IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 21/2018

BETWEEN **COLIN GRAEME CRAIG**

Appellant

AND **JORDAN HENRY WILLIAMS**

Respondent

Hearing: 4–5 September 2018

Coram: Elias CJ
William Young J
Glazebrook J
Ellen France J
Arnold J

Appearances: S J Mills QC, J W J Graham and T F Cleary for the Appellant
P A McKnight and A J Romanos for the Respondent

CIVIL APPEAL AND CROSS-APPEAL

MR MILLS QC:

May it please the Court. Mr Mills for the appellant, Mr Craig, and with me Mr Graham and Mr Cleary.

ELIAS CJ:

Thank you Mr Mills.

MR McKNIGHT:

McKnight and Romanos for the respondent and cross-appellant.

ELIAS CJ:

Thank you Mr McKnight. Well we read the submissions of course. We think, Mr Mills, we would be most assisted by hearing the argument about the sufficiency of the directions given on qualified privilege.

MR MILLS QC:

Yes.

ELIAS CJ:

I'm open to your pushing back on that, but it does seem to me the logical place to start.

MR MILLS QC:

Can I just say is where I was proposing to start was to go, at least initially, and it's not in the written submissions, go chronologically through the key steps in the factual matrix, so that the Court does have the context out of which all of these issues are arising, and I'm just going to undisputed documents, undisputed facts, and I thought that would expedite everything really, both today and tomorrow, so with the Court's leave that's where I thought it would be useful to start.

ELIAS CJ:

Well I guess we're slightly in your hands on this Mr Mills. I would have thought that the factual background is something that we're sufficiently familiar with from the submissions.

MR MILLS QC:

Yes.

ELIAS CJ:

But if you feel it necessary to outline it further that's fine. But I may interrupt you if I think we're taking too long over those matters.

MR MILLS QC:

Yes, well I'd like you to do that.

ELIAS CJ:

We'd really be delighted if there's not too much colour.

MR MILLS QC:

Yes, I'm not going to do anything to deal with disputed issues. I thought it would be useful, though, for the Court, some of you probably have done it already, perhaps you all have, to actually sight some of the key documents and the key passages in the evidence to just know where it is, and so, as I say, with the Court's leave that's where I'll start.

So at least initially, and I'm going to go through this chronologically, at least initially I'm principally in –

ELIAS CJ:

You don't have a chronology that you're going to be following on this?

MR MILLS QC:

Well not one that I have as a hand up, sorry. At least initially I will be principally in volume 3, which is Mr Williams' evidence-in-chief and cross-examination, and then, at least the very first thing I'm going to take you to is in volume 7 of the exhibits, but after that I'm principally in Mr Williams' evidence, and that begins, I'm not sure whether you're working from hard copy or on screen, but that begins at 0431 is his evidence-in-chief. As I say the very first document I'm going to take you to is the starting point I think chronologically of events, and that's in exhibit volume 7, and that is at page 2194. And when you get there you'll see that this is the, what I refer to as the Waiake note I think in the written submissions. This is the note that

Mr Williams made and sent back to Ms MacGregor following his initial meeting with her on the 19th of November 2014, and I think you'll be aware of the background to that. He'd become aware that she had had the sudden resignation and contacted her to talk to her about it and that led to this afternoon meeting in Waiake, where Ms MacGregor then was, and he then subsequently prepared this note, I think the next day, and sent it back to her and if I, I'll flip you through after that two pages to 2197, which is where he sends it back to her. But I'll just start with the note itself, and just, apart from just asking the Court to just sight it, there are some issues in there that have some significance as the trial progressed, and I think as the issues arise in this hearing. You'll see that what Mr Williams has done, and he acknowledged this, is he had set this up almost the way one would for a mediation, where you're testing the interests and the values and so on. So he starts with various interests that he thought might have been in issue, and then the italics entries are what he understood to be Ms MacGregor's answers to those various questions, and you'll see particularly at 2, "Private/in-party humiliation? 'Not hugely important.'" Then under 6, "Anything else?" She wants an apology. "Vindication? 'Don't care.'" "Change in leadership? 'Don't care enough.'"

Then you'll see under "Other questions… What was the nature of the refusals?" And this is about her position on the relationship between her and Mr Craig, and you'll see what's entered there. Then the next heading is "Description of nature of harassments." Again he's written down what he understood she had said to him, and in particular you see the one there referred to first, "Election night incident." And that comes up quite significantly in the subsequent events, and then below that, "Texts," and the only one that's referred to there is, "You are wonderful, (you know what I mean by that)." And again this issue becomes a significant one through the factual narrative.

GLAZEBROOK J:

Whereabouts are you?

MR MILLS QC:

You'll see that under "Description of nature of harassments," and the third line under that, "Texts: 'You are wonderful, (you know what I mean by that).'"

GLAZEBROOK J:

Yes, thank you.

MR MILLS QC:

Then the second to last line he's asked, or he's recorded what he understood to be the duration of this alleged harassment, and it records, "Started e-day," namely election day 2011, and of course the election night incident is part of that, and continued until resignation. Then under, "What can Colin potentially use?" You will see again a reference to the election night incident, and then, "Text messages? Nothing in response from Rachel." And that's an important statement here, that there was nothing in response from Rachel, and of course this turns out not to be correct. Not in relation to text messages so much, although there it's not correct either but, "Letters in response?" You can play with the word "response" but there was lots of correspondence from Ms MacGregor.

Then over on the next page you'll see he sets up his options scenario, a bit like a mediation. Go public at the top. Do nothing at the bottom. Then he goes down to 2014, which of course is the year in which Ms MacGregor resigns, but also the year of the election campaign on which that resignation had a pretty significant impact, and there's a specific reference there to complaints that he understood she had made about Mr Craig's conduct during that 2014 year, and then towards the bottom of that page is the heading "Resignation". What he's recorded is, "2 days before he brought up the hourly rate and Colin blew it off then would not engage on it." The evidence was that she was very concerned about the fact that she didn't feel that her hourly rate had been agreed, there was no agreement on that, and she had raised it, in fact, on the very day and in a very palavery sequence which led her to get out of the vehicle they were both in and announce thereafter she had resigned.

Now importantly you see a reference there, second paragraph under resignation, “On the day,” and I emphasise it’s on the day, and then there’s a quote, “How did you sleep? Colin: ‘I slept well because I dreamt of being between your naked legs.’” Now this is an alleged statement by Mr Craig which morphs into being a sext as matters progress, and there was no evidence that that had ever been said. It was denied by Mr Williams – by Mr Craig rather, and Ms MacGregor disavowed that as well. But the important point for the moment is partly that but also it’s on the day, it’s on the day of resignation.

WILLIAM YOUNG J:
She said something similar was said though?

MR MILLS QC:
Excuse me?

WILLIAM YOUNG J:
She said, didn’t she, that something similar was said?

MR MILLS QC:
No, she said that on the day what he said was, “I slept well because I dreamt I slept on your legs.”

WILLIAM YOUNG J:
Well, pretty similar, isn’t it?

MR MILLS QC:
Well, for the moment I don’t want to engage in an argument about it, I just point out that this, and certainly the evidence from a significant number of the witnesses, including some called for Mr Williams, were that the reference, the sleeping between her naked legs was the end of it really, it was the bombshell who had turned people who had previously not been turned and there’s no evidence that that was said. The trial Judge found it wasn’t and –

WILLIAM YOUNG J:

I mean in a way we've got A, what happened. B, what Mr Williams believed happened and C, what Mr Craig believed happened.

MR MILLS QC:

We do indeed.

WILLIAM YOUNG J:

So there's no reason to think that Mr Williams didn't think this had been said.

MR MILLS QC:

At this point, yes. As matters progress it changes.

WILLIAM YOUNG J:

Right.

MR MILLS QC:

Then finally you'll see –

GLAZEBROOK J:

What significance, well maybe you'll explain it later, but this is a contemporary document?

MR MILLS QC:

Yes it is, and – well it's a record made by Mr Williams of a conversation that he had with Ms MacGregor which he –

GLAZEBROOK J:

So there was no suggestion that he accepted, was, that he'd wrongly misremembered at that stage, and wrongly put that down?

MR MILLS QC:

Well he certainly –

GLAZEBROOK J:

He accepted later that that wasn't what had been said, as I understand it.

MR MILLS QC:

Yes he did, and he recognised at the time that it might not have been accurate, that she was in a distressed and emotional state, and if I can just take you across to the next page in that bundle, at 2197, you see that he then sends it back to her the following day for her comment, for her to correct any inaccuracies, and you see the first line, the notes I made are rough but what I scribbled down is attached. He doesn't think an affidavit is necessary. Just says, it's really an aide-memoire in case it's needed.

ELLEN FRANCE J:

But her evidence is, isn't it, that it's broadly correct, the aide-memoire, apart from the observations about the jewellery?

MR MILLS QC:

Well, she said that initially but during the course of the trial she accepted that it was not correct in relation to the issue of sleeping between the naked legs, that was not correct, and she'd never said that, or he'd never said that to her.

GLAZEBROOK J:

Well she'd never come back either and said that to him at the time.

MR MILLS QC:

Well that's right, at this point what we have is a record made, as he says, rough notes, for her to check not made for the purposes of an affidavit, not made for anything other than an aide-memoire if it's required, and the significance of that in the narrative is that as Mr Williams acknowledged in the course of the trial, he then, despite the fact there'd been no response, he used that note, that aide-memoire as what he accepted was his bible that he then went forth with in effect and used that as the basis for what he did subsequently. So that's the principal point I really draw the Court's attention

to. Began with this and it was never done in a form that, where any assurance of accuracy was given, and –

GLAZEBROOK J:
And is there a duty – how does that matter?

MR MILLS QC:
Well when he, it certainly had a bearing on the question, the big issue question attack, an attack privilege and a right to reply to it, because when he went forward with this he took material from this. It was extraordinarily damaging, as he himself acknowledged, and passed it on to various people as though it were fact, and who responded to it in that way, but in the course of the trial acknowledged that he had inaccuracies, in some cases what he'd said was not correct, and that if he had had, if he had required Ms MacGregor to confirm the accuracy of this at the time, he could not have said many of the things that he subsequently said. So that's the framework.

Of course it also has a direct bearing on Mr Craig's response to this, was that his view, and it was I think clearly established at trial, was that a number of these statements that were recorded in here, were not true, and he responded accordingly in saying these are not true, these are lies, this is dishonest, and it all starts from this document and the way it was then used and not checked and confirmed. At least that's the narrative.

So I've taken you to that. That email back, doesn't get a response to that. Then I want to take you, just to touch on the confidentiality issues, there's a lot of material on confidentiality, but just to confirm again a key step in the sequence of the factual background. On the next page you will see 2199 some notes which, it's not disputed, these notes were made by Ms MacGregor's then lawyer, Mr Geoff Bevan, and they're pretty hard to read but it records his telephone conversation with Mr Williams, you see that at the top there, on the 26th of November. So very soon after the events we were just looking at at Waiake and the following email. The background to it was that he had read Mr Hager's book on dirty politics and had seen Mr Williams'

name there, and it had alarmed him to the extent that he wanted to confirm that Mr Williams understood that what he had been told was in confidence, and so you'll see down the bottom there, "But confidentiality," and then in the circle part, the last circle at the bottom of that page, this isn't disputed, "Confidentiality undertakings as if client."

GLAZEBROOK J:
Sorry, I think I'm on the wrong page?

MR MILLS QC:
Sorry, 2199, the handwritten scrawl. It's the red numbering. So given that Your Honour might not have been given the right numbers before. So I've got 2196 for the Waiake note.

GLAZEBROOK J:
No, I've got that.

MR MILLS QC:
Right, so 2199 is Mr Bevan's contemporaneous note of his conversation with Mr Williams and he's seeking this assurance that he understands that this is strictly confidential, and then you'll see on the next page, 2200, that he then goes back to the his client and tells her that he's had this conversation. "I have since had a very useful conversation with Jordan … He has assured me that, whilst he is not acting for you as a lawyer (which he can't do), he is keeping this matter totally confidential, as if he was your lawyer. He was very clear about giving this assurance." And you'll have noted the handwritten note said, "Confidentiality undertakings as if client." So that was the next step in it and there was no real, there's no disagreement about this with Mr Williams. He has explanations for why he didn't abide by that, but he accepts that he understood that he was receiving all of this in confidence, and he knew from the Waiake note that Ms MacGregor did not want to go public and she wasn't looking for retribution, or a change in the leadership of the Conservative Party. She was looking for an apology and for a financial settlement.

What then happens, if we can now to volume 3, emerges from the evidence. So volume 3, tab 36, and page 538, and this is during cross-examination.

ARNOLD J:

Sorry, I didn't pick up the page?

MR MILLS QC:

Page 538 Your Honour. Cross-examination of Mr Williams. This whole volume is Mr Williams. I won't go through it in detail but from page 538 through to 540 there's three issues in particular which I was exploring with him. One was I was asking him about this note that he had made, the Waiake note, and asking him about the effect that it was likely to have had if before he had used this note for what he used it for, if he had sought an affidavit from Ms MacGregor, and he acknowledged that he understood as a lawyer that affidavits often change what people say, they're more accurate, and she couldn't have said what he had recorded in that note if she had been asked for an affidavit. Secondly, on page 539, down at line 25 or thereabouts it talks about the undertaking, and that goes over onto the next page, and then one of many acknowledgements, that he understood the confidentiality at the middle of 540 at about line 18 I asked him, "She did not want to go public, she wanted confidentiality?" Answer, "Yes..." and there's several other passages above that as well, and many, many more during the course of the trial.

GLAZEBROOK J:

Sorry, what page are you on now?

MR MILLS QC:

Page 540 is the specific reference. I took you to about line 18, but it's further, also at the top of the page where I said to him, line 3, "And you told him certainly, that even though you were not her lawyer, you were giving an assurance of confidentiality as though you were?" Answer, "Mr Mills, we've been here and yes I've acknowledged this."

ELIAS CJ:

But there's no issue about any of this really. We can move a little bit more smartly through it can't we Mr Mills?

MR MILLS QC:

All right, well, yes, I just wanted to be sure that the key structure which really does underpin all the rest of the arguments, that I had at least given the Court a chance to sight key documents and key passages, no more than that.

ELIAS CJ:

Yes, thank you.

MR MILLS QC:

The next thing I just wanted to take the Court to is his acknowledgement about how he was using the Waiake note, and if I could take you first to 544 in that same volume, down to line 24. This is dealing with the information, just to use a neutral word, that he then began to convey to keep people in the Conservative Party arising out of that Waiake note, and I asked him down at line 24, "And so when you were speaking to people like Mr McVicar and Ms Rankin and Mr McCoskrie, that was the memory bank you were drawing on, in the information you conveyed to them wasn't it? " Answer, "Yeah, well I wasn't making it up, I was relying on this." In other words the Waiake note. However, he –

ELLEN FRANCE J:

He had, as is explored, read some of the letters?

MR MILLS QC:

He had read some of her letters – sorry, some of Mr Craig's letters to her, yes. Yes he had.

GLAZEBROOK J:

I'm still not entirely sure what the relevance of this is, because obviously if he made incorrect statements then they could well have been defamatory.

MR MILLS QC:

Yes.

GLAZEBROOK J:

And if he'd checked maybe he wouldn't have made incorrect statements, but if he didn't check and made correct statements, what's the – really what's the significance of checking or not checking, as you say legally.

MR MILLS QC:

Well first of all legally it's important I think to appreciate that when we're talking about the issue of the truth of things, it has relevance in two ways. The first one, the most obvious one is, of course, the truth defence, and there was a truth defence run here, and so then the question was, was what Mr Craig said –

ELIAS CJ:

But we're not really concerned on this appeal with that.

MR MILLS QC:

No we're not, I'm just trying to –

WILLIAM YOUNG J:

You lost on that.

MR MILLS QC:

Yes, absolutely. I'm just trying to respond to Her Honour's question about what's the relevance of this, and I'm just saying –

GLAZEBROOK J:

Well whether you checked or not the question there is whether it was true or not. If you checked then it was more likely to be true but actually you could check as much as you like and it still could be untrue. Equally you could not check at all and it would be true.

MR MILLS QC:

Well it was relevant, and it's certainly relevant when we get around to the damages issues, it's relevant to the way in which Mr Williams went after Mr Craig, to which he was –

WILLIAM YOUNG J:

Just pause there. Did he have any reason for going after Mr Craig, other than what Ms MacGregor told him? I mean was there any background of ill will or tension between them?

MR MILLS QC:

None that was in evidence at the trial.

WILLIAM YOUNG J:

All right.

MR MILLS QC:

Certainly none from Mr Craig. Mr Craig's responses were, on his evidence, all principled responses about responding to what he believed were dishonest things being said about him.

WILLIAM YOUNG J:

Sorry, I'm talking about Mr Williams. Was there any reason for Mr Williams to go after Mr Craig, other than what he understood to have been his dealings with Ms MacGregor? Was that put to him? I just don't know.

MR MILLS QC:

Well the, there was evidence at trial that Mr Williams wanted to have Mr McVicar come in as leader for the Conservative Party.

WILLIAM YOUNG J:

So was that before the Waiake discussion?

MR MILLS QC:

It was never clear as to when that desire arose. Certainly when he began to form this view and tell these stories about Mr Craig's conduct, he approached Mr McVicar early on and said to him a vacancy is likely to become available, and he was urging him to think about taking over the leadership.

WILLIAM YOUNG J:

So do I take it from that, and I don't want to, well I am going to put words in your mouth, there is no evidential basis for thinking that Mr Williams had an animus against Mr Craig before November 2014?

MR MILLS QC:

No, nothing on the evidence that would establish that. The animus formed at that initial Waiake discussion and as he himself acknowledged, at that point he decided that Mr Craig had to go as leader of the Conservative Party and he never changed his mind thereafter.

GLAZEBROOK J:

Can we go back? So you said it's relevant to truth, I don't see that it is. What else was it relevant to? Damages, was there anything else?

MR MILLS QC:

No I was going –

GLAZEBROOK J:

And I can understand the damages point, but obviously if you've tried very hard to fix something up that might, to make something accurate, that may sound, in a reduction in damages possibly.

MR MILLS QC:

Well it's really the other way around.

GLAZEBROOK J:

Well other way around, aggravation, yes.

MR MILLS QC:

What's he entitled to, if he is, if liability is found. The other aspect of this is that he goes to the views that Mr Craig formed about what the allegations were that were being made about him, and when we come to qualified privilege, the issue is not whether what was said is true or not, the issue is whether Mr Craig honestly believed that what he was saying about Mr Williams when he accused him of various things, based on the allegations he understood were being made about him, whether he honestly believed them. So that –

WILLIAM YOUNG J:

Would it be fair to say that the pattern of the jury's verdicts including the finding of fact as to punitive damages suggests the jury were of the view that he didn't honestly believe what he said about Mr Williams.

MR MILLS QC:

Well look I acknowledged to Her Honour Justice Katz when she said to me, subsequent to verdict she said to me, Mr Mills, the jury must have hated your client, and I said –

WILLIAM YOUNG J:

Well, yes, but that's not helpful. The jury found that he acted with flagrant disregard for Mr Williams' rights.

MR MILLS QC:

They did.

WILLIAM YOUNG J:

Now isn't it implicit in that that they were of the view that he didn't honestly believe what he was saying?

MR MILLS QC:

Well it very well may have been. The question is not what they may have found, the question is whether they had an evidentiary basis on which to find it.

WILLIAM YOUNG J:

Well I agree, yes. I'm really trying to cut out the middle bit about do the alleged misdirections matter. Because if he didn't believe that what he was saying was true then he must lose on privilege, one way or another.

MR MILLS QC:

Yes, I think that is right I think, yes. Then just flicking through this a bit faster because I can see the Chief Justice you are wanting me to do that, the –

ELIAS CJ:

Well at the moment I'm not sure where it's going, whereas I did think that starting with any misdirections might get us there a bit faster, but carry on.

MR MILLS QC:

Well as I say the misdirections are based in part upon the factual structure, or relate to the factual structure, so if it's not helpful of course, I would, I can keep going, but you tell me in a moment or two whether this is unhelpful.

ELIAS CJ:

Well how long are you expecting to be on this?

MR MILLS QC:

I was expecting I would go another half hour on this.

ELIAS CJ:

All right, carry on for a bit and we'll see.

MR MILLS QC:

So the next point I wanted to note is that although he had, Mr Williams had initially prepared this note as we've seen, as an aide-memoire, that's all it

was. He then acknowledged that he then used it for a very different purpose and you'll see that, I may not need to take you to it, I'll give you the reference, it's at page 587 of that same bundle 3, and he used it, of course, for a very different purpose without checking it, and you'll see that down at about line 24 when I was questioning him and I said, "But the difficulty I have with what you're telling me is that you then take the information that you believe you've got on that afternoon in Waiake, from Ms MacGregor, and you have used it for much more serious purposes, haven't you?" "Yes," he said. "And you did not, at any stage, check the accuracy of what you took from that night before you did that?" And he said, "Not of the particulars …"

WILLIAM YOUNG J:
Say he was a bit careless, does it matter?

MR MILLS QC:
Well as I said ultimately it feeds through to the damages issues about what's he entitled to given the way he's behaved here.

WILLIAM YOUNG J:
Well that's a slightly different issue, but it seems to me that the level of detail that we're going into is unnecessary. If he thought that Ms MacGregor had been sexually harassed, then broadly speaking he wasn't lying in terms of what he told others, at least as I understand…

MR MILLS QC:
Well we'll come to a point where clearly he knew a lot more than he says he started out believing, particularly about the lack of any responses to the correspondence from Mr Craig, and he knew that, and he acknowledged he knew that, before he spoke to the chairman of the Conservative Party right before this whole thing blew up, that he knew that wasn't correct, and that he had quite deliberately not found out what the facts were when he had them right in front of him in correspondence from Chapman Tripp setting out Mr Craig's position and attaching the combined correspondence from the two parties, and he didn't want to know he said.

GLAZEBROOK J:

All right, but where does this go? Is it just the damages question, is it the qualified privilege question, what question does that go to?

MR MILLS QC:

Well I think in the way that Her Honour dealt with the privilege, it certainly went to the question of whether the submission I made to her at the close of the evidence, that there was a qualified privilege to reply to an attack, it certainly fed into that. This was all part of the attack that Mr Williams had made on Mr Craig –

ELIAS CJ:

But that's not really in issue because she's ruled in your favour on that. She says the occasion is privileged.

MR MILLS QC:

She has.

ELIAS CJ:

The question is whether the occasion was abused. That's really what we're concerned about, not really with, subject to questions of damages around the margins, not with what Mr Williams believed, but with what Mr Craig believed.

MR MILLS QC:

Well of course the arguments that are now, or the criticisms that are now made of the trial Judge by my friends is that on some critical findings that she made about the extent to which the imputations that were made were proven to be true, is challenged, and they feed into the loss of the privilege, of course, because if there were a number of imputations where, as the trial Judge found, Mr Craig had established that those imputations were either true or substantially true, then the basis on which the jury could set aside the privilege is significantly narrowed by that. So it feeds –

WILLIAM YOUNG J:

She couldn't make findings of fact. All she could really properly do is say there was no evidence upon which the jury could find differently.

MR MILLS QC:

Correct, and effectively, this is part of what I had thought made this useful because I was going to take you, I'm going to be taking you to some things where it's accepted by Mr Williams that that wasn't true. That, for example, he –

GLAZEBROOK J:

Can I just – what's the argument on qualified privilege in terms of there are bits of it that weren't true. Obviously it seems the jury found the core allegation, however that was manifested of sexual harassment, was true otherwise their verdicts are inexplicable. So the qualified privilege couldn't apply to that, could it, if Mr Craig didn't honestly believe…

MR MILLS QC:

Yes. Let me –

GLAZEBROOK J:

His explanation was the correct one.

MR MILLS QC:

Let me then do what I think the Chief Justice would like me to do as well. Let me then step across to talk about the framework of qualified privilege. The –

ELIAS CJ:

I would find it helpful if you would tie that to the Judge's directions to the jury when you come to it.

MR MILLS QC:

Yes, you'd rather I do it then?

ELIAS CJ:

Well I'd rather you got on with it really myself, but I don't want to inhibit you from taking us to anything that you think might be helpful background for that discussion which does seem to me to be the critical part of the case.

MR MILLS QC:

All right, let me move to things that I do think are critical to that because they relate to imputations where Mr Craig was right to say that those are untrue. That those are dishonest. That those lack integrity that you would say that. And I should just say also on this question about having used the Waiake notes for the purposes that they were used for, knowing how damaging it was going to be, and Mr Williams acknowledged that, that he knew how damaging it would be, and without checking it, one of the imputations was that Mr Craig had said that Mr Williams lacked integrity, and the argument that was put, and I think Her Honour accepted that, is that there's a lack of integrity in doing what he did, taking a note which he acknowledged in his evidence might not be accurate, where she was in an emotional and distressed state, and when she never came back and corrected it, and he took that, knowing how damaging it would be, used it for another purpose, had various opportunities along the way, which he accepted, to check his facts, and did not, that that sustained an imputation of lack of integrity, which is one of the imputations that the plaintiff pleaded.

WILLIAM YOUNG J:

Do we have what Mr Williams said in writing? Some of what he said about Mr Craig must have been in writing, emails or something I take it, or is it all just what he said orally to Ms Rankin, Mr Stringer, Mr Day and whatever?

MR MILLS QC:

No, some of it is in writing and the one in particular, which I'll take you to I think probably about now, is the exchange he had with Ms Rankin about the alleged sleeping between your legs sext, and that, I should just preface it by saying, that morphed and flipped during the course of the trial between a letter

recording sleeping between your naked legs, to a text that had referred to "sleeping between your naked legs to –

ELIAS CJ:

Why does it matter? I'm still struggling to know why whether it was a text or some other communication matters.

MR MILLS QC:

I don't personally think it does but I think that the reaction of witnesses to being told that Mr Craig had been sending sexts demonstrated that at least with the Conservative Party people he was dealing with, and on whom he depended for his leadership, it mattered a lot.

WILLIAM YOUNG J:

But it couldn't really matter whether it was in the form of a text or an email or a letter, as a matter of common sense.

MR MILLS QC:

No.

WILLIAM YOUNG J:

But what I'm really interested to know is, what did Mr Williams say that was wrong. Now part of the problem is that a lot of what he said was oral and there are different accounts of what he said, as you'd expect, but what I'd like to see is if he's actually said something in a letter or an email or something, where you can put your finger on it and say, well that's a lie, and he knew it.

MR MILLS QC:

Yes, well as I say, in terms of lies, but that's of course not the only imputation, and I've pointed to the integrity one, but the lie one, the one that immediately jumps out on that is about this alleged sext, and so I'll take you then to the exhibits, and it's again, we're in volume 7, and the exhibit is at 2281, and it continues on through to 2288.

WILLIAM YOUNG J:

Who's green and who's blue?

MR MILLS QC:

The green is Mr Williams.

GLAZEBROOK J:

I don't have a green.

MR MILLS QC:

It's the first one then Your Honour. The one, "Gosh Colin is incredible." That's Mr Williams and you'll see, if you go back to the previous page, you'll see what has triggered that comment about Colin being incredible, it's a talk he'd given at Westlake Girls High about marriage. So that leads to this, "Gosh Colin is incredible." And then Ms Rankin says, "I hope you haven't bought into that Rach stuff." And he says, "Haven't bought into? I've read the explicitly hand written letters from Colin where he talks about his fantasies." Now that may well relate to the correspondence that he had seen, and then –

ELIAS CJ:

Is it simply the lying on legs thing?

MR MILLS QC:

Yes.

GLAZEBROOK J:

That was never in writing?

MR MILLS QC:

Well the letters that I'll take you to in a moment, things like, you're beautiful because and –

ELIAS CJ:

No but what's the fantasy apart from that one, is there another one?

MR MILLS QC:

Well I'm assuming that's – no, I'm assuming he's just talking about that collective group of letters that he had seen, various issues about how carefully he'd seen it, but it'll relate to those and I'll take you to this. It was referred to in the trial as a dossier and it was the collection that he took and showed, particularly to Mr Dobbs and Mr Day.

WILLIAM YOUNG J:

But where's the line here?

MR MILLS QC:

There isn't one Your Honour, and because I also want you to see the impact this has on Ms Rankin, this particular wording, and Mr Williams acknowledged he knew how damaging this was. So, "Oh my God Jordan. Can you please tell me more. I need to know. He's lied to me lock stock and barrel if that's the case. Did he write them to her." "Yes. I read the letters." Then you'll see on the next page, it's the third for those of you that don't have the colour, the third bullet down, "I presume he's paid Rachel to keep her quiet." Now Ms Rankin, not surprisingly took that as a statement that he'd paid hush money, which is simply not true. "I know she made a big – "

WILLIAM YOUNG J:

Well it's a matter of opinion, isn't it? And also –

GLAZEBROOK J:

There was a forgiveness of a debt as I understand it.

MR MILLS QC:

There was.

GLAZEBROOK J:

Quite a large forgiveness of debt. Wasn't it something like 18 or $20,000?

MR MILLS QC:

Yes, yes.

GLAZEBROOK J:

Well that's quite, I think most people might think that that was a significant sum.

MR MILLS QC:

Well all I can say to that Your Honour is he's aware of the effect on Ms Rankin. He acknowledged it –

WILLIAM YOUNG J:

Sorry, it's the lies, I'm looking for something crunchy.

MR MILLS QC:

You're about to get it Your Honour.

WILLIAM YOUNG J:

I wouldn't regard "I presume he's paid Rachel to keep her quiet" as a lie.

MR MILLS QC:

I know.

WILLIAM YOUNG J:

Particularly, it may well reflect his assessment of the situation.

MR MILLS QC:

I said the point before, I won't keep repeating it, but what he's done is he's going out on a very uncertain base and causing enormous damage. Then over on the, on page 85 he says, second one down, well Rankin is saying, "Amazing. I am horrified. Thank you for telling me." Mr Williams says, "Happy to talk further as long as you don't attribute the information to me." And she says, "I would never attribute it to you. I do know for sure she was paid in advance because I saw all the payments." So she's telling him, that's not right, I've seen the payments. She was paid in advance. Then she goes

on and says, “How explicit were the letters.” And you’ll notice the reference “the letters”, “Would the public think they were bad.” And then on the next page, this is the question you were asking me particularly about Justice Young. “From what I understand,” and this is Mr Williams, “the loan/invoice stuff was complicated. Re the letters I read the originals late last year when I visited Rachel in Rodney. Colin wrote stuff like ‘I slept well last night because I dreamt of being between your legs,’ and, ‘I wish there were two of me so I could marry you.’ Wouldn’t have believed it had I not read it with my own eyes.” Now he acknowledged he had never seen that, never read it –

GLAZEBROOK J:
Never seen what?

MR MILLS QC:
Never seen the letter that said, “I slept well last night because I dreamt of being between your legs.”

WILLIAM YOUNG J:
What about, “I wish there were two of you.”

MR MILLS QC:
Yes, that is in one of the –

WILLIAM YOUNG J:
So wouldn’t have believed it if I’d not read it with my own eyes. I mean, I don’t want to…

MR MILLS QC:
Well –

WILLIAM YOUNG J:

It's an informal communication. The second, if you read "I wouldn't have believed it if I hadn't read it with my own eyes" as referable to what goes immediately before, is correct.

MR MILLS QC:

Well but in front of that it says –

GLAZEBROOK J:

Well even if it's not, does it matter whether it was said or whether it as written down?

MR MILLS QC:

Only in terms of truth, and that's –

GLAZEBROOK J:

And he acknowledged that that wasn't quite accurate because it was on her legs not between them.

MR MILLS QC:

No, he acknowledged that –

GLAZEBROOK J:

But in fact that's what he had written down in 2014 at the time and not been corrected at the time.

MR MILLS QC:

He did acknowledge that, he acknowledged that he had never read this, and you'll see, Justice Young there, it starts in front of that with, "…when I visited Rachel in Rodney. Colin wrote stuff like I slept well last night because I dreamt of being between your naked legs," recognised that there's another one in there, "Wouldn't have believed it had I not read it," but that was accepted as being not true and he repeated this to others as well, including Mr McCoskrie and also Mr Dobbs and Mr Day, they understood he'd said it to

them as well, and there's a contemporaneous note on what they were told by him, and that statement that he had seen this, he acknowledged that he had never seen it and as Justice Katz said, there was no evidence there was ever such a letter or a text that said that.

WILLIAM YOUNG J:
You are reading that text in a particular way. This one here?

MR MILLS QC:
Well I'm responding to how Ms Rankin responded to it.

WILLIAM YOUNG J:
Okay but he did have a note, the Waiake note that said, recorded a statement by Ms MacGregor that she'd been told this. I did wonder whether all of this detail is that critical. You are dealing with what people are remembering, what people are chatting between others, in perhaps a somewhat emotionally engaged way, are these differences material?

MR MILLS QC:
Well they are because of the pleading. The pleading from Mr Williams was that Mr Craig had defamed him when he said that in various, on various issues Mr Williams had lied by falsely alleging.

WILLIAM YOUNG J:
But, it's a big thing to say this is a lie. It's possible to say he's slightly wrong, but it's a big thing to say it's a lie.

MR MILLS QC:
Well the trial Judge certainly regarded it as an outright lie.

WILLIAM YOUNG J:
Yes, but the jury didn't plainly. I mean I might go with the jury on that I think.

GLAZEBROOK J:

But it is slightly too difficult to see it as an outright lie anyway. I mean it's possibly a lie when he said he read it, but equally possibly that's what he thought he had, based on the way, based on that note.

MR MILLS QC:

Yes, I accept there's two issues here. I keep saying that there are two issues here. One is –

GLAZEBROOK J:

Does it matter because that was said to her, not exactly in those terms, but –

MR MILLS QC:

Well in very, with respect, in very different terms, and indeed again if you judge it by the people, if you judge it by the evidence of the audience to whom these things were directed –

ELIAS CJ:

But you – look, it's accepted that this was an, there was an attack, to which it was appropriate to make a response as long as it didn't abuse the occasion of privilege. That's the – what you're really doing is joining issue here perhaps with the submissions made by Mr McKnight about the excessive damages.

MR MILLS QC:

Well it certainly has a bearing on that but it also relates directly, in my view of this at any rate, to the question of was there an evidentiary base on which the jury could set aside the privilege, and if –

ELIAS CJ:

Why?

MR MILLS QC:

Because the, the first question to be asked about any privilege is what's the purpose for which the privilege was given.

ELIAS CJ:

It's to respond, in this case.

MR MILLS QC:

I would say, and I think this is what the Judge said, and it's also what Mr Craig said he was doing, it was more precise than that, which is the point that Lord Reed is making in the Hong Kong judgment, that's a very important judgment that I'll take Your Honours to. It's not enough just to say it's a broad purpose of a reply to an attack. The purpose is critical in order to protect privileges for the reasons that they are given, which are important reasons of public policy, where the courts always, as you all know, it's based on freedom of expression being more important than reputation within that privileged occasion, and so it is critical to define, for the Judge to define precisely –

GLAZEBROOK J:

I'm not entirely sure that it's freedom of expression in that particular instance, is it? Isn't it, it is actually protecting yourself from an attack and being able to get your side of the story out first. Some of the other issues of qualified privilege are definitely freedom of expression. I'm not certain that I would have put this into exactly the same category because you're only allowed to do that because you may well be damaging the reputation of somebody else in order to protect your own reputation.

MR MILLS QC:

Well look I accept it's a discrete type of privilege but within that privilege the right to express one's self freely, in other words freedom of expression, is nonetheless at the nub of that, it's just in the context of a reply to attack privilege the courts have developed some very discrete rules around how vigorous and how expansive that reply can be, and how to judge whether it's gone outside it, which are discrete to that category. But can I just come back to the purpose issue Your Honour. It is critical, as Lord Reed says, to define the purpose with particularity, and the purpose that is apparent from the trial Judge's summing up, well really from her judgment, her trial judgment, is that the purpose was to allow him to speak out about what he regarded as the

unacceptable way of conducting politics that has gotten the name dirty politics from the Nicky Hager book. Secondly, to defend his political reputation, which as Mr Williams acknowledged, was being shredded, and third his personal reputation as a man and as a husband and as a father. So the purpose of the privilege was all three of those things, and yes it's a reply to attack privilege, but it was to reply on those issues, at least that's the submission I made to you, and I've got passages I can take you to which I think confirm that.

ELIAS CJ:
Sorry, how does that answer why?

MR MILLS QC:
Because the next question then is has the privilege been used for a contrary purpose, or a purpose that's outside the purpose for which the privilege was given. That's why it's critical to define the purpose in the first place.

WILLIAM YOUNG J:
But all of this is sort of too refined if you can form the view, as the jury seems to have done, that he knew he'd sexually harassed her, he knew he was in the wrong, and he was just lashing out to cover the situation up.

MR MILLS QC:
But the issue, once you examine the purpose, is how could the jury find that.

WILLIAM YOUNG J:
Well if the jury were satisfied that he'd sexually harassed Ms MacGregor and he knew it.

MR MILLS QC:
Well they've got to find that he knew it.

WILLIAM YOUNG J:
Okay, yes, now if they find he's known it, then the defence of privilege must fail, mustn't it –

MR MILLS QC:

No.

WILLIAM YOUNG J:

– it doesn't really matter whether he's said things in text or face-to-face or I lay between your naked legs or I lay on top of your legs in my dream, I mean that's all sort of by the by. Do you accept that, that if he sexually harassed her and he knew it, then he hasn't got a defence of privilege?

MR MILLS QC:

If he –

ELIAS CJ:

Well there's no occasion.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

One or the other.

WILLIAM YOUNG J:

It doesn't matter, one way or the other he's out, isn't he.

MR MILLS QC:

If he sexually harassed her, and he knew he had.

WILLIAM YOUNG J:

That's the proposition I put to you.

MR MILLS QC:

Yes, then there's still an issue about the purpose for which the privilege was given and whether the compliance with that purpose played essentially an insignificant role in his response. That's what *Horrocks v Lowe* [1975] AC 135 (HL) said, it's still regarded as the leading case in this area, it's referred to in

the submissions, and that reflects the fact that privileges, once given, because they're given for important public policy reasons, are not to be easily lost.

WILLIAM YOUNG J:

Sorry, if you can answer me specifically not in generalities. Assuming the jury was satisfied that he sexually harassed Ms MacGregor and knew it, would it really have been open for the jury to find that he wasn't motivated by an improper purpose in denying something that he knew to be true.

MR MILLS QC:

Yes I think it would, because the privilege's purpose is much wider than that.

GLAZEBROOK J:

Well no, I mean I didn't stop you when you said the three purposes, but the dirty politics can only be related to whether or not a false allegation of sexual harassment was being used for dirty politics can't it? It's not, because if it was a true allegation then it might be being used for dirty politics but legitimately so, assuming that the public has a legitimate interest, which has been held very many times in knowing about somebody who goes and talks to Westlake Girls High about marriage and in fact is not living up to his ideals.

MR MILLS QC:

Well the only response, the principal response I make to that Your Honour is that the allegation that is made is much more specific than a general allegation of sexual harassment, and again you can see the reaction that the people that this is being conveyed to at the time by Mr Williams are having to variations on that broad brush concept. So –

GLAZEBROOK J:

All right, so if he'd said you're lying specifically about X, I never did that, I admit that I might have done some other things that mightn't have been as savoury as they should have been, given my ideals and I'm sorry for that, then I can understand it, and you knew it and you went further, but that's not what was said was it?

MR MILLS QC:

Well in terms of what Mr Williams did he went well beyond.

GLAZEBROOK J:

Sorry, I meant Mr Craig.

MR MILLS QC:

Mr Craig –

ELIAS CJ:

We are, in fact, looking at the Craig defamation of Williams so that's why what Mr Craig believed and understood is the critical focus. Now I actually have some sympathy with the submissions that are made as to the adequacy of the directions that were given, but I'm starting to be driven back from that, that's why I really thought you should start with that.

MR MILLS QC:

Yes.

ELIAS CJ:

But first of all, in answer to Justice Young's question, do you accept that if Mr Craig knew he had sexually harassed her that the occasion was not privilege, that he should have not, that qualified privilege would not apply.

MR MILLS QC:

I don't –

ELIAS CJ:

Because if that's so, isn't the real question we have to look at is whether the, on the directions given by the Judge, that was sufficiently clear to the jury.

MR MILLS QC:

Well I accept certainly that there's a certain issue around the directions. What I'm resisting is that the, it's critical to start with the purpose, and if, for example, and again Ms MacGregor's evidence changed dramatically

during the course of the trial, she began by saying he had harassed her from almost the time she became his press secretary –

ELIAS CJ:
Isn't this really all detail?

MR MILLS QC:
Well in the end it's not, with respect, Your Honour, because the extent to which there were dishonest things being said about Mr Craig goes to his entitlement within the privilege to say, when I spoke, I spoke for entirely proper reasons, because all of these things that were being said about me, were not true.

WILLIAM YOUNG J:
Say he said well basically I know that I sexually harassed Ms MacGregor. What I take real exception to is that I sent a sext instead of letters. Now, I mean that would have been a ludicrous response –

MR MILLS QC:
Well that's not the facts, but if you –

WILLIAM YOUNG J:
That would have been a ludicrous response so can't, he can't just, if he knows the guts of the allegations against him is correct, he can't just say it's all lies, because that's an assertion that some of what he knows is true is a lie, it's just a straight lie itself.

MR MILLS QC:
Well the tricky issue in responding to that is what's the guts, and that comes back to what was the purpose and what was said about him to which he was absolutely entitled to reply –

WILLIAM YOUNG J:

I suppose – I'm not 100% sure exactly what was said about him. You've taken to us what he said to Ms Rankin. Have we got anything else in writing where you say evidence is a lie on his part?

MR MILLS QC:

Well I do but I'm being pulled two ways here. There are the –

GLAZEBROOK J:

Why don't you just write a list for us and give it to us so that we –

ELIAS CJ:

I think, let's answer your point. Take us to what you want to. Having embarked on this let's follow it through but then let's get onto the legal issues on which leave has been given.

MR MILLS QC:

Yes, I was going to take you, the very thing I was going to take you to.

GLAZEBROOK J:

Can I just check, the proposition seems to be that you can have an all-out attack on somebody denying absolutely everything if, in fact, it turns out that some of the things weren't true, and that's something to do with the purpose of the privilege but I'm afraid you're going to have to explain that to me when you get there. So you can say I didn't have sexual relations with that woman, to borrow a very famous phrase, and so and so is a liar for saying I did, when some of the things that might have been said weren't true but the rest of them were, in terms of –

MR MILLS QC:

I know I'm beginning to sound like a cracked record, but it all starts, as Lord Reed has reemphasised, with purpose.

GLAZEBROOK J:

I know but I just don't understand that because you say the purpose was effectively to say, to go against dirty politics. Well if you have a broadly true allegation of hypocrisy, which –

ELIAS CJ:

The truth of the attack doesn't matter. It's whether the person making the response believes it to be untrue, that's the critical thing for us.

MR MILLS QC:

It is. It is, but the truth of the attack has a bearing on the narrowing of the window through which the jury could find that he had acted for an improper purpose because, let's say that 10 allegations were made against him by Mr Williams. Nine of them were untrue and he rightly responded and said, those are lies. One of them was true. That alone would not lose him the privilege without a very careful enquiry into what the purpose of the privilege was, and what the significance of the one lie was in relation to all the ones where he quite rightly said, that's a lie to say that about me.

WILLIAM YOUNG J:

Well it's a matter of substance, isn't it?

MR MILLS QC:

It is in the end, it was a matter of evidence and a matter of substance.

WILLIAM YOUNG J:

So you're going to take us to –

MR MILLS QC:

Yes, I'm going to, the quick one to take you to I think is the meeting which I think you probably know took place in 18 June 2015 with Mr Dobbs, who was the chair of the Conservative Party at the time, and Mr Day, who was a –

WILLIAM YOUNG J:

Is this in writing, is there a note of this?

MR MILLS QC:

It's a note, it's a note that was taken, and we are going to exhibits volume 7. Volume 8 sorry. And we're going to page 2319. These are Mr Dobbs' notes of the meeting that Mr Williams asked to have with Mr Day, who he had a relationship with because Mr Day was a principal funder of the, or a major funder of the Taxpayers' Union of which Mr Williams was then –

WILLIAM YOUNG J:

The meeting on what day?

MR MILLS QC:

The 18th of June 2015. So this is almost immediately prior to the release through Whale Oil which brings the whole thing down like a pack of cards.

