HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

CONSTANTINE KERAMIANAKIS APPELLANT

AND

REGIONAL PUBLISHERS PTY LTD RESPONDENT

Keramianakis v Regional Publishers Pty Ltd
[2009] HCA 18
29 April 2009
S311/2008

ORDER

1. *Appeal allowed with costs.*

2. *Cross-appeal dismissed.*

3. *Set aside the orders of the New South Wales Court of Appeal of 21 December 2007.*

4. *In place thereof order that:*

   (a) *first appellant's appeal be allowed with costs;*

   (b) *Order 1 and the second sentence of Order 3 of the orders made by the trial judge on 7 August 2006 be set aside; and*

   (c) *there be a new trial in relation to the imputations set out in paragraphs (b) and (c) of paragraph 13 of the third amended statement of claim, limited to the issues of whether those imputations are carried by the newspaper article and are defamatory.*

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with A A Henskens and R J Anderson for the appellant (instructed by Pryor Tzannes & Wallis)

J S Wheelhouse SC with M F Richardson for the respondent (instructed by Johnson Winter & Slattery)

S J Gageler SC, Solicitor-General of the Commonwealth with G M Aitken intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Keramianakis v Regional Publishers Pty Ltd

Practice and procedure – Appeals – Availability of appeal where trial in District Court of New South Wales conducted with jury – Where trial judge entered "verdict" for defendant following jury's answers to questions – Whether appellant a party "dissatisfied with a Judge's … judgment or order in an action" within meaning of *District Court Act* 1973 (NSW), s 127(1) – Relevance of absence in *Supreme Court Act* 1970 (NSW) of express provision conferring power on Court of Appeal in relation to appeals from District Court trial with jury.

Practice and procedure – Appeals – Where right of appeal exists in respect of "a Judge's … judgment or order in an action" – Relevance of cases dealing with phrase "all judgments, decrees, orders, and sentences" in Constitution, s 73.

Words and phrases – "all judgments, decrees, orders, and sentences", "Judge's … judgment or order in an action".

Defamation Act 1974 (NSW), s 7A.
District Court Act 1973 (NSW), ss 126, 127(1).
Supreme Court Act 1970 (NSW), ss 22, 75A.

FRENCH CJ.

Introduction

1 In August 2006, in the District Court of New South Wales, a jury in a defamation trial gave answers to questions which the trial judge put to them as he was required to do by s 7A of the *Defamation Act* 1974 (NSW) ("the 1974 Act"). The two plaintiffs, Dr Constantine Keramianakis and Dr Albert Smagarinsky, claimed they had been defamed by a newspaper report about a medical practice they were conducting in Dubbo. The jury's answers, so far as they related to Dr Keramianakis, were to the effect that the report did not convey the defamatory imputations which he alleged it conveyed. The answers were fatal to his case.

2 The trial judge discharged the jury and said that there would be "a verdict" for the newspaper publisher in respect of the claim by Dr Keramianakis. He also ordered the doctor to pay the publisher's costs. Dr Keramianakis appealed to the Court of Appeal of New South Wales. The Court of Appeal decided, by majority, that it did not have jurisdiction to entertain the appeal because the "verdict" pronounced by the trial judge was not a "judgment or order" of the judge within the meaning of s 127(1) of the *District Court Act* 1973 (NSW)[1]. That section confers the relevant appeal rights from the District Court to the Supreme Court. The Court of Appeal went on to say that if it had had jurisdiction, it would have found in favour of Dr Keramianakis in relation to two of the three imputations which the jury was asked to consider. That was on the basis that the doctor was entitled, as a matter of law, to a verdict based on affirmative answers to those imputations[2].

3 The Court of Appeal did have jurisdiction. What the trial judge did was to make a judgment or order even though he used the word "verdict". The appeal should be allowed.

Procedural history

4 Regional Publishers Pty Limited ("Regional Publishers") is the publisher in New South Wales of the *Daily Liberal*, a newspaper which circulates in Dubbo. On 22 March 2001, the newspaper carried a story about a skin cancer clinic operating in Dubbo under the name "Dubbo Skin Cancer Centre". The article was entitled "Claims skin clinic misleading public". The article included comments attributed to a Dubbo general practitioner, Dr Bruce Wagstaff, critical of the services offered at the clinic and of its fees.

