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| CITATION: | *Sangare v Northern Territory of Australia* [2018] NTCA 10 |
| PARTIES: | SANGARE, Souleymane<br><br>v<br><br>NORTHERN TERRITORY OF AUSTRALIA |
| TITLE OF COURT: | COURT OF APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | No. AP 1 of 2018<br>(21531342) |
| DELIVERED: | 3 August 2018 |
| HEARING DATES: | 3 August 2018 |
| JUDGMENT OF: | Southwood, Kelly and Blokland JJ |

**REPRESENTATION:**

*Counsel:*

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| Appellant: | Self represented |
| Respondent: | T Anderson |

*Solicitors:*

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| Appellant: | Self represented |
| Respondent: | Hunt & Hunt |

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| Judgment category classification: | C |
| Number of pages: | 23 |

IN THE COURT OF CIVIL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Sangare v Northern Territory of Australia* [2018] NTCA 10
No. AP 1 of 2018 (21531342)

BETWEEN:

**SOULEYMANE SANGARE**
Appellant

AND:

**NORTHERN TERRITORY OF AUSTRALIA**
Respondent

CORAM: SOUTHWOOD, KELLY and BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 3 August 2018)

**SOUTHWOOD J:**

[1] I would dismiss the appeal.

[2] No error has been demonstrated by the appellant in the findings or reasoning of his Honour the Chief Justice. There can be no doubt that his Honour's determination that the impugned publication was made in circumstances attracting both the statutory and general law defences of qualified privilege is sound. There can be no doubt that his Honour's determination that the publication was not actuated by malice or improper purpose is sound. The judgment below is correct.

**KELLY J:**

[3] I agree that the appeal should be dismissed.

[4] The appellant is a citizen of Guinea. He arrived in Australia on 13 May 2011 under a Belgian passport belonging to his brother. He applied for a protection (Class XA) visa under s 65 of the *Migration Act* 1958 (Cth) on 3 June 2011. The delegate of the Minister for Immigration refused that application and the appellant applied to the Refugee Review Tribunal for a review of that decision. The Refugee Review Tribunal affirmed the decision not to grant the appellant a protection visa in a statement of reasons dated 22 October 2012.

[5] Between 20 June and 28 August 2014, the appellant was employed as a civil engineer on a temporary basis with the Northern Territory Department of Infrastructure ("the Department"). On 28 August 2014, the Department offered the appellant a permanent position on the basis that it would sponsor him under a skilled migration scheme run by the Australian Government. As part of that scheme the appellant was required to apply for and secure the appropriate visa (a sub-class 457 visa).

[6] On 19 November 2014 the appellant was advised by the relevant Australian Government agency that his application for a temporary work visa was invalid because he had previously been refused a

protection visa on 23 March 2012. The appellant sought expressions of support for his visa application from (among others) the Northern Territory Minister for Infrastructure ("the Minister").

[7] The Minister requested Departmental employees to provide him with a briefing in relation to that request and the Chief Executive of the Department of Infrastructure, David McHugh, provided the Minister with a Ministerial Briefing dated 25 November 2014 ("the Ministerial Briefing").

[8] The appellant sued the respondent for $5 million on the basis of defamatory material said to have been contained in the Ministerial Briefing. He alleged that various employees of the Department conspired together to fabricate the contents of the Ministerial to make it appear that he had provided false and misleading information to the Department in relation to his immigration status; and that he was a dishonest person and of bad character.

[9] The parts of the Ministerial Briefing said to convey the defamatory imputations are in the following terms:

> Through recent discussions with [the appellant] and evidence provided by him regarding his immigration history it appears [the appellant] has not been truthful nor comprehensive in providing information to the department on his complicated immigration history at the time of recruitment. The department was not made aware [the appellant] was ineligible to apply for a 457 visa at the time of nomination.

> The Australian Refugee Review Tribunal decision not to grant [the appellant] a Protection (Class XA) visa found [the appellant] was not a reliable witness, his evidence was characterised by inconsistency, exaggeration, and fabrication. The Tribunal concluded [the appellant] had fabricated his evidence, misrepresented the facts, and was a person who had the propensity to tailor and embellish claims to achieve a favourable migration decision.
>
> In addition, since [the appellant's] commencement with the department, there have been a number of ongoing complaints in relation to [the appellant's] inappropriate treatment of other public sector officers and private contractors. These issues have been discussed with [the appellant] on a number of occasions.

[10] The respondent admits that the Ministerial Briefing was a publication to the Minister, and that it conveyed three defamatory imputations concerning the appellant.

