# MAGISTRATES COURTS OF QUEENSLAND

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| CITATION: | *Walden v Danieletto* [2018] QMC 10 |
| PARTIES: | Jon Nigel WALDEN<br>**v**<br>Attilio DANIELETTO |
| FILE NO/S: | M2825/2011 |
| PROCEEDING: | Civil Hearing |
| ORIGINATING COURT: | Southport Magistrates Court |
| DELIVERED ON: | 16 May 2018 |
| DELIVERED AT: | Southport |
| HEARING DATE: | 19 April 2018 |
| MAGISTRATE: | A.H. Sinclair |
| ORDER: | **The Plaintiffs claim is dismissed** |
| CATCHWORDS: | DEFAMATION – Imputations - Defences – Triviality – Substantial Truth – Qualified Privilege |
| AUTHORITIES: | *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd and Another* [1985] 58 ALR 548<br>*Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449<br>*Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186<br>*Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632<br>*Reader's Digest Services Pty Ltd v Lamb (1982)* 150 CLR 500<br>*Sorrenson v McNamara* [2003] QCA 149<br>*Smith v Farren-Price* [2004] QDC 225<br>*Smith v Lucht* [2016] QCA 267<br>*Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1<br><br>Sections 14, 14A *Acts Interpretation Act 1954*<br>Sections 25, 30 and 33 *Defamation Act 2005*<br>*Section 93 Body Corporate and Community Management (Standard Module) Regulation 2008* |
| COUNSEL: | Mr M. Pope for the Plaintiff<br>Mr B. Strangman for the Defendant |

SOLICITORS: Derek Legal for the Plaintiff

ABKJ Lawyers for the Defendant

## Summary

[1] Mr Waldon owned a unit in the a Body Corporate. He says that the Mr Danieltello who worked for the Body Corporate manager, said at an EGM "a voting paper for Lot 41 was not admitted because the lot was unfinancial". He also later caused those words to be put in the minutes.

[2] Mr Walson says he was defamed and claims $100,000 in damages. The issues for determination on the pleading are:

1. What was said and when?
2. Was it defamatory?
    a. Did it carry the implications alleged?
    b. Where they likely to trip one of the 3 tests which point to it being defamatory?
3. Is there a defence?
    a. Was it trivial, substantially true or the subject of qualified privilege?
4. Damages

[3] These reasons conclude:

1. It was said both in the meeting and the minutes that the Plaintiff's vote did not count towards the motion because he was 'unfinancial'. I find it was said at the start of the meeting and in the context of informing those gathered about which votes had been received and were being counted towards the vote on the agenda.
2. I find it did not carry any of the imputations alleged and is not defamatory.
    a. All it conveyed in context was that at that instant in time, the Plaintiff wasn't fully paid up with all his Body Corporate fees. There being a myriad of reasons why people don't pay their bills on time, such a statement does not carry the imputations pleaded.

b. Such a statement would not cause ordinary people to shun or avoid Mr Walden. Any adverse reactions Mr Walden and his wife experienced were more likely than not the result of other conduct which made Body Corporate members feel aggrieved towards him and which are far more serious than the late payment of his fees.

3. There are two defences establish. One is not:
    a. The late payment of a bill, if it has any defamatory connotations without more is about as trivial a thing as someone could be accused of (even if it was untrue).
    b. The statement was not substantially true.
    c. Qualified privilege applies. The defendant did not blurt these words out and run from the room in an attempt to defame. He said them in a manner consistent with his role in the meeting and without malice. He is as protected as the Chairperson would be.
4. If damages were payable, I would have assessed them at $,500.00.

## The Facts

[4] The only controversial fact in dispute between the parties is when the statements were made in the meeting. The Plaintiff has always pleaded they were said at the end of the meeting. The Defendant's later pleading said it was at the beginning. The Plaintiff and his wife gave evidence that it was said as the last thing spoken during the meeting and immediately before the Defendant leaving the room. Mr Waldon had to rush to catch him. Mr Danieletto says the statement was made early in the meeting when votes were declared.

