IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008240

IN THE MATTER OF	an appeal against a decision of the District Court at Auckland dated 25 November 2008
BETWEEN	YOON CHEOL HONG Appellant
AND	DUK SEUNG AHN Respondent

Hearing: 24 February 2009

Appearances: Appellant in Person
N Tabb and H J Lee for Respondent

Judgment: 24 February 2009

JUDGMENT OF VENNING J
ON APPLICATION TO ADDUCE FURTHER EVIDENCE

This judgment was delivered by me on 24 February 2009 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Sorensen Law, Auckland
Copy to: N Tabb, Auckland
Y C Hong, Auckland

Introduction

[1] The appeal against Judge Hubble's decision finding that Mr Hong had defamed the respondent and entering judgment in the sum of $85,000 together with costs is scheduled for hearing on 8 April 2009 at 11.45 a.m. (half day allocated).

[2] Mr Hong has sought leave to adduce further evidence for that appeal. The application is opposed.

[3] The further evidence Mr Hong seeks to adduce falls into two categories. First, two Notarial Certificates containing two South Korean lawyers' legal opinion on the definition of "stay of prosecution" under the South Korean criminal law. Second, a hard copy printout of an item run by TVNZ One News on Saturday 14 February 2009 relating to the activities of Wasan International Limited.

Principles

[4] Rule 20.16 now deals with the admission of further evidence. The principles, however, have not altered. I accept for present purposes the authorities referred to by Mr Hong of *Comalco NZ Ltd v TVNZ Ltd* (1996) 10 PRNZ 573; *Power NZ Ltd v Mercury Energy Ltd* [1996] 1 NZLR 106; *NZ Co-op Dairy Co Ltd v Commerce Commission* (1991) 3 PRNZ 262.

The South Korean lawyers' evidence

[5] Mr Hong complained first that the Notarial Certificates confirming the evidence of the South Korean lawyers had not been included in the agreed bundle of documents for the District Court hearing. There is nothing in that complaint. The short point is that the respondent did not agree to the inclusion of those documents in the bundle. They were therefore not, by definition, "agreed documents" and were not put before the Court that way, even though that was Mr Hong's wish.

[6] Mr Hong sought to introduce the documents in Court but the District Court Judge declined to allow him to do that. Mr Hong argued that the documents were admissible as business records that s 19 of the Evidence Act 2006 applied. He repeats that argument in support of his application that the documents be adduced as further evidence for the purposes of the appeal.

[7] But Mr Hong has misunderstood the application of s 19 of the Evidence Act 2006 and the nature of the evidence in issue. Mr Hong sought to introduce the evidence as conclusive evidence of the effect of a stay of prosecution in Korea in certain circumstances. Clearly the evidence was intended by him to be accepted by the Court as expert opinion evidence.

[8] Section 19 of the Evidence Act 2006 does not apply in such a case. It relates to the admission of business records. The evidence was not contained in a business record(s). Section 16 defines a business record as a document:

> (a) that is made—
>
> (i) to comply with a duty; or
>
> (ii) in the course of a business, and as a record or part of a record of that business; ...

[9] The expert evidence of the Korean solicitors was not made to comply with a duty or in the course of a business and as a record or part of a record of a business. The reports were obtained by Mr Hong specifically for the purposes of providing expert evidence for the case he was involved in. Section 19 simply has no application.

[10] Mr Hong submitted that the Court should have regard to the provisions of the Evidence Amendment Act (No 2) 1980. I presume he was referring to s 3 of that Act which provided that in certain circumstances a statement made by a person in a document tending to establish that fact or opinion could be admissible if the maker of the statement was unavailable to give evidence. Whatever the force of that section it no longer applies.

[11] The relevant sections in relation to opinion evidence in the 2006 Act, are in subpart 2 of the Evidence Act 2006. The default position is that a statement of opinion is not admissible except as provided by s 24 or 25. Section 24 provides for circumstances that a witness may state an opinion. But "witness" is defined as a person who gives evidence and is able to be cross-examined. It does not apply to the South Korean lawyers. Section 25 provides generally for the admissibility of expert opinion evidence but again contemplates the witness will be present and, in any event, must be read with s 26 which provides that experts must give expert evidence in accordance with the applicable rules of Court. There is no evidence that the South Korean lawyers in this case did so. In that case the evidence would only have been admissible with permission of the Judge. It was a discretionary decision for the Judge whether to accept the opinion evidence or not.

[12] The short point is that the evidence was not admissible as a business record. The Judge was quite entitled to reject Mr Hong's application it be admitted as opinion expert evidence.

[13] Finally, the evidence was, in any event, of limited relevance to the hearing. As Ms Tabb correctly pointed out, even if the evidence bore on the issue of truth, the Court of Appeal have confirmed in *New Zealand Magazines Limited v Hadley* CA74/96, 24 October 1996 the Court is not concerned with the literal meaning of the words or the meaning, which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning, which the ordinary reasonable person would, as a matter of impression carry away in his or her head after reading the publication. That includes what the ordinary reasonable person would infer. The focus is on the sting of the words. The opinion of the south Korean lawyers was directed at the literal or legal meaning of the words.

The TVNZ article

[14] Mr Hong submitted that the TVNZ article was admissible as evidence to address the District Court Judge's "perception of the appellant's state of mind towards Wasan" which the District Court Judge described as malicious.

[15] The issue before the Court was whether the advertisement run by Mr Hong and referring to the respondent Mr Ang was defamatory or not. Mr Hong refused to make an apology. As the Judge recorded the case for Mr Hong was conducted on the basis that the contents of the publication were true. In the circumstances the activities of Wasan International, Mr Ahn's employers, were not particularly relevant.

[16] Although the TVNZ article was published after the decision in the District Court, it is not and could not be relevant to determination of the appeal. Mr Ahn is not referred to in the article. None of the comments in the article establish the truth of the defamatory statements made by Mr Hong about the respondent.

Result

[17] The application to adduce the further evidence at the appeal is dismissed with costs to the respondent on a 2B basis.

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Venning J