(a) that at the time of his recruitment the appellant had not been completely truthful in his communications with the Department's employees concerning his immigration history;

(b) that the appellant had fabricated evidence to the Refugee Review Tribunal; and

(c) that during the course of his employment with the respondent the appellant had dealt inappropriately with various public sector employees and private contractors.

[11] The respondent pleaded that the publication was not actuated by malice and attracted protection from liability on the following grounds:

(a) under s 27 of the *Defamation Act* (NT), or the defence of qualified privilege at general law, on the basis that the Minister had a legitimate interest in information on the work and conduct of the appellant, and that the publication was reasonably made in that belief;

(b) under s 28 of the *Defamation Act*, or the defence of honest opinion at general law, on the basis that the opinions concerning the appellant's conduct were honestly held on a matter of public interest given his position as a public sector employee, and based on material which was either substantially true or published on the occasion of qualified privilege;

(c) under s 22 of the *Defamation Act*, or the defence of justification at general law, on the basis that the publication was substantially true;

(d) under s 23 of the *Defamation Act*, on the basis that if some of the imputations are found to be justified and some not, the publication caused no greater harm to the reputation of the appellant than would have been caused had only the defensible imputations been published; and, or in the alternative

(e) under s 64A of the *Public Sector Employment and Management Act* (NT), on the basis that the publication was made by the

Department's chief executive officer in good faith and in the course of his employment.

[12] The case was tried before Grant CJ. In a judgment handed down on 6 February 2018[1] his Honour made detailed findings of fact[2] and on the basis of the facts as he found them, concluded that the publication of the defamatory imputations attracted protection from liability under both s 27 of the *Defamation Act* and the defence of qualified privilege at general law.[3] (It was therefore not necessary to consider the other defences pleaded.) In summary, the reasoning behind that conclusion is as follows.

(a) The Departmental employees were acting within the scope of their duty in making the publication in question so that if the Departmental employees have a defence of qualified privilege that protection will also extend to the respondent.[4]

(b) The statutory defence of qualified privilege will be made out if the respondent proves:

(i) the Minister had an interest or apparent interest in having information in relation to the appellant's application for a

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**1** *Sangare v Northern Territory of Australia* [2018] NTSC 5
**2** Ibid at [16] to [91]; A summary of the findings of fact relevant to the issues of the appeal is appended to these reasons as Attachment 1.
**3** ibid at [124]
**4** ibid at [108]

sub-class 457 visa and the Department's intentions in relation to his employment; and

(ii) the defamatory imputations were published to the Minister in the course of giving him information on those subjects; and

(iii) the conduct of the Departmental employees (principally Ms Cargill, Ms Birkner and Mr McHugh) in publishing that material was reasonable in the circumstances.[5]

(c) Re requirement (i): the Minister clearly did have an apparent interest in having information on those matters (and the relevant Departmental employees believed on reasonable grounds that the Minister had that interest).[6]

- The appellant had requested the Minister to intervene in support of his application of a sub-class 457 visa and the Minister's office had requested the briefing from Departmental employees.

- The Department's intentions in relation to the appellant's employment were inextricably linked to that issue. This was because the Department had nominated the plaintiff for a sub-class 457 visa and had been sponsoring his application, and

**5** ibid at [110]
**6** ibid at [111]

the purpose of that nomination and sponsorship was directly related to his employment.

- The Minister had a vital interest in the information before he took the very significant step of seeking to intervene in support of the appellant in processes that were being conducted by the Australian Government as that intervention may have involved some direct representation to the responsible Commonwealth Minister (and the Departmental employees believed that to be the case).[7]

(d) Re requirement (ii): the defamatory imputations were published to the Minister in the course of giving him information on those subjects.

(e) Re requirement (iii): his Honour considered the relevant factors which the statute provides a court may take into account in determining whether or not the conduct of the respondent in publishing matter about a person is reasonable in the circumstances; applied them to the findings of fact he had made;[8] and concluded that the publication of the material was reasonable

**7** ibid at [112]
**8** ibid at [113]

in the circumstances.[9] That was sufficient to establish the defence under s 27 of the *Defamation Act*.

[13] His Honour went on to consider the defence of qualified privilege at common law[10] and found that:

(a) the requisite reciprocity of duty and interest between the publisher and those to whom the defamatory material was published had been established; (The publishers were senior public servants and the recipient was their responsible Minister.)

(b) The publication in question was relevant to the mutual interest subsisting in that relationship. (The publication of the Ministerial was clearly made in the performance of the employees' duty, and the Minister clearly had a corresponding interest or duty in the receipt of that material.)