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1 *Keramianakis v Regional Publishers Pty Ltd* (2007) 70 NSWLR 395.

2 (2007) 70 NSWLR 395 at 406-407 [103]-[104].

5 On 12 October 2001, Drs Keramianakis and Smagarinsky, who had established and were conducting the clinic, commenced proceedings for defamation in the District Court of New South Wales against Regional Publishers and Dr Wagstaff. The proceedings were brought under the 1974 Act, which has since been repealed by the *Defamation Act* 2005 (NSW).

6 The doctors alleged that the publication gave rise to three imputations against each of them. They were:

> "(a) That the … plaintiff as a medical practitioner was more concerned with making money than with the well-being of his patients.
>
> (b) That the … plaintiff is a medical practitioner who had misled the public.
>
> (c) That the … plaintiff as a medical practitioner had charged excessive fees for medical services."

7 The action went to trial before a judge and jury in August 2006. On 7 August 2006, the trial judge posed a number of questions for the jury to answer. The questions were consistent with the division of functions between judge and jury prescribed by s 7A of the 1974 Act which is referred to later in these reasons. As between Dr Keramianakis and Regional Publishers the questions posed and answers given by the jury were as follows:

> "Q3. Has the first plaintiff established that the article published in the Daily Liberal on or about 22 March 2001 conveyed to the ordinary reasonable reader the following imputations or imputations that do not differ in substance from them:
>
> A) That the first plaintiff as a medical practitioner was more concerned with making money than with the well-being of his patients?
>
> FOREPERSON: No.
>
> B) That the first plaintiff is a medical practitioner who had misled the public?
>
> FOREPERSON: No.
>
> C) That the first plaintiff as a medical practitioner had charged excessive fees for medical services?
>
> FOREPERSON: No."

These answers spelt the end of Dr Keramianakis' case against Regional Publishers. Dr Smagarinsky was more successful. The jury held that the *Daily*

Liberal article conveyed imputations (b) and (c) about him to the ordinary reader and that the imputations were defamatory of him.

8 Counsel for Regional Publishers then moved the court for judgment and the following exchange ensued:

> "[COUNSEL]: Your Honour I ask for judgment for the second defendant in relation to the claim brought by the first plaintiff against it and costs.
>
> HIS HONOUR: Here's the file. I have marked the jury's answers to the questions on the documents MFI 10 and 11. Now in relation to those answers you seek a verdict in relation to the second defendant, that is Regional Publishers Pty Limited against the first plaintiff.
>
> [COUNSEL]: Dealing with costs and interest.

9 Counsel for Dr Keramianakis said that "in respect of judgment" he could say nothing. His Honour said:

> "Verdict you mean. There will be a verdict for the second defendant in respect of the claim by the first plaintiff Con Keramianakis."

There was debate about costs and in that context the following exchange ensued:

> "[COUNSEL]: Well your Honour the case is wholly concluded against the second defendant so far as the first plaintiff is concerned.
>
> HIS HONOUR: Why?
>
> [COUNSEL]: The second defendant has obtained judgment against the first plaintiff in its entirety.
>
> HIS HONOUR: That's true."

The trial judge, after some debate about the costs orders to be made as between the parties, said:

> "First plaintiff to pay second defendant's costs, yes."

10 On 30 April 2007, the orders were settled by an Assistant Registrar of the District Court according to Form 33, pursuant to r 36.11 of the Uniform Civil Procedure Rules 2005 (NSW). The document was headed "Judgment/Order". The date that the order was made or given was shown as 7 August 2006 and that date was also shown as the date the order was entered. Under the heading "Terms of Judgment or Order", the following appeared:

> "1. Verdict for the second defendant, in respect of the claim by the first plaintiff. First plaintiff to pay second defendant's costs.
>
> 2. Verdict for the second defendant in relation to the second plaintiff in respect of the imputation pleaded in paragraph 14(a) of the third Further Amended Ordinary Statement of Claim (filed 20 May 2005). Reserve question of costs.
>
> 3. Re costs in respect of the 7A trial by the first and second plaintiffs against the first defendant to await determination of the motion. First plaintiff to pay the second defendant's costs as in 1 above. Re second plaintiff v second defendant (7A trial costs) to await determination of the action."

