

BETWEEN YOUNG KWAN KIM
 Appellant

AND JUNG NAM LEE
 Respondent

Court: Arnold, Stevens and Wild JJ

Counsel: M Ryan and S J Corlett for Appellant
 G J Kohler for Respondent

Judgment: 3 June 2011 at 3:00 PM

JUDGMENT OF THE COURT

The application for an extension of time within which to appeal is granted.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] This is an application for an extension of time within which to file an appeal, which is opposed by the respondent, Mr Lee.

Background

[2] The background is that the applicant, Mr Kim, donated some \$50,000 to help establish a Korean language newspaper in New Zealand. Mr Yoo was the editor of the newspaper, the New Korean Herald, and a director of the company which

published it, The New Korea Herald Ltd (the company). In recognition of his donation, Mr Yoo gave Mr Kim a shareholding in the company and made him a director. Mr Kim says that he took no part in the operations of the company (including the publication of the newspaper).

[3] The newspaper published a number of stories about Mr Lee. He considered that these stories were defamatory and issued proceedings against the company, Mr Yoo and Mr Kim. These proceedings were served on Mr Kim on 11 September 2008.

[4] Mr Yoo arranged for a firm of solicitors, Kenton Chambers Lawyers, to act for all three defendants in the litigation. Mr Kim signed a document addressed to the firm, dated 29 September 2008, in which he acknowledged and declared that:

- (a) I am not personally involved in the operation of The New Korea Herald Limited and the publication of the New Korea Herald (“The Korea Herald”);
- (b) I am not personally involved in the preparation of articles, publication or distribution of the Korea Herald;
- ...
- (g) I hereby delegate my full authority in relation to the defending of the Case for myself as the Third Defendant and for The New Korea Herald Limited as the first defendant to [Mr Yoo], co-director of The New Korea Herald Limited;
- (h) I understand that [Mr Yoo] on behalf of himself and The New Korea Herald Limited have decided to use Kenton Chambers Lawyers as the counsel in defending the case for the three defendants;
- ...

[5] That same day Mr Kim had a telephone conversation with a solicitor from Kenton Chambers Lawyers. The lawyer told Mr Kim about an upcoming telephone conference in relation to the proceedings and said that the firm would update him constantly on the progress of the proceedings. This is confirmed in a contemporaneous file note made by the solicitor. Mr Kim says that he heard nothing further from Kenton Chambers Lawyers about the litigation until he learnt of the judgment which he now wishes to appeal. He says that he did not attempt to follow

up with the firm because his son, who is a lawyer in the United States of America, told him that litigation often takes a long time.

[6] The trial was due to commence on 29 June 2010. On 28 June 2010 Mr Yoo filed a document entitled “Notice of Change of Representation and Change of Address for Service” under r 5.40 of the High Court Rules (the Rules). It read:

This document notifies you that –

1. The Defendants whom a solicitor, Kenton Chambers Lawyers, has previously acted wishes to act in person.
2. The Defendants now intends to act in person.
3. The address for service is PO Box 105922, Auckland City, Auckland.
4. The application is made in reliance on:
 - (a) Rules 5.40 of the High Court Rules;

SIGNED:

Jong Ok YOO
Defendants

[7] Mr Yoo also filed a supporting affidavit. In it he said that he was the second defendant in the proceeding, a director of the first defendant and was representing Mr Kim in the proceeding. He gave a new address for service and said that he had served the affidavit on Mr Kohler, counsel for the plaintiff.

[8] Mr Park from Kenton Chambers Lawyers filed a memorandum dated 28 June 2010, which read as follows:

The Former Counsel for the Defendant advise as follows:

1. The Counsel does not represent the Defendant for this proceeding any more.
2. The Defendant will uplift all the relevant documents from the Counsel and the defendant advises that they will represent by themselves in this proceeding.
3. The defendant advises that they will appear on 10am 29 June 2010.

[9] In the judgment which Mr Kim wishes to appeal, Heath J records the position at the hearing as follows:¹

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.

[10] Heath J found that the material complained of was defamatory and that neither the company nor Mr Yoo had any defence to Mr Lee's claims. He then considered Mr Kim's position. He noted, by reference to s 21 of the Defamation Act 1992, that a person in Mr Kim's position could escape liability for defamation by showing that he or she did not know that an article was likely to contain defamatory material, provided that the absence of knowledge was not attributable to negligence. Of that he said:

[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.

