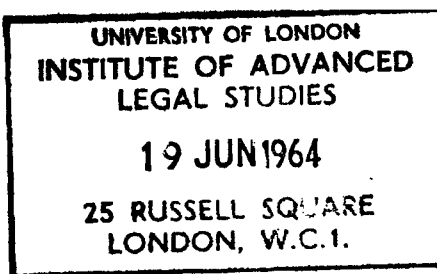


901-9-6



29, 1963

In the Privy Council 74155 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.

Between
GORDON BERKELEY JONES - - - - - Appellant (Plaintiff)
and
CLEMENT JOHN SKELTON - - - - - Respondent (Defendant)

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No. 1

Issues For Trial

*In the
Supreme Court
of New South
Wales.*

—
No. 1.
Issues for Trial.
—
14th Jan., 1959.

PARTICULARS OF CLAIM: Dated 4th March, 1958.

ORDER OBJECTING TO JURISDICTION OF THE DISTRICT COURT: Dated 17th March, 1958.

NOTICE OF APPEARANCE IN THE SUPREME COURT: Dated 17th March, 1958.

DECLARATION: Dated 21st April, 1958.

10 SYDNEY GORDON BERKELEY JONES by FREDERICK WILLIAM MILLAR his Attorney sues CLEMENT JOHN SKELTON for that the Defendant falsely and maliciously printed and published of and concerning the Plaintiff in a newspaper called "The Manly-Warringah News" the words following:—

"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.

20 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 garage.

It is beyond understanding. Or is it?

'Ratepayer'

North Manly".

30 meaning thereby that the Plaintiff had made undue and improper use of his position as a member of the Warringah Shire Council for the purpose of obtaining the approval of such Council for the use of the Plaintiff's garage as servants' quarters and that the Plaintiff had been guilty of corrupt and improper conduct in and about obtaining such approval; whereby the Plaintiff was injured in his reputation and was held up to public hatred, ridicule and contempt and was otherwise greatly damnified;

PLEAS: dated the 18th day of September, 1958.

CLEMENT JOHN SKELTON by IAN ALFRED HAMILTON SPAIN his Attorney says that he is not guilty.

2. And for a second plea 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
40 allegations are true in substance and in fact and as to so much of the alleged words as consists of expressions of opinion and without

*In the
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No. 1.
Issues for Trial.
(Continued)

14th Jan., 1959.

the alleged meaning says that they are fair comment made in good faith without malice upon the said facts which are a matter of public interest.

3. And for a third plea the defendant repeats the allegations contained in the second plea omitting the words "and without the alleged meaning".

4. And for a fourth plea 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 10 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 of garages at Harbord and other places throughout the said Shire for the purpose of their use as dwellings and had systematically refused to permit the use of such garages as dwellings and 20 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 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 and without the meaning alleged the words 30 are fair comment made in good faith and without malice upon the said facts which are a matter of public interest.

5. And for a fifth plea the defendant repeats the allegations contained in the fourth plea omitting the words "and without the meaning alleged".

REPLICATION: dated 14th January, 1959.

The Plaintiff joins issue on the Defendant's pleas herein.

DATED this 14th day of January, 1959.

F. W. Millar,
Solicitor for the Plaintiff. 40
53 Martin Place,
SYDNEY.

No. 2**Pleas (as originally filed)**

*In the
Supreme Court
of New South
Wales.*

The 2nd day of May in the year of Our Lord One thousand
nine hundred and fifty-eight.

No. 2.
Pleas (as
originally filed).

2nd May, 1958.

SKELTON ats JONES

**CLEMENT JOHN SKELTON by IAN ALFRED HAMILTON
SPAIN his Attorney says that he is not guilty.**

2. And for a second plea the Defendant says that in so far as
the matter complained of consists of statements of fact the same is
10 true and by reason of the said facts it was for the public benefit that
the same should be published and as to so much of the matter com-
plained of as consists of comment the Defendant says that such
comment made on the facts set out in the matter herein sued upon
was fair and made without malice on a matter of public interest.

**IAN SPAIN,
Defendant's Solicitor,
137 Pacific Highway,
NORTH SYDNEY.**

20

**By his Sydney Agents:
Messrs. GILL OXLADE & BROAD,
Solicitors,
11c Castlereagh Street,
SYDNEY.**

*In the
Supreme Court
of New South
Wales.*

No. 3

Pleas (as firstly amended)

—
No. 3.
Pleas (as
firstly amended).
—
20th June, 1958.

The 20th day of June in the year of Our Lord One thousand
nine hundred and fifty-eight.

SKELTON ats JONES

**CLEMENT JOHN SKELTON by IAN ALFRED HAMILTON
SPAIN his Attorney** says that he is not guilty.

2. And for a second plea the Defendant says that in so far as the words consist of allegations of fact the words are true in substance and in fact and in so far as the words consist of expressions of opinion 10 and without the alleged meaning they are fair comment made in good faith without malice upon the said facts which are a matter of public interest.

3. And for a third plea the Defendant repeats the allegations contained in the second plea omitting the words, "and without the alleged meaning".

4. And for a fourth plea the Defendant 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, 20 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 council had systematically refused to permit the alteration of garages at Harbord and other places throughout the said Shire for the purpose of their use as dwellings 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 30 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 should be published and the Defendant says that in so far as the words consist of allegations of fact the words are true in substance and in fact and in so far as the words consist of expressions of opinion and without the meaning alleged they are fair comment made in good faith and without malice upon the said facts and are a matter of public interest.

5. And for a fifth plea the Defendant repeats the allegations contained in the fourth plea omitting the words, "and without the meaning alleged".

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Wales.*

IAN SPAIN (Sgd.),
Defendant's Attorney.
137 Pacific Highway,
NORTH SYDNEY.

—
No. 3.
Pleas (as
firstly amended).
(Continued)

—
20th June, 1958.

10

By their Town Agents:
Messrs. GILL OXLADE & BROAD,
Solicitors,
11c Castlereagh Street,
SYDNEY.

*In the
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of New South
Wales.*

—
No. 4.
Reasons for
Judgment of
His Honor
Mr Justice
Sugerman on
Application by
Plaintiff to
Strike Out
Amended Pleas.
—
29th Aug., 1958.

No. 4

Reasons for Judgment of His Honor Mr Justice Sugerman on application by Plaintiff to strike out Amended Pleas

29th August, 1958

HIS HONOR: This is an application to strike out the defendant's 2nd, 3rd, 4th and 5th pleas upon the grounds, shortly stated, that they are embarrassing and clearly demurrable.

The declaration is in libel for the publication in the defendant's newspaper of a letter in the following terms:—

"Cr. Jones' Garage
Sir, —

10

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 garage.

It is beyond understanding. Or is it?

20

'RATEPAYER'

North Manly."

The innuendo alleged by the plaintiff is that the words mean "that the Plaintiff had made undue and improper use of his position as a member of the Warringah Shire Council for the purpose of obtaining the approval of such Council for the use of the Plaintiff's garage as 'servants' quarters and that the plaintiff had been guilty of corrupt and improper conduct in and about obtaining such approval."

The second plea is that "in so far as the words consist of allegations of fact the words are true in substance and in fact and in so far 30 as the words consist of expressions of opinion and without the alleged meaning they are fair comment made in good faith without malice upon the said facts which are a matter of public interest." The third plea repeats these allegations, omitting the words "without the alleged meaning." The fourth plea is in the same terms as the second plea with the addition of allegations of a number of matters by reason whereof, it is alleged, it was "for the public benefit that the alleged words should be published." This plea contains a confusing verbal slip in the second-last line, which counsel has undertaken to have amended. The fifth plea repeats the allegations contained in the 40 fourth plea omitting the words "and without the meaning alleged."

Fair comment must now be specially pleaded (**G.R.C. 0.30 r. 30A**). The decisions establish that, having regard to s.7 of the Defamation Act, 1912, the plea must allege not merely that the facts on

which the comment was based are true but also that it was for the public benefit that they should be published, with a qualification where the allegations of fact are clearly non-defamatory—**Goldsborough v. John Fairfax & Sons Limited** (34 S.R. 524); **Gardiner v. John Fairfax & Sons Pty. Limited** (42 S.R. 171); **Thornton v. Lang** (62 W.N. 163).

Counsel for the defendant has suggested further reasons why difficulty arises in pleading fair comment specially. By reason of s.72 of the Common Law Procedure Act, 1899, a declaration in libel alleging an innuendo is, in effect, two counts, one with the innuendo and one without; these cannot be demurred to separately (**Wilkinson v. S. Bennett Limited** 29 C.L.R. 283), although pleas may distinguish between them (**Queensland Probate Insurance Co. Ltd. v. Manufacturers Mutual Insurance Co. Limited**, 45 W.N. 54; **Watkin v. Hall**, L.R. 3 Q.B. 396 at p. 402). Fair comment could formerly be raised under the general issue, which also denied the defamatory character of the words; now the plea must stand alone.

Counsel for the defendant disclaims any intention to justify the words with the innuendo. He seeks to support the pleas as raising the defence of fair comment to the words with the innuendo and to the words without the innuendo, respectively, the comment being based in each instance upon facts truly stated in the published matter. Then there are variants according to whether the stated facts are to be regarded as defamatory or not defamatory. Thus there are four variants in all of what is essentially the one defence.

The plaintiff's objections to the pleas are directed mainly to the second and third pleas. It is difficult or impossible to determine, it is said, whether these are intended as pleas of fair comment or "rolled-up" pleas. If intended as rolled-up pleas, they do not allege public benefit. If, on the other hand, they are intended as pleas of fair comment, they are said to be objectionable for other reasons. The published matter is, it is submitted, on the face of it a statement of facts only; it consists of a personal attack on the motives and conduct of the plaintiff, and it is submitted that as a matter of law it must be held that the facts stated are incapable of enabling a fair-minded man to draw against the plaintiff the adverse inference the writer has drawn and that the whole matter is statement of fact and not comment or opinion at all. In form it is said the pleas are embarrassing, and this is applied also to the fourth and fifth pleas, because it does not appear with respect to allegations of fact or comment whether the plea is pleaded to the declaration with the meaning alleged in the innuendo or to the declaration without that meaning.

It would appear that in England the so-called "rolled-up" plea is no more than a plea of fair comment (**Sutherland v. Stopes** (1925) A.C. 47). "The averment that the facts were truly stated," said Lord Finlay at pp. 62-63, "is merely to lay the necessary basis for the

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29th Aug., 1958.

defence of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct." In this State it has been said to be obvious that "the so-called 'rolled-up' plea alleging truth only (and not truth and public benefit) as to matters of fact, and fair comment as to matters of comment, could only be a plea of fair comment, and would be demurrable except in a case where the facts alleged were clearly non-defamatory and the defamatory matter was restricted to pure comment" (**Goldsborough v. John Fairfax & Sons Limited**, supra, at p. 536 per Jordan C.J.; and see per Halse Rogers J., at p. 545). In **Gardiner v. John Fairfax & Sons Pty. Limited** (supra at p. 173) it was said by Jordan C.J.: "If the defamatory matter complained of includes a statement of the facts commented on as well as comment on those facts, the burden of proof is on the defendant under a plea of fair comment to establish as well that the defamatory facts are true, and also (in New South Wales) that it was for the public benefit that they should have been published." In **Thornton v. Lang** (supra), Herron, J. said at p. 165: "In my view in the normal case of publications which contain defamatory statement of fact as well as defamatory comment or statements of opinion based on those facts, it is not open to the defendant to set up fair comment upon a matter of public interest without pleading as to the facts that they were true, and that it was for the public benefit that they should be published, and that as to the comment it was fair comment on such facts on a matter of public interest." But His Honor also mentioned a possible exception in cases where "the matters of fact alleged, as opposed to the comment upon them were clearly non-defamatory, and the defamatory matter was restricted to pure comment" (p. 164).

I understand the second and third pleas to be intended as pleas of fair comment framed on the footing that the matters of fact on which the comment was based are not defamatory. The letter whose publication is complained of is a mixture of fact and comment. The matters of fact are the Council's decision to allow Councillor Jones (that is, the plaintiff) to convert his Harbord garage into servants' quarters and that the Council is conducting an insistent campaign against homeless people who are living in garages to force them to quit. The comments are that the first-mentioned decision is "appalling" and "takes the bun" and that the whole matter is "beyond understanding." The sting of the letter would appear to lie in the juxtaposition of the two alleged examples of conduct on the part of a Council of which the plaintiff is a member, the statement that "It is beyond understanding" and the concluding query "Or is it?".

The innuendo alleged is that the plaintiff had made undue and improper use of his position as a member of the Council for the

purpose of obtaining its approval for the use of his garage as servants' quarters and that he had been guilty of corrupt and improper conduct in and about obtaining such approval. In view of some of the arguments which have been advanced it is perhaps necessary to bear in mind that this is not what the defendant published but the interpretation which the plaintiff claims a reasonable reader of average intelligence (**Slatyer v. Daily Telegraph Newspaper Limited**, 6 C.L.R. 1 at p. 7) would place upon the published words. Whether the publication be read in its natural meaning, or whether it be assumed to be

10 capable of bearing and to bear the interpretation placed upon it, I do not agree that it must be treated as consisting entirely of statements of fact and that it could not be regarded as containing comment or opinion at all; indeed the point of the complaint appears to be that the writer of the letter stated a particular combination of contrasting facts with the purpose, in which it is claimed he has been successful, of suggesting and inviting an inference damaging to the plaintiff as flowing from those facts. Nor, in the circumstances, am I able to agree with the submission that as a matter of law which may be determined now the facts stated are incapable of enabling a fair-

20 minded man to draw such inference as the facts may suggest or invite. Plaintiff's counsel has submitted that the two matters stated—allowing the garage of a home to be converted into servants' quarters and campaigning against the use of garages as homes—are so different in character and so unrelated that they could not in combination furnish a fair-minded man with ground for any imputation against the plaintiff. But it does appear to me that it would not be right in this case to rule on these matters as matters of law on the pleadings, at this stage, in the absence of any evidence of the circumstances, and in isolation from the issues raised by the defendant under his

30 plea of not guilty. It is more appropriate that all the questions which may arise should be dealt with by the judge at the trial in deciding what issues should go to the jury.

These considerations, however, leave unresolved the difficulty that, as to matters of fact, the defendant has in these pleas pleaded truth only and not truth and public benefit, which I must take it from the decisions referred to is essential in this State to the validity of a plea of fair comment unless the facts alleged were "clearly non-defamatory." I have difficulty in applying this test at the pleading stage, and I feel that there is the more general difficulty that there

40 might be cases in which, it having been held on the pleadings that the facts alleged are not in this category, the jury might afterwards consider that the allegations of fact were in fact not defamatory, so that after all it was not necessary for the defendant to prove public benefit; possibly the practical solution of that difficulty is that a defendant who has pleaded public benefit (as the defendant here has done in his fourth and fifth pleas) is nonetheless entitled to have the

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(Continued)

—
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—
29th Aug., 1958.

jury appropriately directed as to whether he is obliged to prove that portion of his plea.

In order to ascertain here whether the case is within the only relevant exception allowed by **Goldsborough v. John Fairfax & Sons Limited** (supra) and **Thornton v. Lang** (supra) to the requirement that public benefit must be pleaded, I must ask myself whether the facts alleged in the letter whose publication is complained of were "clearly non-defamatory". What is meant by that expression? It seems to me having regard to the reasoning generally of those cases that what I must ask myself is whether, if the letter were deprived 10 of all vestige of comment, and putting aside the innuendo alleged but leaving open the possibility of some other innuendo, it is clear that the plaintiff must fail in an action for defamation founded on what remained—not in the sense that he clearly could not succeed before a jury but in the sense that what remained clearly not be held to be capable of a defamatory meaning. More particularly, would it, in this sense, clearly be not defamatory of the plaintiff to write that a Shire Council of which he was a member, although conducting an insistent campaign against homeless people who are living in garages to force them to quit, yet gave him approval, he certainly not being 20 homeless, to convert his garage into servants' quarters?

I have felt some doubt about the answer, but in the end I have come to the conclusion that I cannot say that this would clearly not be defamatory of the plaintiff in the sense indicated—that it is not clear that this is not capable of conveying, not necessarily the defamatory meaning alleged in the innuendo but at least some defamatory meaning. That being so, I must hold on the authority of the cases cited that the second and third pleas must be struck out as demurrable upon the ground that they do not allege public benefit as to matters of fact, since I think that as a single Judge my proper course is while 30 they stand to follow those cases which have stood for many years on the books as authority for the proposition that this allegation is necessary.

However, the defendant has on the file two further pleas, the 4th and 5th, which do contain this allegation. As to these, the objection which remains outstanding is the last of those earlier-mentioned, which is put as going only to form, namely that these pleas are embarrassing because they do not clearly state, as to matters of fact and comment, whether they are pleaded to the declaration with the meaning alleged in the innuendo or without that meaning. 40

The general nature of these pleas is clear enough. They are pleas of fair comment pleaded to the statement complained of with and without the innuendo, respectively. They lay the basis for this defence by alleging the facts upon which the comment is based and that those facts are truly stated. To this they add, as required by the decisions earlier

mentioned, that the publication was for the public benefit. And then, on the assumption that he must further comply with s.7(2) of the Defamation Act by alleging the particular facts by reason whereof it was for the public benefit that the matters were published, the pleader has done so. Whether rightly or wrongly does not matter, since it is not complained of and at most it is surplusage. Defendant's counsel has said it was done for more abundant caution; and particulars of it are sought by the plaintiff.

The difficulty advanced by plaintiff's counsel is that the pleas are
 10 silent as to whether the allegations of fact are pleaded to with the innuendo or without the innuendo. This difficulty, counsel suggests, would not have arisen if the pleader had not drawn this very distinction with respect to the expressions of opinion; but he has done so and has thus made it difficult to elucidate the pleas.

If, in a plea of justification, the defendant says that the words are true without expressly excepting the meaning in the innuendo "he accepts the meaning alleged in the innuendo and says that he will establish the truth of the words in that sense" (**Queensland Pastoral Investment Co. Limited v. Manufacturers' Insurance Co. Limited**,
 20 supra, at p. 55). These are pleas of fair comment, and as to such pleas certain observations should be made. First, the comment must rest upon a sub-stratum of fact, either stated in the impugned publication, indicated with sufficient clarity, or at least capable of being regarded as common knowledge between its author and those to whom the publication is addressed, and it must appear from the plea what the sub-stratum relied upon is. Secondly, that the rolled-up plea "in fact raises only one defence, that being the defence of fair comment on matters of public interest" (**Sutherland v. Stopes**, supra, p. 62). And
 30 thirdly, that the character of the rolled-up plea as a plea of fair comment only does not appear to be changed by the requirement in this State that public benefit be alleged in respect of the allegations of fact. The risk that the rolled-up plea, if it fails as a plea of fair comment, will not be available as a plea of justification may be guarded against by putting on, as well, a plea of justification to the whole of the impugned publication or to any severable portion of it. Counsel for the defendant has quite properly pointed out that whether he has by his pleading sufficiently protected himself against this contingency is a matter with which the Court is not concerned on this application.

40 Now, when I look at the 4th and 5th pleas in the light of the declaration and of all these considerations, it appears to me that what the defendant is saying is that insofar as the words, whether in their natural meaning or in the meaning alleged in the innuendo, consists of allegations of fact, they are true, and that insofar as the words consist of expressions of opinion they are fair comment, the second

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allegation being limited to the words used in the natural meaning in the 4th plea but extending to the words in the meaning alleged in the innuendo in the 5th plea. Further, I read the allegation that it was for the public benefit that the words should be published, by reason of the facts stated, as made with respect to the words so far as they consist of allegations of fact. That seems to me to resolve the suggested difficulty of form. It may be that it goes beyond what the defendant intended to allege, more especially since, if the whole thing is found to be fact, even with the meaning attached by the innuendo, there would be nothing left for the plea of fair comment to operate 10 upon, and it may also be that the matter could have been more clearly expressed. However, I think that is what in point of form the pleas must be taken to mean; I give the defendant leave to amend if he so desires.

It has been agreed that if the pleas are not struck out, the summons should be treated as asking in the alternative for particulars in accordance with the request made in a letter from the plaintiff's solicitor to the defendant's solicitor dated 27th June 1958, which is Exhibit A. It is not necessary to consider the request in relation to the 2nd and 3rd pleas. As to the 4th and 5th pleas, the first three 20 requests are directed to the allegation of the facts by reason whereof it is alleged that it was for the public benefit that the alleged words should be published. These allegations include allegations that the Council had systematically refused to permit the alteration of garages in the Shire for the purpose of their use as dwellings and has systematically refused to permit the use of such garages as dwellings and that there was a great shortage of dwellings in the Shire and that the said refusals gave rise to great hardship. The first three requests for particulars as to the 4th and 5th pleas are:—

"1. Please specify the instances upon which the defendant 30 relies as constituting 'systematic' refusal on the part of the Warringah Shire Council to permit the alteration of garages at Harbord and other places throughout the Shire for the purpose of use as dwellings. In relation to each alleged instance please specify the date of the alleged refusal, the location of the premises concerned and the name of the applicant for the relevant permission.

2. Please specify instances upon which the defendant relies as constituting 'systematic' refusal on the part of the Warringah Shire Council to permit the use of garages at Harbord and other places throughout the Shire as dwellings. In relation to each 40 alleged instance please specify the date of the alleged refusal, the location of the premises concerned and the name of the applicant for the relevant permission.

3. Please specify the particular instances of alleged hardship said to have been occasioned by the alleged refusals of the

Council. In each case give the names of the persons to whom such hardship is said to have been caused."

It is said that the plaintiff is in a better position to know these matters than the defendant is, that the evidence is equally available to both parties, that the defendant should not be asked to give particulars of evidence, and that the particulars sought are unduly onerous. It may well be that as a member of the Council the plaintiff is in a position to ascertain from its records what instances of refusal of the kind mentioned in the pleas there were over some period. No period, 10 it should be noted, is stated in the pleas, which simply use the expression "at the time of printing and publishing of the alleged words and at all material times." But I am of the opinion that the plaintiff is entitled to have sufficiently identified to enable him to answer them, not necessarily with all the particularity sought, any instances of refusal which are relied upon by the defendant as constituting "systematic refusal", and it may be pointed out that Clause 38(e) of Ordinance 1 of the Local Government Ordinances provides for a right to peruse Council minutes, which would appear to be available to the defendant. It may be added that this requirement of particulars should not be 20 construed as affecting any right of the defendant to establish a "systematic refusal" by any other means than a multiplication of individual instances of refusal which may be available to him.

The only other request for particulars which requires to be dealt with is:

"4. What are the facts upon which the alleged comment is said to have been made?"

As to this I shall read the following passage from the judgment of Herron J. in **Thornton v. Lang**, *supra*, at p. 164:

"It is possible that in some cases questions of particulars 30 might arise to clarify the matter before the pleas could be attacked, or the hearing safely proceeded with. If neither the plea of fair comment nor the language of the libel itself makes it clear what are the facts on which the comment is based, particulars of such facts will be ordered: **Peter Walker & Sons, Limited v. Hodgson** (1909 1 K.B. 239); but if the defendant pleads justification so far as the words complained of are statements of fact, and fair comment so far as they are expressions of opinion, particulars distinguishing the allegations of fact from expressions of opinion will not be ordered except in extraordinary 40 cases: **The Aga Khan v. Times Publishing Co.** (1924 1 K.B. 675); **Tudor-Hart v. British Union for the Abolition of Vivisection** (1937 4 All E.R. 475). This, I apprehend, is the correct rule with regard to particulars."

The request now under consideration seems to be a request for particulars of the kind referred to in the passage from His Honor's

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judgment which I have just read, which will not be ordered except in extraordinary circumstances. As was said in **The Aga Khan v. Times Publishing Co.** ((1924) 1 K.B. 675 at 680):

"But here the plea itself states the matters upon which the comment is based, and the defendant ties himself down to the admission that it is the statements of fact contained in the libel, and no others, on which he intends to rely. It cannot possibly assist the plaintiff that the defendants should be required to pick out the statements which they say are statements of facts and those which they say are matters of opinion, for the category to 10 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 considered an expression of opinion. On the other hand there may be statements with respect to which different minds may take different views on the question whether they are statements of fact or expressions of opinion."

In my view therefore this fourth request for particulars should be refused, and the fifth request under the 4th and 5th pleas, since it was occasioned only by the verbal slip to which I referred earlier, 20 does not arise in view of counsel's undertaking that in that respect the plea will be amended.

(Mr Loxton asked that His Honor not date the Order from today.)

HIS HONOR: What I should do is first of all to order that the 2nd and 3rd pleas be struck out. Secondly, to order that under the 4th and 5th pleas the defendant do supply to the plaintiff particulars sufficient to identify any instances of refusal by the Warringah Shire Council to permit the alteration of garages at Harbord and other places throughout the Shire or of refusal by the said Council to permit the use of such garages as dwellings which are relied upon by the defendant 30 as amounting to or establishing systematic refusal to permit such alteration or systematic refusal to permit such use, but so that this order for particulars shall not be construed as in any way affecting or limiting any right of the defendant to establish a systematic refusal of either kind by any other means than a multiplication of individual instances of refusal which may be available to him. The order will date from Friday, 12th September 1958. Such particulars to be furnished within fourteen days from the date of the Order. Defendant to have liberty to amend his pleas as he may be advised within seven days from the date of the Order. Costs will be costs in the cause. 40

As it was a matter of importance involving a difficult aspect of the law of defamation in this State and the pleading in relation thereto, I may properly certify for senior counsel.

No. 5**Proceedings before His Honor Mr Justice Maguire and a
Jury of four persons****1st Day—Monday, 30th May, 1960****Gordon Berkeley Jones v. Clement John Skelton**

MR HUGHES appeared for the Plaintiff.

MR LOXTON, Q.C., with MR YELDHAM, appeared for the
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10 (At 10.25 a.m. Mr Hughes opened to the jury.)
(Affidavit under the Newspapers Act tendered and marked
Exhibit "A".)

(Newspaper tendered and marked Exhibit "B".)

ARCHIBALD STUART COX

Sworn, Examined, Deposed:

TO MR HUGHES: I reside at 18 Roberts St., Harbord. I am a retired
Commonwealth Public Servant. I know Mr Jones, the plaintiff in this
action; I have known him for six years, I would say. I have known
him as a member of the Warringah Shire Council—during a period of
20 time I have known him as a member of the Council.

Q. Early in 1958 did you buy the Manly-Warringah newspaper?

A. Yes, I did.

Q. Did you ever see the copy of the newspaper, Exhibit "B",
which I now show you—would you look at p. 9 when you have
identified it? A. Yes.

Q. You see a letter on page 9 which is circled with ink? A.
Yes, I see it.

Q. Did you ever read that letter? A. Yes.

Q. Do you remember when? A. I have a good recollection, it
30 was the day after my birthday anniversary.

Q. What date does that make it that you read it? A. 1957.

Q. 1958? A. I am 63 now.

Q. What date in 1958? A. 27th February.

Q. There is mention in that letter of Councillor Jones. To whom
did you take that to refer? A. To Councillor Jones.

Q. The plaintiff? A. That is correct.

Q. Do not answer this question until my friend has an oppor-
tunity of objecting. After that letter had been read by you, did you
hear anybody talking about it? A. Yes, I did, quite a number of
40 my pals going backwards and forwards—

MR LOXTON: Q. You have answered the question. A. Yes.

MR HUGHES: Q. Under what circumstances did you hear the letter
being talked about? (Objected to.)

Q. I will re-frame the question. When and where did you hear

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people discussing this letter? A. On board the Manly ferry, in my place of employment. More so there than anywhere else, because travelling with your pals—

Q. Do not answer this question until my friend has had an opportunity to object. Can you remember any specific things that were said by other people in these discussions on the ferry? (Objected to.)

(The jury retired to enable the witness to be examined on the voir dire.)

MR HUGHES: Q. You have told us you heard some discussion on 10 the Manly ferry—

MR LOXTON: Tell us what the nature of it is.

MR HUGHES: I understand there was a group on the Manly ferry and one man in the group said to the others "Look at this". I will not use the exact words—"Jones has been doing all right for himself."

HIS HONOR: And showed them the paper?

MR HUGHES: Yes.

HIS HONOR: I did not realise that.

MR HUGHES: I did not want to state that because, after all, I am in the witness' hands and I saw this witness for the first time this 20 morning. I have stated what I understand the position to be, but I think in fairness I should hear it from him on the voir dire.

HIS HONOR: Then how are you going to prove that this is publication, if it was shown by somebody to a group on the Manly Ferry?

MR HUGHES: I am going to get this witness to identify the part of the paper that was shown.

MR LOXTON: I submit that is inadmissible.

HIS HONOR: (After hearing argument.) I am prepared to admit evidence from this witness, but it will have to be done properly and if it is not done properly you will have to put up with the consequences, 30 Mr Hughes.

MR HUGHES: Yes.

HIS HONOR: I am prepared to admit evidence from this witness of the publication of the article appearing in this particular issue of the newspaper. I am not prepared to admit evidence of the reaction of any person to whom publication was repeated, or any evidence as to what they said. Do we understand each other?

MR HUGHES: Yes.

MR LOXTON: I will protect myself by a formal objection against the evidence of re-publication. I am not going to argue it, it is not 40 worth it.

(Short adjournment.)

(In the presence of the jury):

HIS HONOR: I should add that in my opinion a distinction has to be drawn between a witness saying "Later at such and such a place I saw that same article produced and shown to somebody else". There

is a distinction between that situation and the same witness endeavouring to say "I read the article and some days later I heard a group talking and I heard Bill Jones say so-and-so", and then produce this article.

MR HUGHES: As I understand my instructions the evidence will fall into the first category only.

HIS HONOR: It is a matter for you. As I said before, I formed that view and I will admit evidence in accordance with it; if you should go beyond that, the usual situation results.

10 MR HUGHES: Q. You mentioned an occasion when you were on the Manly ferry and you heard some discussion. With whom were you present on this occasion? (Objected to.)

Q. How many people were present?

MR LOXTON: All my friend is entitled to prove is re-publication.

HIS HONOR: But that must necessarily include the nature and extent of the re-publication. Your objection can be noted.

MR HUGHES: Q. On this occasion how many people were present altogether, including yourself? A. Three.

Q. Did someone have a copy of that newspaper? (Objection to 20 leading.)

Q. Did somebody have a paper in that group? (Objected to.)

A. Yes.

HIS HONOR: I suppose Mr Hughes could have asked did somebody have something and then he could have asked what it was.

MR LOXTON: Was anything produced?

HIS HONOR: I have allowed the question.

MR HUGHES: Q. Did somebody have a paper? A. Yes.

Q. Who had it? A. I had it.

Q. What was the paper? A. The Manly-Warringah paper.

30 Q. The Manly-Warringah—? A. News.

Q. What issue was it of that paper; what was the date of the issue? A. The February issue.

Q. What date? A. The 27th.

Q. While you were in that group, you having a paper, did someone point anything out to you and the other person in the group?

A. Yes.

HIS HONOR: Might not that transgress what I have said?

MR HUGHES: With respect, no, because this merely goes to the identification of the particular letter. I am not going to lead evidence 40 of what was said about it or of what opinion was expressed—that would transgress Your Honor's ruling.

HIS HONOR: I will allow it.

MR HUGHES: I do not want you to say any opinion that anybody expressed but did someone point out anything in the paper to you and the other person in the particular group? A. Pointed it out to me, yes.

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MR LOXTON: I ask my friend not to lead and Your Honor is allowing him to do so.

MR HUGHES: Q. Somebody pointed out something. What was pointed out? A. That particular passage.

Q. Would you identify it by looking at that copy? A. That was the passage (indicating on Exhibit "B").

Q. That is the letter about Councillor Jones' garage? A. Yes.

CROSS-EXAMINATION

MR LOXTON: Q. On the Manly boat on that morning, somebody pointed to that letter in your paper? A. Yes. 10

Q. You did not show him your paper first, he came there and pointed to a letter in the paper? A. I had the paper.

Q. He pointed that letter out? A. Yes.

Q. So he must have read the paper before he showed it?

HIS HONOR: Q. To whom did he point it out? A. He pointed it out to me.

MR LOXTON: Q. You had read it—you told us you live at Harbord? A. Yes, I live at Harbord.

Q. That is the Warringah Shire? A. Yes.

Q. At this time in 1958, there was a housing shortage at 20 Harbord? A. There always has been.

MR HUGHES: I object to that on the grounds of the qualifications of the witness.

Q. It was general knowledge in the Harbord district that there was a housing shortage there? (Objected to.) A. Yes.

HIS HONOR: There has to be general knowledge about something in the community. I allow the question.

MR LOXTON: Q. It was also general knowledge that in consequence of the housing shortages that a great number of people were living in garages and sub-standard dwellings? (Objected to.) 30

HIS HONOR: It is one thing, it seems to me, for there to be a general knowledge that in the post-war years there was a housing shortage in this community, but it seems to be probably to be another thing that there should be general knowledge that people were living under any specific sets of conditions. I reject the question.

MR LOXTON: Q. It was to your knowledge that there were a number of people dwelling in garages in and around Harbord? (Objected to.)

HIS HONOR: What plea does this go to?

MR LOXTON: It goes to the fourth and fifth particularly; it also 40 goes to the second and third.

HIS HONOR: This witness may or may not have had personal knowledge acquired somehow. If he had, I see no reason why he should not be permitted to give it. I have rejected the questions based on what is said to have been general knowledge. Mr Loxton has now

asked whether, to the knowledge of this witness, a lot of people were dwelling in garages in and around Harbord. If he has the knowledge, he can answer the question; if he does not have the knowledge, he can say so. I will allow it.