WILLIAM YOUNG J:

So we've got Mr, who's present, Mr Day and –

MR MILLS QC:

Mr Dobbs is the president and he's the one keeping the note, but the other person present in addition to Mr Williams is Mr Day, who was the principal funder of the Taxpayers' Union and through that he had a connection with Mr Williams, who was the chief executive of the Taxpayers' Union. So Mr Williams asks to meet with Mr Day and to tell him about the issues with Mr Craig but then Mr Day brings Mr Dobbs in as well, and so this meeting takes place in Hamilton on that evening. You will – now some of this is disputed, as to its accuracy, but this is the record that was made at the time. Mr Day gave evidence that essentially confirmed the accuracy of what is recorded here, and the other aspect, just to give the context, that does matter, quite apart from whether it's accurate, is that this was subsequently conveyed to Mr Williams – sorry, to Mr Craig by Mr Dobbs. So this goes to the honesty of Mr Craig's belief in what the allegations were that were being made against

him, and his response to him, and it precedes, of course, the two publications on which the defamation action was issued.

So you'll see, to the extent that it can be read, Rachel MacGregor has settlement in place with confidentiality clause. Started August 2011. So this is a reference to sexual harassment allegedly –

GLAZEBROOK J:
Sorry, I just need to find this.

MR MILLS QC:
Fifth line down, started with CC, August 2011.

GLAZEBROOK J:
Thank you.

MR MILLS QC:
Colin Craig smitten with MacGregor. Kissed and touched breast on election night 2011, and you'll see there's a cross there which Mr Dobbs said he's noted the ones that were of particular concern. "Assured would not occur again. Series of incidents and letters 2013. Should then resign." I'm not sure quite what that says. "New pay offer ... CC stopped paying her for six months," that's not correct, "but lent her money. Sexual pressure increased …" sexting text from CC to, I suppose, MacGregor. "Inappropriate touching and words, asked a number of times to stay the night. Massaging, rubbing his back, fell to sleep in his lap," you'll see is recorded there.

WILLIAM YOUNG J:
It's the other way around isn't it?

MR MILLS QC:
It is. Well she acknowledged that it happened as well, that she fell asleep on his lap at one point.

WILLIAM YOUNG J:

I see, okay.

MR MILLS QC:

"Talked him to sleep, love you," et cetera, et cetera. Then there's an excerpt from one of the cards that they were shown by Mr Williams, card to Rachel MacGregor, "Card can never say how much you mean to me. You really do make things sunnier. You brighten up the day and bring me joy." Then another excerpt from a letter, 24th of December 2013. Over the page there's, because Mr Williams wouldn't let them take away the documents so they were making, he was making notes. Here's some excerpts from various things that he was shown, or they were shown, from what is referred to in the trial as the dossier. So there are a number of things in there that are not correct and Mr Williams acknowledged some of those. As I said, Mr Craig was told these were the allegations against him –

WILLIAM YOUNG J:

What are the things that are not correct?

MR MILLS QC:

Well they say that the kissed and touched breast on election night was said to be non-consensual.

WILLIAM YOUNG J:

But that's not in there, is it?

MR MILLS QC:

No it's not in there, but that was her evidence and Mr Williams eventually accepted that it was non-consensual, and –

GLAZEBROOK J:

He denied that though didn't he?

MR MILLS QC:

He did initially but he accepted that eventually, and I'll give you the reference if you like, but it was not –

GLAZEBROOK J:

I do want that reference.

MR MILLS QC:

It is volume 3, tab 36 at 0526 where he says, if my note is correct, that he had told others that it was non-consensual. Volume 3, tab 36, page 0526 is my reference on my notes. It's about, it's line 17, "And that description to you was saying, non-consensual?" "Yes," he says. "So if he had kissed her and felt her up without her consent, this would be an assault wouldn't it?" He said, "… I didn't interpret it ever as an assault." And then he came to a theme that he repeatedly came back to, that, as he got pulled back a bit on what had happened, he would say, well there was a power imbalance. He's saying here that he took away what he was told as being, that this incident was non-consensual and that was consistent with -

GLAZEBROOK J:

Well he's saying it was misuse of power, isn't he, rather than – I mean I know he says yes, but he says he'd interpreted it as a misuse of power.

MR MILLS QC:

Well he does that as well –

WILLIAM YOUNG J:

He says it wasn't an assault.

MR MILLS QC:

Well that was a puzzle. That's his own thinking, I can only tell you that's his thinking.

WILLIAM YOUNG J:

It's not a puzzle if he says it's a power imbalance, it's not the right thing to do but it's not really an indecent assault.

MR MILLS QC:

All right, well that's his view, I wasn't exploring that. What I was interested in –

GLAZEBROOK J:

That is usually the view in terms of – and some people, well the radical feminists would say that there is no consent in those circumstances because of the imbalance of power and that therefore it actually ought to be criminalised.

MR MILLS QC:

Yes.

GLAZEBROOK J:

Our law doesn't say that. It says, well, if there is consent, even through a power imbalance or whatever it may be, then it isn't criminal, and isn't this all that's being said here?

MR MILLS QC:

Well it probably is, and I understand that the, I'm well aware of the concept.

GLAZEBROOK J:

Well then, but what was actually, what you said was that he had, Mr Williams had said to people that it was non-consensual, actually effectively criminal, then you said he accepted that, well I don't read this as his accepting that. So is there somewhere else where he does accept it?

WILLIAM YOUNG J:

This is his –

MR MILLS QC:

Let me be clearer. There's two points here. The first one I'm just taking you to is he said, yes I read what I was being told as non-consensual, Ms MacGregor did not consent to this, and then if we go over to 528 you will see at line 21, "… you told people, including when you saw Mr Dobbs and Mr Day that the election eve incident was non-consensual, correct?" "Yes, 'cos that was my understanding, yes." So the important point for this part of my argument is that that's what he told Dobbs and Day, that it was non-consensual. He didn't say to them, it was non-consensual because there's a power imbalance, he's an elderly gentleman, he would have had to explain it to them, he didn't, he just said, it's non-consensual and so Mr Dobbs I think said I read it that there's been a sexual assault, and he gave evidence that that is indeed what Mr Williams had said to them, that this was a non-consensual exchange and unless one takes the very modern, and it may be true view, of sexual harassment that Your Honour Justice Glazebrook has just articulated, this was a, the evidence was quite clear. It was consented to and there is an interrogatory, which I don't need to take you to, other than you'll know that it's there, where Mr Williams was required to answer a series of interrogatories about this incident, and also there was subsequent cross-examination of Mr Craig, or re-examination of Mr Craig because he said that the interrogatory wasn't entirely correct, and it's one of the things that Justice Katz refers to in her judgment, that it wasn't true to say that it was non-consensual, and he knew by the time he conveyed it that it wasn't. So that's an important note in the sequence of the facts in my submission.

WILLIAM YOUNG J:

So again leaving the sort of three layers of knowledge, presumably this is the note that Mr Craig is responding to.

MR MILLS QC:

Yes, yes it is.

WILLIAM YOUNG J:

Is everything else in here true? Apart from that and the sext?

MR MILLS QC:

No, no not at all. Now I'll have to go back to 2319. Let me first of all just say, I said too quickly to you Your Honour, that it was all based on this. There were rumours coming back to Mr Craig from various people about what was being said about him before this meeting, and they came from Ms Rankin, they came from Mr McCoskrie, they came from Mr Day, it's all dealt with in the evidence. Before this meeting he was getting this information coming back from an anonymous source. Mr Williams was insisting to everyone he spoke to that his anonymity be preserved. Mr Craig says that he reached a point where he became convinced that it was Mr Williams who was behind this, but it was not until he had this meeting with Dobbs and Day that they confirmed what he had come to believe that this was coming from Mr Williams. So to your specific question about what's here, well if you read it together with, for example, the kissed and touched breast, with the evidence that that was told to them as being non-consensual, that's not correct.

WILLIAM YOUNG J:

Yes, we've dealt with that. Okay and the second thing I understand you're going to say is incorrect is the sexting reference.

MR MILLS QC:

The sexting reference is wrong.

WILLIAM YOUNG J:

What about the rest of it?

MR MILLS QC:

The reference to the series of incidents and letter, it was presented to them, and we know it was because of the dossier, on the basis that there were only communications from Mr Craig to Ms MacGregor. That was not true and he acknowledged by the time he went to that meeting he knew it wasn't true.

WILLIAM YOUNG J:

So where does it say, sorry, I'm just trying to…

ELIAS CJ:

What does that matter though?

MR MILLS QC:

Well because the impression that it made on the people he was speaking to was dramatically different when they discovered that there had been replies from Ms MacGregor.

WILLIAM YOUNG J:

Where does it say there'd be no reply?

MR MILLS QC:

Well we know what he gave them, which was the so-called dossier, and again I jumped over the source for that, so let me then speak back briefly to take you to where you can find those documents, and the easiest –

GLAZEBROOK J:

Just give us the gist you say comes out of the fact that there were replies. The gist of those replies?

ELIAS CJ:

Or that it was a consensual relationship.

GLAZEBROOK J:

No, the consensual isn't quite the point.

ELIAS CJ:

That's what I had thought.

GLAZEBROOK J:

Yes, but it is obviously the point in respect of the alleged sexual assault, but the rest of it…

MR MILLS QC:

The trial Judge formed the view and expressed it in her judgment that there was a level of, I think she would've, and I'd have to check to be absolutely sure, effectively that there was a level of affection between the two of them where much of the relationship had been positive and close. The evidence that came in by way of correspondence from Ms MacGregor, that went in the trial and I'll take you to in a moment so at least you can look at it, and the numerous texts that went from Ms MacGregor, my friends are going to say it's a selective group of texts, the ones from Mr Craig aren't there, but they speak for themselves, and they are full of endearments, and Ms MacGregor said, oh well I'm just an affectionate person, that's the way I express myself, so, you know, when I said love ya, love ya, it's just, you know, that's the way I am.

WILLIAM YOUNG J:

There's quite a lot of sizzle here. I'd actually quite like to get to the steak. What are the documents that he showed them, and then what is the stuff that you say he knew about but didn't show them?

MR MILLS QC:

All right, we'll go to it. So the easiest way to get into those documents, which are scattered through the bundle, is the Chapman Tripp letter, but so that there's no criticism of me for not giving you the actual references, I just ask you to note this. These are the actual documents that made up the dossier that was shown to Dobbs and Day from which these notes were taken. They're all in exhibit volume 7, and they are 1714, 1719, 2027, 2114, 2125 and 2153, but I will take you to the Chapman Tripp letter which has an attachment which I think has –

GLAZEBROOK J:

Sorry, I think I missed some of those, can you just run through them again thank you?

MR MILLS QC:

I'll just run through them again. 1714, 1719, 2027, 2114, 2125 and 2153. Now the Chapman Tripp letter is at volume 7, 2252.

ELLEN FRANCE J:

I think it starts earlier doesn't it?

MR MILLS QC:

Yes I think the attachment is what I was wanting to take you to but you'll be right Your Honour, the letter itself starts earlier and it is worth pausing on the first page because – which is the first page which is at 2221, so you see the date, it's March, so it's well before the Dobbs/Day meeting and the evidence from Mr Williams and from Ms MacGregor was that Ms MacGregor was working on a response to this letter for her lawyers to put into a formal letter and Mr Williams was in the same room at the time and he knew that was what she was doing and he knew that this letter would be setting out the response, the letter from Chapman Tripp, would be setting out the response to the letter on behalf of Ms MacGregor and he says he probably, there's a bit of cross-examination around this, he ultimately acknowledged that he probably had read page 1 and if you go to page 1 and look at paragraph 5, if you read page 1, he saw –

GLAZEBROOK J:

So page 1 of the actual letter which is?

MR MILLS QC:

Yes 2221. So if you go to that page and he read the first page as he said he thought he probably had and go to paragraph 5, you'll see what that tells him. And he acknowledged that around about this time he knew that it was not correct to say there had been no responses. So what he then took to the meeting with Dobbs and Day which I think is the dossier, is at 2252 and following. Here we are, so you'll see at 2252 it's broken down into communications from Mr Craig and then communications to Mr Craig. Now there were complaints at trial that dates had been inserted by Mr Craig

which weren't contemporaneous but I'm not going to get into all of that. The important thing here is that he was telling or he did tell Mr Dobbs and Mr Day that the documents that they were showing, which were just those under Mr Craig's communications, that there were no communications back and that was –

GLAZEBROOK J:

Well these don't look like answers to his communications, so were there or were there not specific communications back? As I understand I don't think the evidence is clear at all on that.

MR MILLS QC:

It depends what one means by responses. I accept that and I accept Your Honour that these are not hand in glove me to you, you to me but the first point I make about that is that the communication of this full body of material that's here conveys, as the witnesses said when they learned about it and saw it, a very, very different impression about what had happened from that which they had been led to believe being told about non-consensual touching on election eve, the sext and all of this harassing material which was all one-sided. That was simply not true and the effect that that had, compared to the accurate picture, as Mr Dobbs and Mr Day in particular recorded, was dramatic and Mr Williams knew when he did this it wasn't correct.

ELLEN FRANCE J:

Sorry could I just check, was there evidence that Mr Williams had seen the Gallaway Cook Allan letter to which Chapman Tripp –

MR MILLS QC:

Yes, yes there was.

ELLEN FRANCE J:

So he had seen that?

MR MILLS QC:

Yes and he acknowledged that he had probably read page 1 and he said –

ELLEN FRANCE J:

Sorry I meant the letter –

MR MILLS QC:

Oh the Galloway Cook one, no I don't recall it being an issue at the trial. All I was interested in was –

ELLEN FRANCE J:

No, no, no I didn't think there was anything about that, I just wanted to check.

MR MILLS QC:

Yes, no I don't think there is. Yes, sorry I misheard you. The other, of course, context in this is there is a significant body of emails and other electronic communications which are in I think bundle 7 and so for example the morning after the election eve incident, there's an extremely effusive affectionate text or email going back from Ms MacGregor to Mr Craig.

GLAZEBROOK J:

I'm sorry which election, the 2011?

MR MILLS QC:

2011 yes. So if you wanted the full picture then you would go into those texts as well which are in volume 7.

WILLIAM YOUNG J:

But Mr Williams wouldn't have seen that.

MR MILLS QC:

No, no, no of course not.

WILLIAM YOUNG J:

And if all he read was the first page, it's at para 5 on the first page this material.

MR MILLS QC:

Well he knew, he said he knew that what that letter was dealing with was the other side of the story and he knew there was another side of the story and he knew at some point in here, although he didn't want to know the details he said, "I didn't want to know" but he knew –

GLAZEBROOK J:

I suppose I'm still just having a slight difficulty in understanding where this goes on qualified privilege. It may sound in damages in terms of – well anyway but I mean we're not at that stage yet. So what is the relevance to qualified privilege, just in the sense that the jury had all of this in front of them and it was the jury's decision, not what somebody said that it had an effect or didn't have an effect or changed their effect, although obviously they could take that into account.

MR MILLS QC:

Well the most immediate effect I think is that it goes to the honesty of Mr Craig's belief in what he said when he replied under the privilege. He knew these things and he knew all the communications and allegations that had been made about him which measured against this were completely untrue.

WILLIAM YOUNG J:

Well they weren't completely untrue.

MR MILLS QC:

I said "measured against this". If you say there has been communication only from MacGregor, only to MacGregor.

WILLIAM YOUNG J:

Where does he say that? Where does Mr Williams say that?

GLAZEBROOK J:

Well only he gives – that's what he gave them.

MR MILLS QC:

That's what he gave them at the –

WILLIAM YOUNG J:

He gave them only one side because that's all he's got of course.

MR MILLS QC:

Well that's right but he knew that that wasn't the only side, he acknowledged that in his evidence. So from Mr Craig's point of view he is being told that allegations are being made about him which he knows are not correct. It goes directly –

WILLIAM YOUNG J:

But he's knows there's a substantial basis for them.

MR MILLS QC:

But he knows that on issues such as, with respect, the sext, the election night incident, the unreciprocated nature of this sexual harassment from August 2011 through to the time that she resigns, those are not correct and those were the allegations –

GLAZEBROOK J:

Why do you say the last one isn't correct?

MR MILLS QC:

Sexual harassment from 2011?

GLAZEBROOK J:

I thought that was what was said. That was the allegation made and I would've thought there was an evidential foundation for that.

MR MILLS QC:

Again we're back to this distinction between what's true and what Mr Craig honestly believes was untrue which is the privilege issue.

GLAZEBROOK J:

Well what does he say he honestly believed was untrue?

MR MILLS QC:

He honestly believed there was never a sext ever, never anything.

GLAZEBROOK J:

Sorry what did he honestly believe?

MR MILLS QC:

Never a sext, we've had never a sext of any kind.

GLAZEBROOK J:

Well okay, but so what? To be honest whether it's in writing or said, I personally don't see the distinction and in fact having it said to me personally, personally would've been worse than seeing it in writing. Other people may have had a different view.

MR MILLS QC:

Well it never said either anything about lying between legs or lying between naked legs.

GLAZEBROOK J:

No we understand that. So we understand but all I'm really trying to get at, your argument is that he honestly believed he didn't do specific things that he was alleged to have done.

MR MILLS QC:

Mhm.

GLAZEBROOK J:

I.e. he honestly believed he didn't send a sext.

MR MILLS QC:

Mhm.

GLAZEBROOK J:

Okay, all right what else?

MR MILLS QC:

Did not believe –

WILLIAM YOUNG J:

He did actually acknowledge, didn't he, that he'd sent texts of, well I don't know how to say it, of an affectionate nature.

MR MILLS QC:

Oh yes.

WILLIAM YOUNG J:

He said, "The worst text I sent was something along the lines of…"

MR MILLS QC:

Yes, and she said, also when I asked her to identify what she regarded as the worst thing that he had said to her, it was, "You are wonderful."

WILLIAM YOUNG J:

Yes, but I mean if, the texts that are referred to by both of them are reasonably anodyne, but in the context of the letters, I guess, at a stretch you could say they're sexts, couldn't you?

MR MILLS QC:

Well, again, the trial Judge who heard the evidence, said she didn't read any of it that way, and when you put in the –

WILLIAM YOUNG J:

But it's not her view that really matters.

MR MILLS QC:

Well no, not ultimately, but it played into her view about, or led into her view about whether or not the verdict was unsafe.

GLAZEBROOK J:

The point about what's said is that they have to be read in context, and they're also how somebody might take it. Now somebody might think something's totally anodyne, somebody of a particular sensitive nature may read something more into it, those are all of the sort of difficult issues that arise in sexual harassment cases generally but, so he honestly believed that he didn't sext her.

MR MILLS QC:

Yes.

GLAZEBROOK J:

What else did he honestly believe that, he honest believed that there was communication the other way?

MR MILLS QC:

He certainly did and there's plenty of evidence –

GLAZEBROOK J:

And he honestly believed, and rightly so, that there wasn't a sexual assault on election night, on 2011.

MR MILLS QC:

Yes, and he honestly believed that it was wrong when it was said that she had resigned in 2013 and been lured back by more money, and on the evidence that's simply not correct.

GLAZEBROOK J:

He honestly believed, sorry, that?

MR MILLS QC:

That, he honestly believed that it was untrue to say that she had resigned –

WILLIAM YOUNG J:

Where is that in the note?

MR MILLS QC:

I'm about to be told, but I know it's there. So just while it's being found if I may –

GLAZEBROOK J:

Sorry, I just want to, it's because this gets a bit complicated on the specifics of that particular resignation.

MR MILLS QC:

All right. He honestly believed that it was wrong to allege that he had stopped paying her for a period of six months, and of course we saw the Rankin reference where she understood that, both to be – sorry.

GLAZEBROOK J:

And she was told it was complicated and I can see why.

MR MILLS QC:

Yes, so in the Dobbs note again, 2319, series of incidents and letters 2013 she then resigned, that's his shorthand note but his evidence was –

GLAZEBROOK J:

I saw it, oh yes.

MR MILLS QC:

Yes, but the evidence that was given was that she had resigned and then been lured back by more money, that was not true.

WILLIAM YOUNG J:

So what, did anything happen like that?

MR MILLS QC:

No. No. The only thing that, it's so far away from it, it's almost not worth mentioning, but she switched between being an employee and a contractor, but she never stopped working and was brought back by more money. And of course these things all in the context were being taken as, and I certainly said at trial, were being intended as ways of conveying this story about Mr Craig which was, from his perspective, not true, and he was never directly challenged when he kept saying, I never believed I did, I still don't believe I did. In retrospective I think he may have said, well, yes, maybe now I can see that, but at the time, in the context of the relationship which is apparent from various emails that are in volume 7, and from the evidence that was given it was, he saw it as an affectionate relationship that went too far, and he acknowledged it went too far, but he always understood it to be reciprocated and when, after that election night incident there were concerns all around about where it had got to and they stepped back from that, Ms MacGregor said it got much better after that, and then in 2014 with the intensity of the election period she said it again, that's when she had her complaint, but the evidence of what had occurred during their, was frankly more about money than it was about physical contact.

ELIAS CJ:

Well we'll have to take the adjournment now. When you said "his story" the story you are referring to is, is it not, the story of sexual harassment to which all of these are, or all of these are part of the mosaic.

MR MILLS QC:

Yes.

ELIAS CJ:

That's all it is, isn't it, sexual harassment and whether he believed he was sexually harassing her, as indeed the Judge, I think, said.

MR MILLS QC:

Well the Judge said that the evidence for that was slight.

ELIAS CJ:

Yes.

MR MILLS QC:

And I'd be hard pressed, we'll have to see if my friend identifies any, I cannot identify anywhere in –

ELIAS CJ:

But that's the area on which the case turns really, whether he believed he was sexually harassing in the whole picture that you've taken us to. Now when we come back from the adjournment we're going to, are we through the material, the evidence you wanted to take us to?

MR MILLS QC:

Yes, if it's not helpful to the Court to go further then I won't.

ELIAS CJ:

No, I'm not sure what you want to take us to Mr Mills.

MR MILLS QC:

Well I was really, my original intention had been to give the Court the opportunity to sight key documents and to see the chronological structure that leads up to the defamation.

ELIAS CJ:

But have you got to the end of that, that's my question?

MR MILLS QC:

Two other steps, I suppose, the release to Whale Oil and then the defamatory publications on which Mr Williams said.

ELIAS CJ:

We'll go to those after the adjournment then, thank you.

COURT ADJOURNS: 11.36 AM

COURT RESUMES: 11.53 AM

ELIAS CJ:

Thank you.

MR MILLS QC:

Thank you Your Honour. The final step then in the factual chronology I was going through, and of course I've said to you and I don't think I need to go in detail, is that that information from the Dobbs/Day meeting was conveyed to Mr Craig, is the release through Whale Oil, which was fundamental to the finding of the privilege, and the proportionality of the publication of Mr Craig's response relative to the publication by Mr Williams through Whale Oil, and of course that is one of the misdirection points so it has relevance to that as well.

Now the release itself you'll find in volume 8 at page 2322, and again I'm not given the context particularly, I think Your Honours probably know that this was released contrary to an assurance given to Messrs Dobbs and Day that they would be given time to deal with matters themselves, but the next morning this was released to Whale Oil. Now the reference on that, the conserved conservative, Mr Williams accepted at the trial that he was concerned conservative, and there's a whole series of emails from him which then follow that page all the way through.

WILLIAM YOUNG J:

Sorry, just pause there. That's what appeared on Whale Oil?

MR MILLS QC:

Yes it is.

WILLIAM YOUNG J:

That's all basically true, isn't it?

MR MILLS QC:

Well there was no pay-out on the sexual harassment claim, that was settled, that was a separate issue where it was not –

GLAZEBROOK J:

The forgiveness of debt I thought was related to that settlement.

MR MILLS QC:

Well it was part, there were two aspects of it, and again there's debated evidence over this, but the evidence that was put forward by Mr Craig, which was technically certainly right, was that there were two separate agreements. One related to the sexual harassment issue, the other one related to the unpaid invoices and along with that came an agreement not to enforce a debt which –

WILLIAM YOUNG J:

Where were the proceedings, the Human Rights Tribunal?

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Which didn't have jurisdiction over the unpaid debt I take it?

MR MILLS QC:

No, there was a mediation outside of the Human Rights Tribunal.

WILLIAM YOUNG J:
All right.

MR MILLS QC:
And that was the basis on which they –

GLAZEBROOK J:
In relation to the unpaid invoices, why would you forgive debt if it was owed legitimately? It's an added payment, isn't it?

MR MILLS QC:
Well you'd need to, and obviously I don't have time to do this, the Court needs to read the material around this and the evidence that was given on it. The evidence was that –

GLAZEBROOK J:
The jury could certainly infer that it was a pay-out, couldn't they?

MR MILLS QC:
The primary evidence was the terms of the settlement. What inferences the jury could draw from that, certainly could not draw inferences from that, in my submission, that would be relevant to Mr Craig's honest belief at the time at which these events were in issue.

GLAZEBROOK J:
Sorry, can you just repeat that?

MR MILLS QC:
Certainly would not have been a basis for drawing inferences about Mr Craig's honest belief about whether he had sexually harassed at the time of the events in question.

WILLIAM YOUNG J:
Did Mr Williams write this release at 2332 or is that –

MR MILLS QC:

Yes he did. He is "concerned conservative" and –

WILLIAM YOUNG J:

We've been told by members – "Exclusive: A poem Colin Craig doesn't want you to see." Is that written by Jordan Williams?

MR MILLS QC:

This whole thing is written by Jordan Williams and sent through to the Whale Oil tip line for publication.

WILLIAM YOUNG J:

And is that the same with the next one?

MR MILLS QC:

Yes, and all those that follow, and you can, and you do note there on paragraph 3 on the 2322, "Whale Oil Media understands that no sexual relationship resulted, but Colin Craig is alleged to have pursued the staffer including sending a large volume of text messages, letters and inappropriate touching… We are still working through the material," and this is the flavour of it.

WILLIAM YOUNG J:

And that's the same at 2344 and 2347.

MR MILLS QC:

Yes, and if you look particularly at 2324, the questions that are to be asked of a high profile New Zealander, and there's no question about who this was understood to be, "Did you not pay a staff member for six months."

WILLIAM YOUNG J:

Sorry, where is this?

MR MILLS QC:

This is page 2324, "Did you not pay a staff member for six months? Did you try to use a financial dispute to try to pressure a young staff member to sleep with you? Did you send her love letters begging her for a relationship?" None of that is true. Then –

WILLIAM YOUNG J:

Were these questions published?

MR MILLS QC:

I'm told not. But they're all corroborated –

GLAZEBROOK J:

Well then so what?

MR MILLS QC:

Well they're corroborative of evidence that was given about what –

GLAZEBROOK J:

Okay, well what was published? The 2322, 2323.

MR MILLS QC:

Correct.

GLAZEBROOK J:

2324 not published?

MR MILLS QC:

2322 is the one that went onto Whale Oil and –

GLAZEBROOK J:

So the stuff that comes up afterwards was not published, or some of it was obviously because 2326 looks –

MR MILLS QC:

I think some of them were but the relevance of them at the trial was simply about what Mr Williams was seeking to do, which went to the reply, went to whether there was an attack. He was denying that there was an attack. They were all relevant to the Judge forming the view that indeed there had been an attack and that Mr Craig was entitled to reply. But the, it was the one that we first looked at, at 2322, which went out on Whale Oil and which led to what was described at the trial as a media fire storm and which Mr Williams accepted was deeply humiliating to Mr Craig and that it was done with the intention that he would step down or be removed as the leader of the Conservative Party and that's the background to the proceeding, to the publications that have led to Mr Williams suing.

As I started saying to Her Honour Justice Glazebrook, to the extent that there was disputed evidence, the unpublished conservative lines of propositions where they line up with what Mr Dobbs or Mr Day said they were told, it was clearly capable of some corroboration that their evidence should be believed but that's beyond the scope of what I was really going through this for at the moment. If you see the chronology of how this began, how it developed and what ultimately happened which led to these proceedings. So unless there's any queries about that part, I'm going to go to where the Chief Justice wanted me to go and can I just enquire on this issue now that I'm turning to with misdirections, is the Court wanting me to deal with the discretion issue because that's an important issue as far as the, I imagine as far as the trial Judge is concerned and also as far as Mr Craig is concerned?

ELIAS CJ:

What do you mean by discretion issue?

MR MILLS QC:

Well the Judge exercised the discretion to order a general retrial.

ELIAS CJ:

Oh I see, the retrial.

MR MILLS QC:

The Court of Appeal set that aside on the basis that she didn't realise that she had a discretion.

ELIAS CJ:

Well that is something that you will have to deal with.

MR MILLS QC:

Yes well I wanted to but I was just checking.

ELIAS CJ:

But it does seem to me that the appropriate place to start is with whether there is any misdirection on the qualified privilege matter because I don't see it so much as a matter of discretion but of judgment as to whether a matter should go back and if it were the case that there is a material misdirection on qualified privilege, I would need some persuading that it wasn't appropriate to send the whole thing back.

MR MILLS QC:

Yes, well you recall –

GLAZEBROOK J:

Can I just put the other side to that?

MR MILLS QC:

I actually meant the other way round.

GLAZEBROOK J:

This is a civil case rather than a criminal case and I want – what I would like is the other side of that but it is – obviously in a criminal case if there was a material misdirection then it goes back because in fact it's up to the Judge to direct properly, no matter the way counsel put it. That's not the case in a civil trial and the test is actually higher in terms of whether matters get sent back or not. So that would be the matter that I would be interested in.

MR MILLS QC:

I would be interested in exploring that with you Your Honour because that was not my understanding of the difference between criminal and civil cases but you sit on all these cases, you may know better than I do.

ELIAS CJ:

Well it's not my understanding of the case, the defamation cases I should say, but you may need to go to those defamation cases.

MR MILLS QC:

Yes I will Your Honour. So I was just going to say to Your Honour Justice Glazebrook, that the trial Judge came at this issue that the Chief Justice just identified, the other way around, by saying that I don't need to find whether there's a misdirection because I've already found the excessiveness of the damages.

GLAZEBROOK J:

No I understand that was a different route and I'm not sure that she was correct to look at it that way but I'm not sure that it really matters.

MR MILLS QC:

Well I'll come back to that. Well it could matter but it may not.

GLAZEBROOK J:

It could matter.

MR MILLS QC:

All right then. So the summing up is in volume 2 and so can I invite the Court really to have that open because we'll be dipping in and out of that fairly obviously because that's the source and it is at tab 17 and it begins at 0231. Now again just a slight bit of background, I think the Court will be aware that it was an unfortunate but unavoidable fact that the ruling on qualified privilege came out before the summing up but the reasons did not come out until afterwards and so there is clearly a conflict, if I could put it that way, between

some of the findings that Her Honour made when the reasons came out for why she had found the qualified privilege. Some of the issues that she had ruled on for the purposes of finding the qualified privilege, particularly proportionality and relevance where she had ruled in that reasons judgment and where, as we are about to see, she directed on those in a way which invited the jury to reach a different conclusion.

ELIAS CJ:
Just remind me, what's the date of the reasons?

MR MILLS QC:
The reasons are –

ELIAS CJ:
Oh it doesn't matter.

MR MILLS QC:
I'll get it from Mr Cleary in just a moment but it came out sometime afterwards. 19 October. So all we knew at the point at which summing up took place was that we had a qualified privilege in Mr Craig's favour and Her Honour acknowledged that she had to choose between –

ELIAS CJ:
What was the – sorry was there a ruling given on that?

MR MILLS QC:
Yes there was.

ELIAS CJ:
I didn't find that, can you just –

MR MILLS QC:
It's ruling number 7 is it?

WILLIAM YOUNG J:

Yes but it's after trial that – the reasons for the ruling are given after trial.

ELIAS CJ:

No, no not the reasons, I just want the ruling.

MR MILLS QC:

Tab 23 is the ruling Your Honour.

ELIAS CJ:

Is it?

MR MILLS QC:

Ruling – no tab 23 is the reasons. Minute number 5.

ELIAS CJ:

Minute number 5, but that also was after the summing up was it?

MR MILLS QC:

Tab 10, we'll get there eventually.

ELIAS CJ:

Tab 10.

MR MILLS QC:

So that's got to be in volume 1 doesn't it? Yes minute number 7, page 134.

GLAZEBROOK J:

So that's from paragraph 10?

MR MILLS QC:

Yes it is. She's dealing with some other matters as well.

ELIAS CJ:

So which paragraph?

MR MILLS QC:

It begins at paragraph 10. You see the heading there, whether remarks are to be published on occasions of qualified privilege. So she goes through what the submissions were and the real issue was whether there were disputed facts because if there were, they had to go to the jury of course before she could rule but she was persuaded that there were no necessary facts that needed to be found in order to find there was privilege.

GLAZEBROOK J:

Now didn't, am I imagining this but Mr McKnight I think asked for a specific question on qualified privilege as a basis to be put and she refused that. Is that in that ruling or another one?

MR MILLS QC:

There's a subsequent application on the post-verdict issues, if that's what Your Honour is referring to?

GLAZEBROOK J:

Maybe it is.

MR MILLS QC:

Which I am going to come to.

GLAZEBROOK J:

All right, no that's fine, that's fine.

MR MILLS QC:

Because it has direct relevance to the discretion issue. So that's what happened.

ELIAS CJ:

But the Judge has to resolve the matter on the basis of undisputed facts.

MR MILLS QC:

Yes or alternatively has to refer facts to the jury.

ELIAS CJ:

Or has to refer, yes.

MR MILLS QC:

Before ruling.

ELIAS CJ:

Yes well I think that's really what Justice Glazebrook may be referring to, the question where the Judge considered whether to ask the jury the facts that were disputed and which established the occasion for privilege.

MR MILLS QC:

Well she decided, as she said in there, that, "I don't need any facts to be decided because there are sufficient undisputed facts."

GLAZEBROOK J:

I must admit I thought she had been asked to put something before trial rather than afterwards but as I say I might have misunderstood that.

WILLIAM YOUNG J:

Para 16 of the ruling, she records Mr Romanos submitted it's not currently possible for the Court to rule on whether the statements were published on occasions of qualified privilege on the basis of the undisputed facts, rather the jury's findings reflect a number of factual issues required in law to determine whether the statement was made on this occasion.

MR MILLS QC:

Yes and she rejected that.

WILLIAM YOUNG J:

So this is the threshold, the threshold question proposition.

MR MILLS QC:

Yes that's right and she –

ELLEN FRANCE J:

And that's discussed at paragraph 61 of the reasons.

GLAZEBROOK J:

No, that's actually maybe where I've seen it.

MR MILLS QC:

Yes, so she was –

ELIAS CJ:

She doesn't recite there the facts.

MR MILLS QC:

I think you'll see it in the reasons judgment.

ELIAS CJ:

I see.

MR MILLS QC:

This was obviously a fairly rushed job.

ELIAS CJ:

It might have been –

GLAZEBROOK J:

There was a suggestion that it be put as a preliminary issue, that's what I was looking at.

ELIAS CJ:

It might have been a counsel of perfection but it would have been perhaps wiser to have recorded the undisputed facts on which she made her ruling, even if she didn't elaborate on the reasons.

MR MILLS QC:

Well undoubtedly it would have, and it would also have I think made it much easier to raise issues on the summing up because one of the issues that was argued in the application to the qualified privilege ruling was on this question of the, whether the *Lange* reasonableness issues applied to defence to attack privilege, and I resisted that, but I knew that Her Honour was not completely persuaded on that, or I suspected that she wasn't, because she had given us, all of us, during the course of the trial, a copy of Justice Tipping's speech that he had given on reasonableness and *Lange* and so this is one of the issues with the misdirections. It comes up in the misdirections, to have objected to it at the time would have meant we were rearguing an issue on which the jury, in fact the jury were still out, is what Her Honour held to be the right view on that, and so it was difficult not having those reasons, but I should say in defence of Justice Katz that she worked extraordinarily hard. She was dropped into this very late, because Justice Toogood was going to do it and suddenly wasn't available because his Rotorua trial had run over. She had just come back from sabbatical, literally a couple of days before the trial started, and I have at that level nothing but compliments for her at the way she dug into this.

GLAZEBROOK J:

This issue of justification seems to be in the round it was justified. To what extent is that relevant to qualified privilege?

MR MILLS QC:

Not at all in my view. I think this language has gotten very confused and troubling.

GLAZEBROOK J:

Well that's one of the issues. Okay, maybe it's better not to nit-pick through this.

MR MILLS QC:

I should say one of the reasons it's confusing is because for a long –

GLAZEBROOK J:

Although I'm not sure that the Judge put that even in the summing up.

MR MILLS QC:

For a long time truth has been described as justification, as it used to be, so to use that terminology here is very confusing. The only issues, this is stated at the outset, and it's probably motherhood and apple pie stuff, but in my submission, my understanding of qualified privilege, and I'm confident it's correct on the proper authorities, is that all that the Judge has to find, and it is for the Judge to find in the absence of disputed facts, is is this an occasion of qualified privilege, and to do that the Judge has to find that the, what was done on that occasion is relevant to the occasion, and that any distribution is proportionate to the relationship that the occasion protects.

ELIAS CJ:

That's not necessarily all that has to be determined. There is a determination as to whether it is an occasion of qualified privilege.

MR MILLS QC:

Yes it is.

ELIAS CJ:

And I know there are authorities going both ways as to whether it's a question that the Judge has to determine on established facts, or whether it's something that can be taken into account in deciding whether privilege has been lost, which is the way effectively she dealt with it, but there is powerful authority which would suggest that unless that threshold question of whether Mr Craig believed these were unfounded attacks, he could avail himself of the privilege, and that being really the critical question, one would have thought that it needed to be, that that question of fact needed to be resolved.

MR MILLS QC:

Well, with respect, certainly my submission on qualified privilege, which I think *Adam v Ward* [1917] AC 309 (HL) is still really the sort of the grundnorm in this, is that unless –

ELIAS CJ:

Well hang on, you can't say that given the Defamation Act 1992, which I hope you'll come to at some stage.

MR MILLS QC:

That in terms of finding the privilege the Judge must decide whether there is a privilege and in this case –

ELIAS CJ:

But if the facts are disputed, and the Judge herself says that in her ruling –

MR MILLS QC:

If the facts were disputed –

GLAZEBROOK J:

Mind you that might just be looking more broadly at whether the statements were made or not.

ELIAS CJ:

Well it's the occasion of the privilege she has to rule on, so any facts which bear on that must be either undisputed or must be ascertained by the trier of fact, I would have thought.

MR MILLS QC:

Before she rules, yes.

GLAZEBROOK J:

But is it, I mean it might just be, I can imagine a situation where it's undisputed, where it's disputed whether there's been a prior attack, and there obviously you would have to check because if there's not a prior attack then

you're not allowed to, it can't possibly be a qualified privilege occasion if you're responding to something that was never put forward.

MR MILLS QC:

Well that was certainly the way Her Honour approached it, and in my respectful submission it's the correct approach to it.

GLAZEBROOK J:

And actually the Defamation Act might suggest that's the case because, I can't remember the wording, but it does suggest that it's, you look at the occasion, and the occasion is merely whether it's responding to something, and then see whether you've lost it.

MR MILLS QC:

Well the classic, as we probably all know, the classic definitions of "privileges" are that in which of course *Lange* widened is –

ELIAS CJ:

But *Lange* was actually a reportage case. I think it might be quite, well, there are questions to the extent to which it requires –

MR MILLS QC:

Yes, well I knew you knew a lot about it because you –

ELIAS CJ:

Well no I don't really because it was a long time ago and the Court of Appeal cut it back.

MR MILLS QC:

But the, *Lange* wouldn't come within the British courts are talking about as neutral reportage and which of course is discussed in this recent jury case in the Court of Appeal about which one might have another discussion.

ELIAS CJ:

Yes, one can understand however that is developed in the common law, and the Defamation Act allows the common law to develop, that you may bring in circumstances of reasonableness and so on, and develop that as part of the freedom of speech and in particular the freedom of public speech, but here if you're within a conventional qualified privilege based on the category of response, my understanding is that the cases are very clear that it doesn't have to, you don't have to act reasonably, and yet the Judge's directions suggest that the jury should look at that. I know that's directed at whether he had the honest belief, that's why I really wonder whether the question of honest belief wasn't a threshold question, which had to be resolved before qualified privilege was left to the jury to determine whether it had been lost.

WILLIAM YOUNG J:

This is para 74 of the Judge's ruling.

MR MILLS QC:

Can I just –

GLAZEBROOK J:

Although you couldn't determine that without determining the facts, which would have to be for the jury –

MR MILLS QC:

Can I just respond to the Chief Justice before this gets lost? The effect of finding a privilege is that there is then a presumption of honest belief. Once you've got a privilege there is a presumption of honest belief that goes with it. That's why section 19 works the way it does and says that the onus then moves to the plaintiff to remove the privilege and one way of doing that, and it's certainly not the only way but it's very often the conventional way, is a lack of honest belief by the person using the privilege, which in other words is an improper use of the purpose of the privilege. But on a, well certainly what I regard, whatever that's worth, as the right way to come at qualified privilege, it is that, and to apply it to the facts we've got here, the Judge had to be able to

find that there had been an attack on Mr Craig by Mr Williams, and she did and she said, I don't need any further facts to be able to determine that.

WILLIAM YOUNG J:
I don't think there's any dispute that –

ELIAS CJ:
No.

MR MILLS QC:
Well that's right, so she did –

WILLIAM YOUNG J:
That was an attack and in ordinary circumstances he would have a qualified privilege to respond. What I'm troubled is what she says at para 74 where she says –

MR MILLS QC:
Excuse me, is this the reasons judgment?

WILLIAM YOUNG J:
The reasons judgment, no this is the ruling at tab 23, page 336.

ELIAS CJ:
Para 74 is at 252.

WILLIAM YOUNG J:
No 336 of tab 23.

MR MILLS QC:
That's the reasons isn't it?

WILLIAM YOUNG J:
That's the reasons for the ruling.

MR MILLS QC:

Oh sorry I thought you were going back to the ruling number 7.

ELIAS CJ:

Well I have problems with para 74.

WILLIAM YOUNG J:

Yes because on the face of it she's made a finding of fact that Mr Craig believed he was the victim of a dirty politics attack. Well myself I would have thought that while she could make a finding like that provisionally, that she would leave qualified privilege to the jury on that basis, the question whether he was subject to such an attack was ultimately for the jury because if the allegations were true and he knew it, then I just can't see how he had a privilege and if he did have a privilege well then he would lose it at the second stage.

MR MILLS QC:

Yes and I had not read that paragraph in quite the same way. I'll just tell you how I read what she's doing here. This discussion around the submission that I made to her which then went across this issue about political speech, went to the question of the purpose of the privilege. And in the reasons judgment you can see, at least on my reading of it and understanding of it, that she has said that this privilege is giving Mr Craig the right to speak out on what he regards as a 'dirty politics' style of politics which he doesn't regard as acceptable in New Zealand's democracy. He is entitled to speak out to defend his political reputation which as Mr Williams said was being shredded and to also speak out on his personal reputation which obviously was being deeply damaged. So that's the purpose of the privilege that she's talking about.

WILLIAM YOUNG J:

But she just accepts that he is acting on the basis of a genuine belief.

MR MILLS QC:

I hadn't read it that way because she says, "I accept Mr Mills' submission that it is relevant from Mr Craig's perspective he was responding."

WILLIAM YOUNG J:

But that's a disputed fact.

MR MILLS QC:

No, no, the issue of –

WILLIAM YOUNG J:

He's responding to an attack, it's undoubted that he – there can be no question that he was responding to an attack.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

What troubles me is the apparent conclusion that it was his belief that it was an unfounded attack and that he was the victim of an unfounded attack.

MR MILLS QC:

Yes but with respect, certainly what I had understood that the Judge was doing is, and you can see that I think consistent with that in 76 where she talks about, "It is therefore relevant to Mr Craig's intention." These don't finally determine in terms of section 19 of the Act whether the privilege might be lost, these are all part of framing the purpose of the privilege against which Mr Craig's dominant purpose in using that privilege is to be measured which was the point I was making earlier this morning. She's got to define the purpose.

GLAZEBROOK J:

Well I just mean a dominant purpose but I think where we're getting at cross-purposes is as I understand it the Chief Justice and Justice Young are

saying that those facts are relevant to the determination of the privilege and whether it's an occasion of qualified privilege at all which is what the submission from Mr Williams was in fact in the High Court. Your submission is no they're not, you just look at the very vanilla, was there attack and can this be seen as a response to the attack within the occasion of the sort of things that might allow you to respond, such as dirty politics, your personal reputation and your political reputation. Now if you say that, then the questions that you are being asked are questions that then look at whether the privilege has been lost, rather than whether there was a privilege in the first place. To be honest I'm not sure it makes much difference because they're for the jury anyway.

ELIAS CJ:

Well it makes a big difference because if the Judge didn't resolve this on found facts before she left qualified privilege, then she had to be very specific in what she directed the jury as to in relation to the loss of privilege because if it really was that the occasion wasn't established she should, it seems to me, have said to the jury you must be satisfied that he didn't have any belief in the truth of the allegation and that that is – I mean she does say that but it's all wound up with additional things about reasonableness.

