[redacted]

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2000-404-001568
CP366-SW00

BETWEEN	CHINESE HERALD LTD AND OTHERS First Plaintiff
AND	STEPHEN SIK FUN WONG Second Plaintiff
AND	STELLA HU Third Plaintiff
AND	NEW TIMES MEDIA LTD First Defendant
AND	WEIJIAN CHEN Second Defendant
AND	WEIMING CHEN Third Defendant
AND	WEIZHENG LIU Fourth Defendant
AND	DAVY WAI KEUNG KWOK Fifth Defendant

Hearing: 4 September 2003

Appearances: Belinda Johns for Plaintiffs
Terence Darby and David Watt for Second, Third and Fourth Defendants
(appearance for Fifth Defendant excused)

Judgment: 31 October 2003

JUDGMENT OF HARRISON J

SOLICITORS
Brookfields (Auckland) for Plaintiffs
David Watt & Co (Auckland) for Second, Third and Fourth Defendants
Gregory Denholm (Auckland) for Fifth Defendant

Introduction

[1] The Chinese Herald is a Chinese language newspaper owned by Stephen Wong and his wife, Stella Hu ("the Wongs"), and is published weekly in Auckland. The New Times Weekly ("NTW") was also a Chinese language newspaper owned and controlled by Weijian and Weiming Chen ("the Chens") and published weekly in Auckland. These publications are on opposite sides of the Chinese political divide. The Chinese Herald is said to be the voice of the traditional communist line. The NTW espouses the cause of democracy.

[2] The newspapers did not express their conflicting ideologies in the western tradition of restraint. Their publishers eschewed the language of highbrow exchanges. Inevitably hostilities broke out, and not just through the printed word. On 14 July 2000 Mr Weiming Chen sought to settle their differences by means of a physical confrontation with Mr Wong outside the Sunny Town Restaurant in Newmarket, Auckland.

[3] A stream of uncomplimentary articles followed in both publications. So, too, did litigation. In early August 2000 the Herald and the Wongs issued this proceeding alleging defamation and applied for restraining orders. On 11 August 2000 Paterson J granted the Herald and the Wongs an interim injunction in unusual terms, restraining the NTW and the Chens from publishing:

> Any article, publication or other document alleging that [the Herald and the Wongs] or any one of them are involved with illegal activities off-shore and in New Zealand, are cheats, abductors, forgers or falsifiers of deeds, are enemies against democracy, swindlers, slanderers, are human trash or make malicious remarks about employees behind their backs.

[4] The Herald and the Wongs have since attempted to pursue their substantive claims of defamation against the Chens to trial (the NTW's corporate publisher has since been de-registered). But their efforts have been frustrated by the Chens' systemic delays, breaches of timetable orders, and unsuccessful attempts to consolidate this case with their own two separate proceedings against the Herald and the Wongs in this Court (CP324-SD01 and CP328-SD01). On 3 September 2002

Master Faire struck out the Chens' affirmative defences of truth and honest opinion for failure to comply with an earlier unless order to provide particulars.

[5] Over the next six months the Court made two fixtures for trial. Both were vacated at the Chens' instigation. A third fixture was allocated to commence on 25 August 2003.

[6] On 4 August 2003 I struck out the Chens' remaining defences for non compliance with existing orders and declared that the Herald and the Wongs were entitled to judgment on liability against them subject to formal proof on 25 August 2003. Shortly afterwards the Chens, who had for at least a year been representing themselves, engaged Mr David Watt to act for them. He then applied for orders, first, reviewing the earlier striking out orders made by Master Faire and me and, second, granting the Chens leave to file an amended statement of defence raising two additional defences of qualified privilege. Both applications now fall for determination.

Background

[7] It is necessary for me to recite the history of this litigation in more detail. The Herald and the Wongs claim that they were defamed by four articles published in the NTW on 28 July 2000, 4 August 2000 (2), and 11 August 2000. Their contents are too extensive to repeat here. In summary, the Herald and the Wongs allege that:

a) The NTW article published on 28 July 2000 meant and was meant to mean that the Herald, as a media organisation, opposes democracy, has behaved in an underhand and devious manner, has adopted a biased practice to reporting, reports maliciously and absurdly, is a sycophant and has acted obscenely, has shown utter contempt for everything and is willing to act in total defiance of normal bounds of behaviour, is evil and acted dishonourably, is solely motivated by profit in denouncing democracy, has a very poor reputation and is a less than upright newspaper;

b) The first NTW article published on 4 August 2000 meant and was meant to mean that the Herald is a poor newspaper which fabricates stories, has a poor reputation and is less than upright, and also meant and was meant to mean that Mr and Mrs Wong are evil people who commit evil deeds, are bad, scum or less than upright, have acted fraudulently, are dishonest and have poor reputations. Additionally, the same words meant and were meant to mean that Mr Wong is insidious and a bully, unprofessional as an accountant, untrustworthy, a petty troublemaker, a nuisance, arrogant and bad;

c) The second NTW article published on 4 August 2000 meant and was meant to mean that the Herald as a media organisation opposes democracy, is a sycophant which has acted obscenely and excessively meanly, has forged letters to its own editor, has acted in a shoddy manner and has a very poor reputation, and meant and were meant to mean that Mr Wong was also a sycophant who forged documents and acted deceptively, was devious, has a poor reputation and is dishonest;

d) The NTW article published on 11 August 2000 meant and was meant to mean that Mr Wong has a bad record, operates a newspaper which publishes material amounting to mere personal attacks, is an immoral scumbag who deserves to be assaulted, is morally corrupt, is an unprofessional journalist, lacks integrity and has a poor reputation.

