IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-5072

BETWEEN	JUNG NAM LEE Plaintiff
AND	THE NEW KOREA HERALD LIMITED First Defendant
AND	JONG OK YOO Second Defendant
AND	YOUNG KWAN KIM Third Defendant

Hearing: 29 and 30 June 2010

Counsel: G J Kohler for Plaintiff
Mr Yoo, in person, Second Defendant
No appearance by, or on behalf of, First and Third Defendants

Judgment: 9 November 2010

JUDGMENT OF HEATH J

This judgment was delivered by me on 9 November 2010 at 9.15am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Byoung Kook Ahn, PO Box 5043, Auckland
Kenton Chambers, PO Box7160, Wellesley Street, Auckland
Counsel:
G J Kohler, PO Box 4338, Auckland
Copy To:
Mr Yoo P O Box 105922 Auckland (jong.yoo@koreaherald.co.nz)

Introduction

[1] Mr Lee, a prominent businessman within the Korean community, sues The New Korea Herald Ltd, Mr Yoo and Mr Kim in defamation. Mr Lee alleges that articles published in *The New Korea Herald* newspaper, between 7 March 2008 and 2 May 2008, conveyed the false impression that he was engaged in corrupt, dishonest and immoral practices.

[2] The New Korea Herald Ltd is the publisher of *The New Korea Herald,* a Korean language newspaper. It is a free publication, available to members of the Korean community in New Zealand. The newspaper has a circulation of about 3000 people. It is distributed primarily in the Auckland region where, the evidence suggests, some 22,000 people of Korean origin now live. Mr Yoo and Mr Kim are directors of the publisher. Mr Yoo acknowledges that he had editorial responsibility for relevant articles.

[3] Although the articles were published in the Korean language, Mr Yoo accepts the accuracy of an English translation of each. All oral evidence was in Korean, being interpreted into English at the hearing. In determining the claims on the basis of the English translation of the alleged defamatory words and the interpretation of the oral evidence, I bear in mind that translated words might carry a greater potency in English than in Korean.

[4] Mr Yoo appeared on his own behalf, though his former counsel, Mr Park, agreed to stay and assist him in a role akin to a *McKenzie Friend*. I permitted him to do so and thank Mr Park for his assistance. No appearance was entered on behalf of The New Korea Herald Ltd or Mr Kim. The claim proceeds by way of formal proof against them.

[5] I apologise to counsel and to the parties for the delay in delivering this judgment, which has been caused primarily by an unusual number of other cases that have required urgent determination.

The publications in issue[1]

[6] The first article was published on 7 March 2008. No less than 10 defamatory statements are alleged. In short, the article asserts that Mr Lee had

a) acted illegally and dishonestly in Fiji;

b) been arrested and was being investigated by the Special Branch of the Fijian Police;

c) deliberately contravened Court orders made in the course of proceedings in the High Court of Fiji; and

d) forged a national police officer's signature to fulfil his "irregular" ambitions.

[7] The second article was published on 14 March 2008 and referred to a pending trial of Mr Lee in the High Court of Fiji on 19 March 2008. In the course of that article, allegations were made that Mr Lee had acted dishonestly, had disobeyed Court orders, was under investigation by Fijian authorities (including National Security and Immigration Services) and had had his passport confiscated.

[8] The third publication was on 21 March 2008. Prior allegations of illegal and dishonest conduct and forgery were repeated and a separate allegation was made that, on 1 March 2008, Mr Lee had been "arrested by the Special Investigators as ordered by the Secretary Defence, National Security and Immigration in Fiji while going through departure procedures in Fiji airport".

[9] The fourth article was published on 4 April 2008. It suggested that the Permanent Secretary of Defence, National Security and Immigration had begun an investigation into the details of Mr Lee's departure from Fiji. Prior allegations of illegal and dishonest conduct and forgery were repeated.

---

[1] All words that are in quotation marks in this part of the judgment are taken from the undisputed translation of the articles into the English language.

[10] The fifth article was published on 11 April 2008 and continued the general attack on Mr Lee, by reference to alleged illegal activity; including allegations that he had bribed public officials and had breached orders made by the High Court of Fiji and had left Fiji without permission.

[11] In the sixth article, on 18 April 2008, it was reported that "the High Court of Fiji has found [Mr Lee] guilty". The hearing was described as a "[second] final trial for four people" including Mr Lee and "close associates" who were said to have been "arrested on a charge of obtaining commercial profit from using the name and logo of [the Fiji Professional Golfers Association] by stealth despite two orders from the High Court".

[12] The seventh article, published on 2 May 2008, described Mr Lee as having been arrested on 1 March 2008, on charges of using the trade name and trade mark of the Fiji Professional Golfers Association "by stealth, impersonation of an official as well as illegal business activity". The article referred to a "decision" of the High Court of Fiji, in which it was asserted that the Judge found Mr Lee guilty of certain charges. It also said that the "Special Branch Quarters" of the Fijian Police were following Mr Lee's movements in Fiji. Further, it alleged that Mr Lee was living in a *de facto* relationship at Laucala Beach Estate, in Suva, while his wife and family remained in New Zealand.

