SUPREME COURT OF QUEENSLAND

CITATION:	*Mizikovsky v Queensland Television Limited & Ors* [2013] QCA 68
PARTIES:	**LEV MIZIKOVSKY** (appellant) **v** **QUEENSLAND TELEVISION LIMITED** ACN 009 674 373 (first respondent) **TCN CHANNEL NINE PTY LTD** ACN 001 549 560 (second respondent) **GENERAL TELEVISION CORPORATION PTY LTD** ACN 004 330 036 (third respondent) **SWAN TELEVISION & RADIO BROADCASTERS PTY LTD** ACN 008 689 745 (fifth respondent) **NINE NETWORK AUSTRALIA PTY LTD** ACN 008 685 407 (sixth respondent)
FILE NO/S:	Appeal No 11686 of 2011 Appeal No 11714 of 2011 SC No 8404 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2012
JUDGES:	Holmes and Fraser JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with costs in Appeal No 11686/11.** **2. Appeal allowed with costs in Appeal No 11714/11, and vary Order No 2 made in the Trial Division on 9 December 2011 by substituting the words "a standard basis" for the words "the indemnity basis".**

CATCHWORDS: DEFAMATION – JUSTIFICATION – SUBSTANTIAL TRUTH AND CONTEXTUAL TRUTH – where appellant sued respondents for defamation in a television broadcast – where, after a jury trial, judgment was entered for the respondents against the appellant – where appellant argued trial judge failed to direct jury that they should only take into account defamatory imputations which had not been found to be true in determining whether appellant's reputation had not been further harmed because of substantial truth of contextual imputations – where appellant argued trial judge erred in failing to direct jury that, in considering defence of contextual truth, they were to consider only those contextual imputations which they found to be defamatory – where appellant argued that trial judge erred in failing to include question to jury as to whether any of the contextual imputations which jury found to have been conveyed were also defamatory – where appellant argued trial judge erred in so directing jury as to how it should determine defence of contextual truth that jury would have included all contextual imputations which they found to be conveyed, irrespective of whether defamatory or not, in addition to appellant's defamatory imputations they found to be conveyed, irrespective of whether or not they were true – where appellant argued trial judge erred in failing to direct jury so that they would turn their attention to reputation damage occasioned by conveying of contextual imputations only to the extent that those contextual imputations were defamatory – where appellant argued trial judge erred in failing to direct jury, as soon as correction was sought, that counsel for respondents had wrongly put to jury that sheer number of complaints from customers was indicative of truth of imputation as to incompetence of appellant's building company – whether the trial judge erred

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – WRONG PRINCIPLE – PARTICULAR CASES – DECISION AS TO COSTS – where respondents offered sum, including interest and together with appellant's costs on a standard basis, to settle claim before trial – where appellant did not accept offer – where judgment entered in favour of respondents at trial – where trial judge did not accept appellant's failure to accept offer was unreasonable – where respondent awarded costs on an indemnity basis – whether the trial judge erred in awarding costs on an indemnity basis

Defamation Act 1974 (NSW)
Defamation Act 2005 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

Besser v Kermode (2011) 81 NSWLR 157; (2011) 282 ALR 314; [2011] NSWCA 174, considered

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, cited
Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd [2003] QSC 299, considered
Mizikovsky v Queensland Television Ltd & Ors (No 3) [2011] QSC 375, related
Hepburn v TCN Channel Nine Pty Ltd [1984] 1 NSWLR 386, considered
John Fairfax Publications Pty Ltd v Blake (2001) 53 NSWLR 541; [2001] NSWCA 434, considered
John Fairfax Publications Pty Ltd v Gacic (2007) 230 CLR 291; [2007] HCA 28, cited
McMahon v John Fairfax Publications Pty Ltd (No 3) [2012] NSWSC 196, considered
Reader's Digest Services Pty Ltd v Lamb (1982) 150 CLR 500; [1982] HCA 4, cited
Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2) [2009] 2 Qd R 287; [2008] QCA 398, considered
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd [2011] QCA 312, considered

COUNSEL: T K Tobin QC, with R N Wensley QC, and M D Martin, for the appellant
B R McClintock SC, with P J McCafferty, for the respondents

SOLICITORS: Clarke Kann for the appellant
Thynne & Macartney for the respondents

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** The appellant, who was the Chief Executive of Tamawood Limited (trading as Dixon Homes) sued the respondents for defamation in a television broadcast. After a jury trial which occupied 21 days in the Trial Division, judgment was entered for the respondents against the appellant. The appellant contends that the trial miscarried, that the judgment in favour of the respondents should be set aside, and that there should be a new trial or a new trial as to damages only. The appellant has also appealed against an indemnity costs order made in the respondents' favour.

Main appeal

[3] The jury answered 16 questions which were framed by the trial judge. The jury found that:

(a) The television broadcast conveyed two of the five imputations which the appellant pleaded, namely, that he "was the boss of a building company which was not a competent builder" and that he "had caused financial loss and hardship to customers of Dixon Homes" (answers to question 1).

(b) Those imputations were defamatory of the appellant (answers to question 2).

(c) The imputation that the appellant was the boss of a building company which was not a competent builder was substantially true (answer to question 3). (The respondents did not allege that it was substantially true that the appellant had caused financial loss and hardship to customers of Dixon Homes.)

[4] The principal issue in the main appeal concerns the respondents' defence of "contextual truth". Section 26 of the *Defamation Act* 2005 (Qld) ("the Act") provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that –
> (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, 1 or more other imputations (***contextual imputations***) that are substantially true; and
> (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations."

[5] The jury found that:

(a) The television broadcast would have been understood by the ordinary reasonable viewer as conveying in respect of the appellant the additional imputations (or imputations which were not different in substance from them) that he "was the boss of a building company that routinely failed to deliver on its promises to its customers", he "was the boss of a building company that offered little care or compassion for the plight of its upset customers", he "was the boss of a building company that routinely gave poor customer service to its customers", and that he "was the boss of a building company that routinely failed to adequately respond to its customers' complaints" (answers to question 4).

