IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-5072

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

Hearing: 2 November 2011

Counsel: M Ryan and S J Corlett for Third Defendant
G J Kohler for Plaintiff
No appearance by, or on behalf of other Defendants

Judgment: 9 November 2011

JUDGMENT (NO. 2) OF HEATH J

This judgment was delivered by me on 9 November 2011 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Brookfields, PO Box 240, Auckland
Byoung Kook Ahn, PO Box 5043, Auckland
Counsel:
G J Kohler, PO Box 4338, Auckland

The application

[1] Mr Kim applies for a "rehearing of non involvement defence", arising out of a defamation proceeding on which I gave judgment for the plaintiff, Mr Lee.[1] The application is opposed by Mr Lee, on both jurisdictional and substantive grounds.

Background

[2] Between 7 March 2008 and 2 May 2008, a number of articles appeared in *The New Korea Herald*. They suggested that Mr Lee, a prominent businessman within the Korean community, had engaged in corrupt, dishonest and immoral practices. The newspaper is published by The New Korea Herald Ltd and is freely available to members of the Korean community within New Zealand. Printed in the Korean language, it has a circulation of about 3,000 people. The directors of the company were, at material times, Mr Yoo and Mr Kim. Mr Yoo had editorial responsibility for the relevant articles.

[3] Mr Lee sued The New Korea Herald Ltd, Mr Yoo and Mr Kim for defamation. The proceeding was heard on 29 and 30 June 2010. I gave leave for Mr Kim's solicitors to withdraw. Mr Yoo represented himself. No appearance was entered for the company.

[4] In a judgment given on 9 November 2010, I found in favour of Mr Lee and awarded damages of $250,000 against all three defendants, on a joint and several basis. I also issued an interim injunction requiring the articles to be removed from the newspaper's website, to prevent further publication of the defamatory material.[2]

[5] Mr Kim's explanation for not having participated is recorded in a document that he provided to his solicitors. Following service of the Statement of Claim on Mr Kim, on 11 August 2008,[3] Mr Yoo arranged for a firm of solicitors, Kenton

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[1] *Lee v The New Korea Herald Ltd* HC Auckland CIV 2008-404-5072, 9 November 2010.
[2] Ibid, at paras [76] and [78].
[3] This is the date I have been given in a chronology of events prepared by Mr Kohler, though I note that in a judgment delivered on 3 June 2011, the Court of Appeal records the date of service as 11

Chambers Lawyers, to act for all three defendants. On 29 September 2008, Mr Kim signed a document addressed to that firm in which he stated:

> (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");
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> (b) I am not personally involved in the preparation of articles, publication or distribution of the Korea Herald;
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> ...
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> (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;
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> (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;

[6] While not relevant to the present application, I observe that the acknowledgements contained in Mr Kim's document of 29 September 2008 are expressed in the present tense. In relation to the first two points, it is unclear whether Mr Kim was acknowledging that, *at the time the document was signed*, he was no longer personally involved with the newspaper, or whether he intended to convey that he had never had such an involvement.

[7] Although Mr Kim did not participate in the hearing in this Court, his rights of appeal remained. Mr Kim did not file an appeal within the requisite time. He says that he did not become aware of the judgment until about 23 December 2010 when an associate from the Korean community in Christchurch drew it to his attention. Mr Kim states that he was "shocked" to receive that information (which came from a pamphlet that had been distributed to members of the Korean community in Auckland), as he had never been told of the date of a trial or the fact that judgment had been given.

[8] In an affidavit in support of his application for rehearing, Mr Kim deposed that he first learnt of the articles in issue after being made aware of my judgment, around Christmas 2010. As copies of the seven articles (in both the Korean and

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September 2008: *Kim v Lee* [2011] NZCA 256 at para [3]. Nothing turns on the precise date.

English languages) were attached to the Statement of Claim served on Mr Kim,[4] I must infer from that evidence that when Mr Kim was served, he chose not to read the documents fully.

