SUPREME COURT OF QUEENSLAND

CITATION:	*Cleret v Sunshine Coast Regional Council & Anor* [2017] QCA 163
PARTIES:	**DANIEL CLERET** (appellant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (first respondent) **DENISE BROOKS** (second respondent)
FILE NO/S:	Appeal No 10291 of 2016 SC No 6701 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 208
DELIVERED ON:	1 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2017
JUDGES:	Morrison JA and Mullins and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondents' costs of the appeal, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDING OF FACT – FUNCTIONS OF APPELLATE COURT – PROOF AND EVIDENCE – where the appellant owned a restaurant that was inspected by the second respondent as an employee of the first respondent – where the first respondent, relying on the *Food Act* 2006 (Qld), closed the restaurant – where the appellant brought an action against the first and second respondent for misfeasance in public office, negligence and trespass – where the appellant alleged that the closure notice was issued without power, the respondents were trespassing when the second respondent conducted the inspection, and the respondents were negligent in when conducting the inspections and preparing the reports – where the appeal was dismissed after an eight day trial – where documents were tendered and ten witnesses were called at the trial – where the appellant appeals on the ground

that the trial judge made incorrect findings of fact – where the trial judge's findings relied considerably on an assessment of witness' credibility – whether the trial judge's findings are so inconsistent with facts established by the evidence that appellate intervention is necessary

Food Act 2006 (Qld)

Abalos v Australian Postal Commission (1990) 171 CLR 167; [1990] HCA 47, applied
Adamson v Eade [2009] NSWCA 379, followed
Cleret v Sunshine Coast Regional Council [2016] QSC 208, related
F Hoffman-La Roche & Co v Secretary of State for Trade and Industry [1975] AC 295, followed
Fox v Percy (2003) 214 CLR 118, [2003] HCA 22, applied

COUNSEL: The appellant appeared on his own behalf
R J Anderson for the respondent

SOLICITORS: The appellant appeared on his own behalf
Barry Nilsson Lawyers for the respondent

[1] **MORRISON JA:** Mr Cleret owned a restaurant at Kenilworth. An Environmental Health Officer (Ms Brooks) from the Sunshine Coast Regional Council inspected the restaurant on a number of occasions. She issued notices in relation to it and the restaurant closed in July 2010. As a result, Mr Cleret's mortgagee sold the property it was operated on.

[2] Mr Cleret commenced proceedings against the Council and the Council officer, for misfeasance in public office, negligence and trespass. After an eight day trial his action was dismissed.

[3] Mr Cleret appeals against the dismissal of the action. The amended notice of appeal contains 28 grounds of appeal which largely consist of alleged errors of fact. They can be conveniently categorized as follows:

(a) undesignated errors of fact: grounds 2 and 21-26;

(b) rejection of alleged fraudulent interference with photographs, and impact on the veracity of photographic evidence in the absence of the original metadata: grounds 1, 11 and 13;

(c) acceptance of Ms Brooks' evidence, particularly as to her inspections, photographs taken by her and alleged fabrication of evidence by her: grounds 3-10, 12, 15 and 18;

(d) errors about the hand basin: ground 14;

(e) power to suspend the licence and authority to issue notices: grounds 16, 17 and 19;

(f) whether Ms Brooks trespassed when she entered the restaurant: ground 20;

(g) denial of natural justice because the trial judge selectively dismissed evidence without informing the parties that he intended to do so: ground 27; and

(h) apprehension of bias by way of pre-judgment: ground 28.

Background facts

[4] The background facts concerning the restaurant, its inspections and closure can be taken from the judgment below.[1] None of these are facts in contest.

> "[2] Mr Cleret commenced to operate the restaurant (on a part time basis) in about 1989. The first recorded inspection by Ms Brooks was in 2006. She also carried out inspections on 31 December 2008, 22 January 2009, 11 March 2009, 2 June 2010 and 25 June 2010. For all save the first of these occasions, there is a document described as a Food Business Inspection Report (*Report*), the form for each report referring to the *Food Act* 2006 (Qld). The reports generally recorded that corrective action was required. At least for the later of these inspections and reports, Ms Brooks held authority from the Council: a document dated 9 February 2009 signed by Lisbeth Dean as Executive Director Community Services of the Council recorded the appointment of Ms Brooks as an authorised person for, amongst other things, the *Food Act*.
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> [3] On about 25 May 2010, Ms Brooks sent an Information Notice to Mr Cleret giving notice of the requirements for hand washing facilities for licenced food premises. The notice advised of a requirement to have a separate hand wash basin, specifying 12 months as the period for compliance.
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> [4] The critical inspection occurred on 25 June 2010. On that occasion, Ms Brooks took a number of photographs. Ms Brooks' inspection report book contains both the original and the carbon copy of a report bearing that date (*Report 11244*), stating that she was unable to complete the report, and that she started to write up a new report. The new report (*Report 11246*) recorded the results of her inspection; that assistance was sought from a police officer stationed at Kenilworth; that the licence had been suspended; that Mr Cleret was to cease to operate the restaurant; and it identified some corrective actions that were required.
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> [5] On 7 July 2010, Ms Brooks went to the restaurant and left three notices attached to the door. Two were Improvement Notices, issued in reliance on s 83 of the *Food Act*, alleging contraventions of the Act which were likely to continue. Of these, one was dated 6 July 2010, and set out 37 requirements to be complied with. The second was dated 7 July 2010, and required completion of a form called a Food Safety Supervisor Notification. The third notice, dated 6 July 2010, was an Information Notice, also referred to as a suspension notice, issued in reliance on s 83 of the *Food Act*, and gave notice that the licence for the restaurant under the *Food Act* had been suspended with immediate effect. All three notices were

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[1] *Cleret v Sunshine Coast Regional Council* [2016] QSC 208, (**Reasons**) at [2]-[9]. Internal footnotes omitted.

signed by Mr Jason Brewer, who held the position of Healthy Places Manager with the Council.

[6] On 16 July 2010, Ms Brooks again attended at the restaurant. On that occasion, she took some photographs. She completed another report (*Report 11258*) which contained a note including the words "Please do not operate as advertised for Sunday" and which referred, amongst other things, to the suspension. It also invited a telephone call to Ms Brooks to arrange an inspection, providing a mobile telephone number. She left a copy of that report attached to the door of the restaurant. Mr Cleret did not attempt to arrange an inspection.

[7] On 3 August 2010, Mr Cleret sent a letter to the Chief Executive Officer of the Council, apparently intended as an objection to the suspension notice. The document set out criticisms of Ms Brooks, and commented on the inspection of 25 June 2010, and on matters raised in Report 11246, the suspension notice and the Improvement Notice dated 6 July 2010.

[8] On 23 August 2010, following a conversation between them, Mr Greg Mulder, the Coordinator Environment Health for the Council, wrote a letter to Mr Cleret, giving notice that he intended to undertake an inspection of the restaurant, and inviting Mr Cleret to contact him to provide a suitable time for the inspection. The letter also stated that Mr Cleret was unable to trade until the premises had been inspected, and the "conditions of the improvement notice" had been complied with. Notwithstanding the invitation, Mr Cleret did not contact Mr Mulder to arrange an inspection.

[9] By this time, Mr Cleret had ceased trading. His evidence was that he had continued trading after 25 June 2010, for more than a week. He plainly associated his decision to cease trading with service of the suspension notice and the Information Notices, which occurred on 7 July 2010. On Ms Brooks' evidence, there were indications on 16 July that Mr Cleret intended to continue trading. However, her evidence did not establish that he continued trading after that date. It is difficult to reach a firm conclusion about the date when Mr Cleret ceased to trade, other than that it was not long after 7 July 2010."

