HIGH COURT OF AUSTRALIA

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

Matter No S309/2010

AMANDA CUSH — APPELLANT

AND

MERYL LURLINE DILLON — RESPONDENT

Matter No S310/2010

LESLIE FRANCIS BOLAND — APPELLANT

AND

MERYL LURLINE DILLON — RESPONDENT

Cush v Dillon
Boland v Dillon
[2011] HCA 30
10 August 2011
S309/2010 & S310/2010

ORDER

In each matter, appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

T A Alexis SC with P M Sibtain for the appellant in both matters (instructed by Cole & Butler Solicitors)

G O'L Reynolds SC with G R Rubagotti for the respondent in both matters (instructed by Banki Haddock Fiora)

CATCHWORDS

Cush v Dillon
Boland v Dillon

Defamation – Defence of qualified privilege – Where occasion of qualified privilege existed to communicate existence of rumour – Where defendant published rumour as "common knowledge" – Whether matter published on occasion attracting defence of qualified privilege – Whether distinction between publication of rumour and publication of fact of rumour.

Defamation – Defence of qualified privilege – Rebuttal by express malice – Where defendant did not believe truth of publication – Whether lack of belief in truth of publication sufficient to establish malice.

Words and phrases – "express malice", "qualified privilege".

Defamation Act 1974 (NSW), s 7A.

1 FRENCH CJ, CRENNAN AND KIEFEL JJ. In two separate actions brought in the District Court of New South Wales under the *Defamation Act* 1974 (NSW) and heard together, a jury found that Mrs Meryl Dillon, the respondent in each of these appeals, had defamed the appellants, Ms Amanda Cush and Mr Leslie Boland. The jury found that, on 8 April 2005, she had said to Mr James Croft, "It is common knowledge among people in the CMA that Les and Amanda are having an affair." In the proceedings below the respondent did not suggest that the content of this statement was true. It was accepted by her that it was not. And she did not believe the statement to be true when she made it to Mr Croft.

2 The "CMA" is the Border Rivers-Gwydir Catchment Management Authority. It is a statutory body, representing the Crown, established under the *Catchment Management Authorities Act* 2003 (NSW)[1]. It is subject to the control of the relevant Minister[2]. Its general function is to carry out or fund "catchment activities"[3]. The affairs of the CMA are controlled by the Board of the CMA, the members of which are appointed by the Minister[4]. The office of member is a part-time office[5] and a member is entitled to be paid such remuneration, including travel allowances, as the Minister may from time to time determine[6]. At the time of the defamatory statement Mr Croft was the Chairperson of the Board of the CMA and Mrs Dillon and Mr Boland were Board members. Ms Cush was the General Manager. The CMA had offices in Inverell and Moree. Some five employees worked at the Moree office, where the rumour about Ms Cush and Mr Boland appears to have originated.

3 Internal complaints against officers of the CMA were dealt with by a "Grievance Committee" constituted by members of the CMA Board. A grievance against Ms Cush was filed with the Committee in December 2004. Mr Boland and Mr Croft were members of the Committee which dealt with that

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1 *Catchment Management Authorities Act* 2003 (NSW), s 6.

2 *Catchment Management Authorities Act* 2003, s 9(1).

3 *Catchment Management Authorities Act* 2003, s 14(1). "Catchment activities" are defined in s 4(1) as "activities relating to natural resource management in an area (including the planting of trees, the removal of weeds or obstructions, the carrying out of works and education or training)."

4 *Catchment Management Authorities Act* 2003, s 8.

5 *Catchment Management Authorities Act* 2003, Sched 3, cl 3.

6 *Catchment Management Authorities Act* 2003, Sched 3, cl 4.

complaint. The Committee recommended that no further action be taken. The employee who had lodged the complaint was dissatisfied with this outcome and informed Mrs Dillon that he felt that his matter had not been dealt with impartially, because he believed Ms Cush and Mr Boland were having an affair.

4 The rumour about the appellants appears to have surfaced around the time of a workshop meeting of CMA staff which was held at Tweed Heads in January 2005. The trial judge, Elkaim SC DCJ, considered it likely that the rumour started before the meeting because it was unusual to hold meetings outside the organisation's area of responsibility and persons may have interpreted the reason for the meeting being held at Tweed Heads as connected to the fact that Mr Boland owned a unit nearby. Presumably Ms Cush was involved in the organisation of the meeting. The rumour appears to have strengthened, in part, because of a perception by some persons of familiarity between Ms Cush and Mr Boland.

5 Mr Randall Hart was the Regional Director of the Department of Infrastructure, Planning and Natural Resources, which Department had certain responsibilities for the CMA. He was also aware of the rumour in early 2005. On 30 March 2005 Mr Hart rang Mrs Dillon in order to have a confidential discussion concerning some allegations which had been made to him and which he intended pursuing. In the course of that discussion Mrs Dillon mentioned the subject of the rumour. It would not seem that Mr Hart was unduly concerned about it. Following that discussion Mr Hart prepared a memorandum to the Director-General of the Department dated 1 April 2005, in which he referred to allegations made against Ms Cush concerning approvals of inappropriate travel allowance claims and expenses associated with the Tweed Heads meeting, and also the circumstances surrounding the non-appointment of an indigenous officer to the CMA. The memorandum included advice that a Board member had contacted Mr Hart concerning "corporate governance matters" relating to the Board. Mr Hart recommended that the allegations against Ms Cush be referred to the Department for investigation.

