting or blogging on social media.

Facts

5. The appellant, Ms Leah Madden, and the respondent, Seafolly Pty Ltd, were competitors in the ladies swimwear fashion industry.

6. Madden both asserted and implied that Seafolly had copied eight of her swimwear designs. The assertions were made on Ms Madden's personal Facebook page, her business Facebook page and in emails to media outlets.

7. Madden's assertions stemmed from the fact that an individual named Ms McLaren had met with her on behalf of a swimwear retailer. Ms McLaren viewed a number of designs and took photos of those designs. Madden later learned that Ms McLaren also worked for Seafolly. Seafolly was the majority owner of the retailer.

8. Unfortunately for Madden, six of the relevant Seafolly designs were released to the market prior to her meeting with Ms McLaren and the other two were substantially developed at the time. The court held that Seafolly did not copy Madden's designs.

9. At first instance, the primary judge found that Madden had engaged in conduct that was misleading or deceptive in contravention of section 52 of the *Trade Practices Act* 1974 (Cth) (**TPA)** (now section 18 of schedule 2 of the *Competition and Consumer Act 2010* (Cth)). His Honour held, however, that Seafolly hadn't suffered any damages as regards its profitability but awarded $25,000 under section 82 for damage to its reputation, the damage being neither significant nor ongoing.

10. Madden cross-claimed against Seafolly, submitting that it had defamed her and engaged in misleading or deceptive conduct by publishing its two press releases. The primary judge found the publications to be defamatory but upheld Seafolly's defences of justification and qualified privilege. For similar reasons, the primary judge also held that Madden's misleading or deceptive conduct claim failed.

11. Madden appealed to the Full Court.

Appeal

12. A number of issues arose on appeal. Most interesting was the consideration of the following five issues:[1]

    (a) whether statements made by Madden on her personal Facebook page were made in "trade or commerce";

    (b) whether Madden's representations were statements of opinion rather than statements of fact;

    (c) whether, even if the representations were statements of opinion, they contravened the TPA because Madden was reckless in forming them;

    (d) whether Seafolly had made out the defence of justification to defamation in respect of its statements; and

    (e) whether Seafolly's statements were misleading or deceptive.

Statements made on a personal Facebook page

13. The Full Court upheld the primary judge's view that statements made on a personal Facebook account could be made in trade or commerce because:

    (a) the statements were made to influence the attitude of customers and potential customers of Seafolly;

    (b) a substantial number of those who responded to the comments were in the fashion industry;

    (c) Madden posted the comments using both her own name and her business name; and

    (d) the comments were not of a private character.

Statement of fact or statement of opinion

14. Madden submitted that an allegation of copying or plagiarism was an issue of professional judgment or opinion rather than assertion of fact. Her reasoning in this respect would appear to be that, even if her opinion was ultimately inaccurate, a statement as to her opinion properly reflects her opinion and is therefore not misleading.

15. In ascertaining the scope of what constitutes an opinion for the purposes of s 52, their Honours considered the defence of fair comment under the common law of defamation. Their Honours considered that the common law defence was concerned with protecting the right of persons to express their opinions about facts, such as the production of a film or play or the experience of dining at a restaurant. By referring to the fact, the critic allowed the audience to consider whether or not they agreed with his or her opinion about it. But, if the critic got the

[1] *Madden v Seafolly* [2014] FCAFC 30 at [60].

facts in his or her description of them wrong, the common law refused to let him or her defend what he or she said about those "facts" as being a mere opinion.[2]

16. Their Honours found that Madden captioned six of the eight Seafolly photographs with incorrect release dates for the designs. The dates were facts, not opinion, and were critical to Madden's complaint of plagiarism. Had Madden accurately noted that Seafolly had released its designs before Madden had released her designs, Madden could not have made the assertions that she did.[3]

17. The primary judge's finding of misleading or deceptive conduct was therefore upheld by the Full Court on this basis.[4]

18. Their Honours found in obiter that if the dates had been correct, it may have been open to Madden to argue that what she conveyed about Seafolly was an expression of opinion.[5]

Whether, if the representations were statements of opinion, they were recklessly made and therefore still misleading

19. Having found that the representations were based on incorrect facts, their Honours considered it unnecessary to consider whether, if the representations were statements of opinion, they were recklessly made.[6]

20. It is nevertheless interesting to observe how the primary judge approached this question.

21. His Honour found that before posting her views Madden failed to take a number of steps which would have elicited that Seafolly's garments were not copies, including:

    (a) she could have made enquiries of retailers to establish when the Seafolly garments were placed on the market;

    (b) she could have attended a retail outlet and examined some, at least, of the Seafolly garments; and

    (c) she could have made enquiries of Seafolly with a view to ascertaining when the costumes which she considered had been copied had been designed and released to the market.[7]

22. His Honour concluded that Madden's failure to take such steps was not merely careless. It resulted from her conviction that copying had occurred and her determination to expose what she saw as Seafolly's misconduct. Her resolve was such that she was prepared to and did make the statements not caring whether they were true or false.[8] Therefore, his Honour held that even if Madden's assertions were mere opinion, they would have still constituted misleading or deceptive conduct.[9]

[2] Ibid, at [90].
[3] Ibid, at [94] – [95].
[4] Ibid.
[5] Ibid.
[6] Ibid, at [96].
[7] *Seafolly Pty Ltd v Madden* [2012] FCA 1346, at [68].
[8] Ibid, at [69].
[9] Ibid, at [72] - [73].

Madden's cross-claim – defamation defences

23. The primary judge had held that Seafolly's defamatory statements were justified on the basis that Seafolly's representations were in response to Madden's "malicious" allegations: the allegations being malicious because of her recklessness in not checking the truth and the damage such false allegations might cause to Seafolly.[10]

24. Their Honours, however, found that the primary judge was incorrect to hold that Madden's reckless behaviour constituted malicious intent to damage Seafolly.[11]

25. Their Honours therefore found that the defence of justification was not established.[12] Merely acting recklessly did not necessarily entail malicious intent to damage Seafolly: Madden believed that Seafolly had in fact copied her designs when making her statements.

26. Their Honours held, however, that Seafolly was still able to rely on the defence of qualified privilege as a defence to defamation because its response was commensurate with its right to defend itself.[13] The distinction between the two defamation defences was not elaborated on by the court but, at any rate, Madden's claim of defamation therefore failed.

Madden's cross-claim – misleading and deceptive conduct

27. Their Honours nevertheless found that Seafolly's representations constituted misleading or deceptive conduct. Their Honours held that Seafolly's press releases each conveyed a representation as to fact that Madden had knowingly made false statements. This was false. Madden believed in the truth of her allegations and it was therefore false to allege she had knowingly made such a statement. Accordingly, Seafolly breached section 52 of the TPA. [14]

Conclusions

28. This decision provides some salutary lessons about the use of social media by businesses. In particular:

    (a) always check the accuracy of facts and assertions before publishing those facts or expressing opinions about those facts, particularly where such facts or opinions are directly or indirectly critical or derogatory of third parties;

    (b) be careful in only expressing opinions when making critical comments about businesses on personal social media pages; and

    (c) when responding, in a public way, to comments made by a third party which are asserted as being false, ensure the response is proportionate and does not itself make false assertions.

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[10] *Seafolly Pty Ltd v Madden* [2012] FCA 1346, at [68] – [72].
[11] *Madden v Seafolly* [2014] FCAFC 30 at [136] – [138].
[12] Ibid.
[13] Ibid. at [164].
[14] Ibid, at [165].