Applicable legal principles

[5] An appellant who seeks to overturn findings of fact made by a trial judge, which are based on findings as to the credibility of the witnesses whose evidence led to those findings, faces a considerable hurdle. As was said in *Fox v Percy*:[2]

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[2] (2003) 214 CLR 118, [2003] HCA 22, at [28]-[29], per Gleeson CJ, Gummow and Kirby JJ. Internal citations omitted.

> "[28] Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.
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> [29] That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses."

[6] In the course of his reasons in *Fox v Percy* McHugh J referred to the decision in *Abalos v Australian Postal Commission*,[3] and continued:[4]

> "[66] Mason CJ, Deane, Dawson and Gaudron JJ, the other members of the Court, agreed with my judgment. *Abalos* was applied in *Devries v Australian National Railways Commission* where Brennan and Gaudron JJ and I said:
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> > "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."

Discussion

[7] I intend to deal with the majority of the grounds in categories, and in the course of doing so, I will advert to the competing submissions advanced, but only to the extent necessary to highlight the relevant point.

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3 (1990) 171 CLR 167.

4 *Fox v Percy* at [66]. Internal citations omitted.

Ms Brooks' evidence; alleged fabrication of evidence: grounds 3-10, 12, 15 and 18

[8] Mr Cleret's contentions in this category covered a multitude of complaints about the findings as to Ms Brooks' evidence, and how events could not have occurred as she said in her evidence. However, he identified several "key issues" as being: (i) the evidence showed that Ms Brooks fabricated report No. 11244; (ii) Ms Brooks tampered with digitally recorded data or caused another person to do so; and (iii) deleted pictures were not accounted for.

Inspection 25 June 2010 and Report No. 11244

[9] Because the evidence of the inspection on 25 June 2010, and what occurred in the course of it, was central to a number of Mr Cleret's contentions, it is appropriate to review it now.

[10] Mr Cleret's submission was that report No. 11244, contrary to Ms Brooks' evidence, was not made on the restaurant premises. Central to that submission was that Brooks identified the reason why she stopped one report part way through was that water had dripped onto it while in the restaurant kitchen; that could not be true, which showed the report was fabricated.[5] The relevant findings by the learned trial judge are at Reasons [47]-[54].

[11] Ms Brooks' evidence in chief as to the inspection was as follows:

(a) when she went to do the inspection she had no idea whether the restaurant would be open or whether Mr Cleret would be there;[6]

(b) at first she said that she went into the restaurant and met Mr Cleret; she could not recall precisely where that occurred, whether it was just inside the kitchen door or at the front counter; she said hello to Mr Cleret;[7]

(c) then, when asked for greater detail, she said she was outside, and saw a sign that said "open tonight", so she thought the restaurant was open; she saw people sitting at a table, and concluded that the restaurant was then open for business; she took a photo of the people at the table; she then walked towards the front door and saw Mr Cleret at the table; she greeted him and asked to do an inspection; they then started to walk towards the kitchen;[8]

(d) she commenced to write report No. 11244 during her inspection on 25 June 2010, and at one point placed it on a bench underneath a microwave oven; she was unable to complete it because Mr Cleret spilt water on it when he reached out to clean the microwave with a sponge;[9]

(e) she felt that she needed some support with the inspection, so she made phone calls, but unsuccessfully; she then went around to the local police station and spoke to a police officer; she asked him whether Mr Cleret had a liquor licence for the restaurant;[10]

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5 Appellant's outline, page 3, paragraphs 4-13.
6 AB 536 line 1.
7 AB 500 lines 27-31.
8 AB 500 lines 37-43.
9 AB 499 lines 19-23, AB 512 lines 35-39.
10 AB 499 lines 32-47, AB 507 lines 1-4.

(f) she took photographs when inside the kitchen;[11] she may have taken them both before and after she went to the local police station;[12]

(g) by reference to the photos in Exhibit 12 she recalled that she went across the road to take photo, including of the advertising sign outside the restaurant;[13]

(h) she downloaded the photographs when she returned to her office; she could not recall the sequence in which the photographs were taken, except by relying on the "properties" function in the metadata once the photographs were downloaded;[14]

(i) she had written on the photographs in Exhibit 12; she explained what she relied upon for that purpose:[15]

> "What I relied upon was waiting till I got back to the office to download them onto the computer and then get the date and the time from the metadata in the properties box of the computer. The reason I did it that way was that there was so much happening at the time of the inspection that mentally and physically, there's no way I could have written the time at that time of inspection of those photographs because I was clicking so quickly and having discussions with [Mr Cleret] and making observations in the kitchen that juggling a pen and the camera and writing things would have been impossible to do it all that same time."

(j) it was possible in her writing on the photographs that she got them mixed up, but they were "definitely all taken … on that same day because all the other evidence indicates that";[16] she was taken through the photographs in Exhibit 12 and identified them as being taken during the inspection;[17]

(k) she did not give Mr Cleret a copy of report No. 11244; at the end of the inspection she gave him report No. 11246, and told him to cease operation of the food business;[18]

(l) she discussed with Mr Cleret whether he could clean up by opening time that night; by then it was about 3 pm;[19]

(m) she wrote the time 1.15 on this report because she had "probably looked at my watch on that particular occasion … or my mobile phone …";[20] and

(n) at the end of the inspection on Friday she went back to her office but did not deal with the documentation until the following Monday.[21]

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11 AB 504 line 47 to AB 505 line 4.
12 AB 507 lines 9-11.
13 AB 509 line 41 to AB 510 line 7.
14 AB 508 lines 25-31.
15 AB 509 lines 22-28; see also AB 847 lines 9-28.
16 AB 510 line 26.
17 AB 512-533; AB 537 lines 9-12. From AB 533 photographs from a later time were examined.
18 AB 500 lines 11-21.
19 AB 506 lines 18-25, 38-45.
20 AB 506 lines 34-36.
21 AB 535 lines 32-35.

[12] In cross-examination, which went for a considerable time due in part to the fact that Mr Cleret was inexperienced at asking questions in permissible form, Ms Brooks said that:

(a) she and Mr Cleret had discussions for some time after the last photograph was taken;[22]

(b) the only part of report No. 11244 that was filled out during the inspection was the beginning, because the liquid from the microwave was split on it;[23] she could not recall how much of report No. 11246 was filled out before the inspection ended;[24]

(c) report No. 11244 was left in her report book because it was wet and she could not write any more on it;[25] she denied it was not filled out that day;[26]

(d) some of the notes on the report (in particular, the reference to the police officer) were written later, when the book had dried;[27]

(e) answering the proposition that the stain should have been brown, she could not see a stain on the report at the time she gave evidence, but said it could have been clear water that spilt on it when Mr Cleret went over and cleaned the microwave;[28] when she was later shown the original she said she could see a stain mark, and the crumpled nature of the sheet reflected that it had been damp and dried;[29]

(f) she surmised that she had accidentally skipped a page when she went to report No. 11246;[30] and

(g) she took photographs before and after she went to see the police; her last photograph taken beforehand was at 1.28 pm and the afterwards the next photograph was taken at 2.52 pm.[31]

[13] The learned trial judge accepted the evidence of Ms Brooks as to what occurred at the inspection on 25 June 2010. His Honour also rejected any suggestion of fabrication of, or manipulation of, evidence. Salient aspects of the findings are:

(a) Mr Cleret seemed to accept that Ms Brooks left during the inspection to speak to a police officer, then returned; that she did so was more consistent with her evidence than Mr Cleret's version because she was unlikely to involve an outsider if the kitchen was not in the state she described;[32]

(b) the original of report No. 11244 did have a stain mark and the page was wrinkled, supporting Ms Brook's evidence that liquid was spilt on it;[33]

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22 AB 553 line 15.
23 AB 553 lines 33-35.
24 AB 554 lines 1-4.
25 AB 608 lines 12-19.
26 AB 711 line 35.
27 AB 608 lines 23-31.
28 AB 611 lines 1-26.
29 AB 712 lines 11 to AB 713 line 11.
30 AB 612 lines 1-13.
31 AB 649 lines 24-47.
32 Reasons [50].
33 Reasons [51].

