SUPREME COURT OF QUEENSLAND

CITATION:	*Jamieson v Beattie* [2006] QCA 395
PARTIES:	**WILLIAM ROBINSON JAMIESON** (plaintiff/respondent) **v** **PETER BEATTIE** (defendant/appellant)
FILE NO/S:	Appeal No 109 of 2006 DC No 1 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	13 October 2006
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2006
JUDGES:	Jerrard and Holmes JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The judgment and costs orders for the respondent be set aside** **2. New trial ordered** **3. The respondent to pay the appellant's costs of and incidental to the appeal** **4. The costs of the first trial to be reserved to the next trial judge**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – IMPUTATION – OTHER CASES – trial judge found that evidence supported all pleaded imputations – whether evidence supported all the pleaded imputations DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE – REBUTTAL OF PRIVILEGE BY MALICE-GENERALLY – trial judge held the defence of qualified privilege was not available – trial judge found that the defendant/appellant had not acted in good faith and that malice had been demonstrated in respect of all three publications – whether the trial judge's approach to the defence of qualified privilege was flawed – whether the reasons given by the trial judge for finding an absence of good faith and that malice had been demonstrated were

sufficient

Defamation Act 1889 (Qld), s 16(1)(e)

Australian Consolidated Press Ltd v Uren (1966) 117 CLR 185, cited
Bellino v ABC [1998] QCA 113; Appeal No 51 of 1997, 2 June 1998, cited
Bellino v Australian Broadcasting Corporation (1996) 185 CLR 183, cited
Erglis v Buckley & Ors [2005] QCA 404; Appeal No 2451 of 2005, 4 November 2005, cited
Favell v Queensland Newspapers Pty Ltd (2006) 221 ALR 186; [2005] HCA 52, cited
Queensland Newspapers Pty Ltd & Hardy v Baker [1937] St R Qd 153, cited
Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57, cited

COUNSEL: M D Martin for the appellant
P J Favell, with P W Hackett, for the respondent

SOLICITORS: ClarkeKann for the appellant
Baker Johnson for the respondent

[1] **JERRARD JA**: This is an appeal from a judgment in the District Court delivered 9 December 2005, in which the learned trial judge awarded the respondent/plaintiff $37,821.37 for damages plus interest, on the plaintiff's claim for defamation against the appellant/defendant, in respect of three separate publications. This Court granted leave to appeal on 28 August 2006. The appellant challenges the findings by the learned judge that the pleaded imputations were made out, and the further finding that the respondent proved an absence of good faith, and malice, in the appellant in respect of each of the three publications.

Disputes and meetings

[2] The defamation found by the learned judge occurred in the course of an ongoing dispute about the management, and membership of the committees of the relevant bodies corporate, of two buildings, St Tropez North and St Tropez, located at 27-35 Orchard Avenue, Surfers Paradise. Mr Jamieson was elected chairman of the body corporate of St Tropez in January 2000, and in January 2002 chairman of St Tropez North. Mr Beattie had been a committee member of St Tropez North since the mid-1990's. He is a licensed real estate agent, not the owner himself of any unit, and was a committee member because he was the nominee of Sunshine Hill Nominees Pty Ltd, the owner of three commercial units in St Tropez North. Mr Jamieson owned a unit in St Tropez South, from which he conducted an insolvency practice. He and Mr Beattie came into conflict over issues of expenditure on, and management of, St Tropez North.

[3] The learned trial judge found that Mr Jamieson was concerned about the financial situation at St Tropez North, and had the opinion that it had been mismanaged by the body corporate manager. Body Corporate Services Pty Ltd was the body corporate financial manager, and it acted through a Dianne Cervetto, who was described in Mr Beattie's correspondence as the body corporate secretary. An

extraordinary general meeting (EGM) of the two bodies corporate was called for 17 May 2002, in which Mr Jamieson had proposed that the body corporate management be by an entity trading as Body Corporate Consultants.

