IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-002046
[2013] NZHC 869

UNDER	the Defamation Act 1992
IN THE MATTER OF	an interlocutory application under Rules 7.23 and 7.53 of the High Court Rules
BETWEEN	JOHN CHUNG CHING CHEN Plaintiff
AND	JOHN NORMAN CARTER First Defendant
AND	ROGER BERNARD APPERLEY Second Defendant
AND	DAVID LLOYD BURGESS Third Defendant
AND	PETER FRANCIS Fourth Defendant
AND	JOHN LEONARD MORRIS Fifth Defendant
AND	SALLY LEONARD SYNNOTT Sixth Defendant
AND	CROCKERS BODY CORPORATE MANAGEMENT LIMITED Seventh Defendant
AND	ROCHELLE WILLIAMS Eighth Defendant

Hearing: 23 April 2013

Counsel: J G Miles QC with A J Lloyd and D M Cross for Plaintiff
A S McIntyre and M J Francis for Defendants

Judgment: 3 May 2013

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 12 noon on the 3rd day of May 2013.

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] On 23 April 2013 I heard an application for an interim injunction in which Mr Chen sought orders prohibiting the defendants from repeating what he pleads are defamatory statements made about him.

[2] Soon after the conclusion of the hearing I issued a judgment in which I very briefly said:

(1) that an ex parte interim injunction issued by Keane J on 19 April 2013 was set aside;

(2) that Mr Chen's application for an interim injunction was dismissed; and

(3) that my reasons for this judgment would be delivered as soon as possible.

[3] I was required to make my decision and issue a judgment on 23 April 2013 because a meeting of affected persons was scheduled to commence approximately three hours after the conclusion of the oral hearing. The parties needed to know before that meeting whether or not the existing ex parte interim injunction was to continue, be varied, or be set aside.

Context

[4] Mr Chen seeks an interim injunction against the first to sixth defendants who are members of the management committee of the Body Corporate of the Metropolis

apartment complex in Auckland and the seventh and eighth defendants, who are the Body Corporate secretariat and an employee of the secretariat. For convenience I will refer to all defendants as the Body Corporate committee.

[5] On 19 April 2013 Mr Chen applied for an ex parte interim injunction to prevent the Body Corporate committee from further publishing a communication which comprised:

(1) a three-page email dated 12 April 2013 from the Body Corporate committee to all owners of the Metropolis Body Corporate (the email), which I have annexed to this judgment (Annexure A);

(2) a two-page attachment to the email containing a "summary" of cases in which Mr Chen had been involved (case summary), which I have also annexed to this judgment (Annexure B);

(3) a three-page attachment to the email comprising part of a deed of lease;

(4) a one-page attachment to the email being a list of seven cases from the judicial decisions on-line database;

(5) a one-page attachment to the email being the front page of a judgment of the Court of Appeal involving Theta Management Ltd (Theta), a property management/landlord company owned and managed by Mr Chen;

(6) a 12-page attachment to the email being a decision of the Tenancy Tribunal concerning a case relating to Theta.

[6] On the evening of 19 April 2013, Keane J directed the application for an interim injunction be called in the Duty Judge List on 22 April 2013 and that Mr Chen's application for an injunction proceed on notice. In the meantime, his Honour granted Mr Chen's application for an interim injunction preventing the Body

Corporate committee from distributing further copies of all of the documents described in [5] above.

[7] When the case was called before Katz J on 22 April 2013 in the Duty Judge List she expressed concern at the breadth of the orders sought by Mr Chen.[1] Katz J set the application for an injunction down for hearing before me on 23 April 2013, on the basis that it would be heard as an inter partes case. The Body Corporate committee has filed a notice of opposition and an affidavit in opposition which was sworn by the first defendant, who is an experienced lawyer and member of the Body Corporate committee. In his affidavit Mr Carter explains that he was the author of the case summary which is Annexure B to this judgment. Mr Carter also explains that the Body Corporate committee will be defending Mr Chen's defamation proceeding on the grounds that the statements he complains of are true and covered by qualified privilege.

[8] When the case was called before me, Mr Miles QC, who had just been briefed to act for Mr Chen, very properly adopted a more realistic approach to the scope of any injunction. Mr Miles focused upon the following three portions of the email and case summary:

> (1) This will enable you to form a view as to whether the litigious and obdurate flavour of Mr Chen's management style is consistent with what the Metropolis community wants for its building, taking into account Mr Chen's nomination of himself for the committee.
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> (2) Based on Mr Chen's history elsewhere, the issue of the proceedings can only be seen as the beginning of a divisive and litigious management style. If such a style is allowed to become entrenched, the only possible result is to turn the Metropolis into an undesirable address plagued by disputes with the end result being an overall reduction in the quality of life in the building. If this occurs, the likely negative impact on values is obvious.
>
> (3) Theta's management style and conduct, branded as illegal twice by a District Court Judge and then by two High Court Judges and three Judges of the Court of Appeal over a period of four years is a matter for your consideration.