(b) Each of those additional imputations was substantially true (answers to question 5).

[6] The jury answered "yes" to question 6:

> "Have the defendants established that, because of the substantial truth of all the additional imputations you have found to have been conveyed ("yes" answers to question 5), there was no further harm done to the plaintiff's reputation by broadcasting all the defamatory imputations you have found to be conveyed ("yes" answers to question 2)?"

[7] In consequence of the jury's answer to question 6, the respondents were entitled to judgment in their favour whether or not the respondents succeeded on their defence of statutory qualified privilege. (The jury answered questions of fact relating to that defence and the trial judge received submissions with a view to the issue being determined in the event of an appeal. At the time of the hearing of the appeal the trial judge had not delivered her decision upon that defence.)

[8] During the trial the appellant argued that the jury should also be asked to decide whether the contextual imputations which were conveyed by the broadcast were

defamatory and, consequentially, whether any defamatory contextual imputations conveyed by the broadcast were substantially true. The trial judge ruled that those questions should not be asked of the jury.

[9] The appellant argued that the trial judge should have directed the jury to confine their attention to the damage to the appellant's reputation caused by the contextual imputations only to the extent that the jury found that those imputations were defamatory; that the trial miscarried because the jury would have taken into account each of the contextual imputations they found to be conveyed, irrespective of whether or not they were defamatory, in answering question 6. The appellant also argued that the trial judge should have directed the jury to take into account only the defamatory imputations which the jury did not find to be true in determining whether the defamatory imputations did not further harm the appellant's reputation because of the substantial truth of the contextual imputations. The appellant argued that a consequence of these asserted errors was that the jury were not directed to perform the task required by s 26 of the Act, a task which was entrusted to them by s 22 of the Act, thereby occasioning a substantial miscarriage of justice.

[10] The respondents argued that the construction of s 26 advocated by the appellant was incorrect. They argued that s 26 did not require that contextual imputations be found to be defamatory and it did not require the jury to take into account only the defamatory imputations which had not been found to be true. The respondents also argued that the absence of the questions and directions identified by the appellant did not prejudice the appellant or lead to any miscarriage of justice.

Ground (c): the learned trial judge erred in failing to direct the jury that they should only take into account the defamatory imputations which had not been found to be true in determining whether the appellant's reputation had not been further harmed because of the substantial truth of the contextual imputations[1]

[11] In addressing the jury, senior counsel for the appellant submitted that in answering question 6 the jury were to compare the contextual imputations with such of the defamatory imputations which were not proved to be substantially true. In ruling 3,[2] the trial judge gave reasons for her Honour's directions to the jury that the submission to the jury was incorrect, and that the question for the jury's determination was whether, having regard to the substantial truth of all the contextual imputations, there was any further harm done to the appellant's reputation in publishing all the imputations alleged by the respondents which the jury found were conveyed and were defamatory, regardless of whether or not the jury found that some of them were true.

[12] The trial judge considered that this followed from ss 25 and 26 of the Act and the principle expressed by McColl JA (with whose reasons Beazley and Giles JJA agreed) in *Besser v Kermode*[3] that "…all the plaintiff's imputations found to be conveyed and defamatory are considered against the substantial truth of all the contextual imputations".[4] The trial judge cited [59] of McColl JA's reasons and s 25 of the Act for the proposition that, to succeed on a defence of substantial truth,

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1 This ground is substantially replicated in ground (d), which is reproduced below.

2 *Mizikovsky v Queensland Television Ltd & Ors (No 3)* [2011] QSC 375 at [39] – [43].

3 (2011) 282 ALR 314.

4 [2011] QSC 375 at [40].

it is necessary for a defendant to show that all the imputations in the matter complained of are substantially true. At [59], McColl JA held that, at common law:

> "…
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> (a) a defendant seeking to justify defamatory matter had to prove all stings of the defamatory matter relied upon by the plaintiff were substantially true;
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> (b) a defendant seeking to justify defamatory matter could not do so by seeking to plead and justify an imputation with a substantially different sting from that or those pleaded by the plaintiff; a defendant could only plead nuance imputations; and
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> (c) if a defendant could only establish that one or two or more stings relied upon by the plaintiff was substantially true, the defence of justification failed, but the evidence led to establish that defence could be relied upon in mitigation of damages …"

[13] The trial judge also referred to statements by Hunt J in *Allen v John Fairfax & Sons*[5] and in *John Fairfax Publications Pty Ltd v Hitchcock*[6] to the effect that a plea of contextual truth under the *Defamation Act* 1974 (NSW) ("the 1974 New South Wales Act") admits that the matter complained of conveyed the defamatory imputations relied upon by the plaintiff and that no other defence is available to the plaintiff's cause of action and seeks to establish that the effect of the substantial truth of the defendants' contextual imputations is such that the publication of the plaintiff's defamatory imputations does not further injure the plaintiff's reputation. (Section 16 of the 1974 New South Wales Act provided a contextual truth defence which required proof both that the contextual imputations related to a matter of public interest or were published under qualified privilege and that they were matters of substantial truth. Section 16(2)(c) required proof that "by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff". Under that Act, each defamatory imputation constituted a cause of action, whereas s 8 of the 2005 Act provides for a single cause of action for defamation in relation to the publication of defamatory matter, regardless of the number of defamatory imputations carried by that matter.)

[14] The trial judge's construction adopts the literal meaning of s 26. Section 25 allows the defence of justification only "if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true." That reflects the fact that the cause of action under the Act is for publication of defamatory matter, rather than for publication of a severable defamatory imputation. It requires proof of the substantial truth of every defamatory imputation of which the plaintiff complains. In the absence of such proof, s 25 does not provide a defence. Section 26 then requires the defendant to prove that "the defamatory imputations" – meaning all of the defamatory imputations of which the plaintiff complains - do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

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5 NSWCA, 2 December 1988, unreported, cited in *Con Ange v Fairfax Media Publications Pty Ltd & Ors* [2011] NSWSC 204 [15].