[8] All four articles were, of course, printed in Chinese. However, the parties have arranged translations through an officially accredited agency which I have read. The meanings which the Herald and the Wongs attribute to the words used appear well based. Undeniably they refer to each of the three plaintiffs. Without pre-empting the trial Judge, a finding that the words were defamatory of the Herald and the Wongs seems inevitable. In the absence of affirmative defences, the only probable issue for determination will be relief, particularly damages.

[9] On 15 March 2001 Brookfields on behalf of the Herald and the Wongs filed a comprehensive amended statement of claim, clearly delineating and identifying each

cause of action. On 12 June 2001 the Chens through Vallant Hooker filed a statement of defence raising without any particulars whatsoever truth and honest opinion. On 5 September 2001 the Herald moved to strike out these two affirmative defences for failure to provide particulars. For reasons which are not apparent from the file, the Herald's application did not proceed.

[10] On 10 May 2002 the Herald and the Wongs filed a second amended statement of claim, followed on 6 June 2002 by the Chens' amended statement of defence again pleading truth and honest opinion. Although the form of this pleading was more comprehensive than its predecessor, it remained fundamentally defective in failing to provide proper particulars. On 17 June 2002 the Chens withdrew their instructions from Vallant Hooker and started to act for themselves.

[11] On 26 June 2002 the Herald applied for further and better particulars of the Chens' affirmative defences. On 2 July 2002 Master Faire ordered that those two defences would be struck out unless the Chens provided proper particulars within 42 days of service. On 15 July 2002 Brookfields served a sealed copy of the order upon the Chens. But they did nothing.

[12] As noted, on 3 September 2002 Master Faire struck out the Chens' defences of truth and honest opinion for non compliance with his earlier order. The Master's minute records Mr Chen's presence together with his interpreter, a Mr Zhang, as well as Mr Rodney Smith of Brookfields for the Herald and the Wongs. The order was made in Chambers. The Chens did not appeal or apply to review Master Faire's decision. Contemporaneously he set the proceeding down for trial in the week commencing 25 November 2002. That fixture was later vacated to accommodate the Chens.

[13] On 12 June 2002 Master Gambrill declined the Chens' application to consolidate trial of this proceeding with their two separate proceedings, although she reserved the issue for review at a date closer to trial. Nearly a year later, on 21 May 2003, Master Faire declined the Chens' second application for consolidation and awarded costs to the Herald of $1690. He had earlier allocated a fixture for trial in the week commencing 30 June 2003 and directed the Chens to serve their briefs of

evidence by 6 June 2003. On 4 June 2003, on the Chens' application, Randerson J vacated the fixture for 30 June 2003 and allocated a new trial date commencing on 25 August 2003. He also extended the time for the Chens to submit briefs until 13 June 2003. The Chens failed to comply. So the Herald applied for further orders.

[14] On 16 July 2003 I ordered the Chens by 9 a.m. on 1 August 2003 to:

a) Serve copies on Brookfields of all briefs of evidence of witnesses whom they propose to call at trial, including briefs of their own evidence;

b) Pay Brookfields on behalf of the Herald the sum of $1690 in satisfaction of the costs order made by Master Faire on 26 May 2003.

[15] I also directed that:

> In the event that [the Chens] fail to comply with either of [these orders] ..., their defences will be struck out and the claim will proceed on formal proof ...

[16] On 21 July 2003 the Chens made yet a further application for an extension of time to serve their briefs. On 25 July 2003 I declined the application and noted that the Chens:

> ... are already substantially in default of the earlier timetable orders made by Randerson J on 4 June 2003. I extended the timetable to 1 August 2003 as an indulgence. I will not allow any further extensions. If [the Chens] fail to comply with the existing terms of the timetable order, they face the risk that [the Herald] will apply to strike out their defences.

[17] On 1 August 2003 the Herald applied to strike out the Chens' defence on the grounds of the Chens' continued failures to provide briefs of evidence and pay the costs originally ordered by Master Faire on 26 May 2003. As noted, on 4 August 2003 I struck out the Chens' defences and directed that trial proceed by way of formal proof on 25 August 2003. However, that fixture was vacated as a consequence of Mr Watt's application on the Chens' behalf for orders reinstating their defences and allowing them to plead qualified privilege. I had the benefit of full argument on the application on 4 September 2003 from Mr Terry Darby, whom

the Chens have now engaged as counsel, and Mr Watt, as well as from Ms Belinda Johns representing the Herald and the Wongs.

