HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

MANOBENDRO CHAKRAVARTI APPELLANT

AND

ADVERTISER NEWSPAPERS LIMITED RESPONDENT

Chakravarti v Advertiser Newspapers Limited (A41-1996)
[1998] HCA 37
20 May 1998

ORDER

1. *Appeal allowed with costs.*

2. *Cross-appeal dismissed with costs.*

3. *Set aside the orders of the Full Court of the Supreme Court of South Australia.*

4. *Remit the appellant's cross-appeal to the Full Court to that Court for further hearing and determination in accordance with the reasons of this Court.*

5. *Remit Ground 6 of the respondent's appeal to the Full Court to that Court for hearing and determination in accordance with the reasons of this Court. Otherwise dismiss the appeal to that Court with costs.*

On appeal from the Supreme Court of South Australia

Representation:

T A Gray QC with P A Heywood-Smith and R J Bradshaw for the appellant (instructed by Johnston Withers)

B R McClintock SC with A R Harris and G O'L Reynolds for the respondent (instructed by Lawson Downs)

CATCHWORDS

Chakravarti v Advertiser Newspapers Limited

Defamation - Defence of fair and accurate report - Meaning to be determined before considering fairness of report - Whether newspaper report of meeting of Royal Commission fair and accurate - Whether letter or statement by way of contradiction or explanation is reasonable which inaccurately controverts the fairness or accuracy of report - Whether assessment of reasonableness of letter or statement by way of contradiction confined to consideration of facts known at time of writing.

Defamation - Practice - Pleadings - Whether plaintiff should plead all distinct meanings to be relied on - Whether the defendant can plead different meanings and justify them - Whether the plaintiff should be confined to meanings pleaded - Relevance of considerations of delay, disadvantage, prejudice and embarrassment of fair trial of action - Reliance by plaintiff on different meanings pleaded by defendant - Reliance by plaintiff on meanings comprehended in or less injurious than meanings actually pleaded - Reliance by parties on variants of meanings pleaded.

Defamation - Common law privilege - Whether privilege extends to publication of a fair report of the proceedings of a royal commission.

Damages - Defamation - Applicability to report that is not fair or accurate of approach of subtracting effect of non-actionable parts of defamatory article from defamatory parts in calculating damages - Requirement of special damage in law of slander - Evidence of general loss of business as proof of special damage - Lost earning capacity as special damage in defamation law - Recovery for lost earning capacity productive of actual loss.

Civil Procedure - Pleadings - Defence to respond to Statement of Claim - Embarrassment arising from introduction of a false issue.

Words and Phrases: "fair and accurate report", "meeting of any royal commission", "reasonable letter or statement by way of contradiction or explanation".

Wrongs Act 1936 (SA), s 7(1).

Supreme Court Rules (SA), r 46.19(1).

1 BRENNAN CJ AND McHUGH J. Subject to the two matters which appear below, we agree with the orders proposed by Gaudron and Gummow JJ and the reasons which they give for making those orders.

2 The first matter is that, in our view, where a defendant pleads a defence of fair and accurate report in answer to an action for defamation, it is necessary for the tribunal of fact to determine what meanings the publication has before it determines the fairness of the report. The reason for that is that, until the defamatory meaning of the publication is determined, it is not possible to know whether the report is an answer to the plaintiff's claim. A defendant does not lose a defence of fair and accurate report because it is inaccurate in respect of a distinct defamatory imputation which the plaintiff does not sue upon. A plea of fair and accurate report is a plea in confession and avoidance of the plaintiff's claim. Until the plaintiff's claim is defined, the tribunal of fact cannot know what the plea confesses and avoids. Nor can the Court determine whether the report in defaming the plaintiff is nevertheless fair. As Herron CJ and Ferguson J pointed out in *Thom v Associated Newspapers Ltd*[1]:

> "The report need not be verbatim, but to be privileged it must accurately express what took place. Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he been present at the trial, the protection is not lost. If, however, there is a *substantial misrepresentation of a material fact prejudicial to the plaintiff's reputation*, the report must be regarded as unfair and the jury should be so directed." (emphasis added)

3 In *Anderson v Nationwide News Pty Ltd*[2], Asprey JA pointed out:

> "A report which contains an untrue statement in a material particular of the result of judicial proceedings *prejudicial to a plaintiff's reputation* must be regarded as an unfair report of those proceedings as far as that plaintiff is concerned". (emphasis added)

4 Where a defamatory imputation is alleged to arise out of a word or phrase or its implication, it may make little practical difference whether the tribunal considers the fairness of the report before it considers the meaning of the word or phrase. But where, as is often the case, the imputation is an inference drawn from various paragraphs or sections of a publication, it invites error, in our view, to

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1 (1964) 64 SR(NSW) 376 at 380.

2 (1970) 72 SR(NSW) 313 at 318.

attempt to determine whether the report is fair before determining the defamatory imputation.

5 In this case, however, both imputations pleaded by the plaintiff in respect of the first article were made out and, for the reasons given by Gaudron and Gummow JJ, the report did not fairly and accurately describe the proceedings in so far as the report gave rise to the imputations pleaded and proved. We also agree with the judgment of Gaudron and Gummow JJ as to the imputations which arise in respect of the second article and that the article was not a fair report of the proceedings in so far as the report gives rise to those imputations.

6 The second matter arising out of the judgment of Gaudron and Gummow JJ concerns a defendant pleading and justifying meanings which the plaintiff has not pleaded. Since the decision of the English Court of Appeal in *Polly Peck Plc v Trelford*[3], courts in England and Australia have sanctioned a practice of permitting a defendant to plead a meaning different from that contended for by the plaintiff and then justifying that different meaning[4].

7 The authority for this practice is found in the judgment of O'Connor LJ in *Polly Peck*[5] where his Lordship said:

> "In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him, and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different from that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and to give particulars of the facts and matters upon which he relies in support of his plea, as he is required to do by RSC, Ord 82. It is fortuitous that some or all of those facts and matters are culled from parts of the publication of which the plaintiff has not chosen to complain.

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3 [1986] QB 1000.

4 *Gumina v Williams (No 2)* (1990) 3 WAR 351; *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1; *Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49; [1987] 3 All ER 499; *Prager v Times Newspapers Ltd* [1988] 1 WLR 77; [1988] 1 All ER 300; *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733; *Control Risks Ltd v New Library Ltd* [1990] 1 WLR 183; [1989] 3 All ER 577.

5 [1986] QB 1000 at 1032.

Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.

Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication.

What I have said in the context of justification can be applied by a parity of reasoning to fair comment, subject to what I say at the end of this judgment."

8 With great respect to his Lordship, such an approach is contrary to the basic rules of common law pleadings and in many contexts will raise issues which can only embarrass the fair trial of the action. Leaving aside technical pleas such as pleas in abatement, defences are either by way of denial or confession and avoidance. A defence which alleges a meaning different from that of the plaintiff is in the old pleading terminology an argumentative plea of Not Guilty. Under the principles of pleading at common law, it could tender no issue and would be struck out as embarrassing. Under the modern system, articulating an alternative meaning could conceivably make explicit the ground for denying a pleaded imputation. But it would be only in such a case that a defendant's plea of a new defamatory meaning might be supportable as a plea which prevents the plaintiff being taken by surprise. A plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence. It is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. In our view, the *Polly Peck* defence or practice contravenes the fundamental principles of common law pleadings. In general it raises a false issue which can only embarrass the fair trial of the actions. This was the view of the Court of Common Pleas in *Bremridge v Latimer*[6]. In *Bremridge*[7] Byles J, a common law judge of great authority, said:

"The law is plain that, if you wish to dispute the sense given to the words in the libel, you must do so by the plea of not guilty, and, if you wish to justify, you must confess and avoid. ... Now, the issue raised by these pleas is plainly

6 (1864) 12 WR 878.

7 (1864) 12 WR 878 at 879-880.

calculated to prejudice the plaintiff, who has a right to have the charge of 'treachery' tried, and not to be compelled to take part in an irrelevant inquiry."

9 A similar view was taken by Blackburn J, another great common law judge, in *Watkin v Hall*[8] where his Lordship said:

> "I think the decision in *Bremridge v Latimer* correct, because in that case a portion of a newspaper article being set forth in the declaration, with an innuendo, the defendant endeavoured to shew that if the whole article was taken, the plaintiff would have had a different cause of action, and he sought, by his plea, to set out the whole article, and, so, to justify it as true in fact. That was a matter utterly irrelevant to the question at issue, whether he had published the libel charged in the declaration. The Court of Common Pleas refused to allow the plea."

10 *Bremridge* was applied by the Court of Appeal of New Zealand in *Templeton v Jones*[9]. Cooke J, speaking on behalf of the Court, said[10]:

> "In the present case, however, the allegation that the plaintiff despises Jews is not reasonably capable of being treated as other than a distinct charge. It is obviously different, for instance, from the allegation that he despises women. It is true that many of the allegations in the passage quoted in para 5 of the statement of claim are variations on or illustrations of a theme: namely that the plaintiff indulges in the politics of hatred. They are specific and severable allegations nonetheless.
>
> It is important to note that the plaintiff is not suing on all the words set out in para 5. In para 6 it is made clear that only the allegation about Jews is sued on. The defendant on the other hand, as is made plain by the opening words of para 7 of the amended statement of defence, wishes to prove that all the words set out in para 5 of the statement of claim are true. That is not permissible, because of the limited nature of the plaintiff's complaint."

11 This passage highlights what we regard as the fundamental defect in the reasoning in *Polly Peck.* Cooke J rejected the notion that the defendant can take severable parts of a publication each containing defamatory imputations, link them together, and give the publication a meaning at a sufficiently high level of abstraction to subsume the meanings of the severable parts. That is, a defendant

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8 (1868) LR 3 QB 396 at 402.

9 [1984] 1 NZLR 448.

10 [1984] 1 NZLR 448 at 452.

cannot take a part of an article that wrongly alleges that the plaintiff has convictions for dishonesty and a part that imputes that the plaintiff has defrauded shareholders, assert that the article means that the plaintiff is dishonest, and then justify that meaning, perhaps by proving that the plaintiff had in fact defrauded the shareholders. On that hypothesis, it would be outrageous if the defendant could obtain a finding that the article was true in substance and in fact when it plainly was not. Yet that is the sort of finding that must result from applying the central proposition of *Polly Peck*. That proposition is that[11]:

> "The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting".

12 This proposition is contrary to the principle stated by *Gatley on Libel and Slander*[12] which was approved by Evatt J in *Howden v "Truth" and "Sportsman" Ltd*[13]. That principle is:

> "The plea of justification must be not only as broad as the literal language of the libel, but as broad as the inferences of fact necessarily flowing from the literal language."

13 No injustice is done by holding a defendant to the fundamental principles of pleading by requiring a defence to respond to the statement of claim. The Rules of the Supreme Court of South Australia require that a defence "specifically admit or deny every allegation of fact (including particulars) in the pleading to which the defence ... relates, and allegations which are not specifically denied shall be deemed to be admitted"[14]. The rules thus confirm the common law principle that the defence must plead to the allegations in the statement of claim. Although the rules also require that a party should "specifically plead any fact or matter which raises issues of fact or any mixed question of fact and law not arising out of the preceding pleading"[15], the issues to which this rule applies do not include issues which are irrelevant or embarrassing.

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11 [1986] QB 1000 at 1032.

12 2nd ed (1929) at 551.

13 (1937) 58 CLR 416 at 425.

14 r 46.12(2), but cf r 46.21 relating to close of pleadings.

15 r 46.12(4)(c).

14 A distinct but related question is the effect of a plaintiff's pleading or failing to plead an imputation by way of a false innuendo. Rule 46.19 of the Supreme Court Rules contains a number of provisions specific to pleadings in actions for defamation. Sub-rule (1) reads as follows:

> "In an action for defamation where the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense."

There is no rule which expressly requires a plaintiff to give particulars when the plaintiff relies simply on the "ordinary meaning" of the article on which the claim is based. Before the enactment of rules relating to the pleading of false innuendoes in New South Wales, Wallace P said in *Packer v Mirror Newspapers Ltd*[16]:

> "I am of opinion that the pleader has acted with perfect propriety and quite sufficiently in setting forth the whole of the article complained of without assigning any innuendoes and simply relying on the natural wording of the words used and, in other words, he claims - correctly enough I think - that the meaning thereof is patent and free from subtleties or necessities for background information or the like."

Wallace P concluded by saying[17]:

> "it is possible the wording of s 61[18] could be used to obtain particulars, if required, or it may even be that some rule of court might be helpful to meet the case of a long defamatory article which did not, however, require an innuendo, but all that is for another day."

15 Statute apart, the reason why particulars may be required where the plaintiff intends to rely on the ordinary meaning of the words complained of is the need to

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16 (1969) 90 WN (Pt 1) NSW 308 at 309-310.

17 (1969) 90 WN (Pt 1) NSW 308 at 310.

18 *Common Law Procedure Act* 1899 (NSW). Section 61 (now repealed) read:

> "If any pleading is so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or a Judge to strike out or amend such pleading, and the Court or Judge shall make such order respecting the same and also respecting the costs of the application as the Court or Judge thinks fit."

define issues when more than one meaning may be inferred from the words used in the material complained of. In *Lewis v Daily Telegraph Ltd*, Lord Reid said[19]:

> "What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning."

Herein lies a difficulty, as Lord Reid perceived[20]:

> "Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question."

16 As "the most damaging meaning" or meanings may be a matter in dispute, it is oftentimes necessary for a plaintiff to provide particulars of the meaning or meanings on which reliance will be placed. The necessity arises because the defendant must be able to plead not only a denial of the defamatory meaning assigned by the plaintiff but (if so advised) a plea of confession and avoidance (fair report, justification or qualified privilege). By requiring the plaintiff to plead meaning or meanings upon which the plaintiff relies, the defendant is enabled to plead a defence to the particular defamation that is alleged. Then, when the action comes to trial, the meanings assigned by the plaintiff may be needed to allow the judge to identify the issues for determination: first, whether evidence is relevant to and admissible on an issue for determination and, secondly, whether the article pleaded by the plaintiff is capable of bearing the defamatory meanings which the plaintiff has assigned and which the jury is asked to find. Unless particulars be given of the meanings on which the plaintiff intends to rely, a bare pleading of the words complained of may prejudice or be embarrassing to the defendant in pleading a denial of the defamation or a plea of confession and avoidance and may prejudice the trial judge's ability to determine objections to evidence or to rule effectively on the meanings which may be put to, and be found by, the jury.

17 Where the plaintiff pleads a false innuendo, the plaintiff gives a shape and focus to the cause of action. If the trial judge rules that the matter complained of is

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19 [1964] AC 234 at 258.

20 [1964] AC 234 at 259.

capable of giving rise to the meaning pleaded, the first question for the jury is whether the meaning is made out. If it is, and only if it is, questions then arise as to whether the defendant has a defence to that publication.

18 The courts require plaintiffs to plead false innuendoes where the pleading of an innuendo is needed to define the issues for determination[21]. It would be an invitation to return to the days of "trial by ambush" in defamation actions if courts did anything which might discourage plaintiffs from pleading such innuendoes. One of the vices of the old forms of pleading was that a plaintiff relying on a false innuendo could go to trial simply by relying on the publication without being required to specify the particulars. At the trial, defendants sometimes found themselves in the invidious position of preparing a case that did not arise because the plaintiff did not rely on meanings which the defendant assumed would be relied upon. In such a case, the defendant may have spent much time, effort and money in marshalling the proofs of a defence which did not arise. Worse still from the defendant's point of view was that the plaintiff might be able to persuade the trial judge to let a meaning go to the jury which the defendant had thought could not reasonably arise. The defendant might then find itself in a position where, without an adjournment (often requiring the discharge of the jury and an order paying the costs of a part-heard but lengthy trial), the defendant would not have available to it defences that were in fact available to it.

19 A plaintiff who pleads a false innuendo thereby confines the meanings relied on. The plaintiff cannot then seek a verdict on a different meaning which so alters the substance of the meaning pleaded that the defendant would have been entitled to plead a different issue, to adduce different evidence or to conduct the case on a different basis.

20 In *Slim v Daily Telegraph Ltd*[22], Diplock LJ and Salmon LJ expressed views which, at least textually, appear to conflict. Salmon LJ said that a plaintiff is bound by his or her pleading - "otherwise it may prove to be nothing but a snare for the defendant"[23]. Diplock LJ said that a plaintiff could rely on any meaning which was less injurious than the pleaded meaning. In *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*[24], Stephen J referred to both views, saying that the plaintiff

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21 *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161.

22 [1968] 2 QB 157.

23 [1968] 2 QB 157 at 185.

24 (1975) 134 CLR 1 at 14.

"was not free thereafter to rely upon some quite different meaning which he might seek to read into the words complained of ... at least not one more injurious".

21 The proposition advanced by Salmon LJ in *Slim* is too rigorous: it appears to sacrifice form to substance and to elevate minute differences from the meaning pleaded to the status of a substantial defence. On the other hand, a less injurious meaning than the meaning pleaded is not always without significance as Diplock LJ seems to imply. A defendant who could not justify or otherwise defend a publication having the meaning pleaded by the plaintiff might have been able to justify or otherwise defend a defamatory publication having a less injurious meaning. But a different nuance of meaning from the meaning pleaded may go to, and be found by, the jury provided it is not unfair to the defendant to allow the plaintiff so to depart from the meaning pleaded.

22 Thus, Fox J in *Hadzel v De Waldorf*[25] said that:

> "a judge can find for the plaintiff *on a nuance of meaning not put by him*, but it would be a strange reversal of ordinary practice, and possibly very unfair to one or both parties, for the judge to find that the plaintiff was defamed in some way not averred by the plaintiff." (emphasis added)

The critical consideration is whether it is prejudicial, embarrassing or unfair to the defendant to allow a plaintiff to amend the statement of claim or otherwise to raise as an issue or to seek a verdict on the basis that the matter complained of bears a meaning different from the meaning previously pleaded or relied on by the plaintiff.

23 In *Prichard v Krantz*[26], King CJ, with whom Millhouse and Prior JJ agreed, was of the view that:

> "a plaintiff is in some sense bound by the meanings which he attributes to the words in his statement of claim. ... An allegation of the meanings to be attributed to the words used ... serves no good purpose, and may perhaps be a trap for a defendant, if those meanings can be ignored at trial and other meanings relied upon. The purpose of pleadings and of particulars is to define the issues at trial and to give the opposing party fair notice of the case to be made against him. A defendant needs to know the meanings attributed

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25 (1970) 16 FLR 174 at 182.

26 (1984) 37 SASR 379 at 386. And see *Taylor v Jecks* (1993) 10 WAR 309 at 317-318.

> to the words by the plaintiff in order to decide whether to assert that the words do not bear those meanings, to justify the meanings or to apologise.
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> A plaintiff would not, of course, be confined to a precise nuance and shade of meaning pleaded or particularized. Modern judges, in any class of case, have a considerable discretion as to the rigour with which they will confine a case presented by a party to the precise language of the pleadings. In many cases, moreover, the more serious allegation can be regarded as including the less serious. In that sense, the court is free to attribute to the words a less injurious meaning than that attributed to them in the pleading. ... It seems to me, however, that it would be contrary to the purpose of pleadings and particulars if a plaintiff could obtain a judgment upon the basis of a meaning of the words used which was not merely a less serious form of the imputation pleaded, but amounted to an imputation of a substantially different kind."

Similarly, Mahoney ACJ in *Crampton v Nugawela*[27] said:

> "where the imputation specified by the plaintiff is not the imputation made by the published material, the plaintiff will fail, even though another and different imputation was made by the published material and the plaintiff could have pleaded that imputation.
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> But, in my respectful opinion, that should not mean that the plaintiff should fail where the published material is before the jury, the imputation which it makes may be seen from it, and the plaintiff's error is merely that his pleading of the imputation errs in that it does not with complete accuracy state in the pleading the imputation that is in the published material. ... Where ... the complaint is not that the published material conveys one imputation and the pleading pleads a quite different one, but that the pleader has erred in attempting to translate the imputation from the published material to the pleading, I do not think the law to be that a plaintiff's claim must necessarily fail. It would be sad if the law held the plaintiff's claim defeated because, in pleading, he did not precisely translate from the letter to the pleading the imputation as precisely as should have been done."

24 If the defendant is, or might reasonably be thought to be, prejudiced, embarrassed or unfairly disadvantaged by the departure - whether in pleading or preparing for trial, or adducing evidence or in conducting the case before verdict - the plaintiff will be held to the meaning pleaded. If the meaning pleaded goes to the jury and is not found by the jury, the plaintiff fails. If there be no unfair disadvantage to the defendant by allowing another defamatory meaning to be relied on and to go to and be considered by the jury - as where the plaintiff seeks

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27 (1996) 41 NSWLR 176 at 183.

to rely on a different nuance of meaning or, oftentimes, merely a less serious defamation - the different defamatory meaning may be found by the jury.

25 The defendant suffered no prejudice, embarrassment or unfair disadvantage in this case. The plaintiff was entitled to a favourable finding on the meanings attributed to the first and second articles by Gaudron and Gummow JJ.

Orders

26 We agree with the orders proposed by Gaudron and Gummow JJ.

27 GAUDRON AND GUMMOW JJ. The appellant, Manobendro Chakravarti, sued the respondent, Advertiser Newspapers Limited ("the Advertiser"), for defamation in the Supreme Court of South Australia. He sued on two separate articles published in *The Advertiser* newspaper, the first on 15 July and the second on 18 July 1992 ("the first article" and "the second article" respectively). The articles were based on evidence given to the Royal Commission established in March 1991 to investigate the near collapse of the State Bank of South Australia ("the State Bank").

28 The first article was based on oral evidence given to the Royal Commission by Mr David Simmons, a former chairman of the State Bank. The second was based on a file note made by Mr Simmons and received in evidence by the Royal Commission. The oral evidence and the file note were directed to the affairs of Beneficial Finance Corporation Limited ("Beneficial"), a subsidiary of the State Bank, and four of Beneficial's former senior executives. Mr Chakravarti was one of those executives.

