

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA107/2012  
[2012] NZCA 248**

BETWEEN                      YOUNG KWAN KIM  
   Appellant  
  
AND                                JUNG NAM LEE  
   Respondent

Hearing:            12 June 2012  
  
Court:                Glazebrook, Randerson and Wild JJ  
  
Counsel:            M W Ryan and S J Corlett for Appellant  
                          G J Kohler for Respondent  
  
Judgment:         14 June 2012 at 3 pm

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**JUDGMENT OF THE COURT**

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- A     The appellant’s application for leave to adduce further evidence is granted: the affidavits detailed in [11] of the Court’s reasons will be received as evidence in support of the appeal.**
- B     The respondent is to pay the appellant’s costs for a standard application on a band A basis uplifted by 50 per cent with usual disbursements.**
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**REASONS OF THE COURT**

(Given by Wild J)

[1]     By application dated 27 February 2012, the appellant, Mr Kim, applies for leave to adduce further evidence in support of his appeal. The respondent, Mr Lee, opposes the application.

[2]     Mr Kim’s appeal is against a judgment of Heath J delivered on 9 November 2010 awarding \$250,000 damages for defamation jointly and severally against the

New Korea Herald Ltd, Mr Yoo and Mr Kim.<sup>1</sup> Heath J found that a series of articles published in the New Korea Herald newspaper in the early months of 2008 were defamatory of Mr Lee. Mr Yoo was the editor of the newspaper and a director of the Company. Mr Kim was the other director of the Company.

[3] Mr Kim did not appear and was not represented at the trial. Judgment went against him upon formal proof. Mr Yoo gave evidence that Mr Kim was not involved in the operations of the newspaper or in the publication of the defamatory articles. But Heath J observed:

[67] 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.

[4] The Judge was satisfied on a balance of probabilities that Mr Kim was sufficiently connected to the publications to justify a claim against him, and held that the innocent dissemination defence in s 21 of the Defamation Act 1992 had not been made out by Mr Kim.

[5] In a judgment delivered on 3 June 2011 this Court granted an application by Mr Kim for an extension of time to appeal the judgment of Heath J.<sup>2</sup> It did that because the evidence established two things. First, that Mr Kim had entrusted his defence to his two co-defendants, who had instructed a firm of Auckland solicitors, Kenton Chambers Lawyers, to act for all three defendants. Mr Park of Kenton Chambers Lawyers withdrew as counsel for Mr Kim by memorandum filed the day before the trial began. His memorandum was not in compliance with r 5.41 of the High Court Rules. Notwithstanding that, the Judge treated Mr Kim as having entered no appearance, and the case against Mr Kim as proceeding by way of formal proof. The Court was not critical of the Judge, who was left in an unsatisfactory position by Mr Park's irregular withdrawal.

[6] Secondly, there was affidavit evidence from Mr Kim endorsing Mr Yoo's evidence at trial that he (Mr Kim) had no involvement in the newspaper's operations. Mr Kim deposed that he had no knowledge of the articles until he was told of, and

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<sup>1</sup> *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010.

<sup>2</sup> *Kim v Lee* [2011] NZCA 256.

read, the judgment on about 23 December 2010. After finally managing to make contact with Mr Yoo in mid-January, Mr Kim had filed his application for an extension of time to appeal reasonably promptly on 14 February 2011.

[7] In the face of that evidence, the Court was satisfied that “it is strongly arguable that Mr Kim has suffered a serious injustice” and granted Mr Kim’s application for an extension of time to file an appeal.<sup>3</sup>

[8] In that judgment the Court suggested that Mr Kim could apply to the High Court to hear and determine his non-involvement defence as a separate question in the light of whatever further evidence Mr Kim might advance. The Court pointed out that that course could only be followed by consent.<sup>4</sup>

[9] Notwithstanding that Mr Lee did not consent, Mr Kim adopted the Court’s suggestion detailed in [8]. In a second judgment delivered on 9 November 2011, Heath J dismissed Mr Kim’s application for a “re-hearing of non-involvement defence” for lack of jurisdiction. Heath J added that he would also have dismissed the application on its merits, had that been necessary.<sup>5</sup>

[10] In a second judgment delivered on 21 February 2012 this Court further extended Mr Kim’s time to file an appeal to 2 March 2012.<sup>6</sup> Mr Kim filed his notice of appeal on 27 February 2012.