[18] I should add two things before moving to a discussion of the relevant principles. First, when making my orders on 16 July 2003, 25 July 2003 and 4 August 2003 I was unaware of the existence and effect of Master Faire's order made on 3 September 2002 striking out the Chens' affirmative defences of truth and honest opinion. Second, when making the order on 4 August 2003 I proceeded on the factual premise that the Chens had failed to serve their briefs on 1 August 2003 in breach of the order made on 16 July 2003.

[19] Ms Johns now acknowledges that the Chens may have actually served the briefs on Brookfields' offices late on 1 August 2003. The Chens have tendered 15 witness statements. Ms Johns has prepared a summary of their contents. I agree with her that only one or two could possibly qualify as relevant and thus admissible.

Rescission

(1) Principles

[20] The Chens rely upon R264 which materially provides:

> (1) Any party affected by any order made or decision given on an interlocutory application ... may, instead of appealing therefrom, apply to the Court to vary or rescind the order or decision unless it was made with his consent.
>
> (2) Notice of application under subclause (1) shall be filed and served –
>
> (a) If it is made by a party who was present or represented when the order was made or the decision given, within 7 days thereafter:
>
> (b) If it is made by a party who was not so present or represented, within 7 days after receipt by him of notice of the making of the order or the giving of the decision, as the case may be, and of its effect.
>
> ...

> (5) No application may be made under this rule to vary or rescind an order made or decision given by a Master in Chambers.

[21] Additionally, the Chens rely upon the Court's inherent jurisdiction to set aside an unless order. In *Jarden v Lawlor* (1998) 12 PRNZ 516 Master Venning observed that a jurisdiction to reinstate was clear where a proceeding was struck out for want of compliance with timetable or unless orders. He did not elaborate or cite authority in support. I am aware that in the context of setting aside consent orders Fisher J in *Ryde Holdings Ltd v Sorenson* (1995) 8 PRNZ 339 at 345 recognised the Court's inherent jurisdiction to control its own proceeding. However, I would have thought that jurisdiction in this context is limited to an application to review made under R264. In *Ko v Ko* (2000) 14 PRNZ 362 Paterson J determined a challenge to a Master's decision refusing to grant relief from an unless order as a statutory application to review. I doubt, though, whether either route would lead to a different result in this case.

[22] In *Ko* Paterson J observed at para 18:

> An 'unless order' is an order of last resort. Case management principles should not in ordinary circumstances override the justice of the situation but in a situation where a judicial officer has felt compelled to make an 'unless order', unless it can be established that there were no grounds for making such an order or that reasons beyond the party's control caused non-compliance, the order should be upheld. An 'unless order' is a last chance order and counsel must be aware that non-compliance with it will in normal circumstances bring the proceedings to an end. **It is only in extreme circumstances, which will normally require evidence that the non-compliance was caused by something beyond the control of the party, that a Court should intervene and set aside the order...**
>
> [Emphasis added]

(2) Order dated 4 August 2003

[23] I shall deal first with the second order, made by me on 4 August 2003. As recorded, it followed orders which I made earlier on 16 July 2003 and 25 July 2003, specifically directing the Chens to take the two steps of serving briefs of evidence and paying outstanding costs of $1690 by 1 August 2003. All three orders were made for the purpose of enforcing compliance with pre-trial and related obligations.

[24] In argument Mr Darby observed of the Chens as follows:

> It is apparent that their knowledge and understanding of litigation processes in New Zealand is extremely limited. Although they appear to be well intentioned and have the capability of producing written material, much of such material does not accord with the practice and procedure as expected by the judiciary and customarily followed by practitioners involved in litigation. They have not properly understood that it has been compulsory for steps to be taken in between each Court date, as distinct from the Court date simply being a series of meetings when the discussion is resumed.

[25] This observation may be accurate. But the Chens cannot set up their own election to represent themselves to justify chronic inactivity or grossly inept attempts to participate in the litigation process. Apart from the frustrations and inefficiencies their conduct has caused, they have successfully deprived the Herald and the Wongs of their constitutional right to an early trial of this claim and caused them substantial unnecessary costs. The scale of the Chens' defaults is inexcusable.

[26] Nevertheless, and despite the strictures in *Ko*, I am prepared to set aside my order made on 4 August 2003. I am satisfied that this is an appropriate use of the discretionary power vested by R264 (*Graebar Holdings Ltd v Taylor* [1989] 2 NZLR 10 (CA) per Bisson J at 16-17). When making the order I was most influenced by an assumption that the Chens had failed to serve their briefs by 1 August 2003. Ms Johns now advises that my assumption was factually unsafe, and that the Chens may have served their briefs on Brookfields late that day. While I am satisfied that the Chens' failure to meet my order to pay costs was intentional, it did not go to the root of the claim, involved a relatively insubstantial amount of money, and has now been rectified.

[27] Accordingly, justice requires rescission of my order dated 4 August 2003. The effect of my order will be to allow the Chens to (a) deny that any of the articles were defamatory; (b) deny that the statements referred to the Wongs; and (c) allow them to be heard on relief, principally damages. However, the Chens have much higher hurdles to climb. I have already expressed the opinion that their defences are likely to fail. Thus their applications to review Master Faire's decision and for leave to raise defences of qualified privilege assume great importance.