11 Rule 36.11, headed "Entry of judgment and orders" provided, inter alia, that any judgment or order of the court was to be entered. A judgment or order was taken to be entered when recorded in the court's computerised court record system unless the court ordered otherwise[3].

12 Drs Keramianakis and Smagarinsky filed a notice of appeal, but only as against Regional Publishers. In their amended notice of appeal they stated:

> "The Appellants appeal against all of the jury findings that imputations pleaded by the Appellants were not conveyed and the verdicts and judgments with costs entered in favour of the Respondent by Puckeridge DCJ on 7 August 2006."

13 The grounds of appeal included complaints that each of the jury's answers which was adverse to the doctors was "perverse, unreasonable and an answer that no reasonable jury properly directed could have given." The doctors also complained that the trial judge's directions to the jury were inadequate and that his Honour had denied procedural fairness by commencing his summing up to the jury and thereby denying the appellants the opportunity to make a foreshadowed reply submission.

14 On 21 December 2007, the Court of Appeal of New South Wales dismissed the appeal[4]. The Court (Beazley and Basten JJA and Rothman J) divided. Basten JA, with whom Beazley JA agreed, held that there was no right of appeal to the Court of Appeal from a jury verdict in the District Court. Basten JA said[5]:

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3 Rule 36.11(2).

4 *Keramianakis v Regional Publishers Pty Limited* (2007) 70 NSWLR 395.

5 (2007) 70 NSWLR 395 at 406 [98].

> "In relation to a civil jury trial in the District Court, the right of appeal is now limited to an appeal against the judge's judgment or order."

The majority went on to hold that if the Court had jurisdiction to entertain the appeal, the jury's answers, adverse to Dr Keramianakis, concerning imputations (b) and (c) should be set aside and a verdict directed and judgment given accordingly[6]. There were no relevant points of distinction in relation to those imputations between Dr Keramianakis and Dr Smagarinsky. The jury had been led to a distinction based upon an incorrect understanding of the law. That understanding, it was said, followed from confusing directions in relation to identification and the conveying of imputations[7]. Rothman J dissented on the availability of the appeal.

15 On 13 June 2008, the doctors were granted special leave to appeal from the judgment and order of the Court of Appeal. Regional Publishers filed a cross-appeal and a notice of contention. The appeal came on for hearing on 23 September 2008. At that time counsel for the doctors indicated that he had lately discerned a line of authority, unfavourable to his case, concerning the term "judgments, decrees, orders, and sentences", in s 73 of the Constitution. These authorities might inform argument by analogy about the construction of s 127(1) of the *District Court Act* 1973 upon which he relied as the source of jurisdiction for the Court of Appeal. As reference to these authorities might be thought to raise a question involving the interpretation of the Constitution, the hearing of the appeal was adjourned to enable notices to be sent to the Attorneys-General of the Commonwealth and the States under s 78B of the *Judiciary Act* 1903 (Cth). The Attorney-General of the Commonwealth intervened and the Solicitor-General made submissions on his behalf about the operation of s 73 of the Constitution.

16 When the appeal resumed hearing on 3 March 2009, orders were made by consent dismissing Dr Smagarinsky's appeal. Dr Keramianakis did not press his appeal in relation to imputation (a). Regional Publishers no longer pressed its notice of contention. The contention was that the Court of Appeal had wrongly allowed the appellants to raise on appeal matters not raised at the trial. The cross-appeal could only be entertained if special leave was sought[8]. Special leave was not sought. In any event the cross-appeal was expressed to be from a "holding" of the Court of Appeal that if, contrary to its conclusion, it had jurisdiction, it would have directed a verdict and entered judgment for Dr Keramianakis. This was not a cross-appeal from "a part of the judgment

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6 (2007) 70 NSWLR 395 at 406-407 [101]-[105].

7 (2007) 70 NSWLR 395 at 407 [104].

