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Case Name:

Swan v. Durham Condominium Corp. No. 45

Between
Leslie Arthur Swan, Appellant, and
Durham Condominium Corporation No. 45, Cammy Goan, Catherine Debbert, Letitia Wise, Respondents

[2012] O.J. No. 3934

2012 ONSC 4639

Court File No. 70752/11, 71230/11

Ontario Superior Court of Justice

C. Gilmore J.

Heard: July 10, 2012.
Judgment: August 10, 2012.

(75 paras.)

Counsel:

Howard Wright, for the Appellant.

Edmund Chan, for the Respondents.

RULING ON APPEAL

C. GILMORE J.:--

OVERVIEW

1 This is an appeal of the Small Claims Court judgment of Deputy Judge Gollom dated November 25, 2010. It involved five related cases which were tried together. The parties agreed that the appeals would be heard together as well.

2 The cases involve allegations by the Appellant that he was defamed by the Respondents as a result of the wording of a published notice for a board meeting to consider his removal as President of the condominium Board of Directors. Deputy Judge Gollom concluded that the Appellant had not been defamed and that the Respondents had established the defences of fair comment and/or qualified privilege. The Appellant was ordered to pay costs of $3,750.00.

3 The Appellant appeals the Small Claims Court judgment on the grounds that the trial court was unjust in finding that the Respondents did not commit the tort of defamation, that they were entitled to the pled defences, that there was no malice, that the Appellant's damages would be $2.00 if defamation were established, and that the Appellant should pay costs.

4 The Appellant requests that the court exercise its discretion and grant judgment in his favour. The Appellant does not seek to have the matter sent back to Small Claims Court for a new trial.

BACKGROUND

5 The Respondent Durham Condominium Corporation No. 45 (the "Corporation") is a registered 33 unit condominium pursuant to the provisions of the *Condominium Act, R.S.O. 1970, c.C-77.*

6 The Appellant Swan is the sole owner of unit 10.

7 The Respondent Cammy Goan ("Goan") is a unit owner and was a member of the board of directors of the Corporation. The Respondent Catherine Debbert ("Debbert") is the owner of MCD Enterprises ("MCD"), property manager of the Corporation. The Respondent Letitia Wise ("Wise") is a unit owner and became a director after Swan was removed from the board of directors.

8 On July 16, 2009, the Appellant nominated himself as President of the Corporation and was voted into that position by himself and another director, Mepham. Goan was not present at that meeting.

9 Once elected President, conflicts arose between the Appellant and MCD. The Appellant opposed MCD being present at Board meetings and insisted that the Corporation's records in MCD's possession be returned. Other Board members, including Goan, opposed the Appellant's views on MCD's duties and role.

10 Conflicts between the Appellant and MCD continued. According to Goan, by August 2009 the Appellant was making it difficult for the Corporation to carry on its normal business: he was making unilateral decisions without consulting other Board members and refused to remove a satellite dish from the roof of his unit when roofing work was being done.

11 Ultimately, Goan sought legal advice on the procedure for removing a director from the Corporation. The lawyer drafted a Requisition for Meeting ("Requisition") pursuant to s. 46 of the *Condominium Act.* The Requisition sought removal of the Appellant 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."**

12 The Requisition was prepared and sent in accordance with s. 46 of the *Condominium Act* which provides as follows:

> (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 the owner-occupied units.

13 Goan took the Requisition to several unit owners, including Wise, and had them sign it. She obtained the signature of 12 unit owners. Her evidence at trial was that she prepared the Requisition as a unit owner and not a Board member and that she had no ulterior motive to harm the Appellant but believed he was not acting in good faith. The Appellant received the Requisition on August 5, 2009. The Appellant warned Goan to take no further steps in relation to the Requisition, or court proceedings would result.

14 Despite receiving the Requisition, the Appellant continued to act in his capacity as President. Without consulting the Board or obtaining its approval, the Appellant terminated the Corporation's contract with MCD on August 14, 2009. Debbert told the Appellant he had no authority to terminate MCD's contract without a Board resolution.

15 The meeting to deal with the Requisition was scheduled for September 17, 2009. A copy of the Requisition and notice of the meeting was prepared by Debbert in her capacity as property manager. Debbert and Wise delivered the notice and Requisition to all of the unit owners. The Appellant was removed by majority vote on a motion at the September 17, 2009 meeting. Wise was declared as the new director to replace the Appellant at the same meeting.

