SUPREME COURT OF QUEENSLAND

CITATION:	*O'Hara v Sims* [2009] QCA 186
PARTIES:	**BRIAN O'HARA** (plaintiff/appellant) **v** **CLIFF SIMS** (defendant/respondent)
FILE NO/S:	Appeal No 12175 of 2008 SC No 11608 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 July 2009
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2009
JUDGES:	Keane, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs to be assessed on the standard basis**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – TRIAL – FUNCTIONS OF JUDGE AND JURY – IN GENERAL – where respondent made statements in letter circulated to club members – where appellant alleged statements conveyed defamatory imputations – where jury found that statements either did not convey imputations or that imputations were not defamatory – whether findings reasonably open to jury DEFAMATION – PRIVILEGE – QUALIFIED PRIVILEGE – STATEMENTS MADE IN RESPECT OF A DUTY OR INTEREST – PARTICULAR STATEMENTS – REASONABLENESS OF PUBLICATION – where respondent claimed defence of qualified privilege on basis that publication was reasonable in the circumstances under s 30(1)(c) of the *Defamation Act* 2005 (Qld) – where trial judge ruled in favour of respondent – whether trial judge erred *Defamation Act* 2005 (Qld), s 22, s 25, s 30, s 31

Austin v Mirror Newspapers Ltd [1986] AC 299, cited
Byrne v Deane [1937] 1 KB 818, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, cited
Chakravarti v Advertiser Newspapers Ltd (1998) 193 CLR 519; [1998] HCA 37, cited
Einfeld v Bread Manufacturers of New South Wales, unreported, Supreme Court, NSW, Hunt J, 10 February 1981, cited
Gai Waterhouse v The Herald & Weekly Times Limited, unreported, Supreme Court, NSW, Levine J, 10 June 1997, cited
Gai Waterhouse v The Herald & Weekly Times Limited, unreported, Supreme Court, NSW, Levine J, 29 August 1997, cited
Hall v Queensland Newspapers Pty Ltd [2002] 1 Qd R 376; [2000] QCA 308, cited
Holdsworth v Associated Newspapers (1937) 53 TLR 1029, cited
John Fairfax Publications Pty Ltd v Gacic (2007) 230 CLR 291; [2007] HCA 28, cited
John Fairfax Publications Pty Ltd v Rivkin (2003) 201 ALR 77; [2003] HCA 50, cited
Jones v Skelton [1963] 1 WLR 1362, cited
Mallik v McGeown [2008] NSWCA 230, cited
Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632; [1979] HCA 3, cited
O'Hara v Sims [2008] QSC 301, affirmed
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 254 ALR 606; [2009] HCA 16, cited
Sim v Stretch [1936] 2 All ER 1237, cited
Wallachs v March [1928] 1 TPD 531, cited

COUNSEL: T E F Hughes AO QC, with P J McCafferty, for the appellant
D K Boddice SC, with A P J Collins, for the respondent

SOLICITORS: Nyst Lawyers for the appellant
Gall Stanfield & Smith for the respondent

[1] **KEANE JA:** Mr O'Hara brought an action for damages for defamation against Mr Sims arising out of a letter published by Mr Sims to the members of the Gold Coast Turf Club ("the Turf Club") in October 2007 during the biennial election for membership of the Committee of the Turf Club. Mr O'Hara, who had been a member of the Committee of the Turf Club since 2003, was standing for re-election to the Committee. Mr Sims, an octogenarian retired horse trainer, was a life member of the Turf Club.

[2] Mr Sims' letter the subject of Mr O'Hara's action concluded with the words: "In my view this man is now unworthy of a position on our committee. I will not be voting for Brian O'Hara." Mr O'Hara contended that the letter conveyed the following imputations which were defamatory of him:

(a) that he had engaged in conduct making him unworthy to be a Committee member of the Turf Club;
(b) that he had subordinated the due performance of his duty as a Committee member of the Turf Club to his interest in self-promotion;
(c) that he had acted rashly as a Committee member of the Turf Club.

[3] Mr Sims contended in his defence that his letter had not conveyed the imputations alleged by Mr O'Hara and that, in any event, those imputations were not defamatory of him. Mr Sims also sought to rely by way of defence on s 25 (truth), s 30 (qualified privilege) and s 31 (honest expression of opinion) of the *Defamation Act* 2005 (Qld) ("the Act").

[4] The learned trial judge withdrew the defences set up under s 25 and s 31 of the Act from the jury's consideration. At the request of the parties, his Honour reserved his ruling on the availability of a defence under s 30 of the Act until after the jury delivered its verdict on the only issues left for their determination, namely whether Mr Sims' letter conveyed the imputations alleged by Mr O'Hara and, if so, whether they were defamatory of him.

[5] The jury concluded that imputation (a) was not conveyed by the letter. The jury concluded that imputations (b) and (c) were conveyed by the letter but that they were not defamatory of Mr O'Hara. Upon these findings the learned trial judge entered judgment in the action for Mr Sims.

[6] With the consent of the parties, the learned trial judge then determined the issue as to qualified privilege. That determination was in favour of Mr Sims. For that reason too his Honour gave judgment for Mr Sims.

[7] Mr O'Hara appeals to this Court, contending that each of the jury's findings was one which no reasonable jury could reach[1] and that the learned trial judge erred in upholding the defence of qualified privilege under s 30 of the Act in that the publication of the letter was unreasonable in the circumstances.

[8] On Mr Sims' behalf it is urged that the judgment in his favour was soundly based, and, in the alternative, that the judgment can be sustained by the defences under s 25 and s 31 of the Act. This alternative argument was raised by a notice of contention filed on Mr Sims' behalf.

[9] Before I consider the detail of the arguments which arise on the appeal, I will set out the facts of the case in a little more detail. I will also set out at some length the reasoning of the learned trial judge on the qualified privilege issue.

The facts

[10] The text of the letter of which Mr O'Hara complained was relevantly in the following terms:

> "This year there are a number of new applicants standing for election ... and I would urge you to closely examine the credentials of each before voting. Last year I supported Brian O'Hara ... and he was duly

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[1] *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77. See also *Hall v Queensland Newspapers Pty Ltd* [2002] 1 Qd R 376 at [17] – [21]; *Mallik v McGeown* [2008] NSWCA 230 at [57] – [61].

> elected. Unfortunately I now have to say that in my opinion I made a very serious mistake.
>
> As we all know there have been various stories circulating regarding selling our existing facilities and moving to Palm Meadows. Although a number of people have different views on such a move. Those in elected positions such as Mr O'Hara should take into account all available facts before promoting a particular stance. Our chairman Bill Millican has stated in writing it is vitally important that before any decision is made, all the facts should be presented to the Board by the proponents and any decision is made only after those facts have been considered.
>
> What is Brian O'Hara's stance? On May 4th 2007 he is quoted in the Gold Coast [Bulletin] Newspaper as saying 'Move and move on or stay and stay forever provincial'. Everyone is entitled to an opinion however Mr O'Hara should remember he was elected to represent 2,700 members of the Gold Coast Turf Club. At the date of making those statements no proposal had been put to the board of the Club and as of today's date no proposal has been put to the Club. What was Mr O'Hara basing his views on or was he more interested in self-promotion? Any member of our board is entitled to their own view but before publicly declaring one way or the other they should at least wait for a proposal to be put forward and consider all the facts, good or bad. His actions are akin to selling your home without knowing how much the purchaser is willing to pay.
>
> In my view this man is now unworthy of a position on our committee. I will not be voting for Brian O'Hara.
>
> Regards and good punting"

[11] This letter referred to a proposal by a developer, Eureka Funds Management, for the relocation of the Turf Club's facilities from Bundall to a new site at Palm Meadows. This proposal was obviously a matter of great interest to the members of the Turf Club. Mr O'Hara had been actively involved in the debate concerning the merits of the proposed relocation.

[12] On 4 May 2007 Mr O'Hara had given an interview to Mr Mossop, a journalist, as a result of which the following article appeared in the Gold Coast Bulletin newspaper:

> "Move and move on or stay and stay forever provincial.
>
> Those are the options the 2500 members of the Gold Coast Turf Club will be faced with when an ambitious racetrack relocation plan is put to them next month, according to deputy chairman Brian O'Hara.
>
> The proposal calls for the sale of the Bundall complex and construction of several tracks, a modern club grandstand and parking areas, stables and Magic Millions complex on a new site at Palm Meadows.
>
> At stake is recognition of thoroughbred racing on the [Gold] Coast as a metropolitan entity which would bring with it metropolitan meetings and increased prizemoney ...
>
> …

> Another staunch champion of the move is Dr O'Hara, who a year ago was sceptical, but who now stands convinced of the merits of relocation.
>
> 'In December I said we should never move,' admitted Dr O'Hara, 'but this proposition is far too important to be ignored. Bob Bentley (of QR) came down and blew us away.'
>
> 'If we go with this we can have one of the best racing industries in the world.'"

[13] The article also quoted Mr O'Hara as saying that the Turf Club's existing site at Bundall was too small to provide a venue for larger races and could not be extended and that the proposed new racing complex at Palm Meadows would provide the opportunity for larger, richer and more frequent race meetings which would attract horses from overseas.

[14] Mr O'Hara gave evidence at trial that, in truth, his support for the relocation proposal was always dependent upon a process of due diligence. It must be said, however, that Mr O'Hara took no steps to correct the impression of unqualified support for the relocation proposal conveyed by the article. He had ample opportunity to do so.

[15] In this regard, on 18 May 2007 Mr Sims sent the following letter to all members of the Turf Club:

> "My main reason for writing to you is to ask you to give serious thought to the matter or our Club being sold off and relocated to a new site at Palm Meadows. For people like me it is difficult to contemplate, after all the years of hard work and money that has been put into making this Club a successful racing venture, how a 'glitzy' remote development will give the true racing fraternity the same level of servicing and the integrity and identity we enjoy here at Bundall ...
>
> As members we are entitled to be fully informed on some alternative options for our existing Turf Club. [I am] sure that with careful vision and planning, the present racetrack and facilities ... could be restructured and designed to take us well into the future.
>
> …
>
> As of today's date, Eureka Funds Management ... has not put the final proposal for the suggested move to the board. How can any board members propose what the financial implications are and what is best for the members when the board is not in possession of the facts. All board members should wait until they have all the facts before publicly stating a position either for or against the proposal."

[16] Even after this letter had been published to the membership of the Turf Club, Mr O'Hara took no steps to make it clear, either to Mr Sims or to the members generally, that Mr O'Hara's support for the relocation proposal was contingent on a full assessment of the "financial implications" of the relocation proposal.

[17] It is also to be noted in this regard that Mr Sims' evidence, which the learned trial judge accepted, was to the effect that in April 2007, on the last occasion when Mr Sims and Mr O'Hara discussed the relocation proposal, Mr O'Hara expressed his support for the relocation while Mr Sims expressed his firm opposition. In the course of this conversation, Mr O'Hara said nothing to indicate that his support for the proposal was contingent upon the proposal being found to "stack up" financially. Mr Sims also gave evidence that other members of the Club had told him that Mr O'Hara supported the move to Palm Meadows in circumstances where he knew that no detailed proposal had been received by the Turf Club.

[18] At trial, Mr Hughes of Queen's Counsel, who appeared with Mr McCafferty of Counsel on behalf of Mr O'Hara, elicited the following admissions from Mr Sims in the course of cross-examination:

> "Did you intend to convey ... that the plaintiff had subordinated the due performance of his duty as a director of the club to his own interest in self promotion? - Yes.
>
> And that ... was a very serious allegation to convey, wasn't it? - Yes.
> …
>
> Would you agree that in this letter you intended to convey an allegation that the plaintiff had engaged in conduct making him unworthy to be a committee member of the Gold Coast Turf Club? - Yes.
>
> … And such an allegation ... would be a seriously damaging allegation about the plaintiff, wouldn't it? … - Well, yes, it is. …
>
> You would agree, would you not, that you intended to convey in your October letter an allegation that the plaintiff ... had acted rashly as a committee member of the club? - Yes.
>
> … And that's a pretty serious allegation against a company director, isn't it? - Well, he did.
>
> It is a serious allegation, isn't it? - Yes, I suppose it is."

[19] Mr O'Hara's claim was based in part on the circumstance that the Turf Club is a body corporate of which the Committee members are directors. As a director of a body corporate, each member of the Committee was subject to a fiduciary obligation to act solely by reference to the interests of the members of the Turf Club as a whole and not to promote his self-interest. Mr O'Hara's case was that Mr Sims' letter was to be understood as involving a charge that Mr O'Hara had breached his fiduciary obligations to the Turf Club.