[14] His Honour noted that both the statutory defence and the defence of qualified privilege common law will be defeated if the publication in question was actuated by malice; and that the relevant question for that purpose is whether the publication in question was actuated by some extraneous motive.[11] On the question of malice his Honour concluded:[12]

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**9** ibid at [114]
**10** ibid at [115] to [119]
**11** ibid at [120]
**12** ibid at [122] to [123]

> The relevant question for that purpose is whether the Departmental employees acted as they did from a desire to discharge their duty. There is a presumption that the Departmental employees used the occasion for a proper purpose, and a corresponding onus on the [appellant] to prove that the [respondent's] servants or agents acted dishonestly by not using the occasion for its proper purpose. In discharging that onus, it is not sufficient for the [appellant] to point to carelessness of expression, even if such carelessness could be said to be present in the subject communication, as the basis for inferring malice.
>
> Against that background, and having regard to the factual findings I have made, the appellant has failed to demonstrate that the publication of the defamatory imputations was actuated by malice. Moreover, I make a positive finding that it was not.

[15] His Honour's ultimate conclusion was:

> The Minister had a legitimate interest in information concerning the work and conduct of the [appellant], the Departmental employees who prepared the Ministerial Briefing genuinely believed that to be the case, and the publication was reasonably made in that belief. It follows that the publication was also made for a purpose or motive which was concomitant with the duty or interest protecting it. Accordingly, the publication of the defamatory imputations attracted protection from liability under both s 27 of the Defamation Act and the defence of qualified privilege at general law.[13]

[16] The appellant has purported to appeal against that decision. The grounds of appeal set out in the notice are:

**Grounds:**

1. Whether the officials who deliberately made defamatory statements recklessly, without considering or caring whether it be

**13** ibid at [124]

true or not, they are in this as in other branches of the law, treated as if they knew it to be false.

2. Whether the officials who did not take proper steps to verify the accuracy of the material, who knew the material to be untrue, and further did not seek a response from the person the subject of the publication should attract the defence of qualified privilege.

3. Whether the appellant was able to show that the respondents were predominately motivated by ill-will towards the appellant, or otherwise took improper advantage of the occasion of the publication of the defamatory.

4. Whether it is sufficient that the makers of the defamatory statements honestly believe that they have the legitimate duty or interest to make it or the recipient to receive it, to attract the defence of qualified privilege.

[17] The appeal is incompetent as the notice of appeal does not specify any errors in the judgment appealed from. It merely sets out a series of questions.

[18] However, as the appellant is self-represented, I have scrutinised the document supplied by the appellant purportedly pursuant to the directions for the filing and service of submissions. (The document is

headed “SUMMARY FOR COURT OF APPEAL”.) A perusal of that document reveals that the appellant’s complaint is that the trial judge erred in finding that the occasion was one of qualified privilege because the appellant had not proved malice. The appellant appears to have two contentions under that general complaint.

[19] The first contention is that “officials who deliberately made defamatory statements recklessly, without considering or caring whether it to be true or not, are in this as in other branches of law, treated as if they knew it to be false.” No authority is cited for this proposition and I do not accept that it represents the true legal test for malice. The test is as set out by the trial judge at [120] to [122].

- [Q]ualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication.[14]

- Accordingly:

  > The relevant question for that purpose is whether the Departmental employees acted as they did from a desire to discharge their duty. There is a presumption that the Departmental employees used the occasion for a proper purpose, and a corresponding onus on the plaintiff to prove that the defendant’s servants or agents acted dishonestly by not using the occasion for its proper purpose. In discharging that onus, it is not sufficient for the plaintiff to point to carelessness of expression, even if such carelessness could be said to be present in the subject communication, as the basis for inferring malice.[15]

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**14** ibid at [121]; *Roberts v Bass* (2002) 212 CLR 1 at [76]
**15** ibid at [122]

- As the High Court observed in *Roberts v Bass*:[16]

> An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and actuates the making of the statement is called express malice. The term "express malice" is used in contrast to presumed or implied malice that at common law arises on proof of a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice ("malice") is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff.

[20] In any case, the appellant has not pointed to any evidence that the relevant Departmental employees (or any of them) "made defamatory statements recklessly, without considering or caring whether it to be true or not" and has not challenged any specific findings of fact by the trial judge. He simply made assertions in his "SUMMARY FOR COURT OF APPEAL" that the Departmental officials knew that what they wrote in the Ministerial was untrue and they didn't care because they refused to perform an investigation requested by the appellant.[17] He has not specified what statements in the Ministerial he alleges to be untrue and on what basis.

