

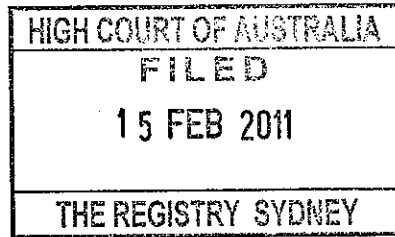
**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No.S309 of 2010

BETWEEN:

AMANDA CUSH
Appellant

AND:



MERYL DILLON
Respondent

No.S310 of 2010

BETWEEN:

LESLEY BOLAND
Appellant

AND:

MERYL DILLON
Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

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Part I: Internet certification

1. These submissions are suitable for publication on the internet.

Part II: Issues on the appeal

2. This appeal concerns the defence of qualified privilege. The Court of Appeal upheld the defence (subject to a retrial on malice). The appellants raise only two arguments in their submissions: see [25] below. Those two arguments raise the following issues.

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3. First, whether there was any substantial discrepancy between the information provided to Ms Dillon concerning an affair between the appellants and the publication made by Ms Dillon to Mr Croft on that same subject.

4. Secondly, if there was a substantial discrepancy, did that discrepancy have the consequence that:

- (i) Ms Dillon had no legal, moral or social duty to make the publication to Mr Croft or that Mr Croft had no interest in receiving it?

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- (ii) the statements Ms Dillon made to Mr Croft were irrelevant to the occasion of qualified privilege?

5. Thirdly, whether the observations made by McHugh J in *Bashford v Information Australia* (2004) 218 CLR 366 at [73] and [77] are relevant to the disposition of this appeal, given that McHugh J stated that his observations did not apply in various situations which are relevant in the present case.

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6. Fourthly, whether the observations by McHugh J in *Bashford* at [73] and [77] are applicable in the present case, whether they are correct in principle and whether they articulate propositions of law or generalised statements in relation to certain factual situations.

Part III: Section 78B Notice

7. The respondent certifies that there is no need for a s.78B notice.

Part IV: Material facts

8. The facts set out in Part V of the appellants' submissions ("AS") are not complete. Accordingly, it has been necessary for the respondent to set out the relevant facts in more detail than would normally be expected of a respondent. The references to "WB" in these submissions are to the White Book in the NSWCA.

9. *Relevant personnel and positions held.* The respondent Ms Dillon was appointed to the board of the Border Rivers-Gwydir Catchment Management Authority (CMA) as a member of the board in May 2004 (CA at [7], WB 547). The first plaintiff, Mr Les Boland, was appointed to the CMA board in August 2004 (CA [7]). Ms Amanda Cush (the second plaintiff) was appointed as general manager of the CMA in mid-2004: WB 487. Mr Croft (the recipient of the relevant publication) was appointed as the inaugural chairman of the board of the CMA in February 2004 (WB 96) and continued to hold that post at the date of the publication. Mr Randall Hart was the Regional Director of the Department of Infrastructure, Planning and Natural Resources ("the Department"). References to other personnel who are of less significance will be made as required below.

10. *CMA and relevant statutory background.* The CMA is a statutory authority established under the *Catchment Management Authorities Act 2003* (NSW): CA at [7]. The CMA was established to invest public moneys in natural resource management in two of the Border Rivers-Gwydir catchments (WB 97). The CMA is a corporation which administers over \$30 million of taxpayer funds over any 4 year period (WB 450). The members of the CMA board are appointed by the relevant minister (CA [7]). The staff of the CMA are employed under the *Public Sector Employment and Management Act 2002* (NSW) as public servants: WB 451, 522, 597, 675. The staff of the CMA were appointed by the general manager (WB 452) and there were approximately 30 CMA staff in April 2005 (WB 637). Mr Croft as chairman was paid \$50,000 per annum (WB 129) and had the power to recommend the appointment or non-appointment of board members to the relevant minister (WB 127). The Department had, at all relevant times, the human resources responsibility and the financial transaction responsibility for the CMA (CA [8]).

11. *CMA Corporate Governance Manual*. The CMA Corporate Governance Manual, Constitution and Code of Ethics and Conduct contain a number of relevant entries:

