DISTRICT COURT OF QUEENSLAND

CITATION:	*Deep Cycle Systems Pty Ltd v Fischer* [2025] QDC 25
PARTIES:	**DEEP CYCLE SYSTEMS PTY LTD** **ACN 611 396 591** (Plaintiff) **v** **STEFAN FISCHER** (Defendant)
FILE NO:	1169 of 2024
DIVISION:	Civil
PROCEEDING:	Separate question hearing.
ORIGINATING COURT:	Brisbane District Court.
DELIVERED ON:	11 March 2025
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2024
JUDGE:	Byrne KC DCJ

ORDERS:

1. **The plaintiff is not an excluded corporation for the purposes of s. 9 of the Defamation Act 2005.**
2. **The defendant is to file and serve written submissions as to costs, not exceeding five pages excluding any further material to be relied on for the purposes of those submissions, on or before 4.00pm on 25 March 2025, with a view to the issue being determined on the papers.**
3. **If the defendant contends that an oral hearing is required, those submissions must outline why an oral hearing is required.**
4. **The plaintiff is to file and serve written submissions as to costs, not exceeding five pages excluding any further material to be relied on for the purposes of those submissions, on or before 4.00pm on 1 April**

2025, with a view to the issue being determined on the papers.

5. **If the plaintiff contends that an oral hearing is required, those submissions must outline why an oral hearing is required.**

6. **The defendant is to file and serve any reply, not exceeding three pages, on or before 4.00pm on 7 April 2025.**

CATCHWORDS: DEFAMATION – PARTIES – WHO MAY SUE – where the defendant has successfully applied for determination as to whether the plaintiff is an excluded corporation under s. 9(2)(b) of the *Defamation Act 2005* (Qld) – where the plaintiff's sole director is also the sole director of two other entities – whether the plaintiff has fewer than 10 employees and is not an associated entity under s. 50AAA of the *Corporations Act 2002* (Cth).

LEGISLATION: *Corporations Act 2002* (Cth), s. 50AAA.
Defamation Act 2005 (Qld), s. 9.

CASES: *Aaren Pty Ltd trading as Price Beat Travel v Arya* [2020] NSWDC 657.
Born Brands Pty Ltd v Nine Network Australia Pty Ltd (2014) 88 NSWLR 421.
Fair Work Ombudsman v Priority Matters Pty Ltd & Anor [2016] FCCA 1474

COUNSEL: Ms. L. Brabazon for the plaintiff.
Mr. J. Castelan for the defendant.

SOLICITORS: Twomey Dispute Lawyers for the plaintiff.
Australian Law Partners as town agents for NetCounsel Lawyers.

Introduction

[1] On 2 May 2024 the plaintiff commenced proceedings seeking damages in defamation. On 15 July 2024, after pleadings had closed, the defendant applied for, *inter alia*, orders that a separate question be determined, namely "*Is the Plaintiff an excluded corporation for the purposes of section 9 of the Defamation Act 2005 (Qld)?*". On 30 July 2024 that application was granted.

[2] Section 9(2) of the *Defamation Act 2005* (Qld) ("**the Act**") provides the definition of an excluded corporation, subject to the following sub-sections and the definitions at

Schedule 5 of the Act. Of present relevance, the plaintiff must establish, on the balance of probabilities, both that it has fewer than 10 employees and that it is not an "*associated entity of another corporation*". The term "*associated entity*" has the meaning given by s. 50AAA of the *Corporations Act 2002* (Cth). The provision at s. 50AAA(7) was the focus of that issue. The time for those assessments to be made is the time of the publications, [1] namely between August 2023 and December 2023.

[3] The plaintiff's sole director, Mr Tomolowicz, is also the sole director of two other entities, namely Energy Tech Electronics Pty Ltd ("**Energy Tech**") and Tomprop Pty Ltd. The latter entity can be ignored for present purposes. There is no suggestion that it is an associated entity at the relevant time.

[4] For the reasons that follow, the plaintiff has failed to satisfy me that it is not an associated entity of another corporation and, accordingly, the question must be answered in the negative.

