1 of 1 DOCUMENT

Case Name:

Swan v. Goan

Between
Leslie Arthur Swan, Plaintiff, and
Cammy Goan, Defendant
And between
Leslie Arthur Swan, Plaintiff, and
Durham Condominium Corporation No. 45, Defendant
And between
Leslie Arthur Swan, Plaintiff, and
Cammy Goan, Defendant
And between
Leslie Arthur Swan, Plaintiff, and
Catherine Debbert, Defendant
And between
Leslie Arthur Swan, Plaintiff, and
Letitia Wise, Defendant

[2010] O.J. No. 5072

Court File Nos. 62391/09, 62392/09, 62853/09,

64949/10, 65336/10

Ontario Superior Court of Justice
Small Claims Court - Oshawa, Ontario

P. Gollom Deputy J.

Heard: October 20, 2010.
Judgment: November 25, 2010.

(59 paras.)

Counsel:

Leslie Arthur Swan, Self represented.

Paul Chornobay, Counsel for the defendants.

REASONS FOR JUDGMENT

1 **P. GOLLOM DEPUTY J.**:-- These five actions, consolidated for trial, arose from the publication and republication of a notice of requisition for a condominium owners' meeting which sought to remove the plaintiff as a director of the condominium corporation. The plaintiff claims damages against each of the defendants for defamation and libel. The plaintiff submits that each cause of action is independent. The defendants deny that they libelled or defamed the plaintiff and seek a dismissal of all five of the claims.

THE DEFENDANTS

2 The defendant, Durham Condominium Corporation No. 45 (referred to as the "Corporation") is a registered condominium corporation which was established in February of 1977, pursuant to the provisions of the *Condominium Act* R.S.O. 1970, Chapter 77. The Corporation property is known municipally as 1230 Radom Street, Pickering, Ontario. The property consists of 33 units. The defendant, Cammy Goan (referred to as "Goan") is a unit owner and a member of the board of directors of the Corporation. The defendant, Catherine Debbert (referred to as "Debbert") is the owner of MCD Enterprises, a sole proprietorship which serves as a property manager for the Corporation. The defendant, Letitia Wise is a unit owner and became a director of the corporation in September 2009.

BACKGROUND

3 The plaintiff took title to part of unit 10 on April 14, 2004. Apparently, his part ownership of unit 10 was not registered with the Corporation. On May 17, 2010, the plaintiff bought out his co-owner's half interest and he is now the sole owner of unit 10. In late June 2009, the plaintiff was asked by some of the unit owners to run for the board of the Corporation. He ran in late June 2009 and was elected as a director along with Goan, and Sam Mepham (referred to as "Mepham"). Both Goan and Mepham were directors prior to the June election.

4 On October 16, 2008, the Corporation entered into an agreement with MCD Enterprises (referred to as "MCD") whereby MCD agreed to serve as the property manager for the Corporation from December 15, 2008 until December 15, 2011. Accordingly, in June of 2009 MCD was the property manager of the Corporation. Debbert was the president and sole proprietor of MCD. The Corporation had an agreement with another property manager prior to entering into the agreement with MCD. It is significant to note the section 2 (c) of by-law no. 1 provides the Corporation with the power to employ a manager at a compensation to be determined, to perform such duties and services as the board authorizes.

5 On July 7, 2009, Debbert sent an e-mail letter to the plaintiff with copies to Goan and Mepham advising that the plaintiff's election was defective as he did not appear to be a unit owner. She requested proof of ownership in order to establish his eligibility to serve on the board of the Corporation. She also advised that proxies used by him to secure his election were invalid pursuant to the provisions of the *Condominium Act*. Apparently, the property manager which managed the Corporation prior to MCD did not add the plaintiff as an owner thus accounting for this error.

6 Subsequent to the receipt of the July 7th e-mail matters between the plaintiff and Debbert took on a confrontational tone. Later that day the plaintiff responded to Debbert by e-mail. He advised that MCD had no right to request confirmation of his ownership of unit 10, and opined that the issue of the proxies was a matter for the board. The e-mail accused Debbert of being ignorant of the *Condominium Act* and suggested that she did not understand her obligations and duties as a property manager.

