

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2011 3293

PHILIP GLUYAS

Plaintiff

v

OLIVER CANBY

Defendant

JUDGE: J FORREST J

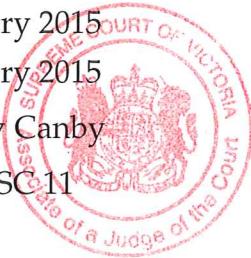
WHERE HELD: Melbourne

DATE OF HEARING: 13 January 2015

DATE OF JUDGMENT: 27 January 2015

CASE MAY BE CITED AS: Gluyas v Canby

MEDIUM NEUTRAL CITATION: [2015] VSC 11



DEFAMATION – Internet publications – blog – undefended trial – whether imputations defamatory – damages – mental harm

APPEARANCES: Counsel Solicitors

For the Plaintiff Mr C Twidle Victorian Bar Duty Barrister

For the Defendant No appearance

HIS HONOUR:

Introduction

- 1 The plaintiff in this proceeding, Philip Gluyas, has previously litigated in this Court and the County Court in relation to defamatory internet publications. In the other two cases, as with this case, the defendant is a resident of the United States.
- 2 In this proceeding, initiated in 2011, Mr Gluyas alleges that Oliver Canby (a resident of California) defamed him in a series of internet blogs published in 2011 and 2012 on his website 'autisimisbad.blogspot.com'.
- 3 For the reasons I will now provide, I am satisfied that Mr Gluyas was defamed by Mr Canby, and that he is entitled to an award of damages of \$50,000 plus interest.

Procedural background

- 4 The background to this proceeding is as follows:
 - (a) The writ was filed on 28 June 2011.
 - (b) After leave to amend was given by Mukhtar AsJ, Mr Gluyas filed his amended statement of claim on 19 June 2013.
 - (c) Mukhtar AsJ being satisfied that the provisions of r 7.04(1)(a) and (b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**the Rules**) had been met – that is, that the subject matter of the proceeding fell within r 7.01 of the Rules and that the originating process had been duly served on Mr Canby – Mr Gluyas was given leave to proceed against Mr Canby.
 - (d) The proceeding was set down by Mukhtar AsJ as an undefended trial.
 - (e) The proceeding was originally fixed for sittings in the Ballarat circuit, but at Mr Gluyas' request was re-fixed for hearing in Melbourne on 13 January 2015.
 - (f) Mr Canby was given notice of the hearing date and venue.
- 5 The helpful and extensive reasons of Mukhtar AsJ of 25 February 2014 set out in

greater detail the complex procedural background.

The trial

6 Mr Gluyas was represented by Mr Twidle of counsel through the Victorian Bar Duty Barristers' Scheme. I adopt what was said by Kaye J in a previous matter involving Mr Gluyas in relation to the role of pro bono counsel in that case.¹ Mr Twidle was of great assistance in the orderly presentation of Mr Gluyas' case, and I am indebted to him.

7 Mr Gluyas' treating psychiatrist, Dr Hickey, gave evidence as to the link between autism and Asperger's syndrome, as well as his opinion on the effects that the various publications have had upon Mr Gluyas' mental state. While his evidence on this aspect was relatively limited, I allowed it to be given notwithstanding the provisions of Order 33 of the Rules. In addition, I permitted the tender of a redacted affidavit of Mr Andrew Ackner of Michigan in the United States² under s 64 of the *Evidence Act 2008* (Vic).

8 I gave leave to Mr Gluyas to amend his statement of claim in accordance with the 'statement of imputations' provided by his counsel prior to the hearing. It contains several additional imputations to those alleged in the statement of claim. For similar reasons to those advanced by Kaye J in *Gluyas v Best*,³ I permitted Mr Gluyas to rely upon these additional imputations. In my opinion, the additional imputations are of a similar tenor to the imputations already pleaded, and are well justified as flowing from the content of the publications alleged to have been made by Mr Canby.

Mr Gluyas' background

9 In *Gluyas v Best*, Kaye J summarised Mr Gluyas' background as at February 2013. This account was adopted by Mr Gluyas at this trial:

The plaintiff is 47 years of age. He was diagnosed as suffering from

¹ *Gluyas v Best* [2013] VSC 3, [60].