(c) his Honour accepted Ms Brooks' account of the conflict between she and Mr Cleret (at the time of the inspection) as honest; that plus the corroboration led to acceptance of her account about the report;[34]

(d) there was no evidence to support the contention that report No. 11244 was written after report No. 11246;[35]

(e) the time recorded as to when the photographs was inaccurate by 12 hours; the evidence of Mr Cleret, Mr Chataway and Mr Minter, that Ms Brooks arrived about midday, was rejected as unreliable; Mr Cleret's evidence about report No. 11244 was also rejected as unconvincing;[36]

(f) the suggested evidence that Ms Brooks had altered the photographs were "not sufficiently convincing to lead me to reject" Ms Brooks' evidence;[37] his Honour referred to her qualifications on her memory, and the fact that photograph P70 was plainly taken outside, on 25 June 2010 and almost certainly by Ms Brooks; the evidence of other witnesses about the sequence of events surrounding Ms Brooks' arrival, was rejected as unreliable; Ms Brook's evidence as to notations on photographs P70 was probably the consequence of "a mistaken recollection";[38] and

(g) other evidence that was said to show that the photographs were taken in a different order, or at another time, was rejected as "not sufficiently convincing" or unreliable, and contentions by Mr Cleret were rejected as unlikely and farfetched.[39]

[14] More importantly, the learned trial judge accepted the evidence of the expert, Mr Diefenbach, who had conducted an audit of the digital file which recorded the photographs. His evidence was that: (i) the metadata for these files had not been accessed, changed or otherwise corrupted since the files were loaded into the Council's system; (ii) for various reasons he gave, there was no evidence that the photographs had been altered; (iii) software he applied could not identify any known software that might have been used with the files, after they were originally created with the camera; (iv) it was technically possible for "a very trained professional in imagery" to hide and change compression signatures; so that it was "potentially possible" for such a person to have altered the photographs in a way that the program would not detect.[40] His Honour said:[41]

> "The result of Mr Diefenbach's evidence is that there was a technical possibility that the files for the photographs taken on 25 June 2010 had been altered; though the results of the analysis by JPEGsnoop suggested otherwise; and the alterations could only have been done by someone with a relatively high level of computer expertise. There is no evidence to suggest that Ms Brooks herself had that expertise, nor that the assistance of anyone with such skill was available to her.

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34 Reasons [52].
35 Reasons [53].
36 Reasons [57].
37 Reasons [58].
38 Reasons [59]-[62].
39 Reasons [63]-[68].
40 Reasons [69]-[70].
41 Reasons [72].

> In my view, the evidence of Mr Diefenbach reinforces my conclusion that the files were not altered."

[15] I pause to note that no expert was called by Mr Cleret at the trial. Consequently Mr Diefenbach's evidence was not contradicted, except to the extent that Mr Cleret might have achieved in cross-examination. Having examined the transcript of the cross-examination, in my view it made no inroads on that evidence.

[16] Mr Cleret's attack on the learned trial judge's acceptance of Ms Brooks' evidence, and the findings above, largely repeated submissions made to and rejected by the learned trial judge. Leaving aside the somewhat pejorative summaries in Mr Cleret's outline, the main contentions as to this aspect of the appeal were that: (i) the time of 1.15 written in report No. 11244 showed when the report was written; (ii) the first photograph of the microwave,[42] which recorded its time as 1.13…58, showed no cleaning had been done by then; (iii) the use of the word "dripped" in the report suggested minimal exposure to water; (iv) there were inconsistent accounts about how much water there was and what colour it was; (v) photograph P77,[43] with a time recorded at 1.15.06, showed there was no-one in the vicinity of the microwave at that time; (vi) "report 11244 is a total fabrication", and "never eventuated on [Mr Cleret's] premises"; (vii) the "alleged water incident never eventuated and is a pure fabrication" as the water marks are not consistent with dripping on the right page and the wrinkling on the other page is more consistent with contact with clean water; and (viii) photograph P107[44] shows that the report book could not have sat under the microwave.

[17] That the time of 1.15 was written in report No. 11244 does not establish when the body of the report was written, but rather when that notation was made. As Ms Brooks said, she wrote the time 1.15 because she had "probably looked at my watch on that particular occasion … or my mobile phone".[45]

[18] The first photograph of the microwave,[46] recorded the time as 1.13, and shows brown residue in the bottom of it. Mr Cleret said that was the way it was when Ms Brooks was there,[47] but he did not clean it.[48] It may be that no cleaning had been done by then, but that would be consistent with Ms Brooks' evidence, which was that Mr Cleret rushed in front of her to try to clean the microwave.[49] The photograph could only be inconsistent with Ms Brooks' evidence if it was accepted that the report was written at about the same time as the photograph. There is no reason why the learned trial judge should have reached that conclusion.

[19] The suggested inconsistencies in Ms Brooks' evidence, such as the use of the word "dripped" in the report, how much water there was and what colour it was, are, in my view, quite peripheral to the resolution of any issue on the appeal. They simply do not bring the findings to the point where it might be said that they are

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42 AB 984.
43 AB 990.
44 AB 1020.
45 AB 506 lines 34-36.
46 AB 984.
47 AB 311 line 23.
48 AB 311 line 31.
49 AB 611 line 23.

inconsistent with facts incontrovertibly established by the evidence or are glaringly improbable.

[20] Photograph P77,[50] with a time recorded at 1.15, does not show there was no-one in the vicinity of the microwave at that time. Mr Cleret's left arm is in the photograph. To suggest that this would show that the report could not have been made at the restaurant that day requires a finding that the 1.15 entry on the report was made at the same time as the photograph, or that the 1.15 entry was fabricated. There is simply no basis, on the strength of this photograph, to conclude either.

[21] The learned trial judge inspected the original of the report. That was the basis of his finding that it did have a stain mark and the page was wrinkled, supporting Ms Brook's evidence that liquid was spilt on it.[51] That was supported by Ms Brooks' evidence. In those circumstances it cannot be accepted that the "alleged water incident never eventuated and is a pure fabrication". The precise colour of the water that contacted the report, and whether it dripped or splashed, are peripheral to the central difficulty confronting Mr Cleret's attack, namely that adverse findings of credit and reliability were made against his evidence, and that of his witnesses, and correspondingly, the evidence of Ms Brooks was accepted. It was plainly open to his Honour to reach the conclusion he did about the impact of water on the report, and whether that supported Ms Brooks' evidence.

[22] Photograph P107 does not establish that a report book could not have sat under the microwave. It shows that there is a section of bench below the microwave that could accommodate a book. Mr Cleret's point was that it could not have sat directly under the microwave, but that misunderstands the evidence. Ms Brooks said the water came from the sponge held by Mr Cleret when he reached out to clean it, not necessarily from the microwave itself.