[5] Mr Danieletto gave evidence that the payment was not showing on the Body Corporate Manager's computer system when he checked it on the morning of the meeting. He concedes that when he checked after the meeting, his staff had located the payment in the bank account and that because the computer could not match it to an exact amount owing, it had been manually processed during the course of the meeting. Exhibit 1 is Mr Walden Body Corporate statement of accounts and shows the payments being credited to his account.

[6] As shown in Exhibit 2, his bank statements, Mr Walden made one transfer of $1,421.75 on 29 June 2011. It's clear that this amount does not tally with any

amount shown (correctly or otherwise) as his then outstanding balance. It is not surprising that the system could not match that payment and it required manual processing. Mr Danieletto accepts that the monies were deposited to the relevant account and credited to it before the meeting. In other words, he concedes that the Plaintiff was not 'unfinancial' in terms of having a Body Corporate debt that disentitled him to vote.

[7] What is beyond doubt is that this payment was long overdue and was paid effectively at the last minute. Mr Walden said he had been overseas for sometime. It is not surprising that the Body Corporate Manager might not have allocated it to Mr Walden's account or realized it had been paid.

[8] The Plaintiff did not seek to tender the minutes or called other witnesses. Either of these two might have made finding in the Plaintiff's favour more likely. Likewise the Defendant ran a fairly confined case. As it is, I prefer the evidence of Mr Danieletto.

[9] Malice must be specifically pleaded and is not.[1] What is pleaded in the Reply is that Mr Danieletto knew what he said was false (in the written version). That only meets the requirements of rule 150(2). No material was put forward as to why Mr Danieletto would wish to say something he knew was false. Reference was made to a Magistrates Court decision unfavourable to the Body Corporate Manager in relation to record keeping but I was not informed of whether that was before or after these events. Exhibit 8 is the Committee Minutes of 16 May 2012. These show the issue of those proceedings having been commenced shortly before that meeting - months after the statements the subject of this claim. It cannot have been any motivation for Mr Danieletto and indeed no motive was put to him.

[10] Exhibits 8 to 20 show ongoing disputes in multiple jurisdictions up to and including QCATA on 16 Nov 2015. These were published along with some of the outcomes to members. Mr Walden continued to live in the Body Corporate for some time after the alleged defamation. It is little wonder that he was shunned and avoided given the way he behaved. There is nothing linking any of that conduct to the alleged defamation. The exhibits show that soon after the June 2011 EGM, Mr Walden was

[1] Rule 150(1)

likely to have been viewed as a serial pest causing great expense and inconvenience to the Body Corporate and thus the other residents.

[11] No reason in relation to making the statement is advanced. I am not informed about whether the making of the declaration of invalidity would have affected the vote. It seems to me that in the absence of any reason to make the statement and in circumstances where he believed it to be true, the only reason for making the statement could have been to inform the meeting. The only relevant time would have been at or about when the votes were being declared and tallied.

[12] It is of course possible that there was only one motion on the EGM and very little happened other than to table the votes and declare the outcome. I am not informed by the tendering of the minutes which might show this. There being perhaps only one item on the agenda, very little time may have passed between the opening, the statement and the end. In any event I am do not accept the evidence of the Plaintiff and his wife that the statement was made immediately before Mr Danieletto exited the room and out of the context of declaring the vote. Mr Walden in particular seems to have overreacted to this statement and blown it out of all proportion. Quite tellingly, this was demonstrated by his insistence that this event and not the later, more frequent and more serious conduct which he engaged in (which was far more likely to upset the residents and the Body Corporate members) was the source of this discomfort he felt after the meeting. His intransigence in the face of what he perceives to be wrongs that need righting are demonstrated in repeatedly taking actions which adjudicators have dismissed with costs. He said he had a right to do so. He did. But it is not free from consequences such as causing fellow residents to disapprove of him.