² Exhibit P13.

³ [2013] VSC 3, [23].

Asperger's Syndrome in February 1997. In the meantime, the plaintiff had left school in 1982. Between 1985 and December 1991, he was employed by Australia Post in a number of clerical positions. As a result of his Asperger's Syndrome, he had difficulties with social interactions with fellow employees. In September 1990, he made a claim under the provisions of the *Commonwealth Employees Rehabilitation and Compensation Act 1988* in respect of a stress related condition, which he claimed had been contributed to by his employment. That claim was rejected. The plaintiff unsuccessfully appealed to the Commonwealth Administrative Appeals Tribunal. Upon the failure of that appeal, the plaintiff left his employment with Australia Post. Subsequently, in 1996 he gained a traineeship with the Department of Defence. His traineeship was terminated on medical grounds six months later in April 1997, based on a report of a Commonwealth medical officer. The effect of the report was that because of the plaintiff's condition, he was not medically fit for appointment with the Defence Department.

Since then, the plaintiff has been in receipt of a disability support pension. He has become an active advocate for the rights and interests of those who are on the autism spectrum. For that purpose, he has created and maintained websites, on which he has published his views concerning the rights of members of the autistic community. The plaintiff has attached to his website a forum, which may be accessed by others who are referred to as members. Generally, there have been between 25 and 38 members of the plaintiff's website.

In addition, the plaintiff has been an Australian Rules football umpire since 1983. He commenced umpiring with the Doncaster and District Junior Football League. Subsequently, he has umpired junior football in the Ballarat area, and particularly in the Ballarat Junior Football League. The plaintiff has a keen interest in Australian Rules football, and he has conducted historical research on the sport. He has also been active in the sport of wrestling, as a referee, a manager and a commentator.⁴

10 Mr Gluyas continues to umpire junior football; however, his activities on his website are now more limited.

Background to the publications

11 'Autism is bad' is a website with the URL: <http://autismisbad.blogspot.com> (the website). The website is maintained in the United States by Mr Canby, and housed on a server in that country. Mr Canby regularly posts blogs on the website.

12 The website also enables members of the public to post items (i.e. to upload comments or a commentary) which are then displayed on the website.

⁴ [2013] VSC 3, [6]-[8].

- 13 To upload comments onto the website, it is not necessary that the contributor be authorised by the administrator of the site to do so.
- 14 Mr Gluyas had, prior to these publications, posted comments on the website under his own name.

The publications and the imputations alleged

- 15 Before going to each of the publications, it is necessary to say something about the structure of the website. In most cases, the impugned publications form part of a blog put out by Mr Canby. However, in a couple of instances, Mr Canby posted comments as a result of an exchange with other contributors to the website who had uploaded comments in response to his blog.
- 16 The writ identifies six separate defamatory publications allegedly made by Mr Canby concerning Mr Gluyas.

1 February 2011

- 17 The first allegedly defamatory publication is dated 1 February 2011. It is necessary briefly to say something about the precursor to this post. There are a number of anonymous posts preceding Mr Canby's publication, which may have provoked Mr Canby's outburst. Mr Gluyas was emphatic in denying that he was responsible for any of those posts. He swore that when he posted material on the website (as he did from time to time) he did so only under his own name and not as an anonymous contributor.
- 18 The post reads as follows:

Oliver M Canby said...

Phil Gluyas: You are now banned from commenting on my blog. This is enough bullshit for now. Calling me the next Jared Loughner, accusing me of stalking people, and insulting my sexual orientation is going too far. I am going to show this to Nathan, and he will be filing a lawsuit against you. Nathan agrees with everything that I say and thinks you are a severely deranged mental case. You know what, Phil? You are also a homosexual faggot. The reason you were an Aussie football umpire was so you could rape the young boys that played it. The reason you were at the "library"

was to stalk young boys and blow on their dicks. You aren't autistic either. You have schizoid personality disorder, and are a sociopath. You are not married, either. Your "wife" is actually a man. I hope someone comes to your house with a knife tonight and saws your head off, because that is what you deserve.⁵

