IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S318 of 2011

BETWEEN:

**HARBOUR RADIO PTY LIMITED**

Appellant

AND

**KEYSAR TRAD**

Respondent

# APPELLANT'S WRITTEN SUBMISSIONS



Filed on behalf of the Appellant on 30 September 2011 by:

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**Part I: Internet certification**

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

**Part II: Issues on the appeal**

2. There are two primary issues for determination in this appeal:

   a. What are the principles governing the defence of qualified privilege in cases of response to an attack?

   b. Was the Court of Appeal correct in holding that the trial judge had failed to deal properly with the truth defence in respect of imputations (b), (c), (d) and (g) and, if so, should the Court of Appeal have made its own findings in respect of the defences of truth and contextual truth?

3. The appellant submits that, in overturning the trial judge's findings in respect of the defences of "response to attack" qualified privilege, truth and contextual truth, the Court of Appeal fell into clear and serious error.

**Part III: Section 78B Notice**

4. This appeal does not raise any issues which would require notice to be given to the Attorney General pursuant to section 78B of the *Judiciary Act* 1903 (Cth).

**Part IV: Reported decisions**

5. The decision under appeal is *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183.

6. The NSW Court of Appeal reversed McClellan CJ at CL's decision in *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750.

**Part V: Material facts**

7. On Sunday 18 December 2005, following events which became known as the Cronulla riots, there was a rally in Sydney's Hyde Park. The respondent addressed the rally, in the presence of representatives of numerous media organisations, and made a speech attacking Radio 2GB (the "Speech"), a station owned and operated by the appellant.

8. During the course of the Speech, the respondent made various allegations about Radio 2GB including that it was whipping up fears, that it was racist, that it was a predominant

cause of the suffering of many of Australia's Muslims, and that it ought to have the sedition laws applied against it.

9. On Monday 19 December 2005, Radio 2GB broadcast a segment in which presenter Jason Morrison responded to the attack (the "Broadcast"). The Broadcast consisted of a monologue by Mr Morrison, an audio recording of extracts from the Speech and two talkback calls.

10. On 17 August 2006, the respondent commenced proceedings for defamation in respect of the Broadcast.

11. Pursuant to the *Defamation Act* 1974 (NSW) (the "Act"), a section 7A trial was held before a jury. The jury found that the Broadcast gave rise to the following defamatory imputations:

    a. The Plaintiff stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety;

    b. The Plaintiff incites people to commit acts of violence;

    c. The Plaintiff incites people to have racist attitudes;

    d. The Plaintiff is a dangerous individual;

    g. The Plaintiff is a disgraceful individual;

    h. The Plaintiff is widely perceived as a pest;

    j. The Plaintiff deliberately gives out misinformation about the Islamic community;

    k. The Plaintiff attacks those people who once gave him a privileged position.

12. In May 2009, a trial dealing with substantive defences was held before McClellan CJ at CL.

13. The appellant relied on a defence of truth in relation to all imputations except (a) and (k). The appellant also raised defences of contextual truth under s.16 of the Act; "response to attack" qualified privilege at common law; and comment.

14. In support of its defence of truth, for example of imputation (g) — *that the Plaintiff is a disgraceful individual* — the appellant relied upon a series of published oral and written statements by the respondent, including the following.

a. Statements in a document the respondent called a "thesis" (Document "R") which was circulated among and intended to influence university students, to the effect that homosexuality is "*mere depraved carnal pursuit*", that homosexuals are no more civilised than dogs and are sub-human, that homosexuality is comparable to drug addiction, that lesbianism is a "*mental fear and not a natural relationship*" and is "*little different to shared masturbation*", that homosexuals are people who "*prowl for prey*", and that homosexuality is analogous to cancer.[1]

b. The endorsement on the respondent's personal website of an anti-Semitic website which contained links to pages entitled "*Did Six Million Really Die?*", "*Zionism: The Protocols of Zion*", and "*Nazism; Mein Kampf*".[2]

c. The respondent's statements defending the notorious speech by Sheikh Hilali in which the Sheikh suggested that women were responsible for sexual violence by likening them to "*uncovered meat*" and by asserting of women that " *[s]he is the one wearing a short dress, then a look, then a smile, then a word, then a greeting, then a chat, then a date, then meeting, then a crime, then Long Bay jail, then comes a merciless judge who gives you 65 years*".[3]

15. The trial judge found that imputations (b), (c), (d) and (g) were substantially true and also upheld the defence of contextual truth to imputations (a), (h), (j) and (k), giving the appellant a complete defence to the respondent's claim.

