IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S318 of 2011

BETWEEN: **HARBOUR RADIO PTY LIMITED**
Appellant

AND: **KEYSAR TRAD**
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

Filed on behalf of the Respondent by
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Part I: Internet Publication

1. These submissions are suitable for internet publication.

Part II: Statement of Issues

2. First, the elements of the defence of response to attack.

3. Secondly, the application of those principles to the facts.

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4. Thirdly, whether the appellant ("2GB") published the broadcast maliciously.

5. Fourthly, whether the trial judge erred in determining the truth defences by reference to general community standards and the views of right thinking members of the community.

Part III: Section 78B Notice

6. No s.78B notice is required.

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Part IV: Material Facts

7. 2GB's summary of facts needs to be supplemented.

8. First, the speech by Trad (if taken with the interjections made by the crowd) is *capable* of conveying the following imputations in relation to 2GB:
   (i) it is the mouthpiece of the Howard government;
   (ii) it is winning the ratings by whipping up fear and hatred;
   (iii) it engages in racist actions;
30 (iv) it should be prosecuted for sedition.

9. The imputations made by Trad are significant because any argument by 2GB that its broadcast is a response to Trad's attack must focus on the attacks which were made upon it by Trad.

10. Secondly, in the broadcast Morrison repeatedly states that Trad aroused hatred against 2GB's reporter (Chris Glasscock) at the rally thus causing him to have concerns about his personal safety.

11. Thirdly, although much of the broadcast was devoted to this allegation (imputation (a)) and a defence of truth was pleaded, 2GB ultimately did not press its defence of truth, no doubt (as the trial judge remarked at [98]) because the imputation could not be proved to be true.

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12. Fourthly, a fair appraisal of the 2GB broadcast reveals that only one small portion of the broadcast could *arguably* be said to be a direct response to any of the allegations made by Trad (see [8] above). That passage is as follows:

> "And it goes on, there is about ten minutes of this bile about how evil and hate-filled this radio station is and about how we incite people to commit acts of violence and racist attitudes. I don't think that I've ever quite done that, like he did. In fact, I don't think anyone here has ever done anything quite like that."

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13. Fifthly, a large segment of the 2GB broadcast is a "call in segment" where a number of callers speak with Morrison and make various allegations against Trad. Whatever view one takes of the broadcast, it is difficult to characterise this segment as a response by 2GB to an attack on 2GB by Trad.

14. Sixthly, the imputations found by a jury to be conveyed and defamatory of Trad at a s.7A trial were as follows:

(a) the plaintiff stirred up hatred against the 2GB reporter which caused him to have concerns about his own personal safety;

30 (b) the plaintiff incites people to commit acts of violence;

(c) the plaintiff incites people to have racist attitudes;

(d) the plaintiff is a dangerous individual;

(g) the plaintiff is a disgraceful individual;

(h) the plaintiff is widely perceived as a pest;

(j) the plaintiff deliberately gives out misinformation about the Islamic community;

(k) the plaintiff attacks those people who once gave him a privileged position.

15. It will be observed that it is difficult to characterise any of these imputations as a response by 2GB to any of the imputations made by Trad against 2GB: see [8] above. For example, there is no imputation that facts alleged by Trad against 2GB were false to Trad's knowledge.

Part V: Applicable statutory provisions

16. Trad agrees with 2GB's statement of applicable statutory provisions subject to the addition of ss.15 and 16 of the *Defamation Act 1974* (NSW).

Part VI: Respondent's argument on appellant's appeal

17. 2GB's appeal relates to qualified privilege and the truth defences. It is convenient to consider the issues under the following headings.

Qualified privilege: introduction

18. The trial judge upheld 2GB's defence of response to attack at [141]:

> "In these circumstances I am completely satisfied that the defendant, through the broadcast by Mr Morrison, was replying to the plaintiff's attack. For this reason, but for the possibility of malice, the defendant was entitled to respond as it did. The attack was expressed in strident terms and justified a vigorous response. The response was, in my opinion, proportionate to the attack."

