

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV 2015-404-001648
[2018] NZHC 3136**

BETWEEN HYUNG SOO LEE
 Plaintiff

AND YONGWOO LEE & ANOR
 Defendant

Hearing: 09 July 2018 - 19 July 2019

Appearances: T C Goatley & J Cole for Plaintiff
 J Strauss for Defendants

Judgment: 30 November 2018

JUDGMENT OF VAN BOHEMEN J

*This judgment was delivered by me on 30 November 2018 at 4pm
Pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

Solicitors:
Bell Gully, Auckland
Northern Legal, Albany
Counsel:
J Strauss, Auckland

TABLE OF CONTENTS

	[Para No.]
Introduction	[1]
Matters not in dispute	[7]
The article	[10]
The plaintiff's contentions	[15]
The defendants' contentions	[17]
Relevant factual background	[19]
<i>Formation of Foundation Committee and identification of Community Centre building</i>	22
<i>Efforts to cover funding shortfall</i>	26
<i>The 27 March 2013 agreement</i>	30
<i>Commitment to further fundraising efforts</i>	31
<i>Discussions regarding Cultural Centre governance and candidates' deposits</i>	34
<i>Deteriorating relationships and ensuing fallout</i>	39
<i>Legal proceedings</i>	48
<i>Department of Internal Affairs warning notice</i>	53
Was Mr Henry Lee defamed in the Seed of Dispute article?	[57]
Were the admitted meanings true?	[66]
Are the admitted imputations true or the logical inference to be drawn, on the balance of probabilities, from the established facts?	[73]
<i>Connotations of "yi-myin-gye-yak"</i>	76
<i>Were the imputations true or not materially different from the truth?</i>	84
<i>Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the agreement from the public</i>	85
<i>Mr Henry Lee a party to a plan to engage in deception</i>	102
<i>Mr Henry Lee had not acted openly, honestly or honourably</i>	105
<i>The existence of the 27 March 2013 agreement and by implication the behaviour of Mr Henry Lee as a party to it were "shocking"</i>	106
<i>In trying to "privatise the Centre", Mr Henry Lee and Mr Hong were attempting to usurp the authority of the Korean Society and take personal control of the Cultural Centre</i>	107
<i>Mr Henry Lee, together with Mr Hong, sought to control the BOD so as to avoid paying money they owed to Mr Kim</i>	111
<i>Mr Henry Lee got involved in a "muddy fight" over the validity of the dismissal of the BOD to try to avoid paying money he owed to Mr Kim</i>	114
<i>The reason why Mr Henry Lee hid the 27 March 2013 agreement was to avoid having to pay any money</i>	118
<i>When entering into the 27 March agreement to share the burden of the funding, Mr Henry Lee had no intention of actually paying any money</i>	120

<i>If Mr Henry Lee had to pay any money, then his plan to avoid paying money would have gone wrong</i>	125
<i>Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community</i>	128
<i>Mr Henry Lee was portraying his actions as if they were for the benefit of the Korean community and the Cultural Centre, when in fact he was engaging in a struggle over money in order to pursue his own personal ambitions</i>	133
<i>Mr Henry Lee is a hypocrite</i>	135
<i>By embellishing the true position, Mr Henry Lee was misleading the Korean community</i>	136

Have the defendants proved that the publication taken as a whole was in substance true, or was in substance not materially different from the truth? [138]

Honest opinion	[139]
<i>Genuine opinion of Mr Steve Lee and the Sunday Times</i>	147
<i>Nature of article</i>	150

Were the imputations, in their context, expressions of genuine opinion? [152]

<i>Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the agreement from the public</i>	152
<i>Mr Henry Lee was a party to a plan to engage in deception</i>	154
<i>Mr Henry Lee had not acted openly, honestly or honourably</i>	155
<i>The existence of the 27 March 2013 agreement and by implication the behaviour of Mr Henry Lee as a party to it were “shocking”</i>	156
<i>Mr Henry Lee, together with Mr Hong, sought to control the BOD so as to avoid paying money they owed to Mr Kim</i>	157
<i>Mr Henry Lee got involved in a “muddy fight” over the validity of the dismissal of the BOD to try to avoid paying money he owed to Mr Kim</i>	158
<i>The reason why Mr Henry Lee hid the 27 March 2013 agreement was to avoid having to pay any money</i>	160
<i>When entering into the 27 March agreement to share the burden of the funding, Mr Henry Lee had no intention of actually paying any money</i>	161
<i>If Mr Henry Lee had to pay any money, then his plan to avoid paying money would have gone wrong</i>	162
<i>Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community</i>	163
<i>Mr Henry Lee was portraying his actions as if they were for the benefit of the Korean community and the Cultural Centre, when in fact he was engaging in a struggle over money in order to pursue his own personal ambitions</i>	164
<i>Mr Henry Lee is a hypocrite</i>	165
<i>By embellishing the true position, Mr Henry Lee was misleading the Korean community</i>	166

Result on defences of truth and honest opinion [167]

Public interest communication	[169]
<i>The elements of the new defence of public interest communication</i>	175
<i>Was the article of public interest?</i>	180

<i>Was publication of the article responsible?</i>	183
<i>Seriousness of allegations</i>	183
<i>Urgency of publication</i>	184
<i>Reliability of any source</i>	185
<i>Comment sought from the plaintiff</i>	186
<i>Tone of article</i>	188
<i>Inclusion of unnecessary defamatory statements</i>	189
<i>Other relevant considerations</i>	190
<i>Conclusion on whether communication was responsible</i>	191
Finding on defamation	[198]
Damages	[199]
<i>Claim for aggravated damages</i>	204
Result	[207]
Costs	[208]
Appendix	

Introduction

[1] The plaintiff, Hyung Soo Lee, known in New Zealand as Henry Lee, has brought a defamation proceeding against Yong Woo Lee, known in New Zealand as Steve Lee, and a weekly Korean language newspaper, the New Zealand Sunday Times Ltd (Sunday Times). The Sunday Times is owned, written and edited by Mr Steve Lee. Mr Henry Lee seeks damages for an article written by Mr Steve Lee and published by the Sunday Times on 13 March 2015.

[2] There are a number of unusual aspects about this proceeding. First, it is a case conducted in English about an article written in Korean for a Korean speaking audience. That raises a question about whether an English translation of an article in Korean can adequately capture the meaning of the original and its significance to the intended audience. Furthermore, Mr Henry Lee, who is not confident in English, gave his evidence in Korean through an interpreter, as did Mr Steve Lee and a number of other witnesses. A number of questions arose over the accuracy of the interpretation into Korean of questions put to witnesses and the interpretation of their answers back into English.

[3] However, those questions and difficulties are ameliorated to an extent by the second unusual aspect of the case, which is that the parties have agreed not only on the appropriate English translation of the article but also on the meanings of the relevant passages in the article. That is, the defendants have admitted all of the 15 meanings pleaded by Mr Henry Lee, even though they deny the article and the admitted meanings are defamatory of Mr Henry Lee. On the other hand, despite the agreed translation, there was disagreement over the connotations of one key phrase in the headline and in the body of the article.

[4] The third unusual aspect of the case is that between the close of the hearing and the preparation of my judgment, the Court of Appeal handed down its decision in *Durie v Gardiner*¹ in which the Court recognised the new defence of public interest communication that is not confined to parliamentary or political issues but extends to matters of significant public concern. Given the possible relevance of that decision to

¹ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131

the current proceeding, I offered the parties the opportunity to make submissions on the applicability of *Durie v Gardiner* and, if they wished, an opportunity to be heard.

[5] Both Mr Strauss for the defendants and Ms Goatley for Mr Henry Lee filed further submissions. Neither requested a further opportunity to be heard.

[6] Mr Strauss seeks leave to amend the defendants' pleadings to align with the new defence by renaming the defendants' third affirmative defence of qualified privilege as public interest communication. I take this to mean, as did Ms Goatley who does not object, that the defendants no longer rely on the defence of qualified privilege but instead rely on the defence of public interest communication. I grant leave accordingly. My judgment proceeds on the basis that the defendants' affirmative defences are truth, honest opinion and public interest communication.

Matters not in dispute

[7] It is common ground that Mr Steve Lee wrote the article and that it was published by the Sunday Times. The Sunday Times is targeted at the Korean community in New Zealand. It has a print run of 3,000 copies and is also available on-line. A number of witnesses in the hearing gave evidence that they read the article shortly after it was published.

[8] It is also common ground that the article concerned Mr Henry Lee, as well as a number of others, and that Mr Steve Lee did not seek Mr Henry Lee's comment on the subject matter of the article before the article was published.

[9] The defendants have not retracted or apologised for the article.

The article

[10] The article concerned the purchase by the Korean Society of Auckland Inc (Korean Society) of a building to be known as the Korean Cultural Community Centre (Cultural Centre) and Mr Henry Lee's involvement in the fundraising arrangements for that purchase and in associated developments within the Korean Society.

[11] The fundraising arrangements for the purchase of the Cultural Centre were overseen by a Foundation Committee established by the Korean Society. Young Pyo Hong (Mr Hong), the then President of the Korean Society, and Mr Henry Lee were co-chairs of the Foundation Committee. The other Committee member was Sung Hyuk Kim (Mr Kim), Vice President of the Korean Society who succeeded Mr Hong as President of the Society. As the date of settlement of the purchase approached, the three committee members recognised there was a shortfall in the funding and took steps to address that situation. At the time, it was understood that the amount of the shortfall was \$423,000.