16. His Honour also upheld the defences of qualified privilege and comment, and found that the appellant was not actuated by malice.

17. The trial judge made a series of express credit findings adverse to the respondent, including that his evidence had been dishonest, and, in particular, rejected the respondent's evidence that he no longer adhered to certain of his published views.[4]

18. The respondent appealed on the following primary grounds.

a. As to qualified privilege, that the Speech was not an attack on the appellant and, therefore, the Broadcast could not be a response to an attack. The respondent also submitted that the response was "out of proportion" to the attack.

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[1] Judgment of McClellan CJ at CL at [83]-[95].

[2] Judgment of McClellan CJ at CL at [75]-[80].

[3] Judgment of McClellan CJ at CL at [27]-[42].

[4] See in particular the judgment of McClellan CJ at CL at [23]-[25], [35],[40], [46], [55],[77], and [94(a)-(d)].

b. As to the defences of truth and contextual truth, that the trial judge had applied an incorrect test (namely "general community standards") in determining these defences.

19. The Court of Appeal allowed the appeal and set aside the trial judge's findings in respect of the defences of truth, contextual truth and comment[5].

20. The Court of Appeal also reversed the trial judge's findings with respect to the defence of qualified privilege. The Court found (at [112]) that the defence was not made out in respect of imputations (c), (h) and (k), but upheld the defence in respect of the other five imputations. The Court remitted the matter for an assessment of damages only with respect to imputations (c), (h) and (k).

21. The Court of Appeal held that the trial judge had identified the correct test in assessing the truth of the imputations.[6] However, the Court found that his Honour, despite having stated the correct test, failed to apply it.[7] On that basis, the Court held that the defence of truth could not be sustained.

22. The Court of Appeal did not, however, proceed under section 75A of the *Supreme Court Act* 1970 (NSW) to conduct a rehearing (by itself applying the correct test to the evidence). Nor did it remit the matter for determination to the trial judge for his Honour to apply the correct test.

23. That was so, notwithstanding that the Court had received very substantial submissions on the evidence relevant to the truth defence, including a 41 page document headed "Findings of Fact" prepared by the appellant and a 57 page response prepared by the respondent, both of which analysed the evidence in relation to the findings made by the trial judge. Indeed, aside from a limited point of distinction about the interpretation of Document "R", which expounded the respondent's "homophobic views",[8] the Court of Appeal did not engage with the evidence on the issues of substantial truth.[9]

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[5] [120]-[121] of the CA judgment.

[6] [66]-[67] and [69] of the CA judgment.

[7] [79], [81], [84], [86], [87] and [120] of the CA judgment.

[8] The Court of Appeal accepted at [77] that Document "R" "demonstrates the appellant held homophobic views".

[9] At [73]-[76], [78]-[79] and [84] the Court of Appeal found that there had been insufficient evidence to support the finding at [89] of the trial judge's judgment that the Plaintiff was in 1999 of the view that homosexuality is "a crime for which the appropriate punishment if stoning to death".

## Part VI: Appellant's argument

### A. Appeal grounds 1-5: "response to attack" qualified privilege

Introduction

24. This appeal involves a well-recognised category of qualified privilege, namely, the privilege which arises where the defendant makes a defamatory publication in response to an attack.

25. This category operates within the general principles applicable to the defence of qualified privilege, but it does so in a distinctive manner because of the nature of the circumstances in which the occasion of privilege arises. In general terms, the defence operates more robustly and widely in cases involving a response to an attack than in other categories of qualified privilege.

