SUPREME COURT OF QUEENSLAND

CITATION:	*Walker & Anor v Brimblecombe* [2015] QCA 232
PARTIES:	**DUGALD WALKER** (first applicant) **ABRE DE VILLIERS** (second applicant) **v** **RICHARD BRIMBLECOMBE** (respondent)
FILE NO/S:	Appeal No 2990 of 2015 DC No 4231 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 33
DELIVERED ON:	17 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2015
JUDGES:	Chief Justice and Gotterson JA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal granted.** **2. Appeal dismissed.** **3. Applicants to pay the respondent's costs of the application and the appeal on the standard basis.**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – OTHER PROCEEDINGS BEFORE TRIAL – OTHER MATTERS – where the respondent commenced a proceeding for defamation against the appellants concerning a matter published in an email to shareholders in a company and in a document attached to said email – where the email and document were republished to ASIC – where the appellants were unsuccessful in seeking to have the claim and statement of claim struck out – where the appellants' solicitors, Bennet & Philp and McBride Legal filed a signed "Notice of Appeal" on behalf of the appellants in March 2015 – where the document is not in Form 64 and a separate application for leave to appeal has not been filed – whether the document filed should be treated as a composite Leave to Appeal and Notice of Appeal DEFAMATION – ACTIONS FOR DEFAMATION – OTHER PROCEEDINGS BEFORE TRIAL – OTHER MATTERS –

where the appellants submitted that the learned primary judge was asked to make a preliminary determination whether in fact the republication was defamatory of the respondent – where this submission is erroneous – where consistent with *Favell v Queensland Newspapers Pty Ltd* [2004] QCA 135 it was not necessary to determine that question in order to determine whether to strike out the proceeding – where the relevant enquiry was as to whether relevant minds might possibly differ on the issue of capability of bearing a defamatory meaning – where a preliminary determination of the question alone would not necessarily have determined the fate of the proceeding – whether there has been an appealable error

DEFAMATION – ACTIONS FOR DEFAMATION – OTHER PROCEEDINGS BEFORE TRIAL – OTHER MATTERS – where the appellants submit that his Honour should have held that absent any allegation of malice on the part of Quantum Power, the republication by it attracts defences of qualified privilege which are available to the appellants notwithstanding the alleged malice on their part in publishing in the first instance – where the arguments, as framed here, have not crystallised as a question for determination whether a defence of qualified privilege is ever available to an original publisher in respect of a republication where the original publisher acts without malice – where the parties have not been able to identify any judicial decision in which this question has been considered and decided – where judicial statements indicate that it is the fact that a person is actuated to publish defamatory matter by a desire to injure another which operates to deprive the person of a defence of qualified privilege – where since malice in making the original publication here has been alleged and is deemed not to be admitted, his Honour was correct to hold that there is a need for a trial on that issue – where if malice is proved, it may defeat the appellant's reliance upon qualified privilege – whether the challenge on this ground must be rejected

Corporations Act 2001 (Cth), s 177, s 180, s 182, s 184
Defamation Act 2005 (Qld), s 27, s 30(1), s 30(4)
Limitation of Actions Act 1974 (Qld), s 10AA
Uniform Civil Procedure Rules 1999 (Qld), r 171, r 293,

Belbin v Mclean & Anor [2004] QCA 181, cited
Bik v Mirror Newspapers Ltd [1979] 2 NSWLR 679(n), cited
Favell v Queensland Newspapers Pty Ltd [2004] QCA 135, cited
Horrocks v Lowe [1975] AC 135, cited
Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57, cited
Sergi v Australian Broadcasting Commission [1983] 2 NSWLR 669, cited

COUNSEL: P J McCafferty for the first and second applicants
P D Tucker for the respondent

SOLICITORS: Bennett & Philp for the first applicant
McBride Legal for the second applicant
Minter Ellison for the respondent

[1] **CHIEF JUSTICE:** I agree with the reasons of Gotterson JA and the orders he proposes.

[2] **GOTTERSON JA:** On 28 October 2014, Mr Richard Brimblecombe commenced a proceeding for damages for defamation in the District Court at Brisbane against Mr Dugald Walker, as first defendant, and Mr Abre de Villiers, as second defendant. The proceedings concern matter published by Mr Walker within an email with the subject line "Quantum GM" sent by him on 25 March 2013 to shareholders in Quantum Power Limited ("Quantum Power"). They also concern matter published in a document headed "Quantum General Meeting 24 April 2013. Abre de Villiers Dugald Walker" which was attached to the email. In the pleadings this document is referred to as "the Presentation". Mr Brimblecombe alleges that it was published by both Mr Walker and Mr de Villiers.

[3] Quantum Power conducts a renewable energy business in which it develops, owns and operates anaerobic digestion systems and biogas fuelled power stations. In March 2013, Mr Brimblecombe was Chief Executive Officer and Managing Director of Quantum Power, having assumed those roles on 31 October 2013. Mr Walker was, at the time, a director and shareholder of Quantum Power. Mr de Villiers had been a chief executive officer and managing director of Quantum Power until 30 October 2011. Thereafter, he acted as its Executive Director: Engineering Services. Both Mr Walker and Mr de Villiers ceased to be directors of Quantum Power on 24 April 2013.

