IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S. 309 of 2010

BETWEEN:

AMANDA CUSH

Appellant

AND

MERYL LURLINE DILLON

Respondent

No. S. 310 of 2010

BETWEEN:

LESLIE FRANCIS BOLAND

Appellant

AND

MERYL LURLINE DILLON

Respondent

APPELLANTS' SUBMISSIONS

Part I: Internet publication

1. The appellants certify that the submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issues raised by the appeal are:

   (a) whether a statement made by a director of a statutory body to its chairman that published the existence of a rumour as a fact and conveyed defamatory imputations, can be published on an occasion of qualified privilege at common law; and

   (b) whether the voluntary nature of the defamatory imputations should have been decisive against the finding in the Court below that the publication occurred on an occasion of qualified privilege.

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Part III: *Judiciary Act*, 1903, Section 78B

3. The appellants certify that no notice needs to be given pursuant to Section 78B of the *Judiciary Act*.

Part IV: Citations of Reasons for Decision below

4. Elkaim SC DCJ.: *Cush v Dillon; Boland v Dillon* [2009] NSWDC 21

5. Court of Appeal: *Dillon v Cush; Dillon v Boland* [2010] NSWCA 165

Part V: Relevant facts

6. In 2005, Mr Les Boland was 61 year old, a farmer and a director of the Border Rivers – Gwydir Catchment Management Authority (the 'CMA'), a statutory authority established under the *Catchment Management Authorities Act*, 2003 (NSW). Its jurisdiction covered the northwest of New South Wales. Ms Amanda Cush was employed by the CMA, as its General Manger, was 36 years of age and single. Mr James Croft was the Chairman of the CMA and the respondent, Ms Meryl Dillon, was also a director. The appellants brought separate proceedings against the respondent claiming damages for defamation that were heard together in the District Court of NSW.

7. The *Defamation Act*, 1974 (NSW) (the '1974 Act') was in force at the time of the events complained of. Section 7A of the 1974 Act divided the functions of judge and jury in a fashion that differed from the procedures of the common law.[1] At the Section 7A trial[2] the jury found that the respondent said to Mr Croft on 8 April, 2005 the following words or words substantially the same: **'It is common knowledge among people in the CMA that Les and Amanda are having an affair'** (the 'defamatory matter'). The conversation between the respondent and Mr Croft occurred in a café at Moree[3] (a town within the CMA area). It was common ground between the parties that Mr Boland and Ms Cush did not have

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[1] *Aktas v Westpac Banking Corporation Limited* [2010] HCA 25 at [9]
[2] this trial occurred on 5 to 8 November, 2007
[3] [2009] NSWDC 21 at [7]; [2010] NSWCA 165, per Bergin CJ in Eq. at [24].

an affair and that Mr Boland was married, although his wife later died in October, 2006 following a long illness[4]. It was also accepted that the respondent did not believe that Mr Boland and Ms Cush were having an affair when she published the defamatory matter.[5] Also, she did not know that it was 'common knowledge' among people in the CMA.[6]

8. The jury found that the defamatory matter conveyed the following defamatory imputations with respect to Mr Boland:

(a) that as a member of the Board of the CMA, he was acting unprofessionally by having an affair with the General Manager of that organisation; and

(b) that he was unfaithful to his wife.

9. The jury found that the defamatory matter conveyed the following defamatory imputations with respect to Ms Cush:

(a) that as the General Manager of the CMA, she was acting unprofessionally by having an affair with a member of the Board of that organisation; and

(b) that she was undermining the marriage of Mr Boland and his wife.

