

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
DEFAMATION LIST

Un Revised
Not Restricted
Suitable for Publication

Case No. CI-19-05641

MATTHEW O'BRIEN

Plaintiff

v

ANNETTE BIELECKI

Defendant

JUDGE: HER HONOUR JUDGE TRAN
WHERE HELD: Melbourne
DATE OF HEARING: 8-9 June 2021
DATE OF JUDGMENT: 21 June 2021
CASE MAY BE CITED AS: O'Brien v Bielecki
MEDIUM NEUTRAL CITATION: [2021] VCC 813

REASONS FOR JUDGMENT

Subject: DEFAMATION
Catchwords: Defamatory imputation – defence of justification – common law and statutory qualified privilege - triviality
Legislation Cited: *Defamation Act 2005 (Vic)*
Cases Cited: *Jones v Skelton* [1963] 1 WLR 1362; *Bailey v WIN Television NSW Pty Ltd* [2020] NSWCA 352; *Murray v Raynor* [2019] NSWCA 274; *Marshall v Megna*; *Megna v Tory*; *Tory v Megna* [2013] NSWCA 30
Judgment: Proceeding dismissed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr S Davison	Joseph Burke Law Pty Ltd
For the Defendant	Mr J Catlin	K G Legal Pty Ltd

HER HONOUR:

- 1 There is a block of four units in George Street, Bacchus Marsh. The plaintiff, Matthew O'Brien, owns Unit 4. He is a licensed estate agent. From May 2018 until about April 2020, the defendant, Annette Bielecki, owned Unit 3. Ms Bielecki lived nearby and leased Unit 3 to her son, Joshua Bielecki. Since April 2020, Unit 3 has been owned by Susan Slack, a middle-aged woman who does volunteer work a few days per week. Unit 2 is owned by Billy Stone, a young man who works in a slaughterhouse. Unit 1 is owned by a man by the name of Arnot Hutcheson.
- 2 Mr O'Brien alleges, in this proceeding, that Ms Bielecki defamed him on three separate occasions.
- 3 First, Ms Bielecki is alleged to have told her general practitioner ("**GP**"), Dr Noor Zannat, on about 2 July 2019, that she was suffering stress and anxiety caused by Mr O'Brien, who lived next door to her son and had been annoying both her and her son verbally, sending emails and making false noise complaints to the police ("**the statement to GP**"). The purpose of the statement to GP was said to be to obtain two "To Whom It May Concern" letters from Dr Zannat, which repeated the content of the statement to GP. The letters were tendered in evidence. The letters themselves are not relied upon as defamatory publications. There is no evidence that these letters were published beyond being provided to the Magistrates' Court, in support of an application by Ms Bielecki for a personal safety intervention order against Mr O'Brien; to VCAT, in relation to a claim or claims made by Mr O'Brien against Ms Bielecki; and to Mr O'Brien himself.
- 4 The statement to GP is said to carry the imputation that Mr O'Brien made false complaints to police or made contact with police and lies.
- 5 Secondly, Ms Bielecki is alleged to have sent an email on 9 August 2019 to Mr O'Brien, Mr Stone and Mr Hutcheson which said:

“You are the most vindictive, poisonous human being that I have ever had the ill fortune to meet. I will never attend any OC Meeting with you in my life, I will always do proxy votes. How dare you be so disrespectful and demeaning about us as owners of units. It is my belief that you are toxic and vile and will go to any length to get your own way and I wont be afraid to say it at VCAT either.”¹

(“the first email”)

6 The first email is said to carry the imputation that Mr O’Brien:

- (a) is out for revenge;
- (b) is bullying toward Ms Bielecki; and
- (c) undertakes illegal acts to get his own way.

7 Finally, Ms Bielecki is alleged to have sent an email on 10 August 2019 to Mr O’Brien, Mr Stone and Mr Hutcheson which said:

“I am so done!! And as for your lies to the police telling them that you told me you were “Gay” that has never been discussed by you with me ever and I couldn’t care less if you were gay, straight or transgender, and in what forum or place did this conversation supposedly occur, obviously none. Just for your information I have 6 nieces and nephews who are gay and it doesn’t bother me at all and for the record I just completed a GLBT course on domestic violence about 2 months ago. And Josh and I have been on a cruise with two nieces that are Gay and Josh loves them and so do I, being “gay” is not an issue in our family and never will be. You may have some issues in regard to this be (sic) we certainly don’t.”²

(“the second email”)

8 The second email is said to carry the imputation that Mr O’Brien has lied to the police.

9 It was accepted by Ms Bielecki at trial that the statement to GP was made and that it carried the imputation that Mr O’Brien made false complaints to police or made contact with police and lies.

¹ Plaintiffs Court Book (“PCB”) 23
² PCB 24

- 10 The sending of the first and second emails was admitted. It was also admitted that the first email carried the imputations that Mr O'Brien is out for revenge and is bullying towards Ms Bielecki and that the second email carried the imputation that Mr O'Brien has lied to the police. The only imputation which was denied at trial was that the first email carried the imputation that Mr O'Brien undertakes illegal acts to get his own way.
- 11 The nub of Ms Bielecki's defence to Mr O'Brien's claims was:
- (a) justification – she said that Mr O'Brien was indeed out for revenge and bullying towards Ms Bielecki and others and that he had lied to police by telling them that he had told Ms Bielecki that he was gay;
 - (b) statutory and common law qualified privilege – she said that the first and second emails were circulated only to members of the Owners Corporation and concerned matters of interest to the members of that Owners Corporation; and that the statement to GP was made to Ms Bielecki's GP on an occasion of qualified privilege; and
 - (c) triviality under s33 of the *Defamation Act* 2005 (“**the Act**”) – she said that the circumstances of the publication of the statement to GP and the first and second emails was such that Mr O'Brien was unlikely to sustain any harm. In the case of the statement to GP, publication was made solely to her GP, who knew nothing of Mr O'Brien. In the case of the two emails, they were intemperate emails sent by Ms Bielecki as a result of her understandable frustration with Mr O'Brien to Mr O'Brien and the two other unit owners, who were capable of, and had, formed their own views of Mr O'Brien arising from their dealings with him.