<u>The pleadings</u>

29 In his Amended Statement of Claim, Mr Chakravarti set out those parts of the articles upon which he sued, assigning particular meanings to each article. The relevant parts of the articles and the pleaded meanings will be set out later in these reasons. The Advertiser contended in its Third Further More Explicit Defence ("the Defence") that the articles did not bear the meanings pleaded or any other meaning defamatory of Mr Chakravarti. Alternatively, it pleaded that the articles each bore a specific meaning different from those pleaded in the Amended Statement of Claim and that, so understood, they were true in substance and in fact. It also pleaded that each article was a fair and accurate report of the proceedings of the Royal Commission, and, thus, privileged both under s 7 of the *Wrongs Act* 1936 (SA) ("the Act") and at common law.

30 So far as is presently relevant, Mr Chakravarti's Fourth Further Amended Reply ("the Reply") denied that either article was a fair and accurate report of the proceedings of the Royal Commission and asserted that, in any event, the Advertiser could not claim protection under s 7 of the Act because it failed to publish letters he had written by way of reply as required by that section. The terms of s 7, so far as they are relevant, will be set out later in these reasons.

The proceedings

31 The matter came on for hearing before Cox J who, in accordance with South Australian practice in these matters, sat without a jury[28]. Without making specific findings as to the meanings pleaded in the Amended Statement of Claim, his Honour held that both articles bore imputations which were defamatory of Mr Chakravarti[29]. He further held that the Advertiser had not made good its defences of justification and fair report[30]. In the result, damages were awarded in the sum of $225,000 for the first article and $25,000 for the second, $175,000 being apportioned as "economic loss" or "special damages" for both articles and $75,000 as general damages. Interest was allowed in the sum of $18,000 and judgment entered for $268,000[31].

32 The Advertiser appealed from the decision of Cox J to the Full Court. Mr Chakravarti cross-appealed on the ground that the amount awarded by way of general damages was manifestly inadequate. The Full Court held[32], by majority (Perry and Williams JJ, Doyle CJ dissenting), that Mr Chakravarti was not entitled to succeed on the first article because it was not capable of bearing the meanings pleaded in his Amended Statement of Claim[33]. However, the Full Court was unanimous in the view that he was entitled to succeed on the second[34]. It was held, again unanimously, that, although he was entitled to succeed on that article, he could recover damages only in respect of the imputations which arose from those parts which did not fairly report the proceedings of the Royal Commission[35]. In the result, the Advertiser's appeal was allowed in part, Mr Chakravarti's cross-

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28 *Chakravarti v Advertiser Newspapers Limited* (1995) 181 LSJS 218.

29 (1995) 181 LSJS 218 at 230, 235.

30 (1995) 181 LSJS 218 at 225, 234.

31 (1995) 181 LSJS 218 at 240.

32 *Chakravarti v Advertiser Newspapers Limited* (1996) 65 SASR 527.

33 Williams J also held that the Advertiser was entitled to succeed on its defences of justification and fair report: (1996) 65 SASR 527 at 559-560.

34 (1996) 65 SASR 527 at 550-551 per Doyle CJ, 557 per Perry J, 560-561 per Williams J.

35 (1996) 65 SASR 527 at 552 per Doyle CJ, 557 per Perry J, 561 per Williams J.

appeal was dismissed, and a verdict of $40,000 plus interest[36] substituted for that entered at first instance. Mr Chakravarti now appeals to this Court and the Advertiser cross-appeals[37].

The issues

33 Six distinct issues are involved in this appeal. The central issue is whether the articles fairly and accurately report the proceedings of the Royal Commission. That issue is raised in respect of the first article by a Notice of Contention filed on behalf of the Advertiser and, in respect of the second, by its Notice of Cross-Appeal. If the Advertiser succeeds to any extent on that issue, it will be necessary to consider whether it can rely on s 7 of the Act. If it cannot, there is a further question whether it can rely on a like common law defence.

34 If the question of fair and accurate report is decided against the Advertiser in respect of either article, it will be necessary to consider whether, and to what extent, that article bears the meanings pleaded in the Amended Statement of Claim. That issue is presented in respect of the first article and the first meaning pleaded with respect to the second article by Mr Chakravarti's Notice of Appeal. Certain of the other meanings pleaded with respect of the second article are put in issue by the Advertiser's Notice of Cross-Appeal. If the first article does not bear the meanings pleaded, there is a further issue whether it bears some other defamatory meaning upon which Mr Chakravarti can rely.

35 The final issue in the appeal is whether the Full Court was correct in its approach to damages.

The proceedings of the Royal Commission

36 Before turning to the newspaper articles, it is convenient to give an account of the evidence which was given by Mr Simmons to the Royal Commission and upon which the first article was based.

37 As already mentioned, Mr Simmons was Chairman of the State Bank. He was also Chairman of Beneficial. He gave evidence on 14 July 1992 of a meeting he had on 30 July 1990 with Mr Bannon, the then Premier of South Australia. During that meeting he provided the Premier with information as to the affairs of Beneficial and four of its senior executives, Messrs Baker, Reichert, Martin and

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36 Interest was allowed in the sum of $9,900 to the date at which judgment was entered by Cox J.

37 Special leave to cross-appeal was granted during the hearing of the appeal.

Chakravarti. The matters discussed at that meeting were set out in the file note to which reference has already been made.

38 Mr Simmons was referred by Counsel to the file note of his meeting with the Premier. In answer to a question from his Counsel, he said that he gave details of the matters referred to in that note to the Premier. Counsel then asked Mr Simmons this question:

> "I don't want to read out all that is in [the file note] on those two topics but did you make it clear to the Premier that with reference to Messrs Baker, Reichert, Martin and Chakravarti there was a question of either civil or criminal misconduct to be looked at."

Initially, no answer was recorded to that question. However, the transcript of proceedings was subsequently amended to indicate that it was answered "Yes". It is no longer in issue that the question was, in fact, answered that way. It is, however, necessary to mention the matter because it has some bearing on the question whether the Advertiser can rely on s 7 of the Act.

39 Immediately following his affirmative answer to the question whether he had informed the Premier that there "was a question of either civil or criminal misconduct" in relation to Messrs Baker, Reichert, Martin and Chakravarti, Mr Simmons was asked by the Royal Commissioner whether he had been involved in the events leading to the resignation of Messrs Baker and Reichert. He said that he had. There then followed further questions from the Royal Commissioner as to the reason given publicly for the resignations of Messrs Baker and Reichert, namely, a difference of opinion between them and the Board as to the direction of Beneficial. Those questions led to this exchange, the questions still being asked by the Royal Commissioner:

> "Q The fact was, to put it in its blandest form, there had been a difference of opinion between the Board and these officers as to their conduct.
> A Yes.
>
> Q The reason it was announced publicly - I am going to put it quite bluntly; it really just wasn't true, was it.
> A The difficulty -
>
> Q I'm not sure where it was announced, but the reason you just gave that there had been a difference of opinion as to the direction, that really wasn't the reason at all, was it.
> A Not really, but to give any other reason at that stage could have prejudiced any position that was being taken.

Q Could have prejudiced.
A Well, the investigation wasn't completed at that stage and there was I believed, as I had said to the Premier, it may be criminal rather than civil.

Q I mean, it would have been closer to the mark to have said something like there was a difference of opinion between these officers and the Board as to what was appropriate conduct for officers of the company. That would be pretty bland and somewhere near the truth, wouldn't it.
A Yes.

Q But there was no hint, was there, of anything like that at all, in what was said.
A No."

40 The following questions were then asked by Counsel for Mr Simmons:

"Q But the Premier knew from what you told him.
A Well, I had gone through the whole scenario and had told him all I knew at that stage.

Q When you told the Premier that their conduct may be criminal rather than civil.
A Yes.

Q And told him of your summary of what Beneficial had learnt they had been doing.
A Yes.

Q Did the Premier respond in any way.
A Well, as I said yesterday, I think he was very angry, particularly with the reference to the Melbourne joint venture."

The first article

41 The first article was headlined "Bannon accused on resignations" and commenced by referring to the resignations of Messrs Baker and Reichert, reporting that the public reason given for their resignations "was not right and that Mr Bannon knew the real reason." The article then proceeded as follows:

> " Mr Simmons said he told Mr Bannon on July 30, 1990, there was a 'question' of either criminal or civil misconduct to be looked at in relation to four Beneficial executives, including Mr Baker and Mr Reichert.

He said he told Mr Bannon about loans to Beneficial executives and Mr Bannon reacted angrily.

Mr Simmons confirmed he told Mr Bannon the question of criminal or civil misconduct was in reference to Mr Baker, Mr Reichert, Mr Garry Martin and Mr Manob Chakravarti.

'I had gone through the whole scenario and had told him (Bannon) all I knew at that stage,' Mr Simmons told the commission.

Mr Bannon told Parliament on August 7, 1990, that Beneficial's managing director Mr Baker had retired after 'differences of opinion' with the board over the 'direction' of Beneficial.

The Royal Commissioner, Mr Samuel Jacobs, QC, said yesterday the public explanation that there had been a difference of opinion over direction was not true.

Mr Jacobs: 'The fact was, to put it in its blandest form, there had been a difference of opinion between the board and these officers as to their conduct.'

Mr Simmons: 'Yes.'

Mr Jacobs: 'The reason ... announced publicly - I am going to put it quite bluntly - it really just wasn't true, was it? It really wasn't the reason at all, was it?'

Mr Simmons: 'Not really, but to give any other reason at that stage could have prejudiced any position that was being taken.

'The investigation wasn't completed at that stage and there was I believed, as I had said to the Premier, it may be criminal rather than civil.'

Mr Jacobs: 'It would have been closer to the mark to have said something like there was a difference of opinion between these officers and the board as to what was appropriate conduct for officers of the company.

'That would be pretty bland and somewhere near the truth, wouldn't it?'

Mr Simmons: 'Yes.'

> Mr Simmons said he was involved in the 'events' that led to the resignation of Mr Baker and Mr Reichert, but it was another executive, Mr Michael Hamilton, who sought their resignation.
>
> Mr Simmons was asked how Mr Bannon responded when told the conduct of those involved may be criminal rather than civil and what Beneficial had learnt they had been doing.
>
> 'I think he was very angry, particularly with the reference to the Melbourne joint venture,' Mr Simmons said.
>
> [No explanation of 'the Melbourne joint venture' was given in the commission.]
>
> Mr Simmons agreed the bank had been concerned that Beneficial may be sued for unfair dismissal.
>
> *The Advertiser* reported last year that Mr Martin left Beneficial in September, 1991, after his job was axed.
>
> Mr Chakravarti also left Beneficial late last year."

The article then reported other matters which do not concern Mr Chakravarti and which were not sued upon.

<u>The first article: fair and accurate report</u>

42 It is well settled that to be fair and accurate, a report need not be a complete report of the proceedings in question. Nor need it be accurate in every respect. It must, however, be substantially accurate[38]. And the question whether it is substantially accurate is a question of fact[39]. It is not suggested that Cox J erred in principle in determining whether the articles in question in this appeal were fair and accurate. Thus, the question that arises is whether it was open to his Honour to find that they were not.

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38 See *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 380 per Herron CJ and Ferguson J, 385 per Sugerman J; *Anderson v Nationwide News Pty Ltd* (1970) 72 SR (NSW) 313 at 318 per Asprey JA, 323-324 per Mason JA. See also *Cook v Alexander* [1974] QB 279.

39 See, generally, *Leslie v Mirror Newspapers Ltd* (1971) 125 CLR 332.

43 So far as is presently relevant, Cox J found that the first article accurately reported the evidence that Mr Simmons had made it clear to the Premier that "there was a 'question' of either criminal or civil misconduct" with respect to four named executives, Messrs Baker, Reichert, Martin and Chakravarti but was inaccurate in its reporting of the evidence as to the difference of opinion between the Board and its executives and, also, the evidence as to the Melbourne joint venture[40]. His Honour took the view that the evidence on those last matters related solely to Messrs Baker and Reichert but was reported in the article as if it related to all four senior executives, including Mr Chakravarti[41].

44 The evidence as to the difference of opinion between the Board of Beneficial and its executives was given by way of answer to questions which referred solely to Messrs Baker and Reichert and, thus, related solely to them. However, in reporting that evidence, the article refers to "these officers", a reference that can only be understood as a reference to the officers last named. And they were Messrs Baker, Reichert, Martin and Chakravarti. The article is, thus, inaccurate in this respect.

45 Similarly, the article is inaccurate in its reference to "the Melbourne joint venture". Although there is nothing in the terms of the questions asked of Mr Simmons to indicate to whom the evidence of "the Melbourne joint venture" related, the questions followed immediately upon the questions asked by the Royal Commissioner with respect to Messrs Baker and Reichert and arose out of those questions. Accordingly, the questions and answers, including the answer with respect to "the Melbourne joint venture", can only be understood as referring to Messrs Baker and Reichert. However, the article links "the Melbourne joint venture" to "those involved [whose conduct] may be criminal rather than civil", a clear reference back to all four Beneficial executives, not simply Messrs Baker and Reichert.

46 The inaccuracies in the first article are substantial, indicating that not only Messrs Baker and Reichert but, also, Messrs Martin and Chakravarti had been in conflict with the Board with respect to the conduct appropriate to their positions as well as the conduct in which they had actually engaged. The article is also substantially inaccurate in its indication that Messrs Martin and Chakravarti were involved in "the Melbourne joint venture" which, although not explained, was a matter of sufficient seriousness to have been reported to the Premier and to have provoked him to anger. Accordingly, the finding of Cox J that the first article was

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40 (1995) 181 LSJS 218 at 225.

41 (1995) 181 LSJS 218 at 223, 225.

not a fair and accurate report of the relevant part of the proceedings of the Royal Commission must stand.

<u>The meanings pleaded with respect to the first article</u>

47 Mr Chakravarti pleaded two meanings with respect to the first article, namely, that:

> "(a) the plaintiff was involved in criminal or civil misconduct, whilst an executive of Beneficial Finance, in respect of loans from Beneficial Finance to himself.
>
> (b) The plaintiff's conduct in receiving loans direct to himself as an executive of Beneficial Finance which loans were in excess of his entitlement was such as to render him not a fit and proper person to be or remain a Beneficial Finance executive or to be or remain in any other position of trust."

48 As already indicated, the majority in the Full Court found that the first article did not bear either of the meanings pleaded in the Amended Statement of Claim. As to the first of those meanings, Perry J and Williams J each took the view that the article merely imputed suspicion of misconduct, not actual misconduct[42]. That view must be rejected. By stating that there "was a 'question' of either criminal or civil misconduct to be looked at" and by postulating that that conduct "[might] be criminal rather than civil", the article clearly conveys the meaning that Mr Chakravarti and his fellow executives engaged in some form of misconduct, merely leaving it uncertain whether it was civil or criminal.

49 As to the second meaning pleaded with respect to the first article, Perry J held that that meaning could not arise out of the first article as "[it] does not refer to loans 'in excess of his entitlement'"[43]. Williams J expressed the view that it added little to the first meaning pleaded by Mr Chakravarti[44].

50 It is true that the first article does not refer in terms to loans "in excess of ... entitlement". It is also true that the second meaning pleaded by Mr Chakravarti adds little to the first in the sense that, subject to one matter which will be mentioned shortly, it arises out of and is dependent on the first. So far as is

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42 (1996) 65 SASR 527 at 556 per Perry J, 559 per Williams J.

43 (1996) 65 SASR 527 at 556.

44 (1996) 65 SASR 527 at 559.

presently relevant, the article imputes misconduct which may be criminal rather than civil with respect to loans from Beneficial. Because it imputes misconduct of that kind, the ordinary reader would take the article to carry a distinct innuendo that, by reason of that misconduct, Mr Chakravarti was not a fit and proper person to be or remain an executive of Beneficial. The matter that should be mentioned is that that innuendo differs from the pleaded meaning in that it omits any reference to the loans being "in excess of his entitlement". That difference, although slight, leads to a consideration of the consequences of Mr Chakravarti's having pleaded specific meanings with respect to the first article.

The effect of pleading specific meanings

51 The majority in the Full Court took the view that, in relation to the first article, Mr Chakravarti could rely only on the meanings pleaded in his Amended Statement of Claim[45]. That view was taken in a context in which the Advertiser pleaded, in relation to that article, that it did not bear either of the meanings set out in the Amended Statement of Claim but meant only that Mr Chakravarti "was suspected of being involved in criminal or civil misconduct ... in respect of loans from [Beneficial]" and, that, so understood, it was true in substance and in fact[46].

52 Although there is no requirement in that regard, it is now common practice for a plaintiff to specify in his or her Statement of Claim the meaning or meanings which, as a matter of ordinary language, are said to be conveyed by the material upon which he or she sues[47]. Whilst the pleading of different shades of meaning

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45 (1996) 65 SASR 527 at 556 per Perry J, 559 per Williams J.

46 A similar defence was also pleaded in respect of the second article.

47 No question arises in this case respecting so-called "true innuendos" which depend on extrinsic circumstances showing, for example, that words not on their face referring to the plaintiff would be understood to refer to the plaintiff, or that words not *ex facie* defamatory would be understood in a defamatory sense owing to the existence of further facts known to the persons to whom the words were published: see *Report of the Committee on the Law of Defamation*, (1948) Cmd [7536], pars 162-166. Rule 46.19(1) of the South Australian Supreme Court Rules states:

> "In an action for defamation where the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense."

(Footnote continues on next page)

is not to be encouraged, distinct or specific meanings should be pleaded and one indication of distinctness or specificity "would be whether the justification would be substantially different"[48]. And since the decision in *Lucas-Box v News Group Newspapers Ltd*[49], a defendant who seeks to justify a different meaning has generally been required to plead or give particulars of that other meaning[50].

53 The consequences of a plaintiff pleading a specific meaning are far from settled. In *Slim v Daily Telegraph Ltd*, Salmon LJ expressed the view that a "plaintiff is bound by his pleading - otherwise it may prove to be nothing but a snare for the defendant"[51], while Diplock LJ took the view that a plaintiff could rely on any natural or ordinary meaning which is less injurious than the pleaded

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In *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 272, Lord Hodson said:

> "[T]he true innuendo has been treated as a separate cause of action from that which arose from the words in their natural and ordinary meaning (with or without inferential meanings commonly called false innuendoes)".

48 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 282 per Lord Devlin.

49 [1986] 1 WLR 147; [1986] 1 All ER 177.

50 See, for example, *Gumina v Williams (No 2)* (1990) 3 WAR 351 at 354-355 per Malcolm CJ, 364-367 per Seaman J; *Woodger v Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1 at 24 per Miles CJ; *Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49 at 58 per May LJ, 60 per Mustill LJ, 63 per Balcombe LJ; [1987] 3 All ER 499 at 505, 507, 509; *Prager v Times Newspapers Ltd* [1988] 1 WLR 77 at 82-83, 85-86, 87 per Purchas LJ, 91 per Nicholls LJ; [1988] 1 All ER 300 at 303-304, 305-306, 308, 310-311; *Morrell v International Thomson Publishing Ltd* [1989] 3 All ER 733 at 736-738 per May LJ, 739 per Nicholls LJ; *Control Risks Ltd v New Library Ltd* [1990] 1 WLR 183 at 189 per Nicholls LJ; [1989] 3 All ER 577 at 581; *Polly Peck Plc v Trelford* [1986] QB 1000 at 1032-1033 per O'Connor LJ.

51 [1968] 2 QB 157 at 185.

meaning[52]. It was later held in *Polly Peck Plc v Trelford*[53] that "where differences of meaning are proposed by the parties, the issue as to the possible meanings of the words [is] confined to those pleaded." More recently, however, in *Prager v Times Newspapers Ltd* (a case in which the plaintiff asserted one meaning and the defendants wished to justify another), Russell LJ expressed the view that "[a]ny 'conceivable meaning which a jury might find' ... must be left for the jury's consideration."[54]

54 The Australian authorities follow much the same pattern as that to be found in the United Kingdom. Thus, in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*, Stephen J said that, having pleaded an innuendo, "the plaintiff was bound by it, and by such others as he also relied upon[55], and was not free thereafter to rely upon some quite different meaning which he might seek to read into the words complained of ... at least not one more injurious"[56]. An even stricter view was taken in *Hadzel v De Waldorf* where Fox J stated that "a judge can find for the plaintiff on a nuance of meaning not put by him, but it would be a strange reversal of ordinary practice, and possibly very unfair to one or both parties, for the judge to find that the plaintiff was defamed in some way not averred by the plaintiff"[57].

55 More recently, however, it was said in *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* that the practice of pleading some specific meaning or meanings "could not alter the position at law that the judge was to decide what meanings were fairly open and was to leave to the jury all such

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52 [1968] 2 QB 157 at 176.

53 [1986] QB 1000 at 1033 per O'Connor LJ.

54 [1988] 1 WLR 77 at 93; [1988] 1 All ER 300 at 312 quoting *Waters v Sunday Pictorial Newspapers Ltd* [1961] 1 WLR 967 at 972 per Willmer LJ; [1961] 2 All ER 758 at 762.

55 The plaintiff had pleaded six other innuendos.

56 (1975) 134 CLR 1 at 14, citing *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 175 per Diplock LJ, 185 per Salmon LJ; *Simmons v Mitchell* (1880) 6 App Cas 156 at 162 and *Ryan v Ross* (1916) 22 CLR 1 at 27 per Isaacs and Gavan Duffy JJ. See also *Prichard v Krantz* (1984) 37 SASR 379 at 385-386 per King CJ.

57 (1970) 16 FLR 174 at 182. See also *Slim v Daily Telegraph Limited* [1968] 2 QB 157 at 185 per Salmon LJ; *Magnifax Publishers Pty Ltd v Incentive Pty Ltd* (1970) 18 FLR 100 at 102 per Fox J.

meanings". It followed, in the view taken in that case, that "neither the judge nor the jury were ... confined to the meanings asserted by the parties"[58].

56 In the authorities concerned above, there has been a tendency to translate into rules what are best seen as considerations going to fair and efficient practice. More cogently, it has been said that, if a defendant seeks to justify a meaning which is different from that asserted by the plaintiff, it should plead that alternative meaning because "[l]ibel law ought not to be an exception to the modern rules of pleading which are directed to precisely defining the issues between the parties, providing the benchmarks against which the relevance of evidence is to be assessed and deciding those issues on their merits"[59]. The alternative meaning pleaded by the defendant may make plain the ground upon which the defendant denies the imputation pleaded by the plaintiff. But the view quoted may be accepted without supporting a general conclusion that, in a defamation action, the parties always should be held to the meanings they have pleaded.

