

IN THE SUPREME COURT OF TASMANIA
AT HOBART

No 312 of 2006

TONY HARRISON

Plaintiff

SUE NEALES

Firstnamed Defendant

GARRY BAILEY

Secondnamed Defendant

DAVIES BROTHERS PTY LTD
ACN 009 475 754

Thirdnamed Defendant

NOTICE OF APPEARANCE

Take notice that this appearance has been filed by or on behalf of Sue Neales, Garry Bailey and Davies Brothers Pty Ltd (ACN 009 475 754), the First, Second and Thirdnamed Defendants, whose address for service of documents is Butler McIntyre & Butler of 20 Murray Street, Hobart in Tasmania.

Dated 1st day of August 2006.**Butler McIntyre & Butler**

Per:

Solicitors for the First, Second and
Thirdnamed Defendants

Sealed day of August 2006.

To **Murdoch Clarke**
10 Victoria Street, Hobart
Solicitors for the Plaintiff

Filed on behalf of the First, Second and Thirdnamed Defendants

Butler McIntyre & Butler
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TONY HARRISON

Plaintiff

SUE NEALES

Firstnamed Defendant

GARRY BAILEY

Secondnamed Defendant

DAVIES BROTHERS PTY LTD
ACN 009 475 754

Thirdnamed Defendant

DEFENCE

1. In response to the Plaintiff's Statement of Claim dated the 26th July 2006 the Defendants say as follows: -

(1) Admitted;

(2) Admitted;

(3) Admitted;

(4) Admitted;

(5) Save that it is admitted that *The Mercury* is circulated throughout Tasmania, paragraph 5 is not admitted;

(6) Admitted;

(7) Admitted;

(8) Admitted;

(9) Admitted;

(10) (a) Not admitted;

(b) Not admitted;

(c) Not admitted;

(d) Not admitted;

(11) Denied.

2. The Defendants say further that at all material times:

(a) the Plaintiff was a director of, and the Managing Director of Corporate Communications (TAS) Pty Ltd (ACN 009 582 209) ("**the company**"); and

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- (b) authorised advertisements ("**the advertisements**") for an organisation known as "Tasmanians for a Better Future" ("**the organisation**") calling upon Tasmanian voters to back the return of a majority in the Assembly general election for Tasmania of the 18th day of March 2006 ("**the election**"); and
 - (c) the advertisements were authorised by the Plaintiff after the issue of writs by the Governor of Tasmania pursuant to section 63 of the *Electoral Act* 2004 for the holding of the election and prior to the election ("**the election period**"); and
 - (d) the Company was a member of the Public Relations Institute of Australia (ACN 066 451 732) ("**the Institute**").
3. The Defendants say further that if the words complained of as set out in paragraph 8 of the Claim ("**the words complained of**") contained the imputations alleged by the Plaintiff (which is denied) then the natural and ordinary meaning of the words complained of was, and was understood to be a reference to Plaintiff in his capacity as the Managing Director of the company.
4. The Defendants say further that if the words complained of were, and were understood to be of and concerning the Plaintiff other than in his capacity as the Managing Director of the company (which is denied) and are defamatory of the Plaintiff (which is denied) then the words complained of were substantially true on the 22nd day of March 2006 ("**the date of publication**").

PARTICULARS OF SUBSTANTIAL TRUTH

- (a) *At the date of publication the company was a member of the Institute.*
- (b) *During the election period and on or about the 6th day of March 2006, Senator Christine Milne, Senator for Tasmania in the Parliament of the Commonwealth of Australia, had lodged a formal complaint with the Institute pursuant to clause 5.1 of the Code of Ethics, Administration Procedure Manual ("**the Manual**") of the Institute complaining that the company and the Plaintiff had arranged and authorised for public broadcast and publication of, the advertisements for the organisation which urged Tasmanian voters in the election period to back a return of majority government in the election and that in doing so neither the Plaintiff or the company had identified the source of funding for the advertisements when requested to do so in breach of the Code of Ethics of the Institute ("**the Code**") and in particular, in breach of clause 9 of the Code.*
- (c) *The Plaintiff and the company declined to identify the source of funding for the advertisements after being requested to do so by the following persons representing the following newspapers on or about the following dates:*
 - (i) *The First Named Defendant representing The Mercury newspaper – 28th February 2006;*
 - (ii) *One Matthew Denholm representing the Australian newspaper – 3rd March 2006;*
 - (iii) *One Julie Macken representing the Australian Financial Review newspaper – 2nd March 2006; and*
 - (iv) *One Andrew Darby representing the Age newspaper and the Sydney Morning Herald newspaper – 15th March 2006.*