- (i) The CMA board is responsible and accountable for the selection and evaluation of the general manager: WB 337.9.
- (ii) The CMA comprises a board, a general manager and other staff reporting to the general manager: WB 338.1.
- (iii) The chairperson ensures that the board fulfils its responsibilities for the governance of the CMA, is a partner to the general manager, and helps him/her to achieve the missionary authority, optimises the relationship between the board and management, and is the public face of the Authority: WB 338.8.
- (iv) Board members provide governance to the Authority, represent it to the community and accept the ultimate legal authority for it, and are expected to behave with the highest ethics, always act within the law and follow government directions and policies: WB 339.1.
- (v) The CMA general manager is responsible for the day-to-day operations of the CMA and reports to the board: WB 339.4.
- (vi) The general manager's responsibilities are set out at para 6.1: WB 339.5.
- (vii) A board member of the CMA must disclose to a meeting of the board any direct or indirect interest in a matter being considered or about to be considered by the board: WB 340.6.
- (viii) A board member who has a material personal interest in a matter must not vote on the matter or be present while the matter or a related resolution is being considered by the board: WB 340.8.
- (ix) An officer of the CMA must act honestly in the exercise of powers and the discharge of functions, must exercise a reasonable degree of care and diligence and must not make improper use of their position or information acquired through their position to gain an advantage for themselves or cause detriment to the CMA: WB 341.2.
- (x) CMA board members must not use information received or their position to benefit themselves, their family or their friends, and have a duty to declare conflicts of interest or potential conflicts of interest and must not vote or be present during discussions of those matters: WB 343.7.
- (xi) All board members have a collective responsibility to the board and the CMA which requires them to be vigilant, question any transactions or decisions that

appear out of the ordinary and ensure that authority has been exercised within the appropriate financial delegations: WB 346.7.

- (xii) If the conduct or position of any member of the board is such that continuance in office appears to the majority of the members of the board to be prejudicial to the interest of the Authority, the majority of the members at a meeting specially convened for that purpose may suspend that member: WB 350.2.
- (xiii) The general manager of the CMA is responsible for the day-to-day management of the operation of the CMA in accordance with the general policies and specific directions of the board and the board may entrust to and confer on the general manager such powers exercisable under the Articles as the members of the board think fit: WB 350.8.
- (xiv) The general manager will at all times and in all respects be subject to the control of the board: WB 351.3.
- (xv) Members of the CMA board have various duties including acting honestly, exercising reasonable care and diligence in the exercise of powers and discharge of functions, not making improper use of their position, not using their position to obtain a gain or advantage for themselves or another person, and not causing detriment to the Authority: WB 351-352.
- (xvi) Members of the board may exercise all powers and do all such acts and things which the Authority is authorised or permitted to exercise and do and which are not required to be done by the Minister: WB 352.6.
- (xvii) Under the code of ethics, the board members have various principles of conduct, including acting honestly and in the public interest, and in performing their duties to promote confidence in the integrity of public administration: WB 356.
- (xviii) Personal and professional behaviour is also subject to various restrictions: WB 356.
- (xix) Disclosures must be made by board members in order to manage conflicts of interest: WB 357.8.
- (xx) The general manager and chairperson are required to report suspected corruption to the ICAC “as soon as there is reasonable suspicion that corrupt conduct may have occurred or may be occurring”: WB 357.9.

12. *Mr Mills raises a complaint which is considered by the Grievance Committee.* Although the main office of the CMA was in Inverell, there were five employees at the Moree office including Mr Greg Mills: CA [10]. Mr Mills filed a grievance against Ms

Cush on about 15 December 2004: CA [11]. The nature of that grievance is not in evidence, but the board of the CMA established a “grievance committee” to deal with his complaint and the committee comprised Mr Croft, Mr Boland and Dr Crouch: CA [11]. The committee gathered information including a written response from Ms Cush which was received by the committee on 21 December 2004: CA [11]. The committee met on 15 January 2005 and made a recommendation to the board that “no further action be taken based on the available information in relation to this grievance”: CA [11]. The board adopted that recommendation at its meeting in January 2005: CA [11]. However, the Human Resources branch of the Department gave some advice to either the board or the grievance committee and it was decided to give Mr Mills “the opportunity to verbally present his case”: CA [11]. That opportunity was provided to Mr Mills in an interview with Mr Croft and Mr Boland on 15 February 2005: CA [11]. The grievance committee made a recommendation thereafter to the board that “as there was no additional information supplied” the decision taken by the board at the January meeting should stand: CA [11]. In early 2005 Mr Mills informed Ms Dillon that he felt that his matter had not been dealt with impartially because he believed that Ms Cush and Mr Boland were having an affair: CA [12]. At about this time Mr O’Brien (an employee at the Moree office of the CMA) informed Ms Dillon that he had some concerns about the CMA generally and, in particular, some concerns about the relationship between Mr Boland and Ms Cush and the grievance committee: CA [12].

