Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 475/2023

ALEXANDER HART GREENWICH

Applicant

MARK WILLIAM LATHAM

Respondent

OUTLINE OF OPENING SUBMISSIONS OF THE APPLICANT

Introduction

1. The Applicant, Alexander Greenwich, sues in respect of two publications by the Respondent, Mark Latham, following the 2023 New South Wales State election campaign: (a) a Tweet published on 30 March 2023 (**the Primary Tweet**): **Court Book (CB) 47**; and (b) quotes given by Mr Latham to a journalist from the *Saturday Telegraph* (**DT Quotes**), which were republished on 1 April 2023 in an article on the website of *The Daily Telegraph* (**DT Article**): **CB 48**, particularly at [9]–[12].

2. Mr Latham's statements were vile, defamatory and homophobic. They were calculated to humiliate Mr Greenwich—a highly respected and openly gay member of the NSW Parliament with a proud record of achievement—by equating him with a sexual act and portraying him as a danger to children. Mr Latham played off crude and base stereotypes. His statements were hate speech of an extreme kind.

3. Mr Latham hit his mark. His statements unleashed a torrent of disturbing and at times deranged hate mail, phone calls and online posts branding Mr Greenwich, among other things, as a filthy pervert and a paedophile, and lauding Mr Latham as some sort of truth teller.

4. Mr Greenwich, understandably, felt intimidated and threatened by Mr Latham's statements and the hatred they provoked. He cancelled work events and became more circumspect in the invitations he accepted. He became withdrawn and worried about

himself, his husband, the staff in his electorate office and the impact of Mr Latham's attack on other vulnerable members of the LGBTQIA+ communities that he represents. He sought assistance from a psychologist.

5. Mr Greenwich reported the hatred to which he was exposed as a result of Mr Latham's statements to NSW Police and the Parliament. He put in place heightened security and mail handling measures at his electorate office and increased support for his staff.

6. Robust debate is, of course, part-and-parcel of political life. Mr Greenwich is no shrinking violet. He is a veteran of many political campaigns which have aroused community passions. But, as he will explain, he has never seen anything like the reaction that followed from Mr Latham's statements. Mr Latham chose to play the person, rather than the ball, and to do so by drawing upon inflammatory stereotypes that he must have known would feed the worst instincts of some members of the community. Then, incredibly, rather than retracting and apologising, as any honourable person would have done (and as Pauline Hanson, the leader of the party he then represented in the NSW Legislative Council, One Nation, urged him to do) he doubled down, refusing to accept any responsibility at all for the consequences of his actions.

7. Mr Latham was, rightly, condemned by many people in politics, the media and the broader community for his conduct, but it is not to the point that Mr Latham might have badly damaged his own standing among right thinking people. In this proceeding, the focus is on the objective meaning of Mr Latham's statements, and then on their objective and subjective impact upon Mr Greenwich.

8. Mr Latham's statements carried defamatory meanings that had a tendency to lower Mr Greenwich's reputation in the eyes of ordinary people generally, and to expose him to hatred, contempt and ridicule. As the evidence will amply show, they not only had that tendency, they had that effect.

9. Mr Latham has filed and served a defence (**CB 68**) in which he denies that his statements were defamatory or that they caused or were likely to cause serious harm to Mr Greenwich—an utterly unjustifiable position to adopt having regard to the objective evidence, of which Mr Latham was put squarely on notice in a concerns notice dated 19 April 2023: **CB 863**—and speaking volumes about his lack of bona fides—and

pleading defences of qualified privilege and honest opinion. None of those defences is sustainable. Their maintenance at trial will further aggravate the harm to Mr Greenwich.

10. Mr Greenwich will call a number of lay witnesses, whose evidence will go principally to the context in which Mr Latham's statements were made, the aftermath of the statements, the impact of Mr Latham's conduct on Mr Greenwich, and the high esteem in which Mr Greenwich is held in the community.

11. Mr Latham does not intend to get into the witness box at trial or to call any oral evidence.

12. The parties have agreed on the Issues in Dispute and some Agreed Facts, as recorded in a document filed on 22 December 2023: **CB 102**.

Background to and publication of Mr Latham's defamatory statements

Context

13. Mr Greenwich and Mr Latham are both well-known members of the NSW Parliament. Mr Greenwich is the Member for Sydney in the NSW Legislative Assembly. He is an openly gay and progressively minded advocate for his electorate and vulnerable groups in the community, including LGBTQIA+ people. Mr Latham was the leader of the One Nation Party in New South Wales from 2018 to 14 August 2023. He now sits as an independent member of the Legislative Council.