57 Modern pleadings fulfil the function performed by traditional pleadings and particulars, traditional pleadings identifying the legal issues to be determined and particulars specifying the case to be made at trial. The South Australian Supreme Court Rules appear to give a special status to particulars. Rule 46.12 requires a specific admission or denial of every allegation of fact "(including particulars)" in the pleading to which the pleader is responding and allegations which are not specifically denied are deemed to be admitted. So far as is relevant to the matter now under consideration, the legal issue which had to be decided was whether the material complained of was defamatory of the plaintiff in the sense that it was to his "discredit ... [tended] to lower him in the estimation of others ... to expose him to hatred, contempt or ridicule, or to injure his reputation in his ... trade or profession"[60]. The pleading of a particular meaning or meanings, whether by

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58 [1989] VR 747 at 768. See also *Gumina v Williams (No 2)* (1990) 3 WAR 351 at 355 per Malcolm CJ; *Kelly v Special Broadcasting Service* [1990] VR 69 at 74 per Murphy J; *Taylor v Jecks* (1993) 10 WAR 309 at 317-318 per Anderson J (although his Honour adverted to contrary authority that a party is confined to meanings it has pleaded).

59 *Pizza Pizza Ltd v Toronto Star Newspapers Ltd* (1996) 2 CPC (4th) 394 at 400 per Cameron J. On 22 September 1997 this decision was affirmed by the Ontario Court of Appeal (Finlayson, Osborne and Austin JJA): unreported, [1997] OJ No 3891; *Lucas-Box v News Group Ltd* [1986] 1 WLR 147 at 151; [1986] 1 All ER 177 at 181; *Viscount De L'Isle v Times Newspapers Ltd* [1988] 1 WLR 49 at 59 per May LJ, 63 per Balcombe LJ; [1987] 3 All ER 499 at 505-506, 509.

60 *Gatley on Libel and Slander*, 8th ed (1981) par 31.

Mr Chakravarti or the Advertiser, was no more than a statement of the case to be made at trial.

58 Doubtless, the pressures on court time and the cost of litigation ordinarily require that, at trial, a party be held to the particulars or those parts of the pleadings which specify the case to be made if departure would occasion delay or disadvantage the other side. The same considerations apply to defamation proceedings. Words do not mean what the parties choose them to mean and, at least ordinarily, the defamatory material will, itself, sufficiently identify and, thus, confine the meanings on which they may rely. Moreover, as was pointed out in *National Mutual Life Association of Australasia v GTV Corporation Pty Ltd*, "[i]t would be most unlikely that the parties would between them fail to hit upon, at least approximately, all the reasonably open meanings"[61].

59 There can be no disadvantage to the Advertiser in allowing Mr Chakravarti to rely, even at this stage, on an innuendo that, by reason of loans received from Beneficial, he was not a fit and proper person to be or remain an executive of that company, notwithstanding the more specific meaning pleaded in his Amended Statement of Claim, namely, that he was unfit by reason of the receipt of loans in excess of his entitlement. The more specific meaning simply limits the innuendo to a factual basis which the Advertiser itself particularised in relation to its plea of justification with respect to the first article[62]. And although the majority in the Full Court held that Mr Chakravarti could not rely on the lesser meaning which the Advertiser asserted, namely, that he was suspected of being involved in criminal or civil misconduct, which lesser meaning it sought to justify and defend, there could have been no disadvantage to the Advertiser in allowing him to do so.

60 As a general rule, there will be no disadvantage in allowing a plaintiff to rely on meanings which are comprehended in, or are less injurious than the meaning pleaded in his or her Statement of Claim. So, too, there will generally be no disadvantage in permitting reliance on a meaning which is simply a variant of the meaning pleaded. On the other hand, there may be disadvantage if a plaintiff is allowed to rely on a substantially different meaning or, even, a meaning which

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61 [1989] VR 747 at 768.

62 By par 10(a)3 of its Defence, the Advertiser provided the following particular:

> "Mr Simmons believed that a preliminary audit of loans to executives of [Beneficial] revealed that the plaintiff, Baker, Eric Reichert and Gary Martin all had loans which were not approved and not authorised and in excess of agreed benefits."

focuses on some different factual basis. Particularly is that so if the defendant has pleaded justification or, as in this case, justification of an alternative meaning. However, the question whether disadvantage will or may result is one to be answered having regard to all the circumstances of the case, including the material which is said to be defamatory and the issues in the trial, and not simply by reference to the pleadings.

61 If Mr Chakravarti's action were confined to the first article, reliance on a meaning imputing misconduct with respect to the Melbourne joint venture - a meaning which was not pleaded but which the trial judge thought was conveyed by that article[63] - might well have resulted in disadvantage to the Advertiser. However, as will later appear, the pleadings with respect to the second article specifically raised misconduct with respect to the Melbourne joint venture and, it may be that, on that account, it could not be said that any disadvantage would result. And if the article did not bear the meanings pleaded or meanings to much the same effect, it may be that the Advertiser would be correct in its complaint that Mr Chakravarti should not be allowed to rely on the other meanings found by the trial judge because it was disadvantaged in that it had no opportunity to address on them. However, as the article bears the first meaning pleaded by Mr Chakravarti and a meaning substantially similar to the second, the question whether he can rely on the meanings found by the trial judge need not be pursued.

<u>The file note</u>

62 The file note which was received in evidence and which formed the basis of the second article is as follows:

> "<u>Loans for Executives</u>
>
> 1. Prior to last Board meeting Baker asked me to approve a loan of $2M to several executives including himself.
>
> 2. Said was not prepared to and should go to the Board.
>
> 3. Board said would approve of it provided that it had Audit sign off.
>
> 4. The loan concerned me.
>
> 5. In telling management on [sic] investigation of Beneficial suggested we should see all loans.

---

63 (1995) 181 LSJS 218 at 224, 225 and 230.

6. Preliminary audit reveals Baker, Reichardt [sic], Chakravarti and Martin have all loans which were not approved, and were not authorised and are in excess of agreed benefits. The loan I looked at was a joint venture and it appears that this joint venture with a Melbourne developer, Tribe and Crispaulie is in default and the account is in default at a level of $37M. rather than within the approved Board 30M. May be criminal rather than civic [sic].

7. There also appears to be loans from a company called Pegasis [sic] which is a joint venture company between Beneficial and Alastair McGregor.

8. The effect[s] of these loans are:

   a) Baker could not exercise proven control over Reichert who arranged structured finance which has proven to be a disaster.

   b) Board presentations were pulled and not accurate.

   c) Internal audit reports were screened.

   d) The Board of Beneficial did not get the true picture.

   e) Accountant was told want $10M. profit and accounts were adjust[ed].

   f) Conspiracy of silence.

   g) Believe that Baker, Reichert, Martin and Chakravarti will have to go - question when.

   h) Clark, John Sulan, at my suggestion, are seeing Chakravarti - now feel he will be weakest."

The second article

63 The second article, which bears the headline "Loans may be criminal: bank chief's diaries", appeared on the front page of *The Advertiser* and was continued on the second page under the heading "Loans may be criminal - diaries". The reference to diaries is a reference to notes of the kind set out above. There is a photograph of Mr Simmons on the front page, underneath which there is what is described as "[a]n excerpt from Mr Simmons' diaries". The so-called "excerpt" was referred to in the pleadings as a "graphic", a term which it is convenient to adopt. The graphic contains the following:

> "Preliminary audit reveals Baker, Reichart [sic], Chakravarti and Martin have all loans which were not approved, and were not authorised and are in excess of agreed benefits....May be criminal rather than civic [sic]."

64 Mr Chakravarti sued on the headline, the heading on the second page, the graphic, the first part of the article and some later paragraphs. The first part is as follows:

> " Sensational allegations of a conspiracy within the State Bank group and multimillion-dollar unauthorised loans involving senior executives have been revealed in diary notes kept by former bank chairman Mr David Simmons.
>
> Mr Simmons says the circumstances surrounding the loans 'may be criminal'.
>
> The loans include unapproved loans to four senior Beneficial Finance Corporation executives and a $37 million joint venture arrangement with a Melbourne developer.
>
> Mr Simmons's diaries also refer to a 'Beneficial conspiracy', how board presentations had been 'pulled' and how internal audit reports were 'screened'.
>
> Several hundred edited pages of diary notes kept by Mr Simmons were released yesterday by the State Bank Royal Commission."

65 The later paragraphs upon which Mr Chakravarti sued were as follows:

> " In notes dated July 30, 1990, concerning a meeting with the Premier, Mr Simmons claims the group profit would be substantially down on the figure of $58 million to $60 million given earlier to Mr Bannon by the managing director, Mr Tim Marcus Clark.

His notes reveal the likely profit as $33 million of which $30.6 million was a tax adjustment.

Mr Simmons records details of loans to executives: 'Prior to last board meeting (then Beneficial chief John) Baker asked me to approve a loan of $2 million to several executives including himself.

'(I) Said was not prepared to and should go to the board.

'Board said would approve of it provided that it had Audit sign off. The loan concerned me.

'In telling management of investigation of Beneficial, suggested we should see all loans.

'Preliminary audit reveals (John) Baker, (Erich) Reichert, (Manob) Chakravarti and (Garry) Martin (all Beneficial Finance executives) have all loans which were not approved and were not authorised and are in excess of agreed benefits.

'The loan I looked at was a joint venture and it appears that this joint venture with a Melbourne developer is in default and the account is in default at a level of $37 million rather than within the approved board $30 million.

'May be criminal rather than civic (civil misconduct).

'There also appears to be loans from a company called Pegasis (sic) which is a joint venture company between Beneficial and Alastair McGregor.'

Mr Simmons writes that the effect of these loans was that Mr Baker could not exercise proven control over his deputy, Mr Reichert, who 'arranged structured finance which has proved to be a disaster'.

He says board presentations were pulled and not accurate, that internal audit reports were screened, that the Beneficial board did not get the true picture, and there was a conspiracy of silence.

Mr Simmons records that when a profit of $10 million was wanted, the accounts were adjusted.

'Believe that Baker, Reichert, Martin and Chakravarti will have to go - question, when?' he says."

The second article: fair and accurate report

66 The considerations which arise on the question whether the second article is a fair and accurate report are somewhat different from those which arose on the first. The file note on which the second article is based clearly links the conduct which may be "criminal rather than civi[l]" to "the Melbourne joint venture", not to the loans to the four named Beneficial executives. However, the graphic juxtaposes the passage in the file note dealing with those loans with that postulating "criminal rather than civi[l]" misconduct, separating them, however, by an ellipsis to indicate that something has been omitted. It is clear that, if there were no ellipsis, the words in the graphic would convey the meaning that all four Beneficial executives had engaged in conduct which "[might] be criminal rather than civi[l]". However, the Advertiser contends that the ellipsis indicates otherwise. That contention must be rejected. As a matter of ordinary usage, an ellipsis simply indicates that words have been omitted, not that, in their proper context, the words bear a different meaning or have a different point of reference.

67 The Advertiser has a further argument. It contends that even if the graphic, standing alone, conveys the meaning that all four executives engaged in conduct which "[might] be criminal rather than civi[l]", the article must be read as a whole and, when so read, that is not the meaning it conveys. The Advertiser is correct in its contention that the article must be read as a whole. In this regard, it is sufficient to note that it is the article, not the graphic, which it defends as a fair and accurate report of the proceedings of the Royal Commission. However, it is not correct in its contention that, when read as a whole, the article conveys a different meaning from that conveyed by the graphic.

68 The meaning conveyed by the graphic is, to a large extent, reinforced by the opening paragraphs of the second article which refer to "multimillion-dollar unauthorised loans involving senior executives", state that Mr Simmons said that "the circumstances surrounding the loans 'may be criminal'" and then assert that "[t]he loans include unapproved loans to four senior Beneficial Finance Corporation executives and a $37 million joint venture arrangement with a Melbourne developer". And the meaning thus reinforced is not changed by the subsequent quotations from Mr Simmons' file note.

69 As already indicated, the file note clearly links the conduct that may be "criminal rather than civi[l]" with the Melbourne joint venture. However, the article does not. The article severs the relevant paragraph in the file note into three distinct paragraphs, the first of which deals with loans to the four named executives and the second with the Melbourne joint venture. There then follows a third and separate paragraph in these terms:

> " May be criminal rather than civic (civil misconduct)".

Thus disjoined, the third paragraph is ambiguous in that it may refer to the loans, to the Melbourne joint venture or to both. Because it is ambiguous, it does nothing to modify the opening paragraphs of the article or the meaning of the words in the graphic.

70 Contrary to the submissions made on behalf of the Advertiser, the second article, when read as a whole, indicates that, by reason of unauthorised loans, all four named Beneficial executives, including Mr Chakravarti, engaged in conduct which might be "criminal rather than civi[l]". In this respect, the article departs significantly from the file note and, thus, it was also open to Cox J to find that it was not a fair and accurate report of the proceedings of the Royal Commission.

The meanings pleaded with respect to the second article

71 The following meanings were pleaded with respect to the second article:

"(a) the plaintiff had engaged in criminal conduct in connection with a loan or loans made to him;

(b) the plaintiff was a party to a conspiracy within the State Bank group in connection with multimillion dollar unauthorized loans;

(c) the plaintiff had received one or more loans which were not approved or authorized and which provided greater benefits to him than those to which he was entitled and that the plaintiff had been involved in criminal, or at least civil, misconduct in connection with obtaining those loans;

(d) the plaintiff had received a loan which had not been approved or authorized and which provided benefits in excess of his entitlement, in relation to a joint venture with a Melbourne developer, which loan was $37 million in default;

(e) the plaintiff had engaged in criminal, or at least civil, misconduct in connection with that loan;

(f) [t]he plaintiff's conduct in relation to the stated loans was such as to render him not a fit and proper person to be or remain a Beneficial Finance executive or to be or remain in any other position of trust."

72 It was held by majority in the Full Court that the second article does not bear the first of the pleaded meanings, but bears the others[64]. So far as the first of the pleaded meanings is concerned, the Full Court was clearly correct in its view that the article does not convey the meaning that the plaintiff had engaged in criminal misconduct. As pointed out by Doyle CJ, "[t]he distinction between 'may be' and 'is' is significant"[65] and the article is consistent in its statement that the conduct in issue "may be criminal rather than civi[l]". Accordingly, Mr Chakravarti cannot succeed on this issue.

73 The Advertiser contends by its cross-appeal that the article does not bear the second, fourth, fifth and sixth of the meanings pleaded by Mr Chakravarti, conceding only that it bears the third meaning, namely, that he "had been involved in criminal, or at least civil, misconduct in connection with obtaining [unapproved or unauthorised loans]". The second of the meanings pleaded is that Mr Chakravarti "was a party to a conspiracy ... in connection with multimillion dollar unauthorized loans". The article refers, in its opening sentence, to a conspiracy and to "multimillion-dollar unauthorised loans involving senior executives", identifies the four named Beneficial executives as persons who have loans in excess of agreed benefits, and records that they "will have to go". There is nothing to suggest that the conspiracy related to anything but the loans to which the article refers and there is nothing to suggest that any of the four named executives was not a party to that conspiracy. In these circumstances, it was clearly open to the majority of the Full Court to conclude that the article bore the second of the meanings pleaded by Mr Chakravarti.

74 The fourth of the pleaded meanings asserts that Mr Chakravarti "received a loan ... in relation to a joint venture with a Melbourne developer". The article does not, in terms, state that that loan was made to Mr Chakravarti or to any of the other named executives. Rather, the article distinguishes between the Melbourne joint venture and loans to Beneficial executives in the statement that the loans which Mr Simmons said might be criminal "include unapproved loans to four senior Beneficial ... executives and a $37 million joint venture arrangement with a Melbourne developer". In the circumstances, it was not open to the Full Court to find that the second article bore the fourth of the meanings pleaded in the Amended Statement of Claim.

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64 (1996) 65 SASR 527 at 549-550 per Doyle CJ, 557 per Perry J. Williams J found that the second article bore only the fourth and fifth meanings and to a limited extent the sixth meaning: at 560-561.

65 (1996) 65 SASR 527 at 549.

75 The fifth of the pleaded meanings is that Mr Chakravarti "had engaged in criminal, or at least civil, misconduct in connection with [the Melbourne joint venture] loan". Given that the article clearly indicates that the loans which "may be criminal" include the Melbourne joint venture and also indicates, without distinguishing between them, that the four named executives "will have to go", it was open to the Full Court to conclude that the article bears the meaning pleaded.

76 The sixth of the pleaded meanings, namely, that Mr Chakravarti is not a fit and proper person to be an executive, is, in effect, an innuendo which follows from the other meanings pleaded. That innuendo arises notwithstanding that Mr Chakravarti cannot rely on the first and fourth of the other meanings pleaded.

Section 7 of the Act

77 Although it is not strictly necessary, it is convenient to deal with the issues which arise out of s 7 of the Act and which were argued in this Court. Moreover, it is convenient to deal with them before dealing with the questions raised with respect to damages.

78 Section 7(1) of the Act relevantly provides:

> " A fair and accurate report published by newspaper, radio or television of the proceedings of-
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> ...
>
> (c) a meeting of any royal commission ...
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> ...
>
> shall be privileged unless it is proved that the report or publication was published or made maliciously:
>
> Provided that-
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> ...
>
> (b) the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it is proved that the defendant has been requested to publish by the same newspaper or radio or television station, as the case may be, a reasonable letter or statement by way of contradiction or explanation of such report or other publication and has refused or neglected to do so:
>
> (c) nothing in this section shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the

> publication of any matter not of public concern and the publication of which is not for the public benefit."[66]

79 It was suggested in the course of argument that the articles do not report a meeting of the Royal Commission, it being put that the expression "a meeting of [a] royal commission" does not encompass the public proceedings of a royal commission. That suggestion does not withstand scrutiny. It is to be noted that s 7(1)(c) is relevantly directed to the proceedings of a meeting of a royal commission and it would have little, if any, work to do if its operation were confined to the proceedings of a private meeting of a royal commission. And although it is not usual to speak of "a meeting of [a] royal commission", there is no difficulty in describing what occurred on 14 July 1992, when Mr Simmons gave evidence to the Royal Commission, as having occurred in the course of the proceedings of a meeting of the Royal Commission.

80 The second matter raised with respect to s 7 concerns proviso (b). As already indicated, Mr Chakravarti submitted a written reply to the Advertiser with respect to each of the articles with which this appeal is concerned. In his letter in response to the first article, he referred to the substance of the report, denied that there had been any misconduct on his part and asserted that any loans he had with Beneficial

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66 Section 7(1) also provides that a "fair and accurate report" published by newspaper, radio or television of the proceedings of:

> "(a) a public meeting; or
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> (ab) either House of Parliament; or
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> (b) (except where neither the public nor any reporter is admitted) ... any meeting of a municipal or district council, school board of advice, board of health, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the abovementioned bodies; or
>
> (c) a meeting of any ... select committee of either House of Parliament; or
>
> (d) a meeting of shareholders in any bank (within the meaning of the *Banking Act 1959* [(Cth)]) or incorporated company,
>
> and the publication by newspaper, radio or television at the request of any Government office or department, Minister of the Crown, or Commissioner of Police, of any notice or report issued ... for the information of the public, shall be privileged unless it is proved that the report or publication was published or made maliciously".

"were within the criteria for such loans ... and at commercial rates of interest". The letter continued:

> "Moreover, I do not believe that Mr Simmons either intended to or did make any allegation to the Premier (or to the Royal Commission) of criminal or civil misconduct which extended to me."

Mr Chakravarti's reply to the second article was not as measured in its tone as his reply to the first. He began by referring to the publication of Mr Simmons' "purported diary notes" and described the second article as "grossly unfair and inaccurate".

81 Before replying to the first article, Mr Chakravarti checked the transcript of the proceedings of the Royal Commission and ascertained that it did not record any answer to the question whether Mr Simmons had made it clear to the Premier that "with reference to Messrs Baker, Reichert, Martin and Chakravarti there was a question of either civil or criminal misconduct to be looked at". However, the Advertiser's reporter believed that the question had been answered affirmatively and, as earlier indicated, the transcript was later amended to record that that was so.

82 The Advertiser declined to publish either of Mr Chakravarti's letters. At first instance, Cox J expressed the view that the question whether the letter forwarded by way of reply to the first article was reasonable was "to be judged objectively". His Honour held that it was not reasonable because for the Advertiser "to have published the letter as it stood would have amounted ... to an admission of seriously inaccurate reporting and could well have invited protests, if not more, from its reporter and from Mr Simmons"[67]. His Honour also held that the reply to the second article was not reasonable because it was "marred by [the] description of the article as 'grossly unfair and inaccurate'" and by "[a subsequent] ... reference ... to 'your inaccurate and unfair reporting'". His Honour also noted the reference to the "purported" diary note[68].

83 In the Full Court, it was said by Doyle CJ that the letter by way of reply to the first article was not reasonable "because it denied that Mr Simmons had given the evidence which he in fact gave"[69]. And his Honour endorsed the reasons of

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67 (1995) 181 LSJS 218 at 228.

68 (1995) 181 LSJS 218 at 235.

69 (1996) 65 SASR 527 at 546.

Cox J for concluding that failure to publish the letter by way of reply to the second article did not deprive the Advertiser of the protection of s 7 of the Act[70].

84 In this Court, the Advertiser argued that a letter or statement will only be reasonable for the purposes of s 7 of the Act if it does not controvert the fairness of the report in question. Seemingly, that proposition underlies the reasoning of Cox J at first instance and that of Doyle CJ in the Full Court. That proposition was disputed by counsel for Mr Chakravarti who also contended that reasonableness, for the purposes of s 7, is to be determined by reference to the facts as known at the time the letter contemplated by proviso (b) is written or the statement made. And it was put that as no answer had been recorded to the critical question asked of Mr Simmons when Mr Chakravarti's letter in reply to the first article was written, that letter was entirely reasonable.

85 Given that proviso (b) is concerned with "a reasonable letter or statement by way of <u>contradiction</u> or explanation of [a] report or ... publication" (emphasis added), it is not possible, in our view, to treat it as imposing an absolute requirement that the letter or statement not controvert the fairness or the accuracy of the report in question. In so far as that is implicit in the argument for the Advertiser, it must be rejected. Even so, it would not ordinarily be reasonable to controvert the fairness of a report on a basis which is factually incorrect. That notwithstanding, it does not automatically follow that the measured assertion of a belief which is subsequently shown to be incorrect is unreasonable.

