No. NSD 475 of 2023

Federal Court of Australia

Registry: New South Wales

Alexander Greenwich

Applicant

Mark William Latham

Respondent

RESPONDENT'S OUTLINE OF OPENING SUBMISSIONS

A. OVERVIEW and ISSUES

1. On 22 March 2023, Mr Greenwich was quoted by the Sydney Morning Herald, describing Mr Latham, as a disgusting human being, comments which were repeated on Twitter. On 25 March 2023, the New South Wales State election was held. On 30 March 2023, Mr Latham published a tweet in response (**Primary Tweet**).

2. The Primary Tweet was online for only a few hours before it came down, but the response of public figures, and the mass media, was immediate and strong, overwhelmingly criticising Mr Latham, and in various ways supporting Mr Greenwich. The response was from prominent figures across the political spectrum, including the leader of Mr Latham's own party. So far as the evidence reveals, no significant public figure expressed support for Mr Latham.

3. In the aftermath of Mr Latham's tweet, some members of the public took it upon themselves to send insulting messages by email, mail and telephone to Mr Greenwich's electoral office, and on social media (**insulting messages**). The evidence shows that Mr Greenwich otherwise experienced support and sympathy from the public.

4. Mr Greenwich himself was apparently hurt and offended by Mr Latham's tweet. He sued for defamation, and, separately, for breach of the *Anti-Discrimination Act* 1977 (NSW). He also complained to the police about Mr Latham (aff [92] AB 159).

5. This case does not raise the question of how the law generally does, or should, treat Mr Latham's conduct, but how the law of defamation does. It squarely raises the question whether, in the circumstances, Mr Latham's tweet was defamatory or caused or was likely to cause serious harm to Mr Greenwich's reputation.

B. PRINCIPLES RE HARM TO REPUTATION AND DEFAMATORY MEANING

6. Since publication is admitted for both matters complained of, the issues which arise for each publication: **(a)** were the relevant pleaded imputations carried; **(b)** were such imputation defamatory; and **(c)** has the applicant established (for each publication) the serious harm element? There is an overlap between the issues, but they are distinct and evidence is not receivable in relation to (a) and (b) but is receivable in relation to (c).

7. From the time of the emergence of the modern law of defamation, it has been concerned with harm to reputation, not with outrage or insult: Spencer Bower, *A Code on the Law of Actionable Defamation* (2nd ed, 1923), at p.4, fn(s). The requirement that there be publication to a third party also reflects this: *ibid*. Words can injure a person's pride (that is, be insulting) without injuring his or her reputation: *Mundey v Askin* [1982] 2 NSWLR 369, at 372B-C; *Dell'Olio v Associated Newspapers Ltd* [2011] EWHC 3472, per Tugendhat J at [32]. Thus, words that cause offence, no matter how great, were not actionable as slander: Starkie, *A treatise on the law of Slander and Libel* (2nd ed, 1830) at pp.44-45. In Australia, the distinction between libel and slander is abolished (Defamation Act 2005 (NSW) (**DA**) s 7), but with disappearance of the presumption of damage (see below), actual serious harm to reputation must now be shown.

(a) Meaning carried?

8. The principles for determining meaning are well-settled. In addition to the principles and authorities set out at AOS [49]-[50] (which the respondent accepts), recent helpful statements include *Rush v Nationwide News Pty Ltd (No.7)* [2019] FCA 496 at [72]-[91] and *Schiff v Nine Network Australia Pty Ltd (No. 2)* [2022] FCA 1120 at [5]-[13] per Jagot J, and the cases there cited. The test is objective and considers the position of the ordinary reasonable person (**ORP**). It is the modern practice for a plaintiff to identify the meaning carried as an imputation: *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; 271 FCR 632 (per Besanko, Bromwich and Wheelahan JJ) (**Chau**) at [15].

9. The single meaning rule means that the issue is the single meaning that an objective audience composed of ordinary decent persons should have collectively understood the matter to bear, and in evaluating whether any individual imputation is conveyed, an applicant is precluded from succeeding merely because a substantial number or proportion in the audience would have understood the words to have that defamatory meaning: *Chau at* [32]-[33].

10. Where words, in context, would be understood as amounting only to vulgar abuse they are not actionable, as they do not carry a distinct defamatory meaning: *Mundey*, at 372B-C; *Blake v Fox* [2023] EWCA Civ 1000 at [27]; *O'Neill v Carson* [2023] NIMaster 9 at [31], [57], [61]. All such words convey is general intense dislike or general disapprobation, but do not make a distinct charge; that is not regarded as carrying a defamatory meaning.

11. When it comes to interpreting social media posts such as Twitter, regard has to be had to the impressionistic nature of the medium and over analysis is to be avoided: *Bazzi v Dutton* [2022] FCAFC84; 289 FCR 1 at [29]-[33]. (As to the mechanics of Twitter, see the appendix to *Monroe v Hopkins* [2017] EWHC 433; [2017] 4 WLR 68 under the heading "How Twitter Works" at 17-18). However, the context of publication includes the whole of the publication containing the impugned words, and the ordinary reasonable reader is taken to have read it all: *Hockey v Fairfax Media Publications Pty Ltd (No 2)* [2015] FCA 750; 237 FCR 127; at [65]-[66].

