

29,1963

In The Privy Council

No. **13** of 1963

ON APPEAL

*FROM THE SUPREME COURT OF
NEW SOUTH WALES*

*IN CAUSE INSTITUTED BY WRIT OF
SUMMONS No. 2887 OF 1958*

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

19 JUN 1964

25 RUSSELL SQUARE
LONDON, W.C.1.

74154

Between

GORDON BERKELEY JONES

Appellant (Plaintiff)

and

CLEMENT JOHN SKELTON

- Respondent (Defendant)

CASE FOR THE RESPONDENT

INTRODUCTORY (Paragraphs 1-17)

Record.
p.117.

1. This Appeal is brought pursuant to final leave to appeal to Her Majesty in Council granted by the Supreme Court of New South Wales by Rule dated 3rd day of September 1962.

p.100.

p.95, 11.38-40.

2. The Appeal is brought from an order of the Full Court of the Supreme Court (Owen, Brereton and Ferguson JJ.) dated the 14th June, 1961, which set aside a verdict in the sum of £500 found by a jury in the Supreme Court in favour of the Appellant on the 3rd day of June, 1960 and entered a verdict for the Defendant. 10

p.1, 1.1.

p.1, 11.2-3.

3. The action was originally commenced in the District Court of the Metropolitan District by Particulars of Claim filed therein on the 4th March, 1958, and was transferred to the Supreme Court by an order dated 17th March, 1958.

p.120.

4. In the action the Appellant claimed damages from the Respondent alleging that he had been libelled by a letter published on the 27th February, 1958, in a newspaper called "The Manly-Warringah News," of which the Respondent was the publisher which letter read 20 as follows:

"Cr. Jones' Garage
Sir,—

Of all the appalling decisions made by Warringah Shire Council, surely the one which takes the bun is that to allow Cr. Jones to convert his Harbord garage into servants' quarters.

Here we have the Shire Council conducting an insistent campaign against homeless people who are living in garages, to force them to quit, and yet they give approval to one of their own councillors (who is certainly not homeless) to convert his 30 garage.

It is beyond understanding. Or is it?

'Ratepayer'

North Manly."

5. Manly and Warringah are suburban areas in Sydney and Harbord is a part of Warringah.

6. Originally the Appellant relied on two innuendoes but by amendment at the hearing these were dropped. 40

7. No legislation corresponding to the English Judicature Act, 1873 has been passed in New South Wales and the system of pleading in force is substantially the same as that which was in force in England prior to the said Act but with certain amendments.

8. At the commencement of the trial the Respondent had on the record five pleas, but during the course of the trial when the Appellant ceased to rely on the innuendoes referred to, the second and fourth pleas were amended by deleting the words "and without the alleged meaning" from each. In effect this made the second plea the same as the third plea and the fourth plea the same as the fifth plea so that there remained in effect three pleas only. The fourth plea was renumbered as the third, it being overlooked that the third and fifth pleas had not been formally deleted.

Record.
p.1, 1.35—
p.2, 1.35.

p.73, 11.35-39.

p.74, 11.3-5.

- 10 9. The first plea was the general issue, a plea of not guilty. The second plea after amendment read as follows: The defendant as to so much of the alleged words as consists of allegations of fact denies that the said allegations are defamatory of the plaintiff and says that the said allegations are true in substance and in fact and as to so much of the alleged words as consists of expressions of opinion says that they are fair comment made in good faith without malice upon the said facts which are a matter of public interest.

p.1, 11.36-37.
p.1, 1.38—
p.2, 1.3.

- 20 The final third plea after amendment (the renumbered fourth) read as follows: The defendant as to so much of the alleged words as consists of allegations of fact says that at the time of the printing and publishing of the alleged words and at all material times the Warringah Shire Council was for the purpose and subject to the provisions of the Local Government Act 1919, as amended, charged with the local government of the Warringah Shire of which "Harbord" formed part and the plaintiff was a member of the said council and for the said purposes the said council was by the said Act empowered, inter alia, to control and regulate the erection alteration and use of buildings and structures within the boundaries of the said Shire and the said council had systematically refused to permit the alteration
30 garages at Harbord and other places throughout the said Shire for the purpose of their use as dwelling and had systematically refused to permit the use of such garages as dwellings and there was at the said time and times a great shortage of dwellings at Harbord and throughout the said Shire and the said refusals by the said council gave rise to great hardship and were the subject of notoriety and public interest both at Harbord and elsewhere in the said Shire and by reason of the facts aforesaid it was for the public benefit that the alleged words in so far as they consist of allegations of fact should be published and the defendant says that in so far as the alleged
40 words consist of allegations of fact the words are true in substance and in fact and insofar as the alleged words consist of expressions of opinion the words are fair comment made in good faith and without malice upon the said facts which are a matter of public interest.

p.2, 11.7-32.

10. At all material times the law of defamation in force in New South Wales was the law of England as introduced generally to the then Colony in 1828 by the Imperial Statute 9 Geo. IV. C.83

and as amended by a local Statute The Defamation Act, 1912-1948.

11. The Defamation Act 1912-1948 provided as follows:

Section 7

- (1) In any action for defamation, whether oral or otherwise, the truth of the matters charged shall not amount to a defence to such action unless it was for the public benefit that the said matters should be published.
- (2) Where the truth of the said matters is relied upon as a defence to such action it shall be necessary for the defendant in his plea of justification to allege that it was for the public benefit that the said matters should be published, and the particular fact or facts by reason whereof it was for the public benefit that they should be published.
- (3) Unless the said allegation is made out to the satisfaction of the jury as well as the truth of the said matters, the plaintiff shall be entitled to recover a verdict with such damages as the jury think proper.

The said Statute also provided as follows:—

Section 33

Nothing in this Act shall take away or prejudice any defence under the plea of not guilty which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.

12. The second and third pleas are local adaptations of the so-called “rolled up” plea, which was held by the House of Lords in *Sutherland v. Stopes* 1925 A.C. 47 to be a defence of fair comment, and the name of which was therein said by Viscount Finlay at p.62 to be a “misnomer based on a misconception of the nature of the plea”.

13. Prior to 1934 it was possible and was the usual practice in New South Wales to raise the defence of fair comment under the general issue: *Thompson v. Truth & Sportsman Limited*, 34 N.S.W.S.R. 21 at 24. (Privy Council.)

14. In 1934 in the case of *Goldsbrough v. John Fairfax & Sons Ltd.*, 34 N.S.W.S.R. 524 the view was expressed in dicta of the Full Court that because of Section 7 of the Defamation Act, 1912-1948, a defendant who wished to rely upon a defence of fair comment to defamatory matter consisting partly of facts and partly of comment was required to allege not only that the comment was fair on a matter of public interest and based on facts truly stated, but also that it was for the public benefit that such facts should be published.