8 High Court Rules 2004, r 42.08.4.

below"[9]. As it turned out, the issue was no longer live at the hearing of the appeal as counsel for Dr Keramianakis handed up a minute of orders proposing that if the appeal were successful there should be a re-trial on imputations (b) and (c). In the result, as counsel for Dr Keramianakis put it, the one issue of substance in the case was the question whether or not the New South Wales Court of Appeal had jurisdiction to entertain the appeal from the District Court.

Statutory framework

17 The functions of judge and jury in defamation cases conducted under the 1974 Act were divided by s 7A of that Act. The division underpinned the procedure followed at trial in this case[10]. It was a matter for the court, not the jury, to determine whether allegedly defamatory matter was reasonably capable of carrying the imputation pleaded by the plaintiff and whether the imputation was reasonably capable of carrying a defamatory meaning[11]. If the court answered either of those questions in the negative then the court was to "enter a verdict for the defendant in relation to the imputation pleaded"[12]. If the matter was reasonably capable of bearing a defamatory meaning then the section provided[13]:

> "the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory."

18 Neither s 7A nor any other provisions of the 1974 Act specified what would happen in the event that the jury found, as it did in this case, that the matter complained of by Dr Keramianakis did not carry the imputations which he alleged.

19 The *District Court Act* 1973, as it stood in August 2006, allowed a party to apply to the District Court for a new trial in the following terms[14]:

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9 High Court Rules 2004, r 42.08.1.

10 The s 7A procedure has a long history which need not be repeated here. The evolution of the respective functions of judge and jury in civil cases and specifically in defamation cases is set out, inter alia, in Lord Devlin's 1956 Hamlyn Lectures: Devlin, *Trial by Jury*, (1956) esp 92-99; and generally in Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 241-243.

11 1974 Act, s 7A(1).

12 1974 Act, s 7A(2).

13 1974 Act, s 7A(3).

14 *District Court Act* 1973, s 126.

"(1) The Court in its discretion may, after judgment in an action, order that a new trial of the action be had if:

…

(b) the action is tried with a jury and on the day on which the jury gives its verdict in the action a party to the action:

(i) in the presence of the other party, or

(ii) in the absence of the other party but after such notice as the Court thinks reasonable has been given to the other party,

makes application for the order …

(2) The Court may, before judgment in an action and if no verdict in the action has been entered, order, on sufficient cause being shown, that the hearing of the action be discontinued and that a new trial be had."

20 Section 127(1) of the Act provided for a right of appeal from the District Court to the Supreme Court in the following terms:

"A party who is dissatisfied with a Judge's or a Judicial Registrar's judgment or order in an action may appeal to the Supreme Court."

Sub-section (2) specified classes of appeal which would lie only by leave of the Supreme Court. None is relevant to the present case. Sub-section (3) provided:

"In any other case, an appeal lies as of right."

21 The term "judgment" was defined in s 4(1) of the Act thus:

"***judgment***, in relation to an action, means judgment given or entered up in the action."

The term was further elaborated in s 4(2) which provided:

"A reference in this Act:

(a) to the giving of a judgment is a reference to the recording and delivering of a judgment, not being a judgment under any provision of the civil procedure rules prescribed for the purposes of this paragraph, and

(b) to the entering up of a judgment is a reference to the entering up of a judgment in accordance with any provision of the civil procedure rules so prescribed."

22 Section 75A of the *Supreme Court Act* 1970 (NSW), as it stood in August 2006, provided that appeals from a non-jury trial, whether the trial had been in the District Court or in the Supreme Court, would be by way of rehearing[15]. Section 102 concerned jury trials in the Supreme Court. It provided that an application for the setting aside of a verdict or judgment, for a new trial or for a variation of debt or damages was to be by way of appeal to the Court of Appeal[16]. Powers relevant to such an appeal were found in s 108[17].