(3) Order dated 3 September 2002

[28] The Chens' amended application sought an order under R264 reviewing Master Faire's order made on 2 July 2002 directing that their two affirmative defences of truth and honest opinion were to be struck out if full particulars were not provided within 42 days after service. The application is plainly misconceived in two respects. First, only the order made by Master Faire on 3 September 2002 is justiciable; his earlier order made on 2 July 2002 was preparatory to and did not determinatively strike out the defences. Second, Master Faire's order made on 3 September 2002 was in Chambers. R264(5) unequivocally excludes jurisdiction to review in these circumstances.

[29] The Chens' right to apply to a Judge to review an order or decision made by a Master in Chambers is governed by s 26P Judicature Act 1908 and R61C. The latter is materially similar to R264 in that it prescribes a time limit of seven days for filing and serving an application if made by a party who was present or represented when the order was made. Master Faire's minute notes that Mr Weiming Chen was present along with his interpreter, a Mr Zhang. I am satisfied that Mr Weiming Chen was also representing his brother, Mr Weijian Chen, and Mr Weizheng Liu, the second and fourth defendants respectively. For example, the Master's minute made on 2 July 2002 records Mr Weiming Chen's appearance on their collective behalf.

[30] Like R264, R61C(2) does not expressly empower the Court to extend time, although R6 vests a general discretion for this purpose where required in the interests of justice. *McGechan on Procedure*, HR61C.06, cites two authorities in this Court where Judges extended time to hear applications which were less than a month out of time. However, the Chens have not sought an extension of time, and even if they had applied I would not have granted it. They waited nearly a year before filing this application to review. The delay is unpardonable. In his affidavit dated 1 September 2003 Mr Weiming Chen asserted that he did not understand the effect of Master Faire's order. The Chens cannot find absolution in ignorance of the rules when they chose to represent themselves. They must live with the consequences.

[31] Moreover, even if I granted an extension of time, I would dismiss the Chens' application to review. The relevant principles are found in the judgment of Fisher J in *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481. Treating the application as essentially appellate in character, the Chens have the burden of persuading me that Master Faire's decision was wrong. They have not led any evidence to establish that he erred in principle or was influenced by irrelevant considerations. Nor have they introduced any fresh material which might establish a proper ground for challenge. They committed and compounded a pattern of inexcusable delays, and in my respectful view Master Faire was correct in finally drawing down the curtain after giving them every opportunity to comply with reasonable requests and directions. In any event, I am satisfied that the Chens would never have been able to properly particularise their defences.

[32] Accordingly, I dismiss the Chens' application to review Master Faire's decision made on 3 September 2002.

Qualified privilege

[33] Over two years after the Herald and the Wongs filed their substantive amended statement of claim the Chens seek leave to raise defences of qualified privilege, relying upon the traditional concept of a shared duty or interest and what is known as the right of defence against attack or self defence.

[34] R187 prohibits a defendant from filing an amended pleading without the leave of the Court where a proceeding has been set down for trial. In exercising my discretion I must be satisfied that leave to raise a defence or defences of qualified privilege is necessary in order to do justice between the parties. The guiding principle is that both parties should have every opportunity to ensure that the real controversy between them goes to trial so as to secure a just determination of the proceeding (*McGechan on Procedure*, para HR187.07). I am entitled, in the usual way, to take into account the strength or tenability of the proposed defences, questions of delay, the nature of the pleadings, the Chens' conduct, and any other relevant considerations.

(1) Traditional Qualified Privilege

[35] Without meaning any disrespect to Mr Darby, his written synopsis of submissions tended to conflate both forms of the defence. However, his primary proposition assumed clearer focus. He argued that each of the four NTW public articles were published on traditionally privileged occasions; that is (*Adam v Ward* [1917] AC 309 per Lord Atkinson at 334):

> ... 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. Nor is it disputed that a privileged communication – a phrase often used loosely to describe a privileged occasion, and vice versa – is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact ...

[36] Mr Darby originally submitted that the NTW and the Chens had a duty, in the moral or social sense, to communicate certain information about the activities of the Herald and the Wongs to members of the Chinese community in Auckland. After some discussion, Mr Darby recast this argument into one of common interest between publisher and audience about the integrity and quality of the Herald and its publishers – the "common convenience and welfare of society" test (*Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 per Parke B at 1049-1050, applied in *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 440-441). He emphasised that the publications were limited to a small or distinct group of persons who have an interest in receiving them, namely the Chinese readership in New Zealand.

[37] In answer Ms Johns submitted that there was no common or reciprocal interest between the NTW and its readers in communicating about the activities of the Herald and the Wongs. The articles did not contain any discussions of public concern or political discussion of interest. Alternatively, Ms Johns submitted that the language used by the Chens was such as demonstrated that they were predominantly motivated by ill will towards the Herald and the Wongs and took improper advantage of their publications (s 19 Defamation Act 1992).

