NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP366/00

BETWEEN	CHINESE HERALD LIMITED & ORS First Plaintiff
AND	STEPHEN SIK FUN WONG Second Plaintiff
AND	STELLA HU Third Plaintiff
AND	NEW TIMES MADIA LIMITED First Defendant
AND	WEIJAN CHEN Second Defendant
AND	WEIMING CHEN Third Defendant
AND	WEIZHENG LIU Fourth Defendant
AND	DAVY WAI KEUNG KWOK Fifth Defendant

Hearing: 9 and 10 February 2004

Appearances: B Johns for the Plaintiffs
D J T Watt for the Defendants

Judgment: 9 February 2004

REASONS FOR DECLINING ADJOURNMENT

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Introduction

[1] This defamation proceeding was set down for a two day fixture to commence on 9 February 2004. On the morning of the application, after initially endeavouring to make an oral application late on Thursday 5 February, counsel for the second, third and fourth defendants filed a written application seeking an adjournment. After hearing counsel, I declined the adjournment and now give my reasons for doing so.

Background

[2] The first plaintiff (Chinese Herald) publishes a Chinese newspaper. The second and third plaintiffs were at the relevant times shareholders of it. The first defendant (New Times Madia Ltd) was the publisher of a rival Chinese newspaper which was, and is still known as, as the *New Times Weekly*. However, the first defendant is no longer on the company register. The second, third and fourth defendants are shareholders, officers or associated with the publication of the *New Times Weekly*.

[3] In late July and early August 2000, the *New Times Weekly* published four articles which the plaintiffs allege defame them. They initially sought an interim injunction on an ex parte basis and an interim injunction was granted on 15 August 2000 on an inter partes basis. However, the final injunction was in far narrower terms than the orders sought by the plaintiffs.

[4] The plaintiffs' present solicitors were instructed on 31 January 2001 and filed an amended statement of claim on 15 March 2001. The defendants (which term will only apply to the second, third and fourth defendants in this judgment) filed a statement of defence on 12 June 2001.

[5] On 5 September 2001, the plaintiffs applied to strike out the defences of honest opinion and truth on the grounds of a failure to provide particulars of these alleged offences notwithstanding repeated requests for them.

[6] A second amended statement of claim was filed on 10 May 2002 and on 6 June 2002 a statement of defence was filed to this amended statement of claim by the

defendants through their then solicitors. This statement of defence did not particularise the alleged defences of honest opinion and truth. Consequently, the plaintiffs filed an application for further and better particulars of these defences. On 2 July 2002, Master Faire ordered that, unless the defendants provided particulars of the defences of honest opinion and truth within 42 days of the service of the order, the defences would be struck out. The defendants' then solicitors had ceased to act for them by 2 July 2002.

[7] The defendants failed to comply with Master Faire's order and on 3 September 2002, the Master confirmed that the defences of honest opinion and truth had been struck out. The matter was set down for a hearing in the week of 25 November 2002, and orders were made for the exchange of briefs.

[8] The fixture was vacated after the defendants filed a second application for consolidation of this proceeding with other proceedings brought by the defendants against the plaintiffs (an earlier application for consolidation was declined by Master Gambrill on 12 June 2002). At the same time, the defendants made a second application to have the matter determined by a jury.

[9] On 28 February 2003, the Master set the matter down for hearing again for the week commencing 30 June 2003 and made further orders as to the exchange of briefs of evidence. The plaintiff served briefs of evidence on the defendants. On 21 May 2003, the Master declined the application to have the proceedings consolidated and made an order for costs against the defendants.

[10] On 4 June 2003, Randerson J gave the defendants a further extension to serve their briefs of evidence and vacated the substantive fixture for 30 June 2003. In July, the plaintiffs applied for orders directing the defendants to comply with timetable directions, and the matter came before Harrison J on 1 August 2003. He directed the defendants to serve all their briefs of evidence and pay the plaintiffs the sum of $1690 costs. He made an order that in the event the defendants failed to comply with the orders "their defence will be struck out and the claim will proceed on formal proof." He also ordered that if jury trial fees of $3200 were not paid, the trial would proceed before a Judge alone.

[11] The defendants then sought further time to prepare their briefs of evidence. On 25 July 2003, Harrison J declined to provide them with further time and stated:

> The defendants 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 defendants fail to comply with the existing terms of the timetable order, they face the risk that the plaintiffs will apply to strike out their defences.

[12] During the afternoon of 1 August 2003, the plaintiffs filed an application to strike out the defendants' defence and have judgment entered against them. Apparently, the defendants then served their briefs of evidence during the evening of 1 August. On 4 August 2003, Harrison J issued a decision and ordered:

a) The defences of the first, second, third and fourth defendants be struck out;

b) The plaintiffs will be entitled to judgment on liability against the first, second, third and fourth defendants;

c) The plaintiffs must formally prove their claim for damages, costs and other relief, against those defendants at 10 am on Monday 25 August 2003;

d) None of the defendants, except the fifth defendant, will be entitled to be heard or lead evidence in answer at the hearing of 25 August 2003;

e) The hearing on 25 August 2003 will be before a Judge alone.