[13] As well as the specific allegations published in each article, Mr Lee also bases his claim on publications that appear on a website maintained by the newspaper. He alleges that the articles of which complaint is made continue to be accessible on the website. Mr Yoo accepts that is so.

[14] Mr Lee denies all allegations and seeks damages to vindicate his position and to restore his reputation within the Korean community in New Zealand. Compensatory, aggravated and punitive damages are sought. A permanent injunction is also sought to prevent members of the public having access to the articles, through the website.

The Fijian litigation

[15] The published allegations stem from Mr Lee's involvement in an organisation called the Fiji Professional Golfers Association (the Association). The background to that involvement can conveniently be gathered from judgments or orders made in the Fijian Courts: namely, *Singh v Lee*[2] (the Lautoka proceeding) and *Rokotavaga v Singh*[3] (the Suva proceeding).

[16] The Association is an unincorporated body that was formed in 1977. Its Constitution deals with membership and the circumstances in which members may be suspended or removed. Management of the Association is vested in the President, Secretary and Treasurer, each of whom are elected at an Annual General Meeting and hold office for one year. Membership of the Association carries with it the right to compete in tournaments that it organises. Mr Lee is associated with a group of people in Fiji, who were once members of the Association but whom the Association now allege are a "rebel" group. The Association alleges that members of this group have performed acts, without authority, in the name of the Association.

[17] On 15 November 2005, Connors J, in the Lautoka proceeding, made an order restraining eight parties (including Mr Lee) from doing anything in the name of "Fiji Professional Golfers Association" prior to a general meeting scheduled for 19 November 2005. On 1 December 2005, the same Judge made further orders:[4]

> 1. That Mr John Lee aka Jung Nam of New Zealand either by himself and/or his agents and/or his servants and/or his employees be refrained from using or publicizing the Logo of the Fiji Professional Golfers Association and the name Fiji Professional Golfers Association which is also known as FPGA.
>
> 2. That Mr John Lee aka Jung Nam of New Zealand either by himself and/or his agents and/or his servants and/or his employees be refrained himself from taking part and/or promoting any golf sports

---

2 *Singh and Ors v Lee and Ors* High Court of Fiji, Lautoka, Civil Action 220/2005, 14 November 2005, Connors J.

3 *Rokotavaga and Ors v Singh and Ors* High Court of Fiji, Suva, Civil Action 170/2007, 3 June 2008, Jiten Singh J.

4 *Singh and Ors v Lee and Ors* High Court of Fiji, Lautoka, Civil Action 220/2005, 1 December 2005. The person named as "Mr John Lee" is the same Mr Lee who brings this proceeding.

with any other golf clubs under the Fiji Professional Golfers Association and banner and style.

3. That Mr John Lee aka Jung Nam of New Zealand either by himself and/or his agents and/or his servants and/or his employees or agents be restrained and refrained from operating or calling himself the office bearer of the FPGA and more specifically not in any way whatsoever operating or calling himself the Vice President and Patron, of the FPGA.

4. That Mr John Lee to pay costs of this action on Solicitor/Client indemnity basis.

5. That this matter is adjourned to the 17th day of January, 2006 for Mention.

[18] The Lautoka proceeding came before Phillips J, in 2006. Consent orders were made. They are reproduced in the later judgment of Jiten Singh J in the Suva proceedings:[5]

It is hereby ordered by consent:

1. That the Respondents:

   (a) Josaia Tareguci

   (b) Faiyaz Mohammed

   (c) Vilikesa Kalou

   (d) Mira Singh

   (e) Anasa Seruvatu

   (f) Simi Serukalou

   As purported officials of Fiji Professional Golfers Association, their servants and/or agents, are [restrained] by INJUNCTION from publishing any material or acting or purporting to act as officials of the Fiji Professional Golfers Association, such restraint to be effective unless and until elected as officials at the next Annual General Meeting of the Association.

2. That the said respondents take immediate measures retracting the Circular dated 30th September 2006 on the website: http/www.fijipga.net/ and are refrained from publishing any further information as officials of the Fiji Professional Golfers Association.

---

5 *Rokotavaga and Ors v Singh and Ors* High Court of Fiji, Suva, Civil Action 170/2007, 3 June 2008, Jiten Singh J at 3.

[19] Despite the consent orders, on 16 November 2006, the "rebel group" registered two companies; Professional Golfers Association of (Fiji) Ltd and Fiji Professional Golfers Association Ltd. In addition, on four websites, without approval of the Association, the "rebels" were held out as members and office bearers of the Association.