16 The Appellant issued five separate claims. Two against Goan, one against Debbert, one against Wise, and one against the Corporation. The claims against Goan related to her authorship and then subsequent republishing of the Requisition when it was distributed to the owners. The claim against Debbert related to her preparation of the notice of the meeting and putting the Requisition in envelopes for the unit owners. The claim against Wise related to her assisting Debbert with the delivery of the notice and Requisition, and allegedly telling unit owners that the Appellant was dishon-

est. The claim against the Corporation relates to Goan issuing the Requisition in her capacity as director and advising the unit owners by way of the Requisition that the Appellant had failed to act honestly and in good faith. The Appellant sought $25,000.00 in damages for each of the claims. All claims were dismissed by Deputy Judge Gollom.

THE TEST FOR DEFAMATION

17 In order to succeed in an action for defamation the Plaintiff must establish each of the following three elements on a balance of probabilities as per *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640 at paragraph 28:

(a) The impugned words are defamatory in the sense that they would lower the plaintiff's reputation in the eyes of a reasonable person;
(b) The words are published, meaning that they were communicated to at least one person other than the plaintiff; and
(c) The plaintiff is defamed, i.e. the words are aimed at him.

18 If all of these elements are proven then damages are presumed.

19 There is no issue in this case that the impugned words referred to the Appellant.

20 The main issue is whether the words were published and defamatory. The impugned words in question are as follows:

> 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.**

WERE THE WORDS PUBLISHED?

21 The Defendants argue that neither Wise nor the Corporation published the material. They conceded that Goan and Debbert did publish the material.

22 When visiting the unit with Requisition in hand, Ms. Goan's evidence was that she did so as a unit owner and not a director or representative of the Corporation. There was no evidence at trial to contradict this, and Deputy Judge Gollom agreed with Goan's assertion in this regard.

23 The Defendants argue that the evidence at trial did not establish that Ms. Wise drafted either the notice or the Requisition or that she distributed them. She did solicit proxies from approximately seven units, but at that point the owners already had the notice and she did not provide or say the impugned words to the owners. The trial judge found that Wise did not publish the words and since there was no evidence to contradict that finding there was no error of fact or law.

24 The Appellant argues that the defamatory words were published by all of the Defendants. The unit owners did not know whether Goan was acting as a unit owner or a director when she delivered the Requisition to the owners. The evidence was that Goan said nothing when she delivered the material so the unit owners had no clarification as to whether Goan was acting as a director or unit owner. Further, Debbert seemed to be under the impression that Goan was acting as a director, as her evidence at trial was that "Goan was the only director doing anything about sending out the notice."

25 With respect to Wise, the Appellant argues that she knew the content of the notice and Requisition and her delivery of it was in fact a republication of the impugned words. The fact that Goan accompanied her (even if Goan said nothing) only reinforced that the procedure and content was endorsed by the Board and the Corporation.

Ruling

26 It is conceded that Goan participated in publishing the material. The issue to determine is whether she did so as an agent of the Corporation. If Goan was acting solely as an owner she need not have enlisted Debbert's help. Debbert was not an owner. She represented the property management company. Her role was directly associated with the operation of the Corporation. Further, since Goan was a known Board member, it was up to her to make it clear to the owners that her role in distributing the material was as an owner and not as a director. Her silence on this point allowed the owners to make the assumption that her participation in the distribution of the material was as a board member and agent of the Corporation.

27 I find that the trial judge erred in concluding that Goan prepared the Requisition in her capacity as a unit owner but distributed it in her capacity as a Board member in order to comply with the provisions of the *Condominium Act.* I

find that her silence when delivering the materials to the owners, and her instruction to Debbert to distribute the materials to the owners, leave no doubt that she was acting on behalf of the Corporation and as such the Corporation may be held responsible for the publication of the impugned material.

28 With respect to Wise, the issue is somewhat more problematic. The claim against her is based on an allegation that she delivered copies of the notice and Requisition to some unit owners and discussed the reason for the Appellant's removal with some owners. Her evidence at trial was that she did not discuss the Appellant's removal but did request the support of other Board members for election to the Board in the event that the Appellant was removed at the September 17, 2009 meeting. The trial judge found that Wise did not discuss the Appellant's removal with other owners when she distributed the material, and therefore she did not publish it and was not liable.