[4] The publications to which I have referred are the subject of complaint in the statement of claim filed at the commencement of the proceeding. That pleading alleges that certain matter published in the email and that separate matter published in the Presentation were each defamatory of Mr Brimblecombe. The defamatory meanings, that is to say, imputations, which, it is alleged, were conveyed by the matter include that Mr Brimblecombe had failed to demonstrate skill, judgment and business acumen; that he was unfit for office; and that he had acted unethically. All of the defamatory meanings concern Mr Brimblecombe in his role as Chief Executive Officer and Managing Director of Quantum Power.

[5] It is further pleaded that the publication of each defamatory meaning exposed Mr Brimblecombe to ridicule and contempt, had injured his reputation, and caused him to suffer hurt and embarrassment: paragraph 10. For that he claims general compensatory damages of $200,000. Further facts are pleaded in paragraphs 12 and 13 to support an additional claim for aggravated compensatory damages of $100,000.

[6] After service of the Claim and Statement of Claim, solicitors engaged by Mr de Villiers and solicitors engaged by Mr Walker both wrote to Mr Brimblecombe's solicitors drawing attention to s 10AA of the *Limitation of Actions Act* 1974 (Qld). That provision stipulates that an action for a cause of action for defamation must not be brought after the end of one year from the date of publication of the matter the subject of complaint. The section had obvious relevance because the proceeding had been commenced more than one year after the dates of publication in March 2013.

[7] On 1 December 2014, Mr Brimblecombe amended his statement of claim.[1] Significantly, the amendments added the following allegations to it:

> "9A. The Presentation and the email were placed with and formed part of the books and records of Quantum Power in accordance with the *Corporations Act 2001* (Cth).
>
> 9B. On 12 August 2014 Quantum Power made a written complaint to ASIC with respect to the conduct of the defendants as former directors of Quantum Power ("the complaint").
>
> 9C. The complaint contained books and records of Quantum Power including the email and the Presentation.
>
> 9D. As a consequence of the matters pleaded in paragraphs 9B and 9C herein the defamatory meanings in the email and the Presentation were republished to unknown persons at ASIC ("the republication").
>
> 9E. The republication was the natural and probable consequence of the publications pleaded in paragraphs 2 and 7 herein."[2]

Paragraph 10 was expanded by amendment to include harm to Mr Brimblecombe by republication of each defamatory meaning as well as by the publication originally pleaded.

[8] Mr Walker and Mr de Villiers pleaded to the amended statement of claim.[3] Their pleadings are similar, but not identical. They plead the limitation defence in respect of each publication on 25 March 2013. Mr Walker admits publication by him of the matter in the email and in the Presentation; Mr de Villiers denies that he published the Presentation. Mr Walker denies that the matter in the email had the defamatory meanings imputed to it by Mr Brimblecombe and that it was defamatory of him. Both Mr Walker and Mr de Villiers plead corresponding denials for the Presentation.

[9] With respect to the republication, the making of the written complaint to ASIC is admitted by both Mr Walker and Mr de Villiers. Each denies paragraphs 9D and 9E of the amended statement of claim on the basis that the alleged republication was not the natural and probable consequence of the publication of the email or of the Presentation.

[10] Each also pleads that the facts pleaded in paragraphs 9B, 9C and 9D of the amended statement of claim are of a publication by Quantum Power with the consequence that:

> "…
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> the alleged republication was published by Quantum Power Limited on an occasion of qualified privilege at common law by reason of the following facts, matters and circumstances:

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1 AB268-276. The amended paragraphs 2 and 7 plead the text of the matter which, it is alleged, conveyed the defamatory meanings in the email and in the Presentation respectively.

2 AB274-275. These amendments invoke the principle, uncontroversial in this proceeding, that an original publisher may be held liable for further publication by third parties of a defamatory publication made by the original publisher where the republication is the natural and probable consequence of the original publication: *Sims v Wran* [1984] 1 NSWLR 317 per Hunt J at 320.

3 Defences were filed on 12 December 2014. Mr Walker filed an Amended Defence on 17 December 2014. These pleadings were superseded by an Amended Defence of the Second Defendant and a Further Amended Defence of the First Defendant both filed on 4 February 2015: AB280-287 and AB288-291 respectively.

(i) in publishing the letter of 12 August 2014 (and its attachments being the Presentation and the email as those terms are defined in the Amended Statement of Claim) Quantum Power Limited were making a complaint to the Australian Securities & Investments Commission, ASIC, (the Complaint); and

(ii) in making the Complaint to ASIC Quantum Power Limited had a duty both social and moral to publish the Complaint (and its attachments being the Presentation and the email as those terms are defined in the Amended Statement of Claim) and ASIC have or were believed by Quantum Power Limited to have a reciprocal interest in receiving the Complaint."[4]

(The covering letter dated 12 August 2014 referred to in (i) alleged contraventions by Mr Walker and Mr de Villiers of ss 177, 180, 182 and 184 of the *Corporations Act* 2001 (Cth) by:

(a) misuse of Quantum Power's information;

(b) the improper disclosure of information confidential to Quantum Power;

(c) the making of reckless, distorted and untrue statements concerning Quantum Power's business; and

(d) seeking to take personal advantage of information obtained whilst directors, and, in Mr de Villiers' case, in the employ, of Quantum Power.)[5]