[9] In mid January 2011, Mr Kim contacted Mr Yoo. Mr Yoo told him that he was taking steps to appeal the judgment, through new lawyers. After Mr Kim received a letter of demand from the solicitors for Mr Lee, dated 25 January 2011, he contacted Mr Yoo again. Mr Yoo advised that he had instructed another firm to pursue his appeal.

[10] Mr Lee agreed to Mr Yoo filing an appeal out of time. However, I have been told that Mr Yoo's appeal is now deemed to be abandoned for failure to pay security for costs in time.

[11] Mr Kim instructed the same firm of solicitors. An application to extend the time to appeal was made. Following a hearing, the Court of Appeal gave judgment on Mr Kim's application, on 3 June 2011.[5] An extension of time to appeal was granted. The Court was influenced by a point that had emerged during argument, to the effect that withdrawal of the solicitors for Mr Kim had not been effected in accordance with r 5.41 of the High Court Rules. That meant that Mr Kim personally had not been given notice of the intended withdrawal.[6]

[12] The Court of Appeal considered it was "strongly arguable that Mr Kim [had] suffered a serious injustice".[7] Arnold J, for the Court, continued:

> [22] ... [Mr Kim] 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. 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, 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.

[4] On either 11 August or 12 September 2008: see para [5] above and n 3 above.
[5] *Kim v Lee* [2011] NZCA 256.
[6] Ibid, at paras [16]–[19].
[7] Ibid, at para [22].

> [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 [High Court] 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.
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> [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 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. (footnotes omitted)

[13] In the "unusual circumstances" of the case the Court of Appeal made "a suggestion as to the way forward".[8] It emphasised that it was "no more than a suggestion" and was not binding on the parties. The Court said:

> [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.
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> [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. 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*.
>
> [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. (footnote omitted; my emphasis)

[14] The Court added that it "would face real difficulties in dealing with [the appeal] without prior determination of the High Court".[9]

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[8] Ibid, at para [26].
[9] Ibid, at n 8.

[15] Once the Court of Appeal gave an extension of time for an appeal to be filed, it was necessary for the appeal to be filed within 20 working days of the judgment of 3 June 2011.[10] That period expired on 4 July 2011. No notice of appeal was lodged within that time. By application dated 3 October 2011, Mr Kim has sought a further extension of time from the Court of Appeal. That application has been made on the basis that his "non-involvement defence" is the subject of the present application and that, if granted, it will be unnecessary for Mr Kim to pursue his appeal. While counsel for Mr Kim indicated a possible difficulty with the date, the Court of Appeal has allocated 29 November 2011 for that application to be heard.

[16] Although it appears that some without prejudice communications may have passed between the solicitors in the meantime, the first occasion on which the solicitors for Mr Kim wrote to Mr Lee's advisers to request consent to a rehearing of the non-involvement defence was 14 July 2011, 10 days after expiration of the extended period. That request was rejected. In a letter dated 3 August 2011, Mr Lee's solicitors expressed a preference to have both Mr Yoo's and Mr Kim's appeal determined at the same time in the Court of Appeal. As a result of Mr Lee's rejection of Mr Kim's proposal, the present application was filed on 12 August 2011.

Competing contentions

[17] Mr Ryan, for Mr Kim, submits that I have power to order a "rehearing", under the inherent jurisdiction of this Court. He acknowledges that there is no specific rule on which he can rely.

[18] To support his jurisdictional submission, Mr Ryan points to *Dellabarca v Northern Storemen and Packers Union.*[11] In that case, Smellie J held that a new trial could be ordered, under either a provision of the then applicable High Court Rules or the inherent jurisdiction of the Court.[12] Mr Ryan also referred to *Smith v Coker*,[13] in which the Court also suggested availability of the inherent jurisdiction.

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[10] Court of Appeal (Civil) Rules 2005, r 29(1)(b).
[11] *Dellabarca v Northern Storemen and Packers Union* [1989] 2 NZLR 734 (HC).
[12] Ibid, at 764.
[13] *Smith v Coker* HC Hamilton CP70/90, 7 March 1996 (Penlington J) at 9–10.

