Is an Argument Between Neighbours Worth $120,000?

The decision of *Raynor v Murray* [2019] NSWDC 189 was decided in the District Court of NSW in May 2019, and landed a resident in a strata building with an order for $120,000 in damages - confirming the law of defamation can be applied to strata disputes.

THE FACTS

In summary, the case involved a dispute between the lessee of a lot (**the Resident**) and the Chairperson of the owners corporation about unlocked letter boxes in a 15 lot strata scheme in Manly.

The area around the building was subject to a number of mail thefts and the residents in the area had been warned by police to keep their letter boxes locked to deter mail theft.

The dispute arose when the Resident left her letter box unlocked, and the Chairperson of the Owners Corporation sent numerous emails requesting her to lock the letter box.

There was nothing in the lease, the by-laws or any resolutions of the owners corporation which required the residents in the building to keep their letter boxes locked. There was also no resolution of the Strata Committee or a General Meeting for the Chairperson to contact the resident.

The Chairperson also sent an email to the Resident and the real estate agent managing her tenancy, requesting her to keep the letter box locked and suggesting she may incur financial liability if the boxes had to be rekeyed.

The dispute escalated and the Resident responded to the Chairperson with a lengthy email copied to all the other owners in the building.

The Chairperson sued the Resident, alleging the email was defamatory.

THE LAW

Defamation refers to something said or written by one person which negatively affects the reputation of another person, and that thing said or written is not true or is unsubstantiated.

Traditionally, defamation was distinguished between libel (defaming someone in writing) and slander (defaming someone orally). However, libel and slander were abolished under the Defamation Act 2005 (NSW) and the introduction of uniform law across states and territories.

Defamation cases are one of the very few civil cases which can be heard by a jury.

A plaintiff who wishes to claim in defamation needs to prove:

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- The defendant has made a communication to other people;
- The communication was related to the plaintiff, or identifies the plaintiff; and
- The communication contained imputations which are defamatory.

There are a number of defences available, such as substantial truth, contextual truth, absolute privilege and triviality.

The law also recognises the tort of injurious falsehood which is similar to defamation. The elements of an injurious falsehood claim requires malice on behalf of the publisher and where a business has suffered financial damage as a result of the publication of false statements.

THE DECISION IN THE DISTRICT COURT

The Court found the lengthy email sent by the Resident was defamatory and contained imputations:

- The Chairperson unreasonably harassed the Resident by consistently threatening her by email;
- The Chairperson acted menacingly towards the Resident by threatening her by email;
- The Chairperson was a malicious person who sent threatening emails to the Resident and copied in other residents of the Watermark building for the express purpose of publicly humiliating the Resident.
- The Chairperson is a small minded busybody who wastes the time of fellow Residents on petty items concerning the running of the Watermark building.

The Court found the Resident acted maliciously by deliberately copying the email to the other residents in the building, and had not established the defenses to the defamation.

The Court also found the Chairperson had suffered injured feelings, as he had acted in his capacity as Chairperson in dealing with the criminal matter of mail theft and the extent of the publication affected him in his own place of residence.

In doing so, the Court found circumstance existed for an award of aggravated damages and made an order of payment for $120,000 by the Resident to the Chairperson.

COURT OF APPEAL

The Resident appealed the decision to the Court of Appeal. The appeal was centered on two issues of determination:

(1) Whether the primary judge erred in failing to find the defence of common law privilege applied.

(2) Whether the primary judge incorrectly assessed the quantum of damages.

On Issue 1, the Court of Appeal found that the primary judge should have determined that the defence of common law privilege applied. This was found on the basis that the 'occasion of privilege' in question during proceedings was the communication to residents of Watermark on the topic of management of the building, including the security of mailboxes. The Court of Appeal set aside the initial finding that the email was made for the *"purpose of humiliating, belittling and insulting [the respondent] in the most hurtful way possible."* Importantly, it was found that proof of ill-will, prejudice, bias, recklessness, lack of belief in truth or some improper motive is insufficient of itself to establish that malice actuated the publication.

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On Issue 2, the Court of Appeal found that the damages awarded were excessive. It was determined that an award of $120,000 for "*an email in these terms addressed to 16 people was a manifestly excessive award,"* and that no more than $25,000 should have been awarded.

Ultimately, the appeal set aside the original decision and the defence of common law privilege absolved the Resident of all wrongdoing.

AMENDMENT ACT

Key changes to defamation laws in NSW were introduced following this case, in the form of the Defamation Amendment Act 2020 No 16 (**DAA 2020**). Section 30 of the DAA 2020 deals specifically with the defence of qualified privilege for provision of certain information. Importantly, it introduced a list of factors that can be taken into account when determining whether the conduct of the defendant in publishing the statement(s) was reasonable. These new factors include:

a) *the seriousness of any defamatory imputation carried by the matter published,*

b) *the extent to which the matter published distinguishes between suspicions, allegations and proven facts,*

c) *the nature of the business environment in which the defendant operates,*

d) *whether it was appropriate in the circumstances for the matter to be published expeditiously,*

e) *any other steps taken to verify the information in the matter published.*

This is not an exhaustive list of factors, nor does it compel the Court to examine each factor in every case. It instead acts as a guide for dealing with this defence in practice.

DEALING WITH DISPUTES

Although the NSW Civil and Administrative Tribunal is the principle forum for ventilating strata disputes under the Strata Schemes Management Act 2015 (**SSMA 2015**), the SSMA 2015 does not expressly contain provisions for dealing with disputes of a personal nature, such as defamation or injurious falsehood.

Committee members, and strata managers retain the personal capacity to sue in defamation, even though they may be carrying out the functions of the owners corporation. Strata managers and building management companies may also be able to sue for injurious falsehood if their business suffers actual financial damage as a result of false statements.

These disputes are ventilated in the Courts which often carry more severe consequences for the parties, including potential orders for aggravated damages and costs.

Regardless of the decision in this case, it is critical for owners and residents in strata schemes to remember that even though they may be dealing with members of the Committee or a strata manager, they need to be careful in their communications.

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