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15. The suggestion was also made in the same case that the practice should be changed so as to provide that the defence of fair comment should not be available under the general issue but that it should be specially pleaded.

16. As a result of the said suggestion a rule was made by the Judges accordingly. This Rule is now Rule 30A of Order XXX.

17. It was a result of the abovementioned dicta, the abovementioned rule, and the interlocutory judgment of Sugerman J. in the present case on the 29th August, 1958 that the second and third (the fourth renumbered) pleas were drawn as they were. They were both pleas of fair comment, although Maguire J. in his summing up called the third a plea of justification, it is respectfully submitted, wrongly.

Record.
pp. 6-14.

p.87, 11.15-17.

10 SUMMARY OF EVIDENCE. (Paragraphs 18-24.)

18. Owen J. in his judgment summarised the evidence as follows:—

20 “It appeared from the evidence in the plaintiff’s case that he was a member of the Warringah Shire Council and that late in 1957 or early in 1958 he had made an application to the Council to be allowed to convert part of a garage at his home into living quarters in which to house a domestic servant. The application was granted by the Council and following the granting of approval the letter set out above was published. It appeared also, from the evidence in the plaintiff’s case, that in 1952 the Council had resolved that: “The Council refuse consent to any application for dwelling in a non-residential building, such as a garage, even if it forms part of an incomplete building’.”

p.101, 11.24-37.

19. The Warringah Shire Council was for the purpose and subject to the provisions of the Local Government Act, 1919 charged with the local government of the Warringah Shire and the Council was by the said Act empowered to control and regulate the erection, alteration and use of buildings and structures within the said Shire.

30 20. The resolution of the Council mentioned by Owen J. was proved in cross-examination of the Warringah Shire Council President who was called as a witness by the plaintiff. It was also established in such cross-examination that the said resolution was still the policy of the Council at the date of the appellant’s application and that that policy had been applied in a considerable number of cases.

p.34, 11.1-3.

p.34, 1.17.

40 21. It was also established in such cross-examination that the Council had resolved in 1952 and that it was still its policy “that in all cases where present occupants of garages and other non-residential buildings have made no genuine attempt to commence or continue the erection of a dwelling house the Council shall withdraw consent and give warning of legal proceedings against the occupants unless substantial progress is made towards the erection of the main dwelling.”

p.34, 11.5-10.
p.34, 11.15-17.

22. It was further established in such cross-examination that

Record.
 p.34, 11.20-21. at the time of the resolution there were a great number of garages
 p.34, 11.22-24. being used as dwellings in the said Shire; that the Council deemed
 p.34, 11.25-27. that most undesirable; that it deemed it undesirable notwithstanding
 p.34, 11.28-34. the fact that there was a great housing shortage in the Shire and
 elsewhere; that since the passing of the resolution the Council had
 prosecuted a great number of people using garages as dwellings with
 the purpose of having them fined or vacate the garages and that the
 prosecutions had that result in the main.

23. No attempt was made by the appellant's Counsel either by re-examination of the said Shire President or by calling other witnesses 10 to show that the facts were other than as set out above.

p.57, 11.7-10. 24. The appellant was not present in Council when his applica-
 tion was discussed and dealt with. He was prevented by law from
 being present; Local Government Act Ordinance No. 1, Clause 32.
THE CONCLUSION OF THE TRIAL AND THE VERDICT.
 (Paragraphs 25-28.)

p.63, 11.36-41. 25. At the end of the evidence the respondent's Counsel moved
 for a verdict on the ground firstly that the words published were not
 capable of a defamatory meaning in respect of the appellant; secondly
 p.63, 11.41-44. that under the second plea the matter being one of public interest, 20
 there was no evidence of unfairness of comment or of malice; thirdly
 p.64, 11.2-7. that under the third plea (then referred to as the fourth and fifth) the
 facts alleged were true and it was for the public benefit that they
 should be published, and the comment was not shown to be other
 pp. 74-76. than fair. His Honour dismissed the motion.

p.84, 11.35-38. 26. Counsel for the appellant alleged that the ways in which
 the words could defame the appellant were in suggesting firstly that
 the appellant was prepared for his own purposes to submit to the
 Council an application conflicting with its established policy; secondly
 p.85, 11.6-10. that he was prepared to accept favourable or preferential treatment 30
 from the Council of which he was a member for the advancement of
 his own private interests and in conflict with Council's policy; and
 p.85, 11.10-16. thirdly, that he was not merely passive in accepting a favour of the
 Council but secured it by improper means. His Honour left all three
 p.84, 11.33-35. possible constructions to the jury, but directed them that the words
 p.85, 11.16-19. were not capable of suggesting that the improper means included
 bribery or money payment.

p.106, 11.22-27. 27. As Brereton J. pointed out in his judgment in the Full
 Court the appellant's case was not put on the footing that the letter
 was defamatory of the Council of which he was a member, but solely 40
 on the basis that the letter was defamatory of him personally and
 without regard to anything said of the Council.

p.95, 11.38-40. 28. The jury returned a verdict for the appellant.

THE APPEAL AND THE JUDGMENTS OF THE FULL COURT.
(Paragraphs 29-38.)

29. The Respondent appealed to the Full Court and relied on the same submissions. Record.
pp. 96-99.

30. The respondent also asked the Full Court if it were against him on these submissions and declined to enter a verdict for him, to order a new trial because of all or some of a number of matters on which he claimed that His Honour had misdirected the jury and all or some of a number of matters of evidence which he claimed His Honour had wrongly rejected. p.96, 11.13-14.

31. The Full Court unanimously held that the words published were not capable of a defamatory meaning in respect of the appellant and accordingly set aside the jury's verdict and entered a verdict for the respondent. pp. 101-114.

32. In his judgment Owen J. quoted the words of Lord Selbourne L.C. in *Capital and Counties Bank Limited v. Henty* (1882) 7 App. Cas. 741 at p.745 as stating the test of whether words were capable of a defamatory meaning as being "Whether reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense". His Honour also quoted the words of Lord Halsbury L.C. in *Nevill v. Fine Art & General Insurance Co.* (1897) A.C. 68 at p.73: "It is not enough to say that by some person or another the words **might** be understood in a defamatory sense"; the words of Lord O'Brien C.J. in *Keogh v. The Incorporated Dental Hospital* (1910) 2 I.R. 577 at p.586 that what was to be considered was "What might be conveyed by the letter to a reasonable fair-minded man, and not what might be inferred from it by a man with a morbid or suspicious mind"; and the words of Lord Shaw in *Stubbs Ltd. v. Russell* 1913 A.C. 386 at p.398 which concluded—"To permit, in the latter case, a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed." p.104, 11.23-26.
p.104, 11.28-30.
p.104, 11.31-34.
p.105, 11.2-6.