[19] Mr Ryan contends that the existence of proceedings in the Court of Appeal does not inhibit exercise of this Court's inherent jurisdiction. He refers to *White v National Australia Bank (NZ) Ltd*[14] and *Green v Broadcasting Corporation of New Zealand.*[15] In the former, the Judge was not concerned that the summary judgment in issue was subject to an appeal because "plainly the appeal [would be] rendered unnecessary by the rehearing".[16] In *Green*, an appeal to the Court of Appeal was on foot at the time an application for rehearing was brought. In that case the Judge, while dismissing the application, did not regard an extant appeal as inhibiting the Court's jurisdiction.

[20] On the merits, Mr Ryan submitted that the touchstone must be the interests of justice. He referred to *Hip Foong Hong v H Neotia and Co*[17] in which Lord Buckmaster, for the Privy Council, said that "[i]n all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice".

[21] Mr Ryan puts forward the following factors as justifying a rehearing on the "non involvement" defence:

(a) Mr Kim's former solicitors failed to make formal application to the Court to withdraw as solicitor on the record and the Court granted leave inappropriately. That meant that Mr Kim was not heard on that issue. He was placed at "material disadvantage", losing an ability to seek an adjournment or to promote a defence.

(b) Mr Kim's former solicitors failed to disclose to him all material information regarding the proceeding, including its progress through case management procedures, the trial date and the need to provide written statements of evidence.

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[14] *White v National Australia Bank (NZ) Ltd* (1993) 7 PRNZ 191 (HC) (David Williams J).
[15] *Green v Broadcasting Corporation of New Zealand* HC Wellington A662/79, 2 June 1987 (Ellis J).
[16] *White v National Australia Bank (NZ) Ltd*, at 194.
[17] *Hip Foong Hong v H Neotia and Co* [1918] AC 888 (PC) at 894.

(c) In terminating their retainer with Mr Kim, the solicitors failed to give Mr Kim an adequate opportunity to make arrangements to pay costs for representation at trial.

(d) The Court of Appeal has said that it would "face real difficulties in dealing with [the non-involvement issue] on appeal [by Mr Kim] without a prior determination of the High Court".[18]

[22] Mr Kohler, for Mr Lee, contends there is no jurisdiction for this Court to make an order of the type sought. He points out that the prior ability of the Court to order new trials[19] have not been re-enacted in the current version of the Rules. He suggests that was a deliberate decision, made on the basis that rehearings were seen as less desirable than appeals, when the spectre of reviewing a trial decision arose. Mr Kohler suggests that the existence of the old rules at the time of the respective decision distinguish cases such as *Dellabarca* and *Smith v Coker*.

[23] In response to Mr Ryan's submissions that the existence of active steps in an appellate process was irrelevant to the exercise of a jurisdiction to order a rehearing, Mr Kohler referred me to *White v New Zealand Stock Exchange*.[20] In that case, an application had been made to strike out an appeal on the grounds it was out of time. Thomas J, dissenting as to the outcome, observed that it was "repugnant in both theory and practice that a High Court Judge should be called upon to determine an application to recall his or her judgment at a time when a notice of appeal against that judgment is extant".[21] Mr Kohler submitted that the existence of Mr Kim's proceedings in the Court of Appeal and the nature of his application in this Court rendered those comments applicable to the present case.

[24] Mr Kohler also supports his jurisdictional submission by reference to r 11.9 of the High Court Rules. That permits recall of a judgment, but only up to the point at which a formal order is sealed. In this case, judgment was sealed on 21 December

[18] *Kim v Lee* [2011] NZCA 256 at n 8.
[19] High Court Rules 1985, rr 494 and 495.
[20] *White v New Zealand Stock Exchange* [2001] 1 NZLR 683 (CA).
[21] Ibid, at para [94].