86 The proposition implicit in the argument made on behalf of Mr Chakravarti, namely, that the question of reasonableness for the purpose of proviso (b) to s 7 of the Act is to be answered simply by reference to the facts known at the time the letter is written or the statement made must also be rejected. Where, as here, a statutory provision requires that some act or thing be reasonable, without specifying the criteria to be applied, that issue is determined by the making of a value judgment in the light of all the circumstances save those which, by reason of the subject-matter concerned, are wholly extraneous[71]. There is, in our view,

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70 (1996) 65 SASR 527 at 551.

71 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504, 505 per Dixon J. See also *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 23 per Mason J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49 per Stephen, Mason, Murphy, Aickin and Wilson JJ; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 56 per Brennan J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 per Gaudron J; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ; *Minister for Immigration and Ethnic*

(Footnote continues on next page)

nothing in defamation law generally or in the law with respect to reports of the proceedings of public bodies, whether under s 7 or at common law, which would confine the consideration of reasonableness to the facts known at the time the letter or statement contemplated by s 7 is written or made. Thus, it is conceivable that a letter might be held to be unreasonable because of some misstatement of fact, although the letter was thought by all concerned to be accurate at the time it was written. However, given that "reasonableness" is simply a matter of making a value judgment and given also that the reasonableness of the letters forwarded to the Advertiser by Mr Chakravarti is no longer a live issue, it is not necessary to say anything further on the matter.

87 The third question that arises with respect to s 7 of the Act is whether sub-s (c) precludes an alternative claim of common law privilege. It is true, as Cox J observed at first instance, that it would be a curious result if s 7 operates so that a defendant could fail on the statutory defence by reason of its failure to publish a letter in reply and yet succeed on an alternative common law defence[72]. However, that possibility is inherent in the direction in the first part of proviso (c), namely, that "nothing in [s 7] shall be deemed or construed to limit or abridge any privilege now by law existing".

88 Section 7 was first enacted in 1895 and it was argued on behalf of Mr Chakravarti that, at that stage, there was no relevant common law defence of fair report of the proceedings of a royal commission. Whether or not that is so, that is not the question posed by the first part of proviso (c). For present purposes, the question is whether there was then any privilege for the publication of a fair report of the proceedings of a royal commission.

89 In *Stephens v West Australian Newspapers Ltd*[73], Brennan J undertook a comprehensive review of the common law of qualified privilege in its application to fair and accurate reports of public bodies. As his Honour's judgment in that case shows, the common law had, by 1895, recognised that qualified privilege extended

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Affairs v Teoh (1995) 183 CLR 273 at 285 per Mason CJ and Deane J; *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 661 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

72 (1995) 181 LSJS 218 at 229.

73 (1994) 182 CLR 211 at 247.

to fair and accurate reports of the proceedings of Parliament and of the courts[74]. And by then, the common law had also recognised that reports of the proceedings of other public bodies were published on occasions of qualified privilege if, as was conclusively taken to be the case in relation to the proceedings of Parliament and of the courts, publication was in the public interest. Thus, for example, it had then been held in *Allbutt v General Council of Medical Education and Registration*[75] that a fair and accurate report of the proceedings of a medical disciplinary body was privileged, it being said by Lopes LJ that "having regard to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the council, and the duty of the council towards the public ... [the] report stands on principle in the same position as a judicial report."[76]

90 It follows that the Advertiser was entitled to plead privilege under s 7 of the Act and also common law qualified privilege. To plead common law qualified privilege, however, it is necessary to plead that the publication is a fair and accurate report of the body in question and that publication is in the public interest. The question whether the Advertiser's Defence, which simply asserted that each article was a fair report of the proceedings of the Royal Commission and privileged at common law, should be construed as impliedly asserting that publication was in the public interest is one that need not be pursued.

Damages

91 Mr Chakravarti makes two complaints with respect to the Full Court's assessment of damages. First, he complains that the Full Court was in error in holding that he could only recover in respect of those imputations which arose out of those parts of the articles which did not fairly report the proceedings of the Royal Commission. His second complaint is that the Full Court erred in its approach to his claim with respect to economic loss.

92 In confining damages to those imputations which arose only from those parts of the articles which did not fairly and accurately report the proceedings of the Royal Commission, Doyle CJ stated, in relation to the first article, that the Advertiser was "only liable for that part of the article which is not privileged ... [and t]herefore one must subtract from the defamatory effect of the article that

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74 See with respect to the proceedings of Parliament, *R v Wright* (1799) 8 TR 293 [101 ER 1396]; *Wason v Walter* (1868) LR 4 QB 73; with respect to proceedings in the courts, *Kimber v The Press Association* [1893] 1 QB 65 at 68 per Lord Esher MR.

75 (1889) 23 QBD 400.

76 (1889) 23 QBD 400 at 410.

effect which derives from the non-actionable parts, in accordance with Lord Radcliffe's approach [in *Dingle v Associated Newspapers Ltd*[77]]"[78]. Doyle CJ adopted the same approach with respect to the second article[79] and, to that extent, the approach was one with which Perry J seemingly agreed[80].

93 In *Dingle*, Lord Radcliffe observed that the trial judge's task of assessing damages in that case had not been simple because "[h]e had first to eliminate from his mind that small part of the imputation that he found to have been justified ... [and n]ext [he] had to eliminate that part of the article that consisted of extracts from the select committee's report[81], since under the Act of 1840 such extracts could not in law be treated as a libel"[82]. That approach would have been permissible in this case if the Advertiser had justified one or more of the imputations upon which Mr Chakravarti relied[83] or established that some discrete part was fair comment or was privileged on some basis other than fair report of the proceedings of the Royal Commission. But that approach has no application where the issue is simply one of fair report of particular proceedings.

94 A report is either fair or it is not. Where privilege attaches, it attaches because it is in the public interest to publish a fair report of the proceedings in issue. It is not in the public interest to publish a report that is unfair, even if the report is accurate in part. Thus, it is inaccurate to speak of parts of an unfair report which are privileged or non-actionable unless, as earlier indicated, they are privileged on some other basis, are fair comment or have been justified.

95 It is necessary, in order to understand Mr Chakravarti's second complaint with respect to damages, to say a little more of the facts. Mr Chakravarti left Beneficial in 1990 of his own accord. Thereafter, he had difficulty in obtaining

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77 [1964] AC 371.

78 (1996) 65 SASR 527 at 554.

79 (1996) 65 SASR 527 at 554.

80 (1996) 65 SASR 527 at 557.

81 The reference is to a Select Committee of the House of Commons.

82 [1964] AC 371 at 394.

83 See, with respect to justification of part only of the material sued upon, *Sutherland v Stopes* [1925] AC 47 at 78 per Lord Shaw of Dunfermline; *Plato Films Ltd v Speidel* [1961] AC 1090 at 1141-1142 per Lord Denning.

comparable employment. In April 1992, his family company contracted his services to Leal Boss at an annual salary of $90,000 plus superannuation and other benefits. His services with Leal Boss were terminated on 17 July 1992, two days after publication of the first article. Mr Chakravarti gave evidence at trial that he had since been unable to obtain regular employment. No evidence was called from Leal Boss to say why Mr Chakravarti had been dismissed.

96 In his Amended Statement of Claim, Mr Chakravarti particularised the loss of employment with Leal Boss and his subsequent inability to obtain regular employment as "economic loss". And, at first instance, Cox J held that it was "likely that, if the articles had not been published but, for some reason, [Mr Chakravarti] had not continued with Leal Boss, he would have obtained a good job, possibly even a better one, elsewhere" and, thus, he had "made out his case of special damage."[84]

97 In the Full Court, Doyle CJ, who would have found for Mr Chakravarti on both articles, was of the view that it could not be "conclude[d] on the balance of probabilities that the defamatory imputations [in the first article] were the cause of [Mr Chakravarti's] dismissal [by Leal Boss]" and that "[o]n the scant evidence ... it [was] ... impossible to say what effect the defamatory imputations ... had on [his subsequent] employment prospects"[85]. On the other hand, Williams J held that Mr Chakravarti had not established his claim for economic loss because there was no connection between the meanings which, in his view, were conveyed by the second article[86] and the termination of his employment[87]. Perry J seemingly indicated his agreement on this issue with the Chief Justice[88].

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84 (1995) 181 LSJS 218 at 240.

85 (1996) 65 SASR 527 at 552.

86 See footnote 37.

87 (1996) 65 SASR 527 at 561.

88 (1996) 65 SASR 527 at 557.

98 It is necessary to say something with respect to "special damage" for the purposes of the law of defamation. At common law[89] and subject to exceptions[90] with respect to words imputing certain crimes[91], contagious or infectious disease[92], adultery or unchastity (in the case of females)[93] and words disparaging a person in his office, trade, calling, business or profession[94], slander is only actionable on proof of special damage[95]. The special damage which must be proved is some form of pecuniary loss or loss capable of assessment in money terms[96]. It clearly includes the loss or refusal of employment if sufficiently connected with the words spoken[97]. Special damage may also be established by proof of general loss of business, at least if that is the likely consequence of the slander involved[98]. Whether, in an action for slander where special damage is shown, the plaintiff is limited to the recovery of the amount of that special damage or whether general damages may be awarded is a question yet to be decided authoritatively[99]. The issue does not arise here because the action was in libel rather than slander and the special damage requirement applies only to the latter.

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89 By statute in various Australian jurisdictions (but not including South Australia), slander has been assimilated to libel: *Defamation Act* 1889 (Q), s 5; *Defamation Act* 1901 (ACT), s 3; *Defamation Act* (NT), s 2; *Defamation Act* 1974 (NSW), s 8. See Fleming, *The Law of Torts*, 9th ed (1998) at 602.

90 *Gatley on Libel and Slander*, 9th ed (1998) par 3.6.

91 *Gatley on Libel and Slander*, 9th ed (1998) pars 4.2, 4.3.

92 *Gatley on Libel and Slander*, 9th ed (1998) par 4.13.

93 *Gatley on Libel and Slander*, 9th ed (1998) par 4.20; see *Wrongs Act* 1958 (Vic), s 8; *Wrongs Act* 1936 (SA), s 5.

94 *Gatley on Libel and Slander*, 9th ed (1998) par 4.15.

95 *McGregor on Damages*, 16th ed (1997) par 1870.

96 *McGregor on Damages*, 16th ed (1997) par 1871.

97 *McGregor on Damages*, 16th ed (1997) par 1874.

98 *Ratcliffe v Evans* [1892] 2 QB 524 at 533 per Bowen LJ. See also *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 259, 260 per Mahoney JA.

99 *McGregor on Damages*, 16th ed (1997) par 1888; Waddams, *The Law of Damages*, 2nd ed (1991) par 4.40.

99 It is necessary to return to the finding at first instance. That was a finding that, had the articles not been published and had Mr Chakravarti elected not to remain with Leal Boss, he would have been able to obtain comparable or better employment elsewhere[100]. That is a finding of lost earning capacity or, perhaps, more accurately, a finding which supports a finding to that effect. Lost earning capacity, if it is or may be productive of actual loss[101], is loss which is capable of assessment in money terms. And it may fairly be described as special damage for the purpose of defamation law. However, in other areas of the law, notably personal injury cases, the expression "special damage" is sometimes used to refer to out-of-pocket expenses and past loss of earnings. Even in personal injury cases, however, damages are awarded for loss of earning capacity, not past loss of earnings[102]. Where a figure is included for past loss of earnings, it is simply the measure of a component part of the damages for lost earning capacity.

100 The award of $175,000 by way of special damages was not an award of special damages for the purposes of defamation law[103]. Rather, it was an award with respect to past loss of earnings. In this respect it is sufficient to refer to the sum involved and the award of interest[104]. And it has been treated by the parties and by the Full Court as an award with respect to past loss of earnings[105]. Because it has been so treated, it was again contended on behalf of Mr Chakravarti in this Court that the first article caused the termination of his services with Leal Boss.

101 Although there might be room for argument whether the evidence would support a finding that the first article resulted in the termination of Mr Chakravarti's services, that was not the finding made at first instance. As already indicated, that finding was simply that, but for the articles, Mr Chakravarti would have been able to obtain comparable or better employment elsewhere[106].

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100 (1995) 181 LSJS 218 at 240 per Cox J.

101 cf *Medlin v State Government Insurance Office* (1995) 182 CLR 1 at 3, 4 per Deane, Dawson, Toohey and Gaudron JJ.

102 *Medlin v State Government Insurance Office* (1995) 182 CLR 1 at 16, 18, 19 per McHugh J.

103 cf *Ratcliffe v Evans* [1892] 2 QB 524 at 528 per Bowen LJ.

104 (1995) 181 LSJS 218 at 240 per Cox J.

105 As to the approach of the Full Court, see (1996) 65 SASR 527 at 552 per Doyle CJ, 557 per Perry J, 561 per Williams J.

106 (1995) 181 LSJS 218 at 240 per Cox J.

That was a finding of fact and a finding that was clearly open on the evidence. When there is added to that finding the undisputed fact that Mr Chakravarti's services were terminated and the evidence, which Cox J said he was disposed to accept, that Mr Chakravarti had not thereafter had regular employment, it was open to his Honour to conclude that the articles resulted in a loss of earning capacity productive of actual loss. To the extent that the Full Court reached a contrary view[107], it was in error. And once Cox J concluded that there had been actual loss, it was open to his Honour to quantify that aspect of Mr Chakravarti's lost earning capacity in a sum reflecting the income he otherwise could and would have earned. As will later appear, there is an outstanding question whether the sum awarded accurately reflects that loss.

102 Two other matters should be noted. Once it is seen that Mr Chakravarti is entitled to damages for lost earning capacity, whether or not some component part is reflected in terms of past income loss, it is irrelevant whether his services with Leal Boss were terminated because of the first article or for some other reason. The fact is they were terminated. And, as is implicit in the findings of Cox J, he suffered actual loss when he could not thereafter obtain regular employment. Moreover, because damages are awarded for lost earning capacity, it is irrelevant that Leal Boss had contracted with Mr Chakravarti's family company and not with Mr Chakravarti personally, a matter which the Advertiser contended would also justify the Full Court in reaching the conclusion that he was not entitled to special damages[108].

Outstanding matters

103 Mr Chakravarti's cross-appeal to the Full Court with respect to general damages was dismissed in a context in which it was wrongly held that he was not entitled to succeed on the first article and was only entitled to damages for those imputations arising out of those parts of the second article which did not fairly report the proceedings of the Royal Commission. It is thus necessary for the cross-appeal to be remitted to the Full Court for its consideration in the light of these reasons. On any view, the imputations were of a kind that could be expected seriously to injure Mr Chakravarti in his capacity as a professional employee in the finance industry and, thus, warrant a very substantial award of general damages.

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107 (1996) 65 SASR 527 at 552 per Doyle CJ, 557 per Perry J, 561 per Williams J.

108 Transcript of proceedings, 2 September 1997 at 90-95.

104 The other matter which should be noted is that the Full Court had no need to deal with an alternative ground of appeal advanced by the Advertiser in that Court, namely, that the award of $175,000 for special damage was manifestly excessive (Ground 6). Nothing was advanced in this Court in support of that proposition. However, as it was not dealt with by the Full Court, that issue should also be remitted to that Court for its consideration but on the footing, as indicated above, that the true character of the award was with respect to past loss of earnings.

<u>Orders</u>

105 Although Mr Chakravarti has failed in his contention that the Full Court should have found that the second article bore the first of the meanings pleaded with respect to it, that does not deprive him of a verdict on that article. Similarly, although the Advertiser is correct in its contention that the Full Court should not have found the fourth of the meanings pleaded with respect to the second article, that does not entitle it to a verdict. Accordingly orders should be made as follows:

1. Appeal allowed with costs.

2. Cross-appeal dismissed with costs.

3. Set aside the orders of the Full Court of the Supreme Court of South Australia.

4. Remit the appellant's cross-appeal to the Full Court to that Court for further hearing and determination in accordance with the reasons of this Court.

5. Remit Ground 6 of the respondent's appeal to the Full Court to that Court for hearing and determination in accordance with the reasons of this Court. Otherwise dismiss the appeal to that Court with costs.

106 KIRBY J. This appeal from the Full Court of the Supreme Court of South Australia[109] concerns defamation law and practice. This is one of the most criticised areas of the law. The commonest criticism is that both law and practice are unnecessarily complicated[110]. Such complexity has consequences which are often unfortunate for plaintiff and defendant alike. But also for the public which has its own interest, particularly where, as here, the matter complained of involves issues of more than private concern.

107 Many questions are involved in the appeal. But there are three which are most important: (1) whether the matters complained of defamed the plaintiff; (2) whether, if they did, the publications were protected as fair and accurate reports of a Royal Commission proceeding or lost that protection by the refusal of the publisher to print letters submitted by the plaintiff in answer to the publications; and (3) whether the approach by the courts below to the damages recoverable by the plaintiff has been shown to be erroneous. At every stage in answering these questions there are problems to be solved. A measure of their difficulty may be seen in the acute differences of opinion between the primary judge[111] and each of the judges constituting the Full Court.

<u>Background facts</u>

108 Mr Manobendro Chakravarti (the appellant), a well qualified finance executive originally from India, joined Beneficial Finance Corporation ("BFC") in 1983. That company was a wholly owned subsidiary of the State Bank of South Australia ("the Bank"). Initially, the appellant served as State Manager of BFC for Western Australia. By 1986 he had risen to General Manager of BFC's commercial business. By 1988 he had been appointed Chief General Manager of BFC's head office operations in Adelaide. In 1990 he was appointed Executive Director of the company's Australian business division. This was the position he held on 30 July 1990 when Mr D W Simmons, who was then the Chairman of the Board of the Bank and Chairman of BFC, called on the Premier of South Australia (the Hon J C Bannon) to discuss with him matters about the operations of BFC which were of concern.

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109 *Chakravarti v Advertiser Newspapers* (1996) 65 SASR 527.

110 See eg Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy, Report No 11* (1979) at ix-x; Great Britain, *Report of the Committee on Defamation* (1975) [Cmnd 5909] at 5; Arnold-Moore, "Legal Pitfalls in Cyberspace: Defamation on Computer Networks" (1994) 5 *Journal of Law and Information Science* 165 at 208; Barendt et al, *Libel and the Media. The Chilling Effect* (1997) at 1.

111 *Chakravarti v Advertiser Newspapers Limited* (1995) 181 LSJS 218 per Cox J.

109 The conversation with the Premier followed a significant downturn in BFC's profits and the conduct of a preliminary audit. Mr Simmons kept a record of the subject matters of his discussion with the Premier. At the trial, that record was described as Mr Simmons's "diaries". Four officers of BFC were named in the "diaries": Messrs Baker, Reichert, Martin and Chakravarti. At the time, Mr Baker was the Managing Director of BFC and Mr Reichert was his deputy. Following Mr Simmons's meeting with the Premier, in early August 1990, Mr Baker and Mr Reichert resigned their positions with BFC. On 7 August 1990, the Premier told Parliament that Mr Baker had retired from his position "following differences of opinion"[112] with the Board of BFC as to the direction that BFC was taking. The appellant continued in BFC's employ. Indeed, in late August 1990, he was appointed director of seven related companies. He applied for appointment as Managing Director in succession to Mr Baker. However, he was not appointed. On 16 November 1990, the appellant resigned from his employment with BFC. He did so "of his own accord"[113] after relations with the new Managing Director became strained. Thereafter, he did a little consulting work and ultimately, in April 1992, was appointed Chief General Manager of Leal Boss Computer and Office Supplies Pty Ltd ("Leal Boss").

110 Meanwhile, following a near financial collapse of the Bank and its related companies (including BFC) a Royal Commission was established in South Australia to investigate what had occurred. At the relevant time the Commission was constituted by the Hon S J Jacobs QC, a retired judge. It commenced its inquiry in March 1991[114].

111 By September 1991, Mr Martin had left the employ of BFC. Thus, each of the four persons named in Mr Simmons's "diaries" had departed BFC by the time in July 1992 that the Royal Commissioner turned to hear the evidence of Mr Simmons. On 14 July 1992, in oral evidence, Mr Simmons mentioned the appellant by name. It is the report of that evidence beginning on page 1 of the edition of *The Advertiser* of 15 July 1992 which gives rise to the first claim of the appellant. The newspaper is published by Advertiser Newspapers Limited (the respondent). The publication of 15 July 1992 will be described as the "first article". The appellant considered that the first article defamed him. He took the day of the publication and the following day off work from Leal Boss. Believing that an answer given by Mr Simmons, quoted in the article, was

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112 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 7 August 1990 at 49.

113 (1995) 181 LSJS 218 at 224.

114 cf South Australia, *Royal Commission into the State Bank of South Australia, First Report*, November 1992; *Second Report*, March 1993; *Final Report*, September 1993.

incorrectly reported, he went to the offices of the Royal Commission to check the transcript. Finding it, in its then uncorrected state, to accord with his impression, he wrote a short letter to the editor of *The Advertiser*. In that letter, he asked the respondent to publish his reply to the article. Evidence was given at the trial that, upon receipt of the letter, the editor consulted the journalist involved. After she had confirmed her notes and adhered to the accuracy of her report, the editor elected to support the published report. He refused, or in any case neglected, to publish the appellant's letter. That letter will be described as the "first letter".

112 The appellant returned to work at Leal Boss on 17 July 1992. However, according to his evidence, he was immediately dismissed, without notice, by one of that company's directors. The primary judge drew the inference that the appellant had lost his job as a result of the publication of the first article[115]. He inferred that the difficulty which the appellant thereafter encountered in securing employment arose from his inability to clear his name publicly. In the Full Court, these conclusions were set aside[116]. However, to the date of the trial, the appellant was effectively unemployed.

113 On the same day as the appellant was dismissed by Leal Boss, the Royal Commissioner released to the public an edited version of Mr Simmons's "diaries". They were examined by journalists of the respondent. On 18 July 1992, *The Advertiser* carried, also on its front page, a further item titled "Loans may be criminal: bank chief's diaries". That article was continued on page 2 under the heading "Loans may be criminal - diaries". The next day, the appellant wrote a further letter to the editor expressing his views. He requested that this be published. It was not. These items will be referred to, respectively, as the "second article" and the "second letter".

114 Five days later the appellant commenced proceedings in the Supreme Court of South Australia. His Statement of Claim pleaded the two articles. It contained, after each, a paragraph pleading false innuendos expressing what he alleged, in their natural and ordinary meaning, the words complained of meant[117].