29 With respect, the trial judge erred in his finding on this point. I find that Wise's evidence makes it clear that she knew the content of the material as she lobbied unit owners to elect her in the Appellant's place. She distributed this material to more than one person. As such, her distribution of the material was a republication and the claim against her cannot be dismissed on the basis that she did not publish the material.

ARE THE WORDS DEFAMATORY?

30 The trial court held that the impugned words were not defamatory because "a reasonable unit owner would pay little if any attention to the contents of the Requisition." The Appellant argues that the trial judge made no real enquiry as to the meaning of the words, and as such did not apply the correct test. The Respondent argues that the trial court decision is detailed and well-reasoned and that applying the standard of correctness, there was no error of law.

31 The Appellant argues that the meaning of the words is such that a reasonable person would take them to mean that Swan in his role as director had acted dishonestly, exercised bad faith, and was imprudent. The words would clearly lower Swan's reputation in the minds of right-thinking members of society. By way of example, the Appellant argues that if such statements had been made about him previously, he would never have been elected President. That is, the words would have influenced the opinion of the Board members about him.

32 The Appellant argues that s. 46(3) of the *Condominium Act* does not prescribe what words are to be used. It simply sets out that "reasons for the removal" are to be provided. The trial court's conclusion, argues the Appellant, that the *Condominium Act* required this wording is an error of law.

33 The Appellant submits that each Defendant is independently liable. They did not claim contribution or indemnity from the other although those claims were available to them. Further, a defendant cannot escape liability by showing that he or she was merely passing on a statement authored by someone else (see *Moises v. Canadian Newspaper Co.* (1996), 30 C.C.L.T. (2d) 145 (B.C.C.A.); leave to appeal refused (1997), 208 N.R. 320 (S.C.C.). As such, the Corporation is vicariously liable for the acts of its directors. Goan was acting in her capacity as director when she told Debbert to send out the notice and when she accompanied Debbert to help deliver the notice and Requisition. Debbert helped prepare the defamatory material and republish it under the direction of Goan. Wise delivered copies of the notice and Requisition to unit owners accompanied by Goan. In doing so, Wise assisted in republishing the defamatory material and is liable.

34 The Appellant submits that the court cannot take into account certain evidence adduced by the Defendants in determining whether the words were defamatory. For example, the fact that the words were drafted by a lawyer, that they came from the *Condominium Act*, or that they were prepared for Goan as a unit owner rather than as a director should not be taken into account. There was no evidence at trial that the recipients of the defamatory material had any information as to how it was prepared and on what advice.

35 The Defendants argue that the words are not defamatory. The words were not disseminated in a newsletter or bulletin or to the Appellant's workplace. They were disseminated in the context of a process set out in the *Condominium Act* and delivered only to the 33 unit owners.

36 The Defendants argue that the Appellant did not adduce any evidence that the words lowered his reputation in the condominium community or anywhere else. He did not adduce evidence that the words caused him to be regarded with feelings of hatred, contempt, ridicule, fear or dislike. The evidence at trial was that the Appellant continues to socialize with other unit owners.

37 In the context in which they were presented, the words are not defamatory. Reasonable unit owners received the Requisition but were not forced to read it. There was no evidence that the Appellant's reputation had been damaged in that community as a result of the wording in the Requisition.

Ruling

38 I find that the words in the Requisition referring to the Appellant were defamatory. In *Gouzenko v. Harris* (1975), [1976] 72 D.L.R. (3d) 293 (H.C.J.) the court found as follows:

> In dealing with the role which forms the particular function of the Judge, Gatley says in para. 121 at p. 69:
>
> > *121. Reasonableness.* "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" [*Per* Lord Morris in *Jones v. Steelton* [1963] 1 W.L.R. at p. 1371]. In determining whether the words are capable of a defamatory meaning the judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them. That clearly is not the test. "The test according to the authorities," said Lord Selborne "is whether, under the circumstances in which the writing was published, *reasonable* men to whom the publication was made would be likely to understand it in a libellous sense" [*Per* Lord Selborne L.C. in *Capital & Counties Bank v. Henty* (1882) 7 App. Cas. at p. 745 ...]. [Emphasis in original.]

