

**BOLAND v DILLON (S309/2010)**  
**CUSH v DILLON (S310/2010)**

Court appealed from: New South Wales Court of Appeal  
[2010] NSWCA 165

Date of judgment: 15 July 2010

Date of grant of special leave: 10 December 2010

These matters concern a defamatory statement made by Ms Meryl Dillon to the Chair of the Border Rivers/Gwydir Catchment Management Authority ("the CMA"), Mr James Croft, in April 2005. Ms Dillon told Mr Croft that it was common knowledge within the CMA that fellow board members, Ms Amanda Cush and Mr Leslie Boland ("the Appellants"), were having an affair. Ms Dillon became aware of that rumour approximately two months before she mentioned it to Mr Croft.

The Appellants brought defamation proceedings in the District Court of New South Wales against Ms Dillon under the *Defamation Act* 1974. It was common ground during that litigation that:

- (a) the Appellants had not had an affair; and
- (b) Ms Dillon did not believe that they had had/were having an affair.

Following the "Section 7(A) trial", the jury found that Ms Dillon had defamed the Appellants. On the trial of defences that followed, Judge Elkaim held that the defence of qualified privilege was not available due to her malice. His Honour made that finding without reaching a conclusion on whether the conversation between Ms Dillon and Mr Croft was an occasion of qualified privilege. He then awarded each of the Appellants \$5000. Upon appeal, Ms Dillon submitted that Judge Elkaim had erred in failing to find that the conversation between her and Mr Croft was an occasion of qualified privilege.

On 15 July 2010 the Court of Appeal (Allsop ACJ, Tobias JA & Bergin CJ in Eq) unanimously allowed the appeal and ordered a fresh trial on the defence of qualified privilege at common law. Their Honours found that in the circumstances of this case, the existence of the rumour was sufficiently connected to the privileged occasion so as to attract the defence of qualified privilege at common law. Their Honours held that Judge Elkaim had erred in failing to reach that conclusion.

The Court of Appeal also found that Judge Elkaim had erred in reversing the onus of proof (of whether an occasion of qualified privilege existed) and then conflating that analysis with whether Ms Dillon was motivated by an improper motive. Their Honours also held that the prior spreading of the rumour would not of itself be a basis for denying the existence of the occasion of qualified privilege. It would however be relevant to whether Ms Dillon was motivated by an improper purpose. In reaching that conclusion, the Court of Appeal distinguished between Ms Dillon perpetuating something she did not believe to be true with something that she knew to be false.

The Court of Appeal found that a lack of honest belief cannot of itself amount to malice, but it may when combined with other factors. Their Honours however found that there was no reliable evidence that Ms Dillon had in fact spread the rumour (prior to her meeting with Mr Croft). In such circumstances, the only finding that remained was that Ms Dillon did not believe the rumour to be true. This was not the same as her knowing it to be false. Malice was not therefore made out.

The grounds of appeal (in both matters) are:

- The Court of Appeal failed to have regard to the defamatory imputations found by the jury and erred in holding that the publication of the "rumour" (and not the defamatory imputations) was on an occasion of qualified privilege.
- The Court of Appeal should have found that the statement of the existence of an actual affair, rather than the existence of a rumour of a possible affair, could not have been published on an occasion of qualified privilege.