[9] Ultimately, Mr Miles invited me to issue an interim injunction preventing the Body Corporate committee from making any further statements that Mr Chen has a

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1 *Chen v Carter* HC Auckland CIV-2013-404-2046, 22 April 2013 at [5].

history of being obdurate and or litigious. Mr Miles suggested that if I issued an injunction to this effect it would expire at the conclusion of the Annual General Meeting of the Body Corporate for the Metropolis scheduled for 1 May 2013. During the course of his submissions, Mr Miles also informed me that although Mr Chen was not reluctant to proceed to trial, in Mr Miles' assessment this was not a case that was likely to proceed to a substantive hearing. This observation from Mr Miles carries significant weight, particularly because of Mr Miles' status as one of New Zealand's most experienced defamation lawyers.

Background

[10] The Metropolis is a prestigious Auckland apartment complex located at 1 Courthouse Lane in central Auckland. There are 412 apartments and commercial units in the Metropolis. Mr Chen had lived in one of the apartments since 2004. He purchased one of the apartments and thereby became a member of the Body Corporate in July 2012.

[11] Earlier this year Mr Chen and a group who own 65 of the units in the Body Corporate became concerned about aspects of the management of the Body Corporate. I will refer to these unit owners as the "concerned owners group". The concerned owners group instructed Minter Ellison Rudd Watts to write to the Body Corporate committee on 14 March 2013. The concerned owners group appeared to be particularly aggrieved that the Body Corporate committee had resolved to extend the building manager's contract for a further five year term. The building manager is the third defendant in this proceeding. In its letter Minter Ellison Rudd Watts set out a number of demands of the Body Corporate committee and conveyed the concerned owners group's views in no uncertain terms. For example, the letter says:

> ... our clients' position is that the [Body Corporate] committee and its members have acted without authority and that they (rather than the Body Corporate) will be personally liable for the consequences of such.

Minter Ellison Rudd Watts sought a response to its letter by 5.00 pm on 22 March 2013.

[12] On 15 March 2013 the seventh defendant (the Body Corporate's secretary) wrote to Minter Ellison Rudd Watts, saying that the Body Corporate committee was meeting on 27 March 2013 and would respond as soon as practicable after that meeting. On the same day Minter Ellison Rudd Watts replied, saying the "delay" proposed by the Body Corporate's secretary was unacceptable and that legal proceedings might be issued if a substantive response was not received by 5.00 pm on 22 March 2013.

[13] On 17 March 2013, the first defendant sent an email asking for confirmation that Minter Ellison Rudd Watts would meet the reasonable costs of responding to the letter sent by Minter Ellison Rudd Watts on 14 March 2013.

[14] On 18 March 2013 Minter Ellison Rudd Watts wrote again to the Body Corporate committee expressing the displeasure of the concerned owners group about the responses received. In that letter Minter Ellison Rudd Watts said they were wanting to give the Body Corporate committee the opportunity to:

> Provide explanations for matters in which they appear to have been acting illegally and/or in excess of their powers, and for which they are liable and may be sued; ...

[15] The first defendant responded by email on 18 March 2013. In his email Mr Carter said that he did not like the "bullying tone" of the letters being sent by Minter Ellison Rudd Watts.

[16] On 23 March 2013 Mr Chen wrote to all members of the Body Corporate. In that letter Mr Chen said, amongst other things:

(1) That he and the interested owners group were concerned about the conduct of the Body Corporate committee.

(2) Asked if the size of the Body Corporate budget "could ... be due to the fiscal mismanagement of the Body Corporate Budget by the Body Corporate committee, [Body Corporate] Secretary and Building manager?"

(3) That the third defendant had a "gross conflict of interest" when the Body Corporate extended his contract and increased his fees.

(4) That there had been no proper tender process carried out to ascertain if there was a suitable alternative building manager.

(5) That the extension of the building manager's contract was "illegal".

[17] On 2 April 2013 a Mr Howard, also a member of the Body Corporate wrote to the Body Corporate owners in similar terms to Mr Chen's letter of 23 March 2013. In his letter Mr Howard asked:

> Are you prepared to vote to replace the current regime with governance that listens to a community voice, and who is fiscally responsible in managing the Body Corp funds, and who will be transparent and accountable?

By this time Mr Chen had declared himself a candidate for election to the Body Corporate committee. The election was to be held at 4.00pm on 1 May 2013.