12. Under modern pleading practice in this Court, the applicant's case is shaped by the meanings alleged in the statement of claim: see *Chau* at [16], [18]. It is not a correct statement of the law to say in such broad terms that neither the judge or jury are "confined to the meanings asserted by the parties": see *Chau* at [16]. This is not to say that this Court does not have some limited flexibility in evaluating meanings. Applicants may succeed upon imputations that do not differ in substance from the pleaded imputations, and are not more injurious: see *Chau* at [18]. First instance judges of this Court, after *Chau*, have described the boundaries to extend to "meanings that are not substantively different in that they are comprehended in, or are a shade or nuance of, the pleaded meaning": *Nassif v Seven Network (Operations) Ltd* [2021] FCA 1286 at [80] per Abraham J; *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15*;* 387 ALR 123; at [15] per Lee J.

13. A general meaning is different in substance to a specific meaning: *Fairfax Media Publications Pty Ltd v Zeccola* (2015) 91 NSWLR 341 at [49]–[50]; *Abou-Lokmeh* v *Harbour Radio Pty Ltd* [2016] NSWCA 228 at [32] –[33]. A useful test for determining whether meanings differ in substance is to consider what evidence might be used to justify them: *Abou-Lokmeh* per McColl JA at [31], *Fenn v Australian Broadcasting Corporation* [2018] VSC 60 per John Dixon J at [16], and the cases there cited.

(b) Meaning defamatory?

14. In deciding whether a publication has a defamatory character, the test is whether the published matter is likely to lead an ordinary reasonable person to think less of a plaintiff: *Radio 2UE Sydney P/L v Chesterton* (2009) 238 CLR 460, at 467 [5]; [36]. It involves reference to hypothetical referees who are taken to share a moral or social standard by which to judge defamatory character: *Chesterton* at [7] following Brennan J in *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, at 506. The hypothetical referee will apply general community standards: *Chesterton* at [39]-[40], [43]. Recently in the United Kingdom, this has been styled as the "consensus requirement" – *Corbyn v Millett* [2021] EWCA Civ 567 at [9] – the test is the same. See generally, *Gatley on Libel and Slander* (13th ed, 2022), at [2-015].

15. Attention is directed to the imputation found to be carried, but context is important and the imputation must be considered in the context of the matter complained of, not in isolation: *Bennette v Cohen* (2005) 64 NSWLR 81, at 91 [25]; *Greek Herald Pty Ltd v Nikolopoulos* (2002) 54 NSWLR 165 at 172 [19]-[27]; *Chau* at [169]; *Green v Fairfax Media Publications Pty Ltd [No 4]* [2021] WASC 474, at [175].

16. Evidence of the standards of a particular group or class is not admissible (or relevant): *Chesterton* at [44]. In terms of harm to reputation, the question is not whether in *some groups or classes within the community* there may be an adverse impact not discernible among the general community -- such an impact is irrelevant on liability: *Costello v Random House* (1999) 137 ACTR 1, at [85]; *Lamb*, at 506-507; *Monroe* at [50]-[51]. One test is whether the conduct in question is illegal or by the standards of society as a whole, immoral: *Monroe* at [51]. The test is objective not decided by reference to what people actually thought the publication meant or how they reacted to it: *Monroe* at [23(2)].

17. The state of public opinion is a matter for the Court, and will change over time: *Gatley* at [2-021]. This is clear in relation to matters of sexual behaviour over the last 40 years where there has been radical change: *Gatley* at [2-021], and [2-025].

18. It is a matter for the Court what it considers are the moral and social values of the ordinary reasonable members of the community. They are however obviously different to what they were 50 or even 30 years ago on questions of consenting relationships between adults of the same sex.

19. The ordinary reasonable member of the community does not care what consenting adults do legally in the privacy of their own homes. Well before same sex marriage became legalised in Australia, ordinary reasonable members of the community proceeded on a basis of tolerance toward people differing sexualities, just as they did toward people of different religions or ethnicities. Whatever particular, actual, individuals may think on such topics, the ordinary reasonable community values on such matters are taken to be uniform.

Ridicule?

20. The applicant also relies on cases in which it said "ridicule" was a basis for finding defamatory character: see Applicant's opening submissions (**AOS**) [53]-[55]. The starting point is that the test for defamatory character is stated in *Chesterton* in general terms. What is required is that the meaning of the publication causes ordinary reasonable people to think less of the plaintiff. There is a shrinking category of cases based on the notion of publications which might cause reasonable people to shun and avoid the plaintiff: see *Gatley* at [2-010], but in any event the applicant does not appear to rely on these. Rather the applicant seeks to rely on the "ridicule" cases.

21. The only relatively recent appellate discussion of "ridicule" in this context appears to be in *Berkoff v Burchill* [1996] 4 All ER 1008. This was not a case about whether a publication in fact bore a defamatory meaning but whether it was capable of doing so: at 1011 a. Neill LJ referred to "ridicule" at 1014 j but immediately noted that "*insults which do not diminish a man's standing among other people do not found an action for libel or slander*". Having regard to the previous authorities quoted by his Lordship which included *Sim v Stretch* (see at 1012f), this comment should be understood to mean standing with right-minded members of society generally (see also at 1016 h), and note generally his Lordship's treatment of *Winyard* at 1016 d-1017 a.