[20] The Association then issued the Suva proceedings against the so called "rebel" group, including Mr Lee. Mr Lee was represented by counsel at the hearing. The claim was heard on 11 April 2008, during the period in which the alleged defamatory articles were published. Judgment on that claim was given on 3 June 2008. By that time, all of the articles had been published.

[21] In his judgment in the Suva proceeding, Jiten Singh J found that Mr Lee was not a member or official of the Association but had held himself out (with others) as members or office bearers on four websites, without the approval of duly appointed officers of the Association.[6] The Association contended that the actions of those associated with Mr Lee were causing financial loss, due to an inability to secure sponsorships for golf tournaments. The Association also alleged that Mr Lee, in conjunction with at least three others, had "sold playing cards to Korean golfers for big sums of money and [had] not accounted for the proceeds".[7]

[22] One of the defendants in the Suva proceeding, Mr Seduadua, had deposed that the name "Fiji Professional Golfers Association" had been cancelled as an "Industrial Association" on 17 April 2006. Mr Seduadua said that he had incorporated a charitable organisation called the "Fiji Professional Golfers Association" on 18 July 2006 and said that that organisation was involved in advertising on the Internet.

[23] Jiten Singh J found that, as at June 2008, there were four organisations with similar names:[8]

a) The Association, an unregistered body that had existed since 1977;

---

6 Ibid, at 4.
7 Ibid, at 5.
8 Ibid, at 6.

b) Fiji Professional Golfers Association, registered under the Charitable Organisation Act, on 18 July 2006;

c) Professional Golfers Association of (Fiji) Ltd, incorporated on 16 November 2006;

d) Fiji Professional Golfers Association Ltd, incorporated on 16 November 2006.

[24] One of the arguments advanced by the defendants, in the Suva proceeding, was that deregistration of the Association as an "Industrial Association" meant that it had ceased to exist and that the new organisations could properly use the words "Fiji Professional Golfers Association". But, Jiten Singh J held that deregistration did not equate to cessation. Therefore, the incorporation of the two companies, after the consent orders were made by Phillips J, was in breach of those orders.

[25] The Judge referred to an affidavit sworn by Mr Lee on 12 December 2007. In that affidavit, Mr Lee had deposed that he had been appointed as Patron and Vice President of "Fiji Professional Golfers Association", on 27 June 2007. He annexed a document to that affidavit which purported to give rights to him to promote sponsorship and development of golf in New Zealand and Suva. That document has not been produced before me. However, its terms are set out in Jiten Singh J's judgment:[9]

1. A new membership of Mr Lee is confirmed.

2. Mr Lee will be responsible for [the Association] concerns in New Zealand, Australia, Korea, Japan, China (Asia and Australian).

3. Overseas [the Association] office to open in New Zealand under Mr Lee who will be responsible for all association dealings abroad.

4. Overseas identification card will be made and issued in New Zealand by Mr Lee.

5. Mr Lee undertakes to guarantee three years sponsorship of $24,000 per annum. This will be paid half yearly in sums of $12,000.00.

---

[9] *Rokotavaga and Ors v Singh and Ors* High Court of Fiji, Suva, Civil Action 170/2007, 3 June 2008, at 8.

6. Future development of office headquarters in Suva to be under Mr Lee's name and after 3 years to be donated to [the Association].

7. Class 4 card holders to undertake further training for upgrading in New Zealand under supervision by Class 1 or 2 card holders.

8. Training will be undertaking if the number is 4 or under in New Zealand if the number exceeds this then training will be provided in Suva or a trainer from Fiji will be supplied.

9. Any yearly subscription by the members is to be shared equally between the two offices.

10. If there is a dispute regarding this agreement then it is to be resolved in New Zealand under New Zealand law.

[26] Jiten Singh J concluded that, even under the agreement, Mr Lee was required to act under the umbrella of the "Fiji Professional Golfers Association", not independently of it.[10] He continued:[11]

> ... [Mr Lee] would still need to take instructions from the officials of [the Association]. He is not given a free rein. He could not act contrary to what the officials considered were the interests of the [Association].
>
> As long as he advanced the interests and welfare of [the Association] and its members his actions would be within the agreement not if he went around advancing his own personal interests whereby he went around in Korea and New Zealand and registered himself as the owner of [the Association] trademark. His actions are in direct conflict with the objectives of [the Association] and prejudicial to its interests.
>
> One may ask why not choose some other name. He is trying to take advantage of an established name.
>
> **Conclusion:**
>
> [The Association] has been in existence since 1977. It has its Constitution. The only way a person can become its official is at the Annual General Meeting. If the defendants feel in any way aggrieved then they should, if they already are not, become members of [the Association] and contest the post of officials at the Annual General Meeting and not try to register parallel names causing confusion. Mr Koya counsel for some of the defendants agreed as much. ....

[27] I have set out the background to the Fijian proceedings and the comments made by Jiten Singh J at some length to demonstrate that (contrary to the clear impression conveyed in the articles) this was a civil proceeding, not a criminal trial.

