



Introduction

The New South Wales Court of Appeal has recently considered whether the defence of common law qualified privilege is available in circumstances where the matter complained of is published by mistake.¹ The Court of Appeal considered that the defence is available in such circumstances. The judgment deals with some of the principles relevant to one of the most commonly used defences in defamation actions – the defence of qualified privilege.

Summary of facts

A bank was sued by a real estate agent after the bank bounced 30 cheques written on his agency's trust account. The real estate agent claimed his business and reputation were devastated after angry landlords had their rent cheques dishonoured in December 1997. At that time the real estate agent and a third party were in dispute regarding commissions. The third party had won a default judgment - it subsequently issued a garnishee order against the real estate agent's agency and served it on the bank. The bank, in error, applied the garnishee order not only to the agency's office account, but also to the agency's trust accounts. The real estate agent claimed damages based on lost sales, reduced commissions, and other consequential losses totalling about \$2million.

The bank was sued for breach of contract, negligence and defamation. This article deals only with the issues arising from the defamation action.

At first instance

At first instance, a jury found that the bank defamed the real estate agent and his agency when it rejected the cheques and put the words '*refer to drawer*' on them. The jury found that the matter complained of (ie the words '*refer to drawer*') conveyed the following defamatory imputations that the real estate agent and his agency were:

- unable to pay their debts as they fell due;
- unable to meet their obligations to clients entitled to payments of monies from the trust account;
- had defaulted in the payment to clients of monies from the trust account; and
- had passed valueless trust account cheques.

At the resumed hearing (dealing with defences and damages) the bank's principal defence to the defamation claim was common law qualified privilege. Qualified privilege arises in circumstances where the communication of a matter is made by a person who has an interest in making the communication and those to whom it is communicated to have a corresponding interest in receiving the communication. When those two things coexist, the occasion is a privileged one.² However, the general principle is not particularly helpful in determining if the bank was entitled to rely on the defence of qualified privilege when wrongly (and mistakenly) dishonouring the cheques.

The trial judge (Fullerton J) found that the bank's actions were covered by qualified privilege, even though it mistakenly applied a stop payment arising from the dispute between the real estate agent and the third party.³ The trial judge held that the fact that the bank wrongly

¹ *Aktas v Westpac Banking Corporation* (2009) NSWCA 9 (9 February 2009)

² *Hunt v Great Northern Railway Company* [1891] 2 QB 189

³ *Aktas v Westpac Banking Corporation* (2007) NSWSC 1261 (7 November 2007)

declined to honour the cheques and returned them with the endorsement '*refer to drawer*' did not deprive it of the protection of qualified privilege because the occasion of the publication was otherwise privileged. The relationship which the bank had with each of the payees of the cheques and the collecting banks warranted the communication of information about its attitude to the presentation of the cheques, notwithstanding that such information was premised on mistake.

The real estate agent appealed.

On appeal

The primary issue raised on appeal was whether, in circumstances where the occasion for the defamatory publication was created by the error of the publisher, the protection of qualified privilege should be available. In other words, the issue was not whether the publication was true or false, but whether the decision by the bank to refuse payment and publish its decision was an error which disentitled it to the defence of qualified privilege.

The Court of Appeal (Ipp JA, Basten JA and McClellan CJ at CL) agreed with the judgment and findings of the trial judge.

McClellan CJ at CL (who delivered the leading judgment) firstly considered whether the occasion of the publication was one on which the necessary reciprocity of duty and interest existed (the occasion), and secondly, whether the matter which defamed the appellants was sufficiently connected to the privileged occasion to attract the defence (relevance). In both instances, the question was answered in the affirmative.

The occasion of qualified privilege

The nature of the communication, the status of the publisher, the number of recipients and the nature of any interest they had in receiving it, the time, place and manner of, and reason for, the publication are all relevant factors when determining whether an occasion of qualified privilege arises. In deciding whether the occasion of qualified privilege exists questions of public policy also usually arise, since the relevant interest must be a matter of substance (and not a mere interest) to be sufficiently tangible for the public interest to require its protection.

Policy considerations

The Court of Appeal noted that the defence of qualified privilege confesses to the publication of a defamatory matter, but pleads that the publication is immune from liability because the public interest requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation. In other words, the defence of qualified privilege reflects the law's recognition that public policy requires certain recipients to receive '*frank and uninhibited communication*' on particular subjects from particular sources⁴ (for example the giving of an employment reference by a former employer about a former employee to a prospective employer). In considering the circumstances giving rise to the occasion of qualified privilege the Court of Appeal noted that the communication was made in the furtherance of the statutory scheme which provides for that refusal to be communicated to the payee.⁵

Relevance

In respect to the issue of relevance, the Court of Appeal considered the endorsement '*refer to drawer*' was sufficiently connected to the occasion of qualified privilege to attract the defence. In dealing with this issue the particular form of pleadings that arise in defamation actions required consideration and further clarification.

Pleading issues

Under the now repealed *Defamation Act 1974* (NSW), which applied to this case, a plaintiff sued on the imputations (not the publication) and it was the imputations which were ultimately defended. In this case, if the defence of qualified privilege required a focus on the

⁴ *Bashford ats Information Australia (Newsletters) Pty Limited* (2004) 218 CLR 366

⁵ *Cheques Act 1986* (Cth), sections 67 and 69

imputations (rather than the publication) the bank would not have been able to establish that it had a relevant interest in showing that the real estate agent failed to discharge his obligations to pay his debts (and the bank would have been unable to raise the defence of qualified privilege). However, the Court of Appeal considered that the defence of qualified privilege will be made good if it can be shown that the defamatory publication (rather than the imputations) was published on an occasion of qualified privilege and the matter was relevant to the privileged occasion.

Although the imputation must be defended, the occasion which attracts the privilege is when the matter which gives rise to the imputation is published. In the present case, each of the imputations arose from the notation on each cheque 'refer to drawer'. In these circumstances, the bank was not required to plead to the imputations - only to the publication of the matter complained of. In short, whether a privileged occasion exists is determined by the occasion, on which the matter complained of, which gave rise to the defamatory imputation, is published.

Observations

The central issue in this case was whether the defence of qualified privilege should extend to someone, who by reason of their error is under a duty to communicate the consequences of their error to another, and whether the law should protect that communication because it is necessary for the good order of society. On balance, the Court of Appeal considered that even if occasioned by a bank's own mistake there are sound policy reasons why the communication contemplated by the *Cheques Act* 1986 (Cth) should be protected.

This case represents a positive development for defendants to defamation claims because it clarifies the circumstances in which defendants (particularly those, including professional advisors and directors and officers of corporations, who by the nature of their business publish material to third parties) may avail themselves of the defence of qualified privilege. This case clarifies the application of the defence of qualified privilege in circumstances where it is raised to defeat a claim for defamation based upon a publication made in error. Importantly, this does not mean that every defamatory publication made in error is defensible as it is always necessary to establish that the publication occurred in circumstances giving rise to an occasion of qualified privilege.

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