SUPREME COURT OF QUEENSLAND

CITATION:	*Putland v Nowak* [2012] QCA 121
PARTIES:	**PAUL PUTLAND** (appellant) **v** **JOSEPH NOWAK** (respondent)
FILE NO/S:	Appeal No 11198 of 2011 DC No 69 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	11 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2012
JUDGES:	Holmes and Muir JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed with costs.** **2. The orders made on 8 November 2011 be set aside.** **3. The matter be remitted to the District Court to be tried before another judge.** **4. The cost to date of the proceedings at first instance be the parties costs in the cause.**
CATCHWORDS:	APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – NECESSITY FOR FINDING TO BE CLEARLY WRONG – where the respondent claimed damages against the appellant – where the respondent alleged the appellant defamed him at a Surf Club by calling him a paedophile, inter alia, in the presence of other patrons – where the respondent claimed that there were subsequent instances of conflict in which the appellant and others called him a paedophile and other derogatory terms – where the respondent alleged these instances amounted to a "hate campaign" – where the primary judge accepted the evidence of the respondent with respect to the Surf Club and other incidents – where the primary judge concluded the evidence of the respondent was corroborated by other witnesses – where the primary judge

doubted the credibility of the appellant and his witness – where the respondent was successful in his claim – where the primary judge ordered that the appellant pay the respondent $150,000 plus costs – whether the primary judge's reasons for judgment were deficient – whether the primary judge misapplied the rules in *Jones v Dunkel* with respect to the failure to call witnesses – whether the primary judge took an unbalanced approach – whether the primary judge failed to use, or misused, the advantage of a trial judge – whether the primary judge failed to properly regard the evidence of witnesses

Appeal Costs Fund Act 1973 (Qld)

ACN 070 037 599 Pty Ltd v Larvik Pty Ltd [2008] QCA 416, cited
CSR Ltd v Della Maddalena (2006) 80 ALJR 458; (2006) 224 ALR 1; [2006] HCA 1, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, followed
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, followed
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, considered
Manly Council v Byrne [2004] NSWCA 123, considered

COUNSEL: P Roney SC for the appellant
R Anderson for the respondent

SOLICITORS: McDonald Balanda & Associates for the appellant
Cronin Litigation Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA: Introduction** The respondent plaintiff sued the appellant defendant in the District Court claiming damages for words allegedly spoken by the appellant of the respondent in the Rainbow Bay Surf Club between 7.00 pm and 8.00 pm on 6 February 2009. After a six day trial in the District Court at Southport the appellant was ordered to pay the respondent $150,000 plus interest and costs. The respondent appeals against these orders. Before considering the numerous grounds of appeal it is useful to outline the pleaded allegations and to say a little about the evidence.

The pleadings

[3] The claim and statement of claim were filed on 5 February 2010. An amended statement of claim was filed on 12 February 2010 but it did not contain the respondent's final case on trial. That role fell to the third further amended statement of claim that was filed on 8 September 2011 which, for convenience, will be referred to as "the statement of claim".

[4] The statement of claim alleged that:

(a) At the Surf Club on 6 February 2009 the respondent was called a paedophile and a wog by the appellant.

(b) Such words were defamatory and were understood by the approximately 50 people who heard them, including Steven McArthur and Brent Taylor, to be about and concerning the respondent.

(c) The words "You're a wog" were meant and understood to mean that the respondent had undesirable ethnic qualities.

(d) It was probable from the circumstances of publication of the defamatory matter that there would be further publication.

(e) "By reasons for the said words pleaded … the [respondent] has: (a) Been injured in this (sic) reputation; (b) Suffered a lowered esteem…; (c) Suffered mental anguish, distress and embarrassment; (d) Been injured in his business reputation; and (e) Suffered and/or is likely to suffer financial loss."

(f) Publication of the defamatory matter was in contumelious disregard of the respondent's rights and the appellant knew, or ought to have known, that the words and/or imputations were untrue and would injure the respondent's reputation.

(g) The loss suffered by the respondent was aggravated by matters including "The fact that the [appellant] has, since the publication … directed a hate campaign at the [respondent] in which the [appellant] has repeatedly called the [respondent] a paedophile".

[5] The final version of the defence, filed on 23 July 2010, denied that the alleged defamatory words were spoken by the appellant.

Evidence led on the trial

[6] The respondent gave evidence and five other witnesses were called in his case, Messrs Graham, Taylor, Kermond, McGlinn and Nowak Senior. The evidence of the respondent occupies some 294 pages of transcript. The evidence of Messrs Graham, Taylor, Kermond, McGlinn and Nowak Senior occupies respectively 14, 29, 14, 9 and 35 pages of transcript. The appellant's evidence occupies some 85 pages of transcript and that of his two witnesses, Messrs Kelly and Boniface, occupies 25 and 40 pages respectively.

[7] **Mr Taylor**, a carpenter/builder and long standing member of the Surf Club, gave evidence-in-chief to the following effect. He had known both the appellant and the respondent for some years as Club members. He was friendly with the appellant and the respondent but did not socialise with either of them outside the Club. He was sitting at the dry bar in the Club on 6 February 2009 when an altercation overheard by him, which included mention of the word "paedophile", caused him to turn around. It was the "loudness of the 'paedophile' word" which caught his attention. He heard and saw the appellant call the respondent a paedophile in the course of "a verbal stoush" between the two men in which vulgar abuse was exchanged. He heard the word "paedophile" spoken "maybe twice". There were about 20 people in the bar at the time. The respondent appeared "very unsettled".

[8] Mr Taylor wrote his name and telephone number on a keno ticket and gave it to the respondent in case the respondent wished to call on him to give evidence in relation to the incident. He made no mention in his evidence of seeing the respondent kicked or of hearing any complaint in this regard.

