SUPREME COURT OF QUEENSLAND

CITATION:	*Harbour Radio Pty Limited & Ors v Wagner & Ors* [2019] QCA 221
PARTIES:	**HARBOUR RADIO PTY LIMITED** ACN 010 853 317 (first appellant) **ALAN BELFORD JONES** (second appellant) **RADIO 4BC BRISBANE PTY LIMITED** ACN 009 662 784 (third appellant) **v** **DENIS WAGNER** (first respondent) **JOHN WAGNER** (second respondent) **NEILL WAGNER** (third respondent) **JOE WAGNER** (fourth respondent)
FILE NO/S:	Appeal No 11072 of 2018 SC No 10830 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 201 (Flanagan J)
DELIVERED ON:	18 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2019
JUDGES:	Fraser and Morrison JJA and Burns J
ORDERS:	**1. The application for leave to adduce fresh evidence is dismissed.** **2. The appeal is dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where the trial judge found the appellants liable for a total of 80 defamatory imputations made by the second appellant in 29 separate matters broadcast by the first and third appellants – where the trial judge's findings included that the imputations were of the gravest kind and that publication of the matters

complained of constituted part of a campaign of vilification against each of the respondents – where the trial judge found that the second appellant had gratuitously repeated a number of the defamatory assertions in the course of his evidence at trial – where the appellants contend that the second appellant's answers in the course of evidence were responsive to the questions asked of him, albeit in an expansive manner on some occasions – whether the trial judge erred in finding that the second appellant had gratuitously repeated the defamatory assertions in the course of his evidence

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING AN ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where the trial judge found that the second appellant had gratuitously repeated a number of the defamatory assertions in the course of his evidence at trial – where the trial judge ordered that the appellants be permanently restrained from publishing the defamatory matter or any defamatory imputation that does not differ in substance from the defamatory imputations conveyed by the publications – where the appellants contend that the trial judge gave insufficient reasons for granting the injunctions – whether the trial judge gave adequate reasons for permanently restraining the appellants

DEFAMATION – INJUNCTIONS – JURISDICTION AND GENERALLY – where the trial judge found that the second appellant had gratuitously repeated a number of the defamatory assertions in the course of his evidence at trial – where the trial judge ordered that the appellants be permanently restrained from publishing the defamatory matter or any defamatory imputation that does not differ in substance from the defamatory imputations conveyed by the publications – where the appellants contend that the evidence and conduct of the appellants did not justify the imposition of permanent injunctions and that there were otherwise no grounds for the making of those orders – whether the trial judge erred in ordering that the appellants be permanently restrained

DEFAMATION – INJUNCTIONS – JURISDICTION AND GENERALLY – where the trial judge ordered that the appellants be permanently restrained from publishing the defamatory matter or any defamatory imputation that does not differ in substance from the defamatory imputations conveyed by the publications – where the injunctions against the first and third appellant operate against each of those appellants by itself and/or its servants or agents – where the appellants contend that the injunctions granted unduly restrain them – whether the trial judge erred in formulating orders that impermissibly or unreasonably restrain the first and third appellants

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – PROCEDURE – POWERS OF COURT – FURTHER EVIDENCE – where the trial judge ordered that the appellants be permanently restrained from publishing the defamatory matter or any defamatory imputation that does not differ in substance from the defamatory imputations conveyed by the publications – where the respondents applied to adduce a letter from the second appellant to a newspaper 10 days after publication of the trial judge's decision – where the respondents contend that the letter infers that the second appellant would repeat one or more of the defamatory imputations if he was not permanently restrained – whether the Court should receive the evidence

Civil Proceedings Act 2011 (Qld), s 9
Defamation Act 2005 (Qld), s 26

Abella v Anderson [1987] 2 Qd R 1, cited
Al Muderis v Duncan (No 3) [2017] NSWSC 726, cited
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, cited
Carolan v Fairfax Media Publications Pty Ltd (No 7) [2017] NSWSC 351, cited
Cypressvale Pty Ltd v Retail Shop Lease Tribunal [1996] 2 Qd R 462; [1995] QCA 187, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, cited
Hamra v The Queen (2017) 260 CLR 479; [2017] HCA 38, cited
Hockey v Fairfax Media Publications Pty Ltd (No 2) (2015) 237 FCR 127; [2015] FCA 750, cited
Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, cited
Kestrel Coal Ltd v Construction, Forestry, Mining and Energy Union [2001] 1 Qd R 634; [2000] QSC 150, cited
King & Ors v Australian Securities and Investments Commission [2018] QCA 352, cited
Kirkpatrick v Kotis (2004) 62 NSWLR 567; [2004] NSWSC 1265, cited
Mifsud v Campbell (1991) 21 NSWLR 725, cited
Sierocki v Klerck (No 2) [2015] QSC 92, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
Wainohu v New South Wales (2011) 243 CLR 181; [2011] HCA 24, cited

COUNSEL: R J Anderson QC, with R De Luchi, for the appellants
T B Blackburn SC, with P J McCafferty QC, for the respondents

SOLICITORS: Bennett & Philp for the appellants
Corrs Chambers Westgarth for the respondents

[1] **FRASER JA:** After a lengthy trial the respondents succeeded in their claim for damages for defamation against the second appellant, Mr Jones, and the first and third appellants, who operate radio stations which broadcast Mr Jones' programs. The appellants were found liable for a total of 80 defamatory imputations made by Mr Jones in 29 separate matters broadcast by one or both of the first and third appellants during a 10 month period between October 2014 and 20 August 2015. The trial judge ordered that Mr Jones and the first appellant pay each respondent damages for defamation of $750,000 plus interest and that Mr Jones and the third appellant pay each respondent damages for defamation of $100,000 plus interest.

[2] The appellants have not appealed against those orders. They appeal only against injunctions ordered by the trial judge which restrain each appellant from again publishing the defamatory matter or any defamatory imputation that does not differ in substance from the defamatory imputations conveyed by the publications.

[3] The grounds of appeal contend that the trial judge erred by failing to give adequate reasons for granting the injunctions, by exercising his discretion to grant the injunctions when the evidence and conduct of the appellants did not justify them, in formulating orders that impermissibly or unreasonably restrained the appellants, and in granting injunctions when there were no grounds to do so. In addition to contesting the appellants' arguments the respondents contend that, in the event that the Court finds that the trial judge's reasons for granting injunctions are inadequate, this Court should exercise the discretion afresh and find that the injunctions are appropriate. The appellants agree that in that event the Court should exercise the discretion afresh but they argue that the Court should refuse to grant any injunction.

Factual and procedural context

[4] The following outline of the context in which the trial judge decided that the injunctions should be granted is drawn from findings expressed by the trial judge which, with one exception identified in these reasons, the appellants do not challenge.

[5] Amongst the businesses conducted by the respondents' company was a quarry at Grantham which the company had acquired in late 1988. The quarry was managed and operated by a Wagner entity until about November 2011. In January 2011 there was disastrous flooding across Queensland. There was an exceptional flood event in the Lockyer Valley. The flooding in and around Grantham was different from previous floods in that area. Eyewitnesses described rapidly rising floodwater. Tragically, the Grantham flood event resulted in the loss of life through drowning of 12 people, including young children.

[6] A commission of inquiry into the flood ("the Queensland Flood Inquiry") was established with the present Chief Justice (then Holmes JA) appointed as Commissioner. The Queensland Flood Inquiry report of 16 March 2012 accepted evidence by a hydrologist that the quarry mitigated the impact of flooding by reducing peak flood levels by between 0.04 and 0.1 metres, it did not affect peak flood velocities at Grantham but attenuated the flows and caused a five-minute delay in the water rise, and at some other locations the existence of the quarry elevated flood levels slightly.