6 These matters came to the attention of Mr Croft, who sought support for Ms Cush from the Board. On 31 March 2005 he sent an email in the nature of an "Out of Sessions Business Paper" to members of the Board to that end. Mrs Dillon responded to the email by enquiring as to the urgency of the issue. Mr Croft advised her that Ms Cush "may have to respond to an accusation prior to the next meeting and needs our support to be prepared for that eventuality". The other members of the Board provided that support. Mrs Dillon did not.

7 It is against this background that a meeting between Mrs Dillon and Mr Croft took place on 8 April 2005 at a café in Moree during which the defamatory words were spoken. Mrs Dillon said that she organised it after she

had spoken with Mr Hart. At the meeting she informed Mr Croft of the telephone conversation she had had with Mr Hart and that he had raised a number of "concerns" about the CMA with her. In particular she referred to the complaint concerning the appointment process of the position of indigenous officer within the CMA, and issues of corporate governance and of staff management. In the latter regard she told Mr Croft that some members of staff had made complaints about "the conduct of the general manager" and she discussed the Board's attitude to staff and complaints about the grievance process. Mrs Dillon advised Mr Croft that Mr Hart was looking into the question of the Board's reaction to these issues.

8 Mr Croft gave evidence that during this discussion Mrs Dillon said it was "well known" or "widely known" that "Les and Amanda were having an affair", although the statement put to the jury was that it was "common knowledge". Nothing would appear to turn upon this difference. What is important, for the purposes of these appeals, is that such words do not convey merely that an unfounded rumour was circulating. They convey the fact of an affair which was known to staff at the CMA. The imputations found by the jury confirm such a perception.

9 The jury found that the statement conveyed the following defamatory imputations with respect to Mr Boland that: (a) as a member of the Board of the CMA he was "acting unprofessionally by having an affair with the General Manager of that organisation"; and (b) "he was unfaithful to his wife." With respect to Ms Cush, the jury found that the statement conveyed the defamatory imputations that: (a) as the General Manager of the CMA she was "acting unprofessionally by having an affair with a member of the board of that organisation"; and (b) "she was undermining the marriage of [Mr Boland] and his wife".

10 Mrs Dillon pleaded, by way of defence to the claims against her, that the statement had been made on an occasion of qualified privilege. In a separate hearing[7], his Honour the trial judge held that any privilege which may have attended the making of the statement had been lost, on account of malice on the part of Mrs Dillon[8]. His conclusion of malice was based upon two findings: that Mrs Dillon had previously spread the rumour and that she had not believed the allegation to be true when she made the statement to Mr Croft. His Honour also found that the conduct of Mrs Dillon was not reasonable in the circumstances.

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7 *Defamation Act* 1974 (NSW), s 7A(4).

8 *Cush v Dillon; Boland v Dillon* [2009] NSWDC 21.

That finding was referable to, and destructive of, the statutory defence of qualified privilege[9]. But it does not affect the defence of qualified privilege at common law, which is preserved by the *Defamation Act*[10]. The statutory defence was not pursued by Mrs Dillon on appeal.

11 Reciprocity of duty and interest, as giving rise to a privileged occasion, is not a feature of the statutory defence, but it is the hallmark of the common law defence of a qualified privilege[11]. As Parke B explained in *Toogood v Spyring*[12], the law regards the publication of a false statement which is injurious to the reputation of a person as malicious:

> "unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice."

12 The defence of qualified privilege is based upon notions of public policy, that freedom of communication may in some circumstances assume more importance than an individual's right to the protection of his or her reputation[13]. The question of whether the person making a defamatory statement was subject to some duty or was acting in the protection of some interest, in making the statement, is to be understood in this light.

13 It was therefore encumbent upon Mrs Dillon to establish that she had a duty to convey the information about the rumour to Mr Croft. She gave evidence that she felt such an obligation, but of course this could not be determinative of the question for the trial judge, namely whether there was a duty of a kind which created the occasion to make the statement, in which case the privilege attached

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9 *Defamation Act* 1974, s 22(1)(c); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 573; [1997] HCA 25.

10 *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 87 [14]; [2010] HCA 25.

11 *Adam v Ward* [1917] AC 309 at 334; *Roberts v Bass* (2002) 212 CLR 1 at 26 [62]; [2002] HCA 57.

12 (1834) 1 C M & R 181 at 193 [149 ER 1044 at 1049-1050].