14. On 3 March 2023, the NSW Parliament entered caretaker mode in the lead up to the NSW State election held on 25 March 2023. As candidates for election, Mr Greenwich and Mr Latham sparred from time to time in the public domain about their very different policy positions on a range of issues. One prominent area in which they disagree concerns the rights of LGBTQIA+ people in general, and transgender people and persons questioning their gender identity in particular.

15. On 21 March 2023—four days before the 2023 election—Mr Latham spoke at a church hall event in Belfield. A small group of peaceful LGBTQIA+ protesters gathered outside the event. There was a violent incident, with attendees of the event attacking the demonstrators in a frightening display of force. Police were required to respond.

16. On 22 March 2023, Mr Greenwich spoke with a journalist from the *Sydney Morning Herald* and gave a statement about the Belfield incident, including a statement about Mr Latham. Mr Greenwich said:

> Mark Latham is a disgusting human being and people who are considering voting for One Nation need to realise they are voting for an extremely hateful and dangerous individual who risks causing a great deal of damage to our state.

17. That statement was strongly worded, but within the bounds of robust political debate in the period immediately preceding an election (and not a matter Mr Latham has sought to take any action about). Mr Greenwich focused on Mr Latham's suitability for office as a member of the NSW Parliament, because of what he considers to be Mr Latham's disgusting, hateful and dangerous policy positions, particularly in relation to transgender people and persons questioning their gender identity. His statement was directed at encouraging people to think carefully before exercising a vote for Mr Latham at the election to be held that weekend.

18. Later that day, Mr Greenwich's statement was quoted in a tweet by a Twitter user, Susan Metcalfe: Agreed Fact, [21] (**Metcalfe Tweet**). The Metcalfe Tweet included a link to an article in the *Sydney Morning Herald* reporting on the Belfield incident and bearing the headline, '*Video shows LGBTQ protesters pleading for help outside Mark Latham event*'.

The Primary Tweet

19. Five days after the election, at about 10.13am on 30 March 2023, Mr Latham posted the Primary Tweet, by way of a comment on the Metcalfe Tweet, in these terms:

> Disgusting? How does that compare with sticking your dick up a bloke's arse and covering it with shit?

20. The language and context of the Primary Tweet is important and telling, and will not have been overlooked by ordinary, reasonable readers. Mr Greenwich had expressed the view that Mr Latham was not a fit person to be a member of the NSW Parliament, tying that view to the danger Mr Greenwich believes Mr Latham to pose to the people of the State, after a pre-election event at which Mr Latham had spoken and where LGBTQIA+ protesters were left pleading for help. Mr Greenwich's statement was,

expressly, a message to voters to think carefully before considering a vote for Mr Latham at the election to be held that weekend.

21. In the Primary Tweet, posted five days after the election, Mr Latham deliberately picked up Mr Greenwich's language and threw it back at him. What he conveyed, and no doubt intended to convey, was that Mr Greenwich is not a fit person to be a member of the NSW Parliament because of the sexual act he described.

22. In this proceeding, Mr Latham does not seek to defend the Primary Tweet by asserting that he knows anything about Mr Greenwich's sex life (because, of course, he knows nothing whatsoever about that subject). The reality is that in sending the Primary Tweet, Mr Latham resolved to go as low as possible, to reduce Mr Greenwich to a sex act, and to stoke a tired and ignorant stereotype about gay men.

23. That stereotype is offensively alluded to at [77h] of the defence (**CB 87**) Mr Latham has filed in the proceeding, as a matter allegedly capable of founding a defence of honest opinion ('*Greenwich is an openly gay man who has participated in homosexual sexual activities…*'). That matter, self-evidently, could not found a defence of honest opinion to the Primary Tweet, any more than an allegation that a lawyer had acted in breach of the Bar rules could be defended by asserting that the lawyer was a barrister who accepted briefs and appeared in court, or an allegation that a doctor was a butcher who had mutilated patients could be defended by asserting that the doctor was a surgeon who performed operations. Mr Latham should withdraw the defence. Its maintenance is a matter warranting an award of aggravated damages.

24. There was a swift public reaction to the Primary Tweet, including condemnation of it by other politicians, including Pauline Hanson: **CB 118**.

25. As a result of that reaction, Mr Latham deleted the Primary Tweet, or caused it to be deleted, some hours after it was posted. At the time, about 66,700 Twitter accounts were following Mr Latham's Twitter Account: Agreed Fact, [24] (**CB 117**). Prior to deletion, Twitter recorded at least 6,171 views of the Primary Tweet: Agreed Fact, [27] (**CB 118**).