[23] There were some other contentions advanced both in the outline and orally, as to this complaint. None of them advanced the contention beyond those dealt with above.

[24] None of the matters dealt with above can, in my view, succeed. They simply do not get anywhere near establishing that the learned trial judge's findings on these issues were inconsistent with facts incontrovertibly established by the evidence or glaringly improbable. Based, as they were, on findings adverse to Mr Cleret as to his credit and reliability, as well as the reliability of his witnesses, and the corresponding findings as to the credit and reliability of Ms Brooks, there is no basis for this Court to interfere. Further, on no credible basis do they establish that the learned trial judge the trial judge failed to use or has palpably misused his advantage of seeing and hearing the witnesses first hand.

[25] The grounds associated with this category fail.

Interference with photographs; absence of original metadata: grounds 1, 11 and 13

[26] These grounds are allied to those in grounds 3-10, 12, 15 and 18, dealt with above. Mr Cleret's contentions can be summarized in this way:[52]

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50 AB 990.
51 Reasons [51].
52 Appellant's outline, paragraphs 14-31.

(a) there is evidence of manipulation of digital evidence, revealed by discrepancies in the alleged timing of photographs P70 in relation to P69, and by evidence given by Mr Cleret, Mr Chataway, Mr Minter, and Mr G Cleret;

(b) photograph P70 was recorded as the third photograph taken on 25 June 2010 but was, in fact, the second last photograph taken that day; it was taken when Ms Brooks left the premises after taking photographs in the restaurant, and Mr Chataway was still sitting at the tables outside the restaurant;

(c) the learned trial judge erred in relation to the audit by Mr Diefenbach, in that Mr Diefenbach's evidence was that errors in the sequential order of the photograph reveals interference with the metadata;

(d) there was no gap in the sequential numbering of the photographs, which shows that the metadata was manipulated between 25 June 2010 (when the photographs were taken) and 30 June 2010 (when they were downloaded into the Council's system); during that time Ms Brooks had possession of the SD card from the camera; the Council employed more than 50 people in its IT department and therefore the necessary skills existed to do so; and

(e) Ms Brooks "doctored and reshuffled the pictures", "doctored the pictures and fabricated a document" in order to corroborate her version of events in relation to arrivals and departures from the restaurant, and to refute the timing of the inspection in the kitchen.

[27] I have already set out the essential parts of Ms Brooks' evidence: see paragraphs [11] and [12] above. To that can be added this:

(a) she said only one SD card from the camera used on 25 June 2010 was produced to Mr Cleret's solicitors because that was all that was available, and it was the only one with photographs on it; the only photographs deleted were those which were blurry or irrelevant; the dealings with the SD card were left to the Council's lawyers; she did not have access to the SD cards once they were handed to the lawyers;[53] and

(b) in cross-examination she denied that she had; (i) altered the report;[54] "planted evidence";[55] taken material from a bin and put it on the bench in order to photograph it;[56] altered the metadata to manipulate dates or to try and make it fit with her evidence, saying she did not even know how to do that, nor had the skill;[57] enhanced photographs to show things that were not there;[58] or interfered with or manipulated the photographs.[59]

Evidence of G Cleret, Chatawy and Minter

[28] Each of these witnesses gave evidence related to events when Ms Brooks came to the restaurant on 25 June 2010.

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53 AB 598 line 27, AB 599 lines 20-45, AB 600 lines 8-26, AB 696 lines 1-29.
54 AB 611 lines 28-37.
55 AB 626 lines 16-18.
56 AB 633 lines 9-17, AB 636 line 43 to AB 637 line 13, AB 643 lines 17-27.
57 AB 644 lines 3-10, AB 648 lines 7-13.
58 AB 648 line 30.
59 AB 835 lines 30-38.

[29] Mr G Cleret's relevant evidence[60] in chief was:

(a) when Ms Brooks arrived he was "sitting outside on lunch with two other people"; Ms Brooks said she could see the restaurant was open, and that she would do an inspection; she went inside, then he quickly finished his lunch and went inside "to get back to what I was doing";[61]

(b) photographs P108 and P109 could not have been taken at the time they recorded, namely about 3 pm, because they depicted preparations for a curry that would have been finished well before that;[62] and

(c) Ms Brooks was only in the kitchen for no more than 10 or 20 minutes.[63]

[30] In cross-examination he said the following: photograph P107 was taken after lunch;[64] and Mr Cleret was cleaning outside while Ms Brooks was there, but he did not see him cleaning in the kitchen.[65]

[31] Mr Chataway relevant evidence was as follows:

(a) photograph P69 in Exhibit 11 showed himself and Mr G Cleret at lunchtime on 25 June 2010; they started lunch between 11.30 am and 12, and Ms Brooks went past them just before he had finished lunch; he was still there when she left;[66]

(b) Ms Brooks said "seeing as you're opening, we'll have an inspection";[67]

(c) when Ms Brooks came out she looked "a bit pissed off" and walked up the street;[68] she came out, he finished his beer and he left;[69] he left by 12.15 "at the most";[70] and

(d) as to photograph P69, "that looks like she must have taken that before she came in".[71]

[32] Mr Minter gave evidence that:

(a) he went to the restaurant on 25 June 2010 to meet Mr Cleret; he arrived about 11.50 am and saw Mr Chataway sitting at a table outside; Mr Chataway said that the health inspector was there; he walked through to do something with the hot water cistern, and heard Ms Brooks saying to Mr Cleret "You will not be opening tonight. And I will have someone watching you";[72]

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60 A great deal of evidence was given as to the cleanliness of the kitchen, and preparation and storage of food items, and the state of equipment, none of which is relevant to the present issue.
61 AB 109 lines 29-43.
62 AB 120-121.
63 AB 128 line 8.
64 AB 155.
65 AB 161-162.
66 AB 179-180.
67 AB 182 line 22.
68 AB 183 line 2.
69 AB 184 line 30.
70 AB 185 line 14.
71 AB 183 line 7.
72 AB 198-199.

(b) after that Ms Brooks came out, turned left, and walked up the street;[73]

(c) after that he did not see her enter the premises, though he was "out to the back" with Mr G Cleret;[74]

(d) he went inside to speak to Mr Cleret who said "she is coming back with someone";[75]

(e) he then carried out various tasks with Mr Cleret, including moving a pizza oven, turning some benches, and checked things on the deck;[76] he thought he was there about an hour and a-half, but did not check the time;[77] and

(f) Mr Cleret said that Ms Brooks had flung the report at him, and he opened it.[78]

[33] Mr Diefenbach was the Council's information, Communication Technology Infrastructure support team leader. He started with the Council in 2001 as a network engineer, moving into the technical services team in 2003 as team leader, then into his current position in 2006. In 1990 he was awarded a Bachelor of Applied Science in Computing, and had worked in IT since. His evidence was given by affidavit[79] as well as oral evidence. In his affidavit he said:

(a) he had inspected the camera used by Ms Brooks at the restaurant on 25 June 2010 and reviewed the data stored in Council's Current File System Folder and Backup System Catalogue relating to those photographs;

(b) he had inspected the memory cards of the camera and that revealed that any photographs taken in 2010 had been overwritten and could not be recovered;

(c) photographs taken on 25 June 2010 were downloaded onto the Current File System Folder on 30 June 2010; he had conducted an audit of the metadata for the photographs taken on 25 June 2010, and that reveals that the metadata has not been accessed, changed or otherwise corrupted since the date the photographs were downloaded onto the Current File System Folder; and

(d) he had also reviewed Council's Backup system catalogue and conducted an audit of the photographs taken on 25 June 2010 relating to the restaurant; that revealed that the metadata contained in the Council Backup system catalogue, which was backed up on 31 December 2010, was identical to the metadata contained in the Current File System Folder; he found no evidence that the photographs had been accessed, information changed or otherwise corrupted when he conducted my audit of the Backup system catalogue.