[18] On 8 April 2013 a meeting was held at Minter Ellison Rudd Watts. That meeting was attended by Mr Chen, Mr Howard, and some members of the Body Corporate committee. At that meeting members of the Body Corporate committee were presented with proceedings in which Howard Property Ltd (owned by Mr Howard) seeks a declaration from the High Court concerning the legality of the decision to renew the Metropolis building management contract for a further term of five years.

[19] On 12 April 2013 the Body Corporate sent the communications described in [5] of this judgment, the main portions of which are annexed as Annexures A and B to this judgment.

[20] On 13 April 2013 Minter Ellison Rudd Watts wrote to the Body Corporate committee in which they explained their concern that the communication of 12 April 2013 from the Body Corporate committee contained a number of untrue and defamatory statements about Mr Chen. The untrue and defamatory statements were identified in this letter. Minter Ellison Rudd Watts sought a retraction and an

undertaking that the Body Corporate committee members abstain from publishing any further defamatory statements about Mr Chen.

[21] On 14 April 2013 Mr Chen wrote to the Body Corporate owners in which he said that the Body Corporate committee had made "a number of false and spurious personal attacks on [him]". In this letter Mr Chen asked a number of questions, including:

> Why are they [the Body Corporate committee] so desperate to maintain their control of our Body Corporate? What are they afraid of? What do they have to hide?
>
> Do we want people who are willing to stoop to such desperate (and seeing as they have chosen to use the word – illegal) action controlling our Body Corporate?

[22] On 19 April 2013 Mr Howard wrote to Body Corporate owners seeking their support for his candidacy to become Chairman of the Body Corporate.

Mr Chen's litigation history

[23] The Body Corporate committee believes there is nothing defamatory about its statements that Mr Chen is obdurate and litigious. Indeed, the Body Corporate committee claims those descriptions of Mr Chen are accurate. As truth is raised as a defence, it is convenient at this juncture to briefly summarise Mr Chen's litigation history.

Xu proceedings

[24] Theta was incorporated in 2007. In the same year Theta became the building manager of a large student accommodation complex in Whitaker Place, Auckland called the Empire Apartments. Theta also became the lessee of a large number of units in that complex. One of its tenants was Ms Xu, who took proceedings against Theta to the Tenancy Tribunal. The dispute concerned Theta's refusal to allow Ms Xu access to the unit she rented unless she paid a fee that had allegedly been incurred by Theta when the Fire Service was called to attend a fire in Ms Xu's apartment.

[25] Mr Chen gave evidence before the Tenancy Adjudicator. In her decision the Tenancy Adjudicator said that she found Mr Chen was not a "credible" witness and that he was "evasive" when giving evidence.[2] The Tenancy Adjudicator also concluded that:

(1) Ms Xu had been treated "most unfairly" by Theta[3];

(2) Theta had not recognised any of Ms Xu's rights and was only concerned about getting payment of rent and costs[4]; and

(3) Ms Xu was "not the only victim of [Theta's] failure to comply with the provisions of the" Residential Tenancies Act 1986.[5]

The Tenancy Adjudicator took the unusual step of awarding punitive damages against Theta.

[26] Theta appealed the decision of the Tenancy Adjudicator to the District Court. In a reserved decision delivered on 15 September 2008, Judge Kerr upheld Theta's appeal on the grounds that as the accommodation complex was a student hostel the Tenancy Adjudicator had no jurisdiction to hear the tenant's complaint.[6] However, in holding that the Tenancy Adjudicator lacked jurisdiction, Judge Kerr said that on the face of it Ms Xu had been treated in a "deliberately high-handed" way by Theta and that the adjudicator could "in no way be criticised for the determination she came to".[7]

Yin Mai proceedings

[27] This litigation also concerned Theta's practices when managing the Empire Apartments complex. Theta and the Body Corporate entered an agreement which required occupiers of units to pay a security deposit to Theta. Yin Mai and a number

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2 *Xu v Theta Management Ltd* NZTT Auckland 07/3534/AK, 8 February 2008 at [20].
3 At [24].
4 At [24].
5 At [38].
6 *Theta Management Ltd v Chief Executive, Department for Building and Housing* DC Auckland CIV-2008-004-1026, 15 September 2008 at [35].
7 At [19] and [35].

of others refused to comply with the demands by the Body Corporate and Theta. When Yin Mai's electronic access card was blocked she issued proceedings in the District Court.

[28] Judge Hole delivered two decisions in the District Court:

(1) 16 January 2008 decision[8]

> On 16 January 2008 Judge Hole directed the Body Corporate to take all practicable steps to provide the plaintiffs with access cards.