2010. Mr Kohler submits that the time for recall having lapsed, this Court is *functus officio.*

[25] As to the merits, Mr Kohler emphasised Mr Lee's lack of fault, with regard to any of the issues raised by Mr Kim. He submits that this is not a case in which the Court should use its processes to remedy any injustice it might perceive to have arisen because Mr Kim has alternative remedies that ought to be exercised, in preference to a rehearing.

[26] Mr Kohler submits that Mr Lee ought not to be put to the time, trouble and expense of relitigating an issue that was properly before the Court in June 2010. He emphasises Mr Kim's decision to leave conduct of the litigation to Mr Yoo and his solicitor. While acknowledging that such a choice was open to Mr Kim, Mr Kohler contends that Mr Kim should be left to bear the consequence of his own decisions.

[27] Mr Kohler submits that Mr Kim should be left to remedies, if any, against Mr Yoo and his former solicitors by reference to the background against which barristerial immunity was abolished in *Lai v Chamberlains.*[22] In developing that submission Mr Kohler referred to the need to take account of the public interest in the provision of a civil justice system and the potential availability of arguments about contributory negligence, if Mr Kim were left to his private law remedies.

[28] Mr Kohler reminded me that the public court system exists to meet the needs of the public at large, as opposed to particular private individuals. The case management provisions, including the exchange of written briefs of evidence before trial, are designed to make the procedures efficient. To allow this proceeding to be relitigated would be contrary to the general purposes of the civil justice system.

[22] *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at para [35] per Elias CJ, Gault and Keith JJ.

Analysis

(a) Jurisdiction

[29] Before analysing the competing submissions, I emphasise that the Court of Appeal did not contemplate that this Court would order a rehearing. The Court of Appeal made it clear that agreement was a prerequisite to any rehearing. Its intention was to allow the appeal by consent and remit that part of the proceeding for rehearing in this Court.[23]

[30] The High Court's inherent jurisdiction is designed to enable it to act effectively, even in respect of matters regulated by rules of court. Nevertheless, exercise of the jurisdiction cannot contravene either provisions of a statute, the Rules, or any other regulatory requirements.[24] Further, when approaching an issue for which some provision is made in the High Court Rules, it is not open to the Court to fill a gap, if to do so were contrary to the "underlying philosophy" of a particular rule.[25]

[31] Under the present form of the High Court Rules, there is no ability to seek a new trial, in whole or in part. Rules 494 and 495 of the previous version of the Rules permitted an application to be made in particular circumstances. Rules 494 and 495 provided:

> **494 Power to order new trial**
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> (1) A new trial may be ordered only where, in the opinion of the Court, there has been a miscarriage of justice that justifies a new trial.
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> (2) An order under subclause (1) may be made on such terms as the Court thinks fit.
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> (3) Without limiting the circumstances in which the Court may hold that there has been a miscarriage of justice that justifies a new trial, it is hereby declared that the Court may hold that there has been such a miscarriage of justice if—

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[23] *Kim v Lee* [2011] NZCA 256 at para [28]; set out at para [13] above.
[24] *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 680, *Donselaar v Mosen* [1976] 2 NZLR 191 (CA) at 192; *Champtaloup v Northern Districts Aero Club Inc* [1980] 1 NZLR 673 (CA) at 679.
[25] *Smith v Covington Spencer Ltd* [2008] 1 NZLR 75 (CA) at para [37], applying *Donselaar v Mosen* [1976] 2 NZLR 191 (CA).

(a) The Judge has misdirected the jury on any material point of law, or, if the action is tried without a jury, has during the course of the trial decided any point of law erroneously; or

(b) The Judge has admitted improper evidence, or rejected evidence which ought to have been admitted; or

(c) The damages are excessive or too small; or

(d) The verdict has been obtained by any unfair or improper practice of the successful party to the prejudice of the opposite party; or

(e) Material evidence has been discovered since the trial which could not reasonably have been foreseen or known before the trial; or

(f) The jury or any juror has been guilty of misconduct, if such misconduct can be proved by extrinsic evidence; but the verdict cannot be impugned on the evidence of any of the jurors; or

(g) A special verdict or other finding of the jury is so defective that the Judge cannot give judgment upon it; or

(h) Any witness has been guilty of such misconduct as to affect the result of the trial; or

(i) The verdict is against the weight of evidence.