115 The respondent denied that either of the matters complained of in the two articles was capable of bearing the meanings assigned by the appellant "or any meaning defamatory of [him]". In so far as the words complained of were defamatory of the appellant, the respondent pleaded imputations for which it contended. These were to the effect that the appellant, along with other BFC

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115 (1995) 181 LSJS 218 at 239-240.

116 (1996) 65 SASR 527 at 552 per Doyle CJ, at 557 per Perry J, concurring.

117 Amended Statement of Claim, par 4 (as to the first article) and par 7 (as to the second article).

executives, was suspected of criminal or civil misconduct and was under investigation specifically in relation to excessive, unauthorised or unapproved loans. As so understood, the respondent pleaded justification. Alternatively, it pleaded that the articles complained of constituted a fair and accurate report of the proceedings of the Royal Commission and, as such, were privileged[118].

116 The material paragraphs of the appellant's Reply denied the imputations pleaded by the respondent and, in answer to the defence of fair and accurate report, pleaded that the articles were not fair and accurate reports and that, in any case, the respondent could not avail itself of the defence. This was because (1) publication of this portion of the Royal Commission's proceedings was neither of public concern nor for the public benefit; (2) the respondent had refused or neglected to publish the letters sent to it by the appellant; and (3) it had acted with actual malice. In answer to the suggested defence of common law privilege for a report of proceedings of a Royal Commission, the appellant disputed the existence of such a common law defence; repeated his denial of the assertion that the report was fair and accurate; and pleaded that any such defence was defeated since the respondent had acted with actual malice.

117 In its Amended Rejoinder the respondent denied the appellant's material assertions. As to the letters, it admitted receiving them but asserted that it was not obliged to publish them.

<u>Trial and appeal</u>

118 In accordance with the practice in South Australia, the trial of the foregoing issues was heard by a judge sitting without a jury. After a lengthy hearing, the judge concluded that, in their natural and ordinary meaning, each of the articles complained of was defamatory of the appellant. He also concluded that neither of the articles represented a fair and accurate report of the proceedings of the Royal Commission. He rejected various other arguments advanced by the parties. He proceeded, on the foregoing basis, to award damages to the appellant of $250,000, plus interest. This was made up of a component of general damages and a component of what was described as "economic loss - ... special damages"[119]. The Judge divided these sums, with an acknowledgment of "a good deal of arbitrariness"[120] between the two articles.

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118 Defendant's Third Further More Explicit Defence, par 9 ("pursuant to Section 7 of the Wrongs Act (SA) and at common law").

119 (1995) 181 LSJS 218 at 240.

120 (1995) 181 LSJS 218 at 240 following *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44.

119 The respondent appealed to the Full Court. By majority that Court upheld the appeal with respect to the first claim[121]. Although Doyle CJ found for the appellant on the first article, he did so on a basis considerably narrower than the primary judge[122]. He was unconvinced that the appellant had established that the defamatory imputations in the first article "were the cause of the dismissal"[123]. Accordingly, he would have allowed only a sum of $45,000 general damages in respect of the first article[124]. In respect of the claim based on the second article, the Full Court was unanimous, although for differing reasons. It held that the appellant was entitled to succeed. However, the damages were reassessed and allowed at $40,000[125]. It was therefore, ultimately, only in that amount, to which was added a sum for interest, that judgment was, by majority, entered by the Supreme Court.

120 Against those orders, the appellant, by special leave, has appealed to this Court. The respondent filed a notice of contention supporting the orders of the Full Court upon bases different from those accepted by that Court. During the hearing, this Court also granted the respondent special leave to cross-appeal.

The issues

121 The primary judge expressed the opinion that the conduct of the litigation by the respondent demonstrated "a degree of intransigence" on its part[126]. Some (but by no means all) of the respondent's particulars of defence were found to have been unjustified. Accordingly these were available to bolster the appellant's damage[127]. Clearly, the case was hard fought at the trial and no less so in the appeals. The result is that a very large number of issues have been presented for decision. At the risk of some over-simplification, the ultimate issues for the determination of this Court are:

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121 (1996) 65 SASR 527 per Perry J and Williams J; Doyle CJ dissenting.

122 (1996) 65 SASR 527 at 543.

123 (1996) 65 SASR 527 at 552.

124 (1996) 65 SASR 527 at 555.

125 (1996) 65 SASR 527 at 555 per Doyle CJ, at 557 per Perry J, at 562 per Williams J.

126 (1995) 181 LSJS 218 at 239.

127 (1995) 181 LSJS 218 at 238-239.

1. *The defamation issue:* Were the matters complained of capable of bearing the defamatory imputations found[128]?

2. *The imputation issue:* If so, were the defamatory imputations so pleaded by the appellant or, alternatively, could the appellant rely upon them within his pleading[129]?

3. *The fair report issue:* If so, did the defence of fair and accurate reporting apply to afford a privilege to the respondent in respect of the publication of the matters complained of[130]? The respondent relied upon this defence both by statute[131] and by the common law. The appellant disputed the applicability of the statute but, if it applied, said that it completely excluded the common law from operation or limited the applicable common law to that "by law existing"[132] at the time of the enactment of the *Law of Libel Amendment Act* 1895 (SA)[133].

4. *The reasonable response issue:* If, prima facie, the respondent was entitled to rely on the defence of fair and accurate reporting, was such defence in the circumstances not available to it because the respondent had been requested to publish the letters written to it by the appellant and had refused or neglected to do so[134]?

5. *The economic loss issue:* If the appellant was entitled to recover damages, did the Full Court err in its re-assessment of those damages and in particular in disturbing the component allowed by the primary judge with respect to economic loss or "special damages"[135].

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128 Notice of Appeal, pars 2, 3; Notice of Cross-Appeal, par 1.

129 Notice of Appeal, pars 4, 5.

130 Notice of Appeal, par 7; Notice of Cross-Appeal, par 3; Respondent's Notice of Contention.

131 *Wrongs Act* 1936 (SA), s 7.

132 *Wrongs Act* 1936 (SA), s 7(1) proviso (c).

133 58 & 59 Vict, No 646. This was the first statute to introduce the law of fair and accurate report in South Australia. See s 4.

134 Notice of Appeal, pars 7-8.

135 Notice of Appeal, par 9. See (1996) 65 SASR 527 at 551-552 per Doyle CJ (both articles), at 557 per Perry J (second article), at 561 per Williams J (second article).

6. *The general damages issue:* In his cross-appeal to the Full Court, the appellant asserted that the assessment of his general damages at $75,000 was manifestly inadequate[136]. In the course which the Full Court took, this ground was not separately dealt with. The appellant urged this Court to return the matter to the Full Court for determination of this ground with instruction to correct the insufficiency of the general damages in order, as it was put, to bring awards in defamation judgments in South Australia into line with those made elsewhere in Australia[137]. The respondent, on the other hand, urged that no general damages were recoverable[138].

The first article

122 It is now necessary to set out the matters complained of. The first article appeared on 15 July 1992. The headline read "Bannon accused on resignations". Below the headline were equal sized photographs of each of the four officers of BFC mentioned in the article, viz Mr Baker, Mr Reichert, Mr Martin and the appellant. The article was as follows:

> "The Premier, Mr Bannon, misled Parliament over the resignation of Beneficial Finance Corporation chief Mr John Baker in August, 1990, according to evidence before the State Bank Royal Commission.
>
> Former bank chairman Mr David Simmons admitted yesterday the public reason given for the resignation of Mr Baker and his deputy, Mr Erich Reichert, was not right and that Mr Bannon knew the real reason.
>
> Mr Simmons said he told Mr Bannon on July 30, 1990, there was a 'question' of either criminal or civil misconduct to be looked at in relation to four Beneficial executives, including Mr Baker and Mr Reichert.
>
> He said he told Mr Bannon about loans to Beneficial executives and Mr Bannon reacted angrily.

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136 Amended Notice of Cross-Appeal (to the Full Court of the Supreme Court of South Australia), ground 1. The Full Court dismissed that cross-appeal: (1996) 65 SASR 527 at 555, 557.

137 cf *Crampton v Nugawela* (1996) 41 NSWLR 176 at 194-195, 199.

138 Amended Notice of Cross-Appeal (to the High Court of Australia), ground 4. The ground addressed the second article which was the only one on which the appellant succeeded before the Full Court. However, in the submissions of the respondent the proposition was common to both articles.

Mr Simmons confirmed he told Mr Bannon the question of criminal or civil misconduct was in reference to Mr Baker, Mr Reichert, Mr Gary Martin and Mr Manob Chakravarti.

'I had gone through the whole scenario and had told him (Bannon) all I knew at that stage,' Mr Simmons told the commission.

Mr Bannon told Parliament on August 7, 1990, that Beneficial's managing director Mr Baker had retired after 'differences of opinion' with the board over the 'direction' of Beneficial.

The Royal Commissioner, Mr Samuel Jacobs, QC, said yesterday the public explanation that there had been a difference of opinion over direction was not true.

Mr Jacobs: 'The fact was, to put it in its blandest form, there had been a difference of opinion between the board and these officers as to their conduct.'

Mr Simmons: 'Yes.'

Mr Jacobs: 'The reason ... announced publicly - I am going to put it quite bluntly - it really just wasn't true, was it? It really wasn't the reason at all, was it?'

Mr Simmons: 'Not really, but to give any other reason at that stage could have prejudiced any position that was being taken.

'The investigation wasn't completed at that stage and there was I believed, as I had said to the Premier, it may be criminal rather than civil.'

Mr Jacobs: 'It would have been closer to the mark to have said something like there was a difference of opinion between these officers and the board as to what was appropriate conduct for officers of the company.'"

The article then continued on page 2 of *The Advertiser*. The heading on that page read "Bannon stands accused". It proceeded:

"'That would be pretty bland and somewhere near the truth, wouldn't it?'

Mr Simmons: 'Yes.'

Mr Simmons said he was involved in the 'events' that led to the resignation of Mr Baker and Mr Reichert, but it was another executive, Mr Michael Hamilton, who sought their resignation.

Mr Simmons was asked how Mr Bannon responded when told the conduct of those involved may be criminal rather than civil and what Beneficial had learnt they had been doing.

'I think he was very angry, particularly with the reference to the Melbourne joint venture,' Mr Simmons said.

[No explanation of 'the Melbourne joint venture' was given in the commission.]

Mr Simmons agreed the bank had been concerned that Beneficial may be sued for unfair dismissal.

The Advertiser reported last year that Mr Martin left Beneficial in September, 1991, after his job was axed.

Mr Chakravarti also left Beneficial late last year.

..."

123 It was the appellant's case at trial that the first article lumped him in with executives of BFC who had been asked to resign[139]. It suggested that he had been engaged in criminal or civil wrong-doing with the others, notably with respect to loans and an undefined "Melbourne joint venture" which, by inference, involved reprehensible conduct. The appellant's case was that the loans to him were perfectly orthodox, properly authorised and charged at market rates; that he had nothing to do with the Melbourne joint venture and that he had left BFC of his own volition. By treating him as indistinguishable from the other executives, quoting passages relating to Messrs Baker and Reichert out of context, referring to the anger of the Premier in discussion with the Managing Director of the Bank and repeatedly referring to "criminal or civil misconduct", the appellant's reputation had been traduced in a serious and unjustifiable way for which he was entitled to damages.

124 The case for the respondent was that the article did no more than accurately recount the proceedings before the Royal Commission. Beyond that, it could only be read as indicating that a suspicion had been raised concerning the appellant as this was what in fact Mr Simmons had told the Royal Commissioner. A fair and accurate report of it was not only protected from action. It was in the public interest that *The Advertiser* should place that report before its readers, who were concerned about the near collapse of the Bank and of BFC which had necessitated the establishment of the Royal Commission in the first place.

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139 (1995) 181 LSJS 218 at 224.

The second article

125 The second article appeared, also commencing on the front page of *The Advertiser,* on 18 July 1992. Under the headline stated earlier, in the centre of the article, appeared a photograph of Mr Simmons. Under that photograph was an item described by counsel as a "graphic". That "graphic" was presented as an apparent tearsheet of a typed document. It was described underneath as "An excerpt from Mr Simmons' diaries". The "graphic" read:

> "Preliminary audit reveals Baker, Reichart [sic], Chakravarti and Martin have all loans which were not approved, and were not authorised and are in excess of agreed benefits ... May be criminal rather than civic [sic]".

The text of the second article was as follows:

> "Sensational allegations of a conspiracy within the State Bank group and multimillion-dollar unauthorised loans involving senior executives have been revealed in diary notes kept by former bank chairman Mr David Simmons.
>
> Mr Simmons says the circumstances surrounding the loans 'may be criminal'.
>
> The loans include unapproved loans to four senior Beneficial Finance Corporation executives and a $37 million joint venture arrangement with a Melbourne developer.
>
> Mr Simmons's diaries also refer to a 'Beneficial conspiracy', how board presentations had been 'pulled' and how internal audit reports were 'screened'.
>
> Several hundred edited pages of diary notes kept by Mr Simmons were released yesterday by the State Bank Royal Commission.
>
> ...
>
> In notes dated July 30, 1990, concerning a meeting with the Premier, Mr Simmons claims the group profit would be substantially down on the figure of $58 million to $60 million given earlier to Mr Bannon by the managing director, Mr Tim Marcus Clark.
>
> His notes reveal the likely profit as $33 million of which $30.6 million was a tax adjustment.
>
> Mr Simmons records details of loans to executives: 'Prior to last board meeting (then Beneficial chief John) Baker asked me to approve a loan of $2 million to several executives including himself.

'(I) Said was not prepared to and should go to the board.

'Board said would approve of it provided that it had Audit sign off. The loan concerned me.

'In telling management of investigation of Beneficial, suggested we should see all loans.

'Preliminary audit reveals (John) Baker, (Erich) Reichert, (Manob) Chakravarti and (Garry) Martin (all Beneficial Finance executives) have all loans which were not approved and were not authorised and are in excess of agreed benefits.

'The loan I looked at was a joint venture and it appears that this joint venture with a Melbourne developer is in default and the account is in default at a level of $37 million rather than within the approved board $30 million.

'May be criminal rather than civic (civil misconduct).'

...

Mr Simmons writes that the effect of these loans was that Mr Baker could not exercise proven control over his deputy, Mr Reichert, who 'arranged structured finance which has proved to be a disaster'.

He says board presentations were pulled and not accurate, that internal audit reports were screened, that the Beneficial board did not get the true picture, and there was a conspiracy of silence.

Mr Simmons records that when a profit of $10 million was wanted, the accounts were adjusted.

'Believe that Baker, Reichert, Martin and Chakravarti will have to go - question, when?' he says."

126 The second article continued on page 2 of *The Advertiser* under a smaller headline "Loans may be criminal - diaries". The other parts of the article were not relied upon by the appellant. Apart from the complaints about alleged inaccuracy in the reporting of the matters contained in the second article, the appellant submitted that its defamatory sting was similar to, and reinforcing of, the first article. According to the appellant, the second article suggested that he had been engaged in criminal conduct in connection with a loan or loans made to him, that he was a party to a conspiracy, that he had received excessive, unapproved and unauthorised benefits which at least amounted to civil misconduct, that he had been involved in a joint venture which was in some way illicit and that he was not a trustworthy person or executive.

127 The respondent's case was that its publication was a fair and accurate report of the proceedings before the Royal Commission. In any event, the report merely raised a suspicion and did not impute guilt. In doing this, it had done no more than to report the Royal Commission proceedings which were of great importance and interest to the readers of *The Advertiser* and of special interest to the people of South Australia.

Matters not in dispute

128 Despite the vigorous contests in the courts below, by the time proceedings reached this Court, many of the earlier disputes had fallen away. It is worth noting these in order to put them out of consideration and to provide context.

129 The respondent did not dispute that both articles carried an imputation that the appellant was the subject of a suspicion of guilt of criminal or civil misconduct. Nor did the respondent dispute that the evidence produced by it fell short of establishing that the loans received by the appellant from BFC were, in fact, unauthorised or excessive. It accepted that the mere proof of Mr Simmons's state of mind did not lessen the hurt to the appellant if he could make the alleged imputations good. The respondent accepted that it had not justified the imputation that, in fact, the appellant had a difference with the Board of BFC over the loans received by him or that he had left its employment under a cloud. Its argument was that those imputations were not open to the appellant and that a fair reading of each article gave rise to no inference other than that the appellant was under investigation on the basis of suspicion: something that would not be actionable[140].

130 Both of the articles complained of related to what might broadly be called political concerns of importance to the electors of South Australia. However, the respondent raised no constitutional argument[141]. I will deal with the case on the footing that none was available. The respondent accepted that, because its conduct in publishing a report of the Royal Commission might affect the reputations of those mentioned adversely, the appellant was entitled to expect that its journalists would ensure that the report was strictly accurate.

131 The appellant abandoned a number of arguments which had taken up time below. He did not dispute Mr Simmons had given the answer "Yes" reported on the first page of the first article. Originally, the transcript of the Royal Commission suggested that the question was left unanswered. This was a fact relevant to the terms of the first letter which the appellant wrote to the respondent. However, on 11 August 1992, the transcript was altered by the Royal Commissioner. The appellant accepted the accuracy of the alteration and thus of the report, in this

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140 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 301, 304.

141 cf *Lange v ABC* (1997) 71 ALJR 818 at 833; 145 ALR 96 at 116.

respect. He did not challenge the finding that the journalist, who had written the first article, believed that Mr Simmons had answered "Yes". He did not re-agitate the editorial interpretation given to the word "civic" where it had appeared in the second article. He no longer contested the evidence of the two journalists of the respondent as to how the two articles were written. He accepted that his case of actual malice, upon which he bore the onus of proof, had not been made out. He did not reagitate arguments, strongly urged in the Supreme Court, that the respondent had lost the benefit of the privilege for a fair and accurate report on the ground that it had failed to incorporate reference to certain exonerating evidence in each article or that the matters in the article were "not of public concern" or their publication "not for the public benefit"[142].

132 These concessions, made on each side, helped to clear away a few of the issues which occupied the Supreme Court. But many issues remain.

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142 Proviso (c) to s 7(1) of the *Wrongs Act* 1936 (SA).

The defamation issue - principles

133 As noted in the Full Court, there are various ways in which the arguments of the appellant might have been approached. However, as it seems to me, the logical starting point is to consider whether the wrong of which the appellant complained was made out. If it was not, either upon a fair reading of the articles in question or because of the way the defamatory imputations were pleaded, it would be unnecessary to consider the ensuing points such as fair reporting, the reasonableness of the response and damages.

134 I take the principles applicable to the determination of the existence of defamation to be as follows:

1. The matter complained of should be considered in the way that a reasonable person, receiving it for the first time, would understand it according to its natural and ordinary meaning[143]. The recipient has been variously described as a "reasonable reader"[144], a "right-thinking [member] of society"[145], or an "ordinary man, not avid for scandal"[146]. Sometimes qualities of understanding have been attributed, such as the "reader of average intelligence"[147]. The point of these attempts to describe the notional recipient is to conjure up an idea of the kind of person who will receive the communication in question and in whose opinion the reputation of the person affected is said to be lowered. Special knowledge is excluded. So are extremes of suspicion and cynicism (on the one hand) or naivety and disbelief (on the other). The basic question which is posed is whether the matter complained of, understood in its natural and ordinary meaning, would tend to lower the subject in the estimate of such an evocation of the

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143 (1996) 65 SASR 527 at 540-541.

144 *Jones v Skelton* [1963] 1 WLR 1362 at 1371; [1963] 3 All ER 952 at 958.

145 *Sim v Stretch* (1936) 52 TLR 669 at 671 per Lord Atkin; cf *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505.

146 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 260 per Lord Reid; cf *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505.

147 *Slatyer v Daily Telegraph Newspaper Co* (1907) 7 SR (NSW) 488 at 504 per Street J, approved in *Slatyer v The Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at 7.

ordinary, reasonable, member of society[148]. In practice, the tribunal of fact, judge or jury, will ask itself about its own response to the matter complained of. To a very large extent that response will be impressionistic, subjective and individual to the decision-maker. The point of the invocation of the hypothetical reasonable person is to remind decision-makers that they may, or may not, reflect the response of the average recipient of the communication and should make allowance for that possibility.

2. In the nature of a defamation action, the matter complained of will be analysed most closely during the trial. It will be studied and taken apart by lawyers, line by line, in a way that the average reader or viewer would never do. This fact presents significant dangers, especially for publishers. It is therefore necessary to remember that relatively few readers will be lawyers reading the matter in question with the attention appropriate to a large, complex and expensive defamation case[149]. The ordinary person is a layman, not a lawyer. He or she approaches perception of the matter complained of in an undisciplined way and with a greater willingness to draw inferences and to read between the lines than a lawyer might do, used to precision[150]. Where words have been used which are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject[151]. That is the price which publishers must pay for the use of loose language.

3. Different views have been expressed concerning the care and attention that will be attributed to the ordinary person and the way in which that person considers the matter complained of. Long ago, it was suggested that the ordinary person, being reasonable, would read the entirety of the matter complained of. Such a person would refrain from drawing inferences adverse to the reputation of another simply because part of the publication included

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148 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 301; *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505; *Parmiter v Coupland* (1840) 6 M & W 105 at 108 [151 ER 340 at 342]; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258, 285.

149 *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

150 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 277; *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348 at 373; *Parker v John Fairfax & Sons Ltd* unreported, Court of Appeal of New South Wales, 30 May 1980 at 8. See also *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646.

151 *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340 at 374; *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

matters discreditable to the subject[152]. This reasoning has lately been endorsed by the House of Lords in *Charleston v News Group Newspapers Ltd*[153]. In that case, photographs of the faces of the plaintiffs, well-known television actors, were superimposed upon near-naked bodies of models engaged in pornographic poses. The headline read "Porn shocker for Neighbours stars". When the text of the publication was closely examined it contained expressions of purported outrage about a pornographic computer game which could superimpose the faces of individuals without their knowledge or consent upon the bodies of others. Their Lordships upheld the decisions of the primary judge and of the English Court of Appeal, sustaining the publisher's objection that the publications were incapable of being defamatory. They rejected the proposition that "the prominent headline, or as here the headlines plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines"[154]. They declared that such reasoning was "unacceptable"[155]. Respectfully, I cannot agree with their Lordships' opinion. In my view it ignores the realities of the way in which ordinary people receive, and are intended to receive, communications of this kind. It ignores changes in media technology and presentation. It removes remedies from people whose reputation may be greatly damaged by casual or superficial perception of such publications. And it overlooks the purpose of defamation law which is to provide redress when reputations are damaged *in fact,* not to reserve remedies to those cases only where detailed and thorough analysis of the matter complained of has been undertaken. I agree with the criticisms which have been voiced about *Charleston*[156]. Many people, including not a few judges and jurors, do not look beyond headlines and photographs. If this is the environment in which reputations may be harmed, it would be contrary to the purposes of the law of defamation to withhold redress from cases where harm was held to be done. To the extent that *dicta* in *Charleston* or other cases suggest that the courts should attribute to the recipients of matter published in the mass media a close and careful attention to the entirety of the item published, I would not follow that opinion. I would not adopt its reasoning as part of the common

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152 *Chalmers v Payne* (1835) 2 CM & R 156 at 159 [150 ER 67 at 68].