---

[10] Ibid, at 8.
[11] Ibid, at 8-9.

Having said that, I also take account of the fact that the Judge took an unfavourable view of Mr Lee's conduct. However, the observations made in the judgment cannot have influenced the content of the articles; the judgment was delivered after the last of the articles had been published.

[28] The judgment in the Suva proceeding is under appeal. At the time this proceeding was heard, the appeal had not been allocated a fixture.

Competing submissions

(a) The case for the plaintiff

[29] Mr Kohler submits that the articles are defamatory because they falsely assert that:

a) Mr Lee was arrested on criminal charges;

b) Mr Lee was on trial for criminal offences;

c) Mr Lee had been convicted of criminal offences;

d) Mr Lee was involved in bribery and forgery;

e) Mr Lee was guilty of dishonest and fraudulent practices;

f) Mr Lee had acted in an hypocritical way, either unethically or without moral standards; and

g) Mr Lee had associated immorally with a woman who was not his wife.

[30] Mr Kohler submits that the newspaper and Mr Yoo are responsible for the defamatory articles and are liable to pay damages to Mr Lee. Liability is put on the

basis that The New Korea Herald Ltd is the publisher and Mr Yoo is both its editor and the person responsible for the articles.

[31] Mr Kohler submitted that Mr Kim ought also to be held responsible for the alleged defamatory conduct, on the basis that, while he is resident in Christchurch and does not appear to have been directly involved in the operation of the newspaper business, there is evidence from which I can infer (at least on a formal proof basis) that Mr Kim must have known of the defamatory content of the articles and failed to have taken steps to remedy it.[12]

[32] Mr Kohler submits that compensatory, aggravated and punitive damages are justified because the defendants had no belief in the truth of the allegations; were reckless in publishing the allegations; failed to make even basic attempts to verify the allegations; intended to damage Mr Lee's reputation; have failed to publish any correction or apology; and have continued to maintain the accuracy of the articles in question, in the face of clear evidence to the contrary.

[33] Based on a review of comparator cases[13], Mr Kohler submitted that a total award of damages of something in the order of $400,000 is justified.

(b) The case for the defendants

[34] In broad terms, Mr Yoo submits that the allegations were based on information received from reliable sources, and that it was his duty, as editor of the newspaper, to convey that information to members of the Korean community in New Zealand.

[35] Mr Yoo does not accept that the newspaper's publication or his conduct was inappropriate. His position is that because he had made an (unsuccessful) attempt to

---

12 Mr Kohler referred to Patrick Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (10th ed, Sweet & Maxwell, 2004), at [8.34] and fn 30. Those extracts are repeated in the 11th edition (2008) at [8.34] and fn 238.

13 *Chinese Herald Limited v New Times Media Limited* [2004] 2 NZLR 749 (HC), *Television New Zealand Limited v Quinn* [1996] 3 NZLR 24 (CA), *Columbus v Independent News Auckland* HC Auckland CP600/98, 7 April 2000 and *KordaMentha v Seimer* HC Auckland CIV-2005-404-1808, 23 December 2008.

contact Mr Lee in relation to the first article and had no reasonable grounds to believe that the articles were inaccurate, the newspaper was entitled to publish, without further inquiry into the veracity of the information, or those who supplied it to him.

Are the articles defamatory?

(a) The pleadings

[36] Pleadings in defamation proceedings retain a more formal character than generally applies in other civil proceedings. A Statement of Claim in defamation must allege that the defendant published the words complained of or caused them to be published, the words referred to the plaintiff (by reference to primary facts if an inference is required) and indicate the circumstances in which words were published; such as the date, place and medium of publication.

[37] If a claim were based on legal innuendo (namely, a meaning depending upon knowledge of extrinsic facts), the plaintiff may be required to identify those among the persons to whom publication was made who knew the relevant facts.

[38] Each publication of a defamatory statement constitutes a separate cause of action, and the plaintiff must state what damages are claimed in respect of each cause of action.[14]

[39] Similarly, a Statement of Defence must plead explicitly any affirmative defence. When "truth" is the basis of a defence, it is necessary to make clear what is said to be true, so that the plaintiff knows what case he or she has to meet. Where a defendant raises an imputation of misconduct against a plaintiff, the plaintiff ought to be able to go to trial with knowledge of the acts which are alleged and on which the defendant intends to rely to justify the imputation.[15] Similarly, where defences of honest opinion and/or qualified privilege are raised, sufficient particulars must be

---

14 Laws NZ, *Defamation* (online ed) at para 156.
15 Ibid at paras 169 and 170.

given to inform the plaintiff of the basis on which the opinion is based, or the circumstances which give rise to a privileged occasion.[16]

[40] Before Mr Yoo became unrepresented, his Amended Statement of Defence pleaded that the ordinary and natural meanings of the published articles were "reports of truth on a subject of public interest", "fair and accurate reports of statements made in courts", "honestly held opinion or comment based on true facts", and "publications made in good faith for the public good". While the English translations of the pleaded portions of the articles were admitted, the alleged defamatory meanings were denied.