23 Reference should also be made to ss 101, 105, 106 and 107 of the *Supreme Court Act* 1970. Section 101 provided that an appeal would lie to the Court of Appeal from:

"(a) any judgment or order of the Court[18] in a Division …"

It did not in terms apply to appeals from the District Court but, like s 127(1) of the *District Court Act* 1973, the appeal for which it provided was from a "judgment or order". Section 106(1) of the *Supreme Court Act* 1970 conferred power on the Court of Appeal to set aside a "verdict, finding, assessment or judgment" and to order a new trial on the issue of damages where, because of matters which have occurred since the trial, the amount of damages awarded at the trial is manifestly too high or too low. This section was expressly applied by s 105 to appeals where the appellant "seeks a new trial or the setting aside of a verdict, finding, assessment or judgment … after a trial … with a jury in an action commenced after the commencement of [s 4 of the *District Court (Amendment) Act* 1975 (NSW)], in the District Court". Section 107 conferred powers on the Court of Appeal to substitute its own assessment of damages for that awarded in the court below and to give such judgment and make such order as the nature of the case requires. None of these powers is of assistance to the resolution of the present case.

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15 *Supreme Court Act* 1970, s 75A(1) and (5).

16 *Supreme Court Act* 1970, s 102.

17 Section 108 refers to the power of the Court of Appeal to enter a verdict where there has been a trial in the Court with a jury. The relevant right of appeal derives from s 102 of the *Supreme Court Act* 1970.

18 Note: "the Court" refers to the Supreme Court: *Supreme Court Act* 1970, s 19(1).

Legislative history

24 This appeal turns on the construction of s 127(1) of the *District Court Act* 1973 as it stood in August 2006. Regional Publishers relied upon the legislative history lying behind ss 126 and 127(1) in support of its proposition that no appeal lay to the Supreme Court in this case.

25 A starting point in the legislative history is s 14 of the *County Courts Act* 1850 (UK)[19]. That section provided for appeals on questions of law or admissibility of evidence to the superior courts of Common Law at Westminster. Those Courts could order a new trial or judgment to be entered for either party. Section 14 was the model for s 94 of the *District Courts Act* 1858 (NSW). That model was followed in s 107 of the *District Courts Act* 1901 (NSW) and in ss 142 and 145 of the *District Courts Act* 1912 (NSW). However the latter Act introduced by its s 98 a mechanism whereby a party could apply to the trial judge for a new trial:

> "Every judgment of any District Court, except as in this Act provided, shall be final and conclusive between the parties, but the judge may –
>
> (1) in any case order a new trial to be had upon such terms as he thinks reasonable, and may in the meantime stay the proceedings …"

The grant of a new trial could not be made merely because the judge disagreed with the jury's verdict. It could be granted on the ground that the verdict was one which no reasonable jury ought to have come to[20].

26 In the Second Reading Speech for the Bill which became the *District Court Act* 1973, the Minister for Justice said, inter alia[21]:

> "The Bill will require most applications for new trial to be made to the Supreme Court by way of appeal, leaving the District Court to consider only applications based on consent of the parties, irregularity, or an obviously untenable verdict of a jury."

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19 13 & 14 Vic c 61. See generally *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 92-93 per Gleeson CJ.

20 Bonthorne, *The Practice of the District Courts of New South Wales*, (5th ed) (1927) at 110, citing *Murdoch v Durning* (1893) 14 LR(NSW) 303 and *Ewan v Waddell* (1891) 8 WN(NSW) 40.

21 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 March 1973 at 3362.

The provisions of the Bill relating to appeals to the Supreme Court on points of law were to be modernised but not substantially altered in principle. The Minister said[22]:

> "An appeal on questions of fact is provided where an injunction is sought or granted; otherwise, in recognition of the importance of the principle of finality in the judgments of a court, there is no appeal on fact, but the Supreme Court may order a new trial if the decision of the District Court judge on fact is unreasonable."

27 Section 126(1) of the *District Court Act* 1973, as it stood in August 2006, remained as originally enacted insofar as it conferred power to order a new trial of an action tried with a jury. An amendment made in the interim dealing with actions tried without juries is not material for present purposes. Section 127 as enacted in 1973 provided for an application for a new trial to be made to the Supreme Court after judgment in an action where an order had not been made under s 126(1). Such an application was deemed by s 127(3) to be an appeal to which ss 106 and 107 of the *Supreme Court Act* 1970 applied.

28 As the Court of Appeal said in *Clutha Developments Pty Ltd v Barry*[23]:

> "As a corollary of the concept of the District Court as a court of confined civil jurisdiction, dealing mainly with limited, and originally relatively small, money claims, at least prior to 1975 the scope for strictly appellate review of District Court decisions was fairly narrowly confined. It was evidently not regarded as being in the public interest, or the interests of litigants, to provide parties to District Court actions, which might involve modest amounts of money, with the fullest possible range of avenues of appeal."