[11] The Judge then considered whether Mr Kim should be regarded as a person who had participated in the publication of the defamatory material. The Judge said:

[66] ... 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.

[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

¹ *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 at [4].

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.

(Footnotes omitted.)

[12] The Judge awarded damages of \$250,000 against the company, Mr Yoo and Mr Kim (jointly and severally).

[13] Mr Kim says that he did not find out about the trial or the decision until around 23 December 2010 when a friend showed him a pamphlet that was circulating within the Korean community. It referred to the High Court's judgment and the fact that damages had been awarded against the defendants, including Mr Kim. Mr Kim deposes that he was "completely shocked" by this news.

[14] Mr Kim attempted to contact Mr Yoo to discuss the matter. He did eventually speak to him in mid-January 2011. Shortly after he received a letter of demand from Mr Lee's lawyers. Mr Kim then instructed Brookfields Lawyers, which led to the filing of the present application for an extension of time to appeal on 14 February 2011.

[15] Although Mr Lee opposes the present application, he did consent to an application to extend time filed by Mr Yoo, who also wishes to appeal Heath J's judgment. Mr Kohler said that the reason for this was that Mr Yoo's delay was the result of his solicitor's inadvertent failure to comply with the dates for filing and service whereas Mr Kim's failure resulted from the fact that he had simply left the defence of the proceedings to Mr Yoo and Kenton Chambers Lawyers and taken no active part.

Analysis

[16] We do not propose to address the arguments advanced by the parties in their written submissions in any detail. This is because a point emerged at the hearing which we consider to be determinative. Because the point emerged only during the course of argument, we allowed Mr Kohler time to file further submissions, which he has done.

[17] As we have said, Mr Park of Kenton Chambers Lawyers was solicitor on the record for the company, Mr Yoo and Mr Kim. However, Mr Park effectively withdrew immediately before the hearing. The difficulty is that his withdrawal as solicitor on the record for Mr Kim does not seem to have been in accordance with the Rules.

[18] Rule 5.41 recognises three mechanisms by which a party's solicitor on the record may be removed from the record:

- (a) First, the solicitor may apply, by way of interlocutory application, to the court for an order declaring that he or she has ceased to be the solicitor on the record for the party. Such an application must be supported by an affidavit giving the grounds of the application and copies of the notice of application and supporting affidavit must be served on the party for whom the solicitor acted. If the court makes an order, the solicitor must serve a copy of it on the parties to the proceeding and file an affidavit of service. Until this is done, the solicitor remains the solicitor on the record.
- (b) Second, the relevant party may effect a change of solicitor in accordance with r 5.40 (which was the rule referred to in Mr Yoo's notice).² That rule essentially requires a party wishing to change his or her representation to advise the court, any other parties and the previous solicitor. Details of who is now acting and of any new address for service must be given.

² See [6] above.

- (c) Third, the relevant party may file a notice that he or she intends to act in person. The notice must give a new address for service. A copy of this must be served on the solicitor on the record and all other parties to the proceeding who have given addresses for service. The party must file an affidavit of service attaching a copy of the notice served.

[19] As will be apparent from the earlier narrative, Mr Park did not withdraw consistently with the procedure described in [18](a) above. Rather, the apparent intention was that the process be effected through one or both of the mechanisms referred in [18](b) and (c) above. But neither of those mechanisms was effective in relation to Mr Kim's position as third defendant. Mr Yoo could deal with his own representation through either mechanism, thus relieving Mr Park from being solicitor on the record as far as he (Mr Yoo) was concerned. But Mr Yoo could not utilise those mechanisms to deal with Mr Kim's representation, much less himself represent Mr Kim in the proceedings, as he indicated he proposed to do in his affidavit. In the circumstances, if Mr Park wished to withdraw as solicitor on the record in respect of Mr Kim, he should have followed the procedure discussed in [18](a). Failing that, in terms of the Rules he remained as solicitor on the record for Mr Kim.

[20] Heath J treated Mr Kim as having entered no appearance at the hearing, so that the case against him was simply a matter of formal proof. Further, despite Mr Yoo's evidence that Mr Kim had no involvement with the company or the newspaper, the Judge found that Mr Kim had not raised a sufficient evidentiary basis to avail himself of possible defences based on such non-involvement.