[12] Subsequently, there was a serious falling out among the Foundation Committee members over the implementation of the arrangements for meeting the shortfall and on governance arrangements for the Cultural Centre. That falling out was played out publicly in statements the Committee members released to Korean language news media and in articles by the Korean media, including articles written and published by the defendants. Various legal proceedings were commenced. There was also an investigation by the Department of Internal Affairs into aspects of the Korean Society's affairs, including the arrangements agreed by Mr Kim, Mr Hong and Mr Henry Lee to cover the funding shortfall. The Department's report was dated 3 March 2015, 10 days before publication on 13 March 2015 of the article that is the basis of this proceeding.

[13] The article was entitled "Seed of Dispute, Behind Contract of Sung Hyuk Kim, Young Pyo Hong and Hyung Soo Lee". The title included the Korean term "yi-myin-gye-yak" which both sets of parties agreed could be translated as "behind contract or "hidden contract". As I discuss later, however, despite their agreement on the translation of the term, Mr Henry Lee and the defendants disagreed on the connotations that attach to the term.

[14] The full text of agreed English translation of the article is set out in the Appendix to this judgment. In summary, the article said that:²

² In the interests of comprehension, the summary makes minor adjustments to the language of the translation.

- (a) Before the due date for completing the purchase of the Cultural Centre, Mr Kong and Mr Henry Lee, the co-chairs of Foundation Committee for the Cultural Centre, announced that the purchase had been completed because Mr Kim had paid the short fall of \$423,000.
- (b) Six months after moving into the Cultural Centre, Mr Kim (now President of the Society) announced “the shocking fact” that there had been a “behind contract” among the Foundation Committee members. Under the contract, Mr Kim would pay \$423,000 on 28 March 2013 and if that amount was not repaid within two months, Mr Hong and Mr Henry Lee would repay one third each of the shortfall to Mr Kim.
- (c) If the fundraising for the Centre had been successful and the borrowed money repaid, the behind contract would never have been revealed to the public.
- (d) The difference between the amount paid by Mr Kim and the amount received (from fundraising) was \$330,000 so Mr Hong and Mr Henry Lee were under an obligation to repay Mr Kim \$110,000.
- (e) Immediately before the announcement, Mr Kim disclosed that he had been notified by the Chairperson of the Board of Directors (BOD) for the Cultural Centre, Mr Henry Lee, that the BOD would turn themselves into a superior body to the Korean Society and would control the President.
- (f) Mr Kim, who thought that persons who had not paid back the money were trying to take control of the Centre, announced the dissolution of the BOD by declaring that the General Meeting of the Korean Society was null and void because of the lack of a quorum.
- (g) If Mr Hong and Mr Henry Lee controlled the BOD, which had “the mighty power”, they could decide how to deal with the \$150,000 granted by the Overseas Korean Foundation and whether the one-third

share of the amount owing to Mr Kim should be repaid or not. In other words, the repayment of the sum owed to Mr Kim could be delayed if the relationship between them soured, even if the Centre had sufficient funds.

- (h) When Mr Kim, Mr Hong and Mr Lee got it into their heads that they could change the arrangements agreed in the behind contract according to who was in control of the organisation, they started a “muddy fight” over the legality of the dissolution of the BOD.
- (i) A series of embarrassing and shameful events followed – a disturbance at the General Meeting, the involvement of the police and defamation proceedings. An audit of the Korean Society found that the Society’s rules had been violated by the borrowing of \$423,000 without a resolution of the General Meeting.
- (j) A paragraph in quotation marks said words to the effect that “if we hide the contract and create ‘an atmosphere’ among the Korean community, we do not need to pay the money”.
- (k) The fight over the money was triggered by personal desires of fame and honour; the behind contract should not be embellished as if it were for the Korean community or for the Cultural Centre. These three people need to settle these matters without dragging the Korean community into their fight.

The plaintiff’s contentions

[15] In accordance with s 37 of the Defamation Act 1992, Mr Henry Lee pleaded that the article had 15 specific defamatory meanings, which were admitted by the defendants. These meanings are set out at [60].

[16] Ms Goatley submits that all of the admitted meanings are plainly defamatory on their face. Ms Goatley further submits that the defamation is made out and

Mr Henry Lee's claims must succeed because the defendants cannot establish an affirmative defence to the claims.

The defendants' contentions

[17] The defendants contend that the article was an editorial or opinion piece, that it was not defamatory and that all of the admitted meanings are either true or are honest opinion based on inferences available from the language of the article taken as a whole and drawing on facts stated in the article or generally known at the time of publication. In the alternative, the defendants submit that the article and the meanings to be taken from it are covered by the defence of public interest communication.

[18] Section 40 of the Defamation Act 1992 requires a defendant intending to rely on a defence of truth and on a defence of honest opinion to plead each of those defences separately. In a technical sense, the defendants have complied with that requirement in that they have pleaded each of the defences separately in the statement of defence. However, by effectively pleading truth and honest opinion to all of the admitted imputations and leaving it to the Court to decide whether any or all of the identified imputations were true or were honest opinion, it is doubtful that they have complied with the intent of s 40. In any event, this approach has made the Court's task considerably more difficult and this judgment considerably longer than might otherwise have been the case.

Relevant factual background

[19] Because the defendants have pleaded truth to all the agreed imputations it is necessary to record the background to the article in some detail.

[20] Mr Henry Lee was born and grew up in the Republic of Korea. He and his family emigrated to New Zealand in 1994. He operates a health food business through a company, Evergreen Life Ltd (Evergreen), based in Albany, Auckland. Mr Henry Lee has been an active member of the Korean community in Auckland and, since 2012 at least, an active member of the Korean Society of Auckland Inc.

[21] Mr Steve Lee was also born in the Republic of Korea where he was a journalist for 10 years before emigrating to New Zealand in 2001. Upon arrival in New Zealand, Mr Steve Lee established the Sunday Times as a weekly Korean newspaper publishing material from Korea and articles on issues that affect the Korean community in the North Island but particularly in Auckland.

Formation of Foundation Committee and identification of Community Centre building

[22] In August 2012, Mr Henry Lee was appointed a member and co-chair of the Foundation Committee formed by the Korean Society to identify and purchase the Community Centre building. As already noted, the other members of the Committee were Mr Hong and Mr Kim.

[23] The announcement of the formation of the Foundation Committee showed the amounts that Committee members and others had agreed to donate to the fundraising effort which, in Mr Henry Lee's case, was \$20,000 to be given through his company, Evergreen. The announcement also said Mr Hong would contribute \$20,000 and Mr Kim \$10,000.

[24] In late 2012, the Society identified the building – at 5 Argus Place, Glenfield, on Auckland's North Shore – it wanted to purchase for the Community Centre and entered into an agreement for the building's sale and purchase. The purchase price was \$1,500,000. Settlement date was 29 March 2013.

[25] The Society's decision to purchase the building was made on the understanding that half of the purchase price or \$750,000 would be met by fundraising. If the fundraising target was met, a grant of \$150,000 would also be provided by the Overseas Korean Foundation, a Korean government agency.

Efforts to cover funding shortfall

[26] In March 2013, it became apparent that the fundraising target would not be met by the settlement date. At the time, it was understood that the amount of the fundraising shortfall was \$423,000. There are important differences in the accounts of Mr Henry Lee and Mr Kim about what happened next.

[27] Mr Henry Lee's account, as set out in his evidence in chief, was that Mr Kim took it upon himself to meet the shortfall, which he did in two payments made on 25 and 26 March 2013, and Mr Kim then had a discussion with Mr Henry Lee and Mr Hong on 27 March 2013 in which the three signed the document referred to in the article as the "behind contract". According to Mr Henry Lee, the agreement made by himself, Mr Kim and Mr Hong on 27 March 2013 was that Mr Kim's advance of \$423,000 was to be treated as a loan to the Korean Society which the Society would be required to repay. The fundraising would continue and after two months there would be an accounting to determine the remaining shortfall. At that point, he and Mr Hong would look to share the remaining shortfall equally with Mr Kim. That is how he interpreted the document of 27 March 2013 which he considered to be equivalent to a memorandum of understanding and not a legally binding document – although he accepted, albeit with some reluctance, that the High Court took a different view of the document in subsequent proceedings.³ For the purposes of this judgment, I refer to the document as the 27 March 2013 agreement.

[28] Mr Kim's evidence was that he, Mr Henry Lee and Mr Hong discussed what to do about the shortfall before he took any steps to pay the shortfall. He says the three men agreed on 20 March 2013 that as the leaders of the Foundation Committee they were responsible for the success of the venture and should jointly assume responsibility for the shortfall. However, because Mr Henry Lee and Mr Hong did not have funds available, Mr Kim agreed to meet the shortfall from money he had invested for his and his wife's retirement. He says he did so on the understanding that the three men would share equally in any shortfall once the fundraising effort had ended. Mr Kim says they were hopeful of raising the shortfall within two months but if it took longer than that he needed to protect his investment by ensuring he was paid interest and had security – which was why he asked Mr Hong and Mr Henry Lee to sign the 27 March 2013 agreement.

[29] Mr Kim's account is more consistent with the content of the 27 March 2013 agreement that Mr Kim prepared and was accepted in a judgment entered by Faire J in a proceeding Mr Kim brought in 2014 for recovery of the amount then owing to

³ *Kim v Lee* [2015] NZHC 3237.

him by Mr Henry Lee.⁴ It is also consistent with the account Mr Henry Lee gave of the funding arrangements in a letter published in *The Weekly Korea* on 15 November 2013. However, it is also apparent from the history of events cited in *Faire J's* judgment and from the Department of Internal Affairs inquiry that the Korean Society treated the advance by Mr Kim as a loan.