153 [1995] 2 AC 65.

154 [1995] 2 AC 65 at 73.

155 [1995] 2 AC 65 at 73 per Lord Bridge of Harwich; Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Mustill concurring.

156 See eg Prescott, "Libel and Pornography" (1995) 58 *Modern Law Review* 752 at 753; Davies, "Neighbours in the House of Lords" (1995) 69 *Australian Law Journal* 590 at 591; cf Fleming, *The Law of Torts*, 9th ed (1998) at 588, n 77.

law of Australia. To do so would be to defy common experience and, if I may say so, commonsense[157].

4. The ordinary reader will draw conclusions from general impressions. He or she will not re-read or review the matter complained of[158]. Such a reader will tend to be specially influenced by headlines, bylines, graphics and the other techniques by which the mass media seek to communicate their principal messages to a mass audience[159]. In a society increasingly used to the immediacy of "channel surfing" with remote controls and accessing the Internet with computers, publishers must take special care with prominently published matter. This obligation clearly applies to headlines, captions, photographs, pictures and their digital equivalents[160] - where such material may diminish the reputations of those affected. The protection of an individual's reputation is a fundamental human right, recognised by international human rights law[161], including that to which Australia has subscribed and for the assurance of which, it has submitted itself to international scrutiny[162].

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157 cf *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646.

158 *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1162.

159 cf *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

160 The application of defamation laws to the Internet is not always easy: Arnold-Moore, "Legal Pitfalls in Cyberspace: Defamation on Computer Networks" (1994) 5 *Journal of Law and Information Science* 165; Bartlett, "Internet: the legal tangle" (1995) 11 *Computer Law & Practice* 110 at 110-112; Todd, "From Village Pump to Superhighway: Internet and the Modern Law of Defamation" (1996) 1 *Media and Arts Law Review* 34; *Rhindos v Hardwick* unreported, Supreme Court of Western Australia, 31 March 1994.

161 Universal Declaration of Human Rights 1948, Art 12 ["No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."] See also European Convention for the Protection of Human Rights and Fundamental Freedoms 1953, Art 10(2); International Covenant on Civil and Political Rights 1966, Art 19.3(a).

162 Through the first Optional Protocol to the International Covenant on Civil and Political Rights 1966; cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288-291, 299, 304.

5. Nevertheless, in considering whether, as claimed, the matter complained of actually harms the reputation of the plaintiff, it is appropriate for the decision-maker to keep in mind the importance attached to freedom of communication. This too is a fundamental human right[163]. Reconciling the attainment of freedom of communication in circumstances where the individual's reputation is also protected is a function of the law of defamation. Allegedly defamatory matter must be read in a way appropriate to a society such as Australia which, by its Constitution and otherwise, enjoys a high measure of freedom of expression. Although reporting that a person has been arrested and charged undoubtedly occasions damage to some degree to the reputation of that person, this must be tolerated on the basis of the legitimate public interest in the reporting of such facts[164]. Only if the publisher goes on to "say or suggest that the charge was well founded"[165] will such a report carry an imputation of guilt and sustain a remedy in defamation. In a relatively open society, it could not be disputed that the ordinary person would have had an interest to receive fair and accurate reports of proceedings of an important Royal Commission. A mass circulation daily newspaper would have been failing to fulfil its function if it had not reported on the proceedings of such a Royal Commission. Nevertheless, the potential damage to the reputation of those affected made it essential that its reports be fair and accurate. Otherwise, suspicion or accusation might be elevated in the public's mind to guilt in fact. That could leave a stain on the reputations of those affected which would do them serious and unjustifiable harm.

<u>The defamation issues - conclusions</u>

135 Each of the articles would, in my opinion, tend to lower the reputation of the plaintiff in the estimation of ordinary, reasonable people[166]. Each of them goes beyond the suggestion of mere suspicion. The pleading point and the fair report point remain to be decided. But just considering the two articles, in the way in which their projected recipients would receive and fairly understand them, I regard it as plain that each would have had a seriously adverse effect upon the appellant's reputation.

136 Take the first article. It implies that something was serious enough in relation to "four Beneficial executives" to warrant the chairman of the Bank calling upon

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163 International Covenant on Civil and Political Rights 1966, Art 19.2. See also European Convention for the Protection of Human Rights and Fundamental Freedoms 1953, Art 10(1).

164 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 300-301.

165 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 303.

166 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 506.

the Premier of the State. So serious was the report about loans to these executives that the Premier had reacted angrily at the chairman's report. The very least that was reported to be involved was "civil misconduct". However, the Premier was reportedly told that the conduct involved "may be criminal rather than civil". There was an ominous allusion to an unexplained "Melbourne joint venture". By inference, this also involved wrong-doing because it made the Premier "very angry". It was implied that the other named executives had been asked to leave the employ of BFC and one had had his job "axed". In this context, the reference to the departure of the appellant suggested that this too was the consequence of his involvement in wrong-doing. No effective differentiation is made between the executives. They are put together in the same boat. This is symbolised by the four prominently displayed photographs of their faces.

137 The second article is also damning of the appellant. The headline beginning "Loans may be criminal", read with the "graphic" again includes the appellant with the other senior executives. The headline and text suggest a greater authenticity in the accusation because it is derived from the "bank chief's diaries". The text also suggests that there was a "conspiracy" within BFC relating to multi-million dollar unauthorised loans of which the appellant was one beneficiary. It suggests attempts to deceive the board of BFC and conduct on the appellant's part which was serious enough to have led to the conclusion that he would "have to go". For a senior finance executive suggestions of possible criminal conduct, involvement in large self-interested, unauthorised loans, deception of the board of his company, involvement in a questionable joint venture and pursuit of conduct that required early termination would combine seriously to damage a reputation already hurt by the report in the same newspaper three days earlier.

138 In the relatively small world of the Australian financial market, and particularly that part of it in Adelaide, such damage could be substantial. By the time the second article was published, the appellant had lost his position with Leal Boss. But this article, by suggesting criminal or at least civil misconduct in the performance of his duties with BFC, would certainly lower his reputation further in the estimation of ordinary, reasonable people. In this respect, I agree in the opinions expressed by the primary judge[167]. The content and presentation of the articles do not bear out the respondent's submission that they would be read as no more than reports of suspicions which required independent investigation. That submission was rightly rejected.

<u>The imputation issue - principles</u>

139 The respondent next submitted that, whatever the natural and ordinary meaning of the articles was, the appellant was strictly confined to the imputations which he had pleaded in his Amended Statement of Claim. It claimed that the

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167 (1995) 181 LSJS 218 at 235-236.

primary judge had found broader, or other, defamatory meanings in the articles and that he had erred in so doing. The starting point is to determine the proper approach. I take the following principles to be established:

1. In some jurisdictions (eg New South Wales) each imputation upon which a plaintiff relies in a defamation action is no longer a particular of what is to be put forward at the trial[168]. It is a separate cause of action to which the publisher must separately plead[169]. In such a statutory context, the need for exact precision in the statement of each cause of action is obvious and essential[170]. This statutory approach has certain advantages. However, it also has disadvantages. It has led to many pre-trial applications, complex interlocutory proceedings and a potential for injustice, depending upon the ingenuity and skill of the pleader of the imputations. It enlarges judicial control over the consideration of the matter complained of by the tribunal of fact. It may also lead to double-dipping in the calculation of the damages for the wrong done by the publication, looked at as a whole. Because readers and viewers are not favoured with pleaded imputations when they receive the matter complained of, there is a risk that the attention at the trial will be deflected from the item actually said to have harmed the plaintiff's reputation to an evaluation of pleaded imputations and a debate about whether they truly arise[171]. Without the clear authority of statute, this approach should not be extended to jurisdictions which have not so far embraced it. South Australia has not done so. That State has no legislation equivalent to the New South Wales Act. Its requirements as to the pleading of imputations must therefore be ascertained from general rules governing particularity in the pleading of civil claims as elaborated by principles of the common law generally accepted in defamation pleadings.

2. For some time, courts in common law countries, including Australia, have made it clear that they favour a practice by which a plaintiff in a defamation action pleads or particularises the meanings which will be attributed at the trial to the matter complained of[172]. This is not a rigid rule. Sometimes it will be sufficient for a plaintiff to plead the offending publication and nothing

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168 As it was previously. See *Ellis v Grant* (1970) 91 WN (NSW) 920 at 925; *Aust Consolidated Press Ltd v Rogers* [1971] 1 NSWLR 682 at 684.

169 Pursuant to *Defamation Act* 1974 (NSW), s 9(2). See *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 190; *Singleton v Ffrench* (1986) 5 NSWLR 425 at 428.

170 *Morris v Newcastle Newspapers Pty Ltd* (1985) 1 NSWLR 260 at 263-264; *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148 at 152.

171 cf *Drummoyne MC v ABC* (1990) 21 NSWLR 135 at 149-151.

172 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 265, 279-280.

more because of the clear defamatory meaning appearing on its face[173]. However, where the meaning of the words sued upon may have overtones outside ordinary understanding and dictionary definitions, it has commonly been considered to be desirable (and sometimes necessary) that the plaintiff give particulars of the meanings which will be alleged at the trial. Doing so may assist the defendant to know whether to plead justification or fair comment, whether to apologise and what issues may be expected at the trial[174]. The practice described has commonly led (as it did in this trial) to the pleading of so-called false innuendos[175]. The purpose of such practice is, and is only, to facilitate the fair determination of the dispute which the parties bring to court[176].

3. In jurisdictions where this matter is not regulated by statute, courts have commonly exercised a measure of discretion and flexibility where the essence of the sting of the defamation complained of at the end of the trial does not exactly, or entirely, coincide with the imputations which were pleaded. In part, this approach reflects the modern attitude to pleading of civil causes by which overly pedantic or rigidly technical rules tend to be avoided where they would inhibit the attainment of justice. In part, it arises from the recognition by courts of the way in which pleading is commonly done. In part, it arises from a recognition of the ample power of the trial judge to protect a defendant from injustice by ordering further particulars before the trial or by adjourning or terminating the hearing if that course is needed to prevent surprise or injustice. In part, the judicial approach arises from the entitlement of the tribunal of fact always to examine the entire

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173 *Packer v Mirror Newspapers Ltd* (1969) 90 WN (Pt 1) NSW 308 at 309-310; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 265; cf Dias and Markesinis, *Tort Law*, 2nd ed (1989) at 430-431.

174 *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161 at 167 per Lord Denning MR; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 275; *Taylor v Jecks* (1993) 10 WAR 309 at 314; *Barclay v Cox* [1968] VR 664 at 666.

175 They are "false" because they do not depend upon the reader or viewer knowing particular extrinsic facts: *National Mutual Life v GTV* [1989] VR 747 at 768; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 271-272; *Gatley on Libel and Slander*, 9th ed (1998) at par 3.17. False innuendos are sometimes called "popular innuendos": *DDSA Pharmaceuticals v Times Newspapers* [1973] QB 21 at 26. An example of a "true innuendo" is the identification of an address published in relation to a person indicating that it is a place of criminal activity where this would otherwise not be obvious.

176 *Polly Peck Plc v Trelford* [1986] QB 1000 at 1021.

publication[177] to see the matter complained of in its context. An overly rigid rule, strictly confining a plaintiff to the pleaded imputations, would run the risk that the alleged wrong was forgotten or overlooked[178]. Instead of measuring the damage done by the publication itself, the trial might be diverted to a different document, namely the pleading containing the imputations formulated by lawyers. I agree, in this regard, with the comments of the Full Court of the Supreme Court of Victoria in *National Mutual Life v GTV*[179]. Speaking with approval of the now common practice of pleading "false innuendos", that Court said:

> "But the practice did not, and in our opinion could not, alter the position at law that the meaning of the words was ultimately a question for the jury, and that the jury must be at large in finding the true meaning amongst such possible meanings as were left to them by the judge, and that the judge was not bound to confine the jury to the false innuendos asserted by the plaintiff."

Where, as in South Australia, there is no jury trial, the entitlement of the judge to consider the meaning of the entire matter complained of, notwithstanding the pleaded imputations, is even more clear.

4. In an attempt to reconcile the desirable encouragement of particularisation of claims, the avoidance of "trial by ambush"[180] and the consideration of the entirety of the publication in question[181], courts will uphold the discretion of the trial judge, including a discretion to confine parties to the imputations pleaded where that is required by considerations of fairness[182]. However, a more serious allegation will generally be taken to include a less serious one unless the latter is of a substantially different kind[183]. It is true that dicta

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177 *S & K Holdings v Throgmorton Publications* [1972] 1 WLR 1036 at 1039; [1972] 3 All ER 497 at 500.

178 cf *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in Liquidation)* (1916) 22 CLR 490 at 517.

179 [1989] VR 747 at 768. See also *Gumina v Williams (No 2)* (1990) 3 WAR 351 at 355, 364.

180 *National Mutual Life v GTV* [1989] VR 747 at 768.

181 Fleming, *The Law of Torts*, 9th ed (1998) at 588.

182 *Prichard v Krantz* (1984) 37 SASR 379 at 386; *Taylor v Jecks* (1993) 10 WAR 309 at 316; *Pizza Pizza v Toronto Star Newspapers* (1996) 2 CPC (4th) 394 at 400.

183 *Prichard v Krantz* (1984) 37 SASR 379 at 386.

appear in decisions of this Court[184], other Australian courts[185] and courts overseas[186] which favour a strict approach: binding a plaintiff at the trial to the precise imputations pleaded. However, I do not consider that these dicta represent the law. The better view is that the rules of pleading must, in those jurisdictions governed by the common law, adapt to the fair evaluation by the tribunal of fact of the matter complained of. If the publisher claims surprise, prejudice or other disadvantage, the trial judge may protect it. No complaint can arise where additional imputations found represent nothing more than nuances or shades of meaning of those pleaded. The position will be otherwise in jurisdictions which, by statute, provide that each imputation is a cause of action upon which the plaintiff may sue. But South Australia is not one of these.

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184 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 14 per Stephen J.

185 *Hadzel v De Waldorf* (1970) 16 FLR 174 at 182 per Fox J.

186 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 185 per Salmon LJ.

The imputation issue: conclusions

140 The first article: Contrary to the majority of the Full Court[187], I consider that each of the imputations - both those pleaded by the appellant[188] and those found to exist by the primary judge[189] - was available. In so far as Cox J's description of the way in which he read the first article fails to coincide exactly with the imputations pleaded, I would take the view that his description adequately falls within the ambit of the pleaded imputations. In particular, I regard it as almost impossible to deny that the first pleaded imputation was made out. It expressed the essence of the appellant's summary of the sting of the defamation. It read:

> "(a) the plaintiff was involved in criminal or civil misconduct, whilst an executive of Beneficial Finance, in respect of loans from Beneficial Finance to himself."

In this respect, I prefer the opinion expressed in the Full Court by Doyle CJ[190]. Considering the imputations found against those pleaded in the way which I regard as proper to the law of South Australia, each of the conclusions expressed by the primary judge was open to him. In this, I would even go a little further than Doyle CJ. He did not consider that the final imputation[191] which the primary judge found was made out was open[192]. In my view, in the context, the reference to the appellant's departure from BFC, so closely associated in the text with the termination of the other named and pictured executives, properly gave rise to the imputation which the primary judge expressed. In sum, Doyle CJ's more flexible approach to the pleaded imputations was correct. Its application sustained the conclusions reached at first instance.

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187 (1996) 65 SASR 527 at 555 per Perry J, at 558-559 per Williams J.

188 The two imputations pleaded with respect to the first article are contained in par 4 of the plaintiff's Amended Statement of Claim. They are set out in the reasons of Doyle CJ: (1996) 65 SASR 527 at 539.

189 (1995) 181 LSJS 218 at 224-225. The primary judge did not set out his imputations seriatim. However, Doyle CJ considered that they could be summarised as four imputations: (1996) 65 SASR 527 at 542. For present purposes, I accept the Chief Justice's summary.

190 (1996) 65 SASR 527 at 542-543.

191 That the appellant had been dismissed, and dismissed for misconduct which might be criminal or civil: (1995) 181 LSJS 218 at 224. See also (1996) 65 SASR 527 at 542.

192 (1996) 65 SASR 527 at 543.

141 The second article: So far as the second article was concerned, six imputations were pleaded by the appellant[193]. They were not considered separately by the primary judge except that he did find the third and sixth imputations to be made out and by inference the second, fourth and fifth[194]. The first pleaded imputation suggested that the second article carried a meaning that "the plaintiff had engaged in criminal conduct in connection with a loan or loans made to him". The primary judge, on the one hand, seemed to consider that this imputation was only a possibility. Elsewhere, however, he pointed out that the "graphic", by emphasising "May be criminal rather than civic" resolved the ambiguity which had remained in the evidence of Mr Simmons and did so adversely to the appellant. The use of the word "reveals" in the "graphic" clearly appears (as the primary judge held) to suggest a fact rather than a possibility.

142 Each of the judges in the Full Court adopted a slightly different approach to the pleading point and the fair report defence. My preference, in this case, is to determine whether each of the imputations was conveyed, and then to apply the fair report defence to the article as a whole[195]. However, none of the members of the Full Court chose to approach the problem in that manner.

143 Doyle CJ[196] considered first whether each of the imputations was conveyed by the articles, and then applied the fair report defence to each imputation. His Honour found that each of the pleaded imputations, save for the first, was conveyed by the article. As to the first, he accepted that the article imputed a suspicion of criminal conduct and that this lesser imputation was within the scope of the pleading. Perry J[197] did not deal separately with the pleading point and the fair report defence, stating simply that he agreed with Doyle CJ's ultimate conclusions on the second article. The third judge in the Full Court, Williams J[198], dealt with the pleading point for all but the second and third pleaded imputations. He followed the reasoning of Doyle CJ with respect to the first. He accepted that the

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193 The imputations pleaded with respect to the second article are contained in par 7 of the Amended Statement of Claim. They are set out in the reasons of Doyle CJ: (1996) 65 SASR 527 at 548.

194 (1995) 181 LSJS 218 at 233-236.

195 See "The fair report issue - conclusions" below.

196 (1996) 65 SASR 527 at 549-550 per Doyle CJ. His Honour also implicitly rejected the imputations pleaded by the respondent (see at 548-549).

197 (1996) 65 SASR 527 at 557 per Perry J.

198 (1996) 65 SASR 527 at 560-561.

fourth and the fifth were conveyed. He considered the sixth a "make weight"[199]. As to the second and third pleaded imputations, Williams J found the report protected by the statutory defence of fair report. In my opinion, Doyle CJ was right to find that all of the pleaded imputations except the first were conveyed. A fair reading of the second article sustains each of the contended meanings.

144 The foregoing analysis shows what a muddle an over-nice attention to the pleading of imputations has produced for defamation law and practice in Australia. It is extremely convoluted and unacceptably confusing. None of the judges below agreed precisely with the views of any of the others. The opportunity for hard fought interlocutory contests and time-wasting at the trial and on appeal is virtually limitless. The diversion which the exercise causes from a fair consideration of the published matter complained of carries a real risk of distorting the focus of the trial. Where by statute that focus is upon the imputations[200], the course embarked upon, however unsatisfactory, may be unavoidable. But it should not be imposed by the courts in those jurisdictions where the pleaded imputations are no more than particulars of what the parties say the published matter means. In those jurisdictions, it is timely to return the focus of attention to the matter complained of itself. After all, that is what the ordinary reader or viewer perceives. It is by that matter, rather than pleaded imputations, that the damage to reputation (if any) is done.

145 It is for that reason that I consider that the approach taken to the imputations by the primary judge was acceptable considering that he was the tribunal of fact. There being no surprise or disadvantage to the respondent, no occasion arose to consider the consequences of the suggested disparities between the imputations found and those pleaded. In any case, in my view, the imputations found were all within the scope of the imputations pleaded. It is therefore unnecessary for me to explore the subordinate question of whether the appellant should, if that had been the case, have been granted leave (as he sought) to amend his pleadings[201]. Each one of the pleaded imputations, in my opinion, was established. Therefore, subject to the fair report defence, the appellant was entitled to damages in respect of those imputations.

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199 (1996) 65 SASR 527 at 561.

200 As by the *Defamation Act* 1974 (NSW), s 9(2).

201 Williams J would have granted the respondent leave to amend its pleading to complain about the alleged failure of the primary judge to find that the imputations pleaded were not conveyed: (1996) 65 SASR 527 at 558. Perry J refused the appellant leave to depart from his pleadings: (1996) 65 SASR 527 at 556. Doyle CJ, by inference, also refused amendment: (1996) 65 SASR 527 at 542; cf *Singleton v Ffrench* (1986) 5 NSWLR 425.

The fair report issue - statutory and common law privilege

146 The respondent's principal defence both at first instance and on appeal was that each of the articles complained of constituted a fair and accurate report of proceedings in the State Bank Royal Commission. The appellant's arguments as to malice and as to public concern and benefit having been abandoned, if the respondent could make this defence good it would, subject to the reasonable reply point next dealt with, have a complete defence to the appellant's action. Its publications would be privileged[202] or, as sometimes described, protected[203] from action. In support of its defence, the respondent relied both on a statutory privilege and on the residue of the common law.

147 In South Australia, the statutory privilege reads[204], relevantly:

> "A fair and accurate report published by newspaper ... of the proceedings of -
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> (a) a public meeting; or
>
> (ab) either House of Parliament; or
>
> (b) ... any meeting of a municipal ... council ... ; or
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> (c) a meeting of any royal commission, select committee of either House of Parliament; or
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> (d) a meeting of shareholders in any bank ... or incorporated company,
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> ... shall be privileged unless it is proved that the report or publication was published or made maliciously:
>
> Provided that -
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> (a) ...
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> (b) the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it is proved that the defendant has been requested to publish by the same newspaper ...

