District Court

New South Wales

Case Name:	Raynor v Murray
Medium Neutral Citation:	[2019] NSWDC 189
Hearing Date(s):	6, 7 and 8 February 2019
Date of Orders:	17 May 2019
Decision Date:	17 May 2019
Jurisdiction:	Civil
Before:	Gibson DCJ
Decision:	(1) Judgment for the plaintiff for $120,000. (2) Liberty to apply in relation to interest and costs. (3) Exhibits retained until further order.
Catchwords:	TORT – defamation – email to residents of strata building – defences under ss 25, 31 and 33 Defamation Act 2005 (NSW) – defence of qualified privilege at common law – reply to attack – malice – damages – whether aggravated damages should be awarded – mitigation of damages – award of $120,000
Legislation Cited:	Defamation Act 2005 (NSW) ss 25, 31, 33, 34 and 35 Evidence Act 1995 (NSW) ss 48 and 79 Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Al Muderis v Duncan (No 3) [2017] NSWSC 726 Alexander v Clegg [2004] 3 NZLR 586 at 602 Assaf v Skalkos [2000] NSWSC 418 Attrill v Christie [2007] NSWSC 1386 Australian Broadcasting Corporation v McBride (2001) 53 NSWLR 430 Australian Broadcasting Corporation v Obeid [2006] NSWCA 231 Bashford v Information Australia (Newsletters) Pty Ltd

(2004) 218 CLR 366
Bass v TCN Channel Nine Pty Ltd [2003] NSWCA 118
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154
Blackwell v News Group Newspapers Ltd [2007] EWHC 3098
Bowden v KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig & Chapman [2019] NSWDC 98
Brooks v Fairfax Media Publications Pty Ltd (No 2) [2015] NSWSC 1331
Broome v Cassell & Co Ltd [1972] AC 1027
Burstein v Times Newspapers Ltd [2001] 1 WLR 579
Carolan v Fairfax Media Publications Pty Ltd (No 6) [2016] NSWSC 1091
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89
Channel Seven Sydney Pty Ltd v Mahommed (2010) 278 ALR 232
Clark v Ainsworth (1996) 40 NSWLR 463
Cole v Operative Plasterers Federation of Australia (NSW Branch) (1927) 28 SR (NSW) 62
Coxon v Wilson [2016] WASCA 48
Coyne v Citizen Finance Ltd (1991) 172 CLR 211
Cripps v Vakras [2015] VSC 193
Davis v Nationwide News Pty Ltd [2008] NSWSC 693
Eardley v Nine Network Australia Pty Ltd [2017] NSWSC 1374
Echo Publications Pty Ltd v Tucker [2007] NSWCA 73
Fairfax Digital Australia & New Zealand Pty Ltd v Kazal [2017] NSWCA 77
Feldman v Polaris Media Pty Ltd as trustee of The Polaris Media Trust trading as The Australian Jewish News (No 2) [2018] NSWSC 1035
Field v Local Sunday Newspapers (North) Ltd [2002] EWHC 336
Gacic v John Fairfax Publications Pty Ltd (2015) 89 NSWLR 538
Gayle v Fairfax Media Publications Pty Ltd (No 2); Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2) [2018] NSWSC 1838
Gordon v Amalgamated Television Services Pty Ltd [1980] 2 NSWLR 410
Gray v Motor Accident Commission (1998) 196 CLR 1

Gray v Scottish Society For The Prevention of Cruelty to Animals (1890) 17 IR 1185
Green v Schneller [2000] NSWSC 548
Groom v Crocker [1939] 1 KB 194
Haddon v Forsyth [2011] NSWSC 123
Harbour Radio Pty Ltd v Tingle [2001] NSWCA 194
Heytesbury Holdings Pty Ltd v City of Subiaco [1998] WASC 183, 9 WAR 440
Holt v TCN Channel Nine Pty Ltd (2014) 86 NSWLR 96
John Fairfax Publications Pty Ltd v Hitchcock (2007) 70 NSWLR 484
John Fairfax Publications Pty Ltd v Rivkin (2003) 201 ALR 77
Jones v Sutton (2003) 61 NSWLR 614
Gair v Greenwood [2017] NSWSC 1652
Goyan v Motyka [2008] NSWCA 28
Gross v Weston (2007) 69 NSWLR 279
Harbour Radio Pty Ltd v Ahmed (2015) 90 NSWLR 695
Hayson v Nationwide News Pty Limited [2019] FCA 81
Kingsfield Holdings Pty Ltd v Rutherford [2016] WASC 117
Loveday v Sun Newspapers Pty Ltd (1938) 59 CLR 503
McKenzie v Mergen Holdings Pty Ltd (1990) 20 NSWLR 42
Megna v Marshall [2010] NSWSC 686
Mengi v Hermitage [2012] EWHC 3445
Millane v Nationwide News Pty Ltd [2004] NSWSC 853
Morgan v Odhams Press Ltd [1971] 1 WLR 1239
Motyka v Gojan [2007] NSWSC 31
Neesham v 6PR Southern Cross Radio Pty Ltd & Ors [2006] WASC 266
Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346
O’Brien v Australian Broadcasting Corporation [2014] NSWSC [2016] NSWSC 1289
Otten v Schutt 15 Wis.2d 497, 113 N.W.2d 152 (1962)
Palmer v Belan [1999] NSWSC 187
Penton v Calwell (1945) 70 CLR 219
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460
Ridis v Strata Plan 10308 [2005] NSWCA 246
Rigby v Associated Newspapers Pty Ltd [1969] 1 NSWLR 729
Roberts v Bass (2002) 212 CLR 1

	Robinson v Brighton [2007] NSWSC 1125 Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327 Rush v Nationwide News Pty Ltd [2018] FCA 357 Rush v Nationwide News Pty Ltd (No 2) [2018] FCA 550 Sands v State of South Australia [2015] SASCFC 346 Sheales v The Age Co Ltd [2017] VSC 380 Singleton v Ffrench (1986) 5 NSWLR 425 Sleboda v Sleboda [2008] NSWCA 122 Skalkos v Assaf (2002) Aust Torts Reports 81-644 Sonier v Breau (1912) 41 N.B.R 177 Templar v Watt (No 3) [2016] NSWSC 1230 Todd v Swan Television and Radio Broadcasters Pty Ltd (2001) 25 WAR 284 Trad v Harbour Radio Pty Ltd [2009] NSWSC 750 Triggell v Pheeney (1951) 82 CLR 497 Turner v MGM Pictures Ltd [1950] 1 All ER 449 Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58 Watts v Times Newspapers Ltd [1997] QB 650 Wilson v Bauer Media Pty Ltd [2017] VSC 521 Wing v Fairfax Media Publications Pty Ltd (2017) 255 FCR 61 Wootton v Sievier [1913] 3 KB 499
Texts Cited:	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), Second Edition (formerly The Law of Defamation in Canada) (Thomson Reuters)
Category:	Principal judgment
Parties:	Plaintiff: Gary Raynor Defendant: Patricia Murray
Representation:	Counsel: Plaintiff: Mr R Potter / Mr A Munro Defendant: Ms S Chrysanthou / Mr B Dean Solicitors: Plaintiff: Goldsmiths Lawyers Defendant: Barclay Churchill Lawyers
File Number(s):	2017/261180

Publication Restriction: None

JUDGMENT

An overview of these proceedings

1 The plaintiff brings proceedings for defamation for publication of an email on 25 May 2017 by the defendant, the tenant of a unit in a residential block of flats in Manly ("Watermark" or "the Watermark building"), to a number of owners of the apartment building in which the plaintiff and defendant both resided.

2 The plaintiff was, and remains, the chair of the strata committee (generally called "the Executive Committee") relating to the Watermark building. This building was comprised of residential apartments and some office suites, most owner-occupied, but some tenanted. The defendant, the lessee of unit number 9, moved into the premises in July 2016.

3 Relevantly for the purposes of these proceedings, the Watermark's mailboxes were a series of standard-sized lockable numbered letter boxes (numbered 1 – 15, together with a separate box labelled "Body Corporate") outside the building and on the street (Exhibit A tab 7). There is a slit at the top of the box for letters and other documents of a similar size to be inserted.

4 The defendant left her mailbox unlocked most if not all of the time after she moved in. The plaintiff sent an email to the defendant on 31 August 2016 noting her mailbox was unlocked. Eight months later, on 10 April 2017, at a time when there were media reports about mail thefts in the area, he emailed her again about her mailbox being open. There is disputed evidence as to whether on 10 or 11 April 2017, following the plaintiff's second email, the defendant's partner had a conversation with the plaintiff concerning the reasons for this, but there is no dispute that the defendant never responded to either email.

5 On 20 April 2017, the mailboxes outside the Watermark building were broken into. The plaintiff circulated an email to all residents asking them to secure their mailboxes and attaching an article from the *Manly Daily* dated 20 December 2016 containing warnings to this effect. Superintendent Arthur Katsogiannis, from the fraud and cybercrime squad, was quoted in this article as saying that

while on the surface mail fraud might seem like a petty crime, local criminals, known as “boxers”, were selling documents to international crime syndicates for identity theft as well as keeping credit cards for their own use; residents were urged to secure their mailboxes and strata managers should consider secure placement and design of letterboxes as well as CCTV.

6 On 27 April 2017, the defendant replied to this email in derisive terms (“Wow! What’s your take on this?” – Exhibit A tab 10), questioning how her mailbox being left open could help a thief break into the Watermark building’s locked mailboxes. The plaintiff replied on 28 April 2017, setting out advice he said he had received from a locksmith.

7 The mailboxes outside the Watermark building were broken into for a second time on 2 May 2017. The plaintiff sent a second email warning residents and asking them to keep their mailboxes locked. According to emails between the plaintiff and other residents (Exhibit A tab 14), the defendant’s mailbox was locked at the time of this second break-in but on or about 3 May the mailbox was left open again. On 5 May 2017 the plaintiff emailed the defendant asking if she had left it open or it had been opened by someone else (Exhibit A tab 15). The defendant did not reply.

8 On 24 May 2017 the plaintiff sent a further email to the defendant, as well as a copy to the real estate agent managing the tenancy of the defendant’s unit, noting that once again the defendant had left her mailbox open “for the last few days” (Exhibit A tab16). He asserted this could be a contributing factor to the two mailbox thefts, asked her to keep her mailbox locked in future, and indicated that the defendant could incur financial liability if the boxes had to be rekeyed.

9 The defendant’s reply of 25 May 2017 (Exhibit A tab 17), which is the matter complained of, complained of being harassed by “many emails” from the plaintiff, of which “the latest topic” was the open letterbox, asked the plaintiff directly if he had opened the box himself as part of his “months of campaigning to have all residents comply with your demands”, derided the “Mission Impossible” scenario that her unlocked mailbox played any contributing role to the break-ins and complained the plaintiff had “never asked why we keep the

letterbox open". The email concluded with the complaint that the plaintiff's "consistent attempt to shame me publicly is cowardly" and that it was "offensive, harassing and menacing through the use of technology to menace me".

10 Although publication of the matter complained of in the form pleaded (namely the defendant's email of 25 May 2017 as a stand-alone document) had been admitted in the defence (T 7), the defendant claimed at the beginning of the trial that this email was published was in a different form to that which was pleaded and particularised. This was not the publication upon which Mr Potter opened (T 6), namely the email of 25 May 2017, but additional earlier emails which the defendant had "cut and pasted" at the end of the 25 May 2017 email. The problems arising from this late objection are set out at paragraphs [12] to [38] below.

11 The defences pleaded are justification pursuant to s 25 *Defamation Act 2005* (NSW) ("*Defamation Act*" or "the Act"), the defence of honest opinion (s 31 of the Act), qualified privilege at common law and triviality (s 33 of the Act). Capacity of the imputations to be conveyed is challenged. A Reply setting out particulars of malice in relation to the defence of qualified privilege at common law was agreed by the parties' representatives to apply to the issue of malice in relation to the defence of honest opinion, as well as the defence of qualified privilege at common law.

The matter complained of and the imputations pleaded

12 Any challenge to the form or extent of the matter complained of is invariably an issue resolved at interlocutory level: see the authorities set out in *Hayson v Nationwide News Pty Limited* [2019] FCA 81 at [9] ("*Hayson*"). Regrettably, this was not the case here.

13 The text of the matter complained of as set out in the statement of claim (and for which publication was admitted in the defence) is the defendant's email of 25 May 2017, the text of which is as follows:

> "[At the commencement of the matter complained of there is a list of email addresses which I do not propose to set out for privacy reasons. However, these persons are:
>
> 1. The plaintiff

2. A woman described as “Unit 1”;
3. A woman described as “Owner Unit 2”;
4. A man and a woman described as “Unit 4”;
5. A woman described as “Unit 5”;
6. A man described as “Unit 6”;
7. A woman separately described as “Unit 6”;
8. A woman described as “Owner Unit 7”;
9. A man and woman described as “Unit 8”;
10. A woman described as “Unit 10”;;
11. A man described as “Unit 11”;
12. A man described as “Unit 12”;
13. A man whose Unit holding is not identified;
14. A woman described as “Unit 15”;
15. Another woman who is described as “Unit 15”;
16. A man who is described as “Office Suite”;
17. A “cc” to Mr Jason Hitchman, who is described as “Agent Unit 9”.

Subject: Re: Watermark Unit 9 mailbox

Gary,

You have now sent many emails to me in our time here at Watermark. Your latest topic “mailboxes”.

Your assertion/s that a single unlocked mailbox has allowed a criminal milieu to stalk the watermark building, and spend the time necessary to copy barrels/locks in order to then construct a master key is farfetched.

Each mailbox has an individual key allowing access. I have noticed on several occasions over the last year (because of your fixation on this issue) that other residents mailboxes have also been left unlocked from time to time. Did you open the front panel Garry? It has not gone unnoticed that the panel to all the mailboxes was opened only following your months of campaigning to have all residents comply with your demands!

Residents make an individual decision on whether they lock their own mailbox, which is why we each have a key. We have risk assessed our requirements and decided that, for the most part, we are comfortable with any residual risk to our mail items.

You also may have noticed that you have had some packages personally delivered to your front door? At least on two occasions, I have done so, as a courtesy to you as your packages had been left for you at the entrance outside of the building. I do this for all residents when the opportunity arises and our experience with the other residents has been nothing but delightful.

The foyer of our Watermark building is well lit and has reasonable surveillance from street level and inside the foyer. This, in addition to residents frequent

movement in and out of the building at different times of the day and night, makes it somewhat risky for a thief (?) to spend the time you are suggesting they would need to copy locks in order to then obtain master keys, if that is indeed possible in the manner you are prosecuting.

So, unless you know something we dont [sic] know about the spoils/secrets being delivered to residents mailboxes, I am doubtful that thieves would execute a Mission Impossible scenario on the Watermark building. Existing types of mailbox locks are not designed to have the same security features as the key to our respective front doors and, indeed, the security key to the entrance foyer.

The nature of the keys used to open mailboxes such as ours is that, it is more likely that thieves (if that is indeed what has happened) have already got their hands on a master key for the mailboxes. This is what used to happen in years gone by.

These mailbox locks are not designed to make access like a fortress, but more of a convenience for the owner of the mailbox to have easy access and lock (if they so wish). You will also find your key could probably open other mailboxes. Mailbox locks are a deterrent and not fortress security.

May I suggest, given your email hobby, that you may want to elect to have things such as banking statements and the like provided to you in e-Statement format to avoid physical mail being delivered to you.

Now, to put, the risk/reward scenario of stealing from Watermark mailboxes in perspective I offer you as follows;

1. Theft from mailboxes is opportunistic and thieves weigh up their likelihood of being seen or caught. They may go past a place and see a mailbox unlocked and have a look and take something if they decide.

2. It is more likely, a thief will roam the streets and steal from unlocked cars and houses where they can immediately take and convert something into cash.

3. There are faster ways to open the front panel of our mailbox than the manner you suggest (eg. a criminal conspiracy going to great efforts to obtain a master key); if you believe that someone is stalking Watermark and have evidence of this, then please share this information with us.

Gary, we are happy friendly people here in unit 9. My partner has 35 years of Police and forensic expertise, but rather than a simple knock on my door for a chat in person, or speak to me face to face when we have exchanged pleasantries in the foyer, or while I'm putting the buildings bins out on the street, you have consistently chosen the public email option; copy in all residents and/or my real agent, sundry alleging that responsibility for the threat and safety to our home at Watermark is our doing and threatening to hold us financially responsible. You have never asked why we keep the mailbox open?

To avoid further harassment, I've not replied to your provoking mailbox emails. However your consistent attempt to shame me publicly is cowardly. It is also offensive, harassing and menacing through the use of technology to threaten me.

Please stop!

Trish Murray"

14 On the first day of the hearing, Ms Chrysanthou stated that the defendant had "cut and pasted" other emails to this chain, and that these other emails needed to be treated as part of the matter complained of. I was not provided with a copy of the alternatively propounded email publication, but fortunately the plaintiff's tender bundle (Exhibit A, tab 17), as well as Mr Gauld's affidavit (Exhibit B), both set these emails out.

15 The text of each of these emails, as well as each of the omissions arising from the defendant's "cut and paste" process, need to be set out in full:

(a) The first "cut and paste" addition is the email from the plaintiff dated 24 May 2017 to which the defendant is replying (although with the recipient list cut off). As Mr Potter noted in his submissions, the significance of the recipient address line being cut off is that this means there is no indication to the recipients as to whether the plaintiff sent the email only to the defendant, which is relevant to both the imputations conveyed and to the defences. The text of this email is as follows:

"Hi Trish

As your mailbox has again been open for the last few days it is obvious I have not been able to convince you of the seriousness of this issue.

As I pointed out in my emails on 27/4/17 and 28/4/17 it is probable that your insistence in leaving the mailbox open during many months is the likely cause of the so called "boxers" being able to obtain a skeleton key to our corporate mailboxes.

The consequences of this breach of the security of our mailboxes have been serious – and may get more serious.

In addition to the fact that residents have been inconvenienced and – in some cases – obliged to go to the expense of obtaining Postal Boxes – it is still possible that the Owners Corporation may have to have all the boxes rekeyed. This would be a serious expense and inconvenience to all concerned.

If this becomes necessary – or individual residents suffer losses or expenses as a consequence of the breach – I believe the Committee would – and should – seek compensation from the owner of Lot 9. (By copy, I am notifying the agent of Lot 9 that *this is a real possibility*.

While it is now too late to overcome the fact that at least one group of thieves have access to the boxes, I must insist that you *lock your mailbox – and keep it locked in future* – to avoid further aggravating the problem."

(b) The second is the text of the plaintiff's email to the defendant (again, with the recipient list cut off), under the heading "Email 5/5/17". The text is as follows:

"Hi Trish

Your mailbox has been open for the last two days.

Was it left open or been opened by someone else?

Rgds

Gary."

(c) The next "cut and paste" is the text of the plaintiff's email to the defendant (again, with the recipient list cut off), under the heading "Email 27/4/17". The text is as follows:

"Hi Trish

I presume you are away?

Would you please arrange to have your mailbox closed and kept locked at all times. Exactly what I warned about has now occurred and your open box may have contributed to the ease with which they apparently obtained a master key to open the other boxes.

Thanks

Gary"

(d) The next is the text of the plaintiff's email to the defendant dated 10 April 2017 (again, with the recipient list cut off), under the heading "Email 10/4/17". The text is as follows:

"Hi Trish

Residents have again expressed their concern over your mailbox being left open all the time.

There have been a number of incidents in Manly of thieves searched thru [sic] mailboxes looking for mail and identity papers and having bokes [sic: should be 'boxes'] obviously open can only encourage them.

Would you mind closing the box.

Thanks

Gary"

(e) The next is the text of the plaintiff's email to the defendant dated 31 August 2016 (again, with the recipient list cut off), under the heading "Email 31/8/16". The text is as follows:

"Hi Trish

I notice your mailbox has been left unlocked for quite a while?

Regards

Gary Raynor

[address]

(f) In addition, after the email reproduced behind Exhibit A tab 17, the words "Regards Gary Raynor" and the plaintiff's address appear, after the Gary Raynor sign-off to the final email, a further 3 times, in different fonts. These four addresses for the plaintiff

therefore also form part of the matter complained of, in that these addresses, suggestive of other emails, may contribute towards the defamatory meaning and/or issues relevant to the defences.

16 Ms Chrysanthou challenged the admissibility (s 48 *Evidence Act 1995* (NSW)) of the matter complained of in any form other than that which she propounded was the full form, namely with all the emails (or part thereof) attached.

The imputations pleaded

17 The imputations pleaded as arising from the matter complained of (in its pleaded form, namely the 25 May 2017 email only) are as follows:

(a) The plaintiff unreasonably harassed the defendant by consistently threatening her by email (lines 73-74 and the matter as a whole).

(b) The plaintiff acted menacingly towards the defendant by consistently threatening her by email (lines 73-74 and the matter as a whole).

(c) The plaintiff is a malicious person who sent threatening emails to the defendant and copied in other residents of the Watermark building for the express purpose of publicly humiliating the defendant (Lines 72-73 and the matter as a whole).

(d) The plaintiff is a small minded busybody who wastes the time of fellow residents on petty items concerning the running of the Watermark building (The matter as a whole).

18 No challenge to the form or capacity of these imputations was made in the course of case management in the Defamation List. Nor was there any application in relation to the striking in of the additional material which the defendant now claims should be included.

Capacity issues in relation to both forms of the matter complained of

19 In *Templar v Watt (No 3)* [2016] NSWSC 1230 at [9], an authority cited by both parties, McCallum J commences her summary of the law in relation to capacity by noting that, in those proceedings, the principles to be applied in determining defamatory meaning were “well-established” and “not in dispute”. In general terms, the relevant principles for determination of capacity of the imputations at the trial are set out in *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at [5]-[6] and *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [26]. The relevant standard of “the ordinary reasonable reader” includes recognition that such a reader may draw inferences, particularly where the

matter complained of is of a sensational nature (as is the case here), and that such a reader may engage in a certain degree of "loose thinking" (*Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245).