22. The way the case was put in *Berkoff* involved the fact that an allegation that he was very ugly might affect his standing among theatregoers and casting directors: see at 1018a. And this was the way that Neill LJ decided the case, which he found far from easy that it was at least capable of lowering an actor's reputation by saying he was hideously ugly: see at 1018 f-g. Phillips LJ (reaching the same result) thought it was impossible to accept that a right-minded person would shun another merely because a third party had expressed distaste for that other person's features: at 1020j-1021a. In relation to ridicule, his Lordship considered that it could not be said, without more, that saying that an individual was hideously ugly might never be defamatory: see at 1021f-h. Millet LJ dissented, noting that defamation was an attack on reputation (at 1019 c) and said at 1020 a-b:

> "It is one thing to ridicule a man; it is another to expose him to ridicule. Miss Burchill made a cheap joke at Mr Berkoff's expense; she may thereby have demeaned herself, but I do not believe that she defamed Mr Berkoff."

23. The two first instance decisions of Hunt J relied on by the applicant (*Boyd v Mirror Newspapers* [1980] 2 NSWLR 449 and *Ettingshausen v Australian Consolidated Ltd* (1991) 23 NSWLR 443, were both (like *Berkoff*) capacity questions. Although in *Boyd*, Hunt J refers to the notion of ridicule (see at [11]), he appeared largely to decide the case on the basis of whether the meanings could be understood as attributing fault to the plaintiff: see at [17], [21]-[25], [34]-[35]. *Ettingshausen* more directly involved a holding that an imputation based on ridicule was capable of being defamatory: see at 447E-449D. It is submitted that the decision is wrongly decided, including because of its reliance on *Youssoupoff* (at 447 F), a decision which would almost certainly not be followed today. The correct test to apply was still the question whether it would have caused ordinary reasonable people to have though less of Mr Ettinghausen or to have shunned and avoided him.

24. In any event, these decisions only stand for the proposition that a publication may be defamatory if it exposes the plaintiff to more than a trivial amount of ridicule in the minds of ordinary reasonable people. Most instances of ridicule, in the eyes of ordinary reasonable people may damage the reputation of the ridiculer, but not the ridiculed.

(c) Serious harm element

25. Section 10A is based on s 1 of the *Defamation Act* 2013 (UK). The formal differences between the two provisions have not so far been regarded as significant:[1] *Newman v Whittington* [2022] NSWSC 249 per Sackar J at [67]-[68]; *Selkirk v Wyatt* [2024] FCAFC 48 at [42]. Australian courts have applied the English cases as offering guidance as to the interpretation of s 10A: see, eg *Newman* at [68]; *Selkirk v Wyatt* at [41]-[52]; *Peros v Blackburn* [2023] FCA 177, at [41]-[42]; *Selkirk v Hocking (No 2)* [2023] FCA 1085, at [17] ff. The serious harm provision imposes a higher threshold of seriousness than the common law rules which were seen unduly to favour protection of reputation at the expense of freedom of expression: *Lachaux v Independent Print Ltd* [2019] UKSC 27; [2020] AC 612 at [1], [12]. It intended to effect a substantial change to the law of defamation: *Lachaux* at [16].

26. Section 10A applies in this Court: *Selkirk v Hocking (No 2)* at [15].

27. The leading case on serious harm is *Lachaux* and the applicable principles have been summarised in a number of recent cases since including *Banks v Cadwalladr* [2022] 1 WLR 5236 at [51] (Steyn J); [2023] EWCA 219; [2023] 3 WLR 167 at [55]-[57], [61]-[62]; *Rader v Haines* [2022] NSWCA 198, per Brereton JA at [28]-[29], quoted with approval in *Selkirk v Wyatt* at [51]; *Supaphien v Chaiyabarn* [2023] ACTSC 240 at [104]-[121].

28. A short summation of the overall principles appears in *Rader* at [28](3):

> The requirement for serious harm to reputation is concerned with actual or likely reputational damage — that is, the impact of the imputation, in all the circumstances, on the plaintiff's reputation — arising from a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. It is not satisfied by the gravity of the imputation alone. Nor is it satisfied by injury to feelings, however great. Relevant factors include the meaning of the words, the extent of the publication, the nature of the recipients and their relationship with the plaintiff, and whether they believe the imputations.

29. Three obvious aspects of the serious harm provisions are (a) they focus on harm to reputation, (b) the harm must be serious and (c) the harm may be actual, or likely, where

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[1] An exception may be referred to in *Rader v Haines* at [17], namely whether English courts still need to consider defamatory meaning *per se*. *Rader* may not be right – compare *Gatley* at [4-005] which states that in England the words must still be defamatory at common law as well as meet the serious harm test.

likely has been held to mean "*probable future harm*": *Lachaux*, at [14]; "*probable, actual, future harm*": *Blake v Fox* [2024] EWHC 146, at [47].