39 The threshold for making a finding that the words were defamatory is low in my view. Would a reasonable unit owner be given to understand that the Appellant was dishonest or a person of low moral character by reading the words? The response is yes.

40 Whether the words were drafted by a lawyer or disseminated to a small group is irrelevant. In reading that the Appellant was described in the Requisition as a person "who failed to act honestly and in good faith" a reasonable unit owner could not help but have a changed opinion of the Appellant's character.

41 While the trial judge considered all of the defences raised by the Defendants, he did not, with respect, adequately consider the law as it related to defamation. I find that the trial judge did not consider the "reasonable person" test in the context of the unit owners. Given all of the above, the test for defamation is therefore met.

THE DEFENCES

Justification

42 If one can demonstrate that a statement is true or substantially true the defence of justification is made out (see *Grant*).

43 The Respondents argue that the trial judge did not err in finding that justification was made out. The Respondents point to several instances of the Appellant's behaviour which show that he failed to act honestly and in good faith and failed to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

44 The examples raised by the Respondents and accepted as facts by the trial judge are as follows:

(a) Even after the Requisition was disseminated, the Respondent demanded that MCD return the Corporation's records by way of threatening emails. He then unilaterally terminated MCD as property manager.

(b) The Appellant attached a satellite dish to his roof without Board approval. He refused to remove it when requested to do so.

(c) The Appellant sued the Corporation in Small Claims court, accepted service on behalf of the Corporation, and did not inform the Board of the claim until after the 20 day limit to defend had expired.

(d) The Appellant unilaterally and without permission from the Board commenced a claim against MCD on behalf of the Corporation.
(e) The Appellant commenced five claims against Goan, Debbert, the Corporation, and Wise.
(f) The Appellant sent an email to the owners on Board letterhead, without the knowledge of Goan and Mepham, advising that the Board was disregarding the regulations of the *Condominium Act* and the By-laws of the Corporation.
(g) The Appellant was disruptive at the September 17, 2009 Board meeting.

45 The Appellant argues that the defence is not made out because there was insufficient evidence to support the contention that the impugned words were true. Further, facts which occur prior to the defamation were not pled or led in evidence. I find that this defence has been made out because the Appellant's actions clearly demonstrate that he was acting outside of his jurisdiction as President. He did not exercise the care, diligence, and skill of a reasonable person when he unilaterally terminated the property management company or commenced a claim against them without Board approval. His actions in accepting service of his own claim against the Board cannot be interpreted as being anything other than the Appellant failing to act honestly and in good faith. On the contrary, the Appellant's actions can be interpreted as intending to undermine the Corporation and taking unfair advantage of his position as President.

46 I therefore do not find that the trial judge erred in coming to the conclusion that this defence was made out.

Fair Comment on a Matter of Public Interest

47 Comments may be protected by this defence if they are intended to be comments and not statements of fact and are made honestly, in good faith, and about facts which are true on a matter of public interest. The Appellant must prove malice to defeat the defence (see *McCullough v. Cohen* [2000] O.J. No. 3431 (S.C.)).

48 The Defendants argue that the Appellant has not proven malice and that the comments made by the Defendants were not intended to affect the Appellant's reputation. Based on the Appellant's actions (enumerated above) the Defendants honestly believed that the Appellant had failed to act honestly and in good faith and had failed to exercise the care, diligence, and skill that a reasonably prudent person would exercise in the circumstances. Deputy Judge Gollom therefore did not make a palpable and overriding error of fact in order to make this finding.

49 The Appellant argues that the test for fair comment is not met because the impugned words are framed as statements of fact and there is nothing to indicate that they are commentary. In order to meet the test the impugned statement would need to be prefaced by words such as "in my opinion, it appears, it seems that. ..." Further, the Appellant argues that the Defendants' pleadings are insufficient as they relate to the defence of fair comment and the Appellant was left without a clear understanding of the case he had to meet on this point.