MR LOXTON: I will repeat the question. It was to your knowledge that there were a number of people in 1958 dwelling in garages in the Harbord district? A. Not garages, I do not know of anybody that was living in garages at that time—but unsuitable houses, yes.

Q. Did you know of any people being prosecuted for living in 10 garages at that time? A. No.

Q. Did you know of any people doing that? A. No.

Q. I suppose you took an interest in your neighbourhood in which you live? A. Very much so.

Q. Are you prepared to say there were not people living in garages? A. Not to my knowledge. I do not know of any.

Q. But there had been—how long had you been living at Harbord? A. In 1951 I first came there.

Q. When you went there in 1951 there were a lot of people living in garages to your knowledge? (Objected to; allowed.)

20 Q. In 1951 there were a lot of people living in garages in the Harbord district? A. Not that I know—living in sub-standard houses, yes.

Q. Including garages? A. Truthfully I would not say that, that I knew it.

Q. Did you not know that there had been a great number of prosecutions between 1951 and 1958 of people living in garages? A. No.

Q. Did you not know it was Council's policy to prohibit the use of garages for dwellings? (Objected to.) A. Yes.

30 HIS HONOR: How can he know what the Council's policy was; for him to say he knew the Council's policy, it would be based on inadmissible material.

MR LOXTON: I cannot prove the fact that there was a prohibition this way, but nevertheless that question may be admissible in cross-examination.

HIS HONOR: I reject the question.

MR LOXTON: Q. This Council and Councillor Jones' garage had attracted considerable attention at this time? (Objected to; rejected.)

40 Q. Do you tell us that you did not know whether this application by Councillor Jones to live in his garage or to use his garage as a dwelling had not attracted considerable attention? (Objected to; rejected.)

HIS HONOR: What allegation of fact in the pleas is this question directed to?

MR LOXTON: It was a matter of public interest and for the public benefit. (Argument ensued. Question read.)

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HIS HONOR: You mean this application before this article was published?

MR LOXTON: The application would be made before.

HIS HONOR: Are you asking this witness his knowledge before the article or letter of 27th February 1958?

MR LOXTON: Councillor Jones' application to alter his garage had attracted considerable public notice.

HIS HONOR: After or before 27th February?

MR LOXTON: It could be before, it was approved on the 18th.

HIS HONOR: You mean before this article was published? 10

MR LOXTON: It was before the article.

HIS HONOR: The question you have directed to this witness—you want him to answer it in relation to the period before 27th February, 1958, or afterwards?

MR LOXTON: Certainly before.

HIS HONOR: Q. Did you ever hear of Councillor Jones' application before the matter was published in the paper? A. No.

MR LOXTON: Q. When this application was granted I suppose you read the Daily Telegraph? A. The Telegraph, yes.

Q. You read the Daily Telegraph report on the Council meeting 20 at which this approval was given? (Objected to; allowed.)

Q. You read that? A. I think I read it in the Herald, and I read one of Oliver Hogue's reports on it.

Q. You read this article in the Telegraph—did you not do that? Look at the article appearing on page 4 of that paper which I hand to you? A. I won't say truthfully that I read it in this paper because I got the Herald and still get the Herald.

Q. Did the Herald publish much the same? A. No, it was only a couple of lines regarding the Shire approving of the dwelling.

Q. You are not prepared to admit you read that article in the 30 Daily Telegraph appearing in that issue, a copy of which has been shown to you? A. No.

(Page 4 of Daily Telegraph of February 18th m.f.i. "1".)

Q. Do you listen to the wireless? A. Yes.

Q. Did you hear any announcement on the wireless relating to this application by Councillor Jones, or this decision of the Council in relation to Councillor Jones' application? A. No.

Q. Do you read the Manly Daily? A. Yes.

Q. Would you look at this paper which I now hand to you, p. 4. I just draw your attention to the particular passages outlined in ink? 40
A. I cannot say I did read it.

Q. You did read the paper but you are not sure whether you read that article? A. That is correct. I was more interested in land sales at the time.

Q. In the article you read in the Manly-Warringah News, that was in the correspondence column—nothing to do with land? A. I

had this posted to me. That paper you get whenever you are lucky, whenever they like to bring it around, you get that paper. This one I had posted to me. Very seldom I got it.

Q. In your reading of the Herald, there were other sources besides the Manly-Warringah News from which people were informed of the Council's decision in this case? A. Yes, I read a bit about it in the Herald.

Q. Did you see any harm in Councillor Jones making an application for approval to alter his garage to permit it to be used as a dwelling? A. Not that particular garage, you cannot call that a garage—(objected to).

Q. Did you see any harm in Councillor Jones making application?—(objected to).

HIS HONOR: I understand you to say one of the defamatory meanings you contend for in this letter is that Jones was prepared for his own purposes to submit to the Council an application conflicting with its established policy?

MR HUGHES: Yes.

HIS HONOR: If that is one of the heads of defamation that you contend for in relation to this matter then the question of damages arises, providing I rule the thing is capable of a defamatory meaning and the jury so finds.

MR HUGHES: Yes.

HIS HONOR: Then must not his view as to Jones' conduct be admissible on the question of damages? If he thought, for instance, there was nothing wrong with Jones doing that, that is one thing; if he thought that was a terrible thing for Jones to do, taking advantage of his position, then that is a different position. I allow the question.

MR LOXTON: Q. Did you see any harm in Councillor Jones making an application for this approval? A. No.

(Witness retired.)

MR HUGHES: I now call the plaintiff.

MR LOXTON: There are documents here on subpoena duces tecum but we have not had an opportunity of looking at them and I will have to look at them before I cross-examine the plaintiff. I do not know whether my friend would have them called now or else I will ask leave to have them produced on the defendant's subpoena.

HIS HONOR: Why did not your client issue a subpoena for their production?

MR LOXTON: We have—we both have.

HIS HONOR: You can have the witness called now.

(James Morgan, Shire Clerk of Warringah Shire Council, was called on subpoena duces tecum.)

MR LOXTON: Q. Do you produce under subpoena duces tecum to this Court a number of documents? A. Yes.

Q. Would you identify the documents you produce in some way?

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A. I would like, if I may, to bring in a young lady, who has assisted in the collating of all the documents to help me identify them.

HIS HONOR: Q. You have been served with a subpoena to produce documents? A. Yes.

Q. You do in answer to that subpoena produce a number of documents to the Court? A. That is correct.

Q. Let us have them.

MR LOXTON: The only trouble is there are other Council officers subpoenaed and this witness may not know which have been produced under his subpoena and which have been brought—

10

HIS HONOR: What does it matter? Call all the Council officers here that you have subpoenaed to produce documents and if they produce them then, subject to my being satisfied that they are relevant to an issue you can see the lot, and if you want anything more or you say the subpoenas have not been properly answered we can go into that question then; but it may never become necessary.

Q. Would you indicate the documents which you produce on your subpoenas? A. I have a series of subpoenas.

HIS HONOR: Strictly speaking, this is quite irregular, but if nobody minds it being done this way, I do not.

20

MR HUGHES: I think the witness should have four subpoenas.

HIS HONOR: Q. Show them to me. (Witness complies.)

Q. Where are these documents that you produce in pursuance to these subpoenas? You have handed me in relation to the first subpoena the subpoena form itself and an annexure setting out a large number of documents that you were required to produce? A. They are here (indicating).

HIS HONOR: What have I to do, have I to go through them all to see if they are relevant?

MR LOXTON: I will have to ask Your Honor to give us an opportunity to pick out the ones that are relevant.

HIS HONOR: One of these subpoenas addressed to this gentleman is subpoena ad test; we need not worry about that. I have looked at the first subpoena duces tecum, which has six pages of annexures. So far as I could judge from the nature of the documents there described, I would be disposed to think that the documents and books said to be produced could be said to be relevant to an issue in this case and therefore, holding that view, unless some reason is shown to me to the contrary I would let you see them, Mr Loxton.

Then there is another document, a document which has no annexure to it, but which requires production of various applications submitted by the plaintiff. That, clearly enough, would be relevant to an issue in this case, or more than one issue perhaps. Then there is another subpoena duces tecum—

40

MR LOXTON: Two of them may be the plaintiff's subpoenas.

MR HUGHES: There are two plaintiff's subpoenas to the Shire Clerk.

HIS HONOR: I am prepared to allow you and, indeed, Mr Hughes, to see every document that is produced to the Court under the subpoena duces tecum unless some cause is shown to the contrary. The only question now is to find out what has been produced to the Court. I am not going to wade through it, unless I have to.

MR LOXTON: I was going to suggest that the witness should identify the documents produced under each.

HIS HONOR: Why not call him into the witness box and see if it can be sorted out that way.

10 MR LOXTON: Without the rights to cross-examine. Let him go into the witness box without prejudice—

HIS HONOR: He is only called into the witness box on his subpoena; he is not called to give evidence.

MR LOXTON: He could give all the information before the Court.

HIS HONOR: I think it is quite irregular to do it from the body of the Court. A person attending Court on a subpoena duces tecum is entitled to be asked from the body of the Court "Were you served with a subpoena and in answer to that subpoena do you produce certain documents to the Court?" That is all he is entitled to be
20 asked from the body of the Court, on my understanding of it.

Do what you like, but unless something like that is done, we won't be able to sort out, as far as I can see, the documents produced under your subpoena duces tecum and the documents produced under the plaintiff's subpoena duces tecum.

MR LOXTON: I will do that. I will put the witness in the box and ask him this question; but would it not be more convenient, as we have both subpoenaed him and the plaintiff is in his case, for the plaintiff to get his documents?

HIS HONOR: That suits me, if you are both agreeable.

30 MR LOXTON: I am perfectly agreeable to that course. I will not claim any right to cross-examine him under those circumstances.

HIS HONOR: Q. You realise, Mr Morgan, that you have had served on you two subpoenas duces tecum to produce documents and books?

A. Yes.

Q. One of them was served on you by the solicitors for the defendant, Yeldham & Spain, and one was served on you by the solicitor for the plaintiff?

MR HUGHES: Two by the plaintiff.

HIS HONOR: Two by the plaintiff.

40 Q. Have you produced to the Court now documents in relation to both these sets of subpoenas? A. Yes.

Q. Are they all there? A. With the exception of certain documents which we were unable to find, yes.

HIS HONOR: It does not become apparent to me, on the surface, Mr Hughes, how the documents in a subpoena I hand you come to be relevant.

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MR HUGHES: I should not endeavour to explain now because they do not relate to my case in chief; they may relate to the case in reply, and I hope not to split my case.

HIS HONOR: If that is the case, if you satisfied me that these were relevant to an issue I would say here and now that both counsel can see all documents that Mr Morgan has produced.

MR HUGHES: I am not trying to be difficult. Can I say then that they will be relevant, I understand, to my case in reply?

HIS HONOR: You do not want this gentleman called to produce your documents at this stage? 10

MR HUGHES: As a matter of convenience, I do not mind because to do that does not split my case, and it might be convenient for Mr Morgan if he did so.

HIS HONOR: Once they are produced to the Court, if either counsel asks me he can have them if I first am satisfied they are relevant. You may not want to use them until you come to your case in reply.

MR HUGHES: Might they be produced to the Court in response to the subpoenas with leave to see them?

HIS HONOR: In relation to the documents produced by Mr Morgan, whether produced on the subpoena duces tecum served by the plaintiff's 20 solicitors or the subpoena duces tecum served by the defendant's solicitor's, they may be seen by both parties.

MR HUGHES: Do the documents Mr Morgan has mentioned as having been lost come within the plaintiff's subpoena?

HIS HONOR: You cannot cross-examine him from the floor of the Court. If you want to ask him anything, put him in the witness box.

MR LOXTON: I will put him in the box.

JAMES MORGAN

Sworn, examined as under:

HIS HONOR: Q. You are the Shire Clerk of the Council of the 30 Shire of Warringah? A. Yes.

MR LOXTON: Q. You have produced to this Court a number of documents? A. Yes.

Q. Are the documents which you have produced all the documents that are on this bench in front of the Associate's desk? A. Yes.

Q. I do not know whether you produced these, or somebody else may have produced some of them? A. No, I have produced the whole of the documents along the table there.

Q. Also the documents that are heaped underneath the table? A. Yes, but the documents underneath the table are documents which 40 have been examined by the parties to this matter with the leave of the Council having been given to them, on a previous occasion. I have brought them into Court, but they are not in answer to the subpoena. I brought them in case they might be needed.

Q. Would you identify some of these documents for us? A. Yes.

Q. Have you produced the file which is known in your office as the refusals file—it is a file which I am instructed was kept pursuant to a resolution of the Council passed in March 1952? A. A refusals file? Just a general refusals file or the refusals file in regard to some specific type of matter?

Q. It is a refusals file kept in connection with a resolution passed by the Council on 31st March 1952? A. I do not believe I have a file there; at any rate under that nomenclature. I do not think I have a file called "The Refusals File".

10 Q. Would you produce it? A. There is such a file called "The Refusals File" kept in the Health and Building Department of the Council, but so far as I can recall I was not asked to produce that file.

Q. We thought you were. If you have not produced it, will you produce it say, two o'clock? A. At two o'clock?

Q. Yes? A. I will certainly do my best, but it is a long way out there.

Q. That is one other file we want. That is "The Refusals File" in the Health and Building Department, following upon the passing of the resolution of the Council in March 1952. I understand in
20 connection with that same resolution there is another file kept by the Council called "The Temporary Dwellings File"? A. Yes, we have a file called "The Temporary Dwellings File". Those files are produced there, the "The Temporary Dwellings Files" are there.

HIS HONOR: Q. On that table in front of the Associate? A. Yes.

MR LOXTON: Q. Would you identify it for me? (The witness proceeded to floor of Court and identified files produced on subpoena.)

A. These are all "Temporary Dwelling Files".

HIS HONOR: Going back to this question of re-publication that was discussed earlier, in the way the evidence came out finally, that may
30 not amount to evidence of re-publication at all; it might only amount to evidence of a separate original application.

MR LOXTON: That would be my submission.

MR HUGHES: That may well be so.

MR LOXTON: I am going to attempt to have all these identified so we can lay our hands on them.

(Temporary Dwelling Files m.f.i. 2.)

WITNESS: This bundle of files are files relating to unauthorised occupation of buildings.

(Files relating to unauthorised occupation of buildings m.f.i. 3.)

40 WITNESS: Other matters mentioned in the subpoena were these, which are in other files headed "Building Breaches and House Drainage Complaints, Closing Orders and Legal Action".

That is a stack of the files and some of the letters mentioned in the subpoenas are embodied in those files.

(File "Building Breaches and House Drainage Complaints, Closing Orders and Legal Action" m.f.i. 4.)

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This next group, also containing certain items mentioned in the subpoena is entitled "Public Health and Pure Foods Act".

HIS HONOR: Q. Does that file contain some documents relating to applications for particular types of buildings, or unauthorised occupation? A. I have not gone through the details. Apart from just having glanced at the papers I have not gone through the details.

(Public Health and Pure Foods Act File m.f.i. 5.)

Q. Are those all the documents? A. I have others beside the minute books. These three matters relate to one of the subpoenas; those three matters relate specifically to that subpoena. 10

MR LOXTON: Q. Do you produce the application in respect of this garage? A. Yes, I have that here.

HIS HONOR: This file seems to be produced in response to your subpoena, Mr Hughes.

MR HUGHES: Yes, the subpoena of 20th May.

HIS HONOR: This bundle can be marked as having been produced pursuant to the plaintiff's subpoena of 20th May, 1960.

(Bundle of documents produced in response to plaintiff's subpoena of 20th May 1960 m.f.i. 6.)

WITNESS: Then there is the application in connection with this 20 building; there is the plan of it, the Inspector's Report on it, the clippings from the minutes of the Council which will be found in most of these other documents to enable a tie up with the original minutes if necessary.

MR LOXTON: I think that is produced in response to the defendant's subpoena.

MR HUGHES: I think it is covered by both sets of subpoenas.

(Bundle of documents produced under subpoenas served on Mr Morgan by both parties m.f.i. 7.)

WITNESS: In regard to that file I have extracted one item from it; 30 it is a statement or memorandum to the Shire Council by the Council's solicitor.

HIS HONOR: Q. Who is the solicitor? A. Mr E. C. Corten.

(Statement handed to His Honor.)

HIS HONOR: What is the date of the application?

MR LOXTON: It came before Council on 17th February.

HIS HONOR: Mr Morgan, on behalf of the Council, desires to claim privilege from production of this document.

WITNESS: I am asking that on behalf of the Council's solicitor.

HIS HONOR: It is not his privilege. It is the Council's privilege. He 40 was acting as solicitor for the Council and the privilege never attains to the solicitor, it pertains to the client.

WITNESS: The Council has passed no resolution to that effect.

HIS HONOR: In that case you cannot claim any privilege.

WITNESS: I cannot. I have never been instructed to do so.

HIS HONOR: That is fundamental. Communications between solicitor and client is privileged with the client, not the solicitor.

(Memorandum from Solicitor to Council m.f.i. 8.)

HIS HONOR: Do you agree with that, Mr Hughes?

MR HUGHES: Yes.

MR LOXTON: Yes, I agree.

WITNESS: I would like to make a statement in regard to the Prosecutions Register. Someone called on me after business hours on Friday night with a further subpoena to produce a Legal Proceedings Register
10 if the Council possessed such a thing, and I did say at the time the Council had no such Register. Quite frankly, although I know I am the custodian of records, we have so many tens of thousands of them I missed this one. However, on going in to our solicitor's office, and our Council has a solicitor in its employment and he keeps this Register, I did find I was incorrect in making that statement, so I have brought that Register along in an endeavour to make amends.

HIS HONOR: Q. You were under a misapprehension, Mr Morgan?

A. Yes. One of the several gentlemen who served subpoenas on me asked me would I bring to the Court, although it has not been
20 covered in a subpoena itself, reference to the delegation of power to the Chief Health and Building Inspector and other Building Inspectors in regard to the proving of plans on behalf of the Council.

(Legal Proceedings Register m.f.i. 9.)

HIS HONOR: I suppose the reference to the delegation of power could have been covered by subpoena. Mr Morgan takes the view it is not covered by subpoena. Would it meet with the approval of both you gentlemen if it was handed to the Court as if produced under subpoena?

MR HUGHES: That would be agreeable to us.

MR LOXTON: I understood at discussions it was agreed between the
30 legal adviser for the defendant and the Council to produce everything, Mr Morgan. I do not know whether you assent to that.

HIS HONOR: I am not going to deal with anything here unless produced on subpoena, or the parties agree to treat it as produced on subpoena.

MR HUGHES: I agree.

MR LOXTON: I agree.

HIS HONOR: That stands in the same position as the others. Either side can see them.

WITNESS: It is the first card in the file which we have to deal with
40 in relation to Council's policy on building matters.

(Reference to delegation of power m.f.i. 10.)

There was other matter I have taken the liberty of bringing along and that was the Report by the Council's solicitor to the Council in regard to this general matter following which the Council made a policy resolution.

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HIS HONOR: Let me have a look at it (shown to His Honor).

Q. What is the Council's attitude to this document to which you have directed my attention? You are not claiming any privilege on behalf of the Council in relation to this? A. No, I brought it along in case it might assist.

(Report from the Council's solicitor to the Finance Committee dated 18th September 1957, m.f.i. 11.)

WITNESS: Those are the minutes of the Council's ordinary meeting, special meeting, Health and Building Committee Meetings, and Town Planning Development Committee Meetings from 1952, or in some 10 cases a little earlier, until 1959.

HIS HONOR: Q. I suppose they speak for themselves in the sense that it is easy to distinguish the minutes of the Council Meetings from the minutes of the Finance Committee? A. They are in separate volumes.

(Witness returned to witness box.)

MR LOXTON: Q. Amongst the documents produced, do you produce instructions from the President to you as Shire Clerk, relating to the carrying out of the resolution of March 1952, that is that resolution relating to sub-standard dwellings? A. I could not answer the 20 question without consulting the file. I think I recall the resolution to which you are referring.

Q. Do you remember the resolution of March 1952 dealing with sub-standard dwellings? A. Yes.

Q. Then, following on that, I understand the Council adopted a certain procedure in dealing with those matters? A. Yes.

HIS HONOR: Is this something specifically enumerated in the subpoena?

MR LOXTON: It is covered.

HIS HONOR: If it is specifically enumerated Mr Morgan's attention 30 could be drawn to it.

MR LOXTON: I do not think it is specifically enumerated.

Q. From time to time there were instructions given to you—(objected to).

MR HUGHES: My friend is embarking on a very polite cross-examination.

(At 12.55 p.m. the Jury retired during argument.)

MR LOXTON: Q. I understand there were Presidential Minutes by the President to the Shire Clerk with reference to that resolution of March 1952. I wanted to know whether the minutes of those instructions 40 are with those papers that you have produced? A. I have not examined those papers relating to that matter in recent time, not in close detail, but whatever instructions were given, if they were given in writing, will be on the file.

Q. Which files would I find them on? A. It would be in the Temporary Dwellings File, around about the March 1952 period.

Q. I understand there is also a file of instructions given by you as Shire Clerk, or your predecessor, to the Building Inspector following upon the resolution of March 1952? A. That I am sure, or as near sure as I can be, is on the same file, the Temporary Dwellings File.
HIS HONOR: Q. How long have you been Shire Clerk? A. Since January 1952.

Q. Were you in the employ of this Council in some other capacity before that? A. No, I came from elsewhere.

MR LOXTON: Q. Do you think you could get that Refusals File sent across early this afternoon? A. You can be sure I will do my very best. It does take quite a time to come from there to here, but I will telephone as soon as I am free and have that done.

MR LOXTON: I am going to ask Your Honor for an opportunity to go through those documents.

HIS HONOR: There are a lot of other documents I understand from Mr Morgan produced here, not in answer to the subpoenas, but which were brought here, I apprehend, because he thought they might assist the parties or the Court.

Q. They are the documents which are underneath the Associate's bench. A. Yes, that is so.

HIS HONOR: If the parties want any more they should subpoena them and you should take away the rest as soon as you can.

MR LOXTON: The defendant has paid a fee to examine the documents in the presence of certain officers of the Council, but the legal advisers for the defendant have not the right so to examine them, and the Council has not been prepared to give the legal advisers that right. We are not at the moment fully instructed and I would ask that those other documents not be taken away.

HIS HONOR: What is your attitude, Mr Hughes, towards the suggestion that those documents be made available to both parties as if produced on subpoena?

MR HUGHES: I am agreeable to that.

MR LOXTON: I am agreeable also.

WITNESS: Perhaps I have not conveyed the right impression about those documents. I do not know whether they will or will not assist the Court. All I do know is they were extracted from our records when the Council gave leave for their examination by certain people connected with this matter here today. I do not know whether they are any use at all.

HIS HONOR: Q. I understand that completely, but you do not mind them staying here? A. No, not at all.

HIS HONOR: You were asking for an opportunity to examine these documents, Mr Loxton. What do you mean by that?

MR LOXTON: I would like an opportunity from now till two o'clock and to allow the rest of the afternoon to go through them; I think it

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will take at least that long. It will probably result in the saving of time in the long run.

MR HUGHES: I am anxious to see the trial proceed as expeditiously as possible. My friend has a junior who could look at the documents.

HIS HONOR: Why can't we proceed by doing what Mr Hughes suggests, Mr Loxton? He can call his client in chief and during the lunch hour you can look at the documents and Mr Yeldham may have a longer opportunity to look at them and you can proceed with your cross-examination as far as you can. If at any particular stage you tell me you would be embarrassed by being required to conclude 10 your examination, because you have not seen all the documents, I would allow you to defer your cross-examination. It seems a pity to adjourn now and achieve nothing so far as the progress of the hearing is concerned until tomorrow morning.

MR LOXTON: I forecast I will make that application as soon as the plaintiff has finished his examination in chief. I could waste the time of the Court while my junior is looking through the documents, but if I am given that opportunity I can put the case in some order. I am not going to take advantage of the position, but I think I will have to make an application. 20

HIS HONOR: May be you will.

(Witness retired.)

(Luncheon adjournment.)

AT 2.10 P.M.

(Upon resumption the Jury returned to Court.)

WILLIAM EDWARD BERRY

Sworn, examined deposed:

TO MR HUGHES: My name is William Edward Berry. I reside at No. 11 Homestead Avenue, Collaroy, and I am a garage proprietor by occupation. 30

Q. Are you a member of the Council of the Shire of Warringah, or are you a Councillor? A. I am the Shire President.

Q. I think you have been a member of the Council for approximately eleven years? A. Yes, approximately, except for one period when at that time I was away overseas for three years, but I was attached to this Council still on the Town Planning side for eleven years.

HIS HONOR: Q. How long have you been President? A. For two years.

MR HUGHES: Q. Were you President during the year 1958? A. Yes. 40

Q. Of course you know the plaintiff in this action, Mr Jones? A. Yes.

Q. Would you have a look at this newspaper, "Manly Warringah

News" dated 27th February 1958. Have you seen that before? A. Yes.

Q. Would you look at the correspondence column on page nine, and you see there a letter headed "Councillor Jones' Garage"? A. Yes.

Q. Have you seen that letter before and read it? A. Yes.

Q. In February 1958, at the time when this paper was published, did you read the paper? A. Yes.

Q. Shortly after its publication did you see that letter relating 10 to Councillor Jones' Garage? A. This letter in the paper?

Q. Yes? A. Yes.

Q. You read it did you? A. Yes, the next day.

Q. To whom did you take the letter to refer? To whom did you understand the letter was referring? A. I understood it was referring to Mr Jones.

Q. Have you met Mr Skelton, the defendant in this case, before? A. Yes, I know Mr Skelton quite well.

Q. During the year 1958 did Mr Skelton on any occasion seek an interview with you? A. Yes.

20 Q. Do you remember approximately when that was? A. It could have been several months after this letter.

Q. But during 1958? A. Yes.

Q. Do you recall what Mr Skelton said to you on the occasion of the interview? A. Mr Skelton spoke to me about his trouble with Councillor Jones.

Q. I want you to tell His Honor and the gentlemen of the Jury, using as best you can having regard to your recollection, the words that Mr Skelton himself used—

30 MR LOXTON: I do not know what this is directed to. I do not know whether it is directed to having a defamatory meaning. My friend is quite wrongly telling the Jury that this publication meant a certain thing. If it did not mean a certain thing that would pose the question differently. Whether this document is capable of a defamatory meaning is a question for Your Honor. What was said by Mr Skelton 8 months later could not be an extrinsic circumstance to guide in any way the interpretation of the document. (Argument ensued.)

(At 2.27 p.m. the Jury retired during argument.)

HIS HONOR: I will allow the evidence. I feel it is open to various constructions, but that is a matter for the Jury. I think it is admissible.

40 (At 2.31 p.m. the Jury returned to Court.)

MR LOXTON: The pleadings as originally drawn lacked an allegation that the facts were not defamatory. That was done deliberately. We said that the second and third pleadings had to be read on the basis that there was no defamatory meaning to be attached to the allegations of fact. We said that the allegations of fact were not capable of defamatory meaning and so the pleas, as originally drawn,

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said the statements of fact were true it would be a good plea if the statements of fact were not capable in law of bearing any defamatory meaning.

HIS HONOR: In this State, in order to found a plea of fair comment, haven't you to prove that the facts commented on were true?

MR LOXTON: Only if the facts themselves are libellous. If fair comment it is essential to prove that the facts, the basis of comment, are true. Sometimes the facts themselves are capable of some libellous imputation.

HIS HONOR: If for instance the Jury took a view that the facts 10 alleged were not true?

MR LOXTON: Then the comment would fail.

HIS HONOR: And you would have to fall back on the first and the fourth and fifth?

MR LOXTON: That is true.

MR HUGHES: Q. I think you had told His Honor and the gentlemen of the Jury, that the defendant, Mr Skelton, sought an interview with you sometime in 1958? A. Yes.

Q. And he had a conversation with you? A. Yes.

Q. Do you recall where the interview took place? A. Yes, I 20 think it was in the Shire Clerk's office.

Q. Would you tell His Honor and the gentlemen of the Jury what Mr Skelton said to you in this interview? A. Mr Skelton told me, as best I can remember, that he was having a little trouble with Councillor Jones, and he said he was very sorry for this trouble and was wondering whether or not this matter could be settled and would I ask Councillor Jones would he consider settling the matter of this newspaper article, and I told Mr Skelton—

Q. Did he say anything else to you about the letter or article? A. He said that he was very sorry that the letter got into the paper. 30 He said as a matter of fact he did not know the article was in the paper until the next day and he said, "It is just one of those things that happen".

Q. Is there anything else you can recall him saying? A. Only as I have just stated, he was sorry the whole matter had happened and he did not wish to have any further trouble over the matter with Mr Jones, as he did not like trouble over matters like this.

CROSS-EXAMINATION

MR LOXTON: Q. This conversation you said took place in the Shire Clerk's office? A. Yes. 40

Q. When? A. It would be as near as I can say, it would be September or October.

Q. What year? A. 1958.

Q. After the action had started? A. Yes.

Q. But surely you knew that Mr Skelton was being sued? A. I certainly did.

Q. Do you mean to tell us Mr Skelton said, "I am having a little trouble with Mr Jones"? A. That is right.

Q. What was Mr Skelton doing in the Shire Clerk's office? A. Well, I think he came down to the Council, as far as I can recollect, to see the Shire Clerk.

Q. He was looking through the Council's records for matters relevant to this action? A. That I do not know.

Q. But didn't you come over and talk to him? A. Yes.

Q. And you approached Mr Skelton, didn't you? A. I certainly did not.

Q. You went over to him? A. Mr Skelton came over to me.

Q. I thought you said a moment ago you went over to him? A. No.

Q. You said that didn't you? A. I do not recall saying that.

Q. What were you doing at this time in the Shire Clerk's office? A. As my duties—

Q. What were you doing? A.—as President of Warringah Shire I had many occasions to go backwards and forwards to the Shire Clerk's office.

20 Q. I am asking what you were doing in the Shire Clerk's office. Can you remember that? A. I cannot really remember what I was doing there, but it would be something to do with Council.

Q. I dare say it was. And when you went into the Shire Clerk's office you there found Mr Skelton going through the Council's records, didn't you? A. I did not see Mr Skelton going through any records.

Q. Wasn't Mr Skelton going through those records in your presence and the presence of another Council officer? A. No.

Q. Are you sure? A. Positive.

Q. Wasn't your late President, Mr Fisher, there with you? A. 30 Definitely not, definitely not.

Q. Do you recollect the motion by this Council passed in March 1952 with reference to sub-standard homes and occupation of garages and that sort of thing? A. I do recollect the motion, yes.

MR LOXTON: It is dated 31st March 1952.

Q. Just have a look at that resolution. I want you to identify it. Do you recollect that resolution? A. I do.

Q. And you are now looking at the minutes of that resolution appearing in the Council's minute book of March 1952? A. Yes.

Q. Has that resolution ever been in any way amended or with- 40 drawn by the Council? A. No.

Q. Who proposed it? A. It was a Presidential minute; it would have been proposed by the President of the day, Councillor Fisher.

Q. Did you second that? A. That is correct.

Q. You seconded it? A. Yes.

Q. You seconded the motion that after the date of this meeting,

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31st March 1952, "The Council refuse consent to any application for dwellings of a non-residential building, such as a garage, even if it forms part of an incomplete building." You did second that motion, didn't you? A. Yes.

Q. And also 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? A. Yes.

10

Q. In seconding that motion you were asking for the opinion of the Council on a matter of policy? A. That is correct.

Q. And you got the opinion of Council on that policy? A. Yes.

Q. They adopted the motion, didn't they? A. Yes.

Q. And that then became the policy of the Warringah Shire Council? A. Yes.

Q. And it still is, isn't it? A. Yes.

Q. You did not get that resolution simply out of the air did you? A. No.

Q. There was at that time a great number of garages being used 20 as dwellings in the Warringah Shire, wasn't there? A. Yes.

Q. And that was deemed by Warringah Shire Council, when they adopted your motion, as being most undesirable? A. Most undesirable, that is right.

Q. And it was undesirable notwithstanding the fact that there was a great housing shortage in the Shire, elsewhere and around in this State? A. Yes.

Q. Since the passing of that resolution, there has been, by the Council, a great number of prosecutions of people using garages as dwellings, has there not? A. Yes.

30

Q. And those prosecutions have in the main resulted either in the occupants being fined, or the occupants vacating the garages? A. That is right.

Q. And that was the purpose of the prosecution? A. Yes.

Q. And in some cases those occupants have had no other home? (Objected to—question rejected.)

Q. In the case of those prosecutions they were all brought as a result of a minute of a resolution by the Council, were they not? A. Yes.

HIS HONOR: You mean this minute you have just spoken of? 40

MR LOXTON: No. Each prosecution was authorised by individual minute.

HIS HONOR: Q. That is right? A. Yes.

MR LOXTON: Q. And I suppose, the Council, by its minute authorising those prosecutions, considered the merits of the case? A. All cases were adjudged on their merits.

Q. On their merits? A. Yes.

Q. And in a great number of cases there was considerable hardship was there not? A. (Objected to.)

HIS HONOR: Q. What do you mean "adjudged on their merits"? Used you give the occupant of the garage an opportunity to put forward reasons why you should do nothing? A. All cases, as I have stated, were adjudged on their merits, and in some cases of extreme hardship Council did not prosecute. The cases that Council prosecuted on were cases where people lived in the garage while they
10 built their house, and then when they built their house they immediately re-let their garage to some poor unfortunate, and many of the cases that were prosecuted on were cases like that.

Q. All I want to know is this: who would initiate these matters and bring them before the Council? Which officer of the Council?