[41] As Mr Kohler submitted in closing, there was no positive pleading of the defences of truth[17] or honest opinion.[18] No issue of qualified privilege was raised in Mr Yoo's pleading. However, there are comments in decisions of the Privy Council and Court of Appeal that are relevant to Mr Yoo's purported "defence" of media responsibility to publish.[19]

[42] While I might be entitled to put to one side issues of truth, honest opinion, and qualified privilege, given the absence of a proper pleading, I consider the preferable approach is to ascertain whether those defences are made out. That approach has the advantage of ensuring that any award of damages made in favour of Mr Lee is not based on allegations of defamatory statements to which Mr Yoo could properly have raised the defences of truth and honest opinion.

(b) The alleged defamatory words and potential defences

[43] The purpose of defamation proceedings is to vindicate the reputation of the person allegedly defamed. Therefore, it must be proved that the statements of which complaint is made are defamatory of the plaintiff.

---

16 Ibid at paras 171-173.

17 Defamation Act 1992, ss 8 and 38; see also *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC).

18 Ibid, ss 9-12.

19 For "qualified privilege" see Defamation Act 1992, ss 16-19; see also *Lange v Atkinson* [2000] 1 NZLR 257 (PC) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

[44] A defamatory statement is one which tends to lower a person in the estimation of right thinking members of society generally,[20] or to cause him or her to be shunned, avoided[21] or exposed to hatred, contempt or ridicule.[22] A false statement about a person to his or her discredit will be regarded as defamatory.[23]

[45] The articles allege (in general terms) that Mr Lee was arrested, tried and convicted of criminal offences, was involved in dishonest and fraudulent practices (including bribery of public officials) and had acted unethically or immorally.[24] I am satisfied that the natural and ordinary meaning of the words used in the articles[25] supports those assertions. The words used would naturally convey to people within the Korean community that Mr Lee has acted in a way that brings him into disrepute in the eyes of right-thinking members of that community. Unless an available defence is established, Mr Lee has a right to seek damages against those legally responsible for publication of the articles.

[46] The defence of "truth" is set out in s 8 of the Defamation Act 1992 (the Act). "Truth" is the new name for the former defence of "justification".[26] The onus of proving truth lies on a defendant. Section 8(3) of the Act provides:

> **8 Truth**
>
> ...
>
> (3) In proceedings for defamation, a defence of truth shall succeed if—
>
> (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

---

20 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.
21 *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) at 587.
22 *Parmiter v Coupland* (1840) 151 ER 340 (Exch. Of Pleas).
23 *Scott v Sampson* (1882) 8 QBD 491 at 503.
24 See para [29] above.
25 On the basis of the agreed translation from Korean into English.
26 Defamation Act 1992, s 8(1).

[47] Mr Yoo was asked specifically in evidence whether he contended that the allegations made in the articles were true. While evading that direct question, I understood Mr Yoo to say that he had no reason to question the correctness of the allegations made against Mr Lee, as conveyed to him by his informants. In those circumstances, the defence of truth cannot be made out because Mr Yoo has not proved the imputations contained in the articles were true or not materially different from the truth.[27] Indeed, as a matter of fact, I find the meanings alleged[28] to be false.

[48] "Honest opinion" equates to the former defence of "fair comment".[29] In general terms, as long as an opinion is honestly held and the facts on which reliance is placed are correct, a publisher will have a good defence to a defamation action.[30] The onus of proving that an opinion is genuine lies on a defendant. Section 10 of the Act provides:

> **10 Opinion must be genuine**
>
> (1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.
>
> (2) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless,—
>
> (a) Where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that—
>
> (i) The opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and
>
> (ii) The defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion:

---

27 Ibid, s 8(3).
28 See para [29] above.
29 Defamation Act 1992, s 9.
30 Todd and Ors (eds) *The Law of Torts in New Zealand* (5th ed Brookers, Wellington, 2009) at para [16.8.01].

(b) Where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—

(i) The opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and

(ii) The defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

(3) A defence of honest opinion shall not fail because the defendant was motivated by malice.

[49] In terms of s 10(1), I shall assume, in Mr Yoo's favour, that opinions expressed in the articles were genuinely held. However, that does not resolve the issue in Mr Yoo's favour. Mr Yoo has an obligation to identify true facts on which his genuine opinion was based. This is because the defence of honest opinion does not protect defendants who comment on things that never happened or on an incorrect version of events.