20 The nature of the defendant's challenge to the capacity of the imputations pleaded in these proceedings is a familiar one. In *Templar v Watt (No 3)* (in which Ms Chrysanthou also appeared for the defendant), the overarching submission was that the imputations were "pitched too high", ordinary reasonable reader would understand the email as merely an expression of concern warranting investigation rather than as definitive imputation of discreditable conduct, as captured in the plaintiff's imputations. Ms Chrysanthou makes the same submission in this case, as she notes at paragraph 41 of her submissions.

21 However, Ms Chrysanthou submitted that her argument relies, at least in part, upon my accepting her reliance upon the additional earlier emails, which she states the plaintiff attached to the matter complained of (see paragraph 46 of her written submissions).

22 Late applications to amend should generally be viewed with caution, and this I is all the more the case where the amendment relates to the form of the matter complained of. Ms Chrysanthou's explanation was that she only became aware of the actual form of the matter complained of when she received a copy of the court book where the full text of the matter complained of was set out (behind Tab 17 of Exhibit A) (T 16). Since her client sent the matter complained of, that is a surprising claim.

23 I asked Ms Chrysanthou if the explanation could be that this was the latest in a chain of emails, which would explain how the earlier emails were attached. (I note that even if that had been the case, this might raise complex issues as to publication because the question of whether the ordinary reasonable reader only reads the latest email or all the previous one is not a question on which there is any authority).

24 The following exchange then occurred:

> "CHRYSANTHOU: No, this is not a chain, your Honour. We say the matter complained of is the document that is marked tab 17A that is six pages, that's

> the matter complained of. It's not a chain of emails. This is my client forwarding as part of her email to the recipients what the plaintiff has sent to her. What my learned friend wants to say the matter complained of is just the two pages and hide the rest of the email, "Quoted text hidden".
>
> HER HONOUR: That's what I mean. What it is, is he's suing on your client's email. He's not suing on this as being a reply to—
>
> POTTER: Yes.
>
> HER HONOUR: If you want to say that this is not the matter complained of—
>
> CHRYSANTHOU: It's not, your Honour. He's cut it in half. He's hidden half the document.
>
> POTTER: That's not correct.
>
> CHRYSANTHOU: He's not entitled to delete half the email.
>
> POTTER: That's not correct." (T 16)

25 Mr Potter then explained that the document sued upon was not only admitted to be published in the defence but was also the document as discovered by the defendant:

> "POTTER: Your Honour, p 33 and p 34 was the document discovered.
>
> HER HONOUR: Page 33 and p 34 is?
>
> POTTER: The bundle behind tab 17. Does your Honour have that?
>
> HER HONOUR: I've got that.
>
> POTTER: It's bright red at the top, "Gmail".
>
> HER HONOUR: Page 17, I've got, "Unit 9 mailbox Gmail".
>
> POTTER: Yes.
>
> HER HONOUR: Yes. That's the matter complained of.
>
> POTTER: This is a document that's been discovered from the defendant. It was the defendant who redacted the text in a document discovered and we can establish that by just looking at the BCC column. This is the defendant's own document which she's BCC'd in her partner. That wouldn't appear in any other, in our documents." (T 17)

26 I pause to note that this particular version of the matter complained of discovered by the defendant (also contained behind Tab 17 of Exhibit A) does contain, in the "Bcc" note, the email address pcurby@gmail.com, which is the email address for the defendant's partner, Mr Curby. However, the defendant emphatically denied sending any copy of this email to anyone by blind copy, despite discovering this document in this form (T 48), which merely adds to the confusion.

27 Which document was sent? The best evidence of the form in which the matter complained of was sent is, as Mr Potter noted at the time, the form in which it appears in the affidavit of Mr Gauld affirmed on 25 January 2019, but previously served, as I understand it, in unsworn form. The email which Mr Gauld received and replied to is the email with the cut and paste attachments (Exhibit B). That is the document which the defendant sent.

28 However, that is not the answer to the problem before me. Publication issues in electronic publications are not always clear-cut, parties are generally bound by the admissions in their pleadings, and there is the additional problem of the defendant's legal representatives only belatedly realising this problem at the trial.

29 Ms Chrysanthou said that the defendant did not know that the matter complained of was only the email text without the cut and paste attachments, and neither did the defendant's legal advisers, to which Mr Potter replied:

> "POTTER: Well, how could they not know, because their client sent the email.
>
> CHRYSANTHOU: My client doesn't know what's relevant and what's not relevant. I'm the one that determines what's relevant and what's not relevant, and I never thought to ask until I saw this tender bundle that a plaintiff would hide half an email. I mean, my friend's position is pretty unbelievable, how can the Court possibly proceed on half a document?" (T 20)

30 I have set out these submissions partly to demonstrate the difficulties I now have in determining capacity issues (as well as liability issues) and partly to illustrate the care that needs to be taken in relation to electronically-based publications, whether these are emails, website publications, social media, text messages and the like. This is not a new phenomenon; the same problems have occurred in past decades in relation to statements made on television (*Gordon v Amalgamated Television Services Pty Ltd* [1980] 2 NSWLR 410 at 413 – 5), radio (*Australian Broadcasting Corporation v Obeid* [2006] NSWCA 231 at [2]), where more than one publication about a plaintiff appears in the same newspaper (*Hayson* at [9]), or where a covering letter attaching documents does not include the attached documents (*Robinson v Brighton* [2007] NSWSC 1125).

31 Not only should care be taken to ensure the parameters of the publication are clearly identified (*Neesham v 6PR Southern Cross Radio Pty Ltd & Ors* [2006]

WASC 266 at [14]), but appropriate steps should be taken to bring applications in the Defamation List when it appears that problems arise.

32 In the present case, there has clearly been a misunderstanding, most probably due to lack of understanding of technology by at least some of the defendant's legal representatives. However, the correct course to take was to make a formal application for the striking in of the material, which requires satisfaction of the two-step test set out by Tobias JA in *Australian Broadcasting Corporation v Obeid* at [69] and to provide the court with a copy of the matter complained of in its asserted full form at the earliest possible opportunity.

33 Neither of these steps has been taken. It has been left to myself, as the trial judge, not only to decide the issue without a formal application or reference to the relevant authorities, but also to cobble together the matter complained of as put forward by the defendant, by cutting and pasting those portions of the previous emails which are claimed to have been added to it.

34 The relevant principles of law for the striking in of material are set out at some length in *Hayson* at [9]. In *Hayson*, applications were brought to strike in a fourth newspaper publication, which the defendants argued should be read together with the other three sued upon, including a similar application in relation to material accessible by a hyperlink (hyperlinks are another problem area in relation to the parameters of publication). That application was unsuccessful. One of the reasons for this was the lateness of the application, although it was made at an interlocutory level and not belatedly put forward at the hearing.

35 There may well be an argument that the ordinary reasonable reader, reading an email signed off as "Please Stop!" by a person leaving a space for a signature, naming themselves as "Trish Murray" and then leaving a space of about nine lines of space before the attachments. In addition, the defendant does not refer to any attachments anywhere in her email, and their inclusion at the end is unexplained. It may be that in those circumstances the question is whether, like a hyperlink, the ordinary reasonable reader was encouraged to keep reading, or whether, like an internet publication, actual evidence of a reader having gone on to read the rest of the publication is required to be

proved. These arguments, coupled with the lateness of the application, would have told heavily against the defendant, as would any application to set aside the admission of publication of the matter complained of in the form pleaded.

36 However, none of these arguments or issues were raised before me. Mr Potter conceded, in relation to the defences, that it was appropriate to have regard to the defendant's email of 25 May 2017 in context, and argued at best only faintly in support of his assertion that the form of the matter complained of was that which was pleaded to by the plaintiff and admitted to by the defendant. No resolution of this issue was sought before the hearing commenced and the hearing proceeded on the basis that it would be something I would have to rule on in my judgment.

37 The parties to these proceedings have limited finances. It is in the interests of both parties that there be finality to this litigation rather than the raising of difficult issues of law by reason of the oversights of both parties. In those circumstances, I have determined to treat the matter complained of in the form in which it has been argued for by the defendant rather than as set out in the pleadings. The decisive factor is that the form of the email as attached to Mr Gauld's affidavit clearly includes the additions.

38 However, in the event that I have erred, I have made alternative findings on all issues in relation to the matter complained of as pleaded in the statement of claim and as admitted in the defence.

Submissions and findings in relation to the imputations

39 Having noted the problems set out above, I set out the submissions and findings in relation to each of the imputations.

40 Both counsel have set out the relevant principles of law in their submissions which are, as McCallum J noted in *Templar v Britton (No 3)* at [9], both well-established and not in dispute, and I have applied those principles to the determination of these issues.

Imputation (a) – The plaintiff unreasonably harassed the defendant by consistently threatening her by email.

41 Ms Chrysanthou submits that there is no suggestion that the plaintiff was "consistently" or repeatedly threatening the defendant by email; the allegation

is that the emails were persistent, not consistent (written submissions, paragraphs 43 – 44).

42 The matter complained of refers, in line 68 - 70, to the plaintiff "consistently choosing the public email option" of sending his "threatening" requests and, at line 73, to the plaintiff's "consistent attempt to shame me publicly" which is also "offensive, harassing and menacing". This conduct is persistent in the form of being repeated conduct, namely repeatedly using the public email option in order to threaten and menace her, in circumstances that are unreasonable (in that it is offensive, harassing and menacing to "threaten" (line 74) her in this way). Lines 68 – 74 clearly convey this imputation, which is defamatory of the plaintiff.

43 Ms Chrysanthou's additional argument is that the emails themselves form part of the matter complained of and it is clear that there is only one threat, in that only the email of 24 May 2017 contains a threat (written submissions, paragraph 46). Therefore, Ms Chrysanthou argues, no reader would understand that there are "consistent threats".

44 The opening sentence of the matter complained of complains that the plaintiff has sent the defendant "many emails" and that "letterboxes" are his "latest topic". It goes on to refer to the plaintiff as having a "fixation" about this issue which includes "months of campaigning" and asks him if this fixation has led him to open the mailboxes himself, the clear inference being that his obsession has led him to open residents' mailboxes and stage not one but two break-ins.

45 The ordinary reasonable reader, reading such a claim and seeing a series of emails attached (as well as four addresses at the end in confusing circumstances that hint at more emails), is going to see these as only part (not the whole) of the plaintiff's "months of campaigning" on this issue in the context of sending the defendant "many emails" of which this is only his "latest topic". The additional material, far from assisting the defendant, makes things worse. The deletion of the recipient address line from all the prior email, in an email which replies to an email purportedly sent by the plaintiff using the public option, creates the illusion that some or all of these prior emails were also sent to more persons than just the defendant.

46 As to whether these emails constituted unreasonable harassment, Mr Potter also drew to my attention the contextual background known to the recipients, namely that the defendant is a relatively young woman who is the subject of a "fixation" by a much older man who has spent "months of campaigning" while "threatening her". However, it is not necessary for me to descend to this level of particularity in order to determine the capacity of this imputation. The matter complained of states openly that this conduct is harassing and ends with the unambiguous request "Please stop!"

47 Imputation (a) is clearly conveyed and is defamatory of the plaintiff.

48 I note, as an alternative finding, that if the matter complained of were restricted in terms to the email of 25 May 2017, the same portions the 25 May 2017 email as set out above would still convey the imputation in question.

Imputation (b) – The plaintiff acted menacingly towards the defendant by consistently threatening her by email.

49 Ms Chrysanthou again submits that there is no suggestion of "consistent" or repeated threats, and that the plaintiff's emails "speak for themselves", although without referring to bane and antidote principles.

50 This imputation differs in substance from imputation (a) in that it relates to "menacing" conduct by the plaintiff. This conduct is submitted to be more serious in that it has dark undertones of menacing behaviour towards a comparatively young woman by a much older man.

51 The depiction of the plaintiff as having a "fixation" with the defendant and spending "months of campaigning" in circumstances where she complains his conduct is "menacing" would be vivid and disturbing to the ordinary reasonable reader. The deletion of the recipient addresses and inclusion of what appear to be some of those emails (noting again the curious four email addresses for the plaintiff at the end) is not antidote to the bane; it merely adds to the sting.

52 Imputation (b) is clearly conveyed and is defamatory of the plaintiff.

53 I note, as an alternative finding, that if the matter complained of were restricted in terms to the email of 25 May 2017, the same portions of that email would still convey the imputation in question.

Imputation (c) – The plaintiff is a malicious person who sent threatening emails to the defendant and copied in other residents of the Watermark building for the express purpose of publicly humiliating the defendant.

54 Ms Chrysanthou starts her submissions in relation to this imputation (paragraph 49) by submitting that this imputation is "confusing" because of the multiple acts said to amount to malice. If that is an attack on the form of the imputation (presumably on the basis of being a rolled-up plea), it should be argued as such. I formally note that I am satisfied that the imputation does not set out multiple acts; what is described is a person on a campaign of publicly humiliating the defendant by sending threatening emails to her, which emails are copied to all the other residents.

55 Ms Chrysanthou submits that "idiocy" rather than malice is conveyed. Given the seriousness of the conduct described – months of campaigning including many emails on many topics, followed by two faked break-ins and "offensive, harassing and menacing" conduct, all of which is expressly portrayed as deliberate – this is not idiocy, but conduct which the ordinary reasonable reader would view as malicious, the more so since the defendant has spent months enduring it.

56 Nor do the attached emails prevent the forming of such a view by the ordinary reasonable reader or outweigh on the bane of conduct so vividly and repeatedly described as to convey an imputation of malicious conduct by a thwarted man against a woman resident.

57 The additional emails attached to the 25 May email merely underline this. The removal of the addressees' email addresses infers that these emails could have been sent to anybody or everybody. The inclusion of the four addresses at the end for the plaintiff hints at other emails being sent as well.

58 This imputation is clearly capable of being conveyed and is defamatory of the plaintiff.

59 I note, as an alternative finding, that if the matter complained of were restricted in terms to the email of 25 May 2017, the same portions of that email as set out above would still convey the imputation in question.

Imputation (d) – The plaintiff is a small minded busybody who wastes the time of fellow residents on petty items concerning the running of the Watermark building.

60 Ms Chrysanthou submits that there is no suggestion that the plaintiff is either small-minded or a busybody, and merely suggests that his overreaction to mailboxes is misguided (written submissions, paragraphs 53 – 54). She does not refer to the additional emails in these submissions.

61 The sneering tenor of this email portrays the plaintiff as a pathetic figure with fixations, requiring careful explanations of such simple things as how to get bank statements by email instead of embarking on "Mission Impossible" style fantasies about thieves attacking the Watermark building. A picture is painted of everyone else in the building being "delightful" while he is, by inference, harassing not only the defendant but also the other residents by copying them in on emails about something as trivial as mailbox break-ins.

62 This imputation is clearly capable of being conveyed and is defamatory of the plaintiff.

63 I note, as an alternative finding, that if the matter complained of were restricted in terms to the email of 25 May 2017, the same portions of that email would still convey the imputation in question.

Conclusions concerning the imputations

64 To summarise, in relation to the alternative form of the matter complained of, in relation to each imputation, the inclusion of the added material in the emails makes things worse for the plaintiff, because it paints a stronger picture of the plaintiff's conduct. However, the matter complained of in its pleaded and defended form is also capable of giving rise to each of the four imputations.

The evidence: the witnesses

65 The plaintiff gave evidence and was cross-examined and his daughter gave evidence in relation to hurt to feelings.

66 Three affidavits were tendered on his behalf by three of the Watermark residents, namely:

(a) Affidavit of Mr Ron Gauld (Exhibit B);

(b) Affidavit of Bronwyn Tuckerman (Exhibit C); and

(c) Affidavit of Wendy Gelhard (Exhibit D).

67 These witnesses, two of whom were residents of the Watermark building and one of whom had family living there, were not required for cross-examination. The plaintiff tendered emails from other residents thanking them for their "kind words" (Exhibit A, Tab 18) of support following the sending of the matter complained of. Although most of their evidence went to hurt to feelings, the emails attached to these affidavits, as well as other emails tendered on behalf of the plaintiff in relation to exchanges with six members of the executive committee (persons other than those named above) paint a vivid picture of concern by the residents about the two mailbox break-ins, discussion of steps that the residents were taking to check their boxes and notify each other and debate about appropriate measures to prevent further break-ins, including the plaintiff obtaining advice from Barrenjoey Locksmiths. They also refer to the ongoing issue of the defendant leaving her mailbox unlocked. These emails included plans for other executive committee members to keep an eye on these issues while the plaintiff was away on holidays. It is clear that the other owners were sympathetic to the plaintiff's difficulties.

68 The other residents were also supportive of the plaintiff's position in relation to locking the mailboxes. Only the representatives of the landlord for the defendant's unit appear to have expressed any resistance to the plaintiff's requests, and that resistance appears to be confined to resisting any financial liability for rekeying the box and whether it was necessary to make amendments to the Owners Corporation rules to require mailboxes to be locked, with fines for failure to comply. Their correspondence indicated their appreciation of the plaintiff's general performance of his duties concerning the management of the building by the Owners Corporation.

69 The defendant and her partner, Mr Curby, gave evidence and were cross-examined. In the course of his evidence Mr Curby, who was a police officer until 1996 and since then has held an unidentified position in the security industry, volunteered some evidence of an expert nature in relation to the cause of mailbox break-ins. That evidence was neither provided in accordance with the relevant provisions of s 79 *Evidence Act 1995* (NSW) nor particularised, and I have accepted Mr Potter's objections to its use. Similarly,

statements were made in the course of the hearing about statutory requirements for Owners Corporations, although regrettably without any reference to the relevant provisions of the legislation, and I have treated such submissions with caution.

70 Much of the relevant evidence consisted of the emails which were exchanged, including the emails omitted by the defendant from the "cut and paste" emails attached to the matter complained of. Exchanges of emails after the matter complained of, and the circumstances in which the owners corporation commenced proceedings in the NCAT to require the defendant to lock her mailbox, would be relevant to the defence of justification, if they had been particularised (which they were not); however, this did not stop the defendant putting such submissions. These later emails are also relevant to qualified privilege at common law, malice and damages.

The omitted emails

71 The emails the defendant attached to the defendant's email to the plaintiff of 25 May 2017 email do not tell the full story, so it is necessary to set out the emails that have been omitted in order to put those attached into context.

72 The plaintiff, who told the court he conducted as much as possible of his activities for the Committee by email, sent the defendant a standard "welcome" email on her arrival, including information about the building. The defendant makes much of the fact that that email did not contain any information about obligations to lock mailboxes.

73 It is not in dispute that the defendant's mailbox (for unit 9) was left unlocked from the time she moved in, namely July 2016. Nor is it in dispute that the defendant never answered the plaintiff's email on 31 August 2016 (the one-liner asking "I noticed your mailbox has been left unlocked for quite a while?") or to the follow-up email of 10 April 2017, the text of both of which emails were attached to the matter complained of.

74 During this period, the plaintiff did send an email to the defendant which was critical of her conduct. Apart from the "welcome" email sent in July 2016, this is the only email tendered by either party in relation to any claims that the plaintiff sent "many" emails using the "public option".

75 The email in question was sent on 13 December 2016 (Exhibit A, Tab 3). While this email was not sent to the other residents, it is likely that they had some input into the situation, as the email reports their complaints about the defendant. (I also note that this was sent to the defendant's real estate agent, a step the defendant objected to when this occurred during the letterbox dispute.) The text sets out that residents had complained to the plaintiff and the strata managers (and that two complaints had been made from occupants of adjoining apartment blocks to police) about a noisy late-night party in the defendant's flat and the adjoining lobby. The defendant was asked to give her assurance that this would not happen again.

76 The defendant replied saying she was sorry, but adding that "not one neighbour knocked on our door, nor rang our buzzer and not once did the police attend or contact us at all", followed by a request to forward her email on to the complainers (Exhibit A, Tab 4).

77 The "welcome" email and the "noisy party" email are the only evidence before me of the plaintiff sending "many emails" to the defendant, copied to other persons, of which mailboxes is only "the latest topic". There was no cross-examination of the plaintiff to the effect that either of these was sent to inappropriate parties, or harassing or menacing in any way, or threatened the defendant, or that his sending it was the conduct of a small-minded busybody, or even that these were some of many.

78 At one point in her evidence the defendant volunteered the statement that she had received "over 31 emails" from the plaintiff concerning Watermark building matters (T 169). The plaintiff was not cross-examined about the nature or number of these emails, nor were any of them tendered.

79 During the Christmas 2016-2017, period there were media reports that mailbox break-ins by organised crime syndicates (known to the police as "boxers") were occurring. Some time during this period the plaintiff read a 20 December 2016 article by John Morcomb of the *Manly Daily* (although it was published on the Telegraph website). It was headed "Manly: Stealing mail from mailboxes for identity theft and for Bankcards".