7 Still later that day Goan sent the plaintiff an e-mail suggesting that his e-mail to Debbert was hostile. She referred to his failure to update his status as an owner of unit 10, and indicated that she did not understand why his attitude towards MCD was so negative. Further e-mails were exchanged but the plaintiff maintained his confrontational tone. On July 8, 2009, Debbert responded to the plaintiff's July 7th e-mail and set out the history of MCD's role as a property manager. Her e-mail noted that she conducted a title search of unit 10 and confirmed that the plaintiff was a co-owner. She indicated that the records would be updated.

8 On July 16, 2009, the directors met and agreed that the plaintiff would serve as the president, and Mepham as secretary treasurer of the Corporation. At some point, after assuming the role of president, the plaintiff sent an undated letter, on the Corporation's letterhead, to the unit owners setting out that the current board was dysfunctional. The letter sets out the plaintiff's opinion with respect to the operation of the *Condominium Act* and the By-Laws. In his opinion the current board and past boards disregarded the rules and regulations. The letter specified that the current directors insisted that the Corporation must hire a property manager as it was too much work for them to properly manage the Corporation without one. The letter opined that MCD was performing duties beyond its scope and charging in the area of $8,000.00 per year for its services. The letter informed the unit owners that he requested the return of all property, re-

cords, and chattels of the Corporation from MCD but he was being obstructed by MCD in his efforts to secure their return. On cross-examination the plaintiff confirmed that he did not seek legal advice prior to preparing the letter.

9 On July 24, 2009, Debbert sent a letter to the board setting out MCD's position. She expressed concern that the board appeared to be heading for self-management and reminded the board that the contract with MCD did not run out until December 15, 2011. The letter set out the reasons why condominium corporations hired property managers. On July 25, 2009, Mepham sent both the plaintiff and Goan an e-mail confirming that he had experienced no problems with MCD holding the corporate records, and he moved to continue to permit MCD to hold the records.

10 Subsequent to July 24th the plaintiff persisted with his efforts to obtain the records from MCD. Goan and the plaintiff exchanged e-mails debating the issues surrounding the records. The plaintiff stated in an e-mail to Goan on July 27, 2009, that the board will determine a safe and simple method for on-site storage, and proceeded to lecture Goan on contracting out of her director's responsibilities by giving private corporate records to MCD. Significantly, the e-mail suggested that Goan and Mepham did not vote on the issue of the storage of the corporate records. The plaintiff suggested that a formal meeting be convened for discussion and a vote.

11 On the same day Goan responded and pointed out that both she and Mepham had voted by e-mail to keep the files with MCD. The plaintiff sent a reply wherein he advised that voting by e-mail was not binding. He suggested that Goan's behaviour put both the Corporation and the directors at risk. He further lectured that she was in breach of privacy laws by including MCD in private correspondence, and as such she would be personally liable for her actions. The message continued, "*You have been warned*." Goan responded by requesting that Mepham be included in all correspondence and reconfirmed that she understood that voting by e-mail was binding.

12 On July 28th, the plaintiff continued his campaign to obtain the corporate records which related to specifically to the contracts entered into between MCD and the Corporation. The plaintiff sent Debbert an e-mail on August 4, 2009, requesting the original contract between MCD and the Corporation as opposed to an unsigned .pdf copy which MCD had already provided. He also requested other documents relating to a recent roofing repair and asked Debbert to compile a list of all of the Corporation's documents in MCD's possession. The e-mail stated, "*Your apparent inability to properly interpret or even understand the Condominium Act* again gives me reason to pause. Is it that you cannot understand what you read, or is it that you are simply manipulative and guileful."