(2) 14 February 2008 decision[9]

> On 14 February 2008 Judge Hole issued a further decision after Yin Mai returned to the Court because Judge Hole's earlier orders had apparently not been complied with. The apparent failure to comply with Judge Hole's decision of 16 January 2008 was attributed to the contents of an agreement between the Body Corporate and Theta. Judge Hole expressed his deep concern about the apparent defiance of his earlier order.[10]

[29] The Body Corporate appealed Judge Hole's decision to the High Court. That appeal was heard by Lang J, who delivered an oral judgment on 6 March 2008.[11] His Honour partially allowed the Body Corporate's appeal but in doing so said that in effect, Yin Mai and the other respondents had succeeded in defending the appeal. In his judgment Lang J explained:[12]

> The dispute in the present case has arisen because of Theta's requirement that the owners pay the deposit before it will hand the keys over. I would be surprised, however, if that requirement could fetter the Body Corporate's absolute right to require Theta to hand the keys over in accordance with its instructions.

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8 *Mai v Body Corporate No. 366611* DC Auckland CIV-2008-004-14, 16 January 2008 (Order).
9 *Mai v Body Corporate No. 366611* DC Auckland CIV-2008-004-14, 14 February 2008.
10 At [9].
11 *Body Corporate No. 366611 v Mai* HC Auckland CIV-2008-404-809, 6 March 2008.
12 At [44]-[46].

> It seems to me that, to date, the Body Corporate may not have properly appreciated the fact that it has an obligation to provide the owners of individual units with keys to their units. That obligation exists regardless of the fact that the Body Corporate has entered into the management contract with Theta. The Body Corporate must continue to honour its obligations to the individual unit owners, notwithstanding the existence of that contract.
>
> The overall impression that I gain from the documents is that the Body Corporate may have believed that it is sufficient for it to make a simple request to Theta that the keys be handed over. Once Theta responded with the requirement that the deposit be paid, it seems that the Body Corporate accepted the situation and did not challenge Theta further.

I have quoted these portions of Lang J's judgment because they succinctly convey his concerns about the role that Theta had played in the dispute.

Wu proceedings

[30] This litigation also involved Theta's management of the Empire Apartments complex. Mr Wu and a number of other owners of units in the complex had been denied access to the units. Mr Wu sued the Body Corporate and Theta. The causes of action included a claim for damages for nuisance, and requests that the High Court issue declarations that certain rules in the Body Corporate rules were ultra vires and that certain resolutions relied upon by the Body Corporate and Theta were also ultra vires.

[31] This proceeding came before Lang J, who was asked to make rulings on three preliminary questions. In a judgment delivered on 30 November 2009 his Honour explained:[13]

> The body corporate and Theta have, ... created a state of affairs under which proprietors are only able to obtain keys to their units if they comply with requirements that the body corporate and Theta have imposed. These include the payment of a refundable deposit amounting to $5,650 and the execution of a detailed security and access protocol. ...

[32] Lang J issued declarations in favour of Mr Wu and the other plaintiffs against the Body Corporate. In doing so, Lang J concluded the Body Corporate had acted in excess of its powers under the Unit Titles Act 1972.

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13 *Wu v Body Corporate 366611*, CIV-2009-404-5756, 30 November 2009 at [5].

[33] Mr Wu returned to the High Court for further interim orders when there was apparently a failure to comply with the declarations issued by Lang J. On 30 July 2010 Heath J delivered his judgment following Mr Wu's application for orders to enforce the judgment of Lang J.[14] That application was brought because Mr Wu had still not gained access to his unit. Heath J did not issue enforcement orders. Instead, his Honour decided that the substantive proceeding needed to be heard and determined.

[34] The substantive proceeding was heard by Asher J. Asher J awarded Mr Wu and the other plaintiffs, $283,663.64 damages for the tort of nuisance.[15] Those damages were awarded against both the Body Corporate and Theta. Asher J also issued declarations that:

(1) certain rules in the Body Corporate rules relied upon by Theta and the Body Corporate were ultra vires;

(2) certain resolutions made by the Body Corporate and relied upon by the Body Corporate and Theta were also ultra vires.

[35] The Body Corporate and Theta appealed Asher J's judgment. In a decision delivered on 20 December 2012 the judgment entered by Asher J in favour of Mr Wu against the Body Corporate and Theta was set aside.[16] The Court of Appeal instead entered judgment for liability in favour of Mr Wu against the Body Corporate and Theta and remitted questions of damages back to the High Court for reconsideration.

[36] In its judgment the Court of Appeal traversed the history of Theta's management of the Empire Apartments, including its role in the Yin Mai proceedings.[17] In its decision, the Court of Appeal held that Asher J was right when he determined there was no reasonable basis on which the Body Corporate or Theta

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14 *Wu v Body Corporate 366611* HC Auckland CIV-2009-404-5756, 30 July 2010.
15 *Wu v Body Corporate 366611* HC Auckland CIV-2009-404-5756, 30 May 2011.
16 *Body Corporate 366611 v Wu* [2012] NZCA 614.
17 At [11]-[19].

could withhold security cards from Mr Wu, and thereby deprive him of access to his own unit.[18]

Lihua Ltd proceedings

[37] This proceeding was brought by another owner of a residential unit in the Empire Apartment complex. This proceeding involved four issues:

(1) the exercise of proxy votes by Theta;

(2) the validity of an Annual General Meeting held by the Body Corporate;

(3) the right of Lihua to access the Register of Unit Owners; and

(4) a dispute about the calculation of certain levies the Body Corporate wished to raise.