[7] The appellants broadcast the defamatory imputations after that report was published. One of the two main topics of those imputations involved assertions by Mr Jones that the quarry aggravated the flood at Grantham. The second main topic

involved unrelated assertions by Mr Jones about the legality and the propriety of the approval process undertaken by the respondents in developing an airport on land they own at Wellcamp, which is about 16 kilometres from the Oakey Army Aviation Centre.

[8] After the appellants had broadcast some of the defamatory imputations, on 11 May 2015 a second Commission of Inquiry ("the Grantham Flood Inquiry") was established. Mr Sofronoff QC (the present President of the Court of Appeal) was appointed to investigate particular aspects of the flooding at Grantham, including whether the existence or breach of the Grantham quarry caused or contributed to the flooding or had a material impact on the damage caused by the flooding. There were extensive public hearings. Numerous Grantham residents gave evidence of what they experienced in the course of the Grantham Flood event. Hydrology and hydraulics experts gave evidence. Mr Sofronoff QC concluded in his report of 7 October 2015 that Grantham flooded in the way that it did because of the combination of the volume of water that surged down Lockyer Creek and the natural shape of the land near Grantham; the only effect of the quarry was to slightly delay the commencement of the flood whilst the quarry pit briefly absorbed part of the flow.

[9] The appellants did not pursue any defence of various defamatory imputations the trial judge found were conveyed by Mr Jones' statements and the appellants properly conceded that there must be an award of damages in the respondents' favour in respect of them.[1] The undefended defamatory imputations included accusations that the respondents were guilty of corruption, high-level cover-ups, criminal conspiracies, terrorising and vilifying people who threaten the truth, and illegally obtaining a national asset for use as a private airport.[2] The trial judge recorded that those imputations themselves were very serious and warranted a substantial award of damages.

[10] The appellants unsuccessfully sought to prove that five categories of defamatory imputations were substantially true:[3]

> "Category 1: the [respondents] bore some responsibility for the flooding that caused the deaths of residents in Grantham because the levee bank constructed at their quarry collapsed, sending a surge of water into Grantham.
>
> Category 2: the [respondents] engaged in conduct designed to cover up the role played by them (and the quarry) in the flood event;
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> Category 3: the [respondents] were involved in bullying and intimidation;
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> Category 4: the [respondents] constructed and operated the Wellcamp Airport in breach of all the rules;
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> Category 5: the [respondents] are self-interested and greedy."

[11] The trial judge found:

(a) The appellants' failure to prove the category one imputations were substantially true resulted from the appellants' "stark

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1 Reasons [436].
2 Reasons [435].
3 Reasons [437].

failure to establish any causal link between the collapse of the bund and the deaths of 12 people".[4]

(b) To the extent that defences were persisted with in respect to the category two to five imputations those defences were of limited scope and they were "weak and unmeritorious".[5]

[12] The trial judge rejected defences that 10 of the matters complained of were fair reports of proceedings of public concern (the Grantham Floods Inquiry), holding that none of those matters amounted to a fair report.[6]

[13] The appellants pleaded a defence of contextual truth under s 26 of the *Defamation Act* 2005 (Qld), but only in relation to four of the matters complained of and only to the extent that those matters were alleged to convey various specific imputations. That defence was rejected for reasons which include the appellants' failure to establish the substantial truth of the contextual imputations they alleged, that the respondents conducted business on their terms with disregard for the laws that regulated them and they conducted business on their own terms with disregard for the impact their operations had on the broader community.[7]

[14] The trial judge's findings include:

(a) the defamatory imputations were of the gravest kind.[8] They included accusations by Mr Jones that:[9]

"(a) the [respondents] were responsible for the deaths of 12 people at Grantham, including two children;

(b) knowing of their culpability, the [respondents] were knowingly involved in a massive cover-up. This cover-up involved the [respondents] conspiring with prominent members of government, including the then Deputy Prime Minister of Australia, the Bligh and Newman Governments, and Barnaby Joyce. The cover-up involved selling the quarry in order to evade legal liability for causing the deaths of 12 people. It also involved telling lies as to whether the quarry wall was part of the natural landscape or man-made. This cover-up also involved the [respondents] bullying and intimidating persons who sought to expose the truth;

(c) the [respondents] were selfish and greedy in that they had illegally built the Wellcamp Airport which involved the stealing of airspace above the Oakey Army Base, thus harming the national defence interests;

(d) the reason the [respondents] were able to construct the Wellcamp Airport was because of their corrupt relationship with the Coalition in Queensland and Canberra; and

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4 Reasons [849].
5 Reasons [849] – [850].
6 Reasons [698] – [708].
7 Reasons [709] – [714].
8 Reasons [788].
9 Reasons [787].

(e) the [respondents] are selfish and [in]sensitive grubs who falsely claimed to have suffered in the Grantham floods."

(b) Mr Jones was wilfully blind to the truth or falsity of what was broadcast.

(c) He made accusations without any evidence to support them.

(d) He used vicious and spiteful language, some of which was "very savage, particularly in relation to Grantham."[10]

(e) He aired very serious accusations on national radio over a period of 10 months without making any inquiry of the respondents, seeking a response from them, or informing them of the nature of the allegations.[11]

(f) The appellants refused to retract the defamatory imputations or to apologise. Mr Jones' refusal to apologise was explained by his evidence that he held to his views, including his views that the respondents were responsible or culpable for the deaths of 12 people at Grantham.[12]

(g) When considered in the context of previous broadcasts[13] the publication of the matters complained of constituted part of a "campaign of vilification against each of the [respondents]".[14]

[15] In relation to the harm suffered by the respondents as a result of the publication of the defamatory matter, the trial judge made the following observations:

(a) Each respondent became visibly upset and broke down whilst giving evidence.[15]

(b) The defamatory broadcast caused each respondent to suffer "profound personal hurt".[16]

(c) In addition to the presumption of good reputation in favour of the respondents, the respondents called six witnesses to testify to their good reputation. None of those witnesses were cross-examined. It was not suggested that each respondent had anything other than an excellent reputation for honesty and integrity in business and community circles before the appellants published the first matter complained of in the proceeding.[17]

(d) The publication of the matters complained of was very extensive.[18] Audience numbers for the Brisbane and Sydney

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10 Reasons [840].
11 Reasons [845].
12 Reasons [846].
13 See Reasons [859] – [867].
14 Reasons [858].
15 Reasons [791], explained with reference to the evidence discussed at [792] – [812].
16 Reasons [791].
17 Reasons [769].
18 Reasons [770].

metropolitan areas which varied between about 150,000 and about 200,000 considerably underestimated the full extent of the publication.[19]

(e) The grapevine effect of the defamatory broadcast was considerable.[20] In this respect the respondents gave evidence of many adverse comments which were apparently attributable to the broadcasts. For example, on the first day of the trial a message was left on the respondents' website which accused the respondents of killing the people in the floods at Grantham, referred to them as pigs now suing Mr Jones to cover-up and feel good and "get more cash", and concluded with a threat.