The pleadings

[5] Relevantly, the Statement of Claim pleaded that the plaintiff was an excluded corporation as it had fewer than 10 employees and was not an associated entity of another corporation.

[6] The defendant, in his Further Amended Defence, pleaded a non-admission to that claim and averred, in effect, that he was unaware if it had fewer than 10 employees but that the sole director of the plaintiff had informed the defendant that it has a factory in China or Ukraine, and also that it was unaware if it was an associated entity but that the sole director had sent messages to the effect that the plaintiff has a 30% stake in a manufacturing facility. Both of the abovementioned limbs of the definition of an excluded corporation are put in issue by that pleading.

[7] The plaintiff, in its Reply, admitted that its sole director informed the defendant that it had a factory in each of China and Ukraine where batteries are manufactured, but stated that it does not own any such factory. It was also admitted that the sole director of the plaintiff had told the defendant that the plaintiff had a 30% stake in a manufacturing facility, but it was asserted that it in fact does not.

The credibility assessment.

[8] The only oral testimony was adduced from Mr Tomolowicz. Given that it was admitted in the Reply that he had told mistruths in dealings with the defendant, the assessment of his credibility and reliability was an important feature of the hearing.

[9] Mr Tomolowicz presented as a confident witness, but perhaps too confident. He appeared dismissive of any suggestion, express or implied, that his testimony may not be accurate. For example, when questioned about a message he sent to the defendant which asserted the plaintiff had a 30% stake in a battery manufacturing business, he

---

1 S. 9(1) of the Act.

replied "*Um – well, that's an untrue statement, so it doesn't exist*", and shortly afterwards "*Yeah. So that – that's just an untrue statement. That's not the case*".[2] His demeanour clearly suggested that he expected that this would be taken as the truth, without further consideration. He did not appear to appreciate the significance of the fact he had made an admittedly untrue assertion.

[10] Other examples can be given. Mr Tomolowicz was taken to an email which, on its face, purported to be sent by someone called Michelle from the plaintiff.[3] It included an email address for Michelle. His affidavit material did not account for a person named Michelle as one of the three employees of the plaintiff. He explained that the email was an AI generated response, and that no-one called Michelle worked at the plaintiff. He testified that he found that it was an effective way when dealing with problematic clients. He seemed entirely unperturbed that it was a misrepresentation as to who the client was dealing with. It might also be noted that his explanation for why a fictitious person would be used as the author was unconvincing.

[11] Further again, in his first affidavit he accepted having told untruths about the business arrangements, he says for a specific reason.[4] It can be taken from the explanation, that he had deliberately done so. Again, whether that is the truth or not, the admission brings issues of credibility and reliability to the fore. There are other examples in his affidavit and oral testimony where he has either made admittedly untrue statements, or deliberately not corrected untrue statements, about his business affairs.[5]

[12] Overall, I consider that Mr Tomolowicz's testimony needs to be treated with caution before it should be accepted, unless it was uncontentious, supported by other reliable evidence or was against the interests of himself or the plaintiff.

[13] The defendant was not required to be called on the hearing. His credibility and reliability is not in contest for present purposes.

Does the plaintiff have fewer than 10 employees?

[14] The statutory definition of "*employee*" at s. 9(6) of the Act is broader than common law concepts of that term.

[15] The defendant contends that I should gain some assistance with the meaning of the term from the observations and findings of Abadee DCJ in *Aaren Pty Ltd trading as Price Beat Travel v Arya.*[6] His Honour was there heavily influenced by *dicta* in *Born Brands Pty Ltd v Nine Network Australia Pty Ltd*.[7] The plaintiff, correctly, notes that the definition there being considered differed from the present terms of the definition, and submits that it is unnecessary to look past the terms of the definition itself for

---

2 Ts 1-25, ll 34 and 45.
3 Trial bundle, page 740.
4 Affidavit of Marek Pawel Tomolowicz dated 29 July 2024, paragraph 41.
5 Including but not limited to Ts 1-29, ll 41-47.
6 [2020] NSWDC 657, [42]-[44], [64]-[65].
7 (2014) 88 NSWLR 421, [106].

assistance. While that is strictly correct, the *obiter* in *Born Brands* is so reminiscent of the current definition to suggest that some assistance can, if necessary, be gained from looking to those observations, and those of Abadee DCJ, for assistance. As the decision in *Aaren Pty Ltd trading as Price Beat Travel v Arya* demonstrates, the relationship between the plaintiff and the employees, as defined, need not be a direct relationship.

