SUPREME COURT OF QUEENSLAND

CITATION:	*Mowen v Rockhampton Regional Council; Bendigo & Adelaide Bank Ltd v Mowen* [2017] QSC 295
PARTIES:	**S449/17:** **BEVAN ALAN MOWEN** (Plaintiff/Applicant) **v** **ROCKHAMPTON REGIONAL COUNCIL** (Defendant/Respondent) **DC2778/17:** **BENDIGO & ADELAIDE BANK LIMITED (ACN 068 049 178)** (Plaintiff/Respondent) v **BEVAN ALAN MOWEN** (Defendant/Applicant) Counterclaim: **BEVAN ALAN MOWEN** (Plaintiff, by Counterclaim/Applicant) v **BENDIGO & ADELAIDE BANK LIMITED (ACN 068 049 178)** (First Defendant, by Counterclaim/First Respondent) And **CLH LEGAL GROUP PTY LTD (ACN 096 845 117)** (Second Defendant, by Counterclaim/Second Respondent) And **DANIEL JOHNSTON** (Third Defendant, by Counterclaim/Third Respondent)
FILE NO/S:	S449/17; DC2778/17
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	20 December 2017

DELIVERED AT: Rockhampton

HEARING DATE: 27 November 2017

JUDGE: McMeekin J

ORDER:

1. **The applications brought by the Plaintiff are dismissed and the Plaintiff is ordered to pay the costs of each respondent.**
2. **Leave is granted to the Council to apply for a vexatious proceedings order. The application for a vexatious proceedings order is dismissed. There is no order for costs in relation to that application.**
3. **Judgment for the Defendant against the Plaintiff in the proceedings S449/17.**
4. **Save for the costs of the application for vexatious proceedings orders the Plaintiff is to pay the costs of the Defendant of the proceedings and of the applications brought by the Defendant.**

Supplementary Orders:

5. **I vacate the order for costs made in the proceedings.**
6. **I direct that the Defendant file and serve written submissions as to the appropriate order for costs of the proceedings as it might be advised on or before 29 January 2018.**
7. **I direct that the Plaintiff file and serve written submissions as to the appropriate order for costs of the proceedings as he might be advised on or before 5 February 2018.**
8. **If the parties wish to be heard further in relation to the appropriate order for costs of the proceedings then I direct that they so advise the Registrar on or before 7 February 2018 and I direct that such further hearing be the held on 9 February 2018 at 9.30 am.**
9. **I give the parties leave to appear by telephone at any adjourned hearing.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where Mr Mowen has two proceedings pending – where the proceedings include a matter in the Supreme Court of Queensland and a matter in the District Court of Queensland – where in the Supreme Court, Mr Mowen seeks damages for

defamation against the Rockhampton Regional Council – where in the District Court, Mr Mowen is defending proceedings brought by the Bendigo and Adelaide Bank for a debt – where in the District Court Mr Mowen has brought a counterclaim against the Bendigo and Adelaide Bank – where Mr Mowen has also named as defendants to the counterclaim lawyers who were retained to act for the Rockhampton Regional Council in earlier Magistrates' Court proceedings – where Mr Mowen seeks to have the District Court proceedings transferred to the Supreme Court and have them heard together – whether the matters should be joined and heard together

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT – where the Rockhampton Regional Council cross applies for summary judgment – where the Rockhampton Regional Council submits that there is no answer to its defence that the publications were made on an occasion of qualified privilege at common law – where Mr Mowen's written submissions are largely unresponsive to the points in issue – whether Mr Mowen has a real prospect of succeeding on all or part of his claim – whether there is need for a trial of the claim or the part of the claim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where in alternative, the Rockhampton Regional Council cross applies to strike out all or various parts of the Statement of Claim pursuant to r 171 *Uniform Civil Procedure Rules* 1999 (Qld) – whether given the decision regarding summary judgment, it is necessary to consider the complaints with respect to the pleadings – whether an order would have been made striking out the whole or part of the Statement of claim had there been a finding that there was a triable issue

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – PARTICULARS – FURTHER AND BETTER – where in the alternative, the Rockhampton Regional Council cross applies for further and better particulars of the statement of claim – whether given the decision regarding summary judgment, it is necessary to consider the complaints with respect to further and better particulars – whether it is necessary to discuss the particulars sought

PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – VEXATIOUS LITIGANTS AND PROCEEDINGS – where the Rockhampton Regional Council cross applies to have Mr Mowen declared a vexatious litigant pursuant to the *Vexatious Proceedings Act*

2005 (Qld) – where the Rockhampton Regional Council is entitled to apply for such an order but only with leave of the Court – where that leave does not need to be first obtained before filing the substantive application – whether that leave should be given – whether vexatious proceedings instituted frequently – whether discretion should be exercised to make vexatious proceedings orders

Defamation Act 2005 (Qld), s 22, s 24, s 33, s 37
District Court of Queensland Act 1967 (Qld), s 86(2)
Local Government Act 2009 (Qld), s 13, s 94, s 95
Local Government Regulation 2012 (Qld), s 132
Uniform Civil Procedure Rules 1999 (Qld), r 78, r 79, r 166, r 171, r 292, r 293
Vexatious Proceedings Act 2005 (Qld), s 6

Agar v Hyde (2000) 201 CLR 552, cited
Aktas v Westpac Banking Corporation & Anor (2010) 241 CLR 79, cited
AMFM Constructions Pty Ltd v Boreal Holdings Pty Ltd [2001] NSWSC 1091, considered
Baird v Wallace-James (1916) 85 LJ PC 193, considered
Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366, cited
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256, cited
Fingleton v The Queen (2005) 227 CLR 166, cited
Guise v Kouvelis (1947) 74 CLR 102, considered
Harbour Radio Pty Ltd v Trad (2012) 247 CLR 31, considered
Howe & McColough v Lees (1910) 11 CLR 361, cited
Levy v Union Bank of Australia Ltd (1896) 21 VLR 738, cited
Macintosh v Dun [1908] AC 390, considered
Markan v Bar Association of Queensland [2015] QCA 128, cited
Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254, cited
Mudie v Gainriver Pty Ltd (No 2) [2003] 2 Qd R 271, cited
Papaconstuntinos v Holmes à Court (2012) 249 CLR 534, considered
Roberts v Bass (2002) 212 CLR 1, considered
Shannon v Australia and New Zealand Banking Group Ltd (No 1) [1994] 2 Qd R 560, cited
Spencer v Commonwealth (2010) 241 CLR 118, cited
Tampion v Anderson [1973] VR 321, cited

COUNSEL: **In S449/17:**

Applicant in person

M Amerena for the respondent

In DC2778/17:

Applicant in person

A M Arnold for Second and Third Respondent

SOLICITORS: **In S449/17:**

Applicant in person

King & Company Solicitors for the respondent

In DC2778/17:

Results Legal for the First Respondent

CLH Lawyers for Second and Third Respondent

[1] **McMeekin J:** There are cross applications before the Court.

[2] Mr Mowen has two proceedings pending, one in the Supreme Court of Queensland (449/17) and one in the District Court of Queensland (2778/17). In this Court Mr Mowen seeks damages in the sum of $500,000 ($250,000 compensatory damages and $250,000 aggravated damages) for defamation against the Rockhampton Regional Council ("the Council"). In the District Court proceedings he is defending a suit brought by the Bendigo and Adelaide Bank ("the Bank") for a debt. He has there brought a counterclaim against the Bank but also naming as defendants to the counterclaim CLH Lawyers and the solicitor employed by another legal firm (Jones King Lawyers) who were retained to act for the Council in earlier Magistrates' Court proceedings brought against him and who it is said appeared before that Court.

[3] Mr Mowen seeks to have the District Court proceedings transferred to the Supreme Court and to have them "joined" in this Court so that they are heard together.

[4] Mr Mowen is not represented and appears in person.

[5] The Council opposes joinder and cross applies:

(a) For summary judgment pursuant to r 293 UCPR;
(b) In the alternative, to strike out all or various parts of the Statement of Claim pursuant to r 171 UCPR;
(c) Further and in the alternative, further and better particulars of the Statement of claim;
(d) Various orders under the *Vexatious Proceedings Act* 2005 (Qld);

[6] The parties to the Counterclaim in the District Court were served and appeared. Each oppose joinder of the two proceedings. They each indicated that their respective clients had provided instructions to have the counterclaim struck out when the forum was determined.

Factual Background

[7] Mr Mowen says that since 1993 he has been a pensioner, the holder of a "Pensioner Concession Card" issued by Centrelink, and, since 2002 under the policies of the Council entitled to a pensioner rebate in respect of any rates that he is required to pay.

[8] Mr Mowen owns land at Struck Oil, within the Council's rateable area. He held title to that land at least in 2002-2003. He then applied for a pensioner rebate. Mr Mowen produces a letter from the relevant Minister to his local MLA dated 26 May 2003 in which his application to have the concession backdated from the date of his application is refused. For present purposes the letter indicates that the rebate scheme commenced on 1 July 2002. It seems to indicate that Mr Mowen is otherwise entitled to the rebate from the date of his application, or at least it does not say that he does not qualify.

[9] Mr Mowen informed me that he gave up title to the Struck Oil land for a period. He again became the registered owner in October 2010.

[10] Mr Mowen borrowed monies from the Bank subsequent to acquiring the property at Struck Oil and mortgaged the property to do so. This pre-dated any dispute about rates.

[11] An affidavit filed in the Magistrates' Court by the senior revenue officer at the Council asserts that Mr Mowen has not applied for the pensioner rebate since becoming the registered proprietor in 2010.[1] The letter from the Minister previously referred to (which was written in relation to the policy in place in 2002-2003) indicates that such an application is a necessary pre-requisite to qualifying for the rebate. I was informed that it is the State government which funds the rebate scheme and so the interest of the Minister.