26. As in all cases of qualified privilege, three conceptually distinct issues may arise for determination. The appellant submits that the proper approach to the issues is, in summary, as follows.

    a. First, the "**occasion issue**": was the publication made on an occasion of qualified privilege? In a case of response to attack qualified privilege, the making of a public attack upon the defendant by the plaintiff gives rise to an occasion of privilege for the defendant to respond to that attack. The occasion permits the defendant to respond, not only by denying the respondent's accusations, but also by way of counter-attack, including (but not limited to) attacks on the respondent's general credibility. Provided that the defendant's publication is a response of that kind, it is published on an occasion of privilege. The occasion issue is a matter for the judge, determined objectively, on which the defendant bears the onus.

    b. Secondly, the "**relevance issue**": was any particular defamatory portion of the defendant's publication so unconnected with the occasion of privilege as to fall outside the protection of the privilege? No question of the defendant's bona fides, or of the "legitimacy" or "proportionality" of the response, is involved. The only question is relevance, which must be judged by reference to the nature of the occasion of privilege. The relevance issue is a matter for the judge, determined objectively, on which the defendant bears the onus.

c. Thirdly, the "**malice issue**": did the defendant abuse the privileged occasion by making the publication for an improper purpose, that is, a purpose foreign to the occasion of privilege? The malice issue is a matter for the jury, on which the plaintiff bears the onus.

27. The malice issue does not arise in this case, as both the trial judge and the Court of Appeal held that the respondent's case on malice failed.[10]

28. Each of the other two issues will be dealt with in turn.

The occasion issue

29. In *Roberts v Bass* (2002) 212 CLR 1 at [62], Gaudron, McHugh and Gummow JJ described the defence of qualified privilege as follows.

> "The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it. Communications made on such occasions are privileged because their making promotes the welfare of society. But the privilege is qualified – hence the name qualified privilege – by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement." (internal citations omitted)

30. The question whether the defendant's "defamatory statement [was] made on an occasion" of privilege is generally stated as the one issue, although it has two aspects: did an occasion of privilege come into existence, and was the defamatory publication made on that occasion? These are issues for the judge to decide.

*Existence of the occasion*

31. As to the coming into *existence* of an occasion of qualified privilege, in most cases this depends on the circumstances and, in particular, on the relationship between the defendant and the recipients of the defamatory statement. But in the category of case where the plaintiff has made a public attack on the defendant, the defendant always has an interest in publicly defending his, her or its reputation and in repulsing the attack, and the public always has a reciprocal interest in receiving the defendant's response. It is thus the making of the public attack by the plaintiff which generates the occasion of qualified privilege. As Starke J observed in *Loveday v Sun Newspapers* (1938) 59 CLR 503 at 515, in such a case the plaintiff "has appealed to the public and provoked or invited a reply. A

[10] Judgment of McClellan CJ at CL at [142]-[147]; CA judgment at [114]-[118].

person attacked 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". Similarly, as Spigelman CJ observed in *Bass v TCN Channel Nine* (2003) 60 NSWLR 251 at [41], the qualified privilege in a response to attack case "is based upon the implicit consent by the attacker to the publication of a riposte".

*Publication made on the occasion*

32. As to the question whether the defamatory publication was *made on* an occasion of privilege, this is judged by reference to the nature of the occasion and the kind of publication which it protects.

33. For example, in *Cush v Dillon* [2011] HCA 30, French CJ, Crennan and Kiefel JJ characterised the nature of the occasion as one arising from the duty which a public authority board member had in disclosing, and the interest which the chairman of the board had in receiving, information about staff-related matters concerning the authority (including the nature of the relationship between members of the board and members of staff) (at [23]). Their Honours then answered the question whether the defendant's defamatory statement had been published on the privileged occasion by reference to the nature of the occasion: "[t]he concession, properly made, was that the occasion of the privilege extended to the communication of the existence of the rumour" of an affair between a board member and a staff member. (The failed attempt by the appellants in that case to distinguish statements of "rumour" from statements of "fact" is addressed below under the heading, "The relevance issue".)

34. In short, a defamatory publication is made on an occasion of privilege if it is of a *kind* to which the nature of the occasion extends.

35. Where the occasion of privilege arises by reason of the plaintiff's public attack on the defendant, the nature of the occasion is not to fulfil a particular duty, but to further the defendant's interest in responding to the attack. It follows that, provided that the defendant's publication is of a kind which constitutes a response to the attack, it is made on an occasion of privilege.