The decision of the qualified privilege issue

[20] Section 30 of the Act provides for a defence of qualified privilege for the publication of defamatory matter to a person if the defendant proves a number of specified matters. The element of the defence which was in controversy in this case was that specified in s 30(1)(c) of the Act, namely that "the conduct of the defendant in publishing the matter is reasonable in the circumstances". In that regard, s 30(3) of the Act provides:

"In determining … whether the conduct of the defendant … is reasonable in the circumstances, a court may take into account–

(a) the extent to which the matter published is of public interest; and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and

(c) the seriousness of any defamatory imputation carried by the matter published; and

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business environment in which the defendant operates; and

(g) the sources of the information in the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant."

[21] The learned trial judge summarised the issues raised in relation to the defence of qualified privilege in the following terms:[2]

"There is, I think, no doubt that Mr Sims' letter was a communication of such a nature that he had an interest in making it and the members to whom he wrote had a corresponding interest in having it made to them. The communication was therefore privileged unless made maliciously or unreasonably. Malice, as I mentioned, is not asserted. I do not understand the plaintiff to contend that the communication was not privileged on any ground other than the reasonableness of the publication. No submissions were addressed to any other point and it seems to me clear that there was a reciprocal interest between Mr Sims and the other members with respect to the subject matter of his letter. That concerned who should represent them on the committee of their club and in particular the attitude of elected committee members to the proposed relocation. That had been a topic of controversy and disagreement and the attitude of those who sought office to the relocation was of particular relevance to the members when casting their votes.

The plaintiff advances five reasons to show that the publication was unreasonable. They are:

(a) The admitted seriousness of the defamatory imputations.

(b) The flimsiness of the sources relied on by the defendant as a basis for the imputations.

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2 *O'Hara v Sims* [2008] QSC 301 at [44] – [45].

(c) The defendant's failure to ask the plaintiff prior to publication for his 'side of the story'.

(d) The defendant's failure to ask the journalist whether the information he published was accurate.

(e) The defendant's evidence that he would have published the letter anyway even if he had known that the article was an inaccurate representation of the plaintiff's opinions about relocation."

[22] As to the first of the reasons advanced by Mr O'Hara, the learned trial judge did not consider that the imputations were as serious as Mr O'Hara contended. His Honour took the view that in a heated election campaign "the imputations are best described as anodyne".[3]

[23] The learned trial judge then addressed himself to the second, third and fourth of the reasons advanced by Mr O'Hara to show that the publication was unreasonable. His Honour said:[4]

> "The next three grounds can be taken together because they have a common theme. It is that Mr Sims had no basis for his criticisms of Mr O'Hara other than that which he asserted in the letter and which he took from the 4 May article. That was that Mr O'Hara supported the relocation though no proposal worthy of the designation had been received and there was nothing on which to base a rational decision to move.
>
> That is the tenor of the article because it portrays Mr O'Hara as advocating the move and expressing enthusiasm for it at a time when it was known there was no such proposal. Had that been the fact then the criticisms would have been justified. It would have been rash to promote a move without knowing anything of the circumstances of the move and to promote it publicly in the local newspaper would well give rise to the inference that the plaintiff was seeking self-promotion and not performing his duty of making a decision on proper facts in the best interests of club members. Such rash conduct would give rise to questions about his fitness for office.
>
> But the facts were otherwise. Mr O'Hara's support was conditional and the condition of his support meant that he was not acting wantonly in promoting the relocation.
>
> The publication is said to be unreasonable because Mr Sims assumed without checking with either the plaintiff or Mossop whether the article correctly represented the plaintiff's opinion.
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> This point, which is the plaintiff's main point, is met by the plaintiff's inactivity. He did nothing to correct the erroneous representation of his views to the world, or that part of it which reads the Gold Coast Bulletin. His reason for not seeking a correction was

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3 [2008] QSC 301 at [49].

4 [2008] QSC 301 at [51] – [60].

> that there was 'not much point' in complaining: a complaint 'wouldn't get anywhere, would achieve nothing' so he 'wouldn't bother'.
>
> Whether one finds that convincing or not, the point is that Mr O'Hara let the representation of his opinion which appeared in the article stand uncorrected. He did not write a letter to the editor of the Bulletin for publication in which he expressed the important qualification to his support for the relocation, nor did he seek Mr Mossop's co-operation in having a correction published in a subsequent edition. Nor did he seek to communicate with the members of the club who might read the paper. This last point is important. The article did stir up controversy and some criticism of Mr O'Hara's view which, as expressed in the newspaper, was rash in his support for the relocation without a detailed proposal. Mr Sims expressed his particular objection in his letter of 18 May 2007 which the plaintiff received and read. He made a particular point of the inappropriateness of making a decision without proper material.
>
> Mr O'Hara did nothing to correct the misconception. He did not even respond to Mr Sims personally by an individual letter. Nor did he speak to him at the club which he attended every Saturday for the races. It would have been easy and without cost to explain to Mr Sims that he had been misquoted and that his opinion on the move, though it differed from Mr Sims', was sensibly based. Nor did he take the opportunity of submitting an article in the spring issue of the club magazine circulated, without cost to him, to the members in which he could have clarified his position.
>
> In these circumstances it is not surprising that the defendant should assume the correctness of the newspaper article. On a matter of particular importance to the membership the plaintiff allowed his views to be seriously misrepresented and made not the slightest effort to have his real opinion promulgated, not even to the defendant whom he saw every week at the races. The plaintiff must have expected that people would assume his views were those reported by Mr Mossop.
>
> In a real sense he brought the defendant's criticisms on himself.
>
> It is right that much of what one reads in newspapers is not true: but much of it is. The lack of any effort at any level to correct the error in the article would lead naturally to the conclusion that it was correct."

[24] The learned trial judge then addressed himself to the fifth point advanced on Mr O'Hara's behalf to show that the publication was unreasonable. His Honour said:[5]

> "The last point is that the publication was unreasonable because Mr Sims said he would have written his letter whether or not he had known that the 4 May article did not accurately record the plaintiff's

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5 [2008] QSC 301 at [61] – [64].

opinions. The defendant's acceptance of that proposition in cross-examination was, however, immediately qualified by his explanation that he firmly believed that the views attributed to Mr O'Hara in the article were, in truth, his views. The question put to him was hypothetical: 'if you knew that Mr O'Hara did not think the club should relocate in the absence of a detailed proposal would you still have written the letter?'. His answer was a rejection of the hypothesis. He said:

> 'If you had known it to be the fact that Dr O'Hara was not unconditionally in favour of the relocation proposal, you wouldn't have expressed the criticisms that you did express in your letter, would you? - I would have ... because Dr O'Hara spoke to many people at the track ... . I wasn't going on what I read in the paper. I was going on what other members of the club had told me.
>
> ... Would you agree that if the Mossop article did not accurately express Dr O'Hara's views on the relocation proposal you might not have written in the terms you did? - No. I don't think that would make any difference. The number of people that came to me at the club on a race day saying that he was running around, they say he was a salesman for the sale of the club'.

Mr Sims made it clear he based his letter on three things. One was his assumption that the article was correct: the second was what he was told by others at the club about what the plaintiff himself had said: and the third was what Mr O'Hara had said to the plaintiff in their last conversation in April 2007. The plaintiff and defendant disagree as to the precise content of the conversation but the versions coincide in this: that the plaintiff expressed some level of support for the relocation while the defendant was adamantly opposed to it, but nothing was said by the plaintiff to explain that his support was conditional upon the proposal 'stacking up'.

There is a degree of imprecision about the evidence of what the plaintiff's views as expressed to members of the club were. It is, I think, a fair inference that Mr Sims understood the plaintiff to be supportive of the move in circumstances where he knew no detailed proposal had been received. The plaintiff's failure to correct the error in the article would serve to reinforce the defendant's assessment of Mr O'Hara's position, to say that he would have published his letter regardless of his state of knowledge of the plaintiff's opinions. He published because he thought the opinions were those expressed in his letter. His error was very largely the product of the plaintiff's decision to let the error go uncorrected.

I do not accept that the evidence establishes that the defendant would have published his letter if he knew the plaintiff did not advocate the relocation unconditionally."

[25] The learned trial judge concluded his discussion of the issue of qualified privilege:[6]

> "In my opinion the circumstances which make the publication of the letter the occasion of qualified privilege establish that the publication was reasonable in the circumstances. The defendant was a life member of the club with a long history of service to it. His communication was limited to other members of the club, all of whom shared a common interest in the election of committee members. The question whether the club should relocate was one of particular importance and controversy and of interest to the club's members. It was of concern to all members that any decision, whether to go or stay, should be made advisedly and after a careful review of all relevant facts. That a prospective committee member advocated acting wantonly with regard to the decision was a matter of particular importance to members and should properly be brought to their attention. The plaintiff had made himself available for an interview by the Gold Coast Bulletin which suggested that he was in favour of the move when no proper factual basis for such a decision had been provided. The plaintiff did not correct that version of his views either generally or by private communication to the defendant or any other member."

The arguments in this Court

[26] I propose to set out and then discuss the arguments agitated in relation to Mr O'Hara's challenge to the jury's verdict. I will then consider the challenge to the learned trial judge's determination of the issue of qualified privilege.

Imputation (a)

[27] On Mr O'Hara's behalf it is argued that the jury's finding that Mr Sims' letter did not convey imputation (a) was perverse. This is said to be so because the letter "related [Mr O'Hara's] unworthiness to serve on the Committee to his conduct as a member of it". It is argued that the substance of imputation (a) was Mr O'Hara's "unfitness, because of his conduct as discussed in [the letter], to serve the [Turf Club] in a fiduciary capacity. [Mr Sims] could not escape that sting by casting the aspersion of fitness for office as a statement of his opinion."

[28] On Mr Sims' behalf, it is said that Mr Sims' letter did not actually charge Mr O'Hara with unworthiness because of a failure on his part to serve loyally as a member of the Committee of the Turf Club. Mr Sims' estimate of Mr O'Hara's unworthiness to be a Committee member was related explicitly to Mr O'Hara's attitude as a candidate for election to the Committee of the Turf Club to the relocation proposal. Mr Sims' expression of that estimate was made in the context of the election in which Mr O'Hara was a candidate and of him as a candidate. It was, so it is said, open to the jury reasonably to conclude that Mr Sims' letter did not convey the imputation that Mr O'Hara's conduct as a committee member, as opposed to the imputation that the position Mr O'Hara was espousing as a candidate, made him unworthy to be elected as a candidate. On this basis, it is said that it was reasonably open to the jury to decline to find that Mr Sims' letter conveyed imputation (a).

Imputations (b) and (c)

[29] As to the jury's findings in relation to imputations (b) and (c), it is argued on Mr O'Hara's behalf that "it is rationally impossible to treat a distinct allegation that

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6 [2008] QSC 301 at [65].

[Mr O'Hara] as a director of the Club breached his duty as such by subordinating its due performance to his interest in self promotion, as not defamatory of him." It is also argued that "it is rationally impossible to attach a non-defamatory meaning to an assertion that [Mr O'Hara] failed in his duty as a director by resorting to rash judgment in a matter affecting the [Turf] Club's interests." This is said to be because of a director's duty to act with due diligence in the affairs of the company.

[30] On Mr Sims' behalf it is argued that not every criticism is so serious as to damage a plaintiff's reputation. In this case the jury is not necessarily to be taken by its finding that the letter conveyed imputation (b) to have concluded that this imputation cast any serious aspersion on Mr O'Hara's loyalty to the Turf Club or upon his honesty or competence as a Committee member. Mr Sims' letter did not purport to offer a critique of Mr O'Hara's performance as a fiduciary officer of the Turf Club. Rather, the imputation expressed a criticism of the flawed judgment involved in Mr O'Hara's support for the relocation proposal. The jury were entitled to take the view that Mr Sims' remarks were not an adverse assessment of Mr O'Hara's performance of his duties as a Committee member of the Turf Club, much less that his performance involved the sacrifice of his obligations as a Committee member to his own interests. Further, to the extent that the jury took the view that the letter did impute "rash judgment" to Mr O'Hara by imputation (c), it was open to the jury to conclude that this imputation was not that Mr O'Hara was guilty of disloyalty to fellow members of the Turf Club rather than an error of judgment.[7] The question was whether the imputation of rash judgment was apt to make ordinary and reasonable people think less of Mr O'Hara; and the jury were reasonably entitled to conclude that ordinary and reasonable people would not think the less of Mr O'Hara because the error of judgment attributed to Mr O'Hara was not very serious.