[11] Mr Walker and Mr de Villiers also plead that, as a publication by Quantum Power,

"…

the alleged republication was published by Quantum Power Limited on an occasion of qualified privilege pursuant to s 30 of the *Defamation Act* 2005 (Qld) in that:

(i) the alleged republication was given to the persons at ASIC in the course of giving them the information set out in the Complaint;

(ii) the information in the alleged republication was of apparent interest to the readers of the complaint;

(iii) the conduct of Quantum Power Limited in publishing the complaint was reasonable in the circumstances."[6]

[12] As well, Mr Walker and Mr de Villiers plead that Mr Brimblecombe expressly, or impliedly, consented to the republication by virtue of the approval for it by resolution of the directors of Quantum Power, including Mr Brimblecombe. They plead further that by reason of his consent, Mr Brimblecombe has no cause of action in respect of the republication.[7]

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4 Amended Defence of the Second Defendant, paragraph 11(b): AB283-284; Further Amended Defence of the First Defendant, paragraph 9(b): AB289.

5 AB108-113.

6 Amended Defence of the Second Defendant, paragraph 12(b): AB284; Further Amended Defence of the First Defendant, paragraph 10(b): AB289-290. The pleadings of consent were made by way of amendment.

7 Amended Defence of the Second Defendant, paragraphs 12A, 12B: AB284-285; Further Amended Defence of the First Defendant, paragraphs 10A, 10B: AB290.

[13] By way of reply,[8] Mr Brimblecombe asserts that the cause of action in respect of which he is suing arose upon the pleaded republication.[9] This assertion strongly implies that the cause of action claimed to have arisen on the publication of the email and the Presentation on 25 March 2013, is no longer pursued. Given that the republication occurred on 12 August 2014 and within one year of the commencement of the proceeding, he further asserts that that cause of action is not statute barred.

[14] With respect to the qualified privilege defences, it is pleaded that the alleged duties or beliefs held by Quantum Power and the reasonableness of its conduct are irrelevant and the pleadings concerning them should be struck out.[10] There is a further and alternative plea that the publication of the email and the Presentation on 25 March 2013 was not reasonable; that it was intended to harm Mr Brimblecombe; that it was made with reckless indifference to the truth or falsity of the defamatory meanings; that it was activated by ill will towards Mr Brimblecombe; and that, in the premises, both Mr Walker and Mr de Villiers were activated by malice in publishing the defamatory meanings in the email and in the Presentation on 23 March 2013.[11] (There is no plea of malice on the part of Quantum Power.) As the Replies are the last pleadings filed, the facts pleaded in them, particularly those in the plea of malice, are to be taken to be the subject of nonadmission.[12]

The strike-out application

[15] On 17 December 2014, Mr Walker and Mr de Villiers filed an application to strike out the claim and amended statement of claim. The application was superseded by an amended application filed on 2 February 2015,[13] several days before it was heard by a judge of the District Court on 5 February 2015. The amended application sought the following substantive relief:

> "1. That, pursuant to rule 171 of the *Uniform Civil Procedure Rules 1999* (UCPR), or alternatively the Court's inherent jurisdiction, the Claim and Statement of Claim against the Defendants be struck out.
>
> 2. In the alternative to the relief sought in paragraph 1, that pursuant to rule 293 of the UCPR, the Defendants have judgment against the Plaintiff in respect of the Plaintiff's claim against the Defendants.
>
> 3. Further, or alternatively, that there be a preliminary determination pursuant to r 483(1) of the Uniform Civil Procedure Rules of the following questions:
>
> (aa) is the republication, as defined in paragraph 9D of the Amended Statement of Claim, published by Quantum Power Limited capable of bearing any meaning defamatory of the plaintiff;
>
> (a) was the republication, as defined in paragraph 9D of the Amended Statement of Claim, the natural and probable consequence of the publications pleaded in paragraphs 2 and 7 in the Amended Statement of Claim;

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8 Replies filed on 24 December 2014: AB292-293; AB294-295.
9 *Ibid*, paragraph 2(a).
10 *Ibid*, paragraphs 3(a), (b) and (c).
11 *Ibid*, paragraph 3(d). Conformably with UCP Rule 174.
12 UCP Rule 168(1).
13 AB277-279.

(b) was the alleged republication, as defined in paragraph 9D of the Amended Statement of Claim, published by Quantum Power Limited on an occasion of qualified privilege:

(i) at common law; or

(ii) pursuant to s 30 of the *Defamation Act 2005* (Qld),

(c) if the answer to questions 3(b)(i) or 3(b)(ii) is yes, in the event the republication, as defined in paragraph 9D of the Amended Statement of Claim, is, or is capable of being, the natural and probable consequence of the publications pleaded in paragraphs 2 and 7 in the Amended Statement of Claim, is the defence of qualified privilege available to the second defendant."[14]

[16] The learned primary judge made an order on 24 February 2015 dismissing the amended application. Later, on 16 March 2015, his Honour ordered Mr Walker and Mr de Villiers to pay Mr Brimblecombe's cost of the application.

