

IN THE DISTRICT COURT
OF WESTERN AUSTRALIA

Appeal No. _____ of 2002

BETWEEN

THE WHICH COMPANY PTY LTD t/as T3 DIRECT

Appellant
(Plaintiff)

And

JOSEPH JOHN McNICOL

Respondent
(Defendant)

**NOTICE OF APPEAL
AGAINST THE DECISION OF THE REGISTRAR
OF THE DISTRICT COURT OF WESTERN AUSTRALIA**

Date of Document: 23 Oct. 2002
Filed on Behalf of: The Appellant
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TAKE NOTICE that a Judge of the District Court in Chambers will be moved by way of appeal at the expiration of 12 weeks from the date of service of this notice upon the Respondent, or so soon thereafter as Counsel may be heard for a hearing of an appeal against the decision of Registrar Hewitt dated 14 October 2002.

AND TAKE FURTHER NOTICE that the grounds for this appeal are:

1. The learned Registrar erred in law or alternatively in fact by finding that the complaint that the Appellant (Plaintiff) had been sending unsolicited bulk email was founded.

2. The learned Registrar should have found that the said complaint was unfounded to the extent necessary for the relevant cause of action, namely that no unsolicited emails were sent by the Appellant (Plaintiff) through the services provided by Swiftel and Webcentral and further, that the said services were terminated due to the actions of the Respondent (Defendant) in reliance upon the said complaint.
3. Alternatively, the learned Registrar erred in law or in fact by finding that the complaint by the Respondent (Defendant) was not capable of giving rise to an action for defamation by the Appellant (Plaintiff).
4. The learned Registrar should have found that the complaint was partially untruthful, and thereby capable of giving rise to an action for defamation, and accordingly should have dismissed the Respondent's (Defendant's) application for Summary Judgment.
5. Further, or alternatively, the learned Registrar erred in law or in fact by finding that there was no inference capable of being drawn to support the Appellant's (Plaintiff's) allegation that the Respondent (Defendant) communicated with SPEWS, and thereby was not capable of causing the termination of services provided to the Appellant (Plaintiff) by Swiftel and Webcentral.
6. The learned Registrar should have found that the issue was one of fact, and should not have ordered a Summary Judgment of dismissal of the Appellant's (Plaintiff's) action upon that alternative basis, particularly by finding that the allegation could be particularised on the basis of discovery, or answers to interrogatories yet to be provided by the Respondent (Defendant).
7. Alternatively, the learned Registrar erred in law or in fact by finding that the actions by the Respondent (Defendant) were not capable of constituting an

unlawful act in light of the present state of the law, and the reasonable possibility that a cause of action lies upon that basis.

8. The learned Registrar should have found that the issue of mixed law and fact was not sufficiently clear under the present law to necessitate a Summary Judgment of dismissal being made with respect to the Appellant's (Plaintiff's) action. In particular, the learned Registrar should have taken into account that the actions by the Respondent (Defendant) were tortious, and thereby unlawful, by reason that they were capable of being defamatory of the Appellant (Plaintiff) or alternatively, induced a breach of contract or a wrongful termination of the Appellant's (Plaintiff's) contracts with Swiftel and Webcentral.

Dated on the 23rd day of October, 2002



A.J. Aristei

Counsel for the Appellant (Plaintiff)