IN THE HIGH COURT OF AUSTRALIA No. S318 of 2011

SYDNEY REGISTRY

BETWEEN:

HARBOUR RADIO PTY LIMITED

Appellant

AND

KEYSAR TRAD

Respondent

APPELLANT'S REPLY

Filed on behalf of the Appellant on 7 November 2011 by:

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1. These submissions are suitable for publication on the internet.

Appellant's appeal: qualified privilege

2. First, Trad attempts to limit the nature of his attack and to limit the permissible ambit of 2GB's reply to sustain his submission that the Broadcast was not a protected publication (RWS [37] and [52]). However: (i) Trad's characterisation of his attack is not supported by the facts; and (ii) his approach to the permissible scope of 2GB's reply is not supported by authority.

3. As to (i), Trad contends that in analysing reply to attack qualified privilege, it is necessary first to isolate particular imputations capable of arising from the attack, as opposed to considering the attack as a whole (RWS [8], [9] and [15]). This approach is without support in the authorities. It was not the basis on which the CA reasoned and it was not advanced by Trad in the courts below. In any event, the small selection of imputations proffered by Trad does not fairly reflect the attack as a whole, which included urgings to the crowd to denounce 2GB and Alan Jones.[1]

4. As to (ii), this Court should reject Trad's attempt to limit the extent to which the Broadcast may be considered a reply by 2GB (RWS [10]-[12]). Trad's attack on 2GB was wide-ranging and, at law, the ambit of 2GB's permissible response was also wide-ranging. Further, Trad's suggestion at RWS [13] that the listener call-in segment cannot be a reply by 2GB is not to the point (even on Trad's analysis): none of the imputations found by the jury was conveyed by listener comments.

5. Secondly, where a person is publicly attacked, he or she "has both a right and an interest in repelling or refuting the attack, and the appeal to the public gives it a corresponding interest in the reply"[2]. Occasions of this kind are privileged and communications relevant to such occasions are protected. The question in this appeal is the test of relevance.

6. At RWS [22]-[29] Trad submits that, in determining whether a reply is a protected communication, it is necessary for the defendant to prove that the reply was "legitimate", "bona fide" and "fairly warranted" (see also RWS [38]-[39]). In so doing, Trad conflates the elements of the defence with the plea in defeasance. The statements of principle in the cases relied on by Trad in RWS [24] refer to the defence of qualified privilege in a general way and the evaluative concepts are used to describe the operation of the defence compendiously, including the issue

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[1] On this view, RWS [10] and [11] are not to the point. Trad's submission at [11] that the trial judge remarked that "imputation [(a)] could not be proved true" does not accurately reflect the trial judge's findings at [98]. See also the trial judge's findings at [146].

[2] *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 515 per Latham CJ.

of malice. Indeed, *Toogood v Spyring* was directed squarely at malice. Similar observations may be made of the cases appearing at RWS [25]-[28].

7. The fundamental problem with Trad's submission is that the plaintiff always bears the onus of proving malice (or improper purpose), that is, a subjective lack of "bona fides". It follows that the question of "relevance" (on which the defendant bears the onus) is purely an objective one, namely whether the defamatory portions of the Broadcast were sufficiently connected to the occasion. And in the case of reply to attack qualified privilege, the range of what is relevant is very wide. It is striking that notwithstanding the basis on which the application for special leave was argued, nowhere does Trad refer to the judgments on appeal from Dixon J in *Penton v Calwell*: per Latham CJ and Williams J at 242-243 and per Starke J at 250. Moreover, the authorities to which Trad does refer do not sustain the approach for which he contends.

8. At RWS [24], Trad misreads the passage quoted from Issacs J in *Norton v Hoare (No. 1)* (1913) 17 CLR 310. It is clear from Issacs J's reference at 322 to the "analogy to *Wright v Ramscott*", that the "facts" that "must appear in the plea" are those that establish the objective circumstances giving rise to the occasion for a response, not facts supporting a subjective belief by the defendant that the response was "fairly warranted" or "honestly made".

9. At RWS [25], Trad extensively quotes Barton ACJ in *Norton v Hoare (No. 1)* at 318 but omits the sentence which connects the quotations, namely the sentence stating that the response – ie what may be considered relevant – is not to be "*confined within the narrowest limits of necessity*". At RWS [40]-[45], however, that is precisely what Trad seeks to do.