29 In 1975 the *District Court Act* 1973 was amended and a new sub-s (6) added to s 127 which effectively rendered it inapplicable to non-jury matters. A new sub-s (2A) introduced into s 128 conferred a right of appeal from "any ruling, order, direction or decision of the Judge …" and so removed the limitation that appeals would lie only on questions of law.

30 The *Courts Legislation Further Amendment Act* 1995 (NSW) replaced ss 127 and 128 of the *District Court Act* 1973 with new provisions. The new s 127(1), headed "Right of appeal to Supreme Court", read:

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22 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 March 1973 at 3362.

23 (1989) 18 NSWLR 86 at 91 per Gleeson CJ.

> "A party who is dissatisfied with a decision of a Judge may appeal to the Supreme Court."

Section 128 provided for a stay of proceedings pending the appeal.

31 The *Courts Legislation Amendment Act* 1996 (NSW) amended s 127(1) to its present form substituting for the words "decision of a Judge" the words "Judge's judgment or order in an action". A further amendment was effected by the *Courts Legislation Amendment Act* 2006 (NSW), which applied the right of appeal under s 127(1) to judgments or orders of judicial registrars as well as judges.

32 Following the decision of the Court of Appeal in these proceedings, a new section, s 127A, was enacted by the *Courts and Crimes Legislation Amendment Act* 2008 (NSW). The new section provided:

> "(1) Where, in any proceedings in the Court, there is a trial of the proceedings or of any issue in the proceedings with a jury, an application for:
>
> (a) the setting aside of a verdict or judgment, or
>
> (b) a new trial, or
>
> (c) the alteration of a verdict by increasing or reducing any amount of debt, damages or other money,
>
> shall be by appeal to the Supreme Court.
>
> (2) An appeal under this section lies as of right."

Counsel for Regional Publishers asked this Court to revoke the grant of special leave on the basis that s 127A had overcome any jurisdictional difficulty and the matter was therefore no longer one of general importance. The Court refused that application[24]. Even if the legal principle in issue in the present case were overtaken by the amendment, the case still involved, if the Court of Appeal were in error as to its jurisdiction, a miscarriage of justice. Dr Keramianakis was denied redress for what the Court of Appeal held to be a verdict pronounced by the trial judge upon the basis of answers given by the jury which would have been set aside under the general law had the Court of Appeal had jurisdiction.

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24 cf *Australian Airlines Ltd v Commissioner of Stamp Duties (Qld)* (1988) 62 ALJR 429 at 431; 79 ALR 425 at 429; [1988] HCA 33 where the Court rescinded special leave after a statutory amendment but was of the "firm view" that the appeal would fail in any event.

The reasoning of the Court of Appeal

33 In dealing with the question of jurisdiction Basten JA referred to aspects of the legislative history. His Honour's reasoning involved the following steps:

(i) The enactment of the new s 127(1) in 1995 provided for an appeal from "a decision of a Judge" when there had been a trial with a jury[25].

(ii) A judgment entered on the basis of a jury verdict does not itself fall within the description "a decision of a Judge".

(iii) A right of appeal was never available in relation to a jury verdict but only from the ruling, order, direction or decision of the judge in point of law or upon a question of evidence.

(iv) A challenge to a jury verdict may be made by way of application for a new trial prior to entry of judgment and was available under s 126[26].

(v) The leave requirement imposed by s 127(2) in respect of interlocutory and other classes of judgment or order does not suggest that the appeal right extends to an appeal against a jury verdict.

(vi) Even if the right of appeal exists, s 75A conferred no power on the Supreme Court with respect to such appeal. If it was not a quantum appeal, no relevant power could be found in ss 105-107.