80 The text of this newspaper report is as follows:

> "Police are urging residents to secure their letterboxes after a spate of mail thefts in Manly and Dee Why in recent weeks.
>
> Thieves have targeted credit cards and information that could be used for stealing identities in the thefts between November 13 and December 15.
>
> In early November, thieves his Narrabeen and Queenscliff letterboxes.
>
> Fraud and cybercrime squad Superintendent Arthur Katsogiannis said at the time, on the surface, mail theft might seem like a petty crime.
>
> However, local criminals, known as "boxers", were selling documents to international syndicates while keeping bank cards for their own use.
>
> "Information from documents such as bank statements and utility bills in then used by the overseas criminals to apply for large loans in the names of their unwitting victims, thereby defrauding financial institutions," Supt Katsogiannis said.
>
> "the low-level thieves tend to keep any credit cards they find to fraudulently purchase goods for later resale, while the identity documents are provided to the international identity theft operations for the larger frauds."
>
> Northern Beaches crime manager Inspector Justin Hadley said the recent theft of mail at Manly and Dee Why fell into the same pattern – the thieves were after bank cards and information that could be used to steal the identity of the victims.
>
> It was yet to be determined where the information for identity theft was ending up, Insp Hadley said.
>
> He urged residents to use padlocks on their letterboxes or install improved locks and, where possible, to clear mail regularly or to use post office boxes.
>
> Insp Hadley said residents should also redirect mail or have their friends collect it if they go away on holidays, while strata managers should consider the secure placement and design of letter boxes, and the installation of quality CCTV systems to catch and deter mail thieves.
>
> Have you been the victim of fraud? Email editor@manlydaily.com.au"

81 The reference in the defendant's email of 10 April 2017 (which is one of the emails in the attachments to the matter complained of) to "a number of incidents in Manly of thieves searching through mailbox looking for mail and identity papers" should be seen in the context of this article.

82 This, then, is the full set of emails between the parties concerning the mailboxes (and, for that matter, any other disputes involving the defendant) as at 10 April 2017, namely a one-sentence inquiry in August 2016 and follow-up eight months later in the context of mailbox break-ins and police advice, both of which were sent to the defendant personally and to neither of which she replied. As is set out below, the defendant considered both these emails

harassing and threatening and said that this was why she refused to answer them.

83 What occurred next, and brought the matter to a head, was that the two mailbox break-ins to the letterboxes outside the Watermark building, the first of which was on 20-21 April 2017 and the second on 1 - 2 May 2017.

The emails concerning the first mailbox break-in

84 On the night of 20-21 April 2017 about 10 of the building's 15 mailboxes were opened by an unknown person. The plaintiff sent a circular email to all owners and tenants advising of the break-ins, noting that at least 10 boxes were still open in the morning, attaching a link to the *Manly Daily* article of 20 December 2016, and adding:

> "As you would be aware from many articles in the local press, this is a common problem in Manly and potentially serious as the "boxers" are after documents that allow them to steal your identity and obtain credit cards etc in your name.
>
> Accordingly would you please:
>
> • Make sure your mailbox is closed and locked ASAP (a number are still open this evening).
>
> • Keep it locked so as not to encourage opportunists to try the boxes or check on our lock type.
>
> • Check to see if you may have had important documents in the box last night that could be used in identity theft.
>
> We will check to see if there is something we can do to improve the security of the boxes but in the interim – in your own interests – please follow the advice in this article."

85 A link to the *Manly Daily* article was attached. As is set out in more detail below, the defendant told the court she opened the link to the article referred to in the last line of the email but did not read the contents.

86 Although this was in fact an email to all residents including the plaintiff and dealt with letterboxes, the defendant did not include this email in the "cut and paste" attachments in the matter complained of. Nor did she include the similar letter the plaintiff wrote after the second break-in shortly afterwards. She did, however, include the reminder that the plaintiff sent her personally on 27 April 2017 (although she deleted the address line which demonstrates that this email

was only sent personally). More importantly, she also failed to include her derisive reply to the plaintiff on 27 April 2017, the text of which is as follows:

> "Hi Gary
>
> Wow! What's your take on this? "…and your open box may have contributed to the ease with which they apparently obtained a master key to open the other boxes."" (Exhibit A, Tab 10)

87 The defendant also omitted the plaintiff's reply, again to her personally and not to the other residents, which was sent the next day (28 April 2017):

> "Hi Trish
>
> It is possible.
>
> At least 10 boxes were opened with no damage to the locks or boxes so it is obvious that they had a master key. (They may have been interrupted – or had opened all the boxes and just didn't bother closing them at all).
>
> The locksmiths tell me that by checking the barrel on the lock they can determine the lock type and have what is effectively a master key cut for the locks. It is apparently the most common way they gain access to corporate boxes.
>
> In this case we have no way of knowing whether they did that by previously checking your open box, or already had a collection of master keys they could try as part of their kit.
>
> In any case you will have to keep your box closed and locked in future.
>
> Rgds
>
> Gary" (Exhibit A, Tab 11)

88 The defendant continued to keep her mailbox unlocked for at least part of the time between the first and second mailbox break-ins. However, as is set out in the plaintiff's email to Patricia Chua dated 3 May 2016 (Exhibit A tab 14), the defendant was noted by him to have been locking her box for several days after the first break-in. It was because she stopped locking her box once again that he sent his email of 24 May 2017 to which the defendant responded by sending the matter complained of.

The emails concerning the second mailbox break-in

89 On night of 1 – 2 May 2017 there was a second incident where an unknown person or persons again opened about five of the mailboxes outside the building. Mr and Mrs Miller, other owners in the building, emailed the plaintiff at 11.28am on 2 May 2017 to say:

> "Don't know if you are aware that the mailboxes were opened again last night. I phoned the Manly Police and they gave me another number to call..." (Exhibit A, Tab 13)

90 The plaintiff forwarded this email to Mr Morgan of unit 12 and replied to Mr and Mrs Miller:

> "I will pass it on to Ron [Morgan] who is scheduling the inspections. Terry called to tell me that 3 mailboxes were open when he came back (units 8, 11 and 15). He thought they may have been opened late this AM? Do you have any idea when they were opened? I will try to report it through the online police report site (although my past efforts to do this didn't work as the site seems to have a limited list of categories that does not include mailbox tampering)." (Exhibit A, Tab 13)

91 I note that the defendant's mail box, number 9, is not on this list, which corroborates the plaintiff's observation in his email to Mrs Chua of 3 May 2017 that the defendant had started locking her mailbox.

92 Mr Miller sent a follow-up email at 1.17 pm on 2 May 2017 noting that he had closed two of the five boxes for which he had keys and that "I have been checking the mailbox around 5 pm, as I think the culprits are coming late at night or early hours of the morning (Exhibit A, Tab 13). It was in these circumstances that the plaintiff sent a brief email to all residents stating "Unfortunately at least 5 of our mailboxes were again opened on the night of 1-2 May 17", attaching once again his email of 21 April 2017 and the article written by the *Manly Daily* journalist.

93 At 1.17pm that day, Mr and Mrs Miller advised the plaintiff that, to their observation, five mailboxes had been opened when they went downstairs, and that they closed their mailbox and that of a neighbour to which they had a key. They were checking the mailboxes at around 5.00pm, as they thought the culprits were coming late at night or in the early hours.

94 Another unit owner, Mrs Chua, emailed the plaintiff on 2 May 2017 at 9.09pm asking if he knew which mailboxes had been opened about both times, apart from her own. His reply listed the boxes that had been opened but noted that the defendant's box for number 9 had been locked:

> "Hi Patricia
>
> This time they opened (at least) 4, 6, 8, 11, and 15.
>
> Previously it was, I believe (at least) 3, 4, 5, 6, 7, 8, 10, 11, 12 and 15.

(I say “at least” because some of the early risers may have relocked their boxes without saying anything).

Some commonality but not sure we can read much into it unless some boxes are easier to open than others.

According to Barrenjoey Locksmiths, by examining the barrel of the lock they can obtain a four digit number for the lock type that enables them to have a quasi skeleton key cut. (I cannot see a number on the barrel of my lock but that may be my poor vision and the difficulty in photographing it. Certainly seeing the barrel does make easier to identify the lock type).

As it hasn’t happened before in 22 years (to the best of my knowledge) I suspect it could well be the result of having the unit 9 box open since August last year. They would have made it easy to check the lock type.

After many requests unit 9 have now closed their box but if these “boxers” have some form of master key we can only expect they will try again if they are finding anything of interest.

Rgds

Gary” (Exhibit A, Tab 14)

95 Ms Chua replied:

“Hi Gary,

Thanks for the info.

I’ve something to share as well:

1. Other than the unlocked mailbox, actually Watermark was featured prominently in a TV news piece just the night before the 1st mail theft - - Channel 9 nightly news, on strata and short-term stay etc. Someone was interviewed right in front of Watermark, and it went on for some minutes.

2. About 2-3 months ago, ABC news did a special report on the seriousness of mail theft in Sydney. One of the person [sic] being interviewed was a young woman whose identity being stolen during a long holiday, and she was living in Manly as well. So it’s quite certain that there are gangs stealing mails regularly in our area.

3. That some ABC report went into some details about mail theft (method, structure of criminals, and etc). And it mentioned that some mailboxes would be hit again and again until criminals have enough information to form fake identities. These thieves would hand over mails to gang leaders, and these leaders/dealers are connected to criminal groups whose operation would include identity theft.

I’m not certain whether what’s described in #3 was what’s happened in the 2nd theft, but it’s a possibility. That’s why I asked the question about which mailboxes were being broken into more than once.

Regards,

Patricia”

96 The plaintiff replied as follows:

“Hi Patricia.

> Yes, I remember seeing that item on the ABC news.
>
> Apparently the problem exists right across the city but is worse in the Northern Beaches area and Manly gets a frequent mention.
>
> I did try to register the "crime" on the NSW Police database (as they won't accept verbal reports on this sort of thing now) but gave up after wasting 30 minutes trying to contend with a very poor webform that doesn't seem to offer much flexibility.
>
> As we can't really install CCTV our only option may be to look at changing the locks for something more secure.
>
> I am reluctant to do that right now as – apart from the cost – it will require a lot of organizing because of the multiple key problem. (I think the OC is only obliged to provide tow keys but many unit owners and agents etc., will have as many as four and some of the more secure locks do not allow users to have them cut without 'permission' – a nightmare I don't want to get into).
>
> I suggest we leave it at the moment to see if there is another breach and, if so, consider it again."

97 The defendant's mailbox, although closed at some earlier time according to the plaintiff's email to Ms Chua, became open again, and the plaintiff wrote to the defendant (and no other person) on 5 May 2017 (this email is contained in the attachments in the matter complained of).

98 There was no reply, and it was in these circumstances that the plaintiff sent the email of 24 May 2017, with a copy to the defendant's real estate agent, to which the matter complained of dated 25 May 2017 to which the defendant replied by sending the matter complained of. However, that reply was not sent to all recipients of the email concerning the break-ins sent by the plaintiff, but to only 16 of the residents, namely persons who had been identified by the defendant as owners of units in the Watermark building.

The plaintiff's provision of prior emails to the Strata Committee during his absence on holidays

99 Before the plaintiff received the matter complained of, he was about to go overseas on holiday, so he sent an email to the Strata Committee attaching the email which had provoked it (namely the plaintiff's email of 24 May 2017) and the previous chain of emails, stating:

> "Strata Committee
>
> FYI in case the issue is raised again while I am away.
>
> I have attached a PDF of some of the many emails sent to the tenant for your info.

Hopefully she – or the agent – will ensure that the box is now kept closed.

I haven't got time to do anything about re-keying etc so suggest we leave it to see what happens and I will get your thoughts again in mid-July.

Regards

Gary" (Exhibit A, Tab 16)

100 This email clearly explains the circumstances in which the plaintiff felt it necessary to share the defendant's emails with his fellow members of the executive committee, namely in case of difficulty while he was away overseas and difficult to contact.

101 The next email in the chain is the matter complained of.

102 The plaintiff sent a polite reply to the matter complained of at 4.02 pm the same day, with a copy to the agent:

"Hi Trish

Thanks for your reply.

Open Letterboxes

Although I am here most of the time – and have lived here for 17 years – your mailbox is the only one I have ever seen left open for any period of time.

Who opened the boxes

I will not make further comment on your remark about "Did you open the front panel" etc., as I suspect you wrote it in haste without thinking about its absurdity or the implications.

Locking the box

Without wasting more time on debating the cause of the breach I must still insist that you lock your mailbox. I believe that not doing so has – and could continue to – put at risk other residents mail security.

Email Distribution

The only emails that are sent to all residents and owners are those that concern them.

All my prior emails on the unit 9 mailbox were sent just to you.

The email of 24/5/17 was copied to the lot agent – and subsequently to the members of the Strata Committee – as it concerned financial responsibility that could affect the lot owner in the fact of your failure to lock the box.

It was NOT sent to other residents and owners.

It appears it was only your reply that was sent to the full mailing list "Residents and Owners".

I will copy this reply to the lot agent – and our Strata Managers – as they have become involved.

> But I see no point in copying it to all and sundry – unless you wish me to?
> Rgds
> Gary"

103 Two other residents responded to the defendant. Although the plaintiff did not press the "reply all" to the defendant's email, Mr Gauld, the son of the owner of unit 14, did. He compared the contents of the defendant's complaints to the anti-vaccination movement (from which I infer that he considered her claims ridiculous) and said he wanted to "publicly acknowledge" the plaintiff's "tireless and effective efforts for the general benefit of Watermark", suggesting that the defendant take any personal grievance with the plaintiff "offline" (Exhibit A tab 19).

104 Wendy Gelhard, in unit 5, emailed a reply only to the plaintiff personally, saying "you have all my support and hope you can ride through this attack" because if not for the plaintiff's work, the building would not have run as smoothly as it had (Exhibit A tab 20).

105 The plaintiff and the defendant's real estate agent exchanged correspondence, with the agent pointing out that there was nothing in the by-laws requiring owners to lock their mailbox. The plaintiff's reply pointing out that if a negligent act caused loss to others, that loss was compensable, whether there was a by-law or not (Exhibit A tab 21). The job of the owners corporation was to remind the residents of their obligations which had been done by drawing their attention to police advice about keeping boxes locked. The plaintiff also repeated the advice he had received from the locksmith (Exhibit A tab 21). He added:

> "I notice that unit 9's box was closed this morning but unfortunately based on past correspondence I cannot be sure that the importance of this basic bit of security is fully appreciated. So it is important to emphasise that tenants can put the [owners corporation] and Lot Owner at risk of incurring considerable liability for costs incurred by both other owners and the [owners corporation] itself." (Exhibit A tab 21)

106 The following day (26 May 2017) the plaintiff encountered Mr Curby in the foyer and they had a brief conversation. There is no evidence that the plaintiff's statement in his email of 25 May 2017 to the real estate agent (Exhibit A tab 21) to the effect that the defendant's mailbox was now closed was incorrect. The text of this conversation was not particularised in the pleadings. The

versions of this conversation given by the plaintiff and Mr Curby are set out in more detail below.

107 The plaintiff had, but did not give to, Mr Curby a letter he went on to put into the defendant's locked mailbox seeking an "unequivocal and unqualified apology" be sent to all the recipients for alleging that he had in fact been the perpetrator of the mailbox break-ins. There was no reply to this or to his subsequent email of 30 May 2017, in which he noted that she had blocked his emails.

108 As set out above, the plaintiff left the conduct of the issue to the managing agent and the executive of the owners corporation while he travelled overseas in June 2017 (Exhibit A tab 24 – 26). The strata manager, Mr Amoroso, took the issue further by emailing the owners (rather than to the real estate agent managing the property) on 31 May 2017, saying:

> "The Committee have liaised with the Tenant directly, she blasted the Committee and has now blocked all emails. The Committee then liaised with the property manager Jason Hitchman to which [he] had responded but seemed to dismiss the matter and not have been taken [sic] seriously. In fact, he is now not responding to any emails nor is the Tenant." (Exhibit A tab

109 It is clear from the emails following the matter complained of that the plaintiff largely left the resolution of the dispute concerning the defendant's mailbox to the strata manager, Mr Amoroso, and the executive committee. On 31 May 2017 the owners replied to Mr Amoroso's email, saying they appreciated the vigilant efforts of the plaintiff to maintain a secure and well-managed building but "gently suggest that a more cooperative and neighbourly style within the building" may have prevented escalation, that threats of litigation were not motivating the defendant to resolve the issue and complaining that, by writing to them rather than the real estate agent, Mr Amoroso was escalating the matter (Exhibit A tab 27).

110 The defendant's lease was up for renewal at about this time and this lease was renewed.

111 The plaintiff's solicitor sent a notice of concerns on 25 July 2017 which was not responded to. Defamation proceedings were then commenced.

112 The matter remained unresolved until the Annual General Meeting, held in the foyer of the building on 11 December 2017. There was no representation on

behalf of unit 9 on this issue and there was no representative for unit 9 at the meeting. It would appear, from the minutes of the meeting, that although the defendant had on occasion locked her box at around the time of the thefts, according to the observations noted by the plaintiff in the emails set out above, she had returned to her previous practice of leaving her mailbox open and unlocked.

113 There were two meetings on 11 December 2017. At the first, the plaintiff and the other seven members of the Committee were re-elected. One of the resolutions was for a review of the by-laws (Item 11). The strata meeting minutes confirmed that the plaintiff was re-appointed chairman and noted at paragraph 5.3:

> "**Mailbox Security**
>
> The meeting noted that a Resident continues to leave the mailbox open, which exposes all other mailboxes at risk of being broken into. The Strata Committee will consider new locks to be installed and further action to those who keep the mailbox unlocked."
>
> (Exhibit A tab 31)

114 There is no note of any opposition to this resolution.

115 The plaintiff sought advice from the strata manager as to the best way forward to deal with the issue, given "the spectacular lack of success" he himself had had. He noted the defendant was still leaving her mailbox open "about half the time", and wanted to know whether a further request to close it should be made, as he did not think the defendant would agree to mediation if NCAT proceedings were commenced. This request for advice included the issue of whether rekeying was appropriate and whether he was in fact correct in his concerns about whether the open mailbox could assist mail thieves (Exhibit A tab 29).

116 Mr Amoroso replied that he hoped the locksmiths could ensure their proposed lock/key will prevent any other mail theft" and that mediation through the NCAT was "the best way forward" (Exhibit A tab 29). This was in fact correct, as the NCAT process commenced in 2018 resulted in a mediation in which there was an agreed confidential result. The defendant's least was not, however, renewed in July 2018, which meant that the problem no longer existed.

117 There is no evidence that the new tenant of unit 9 (or anyone else, for that matter) had a practice of not locking their mailbox, although the defendant at times in her evidence asserted that this was in fact the case. It was put to the plaintiff (T 92) that other residents were not only unconcerned about open mailboxes but left their own boxes open, which he denied. There is nothing in the documentary evidence to support this and there was no particularisation of such a practice in the particulars of justification.

Was a conversation on 11 April 2017 part of this chronology?

118 The principal disputed event in this chronology is whether, despite the claims in the matter complained of that the plaintiff had failed to "speak to [the defendant] face to face" and "never asked why we keep the letterbox open", there was in fact a conversation between the defendant and Mr Curby, which the defendant and Mr Curby assert occurred on 11 April 2017.

119 All that the particulars of justification in the Defence (paragraph 14(i)) reveal is that it is asserted that the plaintiff and defendant's partner, Mr Curby, had a conversation "on or around 11 April 2017". The subject matter was not identified. According to the defendant's outline of submissions, during this conversation, the plaintiff "was informed that they had made a decision to leave their mailbox open from time to time to allow for parcels to be delivered".

120 The plaintiff, in cross-examination, denied that such a conversation had taken place. Mr Curby said it did. Whose evidence should be accepted?

121 The best indicator is the content of the matter complained of itself. The defendant complains (at lines 66 and following) that:

> "…rather than simple [sic] knock on my door for a chat in person, or speak to me face-to-face when we have exchanged pleasantries in the foyer, or while I'm putting the building bins out on the street, you have consistently chosen the public email option; copy in all residents and/or my real estate agent, sundry [sic] alleging that responsibility for the threat and safety to our home at Watermark is our doing and threatening to hold us financially responsible. You have never asked why we keep the mailbox open."

122 This paragraph is difficult to reconcile with evidence from the defendant and her partner Mr Curby that Mr Curby did in fact explain to the plaintiff why it was that they left the mailbox open and told the defendant about this conversation.

123 The plaintiff was asked about this conversation in cross-examination:

Q. What I want to suggest to you is that you bumped into each other shortly after this email had been sent to my client, and Mr Kirby told you that the reason they left the letterbox unlocked from time to time was so that bigger parcels could be delivered. Do you remember that?

A. That's untrue.

Q. Without the need for them to have to go and pick up parcels from the—

A. That is untrue.

Q. --post office. You know they had - my client had two children?

A. I do.

Q. And she worked?

A. I believe she did.

Q. She was busy, and Mr—

A. I believe - I believe she worked. I really don't know anything about her her—

Q. And Mr Kirby told you that it was quite inconvenient for them to have to keep going to the mailbox to pick up parcels that didn't fit in the letterbox?

A. I had no conversation with Mr Kirby prior to 26 May about mailboxes.

Q. About anything?

A. I - I can't remember other conversations - if there were other conversations. There were - they were en passant.

Q. You then - if you look behind tab 6, you sent an email on 21 April?

A. Okay. Just one minute. Tab 6? Email is on 21 April, yes (T 93)

124 That email does not refer to any such conversation either.

125 Mr Curby's evidence was that he and the defendant had a conversation after the 10 April 2017 email and that as a result he decided to mention this issue of locked mailboxes to the plaintiff:

"Q. Did you have a discussion with Ms Murray about it?

A. I did.

Q. Can you just tell us what that was?

A. The discussion was that we thought that since August 2016 and after the Christmas holidays that he wasn't concerned anymore, then all of a sudden it had been raised a second time, and he seemed to have an issue.

Q. Did you do anything about that when you saw him?

A. Yeah. So I did see him shortly after this email, the second email, and I thought it was appropriate to mention it to him.

Q. Did you have a conversation?

A. I did.

Q. Can you just tell her Honour as best you can what the conversation was, what you said and what he said?

A. Yes, your Honour it—

HER HONOUR Q. No, no, look at her. Don't say tell her Honour. It always has that result. Just tell her, forget about me.

A. I, I asked him, I said I saw Mr Raynor, I think it was in the lobby down on the ground floor, and I said to him, I said "I notice that you've sent a second email about our letterbox. What's the issue?". He said, "It's about security in the building." I said, "Well we've chosen to leave our letterbox open because it suits us with parcels that we get delivered." He said, "Well it's a security issue" and that was it. I left it at that.