13. *Information relating to affair conveyed to Ms Dillon.* Ms Dillon first heard that Mr Boland and Ms Cush may be having an affair in late 2004, early 2005: WB 554. In December 2004 Ms Chittenden told Ms Dillon that “Amanda really likes Les”: WB 560. In early 2005 Mr Mills informed Ms Dillon that he had “a matter of grievance” in relation to Ms Cush and that he felt that his matter had not been dealt with impartially because he believed that Mr Boland and Ms Cush were having an affair: WB 556, 613, CA [12]. In early 2005 Mr O’Brien informed Ms Dillon that he had “some concerns about the CMA” and “some concerns about the relationship between Mr Boland and Ms Cush that related to some issues about the grievance committee”: WB 555-556, 612, CA [12]. His words “did include words in relation to a relationship”: WB 556. Some time around February 2005 Mr Pitman conveyed his knowledge of the rumour to Ms Dillon: CA [14], WB 611, 612, 667. Mr Pitman “said that he was concerned that

Mr Boland had been involved in the grievance committee because he believed that there was an affair occurring between the parties”: WB 554. Ms Dillon advised Mr Mills, Mr O’Brien and Mr Pitman that if they had any concerns they should raise them with Mr Croft: WB 614, 626-627.

14. *30 March 2005: Mr Hart (Regional Director of the Department) speaks to Ms Dillon.*

On 30 March 2005 Mr Hart rang Ms Dillon and informed her that he wanted to have a confidential discussion: WB 678, 672 following, CA [17]. At the time Mr Hart spoke to Ms Dillon “lots of people were talking about the rumour” and Mr Hart had “heard it from a number of sources”: WB 681, CA [17]. During the conversation with Ms Dillon “the subject of the existence or otherwise of an affair or relationship” between Mr Boland and Ms Cush was “mentioned”: WB 673 and CA [18]. Ms Dillon later characterised what she had been told by these various people as “the existence of the rumour and the accusation”. In addition to the discussion to which Ms Dillon was a party, there was also much talk at the CMA about Ms Cush and Mr Boland having an affair: see the summary at CA [12]-[18].

15. *Mr Croft asks CMA Board to express confidence for Ms Cush.* On 31 March 2005 Mr

Croft forwarded an out of session business paper by email to members of the board for their early response seeking an affirmation from the CMA board of support for Ms Cush (as general manager): CA [19]. Ms Cush had sought this statement of support: WB 334. On 31 March 2005 Ms Dillon sent an email to Mr Croft asking him what the urgency was in relation to that particular issue. On 1 April 2005 Mr Croft wrote an email to Ms Dillon advising that the urgency was that “Amanda [Cush] may have to respond to an accusation prior to the next meeting and needs our support to be prepared for that eventuality”: CA [20].

16. *Mr Hart’s memorandum to the Director General of the Department dated 1 April 2005.*

This is dealt with by the CA at [21]-[22]:

“After his conversation with [Ms Dillon], Mr Hart prepared a Memorandum to the Director-General of the Department dated 1 April 2005 that he sent by facsimile on 4 April 2005. That Memorandum referred to the “seriousness” of allegations that had been made against Ms Cush and to an investigation carried out by Mr Hart and Ms Bate. It included alleged inappropriate claims in relation to a Travelling

Allowance and approvals thereof. It referred to the Tweed Heads meeting and raised questions about the expenses in relation to that meeting. It also referred to the circumstances surrounding the non-appointment of an indigenous officer. It included advice that a CMA Board member had “been in contact with” Mr Hart in relation to corporate governance matters of the Board and that the Board would bring those matters to the attention of the Minister.

10 There was also a reference to so called “anomalies” including that Mr O’Brien had resigned; a further two staff members of the CMA had indicated they would resign; and two Departmental staff members had indicated they would refuse a transfer to the CMA. The Memorandum did not mention the “rumour”, however it recommended that the allegations against Ms Cush should be referred to the relevant area of the Department for investigation ...”

17. *6 April 2005: Director General writes to Ms Cush.* This is summarised by the CA at [23]:

20 “On 6 April 2005 the Director-General of the Department wrote to Ms Cush advising her that she had decided to treat a complaint in relation to the selection process for the “Catchment Officer Indigenous” as a “disciplinary matter”. The Director-General advised Ms Cush of the process to be followed and the possible “disciplinary actions” that could be applied if a finding of misconduct were to be made ...”

