

## **PAPACONSTUNTINOS v HOLMES A COURT (S319/2011)**

Court appealed from: New South Wales Court of Appeal  
[2011] NSWCA 59

Date of judgment: 21 March 2011

Date of grant of special leave: 2 September 2011

In 2005 the Respondent (and others) made a bid for the controlling interest in the South Sydney Rugby League Club ("Souths"). That bid was bitterly opposed by elements at Souths, including by the Appellant. At that time, the Appellant was one of the directors of South Sydney Leagues Club, a licenced club associated with Souths. He was also an employee of the Construction, Forestry, Mining and Energy Union ("CFMEU"). The bid itself was put to a vote of Souths' members at an Extraordinary General Meeting ("EGM") on 19 March 2006. It ultimately succeeded.

Two days prior to the EGM, the Respondent wrote to Mr Andrew Fergusson, (the state secretary of the CFMEU) and made certain allegations about the Appellant. The primary judge found that that letter contained three defamatory imputations. One accused the Appellant of repeating misleading information about the bid ("the misleading information allegation") and the others accused him of the misuse of Souths' funds ("the corruption allegations"). The corruption allegations related to the employment (by Souths) of the Appellant's son several years earlier. The Respondent defended the proceedings on the basis that the matter complained of was published on an occasion of qualified privilege.

On 4 September 2009 Justice McCallum rejected the Respondent's defence. While her Honour found that the CFMEU (as the Appellant's employer) had a limited interest in receiving the information complained of, she also held there was no pressing need for the Respondent to protect his interests (or that of others associated with the bid) by voluntarily publishing it.

On 21 March 2011 the Court of Appeal (Allsop P, Beazley, Giles, Tobias & McColl JJA) unanimously allowed the Respondent's appeal. Their Honours held that Justice McCallum had erred in rejecting the defence of common law qualified privilege. This was due to her Honour's reference to the voluntary nature of the matter complained of and the absence of any pressing need for its publication. They found that neither was decisive on the issue of whether the defence of qualified privilege was made out.

The Court of Appeal further held that Justice McCallum had erred in concluding that the Respondent had not established the reciprocity of interest necessary to establish the defence of qualified privilege. Their Honours found that the Respondent had in fact proved that necessary interest. He had a tangible interest in ensuring that the Appellant stopped spreading misleading information about the EGM. The CFMEU also had an interest in knowing about the Appellant's character. Their Honours further held that the misleading information allegation and the corruption allegations were germane to the occasion of qualified privilege. This is because, in the Respondent's mind, the latter explained the former.

The grounds of appeal include:

- The Court of Appeal erred in finding that, in the case of a volunteered statement, where reciprocal interests were relied upon (as distinct from reciprocal duty and interest), the defence of qualified privilege at common law did not require the defendant to show a pressing need to communicate the defamatory matter on the occasion in question.
- The Court of Appeal erred in finding that a pressing need to make the communication was not a requirement for the defence once the defendant had shown that, otherwise, he had an interest in the communication of the defamatory matter.