MR MILLS QC:

Well look Chief Justice, of course I agree with that and I think there are serious problems with the summing up and obviously I'm going to come to those specifically but just to get this preliminary finding of privilege at least so you clearly understand my view, whether you accept it or not. It is that she had to find there was an attack and she did, and she didn't need any more facts for that. She had to then find that the response from Mr Craig was relevant to the nature of the attack and the occasion. Then she had to find that the publication through Whale Oil meant that what he then did in distributing nationwide and speaking nationwide was proportionate and she found that and *Adam v Ward* and all of the cases that I know of that deal with this, say those in the absence of disputed facts are all questions of law because the finding of whether there is a privilege involves a question of high

policy which is only for the Judge to make and the issues that Your Honour Justice Young has been referring to, at least on my reading of her judgment, is that they go only to the issue of the purpose for which Mr Craig was being given this privilege which she had to find and she has done it in a way that I would commend and is consistent with what Lord Reed has said in the Hong Kong case I'm going to take you to.

WILLIAM YOUNG J:

Can I just raise one alternative view of the facts? One view of the facts is that Mr Craig believed that he hadn't sexually harassed Ms MacGregor and the whole thing was just dirty politics and lies, undoubtedly privileged, undoubtedly gets home on qualified privilege.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

The other alternative is Mr Craig knows full well that he sexually harassed Ms MacGregor, knew that he was, as it were, bang to rights, and this was just sort of the squid squirting ink and knew it was all false what he was saying. In that case, despite your reservations, I would've said qualified privilege fails.

MR MILLS QC:

Well look I was if I was to accept the premise, then of course I'd accept the conclusion but I'm resisting the premise.

WILLIAM YOUNG J:

All right, okay, then what about in the middle? Mr Craig says, "Crikey I've written some stupid letters, gee I wish I hadn't written those letters and the emails aren't that good and yes there are other things I think you can point to and say what on earth was I thinking and I can understand how someone can look at this stuff and say well – and I know Rachel MacGregor is saying I've sexually harassed her and I look at this stuff and I can see why someone would believe her. So although I disagree with the conclusion that

Jordan Williams is advancing, I recognise that there is a substantial basis for what he is saying and therefore it's not really right to call him a liar." Say that's the view of the facts. On that basis there might be questions that arise as to the proportionality of his response, whether he's cavalier about the facts and so on. Because unless the Judge had that in mind I can't understand what she was thinking of in terms of passages from the summing up that have been discussed in the submissions.

MR MILLS QC:

Mmm, well the – of course the question always, and *Horrocks v Lowe* I think does remain the key authority on this, and the Defamation Act, our own Defamation Act uses a similar language, you have to, having determined what the purpose is, you then have to ask when you are analysing the use of that privileged occasion by the defendant and there's a section 19 application by the plaintiff to set aside the privilege, what was the purpose, what was the predominant motivating purpose of the defendant in using the privilege?

WILLIAM YOUNG J:

But he's not entitled to an extravagant response, a response that goes well beyond what he knows to be the position.

MR MILLS QC:

No look, again, as Your Honours probably know, in the context of reply to attack privilege in the decision of our Court of Appeal on this and leading Australian cases that are referred to, there's more latitude given with what's extravagant.

WILLIAM YOUNG J:

Look I'm fine with the latitude, I'm partly trying to work out why the Judge summed up on this basis and I'm trying to find a scenario to which it could probably be directed.

ELIAS CJ:

An excuse.

WILLIAM YOUNG J:

And it does seem to me the scenario I put to you was what she might have had in mind. If he thought he was being wrongly criticised, but recognised he'd acted in a way that left himself fairly open to the conclusion that he had sexually harassed Ms MacGregor, then it wouldn't have been a fair response to say Jordan Williams is a pernicious liar. It might have been – to say well he didn't know all the facts and he's basically wrong.

MR MILLS QC:

Well I reiterate that in some areas I think the facts show clearly that –

WILLIAM YOUNG J:

Yes, I know, but would you accept that as a proposition, that if he knew, if he thought Mr Williams was wrong, but realised that he probably believed generally what he was saying, would he then have been entitled to say what he did say?

MR MILLS QC:

I know you all think I continue to duck a direct answer but –

WILLIAM YOUNG J:

I quite like direct answers.

MR MILLS QC:

I know you think I continue to duck but the starting point is what were the pleaded imputations. What was it that Mr Williams said Mr Craig had said which he had –

GLAZEBROOK J:

I'm not sure that is the starting point, which is why I think we've been having so much trouble with where you've been taking us. Isn't the starting point – well the starting and finishing point on this, what Mr Craig did, not what Mr Williams did?

MR MILLS QC:

But in –

GLAZEBROOK J:

To the extent that obviously what Mr Williams did is relevant in terms of response.

MR MILLS QC:

Yes but in a defamation case pleadings define the field of battle in effect and so the plaintiff chooses the imputations that it says are to be taken from the remarks in the leaflet that were defamatory. Mr Craig then says in response to each of those specific imputations, most of which were lied by falsely alleging, which of itself is not the same as out and out lie, would be my submission, it's careful, if it's false, it's a lie on that pleading and then the defendant responds to that and so that's why, I suppose I'm continuing to resist a bit what Justice Young is putting to me about it being able to be treated as a kind of global question of sexual harassment. What's in issue here are specifically defined alleged defamatory statements.

WILLIAM YOUNG J:

That's true for was there defamation, was it true, was it fair comment or honest opinion but isn't it here, aren't we really looking at it in a slightly different framework, we're looking at the attack and the counter attack?

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

And the way in which they react to each other.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

And if the counter attack is a legitimate response to the attack, then fine, judgment for the defendant. If it's not, no. Now how do you tell the difference? Well one of them might be was the language in which the counter attack expressed one that was fairly referable to the understanding of facts which Mr Craig had.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Now while I can actually understand why he may have said, "Well I honestly – well I didn't sexually harass Ms MacGregor", he must have been pretty well aware that he'd acted in a way that had opened him to the suspicion that he had.

MR MILLS QC:

Well before I sit down I'm just going to give you a couple more references which I think I'll leave you to go into them but they bear directly on that in terms of the evidence but the, you know, and back to the point that I made before, suppose we have 10 issues that are being considered in the loss of the, the use of the privilege and one of them, and I'm not saying this is exactly what we've got here, but if you imagine one of them, you say you can prove that the defendant did not honestly believe in responding to that. So we put it in a context here and say that he did not honestly believe that Ms MacGregor hadn't resigned in 2014 and then lured back. Now I maintain my position that you couldn't automatically go from there to saying the privilege is lost because it will depend what the privilege was given for and it will depend how that feeds into the statutory question, confirmed many times in the cases, you are looking what the predominant motivation and flipped around as *Horrocks v Lowe* does in Lord Diplock's judgment he says that the exercise of the proper purpose must have played no more – that it must have played essentially an insignificant role in responding because privileges are not to be easily lost.

WILLIAM YOUNG J:

But if the whole purpose was simply to say she didn't resign in 2013, then the whole attack was entirely disproportionate to the occasion.

MR MILLS QC:

Well not his –

WILLIAM YOUNG J:

The counter attack was disproportionate to that.

MR MILLS QC:

Well no because of all the allegations that had been made which we've seen, you've done this, you've done this, you've done this, you've done all these things and many of those, as the trial Judge found and I think the evidence confirms, were not correct statements and he must be entitled to speak back on those things, must be, but it does come back to the fundamental question which I think is – this is why I find Lord Reed's recent judgment so attractive because it's so clear, that the Courts need to focus much more carefully on the purpose of the privilege and it's not enough to just say oh well it's a privilege to, you know, reply to an attack. What does it cover? And I'll take you to it because he breaks down the purpose of the privilege that had been found there and says it's not enough, we have to ask specifically what did that purpose cover because you only lose it if you use it for a contrary purpose and the contrary purpose for which you have used it is the predominant purpose and it does come back to this fundamental starting point. The Courts give privileges for important reasons of high policy and I will say that I think there's an overarching concern with the directions and that is that they have left the jury with the impression they are entitled to remove the privilege far more readily than the law requires. If you read the summing up as a whole, it seems to me quite clear that the jury would've thought this is no big deal to set aside the privilege and it's a very big deal. So I will deal with them discretely.

ARNOLD J:

Just on that point, I mean one of the things Lord Reed does say is that, well at 39, "Given the strength of the public interest in the protection of free speech on privileged occasions, it also needs to be made clear to the jury that the burden is not easily or lightly satisfied."

MR MILLS QC:

Yes.

ARNOLD J:

But I mean the Judge did say in her remarks that the burden, once you were in this area, lay on the plaintiff on the balance of probabilities.

MR MILLS QC:

Yes.

ARNOLD J:

But is Lord Reed saying that you need to do something more than that?

MR MILLS QC:

Yes and that would be consistent with *Horrocks v Lowe* which is always the case that people come back to. *Horrocks v Lowe* is the one where Lord Diplock says that the proper exercise of purpose must essentially be insignificant for the privilege to be lost which is why I keep here in my list of 10 in saying the mere fact that one of them isn't consistent with the purpose, cannot lead automatically to the loss of the privilege without thinking hard about what was the purpose and how does this align, what has been done? So if you take for example where there are, at least on the case that I'm putting and on the findings the trial Judge made and which the Court of Appeal accepted in broad brush terms, that there are a number of allegations made against Mr Craig by Mr Williams that were untrue, in some cases knowingly untrue and there were others where Mr Craig had been told, as we've seen in the Day/Dobbs note, that this is what Mr Williams is saying about you, even though Mr Williams said, "Oh I didn't say that", but Mr Craig

honestly believed that that's what he was responding to because he'd been told, here are my notes and this is what he's saying about you, then he is responding to that privileged occasion on a substantial basis that must be well founded.

WILLIAM YOUNG J:
Well look at page 2415. This is a text Mr Craig sends. Volume 8, 2415.

MR MILLS QC:
Yes.

WILLIAM YOUNG J:
"Hi Jordan, I know you believe Rachel." Which suggests that he didn't think that Mr Williams was a flat out liar. I suppose I'm looking at the substance, you're looking at the whole thing.

MR MILLS QC:
Yes.

GLAZEBROOK J:
I mean that would actually be relatively significant in terms of whether you see whether the privilege or whether there is an occasion of privilege in the first place because if she put it under whether there's an occasion of privilege in the first place and have to show that there was an honest belief effectively or have to decide there was an honest belief and if there wasn't but there was an occasion of privilege, that's a bit different from what you're now suggesting in terms of removing the privilege and it might actually suggest that it does come up at the first stage and that it does matter.

MR MILLS QC:
Well the leading authorities in my view are quite clear on this, that it does not come up at the first stage, with respect.

GLAZEBROOK J:

I'm not entirely sure they were looking at exactly the same thing as we're talking about here.

ELIAS CJ:

It's quite an unusual case this, isn't it?

GLAZEBROOK J:

It is an unusual case.

MR MILLS QC:

Yes.

ELIAS CJ:

Because it depends on what was said one part and what was known on the other and they're talking about Mr Craig's conduct. So they're both talking about that. It's quite unusual.

MR MILLS QC:

Yes. The basic framework of it is not unusual, just reflecting on whether there's some nuances on the facts here that make it so, but the basic framework is, you know, it's pretty classic *Adam v Ward* type of, somebody gets attacked, they respond, they're entitled to respond with the world at large, the Judge must rule on whether that's a privileged occasion, the jury then decide whether it's lost because it's been abused. On the specific text my immediate reaction to that is he is trying to encourage Mr Williams to talk to him. So he's not going to say to him, "You're a liar but I'll talk to you." If you really want to see this in context there's an awful lot of cross-examination around this and Mr Craig consistently, under cross-examination, said he did not believe that he had sexually harassed and he was never really challenged on that, not that I can see in the cross-examination.

WILLIAM YOUNG J:

Can I ask, is there a transcript of what he said at the press conference? We've got the statement he issued but presumably –

MR MILLS QC:

Well that's the leaflet i think, the remarks sorry. They are at – they're in volume 7 at 1700 and I was going to take you to both of those and I should have done that. So the remarks are at 1700, the leaflet is at 1702.

WILLIAM YOUNG J:

Okay the statement that kicked off the press conference is at volume 8.

MR MILLS QC:

Yes he did and he released – he handed out the leaflet at that press conference and the defamatory imputations, if you look at them, are not exactly the same for the leaflet and the remarks or the remarks and the leaflet but similar and I think it was accepted in the course of the hearing that really the common – the heart of the defamatory allegations are the more general ones that follow the specific ones and they were dishonest, lack of integrity and so on, and they're common to both of the causes of action. The commonality in relation to the pleading of aggravated and punitive damages I will deal with tomorrow but you'll see that they are the same, with one small exception, punitive damages are the same particulars as aggravated damages. Can I go now to the specific misdirections, is that convenient?

ELIAS CJ:

Yes I'd find it helpful thank you.

MR MILLS QC:

All right, so we've got to keep the summing up open, which I have now closed. It's volume 2 at 0231, it's tab 2. Sorry no it's not tab 2, it's tab 17. Now I haven't been spending time in the written submissions but I do obviously say

that the structure is there with some care and on these misdirection issues, you'll see it's 74 to 104 of the written submissions.

Now I've already made the point to you as to why the Judge concluded it was unnecessary to deal with the misdirection points because she had already found a general retrial because of the damages and I'll come back to that on the exercise of discretion issue more directly but if I could take you in the written submissions might be the most convenient way to expedite this if I haven't lost it, which I probably have, to paragraph 74 which is where this part of the discussion is found in the written submissions and I don't need to go through that but it sets out the four misdirections that we've been given leave to argue and the first one is that the jury was invited to consider whether the publication of the remarks in the leaflet to the public was disproportionate to reply to Mr Williams' attack and as it goes on to say at 74.1, as you will see in the rulings, the Judge had already ruled that it was not.

ELIAS CJ:
Sorry are you referring to your submissions now?

MR MILLS QC:
I am yes Your Honour. 74, I thought it might be a convenient way to do this, so 74.1, page 21. This is a convenient summary of the misdirections. So the first one, just to repeat then is the jury was invited to consider and I'll take you into the actual summing up so you can see it in context, they were asked to consider whether the publication of the remarks in the leaflet was disproportionate to the publication by Mr Williams when attacked through Whale Oil and Mr Williams accepted that he knew when it went through Whale Oil it would go out to the media at large, so effectively it was a publication to the world at large, when the Judge had in fact ruled in the qualified privilege reasons, as she had to do to find a privilege, that it was proportionate.

Then the second one is that the jury was invited to form its own views on whether Mr Craig had included irrelevant statements in the remarks and the

leaflet when she had said in the reasons judgment that everything was relevant.

Then the third misdirection that is contended is that Mr Craig, asking the jury to consider whether Mr Craig had taken reasonable care or had been careless and again, partly for the reasons that Chief Justice, you and I have already exchanged views on, we say that's a misdirection.

And then finally, whether Mr Craig had given Mr Williams a sufficient opportunity to comment on the remarks and the leaflet before he published them and again we say that is not the law. It might apply under the new jury public interest privilege, well defence, not a privilege and it might apply to *Lange* but no relevance here, which the Court of Appeal accepted.

Now the one that Her Honour said was a clear misdirection is the second one there about relevance. That's the one where she said that was a clear cut misdirection but she didn't have to find whether it was material because she had already decided there had to be a retrial, a general retrial because of the concerns about the damages award, both because it was excessive in itself but also because it raised concerns about the safety of the verdict as a whole and again I'll come to that on the discretion issue.

WILLIAM YOUNG J:
So we're looking at what, 59 of the Judge's summing up are we?

MR MILLS QC:
Yes.

GLAZEBROOK J:
Well you might want to start at 50 because that's where at the end of that, that the proposition is clearly put. If you deliberately say something that's not true, that could result in you losing the privilege. Oh you might have to start sooner than that but I think that's where you start.

MR MILLS QC:

Well I just wondered, it may be unnecessary given the Court, but the authority that we have relied on really for what is a misdirection and when is it material, which I may not need to take you to but I just note that it's in our bundle of authorities at tab 5, it's *Jamieson v Green* [1957] NZLR 1154 (CA) and it's a decision of our Court of Appeal and I think one of the things just worth noting about it in particular is that why you could have a misdirection on a question of fact, if it's a misdirection on a question of law, it's almost axiomatic that it's then material and in my submission the four directions or misdirections I've just run through, they are all on questions on law. They have issues of fact in them but they are ultimately questions of law and I can develop that.

ELIAS CJ:

I think you might have to.

WILLIAM YOUNG J:

I think the materiality point that troubles me more is whether, given the pattern of the verdicts in particular, the finding of flagrant disregard which was the premise of the punitive awards, they were material because they rather suggest that –

ELIAS CJ:

It's a proviso approach.

WILLIAM YOUNG J:

Yes that at the end of para 50 the jury did conclude that something that was said deliberately wasn't true.

MR MILLS QC:

In their finding of punitive damages.

WILLIAM YOUNG J:

Yes.

MR MILLS QC:

Yes, so this was an issue that came up in the Court of Appeal and there was some resistance to what I said in response, other than from Justice Gilbert, but if you look at the particulars of aggravated damages which are replicated as the particulars for punitive damages, you will see that there's, and I can spend time on it if you like, you tell me if you want me to go to it, but you'll see that there a whole lot of particulars which are effectively particulars of punitive damages that having nothing to do with the loss of the privilege and so we don't know –

WILLIAM YOUNG J:

Of course, I'm just looking at the finding.

MR MILLS QC:

I know but the finding is one of punitive damages.

WILLIAM YOUNG J:

No the finding is that there was a flagrant disregard for his rights.

MR MILLS QC:

Well that's what the statute says, yes.

WILLIAM YOUNG J:

And that that was what the jury question said. But could they have found flagrant disregard if of the view that Mr Craig had acted honestly? I don't see how they could.

MR MILLS QC:

Well for example, given that they were invited to consider whether a mailout to 1.6 million people was somehow excessive and disregarded an appropriate response to Mr Williams and that that was put to them as a matter they could consider in deciding whether or not –

WILLIAM YOUNG J:

Well I don't go much on the directions which you take exception, so I don't see them as helpful in the context of the case, even if they might at an abstract level be correct as a matter of law, except perhaps if they are dealing with what are called sort of the middle slot that the Judge may have been concerned the jury would go for, that yes I didn't sexually harass her but I perfectly understand why Mr Williams thought I did. So if that was his position then perhaps he went a bit far but leaving that aside I don't really – I mean I don't see the directions as helpful but I find it hard to look at the verdicts otherwise than on the basis that the jury accepted the plaintiff's case at its highest.

MR MILLS QC:

Oh look I don't dispute that. I think that's exactly what's happened. The question is whether the evidence supports it.

WILLIAM YOUNG J:

Well that's another question.

MR MILLS QC:

But look I mean you have to conclude don't you, given that they awarded the largest ever punitive damages award in New Zealand and they awarded the highest ever defamation award in New Zealand, that they had accepted absolutely in its entirety, the plaintiff's case.

WILLIAM YOUNG J:

Well if they had then these misdirections don't matter do they?

MR MILLS QC:

Well they matter because they have left it to the jury on the basis that the jury was entitled to make a series of findings relevant to the loss of privilege and to how they viewed the entire defamation which on my submission the jury was not entitled to consider. So of course they matter.

ELIAS CJ:

They could have accepted the plaintiff's case at its highest in relation to the damages awarded but have been wrong on the availability of the privilege.

MR MILLS QC:

Well I certainly say that the –

ELIAS CJ:

Well that's really the issue that's troubling Justice Young, is whether there's a gap.

MR MILLS QC:

Well I don't think myself that the two are separable, which is one of the issues that Her Honour said when she was saying there's got to be a general retrial because we can't separate the issues out and I'll have to come back to that on the discretion issue but if the jury get told that it's open to them to take the view that the publication was entirely disproportionate and that it included irrelevant material and that Mr Craig should have given Mr Williams the opportunity to know what he was going to say before he said it and you the jury are entitled to take all these matters into account and that feeds not only into the damages issue, it feeds into the loss of the privilege and so that's, on my submission, what the Judge has left with the jury and yes I accept absolutely that the jury has formed a very, very negative view and as the Court of Appeal said they've been more concerned with punishing him than compensating him.

WILLIAM YOUNG J:

But can't we be reasonably confident, I know absolute confidence isn't possible, that correctly directed the jury will still have done the same thing? If told well you can only find for Mr Williams if you're of the view that Mr Craig wasn't acting honestly.

ELIAS CJ:

But they weren't told that.

WILLIAM YOUNG J:

No they weren't told that but I mean the question then is what the counterfactual is, because I'm pretty reluctant to see four weeks of trial and hundreds of thousands of costs just throw away.

MR MILLS QC:

Well the case-law is clear that the courts, if they find there has been a material misdirection, that this Court might do, the courts do not second guess what might have happened with correct directions.

WILLIAM YOUNG J:

Why? We do with criminal cases.

ELIAS CJ:

Because of the proviso.

MR MILLS QC:

Well it's if you accept –

WILLIAM YOUNG J:

Can you find cases where a Court of Appeal has said we're perfectly satisfied that this direction had no impact on the verdict of the jury but we're still going to set aside the –

MR MILLS QC:

Oh yes. No, no, yes look I'm not - then it wouldn't be material.

WILLIAM YOUNG J:

Well that's what I'm saying, I mean it may be a semantic issue but if the jury did – if we can be confident, we can't be certain but if we can be confident that the jury found that Mr Craig hadn't acted honestly, then it wouldn't be a material mistake.

MR MILLS QC:

I accept that and ultimately this Court will decide whether it's material but what I would say to you is that given the nature of the directions, with all respect to Her Honour, I don't want to be overly critical because of the circumstances but because of the nature of the misdirections that have been identified and then when you also, as I said before, read the summing up as a whole against what I say is the clear law on what's for the Judge and what's for the jury, then the jury has been left with the understanding that it could take into account matters that were never part of its province, they were off limits for the jury and that went to damages and it also went to the loss of the privilege and so my own submission to you is that when you look at those matters, they couldn't be corrected, you could not confidently say if these directions had been given the way they should have been, then a properly directed jury was likely to come to the same conclusion. I don't think the facts are saying that. Not if you accept the misdirections that I'm contending for.

GLAZEBROOK J:

I must say I'm not particularly concerned about the misdirections you note, in the sense that what seems to have happened is 50, as you deliberately say is something that's not true, that's said again at 53 but the test is actually set forth as one of ill will and then the things that you're talking about are indications of ill will. Well I'm not myself necessarily convinced that ill will is actually the right – so motivation of ill will rather than really not responding to the attack because you know very well that the attack is true.

MR MILLS QC:

Yes well this is why my view which I've expressed and sharpened I'd have to say by Lord Reed's recent judgment, is that the wording of section 19 is frequently lost and misunderstood in a number of the New Zealand authorities because both of those limbs are ultimately about an improper use of the occasion. It can be an improper use through ill will, predominant motivation of ill will, but as *Horrocks v Lowe* says, and as Lord Reed says, and the leading Australian cases I think also say this, some of which my friend has included in his bundle, the ultimate question always is 'has the occasion been used for a

purpose for which it was not given' and if it has been, it has to be used for a dominant contrary purpose to lose the privilege. So my own view is that, you know, when you read section 19, the "or otherwise" links the two together and does drive you to the right question but it's a little awkward and I think it has led too often to a sense of somehow these are distinct issues and they are not. They are both ultimately driving at what's the purpose; has it been used wrongly?

ELIAS CJ:

Mr Mills, we need to take the adjournment now. How much longer do you expect to be on your appeal?

MR MILLS QC:

It depends how many questions Your Honour.

ELIAS CJ:

I know that but I am very anxious about the time and I do want Mr McKnight to get on his feet today.

MR MILLS QC:

Yes.

ELIAS CJ:

What are you proposing to do after lunch? Are you going to go through the summing up any more or are you content to rely on what's in your submissions, what do you want to do?

MR MILLS QC:

Well I'm very comfortable with the written submissions. What is important I think is to read the passages that have been extracted into the written submissions in their context obviously and so the references are there to the summing up and I will confer with my co-counsel over lunch but if we're pressed for time, then I'm content.

ELIAS CJ:

Well it just seems to me that it may be that it would be sensible – by all means develop the points that you are making about the summing up – but it would be useful for us to hear Mr McKnight's response to those before we go much further.

MR MILLS QC:

Yes understood. Do you want to deal with that before I deal with discretion? Do you want to start interpolating the –

ELIAS CJ:

Well that is Mr Williams' appeal, isn't it, is that right?

MR MILLS QC:

No I was just –

ELIAS CJ:

Oh no there's both. No I'm just really concerned that we're not going to get through this case in the time that we have available unless counsel push the Court perhaps a little harder. Anyway review it over lunch and perhaps if you could tell us what you want to develop after lunch, that would help, at least we'll have that in our mind.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.17 PM

MR MILLS QC:

Thank you Your Honour, now just to tell you where this is going and I'm aiming to have it done in 45 minutes.

ELIAS CJ:

Well you shouldn't feel constrained by that Mr Mills.

MR MILLS QC:

No but I'm conscious of my friend's entitlements. I don't think tomorrow is going to be as complicated as this but at any rate what I'm aiming to do is deal with misdirections essentially just by taking the Court specifically into the paragraphs in the summing up, in the document so that you can see it in context. We've talked about them but I want to take you to actually look at them and I think the first three misdirections that we rely on are wrapped up in the same paragraphs and so I can do that pretty readily and then I have to take you separately to the fourth misdirection ground which is the failure to tell Mr Williams that this was going to be published. So my intention then is to deal with misdirections relatively quickly on that basis.

On the sufficiency of evidence to set aside the privilege, I sense that because of the issues that have been canvassed so far, that's been largely covered in various ways and it's going to come up again tomorrow because of the way in which my friend's argument is put on the damages.

ELIAS CJ:

Yes I understand that.

MR MILLS QC:

So we'll be back into the evidence on that and so I think I can probably deal with that relatively quickly as well and then I'll go to the discretion to try to push through that pretty quickly, although it's obviously a significant issue both in fairness to the trial Judge to deal with that fairly because she's been criticised by the Court of Appeal quite heavily and also it's a significant issue in itself.

So Your Honours let me then go first into the summing up, just to remind you, in case it's not open, it's at page 231 of volume 2 of the case on appeal and I'm starting at 247 and giving this a bit of context and then particularly –

GLAZEBROOK J:

Starting where sorry?

MR MILLS QC:

Starting on page 247 and really at paragraph 58, to give it the context and then a few paragraphs that follow on from that and the Court of Appeal put a bit of weight on 58 as being accurate but one needs to read on. So at 58 Her Honour has set out I think a pretty straightforward orthodox direction about the privilege and how it's lost, dominant motivation of ill will and so on and if his main motivation was to simply to respond to the attack or defend itself, then that will not be ill will and so on but then 59 Her Honour sets up what is really the meaty part of this and that is the question how can you figure out what Mr Craig's dominant motive was and here we get into a number of the misdirection grounds all mixed up together. So was his response appropriate or over the top? What kind of language did he use? Did he say things that were not relevant to the attack or was everything relevant, matters on which she had in fact ruled in the qualified privilege rulings? Did he publish the response to more people than he needed to in order to respond? Again an issue that had been determined in the reasons judgment, or did he publish it to the right range of people, which is the other side of the same issue.

Now the law is absolutely categorical on this, going back probably beyond *Adam v Ward* but certainly from *Adam v Ward* that these are issues of law for the Judge that must be ruled on by the Judge in order establish whether there's a privilege and that is an issue in the absence of disputed facts that has to be dealt with by the Judge and the Judge alone.

GLAZEBROOK J:

But you didn't pick this up at the time.

MR MILLS QC:

No and one of the reasons for that –

GLAZEBROOK J:

Well it's either a matter of law or not is it? I mean if you say it's clear it's a matter of law, then whether you had her reasons or not, she should've dealt with it in those as a matter of law.

MR MILLS QC:

Well let me defend myself on this. First of all technically I think the law is clear, as I understand it, that while it's obviously very desirable if counsel identify matters at the time, it's ultimately a question of whether the directions are correct or not. Secondly, one is sitting there at the end of nearly a four week trial listening to directions being given and trying to identify aspects of it with which you should take issue and I don't think I'm crying poor me to say that that's a hard task and then third, some of these issues were ones on which in the argument over the application for a ruling on qualified privilege, there had been contest over what the correct position was on these and on some of the issues the Judge had indicated she might be going in a particular direction and it's only when the reasons came out that it became clear that she had, in my view, correctly identified the role of the Judge and jury and correctly identified the matters she had to deal with. So yes of course I look back on this and say I wish I had been in a position or had raised issues but it's very difficult for all of those reasons and I think the law on it is clear and by *Jamieson v Green* that we refer to on that I think, that particularly on errors of law in the directions, that is it is not an answer to that, that it would have been better if counsel had raised it. So let me then go next –

ELIAS CJ:

Just on the point that you raise which I have some sympathy for in terms of whether a matter is for the Judge, the question of qualified privilege or not, I wonder whether the cases are, however, as clear as you are suggesting because over lunchtime re-reading Lord Reed's recent decision, even there, there are indications that if the jury thinks that a response has gone too far, that may be evidence from which they can infer ill will or malice in that case.

MR MILLS QC:
Yes.

ELIAS CJ:
So they're not completely distinct.

MR MILLS QC:
No, my understanding of the law in this area Chief Justice is this, in the first instance, the Court has to make the ruling on privilege or not and in doing that it is necessary to rule on whether the use of the occasion has been in a way that is relevant to the purpose of the occasion and the Court must also rule on whether it's a reply to an attack or whether it's a duty relationship, that the range of communication or the level of communication is appropriate to the privileged occasion and so here, and it's really very similar to *Adam v Ward* which was a reply to attack case where the House of Lords was absolutely adamant that it was for the Judge to rule on whether there had been an initial attack, through the House in that case, through Parliament, and whether that meant that the response that came through from the army counsel on behalf of the person who had been attacked was proportionate and the House of Lords, I think each one of the judgments says that is a question of law on which the Judge must rule as part of finding a privilege.

Now it is possible, and this is where I think the issue arises that you're referring to Chief Justice, that you could have, despite that initial ruling, you could have one part of what was done being outside that privilege and you'd chop it off and say well that's not covered by the privilege and the jury would then be entitled to look at the fact that there was a part that was outside of the privilege as a factor going to whether the privilege is being used properly. So a good example of that, to just make this perhaps a bit more helpful, one of the cases that I've referred to extensively in the written submissions because I think it's a key – in one of these very clear judgments is *Harbour Radio Pty Ltd v Trad* [2012] HCA 44, (2012) 247 CLR 31, which is High Court of Australia and there's a particularly, I think a particularly good judgment by Justice Kiefel in that case and there we had, the background to it was the Cronulla riots

where there had battles between Islamic groups and non-Islamic groups in Sydney, it caused a huge amount of concern and Radio 2GB accused this fellow Trad who had been, they said, one of the inciters of the crowd, of various defamatory statements and among other things qualified privilege was pleaded and the Court there had said and the High Court endorsed that essentially everything that Radio 2GB had said in response to Trad, having made very critical statements about the radio station at the gathering after the riots, that that was all privileged but they had said one thing in particular which fell outside that privileged occasion. It didn't take the privileged occasion away but it was outside it and that was that they had thrown in gratuitously that Mr Trad was a pest and it was said well that has nothing to do with the privileged occasion and so you either say, and it could be both, it's not privileged at all, it's got nothing to do with the occasion for which the privilege was given or in addition you might say well the fact that they threw in that gratuitous statement is a factor that you could consider in what the motive was.

ELIAS CJ:

But it need not be, the point I'm putting to you is it need not be distinct like that, that's something that could be hived off. It may simply overlap because once you've got past the Judge and you have an occasion in which there is qualified privilege, the jury still has to consider whether that's vitiated by ill will, improper purpose.

MR MILLS QC:

Yes.

ELIAS CJ:

In considering whether there's ill will/improper purpose, the jury can look at all of the evidence which can include the features intrinsic to the defamation. So you would look at the terms of the defamation. Now I can see that it would be very difficult perhaps to say that it's irrelevant if the Judge has ruled it to have been relevant but it might have been so intemperately expressed that even though rightly on an occasion of privilege the jury might form the

impression that it wasn't really a response, it was for some other purpose. So that's possible isn't it?

MR MILLS QC:

Yes I think it is. I think one of the confusions is using relevance for both. I think cases that I tend to put more weight on refer to matters extraneous and particularly language being extreme, so I agree with the Chief Justice they come after the Court has ruled but in terms of what Her Honour did here, she in my submission correctly ruled that it was a privileged occasion, that everything said on that occasion was relevant to the occasion of replying to the attack and that the proportionality or the level of distribution being to the world at large, was also appropriate. So those issues can't be left again to the jury which is what happened here, the jury invited to reconsider these issues. So effectively you've got the Judge ruling as a matter of –

ELIAS CJ:

Well unless the direction went no further than say there is some evidence in this from which you would be entitled to decide if applying the correct standard.

MR MILLS QC:

Yes, so if the Judge had said, and unfortunately in my view she didn't, that "I have ruled that this is entirely proportionate, I have ruled that everything in here was relevant but it's open to you if you think the language is too extreme."

ELIAS CJ:

If you think that despite that, the application of the privilege in fact the defendant was actuated by ill will in the correct sense.

MR MILLS QC:

It's possible. There's a very cautioning note however in again *Horrocks v Lowe* by Lord Diplock, saying that if all that's been relied on to find that there is improper purpose by the document itself, then it would be a rare case,

unless you could show a lack of honest belief in which the language would be too extreme to sustain the privilege and that must be particularly so in the reply to attack privilege where the courts are recognising that you can hit back and hit back hard.

WILLIAM YOUNG J:

But I mean doesn't that depend on what Mr Craig believed? Say he was in the middle slot that I've postulated, might the language not have been too extreme? You see the Judge has said it's basically a reasonable response providing on her assumption that he genuinely believed what he was saying but say he only genuinely believes part of what he was saying, what's the – how do we deal with that?

MR MILLS QC:

Well you know what I'm going to say to that, we're back to the purpose and predominant purpose but the –

WILLIAM YOUNG J:

I mean one of the problems of the case is the jury weren't given sort of concrete examples of how they might, in a definitive way, of how they could deal with this defence.

MR MILLS QC:

I do think that's an issue and certainly if you line it up against the approach which I say is the correct one, really because the leading cases say it, that, you know, losing a privilege is a big issue and it must be made clear to the jury that there are really pretty defined and narrow circumstances under which a privilege is lost and I say again what I said before, I invite the Court at some point just look at this in the round and I think it's an inescapable conclusion that the jury would have been left with the impression that they were entitled to put aside the privileges as though it was no big thing.

ELIAS CJ:

Can I just ask you to ground this a bit but in – well I suppose most of the concerns about the Judge's summing up is with paras 59 onwards but I wondered whether you also need to take us to the question trail on these matters.

MR MILLS QC:

Just before I do that –

WILLIAM YOUNG J:

Just in terms of the statute.

ELIAS CJ:

No well sorry I just hadn't looked at it.

GLAZEBROOK J:

Page 276 were the questions 3 and 4 that are referred to.

MR MILLS QC:

Could I just ask you to pause for one second, I'll just give you the other paragraph references here before we leave it if you wouldn't mind. So the paragraph references that I have in the summing up which I think are at the heart of the problems are 59, 61, 63, 71 and 73 and they're all – they cover really the three first misdirections because they're all rolled up together and I think if you ask yourself the question that the cases say one asks about whether there's a misdirection, you look at it from the jury's perspective and has it left, is it likely to have left or is there a risk that it will have left the jury misunderstanding what its proper role was and my submission is it does.

ELLEN FRANCE J:

Could I just ask about relevant because the Court of Appeal rely on *Horrocks v Lowe* for the proposition that relevance, I know that's not a helpful term, may be something that can be taken into account in considering ill will

and that does appear to be what that passage from *Horrocks v Lowe* that they rely on says.

MR MILLS QC:

It does in isolation. I think that, I have to go back and recheck that but I have of course looked at that pretty closely for this hearing and if it's read in context then yes there could be circumstances where you would say that what's included in the defendant's statements is not relevant to the purposes of the privilege. So either, and this has been an ongoing debate, you can either say it's chopped off, it's not part of the privilege at all or it remains part of the privilege but goes to the question of section 19 loss of the privilege. For myself I can't see why it's an either/or, I would've thought you chop it off but still say that it goes to determining the motivation but –

ELIAS CJ:

Well there is a bit of a sliding scale because the cases accept that in response you can be relatively robust. So there's not exact proportionality required.

MR MILLS QC:

No, no there definitely is not.

ELIAS CJ:

So it's understandable that the Judge might rule the privilege is available but the jury say nevertheless we think it was vitiated by improper purpose.

MR MILLS QC:

Well this is the one where the Judge at least accepted there was a clear cut misdirection because what she had said in the reasons judgment is I have found it is relevant and everything was relevant, so it didn't leave anything outside that. It had been ruled on. It's also been pointed out to me and it's a pleading point, so we're really talking principle here, relevance was never put in issue in my friend's section 41 notice under the Defamation Act which is a mandatory requirement that you list all particulars relied on for setting aside the privilege and the *Gatley* reference is very strict on that as are the

New Zealand Courts, you must plead it and it was never pleaded here in section 41 but I know we're talking principle but my friend Mr Cleary has just reminded me of that. So Chief Justice –

GLAZEBROOK J:
Well what would the jury have thought wasn't relevant?

MR MILLS QC:
Well because it's wrapped up and this is why –

GLAZEBROOK J:
I understand that but I mean my difficulty with this is I don't think any of these things actually applied here because in fact the question was what was put at 50 and at various other points which was did he deliberately say something that was not true and that he knew it.

MR MILLS QC:
Well except that doesn't stand in isolation because as I've endeavoured to point out, if you then go to paragraph 59 and the following paragraph –

GLAZEBROOK J:
No, no all I'm saying is that should've been the question and the rest of it is actually irrelevant.

MR MILLS QC:
Well with respect Your Honour –

GLAZEBROOK J:
In the particular factual circumstances of this case.

MR MILLS QC:
Well if that was going to be put to the jury in that way, then it did require some pretty careful directions from the Judge around the factors that she subsequently said were true or substantially true. So the jury required very careful direction on this if that's where it was going.

GLAZEBROOK J:

Well can I just check because we have – my understanding of your argument on this, and tell me if I'm wrong, is something along these lines: Mr Craig was responding to an attack by Mr Williams, part of what Mr Williams said was clearly untrue, and you've gone through the aspects that you say were clearly untrue. In those circumstances Mr Craig's predominant motive can't have been, well the predominant motive can't have been malicious or ill will or whatever we call it so as to lose qualified privilege because there were partial things that were untrue.

MR MILLS QC:

Yes that is certainly one line of the argument.

GLAZEBROOK J:

That what's I thought. So what's another line of the argument? And I understand your point about the misdirections and are those the only arguments? I don't want to put words in your mouth at all I just want to understand, that's, all and really if I've got it wrong just tell me.

MR MILLS QC:

I will, respectfully.

GLAZEBROOK J:

No, no you can be – I mean just tell me.

MR MILLS QC:

I always cycle back to this question about the way it has to be approached, purpose, predominant purpose, is it for a different purpose. So if there was insufficient evidence, and the trial Judge said that the evidence was not strong, that Mr Craig did honestly believe, in other words not strongly that he did not honestly believe that he had never harassed MacGregor. That is the only ground that is identified by the Court of Appeal and indeed the only one identified by the trial Judge on which the privilege could've been set aside

when she gives the judgment, not in the summing up, in the directions but in the judgment that she gives, the trial Judge.

Now I'm not going to have time to take you through this in great detail but can I just on that issue give you a couple of references and ask you please to look at them because in my submission they strongly support Mr Craig's evidence that he gave in which he was never really challenged, that whether he did or he didn't, he honestly didn't believe he had and they support the hesitancy I think you see with Justice Katz saying that evidence was not strong and the references are, and they're just picking a few, volume 7, 2060 which is from Ms MacGregor where she refers to, "I'm reading and rereading the letter from you" and so on and it's very telling I think. And then the next one I was going to give you was 7, 2263 which is of particular relevance because it's December 2013 and if you look at the –

WILLIAM YOUNG J:
Just pause there, do we have the letter to which the emails are a response to?

MR MILLS QC:
Excuse me?

WILLIAM YOUNG J:
Do we know what letter – are the letters dated, so can we –

MR MILLS QC:
I don't think it's that precise but you can tell, I mean you can draw I think a pretty clear conclusion about that.

GLAZEBROOK J:
Sorry 2060, did he say something about this?

MR MILLS QC:
Sorry who's he?

GLAZEBROOK J:
Mr Craig.

MR MILLS QC:
No what I'm asking you, what I'm raising it with you for is because Mr Craig gave evidence repeatedly that he did not believe he had ever sexually harassed Ms MacGregor, it's the critical issue in terms of the basis on which –

GLAZEBROOK J:
Yes what letter is she referring?

MR MILLS QC:
I know no more than what's in that page and then –

GLAZEBROOK J:
So it could be anything?

MR MILLS QC:
Yes, unless I'm told that it can be tied more tightly than that, but it's the tone of it that she's reading and rereading the letters and the letters, as far as I'm aware, there's no dispute that the letters from Mr Craig, with one exception, we have them all, and they are the back of Chapman Tripp correspondence. There was issues around texts and emails but I think there was a reference to eight letters –

GLAZEBROOK J:
So we can't tie this to any letter despite you saying we've got all of the letters?

MR MILLS QC:
Well it's December 2013 isn't it?

GLAZEBROOK J:
February 2012.

MR MILLS QC:
Oh okay.

ELIAS CJ:
I thought her evidence too focused on 2014 much more than the earlier period.

MR MILLS QC:
It did, it did but I've been told Justice Glazebrook, if you go back to the Chapman Tripp letter and the annexure to it that I took the Court to, there's dates set out at the beginning of that annexure and there is a reference to a 7 February letter from Mr Craig.

GLAZEBROOK J:
So it could be 7 February, there was no evidence on that?

MR MILLS QC:
Not directly no but the reason I'm raising it is just again these are issues – the communications from Ms MacGregor –

GLAZEBROOK J:
Where's the Chapman Tripp letter?

ELIAS CJ:
Do we really need to go to it now?

GLAZEBROOK J:
No, no, no I just wanted to know where it was.

ELIAS CJ:
It's just I'm confused I thought we were into the pleadings and I'm not sure why you're taking us to this.

MR MILLS QC:
Well because I was asked.

ELIAS CJ:

I see I'm sorry.

MR MILLS QC:

I was asked about honesty of –

GLAZEBROOK J:

Well if it was me I didn't ask you to.

MR MILLS QC:

Well I was asked about honesty of belief and I said that the evidence –

GLAZEBROOK J:

No, no, no sorry I was just saying was there anything further you were saying and you just say honesty of belief but I thought you were then going to take us to Mr Craig's evidence on honest belief.

MR MILLS QC:

No I'm going to evidence – can I just give you two more references, whether you use them or not and just move on.

ELIAS CJ:

All right but I mean you do have the Judge saying that she thought the evidence wasn't –

MR MILLS QC:

Not strong.

ELIAS CJ:

Was not strong.

MR MILLS QC:

Yes.

ELIAS CJ:

And that, although it's not terribly well expressed, seems to be about his belief in whether he was sexually harassing her.

MR MILLS QC:

That's exactly what she's speaking to.

ELIAS CJ:

Yes so that takes you quite a way.

MR MILLS QC:

It does and indeed I would say that on the basis of the law on the setting aside of a privilege, a finding that the basis on which it is being said by the Court of Appeal, the privilege could be set aside, this being the only basis it's identified, not strong, does not meet the test for setting aside a privilege.

ELIAS CJ:

Yes but Mr Mills you keep going into in a way the wider merits, what I'm particularly – well perhaps other are not so interested in but what I'm particularly interested in is errors that the Judge may have made. Now when you said that about, you know, setting the burden of setting aside the privilege, it's those sorts of things. How did the Judge put that? Are you going to make any more comment on that or are you just depending on what you've said in your written submissions?

MR MILLS QC:

Make sure that I'm on the same wavelength, so am I going to say anything more on how the trial Judge set aside –

ELIAS CJ:

Well you've identified the criticisms you make of her directions, do you want to summarise that by reference to some of the cases as to why they're so deficient and what she should have done?

MR MILLS QC:

Just before I leave it, I'll refer you, because I got cut off, just to one other paragraph which deals with the fourth misdirection ground which is the telling of the jury that they could take account of the fact that Mr Craig had not given Mr Williams a warning that he was going to publish this. So can I just pause on that because it's a separate ground. The other three grounds are all covered by the paragraphs I've taken you to but that is at paragraph – it's at page 250, paragraph 66 of the summing up and I just had a couple of words I want – a couple of comments I want to make about that and you'll see there, first Mr McKnight referred to the fact that Mr Craig did not warn Mr Williams of the remarks or leaflet or seek his comments on them. You'll recall Mr Craig's explanation. Whether you accept that explanation or think he should have made more effort to contact Mr Williams and seek his comment is a matter for you and that's been put to the jury as an issue going to improper purpose.