A. That would come through our solicitor.

Q. Not individual cases? A. Individual cases for prosecution would come before the Health and Building Committee.

Q. On the report of what? A. On the report of the Area Inspectors and then the Chief Health and Building Inspector.

20 Q. Then would the matter come before the full Council? A. Yes.

Q. Was the opportunity given to the person concerned to show cause why you should do nothing about it? A. Before prosecutions were carried out they were all issued with final notices.

Q. Was that before the Council decided they should be prosecuted, or after the Council decided they should be prosecuted? A. After the final notice had been issued.

HIS HONOR: I still do not know the sequence of events.

MR LOXTON: Q. We have not had much opportunity to consider these records, but I am putting to you even in cases of hardship the
30 Council insisted upon its policy. I am not saying they did it wrongly, and I am not criticising it, but that is a fact, they insisted on the policy of the building being vacated? A. I will not say in every case.

Q. Do you remember the case of Mrs Sharpe—

MR HUGHES: Where is this in the particulars?

MR LOXTON: We were never asked for particulars in this.

HIS HONOR: If a request has been made for any sort of particulars and any sort of particulars have been given, let me see the request and the reply.

MR LOXTON: Gratuitously we gave some particulars on this matter
40 and they appear on the second page of the particulars on 12th June 1959.

MR HUGHES: The history of this matter was that Sugerman, J., in the order he made, ordered certain particulars to be given.

HIS HONOR: Tender the documents and let me examine them.

(Letter with particulars from defendant's solicitor to the plaintiff's solicitor tendered and marked Exhibit "C".)

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Judgment of
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Tuesday,
31st May, 1960.

(Further hearing adjourned till 10.00 a.m. Tuesday 31st May, 1960.)

2nd Day—31st May, 1960

Judgment of His Honor Mr Justice Maguire on Admissibility of Evidence

HIS HONOR: Yesterday afternoon, during the cross-examination of Mr Berry, President in 1958 and now of the Council of the Shire of Warringah, a question was asked by counsel for the defendant which was objected to by counsel for the plaintiff as relating to facts which were outside certain particulars which had been furnished by the 10 defendant to the plaintiff. The particulars were furnished in letters of the 23rd December 1958 and the 12th June 1959. A request for particulars had been made by the plaintiff's solicitor in a letter of the 27th June 1958 and the question of what the plaintiff was entitled to by way of particulars was dealt with by Sugerman J. in a judgment on 29th August 1958. In the course of his judgment His Honor said in relation to the fourth and fifth pleas that the plaintiff was entitled to particulars of instances of refusal relied on by the defendant as constituting "systematic refusal" as alleged in those pleas. The particulars in question were delivered pursuant to His Honor's decision 20 and the order subsequently drawn up to give effect to it.

The pleas with which I am now concerned allege that the Warringah Shire was charged with the local government of an area of which Harbord formed part and that the plaintiff was a member of that Shire Council and that the Shire Council was empowered to control, regulate, etc. the erection, alteration and the use of buildings and structures and the Council had systematically refused to permit alteration of garages at Harbord and other places throughout the said Shire for the purpose of their use as dwellings and had systematically refused to permit the use of such garages as dwellings. It is those allegations 30 in the pleas which His Honor ordered to be particularised. The pleas in question then proceeded to say that there was at the time a great shortage of dwellings at Harbord and throughout the Shire and the said refusals by the Council gave rise to great hardship and were the subject of notoriety and public interest both at Harbord and elsewhere in the Shire and by reason of the facts aforesaid it was for the public benefit that the alleged words insofar as they consist of allegations of fact should be published.

It seems clear to me as a matter of construction of the plea that the allegations that the Council had systematically refused to permit, 40 etc., were intended to be allegations of fact which gave rise to a public interest that the matter complained of, so far as it consisted of allegations of fact, should be published. That being so, it seems to me that the particulars which were ordered and which were supplied must be read into the introductory portion of the pleas, so that the situation

now is that it is alleged by the defendant that by reason of the allegations contained in the early part of the pleas, as amplified by the particulars which have been given, it was in the public interest that the defamatory matter should be published so far as it consists of allegations of fact. Those particulars will obviously enough limit the defendant in his attempt to establish that it was in the public interest that the matters of fact complained of should be published. Mr Hughes, however, contended that the particulars also circumscribed the defendant in relation to the evidence he would be entitled to adduce in support of his justification in the same pleas of the matter complained of, so far as the matter complained of consisted of statements of fact.

It seems to me that a question that would arise is whether it would have been open to His Honor to order particulars of justification. Be that as it may, however, I have come to the conclusion as a matter of construction, both of the pleas and of His Honor's order and in the light of the plaintiff's request for particulars which has been supplied to me, that the order did not extend to the defence of justification of what is said to be a matter of fact complained of in the article. This view may lead to somewhat extraordinary results, I do not know, so far as concerns the admissibility of evidence in this trial, but whether it does or not, it is the view to which I have been forced.

Mr Hughes also contended that the particulars which have been furnished limit the defendant as to the type of evidence which he will be entitled to lead to prove facts which would justify the plea of fair comment to such part of the matter complained of as is comment. I do not think that is so. Paragraphs one and two of clause B of the letter of the 27th June 1958 were clearly directed to the introductory portion of the plea and were not directed to the concluding portion, which set up the defence of fair comment. This is made more abundantly clear by the circumstance that the same letter in paragraph four made a specific request for particulars of facts upon which the comment is said to have been made. His Honor made no order in respect of that request for particulars and so I do not think that the particulars which have been given circumscribe the defendant in that regard. I realise, as was pointed out by the House of Lords in *Kemsley v. Foot* ((1952) A. C. 345) that a defendant is not limited in relation to a plea of fair comment to proving facts which are contained in the matter complained of itself, and as a result of the view I have taken as to the effect of the particulars which have been given it might be theoretically open to the defendant here to attempt to prove facts other than those which are alleged in the alleged libel. As a matter of practical politics, however, I do not see how that is likely to arise because, as I construe the pleas, there is a justification of the facts alleged in the matter complained of and it is said in the pleas that such

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part of the matter complained of as consists of comment was fair comment on the facts alleged in the matter complained of.

WILLIAM EDWARD BERRY

Cross-examination continued

MR LOXTON: Q. You remember yesterday I was asking you about the proceedings taken by the Council against people who were living in garages, converted or otherwise? A. Yes.

Q. To refresh your memory, do you remember you did say to His Honor that the Council continued up till 1958, anyhow, to give 10 effect to the policy expressed in the minute of March 1952 to which I drew your attention. Do you remember? A. Yes.

Q. You made one qualification. Do you remember you said that the Council did not enforce that policy in extreme cases? A. That is correct.

Q. When you left the box I was about to draw your attention to certain specific cases? A. Yes.

Q. I think I had asked you whether all those cases were dealt with by the Council on their merits, in deciding whether or not the Council should prosecute? A. That is right. 20

Q. I want to ask you about half a dozen or so of them. I want to show you a report by the Health Inspector in the case of Frank Oliver Sharp. The facts that were considered by the Council in connection with whether they should proceed or not in this matter were contained in the Health Inspector's report? A. Yes, that would be right.

Q. The facts stated by the Health Inspector were that the garage was occupied by Mrs Sharp, an aged invalid, the mother of the owner of the property? A. Yes.

Q. In that case Council decided to proceed and gave the notice 30 to Mrs Sharp that she must vacate the premises, otherwise there would be legal proceedings. Is not that so? A. It states it there; it must be so.

Q. This all came before you as a member of the Council? A. Yes. But I would not remember every one.

Q. You would not unless you looked at this. I want you to say whether that is so or not.

HIS HONOR: What did they do, they gave her notice to vacate?

MR LOXTON: They gave notice to vacate.

Q. On non-vacation the thing would take the natural course and proceedings would be taken in the Police Court? A. In some cases 40 they granted an extension and it may have gone on for some considerable time. I have known it to go on for six months, 12 months.

HIS HONOR: They usually either get out pursuant to the notice or proceedings were taken in that particular case, Mr Loxton?

MR LOXTON: Q. You do not know whether she got out or not, in that case? A. No, I would not remember.

Q. You do not know whether there was a summons taken out or not, in that case? A. No, I could not say.

Q. So the only position here is that on these facts Council saw fit to give notice to vacate? A. Yes.

Q. I cannot carry it beyond that. I draw your attention to the Health Inspector's report of September 1956 in a case of Percy Matthew Preston. That report was in connection with a consideration by the Council of what proceedings should be taken? A. Yes.

Q. The facts of that case were—

10 MR HUGHES: I object to this form of questioning—"The facts of the case were—" My friend is reading from documents.

MR LOXTON: Q. I will frame it differently. In that case the Health Inspector reported? A. That is his report there, yes.

Q. He reported that—(objected to).

MR HUGHES: I object to this, unless this report came before Council.

MR LOXTON: Q. I am asking you about proceedings in the Council. I suggest this was a report made by the then Health Inspector to the Council? A. No, that would be by one of the officers, by the look of it.

20 HIS HONOR: Q. Did it come before the Council? A. Unless I looked through the file, I could not tell you.

MR LOXTON: Q. Have a look through the file? A. Yes, I remember this case just slightly. This case was the case of people pleading hardship, but being Prestons, hotel people, we felt in Council that they had plenty of money and could afford to put their son somewhere else and therefore Council did prosecute, if I remember rightly.

Q. You did not accept their statement as to hardship? A. That is correct.

Q. The statement as to hardship was that the garage—(objected to).

30 HIS HONOR: What came before Council must be admissible?

MR HUGHES: My objection is against it going in as evidence of the facts.

HIS HONOR: As I see it, it would not be evidence of the facts—you would agree with that?

MR LOXTON: I would agree with that.

HIS HONOR: You are not putting it forward as evidence of the facts?

MR LOXTON: No.

HIS HONOR: You are putting it forward merely as representations
40 that were made to the Council, whether they be true or false.

MR LOXTON: That is all I am putting it as.

Q. It was written in this report to the Council that the garage was occupied by Mrs Preston and her husband and a baby, and that she has been in residence for about three months and somebody else was the owner of the garage—the name does not matter? A. The mother or the father would be the owner of the garage.

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HIS HONOR: Q. The father of Preston? A. Yes.

Q. You said something about the hotel keeper—whereabouts?

A. They have all the booths at the Show and they have the Shakespeare Hotel at Newtown.

MR LOXTON: Q. Would you look at this one. I show you a report by the Health and Building Department of the 14th March 1960. (Objected to; withdrawn.)

Q. I want to draw your attention now to the file in the case of Donald Arthur Cleary of 37 Crescent Road, Newport. Do you remember that one? A. Yes. Could I have a look at the file? 10

Q. What I want to know from you is whether that case came before the Council? A. Yes, that is brought by J. R. Williams and O'Brien, solicitors.

Q. That is a letter written by them? A. Yes.

Q. Did that come before the Council? A. Apparently this case was eventually withdrawn because Council found out by the solicitors' representations—

Q. Take it step by step. The letter to which your attention is drawn was before Council in considering whether or not Council should continue legal proceedings? A. That is so. 20

Q. In this case it was reported to the Council that the occupant was living in a garage with his wife, they had been evicted from their home in Parramatta at Easter of the preceding year and in desperation the occupant purchased on terms the block of land at Crescent Road, Newport, and he had applied to the Commonwealth Bank for finance and although the Bank have not given him any final answer to his application they had in fact procrastinated for quite a period of time and the applicant erected the garage premises and had every intention of building as much of the house as his finances would allow for the protection of himself and his family? A. That would be the Council's 30 policy, to allow the man to start his house and build as much as he could.

Q. These were the facts that were before Council. The occupant, a Mr Cleary, was residing on the premises with his wife and two children, the elder being 20 months and the younger 10 days old. He pointed out that it was practically impossible for a man with such a young family to get accommodation—

MR HUGHES: I do not want to be difficult, but my friend is reading bits of the letter.

MR LOXTON: I am reading it all, but I am paraphrasing. 40

MR HUGHES: I do not think it should be paraphrased.

HIS HONOR: No, strictly speaking it should not be.

MR LOXTON: I withdraw the whole of that question and I will restate it.

Q. It was stated to the Council on behalf of the occupant of this garage by the occupant's solicitor that his client had instructed him

to advise the Council that the writer's client had instructed him to advise the Council that the applicant and his wife were evicted from their home in Parramatta at Easter of last year, and in desperation had purchased on terms the block of land at Crescent Road, Newport. He had applied to the Commonwealth Bank for finance and though they had not given him a final answer to his application, they had in fact procrastinated for quite a period of time. His client had erected a garage premises and had every intention of building as much of a house as his finances would allow, for the protection of himself and
 10 his family? A. Yes.

Q. That his client was residing on the premises with his wife and two children, the elder being 20 months and the younger being 10 days old? A. Yes.

Q. The writer asked him to realise that it was practically impossible for a man with such a young family to find accommodation within his means in the Warringah Shire and the only possibility of his ever obtaining a home for his family was to be able to build on his own block. Do you remember that? A. Yes.

Q. The Council considered those circumstances and decided to
 20 issue a summons? A. That would be right, but was the summons issued before the solicitors' letter? The summons was issued on 20th January and this letter would come after the summons.

HIS HONOR: Q. What happened then? A. Council eventually—by looking at the file, withdrew the summons.

MR LOXTON: Q. To get the whole story, you withdrew the summons on the payment of costs? A. That is right.

(Mr Loxton cross-examined the witness on a matter relating to Hazel Barbara Pointon-King of 34 Woolwich Road, Hunters Hill. Mr Loxton agreed that the evidence adduced on this matter was
 30 inadmissible and His Honor directed that the whole of the evidence in relation to that transaction should be struck out, and is therefore not included in this transcript.)

Q. I want to draw your attention to the case of Mr Dever. In this case of Mr Dever's a summons was actually issued? A. Could I look at the front of the file?

Q. I will ask you that question first. In this case a summons was issued against Mr Dever for occupying or using for residential purposes a building erected for a purpose other than residential, to wit, a garage. Is not that right? A. If I can just—

40 Q. Before you look at the file, I am asking whether a summons was not issued in that case? A. That is the copy, I imagine. I am not very well up in these legal matters but if that is the copy, I would say it could have been issued.

Q. In making its decision to issue that summons, Council had regard to the circumstances of that particular case? A. I should say they would—every case they do.

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Q. What were claimed to be the facts of that case were contained in that letter that I now show you? A. Yes. Could I look at our inspector's report?

Q. Yes, but I will put what is claimed to be the facts first. The facts claimed by the occupant were that he was a builder by trade? A. Yes.

Q. And his reason for occupying the premises was that he had to vacate a cottage that he had been renting? A. Yes.

Q. He also found it more practicable to be on the spot to devote his time towards the completion of the dwelling? A. Yes. 10

Q. In this case he was occupying a garage and at the same time building a residence? A. Yes.

Q. He had a home building loan approved by his bank, to complete the cottage. I will read anything else that Mr Hughes wants me to read. The position of himself and his family was that he had a wife and five children to provide for? A. Yes.

Q. He was a returned ex-serviceman? A. Yes.

Q. He asked you to consider those facts and give what help you could? A. Yes.

Q. Then you had your inspector's report? A. Yes, which I 20 have not seen.

Q. Look at that now? A. This is another case where on the proceedings the man substantially started his house and the Council withdrew the proceedings.

Q. But you issued a summons? A. Yes.

Q. You wanted to turn to your building inspector's report, so let us return to that? A. This is only the matter where it has been withdrawn—there is a report here—adjourned for three months.

Q. Is this the building inspector's report? A. It looks like it.

Q. All this was before Council at the time they issued the summons? A. The file is always before Council and they are tabled— 30 where I sit in the Council, I have the Clerk on one side and the chief town planner and engineer on the other, and all the files are put so that whenever a case like this comes up you always refer to the file. This is the resolution.

Q. Could you tell us what other facts were before Council? A. I am finding it very difficult.

Q. They may have been all the facts you had?

MR. HUGHES: At what stage?

MR LOXTON: At the stage the summons was issued. 40

MR HUGHES: Could we find out what was the date of the letter?

MR LOXTON: I am not worried about details like that.

WITNESS: The letter was 17.7.58. It was about October the summons was withdrawn. This is a memorandum report put out by the Area Officer and it says here "Adapting foundations for occupation. Adapting for five or six years." Apparently this man has been occupying

the foundations for five or six years. "Opposite 51 Dress Circle Road, Avalon; Single brick walls. Alongside cottage. Drainage being done. Plumbing. Five children. Enforced occupation of foundations. Robinson, Dress Circle Road, Phone 2.30."

MR LOXTON: Q. I asked for the Health Inspector's report? A. This is their memorandum. When they go out on the field they have a pad and they write down their different notes.

Q. In that case after the representations of that letter in July, the summons was issued? A. This is 8.7.58.

10 Q. What is the date of the summons? A. The date of the summons is 9.7.58.

Q. Immediately after that letter? A. Yes.

Q. The day after the letter was written, not necessarily after the receipt of the letter?

HIS HONOR: Q. When did the Council instruct that the summons be issued?

MR LOXTON: Q. You have a solicitor? Can you tell us when you gave instructions to the solicitor to issue the summons? A. This man has had quite a lot of reviews by Council. He has been given
20 three months.

Q. We are not criticising Council, I only want these facts. Do not think for a moment I am criticising Council, we are not endeavouring to form a judgment on this matter; we are simply wanting to know all the circumstances claimed to exist in cases where Council took action. Council could have been quite justified in the action taken; I am not concerned with that and I am not going to suggest it was not justified; all I want to know is what the position was? A. You want to know the summons—

Q. When Council gave instructions to the solicitor to issue the
30 summons. I would have thought it was at that Council meeting when the letter was dealt with? A. I do not know; it is left to our solicitor. He may be busy and it might be some weeks after the meeting before the summons—it might go on for months.

Q. The summons was issued the day after the date of the letter? A. Yes.

Q. So proceedings would appear to be issued after the letter. If you want to throw further light on the matter, we may as well have it? A. I am trying to find the date of the Council's decision. Apparently here is one resolution "W. & M. Dever, Lot 53, No. 32 Dress Circle
40 Road, Avalon. Complaint regarding occupation of foundations. Notice issued. Letter to hand from owner." The resolution is "Resolved to recommend that the matter be referred to the solicitor for prosecution." That is dated 29th July 1958.

Q. That is after the date of the letter? A. Yes.

Q. I want you to understand that in none of these cases am I

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seeking to try Council's action or to criticise Council's action. All I want is the facts? A. I am doing the best I can.

Q. You are, thank you. I do not think we will worry you any more; we will have to hope that these will be sufficient to enlighten the gentlemen of the jury as to what the position was. You told us yesterday that after the passing of that resolution in March 1952 there were a great number of prosecutions? A. Quite a big number of prosecutions, yes.

Q. There were a number of cases where notices were given to the occupants to vacate, otherwise proceedings would be taken? A. 10 Yes.

Q. In a number of those cases the occupants vacated without proceedings being taken? A. After final letter and final notice, I would say yes.

Q. That resolution to which I referred you yesterday provided as being the policy of the Council that after the date of the resolution the Council refused consent to any applications to dwell in a non-residential building? A. That is correct.

Q. The practice of the Council since March 1952 has been to permit the district building inspector to deal himself with applications 20 for consent for the Council? A. Where they apply, the chief building inspector after recommendation from the Area Inspector has the right to pass the application.

HIS HONOR: Q. Application for what? A. For building a home.

MR LOXTON: Q. I am not asking about building a home, I am asking about applications by people who want to live in garages or occupy garages as dwellings with the Council's consent to do so? A. Council does not consent to people living in garages.

Q. Would you repeat your answer? A. Council do not allow people to live in garages unless they are altered to comply substantially 30 with the Local Government Act or Ordinance 71.

Q. That is what you say they are doing now, but what is the practice of the Council in dealing with applications for consent to dwell in garages? A. We do not allow them to live in garages.

Q. You do not allow that at all? A. No.

Q. No consents have been given since this resolution was passed? A. Not to live in garages, I would say, no—not to my knowledge.

Q. One of the reasons why Council adopted that policy of refusing consents to dwelling in garages is that though there may be perhaps a strong case by the particular applicant, nevertheless the consent of 40 the Council would enable people other than the occupant to occupy their garage? A. There is only one law of the land, or as it is called a council regulation. It states that people cannot occupy garages unless, as I have stated before, they are substantially altered or rebuilt and made to comply with Council ordinances.

Q. Have you had many applications to convert garages? A. I

would say we probably have had. Some possibly with conversion may have been allowed; some, I would say, would have been refused if they could not comply.

Q. In order for it to be allowed, the building as converted would have to be of such a standard that it would meet all the requirements?

A. It would have to be of a pretty good standard, correct ceiling heights, correct floor and with rooms that would comply with the Council regulations and it would have to be, I would say, a good structure.

10 Q. Would you allow a garage to be partitioned so as to provide for a couple of bedrooms and perhaps a small kitchen? A. If it was a garage large enough and if it would comply—you would have to allow it.

Q. You would not have to, would you? A. If it was, as you said, large enough and could be built to comply with Council's regulations, I could see no reason why Council would refuse it.

Q. There was an application made to the Council by Councillor Jones for approval of some alterations he sought to make to his garage and permission to occupy the garage as so altered? A. That is correct.

20 Q. That application came before the Council on the 17th February 1958? A. I cannot remember the date, but I had an application by Mr Jones come before the Council, yes.

Q. The question that arose in the Council itself in dealing with that application was whether or not the Council should approve of such an application, having regard to its declared policy? A. Yes, that was the question.

Q. On that question, four voted in favour—(objected to).

(The jury retired during argument on the admissibility of the above question.)

30 MR HUGHES: My friend is going to ask if they voted in Council so many in favour and so many against. In my submission that does not go to any issue of justification or fair comment.

HIS HONOR: The plaintiff was present at the meeting was he not?

MR HUGHES: He could not be.

HIS HONOR: He should not be.

MR HUGHES: Nor was he. He withdrew, if he was there. It goes to no issue in the case.

40 HIS HONOR: I do not think that the fact that there was a difference of opinion on a particular case in Council is relevant merely because of that in itself. If the plaintiff had something to do with it, I do not know. What are you putting it on?

MR LOXTON: I am not putting it on that ground. I make no attack on the Council and the plaintiff.

HIS HONOR: You make no attack on the plaintiff?

MR LOXTON: I make no attack on the plaintiff.

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HIS HONOR: Your client did not ever make any attack on the plaintiff?

MR LOXTON: Never has.

HIS HONOR: What about the plea of truth and public benefit?

MR LOXTON: I am telling Your Honor in advance that neither my client nor I as his counsel either make now, will make in the future, or have made in the past any attack on the plaintiff whatever.

HIS HONOR: Or if it should be held that you did, you did not intend that it should be?

MR LOXTON: It is fair and reasonable, is what we have said. 10

HIS HONOR: You accepted the innuendo alleged in the declaration. I have nothing more to say about it except that Mr Loxton from his recent statement might open up some very interesting possibilities.

MR LOXTON: Yes, I will; I will open up very interesting probabilities.

HIS HONOR: I meant at this stage of the proceedings.

MR LOXTON: At this stage the only relevance of this remark is this, it is part of my case that anything that has been said or written is fair. It is a matter on which there are differences of opinion and I am proving now there is a difference of opinion in the Council. It must be relevant evidence. 20

HIS HONOR: The innuendos alleged are these, that the plaintiff made undue and improper use of his position for the purpose of obtaining Council's approval.

MR LOXTON: There is another plea.

HIS HONOR: I am talking about the declaration.

(The witness retired while the argument on admissibility of evidence proceeded.)

(Short adjournment.)

HIS HONOR: Mr Loxton desires to ask of Mr Berry questions designed to establish that the decision of the Council giving permis- 30
sion to the plaintiff to convert his garage was a majority decision. I reject that question, and I have less hesitation in doing so in view of the fact that Mr Loxton has made it abundantly clear during argument on the admissibility of the question that his client does not suggest or desire to suggest that the plaintiff brought any improper pressure to bear on the Councillors or any of them.

MR LOXTON: Would Your Honor see fit to mention that the ground of the tender is as evidence that the question raised was a vexed question in the Council itself.

HIS HONOR: Yes, that can be noted. 40

(Jury returned into Court; the witness returned to the witness box.)

HIS HONOR: During Mr Loxton's cross-examination of Mr Berry in relation to the various transactions, he referred specifically to the case of Mr Dever. Mr Berry had a file in his hands in relation to that matter at the time and Mr Loxton put it to Mr Berry that the

summons was issued on the 9th July, to which Mr Berry assented. I have since had a look at the file myself and it seems to be abundantly clear—whether it is important or not is another question—that the summons was not issued until 15th September. Mr Berry's, and I take it Mr Loxton's error, arises from the fact that the Information contains a date of 9th July, but that is the date of the offence alleged. I think you will find that is so; tell me whether you agree with that.

MR LOXTON: What Your Honor has pointed out is in my favour, only so far these are not tendered.

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- 10 HIS HONOR: You elicited from Mr Berry—what he said was the fact or what you suggested to him was the fact—that the summons was issued on 9th July and I am asking you now just to look at the file more closely than you then did. You were in a hurry and you cannot take unlimited time.

MR LOXTON: I have not had time to read this file.

HIS HONOR: It is there in front of you.

MR LOXTON: I will look at it, certainly, but I must protect myself at the same time.

HIS HONOR: There is no need to protect yourself.

- 20 MR LOXTON: There is, because I have not tendered this document.

HIS HONOR: Hand the document back to me, please.

MR LOXTON: I appreciate what Your Honor is putting to me and I am prepared—

HIS HONOR: Q. You remember being asked questions about the date of the issue of the summons? A. Yes.

Q. It was put to you that it was issued on 9th July and you assented to that? A. Yes.

Q. The form of summons does contain the date 9th July? A. Yes.

- 30 Q. On looking at it again, do you agree that it was in fact issued on the 15th September, the date at the bottom of it? A. I do, Your Honor.

MR LOXTON: I have no objection to what Your Honor has done.

HIS HONOR: Thank you very much; I am not concerned whether you have or not.

MR LOXTON: I want to protect myself. I want it noted that I was not a party at all to what Your Honor has just done.

HIS HONOR: Will you proceed with the cross-examination of Mr Berry, Mr Loxton.

- 40 MR LOXTON: Q. I was asking you about the meeting at which this application by Councillor Jones was considered. Before this meeting and during the currency of the year 1955, the Council saw occasion to take steps to prevent occupation and selling of converted garages? A. Before 1955?

Q. In 1955? A. In 1955.

Q. Did it indeed? A. I thought you said before 1955.

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Q. No, before 1958? A. Before 1958.

Q. And during the currency of 1958 the Council instructed its Shire Clerk to write to the Sydney Morning Herald, the manager of the classified advertising branch? A. I wouldn't remember that unless I saw the file.

Q. Perhaps if I read to you portion of the letter. I put it to you that a letter in these terms was authorised by the Council to be written by its Shire Clerk. This particular one is addressed to the Editor, Classified Advertising Branch, Sydney Morning Herald. It says "Dear Sir, Following conversations between your Mr Hood and the Deputy 10 Shire Clerk I have to inform you this Council is concerned at the number of temporary buildings, converted garages and the like which are being advertised for sale. Council's principal concern is the hardship imposed on bona fide purchasers of such properties if the Council subsequently orders them to vacate the premises or to complete building to the Council's satisfaction. In connection with the above it is pointed out that s. 306 of the Act provides—" and amongst the provisions of that Act the letter quotes the relevant part—"It is realised there may be great difficulty in your refusing advertisements of this type but any assistance you can give would be much appreciated by this Council." 20 Do you recollect a letter such as that being written? A. I do remember, but I could not state exactly what time though.

Q. All the statements so far as I have read this document are correct? (Objected to.)

MR LOXTON: I will read it slowly to the witness, if you wish it.

HIS HONOR: Why not show him the whole letter? He can read it more quickly and grasp its import, can he not?

MR LOXTON: I can show it to him, if Your Honor wishes.

HIS HONOR: I think it is better.

MR LOXTON: Q. So that you know what I was reading, I invite 30 you to look at the letter (shown to witness). A. Yes.

Q. The statements are all correct? A. Yes.

Q. About the same time Council authorised a letter in these terms to be written to the Secretary of the Local Government Association—

MR HUGHES: I do not want to be difficult, but can my friend adopt the ordinary course of showing a document to the witness so that not only he but the witness as well can see what is in it?

HIS HONOR: Also I would think ultimately, provided the subject matter is relevant, Mr Loxton would be entitled to get on the transcript the actual terms of the letter. 40

MR LOXTON: Q. In order that you may understand what I am going to read to you, I invite you now to look at a document from which I am going to read. You can read it if you wish? A. I will just read it.

Q. Did not your Council authorise a letter in these terms to be written to the secretary of the Local Government Association: "Dear

Sir, This Council is concerned in the number of temporary dwellings, including uncompleted buildings, converted garages and the like, which are being advertised for sale. Council's principal concern is to the hardship imposed on bona fide purchasers of such properties when the Council subsequently orders them to vacate premises or to complete building to the Council's satisfaction. This Council has circularised all estate agents in the Manly Municipality and Warringah Shire requesting their co-operation in preventing as far as possible the sale of such properties and has directed that I approach your association
 10 with a view to representations being made to the Real Estate Institute requesting them to urge that estate agents co-operate with Council by not inserting such advertisements in these areas for the occupation of temporary or sub-standard dwellings is not permitted." What is your answer? A. That is correct, Council did that.

Q. You did authorise that? A. Yes.

Q. Harbord was an area where sub-standard dwellings were not permitted? A. Yes, that would be right.

Q. Council also authorised a letter in similar terms to be written to each estate agent in Manly and Warringah? A. That is correct.

20 Q. I use the word "similar" to save reading the whole document. In order to appreciate what is involved in my use of the word "similar" I invite you to look at this document that I show you? A. Yes, that is so.

Q. After the decision of the Council to approve this application by Mr Jones, Council received letters from the Narrabeen Community Centre and also from the Narraweena Progress Association. (Objected to as not going to any issue and as being hearsay; pressed by Mr Loxton on the ground of public interest.)

30 HIS HONOR: It can be noted that Mr Loxton has tendered two letters, one of the 17th March 1958 purporting to be from the Narrabeen Community Centre to the Warringah Shire Clerk and another of the 11th March purporting to come from the Narraweena Progress Association to the Shire Clerk. He has not actually tendered them but he has asked Mr Berry whether they were received and obviously he desires to get the contents of them. I will reject any attempt to get the contents of them. The letters can be m.f.i. "12" and m.f.i. "13".

MR LOXTON: Subject to it not being covered by Your Honor's ruling, I ask this question: Q. Is it not a fact that after the decision of Council to approve of Councillor Jones' application the Council
 40 received letters relating to that decision from both those two bodies, the Narrabeen Community Centre and the Narraweena Progress Association. (Objected to; rejected.)

Q. The report of the Council's decision was given publicity in the daily newspapers circulating throughout Sydney. (Objected to; rejected.)

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Q. Was not the fact of the decision broadcast over the wireless?
(Objected to; rejected.)

Q. Was it not a fact that the Council's decision—

MR HUGHES: I can infer what the question is going to be and if it is to be asked, I submit it should be asked in the absence of the jury; because if it is what I think it is, it flies right in the teeth of Your Honor's previous ruling.

(Mr Loxton wrote on a piece of paper the question he proposed to ask. Mr Hughes objected to the question.)

HIS HONOR: Mr Loxton desires to ask a question which he has 10
been good enough to write out for my consideration and which Mr Hughes has seen fit to object to. I reject the question and so that, if I happen to be wrong, my ruling can be adjudicated upon, the question can be m.f.i. "14" and be given back to Mr Loxton.

MR LOXTON: Q. The Council's decision to approve of Mr Jones' application was followed by a motion for rescission?

MR HUGHES: I object, and I ask my friend to follow the same course as before.

MR LOXTON: I am not bound to.

MR HUGHES: I know you are not bound to, but fairness sometimes 20
dictates—

MR LOXTON: Is it fairness for you to object to this evidence?

HIS HONOR: Why is it not fairness for him to object?

MR LOXTON: Why is it not fair for me to ask this question?

HIS HONOR: You do realise, as well as I do, that the over-riding consideration is that this jury should not have inadmissible material brought to its notice.

MR LOXTON: They are not getting it, but I am entitled to ask the question in the presence of the jury. The jury are the witnesses of this trial—

HIS HONOR: Are you prepared to let me see what you are going 30
to ask this witness about before the question is asked, because if you are not this situation can possibly arise, that it is asked and objected to and it might clearly be inadmissible—it might or it might not.

MR LOXTON: In Your Honor's opinion it might—

HIS HONOR: For the time being it is my opinion that counts.

MR LOXTON: It is, Your Honor, for the time being.

HIS HONOR: It might clearly be inadmissible and it might be prejudicial, but despite the fact that it might in my opinion be inadmissible, if I reject it for that reason the effect might be left on 40
the minds of the jury so it is quite a usual procedure, as you know, to ask the jury to retire until a debate can take place in their absence on the question of whether a particular matter is or is not admissible. An alternative method that is sometimes adopted is for a disputed question to be written down and the judge can adjudicate on it that way. If he rules it is admissible, it can then be asked in the presence

of the jury. But, Mr Loxton, what is wrong with adopting one course or the other, either writing it down or asking the jury to retire? Why do you insist on asking it in the presence of the jury?

MR LOXTON: Because I think I am entitled to. If Your Honor rules against me, I accept Your Honor's ruling.

HIS HONOR: Will you put up with the consequences?

MR LOXTON: No, I will adhere to Your Honor's ruling. If Your Honor thinks I should not do so, I will not do so, but I, first of all, claim the right to ask the question publicly.

10 HIS HONOR: Very well, ask it.

MR LOXTON: But I am not going to ask it under the threat Your Honor has just indicated.

HIS HONOR: Threat, my foot, Mr Loxton, if I may use the expression.