18. *Publication by Ms Dillon to Mr Croft on 8 April 2005:* The confidential discussions between Mr Croft and Ms Dillon on 8 April 2005 are summarised by the CA at [24]-[25]:

30 “[24] [Ms Dillon] met with Mr Croft on 8 April 2005 in a café in Moree in a location where they could have a private conversation. [Ms Dillon] informed Mr Croft of the telephone conversation with Mr Hart and the fact that he had raised a number of “concerns” about the CMA with her: [WB 106]. [Ms Dillon] raised concerns about: a complaint in relation to the appointment process in respect of an indigenous officer’s position with the CMA: [WB 105]; the corporate governance of the CMA: [WB 106]; staff management issues, in particular that some of the staff had made complaints about “the conduct of the general manager”: [WB 107]; and the Board’s attitude to the staff; and the grievance process: [WB 108]. Although the concerns that [Ms Dillon] raised with Mr Croft came to the attention of some members of the board before this date, [Ms Dillon] advised Mr Croft that the Department, through Mr Hart, was looking at whether the Board was reacting appropriately to these matters. Mr Croft was concerned that the Department was raising questions about

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whether the Board was doing its job properly: [WB 108-109]. Mr Croft asked [Ms Dillon] to work with Ms Cush to develop a business paper for the Board in relation to the governance concerns that she had raised.

[25] Mr Croft claimed that during the meeting [Ms Dillon] said: “It was well known among members of the Catchment Management Authority that Les and Amanda were having an affair”: [WB 100]; or “It was widely known throughout the CMA that Les and Amanda were having an affair”: [WB 115].”

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19. It will be observed that the conversation between Mr Croft and Ms Dillon covered a wide variety of concerns about Ms Cush, of which the affair between her and Mr Boland was but one matter.¹

20. *Jury’s Findings at the s.7A hearing.* The imputations found by the jury are set out at AS [8]-[9]. On the issue of the words spoken the jury answered “yes” to the following question in respect of both appellants: “Has the plaintiff ... established that on 8 April 2005 [Ms Dillon] said to James Croft 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”.”

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21. The appellants’ submissions contain the following factual errors:

(i) AS[7], sixth sentence: the appellants here assert that Ms Dillon did not know that the affair was common knowledge among people in the CMA. If unqualified, this is incorrect. Ms Dillon knew that several people had been discussing the existence of an affair, namely, Ms Chittenden and Messrs Mills, O’Brien and Pittman (WB 637.41-639.4; WB 554-556).

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(ii) AS[10], second sentence: the appellants here assert that Ms Dillon denied referring to the nature of the relationship between the appellants in her conversation with Mr Croft. This is incorrect. Ms Dillon’s evidence was that the word “relationship” spoke for itself and meant an affair (WB 210.20-.51; WB 565.11-.40; see also WB 627.31-.34 and WB 564.45).

¹ See *Guise v Kouvelis* at p.119 where Dixon J noted that “the entire transaction must be considered in ascertaining whether the occasion was privileged”.

- (iii) AS[13], first sentence: the appellants here assert that in late 2004 or early 2005 Ms Dillon heard rumours of an affair from Messrs O'Brien, Mills and Pittman. This is incorrect. Those staff mentioned the affair to Ms Dillon in a way which is consistent with the affair being fact (WB 554-556, 613, CA [12]). The error is repeated at AS[21], first sentence and AS [25], first to third sentences.
- (iv) AS[13], second sentence: the appellants here assert that Ms Dillon did nothing with the information conveyed to her by Messrs O'Brien, Mills and Pittman. This is incorrect. Ms Dillon advised those staff members to raise their concerns with Mr Croft (WB 612.25-.30; WB 614.25-.38; WB 626.50-627.1). The error is repeated at AS[21], first sentence.
- (v) AS[14], second sentence: the appellants here assert that on 31 March 2005 Mr Croft sent an email to all board members stating that Ms Cush "may have to respond to an accusation prior to the next meeting". This is incorrect. That email is dated 1 April 2005. On 31 March 2005 Mr Croft sent an "Out of Sessions Business Paper" to the board members by email and sought an affirmation of support from the board members for Ms Cush (CA at [17]-[23]).
- (vi) AS[14], third sentence: the appellants imply that Ms Dillon's conversation with Mr Hart occurred after the email correspondence between Ms Dillon and Mr Croft on 31 March 2005. This is incorrect. Ms Dillon spoke with Mr Hart on 30 March 2005 (WB 678, 672ff; CA [17]). The error is repeated at AS[21], second sentence.
- (vii) AS[14], sixth sentence: the appellants assert that Ms Dillon was the only board member not to support Ms Cush. The appellants neglect to mention that on 15 April 2005, when the board resolved to affirm support for Ms Cush as General Manager, Ms Dillon was in Darwin on CMA business (WB 606.9-.12).
- (viii) AS[15], first sentence: the appellants assert that the reason Ms Dillon spoke to Mr Croft about the affair was that others had raised it as a matter of concern. This is incorrect. This was not the only reason Ms Dillon raised the matter with

Mr Croft (WB 188.14-.34; WB 565.36-566.30; WB 626.47-627.3; WB 640.37-.45; WB 642.39-643.4; WB 654.38-655.6).