CHRYSANTHOU Q. Did you tell Ms Murray about that conversation at some point?

A. I did.

Q. When was that?

A. Shortly after the event, either on the day or that evening." (T 266)

126 There are two troubling aspects to this evidence. The first is that the two emails to all residents clearly refer to police warnings (set out in the linked article) as being the reason to lock mailboxes, not to the defendant's failure to do so; the defendant is not mentioned at all. The second is that the matter complained of does not refer at all to the conversation Mr Curby says he had; to the contrary, it is critical of the plaintiff for not seeking an explanation.

127 The defendant asserted she knew about this conversation asserted to have occurred on 10 or 11 April. She was asked why, in those circumstances, she had put in the matter complained of that the defendant has never sought her out by knocking at her door or asking in the course of conversation about the mailbox:

"Q. Now at line 70 it says "You've never asked why we keep the mailbox open", do you see that?

A. Yes.

Q. But according to your evidence you had a conversation with Mr Curby where Mr Curby told you that he'd told Mr Raynor exactly why we keep the mailbox open, correct?

A. Yes but he'd never asked me. We'd never had a conversation with it face to face. In fact it was quite the opposite. It was quite friendly and a hello and, so every time I would seem him I'd think we should talk about the mailbox. He wouldn't bring it up so I'd think maybe he's over the whole mailbox thing. Then an email would arrive, as soon as I opened up my mailbox.

Q. If that conversation had really taken place between Mr Curby and Mr Raynor, and he had really told you about it, you would have never have said that statement would you, “You’ve never asked us why we keep the mailbox open”, because Mr Curby told him?

A. He had never asked me why. That is the truth.

Q. I see, so you say even though Mr Curby had told him, because he’d never asked you rather than Mr Curby told him--

A. He had never asked why. He just straight away went into “Lock your mailbox”. He had never asked anybody why.

Q. But you told him why.

A. Mr Curby may have told him but he never asked why.

Q. What’s the difference? Why would he ask why when he’s already been told by Mr Curby why?

A. Because if he was being courteous he would say “Oh, is there a reason why you, you know, why do you keep your mailbox unlocked?” and I could’ve given him the answer.

Q. But he already had the answer.

A. The same answer I’ve given you.

Q. He already had the answer from Mr Curby if your evidence is to be accepted.

A. It’s a truth statement. He had never asked why.

Q. Well the two things are not consistent are they? He either knew because Mr Curby told him, or he--

A. That’s correct.

Q. --didn’t know and you made this statement here, “You’ve never asked why”.

A. Correct.

Q. The two things--

A. They’re both correct. (T 235)

128 Mr Potter pursued this point, putting that they could not both be correct, in that Mr Curby either did have a conversation in which he explained the position (in which case reference to this would be expected in the matter complained of) or he did not, and could be criticised for failing to inquire:

> “Q. You would have no need to say “You’ve never asked us why” because you know that he knows why. So why would you say the statement if you know that he knows because Mr Curby’s spoken to him?
>
> A. Because it’s factual. He’s never asked why. It was information offered to him.” (T 236)

129 Mr Potter then asked:

“Q. And you could’ve said here, I suggest, “As Paul told you on the 11th, we told you the reasons why we leave it open” but you didn’t say that, did you?

A. No, I was under attack.

Q. Okay.

A. This is, I,I was being attacked and, and harassed hopefully for the very last time. I wanted this to finish, to stop, as I requested in the bottom of this particular email.

Q. So did you forget about the conversation with Mr Curby when you made that statement “You’ve never asked why we keep the mailboxes open”?

A. No. It was something that I was very aware of. At no point had he ever said to me “Why do you keep your mailbox open?” I wasn’t at that conversation that, with Mr Paul Curby and Mr Raynor. I wasn’t--

Q. No but you had a conversation and you knew what Mr Curby had said

to him?

A. I’d been told by Mr Paul Curby what had been said. Q. So there was no need here to ask that question all over again and say that he’d never bothered asking why, was there?

A. Yes. I was asking him why has he never asked me. In all the times that we’ve seen each other in the foyer, why had he never asked me.

HER HONOUR

Q. Well wait a moment. Doesn’t it say “You have never asked why we”? I mean isn’t Mr Curby helping you write this letter?

A. Well yes but I took his name off it. It was just purely from me.

Q. No, but the thing is you’ve said “You have never asked why we keep the mailbox open”. So that’s “we”. That includes Mr Curby doesn’t it?

A. Well he has never asked either of us why.

Q. But if Mr Curby had a conversation with him about this?

A. Yes. Yes he did.

POTTER

Q. And he told you that he had told Mr Raynor that he’d told him the reason why you keep the mailbox open?

A. Yes. It was almost like he, he felt that he had to give justification as to why a mailbox was open. It was there that he said “Is there a law? Is there a by-law?” and he said “No, there’s no, there’s no by-law”. So there was no need to justify why a mailbox was opened or not opened. It was totally our business.

Q. So I suggest to you you would never have raised this had this conversation taken place between Mr Curby, and it never took place between Mr Curby and Mr Raynor, and he never told you about it?

A. Is that a question or a statement?

Q. Yes, it was a question. Do you want me to repeat it?

A. Yes.

> Q. I suggest to you that there was never a conversation between Mr Curby and you to the effect that--
>
> A. There was absolutely a conversation." (T 237)

130 Ms Chrysanthou draws my attention to two pieces of evidence which she submits support her side of the story and mean that the plaintiff's denial that the conversation took place should not be accepted. The first of these is an answer to interrogatory which I am satisfied was not answered at a time when the text of these conversations was before the court and is thus of no assistance. The second is the plaintiff's Reply sets out, at paragraph 3D, that he "does not admit that, on the date pleaded in paragraph 14(i) of the Defence, he had a conversation with Paul Curby concerning the Defendant's alleged failure to lock her mailbox". He admits, however, that he had a conversation with Mr Curby about this topic on 26 May 2017. Great weight is placed on the "not admit" part of the statement, but Mr Potter submits, and I accept, that in the absence of some description of the conversation in question, this was the appropriate course for the pleader to take.

131 Mr Potter put it to Mr Curby that he had become confused about the conversation he had with the plaintiff on 26 May 2017 and that this latter occasion was when this issue was raised:

> "Q. Well it's possible isn't it because you even had some difficulty remembering the conversation of 26 May yesterday? Isn't it possible I suggest that you've slightly confused the dates of the conversations?
>
> A. No.
>
> Q. I suggest to you that no discussion on 10 or 11 April took place to the effect where you explained why you were leaving your mailbox open.
>
> A. That's not correct." (T 280)

132 However, Mr Potter pointed out:

> "Q. Do you see the very last sentence of that paragraph, "You have never asked why we keep the letterbox open"?
>
> A. Yes.
>
> Q. Do you see that?
>
> A. Yes, I see that.
>
> Q. If you had already told him on 11 April there would be no need for you to ask that question or make that statement that he's never asked you why you keep the letterbox open because you've already told him, correct?
>
> A. I've told him, yes, but he never asked why.

Q. So you think there's a difference between you telling him the reason and him knowing the reason but not asking you again what the reason was?

A. Yes, explaining to him on 10 or 11 April to give him some comfort as to why we're doing - why we've chosen that is different to him not asking us at all but keeping on emailing and harassing Trish.

Q. Why would you say, "You never asked us why" you keep the mailbox open when you know perfectly well you've already told him why?

A. This email was from Trish to Gary at the end of the day and I helped her draft the majority of it but I also did say in my evidence that there may have been some things after I left for work that she added.

Q. But you had a conversation with Trish, didn't you, sometime close to the date that you say you had this conversation with Mr Raynor around 10 or 11 April and told her about that conversation?

A. Yes, I did.

Q. Correct?

A. Yes.

Q. So she knew?

A. Yes.

Q. So do you say that you didn't draft that and you don't know why it's there now?

A. I don't specifically recall drafting that but also at one stage I was going to be co-authored on this email and in my absence Trish took my name out, so she - she had made this email from her to him. It was a choice for some reason she decided to do, she didn't want my name in it.

Q. Yes, but you checked it, didn't you, and you satisfied yourself that it was true and accurate?

A. Well, at the time I left for work I had checked the majority of it and yes, I was happy with it because at that time I'd said, "You can - my name can go on it as well," but I don't specifically remember that - that - that sentence.

Q. What I'm suggesting to you is that it's likely, is it not, because of that sentence that in fact the conversation you had with Mr Raynor to that effect took place on 26 May not 11 April or 10 April?

A. No, that's not right." (T 280 – 281)

133 Mr Potter submits, and I agree, that the contents of the matter complained of are inconsistent with the conversation that Mr Curby claims he had with the plaintiff on 10 or 11 April. Mr Curby's assertion that this part of the matter complained of must have been altered by the defendant after he left should not be accepted because Mr Curby claimed (and the defendant confirmed) that he had told the defendant about this conversation at the time. Why this important conversation would not have been a highlight of the letter, and why these

statements to the contrary appear, are factors strongly telling against such a conversation having taken place.

134 Mr Potter further submits, and I agree, that the failure to particularise the contents of the April 2017 conversation between the plaintiff and Mr Curby is the context in which I should read the answers to interrogatories and the particular in the Reply. In the absence of some specification as to what the conversation in question was, particularly a conversation of such an everyday nature, the plaintiff was entitled to give the answers that he did.

135 Accordingly, I am satisfied, when considering the chronology of relevant dates and events leading up to the publication of the matter complained of, that there was no conversation between the plaintiff and Mr Curby in the foyer of the building on or about 10 April 2017, either on this topic or at all.

136 In arriving at this conclusion, I am fortified by examination of the contemporaneous documents, which show a pattern of the defendant ignoring and not replying to the emails from the plaintiff. As it set out in more detail below, I am satisfied that she would have continued to ignore emails from the plaintiff but for the plaintiff's action in sending a copy of the email to which the matter complained of replies to the real estate agent responsible for the letting of the premises in which the defendant and her family resided

The oral evidence of the parties and their witnesses

137 The plaintiff, who is now 78 years of age, is a retired civil engineer with degrees in engineering and economics as well as an MBA from Ottawa. He lived and worked in the United States and Canada as a civil engineer before returning to Australia to set up a company designing software, a business he is still engaged in, to a very limited extent (T 36). He and his purchased an apartment in the Watermark in 1999 and he has lived there ever since. His wife (who died in 2016) was the secretary for the owners corporation for Watermark for some years and he was a committee member, becoming the chairman in about 2012, a position he has held ever since.

138 The plaintiff had difficulty entering the witness box as he had to use two walking sticks. He gave his evidence in a clear and straightforward fashion but at times in cross-examination appeared to be struggling to reply. In particular,

he was to my observation attempting to control distress, particularly when asked about the matter complained of. It is important, when assessing his evidence, to take into account, not only this distress, but also his age and physical infirmities, as being factors which affected his ability to give evidence. This does not reduce the value of his evidence, but means that the reasons for his appearing to be at times uncertain or vague should be seen in context.

139 The plaintiff told the court that he has been the chairman from approximately 2012 after his prior involvement in the strata committee (called the executive committee prior to changes to the legislation in 2016: T 27). There were usually seven to eight members of the committee (T 37-38) and this was the case when the defendant moved into the premises. The plaintiff sent a standard "welcome" letter which was an introduction to such features as gas heaters and other facilities in the building (T 38).

140 The plaintiff explained that outside the building there were 15 mailboxes for the residential units, namely 14 residents and a box for the body corporate. A photograph of the boxes taken shortly after first robbery occurred was tendered (T 79). Each of the boxes is keyed individually and there was no master key available to the plaintiff (T 39-40).

141 There is security for the entry of the premises as follows:

> "Q. Looking at the third photograph on tab 8, does that depict the front of the building?
>
> A. Okay, just a moment. You're ahead of me. The third photograph?
>
> Q. Yes, it's got a silver car right at the front in the middle on mine.
>
> A. Okay, that's taken from the street and unfortunately the car's in the way, it's hard to tell but on the - it shows more or less the entrance. Not very well photographed, I must confess, but that shows the entrance to the Watermark building.
>
> Q. And then the next photograph, do you see that, it's just of a grill door. Have you got that?
>
> A. Yeah, the grill door - yes, the grill door is actually - actually, this is the entrance to the commercial suites, which is immediately south of our main entrance. There are two separate entrances. In fact, two separate addresses, which is rather strange. 5 Victoria Parade is the commercial entrance and the address of the other suites is 5/7.
>
> Q. Does that entrance have its own mail box that's separate?

A. It does, yes, it does. You can actually see the mail box. You should be able to see the mail box in the middle on the left, you can see a large vertical box there.

Q. Is that to the right of the doorbell there?

A. That is the right of the - on the wall - the photograph's not very good. On the wall you can see a panel, I believe, on the left-hand wall there's a panel. I believe that's the key panel that you buzz to allow - to get access.

Q. So, to the right of that, is that the mail box?

A. The mail box is to the right of that, yes.

Q. If a postman was putting anything in, he or she would have to put their hand through the grill door to put the post in?

A. He has to put it through the grill door but it's very - the distance is very short.

Q. The final photograph really just shows the same thing I think, just the front of the building, another photograph of the front.

A. Sorry?

Q. That's the one with the white van in the middle?

A. Yes, it's - shows the same thing, although in truth, you can see very much."

142 The plaintiff noticed that the defendant's mailbox was unlocked and left open for about a month, which was contrary to the general practice of mailboxes being locked, so he sent the one sentence email of 31 August 2016 ("I notice your mailbox has been left unlocked for quite a while?") on that basis.

143 The plaintiff explained the manner in which the owners corporation conducted its affairs. This was by way of email and informal discussion, not formal meetings. There was an obligatory AGM each year, conventionally held on the second Monday of December, which was obligatory under the legislation. That was then followed by a strata committee meeting for the election of committee members and office bearers.

144 The defendant's mailbox was open for the majority of the time, but not all the time, from December to April, which resulted in the plaintiff sending the second email dated 10 April 2017 subsequent to there being discussion at the meeting (T 51). Again, that email was sent to the defendant only.

145 The plaintiff described how, after the second break-in, when the defendant continued to leave her mailbox open, he sent further emails and then received the matter complained of. He said he was bewildered and appalled (T 62) that

he would be accused of having staged the break-ins because of his vexation about the defendant's mailbox, particularly since he could not reply to the email as it would have been just "amplifying it" (T 63). He was particularly concerned that the email "left the impression in people's mind that there had been other altercations between Ms Murray and I, which was totally false, absolutely" (T 63). He consulted his daughter and then sent two letters to the defendant seeking an apology.

146 One of the significant complaints is that the plaintiff signed off these letters as "chairman of the strata committee" even though there was no meeting of the strata committee or owners corporation that entitled the plaintiff to engage in "the harassing conduct" (written submissions, paragraph 26). Ms Chrysanthou put to the plaintiff that he had "no power to ask her to do anything about the unlocked letterbox" (T 86) She asked.

> "Q. First of all, there hadn't been any meeting prior to 31 August in which you were authorised to communicate with her about the letter box had there?
>
> A. There had been no, no formal meetings, no.
>
> Q. There had been no meeting?
>
> A. There'd been no meetings of people getting, no, no.
>
> Q. You knew there wasn't a by-law which required her to keep her letter box locked?
>
> A. There was no by-law, no.
>
> Q. What I'm suggesting to you is that as at 31 August 2016 you knew you actually had no entitlement to ask her to lock the letter box?
>
> A. My understanding is that that would not be correct. My understanding is that as a, as the chairman of the strata committee and member of the strata committee that I had both a right and an obligation to do something about that.
>
> Q. What are you saying, that just because you were chairman or a member of the strata committee you have the right to make demands of tenants as to how they conducted themselves in Watermark?
>
> A. I really doubt we're talking about how a tenant conducts themselves. I think we're talking about the security of the building. Myself, that's my understanding.
>
> Q. I want to suggest to you that you actually knew you had no right.
>
> A. I don't agree."

147 The plaintiff's evidence was that there was an AGM and a strata committee meeting of a formal nature once a year and that thereafter the affairs of the building were conducted informally by email. No submissions were made as to

any provisions of the *Strata Scheme Management Act 2015* (NSW), or its predecessor the *Strata Schemes Management Act 1996* (NSW), nor was my attention drawn to any provision requiring meetings and authorisation of the kind described by Ms Chrysanthou.

148 The current legislation is the *Strata Schemes Management Act 1996* (NSW). The obligations of owners corporations under the repealed legislation (*Strata Schemes Management Act 1996* (NSW)) were considered by the New South Wales Court of Appeal in *Ridis v Strata Plan 10308* [2005] NSWCA 246. That obligation is set out by Hodgson JA (at [5]-[9]) as being a system of periodic inspection by a person such as an experienced managing agent, or a person with general building maintenance skills as part of risk management to prevent the kind of risk or injury or unreasonable risk of harm to others. This point was effectively made by the plaintiff himself in his responses to Ms Chrysanthou.

149 Ms Chrysanthou was critical of the plaintiff for involving the strata manager, Mr Amoroso, the real estate agent, Mr Hitchman and the executive committee in that the issue was put before the AGM of the owners corporation and then went to the Department of Fair Trading despite there being no breach of the bylaws (T 115 - 122). However, it is clear from the emails tendered by the plaintiff that Mr Amoroso and the owners corporation took these steps not at the plaintiff's insistence but because they had determined to do so. Far from telling Mr Amoroso what to do, the plaintiff is seeking his advice. The resolution of the owners corporation and the advice of Mr Amoroso were the reasons for the issue going to the Department of Fair Trading, rather than as a course of menacing harassing conduct using the public option, as Ms Chrysanthou appeared to be attempting to put to the plaintiff.

150 Ms Chrysanthou also cross-examined in relation to when and in what circumstances the plaintiff had consulted a locksmith. As I have noted in my findings on credibility, the plaintiff at times struggled to recollect dates and events. For the reasons set out in my observations concerning the credit of witnesses, I regard the contemporaneous records of the plaintiff and defendant, in the form of the emails exchanged (including the plaintiff's emails with third parties) as being more likely to be accurate than individual

recollections. The plaintiff's difficulties with recollection as to when and in what circumstances he consulted a locksmith and what occurred at the AGM in 2016 do not detract from the honesty of his answers in relation to other matters.

151 The plaintiff's answers to questions were courteous and he made concessions where appropriate. I accept him as a witness of truth.

Evidence of the plaintiff's daughter and other residents

152 Ms Carmen Raynor gave evidence of the plaintiff's hurt to feelings (T 154). She was not cross-examined.

153 The evidence of the three witnesses who provided affidavits were tendered (T 155-162). They were required for cross-examination.

The defendant's evidence

154 The defendant described moving into the Watermark building in July 2016, following which she claimed she only left her letterbox unlocked "sometimes" (T 166). She described receiving a "welcome pack" email from the plaintiff, which she noted did not contain any information about mailboxes being locked.

155 The defendant explained that she did not reply to the plaintiff's email of 31 August 2016 because, despite the use of a question mark at the end of its one-sentence inquiry, it "wasn't actually a question" (T 166). The defendant acknowledged she heard nothing for the next eight months, and said that when received his email of 10 April 2017, it was "a surprise", as "[i]t's the first I'd heard of it that other people had an issue with it and that it was an again situation" (T 167).

156 The defendant felt intimidated and bullied by this email and decided not to respond to it:

> "Q. Did you respond to this?
>
> A. No, because I found it - I did what I teach my kids and that is when you're feeling bullied is the best thing to do is to ignore them. I didn't want to provoke the situation." (T 167)

157 The defendant said that her partner had a conversation with the defendant in the foyer shortly after this email was received. Her version of this conversation was different to that of Mr Curby:

> "Q. --with Mr Curby and what Mr Curby said to you.
>
> A. Yes. He told me after he'd come back from work, I think it was, that he said, "Look, I, I saw Gary in, in the foyer and I told him why you keep the letterbox open." And I actually asked him directly, "Is there a by-law about the letterbox?" And I asked him, "What does a - what is a by-law?" And he said, "It's the law - it's the rules of the building" and that that is how we found out because Gary said, "No, there is no by-law to lock your letterbox" and I went, "Oh okay, so I'm not breaking any rules?"" (T 169)

158 This version of the conversation was not put either to the plaintiff or to Mr Curby. Mr Curby's version of this conversation makes no reference to by-laws and neither does the matter complained of. This evidence of the conversation is, I find, a complete reconstruction.

159 When the defendant received the first group email concerning the first mailbox break-in, she gave dramatic evidence that she immediately felt "harassed" personally:

> "Q. Did you draw any conclusions about the issue after you read this?A. I felt, I felt, actually, more harassed. That here we go again, what he's now suggesting is that it's my fault that we've had people open up other people's letterboxes because my letterbox was sometimes unlocked." (T 170)

160 The defendant wrote to the plaintiff on 27 April 2017 about this email. She received his reply that same day, and felt this was "more harassment":

> "Q. How did you feel when you got this?A. This was more harassment and it is way down, he is now escalating it, my unlocked letterbox and escalating it by copying in previous emails that he has sent me about my unlocked letterbox." (T 171)

161 The defendant said that it was at about this time that her partner made an inquiry of a locksmith (T 173). This is in fact incorrect, as Mr Curby stated in his evidence that he did not make that inquiry until 26 March 2018 (T 282).

162 The defendant said she continued to leave her letterbox unlocked "about 50% of the time" (T 174) because she "knew parcels were coming" (T 174) and she did not want to stand in the line waiting for one little parcel when she "had a relationship with the postman" (T 174).