[4] Another unit owner, a Mr Baptiste, had sent a circular to other St Tropez unit owners both before and after that EGM, complaining about the quantum of fees Mr Jamieson was charging, through a firm Mr Jamieson controlled, for costs in endeavouring to recover unpaid body corporate fees from an allegedly defaulting unit owner. In fact, a meeting of the St Tropez North and St Tropez South body corporate committees, held immediately after that extraordinary general meeting, approved the payment of that account from Mr Jamieson's firm, but only when the unpaid fees were recovered.

[5] On 1 June 2002 a proposal was put forward by owners, to convene an EGM of St Tropez, at which the motions to be put would include "That the current chairman be removed from that office and from the committee because of his improper conduct administering body corporate affairs." The document proposed that Mr Baptiste be elected interim chairman of that body corporate. Similar motions were proposed by Ms Cervetto for an EGM of St Tropez North. Mr Jamieson was unsuccessful in his attempts to obtain from Ms Cervetto particulars of the alleged improper conduct.

[6] Mr Baptiste wrote, on 27 June 2002, to fellow unit owners of St Tropez and St Tropez North, asserting that there had been questionable administration of body corporate affairs by Mr Jamieson, and that Mr Jamieson had been exposed on 17 May 2002 as having in his possession a contract of sale for, or offer to buy, the management rights to (the building at) St Tropez. Mr Jamieson had agreed at that meeting on 17 May in answer to questions, that he had a copy of such a document, but had said that while he had no beneficial interest in the proposed contract, obligations of confidence meant he could not identify the possible purchaser. Mr Baptiste also complained about what he described as "exorbitant" fees that Mr Jamieson's firm proposed to charge to pursue the outstanding levies, about a lack of action to repair what he described as a major structural fault in the roof of St Tropez North, and about Mr Jamieson's alleged use of foul language and abusive threats to Ms Cervetto.

The publications

[7] The EGM of St Tropez South took place on 11 July 2002, and Mr Jamieson was removed as chairman pursuant to the motion described, by 22 votes in favour, 4 against, and with 1 abstention. Mr Jamieson did not attend the meeting, and it seems that no particulars were given of the asserted improper conduct. On 23 July 2002, in the first publication the subject of this litigation, Mr Baptiste and Mr Beattie sent a jointly signed letter to the owners of units in St Tropez North, bearing the title "Important information for owners of St Tropez North – EGM 9 August 2002". It was a three page document, which referred to five motions proposed to be moved by a Mr Fordham at that meeting to be held on 9 August, and criticising the motions. Portions of that letter were reproduced in the statement of claim, and alleged to convey imputations defamatory of Mr Jamieson. The pleaded words were:

> "**Re Motion 2 – Removal of current chairman**

> You may or may not be aware that the then chairman, Mr Will Jamieson was removed from office, because of improper conduct, at the EGM of St Tropez (South) held on July 11 2002."
>
> "Please ensure that you vote for Mr Stein for the committee vacancy, as you no doubt will note the other two nominations are Mr Jamieson himself and Mr Kel Hellier an owner in the south and long time supporter of the Jamieson Group."
>
> "To enable St Tropez to move forward, correct the problems with the building and put in place organised and businesslike committees we would recommend you vote yes to motions 1, 2, 3, 4, 5, and 8."
>
> "Once again if you have any questions at all with regard to the above matters, please do not hesitate to contact us."

[8] The imputations pleaded in paragraph 12 of the statement of claim were that:

(a) The plaintiff had been found guilty of "improper conduct" and had been removed from office because the alleged "improper conduct" had been proven;

(b) The plaintiff had organised a group of owners (the Jamieson Group) to support him in improper conduct;

(c) The plaintiff if not removed as chairman would continue to engage in "improper conduct";

(d) The plaintiff ought to be removed as the chairman as the plaintiff could not be trusted with the body corporate funds;

(e) The plaintiff was dishonest in his conduct;

(f) The plaintiff was of bad character;

(g) The plaintiff lacked moral probity;

(h) The plaintiff was corrupt.