36. The law is clear that the defendant is permitted great latitude in the response. The defendant may refute the attack in its own terms, or may attack the credibility of the attacker, or may raise any other matters constituting a response in the particular circumstances in which the attack was made. Contrary to the view apparently taken by

the Court of Appeal at [111], the response may include a counter-attack. In *Penton v Calwell* (1945) 70 CLR 219 at 233-234, Dixon J said:

> "When the privilege of the occasion arises from the making by the plaintiff of some public attack upon the reputation or conduct of the defendant or upon some interest which he is entitled to protect, the purpose of the privilege is to enable the defendant on his part freely to submit his answer, whether it be strictly defensive or be *by way of counter-attack* ... It may be conceded that to impugn the truth of the charges contained in the attack and even *the general veracity of the attacker* may be a proper exercise of the privilege, if it be commensurate with the occasion." (emphasis supplied)

The relevance issue

37. Even where a defendant's defamatory publication was *made on* an occasion of privilege (because it was of a kind to which the privileged occasion extended), an issue may arise as to whether particular portions of the publication were so unconnected with the occasion as to fall outside the protection of the privilege.

38. The appellant submits that, whatever the circumstances in which the occasion of privilege arises, the nature of the test is the same: a test of relevance. As French CJ, Crennan and Kiefel JJ said in *Cush v Dillon* at [19], the "limits to what may be said upon a subject on an occasion of qualified privilege ... are to be tested by the *connection* of the statement to the subject" (emphasis supplied; see also at [22]). Their Honours emphasised at [25] that the relevance issue involves an "objective assessment. It is not to be confused with an enquiry as to whether a person was actuated by malice in using exaggerated words. As Earl Loreburn observed in *Adam v Ward* [[1917] AC 309 at 321], a statement which exceeds the occasion may be evidence of malice, but 'the two things are different'". It follows that no question of the defendant's bona fides, or of the "legitimacy" or "proportionality" of the response, is involved in the relevance test. Those questions may arise, if at all, on the malice issue (i.e., the defendant's subjective improper purpose) — on which the plaintiff bears the onus.

39. In all cases of qualified privilege, the test of relevance is not a strict or technical one. French CJ, Crennan and Kiefel JJ held at [22], "no narrow view should be taken of the pursuit of a duty or interest in what was said. To do so may unduly restrict the operation of the defence".

40. Moreover, while the test of relevance is the same in all cases of qualified privilege, it is the nature of the particular occasion which determines the ambit of what was relevant.

For example, as noted above, in *Cush v Dillon* the appellants, although conceding that the occasion of privilege extended to statements about the *rumour* of an affair, argued that statements about the *fact* of an affair (that it was "common knowledge") fell outside the privilege. All members of the Court disagreed. French CJ, Crennan and Kiefel JJ expressly applied a test of relevance to the particular occasion:

> "The concession, properly made, was that the *occasion* of the privilege extended to the communication of the existence of the rumour. It could not, in our view, then be suggested that the communication of the fact of an affair was less *relevant* to the matters discussed than a rumour." (at [23], emphasis supplied)

See also at [50]-[52] per Gummow, Hayne and Bell JJ; at [60]-[61] per Heydon J.

41. It follows that where, as here, the case arises out of the defendant's response to a public attack, such that the occasion of privilege extends to counter-attacks (including general attacks on the plaintiff's credibility), the range of what is relevant to the occasion will be very wide indeed. That is simply a function of the distinctive nature of the occasion.

42. In *Watts v Times Newspapers Ltd* (1997) QB 651 at 671C it was held that only "entirely irrelevant and extraneous material" would fall outside the privilege. In *Adam v Ward* at 334-335 Lord Atkinson said:

> "It was, however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law."

See also the discussion of this issue by Hodgson and Sheller JJA in *Bashford v Information Australia (Newsletters) Pty Limited* [2001] NSWCA 470.

The decision below

43. The respondent's Speech was a vitriolic attack in which he called for the sedition provisions to be used against the "racist criminals" of Radio 2GB. The Broadcast was unarguably a response to the respondent's attack on Radio 2GB. The Broadcast referred directly to the respondent's attack on the radio station and even included recordings of part of the respondent's Speech. In light of the analysis above, the Broadcast was plainly published on an occasion of privilege.