163 When the defendant received the second group email about the second mailbox break-in, she felt even more harassed (T 175):

> "Q. Again, how did you feel when you got this?
>
> A. It's more escalation and more harassment, because I already knew by this stage I wasn't breaking any by-law. It had been explained to me what the

by-laws were in regards to the letterbox, and there was no by-law. Again there had been no communication with him face to face, and now I was getting another email, and again he had copied and pasted, copied and pasted previous emails about the letterbox, like I was a very naughty tenant in regards to not doing what he was telling me to do. At no point had he asked me personally, "Why do you keep your letterbox unlocked?".

Q. Did you respond to that?

A. No.

Q. How come?

A. Because I felt bullied and harassed and I wish - I didn't want to provoke him. I just thought, just I have to let this go, let this slide."

164 She continued to leave her mailbox open. When the plaintiff sent an email copied to Mr Hitchman, she said she "felt completely threatened that my now, my home for myself and my children was being threatened" (T 176). She went on to assert:

> "Q. Why did you think it was being threatened?
>
> A. Because it looked - it was suggesting by the chairman that I was a bad tenant and I had breached security of the building, and he'd said statements such as, "This is serious and it may get more serious" and then he talked about that there'll be expenses to my owners, and I was absolutely mortified." (T 176)

165 The defendant then described how she prepared the matter complained of, including the reasons for accusing the plaintiff of staging the mailbox break-ins because of his obsessions with her mailbox, all of which she said was completely true and correct:

> "Q. Reading through this email, at the time you wrote it did you believe in the truth and correctness of everything you've said in here?
>
> A. Absolutely and I still do." (T 178)

166 The defendant went around to complain to her real estate agent the next day and consulted a police website about harassing conduct. She put a block onto her email to prevent any further emails coming from the plaintiff. She was aware he had placed two letters in her letterbox but she refused to read them (T 179, these were the apology letters). She acknowledged that she received and read a letter from Goldsmith Lawyers (T 179).

167 The defendant received a letter from the strata manager to attend a mediation at the Department of Fair Trading. She said that she attended although she was "under the advice that I didn't need to go because I hadn't broken any by-

laws" (T 180). She requested copies of the minutes of meeting because she wanted to know exactly what everyone in the building had been saying in the meeting (T 180). The outcome of the mediation was that both parties signed a letter to the effect that she would agree to lock her letterbox within reason. She considered this whole process to be part of the plaintiff's bullying tactics.

168 In cross-examination, the defendant repeated that she felt "incredibly threatened" (T 181) by each and every one of the emails sent by the defendant (including, inconsistently, the first email he sent in August 2016, although she had not previously said so). However, her reactions should be considered in light of her responses to another document about which she was cross-examined. The document in question was a copy of the defendant's own statement. The defendant was cross-examined about its contents, some parts of which, it was put to her, were inconsistent with her evidence.

169 The defendant's response to this line of questioning (for which there was a very compelling basis) was to deny authorship and to accuse Mr Potter of writing it himself:

> "Q. Does this document represent an accurate summary of the evidence that you intended to give as at 22 January, when it was served on the plaintiff?
>
> A. I actually have no recollection of this document. I don't even know who wrote it and I actually--
>
> Q. That's not what I asked you.
>
> A. --had spotted that there was no date. I don't, I don't know anything about this document.
>
> Q. Can I ask you the question again? You've sat in court and you've read this statement. Regardless of whether you saw it before, does this document, after you've read it, represent a fair summary of the evidence that you, as at 22 January, when it was served, a fair and accurate summary of your evidence?A. These are not my words and there's some things in this that is not correct.
>
> Q. You tell me what's not correct, please.
>
> A. Well, I, I - it's the first time I've seen this document, sir, and it's never been signed. I don't know who - even who wrote this document. *Potentially you wrote this document, I don't know.*" (T 185-186) (Emphasis added)

170 The defendant's exaggerated suspicions and startling allegation that Mr Potter could have written the statement himself bear a similarity to her response to the plaintiff's emails, where her response to being confronted with a challenge to her conduct was to ask the plaintiff if he had staged the mailbox break-ins. In

each case, the defendant preferred attack and accusation, without basis, instead of acknowledging error. She complained of “potentially some trickery” (T 186) and “lazy writing” (T 187), challenging the accuracy (T 188) as well as the honesty of the statement.

171 Ms Chrysanthou objected to this line of questioning:

> “Q. But it's accurate that you did not respond to the email, isn't it?
>
> CHRYSANTHOU: Is that in dispute? I mean, really.
>
> POTTER: No, I know. That's why I'm taking her paragraph by paragraph so she can take her time.
>
> CHRYSANTHOU: There's no dispute. Maybe my learned friend should put to her what he says is inconsistent.
>
> POTTER: How can I possibly do that?
>
> HER HONOUR: Ms Chrysanthou, it's his cross-examination and he---
>
> CHRYSANTHOU: It's a waste of time.
>
> HER HONOUR: --gets to run it.
>
> POTTER: There's no point getting angry with me.
>
> CHRYSANTHOU: Well, it's a complete waste of time.
>
> POTTER: So you say.” (T 188-189)

172 However, the cross-examination of the defendant on her own statement is instructive because the same pattern of overreaction, suspicion and complaint was raised by the defendant effectively to the whole of her own statement. It was put to the defendant that the feelings of anger generated by this email had motivated the sending of the matter complained of:

> “Q. And I also put it to you that the reason why you responded in the way you did in your letter, in your email the next day was out of anger simply because Mr Raynor had raised the stakes by copying in Mr Hitchman to his email of the 24th. Correct?
>
> A. I agree that he raised the stakes but he raised the stakes with more bullying and harassment. This was now an extra long letter and it was now make, and he used word to the effect of “This is serious and may get more serious” and he’s threatened me now with “loss of, of money and that the committee”, which he’s representing “I believe the committee would and should seek compensation from the owners of my lot, lot 9” and he says “By copying I’m notifying the agent of lot 9 that this is a real possibility”. It was a threat.
>
> Q. So do you now agree or disagree with the question, that what motivated you to write the email the next day on the 25th was the fact that you were angry that Mr Raynor had copied in Mr Hitchman in the email the day before?

A. I'm actually terrified at this point that I am going to be more than likely evicted and I feel completely bullied and harassed by the use of on-line technology. That is how I truly felt and exactly you can read it in my response." (T 201)

173 Mr Potter then put to her:

"Q. So in your eyes the fact that you left your mailbox open was a matter of little or no consequence to you at all, was it?

A. That I left my letterbox sometimes unlocked?

Q. Yes?

A. Yes. Can you repeat the question?

Q. Are you agreeing with my question? In your eyes the fact that you let your mailbox open sometimes, as you've just put, qualified it--

A. Yes.

Q. --was a matter of no consequence to you at all. Correct?

A. I thought that the risk of me keeping my letterbox open was only my risk and didn't inconvenience or risk anybody else, and I was not breaking a law. I made sure of that very early on. It was advised to me very early on.

Q. So is the answer to the question yes?

A. Can you repeat the question differently?

Q. Well I'll ask the same question again. In your eyes, the fact that you left your mailbox open sometimes was a matter of no consequence to you at all?

A. It's not that it was a matter of no consequence, the, the risk was mine. It was more about convenience and time. Something I have lack of."

174 There was no reference in the matter complained of to "not breaking a law" or of the defendant getting advice to this effect. This was one of a number of questions which Mr Potter had to ask more than once in order to elicit any responsive reply.

175 The defendant was asked if she was aware of the danger of identity theft and agreed that it would be a very serious matter. She also knew that there had been an increase in letterbox break-ins in the area (T 203), although she had not bothered to click on to the attachments to the plaintiff's letters setting out this information on advising the precaution to be taken.

176 She repeated several times in her evidence that the plaintiff "had no right to ask me to close my letterbox" (T 206).

177 The defendant's description of the sinister nature of 10 April 2017 email is indicative of her overreaction to what was a straightforward request by the plaintiff:

> "Q. What's sinister about that?
>
> A. It's not sinister, it's just the first time I - I was like, whoa. Before - the only other time I'd ever heard about this was months earlier when he'd written to
>
> me - in fact I'll tell you exactly how long. It says, "I've noticed your letterbox has been unlocked for a while." That was on - in August, late August and this - we're now in April of the following year. So when he talks about residents have again expressed their concern, I was like - residents again? I don't, I don't even know about the first time.
>
> Q. So you decided to ignore this email?
>
> A. I did. I, I decided that he - perhaps he had an obsessive compulsive issue about--
>
> Q. A what? Obsessive compulsive issue?
>
> A. Well I, I, I saw that my letterbox was my business and he obviously having it out half a centimetre was concerning him." (T 207)

178 It was never explained why there was such a problem with the delivery of parcels. The letterboxes were just standard boxes for letters. The defendant said she worked about 15-20 hours a week, from home "a lot of the time" (T 231), although occasionally she went to clients' homes. She described her job as "spasmodic, sometimes I work at night, sometimes I work on weekends, it's, it's very spasmodic" (T 231). In practical terms, this meant that, apart from times when she went out for work-related purposes, she was at home to collect mail or packages left for her by either the friendly postman Rodriguez or a courier:

> "Q. Did you get your doorbell buzzed by either Rodriguez or a courier to say that you have a package?
>
> A. Sometimes.
>
> Q. And would you come down and get it?
>
> A. Yes, sometimes, yeah.
>
> Q. I suggest to you that the reasons you gave in relation to leaving your mailbox open were disingenuous because that's how parcels were delivered in the normal course of events?
>
> A. It's not true. Why else would I leave it unlocked?" (T 232)

179 The defendant also complained about the issue going to the Department of Fair Trading (and, by inference, to the resolution passed at the December 2017

meeting of the owners corporation), describing this as more evidence of harassment by the defendant.

180 As is set out in more detail below, all of the defendant's evidence points to her overreacting to a straightforward request for her to lock her mailbox like the other residents, a refusal which created significant difficulties for the other residents, the owners corporation and the strata manager when two mailbox break-ins occurred.

Mr Curby's evidence

181 Mr Curby's evidence is relevant to limited issues:

(a) Whether or not he had a conversation with the plaintiff in the foyer on 10 or 11 April 2017 concerning the reasons why the defendant kept the letterbox unlocked. As set out above (at [118] – [136]), I have rejected that evidence.

(b) When and in what circumstances he had a conversation with a locksmith. Mr Curby acknowledged that he had a conversation with a locksmith only on 26 March 2018 (T 282), which is well after the events in question, and of no relevance to the circumstances in which the matter complained of was composed.

(c) Corroboration of the defendant's explanation of her concern and distress at being harassed by the emails from the plaintiff.

(d) Mr Curby's conversation with the plaintiff on 26 May 2017, when the plaintiff was putting his first request for an apology into the defendant's mailbox (set out above at [131] – [133]).

182 Mr Curby also volunteered information concerning mail fraud, police investigations and building security. This was his opinion, and not expert evidence, and most of it was objected to on that basis.

Credibility issues

183 In *Thornton v Telegraph Media Group Ltd* [2011] EWHC 1884 (QB), Tugendhat J observed at [73]-[74]:

> "[73] There is great assistance to be obtained from extra-judicial writing of Lord Bingham in a chapter headed "The Judge as Juror: The Judicial Determination of Factual Issues" ("The Business of Judging", Oxford 2000, pages 3ff; Current Legal Problems, vol 38 Stevens & Sons Ltd 1985 page 1-27). Lord Bingham cited Sir Richard Eggleston QC *Evidence, Proof and Probability* (1978), 155 who set out the main tests to be used by a judge to determine whether a witness is lying or not.
>
> > (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;

> (2) the internal consistency of the witness's evidence;
>
> (3) consistency with what the witness has said or deposed on other occasions;
>
> (4) the credit of the witness in relation to matters not germane to the litigation;
>
> (5) the demeanour of the witness.

[74] Lord Bingham then added these observations:

> "In choosing between witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may nonetheless be the true one. The improbable is, by definition, as I think Lord Devlin once observed, that which may happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented....
>
> ... so long as there is any realistic chance of a witness being honestly mistaken rather than deliberately dishonest a judge will no doubt hold him to be so, not so much out of charity as out of a cautious reluctance to brand anyone a liar (and perjurer) unless he is plainly shown to be such.""

The plaintiff

184 The plaintiff is a retired man of 78 years of age who needed two walking-sticks to get into the witness box. His credit was attacked on the basis that he at times appeared contradictory or vague.

185 Age and health are both well-recognised as issues to take into account when assessing witness credibility. As to age, the difficulties in assessing the evidence of very young witnesses and the elderly, in terms of giving evidence asserted to be contradictory or vague, have been recognised in academic studies, although they are, more helpfully, also the subject of consideration at appellate level.

186 In *Sleboda v Sleboda* [2008] NSWCA 122, the trial judge, largely as a result of credit findings, preferred the evidence of the plaintiff, who was 79 at the time of the relevant transaction (at [33]) to that of his son in relation to a land transaction, even though the elderly plaintiff had commercial experience (at [34]). The son appealed, arguing that highly improbable evidence given by the plaintiff was not referred to by the trial judge and that admissions by him of bad memory (at [45]) were of significance. The Court of Appeal dismissed the appeal and held that the trial judge's findings in relation to demeanour were of significance in determining whose evidence to accept.

187 At [49] the court said:

> "49 Sometimes, when a trial judge disbelieves evidence of a witness, it is as a result of considering other evidence that show that certain facts are clearly correct, or are more likely to be correct than the witness's evidence, in the light of which the witness's evidence could not be correct. There are other occasions, however, when the reaction of a judge to some evidence, considering that evidence just by itself, is in substance "I have heard the evidence you give, but I have no confidence that what you are saying is really right". In the present case, it was the latter that was the trial judge's view concerning Mr Lee's evidence. Whether a Judge actually believes evidence that he or she hears is fundamental to whether that evidence proves the facts that it relates. As Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361: "… when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.""

188 Another relevant factor in *Sleboda v Sleboda* was that the Court also considered, in relation to the son's evidence, that "the extraordinary improvement between Mr Lee's affidavit evidence and his oral evidence, would make an experienced trial judge pause" (at [50]). As noted above, the defendant did not merely improve her evidence as opposed to what was contained in her statement, but actually challenged her own statement's veracity until Mr Potter pointed out that the document he was putting to her and that she was disagreeing with was her own witness statement.

The defendant

189 The defendant gave evidence in a vigorous fashion, using the words "absolutely", "incredibly" and "totally" repeatedly to endorse her answers, interrupting Mr Potter in his questioning of her (see for example T 235 -238) and at times wanting to justify her position rather than answer the question (T 170). Examples are set out in the extracts from the transcript above.

190 The plaintiff's demeanour in the witness box, which included reluctance to answer questions and at one stage an accusation that Mr Potter was the author of a document on which she was being cross-examined, did not create the impression of a witness who gave thoughtful and considered responses or who was endeavouring to assist the court by giving honest and straightforward evidence. The whole of her evidence was coloured by exaggerated language, groundless suspicions and hostility.

191 The defendant is not a witness upon whom reliance can be placed.

Mr Curby

192 Mr Curby was a less angry witness (T 276 – 277) but was clearly there to support the defendant. To do so, he volunteered his opinions on a number of issues, including matters of an expert nature concerning security (T 275, 282), calling the plaintiff's concerns about copying the mailbox lock "ludicrous" (T 268), although it transpired that the no inquiry had been made by him until 26 March 2018 about the plaintiff's concerns that the unlocked box made key information ascertainable (T 282). He sought to advocate the defendant's case at every opportunity.

193 Mr Curby is not a witness upon whose evidence any reliance can be placed.

The defences

194 The defendant pleads the following defences:

(a) The defence of justification pursuant to s 25 of the Act (paragraphs 10 - 19 of the defence);

(b) The defence of honest opinion pursuant to s 31 of the Act (paragraphs 20 – 22 of the defence);

(c) The defence of triviality pursuant to s 33 of the Act (paragraph 23 of the defence); and

(d) The defence of common law qualified privilege (paragraphs 24 – 25 of the Act).

The defence of justification

195 The particulars of justification set out in the defence are brief. They consist of a list of the 6 emails sent to the defendant personally and the 2 emails to all residents are set out, followed by two conversations between the plaintiff and Mr Curby, which is followed by the assertion that these communications "amounted to repeated harassment" of the defendant "in relation to a trivial matter, namely whether her mailbox was unlocked" (paragraph 15 of the defence). The sole particular for "shaming and humiliating" as that the email sent on 25 May 2017 was also sent to the defendant's real estate agent. The opinion is proffered that this was sent "with the intention of having the defendant, a mother of two children, evicted from her rental home", an assertion which was not put to the plaintiff during the course of cross-examination or supported by any documentation. This conduct is then stated, without any further elucidation, to amount to "harassment and intimidation of

the defendant some of which occurred using the internet, being a carriage service". The conduct which did not involve using the internet is unspecified.

196 Other particulars and evidence were raised during the hearing. Mr Potter complained, not unreasonably, that these had not been particularised and he could not meet them on the run, particularly as the three residents who had provided affidavits had been excused from attendance.

197 These particulars are self-evidently insufficient. A defendant must specify the particulars of truth to support a plea of justification with the same precision as in an indictment: *Brooks v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1331 at [12] per McCallum J, referring to *Wootton v Sievier* [1913] 3 KB 499 at 503. This is because a person who publishes a serious allegation that he or she seeks to defend as true, must know the facts that justify the charge that the publisher makes about the plaintiff in it.

198 In a series of recent decisions in other courts, justification defences containing particulars of this manifest inadequacy have been struck out: *Rush v Nationwide News Pty Ltd* [2018] FCA 357; *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61; *Eardley v Nine Network Australia Pty Ltd* [2017] NSWSC 1374 at [16]; *Gair v Greenwood* [2017] NSWSC 1652 at [11]. Parties should not consider that cases conducted in this court should be run any differently. Trial by ambush is just as unacceptable in this court as in other courts: *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346.

199 The particulars of justification in the defence fail this test at every level. Not only is there a failure to provide particulars for each imputation but the "particulars" consist of a list of the relevant emails and bald assertions which essentially repeat key words in the imputations.

200 Ms Chrysanthou, in her written submissions, set out the evidence of justification in similar terms. Claiming that "the defendant's case on truth is a simple one" (written submissions, paragraph 59), she states that the plaintiff "sent many emails to the defendant and others" and "also spoke to the defendant's partner, Mr Curby, about it" (paragraph 60), propounded an "absurd" theory that the defendant was to blame for the mailbox break-ins, "escalated" the matter by complaining to the strata manager (paragraph 62)

and by his “repetitive conduct over more than a year” made the defendant feel “harassed and menaced” (paragraph 63). His email of 24 May 2017 “constituted a threat” (paragraph 64) and he “publicly humiliated” her in his emails to the strata manager (Mr Amoroso) and to his fellow committee members (paragraph 65). As there was no resolution or provision in the by-laws for the defendant’s mailbox to be locked, the plaintiff had neither the right nor the authority to demand that she lock it, which meant he was wasting everybody’s time and thus a “busybody”.

201 Mr Potter drew attention to these deficiencies in his closing submissions, particularly in relation to the claim of harassment in relation to post-publication emails, none of which had been particularised:

> “There's one thing I'd say about truth, your Honour, that none of these so called post-publication harassment particulars were made in the particulars of truth. I have come to wonder their relevance. I presume there's some sort of Maisel type allegations of post-publication conduct assuming one could characterise the imputations as general imputations.” (T 334)

202 Where evidence is lead which has not been the subject of justification particulars, great caution must be exercised as to whether the evidence should be accepted. However, as is noted in the section of this judgment concerning justification, it is clear from the email chain discovered by the plaintiff that all steps taken in relation to the referral of the dispute to the Department of Fair Trading, including consultations with the strata manager, were taken in accord with advice from the strata manager and with the consultation and concurrence of the other members of the executive committee.

203 Before considering the evidence in relation to each of the imputations (as step the defendant did not take in either the pleadings or the submissions) I note in particular the submission that the plaintiff did not consult a locksmith until after he had commenced defamation proceedings, and that this is supported by asserted concessions made by the plaintiff during cross-examination.

Whether or not the plaintiff consulted a locksmith at the time of the first break-in

204 Ms Chrysanthou’s submissions were that the plaintiff’s evidence that he actually spoke to a locksmith before the matter complained of was published and before he sent the emails he did recording “his theory about viewing the

barrel of the lock in my client's mailbox was unsatisfactory" as he could not put a date on the conversation (T 286).

205 This was one of the particulars that Mr Potter complained that these were added on the run, at the end of the hearing, in circumstances where he had accepted the agreement of the defendant not to require his witnesses for cross-examination and disputed issues of fact of this nature could not be addressed.

206 However, all the documentary evidence is to the contrary of the defendant's claims in this regard. In the course of hearing her oral submissions, I drew to Ms Chrysanthou's attention (T 286 – 288) to the plaintiff's repeated references to consulting a locksmith and locksmith costs, and particularly to the emails of 28 April and 2 May 2017, which specifically refer to a conversation with a locksmith company which is identified, in the email to Ms Chua, as being Barrenjoeys Locksmiths.

207 Ms Chrysanthou's response was that the plaintiff had only identified two conversations and that, as one of them must have been in December 2017 and the other was at an unknown date, he could not have spoken to any locksmith at the time of the robberies.

208 I do not accept that this gloss of the plaintiff's recollections is in fact correct. More importantly, contemporaneous records and independent evidence from disinterested third parties, such as the other residents with whom the plaintiff was exchanging this information, demonstrates clearly to the contrary. Such contemporaneous records are often of greater assistance in proceedings such as the present where a party has difficulty recalling events.

209 The plaintiff's age and physical disabilities, and the obvious distress he had suffered as a result of these events, were readily apparent when he was in the witness box. He was at times uncertain about dates of the meeting, but firm in his evidence that he had consulted a locksmith straight away after the first mailbox break-in. I am satisfied from the contents of his contemporaneous emails with the other residents and with the managing agent that he had in fact done what he told them in his emails that he did.