[16] Accordingly, I accept that I am not precluded from considering whether workers, other than those directly engaged with the plaintiff by contract, are employees for the purposes of s. 9(2)(b) of the Act.

[17] Mr Tomolowicz ultimately deposed[8] that the plaintiff had two full-time employees, Mr Coghlan, Mr Antunovic, and had engaged one freelance engineer, Mr Sydhom. It is uncontentious that they are employees as defined, each occupying one full-time equivalent position.

[18] He deposed to his father and mother working for the business on a voluntary basis. They occupy the equivalent of 1.2 full-time equivalent positions. There are no affidavits before me from either of them. If it is accepted that they were volunteers, neither would be an employee, as defined.

[19] It is not improbable that Mr Tomolowicz's parents would have volunteered, as Mr Tomolowicz attested. Further, it is likely they would have been accounted for in the plaintiff's financial records had they been paid, given they were resident in Australia, and they are not. Hence, I accept that they are not employees as defined.

[20] He has also deposed to business arrangements with a Mr Jonsson in the USA and a Mr Paternoster. Each are described as dealers of the plaintiff's products, but Mr Tomolowicz, in effect, denies that they are employees.

[21] Mr Tomolowicz testified that Mr Paternoster was a dealer whose "*account*" was terminated for making false statements about the plaintiff, and for failing to meet "*the minimum dealer requirements*". The mere use of the description of a dealer suggests a relationship which could fall within the broad meaning of an employee under the Act. That this arrangement, however it may be described, can be terminated by the plaintiff for not meeting minimum requirements strongly supports such a finding.

[22] Mr Jonsson is variously described as the plaintiff's only dealer, or distributor, in the USA. It was established that he operates a business which purports to employ in excess of 1700 employees. Its name is not perfectly clear, but it seems to be "Deep Cycle Systems North America" ("**DCNA**") and uses a logo appearing as "DCS Corp", which is similar to but by no means identical to the plaintiff's logo. Mr Tomolowicz denies that Mr Jonsson works under his direction and control, and also denies that the

---

8 Affidavit of Marek Pawel Tomolowicz dated 4 October 2024, paragraphs 5 to 11.

plaintiff receives any benefit from Mr Jonsson, or that the plaintiff has any interest in his business.

[23] While recognising the caution with which Mr Tomolowicz's evidence must be approached, I am not satisfied on the whole of the material that Mr Jonsson is an employee, as defined.

[24] Again, the mere use of the terms dealer or distributor suggest a relationship falling within the definition. Also, at face value, the material promoting DCNA found in the tender bundle suggests that it is a business of some size which would require the supply of many batteries and other materials from the plaintiff, suggesting a closer arrangement than Mr Tomolowicz accepted was the case. However, Mr Jonsson was not called, and there were no records from DCNA tendered to provide any support for the statements made in the promotional material, at all or at the relevant time. It is true that Mr Tomolowicz did tell the defendant in a written communication in January 2020 that 90 per cent of battery sales were in California, but it would be unwise to assume that those sales continued through and after the effects of COVID-19 on commercial markets.

[25] In those circumstances, I am not prepared to accept that the promotional material reflects the state of affairs between the plaintiff and DCNA at the relevant time. While Mr Tomolowicz referred to Mr Jonsson as the plaintiff's only American dealer, and while I find it surprising that there is no agreement in place between him and the plaintiff, I do not accept that he is an employee, as defined.