MR LOXTON: It is a threat. Under those circumstances I will waive what I think is my right and adhere to Your Honor's ruling.

HIS HONOR: I have not given a ruling.

MR LOXTON: Your Honor has indicated Your Honor might visit some serious consequences on my client.

20 HIS HONOR: No, I am not saying your question would result in those consequences, but if an unfair situation is created in this or any other trial, of course I would, so would any other Judge, take appropriate action.

MR LOXTON: If there is any question, I will adhere to Your Honor's ruling.

HIS HONOR: I have not ruled on it.

MR LOXTON: I adhere to Your Honor's suggestion.

HIS HONOR: I have ruled on a previous question and for your protection I have had it marked for identification.

30 MR LOXTON: I know Your Honor is perfectly fair in these matters, but I have a duty to discharge for the defendant, but I have not got to bow the neck to everybody's suggestion; I am entitled to put my contentions before the Court.

HIS HONOR: Well, ask the question.

MR LOXTON: I am going to write it down because I am afraid of the consequences.

HIS HONOR: You must have a feeling that it is inadmissible.

MR LOXTON: No, I have a feeling that Your Honor might rule it is inadmissible.

HIS HONOR: There is a sharp distinction, I realise that.

40 MR LOXTON: There is a difference.

HIS HONOR: A very sharp distinction, a very clear one.

MR LOXTON: Yes.

HIS HONOR: Somebody has to decide admissibility of questions, gentlemen. It happens to be me. If I am wrong I can be put right, and the method I have suggested be followed gives Mr Loxton every protection in an appeal court.

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MR LOXTON: That is the question, Your Honor. (Handwritten document tendered, objected to.)

HIS HONOR: The question written down by Mr Loxton is objected to by Mr Hughes. I reject it. The question can be marked for identification "15".

MR LOXTON: Will Your Honor hear me?

HIS HONOR: No, I won't on that.

MR LOXTON: Couldn't I ask the jury to retire?

HIS HONOR: I said I won't hear any argument on that question.

MR LOXTON: That is all I wish to ask.

MR HUGHES: No re-examination.

HIS HONOR: Q. I suppose if you are wanted again you will be accessible? A. Yes.

10

(Witness retired, excused.)

PLAINTIFF

Sworn:

MR HUGHES: Q. Is your name Gordon Berkeley Jones? A. Correct.

Q. Are you the plaintiff in this action? A. Yes.

Q. Where do you live? A. 135 Harbord Road, Harbord.

Q. Is your occupation that of master builder? A. That is correct. 20

Q. You are, at the present time, a member of the Council of the Shire of Warringah? A. That is correct.

Q. How long have you held office as Councillor of that Shire? A. This is my seventh year.

Q. I think you were elected to office for the first time at the end of 1953. Is that so? A. That is correct.

Q. Were you living at your present address in Harbord at the time of the publication of the article—the letter which has given rise to this action? A. That is correct.

HIS HONOR: Q. Did you say 135 Harbord Road— A. Harbord. 30

MR HUGHES: Q. Is that a house that you had caused to be built yourself? A. Yes.

Q. At the end of 1957 or in the early part of 1958, did you decide to do anything with respect to that house, or the garage attached to it? A. Yes. I submitted an application to the Council for reconstruction of part of my garage.

Q. That garage was at the rear of your dwelling house? A. That is correct.

Q. What sort of garage was it? A. It was a treble garage with annex, toilet and shower room on the end of it, and was texture brick 40 with a tiled roof.

HIS HONOR: Q. A toilet-shower—outside the main building or what? A. The shower was in the building but the toilet—you had to go outside and then in again.

MR HUGHES: Q. Did you cause some plans to be prepared in con-

nection with your proposed application to the Council? A. I got a Mr J. H. Chaseling to draw plans for me.

Q. (Approaching witness.) First of all, would you look at those plans. They appear to be duplicates, is that so? A. That is correct.

Q. Are those the plans which you submitted to the Council for its approval? A. That is correct.

Q. Is that the application form that you signed? A. Yes, that is correct.

Q. Is that another prescribed form that you signed in connection
10 with your application? A. Yes, that is a Council specification.

Q. Were the duplicate plans, the application form and the Council specification signed by you submitted at one and the same time, as far as you recall? A. Yes.

HIS HONOR: Q. What is the scale of the building, the proposed floor plan? A. One-eighth or one-fortieth equals one inch.

HIS HONOR: Which is it, Mr Hughes?

MR HUGHES: My impression would be, and it is only a guess, that there is a different scale on these two drawings than on these.

WITNESS: I would say that this part here is just done to a small
20 scale, where the actual application would be done to one-eighth scale. It would need too much paper to do the whole block of land all one-eighth scale.

HIS HONOR: Q. That would make it about what? A. Thirty six feet from there to there.

MR HUGHES: Q. You might tell His Honor and the gentlemen of the jury what was proposed in relation to this reconstruction of portion of your garage? A. Well, I had been very sick—

MR LOXTON: What was proposed is all you are asked.

WITNESS: It was proposed to get a lady with or without a child, to
30 provide some domestic help for my wife.

MR HUGHES: Q. Why was that plan formulated? (Objected to.)

MR LOXTON: I submit this evidence can have no relevance to any issue that the plaintiff has to prove. The only issues that the plaintiff has to prove are the meanings of the words. This can have no bearing at all on the meaning of the words. So far as fair comment is concerned, it cannot have any bearing on that. Those are the only two grounds of possible relevance that occur to me. That is all I have to submit, subject to somebody putting up to me some other ground of relevance.

40 HIS HONOR: On what basis do you put the question?

MR HUGHES: I was putting it on the basis of introducing the matter of damages, which I did open to the jury. Your Honor will remember I opened to the jury there was some sickness, and I opened as one of the matters—it is not a matter of great importance, but this is leading up to certain evidence, as I understand my instruction, that may be given as to the effect of the article on the plaintiff when he read it.

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MR LOXTON: I submit it can have no relevance on the question of damages for loss of reputation. The damages depend wholly and solely on the meaning of the word. It cannot make any difference whatsoever. It is presumed. It cannot go to malice, and I submit with respect it cannot go to anything.

MR HUGHES: I will withdraw the question at this stage and introduce the matter in another and more apt way at a later stage.

I tender now the plans and other documents which have been identified by the plaintiff. (Objected to.)

HIS HONOR: The inescapable fact is that the plaintiff claims that 10 your client's article defamed in that whole transaction was "crook", and that he improperly used his position to secure the Council's approval. Whether the transaction was as I have described, or whether it was bona fide, which must be investigated, the plaintiff is entitled to investigate it; to show what sort of an application it really was he made.

MR LOXTON: The only issue so far as fact is concerned is whether an application was made, not whether it is a good application or not. The defences are not guilty. That puts in issue the publication—it was defamatory of the plaintiff. That is a pure question of interpreta- 20 tion. This cannot throw light on the meaning of the words. They are not matters which a reasonable man would have in mind when he was interpreting those words. In this case, I would submit the question is whether it is defamatory or otherwise depends wholly and solely on the document itself. This is not extrinsic evidence of a nature which casts any light on how a reasonable man would interpret them, and that is the limit to which the extrinsic evidence can go on this issue. So, I submit it is not admissible on the issue raised by the plea of not guilty.

So far as the plea of fair comment and truth and public benefit 30 is concerned, it does not go to whether the comment is fair or otherwise, because it is not a circumstance which must be presumed to be within the knowledge of the man who made the comment. So far as truth is concerned, the only fact—

HIS HONOR: The comment is made on what is said to be the facts.

MR LOXTON: The comment is made on the fact that he made an application—not that he made a good application or he made a bad application. The only allegation of fact that concerns Mr Jones is that he made an application. I would submit that the only document that is admissible in this case is the formally signed application. 40

HIS HONOR: Suppose it turned out that this was not a garage at all, would not the plaintiff be able to show that?

MR LOXTON: With respect, so far, the evidence of the plaintiff's own witness is that it was a garage. Supposing he never made application as to a garage at all—well, I suppose that would be relevant. This is tendered for the purpose of stating the nature of the application.

MR HUGHES: I am not tendering it on any issue raised by the pleas of fair comment or truth and public benefit; I am tendering it on this basis, that it is relevant and admissible on the issue of libel or no libel, to put into evidence the attendant circumstances. My friend has stated in his argument that it is relevant for the jury to know that the plaintiff made an application; the fact is that the application was a written application, accompanied by certain documents, which must be taken to be part of the application, and it being in writing, the proper way for it to go before the jury is for it to go before them in the form of the documents. (Admitted.)

(Plans and attendant documents tendered, marked Exhibit "D".)

Q. I think you mentioned that you planned to get some live-in domestic help? A. That is correct.

Q. The next thing I want to ask you is this: did you read the anonymous letter in the Warringah-Manly News, upon which you have brought this action? A. I did.

Q. Did that letter, when you read it, have any effect on you? A. I was very, very upset about it. I felt that my father had given me a good name— (The answer was repeated at the request of Mr Loxton as follows.) It is taking my children's character and my own away. I felt that this letter was taking my character away. My father had given me a good name and I wanted to pass a good name on— (objected to).

MR LOXTON: I don't say, perhaps, injured feelings might not come into it, but the meaning put to it I am objecting to. He is entitled to say how he felt. (Question allowed.)

MR HUGHES: Q. At the time when you read the article on which you sued, what was the condition of your health? A. It was very bad. I had spent most of—(objected to).

30 MR HUGHES: I refer to page 649.

MR LOXTON: We are not concerned with the state of his health as a fact today, unless it is first connected with the same publication. I understood Mr Hughes asked the plaintiff what was the state of his health at the time this article was published.

MR HUGHES: Yes, as introductory to a further question. I refer Your Honor to the middle paragraph—(page 649). (Allowed.)

Q. What was the condition of your health at the time when the paper was published? A. For the previous twelve months I had been, for some four or five months, in Concord Repatriation Hospital. 40 I had been temporarily totally incapacitated for a period of time. My nerves were also affected and I was actually recuperating—(objected to.)

MR LOXTON: This is not a heading of damage claimed.

MR HUGHES: I am not suggesting his previous condition of health is attributable. I am leading up to a question, which is the next question, what effect if any—

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HIS HONOR: Mr Loxton now argues it is a matter of special damage, and it has not been pleaded.

MR HUGHES: It has not been specially pleaded. I submit it is not a matter of special damage; it is a matter of general damage. Injury to reputation and feelings fall within general damage I submit. (Allowed.)

Q. Did the upset which you mentioned, caused by reading the article, have any effect on you in respect of your health? A. Yes, it definitely caused me more nervousness. I was very—it affected my nerves because I was suffering from nerves and other ailments, and 10 it definitely affected me considerably.

CROSS-EXAMINATION

MR LOXTON: Q. Do you say you were ill prior to this occasion? A. I had been ill the previous 12 months.

Q. You attended all Council meetings didn't you? A. No, not for the previous 12 months. I had considerable leave of absence.

Q. From the previous September in 1957 till February 1958 you attended all Council meetings? A. No, I would not say that would be correct. I had many leaves of absence. I would not.

Q. How do you remember whether you were very ill at that time? 20 A. I was attending the doctor and I was on Repatriation pension.

Q. I show you the Council Minutes. Would you look at these Council Minutes. Suppose the Council Minutes say you were at the meetings? A. That would be correct, I did attend Council. I don't know whether I attended every meeting.

Q. You see at the commencement— A. That is one meeting.

HIS HONOR: Q. What is the date of that? A. Monday, 30th September 1957.

MR LOXTON: Q. You attended that meeting? A. That is correct.

Q. The next meeting is 14th October is it? A. That is correct. 30

Q. You attended that meeting? A. That is correct.

Q. The next meeting— A. Is the 28th October.

Q. You attended that meeting? A. That is correct.

Q. And next is 11th November 1957. You attended that meeting? A. That is correct.

Q. The next is the 16th November 1957, and you attended that meeting? A. That is correct.

Q. The next is the 25th November 1957. You attended that meeting? A. That is correct.

Q. And the next is 2nd December 1957. You attended that 40 meeting? A. That is correct.

Q. And the next is the 9th December 1957. You attended that meeting? A. That is correct.

Q. The next is the 16th December 1957. You attended that meeting? A. That is correct.

Q. The next is 23rd December 1957. You attended that meeting?
A. That is correct.

Q. The next one then is 20th January 1958. You attended that?
A. That is correct.

Q. The next one is 3rd February 1958. You attended that?
A. That is correct.

Q. That is the meeting at which your application was approved is it not? A. Yes, but I was not there.

Q. You did not attend that actual discussion, that actual business, but you were at the meeting? A. That is correct.

Q. The next meeting was Monday, 17th February. You attended that meeting? A. I arrived later in the evening. I did attend.

Q. The next one is 3rd March? A. That is right, I was there.

Q. You were there also on 17th March? A. That is true.

Q. It would be an understatement to say that you were a war pensioner, would it not? A. How do you mean an understatement?

Q. You may be entitled to a pension but you are as a matter of fact a builder are you not? A. That is correct.

Q. And you are a builder in quite a big way? (Objected to.)

20 MR LOXTON: (In the absence of the jury.) It would have nothing to do with it had my friend not opened the plaintiff was a war pensioner.

HIS HONOR: The evidence he had been a war pensioner was admitted on the basis of the condition of his health. The effect on a man's health is relevant to be considered in assessing damages. And a man's health is likely to suffer more from a particular defamation (or a jury might think so at any rate) if his pre-existing health condition is not good. That is the way it was dealt with, was it not?

MR LOXTON: Not according to my recollection, that was not so.

30 HIS HONOR: Mr Hughes did say something about the plaintiff's health in opening.

MR LOXTON: What he said was he needed some help in the house for his health. It was my submission that was quite irrelevant in these proceedings. But the other matter, the pensioner matter, I think was thrown in to boost damages.

40 HIS HONOR: It was thrown in as being part of the picture of what is claimed, rightly or wrongly, to have been the state of the plaintiff's health immediately before this publication. Is it not just the same to say, as a matter of principle on the question of admissibility, "before this article was written I had had three coronary occlusions; this upset me very much and I had a fourth"? Is it not the same as a man saying, "I was in ill health, I could not stand up to too much, I was a war pensioner"?

MR LOXTON: Take the illustration Your Honor gave. The evidence would be inadmissible unless some medical evidence was given to connect it. However, Your Honor has ruled and I am bound by Your Honor's ruling, health has something to do with it.

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I accept Your Honor's ruling.

The position now is that I was leading this evidence to rebut ad miseracordiam.

HIS HONOR: It won't be dealt with that way. I can assure you of that. If Mr Hughes should attempt to do so, he will be stopped.

(Luncheon adjournment.)

AT 2 P.M.

MR LOXTON: I hand these papers to Your Honor. They are very cryptic. (Handwritten documents tendered.)

HIS HONOR: The question written on the document—I rejected that. 10

MR LOXTON: Perhaps I should have tendered the other matters which are parallel, in that short respect. My friend spoke to me first, and I asked that particular question.

MR HUGHES: I would submit that would be covered precisely by Your Honor's previous ruling.

HIS HONOR: You put it this way here, in this document: the evidence I intended to call etc. You are calling evidence at the moment; you are not calling evidence at the moment; you are cross-examining the plaintiff. I think it is covered by my previous ruling in relation to the document marked for identification 15. I will reject any question 20 along those lines. That can be marked for identification too.

(Handwritten question submitted by Counsel, m.f.i. 16.)

MR LOXTON: Q. At the adjournment I was asking you about your attendance at the Council meetings? A. That is correct.

Q. In addition to attending Council meetings—I think we came to some date in March, 1958—you subsequently conducted two election campaigns? A. Yes.

Q. You contested two election campaigns? A. I just conducted one recently. I am trying to get the date of the other one.

Q. One election you contested was the State Election. I think 30 it was April, 1959? A. 1956—(objected to).

MR HUGHES: It goes not to credit, that a person stood for a State election.

HIS HONOR: You cross-examined Mr Jones earlier on the number of meetings he attended. I took it that was following on and intended to be related to his evidence as to the state of his health.

MR LOXTON: Yes, and this too.

HIS HONOR: Q. Were you a candidate at the State Parliamentary elections last year? A. No, it was 1956, I feel sure. It was prior to this—1956, yes. 40

MR LOXTON: Q. You did intend contesting the forthcoming State election did you not? (Objected to.)

WITNESS: I would not say that.

HIS HONOR: What was the question?

MR LOXTON: Q. You did, on 30th January 1959, contemplate standing as a candidate for the N.S.W. elections? A. No.

MR HUGHES: If this is 1959, a year after the publication—

HIS HONOR: I think if it had been around about the time it would have been admissible as bearing on the question of his health at the time. If it is removed from the date of the publication by, say, 11 months, I think that is a matter for the jury to say whether it has any weight or whether it has not.

MR LOXTON: (Approaching witness.) That is a letter written by your solicitors is it not? A. That is correct.

Q. And it is written to the defendant's solicitors? A. That is 10 correct.

Q. And in it they state, do they not, that because of your position in the Manly-Warringah district and of the forthcoming State elections, "at which he intends to stand as a candidate, we have been instructed to request an expedited hearing." Did you ever tell your solicitors— A. It is common knowledge I think when I stood originally—

Q. Answer my question would you please? Did you ever tell your solicitors you intended to stand as a candidate? A. Yes. I didn't say what year. I have got political aspirations.

20 Q. Did you tell your solicitors you intended to stand as a candidate at the forthcoming elections? A. I don't think I could have; it would have been a bit too early to even know whether I was going to stand.

Q. I am asking whether you did or you did not? A. Not that I can recall.

Q. Of course, you stood for the last elections to the Warringah Shire Council? A. That is correct.

Q. When were they? A. In December of last year.

Q. December 1959? A. 1959.

30 Q. That was the 3rd time you submitted yourself for election? A. For Council elections, yes.

Q. At the first election you gained about 800 primary—(objected to).

MR LOXTON: I want to get the number of votes he received at the 1st, 2nd and 3rd elections.

HIS HONOR: If they increase it might be due to the poor calibre of opponents. If they decrease it might be due to the improved calibre of opponents. A man can have a good reputation as far as character is concerned and yet not be regarded by some people as a proper 40 representative in a Council.

MR LOXTON: The purpose of the evidence would be to prove that he went back at the last elections with a great increase in the votes. I submit that is relevant on the question—

MR HUGHES: There could be so many accidental features about it (question admitted).

MR LOXTON: Q. I will suggest to you approximately the correct

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figures. At the first election you gained about 800 primary votes, did you not? A. It is 1953, it is a bit hard. I thought it was a few more to be truthful, round about 1,000 I thought, but I am not—

Q. At the second you got about the same? A. No, about 1,600 I think to be truthful—1,600 and some odd.

Q. And at the last election you got 3,400? A. I didn't get 3,400, I don't think I ended up with 3,400. After preferences had been distributed—

Q. What were your primary votes? A. I think about 2,600, 2,700.

HIS HONOR: Q. Were the number of electors the same or had they altered over the years? A. They increased. Our population had risen 50 per cent.

MR LOXTON: Q. These elections are held third yearly? A. Yes.

Q. So that would be the results of the voting in the elections of 1959, 1956 and 1953? A. The other way around were they not?

MR LOXTON: I have given them in reverse.

I wish to refer to a newspaper article, which I show Your Honor. It may be relevant on the question of damages.

MR HUGHES: I object to it.

HIS HONOR: In one sense it is certainly covered by my previous ruling. Mr Loxton has now suggested it may be relevant on the question of damages. I think there is some law about it.

MR HUGHES: There is a provision in the old Defamation Act which, of course, governs this particular case. I have not got the Act with me, but my recollection of the section is that it provides damages covered in other actions would be admissible.

HIS HONOR: Mr Loxton, you have tendered this. You have suggested that it may be relevant to the question of damages. Presumably you have considered that aspect. Have you got anything to which you can direct my attention?

MR LOXTON: No, I put it on elementary principles with respect. I have no authority.

HIS HONOR: Unless you show me some authority which persuades me it is admissible, I reject it.

MR. LOXTON: I have no authority.

MR HUGHES: There is no evidence in re-examination.

(Witness retired.)

Before I close my case I would like now to call the defendant to answer subpoena duces tecum.

DEFENDANT

Called to answer subpoena:

MR HUGHES: Q. Is your name Clement John Skelton? A. Yes.

Q. You are defendant in this action? A. Yes.

Q. Do you produce certain documents to the Court in response

to a subpoena duces tecum served on you on behalf of the plaintiff?
A. What are they?

HIS HONOR: Q. Have you got the subpoena? A. I have not got it on me.

Q. Can you get it?

MR HUGHES: May I show the witness my copy?

HIS HONOR: Yes.

Q. Do you produce to the Court the documents mentioned in that subpoena? A. No, I have not got them.

10 MR HUGHES: Q. In that case may the witness be sworn upon his subpoena?

HIS HONOR: Yes.

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DEFENDANT

Sworn:

MR HUGHES: I notice the witness was sworn to give evidence in the cause; it is really to give information. (Defendant sworn to make true answer.)

MR HUGHES: Q. You have given your name and stated, on the floor of the court, you are the defendant. Was a subpoena in terms
20 of the document which I now show you served upon you? A. Yes.

Q. That was a subpoena to produce a number of documents?

A. Yes.

Q. The first document that you were asked to produce was the original of the letter set out in the plaintiff's declaration—that is the letter, the subject of the action? A. That is right.

Q. Did you understand that? A. Yes.

Q. Is that letter in your possession? A. No.

Q. Is it in your power, in the sense you know where to get hold of it? A. No, I don't know where it is.

30 Q. Has it been in your possession at any time? A. Only when it was set and published in the newspaper.

Q. It was in your possession and control at one time was it?

A. Yes.

Q. What has happened to it? A. I couldn't say.

Q. When did it pass out of your possession? A. Well, it was put in with the other copy. There is a drawer. All the copies go in after the paper is published, and it might be there for a week or a fortnight and then the boy cleans the drawer out and it goes into the waste paper basket.

40 Q. When did you last see the document? A. After I received the writ.

Q. And you did not keep it after you received the writ? A. I put it back in the drawer.

Q. You put it back in the drawer? A. Yes.

Q. When did you put it back in the drawer? A. I can't remember now.

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Q. You can't remember? A. No—just the exact date.

Q. Your solicitors were asked to give information as to the contributor of the letter were they not? A. The name and address, yes.

Q. Did you not have to have recourse to the document to answer that question? A. That is right.

Q. When do you say, approximately, that you last saw the letter? A. After I got the address—the name and address of the writer.

Q. Then you were content to let it be given away or be destroyed? A. No, no. I put it back into the drawer with the other copy. 10

Q. If it was put back into the drawer with the other copy then why cannot it be produced? A. Because I can't find it. It is not there.

Q. When did you last look for it? (No answer.)

Q. When did you last look for it? A. Well, I just could not say.

Q. Would you try? Take your time and think. When did you last look for it? A. Well, it might have been a week, a couple of weeks after I received the writ, just to see if it was there, but it was not there.

Q. It was not there? A. No.

Q. Do you remember swearing a moment ago you had to have 20 recourse to the document to be able to supply the information which had been requested? A. That is right.

Q. Would you have a look at this letter (shown to witness). That information as to the name of the writer of the article was supplied by your solicitor in a letter dated 19th March, 1958, wasn't it? A. That is right.

Q. Do you swear that the letter was in your possession at that date? A. Well it must have been, because the address is here.

Q. What did you do with it after that? A. As soon as I got the name and address I put it back in the drawer. I have already told 30 you that.

Q. When did you last look in the drawer to see if it was still there? A. I told you before I would not know.

Q. You cannot help the Court at all? A. No, I didn't think the matter was that important in any case.

Q. You didn't think the matter was that important? A. No.

Q. You knew, didn't you, that the letter was the very subject matter of this action? A. I published it. I am the proprietor and publisher and I put the letter—

Q. You swear the letter is no longer in your possession and in 40 your control? A. Definitely.

Q. Do you produce to the court all records showing the circulation of the Manly-Warringah News during the months January, February and March, 1958? A. I can't produce those because I haven't got any records.

Q. You haven't got any records? A. No. I don't keep records.

Q. Do you produce to the court any records—I come to the third item in the subpoena now—showing the number of copies of the issue of the Manly-Warringah News dated 27th February 1958, sold or distributed by you or on your behalf? Do you produce any such records? A. No. I don't keep records.

Q. Do you keep no circulation records? A. No, they vary. It varies—circulation varies.

Q. My question to you is did you at any time keep records showing the circulation of that newspaper, of 27th February 1958? A.

10 No. Why should I keep a record of that? I don't keep records for any week, any issue.

MR HUGHES: No. 4 does not matter.

MR LOXTON: Did you keep letter to the editor? A. I beg your pardon?

Q. Is it your practice to keep letters to the editor published in the newspaper? A. No.

MR HUGHES: I object to my friend re-examining or cross-examining on this. These questions are asked purely to elicit whether the documents are in existence. I submit my friend has no right to question
20 the witness at this stage.

MR LOXTON: That is the only question I wish to ask him.

HIS HONOR: It does not matter.

(Witness retired.)

MR HUGHES: That is the plaintiff's case.

CASE FOR THE DEFENDANT:

MR LOXTON: The defendant won't call any evidence. I move for a verdict. They are questions of law. I should think the jury could be released.

30 HIS HONOR: (To jury.) Mr Loxton has asked me to direct a verdict, as a matter of law, for the defendant, and I propose to hear what he has got to say in support of that. If I uphold his submissions, that is the end of the case. If I don't then the matter will go to you for consideration. But it seems that this argument as to whether there is a case to go to the jury or not is going to take some time. I therefore excuse you until tomorrow morning until 10 a.m.

MR LOXTON: The ground on which I propose to move for a verdict is under the first plea, publication complained of is not defamatory on the plaintiff.

HIS HONOR: You have got to go so far as to say cannot be held.

40 MR LOXTON: Yes, is not capable of being given a defamatory meaning as against the plaintiff. Under the second and third pleas, that there is no evidence upon which it could be held that the comment is unfair; and there is no evidence of malice. It might be that malice might be a substitute for unfairness.

HIS HONOR: You submit there is no evidence the comment was unfair.

MR LOXTON: Yes.

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HIS HONOR: And no evidence of malice.

MR LOXTON: And under the fourth and fifth pleas that on the evidence the facts alleged as libel are true; in so far as they relate to the plaintiff, they are published in public interest. And so far as the plaintiff's declaration alleges matters of comment, the comment is fair or there is no evidence that the comment was other than fair and it was in the public interest.

Those are the grounds on which I move for a verdict. Before drawing Your Honor's attention to the authorities that I have here on this question whether a publication is defamatory or not, may I 10 briefly refer Your Honor to the circumstances on which I rely.

HIS HONOR: You have stated your submissions. Now you are going to deal with them in order.

MR LOXTON: I will deal with them in that order. If I might in respect of them all state the extrinsic matters so far as they have any bearing on those questions; there is no dispute in this action as to certain matters. There is no dispute for instance of publication, that the defendant is the proprietor of the newspaper, and it appears that the newspaper itself is one that circulates in the Warringah Shire. There is no dispute that the plaintiff is a councillor, that he has been 20 a councillor since 1953, that he made an application for the Council's approval to convert a garage for the purpose of using it as a dwelling, and that application was approved. The evidence of the plaintiff's own witness is that it was a firm policy of the Council not to give consent to use garages as dwellings—or to use converted garages—other than in cases where, by the alterations to the garage, the building itself was of a high standard as a dwelling. The witness said "A very high standard" or something like that.

HIS HONOR: It had to conform with the ordinance.

MR LOXTON: With the regulations. I will use the term, "at all 30 material times": that the Council, at all material times was implementing that resolution by refusing consent in all cases.

HIS HONOR: In many cases.

MR LOXTON: Consent to dwelling in a garage was refused in all cases; but if you could get the approval of your alterations then, of course, you would get consent to occupy. That the Council had given publicity to its policy by notices to all the estate agents in the Warringah Shire, to the Local Government Association and to the Sydney Morning Herald. That there was, at all material times, a housing shortage; that there was in the Warringah Shire, including Harbord, a great number 40 of cases where garages were being occupied as dwellings; that this gave the Council grave concern; that the Council was enforcing its regulations by notices warning that the use of garages was under pain of prosecution; that except in extreme cases the Council pursued its policy by prosecution.

I might go back to the notice. The documents referred to garages converted. It makes specific mention of converted garages.

MR HUGHES: May I raise one question about documents at this stage. My learned friend said you can look at the documents.

I want to raise this point now so it will be clear where I stand. My learned friend said he was not calling evidence. I suggest he has got to; he has got to put the documents in. He cross-examined on documents and he showed witness's documents, and he has got to put them in. In my submission he cannot elect not to call evidence. That
10 is a matter to be debated later. My friend has moved for a verdict. If it comes to this, if Your Honor holds there is a case to go to the jury, my friend must put in documents on which he has cross-examined, with the usual consequences.

HIS HONOR: We should determine this now before this question of whether he is obliged to go into evidence.

MR LOXTON: I said I am not going into evidence. I move for a verdict.

MR HUGHES: I suggest my learned friend is not in a position to say "I am not going into evidence", because he has cross-examined on
20 documents, put them in the witnesses' hands, and I suggest that imposes the obligation on him to put the documents in.

HIS HONOR: You might be right, but I am by no means sure. This is my understanding of it, if Counsel for a defendant calls for a document and cross-examines on it, then he is obliged to put that document into evidence. I am not aware that the situation is the same if he cross-examines on documents that he obtains under subpoena duces tecum.

MR HUGHES: I suggest the principle is the same.

HIS HONOR: What does Phipson say?

30 MR HUGHES: I have not brought it. All I can speak of is the practice I have seen and heard of being adopted in other courts, in nisi prius. If Counsel, cross-examining, choose to put documents in witnesses' hands so the evidence, it becomes incorporated in the evidence, he does so subject to the obligation to put the document in. I know of no passage in Phipson which supports that, but I have heard of it before. I can only speak from experience.

HIS HONOR: May you not be confusing this situation with the situation where cross-examining Counsel calls for a document?

MR HUGHES: No. I had in mind the sort of case where Counsel
40 for the defendant has his own plan in, say, a running-down case and cross-examines a witness on the plan; so the document becomes merged in the evidence. He must put it in otherwise the picture is incomplete.

If one calls for a document pursuant to notice to produce or when one calls for a document and it is in court and it is produced the obligation to tender is attracted as soon as the document is accepted on that call. In the case of a document produced on subpoena duces

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tecum, leave being given to counsel to seek that does not attract the obligation to tender; but the obligation to tender emerges or arises when that document, however it comes into counsel's hands, is produced and put to the witness. That would be the distinction, in my respectful submission.

I know of no authority, I can only speak of my understanding of the practice.

MR. LOXTON: My friend cannot wait, hear me move for a verdict and in the course of my address on the verdict point make this objection; because if he feels that he ought to have done something earlier. 10 I stated I am not calling evidence. I am moving for a verdict. He does this after he has heard the most important part of the argument. The evidence has been tendered, and it is on the record as to objections taken.

HIS HONOR: What is the law?

MR LOXTON: Under the circumstances I simply show documents for the purpose of refreshing memory. I am perfectly entitled to do so without in any way being bound to go into evidence.

MR HUGHES: At page 500, Phipson 9th edition, "documents produced or referred to by Witness" there is the passage, "When a party 20 calls for a document which he has given his opponent notice to produce and the latter does not produce it . . ." that seems to imply it has got to be put in.

I go back to 461. That does not seem to bear on it. 493 seems to deal with documents used to refresh recollection. I notice at 493, "if a document fails to refresh . . ." that may be in my favour. Here, my learned friend cross-examined on the contents of a number of documents and in respect of some of them he read only portion and paraphrased.

HIS HONOR: What you have just read is dealing specifically with 30 documents which a witness has consulted to refresh his recollection and only with that?

MR HUGHES: That is true; it is not precisely the point. At p. 494, "putting in documents"—"In Chancery it has been held . . ." These documents have been read to the jury.

HIS HONOR: No. He asked the witness to say, "Didn't you write a letter", or "didn't the Council write a letter".

MR HUGHES: And a number of letters were read—excerpts from them: "In a jury trial any document which has been read to a jury . . . treated as evidence". 40

HIS HONOR: I imagine that refers to documents merely read from the bar table.

MR HUGHES: I know of no passage in the book that is strictly in point; but in these matters it is sometimes not unprofitable to consult what is the practice in the courts. And I have understood it to be the case, Your Honor, and I know of instances which have arisen in

the course of trials where, if counsel for the defendant cross-examined a witness on a document, in the sense of putting it in his hands or reading it and getting him to agree to it—something such as a plan or a document—and goes so far as to show the document to the witness, he is precluded from saying he calls no evidence.

HIS HONOR: You could have objected, could you not, to Mr Berry being asked, “Did not the council write this letter”. You could not have objected to that, but as Mr Loxton went further and said, “Now listen to this; that is what the council wrote is it not”? Couldn’t you
10 have objected to that?

MR HUGHES: May be I could have, but with respect that does not touch the present question because there may be some point in not objecting in such circumstances, where you want your opponent to be forced into evidence, particularly in a case like this, which is perhaps a battle of tactics.

HIS HONOR: I cannot recall a case where a party has been required to tender documents on which he has cross-examined a witness except where he has obtained those documents on a call.

MR HUGHES: The only significance of obtaining the document on
20 call is that the counsel who calls for it is obliged, willy nilly to put it in.
HIS HONOR: If he looks at it.

MR HUGHES: Yes, that is the penalty he incurs. That really does not touch the present problem. In this case there are good reasons for saying that the defendant should be obliged to put the documents in, because my learned friend in the course of cross-examining on them said, or gave it to be understood he was not reading the whole.