10 (ix) AS[15], third sentence: the appellants assert that in her evidence Ms Dillon accepted that she was under no duty to disclose to anyone the existence of the rumour in April 2005 (referring to WB 615.15f) but for her conversation with Mr Hart on 30 March 2005. This is incorrect. Ms Dillon's evidence at WB 615.15f was that from January to March 2005 she felt no sense of duty or obligation to speak to Mr Croft about the affair. No mention is made of Mr Hart at WB 615.15f (cf. WB 27-28).

(x) AS[21], third sentence: the appellants assert that on 30 March 2005 Ms Dillon and Mr Hart spoke about a rumour of an affair between Ms Cush and Mr Boland. If unqualified, this is incorrect. Ms Dillon and Mr Hart also spoke about the existence or otherwise of the affair (WB 673.35-.38).

20 (xi) AS[25], second sentence: the appellants assert that Ms Dillon "well knew" there was only a rumour of an affair between Ms Cush and Mr Boland. This is incorrect. CMA staff conveyed the fact of an affair to Ms Dillon, and she retained an open mind as to its existence (WB 554-556, 613; CA [12]; WB 611.49-612.9).

Part V: Applicable statutory provisions

22. The respondent does not accept the accuracy of the appellant's statement of applicable statutory provisions, which should have included reference to the *Catchment Management Authorities Act 2003* (NSW) passim and the *Public Sector Employment and Management Act 2002* (NSW) ss. 3, 7, 40-53. See Annexure A.

30 **Part VI: Respondent's argument**

23. At [43]-[61] Bergin CJ in Eq (with whom Allsop ACJ and Tobias JA agreed) held that the statements made by Ms Dillon to Mr Croft were made on an occasion of qualified privilege. Bergin CJ in Eq reasoned as follows:

- (i) the regional director of the department contacted Ms Dillon in her role as a member of the board of the CMA to discuss serious allegations of misconduct within the CMA: [49];
- (ii) the allegations were of a kind that the regional director considered might be referred to ICAC: [49];
- (iii) during this conversation, the rumour of the relationship between Ms Cush and Mr Boland was mentioned: [49];
- 10 (iv) Mr Hart was well aware of the rumour at the time of the conversation: [49];
- (v) the evidence established that Mr Hart had contacted Mr Pitman, as had his assistant, Ms Bate, to ask about the rumour: [49];
- (vi) the rumour was a matter important enough for Mr Hart to telephone Mr Pitman to ask him about it: [49];
- (vii) the detail of the serious allegations relating to inappropriate financial transactions and expenses as outlined in Mr Hart's memorandum of 1 April 20 2005 to the Director General included allegations that Ms Cush made claims for expenses that were allegedly already paid for by the CMA: [50];
- (viii) the focus of the discussion between Ms Dillon and Mr Hart related to Ms Cush's alleged misconduct: [50];
- (ix) Ms Dillon clearly raised with Mr Hart her concerns about the corporate governance of the board: [50];
- 30 (x) agreement was reached between Mr Hart and Ms Dillon that she would raise these matters directly with the Minister: [50];
- (xi) Ms Dillon decided that she should inform the chairperson of the board, Mr Croft, of as much of the conversation with Mr Hart as she could without compromising any investigation: [50];

- (xii) once Ms Dillon became aware of the serious allegations referred to by Mr Hart, she had a duty to inform the chairperson of the board of the nature of those allegations: [50];
- (xiii) the chairperson of the board had a corresponding interest in receiving the information from a member of the board who had been approached by the regional director of the department: [50];
- 10 (xiv) the rumour of the affair between Ms Cush and Mr Boland was intrinsically intertwined with the concerns which Ms Dillon had raised with Mr Croft about the nature of the relationship between members of the board [including Mr Boland] and staff members [including Ms Cush]: [52];
- (xv) the rumour of the affair was also intrinsically intertwined with concerns which Ms Dillon raised with Mr Croft in relation to complaints which had been made about the grievance process by Mr Mills [which included the allegation that the appellants were having an affair]: [52];
- 20 (xvi) moreover, Mr Hart (the regional director of the Department) had become aware of the rumour about the affair and this gave a “new dimension” to its existence elevating it to an importance that imposed a duty on Ms Dillon to convey its existence to the chairperson: [52];
- (xvii) equally, the chairperson had a reciprocal interest in receiving the information: [52];
- 30 (xviii) to allow the Chairperson to remain ignorant of the rumour when it had been raised by staff of the CMA and discussed between a board member and a regional director of the department that had certain supervisory functions over the CMA would have been in breach of the board member’s duty to inform the chairperson of information relevant to matters that were clearly to be the subject of investigation by the department and possibly by ICAC: [52];

(xix) the information about the affair was relevant to the privileged occasion and sufficiently connected to it so as to attract the defence of qualified privilege: [53].