- (d) *The Code provides that members shall be prepared to identify the source of funding of any public communication they initiate or for which they act as a conduit.*
- (e) *Prior to the election, the Plaintiff had been asked to identify the source of funding for the advertisements as set out in these particulars and neither the Plaintiff nor the company complied with those requests.*

5. The Defendants say further that if the words complained of were, and were understood to be of and concerning the Plaintiff other than in his capacity as the Managing Director of the company (which is denied) then the words complained of formed part of a more substantial publication by the Defendants on the 22nd day of March 2006 ("**the article**") which contained imputations in addition to the words complained of ("**the contextual imputations**") and that if the Plaintiff was defamed in respect of the words complained of (which is denied) then the words complained of did not further harm the reputation of the Plaintiff because of the substantial truth of the contextual imputations.

PARTICULARS OF SUBSTANTIAL TRUTH OF THE CONTEXTUAL IMPUTATIONS

- (a) *The article contained the following additional words by way of the contextual imputations:*

"But Michael Kent, chairman of the Tasmanian Chamber of Commerce and Industry and former head of Woolworths in Tasmania, later identified himself as one of the group's backers.

Mr Harrison said yesterday he had a clear conscience over the campaign.

'I don't believe I have breached the code of ethics and I challenge anyone to say that I have,' he said.

'And ... the ads have all been run and the election is over.'

Earlier Mr Harrison admitted he had personally helped fund the advertising onslaught – dominated by slick 60-second and 30-second TV advertisements aired repeatedly on commercial stations – as well as co-ordinated the campaign."

- (b) *The contextual imputations were substantially true as at the date of publication in that they contained admissions by one Michael Kent and the Plaintiff regarding the advertisements and the organisation namely:*

- (i) *the said Michael Kent identified himself as one of the backers of the organisation and the advertisements after the Plaintiff had been asked to identify the source of the funding for the advertisements and both the Plaintiff and the company had failed to do so;*

the Plaintiff admitted that he had personally helped fund the advertisements after the Plaintiff had been asked to identify the source of the funding for the advertisements and after a time when both the Plaintiff and the company had failed to do so.

- (c) *The substantial truth of the contextual imputations was such as to reasonably lead to the conclusion that the company may have been in breach of clause 9 of the Code and that a complaint might be lodged with the Institute pursuant to clause 5.1 of the Manual.*
- (d) *The substantial truth of the contextual imputations was such as to harm the reputation of the Plaintiff in a particular manner for the reasons set out in these particulars and that the words complained of were not likely to harm the reputation of the Plaintiff in any further manner than the contextual imputations would have done.*

- (e) *The contextual imputations differed from the words complained of in that the former set out facts which demonstrated the company may have been in breach of clause 9 of the Code whilst the latter speculated as to the difficulties that may be experienced by the company if there had been that breach.*

6. The Defendants say further that if the words complained of were, and were understood to be of and concerning the Plaintiff other than in his capacity as the Managing Director of the company (which is denied) and are defamatory of the Plaintiff (which is denied) then the words complained of were published by the Defendants in the course of giving members of the public information on the subject of funding for advertisements that urged the voters of Tasmania to vote a particular way in the election which was information that the voters of Tasmania had an interest in knowing and that the publication of the words complained of was reasonable in the circumstances.

PARICULARS OF REASONABLENESS

- (a) Pursuant section 107 of the Electoral Act 2004 members of the Tasmanian public whose names appeared on the election roll for the election were entitled to vote at the election and pursuant to section 152 of the Electoral Act 2004 it was compulsory for every such person to vote at the election. Every such person therefore had a right and a duty to vote at the election.