HIS HONOR: You said that was not right, and I suggested he had better read the whole.

MR HUGHES: That was not in all cases done.

30 HIS HONOR: After I made the suggestion there was no further complaint so far as I remember.

MR HUGHES: I refer Your Honor to Roscoe’s Law of Evidence, 12th edition, 1870, p. 187: “When a document is put into the hands of a witness under cross-examination merely to prove the significance or identity or general nature of it . . . there will be a right to inspect it.” I don’t suggest it is directly in my favour but it does imply or infer that once a document is read it becomes evidence, which means it should be tendered.

HIS HONOR: I do not know what it means exactly. Page 187 reads
40 “When a document is put in the hands of a witness under cross-examination . . . nor does it become evidence.” That probably means “Nor does it become admissible in evidence.” These passages in Phipson and Roscoe seem to be tied up with the right of the opposing party to inspect. When they are speaking of evidence I rather think they are speaking of the right of the opposing counsel to inspect and to tender it in evidence.

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MR HUGHES: I know one case in which there was much debate as to whether when a witness had been cross-examined on a model of a machine in a factory case, whether the model should be tendered.

HIS HONOR: That might be different, because in that case you have a model set in front of the jury and probably counsel examining the witness in relation to the model had incorporated the model in the questions he asked or the answers he elicited.

MR HUGHES: I would be content to rest on that analogy here.

HIS HONOR: But we have the contents.

MR HUGHES: With respect, not the whole contents because my 10
learned friend in the case of some of the documents said he was reading only excerpts. The jury is entitled to have at my learned friend's expense, he having taken the course of putting the document to the witness, what they say in their entirety. It may be said against that that I could put them in, but that is no answer. The real issue is what is the effect upon the conduct of my learned friend's case of the course he took. If the true fact is as I have suggested, it is not to the point that I could have done something else.

HIS HONOR: Suppose the plaintiff himself had been confronted with a letter which had been obtained from somewhere or other on subpoena 20
duces tecum and counsel said "Q. Did you read that letter? A. Yes. Q. You said this and that in that letter? A. Yes." Do you say cross-examining counsel would be obliged to put that letter in evidence? I am sure that cannot be right.

MR HUGHES: That would be a special case because that would be covered by the section of the Evidence Act, seeking to cross-examine a witness on some inconsistent statement.

HIS HONOR: Not necessarily. I can imagine a plaintiff being cross-examined on many matters he had written in a letter, not merely on the basis of a previous inconsistent statement. 30

MR HUGHES: We have found the passage in Roscoe's "Evidence in Civil Actions" 19 Ed. Vol. 1. p. 161.: "We have seen that if a conversation be given in evidence . . ." With respect, it is hard to see why that does not fit the very position in this case.

HIS HONOR: I am not going to decide this now.

MR HUGHES: I think I can do no more than rest on that submission.

HIS HONOR: Have you anything to say about this—never mind about the stage at which Mr Hughes has taken this point, but deal with the substance of it.

MR LOXTON: On the substance of it I submit there is no compulsion 40
on the party who has done it. It has been done by me as counsel for the defendant in this case and I submit there is no compulsion on me to go into evidence. The position in all the cases where it has been deemed that counsel is bound to go into evidence is that the obligation is based rather upon the fact that he has put himself into evidence in some way. The clearest illustration is the one Your Honor

put, where a document is called for and produced and the other party looks at it. Then it is open to the other party, he is bound to look at it, and in that way he has put himself into evidence.

HIS HONOR: What are these letters he was cross-examined about?

MR LOXTON: I was cross-examining about letters to the Sydney Morning Herald, the Real Estate Institute, the Local Government Association.

MR HUGHES: Reports from the health inspectors which were not fully read. There was in one case a summons, several reports from
10 health inspectors and letters from applicants from which certain portions were elicited as showing matters before the Council as claims for relief upon which the Council acted; a whole heap of material.

MR LOXTON: In all cases the purpose was the same, the material was put to the witness to refresh his memory and he gave evidence in leading form with my friend following the form of the question and in some cases taking objection to it. In those circumstances I submit my friend may or may not have had a valid objection to that course. If my friend has not seen fit to object then he cannot object now.

The other principle that my friend referred to is whether the
20 document is complete or not, whether the jury have before them the complete document. I could have read the whole lot but for the sake of saving time I did not read matters which were not relevant to the issues in this case, and my friend saw that. If there was any further matter relevant in that document my friend could have either insisted upon me tendering the whole document or he could himself have led the remaining part. I submit that was my friend's remedy. His right was by way of objection at the time or by tendering the balance of the document afterwards. All I did was to ask whether a letter was not written for a certain purpose. There is no objection to that except
30 the best evidence principle and my friend waives the best evidence principle.

That is what I submit has happened here and there is no principle under which I can be deemed to have put myself into evidence.

HIS HONOR: I must say that what you say accords with what has been my understanding of the situation, but I might be wrong.

MR LOXTON: There is no clear authority. If the position were as my friend is submitting it is, it is a thing that must have happened over and over again and one would expect to find some clear expression of principle on this very point, whether or not a party so acting
40 has put himself into evidence, and there is none that I know of.

All the statements printed in the textbooks are directed to a different point altogether, as to the admissibility of such evidence. In principle I do not see why it should be so. Why should a party's counsel stand by and allow a plaintiff to adduce facts in evidence which once in evidence are in evidence for all parties and then later on say because you did not read the whole of it, you are in evidence?

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HIS HONOR: I am looking at this passage in Roscoe's Nisi Prius again. It says here "So if any letter, written document or single document be given in evidence the opposite party may insist on having the whole read and given in evidence as part of the case of the party adducing such evidence." I am not sure that this covers it. I think that passage probably refers to a letter tendered by one party. He reads portion of it to the jury; the opposite party is entitled to have him read the whole, much the same as if a party leads portion of a conversation, the opposite party is entitled to elicit the balance of the conversation so far as is relevant to the subject matter. The basis of allowing the 10 opposite party to put the whole letter in is that the remaining portion of it might alter what would appear to be the meaning from the first portion. No written statement or single document has been given in evidence here, so far as we are concerned.

MR HUGHES: With great respect, yes. It is conceded that the witness Berry was cross-examined on portion only of documents. That is giving the document or portion of it in evidence.

HIS HONOR: I do not know that it is, within the rule that Roscoe speaks of.

MR HUGHES: That must be the purport of the rule because cedit 20 questio, if the document as a whole is in evidence; the document goes in as a whole or it stays out. There is no room for the application of that principle if what Your Honor puts to me is correct. The conditions for the application of that principle are in my submissions where portion of a document is put to a witness, not the whole—and that is this case—and then if that is done counsel on the other side, that is myself in this case, can require the other party to put the whole in as part of his case. I submit the situation in this case is precisely analogous to what is written about there in the books.

HIS HONOR: It may only mean this, that as Mr Loxton was asking 30 Mr Berry whether Council did not write a letter like this or in these words, he was skipping a bit or paraphrasing a bit and you were entitled to re-examine Mr Berry as to the balance of it.

MR HUGHES: At the risk of splitting my case, because I did not know then that my learned friend was not going into evidence. I would have split my case wide open and my friend would have been the first to take the point. It is not an answer for my friend to say I have a remedy. It matters not that I had a remedy if the course that my learned friend chose to embark upon was a course that put him into evidence. It is not very helpful, therefore, if that be suggested. 40

HIS HONOR: I will consider it, but I must be frank about it that at the moment I am not disposed to agree with what you say.

MR HUGHES: Two other matters by way of reply: I do not agree with my learned friend's proposition that the documents were put to the witness to refresh the witness' recollection.

HIS HONOR: No, I think it went beyond that.

MR HUGHES: Then it is not surprising that there may be no authoritative statement of principle in the authorities because when one comes to consider it, this is very much a matter of practice and it will be a very rare case in which an argument of this kind assumes real importance by the time a case gets to the Court of Appeal; but I perhaps do not understate the position when I say this is a case, if ever, where the question does assume a very vital importance, where you have pleas of justification with and without the innuendo, pleaded to the libel with the innuendo and without it, and the defendant gives no evidence
10 to prove his plea.

HIS HONOR: Where you have a count that sets out the terms of the written publication then you assign an innuendo to it, can you ask the jury to find a verdict for you either on the basis of the innuendo or on the basis of some other defamatory meaning?

MR HUGHES: Yes, in other words it is like two counts, one with and one without the innuendo.

It was stated this morning in the absence of the jury that in this case no attack was being made on my client. A grievous attack that could be made upon a plaintiff in libel is to plead truth and public
20 benefit to the declaration with the innuendo. I hope it is not impertinent to say that if that is the sort of attitude taken by the defendant, the plaintiff in a case such as this is entitled to take every point that will force the defendant into the publicity of the witness box.

MR LOXTON: Might I deal with the last submission. If the jury held that upon these facts a reasonable man could infer that there was bribery and corruption, then in order to be consistent they have got to hold it was a reasonable inference for the defendant to draw. They must draw it themselves.

MR HUGHES: I thought you were not attacking my client.

30 MR LOXTON: We are not attacking. As far as we are concerned we do not mean that, but if it is open to some reasonable person to believe on the facts that appear in this publication that there has been bribery and corruption, then they have to be consistent and they have to draw that inference in a civil action, and if they do draw that inference then our facts are true in substance and in fact.

HIS HONOR: For all I know, the strongest part of the plaintiff's case might lie in the comment and not in the statement of fact.

MR LOXTON: If they hold it is fair comment—supposing the jury held it is a reasonable inference to be drawn from that fact, then it
40 must be fair comment to make that inference. That is why the pleadings are drawn this way. Your Honor sees the position the defendant was in. The purpose of the pleas is to protect the defendant under several contingencies of findings of fact by the jury. Your Honor will realise how that position arises; there is always this inconsistency. If these facts which we say are not defamatory are defamatory, then it must be because that is the inference reasonable men

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would draw from that. It must be the natural, reasonable and necessary inference that somebody will draw from them. If that is the inference to be drawn from them, the jury must find these facts sufficient to prove the innuendo. That is why the pleas are in the form they are in, to raise clearly this question of whether the statements of fact are defamatory or whether the statements of the comment are defamatory. We say neither is defamatory. If you do start finding one is and one is not fair comment, you get this inconsistency.

(Further hearing adjourned until 10 a.m. on Wednesday, 1st 10
June 1960.)

3rd Day—Wednesday, 1st June, 1960

(Counsel argued further Mr Hughes' submission that the defendant was obliged to go into evidence.)

Judgment of His Honor Mr Justice Maguire on Obligation of Defendant to go into Evidence

Judgment of
His Honor
Mr Justice
Maguire
on Obligation
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to go into
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HIS HONOR: Yesterday, during the cross-examination by counsel for the defendant of Mr Berry, who was in 1958 and still is the President of the Council of the Shire of Warringah, Mr Berry was asked various questions as to what written material was before the Council when 20 it made decisions in relation to the various individuals that they should either be prosecuted or given notice to vacate garages and other similar buildings. That documentary material consisted of reports made to the Council by officers of the Council and of representations made by the persons concerned or on their behalf by firms of solicitors. The witness then gave in evidence, after looking at the relevant Council files, what were in effect the contents of the reports and the representations which were before the Council. No objection was taken in principle to this course being adopted by cross-examining counsel; no objection was taken in principle to it being established 30 in this way what material was before Council when it was considering the various individual cases. Doubtless there were good reasons why no such objections were taken and, indeed, even if it had been taken I have not made up my mind that it would have been upheld. But, be that as it may, one assumes there were very good reasons why no objection was taken as a matter of principle. What might be described as minor objections were taken to certain particular questions. For instance, on p. 29* of the transcript it appears that Mr Hughes objected to one particular question and then made it clear that his objection was based on an assumption that the document referred to had not 40 come before Council or it had not been made to appear that it had come before Council; on it being shown that the particular document had in fact come before Council the matter was carried no further.

On p. 30,* when further objection was taken, Mr Hughes said "My objection is against it going in as evidence of the facts." Mr

* Page 39 of this book.

Loxton made it perfectly clear that he was not seeking to have the representations which were before Council accepted as evidence of the facts but merely as evidence of the material that was before Council. On p. 31* Mr Hughes objected and said "I do not want to be difficult, but my friend is reading bits of the letter". Mr Loxton agreed that he was. He said in effect "I am reading it all, but I am paraphrasing it." Mr Hughes said he did not think it should be paraphrased, and I agree with that, if Mr Hughes desired the whole of it to be read, and Mr Loxton thereupon re-framed his question to Mr Berry.

- 10 Objections of that nature were taken but it was never suggested that there was any objection to eliciting in that way the nature of the material which was before Council when it made its decision in particular cases. Later on, too, Mr Berry was cross-examined as to whether the Council had written letters to the Sydney Morning Herald and the Local Government Association and to various estate agents, and he said that such letters had been written and he gave the contents of such letters. No objection was taken to that, so far as I can recall it.

- It is now contended by Mr Hughes that because Mr Loxton elicited the contents of written documents in the circumstances to which I have referred and in the manner to which I have referred, he is obliged to go into evidence against his will. Mr Hughes has referred me to various text books and authorities which he claims are if not directly in point, at any rate suggestive of a principle which is in his favour. I do not feel that anything that has been put before me constrains me to hold that Mr Loxton is obliged to go into evidence and so far as my own recollection of practice is concerned I cannot recall a case where it has been held that in circumstances such as exist here a defendant is obliged to go into evidence, and therefore I rule that Mr Loxton is entitled to do as he announced yesterday he intended to do, namely, to call no evidence.

(Counsel argued Mr Loxton's application for a verdict by direction and Mr Hughes' submissions relating to the defendant's pleas.) (By consent of the parties His Honor ordered that the issues be amended by deleting from the declaration the words commencing "meaning thereby" and concluding "such approval". Further, that the second plea be amended by deleting from it the words "and without the alleged meaning" and that the fourth plea be amended by deleting from it the words "and without the meaning alleged".)

- 40 (The above proceedings took place in the absence of the jury, the jury being told they were not required before noon on Thursday, 2nd June, 1960.)

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Fourth Day—Thursday, 2nd June, 1960

(In the absence of the jury, Counsel further argued Mr Hughes' submissions relating to the defendant's pleas.

During argument, His Honor said: "By consent of the parties, I will amend the pleadings by altering the number of the fourth plea, so as to make it the third plea".

At 12 noon, His Honor released the jury until 2 p.m. and, at the same time, made an order that, in respect of today's jury service and any other day's jury service, until he made any other further order, each juror was to be paid the sum of two guineas 10 in addition to the fees ordinarily payable.

During Mr Loxton's address in reply, he said that the transcript at page 24,* last question, should read: "The Council refuses consent to any application to dwell in a non-residential building, such as a garage, even if it forms part of an incomplete building." Mr Hughes objected to His Honor referring to the original minute, on the ground that the minute book was not in evidence. After further argument, His Honor said: "It can be noted that, against Mr Hughes' objection, I am going to look at this resolution of the Council of 31st March 1952".)

20

Judgment of
His Honor
Mr Justice
Maguire
on Applications
for Verdict by
Direction.

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Judgment of His Honor Mr Justice Maguire on Applications for Verdict by Direction

HIS HONOR: I am of opinion that this action has to go to the jury on all the issues that are raised by the declaration and the three pleas that now remain. I have listened, with interest, to Mr Hughes' submissions, and they are very persuasive, but it does seem to me that there are elements of fact involved which make it imperative that the whole action go to the jury for its consideration.

Whether, for instance, the facts upon which comment has been made, or can be assumed to have been made, ought to be regarded 30 as true, depend, to some extent, upon the interpretation to be put on some of the words in the letter complained of; the meaning of the word "convert", for example. That seems to me to raise a matter that is proper to be considered by the jury.

Whether there was a departure from the policy of the Council, whatever that policy should be found to be, depends to some extent on what, precisely, the Council did authorise the plaintiff to do. There are before the court, plans of what was authorised, and specifications—if they can be so described—and it seems to me that, so far as one can get a picture of the situation from those plans and specifications 40 there are matters of fact and degree which can only be determined by a tribunal of fact, and that, depending upon a particular person's viewpoint—and I have no right to substitute mine for that of the jury—it might be found by the tribunal of fact that there had been a departure from the Council's practice. On the other hand, it might

* Page 34 of this book.

well be found that there was no such departure. Those aspects, I think, must be left to the jury.

Mr Hughes has contended, furthermore, that the third plea must be taken away, because there is no evidence to support many of the matters alleged in that plea, as making it for the public benefit that the matter complained of should be published. I agree that there is no evidence to support many of those introductory allegations, but I think that, nevertheless, sufficient remains to justify a tribunal of fact in finding that there was a public interest to publish this matter if it was, in fact, defamatory. I do not think that it is necessary for a defendant raising such a plea, to prove affirmatively all the matters of fact which he has alleged in his pleading as establishing a public interest, which justified the publication complained of.

It was contended that there was no evidence of the truth of any defamatory imputation which can be gleaned from the letter complained of. That too, I think, depends, to some extent on the view that is formed as to the meaning of the letter, and the view that is formed as to the nature of the transaction which the Council authorised the plaintiff to embark upon; and those are, I think, appropriate to the tribunal of fact.

Mr Hughes further argued that there was no evidence that the opinion expressed in the letter was the honest opinion of the person who had written it. His argument was that it lies on the defendant affirmatively to establish that his opinion was an honest one, and he based himself firstly on the general principle that the onus lies on a defendant to establish his plea of fair comment, and he said—quite accurately, I think—that the honesty of the opinion is an essential ingredient in a plea of fair comment, and he based himself, furthermore, on what was said in some of the cases, particularly, as I understand it, on what was said by Sankey, L.J., in **Burton v. Board**, (1929) 1 K.B. at 306, and what was said by Lord Porter in the case of **Turner v. M.G.M. Pictures Ltd.**, (1950) 1 All E.R. at 462.

It is undoubtedly correct, that, if such a plea is to succeed, the opinions expressed and which are complained of, must have been honest opinions and not actuated by malice, but I think the real position is, that although the onus rests on the defendant of establishing such a plea, yet, unless there is something in the article or in the surrounding circumstances to suggest lack of honesty or actual malice, there is an assumption or presumption or, at any rate, a jury could find, that the opinions expressed were indeed honest.

I do not think it is necessary for me to go into lengthy reasons, at this stage, as to why I have decided to allow the whole matter to go to the jury. I am anxious indeed, in the interests of the convenience of the jury, to proceed with the next aspect of the hearing, now that I have made that decision, and I do not want to delay the resumption of the hearing in the presence of the jury further, by reserving my

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decision on this point, so that I could put it in writing more elegantly than I have been able to at this juncture, and I do not wish to delay the proceedings further by retiring to consider the matter.

(At 12.45 p.m. His Honor conferred with Mr Downey, Court Reporter, concerning the last question on page 24* of the transcript. His Honor and counsel agreed that the only respect in which the transcript did not accord with Mr Downey's shorthand note was that the word "if" had been omitted from the transcript after the word "even". His Honor then said: "I am not going to allow alteration of it, because I do not think it is necessary. I do not 10 think it is important. I think it is perfectly obvious what the minute was. You get that from the context.

In response to His Honor's enquiry, Mr Hughes intimated that he did not wish to add anything further, as he thought he was adequately protected by the submissions he had made.

He asked that it be noted, however, that he had moved to have all pleas, other than the Not Guilty plea, taken away from the jury.)

(Luncheon adjournment.)

(Counsel addressed the jury.)

(Further hearing adjourned until Friday, 3rd June, 1960.)

20

Fifth Day—Friday, 3rd June, 1960

Summing-up to Jury

Summing Up
to Jury.
—
3rd June, 1960.

HIS HONOR: Gentlemen, in this case you are concerned with that branch of the law which governs the right of one citizen to speak or to write of another citizen. It is a somewhat complex and difficult branch of the law, and I suppose it is so because of the difficulty of reconciling two important principles. The principles of free speech, I suppose, in any democratic community is of fundamental importance and something more than lip service ought to be paid to it; but on 30 the other hand, I suppose that no civilised community could allow anybody at all to say whatever they liked about another person, no matter what the circumstances. I suppose no civilised system of law could allow, no matter how much it desired to reserve the right of free speech, any citizen wantonly or maliciously or without any justification whatever to malign or defame another citizen. To allow such a state of affairs would be grossly unfair to the individual citizen and it might well be productive of public unrest and disorder; and so the law, whilst generally speaking recognising the right of free speech, imposes limits and restraints on freedom of speech in the 40 interests of the reputations of individual citizens and in the interests of community welfare and because of the difficulty of reconciling those two principles I have mentioned, the law has become somewhat involved and complex, and in this particular case, indeed, some very

* Page 34 of this book.

difficult questions of law have arisen for consideration and have been discussed at length. They have been resolved, at any rate for the time being, and I will have to endeavour to explain the relevant matters of law to you, but I will do so as briefly as I can and as simply as I can although it may be that I will have to take a little care and perhaps proceed somewhat slowly and take up a little of your time.

When I say that I will have to explain the law to you so far as it is relevant, I do that because it is the fact in this sort of litigation
 10 that the judge is the judge of the law; it is his duty to determine what it is and to explain it, so far as it is relevant to the particular case, to the jury; and it is the jury's duty to accept what the judge tells them in relation to the law and to apply it to the case. On the other hand, the function of the jury is a very important one because the jury is brought here to be judges of the facts, and so it is that you are here in this case the judges of the facts and you are, indeed, the sole judges of the facts and, being the sole judges of the facts, it is for you and for you entirely to determine what evidence you accept and what you reject; and it is also for you and for you entirely to
 20 determine what inferences or conclusions or interpretations might properly be put upon facts which are established to your satisfaction by direct evidence which you find to be acceptable. As you are the sole judges of the facts in that sense, it follows that if I should express in the course of my summing up any particular view about the facts, you would be in no way obliged to consider yourselves bound to adhere to that view, or, indeed, even to be influenced by it because, as I have already explained, you are the judges of the facts, I am not; the situation is that I am the judge of the law and you are the judges of the facts. You will accept what I tell you in relation to the law,
 30 you will apply it to the facts as you find them to be, and in accordance with what I tell you as to the law and in accordance with your own views as to the facts you will determine whether or not the plaintiff in this case is entitled to succeed or whether he is not.

Although you and you only are the judges of the facts, I will during the course of this summing up refer to some of them. I will be referring to them and I will do so as shortly as I can, I assure you. I will be referring to them not with the intention of expressing any opinion—not with the conscious intention, at any rate, of expressing any view about them, not with the intention of imposing or endeavouring to impose on your minds any particular view as to the facts, but
 40 merely for the purpose of endeavouring to assist you, to the extent that I am able, to appreciate the issues that have to be determined by you and to appreciate also the facts that are relevant to those issues.

In this case the plaintiff, Mr. Jones, says that he was libelled by the defendant, Mr. Skelton. If he is to succeed in that allegation he must satisfy you affirmatively that the article or the letter of which

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he complains in this newspaper was libellous of him; he carries the onus of proving that that is so. That is the law about the matter but, having said that, I should also say that it is not incumbent upon him in order that he should make out his claim that he was libelled by this letter that he should convince your minds to the point of certainty that the letter was libellous. It is sufficient for him in respect of this aspect of the case if he brings to your mind a feeling that as a matter of probability this letter was defamatory or libellous of him; if he weighs down the scales in his favour, even though he does not convince you to the point of certainty, he would have discharged the onus that 10 rests on him of proving that this letter of which he complains was in fact libellous. You will determine as a matter of fact whether the letter was libellous of him, whether it was defamatory of him; that will depend, of course, on how you read it and what meanings you attach to it.

Libel consists of publishing, that is bringing to the notice of other people in some written or printed form, matter which amounts to the disparagement of the good name of the plaintiff, and disparagement of a plaintiff's good name occurs where the matter complained of tends to lower a person in the estimation of right thinking men or tends to 20 expose him to dislike or contempt, tends to impair his reputation with fellow citizens. That is the meaning of libel, and so you will have to construe those words that were published and you will ask yourselves do they disparage the plaintiff's good name, did they tend at the time of publication to lower him in the estimation of right thinking people, did they tend to bring about a feeling of contempt towards him, or did they tend to impair his reputation as a citizen?

As I have said, that depends upon how you construe this letter. In approaching it and reading it and determining whether it is or is not defamatory or libellous of the plaintiff, you will read it in a fair- 30 minded way; you will not seek to read into it anything that it cannot reasonably bear, anything that it is not reasonably capable of bearing. You will look at it as fair-minded men and say: What does this really mean?

As I have said, the onus lies on the plaintiff, to the extent I have mentioned, to establish his case on the balance of probabilities that he was libelled. He must prove that there was publication of and concerning him and that that publication was by the defendant. There is no dispute here, really, that the publication, whatever it means, whether it be defamatory or not, was by the defendant. He is the 40 proprietor and the publisher of this newspaper which is in evidence. There can be no room for doubt, I venture to suggest, that the publication was of and concerning the plaintiff. It may have been, too, of and concerning the Council, but the plaintiff is referred to by name in the letter. So that there seems to be no difficulty at all in relation to the first two matters that the plaintiff has to prove, namely,

publication of and concerning him and publication by the defendant, and your real question comes to this, as I have suggested already: Was that publication libellous of him?

- It is not every publication, whether it be by word of mouth or whether it be, as in this case, in printed form, that criticises a man that is libellous. Indeed, there can be cases where articles are written or words are spoken which are highly critical, perhaps even offensive, but they are not defamatory and, gentlemen, sometimes it becomes a question of law for the judge to rule as a preliminary question before
- 10 the case goes to the jury at all whether the words complained of are capable of being construed as defamatory. They might cause offence, they might be insulting, but there are cases, and there have been many of them, where the judge has been called upon to rule whether they are capable of a defamatory meaning and he has ruled that they are not so capable, and that is the end of the case. On the other hand, if the judge rules as a matter of law that the words complained of are capable of defamatory meaning it then becomes a question of fact for the jury to construe them, to assign a meaning to them and to determine as a question of fact whether they were indeed defamatory.
- 20 In this particular case I have ruled as a matter of law that the words complained of in the letter that was published on the 27th February 1958 are capable of a defamatory meaning, they are capable of being construed as defamatory of the plaintiff and so, as I have said, it becomes a question for you whether they did in fact defame him.

- There is no evidence as to who actually wrote this letter, but that does not matter. A person in the position of the defendant, who is the owner and publisher of a newspaper, is responsible for matter that appears in his newspaper and if it transgresses the defamation laws, if it does defame a citizen, whether he wrote it or not, if it
- 30 appears in his newspaper he is responsible in damages to the person defamed unless he can raise some defence to the matter. So you need not concern yourselves at all with the question of who in fact wrote this letter; it appears in the defendant's newspaper.

- You have read the words in this letter probably several times and you have had them analysed for you by counsel. On the one hand it is put to you by Mr Hughes that it is an attack, by suggestion perhaps to some extent, on the integrity and reputation of the plaintiff, Mr Jones. On the other hand, Mr Loxton has put it to you that it is nothing more nor less than a criticism of the Council. It could be
- 40 both, of course; it could be both, and you will have to consider probably whether—in fact I suggest you will have to consider whether, although it is critical of the Council, it is also defamatory of the plaintiff and you cannot approach the matter on the basis that it is one thing or the other and only one thing or the other.

Defamatory matter or libellous matter—that is what we are concerned with here—can consist either in statements of fact or in matters

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of comment or an expression of opinion. Obviously statements of fact can reflect on a man's reputation and can tend to lower him in the estimation of right thinking people, but it is also equally true to say that comments as apart from statements of fact are equally capable of amounting to defamation. You, I suppose, as men of commonsense would have little difficulty in drawing a distinction between what is on the one hand a statement of fact and what is on the other hand a matter of comment or an expression of opinion, which is the same thing. An illustration that I noticed in one of the books the other day is that to say that a man is a disgrace to human nature is to make a statement of fact. On the other hand, to say that a man murdered his father and therefore is a disgrace to human nature involves in the first part a statement of fact and in the second part an expression of opinion or an expression of comment.

You might think too, in this case, and indeed you will, I venture to suggest, at some stage or other have to give some consideration to the question of whether this letter which has been complained of is a statement of fact, an expression of comment or whether it is both; because different considerations of law apply to defamatory comment on the one hand and defamatory statements of fact on the other hand. You will have the letter before you—you have already had copies of it provided for you—and you will make up your own minds about it as to which part is a statement of fact and which part is a matter of comment. I would think for myself, but you are in no way bound by this, gentlemen, that the first paragraph is probably comment—probably, although there may be an element of statement of fact in it. You will recall that it said in the first paragraph: "Of all the appalling decisions made by Warringah Shire Council, surely the one which takes the bun is that to allow Councillor Jones to convert his Harbord garage into servants' quarters." I suppose there are adjectives used there and there is a reference to "taking the bun" and I would think it is probably comment. I suppose implicit in the paragraph is the statement that the Council has decided to allow Councillor Jones to convert his Harbord garage into servants' quarters and maybe it is partly comment and partly statement of fact; but probably it does not matter very much. But it may be important, and quite important indeed, to consider and make up your minds in relation to other portions of the letter as to whether they are statements of fact or comment.

The second paragraph if I could venture an opinion, and again you are not bound by it—I think from what has been said here in Court that counsel for both sides substantially agree with this—for my part I would think that the second paragraph is, if not entirely then almost entirely, a statement of fact. You will recall what it says: "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)—that seems to be interpolated in the middle of the statement—"to convert his garage". The letter goes on to say: "It is beyond understanding." Of course I suppose in one sense those words "it is beyond understanding" can be taken to be statement of fact but, on the other hand, in the context you would be well justified in regarding them as comment upon what was said in the preceding paragraph. Having said "it is beyond understanding", the letter proceeds to ask the question "Or is it?". That, you might think, is clearly comment.

- 10 The question you have to ask yourselves is whether the plaintiff has satisfied you on a balance of probabilities that this letter is defamatory of him either so far as it alleges facts or so far as it contains matters of comment. If he has so satisfied you, he would be entitled to a verdict against the defendant and to an assessment of damages against the defendant unless the defendant established, and the onus would lie on him in this respect—unless the defendant established one or other of two defences which have been pleaded by him and to which I will have to refer at some little length, I am afraid, later on. But, as I say, if the plaintiff did satisfy you that this letter was defamatory of him he would be entitled to a verdict. If he failed to satisfy
- 20 you, of course, that would be the end of the case and you would return a verdict for the defendant then and there without pausing to consider the second and third pleas which have been raised and which, as I have already said, I will have to deal with at a little later stage.

- It is proper and necessary for you to construe this letter in the light of the surrounding circumstances and the background matter. In substance, you might well think that the letter says that the Council has, against its policy in relation to ratepayers generally, given to one of its own members, Councillor Jones, permission to use a garage in
- 30 a way that would not be permitted to other citizens in the municipality. Now, what was the policy of the Council, first of all? You gentlemen will determine that as a matter of fact—and it has to be determined on the evidence—and then having determined what that policy was you will proceed to consider whether there was or was not a departure from it in favour of Councillor Jones. That is one of the matters you will have to consider in relation to certain aspects of this case.

- Evidence as to what the policy of the Council was was elicited, I think, entirely in cross-examination of Councillor Berry. You will recall that he was asked about a certain resolution which he agreed
- 40 had been passed by the Council in 1952, and as the first part of that resolution appears in the transcript of the evidence it is in this form—there may have been some slight error in getting it on to the transcript or in reading it to Councillor Berry. Anyhow, gentlemen, you heard the question asked and the terms of the resolution may still remain in your memory. As appearing here, it is in these words. This is the first part of it: "The Council refuse consent to any application for

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dwelling of a non-residential building, such as a garage, even if it forms part of an incomplete building." The second part of the resolution which was carried by the Council in 1952 is to the effect also 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. Following upon that resolution, there is evidence that a number of people were given notice to cease to dwell in garages and 10 such-like buildings and that in some cases, broadly speaking, apparently, when the people persisted in continuing to dwell in them, prosecutions were brought against them; and there is evidence also that the Council caused some letters to be written in relation to this very matter. You will recall that on some date which is not, it seems to me, precisely fixed but which might well be some time in 1958, the Council wrote a letter—

Of course a question arises here that never occurred to me before, whether this letter could have anything to do with it unless it was written prior to 27th February 1958. 20

MR HUGHES: There is no evidence of that. If there is any evidence and my learned friend chooses not to tender the document, I suggest it does not help.

HIS HONOR: I do not suppose it does, but that is a point.

MR LOXTON: The whole cross-examination was directed to prior to 1958.

HIS HONOR: That is how it started off, but it got a bit confused, Mr Loxton. This is what happened, if I can remind you: you put to the witness, Mr Berry:

"Q. During the currency of the year 1955 the Council saw occa- 30 sion to take steps to prevent occupation and selling of converted garages? A. Before 1955?

Q. In 1955? A. In 1955.

Q. Did it indeed? A. I thought you said before 1955.

Q. No, before 1958? A. Before 1958.

Q. And during the currency of 1958 the Council instructed its Shire Clerk to write to the Sydney Morning Herald."

That is as far as you took it, during the currency of 1958.

MR LOXTON: It was not objected to.

HIS HONOR: It was not appreciated by anybody, including myself, 40 at that stage.

As it does not appear clearly, gentlemen, whether the letter to the Sydney Morning Herald was written before or after 27th February, 1958, you had best discard it from your consideration.