19 Mr Gluyas alleges that the imputations arising out of this publication are that he is a paedophile and homosexual.

20 This post has been removed from the website.

17 May 2011

21 The second post is that of 17 May 2011, which reads as follows:

Phil Gluyas Does Not Have Asperger's Syndrome

Phil Gluyas claims to have Asperger's syndrome, and even claims to have diagnostic papers proving so. However, despite me giving him numerous opportunities to email me those papers, he has not done so, and in that process has unequivocally proven that **he does not have Asperger's syndrome**. In 1991, Phil Gluyas was involved in a court case (in which **he was charged with felony assault for brutalising his boss**) where he used a cop-out (i.e. insanity defense) by claiming he had schizoid personality disorder. Some time later, he changed his self-diagnosis to Asperger's syndrome, presumably because it was less stigmatizing. That is completely ironic, as Phil Gluyas has done nothing but stigmatize Asperger's syndrome even more through his idiotic behaviour. Now that I've proven that Phil was lying about his Asperger's syndrome, **I'll bet he's lying about his sexual orientation too**. I should ask Paris Tenana about that one, though, because to me he seems way more trustworthy than Phil any day of the week.

Posted by Oliver M Canby at 7:38 AM.⁶

22 Mr Gluyas asserts that the following imputations arise out of this publication:

- that he is a fraud;
- that he falsely claims to have the condition of Asperger's syndrome for the purpose of material gain;
- that he assaulted another person resulting in serious harm;

⁵ Exhibit P3 (emphasis added).

⁶ Exhibit P4 (emphasis added).

- that he is a homosexual; and
- that he is not truthful.

23 This post has been removed from the website.

17 August 2011

24 The third post is dated 17 August 2011:

The Spectral Keeper

Apparently, some dude named "Spectral Keeper" has been banned from Phil Gluyas' website for "slanderizing" him (of course, that really means that he told the truth). From what I can tell, the Spectral Keeper is about 19 and lives in Melbourne. My guess is that he was an Australian rules football player who Phil lured **into his den in attempt to sexually molest**, and when that didn't go so well the Spectral Keeper, you are a brave hero, and you absolutely did the right thing. If you ever want to comment here, you are more than welcome to.

Posted by Oliver Canby at 11:42 AM⁷

25 Mr Gluyas asserts that the imputations arising from this publication are that he is a paedophile and a homosexual.

26 This post can be viewed on the website.

23 May 2012

27 The fourth publication occurred on 23 May 2012:

The HAA Awards

From now on, I will give out the HAA Awards annually on May 23. This year's HAA Award goes to none other than Phil Gluyas. He has proven through his idiocy and his neuroinsanity that he is deserving of this award. Keep in mind that this is a man who has been banned from pretty much every autistic website known to man, even the ND ones. According to Suzi Olsen's forum, he has now been permanently banned from umpiring in Australian rules football **because he pulled out of a young boy's anus too soon**. It is my honor to dole out this HAA award to Phil Gluyas, as he will never learn to stop being an idiot. God Bless America.

Posted by Oliver M Canby at 9:16 PM⁸

⁷ Exhibit P5 (emphasis added).

28 Mr Gluyas asserts that the imputations arising out of this publication are that:

- he is a paedophile and a homosexual; and
- he has been banned from umpiring.

29 This post can be viewed on the website, albeit in an edited form which omits the reference to young boys.

21 June 2012

30 The fifth publication took place on 21 June 2012, and is part of a string of attacks. It reads as follows:

Anonymous said...

Phil Gluyas was arrested and charged for stealing cars last week and his wife has left him.

June 21, 2012 5:26 AM

Oliver Canby said...

Excellent! Now when are they gonna nab him for child molestation?

June 21, 2012 12:22 PM⁹

31 Mr Gluyas asserts that the imputations arising from this publication are that he is a paedophile and a homosexual.

32 This post can be viewed on the website.

14 October 2012

33 The sixth post is dated 14 October 2012:

Oliver Canby said...

Damn after what happened with Coach Sandusky I'd have thought the AFL would be more careful with who they let on the field. I guess the folks down under just don't listen.

October 14, 2012 at 2:23 PM¹⁰

⁸ Exhibit P7 (emphasis added).

⁹ Exhibit P8 (emphasis added).

¹⁰ Exhibit P9.