(f) It was "practically impossible to track the scandal and to know what quarters the poison of the broadcast has in fact reached".[21]

(g) Mr Jones, for whose conduct the first and third appellants were liable, "engaged in unjustifiable conduct" and "was motivated by a desire to injure the [respondents'] reputations", thereby increasing the harm to the respondents' feelings and their reputations.[22]

[16] In a finding challenged by the appellants, the trial judge concluded that Mr Jones gratuitously repeated in evidence the following defamatory assertions, often in answers that bore no connection with the questions he was asked:[23]

(a) the respondents were "not remotely concerned" about the deaths of 12 people at Grantham and "that's the Wagner attitude … they want things done their way";

(b) the respondents built the bund, the bund collapsed, and 12 people died;

(c) the respondents were responsible or culpable for the deaths of 12 people at Grantham;

(d) the deaths in Grantham were a result of "municipal murder";

(e) the respondents lied about the natural landscape of the quarry and lied about the cause of the flood;

(f) the respondents "still haven't been found out" for their responsibility for the deaths of 12 people during the Grantham flood;

(g) the respondents had engaged in a high-level cover-up to hide their responsibility for the deaths in Grantham;

(h) it was true (despite the appellants dropping the truth defence in respect of the allegation the week before the trial

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19 Reasons [771] – [772].
20 Reasons [775].
21 Reasons [784].
22 Reasons [816].
23 Reasons [853].

commenced[24]) that the respondents had conspired with the Deputy Prime Minister and Barnaby Joyce to frustrate the flood inquiry and cover up their culpability;

(i) the respondents stole airspace from Defence; and

(j) the respondents were going to destroy the Oakey Defence Base for their own selfish greedy purposes, which Mr Jones described as "the Wagner way", asserting that "these people do deals".[25]

[17] That was found to be one aspect of unjustifiable conduct by Mr Jones that increased the harm to the respondents' feelings and their reputations.[26] The trial judge held that three further factors supported the finding that the gratuitous repetition of defamatory assertions, particularly in relation to Grantham, constituted unjustifiable conduct:

(i) Mr Jones repeated those defamatory assertions before the Court made any findings as to whether the category one and two imputations were substantially true.

(ii) He continued to maintain his allegations in relation to Grantham against the respondents even though he publically praised Mr Sofronoff QC during the Grantham Floods Inquiry and praised him at the conclusion of the Grantham Floods Inquiry.

(iii) Despite agitating for a fresh inquiry and despite his praise of Mr Sofronoff QC, Mr Jones refused to accept the findings of the Grantham Floods Inquiry and explained that refusal in a way which "does not withstand any sensible analysis".[27]

[18] In Mr Jones' evidence about the last point he accepted what Mr Sofronoff QC "said" but he did not accept "the conclusions". The trial judge recorded that this was the first time Mr Jones publicly stated that he did not accept the conclusions of the Grantham Flood Inquiry. Mr Jones' explanation that witnesses "weren't given a chance to cross-examine the hydrology"[28] ignored the fact that those witnesses were represented by Queen's Counsel who cross-examined the hydrology experts. The trial judge described as "nonsensical" the proposition that it was significant that witnesses represented by Queen's Counsel were unable personally to cross-examine the experts.[29]

The claim for injunctive relief

[19] The remedies claimed in the respondents' claim and statement of claim upon which they went to trial were damages and injunctions to restrain the appellants from continuing to publish or further publish the same or similar words claimed to be

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24 The trial judge previously recorded that in the course of the trial Mr Jones "continued to assert the truth of a number of the imputations conveyed, including some which were no longer sought to be justified": Reasons [789].

25 Reasons [853].

26 Reasons [816], [852], [853].

27 Reasons [854].

28 Reasons [855].

29 Reasons [856].

defamatory of the respondents. The injunctions ordered by the trial judge are in the form proposed by the respondents in a written submission made after the conclusion of evidence at the trial.[30] The appellants' submissions did not raise any issue about the form of the claimed injunctions.

[20] After the conclusion of the evidence at the trial the parties exchanged written submissions. The respondents' claim for injunctions is discussed in the last paragraph of a written submission more than 250 pages long. The respondents submitted that it was appropriate for any relief to include injunctions, the appellants had maintained their belief in the truth of the allegations for which they were responsible, they had not undertaken not to repeat the allegations, and that "[i]n light of the evidence given on these points" it was probable that the allegations would be repeated unless the appellants were restrained. Preceding submissions included extensive criticisms of evidence given by Mr Jones about his asserted belief in the truth of allegations he had made, including the submission that when giving evidence Mr Jones gratuitously attacked the respondents' reputations and repeated his many defamatory assertions, often in answers that bore no connection with the question.[31]

[21] The appellants' argument opposing the grant of injunctive relief, in the last paragraph of their written submission in reply,[32] contends that injunctions are not warranted for the following reasons: a permanent injunction should not lightly be granted; "there is no evidence publication continued after the commencement of the proceedings… or that there is a current threat of saying anything similar in the future – contrary to the [respondents'] submission that it is "probable that the allegations will be repeated unless the [appellants] are appropriately restrained""; Mr Jones gave evidence in cross-examination [T12-99:39] that he would accept absolutely the Court's decision; and mere persistence with a truth defence does not justify orders of this kind. Earlier paragraphs in the appellants' extensive submissions responded to many criticisms made about Mr Jones' conduct, including the submissions that Mr Jones was not motivated to injure the respondents and his motivation to ask "current questions" and deal with "concerns … in a public discourse" should not be mistaken for eagerness to broadcast information that he knows to be false.[33]

[22] The trial judge's lengthy reasons for judgment discussed in detail the parties' arguments and made numerous findings about them, including the finding set out in [16] of these reasons that Mr Jones had gratuitously repeated in evidence defamatory assertions. In the third last and second last paragraphs of the reasons the trial judge referred specifically to the respondents' claim for injunctions and set out the gist of the parties' competing arguments about that claim. In the last paragraph of the reasons the trial judge stated that injunctive relief was appropriate in light of the fact that Mr Jones chose to continue to attack the respondents' reputations and to repeat many defamatory imputations in the course of his evidence.

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30 Plaintiffs' Further Supplementary Submissions, 15 June 2018, para 13.
31 Plaintiffs' Submissions, para 772.
32 Defendants' Outline of Argument Part 2.
33 Defendants' Supplementary Outline, para 12.

The appellants' challenge to the finding that Mr Jones chose to continue to attack the respondents' reputations and repeat many defamatory accusations in the course of his evidence

[23] The appellants argue that Mr Jones' answers were responsive to questions asked of him, albeit "expansively" responsive in some cases, and the evidence reveals only that Mr Jones did not resile from the views he had expressed in the broadcasts.

[24] Example (a) in the reasons of the trial judge (see [16] of these reasons) is the defamatory assertion that the respondents were "not remotely concerned" about the deaths of 12 people at Grantham and "that's the Wagner attitude … they want things done their way".[34] The cross-examiner asked a series of questions designed to establish the fact, ultimately found by the trial judge, that Mr Jones published his very serious accusations on national radio over a period of 10 months without informing the appellants of the nature of the allegations or seeking a response from them. Mr Jones then answered in the negative a question whether his view was that he could say whatever he liked about a person who declined a request from his producer to come on to the program. After answering the question Mr Jones added a statement which occupies seven lines in the transcript and concludes with this defamatory assertion.