[34] Relevant parts of his oral evidence were as follows:

(a) when he examined the camera memory cards they held none of the photographs in question; they had been continuously used since the original photographs had been downloaded;[80]

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73 AB 199 line 16.
74 AB 202 lines 26-37.
75 AB 199 line 36.
76 AB 200-201.
77 AB 201 line 27.
78 AB 201 line 30 to AB 202 line 15.
79 AB 921.
80 AB 721-722.

(b) for each of the photographs the fact that the date taken, date last saved and date modified were exactly the same dates was consistent with that being the original image, and it had not been accessed and altered; likewise the fact that the photographs were numbered sequentially by the camera;[81] going by the date stamp there was no evidence the P photographs had been modified;[82]

(c) he ran a programme called JPEGsnoop but the particular camera was not in its database of about 3,000 digital devices and software programmes, so the results of that search were not definitive,[83] but there was nothing to suggest modifications;[84]

(d) the backup system did not show anything to suggest modifications;[85] and

(e) the result of all his tests was that there was nothing to suggest any alteration or modification of photographs.[86]

[35] Cross-examination of Mr Diefenbach established the following:

(a) it was technically or potentially possible, not by an average person but by a very trained professional in imagery, to hide and change compression signatures;[87]

(b) the JPEGsnoop programme was used as a guide, not a proper forensic tool;[88]

(c) for some photographs, such as P111, the JPEGsnoop programme produced an uncertain result, in the sense that it was classified as group 4, meaning it was not proven one way or another whether it was altered or the original;[89]

(d) the dates on P photographs stayed the same when they were copied onto the Council system;[90] for P photographs the date taken dates and date modified were all identical, and the likely process they went through was: taking the photos with the camera that would put those timestamps on that original image; then the camera was plugged in and a direct copy made across to the Council network; the photos were not opened, but simply copied across;[91]

(e) the FH photographs appeared to have been opened and resaved, which accounted for a different "dated saved" to the "date taken";[92] and

(f) there was no evidence that the photographs had been altered; he had not run forensic tools but looking at the file system and the backup system, and the results of the JPEGsnoop programme, "None of that indicates to me that it's been altered".[93]

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81 AB 725 lines 4-32.
82 AB 726 lines 26-39.
83 AB 727 lines 9-44.
84 AB 728 line 22.
85 AB 729 lines 29-32.
86 AB 730 lines 10-20.
87 AB 736 lines 17-25.
88 AB 738 lines 14-16.
89 AB 741 line 38 to AB 742 line 3.
90 AB 746 lines 9-19.
91 AB 751 lines 11-23.
92 AB 747 line 20 to AB 748 line 14.
93 AB 752 lines 14-41.

[36] Mr Diefenbach said this as to what would have to be done to alter the photographs:[94]

> "To alter it, you would need to download and use an application that can modify various file dates – date modify or the date stamps. You would then have to run through and, potentially, alter all the files, just to keep the sequence in check, or, at least … multiple files to keep the sequence of when the date's taken … and the name of the files as well. You would also have to use file editing software to modify the photo and then … be clever enough and have enough knowledge to then save it and hide any compression signatures. … You'd have to do a fair bit of research and probably practice as well. … You have to develop a bit of a skill."

[37] The learned trial judge examined Mr Diefenbach's evidence in the course of his judgment.[95] His Honour concluded that Mr Diefenbach's evidence reinforced a conclusion that the file had not been altered. Part of that reasoning was (i) acceptance of Mr Diefenbach's evidence that alteration had not occurred, and that alteration could "only have been done by someone with a relatively high level of computer expertise"; and (ii) acceptance of Ms Brooks' evidence that she lacked the relevant skills to do so.

[38] Mr Cleret's challenge to these findings depends on acceptance of the evidence of Mr Chataway and Mr Minter to show the photographs could not have been taken when the time signature on them indicates they were, and rejection of Mr Diefenbach's evidence. To do so Mr Cleret pointed to alleged discrepancies in the sequential numbering of the photographs, contending as to photograph P70:[96]

> "Picture P70 recorded as the 3rd picture taken 25th June 2010 was in fact the second last picture taken that day. It was taken when Ms Brooks left the premises after conducting her photo shoot in the premises. And Mr Chataway was still sitting at the tables."

[39] The timing sequence of the photographs shows the first (P68) taken at 12.56.45, then P69 15 seconds later at 12.57, P70 a further five minutes and 28 seconds later at 1.02.28 pm, P71 a further 11 minutes and 30 seconds later at 1.13.58 pm, and P72 a further 14 seconds later at 1.14.12 pm. Thereafter the photographs were taken at varying intervals of between six and 58 seconds, until the sequence between P94 and P106 when several were over two minutes apart.[97] The largest interval occurred between P106 (taken at 1.28.24pm) and P107, which was taken one hour 23 minutes and 30 seconds later.

[40] The suggestion that P70 was the last taken because it showed Mr Chataway still sitting there, cannot be accepted. The last photograph was taken (according to the time signature) at 2.58.54 pm. Mr Chataway did not suggest that he remained at the restaurant as late as that, saying that he was there when Ms Brooks came out looking "a bit pissed off" and walked up the street.[98] This was evidently when Ms Brooks interrupted her inspection and went to see the police. Mr Chataway then

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94 AB 753 lines 24-36.
95 Reasons [69]-[72].
96 Appellant's outline page 8.
97 P95 to P96, P96 to P97, and P100 to P101.
98 AB 183 line 2.

finished his beer and left by 12.15 "at the most".[99] Ms Brooks came back and continued the inspection after seeing the police.

[41] Further, both Mr Cleret and Mr G Cleret said that they were inside the restaurant when Ms Brooks was inspecting it, but Mr Chataway was not inside.[100] Nothing in the evidence of any of the witnesses for Mr Cleret compels the conclusion that their evidence was wrongly rejected by the learned trial judge.

[42] In my view it is quite probable that there was a time when both Mr Cleret and Mr G Cleret had left the lunch table but Mr Chataway was still there, and that was when P70 was taken from across the road.

[43] From the timing signatures it is, in my view, likely that the time when Ms Brooks went to see the police was between P106 (taken at 1.28.24 pm) and P107 (taken at 2.51.54 pm). Even Mr Cleret's evidence was that she was away about "an hour and a half", and when she came back it became evident to him that she had seen the police.[101] That was a reference to what he had seen written on Report 11246: "assistance sought from Craig Trethewey Kenilworth Police".[102]

[44] One of the curious features of the attack on the photographs was that Mr Cleret accepted that they were taken on 25 June 2010,[103] and he was there.[104] Further, he did not contend that the photographs did not depict the state of the kitchen at the time of the inspection, though he did say that some of the photographs showed the kitchen in worse condition than it truly was.[105] That being the case, it is difficult to understand why the precise sequence matters.