[12] Whether the rebate policy in place in 2002 has continued on the same terms is not clear. The information before the Magistrates' Court on 25 August 2014 was that a policy was then in place that commenced on 24 June 2014.[2]

[13] It appears to be common ground that Mr Mowen has not paid the rates, charges and levies for many years. The Council records show only one payment and that may be before Mr Mowen acquired the land – a sum of $500 paid on 29 September 2010.[3] Mr Mowen says, accurately I think, that the Council refuse to grant him the rebate that he says he is entitled to. He objects, as well, to paying a rural fire brigade levy and interest that has accrued.

[14] In 2012 the Council commenced proceedings in the Magistrates' Court to recover the rates, charges and levies the Council says are owing – proceedings M186/2012. Mr Mowen defended and counterclaimed.

[15] What took place on the occasion that the matter was last before the Magistrates' Court (on 25 August 2014) is not agreed. The Council's affidavits assert: There was a summary judgment application (by which side is not made clear but I assume the Council given the reference to r 292 UCPR) which the Magistrate refused. The solicitor who appeared for the Council says that the learned Magistrate ordered that Mr Mowen's counterclaim be separated from the Council's claim and that it be commenced by separate proceedings within 21 days, leaving the Council's claim

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[1] Affidavit of Mark Frederick Williams filed 15 November 2017 Ex MFW5 exhibiting the affidavit of Tracey Kluver sworn 12 June 2014 at p 141 para 6, p 143 para 10.

[2] Affidavit of Mark Frederick Williams filed 15 November 2017 Ex MFW5 exhibiting the report of Swanwick Murray Roche solicitors at p130

[3] Affidavit of Mark Frederick Williams filed 15 November 2017 Ex MFW15 at p159

for the outstanding rates still on foot. Mr Mowen did not commence any such proceedings.

[16] The Council's claim was discontinued earlier this year. Mr Mowen claims that occurred without his knowledge. That discontinuance occurred after the Bank paid the outstanding rates, charges and levies to the Council.

[17] The circumstances in which that payment came to be made is at the heart of the defamation proceedings.

[18] The Council's lawyers wrote to the Bank on 28 July 2016 stating "that there was owed to the [Council] a total amount outstanding as at the 10th June 2016 is (*sic*) $13,592.46. We are also advised that further rates and levies will be issued on the 1st August 2016 in the amount of $746.95 and become due in the normal course … Our client has requested that we enquire as to whether the Bank would be prepared to attend to the payment of the outstanding rates?"[4] I will refer to this as "the first publication".

[19] Following receipt of that letter the Bank paid the amount of rates outstanding, as asserted by the Council, and subsequently notified Mr Mowen they had been so notified and that the Bank had paid the rates. The Bank advised Mr Mowen in these terms:

> "We advise Rockhampton Regional Council has notified us that rates in the amount of $14,552.81 relating to the above property remains outstanding and they now intend to pursue legal action. …This amount has been paid directly to the Rockhampton Regional Council on your behalf. This payment has resulted in Loan Account arrears of $13,700.73. This amount is due and payable immediately."

[20] I will refer to this as "the second publication".

[21] The Bank then commenced the proceedings in the District Court that I have mentioned to recover monies owing. The monies claimed are the entire amount said to be owing i.e. not limited to the amount paid to the Council.

[22] Mr Mowen says he was defamed in the first publication and the second publication. There is an obvious problem with the second publication – it was a letter published not by the Council but by the Bank and was published to Mr Mowen, not about Mr Mowen to a third party. Presumably Mr Mowen intends to assert that it was the communication by the Council to the Bank, which the Bank asserts in the letter had occurred, which was the defamatory communication, and Mr Mowen assumes that the letter accurately reflects that communication. If so then there will need to be an amended pleading.

[23] Mr Mowen contends that those two publications carried the following imputations:

> "Defamatory Imputations Caused:
> (a) Injury to the Plaintiff's reputation and to cause those whom the words were published to threaten harm to the Plaintiff; and/or

[4] I quote from paragraph 1(a) of Mr Mowen's Amended Statement of Claim

(b) Persons to whom the words were subsequently republished to shun or avoid or ridicule or to despise the Plaintiff and stop his ability to obtain credit; and

(c) By virtue of the statements, false in a material particular not only being published in the banking and credit community but also to the greater public by the involvement of a public credit reporting agency, has imputed that Bevan Alan Mowen was a defaulter and a serious credit risk, a person who breached contracts and a person not to be trusted."

The issues

[24] It is necessary to understand the issues. I will endeavour to summarise the effect of the pleadings. The Council's pleading in a number of places makes reference to "the defendant" when the plain intention is to refer to Mr Mowen, who is the plaintiff in the proceedings. I have ignored those errors. The pleading will need to be amended if the matter goes further.

The District Court proceedings

[25] Mr Mowen frames the relevant issue concerning his alleged indebtedness to the Council as whether he is in the class of person entitled to the pensioner rebate. Mr Mowen, I think, assumes that if you are entitled to the pension then you are entitled to the rebate. If the Minister's letter that I have referred to accurately states the position under the rebate then Mr Mowen's assumption is not accurate. A necessary pre-condition is that you apply for the rebate. It seems to be common ground that the Council did not afford Mr Mowen the rebate and as well claimed he owed the rural fire brigade levy. The issues that require determination on the Claim in the District Court can then be shortly stated:

(a) Was Mr Mowen obliged to pay the rural fire brigade levy? The issue seem to be whether the obligation to pay only arises if Mr Mowen consents to the imposition of the levy;

(b) What were the pre-conditions to obtaining the rebate? According to the Council those pre-conditions included the completion of the necessary application form along with production of the concession card.

(c) Had Mr Mowen complied with the pre-conditions of the Council's policy entitling him to the pensioner rebate?

(d) Is the interest claimed due and owing? The answer will follow on from the determination of the earlier questions.

[26] I have not received submissions, and have not researched for myself, the issue of whether the Council is legally obliged to apply the rebate to a person who meets the pre-conditions.

[27] I have so far left to one side the counterclaim. I have great difficulty following the pleading and I cannot identify the issues. There Mr Mowen claims damages against the Bank, one Daniel Johnston, and a firm CLH Lawyers. A claim is made against each defendant for $250,000 compensatory damages and $250,000 aggravated damages - a total claim of $1,500,000.

[28] The action against the Bank is said to be based on the placing of Mr Mowen's mortgage account in default. It is said to be in breach of a duty of care to a customer. I do not follow how that action, even if done in breach of some form of duty, could possibly result in any harm, let alone $500,000 in damages. Either the money is owed or it is not.

[29] The action against Mr Johnston and CLH Lawyers allege false representation but the representation is not precisely pleaded. If I follow the pleading, and I am not sure that I do, the representations relied on involve statements made (or perhaps not made) to a Magistrates' Court or in the course of the proceedings in that Court by Mr Johnston when employed by another firm of lawyers. The connection between that firm and CLH Lawyers comes about, it is pleaded, because the two firms share an address in the same premises and a postal address. Obviously the conclusion does not follow from the premise.

[30] Mr Johnston and CLH Lawyers (if that firm can possibly be liable in any way for any statement by Mr Johnston when acting in the employ of another firm) have complete immunity from suit in respect of any action taken or statement made in relation to proceedings before a Court. The immunity is in respect of any form of action, not just defamation: *Tampion v Anderson* [1973] VR 321 at pp 334-336 per McInerney J with extensive citation of authority.

The Supreme Court proceedings

[31] The issues that arise in the defamation proceedings include:

(a) Were the publications made? The Council admits the first publication but of course denies it made the second publication. It asserts that the Bank's letter does not accurately reflect its communication to the Bank.

(b) If the publications were made:
  (i) To whom were they made?
  (ii) Were they in fact false?
  (iii) Were they made on an occasion of qualified privilege, either statutory or at common law?
  (iv) Was the Council's conduct in making either publication improper, unreasonable or lacking in bona fides?

(c) Do the publications carry the imputations alleged? If so were they false?

(d) Was Mr Mowen's reputation injured by any false imputation that is established?

(e) If there was any re-publication of any matter published by the Council did that republication cause any person to "shun, avoid, ridicule or despise" Mr Mowen?

(f) Was the first publication made on an occasion of absolute privilege, it being claimed that the publication was made in the course of proceedings M186 of 2012?

(g) Did Mr Mowen already have a reputation in the community "consistent and conformable with any such conduct as the statements may have conveyed"?

(h) Did Mr Mowen already suffer from "low esteem in the police community and the wider public community" which the statements referred to in the pleadings "were incapable of lowering further"?

(i) Did Mr Mowen in fact suffer from mental anguish, distress or embarrassment because the Council recovered the unpaid rates, charges and levies from the mortgagee?
(j) Does the Council have a good defence of triviality under s 33 of the *Defamation Act* 2005 (Qld)?
(k) Is the claim for aggravated damages in truth a claim for exemplary damages and so not available by reason of s 37 of the *Defamation Act* 2005 (Qld)?

Mr Mowen's applications

[32] If I acceded to the Council's applications to give summary judgment then Mr Mowen's applications would be otiose. Nonetheless it is useful to dispose of the relevant arguments.

Transfer up

[33] The claim in the District Court is properly in that Court i.e. the amount in issue is well within the District Court monetary jurisdiction. I ignore the counterclaim here. The factual issues involved in the District Court proceedings are not at all complex. The only suggested reason to bring the proceedings into this Court is the alleged need for "joinder". If that was required then that can be achieved in either Court. As to the counterclaim – I have the power to order that it remain in the District Court: s 86(2) *District Court of Queensland Act* 1967. Given my perception of its inherent worth that is where the proceedings should be determined.

[34] The proceedings in this Court are also well within the District Court's monetary jurisdiction. While the issues are more complex than the simple debt action they are typical of a defamation suit. Defamation proceeding are usually heard in the District Court.

[35] There is no good reason that I can see to permit the Supreme Court proceedings to stay in this Court.

Joinder?