10. The respondent denied publication of the defamatory matter in her initial Defence filed in each of the proceedings and maintained that denial in her oral evidence to the jury[7]. She said that she could recall her 'exact words' to Mr Croft and denied referring to Mr Boland by name or to the nature of the relationship.[8] She also said:

Q. *Did you ever say anything like that* [ie the defamatory matter] *to Mr Croft about Les and Amanda having an affair or a relationship?*

A. *No.*

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[4] Elkaim SC DCJ at [10]
[5] Elkaim SC DCJ at [8]; Bergin CJ in Eq. at [6]
[6] Bergin CJ in Eq. at [58]
[7] T 178.10/20
[8] T 195.11/44

11. An amended Defence filed after the jury's verdict maintained the denial and advanced the defence of qualified privilege at common law. The effect of Section 11 of the 1974 Act, was to preserve the common law defence. The respondent adhered to the evidence she gave before the jury during her further oral evidence before Elkaim SC DCJ, who presided over the further trial of the proceedings to determine defences and assess damages[9] (although she specifically accepted the jury's verdict during that evidence).[10]

12. So when the respondent explained in her evidence the circumstances that gave rise to the alleged duty and interest she relied upon to found her qualified privilege defence, the respondent referred to a need that she then perceived to inform the Chair of the CMA of the existence of *'the rumour and the accusation'* of the affair.[11] Of course, this related to her version of the conversation with Mr Croft, which the jury had rejected.

13. The respondent had heard of the 'rumour' of an affair concerning the appellants from CMA staff (Messrs O'Brien, Mills and Pittman) in late 2004 or early 2005.[12] She did nothing with that information and conceded that she had no duty at that time to convey the existence of the rumour to the Chair. The concession was unsurprising, as the respondent did not believe the rumour was true and had not seen any substantiating evidence.[13] Further, she knew that the rumour lacked the 'weight of credibility' and that the existence of any affair was questionable.[14] Also, she did not honestly believe at the time that it was 'common knowledge' among people in the CMA that 'Les and Amanda' were having an affair.[15]

14. The respondent was aware that Ms Cush was the subject of an investigation by the Department of Infrastructure, Planning and Natural Resources ('DIPNR'). On

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[9] T 180.35; 192; 230.45 to 231.30 and 259.25 – the defences/damages trial occurred on 9 to 13 February, 2009
[10] Bergin CJ in Eq. at [38]
[11] also confirmed in her re-examination at T 270.45. The respondent's version of her conversation with Mr Croft is set out in the judgment Bergin CJ in Eq. at [36].
[12] Elkaim SC DCJ at [27]
[13] T 175.38/9; 231.30/4; 238.34/7; 248.20/2
[14] T 248.41/5
[15] T 244.17

31 March, 2005, the Chair of the CMA circulated an email to all directors seeking 'urgent' support for Ms Cush as General Manager, as she *'may have to respond to an accusation prior to the next meeting.'*[16] The respondent spoke by telephone with Mr Randall Hart, the Regional Director – Barwon of DIPNR in late March, 2005.[17] Mr Hart prepared a contemporaneous memorandum dated 1 April, 2005.[18] The respondent was also aware that DIPNR had appointed an independent investigator to investigate the complaints against Ms Cush and that Ms Cush had received written notice of the complaint and had been requested to respond.[19] The respondent did not join in a show of support for the General Manager, following the Chairman's request.[20] Indeed, the respondent was the only board member not to support the General Manager at this time.

15. The reason advanced by the respondent for conveying the defamatory matter to the Chairman when she did, was that the rumour of the affair was *'not my concerns as such, they were matters of concern that had been raised with me.'*[21] The respondent contended that by reason of her telephone conversation with Mr Hart in late March, she decided that she should inform Mr Croft of the rumour.[22] Importantly, without the alleged affair having been raised by Mr Hart as a matter of concern (on her version of the conversation with him), the respondent had no reason to speak to anyone about the existence of the rumour in April, 2005 and she accepted that she had no duty to do so.[23]

16. Mr Hart denied that he had raised the rumour *'as a matter of concern'* with the respondent.[24] A significant finding of fact by the primary Judge, therefore, was the rejection of the respondent's conversation with Mr Hart as the reason for the respondent publishing the defamatory matter to the Chairman.[25] His Honour was not satisfied that *'Ms Dillon disclosed the rumour to Mr Croft as a result of her*