Relevant factual context

- 12 Before turning to consider each of the issues raised in this proceeding, it is necessary to describe the circumstances surrounding the relationship between the co-owners of this block of four units in Bacchus Marsh in a little more detail.

- 13 Mr Stone has lived in the block of units for approximately six years. He works in a slaughterhouse. In the relevant period, he would leave home for his shift at the slaughterhouse at 4.00am in the morning and return home by about 10.00am. He liked to be in bed by 8.00pm. It was apparent from his evidence and demeanour in Court that he was a genial young man, who generally got on with his neighbours.
- 14 In about November 2017, Mr O'Brien moved into Unit 2.
- 15 The first time that Mr Stone met Mr O'Brien was at a meeting of the Owners Corporation. Mr Stone said that at that very first meeting, Mr O'Brien complained of a lack of water pressure in his unit and told the other members of the Owners Corporation that he would sue them all and take them to VCAT. He said the other members of the Owners Corporation were taken aback, but asked for three days to get quotes and investigate the issue. He said that two days later he received an email from VCAT saying Mr O'Brien had filed a complaint that he was not being allowed to have water pressure.
- 16 Mr Stone said that "straight off the bat" Mr O'Brien started sending email communications to the other members of the Owners Corporation. He said that he and the Owners Corporation were taken to VCAT by Mr O'Brien on multiple occasions. There was the water pressure issue. Mr Stone also gave the example of being taken to VCAT by Mr O'Brien for parking in the wrong spot. Mr Stone said that, in fact, he had approval from the Owners Corporation to park in that place. Mr Stone said that if Mr O'Brien had just asked the Owners Corporation manager before bringing a claim in VCAT, he would have known that.
- 17 Mr Stone said that Mr O'Brien sent hundreds of emails to him and the other members of the Owners Corporation. Mr Stone said that he was not a bloke who uses email very well "but my phone was blowing up".³ He described emails which

³ Transcript ("T") 75

were 10 pages long and “drivel nonsense. It didn’t even make sense”.⁴ Mr Stone said in one week he had received 30 to 40 emails from Mr O’Brien.

18 In about May 2018, Joshua Bielecki⁵ moved into Unit 3. Mr O’Brien and Joshua did not get on.

19 By June 2018, after only one month of living in the unit, Joshua had scrawled offensive and threatening graffiti on Mr O’Brien’s door. Over the time Joshua lived in the unit, Mr O’Brien made at least ten complaints to the police about excessive noise coming from Joshua’s unit. Mr O’Brien issued multiple breach notices and also made multiple complaints to VCAT about excessive noise, towels being placed on the fence and issues with gardening and bins. In addition, Mr O’Brien sent many emails to the members of the Owners Corporation, and emails and texts to Ms Bielecki specifically, complaining about Joshua’s conduct and the conduct of other residents at the block of units.

20 Mr O’Brien also complained to police on one occasion in relation to highly explicit (and allegedly homophobic) music being played by Joshua on repeat in his unit. Mr O’Brien told the police that he had told Ms Bielecki that he was gay and that Joshua had played this music to vilify and harass him. This police report resulted in police visiting Ms Bielecki at her home.

21 Meanwhile, the affairs of the Owners Corporation were not going well.

22 The past two managers of the Owners Corporation had resigned. Plumbing work had been performed at the block of units by a company called PSD plumbing, but neither Mr O’Brien nor Ms Bielecki were happy with the work done. PSD Plumbing was demanding payment, but Mr O’Brien was of the very strong view that they should not be paid. Ultimately, PSD Plumbing sued the Owners Corporation in the Magistrates’ Court and was successful in obtaining a judgment

⁴ T76

⁵ Joshua Bielecki was referred to as “Joshua” throughout the hearing. For ease of identification, and with no disrespect intended, I have also referred to him as Joshua in these reasons.

against it. Three of the members of the Owners Corporation paid their share of the debt to PSD Plumbing. Mr O'Brien did not.

- 23 Mr O'Brien made a formal complaint to the Owners Corporation in January 2019 cataloguing a number of concerns in relation to the conduct of the occupants of Lot 3 (i.e.: Joshua). Ms Bielecki responded to Mr O'Brien on 21 February 2019 as follows:

"I have attended the property on two occasions when you said that there was loud noise and on both occasions when I attended within minutes of your call the unit was either quiet or very low level music being played. Also I wish to advise that the fires in the driveway were not lit by the tenant or its visitors of Unit 3. You may need to investigate this further. I have also video recorded the level of music being played that you complained about with both unit owners of 1 & 2 being present and it definitely wasn't loud, I stayed with the boys for 2 hours on that evening. Also I have tried to work with you but I have found some of your complaints to be total nonsense and I did my own check with the other unit owners. You also have said via text 'fuck you' to me and you have said similar to tenant of unit 3 and his visitors. You also told me that at times you bang and slam doors and this was confirmed by the tenant as well. On one occasion you were doing this so loud that one of the visitors knocked on your door to check that you were okay and you told him to fuck off. The boys are mostly quiet, I do random checks up to 3 times per day and night with nobody being aware that I am coming, and I have never witnessed any loud noise. I have also rang the police on 2 occasions in regard to your complaints one being at 5pm regarding music being played at 2.00pm and the police advised that there was nothing they could do, I checked with Billy from unit 2 and he said music was played for one hour during 2-3pm on a Saturday and it was not affecting anyone else other than you. You also made complaint about music at 6pm on a Saturday and that is the day I attended and it was low level music and I stayed there for 2 hours. I also called the police on this Occassion and they thought you were being unreasonable and wasting their time. However I acknowledge that a note was written on your door and we addressed that back in July last year, we offered to clean the door, get a painter to paint it for you and/or pay you, all of which you did not react to and you had said that Joshua had apologised. I also note that the boys bring your bins in for you and try to be nice but according to them you swear and are rude. The tenant may not be an angel but then I can see your banging doors and swearing hasn't helped either and also Joshua is aware that you continually accuse him of lighting fires in a pit but that is not the case nor has Joshua organised any recreational activities in the driveway. And you have to remember Matt the language that you used via text to me is totally unacceptable and it is not language I am used to being spoken to me as you suggested it would be. I have a lot of anxiety going to the units when I can see your car, and I have sought medical treatment for. The very thing you accuse Joshua and his visitors of doing ie. swearing is what you did to me and you have demanded that I attend the property at 5.00am in the morning. I did attend and so did the police and everything was quiet Joshua had been asleep and only one other young man was

awake when we arrive (a few mins after speaking with you). Joshua had a seizure when police and I arrived and was being assisted by his friend. The police did not give any warning at all about noise when we arrived everything was quiet, a ambulance was called and Josh went to hospital.

I do not want to feel such anxiety and I hope that we can talk civilly. Just for the record the music being played was just from the radio on the day that I attended. I have requested that music or loud noises not to be made after 10pm during the week and 12.00am on weekends.”⁶

(sic)

- 24 Ms Bielecki then forwarded this email to Mr Stone with the following additional comment:

“This is what I sent to Matt as he sent me a copy of the email he sent to you. He has threatened to sue me on several occasions and continues to do so. I will be printing out the texts that he sent me telling me ‘fuck you’. I also have all the texts he sent me regarding the fire pit and barbecues. This man is causing me so much stress. I know there has been some music being played but its all low level and as you know I stayed with you boys for a couple of hours on the night Matt complained. He also complained when music was played for an hour in the afternoon on a Saturday. I am constantly coming to the units and checking for any noise, I come randomly during the day/evening and nobody at Unit 3 is aware that I am coming and I have never found any excessive noise. I am aware that you can prove that I come often as you have security cameras out the front. I hope you can help me if I need to prove this. You have also told me that you go to bed early in the evenings for 2-3am starts and that you rarely hear any excessive noise from unit 3.”⁷

- 25 The entire chain of emails was circulated to the Owners Corporation by Mr Stone.

- 26 In March 2019, Mr O’Brien sent Ms Bielecki a concerns notice, accusing her of making “to an audience false, destructive, and defamatory remarks about me”.⁸ It demanded that she “[i]mmediately cease and desist the unlawful defamation and unlawful assistance of others to defame me”⁹ and threatened that:

“In the event that you may fail to meet this demand, please be advised that I will pursue all available legal remedies, including seeking monetary damages, injunctive relief, and an order that you pay court costs and legal fees”.¹⁰

6 PCB 14-15
7 PCB 14
8 PCB 1
9 PCB 1
10 PCB 1

27 At some point, Mr O'Brien also applied to VCAT for an administrator to be appointed, which he said should be him. The members of the Owners Corporation (apparently at VCAT's urging) agreed to try to appoint a new Owners Corporation manager. Both Ms Bielecki and Mr O'Brien gave evidence that they tried very hard to locate a manager willing to take on the role as Owners Corporation manager. However, the Owners Corporation had great difficulty finding a new manager for the Owners Corporation. Some prospective candidates had been identified by Ms Bielecki. Mr O'Brien sent a letter to those candidates providing "full disclosure" of "a list of outstanding issues" as follows:

- To my knowledge the Owners Corporation past two managers have resigned;
- The Owners Corporation currently has no manager;
- An un-paid Magistrates Court Order which has incurred legal fees is in collection against the Owners Corporation (\$27,486);
- Urgent safety issues, including trip hazards are outstanding;
- Unfinished plumbing works are outstanding;
- Significant damage to brickwork on units from recent plumbing works remains unrepaired;
- Outstanding repairs of common property remain unattended to;
- The gardener has not returned for many months (due to non-payment);
- A carport structure built on a car space lot that shows on plan of subdivision to be a car space with no building;
- Car/s parking on common property (front yard)
- Un-resolved and un-answered Complaint served on all members (breach of rules – continued nuisance behaviour plus criminal damage caused to a lot owners property by an occupier/tenant/guests of), Personal Safety Order has been issued in protection of the effected Lot Owner by the Magistrates Court by way of police application".¹¹

28 None of the prospective Owners Corporation managers were willing to take on the job after receiving this email.

29 Ms Bielecki described receiving barrages of emails from Mr O'Brien, to her personal and work email address, including 118 emails between 15 June 2019 and 11 July 2019 alone. She said her iPad was constantly "pinging" with emails from Mr O'Brien. Ms Bielecki said that she had longstanding depression but had been made anxious and suicidal by the stress of dealing with Mr O'Brien.