[45] There is no basis whatever to overturn the learned trial judge's acceptance of the evidence of Mr Diefenbach, supported by that of Ms Brooks. The challenges were based on evidence that was rejected as unreliable, and other than that, bare assertion unsupported by any expert evidence that might lend credence to the suggestion that the dates of the photographs had been manipulated.

[46] The grounds associated with this aspect of the appeal must fail.

Issue as to the hand basin - ground 14

[47] Mr Cleret's contentions as to this issue can be summarised as follows:[106]

(a) about 25 May 2010 he was given an Information Notice, giving him a period of 12 months to provide required hand washing facilities;

(b) on 6 July 2010 he was given another Notice as to the hand basin, this time requiring immediate compliance;

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99 AB 185 line 14.

100 This was the evidence of Mr Chataway, as elicited in his evidence in chief as part of Mr Cleret's case: AB 183 line 45 to AB 184 line 3.

101 AB 69 lines 2-27.

102 AB 1830.

103 Reasons [67]; AB 309 lines 4-6; AB 421 lines 16-22.

104 He is shown in many of them: P69, P77, P89, P104, P108 and P109.

105 Reasons [67].

106 Appellant's outline, paragraph 33.

(c) the existing hand basin was installed and approved in 1992, and there was nothing wrong with it;[107]

(d) Ms Brooks did not use the hand basin and limited herself to taking a photographs[108] that were later "doctored";

(e) no particular size of hand basin was required;

(f) to make the requirement immediate was purely malicious; and

(g) Mr Mulder's letter in August 2010, requiring that all requirements were complied with, was an abuse of power and in breach of the *Food Act* as it extended the 30 day suspension limit.

[48] For the Council it was submitted that the later notice contradicted the earlier one which had been given to Mr Cleret and other businesses. However the decision to give another notice was not capricious.

[49] The relevant finding by the learned trial judge was in Reasons [74]:[109]

> "The Information Notice of 25 May 2010 permitted Mr Cleret a period of twelve months in which to provide the required hand washing facilities. The Information Notice of 6 July 2010 required immediate compliance. This represented a change from the position in the earlier notice, and, it may be accepted, from what was required of other licensees. It is apparent that requirement was changed as a result of the inspection by Ms Brooks. There is no reason to think that this was harassing conduct; nor that it demonstrates malice on the part of Ms Brooks. The location and condition of the handwash basin were far from satisfactory; and Ms Brooks identified good reason for thinking that those working at the restaurant did not have good hand washing practices."

[50] Mr Cleret referred to clause 14 of the *Food Safety Standards - Standard 3.2.3 Food Premises and Equipment*,[110] contending that his basin met those requirements. The *Standard* relevantly provides that hand washing facilities for food premises must be: (i) located where they can be easily accessed by food handlers, within areas where food handlers work; (ii) connected to warm running water; (iii) of a size that allows easy and effective hand washing; and (iv) clearly designated for the sole purpose of washing hands, arms and face.

[51] The information notice of 25 May 2010[111] was plainly a general notice issued to more than Mr Cleret. It stipulated ways in which warm water could be achieved (if separate hot and cold water supply is provided a mixer tap is required), the size of the basin (a basin of 11 litres capacity with minimum dimensions of 500mm by 400mm off the wall), and that there had to be an adequate supply of liquid soap and paper hand towels on a dispenser available for hand washing. It gave 12 months to comply.

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107 Referring to photograph 6 of Exhibit 6: AB 1129.
108 P77 (AB 990) and P100 (AB 1013).
109 Internal references omitted.
110 Adopted under the *Food Act* 2006 (Qld).
111 AB 1131.

[52] The notice issued on 6 July 2010[112] required that certain steps be taken immediately, and others in one week or 14 days. The immediate ones included (i) providing an adequate, continuous supply of liquid soap and disposable paper towel in wall mounted dispensers at the hand wash basin at all times; and (ii) ensuring that the hand basin was replaced with a new basin, clean and imperviously finished with a minimum dimension of 500 mm by 400 mm off the wall and clearly designated for the sole purpose of washing hands, arms and face.

[53] The reason for the change between the times for compliance was obviously the inspection by Ms Brooks. The photographs of the kitchen plainly showed many deficiencies, and those of the basin show noncompliance with the notice of 25 May and the *Standard*, for example there was no mixer tap, no paper towels and dispenser, the basin was not 400 mm off the wall, and there was nothing to clearly designate it for the sole purpose of washing hands. Given Mr Cleret's evidence[113] and his position that there was nothing wrong with the existing basin there was no reason to conclude that anything was likely to be done by him towards compliance.

[54] Ms Brooks gave evidence of what she saw during her inspection on 25 June, and, by reference to the photographs, that she was concerned because the basin was noncompliant and:[114]

> "… very much indicating that handwashing is of utmost importance and that the hand basin needs to be accessible and used, and, to me, when the hand basin itself is actually dirty, and then you're trying to wash your hands to produce hygienic food, then you don't use dirty utensils and equipment to produce a clean outcome."

[55] Ms Brooks also explained that the hand basin became a greater priority as time went on from the notice in May:[115]

> "… it was – certainly became a higher priority. And the reason was … that after my inspection and examining the photos, it was quite clear that proper handwashing procedures and hygienic practices were not being conducted adequately in your premises. And statistics and information has been proven that it – the reason that the legislation was changed to upgrade handbasins, make them larger and more accessible, was to encourage and enable people to do the right practice with handwashing. I observed inappropriate and inadequate handwashing, therefore it became a much higher priority than before, after considering your premises."

[56] Ms Brooks was also asked about the fact that the requirement to change the basin was under the "immediate and ongoing" part of the notice on 6 July. Her answer was:[116]

> "It was immediate and ongoing under the list. It had on the top of the paragraph "immediate" and "ongoing". And "ongoing" was written there. And of course, I would have appreciated had you

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112 AB 1133.
113 AB 73-74, 375, 400.
114 AB 526 lines 32-36.
115 AB 698 lines 5-17.
116 AB 700 lines 7-13.

> changed that handbasin as quickly as possible. But I had not specifically demanded that you do that immediately. It was under the immediate and ongoing issues that were there, and we were open to negotiation and to discuss what practices you could do to modify or delay some of the upgrading and cleaning that may have been required. It was up to you and I and my superiors, if need be, to actually negotiation what was needed."

[57] Negotiation was plainly open as Mr Cleret did just that with Mr Mulder, albeit that he did not get the result he sought. None of the foregoing justifies a finding that the Council or Ms Brooks acted maliciously in regard to the requirements for the hand basin.

[58] The photographs of the basin bear out Mr Brooks' description and concerns. The evidence amply justified the learned trial judge's finding above. This ground fails.

Power to suspend the licence and authority to issue notices - grounds 16, 17 and 19

[59] Mr Cleret's submissions on these grounds were that the suspension of his licence pursuant to s 83 of the *Food Act* was unlawful and the learned trial judge erred in finding to the contrary. His Honour also erred in his finding, in respect s 83, that an alternative course might be taken; there was no alternative course. Section 83 required an emergency situation, which did not exist at either 25 June or 7 July 2010. The proper course to follow was under s 79, and that did not occur. The use of s 83 was "an abuse of power to cover Ms Brook's misdemeanours and ruthless strategy; by entering doctored pictures into the system the management was caught out and had to respond".[117] Part of the s 83 abuse of power was the issuing of a Council letter on 23 August 2010, described as "a deliberate breach of s 83".[118]

[60] The submissions for Ms Brooks and the Council were that the suspension was plainly warranted by the state of the kitchen on 25 June 2010, and Mr Cleret's evident desire to continue trading without rectifying matters that had been notified. The allegations of systematic destruction or manipulation of key material were rightly rejected. The *Food Act* enabled the Council to act immediately where it was reasonably apparent that there was a threat to public health and safety, and the photographs evidenced unsafe food handling and storage. It was accepted that the proper procedure under the *Food Act* had not been followed, but the relief sought required more than that, and the allegations of malice were rightly rejected.