The 27 March 2013 agreement

[30] The key elements of the 27 March 2013 agreement were (after adjustments to an awkward English translation from the Korean original):

- (a) Mr Kim had put up his money temporarily in order to cover the shortfall of \$423,000;
- (b) Mr Kim was to be reimbursed for this amount by continued fundraising for the Cultural Centre;
- (c) No interest was to be paid on this amount for the first two months but after two months Mr Hong, Mr Lee and Mr Kim would be jointly responsible for interest;
- (d) After two months, there would be a settling of accounts and Mr Hong, Mr Lee and Mr Kim would each be responsible on one-third basis for any fundraising shortfall;
- (e) Mr Kim could mortgage the properties of Mr Hong and Mr Henry Lee at any time;
- (f) If the purchase of the property for the Cultural Centre did not go through, Mr Kim could purchase the property at the original price;
- (g) If Mr Kim purchased the property, a public meeting would be held to consider what should happen with the fundraising amount.

⁴ *Kim v Lee* [2015] NZHC 3237.

Commitment to further fundraising efforts

[31] After settlement of the purchase of the Cultural Centre on 29 March 2013, the Foundation Committee members took steps to encourage further donations from the Korean community.

[32] On 31 March 2013, the Committee published an announcement in the NZ Koreapost in which Mr Henry Lee, Mr Hong and Mr Kim said they had agreed to contribute additional funds to meet the shortfall in the fundraising effort. The announcement said that Mr Lee and Mr Hong would each contribute \$20,000 and Mr Kim would contribute \$30,000, and that together the three committee members had agreed to donate \$120,000 to the fundraising effort. In the event, Mr Henry Lee and Mr Hong did not pay these additional contributions.

[33] On 3 April 2013, Mr Hong issued a statement purporting to be on behalf of himself and Mr Henry Lee which thanked the Korean community for their contributions to the Cultural Centre. Mr Henry Lee denies having any role in the preparation of the statement. The statement:

- (a) Thanked Mr Kim for his "... advanced payment of \$430,000 to make up the balance of the purchase price which was lacking to complete the purchase";
- (b) Said fundraising would end on 26 April 2013;
- (c) Advised that as at 3 April 2013, the total contribution made by the Korean community was \$610,089;
- (d) Recalled that the contribution of the Overseas Korean Foundation was contingent on the Korean community funding half of the purchase price – that is, \$750,000 – and that this requirement had been satisfied with the help of Mr Kim's advanced payment;
- (e) Said that to reach the sum of \$750,000 there still remained \$148,191 to be paid by the community by 26 April 2013;

- (f) Promised that if this was not achieved, the committee co-chairs and Mr Kim would pay the remaining amount;
- (g) Declared to the Overseas Korean Foundation and the Korean community that the fundraising that would end on 26 April would “... share the advanced payment made by the three members of the committee in a unified effort to help the Korean community and the \$750,000 is established as the Korean Community Donation.”

Discussions regarding Cultural Centre governance and candidates' deposits

[34] At around this time, there were also discussions going on within the Korean Society about the appropriate structure to own and manage the Cultural Centre. Mr Henry Lee's position was that the Cultural Centre should be held in a trust under the management of a Board of Trustees (BOT). Mr Henry Lee says that an essential part of the basis on which he signed the 27 March 2013 agreement was that there should be a separation between the Korean Society and the management of the Cultural Centre. There were also discussions about the size of the deposit that should be required from candidates for election to the position of President of the Korean Society and about whether those deposits, proposed to be \$60,000 per candidate, could be used to meet the funding shortfall for the purchase of the Cultural Centre. The size of that proposed deposit generated considerable controversy and was criticised in an article published in the Sunday Times on 11 April 2013.

[35] On 26 April 2013, Mr Hong put out a statement as President of the Korean Society in which he announced the background to a decision to reduce the “donation” of candidates for the Presidency to \$5,000 and explained the “shortage” of the fund for the Cultural Centre and the transfer of responsibility for the shortage to the incoming 12th Committee of the Korean Society. The announcement said that because of the reduction in the “donation” to \$5,000 it would be difficult to meet the “shortage amount of Korean residents” within the term of the 11th Committee (under his Presidency which was to end on 31 May 2013). The statement said that in the difficult economic situation, “it is difficult for the organising committee of 3 persons to additionally donate the shortage amount of Korean residents, which is over \$110,000”

and that if the shortage amount was not “achieved” by the end of his term as President, it would become the responsibility of the incoming Committee.

[36] On 11 May 2013, Mr Kim was elected President of the Korean Society at a special general meeting, with his two-year term of office to commence from the annual general meeting held on 31 May 2013.

[37] On 31 May 2013, at its annual general meeting, the Korean Society amended its rules to provide for the establishment of a board of directors to manage the Cultural Centre. While this was not the BOT he had envisaged, Mr Henry Lee accepted appointment as chair of the BOD. Mr Kim and Mr Hong were also appointed to the BOD.

[38] On 5 September 2013, Mr Henry Lee issued a statement on behalf of the “Korean Community Centre Committee” in which he said the Korean Consulate in Auckland had notified the Committee that the Overseas Korean Foundation had approved funding of \$150,000 towards the establishment of the Cultural Centre. However, the statement said that delivery of that amount was conditional on meeting the funding target of \$750,000, that about \$650,000 had been raised and that an extra \$100,000 was required. The statement also said the Committee planned to continue the Fundraising campaign and was waiting to receive financial statement, bank accounts and other management documents from the Korean Society.

Deteriorating relationships and ensuing fallout

[39] By this stage, relations between Mr Kim and Mr Henry Lee were deteriorating. Mr Henry Lee says that was because of Mr Kim’s refusal to provide an accounting of the funds raised for the Cultural Centre as envisaged in the document of 27 March 2013, and Mr Kim’s refusal to follow through on a commitment to put in place a BOT for the management of the Cultural Centre. Mr Kim says Mr Henry Lee had access to the Korean Society accounts which recorded the state of the fundraising but agrees there was a serious disagreement over the structure for the management of the Cultural Centre. He also says he was receiving representations from other members of the Korean Society questioning the validity of the rule changes and the appointment of

the BOD made at the annual general meeting on 31 May 2013 because the quorum requirements had not been complied with.

[40] On 5 November 2013, the police were called to the Cultural Centre when there was unruliness at a meeting of the BOD, apparently relating to the Korean Society accounts and involving the Society's auditor, Kum Nam Cho (Mr Cho). These developments were the subject of an article in the Sunday Times on 8 November 2013.

[41] On 8 November 2013, Mr Kim issued a public notice to members of the Korean Society advising that the resolutions that had been adopted at the annual general meeting on 31 May 2013 were invalid because there had not been the requisite quorum of Society members present provided for in the Society's rules.

[42] On 11 November 2013, Mr Henry Lee sent a letter to Mr Kim declaring the 27 March 2013 agreement invalid for breach of the condition that there should be separation between the management of the Cultural Centre and the Korean Society.

[43] On 15 November 2013, Mr Henry Lee published a letter in The Weekly Korea setting out his position on how he came to be a co-chair of the foundation committee, the background to the fundraising campaign and how the purchase of the Cultural Centre building was settled. The letter referred to agreements made by himself, Mr Hong and Mr Kim over funding and the management structure of the Cultural Centre and to the dispute over the BOD / BOT, and accused Mr Kim of amending the rules of the Korean Society to enable the establishment of the BOD and made various uncomplimentary remarks about Mr Kim.

[44] Mr Henry Lee's letter referred to the content of the 27 March 2013 agreement but not the existence of a formal document. It stated that nearly a month before the settlement date for the Cultural Centre, when it was understood that donations had fallen "far too short to settle the purchase", the three Foundation Committee members had met at Mr Hong's office to discuss "plans to resolve the settlement issue". They each agreed to make a further donation (\$30,000 by Mr Kim; \$20,000 each by Mr Hong and Mr Henry Lee). Mr Henry Lee agreed to this proposal on condition that a BOT be formed and managed separately from the Korean Society. "All three of us

agreed to this and should the settlement fund fall short, then the three of us would take mutual responsibility by paying the shortfall by “1/N”. (It is understood that “1/N” in this context meant “1/3” or one-third).

[45] On 18 November 2013, Mr Kim published a statement in the NZ Koreapost in which Mr Kim referred to the police call-out to the Cultural Centre on 5 November 2013 and gave his version of the background to those events. The statement referred to questions that had been raised about the validity of the establishment of the BOD in terms of the Korean Society’s rules. It also set out Mr Kim’s version of the funding arrangements for the Cultural Centre and referred specifically to the 27 March 2013 agreement signed by Mr Kim, Mr Hong and Mr Henry Lee in which they agreed to share equally in paying any shortfall. The statement referred to the payment of \$423,000 that Mr Kim had made “by proxy” and said that amount had been reduced to \$333,000 following Mr Kim’s donation of \$30,000 and a repayment to Mr Kim of \$60,000 by the Korean Society.

[46] On 29 November 2013, a special general meeting of the Korean Society annulled the amendments made to its rules in May 2013 and disestablished the BOD.