13 Goan consulted a lawyer to determine whether property managers were entitled to retain corporate documents. In addition, she contacted two other condominium corporations. She was advised that a property manager could retain the Corporation's documents. According to Goan, by August of 2009, the plaintiff was making it difficult for the Corporation to carry on with its normal business. He sent out many e-mails to the unit owners; he stalled the conduct of ordinary business; he wanted to change the manner in which the Corporation was managed; he made unilateral decisions without consulting the other board members; and violated the condominium rules by failing to remove a satellite dish from the roof of unit 10 when roofing work was conducted.

THE REQUISITION

14 As a result, Goan decided to consult a lawyer a second time to obtain advice on the procedure to seek the removal of a director from the Corporation. The lawyer drafted a Requisition for Meeting pursuant to section 46 of the *Condominium Act*. After the Requisition was drafted by the lawyer Goan made no changes. She sent the Requisition to the plaintiff.

15 On August 5, 2009, the plaintiff received the Requisition for Meeting (referred to as the "Requisition"). The Requisition sought the removal of the plaintiff as a director for; "*1) failure to act honestly and in good faith, and 2) failure to exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances*." The Requisition was prepared and sent pursuant to section 46(3) of the *Condominium Act* which provides:

> (3) If the nature of the business to be presented at the meeting includes the removal of one or more of the directors, the requisition shall state, for each director who is proposed to be removed, the name of the director, the reasons for the removal and whether the director occupies a position on the board that under subsection 51 (6) is reserved for voting by owners of owner occupied units.

16 The plaintiff responded to the Requisition by e-mail on August 12, 2009, wherein he advised Goan and Mepham that a claim had been filed against the Corporation. The message requested a board meeting but failed to reference the details of the claim or to state the name of the party who issued it. On August 13, 2009, Goan sent an e-mail requesting details of the claim. The plaintiff .responded the same day and advised that he filed the claim against the Corporation.

The e-mails also reference the need for a board meeting. The plaintiff's response to Goan's August 13th e-mail stated, "*If the board members are unable to attend the meeting and give input and advice, then the President will be required to act without the advantage of Board consultation....*" Thereafter the plaintiff proceeded to act without consultation with the other members of the board.

17 At 4:36 p.m. on August 14, 2009, the plaintiff sent an e-mail to Debbert whereby he purported to terminate the Agreement between the Corporation and MCD. The e-mail requested the return of all of the Corporation's property. Just prior to sending the e-mail the plaintiff sent an e-mail to Goan and Mepham advising that he was terminating MCD's contract. This e-mail set out the plaintiff's basis for the decision to terminate the contract. This decision was premised upon the plaintiff's interpretation of the condominium By-Law and the *Condominium Act*. The plaintiff took this step without obtaining either the approval of the board or consulting a lawyer.

18 Debbert sent the plaintiff an e-mail at 11:08 a.m. on August 18, 2009, whereby she advised him that without being provided with a duly executed resolution from the board, from a properly constituted meeting, the termination of the MCD contract was non-effective. She requested that he cease and desist from harassing MCD. The plaintiff responded by sending an e-mail to MCD, with copies to Goan and Mepham. The e-mail challenged Debbert's understanding of the By-Law and *Condominium Act*. The plaintiff suggested that Debbert's insistence that the contract be continued was absurd and advised that litigation would determine the strength of the contract. A further e-mail was sent by the plaintiff to Debbert advising that if the records were not returned then he would come to MCD's office to retrieve them. He set a deadline for the return.

19 On August, 19, 2009, the plaintiff sent Debbert an e-mail lecturing her on the need to renew the Corporation's insurance. The e-mail suggested that MCD did not possess the requisite skill to perform this duty. The message alleged that MCD was withholding corporate property by refusing to return the documents and threatened to sue MCD for conversion. The action would seek both general damages and punitive damages. MCD responded to the plaintiff's e-mail by serving him with a Trespass to Property Notice advising that he was not under any circumstances permitted access or to be on MCD's premises at 91 Keeble Crescent, Ajax, Ontario.