19. The Court of Appeal rejected the defence in relation to imputations (c), (h) and (k) but accepted it in relation to imputations (a), (b), (d), (g) and (j). The Court of Appeal's reasoning appears at [111]-[113]:

> [111] "However, in our opinion, the better view is that for which [Trad] contends. It is supported by *Gatley*, which notes (at par 14.48) that "[m]ere retaliation, which cannot be described as an answer or explanation, is not protected". As *Gatley* (at par 14.64) records "[t]he privilege extends only so far as to enable [the defendant] to repel the charge brought against him – not to bring fresh accusations against his adversary". In short, in our view, the question is whether the matter complained of is relevant to the occasion of qualified privilege: see

Fraser v Holmes [2009] NSWCA 36 (at [35]ff) per Tobias JA (McColl JA and Basten JJA agreeing).

> [112] Imputations (a), (b), (d) and (g) were based upon a misapprehension of the facts, but that is not fatal to the defence. They constituted a legitimate response to the public attack on the radio station. As indicated above, imputation (c) was, in our view, not a legitimate response and was not accordingly an answer or an explanation. Taken in context, imputation (g), describing [Trad] as a disgraceful individual, could be seen as little more than vulgar abuse, but to the extent it was defamatory it was sufficiently linked to the public attack on the respondent to be part of a legitimate response. Describing [Trad] as a pest (imputation (h)) was also vulgar abuse, and not, in our view, a relevant response. Imputation (j) concerning misinformation, ranges more widely, but, we would accept was within the latitude of response allowed to a party attacked, which seeks to undermine the credibility of its attacker. Imputation (k) was not a bona fide answer or retort by way of vindication fairly warranted by the occasion.
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> [113] The approach of the primary judge was to treat the whole of the response as an occasion of qualified privilege. However, such a broad brush approach is not justifiable. In our view, the defence should not have been upheld in relation to imputations (c), (h) and (k)."

20. 2GB appeals in relation to imputations (c), (h) and (k). Trad has a notice of contention in relation to these three imputations and also seeks leave to cross-appeal in relation to imputations (a), (b), (d), (g) and (j): see [49]-[53] below.

Response to 2GB's arguments on defence of response to attack

21. In its written submissions ("AWS") 2GB puts forward four arguments as to why the CA erred in relation to its defence of response to attack.[1]

22. First, at AWS [47]-[48] 2GB refers to the references by the Court of Appeal at [112] to the expressions "legitimate response", "bona fide answer" and "fairly warranted by the occasion" and submits that to consider these matters as elements of the defence (rather than on the issue of malice) was "wrong as a matter of law" and reversed the onus of proof.

23. Trad submits that High Court and other case law shows that these are matters which must be proved by a defendant in order to establish the defence of response to attack.

[1] Specifically "the right of the [media] proprietor to answer by the hand of [its agent] attacks made upon [its radio station], in other words to defend its business interests": *Penton v Calwell* (1945) 70 CLR 219, at 231 per Dixon J *mutatis mutandis*.

24. In *Norton v Hoare [No 1]* (1913) 17 CLR 310 (also a case involving an attack by a plaintiff on the media business of a media proprietor) Isaacs J (with whom Gavan Duffy, Rich and Powers JJ agreed) said at 322 that "the ordinary right of self-defence" covered communications "fairly warranted by any reasonable occasion or exigency ... and ... honestly made" and (importantly) added that "these facts must ... appear in the plea". In Isaacs J's view, this "rule is substantially based on the same fundamental considerations as that with regard to privileged communications formulated in *Toogood v Spyring*"[2] (a decision which has often been applied in this Court: see for example *Norton v Hoare [No 1]* at 322; *Howe v Lees* (1910) 11 CLR 361, at 368; *Bashford v Information Australia* (2004) 218 CLR 366 at [10], [54], [137], [231]; *Mowlds v Ferguson* (1940) 64 CLR 206, at 219-220).