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[16] Exhibit 5 (White Book (1) 332/335), see also T 222.35/50)
[17] Elkaim SC DCJ at [29] and [30]; See also Bergin CJ in Eq. at [38]
[18] Exhibit H (WB (1) 304/6)
[19] T 214.25/35
[20] T 222.20/25; see also Mr Croft's evidence at T 34.10.
[21] T188.25
[22] Elkaim SC DCJ at [35] and especially at [36] and [37]
[23] T 231.15/30
[24] Elkaim SC DCJ at [37]; Bergin CJ in Eq. at [18]
[25] Elkaim SC DCJ at [37]

conversation with Mr Hart.' That finding was not challenged in the Court of Appeal.

17. The primary Judge did not reach a 'firm conclusion' on whether the respondent published the defamatory matter to Mr Croft on an occasion of qualified privilege[26] because his Honour was satisfied that the appellants had established malice. The other defences advanced by the respondent were rejected.

18. His Honour awarded damages to each appellant of about $5,000 each, primarily because of the limited publication of the defamatory matter to Mr Croft[27] and ordered the respondent to pay their costs in respect of the defamatory matter and on an indemnity basis from 6 December, 2007 (ie, shortly after the conclusion of the Section 7A trial).

19. The Court of Appeal granted the respondent leave to appeal on 31 August, 2009[28] and the appeal was heard on 7 May, 2010. Only the defence of qualified privilege at common law was considered in the appeal.[29] The Court of Appeal (Allsop ACJ at [1], Tobias JA at [5] and Bergin CJ in Eq. at [54]) held that *'the publication of the rumour to Mr Croft was an occasion that attracted the defence of qualified privilege.'* The Court of Appeal also held that the primary Judge fell into error in finding malice[30] and set aside the judgments and the orders made by Elkaim SC DCJ. A new trial was ordered on the defence of qualified privilege at common law.[31] The applicants were ordered to pay the respondent's costs of the appeal.

Part VI: Argument

The defamatory imputations were conveyed, not the existence of the 'rumour'

20. The principles to be applied in determining whether defamatory matter was published on an occasion of qualified privilege are well settled. The complexity

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[26] Elkaim SC SCJ at [72]; Bergin CJ in Eq. at [43]
[27] Elkaim SC DCJ at [87]
[28] Bergin CJ in Eq. at [41]
[29] Bergin CJ in Eq. at [32]
[30] Bergin CJ in Eq. at [67], [75] and [99]
[31] Bergin CJ in Eq. at [110] and [111]

lies in their application. As a general proposition, the common law protects the publication of defamatory matter made on an occasion where one person has a duty or interest to make the publication and the recipient has a corresponding duty or interest to receive it; but the privilege depends upon the absence of malice.[32] In deciding how the principles governing qualified privilege for defamation apply, it is necessary to 'make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication.'[33]

21. The respondent heard of the 'rumour' in late 2004 early 2005 and did nothing with that information. She did not then convey the existence of the 'rumour' to the Chair of the CMA. In the context of Ms Cush being investigated by DIPNR and the Chairman seeking 'urgent' support for the General Manager, the respondent spoke with the Regional Director of DIPNR in late March and then published the defamatory matter to the Chair on 8 April, 2005. So if there was a privileged occasion concerning the subject of the appellants, it existed for the purpose of the respondent conveying to the Chair that she and the Regional Director had recently spoken about the existence of the rumour.

22. A critical circumstance of the case is the respondent's denial of the defamatory matter or *'anything like that'* before the jury, which was rejected. So the jury's verdict was superimposed over and had to be reconciled with the evidence concerning the circumstances of publication, to determine if the defamatory imputations were published on a privileged occasion. The Court of Appeal failed to reconcile this and fell into error by overlooking the defamatory imputations that were conveyed by the respondent publishing the existence of the rumour as a fact.