[50] The defence of "fair comment" turned on whether the comment was one that a person could honestly make on the facts proved, however prejudiced or obstinate that person might be.[31] However, the defence was restricted to expression of opinion, not to assertions of fact.[32] The pleading requirement for a defendant to point to the facts on which an opinion is based enables a plaintiff to understand the factual premise on which the opinion is offered. The law requires those facts to have been in existence at the time that the opinion was given.[33]

[51] The critical distinction between the defence of truth and fair comment lies in the separation of opinion from fact. As the underlying facts were not true, there is no basis on which Mr Yoo can have expressed an honest opinion, for the purposes of establishing a defence to the defamation proceeding. This defence would also fail.

---

31 Laws NZ, *Defamation* (online ed) at para [133]. See also *Truth (NZ) Ltd v Avery* [1959] NZLR 274 (SC and CA) at 278, *News Media Ownership v Finlay* [1970] NZLR 1089 (CA) at 1096-1098, and *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109 (PC).

32 Laws NZ, *Defamation* (online ed) at para [134] and *Truth (NZ) Ltd v Avery* [1959] NZLR 274 (SC and CA).

(c) Qualified privilege

[52] The Act sets out the types of publications protected by qualified privilege. Among those are a "fair and accurate report of the proceedings of a Court outside New Zealand ... or of the result of those proceedings"[34] and a "copy or a fair and accurate report or summary of a statement, notice, or other matter issued for the information of the public by or on behalf of the Government or any department or departmental officer, or any local authority or officer of the authority".[35] The term "Government" includes one in relation to a territory outside New Zealand.[36]

[53] In recent times, attempts have also been made to equate the defence of qualified privilege to a more general (non-statutory) defence of "political expression".[37] That idea was discussed in the *Lange v Atkinson* litigation.[38] In the High Court, Elias J dismissed an application to strike out the plea as disclosing no defence known to the law. The Court of Appeal upheld that decision. The Privy Council remitted the issue to the Court of Appeal, having regard to what had been said in speeches given in the House of Lords, in *Reynolds v Times Newspapers Limited.*[39] *Reynolds* was decided by the same panel of Law Lords who had heard *Lange v Atkinson.*[40] The reason for remission of the issue to the Court of Appeal was the need for the Court of Appeal to consider the approach it wished to take to New Zealand law, having regard to any differences "in details of their constitutional structure and relevant statute law" from the United Kingdom.[41] Ultimately, the Court of Appeal adhered to its earlier decision not to strike out the defence of "political expression", though they tied it to the defence of qualified privilege. In doing so, the Court highlighted the importance of keeping "conceptually separate the

---

33 Ibid, para [135]. See also, *Wilson v Manawatu Daily Times Ltd* [1957] NZLR 735 (SC), and *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407 (CA).

34 Defamation Act 1992, First Schedule, Part II, cl 2.

35 Ibid, cl 15.

36 Ibid, Part III, definition of "Government".

37 *Lange v Atkinson* [1997] 2 NZLR 22 (HC), [1998] 3 NZLR 424 (CA), [2000] 1 NZLR 257 (PC) and [2000] 3 NZLR 385 (CA).

38 Ibid.

39 *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 (HL). The speeches were delivered on the same day as the Privy Council gave its advice in *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

40 Lord Nicholls of Birkenhead, Lord Steyn, Lord Cooke of Thorndon, Lord Hope of Craighead, and Lord Hobhouse of Woodborough.

41 *Lange v Atkinson* [2000] 1 NZLR 257 (PC) at 263-264.

questions whether the occasion [was] privileged and, if so, whether the occasion [had] been misused".[42]

[54] Assuming that reports of Court proceedings in Fiji and communications from Government officials attract an occasion of "qualified privilege",[43] s 19 allows the defence to be rebutted:

> **19 Rebuttal of qualified privilege**
>
> (1) 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.
>
> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[55] There are a number of problems which confront the defendants under s 19. The tenor of the articles suggests a deliberate (if misguided) attempt to destroy Mr Lee's character, in the eyes of those in the Korean community in New Zealand. The fact that Mr Yoo took no real steps to obtain Mr Lee's comment on the articles before they were published[44] and evidenced a willingness to rely on informants (without taking any steps to verify what they were saying) militates against availability of the defence.

[56] In the context of the qualified privilege defence, particulars of ill-will will generally be given, though the plaintiff cannot be criticised for not doing so, given that the defence was not raised explicitly. But the type of particulars required by s 41 of the Act would include the failure to take reasonable steps to verify information provided, especially when opinions were expressed on that factual foundation.[45]

[57] Any defence based on the need for the Fourth Estate to publish information of public interest about a person well known in the community is lost if allegations

---

42 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at para [5].

43 Defamation Act 1992, s 16 and the First Schedule to the Act.

44 Mr Yoo's evidence was that he attempted to telephone Mr Lee once, before the initial article was published. Having received no reply to his call, he did not leave any message or attempt to contact Mr Lee before later articles were published.

