DISTRICT COURT OF QUEENSLAND

CITATION:	***Smith v Farren-Price*** **[2004] QDC 225**
PARTIES:	**KEITH SMITH** Plaintiff and **JOHN FARREN-PRICE** Defendant
FILE NO:	1168/2001
PROCEEDING:	Claim
ORIGINATING COURT:	District Court Southport
DELIVERED ON:	23 April 2004
DELIVERED AT:	Southport
HEARING DATE:	18, 19, 22, 23 & 29 March & 1 April 2004
JUDGE:	Robin QC DCJ
ORDER:	**Claim and counterclaim dismissed**
CATCHWORDS:	DEFAMATION – cross claims by lot owners in a faction-ridden body corporate - defamatory material published only within body corporate on occasions of qualified privilege – absence of good faith not shown *Body Corporate and Community Management Act* 1977 *Defamation Act* 1889 Cases cited: *Anthony v Rockett* [1999] QCA 434 Associated Newspapers Ltd v Dingle [1964] AC 371; (1962) 2 All ER 737 *Body Corporate for "Surfers Waters" v M & G Angland,* Appeal 761 of 1999, 10 March 2000; [2000] QDC 034 *Mayes v Hodson* (1993) 79 LGERA 65, Appeal (1993) 173 LSJS 2000 *Sorenson v MacNamara* [2004] 1 Qd R 82 *Television New Zealand Limited v Ah Koy* [2002] 2NZLR 616
COUNSEL:	Mr P Morrow for the plaintiff, self-represented from 29 March 2004

Self-represented for the defendant

SOLICITORS: Czaus Lawyers for the plaintiff, until 29 March 2004
Self-represented for the defendant

[1] These are the detailed reasons for orders made on 1 April 2004 at the conclusion of a six-day trial dismissing both the plaintiff, Mr Smith's claim and the defendant, Mr Farren-Price's counterclaim. The latter was self-represented throughout, although he had lawyers until some time before trial. Mr Smith (having expended at least $25,000, as he told the Court) dispensed with legal representation after the fourth day. In consequence, closing addresses were devoid of legal argument. Fortunately, the lawyers' efforts had resulted in the respective claims and responses being effectively pleaded, so that the issues were properly identified. Once both sides had come to be self-represented, arguments about admissibility of evidence boded to become unmanageable. The expedient was resorted to of receiving all the evidence tendered, on the basis that any necessary determination of the admissibility of particular evidence or documents could be made in due course by the Court. (The most troublesome category was material tendered by Mr Smith in a "rebuttal" case which his Counsel had earlier reserved a "right" to present, calculated to discredit Mrs Jill Peters, who was not merely a witness for the defendant: she was obviously the person seen by Mr Smith and his supporters as the cause of just about everything that went wrong, at least in the sense that her alleged deficiencies in controlling the on-site caretaker/managers, and otherwise, justified the making of numerous complaints and challenges.)

[2] The plaintiff was quick to court, filing his claim and statement of claim in his defamation action based on publications by the defendant dated 10 November 2001, 14 November 2001 and 20 November 2001 on 28 November 2001. The context is "*unhappy differences*" among the owners of lots in the Kings Row South Community Title Scheme 11397, which is the body corporate in respect of one of three buildings at Commodore Drive, Paradise Waters, Gold Coast, the other two buildings apparently being free of the disharmony for which it appears Kings Row South has acquired a reputation. An objective indication of the disharmony is the large number of disputes that have been taken before an adjudicator under the *Body Corporate and Community Management Act* 1997.

[3] There is a counterclaim by the defendant in respect of an earlier publication by the plaintiff, who wrote a letter to the Secretary of the body corporate (commencing "*Dear Sirs,*" although Mrs Fay Taylor was the Secretary) written to register objections to the accuracy of minutes of an AGM held on 29 March 2001 in respect of whether the defendant had or had not nominated as Chairman, the plaintiff contending in the affirmative, the defendant in the negative. Mr Smith's letter said, among other things:

> "It is obvious that the statements from both the secretary and Farren-Price are a complete fabrication of untruths. I insist that a Correction Notice advising this error also be forwarded to all owners, advising of this blatant misleading statement."

The defendant has amended his counterclaim to exclude claims based on earlier and latter publications of 8 August 2000, 8 March 2001 and 27 November 2001 (2000 – see [66] below) which appeared to be critical of the body corporate committee as a whole, rather than of the defendant in particular.

[4] The defendant's publication of 10 November 2001 was an amazing barrage of vituperation by the defendant, who appears to have "taken up the cudgels" for other members of the body corporate who might be unhappy about Mr Smith. This may seem surprising, given that the defendant was a relative late-comer to Kings Row South, having acquired a lot there only in 2000. Mr Smith had been there virtually since the inception of the scheme. The publication is:

> "**When is Enough, Enough?**
>
> 10th November 2001
>
> To All Unit Owners
> Kings Row South
>
> I have now resided in Kings Row South for approximately sixteen months. Almost from day one I have received a constant stream of abusive mail directed primarily at the Body Corporate Committee and Chairman. I had the great misfortune to be invited to join the Committee after the last AGM when a newly elected Committee member resigned immediately upon being elected. Since then I have been included in the personal abuse and criticism as a Committee member. I personally find the level of disharmony and criticism within this building does not make it a pleasant place in which to reside.
>
> This letter has never before and probably never will again be a course of action that I would normally take. The vast majority, if not all of this highly offensive mail originates from one person Mr Keith Smith. I think it would be unwise for the Committee to dignify his incessant malicious accusations with a response but I feel compelled to do so on a personal basis. He has a handful of hapless puppets he seems to be able to pen his correspondence for and have them unwittingly sign. One of these people recently stood up to be counted but unfortunately almost immediately sat down again. Offering a reward for his identity would only be offered if you were sure that it would never be claimed. I have personally experienced this mans blatant dishonest and unbridled deceit on more than one occasion. I believe at Mr Smiths behest the name 'Kings Row' was raised at a recent public forum as an example of a badly managed building, a situation I find embarrassing and hardly conducive to lifting our stagnant property values.
>
> Apart from myself, a democratic process elected the balance of the committee and chairperson to their positions by a majority of the unit owners. It is extremely unfortunate that Mr Smith will not accept the majority decision and wait until the next election to cast his vote. He did once hold the position of Chairman but resigned because the committee would not support his unreasonable demands. He has openly stated his grand plan to take over the rolls of Chairman, Manager and Body Corporate Manager of the building and live in his own little Kingdom. He is constantly driving our Managers out of the building and will continue to do so unless the silent majority speak up and ends his activities. I have heard from many long-term respectable residents of his deeds over many years and can only wonder why this is allowed to happen. I know of several residents contemplating leaving Kings Row

because of the ill feeling caused by his terrorist like activities. What a shocking state of affairs.

He constantly makes hollow threats of legal action and I can only hope this letter prompts him to take that course with me. I ask you to support your Committee whoever they are as they were elected by the majority of voters. Jill Peters like all of us has her strengths and weaknesses but she will at least stand up to Keith Smith and is prepared to voluntarily give of her time for the good of the building. A position no one else seems willing to undertake also no building Manager should have to contend with a situation like this and knowingly pass it on to their successors.

At the few Committee meetings I have attended the subject matter is invariably very mundane and straightforward eg. Paint on the driveway, fire escape lighting, owners correspondence etc. There is no hidden agenda as has been inferred, we are only there voluntarily for the good of the building, after all we are unit owners too. We seem very much to be damned if we do and damned if we don't, whatever the decision. Any unit owner is always welcome and in fact has a right to attend any Committee meeting they so desire. Our phone numbers are also public knowledge and all unit owner correspondence is acknowledged even though almost 70% comes from one owner.

As an example of his duplicity, Mr Smith was personally aware of the state of the Marina and the urgency of the repairs and in fact even offered to pay his marina fees in advance to help offset the cost. An offer by the way, primarily designed to avoid his increased Marina fees, which were independantly assessed, which he refuses to pay – more legal action. After all, his is the largest boat on the Marina, in fact too large for the Marina and berthed at very cheap rates. Once the Marina was fixed, he then started a crusade of criticism because we did not wait for an AGM. The repairs could not wait for the next AGM and did not warrant an EGM. The Marina had to be fixed – It was our money too. I can't tell you how much time has been taken up by the committee discussing the TV cable between Mr Smiths TV set and his wall, and his Solicitors over an amount of $60, which is plainly his responsibility. I find his constant level of deceit and harassment appalling and only wish there were a more direct course of action available to me to deal with this individual. I sincerely hope the majority of unity holders who I know share my views will stand up and silence this man once and for all. It we don't, it will most certainly continue.

The above instances are but a very small example of Mr Smiths tactics of divide and conquer. A full inspection of Kings Row files will reveal the magnitude of this dreadful problem."

[5] As the defendant expected, his letter prompted a reaction, in the form of the plaintiff's solicitors' letter of 14 November 2001, demanding, among other things, that those who had allegedly given information to Mr Farren-Price be identified:

"Mr Smith has instructed us to write to you in respect of a letter dated 10th November 2001 titled 'When is Enough, Enough?' purportedly written by you signed 'John Farren-Price, Unit 51' and circulated within the building known as Kings Row South.

The letter contains a number of serious allegations against Mr Smith who is particularly concerned at the publication in the letter inter alia of the following words:

1. 'The vast majority, if not all of this highly offensive mail originates from one person Mr Keith Smith.'

2. 'I think it would be unwise for the committee to dignify his incessant malicious accusation with a response but I feel compelled to do so on a personal basis.'

3. ‘He has a handful of hapless puppets he seems to be able to pen his correspondence for and have them unwittingly sign.’

4. ‘I have personally experienced this man’s blatant dishonesty and unbridled deceit on more than one occasion.’

5. ‘I believe that Mr Smith’s behest the name ‘Kings Row’ was raised at a recent public forum an example of a badly managed building.’

6. ‘He did once hold the position of Chairman but resigned because the committee would not support his unreasonable demands.’

7. ‘He has openly stated his grand plan to take over the roles of Chairman, manager and Body Corporate manager of the building and live in his own little kingdom.’

8. ‘He is constantly driving our managers out of the building and will continue to do so unless the silent majority speak up and end his activities.’

9. ‘I have heard from many long term respectable residents of his deeds over many years and currently wonder why this is allowed to happen.’

10. ‘I know of several of the residents contemplating leaving Kings Row because of the ill feeling caused by his terrorist like activities.’

11. ‘He constantly makes hollow threats of legal action and I can only hope this letter prompts him to take that course with me.’

12. ‘As an example of his duplicity Mr Smith was personally aware of the state of the Marina and the urgency of repairs and in fact even offered to pay his Marina fees in advance to help offset the cost.’

13. ‘I find his constant level of deceit and harassment appalling and only wish there were a more direct course of action available to me to deal with this individual.’

14. ‘The above instances are but a very small example of Mr Smith’s tactics of divide and conquer.’

The said words referred to above in the ordinary and natural meaning and or by way of innuendo are understood to mean that:

(a) Mr Smith is unreasonable
(b) Mr Smith is unable to cooperate with people
(c) Mr Smith is malicious
(d) Mr Smith is manipulative
(e) Mr Smith is dishonest and deceitful
(f) Mr Smith is egotistical
(g) Mr Smith is disruptive
(h) Mr Smith is contradictory
(i) Mr Smith carries on terrorist like activities
(j) Mr Smith threatens people
(k) Mr Smith is duplicit
(l) Mr Smith harasses people

Each of these imputations is defamatory of Mr Smith and we are instructed that each of them is also completely false and without foundation.

As a result of the publication of your letter Mr Smith has suffered damage to his reputation which damage continues and Mr Smith demands from you the following:

(a) The name of the persons and or entities to whom you have published the offending words or similar words concerning Mr Smith.
(b) You submit to us a clear and unqualified written apology and retraction for the publication complained of by Mr Smith directed to the persons and or entities to whom you have published the offending words or similar concerning Mr Smith. If it transpires that the letter has been published to more than one or two persons within the building known as Kings Row South then our client will require a copy of the written apology to be posted on the Body Corporate Notice Board for a period of at least seven (7) consecutive days.
(c) Reimbursement of the reasonable legal costs which Mr Smith has incurred as a result of this matter.
(d) The name of the person or persons making the statements/allegations in paragraphs 8 and 10.
(e) An explanation of how you came into possession of envelopes usually used by the Body Corporate.

Mr Smith has instructed us that in the event of your agreeing to this course of action then depending on the extent of publication he may not seek damages against you. However if we do not have confirmation from you by the close of business on the 16th November 2001 that you will adopt this course our instructions are to issue proceedings claiming an amount by way of damages suffered by our client and the costs of such proceeding.

In the meantime Mr Smith reserves his rights."

(The confusing "*currently*" in paragraph 9 should read "*can only*").

[6] Mr Farren-Price's response was immediate:

"With reference to your letter of today's date I acknowledge receipt herewith and advise that I shall not be responding to your threat.

The purpose of my communications re Mr Smith is an attempt by me to bring about a peaceful environment and an end to Mr Smiths disruptive activities at Kings Row South.

Time is of the essence in this regard and I therefore fax you this response in order to ensure your proceedings suffer no unnecessary delays."

[7] Both of these letters of 14 November 2001 (or copies of them) were enclosed with the defendant's next circular letter to owners of the same date, which is the second publication in respect of which the plaintiff sues.

[8] The second relevant publication, apart from the enclosures, (the longer of which obviously constitutes the "sting" of the publication) reads:

"Firstly I feel as though I am doing exactly what I set out to stop ie distributing unwanted mail. However, I have had such encouraging support it appears most of you, as I suspected, also want an end to our most unfortunate situation at Kings Row South. I sincerely thank all those who took the time to contact me, particularly those from interstate.

I have today received from and responded to a letter from Mr Smiths Solicitors (copies attached). Due to the support I have received I feel you may be interested in being kept informed of what may well be lengthy proceedings. However, I certainly

respect your privacy and should you not wish to receive this correspondence simply return this letter with your Unit number on the back to P O Box 759 Broadbeach 4218.

Unfortunately a lot of what has gone on in the past has been distorted or misrepresented and I therefore intend to keep this matter in open forum."

Mr Bingley of Unit 53 went so far as to record his support in writing, in a circular to all owners (Exhibit 37).

[9] Not content to leave things there, the defendant wrote and distributed Exhibit 3 on 20 November 2001:

"**An Open letter to Keith Smith**

Keith, while I am waiting for your next letter I thought I would share a few thoughts with you. You would be aware by now that there has been considerable support to my initial letter. I have also been encouraged to pursue this situation to a positive conclusion. I intend to do so on behalf of all these people – people you have bullied and bluffed for many years and who now have had enough. I am thinking along three possible lines.

1. At the last AGM you threatened to leave Kings Row if you didn't get your way and I immediately offered to phone a removalist for you. Both comments were witnessed and my offer still stands.

2. You could agree to never again contact a list of owners, (a list that I would supply at their request), or cause any one else to contact them in any way shape or form.

3. A large number of owners will join me in seeking a Restraining Order against you to achieve number 2, (Class action – you could be famous, infamous). The relevant Act is 'Orders Under The Peace and Good Behaviour Act 82.205'. Quite appropriately worded I thought.

You have threatened, harassed, abused and manipulated far too many people for far too long. Some even feel physically threatened by you. Owners have invested substantial amounts of money in Kings Row South and they are entitled to enjoy their investment without your dreadful unwanted interference. Your public statement recently that you would 'Bring Kings Row South to its knees' indicates a mind that I can't fully comprehend. I'm sure there would be a lot of suggestions but we won't go into that. As recently as yesterday it was again confirmed to me what a shocking reputation Kings Row South has in the high rise management industry and your part in that.

Keith you MUST accept that the MAJORITY'S wishes MUST and WILL prevail. Yes, we desperately want a happy social environment, but not on your terms. The owners of Kings Row South would all like to hear positively from you Keith in the very near future, ONE LAST TIME! Your choice."