[9] The second publication the subject of litigation, and alleged to convey imputations defamatory of the plaintiff, was a letter sent by Mr Beattie to owners of units in St Tropez North, and headed "Urgent Information". In that one page document he described himself as a committee member of St Tropez North, and wrote that: "We have made an application to remove the current Chairman of the Body Corporate at the EGM on the **9th of August 2002**." The letter advised that the chairman had instructed Body Corporate Services (BCS) to send a Notice of Committee Meeting for a meeting to be held prior to the EGM on 9 August 2002, and if the chairman was removed (on 9 August 2002), it would mean the new committee and new chairman (Mr Baptiste) "will have to go through all the matters again and overturn any matters that are outside the new committee's wishes".

[10] The words complained of in the statement of claim, appearing in that publication, were:

(a) “This matter of the chairman’s removal has become more important after we opened our mail today.”

(b) “Your body corporate has now to incur another lot of wasted expenses in the issuing, printing, postage, and BCS for this unnecessary exercise.”

(c) “This madness and unnecessary expenditure has to stop.”

(d) “The current chairman is not an owner, has been voted out by owners of St Tropez by a vote of 20 to 4, has made no telephone calls to the writer seeking input on any matters [such as the major roof problem we have] and we believe has not spoken to BCS since his dismissal or use of his foul language to our hard working BCS secretary. Matters have to change and commonsense must prevail.”

(e) “Remember our current Chairman is the person who it was alleged, controlled an undeclared sales contract to buy the Management Rights of our building. This matter is still unresolved!”

(f) “Please act now, this matter is important to the value of your unit.”

[11] The pleaded imputations in paragraph 15 were that the plaintiff:

(a) was of bad character;

(b) lacked moral probity;

(c) had a conflict of interest in acting as chairman for the body corporate in circumstances in which the plaintiff preferred his interest and the interest of others to the interest of the body corporate;

(d) was party to a contract and had acted in an inappropriate, improper or dishonest way to gain some improper benefit for himself at the expense of the body corporate;

(e) should be removed as chairman as the plaintiff could not be trusted with the body corporate funds.

[12] The third and last publication the subject of litigation was on 12 December 2003, when Mr Beattie wrote as the company nominee of Sunshine Hill Nominees Pty Ltd, apparently to unit owners in St Tropez North, after Mr Baptiste had resigned as chairman. Apparently no committee members had attended the budget meeting, so Mr Baptiste resigned. The words complained of in the statement of claim, appearing in that letter, were:

(a) “Without consultation with the writer/committee member, a select group of your existing committee (none of whom attended the Budget Meeting), appointed a member who was thrown out by all owners of St Tropez North and St Tropez on the 9th October 2002, **Will Jamieson**.”

(b) "If you have read Warwick Fordham's unsigned, undated, defamatory letter in recent weeks you can see there is some type of agenda by Fordham and Jamieson to diminish the value of St Tropez North."

(c) "The writer is seeking your support to re-establish the stability that Baptiste had brought to St Tropez North since the dismissal of Jamieson."

(d) "Are owners aware that Jamieson called for quotes only to paint the residential part only of the building and not the awnings and shop fronts? The front remains unpainted to this day."

(e) "We need your support to rid ourselves of this group."

[13] The imputations pleaded in paragraph 20 were that:

(a) The plaintiff was involved in some form of illegal or dishonest activity that would directly diminish the value of St Tropez.

(b) The plaintiff was responsible for major body corporate spending during the period he was not a member of the committee of St Tropez North, and had been negligent and dishonest with St Tropez owners.

(c) The plaintiff and the chairman, Warrick Fordham were conspiring for some illegal or corrupt purpose with the express aim of defrauding owners of St Tropez North.

(d) The plaintiff had engaged in improper conduct in the past when associated with the committees of St Tropez, and would continue to act improperly.

(e) The plaintiff could not be trusted with body corporate funds.

(f) The plaintiff was dishonest in his conduct.

(g) The plaintiff was of bad character.

(h) The plaintiff lacked moral probity.

(i) The plaintiff was corrupt.