[11] In his application Mr Kim seeks leave to adduce the evidence he gave in the affidavits he swore on 12 February and 4 March 2011 and 25 February 2012, and also the affidavit Mr Yoo swore on 4 March 2011. The application is founded on r 45 and on the well known cases governing the admission of further evidence on appeal.<sup>7</sup>

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<sup>3</sup> At [22] and [25].

<sup>4</sup> At [26]–[29].

<sup>5</sup> *Lee v The New Korea Herald Ltd (No 2)* HC Auckland CIV-2008-404-5072, 9 November 2011.

<sup>6</sup> *Kim v Lee* [2012] NZCA 19.

<sup>7</sup> *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1; *Erceg v Balenia Ltd* [2008] NZCA 535; *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA); *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA); and *Laurence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

[12] Against the background set out in [5] to [10], we find it surprising to say the least that Mr Kim's application to adduce further evidence in support of his appeal is opposed. After all, without evidence the appeal is pointless. Mr Kim would be in the same position he was at trial before Heath J.

[13] We think Mr Kohler's submissions opposing the application are fairly summarised as follows:

- (a) Mr Kim's proposed evidence is clearly not fresh.
- (b) Mr Kim's proposed evidence is "simply not credible, let alone cogent". In particular, Mr Kim's claim that he had no involvement in or knowledge of the publication of the defamatory articles and did not know of them until well after the trial is not credible. Equally lacking in credibility is Mr Kim's assertion that he was not aware of the trial. The Court should not be gullible enough to accept that evidence.
- (c) Mr Yoo's evidence supporting Mr Kim's claims is also not credible.
- (d) The withdrawal of Mr Park of Kenton Chambers Lawyers as counsel for Mr Kim at the start of the trial is irrelevant to the current application: it has nothing to do with the admission of further evidence.
- (e) The innocent dissemination defence in s 21 of the Defamation Act and/or any similar defence at common law is "not realistically available to Mr Kim whether or not one believes him".
- (f) If, notwithstanding the above, leave is given, the Court will have to deal with the pleadings, discovery, response evidence from Mr Lee and cross-examination.

[14] We do not accept these submissions, except for the last. Mr Kim's proposed evidence is fresh, in the sense that he could not give it at the trial because, he says, he did not know that the trial was taking place. In its 3 June 2011 judgment this

Court accepted Mr Kim's unexamined evidence to that effect. It is not now open to Mr Lee to challenge that on the present application. Secondly, if accepted, Mr Kim's evidence is potentially cogent. No assessment of the credibility of Mr Kim's evidence can be made until he gives it, and in particular is cross-examined upon it and upon any other matters relevant to his credibility. The withdrawal of Mr Park as counsel for Mr Kim is relevant to this application, in that it explains why Mr Kim did not give his evidence at trial. The availability of the s 21 defence (or of any similar defence available to Mr Kim at common law), depends on the Court's assessment of Mr Kim's evidence. The defence(s) cannot be ruled out in advance. Heath J rightly dealt with the s 21 defence on the basis of what evidence he had relating to Mr Kim's position.

[15] As to the last of Mr Kohler's submissions, the Court is well aware of the ramifications of allowing this application. As an appellate Court, this Court is not well placed to deal with amendments to pleadings, discovery and evidence. That is why the Court made the suggestion it did in its 3 June 2011 judgment. The Court will simply have to deal with those matters as best it can.

[16] The application is granted. The affidavits referred to in [11] above will be received as evidence in support of Mr Kim's appeal. In admitting this evidence we are not to be taken to be holding that all of it is necessarily relevant.

[17] Any further directions required as to the hearing of the appeal should be directed to Wild J, who will be managing the appeal toward a hearing. We invite counsel to confer and see if they can agree on the required directions. During the hearing Mr Ryan informed the Court that Mr Kim was prepared to provide to Mr Lee a formal written waiver of privilege in respect of any communications he had with Kenton Chambers Lawyers relevant to this appeal, including to Mr Kim's credibility. Counsel should confer about the provision of this waiver, and if necessary cover it in any directions they seek.

[18] We have already expressed our surprise that this application was opposed. As the Court has (twice) extended time for an appeal by Mr Kim, it was inevitable that the Court would grant his application to adduce further evidence in support of it. We

reiterate that extending time for an appeal was pointless if the Court was then going to rule out further evidence – that is, any evidence at all from Mr Kim – to support the appeal. We view the opposition to the present application as ill founded and order Mr Lee to pay Mr Kim costs for a standard application on a band A basis uplifted by 50 per cent with usual disbursements.

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