[10] It can hardly be doubted that the publications are defamatory, although I am inclined to put the second one in a special category, as it is essentially informing those who received the first one of the response of Mr Smith to it, a response the solicitors chose to give by reproducing the parts that had given most offence, along with their understanding of what those parts meant. Mr Farren-Price, who represented himself at the trial, appears to have repented of some of what he called "*colourful*" aspects of what he wrote. Although, as will be seen, there was a basis

for his criticisms of Mr Smith, or most of them, he may be regarded as stating his case in an extreme way by use of adjectives such as "*constant*", "*incessant*" and "*blatant*" and "*dreadful*" – and variants, particularly "*constantly*". As will be seen, Mr Smith's own style of communication is to resort to similar adjectives and adverbs.

[11] I think it is clear from Court of Appeal decisions such as *Sorenson v MacNamara* [2004] 1 Qd R 82 and *Anthony v Rockett* [1999] QCA 434 at [35], both instances of defamatory publications in similar Gold Coast body corporates, that the occasion of the publications was one of "qualified privilege". The facts of the present matter preclude any other finding. It was common ground that Kings Row South was riven with disharmony. The defendant's publications, essentially, convey information, namely Mr Farren-Price's opinions about the cause(s) and suggest the remedy. The former case (if not the latter as well) shows that it is not necessary that the target of the defamatory publication continues to hold a particular office.

[12] Mr Smith is shown by his own evidence to be a successful business man, presently 75 years old. He began as a radio/TV retailer in Melbourne, then became a manufacturer. After moving to the Gold Coast he seems to have attained a dominating position providing radio and TV hire and service in motels and units. He branched out into operating marine centres at Southport, Brisbane and Mooloolaba. After that he became a property developer on the Gold Coast and a manufacturer in new areas such as desalinators and digital instruments used in boating. Since the early 1960s he has been active in the Southport Yacht Club. He acquired his unit in Kings Row South in 1982. For most of the time since he has lived there. He was Chairman of the body corporate from 1990 to 1996. Mr Smith's witnesses attest to his unblemished character in their opinion.

[13] There was no challenge to assertions that Kings Row South worked efficiently and harmoniously during his chairmanship. He was succeeded by one of his character witnesses, Mr King, who resigned after a couple of years because of ill-health (Mr Farren-Price elicited in cross-examination that he was presently standing for Chairman, despite not being in good health, because he is concerned at the body corporate's situation and certain things happening. The Court was told on the last day of the trial that at the AGM held on the day before Mr King had become Chairman, and that Mr Smith was elected a committee member, displacing Mr Djurovitch, who polled the same number of votes, on the toss of a coin.)

[14] Mr Farren-Price acknowledged that use of the word "*terrorist*" was wrong, particularly in light of events in the United States on 11 September 2001. In the circumstances, although Mr Morrow, for Mr Smith, devoted a considerable amount of attention to this word, I do not think any reader of the publication would take it as implying that Mr Smith represented an actual threat to the person or property of anybody, notwithstanding assertions (which I think are likely to be true) that some susceptible people may have apprehended some physical threat to

themselves from things Mr Smith said or did. Recent events involving Mr Scarr place a different complexion upon this matter. Another respect focused on by Mr Morrow (although not one highlighted in the statement of claim or the solicitor's letter of 14 November 2001) was the encouragement given to others to "*silence this man once and for all*". Depending on the context, such a statement may have an extremely sinister meaning, e.g. if uttered by a Boss in gangland circles. Supposedly, an Archbishop of Canterbury was murdered by someone who overheard and misunderstood King Henry II's lament "*Who will free me from this turbulent priest?*" Nevertheless, I do not think anyone would read the letter as calling for liquidation of Mr Smith, even for preventing his speaking or writing as he wished. While it is not for the defendant in defamation proceedings to identify the meaning of his statement, in this instance, I think Mr Farren-Price is correct, that he wished to "*silence*" Mr Smith through a process of lot owners ignoring unsolicited communications from him to the extent that he would give up making them. The publications make it clear enough he would have been pleased to see Mr Smith leave the building.

The Issue

[15] As I explained to the parties in a short extempore explanation of the judgments to be pronounced, in both claim and counterclaim, everything boiled down to the ability of the claimant, in light of ss 16 and 17 of the *Defamation Act* 1889, to show absence of good faith in the other when he made the relevant publication(s). For what it is worth, I consider Mr Smith's claim to qualified privilege under s 16 of the *Defamation Act* as rather weaker than Mr Farren-Price's; further, the case that Mr Smith did not believe his publication in Exhibit 4 to be true seemed to me a far stronger one than the case he might have been able to make against Mr Farren-Price in that regard. I am very much giving Mr Smith the benefit of the doubt, partly in recognition that he was the victim of more wide-ranging communications, in a series, and that the distribution was wider. The evidence showed that for some years, there was friction in Kings Row South at a level unparalleled in my experience. I consider this makes it advisable, if a reader of these reasons is to understand the Court's conclusions about good faith, to expose, with documented detail, aspects of the context in which the parties found themselves, rather than merely offer broad generalisations or summaries, which would strike an uninformed outsider as hardly credible. Even so, the detail will not be complete. Space and time do not allow a full discussion of the circumstances relevant to every one of Mr Farren-Price's impugned statements. A few will be looked at in detail, and the information relevant to them which Mr Farren-Price had. In respect of none of the statements has absence of good faith been shown against him. On both sides, evidence of events occurring well after the publications was adduced. Parts of it strongly support opinions expressed in 2001 and are useful in that way. However, the findings and conclusions reached would have been the same had there been nothing revealed to the Court of these later events.

The Parties Fall Out: Prelude to Exhibit 4

[16] Mr Farren-Price, a relative newcomer to Kings Row South, was one of those concerned at changes being made to the "eastern penthouse", which the then committee, far from questioning, appeared to be promoting. (It may be noted that the proprietors ultimately got the outcome they wanted from the Adjudicator, through a process which produced some heavy criticism of the committee.) He became an applicant to the Adjudicator himself, with Mr Lees (who gave evidence in his case) and Mr Burns (who gave evidence for Mr Smith), in Application 714 of 2000, an unsuccessful attempt running in tandem with Mr Smith's (Applications 684 of 2000 and 705 of 2000 – also unsuccessful) to overturn what happened at the Extraordinary General Meeting of the body corporate held on 5 December 2000. Mr Smith had applied first on 27 November 2000 for an order that the meeting be put off. The meeting went ahead. Essentially, Mr Smith's challenge in Application 705 of 2000 was to the disallowance of about 10 votes of other owners transmitted to the Secretary – not directly, as relevant rules required, but by Mr Smith and his supporters, the consequence of disallowance apparently being that the Peters faction emerged substantially victorious, the Smith faction failed.

[17] Mr Smith's letter to the Adjudicator, of 8 December 2000, deals with allegations by Mrs Peters that he had "*abused two old ladies for not voting in my favour*":

> "I have spoken to both ladies, one in company with my wife, and both denied having stated that I had abused them. Nor did I make any reference as to how they had voted. It is typical of the vicious attitude in our building today.
>
> Confirmation can be obtained by telephoning either of the above ladies."

Another letter of the same date (Mr Smith also wrote to the Adjudicator in 705/2000 on 6 December, 7 December, 11 December [twice] and 17 December and sent a fax from his boat, MV Manresa on 8 December) refers to "*Unit owners …being outsmarted by deception*", not "*wanting their vote to go astray in the mail boxes*."

[18] At the EGM, the contentious matters were variation of the management/caretaking agreement (carried 25-16), engagement of the firm of Mr Danieletto (Peters/Taylor faction) as "*Body Corporate Manager*" (carried 25-16, so that Mr Smith's motion for the firm of his friend Mr Harrison to be appointed was then "*declared redundant*") and the dismissal of Mrs Peters and all committee members (defeated 15-25). Mr Macaulay's motion that Mr Smith "*be nominated and accepted as interim Chairman and that he seek nomination from eligible persons to fill the vacancies existing on the committee until the next AGM*" was declared redundant and therefore out of order.

[19] Exhibit 5 is a copy of a notice dated 20 November 2000 calling for nominations and motions by 31 December 2000 for the "*forthcoming Annual General Meeting*" (no date for which is indicated, although it is stated that it must be within three months of the latter date). On the Nomination Form incorporated below appears

the acknowledged signature indicating consent of Mr Farren-Price, on the top line in the column (of five columns) furthest to the right. The column furthest to the left indicates the nomination is for Chairman, as opposed to Secretary, Treasurer or Member. Details for Mr Horne and Mr King occupy the first two lines for members. Mr Farren-Price's evidence was that he was presented by Mr Smith with a document (probably blank) and asked to "*sign here*", which he did, without reading it, in reliance on Mr Smith's representation that the purpose was for use at the EGM, if the motion for removal of the existing committee and Chairman got anywhere. His impression was that he might take over chairmanship of the EGM until the motion that might have installed Mr Smith was dealt with. I accept that evidence of Mr Farren-Price, as I do all of his evidence.

[20] I find that when the original of Exhibit 5 was presented to Mr Farren-Price, it was completely blank, that there was nothing relating to Mr Horne or Mr King. Other details for Mr Farren-Price (surname, given name and unit number) were written later by Mr Smith, I find, together with the date (30 December 2000), identification of himself and his wife as nominators and his own signature. The date may well have been genuine in some aspects, but does not represent the time when Mr Farren-Price signed, which I find was prior to the EGM on 5.12.2000. It looks as though Mr Smith spoiled the document after Mr Farren-Price signed by initially writing most of the given name "*John*" in the Surname column. The form which became Exhibit 5 was in circulation for a couple of weeks before the EGM, available to be signed.

[21] Mr Farren-Price did not have the slightest thought of becoming Chairman or even a committee member of the body corporate except for the briefest of periods, consistently with what is said above. The plan was for Mr Smith to become Chairman on 5 December 2000. It is not credible that if he had succeeded he would have vacated the role for Mr Farren-Price. It was a misuse of the document to forward it to the Secretary (albeit in accordance with its terms) as indicating consent of Mr Farren-Price to nomination for any position to be filled at the 2001 AGM. Mr Farren-Price was stunned when his "*Nomination for the Committee*" was formally acknowledged by the Secretary on 16 January 2001 (Exhibit 6), as was Mr Smith's "*Nomination for Committee*" (Exhibit 7); as it happened, there was a fairly dramatic incident in the foyer of the building before the full facts emerged, involving the parties, Mrs Peters and Mrs Taylor. Mr Farren-Price took steps to withdraw any nominations put forward in his name well in advance of the AGM. Of course, it was too late by then for new nominations to be made.

[22] Mr Smith apparently contended that one or both of the women pressured Mr Farren-Price into withdrawing. I prefer their evidence that they would have been happy for Mr Farren-Price to become Chairman. His challenge to the EGM had been thrown out by the Adjudicator on 3 January 2001; they probably saw him as having left the plaintiff's camp.

[23] At the AGM, Mrs Peters was the only nomination for Chairperson and Treasurer. Mrs Taylor was the only nomination for Secretary. As to the committee, of a possible 60 votes (Mrs Peters ruled out five), Mrs Cox garnered a remarkable 53. Of the others on the Burns/Cox/Horne/La Parker/Macaulay/Smith ticket (promoted by Exhibit 44) only Mr Horne, with 27 votes, was elected. Mr King received 23. Mr Horne resigned almost immediately, the defendant being appointed to replace him.

[24] The minutes of the AGM record the following as part of "*general discussion*" at the end of the meeting:

> "It was confirmed that at the time the meeting notice was issued only one nomination had been received for the positions of Chairperson, Secretary and Treasurer. Mr Farren-Price (Lot 51) advised he had signed a nomination form at the request of Mr Smith (Lot 61) but that nomination had related to the general meeting held in December 2000 and that upon learning the nomination had been submitted for this meeting it was withdrawn by him (Mr Farren-Price)." (Exhibit 9)

The foregoing is accurate. Mr Smith did not think so. Among other objections to the minutes set out in Exhibit 4, in which he defames the defendant and Mrs Taylor (both accused of "*a complete fabrication of untruths*") he wrote:

> "Item 2 of General Discussion – This item is grossly inaccurate and misleading. There was a legitimate nomination for Farren-Price for Chairman on the same nomination form as Phil King and Vern Horne for Committee, copy of nomination form signed by all is attached. Both Phil King and Vern Horne were on the ballot paper which confirms it's receipt by the Secretary. Clearly it was signed by Farren-Price on the 30 December, 2000, three (3) weeks following the EGM."

Consistently with the Court's findings above, the comment is insupportable, and may be thought to merit all or many of the pejorative adjectives Mr Smith is shown to have used suggesting deceit, etc. Exhibit 44 indicates that Mr King was not on the ticket for the AGM with Mr Horne; there would appear to be no justification for Mr Smith's so suggesting. Receipt of the document by the Secretary showed nothing, except Mr Smith's breach of the trust Mr Farren-Price reposed in him by signing the document in blank for another purpose. This signing did not happen on 30 December 2000, rather, weeks before. Exhibit 4 shows that Mr Smith either did not recognise or did not care about the truth. I am prepared to assume it was the former.

[25] Exhibit 4 contains one of the many examples among the exhibits of Mr Smith's skill and subtlety in using language, where it charges Mrs Peters and/or Mr Danieletto with being unprofessional without using the word itself:

> "Jill Peters assured us all that as we now had Body Corporate Management, our meetings would be conducted and presented in a professional manner. This is not reflected in the reporting of these Minutes."

This letter was written on 9 April 2001 and marks Mr Farren-Price's introduction to committee work in Kings Row South.

Some of the Events during the Defendant's Term on the Committee

[26] In following paragraphs will be set out a sample of the interactions of Mr Smith with the management (principally Mr and Mrs Taylor) and the chairperson (Mrs Peters) and members of the committee in the months between the defendant's joining the committee and penning Exhibit 1.

[27] The Taylors threatened defamation proceedings (by an aggressive letter of their solicitors, Exhibit 38, of 28 March 2001) based on a "*Memorandum to Owners*" dated 8 March 2001 from Mr Smith and others. Mr Smith responded on 2 April 2001:

> "3. During the past year, the actions of our Body Corporate committee which includes the secretary, have been outrageous, irresponsible and unprofessional resulting in a totally divided hostile community in an extremely unhappy building, which has involved the Commissioners office seven times over the last 18 months.
>
> **...**
>
> 6. Please be advised that the moment an action is taken against any of the Body Corporate members referred to, I will immediately lodge with the appropriate court, the sum of $50,000.00 as security towards cost in the cause. An application with supporting evidence will be lodged with the court seeking similar surety from the plaintiff.
>
> 7. Until now, the disputes between the parties have remained in house, being differences amongst unit owners all having a vested interest. The Taylors proposed action will now make the issue public and avail the owners the opportunity of airing their grievances in a public forum. The media, including current affairs programs will be most interested at this further attempt of monopoly intimidation of body corporate members, whose only crime is attempting to protect their rights and values.
>
> 8. The credibility **of all** parties associated with this action will be questionable if the action does proceed. The management contract **sale value** will be the first to suffer when it all becomes public. No agent or prospective purchaser would care to recommend or buy in to the atmosphere this unprofessional committee has created. Their contract will eventually terminate with the effluxion of time as no sale could possibly eventuate at Kings Row South.
>
> 9. No further correspondence need be entered into. Czaus lawyers, of 66 Marine Parade, Southport, have been instructed to receive service and to engage council best suited to the action. **Many individuals will be engaging their own consulting solicitor**. Once commenced, we will ensure that the action is taken to final judgment. There will be no withdrawals without total cost reimbursement to all 11 defendants." (Exhibit 39)

The dynamics of and relationships within the building were such that Mr Farren-Price would have become aware of this controversy.

[28] There followed, on 9 April 2001, Exhibit 4, defaming (among others) Mr Farren-Price.