- (b) A form of the advertisements published electronically on television during the election period was as follows:

(Scene – male actor walking into a kitchen)

Narrator: "This election is vitally important for Tasmania"

Male Actor: "I remember the bad old days of the 1990s before we had strong stable government."

(Scene – chained up wire and metal gates)

Male Actor: "Development was lost and investment dried up. It was difficult to get a job."

(Scene – a jet aeroplane taking off)

Male Actor: "Young people were leaving and families were packing up and moving to the mainland. We don't want that to happen again."

(Scene – an open air restaurant setting then the Tahune Airwalk and then a young male and female person holding hands with a young child on a beach)

Male Actor: "Recent years have been good for the State so let's ensure Tasmania's future stays bright."

(Scene – male actor standing in a kitchen)

Male Actor: "Vote for strong stable majority government."

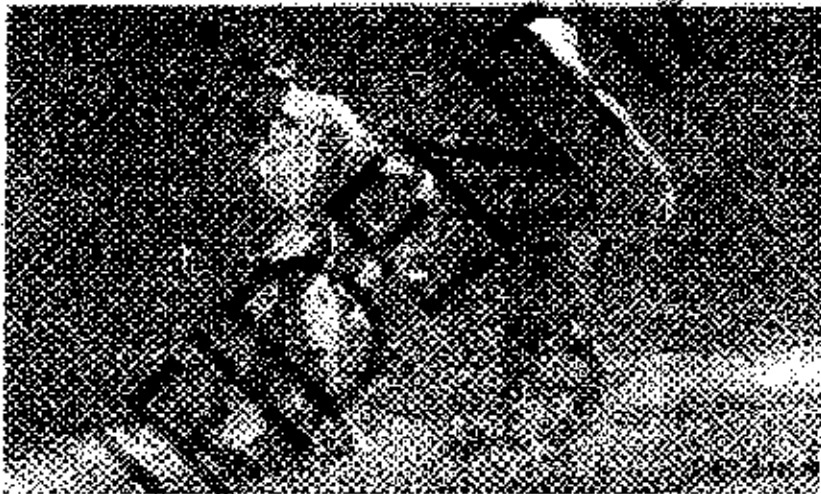
(Scene – showing the following written words – "Authorised by T. Harrison for Tasmanians for a Better Future, Hobart. Spoken by Graeme Stone, Ben Allen")

Narrator: "Authorised by T. Harrison for Tasmanians for a Better Future, Hobart."

- (c) A form of the advertisements in print form and which was published during the election period and in particular on the 10th day of March 2006 was as follows:

ADVERTISEMENT

This election is vitally important for Tasmania.



Ensure Tasmania's future stays bright.
On 18 March, vote for strong, stable majority government.

Tasmanians for a Better Future

reprinted with permission from the Tasmanian Seafood Industry Development Corporation, 10 November 2005

- (d) The advertisements did not disclose who the members of the organisation were.
- (e) The Plaintiff and the company had been requested to disclose the identities of the members of the organisation (as particularised under paragraph 4 of this Defence) although the Plaintiff and the company had refused to do so.
- (f) The company was a member of the Institute during the election period and at the time of the election.

- (g) At the time of the publication of the advertisements during the election period the Code contained clause 9 which provided that members shall be prepared to identify the source of funding of any public communication they initiate or for which they act as a conduit.
- (h) The words complained of sought to highlight to those members of the Tasmanian public who had exercised both their right and who had complied with their duty to vote in the election, all of the circumstances surrounding the publication of the advertisements.
- (i) The Plaintiff and the company became publicly involved in the outcome of the election.
- (j) Those members of the Tasmanian public who had both a right and a duty to vote in the election were entitled to know, and had an interest in knowing, the identities of those who formed the organisation and, in circumstances where the Plaintiff, who authorised the advertisements, would not identify those who formed the organisation, were entitled to know, and had an interest in knowing, of the existence of the Code which governed the company and how the Code related to the advertisements and the role of the company in the advertisements.
- (k) The words complained of were followed in the same article by the Plaintiff's side of the story and in particular the following:

"Mr Harrison said yesterday that he had a clear conscience over the campaign.