[9] In cross-examination Mr Taylor said that he was about four metres away from the scene of the altercation and did not see the appellant "standing over and waving his arms, or his fists in an overbearing way toward" the respondent and that he would have seen that had it happened. The word "paedophile" was used "repetitively", he "wasn't counting". It was used "Several times … it would have been more than two or three times". There were only a few seconds between his first hearing the word paedophile and his intervening and taking the respondent back to his table.

[10] **Mr Kermond**, who was a friend of the respondent's father, swore to an occasion on which he was helping the respondent and his father with a delivery of tiles at the respondent's dwelling at Tweed Heads. He said that the appellant and his son approached the Nowaks and spoke. He recalls the appellant's son saying "paedophile … You know, that's the reason he come to me (sic) door …" the appellant said something like "Yes, you paedophile". This incident was the first of the four incidents constituting the alleged "hate campaign" conducted by the appellant against the respondent after 6 February 2009.

[11] In cross-examination Mr Kermond accepted that he had been asked by the respondent's father to give evidence that, in the incident just described, he had heard the appellant call the respondent a paedophile. He could not remember the appellant asking the respondent and his father "What were you doing knocking on my son's door?".

[12] **The respondent's father** gave evidence of an occasion on which he and the respondent had gone to the appellant's unit, knocked on the door and attempted to take a photograph of the appellant's son. It would seem from other evidence that this was an attempt to obtain evidence that the appellant was using the garage in his unit for accommodation purposes with a view to meeting objections made by other proprietors to the respondent letting out his garage. The respondent's father spoke at some length of the incident involving Mr Kermond saying that as soon as the appellant and his son saw the respondent "they started calling him a paedophile" and the appellant kept doing so. He accepted that at around the commencement of the incident the appellant's son pointed him out and said "You're the fellow who knocked on my door" and that he responded "That was me".

[13] **Mr Graham** swore that when he was delivering tiles to the home of the respondent's father, in the presence of the Nowaks, himself and Mr Kermond, the appellant's son told the respondent that he was a paedophile. He recalled "…the father backing up that type of an issue with the same comment of a paedophile". He said to the best of his recollection the effect of the appellant's words was that the respondent's "actions [were] of a paedophile". Mr Graham accepted that the way the word "paedophile" first came up was when the appellant's son said "You're forever going past my window hassling me, looking through my window, and you're a paedophile". He confirmed that his recollection of the words used by the appellant were "Yes, the actions of a paedophile".

[14] **Mr McGlinn**, a high school teacher and a long standing friend of the respondent, gave evidence of the respondent's reputation and the distress the respondent appeared to have experienced as a result of what had been said about him. He said that the respondent had mentioned two such occasions to him, one at the Surf Club and one when he encountered the appellant and his son, he thought, at the units.

[15] **The respondent's account** of the incident at the Surf Club does not stand very comfortably with the evidence of any of the other eyewitnesses. He said that he was

drinking on the balcony of the sports bar with six to 10 people. He saw the appellant and Mr Kelly with another six to eight people at one table in the bar area. Having gone inside and obtained a drink from the bar, he was returning to the balcony with Mr McArthur, who was in front of him, when he "got a big boot in the back of …the leg …from behind which sort of stumbled [him], nearly dropped [him], and spilt a bit of [his] beer". He turned around and saw the appellant abusing him, calling him a paedophile. The appellant "yelled it and screamed it… loud" and got the attention of "pretty much everyone in the immediate 10 to 15 metre radius".

[16] The respondent asked "What are you doing that for?" and the appellant continued screaming that he was a paedophile. He asked the appellant in a quiet tone "Why did you kick me?" the appellant "sort of came – lunged at [him] like he was going to hit [him]". Mr Kelly then "launched at [him] and started calling [him] a paedophile as well". The appellant asked "Why would you take photos of my son?" to which he responded "Well, you know what's going on with the body corporate situation". The appellant then "…in a real angry manner sort of lunged at [him] again with his hands up and screamed, 'You're a paedophile'".

[17] Asked by the primary judge how many times the appellant repeated "You're a paedophile" the respondent said "…it continued on for probably a few minutes, the situation, so over the whole period he said it numerous times, you know, at least, oh, 15 times, I think, at least, maybe – maybe even more". Asked "And with what type of voice?" he responded "…he was yelling, enraged with anger, he had his hands up like he wanted to hit me and he was moving towards me. He made a big scene, he had his hands up waving them around and basically made a scene so everyone in the bar stopped at that period of time and looked over at us".

[18] Mr Kelly joined the verbal assault, saying "You're a wog… You haven't even got an Australian passport" and called him a paedophile as well. He said "So there's two guys going towards me, screaming abuse". He added that the appellant also called him a wog.

[19] **The appellant's version** of what happened in the Surf Club was as follows:

> "And [the respondent] went [in front of the bar] and Stewart Ball was there. He was talking to him. And I saw him over there and I was probably – he'd been there for about a minute. I said – I said to Peter, I said, 'I'm going to tell this fellow that he can't go around taking photos of me son.', and Peter said – Peter said, 'Let it go. Don't do anything.', and I said, 'I'm sorry, I'm going.' So I went over and I said, 'Hey, you. What do you think you're doing taking photos of my son in the middle of the night?', and he looked at me and he said, 'I can do what I like. I'm getting proof for the council.', and then I said back to him something like, 'You can't go around in the middle of the night taking photos of under-age children. He's only a minor.', and then I – I sort of turned around and was walking back and Peter Kelly started saying things to him. I didn't hear what Peter was saying. I was a little bit agitated, and then about 30 seconds later Peter came back and that was it."

[20] The appellant said he was speaking noisily because there was a lot of background noise and that the respondent spoke back aggressively and loudly. He denied

having physical contact with the respondent and being physically aggressive towards him.

[21] The appellant called Messrs Kelly and Boniface as witnesses.