(4) If it appears to the Court that the miscarriage of justice affects part only of the matter in dispute, the Court may give final judgment as to the part not so affected, and direct a new trial as to the affected part only:

Provided that no new trial shall be ordered as to the affected part if the amount of damages awarded in respect thereof can be separately ascertained, and the plaintiff consents to reduce the whole sum awarded to him by that amount.

(5) A new trial may be ordered on any question in a proceeding, whatever be the grounds on which a new trial is applied for, without interfering with the decision upon any other question.

(6) Where there is more than one defendant, a new trial may be ordered against any one or more of them.

495 Application for new trial

(1) Application for a new trial shall be made by interlocutory application filed within 14 days after the verdict of the jury, or, in the case of trial before a Judge alone, from the date of delivery of judgment.

(2) The application shall state the circumstances alleged to have resulted in a miscarriage of justice and no other circumstances will be considered by the Court.

> (3) The application shall not operate as a stay of proceeding unless the Court so orders.
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> (4) The Court shall not receive—
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> (a) Any affidavit of any witness to explain or add to evidence given by him at the trial; or
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> (b) An affidavit of any facts which might have been given in evidence at the trial.
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> (5) Notwithstanding subclause (4), the Court may receive an affidavit from a material witness showing that he made a serious mistake in giving his testimony.
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> (6) Where misdirection by the Judge is relied upon, the terms of the direction may be proved by reference to any record thereof approved by the Judge, including the transcription of any shorthand note or tape taken at his direction.

[32] The grounds on which a new trial could be sought under r 494 indicate that the rule was primarily directed to cases in which factual determinations and assessments of damages were made by a jury. For example, in r 494(3)(a)–(d) the references to misdirection, admission of improper evidence, assessment of damages and to a "verdict" are all jury concepts. So too are the grounds set out in r 494(3)(f) and (g). The other grounds could apply equally to trials before a jury or a Judge sitting alone.

[33] The two cases on which Mr Ryan referred to support reliance on the inherent jurisdiction were decided at a time when the "new trial" rules were in force.

[34] In *Dellabarca*, the plaintiff had brought a claim against an industrial union on the basis of an intentional tort, inducement of breach of contract. The trial took place before a jury. Having answered 24 issues put before them for the purpose of determining liability on various causes of action, both parties moved for orders in their favour. One of the questions of law that Smellie J was asked to consider concerned the circumstances in which a Judge might refuse to enter judgment, substitute his or her own view in respect of any answer given by the jury or order a new trial.

[35] Rule 494(1) provided that a new trial could be ordered only if the Court was of the opinion that there had been a "miscarriage of justice that justifies a new

trial".[26] While acting under r 494(1), the Judge found that he had power to order a new trial under either that rule or the Court's inherent jurisdiction.[27]

[36] Notwithstanding the authorities to which Smellie J referred on the inherent jurisdiction point,[28] I, with respect, have difficulty in understanding why the inherent jurisdiction needed to be called in aid in a case in which the High Court Rules made express provision for a new trial based on a miscarriage of justice. There was no gap for the inherent jurisdiction to fill. Nor was there any abuse of process that the inherent jurisdiction was required to prevent.

[37] In *Smith v Coker*, Penlington J considered an application for a new trial. On 7 December 1993 (well before the hearing that took place in November and December 1995) Mr Coker's solicitors obtained leave to withdraw. Thereafter, Mr Coker represented himself. The new trial application was based on a number of factors that cumulatively were said to amount to a miscarriage of justice, under r 494(1). For present purposes, it is unnecessary to go into detail. While focussing on rr 494 and 495 of the High Court Rules, Penlington J cited *Dellabarca* and added that "the Court has an inherent jurisdiction to make [a new trial] order".[29] There was no further elaboration. It is clear that this was no more than a passing reference to *Dellabarca.* It was unnecessary for the Judge to form an independent view on the correctness of the proposition. *Smith v Coker* does not advance Mr Ryan's point.