33. Applying these tests His Honour said: "The sting of the attack is that the Council had made an "appalling" decision in granting the plaintiff's application to convert his garage into a dwelling because that decision was inconsistent with a policy which the Council had been pursuing, namely of preventing people from living in garages, and that the Council had made this exception in favour of one of its own members. Could a fair-minded reader, not being a man with a suspicious mind, infer from it that the plaintiff had been guilty of some improper conduct? There is nothing in it to suggest that he had had any hand in the Council's decision to approve of his application, still less that he had improperly influenced its decision. There is, in my opinion, nothing in the terms of the document, read in their

ordinary and natural sense, which could fairly be taken by a reasonable reader to mean more than that he had submitted to the Council an application to be allowed to carry out certain work which could not be carried out without Council approval—knowing that the general policy of the Council was to prevent persons from living in garages.”

Record.
pp. 105-108.

p.108, 11.1-3.

p.108, 11.18-29.

34. Brereton J. in his judgment reasoned that the attack throughout the letter was an attack on the Council and that the concluding words did not suggest any impropriety on the part of Councilor Jones as explaining the Council's decision. He said “There is nothing in what precedes to lead to that explanation; indeed, what 10 precedes tends to weigh against it; there is emphasis by the writer on the badness of the Council's decisions generally.” His Honour added “This is not a case in which an attack on one party to a transaction necessarily taints the other, in that the feature attacked is one to which both must necessarily be privy. It does not follow, from an allegation that the Council gave favoured treatment, that favoured treatment was solicited. If it was implied—and it was certainly not stated—that Cr. Jones sought approval for the conversion of his garage, it was never suggested that he was doing anything that any other resident was not entitled to do; and if it was suggested that he 20 applied with better prospects of success than ordinary residents, there was still nothing to suggest that the reason for this lay with Cr. Jones, or that he was knowingly and deliberately taking advantage of that state of affairs.”

p.111, 11.1-17.

35. Ferguson J. said of the letter—“The writer was voicing his opinion that the Council should not have granted approval to one of its own Councillors, who had a home of his own, to convert his garage into servants' quarters at a time when it was conducting a campaign to have people with no homes but living in garages evicted from them. In his view the decision to do so was the highlight of 30 the many appalling decisions the Council had made. That is all that the letter said except for the final words “It is beyond understanding. Or is it?” But it seems to me that to give a sinister meaning to those words in their context would be quite unreasonable. Why go beyond the interpretation that follows naturally from what has gone before, that is to say, that the decision would be beyond understanding were it not for the fact that the Council was in the habit of making appalling decisions. Where is there any imputation against the plaintiff? I can see none. In terms the criticism is directed against the Council. The fact that it may be illogical, or even unfair to the Council is not a 40 matter which may be regarded as converting it into a criticism of the plaintiff.”

36. As the Judges unanimously held that the words published were not capable of a defamatory meaning it was not necessary for them to rule on the question whether the respondent was entitled to

judgment by virtue of his second or third plea, nor was it necessary for them to rule on the alternative application for a new trial on the grounds of misdirections and wrongful rejections of evidence.

37. However Owen and Ferguson JJ. dealt at length with the question of the nature of the defence of fair comment in New South Wales and the correctness or otherwise of the dicta, referred to in paragraph 14 above, in the case of *Goldsbrough v. John Fairfax & Sons Limited* 34 N.S.W. S.R. 524. Owen J. said "If it were necessary for me to decide whether what was said in *Goldsbrough's* case was good law, I would find it difficult indeed to see an answer to the submissions made to us by Counsel for the defendant." Ferguson J. said that he differed from the dicta and that his view was shared by Judges for generations before *Goldsbrough's* case. Brereton J. also appeared to take a critical view of the dicta. Each Judge referred to Section 33 of the Defamation Act, 1912-1948.

Record.
p.103, 11.24-27.

p.112, 11.1-6.
p.108, 11.32-38.
p.103, 1.19.
p.108, 1.38.
p.113, 1.41.

38. As mentioned above, none of the Judges found it necessary to deal with any of the points by virtue of which the respondent claimed to be entitled to a new trial as an alternative to a verdict, but each of them indicated that had it been necessary to do so, he would have been in favour of allowing the respondent to rely on any such points which were not taken at the trial. Two of the Judges stated that they would have done this because of the impact of *Goldsbrough's* case upon the trial.

p.105, 11.34-38.
p.108, 11.32-35.
p.114, 11.17-24.
p.108, 11.32-34.
p.114, 11.21-22.

SUMMARY OF THE RESPONDENT'S SUBMISSIONS.

39. The respondent's submissions may be summarised as follows:—

- I. The Full Court rightly entered a verdict for him on the ground that the words complained of were not reasonably capable of a meaning defamatory of the appellant. (Paragraphs 40-47.)
- II. He is entitled to a verdict under his second plea, the denial that the matters of fact were defamatory being treated as surplusage. (Paragraphs 48-61.)
- III. He is entitled to a verdict under his second plea even if the denial that the matters of fact were defamatory is not treated as surplusage. (Paragraphs 62-64.)
- IV. He is entitled to a verdict under his third (fourth renumbered) plea, the allegation that it was for the public benefit that the allegations of fact should be published being treated as surplusage. (Paragraph 65.)
- V. He is entitled to a verdict under his third (fourth renumbered) plea even if the allegation that it was for the public benefit that the allegations of fact should be published is not treated as surplusage. (Paragraphs 66-67.)

VI. He is entitled to a new trial upon some or all of a number of grounds of misdirection and wrongful rejection of evidence. (Paragraphs 68-87.)

THE RESPONDENT'S SUBMISSION THAT THE FULL COURT RIGHTLY ENTERED A VERDICT FOR HIM ON THE GROUND THAT THE WORDS COMPLAINED OF WERE NOT REASONABLY CAPABLE OF A MEANING DEFAMATORY OF THE APPELLANT. (Paragraphs 40-47.)

Record.
pp.101-114.

40. The respondent relies on what was said by the Judges in the Full Court on the question of whether the words published are capable of a meaning defamatory of the appellant and on the authorities quoted by their Honours, and submits that their Honours correctly entered a verdict for the respondent accordingly.

p.104, 1.22—
p.105, 1.6.

41. The respondent cites as general tests the authorities, referred to in paragraph 32 above which were cited by Owen J. in his judgment. The following cases are also relied on to show the way in which the Courts have declined to construe alleged libels on a basis of suspicion:—

In *Capital and Counties Bank Ltd. v. Henty* (1882) 7 App. Cas. 741 the defendants sent out a circular containing the words "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." As a result of the circular there was a run on the bank which caused it loss. The House of Lords held that the words were not capable in their natural meaning of a defamatory construction. 20

In *Hunt v. Goodlake*, 43 L.J.C.P. 54 the words used were "We are requested to state that the Honorary Secretary of the Tichborne Defence Fund is not and never was a Captain in the Royal Artillery, as he has been erroneously described." The innuendo was that the plaintiff was an impostor and had falsely and fraudulently represented himself to be such a captain. It was held that the words were not reasonably capable of such a meaning. 30

In *Mulligan v. Cole & Ors.* (1875) L.R. 10 Q.B. 549, the defendants published the words "Walsall Science & Art Institute. The public are informed that Mr. Mulligan's connection with the Institute has ceased, and that he is not authorised to receive subscriptions on its behalf." The words were held incapable of meaning that Mulligan had falsely pretended to be authorised to receive subscriptions, or of any other defamatory meaning.