Just a couple of additional comments on that before I leave it and the first one is that in his closing, and the cases do say the closing of counsel are relevant in considering whether there have been misdirections, in his closing that was the first issue that my friend listed in terms of a basis for a finding of improper purpose, or ill will I think it probably was rather than improper purpose, and in addition, and you'll find that in volume 2, tab 15, page 198 at paragraphs 155 to 156 of his closing.

Then of course we've just looked at Her Honour reinforcing the same point by referring and reminding the jury of what Mr McKnight had said and it's also, it was the subject of cross-examination of Mr Craig, it is listed in the section 41 notice and I emphasise this because the Court of Appeal agreed with my submission that it was an irrelevant issue but said it was unlikely to have left the jury with an understanding that this could be a basis for a finding of ill will and that has to be seen in that context of the emphasis put on it in the closing, the reinforcement and reminder of my friend's submission on this in his closing and you'll see, if you want to see where the Court of Appeal –

GLAZEBROOK J:
Is the submission she should have told them it was irrelevant?

MR MILLS QC:
Should have absolutely, absolutely should have told them.

GLAZEBROOK J:
And again that wasn't a point you picked up at the time?

MR MILLS QC:
No, in part because it had been argued on the qualified privilege issue and what we were getting and Her Honour was clearly –

ELIAS CJ:
Well you had everything in the mix in this case didn't you?

MR MILLS QC:
We did.

ELIAS CJ:
And that's the issue really, was it sufficiently differentiated on qualified privilege because it was evidence that was relevant to damages and to the aggravated damages.

MR MILLS QC:
Well it was relevant to *Lange* and again some of the New Zealand cases in this area and I have persuaded the Court of Appeal they're wrong, have been treating *Lange* as applicable and speaking to privilege generally whereas Your Honour Chief Justice, you will know from your originating judgment in that and it's consistent all the way through the various appeals on that, *Lange* is sort of sui generis in a sense. The *Lange* privilege was specifically for a certain subject matter and for wide communication and I think it's clear and the Court of Appeal accepted this, that the consideration that ultimately comes out in *Lange (No 2)* about reading section 19 more broadly because of the

expanded privilege relates to that privilege and doesn't apply generally but it was clear in the argument when I applied for the ruling on privilege that Her Honour was drawn to what I was trying to dissuade her from, that *Lange* didn't apply, she was thinking that it might and then her summing up comes down on a view that it did apply and the Court of Appeal says that's wrong and in my submission it's wrong and if you think about the reply to attack privilege, how could it make sense that on a reply to attack, the attacked party has to go to the attacker and say, "I'm going to hit back and this is what I'm going to hit back with", it just makes no sense with respect but the jury have been told and my friend put great emphasis on the fact that the jury was entitled to rely on that and so we don't know how the jury got to where it got to but in my submission there are both these specific misdirections and they really matter because they're on issues of law and in addition, when you read it as a whole, the jury will have been left with the very confused view that they could set aside the privilege far more readily that they were entitled to.

So other than the reference which I think is in the submissions, that *Matheson v Schneideman* [1930] NZLR 151 (SC) decision in the Court of Appeal which is dealing with misdirections and the effect of it being factual or legal and the basis on which the Court should deal with misdirections, which I can certainly open if Your Honour would like me to but that's the case that we have put in there as a good example of the effect of misdirections and when they're on questions of law that as I understand the authorities, it's pretty well axiomatic that it has to be a retrial.

GLAZEBROOK J:
So where is this sorry, where are you –

MR MILLS QC:
The decision is in our bundle and it is at tab 5, *Jamieson v Green*, I said *Matheson*, that's wrong. *Jamieson v Green*, tab 5 of our bundle. It's not a defamation case but it's a pretty careful consideration beginning at about page 1158, dealing with misdirections on questions of fact and on questions of law and the effect of them and it runs through. This was a Death by Fatal

Accidents Act case where the Judge had directed the jury that the surviving spouse's income was relevant in considering quantum. That was an error of law, statute spoke otherwise and on that basis there had to be a retrial and you'll see that this is a point I think His Honour Justice Young might've raised with me, at 1165 you'll see the Court saying down at line 41, "We decline to speculate what might have been the result if the learned Judge had rightly directed the jury. There will accordingly be a new trial limited to the question of damages."

It's also got the reference at paragraph 30 to the role of counsel where a distinction is drawn between failing to take an issue in relation to non-direction and failing to take an issue on misdirection and quoting an older New Zealand Court of Appeal case saying, "On the ground of misdirection it now seems to me that the question was not put before the jury as it should have been and if that be so I hardly think the duty lay on the defendant's counsel to point to the learned Judge in what respect it was not sufficient."

WILLIAM YOUNG J:
So what was the direction given by the Judge concerning?

MR MILLS QC:
The direction related to the relevance of the widow's earnings in working out the compensation under the, it's the Fatal Accidents Act, isn't it?

WILLIAM YOUNG J:
So what did he say? It's just I'm interested to see what they meant by that.

MR MILLS QC:
I'll see if I can find the actual direction for you. They were directed that the jury was entitled to take that into account in deciding what compensation should be paid.

WILLIAM YOUNG J:

So her earnings post her husband's death could be taken by way of set-off against the damages?

MR MILLS QC:

Yes, well relevant to how much the compensation should be in the Act, according to the Court of Appeal, said no that's an error.

WILLIAM YOUNG J:

Well it would have almost inevitably have had an effect on the verdict wouldn't it?

MR MILLS QC:

Well yes but my submission of course is that when you've got an important issue of law and my submission is of course is that's what has happened here because the question of proportionality, relevance, they are clearly questions of law, the question of the right to require a reply is a question of law, they are wrong and they have left the jury to understand they could rely on that for setting aside the privilege and they are significant errors and when one reads, if I invite the Court to do this, the other paragraphs that I've referred to in the summing up, you will see the repeated emphasis of the Judge, not just in one place for example about whether the distribution was disproportionate, there was a reaction in the courtroom to the 1.6 million households getting the leaflet. The jury has been told they can take account of that in deciding whether the privilege should be set aside.

WILLIAM YOUNG J:

Wasn't the answer to that what had gone on the Whale Oil blog?

MR MILLS QC:

Well that's right, so that's what Her Honour said, that it had gone on Whale Oil so the 1.6 million was entirely proportionate but it's then been left to the jury to find it was disproportionate.

WILLIAM YOUNG J:
Yes I understand that.

MR MILLS QC:
So these are significant legal errors in my submission in the directions that were given and it's hard not to conclude, working back from the verdict which has got to explained, given how high it is, that the jury has taken into account matters it was not entitled to take into account in arriving at that and the best example of that process which we've got in our bundle is the *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024 decision, the House of Lords which my friend has relied on as well, so it has an added attraction that we're in agreement on one case being relevant but I'll just give you the reference to that because it's a very good example of the House of Lords going very carefully through the evidence, having concluded what the jury would have to have found to have given the verdict it did. This is tab 9 in our bundle of authorities. Those who are soccer fans will know who Mr Grobbelaar was, he was an outstanding goalkeeper, he was surreptitiously filmed talking about taking a bribe to throw games, he sued and about an £800,000 damages award I think was given and the question was could that be explained in a way that complied with the legal requirements of the jury in their reasoning and you'll see the House very carefully going through the evidence, working on the assumption as to what they would have to have found to get to such a high award and then asking could they possibly make those findings on the evidence and the answer was no.

We've set out in some detail in our written submissions how that worked but they started with the verdict and said what must the jury have found to have reached such a high verdict and then having set that up, then looked at the evidence and said, well is the evidence there which could have let them do that and it was the Court's role to make that enquiry. It didn't get lost because it was the jury and left alone, the Court had a role, a responsibility, to look at what the jury reasoning must have been and then decide whether evidence could sustain that.

So that's taken me a bit longer than I said I would, I'm sorry. Let me then – so sufficiency of evidence, as I said before I think that's been adequately covered and will be picked up again tomorrow in the evidence, that's pretty evidence heavy, in my friend's argument on the damages. In addition to the additional references I gave you a few moments ago, I just do or at least the Court aware that volume 9 of the case on appeal, beginning at page 287, is, there are a very significant number of text and email communications from Ms MacGregor to Mr Craig. I know what my friend will say about this, that they've been checkerboarded, that they aren't all there and so on but they are relevant in my submission to the credibility of the honesty of Mr Craig's belief, that he had not sexually harassed her and to the Judge's view that any evidence that he didn't honestly believe was not strong.

WILLIAM YOUNG J:
Can I just ask you one question unrelated to that, in *Grobbelaar* the House of Lords substituted their own assessment of damages for that of the jury.

MR MILLS QC:
Yes.

WILLIAM YOUNG J:
Do we have the same jurisdiction?

MR MILLS QC:
No, you actually have the opposite. The Defamation Act doesn't let the Court do that. The Court of Appeal pressed hard on that but no the Defamation Act will not let the Court do that unless the parties agree. The UK position is the opposite. The Courts have that power and as you will have seen, they issued derisory damages of £1.

The question of discretion, now because of the time I expect, unless the Court wants me to do it otherwise, that I will limit myself to identifying the argument and the relevant documents but I won't go actually into the documents and I'll

just have to rely on our written submissions and the fact that you've got the materials, unless you want me to go further than that.

So can I ask Your Honours, I think I can deal with this by our written submissions pretty much and so that begins at paragraph 33. Let me just first of all just outline where this argument goes. The Court of Appeal sets out its position and you'll find it in volume 1, tab 4 I think it is at page 39, yes it is page 39 on the case on appeal and you'll see there the Court of Appeal's criticism of Justice Katz's decision to order a general retrial and on the basis that she hasn't properly exercised her discretion and it's put on, at least as I see it, three grounds. The first is that there was – that she was not aware that she could have limited the retrial to damages. So she couldn't have exercised the discretion properly because she overlooked a relevant consideration I suppose in more conventional terminology.

Secondly, that the Judge didn't give reasons for ordering a general retrial and finally that a general retrial was not a proper exercise of the discretion, I'm picking my way through what's been said here, because damages could be separated from liability and therefore should have been. So I think those are the three criticisms that come out of paragraph 60 and I need to just respond to those in turn because not surprisingly I am defending the Judge's exercise of discretion as being well informed and entirely properly and open to her.

So first of all on the contention that she essentially when we boil it down, she didn't know what she was doing and if you go to volume 2 of the case on appeal at tab 24 at page –

GLAZEBROOK J:
Well where do you say they say she didn't know what she was doing?

MR MILLS QC:
Well that's of course I'm being colloquial, but they said she didn't understand.

GLAZEBROOK J:

No just show me where they said that?

MR MILLS QC:

Well paragraph 60 is saying that she, I'll find it again, I've just closed it up.

GLAZEBROOK J:

It's just not the way I read it. If paragraph 60 was, I don't read it that way.

MR MILLS QC:

Sorry just a minute.

ELIAS CJ:

There's something else isn't there? There's something about failure to take into account a relevant consideration. Was there some reference to that?

MR MILLS QC:

My reading certainly of the Court of Appeal is that they are saying that Her Honour did not understand that she could limit a retrial under this discretion to damages only.

GLAZEBROOK J:

Well I just read it as she said in these particular circumstances you couldn't separate them and therefore I order a full retrial and they say she didn't give reasons for that and that's wrong.

MR MILLS QC:

They do say that.

GLAZEBROOK J:

But if there's somewhere where she said she didn't understand she could have just sent damages back?

MR MILLS QC:

I need to look at it again myself.

GLAZEBROOK J:

I just don't recall that there, that's all because it's all on the facts I would've thought.

ELLEN FRANCE J:

It's presumably that it is unclear whether the scope of a retrial was the subject of detailed argument.

GLAZEBROOK J:

Well that's just saying we don't know whether they said you could or you couldn't I suppose.

MR MILLS QC:

Well would be happy to –

ELIAS CJ:

Well we can look at what she said.

MR MILLS QC:

I would be happy to take the point as a given that Her Honour did understand that she had –

GLAZEBROOK J:

Well I would've thought it was a given, it would be odd that she didn't understand that.

MR MILLS QC:

Well I agree with that and that's certainly my friend's position in his submissions, that she did not understand that she had a discretion of that kind and he points to –

ELIAS CJ:

It may indeed be in Mr McKnight's submissions. There's some reference to that.

WILLIAM YOUNG J:
She doesn't deal with it though.

ELIAS CJ:
No that's right.

MR MILLS QC:
Well certainly in the course of argument in the Court of Appeal, such as there was an opportunity for argument, the position was clearly coming from the Court that it was being indicated that it wasn't clear that she understood that she could have given a limited retrial only and that's the reason for setting out with some care in our written submissions the various factors that make it clear that that absolutely cannot be right.

WILLIAM YOUNG J:
Sorry but she hasn't – just so we can sort of do it in a logical order, she didn't specifically address the possibility of a retrial just to damages only.

MR MILLS QC:
Well she certainly addressed herself to whether she could do that and chose not to.

WILLIAM YOUNG J:
Whereabouts?

MR MILLS QC:
Several places. You will find that, well it's a combination of factors. It's in our submissions at 33 to 34 but it's summarised but the steps that I would've taken you through given time and I started getting into it, is that our application to set aside the verdict puts it in issue and that is at volume 2, tab 24, 342 to 345.

WILLIAM YOUNG J:

At para 28 she says, "An excessive award of damages can only be remedied by way of retrial." Now it's not 100% clear what she means by that I guess.

MR MILLS QC:

No but she says specifically in the retrial – let me just take this in steps. So we've got the starting point of our application which puts squarely in front of you that she had a discretion.

GLAZEBROOK J:

Sorry I've lost the application, what tab was it?

MR MILLS QC:

It is tab 24 of volume 2 and you'll see the authorities that are relied on and it relies on *Smallbone v London* [2015] NZCA 391, (2015) 22 PRNZ 768 and *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) in particular both of which discuss at great length the nature of the discretion and the choices that are available to the Judge. So that was the starting point and in *Quinn* we've got a case where it was just limited to damages. So it's right in front of her and it was part of the application that was put to her by my client or by me on behalf of my client.

Then the second reference that I would give you is the retrial judgment and that is at tab 2, sorry volume 2, tab 26, page 362 of the case and it's paragraphs 26 to 30 and in particular paragraph 28 where the Judge refers specifically to having a retrial in whole or in part and refers to the previous rule 494 which is discussed at length in *Smallbone* and you'll see that in the *Smallbone* decision at paragraph 30. It's a very extensive discussion about the nature of the Judge's discretion under the new rules because there's been some suggestion the rule had narrowed rule 494 and the decision there was it hadn't.

Then after the retrial judgment was issued, stop if I'm going too fast on this, after the retrial judgment was issued, my friend then filed a memorandum with

the Court asking that the decision to order a general retrial be revisited and she issued a minute which is minute number 9 and you'll find that in the same volume at tab 27.

WILLIAM YOUNG J:

I'm a little bit ahead of you, at para 109 of the setting aside decision she specifically refers to the possibility of directing a retrial.

MR MILLS QC:

She does and look the only reason I'm emphasising this is I know my friend says this was never raised, it was never argued, it's not correct.

WILLIAM YOUNG J:

Well that doesn't really matter does it? No sorry I mean the fact that she did consider it, she didn't give elaborate reasons but she saw it as so intertwined with, the issue of damages so intertwined with the other issues that it wasn't practical to have a trial just for damages only.

MR MILLS QC:

Yes and she's based it on two grounds and they're properly recognised grounds for general retrial.

GLAZEBROOK J:

Can I just check, is your argument that it was within her discretion to do it and shouldn't have been overturned by the Court of Appeal?

MR MILLS QC:

Yes it is, yes.

GLAZEBROOK J:

All right, okay. Well I suppose you're going to have to say well is it actually a discretion in those circumstances or is it an *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

MR MILLS QC:

Excuse me?

GLAZEBROOK J:

Well does *Austin, Nichols* apply so that the appellate Court can overturn it? Is it that sort of discretion or another sort?

MR MILLS QC:

Yes.

GLAZEBROOK J:

So if it's the first sort of discretion then the fact she was right and considered it is sufficient. If it's the other sort of –

MR MILLS QC:

Yes I understand, you would have a full right to reopen it.

GLAZEBROOK J:

Yes.

MR MILLS QC:

Yes well certainly my submission is it's in the first category and in the cases that we have found relevant to it and Mr Cleary will give me those if I'm asked, that it has been treated as a discretion of the first class and indeed in part –

GLAZEBROOK J:

Well sorry I should perhaps say an evaluative decision which would be able to be overturned as against the discretion which has probably been recently very narrowed down. So the older cases are probably not the best ones to rely on.

MR MILLS QC:

All right, well I might be being told something here.

WILLIAM YOUNG J:

The other thing is, I mean in truth, assuming it is a discretion for a moment, the reasons why are probably not adequate. I mean she has addressed, but this conclusion really warranted being teased out and unpacked.

MR MILLS QC:

Well I, what I'm going to say to you next then, if we're over the first hump of the challenge, which the Court of Appeal I think accepted, and move to whether she had properly considered the discretion, which is in part the reasons point, then she has dealt with it on, I did give you the minute reference didn't I?

GLAZEBROOK J:

Yes you did. No you didn't actually, I turned out to be the memorandum of counsel.

MR MILLS QC:

Minute number 9 is volume 2, tab 27 – 28 I'm being told, 389 and paragraphs 3 and 7 also record the defendant's submissions, ours, had drawn attention to the scope of a retrial. We have a hand up of those two paragraphs if you want them, but it's quite clear that it was squarely in front of her as to what sort of retrial it should be, and one of the things I think my friend refers to, but with respect not entirely accurately, is that in the course of discussing this with Her Honour before she made a decision I floated the possibility that there might be various ways of dealing with a retrial, and it might be worthwhile, if Her Honour was minded to order a retrial, that we had further exploration about how best to do it, and I had said it might be possible to have it just on the loss of the privilege. I don't think that is possible, I've since seen cases which say that would never work, but at the time these issues were being talked around with Her Honour to try and find the best possible solution to this. So the memorandum that my friend put in asking for this to be reopened to which Her Honour responded in minute number 9 is pretty terse. It says that first of all she's functus, and secondly that she is perfectly satisfied that it is the right decision here to have a general retrial for two reasons. They're short

but they are, in my submission, proper reasons. The first is that the facts or the evidence relevant to the damages award was intertwined or overlapped with issues evidence relevant to the loss of the privilege. So you couldn't separate them properly. Now the Court of Appeal has said if you could you must effectively. My submission on that is it's wrong. It's a question of should it be separated not just could it be, and it's a question of whether it's in the interests of justice to separate them out in that way, and here, and I'll give you a good illustration of this in a minute –

ARNOLD J:
Sorry to interrupt but I just don't quite follow that. I mean if they could be separated sensibly –

MR MILLS QC:
Oh the sensibly point, you see, I agree with that.

ARNOLD J:
Well, but there isn't another should argument is there?

MR MILLS QC:
Well your sensibly is my should.

ARNOLD J:
I see. Okay.

MR MILLS QC:
The Court of Appeal just talks, we could do it, but what Her Honour has said is that because you can't sensibly separate them out there has to be a general retrial, so that's her first, the recognised grounds for deciding general retrial or limited. And the second one, which is also a well-recognised ground, really goes to the safety of the verdict, and there she says the jury has ignored my directions, they have done this, and she spells it all out, and it's in our written submissions. They were told not to double-count, they've taken account of matters which were true or substantially true, they've overlooked the fact there

was an attack made on Mr Craig to which he was entitled to respond, and they've double-counted aggravated and punitive damages and so on. So it's deeply flawed is what she says in the end. Now if a trial Judge concludes that a verdict has been deeply flawed, that is another way of saying the verdict isn't safe, and if the verdict isn't safe it's a well-recognised ground, as Your Honours will know better than I do, for ordering a general retrial

GLAZEBROOK J:
Well is the verdict unsafe on damages or is the verdict unsafe altogether, because she didn't – well…

WILLIAM YOUNG J:
She thinks it was – that truth was a near miss defence.

MR MILLS QC:
Well I think she, I probably know what she thought but that's not a matter for now, but she, it's expressed in the "deeply flawed" that she's worked back from the damages award and the fact that to reach that award in her decision she says they have ignored directions I gave. They've done –

GLAZEBROOK J:
Actually they were given very few directions on damages I have to say.

MR MILLS QC:
Well she did tell them not to double-count and she told them to –

GLAZEBROOK J:
But she – it was double counting specifically to actually allow to have that as a maximum. I mean if you weren't allowed double counting then you shouldn't have been allowed, one, to have the damages that were claimed as a maximum and secondly, to allow them to be increased during trial.

MR MILLS QC:
I can't, I can't –

GLAZEBROOK J:

Well so, and what are the jury supposed to understand by that then? No double counting but you have a maximum that is the amount pleaded, and allowed to be increased.

MR MILLS QC:

I'm not sure whether you're criticising the directions or…

GLAZEBROOK J:

No, no, but – well to a degree, yes.

MR MILLS QC:

Yes, yes, well I mean –

GLAZEBROOK J:

Because, I'm just sort of saying what was the jury supposed to do with that.

MR MILLS QC:

This is the very essence of the misdirection –

GLAZEBROOK J:

Well in terms of damages I can understand.

MR MILLS QC:

Yes, but in order to get to where they got to on damages what Her Honour has obviously done, and I can confirm this in a moment by another reference, is to say that because of the concerns about ignoring directions and so on to get to the damages award that they got to, it's causing concerns about how they have gone about the whole decision of setting aside the privilege. So if it's an enflamed jury that leads to such a high award, that's a valid reason for being concerned about the fairness, the propriety of the verdict and whether the jury have done what they're supposed to do.

ARNOLD J:

There is also a more pragmatic consideration in the sense that you have to think about if you, if there is an issue about damages, and damages does have to go back, how would you conduct the second trial on damages.

MR MILLS QC:

Indeed.

ARNOLD J:

Now in that respect the Court of Appeal outlines a sort of scheme at paragraph 78 and I wondered if you had any submissions about the process that the Court contemplates there?

MR MILLS QC:

Well the, the Court of Appeal I am bound to say had a pretty firm view that this was going back on damages only, and so we filed a memorandum after the judgment came out, it might have been before the judgment, it was obviously before the judgment, after the hearing, which set out what in my view were the factual issues, evidentiary issues that would have to be dealt with in a new damages trial, and what that showed was that it would overlap significantly into findings that would also challenge the setting aside of the privilege, and that, when I first embarked on that during the course of the hearing I was told my job was not to make it more difficult for it go back just on damages, and I was there to assist that process, and I resisted that. We then got the response that Your Honour has just referred to in the judgment, but there's a very good practical illustration I think in the Judge's summing up which I just draw your attention to where she was summing up to the jury on compensatory damages, and when you look at that you can see how they relate also to privilege, and you'll find this in volume 2 at tab 17 and it's at 264, paragraph 123 where she's telling the jury that they can ask themselves the following questions. "Did he deliberately attack or defame Mr Williams? Was he reckless about the truth? What were the circumstances and the reasons behind the Remarks? Did he provoke Mr Williams into defaming him?" Now yes those are relevant damages but some of those are also directly relevant

to the loss of the privilege, and that is exactly the problem, and we put in our written submissions reference to High Court of Australia cases and one I might ask Mr Cleary to make available to you, it's the very well-known *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 case which is a very good discussion about the deeply flawed concept and the difficulty when you've got a privilege defence, which there wasn't in the principal case that the Court of Appeal relied on, it was a damages and truth case, but when you've got a privilege claim and the plaintiff is seeking to set the privilege aside, you are very much intertwined between matters that affect the damages and matters that go to the loss of the privilege, and the Australian position is that almost invariably that requires a general retrial and you can't separate them off, and that I think is where Her Honour has got to by saying this is deeply flawed, can't separate them out, they're interconnected, and yes she might have gone on for a few more paragraphs but I think it's clear what she's done, and I think it is wrong to describe it as not giving reasons. She has given reasons.

ELIAS CJ:

I should indicate that we are proposing, subject to Justice Arnold who hasn't responded to the request, we're proposing to sit on until five and take a short adjournment in a few minutes when it's convenient.

MR MILLS QC:

All right, well I'm close to finishing the discretion point I think. So that covers, I think, the fact that she understood she had discretion, knew what the discretion was. That she had reasons for, and gave reasons for why she considered that on that facts of this case there needed to be a general retrial, not just a retrial limited to damages. The only other point I make that reinforces that is that you will have seen when she's dealing with the misdirection issues that she says, in relation to the relevance direction, she said clear-cut misdirection, but I don't have to find whether it's material, it doesn't quite say that but that's what she's saying, don't have to decide whether it's material because I've already decided that a general retrial is required because of the damages, which I think is another confirmation that

she has turned her mind very firmly to the fact that a general retrial is required here, and that's why she doesn't have to go on to come to the same conclusion on misdirections, which would have been an inevitable result if she had said that that was a material misdirection. That might be a convenient place to stop.

ELIAS CJ:

Have you finished now on this? I'm just trying to work out what would be convenient for everybody.

MR MILLS QC:

Yes, I think, unless I get told otherwise. Yes, that will conclude what I need to say on that, thank you.

ELIAS CJ:

Thank you. Sorry Mr McKnight?

MR McKNIGHT:

Thank you Your Honour. Mr Romanos will be addressing the situation of qualified privilege and section 19 on misdirections and then I'll take the balance.

ELIAS CJ:

All right, well we'll take it in that order since we've asked for it to be in that order. Yes, thank you. We'll take 15 minutes now.

COURT ADJOURNS: 3.28 PM

COURT RESUMES: 3.49 PM

MR MILLS QC:

Your Honours, just before my friend starts, we've handed up to you copies of *Australian Consolidated Press v Uren*, High Court of Australia, and you'll see that reference in our –

ELIAS CJ:

That was the one where the High Court departed from UK authority, didn't it?

MR MILLS QC:

On punitive damages I think.

ELIAS CJ:

Yes of course, on *Rookes v Barnard* [1964] AC 1129 (HL).

MR MILLS QC:

Yes, but it's relevant on much wider issues now, which I think you'll find helpful. You'll see it referenced at footnote 37 of our written submissions.

ELIAS CJ:

Thank you. Yes Mr Romanos?

MR ROMANOS:

Thank you Your Honours. I've got an outline of my submissions, a three page in terms of the rules. So Your Honours what I've sought to do here is to set out on three pages, effectively sum up the written submissions that have been filed in response to Mr Craig's appeal and I'm happy to address whatever issue Your Honours think appropriate. I'm cognizant of Her Honour the Chief Justice's remarks at the beginning about misdirections being the key point.

ELIAS CJ:

Sorry, I understood that you are addressing us on the qualified privilege point?

MR ROMANOS:

Yes, I'm happy to do that, so effectively I'm addressing the appeal and my learned friend Mr McKnight is addressing our cross-appeal.

ELIAS CJ:

Yes, thank you.

MR ROMANOS:

But I'd like to, I think a good place to start is the ground, it's on page 2, and what's important here is that was there sufficient evidence for the jury to make a finding rebutting the privilege. Now unfortunately the nature of qualified privilege and malice, it's very difficult to, in fact it's impossible to try and compartmentalise all these different factors into neat boxes. Is it ill will, is it improper advantage, is it improper purpose, where does the justification issue fit in for instance, but in my submission there were three grounds really on which the jury could make a finding of malice in this case. The first was the justification issue, and if I could take you to my written submissions at paragraph 121, this is the written submissions dated the 29th of August. It's paragraph 121, page 22.

As was discussed earlier today, Mr Williams, or counsel on behalf of Mr Williams, made an application, or sought directions from Her Honour before the jury retired, that these issues be left to the jury as preconditional elements of the privilege. This isn't an ordinary situation or occasion of qualified privilege like an employment reference check or a complaint to the police, it's a bit more nuanced than that, and effectively it's a defence of, it's based on provocation and in terms of the law, how that fits in to the duty, it doesn't fit in comfortably into a classic shared interest test, and what the, particularly the older authorities, focus on is the bona fides of the person making the response, being a foundational element of the defence. So in both *Gatley* and *Media Law in New Zealand*, both rely on these very old conceptions of these old definitions of this defence, because you've got to remember that, especially in the 19th century, there was a real difficulty the courts were grappling with where malice stood in respect of qualified privilege, what was the position of malice? Was it the defendant seeking to rebut the presumption of malice on publication on defamatory words, or we have these growing defences, defence of qualified privilege being developed whereby it was for the plaintiff to rebut the privilege and get a finding of express malice. So that was the difficulty with this defence and with the older definition. So what I think is important is that in order to establish the defence, the defendant has to establish, yes, there's an attack, and that what they've published in

response is sufficiently germane or relevant so as to activate the privilege, but whether that privilege in fact is perfected will depend on whether, on the justification issue, and what I termed the excess issue. So in terms –

GLAZEBROOK J:
And your justification issue, just to be clear, is actually a lack of honest belief effectively?

MR ROMANOS:
Yes Ma'am.

GLAZEBROOK J:
Or to put it positively, a requirement for honest belief in your rebuttal.

MR ROMANOS:
Certainly it's the bona fides or the good faith of the person responding and, you know, in its most simple term, if you're responding to an attack which you know to be true, or justified in the old language, then there's no privilege or equally it can be said there may be a privilege but it's defeated by malice. So in the written submissions before you at paragraph 121 and 122, oh 121 I set out the law in this regard in respect of this justification issue and in particular it's the decision of the English Court of Appeal in *Fraser-Armstrong v Hadow* [1995] EMLR 140 (CA) and on page 23 His Honour sets out the point that effectively if it's true, what's being responded to. So if the attack is true, then it would either demonstrate that no such privilege properly arises in the first place or it would defeat the defence by successful reply of malice and that is not which –

GLAZEBROOK J:
Sorry, it's really whether the person making the statement honestly believed it was true rather than whether it was true which doesn't seem to be what you're saying at paragraph 122.

MR ROMANOS:

Well in my submission for the defence to apply, it's not just about what the person responding thought, the response, in my submission it's an objective question of fact for the jury as to whether the response met the requirements of the privilege.

WILLIAM YOUNG J:

You put it in para 125 of your submission, haven't you?

MR ROMANOS:

Yes I have Sir.

WILLIAM YOUNG J:

I mean the problem being that sexual harassment and lack of integrity being evaluative matters, Mr Craig may have had a different view of his own conduct to that which the jury had and that wouldn't necessarily – that wouldn't be inconsistent with privilege.

MR ROMANOS:

Yes I accept that. I mean in this case it was a credibility contest between Rachel MacGregor and Colin Craig in respect of the sexual harassment claim.

ELIAS CJ:

Is that though what was the issue for qualified privilege?

GLAZEBROOK J:

Paragraph 121, it's the defendant knowing that an attack is justified, that it's true, it says if that's the case either you don't have privilege or you've abused it.

MR ROMANOS:

Yes.

GLAZEBROOK J:

But on 122, that's not the question that you're saying or the two questions that you're saying were irrelevant because Mr Craig could well have sexually harassed Ms MacGregor and yet honestly believed that he wasn't, in which case he doesn't come within paragraph 121.

MR ROMANOS:

Now in respect, Your Honour, at 122, these were the two fundamental questions that we submitted needed to be put and I must say the –

GLAZEBROOK J:

Well were you right to say those were the two fundamental questions in light of what is, you say the law under 121 which is relating to a knowledge of the defendant of a justified, rather than whether whatever it was, was in fact true.

MR ROMANOS:

Well in light of the credibility contest in this case, it wasn't a situation of maybe a potential accidental sexual harassment, if that can exist, an accidental flashing which has caused offence or something, I mean these were long, deliberate actions with letters and cards and correspondences and massages and all sorts of things.

ELIAS CJ:

But it's whether it's a relationship or whether it's sexual harassment, that's the issue and whether Mr Craig believed it was a relationship.

MR ROMANOS:

Certainly and Mr Craig's credibility was very much put at issue in this case. I think you could look at the cross-examination of Mr Craig in fact it was almost designed totally to destroy his credibility on all sorts of issues so that, you know, when it comes to these more fundamental questions, I mean –

ELIAS CJ:

But where's the indication that the jury was directed to focus on the issue on 21?

MR ROMANOS:

Well if I could take you to the summing up, which is tab 17 of volume 2 and I'll take you to paragraph 60 and Her Honour says that if Mr Craig did not honestly believe that what he published was true, this is another factor that may well indicate ill will.

ELIAS CJ:

Well there is nothing wrong with saying if Mr Craig did not honestly believe that what he published was true, you can take that into account as evidence of ill will but surely in the context of this case the jury had to be instructed that they had to find that he did not honestly believe what he published was true because there's nothing really else, is there? That's the critical issue.

MR ROMANOS:

In terms of the rebuttal of qualified privilege?

ELIAS CJ:

Yes.

MR ROMANOS:

Well I put things more broadly than that. There were many issues independent of the sexual harassment issue which we put to the jury as evidence of ill will from which they could interpret predominant motivation by ill will.

WILLIAM YOUNG J:

I mean there's a funny sort of thing because the only reason why Mr Craig would have had ill will towards Mr Williams I assume is the fact that Mr Williams has put in train the attacks against him.

MR ROMANOS:

Well that Mr Williams has exposed the situation.

WILLIAM YOUNG J:

Yes and so everything that he says which is the subject of the case is really by way of response to those attacks, it's not reflecting ill will or malice except in a very technical sense, that it's not that he's got an extraneous motive or any other reason for doing it, the real question is whether it's a bona fide response to an attack.

MR ROMANOS:

Well whether he's attacking Mr Williams and throwing up all the dirty politics book and all this stuff as a side show to –

WILLIAM YOUNG J:

But say if he believes that, that's fine.

MR ROMANOS:

Pardon me? If he believes?

WILLIAM YOUNG J:

So I mean if Mr Craig believes that he didn't sexually harass Ms MacGregor, if he thinks he's acted fairly over pay, if he thinks he's been the subject of a dirty politics of leaks and blog stories and so on, then what he said seems to me to be a reasonable reaction.

MR ROMANOS:

Well that's for the jury to consider whether it was a reasonable reaction.

WILLIAM YOUNG J:

Maybe.

MR ROMANOS:

Whether he went over the top, I mean the object of the privilege here is to protect your reputation to act in a manner which is commensurate with the reason for the privilege.

ELIAS CJ:

But the Judge has to rule on that.

MR ROMANOS:

Well I'll come to that Your Honour because in my submission I take a very different view to my learned friend and I submit that it's not quite as clear cut as that and I'm going to take you to some authorities in that respect.

WILLIAM YOUNG J:

Given that allegations against Mr Craig have received nationwide publicity, which I think they had hadn't they?

MR ROMANOS:

Yes but I must say that the context of the trial, there was a lot of things going on in respect of Mr Craig about which Mr Williams had nothing to do with.

WILLIAM YOUNG J:

Yes I understand that but the events that Mr Williams has contributed to putting in train had resulted in very substantial, indeed nationwide publicity.

MR ROMANOS:

To which Mr Williams had contributed to.

WILLIAM YOUNG J:

Yes and so on that basis it must have been legitimate for Mr Craig to get his story out to as many people as he wanted to.

MR ROMANOS:

Absolutely.

WILLIAM YOUNG J:

Providing it was a bona fide honest story.

MR ROMANOS:

So what I'd submit Sir, that yes Sir that there was an occasion triggered there. There was an available qualified privilege for him to respond to this attack.

WILLIAM YOUNG J:

And if he was honest, I mean if he honestly believed that he'd been unfairly attacked and untruthfully attacked, didn't the case against him fall away?

MR ROMANOS:

Well if he honestly, I mean again it comes down to a credibility test.

WILLIAM YOUNG J:

Yes, no I understand that. You see what troubles me about the summing up and I'm sure it troubles the other members of the Court, is there are a whole lot of other things that are thrown in there that seem to me to be a bit extraneous or not particularly material to the facts of this case, unless you postulate what I describe as the middle slot, where…

MR ROMANOS:

Well I think the difficulty in this case arises because of section 19, because Her Honour is trying to fit these, this justification issue, which Her Honour did set out to the jury in quite detail, into other ill will or an improper advantage component, and in my submission –

ELIAS CJ:

Well there's only one really, isn't it? I mean you might, ill will, as used in section 19, is part of abusing the occasion of privilege.

MR ROMANOS:

That's one way to abuse the occasion of privilege. I mean it's the most simple way to understand malice if someone is predominantly motivated by –

ELIAS CJ:

Well I don't think we should use malice. The McKay Committee tried to get us to depart from it because it said how unhelpful it was as a term.

MR ROMANOS:

Well if you look at the –

ELIAS CJ:

It's echoed by Lord Reed in the recent case also that criticism so –

MR ROMANOS:

And instead we've got section 19.

ELIAS CJ:

I think ill will may be almost as bad.

MR ROMANOS:

Or improper purpose or improper advantage, they're all broad terms and –

ELIAS CJ:

No, not if you understand what privilege is because privilege is to protect speech on an occasion. So it's just a question of does the occasion arise, and it seems to me that clearly is an appropriate case for privilege as long as it was a bona fide response.

MR ROMANOS:

Yes, well, then we have a situation of relevance and reasonableness of the response –

ELIAS CJ:

But really how could it not have been relevant and reasonable? Reasonable within the sense used in the cases, that if you're responding to an attack you don't have to be too polite.

MR ROMANOS:

No, that's fully – you don't have to be, and you may, you know, you don't have to have one hand behind your back.

ELIAS CJ:

No.

WILLIAM YOUNG J:

Well as you might say the problem is, looking at 130 of your note, the Judge summed up in the manner that Mr Mills had proposed to her.

MR ROMANOS:

Yes, quite.

WILLIAM YOUNG J:

On the reasonableness issue.

MR ROMANOS:

I'm sorry, I'm just looking at – yes, that's what was submitted in the qualified privilege submissions the day, two days before and now we have a reinvention of the wheel of what was argued. We had a trial. We argued the law on a specific basis. I submit there was nothing wrong with the law as it was applied. I don't submit, I submit Her Honour's application of *Lange*, there was nothing wrong with it, and then post-trial my learned friends have really changed, sought to change the law and everything. There's just no coherence between my learned friend submissions, particularly to the jury, and the focused attack on the jury's findings and Her Honour's summing up. They're just two different cases.

ELIAS CJ:

Well we have to be concerned about what the law is.

MR ROMANOS:

Yes.

ELIAS CJ:

So perhaps that's really what…

MR ROMANOS:

Can I take you – when looking at misdirections I think it's common ground that you do have to look at the closings and you have to look at the summing up as well, but you do look at the closings, so –

ELIAS CJ:

Why do we look at the closings? I've never heard that actually.

MR ROMANOS:

In terms of that's what the, that's what my learned friend –

WILLIAM YOUNG J:

It was.

ELIAS CJ:

Was it?

WILLIAM YOUNG J:

Well it could be. Well to the extent to which she's summing up by reference to the closing addresses. But the trouble is the closings put the kitchen sink in too don't they?

MR ROMANOS:

And also I'd say you could look at the question trail too in terms of what guidance the jury is being given. Of course the summing up is the essential point here.

GLAZEBROOK J:

What do you say about the proposition that if there is a material misdirection in the summing up, it doesn't matter what counsel may or may not have said or done, material misdirection on the law, which is the submission as I understand it from Mr Mills.

MR ROMANOS:

I think it's a relevant consideration whether comment was made at the time, but I don't think in every case it's going to be fatal. I don't think that would be right.

WILLIAM YOUNG J:

What would the –

GLAZEBROOK J:

What status though.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Mr Mills says, yes, maybe as a counsel of perfection he should have picked these things up, at the time he gave explanations for why he didn't, but in the final analysis he says, it really doesn't matter if I made a really bad mistake – if there is a material misdirection on the law then it goes back for a retrial.

MR ROMANOS:

I think if there's a material misdirection, you say the jury has been misled by this then yes, retrial.

GLAZEBROOK J:

And that's despite that material misdirection might have been contributed to, or even totally the fault of counsel.

MR ROMANOS:

Well I think ultimately it's the Judge who has to get the law right, but she is –

GLAZEBROOK J:

I actually wouldn't have thought that was the case but…

MR ROMANOS:

The difficulty is that in criminal proceedings –

GLAZEBROOK J:

Well that's right.

MR ROMANOS:

And that's really the –

GLAZEBROOK J:

These are civil, aren't they?

MR ROMANOS:

It's very rare to find retrials ordered in civil proceedings on the basis of misdirections to the jury.

WILLIAM YOUNG J:

Well it's pretty rare to find civil jury proceedings which is part of the problem.

MR ROMANOS:

Yes, I mean I certainly wouldn't want to let my learned friend off the hook, it's caused, and have not raised these issues, we could have argued these at the time if they were issues, but I submit there are no misdirections in the summing up, so it's a moot point.

WILLIAM YOUNG J:

It might bear on whether in the context of the trial these really were that significant given the true contest, that would be one view of it.

MR ROMANOS:

Yes Sir. I think it might be noted that in the, I mention in the submissions, that after the closing arguments we had a full, almost a whole day because we did the closing arguments on the Thursday morning, then we had the whole day with Her Honour doing her summing up the following day, and we raised an issue about my learned friend's closing, and then we said you know what

actually in the scheme of the evidence it's wrong but it's not going to make a blind bit of difference, I submit the same thing with Her Honour's, these points on Her Honour's summing up. It's very important that we have this positive finding of flagrant disregard of Mr Williams' rights.

ELIAS CJ:
For the purposes of exemplary damages.

MR ROMANOS:
I submit it, I can't envisage a situation where you could have someone having flagrant disregard for Mr Williams' rights, yet at the same time holding an honest belief in what he said, because that wouldn't be flagrant disregard of Mr Williams' rights, that would be –

ELIAS CJ:
I don't know what it means actually. I mean I don't know, you might be right in that, but I'm not sure.

MR ROMANOS:
Well –

ELIAS CJ:
It might be simply – no, well the aggravating circumstances, matters such as that, that you called a lot of evidence on.

MR ROMANOS:
Yes we did.

ELIAS CJ:
So are you going to take us, I don't know whether it's necessary, but to your section 41 statement. Is that part of this? Did the Judge direct on all of those?

MR ROMANOS:

Well what I want to point out is I wanted to go through both my learned friend's closing, Mr McKnight's closing and then the summing up, because it's important that the Judge reflects counsel's submissions. In *Quinn* an argument was made, oh well, the trial Judge should have given, shown the jury more evidence about the justification issue, and it says at 27, "It had not been incumbent on the trial Judge to fossick about locating possibilities as to justification not within the strong focus of counsel." So I think the trial Judge is, not circumscribed, but has to give emphasis to the, the emphasis given by counsel, and if counsel don't emphasise points you can't then complain afterwards that the Judge didn't emphasise these points, and in respect of my learned friend's closing argument, or address, that's volume 2, tab 16 at 205. Now that's where it begins but I'd like to take you to page 208 to 211 because this is where my learned friend discusses the rebuttal of qualified privilege in this case. Page 208. So from the second paragraph through to page 211 my learned friend discusses the two ways in which qualified privilege, the rebuttal were defeated, and I want to draw attention to the fact that the justification issue is not mentioned at all, nor is Mr Craig's –

GLAZEBROOK J:

What do you mean by the justification –

MR ROMANOS:

Well I say the justification issue as Mr Craig's sexual harassment of Ms MacGregor –

GLAZEBROOK J:

Well isn't the justification issue that they honestly believed the things they were saying.

MR ROMANOS:

I guess what I'm trying to, the submission I'm trying to make is it was really implicit in that that if he sexually harassed her that he knew he sexually harassed her because the evidence in this case was so strongly weighted as

a credibility contest between the two. Mr Craig's actions being put in issue, Ms MacGregor's actions being put in issue –

ELIAS CJ:
But it's an assessment, isn't it?

MR ROMANOS:
Pardon me?

ELIAS CJ:
It's an assessment whether conduct is sexual harassment.

MR ROMANOS:
Yes.

ELIAS CJ:
So they could honestly believe that it wasn't sexual harassment, that's what they were saying.

WILLIAM YOUNG J:
Well that's what's being put to the jury by Mr Mills.

ELIAS CJ:
Yes.

MR ROMANOS:
Yes, I appreciate that.

WILLIAM YOUNG J:
I think it would be easier if you dealt with in terms of Mr Craig's belief rather than in relation to the underlying facts because you are going to attract challenges every time you do that.

ELIAS CJ:
Anyway, what else do you want to take us to in this?

MR ROMANOS:

I just want to point out that in terms of the, he really only addressed, my learned friend, the Mr X interview and didn't really come to address anything like the Serious Fraud Office allegation in any detail, Mr Craig's repeating of allegations –

ELIAS CJ:

But the Serious Fraud matter was a matter that may well have aggravated damages, and was appropriately taken into account in that, but how is it relevant to qualified privilege?

MR ROMANOS:

It can be relevant to ill will Your Honour because –

ELIAS CJ:

How?

MR ROMANOS:

So, you know, there's the how do you get inside someone's mind at the time of publication, what were they thinking, what was their motives, well you can take into account legitimately post-publication allegations, and that might, if they make them recklessly then, or with knowledge of falsity, then that can give the tribunal of facts a window.