[13] On 11 August 2003, new legal counsel for the defendants made application for reinstatement of their defences. A similar application was made on 18 August 2003 and, combined with an application for leave to plead two new defences (qualified privilege and self defence), and paid outstanding costs.

[14] The defendants' applications were heard before Harrison J on 4 September 2003. In a judgment issued on 31 October 2003, he:

a) Set aside the orders he made on 4 August 2003, the effect of which was to allow the defendants to be heard on

i) Whether or not the articles published were defamatory;

ii) Whether they referred to the plaintiffs; and

iii) Relief.

b) He dismissed the application for an order reviewing the order made by Master Faire on 3 September 2002 striking out their affirmative defences to truth and honest opinion;

c) He dismissed their application for leave to file an amended statement of defence to plead the affirmative defences of qualified privilege, either in its traditional form or in its self defence form.

[15] The matter was called at callover on 28 January 2004 with the intent of giving a fixture in the week of 2 February 2004. Counsel for the defendants then re-stated their application for a jury trial. This was declined but a fixture was made for the hearing to commence on 9 February 2004.

Grounds for application for adjournment

[16] The application was in ex parte form but I directed it to be heard at the start of the hearing. It requested the matter be adjourned to a later date "for inter alia an evaluation conference, once I have had the opportunity to thoroughly investigate the results of my interview with Wang Hao at Christchurch." The application also requested:

a) Such further orders as will protect this witness;

b) That if either Stella Hu or Steven Wong contact the Chinese Embassy, or if Wang Hao's husband is fired at their instigation, then their claim against the defendants will be struck out.

[17] On Saturday 7 February 2004, Mr Watt, the defendants' counsel, interviewed Wang Hao in Christchurch in the presence of an interpreter. The only evidence adduced was an affidavit of the interpreter who typed a statement which Wang Hao signed and which was attached to the interpreter's affidavit. He noted that the statement did not contain a number of other statements which he translated because Wang Hao did not want to have Mr Watt officially record everything which he translated from her to him. In the statement, Wang Hao states she worked for the

plaintiffs from 19 February 2000 to 3 July 2000. There was, according to this statement, a legal issue between the two personal plaintiffs and Wang Hao which resulted in a deed of settlement. Wang Hao also makes an allegation that she entrusted Stella Hu, her former company colleague in China, to undertake an application for immigration and paid her a total of $40,000. $10,000 was an immigration service fee and the balance of $30,000 a fee for purchasing a business. She was to acquire a 37% interest in the *Chinese Herald* and to be a member of the board. She did not become a shareholder or board member and this is evidently a matter which lead to the deed of settlement. There is no evidence from Wang Hao as to the matters mentioned by Mr Watt in his written submissions.

[18] Mr Watt provided written submissions and referred to his trip to Christchurch to interview Wang Hao. Paragraphs 3 and 4 of his memorandum read:

> 3. In the course of the interview with Ms Wang Hao, she advised that one of the plaintiffs, Ms Stella Hu had brought great pressure on her to have nothing more to do with the case, ie to not give evidence. The essence of this pressure was that if Wang Hao gave evidence to support the defendants that her husband would be fired from his job in China.
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> 4. There are good grounds to believe that the witness Wang Hao can give evidence that will lay the framework for an appeal of Justice Harrison's decision.

[19] The allegation which Mr Watt makes is that after Wang Hao provided a brief of evidence to the defendants some months ago, Ms Hu wrote a letter to the Chinese Embassy containing a false claim that Wang Hao had written an article for the *New Times Weekly* which was critical of the Chinese Government. Wang Hao is said to deny that she wrote an article for *New Times Weekly*. The memorandum alleges that

> as a result of the false allegation, her husband in China was contacted and told (presumably) to contact his wife to tell her to stop giving her evidence. In any event, she received a telephone call from her husband to say she must not help the defendants because he, her husband, was at risk of being fired from the Government newspaper where he worked, if she did so help.

As a result, Wang Hao is said to be frightened to give evidence. Mr Watt alleges that if she does give evidence, she will say that Ms Hu made false statements to the New Zealand Immigration Service when she lodged Wang Hao's application for that

service. These false statements are said to have caused considerable difficulties with Wang Hao's immigration application.