Directions on the law

[14] After a careful description of the evidence, the learned trial judge then gave admirably correct self-directions on the law, noting that Mr Beattie denied the pleaded defamatory imputations in respect of each of the three publications, and that Mr Beattie submitted in the alternative that he had a lawful excuse for publishing matter defamatory of Mr Jamieson, by reason of s 16(1)(e) of the *Defamation Act 1889* (Qld) ("the Act"). That section relevantly provides that it is a lawful excuse for the publication of defamatory matter:

"(e) If the publication is made in good faith for the purpose of giving information to the person to whom it is made with

> respect to some subject as to which that person has, or is believed, upon reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make the person's conduct in making the publication reasonable under the circumstances."

Section 16(2) of the Act goes on to provide that:

> "(2) For the purpose of [s 16], a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does believe the defamatory matter to be untrue."

Section 17 places the burden of proof of the absence of good faith upon the party alleging such absence.

[15] Despite the manner in which it is expressed, s 16(2), previously part of s 377 of the *Criminal Code 1899* (Qld), has been construed as describing four separate requirements of which, if a plaintiff proves any, the plaintiff has proved an absence of good faith. Those are:

(a) that the matter published was not relevant to the privileged occasion; or

(b) that the manner and extent of the publication exceeded what was reasonably sufficient for the occasion; or

(c) that the defendant was actuated by ill-will to the plaintiff or other improper motive; or

(d) that the defendant believed the defamatory matter to be untrue.

Those were put as four such separate matters by Brennan CJ in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 205; and by Webb J in *Queensland Newspapers Pty Ltd & Hardy v Baker* [1937] St R Qd 153 at 167. The judgment of Henchman J at page 186 in the latter case also reflects an assumption that evidence of the absence of good faith would be satisfied by proof that the defendant(s) was actuated by an improper motive. That accords with the manner in which Windeyer J dealt with s 17 of the *Defamation Act 1958* (NSW) (which relevantly reproduced that part of s 377 of the *Criminal Code* which became s 16(2) of the Act) in *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185. Windeyer J there wrote that:

> "...the description in the statute of the meaning of a publication made in good faith, is wide enough to indicate almost every way in which the protection of the occasion can be forfeited by being used for purposes foreign to that for which it is given. One is if the person making the defamatory statement believes it to be untrue."[1]

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[1] (1966) 117 CLR 185 at 209.

[16] That same construction is necessarily implicit in the reasoning of McPherson JA in *Bellino v ABC* [1998] QCA 113,[2] relevantly giving the judgment of the Court, in a proceeding in which the plaintiff conceded on appeal that there was no issue of whether the defendant believed the defamatory matter to be untrue. The appeal went ahead on whether or not the jury was entitled to conclude, as it did, in the negative on the question put to them, namely whether or not the defendant was actuated by ill-will to the plaintiff or by any other improper motive. It is also consistent with His Honour's judgment in *Erglis v Buckley & Ors* [2005] QCA 404[3] at [10] and [11]. That line of authority shows a consistent construction of s 16(2) whereby a plaintiff excludes good faith, and establishes its absence, by proving any one of the four matters specified in the subsection.

The first publication

[17] The learned judge then applied the law as correctly described by the judge to each of the three publications. Regarding the publication of 23 July 2002, the judge determined that all the pleaded imputations clearly arose from the publication. However, on the appeal, Mr Favell of counsel, leading for the respondent, formally conceded it was difficult, if not impossible, to make that finding in respect of paragraphs 12(d), 12(e), and 12(h) of the pleadings. As to the first pleaded imputation, Mr M Martin, counsel for Mr Beattie, accepted it could arise. Mr Favell's concession, not made at the trial, makes it difficult to uphold the judgment as to damages for that publication. The judge awarded $10,000 in general damages in respect of each publication, and $2,000 for aggravated and exemplary damages for each.

[18] The learned trial judge did not consider each of the pleaded imputations separately, but did consider the specific argument advanced on Mr Beattie's behalf that the words used did not infer that there had not been a finding or hearing in relation to improper conduct by Mr Jamieson, nor that it had been proven. The learned judge described the submission as completely insupportable, because of the description of Mr Jamieson being removed from office at the recent EGM because of improper conduct. That robust conclusion is now effectively conceded as accurate by Mr Martin.