[38] The principles governing the defence of qualified privilege have been comprehensively stated and restated by the Court of Appeal in both *Lange v Atkinson* judgments ([1998] 3 NZLR 424 and [2000] 3 NZLR 385). It is no part of my function to attempt to add to those statements. I emphasise, though, that whether or not a statement is published on an occasion of qualified privilege is a question of law for my determination. I must be satisfied, therefore, that the defence is legally arguable or sustainable before considering other discretionary issues.

[39] Mr Darby did not file a draft amended pleading or develop the factual basis for an argument that the occasions of publication were privileged. Mr Weiming Chen's affidavit dated 1 September 2003 setting out the factual basis for his defence as follows:

> After the attack upon my reputation in the Chinese Herald, the [NTW] published a series of articles discussing the matters in dispute between it and the Chinese Herald (including, but not limited to, the articles in respect of which this proceeding has been issued). To take the articles out of context, as I believe the plaintiffs are attempting to do, would be misleading. The Chinese Herald responded with a series of articles containing political comment and criticism of the [NTW]. As a newspaper person and commentator, there is effectively only one forum in which I may express my views as to Chinese affairs, and my genuinely held opinions on people involved therein, and that is in the [NTW]... I believe that Mr Stephen Wong, the owner and publisher of the Chinese Herald, has close ties with the Chinese Communist Party. He has also recently formed an alliance with the most important of the news media organisations ... the New China News Agency, which is the official Chinese government news agency... I believe this confirms the lack of impartiality of the Chinese Herald and of its fondness for reporting the official line in all matters relating to Chinese issues. The Chinese Herald has actually published an article saying that the Chinese government should be commended for the massacre of students and pro-democracy activists in Tianamen Square, which event attracted worldwide condemnation...

[40] The extracts from the four NTW articles upon which the Wongs rely are extensive, occupying a large part of their 22 page second amended statement of claim dated 10 May 2002. I do not intend to extend this judgment unnecessarily by reciting them here.

[41] I am prepared to accept that the NTW and the Chens shared an interest with the Chinese community in New Zealand in knowing the Herald's political orientation and its links to the Chinese Communist Party (*Lange v Atkinson (No.2)* at

paras 18-23). I accept that an occasion of communication on this subject should be protected by qualified privilege. However, in my judgment that is not of itself determinative. It is the occasion which is privileged, rather than the communication itself or the publisher, and its identification requires an examination of the nature of the material, the persons by and to whom it was published, and in what circumstances (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 Lord Hope at 229-235, applied in *Lange v Atkinson (No.2)* at para 23). And, of course, what cannot be overlooked in this context is that qualified privilege is indeed a privilege afforded by the law against the otherwise strict nature of liability imposed for defamatory statements and it must not be abused as a vehicle or pretext for protecting attacks on personal reputations.

[42] I have undertaken a review of the occasions on which the four articles were published but without reciting the words used. In my judgment:

a) The first article dated 28 July 2000 was published on a privileged occasion. Some of the language used is extreme. I shall address later the issue of whether or not it which might destroy the protection given to the occasion. As noted, I am satisfied that the NTW and the local Chinese community shared an interest in knowing the relationship between the Herald and the Chinese Communist Party. I observe, though, that on this cause of action the Herald is the only plaintiff and is seeking the remedies of a declaration under s 24 Defamation Act 1992 and solicitor/client costs;

b) The second article (the first of the two on 4 August 2000) was not published on a privileged occasion. An examination of the material shows it was nothing more than a sustained, personalised and vitriolic attack on Mr Wong and, to a lesser extent, Mrs Wong. Neither the NTW or the Chens, on one side, nor the local Chinese community, on the other, shared an interest which should be protected by the law in Mr Wong's character, the details of his commercial activities in a former life as a restaurateur, or his conduct on immigration matters. Similarly they had no interest in knowing about Mrs Wong's

behaviour after she came to New Zealand. Any possible communal interest in communicating this information would be totally outweighed by the importance of protecting the Wongs' reputations;

c) The third article (the second on 4 August 2000) was not published on a privileged occasion. It opened with a reference to public knowledge that the Herald is a pro-Communist newspaper, and accepted that in a democracy such as New Zealand an ideological slant is normal. However, after references to sycophantic behaviour it degenerated into another personalised attack upon Mr Wong, alleging that he forged a letter to the editor of the paper. Again there was no shared interest between the NTW and the local Chinese community in this information;

d) The fourth NTW article dated 11 August 2000 could not possibly have been published on a privileged occasion. It was simply a continuation of the NTW's personalised attacks on Mr Wong, concluding by describing him as 'such a morally corrupt boss'.

[43] Accordingly, only publication of the first article could attract qualified privilege. The purpose of any privilege (*Lange v Atkinson No.2* (supra) at para 42):

> ... is to facilitate responsible public discussion of the matters which it covers. If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion. [S19 Defamation Act 1992] is concerned with situations in which qualified privilege is lost.

[44] S19(1) provides:

> In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

[45] The appropriate question is whether the communication deals with issues that are '... not in any reasonable sense germane to the subject matter of the occasion ...' (*Adam v Ward* per Lord Shaw at 348). While excessively strong or violent language will not of itself destroy the privilege (*Adam v Ward* per Lord Atkinson at 339), the

privilege does not extend to a communication upon something extraneous, foreign or totally unconnected to the privileged subject. Alternatively, the privilege will be lost if the contentious material is so extraneous to the subject matter of the privilege or separately evidences an abuse of the occasion..