[38] Neither *Dellabarca* nor *Smith v Coker* explain why the inherent jurisdiction can be used in a case for which express provision is made under the High Court Rules. To my mind, the observations in *Dellabarca* are inconsistent with the principles set down previously by the Court of Appeal in *Taylor v Attorney-General*,[30] *Donselaar v Mosen*[31] and *Champtaloup v Northern Districts Aero Club Inc.*[32] I decline to follow that aspect of *Dellabarca.*

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[26] High Court Rules 1985, r 494(1) set out at para [31] above.
[27] *Dellabarca v Northern Storemen and Packers Union* [1989] 2 NZLR 734 (HC) at 764–765.
[28] Ibid, at 765.
[29] *Smith v Coker* HC Hamilton CP70/90, 7 March 1996 at 9–10.
[30] *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA).
[31] *Donselaar v Mosen* [1976] 2 NZLR 191 (CA).
[32] *Champtaloup v Northern Districts Aero Club Inc* [1980] 1 NZLR 673 (CA).

[39] I rest my position on the views expressed in *Taylor v Attorney-General*. In that case, all three members of the Court of Appeal accepted the jurisdiction of this Court to make the orders necessary to enable it to act effectively (even though the jurisdiction is in respect of matters regulated by statute or rules of court), so long as it can do so without contravening any statutory or regulatory provisions. The common threads are preventing an abuse of process or filling a gap in a way that enables the machinery of the law to work. Each of the Judges expressed their views in different ways:[33]

(a) Wild CJ said:[34]

> It is worthy of note that nothing specific was said in the judgment as to the source of the Judge's power to give the direction in question. I think it is obvious that it was accepted without question by all concerned that the Judge acted in the exercise of the inherent jurisdiction of a superior Court to prevent abuse of its judicial process. This jurisdiction was described by Menzies J in *R v Forbes, Ex p Bevan* (1972) 127 CLR 1 as follows:
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> > 'Inherent jurisdiction' is the power which a Court has simply because it is [a] court of a particular description. Thus the Courts of Common law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt ..." (ibid, 7).
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> And in *R v Connelly* [1964] AC 125; [1964] 2 All ER 401 Lord Morris of Borth-y-Gest said:
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> > "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process" (ibid, 1301; 409).
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> In New Zealand the Supreme Court is established as a High Court of Justice for the administration of justice throughout the country (Judicature Act 1908, s 3), and it has that inherent jurisdiction.

(b) Richmond J said:[35]

> But when one speaks of the "inherent jurisdiction" of the Court to make orders of the kind now in question the problem really becomes one of

[33] In the cited passages, the references to the Supreme Court should be read as referring to the High Court. The decision was given before the Supreme Court was renamed.
[34] *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 678–679.
[35] Ibid, at 682.

> powers ancillary to the exercise by the Courts of their jurisdiction in the primary sense just described. Many such ancillary powers are conferred by statute or by rules of Court, but in so far as they are not so conferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense. In New Zealand the Supreme Court has "all judicial jurisdiction which may be necessary to administer the laws of New Zealand": Judicature Act 1908, s 16. The approach which I am endeavouring to make to this question of inherent ancillary powers is consistent with what Lord Morris said in *R v Connelly* [1964] AC 1254; [1964] 2 All ER 401 ...
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> The essential nature of this inherent jurisdiction was aptly and succinctly described by Master Jacob in the course of an informative and instructive lecture on the subject which has been published in Current Legal Problems 1970. At pp 27-28 he said:
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> > "The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

(c) Woodhouse J said:[36]

> The inherent jurisdiction of the Court arises in relation to and for the purpose of giving proper support for the functioning of the Court as a Court of justice. It is part not of the substantive but of the procedural law: and in such a case as the present it is exercisable for the purpose of controlling not only the actions of persons associated with the proceedings but the world at large. That sort of judicial power obviously could not be used for purposes of individual or group convenience nor even for the public interest in general. Instead, as one experienced officer of the Court in England has said, "The juridical basis of [the inherent] jurisdiction is ... the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner": Master Jacob, "The Inherent Jurisdiction of the Court", Current Legal Problems 1970 23, 27-28. Thus it is the due administration of justice - at the time and for the future - that is the concern and province of the Court: not the personal but extraneous problem that may face the individual litigant or witness or Judge in some particular case.