6 [2007] NSWCA 364.

[15] That literal meaning of the same section in the New South Wales *Defamation Act* 2005 was adopted in *Besser v Kermode*,[7] in which the New South Wales Court of Appeal held that a defendant is not able to "plead back" a plaintiff's defamatory imputations in a defence of contextual truth. McColl JA's reasons for that conclusion may be summarised as follows. The defence of contextual truth in s 26 must defeat the whole defamatory matter of which the plaintiff complains, publication of which is the plaintiff's cause of action. The defence requires a conclusion that because of the substantial truth of the contextual imputations, the defamatory imputations do not further harm the plaintiff's reputation. The use of the definite article in both sub-paragraphs of s 26 in the expression "the defamatory imputations" focuses attention on the plaintiff's imputations as a group and emphasises that the defence has to respond to all those imputations. The words "in addition to" in s 26(a) cannot be construed as including imputations pleaded by the plaintiff. And the structure of the Act and the language of s 26 belie any legislative intention to allow the "pleading – back" practice which had prevailed under s 16 of the 1974 New South Wales Act to continue under the 2005 Act.

[16] The appellant argued that absurd results would flow from the literal construction of the Act. He posited a case in which the plaintiff complains of two defamatory imputations of a different character, one that the plaintiff had defrauded numerous elderly persons for financial advantage and another that the plaintiff had numerous parking and speeding fines. Assume that the defendant pleaded a contextual imputation that the plaintiff had defrauded the tax authorities twice in the preceding five years, and that both that contextual imputation and the defamatory imputation of fraud were substantially true. If the jury considered only the defamatory imputations which were not true in assessing the contextual truth defence under s 26, that defence could well succeed; but if the jury were directed to take into account each defamatory imputation, the defence would probably fail. The very serious nature of the substantially true defamatory imputation of fraud would preclude operation of the contextual truth defence in respect of the insignificant defamatory imputation that was not true. The appellant argued that this was an unreasonable construction that should be avoided if another construction was open.[8]

[17] But no other construction is fairly open on the statutory text. The appellant argued that the words "defamatory imputations" in s 26(a) might be read as meaning "imputations giving rise to an action in defamation" (i.e. a successful action), but the words of s 26(a) leave no real scope for that meaning. The words "defamatory imputations" convey nothing about the truth or falsity of those imputations, as appears also from the use of the same words in s 25. Furthermore, in *Besser v Kermode* McColl JA did not consider it a sufficient ground for adopting a different construction that, in any case in which a defence of contextual truth was pleaded by a defendant, the plaintiff might defeat that defence merely by "pleading back" the contextual imputations as imputations of which he or she complains.[9] McColl JA accepted that in such a scenario the defendant would only be entitled to obtain a benefit in mitigation of the plaintiff's damages by justifying the former

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7 282 ALR 314 at [78] – [82].

8 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ.

9 282 ALR 314 at [88] – [89]. That result would follow because, once the plaintiff pleaded the contextual imputations as defamatory imputations carried by the defamatory matter, they would no longer constitute imputations "in addition to the defamatory imputations of which the plaintiff complains".

contextual imputations; the defendant could not defeat the plaintiff's cause of action entirely by relying upon the substantial truth of the former contextual imputations under s 26.

[18] As the appellant submitted, the present issue did not arise in *Besser v Kermode*, but the appellant's contention cannot be reconciled with McColl JA's analysis. Furthermore, the appellant's argument that the trial judge's construction of s 26 in this respect leads to absurd results overstates the position. Upon that construction, s 26 still represents a significant reform of the defamation law in Queensland which, in common with in all Australian jurisdictions other than New South Wales, did not provide any defence of contextual truth. It remains the case, as Spigelman CJ pointed out in *John Fairfax Publications Pty Ltd v Jones*[10] in a passage referred to in *Besser v Kermode*,[11] that s 26 remedies the mischief of the common law that a defendant cannot justify serious defamatory imputations where the plaintiff complains only of a different defamatory imputation in the same matter. The example posited by the appellant demonstrates that the reform could have gone further, but that does not justify a construction of the section which its words cannot fairly bear. It must also be remembered that the appellant's example assumes that a plaintiff will plead a substantially true defamatory imputation which is more serious than the defamatory imputation which is not true. That might not occur very commonly, and where it does occur the defendant's partial justification – proof of the substantial truth of the serious defamatory imputation - may be taken into account by the trial judge in mitigation of damages.

[19] The trial judge was correct in instructing the jury that, when they considered the s 26 defence, they should take into account all of the defamatory imputations complained of by the appellant, including those which the jury found to be substantially true. This ground of appeal should be rejected.

[20] I would add that, as the respondents argued, the only effect of the jury taking into account the substantially true imputation in the assessment of the contextual truth defence was to make it more difficult for the respondents to succeed on that defence. If that was an error, it did not prejudice the appellant and it would not justify setting aside the judgment.

Ground (a) - the learned trial judge erred in failing to direct the jury that, in considering the defence of contextual truth, they were to consider only those contextual imputations which they had found to be defamatory

Ground (b) - the learned trial judge erred in failing to include a question to the jury as to whether any of the contextual imputations which the jury found to have been conveyed were also defamatory

Ground (d) - the learned trial judge erred in so directing the jury as to how it should determine the defence of contextual truth that the jury would have included all contextual imputations which they found to be conveyed, irrespective of whether or not they were defamatory, in addition to the plaintiff's defamatory imputations they found to be conveyed, irrespective of whether or not they were true

Ground (e) - the learned trial judge erred in that she failed to direct the jury so that they would turn their attention to the reputation damage occasioned by

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10 [2004] NSWCA 205 at [15] – [16].