[19] But there is still the defence of publication in good faith for the purpose of giving information to others believed on reasonable grounds to have an interest in knowing the truth. As to that, the learned judge concluded that the publication was not made in good faith, and that it was obviously designed to achieve Mr Beattie's ends of having Mr Jamieson removed as chairman of the St Tropez North Body Corporate, by any means whatsoever, including "admitted untruths". That strong finding referred by way of footnote to page 165 of the transcript. The learned judge had earlier described in the reasons for judgment that Mr Beattie had given "electioneering" as his motive for describing Mr Jamieson's removal because of improper conduct, and to the fact that Mr Beattie had said that he was not required to tell the recipients of the letter what the alleged improper conduct was. The judge also described Mr Beattie as having conceded, in cross-examination, that what he was doing was passing on his conclusions, rather than the information from which persons receiving the correspondence might be able to form their own conclusions. On those grounds, the judge found the publication was not made in good faith.

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[2] Appeal No 51 of 1997, 2 June 1998.

[3] Appeal No 2451 of 2005, 4 November 2005.

[20] Those were insufficient grounds for that finding. Mr Favell conceded on the appeal that, contrary to the respondent's written argument, the expression of an opinion could constitute passing on of information, as this Court had held in *Sorrenson v McNamara* [2004] 1 Qd R 82.[4] Mr Beattie had said that his purpose, in referring in that letter to the reason for Jamieson's dismissal, was to inform the owners of St Tropez North "if they weren't aware of this event, of what had occurred".[5] Further, the concession in cross-examination that Mr Beattie was passing on his own conclusions was made in respect of the conclusion, which he acknowledged was implicit in his document, that if Mr Baptiste became chairman, that would enable both committees to move forward quickly, addressing the important issues at hand; Mr Beattie made the same concession about his description of an "ongoing crisis" within the complex, that being an opinion he had formed, particularly regarding the roof. Mr Favell also agreed that a dominant motive of diminishing the prospects of election of an opposing candidate neither constitutes nor negates malice (per Gleeson CJ in *Roberts v Bass* (2002) 212 CLR 1 at 12, in [12]).[6] Again, although the learned judge described the admitted motive as "electioneering", referring by footnote to pages of the transcript, those pages included no reference to "electioneering"; that occurred a little later,[7] in a passage in which Mr Beattie said that there was an electioneering campaign going on, and that Mr Jamieson was "writing letters too."

[21] The learned judge's important reference to "admitted untruths" as one of the means by which Mr Beattie, by that publication, was attempting to remove Mr Jamieson as chairman from St Tropez North, would support a finding of absence of good faith, if open on the evidence. But the finding appears to have been a reference to an inconsequential matter which emerged in the cross-examination.[8] The cross-examiner had actually misquoted what Mr Beattie had written, and Mr Beattie, in cross-examination, accepted the mis-statement. What Mr Beattie wrote – and this was not the subject of litigation – was:

> "4. Motion 12 – Appointment of Body Corporate manager. This old chestnut raises its head again after this same motion was defeated at three previous general meetings.
>
> Re footnote: This claim is that the recommended firm will charge considerably less than Body Corporate Services at $110 per lot. Body Corporate Services charge $95 per lot!
>
> Opinion is that of all the Body Corporate Managers in Queensland the recommended company would be the last you would engage."