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**16** at [75]

**17** It is unclear what he is referring to or what investigation he asserts he requested the Department to make.

[21] The appellant's second contention appears to be that the defence of qualified privilege should not be available because the Departmental employees did not take proper steps to verify the accuracy of the material; knew the material to be untrue; and further did not seek a response from the appellant. Again, no authority has been cited for this contention and I reiterate that the proper tests for the availability of a defence under s 27 of the Act (and the defence of qualified privilege at common law) are those set out in the judgment at first instance, referred to above.

[22] Further, in relation to this contention also, the appellant has not identified any findings of fact which he contends to be erroneous, or any evidence to support his assertions that the statements in the Ministerial were untrue, or that the Departmental employees knew them to be untrue.

[23] The trial judge found that the three public servants involved in drafting, approving and publishing the Ministerial Briefing believed that the defamatory imputations contained in it were true and that it was their duty to convey that information to the Minister.[18] He also found that their conduct in doing so was not actuated by malice.[19]

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**18** ibid at [79] to [87], AB811-814.
**19** *Sangare v Northern Territory of Australia* [2018] NTSC 5 at [88], AB814.

[24] These findings of fact were supported by the evidence, which was comprehensively summarised by the trial judge.[20] The appellant does not point to any particular flaw in the analysis of the evidence or the relevant findings of fact.

[25] His Honour noted that the focus on the application of the statutory defence is on the reasonableness of the publisher's conduct in publishing the material,[21] and found that there was, "*little or no difficulty concluding that the publication of the material was reasonable in the circumstances*".[22]

[26] As noted above, his Honour also correctly identified and applied the principles applicable to the common law defence of qualified privilege, applying the leading High Court authorities (most notably *Roberts v Bass* (2002) 212 CLR 1; [2002] HCA 57). His Honour concluded that, "*the publication of the material in this case was clearly made in the performance of the employees' duty, and the Minister clearly had a corresponding interest or duty in receipt of that material*".[23]

[27] His Honour also correctly identified the principles applicable to the issue of malice and correctly applied those principles to the facts as he found them.

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**20** *Sangare v Northern Territory of Australia* [2018] NTSC 5 at [16] to [91], AB781-815.
**21** *Sangare v Northern Territory of Australia* [2018] NTSC 5 at [110] (AB826) and [115] (AB829).
**22** *Sangare v Northern Territory of Australia* [2018] NTSC 5 at [114], AB829.
**23** *Sangare v Northern Territory of Australia* [2018] NTSC 5 at [119], AB831.

[28] On the hearing of the appeal, the appellant (who appeared in person) argued two grounds.

(a) He contended that he had established malice in the Departmental employees who were responsible for writing the Ministerial, either on the basis that they were reckless as to the truth of what they wrote, or on the basis that he had established that they knew that what they said was untrue.

(b) He contended that the trial judge had erred in his application of s 27 of the *Defamation Act*.

[29] The appellant's contention in relation to malice concerns this paragraph of the Ministerial.

> In addition, since [the appellant's] commencement with the department, there have been a number of ongoing complaints in relation to [the appellant's] inappropriate treatment of other public sector officers and private contractors. These issues have been discussed with [the appellant] on a number of occasions.

His submissions revolved exclusively around the assertion that there had been complaints about his inappropriate treatment of private contractors.

[30] The appellant says that the Departmental employees should have investigated the complaints against him before writing what they did in the Ministerial and that their failure to do so was reckless. He referred

to the letters from the Department terminating his employment which do not refer to any complaints about inappropriate treatment of staff or contractors. He contended that the employees must have known that what they said in the Ministerial about there having been complaints against him was false or they would have included it in the letter terminating his employment. This does not follow.

[31] In the letter from Ms Cargill to the appellant set out in the appellant's written submissions, Ms Cargill wrote:

> With regard to the complaint received from the contractor, this matter was raised with you informally by the CEO and Bob Pendle last week and you were provided with the opportunity to raise any concerns at the time. This was an informal process and no further action was intended other than bringing it to your attention, so you were able to manage such situations more effectively. These matters have not contributed to an unfavourable opinion having been formed of yourself. As such no further investigation is necessary at this point in time.

[32] The appellant's case in relation to the complaint from the contractor is that Mr McHugh deliberately fabricated the whole thing. He contended that Mr McHugh wanted to get rid of him because he was administering a particular contract properly and in accordance with the terms of the contract, and Mr McHugh wanted to corruptly channel government money to the contractor who was his friend. There is no evidence whatsoever which could form the basis for any such allegation. The

appellant did not provide any supporting evidence in his affidavit or put the allegation to Mr McHugh in cross-examination.