[29] In the following month there came Exhibit 31, Czaus Lawyers' letter of 29 May 2001 threatening that Mr Smith would "*enforce his rights and seek compensation …in such quantum as may be determined by the Court*" if the committee proceeded with their resolution of 14 May 2001 to terminate Mr Smith's marina licence should fees remain unpaid. It is noteworthy that the solicitors' letter accepts that the marina arrangement was a "*licence*" terminable by the body corporate (although the letter indicates that termination would lead to a claim for compensation). At the next committee meeting on 31 August 2001 (the minutes are Exhibit 32) multiple issues to do with Mr Smith had to be dealt with: his occupation of a marina berth, his objection to relocation of basement letter boxes and the expenditure of $9,120 upon "*urgent repairs*" to the marina which Mr Smith (among others) was anxious to see effected. Other correspondence generated by Mr Smith included a further letter from his solicitors (6 June 2001, part of Exhibit 47) taking issue with events at and minutes of the AGM of 29 March 2001 and making certain demands and a letter of 30 August 2001 (Exhibit 35) effectively charging Mr and Mrs Taylor with "*a major breach of security*", "*serious disregard for the safety of the residents*", "*lack of appreciation concerning safety of unit owners – an understatement*", putting up an "*outrageous excuse*", relocating mail boxes "*without any consultation whatever with owners*" and of her "*attitude*" during a telephone conversation (to which Mr Smith was not a party): "*I …note that unit owners pay you to carry out the terms of your contract and one of those terms relates to civility in dealing with owners.*" (It was suggested in the letter of 6 June 2001 that Mr Smith's request for "*scrutineers*" should not have been answered "*it's not in the Act*" [although technically that was so] but by an invitation to inspect documents, in recognition of opposing factions.)

[30] Exhibit 35 was followed by Exhibit 40, 11 September 2001, which Mr Smith wrote to the committee regarding another "*blatant breach of…security*" when a garage door was left open, allegedly for some hours, to allow the Salvation Army access to remove second-hand furniture. The committee and/or the managers were accused of an inappropriate "*attitude towards our security and safety*":

> "Also the fact that concerned owners are unable to express their point of view on matters relating to their own property without hostile confrontation (possibly not experienced by those known to have voted in favour)."

There were accusations of "*arrogance*", "*contempt*", not being "*responsible*", "*failure to exercise the Duty of Care*":

> "I assure the Committee that this is not the end of the matter, for I, like many other owners, are concerned by this Committee's apparent negative attitude to obvious problems existing in our building and we intend to do our utmost to return to the original 'address of success' and the pleasant social atmosphere of past years.
>
> From past experience, I did not expect an intelligent reply, for you will get your opportunity of defending your actions in the near future."

[31] Another issue that had festered for some time was the committee's attempt to get Mr Smith to pay for installation of a cable running to his TV set from the wall of his own unit. This was one of the topics in his letter to the Secretary of 27 September 2001 (Exhibit 20):

> "I certainly will not pay this $60.50 account but on principle, I will spend thousands to defend it. The innocent owners will pay a lot of money to have the new Body Corporate Manager pursue this amount, which can only end in Court."

[32] On 17 October 2001, a number of owners requisitioned an Extraordinary General Meeting for 26 November 2001. This led Mr Smith to bring before the Adjudicator Application 700 of 2000 seeking that the Adjudicator would order that the body corporate was not required to call the meeting. Mr Smith advised the Adjudicator that "*owners are being harassed*", that "*owners are sufficiently intimidated to vote against their true interests*". On the same day (17 October 2001) Mr Smith was the primary signatory (of 18) to a rival requisition for an Extraordinary General Meeting (for 28 November 2001) the point of which was to require a secret ballot at the following AGM ("*secret ballot … removes the fear of intimidation and discrimination for having an opposing view*"), to require an independent returning officer (which "*eliminates the practice of opening voting papers prior to meetings and creating embarrassment and intimidation. Not one person with a vested interest can ever have access to your information and discriminate against you*") and "*full disclosure of all correspondence received and discussed by the Committee and the subject matter noted in all minutes*" (- "*the absentee owner is misguided by non-disclosure … The system of keeping people uninformed to gain support is a practice that must be avoided.*")

[33] On 6 November 2001 came Exhibit 30, Mr Smith's circular to unit owners complaining about the 1999 AGM's removal of secret ballot, allegedly on the Committee's recommendation:

> "Avoid being misled again … Union bosses came to power by removing secret ballot which then allowed threats and intimidation to mould people … again I ask, why are they arguing so strongly to retain open ballot? Remember, it was the Committee who removed secret ballot.
>
> Body Corporate Management is a multi-million business today and controlling groups will go to extreme limits to gain control of your building budget, cheque book, Body Corporate seal, bank account and sinking fund.
>
> Seven thousand unit owners have recently lost their money by Management companies being liquidated as published recently in the Courier Mail.
>
> VOTE YES FOR SECRET BALLOT AND RETAIN CONTROL …
>
> What a pack of lies you have received …"

The Macaulay Letter

[34] A new drama unfolded in the building on the eve of Exhibit 1, which appears to refer to it in the second paragraph. There was distributed widely (if not fully – Mr Smith apparently missing out) the following communication, Exhibit 11:

> "11 Kings Row South
> 18 Commodore Drive
> **Paradise Waters Qld 4217**
>
> 8TH November, 2001
>
> Dear Fellow Unit Owners
>
> I wish it known I will have no further contact or involvement with Mr Keith Smith, as I have found him to be dishonest and a trouble maker. He will go to any lengths to get his own way including lying and cheating.
>
> I have come to this conclusion after someone placed two documents under my door (copies included) which clearly show he is a man with no morals.
>
> He also involved me in his lies and I want no part of this. He has his own agenda and I will be of no further assistance to him.
>
> Yours sincerely
>
> (Signed) Peter Macaulay
>
> Peter Macaulay"

What looks like Mr Macaulay's signature appears. No document showing an original signature has surfaced. Mr Macaulay gave evidence that he had nothing to do with the letter; there was no evidence to the contrary. I am not sure whether in the plaintiff's case it was intended to suggest that Mr Farren-Price had anything to do with Exhibit 11, or any of the witnesses Mr Farren-Price called; all of them denied it. There is no reason to think that the defendant was involved. His record is one of acknowledging his anti-Smith publications, and quite aggressively too.

[35] One of the "two documents" reproduced in Exhibit 11 was apparently a copy of a letter dated 10 August 2001 from Mr Czaus, who, as Mr Smith's lawyer, sent it "Without Prejudice" to another firm. The letter effectively shows a client called Keith Smith crying poor ("*struggling financially*"), and offering a lady a very modest sum in respect of all claims past or future for maintenance and costs. The other document was apparently a Westpac Banking Corporation form signed by Mr Macaulay and Mr Smith on 17 May 2001 purporting to summarise the latter's financial circumstances, which hardly show him as "*struggling financially*", rather as a millionaire. The comparison was in fact pointless, as Mr Czaus' client in this instance was Mr Smith's son.

[36] Mr Macaulay had joined Mr Smith in a business venture called World Opal Supplies. Confronted by Mr Smith with Exhibit 11, he responded by distributing

Exhibit 12, dated 10 November 2001 and disavowing Exhibit 11. The two of them were then associated in distribution of a "*Reward Notice*" very prominently proclaiming itself as such, which was posted in prominent locations around Kings Row South (such as the lifts) in the following terms:

> "**REWARD**
> **$10,000**
>
> A reward of $10,000.00 is offered to persons providing information leading to the arrest and prosecution of person or persons involved in the commission of a fraud, falsification of documents, forgery, printing, publication and dissemination knowingly false and injurious material touching or concerning the printed matter circulated on the 9th November 2001 at Kings Row South and elsewhere concerning Mr Keith Smith and Mr Peter Macaulay. Anybody witnessing the distribution into the letterboxes of this material is eligible.
>
> Any person having any information may contact:
>
> | | | |
> |---|---|---|
> | Mr Keith Smith | or | Mr Peter Macaulay |
> | 5531 2876 | | 5532 6880 |
> | 0428 752 061 | | 0403 327 161" |

Some did not appreciate the posters, which I suppose were seen as an unpleasant intrusion hardly calculated to enhance the atmosphere in or reputation of Kings Row South.

[37] Mr Smith said the enclosures which, properly understood, do not reflect badly on him at all, were stolen from his unit by some person who gained unauthorised access to it.

[38] Although the purported author of Exhibit 11 (put into evidence by the plaintiff's Counsel) quickly disavowed it, it does not appear that anything was done to correct the unfavourable impression that comparison of the enclosures would generate, if the solicitor's letter were taken to relate to Mr Smith.

[39] Assuming that Exhibit 11, published to the same readership as Exhibits 1, 2 and 3, had tarnished Mr Smith's reputation before Exhibits 1, 2 and 3 emerged, the Court would be required to isolate the damage caused by the defendant's publications about him, and should not mitigate the damages payable by the defendant on the basis that the plaintiff's reputation was already tarnished: *Television New Zealand Limited v Ah Koy* [2002] 2NZLR 616, applying *Associated Newspapers Ltd v Dingle* [1964] AC 371; (1962) 2 All ER 737.

Defendant's Belief in Truth of His Publications

[40] I accept Mr Farren-Price's evidence that he believed at the time of his publications that what he published to unit owners about Mr Smith was true. The legal issue, of course, is whether he published defamatory material knowing or believing it was not true. In Mr Smith's claim, it is Mr Smith who bears the onus of proving

absence of good faith, at least in one of the respects indicated, if the claim is to succeed (s 17 of the *Defamation Act*). Mr Farren-Price's attack upon him was such that my initial reaction was that the claim of Mr Smith must succeed (subject to possible special considerations respecting Exhibit 2, referred to elsewhere). It seemed unlikely that Mr Farren-Price could show justification for all of the defamatory material. By the time of the trial, Mr Farren-Price's recollection was insufficient to enable him to present "chapter and verse". This may owe something to his having severed all connection with Kings Row South some time ago, and to the demands of his having to earn his living.

[41] The evidence shows not a single witness on either side whose view of Mr Smith was changed by the defendant's publication(s). Mr Smith said he thought some owners treated him differently. As I recall, only one person was identified (by one of his witnesses) as having become concerned about Mr Smith. It is difficult to place any credence in this untestable hearsay, one of the complicating features being the earlier distribution of Exhibit 11, the "*Macaulay letter*", or "*forged Macaulay letter*", as Mr Smith described it.

[42] As a generality, from the safety of the witness box, the defendant's witnesses were forthright in expressing their agreement with the defendant's views, which, by and large, they thought represented the truth. Mr Smith's witnesses, whose high regard for him was made clear, gave evidence to opposite effect. In these circumstances, while considering that the defence witnesses were much more aware of what was going on, in the sense of knowing the facts, I thought it incumbent upon the Court to scrutinise the evidence (particularly "contemporaneous" material and exhibits) for the purpose of reaching an understanding of Mr Smith's role in the building. The outcome vindicates the defendant and his witnesses and tends to confirm their recollections, judgments and even the lay assessments of Mr Smith's personality and psychology which they advanced (without objection from Mr Smith); it is powerful corroboration of assessments of Mr Smith in Exhibits 1, 2 and 3 as likely to be factually true for the most part, *a fortiori* of the defendant's belief in the truth of them.

[43] It is convenient to note what the Statement of Claim asserts to be the various meanings of Exhibit 1, called Schedule A:

> "(a) By paragraphs 1 and 2 of Schedule A:
>
> (i) makes malicious accusations against the Body Corporate Committee and Chairman;
> (ii) makes highly offensive complaints against the Body Corporate and Chairman;
> (iii) makes abusive comments against the Body Corporate and Chairman;
> (iv) creates disharmony within the Kings Row South building;
> (v) is malicious.
>
> (b) By paragraph 2 of Schedule A:

(i) dominates and controls people in order to make them sign comments referred to in paragraph (a)(i), (ii) and (iii) above;
(ii) is manipulative.

(c) By paragraphs 2 of Schedule A is blatantly dishonest.

(d) By paragraph 2 of Schedule A engages in unbridled deceit.

(e) By paragraph 3 of Schedule A:

(i) does not accept majority decisions;
(ii) undermines democracy.

(f) By paragraph 3 of Schedule A makes unreasonable demands upon the Committee of the Body Corporate;

(g) By paragraph 3 of Schedule A is dictatorial and/or monarchal;

(h) By paragraph 3 of Schedule A engages in terrorist-like activities;

(i) By paragraph 4 of Schedule A constantly makes vexatious threats of legal action;

(j) By paragraph 6 of Schedule A:

(i) is duplicitous;
(ii) engaged in deliberate conduct to avoid paying increased marina fees.

(k) By paragraph 6 of Schedule A engages in deceit and harassment;

(l) By paragraph 7 of Schedule A in his dealing with the Committee of the Body Corporate engages in tactics of divide and conquer."

References to the body corporate in (a)(ii) and (iii) are probably intended references to the committee. In my opinion, meaning (l) is not defamatory; but (h) is problematic too: I do not think any unit owner in the building would take it literally – the context is that not only managers were being driven away, other owners might leave too, not because Mr Smith intended that, but because of the "feeling" his activities engendered.

[44] Similar meanings were said to be conveyed by Exhibit 2, essentially a republication, in the guise of informing readers of Exhibit 1 of Mr Smith's response.

[45] Exhibit 3 is covered in paragraph 10 of the statement of claim, alleging meanings that the plaintiff:

"(a) by paragraph 1:
(i) is a bully;
(ii) bluffs people;
(iii) manipulates people.

(b) by paragraph 5:

(i) threatens people to such an extent that some people feel physically threatened;
(ii) harasses people to such an extent that some people feel physically threatened;
(iii) abuses people to such an extent that some people feel physically threatened;
(iv) manipulates people to such an extent that some people feel physically threatened;

(c) by paragraph 5 interferes with the affairs of Kings Row South Body Corporate in an unwanted and dreadful manner;

(d) by paragraph 5 has conducted himself in such a manner that he has played a part in Kings Row South having a shocking reputation in the high rise management industry;

(e) by paragraph 6 refuses to accept democratic decisions."

In my opinion, (b) is an unwarranted conflation of two sentences in the publication, which does not link the inappropriate conduct attributed to Mr Smith with feelings others may have of being physically threatened by him. (This final serious allegation I find was made honestly by the defendant, although he cannot now recall the details he had in mind.) For what it is worth, there are "*similar facts*" in the disgraceful events of the visit Mr Smith and Mr Djurovitch paid to Mr Scarr (whose evidence I accept fully) on 6 February 2004, whose effect will apparently be to force him out of Kings Row South. Further (pre-publication) corroboration is hinted at in one of Mr Smith's own letters of 8 December 2000 to the Adjudicator in Application 705 of 2000, already referred to: it is material on the public record in 2001. I would also refer to Mrs McKay's letter of 28 July 1998 (Exhibit 36). (It would not be appropriate to find anything whatsoever proved against Mr Smith by such material, but its forming part of records the defendant would have had access to bears on the honesty of opinions formed by him.)

[46] Some care must be taken with alleged imputations regarding Mr Smith that are expressed generally – e.g. that he "*is malicious*", when all that was said was that he made certain malicious accusations, that he is a "*bully*", when all that was suggested was that he had bullied certain people in the building. According to the Macquarie Dictionary, a bully is "*a blustering, quarrelsome, overbearing person who brow-beats smaller or weaker people.*" As I read Exhibits 1, 2 and 3, they say nothing about Mr Smith generally, but are limited to expressions of opinion about his conduct within Kings Row South. The publications do not carry imputations about Mr Smith or his conduct outside the confines of Kings Row South affairs.

Some Events After the Defendant's Publications

[47] It might be noted that Mr Farren-Price's publications did nothing to change the regularity or content of Mr Smith's communications. See the "*Important Bulletin*" of 27 November 2001 (Exhibit 46) complaining of "*half truths plus*

edited information" and referring to "*the doubtful ability of your present committee*":

> "(ix) If the committee does not advise me, within 14 days, that it intends to act in a reasonable, competent and responsible manner in respect of the marina and its problems I intend to progress this matter further."