[22] **Mr Kelly's evidence** was to the following effect. He was a retired Victorian solicitor who had practised for 25 years and was Vice President of the Rainbow Bay Supporter's Club and the grievance officer of the Surf Club. He was friendly with the appellant, but not to the extent of socialising with him or his family outside of the Club environment. He had assumed, however, something of a mentoring role in respect of the appellant's son. On the evening of the subject incident in the Surf Club, he was standing at a table in the bar area with the appellant and others when he noticed the respondent "with this big cheesy grin" (which he subsequently referred to as a "smirk") on his face, looking at the appellant and him. The respondent appeared to be confronting them. He cautioned the appellant against responding but after the respondent's conduct continued the appellant approached the respondent and said sternly but in a normal tone of voice, "…leave my son alone, stop taking photos of my son". He also approached the respondent himself and "had a bit of a crack" at him. He denied that the appellant had kicked, punched or otherwise behaved in a physically aggressive manner towards the respondent. He accepted that he probably called the respondent "a wog" and said that he regretted having done so.

[23] Mr Kelly said that the appellant did not call the respondent a paedophile and that after the exchange with the respondent the appellant returned to their table and he followed shortly afterwards. He received no complaint or report about the incident and no one in the Club subsequently remarked on the incident to him. He did not think it possible that the appellant could have kicked the respondent without his having seen it. It was not put to Mr Kelly that the respondent had not been standing smirking at the appellant and Mr Kelly prior to the incident. Nor was it suggested to Mr Kelly that the appellant had displayed physical aggression towards the respondent, the appellant had called the respondent a "wog", or that the word "paedophile" was used repeatedly by the appellant.

[24] **Mr Boniface**, a retired engineer, who had overseen many large construction projects around the world, was the chairman of the body corporate of the building in which the appellant and the respondent resided. He did not have a social relationship with either of the men or with members of their respective families. He discussed difficulties between the respondent and members of the committee of the body corporate over the respondent's carrying out of structural work in the garage of his unit without body corporate approval. Another source of tension between the committee of the body corporate and the respondent was his commercial letting of his converted garage.

[25] Although the respondent was in arrears in payment of his levies at times he was allowed to attend and speak, but not to vote, at body corporate meetings. His father was given the same indulgence. On 18 May 2008 he heard a noise which sounded like someone "pounding on a door". He went outside and saw the appellant pounding on the respondent's door demanding that the respondent "come out and face him". He attempted to call the police but could contact only an answering machine. There was a short "melee" between himself and the respondent in which a tenant in one of the units became involved. The tenant was attempting, with Mr Boniface's implicit agreement, to intervene in order to defuse the matter.

[26] At the annual general meeting of the body corporate on 3 February 2009 one or more of the proprietors said words to the effect that the respondent had molested a young girl in his unit. A female proprietor referred to the respondent as "a toe rag" and a "child molester". The respondent smirked in response to that allegation. The discussion related to a recent incident in which a young female in the respondent's unit had been heard to scream out during the night and in respect of which the police had been called. The respondent told the meeting, smirking as he did so, that "he was comforting her".

[27] At an extraordinary general meeting of the body corporate on 16 February 2009 there was discussion about what should have been recorded in the minutes of the earlier meeting concerning the incident involving the girl. There was some abuse of the respondent to which he responded in kind. At no time during the meeting did the appellant, who had arrived at the meeting before the respondent, call the respondent a paedophile. Mr Boniface said that, to his recollection, the appellant "certainly did not call [the respondent] a paedophile".

[28] Mr Boniface was cross-examined at some length about why there was no mention of the incident involving the screaming girl in the minutes of the annual general meeting and why the minutes of the annual general meeting contained no reference to the explanation of the incident given by the respondent at the meeting. In re-examination Mr Boniface said that the respondent did not object at the 16 February meeting to the discussion which took place about the screaming girl incident or to the proposed content of the proposed minutes which had been formulated by two female proprietors and read out by the secretary. The body corporate secretary was Mrs Boniface.

The notice of appeal

[29] The notice of appeal in respect of this far from complicated dispute, somewhat improbably, contains 35 grounds of appeal. The argument on the hearing of the appeal proceeded without reference to them. The following headings in the notice of appeal convey much of the substance of the issues about which the appellant complained:

- Absence of or deficiency in reasons;
- Failure to properly regard evidence affecting the respondent's credit;
- Failure to properly consider evidence affecting the appellant's and others credit;
- Disregarding testimony of the appellant's witnesses;
- Claim relating to use of the word "wog"; and
- Damages.

The primary judge's reasons

[30] After stating that the respondent claimed damages for defamation and remarking that it was a busy night at the Club during which the respondent who had been drinking on the balcony with friends was kicked in the back of the leg as he was returning to the balcony, the primary judge's reasons quoted, without comment,

some 23 pages of passages from the evidence of the respondent, Mr Taylor, the appellant, and Mr Kelly concerning the incident at the Club. Less than four of these pages were devoted to the appellant's and Mr Kelly's evidence.

[31] The next section of the reasons, paragraphs 12 to 34 inclusive, on pages 25 to 34 inclusive, concern the "hate campaign". The hate campaign was described in paragraph 15 of the statement of claim as the appellant repeatedly calling the respondent a paedophile on four particularised occasions:

> "i. On or about 7 February 2009 at 14 Boundary Street, Tweed Heads [the appellant], in the presence of [the appellant's] son Danny, [the respondent's] father Joe Nowak, Bernard Kermond and Paul Graham said words to the effect 'how dare you knock on my son's door, you are a paedophile.'
>
> ii. On or about 24 November 2009, [the appellant] called to [the respondent] whilst he was walking through the front vestibule of 14 Boundary Street, Tweed Heads 'You are a loser... You are a paedophile';
>
> iii. On or about 6 February 2010 at the entrance of 14 Boundary Street, Tweed Heads, [the appellant] in the presence of [the appellant's] son Danny, called out to [the respondent] 'you paedophile';
>
> iv. On 16 February 2009 [the appellant] said to [the respondent] in the lobby of 14 Boundary Street between 10am and 11am 'You are a paedophile'."