26. Despite having been publicly condemned, and instead of being chastened by his conduct and immediately apologising for the Primary Tweet, Mr Latham continued his attacks on Mr Greenwich.

The DT Quotes

27. On or about 1 April 2023, Mr Latham spoke to a journalist. Quotes were then attributed to Mr Latham (that is, the **DT Quotes**) in the DT Article, '*"Boo-hoo": Latham doubles down after homophobic tweet outcry*': **CB 48**.

28. The headline was apt. By the DT Quotes, Mr Latham had doubled down on his attack on Mr Greenwich. This time, however, Mr Latham played on a different, but equally despicable, stereotype, equating gay men as sexual fiends and groomers of boys and young men.

29. The DT Quotes began with an admission that is fatal to the reply to an attack defence relied on by Mr Latham. Mr Latham described the Primary Tweet as being '*harder and truer*' than the criticism that Mr Greenwich had earlier levelled at him: **CB 50**, [9]. This was a recognition by Mr Latham that his response to Mr Greenwich's criticism was disproportionate to that criticism ('*harder*'). It was also a failure on Mr Latham's part to recognise the disgraceful nature of the attack in the Primary Tweet ('*truer*').

30. Mr Latham then went on to say (**CB 50**, [10]–[12]):

> When he calls someone a disgusting human being for attending a meeting in a church hall, maybe attention will turn to some of his habits… Greenwich goes into schools talking to kids about being gay. I didn't want to be accused of anything similar, leaving that kind of content on my socials.

31. The way in which those words will have been understood by ordinary, reasonable readers is, it is submitted, clear. Mr Latham said that attention needed to turn to some of Mr Greenwich's disgusting habits, one of which was going into school to talk to kids about being gay, something so discreditable that it is something Mr Latham would not 'want to be accused of'. Mr Latham equated the Primary Tweet (about a sex act he had described as 'disgusting') with going into schools to talk about kids being gay. He said he had deleted the Primary Tweet because he '*didn't want to be accused of anything similar*' to the 'disgusting' sex act he had referred to in that tweet.

32. One would not describe a politician who goes to a school for a benign purpose as doing so because that is one of their 'habits', much less a 'habit' that makes that person 'a disgusting human being'. Mr Latham knew exactly what he was saying, and ordinary readers will have understood it too: Mr Latham was alleging that Mr Greenwich has a penchant for going to schools for the disgusting purpose of grooming children; of luring them into becoming gay; and of talking to them about sex acts of the kind he had referred to in the Primary Tweet. The precise nature of the grooming alleged by Mr Latham, however, does not matter. The heart of it is that Mr Latham was branding Mr Greenwich as a danger to children and, as a consequence, not someone who is fit to sit in Parliament.

The maelstrom

33. Mr Latham's statements incited an extraordinary amount of hate-filled vitriol targeting Mr Greenwich. Some of the more extreme examples, taken from the annexures to Mr Greenwich's first affidavit, include:

    (a) A comment to Mr Greenwich's Electorate Office webpage left by 'Sir Donald Trump' on 3 April 2023, which stated, inter alia, '*…You must have a particular extreme hatred of women. Given that you are a sodomite – I guess that is understandable. No man should stick his dick up another man's anus. It's akin to sticking your dick into a sewerage pipe. God bless Mark Lathan who is one of the few public figures who will support women against perverts. Israel Folau spoke the truth. Unrepentant sodomites will fry in hell like bacon…*': **CB 742**.

    (b) An anonymous handwritten letter received on about 16 May 2023 that stated, '*Poor pathetic Pedo Pooftah. Throwing you "blokes" !!! over cliffs was too good for you! Should be hung, drawn and quarted (sic). Fucking Fairy Faggot! Horrible piece of shit. GO MARK!!*': **CB 788**.

    (c) An anonymous typed letter received on about 16 May 2023 that stated, '*Greenwich You piece of poofta shit You fucking alphabet cunt All you weirdo up the arse mongrels should be publically (sic) executed Fucking poofta cunt!!!*': **CB 790**.

(d) An anonymous voicemail left on about 18 May 2023, '*Alex Greenwich, you are a disgusting human being and your actions are even more disgusting. How dare you represent Sydney. Are you fucking serious? Go bury your head in shame*': **CB 831**.

(e) An anonymous voicemail left on about 19 May 2023, *'Miss Greenwich, poofter, paedophile, piece of shit faggot cunt. Jump over the gap you cunt*': **CB 835**.

