SUPREME COURT OF QUEENSLAND

CITATION:	*Mizikovsky v Queensland Television Ltd & Ors (No 3)* [2011] QSC 375
PARTIES:	**LEV MIZIKOVSKY** (plaintiff) **v** **QUEENSLAND TELEVISION LIMITED (ACN 009 674 373)** (first defendant) and **TCN CHANNEL NINE PTY LTD (ACN 001 549 560)** (second defendant) and **GENERAL TELEVISION CORPORATION PTY LTD (ACN 004 330 036)** (third defendant) and ~~**SOUTHERN CROSS BROADCASTING (AUSTRALIA) LTD (ACN 006 186 974)**~~ ~~(fourth defendant)~~ and **SWAN TELEVISION AND RADIO BROADCASTER PTY LTD (ACN 008 689 745)** (fifth defendant) and **NINE NETWORK AUSTRALIA PTY LTD (ACN 008 685 407)** (sixth defendant)
FILE NO/S:	BS 8404 of 2008
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2011-21 November 2011; 25 November 2011
JUDGE:	Dalton J
ORDER:	**1. Reasons delivered for various rulings.** **2.(a) from commencement of this proceeding until 12 October 2011 the plaintiff is to pay the defendants' costs of and incidental to the proceeding, including reserved costs if any, on a**

standard basis to be assessed or agreed, and

(b) from 12 October 2011 the plaintiff is to pay the defendants' costs of and incidental to these proceedings, including reserved costs if any, on an indemnity basis, to be assessed or agreed,

(c) notwithstanding the order at (b) above, the plaintiff is to have its costs of and incidental to the application heard on 25 November 2011 on an indemnity basis, to be assessed or agreed.

CATCHWORDS: **Contextual truth;** relevance of actual reputation of plaintiff; all plaintiff's imputations to be assessed in context of substantial truth of all contextual imputations; including such of plaintiff's imputations as are found to be substantially true; observations on effect of 2005 Act on prior NSW practice in this regard; whether jury should be asked to make a finding that contextual imputations are defamatory; **Honest Opinion;** opinion indistinguishable from fact in television broadcast; defendants' difficulty in articulating case for jury or utility of leaving case to jury; **Malice;** whether sufficient evidence to go to the jury; whether defendant not personally actuated by malice can be infected with malice of third party; need for malice to actuate publication; **Costs;** offer made before trial; whether unreasonable not to accept offer; *Calderbank* principles considered; considerations as to whether indemnity costs should be granted in favour of wholly successful defendant.

Defamation Act 1974 (NSW)
Defamation Act 2005 (Qld)

Allen v John Fairfax & Sons NSWCA, 2 December 1988 unreported
Atholwood v Barrett [2004] QDC 505
Australian Broadcasting Corporation v Comalco Ltd (1986) 12 FCR 510
Bass v TCN Channel Nine Pty Ltd [2003] NSWCA 118
Besser v Kermode [2011] NSWCA 174
Bickel v John Fairfax [1981] 2 NSWLR 474
Channel 7 Adelaide Pty Ltd v Manock [2007] HCA 60
Chappell v Mirror Newspapers Ltd [1984] Aust Torts Reports 80-691
Con Ange v Fairfax Media Publications Pty Ltd & Ors [2011] NSWSC 204
Dougherty v Chandler (1946) 46 SR (NSW) 370
Egger v Viscount Chelmsford [1965] 1 QB 248
Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Pty Ltd [2003] QSC 299
Greig v WIN NSW Television Pty Ltd [2009] NSWSC 876
Hart v Wrenn and The Australian Broadcasting Corporation [1995] NTSC 6
Hepburn v Channel Nine Pty Ltd [1984] 1 NSWLR 386
John Fairfax Publications Pty Ltd v Hitchcock [2007]

NSWCA 364; (2007) 70 NSWLR 484
John Fairfax Publications v Blake [2001] NSWCA 434
Jones v Sutton [2004] NSWCA 439
King and Mergen Holdings Pty Ltd v McKenzie (1991) 24 NSWLR 305
Morosi v Mirror Newspapers Ltd [1977] 2 NSWLR 749
Nationwide News v El-Azzi [2004] NSWCA 382
Nguyen v Nguyen & Vu Publishers Pty Ltd [2006] NSWSC 550
Ratcliffe v Evans [1892] 2 QB 524
Roberts v Bass (2002) 212 CLR 1, 11 and 30
Singleton v John Fairfax and Sons Ltd (No 1) [1983] 2 NSWLR 722
Smith v Streatfield [1913] 3 KB 764
Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2) [2008] QCA 398
Waterhouse & Anor v Hickie [1995] NSWCA 364
Webb v Bloch (1928) 41 CLR 331

COUNSEL: TK Tobin QC with MD Martin for the plaintiff
BR McClintock SC with PJ McCafferty for the defendants

SOLICITORS: ClarkeKann for the plaintiff
Thynne and Macartney for the defendants

[1] **DALTON J:** The plaintiff sued the defendants for defamation said to arise from a television broadcast on 12 June 2008. A trial took place before a jury between 24 October and 21 November 2011. The jury found that some of the imputations said to have been conveyed were in fact conveyed and defamatory, but found that the defence of contextual truth, s 26 of the *Defamation Act* 2005 (Qld) ("the Act"), was established. Accordingly, I gave judgment for the defendants. During the course of the trial various matters of law arose upon which I made rulings and undertook to publish reasons at a later stage. This is a collection of those rulings.

Contextual Truth Ruling 1

[2] There were four rulings in the course of this trial as to contextual truth. The first arose shortly before trial and concerned the question of whether or not evidence of actual reputation was to be considered by the jury in deciding upon a defence of contextual truth. I read my reasons into the record on 1 November 2011, but did not further publish them during the trial. What follows under this heading are the reasons I gave on 1 November 2011.

[3] In this matter, the plaintiff, who was the Chief Executive of Tamawood Limited, trading as Dixon Homes at all material times, pleads that the defendants defamed him during a broadcast of A Current Affair. He relies upon the following imputations:

(a) the plaintiff lied to customers of Dixon Homes with respect to why construction of homes had either not started or was not completed;

(b) the plaintiff had no regard for or did not care about customers of Dixon Homes;

(c) the plaintiff was boss of a building company which was not a competent builder;

(d) the plaintiff had misled customers of Dixon Homes;

(e) the plaintiff had caused financial loss and hardship to customers of Dixon Homes.

[4] It can be seen that the alleged imputations are of different types. For example, (a) and (d) are to the effect that the plaintiff was dishonest in his dealings with the customers of Dixon Homes. Imputation (c) goes to the competence, as a builder, of Dixon Homes.

[5] The defendants take issue with the fact that the imputations pled by the plaintiff were made in the broadcast. I am not deciding those issues at the moment and I assume, for the purposes of this ruling, that the imputations pled by the plaintiff were made by the broadcast.

[6] The defendants plead that the imputations at (b) and (c) above are substantially true. They then plead a number of contextual imputations which they say arose from the broadcast:

(a) the plaintiff was the boss of a building company that unreasonably delayed completion of its work in constructing homes for its customers;

(b) the plaintiff was the boss of a building company that routinely failed to deliver on its promises to customers;

(c) the plaintiff was the boss of a building company that caused significant hardship to its customers by failing to complete its work within a reasonable time;

(d) the plaintiff was the boss of a building company that offered little care or compassion for the plight of its upset customers;

(e) the plaintiff was the boss of a building company that routinely gave poor customer service to its customers;

(f) the plaintiff was the boss of a building company that routinely failed to adequately respond to its customers' complaints.

[7] These contextual imputations are pleaded in train of a defence pursuant to s 26 of the *Defamation Act* 2005 (the Act). The defence is that having regard to the substantial truth of the contextual imputations, and the substantial truth of the imputations at (b) and (c) above, the broadcast did not further harm the plaintiff's reputation.

[8] Section 26 of the Act provides as follows:

> "It is a defence to the publication of defamatory matter if the defendant proves that –
>
> (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true; and
>
> (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations."

[9] The matter for determination arose because the plaintiff wished to call witnesses as to his good reputation, some of whom, from the summaries of evidence exchanged prior to the trial by direction, would testify as to his good reputation for honesty, including in spheres other than in the building industry; for example, in charity work. The defence applied to have these witnesses heard in the absence of the jury on the basis that their evidence could only go to damages and, pursuant to s 22(3) of the Act, damages were a matter for the judge, not the jury. The plaintiff opposed this course, submitting that the evidence of good reputation went to the s 26 question of whether the plaintiff's imputations further harmed the reputation of the plaintiff.

[10] My ruling was to allow the evidence to be given before the jury. I postponed giving my reasons and I now give my reasons for that decision.

[11] There is a good deal of authority concerning s 16 of the New South Wales *Defamation Act* 1974 and some concerning s 26 of the 2005 Act, but it tends to focus on the weighing or comparing exercise required by those sections. It establishes, *inter alia*, that the section requires that the defamatory imputations should be weighed against the substantial truth of the contextual imputations in order to determine whether any further harm is caused to the plaintiff's reputation by the defamatory imputations – *John Fairfax Publications v Blake.*[1]

[12] Properly seen though, this weighing exercise is not all that the section requires. It is an anterior step to a consideration of the effect on the plaintiff's reputation – that is, it must be asked whether, having performed the weighing exercise, further harm is caused to the plaintiff's reputation.

[13] The defence submission was that evidence of actual reputation – good or bad – was not relevant to the question to be determined under s 26. Whether the defamatory imputations caused "further harm" should be assessed by reference to the presumed good reputation of the plaintiff. The submission was that the words of s 26(b) should be read as if it said, "The defamatory imputations do not further harm the *presumed* reputation of the plaintiff."

[14] This point has never been authoritatively determined, despite a very similar provision to s 26 having been part of the law of New South Wales since 1974 and despite a similar provision having been included in the defamation legislation of England since 1952. It appears that the *Defamation Act* 2005 is the first piece of legislation to split the allocation of questions as to damages and defences between judge and jury – in the past either the jury or the judge has determined both questions. Perhaps this accounts for the lack of authority on the point.