¹¹ Defendant's Court Book ("DCB") 55-56

30 Ms Bielecki told her GP that she was suffering anxiety because of Mr O'Brien's behaviour. She told her that he was making false noise complaints to the police about Joshua playing loud music at his unit and that she was getting a lot of emails from him.

31 On 2 July 2019 Ms Bielecki asked her GP to write a letter for her, and a letter for her son, so she could take the letter to VCAT. Her GP could see that she was displaying anxiety symptoms and was very stressed. She agreed to write two "To Whom It May Concern" letters, which read:

"Mrs Bielecki has been a patient of our clinic and mine for long time. She has been suffering from anxiety and stress for last 6 months due to Mr Mathew O'Brian who lives next unit of her son has been annoying her and her son verbally and sending e-mail ,keeps making false noise complaints to police and finally whole issue gone to VCAT."¹²

32 And:

"Mr Joshua Bielecki has been a patient of our clinic and mine for long time. He has been suffering from anxiety and stress for last 6 months due to Mr Mathew O'Brian who lives next unit of him and been annoying him verbally and sending e-mail ,keeps making false noise complaints to police and finally whole issue gone to VCAT."¹³

33 At some point, Ms Bielecki applied for a personal safety intervention order ("PSIO") against Mr O'Brien. She says that she was granted an interim PSIO, but prior to the hearing date for the final PSIO she attempted suicide, was admitted to Sunshine Hospital, and did not appear at the hearing.

34 On 2 August 2019, Ms Bielecki sent Mr O'Brien the following text:

"Hi Matt its got to the end of my tether and my mental health is suffering. If you keep complaining about silly nuisances like children I am going to disclose your country court hearing between yourself and John Falcone . I don't want to do that but ur leaving me little choice. Most of this stuff is childish but its causing me a lot of grief."¹⁴

35 The reference to the County Court hearing between Mr O'Brien and John Falcone was apparently a reference to an article which had been published in the

¹² PCB 31
¹³ PCB 32
¹⁴ PCB 33

Herald Sun in 2016, describing allegations of defamation made by John Falcone against Mr O'Brien. There is no evidence that Ms Bielecki carried through with this threat.

36 On 9 August 2019, Ms Bielecki sent the first email.

37 On 10 August 2019, Ms Bielecki sent the second email.

38 These proceedings were commenced on 26 November 2019.

39 On 5 December 2019, Mr O'Brien sent a concerns notice to Mr Stone. It alleged that Mr Stone had made statements which indicated that Mr O'Brien was a person:

- who engages in acts of aggravating, disturbing, irritating and vexatious behaviour;
- who is a liar, deceiver and have shared untrue-full information;
- who is inflicting unlawful actions to cause pain;
- who has used the Court and/or Law Enforcement to obtain an order of protection by making and complain about untrue (by lying), unimportant, insignificant and issues of little worth or importance.”¹⁵

40 The Concerns Notice “invited” Mr Stone to (among other things) pay Mr O'Brien reasonable expenses of \$550 and compensation and stated:

“In the event that you may fail to meet this demand, please be advised that I will pursue all available legal remedies, including seeking monetary damages, injunctive relief, and an order that you pay court costs and legal fees.”¹⁶

41 When asked for more details of the alleged defamatory statements, Mr O'Brien referred to a letter dated 19 July 2019 written by Mr Stone, in which Mr Stone said:

- ‘I have heard Matthew O'Brien rev up his car for lengthy periods of time early in the mornings outside of Joshua's unit and speed out of the driveway'...
- ‘Matthew O'Brien sends endless emails to all unit holders making complaints about each of us as unit owners/tenants' ...
- ‘For me its where I park my car... He has this listed at VCAT' ...

¹⁵ DCB 91
¹⁶ DCB 92

- 'Matthew O'Brien had told her to fuck off because Annette had apparently called the Police and reported to Matt that the Police had advised that they did not see it as an issue' ...
- 'Matt had reported via email that he had an intervention order in place against Joshua and he mentioned that Joshua had an assault charge pending ... he has not been found guilty of any assault charge' ...
- 'when he didn't get his own way ... he then decided to apply for an IVO'"

42 At some point, Mr O'Brien also sent a concerns notice to Mr Hutcheson, although that letter was not tendered in evidence.

43 In about April 2020, Ms Slack moved into Unit 3, having purchased it from Ms Bielecki.

44 Ms Slack says she first met Mr O'Brien when he banged on her door to tell her that she was required at a VCAT meeting. She says that her only contact with him since then has been of him being abusive to her. She says he has issued breach notices to her and taken her to VCAT for putting up a garden bed with Owners Corporation approval; for an occasion when a tradesperson parked for two hours on common property; and for the location of an air-conditioning split system. She said he also parked on common property and she has attempted to take a photo of it for the purposes of her own breach notice. She says that he has yelled at her through the wall of his unit and while reversing back in the driveway. In the last month, she says that Mr O'Brien has yelled at her about four times. Mr O'Brien admits he knocked on Ms Slack's door to ask her to come to a VCAT meeting, but denies "banging" on Ms Slack's door or yelling at Ms Slack.

45 At the time of the hearing, there were five active proceedings relating to this block of units in VCAT, each initiated by Mr O'Brien.

Did the first email carry the imputation that Mr O'Brien would undertake illegal acts to get his own way?