(f) A Facebook message received on about 8 May 2023 that stated, *'Where (sic) you born a disgusting pedophile,…do you know what horrors kids are going through because of pedophiles in power you sick bastard*': **CB 843**.

34. Throughout April and May 2023, Mr Latham continued to make publications about Mr Greenwich and topics the subject of the maelstrom: Agreed Facts, [50] to [65]; **CB 125–128**. Mr Greenwich relies on Mr Latham's subsequent conduct in support of his claim for damages and aggravated damages: Statement of Claim (**SOC**), [33]; **CB 36–44**.

Overview of evidence to be relied upon

35. Mr Greenwich has affirmed two affidavits in the proceeding, on 28 February 2024 (**CB 130**) and 23 April 2024 (**CB 969**).

36. Mr Greenwich will address at trial the publication of Mr Latham's statements, the immediate fallout, and the subsequent conduct of Mr Latham and members of the public. In his first affidavit, Mr Greenwich deposes, graphically, to feeling emotionally, mentally and physically unsafe as a result of Mr Latham's attacks.

37. Mr Greenwich's evidence about the extreme impact of Mr Latham's statements is relevant to damages, and reminiscent of the evidence of the applicant in *Barilaro v Google LLC* [2022] FCA 650. In that case, Rares J said at [348] (our emphasis):

> Of course, as a politician, Mr Barilaro could expect many people in the community not to agree with his policies or to regard him well. He could expect public criticism and condemnation for his political conduct and stances as part and parcel of being in political life, particularly in as publicly prominent a position as he had as Deputy Premier and a party leader. **Hate filled speech and vitriolic, constant public cyberbullying, however, cannot be classified as in any way acceptable means of communication in a democratic society governed by the rule of law. Google's conduct after 22 December 2020 in leaving both Mr Shanks' existing and**

> **subsequently posted videos online magnified the hurt to Mr Barilaro's feelings, inflamed hate filled responses directed at him by members of the public in personal confrontations and on social media and allowed a perception, until the trial, that Google actually had a bona fide defence in this proceeding for its conduct.** That was conduct that was unjustifiable, improper (because of its contemptuous nature) and, in relation to the conduct of the proceeding, lacking in bona fides (as I explain below): *Rush* 380 ALR at 517–518 [431]–[432].

38. Mr Greenwich will also rely on the evidence of the following individuals who observed Mr Greenwich after the publication of Mr Latham's statements and, in some cases, personally fielded hateful communications or are able to attest to his general good standing in the community:

    (a) Victor Hoeld, Mr Greenwich's husband of 12 years: **CB 882**;

    (b) Alexander Graham, Senior Electorate Officer at the Sydney Electorate Office of Mr Greenwich: **CB 904**;

    (c) Anne McCall, Electorate Officer at the Sydney Electorate Office of Mr Greenwich: **CB 914**;

    (d) Sarah Hanson-Young, Senator for South Australia in the Commonwealth Parliament, who has known Mr Greenwich for about 15 years: **CB 934**; and

    (e) Greg Piper, the Member for Lake Macquarie and the Speaker in the NSW Legislative Assembly, who has known Mr Greenwich for about 12 years: **CB 957**.

39. The evidence will establish that the public reaction to Mr Latham's statements was so hateful and serious that it resulted in, among other matters:

    (a) an adverse impact on not only Mr Greenwich but also his husband and the staff of his Electorate Office;

    (b) Mr Greenwich directing his staff to lock the front door of the Electorate Office for one week, and at other times when people in the office felt unsafe;

    (c) the involvement of NSW Police, including to attend the Electorate Office to demonstrate and aid in the implementation of a process for handling suspicious mail;

(d) Mr Greenwich withdrawing from some public commitments and generally feeling unsafe and intimidated about being in public;

(e) a change in Mr Greenwich's demeanour and confidence, to the point that he has questioned whether he has the fortitude to continue in public office; and

(f) Mr Greenwich seeking assistance from a psychologist.

Publication – Primary Tweet

40. There are some limited matters in issue concerning publication of the Primary Tweet: Agreed Issues, [1] to [3]; **CB 103–104**. The Agreed Facts and evidence relied upon by Mr Greenwich, however, comfortably establish virtually immediate and widespread publication of the Primary Tweet, and then foreseeable republications of the Primary Tweet which gave it a notoriety such that there would scarcely be a person in New South Wales who was not aware of it.

41. There are unlikely to be any issues in relation to the publication of the DT Quotes in the DT Article. The website of the *Daily Telegraph* is a primary source of news and information about events in New South Wales, and it can readily be inferred that it is widely viewed and read in every State and Territory of Australia.