[22] In cross-examination, it was put that Mr Beattie had recited the opinion of all body corporate managers in Queensland,[9] and Mr Beattie accepted that statement as accurate, although it clearly was not. He was then taxed with the proposition that he did not speak with every body corporate manager in Queensland, and he agreed he had not; and he said that he had probably spoken to Ms Cervetto (who unsurprisingly condemned the body proposed to replaced her corporate entity), to

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4 [2004] 1 Qd R 82 at 87; [2003] QCA 149; Appeal No 4592 of 2002, 4 April 2003.
5 AR 165.
6 [2002] HCA 57.
7 At AR 170.
8 At AR 163-165.
9 At AR 163 line 51.

the President of the Body Corporate Unit Association, and to a third person. He contended he had made reasonable inquiries, and somewhat weakly denied that it was untrue to write – as he in fact had not, but as he wrongly agreed he had – that he had spoken with every body corporate manager in Queensland. That was the only "untruth" asserted in cross-examination, and, with due respect, the learned trial judge was in error in treating that evidence as disclosing any untruth or any discreditable conduct by Mr Beattie. In fact what Mr Beattie showed were reasonable grounds for the opinion he expressed, which was not pleaded as a statement giving rise to any defamatory imputation.

[23] The learned judge did not identify any untruth in the information Mr Beattie had conveyed to the unit owners of St Tropez North. There was no suggestion that those unit owners did not have an interest in knowing the truth as to the matters on which the complained of passages conveyed information. The judge made no finding that the published matters were not relevant to those matters, nor that the manner and extent of the publication exceeded what was reasonably sufficient for the occasion. The finding that the plaintiff had established an absence of good faith apparently followed from a finding – not plainly made but implicit in the reasons – that Mr Beattie believed what he wrote in that first publication to be untrue. The evidence did not support that finding, nor the further finding, separately made, that the plaintiff had demonstrated malice by Mr Beattie towards him,[10] in that publication.

The second publication

[24] The learned judge made the same errors regarding the second publication, in respect of which the judge held that all the pleaded imputations arose from the letter dated 2 August 2002. Mr Favell conceded the pleaded imputations 15(c) and 15(d) could not arise, and the same problem immediately arises as to the damages for the second publication. I consider the pleaded imputation 15(e) arose in a more modified form, in that the publication conveyed that Mr Jamieson had a potential conflict of interest, in which he might prefer his own to those of the body corporate. Imputation 15(g) was conveyed, and I consider none of the other pleaded imputations were. However, that may be an excessive refinement[11] of approach, and once again what matters is the finding made by the learned judge that those imputations were not communicated in good faith, but were part of an electioneering campaign in which Mr Beattie was "plainly prepared to use any means to achieve what he saw as the appropriate end".[12] That conclusion appears to have been based on the material described earlier, as well as further opinion that Mr Beattie could not reasonably have held the view that Mr Jamieson, as only one committee member, "was responsible for the failure to repair the roof when that motion was put to an EGM and defeated by lot owners."[13] The learned judge referred, by footnote, to the evidence at pages 126 and 168 of the transcript for that conclusion. The first of those references was to the evidence of Mr Beattie describing a warning given to the body corporate that insurance might be withdrawn if the wear and tear on the roof were not attended to; the second was to the evidence of Mr Beattie that he had voted at the EGM against his own motion for the

[10] At [45] in the reasons for judgment, at AR 27.

[11] See *Favell v Queensland Newspapers Pty Ltd* (2006) 221 ALR 186 at [13]-[14], and particulars at [22]; [2005] HCA 52.

[12] *Jamieson v Beattie* (unreported, District Court, Dearden DCJ, Southport, 9 December 2005), at [38].

[13] *Jamieson v Beattie* (unreported, District Court, Dearden DCJ, Southport, 9 December 2005), at [39].

replacement of the roofing membrane, because it had been brought to his attention during the meeting that the proposed contractor did not have the prescribed license. Mr Beattie's evidence was that "we didn't want to vote on something that was illegal."[14] A little later in his evidence in cross-examination Mr Beattie described the chairman as "our leader", adding "[t]hey're the people that are guiding our little body corporate around."[15] That evidence is insufficient to support the conclusion expressed by the learned judge, namely that Mr Beattie could not reasonably have held the view that Mr Jamieson was responsible for failure to repair the roof when the lot owners had defeated the same motion.