[32] Referring to particular iv the primary judge said:

> "In addition to the [respondent] and [appellant] others were present and, in my view, the issue in relation to the one who was called for the defence (Mr Jack Boniface who chaired the meeting) is whether the words complained of were in fact said and said loudly enough to be heard by him."

[33] The primary judge quoted from the evidence-in-chief and cross-examination of the appellant in relation to particular iv in paragraphs 27, 28, 29, 30, (between pages 28 and the first paragraph on page 33).

[34] Paragraph 31, a relatively brief paragraph, was made up of a statement by the primary judge that the appellant denied calling the respondent a paedophile and a brief extract from the appellant's evidence-in-chief in that regard.

[35] Mr Boniface's evidence in relation to particular iv was dealt with in paragraph 32 by means of an extract from his evidence-in-chief in which the words "Not to my recollection" were highlighted in three of his answers to questions in cross-examination.

[36] The primary judge then, under the heading "Findings", analysed the evidence in paragraphs 35 to 96 inclusive (between pages 34 and 45 inclusive). The primary judge said that the respondent was "quietly spoken and seemed to have a non-

aggressive nature". He dealt briefly with the relationship "between both sides" and found that:

> "Generally [the respondent] seemed to have a pretty good recollection of events but on occasions he tended to exaggerate things but that is understandable given what was said and the effect it had upon him. In my view he was a truthful witness. He was inclined to try and second guess reasons behind questions asked in cross-examination. In some respects he was not a particularly good historian and at times he was a little frustrating in the way he answered questions and explained things but that is probably understandable because of the heated and surprising nature of the confrontation at the RBSC and what was said then and on other occasions and its upsetting and unsettling effect on him. The allegations made by the defendant were still clearly affecting him when he was giving evidence. Sometimes his recollection was such that it required reminding, in the form of a specific rather than a general question, for him to focus more particularly on a particular subject or question."

[37] The primary judge did not accept that the respondent's "cocaine conviction and his use of the drug" impinged on his integrity or reputation. He explained:

> "These are not reasons to doubt his evidence which in overall terms was quite consistent and, where possible, supported by the other witnesses or not contradicted by others [the appellant] said were present but who were not called to give evidence."

[38] The primary judge accepted the respondent's account of what was said at the Surf Club and in the hate campaign incidents and remarked that his evidence about the Surf Club incident "is in a significant and sufficient respect supported by the evidence of Brent Taylor". Although his Honour had some reservations about the respondent's evidence as to the number of times the appellant called him a paedophile at the Club and as to how long the incident lasted and how loudly the appellant was speaking to him at the 16 February meeting, he accepted his evidence that the appellant kicked him as he described. He did not reject the respondent's evidence of being physically threatened by the appellant or refer to the obvious ways in which the respondent's evidence of events at the Club differed from the accounts given by Messrs Taylor and Kelly.

[39] The primary judge found the respondent's evidence to be consistent "With perhaps understandable but not significant differences" to the generally contemporaneous note made by the respondent with respect to the Surf Club incident:

> "Rainbow SLSC 7pm. 8pm kicked in the back of the kneecaps by Paul Putland. Called a pedophile [sic] (Paul and Ned Kelly neighbour 10 or 12 Boundary St) Shouted and made a large scene. NK calling me a wog and asked if I have an OZ passport. I replied you are a sick man."

And with what was stated by the respondent in respect of an application for an apprehended violence order filed on 23 April 2009:

> "6-2-09, 7-8pm I was kicked by Paul Putland in the back of my leg. He then yelled and screamed verbal abuse at me. He made a big scene and up to 30 times loudly called me a pedophile [sic]. His mate he drinks with from (10 Boundary St, Tweed Heads, west lower side level) encouraged Paul Putland and numerous times called me a pedophile [sic]. He also called me racist names (WOG)."

[40] The primary judge noted that in cross-examination the respondent had agreed that he did not record in his contemporaneous note that the appellant had called him a wog and asked if he had an Australian passport. He agreed that it "May well have been the case, yeah…" that had that been said by the appellant he would have made a note of it. He then said that his evidence is that "[the appellant] as well as Mr Kelly called [him] a wog". His Honour noted that in cross-examination in relation to the application for the apprehended personal violence order the respondent had admitted that the calling of racist names referred only to what Mr Kelly had said.

[41] The primary judge said that he could see no reason to reject or doubt Mr Taylor's evidence. He found Mr Taylor to be "obviously independent and not partial". He preferred the evidence of Mr Taylor to that of Mr Kelly as the latter seemed more "partial towards the [appellant]" and "was influenced in his attitude to the [respondent] by what the [appellant] had told him and as a result abused the [respondent] himself". He described Mr Kelly as "a friend and drinking partner of the [appellant]".

[42] In explaining why he could not accept the appellant's or Mr Kelly's account of the Surf Club incident the primary judge said:

> "In cross-examination (T5-91) the [appellant] denied ever having used the words 'paedophile' and 'wog' and directing them towards the [respondent]. There was then this exchange between me and the [appellant] during cross-examination by Mr Anderson (T5-91):
>
> > 'HIS HONOUR: You seemed to hesitate for a moment? -- No, well, when - he said - he used two words. He said - and then I had to think about the second one and then I thought, yeah, no, I haven't.
> >
> > MR ANDERSON: Do you think that you might have called Mr Nowak a wog at some stage? -- No, I don't think - not that I can recall.'"

[43] The primary judge accepted the evidence of the respondent's witnesses in relation to the 7 February 2009 incident (hate campaign particular i) as "they support each other" and the respondent. His Honour concluded that the appellant's denial could not stand against the evidence of the respondent, his father, Mr Graham, and Mr Kermond and that such conclusion reflected adversely on the appellant's credibility in general. He said that in relation to the 24 November 2010 incident (hate campaign particular ii) the respondent's evidence was preferred as "his credibility is better than the [appellant's]". He also found the respondent's account of the 6 February incident more credible than that of the appellant and inferred that had the appellant's wife given evidence it would not have assisted the appellant.