Mr Smith's defaming Mr Farren-Price was reinforced by Exhibit 41, letter of 10 January 2002 to Mr Lees:

> "Dear Ian
>
> As a result of our discussions yesterday, I enclose photocopies of the relevant material as discussed in the hope of assisting you in an accurate assessment of our current position.
>
> Letter No. 1 is a summary submitted to the commissioners office (with other documents) outlining events of the past three years – most revealing. Obtaining a copy of submissions to the commissioners' office on this recent application would be of assistance to your decision making.
>
> Letter No. 2 is a copy of the nomination by J Farren-Price as Chairman for the last AGM in March 2001, dated 30/12/2000 and signed on that date – this being well after the EGM was held in early December. Both Phil King and Verne Horne appeared on the ballot paper but Farren Price's nomination on the same page was denied as ever existing.
>
> Letter No. 3. This is the first letter ever written by Jill Peters in 1999. The contents are self-explanatory in the appointment of Phil King to committee and the ungracious shot at past Chairman without any prior provocation.
>
> Letter No. 4. This is a letter written by Farren-Price to the commissioners office on 31/12/2000, the contents clearly stating his opinion of this committees actions and an apology for yourself and Gerry Burns.
>
> Letter No. 5. This is the latest reply from the commissioners office on the application to resolve the roof disasters. This action by Gerry Burns is still very much alive.
>
> I sincerely hope that this small amount of the material that is available will assist you in your assessment of statements made to date."

"*Farren-Price's nomination on the same page was denied as ever existing*" is a falsehood, as Mr Farren-Price had never denied the existence of Exhibit 5 and his signature on the original. Mr Smith's circular of 14 March 2002 (Exhibit 42) describes the committee's comparison of quotes from Mr Danieletto and from Mr Smith's friend, Mr Harrison as "*inaccurate and at worst is deceptive and misleading.*"

[48] A later letter of 2 May 2002 (Exhibit 43) reported a success before the Adjudicator in relation to expenditure of body corporate monies on part of the manager's lot as part of foyer refurbishment, but Mr Smith expressed his displeasure at the Adjudicator's authorising the refurbishment to proceed – "*for which I question the Adjudicator's motives.*"

[49] Mr Farren-Price's justification for his publications was not limited to Mr Smith's conduct while he (that is, Mr Farren-Price) was on the committee; he presented that conduct as a continuation of unacceptable conduct that had been going on for some years. His argument was that it was time for someone to stand up to Mr Smith. It would be wrong for the Court to rule in terms of or to accept generalities from the defendant's witnesses regarding Mr Smith's role in Kings Row South over the years and/or accept them as justification for the defendant's publications. Those publications were so strong that I think it incumbent on the Court to demonstrate the points made generally by the defendant's witnesses by detailed references to the history of the building. It is difficult to know what is the best way of undertaking what is necessarily a wide-ranging examination of Mr Smith's role. I have decided to do it by examination of particular subjects which came to be important within Kings Row South, and also some particular features of the claims that Mr Smith has made over the years and in his conduct of the trial, and of Mr Farren-Price's claims of conduct by Mr Smith that merited the criticisms he circulated to members of the body corporate. This involves going beyond the examination of what happened while Mr Farren-Price was on the committee.

Management Agreements

[50] Decisions of Queensland Courts in recent years, published articles that got into evidence, some of the evidence in the case and my professional experience before joining the Court all suggest that in a good number of body corporates, of which Kings Row South is an example, there is tension between the interests and attitudes of some or all of the owners and of those who manage or caretake buildings under contractual arrangements which, with options to renew, may apply over considerable periods of years. The genesis of the problem is often the original developer's taking advantage of its control of the body corporate to grant management rights, very likely selling them for a substantial amount of money, and thus inflicting on those who become purchasers of lots and who will have to pay the recurring management/caretaking fees from year to year a manager/caretaker who may prove undesirable for all manner of reasons. A market in management rights has developed in which owners have little or no practical say. It is the outgoing selling manager/caretaker who selects the replacement, ordinarily likely to be whoever will offer the best terms. Large prices are paid for acquisition of "management rights". It is natural that many owners will be resentful of this trading in "rights" which, from some points of view, may be seen as created by and for (and as belonging to) the owners in a moral sense.

[51] The terms of years allowed, even with options exercised, will eventually run out. If an incumbent manager/caretaker is to have something to sell, it will be necessary to get the body corporate to agree to an extension. That has been the pattern in Kings Row South.

[52] It is to be expected that there will be regular contact and dealings between the "management" and the body corporate committee, especially the person who chairs the committee. Whether there is harmony in the body corporate is likely to depend on how amicably and/or efficiently they happen, also on whether the owners are satisfied with the outcome. Relations as between the manager/caretaker and owners may be significant too, the former being likely to need the consent of a majority of the latter to change contractual relationships. The importance to owners of the management being well disposed towards them will depend very much on circumstances. As to whether the management in Kings Row South had letting functions in which the managers might be tempted to favour owners they liked, the evidence was conflicting. Apparently, holiday lettings are not available there.

[53] It seems common sense that the managers and the committee are strategically placed to enjoy easy access to owners and potential to influence owners, many of whom may fall into line either enthusiastically or for the sake of harmony, or because it represents the easier course. Turning to this building in particular, Mr Smith might suggest more sinister explanations such as intimidation, manipulation or deception.

[54] Human nature being what it is, the ways in which individuals respond to each other will often be crucial. People will be influenced by whether they feel respected and whether they feel their legitimate interests or other requirements are being met. It would hardly be surprising to find a certain amount of empathy developing between management and the Chairperson, assuming they are able to get on at all, and associated with that some sympathy with the goals the other is pursuing, so that they come to be perceived by outsiders as allies.

[55] The foregoing general observations have been applicable in Kings Row South, in my opinion. In particular, a relationship of the kind described in the last paragraph developed between Mrs Taylor and Mrs Peters once the latter assumed the chair in October 1999. It is not necessary to assign blame to observe that from that point hostility between the women and Mr Smith developed, which was barely concealed at all. Mr Smith opposed the body corporate's granting indulgences or supposed benefits to the Taylors. These included relieving the Taylors of "*management*" duties of an administrative/secretarial nature, without reduction in their remuneration, and the way in which the committee presumed to achieve this themselves, rather than refer the matter to the body corporate, as they should have done. Mr Smith objected to the Taylors' appointment being extended. He objected to expenditure of body corporate funds upon some work in an adjacent lot owned by the managers when refurbishment of the foyer (common property) was undertaken. The argument for that expenditure was that it would prevent the refurbishment's being marred by unsympathetic décor of part of the private lot.

[56] (There is a relevant side issue showing that Mr Smith was not consistent in his attitude. In March 2001, another owner's complaint of poor TV reception led to a technician's being brought in by the body corporate. He investigated Mr Smith's reception, with Mr Smith's authority. It was improved by replacement of the cable between the wall and Mr Smith's TV set, work I am satisfied Mr Smith authorised, in the sense of telling the technician to go ahead. The committee decided that he should be billed for it, on the tenable basis it was work within a lot. Mr Smith probably had relevant expertise at least equal to the technician's and could have replaced the cable himself for a few dollars. No doubt it would have been open to a fellow-owner to object to expenditure of body corporate funds for improvement of Mr Smith's unit. He thought the body corporate should pay for his new cable and installation of it, having brought the technician to the building. There are arguments for both points of view, as there have been in relation to the work on the managers' lot. Mr Smith made a major issue of the $60.50 bill which went on for months before Exhibit 1 was published. His letter of 27 September 2001 [Exhibit 20] challenging the 31 August 2001 committee minutes about this issue [Exhibit 32] states:

> "I certainly will not pay this $60.50 account but on principle, I will spend thousands to defend it. The innocent owners will pay a lot of money to have the new Body Corporate Manager pursue this amount, which can only end in Court.
>
> I would urge all owners to take an interest in what is happening to their now financially controlled building, as the whole exercise is to make profits at owners' expense out of every letter, photocopy, fax or other action they may take.
>
> Again I state, I did not call for service and have no intention of paying this account. Please remove this charge from my account immediately.")

[57] Mr Smith was not averse to extension of the term of a manager he liked, as the experience of his witness Mrs Morris and her husband attests. He appears to have been willing to do favours for other managers he liked, such as Tom Harrison, author of Exhibit 82, tendered by Mr Smith, and admissible as Mr Harrison is deceased: "*The relationship was beneficial to us both*" – or Mr Bower (Exhibit 65):

> "When Janet and I moved to Kings Row we had a difficult time with the committee who were attempting to change the terms of our management contract in a way that would have seriously reduced the value of our investment. Keith Smith played a role in persuading other unit owners not to support the proposed changes."

[58] The Court heard from managers on both sides of the case – their attitude (understandably) seemed to be that the owners had a responsibility to cooperate with them.

[59] Once it seemed inevitable that the body corporate would approve the removal of administrative/secretarial functions from the management contract for Kings Row South (which is now apparently known as the caretaking agreement), Mr Smith lobbied strongly for Tom Harrison to be given the excised responsibilities

(something he had been working for since 1998), rather than Mr Danieletto, Mrs Peters' nominee, who won the relevant vote at the contentious EGM of 5 December 2000. The result was to add another to Mr Smith's targets for criticism, i.e. Mr Danieletto. The animus or distrust continues. Mr Smith tendered as Exhibit 72 exchanges of correspondence with Mr Danieletto which he suggested showed a selective approach in responding to Mr Smith's requests for material, depending on how the interests of management and/or the committee might be affected by the disclosure.

[60] Mr Smith enjoyed good relations with three managers in succession, until 1996. It is not clear how he got on with the McLeans, who followed. He became an opponent of the Boyces and the Taylors, and I am satisfied made their lives in Kings Row South a misery, whether or not that is what he intended. I cannot endorse his or his witnesses' criticisms of their competence, probity or industry in the face of contrary assessment from other witnesses. Such conflicting views seem to be par for the course in the building, and go back at least to Mr Bower's time at the end of the 1980s.

[61] It was a campaign against Mr Boyce that led to Mr Smith's resignation when he found himself Chairman again in 1998, when Mr King retired because of ill-health. I accept that his attitude to managers, by then, was as assessed by Mrs McCormick, and at odds with that of fellow committee members and that of most fellow owners.

The Plaintiff and Mrs Peters

[62] According to Exhibit 56, on the day before, 29 October 1999, after only 14 months in the building, Mrs Peters was elected Chairman by the committee when Mr Cox resigned. She proclaimed "*We are a democracy*", and closed her first circular as Chairman with an invitation to owners to nominate for next year's committee, or as Chairman. In between came a statement probably not intended to be inflammatory, but whose effect on Mr Smith may well have been:

> "I have been told that there are several ex-Chairman in the building who most likely believe they can do a better job than I can. Well please let me inform them I do not want to be KING. I want this to be a happy, healthy, well-run building…"

2000 was a year of friction. There were six applications to the Adjudicator:

- Mr Smith's successful 441/2000 to cancel an EGM called for 19 August 2000 regarding engaging a body corporate manager, after Mr Smith had made his point that the committee lacked authority to appoint Mr Danieletto.
- 462 (by Peter Macaulay and Del La Parker) which overturned committee approval of work in the eastern penthouse (a result reversed when the penthouse owners, on the Adjudicator's invitation, made application 249/2001)

- 500 by Gerry Burns regarding the method of calculation of marina berth fees
- 684 by Mr Smith seeking cancellation of an EGM called for 5 December 2000 and for an Adjudicator to decide the motions (the main one of which concerned the Body Corporate Manager issue)
- 705 by Mr Smith, to have counted votes excluded at that EGM, which did go ahead, and
- the companion 714, by Lees, Farren-Price and Burns.

Throughout the year 2000, all of the applicants to the Adjudicator could reasonably have been seen as allies of Mr Smith against the committee. On 27 March 2000 when Mrs Peters wrote separate letters to Mr Burns and Mr Smith, who apparently wished to meet her "*regarding the things you perceive as not being done*", Mrs Peters' attitude, expressed in the somewhat hectoring letter to Mr Smith (in Exhibit 46) had made a distinction in favour of him:

> "I have written to Gerry explaining that I personally will not tolerate his contentious attitude and until his manners have improved I will not deal with him personally. I appreciate that although you disagree with some aspects of the committee's decisions you have always behaved as a gentleman in my presence. However, I do feel that you could do more to work with us to make this a happy, healthy and well-run building with stable and competent managers. The four changes of management in four years has undermined the stability and performance but I'm sure you agree that with our help our current managers have the potential to be the best in years."

The letter and Mr Smith's notes on it indicate some of the matters of difference, as to whether a cobweb was "*small*" or "*large*", and how long it had been there before it was removed.

[63] Samples of Mr Smith's letters to the secretary and committee are:

- 29 May 2000 – complaint about the manager's testing the performance of the generator under working conditions of power failure simulation, leading to the lift shuddering and losing illumination momentarily: "*This irresponsible act at peak-hour use of the lifts is inexcusable…would the committee please instruct the manager and contractor on the following major points… I trust that my request will be favourably received and that I, like others, will not be reprimanded by mail and/or nominated as an unreasonable stirrer.*" (Part of Exhibit 47).

- 5 June 2000 (Exhibit 47A) was, in part:

  > "Today I have been made aware of two letters which are of major concern to myself and to all Body Corporate members.
  >
  > Letter (1) A letter from the Committee of Kings Row South to Gerry Burns of Unit 65.
  >
  > Letter (2) A letter from Czaus Lawyers for Gerry Burns claiming defamation damages dated 26-5-2000 with a return date of 7-6-2000. Now a matter of urgency.

> I am advised that two committee members want the matter resolved quickly and to proceed no further, but are frustrated by the attitude to the problem of other committee members.
>
> It is a matter of extreme urgency that an action of this nature does not proceed to costly litigation and is terminated forthwith.
>
> If the present committee continue to be negligent in their responsibilities to owners and allow the possibility of excessive costs being incurred, my hand will be forced and I must go to the members with all the relevant facts involved with the possibility of an E.G.M. to protect their interest and property values.
>
> Please be advised and forewarned that I will not contribute to any legal costs due to this foolish conflict.
>
> I trust that wisdom will prevail and a responsible committee will resolve the problem quickly and not become involved in a costly personality power battle.
>
> Due to the present committee's reluctance to publish incoming correspondence, I am taking the liberty of distributing this letter to each unit owner to afford each member the opportunity of input in the hope of avoiding this potential disaster.
>
> I remain an extremely concerned resident owner."

[64] There followed a rush of increasingly vitriolic correspondence from Mr Smith following his discovery in committee minutes for 27 July 2000 that the committee had appointed Mr Danieletto's firm to perform the secretarial and treasury duties for Kings Row South. On 27 July 2000 Mr Smith wrote that a general meeting was required. When the committee responded by giving notice of an EGM for 19 August 2000, Mr Smith wrote on 29 July 2000:

> "I was amazed at the unprofessional procedure adopted by the committee in response to my letter of 27/7/00. instead of admitting that an error in judgment had occurred, I find in the response to the owners, blame is directed to the owner who made the committee aware of the obvious mistake and, the Chairperson claims that I am opposed to body corporate management of their choice. I am delighted that the committee, who for years vigorously opposed my motions in the past, have finally come to their senses and agreed with me, if only they could do it in a professional manner as required by the *Body Corporate Act* and not accept and follow misguided advice.
>
> I truly believe when I made the committee aware of the illegal content of item no. 5 contained in the minutes, they would at least, as a group, have reviewed the balance of item no. 5 to establish its legality.
>
> However, someone chose to go immediately to an EGM based entirely on the error that I had highlighted in my letter of 27th. It is obvious that the committee has again been misguided in not looking for other potential breeches and has overlooked yet another major error of judgment."

The letter goes on in terms such as "*gross inexcusable error*" and "*the quote from our Chairperson attached to the EGM notice about CPI increases is MISLEADING*". The day following Mr Smith wrote to the committee:

> "Since the present Chairperson came to office, my name and past position with the body corporate has been the subject of adverse comments and innuendoes of an insulting and derogative nature. This criticism has appeared in correspondence to a number of residents and general correspondence to body corporate members. I have quite a collection.
>
> Please be advised if the practice continues, I will use the material and take steps that would be unpalatable to us all.
>
> I trust the poison letter policy will cease forthwith… PS This letter should be available if a search of body corporate records is considered necessary."