[26] The plaintiff disclosed payroll employee summaries for the FY2022-23 and FY2023-24 periods which reveal only two employees, Mr Coghlan and Mr Antunovic. Counting Mr Tomolowicz as an employee of the plaintiff, given the effort he attested to devoting to the plaintiff, Mr Sydhom, whose status is not in contest, and Mr Paternoster for the reasons outlined earlier, five known persons are employees, as defined.

[27] For completeness, I note that the FY2023-24 financial records show expenditure of $3,807 for "Subcontractors". There was no cross-examination on this entry but, given the relatively small amount, even if it was for an employee as defined, it could only amount for a relatively small portion of a full-time equivalent. I also note that there does not appear to be any provision for Mr Sydhom's recompense in the records unless he was paid the small amount just referred to, even though it is accepted that he was an employee as defined.

[28] The defendant points to what he says is the likely use of monies attributed to research and development ("**R & D**") in the financial records to pay for employees, as defined. Based on Mr Tomolowicz's statements about resources based in China, it is argued that this is an inference that is open, and that the plaintiff has failed to negative the inference. Mr Tomolowicz testified that all R & D is done in Australia, and that the

expenditure includes capital and ongoing expenses and does not only relate to personnel expenses.

[29] The defendant did not cross-examine on, nor press in submissions, the representations made concerning resources in Ukraine. In those circumstances it is not appropriate to dwell on the Ukrainian allegations.

[30] It is helpful to make some basic observations about the plaintiff's financial state over five years, culminating in FY2023-24, as revealed in the tender bundle:

Financial Year	**Sales income**	**Nett profit**	**R & D expenditure**
2019-20	$808,216	($59,913)	Not claimed
2020-21	$2,686,611	$403,484	Not claimed
2021-22	$4,029,990	$608,906	Not claimed in 2022 financial documents. $1,154,439 referred to in 2023 financial documents for this period.
2022-23	$3,931,213	$118,366	$2,759,940
2023-24	$2,502,376	$883,029	$621,154

[31] The fact that no expenditure appears for R & D in the FY2021-22 documents, but that a reference is made in the FY2022-23 documents to in excess of $1.1 million being expended in the previous financial year is not explained. There may be a good explanation, but this discrepancy must be seen in light of the plaintiff bearing the onus of proof on the issue.

[32] The plaintiff did press evidence of representations made in August 2020,[9] March 2021,[10] April 2021,[11] February 2022[12] and other representations to which a date cannot be ascribed.[13]

[33] I accept that there is a chance that, to some degree, Mr Tomolowicz was falsely boasting about the plaintiff, thereby creating an image of it being bigger than it was.

---

9 Ts 1-87, ll 3-4; Trial bundle, page 505 lines 5134-5140.
10 Ts 1-86, l 25; Trial bundle, page 354, line 9061.
11 Ts 1-87, l 5; Trial bundle, page 394, line 9260.
12 Ts 1-86, ll 32-36; Trial bundle page, 602, lines 962-971 and page 603 lines 990-993 and page 614 lines 1497-1502.
13 Trial bundle, pages 344 and 735.

Also, phrases such as "*our factory*" can easily been seen as turns of phrase referring to a factory that is regularly used as a customer, rather than asserting ownership or control.

[34] However, some of the statements are in terms that clearly suggest a degree of control over workers that would make them employees, as defined. I specifically have in mind the statements to the effect that he wanted to cull workers and move to robotics because of the difficulty in managing staff, and of having recently hired four new staff. Given the caution with which his evidence must be approached, he has failed to satisfy me that all, or any, of the statements were false boasts only.

[35] None of these representations were made in the relevant period, but making them when there was significant R & D expenditure reasonably raises the scenario that employees, as defined, were being paid through this expenditure item during the relevant period. The prospect that they were based overseas arises from Mr Tomolowicz's own statements, or failure to correct assertions made to him. Those statements, and the level of R & D expenditure, squarely raises the prospect of there being more than four such employees in total. The inference from the still significant expenditure attributed to R & D in the relevant financial year, which has not been explained in any detail, needed to be negatived by the plaintiff, and it has not been.