46 The question of whether a particular statement carries an imputation is to be determined objectively, through a consideration of the natural and ordinary

meaning of the words to a reasonable reader. As said by Lord Morris in *Jones v Skelton*:¹⁷

“The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.”

(Footnote omitted.)

- 47 There is nothing in the text of the first email to suggest that the words “will go to any length to get your own way” should be interpreted specifically to mean that Mr O’Brien would undertake illegal acts to get his own way. Of course, the words “will go to any length”, if taken literally, would mean “would do absolutely anything”, which would therefore include illegal acts. However, as submitted by counsel for Ms Bielecki, that does not mean that they carry the imputation that Mr O’Brien would perform an embarrassing interpretive dance or wear a cake as a hat. As with many colloquial phrases, the words are clearly not intended to be taken literally.
- 48 Counsel for Mr O’Brien submitted that the words had to be interpreted in their context, but when pressed could not identify anything about the context in which they were written that indicated that “any length” specifically referred to illegal acts. If anything, when regard is had to the context (known to the recipients of the first email) “any length” would be interpreted by a reasonable person to be a reference to devoting many hours to the making of complaints, the bringing of VCAT proceedings, the sending of numerous lengthy emails to the Owners Corporation; and the sending of emails and making phone calls to prospective managers of the Owners Corporation, all with a purpose of achieving Mr O’Brien’s personal goals.

¹⁷ [1963] 1 WLR 1362; [1964] NSW 485; see also *Bailey v WIN Television NSW Pty Ltd* [2020] NSWCA 352 at [48]-[50]

49 I accept the submission of Ms Bielecki's counsel that the first email did not carry the imputation that Mr O'Brien would engage in illegal acts to get his own way.

Did Mr O'Brien lie to police?

50 Ms Bielecki admits that the second email carries the imputation that Mr O'Brien had lied to police, however, claims that this imputation is true.

51 This issue arose in the context of Mr O'Brien's complaint to the police that Joshua was playing explicit music on repeat in his unit. Mr O'Brien told the police that he had told Ms Bielecki that he was gay and that Ms Bielecki must have told Joshua this. Mr O'Brien claimed that the playing of this particular music was a homophobic attack on him.

52 The lie alleged by Ms Bielecki was that Mr O'Brien had told Ms Bielecki that he was gay when he had not in fact told her that. The question of whether or not Joshua was playing explicit music on repeat was not in issue in this proceeding.

53 Mr O'Brien said that he had told Ms Bielecki that he was gay in the course of a visit to her house in about 2018, shortly after she had moved into the unit. He said that during the course of a warm two-hour conversation in the kitchen, Ms Bielecki had asked whether he was single or not and had said that she had female friends that she could introduce Mr O'Brien to. Mr O'Brien said he responded that he had no interest and that he was homosexual.

54 Ms Bielecki had an entirely different account of their conversation. She said that the meeting in her kitchen was the first time that she met Mr O'Brien. She said that Mr O'Brien had contacted her by phone and arranged the meeting. She said that during the meeting Mr O'Brien rambled on for two or three hours about carparking and water-pressure issues. She said that in discussing the water-pressure issues, Mr O'Brien said he was going to raise it at the next Owners Corporation meeting and he threatened to sue her if she had known anything about it. She denied mentioning anything about her female friends. She denied

any discussion about Mr O'Brien's sexuality. In relation to the suggestion that she had offered to set Mr O'Brien up with a date she said:

"Absolutely not. I wouldn't – I don't have any- I wouldn't even have anyone to set him up with a date, and I'm single myself. If I thought he was good enough for a friend, why wouldn't have I proposed that for myself? That doesn't even make sense."¹⁸

55 I found Ms Bielecki to be a credible witness. Although she was clearly angry, stressed and upset by the situation she found herself in with Mr O'Brien and at times her answers to questions were unresponsive, in general she appeared to be doing her best to answer questions honestly and to the best of her recollection. Her account of this conversation was believable. Her denial that she would offer to set up Mr O'Brien with one of her female friends in this first meeting, or would engage in any conversation about his sexual preferences during the course of such a meeting, was also believable.

56 Mr O'Brien on the other hand was not a credible witness. He gave the impression of someone who was carefully calculating his responses to each question in order to portray his case in what he perceived to be the best possible light. There were many long pauses when difficult questions were asked and deliberately non-responsive answers.

57 A number of Mr O'Brien's answers to questions on other issues were contradicted by evidence given by Ms Bielecki, Mr Stone or Ms Slack. For example, he denied revving his car in the driveway,¹⁹ but Mr Stone gave evidence that he would rev up his car for lengthy periods of time early in the morning and speed out of the driveway.²⁰ He denied yelling at Ms Slack, but Ms Slack gave evidence that he has been "verbally yelling and screaming" at her. His evidence that he denied sending hundreds of emails to Ms Bielecki in 2018 and that he had sent about 250 emails to Ms Bielecki in 2019 was contradicted by the evidence of both Mr Stone and Ms Bielecki.

18 T37
19 T37
20 T80

58 Mr Stone and Ms Slack were not completely independent of the dispute (having also had complaints made about them by Mr O'Brien). However, they were not directly interested in the outcome of the proceeding. They both impressed me as straightforward witnesses who were doing their best to tell the truth.