11 282 ALR 314 at [69], [85].

the conveying of contextual imputations only to the extent that those contextual imputations were defamatory

[21] In ruling 4,[12] the trial judge rejected the appellant's contention that the jury should be asked the additional question whether or not the contextual imputations, if conveyed, were defamatory, before asking whether, if so, they were substantially true. The trial judge considered that the fact that the apparent purpose of the contextual truth defence was to prevent plaintiffs from taking "relatively minor imputations out of their context within a substantially true publication"[13] did not compel a finding that s 26 requires a defendant to prove that the contextual imputations are defamatory. Section 26 contains no such requirement. The trial judge thought that it would be odd if a defendant were required to plead in defence to a complaint of the publication of alleged defamatory matter that, in addition to the imputations alleged to be defamatory, the defendant published other defamatory imputations. The focus in the section on the effect of the substantial truth of the contextual imputations, rather than the contextual imputations themselves, supports the respondents' position. The trial judge also considered that the approach to s 16 of the 1974 New South Wales Act in *Besser v Kermode* at [68] supported the defendant's position, there being no mention of a requirement that the contextual imputations are defamatory. And since the defence could not succeed unless the contextual imputations were so serious and negative that the defamatory imputations alleged by the plaintiff did not further harm the plaintiff's reputation, it would be otiose to require a jury to find that the contextual imputations were defamatory. The trial judge held that the fact that s 26 refers to "defamatory matter" which must include the contextual imputations did not require that the jury be asked to find that the contextual imputations are defamatory. The word "further" in the expression "further harm" in s 26(b) did not require the conclusion that the contextual imputations did the reputation of the plaintiff harm with the result that they were necessarily defamatory. The trial judge considered that this phrase referred to the fact that at common law and under the Act the law presumed that harm was done to a reputation by publication of a defamation, and that the defendants' reading of the phrase "further harm" contradicted Spigelman CJ's approach in *John Fairfax Publications Pty Ltd v Blake*[14] to the exercise required by s 16 of the 1974 New South Wales Act.[15]

[22] In *John Fairfax Publications Pty Ltd v Blake*,[16] Spigelman CJ (with whom Rolfe AJA agreed) held that under s 16 of the 1974 New South Wales Act, "the Court must focus on the facts, matters and circumstances said to establish the truth of the contextual imputation, rather than on the terms of the contextual imputation itself"; that s 16(2)(c) assumed, but did not express, that an injury had been caused by publication of the contextual imputation; and that it "directed attention to 'substantial truth' which … ought be taken into account in formulating the conclusion for which s 16(2)(c) calls". The trial judge contrasted the approach of the dissentient, Hodgson JA, who considered that the words "further injure" in s 16(2)(c) precluded a focus on the facts, matters and circumstances said to establish the truth of the contextual imputation because the plaintiff's reputation was not in

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12 [2011] QSC 375 [44] – [45].

13 Second Reading speech for the Bill for the New South Wales 2005 Act, quoted in *Besser v Kermode* (2011) 282 ALR 314 at [37].

14 [2001] NSWCA 434.

15 [2011] QSC 375 at [46] – [55].

16 [2001] NSWCA 434 at [5] – [6].

fact injured by those facts, matters and circumstances but only by the publication carrying the contextual imputation.[17]

[23] The trial judge's analysis was adopted by McCallum J in *McMahon v John Fairfax Publications Pty Ltd (No 3)*.[18] McCallum J observed that whilst the defence was premised on the existence of an additional defamatory sting which was not sued on by the plaintiff, the defence did not compare imputation with imputation; its essence was to permit defendants to put imputations in their factual context according to the whole defamatory matter: "… in its factual context, the defamatory publication was true enough that no further harm to reputation was done by the particular imputations selected by the plaintiff, no remedy should lie."

[24] The appellant's argument commenced with the proposition that a textual analysis demonstrated that s 26 assumed that the contextual imputations must be defamatory. The trial judge did not reject that proposition. Rather, her Honour found that s 26 did not require a defendant to prove that the contextual imputations were defamatory "as an element of the defence of contextual truth",[19] that it would be "otiose to require the jury to label the contextual imputations 'defamatory'",[20] and that s 26(a) did not require that the jury "expressly find" that the contextual imputations were defamatory. The argument which the appellant put to the trial judge was instead that it was an element of the defence that the contextual imputations were defamatory and that the jury must be asked whether each contextual imputation was defamatory. It was that argument which the trial judge rejected.

[25] Although s 16 of the 1974 New South Wales Act created a cause of action upon each defamatory imputation in a single publication and the Act creates a single cause of action for the publication of defamatory matter, there remains a strong analogy between s 16(2)(c) of the 1974 New South Wales Act and the presently relevant aspect of s 26(b) of the Act. The majority decision in *John Fairfax Publications Pty Ltd v Blake* upon which the trial judge relied remains persuasive in relation to s 26(b) of the Act. The trial judge was right to find that Spigelman CJ's analysis supported the ruling now under challenge. Directions to the jury should be framed with reference to the text of s 26 and not a potted summary of it, but the broad effect of that section is merely that the question whether any harm to the plaintiff's reputation has been wrought by the defamatory imputations of which the plaintiff complains must be assessed in the context that truths published about the plaintiff in the same matter have brought the plaintiff's reputation down to its "proper level".[21] It would be an unfortunate reversion to the complexities of separate causes of action for each defamatory imputation created by the 1974 New South Wales Act[22] to construe s 26 as making it an element of the defence that each contextual imputation is defamatory. That is not required by s 26.

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17 *John Fairfax Publications Pty Ltd v Blake* [2001] NSWCA 434 at [61].

18 [2012] NSWSC 196 at para 18.

19 [2011] QSC 375 at [48] and, to the same effect, [52].

20 [2011] QSC 375 at [53].

21 *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4 at 21-22, concerning the common law defence of justification, quoted by Gleeson CJ and Crennan J in *Australian Broadcasting Corporation v O'Neil* (2006) 227 CLR 57 at [23] and by McColl JA in *Besser v Kermode* (2011) 282 ALR 314 at [48].