[13] I make this finding because it accords with common sense and the normal course of business at such a meeting. In fact Exhibit 3 is the minutes of an AGM on 24 September 2010. It records the headings as **Attendance Record and Apologies** followed by **Proxies and Voting Papers**. It is in that section that "A voting paper for Lot 43 could not be admitted because the lot was unfinancial". There follows the outcome of the motions voted on then **Election of Committee** and **Close of Business**.

[14] This statement was made before the alleged defamation and shows the normal way in which the Body Corporate conducts its general meetings. There is nothing odd or unusual about the declaration being made in that case. Mr Walden and Mr Danieletto are both recorded as having been present.

[15] Present to hear this said on that date were persons listed in paragraph 4 of the Further Amended Statement of Claim including Helen Kirkham, Betty Reiher, Gwen Cooke, Denise Connolly, Ross Truskett, John Sawyer, Barrie and Jean Owen, Morris and Joan Bath Jean Hancox, Digby Cooke, Bob Cozens, Bernice Newbury, Alison Gordon. In fact, of the people present at the 2011 EGM only Brian Thornton, Len Kingston-Kerr, Colin Cooke, Clem Foreman and Brian Roberts were not. It follows that the vast majority of people attending general meetings and reading the minutes with care would already be aware of instances where votes were declared invalid because the lot for which it was cast was 'unfinancial'.

[16] Exhibit 10 is the minutes of an AGM held on 28 September 2012. Both Mr Walden and Mr Danieletto are present. The order of proceedings is the same as it was on 24 September 2010. No vote was declared invalid.

[17] It follows that where the minutes of the meeting before and after are exhibits and show the declaration was more likely than not to have been made at the start of the meeting, that I accept the evidence of Mr Danieletto that this is what happened at the 2011 EGM.

[18] It follows therefore that rather than the words having been said before Mr Walden had a chance to correct them before the end of the meeting, that he chose to remain silent for the rest of the meeting and only approach Mr Danieletto at the end of it.

[19] I was not impressed by the Plaintiff as a witness. I find it difficult to accept that even he believed what he said of the significance of the alleged defamation on his reputation compared to the publication of what he said and did in relation to the Body Corporate in the years afterwards.

[20] His partner, Ms Gordon, only referred to one incident to people in the lift looking down when they entered and one meeting at which a chair said to be for someone else was not later taken up. All of us have probably had similar experiences but not

regarded them as evidence of 'harassment, intimidation' or the other rather extraordinary language used to describe them.

[21] Only Ms Gordon said it happened shortly after the meeting. Yet the Plaintiff stayed there commencing frivolous and vexatious applications for perhaps another 4 years. The reason he left was clearly not the consequences of the alleged publication.

## Defamation - The Law

[22] Two steps are involved in determining if the material is defamatory. Firstly, I must determine the meaning. Secondly, I must determine if one of three tests is passed . The Defendant's intention is irrelevant.

[23] The 'natural and ordinary meaning' of a publication is that meaning which the publication would convey to the ordinary reasonable person. It includes not only the literal meaning but those which can be read between the lines.[2] What is important is the meaning conveyed by the whole of the publication including all its circumstances and not just the bare words standing by themselves.[3]

[24] What must be pleaded and proved are the imputations said to arise. Four were pleaded:

- The plaintiff was a delinquent payer
- He could not afford to pay his Body Corporate levies
- He had financial difficulties
- He was insolvent.

[25] While Mr Pope conceded during addresses that the last of these was an overreach, ultimately I have found that they all are.

[26] The questions are:

1. What is the meaning of the words used?
2. Is the meaning defamatory?

[27] The pleadings show the admitted oral statement to be "a voting paper for Lot 41 was not admitted because the lot was unfinancial". The minutes stated: "1. A voting paper for Lot 41 was not admitted because the lot was unfinancial; Note: After the

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[2] *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186

meeting Mr Walden of Lot 41 notified Mr Damielotto that he had paid all arrears on his Lot yesterday. Mr Danieletto confirmed advice that, that payment had not been received in the Body Corporate's account which was checked this morning before the meeting."