23. The Court of Appeal found that '*the existence of the rumour that the respondents were having an affair was relevant and sufficiently connected to the privileged occasion as to attract the defence of qualified privilege at common law'* and held

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[32] *Aktas v Westpac Banking Corporation Limited* [2010] HCA 25 at [14]

[33] *Guise v Kouvelis* (1947) 74 CLR 102, per Dixon J at 116; [1947] HCA 13, cited in *Aktas* at [22]

that the primary Judge fell into error in *'failing to find that the publication of the rumour to Mr Croft'* was an occasion of qualified privilege [emphasis added].[34] However, in *Bashford* McHugh J said[35]:

> In determining the question of privilege, the court must consider all the circumstances and ask whether *this* publisher had a duty to publish or an interest in publishing *this* defamatory communication to *this* recipient. It does not ask whether the communication is for the common convenience and welfare of society.

The respondent did not publish the existence of the rumour of an affair to Mr Croft. She was found by the jury to have published the defamatory imputations concerning each of the appellants.

24. Bergin CJ in Eq. expressly defined the defamatory matter in the judgment at [6] as the 'Statement.' Yet in her Honour's consideration of the issue, particularly in the judgment from [49] and following, her Honour consistently refers to the 'rumour' and not to the 'Statement.' At [52] her Honour said:

> *.....The rumour of the affair was intrinsically intertwined with the concerns the appellant raised with Mr Croft .....That a Regional Director of the Department had become aware of the rumour was a new dimension to its existence, elevating it to an importance that imposed a duty on the Appellant to convey its existence to the Chairperson. Equally the Chairperson had a reciprocal interest in receiving the information. To allow the Chairperson to remain ignorant of the rumour when it had been raised by staff.....* [emphasis added]

25. It is clear that the content of the duty and interest, as articulated by her Honour, was the giving/receiving of information concerning the existence of the rumour. There could be no legal or moral or social duty or interest in the respondent publishing the fact that the appellants were having an affair and that it was 'common knowledge' when (as the respondent well knew), there was only a rumour. This submission is fortified by the fact that the respondent did not believe the rumour was true and did not believe that it was 'common knowledge' at the time of publication. Equally, there could be no reciprocal interest in the Chair of the CMA receiving the rumour as a fact. The publication was hardly warranted by

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[34] Bergin CJ in Eq. at [53] and [54]
[35] *Bashford v Information Australia* (2004) 218 CLR 366 at [73], cited in *Aktas*, per Heydon J at [72]

'any reasonable occasion or exigency and honestly made' and the 'common convenience and welfare of society'[36] is not progressed by any reciprocal duty or interest to publish the rumour as fact.

26. It follows, that the Court of Appeal should have found that the defamatory imputations were not published on an occasion of qualified privilege and dismissed the appeal.

27. Curiously, Bergin CJ in Eq. did refer[37] to the respondent conveying information to Mr Croft *'as a fact - ..... - rather than as a rumour or an allegation'* and said[38]: *'to say that a particular matter is widely known, is well known or is common knowledge, is to convey that the matter is true, not that it is a rumour or something that people are talking about.'* In this respect, her Honour was correct. Her Honour went on to contrast a 'rumour' with the defamatory matter by describing the latter as a *'statement that the members of the CMA knew that the respondents were having an affair.'* Whilst this discussion overlooked the critical defamatory imputations, it should have led to the defence of qualified privilege being rejected, because there could be no occasion to publish unsubstantiated gossip under the cloak of qualified privilege.

28. Ultimately, however, having found the respondent *'used expressions in excess of the communications she had received'*[39] in publishing the defamatory matter, her Honour then recorded[40] the appellants' submission about the publication being foreign to the occasion and therefore not covered by the privilege, but then did not deal with it. In *Clark v Molyneux*[41] where the defendant had used expressions in excess of the communications he had received, the holding of qualified privilege was founded upon a consultation for advice and therefore should have been distinguished as inapplicable to this case.