[25] Example (b) is the defamatory assertion that the respondents built the bund, the bund collapsed, and 12 people died. Mr Jones substantially repeated that defamatory assertion when asked about the different topic whether he agreed that he had made an allegation of a conspiracy between the Deputy Prime Minister, a Minister, and one of the respondents to frustrate the Grantham Floods Inquiry.[35] He then twice repeated the defamatory assertion after answering in the affirmative the question whether he still maintained all the allegations he made against the respondents in relation to the bund.[36]

[26] Example (c) is the defamatory assertion that "the [respondents] were responsible or culpable for the deaths of 12 people at Grantham".[37] Mr Jones agreed in evidence that he had regularly and repeatedly made such an assertion.[38] When asked whether he had accused the respondents of being responsible for the deaths, he responded that he was not too sure he had used those exact words – but he added that he believed that 12 people had lost their lives as a consequence of the bund "to which there have been no answers, even to this point". He agreed he had used vituperative terms and said he was angry. When asked whether he had used "vicious terms" he said, "I don't know about vicious… but I strongly worded my concerns… ". He then added the assertion, "and I hold them today." Mr Jones made the imputations upon this topic and repeated them in evidence even though he had no hydrological or scientific evidence of any kind.[39] In relation to Mr Jones' evidence that the "attacks were based on [his] understanding of the grievous circumstances facing the victims" the trial judge found that his "understanding" was "a wholly inadequate basis for the broadcasting of grave accusations concerning the [respondents]" and Mr Jones' senior counsel subsequently conceded that the evidence of the

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34 T12-55 ll 44 – 47.
35 T 12-98 l 43 – T 12-99 l 3.
36 T 12-99 ll 4 – 14.
37 Reasons [853](c).
38 T 14-59 ll 43 – 46.
39 Reasons [821].

eyewitnesses was "insufficient for the purposes of establishing any causal link between the collapse of the bund and the deaths of 12 people".[40]

[27] Example (d) is the defamatory assertion that the deaths in Grantham were a result of "municipal murder". Mr Jones was cross-examined about his conduct in reading out an extract from a letter to him which used that term to describe the loss of 12 lives in the Grantham flood.[41] In addition to responding to questions about what Mr Jones intended to convey to his listeners, he added many remarks, some of which repeated or substantially repeated this defamatory assertion. When asked whether the assertion was an accusation of murder he responded that it was an extract from a letter to him, but he added that "and 12 people lost their lives" … it was "in a municipality – it's a municipal murder" and "we still don't know how". After responding to a suggestion that he intended to convey that the respondents were responsible, he volunteered the affirmation of the defamatory assertion, "I don't resile from anything I've said here." After responding to the same suggestion when it was repeated by denying it and saying he intended to convey the sentiments of the letter which called it municipal murder, he added this defamatory assertion by his statement, "which, in fact, it is." He denied the suggestion that he intended to say the respondents had murdered 12 people in Grantham, but he again repeated the substance of the defamatory assertion by his statements that he intended to say that without the quarry 12 people would not have died and it was a "self-evident fact" that "without the Wagner quarry many of these people wouldn't die".

[28] Example (e) is the defamatory assertion that the respondents lied about the natural landscape of the quarry and lied about the cause of the flood.[42] Mr Jones answered "correct" to questions whether he had alleged the respondents lied. I could not conclude on the face of the transcript that those answers were statements that the defamatory assertions were correct rather than responsive answers that it was correct that he made those allegations.

[29] Example (f) is the defamatory assertion that the respondents "still haven't been found out" for their responsibility for the deaths of 12 people during the Grantham flood. Mr Jones volunteered this defamatory assertion in the course of his statement described in the second sentence of [25] of these reasons.

[30] Example (g) is the defamatory assertion that the respondents had engaged in a high-level cover-up to hide their responsibility for the deaths in Grantham. At one point Mr Jones appeared to be suggesting that it was a Queensland politician who had first asserted that there was a cover-up[43] but he then appeared to acknowledge that he had previously made such an allegation. In answer to a question whether that was so, Mr Jones answered "yes, insofar as cover-up – the way I defined it – insofar as evidence from the local people hadn't been adduced."[44] Mr Jones volunteered that he was "wondering why" and "I still wonder why". He answered "yes" to a question whether a statement he made in a previous answer was an allegation by him of a cover-up. He then volunteered the defamatory assertion that there was a "cover-up" and stated as the basis of that assertion that two people rang him on air

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40 Reasons [821].
41 T 12-67.
42 T 12-56 ll 25 – 28.
43 T 14-61 ll 10 – 35.
44 T 14-61 l 40.

and burst into tears when they read or heard a flood enquiry report with one and a half pages dedicated to the deaths of the 12 people who died in the flood.[45]

[31] Another example of similar conduct concerns Mr Jones' response to a question whether he was including the Chief Justice in his assessment that "they" might have thought that they "could pull off a big cover-up with this report".[46] Both before and after that passage of evidence Mr Jones made it very clear that he did not suggest that the Chief Justice had engaged in any such conduct.[47] When asked directly whether he was including the Chief Justice in his assessment, he added to his answers the unresponsive assertions, "I was saying they, whomever they were". In a lengthy unresponsive passage he went on to assert that he did not resile from the fact that he had called it a cover-up and he made other statements implying that something untoward had occurred.[48]

[32] Example (h) is the defamatory assertion that it was true (despite the appellants dropping the truth defence in respect of the allegation the week before the trial commenced) the respondents had conspired with the Deputy Prime Minister and others to cover up their culpability for the deaths of 12 people in Grantham.[49] After a recording of the broadcast of that imputation was played to Mr Jones, Mr Jones rejected the suggestion that it was grotesquely irresponsible of him to broadcast it without giving the respondents a chance to comment on it. When asked whether he stood by the assertion he answered that he did. He then qualified that answer by adding: "in the sense that I'm aware that, in this – and I – perhaps I can apologise to the Court, because I know the defence in relation to this has been withdrawn … that was the legal advice I got… [b]ut – and if that is an inconvenience to the [C]ourt, I apologise for that".[50] But he qualified that answer also, by asserting that "there is no evidence at all that what I said was untrue." And when it was suggested that he did not put the allegation to the respondents, instead of answering "no I didn't", Mr Jones volunteered a different explanation of the defamatory assertion which culminated in his affirmation of it by the rhetorical question, "why would I – should be surprised about the veracity of this observation to me?" There followed a series of questions and answers about the different explanation given by Mr Jones, after which he was redirected to the original topic by the suggestion that "it was grossly irresponsible for you to make this allegation without giving the Wagners a chance to respond before you made it". After stating that "you would never, ever run a program that way" and he believed his sources although he was unable to provide empirical proof, he again repeated the defamatory assertion by adding, "but that doesn't mean to say I don't agree that this most probably did happen".[51]

[33] Examples (i) and (j) are related. They are defamatory assertions that (i) the respondents stole airspace from Defence and (j) were going to destroy the Oakey Defence Base for their own selfish and greedy purposes, which Mr Jones described as "the Wagner way", asserting that "these people do deals". Those assertions together

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45 T 14-62 ll 5 – 10. The reasons for one and a half pages describing the circumstances of the 16 deaths in the Lockyer Valley area are explained in 14.1 of the report. It refers to the circumstances of urgency which resulted in the recommendations designed to prevent similar tragedies being made in the interim report rather than the final report.