[65] On 3 August 2000 a meeting of 14 or 16 "*concerned members*" chaired by Mr Hayes occurred, minutes of which form part of Exhibit 46. Largely, the meeting was a platform for Mr Smith. Attachments of the same date headed "*Minutes of the Last Meeting*", "*The Manager's Contract*" and "*Summary*" advance the arguments for the concerned members' desire to quash both the committee resolution and their notice of EGM, an alternative EGM to be called on a more sound basis. Further such material dated 8 August 2000 and titled "*Important Bulletin – You are being misled again with half-truths*" and "*Explanation of attachments*" followed, with predictable contents, such as "*Why is your committee in a hurry to give your asset away free?*" and "*Devious last minute attempt by your committee to remove your rights in favour of management…This new proposed appointment cannot ethically or legally be introduced without…being observed and processed at an EGM. NOW DO NOT BE MISGUIDED TO A SYMPATHY VOTE.*" Mr Smith's group were successful in achieving their aims before the Adjudicator. Mr Smith made the most of his victory, sending out the following:

> "25 August 2000
>
> …AND here we go again; another irresponsible 'flying minute' proposed for you to blindly sign or be reprimanded."

The "*flying minute*" referred to appears to be one proposed by Mrs Peters in light of the Adjudicator's ruling in a memo of 19 August 2000 which bears the note:

> "PS Fay put notices in the lifts on Friday to let the owners know the meeting had been cancelled. Three times these notices were taken down. Keith was very angry at the wording and threatened more legal action."

Mr Smith has noted "*This is how the committee is being manipulated*" on a facsimile which Mrs Peters apparently sent Mr Macaulay on 9 August 2000 in respect of an earlier "*flying minute*", which he appears to have passed on to Mr Smith. The evidence showed that Mrs Peters and other committee members regarded Mr Macaulay as an instrument of Mr Smith's and suspected him of withholding votes on issues in committee until he could consult with Mr Smith. Nevertheless, Mrs Peters' style in the fax is hardly ingratiating:

> "The Flying Minute supplied last night lists your options on how to vote: Yes/No/Abstain. You cannot HOW your decision. If you mean No please say so!!!!

> Thank goodness there are some people on committee who have the guts to make a decision according to their conscience.
>
> Please inform the committee how you have come to believe it is a non-conforming use. Fay faxed you on my behalf about 4 hours ago and we have not yet had the courtesy of a reply or explanation. If there is information that needs to be considered please supply it or be aware that you are withholding it from the authority which has the power to approve on behalf of the body corporate (the committee).
>
> Is it possible that you still do not understand what the committee's role is in the approval and that the proper building approval authorities cannot accept an applicant for building approval until the body corporate passes it. The decision the body corporate has is regarding the external appearance of the structure. This was clearly explained last night and there were no questions at the time. Non conforming use and external appearance are two different things.
>
> Please let me know who you have been influenced by after you left the committee presence last night. If you cannot see yourself as a valuable part of a working committee who pull together and DECIDE issues then I would appreciate your resignation forthwith."

("*HOW*" is probably a mistake on Mrs Peters' part or Mr Macaulay's for "HOLD".)

[66] The next flurry of proselytizing and communications was prior to the replacement EGM which the Adjudicator's rulings led to. Material from Mr Smith dominates the "*IMPORTANT BULLETIN*" of 27 November 2000. It is addressed "*To the Owner Members of Kings Row South*", advising them:

> "The same problems that affect you are there again. Half truths plus edited information.
>
> This new EGM is currently being challenged with the Commissioner and may not be held.
>
> The four last challenges against this committee have been found in favour of the applicants and strongly place emphasis on the doubtful ability of your present committee."

The explanation of Motion 7, which appears to contain a threat that it has not been shown could have eventuated is "*To avoid an administrator being appointed to protect your interests Mr Keith Smith will head an* ***interim*** *committee only until your next AGM in March.*" In this period Mr Smith rejected an olive branch offered by Mrs Peters regarding the manager's remuneration:

> "Members of the committee and I would be most interested in discussing this with you. We need to be totally prepared on this issue as my feeling is we will probably end up in the Courts."

Mr Smith's response of 25 November 2000 (part of Exhibit 46) was:

> "I refer to your letter of November 22.
>
> As a result of the latest revelations contained in the last three reports from Natural Resources and certain items contained in your statement enclosed with the latest

> EGM notice, I believe your conciliatory approach at this late stage inappropriate. You and your majority committee have created such a crisis and division within the community that nothing can be gained by asking for my help now… All owners will now be urgently made aware of this necessary process protecting their interests prior to the EGM as it is their money you propose to waste… PS This letter will be circulated in full in an attempt to bypass the practice of selective editing to suit certain parties. A fact that did not escape mention in the Commissioner's report."

[67] History revealed that it would take 10 or 11 further applications by Mr Smith and his group (to adopt that description of those who gave evidence for him in the trial) before there was another success before the Adjudicator in 794 of 2002, which took the committee to task for permitting owners of units in the neighbouring Kings Row Central to book the tennis court. The Adjudicator thought that "*The subject matter of this dispute was minor and of no real substance or practical significance for owners in the scheme*."

[68] In the lead up to the 2001 AGM Mr Smith wrote complaining of "*an unprofessional management and committee decision*" in relation to the eastern penthouse. The principal communication at the time, however, was the memorandum to the Owners – Kings Row South from "*a very concerned group of resident owners*" (including Mr Smith) of 8 March 2001, which is found in Exhibit 46. It is hard-hitting propaganda for the approaching AGM, opening with a description of Mrs Peters as "*autocratic*". Except that the charge of illegality is made so sweepingly, what follows appears to me defensible criticism of things that happened, defensible in the sense that the assertions cannot be dismissed as wrong or unreasonable. It begins with a complaint about the EGM of 5 December 2000:

> "The Secretary of the Body Corporate advised owners (in the documentation) that voting papers were to be returned to the Secretary at the address given in the envelope provided. Having advised owners of the voting procedures, she then invalidated 10 votes from owners claiming that the owners did not follow procedures laid down by the Act, (by mailing them to her). The Adjudicator agreed with this stating that all owners should be aware of the law! This remarkable comment does not allow for the fact that the Secretary was being paid by the Body Corporate to perform the duties of a Secretary, and that owners should have been able to rely on any directions given to them. Of course, this step was taken in order to protect the position of the Chairperson and reverse the will of the owners with regards to the variation of the Caretaker Agreements and the appointment of a body corporate manager with no financial adjustment. Surely this can be seen only as a cynical exercise aimed at depriving owners of their Voting Rights.
>
> During the course of the year the committee **illegally approved**:
>
> 1. The variation of the Management Agreements at a cost to you of $6,000.
> 2. Extensive alterations to the eastern penthouse, at committee level.
> 3. The engagement of a body corporate Manager, at committee level.
> 4. Declined approval for minor alterations to the western penthouse.
> 5. Recommended a massive payment increase to the Managers.
>
> These decisions were not maters that the committee could vote on and were challenged through the Commissioners office by concerned owners and ultimately

> reversed. **They would have been pushed through to your disadvantage by this committee illegally, if not for the vigilance of several owners.**
>
> Further, your chairperson and Secretary have:
>
> 1. Manipulated an EGM away from the majority of owners from a win to a loss.
> 2. Threatened legal action if Chairpersons recommendations were ignored. (See enclosure)."

There is arguable misrepresentation in 1 and 2, immediately above. Mrs Peters did not threaten legal action. She indicated concern (which she seems to have genuinely held) that the Taylors may commence legal action against the body corporate. The "*manipulation*" referred to, while it disfranchised some, was determined by the Adjudicator to be proper. The charges made were bolstered in a rather sinister way by inclusion of other material including a newspaper or magazine article "*Bungling At High Level*" mentioning abuses such as manipulation of votes at meetings, falsification of minutes and ignoring of owners' expressed concerns. Mr Smith sent out a personal circular to owners dated 16 March 2001 relating to "*gardening and cleaning agreements*". He urged "*Do not lose any <u>more</u> control – vote <u>no</u> to motion 9.*"

[69] As noted elsewhere, the 2001 AGM brought success for Mrs Peters, and indirectly, when Mr Horne resigned, the poisoned chalice of committee membership to Mr Farren-Price.

[70] Mrs Peters was a necessary witness for the defence, to identify communications from Mr Smith to the owners and to the committee, for example: she could relevantly indicate her reaction to the defendant's defamatory publications, and give evidence of events she witnessed, and of Mr Smith's reputation, etc. It was legitimate for Mr Smith to discredit her in his cross-examination, to show her hostility to him, or lack of veracity in particular matters. Unfortunately, he insisted upon placing her on trial, effectively, seeking to show against her lack of competence, mistakes in interpreting the requirements of the Act leading to reverses before the Adjudicator. Worse, he sought gratuitously to "*divide and conquer*" by the mischief-making tactic of attributing to her offensive remarks about particular owners or classes of owners, who have nothing to do with the action. There was no legitimate forensic purpose being served. I think it was a simple case of punishing Mrs Peters by seeking to embarrass her. Mr Smith went further, calling evidence (of the unreliable Mr Djurovitch in particular) who make good his (denied) suggestions to Mrs Peters. I regret my determination once both parties became self-represented, to allow them to get on the record the evidence they wanted to adduce, reserving questions of admissibility for later consideration by me. These proceedings are not an appropriate vehicle for pronouncing Mr Smith or Mrs Peters the victor in the protracted war or in any of the separate battles they have waged. Both emerge as unnecessarily critical of the other. The point of the foregoing examination of their relations is to discover whether Mr Farren-Price (who was initially alienated by her, then by Mr Smith) could

honestly form the opinions he published. The conclusion can only be affirmative, even if others (some of whom gave evidence for Mr Smith) saw things differently.

Deceit and the Marina?

[71] In dealings with the body corporate and the committee (and indeed in his case at trial) Mr Smith advanced as a certainty that he had the right in perpetuity to berth his large boat at the marina. On the evidence, the boat may well be too large for the facility, and genuine concerns were held by the body corporate that the consequence might be damage to the marina. I am satisfied that Mr Smith asserted his "*right*", at the same time withholding documentation he was asked to produce (see his letter of 25 November 2000), in order to inhibit the body corporate from attempting to change the status quo: see his letter to Mrs Peters of 25 November 2000 (Exhibit 31). It may be that Mr Smith went so far as to contend that such payments as he made for use of the berth were "*ex gratia*": see Attwood Marshall's letter to Czaus Lawyers of 3 October 2001 (Exhibit 15). The only document Mr Smith has produced is a Deed of Indemnity dated 12 March 1990, requiring Mr Smith and his wife to indemnify the body corporate in respect of damage (Exhibit 13). Although the document says the body corporate "*shall allow*" the Smiths to moor the motor vessel "*Manresa*" at the head of the marina, and although it may be arguable that this is a perpetual arrangement, it is acknowledged by Czaus Lawyers' letter of 29 May 2001 (part of Exhibit 31) that what the Smiths had was no more than a "*licence*" which could be determined by "*an appropriate resolution being passed by the body corporate*". The letter (which denied the committee's right to unilaterally change fees payable – arguably contrary to the Adjudicator's ruling of 20 November 2000 in Mr Burns' reference 500/2000) went on:

> "Any attempt to terminate our client's licence will cause our client loss and damage for which it shall hold the body corporate solely responsible. Our client will not hesitate to enforce his rights and seek compensation from the body corporate in such quantum as may be determined by the Court (if necessary)."

Presumably the letter was sent in accordance with advices to and instructions from Mr Smith.

[72] A second marina-related aspect productive of friction throughout 2001 concerns repairs effected by Broadwater Building Services. I am satisfied these were arranged to benefit the interests of Mr Smith and a handful of marina users, and at Mr Smith's (among others') instigation. I am satisfied that a small ad hoc group of them, including Mr Smith, were asked to keep an eye on the work and that payment was made only on their approval. It seems that corners were cut to get the work under way: faced with a quotation of $9,200, the committee adopted the expedient of approving only $6,500 of work (the limit of their authority, which ordinarily was $100 for each of the 65 lots). Safety concerns in due course led to the committee approving the whole of the work on the basis of emergency. Once the work was completed, Mr Smith, rather than expressing appreciation of the committee's actions, in which he had acquiesced, even been complicit, turned on them, complaining of excess of authority, et cetera, insisting that they get involved

in a building dispute with the contractor, whose work was then said to be substandard, and require rectification. (Exhibit 14 is an independent report critical of the work obtained by Mr Smith from "Quality Building Reports" of 8 March 2002; no attempt was made to prove the accuracy of the report by calling the author.) The contractor's letter of 15 March 2002 presenting its point of view was called by Mr Smith's solicitors "*a complete fabrication on the part of Broadwater Building Services Pty Ltd, Andrew Smith and Brendan Schillaci*" (Czaus Lawyers' letter of 21 March 2002, part of Exhibit 31).

[73] What Mr Farren-Price wrote in the penultimate paragraph of Exhibit 1 relating to marina issues is unexceptionable and, in my opinion, factually true, in particular as to Mr Smith's "*duplicity*", i.e. being two-faced or taking contrary positions. I agree with Mr Farren-Price's characterisation of Mr Smith's conduct regarding the marina as "*deceit*" and instancing the personal experience referred to in the second paragraph of Exhibit 1. Mr Farren-Price there asserted "*Deceit on more than one occasion*". Events in respect of Exhibit 5 represent another.

[74] While on the topic of the marina, and noting that, as recent history, it is strictly irrelevant, there may be noted the charges Mr Smith makes against Mr Arnold (Chairman until 31 March 2004) of stealing a ladder or steps which were improperly being used to access the "Manresa" from the marina walkway.

The Plaintiff and Mr Arnold

[75] Sadly, harmony in the building was not restored when Mrs Peters was no longer Chairman. Mr Arnold's introduction to the office is indicated by Exhibit 62, nine pages from Mr Smith dated 9 June 2003, expounding on a dozen issues requiring "*your immediate attention*", and beginning with a clear rebuke – "*Not one matter has been attended to*" despite the matters' having been brought to his attention while a committee member "*and/or immediately*" on his being elected Chairman "*either in writing or verbally*". Mr Arnold responded on 17 June 2003 giving detail over three pages in respect of 10 of the matters, offering to meet a delegation of all of the "*concerned owners*" for whom Mr Smith wrote Exhibit 62, and taking "*this opportunity to remind you of our current defamation laws*." The balance of Exhibit 61 is Mr Smith's critical five-page response of 20 June 2003, suggesting, *inter alia*, that the reference to defamation was "*attempting to intimidate*".

[76] The threatened application to the Adjudicator by Mr Smith and others was not long in coming. It was 434/2003, lodged by 25 June 2003, seeking that the AGM of 31 March 2003 be declared void, that voting upon four identified motions be declared void, likewise all committee positions decided then, also appointment of an administrator to arrange and conduct an AGM. Although it comes too late in the story to be relevant, Mr Arnold's circular to owners of 20 August 2003, Exhibit 63, tendered by the plaintiff, summarises the situation well – and is a

heartening indication that occasionally people in the Kings Row South community can put pen to paper otherwise than to be critical or complaining:

> "NOTE FROM THE CHAIRMAN
>
> Dear Owner
>
> Firstly I would like to thank our Managers, Fay and Rob Taylor, for their effort in revamping the garden beds around the tennis court. This was carried out in appalling conditions, with pouring rain and high winds. A great effort over and above their contractual agreement – thanks to you both.
>
> It is disappointing that yet another dispute application has been submitted to the Commissioner's Office by a small group, especially after considerable time and effort was expended to resolve their perceived grievances. I have been astounded at the amount of hostility against these few discontented owners as demonstrated by the number of individual submissions to the application, and enormous amount of signatures received on a petition against the ongoing costs being incurred by the Body Corporate.
>
> On a brighter note, the fire hydrant pipe work has begun at long last and I hope will continue without interruption. Any further exterior work has now been deferred until completion of the pipe replacement project.
>
> Finally, I would like to thank my fellow Committee members for attending our 4 hour meetings and for their devotion to maintaining Kings Row South as a first class property. As always, I would like to encourage any owner with genuine concerns to contact me personally."

Mr Smith has endorsed on the document he tendered: "*All correspondence returned to senders mail box torn in half*" and "*copy Arnold correspondence*".