20 The plaintiff unilaterally scheduled a board meeting for August 21, 2009 at 7:00 p.m. Neither Goan nor Mepham attended the meeting. The plaintiff adjourned the meeting and set a new date of September 3, 2009. Goan advised the plaintiff the day before the August 21, 2009 meeting that she was unable to attend. The plaintiff suggested to Goan that she cancel whatever was planned for August 21st in order to attend the meeting. Goan responded by indicating that she would be available for a meeting on September 2, 2009.

21 Subsequent to August 21, 2009, there were various e-mails back and forth between the plaintiff and Goan regarding both the scheduling of the owner's meeting to consider the Requisition, and Goan's right to request the meeting. It appears that the plaintiff did not understand the operation of section 46(1) of the *Condominium Act*, which provides that:

22 A requisition for a meeting of owners may be made by those owners who at the time the board receives the requisition, own at least 15 per cent of the units that are listed in the record maintained by the corporation under subsection 47(2) and are entitled to vote.

23 The Requisition contained the signatures of 12 unit owners and clearly stated that it was brought pursuant to section 46 (1) of the *Condominium Act*, 1998. Goan testified that she prepared the Requisition as an owner and not as a board member. She stated that she had no ulterior motive to harm the plaintiff and that she believed he was not acting in good faith.

24 On August 25, 2009, Goan sent the plaintiff an e-mail enquiring whether he had sent out the notice for the owner's meeting and had booked a meeting room. The plaintiff sent Goan an e-mail the same day wherein he questioned her right to call a meeting of the owners and suggested that she intentionally failed to attend the board meeting, unilaterally scheduled by him, in order to prevent the board from successfully convening. He advised that, in his capacity as president, he neither sent out the meeting notices nor booked a meeting room.

25 Goan rescheduled the owner's meeting to September 17, 2009, in order to meet the notice requirements and thereafter proceeded to deliver the Requisition to the unit owners. Debbert prepared the notices in her capacity as property manager, and Letitia Wise assisted with the delivery of the notice to some of the unit owners.

26 A board meeting was held on September 2, 2009, at which time the plaintiff produced the claim against the Corporation. He advised Goan and Mepham that he would be the chair at the owner's meeting. At the end of the meeting the

plaintiff was requested to leave as Goan and Mepham had to discuss the claim. A resolution was passed and signed by Goan and Mepham whereby the Corporation agreed to appoint legal counsel to deal with both the upcoming owner's meeting and the claim filed against the Corporation. The resolution recorded that the plaintiff was excused from the part of the meeting which dealt with him.

27 The Corporation retained Elia Associates, Barristers and Solicitors, to defend it against the claim commenced by the plaintiff. By letter dated September 17, 2009, from Elia Associates to the plaintiff, Mr. Benjamin Rutherford a lawyer with Elia Associates explained that the three claims that were issued against the Corporation and Debbert were issued without any authority. The letter sought the immediate dismissal of the claims in order to mitigate the potential costs to the Corporation. The letter requested that the plaintiff cease making unsubstantiated claims of conversion and improper conduct against MCD. It warned that if the plaintiff continued his course of conduct then the Corporation would bring an application pursuant to section 134 (5) of the *Condominium Act* to add all of the Corporation's actual legal costs onto the common expenses payable in respect of the plaintiff's unit.

28 The plaintiff responded to the letter by an e-mail to Mr. Rutherford on September 18, 2009, wherein asserted that pursuant to section 38 (2) of the *Condominium Act* he had acted honestly and in good faith. In addition, he confirmed that he had authority to issue the claims and to assert a claim of conversion against MCD.

THE SEPTEMBER 17, 2009 MEETING

29 The owner's meeting proceeded on September 17, 2009. Minutes were recorded which are found at exhibit 3 tab 13. The plaintiff testified that he did not know who recorded the Minutes. Goan testified that Wise recorded the Minutes. Wise testified that the plaintiff asked her to record the Minutes at the start of the meeting. I accept the Minutes as an accurate record of the September 17th meeting.