Application for leave to appeal

[17] On 24 March 2015, Mr Walker and Mr de Villiers filed in this Court a document titled "Notice of Appeal".[15] They are named in it as the First Appellant and the Second Appellant respectively and Mr Brimblecombe is named as the Respondent. This document is not in Form 64 in that it notifies that the appellants seek leave to appeal the orders made on the application, rather than notifying that they are appealing those orders. The document correctly apprehends that under s 118(3) of the *District Court of Queensland Act* 1967 (Qld), leave of this Court to appeal the orders is required. However, a separate application for leave to appeal has not been filed.

[18] In the circumstances, I would treat the document filed as a composite Application for Leave to Appeal and Notice of Appeal. Submissions before this Court proceeded on the footing that argument on the merits of the appeal would be heard and that, if leave to appeal was granted, judgment would be given on the appeal. It is convenient in these reasons to refer to Mr Walker and Mr de Villiers as the appellants rather than as the applicants for leave to appeal.

Findings at first instance

[19] The learned primary judge made findings on a number of matters against a background outlined by him which included an observation that it was not in dispute before him that the email and the Presentation were themselves capable of bearing a meaning defamatory of the plaintiff,[16] and the following description of the letter to ASIC:

> "… The cover letter is a six page document, naming both Walker and de Villiers as 'persons of interest' in the complaint and purporting to set out the 'nature of misconduct'. Further, it seeks to address statements in the email and attachment by stating that they 'made false and defamatory accusations against Richard Brimblecombe' and others, as well as stating that certain identified parts of the email are, amongst other things,

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14 AB277-278.
15 AB311-314.
16 Reasons [3], [4]: AB298.

> 'false and misleading' and 'reckless, damaging, and defamatory'. Additionally, it states, by reference to identified additional documents, constitution of 'a conspiracy by Walker and de Villiers to steal Quantum's proprietary information, intellectual property, and other business records for their own use and benefit' adding that the 'email exchange between de Villiers and Walker confirms that such theft has occurred, and continued'."[17]

[20] His Honour thought that given that it had not been contended before him that no "reasonable" cause of action had been pleaded and that reliance was not placed on any other limb of r 171 UCPR, the application was best approached initially on the basis of a summary judgment application pursuant to r 293 UCPR. His Honour was therefore concerned to enquire into whether he was satisfied that the plaintiff had no real prospects of success on all or part of the claim and, also, that there was no need for a trial of the claim or part of it.[18] It is not suggested on appeal that he erred in adopting such an approach.

[21] The learned primary judge was not convinced that it was inarguable on the material before him that it was foreseeable that the republication was a natural and probable consequence of the initial publication.[19] Nor was he satisfied that the identified "consent" by the plaintiff determined the question so convincingly that it could be said either that there was no real prospect of succeeding or no need for a trial on that issue.[20] Neither of these conclusionary findings is challenged on appeal.

[22] The two conclusionary findings that are challenged on appeal concern whether the republication was capable of bearing a meaning defamatory of the plaintiff, Mr Brimblecombe, and whether the qualified privilege attaching to the complaint by Quantum Power to ASIC could be availed of by the appellants in respect of the republication notwithstanding the alleged malice on their part. His Honour concluded that it was possible that reasonable minds might differ on whether the republication was capable of bearing a defamatory meaning; however, no conclusion as to whether the publication was or was not capable of bearing a defamatory meaning was expressed.[21] His Honour also concluded that while the common law and statutory qualified privilege was available to the appellants, in the plea of malice on their part, a basis had been advanced which could negate those defences.[22]

[23] The learned primary judge was not satisfied pursuant to r 293 that the plaintiff has no real prospects of succeeding to all (or part) of the claim and that there is no need for a trial.[23] It followed that a strike-out order pursuant to r 17 was not open either.[24] His Honour also decided that because the questions sought to be separately determined are substantially the only ones in respect of which there is a real contest, it would be contrary to the principles enunciated in r 5 UCPR to determine any question separately before a trial.[25]

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17 Reasons [8]: AB299.
18 Reasons [11]-[14]: AB300.
19 Reasons [21]: AB302.
20 Reasons [25]: AB303. In this regard, his Honour took into account an affidavit sworn by Mr Brimblecombe swearing to the effect that, as a director of Quantum Power, he had a legal and moral obligation to vote in favour of the resolution: Reasons [10]: AB300.
21 Reasons [32], [33]: AB306.
22 Reasons [45]: AB309.
23 Reasons [47]: AB309.
24 Reasons [47]: AB310.
25 Reasons [48]: AB310.

[24] On appeal, the appellants, Mr Walker and Mr de Villiers, seek to persuade this Court that the learned primary judge erred in making the two findings under challenge. They submit that his Honour should not have found that reasonable minds might differ on whether the republication was capable of conveying a meaning defamatory of the respondent, Mr Brimblecombe. Not only should that finding not have been made, his Honour should have made a preliminary determination that the republication was not capable of bearing such a defamatory meaning.[26]

[25] Further, the appellants submit that his Honour should have held that absent any allegation of malice on the part of Quantum Power, the republication by it attracts defences of qualified privilege which are available to the appellants notwithstanding the alleged malice on their part in publishing in the first instance. Had he done so, they submit, his Honour would have been satisfied that they had qualified privilege defences to the claim without the need for a trial on the issue of malice.

[26] Were the appellants to succeed in their challenge to either finding they would, they submit, be entitled to the relief claimed in the Notice of Appeal. That relief includes orders allowing the appeal, setting aside the orders below, and giving judgment in their favour on the claim against them with costs.