[15] There are three cases which do bear to an extent on the question. The point was raised but not determined in *Greig v WIN Television Pty Ltd.*[2] McClennan CJ at CL, commented that, "It would seem at least arguable that [s 26(b)] requires the jury to consider the actual reputation of the plaintiff and determine whether, having regard to the imputations found to be true, the plaintiff's reputation has been further damaged." – [13].

[16] In *Nguyen & Nguyen v Vu Publishers Pty Ltd*[3] Patten AJ did look at actual reputation in performing the exercise mandated by s 26(b) of the Act, although he

---

1 [2001] NSWCA 434, as to s 16(2)(c) of the *Defamation Act* 1974 (NSW).
2 [2009] NSWSC 876.
3 [2006] NSWSC 550 [160].

did not discuss what he was doing in terms of principle. In that case, the plaintiff's imputations were of a different type from the contextual imputations which proved to be substantially true, (bigamy; plagiarism; falsely pretending to academic qualification; falsely claiming profits from sales of books went to support a Vietnamese political prisoner). Patten AJ found that the defamatory imputation (falsely claiming profits from sales of book went to support Vietnamese political prisoner) did further harm the plaintiff's reputation, even in view of the truth of the contextual imputations (plagiarism and pretending to academic qualifications) because the plaintiff's imputations struck, "at the very heart of the plaintiff's work in the Vietnamese community and would be bound to cause damage to his reputation beyond anything arising from the [contextual imputations]."

[17] The third case to consider in this matter is *Hart v Wrenn and The Australian Broadcasting Corporation.*[4] Mildren J expressed the view, obiter, that s 16 of the New South Wales *Defamation Act* 1974, "Establishes a new exception to the principle that where a defendant has published a libel, damage to the plaintiff's reputation is presumed and the plaintiff's cause of action is complete ..." This passage was quoted and approved by the New South Wales Court of Appeal in *Besser v Kermode.*[5] Again, it seems this approval was obiter.

[18] The primary justification for reading s 26(b) of the Act as if it included the word "presumed" before the word "reputation" was that the Act does not affect the operation of the general law as to defamation – s 6(2). There are two inter-related points here. First, it is said that at common law a plaintiff was presumed to have a good reputation. Second, at common law, even if good or bad reputation was proved, that only went to damages, not the elements of the cause of action, in particular, bad reputation was not a defence.

[19] As to the first point, it is more accurate to say that it was presumed that the publication of a defamation would injure the plaintiff's reputation – *Ratcliffe v Evans;*[6] Gatley on *Libel & Slander;*[7] *Bickel v John Fairfax.*[8]

[20] It seems to me that presumption is recognised in the words of s 26(b). The section assumes that there has been defamatory matter published – see the introductory words – and establishes an inquiry as to whether there has been, "further harm" to the reputation of the plaintiff by publication of the defamatory imputations. The word "further" is used to recognise the common law presumption of harm resulting from the defamatory publication. This seems to me what Hunt J was saying in *Hepburn v Channel Nine Pty Ltd*:

> "The Defamation Act 1974, s 16(2)(c), requires the defendant to establish that the publication of the plaintiff's imputation 'does not further injure the reputation of the plaintiff'. That phrase should, in my view, be construed in the sense of 'does not cause *additional* injury to the reputation of the plaintiff'.
>
> The defence afforded by s 16 does not raise an issue simply of whether the combined effect of the defendant's contextual imputations is greater than the effect of the plaintiff's imputation to which they are pleaded. The defendant would not succeed, even if

---

4 [1995] NTSC 6 [11].
5 [2011] NSWCA 174 [66].
6 [1892] 2 QB 524, 528.
7 8th Edition, [32.54].
8 [1981] 2 NSWLR 474, 482 ff, per Hunt J.

> the jury were satisfied that was the situation, for obviously the plaintiff's imputation will have *some* effect on the plaintiff's reputation, notwithstanding the effect of the truth of the defendant's contextual imputations ... but the defendant must satisfy the jury that, such is the nature of his contextual imputations, the truth so affected the plaintiff's reputation that the publication of the plaintiff's imputation to which they are pleaded did not cause *additional* injury to that reputation."[9] (My underlining, italics in the original).

[21] I think that this was the radical alteration in the common law referred to by Mildren J (above) – if the defendant succeeds in showing that no further harm (over and above the presumed harm) was caused, this will be a defence, notwithstanding the fact that the defamatory imputations were published.

[22] I regard this analysis as destructive of the strength of the defendants' argument. The common law presumption would not accurately be reflected by the addition of the word "presumed" before "reputation". The common law presumption is in relation to the harm caused by publication. It is not at all easy as a matter of semantics to interpolate into the section a word, or words, which support the defendants' argument once that is recognised. Turning from semantics to substance, it can be seen that s 26 inquires as to what, if any, harm is caused to the plaintiff's reputation over and above the harm presumed to result from the publication having regard to the truth of the contextual imputations. That indicates to me that this is to be a real inquiry, not a theoretical one. If there were evidence in a trial as to what a plaintiff's reputation actually was, and indeed as to what harm was done to it, then this evidence may well be relevant to the inquiry established by s 26 and it would be absurd to determine the issue without regard to that evidence.

[23] This is particularly so when: (a) the reform brought about by s 26 allows the substantial truth of the contextual imputations to be relied upon by a defendant whether or not they go to the sting of the defamatory imputation pleaded by the plaintiff and (b) the law recognises that reputation may have different aspects.

[24] As to (a), in some cases the contextual imputations will be of the same type as the defamatory imputations – they might all impugn the plaintiff's honesty, for example. However, clearly enough, they may also be of different types. The texts and cases are replete with examples. Gatley gives that of charges that the plaintiff is an adulterer (false) and a thief (true) – [11.5] – to emphasise the difficulty in determining whether additional harm is caused to a plaintiff's reputation. In my view, it would be artificial in the extreme to perform this difficult task ignoring available evidence which is relevant as to actual reputation. I would be slow to give s 26 a construction which compels that outcome.

[25] As to (b), "… reputation may have a number of different aspects, thus a commercial man may be a well-known rake and yet be respected for his business integrity; a man may display modest professional ability but be an incorruptible community leader. An imputation reflecting on his deserved reputation is not logically proved by proof of shortcomings of a different kind."[10]

[26] Nguyen's case (above) was one where both these aspects, (a) and (b), were in play. The defamatory and contextual imputations were of different types – or conveyed

---

9 [1984] 1 NSWLR 386, 405.

10 Australian Law Reform Commission Report 1979 [121]; see also *Readers Digest Services Pty Ltd v Lamb* (1981-1982) 150 CLR 500.

different stings. Further, the plaintiff had a particular reputation in the Vietnamese community as an anti-communist fighter, so that an allegation that he falsely claimed profits from the sale of his book went to a Vietnamese political prisoner would have a significantly bad effect on his reputation in the Vietnamese community where he worked. In the absence of evidence as to these matters, this defamatory imputation may well not have appeared to cause him any further harm having regard to the truth of the contextual imputations which went broadly to dishonesty, such as plagiarism and pretending to have academic qualifications.

[27] The words of s 26, "Do not further harm the reputation of the plaintiff" support the idea that a real inquiry in accordance with the relevant evidence is to be undertaken. It is not an inquiry as to the reputation of "a plaintiff". The cases on s 16 of the 1974 New South Wales *Defamation Act* and on s 26 of the 2005 Act, are replete with references which accord with this view. For example, "Is the nature of the defendant's contextual imputation ... such that its ... substantial truth is capable of being rationally considered by the jury as so affecting the plaintiff's reputation that the plaintiff's imputation ... did not further injure that reputation."[11] (My underlining). By way of further example, "Determining whether by reason of the substantial truth of the contextual imputations any plaintiff's imputation did not further injure his or her reputation ... required the tribunal of fact to weigh or measure the relative worth of the value of the several imputations contended for by both parties. The defence failed if the plaintiff's imputations would still have some effect on his or her reputation, notwithstanding the effect of the substantial truth of the defendant's contextual imputations."[12] (My underlining).

[28] Further, the words of s 26, "Do not further harm the reputation of the plaintiff", support the idea that a real inquiry in accordance with the relevant evidence is to be undertaken. The words are to be contrasted with the language of s 13 in the 1974 Act, "It is a defence that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm." (My underlining). In *Morosi v Mirror Newspapers Ltd,*[13] the Court explained the operation of that section in these terms:

> "[Section 13] is concerned with the circumstances of the publication and the likelihood of harm. It looks to those circumstances at the time of publication and requires the tribunal of fact, being aware of those circumstances, to consider prospectively, as it were, the likelihood of harm ensuing, and not whether harm actually did ensue..."

[29] The language of s 26, to the contrary, does direct an inquiry as to whether "further harm" in fact, ensued. In the 1974 New South Wales Act, the language of ss 13 and 16 were in contrast. There is no equivalent to s 13 in the 2005 Act, but it is relevant, in my view, that s 26 was modelled on s 16 of the New South Wales Act. Both ss 13 and 16 of the New South Wales Act dealt with the concept of harm done by reason of publication as a liability question – this was foreign to the common law concept which dealt with it only as relevant to damages. For this reason, I think the case law as to s 13 of the 1974 Act has some bearing on the construction of s 26 of the 2005 Act.

---

11 *Hepburn*, above, p 400.

12 *Besser*, above, [73].

13 [1977] 2 NSWLR 749, 799.