30 The plaintiff chaired the meeting. This was objected to by Mr. Rutherford, the lawyer for the Corporation. A motion was made to remove the plaintiff as chair and to appoint Mr. Rutherford. The motion was passed by a majority. After the motion the plaintiff continued to argue. He threatened to commence another lawsuit against the Corporation. A second motion was made to remove the plaintiff as chairman. This motion was not recognized as the plaintiff had been removed by the previous motion.

31 Mr. Rutherford proceeded to explain both the reason for the meeting and the operation of the *Condominium Act* as it applied to the issues to be determined. The plaintiff disputed the validity of the meeting. Mr. Rutherford declared the plaintiff to be out of order and asked him to either sit quietly or leave. Extensive discussion took place with respect to the motion to remove the plaintiff from the board. Eventually a motion was made to move the meeting to a vote. The vote was taken and the motion to remove the plaintiff from the board was carried by the majority. A motion was made to open the floor to nominations to fill the plaintiff's position. Ultimately, Wise was declared as the new director to replace the plaintiff.

THE CLAIMS

32 The plaintiff issued a total of five separate claims. There is one claim against the corporation; two claims against Goan; one claim against Debbert; and one claim against Wise. The plaintiff testified that the first claim against Goan was based upon her authorship of the Requisition. The second claim against her was based upon her republishing the Requisition when she distributed it to the unit owners. The claim against Debbert is premised upon her preparing the notice of meeting and placing the Requisition in envelopes to mail to the unit owners. The plaintiff suggested that as a property manager this act added her weight to the alleged defamation. The claim against Wise was based upon the fact that she delivered copies of the notice of meeting and the Requisition to unit owners, and according to the plaintiff, told unit owners that he was dishonest. The plaintiff called no evidence to prove this assertion. No satisfactory explanation was provided by the plaintiff for the basis of the claim against the Corporation. The only basis provided for the claim against the Corporation was that Goan issued the Resolution in her capacity as a director, and advised unit owners in her capacity as a director that the plaintiff failed to act honestly and in good faith.

33 Goan testified that she did not prepare the Requisition. It was prepared by a lawyer pursuant to section 46 of the *Condominium Act*. She stated that she believed that the plaintiff was not acting in good faith; that she had no ulterior motive, and no desire to harm the plaintiff. The basis for the allegation that the plaintiff acted dishonestly was premised on the fact that when he was president of the Corporation he failed to remove his satellite dish from the roof of his unit with the result that the warranty for the recent roofing job would be voided. The notice for the Roof Replacement Project specifically referenced that anything attached to the roof voids the warranty. The plaintiff put the satellite dish back

up after the roofing work was completed knowing that this would void the warranty. The plaintiff was asked to remove the dish but failed to comply. Clause 17 of By-Law No. 1 expressly provides:

34 No television antennae, aerial, tower or similar structure and appurtenances thereto shall be erected on or fastened to any unit or on any portion of the common elements, except in connection with a common cable system.

35 The plaintiff was familiar with this clause and received a copy of the notice for the roof replacement. He knew that anything attached to the roof voided the warranty. A satellite dish is not part of a common cable system and does not qualify as one of the exceptions. The plaintiff knowingly breached both the By-Law and the notice for the Roof Replacement. It is significant that he ignored the notice for the Roof Replacement during the period that he was the president of the Corporation.

36 Goan prepared the Requisition as an owner but directed Debbert to send out the notice in her capacity as a director. Debbert prepared the notice of meeting as it was one of her functions as the property manager. The Resolution had to be enclosed with the notice as it was required by the *Condominium Act*. She testified that she was instructed to distribute the notice by Goan. She drafted the notice of the meeting but had no involvement in the preparation of the Requisition. Debbert understood that the Requisition was prepared by a lawyer who prepared it in compliance with the *Condominium Act*.

37 Wise gave evidence that she did not draft either the notice or the Requisition. She distributed the notice along with the Requisition. She testified that she did not campaign against the plaintiff. She confirmed that she did tell some unit owners that if they voted to remove the plaintiff from the board then she would appreciate their vote to elect her to the board. At the September 17th meeting she said that the plaintiff asked her to be the recording secretary but later in the meeting challenged her right to do so. Wise confirmed that she did advise some unit owners that the plaintiff put up his satellite dish with the result that this would void the roofing warranty and she advised them that he was attempting to self-manage the Corporation.