[36] In reaching that conclusion I have not lost sight of the fact that two invoices, one each from two different Chinese companies, were tendered.[14] Each purport to be for the supply to the plaintiff of lithium ion batteries. It is argued, in effect, that these invoices demonstrate that the plaintiff was acting merely as a customer with these companies. The difficulty for the plaintiff however is that acceptance of that proposition relies on acceptance of Mr Tomolowicz's evidence, which must be approached with caution for reasons already explained.

[37] The plaintiff has failed to establish that it had less than 10 employees during the relevant period.

Was the plaintiff an associated entity of another corporation?

[38] This issue turns on a consideration of s. 50AAA of the *Corporations Act*, which includes:

> "(7) This subsection is satisfied if:
> (a) an entity (the ***third entity)*** controls both the principal and the associate; and
> (b) the operations, resources or affairs of the principal and the associate are both material to the third entity."

---

14 Exhibits 3 and 4.

[39] For these purposes, Mr Tomolowicz is the third entity, and the plaintiff and Energy Tech are the principal and associate entities. It is uncontentious that, as the sole director and shareholder of both, he controls both for the purposes of s. 50AAA(7)(a).

[40] The plaintiff, in part, points to the separate nature of the businesses to argue that it is not an associated entity of another corporation. In that respect it relies on the findings in *Fair Work Ombudsman v Priority Matters Pty Ltd & Anor*[15] to the effect it is the joint operations, resources or affairs of the entities that must together be material to the third entity. Put another way, there must be a nexus between the associated entities in their respective operations, resources or affairs that are jointly material to the third entity. There does not appear to have been any subsequent jurisprudential dissent concerning the correctness of that finding. Although persuasive only, it is helpful to follow it.

[41] The term "material", unsurprisingly, is not defined. It has been relevantly defined in dictionaries, as a noun, as "*of substantial import or much consequence*"[16] and as "*important or having an important effect*".[17]

[42] As the *Priority Matters* judgment, and other decisions relied on by the plaintiff, illustrate the determination of materiality may depend on issues of fact and degree.

[43] The plaintiff is a lithium battery manufacturer, and considers itself to be one of the pioneers in the development of batteries for use under the bonnet of vehicles. Energy Tech is in the business of selling heating and ventilation products, and is the parent company of a business called Heat On Heating Systems ("**Heat On**"). While both entities operate from the same address, Mr Tomolowicz testified that their operations are kept separate, with the plaintiff operating from a shed on the property, and Energy Tech from a spare room in the associated residence. He also deposed that, although the plaintiff is advertised on Energy Tech's website as its Queensland dealer, with a video embedded into Energy Tech's Facebook page advertising a certain product, both entities have separate websites and contact details, that orders are processed separately and that they operate on separate accounting systems. He accepted in cross-examination that the plaintiff was referred to in the Heat On website as using the plaintiff's batteries, and that this was a means of advertising the plaintiff.

[44] Mr Tomolowicz has also deposed that Energy Tech's operations have slowed significantly since the incorporation of the plaintiff in 2016, and that he has been prioritising the plaintiff's operations and growth since then. That can be accepted. In FY2023-24, Energy Tech's financial records showed trading income of $349,713 and a nett profit of $277, 192, which is notably less than that shown in the plaintiff's records for the same period.

---

15 [2016] FCCA 1474, [183]-[184].
16 Macquarie Concise Dictionary, seventh edition.
17 Cambridge online dictionary, current at date of hearing.

[45] Mr Tomolowicz testified that he used his own credit card to pay the expenses of each company, with a reconciliation occurring, he said, to keep the finances separate. That reconciliation only occurred at the end of each financial year.[18] The credit card had a limit of $10,000.[19] No statements for the credit card have been produced in evidence.