[30] In *Singleton v John Fairfax and Sons Ltd* (No 1)[14] Hunt J allowed that, in some circumstances, evidence of actual reputation might be relevant to the circumstances of publication and thus the likelihood of harm under s 13. That decision was the subject of criticism – see *Chappell v Mirror Newspapers Ltd*.[15]

[31] In *King and Mergen Holdings Pty Ltd v McKenzie*,[16] the New South Wales Court of Appeal held that what publishees already knew of a plaintiff could be taken into account as part of the circumstances of publication in determining whether there was a likelihood of harm pursuant to s 13. The Court made it clear that evidence of bad reputation was not to be taken into account for the same purpose, only because it did not fit within the description "circumstances of publication". The reason it was excluded was not because of any notion as to evidence of reputation being relevant only to damages and not to liability questions of defence:

> "Section 13 might have provided that there was a defence if 'in all the circumstances' the person defamed was not likely to suffer harm from the publication. In such a case, his prior bad reputation would be proved to show that he was not likely to suffer harm from the instant imputation, but, as Moffitt P pointed out in his judgment [in *Chappell*], the section did not so provide. It provided a defence only where, by reason of more restrictive matters, viz, the circumstances of the publication, the plaintiff was not likely to suffer harm."

[32] In any event, it appears that the New South Wales Court of Appeal has had second thoughts about the relevance of reputation into s 13 issues – *Jones v Sutton*.[17]

[33] The cases on s 13 do show that, in dealing with a statutory defence going beyond what was a defence at common law, the courts are prepared to allow evidence of reputation and like questions to be considered as liability issues. It is true that the common law never allowed evidence of reputation as to defence issues, only as to damages – see Spigelman CJ in *Nationwide News v El-Azzi*.[18] However, s 26 provides a defence not available at common law and expressly looks to the harm caused to reputation as part of that defence. It is correct, in those circumstances, to regard it not as limited by common law restrictions on the use of evidence as to reputation. Thus, it seems to me that it is correct to take into account evidence as to actual reputation – good or bad – in assessing whether, in any given case, further harm has been caused to a plaintiff's reputation by reason of the defamatory imputations pursuant to s 26 of the *Defamation Act* 2005.

[34] In this case, there is more than one sting in the defamatory imputations pleaded – both the plaintiff's honesty and competence as a builder are impugned. The defendants do not plead contextual imputations that go directly to the plaintiff's honesty. If the defendants succeed in showing the plaintiff was head of a company which was an incompetent builder, the inquiry becomes whether additional harm was done to the plaintiff by the defamatory allegations going to dishonesty towards his customers. In the end, it may not matter, in this case, whether the defendants' or the plaintiff's approach is adopted in relation to this question. However, where the plaintiff wishes to lead evidence in relation to his good reputation for honesty, not only in business but in respect of a broader community – for example, charity work

---

14 [1983] 2 NSWLR 722.
15 [1984] Aust Torts Reports 80-691.
16 (1991) 24 NSWLR 305.
17 [2004] NSWCA 439 [26]-[29].
18 [2004] NSWCA 382 [16]-[17].

– it seems to me that it is potentially relevant to a s 26 exercise, so that the jury should hear it. There will need to be directions at the end of the trial as to what use they may legitimately make of it.

Contextual Truth Ruling 2

[35] The question first proposed by the defendants to go to the jury on contextual truth was:

> "6. Have the defendants established that there was any further injury to the plaintiff's reputation by any imputation in respect of which you have answered No in question 3 having regard to the truth of the imputations in respect of which you have answered Yes?"[19]

[36] I suggested an alternative form of the question:

> "6. Having regard to all the contextual imputations you have found to be substantially true (yes answers to question 5) was any further damage done to the plaintiff's reputation by broadcasting any of the imputations to which you gave the answer Yes at paragraph 2:
>
> (a) The plaintiff lied to customers of Dixon Homes with respect to why construction of homes had either not started or was not completed Yes/No
>
> (b) The plaintiff had no regard to or did not care about customers of Dixon Homes Yes/No
>
> (c) The plaintiff was the boss of a building company which was not a competent builder Yes/No
>
> (d) The plaintiff misled customers of Dixon Homes Yes/No
>
> (e) The plaintiff had caused financial loss and hardship to customers of Dixon Homes Yes/No"[20]

[37] In postulating the alternative form of question, I was influenced by the law in relation to s 16 of the *Defamation Act* 1974 (NSW) (now repealed), to the effect that when considering a defence of contextual truth, it was proper to weigh the substantial truth of all the contextual imputations against each one of the plaintiff's defamatory imputations individually. My suggestion was embraced by counsel for the defendants, and counsel for the plaintiff made no objection. However, I became convinced that my suggested form of question was incorrect having regard to the reasoning in *Besser v Kermode.* While that decision is limited to whether or not the practice of "pleading back" is permitted under s 26 of the Act, the principles and reasoning in it are far-reaching and profound – they concern what McColl JA called the "sea-change"[21] which the Act effected to the defamation law in New South Wales. Prior to the Act, New South Wales was the only State in Australia which had a statutory defence of contextual truth. Under the 1974 New South Wales Act, each imputation constituted an independent cause of action, even if the imputations were all contained in the one publication. The Act is to the contrary of that. It provides at s 8 that publication of defamatory matter is the cause of action even if

---

19 Exhibit for identification "K".

20 Exhibit for identification "N".

21 [78].

there is more than one defamatory imputation carried by the matter. In *Besser* McColl JA said:

> "[77] The shift from the defamatory imputation to the defamatory matter as the cause of action sets the context for understanding s 26. This is first apparent from the direction in s 26 to there being in the circumstances there provided a 'defence to the publication of defamatory matter'. This refers to the single cause of action constituted by the publication of such matter 'even if more than one defamatory imputation about the person is carried by the matter': s 8, 2005 Act. It is language repeated, as I have earlier remarked, in each other defence under the 2005 Act. In contrast, a defence under s 16 (and s 15) of the 1974 Act went to the 'imputation complained of'.
>
> [78] This markedly different language highlights the sea-change the 2005 Act has wrought to defamation law in this State. Although s 26 created a new defence for all Australian jurisdictions other than this State, it is framed by s 8 in terms of the common law cause of action. A defence of contextual truth must defeat the whole defamatory matter (cause of action) of which the plaintiff complains, that is to say all of the plaintiff's stings: see [47] above. Thus s 26 postulates that the defence of contextual truth must carry contextual imputations 'in addition to' those 'of which the plaintiff complains'.
>
> [79] Secondly, when the tribunal of fact comes to the weighing exercise the contextual truth defence entails (see [73], s 26(b)) it must be able to conclude that because of the substantial truth of the contextual imputations 'the defamatory imputations' – that is to say the plaintiff's cause of action – do not further harm the plaintiff's reputation. Once again the focus is on comparing the defendant's contextual imputations with the plaintiff's cause of action.
>
> [80] Thirdly, the use of the definite article in both subparagraphs of s 26 ('the defamatory imputations') focuses attention on the plaintiff's imputations as a group – emphasising the defence has to respond to all the plaintiff's imputations (cause of action). In contrast, s 16 of the 1974 Act used the indefinite article, directing the defence to 'any imputation complained of', …"

[38] The principles in *Besser* necessitate the weighing of the substantial truth lying behind all the defendants' contextual imputations in determining whether or not publication of all the plaintiff's defamatory imputations might further harm the plaintiff's reputation. The old New South Wales practice of considering each of the plaintiff's defamatory imputations, one by one, against the substantial truth of all the defendants' imputations made sense in the prior legislative framework in New South Wales, where each individual imputation constituted a separate cause of action. All the contextual imputations could legitimately be called in aid to counter each separate cause of action. However, that approach is not in accordance with the principles underlying the Act. Accordingly, the question left to the jury was:

> "6. Have the defendants established that, because of the substantial truth of all the additional imputations you have found to be conveyed ('yes' answers to question 5), there was no further harm done to the plaintiff's reputation by broadcasting all the

> defamatory imputations you have found to be conveyed ('yes' answers to question 2)? Yes/No"[22]

Contextual Truth Ruling 3

[39] In principle, this ruling is related to the one just dealt with. In his address to the jury, counsel for the defendants said that in answering question 6 (above) they were to compare the contextual imputations with such of the plaintiff's defamatory imputations which were not proved to be substantially true. I told the jury that this was an incorrect approach and that the question for their determination was, having regard to the substantial truth of all the contextual imputations, was there any further harm done to the plaintiff's reputation in publishing all the plaintiff's imputations which they found conveyed and defamatory, regardless of whether or not they found some of them were true.

[40] In my view it follows from the principles in *Besser* that all the plaintiff's imputations found to be conveyed and defamatory are considered against the substantial truth of all the contextual imputations. Under the previous legislative regime in New South Wales, where the imputation was the cause of action, a finding by the jury that one of several plaintiff's imputations was substantially true, in effect, removed it from the jury's consideration. It was not to be further considered, including in the comparative process involved in the contextual truth defence. Under the Act, as explained in *Besser*, to succeed on a defence of substantial truth – s 25 of the Act – it is necessary for a defendant to show that all the imputations in the matter complained of are substantially true.[23] It does not avail a defendant to prove that some, but not all, imputations conveyed by defamatory matter are true, although that may go in reduction of damages (partial justification).

[41] If a defendant fails to prove a defence pursuant to s 25 of the Act, the question becomes whether or not there is a defence available pursuant to s 26 of the Act, and in performing the exercise required by that section, it seems to me there can be no warrant for excluding from consideration some of a number of imputations made which the jury consider to be substantially true.[24]

[42] Under the 1974 New South Wales Act the defence of contextual truth stood independently, and alternatively, to the defence of substantial truth:

> "The defence of contextual truth afforded by s 16 accepts that the matter complained of conveys the imputation pleaded by the plaintiff and that no other defence is available to the cause of action *based upon that imputation*. It asserts that the imputations pleaded by the defendant (the contextual imputations) are also conveyed by the matter complained of and that, even though the plaintiff's imputation is otherwise indefensible, such was the effect of the substantial truth of the defendant's contextual imputations upon the plaintiff's reputation that the publication of the imputation of which he

---

22 Exhibit for identification "AD".

23 [59], and s 25 of the Act.