10. Thirdly, contrary to Trad's approach at RWS [40]-[45] and the CA findings at [112] and [113], imputations (c), (h) and (k) were relevant to the occasion and protected.

11. Imputation (c) derives from the following defamatory portion of the Broadcast: "[Trad] *goes on, there is about 10 minutes of this bile about how evil and hate filled this radio station is and about how we incite people to commit acts of violence and racist attitudes. I don't think that I've every quite done that, like he did*". It is a counter-attack, a direct refutation of Trad's attack and a defence of 2GB's reputation. In those circumstances, Trad's reliance on *Bennett v Stupich* (1981) 30 BCLR 57 at [19]; 125 DLR (3d) 743 at 748 and *Milne v Walker* (1898) 21 R 155 at 157 is misplaced.[3] It is also at odds with Trad's concession at RWS [12].

[3] Before giving the example quoted in RWS[41], Lord Kincairney in *Milne v Walker* states "publications in answer to a public attack, meeting that attack and vindicating the character of the person attacked are not actionable; but... this privilege does not extend to charges unconnected with that reply or vindication". Simply put, the question is whether B's charge of theft against A is connected with the attack. If it is, it is relevant, and the charge is protected, subject to malice. In any

12. Imputations (h) and (k) are counter-attacks directed at Trad's general credibility. Trad's attempts to confine the permissible scope of response by reference to "specific charges" (ie the imputations Trad arbitrarily attributes to himself), is unreal and contrary to the authorities. As Issacs J (with whom Gavan Duffy, Rich and Powers JJ agreed) said in *Norton v Hoare (No. 1)* at 322, "it may be that the best, or even the only efficacious, means of averting injury is to warn the persons to whom the first injurious statement is made, of the character or the untrustworthiness of the aggressor". Cf RWS [24].

13. Fourthly, on Trad's submission at [31], the CA "said that the right of counter-attack is limited to the two propositions in *Gatley*", which "accord well with established limits on the extent of permissible response". However, the privilege formulated by those propositions is significantly narrower than established authority, including the "authorities" from which *Gatley* seeks to draw the propositions.

14. In *Brewer v Chase* 80 N.W. 575 (Mich. 1899) at 577, the Court held, "[t]he thing published must be *something in the nature of* an answer, *like* an explanation or denial. What is said must have *some connection* with the charge that is sought to be repelled" (emphasis added).

15. In *Dwyer v Esmonde* (1878) 2 L.R.Ir. 234 at 254, the Court held:

> It is admitted that a privilege of a nature of that claimed by the Defendant extends only so far as to enable him to repel the charges brought against him - not to bring fresh accusations against his adversary... But at the same time, I think a Court of law should not overrule a plea of privilege on such a ground unless it found itself in a position to decide, *without any doubt*, that the statements contained in the letter of the Defendant had *no reasonable connexion* with the charges brought against him, *in reply* to which those statements are published...
>
> The Defendant being charged with oppressive conduct towards the Plaintiff as his tenant, it could not apparently be necessary for his exculpation that he should bring a counter-charge of fraud against the Plaintiff - *assuming that such fraud was wholly disconnected* with the relations which subsisted between the Plaintiff and the Defendant. (Emphasis added.)

16. Both cases make clear that the only test of relevance is objective connection. That is the only limit on the scope of permissible counter-attack; and describing an accusation as "fresh" adds nothing to the analysis.

17. The observations of Issacs J in *Norton v Hoare (No. 1)* – when quoted without ellipsis (cf RWS [32]) – do not assist Trad. In response to a "false statement injurious to *property*", Issacs J observes, "[n]othing unreasonable must be done; no unnecessary step, *such as personal violence, or assault* must be undertaken; retaliation is not permitted..." It is not difficult to

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event, *Gatley* itself states of *Milne v Walker*, "the authority of that case is doubtful considering the language used and held to be within the privilege in *Loughton v Bishop of Sodor and Man* (1872) L.R.4 P.C. 495": *Gatley on Libel and Slander*, 11th edition, page 504, footnote 430. Cf. RWS [42].

conclude that, in defending property, personal violence or assault or a retaliatory attack on the plaintiff's property would be a "wholly disconnected" response, not capable of "warding off [injury], by exposing the detractor". The position is different where the defendant's counter-attack is objectively connected to the plaintiff's original attack.