Discussion

[31] There are a number of matters of general principle which should be mentioned before proceeding to a discussion of the particular imputations in question.

Matters of principle

[32] The first question for the jury was whether each of the alleged imputations was conveyed by the letter, and the second question was whether any such imputation caused ordinary and reasonable persons to think less of the plaintiff. Each of these questions was to be determined by reference to the ordinary and natural meaning of the words in Mr Sims' letter. In *Jones v Skelton*,[8] Lord Morris of Borth-Y-Gest said:

> "The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense."

[33] In *Sim v Stretch*,[9] Lord Atkin said that actionable damage to an individual's reputation was suffered where words published of the individual "tend to lower the

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7 Cf *Byrne v Deane* [1937] 1 KB 818 at 830 – 831.

8 [1963] 1 WLR 1362 at 1371.

9 [1936] 2 All ER 1237 at 1240.

plaintiff in the estimation of right-thinking members of society generally". As French CJ, Gummow, Kiefel and Bell JJ explained recently in *Radio 2UE Sydney Pty Ltd v Chesterton*,[10] subsequent refinements of the test proposed by Lord Atkin mean that the question whether a publication is actionable as defamation is now accurately framed by asking "whether the published matter is likely to lead an ordinary reasonable person to think the less of a plaintiff". Their Honours went on to explain that "words may not only reflect adversely upon a person's private character, but may injure a person in his or her office, profession, business or trade."[11] A person's reputation may be damaged by the publication of words which reflect adversely upon the plaintiff's "fitness or ability to undertake what is necessary to that business, profession or trade."[12] An imputation which causes those to whom it is published to think less of a person in that aspect of his reputation which is concerned with his or her fitness to perform an office, whether public or private, is actionable as defamation.

[34] It is well-settled that if words are capable of conveying a meaning apt to make ordinary and reasonable people think less of the plaintiff, then it is for the jury to determine "whether the words do in fact convey a defamatory meaning".[13] On this appeal, Mr O'Hara must show that the views taken by the jury on these issues were not rationally open to it. The question decided by the jury was a question of fact which necessarily reflects the current state of public opinion.[14]

[35] This Court is obliged to approach a consideration of the jury's verdict with a proper regard to the role of the jury in striking the proper balance between the demands of free speech in a liberal democracy and the legitimate interest of the individual in the protection of his or her reputation. That is the role expressly allocated to the jury by s 22 of the Act.[15] Under s 22(2) "[t]he jury is to determine whether the defendant has published defamatory matter about the plaintiff …". In *John Fairfax Publications Pty Ltd v Rivkin*,[16] Gleeson CJ said:

> "The issue before the Court of Appeal was … whether each of the answers given by the jury to the questions submitted was an answer that no reasonable jury properly directed could have given. It is not

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10 (2009) 254 ALR 606 at [5].

11 (2009) 254 ALR 606 at [10]. See also *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 294[2], 315 – 316 [74], 351 [190].

12 (2009) 254 ALR 606 at [10].

13 *Jones v Skelton* [1963] 1 WLR 1362 at 1370.

14 *Holdsworth v Associated Newspapers* (1937) 53 TLR 1029 at 1033.

15 Section 22 of the Act provides:

"**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.

(3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(4) If the proceedings relate to more than 1 cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.

(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."

16 (2003) 201 ALR 77 at 78 [2]; [2003] HCA 50.

> uncommon, and not inappropriate, for judicial reference to such an issue to be accompanied by admonitions intended to remind appellate courts of a need for restraint. Sometimes such restraint is said to be necessitated by a practical consideration: juries, unlike trial judges sitting alone, do not give reasons for their decisions, and their decisions are, to that extent, unexaminable. Sometimes it is said to reflect deference to the constitutional role of the jury, and to its representative function. …"

[36] The role of this Court is relevantly to ensure that the verdict is within the bounds of rationality. It is to be emphasised that the role of the appellate court is not to ensure that the verdict reflects the "most reasonable" view of the facts. Rather, it is to ensure that the administration of justice proceeds rationally rather than capriciously. The question for this Court then is whether the verdict of the jury is shown to have no rational basis in the facts. In *John Fairfax Publications Pty Ltd v Rivkin*,[17] Gleeson CJ said of one of the jury's findings in that case that it "presents a challenge even to the most adroit rationalisation". In this case a number of grounds have been advanced which suggest that it is possible, without excessive adroitness, to rationalise the conclusions of the jury. I shall discuss these grounds in detail directly but it is necessary first to make two further prefatory observations of a more general nature.

[37] First, as Mr Hughes QC accepted, the judgment of the jury, that the statements made in Mr Sims' letter were not apt to make ordinary reasonable people think less of Mr O'Hara, would not be shown to be erroneous simply because the letter was apt to lead the members of the Turf Club to prefer another candidate for office as a member of the Committee. In my respectful opinion, this concession was rightly made for the following reasons.

[38] Mr O'Hara's cause of action was for defamation not injurious falsehood. In the decision of the High Court in *Radio 2UE Sydney Pty Ltd v Chesterton*,[18] their Honours emphasised the difference between the cause of action for defamation and the cause of action for injurious falsehood, and that a publication will be defamatory only if it damages a person's reputation. The difference between disparagement of, and damage to, Mr O'Hara's candidacy on the one hand, and damage to his reputation in the eyes of ordinary and reasonable members of the community must be borne steadily in mind. The jury were concerned, not with the question whether Mr Sims' letter was apt to harm Mr O'Hara's prospects of success in the election, but with the question whether people to whom the letter was published were likely to think less of Mr O'Hara. It may be that there are communities where the cult of success and celebrity have become so predominant and all-pervasive that the ordinary and reasonable members of those communities think less of a candidate for elective office merely because of a suggestion that his or her candidacy should not succeed. It was the role of the jury to determine whether Mr Sims and Mr O'Hara live in such a community; and no criticism is directed to their determination of this issue.

[39] Secondly, Mr Sims' admissions as to what he intended to convey by his letter or as to the "seriousness" of the imputations is not determinative of the issue as to what the letter conveyed or was apt to convey to an ordinary and reasonable reader. One

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17 (2003) 201 ALR 77 at 78 [4]; [2003] HCA 50.

18 (2009) 254 ALR 606 at [10] – [12].

cannot disregard the possibility that the jury came to the view that the acknowledgments extracted in the cross-examination of Mr Sims reflected confusion on his part or an infirm appreciation of the thrust of what was being put to him. In any event, and perhaps more importantly, the jury were entitled reasonably to conclude that Mr Sims' admissions could be taken as an acknowledgment that Mr O'Hara's prospects of election might have been damaged by the letter: that was after all the evident intention of the letter. But, as I have sought to explain, that is not the same as an admission that Mr O'Hara's reputation was damaged by the letter.

Discussion: Imputation (a)

[40] The jury held that Mr Sims' letter did not convey this imputation. It may readily be accepted that, generally speaking, an assertion that a person's conduct has rendered him unfit to hold office will be regarded as defamatory of him. To the extent, however, that the argument advanced on behalf of Mr O'Hara proceeds upon the assumption that Mr Sims' statements were apt reasonably to be understood only as an imputation that Mr O'Hara's conduct showed that he was not fit to hold office as a director of a company, the argument is as unsound as the assumption on which it depends. It was clearly open to the jury to hold that Mr Sims' letter did not impute to Mr O'Hara conduct which made him unworthy to be a member of the Committee.

[41] To say of one of the candidates at an election that he or she is "not unworthy of a position on [the Turf Club's] Committee" can rationally be understood as a statement of a relative lack of merit of that candidate for election to the office which is not apt to cause ordinary people to think that the candidate has been guilty of misconduct even though it is, at the same time, apt to induce them to vote for another candidate for the office in contest. One can imagine cases where a person, thought by some to be worthy of election or appointment to an office, is described by other commentators as "unworthy" of the office without causing the audience to think that the unworthiness is based on misconduct. To have said of Garfield Barwick that he was not worthy to be appointed Chief Justice of Australia when Owen Dixon was available to fill that office was not necessarily to lead ordinary reasonable members of the community to think that Garfield Barwick was unworthy because of misconduct on his part rather than that Dixon's merits were greater. In Mr Sims' letter the analogous contrast is that between the "stance" attributed to Mr O'Hara and that attributed to Mr Millican.

[42] In my respectful opinion, the jury could rationally regard the thrust of Mr Sims' statements in his letter as concerned with the relative merits of Mr O'Hara's candidacy rather than as imputing conduct to him which rendered him unworthy of the office which Mr O'Hara sought.

Discussion: Imputation (b)

[43] The jury found that Mr Sims' letter conveyed imputation (b), but that it was not defamatory of Mr O'Hara. Mr Hughes QC emphasised that there was no challenge by Mr Sims to the first of these findings by the jury. His contention was that the second finding could not stand with the first, in that, to say of a director of a club that he breached his duty as such by subordinating its due performance to his interest in self-promotion, was necessarily to cause people to think less of him.

[44] It must be borne in mind that the terms of the imputation found by the jury involved concepts of "subordination", "interest", "self-promotion" and "duty". The content of these concepts can vary widely with context. It was for the jury to determine as a

matter of fact which of the possible shades of meaning was involved in the imputation. This Court's role is limited to ensuring that the jury's determination had a rational basis.

[45] In my respectful opinion, it was open to the jury rationally to regard imputation (b) as being to the effect that on an issue of great importance to the membership of the Turf Club, Mr O'Hara's judgment was awry but not so seriously that any ordinary reasonable person should think less of him for that.

[46] There is authority for the view that a jury may properly conclude that an imputation of an error of judgment on the part of an office holder is not defamatory.[19] There may be cases where the error of judgment imputed to a candidate for election is so serious or so dishonest or involves such wrong-headedness that there cannot be any room for the view that ordinary and reasonable persons would not think less of the candidate. But, in this case, the jury were, I think, entitled to accept that ordinary and reasonable members of a mature and well-educated pluralist democracy can entertain a different view upon a matter of judgment to that taken by a candidate without thinking less of that candidate because of that difference in views.

[47] Mr Hughes QC argued that the recipients of Mr Sims' letter would have understood it as charging Mr O'Hara with breaching the fiduciary duties he owed to the Turf Club as a director of the body corporate. This contention must be rejected. It was based on the circumstance that the statement of claim on which Mr O'Hara ultimately proceeded to trial had pleaded, and Mr Sims' defence had admitted, that Mr O'Hara was a member of the Committee of the Turf Club which is a body corporate and a director of that body corporate and, as such, was under a duty to act in the interests of the club as a whole and not by reference to his self-interest. But reference to the text of Mr Sims' letter shows that Mr Sims did not in any way suggest that Mr O'Hara had made any decisions as a director of the Turf Club which favoured his interests over the interests of the members as a whole or that he had in some other way acted contrary to his fiduciary obligations.

[48] Mr Hughes QC emphasised that the circumstance that Mr O'Hara was a candidate for election did not mean that he was to be denied the protection of the laws of defamation: the laws of defamation provide essential protection to candidates for elective office; and the public interest requires that the courts should not accept that "anything goes" in an election campaign. So much may be accepted, but it is not irrelevant to the assessment by the jury of the effect of Mr Sims' letter upon an ordinary and reasonable reader of Mr Sims' letter that Mr Sims' statements were made of Mr O'Hara as having taken a particular "stance" on an issue as a candidate at an election.

[49] In this regard, Mr Sims' criticism was of the "stance" taken by Mr O'Hara on an issue of concern to the members as electors of the committee of the Turf Club. It is in that context that Mr Sims' rhetorical question about Mr O'Hara's interest in "self-promotion" was asked. In such a context, it was, I think, open to the jury to understand imputation (b) as being that Mr O'Hara had taken a "stance" which he thought accorded with the view of a majority of electors, and would thus promote his candidacy, was not in the real interests of the membership. The view that it was

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[19] *Wallachs v March* [1928] TPD 531; *Gai Waterhouse v The Herald & Weekly Times Limited*, unreported, Supreme Court, NSW, Levine J, 29 August 1997; cf *Einfeld v Bread Manufacturers of New South Wales*, unreported, Supreme Court, NSW, Hunt J, 10 February 1981.

only in that sense that there had been "self-promotion" by Mr O'Hara to which his obligations to the Turf Club had been "subordinated" was reasonably open to the jury.