24 While s 25 of the Act requires that a defendant prove the substantial truth of all the imputations carried by defamatory matter, it is almost inevitable that the jury will be asked to decide upon the substantial truth of each individual imputation (in a case where there are more than one) because the defence will rely on partial justification, or the defence will deny that the plaintiff's imputations (or some of them), were conveyed or were defamatory, and plead substantial truth in the alternative to that traverse.

> complains did not further injure his reputation (in the sense that it did not cause additional injury to that reputation.)"[25] (My underlining and my italics).

[43] Hunt J made the same point in *John Fairfax Publications Pty Ltd v Hitchcock*:

> "A plea of contextual truth admits that the matter complained of conveyed the imputations relied upon by the plaintiff, does not seek to justify those imputations … but seeks to establish that by reason of the substantial truth of the contextual imputation(s), the imputation complained of does not further injure the reputation of the plaintiff."[26]

Contextual Truth Ruling 4

[44] The jury was asked three questions in relation to the defence of contextual truth. The first of those questions (question number 4) asked whether or not the contextual imputations were conveyed by the broadcast. The second of the questions (question 5) asked whether, if the contextual imputations were conveyed, they were substantially true. The third question (question 6), designed to have the jury perform the weighing exercise mandated by s 26, is set out above.

[45] It was contended by the plaintiff that there ought to have been an additional question which logically would have been the second question in the series. It would have asked the jury to decide whether or not the contextual imputations, if conveyed, were defamatory. The third question would then have asked whether or not any contextual imputations which were both conveyed and defamatory were substantially true. Counsel for the plaintiff could point to no authority to support his position. However, he said that it had been the invariable practice in New South Wales when dealing with contextual truth under the 1974 Act, and that there were textual indications in s 26 that this was a necessary question for the jury.

Extrinsic Materials

[46] Section 26 of the Act, like its predecessor in the 1974 New South Wales Act, was a response to the common law position described in *Besser v Kermode*:

> " … where a publication contained two or more separate and distinct defamatory statements, the plaintiff was entitled to select one for complaint, and the defendant was not entitled to assert the truth of the others by way of justification: *Polly Peck* …"[27]

[47] At common law a defendant in Australia was in a position where if it, "could only establish that one of two or more stings relied upon by the plaintiff was substantially true, the defence of justification failed …"[28] Section 26 of the Act made a considerable change to the law in all States except New South Wales, because it provided a defence of contextual truth for the first time. Section 26 was to modify the common law position just stated, see for example the explanatory memorandum extracted at [35] of *Besser*:

---

25 Hunt J, *Allen v John Fairfax & Sons* NSWCA, 2 December 1988 unreported, cited in *Con Ange v Fairfax Media Publications Pty Ltd & Ors* [2011] NSWSC 204 [15]. In my view the words in italics in the above extract ought to be ignored, having regard to the fact that an imputation is not an independent cause of action under the Act.

26 [2007] NSWCA 364.

27 *Besser*, above, [57].

28 *Besser*, above, [59].

> "Clause 26 provides for a defence of contextual truth. The defence deals with the case where there are a number of defamatory imputations carried by a matter but the plaintiff has chosen to proceed with one or more but not all of them …"

The second reading speech in New South Wales included the following:

> "Clause 26 provides for a defence of contextual truth. There is already a defence of contextual truth under the existing New South Wales Act. The purpose of the defence is basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication."[29]

The explanatory memorandum expressly reflects an idea that the contextual imputations are defamatory. The second reading speech in New South Wales does not. There was no second reading speech in Queensland.

[48] Acknowledging that background to the legislative provisions does not compel a finding that s 26 requires a defendant to prove, as an element of the defence of contextual truth, that the contextual imputations are defamatory, when the section itself contains no such requirement. The defence filed in this case does not contain a plea that the contextual imputations are defamatory but pleads, in accordance with s 26, that the broadcast carried imputations additional to the plaintiff's imputations, which were substantially true, and which because of their substantial truth, meant that the plaintiff's imputations did not further harm the plaintiff's reputation. Indeed, it would be an odd thing to my mind if a defendant were required to plead in defence of having published allegedly defamatory matter that, in addition to the imputations the plaintiff alleges are defamatory, it published other imputations which were also defamatory. There would seem to be a considerable risk for a defendant in such circumstances if it failed to prove that its contextual imputations were substantially true.

Working of s 16(2)(c) New South Wales Act 1974

[49] There was uncertainty for a time in New South Wales in construing s 16 of the 1974 Act. The two contending positions are captured in an extract from the judgment of Spigelman CJ (with whom Rolfe AJ agreed) in *John Fairfax Publications Pty Ltd v Blake:*

> "[4] Mr Reynolds SC, who appeared for the Claimants made submissions on the basis that the task to be performed under s16(2)(c) was, as he expressed it on one occasion, one of 'weighing imputation against imputation'. I do not agree.
>
> [5] S16(2)(c) does not focus attention on a contextual imputation *as such* but on the proposition that such an imputation is a 'matter of substantial truth'. It is 'by reason' of such 'substantial truth' that a defence to an imputation pleaded by a plaintiff can be made out on the basis that the plaintiff's imputation does not 'further injure the reputation of the plaintiff'. <u>For purposes of determining whether the s16 defence is capable of being made out, the Court must focus on the facts, matters and circumstances said to establish the truth of the contextual imputation, rather than on the terms of the contextual imputation itself.</u>
>
> [6] Hodgson JA emphasises the use of the words 'further injure' and notes that a person's reputation is injured by the publication of an

---

29 *Besser*, above, [37].

> imputation. I accept that s16(1) requires that, for an imputation to be contextual, it must be 'made by the same publication'. However, s16(2)(c) does not begin with words to the effect 'by reason of the publication of the contextual imputation' or 'by reason of the injury caused by the publication of the contextual imputation'. The drafter appears to have assumed that there was such injury and then directed attention to 'substantial truth' which, in my opinion, ought be taken into account in formulating the conclusion for which s16(2)(c) calls."[30] (Original italics, my underlining).

[50] It was common ground between the parties in this case that the approach preferred by Spigelman CJ was correct, both under s 16 of the 1974 Act and under s 26 of the Act. And indeed it accords with the words of the Act. The words of s 26 do not prescribe a crude balancing of defamatory imputations on one hand, and contextual imputations on the other hand. They require a jury to consider whether, given the substantial truth of the contextual imputations, publication of the defamatory imputations further harmed the plaintiff's reputation. *Blake* does not decide the point in issue here, but the general approach to the exercise to be conducted pursuant to s 26(b); the focus on the words of the section; and the focus on the facts, matters and circumstances said to establish the truth of the contextual imputations, rather than the terms of the contextual imputations themselves, do, to my mind, support the defendants' position.

[51] So does the statement of approach to s 16 of the 1974 Act set out at [68] of *Besser:*

> "The operation of s 16 was worked out by Hunt J in a series of decisions – *Jackson v John Fairfax & Sons Ltd* [1981] 1 NSWLR 36; *Hepburn v TCN Channel Nine Pty Ltd* [1984] 1 NSWLR 386 and *Allen v John Fairfax & Sons Ltd* (Supreme Court of New South Wales, Hunt J, unreported, 2 December 1988) – in terms substantially approved in this Court in *Waterhouse v Hickie; Perkins v Harris* [1995] NSWCA 364; *John Fairfax Publications Pty Ltd v Jones* [2004] NSWCA 205 and *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364; (2007) 70 NSWLR 484. As explained in *John Fairfax Publications Pty Ltd v Hitchcock* (at [212]):
>
> > '(a) the defence of contextual truth under s 16 was created to fill a lacunae in the common law by enabling a defendant to justify a meaning of the matter complained of upon which the plaintiff had not relied;
> >
> > (b) a contextual imputation must be another imputation from the plaintiff's imputation; the test of whether it differs in substance from the plaintiff's imputation is a necessary but not sufficient test for "another" imputation, which requires a difference in kind (*Jones*); it must be a "truly alternative" imputation (*Hepburn*);
> >
> > (c) a contextual imputation may plead a different "sting" entirely from that relied upon by the plaintiff; and

---

30 [2001] NSWCA at 434 [4]-[6].

> (d) a plea of contextual truth admits that the matter complained of conveyed the imputations relied upon by the plaintiff, does not seek to justify those imputations (save where a contextual imputation singly, or in combination, pleads back one of the plaintiff's imputations), but seeks to establish that by reason of the substantial truth of the contextual imputation(s), the imputation complained of does not further injure the reputation of the plaintiff.'" (My underlining).

[52] There is no mention of a requirement, or element of the defence being, that the contextual imputations are defamatory. To the contrary, the statement of principle focuses on the establishment of the truth of the contextual imputations and the assessment of the plaintiff's imputations against the context of that truth. As indeed do the words of the section.

The Weighing Exercise Required by s 26

[53] A jury could not perform the exercise mandated by s 26(b) without considering the qualitative nature of the matters establishing the truth of the contextual imputations. A jury could not find the defence proven without considering that those matters were so serious and so negative that, because of them, publication of the defamation alleged by the plaintiff did not further harm the plaintiff's reputation. Indeed this was recognised by the New South Wales Court of Appeal in *Waterhouse & Anor v Hickie,*[31] "In particular, it is important to emphasise that the defendant cannot succeed in this defence unless the truth of the contextual imputation (or imputations) is of such a nature that the plaintiff's imputations are incapable of causing further injury to his reputation." In these circumstances it is otiose to require the jury to label the contextual imputations "defamatory".

Textual Indications

[54] It was conceded by the plaintiff that the words of s 26 do not specify, as an element of the defence, that the contextual imputations are to be defamatory. Nonetheless this was said to flow necessarily from the words of the section. First, the words "defamatory matter" in the introductory words of the section were referred to. It was said that because the contextual imputations must be contained within "the matter" – s 26(a) – it was a necessary implication that they were defamatory because their source was "the matter". The term "defamatory matter" is not defined in the Act. The term "matter" is, in very general terms, in effect to mean an article, broadcast or other publication. There is no doubt that s 26 is designed to operate only where the contextual imputations are found in the same matter, or publication, or broadcast, as the defamatory imputations. However, it is most unlikely that every part of an article, publication or broadcast will be defamatory. I do not read s 26(a) as necessarily requiring that the jury be asked to expressly find the contextual imputations are defamatory.