59 For example, Mr Stone said that Joshua "could be a bit of a pain in the arse ... but everyone can"²¹ and that Joshua's "company ... could be a bit loud".²² However, Mr Stone felt that during the day "[e]veryone has got the right to have ... people around"²³ and "[o]n a weekend ... you know ... during the week it was always fine".²⁴ It is worth recalling at this point that Mr Stone, of all the occupants of this block of units, had the most interest in quiet in the evening, as he was a shift worker who went to bed at 8.00pm. Mr Stone's evidence in relation to Joshua impressed me as frank and reasonable. He seemed to be doing his best to provide a balanced viewpoint of a very stressful and highly conflictual situation, and also doing his best to be a good neighbour. I prefer his evidence that Mr O'Brien revved his car in the driveway to the evidence of Mr O'Brien. I find that Mr O'Brien's denial that he revs the car in his driveway is a lie.

60 Ms Slack had only moved into the unit in April 2020. She had no involvement in any dispute between Ms Bielecki and Mr O'Brien. She, too, impressed me as endeavouring to provide an honest account of a very stressful and highly conflictual situation. I prefer her evidence that Mr O'Brien has yelled at her on a number of occasions to the evidence of Mr O'Brien. I find that Mr O'Brien's denial that he has yelled at her is a lie.

61 I also accept the evidence of Ms Bielecki and Mr Stone that they have been bombarded with an extraordinary number of emails by Mr O'Brien, far more than the numbers admitted to by Mr O'Brien. Again, I find that Mr O'Brien has lied in relation to this issue.

21 T77
22 T77
23 T77
24 T78

62 Although, of course, the fact that a witness has lied under oath about one matter does not necessarily mean that they have lied about a second matter, it is a relevant factor which may lead the Court to prefer the evidence of another witness on the second matter.

63 A finding that someone has lied to police is a grave one and ought not be made lightly. However, I find that, in all of the circumstances outlined above, Ms Bielecki's account that she was effectively bombarded with Mr O'Brien's issues in relation to plumbing and parking during that meeting in the kitchen, is far more likely to be true than his account that she was so impressed with him that she offered to set him up on a date with a friend. I am satisfied that Mr O'Brien did not tell Ms Bielecki that he was gay and that he lied about this to the police.

64 There is one more piece of evidence to be addressed in relation to this issue. Late in the trial a copy of a handwritten police statement signed by Mr O'Brien was tendered in evidence. That police statement did not contain the alleged lie. Instead, it started with the words "Both Annette and Joshua have made the assumption that I am homosexual". These words appear inconsistent with Mr O'Brien having told the police that he had told Ms Bielecki that he was gay.

65 It is difficult to know what to make of this statement. It was part of both parties' cases that Mr O'Brien had told the police that he had told Ms Bielecki he was gay. The question in issue was whether this was a lie or not. Ms Bielecki submitted that the police statement showed that Mr O'Brien was not consistent in his story to the police and that this increased the probability that he had lied. Mr O'Brien submitted that it was unfair to rely upon this statement, given it was incomplete and written by an unnamed police officer, and had been produced part way through the trial.

66 Although there is some merit in Ms Bielecki's submissions, particularly given it was apparent that Mr O'Brien was a careful and detail-oriented man who would be unlikely to sign a document that was incorrect, on balance, I accept Mr

O'Brien's submissions and have not relied upon the existence of this statement in relation to the question of whether or not Mr O'Brien lied to police.

Was Mr O'Brien out for revenge and a bully towards Ms Bielecki?

67 Counsel for Mr O'Brien accepted that a person who engaged in a course of behaviour intending to cause another person distress was a bully. However, he submitted that the fact Mr O'Brien had a particular method of dispute resolution arising as a function of his personality did not make him a bully or a person who was out for revenge.

68 Counsel for Ms Bielecki submitted that a vindictive bully was exactly what Mr O'Brien was. He submitted that Mr O'Brien took action against his neighbours because he didn't like them and that he knew that he was inflicting harm, cost and stress, but kept doing it.

69 Joshua did not give evidence in this proceeding, despite being present in the house from which his mother, Ms Bielecki, gave evidence. It is open to me to draw an inference that his evidence would not have assisted Ms Bielecki in this proceeding. In this context, I am satisfied that Joshua did engage in immature, deliberately provocative and, at times, threatening behaviour towards Mr O'Brien. This included drawing threatening graffiti on his front door and playing a highly explicit song on repeat. I am also satisfied that there were times when Joshua played music which was "a bit loud", although largely confined to the day or during the weekend.

70 It does not amount to bullying for Mr O'Brien to make reasonable and legitimate complaints about Joshua's conduct to VCAT, the police, the Owners Corporation or Ms Bielecki. Nor does it amount to bullying for Mr O'Brien to make reasonable and legitimate complaints about other issues concerning the Owners Corporation.

71 However, the evidence goes far beyond this. I am satisfied that Mr O'Brien complained about Joshua's behaviour on numerous occasions, to the police, to

VCAT, to the Magistrates' Court, to the other members of the Owners Corporation and specifically to Ms Bielecki by email and text. I am satisfied that Mr O'Brien has sent many, many hundreds, if not thousands of emails to the members of the Owners Corporation (with the exception of Ms Slack, who fortuitously does not use emails). In the case of Ms Bielecki, he has used both her personal email address and her work email address.

72 I am satisfied that Mr O'Brien has sent concerns letters threatening to bring defamation proceedings against Mr Stone, Ms Bielecki and Mr Hutcheson. In the case of Mr Stone, the concerns letter was sent in relation to emails which did not do much more than disagree with Mr O'Brien. There was no specific evidence as to the publications which prompted the concerns letter to Ms Bielecki or Mr Hutcheson. However, the concerns letter to Ms Bielecki predated the three publications the subject of this proceeding. It is reasonable to assume that if those publications were serious defamations they would have been included in this proceeding.