45 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at paras [39], [42] and [43].

are made in circumstances where a publisher or other person responsible for publication of the material "is reckless or indifferent to the truth of what is published".[46] In my judgment, Mr Yoo was (at least) "indifferent to the truth of what" was published. Examples of his indifference are his limited attempt to contact Mr Lee before the initial article was published[47] and a failure to check the veracity of information received through Government authorities in Fiji.

[58] On that basis, I hold that neither The New Korea Herald Ltd nor Mr Yoo have any defence to Mr Lee's claims in defamation. Mr Kim's position falls to be determined separately.

(c) Is Mr Kim liable for the defamatory statements?

[59] The fundamental principle is that a report in a newspaper of a defamatory statement will render the newspaper proprietor liable for defamation.[48] The person who writes the material will be taken, in the absence of evidence to the contrary, to understand what has been written and will be liable if it were proved that he or she caused it to be published.[49] If a newspaper proprietor and an editor are sued in respect of a defamatory article, they are both liable.[50]

[60] If it were shown that a person associated with the corporate newspaper proprietor (such as a director) did not know that the article was likely to contain defamatory material, he or she may escape liability; provided that the absence of knowledge was not attributable to negligence. Section 21 of the Act provides:

> **21 Innocent dissemination**
>
> In any proceedings for defamation against any person who has published the matter that is the subject of the proceedings solely in the capacity of, or as the employee or agent of, a processor or a distributor, it is a defence if that person alleges and proves—
>
> (a) That that person did not know that the matter contained the material that is alleged to be defamatory; and

---

46 Ibid at para [43].
47 See fn 44 above.
48 Laws NZ, *Defamation* (online ed) at para 36.
49 Ibid, at paras 63 and 64.
50 Ibid at para [65].

(b) That that person did not know that the matter was of a character likely to contain material of a defamatory nature; and

(c) That that person's lack of knowledge was not due to any negligence on that person's part.

[61] Mr Kim is a director of The New Korea Herald Ltd. On Mr Yoo's evidence, he is a benefactor who does not take any active role in its operation. Nor does he exercise oversight in relation to articles published. Mr Yoo adduced no independent evidence of the role actually played by Mr Kim in relation to the articles in issue. On the evidence given before me, it is much more likely than not that the content would have been drawn to Mr Kim's attention (at the latest) after the first article was published on 7 March 2008.

[62] The onus of establishing the defence of innocent dissemination lies on the person who raises it in the proceeding. Mr Kim has taken no steps and, therefore, has brought no evidence to establish innocent dissemination. Therefore, that defence cannot apply.

[63] That leaves the question whether Mr Kim is sufficiently linked to the defamatory articles to be held liable along with The New Korea Herald Ltd and Mr Yoo.

[64] The principle on which Mr Kohler relies to sheet home liability to Mr Kim is that "no tortfeasor can excuse himself from the consequences of his acts by setting up that he was acting only as the agent of another".[51] However, *Gatley on Libel and Slander*[52] suggests three exceptions to that general rule exist.

[65] One of the exceptions is that a person who is not the author, editor or commercial publisher of defamatory material but who has done some subordinate act contributing to publication, with no reason to know that he was contributing to a defamatory publication, and who had taken reasonable care, may have a defence.

---

51 *Vacher v London Society of Compositors* [1913] AC 107 (HL) at 131, as applied in *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 483 (HC).

52 Patrick Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, 2008) at [8.34], fn 242. See also [29.31].

[66] In New Zealand, The Rt Hon Sir Ian McKay has suggested the proposition that every "person who participates in the publication may be liable as a publisher".[53] The question is whether Mr Kim should be regarded as a person sufficiently connected with the participation in the publication to be liable as a publisher. I must determine that question based on the limited evidence before me, while applying the well known principle that the onus of raising an evidential foundation for a defence in respect of matters within the exclusive knowledge of a defendant lies on the defendant.[54]

[67] In my view, it is probable that a director of the publishing company would have knowledge of the articles of which complaint was made, particularly in circumstances where serious allegations were made by the editor against a well-known member of the Korean community in New Zealand. There is no evidence from Mr Kim to suggest any factual basis for a finding that he did not know of the intended publication or took steps to prevent its publication; or, at least, to initiate further inquiries. Even if Mr Kim were given the benefit of the doubt in respect of the first publication, one would expect him to have been aware of what had been published on that occasion and to be put on notice of the potential for an action against the publisher for defamation.

[68] I am satisfied on a balance of probabilities that Mr Kim is sufficiently connected to the publication to justify a claim against him. That leaves any question of liability as between himself and Mr Yoo to be determined by reference to a claim for contribution, as between joint tortfeasors.[55]

Damages

[69] Damages for defamation are usually compensatory in nature, but in exceptional cases an award of punitive damages may be made. The relevant law on assessment of the quantum of damages in a defamation case is set out in *Television*

---

53 Laws NZ, *Defamation* (online ed) at para 30, in reliance on *R v Paine* (1696) 5 Mod 163 at 167; 87 ER 84.

54 For example, *Ma v Ming Shan Holdings Ltd* [2010] NZCA 325 at para [25].

New Zealand Ltd v Quinn.[56] In *Quinn*, the Court of Appeal considered the appropriate approach to be taken by a trial Judge in directing a jury on the assessment of damages. In that case, a jury had awarded compensatory damages of $400,000 and exemplary damages of $1,100,000 in favour of Mr Quinn. The Judge had set aside the exemplary damages award but the Court of Appeal upheld the compensatory damages.