25. At 318 Barton ACJ referred to "the protection which the law allows to the honest repulse by defamatory matter, believed to be true, of a public attack on a defendant's character" which is "not strictly within the principle laid down as to qualified privilege by Erle CJ in the passage so often cited from *Whiteley v Adams*".[3] Barton ACJ added that the defence "stands on the same ground as the reasonably necessary return of physical blows in self-defence against aggression, and the degree of protection given is limited in a closely analogous way". He continued:

> "In this view the matter rests upon as sound a ground as the right of a defendant to repel by counter-publication a libellous attack upon his own character. In such cases there is no question of community of interest, or of corresponding interest, as in other cases of privilege. A defendant is allowed to defend himself in the same field in which the plaintiff has assailed him – if the attack is through the press then again the press may be used in answer ... But in such cases the defendant must see to it that his retort, if rigorous, is fair; that is, that it does not go beyond the occasion."

26. Similarly in *Macintosh v Dun* [1908] AC 390, at 400, (1908) 6 CLR 303 (PC), at 306 reference was made to the "protection which the law throws around communications made in *legitimate* self-defence" (emphasis added). That statement of principle has often been applied in this Court: see, for example, *Norton v Hoare [No 1]* (1913) 17 CLR 310, at 320 per Isaacs, Gavan Duffy and Rich JJ; *Howe v Lees* (1910) 11 CLR

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[2] *Toogood* (1834) 1 CM&R 181 [149 ER 1044] is a classic case on duty/interest privilege.
[3] *Whitely v Adams* (1863) 15 CB (NS) 392 [143 ER 838] is another classic case on duty/interest privilege.

361, at 374, 387, 398; *Bashford v Information Australia* (2004) 218 CLR 366 at [80], [146]; *Telegraph v Bedford* (1934) 50 CLR 632, at 656.

27. Likewise in *Penton v Calwell* (1945) 70 CLR 219, at 233 Dixon J said:

> "The privilege is given to [the defendant] so that he may with impunity bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion."

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28. This approach has been adopted in many other cases: *Cock v Hughes* [2002] WASC 263 at [31] per McClure J ("published bona fide and ... fairly relevant to the accusations made" and [35] not "beyond what was germane and reasonably appropriate to the occasion"); *Harding v Essey* [2005] WASCA 30 at [10] ("must be proportionate to the attack" and "must be in good faith, publishing what is fairly an answer to the attack"); *Heytesbury Holdings v City of Subiaco* (1998) 19 WAR 440, at 461 per Steytler J ("what the defendant published [must be] germane and appropriate to the occasion in the sense that it was a relevant response"); *Kennett v Farmer* [1988] VR 991, at 1003 per Nathan J ("only to the extent which is commensurate with the
20 nature of the attack made"); *Blackwell v News Group* [2007] EWHC 3098 per Eady J (response must not be "disproportionate"); *Hamilton v Clifford* [2004] EWHC 1542 at [66] per Eady J ("a proportionate response which was appropriate both in terms of subject matter and scale of publication"); *Campbell v Safrah* [2006] EWHC 819 at [23] per Eady J (must respond on an appropriate scale and go no further than necessary for a legitimate defence); *Botiuk v Toronto Free Press* (1995) 126 DLR (4^{th}) 609, at 628 (Sup Ct Can) (response must be "germane and reasonably appropriate to the occasion").

29. Thus the use of the expressions "legitimate response", "bona fide answer" and "fairly
30 warranted by the occasion" as elements of the defence is well supported by authority in this court and elsewhere. In any event, at [111] the CA stated that all of these issues relate to "relevance" (citing *Fraser v Holmes*) which 2GB concedes is an element of the defence: AWS at [51].

30. Secondly, at AWS [46] 2GB submits that at [111] the Court of Appeal "rejected the proposition that a defendant is entitled to respond by way of counter-attack" and that the Court of Appeal erred in adopting the following propositions from *Gatley*:

(i) "[m]ere retaliation, which cannot be described as an answer or explanation, is not protected";

(ii) "[t]he privilege extends only so far as to enable [the defendant] to repel the charge brought against him – not to bring fresh accusations against his adversary".