30. Because of the focus on reputation, injury to feelings, however grave, does not bear on serious harm: *Rader* at [28](3) (set out above); *Monroe* per Warby J at [67]. Further, s 10A of Act has removed the presumption that defamatory imputations have caused damage (and also any presumption of a good reputation), so it is a matter for the applicant to prove as a matter of fact: *Selkirk v Wyatt* at [94].

31. The requirement of "serious" harm means that harm to reputation must be more than just substantial: *Rader* at [27]. However, it may be best to avoid seeking synonyms and to simply apply the statutory language: *Rader*, per Basten AJA at [91]; *Selkirk v Hocking (No 2)* at [29]-[32].

32. The "harm" of defamation is the actual impact of a publication in the mind of a third-party publishee, and thereby upon a claimant's reputation (*Supaphien*, at [107]) and not any specific action adverse to a claimant that the publishee may take as a result (or even the effect of such action) *Blake* [2024], at [49]. There must be an evidential basis for what difference the publications and imputations complained of made (or were likely in future to make) in real life, and the drawing of inferences is not a process of speculative guesswork: *Blake* [2024] at [53].

33. The causal language of the serious harm provisions means that defendants are responsible only for harm to a plaintiff's reputation caused by the effect of each statement (that is, publication) they publish in the minds of the readership of *that* statement: *Sivananthan* [2022] EWHC 2938 at [45], followed in *Amersi v Leslie* [2023] EWHC 1368 at [150]. Thus, when one is looking at third party communications, one needs to look only at those responses which are shown to be causally connected with the publication sued on: see eg *Barron v Vines* [2016] EWHC 1226 per Warby J at [44]-[47]; *Johnson v McArdle*, at [27](v). Causal connection in this context is not limited to whether the communications flow from the publication but whether they are reasonably foreseeable and a relevant consideration is whether the communications go beyond the meanings conveyed by the publication: *Barron* at [46]; see also *Banks* [2022] EWHC 1417, per Steyn J at [49](vii) (third party communications can only be evidence of reputational harm to the extent they can be said to be a natural and probable consequence of the publication). This issue of causation arises in relation to damages, where liability

does not extend to reaction by people that differed in substance from the imputations: see *Aktas v Westpac Banking Corporation Limited* [2007] NSWSC 1261, per Fullerton J at [91]-[96], and the cases there cited.

34. Comments posted online on the matter complained of can be evidence of reputational harm to the extent that they can be said to be the natural and probable consequence of the publication complained of: *Banks* CA at [65].

35. Where publication occurs to an audience which is already partisan, that may make serious harm harder to prove: *Sivananthan* at [57]. However, where a defendant publishes *a specific allegation of a seriously damaging kind* which would ordinarily lead to an inference of serious reputational ham, the fact that the recipients are politically opposed or already dislike the plaintiff does not mean serious harm is not caused: *Banks* CA at [55]. Thus, in *Monroe* at [71(8)] it was said "*if someone is hated for their sexuality or their left-wing views, that does not mean they cannot be libelled by being accused of condoning the vandalization of a war memorial*". Conversely, publishing a non-serious non-specific allegation may not lead to such an inference.

36. Serious harm has to be considered separately for each publication, that is serious harm is considered individually, not cumulatively: *Sube v News Group Newspapers Ltd* [2018] EWHC 1961; [2018] 1 WLR 5767 at [22]; *Banks* Steyn J at [50](iii); *Sivananthan* at [45]. This means that where a statement has been repeated or republished by a defendant, reliance cannot be placed on the effects of statements not sued on: *Sivananthan* at [46]. If there are prior or later publications by the defendant not sued on, that may make establishing causation of serious harm challenging: *Sivananthan* at [56]; *Amersi*, per Nicklin J at [147]-[150].

37. In *Lachaux v Independent Print* [2015] EWHC 2242; [2016] QB 402 at first instance, Warby J said at [65] that:

> "The Court may have regard to all the relevant circumstances, including evidence *of what has actually happened after publication*. Serious harm may be proved by inference, but the evidence may or may not justify such an inference. (Emphasis added.)

Warby J's legal analysis was regarded as correct by Lord Sumption on appeal (see *Lachaux* at [20]) and the above passage was quoted with approval by Nicklin J in *Turley v Unite the Union* [2019] EWHC 3547, at [108].

38. The approach to the serious harm element has been to require that people's minds were probably changed because of the publication and to a degree meriting the description of serious harm: *Blake* [2024] at [53], [83].

39. In carrying out that evidence based assessment (including inferences from evidence) it is the seriousness of the harm to reputation which is the focus, not the seriousness of the imputation: *Rader* at [19]. The duration of any harm to reputation suffered is relevant to whether it is "serious": *Rader*, at [32], [34]. Doubts held about a plaintiff for a short period which then dissipate are not likely to be serious harm: *Rader* at [66].

40. Where the allegations made are not inherently serious, it is not clear how far other evidence will assist an applicant. Put another way, *Lachaux* shows that the making of serious allegations may not be a sufficient condition to establish serious harm, but it does not show it may not be a necessary one: *Gatley* at [4-014]. Given the irrelevance of hurt to feeling and offence to serious harm, relatively unserious defamatory allegations will probably not cause (or be likely to cause) serious harm.