[47] On 16 December 2013, Mr Kim published a further statement about the funding arrangements for the Cultural Centre. The focus of the statement was on the need to meet the overall fundraising target of \$750,000 in order to secure the \$150,000 grant from the Overseas Korean Foundation. However, the statement also referred to the “pledge” made by Mr Kim, Mr Hong and Mr Henry Lee on 27 March 2013 to meet any shortfall and said that agreement was still valid and that Mr Kim would be collecting on the pledges made by Mr Henry Lee and Mr Hong.

Legal proceedings

[48] In December 2013, Mr Kim registered caveats against properties owned by Mr Henry Lee and Mr Hong. Mr Henry Lee and Mr Hong later issued notices seeking the removal of the caveats.

[49] In January 2014, the Department of Internal Affairs began inquiries into various matters relating to the affairs of the Korean Society, including the loan by

Mr Kim to the Korean Society for \$423,000 to enable the Society to complete the purchase of the Cultural Centre.

[50] On 22 February 2014, police were called to a special general meeting of the Korean Society after Mr Cho had attempted to question Mr Kim about the Society's accounts and Mr Kim had attempted to have Mr Cho removed from the meeting. In the ensuing ructions, Mr Hong was escorted from the premises and served with a trespass notice. (The trespass notice was later rescinded by the police).

[51] In March 2014, Mr Kim filed a proceeding against Mr Henry Lee to sustain the caveat against his property. In a judgment issued on 23 May 2014, the caveat was sustained but on condition that Mr Kim bring a proceeding to resolve his dispute with Mr Henry Lee over monies Mr Henry Lee was said to owe to Mr Kim.

[52] Various sets of proceedings were filed in 2014 on matters relating to the funding of the purchase of the Cultural Centre and associated governance issues:

- (a) In April 2014, Mr Lee and Mr Cho commenced proceedings against Mr Kim and the Korean Society over the legality of the decisions made at the Special General meeting of the Korean Society in November 2013 and the expulsion of Mr Cho. These proceedings were subsequently discontinued.
- (b) In June 2014, Mr Kim brought proceedings against Mr Henry Lee for the monies said to be owed under the 27 March 2013 agreement. On 15 December 2015, well after publication of the article that is the basis of the current proceeding, Faire J issued judgment in favour of Mr Kim for the sum of \$41,157.00, being Mr Henry Lee's one-third share of the amount owed to Mr Kim under the document after various adjustments had been made for sums donated by and credited to Mr Kim.⁵

⁵ *Kim v Lee* [2015] NZHC 3237.

- (c) In September 2014, Mr Henry Lee and his company, Evergreen, commenced defamation proceedings against Mr Kim. This proceeding was subsequently discontinued.

Department of Internal Affairs warning notice

[53] On 3 March 2015, the Department of Internal Affairs wrote a letter to Mr Kim headed “Warning Notice – the Korean Society of Auckland Incorporated”. In its letter, the Department said it had completed its investigations into the Korean Society and that those investigations had revealed activities by the Korean Society and more specifically by its past and present Presidents, Mr Hong and Mr Kim, that were against the Society’s charitable purpose and in breach of the Society’s Rules. The letter said the Department had decided not to take formal action to remove the Society from the Charities Register but instead was issuing the formal warning notice under s 54 of the Charities Act 2005.

[54] The Department’s letter addressed three sets of issues: transactions regarding the promotion of the golfer, Lydia Ko; the “written agreement” Mr Kim entered into with Mr Henry Lee and Mr Hong on 27 March 2013 “... to loan the society a shortfall of \$423,000 for the purchase of the Korean Community Centre”; and the various sets of proceedings noted above at [52]. Regarding the shortfall, the letter said that in making the loan Mr Kim had breached the Society’s Rules by not obtaining the approval of two-thirds of the members at a general meeting.

[55] The letter recorded that in the course of the Department’s discussions with Mr Kim, Mr Kim had offered three conflicting explanations of the loan arrangement and about how the loan was to be repaid by the Society and by Mr Henry Lee and Mr Hong and about the donation credits Mr Kim claimed. The Department’s letter recorded that under each of those explanations, Mr Kim would personally profit from the loan arrangement by amounts ranging between \$52,562 to \$69,934 once interest was added. The letter recorded that under all three explanations, Mr Kim was expecting to be repaid by the Korean Society as well as Mr Henry Lee and Mr Hong for what was essentially the same loan.

[56] On 13 March 2015, the Sunday Times published the “Seed of Dispute” article. In his evidence, Mr Steve Lee confirmed he received a copy of the Department’s report, which had been translated into Korean, before publishing the article. He also stated that the Korean community had been shocked and upset about the warning given by the Department and the possibility that the Korean Society could have been deregistered, and he had written the article after reflecting on what had happened to bring the community to that point.

Was Mr Henry Lee defamed in the Seed of Dispute article?

[57] The defendants have admitted the 15 meanings of the article pleaded by Mr Henry Lee but have denied that any of the statements is defamatory. The Court’s first task, therefore, is to decide whether the 15 admitted meanings are defamatory of Mr Henry Lee. In this regard, the focus of the Court’s inquiry is on the admitted meanings and not on the article itself.

[58] Ms Goatley includes in her written submissions the following summary of the law drawn from *The Law of Torts in New Zealand*,⁶ which Mr Strauss does not challenge and which I adopt:

There is no single definition of what is defamatory. Four in particular have achieved common currency:

- (a) A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally;⁷
- (b) A false statement about a person to his or her discredit;⁸
- (c) A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule;⁹
- (d) A statement about a person which tends to make others shun and avoid him or her.¹⁰

⁶ Stephen Todd and others, *The Law of Torts in New Zealand*, (7th ed, Thomson Reuters, Wellington, 2016) at [16.3.01].

⁷ *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.

⁸ *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) per Scrutton LJ.

⁹ *Parmiter v Coupland* (1840) 6 M & W 105, 151 All ER 340 at 109,342 per Parke B.

¹⁰ *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 587 (CA) per Slessor LJ.

[59] As is said in *The Law of Torts in New Zealand*:¹¹

While all these definitions have the same thrust, there are differences in emphasis between them. A reading of all four together gives a reasonable impression of the nature of the tort.

[60] As set out in the statement of claim and as slightly reformulated in Ms Goatley's closing submissions, the admitted meanings are that:

- (a) Mr Henry Lee was a party to an agreement relating to the funding of the Cultural Centre and the plaintiff and the other parties planned to hide the agreement from the public / Korean community;
- (b) Mr Henry Lee was a party to a plan to deceive the public about the true nature of the fundraising arrangements for the Cultural Centre;
- (c) The existence of the "behind contract", and by implication the behaviour of Mr Henry Lee as a party to it, was "shocking";
- (d) Mr Henry Lee has not acted openly, honestly or honourably;
- (e) In trying to "privatise the Centre", Mr Henry Lee and Mr Hong were attempting to usurp the authority of the Korean Society and take personal control of the Cultural Centre;
- (f) Mr Henry Lee, together with Mr Hong, sought to control the BOD so as to be able to avoid paying money they owed to Mr Kim;
- (g) Mr Henry Lee got involved in a "muddy fight" over the validity of the dismissal of the BOD to try to avoid paying money he owned to Mr Kim;

¹¹ Stephen Todd and others, *The Law of Torts in New Zealand*, (7th ed, Thomson Reuters, Wellington, 2016) at [16.3.01].

- (h) Mr Henry Lee was a party to a plan to deceive members of the Korean community by pretending that things (i.e. fundraising) were going well and hiding the contract;
- (i) The reason why Mr Henry Lee hid the contract was to avoid having to pay any money;
- (j) When entering into the contract to share the burden of the funding, Mr Henry Lee had no intention of actually paying any money;
- (k) If Mr Henry Lee had to pay any money, then his plan to avoid paying money would have gone wrong;
- (l) Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community;
- (m) Mr Henry Lee was portraying his actions as if they were for the benefit of the Korean community and the Cultural Centre, when in fact he was engaging in a struggle over money in order to pursue his own personal ambitions;
- (n) Mr Henry Lee is a hypocrite;
- (o) By embellishing the true position, Mr Henry Lee was misleading the Korean community.

[61] Ms Goatley groups the 15 admitted meanings into five broad categories:

- (a) Mr Henry Lee misled or deceived the public / Korean community (meanings (a), (b), (h), (o));
- (b) Mr Henry Lee's behaviour was not open, honest or honourable and was "shocking" (meanings (c), (d) and (e));

- (c) Mr Henry Lee's actions were intended to benefit himself and not the Korean community (meanings (c), (l) and (m));
- (d) Mr Henry Lee's intention or objective was to avoid paying money that he owed to Mr Kim (meanings (f), (g), (i), (j) and (k));
- (e) Mr Henry Lee is a hypocrite (meaning (n)).

[62] Mr Strauss does not challenge that grouping and I adopt it as a useful way of considering the 15 admitted meanings.

[63] Ms Goatley submits that these meanings are defamatory because they fall within the definitions cited at [58] in that:

- (a) They may tend to lower Mr Henry Lee in the estimation of right-thinking members of society generally;
- (b) They are false statements about Mr Henry Lee to his discredit;
- (c) They are publications without justification which are calculated to injure Mr Henry Lee's reputation by exposing him to hatred, contempt or ridicule;
- (d) They will tend to make others shun and avoid Mr Henry Lee.