Identification – Primary Tweet

42. Mr Latham has put in issue whether Mr Greenwich was reasonably identified by the readers of the Primary Tweet. The number of persons who reasonably identified Mr Greenwich is also in issue.

43. The issue is easily resolved and, with respect, ought not to be pressed by Mr Latham.

44. The Primary Tweet was a response to the Metcalfe Tweet, which identified Mr Greenwich by name. Readers of the Primary Tweet saw it because it was a comment upon the Metcalfe Tweet. They cannot have been in any doubt about the target of Mr Latham's attack.

45. The evidence plainly establishes that those who saw the Primary Tweet were not under any misapprehension. They well knew, as all of the public commentary recognised, that Mr Latham's target was Mr Greenwich.

Defamatory meaning

46. Mr Greenwich pleads that, in their natural and ordinary meaning:

    (a) the Primary Tweet carried the imputation, or an imputation not different in substance, that, '*Mr Greenwich engages in disgusting sexual activities*': SOC, [15], **CB 20**; and

    (b) the DT Quotes carried the imputation, or an imputation not different in substance, that, '*Mr Greenwich is a disgusting human being who goes to schools to groom children to become homosexual*': SOC, [24], **CB 22**.

47. Mr Greenwich also brings a true innuendo case, pleading that:

    (a) the Primary Tweet, to persons who had read the Metcalfe Tweet and knew that Mr Greenwich is a member of the NSW Parliament, carried the imputation that '*Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he engages in disgusting sexual activities*': SOC, [16], **CB 20**; and

    (b) the DT Quotes, to persons who knew that Mr Greenwich is a member of the NSW Parliament, carried the imputation that '*Mr Greenwich is not a fit and proper person to be a member of the NSW Parliament because he goes to schools to groom children to become homosexual*': SOC, [25], **CB 22**.

48. It can be inferred that most, if not all, of the readers of the Primary Tweet and the DT Quotes knew the extrinsic facts relied upon for the purposes of the true innuendo case. That is because readers of the Primary Tweet will have come across it because it was a comment on the Metcalfe Tweet, and so will have read it in the light of the contents of that tweet; and because it is a matter of notoriety that Mr Greenwich is a member of the NSW Parliament.

49. The Court is required to determine the meaning or the Primary Tweet and the DT Quotes objectively, by reference to the standards of the hypothetical ordinary reasonable reader. The principles are well-settled. The ordinary reasonable reader is (see eg *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258-60 per Lord Reid; *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 per Hunt J; *Amalgamated Television Services*

Pty Ltd v Marsden (1998) 43 NSWLR 158 at 165; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (HL), 69–74): (a) of fair, average intelligence, experience and education; (b) fair-minded; (c) neither perverse, morbid nor suspicious of mind, nor avid for scandal; (d) a person who does not live in an ivory tower, but can and does read between the lines in light of general knowledge and experience of worldly affairs; (e) a person who does not search for strained or forced meanings; and (f) a person who reads the entire matter complained of and considers the context as a whole.

50. The manner in which the publication was actually understood is irrelevant to the question of meaning (but relevant to the question of damages): *Lee v Wilson and McKinnon* (1934) 51 CLR 276 at 288 (per Dixon J). So, whilst there is a substantial body of evidence in this case about the public response to Mr Latham's statements, showing that many people in fact understood them to carry the imputations pleaded by Mr Greenwich, that evidence is to be put to one side at the stage of determining meaning.

51. We have addressed the way in which we submit ordinary, reasonable readers would have understood the meaning of the Primary Tweet and the DT Quotes in [20]–[21] and [31]–[32] above respectively. Ultimately, however, the meaning of the matters complained of is a matter for the Court, which is not bound by the meanings pleaded by the parties, subject only to the limitation that an applicant cannot succeed on a meaning which is substantially different from, or more serious than, a pleaded meaning: *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667; *Setka v Abbott* (2014) 44 VR 352 cf *Fairfax Media Publications Pty Ltd v Bateman* [2015] NSWCA 154 (a case relating to pleading practice in the State Courts of NSW).

52. All of the imputations pleaded by Mr Greenwich are defamatory, in that they satisfy the classic test of lowering the esteem in which Mr Greenwich is held by the community: *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at [3] (French CJ, Gummow, Kiefel and Bell JJ). Ordinary people will, we submit obviously, think less of persons who engage in disgusting sexual activities; who go into schools to groom children; and who because of their conduct are not fit and proper persons to hold elected public office.