44. Since the Court of Appeal upheld the trial judge's finding of no malice (see at [114]-[118]), the only question which remained as to qualified privilege was the relevance issue: whether any particular portions of the Broadcast were so unconnected with the occasion of privilege as to fall outside the protection of the privilege.

45. It is submitted that the Court of Appeal fell into a number of errors in dealing with this issue.

46. First, at the most general level, the Court of Appeal failed to appreciate the significance for the relevance inquiry of the distinctive nature of the particular occasion of qualified privilege. This appears to have led their Honours at [111] to decline to follow this Court's decision in *Penton*, and instead expressly to prefer what their Honours described as "the better view", said to be "supported by *Gatley*". Although their Honours did not specifically identify the content of this "better view", it appears from [111] that their Honours rejected the proposition that a defendant is entitled to respond by way of counter-attack.

47. Secondly, at [112] the Court of Appeal impermissibly introduced into its consideration of the relevance issue a series of evaluative concepts: whether parts of the Broadcast were a "legitimate response" or a "bona fide answer ... fairly warranted by the occasion".

48. The introduction of these concepts was wrong as a matter of law and had the effect of reversing the onus. The distinction between the issues on which the appellant carried the onus, namely, whether the Broadcast was published on an occasion of privilege and whether any particular part of it was relevant to the occasion, and the issue of defeasance on which the respondent carried the onus, namely, whether the appellant was actuated by actual malice, must be kept firmly in mind. The respondent pleaded and pursued a case of malice which failed at trial. The respondent attacked the trial judge's finding of no malice on appeal and again he failed. The only issue which remained was the relevance issue. It was plainly wrong to assert that, in order to discharge its onus on the relevance issue, the appellant carried the onus of proving that its response was "legitimate" or that it had acted "bona fide".

49. Thirdly, the Court of Appeal fell into error in finding at [112] and [113] that imputations (c), (h) and (k) fell outside the protection of the privilege.

50. It should be noted that the Court's actual findings were that imputation (c) was "not a *legitimate* response"; that imputation (h) was "not ... a *relevant* response"; and that

imputation (k) was "not a *bona fide* answer or retort by way of vindication *fairly warranted* by the occasion". The findings in relation to imputations (c) and (k) were not expressed in terms of relevance, and it is difficult to construe them as if they were findings in terms of relevance.

51. As noted above, the correct test is one of relevance. The appellant submits that, on the facts of this case, the portions of the Broadcast which gave rise to imputations (c), (h) and (k) were clearly relevant and fell within the protection of the privilege.

    a. As to imputation (c), *the plaintiff incites people to have racist attitudes*: this was both a relevant response in the circumstances of the respondent's attack (in which he alleged that Radio 2GB was racist) and a relevant counter-attack directed to the respondent's credibility. In the Speech, the respondent had held himself out as an opponent of racism and a contributor to anti-racist public discourse. The central theme of the Speech was the conflict between the "racist criminals" of 2GB and "Muslims in Australia ... all of whom are suffering as a result of the racist actions of predominantly one radio station". In those circumstances, it was an entirely relevant response to describe the respondent as a person who, himself, incited people to have racist attitudes. Mr Morrison was arguing that the respondent's allegations of racism levelled against Radio 2GB were not genuine: that they were in fact a means of inciting others to hold racist views (i.e. against the people at 2GB). It was also a relevant kind of response for the appellant to expose the respondent as one who publicly claimed to have higher standards or more laudable opinions or beliefs than was the case – in other words, that he was a hypocrite whose attack upon the appellant as a racist radio station therefore lacked credibility. It should also be noted that imputation (b) (which the Court of Appeal held to be relevant to the occasion) and imputation (c) arise from the same sentence of the Broadcast. In those circumstances, the Court of Appeal's finding that imputation (b) was relevant to the occasion, but (c) was not, is unsupportable.

    b. As to imputation (h), *the plaintiff is widely perceived as a pest*: this too was a counter-attack directed to the credibility of the respondent's attack on the radio station. To call someone a pest is to say that he is a nuisance. In other words, the term conveyed that the respondent was someone who habitually interfered or caused annoyance without good reason; that his attacks generally lacked substance and that they should not be accepted.

c. As to imputation (k), *the plaintiff attacks those people who once gave him a privileged position*: it is important to see the portion of the Broadcast which gave rise to the imputation in its context:

> "... he is one of the most complaining people around the place and he does nothing to try to address the actual issues, he just wants to sort of hatchet job people who once gave him the privileged position that he thinks he has."