Forgeries

[77] There is an intriguing pattern of documents highly critical of him being stated or suggested to be forgeries upon challenge by Mr Smith. The first was the "*Macaulay letter*", Exhibit 11. The next was an unsigned or draft typed letter purportedly from Mrs Pixie McCormick dated 27 December 2001 (Exhibit 60), the beginning of which (as with some later parts) reads exactly the same as her genuine handwritten letter of that date to the Adjudicator, Exhibit 57; her evidence was that she always handwrites her letters. Exhibit 57 is critical of Mr Smith:

> "Since he resigned he has opposed & criticised committee decisions constantly. I am an independent committee member & I always vote according my conscience. The majority of owners are happy with the managers, the committee & the way the building is administered. If you inspect the committee minutes you will see what has been happening here & understand what we have to deal with. Even now that we have a professional body corporate Manager for the first time, he is constantly criticising him, the committee & the Manager. Being a committee member is not an easy job, but we are all working to make decisions for the benefit of the majority of the residents. Unfortunately Mr Smith makes this exceeding difficult."

Exhibit 60 is longer and expands on the criticism. Mr Farren-Price made no attempt to use it. The provenance of it is unclear. It was said to have been supplied by Mr Farren-Price's former solicitors pursuant to a request for disclosed

documents to be produced (not to Mr Smith's solicitors on the record, rather to his "litigator"), but it was not a disclosed document. Mr Smith's letter to Mrs McCormick of 10 February 2004 is wrong in asserting that Mr Farren-Price has "*tendered a number of documents to the District Court*" including the letter, contents of which "*are meant to be derogatory and defamatory*". Mr Smith went on in rather familiar vein:

> "As you are aware, my preferred position has always been, in the first instance, to endeavour to discuss such issues as this at a private meeting and therefore suggest that you and I could sit down and attempt to reach a satisfactory conclusion to this matter.
>
> If you are of the opinion that such a meeting would be unproductive then I will have no alternative than to speak to me Barrister with the view of including you in my action against Farren-Price."

[78] The next document suggested to be "*forged/fraudulently altered*", the subject of Exhibit 29, was a version of a letter said to be dated 8 April 1997 to the Chairman from Mrs Brownlee-Smith, attached to a letter which Mr Brace (Mrs Peters' partner) sent the Adjudicator in application 700/2001, dated 26 December 2001. Neither letter is before the Court. Czaus Lawyers wrote to Mr Brace on 11 March 2004, "*We expect Court proceedings to follow. Should you wish to attempt to resolve this matter we suggest you contact Mr Smith prior to the proceedings being issued.*" The suggestion was that the complaints to the Chairman related to Mr King, not to Mr Smith, but were placed before the Adjudicator as referring to Mr Smith. The Court has only multiple hearsay for the proposition that Mr Smith had got Mrs Brownlee-Smith to disavow the attached letter, and is in no position to reach any conclusion. It is noteworthy that Mr Smith claimed that Mrs McCormick's letter to the Chairman of 6 April 1998 (Exhibit 58):

> "The Chairman
> Kings Row South Body Corporate
> 18 Commodore Drive
> Paradise Waters 4217
>
> Attention Keith Smith
>
> Dear Keith
>
> I am writing this letter from Sydney where I am staying until 20th April. I am extremely concerned that just before I left, while I was thanking our managers for the many extra things that they do, I became aware that due to some negative feedback they have been feeling very unsettled. Living on the ground floor, I observe the extra effort they put in, & their friendly obliging manner is certainly appreciated by many people in the building, who have commented on this to me. We are also fortunate to have Marie's nursing experience to call on, & I know that this has been invaluable on several occasions.
>
> It also concerns me that this situation also occurred during the first few months of our previous managers. Having resided previously in a building where the managers made life a misery for the occupants, I would like to record my thanks & appreciation to John & Marie & would encourage others who feel this way to let them know.

> Regards,
>
> Pauline McCormick"

related to (and to conduct by) a different Chairman. The evidence is clear that he was the Chairman addressed by Mrs McCormick and the subject of her observations. Further, I am satisfied Mrs McCormick's note on Exhibit 58 is accurate:

> "Keith Smith rang me in Sydney & asked me not to table this latter 'as it would stir up trouble & conflict' – would 'divide' the building."

A different attitude is displayed here from that underlying Mr Smith's criticisms of the Secretary for keeping correspondence out of the minutes.

[79] (Mrs McCormick was not to be defeated so easily. She read a prepared statement, Exhibit 59 at the next committee meeting, which I am satisfied reveals the truth, so far as it would be known to her:

> "STATEMENT READ BY ME TO THE B.C. COMMITTEE
>
> While I hate conflict & strife, I would think less of myself as a person if I didn't speak up today.
>
> I am saddened & deeply concerned at what is going on in this building over the last few years. Personal attacks & denigration have become more & more prevalent.
>
> I wrote a letter to the then chairman Mr Keith Smith on 6th April 1998, because of my deep concern that the present managers (Boyces) were being treated extremely badly by one or two people & that the same treatment had caused the previous managers (McLeans) to leave.
>
> I don't know how many of you are aware that within a couple of weeks of the McLeans taking over the management I was approached by the chairman saying they were useless & hopeless & we needed to get rid of them. I pointed out in my letter to Mr Smith dated 6/4/98 that this was a repeat scenario that was happening to the Boyces, of not giving new managers a chance to settle in. I don't know whether the previous managers were subjected to the same treatment, as I was new to the building when they took over & not on the body corporate committee. I am now extremely concerned that this persecution will continue with future managers, as I was told by the McLeans that this was they reason they left the building. I was told recently by an ex resident of this building that Kings Row South is known as 'manager bashers' & even real estate people were advising people looking at buying management rights, not to buy here.
>
> John McLean told em that when he & his wife were interviewed prior to taking over the management rights, they were told by Mr Smith that the previous managers (Morris) had been lazy & had not kept the building clean.
>
> I am totally apalled at the personal attacks & pettiness that is being directed to John & Marie Boyce by one or two people & I can no longer stand by & say nothing.
>
> I want to know how many of you know how disgraceful this situation has become & although Mr Smith asked me not to table my letter written 6/4/98 because it would cause strife, someone has to speak up.

P McCormick.")

[80] Mr Brace, who had no connection with the building in 1997 or the first few months of 1998, and would have had no direct knowledge of what was going on, was on the back foot in respect of the Brownlee-Smith letter. I understood him to accept Mr Smith's contentions and to have tendered or be willing to tender an apology. Exhibit 29 includes three written communications from Mr Smith to him:

"3 February 2004

Chris

I have always been aware of your association with the venom spreaders of Kings Row South, but I had always credited you with enough decency as to be above their low level of deceit and dishonesty.

Maybe you have associated with them too long and you have fallen also under the influence of the dragon.

When the walls start to crumble, it is amazing how many grubs come out of the woodwork and innocent eyes are suddenly open to reality.

Chris, you have two options:

1. Provide the detailed evidence to support your statement that I blackmailed a committee member by loaning money, or

2. Provide me with the names of the party or parties low enough to provide you with this slanderous information.

Failing to hear from you within 48 hours, I will have no alternative than to join you in the action.

For your sake, please believe me – this is not a threat but a statement of fact. Harmony must again return to Kings Row South, hopefully without the dragon.

Sincerely

Keith Smith

P.S. Please advise the Taylors that this is only the first stage – they are showing their true character and colour, but will eventually appear in court. We are ready and waiting for the first report of political phone calls by Faye to Kings Row South owners for the venom to continue."

(The "dragon" is Mrs Peters. This looks like a recent attempt to divide and conquer.) Next came:

"27 February 2004

Chris

I have not received a reply to my letter to you of 3 February 2004.

Since that date, I have received copies of documents signed by you that were tendered as evidence in the District Court action with John Farren-Price.

Originals of these documents have now been obtained from the Department of Natural Resources that disclose attachments thereto are fraudulently scanned, criminally altered letters, in a manner to deliberately mislead and deceive that Department.

I have today spent three hours with my solicitor and litigator with a view to:

1. Advise the Police of this fraudulent manipulation.

2. Advise the Department of your deliberate attempt to mislead them and to discredit me, which can only be described as a criminal deceitful act.

3. To commence proceedings against you personally in the District Court.

The altered documents are being reported as stolen property from another Kings Row South unit.

Chris, I am available to discuss the above details with you in an attempt at a satisfactory resolution but advise unless I hear from you by 9am, Monday morning, 1 March 2004, I will set the above in motion immediately.

Due to the substance of these letters, I propose to call you as a witness in the District Court action against John Farren-Price.

Your statement on the subject of gutter tactics is obviously directed to the wrong parties.

Sincerely

Keith Smith"

Finally:

"Chris

Again, herewith the letter I have previously handed to you.

The reason for this form of delivery is that the authorities involved require proof of delivery and that an attempt to resolve the issue had been offered.

Knowing you in the past, I am still of the opinion that you were not the personal perpetrator of this low criminal act. You were the instrument used so that the guilty party could remain hidden and not be the one to suffer the consequences.

You would be well advised to disassociate yourself from this type of relationship and live a normal pleasant lifestyle free of Kings Row South, Focus, Centre Point, Hawaiian and others. It is just not worth the problems thrust upon you."

[81] The fourth suggested forgery is Exhibit 52, Mr Scarr's letter to Mr Farren-Price of 5 January 2002, plainly an account of matters prepared to help the addressee in this action, which was well under way by the date of it. It rather seems that the document got to Mr Smith by being handed over by the defendant's then

solicitors. The evidence suggests no other possibility. However, it would be inexplicable on the face of things for any practitioner to volunteer such material. Mr Farren-Price has not suggested anyone improperly removed it from his possession. Mr Smith's reaction to the letter was to attend upon Mr Scarr on 6 February 2004 in company with Mr Djurovitch. Mr Scarr indicated in strong terms he did not wish to speak to them, as he was entitled to do. Mr Djurovitch, a witness of no credibility, told the Court that hearing the word "*fuck*" induced him to perpetrate the disgraceful behaviour which followed, with Mr Smith standing by, apparently supportive of Mr Djurovitch, rather than Mr Scarr (we did not hear of any attempt on his part to procure an apology, as he had attempted to procure one from Mr Boyce). Suffice it to say that Mr Djurovitch forced his way into Mr Scarr's unit, removed Mr Scarr's glasses and threw them down, then assaulted him by shaking a fist in front of his face, stating, among other things, "*I'm telling you I will belt the shit out of you*" and "*We both have to live here and I will make your life a nightmare*." Mr Smith's contribution was, "*I want to ask you about this paper*." Subsequently, he left a copy of the letter for Mr Scarr, endorsed with a note Mr Scarr (and many others) in the circumstances would justifiably interpret as a threat:

> "DAVID,
>
> THE REASON FOR THE VISIT I
> WAS HOPING FOR YOUR SAKE
> THAT IT MAY HAVE BEEN A FORGERY
> LIKE MACAULAY'S"

[82] Those recent events focusing on Exhibit 52 (which would qualify as "*terrorist-like activity*") lead me to have reservations to a greater or lesser extent about all of the supposed disavowals of documents that followed intervention by Mr Smith.

[83] The number of incidents of forgery, stealing, attempted blackmail, unauthorised entry to premises, "*criminal (deceitful) acts*" and the like touching Mr Smith, according to him, would seem to be well in excess of the norm in the community, and suggests that there may be something unusual about him – if he is correct, that somehow he inflames passions and generates in some other person(s) a determination to strike vindictively at him. For all that appears, bringing in the police has not assisted to identify any wrongdoer. (Mr Smith is not the only owner in the building to have involved the police. Mr Scarr did so in light of 6 February 2004, Mrs Peters threatened or contemplated doing so after Mr Yeomans, who was attempting to exercise the function of scrutineer in the interests of the Smith faction, assaulted her at the EGM of 5 December 2000 – as to which I accept that lady's evidence.)

[84] The conclusion is inescapable that so far as the affairs of Kings Row South are concerned, in recent years, Mr Smith is unaccepting of situations in which he does not get his way. He blames Mrs Peters (and it is clear that each behaved provocatively towards the other), but the evidence strongly supports the assessment of witnesses such as Mrs McCormick and Messrs Scarr and Arnold

that the problems with Mr Smith began before Mrs Peters was even on the horizon – they go back to the committee's refusal to back him over correcting Mr Boyce in July 1998.

[85] Mr Smith impressed me as a courteous, affable person. I am not surprised that he was able to marshal as many sincere witnesses as he did to vouch for his character and qualities as body corporate Chairman; nor was it surprising that those people rejected any suggestion that they were puppets of, or controlled by Mr Smith. It seems that, so far as they and he were concerned, there was never any friction or cause for friction. The managers favoured by him became personal friends. As for other managers, I am sure Mr Smith was the reason why they felt relief such as Mrs Taylor expressed at getting out of Kings Row South, or a good part of the reason. The hostility of their relationship and that of the Smith-Peters relationship leads me to set aside Mrs Taylor and Mrs Peters' comments about Mr Smith. I do not say they were wrong, but their bias against Mr Smith (reciprocated in full) makes it safer to rely only on witnesses who did not seem to be partial. It is safer to exclude Mr Brace as well. Mr Taylor struck me as a fair-minded man. I find no reason to harbour any reservations about the evidence of Mrs McCormick, in particular, her opinion as to Mr Smith's part in managers being driven from the building, Mr Scarr and Mr Arnold (who speaks essentially of times too recent to be of great use in adjudicating upon matters in November 2001).

Mr Smith's Resignation as Chairman in July 1998 and Events Following

[86] The minutes of the committee meeting of 17 July 1998 record attendance of Mr Smith as Chairman, Mr Boyce as Secretary/Treasurer and committee members Mr Horne, Mrs McCormick and Mr Scarr. There were apologies from Mr McKay and Mrs Rasmussen. The minutes (Exhibit 34) were signed in due course by Mr Scarr. Item 8 was:

> "**8. <u>General Business</u>**
>
> Two letters were tabled by the Chairman Mr Keith Smith:
>
> 1. An Apology and explanation to Mr John Hayes from Mr John Boyce regarding the incident of the crooked mat in lift No. 1 of K.R.S.,
>
> 2. Letter to Mr Keith Smith from Mr John Hayes regarding the apology from Mr John Boyce.
>
> Committee members were given time to read letters 1 and 2. Some discussion took place.
>
> Mr Keith Smith moved that the Committee direct Mr John Boyce to write a second letter of apology to Mr John Hayes as he did not consider the first letter appropriate. The reason being that Mr John Boyce stated in his letter that he was requested by Mr Keith Smith to write the apology, which Mr Keith Smith denied. And furthermore, that the letter was demeaning to Mr John Hayes.
>
> Mrs Pauline McCormick requested that Mr John Boyce have a right of reply.

> Mr John Boyce in response said that he had spoken the truth in his letter and therefore did not have anything further to add. Seeming that he had written a sensible and diplomatic factual letter in order to keep the peace, there was no need for a further statement of the facts or apology. Due to the fact that Mr John Hayes' letter contained defamatory material which Mr John Boyce denied, he stated that should this matter continue, a solicitors letter would be forthcoming. In particular, Mr John Boyce took umbrage over the claims in Mr John Hayes' letter that he had used uncouth language. Mr John Boyce stated that he certainly would not use such language, especially to a man of Mr John Hayes' age.
>
> Mr David Scarr stated that after reading both letters he was satisfied that Mr John Boyce had written a suitable apology as he had stated at the end of the letter 'If I offended you apologise…'. Mr David Scarr said that he was prepared to vote against the motion.
>
> Mrs Pauline McCormick and Mr Vern Horne both agreed with Mr David Scarr that no further correspondence was necessary on this matter.
>
> Mr Keith Smith then said that if he could not obtain the support of the Committee on issues he was no longer prepared to continue in his position as Chairman. He stated that to be a Chairman without the support of the Committee was untenable and verbally resigned as Chairman. Mr K Smith said that he found it impossible to work with the Manager Mr John Boyce, and that he would be giving his resignation in writing.
>
> Mr Smith said that he was embarrassed by the situation. He had given an undertaking to Mr John Hayes that a further apology would be forthcoming from Mr John Boyce, and now the lack of an apology was putting him in a position of embarrassment. He said that he could only hold the position of Chairman if he could deal with Mr John Boyce from a position of authority. The fact that the Committee had voted against Mr Smith had made this impossible.
>
> Whats more, Mr Keith Smith said, in his opinion Mr John Boyce was not a competent Manager in regards to his book work and had a bad memory. In addition Mr John Boyce and his wife Marie Boyce were thin skinned, making it impossible to complain to them without them taking it personally.
>
> Mr David Scarr asked Mr Keith Smith to reconsider his resignation, however Mr Keith Smith declined."