[50] It was reasonably open to the jury to conclude that the only obligation to the Turf Club which was imputed to have been subordinated to Mr O'Hara's own interests was an "obligation" of only the most general kind, that is to say an "obligation" of prudent judgment as to the affairs of the Turf Club, and the only interest of Mr O'Hara which was involved was his interest as a candidate for election. The difficulty with Mr O'Hara's argument in respect of imputation (b) is that, in the context of Mr Sims' letter, the only suggestion of any subordination by Mr O'Hara of his duty to the Turf Club to his own interests related to the position Mr O'Hara had taken in relation to the proposed sale, and the only interest on Mr O'Hara's part which he was asserted to be preferring was his interest in his candidacy. To the extent that Mr Sims' letter conveyed the imputation that Mr O'Hara had subordinated a general "obligation" of prudent judgment to his interest as a candidate, it was open to the jury to conclude that the imputation was one of misjudgement. It was, I think, open to the jury to conclude that ordinary reasonable people to whom the letters were published would understand that Mr Sims' letter was concerned to urge that Mr O'Hara had erred in linking his candidacy with his premature support for the relocation proposal, and that they would not think less of Mr O'Hara because of that error.

[51] On that basis, it seems to me, the jury were entitled reasonably to conclude that although ordinary and reasonable readers of Mr Sims' letter might have a different view of the desirability of relocation and form an adverse view of Mr O'Hara's candidacy as a result, they might nevertheless not think less of Mr O'Hara just because he had assumed that the majority of members favoured the move and would therefore vote for him. It was, I think, rationally open to the jury to conclude that it would not make ordinary and reasonable people think that Mr O'Hara had, in any serious way, actually sacrificed the interests of the members of the Turf Club to promote his candidacy.

[52] Accordingly, I am not persuaded that the jury's conclusion in relation to imputation (b) was not reasonably open to it. Even if I am wrong in that view, however, I consider that, at the highest for Mr O'Hara, this imputation could make people think the less of Mr O'Hara only to a minimal extent. This is a consideration relevant to the issue as to qualified privilege. On any reasonable view, this publication was in the category of less serious defamations for the purpose of determining the reasonableness of Mr Sims' conduct in publishing the letter.

Discussion: Imputation (c)

[53] For essentially the same reasons, it seems to me that it was open to the jury rationally to conclude that the imputation of rashness on Mr O'Hara's part was not such as to cause ordinary and reasonable people to think the less of him.

[54] In my respectful opinion, the jury's verdict was not unreasonable. That conclusion is sufficient to dispose of Mr O'Hara's appeal. For the sake of completeness, however, I should address the issue as to qualified privilege, and to a discussion of that issue I now turn.

Qualified privilege

[55] On Mr O'Hara's behalf, a number of arguments were made against the determination of this issue by the learned trial judge. The most potent of those arguments were

that the cross-examination of Mr Sims revealed that he did not rely on the article in the Gold Coast Bulletin as a basis for his statements about Mr O'Hara and so could not hope to discharge the onus of proving that the publication of his letter was reasonable, and that his Honour erred in rejecting Mr Sims' own view of the seriousness of his statements about Mr O'Hara.

[56] As to the first of these arguments, it is apparent from the record that Mr Sims' evidence on these points was a little confused. Notwithstanding the answers given in the passages of cross-examination on which Mr O'Hara relies, Mr Sims did assert that he did indeed rely on the truth of the newspaper article in publishing his letter. He also made it clear that he also relied on what he was told by other members of the Turf Club of Mr O'Hara's attitude to the relocation proposal. This was to the effect that Mr O'Hara was a "salesman for the sale of the Club". Mr Sims had also spoken to Mr O'Hara about the relocation proposal, and there was no suggestion that, in this conversation, Mr O'Hara made it clear that his support for the relocation of the facilities of the Turf Club was conditional upon a financial assessment of the proposal "stacking up".

[57] In my respectful opinion, the learned trial judge was right to conclude that it was reasonable of Mr Sims to put to his fellow members of the Turf Club his view of what he believed to be Mr O'Hara's position on the basis of what appeared in the article, what Mr O'Hara had said to Mr Sims, and what other members of the Turf Club had said to Mr Sims as to Mr O'Hara's position. It would, I think, have been difficult to come to the view that Mr Sims did not have a reasonable basis for describing Mr O'Hara as a supporter of the relocation proposal having regard to the fact that Mr O'Hara had done nothing to correct the impression conveyed by the article in the Gold Coast Bulletin.

[58] As to the second argument, Mr Sims' evidence about the seriousness of his statements can and should be understood as being concerned with the likely effect of his letter upon Mr O'Hara's candidacy rather than his reputation. And in any event the seriousness of the imputations in the letter was a matter for objective assessment rather than subjective evaluation by Mr Sims.

[59] Mr Hughes QC also argued that the learned trial judge erred in his observation that Mr O'Hara "brought [Mr Sims'] criticisms on himself". It was said that Mr O'Hara was not obliged to take steps to correct the impression given by the article and had not acted unreasonably in failing to attempt to do so. But to say these things, even if they be accurate, is to pursue irrelevancies. The question is whether Mr Sims acted reasonably in publishing his letter on the footing that he believed Mr O'Hara supported the relocation of the Turf Club's facilities unconditionally.

[60] In that regard the newspaper article did not suggest that Mr O'Hara's support for the relocation proposal was in any way conditional. Whether or not Mr O'Hara was happy with this representation of his position, and whether or not he took any steps to correct the impression left by the article was, of course, entirely a matter for him. But, so far as Mr Sims was concerned, it was not unreasonable of him to regard the article, uncorrected as it was, as an accurate statement of Mr O'Hara's position on the relocation issue.

[61] At one stage in the course of oral argument, Mr Hughes QC seemed to go so far as to suggest that Mr Sims did not give evidence that he actually believed that Mr O'Hara's position on the relocation proposal was as represented in the article.

That suggestion must be rejected. Mr Sims did give evidence that he believed that Mr O'Hara's position was as stated in the article. The learned trial judge was entitled to accept that evidence. Indeed, a different view would have been difficult to sustain given that the text of the article was printed on the back of the letter circulated by Mr Sims.

[62] Mr Hughes QC also criticised the learned trial judge for his observations that Mr O'Hara and his legal advisers should have appreciated that any damages recoverable by Mr O'Hara would have been within the jurisdiction of the Magistrates Court. It was said that these observations were both premature because the issue of quantum of damages had not been addressed by the parties and unfair because Mr O'Hara's legal advisers had not been given the opportunity of addressing his Honour on a point in respect of which his Honour cast an adverse reflection upon them.

[63] In truth, these observations by the learned primary judge were merely an expression, albeit in emphatic terms, of his Honour's conclusion that the imputation, if defamatory, was not serious. This conclusion was not a gratuitous disparagement of Mr O'Hara or his lawyers; rather it was germane to his Honour's consideration of the reasonableness of Mr Sims' conduct in publishing his letter which was required by s 30(3)(c) of the Act.

[64] I am respectfully of the opinion that these and other criticisms of the learned trial judge's determination of the issue of qualified privilege are without substance. In this respect I agree with the reasons of Fraser JA.

Conclusions and orders

[65] I consider that the verdict of the jury was reasonably open to it, and that the defence of qualified privilege was rightly upheld by the learned trial judge. It is unnecessary to determine the issues raised by the notice of contention.

[66] I would dismiss the appeal and order that the appellant pay the respondent's costs to be assessed on the standard basis.

[67] **MUIR JA:** I am in general agreement with the reasons of both Keane JA and Fraser JA save that, I share Fraser JA's conclusion, for the reasons given by Fraser JA, that the jury's finding that imputation 2 was not defamatory of the appellant was one that no reasonable jury could make. I agree that the appeal should be dismissed with costs.

[68] **FRASER JA:** The appellant and the respondent are members of the Gold Coast Turf Club. It is an incorporated company the directors of which are the committee members.

[69] In proceedings in the Trial Division the appellant claimed that the respondent had defamed him in the following letter sent to the approximately 2,700 members of the club in October 2007:

> "From Cliff Sims- Life Member
>
> Once again the elections for the new committee are upon us. This election could prove to be one of the most crucial in the history of the Turf Club. The recent E I Outbreak has caused chaos throughout the racing industry and is having a serious impact upon Trainers,

> Jockeys, Strappers, Punters and all others associated within our industry. It is also likely to have a significant impact upon the profitability of our Club. Already there is an alarming decline in revenue. Any further reduction in racing dates could cause further damage.
>
> This year there are a number of new applicants standing for election to the committee and I would urge you to closely examine the credentials of each before voting. Last year I supported Brian O'Hara in his quest for election to the committee and he was duly elected. Unfortunately I now have to say that in my opinion I made a very serious mistake.
>
> As we all know there have been various stories circulating regarding selling our existing facilities and moving to Palm Meadows. Although a number of people have different views on such a move. Those in elected positions such as Mr O'Hara should take into account all available facts before promoting a particular stance. Our chairman Bill Millican has stated in writing it is vitally important that before any decision is made, all the facts should be presented to the board by the proponents and any decision is made only after those facts have been considered.
>
> What is Brian O'Hara's stance? On May 4th 2007 he is quoted in the Gold Coast Bulleting [sic] Newspaper as saying 'Move and move on or stay and stay forever provincial'. Everyone is entitled to an opinion however Mr O'Hara should remember he was elected to represent 2,700 members of the Gold Coast Turf Club. At the date of making those statements no proposal had been put to the board of the Club and as of today s date no proposal has been put to the Club. What was Mr O'Hara basing his views on or was he more interested in self-promotion? Any member of our board is entitled to their own view but before publicly declaring one way or the other they should at least wait for a proposal to be put forward and consider all the facts, good or bad. His actions are akin to selling your home without knowing how much the purchaser is willing to pay.
>
> In my view this man is now unworthy of a position on our committee. I will not be voting for Brian O'Hara.
>
> Regards and good punting
>
> Cliff Sims
>
> Copied on the rear of this letter is a reduced version of the article printed on 4th May 2007."

[70] The plaintiff pleaded that the letter conveyed three defamatory imputations:

(1) The plaintiff had engaged in conduct making him unworthy to be a committee member of the Gold Coast Turf Club.

(2) The plaintiff subordinated the due performance of his duty as a committee member of the Gold Coast Turf Club to his interest in self promotion.

(3) The plaintiff had acted rashly as a committee member of the Gold Coast Turf Club.

[71] The defendant denied that the letter conveyed those imputations or defamed the plaintiff. He also pleaded that he had a defence under s 25 of the *Defamation Act* 2005 (Qld) that the imputations were substantially true, or under s 31 of the Act that the letter published the defendant's honest opinion relating to a matter of public interest, or of statutory qualified privilege under s 30 of the Act.

[72] The trial judge took the first two defences from the jury. His Honour ruled that the evidence was incapable of supporting those defences.[20]

[73] The parties joined in asking the trial judge to determine whether, upon the assumption that the letter conveyed all three imputations and each was defamatory of the plaintiff, the defendant had a defence of qualified privilege under s 30 of the Act. That approach required the trial judge to determine all issues of fact and law arising under that defence.[21]

[74] The jury found that the letter did not convey imputation 1, that imputations 2 and 3 were conveyed, but that imputations 2 and 3 were not defamatory. The trial judge then ruled that if (notwithstanding the jury's verdict) the letter conveyed all three imputations and each was defamatory of the plaintiff, the defendant had a defence of qualified privilege under s 30 of the Act.[22] Judgment was therefore entered for the defendant.

[75] The appellant contended in this appeal that the jury's decision that the matter complained of did not convey imputation l should be set aside and replaced by a finding that the imputation was conveyed and was defamatory of him. He contended that the jury's decision that neither imputation 2 or 3 was defamatory should be set aside and replaced by a finding that each of those imputations was defamatory of him. He contended that the trial judge's decision upholding the defence of statutory qualified privilege under s 30 of the *Defamation Act* 2005 (Qld) should be set aside.

[76] The respondent filed a notice of contention in which he contended that if the appeal was allowed there should be a new trial by reason that the trial judge erred in not leaving for consideration by the jury the defences of justification under s 25 of the Act and honest opinion under s 31 of the Act. The notice of contention was not pressed in argument.