[46] He was also cross-examined about loans made by each company to him, and to loans that appear as between the companies. In particular, he was taken to an entry in the Energy Tech FY2022-23 financial records showing a loan to the plaintiff of $34,429. He considered that "*must be*" a reference to the credit card reconciliation. I note that the FY2023-24 financial records refer to a loan to the plaintiff of $119,713. Although Mr Tomolowicz acknowledged that entry, he was not cross-examined with a view to obtaining an explanation about why the loan was made.

[47] The financial records show that, as at 30 June 2024, there were outstanding director's loans by the plaintiff of $1,269,838, from Energy Tech of $402,265 and an outstanding loan from the plaintiff to Energy Tech of $118,114. Energy Tech's financial records for FY23-24 records the loan to the plaintiff as being $119,713. The difference between the two records does not matter. Mr Tomolowicz did not dispute the financial records. This can be taken as reflective of the position during the relevant period of August 2023 to December 2023.

[48] Mr Tomolowicz also accepted that a Landcruiser and a trailer that appear in the plaintiff's records as its assets are sometimes used for Energy Tech business, and that his personal mobile phone is used for both companies.

[49] The defendant points to the use of Energy Tech's Facebook page and Heat On's website as the use of combined resources to advertise the plaintiff's products. Emphasis is also placed on the use of the one credit card to pay the expenses for both companies, thereby making it a shared resource, to the loans by both companies to Mr Tomolowicz and between them and the use of shared resources such as the Landcruiser vehicle and trailer and the mobile phone.

[50] The crux of the issue, in my view, is the shared use of the credit card. When one appreciates the extent of the expenses for each company over the financial year, that there is no reconciliation until the end of the financial year and that the card has a limit of $10,000, it is clear that there is considerable comingling of each company's finances with each other and with Mr Tomolowicz's personal finances, at least until any yearly reconciliation is undertaken. Even then, it appears that the most recent reconciliation has resulted in a loan being recorded as owing to the plaintiff. Why it is recorded as being owed to the plaintiff and not Mr Tomolowicz if it relates to payment from his personal credit card has not been explained by the plaintiff. That, in itself, tends to illustrate the interdependency of the financial affairs of the entities.

---

18 Ts 1-52, l 42.
19 Ts 1-53, l 1.

[51] It is against that context that the loans to Mr Tomolowicz need to be seen, as well as his testimony that he didn't believe that either company paid him wages. The plaintiff has failed to satisfy me that the two entities were not being used as joint means of generating income for the benefit of Mr Tomolowicz, and also for each company. In fact, the cross movement of money between the two entities, and from them to Mr Tomolowicz suggests that is in fact what happened at the relevant time.

[52] As noted earlier, the determination of materiality may depend on fact and degree. There is no evidence to suggest a sharing of employees, but that feature is not a pre-requisite to find that the entities are associated. Given the size of the various loans, the extent of both entities expenses as revealed in the financial material, the fact that the reconciliation of the companies' expenses paid by Mr Tomolowicz's own credit card occurred only yearly and the reality that in order to clear a credit card with a modest credit limit given the extent of both entities' expenses (in addition to any personal expenses) there must have been regular payments made on it, I am satisfied that the resources and affairs of the plaintiff and Energy Tech are both material to Mr Tomolowicz, in the relevant sense.

[53] The shared use of the Landrover and the trailer, both of which are recorded as the plaintiff's assets, and the mobile phone as well as the use of Energy Tech's resources to advertise the plaintiff's products would be unlikely, if considered in isolation, to be material. However, their use is also consistent with my finding and, in the context of the matters earlier raised herein, contributes to my overall finding.

[54] Accordingly, the plaintiff has failed to satisfy me of the second limb of the requirement under s. 9(2)(b) of the Act also.

[55] Given my conclusions, it has been unnecessary to consider issues raised concerning the plaintiff's purported operations in Europe, or otherwise. It is sufficient to say that some of the explanations given were unconvincing, but the resolution of those matters could not materially affect my conclusion.

Costs

[56] The defendant sought to be heard on costs once I gave my decision. He will have that opportunity, to be heard on the papers in the first instance.