13 *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 89 [22].

to it. That question fell to be determined by a consideration of the positions of Mr Croft and of Mrs Dillon within the CMA, the nature and importance of the matters conveyed and the relationship of the defamatory statement to those matters. Mrs Dillon's evidence as to the sense of obligation she felt, if accepted, may be relevant to the question of malice. It will be necessary to say something more about the two questions and the relationship between them.

14 If the trial judge was satisfied that the occasion for a qualified privilege arose, it would then be necessary for Ms Cush and Mr Boland to prove that Mrs Dillon was actuated by malice in making the statement, in order to overcome the privilege. It may be seen from the passage from *Toogood v Spyring* above that the defence of qualified privilege is sufficient to overcome the law's presumption of malice (also referred to as "implied malice"[14]), a presumption which is based upon the making of a false and defamatory statement. The protection given by the privilege is, however, lost if the person making the statement did so for an improper motive[15]. "Express malice" is the term of art used to describe the motive of a person who uses a privileged occasion for some reason not referable to the duty or interest pursued[16]. In the joint judgment in *Roberts v Bass*[17] it was said that the privilege is qualified by the condition that the occasion must not be used for some purpose or motive which is foreign to the duty or interest which protects the making of the statement.

15 His Honour the trial judge did not determine the question whether the occasion for the making of the statement by Mrs Dillon to Mr Croft was a privileged one. His Honour proceeded directly to consider the issue of malice. But that question cannot be approached in isolation, independent of a determination of whether there was present in the circumstances a duty or interest which would support the privilege. A conclusion of express malice requires a finding that the maker of the statement was actuated by some improper purpose or motive, which is to say one not connected to the furtherance of the duty or interest so found. The nature and the extent of the duty or interest must be considered before the question of malice is addressed. In *Roberts v Bass*[18], Gleeson CJ observed that the "kind of malice that defeats a defence of qualified

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14 See *Roberts v Bass* (2002) 212 CLR 1 at 30 [75].

15 *Roberts v Bass* (2002) 212 CLR 1 at 31 [76].

16 *Horrocks v Lowe* [1975] AC 135 at 149 per Lord Diplock.

17 (2002) 212 CLR 1 at 26 [62].

18 (2002) 212 CLR 1 at 11 [8].

privilege at common law is bound up with the nature of the occasion that gives rise to the privilege."

16 Bergin CJ in Eq, with whom the other members of the Court of Appeal agreed (Allsop ACJ and Tobias JA), held that his Honour had fallen into error in failing to find that the publication had occurred on a privileged occasion[19]. Her Honour explained the duty which arose, which justified the making of the statement by Mrs Dillon, as follows[20]:

> "The rumour of the affair was intrinsically intertwined with the concerns [Mrs Dillon] raised with Mr Croft about the nature of the relationship between members of the Board and staff members and the complaints about the grievance process. That a Regional Director of the Department had become aware of the rumour was a new dimension to its existence, elevating it to an importance that imposed a duty on [Mrs Dillon] to convey its existence to the Chairperson. Equally the Chairperson had a reciprocal interest in receiving the information. To allow the Chairperson to remain ignorant of the rumour when it had been raised by staff of the CMA and discussed between a Board Member and a Regional Director of a Department that had certain supervisory functions over the CMA would have been in breach of the Board member's duty to inform the Chairperson of information relevant to matters that were clearly to be the subject of investigation by the Department and possibly by ICAC[21]."

17 Ms Cush and Mr Boland do not challenge that finding. It is clearly correct. It was accepted in argument for them on these appeals that an occasion of privilege, to communicate the existence of the rumour, arose. The point taken by them is within a narrow compass. It is that, in saying that it was "common knowledge" that the appellants were having an affair, or words to that effect, thereby giving the rumour the quality of a known fact, Mrs Dillon went too far. They submitted that the statement was extraneous to, and made outside of, the "umbrella of the applicable privilege"[22]. If this were correct, the privilege would not extend to protect the statement. It would not be necessary to address the question of malice.

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19 *Dillon v Cush; Dillon v Boland* [2010] NSWCA 165.

20 *Dillon v Cush; Dillon v Boland* [2010] NSWCA 165 at [52].

21 Independent Commission Against Corruption.

22 Referring to *Bashford v Information (Newsletters) Pty Ltd Australia* at (2004) 218 CLR 366 at 415 [135] per Gummow J; [2004] HCA 5.

18 The appellants' contention brings to mind the further requirement spoken of by Parke B in *Toogood v Spyring* for statements to attract the qualified privilege[23]:

> "If *fairly warranted* by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." (emphasis added)

19 *Adam v Ward* confirms that there may be limits to what may be said upon a subject on an occasion of qualified privilege and that those limits are to be tested by the connection of the statement to the subject. In that case Earl Loreburn observed that the fact that an occasion is privileged "does not necessarily protect all that is said or written on that occasion" and that anything "not relevant and pertinent" to the discharge of the duty or the safeguarding of the interest which creates the privilege will not be protected[24]. Where such a question is raised it will be necessary for the trial judge to consider the matter of the duty or interest and rule whether the defendant has published something "beyond what was germane and reasonably appropriate to the occasion"[25]. Lord Dunedin spoke of a statement "quite unconnected with and irrelevant to the main statement"[26]; Lord Atkinson to "foreign and irrelevant" matter[27] and Lord Shaw of Dunfermline to matter which was "not in any reasonable sense germane"[28] to what was being conveyed in the discharge of duty or the protection of an interest.