22 See the lamentation by Levine J cited in the second reading speech quoted by McColl JA in *Besser v Kermode* at [37].

[26] I respectfully part company with the trial judge only in one respect, namely, the conclusion that the expression "further harm" refers to harm done in addition to harm which the law might presume to be done to a plaintiff's reputation by the publication of defamatory matter. On that topic, the trial judge referred to reasons she had given in ruling 1[23] for upholding the appellant's argument that evidence of the appellant's good reputation was admissible on the issue whether the defamatory imputations of which the appellant complained further harmed his reputation. In the course of that ruling, the trial judge referred to the common law presumption that the publication of a defamation would injure the plaintiff's reputation,[24] and observed that this presumption was recognised by the word "further" in the expression "further harm" in s 26(b).[25] The trial judge referred to a decision under s 16(2)(c) of the 1974 New South Wales Act,[26] in which Hunt J construed the phrase "does not further injure the reputation of the plaintiff" as meaning "does not cause *additional* injury to the reputation of the plaintiff" and said:

> "The defence afforded by s 16 does not raise an issue simply of whether the combined effect of the defendant's contextual imputations is greater than the effect of the plaintiff's imputation to which they are pleaded. The defendant would not succeed even if the jury were satisfied that that was the situation, for obviously the plaintiffs imputation will have *some* effect on the plaintiff's reputation notwithstanding the effect of the truth of the defendant's contextual imputations. ... but the defendant must satisfy the jury that, such is the nature of his contextual imputations, the truth so affected the plaintiffs reputation that the publication of the plaintiff's imputation to which they are pleaded did not cause *additional* injury to that reputation."[27]

[27] I respectfully consider that Hunt J's reasoning, if applicable in relation to this aspect of the construction of s 26(b), is consistent with the relevant question being whether the publication of the defamatory imputations caused harm which was additional to the harm caused to the plaintiff's actual reputation by the truth of the contextual imputations published. There is also substance in the appellant's submission that it would not be practicable for a jury to determine what harm was done to a plaintiff's reputation in addition to any "presumed harm". However this aspect of the trial judge's reasoning was not essential to the ruling that it was unnecessary to require the jury to answer a question whether each contextual imputation was defamatory. That ruling was correct.

[28] The appellant argued that the failure to ask the separate question whether the contextual imputations were defamatory might have misled the jury because the questions that were asked might have resulted in the jury being unduly concerned with the number, rather than the nature, of the contextual imputations. As the respondents pointed out, the appellant did not identify any error, or anything else, in the trial judge's summing up which might have led the jury to go so wildly astray.

[29] The appellant also argued that there was no way of knowing what criterion was applied by the jury in the course of assessing whether harm to the reputation of the

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23 [2011] QSC 375 at [2] – [34].

24 [2011] QSC 375 at [19], citing *Ratcliffe v Evans* [1892] 2 QB 524 at 528.

25 [2011] QSC 375 at [20].

26 *Hepburn v TCN Channel Nine Pty Ltd* [1984] 1 NSWLR 386 at 405.

27 The underlining was that of the trial judge. The italics were in the original.

plaintiff was occasioned by the contextual imputations; that the failure to ask the question whether the contextual imputations were defamatory and to give appropriate directions adapted to that question might have caused the jury to fail to apply the required perspective of the ordinary, reasonable member of the community;[28] and that the jury might have assessed the contextual imputations subjectively, rather than by reference to the "understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made."[29] The respondents argued that the trial judge's directions were apt to explain to the jury the nature of the qualitative exercise entrusted to them under s 26.

[30] Obviously the jury should not be asked to compare apples with oranges. In considering a defence under s 26, any harmful effect upon the plaintiff's reputation of the substantial truth of contextual imputations must be assessed from the perspective of the same, hypothetical referees whose perspective must be adopted in assessing any harm caused by the defamatory imputations. But the appellant did not argue before the trial judge that the questions asked of the jury or the directions given to the jury were deficient in this respect. Nor did the appellant ask the trial judge for any re-directions designed to overcome any such deficiency. No such matter is the subject of a ground of appeal.

[31] In any event, the jury were not distracted from their task in the manner now submitted by the appellant. Before the trial judge came to direct the jury about the questions concerning contextual truth, the trial judge explained to the jury that they were concerned with the perspective of the "ordinary reasonable viewer". Questions 1, 2 and 4 used that expression when enquiring about what imputations were conveyed by the broadcast, whether those imputations would have been understood as defamatory of the appellant, and what additional imputations were conveyed by the broadcast. The trial judge explained the concept of "the ordinary reasonable viewer" in conventional terms, about which no objection was advanced. The trial judge used the same expression repeatedly in the early part of the summing up, both in explaining the concepts in those questions and in referring to submissions made for the parties. After having referred to that concept many times, the trial judge told the jury, for example, that when they looked at question 2 they would "meet up with the ordinary reasonable viewer again … the same person we've have been talking about – the same hypothetical person – but we have the new concept of 'defamatory of the plaintiff'." The trial judge directed the jury to consider the effect an imputation was likely to have on the reputation of the plaintiff and that they were required to ask whether the imputation in issue was "one which [was] likely to make ordinary, decent people in the general community think less of the plaintiff"; that the jury needed to go through each imputation, look at its precise terms, and say whether it was "of a type or quality which would injure the plaintiff's reputation in this way".

[32] The trial judge said and repeated that the jury was required to look at the imputation itself and enquire whether it was "…something that's likely to make ordinary, decent people in the general community think less of the plaintiff…". The trial judge made many more references to "the ordinary reasonable viewer" before

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28 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 309 [53], per Gummow and Hayne JJ.