41. A question which does not seem to be directly addressed in the serious harm authorities to date is whether, when considering the "*inherent tendency of the words*" (that is, before turning to the evidence of how they were *actually* understood), one is considering the defamatory character of the publication (in which case the question is its impact on ordinary reasonable community members) or rather its effect on all recipients, however unreasonable, or unrepresentative of shared community values they may have been. The respondent submits that the former is the correct approach as that is inherent in the statutory language ("caused, or is likely to cause, serious harm to … reputation"), since allegations that may only affect a person's reputation with a special part of community are not treated as defamatory.

42. In considering the extent of publication, a defendant is only liable for republication which is intended, authorised or the natural and probable consequence of his or her publication. Further, the original publisher is in any event only liable for publications which do not change the sense and substance of the original publication: *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550; 359 ALR 564.

C. Legal principles: defences

43. **Section 31** of the Act[2] relevantly requires that (a) the defamatory matter was an expression of opinion of the defendant, (b) the opinion related to a matter of public interest and (c) the opinion was based on proper material.

44. As to (a), the inquiry requires consideration of the meanings found to be conveyed but is not constrained or dictated by their terms: *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15; (2021) 387 ALR 123, per Lee J at [131]; *Dutton v Bazzi* [2021] FCA 1474, per White J at [72]-[74]; *Kumova v Davidson (No 2)* [2023] FCA 1 at [272]. The question is whether the matter would have been understood by the ORP to be an expression of opinion: *Kumova* at [271]; There are some terms that will almost always signify opinion: *Blake* [2023] at [29]. A statement may qualify as a comment if it appears to be a deduction, inference, conclusion, judgment, remark or observation come to by the writer or speak from facts state or referred to by him, or in common knowledge: *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60; (2007) 232 CLR 245 at [35]; Nettle JA in *State of New South Wales v IG Index plc* [2007] VSCA 212; (2007) 17 VR 87 per Nettle JA at [48].

45. As to (b), public interest may constitute a wide variety of matters and should not be confined within narrow limits. See *Stead*, at [141] *Dutton v Bazzi* at [103]-[105].

46. As to (c), the material on which the opinion is based is determined by reference to what the ORP would have understood from the impugned matter to have been intended by the author to be considered the basis for his or her comments: see *Dutton v Bazzi* at [123]; *O'Neill v Fairfax Media Publications Pty Ltd (No 2)* [2019] NSWSC 655 at [106]. It may include hyperlinked material (*Dutton v Bazzi*, at [126], and see now s 31(5)(a)(iii). Once that is done, that material will be proper if it is true and was set out in the defamatory matter or otherwise apparent: see UDA s 31(5). The requirement that the opinion be "based on proper material" must be capable of being rationally based on it but "[t]he opinion may be extreme or even insulting and not one shared by ordinary reasonable readers but nevertheless be capable of being rationally based on the proper material": *Dutton v Bazzi* at [150]; *Kumova* at [271].

47. **Common law qualified privilege (reply to attack):** The principles applicable to this defence were extensively considered and summarised by White J in *Gould v Jordan (No*

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[2] Note the form of s 31 was amended somewhat with effect from 1 July 2021.

2) [2021] FCA 1289, at [50]-[75]; see also *Harbour Radio Pty Ltd v Trad* [2012] HCA 44; (2012) 247 CLR 31, per Gummow, Hayne and Bell JJ at [32]-[35]; *Palmer v McGowan (No 5)* [2022] FCA 893; 404 ALR 621, per Lee J at [374]-[379].

48. Put shortly, the law recognises a legitimate right or interest in a party whose reputation (or that of his business or family or associates) has been attacked to respond publicly, dealing with the content of the attack or the credibility of the attack or the credibility of the person making the attack. Where a strong attack is made, the defence may extend to counterattack and need not "adhere to the Queensbury rules": *Penton v Calwell* (1945) 70 CLR 219, per Dixon J at 233-4.

49. **Section 30 DA**: this requires that (a) the recipients had an interest or apparent interest in having information on some subject, (b) that the matter is published accordingly and that the conduct in publishing is reasonable in the circumstances. Where s 30 is relied on by a non-commercial media publisher, that fact, and all the circumstances surrounding the publication may be relevant: see, for example, *Templar v Watt* [2016] NSWSC, per McCallum J at [76]-[77].

50. **Section 29A DA:** this requires that (a) the matter concerns an issue of public interest and (b) the defendant reasonably believed that the publication was in the public interest. While (b) requires proof on the balance of probabilities of that state of affairs, there is no reason why in an appropriate case that cannot be done based on inferences from other facts, rather than direct evidence, and nothing in *Turley* suggests otherwise. To the extent that Lee J held otherwise in *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 at [322], his Honour was plainly wrong.

D. Application: defamatory meaning and serious harm: Primary Tweet

(a) Imputation carried?

51. **Imputation 15.1** is that "*Mr Greenwich engages in disgusting sexual activities*". It was not carried to the ORP by the Primary Tweet because:

    (a) The Primary Tweet includes the quote from Mr Greenwich, so the reason for referring to "disgusting" was apparent to the ORP – it echoed an attack on Mr Latham. The same quote made clear the political context ("*people who are considering voting for One Nation … they are voting*").