ANALYSIS

38 The plaintiff's five claims each seek damages of $25,000.00. He submits that each claim is separate and distinct. The plaintiff's claims arise from the wording contained in the Resolution. The second claim against Goan and the claims against Debbert and Wise are based on the republication of the Resolution, as discussed above. The only basis for the claim against the Corporation was the plaintiff's belief that Goan prepared the Requisition in her capacity as an officer and director of the Corporation. The plaintiff did not lead any evidence to substantiate the damages that he allegedly sustained from the supposed libel and defamation other than the fact that the notice of meeting and Requisition were served on the unit owners.

39 The defendants submit that the statements in the Requisition were expressions of opinion, fair comment, and were made without malice. At the settlement conference, the defendant Goan was ordered to produce particulars of the allegations raised in her defence. By letter dated March 31, 2010, from Elia & Associates to the plaintiff the allegations were set out. The allegations include the following:

1. The plaintiff ignored the directive not to append anything to the common elements roof of his unit by erecting the satellite dish and when requested to remove it he refused.
2. Without consulting the rest of the Board and despite the objections of the other board members, the plaintiff continued to demand the records for the Corporation from MCD.
3. The plaintiff composed confrontational and threatening e-mails to Goan and Debbert, despite objections from Goan and Debbert.
4. The plaintiff unilaterally and without a resolution by the Board sent an e-mail to MCD terminating it as the property manage.
5. Without the knowledge of Goan and Mepham, the plaintiff sent an e-mail to unit owners, on Corporation letterhead, advising that "*it appears that both the current and past Boards have disregarded many of the rules and regulations of both the Condominium Act* and the By-laws of DCC 45."
6. The plaintiff accepted service of his claim against DCC 45 and did not notify the other board members until after the expiration of the 20 time limit for filing a defence.
7. The plaintiff commenced a total of six claims against Goan, Debbert, the Corporation, and Wise.
8. The plaintiff parked in the visitor parking area while storing his second vehicle in his assigned parking place.

All of the defendants rely upon these allegations to support the defence set out above. I find that the defendants have established the validity of items 1, 2, 3, 4, 5, 6, and 7.

40 Defamation consists of two distinct torts, being libel and slander. Libel arises with any publication of the defamatory words in a permanent form. If the words convey a defamatory sense then the above criteria must be considered. Publication of the slander occurs when the defamatory material is communicated by spoken words or some other audible or visible form such as looks, gestures or sounds.

41 Goan published the imputed words complained of by preparing the Requistion with the assistance of her lawyer. There is no issue that the impugned words were printed and distributed to the unit owners. The Supreme Court of Canada set out the elements that a plaintiff is required to prove in a defamation action. In *Grant v. Torstar*, [2009] S.C.J. 61, at paragraph 28, CJC, McLachlin stated:

42 A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism:

> In these claims the plaintiff submits that impugned words in the Requisition would tend to lower his reputation in the eyes of a reasonable person; that the words referred to him; and that the words were published. Once these elements are established the onus shifts to the defendants to advance a defence to escape liability.

43 There is no dispute that the Requisition was published and subsequently distributed to the unit owners by both Goan and Wise. The plaintiff suggested that both Goan and Wise spoke to various unit owners and repeated the words in the Requisition. No evidence was adduced by the plaintiff to establish that Goan and Wise spoke about this to the unit owners and accordingly, this component of the claims will not be considered.