53. In addition, the imputations relied on by Mr Greenwich are defamatory, in that they tend to expose him to hatred, contempt or ridicule. In *Parmiter v Coupland* (1840) 151 ER 340, Parke B said at 342:

> A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is libel.

54. As that classic statement expressly recognised, a publication which exposes a person to hatred, contempt or ridicule is a publication that injures the person's reputation.

55. The test in *Parmiter* has been recognised and applied in a number of Australian cases. An example is *Ettinghausen v Australian Consolidated Ltd* (1991) 23 NSWLR 443. In that case, Hunt J ag 449 found an imputation that Mr Ettinghausen '*is a person whose genitals have been exposed to the readers of the defendant's magazine "HQ", a publication with a widespread readership*', exposed Mr Ettinghausen to more than a trivial degree of ridicule and that the imputation was accordingly capable of defaming him. See also *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449, where Hunt J found a newspaper article branding a professional footballer '*fat, slow and predictable*' was capable of being defamatory because it exposed him to ridicule, and because it may have imputed that he allowed his physical condition to degenerate. An English example of the application of the test is *Berkoff v Burchill* [1997] EMLR 139: imputation that the plaintiff was hideously ugly.

Republication of the DT Quotes in the DT Article

56. Mr Greenwich alleges that Mr Latham is liable for the republication of the DT Quotes in the DT Article: see Agreed Issues [10]–[13] (**CB 105**) and SOC, [22] (**CB 21**).

57. Mr Latham admits that he knew and intended the journalist to whom he published the DT Quotes would republish them: Agreed Fact, [45] (**CB 122**). Mr Latham also admits that it was a natural and probable consequence of the publication of the DT Quotes that the journalist would republish them: Agreed Fact, [46] (**CB 123**). In the light of those admissions, Mr Latham's liability for republication has been established in accordance with the usual principles: see eg *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 321; *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd* [2018] NSWCA 325 at [187].

58. The DT Article was published online on about 1 April 2023 and remained accessible at the date of the SOC, being 26 May 2023: Agreed Fact [41] (**CB 122**). The *Daily Telegraph* is a mass media publication in Australia. There is evidence of a digital reach of 3.73 million people: **CB 284**. The copy of the article in SOC, Schedule B records 46 comments on the article: **CB 58**.

Element of Serious Harm

59. Mr Greenwich is required to establish the serious harm element in s 10A(1) of the *Defamation Act 2005* (NSW) (***Defamation Act***), namely that, '*…the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*'

60. There are six issues relevant to the element of serious harm. Agreed Issues [14] to [18] (**CB 105–6**) are causation issues. Issue [19] (**CB 106**) is about the relevance of the matters pleaded in paragraph 30 of the SOC (**CB 23–36**).

61. Mr Greenwich relies upon the following matters pleaded in paragraph [30] of the SOC: (a) the extent of publication: [30.1]; (b) the seriousness of the imputations: [30.2]; (c) the demeaning language used in the matters complained of in connection with Mr Greenwich's sexuality and assumed sexual conduct: [30.3]; and (d) the hateful conduct of members of the public following and as a result of the publication of the matters complained of: [30.4].

62. As we have endeavoured to set out by way of overview above, the vitriolic hatred heaped upon Mr Greenwich following Mr Latham's statements was striking, disturbing, threatening and dispiriting. There can be no doubt that serious harm was caused. The harm was to reputation, for the reasons identified above in relation to defamatory meaning: readers *in fact* understood Mr Latham's statements to carry imputations to the effect pleaded by Mr Greenwich.

63. Principles relevant to serious harm were recently summarised in *Selkirk v Wyatt* [2024] FCAFC 48 at [41] to [52] (Besanko J, Anderson and O'Sullivan JJ agreeing, on appeal from *Selkirk v Hocking (No 2)* [2023] FCA 1085).

64. In *Hun To v Aljazeera International (Malaysia) SDN BHD* [2023] FCA 1103, McEvoy J in determining applications for the serious harm element to be dealt with as a separate matter, considered, relevantly, the following matters to bear on the serious harm question:

(a) the gravity of the pleaded imputations, observing at [41]:

> Although it may be accepted that in considering whether there has been serious harm the focus should be on the damage to reputation and not the imputations themselves (as to which see *Rader* at [19]), if it is concluded that the imputations are made out it will be open to the Court to draw inferences based on the totality of the circumstances, including the seriousness of the imputations conveyed and the inherent tendency of them to cause harm.

(b) the nature and extent of the publications, and the fact that they were mass-media publications: [43] to [46].

Defences – principles to be applied

65. The positive defences relied on by Mr Latham will be addressed in closing submissions. Set out below are the principles to be applied in respect of those defences.