(b) In that context, the Primary Tweet was about homosexual men generally, not the applicant – that is, its meaning was a retort, "if you say I'm disgusting, what about the sort of sexual conduct which gay men engage in?".

(c) *Some* readers might have thought it was referring to Mr Greenwich personally, but that is not the more obvious reading in context.

(d) Further, the applicant has cast his imputation at too high a level of generality – it wasn't about "disgusting sexual activities" generally (which would extend to lack of consent etc) but to homosexual sex, which was said to be disgusting.

52. **Imputation 16.1** is 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*". It was not carried to the ORP by the Primary Tweet because:

(a) As to "*engages in disgusting sexual activities*", see above re imputation 15.1.

(b) As to "*not a fit and proper person to be a member of the NSW Parliament*", this goes well beyond the context of the Primary Tweet, which is obviously a response to Mr Greenwich's attack on Mr Latham. The attempt at AOS [20]-[21] to tie together the reference to voting in the words attributed to Mr Greenwich, with Mr Latham's words, is an example of the sort of overly elaborate analysis of a Tweet that was decried in *Bazzi*, and *Stocker*, and should not be accepted as the single meaning of the Primary Tweet.

(b) Imputation defamatory?

53. If **imputation 15.1** is carried, the context is important – it was political and arose as a response to Mr Greenwich's attack, as the form of the Primary Tweet makes clear. Leaving to one side its capacity to cause *offence* (either in Mr Greenwich or others), the question is whether it would cause ordinary reasonable people to think less of Mr Greenwich.

54. The starting point is that the fact that it carried the meaning that Mr Greenwich engaged in homosexual sex would not today be regarded as causing ordinary reasonable people to think less of him, absent some special circumstances, which were not present (e.g. violation of religious vows): *Gatley* [2-025], esp at fn 279; *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432, per Bell J at [24]-[31]; *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; 201 ALR 77, per Kirby J at [140]. Since

2003, the position has become even clearer eg changes to marriage and adoption laws, changes to the *Anti-Discrimination Act* in New South Wales, but also the widespread and obvious acceptance of openly homosexual men and women in public life.

55. If the Court finds that imputation 15.1 is carried, then it still has to be understood in the context of the matter. It is not to the point in evaluating defamatory character that Chesterton referees would think less of a person who engaged in some types of "disgusting sexual activities", such as those involving lack of consent, or underage victims (which also involves lack of consent of course), because that is not what was being alleged in the circumstances. Once that context is understood, the fact that the ordinary reasonable reader sees Mr Latham brand homosexual sex as disgusting is not going to alter their opinion of Mr Greenwich, having regard to contemporary standards.

56. The position is not advanced by invoking the "ridicule" cases (see above). Once it is accepted that the test still involves the ordinary reasonable person, it would not be the case that imputation 15.1, in context, would have caused ordinary reasonable people to think less of Mr Greenwich on the basis that he had been successfully held up to ridicule.

57. If **imputation 16.1** is carried, then it is obviously defamatory.

(c) Serious harm established for Primary Tweet?

58. **Inherent gravity:** In this case, their inherent seriousness (that is, before turning to evidence) on Mr Greenwich's reputation is low. Other than conveying Mr Latham's *own* sense of disgust about homosexual sex, why would the material cause people to think less *of Mr Greenwich*? If (as submitted above) the focus in this part is on ordinary reasonable people, the position is even clearer.

59. In any event, the impact of the allegations in this case, in terms of their inherent tendency, is in direct contrast to allegations such as fraud, illegality, cruelty, betrayal or other allegations which might, in their inherent nature, be regarded as "serious".

60. **Extent of publication**: The evidence is that the Primary Tweet had 6,171 views (AB 349). The applicant's case on serious harm includes that regard should be had to republication or "grapevine" spread of the Primary Tweet through publication by other people, notably the Riminton tweet and the Jamal Video. If these are regarded as relevant (see legal principles above), then in any event, they likely do not make much difference, in the circumstances (see below).

61. **Evidence of defamatory impact on recipients**: **First**, there is no evidence of any witness called that they in fact thought less of Mr Greenwich. **Second**, there is no *a priori* reason why those already favourably disposed to Mr Greenwich would change that position by reason of the Primary Tweet. **Third**, there is positive evidence of sympathy and concern from people who approached Mr Greenwich. **Fourth**, there is the striking public political and media response to the Primary Tweet, in summary, rallying around Mr Greenwich: see agreed facts at AB 118-121; media reports including those at AB 413-524. Given that that response was mostly within hours of the Tweet going up, it is proper to regard it as occurring at the date of publication for the purpose of assessing serious harm; put another way, given the extent and timing of the response, it is unlikely that any substantial number of persons read the primary tweet without already being aware of, or very shortly after become aware of, that response, directly affecting the "harm" (such as it was) to Mr Greenwich's reputation. It was especially relevant to the extent to which such harm was "likely to be caused".