44 The defendants submit that the words contained in the Requisition are true with the result that the comments were justified by the facts. In the alternative, the defendants submit that the impugned words are protected by the defence of fair comment. In Mack v North Hill News Ltd., [1964] A.J. 50, at paragraphs 42 and 43 the Court quoted from *Sutherland et al v. Stopes*, [1925] A.C. 47 as follows:

45 The defence of fair comment pleaded in these actions has become known as the "rolled-up plea" and is distinguished from the plea of justification in *Sutherland et al. v. Stopes*, [1925] A.C. 47, the headnote of which states:

> The plea in an action for libel that in so far as the words complained of consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice on a matter of public interest is not a plea partly of justification and partly of fair comment, but is a plea of fair comment only.
>
> Viscount Finlay, in distinguishing the defence of fair comment from that of justification, says at pp. 62-3:
>
> It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact but also in any comments made therein.
>
> The defence of fair comment on matters of public interest is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made.

46 In his paper, The Tort of Defamation - Libel and Slander, delivered to the Canadian Bar Association on February 9th, 1995, Robert P. Armstrong Q.C. defined the defence of fair comment as follows:

Fair Comment

The defence of fair comment protects expressions of opinion made in good faith on facts that are truthful and which concern a matter of public interest. The comment must be an honest expression of the publisher's opinion, and must be a statement of opinion, as opposed to an allegation of fact. The defence of fair comment can also be rebutted if the plaintiff can establish malice.

A good description of the defence of fair comment can be found in the Canadian text of Professor Raymond Brown:

"Everyone is entitled to comment fairly on matters of public interest. Such comments are protected by qualified privilege if they are found to be comments and not statements of fact, and are made honestly, and in good faith, about facts which are true on a matter of public interest. A comment is the subjective expression of opinion in the form of a deduction, inference, conclusion, criticism, judgement, remark or observation which is generally incapable of proof. In order to be fair, it must be shown that the facts upon which the comment is based are truly stated, and that the comment is an honest expression of opinion relating to those facts. Where a comment imputes evil, base or corrupt motives to a person, it must be shown that such imputations are warranted by, and could reasonably be drawn from these facts. A comment must be made on a matter of public interest. The matter may be of interest because of the importance of the person about whom the comment is made, or because of the event, occasion or circumstances that give rise to the opinion. The protection may be lost if it is shown that the comment was made maliciously, in the sense that it originated from some improper or indirect motive, or if there was no reasonable relationship between the comment that was made and the public interest that it was designed to serve."

47 The defendants rely upon the 8 headings set out above as the basis for the truth of the impugned words. The Requisition referenced the plaintiff's, "failure to act honestly and in good faith", and his, "failure to exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances". The defendants did not state that the plaintiff was dishonest but rather that he failed to act honestly. This comment was premised upon the refusal by the plaintiff, who at the time was the president of the Corporation, to remove his satellite dish from the roof of his unit and upon his actions as the president.

48 The comments regarding his failure to exercise the care, diligence and skill were premised upon the actions taken by the plaintiff upon becoming the president of the Corporation. Based upon the evidence before me I find that the plaintiff assumed a confrontational approach in his role as president. In addition, he took actions which were contrary to By-Law No. 1, by making unilateral decisions without consulting the other board members, and he purported to cancel the contract with MCD notwithstanding the fact that Goan and Mepham opposed such action. The acts of the plaintiff were matters of interest to all of the unit owners and Goan acted properly by seeking out legal advice with respect to seeking the plaintiff's removal from the board. In the circumstances, I find that Goan acted properly by preparing the Requisition which sought the removal of the plaintiff from the board of the Corporation. The defendants have established that the basis for the impugned words contained in the Requisition were true in both substance and fact. Alternatively, I find that the words complained of are protected by the defence of fair comment.

49 The defendants further rely upon the defence of qualified privilege. This defence was discussed by the Supreme Court of Canada in *Hill v. Church of Scientology* [1995] S.C.R. No. 64, where at paragraph 42 Cory J. stated:

> Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:
>
> > ... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

This passage was quoted with approval in *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 321.

> The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.
>
> Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in Cherneskey, supra, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See McLoughlin, supra, at pp. 323-24, and *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 61-62.

50 At paragraph 43 of *Hill v. Church* of Scientology, Cory J. indicated that qualified privilege has been held to apply to the condominium setting. Accordingly, I find that the defence of qualified privilege would apply to the Corporation and to the defendants. Consideration must be applied to whether the defendants published the impugned words with malice.