34 Rothman J dissented on the jurisdictional question. His Honour saw nothing in the history of s 127, nor in the absence of specific remedial powers, to qualify the right of appeal which it granted[27]. The dichotomy between an application for a new trial on the one hand and an appeal on the other, which preceded the 1995 amendments, did not lead to the conclusion that s 127 was not intended to deal with jury verdicts[28]. His Honour accepted, as Basten JA had concluded, that there was no specific power in the *Supreme Court Act* 1970 in relation to appeals from a judgment of a District Court judge sitting with a jury. His Honour, however, referred to general powers conferred on the Supreme

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25 (2007) 70 NSWLR 395 at 404 [88].

26 (2007) 70 NSWLR 395 at 404 [89].

27 (2007) 70 NSWLR 395 at 408 [111].

28 (2007) 70 NSWLR 395 at 409 [116].

Court and in particular ss 23, 63 and 91 of the *Supreme Court Act* 1970 and s 90 of the *Civil Procedure Act* 2005 (NSW).

Whether the right of appeal existed in this case

35 The legislative history to which reference is made above and upon which reliance was placed by the majority in the Court of Appeal and by Regional Publishers ultimately assists little in the resolution of this appeal. The language of s 127(1) following the 1995 amendments was apt to confer a right of appeal against judgments or orders which was unqualified by the existence of a procedure for seeking a new trial under s 126. The absence of any power expressly applicable to the disposition of an appeal under s 127 arising out of a trial with a jury in the District Court does not alter that conclusion. The absence of an express power in relation to a particular subject matter or class of case is not a basis for limiting a grant of jurisdiction which would otherwise apply to that subject matter.

36 The Supreme Court, by virtue of s 22 of the *Supreme Court Act* 1970, was continued "as formerly established as the superior court of record in New South Wales". As formerly established, it was authorised to do the same things that could be done "by or before Her Majesty's Courts at Westminster or the respective Judges thereof in the administration of justice"[29]. The grant of jurisdiction to the Court so continued attracts the "inherent jurisdiction", that is to say the inherent power necessary to the effective exercise of the jurisdiction granted. As Dawson J said in *Grassby v The Queen*[30] it is the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to that inherent power.

37 The respondent drew attention to *Nominal Defendant v Hook*[31], in which Windeyer J said that the policy of ss 72 and 94 of the *District Courts Act* 1858 (NSW) and of ss 98 and 142 of the *District Courts Act* 1912 (NSW) was that applications for new trials and for setting aside judgments were to be made to the District Court, not to a superior court, and were to be disposed of finally in the District Court unless they involved some question of law. Basten JA saw that position as continuing from the *District Court Act* 1973 onwards. In this Court the respondent seemed to accept that the *District Court Act* 1973 had altered the

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29 *Supreme Court and Circuit Courts Act* 1900 (NSW), s 16.

30 (1989) 168 CLR 1 at 16-17; [1989] HCA 45; and referred to with approval in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 451 [50] per Gaudron, Gummow and Callinan JJ; [1999] HCA 19.

31 (1962) 113 CLR 641 at 656; [1962] HCA 50.

pre-existing position, but submitted that the position as described by Windeyer J had been reintroduced in 1995. However, the words of s 127(1) are clear. They confer a right of appeal against a judgment or order of a judge made after a trial with a jury in the District Court.

38 Decisions relating to s 73 of the Constitution do not affect this conclusion. In *Musgrove v McDonald*[32] the appeal to this Court from the Supreme Court of South Australia followed a directed verdict for defendants in civil proceedings upon which judgment had been entered by the judge. The Court referred to the settled rule of the Privy Council that an appeal did not lie from a verdict of a jury or from a judgment of the Court founded upon it unless there had been a previous application to the Supreme Court for a new trial and that the provisions of the Constitution conferring appellate jurisdiction upon the High Court should be read in the light of that rule. The Court said[33]:

> "[I]f they are so read, an application for a new trial after verdict, upon whatever ground, does not fall within the words 'appeals from all judgments decrees orders and sentences' of Federal Courts or Supreme Courts."

However the underlying principle seemed to be reflected in the following passage[34]:

> "The verdict in the present case, which was a general verdict for the defendants, must be read as if the specific facts which established their freedom from liability had been found by the jury. By those findings this Court is bound, and, as upon them the judgment is right, the appeal fails."