ELIAS CJ:

What, is it propensity?

MR ROMANOS:

Yes, yes.

ELIAS CJ:

Oh, okay.

MR ROMANOS:

Precisely, and in my written submissions I do set out the *Gatley* references where that's discussed. So I guess what I'm trying to say is that we didn't just base our case on, well we really refer to this, predominantly motivated by ill will, and there are many particulars which were directed to that independent of the sexual harassment allegation, and that's Mr Craig's attitude towards Mr Williams, which is a focus on ill will.

ELIAS CJ:

Isn't that a real danger that if it isn't explained that ill will means abusing the occasion of the privilege, it's got to be directed at that, that the fact that Mr Craig may not like Mr Williams, in view of the recent history between them, that the jury will think that that is sufficient.

MR ROMANOS:

Well in my respectful submission Her Honour Justice Katz properly directed the jury that it has to be the predominant motivation of ill will, and as part of that you can find the predominant motivation of ill will if this person is out there publishing falsities about you which they know to be false, and that's ill will.

ELIAS CJ:

Okay, we don't have a problem with that.

MR ROMANOS:

And I think it must be important that in the, in Her Honour's judgment, the retrial judgment, Her Honour accepted, so Mr Craig had, this is, Mr Craig had proposed this test of malice, which is strictly dishonesty and fraud, an allegation akin to dishonesty and fraud, whereas we advocated for a more *Lange*, a lower threshold than dishonesty and fraud and that improper advantage was a flexible concept, but Her Honour, and we had this, you know, huge battle about which was the right interpretation, Her Honour said, it doesn't really matter – even on Mr Craig's higher threshold, I'm satisfied the jury could have made a finding of malice. She also found that there was evidence for some award of punitive damages. So Her Honour was

satisfied there was some evidence that the jury could accept that Mr Craig acted in flagrant disregard of Mr Williams' rights. So Her Honour has found malice.

ELIAS CJ:
Does she identify in what respect?

MR ROMANOS:
She does Ma'am.

ELIAS CJ:
Can you just give me the reference? Don't take time going to it, just give me the paragraph reference.

MR ROMANOS:
So her judgment is tab 26, volume 2 I believe and Her Honour sets out in quite a bit of detail from paragraph 77 which is page 378 through until page 383, paragraph 96 and what Her Honour did is go through two of our particulars of malice. Sorry Your Honour I'm going to use the word "malice" as a shorthand, I mean section 19, if that's convenient.

ELIAS CJ:
Well I think you should try and break yourself of a habit but we'll listen to it.

MR ROMANOS:
Old habits die hard. And Her Honour discussed the two particulars and found that she was satisfied that there was an evidential basis for each. I mean it was so much for the jury to who they believed between Mr Craig and Ms MacGregor and it was very much he adamantly said he didn't do it, she adamantly said he did sexually harass her and with respect to, I suggest Mr Craig's credibility was heavily impugned during this trial in so many ways. You know, when it comes to an important finding, if the jury can't get inside his head, they have to look at his credibility in light of the trial and if they just don't believe him at anything he has to say well it's perfectly rational for the jury to

find that he knew he sexually harassed her and acted with a lack of integrity in respect of her pay.

WILLIAM YOUNG J:
Where does the Judge deal with the punitive damages issue?

MR ROMANOS:
In my 74.

ELIAS CJ:
Sorry your 74?

MR ROMANOS:
Sorry Her Honour's judgment, I believe it's 74, yes.

ELIAS CJ:
Sorry which judgment?

MR ROMANOS:
Sorry I'm talking about the retrial judgment, 12th April.

ELIAS CJ:
So just give me the page reference in the volume again.

MR ROMANOS:
Yes, 0377 and the second sentence she says, "In my view some award of punitive damages could still be justified." Of course she's making a finding that the punitive damages were excessive but the short point is it was argued by Mr Craig on that application that there was no – that punitive damages apparently were now a matter of law for the Judge and not for the jury, even though that's exactly how it was left to them and Mr Craig had added a question on punitive damages but it's important because that's Her Honour assessing the evidence of Mr Craig's subjective motivations as seen by the jury in finding that the jury could find he'd acted to this high degree of malice

of dishonesty or fraud and that there was evidence for the jury to find he'd acted in flagrant disregard of Mr Williams' rights.

So in respect of Her Honour's summing up, I just want to talk about the political element of Mr Craig's privilege which I submit is a complete misnomer. So you're looking at the High Court judgment, if you go to paragraph 63 of that judgment which is on page 374.

ELIAS CJ:
Oh yes, I thought it was the summing up we were going to, 374 again.

MR ROMANOS:
The short point is that she – what Her Honour is doing there is saying, "Mr Craig's actions must be viewed in the broader context. The importance of the privilege was particularly significant because the category of speech involved is deserving of a high level of protection. Mr Craig was responding to an attack on his reputation", and it's this political element and what Her Honour does here is she effectively sums up what she'd said in the qualified privilege judgment which I'd like to turn you to. So this one is at – I'm not sure what tab it is.

ELIAS CJ:
Sorry what are you wanting us to take from this?

MR ROMANOS:
What I'm going to do here –

ELIAS CJ:
Before I move onto the other one.

MR ROMANOS:
Yes Ma'am, there was a comment made earlier today that Her Honour shouldn't have made a finding, you know, what Mr Craig believed he was responding to an attack in respect of dirty politics and I'm picking up on that

because the difference – because I submit that was an usurpation of the jury for Her Honour to make such findings about Mr Craig's alleged honest beliefs and it's totally contrary to the summing up which I submit was absolutely bang on and correct.

If I could please turn you to the reasons judgment. I'm not sure what tab that is but it's page 314 of the volume 2. Tab 23, thank you Mr Graham and on page 336, so paragraph 74, "I also accept Mr Mills' submission that it is relevant that from Mr Craig's perspective he was responding to what he saw as a dirty politics-styled attack against him." And at the end, "Mr Craig believed he was a victim of such an attack." And then Her Honour goes on in 75 to talk about the hierarchy of speech value and in 76, over the page, Her Honour says, "It is therefore relevant that Mr Craig's intention, at least in part, was to speak out against what he saw as the tactics of dirty politics in New Zealand, which he believed to be destructive to the fabric of New Zealand's democracy." So in my submission that's not for Her Honour to make that finding of fact of Mr Craig's subjective beliefs and indeed when looking at the privilege, certainly it was put by Mr Craig that he was, you know, I accept Mr Craig at least submitted and gave evidence that he was doing this on the basis of, you know, interests of democracy in New Zealand and cleaning up politics or whatever but that was for the jury to consider.

So if I could now turn you to Her Honour's summing up and that's tab 2, sorry volume 2, tab 26, oh apologies 17 and I wanted to turn you to paragraph 67 which on page 250 and Her Honour is summarising my learned friend Mr McKnight's submissions, "Second, Mr McKnight referred to the fact Mr Craig continued to talk to the media and go on various radio and TV shows after publishing the leaflet. It is for you to decide whether this indicates Mr Craig's dominant motivation was to hurt Mr Williams or on the other hand whether it is consistent with Mr Craig's version of events, namely that his aim was to restore the damage to his own reputation and expose what he saw as dirty politics in New Zealand, so it is for you to decide." Yet Her Honour later decides that it was his intention in part.

ELIAS CJ:

Sorry just a moment, the authorities say you can repeat these things in response – you don't have to respond on one occasion. So I must say I don't quite understand why this assumed any significance here.

MR ROMANOS:

Well in my submission –

ELIAS CJ:

If it didn't go beyond the same scope of response.

MR ROMANOS:

Response to what though? What's the purpose of it? To respond to the attack and it must be a question for the jury and I'm going to refer you to three cases where the Court has held this to be an objective question of fact, that there are reasonable limits. In the terms of reasonableness even Her Honour in the qualified privilege judgment made clear, she left the issue of reasonableness to the jury.

ELIAS CJ:

I'm not sure that she should have really but anyway.

WILLIAM YOUNG J:

I suppose it all depends on the facts.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

It seems to me at least if we just look at the two primary alternatives, counter attack made completely honestly, counter attack completely dishonestly, which are the two hypotheses, on one there's no question of privilege, on the other I would've thought it pretty clear that he did act reasonably because the

allegation has been made against him on a nationwide basis and that's really what he's doing is responding as far and as wide as he can.

MR ROMANOS:
Not if things are – if he knows the substance to be true.

WILLIAM YOUNG J:
Well yes I know but if he knows they're untrue then he's gone anyway in my way of thinking.

MR ROMANOS:
Yes, if he goes around and says what's –

WILLIAM YOUNG J:
But he's gone anyway if he knows it's untrue, what's troubling is that these extraneous issues come into the summing up, extraneous on at least the two hypotheses I've mentioned, not necessarily extraneous on the middle slot I proposed.

MR ROMANOS:
Yes I hear what Your Honour is saying. I was just going to refer you to paragraph 75 and 76, where again Her Honour invited the jury to consider Mr Craig's evidence.

ELIAS CJ:
Sorry just para 69 while we're on that page, the allegation in the proceedings that Mr Williams has a bad reputation. Why was that relevant to the qualified privilege?

MR ROMANOS:
Well I mean there was evidence that Mr Williams was a big supporter of Mr Craig prior to all this happening, that Mr Williams, after the *Dirty Politics* book came –

ELIAS CJ:

No so can you just answer that shortly.

MR ROMANOS:

I'm trying to. After the *Dirty Politics* book came out, Mr Williams was invited to present at Conservative Party events. It was submitted that Mr Craig didn't genuinely believe that he had a bad reputation and that he was piggy backing on this *Dirty Politics* book as the basis to sort of launch this attack against Mr Williams and create this sideshow as a diversionary tactic.

ELIAS CJ:

I still don't see how it's relevant to the qualified privilege matter which the Judge is addressing the jury on here. It may well be very relevant to aggravation of damages or something like that.

MR ROMANOS:

Well if a person – if a defendant conducts a proceeding in a very high stakes manner, as it was in this case, and just attacks the plaintiff and the jury rejects those attacks on the plaintiff during the course of the proceeding, including with the defences of truth and bad reputation and I submit they absolutely can take that as a matter of animus, spite, ill will towards the plaintiff.

ELIAS CJ:

So it's evidence of animus you say?

MR ROMANOS:

Animus, ill will, spite. I don't view ill will as meaning improper purpose, I view ill will as a predominantly motivated by ill will, I just read section 19 for what it says, that the plaintiff can defeat qualified privilege if he proves the defendant was predominantly dominated by ill will.

ELIAS CJ:

And what do you mean by that?

MR ROMANOS:

I mean ill will as in spite, animus.

ELIAS CJ:

Spite?

MR ROMANOS:

Yes Ma'am.

WILLIAM YOUNG J:

Well again in a marginal case I guess it might be that where the defence is conducted on a basis that it drips with malice, then the jury might reason back from saying the defendant so hates the plaintiff, that's relevant to our assessment of what happened but I don't think this is really this case, is it? They only hate each other over the subject matter of the litigation.

MR ROMANOS:

Well no in my submission Mr Craig hated Mr Williams for exposing him for this stuff and that was the ill will.

ELIAS CJ:

But that's not really different from knowing that he's not in the right, so not acting in good faith.

MR ROMANOS:

Yes I submit that's fair.

ELIAS CJ:

But it's all doubling up here, all these different factors.

MR ROMANOS:

And that's the nature of section 19, these things do double, they do double up.

ELIAS CJ:

Well I'm not sure that it is the nature of section 19 but you'll come on to address that.

MR ROMANOS:

Well I suggest that's the nature in which these particulars of ill will and/or improper advantage are put. I mean certainly in our closing address Mr McKnight was referring to and, you know, this is a matter of improper advantage but it could also be one of ill will and equally Her Honour said the same thing and, you know, it's very difficult to just put these into neat components but the Courts have, you know, obviously this is the first time this Court has addressed this issue but Courts have dichotomised ill will and improper advantage and I could list even in the *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 Court of Appeal case last week or the week before, there the Court said privilege can be defeated predominantly by ill will or improper advantage, an either/or situation.

ARNOLD J:

Well it says "or otherwise" and doesn't that indicate that the notion improper, ill will is just one component, one way of assessing whether there's an improper advantage or an improper use of the occasion?

MR ROMANOS:

Well then it's a matter of statutory interpretation to what does "or otherwise" mean because I've had a look at the dictionary and "or otherwise" can also mean to state, in contrast to the thing just stated. I mean what was the point of having section 19 as opposed to the old law? It was supposed to be to simplify it.

ELIAS CJ:

Well have you gone back and had a look at the McKay report on it?

MR ROMANOS:

No the point was to –

ELIAS CJ:

Get away from malice.

MR ROMANOS:

Because on the suggestion that juries couldn't understand what malice meant and I've never seen any reports where juries are stumbling over malice. I'm not sure whether that was the McKay Committee's view or whether it was based on empirical evidence, it was just – you know, there were other changes made. Well, for instance, Your Honour, there was the deliberate renaming of truth and honest opinion from fair comment, justification and that's deliberately stated in the Act. Section 8(1) says the defence of truth is now known as justification, is now known as truth but section 19 doesn't say that. It doesn't say – it just says section 19(1) in any proceedings for defamation predominantly motivated by ill will or improper advantage or otherwise improper advantage of the occasion and number (2) says defence should not be otherwise defeated on the basis of malice but that doesn't say that the word "malice" is no longer part of the lexicon as it does for truth and honest opinion. So, you know, I fully accept that the McKay Committee's intent was to take out the word "malice" but in my submission that hasn't actually been achieved like it has for truth and honest opinion and ultimately, as Your Honour says, you know, where we get to know is it any more straightforward? I mean should it just say "improper advantage", should it just say "improper purpose"? I mean juries can understand, anybody can understand malice in the sense of being predominantly motivated by ill will towards someone, malevolent, spite.

ARNOLD J:

The trouble is, the cases accept that when you are responding to an attack, you are entitled to be angry, indignant, perhaps overstate things, it's just human nature.

MR ROMANOS:

Yes Sir.

ARNOLD J:

So the trouble is when you start to use a concept such as spite and so on, I mean there's a line and it's quite hard, it seems to me, to distinguish between sort of outraged, angry, fury and all the rest of it which is legitimate and something that you put the label "spite" on. It is better, isn't it, to focus on what is it that has given rise to the privilege and what has happened and is it fairly referable to a response to the object that the privilege is trying to protect?

MR ROMANOS:

Yes I do accept that Sir. I mean the question is what does the privilege protect?

ELIAS CJ:

Well this is common law privilege.

MR ROMANOS:

Yes.

ELIAS CJ:

So it arises in a much wider context and privilege always attaches to occasions.

MR ROMANOS:

Yes, quite.

ELIAS CJ:

It doesn't attach to people or – so it's the occasion and the occasion of this privilege is response to attack. It's not even right response to attack, as long as you believe you're justified.

MR ROMANOS:

Well then the question is that subjective component, whether you believe, is that a preconditional element for the privilege, what I'm calling the justification issue or is it evidence of, for want of a better term, malice?

ELIAS CJ:

Well it may depend how it's served up. It may not matter if the Judge has sufficiently identified it and said that if you don't have good – if you don't believe in the statement you put out in response to an attack, that demonstrates malice or sorry demonstrates ill will and the privilege goes but it has to be fairly – but otherwise it also could be treated as a precondition. The Judge could have taken a verdict from the jury on the point.

MR ROMANOS:

Another threshold question we proposed was did Mr Craig act in good faith? I mean that was a question that was proposed and not accepted. We proposed several matters that we said –

WILLIAM YOUNG J:

Why was that not accepted?

MR ROMANOS:

Her Honour didn't even address that, I'm not sure. Do you want to look at the submissions? I promise you it was because again because the definitions of the defences in *Gatley* and media law in New Zealand refer to a bona fide response.

Can I just take a slightly different angle? I said I was going to refer to three authorities where I'm saying there are objective limits to the response. I've got three. The first case I'd like to take you to is the relatively recent jury trial of *Stephenson v Jones* HC Wellington CIV-2012-485-1982, 17 July 2013 and it was summing of His Honour Justice MacKenzie and that's in the second volume of the plaintiff's, sorry of Mr Williams' bundle of authorities and that's at tab 18. We're lucky we've got this, we've got a relatively recent

New Zealand jury trial where the same issue, response to attack was put in issue and if I could turn you to paragraph 30 of His Honour's summing up and His Honour says, "Now, a person or organisation whose character … has been attacked is entitled to answer that attack. This is called in law a qualified privilege. It is called a privilege because the party who is entitled to that privilege is protected from liability … the party who seeks to invoke it must observe certain limits. Those limits govern how far a person or organisation can go in answering the attack. The reply cannot go further than necessary to reply to the attack. The reply must be fairly relevant to the accusations made in the attack. The reply should not go into irrelevant matters. It should not attack the integrity", and I think this is the most important part, "It should not attack the integrity of the plaintiff, if that is not reasonably necessary for the purpose of defending the defendant's own reputation. Retaliation which is not an answer or explanation …"

ELIAS CJ:

So the attack though in these responses, perhaps we really should have gone to your section 41 statement.

MR ROMANOS:

Section 41 notice.

ELIAS CJ:

Yes 41 notice, what was it, calling him a liar.

MR ROMANOS:

Calling?

ELIAS CJ:

Him a liar. I mean what were the matters you relied on as going outside the privilege?

MR ROMANOS:

Well as I say I'm submitting that there's – in order to avail oneself of the defence it has to be reasonable, proportionate and relevant and I'm saying that's a jury question, it's an objective question for the defendant to make out and what's very important in this case, His Honour Justice MacKenzie left this as preconditional elements for the defendant to establish and that they would subsequently address the issue of malice if they found the privilege.

So I don't want to take too long because I have a bit to get through but I just note paragraph 38 – "if you find there was an attack" – because he left it to the jury to determine whether there was an attack, which was another thing we asked Her Honour to do, "If you find that there was an attack, the next question is whether the words that are set out are a reply to the attack. In considering that question you can look at the whole of the press release as part of the relevant context. But again, the question is not whether the press release as a whole is a proper reply but whether the words complained of in the statement are a reasonable and proper part of that reply."

And in paragraph 39, this is I submit different to Your Honour Chief Justice's conception a few moments ago. His Honour says, "I need to tell you that, as a matter of law, it's not enough for the defendants to prove that they believed the words complained of were a reply to an attack. The question must be decided objectively. You are the people who decide that question."

ELIAS CJ:

No well I agree with that. It has to reply to the attack.

MR ROMANOS:

But would a fair-minded observer consider that the words in the statement were a proper reply to the attack, a proper reply to the attack?

ELIAS CJ:

Well it depends what you invest "proper" with. But if it is simply is it a response to the attack, then I don't have a problem with it.

MR ROMANOS:

Not whether it's just a response but –

ELIAS CJ:

As you say he's not dealing with ill will here.

MR ROMANOS:

Not yet no and then at paragraph 43 and just I think he moves onto the issue of ill will and certainly we provided that summing up to Her Honour Justice Katz and said, "Here is a template of how this should be run and we should have these issues as pre-conditional issues" but Her Honour didn't accept that and in my submission ultimately because –

WILLIAM YOUNG J:

Did she give a reason for that in the qualified privilege ruling?

MR ROMANOS:

It was not because it was wrong but because it was unduly cumbersome and unnecessary in all the circumstances. I proposed that very firmly and, you know, harking back to the justification issue, harking back to the point in *Gatley* and Justice Brown, you know, if it's true, does it really matter, either the privilege doesn't arise or it's defeated, ultimately it doesn't really matter. So as long as the jury is there to consider those issues one way or another, then that's the key thing and it did happen in this case and where did the issues fit? They were slotted under ill will or improper advantage. The short point is the jury were directed to consider Mr Craig's credibility, they were invited by my learned friend to consider Mr Craig credibility, that he'd been cross-examined for a long time, that my learned friend Mr McKnight had put to him squarely, you know, "You were motivated by ill will" and he said, "No".

WILLIAM YOUNG J:

Well he would say no.

MR ROMANOS:

Well I know it would be wonderful if, “Yes I am I was predominately by ill will.”

WILLIAM YOUNG J:

Yes, how did you know?

MR ROMANOS:

That’s one of those questions you sort of just have to put but the point is that’s for the jury to consider that evidence and whether they accept that or not. So that’s the first case I wish to refer you to. The second case I wanted to refer you to is a Supreme Court of Canada decision on response to attack qualified privilege and in that small bundle you’ve got there, that one is at tab 21 and this is *Botiuk v Toronto Free Press* [1995] 3 SCR 3 and this was another response to attack case where – I’ll just take you first to the trial Judge’s findings. My proposition here is to show that there are objective limits to the defence and if you don’t observe those limits, yes you can, not necessarily must, be violent and extreme in the language, you don’t have to keep your hand behind my back but there are limits, there must be limits and that’s for the jury to decide or the finder of fact to decide, as the case may be, where those limits are. So I’ll take you to paragraph 44 of that decision.

WILLIAM YOUNG J:

I don’t think I’ve got a para 44.

MR ROMANOS:

On the inside margins.

ELIAS CJ:

“The trial Judge then …”

WILLIAM YOUNG J:

I haven't got that.

GLAZEBROOK J:

Paragraph 44 do you say?

MR ROMANOS:

Paragraph 44 to 46. Sorry my version's got some pages all mixed up. 44 to 46 is the trial Judge's findings. So the trial Judge "concluded that the defamatory references to Botiuk were not necessary to offset what the appellants considered to be an attack upon their integrity." Oh, I see what's happened here. So 44 to 46 is the trial judge's finding on this case, and then the Court of Appeal's finding, you might just note this, is at paragraph 56, and then importantly the important part is for our present purposes is paragraphs 79 to 80. So this is where the Supreme Court of Canada sets out the defence. Now what's different in Canada to New Zealand is that they have this, they look at excess as a discrete means to take away the privilege, and indeed the Court here refers to *Horrocks v Lowe*, so there's two ways it can be defeated. First, "if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created … Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard," and I think that's pretty safe, pretty reasonable.

"Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion," it would be defeated, and in this case if I take you to paragraphs 86 to 88 –

ELIAS CJ:

Of what, of this case?

MR ROMANOS:

The same case. The Court finds that the privilege was exceeded. Or it upholds the lower Courts findings that it is exceeded. So the response must be "germane and reasonably appropriate to the occasion." This declaration

attacks the report as groundless and untrue. "The appellants were entitled to respond to protect their interest and, therefore, the defence of qualified privilege was available to them. However, they went well beyond what was reasonably appropriate to the occasion, and as a result, they lost the protections afforded by that defence."

Then over the page, "As the trial judge observed, 'it was [not] necessary for the [appellants] to continue to defame the [respondent] in order to deal with the … declaration.' Neither the Lawyers' Declaration nor the … reply was a measured response to the document authored by the UCC." So the issue of, you know, was it measured, was it proper in His Honour Justice MacKenzie's wording. Did it exceed the interest being to protect the reputation? In this case, you know, the jury could have found, they could have said, no, Mr Craig was entitled to go on and on and on, or they were entitled to say, no, you went way too far, this didn't call for this excessive response. He repeated and repeated and repeated. I submit that is a legitimate factor by which the jury could find the interest at issue here, being Mr Craig's interest in protecting his reputation, was exceeded.

ELIAS CJ:
But it will have to be exceeded by the two defamations you're alleging.

MR ROMANOS:
The two defamations we're alleging, yes, but in the points of aggravation and points of malice both –

ELIAS CJ:
But the aggravation goes to damages doesn't it?

MR ROMANOS:
Aggravation goes to damages, yes.

ELIAS CJ:

But in terms of whether the response exceeded and was an abuse of the privileged occasion, that will be determined on the basis of what was said on the occasions you say are defamatory. Or the jury found to be –

MR ROMANOS:

Yes but at the same time Your Honour, so for instance where there's a repeated defamation a plaintiff has a choice. He can either plead another cause of action or can choose to cite it as a point of aggravation. In this case Mr –

ELIAS CJ:

But it's not an addition, it's not a point that – well, I'm just trying to work out why it's relevant to –

MR ROMANOS:

Well maybe the, if the…

ELIAS CJ:

To this question of qualified privilege.

MR ROMANOS:

It's this excess issue. So I'm, what we're dealing with here is this, I'm saying that for the defence to be established the defendant has to satisfy the tribunal of facts that the response was reasonable, proportionate and relevant, and that's for the jury to determine.

GLAZEBROOK J:

So obviously that Canadian case is authority for the excess Mr Mills says that is actually for both of those questions and for the Judge to decide.

MR ROMANOS:

Yes.

GLAZEBROOK J:

Do you have any other authority apart from the Supreme Court of Canada?

MR ROMANOS:

I do.

GLAZEBROOK J:

So your submission would be that she shouldn't have decided those things, or if she did they were just a provisional decision?

MR ROMANOS:

Yes Ma'am.

GLAZEBROOK J:

And not a point of law, a point of fact presumably.

MR ROMANOS:

Precisely. My submission is that, so this is a judgment of the English High Court [*Hamilton v Clifford* [2004] EWHC 1542 (QB)] but it is His Honour Justice Eady and it's relatively recent, and he refers to *Horrocks v Lowe* and he refers to *Adam v Ward*. So just really briefly, Your Honour Justice Glazebrook will be absolutely, this is exactly what I'm going to be addressing in this judgment, Mr Clifford was a publicist and he republished allegations by I believe a nanny who made allegations of rape or sexual abuse by the Hamiltons and they had a crack at him and he had a crack at them, like all these cases. Now the discussion is really between paragraphs 63 to 80 of this case and the exposition of the defence is at paragraph 66. So just as important, this is an interlocutory decision, and the second part there he says, "It is hardly capable of challenge that each of those 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 … 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."

So I'll come to our case in a moment. If you just turn over to paragraph 73 and 74, so this is dealing with this issue of relevance, particularly under the second part of paragraph 73 and then that page, 74, and what His Honour Justice Eady is doing is setting where the criterion of relevance sits in the mix. "Yet when the issue is whether or not a particular defendant has ventured into entirely irrelevant or extraneous material, going beyond what is germane… it would seem that this is a factor to be taken into account in assessing malice and accordingly for the jury to decide. There appears to be clear authority for this proposition in the speech of Lord Diplock," and Your Honour Justice Ellen France referred to *Horrocks v Lowe* and that's the same page, 151, and I think that page is very important, relied on by the Court of Appeal makes clear that, you know, paragraph 76, so the central proposition is that on the issue of relevance it's for the trial Judge, an application can be made –

ELIAS CJ:
Sorry where are you?

MR ROMANOS:
Paragraph 76. It's impossible to conceive we included irrelevant material. So the limits of the Judge on relevance is at paragraph 78. "Here I am satisfied that I would be exceeding my role at this stage of the proceedings to rule that Mr Clifford's statements about the Hamiltons were 'obviously and wholly extraneous' to his purported defence … and thus outside privilege altogether. I believe it will be for the jury to decide if he was deliberately putting the boot into the Hamiltons by lending credibility to what are now known to be false accusations of criminality."

So in 75 His Honour made clear that, you know, the Court may exclude privilege where the irrelevance is plain and obvious. So in this particular case,

you know, we couldn't say to Her Honour in this case oh there's obviously things that he's called Mr Williams a thief or something that would be obviously irrelevant. So I mean in the *Harbour Radio* case which my learned friend referred to before, you know, there were eight imputations and ultimately it got whittled down to I think two that were said to be outside the privilege but I've got some important points about that case.

So what I'm saying at a threshold level, yes the Judge can strike out a defence by saying you've gone beyond what's reasonably appropriate here or what's relevant. So you lose the defence but in my submission it's not a matter of –

ELIAS CJ:
Well the jury still has to determine ill will.

MR ROMANOS:
Yes. Yes but I submit they have to look at the publication.

ELIAS CJ:
And if it goes too far it may be evidence of ill will as the cases say.

MR ROMANOS:
Yes, excessive retaliation, proceeds to offence, not a proper reply, whatever the – it's all fairly tautological in my submission but it's the same point, it had gone too far.

ELIAS CJ:
Well it goes to the question of whether ill will is established which is abuse of the occasion of privilege.

MR ROMANOS:
Yes.

ELIAS CJ:

Well I don't have a problem with it.

MR ROMANOS:

Well so in my submission the jury must consider whether it's, you know, one is allowed to be violent and what's too violent. I mean Mr Williams hits Mr Craig, Mr Craig hits him back with a sledgehammer. I mean has he gone too far? There has to be a level where you've gone too far and in this case I submit this was a –

ELIAS CJ:

But if it's directed at whether the section 19 withdrawal of privilege applies, then it has to be the predominant motive.

MR ROMANOS:

Yes predominantly motived by ill will.

ELIAS CJ:

So that's really the jury question.

MR ROMANOS:

Yes. Yes I accept that.

WILLIAM YOUNG J:

Sorry what's section 19?

ELIAS CJ:

Or otherwise.

WILLIAM YOUNG J:

Or improper advantage.

ELIAS CJ:

Yes that's right.

WILLIAM YOUNG J:

Proper advantage could be putting in material.

ELIAS CJ:

A gratuitous defamation, yes I agree with that, yes.

MR ROMANOS:

Well it's just interesting where the recklessness, where that fits because in *Smith v Dooley* [2013] NZCA 428 the Court of Appeal, they thought of it as ill will, predominantly motivated by ill will and then improper advantage meaning recklessness.

WILLIAM YOUNG J:

It's very unfortunate that ill will is still there because it is a sort of completely distracting.

ELIAS CJ:

Now we should probably have the adjournment. Just complete what you wanted to say, we'll take the adjournment shortly.

MR ROMANOS:

I guess I just wanted to leave with the proposition that it's for the jury to consider whether the responses exceeded the interest to which the privilege protects and that's for the jury. Has he gone too far? And that must be a jury question and if the jury thinks it's gone too far, well you've exceeded the privilege, just as in the Supreme Court of Canada, you lose the privilege, you're not entitled to claim, there's no privilege, you know, but this is all, yes, I come back to that. I just want to finish with, this is all pretty like – we always sort of felt this was a bit of red herring this improper advantage limb because of the finding of flagrant disregard. The jury made subjective findings on Mr Craig and they didn't say $1000 punitive damages, they gave $220,000 punitive damages. You can say what you like if it's excessive or not but they knew that that's a lot of money and that flagrant disregard, they made a

categorical finding of Mr Craig's mala fides in this case I submit but I'm happy to address further stuff after the break.

ELIAS CJ:

All right, well we'll take the adjournment now. How do you think we're going? How much longer do you expect to be Mr Romanos?

MR ROMANOS:

Well I believe I've covered the points I wanted to on the misdirections, except maybe just this point about reasonable care. You'd like me to address the discretion issue, I think that would be fairly quick and I wanted to address this point of rebuttal of qualified privilege, that it wasn't just sexual harassment from our perspective, that there were other means where ill will could have been found but I think I have addressed them and I'm happy with my written submissions in that regard.

ELIAS CJ:

So you'd expect to be what, another 15 minutes or so?

MR ROMANOS:

Yes, 15 minutes sounds about right.

ELIAS CJ:

And then how are we going in terms of completing? Mr McKnight how long do you expect to be with your cross-appeal.

MR McKNIGHT:

I've got about 10 pages.

ELIAS CJ:

We'll have to have a reply of course too.

MR McKNIGHT:

So I believe I will be about an hour, hour and a half. So I've got some notes, my speaking notes.

ELIAS CJ:

That's fine. Well it looks as though we're still on track to complete. Yes thank you.

COURT ADJOURNS: 5.07 PM

COURT RESUMES ON TUESDAY 5 SEPTEMBER 2018 AT 09.58 AM

ELIAS CJ:

Yes Mr Romanos.

MR ROMANOS:

Good morning Your Honours. I am very conscious of the premium of time we've got here today so I will endeavour to keep this relatively brief. Overnight I just wanted to think about a couple of matters that came up yesterday, I thought I could provide a bit more assistance on a couple of points, so I'll just do that first and Your Honour Justice Glazebrook and Your Honour Chief Justice were debating the test for misdirection and when a retrial would be ordered in that regard and what I've done, I'd like to hand up, I've got some commentary from *Sim's Court Practice.* So you may be aware that rules 494 and 495 of the High Court Rules 1985, these were the rules that governed retrials. These rules were repealed when the High Court Rules 2010 were implemented, they were taken out and in *Smallbone* the Court of Appeal basically said that it remains in the inherent jurisdiction of the trial Court to order a retrial if various circumstances, effectively the same circumstances as existed under the old rules and I bring this to the Court's attention because it's quite tricky to find this, it could be overlooked this commentary, this valuable commentary because it's no longer in the current version because these rules have been repealed and what I'd like to highlight first is rule 494(1), "A new trial may be ordered only where the opinion of the Court there has been a miscarriage of justice that justifies a new trial."

And if you turn the page, you'll see the commentary and cases on that point and the second paragraph, so this subclause is paramount so that even if one of the grounds referred to in the subclause were to be made out, the Court must be satisfied that there has been (1) a miscarriage of justice and (2) that that justifies a new trial. The ultimate question is whether the applicant has established circumstances which in their totality amount to a miscarriage of justice that justifies a new trial and further down, the commentary talks that, and this is in respect of Judge trials, but where the essential findings of the

trial Judge would have remained exactly the same even if additional evidence had been heard, no miscarriage of justice, it seems to follow that before it can be said there's been a miscarriage of justice, the Court must be satisfied the result of any trial might not have been the same as the result of the first trial and I think importantly each party is bound by the conduct of their case and then we have administration of justice concerns and I submit that's different to the criminal sphere. We have an adversarial system in civil litigation where each party puts the evidence and raises the arguments and submissions and pleadings that they want and that's the battleground for the proceeding.

So in this case it's my submission that there are two very important elections by Mr Craig by which he must be bound. First, it's the election not to seek to take away any of the particulars of malice or to seek findings of truth based on alleged undisputed evidence. These issues were left to the jury and properly so and it's my submission that if the sort of application that was going to be made post-trial that oh well undisputed evidence, all these things were true, it was incumbent to raise this issue before the jury went out so this could be properly argued and determined at that time.

And the second election I submit is very important and that's the decision not to challenge the trial Judge's summing up and when Mr McKnight addresses you, he will be referring you to the *Smallbone* case where the shoe was on the other foot, where Mr McKnight and myself made certain elections by which the Court of Appeal and this Court in dismissing our leave application and which I think Your Honour's Glazebrook and Arnold were on that panel, we were bound by our elections. So that's the first point I just wanted to address Your Honour Justice Glazebrook.

WILLIAM YOUNG J:
Sorry are there any rules or statutory provisions governing the right to apply for a retrial or is it just as it is in the rules which just says you can apply for a retrial?

MR ROMANOS:

So under the old rules it was very nice and clearly set out under, 494, 495. The practice that's developed now and it's happened three times in *Smallbone v London*, this case and recently in *Arnold v Stuff Ltd* [2018] NZHC 1641 earlier this year. Rule 11.15 is about what happens after the jury comes back and what the trial Judge can do is (a) give judgment.

WILLIAM YOUNG J:

I know what the rule says but it doesn't give criteria.

MR ROMANOS:

(b) Stop for further consideration and it's under that further consideration limb it would appear from the *Smallbone* judgment that all the old 494, 495 rules have been swallowed up by and in *Smallbone* the Court gives examples of when a retrial might be justified before judgment is sealed and as I say effectively they just incorporate all the old –

ELIAS CJ:

Well the old rules purported to follow the case-law anyway, just via a convenient capture.

MR ROMANOS:

Yes Ma'am.

ELIAS CJ:

So effectively it's just the case-law that is being applied now. So you say *Smallbone,* I haven't read *Smallbone.*

GLAZEBROOK J:

You're not seeking to challenge any of that are you?

MR ROMANOS:

No. It was a very confused situation in *Smallbone* because we didn't have these rules anymore and it was a sort of a where's the power of the Court to,

where's the power of the trial court to consider these matters. Hasn't the repeal of these rules indicated that it's an issue for the Court of Appeal, but the way it's been worked out I think in a pretty awkward way is that rule 11.15(b), in the current High Court Rules, apparently enveloped the jurisdiction of the High Court Judge to deal with that.

ELIAS CJ:

Do we have *Smallbone* in your authorities?

MR ROMANOS:

Yes, it is –

ELIAS CJ:

That's all right, don't take us to it, I just wondered if we had it.

GLAZEBROOK J:

So you're not challenging the jurisdiction to grant a retrial, just whether it was appropriate in this case?

MR ROMANOS:

Yes, well Her Honour Justice Katz was bound by the Court of Appeal in *Smallbone*, and yes I'm challenging the –

GLAZEBROOK J:

You're not now saying that that was wrongly decided is what I'm asking you.

MR ROMANOS:

No I'm not.

ELIAS CJ:

So in what respect was she bound by *Smallbone*? What do you say…

MR ROMANOS:

At the conclusion of our trial judgment wasn't sealed, and in those circumstances the Court of Appeal in *Smallbone* said that there's a power for the –

ELIAS CJ:

I see.

MR ROMANOS:

– Judge to consider further consideration, 11.15(b), any application that the losing party may wish to make.

GLAZEBROOK J:

Well she was bound to consider it, not bound to grant it, and bound to consider it on the basis that she has jurisdiction to grant the application is the submission, is the point, yes.

MR ROMANOS:

Yes.

ELIAS CJ:

What's the provision of that, sorry, I just have a loose thread. What's the provision of the Act that deals with the Court's power on appeal?

MR ROMANOS:

The Defamation Act?

ELIAS CJ:

Yes. Is there one?

WILLIAM YOUNG J:

Section 22 isn't it?

MR ROMANOS:

In terms of damages?

ELIAS CJ:

Yes.

MR ROMANOS:

Or just powers of general –

ELIAS CJ:

I think it only deals with damages, doesn't it?

MR ROMANOS:

That just deals with the proposition that court by which the verdict is set aside may, on damages, may recalculate the damages –

ELIAS CJ:

Or send it back.

MR ROMANOS:

With the consent of the parties.

ELIAS CJ:

Sorry, what section is it again?

MR ROMANOS:

Section 33 Ma'am.

WILLIAM YOUNG J:

Well it requires consent of the parties.

ELIAS CJ:

Oh, for the Court to decide, yes. But that must be a very significant factor in deciding what you do when you get to that point.

MR ROMANOS:

Yes well the McKay Committee discussed the application of this rule being to help avoid parties having to have further litigation, so in the cases in England

before 1990 the Courts lamented over the fact that if we find excessive damages we have to send it back for a retrial, and then it was gradually teased out that the parties could consent, like they did in *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL), but in the absence of legislation the Court couldn't decide damages, but in 1990, and we set this out in the written submissions, legislation was implemented saying that the Court of Appeal could –

ELIAS CJ:

No, I understand all that. What I'm saying is with the background of section 33, that must affect the ability to order a retrial because normally on appeal the Court hearing the appeal can substitute its own views. That is not permitted in the case of an award of damages except by consent, so that must impact upon the frequency with which retrial will be appropriate, and then the only question is does it go back only on damages, can the damages matter be dealt with distinctly, which is really what we've been discussing.

MR ROMANOS:

And further, it wasn't considered in this case, we tried to get the Court of Appeal to consider this, is that there were four verdicts on damages, and it's within the power of the Court to uphold one or more of those verdicts of damages, and to send the remainder back to a retrial, whereas –

ELIAS CJ:

Or not.

MR ROMANOS:

Or not.

ELIAS CJ:

Yes, I see. That would be a bit of a manipulation though, wouldn't it?

MR ROMANOS:

Not in my submission but I'll leave to Mr McKnight who's –

GLAZEBROOK J:

Well I suppose you could say well double counting can be dealt with by only upholding the damages on the first one, if in fact that was the basis upon which the damages were excessive.

MR ROMANOS:

I mean in *Quinn* both the trial Judge and the Court of Appeal looked at both awards and there was two awards, one for each cause of action with punitive damages wrapped up in those awards, whereas we've got four awards, four verdicts on damages, general punitive, general punitive and certainly it's our backstop position that this could uphold –

WILLIAM YOUNG J:

Uphold the awards on the first cause of action.

MR ROMANOS:

Yes Sir.

GLAZEBROOK J:

Well that arguably would get rid of double counting.

MR ROMANOS:

Absolutely.

GLAZEBROOK J:

Sorry I'm just saying assuming there is double counting.

MR ROMANOS:

Assuming there is double counting as a consideration, yes. So the next matter I wanted to address was I was discussing with Your Honour Chief Justice yesterday the situation of ill will being independent matters for a finding of ill will beyond the sexual harassment situation and I'd just like to refer you to *Horrocks v Lowe*, tab 11 of my learned friend's bundle and I'll be taking you to page 151 and it's the second paragraph to which I would like to

refer you. There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even though he believed it to be true and importantly whereas in the instant case conduct extraneous to the privileged occasion itself is not relied upon, well there's a distinction here between this case and *Horrocks v Lowe* because we are relying on conduct of Mr Craig extraneous to the publication for which an inference of ill will may be drawn and it's the Serious Fraud Office allegation which was a discrete particular of ill will.

ELIAS CJ:
Raised in the pleading?

MR ROMANOS:
Yes in the section 41 notice and I know Your Honour –

WILLIAM YOUNG J:
Where is the Serious Fraud Office allegation made in the publication defamatory material?

MR ROMANOS:
It's made in the pleading of truth. So this is evidence of the defendant's conduct upon occasions other than that protected by the privilege and I'm happy to take you to it. In the original statement of defence filed there were a series of – or there was a huge number of allegations made about Mr Williams and one of them was this baseless allegation that Mr Williams had sought a campaign, a smear campaign against the former head of the Serious Fraud Office and there was just no basis for that allegation which was hugely – it's a hugely damaging allegation and to say you're going to run the defence of truth on this basis.

WILLIAM YOUNG J:
It wasn't run at trial I take it?

MR ROMANOS:

No it was withdrawn, this allegation.

WILLIAM YOUNG J:

So it's a bit sort of, I suppose some of these things are a bit remote from what was going through Mr Craig's mind in June 2015. I mean once the sort of battles joined then all sorts of other stuff are going to come out but didn't the jury really have to look at the position as it was in June 2015?

MR ROMANOS:

Yes Sir, they had to consider the position in June 2015 but they are entitled to take into – you know, how do you get inside somebody's mind and here's House of Lords, I've said that *Gatley* also refers to this, this is a legitimate propensity point that a plaintiff can rely upon to invite an inference of ill will.

ELIAS CJ:

Well I don't have any trouble with accepting that extraneous evidence is available to the jury to draw an inference of ill will but as has been put to you, it's getting a bit remote this later allegation in the course of the proceeding.

MR ROMANOS:

It's evidence that shows Mr Craig was prepared –

ELIAS CJ:

But it was left.

MR ROMANOS:

It was withdrawn after and there was never any explanation as to how it came to be made and certainly the Court of Appeal was of the view the jury could take this into account and both Her Honour did –

ARNOLD J:

I'm not sure myself how it helps at all. As I understood it, that's what he thought when the allegation was made, when he learnt that it was untrue, it got withdrawn.

MR ROMANOS:

But there was never an explanation of how this came to be made this terrible –

WILLIAM YOUNG J:

But I mean this is really chasing a hare isn't it? I mean you're really chasing hares. I mean it's a thing that's pleaded, it's not pursued, it's –

MR ROMANOS:

Never explained.

WILLIAM YOUNG J:

But why explain it? I mean it's of diversionary significance as far as the jury is concerned. The bit that does seem to be slightly overlooked from Lord Diplock's speech in *Horrocks v Lowe* is that the focus really should have been throughout on whether Mr Craig believed what he was saying was true or was indifferent to truth or falsity.

MR ROMANOS:

Quite.

WILLIAM YOUNG J:

I mean if the case had just been put on that basis then it would've been, you know, relatively simple.

MR ROMANOS:

But it's open to a plaintiff to call evidence and when you're dealing with ill will the defendant's objective, it's hard to get inside somebody's head, you've got to look for other markers of other conduct, you know, and you're entitled to

and we did and I submit it was significant in the case. I mean it's a very serious allegation that was made.

ELIAS CJ:
It was never established that he had no belief in its truth.

WILLIAM YOUNG J:
Well it may have been. Well I mean that is a likely explanation what the jury's found.

GLAZEBROOK J:
In some ways it doesn't matter, the point is really even if this might be remote or whatever, that it was still something the jury could take into account. That's the submission isn't it?

MR ROMANOS:
Yes.

GLAZEBROOK J:
That they might have been unlikely to find it of any particular assistance might be beside the point.

MR ROMANOS:
I mean the particulars of ill will, the ways in which –

ELIAS CJ:
Sorry you were going to take us to the particulars.

MR ROMANOS:
No I was just going to – I will just give you the reference.

GLAZEBROOK J:
It might be an idea actually.

ELIAS CJ:

I think we should look at the particulars.

MR ROMANOS:

All right, volume 1, tab 14 and page 183 and it's paragraph 3.10.

GLAZEBROOK J:

So is there anything you want to particularly draw our attention to?