[36] The rules provide for consolidation (r 78 UCPR) or for proceedings to be heard together or in sequence (r 79 UCPR), not for joinder. I will assume that Mr Mowen seeks one of these two orders.

[37] I have no jurisdiction to make an order in respect of the District Court proceedings, save of course to order it be transferred into this Court. Even then I have no jurisdiction to make an order of the type sought at this stage: *Shannon v Australia and New Zealand Banking Group Ltd (No 1)* [1994] 2 Qd R 560 at 562.

[38] Nonetheless to save unnecessary wastage of costs I point out that in my judgment this is not a proper case in which to exercise the discretion that the rules provide.

[39] Rule 78 provides:

> **Consolidation of proceedings**
>
> The court may order that 2 or more proceedings be consolidated if—

(a) the same or substantially the same question is involved in all the proceedings; or

(b) the decision in 1 proceeding will decide or affect the other proceeding or proceedings.

[40] Rule 79 provides:

> **Sequence of hearings**
>
> The court may order that 2 or more proceedings be heard together or in a particular sequence.

[41] Paragraph (b) of r 78 is satisfied but not paragraph (a). That means that the discretion to consolidate is enlivened, but the discretion remains to be exercised.

[42] The two proceedings have very little in common. It is true that at the heart of the dispute is the question of whether Mr Mowen owed the rates and levies that he has been charged. And if the Council succeed in the debt action that will be the end of any possible claim in defamation (but not the converse). But the defamation proceedings involves many issues that go far beyond the simple questions involved in the debt action. The debt action should be resolved in a day, if not an hour or so. Trial by jury has not been requested and would be quite inappropriate for so simple a matter. The hearing of the defamation proceedings would take many days. A jury has been requested. To involve the parties in the District Court action in the defamation proceedings would expose them to very substantial costs that would be quite unwarranted.

[43] If necessary I would have declined to exercise the discretion to consolidate the actions. It would facilitate the resolution of the matters if the proceedings for debt preceded the hearing of the defamation proceedings.

SUMMARY JUDGMENT – QUALIFIED PRIVILEGE

[44] The Council seeks summary judgement. Rule 293 is relevant. It provides:

> **Summary judgment for defendant**
>
> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
> (2) If the court is satisfied—
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.

[45] The application is made on the assumption that the Council made the publications complained of and bear the imputations alleged, although those matters will be in dispute at any trial.

[46] The Council submits that there is no answer to its defence that the publications were made on an occasion of qualified privilege at common law.

[47] In considering the application I bear in mind the following. A gloss is not to be put on the words used in the rule: *Spencer v Commonwealth*[5] at [58] per Hayne, Crennan, Kiefel and Bell JJ. Care must be taken in depriving a party of their right to a trial. The plurality in *Spencer* referred to *Agar v Hyde*[6] and the statement by Gaudron, McHugh, Gummow and Hayne JJ:

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[7]

[48] That statement was endorsed by Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos v Roads and Traffic Authority of New South Wales*[8] and by French CJ and Gummow J in *Spencer.*[9]

Qualified Privilege – the basic principles

[49] On the grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. A succinct statement of the principle appears in the judgment of Gaudron, McHugh and Gummow JJ in *Roberts v Bass:*[10]

> "The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it. Communications made on such occasions are privileged because their making promotes the welfare of society. But the privilege is qualified — hence the name qualified privilege — by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement."[11]

[50] The plurality in *Papaconstuntinos v Holmes à Court*[12] considered the reciprocity of interest necessary to found the privilege:

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[5] (2010) 241 CLR 118.
[6] (2000) 201 CLR 552.
[7] At [57]. Citations omitted.
[8] (2006) 226 CLR 256, at [46].
[9] At [24].
[10] (2002) 212 CLR 1.
[11] At [62].
[12] (2012) 249 CLR 534 per French CJ, Crennan, Kiefel, and Bell JJ.

> "The defence of qualified privilege at common law has been held to require that both the maker and the recipient of a defamatory statement have an interest in what is conveyed. This is often referred to as a reciprocity of interest, although "community of interest" has been considered a more accurate term because it does not suggest as necessary a perfect correspondence of interest. The interest spoken of may also be founded in a duty to speak and to listen to what is conveyed."[13]

[51] The defence is preserved by the Act: s 24(1) *Defamation Act* 2005 (Qld).

For the judge or the jury?

[52] Section 22 of the *Defamation Act* 2005 (Qld) provides:

> **22 Roles of judicial officers and juries in defamation proceedings**
>
> (1) This section applies to defamation proceedings that are tried by jury.
>
> (2) The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.
>
> ….
>
> (5) Nothing in this section—
>
> (a) affects any law or practice relating to special verdicts; or
>
> (b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer.

[53] Despite the provisions of s 22(2) it is plain from s 22(5)(b) that the common law position is preserved. The question whether the occasion is one to which the defence applies is one for the judge, not the jury (jury trial having been sought here by both parties). There are many decisions to that effect but reference to one will suffice. In *Guise v Kouvelis*[14] Dixon J (who was in dissent as to the result but the following is uncontroversial) said:

> "The question whether the defamatory matter is or may be relevant to the occasion may arise in a form which the Court must decide. But it is for the jury to say under the issue of malice with what purpose the defamatory matter was published. That is to say whether the occasion was used for the purpose of the privilege is a matter for the jury; and since upon this issue the burden is upon the plaintiff, a question of the sufficiency of evidence to sustain the issue, which, of course, is one for the Court, is a question whether the plaintiff has displaced, not whether the defendant has established, privilege for

[13] At [8]. Citations omitted.
[14] (1947) 74 CLR 102.

> the communication. Whether or not the occasion gives a privilege is a question of law for the judge, but whether the party has fairly and properly conducted himself in the exercise of it is a question for the jury: per Lord Campbell CJ in *Dickson v Earl of Wilton* (1859) 1 F. & F. 419, at p 426 175 E.R. 790, at p 793."[15]

What are the relevant matters to consider?

[54] Dixon J, in *Guise v Kouvelis,*[16] in examining the duty of the Court in determining whether an occasion is privileged quoted Lord Loreburn in *Baird v Wallace-James*:

> "In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel," (or slander) "and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty."[17]

[55] Again there are many decisions to like effect. For a more recent decision see *Harbour Radio Pty Ltd v Trad.*[18]

[56] The reference by Dixon J to "a social or moral right or duty" met the facts of the case there under discussion but is not essential.

The relevant matters here

[57] The publications were made by the Council to the Bank (or at least that is the assumption for present purposes) in its capacity as the mortgagee (and the holder of the first mortgage) of the land in respect of which rates, levies and charges were claimed to be owing. The letter was written with the evident purpose to persuade the Bank to meet the outstanding rates etc. The Council had an obvious and legitimate interest in having its rates etc. met.

[58] There is no evidence that either publication (or any communication that lay behind the second publication) were published to any person other than the Bank. There is an allegation in the pleading of the imputations in the Amended Statement of Claim that the publications were made to "the banking and credit community" and "to the greater public by the involvement of a public credit agency". No particulars are supplied to support the allegations nor is any evidence advanced on this application to show any such further publication, despite notice of the Council's intention to seek summary judgment.

[59] While I will examine the circumstances in which the publications were made more closely below, in a general sense the publications go to Mr Mowen's ability and willingness to meet his debts. Publications in the course of banking and in answer to credit enquiries is a well-accepted category of qualified privilege: *Levy v Union Bank of Australia Ltd;*[19] *Howe & McColough v Lees*.[20] That is not to say that a

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[15] At 117.
[16] (1947) 74 CLR 102.
[17] (1916) 85 LJ PC 193 at 198.
[18] (2012) 247 CLR 31 at [3] per Gummow, Hayne and Bell JJ.
[19] (1896) 21 VLR 738.

close examination of the circumstances is not required even though the publications might fall within a generally recognised occasion of privilege. *Aktas v Westpac Banking Corporation & Anor*[21] provides an example where the privilege did not extend to the circumstances there.

[60] Mr Mowen has drawn my attention to *AMFM Constructions Pty Ltd v Boreal Holdings Pty Ltd*[22], a decision of Young CJ in Eq, where his Honour observed:

> "This sort of business, that is credit reference, has always been a thorn in the side of the law. The cases show that this sort of activity is necessary in a society where credit is important and that within certain limits, agencies should be permitted to disseminate information to genuinely interested parties without fear of action for defamation: see *Waller v Loch* (1881) 7 QBD 619 at 622."[23]

Those remarks are consistent with the general view that the publications here can be within the class of qualified privilege.

[61] The limits on dissemination of such information are not defined. Thus in *Macintosh v Dun*[24], the Privy Council rejected qualified privilege as a defence to publications by a credit agency for reward to its subscribers irrespective of their legitimate interest in the credit or financial standing of the person defamed therein. That decision was distinguished in *Howe v Lees*.[25] The High Court there upheld a defence of qualified privilege where publication was made in answer to an inquiry, rather than as information volunteered to all subscribers, where a community of interest existed between the member making the inquiry and the association acting as his agent for the purpose of making inquiries, and where the association did not trade for gain.

[62] Nor does *Howe v Lees* set the boundaries on the occasions when the privilege might apply. This is not a subscriber case, which involves more complex considerations. But the publications here were not made in response to any request or inquiry from the Bank. They were volunteered. It is now clear that is not a disqualification. McHugh J's view that such voluntary communications were privileged only if there was some pressing need that they be made was rejected in *Papaconstuntinos v Holmes à Court*[26] at [21] per French CJ, Crennan, Kiefel, and Bell JJ. Their honours said:[27]

> "…in the joint judgment in *Bashford v Information Australia* it was acknowledged that the voluntary nature of the undertaking of an identifiable duty or interest does not prevent an occasion for the privilege from arising. In the joint judgment it was said:[28]

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[20] (1910) 11 CLR 361.
[21] (2010) 241 CLR 79.
[22] [2001] NSWSC 1091.
[23] At [8].
[24] [1908] AC 390.
[25] (1910) 11 CLR 361.
[26] (2012) 249 CLR 534 at pp545-546
[27] At [31].
[28] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 378 [25] per Gleeson CJ, Hayne and Heydon JJ.

