

JOHN FAIRFAX PUBLICATIONS PTY LTD & ANOR v GACIC & ORS
(S480/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 30 June 2006

Date of grant of special leave: 8 December 2006

On 30 September 2003 the Appellant published an article in the Sydney Morning Herald in which the restaurant, 'Coco Roco', was critically reviewed. The Respondents own that restaurant and they claimed that the article conveyed the following defamatory imputations:

- (a) The Respondents sell unpalatable food at Coco Roco.
- (b) The Respondents charge excessive prices at Coco Roco.
- (c) The Respondents provide some bad service at Coco Roco.
- (d) The Respondents are incompetent restaurant owners because they employ a chef at Coco Roco who makes poor quality food.

Following a trial conducted pursuant to section 7A of the *Defamation Act* 1974 (NSW) the jury found that imputations (a) and (c) were conveyed but were not defamatory. The jury also found that imputations (b) and (d) were not conveyed.

Upon appeal, the Respondents submitted that the Appellant's counsel had misled the jury with his statements concerning defamatory meaning. This was in respect of imputations (a) and (c). They also submitted that the trial judge, Justice Bell, had failed to properly direct the jury to overcome this. With respect to imputation (d), the Respondents also claimed that the Appellant's counsel had misled the jury by submitting that it involved an inference upon an inference which did not give rise to a defamatory imputation. They further submitted that Justice Bell had erred in permitting this matter to go to the jury. There was no appeal in respect of imputation (b).

In relation to imputations (a) and (c) the Court of Appeal (Handley, Beazley & Ipp JJA) held that 'business defamation' differed from defamation as it is generally understood. This is because it does not require proof that the defamatory imputation would tend to lower a person's reputation in the minds of right-thinking members of society. It requires only that that person's reputation in their trade, profession or office be injured. Their Honours found that Justice Bell had failed to adequately direct the jury that 'business defamation' was distinct from defamation in its generally understood sense.

Their Honours then held that an appellate court may enter a verdict where an imputation is plainly defamatory and no jury, properly directed, could have reasonably reached any other verdict. It was appropriate therefore for the Court to enter a verdict in favour of the Respondents in respect of imputations (a) and (c). This is because these imputations were clearly defamatory and

there was no question of community standards nor a suggestion of a compromise verdict.

With respect to imputation (d), Justices Beazley & Handley held that the question of whether an imputation involves an inference on an inference is a matter for determination by a judge and not by the jury. They then held that imputation (d) did not involve an inference upon an inference and this question should not have been left to the jury.

The grounds of appeal include:

- The Court of Appeal erred in holding, in reliance on section 108(3) of the *Supreme Court Act 1970* (NSW), that the Respondents were entitled as a matter of law to a verdict on imputations (a) and (c) after a finding by the Court that the jury's answers were unreasonable. The Court should have held that the party carrying the onus is not entitled to an order for a verdict in his or her favour, except in circumstances where there is no remaining factual controversy for the jury to determine, and the uncontroverted facts entitle that party to a verdict as a matter of law.
- The Court of Appeal erred in failing to hold that the question whether a party carrying the onus has discharged that onus, so as to make a contrary finding unreasonable, is a question of fact, not of law, and that section 108(3) had no application.