20 Although the statements in *Adam v Ward* were not central to the matter being communicated, they were held to be relevant. In that case the plaintiff had made allegations against a Major-General in Parliament, that he had deliberately misstated the facts relating to one of five officers who had been placed on half-pay, in a confidential report he had submitted to a superior officer. The

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23 *Toogood v Spyring* (1834) 1 C M & R 181 at 193 [149 ER 1044 at 1050].

24 *Adam v Ward* [1917] AC 309 at 320-321.

25 *Adam v Ward* [1917] AC 309 at 321.

26 *Adam v Ward* [1917] AC 309 at 327.

27 *Adam v Ward* [1917] AC 309 at 340.

28 *Adam v Ward* [1917] AC 309 at 348.

defendant was the secretary to the Army Council which investigated the allegation and then issued a letter, addressed to the General, to the press. The evident purpose of the letter was to vindicate the General from the charges made by the plaintiff. But in the course of doing so it identified the plaintiff as one of the other officers who had been the subject of the report and who were afterwards removed from the regiment. It said that the plaintiff had been called upon to retire from the service, but that the General had intervened on his behalf[29].

21 The statements were held to be relevant to what was said on the occasion of the privilege, since they were necessary to the complete vindication of the General. In that regard it was considered necessary that the true position of the plaintiff, a person not disinterested in the report, be revealed[30]. Earl Loreburn entertained some doubt on the question of relevance, but did not dissent.

22 It is not necessary to determine whether the descriptions given of irrelevant material in *Adam v Ward* vary as to the stringency with which relevance ought to be tested. The passage from *Toogood v Spyring*[31] suggests that 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. More recently an issue of the kind here in question was stated in the joint judgment in *Bashford v Information Australia (Newsletters) Pty Ltd*[32] to be "whether the matter which defamed the appellant was sufficiently connected to the privileged occasion to attract the defence". In that case the article in question incorrectly described the result of court proceedings, by identifying the plaintiff as the subject of findings of contravention of s 52 of the *Trade Practices Act* 1974 (Cth), by engaging in misleading and deceptive conduct. In fact the party the subject of the findings was a company controlled by the plaintiff and his wife. In the joint judgment it was held that the error "did not alter or reduce the connection between the privileged occasion and the defamatory matter."[33]

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29 *Adam v Ward* [1917] AC 309 at 311-313.

30 *Adam v Ward* [1917] AC 309 at 319 per Lord Finlay LC, 329 per Lord Dunedin, 342 per Lord Atkinson and 348-349 per Lord Shaw of Dunfermline.

31 At [18] above.

32 (2004) 218 CLR 366 at 378 [27].

33 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 379 [29].

23 In this case it cannot be said that the necessary connection was absent. As Bergin CJ in Eq held, the duty Mrs Dillon had in disclosing and the interest Mr Croft had in receiving the information concerning CMA staff-related matters, including the nature of the relationship between members of the Board and members of staff, gave rise to an occasion of privilege. 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. The error inherent in the statement does not deny the privilege.

24 The final determination of this case rests upon the issue of actual malice. The observations of Lord Esher MR in *Nevill v Fine Arts and General Insurance Company*[34], to which Lord Dunedin referred in *Adam v Ward*[35], are apposite to this case. Lord Esher was concerned to distinguish an excessive statement, otherwise connected to the privileged occasion, from one which has no such connection:

> "There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion. But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice."

25 The enquiry which precedes that of actual malice is undertaken in order to determine the boundaries of the privilege[36], by reference to the duty or interest which gave rise to it. It may be said to involve 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*[37], a

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34 [1895] 2 QB 156 at 170.

35 [1917] AC 309 at 327.

36 As observed by Kirby J in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 435 [193]-[194].

37 [1917] AC 309 at 321.

statement which exceeds the occasion may be evidence of malice, but "the two things are different".

26 The statement made by the defendant in *Guise v Kouvelis*[38] might be considered as excessive, both in the manner of its delivery and with respect to the number of persons to whom it was communicated. The defendant was a member of a club and of its committee. He had formed the opinion that the plaintiff was cheating at cards. He accused the plaintiff, in a loud voice, "You are a crook" in the presence of a large number of persons at the club. Dixon J dissented on the question of whether the statement was made on an occasion of privilege. But his Honour identified the approach to be taken, in relation to the statement, in the event that it was determined that the occasion was privileged and permitted the defendant to state his belief as to the propriety of the plaintiff's play. He said in that event "unless the words complained of were so foreign to the occasion that they must be held extraneous or irrelevant, the rest is all matter for the jury."[39] The "matter" for the jury involved whether the occasion was used by the defendant for the purpose of the privilege, or some other purpose[40].