> 'The facts that the respondent voluntarily embarked on its publishing venture and charged subscribers for its Bulletin required no different answer. There will be cases where an occasion is privileged but where both maker and recipient of the matter complained of have voluntarily undertaken the reciprocal duties which make the occasion privileged.'"

[63] As the discussions in *Papaconstuntinos* show the privilege is equally available whether the communication be pursuant to a duty or in furtherance of an interest. Here it is the interest that each had in the matters the subject of the publications that are pertinent.

The community of interest claimed

[64] The essential issue is whether there is present here that community of interest spoken of in *Papaconstuntinos*.

[65] The Council's submission is that the legitimate interests of the Bank and the Council in the subject matter of the publications substantially overlapped. I think that is clearly right.

[66] The Council's interest is in collecting unpaid rates and charges. Reference is made in Council's submissions to various provisions of the *Local Government Act* 2009 (Qld) ("LGA") the statute governing local councils in Queensland. Relevantly the Council has the power to levy rates and charges (s 94 LGA), its employees and executive officers are obliged to carry out their duties and responsibilities in a way that promotes "the effective, efficient, and economical management of public resources" (s 13(2) and (3) LGA), overdue rates and charges are a charge over rateable land (s 95(2) LGA), the local government may register the charge over the land without obtaining any prior judgment from a Court (s 95(3) LGA), and once registered the charge has "priority over any other encumbrance" (s 95(4) LGA). Section 132(1)(a)(ii) of the *Local Government Regulation* 2012 (Qld) makes plain that the rates and charges become overdue if not paid by the date specified in the rates notice. There is no need to first obtain a judgment.

[67] From the perspective of the Bank, the holder of the first mortgage over the land, it is said that it had a "real, direct and legitimate interest in receiving the publications" because:

(a) Overdue rates and charges are a charge on the land (including 60 Archer Road): see s 95(2) of the LGA;

(b) That charge, once registered, would rank in priority to the mortgagee's first registered mortgage: see s 95(4) of the LGA;

(c) Mr Mowen had, by the terms of the mortgage over 60 Archer Road, become obliged to the mortgagee to pay all outgoings relating to 60 Archer Road, including Council rates and charges: see clause 5(j) of the Registered Standard Terms document being general request No. 709184244 ("standard mortgage terms");

(d) Mr Mowen had agreed if he failed to meet this obligation, that the mortgagee might make good his failure: see clause 9.4 of the standard mortgage terms;

(e) Mr Mowen had agreed he would reimburse the mortgagee for its expenses for the actual exercise (as here) of the mortgagee's power

under clause 9.4 of the standard mortgage terms; see clause 10.1(c) of the standard mortgage terms.

Mr Mowen's answer to the defence

[68] The defence of qualified privilege under the common law is made at paragraph 6 of the Council's Amended Defence. In his Reply Mr Mowen merely denies the statements made in that paragraph. There is no explanation for Mr Mowen's belief that the allegations there made are untrue. While affidavit evidence was filed it does not meet, or attempt to meet, the Council's case.

[69] Mr Mowen made written submissions but they are largely unresponsive to the points in issue. In fact they are to a large extent entirely irrelevant to any issue, contain scurrilous material so that I have ordered they be sealed up, and consist to a large degree of assertions that there is a conspiracy in the judiciary to deny Mr Mowen his rights.

[70] The only paragraph that seemed to me to be potentially relevant is paragraph 22 where Mr Mowen asserts that the CEO of the former Mount Morgan Council (which amalgamated into the Rockhampton Regional Council) falsified a letter of 3 June 2003 sent to Mr Mowen by the former Council and made false statements to the Bank, which leads to a claim of "malice exposed by the statements false in material particular".

[71] The allegedly false statement is not precisely identified but if I have followed Mr Mowen's argument he seems to interpret the letter from the Minister of 26 May 2003 that I have earlier referred to as granting him access the pensioner rebate scheme and the letter from the CEO of 3 June as denying him access to the scheme. Neither letter has the effect contended for. The point of the exchange was to determine whether the Minister would agree to back dating Mr Mowen's access to the scheme. The CEO accurately points out that the Minster had denied Mr Mowen's claim to have his access to the scheme backdated to the date of its commencement. That was so because Mr Mowen had failed to make timely application. Even if it was shown that the communications in 2003 have anything to do with the failure to allow the rebate sometime after October 2010, and so much is not shown, there is no arguable falseness in any communication that I can see.

[72] For present purposes Mr Mowen has not made submissions that are helpful.

Discussion

[73] Rule 166 UCPR relevantly provides:

> (4) A party's denial or nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.
>
> (5) If a party's denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.

[74] As the pleadings presently stand the allegations made in paragraph 6 of the Defence are deemed to be admitted as no explanation for the denial of the matters there set

out is proffered. Not only do the pleadings have the effect of showing a prima facie case but the evidence advanced by the Council supports its case comprehensively.

[75] Mr Mowen was obliged by the terms of his mortgage to meet the rates as they fell due. It is common ground that he did not. The extent of his indebtedness is in issue but not the fact of it. The Bank clearly had an interest in knowing that its first charge over the land stood to be displaced. It had an interest in preserving its priority. The importance of that interest is shown by its actions in meeting the claimed outstanding rates.

[76] The Council had an interest and a duty to collect rates and other charges that it believed to be owing.

[77] The key issue is whether the publications satisfy the test variously formulated by the plurality in *Harbour Radio Pty Ltd v Trad*:[29]

> "In *Bashford v Information Australia (Newsletters) Pty Ltd*, Gleeson CJ, Hayne and Heydon JJ asked 'whether the matter which defamed the appellant was sufficiently connected to the privileged occasion to attract the defence'. These notions of what is 'commensurate with the occasion', 'relevant to the attack', and 'sufficiently connected' reflect the idea captured by Parke B in *Toogood v Spyring* in the phrase 'fairly warranted by any reasonable occasion or exigency'".[30]

[78] In my judgment the publications taken at their highest for Mr Mowen were commensurate with the occasion and did not exceed the limits of the community of interest that the Council and the Bank shared: see *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [148]. As mentioned above there is no evidence that the publications were to any person other than the Bank. The publications are moderate in their terms and deal precisely with the shared interest the two parties had. In my judgment the Council has made out a prima facie case of qualified privilege.

[79] It is uncontroversial that once an applicant for summary judgment has made out a prima facie case the evidentiary onus shifts to the respondent: *Queensland Pork Pty Ltd v Lott* [2003] QCA 271 at [41] per Jones J; *LCR Mining v Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [22] per White JA.

[80] Quite apart from that, the onus is on Mr Mowen to displace the defence of qualified privilege. In *Harbour Radio Pty Ltd v Trad*[31] the plurality (Gummow, Hayne and Bell JJ) held that there are two possible answers to the defence of qualified privilege. Their Honours said:

> "The result is that stated as follows by Cory J, speaking for the Supreme Court of Canada, in *Botiuk v Toronto Free Press Publications Ltd*:
>
> > '[T]he privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is

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[29] (2012) 247 CLR 31.
[30] At [34] per Gummow, Hayne and Bell JJ. Citations omitted.
[31] (2012) 247 CLR 31 [2012] HCA 44

> actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.
>
> Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated."
>
> To similar effect is the earlier statement by Jordan CJ in *Mowlds v Fergusson*:
>
> > 'If anyone complains that the communication defames him, the burden of proof lies on the complainant to establish either that the defamatory matter was irrelevant to the purposes of the occasion or else that it was made in order to serve some other purpose than the purposes warranted by the occasion.'"[32]

[81] The onus therefore is on the plaintiff here – Mr Mowen – to raise either ground or both as answers to the defence in his pleading in Reply and, on a summary judgment application, to at least point to the existence of evidence that if accepted would satisfy the onus now on him. The Reply raises neither defence. While affidavits were filed by Mr Mowen no relevant fact is asserted that discharges the onus on Mr Mowen to show a triable issue.

[82] The highest that Mr Mowen's case can be put is that he claims that some part of his rates are not owing (and the amount of the rebate is not proved) because he claims to be entitled to the pensioner's rebate because he can show that he is a pensioner. As I have endeavoured to show above that is not the real issue. The argument confuses eligibility with entitlement. The evidence, so far as it goes, shows that to be a pensioner is but the first step in qualifying for the rebate. Mr Mowen relies on the letter from the Minister that I have earlier referred to as showing that the pensioner rebate scheme started in mid-2002. But the letter also shows that at least in 2002 - 2003 the pre-conditions included the completion and lodging of the necessary form along with production of the concession card. The Council's evidence is that Mr Mowen has not applied for the rebate since he became the registered proprietor in 2010. Mr Mowen has not claimed that he has applied.

[83] Mr Mowen has not disputed that he received the relevant rate notices. The provisions of the LGA have the effect that the rates are overdue from the date shown on the Notice that they became due. While Mr Mowen disputes that, he has put on no evidence - or pleaded any fact – which would show that his defence to the debt action has any prospect of success and that is fundamental to his claim that he has been defamed. Still less has he shown that the Council by its officers knew that the matters published were not the truth or that those officers were reckless with the truth. In fact the Council have pursued Mr Mowen in the Courts, consistently with

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[32] At 47 [31] – Citations omitted.

an honest belief that the rates etc. are owing. In support of that claim a council officer has sworn to facts which, if true, show that Mr Mowen has not satisfied what seems to be the pre-condition of entitlement to the rebate namely an application for it.

[84] It is relevant to note that Mr Mowen can raise his claimed defence to the outstanding rates and levies in his defence to the Bank's claim in the District Court proceedings. So no inference of malice can be drawn from any alleged attempt to deprive Mr Mowen of any valid defence.