Again, this was a counter-attack directed to the respondent's general credibility. The appellant's point was that the respondent's many complaints were not genuine — that the respondent's true purpose was not "to address the actual issues" but to pursue an agenda of betrayal, attacking the respondent's former supporters.

52. The appellant submits that the Court of Appeal's reasoning at [112] was mere assertion and cannot be supported.

53. In the circumstances, the defence of qualified privilege should have succeeded with respect to all imputations and the defendant should have retained the judgment in its favour.

**B. Appeal Ground 6: Truth and contextual truth**

54. The Court of Appeal's reasoning in respect of the defences of truth and contextual truth is also permeated with error.

55. While the Court of Appeal correctly rejected the respondent's primary submission as to the correct test to be applied, it nevertheless erred in holding that the trial judge had failed to apply the correct test.

56. The trial judge held that the test to be applied in evaluating the truth of imputations such as whether the respondent was "a disgraceful individual" was the application of general community standards adopted by hypothetical right thinking members of the community.[11] Each of paragraphs 1, 2 and 3 of the notice of appeal in the Court of Appeal attacked that aspect of the trial judge's decision, and in written and oral submissions the respondent proposed alternative tests favouring sectional, rather than general community, standards. Critically, at no point in the notice of appeal, nor in argument nor submissions, did the respondent suggest that the trial judge had failed to apply a test based on general community standards. The respondent's primary complaint was the opposite: that general community standards provided the wrong test, and that that

[11] Judgment of McClellan CJ at CL at [17], [20].

was the test which his Honour had applied: see Grounds of Appeal 1-3 in the Court of Appeal. The respondent's secondary complaint was that the evidence did not support his Honour's various findings in any event: see Grounds of Appeal 4-10 in the Court of Appeal.

57. The basis on which the appeal was conducted thus involved: (a) a contest about whether the general community values test was the correct test; and (b) a contest about whether the evidence supported his Honour's findings made in applying that test.

58. The Court of Appeal agreed that the general community standards test adopted by the trial judge was the correct test.[12] However, despite the absence of any ground of appeal, submissions or even discussion at the hearing on this issue, the Court of Appeal held that the trial judge did not in fact apply that test.[13] This conclusion appears to have been based on the failure of the trial judge, on each occasion he was dealing with a factual matter, to recite the test word for word and then mechanically posit an answer.[14] The appellant submits that this conclusion of the Court of Appeal is clearly wrong. It is plain that the trial judge was at all times applying the (correct) general community values test which he had formulated. This is simply inescapable from dozens of repeated references to the incompatibility of the respondent's views with the views of right thinking community members and general community standards scattered throughout the judgment.[15] Indeed, on the Court of Appeal's reasoning, the learned Chief Judge at Common Law applied no test at all, or the test applied is a mystery.

59. The second error made by the Court of Appeal in respect of the truth defence was the approach it then took, having found that the trial judge had failed to apply the correct test at all in assessing the truth of the imputations.

60. Section 75A of the *Supreme Court Act* 1970 NSW relevantly provides:

> *(6) The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning:*
>
> *(a) amendment,*
>
> *(b) the drawing of inferences and the making of findings of fact, and*
>
> *(c) the assessment of damages and other money sums.*

[12] Judgment CA at [69].

[13] CA judgment at [79], [81], [84], [86], [87] and [120].

[14] See, e.g., the CA judgment at [86]: "The question whether right-thinking members of the community would consider such an individual disgraceful was not asked *in those terms*." (emphasis supplied)

[15] Judgment of McClellan CJ at CL at for instance [42], [46], [47], [51], [56], [57], [61], [64], [67], [69], [74], [82], [91], [97], [104], [108], [112], [113], [114].