31. However, the CA did not state at [111] or elsewhere that 2GB was not entitled to counter-attack. The CA merely said that the right of counter-attack was limited by the two propositions in *Gatley*. And the two propositions from *Gatley* accord with well established limits on the extent of permissible response. As noted at [22]-[29] above, the defendant's publication must be responsive (i.e. "deal with [the] attack": *Penton* at 232), legitimate, fairly warranted by the occasion and "show a connection between the [defendant's publication] and earlier attacks by the plaintiff" (*Penton*, at 232). And it cannot constitute a separate attack by way of retaliation which is unconnected with the original attack and unrelated to the credibility of the plaintiff in making that attack.

32. Thus, in *Norton v Hoare [No 1]* at 326 Isaacs J (with whom Gavan Duffy, Rich and Powers JJ agreed) said:

> "*Nothing unreasonable must be done; no unnecessary step ... must be undertaken; retaliation is not permitted*; but the warding off, by exposing the detractor, of injury, not measurable and not capable of definite ascertainment if it should actually happen, may, according to the circumstances in which, and the motive with which, it is done, be most reasonable." (emphasis added)

33. In *Penton v Calwell* (1945) 70 CLR 219, at 233 Dixon J observed that the defendant's right of "answer, whether it be strictly defensive or be by way of counter-attack ... is given to him so that he may with impunity bring to the minds of those before whom the attack was made *any bona fide answer or retort by way of vindication which appears fairly warranted by the occasion*". Dixon J added at 234 that "to impugn the

truth of the charges contained in the attack and even the general veracity of the attacker *may* be a proper exercise of the privilege, *if it be commensurate with the occasion* ... and it is done bona fide for the purpose of vindication" (emphasis added).

34. These statements of principle are entirely consistent with the two propositions quoted from *Gatley*: retaliation is not permitted; the defendant's publication must be reasonable and a bona fide answer to the plaintiff's charge which is fairly warranted by the occasion; and although in appropriate circumstances an attack on the general veracity of the attacker *may* be permissible, it must be commensurate with the occasion and not go beyond what is necessary and reasonable.

35. Similar statements appear in other cases: *Heytesbury Holdings v City of Subiaco* (1998) 19 WAR 440, at 461 per Steytler J ("mere retaliation, not comprising an answer or explanation does not attract the privilege"); *Turner v MGM* [1950] 1 All ER 449, at 470 per Lord Oaksey (defendant "loses the protection of the law if he goes beyond defence and proceeds to offence"); *Hamilton v Clifford* [2004] EWHC 1542 at [66] per Eady J (defendant should not "cross over into an attack on the integrity of the claimant if it is not reasonably necessary for defending his own reputation"); *Campbell v Safrah* [2006] EWHC 819 at [23] per Eady J (defendant must respond on an appropriate scale and go no further than is necessary for legitimate defence); *O'Malley v O'Callaghan* (1992) 1 Alta LR (3d) 88, at [43] per Mason J ("answer must be proportionate to the initial attack" and "where self-defence becomes offence, the privilege will be lost"); *Nixon v O'Callaghan* [1927] 1 DLR 1152, at 1161 (defendant may "answer the charge; and if he does so in good faith and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not without malice, it is privileged"); *Wilson v Deane* (1910) 3 Alta LR 186, at 196 per Beck J (privilege applies "if the person attacked confines himself to vindicating honestly and without malice his conduct or character though incidentally he may reflect upon that of his assailant"); *News Media v Finlay* [1970] NZLR 1089, at 1095, 1103-1104 (CA) ("privilege is lost if the reply becomes a counter attack raising allegations against the plaintiff which are unrelated or insufficiently related to the attack ... made on the defendant"; defendant "cannot claim the protection of the privilege if he decides to bring fresh accusations against his adversary"; defence rejected where the defendant "went far beyond repelling the charges which he had

brought ... and made fresh accusations against [the plaintiff] of a highly defamatory character" and where the defendant "elected to embark upon counter-charges against the character of the plaintiff which clearly exceeded the permissible limits of being mere retorts in reply to an initial attack"); *Gray v Scottish Society for the Prevention of Cruelty to Animals* (1890) 17 R 1185, at 1198 per Lord Shand ("privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks" or "where such retort is a necessary part of [the] defence, or fairly arises out of the charges ... made").