[40] Another point tells against use of the inherent jurisdiction as a basis for the present application. Ironically, the deliberate omission of the new trial provisions from the current version of the High Court Rules suggests that greater emphasis has been put on rights of appeal to remedy any miscarriage of justice. While repealing the new trial rules, the present rules have left intact the ability to seek recall of a judgment, up to the point of sealing. In my view, the Rules Committee did not

[36] Ibid, at 689.

intend that this Court exercise any residual jurisdiction to order a rehearing of all or part of a proceeding, once the ability to recall was lost through sealing of the Court order. Revocation of rr 494 and 495 means that the power to prevent miscarriages (as opposed to this Court's use of the inherent jurisdiction to prevent an abuse of its processes) now lies squarely within the hands of the Court of Appeal.

[41] For those reasons, I do not consider there is jurisdiction to make the order sought.

(b) Merits

[42] Strictly, it is unnecessary for me to address the merits of the application. However, in case my jurisdictional decision is successfully challenged on appeal, I add some brief observations.

[43] I acknowledge some fault on the part of the Court (and myself) in not ensuring that Mr Kim's solicitors were given leave to withdraw following the processes set out in the High Court Rules. That is the only fault to which Mr Kim can point within the Court system. Mr Ryan acknowledges that no fault can be attributed to Mr Lee for any of the difficulties encountered.

[44] Mr Kim made a decision to leave conduct of the proceeding in the hands of Mr Yoo and the solicitors instructed. They did not keep him informed of developments. Equally, he did not make inquiries to ascertain progress. As Mr Kohler pointed out, if Mr Kim were to be left to any remedies against either Mr Yoo or the solicitors, questions of contributory conduct might arise. These are irrelevant to any action that may be taken by the Court to remedy a perceived injustice.

[45] Mr Kim's potential defence of non-involvement was the subject of discussion in my judgment. While there was no evidence on which a foundation for innocent dissemination might be argued,[37] I took the view that I should consider whether there was sufficient evidence to link Mr Kim to the defamatory articles for the purpose of

[37] Defamation Act 1992, s 21; see *Lee v The New Korea Herald Ltd* HC Auckland CIV 2008-404-5072, 9 November 2010 at paras [60]–[62].

holding him liable for the publications.[38] If I were wrong in my analysis of the law or my application of the law to the facts disclosed by the evidence that I heard, that is something that the Court of Appeal could remedy, if it were to give a further period of time for Mr Kim to appeal against the judgment.

[46] There is also the delay that would occur if a rehearing were ordered. Mr Lee is elderly. He has done nothing wrong in the pursuit of his claim. He is entitled to the fruits of his judgment. Even though his position could be ameliorated by an order that Mr Kim pay indemnity costs, regardless of the outcome in respect of any rehearing, that does not answer the problems likely to be caused by delay. It is unclear when a hearing might be arranged before me. Depending on whether or not hearings that have been allocated proceed, it may not be until the second half of next year.

[47] Accordingly, were it necessary to do so, I would find in favour of Mr Lee on the merits of the claim and dismiss the application on that basis.

Result

[48] Mr Kim's application is dismissed.

[49] I award costs in favour of Mr Lee on a 2B basis, together with reasonable disbursements. Costs and disbursements shall be fixed by the Registrar.

[50] I thank counsel for their assistance.

P R Heath J

Delivered at 4.00pm on 9 November 2011

[38] Ibid, at paras [63]–[68].