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[36] *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193; [1834] Eng R 363; 149 ER 1044 at 1049 - 1050
[37] at [55]
[38] at [56]
[39] at [57]
[40] at [61]
[41] (1877) 3 QBD 237, referred to by Bergin CJ in Eq at [57]

29. If the reciprocal duty and interest creating the privileged occasion was the giving/receiving of information concerning the existence of the rumour, then it is plain that the publication of the rumour as a fact was extraneous to the occasion. The defamatory imputations fell outside the 'umbrella of the applicable privilege.'[42] Alternatively, they were irrelevant to the occasion – and caused unacceptable harm to the reputation and honour of each of the appellants.[43] The Court of Appeal should have rejected the defence of qualified privilege for these reasons as well.

30. Also, the rejection of the respondent's evidence to explain why she published the defamatory matter to Mr Croft at the time she did, is a significant circumstance of the publication, which strongly indicates against the occasion being a privileged one. In the result, the timing of the publication and the false imprimatur of the Regional Director of DIPNR that the Respondent tried to attach to the defamatory matter[44] was removed by the finding of the primary Judge, as well as the objective reason for the 'duty' which the respondent said she actually felt. What follows about the nature of the communication to the Chair, was that the defamatory matter was entirely voluntary.

Voluntary nature of the defamatory matter

31. Although in the disposition of the appeal, the Court of Appeal did not expressly consider the question of *'the voluntary character or not of a communication in the ascertainment of whether an occasion is privileged or not,'*[45] the appellants made the following submission to the Court of Appeal:[46]

> 'As the defamatory statement was volunteered and not the subject of any pressing need to protect any interest of the Appellant or the CMA, the reputation of each of the Respondents ought be preferred over the freedom to publish volunteered but defamatory statements that may or may not be true. In most cases, where a defamatory statement is published that neither protects the publisher's interests nor answers a request for information,

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[42] *Bashford*, per Gummow J at [135]
[43] *Bashford*, per Kirby J at [194]
[44] See the reference to the 'rumour cases' in *Mirror Newspapers Limited v Harrison* (1982) 149 CLR 293, per Mason J at 300
[45] as noted by Allsop ACJ at [2]
[46] appellants' written submissions to the Court of Appeal dated 7 December, 2009 at [22] – citations omitted

qualified privilege cannot be called in aid: Bashford; Lindholt v Hyer; Bennette v. Cohen.'

32. In *Bennette*[47], Ipp JA provided a summary of the principles to be applied by the Court when scrutinising the circumstances of publication. One of the principles referred to, was the relevance of the fact that defamatory matter was volunteered by a defendant. His Honour said:[48] 'Ordinarily, a volunteered statement is privileged only where there is a pressing need to protect the interests of the defendant or a third party, or where the defendant has a duty to make the statement.'

33. In *Bashford* McHugh J said:[49]

> 'Different considerations apply when the defendant volunteers defamatory information. Ordinarily the occasion for making a volunteered statement will be privileged only where there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient. The common law has generally perceived no advantage to society in giving qualified privilege to volunteered statements in the absence of a pre-existing reciprocity of interest between the defendant and the recipient. It has taken the view that the reputation of the defamed should be preferred over the freedom to publish volunteered but defamatory statements that may or may not be true. In most cases, a defendant who publishes a defamatory statement that neither protects his or her interests nor answers a request for information will have to rely on some other defence .....'

34. *Gatley* refers to this passage[50] and says that 'it does not appear that the majority would have disputed the proposition.' His Honour then discussed the distinction with cases where the defendant is responding to a request and continued:[51]

> 'But where neither life is in immediate danger nor harm to the person or injury to property imminent, the fact that the defendant has volunteered defamatory matter is likely to be decisive against a finding of qualified privilege.'