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202 *Wrongs Act* 1936 (SA), s 7(1).

203 *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 383; cf *Defamation Act* 1958 (NSW), s 14(1)(d) (since repealed); *Wrongs Act* 1936 (SA), s 7(1), proviso (b) ["the protection intended to be afforded [by the section]"].

204 *Wrongs Act* 1936 (SA), s 7(1).

a reasonable letter or statement by way of contradiction or explanation of such report or other publication and has refused or neglected to do so:

(c) nothing in this section shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit."

148 The appellant submitted that the statutory defence did not apply to this case because it was confined to a "meeting" of a Royal Commission and the relevant proceedings reported upon were not such a "meeting". This argument was properly rejected by both the primary judge and the Full Court. In the context of paragraphs, all but one of which (par (ab)) refers to a "meeting", it is clear that the legislature intended to cover any formal sitting of a Royal Commission. The word "meeting" was used to exclude from the privilege informal or internal activities of a Royal Commission which did not partake of the public activity which would attract the "public concern" warranting publication of the proceedings under conditions of privilege. On each of the days the subject of the articles complained of, the Royal Commission conducted its proceedings by a "meeting" in the foregoing sense. The section affording the privilege for fair and accurate reports therefore applied.

149 A question arose as to whether anything relevant to this case was added by proviso (c). It would obviously be absurd to construe that proviso to allow a common law defence to a newspaper without the necessity to comply with the requirement to publish a reasonable letter or statement as envisaged by proviso (b). The express provisions in proviso (b) would expel a construction of proviso (c) which would have that effect[205]. The key to understanding proviso (c) appears in the use of the word "now". The provision in South Australia for a statutory defence of fair and accurate report may be traced, ultimately, to the passage of the *Newspaper Libel and Registration Act* 1881 (UK)[206]. The latter Act was later amended by the *Law of Libel Amendment Act* 1888 (UK)[207]. That Act provided,

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205 cf (1995) 181 LSJS 218 at 229.

206 44 & 45 Vict c 60, s 2: "Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit"; cf Odgers, *A Digest of the Law of Libel and Slander,* 2nd ed (1890) at 266; Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 201.

207 51 & 52 Vict c 64, s 2.

relevantly[208] that "[a] fair and accurate report published in any newspaper of ... any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority" would be privileged, subject to provisos substantially in the terms of s 7(1) of the *Wrongs Act* 1936 (SA) ("the Act") set out above. The form of this legislation was largely followed when, in 1895, the South Australian Parliament enacted the *Law of Libel Amendment Act*[209]. However, in that Act[210] express reference was made to "Royal Commissions". That Act was, in turn, repealed[211] when the *Wrongs Act* was enacted in the terms which apply to these proceedings. Both in the 1895 and in the 1936 Acts of South Australia the proviso preserving any privilege or protection "now by law existing" is copied exactly from the English Act of 1888. The appellant therefore urged that the phrase "now by law existing" required ascertainment of the common law applicable in South Australia in 1888.

150 During the nineteenth century, the privilege for fair reporting grew out of newspaper reports of judicial proceedings[212]. However, texts contemporary with the introduction of the proviso both into the statute law of England and, later, of South Australia, reflect a recognition of the rapid development of the common law which was occurring at that time. That development, no doubt, accompanied the growth of mass circulation newspapers[213]. Although, for a long time, there had been doubt concerning reports of parliamentary proceedings, the common law eventually extended privilege to such reports. It did so by analogy with reports of legal proceedings[214]. Apart from reports of judicial and parliamentary proceedings, however, it is clear that, as the common law then stood, "[n]o other

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208 s 4.

209 58 & 59 Vict, No 646.

210 s 4.

211 By *Wrongs Act* 1936 (SA), s 2.

212 Odgers, *A Digest of the Law of Libel and Slander,* 2nd ed (1890) at 248 citing *R v Wright* (1799) 8 TR 293 at 298 [101 ER 1396 at 1399]; *Wason v Walter* [1861-73] All ER Rep 105 at 109; (1868) LR 4 QB 73 at 87.

213 cf Odgers, *A Digest of the Law of Libel and Slander*, 2nd ed (1890) at 251.

214 Odgers, *A Digest of the Law of Libel and Slander*, 2nd ed (1890) at 264 and cases there cited including *Wason v Walter* [1861-73] All ER Rep 105; (1868) LR 4 QB 73.

reports are privileged"[215]. Thus, no privilege would have existed for a report published by a newspaper concerning proceedings of a Royal Commission. Unless the respondent could bring itself within the statutory privilege, no other privilege would avail it.

151 In my view, the phrase "now by law existing" in proviso (c) is simply a recognition by Parliament that the privilege attaching to various meetings might extend beyond the categories expressly stated. If that is so, the privilege for the proceedings of Royal Commissions would remain to be governed exclusively as the statute has provided. The proviso would be inapplicable in this case. But even if this be incorrect and the purpose of proviso (c) was generally to preserve the common law privilege of fair report, that privilege could not be larger than the express provision for reports of proceedings of a Royal Commission expressed in the Act. Nor could it exclude the condition of the publication of reasonable letters or statements as referred to in proviso (b). Another argument would produce the same result[216]. But I will not delay to examine it.

152 The result is that to secure a defence of privilege for its report of the proceedings of the Royal Commission, the respondent was obliged to bring itself within s 7 of the Act. No common law privilege, assuming one to exist, to be different and to have survived the specific provisions of the Act, could have provided a wider, or different, protection for reports of the proceedings of a Royal Commission.

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215 Odgers, *A Digest of the Law of Libel and Slander*, 2nd ed (1890) at 266. See also Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 408: "In the case of the publications which form the subject of sect 4 of the Act of 1888 ... the legislature no doubt thought, and with some justification, that they were enacting in favour of newspapers something in excess of and beyond the ordinary law."

216 That the word "now" meant 1895 when the proviso was first incorporated in the law of South Australia and that at that time, whatever the later development of the common law of privilege, a report of proceedings of a Royal Commission would not be privileged. Even if 1936 were chosen as the relevant date for the meaning of "now" (being the year in which the *Wrongs Act* 1936 (SA) was enacted) it is doubtful whether the result would be different. Statute apart, in 1936, reports of a Royal Commission's proceedings would not have partaken of the common law privilege attached to reports of judicial proceedings: *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 180-181. Common law privilege for such reports would depend upon the subject matter dealt with in the particular report: *Perera (MG) v Peiris* [1949] AC 1 at 21.

The fair report issue - principles

153 The following principles may be derived from a consideration of the purpose of the statutory provisions and from decisions in the relevant cases:

1. It is not enough that the challenged report be generally fair. It must also be accurate. It must be a report of the proceedings described. To the extent that it goes beyond a report, and the reporter engages in comment, description and elaboration of the reporter's own, the privilege provided for a "report" will be inapplicable and may be entirely lost. The tendency for journalists to intersperse descriptive reports with adjectives and comments of their own is not new. It was remarked upon soon after the statutory provision was first introduced[217]. The practice of adding commentary to reports has not diminished since that time. It appears in the subject articles[218]. Excessive commentary or misleading headlines which amount to commentary run the risk of depriving the text of the quality of fairness essential to attract the privilege[219].

2. It has never been necessary that the report should be a verbatim record of the proceedings reported[220]. A report will ordinarily be abridged or condensed. However, it must not be biased or garbled. In considering whether a publication was a fair report it is proper to take into account any omission from the discussion[221]. A summary of the proceeding is acceptable as long as it retains "substantial accuracy in all material aspects"[222]. The emphasis upon "substantial" is important. The reason for affording the privilege is the public benefit to be derived from reports of the privileged kind. Some

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217 Odgers, *A Digest of the Law of Libel and Slander*, 2nd ed (1890) at 259 ["The reporter must add nothing of his own."]

218 For example, in the second article, "*Sensational* allegations of a conspiracy within the State Bank group ..." (emphasis added).

219 See *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 411 per Lord Denning: "It has 'put the meat on the bones' and must answer for the whole joint."

220 Odgers, *A Digest of the Law of Libel and Slander,* 2nd ed (1890) at 255; *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 380; *Anderson v Nationwide News* [1970] 1 NSWR 317 at 320-321; cf *Waterhouse v Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 63; *Leslie v Mirror Newspapers Ltd* (1971) 125 CLR 332 at 337.

221 *Leslie v Mirror Newspapers Ltd* (1971) 125 CLR 332 at 337, 341.

222 *Anderson v Nationwide News* [1970] 1 NSWR 317 at 321; cf *Nowlan v Moncton Publishing Co* [1952] 4 DLR 808 at 812-814.

recognition may be given of the conditions of urgency in which reports are often compiled and then published[223]. Nit-picking over trivial inaccuracies will not take a report outside the privilege of the section[224]. But because the statute extends its protection to matters said about an individual, which may be untrue and highly damaging when republished by the mass media, the obligations of fairness and accuracy are substantial ones upon which the law insists[225].

3. Where there is a dispute as to whether a report is fair and accurate, that dispute must be resolved as a factual question by comparing the relevant record of the proceedings with the matter complained of. The test has been expressed in terms of whether the report substantially alters the impression which its recipient would have gained had he or she been present during the proceedings[226]. The issue is not what a trained lawyer would make of the comparison[227]. Nor is it what a particular person with particular knowledge would think[228].

4. Although in judging the accuracy of the report, its entirety should be examined, in judging its fairness particular attention may be given to headlines and graphics which, by definition, have the object of capturing maximum public attention. The report must retain substantial accuracy in all material respects. If it contains untrue statements of a material fact, which have the potential to damage the reputation of the person referred to, the report will be unfair and hence outside the section[229]. Rarely will a report be wholly inaccurate. Typically, a report otherwise correct will contain particular mistakes, distortions or misunderstandings of the proceedings reported. Because the defence is claimed with respect to the entire report, including therefore each matter complained of, it is necessary to consider all of the complaints together and then to decide whether the publication as a

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223 cf *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 385.

224 cf *M'Wade v Goodlake, The Times,* 23 June 1881 per Bramwell LJ, cited in *Gatley on Libel and Slander*, 9th ed (1998) at par 13.35.

225 *Bennett v Sun Publishing Co Ltd* (1972) 29 DLR (3rd) 423 at 434-435; *Gatley on Libel and Slander*, 9th ed (1998) at par 13.34.

226 *Waterhouse v Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 63; cf *Leslie v Mirror Newspapers Ltd* (1971) 125 CLR 332 at 337.

227 *Hope v Sir W C Leng & Co* (1907) 23 TLR 243 at 244.

228 *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

229 *Anderson v Nationwide News* [1970] 1 NSWR 317 at 321.

whole is fair and accurate. However, reflecting the way in which the ordinary reader or viewer will often perceive the report, it will not be assumed that every recipient of it would read it carefully and in its entirety. Whereas a scholarly book might be approached in such a manner, it would be a fiction to suggest that it was so in the case of the mass media[230]. That is why headlines and graphics are so important. For many readers, such eye-catching material will constitute the entirety of what is perceived or, at least, of what is likely to be remembered relevant to a person's reputation.

5. That purpose of examining suggested mistakes and inaccuracies in a report is to determine whether the publisher is entitled to the fair report defence. It is not, as such, to determine, for example, whether the plaintiff is entitled to recover damages for such mistakes and inaccuracies found. The plaintiff's action is not one for negligence. It is one for defamation. The mistakes and inaccuracies may deprive the defendant of the defence of fair report. Of their nature, they may also contribute to the damage done to the plaintiff's reputation. They may therefore warrant consideration in the context to identify what it is about the matter complained of that is defamatory of the plaintiff.

The fair report issue - conclusions

154 The first article: In the Full Court, the majority judges approached the fair report issue differently. Williams J found that, to the extent that the pleaded imputations were conveyed by the first article, the article was protected by the statutory fair report defence[231]. Perry J did not address the fairness and accuracy of the report constituted by the first article. This was because of the view which he had formed about the defamatory imputations arising from the article[232]. On the other hand, the primary judge, having found that certain pleaded imputations were conveyed by the first article, also found that it was not accurate in particular respects[233]. The inaccuracies related to the way in which specific evidence of Mr Simmons before the Royal Commission was addressed or apparently addressed to the conduct of Mr Baker and Mr Reichert and not to the other "executives", including the appellant. The passages of transcript before the Royal Commission are contained in the reasons of the primary judge. I will not repeat them. In my

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230 *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

231 (1996) 65 SASR 527 at 559-560.

232 (1996) 65 SASR 527 at 555-556.

233 (1995) 181 LSJS 218 at 223-225.

view, they bear out the conclusion to which Doyle CJ also came in the Full Court[234]:

> "[T]he article was not accurate in reporting that Mr Simmons said that there had been a difference of opinion between the Board and all four executives relating to appropriate conduct for them. The article was written in a manner which conveyed this impression of Mr Simmons' evidence. I agree with the trial judge that the questions on this topic related only to Mr Baker and Mr Reichert. And I am of the opinion that this was a significant point of distinction. It is one thing to have engaged in conduct which 'raised a question' but was still under investigation, another thing to have had an actual difference of opinion with the Board over the question of appropriate conduct, even though the precise link between the two (conduct under investigation and difference of opinion) is not explained.
>
> So, in my opinion, the article was not a fair and accurate report [to that extent] ...
>
> [Further,] the article is not a fair and accurate report to the extent that it imputes that the plaintiff had left his employment with [BFC] under a cloud because of questionable conduct involving loans. Mr Simmons gave no evidence at all touching the plaintiff's departure. In my opinion the article does link the plaintiff's departure to the questionable conduct."

155 Although the foregoing finding would be sufficient to deprive the first article of the quality of being a fair and accurate report necessary to attract the statutory defence, it is my opinion, alike with the primary judge, that there were other inaccuracies. They have the effect of reinforcing the stated conclusion. The report attributes Mr Simmons's disputed answer "Yes" to the question by the Royal Commissioner about "a difference of opinion between the board and these officers". It does so in a context in which the report appears to be referring to all four officers of BFC. The primary judge concluded[235] that, in fact, the Royal Commissioner's questions, when he referred to "these officers", were confined to Mr Baker and Mr Reichert. The context confirms this conclusion. Yet the author of the respondent's report has, in the words of the primary judge[236]:

> "preferred the general and numerically imprecise 'those involved' instead of the obvious 'their conduct'".

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234 (1996) 65 SASR 527 at 545.

235 (1995) 181 LSJS 218 at 224.

236 (1995) 181 LSJS 218 at 224.

The primary judge concluded that such a wording[237]:

> "tars the plaintiff with the imputation ... not just that the Premier was very angry but that his anger was directed particularly to 'the Melbourne joint venture'. The author went on to say that no explanation of the Melbourne joint venture was given to the Royal Commission, but the implication of the report is that it was something discreditable to any Beneficial executive who was involved in it, with a suggestion of financial mismanagement at the least but possibly more than that. On my interpretation of the Royal Commission transcript, all of this was said of Mr Baker and Mr Reichert, not of the plaintiff."

I agree.

156 The second article: The primary judge also found significant inaccuracies in the second article. In particular, the effect of the abbreviated "graphic", read in the context of the main headline was held to impute criminal misconduct to the appellant. This was reinforced in his Honour's mind by the breaking up of the paragraph so that the words "may be criminal rather than civic" appear as a separate commentary upon the loans received, including by the appellant. In fact, as the actual "diary" notes of Mr Simmons disclose, this may have been a comment on the Melbourne joint venture in which the appellant was completely uninvolved. The primary judge said[238]:

> "There may be a world of difference between obtaining a loan which is not approved ... and obtaining a loan in circumstances which, it is said, may amount to criminal misconduct."

Again, I agree. In each of the articles complained of, the appellant was cast in the same mould as the other named executives. Specific observations by Mr Simmons that were arguably restricted to Messrs Baker and Reichert were not so reported. The appellant was tarred with their brush.

157 There were differences on this issue among the judges constituting the Full Court[239]. Much time could be taken in sorting out the competing opinions and

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237 (1995) 181 LSJS 218 at 224.

238 (1995) 181 LSJS 218 at 234.

239 Thus Doyle CJ ((1996) 65 SASR 527 at 550) with Perry J concurring (at 557) rejected the suggested inaccuracy based on the ambiguity, the graphic or the break-up of the sentences. However, Williams J (at 560) agreed with Cox J ((1995) 181 LSJS 218 at 233-234) on this point. Whereas Cox J ((1995) 181 LSJS 218 at 234) rejected the complaint that the article had inaccurately suggested that the appellant

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adding yet another to them. My own conclusion is that there were three substantial inaccuracies. First, that the ambiguity in Mr Simmons's diary note was resolved adversely to the appellant and served up in that adverse way by the headline, by the graphic and by the text of the article. Secondly, the text suggests an active "conspiracy" on the part of the appellant with the other named executives. In this, I prefer the opinion of the majority in the Full Court. The primary judge appears to have overlooked the opening words of the second article which expressly refer to a "conspiracy" involving senior executives, identified soon thereafter in the text (as in the graphic) as including the appellant. Thirdly, I prefer the view of the Full Court that the article linked the appellant to the Melbourne joint venture which, by implication, was discreditable. In fact, the appellant gave evidence (which was uncontested) that such involvement related only to Messrs Baker and Reichert.

158 In material, and not pernickety, respects each of the reports was therefore inaccurate. Because such inaccuracies significantly affected the reputation of the appellant, each report was unfair. The respondent was therefore deprived of the privilege which the Act reserved to a fair and accurate report.

<u>The reasonable response issue - principles</u>

159 There is an alternative, and in my opinion equally persuasive, reason for reaching the conclusion that the respondent was deprived of the privilege in respect of the publication of both articles. This is that, in each case, the respondent had forfeited the privilege by reason of its failure to publish "a reasonable letter or statement" submitted by the appellant.

160 The reciprocal requirement of a newspaper to afford this facility was introduced by the *Newspaper Libel and Registration Act* 1881 (UK)[240], re-enacted by the *Law of Libel Amendment Act* 1888 (UK)[241] and enacted as part of the law

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was engaged in a conspiracy, Doyle CJ ((1996) 65 SASR 527 at 550), with Perry J concurring (at 557), found that this inaccuracy was made out and was serious. Williams J (at 560) disagreed. All judges in the Full Court found (contrary to Cox J) that the report had inaccurately and unfairly suggested that the appellant was somehow involved in the joint venture which was discreditable: (1995) 181 LSJS 218 at 234 per Cox J; (1996) 65 SASR 527 at 551 per Doyle CJ, at 557 per Perry J, at 560 per Williams J.

240 s 2.

241 s 4: "... Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of

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of South Australia by statutory derivatives[242]. The provision of a right of reply is an important remedy afforded in defamation cases in civil law jurisdictions[243]. It is, in some ways, a remedy more appropriate to redress the wrong of defamation[244]. Law reform bodies have recommended the introduction of a larger facility of reply in Australian law, so far without success[245]. This notwithstanding, proviso (b) is as close as Australian law comes to offering a right of reply. As there are roughly equivalent statutory provisions in most jurisdictions of Australia[246], it is appropriate to say something about this topic.

161 The following points arise out of the language and apparent purpose of the provision:

1. The statute envisages that a letter or statement will be provided to the defendant by someone (not necessarily the ultimate plaintiff) making the request that it be published. The provision would not be enlivened by a bald request, with nothing more, for an opportunity to put a different point of

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contradiction or explanation of such report or other publication, and has refused or neglected to insert the same ...".

242 As a proviso to *Law of Libel Amendment Act* 1895 (SA), s 4 and *Wrongs Act* 1936 (SA), s 7(1).

243 Article 13 of the French Press Law provides a right of reply (*Droit de Réponse*) legally enforceable by court order. Similar provision is made under German law. The law in most Canadian provinces also allows a right of reply - though such right cannot be enforced by court order. See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy, Report No 11* (1979) at par 178; Brown, *The Law of Defamation in Canada*, 2nd ed (looseleaf) at par 14.3(2).

244 By affording the person an opportunity to put his or her viewpoint, by enhancing the information provided to the public and by discouraging the misuse of power to harm reputations in the knowledge that proceedings for vindication are expensive and time-consuming and that their outcome may, in any case, not be published extensively or at all.

245 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy, Report No 11* (1979) at pars 178-180; see also Appendix C (Draft Bill), cll 16(2), (3) and (4). The importance of the provision of an opportunity to reply is also referred to in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 252-253; *Lange v ABC* (1997) 71 ALJR 818 at 835; 145 ALR 96 at 118.

246 *Wrongs Act* 1958 (Vic), ss 5(3), 5(A)(3); *Defamation Act* 1889 (Q), s 13(4); Criminal Code (WA), s 354; *Defamation Act* 1957 (Tas) s 13(2)(b); *Defamation (Amendment) Act* 1909 (ACT), s 5; *Defamation Act* (NT) s 6(1), proviso (b).

view[247]. A mere request for retraction is also not within such provisions[248]. Still less is a mere letter of protest or insult. It is the person who wishes to contradict or explain matters published in the report complained of who must prepare the "letter or statement" and to send it to the publisher.

2. The objects of providing this facility emerge clearly enough from a consideration of the section. The point of affording a special privilege to publishers of newspaper, radio or television reports concerning proceedings of public meetings of the specified kind is to recognise their particular role in a society which enjoys a high measure of freedom of communication. That role extends today to providing reports to the public, although the matters reported might later turn out to be inaccurate, unfair or defamatory of the persons mentioned. It is the public or official character of the specified meetings which, it has been considered, will ensure, at least in most cases, appropriate restraint against the reporting of irresponsible or groundless accusations. This purpose is made doubly clear by the closing words of proviso (c). Those words withdraw the protection otherwise applicable if the matter is "not of public concern and the publication ... is not for the public benefit". The emphasis upon the public character of the meetings and the criterion of public concern and public benefit help to explain the true purpose of proviso (b). It is to enhance the information given to the public on a particular matter. It is also to recognise that, in the nature of the particular meetings specified, inaccurate, unfair or defamatory statements may be made which can then be published under qualified privilege. Fairness requires the balancing of that right with a provision, to those complaining about its exercise, of the opportunity to place a contradictory statement or explanation before the public. The request would have to be reasonably contemporaneous with the publication. It would not ordinarily be reasonable to expect publication of a letter or statement years or perhaps even months later. The criterion of the public's interest must be kept in mind in giving meaning to the section, including proviso (b).