34 Mr Gluyas asserts that the imputations arising from this publication are that he is a paedophile and a homosexual. The context makes it clear that the comment is about Mr Gluyas. The reference to 'Coach Sandusky' is to a now infamous former Penn State gridiron coach who was convicted in 2012 of multiple counts of child molestation and sentenced to sixty years imprisonment.

35 This post can be viewed on the website.

'The Call for Violence' post

36 Finally, for the sake of completeness, I should set out a post of Mr Canby's dated 12 March 2012, which is not the subject of the defamation claim, but is the basis for Mr Gluyas' mental harm claim:

A Call for Violence Against Phil Gluyas

Will anyone who lives in Australia please show up at 5/304 Albert Street Sebastopol, Victoria 3556 and murder Phil Gluyas? Please slit his throat and make sure to sever both vocal chords and the jugular vein. I don't just want him to die I want him to suffer to it has to be done right. After you are done decapitating him, please mount his head on a stick and roast it over an open fire. The rest of him can be dismembered and tossed into the ocean. I am offering a reward of \$500 to the perpetrator from the fund I received to start my Occupy Neurodiversity movement, and I am following up on my call to use force and violence if necessary. This will be the first act of the 99% striking back against the 1%. I will need proof that the deed has been done before I can send the reward money, so if anyone is interested please contact me via email. I am specifically targeting you, Paris Tenana and Dave Ayling. I know both of you want Phil dead probably more than I do, so if I find out that either of you was the perpetrator I will double the reward to \$1,000. For Dave and Paris only, they can make a deal to split the reward money for \$500 each. No other splits will be allowed. If any perpetrator is charged with a crime as a result of this, I will fully pay for your legal defense and present this to the courts as a justifiable homicide. Just to clarify, this is a threat of bodily harm, as well as a threat to Phil Gluyas' life. This will only be the beginning of Occupy Neurodiversity, and there will certainly be more violent acts to come in the near future.

Posted by Oliver M Canby at 9:22 PM¹¹

37 This post has been removed from the website.

¹¹ Exhibit P6.

Considerations

Were the articles published by Mr Canby?

38 I am satisfied that each of the publications were made by Mr Canby. It can be readily inferred from the contents of the relevant web pages that the site is maintained by Mr Canby: Mr Canby's name is directly identified on the site and blog archive with the words 'about me'. Clicking his name produces a Google+ profile which states that Oliver Canby lives in Los Angeles, California. Moreover, he is identified in each of the extracts (be they a blog, posting or comment), as the author.

39 In February 2011, Mr Gluyas sent an interesting, and perhaps inflammatory, letter by ordinary mail to Mr Canby at an address he had extracted from the Californian equivalent of the White Pages.¹² On 14 February 2011, in a post on the website, Mr Canby acknowledged receiving the letter, adding 'not by the service of process like I did last time'.

40 The evidence establishes that Mr Canby maintains the website and that he is the author of the allegedly defamatory publications. I am also satisfied on the basis of Mr Gluyas' evidence and the evidence of Mr Ackner and Dr Hickey that each of the publications have been read by others – although I consider that the audience for such publications is relatively minimal. Notwithstanding that there has been limited viewing of the various publications, there is a point of some significance: a number of the publications remain on the website and can be viewed easily following a Google or other web search.

Are the publications defamatory of Mr Gluyas?

41 It is not necessary to go any further than to repeat the following statement of principle by Kaye J in *Gluyas v Best*:

That issue must be determined by reference to how the publications by the defendant would have been understood by an ordinary reasonable reader. The attributes, ascribed by the law to the "ordinary reasonable" reader, are

¹² Exhibit P11.

well known. Such an hypothetical person is described as someone who is not “avid for scandal”, and who is neither “unusually suspicious nor unusually naïve”. Equally, the hypothetical “ordinary reasonable” reader has been described as an ordinary person, who does not live in an ivory tower, and who reads between the lines in light of his or her general knowledge and experience of worldly affairs. Thus, the ordinary reasonable reader does engage in a degree of loose thinking. In this respect, it is important to bear in mind that the ordinary reasonable reader is a lay person, and not a lawyer, and such a person has a much greater capacity for implication than a lawyer. On the other hand, it is necessary to bear in mind the distinction between the reader’s understanding of what the article is stating, and a judgment or conclusion, which the reader may reach as a result of his or her own beliefs and prejudices, after reading the article; the defamatory quality of the material is to be determined by the former, and not the latter, proposition.¹³