210 All of the contemporaneous evidence points to the plaintiff having made the inquiries referred to in his emails with the other directors, and to having been told by Barrenjoey Locksmiths the information he passed on to Ms Chua and others about how an unlocked mailbox could have provided information to the thieves. He was not cross-examined about his reference to Barrenjoey Locksmiths in his email to Ms Chua. No particular of justification asserts that the plaintiff had not made the inquiries of the locksmith to which he referred in his email to the plaintiff.

211 I am satisfied that the plaintiff made the inquiries and that he was told by Barrenjoey Locksmiths the information set out in his emails following the thefts, including the information about how an open mailbox could have provided information to the thieves.

Justification of imputation (a) – The plaintiff unreasonably harassed the defendant by consistently threatening her by email.

212 Proof of justification of this imputation would require, at the very least, identification of the evidence as a whole that the plaintiff's correspondence (wholly or in relation to specific letters), amounted not merely to harassment, but to unreasonable harassment in the form of "consistently threatening her". This requires analysis of the emails one by one, as well as to their cumulative effect.

213 The plaintiff sent two emails to the defendant over an eight-month period about her mailbox, both of which she failed to reply to. Nothing in the tone or content of either of those emails is harassing in nature. The second is a reasonable follow-up letter given the box remained open for most of the time for eight months without any explanation or reply from the defendant. As set out above, I am satisfied that there was no conversation between the plaintiff and Mr Curby as asserted in the defence but even if there had been, this was asserted to have been initiated by Mr Curby to explain why they did it.

214 Even so, Mr Curby's bare statement that it suited them to leave the mailbox open was then overtaken by the two mailbox break-ins in April and May 2017. The plaintiff was clearly obliged to notify residents of each of the two mailbox break-ins, and the attaching a newspaper article with advice from the police

was a reasonable and sensible step. There is nothing harassing of the defendant in attaching the newspaper article containing the police advice and in asking residents to comply.

215 The defendant has a significant problem in establishing this defence, as is the case with other defences, in that although the plaintiff attached a link containing advice from the police, the defendant was so incensed by the plaintiff's email that she not only refused to read this information but refused to follow the police advice. Instead, the defendant complains she felt targeted by this email because she was the only resident leaving her mailbox open (although she inconsistently claimed in her evidence that others sometimes did as well).

216 Only the most tortured reading could elicit any reference to the defendant. It is clear, from the references to the police advice and the request for the email recipients to read it, that the plaintiff is repeating police advice, not targeting or even referring to the defendant. Like the email sent after the second break-in, this is not a harassing email of any kind, but important and neutrally worded information of an urgent nature for all residents, and addressed to all residents, not to the defendant.

217 When the defendant continued to leave her mailbox open, he sent her a reminder and answered her derisive email of 27 April 2017 politely. That email is not a harassing or threatening email, either individually or as part of a chain with the previous correspondence. It was an appropriate response.

218 The second mailbox theft on 2 May 2017 resulted in a second email containing a link to the police advice. It is clear from the emails to the plaintiff from other residents that they were all concerned about two break-ins a matter of weeks apart. This email did not identify the defendant in any way.

219 The plaintiff had a conversation with Mr Curby on 26 May 2017. He described the terms of this as follows:

> "Q. Did you have a conversation with anyone on that day, in relation to this matter?
>
> A. I had a conversation, in fact, with Ms Murray's partner, Paul. By accident he was in the lift as I went down to the mailboxes. He was actually coming down, presumably from the third floor, and I met him in the lift, and we had a—

Q. What was that conversation?

A. It wasn't a long conversation. I - he started to engage me about mailboxes; I said to him this is no longer about mailboxes, this is about something much more serious, and as we walked out through the lobby, into the front steps, I said to him basically I believe this is defamatory, and, and I'm delivering a letter to Trish and that which you can see I'm putting in the mailbox. I didn't show him the letter, meaning all he saw was the envelope with the letter in it, so.

Q. What did he say to you? Did he say anything about the mailboxes before you—

A. He didn't really say anything about the mailboxes. He said, he said to me, I do remember him saying to me something about - I don't think he specifically said this is not defamatory, and I think that he did make a remark to me that Trish has used question marks in her email, and I, my inference from that was that she wasn't really stating things as facts; she was asking questions. I don't know. That's it.

Q. Was that the only conversation you had?

A. That was essentially the only conversation because, in truth, I effectively cut it off by saying, "I don't want to talk about mailboxes. This is not an issue about mailboxes per se; it's an issue about what was written in that email." So-“ (T 64)

220 Mr Curby gave the following account of this conversation:

“Q. The first conversation or the second conversation?

A. This is the second conversation. Yeah. We, we had a conversation about the master key, the locksmith, the by-laws and, and the opening - the rekeying of the front panel, and in relation to the master key, Mr Raynor said, "Well they think that they created a master key from your open letterbox," and I asked him, "Who said that?" He said, "The locksmith said that's how it was likely done." I said, "Which locksmith is that?" He said, "Well I didn't actually speak with the locksmith, someone told me." and I said, "Who told you that?" He said, "Someone." And then, then he said, "It's - it looks like that the front panel is going to have to be changed," or words to that effect and - "or the locks rekeyed." And I said, "Who told you that?" He said, "The locksmith told me that." Or the locksmith. He didn't say, "The locksmith told me that," he said, "The locksmith." And then I asked him about the by-law and I said, "So just so that I can understand, is there a by-law that relates to us having to keep the letterbox locked?" and he said, "No." And I said, "Well then it's up to each resident whether we unlock or lock our letterbox," and he said, "I'm tired" - he said that, "I'm tired of doing everything around here. Everyone comes to me with their complaints." He said, "I'm about to go on a complicated holiday, we'll deal with this when I get back." And that's what he said.

HER HONOUR: I don't remember that. Was that put to the plaintiff?
CHRYSANTHOU: Most of it was yes. Some of the details weren't but definitely the admission we say the plaintiff made about not directly speaking to the locksmith.” (T 273 – 4)

221 This conversation was not in fact put to the plaintiff in terms, but his answers in cross-examination were similar to the description he gave in chief, namely that

when he saw Mr Curby and Mr Curby started to talk about the mailboxes, the plaintiff said that things had now gone beyond that.

222 Mr Curby's claims concerning this conversation, like the claims concerning the 10 or 11 April 2017 conversation, are inconsistent with what was actually occurring. The day before, the plaintiff had received the matter complained of from the defendant, and this had upset him so much he was about to put a letter requesting an apology into her mailbox (she had blocked his emails so he could not reply by email). The likelihood that he would have a long conversation about locksmiths and bylaws with her partner is low. It is far more likely that the plaintiff said that the matter had gone beyond being about mailboxes in light of her email, which he considered defamatory, and then cut the defendant off when he attempted to talk about other issues. I also note that, in her inconsistent version of the 10 or 11 April 2017 conversation between the plaintiff and Mr Curby as reported to her, the defendant claims that the issue of bylaws was raised at that time.

223 In those circumstances, it is more likely that Mr Curby responded in the manner described by the plaintiff, namely to try to defend what the defendant had said, and that the topic of conversation was the matter complained of and the plaintiff's letter containing a request for an apology. I am accordingly satisfied that this conversation happened in the way described by the plaintiff.

224 As the defendant ignored the plaintiff's requests to lock her mailbox, the Executive Committee went to the Department of Fair Trading seeking appropriate relief, where the matter was resolved at mediation. That was a decision made by the Executive Committee, which the plaintiff explained was comprised of a number of persons. That action does not amount to harassing, threatening or menacing conduct. It is part of the proper conduct of an owners corporation seeking to protect the interests of all the occupants.

225 The defendant has failed to discharge the burden of proof. I am not satisfied that any of the correspondence was anything other than reasonable or proportionate. Leaving a letterbox unlocked is not a trivial matter when there are two mailbox break-ins and, as the police noted in their public warnings, while mail theft might appear petty, it should be taken seriously because of the

potential for criminal activity ranging from credit card misuse to identity theft involving crime syndicate activity.

Justification of imputation (b) – The plaintiff acted menacingly towards the defendant by consistently threatening her by email.

226 I repeat the factual background set out in relation to imputation (a).

227 What aspect of this conduct could be called “menacing”? The defendant employs this word and gave dramatic evidence in the witness box about feeling menaced (T 178), but Mr Potter put it to her that she had used that word because she had found it on a website:

> “Q. Can I just show you a piece of paper. Was the police website setting out the criminal offence of cyber harassment being this section where I've highlighted those words “menacing, harassing or offensive”? Is that what you found on the police website?
>
> A. I don't know exactly what I found on the police website. Like this is - this says the same thing.
>
> Q. I suggest that those words that you used in this email came from—
>
> A. This particular piece—
>
> Q. --this particular section.
>
> A. No, I don't think so because I would have put it in that order. So it's not from this.
>
> Q. Just because the words don't appear in the same order doesn't necessarily mean you didn't take it from the same source does it?
>
> A. I didn't take it from this source.” (T 244)

228 The defendant said she hoped that calling this conduct “menacing” would “clear the air”:

> “Q. How did you imagine that sending an email alleging menacing conduct and harassment for the very first time would clear the air?
>
> A. I just wanted the harassment to stop.
>
> Q. And you thought sending this email would clear the air, did you?
>
> A. I, I, I hoped it would stop the emails. It didn't work.
>
> Q. I suggest that that evidence is completely false and, far from clearing the air, you were actually putting the plaintiff, in your mind, back in a box and stopping him from contacting you or talking about the mailboxes at all. Do you want me to repeat the question?
>
> A. Yes.
>
> Q. I suggest that rather than you having a view that sending this email would somehow clear the air, it was sent for the express purpose of ridiculing the

> plaintiff and putting him back in his box or sending an email to you and copying in the agent?
>
> A. I found his email that was copied into my agent frightening and threatening. I was past - it had gone past trying to sort this out. I realised what his intentions were and that was to get me out of the building." (T 246)

229 All of the evidence points to the defendant looking for the strongest adjectives she could find, in order to embarrass the plaintiff and make him look as if his conduct was criminal, without having any basis for the making of such allegations. I do not accept her evidence that she felt menaced by the defendant. I am satisfied by this evidence and by her angry demeanour in the witness box that the defendant never felt menaced by the plaintiff but enraged by his request.

230 The defendant has failed to discharge the onus of proof in relation to this imputation or to establish any evidence in support of this plea. There is no evidence whatsoever of menacing conduct or publicly sent emails.

Justification of imputation (c) – The plaintiff is a malicious person who sent threatening emails to the defendant and copied in other residents of the Watermark building for the express purpose of publicly humiliating the defendant.

231 To the factual material set out in relation to imputation (a) (where I have found that the emails the plaintiff sent were not threatening) must be added the additional and very significant difficulty the defendant has in that apart from the final email, which was sent to the real estate agent (a perfectly reasonable step, in that the defendant does not complain that the plaintiff's "noisy party" letter was also sent to the real estate agent), there was no sending of emails to anybody else, let alone other residents. The defendant eventually acknowledged this in cross-examination:

> "Q. Could you tell me where in the chain of emails below your email there reveals any other recipient besides you?
>
> A. Just Jason Hitchman, my real estate agent." (T 247)

232 I specifically exclude from this list the two emails to all residents notifying the mailbox break-ins. These were emails the plaintiff was obligated to send in order to notify residents of these break-ins. Nor was it unreasonable of him to include a link to advice that the police were providing. I am satisfied that this

information was provided for the benefit of all residents and not to target the defendant.

233 Mr Potter put it to the defendant that she deliberately structured her email reply to make it look to the recipients as if he had in fact been sending emails not only to the defendant but to others when that was not in fact the case:

> "Q. No, my question was do you agree that the person reading your email, be that an owner of an apartment at Watermark, would see your email and then, if you say they would read the emails below, they'd have no idea whether those emails were sent to all the other owners besides them or whether it was sent to two or three owners or the committee or Mr Hitchman or anybody? Correct?
>
> A. I don't know what they think.
>
> Q. What I'm saying to you is when you drafted this email it would have been prudent, wouldn't it, to say, "Here's a chain of emails which Mr Raynor sent to me personally and the last one he copied in my agent"?
>
> A. Well, I just copied - I just did exactly what Mr Raynor did.
>
> Q. Because—
>
> A. Mr Raynor didn't do that with his previous emails either.
>
> Q. Because do you agree the impression that you have created by this document is that those chain of emails could have been sent to anybody including—
>
> A. No, I—
>
> Q. --owners?
>
> A. No, I don't agree with that.
>
> Q. So do you agree with the proposition that the reader would just be left wondering who those emails were sent to?
>
> A. No, I don't agree with that." (T 251)

234 I do not accept the defendant's evidence on this issue. I am satisfied that she deleted the recipient line so that other persons reading the email would believe that the emails the plaintiff had sent to her had in fact been sent on the "public option" as she claimed, namely to other residents or third parties, the inference being he was trying to shame her publicly. The list of parts of emails at the end of the email, although not the subject of cross-examination, could have added to this confusion, but as the defendant was not cross-examined about these, I shall not rely upon this part of the matter complained of.

235 As to post-publication conduct, the failure of the defendant to plead or particularise just which letters were "copied in" to other residents is just one of

the many difficulties with which I am confronted. The defendant's failure to provide particulars of justification with the requisite precision (*Brooks v Fairfax Media Publications Pty Ltd (No 2)* at [12] per McCallum J) should not be rewarded by allowing her to spin a case which the plaintiff has to meet on the run.

236 The defendant has failed to establish any of the factual matters going to the proof of justification in relation to imputation (c).

Justification of imputation (d) – The plaintiff is a small minded busybody who wastes the time of fellow residents on petty items concerning the running of the Watermark building.

237 As is the case with the other three imputations, the facts to support justification of this imputation were not identified either in the defence or in Ms Chrysanthou's written submissions.

238 The principal difference between this imputation and the other three is that this refers to the plaintiff's conduct on a general basis.

239 The first point to note is that, although the matter complained of asserts that the plaintiff sent the defendant "many emails" of which the mailbox emails were the "latest topic", the only evidence of the plaintiff sending the defendant any emails on topics other than mailboxes are the welcome email and the email concerning the noisy party the defendant had. This noisy party had resulted in complaints to the strata manager and the police by residents not only in the Watermark building but from other residents in other buildings. Not even the defendant suggested that this email, the text of which is set out above, was anything other than perfectly proper. This means that the defendant must rely upon the emails in relation to one topic, namely the mailboxes.

240 I set out once again that the plaintiff sent two emails to the defendant over an eight-month period about her mailbox, both of which she failed to reply to. He was then obliged to notify residents of mailbox break-ins, attaching a newspaper article with advice from the police which the defendant did not even read, let alone comply with. When she continued to leave her mailbox open he sent her a reminder and answered her derisive email of 27 April politely. The second mailbox theft on 2 May resulted in further correspondence. The request

for the defendant to comply was what led to the matter complained of. As the defendant ignored the plaintiff's requests to lock her mailbox, the Executive Committee went to NCAT seeking appropriate relief, where the matter was resolved at mediation.

241 The defendant has failed to establish the justification of this imputation.

Conclusions concerning the defence of justification

242 The defendant has failed to establish the proof of any matters going to the justification of any of the four imputations.

243 For convenience, in relation to damages, I note I am also satisfied that, in addition to failing in relation to the proof going to each imputation, the defendant has also failed to prove any fact or matter capable of going to mitigation of damages.

The defence of statutory honest opinion

244 In their written submissions, counsel agree that this defence goes to the defamatory publication as a whole "in its defamatory sense" (*Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 at [100] per McCallum J), in contrast to other defences such as the justification defence (s 25) also relied upon in these proceedings (plaintiff's submissions, paragraphs 19-21; defendant's submissions, paragraphs 121 – 4). As the Court of Appeal (McColl, Basten and Meagher JJA) pointed out in *Harbour Radio Pty Ltd v Ahmed* (2015) 90 NSWLR 695 at [44], the risk in treating the imputation as the matter which must be identified as the expression of fact is that it may not accurately reflect the language of the defamatory publication. The Court referred instead to "the contextual nature of the inquiry as to whether a statement is an opinion" (at [44]). The critical question is whether the defamatory sense of the matter complained of was conveyed as an expression of opinion rather than as an assertion of fact (*O'Brien v Australian Broadcasting Corporation* [2014] NSWSC [2016] NSWSC 1289 at [41] - [50]; although the appeal ([2017] NSWCA 338) was dismissed on other grounds, as McCallum J noted in *Feldman v Polaris Media Pty Ltd as trustee of The Polaris Media Trust trading as The Australian Jewish News (No 2)* [2018] NSWSC 1035 at [45], these are not decisions to be disagreed with lightly).

Fact or opinion?

245 The task of the court is thus to determine whether the matter (in the context of any defamatory meaning as found by the court) was an expression of opinion of the defendant as opposed to a statement of fact. Mr Potter draws my attention to the statement by McCallum J in *Feldman v Polaris Media Pty Ltd as trustee of The Polaris Media Trust trading as The Australian Jewish News (No 2)* at [51].

246 The words in the matter complained of (particularly at lines 68-74) are statements of fact, namely consistently choosing the public email option and, consistent attempts to shame the defendant of a harassing and menacing nature, and sending threatening emails.

247 Imputation 5(a), namely that the plaintiff unreasonably harassed the defendant by consistently threatening her by emails is a statement of fact rather than an opinion. The material set out in lines 68-71 state that the plaintiff has consistently chosen the "public email option" in making his accusations against her, lines 72-74 consists of statements that this is harassment and an attempt to shame her publicly. This imputation is a statement of fact.

248 Similarly, a statement of menacing conduct (imputation 5(b)) is a direct accusation of conduct, not an expression of an opinion as to the nature of that conduct. The factual material which is alleged to give rise to the complaint of menacing behaviour consists of statements of fact.

249 Similarly, in relation to imputation 5(c) the conclusion that the plaintiff is malicious is asserted to be a statement of fact based upon the sending of threatening emails to the defendant which are copied into residents in the Watermark building.

250 Only imputation 5(d), which is that the plaintiff is a small minded busybody may be regarded as an opinion rather than a direct statement of fact. Accordingly, only imputation 5(d) is capable of amounting to an opinion.

251 In the event that I have erred in these findings, I set out below my reasons for finding that none of the imputations is based on proper material for comment.

Proper material for comment

252 The defendant has elected to plead, under s 31(5)(a) that the proper material was substantially true (see paragraph 20(c) of the defence).

253 The proper material for comment identified in the defence is:

(a) The plaintiff sent the defendant many emails about the mailboxes (lines 20 – 21).

(b) The plaintiff had asserted that leaving a mailbox open posed a security risk for all residents in the building (lines 22 – 24).

254 A third particular, namely that the plaintiff's assertion about the risk of leaving a mailbox unopened was fanciful, was withdrawn during closing submissions as it was acknowledged to be an opinion (T 302).

255 Starting with imputation 5(d), this differs from the other imputations in that it does not refer to the sending of threatening correspondence but paints the plaintiff as a small minded busybody because he wastes the time of fellow residents on petty items (in the plural) concerning the running of the Watermark building.

256 Nowhere is there any particularisation of any conduct other than the sending of emails about the letterboxes. Although there was a reference to there being many other emails, these are not identified, nor is it identified how the contents of those emails or indeed any aspect of the plaintiff's conduct as chairman amounts to being a small minded busybody. The sole basis upon which there could be said to be any material for comment would be the issue of the mailboxes. That would not be sufficient to be proper material for comment for imputation 5(d).

257 Having made those specific observations concerning the lack of proper material for comment in relation to imputation 5(d), I now address all four imputations in relations to the particulars which have been pleaded as set out above. This is particularly the case in relation to the adding of the additional emails. Although Ms Chrysanthou submitted that this was "an interesting case where the proper material was actually put before the reader" (T 302), this must fail as well, in part because of the selective approach taken by the plaintiff to the inclusion of emails, and in part as to her editing of them.

258 As to particular (a) (sending many emails), this misstates both the nature and extent of the emails in question. The matter complained of states (line 68) that "you have consistently chosen the public option and copy in all residents and/or my real estate agent" and adds, at line 72, that the plaintiff has made "consistent attempts to shame me publicly" when in fact, as Mr Potter pointed out in the outline of submissions at the commencement of the case (paragraph 28), only the last of the contentious emails was sent to a person other than the defendant (the two emails to all occupants advising of the mailbox break-ins do not, I have found, identify the defendant in any way). The sense in which the ordinary reader would have understood the basis of the comment would have to be what is in the matter complained of, namely that the plaintiff "had consistently chosen the public email option and copy in all residents and the agent" and that these "many" (to quote the particular) emails identified the defendant as the security risk for all the Watermark residents.

259 These facts cannot support the opinion. There is no chain of "many" emails sent to all the residents about the defendant.

260 The next problem is the selectivity of presentation for the "cut and paste". In closing submissions, in addition to the other matters submitted to amount to proper material for comment, Ms Chrysanthou submitted (T 302) that the proper material was the emails that the plaintiff sent to the defendant, as that material was put before the reader for them to form their own view:

> "The reader of the matter complained of is in a position to form their own conclusions about the plaintiff's emails to the defendant because those emails are put before him or her. So it's an unusual situation we say in one of these cases where the proper material is actually before the reader. We say that's why it's actually a good opinion defence because the proper material is that he was sending lots of emails and that he was accusing the defendant of being responsible for the break-ins. Those two facts are undoubtedly true."

261 There must be a rational connection between the facts in the opinion to sustain the claim that the opinion was based on those facts. However, all the additional material does is to underline the total lack of connection between the facts and the asserted opinion. I particularly note:

(a) There is nothing, either in the matter complained of or in the "attached emails", to support the assertion that the plaintiff "sent many emails to me in our time here at Watermark" of which the

"latest topic" is mailboxes. These "many" other emails are simply never identified.