[33] The trial judge found as a fact that the Departmental officers concerned believed that what they wrote in the Ministerial was true. The appellant has not pointed to anything which would cast doubt on that finding.

[34] The second point raised by the appellant on the hearing of the appeal was that the trial judge had erred in his application of s 27(3) of the *Defamation Act*, and should not have found that the communication attracted qualified privilege in the circumstances. That subsection provides:

> (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:
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> (a) the extent to which the matter published is of public interest; and
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> (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
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> (c) the seriousness of any defamatory imputation carried by the matter published; and
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> (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
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> (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

[35] The appellant contended that the trial judge made errors in relation to paragraphs (d), (e), (g), (h) and (i) of sub-section (3).

[36] In relation to (d), the appellant contended that there were no facts established by Departmental employees before writing the Ministerial, because they did not investigate the complaint made by the contractor.

[37] In relation to (e), the appellant contends that there was no public interest in his migration history.

[38] In relation to (g) the appellant submitted that the source of the information in relation to the complaint by the contractor was one contractor who was a friend of Mr McHugh. (This relates to the appellant’s unsupported allegation against Mr McHugh – the

implication being that either the "friend" or Mr McHugh lacked integrity.)

[39] In relation to (h), the appellant contended that that the Departmental employees did not make a reasonable attempt to obtain and publish his side of the story – again in relation to the complaint by the contractor. He made the same point in relation to (i).

[40] The chief difficulty with the appellant's contention is that it wrongly treats s 27(3) as requiring the trial judge to make positive findings in relation to all of the matters set out in the various paragraphs of the sub-section.[24] That is not the purpose of the subsection: it is simply a non-exhaustive list of the matters which the court may take into account when determining whether the conduct of the respondent in publishing matter about a person is reasonable in the circumstances.

[41] At [113] of the judgment at first instance, the trial judge set out his analysis of such of the factors in s 27(3) that were relevant to his

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**24** There are other difficulties with the factual basis of these contentions. The respondent adduced a great deal of evidence in support of the truth of the statements made in the Ministerial. The appellant's contention in relation to (e) misunderstands what is meant by public interest in the circumstances: there was a clear public interest in the Departmental employees briefing the Minister at the Minister's request before the Minister made representations to Commonwealth officials concerning the appellant's visa application. As already mentioned, there is no evidentiary basis for the appellant's allegations against Mr McHugh – or even that the contractor was in fact a friend of his. (When asked in cross-examination whether he favoured the particular contractor, Mr McHugh said no and added that the contractor had underquoted and had not been awarded the contract for the second stage of the works in question.)

determination of whether conduct of the Departmental employees was reasonable in the circumstances, and at [114] his Honour concluded:

> In the application of those factors, and having regard to the findings of fact I have made, there is little or no difficulty concluding that the publication of the material was reasonable in the circumstances.

[42] No error in either the process of reasoning or the conclusion has been demonstrated and, accordingly, I would dismiss the appeal.

**BLOKLAND J:**

[43] I have read a draft of the reasons of Kelly J and agree with her Honour's reasons. I agree that the appeal should be dismissed.

**THE COURT:**

[44] The respondent seeks its cost of the appeal and of the trial below from the appellant. The respondent does so in circumstances where the respondent was wholly successful in the court below and in this Court and the appeal was without merit. It was doomed to fail. The appellant opposes any order for costs.

[45] Rule 63.03 of the *Supreme Court Rules* provides that:

> Subject to these Rules and any other law in force in the Territory, the costs of a proceeding are in the discretion of the Court.

[46] Customarily, in circumstances such as this the Court will make an order for costs on the basis that costs should follow the event. However, the legislative intention is plainly to confer on courts and judges an unfettered discretion as to costs and a construction of a rule of court which practically negates the statutory provision is not lightly to be adopted.[25] Nonetheless, the discretion must be exercised judicially.

[47] In this case the relevant factors are as follows:

(a) The respondent has been wholly successful and has been brought to court not once but twice.

(b) The purpose of an award of costs is not to punish the unsuccessful party but to compensate the successful party.[26]

(c) The appellant is most unlikely to be able to pay any costs that are awarded against him.

[48] The respondent is most unlikely to be compensated even if an award of costs was made in its favour. In the circumstances, it seems to us that the Court should not make a futile order or orders as to costs. Both as to the costs below and the costs of the appeal the Court makes no order as to costs.

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**25** *Copping v ANZ McCaughan Ltd* (1995) 63 SASR 523 at 527
**26** *Latoudis v Casey* (1990) 170 CLR 534 at 543

[49] ORDER: The appeal is dismissed.

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