29 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505-506.

moving to the contextual truth defence. The trial judge explained that questions 4, 5 and 6 were all part of that defence. Notably, in introducing the idea of contextual truth, the trial judge told the jury that if a broadcast made several different imputations against a person and the person decided to sue for defamation, the person had a choice: "…they could sue in relation to all the imputations or they could limit their case to just some." The trial judge gave an example of a case in which a plaintiff chose to sue only on an imputation that the plaintiff had cheated on his tax but did not sue on an imputation that he had defrauded his employer. The trial judge explained that this defence let the defendant prove the imputation that the plaintiff had defrauded his employer and that it was not true and that, "…having regard to the nature of that truth, that is that you're a fraudster, there could be no further harm done by also broadcasting that you were a tax cheat". The trial judge directed the jury that the defence required the jury to "…weigh up the defamatory imputation alleged by the plaintiff, in that example, tax cheat, against the additional imputation alleged by the defendant, fraudster, or the truth of the additional imputation alleged by the defendant, that you were a fraudster, and decide whether, because of the truth that this person is a fraudster: Was any further harm done by saying that he was a tax cheat?". The trial judge elaborated upon the example, referring to the "…need to think about things like the amount of moral [opprobrium] that attaches to being a tax cheat or attaches to being a fraudster".

[33] By that point in the summing up, the jury must have been left with the powerful impression that they were required to adopt the perspective of the same hypothetical referees in assessing the effect of the defamatory imputations and in assessing the effect of the substantial truth of the contextual imputations. That was immediately reinforced in the trial judge's directions about question 4, when the trial judge directed the jury that they would see that "its structure and the concepts it involves are similar to question 1. You're looking again at the ordinary reasonable viewer."

[34] In relation to question 6, the trial judge directed the jury to ask whether, because of the additional imputations that they found to be substantially true, they could conclude that "there was no further harm done to the plaintiff's reputation by broadcasting all the defamatory imputations that you found to be conveyed". The trial judge explained that it was not as crude as balancing one set of imputations against another, but rather, "having regard to the substantial truth of the additional imputations, was there any further harm done to the plaintiff's reputation by broadcasting the defamatory meanings? So given that this was the truth of the matter, was there any further harm done by publishing the defamatory meanings, any further harm done to Mr Mizikovsky's reputation?"

[35] There is no real prospect that the jury responded to the trial judge's directions by simply assuming that the plaintiff's reputation was harmed by the substantial truth of the contextual imputations. In light of the preceding emphasis upon the requirement that the jury consider the perspective of an ordinary reasonable viewer in assessing what imputations were conveyed and the effect of those imputations upon the appellant's reputation, there is also no real prospect that the jury adopted some idiosyncratic perspective when considering the effect upon the appellant's reputation of the substantial truth of the contextual imputations. There is no real prospect that they applied any test in that respect which differed from the test they were appropriately directed to apply in considering whether the imputations complained of by the appellant were defamatory.

[36] None of appeal grounds (a), (b), (d) and (e) is established.

Ground (f) - the learned trial judge erred in failing to direct the jury, as soon as a correction was sought, that counsel for the respondents had wrongly put to the jury that the sheer number of complaints from customers was indicative of the truth of the imputation as to the incompetence of the plaintiff's building company

[37] Under appeal ground (f), the appellant argued that the trial miscarried as a result of an inappropriate submission to the jury by the respondents' senior counsel.

[38] The respondents adduced evidence from witnesses who had been identified in the particulars of the respondents' defence of justification upon the issue of the substantial truth of the imputation that the plaintiff was the boss of a building company which was not a competent builder. Upon a different issue, the respondents relied upon documentary evidence comprising many emails making complaints by customers of the company of which the appellant was the chief executive. That documentary evidence was admitted only as evidence relating to the reasonableness of the respondents' conduct in broadcasting the defamatory matter. The trial judge gave directions to the jury to confine the use of that evidence accordingly. In the closing address for the respondents, delivered a week after the emails had been admitted in evidence, senior counsel for the respondents adverted to the emails. After submitting that it was not a matter of counting heads, and emphasising a submission that the building company had been incompetent, senior counsel submitted to the jury that "the mere fact of the complaints and the number of [complainants] that came in to Channel Nine itself is telling. If – if those people were so dissatisfied, and so many of them, why doesn't it provide a very fair indication that they were – of the incompetence of this company?"

[39] This statement was made at about mid-morning of the second day of senior counsel's address, which concluded shortly before the lunch adjournment. Not long after the statement was made, senior counsel for the appellant complained about two matters mentioned by the respondents' senior counsel. Relevantly, he complained that the submission that the reference to the number of complaints was "telling", meaning probative on the question of competence or incompetence, departed from the basis upon which the emails had been admitted in evidence. He argued that the respondents' senior counsel had ignored a direction, or the consequences of a direction, given by the trial judge in that respect. The appellant's senior counsel then referred to the other matter and to a different question, introduced by the trial judge, concerning the distribution to the jury of the exhibits. Apart from an introductory statement by the appellant's counsel asking the trial judge "…to direct the jury on two matters we've heard from my learned friend this morning", there was no request of the trial judge to take any particular action. In particular, the appellant's counsel did not ask the trial judge to give any immediate direction. No submissions were made on behalf of the respondents about the presently relevant matter.

[40] Shortly after the appellant's senior counsel commenced his address after the lunch adjournment, he reminded the jury that the trial judge had given directions about the "…swag of untested E-mails from Channel 9 viewers … from people, bar two or three who never came to give evidence". He reminded the jury that the trial judge had directed them that the emails were not evidence of the truth of what was in them but went to an issue, raised in different questions, concerning reasonableness of the conduct of the journalists.

[41] Two days after the respondents' senior counsel had made the contentious statement, the trial judge, in summing up to the jury, directed the jury that the bundles of emails that Channel Nine received from customers who had not given evidence could only be used by the jury as going to the state of the journalists' minds and the jury could not use that evidence as though it were true. The trial judge explained to the jury that they had not seen the people who wrote those emails tested. The trial judge added that "…to the contrary, we've heard some witnesses come along and be cross-examined about their e-mails, and they've said, 'All right [sic] then. I was exaggerating. I wanted to get some attention. I was very angry', that sort of thing." The trial judge returned to the point very shortly before concluding the summing up, again warning the jury not to use the emails as truth of their contents. The trial judge directed the jury not to look at the emails as complaints which falsified the appellant's argument that they had only heard about a few of the complaints in the court case. The trial judge directed the jury not to use the emails for that purpose, repeated the direction that they were not evidence of the truth of what they say, and added that they had not been tested.