27 The trial judge's findings as to malice were not directed to Mrs Dillon's purpose in using the words that she did, which is to say whether she was actuated by malice. Bergin CJ in Eq held, correctly, that his Honour's finding that Mrs Dillon had spread the rumour was based upon evidence which was hearsay and inadmissible[41]. His Honour's conclusion of malice therefore rested upon his finding as to Mrs Dillon's lack of belief in the statement as true. However, by itself this would not be sufficient to destroy the privilege. More importantly, it is not the correct question to be addressed in connection with actual malice. The question is whether some purpose foreign to the privilege caused Mrs Dillon to use the words she did.

28 In *Roberts v Bass*[42] it was pointed out that qualified privilege, which attaches to a defamatory statement, can only be destroyed by the existence of an improper motive that causes the person to make the statement. Thus, lack of belief in the truth of the statement, or even ill-will felt towards the person

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38 (1947) 74 CLR 102; [1947] HCA 13.

39 *Guise v Kouvelis* (1947) 74 CLR 102 at 118.

40 *Guise v Kouvelis* (1947) 74 CLR 102 at 117.

41 *Dillon v Cush; Dillon v Boland* [2010] NSWCA 165 at [99].

42 (2002) 212 CLR 1 at 31 [76].

defamed, will not be sufficient. There must be evidence that the making of the statement was actuated by improper motive. As Cotton LJ said in *Clark v Molyneux*[43] the question is "whether [the defendant] acted as he did from a desire to discharge his duty."

29 Knowledge on the part of a defendant that a statement is untrue may be almost conclusive evidence of malice. This is because a person who knowingly publishes false and defamatory material will usually have an improper motive. A lack of belief in the statement may stand in a different category. But in neither event is there warrant for equating knowledge or lack of belief with actual malice[44].

30 Bergin CJ in Eq properly considered that it was not appropriate for the Court of Appeal to make findings based upon an evaluation of the evidence of Mrs Dillon. Her Honour made an order for a new trial on the defence of qualified privilege at common law. Given that the defamatory statement had a sufficient connection to the occasion of qualified privilege, that trial should be restricted to the issue of malice.

Orders

31 The appeals should be dismissed with costs. The third order of the Court of Appeal should be varied to require a new trial on the issue of malice.

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43 (1877) 3 QB 237 at 250.

44 *Roberts v Bass* (2002) 212 CLR 1 at 32 [77]-[78], 34 [83] and 66-67 [185].

32 GUMMOW, HAYNE AND BELL JJ. Several aspects of the defence in the common law of defamation of publication on an occasion of qualified privilege have been considered in recent decisions of this Court. In *Bashford v Information Australia (Newsletters) Pty Ltd*[45] the Court considered the requirement of reciprocity of duty or interest necessary to attract the defence, and it did so again in *Aktas v Westpac Banking Corporation*[46]. Also in *Bashford* the Court rejected a submission that on the facts of that case inaccuracies in the report of court proceedings denied the presence of a sufficient connection between the defamatory matter and the privileged occasion. Earlier, in *Roberts v Bass*[47] the Court considered the requirements of proof of the express malice which destroys the privilege and held that mere absence of belief in the truth of a publication did not constitute express malice.

33 Issues of this nature are presented in the litigation which has reached this Court on appeals from the Court of Appeal of the Supreme Court of New South Wales (Allsop ACJ, Tobias JA, Bergin CJ in Eq)[48]. The principal judgment was given by the Chief Judge in Equity. The appeals to this Court were heard together, as had been done in the Court of Appeal.

34 The parties accept that the effect of the orders made by the Court of Appeal is that there is to be a new trial confined to the issue whether the qualified privilege which was held by the Court of Appeal in these cases to otherwise exist at common law has been destroyed by the malice of the respondent. For the reasons which follow, the appeals to this Court should be dismissed, with the result that there will be a new trial on that limited issue.

35 The litigation concerns a statement published by the respondent (Mrs Meryl Dillon) to Mr James Croft in the course of a conversation between them in a café at Moree, in regional New South Wales, on 8 April 2005. The litigation was governed by the *Defamation Act* 1974 (NSW) ("the Defamation Act"). Section 8 thereof provides that slander is actionable without special damage, in the same way and to the same extent as libel. Section 11 operates to preserve the common law defence of qualified privilege.

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45 (2004) 218 CLR 366; [2004] HCA 5.

46 (2010) 241 CLR 79; [2010] HCA 25.

47 (2002) 212 CLR 1; [2002] HCA 57.

48 *Dillon v Cush*; *Dillon v Boland* [2010] NSWCA 165.