A similar case was *Nevill v. Fine Art and General Insurance Co. Ltd.* (1897) A.C. 68. 40

p.84, 11.35-38.

42. The first defamatory meaning suggested by the appellant was that he was prepared for his own purposes to submit to the Council an application conflicting with its established policy. It is submitted to the contrary that "an insistent campaign", which were

the words published, does not necessarily amount in the case of an administrative body to an "established policy". Such a campaign might consist of a number of arbitrary decisions without any real establishment of policy. Even if there were an established policy, every citizen must have the right to make an application to a Local Government Authority in an individual case hoping that the Council will either vary its policy in general or in the particular case. This must also be the right of a member of the Council no less than of any other member of the public. If the appellant, along with other members
 10 of the public, had this right, it cannot possibly be defamatory of him to say that he exercised it.

43. The second defamatory meaning suggested by the appellant was that he was prepared to accept favourable or preferential treatment from the Council of which he was a member for the advancement of his own private interests and in conflict with the Council's policy. It is submitted to the contrary that there is nothing in the words published to suggest that Councillor Jones would have had any knowledge or expectation that the Council would give him favourable or preferential treatment in conflict with its policy, even if, as is not
 20 admitted, the words suggested the Council did so. Nor is there anything in the words to suggest that the appellant's application could only succeed by virtue of preferential treatment. The rights of an individual Councillor, such as the appellant, would be less than those of other ordinary citizens, if it could be suggested that, in making an individual application which was in conflict with a "campaign" of decisions or an established policy, he should be thought of as one prepared to accept favourable or preferential treatment.

Record.
 p.85, 11.6-10.

44. The third defamatory meaning suggested by the appellant was that he was not merely passive in accepting a favour of the
 30 Council but secured it by improper means. It is submitted to the contrary that even if the words are capable, which is not admitted, of suggesting that the Council gave favoured treatment, then, as Brereton J. pointed out, it does not follow, and a reasonable reader would not think, that such favoured treatment was solicited. It is the act of an unduly suspicious reader to infer that the appellant was himself a party to any such improper conduct of the Council.

p.85, 11.10-16.

p.108, 11.21-22.

45. As Brereton J. said the letter makes no express reference to any act of Councillor Jones and does not state that he made any
 40 application nor does it invite the reader to assume that such an application was made. So far as the letter goes the Council could have conferred the benefit which it did confer on Councillor Jones ex mero motu.

p.107, 11.14-19.

46. The whole tone of the letter is one of criticism of the Council. It criticises the Council's decision in favour of Councillor

Jones and it also impliedly criticises the Council's earlier decisions which forced homeless people to quit garages in which they lived. It contrasts the one with the others and involved in such contrast is a criticism of arbitrariness and perhaps inconsistency but not necessarily a departure from policy.

47. The final words "It is beyond understanding. Or is it?" do not reasonably convey a meaning that what happened was through favouritism or impropriety. They merely invite the reader to say that the Council's decisions are not beyond misunderstanding because they can be understood as a series of appalling decisions or of arbitrary 10 decisions. Even if this were not so and the words were read as inviting the reader to speculate on the reasons for the latest decision only, there is nothing in the words to suggest that the reader should come to any particular conclusion. There is even less reason why the reader who is not unduly suspicious should take it that it is being suggested to him that he should come to the conclusion of favouritism or some form of impropriety on the part of the Council. As Lord Halsbury said in *Nevill v. Fine Art and General Insurance Company* (1897) A.C. 68 at p.73 "Because some persons may choose, not by reason of the language itself, but by reason of some fact to which it 20 refers, to draw an unfavourable inference, it does not follow that therefore such matter is libellous."

Even if the words were capable of suggesting that the conclusion of favouritism or impropriety should be drawn against the Council, there is no reason why a reasonable reader should take the words as suggesting that Councillor Jones was a party to such impropriety.

II. THE RESPONDENT'S SUBMISSION THAT HE IS ENTITLED TO A VERDICT UNDER HIS SECOND PLEA, THE DENIAL THAT THE MATTERS OF FACT WERE DEFAMATORY BEING TREATED AS SURPLUSAGE. (Paragraphs 48-61.) 30

p.104, 11.7-10.

48. As was pointed out by Owen J. in his Judgment, the second plea was "designed to avoid pleading 'public benefit' by denying that the statement of facts were defamatory and, if what was said by Jordan C.J. in *Goldsbrough's* case was not correct, this allegation was unnecessary." In other words the plea of fair comment in New South Wales would be the same as the plea in England prior to the English Defamation Act 1952, notwithstanding Section 7 of the New South Wales Defamation Act 1912-1948.

49. It is submitted that the respondent was entitled to judgment under this plea, treating the denial that the matters of fact were 40 defamatory as surplusage, because the subject matter was plainly a matter of public interest, there was no evidence of unfairness of comment to go to the jury, the comment was based on facts which plainly were not untruly stated and there was no evidence of malice to go to the jury.

50. As to the dicta in Goldsbrough's case, the respondent respectfully adopts the reasoning of Ferguson J. and submits that they were wrong.

Record.
p.111, 1.21—
p.114, 1.16.

51. The plea of fair comment was never a plea of justification, although after the so-called "rolled-up" plea became common, the latter was commonly confused with the plea of justification. (*Sutherland v. Stopes* 1925 AC 47 at 76.) In the last cited case the plea was authoritatively distinguished, whether in the "rolled-up" form or not, from the plea of justification. So different was it from a plea
10 of justification, that, even though it was pleaded in the "rolled-up" form, the English Courts declined to order particulars as to the truth of the facts alleged in it to be truly stated, which would presumably have been ordered had such facts been so alleged in a plea of justification. (*Digby v. The Financial News Limited* 1907 1 K.B. 502; *Aga Khan v. Times Publishing Co.* 1924 1 K.B. 675.) (The position was changed in England in this respect by Order 19 Rule 22A.)

52. When the difference between the plea of justification and the plea of fair comment is kept in mind it can be seen that Section 7 of the Defamation Act, 1912-1948 did not, as Ferguson J. pointed
20 out, alter the Common Law as to the defence of fair comment. p.113, 11.37-41.

53. It would not be expected that the legislature would limit or qualify the important defence of fair comment by implication in legislating as to the defence of justification viz. in Section 7 of the Defamation Act, 1912-1948.