10 36. In *Foretich v Capital Cities* 37F(3d) 1541, at 1560-1561 (1994) Murnaghan J summarised the American law as follows (omitting citations):

> "A supposed "reply" is not truly a reply if it is "patently unrelated to the subject matter" of the antecedent attack. One may not "publish any and all kinds of charges against the offender, upon the theory that they tend to degrade him, and thereby discredit his [accusations]". To be responsive, a reply's contents must clearly relate to its supposed objective – blunting the initial attack and restoring one's good name. Statements that simply deny the accusations, or directly respond to
> 20 them, or express one's impressions upon first hearing them are certainly responsive. So, too, are statements impugning the motives of the accuser: "One in self-defence is not confined to parrying the thrust of his assailant." If however, one's reply exceeds the scope of the original attack, and says more than reasonably appears to be necessary to protect his reputation, it is not reasonably responsive."

37. In short, the observations by the Court of Appeal at [111] and principles adopted from *Gatley* are consistent with High Court and other case law. Nor do 2GB's submissions demonstrate that CA [111] is contrary to authority. 2GB's difficulty is that the
30 charges it has made against Trad are not in any way responsive to the attack made by Trad on 2GB. They are nothing more than fresh accusations made out of retaliation which in no way answer Trad's charges or undermine Trad's credibility in making those charges (see [8] above).[4]

38. Thirdly, at AWS [49]-[51] (with [26]) 2GB submits that once a portion of a defendant's publication is a "response to attack" the only remaining issue (other than malice if pleaded) is the "relevance issue", namely, whether "any particular defamatory portion of the defendant's publication [is] so unconnected with the

[4] It is noteworthy that Trad does not purport to be a witness to the events which are the subject of his charges against 2GB.

occasion of privilege as to fall outside the protection of the privilege". 2GB adds that on the issue of the existence of the privilege "no question of the defendant's bona fides, or of the "legitimacy" or "proportionality" of the response, is involved".

39. Trad responds to this submission in four ways. First, this submission is inconsistent with the case law referred to at [23]-[36] above, which makes it clear that "legitimacy", "proportionality", bona fides etc are elements of the defence. Secondly, (as the Court of Appeal held at [111]) a response will not be a "relevant" response if it is unresponsive, disproportionate and retaliatory. Thirdly, 2GB cites no authority in support of this submission. Fourthly, even if relevance is the correct test, the response by 2GB was not relevant: see [40]-[45] and [52] below.

40. Fourthly, 2GB submits at AWS [51] that applying only a test of relevance, imputations (c), (h) and (k) were all "clearly relevant and fell within the protection of the privilege".

41. As to imputation (c) (the plaintiff incites people to have racist attitudes), 2GB submits that this was relevant because it was "a relevant counter-attack directed to [Trad's] credibility" and because it showed that "he was a hypocrite". It is certainly not directly responsive for a person charged with racism to say that his attacker is also a racist. And that the plaintiff is (or may be) guilty of a charge which is similar to one made by him will not usually reflect on his general credibility in making the charge. Thus, in *Bennett v Stupich* (1981) 30 BCLR 57 the plaintiff was criticised for excessive drinking by the defendant, but the court held that it was not legitimate self-defence for the defendant to suggest that the plaintiff was also given to excessive consumption of alcohol: the "defamatory words of the defendant answer nothing, they only attack" (at [19]). Similarly, in *Milne v Walker* (1898) 21 R 155, at 157 Lord Kincairney made the following observations:

> "If, for example, A should charge B with theft, a denial by B of the charge would not warrant an action for damages by A however vigorous or gross the language might be in which B's denial was couched. But if B should go on to charge A with theft, that would be actionable, and would not be protected or privileged to any extent on account of A's previous attack."