42 In my view, each imputation is defamatory of Mr Gluyas. I should mention specifically the imputation that Mr Gluyas is a homosexual. The question of whether this imputation is capable of being defamatory in today’s society has been discussed on separate occasions by trial judges in New South Wales. In *Rivkin v Amalgamated Television Services Pty Ltd*,¹⁴ Bell J struck out imputations that the plaintiff engaged in homosexual intercourse on the basis that they were no longer defamatory. Her Honour said:

... it is no longer open to contend that the shared social and moral standards with which the ordinary reasonable member of the community is imbued include that of holding homosexual men (or men who engage in homosexual sex) in lesser regard on account of that fact alone.¹⁵

43 However, her Honour added the qualification that such an assertion could give rise to a defamatory imputation ‘in the context of the publication or by way of true innuendo’.¹⁶ In *Kelly v John Fairfax Publications Pty Ltd*,¹⁷ Levine J held that the imputation was capable of being defamatory. His Honour said that ‘context now is identified as playing an important part in the question of capacity to defame’ and allowed the imputation to go to the jury.¹⁸

¹³ [2013] VSC 3, [22].

¹⁴ [2001] NSWSC 432.

¹⁵ [2001] NSWSC 432, [30].

¹⁶ [2001] NSWSC 432.

¹⁷ [2003] NSWSC 586.

¹⁸ [2003] NSWSC 586, [41].

44 I should also refer to the dicta of Kirby J in the High Court decision of *John Fairfax Publications Pty Ltd v Rivkin*,¹⁹ in which his Honour said:

In most circumstances, it ought not be the case in Australia that to publish a statement that one adult was involved in consenting, private homosexual activity with another adult involves a defamatory imputation. But whether it does or does not harm a person's reputation to publish such an imputation is related to time, personality and circumstance. ... At least for people who treat their sexuality as private or secret, or people who have presented themselves as having a different sexual orientation, such an imputation could, depending on the circumstances, still sometimes be defamatory.²⁰

45 Therefore, the question of whether the reference to Mr Gluyas as a homosexual is defamatory requires an examination of the publication in context. He is married and says that he has never been involved in a homosexual relationship. I think that an ordinary, reasonable reader with knowledge of Mr Gluyas would regard such an assertion as being defamatory. Relevantly, at least one person who saw the publications imputing that Mr Gluyas was a homosexual knew that he was married and heterosexual.²¹

46 That, of course, does not mean that in all cases such an assertion will be defamatory; each case will turn upon its own facts. However, in my view, in the particular circumstances of this case, each of these imputations is defamatory of Mr Gluyas.

Damages for defamation

47 Mr Gluyas is entitled to an award of damages in relation to each of the impugned publications. I adopt, again, what was said by Kaye J in *Gluyas v Best*:

In general, an award of damages for defamation has three principal functions, namely, as reparation for the harm done to the plaintiff's reputation, as solatium for the distress and embarrassment occasioned to the plaintiff by reason of the publication, and as vindication of the plaintiff's reputation.

An important component of an award for damages for defamation consists of the compensation for injury to the plaintiff's feelings, and for the

¹⁹ (2003) 201 ALR 77.

²⁰ (2003) 201 ALR 77, [140].

²¹ *Lewis v Daily Telegraph* [1964] AC 234; *Hughes v Mirror Newspapers* (1985) 3 NSWLR 504, 506.

embarrassment and distress, occasioned by the defamatory publication. In an appropriate case, a plaintiff is entitled to an award of aggravated damages, where the conduct of the defendant, subsequent to publication, has been such as to compound the distress and humiliation occasioned to the plaintiff as a result of the publication. However, an award of damages may only be made where the conduct of the defendant is lacking in bona fides, or is improper or unjustifiable.