As Scott L.J. said of the right of fair comment in *Lyon v. The Daily Telegraph Limited* 1943 1 K.B. 746 at 753 "It is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom that the Courts should
30 preserve the right of fair comment undiminished and unimpaired." Indeed the legislature has expressly provided in effect by Section 33 cited above (paragraph 11) that the defence of fair comment is to be unchanged. That section provides that nothing in the Act is to take away or prejudice any defence under the plea of not guilty "which it is now competent to the defendant to make under such plea". The defence of fair comment could be raised under the plea of not guilty at the commencement of the Defamation Act 1912-1948. *Thomson v. Truth and Sportsman Limited* 34 N.S.W.S.R. 21 at 24 (Privy Council).

40 54. One of the reasons given by Jordan C.J. in Goldsbrough's case for his view that in pleading fair comment in New South Wales it was necessary to say not only that allegations of fact were truly stated but also that it was for the public benefit that they should be published, was that he considered that otherwise such a plea would purport to answer the whole declaration but would be no answer to

defamatory allegations of fact. (*Goldsbrough v. John Fairfax & Son Limited* 34 N.S.W.S.R. 524 at 536.) The answer to this, however, is, that if there are allegations of fact which are truly separate from other allegations of fact or from matters of comment, in other words if they are truly severable, then they may be severed in pleading and several pleas may be pleaded to them. (*Sutherland v. Stopes* 1925 A.C. 47 at 78; *Thompson v. Truth & Sportsman Limited* 34 N.S.W.S.R. 21 at 24; *Howden v. Truth & Sportsman Limited No. 2*, 38 S.R. 287.

55. In *Goldsbrough's* case (*loc. cit.* at page 545) Halse Rogers 10 J. said "To my mind it is entirely illogical that mere truth should not be a defence unless publication is shown to be for the public benefit, and yet mere truth coupled with some comment or other which might be decided to be fair should afford a defence." It is submitted that this sort of reasoning from anomaly, is not admissible in this context. There are other anomalies created if His Honour's view is adopted. For example: Comment must always be based on some matters of fact, but it is not necessary that such facts be stated in the publication. A sufficient substratum of fact may be implied from the words published although not actually contained therein: 20 *Kemsley v. Foot* 1952 A.C. 345. Yet the principle of *Goldsbrough's* case could hardly go so far as to require it to be alleged and proved that it would have been for the public benefit that such implied facts should have been published, if they had been published. It is respectfully submitted that the only safe rule is to hold fast to the principle that justification and fair comment are separate and distinct pleas. As Collins M.R. said in *Digby v. The Financial News Limited* 1907 1 K.B. 502 at 507, "When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel. This plea does not purport to be 30 a plea of justification of the imputations, if any, contained in the libel; it is nothing of the sort, but it is a plea intended to raise a totally different defence, that of fair comment. Comment, in order to be fair, must be based upon facts, and if a defendant cannot show that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. . . . It is therefore a necessary part of a plea of fair comment to show that there has been no misstatement of facts in the statement of the materials upon which the comment was based."

56. If the dicta in *Goldsbrough's* case were wrong the denial 40 in the second plea that the allegations of fact were defamatory may be treated as surplusage, and it is necessary only to consider the remaining elements of the plea.

57. The question whether the subject matter is one of public interest is a matter of law: *Thompson v. Truth & Sportsman Limited*

34 N.S.W.S.R. 21 at 24 (Privy Council). Local Government Administration is one of the well recognised heads of public interest: *Purcell v. Sowler* (1887) 2 C.P.D. 215. Indeed the trial Judge ruled that the matter was one of public interest, though at some places in his summing up he appeared to leave the question to the jury.

Record.
p.86, 11.33-38.

58. There was no evidence of unfairness of comment fit to have been left to the jury. There are cases of the highest authority where, the facts being not untruly stated, juries' verdicts have been
10 set aside or non suits have been entered on the ground that there was no question of unfairness fit to be left to the jury. *Sutherland v. Stopes* 1925 A.C. 47; *McQuire v. Western Morning News Company* 1903 2 K.B. 100; *Henwood v. Harrison* L.R. 7 C.P. 606. High authorities have stated that wide range should be given to the comment that is allowable without it being held to be unfair. Lord Esher M.R. said in *Merivale v. Carson* (1888) 20 Q.B.D. 275 at 281: "Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the
20 prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised."

59. The words published, do not themselves go into the question what were the reasons for or the causes of the Council's decision. It may be true that they invite the reader perhaps to speculate, but they do not suggest any form which such speculation should take, nor do they suggest that the speculation should be of a suspicious nature or that dishonesty or impropriety should be inferred. The
30 matters of comment are probably limited to the epithet "appalling", the reference to "taking the bun" and the last two sentences, and apart from that the facts themselves are left to the reader. Thus the appellant is faced with this dilemma, that either the words are reasonably capable to the reasonable reader of implying some impropriety on the part of the appellant or they are not. If they are not so capable, then the words, as has been submitted above, are not capable of a defamatory meaning. On the other hand if they are so capable, such impropriety must be implicit in the facts themselves and could not under any circumstances be other than fair comment.

40 60. The facts on which the comment was based were beyond any question truly stated because as stated they were substantially the same as facts elicited from the appellant's witnesses which the appellant did not seek to contradict or set aside. They consisted on the one hand of the Council's campaign against homeless people, and on the other hand of its approval to the appellant to convert his garage. In

those circumstances the respondent is relieved of the necessity of proving them himself.

61. Finally it is submitted there is no evidence of actual malice, of impropriety of motive on the part of the respondent.

III. RESPONDENT'S SUBMISSION THAT HE IS ENTITLED TO A VERDICT UNDER HIS SECOND PLEA, EVEN IF THE DENIAL THAT THE MATTERS OF FACT WERE DEFAMATORY IS NOT TREATED AS SURPLUSAGE. (Paragraphs 62-64.)

62. If the dicta in Goldsbrough's case are correct, a defence of fair comment would not be restricted to the one type of defence, that the comment was fair and the facts were true and were published for the public benefit. It has been held sufficient in a plea of fair comment to show that the statements of fact even though false were privileged facts: *Mangena v. Wright* (1909) 2 K.B. 958. Similarly it must be a sufficient defence, if fair comment on facts truly stated is not alone sufficient, to show that the facts were facts that were not defamatory of a plaintiff. Indeed Jordan C.J. suggests so in Goldsbrough's case at p.536. 10

63. Of the words complained of it is submitted that the epithet "appalling", the reference to "taking the bun" and the last two sentences are matters of comment and the other matters published are probably matters of fact. They are matters describing the Council's campaign in the past on the one hand, and on the other hand its approval of Councillor Jones's application. It is submitted that, whatever is the decision in regard to whether the facts and comment taken as a whole are capable of being defamatory of the appellant, the bare statements of fact alone could not be defamatory of him. 20

64. If that is so, then as submitted above in paragraphs 57-61, the evidence was such in regard to the other elements of the defence of fair comment that the respondent is entitled to a verdict on the second plea. 30

IV. THE RESPONDENT'S SUBMISSION THAT HE IS ENTITLED TO A VERDICT UNDER HIS THIRD (FOURTH RENUMBERED) PLEA, THE ALLEGATION THAT IT WAS FOR THE PUBLIC BENEFIT THAT THE ALLEGATIONS OF FACT SHOULD BE PUBLISHED BEING TREATED AS SURPLUSAGE. (Paragraph 65.)