[46] The relevant portion of NTW's first article is as follows:

> (c) "Even the mouthpiece of the Chinese Communist Party, the *People's Daily* and the *Wenhui Bao* would not have dared to stoop to their choice of words, sentence patterns and examples cited, such was their general maliciousness and level of absurdity."
>
> (d) "This level of sycophancy towards the Chinese Communist Party is rarely seen; not only would the innocent victims of June Fourth not be able to forgive them for the sheer obscenity of what they did, the dead souls of those who perpetrated the massacre would not be able to either, for there is no-one inside the Chinese Communist Party who would be willing to wear the laurels of a Murderer."
>
> (e) "In such a democratic and law-abiding society as New Zealand, where human rights are respected and where even mistreatment of cats and dogs render one liable for prosecution, that such a small overseas newspaper can be audacious enough to publicly preach that the killing of people is justified and merited, means that they have finally reached the stage of showing utter contempt for everything and being willing to act in total defiance of normal bounds of behaviour. That they should be so sycophantic towards the Chinese Community Party is truly crazy. An evil person always starts himself on a path to doom by first hurting someone else, and always finally ends up by hurting himself. This is more or less what can be definitely predicted here as his final fate."
>
> (f) "Is it because they believe in communism that the *Chinese Herald* is so willing to lead the overseas opposition to democracy on behalf of the Chinese Communist Party? Of course not. They are only behaving like this because they are eyeing up their profits."
>
> (g) "Anyone who is in the know about what's going on will be disgusted by such behaviour, their wanting to be a whore but still be considered chaste. What they are really trying to do is to cover up their sordid, obscene and unspeakable behaviour."

[47] The language is strong, even violent. But that does not disqualify the publication from protection. Some of the contents might be marginally germane to the privileged subject. Whether the author abused the occasion would be a question of fact for the jury at trial. On balance I am not prepared to find that the first article would not attract qualified privilege. However, the Herald would always be entitled to discontinue this cause of action and in any case, as I shall shortly identify, there

are other circumstances falling within my discretionary inquiry which will prove decisive against granting leave to raise the defence.

(2) Self Defence Privilege

[48] Alternatively, Mr Darby submitted that the Chens should be entitled to raise the defence against attack privilege. In support he relied upon these statements in Mr Weiming Chen's affidavit dated 1 September 2003:

> 2. My wife, Mrs Eryou Chen, is a regular contributor to the New Times Weekly newspaper.
>
> 3. In or about May/June 2000 she co-authored an article for New Times Weekly, which commented on the murder of a Chinese woman who was a massage-girl and who was murdered by her husband. The theme of this article was that the murder was a breach of the murdered woman's human rights and a morally and legally reprehensible act.
>
> 4. Immediately following the publication of this article, the Chinese Herald responded with articles which said, effectively, that Mrs Eryou Chen was commending prostitution and/or endorsing prostitution, and that any writer who held such a view should go to hell and was morally reprehensible herself. Some of this was expressed by innuendo, but the message was plain and clear to the Chinese community.
>
> 5. The Chinese Herald subsequently wrote an article referring to Mrs Eryou Chen as having a 'twisted face' and said that she was 'as fat as a pregnant woman'.
>
> 6. My wife has a slight facial disfigurement, which is as a result of a childhood illness. We have had three children and my wife has not regained her former figure. She is a well-liked and respected member of our community and she and I found the Chinese Herald's description of her facial condition and her physical appearance generally to be unwelcome. Such remarks are indicative of the context in which the two newspapers operate. Much apparently extravagant language is customarily used by these Chinese newspapers in their exchanges regarding matters of interest to the Chinese Community. I am told that in New Zealand there is a phrase 'poking the borax'. I think this describes to some extent what the rival newspapers do. However, I consider that the remarks by the Chinese Herald went 'beyond the pale' and constituted an attack by them (the intensity of which was subsequently increased by them), which eventually justified the making of a response.
>
> 7. **Indeed, in Chinese culture, the family is the most important social unit so that attacks on a Chinese person's family are**

viewed extremely seriously. My wife was upset by the attack and left New Zealand to live in America for almost one year. This was difficult for the family, including our three children, who were aged seven, nine and thirteen at that time.

8. It was in the context of this background that the incorrect and misleading article was published in the Chinese Herald on 20 July 2000, which falsely stated that I had attacked Stephen Wong, the owner of the Chinese Herald. The article alleging the assault is a fabrication and distortion of the truth and it generated what I, and many others, believe was a justified response from the New Times Weekly.

9. After the attack on my reputation in the Chinese Herald, the New Times Weekly published a series of articles discussing the matters in dispute between it and the Chinese Herald (including, but not limited to, the articles in respect of which this proceeding has been issued). To take the articles out of context, as I believe the Plaintiffs are attempting to do, would be misleading.

[Emphasis added]

I shall return to the emphasised passage later.