[64] I accept that the admitted meanings are defamatory in terms of the definitions in (a) and (d) in [58]. Whether or not the meanings are defamatory in terms of the definitions in (b) and (c) in [58] depends on whether the statements are false or made without justification. That is for consideration when assessing the pleaded affirmative defences. For the moment, however, I am satisfied that all of the admitted meanings are defamatory in the sense that statements that Mr Henry Lee sought to hide matters from the Korean community, misled or deceived the Korean community, was not honest or honourable in his conduct, was looking to benefit himself in actions taken on behalf of the Korean community, was looking to avoid paying money he owed to someone else and was a hypocrite are all statements that tend to lower Mr Henry Lee

in the estimation of the Korean community. In the context of this publication, published in Korean and aimed at the Korean community, the Korean community is the relevant society for assessing the fact and extent of the defamation.

[65] As Ms Goatley submits, there is no requirement for Mr Henry Lee to prove actual damage from the defamatory statements,¹² although Mr Lee gave evidence as to the damage he says his reputation has suffered and to his loss of standing in the Korean community. While the defendants deny the article caused damage to Mr Henry Lee's reputation and say that any such damage was caused by the conduct of Mr Henry Lee and others, I am satisfied that the admitted meanings in themselves were damaging to Mr Lee's reputation and standing irrespective of his own actions and the actions of others.

Were the admitted meanings true?

[66] Section 8(3) of the Defamation Act provides:

- (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.

[67] The Court of Appeal in *Television New Zealand Ltd v Haines* has determined that paragraphs (a) and (b) of s 8(3) provide alternative defences. Under paragraph (a), a defendant will avoid liability if it proves that the imputations pleaded were true or not materially different from the truth. Alternatively, under paragraph (b), a defendant will avoid liability if it proves that the publication taken as a whole was in substance true or was in substance not materially different from the truth. The Court of Appeal also held that the two different methods of proving truth must be pleaded separately.¹³

¹² See *English and Scottish Cooperative Properties Mortgage and Investment Society* [1940] 1 KB 440 at 461 per Goddard LJ.

¹³ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [46].

[68] The defendants' pleadings do not accord with that direction by the Court of Appeal but, in effect, plead the two alternatives together. Paragraph 30 of the Amended Statement of Defence dated 27 February 2018 states:

The publication and the admitted imputations ... are in substance true or not materially different from the truth.

[69] This rolled up approach to the defence of truth was continued in the opening and closing submissions for the defendants which assert that the article taken as a whole, including the admitted imputations, was in substance true, or was in substance not materially different from the truth. The defendants in their closing submissions also say that most of the imputations which the defendants have admitted are available inferences to be drawn from the contents of the article rather than the meaning of the words and that the defendants must prove the truth of the facts providing the basis for the inferences but do not have to prove the truth of the inferences.

[70] There are difficulties with that approach and those propositions. First, the approach does not accord with that directed in *Television New Zealand Ltd v Haines*. While I do not consider that fatal, to be consistent with that decision and the language of s 8(3) I must consider the pleaded defence separately against the two paragraphs in s 8(3). That is, I must first consider whether the defendants have proven that the 15 imputations pleaded by Mr Henry Lee and admitted by the defendants were true, or not materially different from the truth. I must then consider whether the defendants have proven that the article as a whole was in substance true or not materially different from the truth.

[71] Secondly, as part of this rolled up defence, Mr Strauss submits that the defence of truth can succeed if the defendants establish that the admitted imputations are available inferences to be drawn from established facts and that the defendants do not have to prove the truth of the imputations themselves. I accept that inferences are logical conclusions drawn from facts that have been reliably established. To that extent, I accept that to prove the truth of an inference it is sufficient to prove the facts from which the inference is drawn. But I do not accept that it is sufficient to establish the truth of an inference by showing that the inference is "available".

[72] As Ms Goatley submitted, the law in New Zealand, as affirmed by the Court of Appeal in *Broadcasting Corporation of New Zealand v Crush*,¹⁴ and confirmed by the Court of Appeal in *Television New Zealand Ltd v Haines* and *Simunovich Fisheries Ltd v Television New Zealand Ltd*¹⁵ following the passage of the Defamation Act, is that in seeking to establish the defence of truth, a defendant cannot set up an alternative meaning from that pleaded by the plaintiff. Rather, a defendant can deny that the words used are capable of bearing the meanings alleged or it can prove that the meanings alleged are true or substantially true.¹⁶ It follows that where an imputation is an inference, to establish the truth of that imputation a defendant must satisfy the Court that the facts from which the inference is drawn are true or not materially different from the truth and that the inference as pleaded by the plaintiff is, on the balance of probabilities, the logical inference to be drawn from the established facts. That is, the defendants must satisfy the Court that the inference is more likely than any other inference to be drawn from those facts and not just that it is “available”.

Are the admitted imputations true or the logical inference to be drawn, on the balance of probabilities, from the established facts?

[73] Section 38 of the Defamation Act provides:

38 Particulars in defence of truth

In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying—

- (a) the statements that the defendant alleges are statements of fact; and
- (b) the facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[74] In paragraph 31 of their statement of defence, the defendants list, in 27 subparagraphs, the facts on which they rely to establish the truth of the admitted

¹⁴ *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA).

¹⁵ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [55] – [59]; *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [51] – [52].

¹⁶ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [54].

imputations. Those subparagraphs cover in summary form most but not all of the matters described in [22] – [52] above.

[75] In his submissions, Mr Strauss says that five of the admitted imputations are true and that the remaining 10 are either true or are honest opinion. Accordingly, for the purposes of determining the first affirmative defence of truth, the Court must assess whether, on the balance of probabilities, the defendants have established that each of the imputations is true or is the logical inference to be drawn from the established facts.

Connotations of “yi-myin-gye-yak”

[76] Before considering the individual imputations, it is useful to consider the meaning of the Korean term “yi-myin-gye-yak” used to describe the 27 March 2013 agreement in the headline to the article and in the body of the article. While it is not the function of the Court to decide the English meaning of a Korean term, I consider it necessary to establish whether the term has particular connotations because that may be relevant both to the veracity of the admitted imputations and to the issue of aggravated damages.

[77] As noted at [13], while both parties agreed the term could be translated as “behind contract or “hidden contract”, they disagreed on the connotations said to arise in the use of the term. Witnesses for Mr Henry Lee asserted that the term has very negative connotations in Korean of shameful and untoward secretiveness, whereas witnesses for the defendants asserted that, depending on the context, the term can simply mean undisclosed or hidden.

[78] Paul Wislang Lee (Mr Paul Lee), a professional translator called by Mr Henry Lee, said the term can have different meanings. It can be used neutrally, such as when concealing something from a third party. But he said that more often than not it is used with negative meanings including “dual contract”, “behind contract”, “back-door deal”, “non-genuine agreement”, “under the table agreement”, “behind the scenes agreement” and “secret deal”.

[79] Mr Paul Lee's views were supported by the evidence of Jung Hee Kim (Ms Kim), another professional translator called by Mr Henry Lee. She said the term "yi-myin-gye-yak" has a very negative meaning in Korean and it is a "distasteful word used to denote under-the-table agreements and other unsavoury arrangements". Under cross examination, Ms Kim refused to accept that the term itself does not have any negative meaning and instead takes its meaning from its context.

[80] Hae-Gyeobng Shin (Ms Shin) a translator called by the defendants said it was not the function of a translator to speculate on which particular meaning of several possible meanings an author may have in mind nor to attribute a particular connotation to a word or phrase. In her view, the term "yi-myin-gye-yak" was best translated as "internal contract" because it was an agreement between three members of the same committee. She maintained this neutral and somewhat technical approach to the translation of the term under cross-examination.

[81] Unsurprisingly, Mr Henry Lee insisted that the term has very negative connotations. Mr Henry Lee said any suggestion that the 27 March 2013 agreement was a "yi-myin-gye-yak" was highly offensive and damaging to his reputation. His view was endorsed by Mr Cho.

[82] Mr Steve Lee acknowledged in cross examination that the term "yi-myin-gye-yak" can have negative connotations and can have meanings such as "back door deal" and "non-genuine agreement" but insisted that in his article there was no implication or comment that the 27 March 2013 agreement was illegal or immoral or wrong, and said the meaning of the term was a different matter from the existence of the agreement and whether or not it was disclosed.

[83] I was not persuaded by the evidence of Mr Steve Lee on this point nor by the evidence of Ms Shin. Both avoided engaging with the meaning of the term in the context in which it was used. While I do not have to decide what the term "yi-myin-gye-yak" means, I am satisfied that it has the negative connotations of shamefulness and untoward secretiveness asserted by Mr Paul Lee and Ms Kim and was intended to describe the 27 March 2013 agreement, particularly in the headline to the article, in pejorative and sensational terms.

Were the imputations true or not materially different from the truth?

[84] I consider each of the imputations in turn although, for convenience, I group some together.

*Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the agreement from the public*¹⁷

[85] This imputation arises from the headline to the article and in a paragraph in the body of the article where, as in the headline, “yi-myin-gye-yak” is used to describe the 27 March 2013 agreement.

[86] In addition to the difference in view over the interpretation of “yi-myin-gye-yak”, it became apparent at the hearing that there is also a difference of view as to the meaning of the first imputation, even though it has been admitted by the defendants. Mr Henry Lee says the imputation is that he planned to hide from the public the fact that Mr Henry Lee, Mr Hong and Mr Kim had made an agreement to cover the shortfall. The defendants say that the crux of the imputation is that the three men planned to hide the fact they had entered into a formal agreement and that it is the fact of the formal agreement that is the “shocking fact” referred to later in the article.