65. The allegation that it was for the public benefit that the allegations of fact should be published was included in the plea because of the dicta in Goldsbrough's case. The respondent repeats his submissions in paragraphs 50-55 above that those dicta were not correct, that therefore such allegation was unnecessary and may be treated as surplusage. If that is so, the same submissions apply to the third plea as were made in regard to the second plea under II 40

above (paragraphs 48-61). If the surplusage were removed from each plea, the second and third pleas would become in effect the same.

V. THE RESPONDENT'S SUBMISSION THAT HE IS ENTITLED TO A VERDICT UNDER HIS THIRD (FOURTH RENUMBERED) PLEA, EVEN IF THE ALLEGATION THAT IT WAS FOR THE PUBLIC BENEFIT THAT THE ALLEGATIONS OF FACT SHOULD BE PUBLISHED IS NOT TREATED AS SURPLUSAGE. (Paragraphs 66-67.)

66. As has been submitted above (paragraph 60) the statements of fact in the words complained of have been shown to be true and it is not possible for a reasonable jury to hold otherwise. Their subject matter deals with a well recognised matter of public interest, namely Local Government Administration: Purcell v. Sowler (1887) 2 C.P.D. 215. Having regard to the considerations expressed in the words of Scott L.J. cited above (paragraph 53) it is not open to a jury to hold that the publication of such true statements of fact is not for the public benefit.

67. If that is so, then as submitted above in paragraphs 57-61, the evidence was such in regard to the other elements of the defence of fair comment that the respondent is entitled to a verdict on his third (fourth renumbered) plea.

VI. THE RESPONDENT'S SUBMISSION THAT IF HE IS NOT ENTITLED TO A VERDICT, HE IS ENTITLED TO A NEW TRIAL ON SOME OR ALL OF A NUMBER OF GROUNDS OF MISDIRECTION AND REJECTION OF EVIDENCE. (Paragraphs 68-87.)

68. It will probably be most convenient to deal with these approximately in the order in which they appear in the Notice of Appeal and the Further Grounds of Appeal, grouping such as may be conveniently grouped, and dealing first with the Further Grounds of Appeal. The grounds relating to misdirections are dealt with in paragraphs 69-82 and those relating to wrongful rejection of evidence in paragraphs 83-87.

Record.
p.96.
pp.97-99.
pp.97-99.

GROUND S BASED ON MISDIRECTION.

69. Further Grounds of Appeal. Grounds 1, 2 and 3.

The respondent does not seek to argue these grounds.

p.97, 11.4-12.

70. Grounds 4 and 5.

These have already been dealt with.

p.97, 11.13-20.

71. Grounds 6, 13, 23 and 24.

(6) That His Honour should have directed the jury that the words published were in respect of a matter of public interest and the onus lay upon the plaintiff to prove malice or that the comment was unfair.

p.97, 11.21-23.
p.98, 11.3-5.
p.98, 11.32-35.
p.98, 11.36-41.

Record.
p.86, 11.1-2.

p.85, 11.32-43.

p.89, 11.19-26.

p.85, 11.37-43.
p.86, 11.1-2.
p.86, 11.28-32.
p.87, 11.23-25.
p.87, 11.1-2.
p.89, 11.22-23.
p.89, 11.34-35.

- (13) That His Honour was in error in directing the jury that the onus lay upon the defendant of proving all the elements of the defence of fair comment.
- (23) That His Honour was in error in directing the Jury that if they thought the letter was defamatory of the plaintiff he would be entitled to a verdict unless one or other of the Defendant's second and third pleas had been affirmatively established by the defendant.
- (24) That His Honour was in error in directing the jury that, "if they found that the letter was defamatory of 10 the plaintiff because it contained defamatory comment then they had to consider whether the defendant had affirmatively satisfied them that his comment was fair, that it was made on a matter of public interest" and that it was made on facts that were not defamatory. The substantial complaint here is that His Honour directed the jury that the onus lay on the plaintiff affirmatively to establish the matters contained in the second and third pleas. His Honour gave this direction in at least four different places. In three other places 20 he specifically directed the jury that the respondent had to satisfy them that the comment was fair comment. It is submitted that these directions were incorrect in that the onus lies on the plaintiff to show that the comment was unfair. In *Sutherland v. Stopes* 1925 A.C. 47 at p.63 Viscount Finlay adopted the words of Collins M.R. as follows: "It is, however, for the plaintiff, who rests his claim upon a document which on his own statement purports to be a criticism of a matter of public interest, to show that it is a libel— 30 i.e., that it travels beyond the limit of fair criticism; and therefore it must be for the Judge to say whether it is reasonably capable of being so interpreted." In *Gardiner v. John Fairfax & Sons Pty. Limited* 42 N.S.W.S.R. 171 the Full Court of the Supreme Court of New South Wales held that the onus lay on the plaintiff to prove the comment was unfair. The words of Davidson J. at page 177 in particular are respectfully relied on.

Verdicts were entered for the defendant or the plaintiff 40 was non suited on the ground that there was no evidence to support a finding of unfairness of comment in *Sutherland v. Stopes* 1925 A.C. 47; *McQuire v. Western Morning News Company* 1903 2 K.B. 100 and in *Henwood v. Harrison* L.R. 7 C.P. 606.

Again although His Honour told the jury that the allegation of absence of malice was a part of each plea,

p.86, 11.20-21.
p.89, 1.2.

he nowhere told the jury that the onus lay on the plaintiff of proving malice.

Again His Honour did not make it sufficiently clear to the jury that he was directing them as a matter of law that the subject matter was one of public interest. This question was for His Honour to decide: *Thompson v. Truth & Sportsman Limited* 34 N.S.W.S.R. 21 at 24 (Privy Council). It is true that in one passage he did so direct the jury, but the words with which he closed that passage suggested that the matter was not one completely beyond the jury's decision. The words he used to the jury a little later "it being clear enough that the comments made in the letter is on a matter of public interest" again did not tell the jury that the matter was one outside the scope of their decision. In the various other passages where he told the jury that the onus lay on the defendant to establish the defence of fair comment, he did not except the element that the subject matter was one of public interest with the possible exception of one passage where he merely said "There is no difficulty about that".

Record.
p.86, 11.33-38.

p.86, 11.46-47.

p.89, 11.23-24.