(b) Similarly, looking at the recipients both to those "attached emails" as well as the matter as pleaded, the statement that "you have consistently chosen the public email opinion and copy in all resident as and/or my real estate agent" is demonstrably false. Apart from the last one, they were only sent to the defendant. For the same reason, the defendant's statement that the plaintiff has made a "consistent attempt to shame me publicly" which is "cowardly" (line 72) is not based on proper material for comment. The sense in which the ordinary reader would have taken as the basis for the comment must be that the defendant consistently chooses to copy in all residents and/or the real estate agent and that he did so for the purpose of shaming her publicly. These are not facts of substantial truth, either in relation to the matter complained of as pleaded or in the light of the emails that were attached.

(c) Looking at the publication in both its forms (namely as tendered by the plaintiff and as containing the "attached emails") in the manner commended by the NSW Court of Appeal in *Harbour Radio Pty Ltd v Ahmed* at [44], this means that particular (a) in the defence is not proper material for comment upon which to base any opinion.

(d) The second particular of proper material as pleaded in the defence, namely that the plaintiff had asserted that leaving a mailbox open posed a security risk for all residents in the building, suffers from a different problem. How does this connect with the matter in terms of the words giving rise to the defamatory imputations, namely that the plaintiff was sending multiple emails to all residents and/or the defendant's real estate agent to threaten and shame her? Nor is the statement true; there was no question of a "security risk for all residents" as a result of one mailbox being open; the risk was that an open mailbox could encourage mailbox break-ins.

262 As previously noted, particular (c) was abandoned.

263 The defence of honest opinion would therefore also fail because any opinion found to have been made was not rationally based on the proper material identified in particulars (a) and (b). I also note that the material set out in those particulars was not true (s 31(5)(a) *Defamation Act 2005* (NSW)).

Public Interest

264 While the test for public interest is an easy one to satisfy (*John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484 at [123]ff), a defendant should not take it for granted (as appears to be the case here) that public

interest does not need to be defined with any precision or shown in some way to be relevant to the sting of the libel.

265 The particulars provided in the defence are:

(a) Watermark;

(b) Harassment by email; and

(c) Security at Watermark.

266 In her written submissions, Ms Chrysanthou adds the "the matter complained of related to the mailbox crimes and the cause of them" (written submissions, paragraph 129). I will deal with all four particulars, since the fourth one bears no resemblance to particulars (a) and (b) and is only tenuously related to (c).

267 The first particular ("Watermark") is nonsensical. As to (b), the issue of harassment by email, the conduct by the plaintiff in sending harassing emails to members of a closed community (namely all residents and the defendant's real estate agent) in the course of strata business could not invite public criticism or be such as to effect people at large. As to the security of the Watermark building and the cause of "mailbox crimes" at Watermark, these are similarly private.

268 Professor Brown in *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), Second Edition (formerly The Law of Defamation in Canada)* (Thomson Reuters) at [15.5(3)] gives examples of personal and private matters where public interest is not made out. These include *Haddon v Forsyth* [2011] NSWSC 123 (the conduct of a parishioner in a church), *Green v Schneller* [2000] NSWSC 548 (a dispute between neighbours concerning a ruptured sewer line), *Cole v Operative Plasterers Federation of Australia (NSW Branch)* (1927) 28 SR (NSW) 62 (the competence and honesty of an architect carrying out works in a private building) and *Anderson v Ah Kit* [2004] WASC 194 (conduct of a private wildlife sanctuary).

269 While I was not addressed on this topic, there may be private matters which have a public impact; Professor Brown notes (at [15.5](2)(k)) the apparent inconsistency between *Green v Schneller* and *Millane v Nationwide News Pty Ltd* [2004] NSWSC 853. However, this decision is explicable in that the conduct in question related to the way real estate agents in general "used

aggressive tactics where their own business concerns were involved" (at [122]). There is no suggestion here that the plaintiff's conduct was an example of some wider kind of misconduct by chairmen of owners' corporations.

270 Accordingly, if I have erred in my previous findings, the element of public interest has not been made out.

271 In addition, I note that a challenge to defeasance (defendant's written submissions, paragraph 133) was abandoned. I note, however, that it is clear from the pleadings that defeasance of both defences on the basis of malice was intended to be pleaded. I have made findings in relation to malice for the defence of qualified privilege at common law, which I formally note that I would have applied to the defence of opinion as well if necessary.

Was the opinion held by the defendant?

272 Mr Potter foreshadowed in his written submissions (paragraph 38) that he proposed to challenge whether the opinion was in fact held by the defendant. Although he did not do so in terms, it was clearly his submission, in relation to qualified privilege, that the defendant knew of the falsity of the imputations, by reason, inter alia, of her selective editing of the previous emails in order to create an inaccurate impression of the exchanges between the plaintiff and defendant in prior emails. I note these as follows:

(a) The defendant left out the email exchange which included her derisive "wow" response and the plaintiff's reply explaining the reasons for his position;

(b) The defendant did not refer to the circulation of the newspaper article containing police warnings; and

(c) The defendant left out the names of the addressees so that it would appear that the emails had indeed been sent by "the public option" to other persons.

273 I am satisfied that the defendant took these steps because she knew that anyone reading the emails in a proper context would appreciate that the plaintiff's motivation was not to harass her personally but for building security issues, and that this concern became acute after the two robberies.

274 The defendant was not cross-examined about whether her inclusion of four sets of addresses for the defendant at the end was intended to create the

impression that there were more emails to similar effect so I have not taken this unexplained addition to the "cut and paste" process into account.

Triviality – section 33

275 In her closing submissions, Ms Chrysanthou said only that she would not have much to say about the defence of triviality (T 296).

276 Both counsel submit that the defendant must establish that, in the circumstances of the publication, the plaintiff was unlikely to sustain any harm, as Kenneth Martin J explains in *Kingsfield Holdings Pty Ltd v Rutherford* [2016] WASC 117 at [379] – [383]. I note Ms Chrysanthou's written submissions set out these principles in more detail and I adopt these principles as stated by her.

277 Ms Chrysanthou submits that the subject matter is "unlocked mailboxes", which is "trivial", that the tone of the matter complained of is "light-hearted and jocular", that it was limited in distribution to those who had already received the mailbox emails" and had consequently already formed views, and that in those circumstances the publication was unlikely to cause harm (written submissions, paragraphs 140 – 143).

278 Applying the relevant principles as set out in *Jones v Sutton* (2003) 61 NSWLR 614, these submissions should be rejected as they do not accurately reflect either the matter complained of or the circumstances in which it was published. The defendant sent the email to the plaintiff and sixteen other named persons who had not known about the earlier chain of emails attached because, apart from the one email copied to the real estate agent, these were only previously sent to the defendant. The subject matter was not "unlocked mailboxes" but a complaint of harassment which ended with the words "Please stop!"

279 Applying the *Jones v Sutton* test, and noting that the recipients would have formed a general impression rather than make a study of the matter complained of for the purpose of determining whether it is "light-hearted and jocular" as Ms Chrysanthou claims, the use of words such as "criminal", "stalk"/"stalking" (twice), "fixation", "thief"/"thieves" (six times), "harassing"/"harassment" (twice), "offensive" and "menacing" do not suggest light-hearted or jocular communication. The addition of suggestions, to persons some of whom could have been the victims of the mailbox break-ins, that the

plaintiff could have staged the break-ins as well as behaved threateningly to a woman tenant, could not in the circumstances of publication mean that there was an absence of the real possibility of harm to the reputation of the plaintiff.

280 Although Ms Chrysanthou does not refer to the issue of the limited extent of publication, I note the observations of Kenneth Martin J in *Kingsfield Holdings Pty Ltd v Rutherford* (where there was publication to one person) that the issue is "fact-sensitive" (at [385]) rather than a head-count of the number of persons to whom the publication was made.

281 The defendant accordingly has not established that the matter complained of in the circumstances of publication was unlikely to cause harm to the plaintiff.

Qualified privilege at common law

282 The defence of qualified privilege at common law is directed to the circumstances of publication and the defendant must establish a duty and interest to publish. The defence arises where there is an occasion where the publication is made in the course of a legal, social or moral duty to a person with a corresponding duty or interest, for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive it (or to a person sharing a common interest). Most relevantly for the purpose of these proceedings, the publication in question must be sufficiently connected to the occasion of qualified privilege. I note Mr Potter's helpful summary of the relevant features of the defence at paragraph 45 of his written submissions.

283 In *Megna v Marshall* [2010] NSWSC 686 at [50], Simpson J set out the three components in "the proper process for determining a defence of qualified privilege". If the occasion of qualified privilege was created (the first of the three components), the next question was whether the publication was "sufficiently relevant, germane or did it have sufficient connection to that occasion". If the answer to this question is in the negative, then "there is no need to proceed further" as there is no defence of qualified privilege. It is only if the first two components – occasion and relevance/connection – are made out that the question of whether the defendant was actuated by express malice arises, which is when the burden of proof switches from the defendant to the plaintiff.

Connection to the occasion of privilege

284 In *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [54], it was necessary to determine whether the matter which defamed the plaintiff was sufficiently connected to the privileged occasion to attract the defence.

285 The following may be distilled:

(a) The nature of the defamatory communication is relevant. For example, a privilege may be lost if the communication is not made for the reason that makes the occasion privileged, even though the person to whom the communication is otherwise appropriate. For example, criminal allegations which are not for the protected purpose of instituting an inquiry but for the purposes of insulting the plaintiff (*Sonier v Breau* (1912) 41 N.B.R 177) or embarrassing him (*Otten v Schutt* 15 Wis.2d 497, 113 N.W.2d 152 (1962)) are not protected. Similarly, in *Sands v State of South Australia* [2015] SASCFC 346 at [437], when police at a press conference relating to a murder investigation gratuitously stated that they had reasonable grounds to suspect the plaintiff, they were held to have stepped outside the occasion of qualified privilege.

(b) The status or position of the publisher and the relevance to the occasion. For example, merely being a resident in a strata building does not entitle that person the right to publish indiscriminately or contrary to meeting procedure.

(c) The number of recipients and the nature of the interest they had in receiving it. Factors such as increasing or reducing the number of recipients may be relevant, as is the nature of interest of the recipients.

(d) Relevant factors such as the time, place and manner of, and reason for, each publication.

286 "Manner" may, in exceptional cases, mean insulting or belittling language: *Skalkos v Assaf* (2002) Aust Torts Reports 81-644. In *Megna v Marshall* at [101]-[118], Simpson J, expressing reservations about the correctness of the first instance and appeal judges in *Assaf v Skalkos* [2000] NSWSC 418 and *Skalkos v Assaf*, noted that there may be rare cases where the language was such that the occasion would be lost:

> "There may be cases in which the vituperative tone so masks or clouds or overrides any real communication of fact or opinion that there is no communication other than of vitriol, abuse, or vituperation. It may be that that is what Carruthers AJ had in mind, what Giles JA had in mind at [130], and what Mason P had in mind."

287 Simpson J expressed similar reservations concerning *Goyan v Motyka* [2008] NSWCA 28 (at first instance, *Motyka v Gojan* [2007] NSWSC 31), stating that Tobias JA had misunderstood the first instance judge's reasons for holding that the publication was made on a privileged occasion and that insofar as these mistaken findings were binding, her Honour would not follow them (at [126] – [128]).

288 Every sentence in this email conveys contempt and anger. The language is extraordinary, as are the accusations, and the accusations are serious. This may be an exceptional case where the language and manner could amount to reasons for loss of occasion, namely for the same reasons as those applicable in *Assaf v Skalkos* [2000] NSWSC 418 and *Skalkos v Assaf* (2002) Aust Torts Reports 81-644 that the publication was not so much an attempt to communicate but a series of insulting allegations from beginning to end.

289 However, the material set out in paragraphs (a), (b) and (c) above are more than sufficient to warrant a finding that the nature of the occasion of privilege is lost because the communication has not been made for the reason that makes the occasion privileged, but for the purpose of humiliating, belittling and insulting the plaintiff in the most hurtful way possible, and to do so to other residents in the building, whose names were carefully copied from the address lines for the provision of information concerning the thieves.

290 I am satisfied that the connection to the occasion of privilege has not been made out and that the occasion of privilege is lost. This means that the defence of qualified privilege at common law fails, but I have concluded as alternative findings my observations as to reply to attack and malice.

Reply to attack

291 Ms Chrysanthou submits that there are certain categories of cases where courts have been more inclined to recognise the existence of a privileged occasion, such as reply to attack (*Bass v TCN Channel Nine Pty Ltd* [2003] NSWCA 118 at [14]-[15] (per Spigelman CJ) and [58]ff (per Handley JA)).

292 There is a "privilege to hit back when one's reputation is attacked" (*Alexander v Clegg* [2004] 3 NZLR 586 at 602) which is not dissimilar to a right to self-defence in criminal law (*Turner v MGM Pictures Ltd* [1950] 1 All ER 449 at 470

– 471; *Field v Local Sunday Newspapers (North) Ltd* [2002] EWHC 336 at [73]). However, "that privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks" (*Gray v Scottish Society For The Prevention of Cruelty to Animals* (1890) 17 IR 1185 at 1198 per Lord Shand). Most importantly, "there must be some proportionality between the attack and the response", as McClellan CJ at CL emphasized in *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [135] (see also *Heytesbury Holdings Pty Ltd v City of Subiaco* [1998] WASC 183, 9 WAR 440). Not only must the response be germane and appropriate, but the language should not be unnecessarily defamatory or introduce extraneous matter (*Watts v Times Newspapers Ltd* [1997] QB 650 at 671; *Mengi v Hermitage* [2012] EWHC 3445 at [97]). What is protected by the defence is an appropriate response and reply, not a retaliation.

293 Ms Chrysanthou submitted that a person in the defendant's position is given "a considerable degree of latitude", a phrase commonly appearing in decisions on this issue (see for example *Watts v Times Newspapers Ltd* at 671, *Echo Publications Pty Ltd v Tucker* [2007] NSWCA 73 at [77] per Hodgson JA, *Penton v Calwell* (1945) 70 CLR 219 at 250 per Starke J). However, the court will not countenance a counter-attack which does not fairly bear on the subject matter, and the reply "must be relevant to the attack" (*Loveday v Sun Newspapers Pty Ltd* (1938) 59 CLR 503 at 516 per Starke J). The privilege will be lost if the defamatory remarks are entirely unrelated to or in excess of the occasion.

294 The first problem the defendant has is that the court must be satisfied that there was an attack in the first place (*Blackwell v News Group Newspapers Ltd* [2007] EWHC 3098 at [7] per Eady J; *Palmer v Belan* [1999] NSWSC 187 at [139]). The defence is a shield, not a sword. For example, the facts of this case could not be more different from the "serious attack" made by the plaintiff in *Trad v Harbour Radio Pty Ltd* (at [137]), in terms of reason for publishing and content. The plaintiff was exercising his duties as chair of the strata committee, first to check if the defendant was aware her mailbox was open, then, following police advice to secure mailboxes, to draw her attention to police advice and finally to notify residents of the two mailbox break-ins and the need for

vigilance. This was not an attack; the defendant is neither mentioned in the group emails nor attacked, and his emails to the defendant are courteous, if firm, in terms of passing on advice from the locksmith he consulted.

295 Even if the emails to the plaintiff (or some of them, and I note Ms Chrysanthou does not identify with precision exactly which emails the matter complained of is "replying" to) did constitute an attack, the plaintiff's response goes wholly outside the parameters of the debate and is disproportionate, in terms of both content and language, to the document(s) the publication is replying to. Accordingly, reply to attack would not apply to the matter complained of.

Malice

296 Mr Potter draws to my attention the helpful summary of the relevant principles by Hunt AJA in *Gross v Weston* (2007) 69 NSWLR 279 at [52], where his Honour distilled the following principles from the decision of the High Court of Australia in *Roberts v Bass* (2002) 212 CLR 1 as follows:

> "[52] In my opinion, the joint judgment in *Roberts v Bass* is authority for the following propositions relevant to the present appeal:
>
> (1) Except where the defendant was under a legal duty to publish the matter complained of, the defendant's knowledge that it was false is ordinarily conclusive evidence that the publication was actuated by an improper motive.
>
> (2) Recklessness in the publication of the matter complained of does not establish knowledge of its falsity unless it amounts to wilful blindness on the part of the defendant which the law equates with knowledge.
>
> (3) Recklessness — when present with other evidence — may nevertheless be relevant to whether the defendant had an improper motive which actuated the publication.
>
> (4) If a plaintiff's case rises no higher than evidence that the defendant did not have a positive belief in the truth of what he published, there is no evidence that its publication was actuated by an improper motive.
>
> (5) The absence of a positive belief in the truth of what was published may nevertheless be relevant — with other evidence — to whether the defendant's improper motive actuated the publication, but it will not establish that fact by itself.
>
> (6) Where the plaintiff relies on the defendant's knowledge of the falsity of the matter complained of to establish an improper motive, it is unnecessary to identify that improper motive, as there can be no proper motive in those circumstances unless the defendant has a duty to publish the matter complained of."

297 The particulars of malice pleaded are as follows:

> "**Particulars of Malice**
>
> Knowledge of falsity
>
> A. The defendant knew that statements made by her in the matter complained of were false, in that she knew that:
>
> > (i) The plaintiff had not consistently chosen the public email option.
> >
> > (ii) He had not copied in all residents and the defendant's real (estate) agent and (all and) sundry alleging that responsibility for the threat and safety to her home at Watermark was her doing and holding her financially responsible.
> >
> > (iii) The plaintiff had not consistently attempted to shame her publicly.
>
> B. Alternatively to A above, the defendant was recklessly indifferent to the truth or otherwise of the statements referred to in A above.
>
> The proportionality of the matter complained of
>
> C. The matter complained of was not commensurate with and was disproportionate to the emails from the plaintiff to the defendant, which:
>
> > (i) did not include any personal attacks upon the defendant's character.
> >
> > (ii) were polite, succinct and concerned solely with the locking by the defendant of her mailbox/mailbox.
> >
> > (iii) were concerned with the security of the Watermark building,
>
> Whereas the matter complained of contained statements by the defendant that:
>
> > (iv) were offensive in nature.
> >
> > (v) amounted to a personal attack on the plaintiff's character.
> >
> > (vi) attacked the plaintiff's integrity, both as an owner and as Chairperson of the Strata Committee.
> >
> > (vii) were vituperative;
> >
> > (viii) were not based on facts, including the suggestion that the plaintiff, an owner and Chairperson of the Strata Committee, who was encouraging all residents to lock their mailboxes/mailboxes, had actually opened them.
> >
> > (ix) were patronising when the plaintiff was merely acting in the discharge of his responsibilities as Chairperson of the Strata Committee.
> >
> > (x) were argumentative when argument was not invited, nor was it appropriate.
>
> D. Despite the matter complained of being significantly disproportionate in size to any communications from the plaintiff to the defendant, it failed to include

any agreement or assurance from the defendant that she would lock her mailbox pursuant to the various justified requests from the plaintiff, thereby evidencing an improper purpose on her part.

E. The defendant was actuated in the publication of the matter complained of by personal spite or ill-will towards the plaintiff.

Risk assessment of the defendant's requirements

F. To the extent that the defendant, in deciding to leave unopened the mailbox for unit 9, relied upon a risk assessment of her requirements:

(i) Any such risk assessment was inappropriate and/or unnecessary; and

(ii) Any assessment of the defendant's requirements failed to have reasonable or proper regard to the requirements of the other residents of the building,

Thereby evidencing an improper purpose on the part of the defendant.

The extent of the defendant's publication

G. None of the emails sent by the plaintiff that concerned the defendant personally was sent to anyone other than the defendant save that, on one occasion, an email was sent to the real estate agent for the owner of the unit in which the defendant resided, yet the defendant published the matter complained of to a variety of individuals as pleaded in paragraph 1B of the amended statement of claim, thereby evidencing an improper purpose on her part."

298 The defendant's answer to these particulars of malice, as set out in Ms Chrysanthou's submissions (paragraphs 116 – 119), are as follows:

(a) The defendant received "many emails over a period of a year concerning the mailboxes" and "some" were to a group, so the defendant "believed that the plaintiff had made the allegations about her to the entire group".

(b) "Proportionate" response "is not a proper malice plea" and where there is a reply to attack "the response need not be proportionate".

(c) Spite and ill-will have "not been made out" and the defendant "was merely defending herself and seeking to stop the plaintiff from further harassing her".

(d) "No improper purpose has been proved".

299 Ms Chrysanthou in her oral submissions noted that language was irrelevant both to the occasion of privilege and to malice. I have accepted these submissions, although the language of the matter complained of is well outside the usual parameters.

300 I am satisfied that the defendant was well aware of the falsity of her allegations. She knew that the plaintiff had not consistently chosen the public option, and that he had not copied in all residents or the defendant's real estate agent into the prior imputations about which he complained. She knew his emails were not harassing in nature and that she was not being harassed by him.

301 Mr Potter puts to me, as an alternative, that the defendant was reckless indifferent to the truth or falsity. I consider her actual knowledge is demonstrated by the selective nature of the "cut and paste" action and the deletion of the "recipients" portion of the emails. However, her recklessness included not reading the attachments to the two emails from the plaintiff (after each break-in) referring to police advice to keep mailboxes locked.

302 The third particular raised in relation to malice is the disproportionate nature of the response to any previous email correspondence, which was not only polite information about the security of the Watermark building, but did not descend into the kind of personal attacks on the defendant's character that the defendant was now making about the plaintiff.

303 A significant matter in the list of particulars of malice is prior hostility, personal spite and ill-will towards the plaintiff. I am satisfied that the defendant was angry and resentful at being told to keep her mailbox closed and the fact that two mailbox break-ins occurred, instead of being regarded by her as being an opportunity to reconsider her position, simply made her angrier. She published the matter complained of to humiliate and insult the plaintiff in the eyes of all the other residents in the building and she was motivated by her hostility and ill-will towards him in doing so.

