DISTRICT COURT OF QUEENSLAND

CITATION:	*Walden v Danieletto* [2018] QDC 221
PARTIES:	**JOHN NIGEL WALDEN** **(Appellant)** **v** **ATTILIO DANIELETTO** **(Respondent)**
FILE NO/S:	D140/18
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	8 November 2018
DELIVERED AT:	Southport
HEARING DATE:	8 October 2018
JUDGE:	Kent QC, DCJ
ORDER:	Appeal dismissed
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – CHARGES OF INSOLVENCY OR FINANCIAL DEFAULT – where the respondent body corporate manager said the plaintiff was "unfinancial" during a body corporate meeting – where the plaintiff claimed that this statement was defamatory – where the alleged imputations included that the plaintiff was a delinquent payer who could not afford his body corporate levies – whether the assertion of an unpaid debt is defamatory DEFAMATION – OTHER DEFENCES – PLAINTIFF'S CHARACTER NOT LIKELY TO BE DAMAGED - SLANDER – where the respondent body corporate manager said the plaintiff was "unfinancial" during a body corporate meeting – where the plaintiff claimed that this statement was defamatory – where the respondent relied on the defence of triviality as provided in s 33 of the *Defamation Act* – whether the circumstances of publication were such that the plaintiff was unlikely to sustain any harm DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE

– STATEMENTS MADE IN RESPECT OF A DUTY OR INTEREST – PARTICULAR STATEMENTS – ON MATTERS OF COMMON INTEREST – where the respondent body corporate manager said the plaintiff was "unfinancial" during a body corporate meeting – where the plaintiff claimed that this statement was defamatory – where the members of the body corporate had an interest in knowing if lots were "unfinancial" as it altered their voting rights – where the defendant reasonably believed the information was true – whether the defence of qualified privilege was been established

COUNSEL: M Pope for the Appellant

B Strangman for the Respondent

SOLICITORS: Derek Legal for the Appellant

ABJK Lawyers for the Respondent

Introduction

[1] The appellant appeals against the determination of the Magistrates Court at Southport on 16 May 2018 whereby the appellant's claim for damages for defamation was dismissed. Four grounds of appeal are pressed.

First ground:

The learned Magistrate was wrong in finding that the publications were not defamatory of the appellant.

[2] There were two publications the subject of the action. As set out in paragraph 4 of the Amended Statement of Claim, the defendant, who was the body corporate manager for the Broadwater Tower Body Corporate, of which the plaintiff was a unit owner, said at an extraordinary general meeting "a voting paper for lot 41 was not admitted because the lot was un-financial". This was said in the presence of a number of other unit holders present at the meeting. It is said that the plaintiff later approached the defendant saying that he was in fact financial. This seems to have led to the second alleged publication, which was that on 4 July 2011 the defendant sent to all members of the body corporate, minutes of the meeting which included the following statement:

> "1.A voting paper for lot 41 was not admitted because the lot was un-financial;
>
> Note: after the meeting Mr Walden of lot 41 notified Mr Danieletto that he had paid all arrears on his lot yesterday. Mr Danieletto confirmed advice that payment had not been received in the body corporate's account which was checked this morning before the meeting."

[3] The imputations which were pressed in respect of these two publications were that:

(a) The plaintiff was a delinquent payer;

(b) The plaintiff could not afford to pay his body corporate levies;

(c) The plaintiff had financial difficulties.[1]

[4] The Magistrates conclusion that the publications were not defamatory of the appellant is challenged as simply being a wrong factual conclusion. The appellant submits that the correct test is as follows:

> "While it is not defamatory, without more, to say that a man owes money, for that is to say what is true of every householder… on most days of the month. It is defamatory to say that any man (whether or not he is a trader or a businessman) is insolvent or cannot or will not pay his debts or has delayed paying his debts. The general test that a defamatory imputation is one in which, would tend to lower the plaintiff in the estimation of right thinking members of society generally, was suggested by Lord Aitken in a case where the imputation complained of, was borrowing money from a servant or leaving her wages unpaid. *No element of misconduct is required; even if delay in paying or inability to pay a debt is the result of misfortune, to impute such delay or inability to someone would tend to injure his credit in a financial sense, which the law protects as part of his reputation.*"[2] (Emphasis added)

[5] Thus the appellant submits that the statements made are clearly capable of having the meanings pleaded as set out above and are defamatory of the plaintiff. The appellant submits that it is clear to everyone to whom the statement was published that the appellant had not paid his levies and could not pay his bills or did not pay his bills. This is particularly so at a meeting where voting entitlement turned on having paid the levies.

Response

[6] In response the respondent submits that the use of the word 'un-financial' was important. This was relevant to the rules or laws governing the voting.[3]

[7] The conduct of the meetings of body corporate of this kind is governed by the *Body Corporate and Community Management Act* 1997 (Qld) (*The BCCM Act*) or the applicable regulation module with *Body Corporate and Community Management (The Standard Module) Regulation* 2008.