[27] I now turn to consider each of the findings under challenge and the bases for challenge of them.

Capable of bearing a defamatory meaning

[28] It is common ground here that in order to be actionable, a republication must itself be defamatory. Ordinarily the republication will be defamatory by virtue of the repetition of the defamatory matter originally published. However, the republication may so comprehensively refute the repeated defamatory matter that it itself is incapable of conveying any defamatory meaning.[27]

[29] At the hearing of the application below, counsel for Mr Walker and Mr de Villiers submitted, and his Honour accepted, that the relevant frame of reference for this enquiry is the actual complaint sent to ASIC, including the covering letter.[28] His Honour also accepted counsel's submission that any consideration of whether the complaint was capable of bearing a defamatory meaning required a reading of all of the documents constituting the complaint as a whole.[29] Argument before his Honour centred upon the covering letter to ASIC. Counsel for Mr Walker and Mr de Villiers submitted that it provided the antidote to any defamatory bane in the email and the Presentation attached to it.[30] The letter was "a complete dispelling of any defamatory content".[31]

[30] As to the approach to be taken where a republication of defamatory matter includes further matter which repudiates, the learned primary judge observed:

> "[29] In *Corby v Allen & Unwin Pty Ltd*,[32] the New South Wales Court of Appeal accepted remarks made by McHugh J (in the

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26 Appellants' Amended Outline of Argument, paragraph 53.

27 *Bik v Mirror Newspapers Ltd* [1979] 2 NSWLR 679(n); *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418(n) per Samuels JA at 419.

28 AB6; Tr1-6 ll31-38; Reasons [32]: AB306.

29 *Ibid*.

30 AB6; Tr1-6 ll31-34.

31 AB11; Tr1-11 ll23-26.

32 [2014] NSWCA 227.

earlier decision of *John Fairfax Publications Pty Ltd v Rivkin*[33]*)* as 'correctly stating' the relevant principle. See, also, *John Fairfax Publications Pty Ltd v Obeid*:[34] at 505 [97]. As so explained by McHugh J the following factors are important:

- although a reasonable reader may engage in some loose thinking, such a person is not 'avid for scandal', considering a publication as a whole and striking a balance between the most extreme meaning the words could have and their most innocent meaning;
- the reasonable reader considers the context as well as the words alleged to be defamatory, with the 'bane and antidote' required to be 'taken together';
- a contrary statement within the publication does not automatically negate the effect of other, defamatory, statements in the publication; and
- it is not the law that a person reporting the defamatory statement of another is only liable if he or she adopts the statement or reaffirms it, since the context of the statement may show that it is refuted or undetermined by other parts of the publication: at [26]-[27]."[35]

[31] The precise issue on which he needed to focus for deciding whether to strike out on a basis of incapacity to bear a defamatory meaning was elaborated by his Honour in the following terms:

> "[31] In turning to how a court should look at such a pleading at this stage of the proceeding, it is noted that in *Favell v Queensland Newspapers Pty Ltd*,[36] the plurality of Gleeson CJ, McHugh, Gummow and Heydon JJ at [6] adopted a statement of McPherson JA in the Queensland Court of Appeal[37] to the effect that:
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> - whether or not the pleading ought to, and will be struck out, as disclosing no cause of action is ultimately a matter of discretion for the judge;
> - such a step is not to be undertaken lightly but only with great caution;
> - the decision depends on the degree of assurance with which the requisite conclusion is, or can be, arrived at;
> - the fact that reasonable minds may possibly differ about whether or not the material is capable of a defamatory meaning is a strong, perhaps an insuperable, reason, for not exercising the discretion to strike out; but

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33 [2003] HCA 50; (2003) 77 ALJR 1657.
34 (2005) 64 NSWLR 485.
35 AB304-305.
36 [2005] HCA 52; (2005) 79 ALJR 1716.
37 *Favell v Queensland Newspapers Pty Ltd* [2004] QCA 135.

- if a conclusion is firmly reached, there is no justification for delaying or avoiding the step, at whatever stage it falls to be taken."[38]

[32] So informed, his Honour reasoned to his conclusion on the issue as follows:

> "[32] In this case, it is obvious that the republication, which must be the whole of the actual complaint sent to ASIC, must be read as a whole: see *Favell* at [17]. The consequence of that is that different reasonable readers (even taking into account those aspects in the covering letter - some of which have been referred to earlier - which contain a qualification, or apparent refutation, of what is contained in the content of the email and the presentation) may have possibly reached conclusions leading to them having differing minds, even understanding that the actual defamatory material was 'isolated' as an attachment.
>
> [33] Therefore, considering the nature and quality of the republication, the context in which it was made (including the purpose of making it) and reading it as a whole, I accept that reasonable minds may *possibly* differ in concluding that the republication is incapable of bearing a defamatory meaning when taken as a whole, especially where the covering letter can be interpreted as potentially reaffirming the defamatory content of the original publications. Of course, 'adoption' is irrelevant to basic liability: see *Obeid* at 506 [98]. But as *Obeid* goes on to discuss, to avoid confusion arising from the different senses in which 'adoption' has been used, it is preferable, in the view of the New South Wales Court of Appeal, that the question to be asked is, inter alia: 'whether the defamatory (matter) had been approved, reaffirmed or endorsed by the republisher': at 506 [102]."[39]

[33] The appellants' arguments on this challenge are at several levels. In their written outline in reply,[40] they submit that the learned primary judge was asked to make a preliminary determination whether in fact the republication was defamatory of the respondent and that he should have done so. The submission is erroneous. The preliminary determination sought in paragraph 3(aa) of the Amended Application was of the question whether the republication was *capable of bearing* any meaning defamatory of Mr Brimblecombe.