Some evidence was also given as to the terms of the letter written by the Council to the Local Government Association but again, as far

as I can see, Mr Loxton did not precisely fix the date of that letter and again, therefore, it seems to me to be impossible to determine whether it was before or after the 27th February 1958, and, of course, unless it appears that it was before it can have no relevance on the question of what was the Council's policy as at the date it dealt with Councillor Jones' application. At any rate, you have the fact that the Council in 1952 had passed a resolution which I have mentioned. You have the fact, if you accept the evidence, and there seems to be no reason why you should not, that subsequently to that a number of

10 notices were issued with the intention and purpose of giving effect to that resolution and requiring people to vacate garages and similar buildings, and you have evidence that there were a number of prosecutions when those notices were ignored, and it is against that background that this letter which the plaintiff complains of was published in the defendant's newspaper.

You might think 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

20 a member of the Council. You, as I say, will sooner or later on some aspects of this case, as you will see before I have concluded my summing up, have to form an opinion as to whether, if the letter means that, the allegation of a departure from the policy was true or not.

What was the policy? What was the Council really getting at, what does the resolution mean? What state of affairs were they endeavouring to deal with in the municipality? Was what they approved of in this case a departure from that policy? Mr Hughes, for the plaintiff, contends that there was no departure at all. He contends that what was approved of in this case was something quite different

30 from what the Council had been resisting and attempting to put a stop to earlier. His argument is that this application of the plaintiff's was not in any real sense an application for approval to live in a garage but it was an application for approval to alter portion of premises which had previously been a garage and to convert that portion into living quarters. Mr Hughes points to the plans that are in evidence; he points out that these plans disclose that this building had previously been a triple garage and the proposal submitted to the Council was that he be permitted to divide it into two parts with a stud wall so that you would have on the front portion of it a room which, according

40 to the plaintiff, would be about 22 ft. long by 10 ft. wide, and from having the previously existing laundry there, the application was that that might be turned into a kitchen, and there would also be a shower room and W.C. such as is shown on this plan. There was a further element in the application, that the roof of that particular portion of the building was to be made higher to conform with regulations. That is Mr Hughes' argument. You have seen the plans; you will see them again. You will have before you the terms of the application that was

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made to the Council and you will have before you a document signed by the plaintiff when he made his application and you will determine as a matter of fact whether there was or was not any departure in favour of Councillor Jones from the policy of the Council in relation to other ratepayers.

(Short adjournment.)

Gentlemen, before we adjourned I was suggesting to you that you will have to make up your minds at some stage in this case whether this letter alleges that there had been a departure from policy in favour of a member of the Council or whether there had not. If you construe 10 the letter as alleging that there had been such a departure from policy in favour of Councillor Jones you will then have to ask yourselves whether that allegation was true or false, and I had put to you Mr Hughes' argument to the effect that it was false. Having told you that you will have to make up your minds, if that is the allegation, as to its truth or its falsity, I must now make it perfectly clear that that question, if that is the allegation, the question whether it is true or false has nothing whatever to do with the question of whether the letter is defamatory. That question depends upon whether, as I have said before, it reflects on the reputation and integrity of the plaintiff, 20 and it does not matter whether it is true or false for that purpose; but it does become, or will become necessary, as you will see later on, in considering certain defences that have been raised, to consider, if the letter alleges a departure from policy in favour of Councillor Jones, whether that allegation is true or false. But so far as concerns the plaintiff's case, that is the matters that he has to prove, the question of whether the letter is defamatory in the sense I earlier defined for you, the truth or falsity of the matter contained in it is completely irrelevant.

I have told you that I did as a matter of law rule that this letter 30 complained of is capable of a defamatory meaning and it is entirely a matter for you to determine as a matter of fact whether it does bear a defamatory meaning. Perhaps it would be convenient for me now to put to you the three suggested meanings which counsel for the plaintiff invited you to say the letter was capable of bearing. You will recall that he suggested to you in the first place that the letter suggested that Jones was prepared for his own purposes to submit to the Council an application conflicting with its established policy. You will ask yourselves is that on a fair reading of the article what it was intended to convey, or rather what it did convey. You will ask yourselves, if 40 you answer that question in the affirmative in favour of the plaintiff, whether that is defamatory of a man in his position, a member of the Council, a man in a public position. Would it tend to lower his reputation in the eyes of right-thinking people? In relation to the other two suggested meanings put to you by Mr Hughes, you will also ask yourselves on a fair reading does the letter mean these things or

any one of them and if you find it does you will again ask yourselves in relation to those matters, or whichever one you find in the plaintiff's favour, if you find any in his favour—you will ask yourselves, if it bears that particular meaning, would that meaning be defamatory of the plaintiff having regard to his position.

- The second suggested meaning put to you by Mr Hughes, as you might very well remember, is that the letter suggests that the plaintiff was prepared to accept favourable or preferential treatment from the Council of which he was a member for the advancement of his own
- 10 private interests and in conflict with the Council's policy. The third meaning which the plaintiff's counsel invited you to assign to the letter is that it suggests that the plaintiff was not merely passive in accepting a favour of the Council but secured it by improper means, by, presumably, influencing in some way his colleagues on the Council—
- influencing them to pass this resolution or this motion granting his application. The document, I have ruled as a matter of law, is not capable of suggesting that Councillor Jones influenced his colleagues by bribery or by money payment, but I leave it to you as to whether as a matter of fact it means that he influenced them in some other way.
- 20 You will ask yourselves whether on a fair reading, the letter does in fact bear these meanings or any one of them and you will ask yourselves whether if it bears all of them or one or two of them, that particular meaning is defamatory of the plaintiff in the sense I endeavoured to define earlier.

- Mr Loxton argues that you cannot possibly assign any one of those meanings to the letter. He says it is nothing more nor less than an attack on the Council, not a reflection on the plaintiff. Well, gentlemen, you will have the letter before you again in the newspaper and it is entirely a matter for you to interpret it and say what its real
- 30 meaning is—interpreting it, as I have said before, on a reasonable, proper and sensible approach, a fair approach.

- If you find that the letter is defamatory of the plaintiff he would be entitled to a verdict against the defendant and to an assessment of damages unless the defendant succeeded on one or other or both of two defences which he has raised. The first of those defences is a defence of what has been called, and properly called, fair comment. In relation to this defence and in relation to the other one which I will refer to later it is my duty to tell you as a matter of law that the onus lies on the defendant to establish them. He carries the burden of
- 40 persuading you—again, it is true, only on a balance of probabilities, but he does carry the burden of persuading you if he is to succeed on one or other of these defences, that they are indeed defences to this action in the particular circumstances of the case. As I said before, these defences do not fall to be considered at all unless you first find that the letter complained of was defamatory of the plaintiff.

The first of those defences is, as I have said, a defence of fair

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comment. If it is to succeed, various elements in it must be established and the defendant bears the onus of establishing all those elements. I will summarise what the plea or the defence says—it is called a plea in our language. It is important to bear this in mind because this plea can only avail against the plaintiff's success on the assumption that you have already decided that the letter is defamatory. This plea can only avail the defendant if you do decide that the letter complained of was defamatory because of comment in it. This plea is not and cannot be a defence against any defamatory statement of fact. The plea says: So far as the words complained of consist of allegations of fact the defendant denies that they are defamatory. That is one element in this plea; if it is to succeed the defendant must satisfy you that the allegations of fact in the letter are not defamatory of the plaintiff. If they are defamatory you cannot have, for the purposes of this plea, fair comment on them. He says additionally that any allegations of fact in the letter are true, and if this plea is to avail him he must prove that such allegations of fact are true because so far as this plea is concerned you cannot have fair comment on facts that are not true; and he says so far as the words complained of in the letter consist of expressions of opinion they are fair comment made in good faith without malice upon the facts which he says are true and which he says are not defamatory; and he says they are comments made on a matter of public interest.

As I say, all these matters must be established if this plea is to avail and it only becomes relevant at all if you have decided that the article is defamatory by reason of comment in it, because that is the only answer to comment.

The defendant must prove then, that so far as this plea is concerned that any allegations of fact in the letter complained of are true; secondly that they are not defamatory of the plaintiff; thirdly, that the expressions of opinion or the matter of comment, which is the same thing, is fair comment on a matter of public interest.

It is for me, I think, as a matter of law, to say what is or is not a matter of public interest. I do not think there is any dispute between the parties anyhow, but I will tell you that the affairs of a Shire Council and the affairs of a member of that Council in relation to the Council are a matter of public interest; so you will probably think there is no difficulty about that part of it.

You will, as I suggested to you earlier, have to consider what in this letter complained of are allegations of fact. You will ask yourselves are those allegations of fact true and you will ask yourselves are they defamatory of the plaintiff? If they are untrue or if they are defamatory of the plaintiff, this plea must go by the board. But assuming the defendant satisfies you on a balance of probabilities that such allegations of fact as do appear in the letter are true and are not defamatory of the plaintiff, it being clear enough that the comments made in the letter is on a matter of public interest, you

will then ask yourselves has the defendant satisfied you, as he must, that that comment was fair comment. Fair comment means honest comment; it does not cease to be fair comment because it might be harsh or might even be extravagant but it has got to be an expression of opinion honestly held.

That, I think, is all I need say about the matter. As I have already said, if you come to this conclusion, to the extent that any statement of fact in the letter is defamatory of the plaintiff this plea would be no defence even though the various matters of fact alleged
 10 in it were established to your satisfaction by the defendant.

It becomes necessary for me to refer now to another plea which the defendant relies on, and again this plea only falls to be considered if you have first of all decided that the letter printed in the newspaper was defamatory of the plaintiff either as a matter of statement of fact or as a matter of comment. This plea is what is sometimes called a plea of justification and, amongst other things, it alleges that any statements of fact in the letter complained of are true. When it alleges that, it means that they are true in their defamatory sense, if they have a defamatory sense. So it is a plea of justification not
 20 merely of the publishing of the allegations of fact but of the publishing of defamatory allegations of fact. It assumes the words are true and their defamatory meaning is true; that is one of the elements in this plea. In this plea, as in the other one which I have just recently discussed, the onus lies on the defendant to establish the various ingredients in it. I have mentioned one, truth; but truth in itself of a defamatory statement of fact is no defence in this country at all. It must appear not merely that the defamatory statement of fact which is published is true, but it must also appear that it was for the public benefit that that statement of fact should be published. So this plea
 30 sets out, and I will summarise it for you, by way of certain preliminary averments that at relevant times the Warringah Shire was subject to the provisions of the Local Government Act and it was charged with the local government of that particular area of which Harbord formed part, and that the plaintiff was a member of the Council and the Local Government Act empowered the Council to control and regulate the erection and alteration and use of buildings and structures within the boundaries of the Shire. There is no dispute about any of those matters; there cannot be, that all follows from the Local Government Act. It then goes on to make a further averment of
 40 fact which I am not going to mention because I do not think there is any evidence to support it; and then it proceeds to aver that the Council had systematically refused to permit the use of such garages and dwellings and there was at the time a great shortage of dwellings at Harbord. You will make up your minds on the evidence whether there was a great shortage of dwellings at Harbord. One witness did say, I think Mr Cox did say that and his is the only evidence on it, I think, but you will make up your minds whether as a matter of

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fact the Council had systematically refused to permit the use of garages as dwellings. Then if you find those facts in the defendant's favour, the defendant asks you to form the view, in view of the fact that this was a local government body charged with the local government administration of this area and in view of the fact that the plaintiff was a councillor and that the Council had this policy, the defendant asks you to take the view, to form the opinion that it was for the public benefit that this matter should be published, even though defamatory. The plea goes on to say that so far as the matter complained of consists of allegations of fact it was, for the reasons 10 previously suggested, for the public benefit that those allegations of fact should be published. So you see, gentlemen, this plea if established would be a good plea even though the allegations of fact were defamatory in your view if it appeared to you that it was for the public benefit that they should be published.

You will recall that in relation to the other plea, the plea of fair comment, I told you that that plea could not succeed at all, even if the comment was fair, if the comment was on facts which were defamatory; to be a good plea, a successful plea, it had to be on facts which were not defamatory. But here, so far as the allegations 20 of fact in the article are concerned, if it was for the public benefit to publish them then that would be a defence together with the truth of the words, even though the words were defamatory. So here on this aspect of this plea, what the defendant has to prove to your satisfaction on a balance of probabilities is that the words published, so far as they amount to allegations of fact, were true, true in their defamatory sense, and that it was for the public benefit that they be published. If he fails to discharge the onus that rests on him in that regard, then that plea would go by the board, and if you had earlier decided that the letter complained of was defamatory of the plaintiff 30 he would succeed, subject of course to the questions raised and which I have already discussed in relation to the second plea, the plea of fair comment.

Now you see in regard to this plea it becomes necessary for you to consider, if this letter means or contains allegations of fact that there was a departure from policy in relation to Councillor Jones, was that allegation true or was it not. If it was not true, the plea cannot succeed; if it was true, then even though defamatory the defendant would be justified in publishing it if it was also for the public benefit that it should be published. 40

The plea does not end there because it seeks to answer the whole of the letter. You will remember that the second plea, the plea of fair comment, attempted to answer merely comment that might be found to be defamatory. This seeks to answer defamatory matter, whether it be by way of allegation of fact or by way of comment or expression of opinion. Having alleged that the facts were true and it was for the public benefit to publish them it goes on to say "And

so far as the letter consists of expressions of opinion, those expressions were fair comment made in good faith and without malice on the facts." So the question of fair comment and honesty of comment comes up for consideration in relation to this plea too, but there is this difference between fair comment under this plea and fair comment under the plea of fair comment. I have told you that in relation to the other plea you cannot have a good defence of fair comment if that comment is about defamatory facts; it must be about non-defamatory facts. Under this plea, fair comment can exist even
 10 though that comment is on defamatory facts because if the other part of the plea succeeds the defendant will have been found by you to have been justified by publishing in the public interest defamatory allegations of fact.

There is the matter on which you will determine whether or not the plaintiff is entitled to succeed. If you think the letter is defamatory of him he will be entitled to a verdict unless one or other of these defences has been affirmatively established by the defendant. If you are not satisfied that the letter is defamatory of him you would return a verdict for the defendant. If you find that the letter is defamatory
 20 of him because it contains defamatory comment, then you have to consider whether the defendant has made out his defence of fair comment; has he affirmatively satisfied you that his comment was fair, that it was made on a matter of public interest? There is no difficulty about that. Has he affirmatively satisfied you that it was made on facts that were true, truly stated, and that it was made on facts that were not defamatory? If you think that the letter was defamatory of the plaintiff in relation to allegations of fact as well as comment, the plaintiff would be entitled to succeed unless this defence or plea of justification was established, under which the
 30 defendant, as I have indicated, has to prove not merely that the defamatory allegations of fact were true in their defamatory sense but that it was for the public benefit that they should be published and, so far as there is defamatory comment on any such allegations of fact in the letter, the defendant would have to satisfy you that it was fair comment in the sense that I have discussed. I do not think it is necessary to say anything more about it.

If you found a verdict for the defendant, that would be the end of the matter; if, on the other hand, you found a verdict for the plaintiff your duty would be to proceed to assess damages in his favour. Damages in a case such as this are peculiarly within the province of
 40 the jury and there is little that I could do even if I should desire to do it to assist you. It is an exercise very largely in common sense and that is why it is peculiarly a matter for you gentlemen who are entitled to bring to bear on this aspect of the case and, indeed, to every aspect of the case your common sense and your experience of affairs.

If the article is defamatory of the plaintiff and the defences I have discussed fail he is entitled to damages because where a man is

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—
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defamed the law presumes that he has suffered some damage to his reputation. The primary matter to be considered in assessing damages is, I suppose, damage to reputation and that depends on a lot of things. You would take into consideration the extent of the publication; you would take into consideration the position in the community that the plaintiff occupies; you would be entitled if you saw fit to regard the defamation as being aggravated by a refusal to apologise when the plaintiff offered to accept an apology and costs; you would, as I have already said, be entitled to pay regard to the extent of the publication. Something that is published to one or a few persons, I 10 suppose, is not ordinarily as injurious to the reputation of a man as something that is published to many. Only a couple of witnesses have been called here, two, I think, who have said that they read this article that is complained of; but you would be entitled to look at the paper itself, and it claims that it has got a circulation over a fairly wide area. It says it circulates in Avalon Beach, Balgowlah, Bayview, Bantry Bay, Belrose, Church Point, and various other places. You would be entitled, as I say, to have regard to the extent of the publication. You would be entitled to have regard to any effects the defamation had on the plaintiff's health. In that regard he has told you, it 20 is a matter for you whether you accept his evidence or whether you do not, that he had been in a nervous condition and had been under treatment—I think he mentioned a hospital at Concord. He said that when he read this article, this letter, he felt very upset, he had previously had nervous trouble and the letter complained of affected him considerably. In that regard, in regard to the plaintiff's claim that he had been in a nervous condition, Mr Loxton cross-examined him as to the regularity of his attendances at Council meeting, and it did appear, so far as I remember the evidence correctly, that from about September 1957 until the month following publication of this letter, namely 30 until March 1958, the Councillor had attended regularly at Council meetings. What you make of that, gentlemen, is a matter for you.

One matter I propose to refer to, one matter that arose out of Mr Loxton's address is that he reminded you that Councillor Berry had given evidence of a conversation which he had with the defendant, Mr Skelton, some time after the publication of this letter. In that conversation, according to Councillor Berry if you accept his evidence, the defendant said the letter had been published without his knowledge. If you accept Councillor Berry's evidence, that statement by the defendant on that occasion is not evidence of the fact. It was not 40 said in the plaintiff's presence and it was not said in this Court; so I suppose the real position is that there is no evidence before you one way or the other, as to whether the letter was published with or without the knowledge of the defendant.

Do you desire me to deal with anything else, Mr Loxton?

MR LOXTON: Your Honor has stated the meanings that have been attributed by the plaintiff to this publication, but Your Honor has not

referred at all to the meanings attributed by the defendant to this publication.

HIS HONOR: I do not agree with that.

MR LOXTON: What Your Honor did say was that I had merely argued that this was solely a criticism of the Council. I know Your Honour need not, but I am reminding Your Honor that you never—

HIS HONOR: You did say more than that, I suppose.

MR LOXTON: I did say a lot more, over a long time. I remind Your Honor, but it is purely a matter for Your Honor. Your Honor
 10 has also left to the jury, on the question of the plea of truth and public benefit, that they should consider whether there was a departure from policy in the case of Jones; then if there was not a departure from policy the plea is not true. Your Honor twice directed that way. With respect, all I have to prove is the truth of the allegation; I do not have to prove the Council's policy.

HIS HONOR: What I meant to convey, whether I succeeded in doing it or not I do not know—what I meant to convey was this—that if the jury found defamation in that the letter said there had been a departure from policy in favour of Councillor Jones through his
 20 manoeuvring or that he was prepared to accept a favour which was preferential treatment, which was a departure from policy, then the truth of that would have to be established.

MR LOXTON: I did not understand that.

HIS HONOR: Perhaps I did not make it very clear; it is a bit difficult.

MR LOXTON: I quite appreciate Your Honor's difficulty. Your Honor has left matters to the jury, and at the same time according to their finding Your Honor has to direct and at the same time Your Honor has to put it so that the ordinary reasonable man can understand, but it conveyed to me the meaning that he would have to
 30 prove that.

HIS HONOR: Perhaps to make that clear—perhaps I did not express myself very well. What I meant to convey was this: if you found any defamation in the letter complained of, any defamation which was an allegation of fact, whether it be a departure from policy or anything else, then under the third plea the truth of that defamation would have to be established as well as public benefit in establishing it.

MR LOXTON: There is one other matter. Councillor Berry's evidence, had it been tendered by the defendant, would not be evidence of the truth of the facts, I quite concede that; but when it is tendered
 40 by the plaintiff without objection it is evidence for all purposes I would submit.

HIS HONOR: I do not think so. I do not think I will direct the jury to that effect.

MR LOXTON: There is one somewhat difficult point upon which I would ask Your Honor to give a direction. Assuming the jury should find, as I indicated in my address, that these words were reasonably

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capable of a defamatory and a non-defamatory meaning, if they do find that way I submit the defendant would be entitled to a verdict.

HIS HONOR: If they were reasonably capable of either a defamatory or a non-defamatory meaning—why would that be?

MR LOXTON: I think it must be. That is what Lord Bramwell said. That must be, because the plaintiff would not have discharged the onus.

HIS HONOR: If they were equally balanced the possibilities or probabilities of a defamatory or a non-defamatory meaning, I would agree with you perhaps, but not merely because they are reasonably capable of either meaning. 10

MR LOXTON: Once a thing is reasonably capable of two meanings, it is very difficult to weigh the one as against the other. Lord Bramwell said it should not go to the jury.

HIS HONOR: In every case where a judge rules that matter complained of, written or printed, is capable of a defamatory meaning it must be that the matter is reasonably capable of a defamatory or a non-defamatory meaning.

MR LOXTON: That is so.

HIS HONOR: It should not go to the jury at all if it is reasonably capable of both? 20

MR LOXTON: Quite so.

HIS HONOR: I cannot agree with that.

MR LOXTON: That is not necessarily so; Your Honor by ruling that it is capable expresses no opinion at all on what the meaning is.

HIS HONOR: Of course.

MR LOXTON: All that Your Honor says is that this is a question of fact, not a question of law. Your Honor says there is a question of fact for the jury and the question of fact for the jury is whether a reasonable man would interpret those words as having some imputation against the plaintiff. That is the question the jury are asked and 30 which they must answer.

HIS HONOR: No, what is their reasonable interpretation, what does this document mean on its reasonable interpretation. What point are you on now?

MR LOXTON: I want Your Honor to direct the gentlemen of the jury that if they find the meaning attributed to it by the defendant's counsel is at least equally as reasonable as that attributed by the plaintiff's counsel the defendant is entitled to succeed.

HIS HONOR: Did I not, in the course of my summing up tell the jury that the plaintiff carried the onus of satisfying them that the matter 40 complained of had a defamatory meaning?

MR LOXTON: Yes, but Your Honor did not deal with that particular position.

HIS HONOR: I will not go any further.

MR LOXTON: I just ask for that direction.

HIS HONOR: I do not think so, Mr Loxton.

I perhaps was somewhat in error—not in error, but perhaps in my desire to cut down the time to a minimum I did overlook one thing contended for here by the defendant. I put to you the three possible interpretations, or what Mr Hughes contends are three possible interpretations of this letter and his argument that they are all defamatory of the plaintiff. I put it to you on the contrary that the defendant contended that this letter had nothing to do with the plaintiff at all, was no reflection on him and was merely an attack on the Council.

- Of course, the defendant, through his counsel, does contend also that
 10 another non-defamatory meaning is that the plaintiff did nothing more than exercise his rights to make an application to the Council as any citizen was entitled to make.

MR LOXTON: An interpretation.

HIS HONOR: I did not make a note of the word used.

MR LOXTON: "Interpretation" is my word. Either the Council was so foolish that nothing was beyond understanding, and the other one was that the Council may have extended a favour or been not impartial in weighing the merits.

HIS HONOR: That is covered by an attack on the Council.

- 20 MR HUGHES: There are several matters, two or three of which are purely formal in character as they are in the way of stating matters that have been argued previously. There are one or two matters which might conveniently be referred to by me before the jury retires. The first one is on a question of damages. I would ask Your Honor to tell the jury that they may if they see fit, it being entirely a matter for them, take into account as aggravating the damage and as a ground for increasing damages which would otherwise be awarded, the fact that the defendant has persisted in the plea that the defamatory matter, if it was a defamatory statement of fact, was true and was for the
 30 public benefit.

HIS HONOR: I will do it if you like, but if I do it I think in this particular case I ought to go a bit further than ordinarily I would, because of the nature of the word that he used.

MR HUGHES: The jury would be entitled to take into account that although in the latter stages of my learned friend's address he at last conceded, I think, that there was no attack on the probity of the plaintiff—

HIS HONOR: That is what he contends, he contends the article is not an attack on the reputation and probity of the plaintiff.

- 40 MR HUGHES: The defendant will persist in saying if that is wrong and it is true that the plaintiff was guilty of some lack of probity in the public benefit matter, that is a matter on the authorities—

HIS HONOR: I know.

MR HUGHES: I simply ask Your Honor to draw the jury's attention to that. The other matter I raise with diffidence, but only because the plea of truth and public benefit was persisted in. Your Honor did not

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in terms say to the members of the jury that the law presumes the matter, if it is defamatory, to be false. That is a matter of some importance, Your Honor may think, in the light of the fact that the defendant persisted in his plea of truth and public benefit.

HIS HONOR: It is correct that if this matter is defamatory of the plaintiff it is presumed to be false and in relation to the plea of truth and public benefit if that presumption is to be overcome the defendant carries the onus of showing that it is true. I think I have already told you as a matter of fact that the defendant carries the onus in relation to all matters under that plea. 10

MR HUGHES: The only other matter is this: In dealing with the defence of fair comment, your Honor said it had to be honest comment and Your Honor used the word "fair". I respectfully ask Your Honor to give the jury one further direction on the question of fairness, that is the further element that must exist. It must be comment which is not only honest but capable of being warranted from the facts stated, if they be true facts. This is stated by Gatley at the top of p. 353; "Is the inference an honest expression of the opinion which the defendant held . . . inference." In my opinion the second part should be put in a case such as this where the libel, if it be one, is a libel 20 upon the probity of a public man. Those are the only matters I wanted to put, apart from purely formal matters which I do not think I need to trouble to put to Your Honor in the presence of the jury.

HIS HONOR: I do not think I will say anything further about that aspect. So far as concerns this plea of truth and public benefit I think I should perhaps say this: If a defendant justifies, alleges to be true, defamatory matter which he has published of a plaintiff, persistence in that, although he expressly says that the article makes no attack on the plaintiff's probity, is a matter you can take into account in assessing damages and you should give such effect to it as you think proper. 30

(The jury were allowed to leave the Court until 2 p.m.)

MR HUGHES: The matters are necessarily very short. Your Honor directed the jury that they would have to consider whether or not there had been a departure by the Council from its established policy in relation to dwellings. My submission would be this, that the jury should not have been invited to consider whether or not there was a departure because there is, in my submission, no evidence of a departure. I would shortly reinforce that—

HIS HONOR: I understand your point; I do not think you need reinforce it. I think it is a question of fact for the jury. 40

MR HUGHES: I think the other matters are covered by the submissions I made on the application to take away the other pleas. In my submission there was no evidence of facts capable of making publication for the public benefit under the third plea.

HIS HONOR: No evidence of truth.

MR HUGHES: No evidence of truth and no evidence that the comment was either fair or honest.

HIS HONOR: And no evidence upon which it could be found in relation to the second plea that the words were non-defamatory.

MR HUGHES: I also make the formal submission that as a matter of law the whole of the matters contained in the article complained of should be proved for the purpose of considering any defence to the action simpliciter.

HIS HONOR: That can be noted.

10 (Luncheon adjournment.)
AT 2 P.M.

HIS HONOR: Gentlemen, will you please retire to consider your verdict. The exhibits can be sent out to you and you can make such use of them as you see fit.

MR HUGHES: There is one exhibit there which consists of two letters.

HIS HONOR: You say there is no point in sending that out. Unless both parties consent to it not being sent out.

MR LOXTON: I do not mind. If it is sent out there might be some short explanation.

20 HIS HONOR: Do you want it sent out—do you really want to help the jury?

MR LOXTON: No, it need not be sent out.

HIS HONOR: It is no help to anybody. It may be noted that by consent of the parties Exhibit "C" is not sent out to the jury room.

It is only formal and technical, gentlemen.

(The jury retired and returned at 2.25 p.m. to ask a question.)

HIS HONOR: I received a message that you desired to ask a question. (Question on slip of paper and handed to His Honor and m.f.i. "17".)

30 You ask me what the position is about costs and you conclude your question by saying "Or are the costs my sole concern". In point of fact they are not, but I think you had better discard any such consideration from your minds. It has nothing to do with you, if you do not mind me saying so, and it has nothing to do with me either. The law makes certain provisions about these things. I am sorry, but that is all I can tell you, I am afraid.

Verdict of Jury

Verdict of Jury.

40 The jury retired and returned at 2.37 p.m. with a verdict for the plaintiff for £500. On the application of Mr Loxton His Honor granted a stay of proceedings for 21 days on the usual terms.

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before
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Mr Justice
Maguire and
a Jury of
four persons.
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Summing Up
to Jury.
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3rd June, 1960.

*In the
Full Court
of the
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—
No. 6,
Notice of
Appeal.
—

22nd June, 1960.

No. 6

Notice of Appeal 22nd June, 1960

TAKE NOTICE that in this action which was heard before His Honour Mr Justice Maguire and a Jury of four persons on the 30th and 31st days of May and the 1st, 2nd and 3rd days of June, 1960, when a verdict was returned in favour of the Plaintiff in the sum of Five hundred pounds (£500.0.0) the Defendant intends to move this Honourable Court sitting in Banco on the First day of which the Court sits next after the expiration of Sixteen (16) days from the filing of 10 this Notice of Appeal or so soon thereafter as Counsel can be heard in that behalf for an order that the verdict be set aside and a verdict be entered for the Defendant or alternatively that a new trial of the action be ordered or for such further or other order as to the Court seems meet upon the following grounds:—

1. THAT His Honour should have directed a verdict for the Defendant.

2. THAT His Honour was in error in holding that the alleged words were capable of a defamatory meaning as against the Plaintiff.

3. THAT His Honour should have held that the alleged words 20 were fair comment on facts which were true and which were of public interest.

4. THAT His Honour was in error in rejecting the evidence relating to:

- (a) the voting for and against the Plaintiff's application at the Council Meeting held on the 17th February, 1958;
- (b) the receipt by the Council of letters from the Narrabeen Community Centre and the Narrabeena Progress Association after its approval of the Plaintiff's said application;
- (c) the publicity given to the Council's decision by daily news- 30 papers circulating throughout Sydney and over the wireless;
- (d) the criticism of the Council's decision by ratepayers throughout the Shire;
- (e) the resolution by the Council rescinding the approval given by it of the Plaintiff's application.

5. THAT the damages awarded are excessive.

6. THAT the verdict of the Jury is against the evidence and weight of evidence.

DATED this 22nd day of June 1960.

D. A. YELDHAM (SGD.) 40
Counsel for the Defendant (Appellant)

NOTE: This Notice of Appeal is filed by Messrs. John H. Yeldham & Spain of 137 Pacific Highway, North Sydney the Solicitors for the Defendant by their Sydney Agents, Messrs. Gill Oxlade & Broad, 11c Castlereagh Street, Sydney.

No. 7

Further Grounds of Appeal

12th July, 1960

*In the
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Supreme Court
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—
No. 7.
Further Grounds
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—
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1. THAT His Honour misdirected the Jury as to the relative importance of the universal right of freedom of speech and the private right to maintain reputation unimpaired.

2. THAT His Honour was in error in directing the Jury that they should look at the alleged libel as fair minded men and say "What does this really mean?"

10 3. THAT His Honour was in error in directing the Jury that "there can be no room for doubt that the publication was of and concerning the Plaintiff".

4. THAT His Honour was in error in directing the Jury, in the context in which such direction was given that in this case he had ruled as a matter of law that the words complained of in the letter that was published on the 27th day of February, 1958 are capable of a defamatory meaning.

5. THAT His Honour was in error in directing the Jury that the alleged libel could be "an attack by suggestion perhaps to some extent
20 on the integrity and reputation of the Plaintiff".

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.

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.

8. THAT 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.

9. THAT His Honour was in error in directing the Jury that
30 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.

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
40 allegation of a departure was true or not.

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.

12. THAT His Honour was in error in leaving it open to the

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Jury to find that the alleged words meant the three meanings alleged by Counsel for the Plaintiff or any one or more of them.

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.

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 10 of fact in the letter complained of are not defamatory of the Plaintiff.

16. THAT His Honour was in error in leaving to the Jury the question whether the comment was on a matter of public interest.

17. THAT 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.

19. THAT His Honour was in error in leaving the Jury to determine under the Defendant's Third Plea whether the statements 20 of fact were true in a defamatory sense.

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.

21. THAT His Honour was in error in directing the Jury that if the letter meant or contained allegations of fact "that there was a departure from policy in relation to Councillor Jones, was that allegation true or was it not? If it was not true, the Plea cannot succeed".

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 30 be published.

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 2nd and 3rd 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 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 40 made on facts that were not defamatory.

25. THAT His Honour was in error in directing the Jury that the statement by the Defendant to Councillor Berry was not evidence of the facts.

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.

27. THAT His Honour was in error in directing the Jury on the question of damages that "if a Defendant justifies, alleges to be true, defamatory matter which he has published of a Plaintiff, persistence in that, although he expressly says that the article makes no attack on the Plaintiff's probity", is a matter that they could take into account.

28. THAT the real issues in the case were not put by His Honour to the Jury.

10 DATED this 12th day of July, 1960.

(Sgd.) D. A. YELDHAM
Counsel for the Defendant (Appellant)

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Full Court
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*In the
Full Court
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Supreme Court
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No. 8**Rule Allowing Appeal****14th June, 1961**

No. 8.
Rule Allowing
Appeal.

—
14th June, 1961.

UPON MOTION made on the Twenty-ninth, Thirtieth and Thirty-first days of May, 1961 and the First day of June 1961 on behalf of the abovenamed Gordon Berkeley Jones WHEREUPON AND UPON READING the Notice of Motion herein dated the Twenty-second day of June 1960 the Further Grounds of Appeal dated the Twelfth day of July 1960 and the Appeal book filed herein AND UPON HEARING Mr M. F. Loxton of Queen's Counsel with him Mr D. A. Yeldham 10 of Counsel for the Appellant and Mr T. E. F. Hughes of Counsel for the Respondent IT WAS ORDERED that the matter stand for judgment AND the same standing in the list this day for judgment accordingly IT IS ORDERED that appeal herein be and the same is hereby allowed AND IT IS FURTHER ORDERED that the verdict of the Jury be set aside and in its place a verdict be entered for the Defendant and IT IS FURTHER ORDERED that the costs of the Appellant of and incidental to this appeal be paid by the Respondent to the Appellant or to his Solicitor AND IT IS FURTHER ORDERED that the Respondent be granted an indemnity certificate as provided 20 by Section 6 of the Suitors' Fund Act, 1951.

