IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S319 of 2011

BETWEEN **TONY PAPACONSTUNTINOS**
Applicant

AND



**PETER HOLMES A COURT**
Respondent

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## APPELLANT'S SUBMISSIONS IN REPLY

### Part I: Internet Publication

1. The appellant certifies that these submissions are in the form suitable for publication on the internet.

### Part II: Statements of Issues

20 2. The respondent's submissions [RS] misconceive the nature of the issues on the appeal. The substantive question of law with respect to the common law defence of qualified privilege concerns a defamatory communication made by a defendant in defence of the defendant's personal interests. The appellant proposes that such communication will only be protected where a reasonable person in the defendant's position would have thought that publication was necessary to defend those interests. This has been identified as the *reasonable necessity test*. Further, in cases of volunteered communications, the defendant must ordinarily show a pressing need for the communication in order to satisfy the reasonable necessity test.

30 3. There is no issue raised by the appeal concerning the proper approach by intermediate appellate Courts to dissenting judgments of this Court. The implicit suggestion that the Court of Appeal in New South Wales in some way wilfully preferred a dissenting judgment in *Bashford v Information Australia (Newsletters) Pty Limited* (2004) 218 CLR 366 only to have realised its error by adopting the correct approach in the present case under appeal is quite erroneous. The joint judgment of Gleeson CJ, Hayne and Heydon JJ read in the context of that of Gummow J in *Bashford* reveals that that case was decided upon the basis that the publisher had a duty to communicate the information containing otherwise defamatory matter: see Gummow J at [145] and Gleeson CJ, Hayne and Heydon JJ at [25].

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4. The use of a dissenting judgment for a statement of principle which is not contrary to the decision of the Court is in no way remarkable: see Gummow J in *Bashford* at [139]

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referring to the dissenting judgment of Dixon J in *Guise v Kouvelis* (1947) 74 CLR 102 at 116. A revisiting of the Court's decision in *Bashford* forms no part of this appeal and the respondent's submission does not make it so. The present matter concerns that class of cases (in which *Bashford* is not included) where the publication by a defendant is in defence of the defendant's interests and is a volunteered communication. The respondent readily accepts this at RS [38] and [39] and specifically refers to the adoption of the statement of principle by Dixon J in his dissenting judgement in *Guise* as one which "commands acceptance" as stated by McColl JA at [82] in the Court of Appeal judgment.

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**Part III: Material Facts**

5. The respondent raises an evidentiary issue concerning the efforts by Mr Ferguson, the recipient of the letter of 17 March 2006 from the respondent (the matter complained of) to contact the respondent about the letter on 17 March 2006 and the respondent's failure to respond on 17 March 2006 and over the following weekend.

6. This matter is relevant to the question as to whether there was a pressing need for the communication to be made, in the absence of which the respondent would not meet the
20 reasonable necessity test.

7. The evidence from Mr Ferguson was led during the appellant's case in chief. It is set out at AB121:8-14. He tried to contact the respondent to discuss the issue raised in the letter and to seek further clarification. He left a number of phone messages marked urgent but received no return call. He heard nothing from the respondent over the ensuing weekend. Mr Ferguson was not challenged on this evidence. When the respondent gave his evidence in chief, he did not refer to nor did he contest the version of events as given by Mr Ferguson. In these circumstances, there was no forensic basis requiring Mr Holmes a Court to be cross-examined on the matter. Further, the
30 Court was entitled to draw any reasonable inference from the failure by the respondent to contest this evidence.

**Part IV: Respondent's Argument**

8. There is no need to separate out the various imputations found to have been conveyed in this matter. The respondent seems to recognise this in RS [20]. The question as to whether or not the publication was on an occasion of qualified privilege arises with respect to the publication itself rather than to any of the imputations. As ground 4 of the notice of appeal states, it is the absence of pressing need in the circumstances of
40 the communication of the defamatory matter itself that is decisive against a successful defence of qualified privilege.

9. The approach taken by the respondent at RS [14] to [18] highlights the necessity for a limitation upon the protection to be given to volunteered statements in pursuit of a defendant's interests. The extracts from the judgments of Allsop P at [9] and McColl JA at [144] set out in RS [16] refer to what might be described as the tactical considerations in the respondent's mind in conveying the suspicion of corruption allegations. As explained by Allsop P, they were the device chosen to bring about the

desired result. The respondent's interest was to win the vote at the meeting. The conveying of the defamatory imputations made it "more likely that the intervention of Mr Ferguson would be brought about in order to stop Mr Papaconstuntinos ringing and contacting people". The making of the corruption allegations was in pursuit of that objective, and served that interest.

10. The justification for that course of action is not established by reference to the respondent's state of mind as explained by McColl JA at [144]. The test is an objective one (whether a reasonable person in the defendant's position would have thought that publication was necessary). Whereas the respondent's state of mind would be relevant to an issue of malice, it is not relevant to whether or not he had an *interest* in making the communication. In the absence of any reasonable occasion or exigency, in this case a pressing need, the appellant submits that no such protection has been successfully invoked.

11. Thus it is not the case as argued at RS [22](a) that if a defendant does not satisfy the requirement of reasonable necessity, then the requisite interest does not exist. The issue of pressing need arises when considering whether the protection provided by the defence should extend to the particular occasion upon which the defamatory matter was published. It does not affect the existence or otherwise of an interest. It does however limit the circumstances in which an otherwise defamatory publication may be made in protection of that interest.