...

*(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires.*

61. Despite receiving long and detailed documentary and oral submission addressing the evidence relevant to the truth of the imputations[16], the Court of Appeal did not proceed to make any factual findings as to the truth of the imputations for itself under s75A(6)(b). Nor did the Court of Appeal remit the matter. Instead, it held that the defence of truth as found by his Honour could not be sustained and, on that basis, the Court of Appeal took the defence away from the appellant.

62. In light of the way in which the appeal had been conducted, there was no substance to the Court of Appeal's apparent justification at [87] for the course it took, namely, that "[t]here was no notice of contention inviting the Court to uphold those findings on any different basis".

63. Even if, contrary to the appellant's primary submissions, the Court of Appeal had been correct in holding that McClellan CJ at CL failed altogether to apply the correct (community values) test, the Court of Appeal erred by failing to exercise its jurisdiction under s.75A to reconsider the matter and make findings itself, or alternatively to remit the matter. This occasioned a serious injustice to the Defendant.

64. The trial judge had found that the truth case in respect of imputations (b), (c), (d) and (g) was made out. Those findings should not have been overturned by the Court of Appeal. Since imputations (b), (c), (d) and (g) were clearly more serious than the remaining imputations, his Honour had plainly been correct to find (at [129]) that the defence of contextual truth was also made out, such that the truth defences were a complete answer to the respondent's claim ([130]).

**Part VII: Applicable statutory provisions**

65. The applicable statutory provision is section 75A of the *Supreme Court Act* 1970 (NSW). That provision is still in force, in that form, at the date of making these submissions. A copy is annexed and marked "A".

[16] See paragraph 23 above.

**Part VIII: Orders sought**

66. The appeal be allowed with costs.

67. In the event that the appeal is allowed with respect to grounds 1-5, the orders of the Court of Appeal made on 22 March 2011 be set aside and, in lieu thereof, it be ordered that the appeal to the Court of Appeal be dismissed with costs.

68. In the event that the appeal is allowed only in respect of ground 6, the orders of the Court of Appeal made on 22 March 2011 be set aside and the matter be remitted to the Court of Appeal for determination of the defences of truth and contextual truth.

10 69. Such further or other order as the Court thinks fit.

Dated: 30 September 2011

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## [SCA s 75A] Appeal

**75A** (1) Subject to subsections (2) and (3), this section applies to an appeal to the Court and to an appeal in proceedings in the Court.

[Act 49 of 1900 s 5; Act 24 of 1901 ss 82, 84; Act 32 of 1965 s 5]

(2) This section does not apply to so much of an appeal as relates to a claim in the appeal—

(a) for a new trial on a cause of action for debt, damages or other money or for possession of land, or for detention of goods; or

(b) for the setting aside of a verdict, finding, assessment or judgment on a cause of action of any of those kinds,

being an appeal arising out of—

(c) a trial with a jury in the Court; or

(d) a trial—

(i) with or without a jury in an action commenced before the commencement of section 4 of the District Court (Amendment) Act 1975; or

(ii) with a jury in an action commenced after the commencement of that section,

in the District Court.

[subs (2) am Act 1 of 1975 s 4]

(3) This section does not apply to:

(a) an appeal to the Court under the Crimes (Local Courts Appeal and Review) Act 2001, or

(b) to a case stated under the Criminal Appeal Act 1912.

[subs (3) subst Act 121 of 2001 s 4 and Sch 2, opn 7 July 2003]

(4) This section has effect subject to any Act.

(5) Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.

(6) The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning—

(a) amendment;

(b) the drawing of inferences and the making of findings of fact; and

(c) the assessment of damages and other money sums.

(7) The Court may receive further evidence.

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing.

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires.

[subs (10) subst Act 226 of 1989 s 3 and Sch 1]

[s 75A insrt Act 41 of 1972 s 7]

NOTES

Scope of the section ..... [SCA s 75A.5]
Appeal by way of rehearing ..... [SCA s 75A.10]
Appeal — basic character ..... [SCA s 75A.12]
Appeals subject to specific statutory provisions s 75A(4) ..... [SCA s 75A.14]