62. The only potentially contrary factor is the adverse comments made by some members of public (see electoral office material is AG 80 – 158 which AB 661-850). But these comments, offensive as they obviously were, are weak evidence of serious harm for the following reasons. **First**, one needs to look only at those responses which are shown to be causally connected with the Primary Tweet. **Second**, there is no reason to suppose these comments reflect any widespread *change* in the views held by those particular people (whomever they may be). Put another way, it seems likely that these individuals were already adversely disposed to Mr Greenwich and there is no distinct particular serious allegation in the Primary Tweet which would lead to an inference of reputational damage. **Third**, it seems a reasonable inference that they are people who are not likely to matter to Mr Greenwich in terms of political support. **Fourth**, if an (adverse) change of view can be seen or inferred in some particular instances, there is no basis to infer that such a change is *widespread* in the community – indeed having regard to the other matters referred to above, that is unlikely.

63. Evidence of disruption caused at Mr Greenwich's electoral office, does not bear upon the serious harm question. Nor does evidence of the impact of the messages on Mr Greenwich.

E. Defences re Primary Tweet: application

64. **S 31 DA:** The context, and the use of the term "disgusting" clearly marks to the ORP that an opinion was being expressed.

65. It was on a matter of public interest, having regard to the context created by Mr Greenwich's comments published in the Sydney Morning Herald.

66. As to being based on proper material, it is a matter for the Court what the ORP would consider was the basis of the opinion expressed in the Primary Tweet, having regard to the submissions made above as to the true single meaning of the Primary Tweet, that basis is submitted to be the matters set out at Defence [77](a) to (g), but rather than (h) the basis was that in making his comments to the Sydney Morning Herald, Mr Greenwich was advocating in support of the LGBTQ community, as appears from his comments in the SMH article.

67. **Common law qualified privilege (reply to attack):** In the present matter, Mr Greenwich had made a very strong attack on Mr Latham in the Sydney Morning Herald. The primary tweet directly referred to that attack, both by echoing it ("*disgusting*") and by quoting the Metcalfe Tweet. The reply made by Mr Latham, by way of the defence of the attack on him, pointed out to public that what was "disgusting" was up for debate. Given the large readership of the Sydney Morning Herald, Mr Latham's use of a tweet which was online for only a few hours was proportionate in scope.

68. In terms of malice, Mr Latham was using the occasion to attack the credibility of his attacker, which was a proper purpose. To defeat the defence it must be shown that an improper motive existed and it was the dominant reason for the publication: *Roberts v Bass* (2002) 212 CLR 1, at [104]. And honesty of purpose is presumed in favour of the publisher: *Roberts* at [96]. Harming the reputation of political opponents or candidates is not, *per se*, an improper purpose: see per Kirby J in *Roberts* at [171].

F. Application: defamatory meaning and serious harm: DT Quotes

(a) Imputation carried by DT Quotes?

69. The message that Mr Latham published is at AB 559. As reflected in the DT Article, his message comprised two distinct parts in response to two requests for comment.

70. The applicant's imputations (24.1/25.1) of going to schools *to groom children* are clearly not carried. The way Mr Latham's words at AB 50 would be understood is that he did not think it was right for people to go to schools to talk to students about sexual matters, and, consistently, given the sexually explicit nature of the Primary Tweet, he thought he (Mr Latham) should take it down in case young people might read it. There is nothing which suggests that Mr Greenwich was *grooming* students – softening them up with a view to their engaging in sexual activity (homosexual or otherwise). It is a strained meaning which the ORP would not draw. Imputation 25.1

71. So far as the DT Article is concerned, the DT Article, *as a whole*, did not carry those imputations to the ORR, having regard to the other matter in the article.

(b) Imputation defamatory?

72. If either imputation 24.1 or 25.1 were carried, they were defamatory.

(c) Serious harm caused by DT Quotes?

73. The evidence from Ms Silmalis in her message to Mr Greenwich (AB 561) and the content of the DT Article does not suggest in any way that the publication had changed Ms Silmalis's opinion of Mr Greenwich, as a result of the DT Quotes. Despite the defamatory nature of the pleaded imputations, the content of the DT Article criticising *Mr Latham* and his conduct, including by suggesting that Mr Latham is unwell, means that even if an imputation is carried by the republication of the DT Quotes it was unlikely to have caused serious harm to Mr Greenwich's reputation.

74. The applicant otherwise relies upon the identical evidence to the Primary Tweet. Given that serious harm has to be established separately for each matter, this is insufficient.

G. Application: Defences: DT quotes

75. The defences are: (a) reply to attack, (b) s 30 DA, (c) Lange, (d) s 29A DA, (e) s 31 DA.

76. Generally, although the message from Ms Silmalis is not in evidence. the ready inference from the content of Mr Latham's response (AB 559) and her immediate subsequent message to Mr Greenwich (AB 561) is that Ms Silmalis asked Mr Latham to explain why he published the Primary Tweet and why he took down that tweet and Mr Latham published the DT Quotes in response to Ms Silmalis' requests for those responses.

77. **As to reply to attack**, by early morning on 1 April 2023 when the DT Quotes were published, Mr Latham's actions in publishing the Primary Tweet had been widely

condemned by various public and media figures (see AB 118-121 [30]-[36]). All of these persons made statements condemning Mr Latham and many of these responses were reported throughout the mass media and internet.