Conclusion

[85] While I am conscious of the care that must be taken before depriving a party of the chance to have his case heard in the usual way, on the present materials I cannot see that Mr Mowen has any real prospect of defeating the defence of qualified privilege and so succeeding on any part of his claim. I am satisfied that there is no need for a trial of the claim or the part of the claim.

[86] The Council's solicitors put Mr Mowen on notice, by letter served some weeks prior to the hearing of the application,[33] that if he intended to raise a triable issue in respect of this defence he would need to file affidavits containing the evidence on which he proposed to rely. No advantage was sought to be taken of his position as self-represented litigant.

[87] There should be judgment for the Council on the Claim.

PLEADINGS

[88] There are many points taken by the Council about the Statement of Claim and the Reply. Given my decision regarding the summary judgment application there is no need to consider the complaints. I merely observe that they have considerable merit.

[89] Were I of the view that there was a triable issue I would have ordered that the whole of the Statement of Claim be struck out. There are so many deficiencies that it would cause only confusion to leave in those parts that are unobjectionable.

[90] Similarly there is no need to discuss the particulars sought.

VEXATIOUS PROCEEDINGS ACT

[91] The Council applies to have Mr Mowen declared a vexatious litigant pursuant to the *Vexatious Proceedings Act* 2005 (Qld) ("VPA"). It is entitled to apply for such an order but only with the leave of the Court: s 5(2) VPA. That leave does not need to be first obtained before filing the substantive application: *Markan v Bar Association of Queensland* [2015] QCA 128 at [22]. It is a matter now to decide whether that leave should be given.

[92] Under s 6 of the VPA a "vexatious proceedings order" can be made if the court is satisfied if the person has frequently instituted or conducted vexatious proceedings in Australia. So the court has to consider two matters, and be satisfied about them:

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[33] See Ex MFW7 at p 309 of Mr William's affidavit filed 15 November 2017.

that the plaintiff has instituted or conducted vexatious proceedings; and, that they have been instituted or conducted frequently.

[93] A "vexatious proceeding" is defined in the dictionary to the VPA to include a proceeding that is an abuse of the process of a court; a proceeding instituted in a court to harass or annoy, to cause delay or detriment, or for another wrongful purpose; a proceeding instituted in a court without reasonable ground; and, a proceeding conducted in a court in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

[94] The term has been construed to mean something more than a lack of success - rather, the proceedings must be seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment: *Mudie v Gainriver Pty Ltd (No 2)* [2003] 2 Qd R 271 at 283-4.

[95] The Council relies on the following proceedings:

(a) *Mowen v McGowran* [2010] QCA 86;
(b) *Mowen v Queensland State Government* [2011] QSC 12 and the appeal: [2011] QCA 137; and special leave application: [2011] HCA SL 190;
(c) The proceedings before the Magistrates' Court in this complex of matters: M186/12 and two appeals to the District Court: D74/2012 and D24/2016;
(d) *Mowen v Morning Bulletin & Ors* [2012] QSC 194 and on appeal: [2013] QCA 36;
(e) *Mowen v Electoral Commission of Queensland* [2015] QSC 016 and on appeal: [2015] QCA 221;
(f) *Mowen v Australian Electoral Commission* [2016] QCA 152;
(g) *Mowen v The Crown in the State of Queensland* S635 of 2017 pending in the Rockhampton registry;
(h) The arguments raised in these proceedings.

[96] If one includes in the count primary hearings as well as appeals there are 15 proceedings relied on.

[97] The Council argues that an examination of these proceedings demonstrates:

(a) Lack of understanding of the legal process;
(b) Lack of reasonable grounds for claims and unreasonable persistence in appeals;
(c) Attempts to re-litigate arguments already finally decided;
(d) Harassment of persons involved in proceedings without reasonable basis;
(e) Disregard of court procedure.

[98] I will discuss each proceeding referred to.

Mowen v McGowran

[99] Mr McGowran is a solicitor. He acted for Mr Mowen at a committal hearing. Mr Mowen then faced a charge of having caused grievous bodily harm. He was subsequently acquitted of that charge by a jury. Mr McGowran ceased to act prior

to the trial. Following his acquittal Mr Mowen applied under s 686 of the *Criminal Code* (Qld) to present an information against Mr McGowran for an indictable offence alleged to have been committed by him namely attempting to pervert the course of justice. The primary judge refused the application.

[100] On appeal[34] Muir JA said (Holmes and Chesterman JJA agreeing):[35]

> "From the particularised allegations the appellant seeks to make out a case that the respondent attempted to pervert the course of justice. The principal thrust of the appellant's case, as particularised, was that the respondent, who was representing the appellant at the committal hearing, failed to object or otherwise intervene when Detective Zanella told Mr Johansen that he was no longer required as a witness, with the result that the prosecutor failed to call a subpoenaed witness at the appellant's committal hearing.
>
> **The allegations betray a misunderstanding of the legal process**. **The appellant's legal representative had no power or right to require the prosecutor to call any witness**: that was a matter entirely within the discretion of the prosecutor. The presiding magistrate also lacked power to require the prosecutor to call a particular witness. **However, the complaint centering on the respondent's alleged failure to ensure that Mr Johansen gave evidence, appears to have been misguided. There was in evidence before the primary judge an affidavit of the respondent in which he swore that Mr Johansen's statement was, in fact, tendered in the committal hearing.** When this was drawn to the appellant's attention on the hearing of the appeal, the focus of his argument changed to a complaint that the respondent had not taken appropriate steps to cross-examine Mr Johansen.
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> …
>
> **There was nothing in the evidence before the primary judge or before this court which suggested that the content of para 8 was harmful to the appellant's case or that it would have been desirable for the respondent to attempt to cross-examine Mr Johansen on it or in relation to anything else.** There was no evidence before the primary judge which asserted or suggested that the content of that paragraph was wrong in whole or in part and Mr Johansen was not said to have been a witness to the incident which gave rise to the charge.
>
> **There are thus no grounds for concluding that the respondent was in any way derelict in his duty for not attempting to persuade the prosecutor to call Mr Johansen so that he could be cross-examined, or for not attempting to have Mr Johansen remain in the courthouse and available to be called as a witness**.

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[34] *Mowen v McGowran* [2010] QCA 86.
[35] At [9] – [15]. My emphasis.

> The other two complaints referred to in the primary judge's reasons were not particularised and were not developed in argument at first instance or on appeal, except insofar as the appellant contended on appeal, in effect, that the respondent should not have sought to obtain a psychiatric report from a psychiatrist who was not the appellant's treating psychiatrist. **Nothing was said in relation to both these complaints which suggested that, even if substantiated, they might lend the faintest support to the allegation that the respondent had attempted to pervert the course of justice.**
>
> **As no vestige of an arguable case against the respondent was demonstrated by the appellant, it would have been wrong for the primary judge to grant leave to the appellant to present an information against the respondent. The appellant has not shown any error of law or fact in the primary judge's reasons.** Even if such an error had been shown, for the reasons just given, it would not have been appropriate for leave to be given under s 686 of the Code."

[101] The emphasis in the Council's submission is on Mr Mowen's patent lack of understanding of the legal processes. As well there appears to have been a complete lack of understanding of the material facts. The evidence that was said to be missing was before the Court. As well the evidence was not harmful to Mr Mowen's case and there was therefore no reason to cross-examine the witness. The finding that "there was no vestige of an arguable case against" Mr McGowran calls into question the motivation behind the attack on him, particularly as it was pursued on appeal.

Mowen v Queensland State Government

[102] In 2011 Mr Mowen applied for an injunction to prevent the sale of Queensland Rail. I held that Mr Mowen had no standing (at [17]) and that I had no power to issue the injunction:

> "The error in the submission is the assumption that the court has jurisdiction to strike down State legislation on the ground that, in the opinion of the court, the legislation does not promote or secure the peace, welfare and good government of the State. It is well recognised that the court does not have such jurisdiction: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10; 82 ALR 43; 62 ALJR 645; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 33; 189 ALR 161; [2002] HCA 27; BC200203432 per Gaudron, Gummow and Hayne JJ."[36]

[103] On appeal Mullins J said:[37]

> "Mr Mowen wished to put similar arguments before this court on appeal that he put at first instance. Mr Mowen as a citizen with no special interest in the subject matter of his application seeks to voice his concerns about the effect on public safety caused by an increased number of semi-trailers on Queensland roads, as a result of the sale

[36] At [14].
[37] [2011] QCA 137 at [6] and [7] – Fraser JA and Margaret Wilson AJA agreeing. My emphasis.

> of Queensland Rail, without the approval of the referendum of the citizens of Queensland. As explained in para [17] of the reasons, **Mr Mowen does not have standing to apply for an injunction** against the respondent to draw attention to his concerns. In any case, **he should not have pursued his application without properly serving the respondent.**
>
> There was no error in the dismissal of Mr Mowen's ex parte application for a mandatory injunction. The appeal should also be dismissed."

[104] Mr Mowen applied for special leave to the High Court which was refused: [2011] HCASL 190.

[105] The Council here submits that the relevant matters include the lack of any understanding of the legal process, the failure to accept judicial explanations of the problems facing him, and persistence in pursuing, including through the appeal process to the highest Court, what was patently inappropriate relief.

M186/2012

[106] This is the proceeding mentioned above.[38] In this proceeding the Council sued for outstanding rates and charges in the sum of $2,631.91 and interest. The rates were said to be due in respect of the period from 1 January 2010 to 27 April 2012. Mr Mowen defended and counterclaimed for $200,000.00 alleging a breach of a duty of care. The duty was said to be owed by the CEO of the Mount Morgan Council in relation to a dividing fence complaint. The counterclaim asserts that the CEO "failed in his duty of care with regard to the issues brought to his attention with regard to the disputed fence". As a result it is said that Mr Mowen's reputation was damaged and he "had damage inflicted in him when he was attacked by the people who had erected the dividing fence". This I take to be a reference to the criminal charge that Mr Mowen later faced.