46 T 12-64 l 15.

47 T 12-63 ll 18, 20, 26, 42 and T 12-64 ll 34 – 36, T 12-65 l 3.

48 T 12-64 ll 22 – 30.

49 Reasons [853](h).

50 T 12-98 ll 15 – 18.

51 T 12-99 ll 41 – 47.

largely reflect imputation 63(b). The defence denying that the imputation arose was determined against the appellants.[52] It was admitted that the imputation was defamatory of each of the respondents. The appellants' defence pleaded that the imputation was substantially true for identified reasons "and where the [respondents] are self-interested, selfish people".[53] The quoted assertion and the identified reasons[54] are manifestly incapable of supporting that allegation. In this appeal the appellants did not contest the submission for the respondents that the truth of the imputation was never defended in any realistic or plausible sense. Ultimately the appellants abandoned any attempt to justify the imputation.[55]

[34] In cross-examination Mr Jones first rejected the proposition that it was untrue that the respondents or anyone else stole airspace from Defence.[56] Consistently with those answers Mr Jones justified the use of the word "steal".[57] Immediately after giving that evidence Mr Jones volunteered that "stealing" was "most probably, on reflection … not a good choice of words".[58] Although Mr Jones rhetorically asked what word he would use he persisted in his concession that it was a poor choice of words and he apologised.[59] But when asked whether he accepted that the respondents did not steal anything, he responded, "no, I – I don't – no I don't", [60] he said that he did not blame "entirely" the respondents for what happened and he was asking "legitimate questions" and "I still ask them".[61] He then repeated part of the defamatory imputation by asserting that there were "major security issues in relation to Oakey Airport and the area that has been appropriated to the [respondents] is the kind of area that would be used in the training of helicopter pilots to meet certain circumstances in a terrorist attack. And I think many object to that happening".[62] After cross-examination on those assertions revealed Mr Jones' inability to identify a persuasive basis for them he accepted that the respondents had not stolen anything – but at the same time he stated that the airspace had been "appropriated" to the respondents when it "should be sacrosanct".[63] Mr Jones agreed that this was a serious allegation, he acknowledged that he had not withdrawn it on national radio, but he volunteered that he would do so if that would make the cross-examiner "comfortable".[64]

[35] The specific aspect of imputation 63(b) that "the [respondents] were going to destroy the Oakey Defence Base for their own selfish, greedy purposes"[65] was the subject of a partial, attempted justification in the appellants' defence in the pleading already mentioned, one particular of which alleged that the consequence of the airport was that it would contribute to the closure of the helicopter base at the

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52 Reasons [254] – [255].
53 Third Further Amended Defence, para 141(a)(xxxiii).
54 Third Further Amended Defence para 141(a)(vi) 1 – 11. (It was submitted for the respondents that the relevant paragraphs were 3 and 4, but it not easy to see why they are less irrelevant than other paragraphs.)
55 Reasons [10] – [11], [650] (which refers to the imputations within the relevant category which were sought to be justified, which do not include this imputation; that is confirmed by [651] – [652].)
56 T 12-105 ll 33, 35.
57 T 12-106 ll 20 – 30.
58 T 12-106 l 35.
59 T 12-106 ll 34 – 40.
60 T 12-106 ll 42 – 43.
61 T 12-106 ll 45 – 46.
62 T 12-106 l 46 – T 12-107 l 4.
63 T 12-108 ll 9 – 14.
64 T 12-108 ll 15 – 25.
65 Reasons [853](j).

Oakey Defence Base. No evidence to that effect was adduced and that particular was abandoned. Yet after Mr Jones answered a question suggesting that if the airspace over Oakey was owned by anybody it was owned by the Federal Government, he added the defamatory assertion that the respondents had compromised Australia's capacity for combat in instances of terrorism.[66] I accept the respondents' submission that this was not an answer to the question, it was not related to any matter that Mr Jones or the other appellants sought to prove in the proceedings, no evidence was offered to support Mr Jones' statements, and in these circumstances this was a reckless assertion under privilege in open court that the respondents had dangerously compromised Australia's ability to combat terrorism.

[36] In summary, whilst Mr Jones usually gave responsive answers in cross-examination, in nine of the 10 examples identified in the trial judge's reasons it seems clear on the face of the transcript that Mr Jones went on to attack the respondents' reputations by repeating defamatory assertions that were not responsive to the questions. It is difficult to explain those assertions as merely part of unduly expansive responses to the questions. I conclude that the appellants have not established any error in the finding they challenge.

[37] That conclusion finds additional support in the circumstance upon which the respondents rely that the trial judge had the advantage, not available in this appeal, of seeing and hearing Mr Jones give evidence-in-chief and answer questions in cross-examination over a lengthy period. The appellants' challenge therefore faces the additional hurdle that the finding, that Mr Jones' repetitions in evidence of his defamatory assertions evidenced a deliberate choice to use the occasion to attack the respondents' reputations, may have been influenced, not only by the tone and timing of the defamatory assertions, but also by the trial judge's assessment of Mr Jones as he gave evidence.

Sufficiency of the trial judge's reasons for granting injunctions

[38] The appellants argue that an injunction against a media organisation is exceptional and must be based upon careful reasoning and that on such an important issue they were entitled to more than three paragraphs. They argue that the trial judge did not find that there was a risk of repetition of the defamatory imputations; the trial judge's reasons contain only the single reason for the injunctions that Mr Jones chose to continue to attack the respondents' reputations and to repeat many of the defamatory imputations. That is submitted to be incapable of justifying the injunctions. They argue that the trial judge ignored important evidence that militated against granting injunctions, particularly, Mr Jones' unchallenged evidence that he would "absolutely" accept the outcome of the proceedings.[67] The appellants criticise the absence from the reasons of a restatement of relevant principles or cases. They contend that the reasons should have articulated a consideration of the necessary balancing exercise, including reference to the nature of the defamation, the damage to the respondents, and the value of free speech associated with the appellants' capacity to continue to publish;[68] or the existence and degree of the threat or risk of repetition of publication of the defamatory

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66 T 13-20 ll 10 – 20.

67 T 12-99 ll 4 – 14.

68 The appellants refer to *Al Muderis v Duncan (No 3)* [2017] NSWSC 726.

matter.[69] The reasons are said to be deficient also because they do not explain why it is necessary to permanently restrain the first and third appellants rather than merely Mr Jones, an injunction against whom would prevent any further publication by the first and third appellants, and for the absence of consideration of the effect and scope of the injunctions against the first and third appellants.

[39] The only substantial issue raised by the parties in relation to the claimed injunctions at the trial was whether there was a risk that Mr Jones would repeat the defamatory imputations on air. The appellants' proposition that the trial judge did not find that there was such a risk is premised upon the last paragraph of the trial judge's reasons being read in isolation from all that precedes it, including the two preceding paragraphs which summarise the parties' submissions. That is not an appropriate way of reading the reasons. The language used in the last section of the reasons, which concerns only the appropriateness of a remedial response to the findings about the appellants' wrongs in preceding reasons, suggests the unsurprising conclusion that it draws upon the preceding reasons. If it be thought that this involves some "truncation of reference and expression", so much was appropriate in order to produce "coherent and tolerably workable reasons" in the context of the numerous issues and very lengthy written submissions the trial judge was required to consider.[70]

[40] The third last paragraph of the reasons directs the reader to the matter published by the appellants by referring to the claim for injunctions to restrain the appellants from continuing to publish or broadcast "the same or similar words", being those which are set out in Attachments 1 – 34 immediately following the end of the reasons. The second last paragraph of the reasons summarises the respondents' submission to the effect that there was a risk that the appellants would again publish the defamatory imputations in light of the evidence on points which include "that Mr Jones has maintained his belief in the truth of the many defamatory imputations conveyed". That submission invokes reference both to the evidence upon which the respondents relied for their submission to the trial judge that Mr Jones had gratuitously repeated defamatory assertions in the course of his evidence and to the 80 imputations set out in Attachment 35.

