



## Contracting out of free speech: Film makers beware

*Broadley Rees Hogan clients, Hollie Fifer, Rebecca Barry and Madeleine Hetherton and their companies, Media Stockade & Beacon Films, were this year embroiled in a well-publicised dispute over their film "The Opposition" and one of its subjects, Dame Carol Kidu. The litigation was heard in the New South Wales Supreme Court and **Broadley Rees Hogan Special Counsel, Peter Bolam**, acted for the film makers with Sydney barristers Richard Potter and Mark Maconachie. The dispute took just three months to reach a final hearing and resulted in a resounding win for the film makers.*

Restraining a threatened breach of legal rights is often the most effective legal remedy. The alternative, recovering damages through protracted litigation, is often a poor second. But for some types of disputes, injunctions to maintain the status quo until the final hearing are very difficult to obtain. Defamation and other actions that are directed to the protection of reputation fall into this category.

### Balancing freedom of speech with defamation

It is one thing for the law to impose consequences, civil or criminal in the case of an abuse of the right of free speech. It is another matter for a Court to interfere with the right of free speech by prior restraint . (1)

Exceptional caution is exercised by a Court considering the grant of an injunction before trial to restrain a publication that may be defamatory. There will need to be no reasonable defence before an injunction is granted. However, the plaintiff may have an alternative basis to stop the threatened publication, or at least part of it.

### Using contract to side step defamation

Publications that depend upon the participation of a subject can give rise to an argument that the interviewer was granted access to the subject under a contract, the threatened breach of which can support an injunction.

#### ***Edelsten v ABC***

In an early case the flamboyant Dr Geoffrey Edelsten allowed the ABC *Four Corners* program to have access to film him and one of his clinics to investigate a controversial procedure for the laser removal of tattoos. Dr Edelsten sued the ABC before the program was broadcast claiming that it was false and would defame him and injure his business. As well, Dr Edelsten claimed that the broadcast of the program would amount to a breach of contract. His affidavit evidence was that the ABC had agreed that, at his election, it would not use any of his information or its recordings of him.

The ABC denied the contract but the affidavit evidence was enough for an injunction before trial preventing the ABC from using the information provided by Edelsten or film recordings of him. However, the balance of the program even if it had defamed Dr Edelsten or injured his business was not restrained.

#### ***Kidu v Fifer, Media Stockade & Beacon Films***

This year, another high profile figure ran a similar argument in the New South Wales Supreme Court. Dame Carol Ann Kidu was the former Opposition leader in the parliament of Papua New Guinea. She applied for an injunction before trial to restrain a film maker, Hollie Fifer and production companies, Media Stockade and Beacon Films from publishing, distributing or exhibiting parts of a 75 minute documentary, *The Opposition*. The film featured 20 minutes of footage of Dame Carol shot between 2012 and 2014.

*The Opposition* followed Joe Moses, a local community leader in Port Moresby as he tried to defend the families living in a settlement on Paga Hill from being forcibly evicted to make way for a development of an international 5-

star hotel and marina. In 2012 Dame Carol supported Joe Moses and the community as its MP and publicly criticised the developer of the project. In 2013/14 after her retirement from parliament and through her company she entered into a contract to consult with the developer to resettle the community.

In 2014 Dame Carol commenced to object to the film. Although she had given a written irrevocable consent for filming and use of the recordings of her she alleged that it had been agreed that the film was to be for Fifer's film school assignment and would follow the last few months of Dame Carol's parliamentary career. She claimed that in breach of that agreement, the film makers had expanded the subject matter of the film and that it now was proposed to have a theatrical release at an international film festival in Canada.

At the hearing of the application for an injunction before trial, Supreme Court Justice Slattery noted:

The defendants [*film makers*] argue that the claim of the plaintiff [*Dame Carol*] is really a defamation action dressed up in other clothes. They contend that the documentary has the capacity to convey from the plaintiff's own words that she is a hypocrite by taking one position in relation to the Paga Hill clearance and then a different position later (2). *Italics added*

The film makers argued that an injunction before trial should be granted only in a very clear case and that foremost among the relevant considerations was the public interest in free speech.

However, Justice Slattery thought the decision in *Edelsten* answered their argument and that the special exception of freedom of speech did not apply in relation to a more limited claim for an injunction based on breach of contract(3). The result was that an injunction before trial was granted but (as in *Edelsten*) limited to the audio-visual recordings of Dame Carol or those facilitated by her, and on the condition of security of \$250,000 being lodged in Court.

## **Conclusion: free speech triumphs**

Justice Slattery's decision was widely reported in the national media(4), but that was not the end of the matter. Two months later, the final hearing in *Kidu v Fifer & Ors* came before Supreme Court Justice Rein and he comprehensively rejected the version of events and therefore the contract claim of Dame Carol and discharged the injunction granted by Justice Slattery.(5)

*Kidu* is a rare example of a case in which an injunction restraining publication before trial has been discharged at a final hearing. Often cases of this type settle before the final hearing because one of the parties does not have the mettle to risk the outcome of a final hearing.

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1. Australian Broadcasting Corporation v O'Neill (2006) 229 ALR 457 at [32]
  2. *Kidu v Fifer & Ors* [2016] NSWSC 488 at [78]
  3. *Kidu v Fifer & Ors* [2016] NSWSC 488 at [79]
  4. <http://www.smh.com.au/nsw/former-png-politician-dame-carol-kidu-wins-injunction-against-australian-documentary-20160422-gocrxt.html>  
<http://www.smh.com.au/nsw/former-png-politician-dame-carol-kidu-claims-australian-filmmaker-duped-her-20160414-go69tb.html>  
<http://www.smh.com.au/entertainment/movies/controversial-png-documentary-premiered-with-major-cuts-following-injunction-20160504-golymo.html>
  5. *Carol Anne Kidu v Hollie Fifer* [2016] NSWSC 982

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