107] The Council submits that there is no reasonable basis shown for the claim. That is patently so. There is not the slightest prospect that the CEO of a Council comes under a liability for the criminal conduct of persons within the council area because he is alerted to a squabble between neighbours over a dividing fence: for a discussion on the limits on any duty of care to protect against criminal acts by a third party see *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254. Nor can the CEO by such an involvement become in some way vicariously liable for any harm to Mr Mowen's reputation.

[108] Mr Mowen applied to the Magistrates' Court to have the proceedings moved to "a court of appropriate jurisdiction" and for the matter to be heard by jury. The solicitor then acting for the Council (the Mr Johnston mentioned above) has sworn an affidavit in which he asserts that an agreement was reached whereby Mr Mowen's application was to be dismissed without any order for costs. Mr Mowen appeared before the Acting Magistrate, Mr Bradshaw. A transcript of the appearance is exhibited. Mr Mowen consented to the dismissal of his application. The Acting Magistrate was quite careful in ascertaining that the order made

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[38] See[14]-[15].

reflected both what had been agreed and what Mr Mowen desired.[39] Mr Johnston, by prior agreement, did not appear.

[109] Mr Mowen then appealed the Magistrate's decision that he had obtained: D74/2012. Unsurprisingly the appeal was dismissed by his Honour Judge Dorney QC. Apart from the fact that Mr Mowen had himself sought the order and that it was pursuant to an agreement, the order was in the nature of an interlocutory order that did not affect the substantive rights of either party. Mr Mowen was ordered to pay costs.

[110] Pursuant to that costs order the Registrar ordered that an assessor be appointed. On the basis of that assessment the Registrar ordered that Mr Mowen pay costs in the sum of $2,150.35. This resulted in yet another appeal D24/2016. In his Notice of Appeal Mr Mowen appealed against what he described as "the denial of natural justice in the fraudulent misrepresentation by Mr Dorney [a reference to his Honour Judge Dorney QC]" and "this prejudicial decision by Mr Dorney" with four nominated grounds of appeal, none of which touches on the decision of the Registrar or provides any ground for interfering in the decision under appeal. One ground refers to the "prejudice within the judicature of Queensland with a history going back to 1984 … and is evidenced in every matter Mowen has brought before the Court…". That complaint has become a continuing theme. Another ground refers to a denial of natural justice before Acting Magistrate Bradshaw.[40] The transcript shows that claim to be completely unfounded.

[111] The Council's schedule of proceedings shows that an order was made dismissing the appeal with the "applicant" being ordered to pay costs – presumably Mr Mowen. I cannot find the source documents.[41]

[112] On 18 December 2014 Mr Mowen wrote to the Mayor, Councillors and employees of the Council involved in M186/12 and said in conclusion:

> "…after I have settled this matter I will pursue each public officer for damages in the maximum amount allowed under the statute for each public officer involved, which I believe to be two hundred thousand dollars ($200,000.00), and I will also be pursuing criminal charges against all of the officers involved, should you fail to take this advantage (sic)".

[113] The Council submit these various proceedings show a lack of any reasonable grounds for the actions taken and an unreasonable persistence in appeals. The letter shows a willingness to use court procedures to harass the staff of the Council.

Mowen v Morning Bulletin & Ors

[114] In 2012 Mr Mowen claimed damages for defamation against the Morning Bulletin, a local newspaper and two named individuals. The publication complained of related to the report of the criminal trial involving Mr Mowen mentioned earlier. The newspaper defended on the basis that the limitation period had expired. Mr Mowen applied for an extension of the limitation period pursuant to s 32A

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[39] See Ex MFW5 of Mr William's affidavit filed 15 November 2017 at p 95.
[40] See Ex MFW5 of Mr William's affidavit filed 15 November 2017 at p 227-228.
[41] See Ex MFW4 of Mr William's affidavit filed 15 November 2017 at p 24.

Limitation of Actions Act 1974 Qld). The legislation provided for an extension for three years from accrual of the cause of action. More than three years had passed since the matters complained of had been published. I held that I had no power to assist Mr Mowen. I struck out the Claim and Statement of Claim as being out of time. On the question of costs I said:

> "I do not think it fair to characterise the bringing of the proceedings as involving a degree of unreasonableness justifying a description such as irresponsible — Mr Mowen demonstrated that his reputation has suffered from comments published in the Morning Bulletin. That does not mean the comments were defamatory or that the respondents would not be able to demonstrate defences to the suit, but his complaint was far from frivolous.
>
> However the solicitors did point out the fundamental difficulties that Mr Mowen faced and Mr Mowen determined to attempt to overcome those problems, without however any authority to support his position. It is the persistence in the suit by requiring the hearing of the application that was doomed to fail that involves some degree of unreasonable conduct."[42]

[115] Mr Mowen appealed. Dalton J who gave the reasons for the Court concluded:

> "As will appear from the above reasons, my view is that **the proceedings before us were utterly devoid of merit** and I accede to the respondents' submissions that costs of this appeal should also be ordered on an indemnity basis."[43]

Mowen v Electoral Commission of Queensland

[116] In 2015 Mr Mowen sought an injunction to stop the then pending State election. The matter came before Daubney J who, in an ex tempore decision the day before the election, said:[44]

> The form in which the present application was filed purported to be an "ex parte originating application" by the applicant, Bevan Mowen, seeking, in effect, an injunction to restrain the holding of the State election tomorrow, the 31 January 2015. Notice of the application was, in fact, given to the Electoral Commission of Queensland and counsel for the Electoral Commission appeared before me this morning, initially seeking to appear as amicus curiae. **But after raising with the applicant the patent technical defect in the form of his application in that it had not named any respondent but rather purported to seek an injunction at large with no dispute and no contradictor, Mr Mowen sought and was granted leave to name the Electoral Commission of Queensland as a respondent**. Counsel for the Electoral Commission then formally appeared for the respondent and provided me with an

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42 [2012] QSC 194 at [32]-[33].
43 [2013] QCA 36 at [25] – Holmes and Fraser JJA agreeing. My emphasis.
44 [2015] QSC 16 – again my emphasis.

> affidavit in response to the application and with written submissions addressing the matters raised by the applicant.
>
> Central to the relief sought by the applicant, as appears from para 1 of the originating application, is the contention that the franchise age stated in the Commonwealth Constitution is 21 years. The issues raised on the face of the application clearly concern matters of interpretation and construction of the Constitution of the Commonwealth of Australia and normally would require notices to be given to the Attorneys-General of the states and territories pursuant to s 78B of the Judiciary Act 1903. I am, however, able to deal with the matter now without such notices having been given pursuant to s 78B because, for the reasons that I will shortly address, **the contentions advanced on the originating application are plainly unarguable and the application must be dismissed**.
>
> The reason why the matters raised on the originating application are plainly unarguable can be stated shortly. As I have already noted, **central to the applicant's case is the notion that s 34 of the Commonwealth Constitution mandates that the age of enfranchisement under the Commonwealth Constitution is 21 years. Section 34 says no such thing. Section 34 is clearly concerned with the qualifications for persons to become members of the House of Representatives. One of those qualifications is that a person who would seek to become a member of the House of Representatives must be of the full age of 21 years. Section 34 has nothing to do with the qualification of electors for those persons**.[45]
>
> …. Accordingly, there is nothing in the Constitution of the Commonwealth of Australia which mandates or prescribes that the franchise age for electors in the Queensland state election is 21 years of age. Rather, by reference to the provisions of the Electoral Act of Queensland and the Commonwealth Electoral Act, **it is clear beyond any argument that the age of entitlement to be enrolled to vote in Queensland is 18.**
>
> Further arguments were alluded to in the originating application. One concerned s 128 of the Constitution in respect of an argument that any alleged reduction in the qualification age involves an alteration to the Constitution. **That argument simply cannot be countenanced, not least because of the express terms of the Constitution in s 30 and the express terms of both the state and federal legislation to which I have already referred.** Similarly, s 109 of the Constitution which concerns inconsistencies between state and federal legislation has no application to the present case.[46]

[117] I interpose here that I am aware of a very similar application on similar grounds brought by Mr Mowen before me in 2012. The matter is unreported but has file

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[45] At [1] – [3].
[46] At [5]-[6].

reference S110/2012 (Rockhampton registry) and was determined by me on 23 March 2012, two days before the State election.[47] I refused the application. In my reasons for doing so I said:

> "Mr Mowen applies to the Court for an injunction to prevent the holding of the Queensland State election, which is due to be held in two days' time. He applies ex parte. At my request, upon the Registrar referring the papers to me, pursuant to rule 15 of the Uniform Civil Procedure Rules, I directed that the application be heard today, notice having been received by me, I think late on Tuesday evening, and I requested that the papers be referred to the Attorney-General and the Crown Solicitor, to determine whether they were in a position to assist the Court.
>
> Mr Keyes has been instructed to appear on behalf of the Attorney-General and has provided a detailed submission, which is of great assistance, and he has done so on very short notice.
>
> The background to this application is that Mr Mowen has applied to the High Court of Australia seeking its determination of a constitutional issue that he believes arises by reason of a conflict of laws between the constitution and the Queensland electoral laws.
>
> His point is that, under section 34 of the Federal Constitution, in order to be qualified to be a member of the House of Representatives, one is required to be, "Of the full age of 21 years." In this State the relevant qualification is set out in section 64 of the Parliament of Queensland Act (2001), and that is that one be "an adult Australian citizen living in Queensland". For the purpose of the Act, the word "adult" is defined in the Act's Interpretation Act s 36 as a person aged 18 years or over.
>
> Mr Mowen's application before the High Court deals with the federal laws, and the federal laws have a similar age qualification under the Federal Electoral Act, hence he has made his application to the High Court.
>
> His attempt to file that application, however, met with a referral under the relevant Rule 6.07 to a High Court Justice, and Justice Heydon has determined that the application will not be accepted by the Registry until Mr Mowen shows cause, and he must do so with the leave of the Justice of that Court.
>
> Mr Mowen's concern is to delay the State election until he has had a chance to apply to the High Court and have his application there determined.[48]
>
> …

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[47] I have now arranged to have the decision published: *Re Mowen* [2012] QSC 434.
[48] At [1] – [7].

