

# Publication of defamatory rumour

*Cush v Dillon; Boland v Dillon* (2011) 279 ALR 631; [2011] HCA 30

The High Court has unanimously dismissed an appeal brought by Amanda Cush and Leslie Boland in a decision which highlights the strength of the defence of common law qualified privilege.

### The facts

Ms Amanda Cush was the general manager of the Border Rivers–Gwydir Catchment Management Authority (CMA), a statutory body. Mr Leslie Boland and Mrs Meredith Dillon were members of the board of the CMA. The case arose out of a statement made by Mrs Dillon to Mr James Croft, the chairperson of the board, that ‘it is common knowledge among people in the CMA that Les and Amanda are having an affair’ (statement).

The background to the statement is that in January 2005, a rumour started circulating within the CMA that Ms Cush and Mr Boland were having an affair. The rumour appeared to have originated as a result of an employee’s dissatisfaction with the outcome of a grievance lodged against Ms Cush. The grievance was dealt with by a ‘Grievance Committee’, constituted by members of the board, including Mr Boland, which recommended that no further action be taken against Ms Cush. The employee informed Mrs Dillon that he considered that the grievance had not been dealt with impartially because he believed Ms Cush and Mr Boland were having an affair. Various other matters led to the rumour gaining strength.

On 30 March 2005 Mr Randall Hart, the regional director of the Department of Infrastructure, Planning and Natural Resources (department), which department had certain responsibilities for the CMA, telephoned Mrs Dillon. Mr Hart contacted Mrs Dillon to have a confidential discussion regarding some allegations that had been made to him concerning Ms Cush. During the course of that conversation the subject of the rumour was raised.

Following that conversation, Mr Hart prepared a memorandum to the director-general of the department regarding the allegations against Ms Cush, which concerned approvals of inappropriate travel, allowance and expense claims and the circumstances surrounding the non-appointment of an Indigenous officer to the CMA. The memorandum also referred to ‘corporate governance matters’ relating to the board, although did not refer to the rumour. The memorandum

recommended that the allegations against Ms Cush be referred to the department for investigation.

It was in this context that Mrs Dillon arranged the meeting with Mr Croft at a café in Moree. Mrs Dillon informed Mr Croft of her conversation with Mr Hart and that he had raised a number of concerns about the CMA with her. Mrs Dillon discussed with Mr Croft the complaint regarding the appointment process of the position of Indigenous officer and issues of corporate governance and staff management. Mrs Dillon informed Mr Croft that Mr Hart was looking into the question of the board’s reaction to the issue concerning Ms Cush. The statement was made during this meeting.

### First instance proceedings

Ms Cush and Mr Boland sued Mrs Dillon for defamation. Mrs Dillon denied the publication was made as alleged and relied upon the defences of statutory and common law qualified privilege. At first instance the jury found that the statement was made as alleged by the plaintiffs and that it conveyed the following defamatory meanings:

As against Mr Boland:

- That as a member of the board of the CMA he was acting unprofessionally by having an affair with the general manager of that organisation; and
- That he was unfaithful to his wife.

As against Ms Cush:

- That as the general manager of the CMA she was acting unprofessionally by having an affair with a member of the board of that organisation; and
- That she was undermining the marriage of Mr Boland and his wife.

It was accepted by Mrs Dillon that the statement was not true and that she did not believe it to be true at the time that she made it.

Elkaim DCJ found that any privilege that may have attached to the statement had been lost on account of malice on the part of Mrs Dillon. His Honour did not make a determination as to whether the occasion was in fact a privileged occasion. His Honour based his finding as to malice on the fact that Mrs Dillon had previously spread the rumour and that she had no belief in the truth of the statement at the time she made it. In

relation to the defence of statutory qualified privilege, his Honour found that Mrs Dillon's conduct was not reasonable in the circumstances, and accordingly the defence failed. The plaintiffs were each awarded \$5,000 in damages plus costs.

### **Court of Appeal proceedings**

On appeal Bergin CJ in Eq, with whom Allsop ACJ and Tobias JA agreed, found that Elkaim DCJ had erred in failing to find that the publication had occurred on a privileged occasion.

Further, her Honour held that Elkaim DCJ's finding that Mrs Dillon had spread the rumour was based upon evidence which was hearsay and inadmissible. His Honour's finding of malice therefore rested upon Mrs Dillon's lack of belief in the truth of the statement, which was not by itself sufficient to destroy the privilege. The Court of Appeal set aside the orders of Elkaim DCJ and ordered a new trial limited to the issue of malice.

### **The High Court's decision**

The High Court emphasised the importance of reciprocity of duty and interest, as a hallmark of the common law defence of qualified privilege. French CJ, Crennan and Kiefel JJ agreed with the Court of Appeal that Elkaim DCJ had erred in failing to determine whether the occasion of the statement being made was a privileged one. Their honours stated that the question of malice cannot be considered 'in isolation independent of a determination of whether there was present in the circumstances a duty or interest which would support the privilege'.<sup>1</sup>

French CJ, Crennan and Kiefel JJ agreed with Bergin CJ in Eq's explanation of the duty which arose and which justified the making of the statement, as follows:

The rumour of the affair was intrinsically intertwined with the concerns [Mrs Dillon] raised with Mr Croft about the nature of the relationship between members of the Board and staff members and the complaints about the grievance process. That a Regional Director of the Department had become aware of the rumour was a new dimension to its existence, elevating it to an importance that imposed a duty on [Mrs Dillon] to convey its existence to the Chairperson. Equally the Chairperson had a reciprocal interest in receiving the information. To allow the Chairperson to remain ignorant of the rumour when it had been raised by staff of the CMA and discussed between a Board Member and a Regional Director of a 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.<sup>2</sup>

Gummow, Hayne and Bell JJ also agreed that there was sufficient reciprocity in Mrs Dillon's duty to make the statement and Mr Croft's interest in receiving the information to render the occasion a privileged one.

The respondents accepted that an occasion of privilege, to communicate the existence of the rumour, arose. However, they contended that Mrs Dillon went too far in that she conveyed the rumour as a fact through the use of the phrase 'common knowledge'. French CJ, Crennan and Kiefel JJ disagreed, stating that it could not be said that the communication of the fact of an affair was less relevant to the occasion of qualified privilege than the existence of a rumour. The error in the statement did not deny the privilege.

French CJ, Crennan and Kiefel JJ agreed with Bergin CJ in Eq's findings in relation to malice. Their honours stated that a lack of belief in the statement as true by itself would not be sufficient to destroy the privilege. The correct question is whether some foreign or improper purpose to the privilege caused Mrs Dillon to make the statement.

Heydon J held that the respondents were drawing too sharp a distinction between 'rumour' and 'common knowledge'. The appeal was dismissed with costs.

### **Conclusion**

As the High Court has stated,<sup>3</sup> as a matter of public policy, in some circumstances the freedom of communication may assume more importance than an individual's right to protection of their reputation. The court's decision that the publication of a rumour, which was not believed to be true, was made on a privileged occasion serves as a reminder of the value of the defence and the manner it may be utilised to protect communications where there is a sufficient reciprocity of duty and interest.

**By Lyndelle Brown**

### **Endnotes**

1. *Cush v Dillon; Boland v Dillon* (2011) 279 ALR 631 at 636.
2. *Ibid; Dillon v Cush; Dillon v Boland* [2010] NSWCA 165 at [52].
3. *Ibid* at 635. See also *Aktas v Westpac Banking Corporation* (2010) 24 CLR 79 at [22].