Common law qualified privilege and reply to attack

66. Mr Latham alleges that he is entitled to the protection of the form of common law qualified privilege defence which applies to a reply an attack.

67. In *Hamilton v Clifford* [2004] EWHC 1542 (QB), Eady J said at [66] (our emphasis):

> It is hardly capable of challenge that each of [the complainant's] remarks, which are said to have been subsequently republished, is reasonably to be described as a 'public attack'. In those circumstances a defence of qualified privilege could be deployed in accordance with the authorities governing 'reply to attack': for a recent example see *Vassiliev v Frank Cass* [2003] EMLR 33. The defendant would be entitled to protect his reputation by **a proportionate response which was appropriate both in terms of subject matter and scale of publication. In order for a defendant to avail himself of this form of privilege, the response should not go into irrelevant matters or, in particular, cross over into an attack on the integrity of the claimant if it is not reasonably necessary for defending his own reputation**.

68. The relevant principles have been recently discussed in *Palmer v McGowan (No 5)* [2022] FCA 893 at [374] to [379].

69. Mr Latham's attack was, obviously, neither proportionate nor appropriate in terms of subject matter. It went into wholly irrelevant matters, amounting to an attack on the humanity of Mr Greenwich, something which was manifestly not necessary for Mr Latham to defend his own reputation.

Lange defence

70. Mr Latham also relies on the extended form of common law qualified privilege known as the *Lange* defence, arising from the decision in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 (***Lange***). In *Lange*, the Court said at 571:

> The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution…

71. The *Lange* defence requires defendants to establish they acted reasonably: *Lange,* 573.

72. Mr Latham's conduct in publishing the Primary Tweet and the DT Quotes was, we submit plainly, not reasonable. Mr Latham can have had no reasonable belief in the truth of the imputations carried by the Primary Tweet and the DT Quotes.

Statutory qualified privilege – s 30, Defamation Act

73. Mr Latham also pleads the defence in section 30 of the *Defamation Act.* Section 30(1) provides:

> There is a defence of qualified privilege for the publication of defamatory matter to a person (the 'recipient') if the defendant proves that—
>
> (a) the recipient has an interest or apparent interest in having information on some subject, and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

74. For the purpose of s 30(1)(a), a recipient will have an apparent interest if Mr Latham proves that at the time of publication, he believed on reasonable grounds the recipient has that interest: s 30(2).

75. In respect of the assessment of reasonableness in s 30(1)(c), the Court may take into account the factors in s 30(3), but not all of those factors need to be taken into account and they are not exhaustive: s 30(3A).

76. The section 30 defence will fail for the same reasons as the *Lange* defence: there was nothing reasonable about Mr Latham's conduct in publishing the Primary Tweet and the DT Quotes. Mr Latham can have had no reasonable belief in the truth of the imputations carried by the Primary Tweet and the DT Quotes.

Malice

77. All qualified privilege defences, if otherwise available, would be defeated if Mr Greenwich proves Mr Latham's dominant motive actuating the publication of the Primary Tweet and the DT Quotes was one of malice.

78. Mr Greenwich alleges that Mr Latham was actuated by malice: Reply, [3(b)], [4], [5(b)], [6], [7], [8] (**CB 94**). In particular, Mr Greenwich alleges that Mr Latham's dominant motivation in publishing the Primary Tweet and the DT Quotes was an improper one, namely to expose Mr Greenwich to public humiliation, ridicule, contempt and hatred by reason of Mr Greenwich's sexuality.

Public interest defence – Defamation Act, s 29A

79. Section 29A(1) of the *Defamation Act* provides:

> It is a defence to the publication of defamatory matter if the defendant proves that—
>
> (a) the matter concerns an issue of public interest, and
>
> (b) the defendant reasonably believed that the publication of the matter was in the public interest.

80. The court must take into account all of the circumstances of the case, and in doing so may take into account the factors in s 29A(3), although not all of those factors must be taken into account and they are not exhaustive: s 29A(2).

81. The element in paragraph (b) of the defence imports both subjective and objective elements: the applicant must *subjectively* believe that their publication is in the public interest; and that belief must be *objectively* reasonable. Neither element is present here.