[55] The other words relied upon by the plaintiff are the words "further harm" in s 26(b). It was said on behalf of the plaintiff that it could be drawn from the word "further" that the contextual imputations published did the reputation of the plaintiff harm, and it necessarily followed from that, that they were defamatory. I reject that

---

31 [1995] NSWCA 364.

interpretation of the phrase "further harm" as outlined in paragraphs [19]-[21] above. In my view that phrase is a reference to the fact that both at common law and under the Act (see s 7(2)), the law presumes that harm is done to a reputation on publication of a defamation. In any event, to read "further harm" in the way for which the plaintiff contends, contradicts the approach of Spigelman CJ in *Blake* to the comparative exercise undertaken in assessing this defence. Section 26(b) does not read, "The defamatory imputations do not further harm the reputation of the plaintiff because of the publication of the contextual imputations." This is the very point made by Spigelman CJ in [6] in *Blake* – see the underlined parts of paragraph [6] in the extract above. That the plaintiff's contention as to the words, "further harm" is inconsistent with the reasoning of Spigelman CJ is made clear when the contrary view, articulated in that case by Hodgson JA, is considered:

> "In his judgment in this case, Spigelman CJ has taken the view that s16(2)(c) does not require 'weighing imputation against imputation': rather, the Court must focus on the facts, matters and circumstances said to establish the truth of the contextual imputation itself. In my opinion, the use of the words 'further injure' in s 16(2)(c) precludes this approach: the reputation of the plaintiff is not in fact injured at all by the facts, matters and circumstances in question, but only by the publication carrying the contextual imputation; so in my opinion it is a matter of weighing imputation against imputation. …"[32]

Honest Opinion Ruling

[56] The defendants struggled to isolate parts of the defamatory broadcast which were said to be opinion. A list was provided in submissions which were read and filed on 9 November 2011. Of these matters, it seemed to me that only two, those at items 56 and 57 could potentially amount to opinion, rather than fact. My view was that, apart from these two, the matters put forward by the defendants were so bound up in the statements of fact which surrounded them that they were indistinguishable as comment, particularly having regard to the difficulties of distinguishing between fact and comment in a television broadcast.[33] The two matters capable of being regarded as opinion which was not so intermingled with fact are concluding comments of two unhappy customers at the very end of the broadcast:

> "56. David Fletcher Disgusting, I would never use them again.
>
> 57. Lisa Alexander I wouldn't have them build a dog kennel."[34]

[57] Counsel for the defendants found it difficult to articulate the case to be made as to this defence. He conceded it was difficult to be certain about the matter, but, at least in oral argument, did not demur from the proposition that the only imputations advanced by the plaintiff to which these comments could relate were those pleaded at paragraphs 5(b) and 5(c) of the statement of claim:

> "(b) the plaintiff had no regard for or did not care about customers of Dixon Homes;
>
> (c) the plaintiff was boss of a building company which was not a competent builder."

---

32 Above, [61].

33 *Channel 7 Adelaide Pty Ltd v Manock* [2007] HCA 60, [33]-[37].

34 Exhibit for identification "C".

These were the only imputations which the defendants sought to justify as substantially true.[35] There was certainly evidence led by the defendants which was capable of being accepted by the jury to the effect that these imputations were substantially true. The plaintiff raised no issue that the parts of the broadcast identified by the defendants as opinion were incapable of being so justified because they were opinion, not fact. Indeed, the plaintiff's position was that there were no matters of opinion broadcast.

[58] In these circumstances, having regard to the need for a defendant raising honest opinion to prove that the opinion was based on facts which are substantially true, it seemed to me there was no point in the defence persisting in its attempt to defend a very minor part of the broadcast as comment. While acknowledging that his instructions did not permit him to withdraw the defence, counsel for the defendants did not seek to argue against the logic of this position.[36] Accordingly I withdrew the defence of honest opinion from the jury.

Malice Ruling 1

[59] The plaintiff pleaded that the defamatory imputations were published maliciously. The defence raised qualified privilege, which is defeated if the plaintiff shows malice. The defendants submitted after the close of evidence that there was insufficient evidence of malice for the issue to be left to the jury. I ruled against that submission.

[60] The plaintiff's pleading of malice was as follows:

> "9. Further the imputations were published maliciously in that:-
>
> (a) the defendants knew the content of the broadcast to be false or recklessly not caring whether it was true or false;
>
> (b) the defendants were activated by the dominant motive of damaging the plaintiff and the business of Dixon Homes and broadcasting the story for its own commercial purpose regardless of the truth of the broadcast;
>
> (c) on 8 April 2008 Chris Allen on behalf of the defendants sent an email to the plaintiff regarding complaints from three customers of Dixon Homes;
>
> (d) by email and attached documentation dated 9 April 2008 the plaintiff provided a full and comprehensive answer to the complaints referred to in (c);
>
> (e) the broadcast was promoted by the defendants on national television during the 2008 rugby league state of origin game for the purposes of maximising the available viewing audience;
>
> (f) at the conclusion of the events depicted in the broadcast the customers identified therein remained at the premises of Dixon Homes and continued to speak with the plaintiff (the conversations);

---

35 In written submissions counsel for the defendants said that the comments might also go to the imputation at 5(d) of the statement of claim, viz, that the plaintiff misled customers of Dixon Homes. A substantial difficulty for the defendants, if this were so, was that that imputation was not argued to be substantially true.

36 T 15-80-81.

(g) at the conclusion of the conversations all of the customers of Dixon Homes depicted in the broadcast with the exception of Gardner were satisfied with the explanations provided by the plaintiff and had no further complaints with respect of the plaintiff or Dixon Homes;

(h) the conversations took place in the presence of employees or agents of the defendants including Chris Allen further particulars of which will be provided after disclosure;

(i) the conversations were recorded both visually and in audio format by employees or agents of the defendants (the recordings);

(j) notwithstanding the recordings and the matters pleaded in (e), (f) and (g) herein the defendants published the broadcast and the promotion which did not include nor have reference to:-

(i) the recordings;

(ii) the matters pleaded in (f) herein."

[61] The reply adopted the above particulars and also pleaded in relation to the qualified privilege defence that, "the defendants were attempting to sensationalise complaints from a small number of customers of Dixon Homes for the purposes of advancing the defendants' own commercial purposes." While this was not expressly a plea of malice, I accept that it is capable of being one having regard to the decision of *Roberts v Bass.*[37]

[62] Counsel for the plaintiff put forward a submission as to the topics raised in the evidence which were relevant to the issue of malice.[38] They were:

"1. The language, Get-Up, and composition of the matter complained of.

2. The abuse, threats, and intimidation at the company premises.

3. The ill will of Mr Allen towards the Plaintiff.

4. The ill will of Mr Gardner towards the Plaintiff.

5. The use of Mr Gardner's complaints in the matter complained of, notwithstanding his ill will towards the Plaintiff, which was known to Mr Allan when he scripted the matter complained of.

6. The failure of the Defendants to check the contents of customer's allegations as broadcast in the matter complained of."

Background to the Broadcast Complained of

[63] Channel Nine's "A Current Affair" program broadcast two programs dealing with unhappy customers of Tamawood in April 2008. Reporters attended at the partly-built houses of customers who complained of poor quality work and delay in building their homes. No complaint was made by the plaintiff about those programs. Following the April broadcasts, the defendants received numerous email

---

37 (2002) 212 CLR 1, [11] and [30].

38 Exhibit for identification "W".

complaints from other dissatisfied customers of Dixon Homes. On 12 June 2008 A Current Affair broadcast a third program. It was different in form. The defendants organised a bus which transported around a dozen upset homeowners to the main office of Tamawood, along with camera crews and a reporter, Mr Chris Allen. Mr Allen led the customers into the reception area of Tamawood's office. The plaintiff attended at reception and there followed some 40 minutes or so, in which customers ventilated their complaints directly to the plaintiff. This was referred to as the "walk in" during the trial. To the extent that there was any structure to what went on, Mr Allen provided it. He acted sometimes as moderator between the customers and Mr Mizikovsky, and at other times, interlocutor on behalf of the customers. He accepted in cross-examination that his role was one of "ringmaster" during the event. From the raw footage, Mr Allen edited and presented the broadcast complained of.

[64] Some of the customers shown on the raw footage are very angry and upset. It was the plaintiff's case that they were confrontational and abusive towards him, and that is no doubt a view which was open to the jury on the evidence. The plaintiff's case was that there was an undercurrent of physical violence during the walk in. The plaintiff particularly focuses on one unhappy customer, Stuart Gardner in this regard. Mr Mizikovsky gave evidence which is capable of being interpreted as meaning that he felt physically threatened by Mr Gardner. There was evidence from which the jury could have found that Mr Gardner's behaviour was physically threatening, depending on their view of things. There are times during the walk in when Mr Gardner makes unpleasant comments to reception staff and to another lady who was present in reception, but apparently a bystander. During the walk in, the plaintiff accuses Mr Gardner saying, "You said you wanted $40,000 or you're going to have a group of people here making my life misery." In response Mr Gardner said he asked for $40,000 as compensation and denied anything further. The behaviour of Mr Gardner at the walk in was capable of being regarded by the jury as abusive and aggressive, as I say, depending upon their view of things. Mr Gardner and his wife had been subject to a considerable amount of mismanagement of their building job and there had been very serious defects discovered in the home which was built for them. That is, there was ample evidence from which the jury could conclude Mr Gardner had reason to be angry and frustrated.