42. It would only be in unusual or special circumstances, eg if "B [was] charging A with the theft with which A charged B" (*Gatley on Libel and Slander*, 11th edition, page 503, footnote 422) that the counter-charge of theft would be relevant. Absent such circumstances, a *tu quoque* retort is not legitimate self-defence.

43. As to imputation (h) (the plaintiff is widely perceived as a pest), 2GB submits that this was a "counter-attack directed to the credibility of [Trad's] attack on the radio station". 2GB then submits that being a pest somehow meant "that his attacks generally lack substance and that they should not be accepted". However, the charge of being a pest in no way reflects on Trad's credibility in making the charges he made against 2GB. That someone is a pest does not mean that specific charges they level against a radio station are lacking in credibility. And it is certainly not directly responsive to the charges levelled by Trad against 2GB.

44. As to imputation (k) (the plaintiff attacks those people who once gave him a privileged position), 2GB submits that this was "a counter-attack directed to [Trad's] general credibility". However, that Trad is attacking people who once gave him a privileged position is in no way a response to the charges levelled by Trad against 2GB and in no way makes his charges against 2GB less credible.

45. Thus 2GB has not shown that these imputations were relevant, i.e. has failed to "show a connection between the [broadcast] and the earlier attacks by the plaintiff upon [it] ... a connection in the light of which the [broadcast] would be considered an intended exercise of the right of defence to those attacks" (*Penton*, at 232 per Dixon J). In any event, even if these imputations were relevant (on some test), the defence cannot succeed because the other requirements for the defence have not been satisfied: see [22]-[36] above.

2GB's appeal on truth defences

46. 2GB submits that the trial judge determined all of the issues of truth by reference to the "incompatibility of [Trad's] views with the views of right-thinking community members and general community standards": AWS at [58]. Trad agrees. Trad also

accepts 2GB's submission that the "Court of Appeal agreed that the general community standards test ... was the correct test": AWS at [58].

47. Trad does not wish to defend the Court of Appeal's reasoning. Instead, Trad submits, by way of notice of contention, that "the views of right-thinking community members and general community standards" were not relevant to the truth defences and that the trial judge's acceptance of those defences should be set aside. This is dealt with at [63]-[69] below.

10 **Part VII: Notice of contention and cross-appeal**

48. Trad relies upon a number of arguments by way of notice of contention and cross-appeal which are conveniently considered under the following headings.

Qualified privilege

49. At [112] the Court of Appeal upheld the defence of response to attack in relation to imputations (a), (b), (d), (g) and (j). The Court of Appeal reasoning is set out at [19] above.

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50. Trad submits (seeking leave to cross-appeal) that the defence should have been rejected in relation to all of the imputations for the following reasons.

51. Imputations (a), (b) and (d) were said by the Court of Appeal at [112] simply to be "a legitimate response to the public attack on the radio station" without any further reasoning. Imputation (g) was said to be "vulgar abuse ... but to the extent it was defamatory it was sufficiently linked to the public attack on [Trad] to be part of a legitimate response". Imputation (j) was said to be "within the latitude of response allowed to a party attacked, which seeks to undermine the credibility of its attacker".

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52. Trad submits that all of these imputations were non-responsive, fresh accusations in the nature of a retaliation, which were in no way relevant to the charges made by Trad against 2GB. Nor were these charges legitimate or fairly warranted by the occasion. None can be described as a direct (or even indirect) response to the charges levelled

by Trad against 2GB. Nor do any of the imputations make Trad's imputations against 2GB any less credible. It is submitted that the Court of Appeal should have held that no portion of the 2GB broadcast was a legitimate response to the attack made on 2GB by Trad.[5]

53. In addition, for reasons set out at [54]-[62] below, 2GB was guilty of malice.

Malice: notice of contention and cross-appeal

10 54. Trad submits, by way of notice of contention and in seeking leave to cross-appeal, that the whole of the qualified privilege defence should have been rejected on the ground of the malice of 2GB. This submission is by way of notice of contention so far as imputations (c), (h) and (k) are concerned and by way of cross-appeal in relation to imputations (a), (b), (d), (g) and (j).