[38] This proceeding was heard by Woolford J, who found in favour of the Body Corporate and Theta on the first two issues and in favour of Lihua on the fourth issue.[19] Woolford J declined to make orders in relation to the third issue. Costs were awarded in favour of the Body Corporate and Theta.

Threshold for an injunction in defamation cases

[39] There is no question that I have the jurisdiction to restrain a prospective defamatory publication.[20] It is also apparent that those wishing to restrain the publication of a prospective defamatory statement face a high hurdle.[21] The

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18 At [53].

19 *Lihua Ltd v Body Corporate 366611* [2012] NZHC 19750.

20 *Barry Blake Associates Ltd v Consumer Institute of New Zealand Incorporated* HC Wellington CIV-2005-485-325, 23 February 2005 at [16] citing *Auckland Area Health Board v Television New Zealand ltd* [1992] 3 NZLR 406 (CA); *TV Network v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA); *Hosking v Runting* [2005] 1 NZLR 1 (CA).

21 "Any prior restraint of free expression requires passing a much higher threshold than the arguable case standard": *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 at 130.

rationale for this was questioned by Chambers J when delivering the judgment of the Court of Appeal in *Siemer v Hodgson*, when he said:[22]

> The law as to prior restraint has really developed on the basis of some unstated assumptions: the defendant in most of the cases has been a responsible news media organisation with a keen sense of its vulnerability to substantial damages awards if its continuing investigation of and publication of a plaintiff's alleged misdeeds cannot ultimately be justified. Whether the law in this area should apply with its full rigour in circumstances such as present in this case may be a matter for debate. But it is a debate which should be postponed until it arises in a case where its resolution will be crucial.

[40] Notwithstanding the questionable assumptions that underpin the reasons for the existing high threshold for an injunction in cases such as this, the law which binds me is very clear:

(1) An interim injunction will not be granted in a defamation case if there is any doubt about the words are defamatory, or if the defendant swears that he or she will prove the truth of the words, or that he or she intends to rely on a recognised defence such as qualified privilege or honest opinion, unless the Court is satisfied that the defence will fail.[23]

(2) Since the passing of the New Zealand Bill of Rights Act 1990, the Court of Appeal has emphasised that it is not part of the function of the Court to act a censor, and that jurisdiction to restrain in defamation cases remains exceptional.[24]

(3) It must be shown by the applicant for an injunction that the defamation for which there is no reasonable possibility of a defence is likely to be published.[25]

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22 *Siemer v Hodgson* CA87/05, 13 December 2005 at [34].

23 *Bonnard v Perryman* [1891] 2 Ch 269 (CA) cited in *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 at [111]-[112]; *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 at 5-6.

24 *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 (CA); see also *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, (2006) 227 CLR 57.

25 *Auckland Area Health Board v Television New Zealand*, above n 8, at 407.

[41] In *TV3 Network Services Ltd v Fahey*,[26] the Court of Appeal recognised that restraint should only be exercised for clear and compelling reasons. Richardson P for the Court said the circumstances "must be exceptional" to warrant an injunction rather than leaving the complainant with his or her remedy in damages.[27]

Mr Chen did not establish the grounds for an interim injunction

[42] I set aside the ex parte interim injunction issued by Keane J on 19 April 2013 and declined to issue any inter partes interim injunction because I was far from satisfied Mr Chen had demonstrated there was no reasonable possibility of a defence to an action in defamation if the statements complained of were republished. I was also far from satisfied that the circumstances of this case warranted the issuing of an interim injunction.

Failure to demonstrate no reasonable possibility of a defence

Truth

[43] Mr Miles was very confident that the Body Corporate committee could not successfully rely upon the defence of truth.[28] In support of this submission Mr Miles said that any objective reading of the judgments I have summarised reveals Mr Chen is not litigious or obdurate. Mr Miles suggested that the adjective "litigious" is normally reserved for plaintiffs and that in all the proceedings I have summarised, Mr Chen, through Theta, was effectively a defendant.

[44] In my assessment the word "litigious" can apply with equal force to plaintiffs and defendants. It can particularly apply to defendants who argue unmeritorious points and who appear to be unable to see the merits in a plaintiff's claim.