[65] I turn back to the topics nominated by the plaintiff as sufficiently raised on the evidence to go to the jury on the issue of malice. In my view there was evidence from which the jury, if it were so minded, could rationally conclude that there was ill-will borne towards the plaintiff, or some other improper purpose on behalf of the defendants, which actuated the broadcast. There was the use of a tolling bell to introduce the broadcast. The plaintiff argued the editing of the broadcast was such as to make it seem that Mr Mizikovsky in fact raised no defence of substance to any of the customers' complaints, when that was not so.[39] As discussed above, there was evidence from which the jury might conclude that the behaviour of the customers at the plaintiff's premises, under the supervision or control, as it were, of Mr Allen, was indicative of ill-will on the part of Mr Allen. Mr Allen was cross-examined as to his state of mind towards the plaintiff; including whether he believed the complaints the unhappy customers made. There was a question for the jury as to whether Mr Allen had, in the course of his investigations, formed ill-will towards the plaintiff. The plaintiff did not rely upon the ill-will of Mr Gardner

---

39 In fact the jury answered a question at the end of the day to the effect that the broadcast had not been fairly edited and presented in relation to the plaintiff's explanations of wet weather. This was the answer to a factual question relating to qualified privilege, not one relating to malice.

towards the plaintiff as a separate indicia of malice.[40] The plaintiff relied upon the ill-will of Mr Gardner being manifest in the presence of Chris Allen and the use of footage of Mr Gardner. Finally, there was evidence from the cross-examinations of both Mr Allen and the producer of the broadcast, Amelia Ballinger, that the defendants ran few objective checks on the allegations made to them by the unhappy customers.

Malice Ruling 2

[66] In summing up to the jury on the plaintiff's malice case so far as it involved Mr Gardner, I said this:

> "Now, malice in defamation law has got a particular meaning which is different, I think, from what we think of it in common parlance. We sort of think of it as some very evil intention of a fairytale character, don't we, but in defamation law, it is something quite specific. It means an improper motive or purpose.
>
> So, to judge if something is improper, you need to know, well, what is a proper motive. To publish information to the public about a subject matter where they have an interest in receiving that information is a proper motive. So, publishing what might be broadly classed as a consumer affairs information segment would be a proper motive. So, you judge what would be an improper motive against that background.
>
> …
>
> Now, turning away from those sort of extreme cases, unless there's some extraordinary sort of evidence in a case, you're not often going to have direct evidence of malice and we can't sort of lift up the top of Mr Allen's head and look inside, or Ms Ballinger's head and look inside, and examine what their intentions were. So, you have to look for indicators or markers of malice. Indicators of ill-will borne to Mr Mizikovsky by the defendants or their employees, a desire to injure him, prejudice against him.
>
> Mr Tobin points to words like 'victims' and 'perpetrator' as being relevant to Mr Allen's state of mind. He talked to you yesterday about how Mr Allen seemed, he said, to be resentful of the fact, or indignant about the fact, that Mr Mizikovsky had lectured him and he referred to Mr Allen's evidence that Mr Mizikovsky, before the broadcast, had laughed at him and said he'd take action, you know: 'Go your hardest,' or something and said he'd take action against him if he did and he said all those things are relevant to Mr Allen's state of mind.
>
> He referred to Mr Allen's evidence that Mr Allen appreciated that the broadcast was potentially damaging, and he refers to the way he says Mr Allen edited the broadcast with respect to the explanation about the wet weather.
>
> Now, whether they're markers that for you indicate an improper motive on Mr Allen's part is something that you're going to have to weigh up and consider.

---

40 T 15-77, ll 30-40.

Mr McClintock, on behalf of the defendants, says they're not. He says the defendants were acting professionally as journalists, and if anything, out of a motive to assist the customers of Dixon Homes, who – you recall the evidence even after the 2 April programs, the journalists said: 'One of the reasons we went on to make the third program was that Mr Gardner in particular still hadn't had any redress.'

And their evidence was these are people who can't otherwise obtain redress.

Now even if you find that there's markers of malice, there's much more required before you could make a yes answer to this question. You need to find that an improper motive existed at the time of the broadcast and that it caused the broadcast, it actuated it.

Now we know in every day life that sometimes more than one thing will cause us to act or cause us to speak, we will have more than one motive. To find that malice or an improper motive actuated the broadcast you need to find that it's the dominant motive.

So in this context think about Stuart Gardner. Mr Tobin says that from his behaviour and from his evidence, say, in relation to his idea of picketing or about the $40,000, you can see that Mr Gardner bore ill will or malice towards the plaintiff. You need to assess all of that and decide whether or not he did.

But Mr Gardner's not the defendant. Whether the defendants bore any ill will is a completely separate question. Mr Tobin says look at the way Mr Gardner behaved in front of Chris Allen on the 10th of June. Chris Allen must have understood, he said, that Mr Gardner wanted to hurt the plaintiff, that Mr Gardner bore the plaintiff malice. Well, again, it's a matter for you whether you think Mr Allen would have realised this.

But the chain of reasoning continues. Mr Tobin says, knowing how Mr Gardner behaved at Dixon Homes, Channel 9 gave Mr Gardner quite a bit of air time on the broadcast. So, he says, that's a marker of malice on the part of Chris Allen or Amelia Ballinger. Well, that's a matter for you. But you will have to bear in mind that A Current Affair did not broadcast anything about the $40,000 issue, it didn't broadcast anything about the BSA cancelling the licence, it didn't broadcast anything about Mr Gardner's threats to hurt Mr Mizikovsky, or anything about his idea of pickets or the sort of footage that Mr Tobin drew to your attention like the lady with the smug look. None of that was broadcast. And the question for your consideration is the state of mind of the journalists, not the state of mind of Mr Gardner. And then, after you consider state of mind, was there an improper purpose that motivated the journalists or actuated the journalists to make the broadcast?

…

All right, now the last thing on malice, and it's an important thing, a finding of malice is a very serious finding because it involves a finding of improper motive. So it's not one that you'd make lightly.

> You'd want to feel an appropriate degree of persuasion before you'd make a finding like that."

[67] Counsel for the plaintiff asked for a redirection to the effect that if the jury found the journalist Mr Allen was aware of Mr Gardner's malice and broadcast footage of Stuart Gardner at the walk in, the defendants were liable for Mr Gardner's malice.[41] The point was expressly put as not being based on vicarious liability. It was said that if Mr Gardner had an improper motive in publishing what he did on the occasion of the walk in, and the defendants knew of this, and selected Mr Gardner to be part of the broadcast, then the broadcast became "infected by malice".[42]

[68] Nothing like this was pleaded by the plaintiff. The matter was first raised in exhibit for identification "W", and during argument after all the evidence was in. The defendants objected at that point that the matter had not been pleaded.[43] This objection was renewed when the point was argued fully.[44] Evidence was certainly led in cross-examination from Mr Allen about his knowledge of the behaviour of Mr Gardner said to demonstrate Mr Gardner's ill-will towards the plaintiff, and there was no objection to that evidence. But at that time there was no indication from the plaintiff that the evidence went further than establishing indicia of ill-will held by Mr Allen by reason of the fact that, as ringmaster at the walk in, he allowed customers to behave in an abusive, threatening way, or at least did not demur when they did. In fact, those matters were not pleaded either, but there was a significant amount of cross-examination of both Mr Allen and Ms Ballinger on the basis that they personally bore ill-will towards the plaintiff, and it would appear from the lack of objection on behalf of the defendants, that they acceded to the plaintiff attempting to prove its case on malice in this way. On the other hand, counsel for the defendants asserted that, had he understood that the plaintiff wished to make an argument that Mr Gardner's malice infected the defendants with malice, he would have taken a different approach with his witnesses Mr Allen, and Mr Gardner in their evidence-in-chief.[45] For this reason alone my view was that the point should not be left to the jury. In addition, I think the plaintiff's submissions on this point were wrong.

[69] It was said by the plaintiff that the High Court case of *Webb v Bloch*[46] supported his position. The facts of *Webb v Bloch* are very different to the facts here. In that matter, a committee employed a solicitor to draw a letter to be sent to many farmers and scrip-holders in a wheat harvest scheme. It was found that the employed solicitor was motivated by malice in drawing the letter which defamed the plaintiff. There were independent grounds for establishing malice in some, but not all, of the committee members. The matter came before the High Court in its original jurisdiction and Starke J gave the opinion that the malice of the solicitor:

> "… would not have destroyed the privilege of the defendants who were not guilty of malice. They merely authorised the publication by [the solicitor] of a specific circular which they honestly believed to be true and necessary for the common interest of scrip-holders in the Harvest Scheme. It was their privilege to publish the circular and any improper motive on (the solicitor's) part unknown to the

---

41 T 19-58, ll 1-5.
42 T 19-57, l 25.
43 T 15-72, l 25 and 15-73, ll 8-45.
44 T 19-111, l 25 and 19-113, l 12.
45 T 19-112, ll 10-20.
46 (1928) 41 CLR 331.

> defendants would not, in my opinion have infected the occasion and destroyed their privilege."[47]

[70] Starke J gave this opinion, "despite" the case of *Smith v Streatfield*.[48] The matter went on appeal to a bench of three High Court Judges. Knox CJ followed *Smith v Streatfield* saying:

> "The other defendants seem to have had no knowledge, and to have made no attempt to ascertain, what statements were contained in the circular, or whether such statements were true or false. It is unnecessary to consider whether the evidence establishes that they were personally guilty of malice, for they are jointly responsible with the [committee members who actually had malice] for the publication of the libel and so joint tortfeasors with them; and in such a case the malice of one or more of the joint tortfeasors defeats the privilege of all those responsible in law for the publication of the defamatory matter (*Smith v Streatfield*)."[49]

[71] Isaacs J emphasised the fact that the solicitor was employed by the committee. He held that in writing and distributing the circular the solicitor himself published the libel as a principal. He found that the solicitor was in fact the real author of the circular, the "mastermind". He said:

> "[The committee members] cannot employ the mastermind for the very purpose, accept its suggestions, approve and disseminate its production, and then disclaim malice … if fraud of an employee can be imputed in an action of deceit where the *factum* creating the contractual relations is that of the principal and not of the employee, there is no room for the argument of differentiation in this case."[50]

[72] The third member of the Court, Gavan Duffy J dissented and gave no reasons.