[41] In the last paragraph of the reasons, the findings that Mr Jones in the course of giving his evidence chose "to continue to attack the [respondents'] reputations and to repeat many of the defamatory imputations" hark back both to the findings about Mr Jones' extensive and gravely serious attacks upon the respondents' reputations in the programs broadcast by the appellants, including attacks motivated by Mr Jones' desire to injure the respondents' reputations, and to Mr Jones' conduct in continuing those attacks by his gratuitous repetition of defamatory imputations in the course of his evidence.

[42] When the last paragraph of the reasons is read in context, the trial judge's findings that Mr Jones chose to continue his attack upon the respondents' reputations when giving evidence clearly conveys the trial judge's acceptance of the respondents' submission that there was a risk that, unless injunctions were granted, the appellants

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69 *Carolan v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351; *Hockey v Fairfax Media Publications Pty Ltd (No 2)* (2015) 237 FCR 127.

70 *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2] (Allsop P), quoted in *King & Ors v The Australian Securities and Investments Commission* [2018] QCA 352 at [42] (Morrison and McMurdo JJA and Applegarth J).

would publish the defamatory imputations after the judgement was given against them. The trial judge thereby rejected the appellants' argument that he should accept evidence given by Mr Jones as proof that there was no such risk. That accords with the trial judge's express rejection of Mr Jones' evidence that he did not hate people and was trying only to serve community concerns expressed to him. The trial judge found that the import of this part of Mr Jones' evidence was "wholly contradicted" by other evidence and by the unjustifiable conduct of Mr Jones, including his conduct in gratuitously repeating defamatory assertions in evidence.[71]

[43] Contrary to the appellants' argument, the trial judge's reasons explain why the only issue raised by the parties' submissions upon this topic was resolved in favour of the respondents: the injunctions were appropriate to meet the risk of the gravely serious defamatory imputations upon which the respondents sued being repeated on air after judgment, such a risk being inferred from Mr Jones' conduct in continuing his original attacks upon the respondents' reputations, including attacks motivated by his desire to injure the respondents' reputations, by the gratuitous repetition of the defamatory assertions in evidence, often in answers that bore no connection with the questions he was asked.

[44] Otherwise the appellants' arguments contend that the reasons are deficient on account of their failure to discuss various topics that were not contentious at the trial. The appellants argue that short or even inadequate submissions from the parties do not relieve a court of the obligation upon it to provide proper reasoning. It does not follow, however, that the appellants are entitled to complain that the trial judge's reasons are inadequate because of the absence of reasons about points raised for the first time on appeal.

[45] It is not possible to be dogmatic about the content of reasons required of a judge after a trial in a case in which the judgment may be challenged on appeal. In *King & Ors v Australian Securities and Investments Commission*[72] the Court (Morrison and McMurdo JJA and Applegarth J) derived from authorities[73] the "general rule" that the reasons will refer to the evidence of importance to the determination, set out material findings of fact and the reasons for those findings, including why the judge preferred one competing body of evidence over another, and engage with the parties' submissions by explaining why one party's case is preferred over the other party's case. Those requirements ensure that "rights of appeal are not rendered meaningless and that a losing party is not left with a justified sense of grievance that the case has not been properly considered" and are "likely to produce a more soundly-based judgment and they further judicial accountability."

[46] The duty to give reasons is an incident of the judicial function and, in the case of the Supreme Court of a State, has a constitutional character; for reasons of that kind, there are limits upon the extent to which the duty may be circumscribed by the parties' submissions, but it remains the case that "the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the Court is exercising and the particular matter the subject of the decision".[74] Similarly, after the Court in *King & Ors v Australian Securities and Investments*

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71 Reasons [867].

72 [2018] QCA 352 at [39].

73 *Camden v McKenzie* [2008] 1 Qd R 39 at 47 – 48, [30] – [31] (Keane JA); *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 282 – 283 [26] – [29] (Steytler, Templeman and Simmonds JJ).

74 *Wainohu v New South Wale*s (2011) 243 CLR 181 at 214 – 215 [56] (French CJ and Keifel J).

Commission described the "general rule" concerning the required content of reasons, the Court observed that although it was possible to state general principles about the topic, those general principles must be applied to the facts of the particular case.[75]

[47] There is ample authority for the proposition that the content of reasons required depends upon the circumstances of the case,[76] including the submissions made by the parties.[77] For example, in *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd*[78] Mahoney JA observed that, putting aside particular cases where special considerations might apply, such as cases involving constitutional or jurisdictional issues, the judge ordinarily may confine attention to the points which had been taken and the submissions made in relation to them: "… it is not open to a party on appeal to complain that reasons were not given for the decision of a matter of fact or law which was, or must have been, decided, if the matter was not the subject of submissions made to the court below in a way which called for a reasoned consideration of them."

[48] The appellants have not identified any consideration that suggests the trial judge was not entitled to confine the section of the reasons expressly concerning the injunctions to the only substantial issue raised by the parties' submissions. The trial judge's reasons have not been shown to be inadequate.

The appropriateness of injunctive relief

[49] Under this heading I will discuss the grounds of appeal which contend that the trial judge erred by exercising his discretion to grant the injunctions when the evidence and conduct of the appellants did not justify it and there were no grounds to do so. The main focus of the appellants' arguments in support of these grounds is their contention that the respondents did not prove that there was a real risk that the appellants would re-publish the defamatory matter or the defamatory imputations after judgment was given against the appellants.

[50] Section 9 of the *Civil Proceedings Act* 2011 (derived from s 66 of the *Supreme Court Act* 1970 (NSW)) provides in sub-section (1) that a court that has jurisdiction to hear an application for an injunction "may, at any stage of a proceeding by injunction, restrain a threatened or apprehended breach of contract or other wrongful conduct." The original source of that provision, and earlier Queensland enactments to similar effect,[79] is s 79 of the English *Common Law Procedure Act* 1854. That section conferred a power to grant injunctions only upon the common

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75 [2018] QCA 352 at [42] (Morrison and McMurdo JJA and Applegarth J).

76 See, for example *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at 237 [59] (Muir JA); *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 476 (Fitzgerald P) and 484 (McPherson and Davies JJA); *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 (Samuels JA).

77 *Hamra v The Queen* (2017) 260 CLR 479 at 496 – 497 [42] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270 (Mahoney JA); *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* (1983) 3 NSWLR 378 at 385 – 386 (Mahoney JA).

78 [1983] 3 NSWLR 378 at 385 – 386; see also *Soulemezis v Dudley*.