36 The two actions brought by the present appellants were tried together. After a hearing in the District Court (Elkaim DCJ) conducted pursuant to s 7A of the Defamation Act[49], the jury answered "yes" to the question whether Mrs Dillon had said to Mr Croft the following words or words substantially the same: "It is common knowledge among people in the CMA that Les and Amanda are having an affair"; and also answered "yes" to the question whether the ordinary reasonable listener could reasonably have believed that these words referred respectively to the appellants, Mr Leslie Boland and Ms Amanda Cush. With respect to Mr Boland, the jury further found that these words conveyed the imputations that, as a member of the Board of the CMA, he was acting unprofessionally by having an affair with the General Manager, Ms Cush, and that he was unfaithful to his wife. With respect to Ms Cush, the jury found that the words conveyed the imputations that she was acting unprofessionally, and that she was undermining the marriage of Mr Boland.

37 The "CMA" referred to was the Border Rivers-Gwydir Catchment Management Authority, established under the *Catchment Management Authorities Act* 2003 (NSW) ("the CMA Act"). In the exercise of its functions, the CMA was subject to the control and direction of the Minister (s 9). The affairs of the CMA otherwise were controlled by the Board appointed by the Minister (s 8(2), (3)). Section 13 empowered the Minister to appoint an administrator to the CMA if satisfied, inter alia, that it had failed to comply with its statutory obligations or that the Board had ceased to function effectively. The responsible Department of the New South Wales Government was that of Infrastructure, Planning and Natural Resources. Mr Randall Hart was its Regional Director and Ms Wendy Bate worked with him.

38 Mr Croft was Chairperson of the Board of the CMA, of which Mr Boland and also Mrs Dillon were members. In addition to Mr Boland and Mrs Dillon, there were four other members of the Board. Ms Cush had been General Manager of the CMA since mid-2004. The main office of the CMA was at Inverell, but five employees worked at the Moree office. They were Mrs Cross, Ms Chittenden, Mr Pitman, Mr O'Brien and Mr Mills.

39 On appeals by Mrs Dillon, the Court of Appeal set aside the awards of damages to each of Mr Boland and Ms Cush of $5,000. The awards had been made after the trial judge had ruled against the defence by Mrs Dillon of qualified privilege at common law. The Court of Appeal held that in doing so

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49 As to the split trial procedures established by s 7A, see *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 303-304 [32]-[36], 336-338 [156]-[158]; [2007] HCA 28.

the trial judge had erred, but, as noted above, the issue of malice was left to a new trial.

40 In this Court, Mr Boland and Ms Cush seek to restore the decision at trial that the defence was not made out, accepting, however, that if their appeals fail there will be a new trial on the question of malice. They submitted in their written submissions that the "voluntary" nature of the defamatory imputations should have been a decisive answer to the defence of qualified privilege. In that regard they relied upon a passage in the dissenting reasons of McHugh J in *Bashford*[50] where his Honour had said:

> "Ordinarily the occasion for making a volunteered statement will be privileged only where there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient. The common law has generally perceived no advantage to society in giving qualified privilege to volunteered statements in the absence of a pre-existing reciprocity of interest between the defendant and the recipient[51]."

He had added[52]:

> "But where neither life is in immediate danger nor harm to the person or injury to property imminent, the fact that the defendant has volunteered defamatory matter is likely to be decisive against a finding of qualified privilege."

41 The appellants initially contended that there had been no "pressing need" for Mrs Dillon to speak as she had to Mr Croft so as to protect her interests or those of the CMA. However, there intervened the decision of the Court of Appeal in *Holmes a Court v Papaconstuntinos*[53], given shortly before these appeals were heard. In that case, the Court of Appeal held that the circumstance

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50 (2004) 218 CLR 366 at 393 [73].

51 *Wyatt v Gore* (1816) Holt 299 [171 ER 250]; *Brooks v Blanshard* (1833) 1 C & M 779 [149 ER 613]; *Wenman v Ash* (1853) 13 CB 836 [138 ER 1432]; *Dickeson v Hilliard* (1874) LR 9 Exch 79; *Thomas v Moore* [1918] 1 KB 555; *Guise v Kouvelis* (1947) 74 CLR 102; [1947] HCA 13; *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357.

52 (2004) 218 CLR 366 at 395 [77].

53 [2011] NSWCA 59.

that a defamatory statement was volunteered in the sense described by McHugh J in *Bashford* is not decisive against the existence of a defence of qualified privilege. The upshot was that at the hearing in this Court of the present appeals, the appellants did not press this ground of their appeal.

42 There remained alive at the hearing an alternative submission by the appellants. This proceeded by the following steps: (i) the only reciprocal duty or interest articulated by the Court of Appeal was one to inform Mr Croft as Chairperson of the Board of the CMA of the existence of the "rumour" concerning Mr Boland and the General Manager; (ii) Mrs Dillon had published the "rumour" as a fact and conveyed the defamatory imputations; (iii) Mrs Dillon had known that she was repeating to Mr Croft no more than a rumour and such a communication could not be classified as one for the common convenience and welfare of society within the meaning of the authorities dealing with privileged occasions; and (iv) no reciprocal duty or interest had been engaged.