[44] The primary judge found that at the 16 February 2009 meeting it was probable that the appellant called the respondent a paedophile. He found also that it was more probable than not that all of the so called hate campaign matters had occurred. He concluded that his acceptance of those allegations made it more probable that the respondent's allegations as to what was said by the appellant to him in the Club should also be accepted.

[45] The primary judge concluded that what was said by the appellant to the respondent in the course of the 16 February 2009 meeting was probably said three or four times during the meeting at a "normal conversational level when other people were talking". He concluded, by inference, that this is why Mr Boniface didn't hear what was said. He noted that Mrs Brown was not called to give evidence and held that it may be inferred that her evidence, if she had been called, would not have assisted the appellant.

[46] The primary judge concluded that Mr Boniface "underplayed the tensions and animosity which existed at the units", was "ranged against the [respondent]" and was "partial to the [appellant] rather than objective in his attitude towards the [respondent]". To support these findings the primary judge referred to an application made by the body corporate to the NSW Consumer, Trader and Tenancy Tribunal which was only partially successful. The primary judge said that he "felt [Mr Boniface] was reluctant to be entirely frank about what he may have heard the [appellant] say to the [respondent] at the meeting on 16 February 2009" and that his "impression from listening to him and watching him is that in any conflict or dispute between the [respondent] and the [appellant] he would support the [respondent] and that if an event was capable of being looked at or interpreted in two ways he would do so in a way… adverse to the [respondent]". He referred also to the incident involving the young girl which had been reported to the police by Mr Boniface and said that Mr Boniface was "clearly uncomfortable when his evidence was tested".

[47] On the other hand, the primary judge found no evidence of partiality in the evidence given by the respondent's father who was funding and helping the respondent with the litigation. The primary judge was critical of the appellant's failure to call his son, his wife and Mrs Brown in the defence case. He held that in the normal course of events the appellant could reasonably have been expected to call those persons as witnesses. However, he rejected the criticism of the respondent's failure to call other witnesses to the Surf Club incident. He attributed this to the reluctance of others to become involved.

[48] Mr McArthur and Mr Taylor had been named in all versions of the statement of claim as persons to whom the defamatory words had been published in the Surf Club.

[49] As to the failure to call Mr McArthur in support of his case, he quoted from the appellant's evidence as follows:

> "From what I recall... I think he stopped for a split second or two and he looked back and saw the whole problem and he just took off. He didn't want to know anything about it... He may or may not have heard what the [appellant] said."

[50] He referred also to the respondent's evidence that he had not seen Mr McArthur for three or four months and noted that his evidence was not opened. The primary judge further found:

> "I am satisfied that at the RBSC the [appellant] in a loud voice called the [respondent] a paedophile four or five times after having first kicked him. The [appellant] behaved in a bullying and harassing manner. I accept the evidence of Mr Kelly that the [appellant] was verbally aggressive towards the [respondent] and verbally attacked him. The [respondent] was unintentionally exaggerating when he said fifteen or thirty times but he was not lying rather he was most probably mistaken. It was his way of emphasising his perception of the seriousness of what was said. He was clearly surprised, shocked and upset by what was said and it seemed to him like it was said many many times when in fact it probably wasn't said as many times as he thought. This was conceded by Mr Anderson (T6-88). I accept the [respondent] when he said time froze for him, he lost track of time. The incident could in fact have lasted a minute during which the [appellant] called him a paedophile every 10-15 seconds. Mr Roney acknowledged, when cross-examining Mr Taylor, 'that time can be a strange thing in these situations' (T4-26).
>
> I am also satisfied (notwithstanding the [respondent]'s notes (ex 1)) that the [appellant] called the [respondent] a wog once at the same time and in the same way. Mr Kelly also called him a wog. The evidence does not suggest it was said by each more than once. The [respondent] heard it said by the [appellant] and Mr Kelly. Mr Kelly may have used the word first and the [appellant] then adopted it and used it himself. Mr Taylor didn't hear it but that was, I consider, because his concentration was on the word 'paedophile' and his recollection is influenced by that fact. This is also understandable if it was only said once by the [appellant] and Mr Kelly. In ex 1, I think the [respondent] emphasised the more serious allegation made by the [appellant] but was also concerned to note what Mr Kelly said.
>
> I agree that the words used by the [appellant] – 'you're a paedophile' and 'you're a wog' were said of and concerning the [respondent] because at the time they were said they were directed by the [appellant] at the [respondent] and were understood by those who heard them to be about and concerning the [respondent]. There was no real dispute about this assuming the words were said, and I find they were.
>
> Those words were published to many patrons at the club; many would have heard them. About fifty patrons were in the bar at the time including Brent Taylor, and it was to them that the words were published. According to the [respondent] (T2-100) the 'whole room were all standing there looking'."

An analysis of the evidence of the Surf Club incident

[51] Mr Taylor's account of the Surf Club incident is very different to that of the respondent. He heard the word paedophile being said loudly and venomously, turned around and saw and heard the appellant saying those words again "maybe twice". He did not see the appellant "standing over and waving his arms, or his fists in an overbearing way toward" the respondent. He said that the incident was very brief and that he intervened and took the respondent to his table.

[52] There was no suggestion in Mr Taylor's evidence-in-chief or cross-examination that he had heard the respondent called a wog but, of course, he did recall that the participants exchanged vulgar abuse.

[53] Mr Kelly was quite confident that there had been no physical contact between the appellant and the respondent. Unlike Mr Taylor, he was in a position to describe how the incident started. There was nothing implausible in his account in this regard. He too denied that the appellant had exhibited any signs of physical aggression towards the respondent. He said that he and not the appellant had called the respondent "a wog" and that the appellant did not call the respondent a paedophile. He gave no evidence of hearing any complaint about or reference to the respondent being kicked.