[34] That question is, of course, a question of law to be determined by the Court.[41] His Honour did not make a preliminary determination of that question. In my view, he did not err in not doing so. I say this for two reasons. First, consistently with *Favell*, it was not necessary to determine that question in order to determine whether or not to strike out the proceeding. The relevant enquiry was as to whether reasonable minds might possibly differ on the issue of capability of bearing a defamatory meaning. Secondly, and in any event, a preliminary determination of that question alone would not necessarily have determined the fate of the proceeding. No appealable error in exercise of discretion at this level is shown.

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38 AB305-306.

39 AB306.

40 At paragraph 2.

41 *Jones v Skelton* [1963] SR (NSW) 644 (PC) at 650; *Farquhar v Bottom* [1980] 2 NSWLR 380 per Hunt J at 385.

[35] Next, the appellants contend that it is apparent that the learned primary judge did not consider the complaint as a whole from the perspective of the ordinary reasonable reader.[42] Alternatively, it is contended that the conclusion reached by his Honour is either unreasonable or plainly unjust.[43]

[36] As to the first of these contentions, it is, I think, evident from paragraph 32 of his Honour's reasons that he did consider the whole of the material constituting the complaint and that he did consider it from the perspective of the reasonable reader.

[37] As to the second of them, I am unpersuaded that his Honour's conclusion that reasonable minds might possibly differ on whether the complaint was capable of bearing a meaning defamatory of Mr Brimblecome, was either unreasonable or plainly unjust. I say this for the following reasons:

(a) An antidote, to be effective, must answer and nullify every imputation republished.[44]

(b) Here, the covering letter, the purpose of which was to make a complaint to ASIC about alleged contraventions of the *Corporations Act*, includes refutations of some of the imputations conveyed by the email and the Presentation. It does so by a process in which certain passages from those documents are quoted and refuted as "false", "false and misleading" or "reckless and damaging".

(c) However, as counsel for the appellants in effect concedes,[45] the covering letter does not address and refute individually all of the imputations. Those which are alleged and which are not refuted are those in the following paragraphs in the Amended Statement of Claim: paragraph 8(a) (causing Quantum Power to lose money in a commercial transaction); paragraph 8(b) (Mr Brimblecombe acting unethically in respect of charging for his time); paragraphs 8(d) and (e) (causing Quantum Power to breach its Constitution in two ways, one of them involving financial advantage to Mr Brimblecombe).

(d) A hypothetical reasonable reader would not necessarily think that because the purpose of the letter was to complain of alleged contraventions by the appellants, then anything and everything said by them in the attached documents was refuted. It is quite possible that such a reader might well think that certain imputations were not addressed because they could not be readily refuted. Moreover, such a reader might be inclined to reject all, or some, of the refutations; or to give greater emphasis to the email and the Presentation (together some 61 pages) than to the covering letter (six pages).

(e) In these circumstances, it was open to his Honour to conclude that a reasonable reader might think that the complaint was capable of bearing a meaning defamatory of Mr Brimblecombe.

[38] I therefore reject the appellants' challenge to the finding concerning the capability of the complaint to bear a defamatory meaning.

Qualified privilege

[39] The learned primary judge approached the defence of qualified privilege on the basis that both at common law and under statute, it is available to a publisher of defamatory

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42 Appellants' Amended Outline of Argument, paragraph 23(a).

43 *Ibid*, paragraph 23(b).

44 *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669 per Hutley JA at 670; *Cornes v Ten Group Pty Ltd* [2011] SASC 104; (2011) 114 SASR 1 per Peek J at [68], [69]; *Stubbs Ltd v Mazure* [1920] AC 66, per Viscount Finlay at 71-72, 74.

45 Appeal Transcript 1-9 l41 – 1-10 l2.

matter when a republisher of it republishes without malice.[46] He explained the basis for the approach in the following terms:

> "[39] In *Belbin v McLean & Anor*,[47] Muir J (as he then was), with whom Williams JA and Mullins J agreed, held that, where a republisher has a defence 'which protects him' from liability for the republication, that defence is available to the original publisher: at [14]. This is consistent with the respected text of *Gatley*[48] where, at paragraph [6.52], the text, identifying the case of a claimant who sues the defendant both for the original publication and for the republication 'as two separate causes of action', makes the argument 'that the correct view is that where no claim would lie against the defendant in respect of the later publication, the claimant should not as a matter of principle be allowed to recover damage with respect to that publication'. The text then further argues, in the same paragraph, that the consequence is that, regardless of whether a claimant 'relies on a republication as a cause of action or an aggravation of damages, a defendant will be entitled to meet the claim in respect of that publication with any relevant defence'. This is amplified later in that text where, at paragraph [6.58], dealing specifically with a privileged occasion, the authors argue that, if a statement by D to X was not on a privileged occasion but the republication by X was, if D is to be treated as a publisher on the occasion of republication, there is 'simply no wrong on that occasion'."[49]

[40] His Honour noted that a decision on whether a particular occasion is one of qualified privilege is a question of law for the judge alone.[50] He also referred to the remarks of Brennan CJ, Dawson, Toohey and Gaudron JJ in *Mann v O'Neill*[51] that complaints to prosecuting authorities "enjoy qualified privilege".