304 I was not addressed by either party in relation to the plaintiff's particularisation of a "risk assessment" that was inappropriate or necessary. There are other grounds upon which malice can be made out (notably knowledge of the falsity and prior hostility and ill-will).

305 The final basis upon which malice is particularised is the extent of publication. None of the emails sent by the plaintiff concerning the defendant personally had been sent to anyone other than to her (apart from the final email which was sent also to the real estate agent, a person who clearly had interest in

receiving such an email, as the exchange about the noisy party demonstrates). Mr Potter submits, that I accept, that the extent of publication to other persons with no prior knowledge of those emails, particularly in circumstances where one or more of those recipients would assume that others had received them as well, went far beyond what was proper, thereby evidencing an improper purpose on her part.

306 I am satisfied that the plaintiff has discharged the onus of establishing malice. I acknowledge that the court must be slow to come to a finding of malice for the reasons explained by Mahoney J in *McKenzie v Mergen Holdings Pty Ltd* (1990) 20 NSWLR 42. However, in the present case, the evidence of knowledge of falsity, prior hostility and ill-will and the total disproportion between the matter complained of and the extent of publication are each individually sufficient to amount to evidence of malice.

307 Accordingly, if I have erred in finding that the matter complained of was not published on a protected occasion, the defence of qualified privilege at common law is defeated by reason of the defendant's malice.

Conclusions concerning liability

308 All of the defences have failed. The remaining issue is the question of damages.

Damages

309 The three purposes of defamation damages awards have always been consolation of hurt to feelings, recompense for damage to reputation and vindication of the plaintiff's reputation (*Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [60] per Hayne J (Gleeson CJ and Gummow J agreeing)). These principles underpin s 34 *Defamation Act 2005* (NSW), which provides that:

> "**34 Damages to bear rational relationship to harm**
>
> In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded."

310 Section 35 *Defamation Act 2005* (NSW) caps the damages at $398,500 (Gazette No 66 of 29.6.2018, p 3970).

311 Judicial interpretations of the principles for the awarding of damages have undergone a significant change since the uniform legislation was enacted, resulting in inconsistencies in the method of assessment and size of judgments. These changes have arisen from differing approaches to the legislation and the willingness (or lack thereof) of courts to consider other awards of damages as relevant. The following are the main areas of difficulty:

(a) Whether the cap on damages is a ceiling (*Attrill v Christie* [2007] NSWSC 1386) or a mere cut-off (*Cripps v Vakras* [2015] VSC 193 per Kyrou J at [603]-[608]; *Carolan v Fairfax Media Publications Pty Ltd (No 6)* per McCallum J at [127]; *Sheales v The Age Co Ltd* [2017] VSC 380 per John Dixon J at [70]). Most judges now regard the cap as a cut-off, but awards are still being made on the basis that the gazetted figure is a "maximum": *Bowden v KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig & Chapman* [2019] NSWDC 98 at [305] and [315].

(b) Whether the gazetted figure is a cap or a ceiling, should damages in excess of the cap be awarded only if they are aggravated in nature (*Davis v Nationwide News Pty Ltd* [2008] NSWSC 693 at [18]-[20]; *Al Muderis v Duncan (No 3)* [2017] NSWSC 726; *Bowden v KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig & Chapman* (at [304] – [319]), or dispensed with altogether where the damages to be awarded include an award of aggravated damages (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521)?

(c) An additional problem, in relation to consideration of other awards, is whether there is, or should be, any relationship between defamation damages awards and personal injury awards, an issue long the subject of judicial concern (*Groom v Crocker* [1939] 1 KB 194 at 231 per McKinnon J; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 58 – 9 per Mason CJ, Deane, Dawson and Gaudron JJ). One of the reasons for difficulty is that, unlike defamation damages awards, there is a degree of recognition of awards in other damages cases, because "the law has long since recognised that this cannot be achieved by a money award, and so the amount is assessed as well as that can be done by comparison with other awards" (*BDT v BDG* [2019] QDC 74 at [25]). Calculation of damages for assault claims similarly demonstrate a regard for other awards, as the assessment process demonstrated in *BDT v BDG*, which was for psychiatric injury following years of incest-based sexual assault, is but one example. Disdain for the assessments of damages by other judges is a feature not seen in other areas of damages assessment.

(d) To what degree should the reasoning behind the assessment of damages be set out? While some judgments make a careful

> analysis of the evidence (*Cerutti v Crestside Pty Ltd*), most simply state the amount awarded in a single paragraph. Where there are multiple publications, a series of such amounts may be given, followed by a "holistic" approach to the sum to be awarded: *Gayle v Fairfax Media Publications Pty Ltd (No 2); Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* [2018] NSWSC 1838 at [45]).

312 The above methods set out the accepted way to approach damages. The task before me is the application of principles set out in these judgments.

Issues relevant to the award of general damages

313 Mr Potter drew my attention to the evidence hurt to feelings, which the plaintiff gave evidence of, and more especially his daughter. The plaintiff felt the problem was compounded as couldn't respond to the owners, as that would only make it worse, and so he kept quiet, , but that caused more hurt because he wondered what people were thinking. Secondly, the mode and extent of publication to all the owners of Watermark meant that this defamatory publication, although limited, affected him in the very place where he lived. There was also the unexpectedness of the libel, in circumstances where the plaintiff was endeavouring, as chairman of the owners corporation, to deal with two mailbox break-ins, which should not be regarded as petty matters but as acts of a criminal nature which required prompt response for the security of the Watermark building residents.

314 Other issues include the bringing of a defence of justification (and other aspects of the conduct of the trial) and the failure of the defendant to respond to the two letters seeking an apology written to her by the plaintiff, or to the notice of concerns. Care needs to be taken in regard to these issues in order to ensure that these are not double-counted in relation to factors warranting the award of aggravated damages.

315 As to the conduct of the proceedings, pleading and persisting in a defence of justification may increase the harm, thereby tending to increase the damages awarded (*Herald & Weekly Times v McGregor* (1928) 41 CLR 254 at 263), as "compensation for continuing harm is a component of normal compensatory damages" (*Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 238 per Toohey J*).*

316 As to failure to apologise, the position is that, in claims for defamation and false imprisonment, a failure to apologise may relevant to the assessment of ordinary compensatory damages, rather than aggravated damages: *Clark v Ainsworth* (1996) 40 NSWLR 463: *Schmidt v Argent* [2003] QCA 507. Mere failure to apologise does not result in an award of aggravated damages (*Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 66) unless that failure is shown to be, in the circumstances of the case, improper, unjustifiable or lacking in bona fides (*Cerutti v Crestside Pty Ltd* at [38]).

317 The defendant's written submissions state only that the publication was limited and the imputations not very serious; "if any award of damages is to be made, it should be nominal" (written submissions, paragraph 150). This was because the plaintiff harassed the defendant for over a year about the letterboxes, even to the point of seeking to commence NCAT proceedings. His complaints about the unlocked letterbox are described as "silly and a waste of time" (written submissions, paragraph 151). No additional matters on general damages were put in oral submissions (T 314)

318 Although the plaintiff appeared to be trying not to show emotion, he was at times clearly distressed when asked how he felt. He was asked:

> "Q. "For the purpose of shaming and humiliating the defendant", how did you feel when you read that?
>
> A. That, that is untrue. That is - that is a horrible thing to say. It, it - yeah, it made me - clearly, as the email itself - it, it put me in the position of, of being accused of, of attempting to humiliate, to, to harass, to, to make unnecessary difficulties for someone in the building and whether that be, be the defendant or be anyone else, that is not something I do. It is not something I would ever do and, and none of those accusations - I have never, in my life, in my personal life, in my professional life, in my business life, have I ever been accused of harassing, humiliating or doing any such thing.
>
> Q. So, did that upset you or not?
>
> A. Yes, yes, it did." (T 78)

319 His description of his feelings was at times disjointed because of this distress:

> "A. Likewise, the - likewise, the, the idea, again, that I would go out of my way to try and (a) interfere in the relationship between a, a tenant and the lot agent but more, more to the point, to, to attempt to have someone evicted from the building is appalling. It - it's just - it's, it's an egregious, over the top accusation. It, it really has no basis. It could never have any basis, it would make no sense. And, yes, it made me feel, feel horrible, to be quite honest." (T 79)

320 The plaintiff was similarly distressed when explaining that he had consulted his daughter, whose opinion he trusted, as to what was in the email, and as to why he wrote to the defendant seeking an apology:

> "Q. Did you send her a copy?
>
> A. I did, either - I can't remember whether I sent her a copy immediately or whether I'd sent her a copy after a phone conversation. I really - my daughter is my confidant, okay, and I really, I wasn't looking for someone to say to me this is ridiculous; I knew that. I was looking for someone to give me a check explanation, cause they - what, what - what could, what could inspire this, what could motivate this, and I, I trust my daughter's judgment.
>
> Q. What did she say?
>
> A. I can't remember the details of the conversation, other than she might've used harsher words than I've used. I'm not sure, but—
>
> Q. What action did you take, vis a vis, responding to that email on 25 May?
>
> A. Well, I, I couldn't respond directly to the email for the reasons that I've outlined. The, the - to my mind it was defamatory. I'm not obviously an expert on that field, but I, I thought it was clearly defamatory. It was over the top, it was abusive, it was - it was horrible, and I, I did the following day actually write a private letter to, to Ms Murray and—" (T 63)

321 The plaintiff's daughter gave some revealing insights into his distress. This is a case where there is strong evidence of hurt to feelings.

322 Ms Chrysanthou submitted that all the evidence pointed to the recipients of the email regarding the defendant's allegations as without merit (Mr Gauld, for example, in his email in reply, compared her complaints to the complaints of the anti-vaccination lobby). However, the affidavit evidence demonstrates that at least one recipient wondered what had really happened.

323 The extent of publication was limited to the 16 recipients. However, it was clearly discussed by them with other members of their family (which resulted in Mr Gauld's email, as he was not a resident).

324 All the above factors warrant a substantial award of damages, having regard to the legislation and to the cap. The next question is whether the cap should apply if circumstances warranting an award of aggravated damages can be made out.

Aggravated damages

325 The plaintiff brings a claim for aggravated damages, setting out the following particulars in the statement of claim:

"Particulars of aggravated damages

A. The defendant's failure to apologise.

B. The plaintiff's knowledge that the defendant believed that the words giving rise to the imputations set out herein were false.

C. The plaintiff's knowledge that the defendant was recklessly indifferent as to the truth or otherwise of the words giving rise to the imputations set out herein.

D. The plaintiff's knowledge that the defendant published the matter complained of for an improper purpose in that she published it in order to punish and/or humiliate the plaintiff because, in his capacity as Chairman of the Strata Committee of a strata property, in which both the plaintiff and the defendant reside, the plaintiff had cause, including as a result of concerns expressed by some residents, to write to the defendant about her leaving her mailbox unlocked, and the defendant was indignant at receiving such e-mails and she decide to punish and/or humiliate the plaintiff by sending the matter complained of.

E. The plaintiff's knowledge that the defendant published the matter complained [sic] by making statements and using language that were non-responsive or disproportionate to the content and language used by the plaintiff in his publications to the defendant, and which were concerned with safety issues arising out of unlocked mailboxes.

F. The plaintiff's knowledge that the defendant published the matter complained of for an improper purpose in that she published it to cause as much harm as possible to the plaintiff and she sought to do that by publishing the matter complained of to:

(i) A number of people who had not been copied in on the correspondence from the plaintiff to the defendant.

(ii) A number of people who were not aware of the communications from the plaintiff to the defendant re her unlocked mailbox.

(iii) A number of people who had no interest in private communications between the plaintiff, in his capacity as Chairman of the Strata Committee, and the defendant."

326 Section 35(2) *Defamation Act 2005* (NSW) provides:

"(2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages."

327 Section 36 provides:

"**36 State of mind of defendant generally not relevant to awarding damages**

In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except

> to the extent that the malice or other state of mind affects the harm sustained by the plaintiff."

328 In *Rookes v Barnard* [1964] AC 1129, Devlin J explained the nature of the award of aggravated damages where the injury done to the plaintiff has been exacerbated by the conduct of the defendant, thereby attracting higher compensatory damages. These principles underlay the provision of such damages under ss 35 and 36 of the uniform legislation.

329 The calculation of this larger sum of damages should disregard malice or other state of mind of the defendant at the time of publication or at any other time, except to the extent that it affects the harm sustained by the plaintiff (s 36 *Defamation Act 2005* (NSW)); however, where it does affect the harm, the proceedings may warrant greater compensation.

Interaction between general and aggravated damages

330 In *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693, McClellan CJ at CL used the "if, and only if" formula for the cap to be exceeded if a claim for aggravated damages was to be made (at [18]-[20]). This was effectively confirmed in the next decision in which the interaction between general and aggravated damages, *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89, where Applegarth J explained the interaction between general damages and the cap on damages as follows (at [41]-[42]).

> "[41] An award of damages in excess of the statutory cap is permitted if the circumstances of publication are such as to warrant an award of aggravated damages. But this does not compel a judge to separately assess aggravated damages. In 1997 this court remarked in the context of a jury's assessment of damages that there was no reason why the jury should have been obliged to answer a distinct question about aggravated damages. Circumstances of aggravation may justify "the court in assessing compensatory damages at a figure higher than that which would have been appropriate without those circumstances; but this does not mean that the increase is a separate category of damages." The court observed: "The jury is not to be invited to perform the difficult intellectual task of first considering the defamation in an abstract way, disregarding the circumstances in which it was published and the extent of publication, and then separately considering how much should be awarded for those matters". (Footnotes omitted)

331 Following *Cerutti v Crestside Pty Ltd*, awards continued to be made on the basis that the cap on general damages remained in place where an award of aggravated damages was made and that the cap remained in place (see for example *Al Muderis v Duncan (No 3)* [2017] NSWSC 726). *Bowden v KSMC*

Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig & Chapman (at [304] – [319]). However, in *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, Dixon J held that the awarding of aggravated damages would take the cap out of contention altogether where an award of aggravated damages is to be made. That interpretation was accepted on appeal.

332 The degree to which this position ran contrary to accepted principles of damages assessment in New South Wales is clear from the position the parties took in *Gayle v Fairfax Media Publications Pty Ltd (No 2) Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* [2018] NSWSC 1838, where McCallum J noted at [42]:

> "In the absence of any established basis for awarding aggravated damages, it is not necessary to resolve a dispute between the parties as to the proper construction of s 35(2) of the *Defamation Act*. The dispute arises from the decisions in the Rebel Wilson litigation. In that case, at first instance, Dixon J upheld a submission by the plaintiff that the statutory maximum damages amount has no role to play when an award of aggravated damages is warranted by the circumstances of the publication: *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 at [76]. At the hearing before me, the plaintiff disavowed reliance on that decision. However, after I reserved my decision, the Victorian Court of Appeal affirmed that aspect of Dixon J's decision: *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154 at [249]. The plaintiff embraced that development and submitted that there is "no cap" applicable in any of the three proceedings before me."

333 McCallum J ultimately did not award aggravated damages, so the issue did not arise. However, other judges in New South Wales have continued to award damages on the basis that the cap still applies: *Bowden v KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig & Chapman* at [303] – [319].

334 There would appear to be conflicting authorities at first instance and appellate level on this issue. Having regard to the observations of McCallum J in *Gayle v Fairfax Media Publications Pty Ltd (No 2) Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* , notwithstanding my reservations as to the correctness of the approach, I propose to consider myself bound to follow *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154.

Factors relevant to the award of aggravated damages

335 Ms Chrysanthou's submissions were that "no matter has been proved warranting an award of aggravated damages" (written submissions, paragraph 149).

336 Mr Potter submitted that the gravity of the libel, the conduct of the trial (especially the pleading of the defence of justification) and the wrongful failure to apologise constituted grounds for the award of aggravated damages (T 337).

337 Aggravated damages may be awarded where the circumstances in which the defendant has defamed the plaintiff increased the hurt or humiliation to the plaintiff. The focus is on the subjective experience of the plaintiff as the victim of the tort: *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 per Gleeson CJ, McHugh, Gummow and Hayne JJ; see also *Cerutti v Crestside Pty Ltd* at [37]. In the present case, there is strong evidence as to the subjective experience of the plaintiff and also that the defendant's conduct was improper, unjustifiable and lacking in bona fides: *Triggell v Pheeney* (1951) 82 CLR 497 at 514 per Dixon, Williams, Webb and Kitto JJ; see also *Clark v Ainsworth* (1996) 40 NSWLR 463 at 466 per Sheller JA.

338 I note the observation in a number of decisions that tone of voice and giving unreasonable prominence to an allegation may be factors which are relevant to the award of aggravated damages; see for example, *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 79. However, given Ms Chrysanthou's submission about the asserted incorrectness of decisions such as *Assaf v Skalkos* on this issue, I propose to exercise caution in this regard.

339 The defendant's conduct at trial may afford grounds for awarding aggravated damages. This is not merely the pleading of a baseless defence (see *Cerutti v Crestside Pty Ltd* at [38]) but the actual conduct of the trial itself (*Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 237 per Toohey J). There must be something improper or unjustifiable in the conduct of the litigation that warrants an aggravation of the damages that are awarded (*Todd v Swan Television and Radio Broadcasters Pty Ltd* (2001) 25 WAR 284). This may include unduly

unfair cross-examination (*Harbour Radio Pty Ltd v Tingle* [2001] NSWCA 194 at [30] per Beazley JA), although that was not the case here.

340 The damage to the plaintiff has been aggravated by the defendant's knowledge of the falsity contained within the matter complained of, as is made clear in his request for apology, where he drew those falsities to the attention of the defendant. The defendant's repeated failure to apologise is wrongful; her explanation that she could not bring herself to even read the letters that were delivered to her mailbox by the defendant was reckless in the extreme. It is unclear whether she read the letter from Goldsmith Lawyers, which was the third request for an apology, but that request was not answered either.

341 I am satisfied that an award of aggravated damages should be made out as part of the damages to be awarded to the plaintiff. Before determining the amount, I should also have regard to the defendant's submissions that there are mitigating factors which should be taken into account in relation to the award of damages.

Mitigation of damages

342 The defendant submits that if the plaintiff succeeds on liability, "any award of damages should be minimal given the matters pleaded and proved by the defendant" in relation to "the plea of justification or honest opinion" (written submissions, paragraphs 32 and 33).

343 This is an overstatement of the principles of mitigation. First, merely pleading an issue does not permit a party to claim mitigation. Second, the fact that one or more "matter" is proved does not mean, for example, that a claim for aggravated damages cannot be made if aggravating circumstances are made out. Third, evidence before the court which is in support of a failed defence of justification will only be relevant in the circumstances set out in *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96.

344 Ms Chrysanthou submitted that the plaintiff's "terrible" email of 24 May 2017, which indicated that she could be financially liable for the costs of rekeying the box, as this was "a shocking allegation" when there was no by-law requiring residents to lock their mailboxes (T 315). This email was harassing, menacing and threatening and even if I did not make findings that this was sufficient to

amount to justification of one or more of the imputations, I should accept her word for it that it was so harassing, menacing and threatening that only nominal damages should be awarded (T 315 – 317).

345 Ms Chrysanthou referred to *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550 as providing support for her position. However, Wigney J's explanation (at [32] – [46]) of the limited application of the principles in *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 (as applied in *Australian Broadcasting Corporation v McBride* (2001) 53 NSWLR 430; *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232 at [262]-[265]); *Holt v TCN Channel Nine Pty Ltd* (2014) 86 NSWLR 96; *Gacic v John Fairfax Publications Pty Ltd* (2015) 89 NSWLR 538; *Coxon v Wilson* [2016] WASCA 48; and *Fairfax Digital Australia & New Zealand Pty Ltd v Kazal* [2017] NSWCA 77) does not assist the defendant, for two reasons. The first is that there are no particulars as such, and the exercise of determining whether the particulars are proper *Burstein* particulars is difficult to determine. The second is that if such particulars can be gleaned from Ms Chrysanthou's oral or written submissions, they are presented at the heel of the hunt, namely during the trial, whereas Wigney J struck out particulars for delay in circumstances where the trial was six months away.

346 I was not addressed on mitigation of damages by Mr Potter (see T 337). However, he referred more than once to the prejudice caused by the raising of unparticularised issues at the trial and I see no reason why that complaint should not be heard here.

347 The defendant's submission that these are mitigation factors should be rejected.

Conclusions concerning damages

348 It would be fair to say that every sentence of the defendant's email in reply struck a blow at the plaintiff, and was intended to ridicule and humiliate him in every way. Taking into account the range of relevant factors (*Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 and 1073 by Lord Hailsham of St Marylebone LC), a substantial award is called for. Using the generalised approach to the assessment of damages generally employed in defamation claims, I consider

that, having regard to those factors, general damages of $90,000 would be an appropriate sum.

349 A substantial award of aggravated damages should be made by reason of the strong evidence that the defendant's conduct was improper, unjustifiable and lacking in bona fides. The falsity of the imputations (*Rigby v Associated Newspapers Pty Ltd* [1969] 1 NSWLR 729 at 738 per Walsh JA), the conduct of the defendant at trial (*Singleton v Ffrench* (1986) 5 NSWLR 425 at 439 per McHugh JA), namely the knowing bringing of a baseless defence in that the defendant's "cut and paste" exercise misrepresented the prior correspondence (see *Cerutti v Crestside Pty Ltd* at [38] per Applegarth J) and the recklessness of the publication (as well as of the defendant's refusal even to read, let alone answer, the plaintiff's requests for an apology) as set out in the particulars would each, individually, warrant the award of aggravated damages.

350 Collectively, these factors present a strong basis for such an award, which I assess at $30,000, resulting in judgment for the plaintiff in the sum of $120,000.

Interest and costs

351 I have reserved the issues of interests and costs with liberty to apply.

Orders

(1) Judgment for the plaintiff for $120,000.

(2) Liberty to apply in relation to interest and costs.

(3) Exhibits retained until further order.

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