51 The Requisition was prepared for Goan by a lawyer. Goan made no changes once it was completed. She testified that she believed that the plaintiff was not acting in good faith and that she had not ulterior motive. The Requisition was prepared pursuant to section 46(1) of the *Condominium Act*, and distributed to the unit owners pursuant to the *Act*. I find that Goan's actions were motivated by her interest in ensuring that the Corporation was properly managed. The evidence established that the Corporation was being mismanaged by the plaintiff. Accordingly, Goan acted properly and in the best interests of the Corporation by preparing the Requisition and circulating it to the unit owners. The unit owners clearly had an interest in receiving the information and thereafter attending the meeting to vote on the removal of the plaintiff. The statements made by Goan, and circulated by Wise were made honestly and without malice.

CONCLUSION

52 The claim against Debbert is premised upon the fact that she prepared the Notice of Meeting and enclosed the Requisition for delivery to the unit owners. The plaintiff alleges that by so doing she republished the defamatory material. Debbert was duty bound to take these steps in her capacity as the property manager. There is no basis for the claim against Debbert and accordingly, it is dismissed.

53 The claim against Wise is based upon the fact that she delivered copies of the Notice of Meeting and Requisition to some unit owners, and according to the plaintiff discussed the reasons for his removal with some unit owners. As stated above, there was no evidence that Wise discussed the reasons for removal with unit owners. She denied such discussions but acknowledged that she did request unit owners' support to elect her to the board in the event the plaintiff was removed. There is no basis for the claim against Wise and accordingly, it is dismissed.

54 The claim against the Corporation was premised upon the plaintiff's assertion that Goan prepared the Requisition in her capacity as a board member and in so doing acted on behalf of the corporation. I find that Goan prepared the Requisition in her personal capacity as a unit owner. She directed Debbert to distribute it in her capacity as a board member in order to comply with the provisions of the *Condominium Act*. I can find no basis for the claim against the Corporation. This claim is dismissed.

55 I find that the statements made by Goan were not defamatory and if they were, then she and all of the defendants are entitled to rely upon the defences of fair comment and/or qualified privilege. Accordingly, the claims against Goan are dismissed.

56 In the event that I am wrong and if any of the defendants libelled or defamed the plaintiff, then I would assess the damages in the amount of $2.00. The plaintiff led no evidence to establish any damage to his reputation. The Requisition was distributed only to the unit owners. A meeting was held to vote on the Requisition and the plaintiff was removed by a vote of the majority. Prior to the meeting the plaintiff took no steps to counter the impugned words or to

campaign for a defeat of the motion. A reasonable unit owner would pay little if any attention to the contents of the Requisition.

57 A similar fact situation occurred in *Bird v. York Condominium Corp. No. 340*, [2002] O.J. No. 1993. The plaintiff's claim was dismissed but in assessing potential damages O'Neill J. stated at paragraph 73;

> ... I am of the view that if the plaintiff's defamation action ought to have succeeded either or both in respect of the words spoken on July 18th, 2001, or the words posted in December of 2001, these words would not "tend to lower the plaintiff in the estimation of right-thinking members of society generally" and accordingly, I would assess the damages of the plaintiff in the sum of $1.00.

58 All five of the claims arose from the impugned words which were set out in the Requisition. The Requisition was distributed to the unit owners pursuant to the provisions of the *Condominium Act*. The plaintiff asserted that each claim should be treated as a separate claim. I find that the plaintiff had one claim which he chose to treat as five separate claims. I therefore reject the plaintiff's submission that each claim was separate and distinct.

59 The defendants are entitled to their costs. All of the defendants were represented by Mr. Chornobay. I award the defendants one set of costs which I fix at $3,750.00, subject to offers to settle. If offers to settle were delivered then the costs are to be doubled. The defendants are entitled to their respective disbursements for each of the five claims pursuant to rule 19.01 of the Rules of the Small Claims Court.

P. GOLLOM DEPUTY J.

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