[54] The appellant's account of the Surf Club incident differs substantially from that of Mr Taylor and Mr Kelly but is closer to both of these versions than the respondent's version. The respondent gives the only version in which there is physical contact and the threat of physical violence.

[55] The primary judge appears to have overlooked the significance of Mr Kelly's evidence that he had witnessed the incident from beginning to end and had also participated in it. His account of how the incident started, which is generally consistent with the appellant's, cannot stand with the respondent's claim that his confrontation with the appellant started when the appellant kicked him in the back of the legs.

[56] It is true that Mr Kelly was friendly with the appellant, but he had no social contact with him outside the club and its activities. It was not suggested in cross-examination that he was giving false evidence or even that the incident did not start in the way he suggested. His evidence that he and not the appellant called the respondent a "wog" and queried whether he had an Australian passport was supported by the respondent's note. Also, his account of the incident is much closer to Mr Taylor's than the respondent's.

Analysis of the primary judge's treatment of the documentary evidence

[57] The primary judge regarded the note claimed to be made by the respondent after the Surf Club incident and his written evidence in relation to an apprehended personal violence order filed on 23 April 2009 as supporting his evidence. The documents support the claim that the respondent was kicked and called a paedophile, but are damaging to the respondent's credit. The earlier note asserts that the respondent was called "a wog" and asked if he had "an Oz passport" by Mr Kelly. Plainly he was differentiating in the note between what was said by the appellant on the one hand and by Mr Kelly on the other. His note recorded that they both called him a paedophile.

[58] There are other difficulties. The note records that the respondent was "kicked in the back of the kneecaps" by the appellant, but if the evidence of either or both Mr Kelly and Mr Taylor is to be accepted, that assault did not occur. If it had occurred it is surprising that there was no claim for damages made in respect of it. It is also surprising that Mr Taylor had no recollection not only of not observing anything of that kind but of nothing being said about it by the respondent when he was, according to Mr Taylor, ushered back to his table and a discussion took place in the course of which Mr Taylor volunteered to be a witness.

[59] In making his application for the apprehended personal violence order, the respondent, aware that he was dealing with a serious matter, claimed that the appellant "yelled and screamed verbal abuse at [him]… made a big scene and up to 30 times loudly called [him] a [paedophile]". Again, he said nothing about being called a wog by the appellant and attributed the use of the word "wog" only to Mr Kelly.

Analysis of evidence in relation to the body corporate meeting on 16 February 2009

[60] Even apart from the respondent's largely contradicted account of the critical events at the Surf Club there was little to inspire confidence in his reliability as a witness. The aspect of the "hate campaign" that attracted the most attention on trial was the events at the meeting on 16 February 2009. The respondent's evidence in relation to that incident may be summarised as follows. A number of proprietors of units in the subject unit complex were seated in a small area in the foyer of the building. The meeting was chaired by Mr Boniface.

[61] The appellant was seated next to him on his left and during the meeting the appellant turned towards him and said "'You're a wanker'… 'You're a paedophile' …numerous times …so it was probably on a 15 to 20-minute interval, constantly through the meeting…". These comments were not made in the course of any conversation and he said "nothing in response". The appellant's words "could be heard by the rest of the meeting, quite easily". At times such words were said when someone else was speaking and at other times they were said when the respondent had finished speaking. In consequence of this conduct on the part of the appellant he "felt like dirt… [and] was disgusted". In cross-examination the respondent, asked if what was said to him by the appellant was said "quietly and to you?", responded:

> "No. It was to the meeting, basically. Yeah, the meeting could have all heard it. We were all sitting around very closely".

[62] Mr Boniface's unchallenged evidence was that there was a "bit of name calling on both sides" which he tried to calm down and that the respondent was abused by Mrs Brown, in particular. It was resolved that the minutes of the annual general meeting would be amended to include reference to the screaming incident. It did not appear from the evidence that the appellant was a prime mover in any verbal attack on the respondent at this meeting or even a participant.

[63] The primary judge, in dealing with Mr Boniface's evidence, referred to answers to questions by Mr Boniface which commenced "Not to my recollection". The point of this appeared to be to illustrate some uncertainty or lack of clarity in Mr Boniface's recollection. His Honour ignored, however, the answer given in evidence-in-chief by Mr Boniface to the question "did [the appellant] call [the respondent] a paedophile?". It was, "Not to my recollection he certainly did not call him a paedophile". A perusal of Mr Boniface's evidence shows him to be a cautious witness who generally preferred to avoid making positive assertions. Hence he would often answer "not to my recollection" instead of "no" to indicate that he had not heard or seen something. In my view, the use of words "not to my recollection" does not appear to indicate any hesitancy or uncertainty on Mr Boniface's part. Even if the primary judge was entitled to reach a contrary conclusion, he should have understood that Mr Boniface went out of his way to

make it plain that the appellant did not call the respondent a paedophile at the meeting.

[64] The primary judge misconstrued Mr Boniface's evidence and also that of the respondent. The clear import of the evidence of the respondent was not, as the primary judge would have it, that the respondent thought that what the appellant said at the meeting could have been heard by others but that he could not say whether in fact they did hear. It was, in effect, that there was no reason why others would not hear what was said. The respondent's evidence in this regard was given with a view to providing that defamatory words spoken by the appellant were published to proprietors at the meeting. The primary judge's finding that the appellant called the respondent a paedophile probably "3 or 4 times throughout the meeting… when other people were talking" is contrary to the respondent's evidence stated above. His Honour's speculation about seating arrangements at the meeting also derives no support from the evidence. Moreover, it was never suggested to Mr Boniface that he erred in his evidence in this regard. On the contrary, the cross-examiner appeared to have obtained the answer he was seeking when Mr Boniface responded, "Not to my recollection" to the query, "…does that mean that [the appellant] wasn't sitting next to [the respondent]?".