[73] The case of *Smith v Streatfield* was widely disapproved[51] and eventually overruled in *Egger v Viscount Chelmsford*.[52] *Smith v Streatfield* was a case where the author and printer of a pamphlet were sued. They were held to be joint publishers and joint tortfeasors. Malice in the author was held to defeat the plea of privilege made by the printer, even though the printer was not malicious and did not know the author was. In *Egger*, a committee resolved to send a letter which was held to be defamatory. Some of the committee members were found to be actuated by malice; some were not. There is no suggestion in the case that the innocent members of the committee knew of the malice of the other members. Lord Denning MR discussed *Webb v Bloch* as an example of vicarious liability. He concluded:

> "It is a mistake to suppose that, on a joint publication, the malice of one defendant infects his co-defendant. Each defendant is answerable severally, as well as jointly, for the joint publication: and each is entitled to his several defence, whether he be sued jointly or separately from the others. If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must

---

47 Above p 343.
48 [1913] 3 KB 764.
49 Above, p 359.
50 Pp 365-366.
51 See the judgment of Jordan CJ in *Dougherty v Chandler* (1946) 46 SR (NSW) 370, 376 and the cases cited there.
52 [1965] 1 QB 248.

> prove malice against each person whom he charges with it. A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment."[53] (My underlining).

[74] In these circumstances the authority of *Webb v Bloch* must be limited. It is suggested in *Australian Defamation Law and Practice* that the case is limited to the proposition that there will be malice where a joint tortfeasor is vicariously liable for another joint tortfeasor who is actuated by malice.[54] To this effect is *Dougherty v Chandler*,[55] where Jordan CJ said this (obiter):

> "Where several defendants are charged with joint defamation, and express malice is established against one only, it has been said that the express malice of the one is fatal to the success of a plea of privileged occasion of fair comment by all or any … This may be true enough where the others are, on general principles, vicariously liable for the acts of the one … But, except in this class of case, I think, with all respect, that, as a matter of principle, where, to defeat a plea of several defendants sued jointly, it is necessary for the plaintiff to prove express malice, he must fail as against any defendant to whom he is unable to sheet home express malice."

[75] This passage was referenced by the Court of Appeal in New South Wales in *Bass v TCN Channel Nine Pty Ltd.*[56] Handley JA said in this respect, "There is no doctrine of transferred malice in the law of defamation apart from the ordinary principles of vicarious liability."

[76] In *Bass v TCN Channel Nine* the defendant published a television program inspired by the decision of the New South Wales Government to establish a Royal Commission to investigate the building industry. This program featured the plaintiff explaining how he had once been a successful building subcontractor but was now out of business, he claimed, as the result of a black-ban by a union. The program went on to show a response by the secretary of the relevant union, which was found by a jury to convey the defamatory imputations that the plaintiff was a shonky operator and could not be relied upon to pay his employees. Channel Nine pleaded a defence of qualified privilege on the basis that the union official was responding to an attack asserted against the union. This of course is a different type of qualified privilege from that asserted by the defendants in this case. Spigelman CJ (in dissent) described the type of privilege asserted in *Bass v TCN Channel Nine* as ancillary on the part of the television station publisher:

> "This public policy can be availed of by a third party publisher, such as the media, which has a privilege ancillary to that of the person replying to the attack. As Dixon J put it in *Loveday* (at 519):
>
> > '… the reason for the privilege of the newspaper publisher is that it is right and for the common convenience and welfare of society that he should lend the aid of his newspaper to the party who is entitled publicly to repel the attack or answer the criticism.'"[57]

---

53 Above, p 265; followed *McLeod v Jones* [1977] 1 NZLR 441.
54 Tobin & Sexton [18,065].
55 Above, p 376.
56 [2003] NSWCA 118, [77].
57 *Bass*, above, [15].

[77] The qualified privilege asserted by the defendants in this case was not ancillary. The purpose for which a qualified privilege is granted is fundamental to determining whether or not publication has taken place for another, improper, purpose. As Gleeson CJ said in *Roberts v Bass,*[58] "The kind of malice that defeats a defence of qualified privilege at common law is bound up with the nature of the occasion that gives rise to the privilege." In each case when looking for malice under the test in *Roberts v Bass,* one looks to see if the privilege has been abused, which must be judged against the purpose for which any particular type of qualified privilege is granted.

[78] In *Bass v TCN Channel Nine,* the trial judge had kept from the jury the question of whether or not the defendant published by reason of malice. The particulars of the plaintiff's case were that: (a) the defendant knew that the union was motivated by malice towards the plaintiff and (b) the defendant believed what it published about the plaintiff was false. These two particulars were considered together and the majority decision was that a case for malice based on both the particulars ought to have been left to the jury.[59] There is a discussion of what scant authority there is on the question of whether or not malice can affect a defendant who is not actuated by it at paragraphs [93]-[100]. Statements to the effect that, "innocent parties to a joint publication ought not to be affected by the malice of the malicious one" are considered. Handley JA observes that it is not obvious to him that a person who "republishes with knowledge of malice or falsity can properly be described as innocent." (My underlining). The discussion in the judgment of Handley JA then moves to a consideration of the case of *Australian Broadcasting Corporation v Comalco Ltd.*[60] That case concerned malice established when a republisher knew the material republished was untrue. The long discussion of this case shows how Handley JA's judgment very much considered both the particulars of malice alleged in that case together, rather than separately. In fact his statement, "I can see no reason why a media organisation should retain a derivative qualified privilege when it knows that its joint publisher has lost its primary privilege because it is actuated by malice"[61] (my underlining), follows immediately on from a discussion of *ABC v Comalco* and is expressed as an endorsement of the result in that case where the finding of malice rested squarely upon the basis that the defendant published material it knew to be untrue.

[79] I do not regard *Bass v TCN Channel Nine* as deciding the point which the plaintiff now puts forward. The majority decision deals with two particulars of alleged malice together. The decision is not one that knowledge of another's ill-will alone could infect a defendant with malice.[62] The type of qualified privilege being considered in *Bass v TCN Channel Nine* was derivative. The proper purpose was to aid a person who had been attacked to respond to the attack. If a broadcaster knew in such a case that the person responding was actuated by malice, that might well be greatly significant in determining the question of whether an improper purpose actuated the publication made by the broadcaster, given the proper purpose of the privilege asserted. The qualified privilege asserted here is not ancillary or derivative.

---

58 Above, [11].
59 Above [132], [137].
60 (1986) 12 FCR 510.
61 Above, [114].
62 See the references to Handley JA's judgment above and Wood CJ at CL at [165], [169] and [171].

[80] Spigelman CJ (dissenting) did consider the first matter particularised as a separate issue and he raised what appears to me to be a very salient point. He said this:

> "[31] The matter raised by particular (c) is quite distinct. Particular (c) states:
>
> '(c)(i) the defendant knew that the Building Workers' Industrial Union, for whom Mr McDonald was the spokesman in the matter complained of, was motivated by malice towards the plaintiff, in particular through the attitude and activities directed towards the plaintiff by its employee John Higgins.
>
> (ii) the defendant knew that the source of what was said about the plaintiff by Mr McDonald in the matter complained of was Mr Higgins …'
>
> [32] The particular identified in par (c)(i) expresses a proposition which does not reflect terminology that resonates in the case law. It appears to assert that malice can be made out on the basis of knowledge that the person replying to the attack was actuated by malice.
>
> …
>
> [34] It is not enough to state, as particular (c)(i) does, that a person had a particular motivation, unless that motivation was the actuating purpose of the defamatory statement. Latham CJ and Williams J made a similar point on appeal in *Penton v Calwell* (at 245): '… An object or purpose of self-defence may co-exist with an object or purpose of attacking a traducer. It is the former element which is relevant in relation to the defence of qualified privilege, and it does not cease to exist simply because the latter element also exists …'.
>
> [35] To similar effect are the observations of Jordan CJ in *Godfrey v Henderson* (1944) 44 SR (NSW) 447 at 454; … quoted with approval in *Roberts v Bass* (at 41 [104]), that what is required is evidence that '… as a matter of commonsense, points to the actual existence of some express malice which was really operative in the making of the statement'." (My underlining).

[81] That common law position is reflected in s 30(4) of the Act which provides:

> "(4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice."

[82] As an epilogue to *Bass v TCN Channel Nine*, it is instructive to review the later case reported under the same name at [2006] NSWCA 343. Following the first Court of Appeal decision, the plaintiff sought leave to amend its reply to formulate his allegation of malice conformably with that decision. The case went to trial again with the plaintiff's case on malice, "restricted to the allegation that the defendant's dominant purpose in publishing the imputations against the plaintiff was improper."[63] The bases for that inference of impropriety were limited in the summing up to the defendant's knowledge that the union was motivated by malice

---

63 Above, [32].

and the defendant's belief that what it published was false. The question put to the jury was, "Has the plaintiff proved that the defendant's dominant motive in publishing what was said by Mr McDonald concerning the plaintiff was an improper motive?"[64] That is, the second trial proceeded on the basis that it was necessary for the plaintiff to prove that the television station's dominant motive in broadcasting was improper. The matter was not put to the jury on the basis that because the defendant knew of the union's improper motive, it was somehow infected with malice. There was no interference with this position on the second appeal.

[83] Knowledge of malice borne by a joint publisher may, but will not necessarily, prove malice actuating publication. In each case it must be a question of fact. The publication complained of is the broadcast of A Current Affair on 12 June 2008. The plaintiff does not complain of Mr Gardner publishing his views to those present at the walk in. The broadcast on 12 June 2008 contained a few minutes of footage edited from over 40 minutes of footage shot at the walk in. It showed at least six unhappy customers complaining to the plaintiff; one was Mr Gardner. It comprises much commentary, editing, music and etc for which the defendants are responsible. It is this publication which the plaintiff must show was activated by the dominant motive of malice. There was evidence fit for the jury to consider as to whether Mr Gardner was motivated by malice, and whether Mr Allen knew of this. That was left to the jury as something they ought to consider in determining whether or not Mr Allen (on behalf of the defendants) was himself actuated by malice. There was no warrant in my view to go further and direct the jury that if they came to the conclusion Mr Allen knew of malice on the part of Mr Gardner, they should regard the publication by the defendants of the segment broadcast on 12 June 2008 as being actuated by a dominant improper purpose.