Ruling

50 I do not find that the trial judge erred in finding that the defence of fair comment applied. I find that the statements about the Appellant were made with foundation, and were not made dishonestly or with reckless disregard for the truth. Further, they were not made with an intent to injure the Appellant.[1]

51 I find that there is ample foundation for the honest belief that the statements were true. That is, there were sufficient facts reasonably and objectively believed by the Defendants such that the commentary made was fair comment within the Durham Condominium Corporation ("DCC") community. Some examples of the foundation were the Appellant's unilateral actions in terminating the MCD contract, and his commencing a personal action against the Corporation and then accepting service of the claim on behalf of the Corporation and allowing the 20 day limit to defend to expire. These were found as facts by the trial judge and I see no error with those findings.

52 Further, I agree with the trial judge that the Appellant failed to prove malice on the part of the Defendants. The most that can be said is that Ms. Wise wanted the Appellant's position on the Board and that Debbert, on behalf of MCD, was concerned about the Appellant's unilateral actions and aggressive emails. That is not sufficient to prove malice.

Qualified Privilege

53 The defence of qualified privilege applies if the statement or publication is made in the exercise of a duty, or for the purpose of pursuing or protecting some interest, provided that it is made to a person who has some corresponding interest. In order to defeat the defence the Appellant must prove malice (see *McCullough*).

54 The *Condominium Act* requires that a Requisition under subsection 46(3) include the reasons for removal. Subsection 47(9)(a)(ii) of the Act requires a Notice of Meeting to include a copy of the Requisition. After receiving signatures from 15% of the owners, the Board had an obligation to call a meeting and give proper notice of the meeting. Goan instructed Debbert to prepare and mail the notice and Requisition to the owners as required by the Act.

55 The Respondents argue that the trial judge did not err in accepting the Defendants evidence that the dissemination was made in the exercise of a duty or for the purpose of protecting the interest of the Corporation. Further, the dissemination was made to the owners who have a corresponding interest.

56 The Appellant argues that the privilege is defeated in this case because limits on the duty or interest of the Respondents were exceeded (see *Gates v. Standard*, [2004] O.J. No. 1470 at paras. 52-54). Further, the trial judge relied on a passage in *Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130* for the proposition that qualified privilege applies in a condominium setting, when no such statement exists in that case. Finally, the trial judge failed to analyze how the defence of qualified privilege (and fair comment) applies to each Defendant but simply concluded that the defences applied to all the Defendants.

Ruling

57 Were the limits on the duty or interest of the Respondents exceeded because of the wording of the reasons for removal? The trial judge found that Goan's motivation in obtaining legal advice and preparing the Requisition was to ensure that the Corporation was properly managed. The unit owners clearly had the same interest. The trial judge found that there was sufficient evidence to show that the Appellant was mismanaging the Corporation.

58 I do not interfere with the trial judge's findings in relation to this defence. Goan was pursuing a legal duty, and in doing so distributed a Requisition that contained reasons for removal which she honestly believed were true because she felt the Appellant was mismanaging the corporation.

59 While the trial judge may have misstated the reference to the application to condominiums in referring to the *Hill* case, there is no doubt that *McCullough* deals with defamatory statements and defences in a condominium setting.

60 In *Botiuk v. Toronto Free Press Publications Ltd., [1995] 3 S.C.R.3* the court dealt with qualified privilege as follows:

> 79. Where an occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.
>
> 80. Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated. This was discussed at some length in *Hill, supra*, and there is no need to repeat it in these reasons.

61 Dealing first with the malice argument, I agree with the trial judge's finding that Goan's interest in disseminating the material related to her concern for the management of the Corporation. Goan believed the statements were true and, as referred to above, had a factual foundation for that belief. She testified that she believed the Appellant was mismanaging the corporation. Her actions were all directed towards rectifying that concern.

62 With respect to whether the limits of the duty were exceeded, I agree that the trial judge did not specifically deal with that aspect of qualified privilege. However, I do not find that his failure to advert to that issue is an error in law. That is, if Goan honestly believed the statements were true based on her information about the factual underpinnings for the reason for removal, then the information communicated was "reasonably appropriate to the legitimate purpose of the occasion." I do not find that the limits of the duty have been exceeded, and the defence of qualified privilege therefore applies.

TRIAL FAIRNESS ISSUES

Rebuttal

63 The Appellant submits that the trial judge erred in not allowing the Appellant to rebut the defences relied upon. The court directed the Appellant to focus on the issues of whether the words were defamatory and the issue of damages, thereby leaving the Appellant with the impression that the defences raised by the Respondents would be given little weight.