[61] The learned trial judge examined the provisions of ss 79, 82 and 83 (and others) of the *Food Act*, then turned to the cause of action based on misfeasance of office. His Honour observed that the elements of the tort required that the damages must have been suffered by conduct where: (i) the actuating motive for the defendant's exercise of the power was to inflict harm upon the plaintiff, referred to as "targeted malice"; (ii) the defendant knew that they were acting without authority; and the defendant's conduct was calculated in the ordinary course to cause harm, or (possibly) involved the foreseeable risk of harm; and (iii) the defendant "has actual knowledge … that his or her action … would cause or be likely to cause injury or else that (the defendant) has acted with reckless indifference … to the possibility that that action

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117 Appellant's outline paragraph 42.

118 Reasons [35].

would cause or be likely to cause injury".[119] There was no contention on the appeal that the learned trial judge misapprehended the applicable principles.

[62] Mr Cleret's pleaded case was that each of the acts done on 25 June (the inspection and suspension) and 7 July (notified suspension) was done maliciously, with intention to cause him harm; and each was done with knowledge that it was beyond power, damage being reasonably foreseeable; or alternatively, the Council and Ms Brooks were reckless with regard to the question whether their acts were within power.

[63] The learned trial judge rejected that claim, finding:

(a) he was not persuaded that Ms Brooks had the photographs altered, or that they had been taken in any order other than that which their numbering revealed;[120]

(b) accepting Mr Diefenbach's evidence, the files for the photographs had not been altered;[121]

(c) the change in the period given under the notices of 25 May and 6 July was the product of the inspection on 25 June, and was not harassing conduct, nor malicious;[122]

(d) the basis for the suggested inference for the malice on Ms Brooks' part was her fraudulent alteration of photographs, and her manufacturing of report 11244; since those facts were rejected, and Ms Brooks' evidence accepted that on 25 June 2010 "the kitchen was disorganised and in places dirty, with substantial evidence that there had been insufficient attention to maintaining cleanliness and avoiding food contamination", there was no basis for a finding of malice;[123]

(e) there was no reason advanced to reject Ms Brooks' evidence that she believed she had power to suspend Mr Cleret's licence on 25 June, nor was there any evidential basis to conclude that she knew she was acting beyond power (even though she was);[124]

(f) there was no reason to doubt the evidence of Mr Brewer (the Council officer who prepared the notice of 6 July), that he discussed the state of the kitchen with Ms Brooks and examined the photographs, concluding that the restaurant posed an immediate or serious threat to public health and safety, and that he believed the suspension notice was effective when it was issued; it was not suggested to Mr Brewer that his determination to suspend the *Food Act* licence was motivated by some consideration other than achieving compliance with the requirements of the *Food Act*, and the licence; consequently he was not actuated by malice when he issued the notices on 6 and 7 July 2010;[125]

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119 Reasons [32].
120 Reasons [58] and [61]-[66].
121 Reasons [72].
122 Reasons [74].
123 Reasons [76].
124 Reasons [78]-[79].
125 Reasons [85]-[90].

(g) the requirement in s 83(2) of the *Food Act*, that a suspension notice must be accompanied by a show cause notice, did not occur; Mr Brewer gave evidence that he advised Ms Brooks of the requirement for the show cause notice; it was not suggested to him that he knew that it was beyond his power to suspend the *Food Act* licence, because the requirement to issue a show cause notice would not be complied with; therefore it was not established that Mr Brewer issued the suspension notice knowing that his conduct was beyond the power conferred on him by the *Food Act*;[126]

(h) the letter on 23 August 2010 was not an exercise of power.[127]

[64] It will be apparent that this ground depends to a great extent upon the challenges to the learned trial judge's findings concerning the timing and manipulation of photographs, the state of the kitchen on 25 June 2010, acceptance of the evidence of Ms Brooks and Mr Brewer, and rejection of the evidence of Mr Cleret's witnesses. For the reasons advanced above those challenges fail.

[65] The learned trial judge was undoubtedly correct to find that the letter of 23 August 2010 was not an exercise of power. Reference to it[128] shows that it responded to a telephone call with Mr Cleret and invited him to contact Mr Brewer so that a follow up inspection at the restaurant could be arranged. The letter remind him that he could not trade, but was not itself a suspension notice.

[66] The only extra factor raised by Mr Cleret in oral address was the fact that Ms Brooks' Delegation of Authority[129] did not include power to suspend a licence. Ms Brooks' evidence was that after the inspection on 25 June she waited to see Mr Brewer as he was the person with delegated authority to sign the suspension notice.[130] The impact of the Authority was raised in cross-examination of Ms Brooks, who said nonetheless that she believed she had the relevant power on 25 June 2010.[131] That evidence was before the learned trial judge, who accepted Ms Brooks' evidence that she believed she had the power on 25 June 2010. No basis has been demonstrated for overturning that finding.

[67] Mr Cleret's case had to prove that the acts were actuated by malice, not merely beyond power. In my view there is no basis to conclude that the learned trial judge's findings were not open to him. These grounds fail.

Did Ms Brooks trespassed when she entered the restaurant - ground 20

[68] Mr Cleret alleged that Ms Brooks trespassed on the property on an inspection on 2 June 2010. Ms Brooks said in her evidence she had walked through the open front door and stood at the counter.[132] She was cross-examined and said the door was open and she could see into the kitchen.[133] It was an account she had given

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126 Reasons [91].
127 Reasons [92].
128 AB 1140.
129 AB 1144.
130 AB 535 lines 32-46.
131 AB 840 line 24 to AB 841 line 10.
132 AB 498 Lines 9-10, 31-38.
133 AB 661 line 44 to AB 662 line 5.

since at least 2012.[134] She was not challenged as to that evidence. However Mr Cleret said that he told her on 25 June that there was no-one there on 2 June.[135]

[69] The learned trial judge accepted Ms Brooks' evidence, supported, as it was, by her report of the inspection on 2 June, and held that there was no impediment to entry on that day.[136] Consequently there was no trespass on 2 June, and Ms Brooks' entry to the premises that day was authorised by s 175(1)(d) of the *Food Act*.

[70] No basis has been shown to overturn that finding.

[71] In oral address, Mr Cleret sought to raise an argument that there was no evidence that on 2 June 2010 Ms Brooks produced an identity card, and therefore was in breach of s 171 of the *Food Act*. Section 171(1) refers to the requirement for a card to be produced or clearly displayed, and s 171(2) permits a card to be produced later if it was impractical to show it at the time. As the point was not raised below, and would have been a matter upon which Ms Brooks could have given evidence, leave to raise it should be refused.

[72] This ground fails.

Denial of procedural fairness - ground 27

[73] Mr Cleret submitted that the learned trial judge failed to afford procedural fairness because he failed to draw the parties' attention to a determination he was going to make about the evidence of witnesses including evidence given by Ms Brooks. The contention was that his Honour did not forewarn that he was to dismiss evidence from certain witnesses called by Mr Cleret[137] and dismiss parts of Ms Brooks' evidence on the ground of frailty of recollection.[138]

[74] The contention is misconceived. There is no obligation on a trial judge to forewarn the parties as to how the evidence may be dealt with when the judge finally comes to consider it. For one thing, the judge may not know at the end of the trial just what evidence will ultimately be accepted or rejected, and why. But there is authority directly on point.