[41] The learned primary judge considered, but reached no concluded view on, whether the pleading in the Replies putting in issue the reasonableness of the conduct of Quantum Power in making the complaint[52] warranted a trial. He countenanced that as a possibility "despite the apparent absurdity of the plaintiff claiming that a decision that he was party to might, arguably, not be reasonable".[53]

[42] As noted, his Honour did conclude that a trial on the non-admitted allegations of malice on the part of Mr Walker and Mr de Villiers was required because of their potential impact upon the availability to those defendants of the qualified privilege defences. He reasoned to that conclusion in the following way:

> "[44] At present, no malice has been pleaded referable to the republication. I refuse to entertain any argument with respect to

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46 Reasons [43]: AB308. His Honour observed *ibid* that the plaintiff had presented no compelling argument why qualified privilege could not be relied upon in the proceeding.

47 [2004] QCA 181.

48 *Gatley on Libel and Slander*, 12th edit (2013).

49 AB307-308.

50 Reasons [40], citing *Adam v Ward* [1917] AC 309 per Lord Finlay LC at 318: AB308.

51 (1997) 191 CLR 204 at 216.

52 Reasonableness of that conduct being a fact that the defendants would need to prove in order to establish the statutory qualified privilege: *Defamation Act* 2005 (Qld) s 30(1)(c).

53 Reasons [43]: AB308-309.

> it when no suggested evidence has been forthcoming. Nevertheless there is the question of malice which is pleaded for the original publications. *Egger v Chelmsford*[54] confirms the law that the occasion of the communication which triggers a privileged communication rebuts an inference of malice which prima facie arises from a statement prejudicial to the character of a plaintiff and, therefore, puts it upon the plaintiff to prove that there was, in fact, malice: at 264. Also, importantly, Lord Denning held that the malice of one defendant does 'not infect' a co-defendant: at 265. But, for present purposes, it has been raised. *Gatley*, at paragraph [6.58], contends that, where (using the same example as above) D is actuated by malice, when X republishes he has the protection of privilege 'but D does not'. Therefore, there does need to be a trial on the issue of malice and its effect on republication defences."[55]

[43] The appellants adopt his Honour's attribution to Muir J in *Belbin* of the proposition that where a republisher has a defence which protects him from liability, that defence is available to the original publisher. They submit that the proposition so comprehensively affirms the availability of a defence of qualified privilege as to exclude any role for malice on the part of the original publisher to negate it for that publisher. The respondent's submissions accept that a defence of qualified privilege may be available to the original publisher where no malice is involved.[56] The respondent has not contended otherwise.[57] The respondent submits that "logic, principle and fairness" underpin a role for malice in negating the availability of a qualified defence to an original publisher.[58]

[44] Thus, the arguments, as framed here, have not crystallised as a question for determination whether a defence of qualified privilege is ever available to an original publisher in respect of a republication where the original publisher acts without malice. That issue is not directly addressed in either written or oral submissions. In these circumstances, I am not prepared to address or decide that question. Nor is it necessary to do so. The matter can be disposed of on the basis that the defence of qualified privilege is capable of being availed of by the original publisher, the question for resolution being whether malice on that publisher's part disentitles them to avail of it.

[45] The parties have not been able to identify any judicial decision in which this question has been considered and decided. An answer to it, for which no authority is cited, is ventured by the learned authors of *Gatley*.[59] For the reasons which follow, I am of the view that the answer there ventured, that the original publisher who is activated by malice does not have the protection of qualified privilege, correctly states the law both in respect of the common law defence and the statutory defence of qualified privilege.

[46] I do not accept the appellants' submission that the decision in *Belbin* provides a firm basis for argument to the contrary. A question under consideration in that case was whether a statutory defence of absolute privilege conferred by s 101(2) of the *Criminal Justice Act* 1989 (Qld) is available to a person who has provided material

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54 [1965] 1 QB 248.
55 Reasons [44]: AB309.
56 Respondent's Amended Outline of Argument, paragraph 24.
57 There is no Notice of Contention propounding that, as a matter of law, such a defence is not so available.
58 Respondent's Amended Outline of Argument, paragraph 25.
59 At paragraph 6.58.

to another who then publishes it to the Criminal Justice Commission. In addressing that question, Muir J observed:

> "[39] In the case of a defence of absolute privilege, which was not under consideration in *Smith v Harris*,[60] the denial to the original publisher of the benefit of a defence open to the republisher could seriously undermine the protection of the defence. For example, if the quantum of damages able to be recovered from a publisher of defamatory information to a parliamentarian could be greatly increased by virtue of republication in Parliament, there would be an obvious practical restraint on the parliamentarian's freedom to use the information. Similar concerns could arise in relation to legal proceedings. Considerations such as these, and dicta of Hunt J in *Toomey v Mirror Newspapers Ltd*,[61] support the conclusion that a defence of absolute privilege open to a republisher may be availed of by the original publisher. The appellant's argument identified a decision in the United States which supported a contrary conclusion,[62] but as I have said, it is unnecessary to determine the point."[63]

[47] These observations were made *obiter*. They concern an absolute privilege. Malice does not defeat an absolute privilege at common law or under statute.[64] Thus, the context which Muir J was addressing differed from the present in this significant respect. Notwithstanding, it is noteworthy that his Honour employed public-interest based reasoning to support a conclusion that absolute privilege should be available to the original publisher.