[87] Whether or not the fact of a formal written agreement has more far-reaching connotations in a Korean context as Mr Steve Lee asserted, based on the agreed translation of the article I do not accept that the imputation that Mr Henry Lee planned to hide the 27 March 2013 agreement means that it was the fact of a formal agreement that the three men planned to hide. I consider that the article and the admitted imputation are sufficiently broad to encompass an assertion that the three men planned to hide the fact that they had made an arrangement, whether formal or informal, to cover the shortfall. However, I do not consider that anything turns on this difference of interpretation.

[88] Mr Strauss says the documents and the viva voce evidence establish that the fact of a formal written agreement was not disclosed until 24 November 2013 when Mr Kim published his statement in the NZ Koreapost, which proves the intention to

¹⁷ Paragraphs 14(a) and 16(a) of Third Amended Statement of Claim.

hide the agreement from the public. Ms Goatley says the fact of an agreement to cover the shortfall was disclosed in Mr Hong's statement of 3 April 2013, shortly after the 27 March 2013 agreement had been signed.

[89] Ms Goatley, in her cross examination of Mr Kim, challenged Mr Kim's evidence in chief in which he said that the three men did not intend the agreement to become public because if the Korean public found out about the agreement to cover the shortfall the public would be less inclined to contribute themselves to meeting that shortfall. Mr Kim acknowledged that there is no explicit provision in the agreement requiring that it not be disclosed and that he had not intended to hide the agreement from the public even if he had no reason to make it public. However, this last admission was followed by a statement by Mr Kim that if the agreement had been publicised, it could have affected fundraising so the three signatories implicitly agreed it would not be disclosed to the public. That statement is consistent with Mr Kim's evidence in chief.

[90] I also note that in Mr Kim's evidence in chief he stated:

By concluding the agreement and using my retirement funds, we avoided the shame and humiliation if the transaction had not settled and the [Korean Society] had lost its deposit.

[91] In cross examination, Mr Steve Lee also accepted that the 27 March agreement had the effect of ensuring that the settlement was completed and the deposit was not lost. In Mr Henry Lee's evidence in reply, he too referred to the "beneficial" nature of the 27 March 2013 agreement because it enabled the completion of the purchase of the Cultural Centre.

[92] I am satisfied that the documentary evidence establishes there was no intention to make the fact of an agreement, whether formal or informal, or its contents public at the time the 27 March 2013 agreement was signed or for some months afterwards. I do not accept Mr Henry Lee's evidence or Ms Goatley's submission that the fact of the agreement was disclosed in Mr Hong's statement of 3 April 2013.

[93] Mr Hong's statement distinguishes between Mr Kim's "advance payment" of \$430,000 and the remaining sum of \$148,191 to be paid by the Korean community in

order to meet the target of \$750,000 necessary to trigger the contribution by the Overseas Koreans Foundation. The commitment stated in that announcement to “pay the remaining amount” is clearly a reference to any shortfall in the remaining sum of \$148,191 and not a reference to the much larger sum covered in the “advance payment” by Mr Kim and provided for in the 27 March 2013 agreement.

[94] Ms Goatley says the paragraph in Mr Hong’s statement – in which he declared that the fundraising that would end on 26 April would share the advanced payment made by the three members of the committee in a unified effort to help the Korean community – amounts to a disclosure of the essence of the 27 March 2013 agreement.

[95] I consider that paragraph is too unclear to bear that interpretation given the significance of the point at issue and given the difficulties of interpreting an English translation of a Korean document. On the translation before the Court, it would require a very well-informed reader to understand that this paragraph meant that, notwithstanding the preceding paragraphs in which it was said that a further payment of \$148,191 had to be paid by the Korean community and that the three committee members would cover that amount if necessary, in fact the fundraising from the community would also be used to cover the advance payment made by Mr Kim, and that Mr Henry Lee and Mr Hong would share in that as well. The paragraph may be an allusion to the 27 March 2013 agreement but it falls short of a disclosure of the fact of the agreement or its contents.

[96] My conclusion that there was no disclosure of the 27 March 2013 agreement or its contents and no intention to make such disclosure before November 2013 is reinforced by the following:

- (a) There was no reference to the fact or content of the 27 March 2013 agreement in Mr Hong’s statement of 26 April 2013 which linked the commitment of the three Foundation Committee members to meeting the “shortage amount of Korean residents” then stated to be “over \$110,000” and not to any wider undertaking. The figure of “over \$110,000” is consistent with the sum of \$148,191 said to be outstanding in the statement of 3 April 2013.

- (b) There was no reference to the fact or content of the 27 March 2013 agreement in Mr Henry Lee's statement of 5 September 2013. Furthermore, that statement said that about \$650,000 had been raised towards the fundraising target of \$750,000 and that an extra \$100,000 was required. The last figure is also consistent with the figures in Mr Hong's statements of 3 and 26 April 2013.
- (c) The Korean Society's treatment of the advance payment as a loan as confirmed in the report by the Department of Internal Affairs.
- (d) Mr Henry Lee's evident reluctance at the time and subsequently, including at the hearing of this proceeding, to accept that the 27 March 2013 agreement imposed any binding obligations on him.
- (e) The first direct reference to the content of the 27 March 2013 agreement was in Mr Henry Lee's statement published in the Weekly Korean on 15 November 2013 in which he referred obliquely to the agreement the three committee members had made to meet any shortfall by one third in the context of explaining his insistence on the establishment of a BOT.
- (f) The first full reference to the fact and content of the 27 March 2013 agreement was in Mr Kim's statement of 18 November 2013.

[97] I am satisfied, therefore, that, notwithstanding the agreement's silence on the question of disclosure, none of the three signatories intended the fact or the content of the 27 March 2013 agreement to be disclosed at the time it was made because:

- (a) Disclosure might discourage further donations by the wider Korean community;
- (b) The three signatories were concerned to ensure that the purchase of the Cultural Centre did not fall through and the Korean Society's deposit

was not forfeited, as might have been the case if the full extent of the fundraising shortfall had been disclosed;

- (c) All three signatories were concerned to protect their own reputations and not to reveal publicly the extent to which their fundraising efforts had fallen short;
- (d) Neither Mr Hong nor Mr Henry Lee was keen to acknowledge a responsibility to meet one third of a shortfall that included most or all of the payment of \$430,000 made by Mr Kim.

[98] Ms Goatley submits that there is a material difference between merely not disclosing something and deliberately “hiding” it. I accept there is a difference but it depends on the context. In this case, the phrase complained of is that Mr Henry Lee and the other signatories of the 27 March 2013 agreement had a plan to hide the agreement from the public. I am satisfied that they had at least an informal understanding not to disclose the agreement. That is clear from the distinction drawn in Mr Hong’s statement of 3 April 2013 between Mr Kim’s “advance payment” of \$430,000 and the remaining sum of \$148,191. In these circumstances, and because we are working on the basis of an English translation of a Korean document, I have had considerable difficulty deciding whether saying the three signatories had a plan to hide the agreement is substantially different from saying they had a plan not to disclose the agreement, even if the former states the point more pejoratively.

[99] However, there is the further consideration of the use of the term “yi-myin-gye-yak” to describe the 27 March 2013 agreement which, as I have already found, adds a substantially greater derogatory connotation that Mr Henry Lee and the other signatories concluded an agreement that had connotations of shamefulness and untoward secretiveness. Whether that description of the agreement is appropriate requires some analysis of the circumstances that applied at the time the 27 March 2013 agreement was entered into.

[100] While it can be argued that the three Foundation Committee members should have disclosed the full extent of the fundraising shortfall at the time of settlement of

the purchase, I infer from the evidence that the Committee members were concerned that if the full extent of the shortfall had been revealed, it might have led to collapse of the purchase and the loss of the deposit already paid by the Korean Society. That would have been a significant blow for the Korean community as well as a loss of face for the three Committee members. By concluding the 27 March 2013 agreement, the Committee members ensured that the purchase could be settled – which was to the benefit of the Korean community and not at all inappropriate or shameful. In fact, there was nothing in the agreement or its contents that required that it should be disclosed. It was a private agreement between the three Committee members who were entitled to treat it as such. Putting to one side the disputes that arose subsequently, there was nothing inappropriate or shameful about the three Foundation Committee members agreeing on an arrangement to cover the fundraising shortfall to enable the settlement of the purchase of the Cultural Centre in the hope that the shortfall could be met by future donations.

[101] Accordingly, I conclude that to say that Mr Henry Lee and the other signatories had a plan “to hide” the 27 March 2013 agreement which is described by the use of the derogatory term “yi-myin-gye-yak” is substantially different from saying that they had a plan, in the sense of an informal understanding, not to disclose an agreement that they genuinely considered to be in the interests of the Korean community. Accordingly, I find that the defendants have not proven that the imputation that Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the agreement from the public was true or not materially different from the truth.

*Mr Henry Lee a party to a plan to engage in deception*¹⁸

[102] There are, in essence, two imputations going to the question of deception. These are that Mr Henry Lee was a party to plans:

- (a) To deceive the Korean community about the true nature of the fundraising arrangements for the Cultural Centre;

¹⁸ Paragraphs 14(b), 16(b) and 22(a) of Third Amended Statement of Claim.

- (b) To deceive the Korean community by pretending that the fundraising was going well and hiding the 27 March 2013 agreement.