73 I am satisfied that Mr O'Brien has made numerous formal complaints in relation to relatively trivial matters such as towels on the fence or a tradesperson parking in the wrong spot for two hours. I am satisfied that Mr O'Brien has been verbally abusive to Ms Slack. I am satisfied that Mr O'Brien lied to police about having told Ms Bielecki that he was gay and that he did so knowing that this would draw her further into his complaint against Joshua.

74 I am satisfied that Mr O'Brien has made a point of "disclosing" to all prospective Owners Corporation managers his perspective of the status of the Owners Corporation, in a manner which was not frank²⁵ and was calculated to ensure that the prospective Owners Corporation manager declined the role. I do not accept that in writing to prospective Owners Corporation managers Mr O'Brien was doing no more than being "transparent", with a view to ensuring that the

²⁵ For example, he made it appear that the Owners Corporation was insolvent, when any issues of non-payment were due to his disputing the PSD Plumbing invoice. See further T60.

Owners Corporation managers were alive to the issues that they faced. He must have known that his emails would lead to the Owners Corporation manager declining the role. I am satisfied that Mr O'Brien hoped to gain from this behaviour by being appointed administrator of the Owners Corporation, although I am unable to say whether this was because he wanted the power of being administrator or financial gain.

75 Mr O'Brien may well have a difficult personality. But I am satisfied that he had sufficient insight into human nature to understand that his conduct would cause stress and hurt to Ms Bielecki, Mr Stone and Ms Slack. I am also satisfied that much of the above behaviour was engaged in with the intention of causing stress and hurt in order to get his own way.

76 I find that Mr O'Brien is out for revenge and a bully towards Ms Bielecki and that the defence of vindication is made out with respect to the first email.

Were the first and second emails sent on an occasion of qualified privilege?

77 In *Murray v Raynor*,²⁶ the New South Wales Court of Appeal considered the question of whether common law qualified privilege applied to an email by one member of an Owners Corporation to the other members of an Owners Corporation. In the email in question, the defendant had said:

“To avoid further harassment, I've not replied to your provoking letterbox emails. However your consistent attempt to shame me publically (sic) is cowardly. It is also offensive, harassing and menacing through the use of technology to threaten me.”

78 The Court of Appeal held that in considering the common law defence of qualified privilege, it was necessary to:

- (a) identify the privileged occasion;
- (b) determine whether the defamatory statement was sufficiently connected to the privileged occasion to attract the defence; and

²⁶ [2019] NSWCA 274

(c) if malice is raised by the plaintiff, determine whether the publication was actuated by malice.

79 The Court of Appeal concluded that the defence of qualified privilege applied to the email in question and that malice had not been established.

80 The critical first step was to identify the privileged occasion. In doing so it was necessary to identify an occasion of reciprocal interest. The Court of Appeal held that in the case before them, the defendant had an interest in communications between the strata committee and residents about management of the building and the owners of the units had an interest in receiving communication about that subject matter.²⁷

81 An occasion of reciprocal interest plainly also applies in the present situation. Ms Bielecki had an interest in communications about management of the Owners Corporation and the use and maintenance of the common property. The members of the Owners Corporation in this block of units have an interest in receiving communication concerning the management of the Owners Corporation and the use and maintenance of the common property. This is borne out by the evidence of the types of matters which might be brought to the Owners Corporation meetings, including complaints about plumbing and car parking.

82 The second question is to determine whether the defamatory statement was sufficiently connected to the privilege to attract the defence. This is an objective test, Ms Bielecki's subjective intention or purpose is not relevant.²⁸ The question is whether the defamatory matter is "extraneous to that subject matter or was "sufficiently connected" and "germane and reasonably appropriate"²⁹ to it.

²⁷ Ibid at [22]-[23]

²⁸ Ibid at [33], [38]-[39]

²⁹ Ibid at [41]

83 I am satisfied that the first email is sufficiently connected to the privilege to attract the defence. That email explains why Ms Bielecki says she will not attend future Owners Corporation meetings. Her statements about Mr O'Brien are made in the context of, and concerning, his emails to prospective Owners Corporation managers. It is undoubtedly intemperate language. However, this does not necessarily mean that the defence is unavailable, as is demonstrated by the decision of the Court of Appeal in *Murray*.³⁰

84 I am not, however, satisfied that the second email is sufficiently connected to the privilege to attract the defence. Ms Bielecki's statement that Mr O'Brien has lied to police does not concern the management of the Owners Corporation or the use or maintenance of the common property. It concerns a private complaint made by Mr O'Brien to police about the conduct of Joshua. I do not accept that the Owners Corporation was the correct forum for resolving all grievances between the individual owners of the units.

85 It is not necessary to consider the question of malice, as this was not raised by Mr O'Brien in this case.

86 Accordingly, I am satisfied that the common law defence of qualified privilege is made out with respect to the first email. However, I am not satisfied that the common law defence of qualified privilege is made out with respect to the second email. I am also not satisfied that the statutory defence of qualified privilege in s30 of the Act applies to the second email, as the information in that email was not information that the recipients had an interest or apparent interest in receiving.

Was the statement to GP made on an occasion of qualified privilege?

87 It was not clear on the evidence before me whether Ms Bielecki made the statement to GP for the purpose of receiving appropriate medical advice and treatment and then, having done so, requested the two "To Whom It May

³⁰ See also *Marshall v Megna; Megna v Tory; Tory v Megna* [2013] NSWCA 30 at [95]

Concern” letters or whether she made the statement to GP for the purpose of obtaining the two “To Whom It May Concern” letters.