[77] I have concluded that the jury erred in finding that imputation 2 was not defamatory of the plaintiff, that the appellant has otherwise failed to establish error in the findings of the jury, and that the trial judge correctly upheld the defence of statutory qualified privilege under s 30 of the Act.

Did the respondent's letter convey imputation 1 (that the plaintiff had engaged in conduct making him unworthy to be a committee member of the Gold Coast Turf Club)?

[78] The appellant argued that no reasonable, properly directed,[23] jury could find that the letter did not convey imputation 1. That way of putting the argument accurately

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20 *O'Hara v Sims*, Transcript, 29 October 2008 at 3-85 and 3-86.

21 Senior counsel for both parties in this Court endorsed this procedure whereby it was left to the trial judge to determine every element of the defence, making factual findings where necessary. The effect of ss 22(2) and 22(5)(b) of the Act, which were mentioned in the course of argument, is not in issue in this appeal.

22 *O'Hara v Sims* [2008] QSC 301 at [3]-[4].

23 Neither party advanced any criticism of any of the trial judge's directions to the jury.

expresses the test this Court must apply if it is to set aside any of the jury findings of which the appellant complains.[24] It is, I think, practically indistinguishable in effect from the test posited for the respondent, namely whether the finding was so outside the range of conclusions that could reasonably be reached such as to warrant the intervention of the Court so as to prevent a miscarriage of justice.[25]

[79] The appellant argued that the imputation necessarily arose from clear statements in the letter that the appellant was unworthy to be a member of the committee of the club and relating that to his conduct as a member of it. He argued that the respondent could not defend the statement as opinion because the trial judge rejected the defence of honest opinion.

[80] These arguments are not insubstantial. Further, I have concluded that the jury erred in finding that imputation 2 was not defamatory of the appellant. That is significant because that finding might have influenced the jury's rejection of imputation 1 (although that consideration is weakened by the fact that I do not accept that imputation 2 was nearly as serious as the appellant contended).

[81] I am nevertheless not satisfied that no reasonable jury could find that the letter did not convey imputation 1. The directly relevant part of the letter stated that, "In my view this man is now unworthy of a position on our committee." The immediately following sentence stated that, "I will not be voting for Brian O'Hara." True it is that those statements were preceded by criticism of the appellant's conduct as a committee member, but the jury was entitled to attribute weight to the actual words of those statements. It was entitled to find that the letter conveyed in this respect only the respondent's view that the appellant did not deserve re-election to the committee. That differs materially from the pleaded imputation that the appellant's conduct complained of rendered the appellant unworthy to be a committee member.

Was imputation 2 (that the plaintiff subordinated the due performance of his duty as a committee member of the Gold Coast Turf Club to his interest in self promotion) defamatory of the plaintiff?

[82] The imputation was defamatory if the publication of it was likely to lead ordinary, decent persons to think the less of the plaintiff.[26]

[83] The appellant contended that the effect of imputation 2 was that the appellant had subordinated the due performance of his **fiduciary** duty as a committee member of the club to his interests in self-promotion. The appellant's senior counsel went even further, arguing that the imputation suggested a breach of fiduciary duty and even, in his written argument in reply, "deliberate breaches by a company director of fiduciary duty and of the duty to act with due diligence". The respondent did not challenge the jury's finding of imputation 2, but he argued that the imputation did not refer to any fiduciary or legal duty and that the jury was entitled to find that the imputation was not defamatory.

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24 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [6], [185].

25 *Hall v Queensland Newspapers Pty Ltd* [2002] 1 Qd R 376 at [17], [21]; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61-2.

26 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 254 ALR 606; [2009] HCA 16 at [5] and [40], per French CJ, Gummow, Heydon, Kiefel and Bell JJ, referring to *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 638–639; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 545 [57], [1998] HCA 37; *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 351 [190]; [2007] HCA 28.

[84] If the respondent had published an allegation against the appellant of the kind described by the appellant's senior counsel it would be surprising to find that it was not defamatory,[27] but imputation 2 is not framed in those terms. The "duty" referred to in imputation 2 is not expressed as a fiduciary duty and nor was it necessarily considered by the jury to connote a fiduciary duty.

[85] It was admitted on the pleadings that the appellant, as a committee member and director of the club, owed the club a duty to act in the interests of the club and its members as a whole and not by reference to his self interest, but, contrary to one of the appellant's arguments, that did not convey that the imputation referred to a fiduciary duty. The trial judge did not direct the jury in those terms and was not asked to do so. It was not alleged or admitted that the letter imputed that the appellant owed or subordinated to self-interest any fiduciary duty. No facts were pleaded that might justify such a construction of the letter. The evidence did not suggest it.

[86] The letter asserted that the appellant's actions were "akin to selling your home without knowing how much the purchaser is willing to pay". That characterised the conduct which the letter attributed to the appellant. The asserted conduct did not extend beyond the appellant's public declaration of support for and promotion of the club shifting its premises pursuant to a foreshadowed proposal by a developer in circumstances in which the absence of detail about the anticipated proposal precluded sound judgment about its merits. The letter made it plain, as the evidence showed was widely known amongst the club membership, that no such proposal was before the committee for its consideration. In these circumstances, the respondent's letter was not capable of being read as conveying that the appellant had participated in any decision committing the club to the mooted move, or had engaged in any other conduct on behalf of the club. Even more clearly, there is no basis for construing the letter as charging the appellant with acting as a director of the club corruptly, in a situation in which his personal interest or duty conflicted with that of the club, or otherwise in breach of any fiduciary duty.

[87] On the other hand, the imputation found by the jury was not merely of an error of judgment, which of itself has been held to be incapable of being defamatory.[28] Because the jury found the imputation in the terms in which it was alleged, the jury must be taken to have concluded that the letter asserted that the appellant had subordinated to his interests in self-promotion a duty he owed to the club in his character as a committee member.

[88] The imputed duty is not further defined and its basis in law is not clarified, but nevertheless the jury's unchallenged finding requires the Court to accept that the letter charged the appellant with preferring his self interest to a duty he owed to the club in his character as a committee member. The suggestion of an undefined breach of an amorphous duty is not necessarily disparaging and many in the community engage in self-promotion without adverse comment. But accepting that the imputation fell short of charging any breach or subordination of a fiduciary duty, it did nevertheless charge that the appellant, in his capacity as a committee member

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27 The learned authors of *Gatley on Libel and Slander*, (11th Ed, 2008), 73 [2.28] cite authority for the proposition that it is defamatory to impute to a person in any office any "corrupt, dishonest or fraudulent conduct or other misconduct or inefficiency in it…"

28 *Gai Waterhouse v The Herald & Weekly Times Limited*, unreported, Supreme Court, NSW, Levine J, 10 June 1997.

of the club, owed the club a duty his performance of which he subordinated to his own interests in self-promotion. That carried a sting. The respondent pointed out that the publication was made in the course of an election campaign but that provided no balm for the sting.

[89] Attributing to the ideal member of the community by whose standards this issue is to be determined the necessary attribute of decency, I am unable to see how the imputation found by the jury could reasonably be thought not to cause ordinary persons to think less of the appellant.

[90] It is necessary to bear in mind the traditional restraint which courts exercise in interfering with jury verdicts[29] and that it is a very strong thing to overrule a jury's decision that a publication did not defame a plaintiff.[30] Even so, for the reasons I have given I conclude that, although imputation 2 was not nearly as serious as was contended for by the appellant, the jury's finding that imputation 2 was not defamatory of the appellant was one that no reasonable jury could make.

Was imputation 3 (that the plaintiff had acted rashly as a committee member of the Gold Coast Turf Club) defamatory of the plaintiff?

[91] I do not accept the appellant's argument that no reasonable, properly directed, jury could find that imputation 3 was not defamatory of the plaintiff. It was open to the jury to conclude that the nature of the rashness the article imputed to the appellant lacked sufficient seriousness to cause right minded members of society to think less of the appellant.

Qualified privilege

[92] It follows that the appellant was entitled to judgment unless the respondent established a defence for his publication of imputation 2, that the appellant subordinated the due performance of his duty as a committee member of the Gold Coast Turf Club to his interests in self-promotion. As I have mentioned the trial judge concluded that the respondent had established a defence on the footing that the respondent's letter conveyed all three imputations and that each of them was defamatory of the appellant.

[93] Section 30 of the *Defamation Act* 2005 (Qld) provides:

> "(1) There is a defence of qualified privilege for the publication of defamatory matter to ... the ***recipient*** if the defendant proves that –
>
> (a) the ***recipient*** has an interest or apparent interest in having information on some subject; and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
>
> (2) ...

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29 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [2], [17], [109] – [110], [184] – [185].

30 *Rivkin*, per McHugh J at [19] – [20]; *Mallik v McGeown* [2008] NSWCA 230 at [47], per McColl JA, Campbell and Bell JJA agreeing.

> (3) In determining ... whether the conduct of the defendant ... is reasonable in the circumstances, a court may take into account –
>
> (a) the extent to which the matter published is of public interest; and
>
> (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
>
> (c) the seriousness of any defamatory imputation carried by the matter published; and
>
> (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
>
> (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
>
> (f) the nature of the business environment in which the defendant operates; and
>
> (g) the sources of the information in the matter published and the integrity of those sources; and
>
> (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
>
> (i) any other steps taken to verify the information in the matter published; and
>
> (j) any other circumstances that the court considers relevant."

[94] Malice was not alleged against the respondent. The appellant also accepted that the respondent proved that he published the imputations to the club's members in the course of giving them information on a subject in which they had a legitimate interest in having that information. The question was whether, in terms of s 30(1)(c), the respondent proved that his conduct in publishing the imputations was reasonable in the circumstances. It is necessary then to refer to the facts upon which the trial judge concluded that it was.

The facts

[95] For about 40 years the respondent trained horses which raced at the club's track at Bundall. He was made a life member for his services to the club. The appellant was also a member for a very long time. He was elected to the committee in 2003. Between 2005 and 2007 the appellant was the deputy chairman of the club. There was an election for the members of the committee conducted by a postal ballot of members in October 2007, at which the appellant had anticipated succeeding Mr Millican as chairman.

[96] The trial judge found that election "generated more than usual interest and perhaps excitement amongst the membership".[31] The committee had been contemplating relocating the activities of the club from Bundall to Palm Meadows where a

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[31] *O'Hara v Sims* [2008] QSC 301 at [16].

developer or financier ('Eureka') had suggested to the committee very early in 2007 that it was interested in developing a new racetrack. The suggested new development was to include new tracks; a purpose-built concourse for the Magic Millions Annual Sale; a luxury hotel; training facilities; and offices and residential development. There was a "vague promise" that the new structure would be equivalent in size and prestige to the racecourses in Singapore and Hong Kong and rival those of Flemington and Randwick.

[97] The trial judge found[32] that no detail was provided about the structural or financial feasibility of the new racecourse development; the designated land was on a flood plain and the suggested development would be very expensive; no valuation of the Bundall site had been undertaken and no engineering evaluation of the new site had been provided to the committee; but the idea held out the prospect that the Gold Coast Turf Club would become of national importance to racing. Mr Bentley, the chairman of Queensland Racing (the entity which controls racing and race clubs in Queensland) urged the committee to give favourable consideration to the new development and relocation.

[98] In March 2007 the developer presented a 'concept plan' to the committee members. The committee resolved to give the developer six months exclusivity to conduct due diligence and feasibility and that, "If the results of the due diligence and feasibility conducted by the consortium were satisfactory to the ... club the Board ... would support the move to Palm Meadows. It was further agreed that after an information session to members ... the Board would ascertain the members' agreement or otherwise to the move ...'

[99] It is convenient here to quote from the reasons of the trial judge:[33]

> "[22] On 29 March 2007 Mr Steven Davoren, a member of the club, wrote to its chief executive officer:
>
> '... I was deeply disturbed by an article in yesterday's ... Bulletin ... .
>
> I do not believe anything just because the local paper states it and for this reason wish to give the committee the opportunity to set out their side of the story.
>
> My concerns are as follows:
> (1) What is the likely result with ownership of the property at (Palm Meadows) and debt level of the club?
> (2) What other alternatives have been looked at and has the club called for other alternatives?
> (3) Is a fully detailed proposal available to the members to inspect? ...
> (4) After the members have been given the proposal, what opportunity will be given to the members to question the proposal before the vote?
> (5) Will the members be given a chance to voice their views?"
>
> There was no reply to the letter.