[8] Although the word 'un-financial' is not specifically defined, s 84 of the *Standard Module* provides:

> "A person does not have the right to exercise a vote for a particular lot on a motion (other than a motion for which a resolution without dissent is required), or for choosing a member of the committee, if the owner of the lot owes a body corporate debt in relation to the lot at the time of the meeting."

[9] Thus the word 'un-financial' suggested that the appellant owed a body corporate debt at the time of the meeting.[4]

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1 Amended statement of claim para 7.

2 See Gatley on Libel and Slander (12th Edition, Sweet and Maxwell) paragraph 2.30; *Wolfenden v Giles* (1892) 2 Br Col R at 284; *Sim v Stretch* (1936) 52 TLR 669 HL; *Borella v Penfolds Wines Pty Ltd* (1992) 7 WAR 492; *Stubbs v Russell* (1913) AC 386 per Lord Shaw at 397-398.

3 Page 8 para 4 of the Reasons for Judgment.

4 Reasons for Judgment page 8, para 5.

[10] As to whether such a statement was in the circumstances (or indeed as a matter of law is capable of) being defamatory. The respondent refers to *Black v Houghton*[5] at 438 per Stable J:

> "On such an analysis the meaning left was that the appellant owed the council money. I have not found anything to displace the law to which the trial Judge referred – that it is not defamatory of a man to say that he owes money. It has been held that this does not imply he is unable or unwilling to pay his debts."

[11] The respondent also refers to similar observations by Butler SC DCJ in *Cutbush & Anor v Leach & Anor*.[6]

[12] Thus the respondent submits that the mere assertion that the appellant owed a debt to the body corporate, without more, is not capable of constituting a defamatory remark, and did not do so in the present context. Therefore, the Magistrate is not shown to be in error.

Consideration

[13] In my view, the submissions of the respondent should be accepted. The respondent was merely following his official duties as to who was entitled to vote at the meeting. In my view, the respondent is correct to submit that the law is to the effect that mere assertion of an unpaid debt is not defamatory. I am struck by the passage at the foot of p 8 of the Magistrate's Reasons for Judgment:

> "Many people (if not all of us) have paid a bill late. The reasons commonly include oversight, lost mail, change of address, absence when the bill arrives, mistakes as to the due date, failure of transfer payments etc. In essence the plaintiff asserts that the four imputations arise and that an ordinary person would not imagine the more mundane and clearly non-defamatory possibilities are more likely. It is possible that some people could jump to wild theories but the hypothetical right thinking person would not have."[7]

[14] This last sentence seems to refer to the legal test for whether a published matter is capable of being defamatory, namely what ordinary reasonable people would understand by the matter complained of.[8]

[15] In my view, the statements complained of amounted to no more than the assertion, which was no doubt correct (and not suggested before me to be incorrect) that as at the relevant date the records of the body corporate indicated that the levies for the relevant lot were unpaid, that is, that the plaintiff owed a debt. This is, on the basis of a number of the authorities but including *Black v Houghton*, not capable of bearing any meaning defamatory of the plaintiff. Indeed, in my view, the words used in *Black v Houghton* may have been stronger for that plaintiff than the words in the present case. In the very brief judgment of Hanger J in *Black*, his Honour said:

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5 (1966) Qd R 435.
6 [2013] QDC 329 at [70]-[72].
7 Reasons for Judgment page 8, para 6 – page 9, para1.
8 See *Trkulja v Google LLC* [2018] HCA 25 at [31].

> "In my opinion, the matter was not capable of bearing any meaning defamatory of the plaintiff."

This pithy observation is an elegant statement of a binding legal proposition which has application in the present case.

[16] Therefore, the appellant has failed to establish the first ground of appeal.

Second ground:

The learned Magistrate was wrong in finding that the publications were unlikely to result in a real possibility of harm to the appellant's reputation

[17] On this ground, the appellant refers to the relevant test under s 33 of the *Defamation Act* 2005 (Qld) as to the defence of triviality, which provides:

> It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

[18] The appellant submits that it cannot be said "that the circumstance of the publications were such that the plaintiff was unlikely to sustain any harm". It is said that the first publication was made to unit owners and levy payers present at the meeting, and then the second publication was made in the minutes to all of the unit owner and levy payers, thus the publication was to people whom the plaintiff knew and who lived in the same building.

[19] The major circumstances to be considered in the context of s 33 include:

(a) the content of the publication;
(b) the extent of the publication;
(c) the nature of the recipients and their relationship with the plaintiff, which may include the recipient's knowledge of the plaintiff's reputation.[9]

Response

[20] The respondent submits that his Honour, relying on *Smith v Lucht*[10], particularly at [54], correctly categorised the harm caused as hurt feelings, rather than reputational harm. His Honour noted at the third paragraph on p 11:

> "I find that even the imputation that the plaintiff was temporarily unable to pay his bills is unlikely to result in a real possibility of harm to his reputation regardless of how much it subjectively upset him."