The third aspect, of an award of damages for defamation, consists of the vindication of the reputation of the plaintiff. In *Broome v Cassell & Co Ltd*, Lord Hailsham referred to the role of an award of damages, in vindicating the reputation of a plaintiff, in the following terms:

"In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of *restitution in integrum* has necessarily an even more highly objective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge."²²

- 48 As I mentioned earlier, the evidence justifies a conclusion that only a very small number of persons have viewed the publication. However, I am conscious of the prospect that there may be a grapevine effect,²³ particularly given that some of the defamatory material may still be accessed by a web search.
- 49 Dr Hickey confirmed Mr Gluyas' evidence that he had suffered marked feelings of distress and upset as a result of the publications. I did, however, form the view that the publication that concerned him the most, understandably, was that containing the threats in the 'Call for Violence' post, which is not the subject of the defamation claim.
- 50 I consider that the defamatory imputations are serious, and that Mr Gluyas is entitled to an award of damages that vindicates his reputation and standing.
- 51 There is also an aspect of aggravation on the part of Mr Canby. The fact that several of the defamatory publications remain on the site, notwithstanding this proceeding and requests for the publications to be taken down, is an aggravating circumstance.

²² [2013] VSC 3, [44]-[46] (citations omitted).

²³ See *Gluyas v Best* [2013] VSC 3, [49].

52 In my opinion, an appropriate award of damages is in the sum of \$50,000.

Interest on damages

53 Mr Gluyas is entitled to interest on those damages.²⁴ The appropriate rate of interest is generally accepted to be four per cent per annum.²⁵ However, in this case, four of the impugned publications occurred after Mr Gluyas issued the proceeding. Accordingly, I will adopt the approach of Kaye J in *Gluyas v Best*, and fix a rate of 3 per cent per annum since the date of issue of proceeding on 28 June 2011. On this basis, Mr Gluyas is entitled to interest rounded out at \$6,900.

The claim for mental harm

Non-Economic Loss

54 The statement of claim includes a claim for mental harm arising out of the 'Call for Violence' post. In the course of discussion with counsel for Mr Gluyas, I queried whether it was possible to proceed with a claim for non-economic loss given that there was no evidence that Mr Gluyas had satisfied the significant injury test imposed by s 28LE of the *Wrongs Act 1958* (Vic).

55 Counsel for Mr Gluyas did not contend that the claim for mental harm fell outside Part VBA of the *Wrongs Act*. In *Multari v Amaca Pty Ltd*,²⁶ Williams J held that

s 28LE does require the plaintiffs to establish the existence of a significant injury before the resumption of the trial in respect of any injury not falling within the exclusionary provisions of s 28LC(2)(d).²⁷

56 It was not suggested that Mr Gluyas had complied with the terms of the section, nor that he intended to make an application to do so. As a result, the claim for non-economic loss was not pursued at trial and should be dismissed.

²⁴ *Supreme Court Act 1958* (Vic), s 60.

²⁵ *MPB(SA) Pty Ltd v Gogic* (1991) CLR 657.

²⁶ [2014] VSC 277.

²⁷ [2014] VSC 277, [26].

Economic Loss

57 On the other hand, counsel submitted that it was open to Mr Gluyas to bring a claim for economic loss as a result of the alleged mental harm. This was said to arise from additional expenses – such as arranging secure accommodation – incurred by Mr Gluyas as a result of fears for his safety occasioned by the ‘Call for Violence’ post.

58 Part VBA of the *Wrongs Act* does not preclude such a claim; however, in my opinion, such a claim cannot be permitted. Nowhere in the several versions of Mr Gluyas’ amended statement of claim has there been any suggestion of a claim for economic loss. The allegation within each of the statements of claim has been solely to ‘damage to mental health’, with no identification of the nature of the loss.

59 It would be unfair in the extreme to Mr Canby to permit such an unheralded claim to now be canvassed at trial. I indicated this to counsel for Mr Gluyas at the time of the embryonic application to amend the statement of claim. It was not pressed.

60 Consequently, the claim for economic loss allegedly attributable to ‘mental harm’ is dismissed.

Injunctive relief

61 Although the statement of claim seeks injunctive relief, this was not pressed at the trial. It will also be dismissed.

Conclusion

62 Mr Gluyas was seriously defamed in each of the publications, and is entitled to an award of damages of \$50,000 plus interest in the amount of \$6,900.

CERTIFICATE

I certify that this and the 14 preceding pages are a true copy of the reasons for Judgment of J Forrest J of the Supreme Court of Victoria delivered on 27 January 2015.

DATED 27 January 2015.