[65] The primary judge accepted the respondent's evidence in relation to this incident that the words spoken to him by the appellant:

> "…put me down. I felt like dirt. I was disgusted. I sort of dealt with it earlier on… back on the 6th of February there and the same feelings came back and it just re-enforced all of those."

[66] His Honour did not appear to advert to the improbability of this reaction to words said by the respondent to be spoken in a normal tone of voice by the appellant in a meeting at which at least two other proprietors were openly abusive of him.

[67] At the annual general meeting, the respondent said he had been called a child molester and a "toe rag", a paedophile and a liar by proprietors other than the appellant and there had been discussion of the screaming girl incident. The matter was revived at the meeting on 16 February.

[68] Two proprietors, not including the appellant, sought to have the minutes of the annual general meeting altered to include reference to the screaming girl incident. Mr Boniface said there was "a bit of name calling on both sides". The respondent was called a "toe rag" again and the respondent responded in terms which were not "very complimentary".

[69] This evidence, which was unchallenged, also casts doubt on the respondent's assertion that he suffered in silence when called a "wanker" and "paedophile" by the appellant.

[70] The primary judge's findings in respect of the events at the 16 February meeting are of further significance in that the primary judge found that they supported his finding that the evidence of the respondent was to be preferred to that of the appellant.

Application of the rules in *Jones v Dunkel*[1]

[71] The primary judge's implied criticism of the appellant for not calling Mrs Brown as a witness contrasts with his treatment of the respondent's failure to call Steven

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1 (1959) 101 CLR 298.

McArthur, who together with Mr Taylor, was specifically mentioned in the pleadings as a person to whom the defamatory matter was published at the Surf Club. Mr McArthur's failure to give evidence was excused by the primary judge partly on the basis that the respondent said in evidence that Mr McArthur "didn't want to know anything about it… He may or may not have heard what the [appellant] said". The excuse was also offered that although the respondent said that he was on good terms with Mr McArthur he "hadn't seen him for 3 or 4 months". He was "not disposed to criticise the [respondent]" for not calling Mr McArthur or other witnesses to the Surf Club incident because that failure was "most probably due to the reluctance of others to become involved than to the fact that no one heard the statements made". This reasoning did not seem to his Honour to be equally applicable to the proprietors present at the extraordinary general meeting, with the exception of Mr and Mrs Boniface and the appellant.

[72] Whether by application of the rule in *Jones v Dunkel* the primary judge was entitled to infer that Mrs Brown's evidence would not have assisted the appellant may be doubted. The evidence is that the appellant and Mrs Brown were social acquaintances by virtue of the fact that they lived in the same apartment block. It may readily be inferred that Mrs Brown was hostile to the respondent, but that and no other evidence established that Mrs Brown was willing to cooperate with the appellant in relation to litigation. More significantly, the events of the meeting on 16 February were not central to the defamation claims which were confined to the words published in the Surf Club. The appellant gave evidence concerning the 16 February meeting and called the chairman of the meeting to give evidence.

[73] In *Manly Council v Byrne and Anor*,[2] Campbell J (Beazley JA and Pearlman AJA agreeing) quoted with approval the following from the then current electronic version of *Cross on Evidence* (Australian edition):

> "The rule does not operate to require a party to give merely cumulative evidence (*Gafford v Trans-Texas Airways* 299 F 2d 60 (1962) (USCA, 6th Circ) and cases there cited; *Ballard v Lumbermen's Mutual Casualty Co* (1967) 148 NW 2d 65 at 73 (SC Wisc)). If five people attended a relevant meeting and some are called, no *Jones v Dunkel* inference can normally arise in respect of those who are not: the rule does not compel time to be wasted by calling unnecessary witnesses."

[74] In cross-examination, the respondent accepted that he had no arguments or disagreements with one of the proprietors present at the 16 February meeting, although that proprietor had expressed her disapproval of language used by the respondent at the Annual General Meeting. There was no apparent reason why the appellant, rather than the respondent, could have been expected to have called her.

[75] On the other hand, it is reasonable to expect that a potential witness named in all versions of the pleadings as a person to whom the defamatory matter was published would be called as a witness. The issue of publication of the defamatory words was central to the outcome of the case. The respondent accepted that Mr McArthur was mentioned in the various statements of claim, including the third Final Amended Statement of Claim delivered during the trial on his instructions.

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2 [2004] NSWCA 123 at [61].

[76] The respondent's evidence about why Mr McArthur was not called as a witness was vague. He said, in effect, that although Mr McArthur was immediately in front of him at the beginning of the incident, he may have seen the kick and he may or may not have heard the offending words. If the respondent's evidence was to be accepted as to the volume at which the offending words were spoken, there would have been few people in the club who had not heard them.

[77] Even if the primary judge was justified in concluding that no adverse inference should be drawn from the respondent's failure to call Mr McArthur and at least one other witness in addition to Mr Taylor, the primary judge's approach in this respect contrasts with his findings in relation to the appellant's failure to call other proprietors present at the 16 February meeting.

[78] Support for the conclusion that the primary judge took an unbalanced approach to his consideration of the evidence may be found in the structure of the reasons in which far more attention is devoted to the evidence on the respondent's side of the record than to the evidence on the other side.

Relevant principles

[79] In *Fox v Percy*,[3] Gleeson CJ, Gummow and Kirby JJ, discussing the circumstances in which an appellate court should interfere with a trial judge's findings of fact, said:

> "…the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.[4]
>
> …In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable'[5] or 'contrary to compelling inferences' in the case.[6] In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion."

[80] After referring to the nature of an appeal by way of re-hearing, their Honours said:

> "The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to

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3 (2003) 214 CLR 118 at 128.

4 eg, *Voulis v Kozary* (1975) 180 CLR 177; *SRA* (1999) 73 ALJR 306; 160 ALR 588; cf *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-351.