[45] Having read all of the judgments referred to above I am not nearly as certain as Mr Miles that the defence of truth will fail in this case. Because of the view I

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26 *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).
27 At 132.
28 Defamation Act 1992, s 8(3).

have taken about the defence of qualified privilege I do not have to determine whether or not there is any reasonable possibility that the defence of truth will succeed. However, I record there may well be sufficient material in the decision of the Tenancy Adjudicator, and the judgments of Lang J and the Court of Appeal to suggest that the Body Corporate's description of Mr Chen was in substance true, or at least in substance not materially different from the truth. Aside from the *Lihua Ltd* proceedings, the judgments I have summarised convey a strong impression that Mr Chen, through Theta, appears willing to stubbornly ignore the merits of the cases brought against Theta and has taken unmeritorious points when defending those proceedings.

Qualified privilege

[46] In my assessment, the Body Corporate committee is on even stronger ground in relation to the defence of qualified privilege, which arises when the person who makes a comment has an interest or a legal, social or moral duty to make the comment to its recipient.[29]

[47] In the present case the communication Mr Chen complains of was made in circumstances where the Body Corporate committee were communicating with Body Corporate members in the lead up to an Annual General Meeting of the Body Corporate at which an election would be held to determine the future membership of the Body Corporate committee.

[48] Furthermore, the communication which Mr Chen complains of was sent in response to a communication from Mr Chen to the same audience. Mr Chen's communication of 23 March was not disclosed to Keane J. I was told the reason for that relates to an administrative oversight by the lawyers acting for Mr Chen. There can be no doubt that that letter should have been put before Keane J when he was asked to issue the ex parte injunction.

[49] The purpose of the Body Corporate committee's communication was explained in the introductory section of the email in the following way:

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[29] *Lange v Atkinson* [1998] 3 NZLR 424 at 437 and *Adam v Ward* [1917] AC 309 at 334 (HL).

> We are writing to you in relation to correspondence that was sent to us by an owner after it had been circulated within the Body Corporate by Mr John Chen. We are also reporting to you about a meeting between the committee, John Chen, Tony Howard and Julia Best which was held at the offices of Minter Ellison Rudd Watts on Monday 8th April 2013. This meeting followed an offer by us to meet in order to try and resolve the issues between the aforementioned owners and the Body Corporate.

[50] Parallels can be drawn between the circumstances of this case and the decision of the Court of Appeal in *Alexander v Clegg*, where it was said that the words of a defensive response to an earlier attack should not be "judged to a nicety".[30] By this the Court of Appeal meant that when assessing whether or not the veil of qualified privilege had been lifted by the nature of retaliatory words, it was important not to examine the words used too narrowly and without bearing in mind the policy reasons for qualified privilege.

[51] In the present case Mr Chen was perfectly entitled to question and challenge the Body Corporate committee's decisions. However, in his email to Body Corporate members of 23 March, he used strong language. He appears to have been quite willing to question the integrity of at least one of the defendants (refer [16](3) above) and to accuse the Body Corporate of acting illegally (refer [16](4) above). In that context, the communication complained of by Mr Chen was a proportionate response to his attack on the Body Corporate committee, particularly bearing in mind the communications were made in the lead-up to an election.

[52] For these reasons I was not satisfied that the defence of qualified privilege had no reasonable possibility of succeeding.

Balance of convenience/overall justice of granting an injunction

[53] I was also far from satisfied that it was appropriate to issue an interim injunction in the circumstances of this case. My reasons for reaching that view can be succinctly summarised:

(1) The words complained of had already been published. Therefore, any damage had, in all likelihood, already been done.

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[30] *Alexander v Clegg* [2004] 3 NZLR 586 (CA) at [58].

(2) While no undertaking was given, Mr McIntyre, counsel for the Body Corporate committee, explained that the Body Corporate committee had no intention of resending the communication which Mr Chen complained of.

(3) The injunction was sought for a very short duration and in circumstances where it was questionable whether the proceeding would advance to a substantive hearing. I did not think it appropriate to exercise my discretion in favour of Mr Chen's application in circumstances where the primary purpose behind his proceeding and application for an interim injunction was to try and stop existing debate in the lead-up to the Body Corporate election.

(4) I considered it futile to prohibit the Body Corporate committee members from repeating their belief that Mr Chen was litigious and obdurate in circumstances where an interim injunction would not have prohibited them saying, amongst other things that the Tenancy Adjudicator had found Mr Chen lacked "credibility" and was "evasive".

[54] Ultimately, I formed the view, that if Mr Chen truly believes he has been defamed then he has the option of seeking a remedy in damages.[31] His was not a case that justified interim relief.

Costs

[55] The defendants are entitled to costs. I am inclined to award costs on a scale 2B basis. If the parties cannot reach agreement on costs they should file memoranda explaining their positions within ten working days of this judgment.

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31 *TV3 Network Services Ltd v Fahey*, above n 26, at 136.