BY THE COURT

R. E. Walker, L.S.

PROTHONOTARY.

No. 9

Reasons of Their Honors Owen, Brereton and Ferguson, JJ

14th June, 1961

*In the
Full Court
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Supreme Court
of New South
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No. 9.
Reasons of
their Honors
Owen, Brereton
and Ferguson,
JJ.

14th June, 1961.

OWEN, J. This is an appeal by the defendant in a libel action in which the jury found a verdict for the plaintiff for £500. The action arose out of a letter published by the defendant in a newspaper of which he was the publisher and which circulated in the Warringah Shire. The letter was as follows:—

“Sir, —

- 10 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 garage.

It is beyond understanding. Or is it?

RATEPAYER.”

- 20 On the appeal it was submitted on behalf of the defendant that for various reasons the jury should have been directed to find a verdict for the defendant. Other grounds of appeal were directed to obtaining a new trial.

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. The application was granted by the Council and following the grant of approval the letter set out above was published.

- 30 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”.

- 40 The evidence was to the effect that this was still the policy of the Council at the date of the plaintiff's application and that that policy had been applied in a considerable number of cases. The plaintiff's declaration alleged two innuendos. First, that the plaintiff had made undue and improper use of his position as a member of the Council for the purpose of obtaining the approval of the Council to the use of his garage as servant's quarters, and secondly, that he had been guilty of corrupt and improper conduct in and about obtaining such approval. At the trial these innuendos were dropped and reliance was placed only on the natural and ordinary meaning of the words published.

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No. 9.
Reasons of
their Honors
Owen, Brereton
and Ferguson,
JJ.

(Continued)

14th June, 1961.

Originally the defendant filed five pleas. The first was "Not guilty" and the second was in the following form:—

"The Defendant says that insofar as the words consist of allegations of fact the words are true in substance and in fact and insofar as the words consist of expressions of opinion and without the meaning alleged they are fair comment made in good faith and without malice upon the said facts which are a matter of public interest".

The third plea was in similar terms but was pleaded to the innuendos as well as to the words published. The fourth plea averred 10 a series of facts which it alleged made it for the public benefit to publish the letter, and went on:

"And the defendant says that insofar as the words consist of allegations of fact the words are true in substance and in fact and insofar as the words consist of expressions of opinion and without the meaning alleged they are fair comment made in good faith and without malice upon the said facts which are a matter of public interest".

The fifth plea repeated the fourth plea but without the words "and without the meaning alleged". 20

The fourth and fifth pleas took the form they did because of what was said by Jordon C.J. and Halse Rogers J. in **Goldsbrough v. John Fairfax & Sons Pty. Ltd.** (34 S.R. 525). Until Goldbrough's case was decided it had always been thought that where a publication contained defamatory statements of fact and defamatory comment on those facts a defence of fair comment was made out if the facts stated were shown to be true and the comment was fair provided also, of course, that the publication was on a matter of public interest. In that case, however, it was said that Section 7 of the Defamation Act, which first appeared in New South Wales in 1847, had altered the law not 30 only in relation to a plea justifying the publication of defamatory matter on the ground that it was true, but also in relation to a defence of fair comment which is not a plea of justification but denies that the publication is actionable and can be raised under a plea of not guilty. Section 7 provides:—

- (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 40 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”.

Their Honours expressed the view, which was obiter, that as a result of that provision a defendant who wished to rely upon a defence of fair comment to the publication of defamatory matter consisting partly of fact and partly of comment was required to show not only that the defamatory facts were true, that the comment was fair, and that the matter upon which the comment was made was a matter of public
 10 interest, but also that it was for the public benefit that the defamatory facts should be published, the question of public interest being one for the Judge’s decision and the question of public benefit being for the jury to decide.

Pausing there for a moment, counsel for the defendant submitted very weighty arguments to us that what was said in Goldsbrough’s case was wrong and that on its true construction Section 7 of the Defamation Act applies only to a plea justifying the publication of defamatory matter on the ground of truth. In this connection counsel drew our attention to Section 33 of the Act, which provides that:—

20 “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”.

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. The question is simply one of the interpretation of the Defamation Act, and Section 7 itself speaks only of a plea justifying the publication of defamatory matter on the ground of its truth.
 30 Further I would have thought it unlikely that if the Legislature had intended Section 7 to apply to the defence of fair comment, it would have left the law in a condition in which the issue of “public benefit” would be for the jury and that of “public interest” for the Judge. However, that may be, I do not find it necessary to decide finally whether what was said in Goldsbrough’s case was correct and I need scarcely add that I would differ with very great diffidence from any legal proposition laid down by a lawyer of the stature of Jordon C.J.

Turning back to the history of the case under appeal, the defendant’s pleas having been filed, an application was made to Sugerman
 40 J. to strike them out with the exception of the plea of not guilty. His Honour was, rightly, of opinion that he as a single Judge should follow what had been said in Goldsbrough’s case, and since the second and third pleas merely alleged that the statements of fact in the letter were true and made no reference to the public benefit, they were, on the authority of that case, clearly demurrable. Accordingly he struck them out and gave leave to the defendant to file amended pleas. The

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defendant then pleaded new second and third pleas. The second plea denied that any statements of fact in the letter were defamatory of the plaintiff and alleged that those statements were true. As to so much of the publication as consisted of comment, the plea alleged that it was fair comment upon a matter of public interest. This plea was not pleaded to the innuendos. The new third plea was in the same form and covered the innuendos. These pleas were of course designed to avoid pleading "public benefit" by denying that the statements of fact were defamatory and, if what was said by Jordan C.J. in Goldsbrough's case was not correct, this allegation was unnecessary. At 10 the close of the plaintiff's case counsel for the defendant moved for a verdict by direction on several grounds, but this was refused. The transcript seems to me to disclose that the case had got into a somewhat confused state, but it is clear enough that one ground on which counsel for the defendant based his application was that the publication could not reasonably be held to be defamatory of the plaintiff, and it seems reasonably clear that another ground was that under the second and third pleas the defendant was entitled to a verdict because on the evidence the matters of fact stated in the letter were true, the comment on those facts could not, on its face, be said to be unfair 20 and there was no evidence of malice.

The first question is whether the letter is capable of a meaning defamatory to the plaintiff, that is to say "whether reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense" (per Lord Selborne L.C. in **Henty's case** (7 A.C. 741 at p. 745)). If the answer to that question is "No", then the case should not have gone to the jury and the defendant would be entitled to a verdict. In considering that question "it is not enough to say that by some person or another the words **might** be understood in a defamatory sense" (per Lord Halsbury L.C. in **Nevill v. Fine Art & 30 General Insurance Co.** (1897 A.C. 68 at p. 73)). What is to be considered is "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". (**Keogh v. The Incorporated Dental Hospital** (1910 2 I.R. at p. 586, per Lord O'Brien C.J.)). As Lord Shaw said in **Stubbs Ltd. v. Russell** (1913 A.C. 386 at p. 398):—

"Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether 40 some people would put such and such a meaning upon the words, however strained or unlikely that construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge, the mental equipment, even the prejudices, of the reader or hearer; it varies—and very often greatly varies—with his temperament or his disposition, in which the elements,

on the one hand, of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. 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”.

Applying these tests to the publication in question, it is beyond question, and could not reasonably be held otherwise, that a reasonable person reading the letter would take it to be an attack upon the Council, and I should add that it has never been suggested in the present case that the plaintiff sued as a member of a class which had been defamed. 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.

Accordingly—and on the ground that the letter could not reasonably be found to be defamatory of the plaintiff—I am of the opinion that the appeal should be upheld, the verdict set aside and in its place a verdict entered for the defendant. The plaintiff should pay the costs of the appeal and have a certificate under the Suitors’ Fund Act.

I should add that if I had come to the conclusion that the defendant was not entitled to have a verdict entered in his favour, I would have been in favour of allowing the defendant to rely upon the grounds of appeal directed to certain passages in the summing up although specific objection was not taken to them at the hearing.

BRERETON, J. In an action for defamation the plaintiff recovered a verdict and the defendant now moves for an order setting aside the verdict and entering a verdict for the defendant or alternatively for a new trial, upon a large number of diverse grounds.

The basis of the plaintiff’s action is the publication in the defendant’s newspaper of the following letter, under the caption of “Cr. Jones’ Garage”.

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“Sir,

Of all the appalling decisions made by the 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 garage.

It is beyond understanding. Or is it?

10

RATEPAYER.

North Manly.”

The innuendoes originally pleaded were abandoned, and the question immediately arising is whether the words, read in their ordinary meaning, are susceptible of an imputation defamatory of Cr. Jones, the plaintiff. Would any ordinary, fair-minded reader, not unduly suspicious, and not over astute to seek out a hidden meaning, think the less of Cr. Jones, as a result of reading this letter? No facts or circumstances other than those appearing in the letter, were proved, such as would cause a reader who knew them to draw any inference 20 other than what was eligible by anyone at all from the letter itself. Nor was the plaintiff’s case put on the footing that the letter was defamatory of the Council of which he was a member—if indeed, it could have been successfully so put; it was put solely on the basis that the letter was defamatory of him personally, and without regard to anything said of the Council. In other words, he sues, not in respect of what was said of the Council, but of what he alleges was said of him.

It is thus with the letter, and the letter alone, that we are concerned; and we are concerned only with ascertaining whether it contains, expressly or by suggestion, any damaging reflection upon 30 Cr. Jones, the plaintiff.

The caption has the effect of placing Cr. Jones, and his garage, in the forefront of the reader’s mind; he is told by it that that is what the letter is about. The writer then proceeds to allege that the Council has been responsible for many appalling decisions, and that the worst of these is “that to allow Cr. Jones to convert his Harbord garage into servants’ quarters”. Up to this point the letter is critical only of the Council. There is nothing to suggest that the reader would do more than congratulate Cr. Jones on his extreme good fortune in winning on a bad decision. Even though the reader took it that Cr. Jones was 40 a party to it, there is no suggestion of anything actually discreditable. It does not defame a legislator to say simply that he voted the wrong way.

The writer however proceeds to point out that the Council is conducting an “insistent” campaign to force homeless people living in garages to quit “and yet they give approval to one of their own

councillors (who certainly is not homeless) to convert his garage". The attack is still on the Council. The writer sees a departure from the principle of not allowing people to live in garages in the fact of allowing someone to convert one. The reader may or may not; but the author does, and his imputation is that the Council departs from its principles by way of favour to its own members; that it has one rule for the rulers and another for the ruled. This is certainly not a flattering thing to say of the Council; but it is said only of the Council.

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I can detect no suggestion that the plaintiff himself "gave approval",
10 thus making him guilty of a departure from principle to favour him-
self above the ordinary resident. The most that could be said to be
imputed of him is that in making an application he was seeking a
special favour and thus countenancing if not inviting preferential
treatment of councillors. However, no express reference to any act of
Cr. Jones is made; it is not stated that he made any application; so
far as the letter goes, the Council could have conferred this benefit on
Cr. Jones ex mero motu, and without having been invited by him so
to do. The letter does not invite the reader to assume that an applica-
tion was made; though a reader familiar with the procedure might
20 well do so; but if the reader does, and thereupon makes the imputa-
tion, perhaps farfetched, which I have suggested to be possible, I think
that imputation is the product of the reader's own mind, and not of
the author of the letter. His mind may have been set in motion, his
reflections instigated, by the letter; but his conclusion is not one to
which the letter directs him; it is not one which the writer's words of
themselves suggest to him. The man who states a proposition is not
responsible for every corollary which may occur to a mind revolving
around it; he is responsible only for those suggested, expressly or
impliedly, by what he has actually written, its obvious elisions and
30 its juxtapositions.

The letter concludes "It is beyond understanding" and then the
writer sneers "Or is it?" He thereby, to my mind, suggests that
perhaps there is an explanation; rhetorically, he invites the reader to
suggest it; and, it may be that the implication is that the explanation
is one which the writer is not prepared to put on paper. But what
explanation suggests itself to a reader educated only by the letter he
has just read? And specifically, is the explanation which comes to
the mind of the reader thus invited to ruminate, going to involve any-
thing disparaging of Cr. Jones of whom all that has been implied is
40 that he benefited by virtue of an exceptional, and therefore exception-
ally bad, decision? Why when all the previous shafts were levelled at
the Council, should it be taken that the parthian shot is levelled at
him? Is the writer to be taken as suggesting by his unanswered question,
that the approval may have been the result of some understanding
between Cr. Jones and other members of the Council such that benefits
might accrue out of good fellowship at the expense of good govern-

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ment? There is nothing in what precedes to lead to that explanation; indeed, what precedes tends to weigh against it; there is emphasis by the writer on the badness of the Council's decisions generally (quite apart from this one, which he thinks merely won the blue ribbon against strong competition) an emphasis quite unnecessary to the point he really wishes to make, that this particular one was discriminatory; and if the answer to the writer's question is to be spelt out from what has gone before, it would seem that the answer suggested is that the Council was incapable of making other than bad decisions, and was therefore unfit to hold office.

10

I am therefore unable to see that the letter, read as a whole, is reasonably susceptible of the inference that Councillor Jones was prepared for his own purposes to submit to the Council an application conflicting with its established policy; that he was prepared to accept preferential treatment; least of all that he secured such treatment by influencing his colleagues. These were the imputations laid by the plaintiff, and what I have already said disposes of them. I would only add, as being implicit in what goes before, that 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 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.

It becomes unnecessary to consider the numerous other grounds of appeal. As to some, it was argued in bar that the point was not taken at the trial. In all the circumstances of this trial, and bearing in mind the confusion wrought by the impact upon it of **Goldsbrough v. John Fairfax & Sons Ltd.** (34 S.R. 524) had it been necessary, I would have been in favour of giving leave to rely on points not taken; and of the remarks on the plea of fair comment contained in the judgments in that case I would only say that the Court was apparently not referred to s.33 of the Defamation Act 1912. For that and other substantial reasons, should it ever now become necessary, those remarks will need to be critically examined.

40

In my opinion the appeal should be allowed, the verdict for the plaintiff set aside, and a verdict entered for the defendant.

— — —
FERGUSON, J. This is a motion for an order setting aside the verdict and entering a verdict for the defendant, or alternatively granting a new trial in an action for libel in which the jury returned a verdict in favour of the plaintiff for £500.

At all relevant times the plaintiff was a member of the Council of the Shire of Warringah and the defendant was the proprietor and publisher of a newspaper called "The Manly-Warringah News". On the 27th February 1958 the defendant published in his newspaper a letter in the following terms:—

"Cr. Jones' Garage

Sir, —

10 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 garage.

It is beyond understanding. Or is it?

'Ratepayer.'

North Manly."

20 Thereupon the plaintiff, conceiving the letter to be defamatory of him, commenced the action under appeal. The declaration set out the letter in full and alleged by way of innuendo that the defendant thereby meant "that the plaintiff had made undue and improper use of his position as a member of the Warringah Shire Council for the purpose of obtaining the approval of such Council for the use of the plaintiff's garage as servants' quarters and that the plaintiff had been guilty of corrupt and improper conduct in and about obtaining such approval."

30 To this declaration the defendant pleaded five pleas. The first was a plea of not guilty. The second alleged, in effect, that as to so much of the letter complained of as consisted of allegations of fact, such allegations were true, and as to so much as consisted of expressions of opinion, without the meaning attached to them by the innuendo, they were fair comment made in good faith without malice upon such facts which were matters of public interest. The third plea was to the same effect as the second except that it was pleaded to the innuendo as well. The fourth plea, like the second, was a plea of fair comment pleaded to the words complained of, without the meaning alleged in the innuendo, but in addition to setting out the allegations contained in the second plea, it further alleged that it was for the public benefit
40 that the words were published and stated the particular facts by reason whereof it was for the public benefit. The fifth plea was to the same effect, but like the third, was pleaded to the innuendo as well.

On the application of the plaintiff, the second and third pleas were struck out on the ground that they did not conform to the requirements laid down in **Goldsbrough v. John Fairfax & Sons Ltd.**, 34 S.R. 524, to which I shall refer more fully later; but the defendant was

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given leave to amend his pleas generally. Pursuant to such leave the second and third pleas were repleaded with an additional allegation that insofar as the letter complained of consisted of allegations of fact they were not defamatory of the plaintiff. In substance the fourth and fifth pleas remained the same. During the trial the plaintiff withdrew the innuendo, the third and fifth pleas were discarded, and the fourth plea was renumbered three; also the words in the second plea limiting its application to the declaration exclusive of the innuendo were deleted.

At the close of the plaintiff's case counsel for the defendant moved unsuccessfully for a verdict, firstly on the ground that the words com- 10
plained of were not reasonably capable of bearing a meaning defamatory of the plaintiff, and secondly, that under the second and third pleas there was no evidence that the comment was unfair and there was no evidence of malice. It was submitted that the allegation in the second plea that the facts were not defamatory of the plaintiff was surplusage and that the defendant was entitled to a verdict whether they were defamatory or not.

On the question as to whether the words complained of are capable of a defamatory meaning, it is submitted by counsel for the respondent that they suggest that the respondent was prepared, for 20
his own purpose, to submit to the Council an application conflicting with its established policy, and 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 further that he was not merely passive in accepting a favour from the Council but secured it by improper means. The letter does not say anything of that nature; but it is said that those allegations are implicit in it and are to be inferred from the use of the words "and yet" in the second paragraph, which it is claimed, as I understand the argument, would lead a reader wrongly to suppose that granting leave to convert a garage 30
into servants' quarters was in conflict with the Council's policy pursuant to which it was conducting an insistent campaign against homeless people living in garages to force them to quit; that thus an entirely false picture is created which would lead a person reading the letter further to suppose that the plaintiff, by virtue of his position as a councillor, had sought and obtained from the Council approval to do that which others, not so favourably placed, were being forced by the Council to discontinue. It was further submitted that the final words "It is beyond understanding. Or is it?" suggest that the plaintiff had used improper means to obtain the Council's approval. 40

This argument seems to me to involve a submission that the letter is capable of being understood in a defamatory sense if it be misread. But the test as to whether words are capable of being understood in a defamatory sense is not whether some people would put a sinister construction upon them, but whether they would be so understood by a reasonable reader. The letter, in terms, is a criticism of the Council,

not of the plaintiff. 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 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 matter which may be regarded as converting it into a criticism of the plaintiff. In my opinion the words complained of are not susceptible of being understood by a reasonable and fair minded reader in any sense defamatory of the plaintiff.

That would be sufficient to dispose of this appeal, but since a great deal of argument was addressed to us on the defence of fair comment and what it is necessary to prove in order to establish it, I think it proper that I should express my views upon it. I do so because it seems to me that many of the difficulties that arose at the hearing were due, in great measure, to the fact that the learned trial Judge felt himself bound to follow certain dicta expressed by Jordon C.J. and Halse Rogers J. in **Goldsbrough v. John Fairfax & Sons Ltd.** (34 S.R. 524). In that case their Honors expressed the view that by reason of the provisions of s.7 of the Defamation Act, a defence of fair comment could succeed, where defamatory statements of fact were published as the basis of the comment complained of, only if it were for the public benefit that such facts should have been published. At p. 534, Jordan C.J. said:—

"The question really is whether it can be regarded as fair to publish defamatory comments on defamatory statements of fact which, although true, it is unlawful to publish because it is not for the public benefit that they should be published. I am of the opinion that it cannot. It follows that in my opinion, in New South Wales, where the defamatory matter complained of consists of both facts and comment, the defence of fair comment is not, in principle, available as to the comment unless it can be established that the defamatory facts relied on as the basis for the comment, or some of them, were true, and that it was for the public benefit that they should be published".

I find that conclusion somewhat difficult to understand. Never-

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theless it is with the utmost diffidence that I venture to differ from the considered opinion of so weighty an authority in the law as Jordan C.J.; yet in doing so, I draw considerable comfort from the fact that, for generations before Goldsbrough's case was decided, Judges of comparable authority in this State shared the view that I believe to be the correct one. It is for that reason that I venture to express it.

It is the right of every citizen to have his good name maintained unimpaired; but it is equally the right of every citizen to speak his mind freely and honestly on matters of public interest. In any conflict between those rights, the plaintiff must give way. In *Campbell v. 10 Spottiswoode*, 3 B. & S. 769, Crompton J. at p. 778 said:

"Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter . . . The first question is whether the article on which this action is brought is a libel or not libel—not whether it is privileged or not. It is no libel if it is within the range of fair comment, that is, if a person might fairly and bona fide write the article; otherwise it is."

And Blackburn J. at p. 780:—

"It is important to bear in mind that the question is, not whether 20 the publication is privileged, but whether it is a libel".

It is to be observed that the plea of fair comment is not a plea in justification of a libel; on the contrary, it goes to the very root of the matter: if the words complained of are within the bounds of fair comment they are no libel at all, whatever defamatory trend they may have. At common law it matters not that the facts upon which the comment is based are defamatory: if truly stated and fairly commented upon there is no libel. It is important to bear this in mind, as s. 7 of the Defamation Act is concerned with what may justify a libel, not with any question of libel or no libel. It merely provides that the 30 truth of the matters charged shall not be a defence unless it was for the public benefit that such matters should be published. Under the old system of pleading in England, truth as a justification of the libel, could not be proved under the general issue (B. and L. 3rd Ed. p. 723); but truth as a basis for the defence of fair comment always could, because the plea is not directed to the facts at all. That was the position in New South Wales too until, following Goldsbrough's case, a rule was passed requiring the defence of fair comment to the specially pleaded.

In any such plea, even where the basic facts are not defamatory 40 of the plaintiff, their truth would need to be alleged. The form of the plea, so as not to be demurrable, would need to be to the following effect:—

"Insofar as the said words consist of allegations of fact they are true in substance and in fact, and insofar as they consist of expressions of opinion they are fair comments made in good

faith and without malice upon the said facts which are matters of public interest.

That is the form of the rolled up plea in England, and, if the dicta in Goldsbrough's case are incorrect, it would be a sufficient compliance with the rule here. It is to be observed that the plea is pleaded to the comments only, not to the facts. In **Sutherland v. Stopes**, 1925 A.C., p. 47, Viscount Finlay, at p. 62 said:—

10 “There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one but it, in fact, raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct”.

It is the fairness of the opinions expressed, not their truth, that is material; but in order that they should be fair, the facts upon which
20 they are based must be truly stated. It is therefore, necessary in a plea of fair comment, to allege that the facts on which the comments are based are true, otherwise the plea would be demurrable. It has been well said that every pleading is the minor premise of a syllogism of which the principle of law or the particular law invoked and relied upon is the major premise. That being so, the conclusion that the pleader has brought himself within that law must necessarily follow from the facts alleged. If it may or may not follow depending upon the existence or non-existence of some additional fact not alleged in the pleading, or elsewhere on the record, the pleading is demurrable.
30 When a plea of fair comment is pleaded, the principle of law relied upon is that every citizen, not being actuated by malice, is entitled to comment fairly on facts truly stated which are matters of public interest. Unless the plea alleged that the facts were true, the pleader would not necessarily have brought himself within the principle and the plea would be bad. The truth of the facts is a necessary ingredient to the comment being fair, but their truth is not pleaded as justifying any defamatory meaning conveyed by them. As the plea is not pleaded to the facts at all, and as the truth of the comments to which it is pleaded is not a relevant matter, it seems to me that s. 7 of the Defama-
40 tion Act was not intended to have any application to a defence of fair comment. That this is so is made clear by the provisions of s. 33 of the Act. As mentioned above, before Goldsbrough's case, the defence of fair comment was raised under a plea of not guilty; and s. 33 provides that nothing in the Act shall take away or prejudice any defence under the plea of not guilty which it was then competent for the defendant to raise. If the view that I have expressed be correct,

*In the
Full Court
of the
Supreme Court
of New South
Wales.*

—
No. 9.
Reasons of
their Honors
Owen, Brereton
and Ferguson,
JJ.
(Continued)

14th June, 1961.

*In the
Full Court
of the
Supreme Court
of New South
Wales.*

—
No. 9.
Reasons of
their Honors
Owen, Brereton
and Ferguson,
JJ.
(Continued)

—
14th June, 1961.

and I think it is, the very basis of the dicta in Goldsbrough's case falls to the ground. The question posed by Jordan, C.J. was whether it could be regarded as fair to publish defamatory comments on defamatory statements of fact which, although true, it is unlawful to publish because it is not for the public benefit that they should be published. But that question assumes an illegality. At common law it is not and never was unlawful, merely because it is not for the public benefit that the facts should be published, truly to state defamatory facts which are matters of public interest and to comment fairly upon them, and s. 7 of the Defamation Act did not make it so. A person who honestly 10 exercises his undoubted right to comment upon matters of public interest, which themselves convey imputations of a defamatory nature against another, is entitled to say to what facts his comments relate, otherwise the right would be a mockery; and if he states them truly, however defamatory they may be, and comments fairly upon them, he commits no wrong.

There is one final matter to which I wish to refer. There were a number of grounds of appeal objecting to certain directions in the summing-up. In view of the conclusion to which I have come, it is unnecessary to refer to them, but no specific objection to those direc- 20 tions was taken at the hearing. Nevertheless, in view of the fact that they were apparently influenced by the dicta in Goldsbrough's case, had I not thought that the verdict should be set aside, I would have felt inclined to allow them to be relied upon.

In my opinion the appeal should be upheld, the verdict should be set aside and a verdict entered for the defendant.

No. 10**Rule of Full Court of New South Wales granting Conditional Leave to Appeal to Her Majesty in Council****28th September, 1961**

*In the
Full Court
of the
Supreme Court
of New South
Wales.*

*No. 10.
Rule of
Full Court of
New South
Wales
granting
Conditional
Leave to Appeal
to Her Majesty
in Council.*

28th Sept., 1961.

UPON MOTION made on the Twenty-sixth and Twenty-seventh days of June, 1961 on behalf of the abovenamed Gordon Berkley Jones WHEREUPON AND UPON READING the Notice of Motion herein dated the Twenty-second day of June, 1961 and the Affidavit of David Anthony Hunt sworn the Twenty-second day of June, 1961

10 AND UPON HEARING Mr. T. E. F. Hughes and Mr. K. J. Holland of Counsel for the Applicant and Mr. M. F. Loxton of Queen's Counsel with him Mr. D. A. Yeldham, Mr. H. B. Farncomb and Mr. M. J. Clarke of Counsel for the Respondent IT WAS ORDERED that the matter stand for judgment AND the same standing in the list on the Twenty-fifth day of August, 1961 the Court published its reasons for judgment AND IT WAS FURTHER ORDERED that the matter stand for a formal Order to be made and for conditions to be set AND the same standing in the list on the Seventh and Twenty-fifth days of September, 1961 and this day accordingly IT

20 IS ORDERED that leave to appeal to Her Majesty in Council from the judgment of this Court be and the same is hereby granted to the abovenamed Gordon Berkley Jones hereinafter called the Appellant UPON CONDITION that the Appellant do within three months from the date hereof give security to the satisfaction of the Prothonotary in the amount of Five hundred pounds (£500) for the due prosecution of the said appeal and the payment of such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal from the said judgment or of the appeal being dismissed for non-prosecution or of Her

30 Majesty in Council ordering the appellant to pay the Respondent's costs of the said appeal, as the case may be AND UPON FURTHER CONDITION that the Appellant do within fourteen (14) days from the date hereof deposit with the Prothonotary the sum of Twenty-five pounds (£25.0.0) as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal AND UPON FURTHER CONDITION that the Appellant do within three months of the date hereof, or, in the event of the Respondent making an application to the High Court of Australia for special leave to appeal from this Rule, within such further time as this Court may

40 allow, take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed AND UPON

*In the
Full Court
of the
Supreme Court
of New South
Wales.*

*—
No. 10.
Rule of
Full Court of
New South
Wales
granting
Conditional
Leave to Appeal
to Her Majesty
in Council.
(Continued)*

*—
28th Sept., 1961.*

FURTHER CONDITION finally that the Appellant do obtain a final order of this Court granting it leave to appeal as aforesaid AND THIS COURT DOTH FURTHER ORDER that the costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or do abide the result of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the rules next hereinafter mentioned that is to say rules 16, 17, 20 and 21 of the Rules of the second day of April One thousand nine hundred and nine regulating appeals from this Court to Her Majesty in Council AND THIS COURT DOTH FURTHER ORDER that the costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party to this appeal be taxed and paid to the party to whom the same shall be payable AND THIS COURT DOTH FURTHER ORDER that so much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of any moneys paid into Court as such security as aforesaid so far as the same shall extend AND that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the appellant AND THIS COURT DOTH FURTHER ORDER that pending the said Appeal all proceedings under the said judgment or otherwise in this cause be and the same are hereby stayed AND that each party is to be at liberty to restore this matter to the list upon giving two days notice thereof to the other for the purpose of obtaining any necessary rectification of this order.

30

BY THE COURT,

R. E. Walker, L.S.

PROTHONOTARY

No. 11

**Rule of Full Court of New South Wales granting Final Leave
to Appeal to Her Majesty in Council
3rd September, 1962**

*In the
Full Court
Full Court
Supreme Court
of New South
Wales.*

—
No. 11.
Rule of
Full Court of
New South
Wales
granting
Final Leave
to Appeal
to Her Majesty
in Council.
—
3rd Sept., 1962.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the Twenty-seventh day of August 1962 WHERE-
UPON AND UPON READING the said Notice of Motion the Certificate of the Prothonotary dated the Fifteenth day of August 1962 of compliance AND UPON HEARING what was alleged by
10 Mr. G. Masterman of Counsel for the appellant AND UPON HEAR-
ING the consent of Mr. C. R. Callaway of Counsel for the respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the judgment of the Full Court given and made herein on the Fourteenth day of June 1961 be and the same is hereby granted to the appellant AND IT IS FURTHER ORDERED that upon payment by the appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Twenty-five pounds (£25) deposited in Court by the appellant as security for and towards the cost thereof be paid out of Court to the appellant.

20

BY THE COURT,
FOR THE PROTHONOTARY

(Sgd.) E. R. Stephens
L.S.
CHIEF CLERK.

*In the
Full Court
Full Court
Supreme Court
of New South
Wales.*

No. 12

**Certificate of the Prothonotary of the Supreme Court of New South
Wales verifying Transcript Record**

—
No. 12.
Certificate
of the
Prothonotary
of the
Supreme Court
of New South
Wales
verifying
Transcript
Record.

I RONALD EARLE WALKER of the City of Sydney in the State of New South Wales Commonwealth of Australia Prothonotary of the Supreme Court of the said State DO HEREBY CERTIFY that the numbered sheets hereunto annexed and contained in pages numbered one to one hundred and thirty-seven inclusive contain a true copy of all documents relevant to the appeal by the Appellant Gordon Berkley Jones to Her Majesty in Her Majesty's Privy Council from the order 10 made in cause instituted by Writ of Summons No. 2807 of 1958 by the Full Court of the said Supreme Court on the fourteenth day of June One thousand nine hundred and sixty-one so far as the same have relation to the matters of the said appeal together with the reasons for the said order given by the said Full Court of the said Supreme Court and that the sheets hereunto annexed and contained in pages numbered (i) to (iv) contain an index of all the papers documents and exhibits in the said cause included in the annexed transcript record and of all papers documents and exhibits in the said cause not reproduced in the annexed transcript record which true copy and index 20 are remitted to the Privy Council pursuant to the Order of his late Majesty King Edward the Seventh in his late Majesty's Privy Council of the second day of April in the year of Our Lord One thousand nine hundred and nine.

IN FAITH AND TESTIMONY whereof
I have hereunto set my hand and caused
the seal of the said Supreme Court to be
affixed this 9th day of April in the year
of Our Lord One thousand nine hundred
and sixty-three.

30

R. E. WALKER (L.S.)
Prothonotary of the Supreme
Court of New South Wales.

EXHIBIT A

Certified Copy of Affidavit of Printer, Publisher and Proprietor
23rd May, 1960

Exhibit A.
 —
 Certified Copy
 of Affidavit of
 Printer,
 Publisher and
 Proprietor.
 —
 23rd May, 1960.

RG's Dept.)

ON the 23rd day of January in the year One thousand nine hundred and fifty seven CLEMENT JOHN SKELTON of 7 Smith Avenue, North Manly, in the State of New South Wales, Printer, being duly sworn maketh oath and saith as follows:—

I am the Printer Publisher and Proprietor of a certain newspaper 10 called "The Manly Warringah News" a weekly newspaper which said newspaper is to be printed at the house and premises situated at Denison Street, Manly.

SWORN by the Deponent on the }
 day first abovementioned at } C. J. Skelton
 Sydney, Before me:

F. Aston
 Deputy Registrar General.

Received into the office of the Registrar General 25th day of January 1957.

20

T. Wells
 REGISTRAR GENERAL.

R.J.

I HEREBY CERTIFY the above typewriting to be a true and correct copy of document recorded number 2 of 1957 in the office of the Registrar General at Sydney in the State of New South Wales in pursuance of the Newspapers Act, 1898, as amended by the Transfer of Records Act, 1923, and of the recording note endorsed thereon.

DATED at Sydney this twenty third day of May, One thousand nine hundred and sixty.

30

(L.S.) F. Aston. (Sgd.)
 DEPUTY REGISTRAR GENERAL.

Exhibit B.
—
Letter
Complained of.
—
27th Feb., 1958.

EXHIBIT B
Letter Complained Of
27th February, 1958
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 10 quit, and yet they give approval to one of their own councillors (who is certainly not homeless) to convert his garage.

It is beyond understanding. Or is it?

"RATEPAYER."

North Manly.