[28] The failure of the minutes to include the information by then known to Mr Danieletto (namely that Mr Walden had in fact paid) might gave rise to a new imputation, namely that Mr Walden lied to Mr Danieletto. That is not pleaded. Any imputation relied on must be pleaded and proven.[4] It is not enough that some other meaning might have been open. The defendant is entitled to know the case it has to meet at trial.

[29] Without any imputation being pleaded about the second defamation. I accept all of his evidence in particular that he genuinely believed the payment hadn't been received when he made the comments at the meeting and that people are often late paying their Body Corporate fees. I accept his evidence that there was sufficient time in the meeting after the announcement for Mr Walden to have approached the Defendant or the Chairperson to have the matter corrected during the meeting.

[30] The context for the statements is therefore the Body Corporate Manager telling the members of the Body Corporate in an Extraordinary General Meeting or the minutes thereof what happened with the votes. It was not said in the context of some discussion about people capacity to pay or in any discussion about Mr Walden.

[31] "Unfinancial" is not defined in the Act or Regulations but any person hearing the term in the context of why a vote was disallowed would no doubt know or assume that it was relevant to some Body Corporate rules or laws governing voting.[5] They would be most likely to assume that this was some declaration of values by the person making the statement or some unilateral sanction imposed by them.

[32] The pleadings earlier said that the oral statement was "that the Plaintiff's vote was invalid because the Plaintiff was unfinancial with Body Corporate levies". That is what most people would understand the pleaded version to mean. In that context

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[3] *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641

[4] *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd and Another* [1985] 58 ALR 548 at 590-591

[5] *Section 93 Body Corporate And Community Management (Standard Module) Regulation 2008*

does it fall within one of the touchstones referred to in the authorities as amounting to being defamatory?

[33] Many people (if not all of us) have paid a bill late. The reasons commonly include oversight, lost mail, change of address, absence when the bill arrives, mistakes as to the due date, failure of transfer payments etc. In essence the plaintiff asserts that the four imputations arise and that an ordinary person would not imagine the more mundane and clearly non-defamatory possibilities are more likely. It is possible that some people could jump to wild theories but the hypothetical right-thinking person would not have

[34] The Plaintiff's submission is that ordinary people would be likely to visit serious disregard on anyone paying a bill late, even by a small period of time, without knowing the reason.

1. Is it 'calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule?'[6]
2. Would it tend to lower the plaintiff in the estimation of of right-thinking members of society?[7]
3. Would it cause people to shun or avoid the Plaintiff?[8]

[35] Evidence was led to support the third test. It failed to prove that what was said to be shunning or avoiding the Plaintiff related to the defamation and not to other acts.

[36] Even if there is a member of society who has never paid a bill late that person would be aware that they are a rarity and that their friends, family and co-workers are sometimes late and miss a due date. Do people hate or ridicule one another about overdue bills? Do these cause people's estimations of one another to be lowered where neither the amount, the period they are late or the reason are known? Clearly not. Ordinary people accept that other ordinary people are neither infallible or perfect.

[37] There were two general minutes meeting minutes tendered and both have similar formats and ones familiar to those who have read minutes before. The first shows the issue of votes being declared non-financial at the start of the meeting. They both

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[6] *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 453 per Hunt J

[7] *Reader's Digest Services Pty Ltd v Lamb (1982)* 150 CLR 500 at 505, 506

show a function being performed by whomever made the statements was clearly either the chair or someone speaking through them. They also show that it is uncommon indeed unremarkable for people to be 'unfinancial'.