Appellant's appeal: truth

18. The Court should note RWS [47]: "Trad does not wish to defend the Court of Appeal's reasoning".

Respondent's cross appeal and notice of contention

19. Trad proposes to agitate new substantive issues by way of a notice of cross-appeal and a notice of contention. But Trad makes no submission in support of leave to cross appeal to challenge a number of findings of fact made below.

20. No response to attack: imputations (a), (b), (d), (g) and (h) were plainly relevant to the occasion and protected. Each constituted an answer to and a direct refutation of Trad's attack and a defence of 2GB's reputation.

21. Malice: Trad carries the onus on the issue of malice. At RWS [58] Trad makes the following submissions: (i) 2GB knew that, or was wilfully blind as to whether, imputation (a) was false (i.e. whether "the plaintiff stirred up hatred against the 2GB reporter which caused him to have concerns about his own personal safety"); (ii) 2GB knew its particulars of truth concerning this imputation were false; and (iii) 2GB was actuated by an improper motive.

22. As to (i) and RWS [59]: at trial, Trad "led no evidence in support of these matters": TJ [146]. The only evidence on which Trad relies (as to Morrison's state of mind) is Exhibit 4 (DVD footage of the rally). Exhibit 4 was discovered by Trad (TS54.22) and was tendered by 2GB on the issue of occasion[4], ie to establish that Trad had attacked 2GB: TS54.22-55.5. There is no evidence from which to infer that Morrison viewed this footage (indeed, at trial, Trad's counsel appears to have accepted that that proposition was attended with some doubt: TS326.44-.50; TS327.1-.50). Instead, the only available inference to be drawn from the 2GB broadcast itself is that Morrison had seen a video tape of whatever "TV pictures" of the rally had been broadcast on the television news the night before (as to the contents of which there was no evidence). Moreover, the question whether Morrison had viewed Exhibit 4 was never particularised in Trad's reply; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438 forecloses the issue. And, in any event, Exhibit 4 itself does not purport to be a complete recording of events at the rally.

[4] A copy of the DVD footage provided by Trad to 2GB (after the broadcast) was subsequently included in 2GB's list of documents: TS336.8-.15.

23. As to the balance of RWS [59]: Trad's subjective belief as to whether he stirred up hatred causing Glasscock to be concerned about his safety is irrelevant to the issue of 2GB's subjective knowledge; the principles in *Precision Plastics v Demir* (1975) 132 CLR 362 are therefore also irrelevant; moreover, as malice was an issue on which 2GB bore no legal or evidentiary onus (see the well known judgment of Glass JA in *Payne v Parker* [1976] 1 NSWLR 191 at 201), the principles in *Blatch v Archer* (1774) 1 Cowp 63 and *Jones v Dunkel* (1959) 101 CLR 298 have no application. Further, the question whether or not 2GB pressed a defence of justification at trial is wholly irrelevant to the question whether Morrison was actuated by an improper motive at the time of the broadcast.

24. As to (ii) and RWS [60]: this submission stands or falls with (i), as Trad accepts. For the reasons already given, this submission must fail.

25. As to (iii) and RWS [61]: the question whether 2GB's response was "unresponsive, disproportionate, unreasonable and irrelevant" was "alive" on the objective issue of relevance; it was not "alive" on the subjective issue of malice, it was not a particular of malice in the reply and no findings of fact were made. The issue is foreclosed on appeal.

26. Truth: On his notice of contention, Trad raises a wholly new argument. In the courts below, Trad accepted that the evaluative imputations (eg, "the plaintiff is a disgraceful individual") must be measured against some standard. Trad submitted that the appropriate standards were not those of the general community; rather, the question was whether Trad's public statements were acceptable to Muslim Australians. Trad now contends that all such standards are irrelevant. But Trad's submission that the trial judge and the CA failed to determine the issue of truth in accordance with ss. 15 and 16 of the *Defamation Act* 1974 (NSW) by importing into the defence a "community standards test" is plainly wrong. Trad takes out of context the use to which the test was put. The evaluative imputations involve moral judgments. 2GB submits that the trial judge and the CA correctly identified the standard for the evaluative imputations as that of the "general community".

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