12. Similarly, in dealing with *pressing need* at RS [22](b), in cases of a volunteered communication a defendant will ordinarily fail to establish reasonable necessity unless a pressing need for the volunteered communication can be shown.

**Part V: Appellant's Response re "language of necessity"**

13. In RS [25]-[31] it is claimed that the extracts from the authorities cited by the appellant as to use of the language of necessity have been taken out of context. However, in applying the principle set out by Parke B in *Toogood v Spyring*, it is necessary to quote the full passage and to give the words 'fairly warranted by any occasion or exigency' their full force and effect. For completeness the relevant passage from *Toogood v Spyring* is as follows:

> In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

14. This reinforces the appellant's primary submission that Parke B identified two limitations upon the protection of such communications: they must be *fairly warranted by any occasion or exigency* and they must be *honestly made*. The nature of these limitations is set out in AS [28]-[31]

15. The analysis by Allsop P at [4] and [5] of the Court of Appeal judgment suggests that the requirement of pressing need for voluntary publications as proposed by the appellant is "superadded" as a precondition to establish the defence of qualified privilege. This is to miss the significance of the relationship between pressing need and the reasonable necessity test. Without that limitation, a defendant may too readily invoke *interest* as a justification for a defamatory publication while ignoring the very requirement that such a publication be "fairly warranted by any reasonable occasion or exigency". The concept of pressing need thus limits what is "required" to serve a defendant's (self) interests. A defendant, as here, may point to the *need* to make a defamatory publication in order to silence an opponent on the eve of an important vote. It can hardly be "fairly warranted" to make an allegation of suspected corruption for the purpose of silencing an opponent who is mustering votes to block an attempted takeover of a club, and to justify it by recourse to bare need.

**Part VI: Appellant's Response re authorities**

16. ***Guise v Kouvelis :*** In RS [37] reference is made to the appellant's reliance on an extract from the judgment of Latham CJ in *Guise v Kouvelis*. It is important to note that his Honour at page 111 assumed that the defendant had an interest but that that interest could not be maintained because of the manner in which he sought to protect that interest:

> Protection of such interests did not *require* (emphasis added) any statement about the plaintiff to any other person. The defendant could protect himself against the plaintiff by abstaining from having anything to do with him and there was, from this point of view, no warrant for making any statement to any other person that the plaintiff was dishonest, even if the defendant honestly believed that to be the case.

17. This passage emphasises that the alternative means available to a defendant, other than the publication of the defamatory matter, is relevant in assessing whether the publication in question was warranted.

18. It is clear from this language that there is a requirement of necessity before the protection of such communication is warranted. These considerations are amplified by the appellant at AS [54] and [55].

19. ***Brown v Croome :*** Lord Ellenborough CJ in *Brown v Croome* (1817) 2 Stark 297; 171 ER 652 emphasised the underlying requirement of necessity in order to attract the protection of the common law defence.

> The question is whether the defendant was justified in publishing this advertisement to the world, *when all the communication which was necessary might have been made in a manner less injurious.*

20. The respondent in RS [40] omitted the words in italics when quoting Lord Ellenborough. However, this elision makes the very point for which the appellant contends, namely that *Brown v Croome* stands in a line of authorities which preceded *Toogood v Spyring* and no doubt helped to shape the formulation of the common law

as stated by Parke B, namely the requirement in cases of interest that the circumstances require, compel or necessitate publication.

21. When applied to the circumstances of the present case, a distinction must be drawn between the means employed by the defendant (the publication of the letter and the allegations therein) to achieve his ends and whether circumstances required, compelled or necessitated publication. The Court of Appeal took the view that the ends being legitimate, that is to say the defendant's interest in winning the vote, the means of a defamatory publication to serve that end was fairly warranted. However, this overlooked the essential element of necessity which underpins the protection of a defendant's interests in such circumstances.

22. ***Odgers: re Davies v Snead :*** Although the respondent proposes at RS [11](d) that a key point in the judgment of the Court of Appeal was that there was no sharp demarcation "separating the concepts of duty and interest" it is submitted that the concepts are clearly distinct and almost always readily distinguishable. This confusion carries over to the observations in RS [44] with respect to Odgers' commentary on volunteered statements. The passage itself deals with statements made under a duty and does not refer to statements made in advancement or protection of an interest. This is clear from Odgers' quotation from Blackburn J in *Davies v Snead* (1869 – 1870) LR 5 QB 611:

> ...where a person is so situated that it becomes right in the interests of society that he *should tell* (emphasis added) a third person certain facts, then if he bona fide and without malice does tell them it is a privileged communication. I think that the present case falls under that rule. I cannot help thinking that when a parishioner hears matters injurious to the clergyman, which would injure his authority and influence as a clergyman, if those facts are bona fide told under the belief that they are important for him to know, they come within the category of privileged communications.

23. The passage clearly uses the language of moral obligation. Accordingly, this extract from Odgers on volunteered communications has no relevance to those proceedings.

24. A review of the authorities as undertaken by the appellant clearly establishes the central requirement of necessity, with the concomitant element of pressing need, in order to establish the grounds for protection of a volunteered statement in furtherance of a defendant's own interests.

25. The appellant submits that the appeal should be allowed and the decision of the trial judge affirmed.

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