[75] In *F Hoffman-La Roche & Co v Secretary of State for Trade and Industry*[139] Lord Diplock said:

> "Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

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134 AB 917.
135 AB 68 lines 18-20.
136 Reasons [101]-[102].
137 Mr Chataway, Mr Minter and Mr G Cleret (his son).
138 Appellant's outline, page 3, paragraphs 1-2.
139 [1975] AC 295 at 369.

[76] That passage was referred to in *Adamson v Eade*,[140] where the question was whether a judge was obliged to forewarn a party that he was intending to make a finding detrimental to that party. The Court held that there was no such obligation. Campbell JA[141] said:

> "[114] That passage has been adopted by Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at 166 [48], and there applied by their Honours to the Refugee Review Tribunal with the comment:
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> > 'Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.'
>
> To similar effect is *Habib v Director-General of Security* [2009] FAFC 48; (2009) 175 FCR 411 at 428 [64].
>
> [115] In *Piras v Egan* [2008] NSWCA 59, a trial judge had referred in his judgment to the evidence of one witness about why some locks had been changed as being of importance in his ultimate conclusion concerning contested matters of credit. He had not told the parties that he was contemplating attributing that role to that particular piece of evidence. It was argued that the judge's failure to do so amounted to a denial of natural justice. At [174], I considered the possibility that this might have amounted to a breach of natural justice, but did not decide whether or not it was such a breach. I went on to consider what the situation would have been if it had been a breach of natural justice.
>
> [116] Giles JA (with whom Tobias JA agreed on this point) did not accept that I had been right in even having a doubt about the matter. He said, at [3]:
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> > 'The requirements of natural justice, now often referred to as procedural fairness, depend on the circumstances, see for example *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552–3 per Barwick CJ, McTiernan, Kitto, Taylor, Menzies and Owen JJ). It was not necessary that the trial judge disclose before judgment that he saw in the evidence what he described at [73] as "a clue as to what might have been going on", any more than it was necessary that he disclose before judgment the significance he saw in other of the host of competing factual indicators of the nature of the relationship between the deceased and the appellant.'"

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140 [2009] NSWCA 379.

141 With whom Giles and Hodgson JJA concurred.

[77] This ground fails.

Apprehension of bias by way of pre-judgment - ground 28

[78] This ground was added by amendment at the commencement of the hearing. As the oral submissions progressed the basis of the contention was that the learned trial judge had ignored the evidence from Mr Cleret and his witnesses. However, this was then clarified as being a contention that the learned trial judge did not make the findings of fact which Mr Cleret said were warranted by that evidence. In particular, complaint was made that his Honour rejected the evidence of Mr Cleret's witnesses, and consequently accepted Ms Brooks' evidence on matters such as the timing of her inspection and photographs, and the fact of water dripping on the report book.

[79] For the reasons given earlier this ground must fail. In the circumstances of this case, where serious allegations of misfeasance in office, malice and fraud were made against Ms Brooks and the Council, the failure of the trial judge to make findings in favour of Mr Cleret does not give rise to an apprehension of bias. His Honour was well aware of the seriousness of the allegations and the need for the evidence to be clear and cogent before the requisite standard of satisfaction of proof of those allegations could be reached.[142] What followed in the Reasons was a very careful analysis of the evidence, an examination of Mr Cleret's criticisms of it, and a full explanation of why the findings were made.

[80] In my view, the evidence amply supported the learned trial judge's findings and his rejection of the evidence of Mr Cleret and his witnesses as relevantly unreliable, and, correspondingly, his acceptance of the evidence of Ms Brooks and Mr Diefenbach.

[81] This ground fails.

Other matters

[82] Mr Cleret raised a number of matters that are not included in the grounds dealt with above. None of them take the appeal beyond the level of those grounds. However I will mention some of them, for completeness.

[83] Mr Cleret's notice of appeal raised undesignated errors of fact in grounds 2 and 21-26. There were no particulars given of what they were, and oral argument did not advance them any further. They can be disregarded.

[84] Mr Cleret also made allegations that Ms Brooks destroyed her notes and a log book for the car, and thereby the Council thus breached the *Public Records Act* 2002 (Qld) and the *Evidence Act* 1977 (Qld).[143] At the trial Mr Cleret raised the destruction of the log book[144] and the method keeping of notes.[145] However, he did not challenge Ms Brooks about the alleged destruction of them. To the extent these

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142 See, for example Reasons [45], where his Honour referred to that very fact, citing *Briginshaw v Briginshaw* (1938) 60 CLR 336.

143 Appellant's outline page 2 and paragraphs 43-47.

144 AB 807-808, and see Reasons [37]. It appeared the destruction of them was a routine part of Council's management, rather than anything indicative of malice: appellant's outline paragraph 46.

145 AB 462.

matters were raised they were clearly before the learned trial judge and did not impact upon his Honour's findings.

[85] Mr Cleret raised a number of contentions in respect of the issue of the compensation that might have been awarded had the claim succeeded. The claim was for lost income between 2010 and the trial in 2015. Given that I have concluded that appeal should be dismissed it is strictly not necessary to deal with them. However, some observations are pertinent.

[86] The learned trial judge rejected the claim for compensation on the basis that there had been no evidence adduced to prove the loss.[146] Specific problems were:

(a) Mr Cleret had not proved any income for the years prior to June 2010, nor any records to show that the restaurant was profitable;[147]

(b) his claim that repayments on his mortgage were made from restaurant income were challenged by an expert accountant; Mr Cleret's evidence was rejected as insufficiently reliable, and the learned trial judge found that he could not reach the requisite degree of satisfaction to conclude that the repayments came from restaurant income;[148]

(c) Mr Cleret had not demonstrated that he was entitled to the cost or value of improvements made to the property;[149] and

(d) the learned trial judge preferred the evidence of the valuer called by the Council to that of Mr Cleret's valuer,[150] but that was not critical to his Honour's finding; no basis was advanced for a claim to damages based on the value of the property in 2010, and any such claim for loss failed because there was no evidence that Mr Cleret would have sold then.[151]

[87] On the appeal there was no substantive, but rather a misconceived, challenge to those findings.[152] A challenge was also made as to the approach of the valuers (concerned with taking into account post valuation events and a piecemeal valuation), and the Council's expert accountant (factual errors as to defaults) but Mr Cleret conceded these points had not been raised below.

[88] In truth Mr Cleret's contentions on the compensation issue suffered because he did not attempt to demonstrate any error on the part of the learned trial judge.

[89] Finally Mr Cleret sought to challenge the learned trial judge's refusal of aggravated or exemplary damages. There was no basis for such a finding, nor is there now.

Conclusion and disposition of the appeal

[90] For the reasons above the appeal must be dismissed. I propose the following orders:

1. Appeal dismissed.

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146 Reasons [142]-[145].
147 Reasons [142].
148 Reasons [143]-[144].
149 Reasons [146].
150 Reasons [154].
151 Reasons [155].
152 Appellant's outline paragraphs 51-58.

2. The appellant pay the respondents' costs of the appeal, to be assessed on the standard basis.

[91] **MULLINS J:** I agree with Morrison JA.

[92] **FLANAGAN J:** I agree with the orders proposed by Morrison JA and with his Honour's reasons.