[42] In support of this ground of appeal, the appellant emphasised what was submitted to be egregiously bad conduct of senior counsel for the respondents in asking the jury to take into account the sheer volume of complaints as a factor supporting the truth of various imputations. This conduct was characterised as being "highly prejudicial" and as "misconduct". It was submitted to have created irremediable prejudice to the appellant, or prejudice which could only have been cured by an immediate direction by the trial judge.

[43] In addition to arguing that any prejudice was cured by the trial judge's directions, the respondents' senior counsel made submissions in defence of his conduct in relying upon the emails as truth of their contents. He made the point that some 17 of the much larger number of emails had been admitted as evidence of the truth of their contents, but his submission to the jury was plainly not confined to those emails. Nevertheless, it is difficult for the appellant to maintain a contention that the trial judge erred in not giving an immediate direction when an immediate direction was not sought at the trial. The failure by the appellant's senior counsel to seek either the discharge of the jury or an immediate direction tends to reinforce my conclusion that the appellant's interests were sufficiently served by the directions which the trial judge gave the jury in the summing up. This is a matter in relation to which the trial judge was in a better position than an appeal court to judge the appropriate corrective measure. The corrective directions towards the start of the summing up set the point straight and the jury must have commenced their deliberations with the emphatic corrective directions at the end of the summing up ringing in their ears. Those directions were sufficient to cure any potential prejudice to the appellant.

Costs appeal

[44] On 12 October 2011, the respondents offered to settle the claim by paying $100,000, including interest, together with the appellant's costs of the proceedings on a standard basis. The offer was expressed to be made under ch 9, pt 5 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*). The appellant did not accept the offer. The case was tried between 24 October and 21 November 2011. When judgment was entered for the respondents against the appellant on 21 November 2011, the trial judge ordered the appellant to pay the respondents' costs on

a standard basis. The offer was not then drawn to the trial judge's attention. On 25 November 2011, the respondents asked for that order to be vacated so that they could seek an indemnity costs order. After hearing argument, on 9 December 2011, the trial judge ordered that (1) from the commencement of the proceedings until 12 October 2011, the appellant was to pay the respondents' costs on a standard basis, and (2) from 12 October 2011 the appellant was to the pay the respondents' costs on an indemnity basis, save that (3) the appellant was to have its costs of the application heard on 25 November 2011 on an indemnity basis.

[45] On 19 December 2011, the appellant filed a notice of appeal against order (2), the order for indemnity costs against him. He did not obtain the leave of the trial judge to appeal the costs order, as required by s 253 of the *Supreme Court Act* 1995, until 27 February 2012. The respondents initially argued that it was necessary for the appellant to obtain an extension of time within which to appeal, but they ultimately accepted that this was not necessary because the trial judge had given leave to appeal "nunc pro tunc".

[46] Section 40(1) of the Act requires a court in awarding costs in defamation proceedings to have regard to the way in which the parties conducted their cases and any other matters that the court considers relevant. Section 40(2)(b) provides that if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant, the court must, unless the interests of justice require otherwise, order costs of and incidental to the proceedings to be assessed on an indemnity basis "…if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant."

[47] The trial judge rejected the respondents contention that the appellant's failure to accept the respondents' offer was unreasonable for the purposes of s 40(2)(b) of the Act. The trial judge observed that it would have been "a reasonable decision" for the plaintiff to accept the offer, but was not convinced that it was unreasonable not to have accepted the offer.[30] In so finding, the trial judge took into account the following matters.[31] This was an unusually "fact rich" case and the credit and reliability of the evidence of witnesses called by the defence to prove the substantial truth of two of the pleaded imputations and of the contextual imputations were very much an issue. One of the two plaintiff's imputations was found to be substantially true and four of the six contextual imputations were found to be substantially true, reflecting "nuanced findings of fact" based on the evidence of those witnesses. Whilst the factual findings ultimately favoured the respondents more than the appellant, the findings were not wholly in the respondents' favour. There was nothing which would have made the appellant understand that it was more probable than not that the witnesses of truth would present well. The respondents had provided summaries of the evidence which the witnesses of truth would give and the nature of the respondents' case was plain, but much depended upon the jury's assessment of the witnesses under cross-examination. The appellant had available evidence which, if accepted, supported his case. The trial judge found that it could not be concluded that when the offer was made the appellant ought to have realised he had poor prospects.

[48] In nevertheless ordering costs to be assessed on the indemnity basis, the trial judge made the following findings and observations.[32] Appropriately advised, the plaintiff

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30 [2011] QSC 375 at [90].

31 [2011] QSC 375 at [86], [87].

32 [2011] QSC 375 at [92]-[93].

must have realised that there was a real risk that he might not succeed. Although the offer was not expressed to be a *Calderbank* offer,[33] because it was made pursuant to the rules it could potentially be brought to the attention of the court on the question of costs. It seemed anomalous that under r 361(3) an offer made shortly before the first day of the trial did not entitle a defendant to indemnity costs if not accepted. The defendants were wholly successful. The plaintiff did not accept the substantial sum offered to him before the trial. The plaintiff took a risk in making that decision because the outcome of the case was likely to turn on the jury's determination of factual matters on the basis of the jury's view of lay witnesses, who the plaintiff had no opportunity to assess before the trial. Both sides were well resourced and likely to incur considerable costs in a trial which might run beyond the period of three weeks for which it was set down.

[49] In ch 9, pt 5 of *UCPR*, r 361(1) provides that r 361 applies if the defendant makes an offer that is not accepted by the plaintiff and the plaintiff obtains a judgment that is not more favourable than the offer and the court is satisfied that the defendant was willing and able to carry out the offer. The rule goes on to provide:

> "(2) Unless a party shows another order for costs is appropriate in the circumstances, the court must—
>
> (a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer to settle; and
>
> (b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer to settle.
>
> (3) However, if the defendant's offer to settle is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders—
>
> (a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial; and
>
> (b) the defendant is entitled to the defendant's costs incurred after the opening of the court on that day on the indemnity basis."