[21] In his further submissions, Mr Kohler drew our attention to three Minutes which the Judge issued in the course of the hearing. In the first, Heath J described what had occurred on the first morning of the hearing. He said that Mr Kim had elected not to attend the proceeding and that he could not be represented other than by a lawyer (that is, Mr Yoo could not represent him).³ In Minute 3 issued on the second (and final) day of the hearing, Heath J said:⁴

³ *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 29 June 2010 at [3].

⁴ *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 30 June 2010 at [4].

While I have declined leave for Mr Yoo to appear and present cases on behalf of either The New Korea Herald Ltd or Mr Kim ..., the reality is that the same issues arise in each case, save for an issue relating to the precise role of Mr Kim which will likely turn on whether evidence called on behalf of the plaintiff is sufficient to make him liable for any defamatory publications I might find have occurred.

[22] Against this background, it is strongly arguable that Mr Kim has suffered a serious injustice. He understood that he was being represented in the proceedings by Kenton Chambers Lawyers, who took instructions from Mr Yoo. He also understood that he would be kept informed of developments with the litigation, as is confirmed by the lawyer's contemporaneous file note.⁵ Mr Kim was neither kept informed, nor was he represented at trial. Although the question of his involvement in the company and its operations had been put in issue prior to trial,⁶ he had no opportunity at trial to address matters relevant to potential defences based on his non-involvement. As it turned out this was critical, given the basis of the Judge's findings against him.⁷

[23] When Mr Kim found out what had occurred, he acted reasonably promptly to retain legal advisers and to institute steps to appeal. In these circumstances, we consider that he must be granted an extension of time to appeal. We do not accept Mr Kohler's submission that the proper course is that we decline Mr Kim's application and leave him to whatever remedies he may have against Kenton Chambers Lawyers or Mr Yoo. The provisions of the Rules were not complied with in an important respect and Mr Kim has suffered a material disadvantage as a consequence. The Judge proceeded on the basis that Mr Kim had made a deliberate decision not to attend or participate in the hearing, either in person or through counsel. Mr Kim has now deposed that that was not the position.

[24] We wish to emphasise that we intend no criticism of Heath J in anything we have said. He was faced on the morning of trial with a most unsatisfactory situation, namely, the withdrawal of counsel. He did not receive the assistance from counsel

⁵ See [5] above.

⁶ It is clear from his affidavit of 24 February 2011 that Mr Lee understood that Mr Kim had raised the question of his involvement in the pleadings.

⁷ See the extracts quoted at [10]–[11] above.

that he was entitled to expect in terms of the application of the Rules. That said, we acknowledge that Mr Park did remain in court to assist Mr Yoo.

Decision

[25] For these reasons, we grant the application for an extension of time to file an appeal. We reserve the question of costs on this application.

Suggestion as to the way forward

[26] In the unusual circumstances of this case, we propose to make a suggestion as to the way forward. We emphasise that it is no more than a suggestion and is in no way binding on the parties. We make it on the basis of the material before us, which is, we acknowledge, untested and may be incomplete.

[27] We consider that Mr Kim has a strong argument that the hearing before Heath J miscarried as far as he was concerned. This is for the reasons already given, which meant that Mr Kim did not have an opportunity to address his particular position by leading further evidence to support Mr Yoo's evidence that he was not involved in the operations of the newspaper or the publication of the defamatory material. We think he should be given that opportunity.

[28] That could be achieved if the matter were referred back to the High Court for determination of Mr Kim's non-involvement defence (as a separate question) in light of whatever further evidence he might advance.⁸ Depending on the outcome of that hearing, Mr Kim or Mr Lee may wish to appeal. Any such appeal could be dealt with in conjunction with Mr Yoo's appeal, which would mean that all matters could be addressed together. Before the matter could be referred back to the High Court, however, both parties would have to agree that that course was appropriate. In effect, the appeal would have to be allowed, and relief granted, by consent.

⁸ We note that this Court would face real difficulties in dealing with this matter on appeal without a prior determination of the High Court.

[29] We reiterate that this is simply a suggestion. The parties are free to accept, modify or reject it. If the appeal in respect of which we have granted an extension of time does proceed to a hearing, none of the present coram will sit on it.

Solicitors:
Brookfields Lawyers, Auckland for Appellant
Byoung Kook Ahn, Auckland for Respondent