Costs

[84] When the jury delivered the answers to the questions posed, I gave judgment for the defendants. Junior counsel for the defendants asked me to make a costs order in his clients' favour and I did so, on a standard basis. Some days later the defendants asked for this order to be vacated. They argued that an order should be made on the indemnity basis because an offer had been made to the plaintiff prior to the trial. This offer was not drawn to my attention on the day judgment was delivered.

[85] A formal offer to settle under r 353 was made on 12 October 2011 by the defendants in an amount of $100,000 including interest, together with the plaintiff's costs of the proceeding on a standard basis. It was conceded by the defendants that even though the offer was made under the rules of court, the rules accorded them no advantage, notwithstanding that they had been wholly successful – see r 361. The defendants relied upon s 40 of the Act and common law *Calderbank* principles. Section 40 of the Act provides:

> "**40 Costs in defamation proceedings**
>
> (1) In awarding costs in defamation proceedings, the court may have regard to –
>
> (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and

---

64 [15].

(b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise) –

…

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant – order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

(3) In this section –

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made."

[86] The question for me is whether or not the plaintiff "unreasonably failed to accept" the settlement offer of 12 October 2011. This case was unusually fact rich. At the heart of it lay the evidence of 16 laypeople who, in the years 2006-2008, contracted to have the plaintiff's company build them a home. These witnesses were called by the defence to prove the substantial truth of two of the plaintiff's imputations and the contextual imputations. The credit and reliability of the evidence of these witnesses was very much in issue at the trial. The jury found one of the two plaintiff's imputations to be substantially true. It found four of the six contextual imputations to be substantially true. In other words, the jury made nuanced findings of fact based on the evidence of these witnesses of truth. They did not wholly accept or wholly reject what the defendants said should be made of their evidence. At the end of the day these factual findings favoured the defendants more than the plaintiff, but the findings cannot be said to be wholly in the defendants' favour.

[87] No doubt it was reasonable for the plaintiff, properly advised, to be aware that if the witnesses of truth presented well, there was a significant likelihood that he would be unsuccessful in his suit. Nonetheless, there is nothing which I have seen which would have made the plaintiff understand that it was more probable than not that the witnesses of truth would present well. The nature of the defendants' case was plain, and indeed the defendants provided summaries of the evidence which each of these witnesses of truth would give at trial. Much however depended upon the jury's assessment of the witnesses in the witness box, and under cross-examination. The plaintiff had available to him evidence which, if accepted by a jury, would support the case he wished to make. I cannot see that, at the time the offer was made, the plaintiff ought to have realised he had poor prospects if he continued with his proceeding. He ought, however, to have realised (properly advised) that continuing with the proceeding involved a real risk.

[88] The defendants put their submissions on the basis that, whatever view the plaintiff took of liability, the 12 October 2011 offer was so generous that it was unreasonable to fail to accept it: a higher award from the Court was unlikely. The offer was for $100,000 including interest. The matters complained of occurred in June 2008, so that excluding interest, the offer was in the region of $80,000. The plaintiff pointed

to *Atholwood v Barrett*[65] where Samios DCJ awarded $140,000 for a defamation where the imputations were more serious than those in the current case, but where the publication was much more limited. The defence says this is the high water mark of defamation damages in Queensland.

[89] For the plaintiff it was argued that the evidence at the trial showed that around one million viewers could be expected to have watched the broadcast complained of. The evidence was that it was promoted during the State of Origin match the previous night, when a higher than normal number of viewers might be expected to be watching television. It was pointed out that *Atholwood* was a judgment now over eight years old and that the award in that case was of general damages, whereas in this case the plaintiff had in addition, claimed aggravated damages. The plaintiff argued that the point of this proceeding was not just to obtain compensation, it was also to vindicate his reputation through a judgment of the Court. There is nothing in the rules, or the offer made, which would have prevented a judgment in favour of the plaintiff issuing had the plaintiff accepted the offer.

[90] It would have been a reasonable decision for the plaintiff to have accepted the offer made. That however is not the question under s 40(2)(b) of the Act. I am not convinced in all the circumstances that it was unreasonable for the plaintiff not to have accepted the offer.

[91] As to the *Calderbank* principles, the usual order for costs is on a standard basis, but where a *Calderbank* offer has been made before judgment, the Court has a discretion to order costs on an indemnity basis from the time of that offer. The relevant principles are discussed in *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2),*[66] beginning with a reference to the judgment of Chesterman J in *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Pty Ltd*:[67]

> "[10] His Honour considered the appropriate discretionary response where a successful defendant has offered to compromise on terms which gave a plaintiff something and the offer was rejected and summarised the authorities:
>
> > 'There are slightly conflicting views: on the one hand there is said to be a 'presumption' that the defendant should have its costs on the indemnity basis and the plaintiff must show some good reason why another order should be made. The second view is that the defendant must show that the offer was rejected unreasonably, judged in the circumstances known at the time it was made.'
>
> [11] His Honour rejected the adoption of any hard and fast rule, noting, correctly, with respect, that since the award of costs is discretionary there will be many circumstances to be weighed but the making of an offer 'is a very relevant circumstance' and, if no countervailing circumstances are raised, 'the order for indemnity costs is likely to be made'.
>
> [12] In *Kozak v Matthews & Anor* Helman J accepted a submission that where an applicant had been wholly unsuccessful (assuming that r 361 applied to a *Succession Act* application) and an offer to settle

---

65 [2004] QDC 505.

66 [2008] QCA 398.

67 [2003] QSC 299, [36]-[39].

> had been made by the respondent/executor pursuant to Chapter 9 of the UCPR, such an offer may be treated as a *Calderbank* offer.
>
> [13] In *Astway Pty Ltd v Council of the City of the Gold Coast* Wilson J concluded that where a successful defendant has made an offer to which r 361 does not apply then r 689 – the general rule that costs follow the event unless another order is more appropriate – applies. Whether to depart in that circumstance from the usual order that costs are to be assessed on the standard basis will then fall to be considered consistently with factors identified as enlivening the discretion to award costs on the indemnity basis.
>
> …
>
> [15] Where a *Calderbank* type offer has been made courts are inclined to the award of indemnity costs as an incentive to parties to consider seriously offers to settle which are reasonably made. …
>
> [17] … The failure to accept the offer is an important factor, as Chesterman J observed in *Emmanuel*, in the absence of other countervailing factors will be likely to lead to an order for indemnity costs."

[92] As noted above, I do not believe that it was unreasonable for the plaintiff not to have taken the offer of 12 October 2011. Nonetheless, appropriately advised, the plaintiff must have realised that there was a real risk that he might not succeed in the proceeding. The offer was expressed to be pursuant to the rules, and not expressed to be a *Calderbank* offer. Nonetheless, because it was made pursuant to the rules, it was one which could potentially be brought to the attention of the Court on the question of costs. The fact that it was not expressed as a *Calderbank* offer does not prohibit my taking it into account – see the comments in *Emanuel*[68] and in *Kozak v Matthews & Anor* referred to at [12] of *Sultana Investments Pty Ltd* (above).

[93] I agree with the remarks of Chesterman J (as he then was) in *Emanuel* as to the anomaly in r 361(1): it does not provide for a situation where a defendant has been wholly successful. Further, it seems anomalous that pursuant to r 361(3), an offer made shortly before the first day of trial does not entitle a defendant to indemnity costs if not accepted. Here, the defendants have been wholly successful. They offered the plaintiff a substantial sum on 12 October 2011 which the plaintiff did not accept. The plaintiff made that decision in circumstances where the outcome of the case was likely to turn on factual matters, and factual matters determined in accordance with a jury's view of a large number of lay witnesses which the plaintiff had no opportunity to assess prior to the trial. In short, the plaintiff took a risk in circumstances where the outcome of the trial was subject to unpredictable factors. The trial was set down for three weeks and it was not unforeseeable that it would run longer than that, as it in fact did. Both sides were well-resourced, there was likely to be considerable cost to both parties. The defendants offered to pay the plaintiff's costs on a standard basis. Having regard to all the circumstances I order that:

(a) from commencement of this proceeding until 12 October 2011 the plaintiff is to pay the defendants' costs of and incidental to the proceeding, including reserved costs if any, on a standard basis to be assessed or agreed, and

---

[68] Above, [36] and [37]

(b) from 12 October 2011 the plaintiff is to pay the defendants' costs of and incidental to these proceedings, including reserved costs if any, on an indemnity basis, to be assessed or agreed,

(c) notwithstanding the order at (b) above, the plaintiff is to have its costs of and incidental to the application heard on 25 November 2011 on an indemnity basis, to be assessed or agreed.

[94] The reason for the order at (c) above is that the matters argued on 25 November 2011 ought to have been argued on 21 November 2011. They were not raised on that day. Unless there is something out of the ordinary about the matter, counsel who comes to the Court to receive judgment ought be in a position to fully argue costs questions then and there. The fact that one party has made an offer to another is not something out of the ordinary. Counsel attending to take judgment should, as part of basic preparation, apprise themselves of such matters. This matter was hard fought on both sides; involved inter-State specialist counsel on both sides of the record, and junior counsel and numerous solicitors attending Court every day of the trial. The jury deliberated from 3.00 pm on Thursday afternoon until nearly noon on the next Monday, when they returned their answers to the questions posed for them. There was more than ample time for counsel on both sides to have prepared for the contingencies which might arise when the answers to those questions were returned. I note the undertaking given by senior counsel for the defendants that the defendants themselves will be held harmless in respect of my costs order at (c) above.