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32 *O'Hara v Sims* [2008] QSC 301 at [17].

33 *O'Hara v Sims* [2008] QSC 301 at [22]-[24].

> [23] News or rumours of the possibility of a relocation and development of a super race track reached the members. As one would expect, opinion was polarised: there were those who thought the move exciting and those who were attached to the old course and the old ways and did not want to contemplate moving. There appears to have been particular opposition to the move by a group of trainers and their adherants [sic]. A meeting of about 30 of them on 30 March 2007 expressed their concerns. It was addressed by the plaintiff who was deputy chairman of the Turf Club. Mr O'Hara spoke in favour of the relocation. He said, according to Mr Davoren, that the club would move whether the trainers and strappers liked it or not and that it was the best future for the club. He also said that the move would not occur unless it was on terms that the club would own the new premises debt free and that the club would not have to pay anything for the relocation.
>
> [24] The two statements are hard to reconcile. I think it likely that Mr O'Hara did positively assert the advantages of the move and his firm support for it with the caveat being expressed *diminuendo*."

[100] I interpolate here that although the notice of appeal essayed numerous challenges to findings made by the trial judge, it did not challenge the finding in paragraph [24]. Nevertheless at the hearing of the appeal the appellant contended that there was no evidentiary foundation for the finding that it was likely that the caveat was "expressed *diminuendo*". I am not persuaded that such an inference was not open to the trial judge, but in any case the point is not significant. The appellant agreed in cross-examination that the respondent was not present at the meeting, and the respondent relied upon matters that all post-dated the 30 March meeting (including a conversation with the appellant in April) to establish the reasonableness of his conduct in publishing the imputations.

[101] The trial judge's reasons continued:

> "[25] On 3 April 2007, three days after the meeting at the stables, Mr Davoren and Mr Eggleston, another member, wrote to the chief executive officer of the Turf Club requisitioning a special general meeting to consider resolutions that:
>
> 1. The committee should immediately set up an information process for any decision relating to the relocation. The process was to include calling for information from members and other affected parties which would: identify the risks, detriments and benefits of the relocation, and risks, detriments and benefits of remaining at Bundall; identify whether there were any alternative proposal to alleviate problems caused by large race meetings; ascertain the value of the Bundall realty.
>
> 2. Would amend the constitution to restrict the power of the Board to enter into transaction to give effect to

> the relocation by requiring 66 per cent of the votes of members at a special general meeting.

The request for the special general meeting was supported by the signatures of 200 members.

[26] On 18 April 2007 Mr Millican wrote to all members of the club:

> 'The committee ... recently received a preliminary proposal from a consortium to relocate the turf club to a new site at Palm Meadows.
>
> The club has accepted the offer by the consortium to provide information to members over the next four to six weeks.
>
> The committee is proposing that members be contacted in early June to consider the proposal and vote upon its acceptance or otherwise.
>
> A detailed information session for all members, stakeholders and the public will be held in late May in order that everybody is fully informed regarding the proposition ... . It is anticipated that dates will be finalised in the next fortnight.'

There followed a summary of the proposed developed expressed in terms that made it attractive. Enclosed with the letter was a photograph of a large modern grandstand which was described as an artist's impression of the 'new Gold Coast racecourse Palm Meadows' and a schematic plan showing the new course and associated residential and commercial development. The letter concluded:

> 'Please be assured that your committee will review in detail all aspects of this proposal and looks forward to your input into the discussions relevant to this major decision.'

[27] It is relevant to interpolate that no detailed proposal has ever been received from the developer or Queensland Racing. No proposal has been put to the members for their approval and no 'information session' was ever convened and the members were never given notice that there would be such a meeting to inform them about what was proposed by way of redevelopment and relocation.

[28] There was a meeting in May 2007 between the chairman and deputy chairman of the Turf Club with representatives of Eureka, its architects, accountants and solicitors which was 'disappointing' as 'no further concrete information was offered by the consortium' and no exposition from Queensland Racing of the extent to which it might contribute or assist. The Turf Club chairman advised the financiers and their consultants that the club would require

> substantial and detailed information before it could ask the members for their support. He expressed his disappointment that the developers had not worked out a detailed plan which could be considered and discussed with the members. He described the meeting as a 'waste of time' and said there was 'no proposal to consider' because of the developer's failure to provide any sufficient information."

[102] On 4 May 2007 the Gold Coast Bulletin published an article which, so the trial judge found, was based largely upon an interview given to Mr Mossop, a journalist, by the appellant; the trial judge inferred that the appellant "sought to present positive aspects on the proposal, such as it was, to persuade the wider public and the club membership to support it".[34] The article referred to the statements opposing and favouring the move. It included the following statements:

> "D-day is looming for 2500 Gold Coast Turf Club members who must decide the future of their track, the current Bundall site, and a larger one at Palm Meadows. Brian Mossop lines up at the barrier
>
> Turf Club bets bob each way on move
>
> Move and move on or stay and stay forever provincial.
>
> Those are the options of the 2500 members of the Gold Coast Turf Club will be faced with when an ambitious racetrack relocation plan is put to them next month, according to deputy chairman Brian O'Hara.
>
> …
>
> Another staunch champion of the move is Dr O'Hara, who a year ago was sceptical, but who now stands convinced of the merits of relocation.
>
> 'In December I said we should never move,' admitted Dr O'Hara, 'but this proposition is far too important to be ignored. Bob Bentley (of QR) came down and blew us away. 'If we go with this we can have one of the best racing industries in the world.'"

[103] The appellant was also quoted as saying that the Bundall site was too small for larger races and could not be extended, and that the new complex would allow for larger, richer, more frequent race meetings, which would attract horses and owners from overseas.

[104] The trial judge found that the appellant was not accurately reported in that article. The appellant's opinion on the possible move was in fact that he would support the move "if, in his words, it 'stacked up', by which he meant if a detailed proposal was received which showed that the club could relocate to Palm Meadows without cost and there own the new racetrack facilities in its own right and without encumbrance".[35]

[105] The trial judge also found that after the article was published the appellant did nothing to correct the erroneous representation of his views to the world, or that part

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34 *O'Hara v Sims* [2008] QSC 301 at [30].

35 *O'Hara v Sims* [2008] QSC 301 at [41]-[42].

of it which reads the Gold Coast Bulletin.[36] The appellant gave evidence that his reason for not seeking a correction was that there was 'not much point' in complaining: a complaint 'wouldn't get anywhere, would achieve nothing' so he 'wouldn't bother'.

[106] The article gave rise to controversy among the members of the club. The trial judge found that "[a] large number of them were critical of it because 'it was seen to be going against the way what they thought to be the proper way to handle' the prospects of relocation.'"[37]

[107] On 18 May 2007 the respondent sent a letter to all other members of the club in which he said:

> "My main reason for writing to you is to ask you to give serious thought to the matter or our Club being sold off and relocated to a new site at Palm Meadows. For people like me it is difficult to contemplate, after all the years of hard work and money that has been put into making this Club a successful racing venture, how a 'glitzy' remote development will give the true racing fraternity the same level of servicing and the integrity and identity we enjoy here at Bundall. ...
>
> As members we are entitled to be fully informed on some alternative options for our existing Turf Club. I'm sure that with careful vision and planning, the present racetrack and facilities ... could be restructured and designed to take us well into the future.
>
> ...
>
> As of today's date, Eureka Funds Management ... has not put the final proposal for the suggested move to the board. How can any board members propose what the financial implications are and what is best for the members when the board is not in possession of the facts. All board members should wait until they have all the facts before publicly stating a position either for or against the proposal."

[108] On 12 June 2007 Mr Millican wrote to the executive director of Eureka to set out what the Board required by way of a proposal to consider and put to its members. The letter concluded:

> "As you can appreciate ... there is a substantial amount of work yet to be done before GCTC can put the proposal to its members. Whilst there is some benefit in putting a concept to the members it is important that members are provided with all the information they necessarily need to consider this important decision carefully. It is, in the Boards' view, of no benefit to either the GCTC or the Eureka Consortium to put a proposal ... prematurely since this would encourage a rejection on the grounds of inadequate information rather than on the merits or demerits of the proposal."

[109] The developer did not reply.

[110] Mr Millican wrote in the club's September issue of its quarterly magazine, sent to its members, that:

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36 *O'Hara v Sims* [2008] QSC 301 at [55].

37 *O'Hara v Sims* [2008] QSC 301 at [43].

> "The release of this issue ... is timely ... as it allows me to address and provide some clarification to one of the most important issues ever to come before our club. I am aware there has been some speculation that the Board knows more than we are letting on over the proposal ... presented ... by the Eureka Consortium concerning a possible relocation ... In every statement I have made to the press over the issue, I have said we will reserve any decision ... until such a time that all the facts have been presented ... and have been put to the Members and key stakeholders for their consideration. The Board considers it necessary that appropriate due diligence is undertaken on the proposal and that the risks and returns inherent to the Members of the Gold Coast Turf Club are fully understood...As you can appreciate from the above ... we believe there is a substantial amount of work yet to be done before Gold Coast Turf Club can put the proposal to you, our Members. We see it as essential that all Members are provided with all the information needed to consider this important decision carefully, rather than ask you to consider the proposal and your personal position prematurely."

[111] The respondent subsequently distributed to the members the letter of October 2007 which the appellant contends was defamatory of him. The letter is set out in paragraph 69 of these reasons. The respondent gave evidence, which was not contradicted, that he had not seen Mr Millican's statements before he sent the October 2007 letter.

The trial judge's reasons for upholding the defence

[112] The trial judge's reasons for concluding that the respondent had established the defence under s 30 of the Act are encapsulated in the following passage:[38]

> "[44] There is, I think, no doubt that Mr Sims' letter was a communication of such a nature that he had an interest in making it and the members to whom he wrote had a corresponding interest in having it made to them. The communication was therefore privileged unless made maliciously or unreasonably. Malice, as I mentioned, is not asserted. I do not understand the plaintiff to contend that the communication was not privileged on any ground other than the reasonableness of the publication. No submissions were addressed to any other point and it seems to me clear that there was a reciprocal interest between Mr Sims and the other members with respect to the subject matter of his letter. That concerned who should represent them on the committee of their club and in particular the attitude of elected committee members to the proposed relocation. That had been a topic of controversy and disagreement and the attitude of those who sought office to the relocation was of particular relevance to the members when casting their votes.
>
> …

[38] *O'Hara v Sims* [2008] QSC 301 at [44], [65] – [67].

> [65] In my opinion the circumstances which make the publication of the letter the occasion of qualified privilege establish that the publication was reasonable in the circumstances. The defendant was a life member of the club with a long history of service to it. His communication was limited to other members of the club, all of whom shared a common interest in the election of committee members. The question whether the club should relocate was one of particular importance and controversy and of interest to the club's members. It was of concern to all members that any decision, whether to go or stay, should be made advisedly and after a careful review of all relevant facts. That a prospective committee member advocated acting wantonly with regard to the decision was a matter of particular importance to members and should properly be brought to their attention. The plaintiff had made himself available for an interview by the Gold Coast Bulletin which suggested that he was in favour of the move when no proper factual basis for such a decision had been provided. The plaintiff did not correct that version of his views either generally or by private communication to the defendant or any other member.
>
> [66] Another factor of significance is that the committee did not at any time inform the members of the progress, or lack of it, of the dealings with Eureka. The promised 'information session' was not convened and the members were told nothing about the terms of any proposal for the relocation. That was because there was no proposal to put to them, but they were not told that. As late as September Mr Millican wrote in clear terms suggesting that a detailed proposal was expected. The elections were held in the following month. It was an obvious point of interest and importance to the membership that when the expected proposal arrived it be considered carefully. The article written following the interview with Mr Mossop did not suggest that Mr O'Hara would give it that careful scrutiny.
>
> [67] This recital of the circumstances of the publication are enough to establish its reasonableness. The particular objections of the plaintiff are without substance. Accordingly I rule that the publication of the defendant's letter of October 2007 attracts the defence of qualified privilege pursuant to s 30 of the *Defamation Act*."

[113] In my respectful opinion those reasons for upholding the defence are compelling. In the next section of my reasons I explain why I have rejected the appellant's arguments that the ruling was wrong.

The appellant's challenges to the finding of statutory qualified privilege

[114] I will discuss the appellant's arguments under headings which reproduce the grounds specified in the appellant's notice of appeal advanced in support of his contention that the trial judge erred in his Honour's consideration of the defence.