[20] Mr Watt acknowledges that no evidence could be found up until the interview with Wang Hao to prove that the plaintiffs were less than upright in their business dealings. He submitted that if they had had this evidence, it would have undermined the reasons for Harrison J's judgment of 31 October 2003. The reason for the requested adjournment was to obtain a copy of Wang Hao's immigration file to see if there were indeed false letters. Additionally, Harrison J had noted that one of the plaintiff's complaints was an allegation made that the plaintiffs had forged letters published in the *Chinese Herald*. This was an allegation the Judge noted was serious and could not be substantiated. It was submitted on behalf of the defendants that if Ms Hu did in fact write false and untrue letters to the Immigration Department, this was similar fact evidence which was relevant to the defendants' defence. The purpose of an adjournment, if granted, was to enable Wang Hao's new evidence to be assessed, for her immigration records to be obtained, and for a subpoena to be served on her.

Discussion

[21] The circumstances which gave rise to the application originated from Mr Watt's meeting with Wang Hao in Christchurch on 7 February 2004. In the circumstances, it was somewhat surprising that an approach was made to this Court on Thursday 5 February to see whether a Judge would entertain an oral application for an adjournment. At that stage, Mr Watt had not contacted Wang Hao. Mr Watt said that the reason that he approached the Court was that he had heard of the possibility of a letter to the Chinese Embassy. It is to be noted that there is no concrete evidence before the Court to suggest that there is such a letter.

[22] The Court may "in the interests of justice" adjourn a trial. It is necessary in such circumstances to look at the justice to each party. It is a balancing exercise. In this case, it would obviously be unjust to the plaintiffs to grant the adjournment. The history of the proceeding narrated above suggests that the defendants have had little regard for Court timetable orders. They have had ample opportunity to assess the

evidence and it is apparent that they originally briefed Wang Hao's evidence and supplied a brief from her. In his judgment of 31 October last, Harrison J noted their chronic inactivity and stated:

> 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 Chen's defaults is inexcusable.

[23] Although it was not a reason for some of the orders made by Harrison J, he was satisfied that the Chens' failure to meet his earlier orders to pay costs was intentional. In exercising his discretion against some of the orders sought by the defendants, Harrison J noted that the *Chinese Herald* and the Wongs had been ready to go to trial for at least a year, their pleadings had been in order and they had taken all necessary steps to secure fixtures, and the defendants' defaults have caused at least three adjournments of fixtures. I note that they in fact caused a fourth adjournment at the callover on 28 January last. His Honour also noted that

> 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.

Further, he was satisfied that Mr Chen had deliberately set out to mislead the Court in evidence given in support of the application before him. He cited two obvious examples. The Judge concluded by saying:

> Mr Chen cannot bend the truth to 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.

[24] Against this background, the defendants need to have a convincing case for an adjournment. In my view, they did not have one. Apart from there being no explanation as to why the interview with Wang Hao was at the eleventh hour, and took place after the week in which the matter had initially been set down for hearing, there is no credible evidence in support of the application. This is a case of parties who have failed to take a responsible attitude towards the litigation, applying for the fifth time at the eleventh hour for an adjournment. If the interests of justice required

an adjournment, one would have been given notwithstanding the disentitling factors. However, there is no credible evidence in support of the application.

[25] The interpretor's statement does not take the matter any further than indicating that there was a dispute between Wang Hao and Mr Wong and Ms Hu over $40,000 which Wang Hao evidently paid. This has been part of a settlement recorded in a settlement deed. This, in my view, can be of no assistance to the defendants in determining whether or not what was said in the four articles was defamatory. Section 42 of the Defamation Act 1992 requires a defendant who intends to adduce evidence of specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, to include in the defendants' statement of defence a statement that the defendant intends to adduce that evidence. No such statement appears in the statement of defence in this case. On the pleadings the plaintiffs' reputations are not in issue. Indeed, Mr Watt conceded that until Saturday last, the defendants could not obtain any evidence to support such allegations. They have had ample time to do so and have obviously spoken to Wang Hao some considerable time ago. The evidence in her statement cannot assist the defendants. It is not cogent evidence.

[26] The only other evidence is in the form of a submission from Mr Watt. Even then, he is obviously presuming facts. An example of this is the statement that it is presumed that Wang Hao's husband in China was contacted and told to tell his wife not to give evidence. Even if Mr Watt's statements had been in the form of sworn evidence, they go no further than advice from Wang Hao that her husband phoned her and told her not to give evidence. This may have been because she told him she had been approached to give evidence and he did not wish her to do so. Since I declined the affidavit, Ms Hu has given evidence and has denied that she made any contact with the Chinese Embassy in respect of Wang Hao giving evidence in this case. At best, the submissions show that Mr Watt has a suspicion that there may have been some contact with the Embassy but has no evidence to support it. He has made statements based on hearsay that there may have been false statements made to the Immigration Service. Even if there were such statements, it is difficult to see how they are relevant to most of the alleged defamatory statements.

[27] The combination of the defendants' past unsatisfactory approach to this litigation and the lack of credible evidence to support submissions made by Mr Watt led me to the view that in the interests of justice, the adjournment should be declined. Accordingly it was declined.

B J Paterson J