55. As noted by the trial judge (at [142]-[147]), Trad submitted at trial that there was malice because 2GB pleaded false and misleading particulars of truth, 2GB knew that the words in the broadcast were false, 2GB knew that the words relating to the intimidation of Mr Glasscock were false (or was recklessly indifferent to the truth or
20 falsity of those words), there were no proper enquiries by 2GB before publication and the "dominant purpose of [2GB] in making the broadcast was improper" (see [146]). And at trial Trad also submitted that the broadcast by 2GB was not a response and not a legitimate or proportionate response, fairly warranted by the occasion (although this was not specifically pleaded in the reply).

56. The trial judge at [146] dealt with only one aspect of malice and did so very briefly, stating that:

> "Ultimately there is *no evidence* from which I could conclude that Mr
> 30 Morrison as opposed to Mr Glasscock knew that his remarks on air were false. Even if Mr Morrison knew that this allegation which he broadcast was false, I am not persuaded that the dominant purpose of the defendant in making the broadcast was improper." (emphasis added)

[5] Given the nature of the material published, the broadcast was probably only defensible as comment (*Stephens v West Australian Newspapers* (1994) 182 CLR 211 at 266, 270, 258) but is "essentially bare defamatory comment unaccompanied by explanatory statements of fact" (at 270 per McHugh J): see CA at [91], [93], [98], [102].

57. At [118] the Court of Appeal dealt with the trial judge's remarks at [146] in relation to malice as follows:

> "With respect, both of these sentences are troubling. The reference to "no evidence" must be understood not as meaning there was no material from which he could draw a relevant inference, but rather that such material as there was did not suffice to satisfy him on the balance of probabilities. So far as the second sentence is concerned, if Mr Morrison knew that he was making false statements about the appellant's conduct and character, it is difficult to identify a "proper" motive for such conduct on Mr Morrison's part. However, these remarks do not undermine the finding of fact, namely, that Mr Morrison, believing that what he said was true, had not been shown to have acted with malice."

58. It is respectfully submitted that neither the trial judge nor the Court of Appeal has given due consideration to the malice issues which are conveniently considered under the following heads:

(i) 2GB knew that imputation (a) was false (or was wilfully blind to the truth of this allegation);

(ii) 2GB knew that the particulars of truth (in relation to imputation (a)) were false and misleading;

(iii) the purpose of 2GB in making the broadcast was improper.

59. As to (i): as noted by the trial judge at [98], 2GB did not press its defence of justification in relation to imputation (a) (the plaintiff stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety) because there was "no indication [in the video in evidence] of a concern [by Glasscock] about his personal safety". Although the reliability of the information broadcast was particularised in 2GB's defence, 2GB called no evidence from either Morrison or Glasscock to support the assertion (repeatedly made in the broadcast) that Trad stirred up hatred against Glasscock which caused him to have concerns about his personal safety. The video (exhibit [4]) is evidence that this assertion by 2GB against Trad was not true. In his examination in chief Trad gave clear evidence denying that he stirred up hatred against Glasscock or did anything which could have caused Glasscock to have concerns about his personal safety (TS 88.15 and 89.35). And in accordance with the principles in *Blatch v Archer* (1774) 1 Cowp 63, at 65 [98 ER 969, at 970], which have often been applied in this Court, the evidence adduced by

Trad should be assessed in accordance with his capacity to adduce evidence on the point and the power of 2GB to have contradicted that evidence. Moreover, counsel for 2GB never cross-examined Trad to suggest that this evidence was not correct: see *Precision Plastics v Demir* (1975) 132 CLR 362, at 370-371 per Gibbs J. And it is clear from the broadcast (para 4) that Morrison had possession of a video tape of Trad's speech at the time of the broadcast. In these circumstances, it cannot be suggested that there was no evidence that Morrison knew that his remarks were false: compare trial judge at [146]. Moreover, when one bears in mind the principles in *Jones v Dunkel* (1959) 101 CLR 298, the failure of 2GB to call Morrison and Glasscock enables an inference to be drawn that their evidence would not have assisted 2GB.[6] It is submitted that the trial judge and the Court of Appeal should have found that 2GB knew that imputation (a) was false (or was at least wilfully blind to this fact) and that 2GB was guilty of malice.