[38] In fact Exhibit 4 shows that on the 18th May 2011 the Committee reinstated levy discounts for another lot owner who showed special circumstances for the late net payment. This hardly speaks of a Committee who regarded late payment as something unforgivable. They did something similar for another owner as shown in the 24 August 2011 minutes. These also record the fact of Mr Walden asserting the defamation and make it clear that the arrears were in fact received in the relevant bank account the day before the meeting. This is further evidence that any negative consequences of its earlier publication were reduced for those reading these minutes.

[39] They also show the first of several adjudications in which adjudicators dismissed Mr Waldens applications to the Body Corporate Commissioner and awarded costs on the basis that the applications were frivolous, vexatious, misconceived and without substance. The Committee voted that a copy of that order be given to each resident. Any resident reading these would know the truth of Mr Walden having paid on time but the shunning continued according to him.

# Defences

### *Triviality - Section 33 Defamation Act*

[40] The Defamation Act defines several defences. One is under Section 33.

> **33 Defence of triviality**
> It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

[41] This section raises several issues:

1. How does the Court assess what is 'unlikely to sustain harm'?

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[8] *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 23, 24

2. Is it the harm that is trivial or the publication?
3. When is the assessment to be made?
4. What is the harm spoken of?

[42] The *Acts* Interpretation *Act* assists in deciding that 'triviality' itself is part of what the court must consider when considering the whole of the Act to arrive at a purposive meaning:[9]

> **14 Material that is, and is not, part of an Act**
>
> (1) A heading to a chapter, part, division or subdivision of an Act is part of the Act .
>
> (2) A heading to a section, subsection or another provision of an Act is part of the Act if—
>
> (a) the Act is enacted after 30 June 1991; or
>
> (b) the heading is amended or inserted after 30 June 1991.

[43] I am also happily bound by *Smith v Lucht* [2016] QCA 267 in which Justice Flanagan wrote the leading decision. Together these authorities show that the assessment is as to damage to the reputation of the plaintiff. This is the likelihood of harm that must be trivial. The assessment is to be made at the time of publication.[10] The harm is to reputation and not just personal distress of the plaintiff.[11]

[44] Without wishing to place a gloss on the words of the section or the decision, the Court must look at the circumstances of the publication at the time it is made, and determine if there is the absence of a real possibility of harm arising from it in considering the content and extent of the publication and the nature of the recipients and their relationship with the plaintiff.[12]

[45] No evidence was led from either side about the Plaintiff's reputation with other lot owners before the meeting. If I am wrong about the words used as being defamatory, I would conclude that this defence is made out. The statement was made only at a meeting and in minutes to people interested in attending or reading. That group would by virtue of their demonstrated interest in Body Corporate affairs, be very likely to understand that lot owners do not all pay their fees on time every time and that this is rarely because they are unable to. I find that even the

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[9] Section 14A *Acts Interpretation Act 1954*
[10] At [33]
[11] At [54]
[12] At [37]

imputation that the Plaintiff was temporarily unable to pay his bills is unlikely to result in a real possibility of harm to his reputation regardless of how much it subjectively upset him.

[46] It was said in addresses that it was admitted that he was not unfinancial, whatever that meant. That's not correct. It was not pleaded that he was 'financial' so it could not be admitted. What the defence pleads in 6(d) is that the contribution was required on 30 April 2011 and was not paid until 30 June 2011. In the Further Further Amended Reply the Plaintiff says of those allegations that the contributions were required to be paid by 6 May 2011

[47] If I am wrong and the imputations can be made out, the allegations are amongst the most trivial I can imagine. Section 33 applies to the first publication. No-one would be likely to suffer harm from it. The second publication simply repeats it and the fact of Mr Waldens approach after the meeting without pleading any additional implication. It is therefore just as trivial.

***Substantial Truth - Section 25 Defamation Act***

[48] The Defendant also relies in Section 25 which reads:

> **25 Defence of justification**
> It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

[49] The pleaded defence of section 25 is not made out.