79 *Interdict Act* 1867 (Qld), s 52; *Supreme Court Act* 1995 (Qld), s 180. The form of s 79 *Common Law Procedure Act* 1854 was mirrored in the colony of New South Wales by s 44 *Common Law Procedure Act* 1857. Prior to the commencement of the *Interdict Act* 1867, s 44 *Common Law Procedure Act* had effect in Queensland by virtue of the Order in Council establishing Representative Government in Queensland, dated 6 June 1859.

law courts. In *Australian Broadcasting Corporation v O'Neill*,[80] Gleeson CJ and Crennan J, and Heydon J, refer to the unwillingness of courts of equity to issue an injunction to restrain a threatened libel. Gummow and Hayne JJ conclude that a court exercising equitable jurisdiction would restrain only the repetition of what has been found to be libellous and then only if it threatened damage to a plaintiff's proprietary interest.[81] Nevertheless, final injunctions to restrain a threatened defamation or the repetition of what has been found to be defamatory under s 9(1) of the *Civil Proceedings Act* 2011 and similar provisions ordinarily have been granted or refused with reference to the general principles applied by a court of equity in its auxiliary jurisdiction to restrain the repetition of a legal wrong.[82]

[51] The relevant principles concern the exercise of the Court's discretion. In *Kestrel Coal Ltd v Construction Forestry, Mining and Energy Union*[83] Chesterman J discussed authorities upon the topic and concluded that they supported the general principle articulated by Dr Spry: [84] the plaintiff must satisfy the court that there is "a sufficient risk that [the] act will take place to render it just, in all the circumstances that an injunction should be granted"; the fundamental enquiry "relates to the extent of hardship that would be caused by leaving the plaintiff to resort to damages or to renew [the plaintiff's] application subsequently if the threat of injury … should become greater, and this consideration in turn depends not merely on the precise probability that the acts to be enjoined will take place, but also on the gravity of those acts and on the degree of damage or inconvenience that they would cause if they took place". Account also must be taken of "such considerations as the degree of any hardship that might be caused [to] the defendant if an injunction were granted, any inequitable conduct on the part of the plaintiff and other discretionary matters".

[52] It is of course necessary to apply the general principles with reference to the particular circumstances of each case. The appellants particularly rely upon two cases in which a final injunction to restrain the repetition of the publication of defamatory matter was refused.[85] In *Carolan v Fairfax Media Publications Pty Ltd (No 7)*,[86] McCallum J concluded that the critical factor should be an assessment of the existence and degree of any threat or risk of repetition of the publication of the defamatory matter upon which the plaintiff had successfully sued; such an order should be made only where the court was satisfied that the order was "reasonably necessary to address that threat or risk".[87] (The authorities to which McCallum J referred[88] include *Sierocki v Klerck (No 2)*,[89] in which the trial judge in this case granted injunctive relief because he was satisfied the defendants might be likely to publish similar allegations against the first plaintiff unless they were restrained.) White J's reasons in *Hockey v Fairfax Media Publications Pty Ltd (No 2)*[90] are to

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80 (2006) 227 CLR 57 at 72 – 73 [31] (Gleeson CJ and Kiefel J), 121 – 123 [188] – [191] (Heydon J).

81 (2006) 227 CLR 57 at 78 – 81 [55], [57], [59], [62] – [63].

82 See I C F Spry, *The Principles of Equitable Remedies*, 9th Ed, at 326 – 327, 334 – 335.

83 [2001] 1 Qd R 634 at [22] – [28].

84 *The Principles of Equitable Remedies*, 9th Ed, at pp 407 – 408.

85 I note that after this appeal was argued, in *Rush v Nationwide News Pty Limited (No 9)* [2019] FCA 1383 at [27] – [29] Wigney J cited the 5th Edition of Dr Spry's textbook as demonstrating consistency of the general law with the "general requirement that there be some risk or apprehension of republication of the defamatory imputations before permanent injunctions are granted in defamation cases".

86 [2017] NSWSC 351.

87 [2017] NSWSC 351 at [15].

88 [2017] NSWSC 351 at [16] – [32].

89 [2015] QSC 92.

90 (2015) 237 FCR 127.

the same effect: permanent injunctions are usually issued only where some additional factor suggests that a defendant found to have defamed the plaintiff may publish the same or similar defamatory matter unless restrained by an injunction.

[53] The appellants argue that matters, such as those in [14] – [18] of these reasons, which are found to have aggravated the harm suffered, including malice, are relevant only to the award of aggravated damages in the absence of some real reason why the malice would continue after the judgment. The appellants' argument does not explain why such matters may not equally support an inference that there is a risk of republication after judgment. The appellants published a total of 80 defamatory imputations made by Mr Jones in 29 separate matters broadcast during a 10 month period. Upon the footing that what has happened in the past may supply some guidance for what is likely to happen in the future, what the trial judge found to be a "campaign of vilification",[91] motivated at least in some respects by a desire to injure the respondents' reputations, is plainly capable of supporting an inference that there is a risk that the appellants will again publish the defamatory matter.

[54] I accept that the significance that otherwise might be attributed to the past publication of the defamatory matter may well be outweighed in many cases by the conventional expectation that professional journalists and media organisations will not again publish matter that a court has found to be defamatory. In this case the combination of the findings and evidence described in [14] – [18] of these reasons supports the conclusion that, despite the judgment and the very large award of damages, there is a real risk that Mr Jones may repeat gravely serious and very hurtful defamatory matter in programmes broadcast by the first and third appellants. In the circumstances described by the trial judge such a risk is to be inferred from the apparent strength of Mr Jones' motive to injure the respondents' reputations, the endurance of which is evidenced by Mr Jones' conduct when giving evidence.

[55] I will illustrate the point by referring in a little more detail to one of the various examples of Mr Jones' conduct revealed by the evidence. The appellants broadcast Mr Jones' assertion that the respondents "were at their very, very worst" when Mr Denis Wagner said in evidence before the Grantham Flood Inquiry that "his family had suffered from the flood, and his business had been impacted"; the respondents' family was "worth millions, with a private jet and chopper … [and lived] in *Gone with the Wind* style, and they're saying they suffered." After adding that 12 people had lost their lives Mr Jones described the respondents as "selfish, insensitive grubs." The evidence which Mr Jones purported to report was quoted by the trial judge in the course of explaining why pleaded imputations did not amount to a fair report of the Grantham Floods Inquiry proceeding, as had been alleged by the appellants.[92] Mr Jones' statements not only substantially altered the impression the listener would have received if present at the Inquiry; Mr Jones created a false impression by ignoring the effect of Mr Denis Wagner's evidence, accurately summarised in Mr Sofronoff QC's response "you're quite right, and property is nothing in this context". Mr Jones' statements are referred to by the trial judge as an example of his wilful blindness to the truth or falsity of his accusations.[93]

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91 Reasons [858].
92 Reasons [707](f).
93 Reasons [823] – [826].

[56] When the transcript of the evidence at the Inquiry was read to Mr Jones at the trial, he accepted that what Mr Denis Wagner in fact said was "most laudable".[94] He agreed that on any fair reading of the transcript an accurate summary of it was that "the Commissioner asked Mr Wagner if he'd suffered any damage and he replied they suffered some loss of equipment but that was nothing compared to the damage that'd been suffered by others". Yet when Mr Jones was reminded of the contrast between his accusation that Mr Wagner was "a selfish, insensitive grub" and his evidence that Mr Wagner had expressed "most laudable" sentiments, Mr Jones attempted to justify his position by volunteering a different defamatory assertion.

[57] The evidence of Mr Jones upon which the appellants principally rely as demonstrating there is no risk of republication is his response, "absolutely", to a question whether he would accept the outcome of the proceedings.[95] For the first time in this appeal the appellants also rely upon the proposition put to Mr Jones in cross-examination that his repeated criticism of the respondents on his programme over a period of about four years "finished or became muted" after the respondents sued, and Mr Jones' response that this was because he thought that was "the proper thing to do".[96] The appellants' argument that "absolutely" was a general answer to a general question should not be accepted. The context reveals that the statement concerns only the issue whether the 12 tragic deaths at Grantham were caused by the bund. In any case, in light of the trial judge's rejection of critically important aspects of Mr Jones' evidence and the trial judge's findings about Mr Jones' conduct and motivation, evidence given by Mr Jones is not a persuasive basis for the appellants' contention.