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[47] [2009] NSWCA 60
[48] at [25]; Campbell JA agreed at [206].
[49] at [73]
[50] *Gatley on Libel and Slander* Eleventh Edition at [14.31]
[51] at [77]

35. In *Coxhead v Richards*[52] Coltman J said[53] that the 'duty of not slandering your neighbour on insufficient grounds is so clear, that a violation of that duty ought not be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity.'

36. Although McHugh J dissented in the result of *Bashford* that dissent did not turn on a different view of the principle that the volunteered nature of the defamatory matter is a relevant factor and may be decisive against a finding of qualified privilege. This statement of principle, has been cited with approval by the NSW Court of Appeal on a number of occasions[54] often with the notation that his Honour dissented 'on the facts'[55] or 'as to the outcome.'[56]

37. *Gatley* puts the point this way:

> 'While one cannot rule out the possibility that a statement volunteered to a stranger about the claimant's credit could be privileged, such a case would, it is thought, be rare.[57]
>
> The real test is whether, having regard to all other circumstances of the particular case, it was the moral or social duty of the defendant to volunteer the communication.
>
> > "It may be that the interest of the person receiving the communication is of such a character as by its very nature to create a social duty in another under the circumstances to make the communication that he does in fact make."[58]
>
> What must be emphasised is that it is not enough that the communication was made with the honest purpose of protecting the interests of the recipient: the interest must be such that in the eyes of the law it creates a moral duty in the defendant to protect it. The cause of the privileged occasion is not merely the interest of the recipient; it is that interest *plus* the corresponding moral or

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[52] (1846) 2 CB 569 at 596 [135 ER 1069 at 1080], cited in *Bashford* by McHugh J at [75]
[53] in reference to *Patterson v Jones* (1828) 8 B & C 578 [108 ER 1157]
[54] *Goyan v Motyka* [2008] NSWCA 28 at [86], per Tobias JA (with whom Giles JA and Handley AJA generally agreed); *Lindholt v Hyer* [2008] NSWCA 264 at [92], per McColl JA (the issue of voluntariness was not expressly referred to by either Giles JA or Basten JA); *Bennette* per Ipp JA at [21] (Campbell JA agreeing with the reasons of Ipp JA as to qualified privilege at [206]) and per Tobias JA at [145]
[55] *Goyan* at [86]
[56] *Bennette* at [8]

[57] citing *Storey v Challands* (1837) 8 C. & P. 234
[58] *Watt v Longsdon* [1930] 1 KB 130 CA at 152, per Greer LJ.

social duty which arises in the circumstances of the case by reason of the nature of the interest.'

38. When the respondent published the defamatory matter to the Chair of the CMA, there was no pressing need to make the publication to protect the interests of the respondent or the CMA. There was no imminent danger or harm to anyone or anything. The defamatory matter did not answer a request for information. It could not have been warranted by the content of the respondent's prior conversation with Mr Hart, as recorded in his memorandum. The publication of the defamatory matter was entirely voluntary and this factor should have been decisive against the finding of qualified privilege in this case.

Part VII: Applicable statutory provisions

39. It is noted that the defence of qualified privilege at common law was preserved by Section 11 of the 1974 Act and is preserved by Section 24 *Defamation Act*, 2005 (NSW) and by statute in every state and territory of Australia.[59]

Part VIII: Orders sought

40. The appellants seek the following orders in each appeal:

(i) Appeal allowed.

(ii) Orders of the Court of Appeal made on 15 July, 2010 be set aside.

(iii) The Respondent pay the Appellant's costs of the appeal to the Court of Appeal.

(iv) The Respondent pay the Appellant's costs in this Court.

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[59] Section 24 *Defamation Act*, 2005 (QLD), (VIC)), (WA) and (TAS); Section 22 (SA); Section 40 *Defamation Act*, 2001 (ACT) and Section 21 *Defamation Act*, 2006 (NT)

Dated: 1 February, 2011

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