MR ROMANOS:

Well I suppose I'd highlight that for Her Honour Justice Katz the particular at 3.6 which really captured this justification issue.

ELIAS CJ:

So is it right to capture what you put in this notice as being the statements made which are the subject of the action plus the consequential pleadings, that's all is it? So it's the intrinsic elements in the statements plus the way the proceeding was conducted?

MR ROMANOS:

Yes it may be referred by intrinsic matters and extrinsic matters. Intrinsic matters to the publication.

ELIAS CJ:

Yes I understand that but the only extrinsic matters referred to are in the conduct of the proceeding.

MR ROMANOS:

Yes.

WILLIAM YOUNG J:

Well you'd also rely, rightly or wrongly, on the failure to check the accuracy.

MR ROMANOS:

Yes and conduct of the publications being made and the conduct of the proceeding.

GLAZEBROOK J:

And the Mr X interview seems to be quite…

MR ROMANOS:

Yes. The purpose of that is because it was a complete fabrication.

ELIAS CJ:

But that was all in what's being pleaded.

MR ROMANOS:

Yes and that was pleaded as, you know, again it's difficult, when you're dealing a section 39 notice, evidence that the defendant did genuinely believe things, again it's very difficult to find – it's very difficult to have evidence that someone genuinely didn't believe something because you're really trying to get inside their head, so you can only look for external markers by which you can draw that inference, and –

ELIAS CJ:

But there's no other, beyond this matter really, there is no extrinsic evidence relied on of animus.

MR ROMANOS:

There's not, like in 2005 that Mr Craig threatened Mr Williams, no there's nothing like that, no. And I mean in the context they were on the same side of politics and before this matter arose the same side of politics, but Mr Williams was a supporter of the party.

ELLEN FRANCE J:

You do rely on the media interviews?

MR ROMANOS:

Yes.

ELLEN FRANCE J:

Subsequent.

MR ROMANOS:

Subsequent, because one of the difficulties with this document, and it's really pressure to the trial, is the cross-referencing to the statement of claim because we rely upon, if you look at paragraph 3.3 on page 182 of the notice, the plaintiff relies upon paragraph 7 to 15, 22.4, 22.6, so there was cross-referencing to the matters in the statement of claim, but certainly the repetitious nature of the – and again I come back to the point of ill will/improper advantage, it's had to fit these, it's hard to fit evidence into neat boxes because it can be evidence of either, or in the way Your Honours were discussing it, particularly Your Honour the Chief Justice, yesterday that it's not even the right term, predominantly motivated by ill will.

ELIAS CJ:

Well it's capable of misunderstanding I think.

MR ROMANOS:

Yes, I do accept that. That's all I really wanted to highlight in terms of the notice, and I just, you know, I've dealt with the Serious Fraud Office allegation. I'm very conscious of the time so I've got two hand ups, we're getting quite deep into qualified privilege and the issues surrounding it. I don't know if the Court has got this book in its library, this is a very, very detailed text, *The Making of the Modern Law of Defamation.*

ELIAS CJ:

By?

MR ROMANOS:

It's by Paul Mitchell.

ELIAS CJ:

Oh yes.

MR ROMANOS:

There's a very good chapter on qualified privilege which just sets out the chaotic state of the English common law in respect of common law qualified privilege. So what I'd just like to do is, I'd just like to, I think it would be of considerable assistance to Your Honours when understanding, you know, how these issues of relevance, reasonableness, proportionality just do not fit into neat boxes and can't be characterised as a concrete substantial misdirection. So I would just like to, I'm not going to take you to this but I think Your Honours would find this helpful, so Madam Registrar if I could please –

GLAZEBROOK J:

So are you giving us the relevant chapter are you?

MR ROMANOS:

Yes, just the relevant chapter on qualified privilege. In *Cassell v Broome* there was a 12-day hearing in the House of Lords, perhaps if we had that much time I could take Your Honours through that.

ELIAS CJ:

I think we will have this, because I think we have all the Hart publications.

MR ROMANOS:

Sorry, I've got one more hand up, sorry. In the Court of Appeal I prepared a table called discussion about where these components fit, because we're dealing with this …

ELIAS CJ:

Sorry, what is this?

MR ROMANOS:

So this is a table I prepared as an analytical tool to work out –

ELIAS CJ:

In the High Court?

MR ROMANOS:

In the Court of Appeal, because there's an obvious conflict between Her Honour's summing up and her later reasons of qualified privilege where she found, oh no, I've said, I should have dropped out relevance because it's not for the jury, and what I'm seeking to do in this is set out some pretty uncontroversial propositions about the availability of privilege and then its rebuttal, and I think, I mean I think the *Horrocks v Lowe* page I referred you to, this issue of irrelevant material is really captured on that page, the place of irrelevancy, and I can't read it any better than that, but just in terms of relevant proportionality and reasonableness in my submission these are matters that do go both to the occasion and are equally capable of being regarded as malice.

ARNOLD J:

Just on that, take the scope of the, or what you describe as proportionality. As I understand it the cases basically say that if the attack is a public one, then you're entitled to respond publicly, so the fact that you respond publicly can't itself indicate ill will, can it. It's part of the definition of the scope of the privilege.

MR ROMANOS:

Yes.

ARNOLD J:

So to take this case, if Mr Williams had simply spoken to the Board of the Conservative Party about his concerns, and Mr Craig had got wind of that and then published the leaflet and all the media things, the public part of it wouldn't be within the scope of the privilege. So you would deal with it at that stage. But at the stage where you have said there is a public attack, it seems to me very difficult then to say that fact that you've responded publicly can nevertheless be an indication of ill will. There might be other features of the

public attack that would justify a finding of ill will, but not the fact that you've done it publicly.

MR ROMANOS:

No, I accept that, but my proposition is that you shouldn't look at these like a check list – relevance proportionality and reasonableness – because they really all come into the whole of is the response reasonably necessary to protect the reputation, and in this case it was the repetition of, the nature of the repetition of Mr Craig's response that was, and that just how – I mean it is the widest defamation in New Zealand history in terms of how many – much more than a *Quinn* 700,000 people, much more than a Ray Columbus *Truth* to 26,000 subscribers, this was a, I mean –

WILLIAM YOUNG J:

That's damages I think, isn't it? I mean it's material to damages how many people saw it, but in terms of – I mean if it were the case that Mr Craig acted with complete honesty and purpose, that he believed that in all the respects that he criticised Mr Williams he was absolutely right, then it can't really be a problem that he sent out basically to everyone in New Zealand, can it?

MR ROMANOS:

I mean you've got to look at what he said. He's calling Mr Williams a liar –

WILLIAM YOUNG J:

I know, but if he believed all of that is true, and he's not reckless, so say he's acting – can I summarise that by honesty and purpose, if he acted with honesty and purpose then it can't really matter that he sent it out to the whole of New Zealand. Now as I said there are a whole series of spots on the continuum between complete honesty of purpose and complete scoundrel, and one of them is well, for instance, Mr Williams has said I sent texts, well I jolly well didn't send texts. So that might be a reasonable response, or another, that might be a state of mind, or he might say well I know I've acted like a complete idiot but I didn't actually sexually harass Ms MacGregor, so

part of the problem is we haven't got a clear basis, a clear factual basis for what the privilege was.

MR ROMANOS:
Well I mean in my submission to Her Honour –

WILLIAM YOUNG J:
So what was the legitimate scope, what was the occasion for him to make a response.

MR ROMANOS:
As much as the jury considers it was reasonably necessary for him to defend his reputation, and I just say you can't try and chip these pieces off. The jury has got to look at what Mr Craig said, to whom he said it, and you've got to look at these things, you've got to look at this broadly.

WILLIAM YOUNG J:
I suppose if he thought well I didn't actually sexually harass Ms MacGregor but gee it's perfectly, I've acted in such a way that anyone might think I did, then you might be right, it might be unfair to publish that everyone's a liar throughout New Zealand.

MR ROMANOS:
Everyone is a liar, not everyone is misguided, everyone has taken the wrong – everyone has got the wrong end of the stick here, it's not that, it's these guys are liars. If you go to the leaflet which is, if I can take you to tab 7, page 1713. I'm sorry volume 7, 1713. So there's a cartoon there and in my submission the jury were entitled to say this went way too far, have this cartoon created with Mr Williams holding an anvil or positioning an anvil above Mr Craig. Mr Craig might have thought it was, you know, funny or something but it makes Mr Williams look evil and was that reasonably necessary to defend his reputation to include this cartoon? Was that proportionate, was that reasonable?

WILLIAM YOUNG J:

Well maybe. I mean if he thinks he is the subject of completely false allegations made by three liars then maybe it is.

MR ROMANOS:

That these are lies though.

WILLIAM YOUNG J:

Yes, but it assumes on what he thinks.

GLAZEBROOK J:

But that's probably your point isn't it, that this is for the jury not for the Judge to be ruling in respect of a generic, of course this is all right, of course the Judge can rule generically well it's a public attack, you can attack publicly or in Justice Young's, if it hadn't been a public attack, could say well when you published it to the world that was disproportionate but the detail you say has to go to the jury, is that the submission?

MR ROMANOS:

Yes it all has to go to the jury and if I could just say as well, I'm talking about the approach of His Honour Justice MacKenzie yesterday and how he left this is it a proper reply, does the privilege even attach? Well I submit the same issue should have been put to the jury and moreover this is the first case I'm aware of where qualified privilege has been determined post-verdict. Normally the jury determines malice and if they make no finding of malice, then the Judge has got to consider right, is this a privileged occasion and that happened in *Harrison v Banks* in '94 before Justice Paterson, in *Nightingale v Ministry of Agriculture and Fisheries* before Justice McGechan, in *Smallbone v London,* Justice Williams didn't determine whether it was a privileged occasion and one of the problems is that Her Honour didn't like the look of that because it said well hang on if it's not a privileged occasion then why would the jury have to determine malice and I can understand the rationalisation about that but I think Her Honour jumped the gun here with respect by ruling this privileged occasion because in my submission it wasn't

a privileged occasion if the jury found he didn't have bona fides, didn't do it good faith and there's no privileged occasion.

WILLIAM YOUNG J:

There is an onus of proof issue here, if it's treated as going to removal of privilege, then the onus of proof is on the defendant, is on the plaintiff sorry but if you have to prove it's a privileged occasion, that is – and if that requires the plaintiff to show that the plaintiff was responding to what was perceived to be an untrue attack, then the onus of proof on bona fides would be on the defendant.

GLAZEBROOK J:

That's very confusing.

WILLIAM YOUNG J:

So the defendant has to establish that it's an occasion of qualified privilege. Now if that means that the defendant has to establish that he or she thought the attack was untrue, then the onus of proof would be on the defendant to show bona fides effectively.

MR ROMANOS:

Yes.

WILLIAM YOUNG J:

If it's treated under the awfully described malice column, then the onus of proof would be on the plaintiff.

MR ROMANOS:

Yes.

WILLIAM YOUNG J:

So the passage you took us to yesterday saying it doesn't make a difference whether it's treated as whether there's privilege, an occasion of privilege or

whether privilege is lost isn't quite right because there is an onus of proof issue although most cases aren't going to turn on that.

ELIAS CJ:

But it may be that that points to post the Defamation Act, bone fides being taken up by the ill will provision so that establishing the occasion simply requires an assessment of whether it is a response to attack and then it's for the jury to decide whether there is ill will which removes the prima facie privilege.

WILLIAM YOUNG J:

That would be the tidiest approach.

ELIAS CJ:

That is the way everyone has proceeded really it seems to me in this case, it's just that *Gately* does cite authorities, early authorities too which suggest that bona fides comes into the occasion.

MR ROMANOS:

And the chapter I handed you up it makes very clear the difficulty of, you know, is it for the defendant to rebut the inference of malice or is it for the plaintiff to prove the existence of malice and that's the point.

WILLIAM YOUNG J:

The Judge has sort of – I know Mr Mills didn't accept it, but the Judge in her qualified privilege ruling did seem to accept that it was a bona fide response to an attack. There were passages in there saying well Mr Craig genuinely believed he'd been the subject of an unjustified attack.

MR ROMANOS:

That was Her Honour's view on the facts but that was certainly not our case.

WILLIAM YOUNG J:

No I understand, it's not really – it's a bit awkward – there's an awkward division of function between Judge and jury.

ELIAS CJ:

But it doesn't matter if the Judge expressed a view of that, if it is for the jury to determine it as a matter of ill will.

MR ROMANOS:

As long as it's left to the jury, whether you put it under the ill will limb, the improper advantage, the short point is, is the jury considering the subjective motivations of the defendant? Yes they are. It matters not whether it's a threshold or done after the privilege is said to be found but I've always, because there's a conditional finding of qualified privilege in this case whereas Her Honour subsequently seemed to think oh I found privilege, honest, good faith is presumed on the establishment of an occasion of qualified privilege which might be true on other occasions but not this one which is a subjective qualified privilege defence because is he or she responding to an attack in a reasonable proportionate, relevant way but look, the depths of qualified privilege, many have tried and failed.

ELIAS CJ:

I just query whether it is adequate to refer to it turning on subjective, the subjective motivations because the ill will/misuse of the occasion is much more tied to the privilege than that. It's not just whether you didn't like someone when you said something.

MR ROMANOS:

No. On that point, can I take you to *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA) which is tab 8 of my learned friend's bundle of authorities. Now what I'd like to do is take to paragraphs 42 to 49. So we've had all this *Durie v Gardiner* excitement but in my submission *Lange (No 2)* discussion on misuse of an occasion of privilege is still the leading authority in New Zealand and in my submission this doesn't just relate, you know, in both the

Lange v Atkinson (No 1) [1998] 3 NZLR 424 (CA) and *Lange (No 2)*, there was discussion of all sorts of parts of defamation law and I submit this part is not just about this responsible, sorry this political discussion extension and there's a big focus on recklessness.

ELIAS CJ:
For the newly recognised privilege?

MR ROMANOS:
Not just the newly recognised privilege Your Honour, in my submission.

WILLIAM YOUNG J:
Well it's in *Horrocks v Lowe*, recklessness.

ELIAS CJ:
Yes, oh recklessness?

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
Yes, no I don't have a problem with recklessness.

MR ROMANOS:
So I mean just the first sentence of 45, "Recklessness as to truth has traditionally been treated as equivalent to knowledge of falsity … Both deprived the defendant of privilege", and talking about *Horrocks v Lowe*. They're not just talking about political discussion, this is the –

ELIAS CJ:
Yes.

MR ROMANOS:
And the reason I want to refer to – I want to highlight 42 to 49 is because this is what Her Honour based her summing up on. So in 47, I think 47 is the ratio

or most about recklessness, what constitutes recklessness is something which must take its colour from the nature of the occasion and the nature of the publication. I mean it's within the concept of misusing the occasion to say that the defendant may be regarded as reckless or if there's been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstances.

In essence the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement. That's for all qualified privilege, it's not just for – and the use of the word "responsible", I didn't read Her Honour's direction on responsible as being some sort of journalistic standards type *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) argument and the nature of the publication, and here we have one, you know, that went to 1.6 million people, had the massive potential to cause damages.

ELIAS CJ:
In this case of course where it's not one of the paradigm cases where you can make enquiry as to the truth of something, the subjective view taken by the defendant is the whole thing. He didn't have any enquiries to make of himself.

MR ROMANOS:
Enquiries to make of the truth of whether Mr Williams was a liar?

ELIAS CJ:
What enquiries should he have made?

MR ROMANOS:
Well for instance he, rather than send a Chapman Tripp letter to Mr Williams, you know, putting him on notice, instead he launches this leaflet and press conference ambush and then sends the letter out and then when we have the correspondence between the lawyers where Mr Craig doesn't know everything. He made a conscious decision to go and publish this without knowing the full situation.

ELIAS CJ:

Well I don't see how he knows the full situation any further today, after all the time that's been – it's very hard to know what he could've done. You say give notice of it?

MR ROMANOS:

Yes and certainly that was one of the points for punitive damages too.

ELIAS CJ:

I know.

MR ROMANOS:

Yes. So I mean I tie this to what this or I'm responding to is an appeal against misdirection, in my submission, first on the relevance proportionality elements, I submit these are not substantial clear cut misdirections. It is notoriously difficult to actually demarcate where these points go and I think it is for the jury to consider this matters or it's not wrong for the jury to consider these matters and on the responsibility element, in my submission, you know, you've got to look at the summing up as a whole and Her Honour was relying, clearly relying on these comments in *Lange* which is still I submit the leading authority and in my submission there just were no misdirections at all.

And finally, the last thing I wanted to address before I just touch on the discretion which I can do very quickly is just Your Honour Justice Young yesterday was talking about this middle ground postulate, I believe was the expression.

WILLIAM YOUNG J:

Slot I think.

MR ROMANOS:

Oh sorry. And I'm not going to take you – I'm just going to give you the reference in the evidence, Mr Craig's cross-examination which I believed touched, well the closest to this. So I'll just give you the reference, it's

volume 5, tab 75, pages 1198 to 1199 and I don't think it's helpful to cherry pick answers like yes to a question because I think you've got to look at these discussions in context over several pages but really what my learned friend Mr McKnight is doing is putting to Mr Craig that in view of all documents Mr Williams had seen and what he had been told by Ms MacGregor where this warranted action by Mr Williams and Mr Craig accepted that it did and then sort of moves back on that and actually ironically talks about how Mr Williams had a duty to get the accuracy right and all the sort of double standards here. Mr Craig is not required to have any responsibility but Mr Williams has all the responsibility on the facts. So I just refer you to that because it came to me.

ELIAS CJ:

Well what are you asking us to look at?

MR ROMANOS:

So pages 1198 to 1199, and in the middle of the page, the relevant questions, the discussion starts and the point is that Mr Williams clearly had seen – those letters speak for themselves, there's no fabrication, that's Mr Craig's words, Mr Williams had seen that plus he had spoken to Ms MacGregor at length in Waiake and to say that he's a liar in my submission is just untenable and I think that touches possibly upon Your Honour Justice Young's middle ground.

WILLIAM YOUNG J:

Well he may have been entitled to say he was wrong.

MR ROMANOS:

That's a different, that's a completely different – the imputation wasn't that Mr Williams shows a lack of care to things and is a negligent person. He's a liar, he's telling deliberate falsehoods and the alleged – perhaps he doesn't tell any substantial falsehoods –

ELIAS CJ:

All right I think we need to – we get that point.

MR ROMANOS:

All right, I'd just like to just finish up on, have you got my three-page outline on page 1 of that, it's that three-page outline and I just touched on the discretion, the first ground of appeal. So my learned friend I believe tried valiantly yesterday to extrapolate reasons from Her Honour's comments but in my submission there were no reasons given, there was no argument had on this very important issue. It's a massive call to say full retrial versus retrial limited to damages and this is why we did this memorandum, you know, risking the ire of Her Honour which we felt, putting cases to the Court that were helpful on this, particularly was the *Matheson v Schneideman* issue because that was a very similar case to this in terms of it was a finding by the excessive damages but there was qualified privilege and malice in play and the Court ordered a retrial as to damages.

Now just that case, it's actually – it's not in the bundle of authorities and I don't want to take you to it but I just want to tell you where it is because it's attached to the memorandum in the pleadings bundle. So I'll just tell you it's volume 2, tab 27, page 399 and I think you'd find that case – it does have striking parallels. No two cases are the same in defamation, they're all completely different but there are similar issues raised as in this case and Her Honour just said, "Oh well I don't find this helpful because the facts are different." Well the facts are different in every case.

So, you know, we know Her Honour said, "Any assessment of damages must necessarily be based on the jury's overall factual findings." I say that's the same in every case. More importantly it was Her Honour's findings on truth, it wasn't about malice, she found that there was evidence for the jury to find –

WILLIAM YOUNG J:

Well she found that the truth defence was a near miss.

MR ROMANOS:

Yes she thought the truth defence had prevailed on several imputations and we're going to address that of course but –

ELIAS CJ:

Well if there is time. I am a bit concerned about the progress you're making.

MR ROMANOS:

I can be finished in one minute Your Honour. Her Honour said again, "Given the factual complexity of this case, it's simply not possible to say with any certainty what this jury's factual findings were." We don't even know what the jury's – they don't give reasons but we do have some valuable findings, we know that they found flagrant disregard and we know that they awarded a very large sum of damages which must have marked their disapproval of Mr Craig's conduct.

So in my submission the issues in this case are severable. No retrial, whether it's a full retrial, no retrial is ever easy to conduct on damages but it's been done, it's been done a lot. I mean in the *Carson v John Fairfax & Sons Ltd* (1993) 113 ALR 577 (HCA) case in Australia in the late '80s, early 1990s, the jury awarded $600,000. The High Court ordered retrial limited to damages. Then they had a second trial and the jury awarded $1.3 million.

WILLIAM YOUNG J:

So what happened then?

MR ROMANOS:

Then from the bar they've settled for I believe $600,000 the damages component and I'm not sure what happened with the costs.

WILLIAM YOUNG J:

But it's happened in New Zealand where verdicts were set aside and the jury returned the same or more the second time around and Judges had to wear that.

MR ROMANOS:

Yes and actually the commentary I referred you to talks about a case where three and a half thousand dollars awarded the first time, set aside, $3000

awarded the second time. The Judge says, “Look I’m not going to send this back for a third go.” I think that might have been Mr Chris Corry involved in that case but, you know, it’s easy to have a retrial on those personal injury cases.

ELIAS CJ:
Mr Romanos, conclude.

MR ROMANOS:
Conclude. So in my submission it would be a major injustice to subject Mr Williams to the costs and trauma of a full retrial. It’s not as simple as rerunning a laboratory experiment. He prevailed and if this Court does not agree with us that the damages or parts thereof should remain intact, then in my submission it must be retrial limited to damages. Is there anything further?

ELIAS CJ:
No questions, no. Thank you Mr Romanos.

MR McKNIGHT:
Your Honours, I’ve reduced my submissions to speaking notes and I’m hopeful that will just bring a bit of focus and get through the whole matter as quickly as possible. So I won’t be reading them or referring to them all but just they’re a note for Your Honours for future reference and I just note there that right at the start of this trial Her Honour made it very clear that she was a pleadings person and that she required the parties to identify all the issues and of course that’s what happened in this trial. So we have the fourth amended statement of claim and I won’t take you to that but I’ve made a reference there and that importantly sets out the meanings –

ELIAS CJ:
We don’t seem to have a statement of defence to that.

MR McKNIGHT:
No well there was no statement of defence.

ELIAS CJ:

That was during the course of the trial was it?

MR McKNIGHT:

Yes and there wasn't a statement.

ELIAS CJ:

All right, that's fine.

MR McKNIGHT:

But the references and I won't take you to it but the remarks and the meanings are at pages 165 and 167 and as indicated, we had the statement of defence, there is the pleading of truth in relation to certain identified meanings but in relation to all the meanings on this opinion, so that really put all the meanings in issue and the important section of the third amended statement of defence is pages 126 and 132 because those are the facts, just noted there at paragraph 6, so while the plaintiff may settle the battleground for a defamation, so does the defendant for the defences and we then had the reply by Mr Williams to that defence. Once again I've given a reference and importantly in most of the facts that were put forward by Mr Craig, they were denied and I just note here that it seems that Her Honour rather overlooked that situation.

ELIAS CJ:

Sorry why do you say that?

MR McKNIGHT:

I say that she did not really concentrate on certain parts of those points that were in issue and one of the primary problems here is that there was never any reference in the closing or otherwise to undisputed facts, it was only something that came up later on.

So these pleadings, they identified the real issues for trial, particularly the facts that were undisputed and those that were not and as I've just said, all

the facts in relation to Mr Craig's defences were in dispute and I just note there of course, the onus was on Mr Craig to establish all or most of these particulars sufficient to the jury's satisfaction. On the other side, all Mr Williams had to do was to show that Mr Craig had failed to discharge these onuses and I think it's important for the Court to go to and we were going to do it yesterday but it's important to look at the question trail because it was always agreed that that was the path or that was the position of the various parties and that's at volume 2, tab 18, page 272 and it will be noted that there's constant references to –

ELIAS CJ:

Could you just try to speak a little bit more into the microphone.

MR McKNIGHT:

Thank you I will, apologies.

ELIAS CJ:

It's just it gets transcribed and they can't hear.

MR McKNIGHT:

Thank you. So just one point I wish to or quite a few points but the first one is that there was always a reference to the onuses, who had the onus and of course there was –

GLAZEBROOK J:

I managed to miss the latest volume, so you're at tab 18 did you say?

MR McKNIGHT:

Tab 18, volume 2.

GLAZEBROOK J:

And where were you in tab 18?

MR McKNIGHT:

272 and importantly all the meanings were left to the jury, no application was made by Mr Craig to have any of those taken away from the jury on so-called undisputed facts. So the jury was asked to go through all the meanings and answer them.

WILLIAM YOUNG J:

I mean some of them were too plain for argument weren't they? I mean it was perfectly clear that he called Mr Williams a liar.

MR McKNIGHT:

Yes.

WILLIAM YOUNG J:

But there wasn't much issue actually as to the meanings were there, weren't they substantially not in dispute?

MR McKNIGHT:

Well a lot of them were in the way they were pleaded. You've got to look at all the meanings. You've got to look at them, yes you've got to look at each meaning.

WILLIAM YOUNG J:

But if you look at page 273, wasn't it pretty clear that the remarks did assert that Mr Williams was a party to a strategy agenda and web of deceit as alleged, because that's really what the remark – what was said.

MR McKNIGHT:

Well if that was the position, why didn't the –

WILLIAM YOUNG J:

I'm not asking – it's not a criticism it's just I didn't understand that to be in dispute that that's what Mr Craig was saying.

MR McKNIGHT:
Yes.

WILLIAM YOUNG J:
There might have been an issue in relation to B, whether Mr Craig was asserting that Mr Williams was responsible for the second victim's story, that's debatable.

MR McKNIGHT:
Yes. But my only point in raising that was just to emphasise that there was never an invitation to take any of these meanings away from the jury and just moving to the High Court, Her Honour identified in her judgments what she said were undisputed facts and much of the submissions of Mr Williams both in the Court of Appeal and this Court have been directed to addressing these findings of fact.

In the summing up and that is at volume 2, tab 17, Her Honour addresses, and that's at page 235, paragraph 13 where she addresses inferences and she goes on and instructs the jury that if the jury finds an inference is equally in favour or Mr Williams or Mr Craig, the jury cannot decide either way, the jury should find the relevant matter has not been proved and that is very important as it was Mr Craig who had the relevant onus or onuses on the issue of truth and as I've noted there that Her Honour made a similar comment when she was addressing onuses and burden of proof and when she said, "For the defences of truth and honest opinion it is for Mr Craig to tip the scales in his favour, but if they are even, Mr Craig would have failed on that point."

And just paragraphs 17 through to 18, I just note there that for the imputations of alleged conduct by Mr Williams, a plea of truth required Mr Craig to prove three discrete limbs, first that Mr Williams had made –

ELIAS CJ:
Where are you?

MR McKNIGHT:

I'm talking to my notes. I've moved from the summing up. The summing up is page 235 and 236, paragraphs 13 and 14. So for the imputations of alleged conduct by Mr Williams, the plea of truth required Mr Craig to prove three discrete limbs. First, that Mr Williams had made a particular allegation, second, that the particular allegation was false and third that Mr Williams had lied in making the allegation and I give an example there in respect of large pay out or that allegation, it was for Mr Craig to prove that Mr Williams had lied by falsely alleging Mr Craig had made a pay out or pay outs of large sums of money to silence Mr Craig's victims of sexual harassment. So the three limbs, did Mr Williams allege that Mr Craig had made a pay out or pay outs of large sums of money to silence Mr Craig's victims of sexual harassment? If so, was the allegation false? And if so, had Mr Williams lied by making that allegation?

Now in respect of the sext allegation, it was for Mr Craig to prove that Mr Williams had lied by falsely alleging Mr Craig had sent sexually explicit text messages or sexts as they came to be known. Again the three limbs. First, that Mr Williams had made the allegation about sexually explicit text messages, second, that the particular allegation was false and third, that Mr Williams had lied in making the allegation and I just note there that this issue is a little different, it was common ground that Mr Williams did make the allegation but it was disputed whether Mr Craig had established whether the allegation was false and disputed whether Mr Williams had lied by making the allegation.

And then just in terms of Her Honour's direction to the jury on inferences, I've already covered this but just that if the jury could not make a positive finding one way or the other, then they must find the person who bore the onus on the particular issue had not been discharged.

On the second limb of the sext allegation, it was for Mr Craig to prove that this was a false allegation and we had evidence of some 110 missing pages of the texts.

WILLIAM YOUNG J:

Just can you explain this to me. What happened to Ms MacGregor's cellphone? Was that a Conservative Party cellphone?

MR McKNIGHT:

No I don't think so Your Honour.

WILLIAM YOUNG J:

So I'm just trying to work out the evidential trail, so what happened to the cellphone on which she had exchanged texts with Mr Craig?

MR McKNIGHT:

Well they were never sought because there was third party, there was an application for third party discovery against her but as I recall her phone was not sought.

WILLIAM YOUNG J:

I think Mr Mills might have something to say about that but anyway as far as you're aware there was no search made of what was on her phone?

MR McKNIGHT:

No.

WILLIAM YOUNG J:

So there was then a search made of what was on Mr Craig's phone?

MR McKNIGHT:

That's right.

WILLIAM YOUNG J:

And some had been presumably deleted or had been lost or over written?

MR McKNIGHT:

A hundred and 10 pages of it.

WILLIAM YOUNG J:

What do you mean by page?

MR McKNIGHT:

Well –

WILLIAM YOUNG J:

Do you mean cellphone page?

ELIAS CJ:

Screen.

WILLIAM YOUNG J:

A screen?

MR McKNIGHT:

No we're dealing with C in the exhibits, there are pages and pages of these text messages, so what we're referring to is 110 pages of such a nature that –

WILLIAM YOUNG J:

The pages that are in volume 8?

MR McKNIGHT:

Yes. That's exactly, so there were scores of them, pages and pages of them.

WILLIAM YOUNG J:

So what was Mr Craig's explanation for that?

MR McKNIGHT:

Various explanations, just didn't have them, weren't available, he had sought the assistance of an expert in this area and that person couldn't help. So it was – and it was something that was emphasised again and again by Rachel MacGregor, where are the missing – it's all very well asking me these questions Mr Mills but you've only got half the story. So the jury were entitled

to come to the conclusion that there could well have been some other material.

GLAZEBROOK J:
Well isn't missing material just missing material and the jury have to look at it on the basis of what there is there?

MR McKNIGHT:
They can.

GLAZEBROOK J:
Absent allegations of any getting rid of the texts on purpose which –

WILLIAM YOUNG J:
But did Ms MacGregor, she said that she had received texts which I suppose at a bit of a stretch could be regarded as sexts.

MR McKNIGHT:
Untoward.

WILLIAM YOUNG J:
Sorry?

MR McKNIGHT:
Untoward.

WILLIAM YOUNG J:
Yes but pretty – at the lower end of that weren't they?

MR McKNIGHT:
Yes they were about the sleep tricks and I'll come to that in a minute but it was a reference that she was very upset about when she would ask him how he had slept and then he would say or in effect he would say that, "I slept well because I dreamt of sleeping on your legs."

WILLIAM YOUNG J:

In a text?

MR McKNIGHT:

In a text, sleep trick. So quite a bit of evidence was given –

ELLEN FRANCE J:

Could you give us the references to her evidence at some point on that?

MR McKNIGHT:

Yes certainly and I'll give you another reference very soon just in relation to – it is to be recalled that there was a letter written by Chapman Tripp and Ms MacGregor's solicitors, Cook Allan, they responded to that letter in detail about the suggested untoward behaviour of Mr Craig and I'll give you this reference when I find it but at paragraph 60 of that letter, there's a reference there to the same thing about how he would say he slept well because he dreamt he was sleeping on top of her. So it's pretty sleazy.

GLAZEBROOK J:

Have you got where that is?

MR McKNIGHT:

Yes. So I just conclude at paragraph 25 by saying that, and I'll come back to that Your Honour, those references but it's volume 7, and the particular page is page 2215 and paragraph 60 where Ms MacGregor's lawyer there records, "On another occasion about two weeks before the election Rachel asked Mr Craig how he had slept. Mr Craig –"

WILLIAM YOUNG J:

This isn't a sext is it, this is oral communication?

MR McKNIGHT:

Yes. It all comes down to and references to the sleep trick which go back to the text messages.

ELLEN FRANCE J:

I thought that that letter though was the first letter, Chapman Tripp's letter follows from that. I thought you were suggesting there had been another letter from Gallaway Cook after this.

MR McKNIGHT:

No, no.

ELLEN FRANCE J:

Right, so you then have to look at what Chapman Tripp says in response.

MR McKNIGHT:

I'm sorry, I do apologise, I have got it round the wrong way. So a lot of evidence was given about sleep tricks and the like and one of the, well the evidence given by Ms MacGregor was as to her concern about some of the responses that she had had from Mr Craig about this sleep technique and if I can ask you please just to go to volume 7 at page 1791 and 1792. Now you need to look at 1792 because the text messages go backwards but this was an exchange of text messages between Ms MacGregor and Mr Craig and if you follow it through it starts at 180, it's numbered 180, "How did you sleep?" "Actually I slept best I have for a number of days." Then a response, "Yay", and then, "New sleep trick worked amazingly well", smiley face, smiley face, then there's two exchanges of emails going on here but the next one, one should look at is page 175, not page –

WILLIAM YOUNG J:

It's got to go backwards don't you?

MR McKNIGHT:

Yes you go backwards, so that's what I'm doing.

WILLIAM YOUNG J:

Oh sorry 175, yes.

MR McKNIGHT:

So you come to page 1791 and you have there, “Same trick as last time?” “Yes the same.” Now and then up further, “Be careful with that sleep trick, probably not wise”, sad face. Up further, “It brings me peace and rest but I hear you, it’s a bit mean to offer a solution and take it away.” And then Rachel MacGregor said, “I didn’t offer the solution.” Now she was cross-examined about this and she was saying that she was very concerned with what was being said about the sleep trick and her evidence is at volume 4, tab 64, page 1006 to 1007.

Just before I move to that, one occurrence during the trial was very important, Mr Williams was being cross-examined and suddenly there was a folder of all these text messages put together which had never been discussed with us, which we later discovered was quite different in the way they’d been put together. I immediately raised my concern as to what was going on but Her Honour didn’t share my concern but the jury certainly saw that there was a bound volume of text messages which if they compared them, and they were a very attentive jury, they would see that they were different, so I just make that point. Now as to –

ELIAS CJ:

I don’t know what we can do with that.

MR McKNIGHT:

No, I’m just saying that it was an important part of the trial as to the situation. These are all evidential matters. While I know that you can’t do anything about it.

ELIAS CJ:

Well I’m not even sure that they’re evidential matters, they’re wholly speculative.

WILLIAM YOUNG J:

Why tell us? We can't take it any further.

MR McKNIGHT:

Well just the point I'm raising is that all these things are seen by juries.

WILLIAM YOUNG J:

Okay, but I mean here on the face of it these look like sexts.

MR McKNIGHT:

Yes.

WILLIAM YOUNG J:

Whatever, I mean it depends on what you think sext is.

MR McKNIGHT:

All right, well I'll move on, I do no more –

WILLIAM YOUNG J:

Sorry what did Mr Craig say about these?

MR McKNIGHT:

Well he denied that there was any sleep trick or anything untoward in relation to them.

WILLIAM YOUNG J:

What did he say the sleep trick was?

ELIAS CJ:

Well perhaps we need to take it in order because we're looking at her evidence on this first which we have in front of us.

MR McKNIGHT:

Yes I'll come to that.

WILLIAM YOUNG J:

Yes okay, sorry.

ELIAS CJ:

So what do you want to take us to?

GLAZEBROOK J:

Does she explain what the sleep trick is?

MR McKNIGHT:

Yes.

GLAZEBROOK J:

Because she doesn't seem to just here where you've sent us. Did she do that in her evidence-in-chief?

MR McKNIGHT:

Yes. So she is talking about the smiley face on at 19 at page 1006.

GLAZEBROOK J:

This is in cross-examination isn't it?

MR McKNIGHT:

Yes cross-examination.

GLAZEBROOK J:

Does she say what the sleep trick is anywhere?

MR McKNIGHT:

Yes I think she – I'll check that and come back to you in relation to that.

GLAZEBROOK J:

Because I mean there's all sorts of sleep tricks that aren't necessarily sexual.

MR McKNIGHT:

Exactly but she took it that it was sexual.

GLAZEBROOK J:

All right.

ELIAS CJ:

Well she says “romantic”, she says “flirting”, she says words like that, reading ahead. Is there anything you want to take us to in particular here?

MR McKNIGHT:

No I’ll just leave it there. And then I don’t thing paragraph 25 –

ELIAS CJ:

And in terms of timing she confirms they’re around the election eve incident?

MR McKNIGHT:

Yes. So just to paragraph 26 of my notes, it was concerning that whereas in the qualified privilege judgment Her Honour recognised this issue was in dispute, but in the retrial judgment Her Honour went on to actually make a finding of fact in this regard. That is basically on Mr Williams’ credibility that he had lied and really as to whether or not he had lied was a jury issue.

GLAZEBROOK J:

So lied about sexts is that –

MR McKNIGHT:

Yes.

ELIAS CJ:

What does she, I don’t want to hold you up but what does she actually say because you haven’t given us the reference to that, that she actually made a finding of fact on that? Can you just –

MR McKNIGHT:

Yes. It’s Rachel’s brief in reply which is volume –

ELIAS CJ:

No it's Her Honour's retrial judgment you're referring to.

MR McKNIGHT:

Oh right, yes. Well just before I do that, if I may just answer Her Honour Justice Glazebrook's enquiry, it's Rachel's brief in reply which is volume 4 at 62, 0918.

GLAZEBROOK J:

All right so that squarely puts the technique down to –

ELIAS CJ:

Which year is she talking? This is in 2014?

MR McKNIGHT:

Yes. Just in relation to Your Honour the Chief Justice, in support of that submission it is the judgment of Her Honour for a retrial, 12 April, which is volume 2, tab 26, page 0370, paragraph 53, where she ends, "The undisputed evidence at trial however was that Mr Williams did tell a number of people that Mr Craig had sent Ms MacGregor sext messages and that was not true. This information had a significant impact on those who heard it and was a key factor and put pressure on Mr Craig to step down as leader of the Conservative –"

ELIAS CJ:

That's about having been told.

MR McKNIGHT:

Yes.

ELIAS CJ:

Yes, it's not about the truth of whether sexts have been sent.

GLAZEBROOK J:

No she said it wasn't true that sexts had been sent.

ELIAS CJ:

That didn't sound what was read out but I might have just misheard it.

GLAZEBROOK J:

Yes so, "The undisputed evidence at trial however was that Mr Williams did tell a number of people that Mr Craig had sent Ms MacGregor sext messages and that this was not true."

ELIAS CJ:

It was the fact that he, I've understood it to have been the fact that it had been said is untrue.

MR McKNIGHT:

I don't read it that way Your Honour.

ELIAS CJ:

Well that's what a lot of the material has been directed at, whether in fact it was true to say that a number of people had said that.

GLAZEBROOK J:

Well he definitely did say that she'd sent sext messages. Mr Williams definitely said –

ELIAS CJ:

Oh yes I know.

GLAZEBROOK J:

So that wasn't in dispute.

ELIAS CJ:

No, no I understand that.

GLAZEBROOK J:

What was in dispute was whether in fact sext messages had been sent.

MR McKNIGHT:

Yes.

ELIAS CJ:

Well I think there's another point there.

MR McKNIGHT:

Just before I move away from that point, just another reference to Ms MacGregor's cross-examination, and I gave you the reference there which was volume 4 at tab 64, just at page 958, which is very similar to the reply brief that I referred to. Your Honour I see the time.

ELIAS CJ:

Yes we'll take the mourning adjournment now if that's convenient.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.48 AM

MR McKNIGHT:

Your Honour, in my haste to get to my feet, there was just one other document because I understand the Court likes to have a three-page document outlining the basis of the argument we presented, so that is available.

ELIAS CJ:

Oh but you've given us a longer one.

MR McKNIGHT:

I've given you my notes.

ELIAS CJ:

Well do we need another one if it simply summarises it?

MR McKNIGHT:

Well it just summarises it.

ELIAS CJ:

Well let's go through your document.

MR McKNIGHT:

This also has some references, so maybe it would be best if the Court did have it.

ELIAS CJ:

All right, thank you.

MR McKNIGHT:

I was coming to the summing up and just saying that how ironic that the submissions of the appellant seek to go into so much detail on evidential matters when Her Honour addressing the lengthy transcript urged the jury not to fall into the danger of losing the wood for trees but she says to concentrate on the big picture or picture issues and I've given there a reference to that but I just note there that of course this is an appeal against part of a Court of Appeal judgment, why is there so much reference to her judgment? Well quite simply it's because the Court just adopted those findings made on those factual matters by Her Honour.

ARNOLD J:

Can I just understand something about what happened in the Court of Appeal, you prepared a schedule identifying all the relevant – the evidence relevant to the various points that were said to be undisputed.

MR McKNIGHT:

Yes which are virtually repeated in our submissions in this Court.

ARNOLD J:

Right, so it's the same?

MR McKNIGHT:
It's the same.

ARNOLD J:
Okay, thank you.

MR McKNIGHT:
Then I turn to the reply submissions of the appellant and these are the ones dated 29 August 2018 and it appeared to us that we weren't engaging on the same issues, that we were talking past ourselves and the points we'd made in our submissions and it was in my submission a failure on the part of the appellant to engage on those issues identified by Her Honour and adopted by the Court of Appeal and about which we say there is much dispute and then importantly in nearly all instances Mr Craig does not engage with the plaintiff's pleaded imputations, instead Mr Craig attempts to set up his own imputations and it was interesting yesterday that Mr Mills said how important imputations are, they settle the battleground. I just note there at paragraph 32 that Mr Craig in those submissions does not even seek to defend the trial Judge's finding on a large pay out issue. It appears to be common ground that Her Honour erred in making such a finding. Instead Mr Craig resorts to the more sweeping submission in paragraphs 5 and 9, because of the number of imputations that were true or partially true, this affected the award of damages.

Now first, partially true for an imputation is not sufficient. They must materially be true or substantially true and it could be asked just what does the appellant mean by partially true. If there were three limbs for a particular imputation, would establishing that Mr Williams had made an allegation, amount to partially true, even though Mr Craig had not established either that the allegation was false or that Mr Williams had lied about it.

And the second point is that Mr Craig never, in a detailed way, identified exactly which of the plaintiff's pleaded meanings had been proven true and on close inspection it will be seen that in Mr Craig's submissions they do not

accurately paraphrase Mr Williams' meanings. In fact at paragraph 4, he sets up alternative meanings which he says were proved true. And I make the point at paragraph 35 that some of these alternative meanings do not bear any resemblance to Mr Williams' pleaded meanings and one needs to look at paragraph 4.4 of the submissions.

ELIAS CJ:
The appellant's submissions?

MR McKNIGHT:
Yes 29 August 2018. Cross-respondent submissions against the cross-appeal and when one looks at the meanings that were identified for the two publications, I've noted there the page numbers for those, and I'm not going to do it now because of time and I just leave this with you, if one looks at the meanings as pleaded and then looks at what Mr Craig is saying is part of the imputations, they're quite different and in one, just as an example paragraph 4.4, "Mr Williams lied by falsely alleging that Mr Craig's communications that he showed to Messrs Day and Dobbs were unreciprocated when he knew there had been responses from Ms MacGregor." Well that was not even a particular of truth and I'm not sure why it's called an imputation.

And then the defects continue, in paragraph 4 of the submissions Mr Craig puts forward what he says was undisputed evidence in support of certain imputations. In fact Mr Craig does not identify the undisputed evidence to any actual imputations. The closest he comes is at paragraph 4.5 where it says that Mr Williams acted dishonestly, deceitfully, lacked integrity and could not be trusted but again this was not the imputation or the meanings pleaded and I note there that this is an important point because Mr Williams pleaded certain imputations in respect of his alleged misconduct and certain imputations in respect of his alleged bad character and as I note the central question was had Mr Craig established to the jury's satisfaction the allegations of conduct and the allegations of character? I just emphasise again, it was for

Mr Craig to establish the truth of the meanings of Mr Williams. It was for Mr Craig to discharge that onus.

WILLIAM YOUNG J:
Your complaint essentially is that she found a near miss on justification by reference to what the defendant said he meant and not by what the jury must have concluded he meant?

MR McKNIGHT:
Yes that's it.

WILLIAM YOUNG J:
Well that seems – is that actually disputed? I mean we're going into in detail, I mean I'm not sure if that's disputed is it?

MR McKNIGHT:
I think it is disputed. Can we just reflect on that for the moment?

WILLIAM YOUNG J:
Okay.