On the same day, Mr Smith explained his resignation in a letter, Exhibit 53:

> "It has always been my practice… to take whatever action is necessary to smooth the troubled waters in an attempt to preserve the harmony required for community living. …without the support of my Committee, I would no longer be able to negotiate with Management from a position of authority."

The letter focused on the Hayes issue:

> "During discussions with Management, an admission was made and I received an undertaking that Management would act in a certain responsible manner that would be satisfactory to both parties and resolve the problem."

[87] That Mr Smith's general approach was more abrasive than his own description was demonstrated by the contemporaneous documents in Exhibit 36 relating to an issue raised by him about the parking of the McKays' boat trailer. The documents

include their solicitor's letter of 15 July 1998 to Mr Smith threatening legal redress if Mr Smith's direction to the management to remove the boat and trailer were implemented or repeated. On 25 July 1998 Mr Smith wrote to the Secretary and committee to "*advise that it belongs to one of our committee members*", something everyone had presumably known all along, calling it:

> "A disgrace that a committee member…should blatantly abuse the rights not available to other residents… if my request be ignored for the next 24 hours, I shall have no option but to involve the referee."

The next day Mr Smith wrote:

> "I will be taking action with the appropriate authorities, for, at the same time, an attempt at blackmail was made (by Mrs McKay) to silence me on the matter… I next called my wife to the door to identify Sandra (McKay)."

(This is but one of the instances revealed by the evidence of Mr Smith's organising a witness for possible later use – something I am inclined to think somewhat unusual among ordinary people.) The other document in Exhibit 36 is Mrs McKay's foreshadowing (on 28 July 1998) legal steps in light of being "*publicly slandered by Keith Smith*."

[88] In that year Mr Smith made the first of a series of applications to an Adjudicator under the *Body Corporate and Community Management Act* 1997, opposing the committee's plan to change the Financial Year, as they thought the Act required, although, as Mr Scarr says in Exhibit 52, his reasons for this opposition were not clear. Mr Smith did not explain them before the Adjudicator or at the trial. It is difficult to disagree with Mr Scarr's view that Mr Smith had simply set out "*to oppose any action by the Committee and managers and to attempt to discredit them.*" (According to its terms, Exhibit 52 originally enclosed a copy of one of Mr Smith's "*numerous letters… accusing the then and subsequent managers of negligence and incompetence*" – retained because it "*led me to obtain a legal opinion from Clayton Utz regarding a possible action for defamation against Smith.*")

[89] Application 492/1998 involved a contention by Mr Smith that a meeting of the body corporate on 16 December 1980 called the "*First AGM*", when the first committee were elected, was misdescribed, that a meeting on 1 August 1980 called an "*Inaugural Meeting*" (when exclusive use by-laws were dealt with) should be regarded as the first AGM. In August 1998, Mr Smith obtained statements from manager/secretaries to the effect that minutes of the Inaugural Meeting, apparently by then missing, had been stapled or attached to the inside cover or front page of the Minute Book, being Mr Bower (June 1989 to November 1991, Exhibit 66), Mr Harrison (November 1991 to November 1993, Exhibit 82) and Mrs Morris (October 1993 to July 1996, Exhibits 80 and 81). Companion statements are included in the exhibits whose effect is to praise Mr Smith's cooperativeness as Chairman, and to deny he played any part in their decisions to leave (Mr Bower found the committee which preceded Mr Smith's a "*difficult and intransigent group*"). I suppose their purpose was to counteract views of the kind

recently expressed by Mrs McCormick. The fact seems to be, however, that no-one who became manager after July 1996 is prepared to support Mr Smith.

[90] Another source of conflict from August 1998 was Mr Smith's campaign to have his friend Mr Harrison engaged to take over from the resident manager/caretaker what might be seen as managerial/secretarial functions. The details are in Exhibit 52. I suppose this change would reduce the influence and maybe the remuneration of the resident manager/caretaker. Mr Smith's campaign to have Mr Harrison engaged continued at the 1999 AGM on 20 July 1999. His motion was pre-empted by a successful one that the body corporate "*not appoint a body corporate manager at this time*". The documents that got into evidence do not indicate that the friction of 1998 (important because it predates Mrs Peters) characterised the next calendar year – there are relatively few documents relating to most of 1999.

[91] The evidence in the trial suggests Mr Smith was more assiduous than the average owner in perusing minutes and advocating changes he thought would make them more truly reflect what happened – or what ought to be recorded about what happened. At the committee meeting on 11 September 1998, which Mr Smith attended as proxy for Mrs Rasmussen, it was agreed that the minutes of the previous meeting ought not to be confirmed until Mr Smith produced a report. He suggested the minutes were "*biased and slanted in favour of the Management*". He also "*declared that the meeting should be declared invalid*" (according to the minutes). His report of 17 September 1998 (Exhibit 47) says the minutes are "*selective in the Manager's favour, Favour a secretary's campaign of division and Refused… to reveal the true position of the accounts as of June 30, 1998.*" The Report raised a dozen or more matters. It complains of things "*deliberately removed from the record*", "*not mentioned*", "*deliberately misquoted*", dates "*deliberately altered to be misleading*", "*deliberately deleted*". Other matters were "*not recorded*", or "*worded so as to support the secretary's actions*". There were two instances identified of "*false reporting*". Other material Mr Smith thought should not be there, because events happened "*prior to the meeting*". The errant secretary at the time was Mr Boyce. Mr Smith's strongest criticism related to Item 12:

> "Statement report dated 20th August, 1998.
>
> This is a disgraceful piece of provocative and insulting editorial and like Mrs Harrys application, has no supporting evidence of substance to prove it other than malicious, unsupported, Salem-like puritan witch hunting. A deliberate attempt to destroy any person with opposing views. A further attempt to divide and disrupt the lifestyle of the Kings Row South community. It is a complete figment of someone's imagination and should be denounced by the Committee and deleted in its entirety."

His conclusion was:

> "I submit that due to the many omissions, false recording and non-disclosure of the true events of the meetings, together with the misuse of certain sections of the Act to justify a breach of performance in carrying out the legitimate directions of the

> Committee and the constant inclusion of defamatory insinuations as editorial in the Minutes that the Secretary should be requested to stand down pending a full enquiry into his actions and activities and the meeting of August 20th, 1998 be declared invalid."

[92] It is not the case that unpleasantness emanates only from Mr Smith. His contention that minutes have been prepared in a way that reflects badly on those the committee saw as opposed to them can be supported in some instances. For example (long before Mrs Peters' time) at the meeting on 11 September (Exhibit 25): Mr Smith, in canvassing support for Application 492/1998 to the Adjudicator, had arranged that Mr O'Connor's daughter sign a supportive document (with her father's approval), which happened, without the customary "*per…*". The minutes say:

> "Mr K Smith stated that anyone could sign your name on a document, as long as they have the permission from the person for whom they are signing.
>
> Mrs P McCormick stated that she would like this checked out legally and put in writing, as she felt this was not a legal practice."

The minutes of the following meeting (5 November 1998, Exhibit 26) note under Correspondence:

> "F. Letter from Solicitor, Short Punch Greatorix, advising that to sign another's name even with their permission constitutes fraud. In some circumstances it will be legal to sign one's own signature on behalf of another, however it is never legal to sign another person's name."

I think Mr Smith would be justified in taking offence. He was not at the latter meeting. At the earlier one, and apparently before that on at least one occasion, he had been proxy for Mrs Rasmussen, attracting a challenge from Mr Boyce (the then manager of the body corporate), who contended she was automatically excluded from the committee because of the number of non-attendances. The apparent challenge to Mr Smith's right to participate seems to have evaporated, as he is recorded as active for the rest of the meeting. It obviously did not follow from his resignation as Chairman that he ceased to participate in committee affairs. Among other things, as noted, he challenged the minutes of the two preceding meetings as "*biased and slanted in favour of the Management*", handing in an explanatory letter. One of the continuing issues about minutes had been alleged selectivity in incorporating correspondence. Oddly, Mr Smith asked on 11 September 1998 that Mr Boniface's letter regarding omissions from material sent out of "*the copy of the chairperson's resignation letter*" "*not be attached to the Minutes*". The minutes go on:

> "Mr V Horne discussed this request for selective publishing. Mr Horne suggested that all letters should be made available to the owners if they wished to inform themselves of their contents. Mrs P McCormick suggested that a statement be made regarding the contents of all letters to the secretary, and moved that all letters are to be made available to any owner wishing to view them.
>
> Seconded by Mr V Horne. Carried."

The point of noting this is that Mr Smith would contemplate that any communication of his to the secretary, such as Exhibit 4, might come to the notice of all lot owners.

[93] Three years later, in his circular to unit owners of 6 November 2001 (Exhibit 30), four days before the defendant distributed Exhibit 1, Mr Smith was still pursuing this subject:

> "Full Disclosure in Minutes:
>
> What can I say! What a pack of lies you have received about the cost of you being told what is happening in your building.
>
> Full disclosure of minutes means to acknowledge each letter by name with a brief summary of the contents.
>
> e.g. Mr Jones – unit 70 writes re disgraceful condition each night of the lift carpet.
>
> Mr Thomas – unit 69 writes regarding security doors being locked open for hours endangering security.
>
> Mr Adams – unit 71 regarding attitude by Managers towards him for having an opposing view.
>
> You will notice in the last minutes this format was used, not by the 50 letters spoken of, but only those few where an attack on the writers was thought to be a good idea by this committee. Any material that does not favour the committee was withheld. Providing this detail will cost nothing other than at best, one more page to your notice of minutes.
>
> Fifty articles of correspondence was tabled – 35 of these from three owners, 13 from one owner. DO YOU REALLY BELIEVE THIS RUBBISH?
>
> I will shortly advise the results of a Body Corporate Records Search. We will see if this committee's information is reliable.
>
> This is another example of how desperate these people are to stop you, the owners, from receiving this important information. For eighteen years the owners in this building knew what was happening – you tell me why this committee wants to hide this information.
>
> RETURN TO BEING INFORMED. VOTE YES FOR FULL DISCLOSURE."

In 1998 Mr Smith, when he was active on the committee, can be shown, in some instances, to have actively promoted hiding information, he would suggest in the interests of "*harmony*".

Applications to Adjudicators

[94] Mr Smith's application 441/2000 (his second) raised what the Adjudicator assessed as valid concerns. The Adjudicator appeared to consider the committee's actions over-hasty, their solicitors' advice questionable. The orders were:

> "
> - that the Extraordinary General Meeting scheduled for 19 August 2000 shall not proceed;
> - that the resolution purported passed at the committee meeting held on 21 July 2000 to vary the Management Agreement by deleting the secretarial and treasury duties was at all times void;
> - that the secretary shall, within seven days … forward a copy of this order to all owners together with a notice inviting owners to submit motions within 14 days for consideration at a further Extraordinary General Meeting;
> - that the secretary of the body corporate shall convene a further Extraordinary General Meeting at which the body corporate shall consider motions relating to the variation of the Management Agreement, and the appointment of a body corporate manager, and any other motions which may be submitted by owners within the time allowed by this order;
> - that owners shall be permitted to include any other motions on the agenda …;
> - that the secretary shall not give notice of the Extraordinary General Meeting until 21 days after the date of this order, to enable owners to submit other motions…"

[95] In 462/2000 another Adjudicator, Mr Meek was very critical of the committee in relation to permitted improvements to the eastern penthouse (which impinged on common property):

> "A prudent committee would have referred the matter to a general meeting in any event.
>
> The committee in its submission seeks to suggest that its actions were naïve and in accordance with the advice of other experts…
>
> I find it very difficult to see the committee's actions in this light. Rather it seems to me that this committee almost fell over itself to give its approval to the improvements…
>
> I simply cannot find that the actions of this committee were reasonable. This is particularly so when the committee's approval is contrasted with the refusal of the committee to approve an application by the owner of Lot 65 to make certain improvements (which in contrast to those to Lot 64, are minor)… No reasonable person would believe that a committee acting fairly and consistently *vis-à-vis* all owners could, in good faith, give its approval to the improvements to Lot 64 which it did, but deny the limited improvements proposed to Lot 65.
>
> The committee approval process in respect of this proposal was seriously flawed… Perhaps, more to do with the identity of the owner proposing."

The day before, Mr Meek had handed down his reasons in Mr Burns' application 482/2000, seeking to force the committee to approve changes to external windows of his lot, Lot 65 – unsuccessful, "*for the reason that the improvement sought…requires the approval of the body corporate in general meeting by special*

resolution", also, Mr Burns' application 500/2000, in relation to the method of fixing marina fees. The orders were:

> "▪ that the body corporate shall, as from 1 October 2000, calculate and charge marina fees to users, subject to the terms of any pre-existing agreements, based upon the length of the longest single side of the berth required to secure the boat occupying that berth;
>
> ▪ that…Gerald Peter Burns should not be subject to any increase in marina fees until the period commencing 1 October 2000;
>
> ▪ that in its next committee minutes, the committee shall correct the inaccurate statement made in the committee minutes of meeting of 21 July 2000 at item 10.1 paragraph 2, and further provide a statement of apology to the owner of Lot 65, Gerald Peter Burns, for the incorrect inference made regarding him."

Mr Meek said:

> "I will comment generally that I have been somewhat surprised at the tone and content of material emanating from the committee generally in the three applications before me involving Kings Row South. For example, there is undated facsimile correspondence (transmitted 9 August 2000 at 2.16pm) from Jill Peter, Chairperson to Peter Macaulay, committee member, which I consider to be abrupt. Further, a memo from Jill Peters to all committee members of 6 September 2000 does nothing to engender harmony amongst committee members. Rather it is divisive and pointless.
>
> I suggest that this form of committee level communication must stop immediately. In the worst possible scenario, it might involve the committee in allegations of defamation. I note that the committee minutes of 21 July 2000 at paragraph 6 do refer to an allegation of defamation. The paragraph suggests the possibility of defamation of the applicant by the current chairperson. If the personal style of certain committee members is to communicate in this way, then these persons should be prevented by the committee from preparing future committee documentation, including minutes."

[96] The next application was Mr Smith's, 684/2000. It was made only a week later, on 27 November 2000. Mr Smith suggests:

> "that the Chairperson (Mrs Peters) should be directed to circulate a document to owners withdrawing misleading comments made…(that to motions) submitted by other lot owners The Committee (presumably the Chairperson) has added their own Explanatory Note, some of which contains negative comments…that the Committee are…tampering with a motion submitted by a member of the body corporate…(that it was appropriate) the Chairperson be directed to circulate a document withdrawing misleading comments made in her letter to owners accompanying the EGM documentation, and:
>
> (iv) that in view of the contentious nature of the EGM that the secretary be directed to circulate a document constructed by myself, or another, which offers an alternate viewpoint to that of the Chairperson. I may add that this last request would have been unnecessary had a Chairperson adopted a responsible attitude, consistent with fairness and the good welfare of ALL the owners of Kings Row South. It is my view and concern, that owners are receiving very one-sided information of recent contentious events at Kings

> Row South, as indeed your office has recently noted." (There followed reference to applications 441, 462, 482 and 500.)