64 The Respondents argue that the Appellant (who was self-represented at the Small Claims Court trial) was given every opportunity for rebuttal and submissions including written submissions.

The Roof Warranty

65 The Appellant argues that the trial judge erred in assuming that erecting a satellite dish on the roof would void the roof warranty. There was no evidence from an expert to confirm this point. The Appellant did not testify that he knew of any warranty.

66 The Respondents submit that the trial judge's findings on this point were reasonable in that the Appellant had received a copy of the notice for the Roof Replacement Project which referenced that items attached to the roof would void the warranty. There was no evidence that the Appellant did not know about this warning.

Prohibition on Certain Questions by the Appellant

67 The Appellant submitted that the trial judge erred in law by not permitting proper trial procedure in that he was prohibited from questioning the authority of MCD because the court assumed that MCD's authority was valid. The Appellant was therefore not permitted to cross-examine on the Board's authority to retain MCD.

68 The Respondents submit that their counsel quite properly objected to questions put to Debbert about questions of law relating to the authority of the Board and MCD. The Appellant was permitted to make written submissions which included submissions on this point. In any event, the trial judge found that the Board did have the authority to retain MCD as per DCC 45's By-Law no. 1.

Error in Assessing Damages

69 The Appellant submits that the trial judge erred in concluding that if defamation were proven, that damages would be nominal as the Appellant had not provided any evidence of damages. The Appellant set out in his factum a number of factors which the court should have taken into account in assessing damages. Further, the Appellant submits it is an error in law to require the Appellant to prove damages since they are presumed where defamation is proved.

70 The Respondents rely on *McCullough* and *Bird* for the proposition that even if the words had been found to be defamatory, their distribution to the small group of condominium owners would have attracted damages of only $1.00. In this case, the words were distributed to only 33 people (the owners) and the Appellant did not produce any credible evidence that his reputation had been damaged.

Combining the Claims

71 The Appellant argues that the trial judge erred in law in combining all of the claims and failing to advert to the fact that each republication was a separate tort and gave rise to a new cause of action. The trial judge did not effectively evaluate each Respondent's situation as it related to the issue of defamation and with respect to the defences pled.

72 The Respondents argue that the claims arose out of the same circumstances and the same words and it was therefore appropriate for them to be dealt with together.

Ruling on Trial Fairness Issues

73 I do not find that the trial judge made any errors of law in this regard for the following reasons:

(a) A review of the trial transcript reveals that the trial judge exercised his discretion in controlling the trial process to ensure that all matters proceeded efficiently and that the litigants were treated fairly. He was particularly astute in ensuring that the Appellant, who was self-represented, received a fair hearing. Requesting written submissions ensured that the Appellant had an opportunity to plan out and research his legal argument.

(b) The trial judge examined the notice in relation to the roof replacement and noted the provisions relating to attachments to the roof. I do not find that he erred in concluding that as

the Appellant had received the notice he was therefore aware that his satellite dish would void the warranty.

(c) While the trial judge was in a position to conclude that the Appellant had provided no evidence of damages, the Appellant is correct in submitting that such proof was not required and that damages were presumed. However, the point is moot as this court and the Small Claims Court have found that the defences pled by the Respondents succeed and as such, no damages will be awarded.

(d) There was no reason for the claims in this case to be heard separately as they related to the same set of circumstances and the same words. While each Respondent was in a slightly different position, that difference was nominal. To put it more succinctly, the defences which apply to Goan would also apply to the Corporation as she was found to be acting as its agent. The defences would also apply to Wise and Debbert as they were found to have "published" the material by distributing it. In "publishing" the material they were deemed to have knowledge of its potentially defamatory content, and the defences would apply to them equally. The evidence supported that both Wise and Debbert were aware of the contents of Requisition and participated in its publication.

SUMMARY AND FINAL ORDERS

74 For all of the above reasons the Appellant's appeal is dismissed. While the test for defamation was met, the Respondents were entitled to the defences of justification, fair comment, and qualified privilege.

75 If the parties cannot agree on costs they may provide a two page summary, exclusive of any Offers to Settle or Bill of Costs, on a seven day turnaround starting with the Respondents.

C. GILMORE J.

cp/e/qljel/qlpmg

1 *Bird v. York Condominium Corp. No. 340*, 2002 CarswellOnt 1661 (S.C.J.).