[103] Mr Strauss says the first of these imputations is no different in substance from the imputation that Mr Henry Lee planned to hide the 27 March 2013 agreement from the public. Mr Strass is correct, depending on the meaning to be given to “deceive”. In some contexts, the term can mean causing or allowing someone to believe something that is false. In other contexts, it carries the added factor of trapping, depriving or overcoming someone by trickery.¹⁹ In my view, the use of the terms “deception” and “deceive” in the context of this article, combined with the description of the 27 March 2013 agreement as a “yi-myin-gye-yak”, carries some of those added connotations; that is that the three signatories to the 27 March agreement were trying to trick or fool the Korean community into thinking that the signatories were doing something honourable when in fact they were acting less than honourably.

[104] I accept that by not disclosing the true extent of the shortfall to the Korean community, Mr Henry Lee and the other Committee members allowed the community to believe the fundraising had gone reasonably well to the extent there was only a shortfall of approximately \$100,000 in April 2013 when in fact the true extent of the shortfall was considerably greater. However, I do not accept that the Committee members’ lack of candour was for the purpose of trapping, depriving or overcoming the Korean community by trickery. Accordingly, I find that the defendants have not proven that the imputations of deception are true or not materially different from the truth.

*Mr Henry Lee had not acted openly, honestly or honourably*²⁰

[105] Despite the defendants pleading truth to the two imputations to identical effect, in closing submissions Mr Strauss says only that these imputations amount to a value judgment which the defendants contend was an honest opinion. While I do not take that submission to mean that the defendants have abandoned their pleading of truth to these imputations, the submission is a recognition of the difficulty of proving

¹⁹ Shorter Oxford English Dictionary, (6th ed, Oxford University Press, New York, 2007).

²⁰ Paragraphs 14(c) and 16(d) of Third Amended Statement of Claim.

propositions going to character. I consider it established, on the basis of the discussion of the preceding imputation, that Mr Henry Lee and the other signatories were less than open in their engagements with the Korean community about the fundraising. But the evidence fell well short of establishing that Mr Henry Lee was dishonest or acted dishonourably. Accordingly, I find that the defendants have not established that these imputations were true or not materially different from the truth.

*The existence of the 27 March 2013 agreement and by implication the behaviour of Mr Henry Lee as a party to it were “shocking”*²¹

[106] Mr Strauss says on his closing submissions that the description of something as “shocking” is an opinion. I agree. The question of whether or not something is shocking relates to the impact of an event on others – which is inherently a matter of opinion. The truth of that is not easily proved. In any event, as I have held, there was nothing inherently inappropriate or shameful about the 27 March 2013 agreement that makes the existence of the agreement or Mr Henry Lee being a party to it “shocking”. Accordingly, the defendants have not established that this imputation was true or not materially different from the truth.

*In trying to “privatise the Centre”, Mr Henry Lee and Mr Hong were attempting to usurp the authority of the Korean Society and take personal control of the Cultural Centre*²²

[107] This imputation is written as if the propositions stated are the views of the writer. In fact, it is clear from the paragraph of the article from which this imputation is drawn that the paragraph deals with Mr Kim’s thoughts on the matters addressed. The paragraph begins:

The President Kim, who thought that the persons who did not pay back the money tried to privatise the Centre, announced the dissolution of BOD by

[108] Although the imputation was not pleaded or admitted as Mr Kim’s opinion, the imputation cannot be given a meaning in pleadings that is not faithful to the text from which it was drawn. I consider, therefore, that the imputation must be considered in the context of the article so that it means “Mr Kim thought that, in trying to privatise

²¹ Paragraph 16(c) of Third Amended Statement of Claim.

²² Paragraph 18(a) of Third Amended Statement of Claim.

the Centre Mr Henry Lee and Mr Hong were attempting to usurp the authority of the Korean Society and take personal control of the Cultural Centre.”

[109] The only evidence offered to establish the truth of the proposition of privatisation is the statement of claim in the proceeding Mr Henry Lee brought against Mr Kim in September 2014 but later discontinued. In that statement of claim, Mr Henry Lee alleged that Mr and Mrs Kim had stated publicly that Mr Henry Lee would like to take ownership of the Cultural Centre. That allegation was pleaded in establishing the foundation for a defamation proceeding and cannot be taken as proving as true that Mr Kim thought Mr Lee and Mr Hong were looking to own or privatise the Cultural Centre. Moreover, it is clear from Mr Kim’s evidence in chief and from the article he published in the NZ Koreapost on 18 November 2013 that Mr Kim’s concerns were focused on what he saw as Mr Henry Lee’s attempt to make the BOD a superior body to the Korean Society rather than any attempt to “privatise” the Centre.

[110] However, the privatisation point is subsidiary to the more substantive allegations in the imputation, namely that Mr Kim thought that Mr Henry Lee and Mr Hong were attempting to usurp the authority of the Korean Society and take personal control of the Cultural Centre. It is clear from the article Mr Kim published in the NZ Koreapost on 18 November 2013 and from Mr Kim’s evidence in chief that Mr Kim did indeed believe that Mr Lee and Mr Hong were attempting to usurp the authority of the Korean Society – in the sense that he saw their efforts as designed to make the BOD superior to the Society – and that he thought Mr Lee wanted to be in control. Accordingly, I am satisfied that this imputation, when read in the context of the article from which it is drawn, is true or not materially different from the truth.

*Mr Henry Lee, together with Mr Hong, sought to control the BOD so as to avoid paying money they owed to Mr Kim*²³

[111] In his closing submissions, Mr Strauss says this imputation is, in substance, not materially different from the truth in that the issue of control over the Cultural

²³ Paragraph 20(a) of Third Amended Statement of Claim.

Centre played a major role in the dispute between the parties and Mr Henry Lee in fact delayed payment to Mr Kim until 2016.

[112] I do not accept that submission. Whatever Mr Kim may have thought, I am not satisfied the evidence establishes that Mr Henry Lee was in fact trying to control the BOD or the Cultural Centre. Mr Lee's evidence, which was not seriously challenged by the defendants, was that he wanted an accounting of the amounts raised in the fundraising and he wanted a separation between the governance of the Korean Society and the Cultural Centre. There are sound administrative reasons for such a separation. The report of the Department of Internal Affairs, which set out the ways in which Mr Kim sought to profit personally from his position as President of the Society, confirms there was substance to Mr Henry Lee's concerns.

[113] It follows that the defendants cannot establish that the imputation that Mr Henry Lee sought to control the BOD in order to avoid paying money was true or not materially different from the truth because it is based on a false premise.

Mr Henry Lee got involved in a "muddy fight" over the validity of the dismissal of the BOD to try to avoid paying money he owed to Mr Kim²⁴

[114] In cross examination, Mr Steve Lee said he considered the "muddy fight" to be about all the matters that arose in relation to the funding of the Cultural Centre including the legal proceedings, the public meetings of the Korean Society, and the involvement of the police, and it was not just about the dismissal of the BOD. However, that is not what the agreed translation of the article says. Nor is it the sense of the admitted imputation or how counsel for the defendants or Mr Henry Lee addressed this imputation.

[115] As Mr Strauss submits, the fact that a serious dispute erupted is not in issue. However, the inference that Mr Henry Lee became involved in the dispute over the BOD to try to avoid paying money he owed to Mr Kim is disputed.

²⁴ Paragraph 20(b) of Third Amended Statement of Claim.

[116] Ms Goatley says that Mr Henry Lee's evidence was that he did not want to be involved in the fight and that he stepped down from the position of co-chair of the Foundation Committee on 15 November 2013. That was the same day Mr Henry Lee published his letter in *The Weekly Korea* on the issues of governance and the arrangements for meeting the fundraising shortfall and in which he made direct attacks on Mr Kim's character. It was also only four days after Mr Henry Lee had written to Mr Kim purporting to declare the 27 March 2013 agreement invalid. There was undoubtedly a link between the BOD governance issues and the arrangements for meeting the fundraising shortfall.

[117] However, the decision to dismiss the BOD was that of Mr Kim, not Mr Henry Lee. The evidence demonstrates there was already a significant dispute between the two men over the governance and shortfall issues before Mr Kim took steps to disestablish the BOD. Given that history, it is hardly surprising that Mr Henry Lee reacted strongly to the dismissal of the BOD. But the assertion that he became involved in a fight over the dismissal in order to avoid paying the money he owed to Mr Kim is not supported by the evidence. Accordingly, the defendants have not established that this imputation was true or not materially different from the truth.

*The reason why Mr Henry Lee hid the 27 March 2013 agreement was to avoid having to pay any money*²⁵

[118] I have already found that Mr Henry Lee and the other signatories to the 27 March 2013 agreement had an informal understanding not to disclose the agreement and that one of the reasons for that was a reluctance on the part of Mr Henry Lee and Mr Hong to accept that they had made a binding commitment to meet any residual shortfall. However, I do not consider that this was the driving consideration behind the informal understanding not to disclose the agreement. I consider the other considerations I have identified – namely a wish not to discourage others from contributing funds, a concern not to allow the purchase of the Cultural Centre to fall over and to forfeit the Korean Society's deposit and a wish by all three Foundation Committee Members to protect their reputations – were more important in the non-disclosure understanding. Whether or not a reluctance to pay amounts to an intention

²⁵ Paragraph 22(b) of Third Amended Statement of Claim

to avoid paying and whether or not hiding and not disclosing amount to the same thing, I do not consider it would be accurate to say that “the reason” why Mr Henry Lee did not disclose the 27 March 2013 agreement was to avoid paying any money under the agreement.