43 The trial judge had found that Mrs Dillon had spread the "rumour" before she spoke to Mr Croft and that this, "combined with her belief that the allegation was not true, establishes the malice necessary to negate the privilege". In the Court of Appeal, Bergin CJ in Eq referred to evidence that before Mrs Dillon spoke to Mr Croft there had circulated among staff at the Moree office a "rumour" that Mr Boland and Ms Cush were having an affair.

44 On 30 March 2005, Mr Hart had telephoned Mrs Dillon to discuss the operation of the CMA, including the existence or otherwise of an affair between Mr Boland and Ms Cush, before he reported to the Director-General of the Department. Then on 1 April 2005, a week before the conversation between Mrs Dillon and Mr Croft, Mr Hart prepared a memorandum to the Director-General which he sent by facsimile on 4 April.

45 In her reasons, Bergin CJ in Eq said of this memorandum:

> "That Memorandum referred to the 'seriousness' of allegations that had been made against Ms Cush and to an investigation carried out by Mr Hart and Ms Bate. It included alleged inappropriate claims in relation to a Travelling Allowance and approvals thereof. It referred to the Tweed Heads [workshop] meeting [in January 2005] and raised questions about the expenses incurred in relation to that meeting. It also referred to the circumstances surrounding the non-appointment of an indigenous officer. It included advice that a CMA Board member had 'been in contact with' Mr Hart in relation to corporate governance matters of the Board and that the Board member would bring those matters to the attention of the Minister."

Her Honour continued:

> "There was also a reference to so-called 'anomalies' including that Mr O'Brien had resigned; a further two staff members of the CMA had indicated they would resign; and two Departmental staff members had indicated they would refuse a transfer to the CMA. The Memorandum did not mention the 'rumour', however it recommended that the allegations against Ms Cush should be referred to the relevant area of the Department for investigation.
>
> On 6 April 2005 the Director-General of the Department wrote to Ms Cush advising her that she had decided to treat a complaint in relation to the selection process for the 'Catchment Officer Indigenous' as a 'disciplinary matter'. The Director-General advised Ms Cush of the process to be followed and the possible 'disciplinary actions' that could be applied if a finding of misconduct were to be made."

46 Against that background, the response of counsel for Mrs Dillon in this Court was to emphasise that: (i) having regard to the establishment of the CMA as a statutory authority, as a member of the Board Mrs Dillon had been under a public duty to bring to the attention of the Board, through its Chairperson, matters affecting the proper performance by the Board of its functions under s 8(2) of the CMA Act and Mr Croft had a corresponding interest in having those matters brought to his attention; (ii) Mrs Dillon had had conveyed to her by the Regional Director (Mr Hart), three employees at the Moree office (Messrs Mills, O'Brien and Pitman) and others of allegations constituting more than a mere rumour; and (iii) more accurately, Mrs Dillon had received allegations of an affair, expressions of concern that there was an affair and expressions of belief that there was an affair.

47 Probably early in 2005 Mr Mills had told Mrs Dillon that he had a matter of grievance in relation to Ms Cush, and that he felt the matter was not being dealt with impartially by a three member Grievance Committee established by the Board, of which Mr Boland and Mr Croft were members, because he believed Mr Boland and Ms Cush were having an affair. At about this time Mr O'Brien told Mrs Dillon that he had "concerns" about the relationship between Mr Boland and Ms Cush and that these related to issues about the Grievance Committee.

48 Mr Pitman regarded Mr Boland as "normally aloof" but had observed signs of physical intimacy or "a relative closeness" in the workplace between Mr Boland and Ms Cush. The venue of Tweed Heads for the workshop and retreat held in January 2005 had been unusual and Mr Pitman identified as the basis of the rumour the proximity of the Tweed Heads venue to a home unit Mr Boland had at the Gold Coast. At some time around February 2005

Mr Pitman had a conversation with Mrs Dillon in the course of which he mentioned the rumour of a relationship between Ms Cush and Mr Boland. He also had had a conversation on the subject with Ms Bate, from Mr Hart's office.

49 Mrs Dillon met with Mr Croft in the Moree café on 8 April 2005 as a location where they could have a private conversation. Mr Croft was concerned that the Department was raising questions whether the Board was doing its job properly. Mrs Dillon referred to a complaint respecting the appointment process for an indigenous officer's position, complaints by staff about the conduct of Ms Cush, the "grievance process" and other "concerns" she had about the CMA.

50 In that setting, what Mrs Dillon said to Mr Croft concerning "common knowledge" of people in the CMA about the conduct of Mr Boland and Ms Cush was intertwined with the above matters concerning the operations of the CMA which she raised with Mr Croft. There was the necessary reciprocity of interest, as the Court of Appeal held, to render the meeting on 8 April a privileged occasion.

51 Counsel for the appellants emphasised a distinction between an allegation, belief or concern about an affair on the one hand, and the statement using the expression "common knowledge". Counsel for the respondent correctly responded that, in the context in which Mrs Dillon spoke to Mr Croft, in substance there was no relevant distinction. Both forms of words imply that, as a member of the Board and as General Manager of the CMA respectively, Mr Boland and Ms Cush were acting unprofessionally by having an affair.