82. As to the first, the defence must fail in the absence of evidence from Mr Latham. Recently in *Russell,* Lee J said at [321] to [323] (our emphasis):

> [321] Section 29A(1)(b) is concerned with the respondent's actual state of mind at the time of publication: see, comparably, *Doyle v Smith* (at [75] per Warby J). The respondent must prove belief that the publication of the matter was in the public interest: see *Lachaux* QB (at [131] per Nicklin J).
>
> [322] Put another way, this element of the defence is not made good by showing that a notional reasonable person in the respondent's position could have believed that publication was in the public interest. **The respondent must prove this element by adducing evidence that the publisher turned the publisher's actual or attributed mind to the issue and did hold the relevant belief: *Turley v Unite the Union* [2019] EWHC 3547 (at [138(vii)] per Nicklin J). The significance of this aspect of the defence should not be understated.** Ex post rationalisations are not enough. In some ways it is analogous to person who made a future representation being required, among other things, to point to some facts or circumstances existing at the time of the representation on which the representor in fact relied to support the representation made: see, for example, *Sykes v Reserve Bank of Australia* [1998] FCA 1405; (1998) 88 FCR 511 (per Heerey J at 513); *Botany Bay City Council v Jazabas Pty Ltd* [2001] NSWCA 94; [2001] ATPR 46-210 (at [84] per Mason P).
>
> [323] The statutory formulation directs focus to the publisher's belief, not in the truth of what was published (cf *Morgan v John Fairfax* (at 387F–G per Hunt AJA)), but in the public interest in publishing the matter in question.

83. As to the second element, it fails for reasons similar to those in respect of the *Lange* and section 30 defences. Whatever his subjective views might have been, no person in Mr Latham's position could have held a reasonable belief in the truth of the imputations carried by the Primary Tweet and the DT Quotes.

Honest opinion – s 31, Defamation Act

84. Section 31(1) provides:

> It is a defence to the publication of defamatory matter if the defendant proves that—
>
> (a) the matter was an expression of opinion of the defendant rather than a statement of fact, and
>
> (b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

85. If Mr Greenwich proves that the opinion was not honestly held by Mr Latham at the time the defamatory matter was published, the defence will be defeated: s 31(4).

86. There are a number of reasons why this defence is untenable, which we will develop in closing, but in summary: (a) the Primary Tweet and the DT Quotes were clearly not expressions of opinion: cf s 31(1)(a); (b) they related to Mr Greenwich's private life, a matter which is not a subject of public interest: cf 31(1)(b); (c) they were not based on proper material: cf s 31(1)(c), see [23] above; and (d) Mr Latham cannot have honestly held an opinion to the effect allegedly expressed, in circumstances where he knew nothing about Mr Greenwich's sexual activities or what he spoke about in schools: cf s 31(4).

Damages and other proposed relief

87. Mr Greenwich makes a claim for damages, including aggravated damages. Submissions will be advanced in closing as to the appropriate award.

88. The relevant principles are not, however, likely to be in issue.

89. There must be an appropriate and rational relationship between the harm sustained and any award of damages: *Defamation Act*, s 34. The current maximum amount of damages for non-economic loss that may be awarded is $459,000 (from 1 July 2023; the amount will increase if judgment is not delivered before 30 June 2024): s 35(3) and Government Gazette No 250 of 9 June 2023. The maximum damages amount is to be awarded only in a most serious case: s 35(2). The damages amount may be exceeded where an award of aggravated damages is made, but only to the extent that the aggravation increases the damages beyond the cap: s 35(2A).

90. Aggravated damages are to be awarded separately from an award of damages for non-economic loss: s 35(2B), *Defamation Act*.

91. Mr Greenwich relies on the matters in SOC, [33] (**CB 36**) and Reply, [2] (**CB 94**), in support of his claim for aggravated damages. A claim for aggravated damages will be warranted if the Court is satisfied that Mr Greenwich's hurt has been subjectively

increased because of conduct by Mr Latham that was lacking in bona fides, improper or unjustifiable: *Triggel v Pheeney* (1951) 82 CLR 497.

92. An issue in the case is whether the concerns notices (**CB 863**) and a response to the concerns notice from Mr Latham's former solicitor (**CB 880**) is admissible at trial: Agreed Issue [43] (**CB 112**).

93. Additionally, Mr Greenwich seeks injunctive relief. In determining whether that relief is appropriate, the Court will need to consider the threat or risk of repeated publication of the defamatory matters successfully sued upon: *Carolan v Fairfax Media Publications (No 7)* [2017] NSWSC 351. In that regard, Mr Greenwich relies on the existence of a self-evident threat or risk, having regard to the extended campaign that Mr Latham has engaged in against Mr Greenwich, including by the conduct particularised in SOC, [33.5] (**CB 37–44**).

Costs

94. Submissions as to costs will be developed following judgment.

DATED: 15 May 2024

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S Jeliba

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