MR McKNIGHT:
Now I turn to the very important part of this appeal, is that and I note there at paragraph 43, if there were meanings that could be established as true on undisputed evidence, why did Mr Craig make the tactical decision to leave all the meanings to the jury? Surely if Mr Craig was of a view that there were meanings that could be proven true on undisputed evidence, they would be identified and the appropriate application made to the trial Judge and I just note there at paragraph 44 that Her Honour made it very clear where she said at page 209 of the summing up, "Where the rubber will really hit the road for you is when you come to consider", that should be, "Mr Craig's defences and of course that was the situation. Most of the trial was taken up by the consideration of the defences but Mr Mills in his closing chose to leave all the issues to the jury and it's of note the lack of detail on such issues in Mr Mills'

closing, in fact there is not one single reference to the word “undisputed”. I suppose there is a good reason for that, everything was disputed.

And to note that Mr Mills made no references to the notes of evidence, no references to exhibits to support the defences. So that was Mr Craig’s position at trial but after the trial, in the application for a retrial, with these some enormous submissions that were filed, a completely different case was presented and of course going second to address the jury, I responded to the stance taken by Mr Mills in his closing. If Mr Mills had raised alleged undisputed evidence, I would have had to respond and possibly seek a direction from the trial Judge on such matters and no doubt Her Honour would have had to address such a matter. And if I can just say that has been my experience with such trials, that there are always a number of applications at the close of evidence, applications by both sides on all sorts of matters and here we had an application by the defendant for a ruling pretrial on qualified privilege and by the plaintiff, that there was an application to add particulars of malice, particulars of what should or more particularly could go to the jury and then there was an argument about particulars of aggravation.

My submission that Mr Craig or his lawyers did not consider that there was an issue, a meaning that should not go to the jury he should have raised that matter at that stage and I just note there that the assertion is now made in the submission, the imputation that Mr Craig alleged Mr Williams lied about another sexual harassment victim was not available but that was never raised at trial nor could it have been and at paragraph 82 of the submissions, at paragraph 82 refers to the leaflet but none of Mr Williams’ pleaded meanings of the leaflet makes any such allegation.

This stance gives emphasis to the submission by Mr Williams that there was a time and place for such an issue to be raised and just looking again at the question trail, it was certainly a matter of some moment about all the meanings and the like and in my submission it’s just totally inappropriate to start raising these matters before this Court.

And then at paragraph 83 there is the elementary submission that is a question of law whether the words complained of would be understood by reasonable persons to refer to the complainant. This is totally incorrect. It is a question of whether the words are capable as a matter of law but it's a question of fact as to whether or not they do identify the plaintiff. Exactly the same situation with meanings. The Judge decides are they capable of having that meaning and it is for the jury to say whether or not they do.

ELIAS CJ:
So the error in that submission is saying "would" instead of "could"? If we amend, does that draw the sting of the submission you're now making?

MR McKNIGHT:
What's it in relation to Chief Justice?

ELIAS CJ:
Just your criticism of para 83.

MR McKNIGHT:
83, yes. And I just, this brings me to damages because it seems to be suggested that somehow maybe I should have sought or we should have sought to have that particular imputation removed from the jury and of course it was certainly not my role to do that and rather like the situation of damages, Mr Craig made no comment nor sought any direction that the level of damages claimed was excessive and now it's being suggested by the Court of Appeal – no I'll come to that a bit later on.

Paragraph 61, the Court of Appeal suggested that Mr Williams should have raised some concern with the trial Judge about the level of damages he was seeking. As I note there at paragraph 62, it was certainly never raised by Mr Mills when the total sum was sought nor by Her Honour. All she said was that the jury could give no more than the amount claimed. No complaint was made about the sum sought and of course in the remarks and leaflet, Mr Craig had indicated he was to seek some $1,550,000 of damages for the

defamations he allegedly suffered and all Mr Mills said, I've given there a reference to his closing, he said that he expected me as counsel for Mr Williams to give figures for other cases and he said that there was a need for care about such figures because every defamation case is different on its facts. I certainly agree with that.

Then he goes on to say that the amount was entirely in their hands, that it could be a small sum, a very small sum or it could be a bigger sum. Further, Mr Mills did not ask the jury to consider that several of Mr Craig's statements were true or partially true, that there has to be care with a line between compensation and punishment. Mr Mills in fact didn't even address punitive damages and importantly nor did he seek to have them taken away from the jury as had been the case that I was involved in, in 2012, a jury trial, where the defendant had made application to Her Honour Justice Mallon that there was insufficient evidence to go to the jury on punitive damages.

I say there at paragraph 66 but before looking at the comparisons which are difficult, as acknowledged by Mr Mills, there was a recommendation by the Court of Appeal of a sum not exceeding in total $260,000. It is to be noted that the hearing in the Court of Appeal was for some two days and as I said, with complete respect, it was a little surprising that if the Court was to recommend such a sum, such a matter was not raised with counsel on the second day for there to be submissions on the suggested level.

If they had been given on behalf of Mr Williams, it would have been pointed out to the Court that such an award is very much below the level for the District Court jurisdiction which is $350,000, that with the High Court cost regime and with such a level of damages would just mean such trials could not take place, they would be just totally uneconomic.

The Court of Appeal referred to Mr Craig mounting a very aggressive counteroffensive against Mr Williams, with his defences including trying to prove Mr Williams' bad character and reputation. As the Court notes in the

Court of Appeal, Mr Craig played for high stakes and he lost. It is submitted that those high stakes would not be reflected with an award of only $260,000.

So just turning to the comparisons which are particularly difficult because every case is different. I just want to emphasise the long, hard fought trial that this was and the considerable publicity it occasioned but I first refer to, and it's helpful that my learned friends rely upon *Quinn* and I totally agree that is for very good reason because it is a recent decision of the full Court of Appeal and has similar factors to this proceeding. It involved two publications, two causes of action. For the first cause of action, the jury awarded $400,000 when $1.7 million had been claimed. For the second cause of action, the jury awarded $1.1 million, when $2.3 million had been claimed, so the total amount claimed was $3.4 million in 1994. Actually, it's of note that Mr Miles when he was addressing the jury called that a vast and obscenely greedy sum. There was never such a submission made by Mr Mills.

The first award was left in place but a new trial only as to damages was ordered for the second cause of action. It is noted that Lord Cooke indicated that he would have upheld an award of $500,000 on the second cause of action and this was even upon the common recognition that the second programme was not as serious as the first. That was a shorter trial with no similar defences being pleaded but I just note that it certainly looked as though TVNZ were putting into question the rather colourful character of Mr Quinn. So if there was an aggregate for the two sums of $900,000, that would come to some $1.43 million today.

ARNOLD J:
One of the issues in *Quinn* wasn't it, was the two programmes were different defamations? Wasn't the first one relating to doping of horses and the second one was related to financial irregularities?

MR McKNIGHT:
Yes.

ARNOLD J:
But here both the remarks and the leaflet are essentially the same, aren't they?

MR McKNIGHT:
Very similar Your Honour and I accept that totally and one of the difficulties I suppose, we could have just pleaded one cause of action and identified one or the other as an aggravating feature, so that's why I'm going to encourage you to look at it in a total sum for the defamation occasion and I note here and have recorded in several cases where they look at it as a global sum. I mean they even did that in *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361, Her Honour Justice Courtney did it in *Karam v Parker* [2014] NZHC 737. In *Karam* there were dozens of causes of action. I'm sure in *Siemer* there must have been more than one cause of action there and they look it at it in a global sum.

And of course in *Quinn* there was a slight criticism of the trial Judge in not raising with the jury with those sorts of sums you may think that they're excessive, that it may result in some form of retrial or something like that. So it's interesting that Mr Craig did not do this, no objection and then out it comes and this is something touched upon by Mr Romanos, in comparing *Quinn* to the present case, the defamation on Mr Williams was based on a publication of unprecedented width in New Zealand and even in the other jurisdictions overseas, that the publication of Mr Craig went much further than the allegations in *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, a Canadian case, *Carson v John Fairfax & Sons Ltd*, and much larger than *Quinn* or in fact Mr Columbus or the plaintiff in *Broome v Cassell & Co Ltd*.

I just want to emphasise that Mr Craig's published grave imputations that went to the heart of Mr Williams' personal and professional reputations which had considerable effect on his self-esteem and then aggravated the harm to Mr Williams' reputation and feelings in the most wounding way and the jury were entitled to accept that. They sat there for some three weeks of

evidence, they were an interested jury, they were taking note of what was going on.

Now in our submissions on the cross-appeal which are dated 8th of August, there is reference to awards in England, Canada, Australia and Ireland. I just make the point that maybe Ireland is of particular relevance given it has a very similar Defamation Act, it has juries for all issues, unlike Australia, a similar population and a Court structure and it is to be noted the significant sums that have been awarded and upheld on appeal and they're mentioned at page 26 of the submissions, paragraphs 120 and 121 and something touched upon by my learned friend Mr Mills, I make reference to Canada and I note there that the Court of Appeal very recently in the rather ground breaking case of *Durie v Gardiner and Māori Television* which is tab 6 of the appellant's authorities, relied upon the Supreme Court of Canada in support of the Court of Appeal's decision to extend qualified privilege to responsible communication of public interest. It is to be noted the level of damages the Supreme Court of Canada upheld in *Hill* with particular emphasis on the aggravated and punitive damages, punitive damages of $800,000 in 1995 was upheld.

Then I turn to Australia. While there is now a statutory cap on damages, and I note the figure there, nearly $400,000, the trial Judge is left with the discretion to go above that figure if he or she is of the opinion that there are points of aggravation and in a recent decision of the Supreme Court of Victoria, and that's the case to do with *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, His Honour Justice Dixon ordered damages for non-economic loss of $650,000 and special damages of some 3.9.

ARNOLD J:

I wonder if these overseas cases really help us. I recall reading in one of these judgments in the House of Lords or somewhere, where the observation was made that it really isn't helpful to look at what they do in other jurisdictions because the whole context and circumstances are so different.

MR McKNIGHT:

I can understand, it's so difficult to make comparisons. I tend to agree that I suppose it's just one of the exercises, you look beyond our shores and I raise that because of the Court of Appeal looking to the Supreme Court of Canada in terms of the defamation law. So it seems that – and that's a very interesting decision and has quite a marked effect on the law of defamation. So to rely on that for issues of liability, I just invite the Court to look at the sort of awards that are awarded in those jurisdictions.

WILLIAM YOUNG J:

I suppose part of the trouble is we don't really have many other benchmarks, we don't have personal injuries litigation, we don't have general damages and tort much.

MR McKNIGHT:

No. Well in Australia they've said you cannot make any reference to personal injury cases, it's just illogical, it's not right but all I rely –

WILLIAM YOUNG J:

Although it's a bit odd that if damages are awarded for defamation exceed the general damages, non-economic loss damages, someone who has been terrible badly injured against but the English have been more concerned about that haven't they?

MR McKNIGHT:

Yes, well they provided a cap but in Australia the cap was by legislation but I certainly understand it's difficult but here we are, as Justice Young says, we're trying to grapple with what's appropriate but the *Rebel Wilson* case was of some interest because amazingly in a 250-page judgment the Court of Appeal [[2018] VSCA 154] reduced the non-economic figure to 600, quashed the order for special damages but as I understand, a leave application has been made to go to the High Court and as I note in paragraph 79, that proceeding was in September 2017, it involved a 19 day trial, it involved an allegation that Ms Wilson was a serial liar who invented fantastic stories in order to make it in

Hollywood, with a defendant denying the meanings, basically was one meaning or meanings and pleaded truth and rather like this proceeding, that proceeding was in the daily news, as was the result.

And then I just note at paragraph 80, that *Carson* is very interesting for several reasons and one of them is because they looked at two causes of action in aggregate, they looked at the total sum and in 1989, after a five day trial, and this is something that Mr Romanos referred to, it's interesting to the note that the jury in that case, after some 47 minutes, came back with the award of $600,000 and then in New South Wales Court of Appeal by a majority of two to one, set aside the awards and awarded a new trial limited as to damages. In the High Court a four–three majority upheld the order of the Court of Appeal for a retrial and as noted it later went before a new jury and 1.3 or in New Zealand dollars, $2.55 million and I can say that that was also appealed but then was settled.

I turn to the Court of Appeal's consideration of damages. The Court of Appeal made several additional findings about Mr Williams' reputation and conduct which apparently warranted a reduction in damages. With respect, these matters are misconceived and reflect the Court of Appeal's view on various factual matters that were in the province of the jury.

Paragraph 42, the Court of Appeal said, "Mr Williams cannot point to any special harm, he is not a public figure, he is the leader of a little known political group, nor was he defamed in performing his professional duties as a lawyer." Well to the contrary, the jury heard that Mr Williams appeared regularly across TV and radio in both stories and commentary roles and even that Mr Williams was engaged as a guest speaker for the Conservative Party and had considered running as a candidate and the Court of Appeal even contradicted Her Honour's summing up when she reflected the submission that Mr Williams was not only a lawyer but an executive director of the Taxpayers' Union, an organisation with a significant public profile.

ELLEN FRANCE J:

In that paragraph, the Court of Appeal also makes some reference to his approach being covert so as to keep himself out of the public eye. What do you say in relation to that? So they refer to what they described as his tactics, such as private messaging et cetera.

MR McKNIGHT:

Well the first point is, there was a specific question for the jury as to whether or not bad reputation should be taken into account and that was rejected and I suppose all I can say is that rather like *Quinn* where there was an attempt by Television New Zealand to paint Mr Quinn in all sorts of ways but that was not successful. Now there was a real attempt to attack the character and reputation of Mr Williams but the jury decided, they heard all the evidence, they decided that that was not appropriate to reduce or make a finding in terms of bad reputation. So I suppose if one trawled through somebody's private emails or text messages –

ELLEN FRANCE J:

No, no I was referring solely to the public/private aspect, so this is paragraph 42 of the Court of Appeal's judgment, I'm not talking about the next part. You were just making a distinction based – a submission relating to the significant public profile and I was just asking about the other aspect of that part of the Court of Appeal's finding.

MR McKNIGHT:

Well I don't believe that was for them to do. They hadn't heard Mr Williams give evidence, they hadn't heard from Mr Williams' mother and family and other witnesses and then at paragraphs 43 and 48, the Court of Appeal made an even more serious error when it found Mr Williams harboured offensive attitude towards women and that this was unknown to those among whom he enjoyed a good reputation and the Facebook exchange. I note there that this is rejected, the Court of Appeal actually appears to have misunderstood this evidence, the Facebook apology to which Mr Williams referred and about

which he was cross-examined was dated 4 September 2014 and the apology attracted 105 likes.

ELIAS CJ:

Sorry I don't quite understand the reference either to the date or to the likes because September 2014 is what a year before the –

MR McKNIGHT:

It was the resignation took place around about that time. So it's just that when Mr Williams is recalled, this material is put to him and I just record there that the apology he made for the inappropriate material received 105 likes.

ELIAS CJ:

What does that mean?

MR McKNIGHT:

Well it means that people were accepting it and the jury of course, they were there to hear this, they were a younger age group, they understood what this meant.

WILLIAM YOUNG J:

Well it almost certainly was a tactic that completely backfired on Mr Craig, that it was effectively a gratuitous attempt to open another front.

MR McKNIGHT:

It was a change, it was enormous. It was the last witness, it was a Friday afternoon, television cameras there.

WILLIAM YOUNG J:

So was there an argument about whether it was admissible because it doesn't seem to have been relevant in terms of the Defamation Act test because it wasn't referable to the subject matter of the case.

MR McKNIGHT:

And we did argue that and it was dismissed.

WILLIAM YOUNG J:
And the Judge allowed it?

MR McKNIGHT:
Yes.

WILLIAM YOUNG J:
Is there a ruling on that?

MR McKNIGHT:
Yes.

WILLIAM YOUNG J:
It's in our bundles.

MR McKNIGHT:
But it was a major part of the trial and that night it was the main item on television. So it was a horrendous trial and then I record there at paragraph 87 and the case was not about whether Mr Williams was a misogynist, it was about his honesty and integrity in respect of the allegations about Mr Craig. So the Court of Appeal's reliance on this matter which the Court could not reconcile as falling under the issue of bad reputation in terms of the Defamation Act, really sadly demonstrates the success of Mr Craig's mudslinging strategy albeit it resonated with the Court of Appeal and not the jury. So I just emphasise the jury sat there for three weeks and heard all of this and at paragraph 47, the Court suggested that the $200,000 increase in damages at the conclusion of evidence is not warranted, that is not accepted. The recalling of Mr Williams presented the crux of the trial on Mr Williams' diversionary tactics and the core of his repeated allegations that Mr Williams had a bad reputation and character.

As the Court of Appeal found, the jury could see this as an attempt to divert the focus at a stage when it had formed an adverse view of Mr Craig's own character and credibility and as I said before, he played for high stakes and he

lost and importantly Mr Romanos reminds me that one of the questions in the question trail and this is at volume 2, tab 18, the question is, “Has Mr Craig proven”, on page 302, “Has Mr Craig proven that, in mitigation of damages, Mr Williams is a person whose reputation is generally bad in relation to the defamatory meanings you have found?” Now that was the question that was carefully considered and was included and while there were not special verdicts, one can take it that that was definitely a no.

WILLIAM YOUNG J:
One would assume the answer to that was no.

MR McKNIGHT:
I would think so. And then the Court of Appeal gave no regard to the additional points of aggravation that we sought leave to plead after close of evidence. First there was Mr Craig’s decision not to cross-examine Messrs Bhatnagar and Graham and they were key figures of the *Dirty Politics* book and I submit that that laid bare that Mr Craig’s claims of speaking out in the interests of a healthy New Zealand politics was just not there and this dovetailed with Mr Craig’s concession in evidence that he was piggybacking on Mr Hager’s book.

Further Mr Craig’s repeated denial of the defamatory imputations may have carried some significant weight with the jury and indeed in *Quinn* was held to be a major aggravating feature and I’ve really covered this in my discussion with His Honour Justice Arnold, I invite the Court to adopt *Hill* and consider Mr Craig’s post-trial actions as an additional factor justifying the jury’s damages and all he said post-verdict in his public record interviews, he would publish the leaflet tomorrow.

So that brings me to punitive damages and I note at paragraph 91, New Zealand juries’ power to award punitive damages has constitutional significance. The Committee on Defamation or the McKay Committee had recommended that the assessment of punitive damages be reserved to the Judge but Parliament did not implement this and, as Her Honour Justice Katz

and the Court of Appeal both recognised, that punitive damages were clearly available here. Indeed it was a necessary inference upon the question trail that the jury found Mr Craig acted in a flagrant disregard of Mr Williams' rights and it is submitted that both the High Court and the Court of Appeal erred in using the $25,000 award in *Siemer* as a benchmark.

And I there at paragraph 94, I just record the principles of exemplary or punitive damages from *Cassell v Broome* and one point I just want to emphasise, it's – well they're all very important, to teach a wrongdoer that tort does not pay, this can only be achieved by awarding a plaintiff a sum of damages which he does not deserve, being in excess of any loss or injury he has suffered, the social purpose of the award is that it is calculated to deter the defendant and other likeminded persons from committing similar offences, that the effect of social high awards should be upheld to affect the social purpose because the plaintiff can only profit from the windfall if the wind was blowing his way and then importantly I emphasise the means of the defendant are pertinent when considering the amount of punitive damages. What sort of message does it send that the suggested sum of $10,000 for punitive damages by the Court of Appeal, just what sort of message does that send and then finally, it cannot be said with any assurance that an estimate of the figure by a learned Judge would necessarily have superior validity. A learned Judge had the experience and knowledge of other cases but in a matter so elusive as fixing in monetary terms a reflection of feelings and disapproval, there is no norm.

Parliament decided to leave punitive damages to juries and as I've emphasised, the means of the defendant are important in that regard and just reflecting on what Mr Craig spent for the distribution of the leaflet, he spent, just for distribution, $287,000 and then just in relation to double counting, concerns were expressed in the High Court and the Court of Appeal about double counting between the awards and is something I've already canvassed with His Honour Justice Arnold in his questioning, so I won't repeat but it was open to look at this as one cause of action. The decision was made as to two because it was seen that the, and the jury asked to see and once again they

saw the 20-minute interview that Mr Craig gave to national media where he said he was going to sue these people and then he was asked please do not circulate the leaflet, do not do it and what does he do, he goes out and circulates the leaflet. It is submitted the Court –

WILLIAM YOUNG J:
So is there a letter saying "Please don't circulate the leaflet"?

MR McKNIGHT:
Yes. It's Mr Langford, he wrote to –

ELIAS CJ:
You could continue while it's being found.

MR McKNIGHT:
Yes I will yes. It is submitted the Court should look to the total sums involved, the aggregate of the figures and we've already canvassed this but that's what occurred in *Carson*. There were two causes of action – the Court looked, the combined sums to assess reasonableness and then the Court of Appeal did in *Siemer*, the Court looked at a global sum and then there was *Karam* where there were multiple actions and that was a global sum.

There needs to be a figure that fully addresses the combined behaviour of Mr Craig in all ways both before the proceedings were issued and most importantly after they were issued. Mr Craig wanted the Court to decide who was telling the truth. He was to do that through the issuing of defamation proceedings in which he was to seek $1.5 million. He is suing two other persons, Messrs Slater and Stringer, for figures that far exceed $260,000 mentioned by the Court of Appeal.

ELIAS CJ:
Well I don't know how we can take that into account really.

WILLIAM YOUNG J:
Well it was sort of raised that the big numbers were what he'd been talking about I suppose.

MR McKNIGHT:
They're floating around.

WILLIAM YOUNG J:
Sauce for the goose is sauce for the gander but it's sort of a debating point.

ELIAS CJ:
It is a debating point, that's all right.

MR McKNIGHT:
Well I see that because those are the sort of figures he's claiming and now complaining about when they're awarded, that's the point. So I just conclude there that I ask the Court to correct the lower Courts' errors and reinstate the jury's awards. The jury were the constitutional arbiter of liability and damages and in the end those should be accepted.

Just one final comment and reference, it's to the respondent's bundle of principal authorities, the case is *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015, tab 5, because it was interesting that His Honour Justice Harrison said well vindication is enough, he's got an award, he's got liability but in my submission that's not correct at all and in this case if *Cairns v Modi* which went to the Court of Appeal, it is stated, "In any event", and this is paragraph 32, "In any event it cannot be right in principle for a defendant to embark on a wholesale attack on the character of a claimant in a libel action heard by a Judge without having to face the consequences of the actual and potential damage done to the victim both in the forensic process and as a result of further publicity. There will be occasions when the judgment will provide sufficient vindication, but whether it does so is always a fact-specific question. The Judge will be well placed to assess whether the terms of the judgment do indeed provide sufficient vindication in the overall context of the

case. In the present case, we think it unlikely that cricket fans will have downloaded the judgment of Bean J and read it with close attention. It is more likely, as in so many cases, that the general public (or rather, interested 'bystanders' who need to be convinced) will be concerned to discover what might be called the 'headline' result. What most people want to know, and that includes those who read the judgment closely, as Mr Caldicott submitted, is simply 'how much did he get?'" Those are my submissions.

ELIAS CJ:

Any further questions? No thank you. So that concludes your submissions on the cross-appeal. Well we'll take the lunch adjournment now and hear the replies later. I am conscious that you are to reply. I didn't give you a right of reply and then Mr McKnight can reply to anything on the cross-appeal later.

COURT ADJOURNS: 12.54 PM

COURT RESUMES: 2.16 PM

MR MILLS QC:

I'm going to deal first with Mr Romanos and give a reply to that and then deal with the substantive response to the submissions from Mr McKnight. Just before I turn to reply to Mr Romanos' submissions, there's one issue that I want to correct from my friend Mr McKnight's submissions and you'll recall and I think Justice Young you raised or queried an issue round this, my friend said that the amount that Mr Craig was seeking was as a comparator for the claim that has now been awarded to Mr Williams was $1.55 million – he said that twice and it's in his little note. That's not correct, the amount that Mr Craig foreshadowed against Mr Williams in the leaflet was $300,000 and that 1.55 is a cumulative sum of what was said to be likely to be claimed against Mr Williams and Mr Slater and Mr Stringer. So the relevant comparative, to the extent it has any relevance is $300,000 which is what he was foreshadowing, not $1.55 million.

Turning then to the reply to Mr Romanos and there's a hand up which we've been able to prepare overnight which is largely on the law. Just while it's being handed up to Your Honours, there are some really important issues of law here for our highest Court and to the extent that I can assist with that, I will do that. In the end of course it's for Your Honours but this issue around who finds a privilege, which goes to a finding of a privilege and when is it lost is going to have even more significance in light of the Court of Appeal's decision in *Durie* because that has moved away, it has taken *Lange* as Your Honours will know, dropped calling it a privilege and thus taken it out from under section 19 and effectively altered the onus that would apply to it under the *Lange* decision and Your Honours may recall, particularly you Chief Justice, that when we were involved in the *Lange* argument itself, that one of the really significant issues between the *Lange* approach and the *Reynolds* approach and one on which Rhys Harrison QC as he then was and I were certainly getting pressure in London from Lord Lester was the different approach to onus under *Reynolds* and under *Lange* and all of the New Zealand *Lange* judgments, starting with yours Chief Justice, were very firm on the significance of section 19 and the way in which the onus played out in relation to qualified privilege.

Now this is an issue that His Honour Justice Young raised in one of the questions I think, exchanges with Mr Romanos and with respect the points you raised Your Honour were in my view absolutely right, that the onus is critical here in thinking about these issues and where we put good faith in relation to who's responsible for what in the course of a defamation trial where qualified privilege is in issue, is it's critical that that be correctly understood and applied and so I want to say some things about that at least as I see how that works and it really does to some extent reflect Justice Young, the point you raised about the effect of making good faith a precondition to the finding of a privilege, which as my friend Mr Romanos' position on this.

And so that note that's been handed up for which I can credit Mr Cleary who assiduously got onto this overnight, is I think let me start with it at the level of principle. It is wrong, in my submission, to contend that a question of good

faith goes to whether or not there's a privilege and if it is treated that way, then its effect on the long developed work through, and in our case statutorily enshrined through section 19, operation of the privilege would be fundamentally altered. And as a first step in that, I think it's the point that when a privilege is found, there is a presumption that there is an honesty of the person responding to it. So honesty is assumed once you find, or an absence of malice in the old terminology, is presumed once there's a privilege.

If the question of good faith was to be determined before a privilege could be found, then you would have the onus and the presumption that goes with that onus turned on its head, which I think is the point that Justice Young was making an observation on. So you'd have the question that under the right approach to this which section 19 confirms, the onus is on the plaintiff to prove that the defendant did not properly use the privilege of which honesty and belief is often a critical issue.

WILLIAM YOUNG J:
Well that's one way of looking at it. The other way is to say there's only a privilege to respond to an attack which is thought to be unfounded.

MR MILLS QC:
Yes but of course that doesn't – and I agree with actually but the suggestion or the contention that I'm hearing from my friend is that good faith is part of what has to be determined by a jury before the Judge rules on privilege and the effect of that would be that the presumption would be meaningless because it would have already been determined before the privilege is found and you're not then going to have the onus where it should be under section 19 for the plaintiff to have to prove that there was a lack of honest belief on the defendant.

WILLIAM YOUNG J:
Well I suppose it's not going to be a very difficult issue in most cases because usually it's going to be pretty – sorry this is a very particular case because of

the different layers of truth, what actually happened, what Mr Craig thought and what Mr Williams thought but that's not always going to happen in this context is it?

MR MILLS QC:

Well with respect where the onus sits as a matter of principle is fundamental and hugely significant.

WILLIAM YOUNG J:

What do you say about the *Gatley* passage that says if it's not an honest response there's no privilege?

MR MILLS QC:

Well I think there's two issues here, as I understand what *Gatley* is saying. To the extent *Gatley* is saying further than that then with the greatest of respect I disagree with it. If it was clear to the Judge whose responsibility it is to rule on whether there's a privilege, it only goes to the jury to determine any disputed facts on which the Judge says we need the answer to those facts before I could rule, subject to that it's absolutely a question of law for the Judge. So if it was apparent from the evidence in front of the Judge that this could not give rise to a privilege and there was nothing that the jury needed to answer in the way of disputed facts, then there would be no privilege but it's not a requirement and I don't think *Gately* is saying – if it is then it's inconsistent with cases for which I really start with, *Adam v Ward* and then move on up. It is inconsistent with the basic structure which at least in New Zealand is confirmed by section 19, that you have a presumption of the privilege being properly used once the Court has –

GLAZEBROOK J:

Well I mean I know we have to get the law right but there's no question in this case but the onus was in the Judge's directions, put onto Mr Williams at this stage.

MR MILLS QC:

Yes look I'm only responding to the submission that's been made.

GLAZEBROOK J:

No I understand that, it's just that I wasn't imagining it, that is how it was done?

MR MILLS QC:

Yes it was, yes it was. The issue around the way in which it was dealt with by the Judge does not engage with that, it engages, as we discussed yesterday in relation to the misdirections with what the Judge said was relevant in considering the loss of the privilege, so reasonableness, carelessness.

GLAZEBROOK J:

I understand that.

MR MILLS QC:

But my concern simply is that it's been put to this Court that this is the law, the proper interpretation of the law about qualified privilege and to the extent that I can assist the Court, you might not accept what I'm saying.

WILLIAM YOUNG J:

Well your approach makes sense as a matter of practicalities and in the end not many cases are going to turn on the balance of proof. There's hardly any case where the finder of fact is going to say well I'm in a state of complete equipoise as between the competing contentions.

MR MILLS QC:

Well again with respect, I'm not sure that's right.

WILLIAM YOUNG J:

Well sorry, it's right if you take a burden of proof as standard as more likely than not and lay off the more serious the allegation, the more proof is required approach which used to be quite popular.

MR MILLS QC:

Well let me just try and I suppose –

GLAZEBROOK J:

That's what does slightly worry me about a presumption that has to be displaced and the comments that say you have to be really, really sure and it's really difficult, especially in a case like this which just turns on whether there was an honest belief or not because there either was an honest belief or there wasn't and it's a bit difficult to say you've got to be really, really careful in finding there wasn't an honest belief. I know that's said all the time and I can see that in some circumstances that you would have to be careful but when it really just comes to was there an honest – and I realise there are other aspects that people are suggesting here.

MR MILLS QC:

Yes, well as I say I'm dealing initially with a submission about what the correct law is around the operation of qualified privilege and just wanting to be sure that the Court does have, at least from me as counsel, the best information I can give you, best submissions I can give you about what I think is the correct position and I should add to that and it's –

ELIAS CJ:

So we don't muck it up, when we don't need to muck it up.

MR MILLS QC:

Well the Supreme Court never mucks it up, the Supreme Court is right but I just want to be sure that you've got whatever I can you on this because as I said before, I think that the Court of Appeal's decision in *Durie* is going to really put an issue around this because we're going to have a different onus now that will arise under *Durie* from that which will arise under the qualified privileges and there's a very interesting Osgoode Hall article that I was given to read about the Canadian Supreme Court decision on which *Durie* is based, expressing concern about the way in which the onus is now being placed under that public interest defence and really advocating for the *Lange*

approach which under section 19 would continue to put that onus under the new defence, on the defendant rather than – on the plaintiff rather than on the defendant.

The other point to emphasise I think which is in this note, with respect to the effect of the onus is, as you will see in this quote from the Australian High Court decision in *Roberts v Bass* [2002] HCA 57, (2002) 212 CLR 1, that when we talk about a plaintiff having to establish a lack of honest belief on the part of the defendant exercising the privilege, it's really a contraction I suppose of the correct position which at the end of that quote there with all the bolding in it, the plaintiff actually has to positively prove that the defendant acted dishonestly by not using the occasion for its proper purpose. It's not just a lack of honest belief, it's a positive proof that the defendant did not believe that that contracted phrase actually means and that again does reinforce the significance of the onus and its application here.

So I won't go through this in detail, this is really for the Court to have for reference when considering the issues. There's a section on the second page of that under that heading, "Truth or falsity of the attack are relevant to privilege", which is again this issue about what goes into the finding of the privilege and what goes into its loss and you'll see there a reference to some cases that often get cited, old but still treated very often as very clear authority on *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495, it's a Privy Council decision where the Privy Council specifically said it was necessary to determine whether or not the accusations against the Bishop were false in order for the Privy Council to rule that the occasion was privilege, that goes to the loss of the privilege. And the reference my friend made to the *Fraser-Armstrong* case which is the next one, to the extent that Lord Justice Brown was saying well it doesn't really matter which way we look at this, you know from what I've just said that I say it does because it has the effect on the onus as how you come at this and New Zealand in particularly it's statutory.

On the question of the place and restriction of relevance which is the other issue that has been I think put into issue by my friend, *Adam v Ward* again is very clear on this and I've got there the quote from Lord Loreburn. The other judgment in there which I think is worth noting for a reason I will give you in a moment, is that judgment of Lord Dunedin's which is mentioned a little lower down with a reference to page 329. There's a reference at page 331 which I think is worth drawing attention to because it is what the trial Judge had done and the House of Lords is very critical of the trial Judge for deferring effectively the finding of the privilege to the jury and to the extent that that summing up by His Honour Justice MacKenzie does that, then just bear in mind it is a summing up, it was actually given by my friend to Justice Katz which might have had some impact on some of the issues that are now causing concern but the way in which Justice MacKenzie left issues related to the finding of privilege to the jury there would probably come within the concerns expressed in *Adam v Ward* about what had happened there and the division of functions between judge and jury.

WILLIAM YOUNG J:
Are you saying that it's not open to a jury to conclude that an attack was not fairly – a response was not fairly proportionate to the attack?

MR MILLS QC:
Yes I say that unless there's –

WILLIAM YOUNG J:
There's ample authority to contrary.

MR MILLS QC:
No not that I'm aware of.

WILLIAM YOUNG J:
What about *Lange v Atkinson (No 2),* the passage that was read to us this morning?

MR MILLS QC:

Well *Lange v Atkinson* and I have a view on this that is pretty firm, *Lange v Atkinson* says very clearly that the expanded use of section 19 was because of the expanded scope of the privilege which was given on the one hand and then it needed to be balanced out by a wider interpretation of section 19 on the other and I certainly made the submission to the Court of Appeal which the Court of Appeal accepted rightly or wrongly, that that wider use of section 19 in *Lange (No 2)* was specific to the privilege that was being recognised there and does not have general application to all privileges.

WILLIAM YOUNG J:

What about the case, the *Clifford v Hamilton* case, wasn't there something in there to suggest that this question of the qualitative nature of the response would in the end be for the jury to determine?

MR MILLS QC:

I think that's commented on somewhere in here but I just simply say just as a matter of principle as I see it, unless there were disputed issues of fact that the Judge felt that he or she needed to have the jury make a decision on before proportionality could be determined, then it's solely for the Judge.

WILLIAM YOUNG J:

I assume Mr Craig thinks he's been the subject of an attack which contains an allegation which are not true.

MR MILLS QC:

Mhm.

WILLIAM YOUNG J:

But it's not the case that he necessarily believes everything he says in his responses. He doesn't necessarily believe that Mr Williams is a liar for instance. He's got in the back of his head he might be mistaken.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Well wouldn't questions of proportionality and referability of the attack come into play then?

MR MILLS QC:

Not in terms of the initial finding of the Court.

WILLIAM YOUNG J:

No I agree with that, I agree with that but in terms of whether he's lost the privilege.

MR MILLS QC:

Oh yes well those issues well may come into the loss of the privilege. Sorry we were miscommunicating but in terms of the finding and of course here the Judge has said on proportionality that Mr Williams published through Whale Oil, he knew it was going to go countrywide as a result of that as it did, so Mr Craig was entitled to do the same and publish countrywide, so all of this reference my friend has made to 1.6 million people and so on, in my opinion or my view it's all just irrelevant because that proportionate to where the attack went.

WILLIAM YOUNG J:

But assuming he believes what he's saying.

MR MILLS QC:

Well that will come to the loss of the privilege.

WILLIAM YOUNG J:

Yes, okay, well actually I think I agree with you I think –

MR MILLS QC:

Yes well I thought you did.

WILLIAM YOUNG J:

Because the question of all of this really should come at the second stage and with the onus of proof on the defendant.

MR MILLS QC:

Yes, yes, well that's certainly my –

WILLIAM YOUNG J:

Sorry on the plaintiff I mean.

MR MILLS QC:

Yes that's certainly my position on it. So that's discussed down here and then under the question of relevance which again is an issue that my friend has raised about the way the privilege works. You'll see the various provisions set out there that we think are the correct position on the law and again Her Honour Justice Katz, as you know, ruled as it was her obligation to do on the issue of law as to whether relevance was satisfied and said not only that relevance was satisfied for the purpose of finding the privilege but that everything was relevant, so this was not a case where it left open issues where you might have been outside of the privilege and which could arise but clearly is not arising here. No disputed facts and so…

WILLIAM YOUNG J:

I suppose my trouble is that again, are you saying that you're still dealing with the first stage?

MR MILLS QC:

Yes I am, yes but it has a bearing here on the second stage.

GLAZEBROOK J:

Well no, no because you say that by the time it gets to the second stage the jury can neither consider proportionality nor relevance when –

MR MILLS QC:

Absolutely.

GLAZEBROOK J:

Well there you go.

WILLIAM YOUNG J:

Well this is where I disagree.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

This is where I would take issue with you.

GLAZEBROOK J:

And in fact what is –

ELIAS CJ:

I thought you said it was evidential though in relation to loss of the privilege.

MR MILLS QC:

It is, but it is the Judge's task and function in this, this is the quotes that are on the first page.

ELIAS CJ:

You're still on the first page?

MR MILLS QC:

No I'd actually moved on but just because of the question I was asked just flicking back. So it's *Adam v Ward*, it's classic *Adam v Ward* that unless there are disputed facts the Judge and the Judge alone rules on relevance and proportionality and whether the occasion is as a consequence privileged. Once that ruling is made, then the rest of it goes to the loss of the privilege

and you can't have the jury second guessing the decision that the Judge has made on those issues which are ones of law only.

GLAZEBROOK J:
Well it's difficult, isn't it, to make a decision on proportionality if you don't know what was believed to be true or not?

MR MILLS QC:
Well proportionality is –

GLAZEBROOK J:
Because if only a tenth of it is actually honestly believed to be true, then it couldn't have been proportional to add the rest of the allegations on, arguably and it may even have been irrelevant, some of those allegations, if in fact only a small portion is believed to be true.

MR MILLS QC:
I think proportionality is a term that might have the potential to be ambiguous. When the Courts are talking about what I'm now referring to as proportionality, and I want to be careful using is, but you look at the cases like *Adam v Ward* and what the Judge did here and cases like the *Trad* case in the High Court of Australia that is in the bundle, the Judge is looking at the appropriate connection and the classic qualified privilege concept of interest and duty or interest and interest, common interest but here once you decide it's an attack, what was the audience to which the attack was made? And the right to reply is not to reply to hear Mr Williams, it's the reply to the same audience to which the attack was made and because the attack here was made nationwide, the audience to which Mr Craig is entitled to reply is countrywide. That is the issue that the Judge rules on and must rule on.

WILLIAM YOUNG J:
But it must be conditional on, somewhere along the line Mr Williams being able to say well he didn't believe what he was saying.

MR MILLS QC:

It does and that will come up under section 19 where the onus is on him.

WILLIAM YOUNG J:

Yes and it must be open to Mr Williams to say having regard to what he did believe, what he said was disproportionate and not fairly referable to the subject matter of the attack.

MR MILLS QC:

Yes well I just wouldn't call it disproportionate.

ELIAS CJ:

Except you don't need to put it on that basis, you simply say that you've been predominantly actuated by ill will and the disproportionateness of your response is evidence of that.

WILLIAM YOUNG J:

He may not be motivated by ill will, he may just want to create a smoke screen.

GLAZEBROOK J:

Well that's the trouble with ill will, is the terminology, it's the trouble with all of this terminology and especially if you're expecting a jury to make very subtle distinctions between all of this stuff.

ELIAS CJ:

It's an abuse of the occasion.

GLAZEBROOK J:

Well even that would be completely non-understandable to the jury.

ELIAS CJ:

But it is an abuse of the occasion if you are trying to set up smokescreen. The occasion is only to allow you to respond.

MR MILLS QC:

For the purpose for which the occasion was given.

ELIAS CJ:

Yes.

MR MILLS QC:

So I think Lord Reed's judgment is one of the clearest expositions of this I have read in a long time and as I said before and my friends didn't like it particularly, but section 19 is ultimately all leading to the same question, what's the purpose for which the privilege was given, what's the purpose for which in this case Mr Craig has used it, is he within that purpose as his predominant purpose? If that proper purpose played only an insignificant function then he's open to losing the privilege.

ELLEN FRANCE J:

Could I just check in terms of relevance, you're saying the fact that it's not a section 41 particular means the jury can't consider it at all, is that the submission?

MR MILLS QC:

Well that's the way it works.

WILLIAM YOUNG J:

But didn't you say – didn't you tell – wasn't the bit of your submissions that was cited yesterday, wasn't to the effect that relevance would be for the jury?

MR MILLS QC:

Well if it was I don't know where it came from because it's certainly not my position.

GLAZEBROOK J:

Well I suppose the slight difficulty here is I'm having – I don't think there were any allegations of irrelevance anyway, nobody was pointing to them, so quite

what – and I don't know that the jury could have found anything irrelevant anyway.

MR MILLS QC:

Well they certainly couldn't in light of the Judge's ruling.

GLAZEBROOK J:

Well yes but then so has it actually caused any sort of miscarriage of justice?

MR MILLS QC:

Well it was not as Justice Ellen France has just raised with me, it was not put in issue by my friends in their section 41 particulars and the pleading rules around this which the Courts have – you can't do it.

GLAZEBROOK J:

But leaving aside the pleading rules, what on earth are the jury going to find as irrelevant, given it wasn't pleaded, it wasn't argued and nobody suggested anything to do with it? Just in terms of miscarriage is the point I'm making.

MR MILLS QC:

Yes well as Your Honour may recall, that's exactly the concern about the way in which the direction was given to the jury where issues of the 1.6 million people to whom this was distributed was tied together with a concept of the jury finding that there was excessive publication or matters irrelevant and it's because of those conflation of these various things that I made the earlier submission, when you read the summing up as a whole, with all respect to Her Honour, it leaves the jury with an understanding that is quite confused and most worryingly leaves them with the impression that the privilege can be set aside, quite easily and that is fundamentally unsound.

WILLIAM YOUNG J:

But I mean in the end, I mean if it's more likely than not, then that's the case, isn't it? It's not easily or hard, if you're satisfied one way and you've

discharged the burden, even if it's 50.1% against 49.9%, you still win don't you?

ELIAS CJ:
But it may affect the evidence that it is appropriate for you to rely on.

MR MILLS QC:
It's like fraud. Yes that's technically the same balance.

GLAZEBROOK J:
Well I'm not –

MR MILLS QC:
It's the point that the Chief Justice has made which with respect I think is right, that just as Judges caution that the more serious the allegation, yes it's still balance of probabilities but the cogency of the evidence required to get you there goes up and that's what the leading cases are all saying, that the jury must be cautioned that because of the significance of a privilege, that the cogency of the evidence required to set it aside is high.

WILLIAM YOUNG J:
I don't think that's the current position, certainly not in my mind.

GLAZEBROOK J:
Well especially in a case like this and I know they all say it in the cases and Lord Reed makes that point on a number of occasions but my difficulty with that and in a case where you're just saying well did you have an honest belief in what you were actually saying, to say well we assume you did have an honest belief and we need a big hurdle to get over that, just doesn't seem to me to be the right position. I mean you either had an honest belief or you didn't.

ELIAS CJ:

But the common law always assumes honesty in all sorts of areas. This is not special.

GLAZEBROOK J:

But I don't really see it as assuming, I mean I don't see it as dishonesty which is why I had a bit of trouble with this because it's the same sort of thing with malice and ill will et cetera, it's really just whether you actually had that honest belief or not, it doesn't meant you're dishonest if you didn't because people sort of fool themselves all the time, especially with something like this where there are a whole pile of allegations.

MR MILLS QC:

Well if we move away, which I would urge the Court to do, from continuing to think about this just as an honesty of belief issue, the real issue, as I have said, I know probably too many times, the real question is what's the purpose for which the privilege is given and has it been used for a contrary purpose? And in determining whether it's been used for a contrary purpose, the issue of honesty is a factor which may or may not because a dominant issue or not but the real question –

GLAZEBROOK J:

But when in something like this would it not be a dominant issue?

MR MILLS QC:

Well this is the point I think I made at one earlier stage which is that supposing that nine of the 10 allegations that Mr Williams had made against Mr Craig were untrue and one of them was true. So for example that he had, and this is not true, but supposing he had had her retire or resign in 2013 and then he had lured her back by an offer of more money. Just stop there, that's an allegation that Mr Williams had made. Now if Mr Craig knew that was right and he had said that's dishonest as well but nine other things he had said were honest, then I would say to that, you've got to look at the purpose in the round and where that false allegation in response sits in relation to the overall

purpose and so I don't think it is right, with respect, to think of honesty in a vacuum. It's got to be, as Lord Reed said, ultimately all these questions about the loss of the privilege leads to one issue and that is what was the purpose of the privilege and has it been used for a contrary purpose, as a dominant purpose or has the contrary, the improper use been a dominant purpose? So that's the law at least.