24. The conversation between Ms Dillon and Mr Croft was confidential. It related to their duties as directors of the CMA (a statutory authority) and to the conduct of an officer of a statutory body: CA[50]. The material was published by Ms Dillon to only one other person: CA [24]. And the information was part of a discussion which was most germane to the performance by these two board members of their responsibilities. It was also directly relevant to the issue of a confidence motion scheduled for later consideration by the board: CA [19] and [26]. The information was closely related to various allegations that had been made about Ms Cush which were the concern of both the board and the department, particularly given the board's supervisory responsibilities over the general manager (who reported to the board).

25. In AS the appellants raise two highly specific arguments as to why the Court of Appeal should have rejected the defence of qualified privilege:

(i) It is submitted that the information received by Ms Dillon was only a "rumour" and yet she reported it to Mr Croft as a fact; therefore, there can be no defence of privilege because Ms Dillon could have no duty to publish rumour as fact and Mr Croft could have had no interest in receiving incorrect information; further that the rumour had been published as a fact had the consequence that the information published was irrelevant to the occasion.

(ii) It is submitted that statements made by McHugh J in *Bashford*, particularly at [73], should have been followed: because the publication was entirely voluntary this should have been decisive against a finding of qualified privilege.

26. It is submitted that the first argument has substantial problems.

27. The first problem is that it is inaccurate to assert that the information given to Ms Dillon was simply that there was a rumour about an affair. It is true that the judgment of Bergin CJ in Eq uses the expression "rumour" (sometimes in inverted commas – eg [54], [22]) as a compendious way of referring to the information provided to Ms Dillon.

However, when one looks at the information provided to Ms Dillon in relation to the alleged affair, it cannot be classified simply as “rumour”:

- (i) Ms Chittenden had told Ms Dillon that “Amanda really likes Les”: WB 560.24.
- (ii) Mr Mills informed Ms Dillon that he believed that Mr Boland and Ms Cush were having an affair: WB 556.35, 613.20-613.50, CA [12].
- (iii) Mr O’Brien had informed Ms Dillon that he had concerns about the CMA and in particular “concerns about the relationship” between Mr Boland and Ms Cush that related to some of the issues about the Grievance Committee: WB 555-556, CA [12].
- (iv) Mr Pitman told Ms Dillon that he was concerned that Mr Boland had been involved in the Grievance Committee because he believed that there was an affair occurring between the appellants: WB 554.47.
- (v) Mr Pitman also told Ms Dillon that he had observed interactions between Mr Boland and Ms Cush; he added that they were more than the interaction of a board member and a general manager and that “they were very friendly”: WB 555.25.
- (vi) Mr Pitman told Ms Dillon about the rumour in February 2005: WB 667.25; CA[14].
- (vii) The topic of the existence or otherwise of an affair or relationship between a board member and Ms Cush was mentioned in a telephone conversation between Ms Dillon and Mr Hart: WB 673.38 and CA [18].

28. Secondly, the appellants’ assertion that Ms Dillon stated as a fact that the appellants were having an affair also needs substantial qualification by reference to the particular facts and circumstances of this case. Although the imputations found by the jury can be so characterised, the requisite close examination of the facts and circumstances of publication requires that account be taken of the following:

- (i) there is no jury finding as to the exact words used by Ms Dillon; nor is there a finding that Ms Dillon stated in terms that the appellants were having an affair; there is only a finding that the words used were the words or “words substantially the same” as “it is common knowledge among people in the CMA that Les and Amanda are having an affair”;
- (ii) the jury, in determining whether the imputations were conveyed, were entitled to rely on an ordinary reasonable listener’s capacity for loose thinking, incomplete attention, regard to a broad general impression of what was said and drawing of inferences from the actual words used and the context of the discussion; these matters underline the proposition that there may be real differences between the words used in a slander and the imputations conveyed;
- (iii) in the defamation context, there is no difference of substance between a statement that “Smith is a murderer” and “people say that Smith is a murderer”: both convey the imputation that Smith is a murderer; accordingly it is difficult for the appellants to assert that there is a substantial distinction between an allegation of fact and one of rumour.

20 29. Thirdly, at AS [25] the appellants submit that there was no duty to publish or interest in receiving the publication because Ms Dillon referred to the affair as a fact when there was only a rumour to this effect. The appellants’ submission does not dispute that a relevant duty and interest would have arisen if Ms Dillon had stated that there was a rumour of an affair: see CA at [52]. The appellants’ submission is difficult in the light of the reasoning of the majority in *Bashford*. In that case the plaintiff argued (as here) that there was no privilege because the publication contained an inaccuracy. At [23]-[26] Gleeson CJ, Hayne and Heydon JJ held that the requisite reciprocity of duty and interest existed by reason of the *subject matters* of the publication. At [26] their Honours noted agreement with the reasoning of the Court of Appeal to the same effect: see [12]. At [187] Kirby J agreed with the reasoning of Gleeson CJ, Hayne and Heydon JJ and with the Court of Appeal on this point. Thus a majority in *Bashford* determined the questions of duty and interest by focusing on the topics or subjects of the discussion and held that a relevant duty and interest arose despite the inaccuracy in the discussion of those topics.