[58] Another factor supporting the grant of injunctive relief is the magnitude of the harm which might be wrought if Mr Jones repeats defamatory matter on air. The amount of the damages awarded is a reflection of the seriousness and hurtful character of the defamatory matter: see in particular [14](a) and [15] of these reasons. The inadequacy of the respondents' legal remedy of suing the appellants for damages if they do repeat defamatory matter after judgment is emphasised in this case by the findings in [15](a), (b), (e) and (f).

[59] The values of free speech and freedom of the press are important in the law. Those values inform the defamation legislation with reference to which the trial proceeded. The trial having concluded in a judgment in favour of the respondents from which there has been no appeal on the merits, significance now must be accorded to the finality of that judgment. The injunctions operate in substance only to prevent the appellants from again publishing that which already has been found to be defamatory. The appellants' argument suggested that the injunctions also create incidental restrictions upon their capacity to publish associated matters. The argument is incorrect in so far as it conveys that the injunctions prevent them from criticising the trial judge's reasons. It does of course prevent them from criticising the reasons in terms that would convey the defamatory matter or the defamatory imputations. If there is an incidental restriction of that kind it would not appear to carry much weight against the grant of the injunctions in the circumstances described by the trial judge and where the appellants did not appeal against the award of damages or challenge the findings against them in this appeal. In the

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94 Reasons [825].
95 T 12-99 l 40.
96 T 12-40 ll 40 – 41.

absence of any other identification of the incidental restriction for which the appellants contend they have not identified a factor of any significance that is opposed to the grant of the injunctions.

[60] In my respectful opinion the trial judge's findings, none of which have been shown to be incorrect, established an overwhelming case for the injunctions despite the exceptional character of such orders in a claim against a professional journalist and a media organisation. The appellants have not established any error in the trial judge's decision.

[61] For the same reasons, if, contrary to my conclusion, the trial judge's reasons are insufficient and the Court should exercise the discretion afresh, I would grant injunctive relief to the same effect as that ordered by the trial judge.

The appropriateness of injunctions against the first and third appellants and the form of the injunctions

[62] The appellants contend that the trial judge erred in formulating orders that impermissibly or unreasonably restrain the appellants. They also argue that if the injunctions are maintained against Mr Jones that will practically preclude any republication, there being no suggestion that any person other than Mr Jones was responsible for the publication of defamatory matter. Injunctions against the first and third appellants are submitted to be inappropriate because equity limits itself to that which is truly necessary.[97]

[63] These arguments are a significant departure from the way in which the appellants' case was conducted at trial. The first and third appellants did not make any submission to this effect before the trial judge. The appellants were represented by the same solicitors and counsel and advanced one set of arguments throughout, with no discrimination amongst the appellants of the kind now advocated. Nor did the appellants criticise the form of the orders sought by the respondents in any respect.

[64] Mr Jones gave evidence to the effect that the first and third appellants did not exercise any editorial oversight over him, he was largely given a free rein in his program,[98] and employees of "Macquarie Media", which was regarded as being the owner of the two radio stations, worked with Mr Jones on programme content and in compilation and distribution to syndicated stations.[99] No evidence was adduced at trial and nor was it submitted that this way of conducting radio broadcasts of Mr Jones' programmes changed or might change as a result of Mr Jones' lengthy "campaign of vilification" against the respondents and the prosecution or result of the defamation claim.

[65] The combination of the judge's findings and the absence of any editorial oversight by the first and third appellants of its presenter's regular broadcasts sets this case apart from the numerous cases in which injunctions have either not been sought by plaintiffs against media organisations or, where sought, they have not been granted.

[66] The appellants criticise the scope of that part of the injunctions against the first and third appellants which restrain each company by itself "and/or its servants or agents,

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97 The appellants cite *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 428 – 429 [124] (Kirby J).

98 T 12-5.

99 T 12-6.

from publishing…" The appellants contend that even employees or agents who are not involved in broadcasting will be subject to the restraints and that there is a question whether a guest on a radio programme broadcast by the first and/or third appellants is an agent for the purpose of the injunctions. They complain that the injunctions require the first and third appellants to make their employees and agents aware of the terms of the orders.

[67] As I have indicated, the arguments about the form of the injunctions are departures from the way in which they conducted the trial: see [19] of these reasons. In any case, the restraint of each appellant company by itself "and/or its servants or agents" is conventional. Contrary to the appellants' submission that form of order does not operate as a restraint upon employees or agents: see *Abella v Anderson*[100] and *Kirkpatrick v Kotis*.[101] In the latter case Campbell J explained that this part of the order merely draws to the attention of the defendant subject to the order the fact that it might sometimes be possible for the defendant to carry out an act prohibited by the order if a servant or agent carries it out.[102] Nor does it appear to be significant whether or not a guest on a programme is an agent for the purposes of the injunctions. If the first appellant or the third appellant itself or by its agents or employees broadcasts matter or an imputation that was found at the trial to be defamatory, that appellant will have failed to comply with the injunction – that is the central purpose of the injunctions against those appellants. On the other hand, the appellants' argument does not explain how there is any practical likelihood that they might be found liable for the publication of the defamatory matter or imputations by a person who happens to be an employee or agent where that person's statements are not broadcast. In the absence of additional evidence about those appellants' organisations no basis appears for thinking that this is a significant issue.

[68] The injunctions require each of the appellants to take steps to ensure that they do not breach the injunctions, including ensuring that the appellants' employees and agents are familiar with the injunctions. The fact that some cost and inconvenience may be involved in that respect is not a ground for setting aside the injunctions. As to issues associated with the perpetual existence of the corporate appellants, the respondents correctly point out that they, like Mr Jones, are entitled to apply to discharge the injunctions if changes in circumstances indicate that they cease to remain appropriate.[103]

Application to adduce fresh evidence

[69] The respondents applied to adduce as evidence in the appeal a letter from Mr Jones to a newspaper published 10 days after the trial judge's decision. The letter suggests that it was written to enable the readers of the newspaper to understand Mr Jones' situation. The respondents rely upon the statements that the newspaper's readers "should know that part of the judgment involved an injunction that prevents me and all staff at 4BC and 2GB from discussing most aspects of the decision or a defence of the case in any detail" and "the other side can go open slather". The respondents submit that, given that the injunctions merely prevent the appellants

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100 [1987] 2 Qd R 1 at 4 (McPherson J).

101 (2004) 62 NSWLR 567 at 580 [81] (Campbell J).

102 (2004) 62 NSWLR 567 at 580 – 593 [81] – [123].

103 See *Uniform Civil Procedure Rules* 1999 (Qld), r 667(2)(c) and *Kestrel Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] 1 Qd R 634 at 644 [34] (Chesterman J).

from repeating the defamatory matter and the defamatory imputations, the inference should be drawn that Mr Jones would repeat one or more of the defamatory imputations if there were no injunctions. Upon that footing the respondents seek to rely upon the letter as additional evidence of a risk that the appellants will again publish some of the defamatory matter or the defamatory imputations unless restrained by injunctions. A competing inference is that Mr Jones is intent upon complying with the letter and the spirit of the injunctions and, if they were set aside, would comment only to the extent that to do so would not involve any repetition of the defamatory matter or imputations currently restrained by the injunctions. I would refuse the application upon the ground that the letter does not clearly justify the inference advocated by the respondents.

Proposed orders

[70] The application for leave to adduce fresh evidence should be dismissed. The appeal should be dismissed with costs.

[71] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

[72] **BURNS J:** I agree with the reasons of Fraser JA and the orders proposed by his Honour.