[70] The importance of *Quinn* lies in the breadth of the jurisdiction to award damages and to fix the amount payable. While, in considering directions that a Judge ought to give to a jury, the Court of Appeal held there was no problem in making suggestions for the jury's consideration or adding that an "undoubtedly excessive (or inadequate) award [was] likely to lead to further proceedings ...", none of the Judges considered there was any "pressing need" for a "radical" new approach to quantum directions.[57]

[71] Lord Cooke of Thorndon began his analysis with the proposition that assessment of damages for defamation was treated very much as a jury question but a more "interventionist role" was required as a result of awards of damages which could be regarded as "wildly disproportionate to any damage conceivably suffered by the plaintiff".[58] In circumstances where exemplary damages were sought, Lord Cooke indicated that it should be made clear to a jury that it must be satisfied that the publisher had no genuine belief in the truth of what was published before making an award of that type.

[72] Mr Kohler referred me to comparable cases.[59] But, in the end, quantum is for me to decide, as if a jury question, having proper regard to the desirability of consistency of approach.

---

55 Patrick Milmo and WVH Rogers (eds) *Gatley on Libel & Slander* (11th ed, Sweet & Maxwell, 2008) at [8.34] and [29.31]. See also, Laws NZ, *Defamation* (online ed) at para 36 and Law Reform Act 1936, s 17(1)(c) and (2).

56 *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA).

57 Ibid, at 36-37 (Lord Cooke of Thorndon), 40 (Sir Ivor Richardson and Gault J), 46 (McKay J) and 74 (McGechan J).

58 Ibid, at 33, citing a judgment of the Court of Appeal in *John v MGN Ltd* [1996] 2 All ER 35 (CA) in which the Court of Appeal set aside a jury award against the *Sunday Mirror* of £75,000 compensatory damages and £275,000 exemplary damages for an untrue story that Elton John suffered from a form of bulimia.

59 See fn 13 above.

[73] There are a number of factors that justify a significant award of damages in favour of Mr Lee. First, the allegations were serious and ungrounded in fact. Second, there were multiple articles which escalated in their attempts to destroy Mr Lee's character. Third, the publication was made to persons within the relatively small Korean community in New Zealand. Fourth, Mr Lee is now aged 73 years and, as a result of the defamatory publications, has had a reputation built over decades put at risk of being improperly destroyed. Fifth, Mr Yoo has declined to apologise or to remove offending material from the newspaper's website.

[74] In mitigation of any award, I take account of the nature of the criticisms made against Mr Lee in Jiten Singh J's judgment in the Suva proceedings, the need for some allowance for the possibility that the potency of the articles appear more serious in English than it was in Korean and the genuine (if misguided) views held by Mr Yoo about what was published.

[75] Balancing those factors as best I can, I conclude that an award of damages of $250,000 is appropriate. That award will be compensatory in nature only. I have taken into account the various mitigating factors to which I have referred in reaching that conclusion. This is not a case in which, on the authorities, an award of exemplary damages is required.[60]

Injunction

[76] As I have found that the articles were untrue, it is necessary for a permanent injunction to issue requiring The New Korea Herald Ltd and Mr Yoo to remove, immediately, the articles from The New Korea Herald Ltd website, as well as any links to those articles. I make it clear that the injunction relates not only to present articles but also archival material that may be accessed through hyperlinks from the website.

---

[60] *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 36-37, per Lord Cooke of Thorndon.

Costs

[77] Mr Lee is entitled to costs. By a fine margin, I conclude that increased, rather than indemnity costs, are justified.[61] The defendants marginally escape indemnity costs because I conclude that Mr Yoo's conduct should be characterised as very unreasonable rather than vindictive.

Result

[78] For the reasons given:

a) I make an award of damages against The New Korea Herald Ltd, Mr Yoo and Mr Kim (jointly and severally) in the sum of $250,000.

b) I issue a permanent injunction in the terms set out in para [76] above.

c) Costs are awarded on a 2B basis, with an uplift of 50%, together with reasonable disbursements, in favour of Mr Lee. Costs and disbursement are to be fixed by the Registrar. They are awarded on a joint and several basis, as among all three defendants.

P R Heath J

Delivered at 9.15am on 9 November 2010

[61] For a discussion of relevant principles see *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA) at paras [6], [7], [24]-[27]. See also r 14.6(3) and 14.6(4) High Court Rules.