D B Collins J

Solicitors:
Minter Ellison Rudd Watts, Auckland for Plaintiff
DAC Beachcroft New Zealand Limited – Wellington Branch, Wellington for Defendants

ANNEXURE A

Body Corporate 198438 – Metropolis

1 Courthouse Lane, Auckland

12 April 2013

By E-mail to all owners in the Metropolis Body Corporate

Communication from the Body Corporate Committee

We are writing to you in relation to correspondence that was sent to us by an owner after it had been circulated within the body corporate by Mr John Chen. We are also reporting to you about a meeting between the committee, John Chen, Tony Howard and Julia Best which was held at the offices of Minter Ellison Rudd Watts on Monday 8th April 2013. This meeting followed an offer by us to meet in order to try and resolve the issues between the aforementioned owners and the body corporate.

Mr Chen's correspondence

1. As Mr Chen points out in his correspondence, he is the owner of unit 3404. Mr Chen's (sic) became an owner in or about July 2012. Accordingly, any comments he makes about issues predating that time do not have the benefit of first hand knowledge.

2. The statement that the body corporate's budget is 33% higher than any other building is misleading. The budget reflects two primary types of cost:

    a. Costs dictated by statute such as the repair and maintenance obligations in the Unit Titles Act 2010 and the compliance obligations in the Building Act; and

    b. Costs that reflect the standard of living owners have chosen for themselves. For example: The provision of 24 hour security, a front desk service, a recreation area, a communal Sky Television subscription etc.

    In relation to the first group of costs, these are reviewed constantly. An "RFP" (request for a proposal) is sent to a range of contractors capable of providing the particular service being reviewed. The contractors are interviewed and assessed by the facilities manager. A recommendation is made to the committee and we make a decision. For the most part, the service contracts are in the standard form provided by the New Zealand Institute of Facilities Managers and are capable of termination on three months notice. The process followed is entirely consistent with good property management practice and is aimed at getting the required services at the best available cost.

    In relation to the second group of costs, their existence is largely controlled by the body corporate. For example: The Sky TV subscription is included in the body corporate levy. If the aim is to reduce body corporate costs, then it is a simple matter for the body corporate to vote to remove the cost of the subscription from the budget. Any owner can respond to the Notice of Intention to hold an Annual

General Meeting by submitting a motion for inclusion on the agenda. The democratic process will then decide whether the subscription continues or goes. It is worth noting that when the proposition to reduce costs by cancelling the Sky TV subscription was considered at an annual general meeting two years ago, the motion was defeated.

In summary, Metropolis is a reflection of what the owners want it to be. Changes occur as owners come and go, and matters are voted on at general meetings.

Notwithstanding this, as the current committee we will (if elected) undertake a benchmarking project to ensure that what we pay for the services the body corporate must have, or has chosen to have are comparable with other similar buildings in Auckland.

3. The comments made by Mr Chen about the renewal of the building management contract, which took place prior to the time he became an owner, are purely speculative and bear no resemblance whatsoever to the facts. Mr Chen has previously expressed interest in obtaining the contract himself, and it is our view that he is entirely motivated by the prospect of advancing his own commercial interests.

4. In this regard, the committee attaches for your information:

    a. A case summary in relation to 4 years of litigation involving Mr Chen's management company, Theta Management Limited and its body corporate client, Body Corporate 366611; and

    b. A decision of the Tenancy Tribunal in relation to the same property

The judgment came from a search of the Judicial Decisions section of the Ministry of Justice website. The Tenancy Tribunal decision also came from the Tribunal's website. A copy of the Order of Tenancy Tribunal together with a summary of the judgment is attached. We urge all owners to uplift and read the full judgments from the Ministry of Justice's website. Particular attention should be given to paragraphs 20, 35 and 36 in the Tenancy Tribunal decision. This will enable you to form a view as to whether the litigious and obdurate flavour of Mr Chen's management style is consistent with what the Metropolis community wants for its building, taking into account Mr Chen's nomination of himself for the committee.

<u>Meeting at Minter Ellison Rudd Watts</u>

5. On Monday we attempted to meet with Mr Chen and his associates in an effort to clarify any issues and improve communication with anyone who is disaffected. Very quickly it became obvious to all of us that Mr Chen's only agenda is to advance his commercial aspirations which centre on a complete takeover of all aspects of the management of Metropolis, including the committee, building management, letting and secretarial functions. There was no interest in hearing anything we had to say. At the end of the meeting we were presented with legal proceedings, a copy of which will be served on all of you. These proceedings name as parties the body corporate, each committee member personally and the Building Manager. They are seeking a declaratory judgment from the High Court in relation to our decision to renew the building management contract for a further term of 5 years from 1 October 2013. As we have mentioned in previous correspondence, the renewal was granted in exchange for a reduction of $62,000 per annum in the management fee effective from the body corporate's financial year commencing on 1 December

2012. Further, the decision is supported by legal opinion. Based on Mr Chen's history elsewhere, the issue of the proceedings can only be seen as the beginning of a divisive and litigious management style. If such a style is allowed to become entrenched, the only possible result is to turn Metropolis into an undesirable address plagued by disputes with the end result being an overall reduction in the quality of life in the building. If this occurs, the likely negative impact on values is obvious.