[25] The learned judge also concluded that the evidence of Ms Cervetto indicated Mr Beattie could not have held the belief that Mr Jamieson was responsible for failing to repair that roof; but the judge referred by footnote only to the evidence by Ms Cervetto that a building manager would obtain two quotations for repair work, which would both be submitted to a committee meeting, and ultimately to an AGM or EGM of unit owners. That evidence conveys nothing to contradict Mr Beattie's opinion that Mr Jamieson was responsible for a failure to repair the roof. In any event, all that Mr Beattie had written on that topic in the second publication was that Mr Jamieson had not telephoned Mr Beattie seeking Mr Beattie's input on matters such as the major roof problem.

[26] Finally, the judge concluded that Mr Beattie could not reasonably have held the view that Mr Jamieson was devaluing the value of the owners' assets. That was not pleaded as an imputation arising from the second publication, although Mr Beattie did refer to "the value of your unit" in the document. Mr Beattie swore he did have the opinion that[16] Mr Jamieson was diminishing the value of the building at St Tropez North, and that his opinion was based on the fact that the building's presentation was poor, many owners were complaining about it, the painting and the roof needed to be attended to, and were not being attended to.[17] Mr Jamieson had been the chairman for some six months by the time of that complaint. The essence of Mr Beattie's explanation for his opinion[18] was his understanding that Mr Jamieson intended to ensure that levies on unit owners were controlled and did not "continue to go through the roof", whereas Mr Beattie thought the building needed money spent on it; Mr Jamieson's attempts to cut the building costs to owners were therefore diminishing its value. With respect, those answers were not relevant to the defamation pleaded in the second publication, and they describe an apparently reasonably held view that the value of the building was diminishing. The learned judge described no other, and had insufficient, grounds for finding the defence of qualified protection was not available. The judge so found because of the conclusion that Mr Beattie had not acted in good faith, and the finding that malice had been demonstrated.

The third publication

[27] Regarding the third publication, the learned judge also concluded that all pleaded imputations were made out, and that the defence of qualified protection was not. Mr Favell conceded 20(b) could not arise, but defended the others. The learned

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[14] At AR 221, transcript 168.

[15] At AR 223, transcript 170.

[16] At transcript 138, 139; AR 191.

[17] At AR 226-227; transcript 173, 174.

[18] At transcript 178, AR 231.

judge was particularly critical of the statement by Mr Beattie that "there is some type of agenda by Fordham and Jamieson to diminish the value of St Tropez North", holding that to be a clear and blatant defamation. For my part, albeit again perhaps because of excessive refinement, I would conclude that the pleaded imputation 20(d) was made out, and so too were modified versions of the pleaded imputations 20(a) and 20(c). The pleaded words do not give rise to imputations of illegal, dishonest, or corrupt activities or purposes, and those pleaded imputations were not made out.

[28] Once again the important matter is the pleaded defence, and again the learned judge held that publication was not in good faith, but was part of an electioneering campaign designed to create bad impressions about Mr Jamieson. The judge also held that the letter was not sent for the purpose of giving information to the persons to whom it was addressed, but was sent for the purpose of conveying Mr Beattie's conclusions or beliefs about alleged impropriety, rather than the facts on which those were based. But the letter did convey information about recent events, particularly the resignation of Mr Baptiste, and it asked for new owners to nominate for the next year's committee.

[29] The learned trial judge accepted the submission that Mr Beattie could not have believed that Mr Jamieson had been thrown out by "all" owners of St Tropez North, since that was untrue. The judge also accepted the submission that Mr Beattie could not have believed, and he had no basis to believe, that Mr Jamieson and Mr Fordham had an agenda to diminish the value of St Tropez North. That finding quoted the words of the publication itself, which were not reproduced in the reasons for judgment, and not the pleaded imputations. The learned judge did not state any specific reasons for accepting the submission, nor did the judge give reasons for concluding that any – let alone all – the pleaded imputations were conveyed by that statement. As to the finding about non-belief in an agenda, Mr Beattie swore that he did believe that, and gave his reasons, described above. It may seem hypocritical for Mr Beattie to complain in August 2002 about unnecessary expenditure incurred by Mr Jamieson as chairman, and in December 2002 about Mr Jamieson not being willing to incur expenditure on roof repair and improvement of the building facade. But that is different from a finding that Mr Beattie neither had that belief as to Mr Jamieson's "agenda", nor any basis for it.