78. In those circumstances, there was plainly a privileged occasion for Mr Latham to give a response to a mass-media journalist such as Ms Silmalis answering why he posted the tweet and why he took it down in response to the extreme public criticism of him. His responses were relevant and proportional to the privileged occasion.

79. **As to s31**, if the ORP did derive imputations 24.1 or 25.1, that would be on the basis it was an expression of opinion of Mr Latham, that is, his characterisation or comment about Mr Greenwich. The opinion related to a matter of public interest in that any opinion expressed was of and concerning a NSW member of parliament and in the pleaded imputation his conduct towards education and schools. Any such expression of opinion found was based on proper material stated or sufficiently referred to in the message: the Primary Tweet was published, which was true in that Mr Greenwich did go to Sydney Boys High to talk to students at a Pride assembly (see AB 301-305). There is plainly a rational connection between any expression of opinion found and the proper material, and (in anticipation of defeasance) it cannot seriously be contended that Mr Latham did not honestly hold an opinion that Mr Greenwich's conduct and policies towards schools were inappropriate and damaging to students: see, for example, his tweets at AB 325, 340.

80. **As to s 30 and *Lange***, Mr Latham acted reasonably in all relevant circumstances in publishing the DT Quotes to Ms Silmalis. **First**, Ms Silmalis was a journalist at The Daily Telegraph. **Second**, Ms Silmalis' request for comment and article, and Mr Latham's response to those requests, were of significant public interest at that time, due to the response from his widespread public condemnation. **Third**, the source of Mr Latham's information that Mr Greenwich had visited a school to talk to students is shown to be reliable (AB 301-305). Mr Latham's conduct in answering Ms Silmalis in all the circumstances was reasonable.

81. **As to s 29A**, for the same reasons as to s30 and *Lange*, the request and then Mr Latham's response to comment concerned an issue of public interest, that is the controversy about the Primary Tweet and the public criticism of Mr Latham's conduct and suitability to be a member of the NSW Parliament. As submitted above, the failure of Mr Latham to give

evidence is not fatal; the evidence of the circumstances support a conclusion of the relevant belief required by the provision.

H. DAMAGES/REMEDIES

Damages

82. If the Court finds that the respondent has published defamatory matter about the applicant and that no defence has been established, the Court is to determine the amount of damages. The Court is required by DA s34 to ensure that there is an appropriate and rational relationship between the harm sustained and the amount of damages. The three purposes of the award of general damages for defamation are consolation for hurt feelings, recompense for damage to reputation, and vindication of the plaintiff's reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61 per Mason CJ, Deane, Dawson, and Gaudron JJ).

83. The applicant has the onus to establish the quantum of damage he is entitled, and the extent of harm, if any, the publication of the defamatory matter(s) caused him: see *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361 at [165]-[166]. Questions of remoteness and causation become important because the applicant is to be compensated for the defamation not for every subsequent event, save questions of aggravating conduct by the respondent. This is particularly the case where the actuating cause of those events may be intervening actions and reactions of third parties such as the universal mainstream condemnation of Mr Latham and related blanket media coverage, or the decision of the applicant to make public statements about Mr Latham.

84. In any event, the Court may also take into account in mitigation of damages the public statements and responses Mr Greenwich has made, see: *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 at [322]-[324] per White J; *Palmer v McGowan (No 5)* (2022) 404 ALR 621; [2022] FCA 893 at [434] per Lee J.

85. Further, the Court should also take into account to assess damage to reputation at a lower range the political context of the defamation and that given his existing public profile and advocacy many of the recipients of the matter are likely to have hardened views about Mr Greenwich and the matters were unlikely to have changed their opinion of him: see *Hanson-Young* at [293]-[295]; see also *Palmer v McGowan* at [431]-[433].

86. The maximum damages amount proscribed pursuant to s35 DA constitute the damages only to be awarded in a most serious case: s35(2). Because of the comparatively less serious nature of the imputations, the universal condemnation, the applicant's public responses and the political context of the publications, irrespective of the Court's findings on all disputed issues of fact and law, this case falls well below that threshold, and near the bottom of the range of seriousness.

87. **Aggravated damages** are only awarded to compensate an applicant where the respondent's conduct towards the applicant was improper, unjustifiable or lacking in bona fides and does in truth aggravate the applicant's hurt to feelings they have already suffered, see: *Triggell v Pheeney* (1951) 82 CLR 497; *Hubba Bubba Childcare on Haig v Bowden* [2020] NSWCA 28; (2020) 101 NSWLR 729 at [150]; *Carson* at 50 per Mason CJ and Dean, Dawson and Gaudron JJ.

Injunctions

88. Permanent injunctions restraining a repetition of publication of matters found to be defamatory are not usually issued as a matter of course in Australia. In *Hockey* at [15], White J explained that the "authorities show that injunctions are issued only when some additional factor is evident, usually, an apprehension that the respondent may, by reason of irrationality, defiance, disrespect of the court's judgment or otherwise, publish allegations similar to those found to be defamatory unless restrained from doing so."

89. It may be best to address the question of injunctions separately, once judgment has been delivered, should the applicant be successful.

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