72. Grounds 7, 10 and 11.

p.97, 11.24-25.
p.97, 11.34-43.
p.84, 11.2-5.

(7) "That His Honour was in error in directing the jury that they would have to determine what was the policy of the Council as a fact."

(10) "That His Honour was in error in directing the jury that if they thought that the gist of the letter, whether it is a criticism of the Council or whether it is a criticism of the plaintiff or whether it is both, is a suggestion that there has been a departure from the policy of the Council, and a departure from that policy in favour of a member of the Council they would have to form an opinion whether the allegation of a departure was true or not."

p.83, 11.16-23.

(11) "That His Honour in giving the direction in the last preceding paragraph set out should have left it to the jury to determine whether the said suggestion was by way of statement of fact or comment."

It is submitted that the words complained of do not state that the Shire Council ever had a policy and do not allege that there was any departure from it. All the words state is that there was an "insistent campaign" conducted by the Shire Council, and even if that were taken to mean a policy, the words do not state or imply that there was a departure from that policy. What the words do is to contrast the "insistent campaign" with the decision in favour of the appellant. There was no need to read into the words any allegation of departure from policy. The natural meaning of the words is that

Record.
p.84, 11.2-5.
p.83, 11.16-23.
p.88, 11.34-37.

they charge the Council with arbitrariness. The words merely contrast the campaign against homeless people with the treatment of the appellant. Even if the words can be read as charging the Council with inconsistency, it would still not be correct to direct a jury, as His Honour did, that they would have to determine as a fact the policy of the Council and then whether or not there was a departure from it. He did that in at least one place although in two other places he used words which allowed the possibility of such a construction being a matter for the jury. It is submitted that such directions put wrong issues before the jury.

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If it is held that His Honour was not incorrect in so doing, it is submitted that His Honour should not have directed the jury that the question of departure from policy was one of fact. His Honour should either have directed the jury that a departure was a matter of comment or have left it to them to decide whether it was a matter of comment or of fact. It is submitted that particular policies and particular decisions which apparently are inconsistent with such policies are questions of fact, but to allege that any particular decision was a departure from a particular policy is to comment. At least if it is not a comment it is an open question. In *Kemsley v. Foot* 1952 A.C. 345 at 356 Lord Porter approved the following words from *Odgers on Libel and Slander* 6th Edn. p.166: "If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment." His Lordship added "But the question whether an inference is a bare inference in this sense must depend upon all the circumstances." As to the tribunal to decide whether the matter is fact or comment, Bankes L.J. in *Aga Khan v. Times Publishing Company* 1924 1 K.B. 675 at 680 said: "The category to which the several statements belong is a question for the jury, subject to a direction from the judge. In some cases the judge may tell the jury that a particular statement is a statement of fact and is not capable of being an expression of opinion."

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73. **Grounds 8 and 9** will be dealt with later under the heading of Wrongful Rejection of Evidence.

p.97, 1.44—
p.98, 1.2.

74. **Ground 12.**

"That His Honour was in error in leaving it open to the jury to find that the alleged words meant the three meanings alleged by Counsel for the plaintiff or any one or more of them."

40

It has already been argued that the words complained of could not reasonably bear any of the three meanings alleged on behalf of the appellant. If it is held that the words could bear some, but less than all, of the said three meanings then it is submitted that His Honour was in error in leaving any remaining meaning, which it is held that the words could not bear, to the jury.

75. Grounds 14 and 15.Record.
p.98, 11.6-11.

- (14) "That His Honour was in error in directing the jury that if the statements of fact were defamatory you cannot have fair comment upon them."
- (15) "That His Honour was in error in directing the jury that the defendant must prove under his second plea that any allegations of fact in the letter complained of are not defamatory of the plaintiff."

10 The respondent repeats his above submissions that the words in the second plea "denies that the said allegations are defamatory of the plaintiff", were surplusage and that the plea of fair comment in New South Wales need only allege fair comment on a matter of public interest based on facts not untruly stated. If it is held that the Respondent is not entitled to judgment as a result of such submissions, he now submits that the said direction was a misdirection as a result of which he is entitled to a new trial.

76. Grounds 17 and 18.p.98, 11.14-18.
p.86, 1.43—
p.87, 1.5.

- 20 (17) "His Honour was in error in leaving the question of the fairness of the comment to the jury's own opinion as to what was fair."
- (18) "That His Honour was in error in leaving it to the jury to determine whether the comment was honest."

It has already been submitted in paragraphs 58-59 above that there was no evidence of unfairness of comment. If the submission is held to be correct, but it is held that the respondent is not entitled to a verdict as a result thereof, then it is submitted that His Honour was in error in leaving the question of fair comment to the jury and as a result the respondent is entitled to a new trial.

30 It is also submitted that His Honour should not have left this matter to the jury without explaining to them that it was not a matter of whether or not they agreed with the comment but of whether or not the comment exceeded the limits of public criticism. To quote further from the words of Scott L.J. in the place already cited (paragraph 53) (Lyon v. The Daily Telegraph Limited 1943 1 K.B. 746 at 753); "Some people evidently think that in a case of libel or slander a judicial pronouncement that what the defendant wrote or said was within his right of fair comment means that the court accepts and endorses his opinions. That impression is, of course, wrong. The Court may, as private individuals, agree or disagree with the opinions
40 expressed. Indeed, it may disagree very much, and yet hold that there is nothing in the language used which exceeds the limits of public criticism so as to become mere personal defamation."

77. Ground 19

p.98, 11.19-21.

"His Honour was in error in leaving the Jury to determine under the defendant's third plea whether the statements of fact were true in a defamatory sense." It has already been submitted above that there was no evidence fit to go to the jury that the statements of fact,

as distinct from comment were untruly stated. If it is held that the respondent is not entitled to a verdict as a result of the above submissions and that there is something to go to the jury under the third plea, then it is submitted that the question of the truth of the statements of fact as distinct from comment could only be decided in one way and should not have been left to the jury.

Record.
p.98, 11.22-24.

78. Ground 20

"That His Honour should have directed the jury that the allegations of fact in the letter complained of were not capable of a defamatory meaning."

10

This ground relates to the second plea. If it is held that the denial of a defamatory meaning in respect of the allegations of fact is essential in this plea and not surplusage, then the respondent repeats his submission that the allegations of fact alone were not capable of a meaning defamatory of the plaintiff. The jury should have been so directed in connection with this plea.

p.98, 11.29-31.

79. Ground 22

"That His Honour was in error in leaving it to the Jury to decide whether it was for the public benefit that the alleged facts should be published."

20

It has already been submitted that this was not an essential allegation in the third plea and was mere surplusage. Alternatively it has also been submitted that the question whether or not the publication of facts was for the public benefit could only have been decided in favour of the respondent and should not have been left to the jury. However if it is considered that some part of the issue raised by the third plea should have been left to the jury, then the above submissions are repeated that this part of the third plea should not have been left to them.

p.98, 11.42-44.