[21] Thus the respondent submits that the defence of triviality was available and correctly applied considering the provisions of s 33."

Consideration

[22] Although I have found that the appellant fails in his primary submission that the Magistrate's findings as to the defamatory nature of the imputations should be

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9 Supra at [37].
10 [2016] QCA 267

overturned, nevertheless for completeness ground 2 should be considered. In my view, on this ground the respondent's submissions should also be accepted. Had any of the relevant imputations been made out, the defence of triviality would nevertheless have succeeded. In the context and extent of the matter, reputational harm was not established. In my view, his Honour's reasoning on this issue, at pp 11-12 of the Reasons, is free from appellable error.

Ground 3:

The learned Magistrate failed to properly address the issue of qualified privilege and was wrong in finding that it did apply

[23] The defence of qualified privilege is set out in s 30(1) of the Defamation Act which provides:

> "(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that—
>
> (a) the recipient has an interest or apparent interest in having information on some subject; and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances."

[24] The appellant argues that the information was about the plaintiff rather than the body corporate, contrary to the findings of the Magistrate.

[25] It is said that the fact that lot 41 was unfinancial should have simply been recorded on a tally sheet pursuant to s 93(4) of the *Body Corporate and Community Management (Standard Module) Regulation* 2008, rather than being announced at the meeting. Nor, so the appellant submits, was it necessary to have the statement in the minutes. It is submitted that the conduct of the defendant was not reasonable in the circumstances, where the respondent knew or should have known at the time that in truth the appellant was financial.

Response

[26] Conversely the respondent submits that the members of the body corporate did have an interest in receiving information about the body corporate, as referred to by the Magistrate in his reasons. His Honour referred to authority in this regard; *Sorrenson v McNamara*[11] and *Smith v Farren-Price.*[12]

[27] The respondent submits that the members of the body corporate clearly had an interest in having information about which lots were capable of casting votes and thus the statement as to the appellant being unfinancial was made in the course of giving them information on that subject and was reasonable. The respondent made the statement at the start of the meeting to inform members who had the right to vote for the purpose of giving relevant information as the respondent believed

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11 [2003] QCA 149.

12 [2004] QDC 225.

himself to be obliged to do. Further, at the time, the respondent believed the information to be true. Thus the conduct was reasonable.

[28] The respondent also submits that the actions taken by him at the time were consistent with the standard module requirements. Thus the respondent submits that no error is shown in the Magistrate's analysis.

Consideration

[29] The respondent's submissions should again be accepted as to this ground of appeal. In my view, the actions of the respondent were reasonable in giving members of the body corporate information about which they had an interest in receiving. The defence of qualified privilege was made out. Of course, it is also not necessary to make this conclusion where the matter is concluded not to be defamatory.

Ground 4:

The learned Magistrate erred in the way he assessed damages and they are manifestly inadequate

[30] The appellant challenges the Magistrate's assessment of damages which was $1,500. His Honour noted that the present circumstances were at the "very bottom end" of defamation given the nature of the material and the audience receiving it. He noted that the evidence was that other publications made about the defendant at meetings and in minutes between the 2011 emergency general meeting and trial were far more serious and much more damaging to the plaintiff's reputation. This is a reference to the evidence that

- The plaintiff had continued to live in the body corporate for some time after the alleged defamation;

- Further, he had commenced other proceedings in multiple jurisdictions up to and including QCAT against the body corporate until November 2015;

- As the Magistrate put it, the plaintiff was likely to have been viewed as a serial pest causing great expense and inconvenience to the body corporate and thus the other residents.

In this context, the Magistrate observed that other body corporate members may have been poorly disposed towards the plaintiff for reasons nothing to do with the commentary at the meeting about being unfinancial. Nevertheless the appellant argues that the defamation was serious and published on two occasions to a group of people that the appellant was in regular contact with and in those circumstances an award of damages of $20,000 was argued to have been appropriate.

Response

[31] The respondent submits that the plaintiff has not identified any particular authorities supporting the award of damages for which he contends. Conversely, the respondent has provided a schedule of comparable cases, a copy of which is annexed to these reasons and marked "A". This indicates that awards for damages for defamation unsurprisingly fall in a wide range, but for minor matters awards of between $250 and $10,000 have been made. In the circumstances, the respondent argues that the assessment by the learned Magistrate was correct.

Consideration

[32] In light of my findings above on the merits of the case in relation to liability, consideration of the correctness of the award of damages is a somewhat academic exercise. Nevertheless the question is a live ground of appeal and thus should be determined.

[33] I find the respondent's submissions on this issue to be more clearly supported by authority. The nature of the defamation, if the matter had been found to be defamatory, would necessarily fall towards the lower end of seriousness of such matters as the learned Magistrate observed. In the circumstances, I do not find there to be any identified error in the Magistrate's assessment and I would dismiss this aspect of the appeal as well.

[34] In the circumstances, the appeal is dismissed in all respects. Costs would normally follow the event and unless otherwise advised the respondent should have his costs of and incidental to the appeal on the standard basis.