Conclusion

6. We have the interests of all unit owners at heart. We comprise a mix of both resident owners and non-resident investor owners. There will always be some conflict between these two groups. The primary motivator for most investor owners is the return on their investment. Resident owners are usually also motivated by choices that reflect the standard of living they desire. Anecdotally we enjoy a much higher proportion of owner occupiers than many, if not most other buildings. It goes without saying that any decision to slash expenses will result in reduced living standards for the homeowners at Metropolis. Metropolis is, and always has been one of the most prestigious buildings in the city. If it is to retain this rank it must continue to provide, at a fair cost, a standard of living that reflects its iconic status. The concerned owners group might control in excess of 60 units, however, they comprise only 7 or 2.5% of the 286 unique owners. As committee members we are all highly motivated to control costs as we share in them ourselves, and we are willing to offer our collective commercial expertise and experience to achieve this.

7. Accordingly, it is most important that all members of the body corporate participate in the Annual General Meeting in order to ensure that the governance of Metropolis reflects a culture that the majority of owners desire.

8. If you would like to discuss any of these matters with us personally, we will be available on the bridge by the lift lobby on level 3 between 6 pm and 7 pm on Tuesday, 23rd April 2013.

For and on behalf of the Body Corporate Committee
Body Corporate 198438 – Metropolis

Roger Apperley | **Peter Francis** | **Sally Synnott** | **John Morris** | **John Carter** | **Dave Burgess**

ANNEXURE B

Mr John Chen is the sole director of a residential property management company, Theta Management Limited ("Theta").

That company is the Lessee of most of the units in the Empire building, Body Corporate number 366611 and controls the management of it.

In the Empire, Theta has secured a lease of most of the units in the Empire and controls the management contract and the Body Corporate. The leases are for 10 years with a right of renewal of 10 years expiring in April 2026. A copy of Clauses 9.2 and 13.1 from a Specimen lease is **attached**. By virtue of these Theta has total control of the Body Corporate voting rights and management for the next 20 years.

Apparently some unit owners in the Empire refused to sign up on these onerous terms and Theta and the Body Corporate refused to give these reluctant owners access to the common property of the Empire Building or even their own units unless they agreed to some security and access protocols and signed leases containing those provisions.

The disaffected unit holders took legal action to enforce their rights and there appear to have been no less than seven court cases arising out of Theta's refusal which are listed in the **attached** page headed Judicial Decisions Online.

The dispute has so far got as far as the Court of Appeal. Prior to the Court of Appeal hearing Theta lost every round of the litigation recorded in the Court of Appeal judgment of 20 December 2012. The Body Corporate and Theta ignored an injunction dated 16/01/08 and another order to deliver keys to owners dated 14/2/08. The Body Corporate appealed against the latter decision and the appeal was dismissed.

In late 2009 Justice Lang in the High Court concluded, with the agreement of Counsel for the Empire Body Corporate, "there can be no justification for the Body Corporate and Theta denying proprietors access to the units in the future".

That was a preliminary determination and the matter went to a full hearing before Justice Asher in the High Court. Justice Asher ruled that the Body Corporate and Theta were both liable in private nuisance to the plaintiff Mr Wu.

Once again the Empire Body Corporate and Theta appealed. The Court of Appeal upheld Justice Asher's conclusion that the Body Corporate committed a private nuisance actionable at the suit of Mr Wu and the Court of Appeal also confirmed that the Body Corporate as principal was responsible for the actions of Theta.

The Court of Appeal entered Judgment for liability in favour of Mr Wu against the Body Corporate and Theta but remitted the question of damages to the High Court for reassessment (instead of the sum of $283,663.64 awarded in the High Court). The Question of costs was also reserved.

We understand that Mr Wu is seeking leave to appeal the Court of Appeal judgment to the Supreme Court.

We also understand that two other apartment blocks the Columbia and Princeton are also controlled by Theta in the same or very similar way.

Theta's management style and conduct, branded as illegal twice by a District Court Judge

then by two High Court Judges and three Judges of the Court of Appeal over a period of 4 years is a matter for your consideration.

The Committee also understands that Minter Ellison are John Chen's/Theta's usual lawyers but that Minter Ellison were not able to act in the Empire case because of a conflict of interest. (attachments omitted)