80. Ground 25

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"His Honour was in error in directing the Jury that the statement by the defendant to Councillor Berry was not evidence of the facts."

p.32, 11.16-33.

His Honour allowed evidence to be led by the appellant from Councillor Berry that the respondent had approached him and said that he was having trouble with the appellant; that he was very sorry for the trouble and was wondering whether the matter could be settled; that he was very sorry that the letter had got into the paper; as a matter of fact he did not know that it was in the paper until the next day. His Honour told the jury that if they accepted Councillor Berry's evidence that statement by the defendant on that occasion

p.90, 11.39-44.

was not evidence of the fact. He added that the real position was that there was no evidence before them one way or the other as to whether the letter was published with or without the knowledge of the defendant. He declined to direct the jury that such evidence was evidence for all purposes. It is submitted that the position is that such a statement, even though hearsay, once in evidence, is in evidence for all purposes: *Walker v. Walker* 57 C.L.R. 630. It is conceded

p.91, 11.42-43.

40

that this question would go to damages only, but it is relied on as being another matter, that shows that the trial was generally unsatisfactory.

81. Ground 26

“That His Honour was in error in refusing to direct the jury that if they found that the meaning attributed to the letter by the defendant’s Counsel is at least equally as reasonable as that attributed to it by the plaintiff’s Counsel the defendant was entitled to succeed.” It is true, as His Honour said in declining to give this direction, that he had told the jury that the plaintiff carried the onus of satisfying them that the matter complained of had a defamatory meaning. However, it is submitted that the direction sought would have been a useful elucidation to the jury of the nature of the onus of proof that lay on the plaintiff.

Record.
p.98, 1.45—
p.99, 1.2.
p.92, 11.35-44.

p.92, 11.39-41.

82. Grounds 27 and 28

The respondent does not rely on these grounds.

GROUND FOR A NEW TRIAL BASED ON THE WRONGFUL REJECTION OF EVIDENCE.

83. THE ORIGINAL NOTICE OF APPEAL. Ground 4(a).

p.96, 11.23-26.

“That His Honour was in error in rejecting evidence relating to the voting for and against the plaintiff’s application at the Council Meeting held on the 17th February, 1958.”

It is submitted that the question of the Council’s decision being a majority decision only was relevant to the question of fairness of comment. If the Council’s decision was a majority decision, this indicates that the matter was a vexed question in the Council itself and that there were differing views in the Council as to whether the decision was a good one. It is submitted that the details of the voting are also relevant to the question of whether the publication of the facts was for the public benefit, if it is held that it is necessary to establish that matter.

84. Grounds 4(b), 4(c) and 4(d)

p.96, 11.27-33.

“His Honour was in error in rejecting the evidence relating to

- (b) the receipt by the Council of letters from the Narrabeen Community Centre and the Narraweena Progress Association after its approval of the plaintiff’s said application;
- (c) the publicity given to the Council’s decision by daily newspapers circulating throughout Sydney and over the wireless;

(d) the criticism of the Council’s decision by ratepayers throughout the shire.”

It is submitted that the evidence of each of these matters is relevant to the question of whether the publication of the facts was for the public benefit, if it is necessary to establish that matter, and also that it is relevant to the question of the fairness of the comment.

85. Ground 4(e)

p.96, 11.34-35.

“His Honour was in error in rejecting the evidence relating to

the resolution by the Council rescinding the approval given by it of the plaintiff's application."

It is submitted that the rescinding resolution was most material to the question of fairness of comment. Moreover if it was proper to direct the jury that they should determine the Council's policy as a question of fact and that they should consider whether there was any departure from that policy as a question of fact, then it is submitted that the Council's resolution would be most material to such consideration.

Record.
p.97, 11.26-28.

86. Ground 8 of the Further Grounds of Appeal

10

"His Honour was in error in directing the jury to discard from their consideration the letter written by the Shire Clerk to the Sydney Morning Herald."

p.48, 11.9-20.
p.82, 11.42-44.

The contents of this letter were admitted in evidence but during the course of his summing up His Honour stated that it was not clear that the letter was written prior to the publication of the words complained of on the 27th February, 1958. His Honour told the jury they had best discard it from their consideration. It is submitted that this direction was wrong because the question was asked in a context which indicated that it was written prior to the publication 20 complained of and was not objected to. In any case it is clear that the letter was written during the currency of the year in which the publication complained of occurred. The presumption of continuance would be applicable in regard to the Council's intentions. The letter is of considerable evidentiary importance in connection with the contrast in the publication complained of between the Council's insistent campaign against homeless people living in garages and its decision in favour of the appellant, since the letter refers to Council's concern at "converted garages" being advertised for sale.

p.97, 11.29-33.

87. GROUND 9 OF THE FURTHER GROUNDS OF APPEAL

30

p.82, 1.45—
1.83-1.6.

"That His Honour was in error in directing the jury that as it was impossible to determine whether the letter written by the Council to the Local Government Association was written before or after the 27th day of February, 1958, it could have no relevance on the question what was the Council's policy." This was a similar letter to that written to the Sydney Morning Herald and similar submissions are made in regard to it.

p.48, 1.46—
p.49, 1.13.

The respondent accordingly submits that the appeal ought to be dismissed, or if it is not dismissed that a new trial should be 40 ordered for the following, amongst other reasons:—

REASONS THAT THE APPEAL SHOULD BE DISMISSED

1. The words complained of were not reasonably capable of a meaning defamatory of the appellant.
2. The respondent was entitled to a verdict under the second plea, the denial therein that the matters of fact were defamatory being treated as surplusage, because the subject matter

was as a matter of law a matter of public interest, because there was no evidence that the comment was unfair, because the comment was based on facts which were not untruly stated and there was no evidence of malice.

3. The respondent was entitled to a verdict under the second plea even if the denial that the matters of fact were defamatory was not surplusage, because of the matters mentioned in reason (2) above and because the facts on which the comment was based were not capable of a meaning defamatory of the appellant.
4. The respondent was entitled to a verdict under the third (fourth renumbered) plea, the allegation therein that it was for the public benefit that the alleged words so far as they consisted of allegations of fact should be published being treated as surplusage, because of the matters mentioned in reason (2) above.
5. The respondent was entitled to a verdict under the third plea, even if the said allegation was not surplusage, because of the matters mentioned in reason (2) above and because it was not possible for a reasonable jury to hold that the publication of the allegations of fact in the publication complained of was not for the public benefit.

THAT A NEW TRIAL SHOULD BE ORDERED

6. By reason of some or all of the misdirections above complained of, the true issues were not before the jury and injustice was or may have been done to the respondent.
7. Because of the wrongful rejection of evidence by the Judge above complained of, injustice was or may have been done to the respondent.

TREVOR MARTIN.