[49] In his affidavit dated 3 September 2003 Mr Chen referred to extracts from articles published in the Herald on 13 April 2000 and 3 August 2000 to support this defence. Only the second is relevant. The article referred to the fact that NTW's publisher was struck off the Companies Registry some time prior to 24 July 2000 and inquired whether this justified a champion of democratic rights breaking the law. It then gave the Herald's version of Mr Weiming Chen's assault on Mr Wong at the Sunny Town Restaurant on 14 July 2000, describing 'the attack [as] barbaric action [that is] despicable ...'. The article concluded with the words:

> When I see such person who decorated and elevated herself audaciously (sic), I fainted. It is like a woman with a crooked mouth, slanted eyes and a pregnant profile claiming herself to have enticing mouth, charming eyes, and an attractive body feature.

[50] In his affidavit also dated 3 September 2003 Mr Wong confirmed that on 26 August 2002, following a defended hearing, Judge Frederick McElrea found Mr Weiming Chen guilty on a charge of wilfully damaging Mr Wong's glasses on 14 July 2000. He was convicted and ordered to pay reparation and to come up for sentence if called upon within 12 months. In belated compliance he paid $1119 on 25 August 2003. Mr Weiming Chen explained his conviction in these terms:

> I had difficulty with the lawyer who was supposed to be representing me **and it eventually transpired that the case went against me when neither the lawyer nor I were at Court**. I understand that my present lawyers are considering the question of whether an appeal could be brought in respect of the matter, as a conviction against me gives a wrong impression of what really happened.
>
> [Emphasis added]

[51] Judge McElrea's written entry on the District Court information sheet notes 'defendant in person (+ Mandarin interpreter)' and that 'after a defended hearing information proved'. Again I shall return to this subject later.

[52] Mr Darby relied upon this passage from *Todd: The Law of Torts in New Zealand*, 3rd ed. at 876:

> If a person is verbally attacked, that person is entitled to publish a rebuttal. Provided this rebuttal goes no further than is reasonably necessary for the purpose of defending himself or herself and is not activated by ill will, then any imputations the rebuttal may cast on another are privileged. This is so regardless of how public the dispute may be. If a person is defamed in the press, that person may reply through the same medium ...

[53] In *Turner v Metro Goldwyn Mayer Pictures Ltd* [1950] 1 All ER 449 at 470-471 Lord Oaksey drew an analogy between the criminal law of self defence and a person's right to defend himself or herself against written or verbal attacks. In both cases the victim is entitled to mount an effective defence. However, the limits of the defence were authoritatively drawn by North P in *News Media v Finlay* [1970] NZLR 1089 where he observed at 1095:

> ... yet privilege is lost if the reply becomes a counter attack raising allegations against the plaintiff which are unrelated or insufficiently related to the attack he made on the defendant. In other words he cannot claim the protection of privilege if he decides to bring fresh accusations against his adversary... 'This privilege is in fact a shield of defence, not a weapon of attack...' 'The thing published must be something in the nature of an answer, like an explanation or denial. What is said must have some connection with the charge that is sought to be repelled.'
>
> [Internal citations omitted]

[54] In order to qualify for this special type of protection the content of the response must be related and restricted to answering the original charge. It must be proportionate to what is required for that purpose. To use the analogy of self defence

in criminal law, an excess of subject or language which removes the publication from the realm of an explanation, justification or answer – something that is necessary to repel the attack – into a fresh assault on the original publisher on an unrelated subject will defeat the privilege. It is available only as a shield of defence, not as a weapon of attack.

[55] Mr Darby submitted that the facts established a proper foundation for the existence of this privilege. In his words:

> We have a man whose wife was the victim of attacks of a quite hurtful and insulting personal nature. These attacks were published in a newspaper read by everyone in her own community. So hurt was she by these attacks that she could no longer reside in that community and was therefore forced to depart from New Zealand and leave behind her husband and two of their three children to live in America, where she was forced to reside for an entire year before she felt able to return. Clearly the effect this had on her husband and the children was equally great, and it was in these circumstances, and the further publication by [the Herald] to which Mr Chen refers ..., that the Chens availed themselves of the right of rebuttal.

[56] Plainly none of the four NTW articles fall within the scope of this protection. As Ms Johns submitted, they did not even answer what Mr Weiming Chen appears to identify as the three areas of provocation or attack raised by the Herald – the striking off of the publisher's name from the Companies Registry, an account of Mr Chen's assault on Mr Wong on 14 July 2000, and an alleged attack on Mrs Chen's physical characteristics. Instead the articles launched into sustained assaults on Mr Wong's character; not only did they fail to answer the original charges, but they went well beyond what could ever have been necessary to meet them. As a matter of law, this defence would be unsustainable by the NTW or the Chens at trial. I agree with Ms Johns that the Chens have used all four articles as weapons of attack, not as shields of defence.

(3) Discretion

[57] I would independently refuse the Chens' leave to raise either defence of qualified privilege on two related discretionary grounds. First, the Herald and the Wongs have been ready to go to trial for at least a year. Their pleadings have been in order and they have taken all necessary steps to secure fixtures. The Chens'

defaults have caused at least three adjournments of fixtures. Further and lengthy delays are inevitable if they are given leave at this very late stage to raise two new affirmative defences.