(a) In failing to regard as relevant the evidence of the Respondent (Defendant) that he intended, by publishing the matter complained of, to convey each of those imputations;

[115] There is no substance in this ground. The trial judge accepted that the evidence that the respondent intended to convey the imputations was relevant. His Honour quoted the relevant passage in the cross examination of the respondent in which he admitted that he had intended to convey each of the three imputations alleged by the appellant.[39] Further passages in the trial judge's reasons, including those quoted in the preceding section of these reasons, demonstrate that his Honour proceeded on the footing that the respondent did intend to convey the imputations. A substantial part of the trial judge's reasons is concerned with the question, answered in the respondent's favour, whether the respondent believed the truth of those imputations and on reasonable grounds. Thus, for example, in paragraph [63] of the trial judge's reasons, his Honour said that he thought it "a fair inference that Mr Sims understood the plaintiff to be supportive of the move in circumstances where he knew no detailed proposal had been received"; and that the respondent "published because he thought the [appellant's] opinions were those expressed in his letter".

(b) In failing to regard as relevant the evidence of the Respondent (Defendant) that he regarded each imputation as seriously damaging to the Appellant (Plaintiff).

(c) In substituting His Honour's own view, which negated the seriousness of the pleaded imputations, to the exclusion of the Defendant's (Respondent's) own view of their serious nature as expressed in his evidence (see [47]), and in His Honour's description of each of the pleaded imputations as "anodyne" (see [49]), when the imputations charged the Appellant (Plaintiff) with a breach of his fiduciary duty as a director of the Club (a duty admitted on the pleadings).

[116] I am not persuaded that the trial judge erred in any of the respects contended for in these grounds of appeal.

[117] It is apparent that the trial judge was sceptical about the respondent's evidence in cross-examination that he thought that the imputations were serious or very serious: his Honour observed that the respondent had been "induced to agree" and that "I do not share [the appellant's] assessment of the imputations".[40] It is right to acknowledge the advantage possessed by his Honour in seeing and hearing the respondent give evidence, but apart from that the transcript also suggests justifications for that scepticism. It seems that the respondent, who was 89 years old when he gave evidence, sometimes expressed his inability to understand the import of questions put to him and he had some difficulty in answering questions responsively.

[118] As appears from the terms of ground (c) set out in the above heading, the appellant's attack upon the trial judge's finding that the imputations lacked seriousness assumed that the imputations charged the appellant with a breach of his fiduciary duty as a director of the club. My rejection of that assumption (in paragraphs [84] – [88] above) removes much of the substratum of this ground of appeal.

[119] The trial judge said on this topic that:[41]

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39 *O'Hara v Sims* [2008] QSC 301 at [47].

40 *O'Hara v Sims* [2008] QSC 301 at [47], [48].

41 *O'Hara v Sims* [2008] QSC 301 at [49].

> "[49] The case is one of defamation to a limited audience, all of whom had an interest in receiving Mr Sims' views of the appropriateness of Mr O'Hara as their representative on the committee. Mr O'Hara's vanity may have been ruffled and his pride pricked by the criticisms but in the context of what was, I was told, a heated election campaign involving 'one of the most important issues ever to come before (the) club' the imputations are best described as anodyne.
>
> [50] The case is concerned with an internal division of opinion amongst the members of a provincial turf club as to the proper processes for evaluating a prospect of relocation. To say of one of the committee members seeking re-election that he was rash and self-promoting and thereby unfit for the office may have affected the outcome of the election and given the plaintiff less cause for self-satisfaction than he otherwise felt, but they do not deserve the appellation of 'serious allegations' warranting a trial in this Court."

[120] The appellant argued that the fact that the respondent published his letter in the course of a campaign for the election of committee members did not excuse the publication of the defamatory imputations. The respondent did not argue for any such conclusion, but the context in which the respondent published the imputations, including that he sent the letter in the midst of a "heated election campaign" involving "one of the most important issues ever to come before [the] club", remained very relevant. It provided support for the conclusion that it was reasonable for the respondent to assume that had the article misrepresented the appellant's position the appellant would have drawn that to the respondent's attention. The trial judge did not err in relying upon that as one of the matters which suggested that it was reasonable for the respondent to rely upon the article as a source of information for the imputations.

[121] Of course the conclusion that the publication was reasonable depended significantly upon the degree of seriousness of the defamatory imputations conveyed by the letter. It might well not have been reasonable to rely upon the article and the other matters identified by the trial judge if the letter had conveyed that the appellant had committed the breaches of fiduciary duty which the appellant contended it conveyed, but for the reasons I gave earlier I have concluded that this was far from being a serious defamation. In my opinion it was open to the trial judge to conclude that the imputations should be characterised as being "anodyne", in the sense that, if defamatory, they were nevertheless objectively unlikely to provoke a strong response.

(d) In taking into account as a relevant factor, His Honour's own view that common sense and proper advice should have taken" the Appellant (Plaintiff) "to the Magistrates Court" as the appropriate forum [48], [50];

[122] The quoted statement appears in the following passage of the trial judge's reasons:

> "[48] … The circumstances of the case make it completely inappropriate as the subject of an action in the Supreme Court. If the plaintiff felt obliged to sue an 88 year old man who had been made a life member of the Gold Coast Turf Club for his decades of contribution to it because he wrongly

> criticised him for his attitude on a point about which the defendant felt strongly, common sense and proper advice should have taken him to the Magistrates Court."

[123] In written submissions the appellant's counsel argued that the trial judge erroneously treated as relevant his Honour's own opinion impugning the propriety of the conduct of the appellant and his advisors in bringing proceedings in the Supreme Court, rather than in the Magistrates' Court.

[124] I respectfully accept, as I understood the respondent to concede in the course of argument, that the propriety of the conduct of the appellant and his advisors in that respect was not relevant to any issue arising under s 30 of the Act, but that is not to conclude that the trial judge erred in ruling in favour of the defence. The trial judge's statements criticised by the appellant are not the judge's reasons for that conclusion. They are consequential observations premised upon that conclusion and elaborating upon it. I have already explained why I consider that the conclusion was correct.

[125] In oral argument the appellant's counsel contended that the trial judge's statements that "common sense and proper advice should have taken [the appellant] to the Magistrates' Court" involved a denial of procedural fairness to the appellant and an impermissible pre-judgment, unfavourably to the appellant of the question of the seriousness from the appellant's perspective of the publication complained of on the issues of damages. He argued that the appellant was precluded at the trial from going in to that topic in detail because the issue of damages was to be resolved in a subsequent, separate trial. Those submissions relate to the question whether the trial judge's statements disqualify him from conducting the trial on damages (if, contrary to my own conclusion, such a trial is to occur) but for the reasons I gave in the previous paragraph they do not support an argument that the judge erred in finding that the imputations lacked seriousness .

[126] I have concluded that the trial judge's characterisation of the imputations as lacking seriousness was soundly based on an objective assessment of the character of the imputations and the circumstances of their publication.

(e) In finding at [59] that in a real sense the Appellant (Plaintiff) "brought the defendant's criticism on himself", thereby disregarding the Respondent's (Defendant's) evidence quoted at [61]): "1 wasn't going" (scll relying) "on what I read in the paper" (scil. the Mossop article). "1t was going on what other members of the club had told me", the effect of such evidence being to negate any causative connection between the Plaintiff's omission to seek a correction of the Mossop article and the publication of the imputations complained of.

(f) In attributing to the Respondent (Defendant) a "natural" conclusion that the Mossop article was correct [60] when there was evidence that he did not rely on that article as a basis for publishing the imputations complained of;

(*g) In finding at [62] that one of the three things on which the Respondent (Defendant) based the publication of the imputations complained of was "his assumption that the article" (scil. the Mossop article) "was correct", whereas the Respondent's (Defendant's) own evidence quoted at [61] was that he did not rely on any such assumption;*

(h) In disregarding the Respondent's (Defendant's) evidence that even if the Appellant (Plaintiff) had told him that the financial feasibility of the relocation proposal was a condition subject to which the Appellant (Plaintiff) had expressed support for such proposal, the Respondent would nevertheless have published the imputations complained of.

(l) In disregarding, in the light of the Respondent's (Defendant's) admitted non-reliance on the Mossop article as a basis for publishing the imputations complained of, the absence of any causative connection between the Appellant's (Plaintiff's) omission to seek a correction of that article and the publication of those imputations;

[127] Under these grounds the appellant challenges the trial judge's conclusion that the Gold Coast Bulletin article of 4 May 2007 formed a sound basis for the respondent's publication of the imputations.

[128] The conclusion that the respondent did rely upon the article is suggested by the fact that it was referred to in the respondent's October 2007 letter and a reduced copy of it was printed on the back of the letter. It is suggested also by the trial judge's conclusion,[42] which the appellant does not challenge, that the Gold Coast Bulletin of 4 May 2007 portrayed the appellant as advocating that the club should move and as expressing enthusiasm for it at a time when it was known that there was no proposal capable of justifying a rational decision to move. The trial judge found that,[43] contrary to the tenor of the article, the appellant's support for the move was in fact conditional, the appellant did not act rashly (by promoting the move without knowing anything of its circumstances), and that he was not seeking self-promotion instead of basing a decision about the move on proper facts and the best interests of club members; but the evidence justified the trial judge's conclusion that the respondent was unaware of the true position.

[129] In evidence-in-chief the respondent said that he had read the article from start to finish. He subsequently sent to all members of the club his letter of 18 May 2007 in which he argued that all Board members should wait until they had all the facts before them before publicly stating a position either for or against the proposal to move. He gave evidence that after a conversation in April 2007 with the appellant in which the appellant categorically affirmed his support for the move, the respondent received no communication from the appellant or anyone else suggesting that the newspaper article was not correct. The respondent was referred to each of the relevant statements in his letter and he said in terms that he believed them to be true when he wrote the letter.

[130] In cross-examination the respondent said that when he wrote his letter upon which he was being sued he had assumed that the article in the Gold Coast Bulletin accurately recorded the appellant's views on the proposal to re-locate the Gold Coast Turf Club. The respondent denied the proposition in the next question in cross-examination that "the accuracy of the views attributed to [the appellant] by [the article] [was] the basis upon which . . . you engaged in the criticism you levelled against him in your letter", but that answer seems to reflect the appellant's evidence-in-chief and in cross-examination that he had relied also upon the statements made to him by the appellant and by the other club members. In further

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42 *O'Hara v Sims* [2008] QSC 301 at [51]-[52].

43 *O'Hara v Sims* [2008] QSC 301 at [53].

cross examination the respondent agreed with the proposition that he had assumed, as the basis for writing his letter, that the journalist had accurately reported the appellant's views on the relocation proposal and that the respondent had gathered from the article that the appellant was "unconditionally in favour of the relocation proposal".

[131] The respondent subsequently gave the answer quoted in appeal ground (e). It appears at the end of the following passage:

> "I'm so sorry, can I just finish the question. You assumed, did you, as the basis for writing your letter, your October letter that Mr Mossop in his article accurately reported Dr O'Hara's views on the relocation proposal?-- Well, yes, I did.
>
> Thank you. And is it correct that as you read the Mossop article you gathered that Dr O'Hara was unconditionally in favour of the relocation proposal?-- That's right.
>
> Yes. If you had known it to be the fact that Dr O'Hara was not unconditionally in favour of the relocation proposal you wouldn't have expressed the criticisms that you did express in your letter, would you?-- I would have.
>
> You would have?-- at the track. Yes, because Dr O'Hara spoke to many people at the track.
>
> Well -----?-- And they came to me and said, 'What do you think?'
>
> But ... ?-- I wasn't going on what I read in the paper. I was going on what other members of the club had told me."

[132] In a question shortly after the answer just quoted the respondent agreed with the suggestion put by the cross-examiner that, "the second basis of the criticisms you expressed of Dr O'Hara in this letter was your assumption that the views attributed to Dr O'Hara on a relocation issue in the Bulletin article of 4th of May were accurately recorded?".

[133] Having regard to the respondent's repeated statements in evidence affirming his reliance upon the newspaper article, and the impression conveyed by the transcript quoted above that one of the cross-examiner and the respondent interrupted the other, I am unconvinced that the quoted answer was a reliable denial that the respondent relied upon the article. Furthermore, no basis appears for disregarding the trial judge's undoubted advantage in assessing the reliability and effect of the respondent's answers in the passage now relied upon by the appellant.