[50] It matters not for that defence whether the allegation was true <u>just before</u> it was made. It only whether it was substantially true <u>when</u> made. There is a temporal link in the reporting of being unfinancial and the right to vote. The fact that he was unfinancial on several occasions before this and after it do not change the fact that at the time it was made, this black and white statement was not true.

***Qualified privilege - Section 30 Defamation Act***

[51] The section reads:

> **30** Defence of qualified privilege for provision of certain information
> (1)There is a defence of qualified privilege for the publication of defamatory matter to a person (the ***recipient***) if the defendant proves that—
> (a)the recipient has an interest or apparent interest in having information on some subject; and
> (b)the matter is published to the recipient in the course of giving to the recipient information on that subject; and
> (c)the conduct of the defendant in publishing that matter is reasonable in the circumstances.
> (2)For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
> (3)In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—
> (a)the extent to which the matter published is of public interest; and
> (b)the extent to which the matter published relates to the performance of the public functions or activities of the person; and
> (c)the seriousness of any defamatory imputation carried by the matter published; and
> (d)the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
> (e)whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
> (f)the nature of the business environment in which the defendant operates; and
> (g)the sources of the information in the matter published and the integrity of those sources; and
> (h)whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
> (i)any other steps taken to verify the information in the matter published; and
> (j)any other circumstances that the court considers relevant.
> (4)For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
> (5)However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

[52] I find that the oral and written statements were made only to those persons interested - that is members who would want to know if and why a vote were excluded. The statements were made only in the context of giving that information and for no other reason.

[53] It was entirely reasonable for the person charged with collecting the proxies and votes as a professional manager of a Body Corporate with a large number of lots actually speak the words or draft the minutes. It was submitted that only the Chairperson could have this privilege because only they could declare a vote invalid.

[54] If the Chairperson told the meeting the plaintiff was unfinancial that would clearly have been a protected disclosure. It would have been the result of a defamatory statement made to him by the defendant. If the Defendant would have been protected in conveying the information to the Chair who would have been protected conveying it to the meeting and recording it in the minutes, it would seem odd if the defence would not extend to the Defendant making the statement at the behest of the Chair directly.

[55] The meeting must know if a vote was received but is not to be counted. So must the person affected.

[56] I find Mr Danieletto believed on reasonable grounds that it was in the recipients interests to receive this information. He in fact felt contractually and legislatively obliged to make the statements. It is impossible to think that the legislature intended that these matters would have to be handled only by a direct statement from the Chair.

- There was no publication proven or even alleged outside members of the Body Corporate.
- The matter did not carry any serious imputations at all.
- It stated that Mr Walden was unfinancial as a fact.
- Members had a right to know the matters when and where the publications were made.
- An attempt was made in the Minutes to put Mr Walden's version.
- Mr Danieletto had verified the lack of payment before going to the meeting.

[57] I find the defence of qualified privilege applies.

[58] I note that far worse allegations were made in writing and out of the blue about person involved in Body Corporate affairs and these all attracted the privilege.[13]

## Damages

[13] *Sorrenson v McNamara* [2003] QCA 149 and *Smith v Farren-Price* [2004] QDC 225.

[59] As a precautionary measure, I will assess damages. Comparing the nature of the material and the audience receiving it to the relevant authorities I have been shown I note this is at the very bottom end. The publications made about the Defendant at meetings and in minutes between 2011 EGM and now were far more serious and would have left anyones reputation in tatters. It would be no surprise at all if people shunned and avoided the Plaintiff because his frequent wasting of Body Corporate money.

[60] Here there is a passing reference in the meeting and the minutes. Body Corporate meetings don't draw huge crowds. Most owners don't stay up all night reading the minutes. The publication was very limited. The truth of the facts were known to anyone with an interest in reading committee minutes within a short period.

[61] I would assess damage to reputation and Mr Walden's feelings in the sum of $1,500.00.

**A.H. Sinclair**
**Magistrate**