'I don't believe I have breached the code of ethics and I challenge anyone to say that I have,' he said.

'And ... the ads have all been run and the election is over.'"

7. The Defendants say further that if the words complained of were, and were understood to be of and concerning the Plaintiff other than in his capacity as the Managing Director of the company (which is denied) and are defamatory of the Plaintiff (which is denied) then the words complained of were published by the Defendants as the expression of opinion of the First and/or Second Named Defendants relating to a matter of public interest and based upon proper material.

PARTICULARS OF PUBLIC INTEREST

The Defendants repeat and rely upon the particulars set out under paragraph 6 of this Defence.

PARTICULARS OF PROPER MATERIAL

The Defendants repeat and rely upon the particulars set out under paragraphs 4 and 5 of this Defence.

9. The Defendants say further that if the words complained of were, and were understood to be of and concerning the Plaintiff other than in his capacity as the Managing Director of the company (which is denied) and are defamatory of the Plaintiff (which is denied) then the circumstances of the publication of the words complained of were such that the Plaintiff was unlikely to sustain any harm.

PARTICULARS OF CIRCUMSTANCES

- (a) The Plaintiff was the Managing Director of the Company during the election period.

- (b) *The Plaintiff authorised the advertisements.*
 - (c) *The Company was a member of the Institute during the election period and at the times of the publication of the advertisements.*
 - (d) *The Code provided at clause 9 provided that members shall be prepared to identify the source of funding of any public communication they initiate or for which they act as a conduit.*
 - (e) *The Plaintiff had been asked prior to the election to identify the source of the funding for the advertisements which the Plaintiff had declined to do.*
 - (f) *Clause 5.1 of the Manual entitled any person to make a complaint in respect of the activities of a member of the Institute.*
 - (g) *The reference in the words complained of to the publication of the advertisements landing the Plaintiff in hot water was understood to be a reference to the Plaintiff in his capacity as the Managing Director of the company and did no more than highlight the fact that the company had not complied with the requirements of clause 9 of the Code which is pleaded in this Defence as a matter which is substantially true.*
 - (i) *In those circumstances, the reference to the Plaintiff landing in hot water as a result of the publication of the advertisements was such that the Plaintiff was unlikely to sustain any harm beyond any harm suffered as a result of the publication of the words complained of which the Defendants have pleaded in this Defence as matters which are substantially true.*
10. The Defendants say further that if the words complained of were, and were understood to be of and concerning the Plaintiff other than in his capacity as the Managing Director of the company (which is denied) and are defamatory of the Plaintiff (which is denied) then the Second and Third Named Defendants also published the following words on or about the 20th day of June 2006 referring to the Plaintiff and the company:

"In the clear over state poll push

Leading Tasmanian media company Corporate Communications will not be investigated for a potential breach of its industry code of conduct during the March state election.

The Public Relations Institute of Australia claims chief executive Tony Harrison has 'no case to answer' after fronting the 'Tasmanians for a Better Future' political advertising campaign.

Greens senator Christine Milne lodged a complaint with the institute about the conduct of Mr Harrison and Corporate communications.

More than \$150,000 of advertising was placed by Corporate Communications during the election campaign on behalf of an unidentified group of Tasmanian businesspeople.

The glossy TV and press advertisements urged voter not to elect a minority government with the Greens holding the balance of power, advocating a Labor majority outcome as the only safe poll result for Tasmania.

Mr Harrison refused to identify any of the businessmen involved (although one, Michael Kent, later acknowledged his own contribution), and was listed as the authoriser of the campaign under political advertising rules."

AND the Defendants deny that the Plaintiff is entitled to the relief claimed or any relief at all.

Dated the 10th day of August 2006.

Butler McIntyre & Butler

Per: 

Solicitors for the First, Second and Thirdnamed Defendants

To: The Registrar
Supreme Court of Tasmania
DX 18 Hobart

And
To **Murdoch Clarke**
10 Victoria Street, Hobart
Solicitors for the Plaintiff

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