[58] Among other things, the Chens would require some time to file a comprehensive statement of defence; based on past experience I forecast extended argument over the adequacy of any such pleadings, even allowing for the assistance of Messrs Darby and Watt. Then, once the statement of defence was settled, the Herald and the Wongs would have to give particulars of ill will under s 41 before embarking upon full discovery. Inevitably those exercises would be subject to further dispute and delay.

[59] The interests of justice are not the Chens' sole preserve. The Herald and the Wongs are entitled to equal consideration. The Chens' prolonged and inexcusable misconduct should not be allowed to deprive them indefinitely of access to their legal rights. Their interests in securing a just and prompt resolution of their claim must now predominate over those of parties to whom the Court has extended many but abused indulgences.

[60] Second, I am satisfied that Mr Weiming Chen has deliberately set out to mislead the Court in evidence given in support of this application. There are two obvious examples. I have already referred to Mr Chen's lie in his affidavit sworn on 3 September 2003 that he was absent from the District Court on 26 August 2002 and did not have an opportunity to defend himself on the charge of intentional damage. Judge McElrea's note is unequivocal in confirming his presence.

[61] Additionally, in his first affidavit sworn on 1 September 2003 Mr Chen stated:

> My wife was upset by the attack and left New Zealand to live in America for almost one year. This was difficult for the family, including our three children, who were aged seven, nine and thirteen at the time.

[62] Mr Darby's written submission best captured the impression given by Mr Chen's statement. He understood it to mean that:

> So hurt was [Mrs Chen] by these attacks that she could no longer reside in that community and **was therefore forced to depart from New Zealand and leave behind her husband and two of their children to live in America**, where she was forced to reside for an entire year before she felt able to return.
>
> [Emphasis added]

[63] As Ms Johns pointed out, Mr Weiming Chen and his wife have issued a separate proceeding in this Court under CP324-SD01 claiming that they were defamed by these publications. On 6 November 2001 Mrs Chen swore an affidavit in CP324-SD01. She stated:

> My husband and I have lived in New Zealand for 13 years. At the end of last year, and partly as a result of the libellous material that [the Herald and the Wongs] had published about us, my husband and I took up a writing assignment in New York. The assignment was for a period of one year. I have recently finished my work in New York and have now returned permanently to New Zealand. My husband is still working in New York but is returning to live in New Zealand permanently on or about 20 December 2001. I confirm that during the past year, whilst my husband and I have been in New York, our three children aged 11, 8 and 5 respectively have remained living in New Zealand with my parents.

[64] I am satisfied that Mr Chen deliberately omitted any reference to the fact that he accompanied his wife to New York for a year to take up a writing assignment there. As a consequence, until Ms Johns drew our attention to Mrs Chen's affidavit, both Mr Darby and I understood that she left her husband and their young children for a year in New Zealand. Moreover, I am satisfied that Mr Chen sought to create an impression that the publications by the Herald and the Wongs were so hurtful and traumatic to Mrs Chen that she was forced to hide in New York. Indeed, that was Mr Darby's submission. Her affidavit painted a different picture.

[65] Mr Chen cannot bend the truth or say whatever suits him, regardless of its veracity, for the purpose of obtaining another indulgence. His conduct absolutely disqualifies him from any further forbearance. His application for leave to file an amended defence to plead qualified privilege is declined accordingly.

Conclusion

[66] In the result:

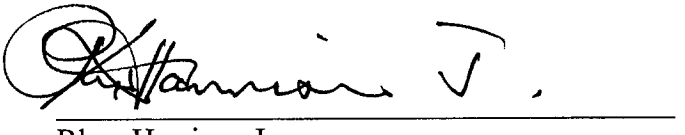
a) I grant the Chens' application to set aside the orders made by me on 4 August 2003 striking out their remaining defences and declaring that the Herald and the Wongs are entitled to judgment on liability against them. The result is that at trial the Chens and Mr Liu will be entitled to be heard on the issues of, first, whether or not the articles published by them were defamatory; second, whether they referred to the Herald and/or the Wongs; and, third, relief;

b) I dismiss the Chens' application for an order reviewing the order made by Master Faire on 3 September 2002 striking out their affirmative defences of truth and honest opinion; and

c) I dismiss the Chens' application for leave to file an amended statement of defence to plead the affirmative defences of qualified privilege, either in its traditional or self defence forms.

[67] The Herald and the Wongs have been put to very substantial expense in answering the Chens' applications. I award them costs against the Chens and Mr Liu on these applications in the sum of $10,000 to be paid on or before 21 November 2003. For the avoidance of doubt, I record that unless the Chens pay costs by that date their remaining defences will be struck out.

[68] I direct the registry to allocate a fixture for trial of this proceeding before a Judge alone for one day on the first available date to determine the questions of defamation and damages. In view of the findings made in this judgment it is inappropriate that I should conduct the trial.



Rhys Harrison J

Signed at 5.15 p.m. on the 31st day of October 2003