The underlying principle suggests not want of jurisdiction in such a case, but want of power. That view is supported by the observations of Dixon J in *McDonnell & East Ltd v McGregor*[35]:

> "Decisions of this court, which are based upon sec 73 of the Constitution, have established that, although an appeal does lie from every judgment, decree, order, or sentence of a Supreme Court, yet in deciding an appeal from a judgment founded on a jury's verdict or findings this Court stands in the position which the court below stood at the time when it was

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32 (1905) 3 CLR 132; [1905] HCA 50.

33 (1905) 3 CLR 132 at 147.

34 (1905) 3 CLR 132 at 149.

35 (1936) 56 CLR 50 at 53-54; [1936] HCA 28.

> pronounced. If the court below takes a general verdict or findings from a jury and if, after having done so, it has no authority under the law governing its procedure to interfere with the verdict or findings of the jury or to disregard them but is required to give effect to them, then this court stands in a like position and cannot go behind the verdict or findings."

39 The appellate function conferred on this Court by s 73 authorises it to determine the correctness or otherwise of the decision under appeal in the light of the evidence and issues as they were before the court whose decision is in question[36]. The jurisdiction to hear and determine appeals under s 73 does not exceed the jurisdiction or capacity of the court appealed from[37]. The cases about the scope of this Court's jurisdiction under s 73 have ultimately nothing to say about the scope of the statutory jurisdiction conferred upon the Court of Appeal by s 127(1) or its powers in the exercise of that jurisdiction.

40 The jury's answers to the questions put to it at trial were fatal to the action brought by Dr Keramianakis. Section 7A of the 1974 Act made no provision for the orders which might be made in such a case. It was not necessary that it should. On the jury's answers, Dr Keramianakis could not succeed in his action. The trial judge pronounced what he called "Verdict for the second defendant … in respect of the claim by the first plaintiff". He also made the order "First plaintiff to pay second defendant's costs". This was not merely a recording of the jury's answers. The answers themselves did not dispose of the action. The "verdict for the second defendant" pronounced by the trial judge was the legal equivalent of the dismissal of Dr Keramianakis' action. Although that "verdict" was an inevitable outcome of the jury's answers, the judge had to make the legal judgment, as he correctly did, that it was the inevitable result. The necessity of the judge making an order or judgment is underlined by s 90(1) of the *Civil Procedure Act* 2005, which provides that a court is required, "at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires". The order for costs reinforces the characterisation of the "verdict for the second defendant" as a judge's "judgment or order".

Conclusion

41 The appeal should be allowed with costs. The costs should include the costs of the first hearing. Regional Publishers submitted that there was no

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36 *Mickelberg v The Queen* (1989) 167 CLR 259 at 274 per Brennan J, 298 per Toohey and Gaudron JJ; [1989] HCA 35.

37 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109 per Dixon J; [1931] HCA 34.

constitutional question in the appeal warranting the issue of s 78B notices. Nevertheless it responded to the submissions on the s 73 case made on behalf of Dr Keramianakis. It relied upon *Musgrove v McDonald*[38] and *McDonnell & East Ltd v McGregor*[39] as consistent with its general argument. It conceded, however, that they were not determinative. The orders should be in the following terms:

1. Appeal allowed with costs.

2. Cross-appeal dismissed.

3. Set aside the orders of the New South Wales Court of Appeal of 21 December 2007.

4. In place thereof order that:

   (a) the first appellant's appeal be allowed with costs;

   (b) Order 1 and the second sentence of Order 3 of the orders made by the trial judge on 7 August 2006 be set aside;

   (c) there be a new trial in relation to the imputations set out in paragraphs (b) and (c) of paragraph 13 of the third amended statement of claim, limited to the issues of whether those imputations are carried by the newspaper article and are defamatory.

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38 (1905) 3 CLR 132.

39 (1936) 56 CLR 50.

42 GUMMOW J. The appeal should be allowed and orders made as proposed by the Chief Justice. I agree with the reasons of the Chief Justice.

43 HAYNE J. I agree with French CJ.

44 HEYDON J. I agree with French CJ.

45 CRENNAN J. I have had the advantage of reading in draft the reasons for judgment of the Chief Justice. I agree with the orders proposed by the Chief Justice, for the reasons given by his Honour.

46 KIEFEL J. I agree with French CJ.

47 BELL J. I agree with French CJ.