[30] Mr Beattie was plainly overstating the position if he was implying Mr Jamieson had a goal or purpose of lowering the value of St Tropez North, when that was simply the result of an understandable wish, which wish Mr Beattie believed or knew Mr Jamieson had, to avoid imposing high levies on unit owners. But unreasonably overstating the position, by implying a purpose to achieve a result that simply followed from a quite different and known object or goal, does not necessarily establish that Mr Beattie believed what he wrote to be untrue. That conclusion may be open, but if drawn it should be explained.

[31] Likewise Mr Beattie was cross-examined to suggest that Mr Jamieson was not "thrown out", but not that that had not been done by "all" owners of St Tropez North. In fact the evidence was that the minutes of the body corporate meeting of 9 August 2002 recorded that Mr Jamieson was removed as chair and from the committee because of his "improper conduct administering Body Corporate

affairs"; that motion was carried by 11 votes to 6, with four abstentions.[19] The learned judge was accordingly correct in concluding that Mr Beattie could not have believed that Mr Jamieson had been either removed or thrown out by "all" owners, since he was present in person on 9 August 2002. But that overstatement, not the subject of any cross-examination, establishes neither an absence of good faith, nor actual malice. I conclude that the learned trial judge erred in finding those matters in respect of all three publications, as the judge did. The problem is simply that the reasons the judge gave were insufficient to support those conclusions.

Malice

[32] The learned judge considered malice separately from the judge's conclusions that, for each publication, an absence of good faith was proved. Mr Favell submitted that it perhaps followed, from the structure of the judgment, that the learned judge had concluded that the defendant had not established the defence under s 16(1)(e), in that the judge had concluded Mr Beattie was not supplying information, but was just giving vent to his malice. Mr Favell also contended that to establish malice, it was relevant, and probably sufficient, that Mr Beattie had no basis for believing what he wrote was true, and did not believe it was, and that was what the judge had actually found.

[33] The judge concluded, as to malice, that none of the three impugned publications sought to provide information to unit owners, but were instead part of an electioneering campaign, in the course of which Mr Beattie considered that the end justified the means, and which included the supplying of information or assertions by Mr Beattie which were untrue and which could not have been believed by Mr Beattie to be true. The grounds for those conclusions were not separately identified, but must include the passage in cross-examination in which the cross-examiner misquoted what Mr Beattie had written, and in which Mr Beattie fell into the same error. The learned judge gave no other express grounds for finding malice, and the evidence discloses none. Accordingly, the conclusions separately stated about malice seem to have been part of the reasoning on which an absence of good faith was inferred, and are not capable of being regarded as a finding that the defendant had not established the necessary matters for a defence under s 16(1)(e). If that was what the learned judge intended, the judge needed to describe more reasons to sustain the conclusion.

[34] The learned judge erred in finding on the reasons the judge gave that the plaintiff had established an absence of good faith, and actual malice, and since that appears to have been the only ground in which the defence of lawful excuse – qualified privilege – was rejected, the verdict for the plaintiff must be set aside, and a new trial ordered. I would order:

- The judgment and costs orders for Mr Jamieson be set aside;
- a new trial ordered;
- that Mr Jamieson pay Mr Beattie's costs of and incidental to the appeal;
- that the costs of the first trial be reserved to the next trial judge.

[35] **HOLMES JA:** I have had the advantage of reading the judgment of Jerrard JA and gratefully adopt his Honour's setting out of the publications, the backgrounds to them and the findings of the trial judge. I agree with him that the judgment must be

[19] See AR 343; and at 127, 134 (transcript 74 and 81).

set aside: the evidence could not support all of the imputations found and the learned trial judge's approach to the defence of qualified privilege was, as Jerrard JA explains, flawed. I agree also with the orders his Honour proposes.

[36] **DOUGLAS J:** I also have had the advantage of reading the reasons of Jerrard JA, agree with them and with the orders proposed by his Honour.