5 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

6 *Chambers v Jobling* (1987) 7 NSWLR 1 at 10.

> 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."

[81] In *Devries v Australian National Railways Commission*,[7] Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact.[8] If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage'[9] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'[10]."

Gleeson CJ, Gummow and Kirby JJ, in their reasons in *Fox v Percy*, referred to *Devries* as one of three cases in which the High Court had reiterated:[11]

> "…its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

[82] Their Honours observed[12] that those three decisions "were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges".

Conclusions

[83] I am conscious of the advantage a trial judge has over an appellate court in deciding questions of credibility in a case such as the present. I am conscious also of the fact that there is evidence accepted by the primary judge which supports his central

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7 (1993) 177 CLR 472 at 479.

8 See *Brunskill* (1985) 59 ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

9 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

10 *Brunskill* (1985) 59 ALJR at 844; 62 ALR at 57.

11 (2003) 214 CLR 118 at 127.

12 (2003) 214 CLR 118 at 127.

findings. However, as the above discussions reveal, the primary judge failed to use and misused the advantage he enjoyed as the trial judge. He: misunderstood significant parts of the evidence; failed to have regard to material evidence; failed to understand the significance of and to give due weight to the documentary evidence in assessing credibility; in assessing the evidence of witnesses, particularly that of Messrs Kelly and Boniface, failed to have regard to the fact that substantial parts of their evidence were unchallenged; and generally took a more critical approach to the evidence of the appellant and his witnesses than to the evidence of the respondent and his witnesses.

[84] As appears from paragraph 38 of the reasons, quoted in paragraph [36] hereof, the primary judge recognised that the respondent was far from a perfect witness. The primary judge was charitable in his assessment. He could, and probably should, have added that the respondent was disposed to give non-responsive, evasive, self-serving and frequently unconvincing answers to questions in cross-examination.

[85] The excuse offered by the primary judge that some of the respondent's shortcomings as a witness were explicable by "the heated and surprising nature of the confrontation at the RBSC and what was said then and on other occasions and its upsetting and unsettling effect on him" may be thought to be unduly charitable. So too may the conclusion that the appellant's allegations "were still clearly affecting him when he was giving evidence". The evidence revealed the respondent to be a man who did not shrink from confrontation or vulgar abuse. He was prepared to attend body corporate meetings and confront a body of hostile proprietors. He engaged in litigation against the body corporate with some success. He contested the appellant's application against him in 2009 for an apprehended violence order and subsequently brought his own such application against the appellant. No medical evidence was adduced in support of the respondent's claims of emotional stress.

[86] The primary judge's important finding that the respondent's evidence was "where possible, supported by the other witnesses" cannot be sustained in respect of the critical events in the Surf Club or in respect of the 16 February meeting.

[87] Counsel for the respondent ably argued his client's case. He referred to relevant authorities such as *Fox v Percy*,[13] *CSR Ltd v Maddalena*,[14] and *ACN 070 037 599 Pty Ltd v Larvik Pty Ltd*[15] and submitted that once it is accepted that:

- there were reasonable grounds upon which the respondent's evidence could be accepted over that of the appellant; and
- no other compelling evidence countered the respondent's case,

the appeal ought to be rejected.

[88] He submitted that the appellant had not demonstrated that the evidence pointed to a glaringly improbable result or that compelling inferences could be drawn which demonstrated error.

[89] Even if the evidence supported these propositions, they would not answer the fundamental difficulties with the primary judge's reasons identified in paragraph [83] above.

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13 (2003) 214 CLR 118 at 128.
14 [2006] HCA 1 at [21].
15 [2008] QCA 416 at [14].

[90] Counsel for the respondent dealt at some length with the competition between Mr Kelly's and Mr Taylor's evidence. He argued that Mr Kelly's social connection with the appellant was much stronger than Mr Taylor's social connection with the respondent, justifying the primary judge's acceptance of Mr Taylor's evidence in preference to that of Mr Kelly.

[91] It may be accepted that Mr Kelly's relationship with the appellant had the additional dimension that he perceived himself to be something of a mentor to the appellant's son. However, that would not appear to be a particularly cogent reason for rejecting the evidence of the only witness who claimed to have seen and heard the whole of the Surf Club incident and whose evidence received some support from the documentary evidence and was not challenged in important respects.

[92] The respondent's counsel addressed the evidence of Mr Boniface at some length with a view to supporting the primary judge's findings in relation to Mr Boniface. These arguments did not meet the difficulties with the primary judge's approach in relation to the 16 February meeting discussed above. Although not critical to the resolution of this case, it seems to me that the primary judge's drawing of adverse inferences against the credibility of Mr Boniface, in part as a result of the tension between Mr Boniface and the proprietors other than the respondent, on the one hand and the appellant on the other, lacked justification. The respondent appeared to have been the only proprietor in the unit complex out of step. He had done structural work to the garage in his unit in a small complex without body corporate approval and had let the garage space for accommodation. In those circumstances, conflict was almost inevitable. It does not follow, however, that Mr Boniface, a respectable retired engineer and chairman of the body corporate, would not give his evidence carefully and honestly.

[93] Despite the respondent's counsel's skilful arguments, the appellant has established appellable error by the primary judge. This Court, not having seen the witnesses, is not in a position to substitute its own findings for those of the primary judge and, regrettably, a retrial must be ordered. It is to be hoped that the parties will realise that this dispute has already gone far too long and consumed too much time, emotional energy and costs. If commonsense does not prevail, there must be a retrial with all the expense that entails.

[94] I would order that:

- The appeal be allowed with costs.
- The orders made on 8 November 2011 be set aside.
- The matter be remitted to the District Court to be tried before another judge.
- The costs to date of the proceedings at first instance be the parties costs in the cause.

[95] This would appear to be a matter in which an indemnity certificate under the *Appeal Costs Fund Act* 1973 would be forthcoming if applied for by the respondent.

[96] **MULLINS J:** I agree with Muir JA.