[134] The evidence referred to in ground (h) includes also the following answer:

> "To be fair, would you agree that if the Mossop article did not accurately express Dr O'Hara's views on the relocation proposal you might have not written in the terms you did? . . . No. I don't think that would make any difference. The number of people that came to me at the club on a race day saying that he was running around, they say he was a salesmen [sic] for the sale of the club."

[135] The trial judge pointed out, accurately in my respectful opinion, that the question was hypothetical and that the respondent's answer was a rejection of the hypothesis

(that is, a rejection of the hypothesis that the appellant was not unconditionally in favour of the relocation proposal).[44] The answer was therefore not responsive to the question.

[136] In the immediately following questions the cross-examiner asked whether the respondent was relying "in part" on information that he said was given to him by unnamed other people at the club as the basis of his criticism, to which the respondent agreed. In further cross examination the respondent adhered to his evidence that he also relied upon "an unqualified statement" by the appellant to the respondent that the appellant wanted "to sell the club and move to Palm Meadows and get a better stand for the members and all sorts of things, going to have a hotel and everything", as well as statements by people at the racecourse about what the appellant had said to them. In the context of that evidence, the evidence in which the appellant affirmed his reliance upon the article, and the non-responsive nature of the earlier answer quoted in appeal ground (h), the trial judge was amply justified in not attributing weight to that answer. There was no error in the trial judge's rejection[45] of the appellant's argument that the respondent would have published his letter if he had known that the appellant did not advocate the relocation unconditionally.

(j) In disregarding evidence that before the Respondent (Defendant) published the imputations complained of, information was available to members of the Club in the Club magazine (published in September 2007) in the form of an article by his friend and legal adviser, Mr Millican (who was Chairman of the Club's board), that, in common with the other directors of the Club) the Appellant's (Plaintiff's) support for the relocation proposal was conditional upon the establishment of its financial feasibility by a process of due diligence;

[137] The trial judge referred to the evidence described in this ground and there is no basis for the proposition that his Honour disregarded it. His Honour was entitled to accept the respondent's evidence that he was not aware of the article by Mr Millican. Nor did the respondent's failure to acquire that knowledge require the conclusion that the respondent had not established the reasonableness of the publication of the imputations.

(k) In disregarding the absence of any evidence to establish the reliability of unspecified information from Club members upon which the Respondent (Defendant) said he relied as a basis for the publication of the imputations complained of;

(o) In failing to attach any significance to the ruling that there was no evidence capable of supporting the defence of honest opinion under section 31 of the Defamation Act 2005; see Austin v Mirror Newspapers Ltd ((1986) AC 299 at p 317);

[138] A proposition to the effect stated in ground (o) is to be found in the judgment of the Privy Council in *Austin v Mirror Newspapers Ltd*.[46] Their Lordships were concerned in that case with a newspaper defamation which, of course, carried a far greater potential for harm than the respondent's letter to club members. The ground of the Privy Council's decision to set aside the finding of reasonableness was that

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44 *O'Hara v Sims* [2008] QSC 301 at [61].

45 *O'Hara v Sims* [2008] QSC 301 at [64].

46 (1986) AC 299; (1985) 63 ALR 149.

"the Court of Appeal never considered the most material part of the circumstances in this case, namely how it came about that Mr Casey came to write a factually untrue account of the appellant's training methods." The trial judge here conducted a careful examination of the circumstances before concluding that the conduct of the respondent in publishing the defamatory imputations was reasonable.

[139] The appellant argued that the evidence of the statements made by unidentified members of the club and of the statement made by the appellant to the respondent was rejected by the trial judge as providing a reasonable basis for the imputations in the course of the trial judge's ruling that there was no evidence fit to go to the jury of a defence of honest opinion under s 31 of the Act. However, the trial judge was there concerned to decide "whether there is evidence to go to the jury that the opinion ascribed to Mr O'Hara in Mr Sims' letter could be found from the evidence"[47] as to which his Honour concluded that there was "an absence of proper material to support the opinion which is pleaded as the defence."[48] The question under s 30(1)(c) of the Act was the different one whether the conduct of the respondent in publishing his opinions "was reasonable in the circumstances".

[140] Accepting the need for a cautious approach in such circumstances, the trial judge's finding that the vagueness of the evidence concerning the bases for the opinion advanced for the purposes of s 31 was such as to deny them status as "proper material" was not inconsistent with acceptance of the view that the same bases formed part of the grounds for concluding that the respondent acted reasonably in publishing the imputations for the purposes of s 30.

[141] The appellant also argued that the statements made to him by other club members concerning the appellant's attitude to the move were unreliable because of the absence of detail either as to the identity of the information providers or as to the content of the remarks attributed by them to the appellant.

[142] The respondent gave evidence, which the trial judge accepted, that many trainers, stable hands and other members of the club expressed to him statements about the appellant's support of the relocation proposal, saying that the appellant wanted to sell the club and that "he was a salesman for the sale of the club". The trial judge accepted that there was "a degree of imprecision about the evidence of what the plaintiff's views as expressed to members of the club were", but drew the inference that statements by various members to the respondent contributed to the respondent's understanding that the appellant was supportive of the move in circumstances where he knew that no detailed proposal had been received.[49] Those findings were supported by the evidence identified by the trial judge.

[143] No specific ground in the notice of appeal challenged the finding by the trial judge that[50] in the last conversation between the appellant and the respondent in April 2007 the appellant "expressed some level of support for the relocation while the defendant was adamantly opposed to it, but nothing was said by the plaintiff to explain that his support was conditional upon the proposal "stacking up"". The trial judge did not err by attributing to that conversation some support for the respondent's imputations in his letter.

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47 *O'Hara v Sims*, Transcript, 29 October 2008 at 3-86.

48 *O'Hara v Sims*, Transcript, 29 October 2008 at 3-86.

49 *O'Hara v Sims* [2008] QSC 301 at [63].

50 *O'Hara v Sims* [2008] QSC 301 at [62].

(m) In failing to give any weight to the circumstance that the Respondent (Defendant) proffered no explanation in his evidence for the difference between his moderately expressed and non-defamatory criticism of the re-location proposal in his letter to members dated 18 May 2007 and the defamatory attack on the Appellant (Plaintiff) in the matter complained of.

[144] I accept the argument for the respondent that there was no error in the trial judge's failure to attribute significance to the disparity between the respondent's two letters in circumstances in which they were months apart, the second publication occurred after the appellant had done nothing to disabuse the respondent about the concerns expressed in the respondent's letter of 18 May 2007, in the conversation of April 2007 the appellant had expressed support for the relocation without mentioning that the support was conditional upon the proposal "stacking up", where the respondent believed as a result of statements by other members of the club that the appellant supported the move despite the absence of a detailed proposal, and where, notwithstanding the imminence of the election of members of the committee, the appellant had not disavowed the views mistakenly attributed to him in the article published in the Gold Coast Bulletin.

(n) In failing to give any appropriate consideration to the question whether the Appellant's (Plaintiff's) explanation in his evidence of his omission to seek a correction of the Mossop article was a reasonable one.

[145] The appellant elaborated upon this ground of appeal in a way which emphasised the reasonableness, from the perspective of the appellant, of his failure to seek any correction of the Mossop article. The appellant's senior counsel pointed out that the appellant was not cross-examined to suggest that his decision not to seek a correction of the Mossop article was unreasonable, and that there was no guarantee that the appellant would have obtained a correction in the Gold Coast Bulletin had he sought it or that any such correction would have come to the notice of the respondent.

[146] What is in issue here though is the conduct of the respondent in defaming the appellant. His Honour observed that whilst much of what one reads in the newspaper is not true, much of it is.[51] His Honour regarded it as significant that the error in the article remained uncorrected despite the subsequent and continuing controversy. In these particular circumstances the trial judge was right to treat the newspaper article as a source of information for the respondent's article for the purposes of the defence.[52] The question is not whether the appellant owed any duty to correct the article. As was submitted for the appellant in argument in reply, the focus should be on the reasonableness of the respondent's conduct. Section 30(1)(c) of the Act specifies, as one of the elements of the defence of qualified privilege, that the conduct "of the defendant in publishing the defamatory matter" is reasonable in the circumstances.

[147] The trial judge quoted the evidence given by the appellant concerning the reasons for his failure to correct the inaccurate reporting of his position, but the trial judge correctly did not attribute significance to the appellant's subjective views; rather his Honour focussed upon the significance of the absence of any correction for the reasonableness of the respondent's conduct. The trial judge said:[53]

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51 *O'Hara v Sims* [2008] QSC 301 at [60].

52 *Defamation Act* 2005 (Qld), s 30(3)(g).

53 *O'Hara v Sims* [2008] QSC 301 at [54]-[60].

"[54] The publication is said to be unreasonable because Mr Sims assumed without checking with either the plaintiff or Mossop whether the article correctly represented the plaintiff's opinion.

[55] This point, which is the plaintiff's main point, is met by the plaintiff's inactivity. He did nothing to correct the erroneous representation of his views to the world, or that part of it which reads the Gold Coast Bulletin. His reason for not seeking a correction was that there was 'not much point' in complaining: a complaint 'wouldn't get anywhere, would achieve nothing' so he 'wouldn't bother'.

[56] Whether one finds that convincing or not, the point is that Mr O'Hara let the representation of his opinion which appeared in the article stand uncorrected. He did not write a letter to the editor of the Bulletin for publication in which he expressed the important qualification to his support for the relocation, nor did he seek Mr Mossop's co-operation in having a correction published in a subsequent edition. Nor did he seek to communicate with the members of the club who might read the paper. This last point is important. The article did stir up controversy and some criticism of Mr O'Hara's view which, as expressed in the newspaper, was rash in his support for the relocation without a detailed proposal. Mr Sims expressed his particular objection in his letter of 18 May 2007 which the plaintiff received and read. He made a particular point of the inappropriateness of making a decision without proper material.

[57] Mr O'Hara did nothing to correct the misconception. He did not even respond to Mr Sims personally by an individual letter. Nor did he speak to him at the club which he attended every Saturday for the races. It would have been easy and without cost to explain to Mr Sims that he had been misquoted and that his opinion on the move, though it differed from Mr Sims', was sensibly based. Nor did he take the opportunity of submitting an article in the spring issue of the club magazine circulated, without cost to him, to the members in which he could have clarified his position.

[58] In these circumstances it is not surprising that the defendant should assume the correctness of the newspaper article. On a matter of particular importance to the membership the plaintiff allowed his views to be seriously misrepresented and made not the slightest effort to have his real opinion promulgated, not even to the defendant whom he saw every week at the races. The plaintiff must have expected that people would assume his views were those reported by Mr Mossop.

[59] In a real sense he brought the defendant's criticisms on himself.

> [60] It is right that much of what one reads in newspapers is not true: but much of it is. The lack of any effort at any level to correct the error in the article would lead naturally to the conclusion that it was correct."

[148] It is true that the trial judge referred in parts of that passage to the question whether it was reasonable not to correct the article from the perspective of the appellant, but the burden of the reasoning was directed to the conclusion that in the absence of any retraction and in light of the other evidence it was unsurprising and natural that the respondent would assume that the newspaper article correctly reported the appellant's position.

(p) In failing to consider, in the light of inconsistencies in his evidence as to the basis upon which the Respondent (Defendant) published the imputations complained of, he had discharged the onus of proving the defence;

[149] I have discussed the particular inconsistencies in the evidence of the respondent to which the appellant pointed as supporting this ground of appeal. The appellant submitted that the trial judge lost sight of the fact that the onus lay upon the respondent to establish that his conduct in publishing the defamatory imputations was reasonable in the circumstances. There is no substance in that submission. The trial judge decided that the respondent had satisfied that onus.

(q) In failing to attach any weight to the respondent's (Defendant's) evidence that he did not make any check with Mossop as to the accuracy of his article published in the "Gold Coast Bulletin" of 4 May 2007.

[150] This is the last of the particular errors asserted by the appellant.

[151] The appellant's contention that the trial judge failed to attach weight to the respondent's evidence that he did not check with the journalist as to the accuracy of his article is incorrect. The trial judge was alive to that consideration[54] but considered that the respondent's conduct in publishing the defamatory imputations was nevertheless reasonable for the reasons which I have traversed.

Orders

[152] I would dismiss the appeal and order the appellant to pay the respondent's costs of the appeal to be assessed.

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[54] *O'Hara v Sims* [2008] QSC 301 at [54].