Whether or not it is a mere coincidence, Mr Smith's entering the lists, and (in my opinion) overstating Mr Meek's criticisms of the committee, from this point, Mrs Peters and her committee began to enjoy success before Adjudicators. Mr Smith's post-EGM application 705/2000 saw the Adjudicator bombarded with communications from Mr Smith, many uncomplimentary, about those he saw as his opponents. He referred to the "*the vicious attitude within our building today*", "*our recent problem of mail being removed from our exposed mail boxes"*, the chairperson opening sealed envelopes containing votes, checking the contents, admitting four and rejecting 10 *("There was extensive anger amongst those present against this action by the chairperson who was unmoving, even when quoted relevant sections of the Act"),* absence of "*any clarification of what she was talking about*", "*The chairperson ignored them all and proceeded…*", "*not one voting paper was rejected until it was opened and inspected by the chairperson. It was then either rejected or handed to the by now very concerned scrutineers (who)…at first…were refused the right to check those (votes) previously entered…*". On 17 December 2000, Mr Smith wrote about "*the ever increasing tension between resident owners of Kings Row South and management committee…fast becoming untenable during the wait for your Adjudicator's decision*", (by implication) his representing "*the views and wishes of the majority of our owners who had not been intimidated*". His letter of 8 December 2000 refers to unit owners "*being outsmarted by deception…(not) wanting their vote to go astray in the mail boxes*", that he was "*not a vested interest trying to take over*": "*Body Corporate managers and our committee assumed a position that they are not entitled to assume, by threatening owners of pending legal action unless they voted as the committee advised*", "*mistrust in our building will continue*". There were multiple references to "*intimidation*" and the conclusion "*our voters had NO chance. They have been totally mislead.*" The Adjudicator (Mr Young) determined that the 10 excluded votes had been correctly dealt with, making some reference to a decision of mine, *Body Corporate for "Surfers Waters" v M & G Angland,* Appeal 761 of 1999, 10 March 2000; [2000] QDC 034. The Adjudicator said of Mr Smith:

> "I have already pointed out that the applicant has a self-interest in the outcome of this application in that a favourable decision would mean the dismissal of the committee (apart from the secretary and treasurer) and his appointment as chairperson, charged under the motion to then '*seek nominations from eligible persons to fill the vacancies existing on the committee until the next AGM*.' While Mr Smith would say that his appointment was sought solely in the interests of owners and not for any personal achievement or advantage, when look at objectively the circumstances surrounding the delivery of the rejected voting papers to the secretary was not one of an owner giving their vote to a spouse or a trusted friend, but of a different character. The sacking of a committee was afoot and Mr Smith and the other four were ensuring that votes favouring their views were being delivered. At least Smith as an intermediary was no disinterested party in the votes he was carrying, and it is exactly this type of carriage of votes that the Court saw as being the potential problem section 51(2) was designed to prevent against. That is, the delivery of votes by an interested party, or those with the same interests, cannot truly be clearly seen as being votes that are '*enthusiastic, free and genuine*.'…

> I would also like to point out to the applicant that I adjudicate applications in an unbiased and objective manner and I cannot be swayed by the pressures, or notice of the undesirable consequences, of the kind contained in three of a number of faxes that he has forwarded. The first, made in respect to a further application that has recently been filed seeking orders consistent with his views, says, '*they have advised me they would be willing to withdraw if my application to reinstate the 10 voting papers is successful';* the second being in a fax dated 11 December, '…*should the adjudicator find in favour of* (the) *committee, by disregarding that voters were wrongly advised and not made aware of a district court decision, the financial effect on many resident owners on limited income, would be a disaster.'*; the third being in a fax dated 17 December, '*The concerned members of Kings Row South are quite nervous about the outcome and are therefore obtaining councils* (sic) *advice in the event that another District Court challenge may eventuate. Another costly EGM would upset everybody, whereas the reinstatement of the ten votes would solve all the problems for our owners, now and in the future.*"

[97] Then came 714/2000, in which Mr Farren-Price was one of the applicants. Mr Young, who dealt with the matters centering on the EGM of 5 December 2000 together, said of 714:

> "It seems to me that the applicants have bundled a number of allegations together into an application in the hope that this office would conduct an investigation which would turn up some fundamental error or omission that would result in the meeting being invalidated. From my reading of a number of documents, including circular letters to owners, contained in application 705-2000, there is a factional split amongst owners where emotional language and allegations serve to continue the division.
>
> Both factions are undoubtedly convinced they are right and the result is applications of the type seen here, in application 705-2000 and in the rash of other applications lodged during the year 2000 (seven in all). While I can understand the applicant's view in lodging this application, I would point out that this office does not have the resources to attend to an ongoing series of applications that reflect factional interests."

[98] Finally, although it comes after the publications, in the interests of balance, I would note application 794/2002, the penultimate one contained in the voluminous Exhibit 23. Mr Smith and others got invalidated a committee resolution that "*non-owners are only entitled to book the tennis court one week in advance*" after the expiry of reciprocal arrangements with a neighbouring building ("*the resolution was an inadvertent oversight*"). Mr Meek, whose criticism had hitherto been of the committee, concluded his reasons:

> "Finally, I want to make comment on one point which the applicants have made in their reply. They state, after referring to the fact of more applications pending regarding this scheme –
>
> > *Just how many applications will have to be made, how much expense, time and effort, before the Department acknowledges that KRS has serious management problems? Indeed, what do owners have to do to attract the attention of the Department?*
>
> For the reasons I have alluded to, I consider that the subject matter of this dispute was minor and of no real substance or practical significant for owners in the scheme. I consider that this dispute was capable of resolution by normal communication between persons acting in a reasonable manner.

> However, I am well aware of the on going level of disputation between certain groups within this body corporate. Specifically regarding the applicants above statement, if the applicants are suggesting that this office should somehow involve itself in the micro management of issues in this body corporate, then I will point out that this is not going to occur. Section 4 of the Act headed Secondary Objects provides that one of the secondary objects or purposes of the Act is –
>
> > *To balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes.*
>
> The words 'responsibility for self management as an inherent aspect of community titles schemes' have meaning. With the approximate 30,000 thousand community title schemes which already exist, and more being created daily, the legislature expects owners in schemes to be responsible 'for self management' of their schemes. As members of a body corporate, all owners have a responsibility to act in a reasonable fashion for the benefit of all members and for common goals associated with enjoyable community style living. Significantly, this office is not sufficiently resourced to address disputes which are essentially personality driven, rather than which reflect serious issues of dispute within bodies corporate.
>
> The applicants have foreshadowed further applications. I draw the applicants attention to an amended provision in the Act. Section 270 provides…" (The section provides for costs to be ordered against applicants.)

Conclusion

[99] In his closing address to the Court, Mr Smith justified his interventions, whether before an Adjudicator or kept within the body corporate, as occurring only when something was wrong. Individually, his interventions appear reasonable, both those where he carried the day (before the Adjudicator, or otherwise), and those where he did not. However, when they are assessed in combination, the conclusion that he was unreasonable, interfering, indeed trouble-making and fermenting unhappiness and unease can fairly be drawn by a dispassionate observer, and would more readily be drawn by members of the Kings Row South community who did not share Mr Smith's views. It is inescapable that he did have that effect on a number of the Kings Row South community, not all of whom can be characterised as unreasonable or thin-skinned. I would go so far as to imagine that, at times, there were those who dreaded opening the mail, lest it include a new unsolicited communication from Mr Smith. It appears to me that, so far as the affairs of Kings Row South are concerned, Mr Smith's approach is that the motives, actions and attitudes of those whose views are different from his own must be improper, or explained by some other problem such as incompetence. It is clear he retains considerable support within the building, also, I think, that he has alienated people by his actions, who started out well-disposed towards him. These include Mrs McCormick, Mr Scarr, Mr Lees (to whom he suggested in his cross-examination that he was unsuccessful in business and had been bankrupted) and Mr Farren-Price.

[100] Mr Farren-Price was first "*politicised*" by Mrs Peters' letter of 6 November 2000, Exhibit 16, which attempted to recruit him as a counter to Mr Burns at a visit the Adjudicator was to make to the building on 8 November 2000 regarding the eastern penthouse issue; Mrs Peters wrongly expected that he would support

the committee. His note on Exhibit 16 shows that she miscalculated. Indeed, she effectively drove him into the other camp. Mr Lees' letter to Mr Burns, Exhibit 17, indicates a similar miscalculation by Mrs Peters in relation to him. It is interesting that it took a whole year of experience of Mr Smith, and the "*Macaulay letter*" to lead Mr Farren-Price to distribute Exhibit 1. He waited until seven months after Mr Smith had unjustifiably denounced him as a liar in an official communication to the secretary of the body corporate. Documents of Mr Smith's quoted in these reasons demonstrate that the expressions which he complains of when used about him may be found used by him in the course of the vigorously expressed exchanges of views which seem to have typified Kings Row South, at least from about the middle of 1998. There are one or two exceptions, such as "*hapless puppets*" (which may defame those so described, rather than Mr Smith) and "*terrorist-like activities*" which are exceptions, but, generally, Mr Smith's own words, exactly, were used against him. Those observations, while interesting, are arguably not really relevant (but see the third "**.**" in [102]).

[101] As *Sorenson v MacNamara* demonstrates, what matters is whether the defendant is able to establish that his publications occurred on an occasion of qualified privilege and, if so, whether the plaintiff can show that the protection of the qualified privilege was lost because of lack of good faith in the publication under consideration in any one or more of the aspects of good faith, as defined in the *Defamation Act*. There is a wealth of material to show that at the time of the defendant's publications, disharmony in the building was a matter of serious concern to many lot owners. A number of the documents attribute this to "*lifestyle*" considerations. Further, the legitimacy of the defendant's expressed concern at "*falling values*" in the building (attributed to the disharmony) and replication of that concern among other owners is confirmed by Exhibit 44, publicity seeking votes for the Burns/Cox/Horne/La Parker/Macaulay/Smith ticket at the March 2001 AGM. On the evidence, it is incontrovertible that Mr Smith (aided and abetted by both supporters and opponents) contributed to the disharmony. The addressees of the defendant's publications had an interest in knowing the defendant's opinions about this, which amount to "*information*" about a relevant subject. *Sorenson* establishes that the factual inaccuracy of the opinion or "*facts*" on which it is based does not destroy the defence, where the defendant believes his published opinions to be true. These reasons go to (probably inordinate) lengths to show that a basis existed, positively, for the opinions the defendant expressed. There is not the slightest basis for finding of lack of belief in the truth of what he wrote against the defendant. There was no excess in the manner or extent of publication. There is no evidence capable of showing malice actuated the defendant. In other contexts, repeated publications might have that effect (I erred in so thinking in *Rockett v Anthony*); here, the defendant's publications came close to each other in time, those after Exhibit 1 appear defensible in terms of keeping the lot owners informed. Very late in the case, Mr Smith sought to rely on Exhibit 83:

> "29th December 2001
>
> To All Unit Owners
> Kings Row South

> Just a short note to keep you abreast of the proceedings. Fortunately Mr Smith is now suing me for defamation, an action which affords me the opportunity of airing our situation in public. Many people have come forward already volunteering both evidence and testimony to support my statements. If you have or you know someone who has information and would like to assist please contact me on either 0408-759019 or PO Box 759 Broadbeach. Our time has come at last!
>
> In amassing the not inconsiderable amount of evidence it has become obvious to me that I as a committee member have more than enough evidence and cause to counter sue Mr Smith for defamation, an action I have commenced and will run in tandem with his.
>
> For business reasons I have sold my Unit in Kings Row South and for the time being will be spending a considerable amount of time in Brisbane. My branch on the Gold Coast will still require me to spend some time there. I have been asked to nominate for the committee again (possible without owning a unit) and have gladly submitted my name for your consideration. I will be finishing what I have started and can only hope that justice will see the majority's wishes prevail. To date not one owner has asked to be removed from my mailing list whilst only Vern Horne and Mrs Smith (understandably) have personally voiced their disapproval to me of my actions.
>
> Yours faithfully
>
> John Farren-Price
> Unit 51"

I see nothing untoward in the provision of further "*information*", nor in the request for help from those who "*would like to assist*".

[102] The Reply and Amended Reply deals with matters under s 16(1) of the Act by denying that qualified privilege applies because:

> "(a) the protection of the interests of the Defendant did not require publication of the defamatory words;
>
> (b) the protection of the interests of the Unit Owners of 'Kings Row South' did not require the publication of the defamatory words;
>
> (c) the Unit Owners had no interest in the content of the defamatory words and the Defendant's conduct in making the publication was not reasonable in the circumstances;
>
> (d) the Plaintiff had not published defamatory matter concerning the Defendant and Members of the Committee of the Body Corporate and there was no need to answer or refute any defamatory matter."

Factually, (c) and (d) are not maintainable; (a) and (b) appear to state an unorthodox test in terms of what protection of interests would "require". S 16(2) issues are dealt with in the pleading by a denial that publication was in good faith, in that:

> "(a) the Defendant knew that the defamatory material published was untrue or did not care whether such report was true or false;

(b) the Defendant had no belief and/or no reasonably founded belief that the defamatory material was true;

(c) the language of the defamatory material taken as a whole was not necessary for the occasion;

(d) the manner and extent of the defamatory material exceeded what was reasonably sufficient for the occasion;

(e) the defamatory material taken as a whole and in its entirety showed that the Defendant was actuated by ill will towards the Plaintiff;

(f) the Defendant failed/or refused to apologise to the Plaintiff despite the Plaintiff requesting the Defendant to do so in a letter from the Plaintiff's Solicitors, Czaus Lawyers to the Defendant dated 14 November 2001 (the Solicitors' letter);

(g) the Defendant aggravated the initial defamation made on 10 November 2001 by further publishing the Solicitors' letter on or about 14 November 2001 referred to in paragraph 7 of the Statement of Claim and publishing further defamatory material on 20 November 2001 as referred to in paragraph 9 of the Statement of Claim;

(h) the defamatory material was not relevant to those matters by which the Defendant seeks to excuse the publications.

(i) the Defendant maintains in paragraphs 10 and 11 of the Defence and Counterclaim filed herein that the defamatory words were true;

(j) the Defendant maintains in paragraph 14 of the Defence and Counterclaim herein that the Plaintiff had the general reputation encapsulated by the admitted and deleted words despite the fact that the Plaintiff has and always has had an excellent reputation."

None of those 10 contentions has been made out. Descending to some particularity, I would note that:

- (c) is another instance of departure from the clear language of the Act: "reasonably sufficient" does not equate to "necessary";

- as to (d), "manner and extent" appears to have nothing to do with extravagance of language – but, relevantly, to the use of letter form, and distribution being restricted to lot owners in the body corporate, held appropriate by the Court of Appeal in *Sorenson v MacNamara* [2004] 1 Qd R 82, 88;

- as to (e), and indeed the other paragraphs mentioned, malice, spite and ill-will should not be found lightly: *Anthony v Rockett; Mayes v Hodson* (1993) 79 LGERA 65, Appeal (1993) 173 LSJS 2000, cited in the Laws of Australia 6.1[86], where the language of debate adopted by the protagonists was considered significant (as I think Mr Smith's pejorative modes of expression were);

- as to (j), it would be overly technical to deprive the defendant of a defence because of this minor aspect of pleading. In context, the

"general reputation" looked at was strictly confined to Kings Row South where it is clear there were conflicting assessments;

- the allegations that may be factually correct, such as (f) and (i), do not here show lack of good faith.

[103] In the circumstances, the plaintiff's claim must fail.

[104] For similar reasons, Mr Farren-Price's counterclaim fails. The Court of Appeal decision mentioned establishes that the falsity of the charge of "*a complete fabrication of untruths*" does not defeat Mr Smith. Mr Farren-Price has not shown convincingly that by 9 April 2001, Mr Smith lacked belief in what he wrote, which is very much dependent on his recollection of events that happened in November 2000.

[105] The counterclaim received so little attention at the trial as to have been barely litigated at all. Mr Farren-Price's lack of legal experience may be the explanation. The impugned publication was defamatory and untrue. The answer sets up an untenable defence under s 15 and defences under s 16; the occasion of the publication potentially attracts qualified privilege. There appears to be no pleading asserting that Mr Smith's publication was not made in good faith. There is no useful evidence about this vital issue. In the circumstances, the Court should not infer lack of good faith in any of its aspects against Mr Smith, merely because of the falsity of his publication. There was no evidence of Mr Farren-Price's reputation (which may be presumed to be good) or of any damage to it from publication of Exhibit 4. In those circumstances, the counterclaim was dismissed at the end of the trial.

Truth and Public Benefit

[106] Both defendant and plaintiff defend their defamatory publications about the other in reliance on s 15 of the *Defamation Act*. The plaintiff has proved neither aspect of the s 15 defence. The defendant has not established any public benefit in his publications. No-one unconnected with Kings Row South (with the possible exception of Adjudicators under the *Body Corporate and Community Management Act*) would be concerned or interested in the subject matter. It is idle to embark on the complex issue of determining to what extent the defendant has established the truth of his publications, a good deal of which is opinion – the opinion the defendant expressed he did honestly hold, and on the basis of his own experience and information available to him within Kings Row South.

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