> Fundamentally, in my view, Mr Mowen's application is misconceived.[49]
>
> …
>
> But that has nothing to do with the Queensland Parliament. It too has power to make laws in respect of this State for its peace, order and good government, and it has passed a law which provides that an elector, and a candidate for election, can be 18 years of age.
>
> There is no prospect that that law will be held invalid. I know of no constitutional or other concern that can possibly be engaged that would have that effect."[50]

[118] The similarities between the two applications before myself and Daubney J include seeking an injunction ex parte, seeking to halt the State election only days before it was to be held, a misconceived argument as to the age qualification for electors, and a misreading of s 34 of the *Constitution* and the effect of State laws. The judicial rebuff in 2012 did not deter Mr Mowen from repeating the effort in 2015. The response of Heydon J referred to is also instructive. Bell J refused leave to issue process: [2012] HCA Trans 097.

[119] So far as I am aware Mr Mowen did not appeal my decision but he did appeal the decision of Daubney J. His appeal was dismissed with costs. Applegarth J gave the reasons of the Court (McMurdo P and Gotterson JA agreeing). In response to arguments that Mr Mowen had been denied natural justice by Daubney J, was coerced into joining the Electoral Commission, and that Dabney J had made errors of law with assertions of abuse of power Applegarth J wrote, *inter alia*:[51]

> First, the appellant alleges that the primary judge failed to allow natural justice. **There is no substance to this allegation**.
>
> …
>
> **The appellant provided no reasonable argument to the primary judge as to why the respondent's submissions on the points of law raised by the appellant were wrong. He still has not done so.** The ground of appeal that the primary judge denied the appellant natural justice should be rejected.
>
> Next, the notice of appeal asserts the primary judge coerced him to amend the ex parte proceedings and then encouraged lawyers for the Electoral Commission of Queensland to apply for costs. **The transcript of the hearing shows that these allegations are without substance**.
>
> …

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[49] At [18].
[50] At [20] – [21].
[51] [2015] QCA 221. My emphasis.

The complaint that the primary judge encouraged the lawyers for the Electoral Commission of Queensland to apply for costs is without merit. As noted, following the dismissal of the application, the primary judge adopted the common practice of inquiring of counsel for the successful party as to whether he had an application. The inquiry was entirely appropriate.

The notice of appeal alleges that the primary judge:

'Failed to point to any Enumerated Power in the Constitution of the Commonwealth of Australia, under Chapter III, The Judicature that gives the Judiciary of Queensland plenary power.'

This ground is without merit. The primary judge was not required to point out the power of the Supreme Court of Queensland to issue an injunction. The appellant's originating application relied upon the court having that power and nothing required the primary judge to address the source of the court's power to issue an injunction, or the Constitutional recognition given to the Supreme Court of Queensland by the Commonwealth Constitution. In hearing, determining and dismissing the appellant's proceeding, the primary judge was not purporting to exercise any legislative power under the Constitution. **His Honour was exercising the judicial power which the appellant asked the court to exercise**.

…

The remaining two grounds appearing in the notice of appeal make assertions of abuse of power in contravention of the Crimes Act 1914 (Cth) s 34(4) and assert "Criminals cannot write law and criminals cannot nominate persons to the bench". The appellant's outline of submissions filed 10 April 2015 and his document **Submission in Response to the Application filed 3 August 2015 make allegations about public officers refusing to do their duty and extravagant allegations of treason and criminal conduct. The allegations are scandalous and irrelevant to the subject matter of this appeal.** They do nothing to assist this court to understand any alleged error of law made by the primary judge in disposing of the arguments that were before him on 30 January 2015.

The primary judge was clearly correct in concluding that the appellant's arguments were misconceived. He was correct to dismiss the application. The appellant's notice of appeal and his submissions simply do not engage with the reasons given by the primary judge. They do not provide any basis in law to set aside the orders made on 30 January 2015.

[120] As those reasons show Mr Mowen's arguments were misconceived at best and at worst were irrelevant and involved scandalous attacks on public officials.

[121] Mr Mowen did not vote in the federal election in 2013. He was convicted by a Magistrate of a contravention of s 245(15) of the *Commonwealth Electoral Act* 1918 (Cth) and fined $170 and ordered to pay $93.40 for court costs and $150 for witness expenses. He was allowed one month to pay the fine. He appealed the conviction to the District Court which appeal was dismissed. He then sought leave to appeal from the Court of Appeal.[52]

[122] Atkinson J who gave the reasons for the court (Fraser JA and Dalton J agreeing) described the ground of the application for leave to appeal as:

> "The Commonwealth Electoral Act 1981 age qualification requirements are contrary to the age qualifications expressly stated in the constitution and are therefore unconstitutional."[53]

[123] Her Honour then set out the orders sought and the reasons advanced by Mr Mowen as to why leave should be granted:

> "The application for leave to appeal said that the orders he sought on the appeal are:
>
> > "(a) the appeal be allowed
> >
> > (b) the void judgment be set aside
> >
> > (c) this matter be heard by a jury as my constitutional right under section 80
> >
> > (d) Or this matter be moved to the Privy Council a court of appropriate jurisdiction as no person acting in the position of judge in this country can say they are constitutional and therefore qualified to hear this matter as is evidence by all judicial activism in previous decisions in the courts with regard this matter and all matters brought before the court by Bevan Mowen.
>
> In para 4 of the application the applicant set out the reasons why the court should grant leave for him to appeal. They were:
>
> > 'Criminals cannot pass legislation, Judges have a statutory duty to the law, all judges have either failed, refused or performed their duty poorly so as not to have done it at all.
> >
> > It is hypocritical of the court to expect a decision to be appealed that is void ab initio, fails all rules of construction and interpretation and is unconstitutional.
> >
> > If any criminal conviction is put on my name I will be seeking defamation damages from [the District Court judge] and anyone else complicit in this criminal act.

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[52] [2016] QCA 152.
[53] At [6].

> Section 5 of the Constitution Act states the only laws that must be obeyed are the laws made under the constitution — Acts Interpretation Act 1901 Section 15A Construction of Acts to be subject to the constitution, every act shall be read and construed subject to the constitution and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power — Section 34 of the constitution which expressly states the full age of 21 years — Section 128 mode of altering the constitution, is only by referendum — neither the judicature nor the parliament can alter one word of the constitution without the approval of the people — no court or false parliament can order or force me to vote under an act that is unconstitutional in its terms.'"[54]

[124] Atkinson J held that the constitutional arguments were "clearly unmeritorious". On the section 34 argument Atkinson J wrote:

> "The respondent has identified that the applicant's core argument seems to be that s 93 of the Commonwealth Electoral Act, which relevantly provides that a person who is 18 years of age and an Australian citizen shall be entitled to enrolment to vote, is inconsistent with s 34 of the Constitution and therefore the Commonwealth Electoral Act is invalid in its entirety. There are two problems with this contention. Firstly, if one section of an Act is constitutionally invalid then the normal procedure would be to declare that section unconstitutional rather to invalidate the entire Act. Secondly, and more importantly, s 34 of the Constitution itself expressly says "until the Parliament otherwise provides". This section of the Constitution clearly provides that the Commonwealth Parliament can make laws with regard to the qualification to be a member of Parliament and can therefore validly change the age at which a person is eligible to be a member of Parliament. It has done so in s 163 of the Commonwealth Electoral Act and there is no merit in the argument that in doing so the Parliament has behaved in a way that is contrary to the Constitution. Section 30, which deals with suffrage, also contains the expression "until the Parliament otherwise provides" giving the Commonwealth Parliament power to legislate in this area."[55]

[125] Atkinson J held, after discussing each of the grounds advanced and pointing out they were without merit:

> "The learned Magistrate was satisfied that none of the matters raised in that court provided a valid and sufficient reason for failing to vote. The appeal against that decision was dismissed. There is no reason to conclude that the decision of the learned District Court judge

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[54] At [7] – [8].
[55] At [12].

> dismissing the appeal was in error. The additional argument raised in this court is also completely lacking in merit."[56]

[126] Of note is that the age qualification argument had been advanced before myself in 2012, and Daubney J and the Court of Appeal in 2015. Despite three judicial explanations (involving five judicial officers) that his views on the age qualification under the Constitution were fundamentally misconceived and wrong Mr Mowen still persisted in them. He did so before the Magistrate, the District Court and the Court of Appeal. In fact he still persists in them as his written submissions before me make plain.[57]

[127] The threat to bring defamation proceedings against the District Court judge "and anyone else complicit in this criminal act" indicates a readiness to abuse the legal processes in an endeavour to cause inconvenience and harm to others carrying out their duty.

Mowen v The Crown in the State of Queensland

[128] Mr Mowen has claimed damages from the State of Queensland in the sum of $30,240,000. A Claim and Statement of Claim have been filed in the Rockhampton registry (S635/17). Mr Mowen was imprisoned for 14 days by order of a Magistrate for contempt in the face of the Court. After his incarceration had ended Mr Mowen appealed and the Crown conceded the appeal. He sues for damages for false imprisonment.

[129] The Council points out that no personal action lies against any judicial officer for anything done in the course of their office. In *Fingleton v The Queen*[58] Gleeson J said of the policy of the common law:[59]

> "Most discussion of judicial immunity concerns the possibility of civil liability, including liability for damages, at the suit of an aggrieved litigant. The general principle is as stated by Lord Denning MR in *Sirros v Moore*[60]:
>
> > 'Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action.'"