60. As to (ii): the statements in the broadcast in relation to Glasscock (imputation (a)) were false as were the particulars of truth which had been filed in relation to imputation (a). If the submission in the previous paragraph is accepted, 2GB must have known that the plea of justification to imputation (a) was false (or at least been wilfully blind to its truth). The conduct of 2GB after publication is thus further evidence of the malice which it had at the time of publication. 2GB did not use the broadcast for the purpose of responding to an attack by Trad, but rather to make irrelevant and baseless allegations against him.

61. As to (iii): the unresponsive, illegitimate, disproportionate, unreasonable and irrelevant attacks on Trad show that the broadcast was not made for the purpose of responding to Trad's attack, but rather to retaliate against him and gratuitously to blacken his name. Although not pleaded in the reply, these were live issues at the trial and the subject of findings by the Court of Appeal: see [111]-[113] (quoted at [19] above). The case law indicates that these matters were relevant to the existence of the privilege: see [21]-[37] above. It is submitted that if this Court holds those cases to be incorrect (and that these issues are only relevant to malice), Trad should be permitted

[6] For example, there is no evidence that Morrison believed that what he said was true or of any enquiry by 2GB of Trad before the broadcast to ascertain whether imputation (a) (or any of the other imputations) was true. No such evidence was led even when "imputations (a), (b), (d) and (g) were based upon a misapprehension of the facts" (CA at [112]).

to rely on these matters on the question of malice in conjunction with the other evidence of malice.

62. Accordingly, it is submitted that there was a clear case of malice which should have been found both by the trial judge and the Court of Appeal. The defence of response to attack should have been rejected on this basis.

Truth defences: notice of contention

63. As 2GB notes in AWS at [58], a "general community standards test" was adopted by the trial judge as the test to be applied in determining whether all of the imputations were true and it was "plain that the trial judge was *at all times* applying the ... general community values test" (emphasis added), a matter which is "simply inescapable from dozens of repeated references to the incompatibility of [Trad's] views with the views of right-thinking community members and general community standards scattered throughout the judgment" (citing the trial judge at [42], [46], [47], [51], [56], [57], [61], [64], [67], [69], [74], [82], [91], [97], [104], [108], [112], [113] and [114]).

64. Trad submits (by way of notice of contention) that the application "at all times" by the trial judge of this "general community standards test" and the ubiquitous references by the trial judge to Trad's views being inconsistent with the views of right-thinking community members were irrelevant to the determination of the truth defences.

65. Under ss.15 and 16 of the *Defamation Act* 1974 (NSW) there were (relevantly) only two issues to be determined in relation to each imputation pleaded by Trad:
    (i) was the imputation a matter of substantial truth?
    (ii) did the imputation relate to a matter of public interest?

66. (Other issues arose in relation to the defence of contextual truth but are not relevant to the submission made in this section).

67. 2GB was obliged to provide particulars of the truth of each imputation and purported to do so in its defence. Accordingly, the only relevant issues for the trial judge were whether the evidence at the trial (adduced in accordance with the particulars) proved

each imputation to be true and whether each imputation related to a matter of public interest.

68. It is well established that the issue of whether imputations are defamatory is determined in accordance with the views of right-thinking members of society: *Readers Digest v Lamb* (1982) 150 CLR 500. That issue had been resolved in Trad's favour at the s.7A trial.

69. However, such issues are not relevant to the truth defences under ss.15 and 16 of the *Defamation Act*.

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