The unlocked letterbox → the group email → the defamation suit → legal fees

Anthony J Cordato

In a victory for freedom of speech, the NSW Court of Appeal has decided that residents in strata buildings can freely express opinions about the management of their strata scheme even though the opinions might be defamatory, because they are protected by common law qualified privilege.

The decision is *Murray v Raynor* [2019] NSWCA 274 (13 November 2019) (Payne JA, Macfarlan JA and Emmett AJA agreeing), Court of Appeal, Supreme Court of New South Wales, on appeal from the NSW District Court decision of *Raynor v Murray* [2019] NSWDC 189 (Gibson DCJ).

The facts

The Watermark Apartment Building is premium quality apartment building overlooking Manly Cove Beach. There are 16 letterboxes, which are standard-sized lockable numbered boxes. They are outside the building, in a portico on Victoria Street – see photos.

Gary Raynor, a retired civil engineer, had been the chair of the strata committee since 2012.

Trish Murray rented apartment 9 in July 2016.

A chain of emails between Mr Raynor and Ms Murray led to the defamation suit:

(1) On 25 July 2016, Mr Raynor sent her a "welcome" email containing information on Watermark.
(2) On 31 August 2016, Mr Raynor sent her an email: "I notice your mailbox has been left unlocked for quite a while?"
(3) On 13 December 2016, Mr Raynor complained to her about a party she had held.
(4) On 10 April 2017, Mr Raynor sent her an email to the effect that keeping mailboxes open encourages thieves looking for mail and identity papers, ending: "Would you mind closing the box."
(5) On 21 April 2017, Mr Raynor sent a group email to owners, residents and agents of Watermark advising "It appears that during the night of 20/21 April 17, our mailboxes were opened by potential thieves … please make sure your mailbox is closed and locked ASAP … and keep it locked". A link was included to an article on the Daily Telegraph about identity theft by thieves known as "boxers".

(6) On 27 April 2017, Mr Raynor sent her an email which included the text of his emails of 10 April 2017 and 31 August 2016, and said that "exactly" what he had warned about had happened and that her "open box may have contributed to the ease with which the [thieves] apparently obtained a master key to open the other boxes".
(7) On 2 May 2017, Mr Raynor sent a further group email to report that 5 mailboxes were broken in overnight on 1/2 May 17.
(8) On 5 May 2017, Mr Raynor sent her an email to point out that her mailbox had been open "for the last two days".
Ms Murray did not reply to these emails.
(9) On 24 May 2017, Mr Raynor sent her an email copying in her agent and the landlord. He then forwarded the email to the group of owners, residents and agents. He repeated that her leaving the mailbox open "is the likely cause" of thieves obtaining a skeleton key, that all boxes may have to be rekeyed, and that compensation would be sought from the owner of Unit 9.
(10) On 25 May 2017, Ms Murray replied, copying in the group. This was the email that Mr Raynor alleged was defamatory. These are some excerpts:
From: Trish Murray Subject Re: Watermark: Unit 9 mailbox
Your assertion/s that a single unlocked letterbox has allowed a criminal milieu to stalk the watermark building, and spend the time necessary to copy barrels/locks in order to then construct a master key is farfetched.
I doubt that thieves would execute a Mission Impossible scenario on the Watermark building.
Letterbox locks are a deterrent and not fortress security.
May I suggest, given your email hobby, that ... banking statements ...[be] provided to you in an e-Statement format.
rather than a simple knock on my door for a chat in person … you have consistently chosen the public email option … alleging that responsibility for the threat and safety to our home at Watermark is our doing and threatening to hold us financially responsible.
Your consistent attempt to shame me publicly is cowardly. It is also offensive, harassing and menacing through use of technology to threaten me.
Please stop!

In early 2018, the strata owners corporation took Ms Raynor to NCAT (the NSW Civil and Administrative Tribunal) which resulted in a confidential agreement by Ms Murray to keep her mailbox locked.

Notes:

- there was no strata by-law which required letterboxes to be kept locked.
- Ms Murray deliberately kept her letterbox unlocked to allow the postman to place small packages into the box which would not fit through the slot.
- Ms Murray's lease was not renewed and she moved out in July 2018.

The defamation suit

In proceedings commenced in 2017, Mr Raynor alleged that the email of 25 May 2017 contained defamatory imputations, namely that he:

- Unreasonably harassed and acted menacingly towards Ms Murray by consistently threatening her by email

- Was a malicious person by sending group emails to publicly humiliate her
- Was a small minded busybody who wastes the time of fellow residents on petty items concerning the running of the Watermark building

The District Court found the defamation was established, and that the defences under the *Defamation Act* 2005 of honest opinion and triviality were not established. Nor was the defence of qualified opinion at common law established.

The Court awarded Mr Raynor $120,000 in damages, concluding that:

It would be fair to say that every sentence of [Ms Murray's] email struck a blow at [Mr Raynor], and was intended to ridicule and humiliate him in every way.

The Court of Appeal decided differently. It found that the common law defence of qualified privilege applied. The Court relied upon a 185 year old precedent decision of *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 where Baron Parke said:

If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

The Court found that the privileged 'occasion' was "communication to residents of Watermark on the topic of management of the building including the security of mailboxes"; and that the defamatory statements were "sufficiently connected" to the privileged occasion , were not motivated by malice and there was no improper purpose. The Court noted that "ill-will, prejudice, bias, recklessness, lack of belief in truth or some improper motive" are insufficient to establish malice.

It is worth noting that Ms Murray's email was sent only to the owners of units in the Watermark. The Court noted that "If, for example, the matter complained of had been published on an internet platform open to all this may have been a very different case."

The NSW Court of Appeal upheld the appeal, set aside the award of $120,000, and ordered Mr Raynor pay Ms Murray's legal costs in the appeal and also in the trial in the District Court. My Raynor needs to also pay his own legal costs.

The outcome is that Mr Raynor not only failed in his defamation suit but will pay an estimated total of $400,000 in legal costs - $200,000 for Ms Raynor and $200,000 for himself, for the trial and the appeal.

Conclusions

This decision stands for the proposition that owners and residents in strata buildings are free to express their opinions about matters concerning the management of their building to other residents and owners, without fearing defamation proceedings.

But there are limits – the opinions cannot be malicious, and must not be published on social media platforms outside of a closed group (the owners and residents).

This decision also stands for the proposition that defamation proceedings should only be considered if the defamation is clear-cut. Otherwise, the defamed party may end up paying not only their own but the other party's legal costs.