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30. Likewise, at [126] of *Bashford* Gummow J made the following observations:

“[I]t is well established that the inaccuracy of an imputation is no bar to the availability of qualified privilege arising out of a reciprocal duty or interest. This is because the particular relationship between the defendant and the person in receipt of the communication, and the advantages which the law deems are to be had from free communication within such a relationship, enjoy a significance over and above the accuracy of the defamatory imputation in question.”

31. This passage was applied by Kiefel J in *Aktas v Westpac* (2010) 241 CLR 79, at [94]. It is submitted that the topics and issues discussed by Ms Dillon with Mr Croft all related to concerns about Ms Cush’s alleged behaviour and related matters and that (applying the majority reasoning in *Bashford*) these *topics* created the requisite duty and interest. It is difficult to see how an inaccuracy (if such it be) in the discussion of these topics would destroy the interest and duty which the appellants concede to have existed if Ms Dillon had simply mentioned the affair as a rumour (rather than as fact).

32. Fourthly, at AS [29] a submission is made that if the privileged occasion involved the giving and receipt of information concerning the existence of a rumour, the assertion that the affair was a fact was extraneous or irrelevant to the occasion of qualified privilege. This submission accepts that discussion of the *rumour* of an affair was relevant to the occasion of privilege but asserts that a statement that the affair was a *fact* was irrelevant to the occasion. The submission implicitly assumes a very precious and demanding test of relevance or connexion which would treat most inaccuracies as irrelevant to the occasion. In *Bashford* (which involved an inaccuracy) Gleeson CJ, Hayne and Heydon JJ applied an undemanding approach on relevance based simply upon whether the parts of the publication which defamed the plaintiff related to the subject matter giving rise to the privileged occasion: see [27]-[30] and especially [29]. See also Gummow J at [132]-[135]. At [194]-[196] Kirby J did not embrace any particular test of relevance but at [196] decried an approach which would involve “unrealistic demands that all communications ... be fastidiously checked so as to remove the slightest inaccuracies before publication”: see also [202]. These approaches provide no encouragement to the appellants whose submission proceeds upon the basis that the subject of the affair is relevant to the occasion but that the alleged inaccuracy of

referring to the affair as fact makes the statement irrelevant to that occasion. The approaches applied in other cases to the issue of relevance (or connexion) also make the appellants' task difficult: see *Horrocks v Lowe* [1975] AC 135, at 151 (Lord Diplock with whom three other members of the House agreed); *Adam v Ward* [1917] AC 309, at 318, 321, 326-327, 340, 348. In *Bashford v Information Australia* [2001] NSWCA 470 Hodgson JA reviewed *Adam* and *Horrocks* and held at [43] that "material communicated on the privileged occasion will have the protection of the privilege unless it is *truly unconnected* with the subject matter of the occasion" (emphasis added). Further, that an imputation found in respect of both appellants asserts that they were "acting unprofessionally" only serves to emphasise the relevance of the defamatory words to the subject matter giving rise to the occasion.

33. The appellants' second submission (AS paras [31]-[38]) focuses on the alleged voluntary nature of the publication. In reliance on some statements by McHugh J in *Bashford* at [73] and [77], it is submitted at AS [38] that 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".

34. A number of preliminary points may be made in relation to the judgment of McHugh J in *Bashford* at [73] and [77]:

(i) McHugh J's observations are subject to certain stated exceptions; for example, where the publisher has a duty to make the statement to the recipient [73], where there is a pressing need to protect the interest of the defendant or a third party [73], where there is a pre-existing reciprocity of interest between the publisher and the recipient [73], where life is in imminent danger [77], where harm to the person or injury to property is imminent [77], where there is a relationship of confidence between the parties [79] and where the publisher answers a request for information [73];

(ii) the use of the expressions "ordinarily" [73], "generally" [73] and "in most cases" [73] indicate that McHugh J's observations are subject to further unarticulated exceptions or qualifications;

- (iii) the statements at [77] that the voluntary nature of a publication “is *likely* to be decisive against a finding of qualified privilege” and at [74] (“often decisive”) indicate that no legal rule is being articulated but rather a relevant factor which may or may not be decisive in any particular case;
- (iv) the observations do not sit well with the reasoning of any of the majority justices in *Bashford*: see Gleeson CJ, Hayne and Heydon JJ, especially at [25]; neither Gummow J nor Kirby J treated the voluntary nature of the publication in that case as significant.