88 If it was the former, the statement to GP would plainly be made on an occasion of qualified privilege. Although counsel for the defendant was not able to provide any reported decisions in which qualified privilege was found to exist in the case of doctor-patient communications, I am satisfied that the therapeutic relationship between doctor and patient is an occasion of qualified privilege. Ms Bielecki had an interest in communicating matters which impacted on her mental and physical health to her doctor, and her doctor had a reciprocal duty and interest in receiving that information so as to provide her with appropriate medical advice and treatment.

89 I am also satisfied that the statement to GP was made on an occasion of qualified privilege if it was the latter. I accept Ms Bielecki’s evidence that (although the letters were headed “To Whom It May Concern”) the specific purpose of the letters was for use in VCAT or the Magistrates’ Court in support of a submission that Ms Bielecki was suffering anxiety and stress by reason of Mr O’Brien’s actions. Although brief and informal, the letters were in the nature of a medical report for use in Court or tribunal proceedings. There is a reciprocity of interest between a patient and a doctor in communications made for the purpose of obtaining a medical report. Further, the filing of a medical report in a court or tribunal would be an occasion of absolute privilege. There are clear public policy reasons for this to be the case. It would stultify that privilege if a patient was unable to frankly communicate with her doctor for the purposes of obtaining such a medical report for use in evidence in court.

Were the publications trivial?

90 The first email was sent only to the other members of the Owners Corporation who knew Mr O’Brien. This is a very limited publication. Mr Stone and Mr Hutcheson knew of the circumstances which lead to the email and were capable of forming their own views as to Mr O’Brien. The first email was intemperate, but

in the circumstances of the publication, it was unlikely to cause harm to Mr O'Brien. I am satisfied that the defence of triviality under s33 of the Act is available to Mr O'Brien with respect to the first email.

91 The second email was also sent only to the other members of the Owners Corporation. However, it concerned a private matter, being the question of whether Mr O'Brien lied to police when he said that he had told Ms Bielecki that he was gay. Stating that someone has lied to police is a more serious defamation than any defamatory statement in the first email. I am not satisfied that the defence of triviality is available with respect to the second email.

92 The statement to GP was made only to one person, a doctor who was not known to Mr O'Brien. Its only intended further publication was to the Magistrates' Court or VCAT in a medical report, which would be an occasion of absolute privilege and does not amount to relevant harm for the purposes of s33 of the Act. I am satisfied that the defence of triviality is available with respect to the statement to GP.

Assessment of damages

93 I have found that Ms Bielecki has made out her defences of justification in relation to the first and second emails; of triviality in relation to the first email and the statement to GP; and of statutory and qualified privilege in relation to the first email and the statement to GP. Accordingly, Mr O'Brien has not made out his claim for damages for defamation. However, for completeness, I will record my views as to the quantum of damages had Mr O'Brien successfully established a cause of action in defamation.

94 In closing submissions, counsel for Mr O'Brien submitted that I should assess general damages at \$25,000 and aggravated damages at \$10,000. Counsel for Ms Bielecki submitted that I should award no more than nominal damages.

95 The publications were made to an extremely limited audience, consisting of Ms Bielecki's GP and the two other members of the Owners Corporation. Ms

Bielecki's GP had no knowledge of Mr O'Brien. There was no evidence that the "To Whom It May Concern" letters that the GP produced repeating the statement to GP have been published to anyone beyond Mr O'Brien, or the Magistrates Court or VCAT (an occasion of absolute privilege).

96 Mr Stone and Mr Hutcheson were plainly capable of forming their own views of Mr O'Brien. In relation to Mr Stone, at least, those views were negative. Mr O'Brien was also capable of defending himself against Ms Bielecki's attacks against him to them (and in fact did so).

97 Mr O'Brien's claim to have been "gutted" by Ms Bielecki's publications was not credible. Mr O'Brien was not someone who would be "gutted" by a publication by Ms Bielecki. To the contrary, he was clearly someone who relished conflict and saw the emails as ammunition he could use in his conflict against Ms Bielecki and Joshua. It is far more likely that he was enraged by Ms Bielecki's communication than "gutted" by it.

98 In all the circumstances, even had I been satisfied that Mr O'Brien had a cause of action in defamation against Ms Bielecki, I would not have awarded more than nominal general damages of \$1,000.

99 I am also not satisfied that aggravated damages would be appropriate in this case. Mr O'Brien relied upon two circumstances as aggravated damages. The first was a text threat made by Ms Bielecki on 2 August 2019 to disclose a court proceeding with a John Falcone. This threat was sent before the first or second email, or the statement to GP. There is no evidence the threat was carried out. I do not accept this is an aggravating circumstance.

100 The second was the late provision of discovery in this proceeding. There was no evidence given in relation to this late provision of discovery or the impact of it upon Mr O'Brien. In any event, while conduct of litigation may be an aggravating circumstance, it must be conduct which aggravates the harm caused by the

defamatory publications. It is not the purpose of aggravated damages to punish for a failure to comply with court orders. I am not satisfied that the late provision of discovery aggravated the harm caused by the defamation.

Conclusion

101 The proceeding is dismissed. I will hear from the parties on the question of costs.

Certificate

I certify that the preceding 25 pages are a true copy of the reasons for decision of Her Honour Judge Tran delivered on 22 June 2021.

Dated: 22 June 2021

Cathy Baldwin
Acting Associate to Her
Honour Judge Tran