52 Further, an inaccuracy in relation to the relevant subject matter will not necessarily render what was said irrelevant to the privileged occasion[54]. The words used by Mrs Dillon were not, as Dixon J put it in *Guise v Kouvelis*[55], "so foreign to the occasion that they must be held extraneous or irrelevant".

53 The appeals should be dismissed with costs.

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54 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 378-379 [27]-[30], 412 [126], 437 [199].

55 (1947) 74 CLR 102 at 118.

54 HEYDON J. The jury found that in the course of a long conversation on several topics the defendant said to Mr Croft words to the following effect: "It is common knowledge among people … that [the plaintiffs] are having an affair." In so finding the jury rejected the defendant's denial that she said that. The jury also rejected her claim that she had made only vague remarks about the concerns expressed by others concerning the relationship between the plaintiffs. The jury found that in consequence certain defamatory imputations had been made. The defendant contended that the defamatory imputations were published on an occasion of qualified privilege. Two of the necessary conditions of that defence were that she had a duty to say or an interest in saying what she said, and that Mr Croft had a corresponding duty to hear it or a corresponding interest in hearing it. In her evidence going to qualified privilege, she contended that the duty or interest arose from her perception that she needed to inform Mr Croft of the existence of "the rumour and the accusation" – that is, a rumour that the plaintiffs were having an affair.

55 The plaintiffs contended that the Court of Appeal of the Supreme Court of New South Wales had erred in finding that there was an occasion of qualified privilege. The plaintiffs submitted that a duty to convey the existence of a rumour about and an accusation of a matter of fact would create an occasion of qualified privilege, but that that duty was different from a duty to convey that that fact was "common knowledge" – that is, a fact known to be the case. They argued that it "is an odd proposition for [the defendant] to assert a reciprocal duty or interest for a publication she denied making".

56 The plaintiffs were thus seeking to exploit the jury's rejection of the defendant's denial of having said to Mr Croft what the jury found she had said. They were seeking to drive a wedge between the jury finding and the defendant's evidence going to qualified privilege. The defendant's evidence going to qualified privilege might have matched her evidence going to publication, but it did not match what the jury found had been published.

57 Thus the plaintiffs attacked the conclusion of the Court of Appeal that "the existence of the *rumour* that the [plaintiffs] were having an affair was relevant and sufficiently connected to the privileged occasion as to attract the defence of qualified privilege" (emphasis added). It was said that this conclusion was flawed in failing to distinguish between the defendant's evidence suggesting that she arranged the meeting with Mr Croft to acquaint him with the rumour and the accusation and the jury's rejection of her evidence that she spoke of a rumour but not of what was "common knowledge".

58 There are authorities to the effect that there is no necessary distinction between saying that a thing is rumoured and saying that that thing is the case[56].

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56 For example, *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 274-275 and 283-284.

But even apart from those authorities, the submissions of the plaintiffs rest on a distinction which, in the particular circumstances of this case, is too rigid.

59 First, the submissions do not give sufficient significance to the difficulties a witness may have in giving a recollection of a small part of a long conversation long after the event, coupled with the possibility that a jury may choose for itself one among a number of available versions of the conversation. An account of why something – whatever precisely it was – was said may satisfy the two conditions for qualified privilege under discussion even though what the witness says was said does not correspond with what the trier of fact finds was said.

60 Secondly, the plaintiffs submitted that the publication of a matter of "common knowledge" as a fact was "extraneous to the occasion" or "irrelevant" to the occasion of seeking to publish a "rumour and [an] accusation" of that fact. The flaw is that this draws too sharp a distinction between "rumour" and "common knowledge". To state that a rumour exists can be to give weight to a conclusion drawn by a hearer that what is rumoured actually took place. To state that something is common knowledge is not necessarily to say that what is commonly known in truth exists, for "common knowledge" can be a euphemism for rumour. If a defendant says "X is true", the statement may have much more force than a statement that "X is common knowledge", and the latter statement may have more force than a statement that "it is rumoured that X is true". Depending on the circumstances, the central core of a statement that there is a rumour that X is true may not coincide with the central core of a claim that X actually is true. The central core of a statement that something is common knowledge may not coincide with the central core of a claim that it is merely rumoured. But about the central core of each statement there can cluster wider meanings which are capable of overlapping. That is so here.

61 A third problem arises even if the plaintiffs were correct to contend that there is a sharp distinction between saying that there is a rumour that something is the case (without conveying that the rumour is true) and saying that it is common knowledge that something is the case (conveying that it is true). If, as the plaintiffs accept, there was a duty to convey or an interest in conveying that there is a rumour about a matter, there would appear to be at least as much a duty to convey or an interest in conveying the proposition that that matter is a matter of common knowledge.

62 The appeals must be dismissed with costs.

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