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35. The appellants’ second submission warrants the following responses.

36. First, McHugh J’s observations are not applicable in the present case because the Court of Appeal held that “the defendant [had] a duty to make the statement to the recipient” and McHugh J specifically stated in *Bashford* at [73] that his observations about voluntary statements did not apply in that situation. And the only argument put by the appellants as to why there is no duty is the first argument dealt with above.

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37. Secondly, McHugh J at [73] qualified his observations so as to exclude a situation where there was “a pre-existing reciprocity of interest between the defendant and the recipient”. In the present case, Ms Dillon and Mr Croft, as directors of the board were dealing with board business in general and, in particular, matters relevant to the conduct of the general manager and had a pre-existing “reciprocity of interest” in relation to both.

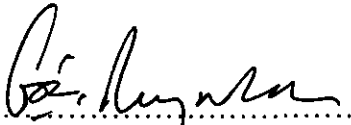
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38. Thirdly, at [79] McHugh J stated that a defendant is “entitled to volunteer defamatory information to a third party ... where a confidential relationship exists between the defendant and the third party and the defendant has a duty to protect the interests of that person”. As members of a board of a statutory authority, Ms Dillon and Mr Croft had an “obligation of respecting the confidential nature of board affairs where the interests of the board itself so require[d]” (*Bennetts v Board of Fire Commissioners* (1967) 87 WN 307, at 310 per Street J) and board members were all under a duty to protect the interests of board members, particularly in relation to information which might result in serious consequences for the board members. Likewise at [73] McHugh J notes that his formulation does not apply where the publication “protects [the publisher’s] interests”.

39. Fourthly, McHugh J's formulation does not apply where the publisher "answers a request for information": *Bashford* at [73]. The request by Mr Croft for a written statement of support for the general manager (WB 334) *implicitly* seeks information which is relevant to whether such support should be given by board members and the discussions between Ms Dillon and Mr Croft fall into this category. On this reasoning, the statements made by Ms Dillon were not "volunteered" but rather elicited by Mr Croft.
- 10 40. Fifthly, McHugh J's formulation does not operate where "there is a pressing need to protect the interests of the defendant or a third party": see [73]. The communication by Ms Dillon to Mr Croft was necessary to protect the interests of the members of the board of the CMA (of which both Ms Dillon and Mr Croft were members), particularly given the departmental inquiry which had been announced, the likely inquiry by ICAC and the scheduled motion of confidence in Ms Cush. A failure on the part of the board members to address the issue of any relationship between the appellants might well result in serious consequences for all concerned.
- 20 41. Sixthly, as noted above, McHugh J's formulation is subject to exceptions and qualifications and it is submitted that in the particular circumstances of the present case the voluntary nature of the publication is not only not decisive but also irrelevant. The appellants point to no convincing reason why that should be decisive in the present case.
- 30 42. Seventhly, no case is cited by the appellants which supports the approach articulated by McHugh J. Some reported cases may be consistent factually with what his Honour says (or can be made to appear so). However, the appellants point to no case (despite the thousands of cases in this area) which has formulated the principles in the detailed manner formulated by McHugh J. Certainly the majority judgments in *Bashford* provide no support for McHugh J's approach: see *Bashford* at [25] in particular.
43. Eighthly, McHugh J's statements (if they amount to matters of principle) are contrary to the approach previously adopted by this court. Dixon J in *Guise v Kouvelis* (1947) 74 CLR 102, at 116-117 stated that the law of qualified privilege is expressed at a high level of generality by reference to broad and flexible tests (viz. duty and interest) and is

dependent on a close examination of the facts. At 116 Dixon J noted that “these formulas have been developed to such a degree that they permit a court to individualize a case to much the same extent as is possible in a negligence case”. These principles have been adopted in both *Aktas* (see [21]-[22]) and *Bashford* (see [10] and [139]). The formulation of McHugh J (if treated as a matter of principle) is inconsistent with these well-established principles because it creates categories and exceptions which are superimposed on the established broad and general formulas of duty and interest and the approach of individualised examination of the facts. This is just as inapposite in this area as it is in the law of negligence: see the observations of Messrs Glass and McHugh in the preface to the 1st edition of *The Liability of Employers* (reprinted in the 2nd edition at pages v-vi).

44. It is respectfully submitted that the decision of the Court of Appeal in the present case is not inconsistent with the approach of McHugh J. Alternatively, McHugh J’s formulation is either inapplicable or (if applicable) is contrary to principle and authority.


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