[130] To ensure that there is no misunderstanding I do not mean to assert that Magistrate Press operated under "some gross error or ignorance, or was actuated by envy,

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[56] At [16].
[57] See paragraph 25.
[58] (2005) 227 CLR 166.
[59] At [36].
[60] [1975] QB 118 at 132.

hatred and malice". On appeal Burnett DCJ ordered that the charge of contempt be remitted back to the Magistrates' Court to be heard and determined according to law.[61]

[131] The Council cites this as another example of proceedings that Mr Mowen must know are doomed to fail and urges that the extravagant damages claim reflects Mr Mowen's antipathy towards the Magistrate concerned, Magistrate Press. That antipathy, it is said, is shown by statements made by Mr Mowen concerning Magistrate Press in various proceedings. The Council points to the report by Mr Johnston of the proceedings before the learned Magistrate on 25 August 2014 referred to earlier, appeal D 24/16, and an affidavit filed in support. According to the report Mr Mowen then made allegations of "extreme prejudice and bias" against the Magistrate apparently said to arise out of a determination of a speeding fine by the Magistrate some years before and from the Magistrates' alleged appearance for the Council when a barrister.[62] It will be recalled that the learned Magistrate declined to accede to a summary judgment application brought by the Council, effectively finding in Mr Mowen's favour.

Mowen v BWBK Pty Ltd

[132] These proceedings (S312/16) are currently before the Supreme Court. Mr Mowen sues for defamation. He claims $500,000 in damages including $250,000 for aggravated damages.

[133] The pleadings indicate that a report was made to police that Mr Mowen had taken a file from the Defendant's offices without the permission of the Defendant. That report constitutes the alleged defamatory publications.

[134] The Defence pleads that after the report was made to the police Mr Mowen returned with the file, a copy was made, and each side retained a copy.

[135] The Council characterises the report to the police as a "completely understandable complaint".

[136] The truth of these claims remains to be determined.

The current proceedings

[137] The Council submits that the current claim for damages is motivated by Mr Mowen's annoyance that the Council collected the monies it claims are outstanding from his mortgagee. It submits that the proceedings share a common characteristic with *Mowen v The Crown in the State of Queensland* and *Mowen v BWBK Pty Ltd* as "emotional getting square exercises".

[138] In his written submissions Mr Mowen makes several allegations that reflect his approach in other proceedings. Much of the submission relates Mr Mowen's claim that there is a judicial conspiracy against him. As well he relates there that he has said to judicial officers who have been required to hear proceedings involving him that they are "fucking criminals" (Judge Burnett), a "criminal" (Justice Daubney), and "criminals at the level of paedophiles and murderers" (McMurdo P, Gotterson

[61] See File D26/16 (Rockhampton)
[62] See Ex MFW5 Item 11 of Mr William's affidavit filed 15 November 2017 at p 129-131.

JA and Applegarth J).[63] That he would be prepared to say such things to persons of outstanding integrity reflects very poorly on him.

Discussion

[139] The foregoing are by no means all the proceedings in which Mr Mowen has been involved over the last 40 years. The Council have found records of some 29 such proceedings. For present purposes the foregoing are the relevant ones to consider.

[140] The proceedings involving Mr Mowen can be placed into three distinct categories. First, there are those proceedings in which he defends the claims made by others against him. Secondly, there are proceedings where he seeks to intervene in the affairs of the State. Thirdly, there are proceedings where he pursues a defendant for perceived wrongs.

[141] I would characterize the defence of the debt claim in proceedings M186/12 and D2778/17 as falling in the first category. I do not think that any inference adverse to Mr Mowen can be drawn from his desire to have judicial determination of the issues involved. His counterclaims however fall into the third category.

[142] Even though I am not critical of Mr Mowen in defending the suit, it is the manner in which he pursued his defence which is concerning. The amount originally involved (M186/12) was $2,631.91 and interest. Only that part of the outstanding rates that might have been the subject of a rebate was in fact in dispute, so something less than $2,600. I point out that at the heart of the dispute are three very simple questions. The first is whether the pensioner rebate policy requires that to qualify for the rebate a pensioner make application for the rebate. The second is whether Mr Mowen has in fact applied. The third is whether Mr Mowen can opt out of paying the rural fire brigade levy. The fact that the saga has continued over five years, with two proceedings and two appeals to the District Court (over an interlocutory ruling that split the claim and counterclaim without effecting the substantive rights of either party) and an action in the Supreme Court for defamation is staggering.

[143] I would characterize the defence to the charge of failing to vote as also within this first category. I do not think it perverse to seek to avoid a fine. The problem lies in the persistence in appeals on grounds that not only were plainly unmeritorious but which Mr Mowen had been told were hopeless in prior hearings and appeals before the Supreme Court.

[144] As to the second category Mr Mowen has embarked on proceedings that he must have realised were doomed to fail. To seek to enjoin by injunction the State of Queensland from selling Queensland Rail with no possible standing, or to twice seek to hold up the State election a day or two before the election was to be held on identical and demonstrably misguided grounds, pursuing the matter on appeal to the High Court, demonstrates a significant level of perversity. The institution of such proceedings involves a waste of resources, wastes valuable Court time, and wastes the time of those potentially adversely affected by the proposed injunctions.

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[63] See paragraph 25 of the submission. A similar comment was made to myself when sitting on the appeal of *Mowen v The Australian Electoral Commission.* I then recused myself on the mistaken understanding that other judges were readily available to hear the appeal and unaware that I was but the latest in a distinguished line.

[145] Further the proceedings have been marked by abuse directed at the judiciary. I do not see this as particularly important but it does reflect on the genuineness with which Mr Mowen conducts himself.

[146] As to the third category (*Mowen v McGowran*; the counterclaim in D2778/17; the current proceedings; *Mowen v The Crown in the State of Queensland* – the claim for $30,240,000; *Mowen v BWBK Pty Ltd* – the claim for $500,000 damages for defamation; *Mowen v Morning Bulletin & Ors* – the claim for damages for defamation that was out of time) it can fairly be said that there is an element of harassment involved. The damages claimed in each case are quite extravagant. The pursuit of Mr McGowran was entirely without merit and quite inexplicable. While there is yet to be any determination I am confident that the same can be said of the counterclaim in D2778/17 involving lawyers acting on instructions and performing their duty to their client. On its face the *BWBK* claim is a wholly disproportionate response to the issue between the parties.

[147] As well, where there have been determinations (*Mowen v Morning Bulletin & Ors*; *Mowen v McGowran*) there have been appeals but on grounds without any possible merit.

[148] Overall the Council has shown that there has been persistence in appeals that are patently unreasonable, attempts to re-litigate questions already decided against him, the use of court proceedings to harass individuals, and a threat to use those proceedings for that improper purpose. I have not detailed all of the points made by the Council but Mr Mowen has demonstrated a profound misunderstanding, and at times non-acceptance, of the legal process.

[149] To put against those considerations however is that there was some basis for some of these proceedings. Thus in *Mowen v The Crown in the State of Queensland* Mr Mowen was imprisoned and was successful in appealing that sentence. The materials before me do not show what words or conduct of Mr Mowen constituted the alleged contempt,[64] or why the appeal was conceded by the Crown. But there may be some legitimate ground for Mr Mowen to feel aggrieved. In *Mowen v BWBK Pty Ltd* it seems to be common ground that a complaint was made to police. If unjustified that would be a cause of legitimate annoyance, albeit few would consider a damages claim for $500,000 a proportionate response. In *Mowen v Morning Bulletin & Ors* I was not prepared to find that the bringing of the action for damages was so unreasonable as to permit an order for indemnity costs. And in *Mowen v Queensland State Government* I remarked in conclusion:

> "Mr Mowen is a concerned citizen who seeks to right what he sees as a wrong. Whilst that might show a commendable interest in the good governance of the State, that of itself is insufficient to give him standing to seek an injunction."[65]

[150] My perception of Mr Mowen's conduct then was not of course informed by what has followed. But I can record that he conducted himself with courtesy and restraint in the hearing before me.

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[64] Although Mr Mowen's continued reference in his written submissions (paragraph 25) to the failure of judges to deal with him for contempt for the abusive epithets he used towards them may give a clue. No reference is made there to his conduct before Magistrate Press.

[65] [2011] QSC 12 at [18].

[151] And while Mr Mowen persisted in his attempts to halt the State elections in 2012 and 2015, he did not attempt to do so again in 2017.

Conclusion

[152] In my judgment some, but not all, of these various proceedings merit the term vexatious. I bear in mind that the test is quite demanding – the proceedings must be "seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment". And the bringing of vexatious proceedings must be frequent.

[153] The two most egregious claims concern the pursuit of Mr McGowran and the counterclaim against the lawyers who acted for the Council. Mr Mowen is evidently making good the threat he made in his letter to the Council.[66] The bringing of the claims is disturbing and vexatious but there are only two such claims over 5 years.

[154] The striking thing about the proceedings to interfere with the governance of the State is that Mr Mowen sought not to harass or annoy anyone save the judge in what were patently futile attempts to obtain injunctions. He did not serve any contradictor, no doubt to avoid paying costs. But it is difficult to see that the proceedings bear the character described in the legislation.

[155] I can well understand the Council bringing the application. Their officers are being pursued through the Courts most unfairly simply for doing their jobs. The Council should have leave to bring the application. In my view Mr Mowen's conduct comes very close to the line. However in my judgment the Council has not shown that at this stage his conduct merits the imposition of the orders of the type mentioned in s 6(2) of the VPA.

ORDERS

[156] There will be judgment for the Council in these proceedings (S449/17).

[157] I dismiss the applications brought by Mr Mowen. I order that he pay the costs of each respondent.

[158] I grant leave to the Council to apply for a vexatious proceedings order but dismiss the application. There should be no order for costs in relation to that application.

[159] Save for the costs of the application for a vexatious proceedings order I order Mr Mowen to pay the costs of the Council of the proceedings and of this application.

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[66] See [112] above.