Printed and published by Clement John Skelton of 7 Smith Avenue, North Manly, at the registered office of the "Manly Warringah News," Denison Street, Manly.

EXHIBIT C (i)

Letter, Defendant's Solicitors to Plaintiff's Solicitors
23rd December, 1958

Exhibit C (i).

—
 Letter,
 Defendant's
 Solicitors to
 Plaintiff's
 Solicitors.
 —

23rd Dec., 1958.

FROM: JOHN H. YELDHAM & SPAIN
 Solicitors,
 10 Belgrave Street, MANLY.

TO: ALLEN ALLEN & HEMSLEY
 Solicitors,
 53 Martin Place, SYDNEY.

10

IAHS.VL. 23rd December,
 1958.

Dear Sirs,

Re: Skelton ats Jones—Attention Mr. Millar.

We refer to the order for particulars made by His Honour Mr Justice Sugarman in connection with this matter and we regret the long delay that has occurred in furnishing the same. Our client was originally informed that no particulars had been retained by the Council of the instances at which consent had been refused in the
 20 case of persons desiring either to dwell in garages, or to convert garages to dwellings, but he has now ascertained that this information was erroneous.

The Defendant has commenced a lengthy search through the records of the Council and so far has been able to locate certain particular instances which we set out below, and in view of your statement to us that you would like us to furnish at this stage such particulars as are available we now send them to you but desire to make it clear that during January we will furnish to you certain further particulars because our client instructs us that it will take him at least
 30 several weeks before he can complete his investigations. There are a great many documents and records which he has to peruse in order to find all the required material.

You will remember that the particulars which we are required to furnish are instances of refusal which are relied upon by the defendant as constituting "systematic refusal" to permit the alteration of garages at Harbord and other places throughout the Shire of Warringah for the purpose of use as dwellings, and also instances of refusal which are relied upon by the defendant as constituting "systematic refusal" on the part of the Council to permit the use of garages at
 40 Harbord and other places throughout the Shire as dwellings.

The particulars which we furnish below, and which we will incorporate in a later and fuller document containing all the particulars you require, relate to the refusal of the Council to permit persons to

Exhibit C (i). use garages at Harbord and other places throughout the Shire as dwellings.

Letter,
Defendant's
Solicitors to
Plaintiff's
Solicitors.
(Continued)

23rd Dec., 1958.

The following matters, in the light of the information available at this date and in the light of the above remarks, are relied upon—

1. Resolution of the Warringah Shire Council passed on the 31st March, 1952, dealing with "sub-standard" dwellings in which it was resolved, inter/alia, as follows:

(a) That after the date of this meeting the Council refuse consent to any application to dwell in a non-residential building, such as a garage, even if it forms part of an incomplete dwelling. 10

(d) 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."

2. The following specific instances of refusal are relied upon:

Name of Applicant	Date of Application	Address of Land	Date of Council's reply refusing permission.	
D. Loan	14th Aug, 1955	Lot 3, Currie St. Forestville.	2.9.55	
E. Stringer	24 Aug 1955	Not stated	30.8.55	
Miss Denny	22 July 1955	Not Stated	26.7.55	
Miss A. Cunningham	23 April 1955	Not Stated	4.5.55	
Colin S. Huntingdon	29 June 1953	199 Headland Rd. Dee Why	30.7.53	
M. A. Budd	6 March 1953	17 Burrawong Rd. Avalon	13.3.53	30
Messrs. Florence & Florence on behalf of one Quattroville	12 Dec 1957	Lot 11 Essilia St. Collaroy Plateau	7.1.58	

3. Notices served upon persons requiring them to cease dwelling in garages.

Name	Date	Address of Premises:	
P. R. O'Keefe	29.4.52	Lot 3, Nareen Parade, North Narrabeen	
J. Van Beers	7.5.52	Lot 27, Fuller St. Collaroy Plateau	40
H. Manning	7.5.52	24 Surfers Parade, Harbord.	
L. Bailkie	9.5.52	Eastview Street, Church Point.	

As indicated above we will supply you with the balance of the particulars as soon as our client furnishes us with the necessary information which we expect to be some time during the month of January.

Exhibit C (i).

—
Letter,
Defendant's
Solicitors to
Plaintiff's
Solicitors.
(Continued)

Yours faithfully,

JOHN H. YELDHAM & SPAIN.

—
23rd Dec., 1958.

per Ian Spain

Exhibit C (ii).

—
Letter,
Defendant's
Solicitors to
Plaintiff's
Solicitors.
—

12th June, 1959.

EXHIBIT C (ii)

Letter, Defendant's Solicitors to Plaintiff's Solicitors
12th June, 1959

FROM: JOHN H. YELDHAM & SPAIN
Solicitors,
10 Belgrave Street,
MANLY.

TO: ALLEN ALLEN & HEMSLEY,
Solicitors,
Box 50, G.P.O.
SYDNEY.

12th June, 1959.

10

Dear Sirs,

re SKELTON ats JONES
Your Ref: IB.FWM.

We refer to our letter of the 23rd December last and now furnish the balance of the particulars in connection with this matter. We again regret the long delay which has occurred but the task has been a considerable one and we have only just received the relevant particulars from our client who has spent some considerable time searching the records of the Council. The particulars furnished are in addition 20 to those set out in our letter of the 23rd December.

1. Refusal of Application for permission to erect garage type structure for use as dwelling:

R. A. Rothery—Lot 7, Pymble Road, French's Forest—
Refusal on 16.3.53.

2. Instances of refusal of applications to use garage for the purpose of dwelling:

Name of Applicant	Address of Land	Date of Refusal	
S. Small	See file 53/3646	23.12.53	
N. Kennedy	30 Bix Road, Dee Why	22.12.53	30
L. Quattroville	Lot 11 Essilia St., Collaroy Plateau		
E. Langer	Lot 166, Coolangatta Av. North Narrabeen	8.8.52	

3. Instances of notices served upon persons occupying garages as dwellings:

Name of Occupant	Address	Date of Service of Notice	
S. Hogarth & E. Martin	Government Road, Palm Beach	11.11.53	40

	C. A. Wiseman	Cook Terrace, Warriewood	20.10.53	Exhibit C (ii).
	T. P. Jordan	Lot 76 Marinna Rd. Elanora	31. 1.57	Letter, Defendant's Solicitors to Plaintiff's Solicitors. (Continued)
	J. G. Thomson	Lot 51, Binburra Rd. Avalon	21. 1.57	—
	Estate A. W. Mawdsley	Lot 26, Oak Street, North Narrabeen	8. 2.57	12th June, 1959.
10	N. A. Stimson	Lot 2 Urana Road, North Avalon		
	McTackett	22 Beaconsfield St. Newport	1.10.57	
	F. O. Sharp	16 Avon Road, Dee Why	23. 9.52	

4. **List of Prosecutions instituted against owners or Occupiers of garages used as temporary dwellings:**

1955:

- 20 K. Porter
P. White
E. Ingram-Moore
J. C. Thompson
G. M. Sutherland and L. Thomas—Oxford Falls Road
P. N. Preston—Emerald Street, Narrabeen
W. C. Brown—Windsor Parade, North Narrabeen
M. Dusting—Wimbledon Avenue, Narrabeen
V. J., V. T., and V. F. Chiarella, Campbell Ave. Dee Why
Mrs. H. P. King and A. Hill—Prince Alfred Pde.
J. T. Redman and A. Damme
J. Schuurman and R. Brandjes—Ocean Street, Newport
30 L. Vos—Pymble Road, French's Forest
S. B. Griffiths and N. McKellan—Sybil Street Newport
L. Atkinson—Tourmaline Street, Collaroy Plateau.

1956

- V. S. McGannon
R. H. and H. Porter and Mr. Douglas, Bellearde Pde, Mona Vale.
E. R. Taylor and W. Hughes Rickard Road, Narrabeen.
E. H. Hudson—The Crescent Dee Why
M. J. Ferris and C. Smith—Woolgoola St., North Balgowlah
K. J. Campbell and D. M. Campbell—Campbell Pde, Manly Vale
40 E. M. Cassinelli—Park Street, Mona Vale.
T. E. Yates—Barina Road, Avalon
A. Davis and H. Veenema—Warringah Road, Dee Why
E. W. Edser—Pittwater Road, North Narrabeen

1957

- A. McClintock—Lynwood Avenue, Dee Why

Exhibit C (ii).

—
Letter,
Defendant's
Solicitors to
Plaintiff's
Solicitors.
(Continued)
—

12th June, 1959.

R. Simonetta—Old Pittwater Road, Brookvale

J. Roosien—Hendy Avenue, Collaroy.

A. J. Davidson—Marrinna Road, Elanora

J. Seubert—Barrenjoey Road, Avalon

E. J. Pearson—Warringah Road, Forestville

Mrs. E. Baldwin

Mr. J. M. Robinson, Mona Vale Road, Mona Vale.

J. N Gibling—Grenfell Avenue, North Narrabeen

H. and B. Verhagen, Delmar Parade, Dee Why

G. B. Semple, Landscape Ave., Forestville.

W. M. Folkard.

10

1958

J. E. Perry, Binburra Road, North Avalon

D. A. Cleary, Crescent Road, Newport

H. C. Edwards, Wallumatta Road, Newport

F. Marik

J. Wilson, Prince Charles Street, French's Forest

T. H. Cratchley, St. Andrew's Gate, Elanora

G. M. Bayes, Binburra Road, Avalon

R. A. Cooper and L. Beal—Lantena Avenue, Collaroy Plateau 20

R. R. Keiran, Ethie Street, Beacon Hill.

Miss M. V. Davis, Quirk Street, Dee Why

C. Black and J. Midd, Lisle Street, Narrabeen

Mrs. E. Whitlock, Avalon

J. A. Richardson, North Manly

C. C. Wheeler and Mr. Le. Quesne, Pavilion Street, Queenscliff

W. T. Dever, Dress Circle Road, Avalon

J. A. McCombie

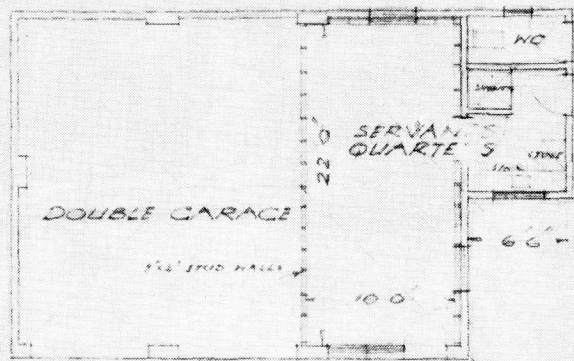
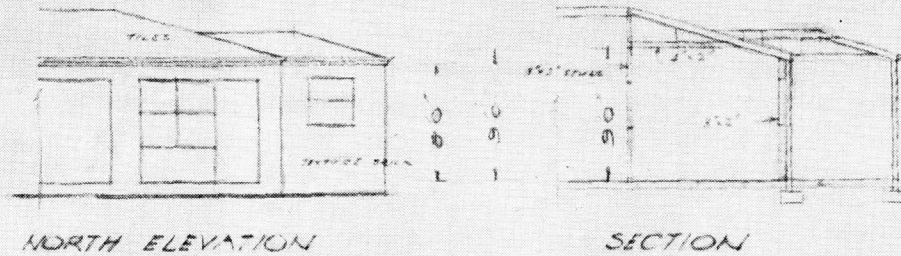
Yours faithfully,

JOHN H. YELDHAM & SPAIN

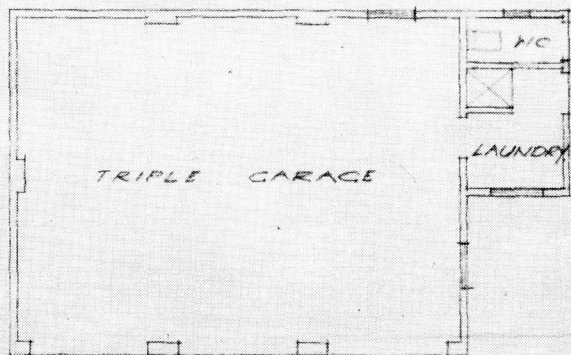
30

Ian Spain

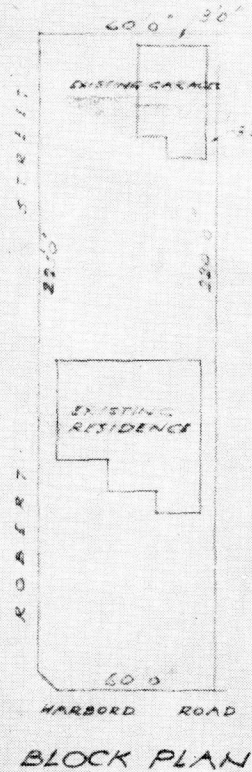
127
EXHIBIT D
D1 — Plans



PROPOSED FLOOR PLAN



EXISTING PLAN OF GARAGES ETC



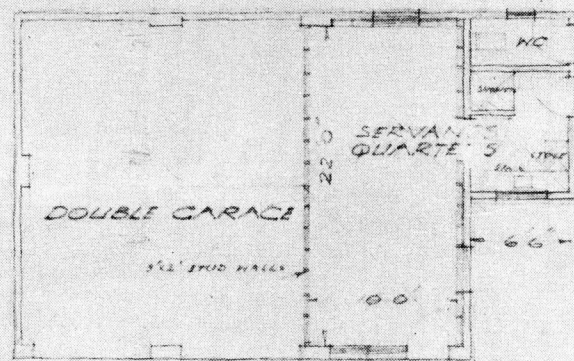
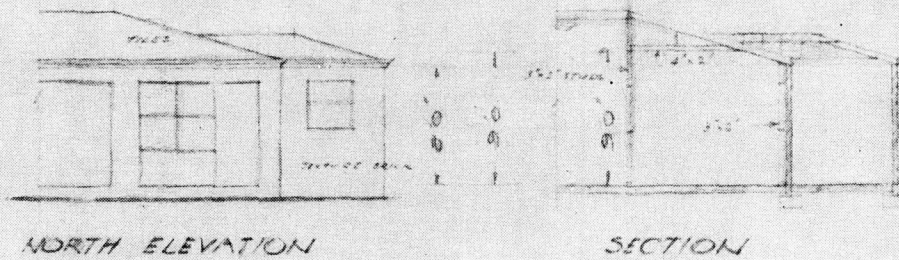
BLOCK PLAN

PROPOSED ALTERATIONS HARBORD ROAD AND
ROBERT ST. HARBORD FOR G. B. JONES & SONS
SCALE 1/8" AND 1/60" = 1'0" JOHN CHASTON KRS 2266

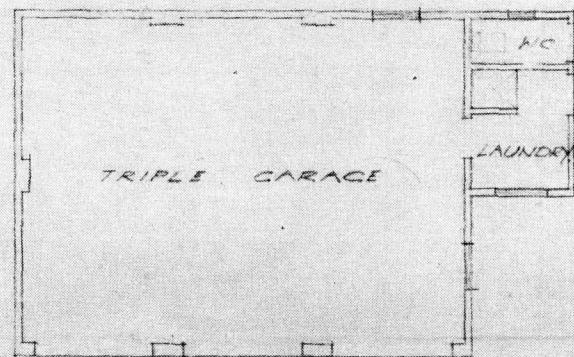
Exhibit D.
D1—Plans.

128
EXHIBIT D
D2 — Plans

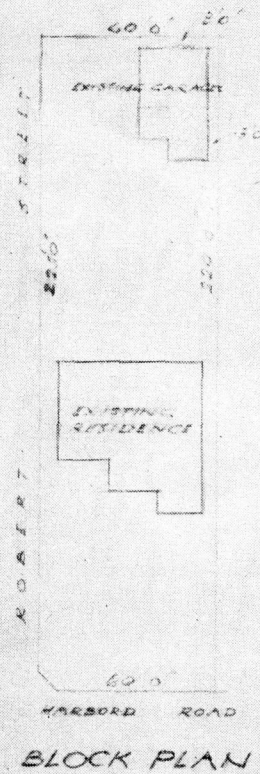
Exhibit D.
(Continued)
D2—Plans.



PROPOSED FLOOR PLAN



EXISTING PLAN OF GARAGES ETC



BLOCK PLAN

• PROPOSED • ALTERATIONS • HARBORD • ROAD • AND •
• ROBERT • ST. • HARBORD • FOR • G. B. JONES • ESQ
SCALE 1/8" AND 1/60" = 1'0" JOHN CHASTON KR 5466

EXHIBIT D3

Exhibit D3.

**Warringah Shire Council Rules, Specifications and Conditions
Governing Approval for the Erection of Dwellings, Alteration or
Addition**

—
Warringah
Shire Council
Rules and
Specifications.

— — —
OFFICE HOURS—Health & Building Department:

Builders, contractors and householders are notified that with a view to expeditiously dealing with building plans, septic tank and drainage plans, and health matters generally, one or more of the
10 Council's Health and Building Inspectors will be available for interview at the Health and Building Office at the Shire Hall from 9 a.m. to 10.30 a.m. on week days (or at other hours of the day by appointment).

All persons desirous of building, or altering their buildings, are advised to consult the Building Inspector (during the hours stated) as acceptance of technical advice from him will prevent future delay and inconvenience.

Generally, except as herein expressly provided, the provisions of Ordinance 71, Local Government Act, shall apply to all work in
20 connection with the erection of dwellings and the undermentioned Rules and Conditions as a minimum standard shall be strictly observed.

1. Foundations:

(a) Brick footings under 9 in. and 11 in. cavity walls are to be one 22 in. course, two 18 in. courses, one 14 in. course. Footings under 4½ in. walls are to be one 18 in. course, two 14 in. courses, and one 9 in. course.

(b) Brick footings on solid rock or concrete to be one 14 in. course under 9 in. and 11 in. cavity walls and one 9 in. course under 4½ in. walls.

30 (c) All timber framed structures shall have 4½ in. brick, stone or concrete foundation walls throughout the front of building, with return on side walls of at least 5 ft. Where height of foundation does not exceed 5 ft., brick footings to be one 14 in. course and one 9 in. course or in concrete 10 in. x 6 in. Where height of foundation walls are above 5 ft. in height, these footings are to be proportionately increased.

(d) All engaged brick piers to be 9 in. x 4½ in. properly bonded, and built up from footings.

(e) Sleeper piers to be 9 in. x 9 in. on two courses of 14 in.
40 footings, and where over 5 ft. high are to be 14 in. x 14 in. for half their height, on a base of two courses of 18 in. work. All piers to be spaced at not more than 6 ft. centres.

Exhibit D3.
—
Warringah
Shire Council
Rules and
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(Continued)

(f) Concrete footings are to be composed of four (4) parts three-quarter inch gauge blue metal, two (2) parts clean sharp sand, and one (1) part of Portland cement. Such footings must be solid, without voids, and are to be at least 24 in. x 10 in. under 9 in. and 11 in. cavity walls, and 18 in. x 10 in. under 4½ in. brick walls. The footings are to be reinforced with six ½ in. diameter mild steel rods to all external walls, and four ½ in. rods to all internal walls, placed 3 in. from the bottoms and tops of concrete, hooked and lapped 10 in. The concrete is to be kept covered and allowed to stand for at least four (4) days before being built on.

10

(g) Stone footings are to consist of all through stones 24 in. wide under 9 in. and 11 in. cavity walls, and 18 in. wide under 4½ in. walls, and are to have a minimum depth of 9 in. Foundation walling is to consist of not less than 25 per cent. through stones, and is to be at least 18 in. thick under 9 in. and 11 in. cavity walls, and 12 in. thick under 4½ in. walls. All stonework is to be built in composition, consisting of one (1) part cement, one and half (1½) parts lime, and six (6) parts sand.

2.—Built in Cement:

The following are to be built in cement—all brickwork up to 20 dampcourse level, or 3 ft. above finished ground level, all dwarf walls, fender walls, copings, sills, verandah piers, arches, fences, four (4) courses over all openings, chimneys and fireplaces.

3.—Mortar:

Lime mortar is to consist of one (1) part of lime to three (3) parts clean sharp sand.

Cement mortar is to consist of one (1) part approved Portland cement to four (4) parts of clean sharp sand and 1/10 part hydrated lime.

4.—Dampcourse:

30

Must be of lead (minimum weight, 2 lb.), two courses of slates, embedded in cement with "broken" joints or other approved material, laid the full width of brickwork in all walls at least 6½ in. above the bottom of wall cavity, under floor plates and on top of all piers; weep holes to be left in external walls at bottom of cavity. When solid floors adjoin or intersect walls, an additional lead dampcourse is to be laid just above floor level.

External openings are to have dampcourses carried across cavity above and below, built in one course lower on the external walls, in which weep holes are to be left.

40

In the case of timber-frame buildings, 24-gauge galvanised iron ant caps may be used, with Council's approval, on sleeper piers.

5.—Internal Openings:

Openings of $4\frac{1}{2}$ in. internal walls up to 4 ft. wide are to have 2 in. x $\frac{1}{2}$ in. wrought iron bar; openings from 4 ft. to 5 ft. wide, a 3 in. x $\frac{1}{2}$ in. bar; and openings from 5 ft. to 8 ft. wide are to have two angle irons 2 in. x $\frac{3}{8}$ in. All bars and angle irons are to be built in with a $4\frac{1}{2}$ in. bearing on each jamb.

Exhibit D3.

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Warringah
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(Continued)

6.—External Openings:

Openings up to 4 ft. wide are to be carried on 2 in. x $\frac{1}{2}$ in. bars, openings from 4 ft. to 5 ft. are to have 3 in. x $\frac{1}{2}$ in. bars, and openings
10 from 5 ft. to 8 ft. are to be carried on two 4 in. x 3 in. x $\frac{1}{2}$ in. angle irons. All bars and angle irons to be built in with a $4\frac{1}{2}$ in. bearing on each jamb. Concrete lintels will not be permitted in the building, unless special circumstances warrant.

7.—Ground Floor Timbers:

No ground floor timbers to be built into the brickwork or built below the level of dampcourses in cavity wall.

8.—Concrete Floors for Bathroom, Laundry, Etc.:

In all cases are to be not less than 4 in. thick and supported on a 3 in. corbel course. Concrete is to be composed of four (4) parts
20 $\frac{3}{4}$ in. blue metal, two (2) parts of clean sharp sand, and one (1) part Portland cement, and in all cases where more than 12 in. above original ground level is to be suspended and reinforced with $\frac{3}{8}$ in. diameter mild steel bars of 9 in. mesh, tied at intersections.

9.—Plumbing and Drains:

(a) Plans and specifications are approved subject to the requirements of the By-laws of the Metropolitan Water, Sewerage and Drainage Board being strictly adhered to in connection with all internal sanitary fittings and drainage connections.

A certificate to this effect must be obtained from the Water Board
30 before occupancy of the building will be permitted, and builders and owners are responsible for observance of this clause.

(b) Drainage work shall be in accordance with Council Rules and carried out by licensees authorised by the Council. Disposal pit and all drains and connections shall be in accordance with the afore-said Rules and plans, which may be had on payment of the prescribed fees.

(c) All roof waters must be carried out to the street gutter, and where this is not practicable, on account of falls, it is to be carried at least 10 ft. clear of all footings by means of stoneware drain pipes.

40 (d) Where the public sewer is available, all buildings shall be connected thereto.

Exhibit D3.
—
Warringah
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Rules and
Specifications.
(Continued)

10.—Road Openings and Crossings, Etc.:

No road openings, footpath crossings, or use of roadway for storage of materials shall be made without a written permit of the Engineer and prepayment of the prescribed fees therefor.

11.—Erection of Fences or Buildings Adjacent to Street Alignments:

All walls and fences shall be clearly shown on plans and their dimensions and material clearly specified. The correct street levels shall be ascertained from the Engineer before the erection of any structure, such as garages, fences, entrances, etc., adjacent to street boundaries, and these levels shall be strictly conformed with. Walls 10 and/or fences shall be completed over the whole frontage to such levels.

Fences on street corner allotments shall be of a design to satisfaction of Council, and so constructed as not to impair views or present danger to traffic. Builders and owners should consult the building inspector before commencing any work in connection with such fences.

12.—Size of Windows:

Minimum window area to be as follows:—ROOMS—one-tenth of floor area; KITCHEN—10 sq. feet; BATHROOM—3½ sq. feet; ENCLOSED LAUNDRY—6 sq. feet. 20

13.—Verandahs, Sunrooms, Etc.:

These shall be defined as rooms and shall have prescribed ceiling height of 9 ft. and other requirements as specified by Ordinance 71, except where specially permitted by Council.

14.—Ventilation:

ROOMS—One 9 in. x 6 in. ventilator to each 1000 cubic feet, one additional ventilator to each bedroom, and one additional ventilator at floor level in each bathroom.

SUB-FLOOR—Two 9 in. x 6 in. ventilators under each room, and suitable openings in internal divisional walls below floors. 30

15.—Statutory Notices to Council:

Forty-eight (48) hours' notice must be given prior to covering in (a) trenches, before foundations are laid; (b) foundations, before trenches are filled in; (c) drains and (d) roof timbers. Before permitting any person to use or occupy any uncompleted building, the person by or in consequence of whose order the building is being erected shall give notice to the Council, and the building shall not be occupied until it has been completed in accordance with the approved plan and specification.

16.—Electrical Installations: 40

All electrical installations shall be carried out to the provisions of Ordinance 54, Local Government Act, Wiring Rules of the Standards Association of Australia, and Council Service Rules.

17.—Framing:

MINIMUM SIZES

Description		Hardwood	Hardwood, Rimu, Cypress or Oregon
	Roof Plates		4 in. x 3 in.
	Floor Plates	4 in. x 3 in.	
	Bearers (not more than 6 ft. centres)	4 in. x 3 in.	
10	Floor Joists (at 18 in. centres)	4 in. x 2 in.	
	Ceiling Joists (at 18 in. centres)		4 in. x 2 in.
	Hanging Beams (not more than 6 ft. centres)		7 in. x 1½ in.
	Rafters (18 in. centres)		4 in. x 2 in.
	Studs, Plates (internal)	3 in. x 2 in.	3 in. x 2 in.
	Studs, Plates (external)	3 in. x 2 in.	4 in. x 2 in.
	BRACING: 2 in. x 1 in. to all walls, let in flush.		
	BRIDGING: Provide 2 rows to be 1½ in. x width of studs.		
20	Purlins		4 in. x 3 in.
	Struts (not more than 6 ft. centres)		4 in. x 2 in.
	Collar Ties (halved and spiked at every alternate pair of rafters)		3 in. x 2 in.
	Ridges		7 in. x 1¼ in.
	Hips		7 in. x 1¼ in.
	Valleys		7 in. x 1¼ in.
	Verandah Plates (minimum)		8 in. x 2½ in.

18.—Asbestos Cement External:

- 30 To be minimum of 3/16 in. thick. Fix from 1 in. below bearers to eaves. Joints to be covered with 2 in. x ½ in. timber strips or asbestos strips. All horizontal joints to be flashed or have specially rebated cover strips. Sheets to be secured at every bearing on studs and all joints and edge to be backed with a stud plate or bridging pieces.

19.—Fibrous Plaster:

Shall be dry and a minimum thickness of ¾ in.

All joins to be backed by studs or bridging. Sheets to be full length of wall. Fibrous plaster will not be permitted in laundries or bathrooms below 6 ft. above flooring or at back of sink and draining

- 40 board and cooking stoves.

20.—Ceilings:

Fibrous plaster shall not be used for laundries or open verandahs. All ceilings shall be secured to 1½ in. x 1 in. oregon battens spaced as directed by the Building Inspector.

Exhibit D3.

Warringah
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Exhibit D3.
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Specifications.
(Continued)

21.—Second-hand Materials:

Unless inspected and approved beforehand by the Building Inspector shall be prohibited.

22.—Alignments:

Generally, the front set back of all buildings shall not be less than 20 ft. from road alignments, and side alignments shall comply with Ordinance 71, viz., 2 ft. 3 in. from gutter line to side boundary.

23.—Closets:

Shall comply with the provisions of Ordinance 44 and 71, as to size, height, ventilation and type in unsewered areas and to the Metropolitan Water, Sewerage and Drainage Board's By-Laws in sewered areas. Closets must be placed in a position as approved by the Health Inspector.

24.—Land Unfit for Building:

Where land is low-lying or drainage easements exist and otherwise is, or likely to be, unfit for building purposes, it shall be the legal obligation of owners to satisfy themselves as to any Public Health Proclamation thereon as provided by Section 55, Public Health Act, or the provisions of Ordinance 71-2 (6) Local Government Act.

25.—Septic Tanks, Septic Closets and Chemical Closets: 20

Separate application must be made as prescribed in Ordinance 44, Local Government Act, 1919, and approval obtained before any work in this regard is commenced.

26.—Variation from Specifications (separate details):—

Notwithstanding anything contained in the said specifications or where any matter therein is inconsistent with these Rules or the Ordinances it **SHALL BE CLEARLY UNDERSTOOD** that these rules shall prevail and I **HEREBY** undertake to erect the building referred to in Plan No. _____ on Lot 44 _____ Street

Robert St & Harbord Rd _____ in accordance with the 30 above Rules and Conditions:

Signature of Owner/Builder G. B. Jones

Address 135 Harbord Rd
Harbord

Date

EXHIBIT D4

Plaintiff's Building Application and Receipt

Exhibit D4.
Plaintiff's
Building
Application.

2nd Jan., 1958.

WARRINGAH SHIRE COUNCIL

Building Application

Local Government Act Ordinance 71

RIDING.....

APP. No.....

ASS. No.....

PLANS AND SPECIFICATIONS: Plans and Specifications shall both be drawn and written in ink and be submitted in duplicate. A General Plan, drawn to a scale $\frac{1}{8}$ in. to 1 ft. shall show all floor plans, elevations, sections, figured dimensions of all rooms and the heights of ceilings, and a drainage diagram showing the proposed treatment of household wastes and roof waters. A Site Plan, drawn to a scale of 1 in. to 40 ft., shall show the relation of the proposed building and any existing buildings to all boundaries of the allotment and the street to which it fronts and/or is bounded.

The Shire Clerk,
Warringah Shire Council,
BROOKVALE.

YOUR PHONE No.....

(COPY ONLY)

Sir,—

I, the undersigned, hereby make application to Council for the approval of Plans and Specifications of a building, which I propose to erect and complete within TWELVE MONTHS from the date of approval.

Particulars as under:

287/58

CLASS OF BUILDING.....

(Here state dwelling, flats, shop and dwelling combined, garage, additions, alterations, as the case may be.)

TYPE OF CONSTRUCTION.....ESTIMATED COST OF BUILDING, £.....

(State whether brick, brick veneer, etc.)

FULL PARTICULARS ARE ESSENTIAL

LOT No...44. SEC. No.....D.P. Nos., etc.....HOUSE NAME/No.....

FRONTAGE.....

STREET...Harbord Road,...LOCALITY...Harbord...DEPTH.....

Where full particulars are not available, locality sketch should be submitted

FULL NAME OF OWNER...G. B. Jones...NAME OF BUILDER.....

(Block Letters)

(Block Letters)

PERMANENT ADDRESS.....As above.....ADDRESS.....As above.....

MATERIALS OF ROOF.....TYPE OF ROOF.....

(Hip, Gable, Flat)

DESCRIPTION OF FENCES FRONTING PUBLIC PLACES:

40 HEIGHT.....MATERIALS.....

I undertake to comply with the provisions of the Local Government Act 1919 and Ordinances Nos. 71, 30, 39 and 44 and all amendments thereto, and the Rules and Conditions of the Council of the Shire of Warringah.

Date.....Signature of Applicant.....(sgnd) G. B. Jones.....

State whether applicant is owner, builder or architect.....

Exhibit D4.
Plaintiff's
Building
Application.
(Continued)

OFFICE USE ONLY

2nd Jan., 1958.

BUILDING FEES

One fifth of 1% of contract price (where contract is produced);

otherwise, the estimated cost as determined by Council.

Minimum Fee — 10/-

Maximum Fee — £100

	£	s.	d.	Rect. No.	Date
BUILDING FEE.....	10	—		00076	2/1/58
Exist Footpath Cross					
DEPOSIT covering likely damage to paving, kerb and guttering, etc.					
Exist. Build.					
TOTAL					10

Important — Sanitation

Council requires, in accordance with its policy, to eliminate the sanitary pan system in unsewered areas of the Shire so that all NEW premises be either (a) connected to the sewerage mains if available (b) provided with septic sewerage if practicable (c) provided with a septic closet installation or (d) provided with septic sewerage using Council's effluent disposal service. Council will also consider the installation of a Chemical Closet if the method mentioned in (a) (b) and (c) are not practicable. Information will be given freely by the Health and Building Department of the Council regarding any of the above methods.

SHIRE OF WARRINGAH

RECEIVED as per printed figures:

ORIGINAL
Cash Register
will print
amount paid
in space
opposite

Exhibit D4.
—
Receipt.
—
2nd Jan., 1958.

£ ***** -10-OLST 4 B 000 7 6 JAN-2-58

By Cheque

Cash

10 M.O.

P.N.

J. MORGAN, Shire Clerk, per.....Cashier

M.....G. B. JONES.....

Postal (.....LOT 44 HARBORD RD.....

Address (.....HARBORD.....

PARTICULARS		£	s.	d.
GENERAL FUND				
20	Certificate Sec. 342 A.S.			
	Certificate Fees (Section 160)			
	Licence Fees			
	Subdivision Fees			
	Septic Tank Fees			
	Building Fees Lot 44 Harbord		10	0
	Sale of Plans for Septic Tanks			
	Chemical Closet Fees			
	Extra Sanitary Service			
TRUST FUND				
30	TOTAL £		10	0

N.B.—Where payment is made by cheque, this receipt is given subject to cheque being paid.