[48] His Honour's reliance upon public interest is reminiscent of the public interest-based rationale for qualified privilege and the loss of it for express malice given by Lord Diplock in *Horrocks v Lowe*.[65] In a passage, the first paragraph of which was quoted by Gleeson CJ and the second paragraph of which was quoted by Gaudron, McHugh and Gummow JJ in *Roberts v Bass*,[66] in each case with apparent approval, his Lordship said:

> "… The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private

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60 (1995) A Def R 43,861 at 43,864.
61 (1985) 1 NSWLR 173 at 183, 186.
62 *Laun v Union Electric Co of Missouri* 350 Mo 572, 166 SW 2d 1065.
63 *Belbin v Mclean & Anor* [2004] QCA 181.
64 *Defamation Act* 2005 (Qld) s 27.
65 [1975] AC 135.
66 [2002] HCA 57; (2002) 212 CLR 1 at [9] and [75] respectively.

> duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.
>
> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. …"[67]

[49] In the sentence which follows Lord Diplock said that, broadly speaking, express malice means "malice in the popular sense of a desire to injure the person who is defamed". Gleeson CJ cited that description of malice in *Roberts* without qualification.[68]

[50] Malice focuses upon the individual who is activated by a dominant and improper motive of the kind of which Lord Diplock spoke. I understand his Lordship to mean that it is by reason of its dominance and impropriety, that the law regards such a motive as disentitling a person actuated by it from the protection of qualified privilege. To similar effect, in *Roberts*, Gaudron, McHugh and Gummow JJ observed:

> "Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice (malice) is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff."[69]

[51] The focus on impropriety of motive of the individual as the reason for disentitlement is further illustrated in the context of a joint publication in the decision in *Egger* to which the learned primary judge referred. There, Lord Denning MR stated the law to be this:

> "… It is a mistake to propose that, on a joint publication, the malice of one defendant infects his co-defendant. Each defendant is answerable severally, as well as jointly, for the joint publication: and each is entitled to his several defence, whether he be sued jointly or separately from the others. If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must prove malice against each person whom he charges with it. …"[70]

[52] These judicial statements indicate that it is the fact that a person is actuated to publish defamatory matter by a desire to injure another which operates to deprive the person of a defence of qualified privilege. Accepting that, there is, in my view, a public interest in ensuring that that fact operates uniformly and in all circumstances to deprive such a person of the defence where that person would or might otherwise have been entitled to rely upon it not only in respect of a publication but also in respect of a republication of the defamatory matter. I do not consider that the public interest is appropriately served by confining the operation of that fact to the person's liability for the publication and not extending it to the person's liability for the republication.

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67 At 149.
68 At [10].
69 At [75].
70 At 265.

[53] In the case of a publication of defamatory matter which is not made on an occasion of qualified privilege but is made to a person who republishes on an occasion of qualified privilege, absent malice on the part of the third person, he or she would be entitled to the protection of qualified privilege in respect of the republication whereas the original publisher would, of course, not be entitled to such protection in respect of the original publication. To my mind, it would be both inconsistent with the public interest and anomalous for the original publisher, actuated by a desire to injure, to be entitled to the protection of qualified privilege against legal liability he or she may have in respect of the republication, but not against legal liability he or she may have in respect of the original publication.

[54] To this point, the public interest considerations to which I have referred concern the common law defence of qualified privilege. Those considerations are reflected in the statutory defence in two respects. Firstly, s 30(4) states comprehensively that proof by a plaintiff that a publication of defamatory matter was actuated by malice defeats a defence of qualified privilege under s 30(1). Secondly, neither s 30(4) nor any other provision in s 30 operates to preserve for an original publisher who is actuated by malice, qualified privilege in respect of a republication by a third person. Thus, if s 30(1) may be construed to provide for a qualified privilege defence for an original publisher in such circumstances, an issue which this Court is not asked to determine on this application, s 30(4) will operate to defeat the defence where there is proof that the original publisher was actuated by malice.

[55] Since malice in making the original publication here has been alleged and is deemed not to be admitted, his Honour was correct to hold that there is a need for a trial on that issue. If malice is proved, it may defeat the appellant's reliance upon qualified privilege. This challenge must also be rejected.

Disposition

[56] The proposed appeal does involve a significant question of law for which there appears to be no direct answer in the authorities. This warrants the grant of leave to appeal. However, for the reasons given, none of the proposed grounds of appeal can succeed. The appeal ought therefore be dismissed.

Orders

[57] I would propose the following orders:

1. Leave to appeal granted.

2. Appeal dismissed.

3. Applicants to pay the respondent's costs of the application and the appeal on the standard basis.

[58] **ANN LYONS J:** I agree with the reasons of Gotterson JA and the orders he proposes.