3. By the terms of the proviso, any such letter or statement must be "reasonable". It was urged that this meant reasonable from the point of view of the person complaining or tendering the statement. However, in my view, "reasonable", in this context, means objectively reasonable for the purpose for which the statutory facility has been provided. This is to allow already published facts to be contradicted or explained by those claiming to be hurt by the report of them. The reference to "reasonable" is intended to control such matters as the length of the letter or statement, the terms in which it is expressed and the avoidance of gratuitous defamation of third parties. I do

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247 *Khan v Ahmed* [1957] 2 QB 149 at 153.

248 *Hansen v Nugget Publishers Ltd* (1927) 61 OLR 239 at 244-245.

not regard the word "reasonable" as affording an editorial veto to the publication of a letter which is strongly expressed or contains disputable propositions or arguable inaccuracies. After all, it is always open to the publisher to have the last word. It is not uncommon, where letters of complaint are published, for an editorial note to be added expressing the publisher's reply. The sting of defamation often causes emotion and anger. That is the context in which Parliament has made provision for a letter or statement in reply to be given its statutory status. Publishers of newspapers who have considerable power to harm reputations should not be overly tender about complaints and expressions of anger when appearing in a letter or statement to which proviso (b) applies.

4. The proviso makes no express mention of editorial amendment, abbreviation or alteration. But neither does it expressly state that the letter or statement must be "accurate". In the real world, if some aspect of a letter or statement were thought to take it outside the bounds of reasonableness, it would be sensible for there to be negotiation between the publisher and the person complaining. A failure or refusal to enter into such negotiation might, in a particular case, confirm an opinion that, on the whole, the letter or statement tendered was "reasonable". Otherwise, all of the cards are stacked in favour of the publisher and against the person complaining. The purpose of the proviso is to afford the complainant a statutory means to secure the publication of a relevant contradiction or explanation. The purpose of the publication envisaged by the proviso is not to afford the complainant, or anyone else, the opportunity to insult the publisher, to extract an apology or to defame others. The ultimate purpose is to contribute to equalising the power to communicate with the audience which has already heard or seen matter considered to be defamatory where it is desired by the person affected to offer to the public other material in contradiction or explanation.

5. It was suggested during argument that proviso (b) would only apply where a determination had already been made that the report in question was "fair and accurate"; for only then would the protection otherwise be applicable. This is true as far as it goes. However, the language of the proviso recognises, in a very practical way, that disputes concerning the fairness and accuracy of a report will often be highly contentious. If they go to trial, they may not be resolved for a very long time. By the time of their resolution the public may have forgotten the defamation. The possibility of retrieving the reputation of the complainant may have been wholly lost. That is why the proviso talks of "the protection *intended to* be afforded by this section"[249]. That language makes it plain that the proviso is to work in circumstances where the issue of the fairness and accuracy of the report has not been (and in the nature of things could not have been) authoritatively decided. In that context, it is the

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249 Emphasis added.

will of Parliament that a reasonable letter or statement should be published. Because the publication advances freedom of expression and enhances the public's entitlement to make its own judgments on reputation, courts (and therefore editors) should err on the side of upholding publication of such letters. It can rarely be in the public interest or for the public benefit to deny a person claiming to have been defamed an opportunity to put his or her contradictory or explanatory statement before the same public as has heard the matter complained of. In some circumstances such a denial would evidence an arrogance of power, deprive the publisher of the privilege otherwise applicable and perhaps even illustrate actual malice.

The reasonable response issue - conclusions

162 All of the judges of the Supreme Court who considered this question concluded it adversely to the appellant. They decided that the two letters which he had sent to the respondent were not, within proviso (b), reasonable letters by way of contradiction or explanation.

163 The first article and letter: The primary judge rejected the first letter on the ground that it contained an assertion about Mr Simmons's omission to answer a question which the journalist disputed and which the Royal Commission transcript was ultimately corrected to confirm[250]. The appellant could not have known this at the time he wrote the first letter. His examination of the transcript, in its then state, reinforced his own impressions. However, whilst the primary judge thought that the respondent should have made a better response to the appellant's request than "mere silence and inaction"[251], he was not prepared to hold that the first letter attracted the disqualifying effect of the proviso. The letter was, he considered, inaccurate, as ultimately found upon full inquiry. On that point the appellant lost this argument.

164 In the Full Court, Doyle CJ agreed with the analysis of the primary judge[252]. For the other members of the Full Court, the question did not arise in respect of the first article. However, Williams J implicitly agreed with the primary judge's analysis of the section[253].

165 The first letter read as follows:

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250 (1995) 181 LSJS 218 at 228.

251 (1995) 181 LSJS 218 at 228.

252 (1996) 65 SASR 527 at 546.

253 (1996) 65 SASR 527 at 560.

> "On page 1 of today's Advertiser, in an article by Debra Read, it was reported that Mr Simmons told the Royal Commission that I was one of four executives of Beneficial Finance in respect of whom a question of criminal or civil misconduct had been raised with the Premier. The allegation was made in the context of loans to Beneficial executives.
>
> I deny any misconduct on my part whether criminal or civil. Any loans received by me from Beneficial Finance were within the criteria for such loans applied to all senior Beneficial executives and at commercial rates of interest.
>
> Moreover, I do not believe that Mr Simmons either intended to or did make any allegation to the Premier (or to the Royal Commission) of criminal or civil misconduct which extended to me.
>
> I request that you publish this letter immediately and on page 1 of your newspaper to prevent continuing damage to my reputation."

166 In the result, the only statement which was held to take this letter out of the description of "a reasonable letter" was the assertion of the appellant's belief about what Mr Simmons intended to and did say by way of allegation to the Royal Commission. There was no doubt that the appellant believed what he stated in that regard. Indeed, having inspected the Commission's copy of the transcript he had good reason for that belief. He did not state it as a fact. He simply stated his belief. It would have been open for the respondent to append a comment to the publication of such a letter to the effect that it stood by its report. Instead, it simply ignored the letter altogether. It denied the appellant the opportunity of putting forward a correction which accorded with his understanding both of the facts and of Mr Simmons's evidence.

167 Within the purposes of proviso (b), as I have explained them, the letter was perfectly reasonable. It was brief. It defamed no third person. It clearly put the appellant's contradiction to the matters reported. The failure to publish it was not only unfortunate (as the primary judge thought). It was also a denial of the operation of s 7 of the Act as it was intended to work. It prevented the public from having the opportunity of reading, and then evaluating, the appellant's defence of his reputation. For that denial, the respondent lost the privilege afforded by s 7 in respect of the first article.

168 The second article and letter: I will not set out in full the terms of the second letter. It was not unduly lengthy, being of six paragraphs. Once again, quite succinctly, the appellant expressed the gist of his principal objections to the second article and asked for publication which was refused.

169 The appellant's argument concerning the second letter appears to have been rejected by all of the judges below[254] because the appellant described Mr Simmons's diary notes as "purported diary notes" and referred to the article as "grossly unfair and inaccurate". On neither count could such words remove from an otherwise publishable letter the quality of reasonableness as that word has been explained. The use of the word "purported" was perfectly reasonable. When examined, the "diary notes" of Mr Simmons appear much more likely to have been aides-mémoire for his discussions with the Premier rather than a true diary record of what was discussed. That this is so appears from the total absence of the slightest mention in the "diaries" of the Premier's responses to the various points listed by Mr Simmons. In any case, it was open to the appellant to describe those records as "purported", indicating his dispute of them as a "diary".

170 Likewise, in the context of the heat which is commonly generated by the publication of matter claimed to be defamatory, the allegation in the second letter that the article was "grossly unfair and inaccurate" seems hardly extravagant. As it happens, I am of the opinion, alike with the primary judge and the Full Court, that in material respects the second article was indeed inaccurate and unfair reporting. But that could only ultimately be determined after hearings at three levels of the Australian judicial hierarchy, the passage of almost six years and the expenditure of very large sums of money. Proviso (b) is intended to operate peremptorily in the heat of the aftermath of a publication which causes the alleged hurt. With every respect to the judges below, I regard the second letter, as the first, as reasonable by way of contradiction or explanation by a person clearly affected. Not only should it have been published. The failure to do so meant that the defence of privilege, provided by s 7, was "not ... available" to the respondent in respect of the second article.

171 I should make it plain that I rest my conclusion concerning the rejection of the respondent's reliance on the defence of fair and accurate report upon the two grounds each of which I would hold to have been made out. The defence was not available because neither report published was fair and accurate. Even if it were, the defence would not apply because the respondent refused to publish a reasonable response.

<u>The economic loss issue</u>

172 In light of the foregoing conclusions, the appeal must be allowed and the matter returned to the Full Court. The appellant is entitled to succeed upon both articles. In my view, he is entitled to succeed upon all of the imputations pleaded. His cross-appeal to the Full Court, by which he complained about the inadequacy of the general damages awarded to him by the primary judge, must be re-determined by the Full Court. In view of the fact that damages will have to be

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254 (1995) 181 LSJS 218 at 235; (1996) 65 SASR 527 at 551, 557, 561.

addressed in the Full Court, it may be helpful to deal with some of the issues argued in relation to damages. It is necessary to do so in respect of the general damages because of the terms of the respondent's cross-appeal to this Court.

173 I turn first to the component of the appellant's damages which the primary judge awarded for economic loss. The matter became unnecessarily complicated because of the use of the term "special damages"[255] to describe the award for economic loss. The primary judge found this item in the sum of $175,000 for the two articles. He found composite general damages of $75,000 making a total judgment (before interest) of $250,000 which he divided: as to $225,000 for the first article and $25,000 for the second. The Full Court unanimously concluded that the claim for economic loss was not made out in the evidence. There are therefore two questions to be considered. The first is whether, as the primary judge thought, the evidence called at trial was sufficient, in fact, to sustain a claim for damages for loss of employment and reduced prospects of re-employment. The second, if the requisite factual nexus is established, is whether the correct approach was taken to the calculation of that loss and, specifically, whether the correct classification is one of general or special damages.

174 The factual difficulty arises out of the sparsity of the appellant's evidence concerning his termination by Leal Boss. He described the way in which he was summarily dismissed two days after the publication of the first article and the subsequent efforts, substantially futile, to obtain equivalent, or other, employment. He did not call evidence from Leal Boss to establish affirmatively that officers of the company had read the first article and decided that it could not have in its employ a person such as the appellant. He did not seek to give evidence of anything said to him by his superior at the time of his termination. Effectively, he left it open to inference that the publication of the article in such a prominent place in Adelaide's daily newspaper was a cause of the termination and the difficulty he there faced in obtaining comparable or better employment elsewhere. He relied upon the nature of the publication, the description of the financial responsibilities which he had with Leal Boss, the absence of any other demonstrated cause and the sudden circumstances of the termination. It was argued, successfully at first instance, that this evidence was sufficient to sustain a conclusion that the publication of the first article was *a cause*, if necessary *the cause* of the loss of his job.

175 The Full Court was not prepared to draw the inference which the primary judge drew that, but for the articles, the appellant would have been able to find employment. Nor did it agree that it was "unrealistic to criticise [the appellant] for not calling someone from Leal Boss to say why they dismissed him"[256]. Doyle CJ,

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255 (1995) 181 LSJS 218 at 240.

256 (1995) 181 LSJS 218 at 240.

in a passage criticised by the appellant, explained his rejection of the claim for economic loss thus[257]:

> "I do not consider that one can conclude on the balance of probabilities that the defamatory imputations were the cause of the dismissal. I would not favour a pedantic approach on this issue, nor would I call for strict proof on such a difficult issue. But I cannot accept the soundness of a finding for the [appellant] in the light of what the defendant reported in the first article without incurring liability, and knowing nothing at all about the reasons for the dismissal.
>
> In my opinion the [appellant's] evidence does not provide a basis for an award of economic loss in respect of his employment with Leal Boss. On the scant evidence given it is moreover, impossible to say what effect the defamatory imputations had had on the [appellant's] employment prospects since his employment with Leal Boss came to an end.
>
> In the end, the issue is one of causation. Did the [appellant] prove that the defamatory imputations caused the loss of his employment and subsequently damaged his prospects of re-employment? ...
>
> It is on this issue ... that I am unable to agree with the trial judge."

176 Because Perry J was of the view that the first article was not actionable, the question did not arise for him in that instance. However, in respect of the second article he expressed his agreement with Doyle CJ that "the claim for economic loss was not made out"[258]. Williams J was in the same position. He found it unnecessary to deal with the question with respect to the first article and, with respect to the second, he expressed the opinion that the claim for special damages for economic loss had not been made out. He did not consider that "a nexus has been established"[259] between the publication of the matters mentioned in the imputations found in respect of the second article and the termination of the appellant's employment. The appellant criticised this conclusion of Williams J on the basis that the termination of employment with Leal Boss occurred before the publication of the second article. It is not entirely clear but it may be that Williams J was merely saying that no economic loss, after termination, could be attributed to the second article upon which only he was obliged to calculate damages.

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257 (1996) 65 SASR 527 at 552.

258 (1996) 65 SASR 527 at 557.

259 (1996) 65 SASR 527 at 561.

177 With all respect to the Full Court, I consider that the approach taken to the proof of the economic loss of the appellant indicates error. The assessment of the probabilities in a matter of this kind would ordinarily be left to the trial judge with the advantages usually ascribed to that position where the drawing of inferences is concerned. The suggestion for the respondent that the reason for the termination by Leal Boss was the absence of the appellant from his duties on the two days immediately following the publication of the first article borders on the absurd. Such absence, in a senior executive, would not warrant peremptory termination. The inference that the termination was somehow connected with, and flowed from, the article, on the other hand, is extremely strong. Clearly, it was open to the primary judge to so infer. In any case it was open to him to conclude that the publications had a seriously adverse consequence on the appellant's employability. In reaching the opposite conclusion, it would appear that, despite remarks to the contrary, Doyle CJ may have demanded too strict a proof. His Honour's suggestion that the appellant was obliged to prove that the defamatory imputations in the first article were *the cause* of his dismissal mis-states, with respect, the burden resting upon the appellant. It was enough that he should establish that the actionable parts of the article were *a cause* of the injury to his reputation and all of the consequences that flowed from it[260].

178 Viewed in this way, I regard it as overwhelmingly probable that the publication of the first article was a cause of the termination of the appellant's employment and of the difficulty which he thereafter experienced in obtaining employment in the finance industry. There may have been other contributing causes. They may, for example, have included the appellant's mere association with the Bank and BFC during their troubles. But the appellant was entitled to damages for the effect which the publication of both articles had on his economic capacity.

179 The appellant asked for restoration of the primary judge's finding that he was entitled to damages for loss of employment and reduced prospects of re-employment. At first instance, his Amended Statement of Claim included a specific demand[261], properly particularised[262], claiming such damages as economic loss. In this Court, however, counsel for the appellant submitted that such damages could come under the head of either general or special damages[263]. My own view is that, contrary to the observations of the primary judge, this allowance should be regarded not as special damages but as general damages resulting from the kind of

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260 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 509, 524, 530.

261 Amended Statement of Claim, par 8 [AB43-44].

262 cf *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 235-236, 251-252.

263 *Chakravarti v Advertiser Newspapers Limited*, High Court of Australia, 3 September 1997, Transcript of Proceedings at 206-207.

injury which the appellant sustained[264]. If the question is whether particular earnings are lost as a result of the publication of a defamation, I see no reason why, if properly pleaded, particularised and proved, such earnings could not be recovered as special damages in the sense of quantifiable economic loss[265]. However, in this case, the real gravamen of the appellant's complaint was one of general damage to his reputation and hence to his employability as a senior finance executive. In this sense, the damage was to his economic capacity. It therefore sounded in general damages. Its calculation would have regard to the considerations which the appellant pleaded and which the primary judge appears to have accepted[266]. As the Full Court must recalculate the entirety of the appellant's damages, it is enough to say that, in my opinion, there is no reason why the appellant should not recover damages for loss of employment and reduced prospects of employment. The respondent still has formally outstanding its ground of appeal to the Full Court (ground 6) that the award of $175,000 for "special damages" was manifestly excessive. It will be apparent that I do not see any substantive merit in the complaint; but it is appropriate that it receive its quietus from the Full Court to which the whole issue of damages must be returned.

The general damages issue

180 That leaves, finally, the residual questions of general damages. The primary judge found $75,000 for both articles and then apportioned them between the first and the second[267]. The Full Court, having rejected that part of the claim for damages which related to economic loss, substantially reduced the judgment, which was then one for general damages only. On this footing, Doyle CJ would have found judgment in the sum of $45,000 for the first article and $40,000 for the second. Perry J and Williams J, having found that the first article was not actionable, agreed in the assessment of general damages at $40,000 for the second article. Doyle CJ described the primary judge's assessment of $75,000 general damages for both articles as "a high one"[268]. However, he expressly recognised

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264 cf *Harrison v Pearce* (1859) 32 LTOS 298 at 298 per Pollock CB; *Gatley on Libel and Slander*, 9th ed (1998) at pars 32.47-32.48.

265 *Duncan and Neill on Defamation*, 2nd ed (1983) at par 18.11. Note the different senses in which "special damages" are used: *Ratcliffe v Evans* [1892] 2 QB 524 at 528-529 and the criticisms of the expression in *Broome v Cassell & Co* [1972] AC 1027 at 1073.

266 (1995) 181 LSJS 218 at 239-240. The following figures are all exclusive of interest.

267 (1995) 181 LSJS 218 at 240.

268 (1996) 65 SASR 527 at 554.

that the defamatory imputations were "quite serious"[269]. I agree that the imputations which both articles carried were serious. They were especially so for a senior finance executive whose earning capacity depended upon a reputation for probity and personal integrity. However, I cannot agree that the award for general damages found by the primary judge, or that favoured by the Full Court, was a "high" one. It may have been so regarded in South Australia where defamation actions are tried by judge alone and appear to be comparatively rare. But in comparison with judgments returned in other parts of Australia, the award for general damages appears insufficient to the wrongs which were found[270].

181 It is possible that the inadequacy arose from the approach which Doyle CJ took to the calculation of general damages, having regard to the fact that some parts of each of the matters complained of were found not to be actionable. His Honour referred to the decision of the House of Lords in *Dingle v Associated Newspapers Ltd*[271]. In that case, which concerned a series of newspaper articles highly critical of the plaintiff, only one of which was objected to and found to be defamatory, their Lordships made it plain that the publisher was liable only in respect of those parts of its articles which were not found to be privileged or which had not been justified[272]. But this did not diminish the plaintiff's entitlement to vindication for a proved defamation. That entitlement could not be lost by the publisher's seeking to establish that others were similarly defaming the plaintiff so that he had less reputation to lose[273]. The correctness of the approach in *Dingle* was not doubted. However, the passage in the reasoning of Doyle CJ, which was criticised, was as follows[274]:

> "[T]he [respondent] is only liable for that part of the article which is not privileged. Therefore one must *subtract* from the defamatory effect of the article that effect which derives from the non-actionable parts".

182 The appellant suggested that the stated process of subtraction involved an unnecessary diminution of his entitlement to general damages for the defamatory

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269 (1996) 65 SASR 527 at 554.

270 Compare for example *Crampton v Nugawela* (1996) 41 NSWLR 176.

271 [1964] AC 371.

272 [1964] AC 371 at 394 per Lord Radcliffe.

273 [1964] AC 371 at 396 per Lord Radcliffe, at 410 per Lord Denning.

274 (1996) 65 SASR 527 at 554 (emphasis added).

effect of the article as a whole. I am by no means convinced that this complaint is justified. Doyle CJ went on to say[275]:

> "However, one may not reduce the award of damages which would go to vindicate the [appellant] in relation to a false imputation, merely because other statements have been made (either in the same article or in other previous articles) which are almost as discreditable but which are justified or privileged."

183 Nevertheless, thinking in terms of "subtraction" or "reduction" may lead to errors of calculation of general damages which would inappropriately diminish the plaintiff's just entitlements. The decision-maker should never lose sight of the objective of the award of damages, once entitlement is established. It is to vindicate the reputation of the party wronged, to compensate that person for the hurt caused by the wrong proved[276] and, at least in some cases, to resolve such matters before the public which may have its own interest to know the outcome. The damages must be such as to sustain the law's assumption that, once they are awarded, there will be no future loss[277]. Irrelevant considerations such as the existence of other discreditable matter which might have been published of the plaintiff, but was not, or the existence of some accurate allegations in the midst of unsustainable ones must simply be put out of mind[278]. The plaintiff is only entitled to recover damages for the actionable wrongs proved. But for them, the plaintiff is entitled to full recovery without subtractions and without reductions. In the present proceeding, a relevant consideration is the fact that the appellant's potential employment market was not confined to South Australia. He had already demonstrated a willingness to move in search of advancement. His employment market in the financial sector was national or regional, if not international.

184 When this approach is applied to the awards of general damages found for the appellant, their extreme modesty is demonstrated in sharp relief. This is particularly so given that the primary judge found that there were at least some circumstances of aggravation (notably a degree of intransigence found on the

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275 (1996) 65 SASR 527 at 554.

276 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150; *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 396; cf *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 215.

277 *John Fairfax & Sons v Kelly* (1987) 8 NSWLR 131 at 142 per McHugh JA approved by Brennan J in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 77.

278 *Bunker v James* (1980) 26 SASR 286 at 291.

respondent's part in the conduct of the proceedings)[279] which had to be taken into account in deciding the amount of general damages[280].

185 The appellant's cross-appeal to the Full Court in challenge to the award of general damages having been dismissed by that Court, it will now fall to the Full Court to reconsider the general damages awarded to him. There may be reasons for variations in damages awards for particular wrongs in different parts of Australia. But variations in the award of general damages in defamation to the extent evident in this case is not justified. Least of all is it justified given that the primary judge thought that the wrongs found demanded "substantial damages"[281]. By modern Australian standards the awards of general damages made here were parsimonious[282].

Conclusion and orders

186 The result is that the orders of the Full Court cannot stand. Nor is it possible simply to restore the orders of the primary judge.

187 I therefore agree in the orders proposed by Gaudron and Gummow JJ.

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279 (1995) 181 LSJS 218 at 239.

280 (1995) 181 LSJS 218 at 240.

281 (1995) 181 LSJS 218 at 240.

282 This is particularly so when regard is had to the fact that it is now an established principle that attention may be called to the levels of general damages in personal injury awards as a foundation for guidance and to ensure proportionality: *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 219-221; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 56-60.