WILLIAM YOUNG J:
Yes but doesn't this mean that there has to be a factual evaluation by the jury?

MR MILLS QC:
At the loss of privilege stage.

WILLIAM YOUNG J:
At the loss of privilege stage.

MR MILLS QC:
Yes, yes but that factual analysis is of course consistent but has to be done in accordance to the onus and in accordance with the directions that the leading cases all require really the jury to be given about the loss of the privilege and I would say on that, there's one other matter in our submissions that I haven't touched on that's relevant to the damages issue as well in my submission and that is the New Zealand Bill of Rights Act 1990. The New Zealand Bill of Rights Act, section 3, applies to juries. They are judicial, performing a judicial function as the finders of fact and the –

ELIAS CJ:
I don't think I've ever seen that suggested.

MR MILLS QC:
I'm suggesting it now.

ELIAS CJ:

Yes I know, I've just not ever thought of it.

MR MILLS QC:

And so both in relation to directing a jury on the loss of a privilege and again this is an argument or a submission I put to Her Honour in the High Court which she has accepted, that the issue of the value of the speech becomes relevant and what we're dealing with here is fundamentally political speech. Mr Craig was attacked by Mr Williams to push him out as leader of a party that was on the cusp of going into Parliament, like it or not, and he responded on a political level and in the leaflet you can see its dominant purpose there is to draw attention to what he believed was a form of politics which was unacceptable, it was going after the person rather than debating the ideas and principles. Now whether we agree with him or not, that is political speech and democratic speech at a high level and my submission is that in considering that directions to a jury in New Zealand with section 14 and it's coming to the English cases under the European Convention under article 10, that these issues need to be thought about in terms of the way juries are directed. Not all speech is of equivalent value. You can have a privileged occasion for relatively low value speech but nonetheless it's important to protect it but when the speech value is high, as Her Honour agreed that it was here, that too is a factor that needs to be weighed in and the jury needs to be directed on that or else the privilege has little value.

GLAZEBROOK J:

I must say I find that argument about political speech difficult, if in fact there wasn't an honest belief because at that stage it's actually pretending to be political speech, when actually it's a protection of personal reputation effectively by not actually believing what you're saying. I mean I can understand the argument about political speech if in fact the allegations weren't or there was a belief that the allegations were wrong.

MR MILLS QC:

Yes.

GLAZEBROOK J:

I just have a bit of difficulty in saying well it's political speech and of high value in order to be able to tell lies to electorate because political speech has high value, yes, but not the telling of lies.

MR MILLS QC:

Well I don't have time to go through all the evidence again but it's carefully set out in the written submissions but irrespective of what there might be a dispute over, what is not disputed is that Mr Williams made the decision that he was going to take very deliberate steps over a period of time to have Mr Craig step down or forced to resign as the leader of a, in fact quite significant political party in New Zealand and he went about that in a way that involved seeding rumours to various key people, this is all not contested. First Mr McIvor, then Mr McCoskrie, then Mr Dobbs, Mr Day, Ms Rankin and ultimately with that release to Whale Oil which the evidence he acknowledged was intended to be the final push to make him have to go. So that's a political issue.

GLAZEBROOK J:

But if that was for the reason that the person was thought to be unsuitable because of a particular behaviour, then that is quite important political speech on the other side, isn't it?

MR MILLS QC:

Well it's part of the –

GLAZEBROOK J:

And then if it's not that, then in fact it is dirty politics.

MR MILLS QC:

But it's all relevant to a form of politics anyway, I would have thought, to go about it, removing the leader of a political party by a series of drip feeds and seeding of different news and we know, undisputed, that some of that was not

true, whether it was dishonest or not may be debated but a number of those things were not true.

ARNOLD J:
Well I suppose your point is, there is a legitimate process for getting rid of leaders.

MR MILLS QC:
Yes, yes.

ARNOLD J:
Which would have involved I guess some sort of hearing before the Board or some sort of process.

MR MILLS QC:
And had he done that, then many of the things that he told key people would not have been sustained because for example he would not have been saying under a rigorous process that there were no responses from Ms MacGregor, there would've been evidence then that would have come forward with people who worked closely with him and gave evidence about what they thought the relationship was, the evidence about there being no sext of the kind that was so damaging would have come forth and so on.

WILLIAM YOUNG J:
It's not whether he was careless though is it? I mean I can understand why Mr Craig may have been cross about the attack obviously but the focus for this is really on Mr Craig and not on Mr Williams on this part of the case.

MR MILLS QC:
Well the focus is on him in terms of what he said about Mr Craig and what Mr Craig was told from good authority he had said about him and then whether Mr Craig in responding to that, responded in a way that was relevant, as Her Honour has found, but then beyond that, whether it has been shown that he lacked an honest belief in what he was saying.

WILLIAM YOUNG J:

I mean it's sometimes in the books, it's a privilege in respect of the good faith rebuttal, that's wrapping it all up.

MR MILLS QC:

Yes again if good faith is taken to mean a lack of honesty where that's the critical issue, then I wouldn't have any issue with that. I mean it would be nice if there was more repetitive use of the same terminology but that's asking too much. So unless there's any issues around any of that, I think it's adequately, I hope, helpfully set out in that handout.

So I need to move now pretty quickly to the cross-appeal and before I go to the submissions and I will go through really just – a lot of the evidentiary material I tried to deal with on the first day and I think by now you'll be at least familiar about what the narrative is and the references are all in there because I just pick up some points that came out of my friend's oral argument and deal with those.

First, on this reasonably inflammatory issue of sexts, the worst text, and I'm using the more neutral term at the moment, the worst text that Ms MacGregor referred to was the one that went, "You are wonderful because". That is the one that in the letter that came from her lawyers which was the basis of her claim in the Human Rights Tribunal, I'll give you the reference, that's the one that was pointed to as the text that she was principally complaining about and you'll find that in the Gallaway Cook letter at volume 7, page 2211 at paragraph 26. Unless you want me to I won't take you to it. And then while you're there because it's pretty close nearby, the Chapman Tripp letter that I took Your Honours to yesterday at page 2244, paragraph 67 which also bears on this issue. So that was the text that was identified as the complaint, "You are wonderful because" et cetera, et cetera.

GLAZEBROOK J:

Why are we limiting ourselves to this? Sorry I didn't quite understand.

MR MILLS QC:

Because it is being suggested I think, pretty strongly suggested, there's a whole lot of these texts and they were sexts and the next thing I'm going to say to you is that is not a sext because there is a specific recognised definition of the meaning of sext from which the acronym comes.

WILLIAM YOUNG J:

Sorry, obviously there is a range of activities to which the expression "sext" might be applied but can it not apply to texts of sexual or flirtatious nature?

MR MILLS QC:

Not in the recognised meaning of that. It is a sexually explicit text and in my submission to you, "You are wonderful" –

WILLIAM YOUNG J:

So where does that come from? From a dictionary?

MR MILLS QC:

Well that's where the acronym comes from.

WILLIAM YOUNG J:

No, but it's text to do with sex.

MR MILLS QC:

No sext is sexually explicit text, that's where the S-E-X-T comes from.

WILLIAM YOUNG J:

So you say that a flirtatious text can't be described as a sext as a matter of ordinary English usage?

MR MILLS QC:

Well I say that's not within what the acronym comes from and furthermore in Mr Craig's –

WILLIAM YOUNG J:

Well a text pertaining to matters of sex.

MR MILLS QC:

Yes, sexually explicit is a different connotation from pertaining to matters of sex and that's of course what Her Honour concluded, rightly or wrongly, that there were exchanges, that was a lot of affection but she did not see anything that would meet the measure of sexually explicit, maybe this Court will.

WILLIAM YOUNG J:

What was the reference to the sleep trick, was that explored in Mr Williams' evidence?

MR MILLS QC:

I'm going to take you to that.

WILLIAM YOUNG J:

Mr Craig's evidence.

MR MILLS QC:

I'm going to take you to that in just one second if you just bear with me a moment. Anyway, so that's the one that her lawyers identified going into the Human Rights Tribunal to complain, is the one of concern and you may recall, I just remind you of it, that in those Waiake notes, which again I won't take you to this specifically but it's volume 7, 2194, that's the one that you'll see mentioned there as well and the reference to sleeping between your naked legs was never said to be a text.

GLAZEBROOK J:

I'm actually just reading a whole lot on the Internet of suggested sexts for people who are sort of worried about it and one of them is, "I've got a surprise waiting for you." The other one is, "Get over here right now". Another one is, so those are more explicit I must say.

ELIAS CJ:

Read them out.

MR MILLS QC:

Yes we can do with some levity.

GLAZEBROOK J:

Yes I don't think I'll read any more of those but I think it's really just what Justice Young was putting to you and I mean that in some cases it might be that they're sexually explicit but only because of what's known to the parties.

MR MILLS QC:

Yes well we know a lot of course about what sits around this because of the number of texts that we do have in that volume 7 and also the correspondence between them and so on and so, you know, certainly it is not in my submission in the same genre as the one that did cause so much damage to Mr Craig and that is the claim that Mr Williams made to among others Mr McCoskrie that there was this sext about, "I slept well because I dreamt I was sleeping between your naked legs." Now that is a sext absolutely fair and square and that was never claimed to have been something Mr Williams had seen or had had or had read. He referred to it as a letter to Ms Rankin but he said to Mr McCoskrie that it was a sext and he would make it available when Mr McCoskrie pressed him for it and I can give you the reference to that and that is volume 7 at 2025.

ELLEN FRANCE J:

The pleading refers to sexually explicit or sex.

MR MILLS QC:

Yes and as I mentioned in passing but I may have passed off it too quickly, in the leaflet which is one of the two sources of the defamation claim, there's a specific definition in effect given by Mr Craig as to what he says is being alleged against him and that is volume 7, 1702 at 1709 is his reference in the leaflet to the allegation that he had sent sexts and saying it's not true.

So I certainly urge the Court not to minimise the significance of what really is a sext and the claim of sext, particularly when it has been put into issue as, “I slept well because I dreamt of sleeping between your legs and sometimes your naked legs”, that is absolutely a sext and the response of the people that were told that was it’s all over with Mr Craig, all over, you can’t survive that.

WILLIAM YOUNG J:
Are you going to take us to what Mr Craig said about the sleep trick?

MR MILLS QC:
Yes I am Your Honour. So that one that you were taken to before about, “Slept well because of sleeping on your legs”, there's a history to that and I think it’s important to put in context and you'll find it in volume 4 at tab 64, page 1002 at line 15 and it runs over to the next page and I won’t, unless you want me to take time reading it out, I’ll just give you a moment to read it and you'll see it gives the background to –

GLAZEBROOK J:
Is this Mr –

MR MILLS QC:
This is Ms MacGregor’s I think.

GLAZEBROOK J:
This is Ms MacGregor again.

MR MILLS QC:
Yes it is Ms MacGregor’s evidence, yes. So it goes over, it’s cross-examination.

WILLIAM YOUNG J:
So she’s saying that the sleep trick is sleeping on her legs?

MR MILLS QC:

Yes and the background to it was that he once fell asleep exhausted and that's where it originated from. So it's I think important to see the context that they worked incredibly hard together and he was often exhausted, he has a serious back problem which she would help him with and you'll see in the communications, despite what she's saying now, that she often offered to give him a back massage because he was in such pain and this is the background to it and he continued, it appears, to help to get from remembering that. Now eventually she indicated that she didn't really think that was a great idea but that's the background to it.

WILLIAM YOUNG J:

But this is a huge chunk of Mr Craig's evidence being put to Ms MacGregor isn't it?

MR MILLS QC:

Yes it is, yes. Well it goes on and one much before that, much more than the pages I've referred to. The other page, and I can't remember why we put it in, but 1423 was the other page that –

GLAZEBROOK J:

So this isn't an answer, there's something wrong with this.

MR MILLS QC:

In what sense? I'm bringing it to the Court's attention –

GLAZEBROOK J:

No, no can you tell me where the question and where the answer comes, 424, we've got question and then answer, yes so this is on page 800, this is Mr Craig's version of events I'm talking about.

MR MILLS QC:

Sorry?

GLAZEBROOK J:
Is that her replying?

MR MILLS QC:
We're on different pages, I'm on –

WILLIAM YOUNG J:
1001.

GLAZEBROOK J:
Yes. It's the A. right there, is that an answer and therefore is 425 all her answer?

MR MILLS QC:
Oh yes, yes it is yes.

GLAZEBROOK J:
So her explanation is that the sleep trick that he was talking about is falling asleep on her legs?

MR MILLS QC:
Yes.

GLAZEBROOK J:
And why is that good for your client?

MR MILLS QC:
Because the background to it which is explained in here was it initially came from him falling asleep exhausted at her flat, as I recall it, which she'd invited him to go to, to work and to rest and sometimes to prepare speeches away from the hubbub of the Conservative Party offices and he has trouble sleeping, the evidence was he has a very bad back, as I said before, and so he then found that he got this very restful, peaceful sleep and he then continued to use it as a sleep trick when he was trying to get to sleep, he

remembered that and thought this is a peaceful way to go to sleep. Now eventually –

WILLIAM YOUNG J:
She doesn't entirely agree with that does she?

MR MILLS QC:
Well eventually she – I mean my friend took you to some various references between the two of them in the email exchanges or text exchanges they may have been but you probably notice this for yourself, but he did not take you to the final one in that exchange and as I say I imagine you looked at it –

WILLIAM YOUNG J:
What's the page?

MR MILLS QC:
This is volume 7 at page 1792 and stopped one short of Ms MacGregor's final response on this which is telling. It's the exhibits, it's the texts. I'd assumed you probably would've gone up to the next one up but you weren't taken to it and you'll see that it says from Ms MacGregor coming back after she said, "I didn't offer the solution."

WILLIAM YOUNG J:
What number?

MR MILLS QC:
This is on 1791.

ELIAS CJ:
No but what's the number of the text.

GLAZEBROOK J:
167, is that the one you're referring to, "Yes up to you, I'm happy you found rest"?

MR MILLS QC:

Yes that's right, "But yes up to you, I'm happy you found rest." And then it keeps going up, "It's been such a relief." 163 I am being told is also relevant. Sorry just let me check this for a minute so you're getting the full picture. Yes well you see a bit further up she says she's so glad to hear that when Mr Craig says that it's been such a relief to be able use this as a solution to help me sleep. So this is being put forward by my friends as being an example of his harassment of her.

WILLIAM YOUNG J:

Well it's actually been put forward as an example of sexting because I mean sexting can take place, in fact probably does normally take place between people who are both engaged in the process.

MR MILLS QC:

Yes well I mean I don't for myself, and the Court has to read it for itself, but my submission to you is that the trial Judge was right, having heard all the evidence and including looking at these materials to say that she did not see any sexts and what she saw was a level of relationship between them which for whatever reason has gone sour and I to myself, having read all this material, it's not for me but there is a huge amount –

GLAZEBROOK J:

This isn't really – the point was she said on the retrial that it was accepted there were no sexts and that it certainly wasn't accepted and that's all that's relevant for this isn't it? And it's not relevant for us whether this was sexual harassment or not.

MR MILLS QC:

No, this is for the purposes of the qualified privilege defence, what this is directly relevant to is that it goes to the credibility of Mr Craig's continued assertions that he never believed that he had sexually harassed her and that it was a reciprocated and at times affectionate relationship and the numerous exchanges, including these texts and the correspondence that were in

negotiation, in my submission they all go the credibility of that and to whether the trial Judge had reached the right view on this and whether there was sufficient evidence for the jury to have found that lost the privilege because he knew he had and so I have been all over that before but I say again the evidence is not sufficient to have found that he knew that he had sexually harassed her. So unless there's anything more on that.

WILLIAM YOUNG J:
So I suppose what Mr Williams has to say is basically what was put to Ms MacGregor?

MR MILLS QC:
Yes, yes. Did I give you the – can I just check, did I give you the McCoskrie references?

WILLIAM YOUNG J:
I don't think so.

MR MILLS QC:
All right let me give you those and then without spending undue time on it. Now this is – there's two elements to this, Mr Williams in cross-examination said that if Mr McCoskrie said that he, Mr Williams, had told him about this sext, the one that, the terminology which is "sleeping between your naked legs", then he'd accept what Mr McCoskrie said and you'll see that at volume 3, tab 36, page 514 and at least on my note it's lines 13 to 22. So to give it to you again 3, 36, 514, page 514, tab 36.

ELIAS CJ:
And what line?

MR MILLS QC:
So this him accepting that if Mr McCoskrie says that he'll accept it.

ELIAS CJ:
What line?

MR MILLS QC:
Volume 3, line 13, and if you're ready for me to move on, I'll give you the McCoskrie reference. So the exchange between Mr McCoskrie and Mr Williams relevant to this is at volume 7, so it's an exhibit at 2025 and before I spend any time on that, I'll give you another McCoskrie reference which is his evidence and that's volume 6 at tab 84 and I'll come back to that, particularly the reference but the complete picture, that's 1535.

Now just to come back to this one, Mr McCoskrie's evidence was that he was really pressing Mr Williams to, as he put it, put up or shut up on this sext and he wanted to see it and so you will see him saying, he's the yellow one, "When can I see evidence? I don't think he's going to listen to anyone else", meaning Mr Craig won't listen to anyone.

ELIAS CJ:
Sorry when you say yellow?

MR MILLS QC:
Oh is yours not coloured again?

ELIAS CJ:
I've got blue.

WILLIAM YOUNG J:
We've got the blue but basically the other ones aren't coloured but I think it's clear who's who I think.

MR MILLS QC:
So Mr McCoskrie about the middle of page 2025 Chief Justice, "When can I see evidence? I don't think he's going to listen to anyone else." So that's Mr McCoskrie, there's no dispute around this.

WILLIAM YOUNG J:

So when was the press conference?

MR MILLS QC:

Oh the one that's been sue on you mean?

WILLIAM YOUNG J:

Yes.

MR MILLS QC:

That's July.

WILLIAM YOUNG J:

What date in July?

MR MILLS QC:

The 29th I'm being told.

WILLIAM YOUNG J:

The 29th of July?

MR MILLS QC:

Yes, so this is well before that and then – well I shouldn't say well before that but it's before it and then in response to that as to when can I see the evidence, Mr Williams says, "Monday works." Now I invite the Court to conclude that can mean only one thing and that is Monday will work for me to show it to you.

WILLIAM YOUNG J:

So "Monday works" –

MR MILLS QC:

Yes, stop there, "Monday works". Now he never had it. That in my submission is dishonest. He's leaving Mr McCoskrie with the impression that he has it, Monday will work to show it to him but then he goes on, and this is

right on the cusp of Whale Oil, “But someone has leaked to Slater, looks all over.” And the McCoskrie says, “Gosh that’s a major leak”, and the response to that is, “I have my suspicions but am keeping low. Now the leaker was Mr Williams of course and so he is deceiving Mr McCoskrie by saying that he doesn’t know who the source but it looks all over and I'm keeping my head down.

So there are, in addition to the specific points about the sext which are picked up in that other evidence reference I gave you, there’s some other dishonest statements there which are –

WILLIAM YOUNG J:
Did Mr Williams say that he was trying to get the sext but couldn’t get it? What was his explanation for all of that?

MR MILLS QC:
Well there's another exchange over this which relates to the Dobbs evidence and Mr Day’s evidence where they, I think Mr Day in particular, says that he was pressing also Mr Williams to see this sext that he says that he and Mr Dobbs both say was referred to them in the meeting that you heard about earlier on and Mr Williams was saying in effect, “I’ll get it, you know, I have it, I’ll get it.” And then he had to go back and eventually say, well it wasn’t actually that at all and of course we know he never had it. So again you’ll see the evidence of Mr Day on this, how he felt he had been misled over that but again the same thing as we’re seeing here, Mr Williams presenting it as though he had it, he had seen, he would provide and he knew he didn’t and just bear in mind the context. The context here, it’s not disputed, he is going to the Board to further his accepted and agreed goal of getting Mr Craig removed as leader of the Conservative Party. That’s the context.

WILLIAM YOUNG J:
So we've really got to look at the evidence of Mr McCoskrie.

MR MILLS QC:

Mr McCoskrie and Dobbs and Day I think also warrant a good look and Mr Day in particular because he was a principal funder of the Conservative Party, of the Taxpayers' Union, he was supporting the Conservative Party only because it favoured binding referenda. He said if the Green Party supporting binding referenda he'd give a million dollars to them, so he has no axe to grind. So his evidence is interesting reading.

ARNOLD J:

Can I just follow and make sure I understand how these things work, so on 2025, about a third of the way down, is that 19th of June 2015?

MR MILLS QC:

Yes it will be.

ARNOLD J:

So there's some texts.

MR MILLS QC:

Yes.

ARNOLD J:

So then on the next page, 2026, there's on the 21st of June and that raises the text again. Is that the same text?

MR MILLS QC:

Yes it does, yes it does, yes.

ARNOLD J:

And then there's another one on the 7th of July, talking about a text, is that the same one?

MR MILLS QC:

Yes, same thing.

ARNOLD J:
And the 15th?

MR MILLS QC:
Yes, yes, he will say, as this reflects in his evidence, that he was really pressing to see this because he saw it as such a significant thing that allegedly Mr Craig had been sending sexts of this kind and Mr Day's evidence, when he learned what it actually was, that it was this issue about sleeping on her legs, even though he thought it was all over for Mr Craig, he said, "If I had known that there had been communications both ways and I had known that that was not something he said, I would have been troubled but I wouldn't have had the same reaction that I had which had which was all over rover." And Mr Williams' evidence under cross-examination was that he knew how damaging that was, that sext about "between your naked legs" and bear in mind who he is dealing with. I mean he's dealing with the head of, Mr McCoskrie is the head of Family First, he's dealing with the Conservative Party of New Zealand.

Now I know that I'm going to hit the wall on time pretty soon, so unless there's any further questions around that, that's really all I wanted to say on the legal issues and on that issues that Mr McKnight was dealing with. There was a technical pleading issue, there may have been several of them which my friend raised, insofar as it was being directed at our submissions. I don't think it counts for anything but I just say that what was our first part of the submissions was simply a summary of the pleading, of the actual imputations. I don't think it has any relevance at all.

My friend also criticised the trial Judge I think for referring to it being relevant that matters were true or partially true. He said well under the Defamation Act it's got to be true or substantially true. So whether the Judge just was a bit loose in the use of language or not, the authorities are very clear and I can give you the references, that even if you miss the mark on a defect of truth, it goes to mitigation and in *Quinn* that's referred to, it's tab 4, I think at page 70 of our bundle and there's a reference in *Quinn* to the *Pamplin v Express*

Newspapers Ltd [1988] 1 WLR 116 (CA) decision in the UK making the point that even though you missed the mark on truth, it can be so damaging, so close to it that it can reduce damages to zero. So the Judge would've been quite right in the context of considering the impact on damages, even if she did mean substantially true but said partially true, even if that's what she meant, it's still relevant to the reduction in any damages which is what she was focusing on because it's a mitigation point.

Then there are a number of criticisms of me which I just will wear but on the Facebook issue, I just do want to explain to you because I think particularly Justice Young wanted to know why did this come in, and it was of course not me who recalls the witness, the Judge recalled the witness. I applied for him to be recalled but it is the Judge's decision on whether to recall a witness and it was because this Facebook document had been discovered only in part and at a very late stage in the trial, what appeared to be the missing parts of the Facebook chat emerged and it was on that basis that I applied to have Mr Williams recalled. It was extremely awkward, I was aware of the risks of him being brought as the last witness but the argument with the Judge, which the Judge accepted, was twofold, that Mr Williams, as you can see from the evidence, was really presenting himself as the white knight on behalf of Ms MacGregor, he's there to save her and do the right thing by her and I had, as the Judge readily acknowledged, been at some level running the theory through the trial that Mr Williams was capable of holding two things in his mind at the same time and one was to be supportive of Ms MacGregor, the other was to pursue his own strategy to have Mr Craig removed as leader of the Conservative Party and this Facebook exchange, as you will see when you look at it, went directly to that very point of him being prepared to use this unnamed woman for a political purpose. It was in relation to the waterfront workers' strike, she was apparently a nurse at Starship and he told Mr Slater that she might be able to give evidence that emergency supplies or necessary supplies for children at Starship were being held up by the strike and of course Mr Slater thought was absolute gold and you will see what the chat then says about what he would do to get this information to use against the strikers. So that's why he was recalled and that was the theory behind it and I

don't make any apologies for that and I think the Judge was the one who decided it, not me, on my application.

The other thing relevant to this which goes to the damaged issue, is that there is a passage in *McGregor on Damages* which is in our supplementary bundle, which would make the point around here that you're not limited in a defamation case to character only when you plead it under those very specific provisions of the Defamation Act. That if issues emerge during the trial which were not part of the specific pleading of bad character but they go to the person's reputation and what his reputation is worth, then they are relevant to mitigation and this was not the only piece of evidence about Mr Williams' behaviour with women or about women and his views about women and so there's a sort of level of hypocrisy here, he's holding himself up as the white knight for Ms MacGregor and yet this is what the documents showed. Now he had explanations for that, he said, "That was me then, not now, I've changed my views, I've seen the wrongness of my ways", but nonetheless they were matters that the Court of Appeal was perfectly entitled to point to and say these are relevant matters in terms of the appropriate damages award.

WILLIAM YOUNG J:
Well isn't it open to a jury to conclude that you were simply opening another front?

MR MILLS QC:
Well they may well have –

WILLIAM YOUNG J:
I mean that happens. I mean the vigorous defence of justification, you know, has a nasty habit of truth if it doesn't come off, of substantially increasing the damages.

MR MILLS QC:
Yes there is a risk in that, yes.

WILLIAM YOUNG J:

So I mean you can't really – I mean you took, I suppose a gamble, it might have come off but as it turned out it didn't and you must have recognised that it was a risk.

MR MILLS QC:

There's a risk with it. All I'm saying is that it had a proper foundation for doing it, as Her Honour accepted.

WILLIAM YOUNG J:

Has she given a ruling somewhere that we can look at?

MR MILLS QC:

She did and I think – I'm being told not, it was just oral but I don't think there will be any dispute from my friend about what was – the reason that she gave for doing it, that I had been running that theory and this fitted into it. But the jumping of the damages by $200,000 essentially on the basis of that, is what the Court of Appeal said and it cannot be right.

WILLIAM YOUNG J:

Well did you object to that?

MR MILLS QC:

I don't think he even knew it was happening at the time, this came afterwards and things were coming in all over the place. All I knew was that there was some risk in doing it.

WILLIAM YOUNG J:

Sorry but did you know that the damages claim was amended upwards because of this?

MR MILLS QC:

I suppose I did but in truth I don't think I registered it because there were so many balls in the air at that time that I had to deal with. I mean their claim was their claim and if they overclaimed that was their problem, not mine.

WILLIAM YOUNG J:

So what's the page reference for the recalling of Mr Williams?

MR MILLS QC:

Oh it's right at the end of the volume that's got Mr Williams in it and it's got its own tab right at the end. The very last tab I think.

WILLIAM YOUNG J:

That just seems to be the re-examination.

MR MILLS QC:

Yes that's what I'm just being told. 744 Your Honour which is tab 36 of volume 3 isn't it?

ELIAS CJ:

What are we looking at this for?

WILLIAM YOUNG J:

It's just the re-examination, it's just the re-cross-examination of the Facebook.

MR MILLS QC:

Yes we've got that. Shall I just move on?

WILLIAM YOUNG J:

Yes, that's fine, I've got it now.

MR MILLS QC:

Now the only other thing that I wanted to draw your attention, which I don't think you've been taken to specifically, is the pleading of punitive damages and the way in which it is a complete double up of the aggravated damages

which is one of the issues that the trial Judge expressed concern about and that is in the pleadings volume, volume 1 and it is at tab 13. This is the fourth amended statement of claim which was done I think after the end of trial. I think we went to trial on the third amended statement of claim. So it's tab 13 and the first cause of action, the pleading is at page 170 and you'll see it's pretty simple, paragraph 23, the plaintiff claims punitive damages against Mr Craig simply by repeating the particulars of aggravation. So the risk of double counting is apparent on the face of it.

The other thing, without spending time on it right now, goes to the fact that Her Honour said that there could be a basis for some punitive damages. I just invite the Court at some point, if that's an issue that you are reflecting on at all, at the particulars that are given here and I made the point earlier but there's the substance for it, that the majority of these points of aggravation would not be relevant to the loss of the privilege. So we don't know when Her Honour said there was a potential basis for punitive damages, whether that has anything to do with the loss of the privilege.

And then if you look across at the second cause of action, which is 175, you will see again it's exactly the same except that paragraph 31 puts in issue this not telling Mr Williams that he was about to reply to the attack on him. So there is your double up again and of course the first point, if my submission is correct, it's irrelevant to the reply to attack privilege, so it couldn't be a basis for either aggravation or punitive.

Now I'm just going to, because of time and my friend needs some time for his reply, I'm just going to make a few very general points about the balance of the argument on excessive damages and beyond that I'm content, in fact very content, to rely on the written submissions which have all the evidentiary references in it and have all the issues that I would have raised in argument had there been more time.

So the first point to be made is that it's fundamental to Mr Williams' claim that the damages award is appropriate, that the jury found that Mr Williams was

entirely successful and you'll see that's in the written submissions at paragraph 125. So that's their first step. They say that damages award is the right one because I was – the jury was entitled to find I was 100% successful and did, paragraph 125 and then in a very similar tone, the other side of that, the jury was entitled to wholly accept Mr Williams' claims and credibility and wholly reject Mr Williams' defences and credibility.

WILLIAM YOUNG J:
Mr Craig's defences and credibility.

MR MILLS QC:
Yes.

WILLIAM YOUNG J:
You said Williams.

MR MILLS QC:
Oh sorry yes, it's been done too hurriedly. So it's based – their defence of the damages award is based on that proposition. Absolutely reject every defence which Mr Craig raised, absolutely find everything in favour or Mr Williams and of course the trial Judge, as you know, said he wasn't fully successful, so that cannot be a proper basis for the jury to have proceeded and the plaintiff's position is that that's how they proceeded.

Now to again just touch the high points, the first and most obvious defence that Mr Williams didn't succeed in defeating is the reply to attack defence and as Her Honour said, where there was a privilege under which Mr Williams had provoked this by his attack on Mr Craig and Mr Craig had a privilege to reply to it, that must have an effect on damages, irrespective of whether the privilege is lost.

WILLIAM YOUNG J:
Why if the reply is a pack of lies?

MR MILLS QC:

Because the reason for – well there must with respect be a difference between –

GLAZEBROOK J:

Well if I've maliciously, and I've used that word advisedly, absolutely maliciously replied to an attack on me, you say that nevertheless damages are reduced? I mean I have done for a totally collateral purpose, I've made totally extravagant claims backwards and yet when that's found to be the case by the jury, I get a lower – I'm subject to a lower award of damages.

MR MILLS QC:

Well there'd be no privilege, there would've been no privilege in the first place on that proposition.

GLAZEBROOK J:

No, no, no.

WILLIAM YOUNG J:

No but you'd say the question of lies is for the jury and the judge will say provisionally, yes I have to assume the defendant is telling the truth. Jury says no the defendant is not telling the truth, it's a complete pack of lies, there's not an ounce of any merit in anything that was said, now surely the fact that there's been an attack doesn't justify reducing damages.

MR MILLS QC:

Well it may be in that very extreme scenario that you paint it wouldn't but the fact that, and this is without any doubt, the fact that Mr Williams went after Mr Craig to have him removed as leader of the Conservative Party and in doing so, he made statements which he has acknowledged in evidence were not true and he has said things which the Judge found, and I think rightly found lacked integrity and so on. Even if the jury were to find that there was some issues such as I don't know, if there was some issue that had led the

jury nonetheless to rightly set aside the privilege, those factors would have to surely be relevant.

GLAZEBROOK J:

Can I just check again, what are the factors, and leave aside whether they're acknowledged to be true because I don't think that's right, they're the sexting, the lack of payment.

MR MILLS QC:

The telling people that there was no communication back from Ms MacGregor when there was and he knew there was.

GLAZEBROOK J:

Well there's a dispute as to whether he did tell people that.

MR MILLS QC:

Oh well there's not a dispute really with respect because when he was there to see Dobbs and Day, he showed them the dossier and the dossier was all one way and he acknowledged in his evidence that by about March or April he knew, even though he had not wanted to see the detail.

GLAZEBROOK J:

Well he didn't provide it but there's a dispute over whether he told people there was no respect. So not providing that material.

MR MILLS QC:

Well he showed the one-way communication to Messrs Dobbs and Day.

GLAZEBROOK J:

All right and is that all? The lack of payment I'm not sure I quite understand where that came out but I think it's in the submissions, so we don't need to go to it. So sexting, lack of payment, not providing material from her. Was there anything else?

MR MILLS QC:

Conveying that the election night incident was non-consensual.

GLAZEBROOK J:

Well he again says he didn't say that.

MR MILLS QC:

Well no.

GLAZEBROOK J:

I know we've been through that but he says it's not consensual in a power relationship didn't he?

MR MILLS QC:

Well yes but he is –

GLAZEBROOK J:

And one has to say that's what sexual harassment is all about in any event.

MR MILLS QC:

If he had said to the people –

GLAZEBROOK J:

All right well I think we've been over that, so I just want to get what the –

MR MILLS QC:

All right well then one of them is that he told people that it was non-consensual.

GLAZEBROOK J:

All right and was there anything else?

MR MILLS QC:

That Mr, well we've just been on, that Mr Craig sent a letter, which is the one that Rankin was told about, which said, "I slept well because I dreamt of sleeping".

GLAZEBROOK J:

That's a sext isn't it?

MR MILLS QC:

Well it was described as a letter in that exchange. Ms Rankin morphed it very quickly into being a sext and I don't know why that was but he did tell others, including Mr McCoskrie as we've just seen that it was a sext.

GLAZEBROOK J:

But it's the same issue.

MR MILLS QC:

It is the same issue, morphs into what probably was a more inflammatory term of being a sext.

GLAZEBROOK J:

And "between the legs", rather than "on the legs".

MR MILLS QC:

Yes and "naked legs" was conveyed to Mr McCoskrie and also disputed that Dobbs and Day said that's what they were told.

GLAZEBROOK J:

Now not all of those were acknowledged, were they?

MR MILLS QC:

I think the evidence supports all of them.

GLAZEBROOK J:

All right, okay so that's it?

ARNOLD J:

But it's the things listed in paragraph 4 of your submissions.

MR MILLS QC:

Yes they are.

GLAZEBROOK J:

I'm just really checking there's nothing more.

MR MILLS QC:

Those are those ones that I recall. Well I see Chief Justice you're looking a bit discouraged at quarter to four.

ELIAS CJ:

I have a meeting which is going to be extremely difficult to –

MR MILLS QC:

Yes I will finish. So all I would say then beyond those general points that I've just made is that the written submissions track through very carefully the findings that or the evidence that supports the conclusions that the trial Judge came to which is that the damages award simply could not be sustained on the basis on which Mr Williams was claiming or his counsel was claiming it could be, because of the significant number of things where he did not show that Mr Craig was telling lies about him when Mr Craig responded and the broader issues about lack of integrity and so and probably I should have said to you Justice Glazebrook, they went to the number of occasions on which he knowingly breached Ms MacGregor's confidence, she ultimately sort of forgave some of it, that they were at some point in a romantic relationship but her evidence when she learned what he did with Whale Oil, what he had done when he conveyed it initially in McIvor, she was scared and upset and he told her repeatedly, lies about what he was doing and not doing and that's all tracked through here.

So I just say that the, I think whether the position of the Court of Appeal is right with what they suggested was the upper level, is really not what I'm here to defend. I'm here to say that measured against the benchmarks, and particularly *Siemer*, that given the actual evidence and the conclusions that are properly drawn about this case, that this fell well short or as alternatively seen is well above and it easily meets the statutory test of an excessive damages award and it can't stand and a punitive damages issue is so far out and beyond, that it hardly even needs to be said I don't think.

WILLIAM YOUNG J:
You've obviously finished with qualified privilege?

MR MILLS QC:
Oh yes, yes.

WILLIAM YOUNG J:
Well just to be absolutely precise so that it is put to you squarely, if it is the case that qualified privilege is lost if the jury is satisfied that the response was not bona fide, in good faith.

MR MILLS QC:
Meaning that he was saying things that he absolutely knew were not true.

WILLIAM YOUNG J:
Well that he was reckless. Saying things he wasn't confident were true.

MR MILLS QC:
Well the test is a bit more stringent than that.

WILLIAM YOUNG J:
Or cavalier disregard of the facts.

MR MILLS QC:
So reckless that effectively it amounts to knowing it was not true.

WILLIAM YOUNG J:

Well is it possible to conceive of a situation where a jury could find that he had acted in good faith in the sense that we've talked about but nonetheless flagrantly in disregard of Mr Williams' rights?

MR MILLS QC:

No, not in my submission. The law would not permit that.

WILLIAM YOUNG J:

Okay, so doesn't the finding of flagrant disregard mean that he was never going to succeed on qualified privilege?

MR MILLS QC:

Where's the finding of flagrant disregard?

WILLIAM YOUNG J:

In the punitive damage award.

MR MILLS QC:

Well this is the point I was making, that we don't know which of those about 20 particulars of aggravated damages –

WILLIAM YOUNG J:

No I know but the jury found that he acted with flagrant disregard of Mr Williams' rights.

MR MILLS QC:

Yes but on what basis?

WILLIAM YOUNG J:

Well we don't know, it's one of the things on the jury trial.

MR MILLS QC:

Well that's the problem.

WILLIAM YOUNG J:

Yes but sorry, I mean what I'm trying to see is whether one can rationalise that finding with the view that the jury might have, if more I suppose precisely directed, have found that his responses were in fact a good faith rebuttal of the attack.

MR MILLS QC:

Well I say the evidence is not sufficient to support that, that's been my position.

WILLIAM YOUNG J:

And I know you say the evidence isn't there but just say there is evidence and we have got this finding of fact or a valuation if you like of flagrant disregard.

MR MILLS QC:

Well we're back to the analysis which I haven't had time to push back on my friend's contention that the trial Judge exceeded, usurped her proper role of the jury. The correct role, which in my view she constitutionally performed, was she looked at the amount of the award –

WILLIAM YOUNG J:

No I'm not worried about the award.

ELIAS CJ:

You're not really answering the point.

MR MILLS QC:

All right sorry.

ELIAS CJ:

But surely your answer is that the Judge had to direct the jury so that they did decide it on the correct basis.

WILLIAM YOUNG J:

Well I agree with that.

MR MILLS QC:

Yes and also what I would say is that it's not enough what the jury did, it's whether they were entitled to do it.

WILLIAM YOUNG J:

Well that's a different – let's just say the jury was entitled on the evidence to conclude there was a flagrant disregard.

MR MILLS QC:

Mhm.

WILLIAM YOUNG J:

Is it very likely that a jury of that view would have found a good faith response, a good faith rebuttal?

MR MILLS QC:

Well I think the trial judge was right to say that because we don't know what the jury did, only what they resulted in, that this intermixing of damages and liability for qualified privileges, it cannot be adequately separated.

WILLIAM YOUNG J:

For me, I mean I don't think the summing up on qualified privilege was correct or appropriate, so you've persuaded me of that, but I'm troubled with the view that a four week trial just goes for nothing, hundreds of thousands of dollars down the plug hole, because of a few, perhaps not very consequential directions, and I would look to see if those misdirections were probably causative of something going wrong.

MR MILLS QC:

Well I understand that's your role –

WILLIAM YOUNG J:

So that's the proposition that I'm, that I would feel some comfort in upholding the verdict if I thought it didn't make a difference.

MR MILLS QC:

Well, that's of course for this Court to decide. I've said to you that when you read the summing up, they are misdirections on questions of law, they are material, and it's not possible, in my submission, to conclude that if properly directed the jury could have ever come to the same conclusion, and beyond that it's a matter for Your Honours. So unless there's something else I can help you with?

ELIAS CJ:

No, thank you Mr Mills. Yes Mr McKnight?

MR McKNIGHT:

I'll be as brief as possible Your Honour. I've only got four points to raise.

ELIAS CJ:

My meeting is not until 4.30. It's just that it's with all the Heads of Bench and very difficult to rearrange.

MR McKNIGHT:

Just on the point of punitive damages, I refer to our submissions on the 29th of August, and just paragraphs 94, and particularly paragraph 95, page 18, where Her Honour in the summing up says, and I won't read it but it's there that if you, she says, for example, "If you rejected his evidence that his intention was to set the record straight and restore his reputation, and think that he set about to deliberately hurt Mr Williams, that would be relevant."

Now, just a further point as to the particulars of, in terms of section 41, and they are at volume 1, under tab 14, and at page 183, importantly there is a particular that says, "In so far as Mr Craig's publication of the Remarks and Leaflet amounted to a 'response' to Mr Williams' 'attack', the response was totally disproportionate and thus unreasonable, having regard to the relatively limited audience to whom Mr Williams made the allegations about Mr Craig, and the nationwide audience to whom Mr Craig disseminated the Remarks

and Leaflet." I make my point again, there was no application to have that particular taken away from the jury.

Then just dealing with the point in relation to Mr McCoskrie and that was at volume 7, it's the exhibits, and you were taken to page 2025, and contrary to my friend's submission, I cannot see how that imputes dishonesty. It was dated the 19th of June, it wasn't until later that Mr Williams realised the wording was wrong, and only been prompted by Mr Day. And importantly, I give you a reference for that cross-examination of Mr Williams on this particular point, volume 3, tab 36, pages 515 to 516 and 743, the short point was that he said in his evidence he just didn't trust Mr McCoskrie because he thought he might have been in the pocket of Mr Craig.

Just one point was made by Mr Mills about the figures and suggesting I'm misinforming the Court in some way, can I say that the primary purpose of defamation awards are vindication and if Mr Craig gets up and creates a contest of truth, and he says that he's going to claim for that wrong the sum of $1.5 million, then how else can Mr Williams be vindicated without an award of a similar amount. Mr Mills makes the point about $300,000, well, there were to be proceedings for $1.5 million, and no doubt if we hadn't sued first, we'd have a proceeding with three defendants where the sum like that would be claimed.

One factor I ask the Court to take into account is that all along Mr Williams has said, both to Her Honour and the Court of Appeal, you can deal with the damages, and that's been rejected. So I ask you to take that into account, just as to the stance of wanting to have a full retrial to challenge, once again, all those factors that were dealt with by a jury.

Then I just want to conclude with a very interesting exchange, Rachel MacGregor, and this is at volume 4, under tab 64, at page, well it really starts at page 983, but I won't, because of time I won't read that.

ELIAS CJ:

Well you have time.

MR McKNIGHT:

Thank you, because it's the last point I wish to make. The page is 983. So this is cross-examination by Mr Mills.

GLAZEBROOK J:

Of Ms MacGregor?

MR McKNIGHT:

Yes, and it starts at line 16 where it is a question, "You recall I drew your attention to the fact that Mr Williams there had identified the fact that Mr Craig was flawed and shouldn't be the leader of the Conservative Party?" Answer, "I do remember that, yes." Question, "The effect of sending that poem to Whale Oil Mr Williams accepted in cross-examination that he knew that that poem would be humiliating for Mr Craig?" Answer, "And hence why Jordan is very courageous because Jordan knows what Colin does to people who cross him. He goes out to destroy them which is what he's trying to do – well, yeah, anyway, trying to do it to me. So, yeah, I mean he's – "

ELIAS CJ:

What are you taking us to this for?

MR McKNIGHT:

I'm taking –

WILLIAM YOUNG J:

Ms MacGregor didn't take exception to the breach of confidence, is this the gust of it?

MR McKNIGHT:

Exactly.

ELIAS CJ:

Oh I see.

MR McKNIGHT:

She saw it, I'm just coming to the final page, she completely accepted, and I'm paraphrasing, she completely accepted what Jordan Williams had done.

ARNOLD J:

Well she did ultimately, she says in her evidence that initially she felt betrayed but later on she felt –

MR McKNIGHT:

She fully understood.

ARNOLD J:

Yes.

MR McKNIGHT:

Well that's, I fully acknowledge that she had her doubts and concerns.

ELIAS CJ:

Well she said, she was turned because she found out that he'd taken legal advice. At an earlier stage.

MR McKNIGHT:

Yes, that's part of it.

ELIAS CJ:

Yes.

MR McKNIGHT:

But she was, in this final part of the evidence she was very supportive of Mr Williams, that's my point.

ELIAS CJ:

Yes, yes, I understand.

MR McKNIGHT:

And that's my final point, unless there's anything I can help you with?

ELIAS CJ:

Any questions? No. Thank you counsel for your help in this matter. We will reserve our decision and we'll adjourn.

HEARING CONCLUDES