[50] The respondents accepted that these rules did not justify an award of indemnity costs in their favour. The appellant did not contest the respondent's submission that the primary judge made the order for indemnity costs in the exercise of the discretion under rr 681 and 703 of *UCPR*. Rule 681 provides that "costs are in the discretion of the court but follow the event, unless the court orders otherwise". Rule 703 empowers the Court to order costs to be assessed on the indemnity basis.

[51] The appellant argued that the trial judge, having found that it was not unreasonable for the appellant to reject the offer, misdirected herself in ordering the assessment of the respondents' costs on an indemnity basis on the ground that it would have been reasonable for the appellant to have accepted the offer. The appellant submitted that *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* [34] established that assessment on an indemnity basis should not be ordered on the ground that the plaintiff did not obtain a judgment as favourable as the defendants' offer in the absence of any

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33 *Calderbank v Calderbank* [1976] Fam 93.

34 [2011] QCA 312 at [106].

element of unreasonableness by the plaintiff in not accepting the offer. The respondents relied upon *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)*[35] and *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd*[36] for their contrary argument that the making of an offer "is a very relevant circumstance" and, if no countervailing circumstances are raised, "the order for indemnity costs is likely to be made".[37]

[52] *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* concerned a *Calderbank* offer. White AJA (with whose reasons McMurdo P and Holmes JA agreed) observed in that respect that in the case of a *Calderbank* offer the Courts are "inclined to the award of indemnity costs as an incentive to parties to consider seriously offers to settle which are reasonably made".[38] The respondents and the appellant agreed in their submissions that the respondents' offer in this case was not expressed to be a *Calderbank* offer and that it should not be treated as such an offer. *Emanuel Management Pty Ltd (in liq v Foster's Brewing Group Ltd*, which was approved in *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)*, also concerned a *Calderbank* offer. It is distinguishable on the further ground that Chesterman J found that the plaintiffs prosecuted their case when they should have appreciated that it had no worthwhile prospects of success, and that finding informed his Honour's further finding that it was unreasonable for the plaintiffs not to accept the first defendant's *Calderbank* offer.[39]

[53] Another ground of distinction is that Chesterman J considered that r 361(3) did not apply in that case only because the plaintiffs did not obtain any judgment; his Honour thought that a defendant who was completely successful and had made an offer to settle which was better than the result for the plaintiff should not be in a worse position than a partly unsuccessful defendant who made such an offer.[40] That reasoning is not applicable in this case because the respondents' offer was made before the first day of the trial. The rules leave scope for costs orders adapted to the particular circumstances of the case and r 361 did not apply in this case because the appellant did not obtain any judgment, but the closest analogy here is r 361(2) (which refers to costs on the standard basis) rather than r 361(3) (which refers to costs on the indemnity basis). The trial judge described that contrast between rr 361(2) and 361(3) as "anomalous", but the contrast was apparently deliberate.[41]

[54] In *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd,*[42] the relevant principle was stated as being that "…a party who unreasonably refuses to accept

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35 [2009] 2 Qd R 287

36 [2003] QSC 299 at [36]-[39].

37 *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299 at [39] per Chesterman J, quoted in *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* [2009] 2 Qd R 287 at [11].

38 [2009] 2 Qd R 287 at [15].

39 [2003] QSC 299 at [40] – [41].

40 *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299 at [36]-[37]. Shepherdson J made much the same point in *Naomi Marble and Granite Pty Ltd v FAI General Insurance Co Ltd (No 2)* [1999] 1 Qd R 518 at 527, which concerned Order 26 R 9(1) of the *Rules of the Supreme Court*.

41 That contrast was introduced in the drafting of *UCPR* by a change to rr 408(1) and (2) of the Consultation Draft *UCPR*: see *Uniform Civil Procedure Rules for the Supreme Court, District Courts & Magistrates Courts – Consultation Draft*, October 1997 p.200. Rules 408(1) and (2) of the Consultation Draft, upon which the current rr 361(1), (2) and (3) were modelled, both adverted to costs on a party and party basis, and draft r 408(1) did not reserve any discretion to the court to make a different order where that rule applied.

42 [2011] QCA 312 at [105].

a *Calderbank* offer, on terms more favourable than the court's subsequent order, may be ordered to pay indemnity costs". The principle should not be more generous in the case of a defendant who makes an offer which, as the respondents accepted was the case here, is not a *Calderbank* offer. That offer afforded the respondents a significant protection against the adverse costs order which would probably be made if the appellant obtained even a relatively small judgment in his favour. In such a case, the appellant's failure to accept the offer would displace the usual presumption of costs following the event of the litigation, provided that the judgment in favour of the appellant was not more favourable to him than the respondents' offer. As the litigation fell out, it was the respondents who were entitled to the benefit of that usual approach to costs, but it does not follow that the appellant's mere failure to accept the offer afforded a ground for the costs awarded in favour of the respondents to be assessed on an indemnity basis.

[55] The circumstances identified by the trial judge provided an insufficient basis for departing from the usual basis of assessment of a successful party's costs. In the kind of defamation litigation described by the trial judge – which is presumably not atypical of serious defamation litigation - it would be reasonable for a plaintiff to accept any one of a very broad range of offers. To adopt that as a sufficient ground for ordering indemnity costs where the plaintiff has not acted unreasonably in any respect would unduly erode the basic principle that indemnity costs orders are the exception rather than the norm.

Proposed orders

[56] I favour the following orders:

(a) Dismiss the appeal in CA No 11686/11, with costs.

(b) Allow the appeal in CA No 11714/11 with costs, and vary Order No 2 made in the Trial Division on 9 December 2011 by substituting the words "a standard basis" for the words "the indemnity basis".

[57] **FRYBERG J:** I agree with the orders proposed by Fraser JA in both appeals, and with his Honour's reasons for those orders.