[119] Accordingly, I find that the defendants have not proven that this imputation was true or not materially different from the truth.

*When entering into the 27 March agreement to share the burden of the funding, Mr Henry Lee had no intention of actually paying any money*²⁶

[120] As Ms Goatley submitted, this imputation is similar to the preceding one but it does not hinge on an assumption that Mr Henry Lee hid the 27 March 2013 agreement. It addresses only the question of Mr Henry Lee’s intentions when he entered into the agreement and raises directly the question or whether Mr Henry Lee’s reluctance to pay under the agreement amounted, at the time of the agreement’s signature, to an intention not to pay.

[121] Mr Henry Lee’s intentions can be determined only by assessing the truth of his evidence and by inferences drawn from established facts. In giving evidence, Mr Henry Lee evinced a continuing unwillingness to accept that he had any obligations under the 27 March 2013. He said he would not have signed it if he had understood it to be binding. But in cross examination, he denied that he never had any intention or paying any money under the 27 March 2013 agreement.

[122] It was clear from the evidence that Mr Henry Lee expected, or at least hoped, that sufficient funds would be raised from the Korean community so that he would not be called on to make good on the undertaking to meet one-third of any shortfall. He refused to accept any liability to pay without a full accounting of fundraising received and continued to dispute the amount due under the agreement. He also claimed that his obligation to pay was conditional on there being a separation between the governance of the Korean Society and that of the Cultural Centre when there was no such requirement in the 27 March 2013 agreement. And, in fact, the only money he

²⁶ Paragraph 22(c) of Third Amended Statement of Claim.

paid under the agreement was pursuant to the judgment given by Faire J on 15 December 2015.

[123] However, a demand that there be an accounting of fundraising amounts before paying any money is not unreasonable. The report of the Department of Internal Affairs also shows that Mr Henry Lee had grounds for being suspicious about the way Mr Kim was managing the fundraising accounts and for insisting on separate governance arrangements for the Korean Society and the Cultural Centre. In addition, relationships had so deteriorated by the time proceedings were brought for payment under the agreement that it is difficult to say whether Mr Henry Lee's stance at that time was motivated by his initial reluctance to pay or by other considerations. For example, it was clear from Mr Henry Lee's evidence that he had taken particular exception to the fact that Mr Kim had registered a caveat against his property.

[124] For these reasons, I do not accept that the established facts provide an adequate basis for inferring that when entering into the 27 March 2013 agreement, Mr Henry Lee had no intention of actually paying any money. Accordingly, I find that the defendants have not proven that this imputation was true or not materially different from the truth.

If Mr Henry Lee had to pay any money, then his plan to avoid paying money would have gone wrong²⁷

[125] The defendants do not accept that this imputation is defamatory but contend it is either true or an honest opinion based on true facts.

[126] I consider that the imputation is defamatory because it proceeds from an assumption Mr Henry Lee had a plan to avoid paying money. I do not accept that is established on the evidence.

[127] I have already held that Mr Henry Lee was reluctant to pay any money under the 27 March 2013 agreement but I have also held that the established facts do not provide an adequate basis for inferring that when entering into the 27 March 2013

²⁷ Paragraph 22(d) of Third Amended Statement of Claim.

agreement, Mr Henry Lee had no intention of actually paying any money. It follows that the established facts do not provide an adequate basis for inferring that Mr Henry Lee had a plan to avoid paying money. Therefore, I do not accept the premise on which this imputation is based and find that the defendants have not established that this imputation was true or not materially different from the truth.

*Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community*²⁸

[128] This imputation was pleaded as arising from the penultimate paragraph in the article which read:

The fight over the money which was triggered by personal desires for fame and honour and the behind contract shall not be embellished as if it were “for the Korean community” or “for the Centre”. ...

[129] That paragraph followed a paragraph referring to the agreement of Mr Henry Lee, Mr Kim and Mr Hong to share one third of \$430,000 but asserting they intended to “create an atmosphere” among the Korean community in order to avoid having to pay any money.

[130] Taken in context, therefore, this imputation must mean that Mr Henry Lee and the other signatories, in entering into the 27 March 2013 agreement and then becoming engaged in the fight over its implementation of the agreement and the governance arrangements for the Cultural Centre, principally had regard to their own interests and not those of the Korean community.

[131] Mr Henry Lee and Mr Kim both gave evidence, which I considered credible, that they had been motivated by a concern to complete the purchase of the Cultural Centre on behalf of the Korean Community when they entered into the 27 March 2013 agreement. I consider Mr Henry Lee’s focus on the governance issues for the Cultural Centre was also motivated by a concern to protect the interests of the Korean community. The evidence established that there were also personal interests involved: to protect their reputations, Mr Henry Lee’s concern to minimise if not avoid responsibility to contribute more funding and Mr Kim’s apparent profiteering from the

²⁸ Paragraph 24(a) of Third Amended Statement of Claim.

manner in which he sought to recover the funds he had advanced, as found by the Department of Internal Affairs.

[132] I accept that these personal reputational and monetary concerns were part of the reason for “the fight over the money”. However, I do not consider that the evidence establishes that they were the sole or motivating considerations behind the 27 March 2013 agreement or even behind the fight given the range and interplay of the issues around the agreement, the governance arrangements for the Cultural Centre, the findings of the Department of Internal Affairs in its report and the deteriorating relationships between Mr Kim on one side and Mr Henry Lee and Mr Hong on the other.

[133] Accordingly, I find that the defendants have not proven that the imputation that Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community was true or not materially different from the truth.

*Mr Henry Lee was portraying his actions as if they were for the benefit of the Korean community and the Cultural Centre, when in fact he was engaging in a struggle over money in order to pursue his own personal ambitions*²⁹

[134] This imputation deals with the same issues as the previous one but is put around the other way: that Mr Henry Lee is said to have portrayed his actions as being motivated by the interests of the Korean community when in fact he was pursuing his own interests. I have already held that the evidence does not establish that Mr Henry Lee’s personal interests were the sole or motivating considerations. It follows that I find that the defendants have not proven that this imputation was true or not materially different from the truth.

*Mr Henry Lee is a hypocrite*³⁰

[135] Mr Strauss submits that the crux of this imputation is that of the imputation that Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community. I accept that submission because it is made in relation to the same paragraph in the article. It follows that, for the same reasons identified with

²⁹ Paragraph 24(b) of Third Amended Statement of Claim.

³⁰ Paragraph 24(c) of Third Amended Statement of Claim.

regard to the earlier imputation, I find that the defendants have not proven that this imputation was true or not materially different from the truth.

*By embellishing the true position, Mr Henry Lee was misleading the Korean community*³¹

[136] This imputation assumes Mr Henry Lee was embellishing the true position. The alleged embellishment is that he was claiming to be acting in the interests of the Korean community when in fact he was acting in his own interests. I have already held that the evidence does not establish that Mr Henry Lee's personal interests were the motivating considerations. Accordingly, I do not accept that the evidence established that Mr Henry Lee was embellishing the true position or misleading the Korean community.

[137] In summary, therefore, I find that, on the balance of probabilities, the defendants have established the truth of one of the admitted imputations: that Mr Kim thought that Mr Henry Lee was attempting to usurp the authority of the Korean Society and take personal control of the Cultural Centre. In all other respects, in terms of s 8(3)(a) of the Defamation Act, the defendants have not proved that the imputations pleaded by Mr Henry Lee and admitted by the defendants were true or not materially different from the truth.

Have the defendants proved that the publication taken as a whole was in substance true, or was in substance not materially different from the truth?

[138] For the reasons previously discussed, I address this point because it flows from the defendants' rolled up approach to the defence of truth. However, the defendants have not contended that the meaning of the article taken as a whole is different from the meaning of the admitted imputations. Nor could such a submission succeed. I am satisfied that the imputations reflect the overall content of the article. I have found that the defendants have proved that only one of those imputations was true or not materially different from the truth, and that was principally because that imputation was linked to the thoughts of Mr Kim. Since the imputations reflect the overall content

³¹ Paragraph 24(d) of Third Amended Statement of Claim.

of the article and have not been found to be true, it follows that the article taken as a whole is not in substance true or not materially different from the truth.

Honest opinion

[139] As noted at [73], s 38 of the Defamation Act requires that a defendant who alleges that an expression of opinion is an honest opinion must give particulars specifying the statements it alleges are statement of fact and the facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[140] Section 11 of the Defamation Act provides:

11 Defendant not required to prove truth of every statement of fact

In proceedings for defamation in respect of matter that consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion shall not fail merely because the defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to—

- (a) those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or
- (b) any other facts that were generally known at the time of the publication and are proved to be true.

[141] In paragraph 41 of the statement of defence, the defendants identify 22 of the 27 subparagraphs set out in paragraph 31 of the statement of defence as the facts supporting the asserted opinions. In paragraph 42 of the statement of defence, the defendants identify five of those 22 subparagraphs as appearing in the article. In paragraph 43 of the statement of defence, the defendants say that the facts in the remaining 17 subparagraphs of the 22 subparagraphs were generally known at the time of publication.

[142] In that bare sense, the defendants have complied with the requirements of ss 11 and 38 of the Defamation Act. However, this further rolled up pleading is far from ideal and is some distance from the approach mandated by the Supreme Court in *APN*

New Zealand Ltd v Simunovich Fisheries Ltd where the Court said, with respect to the pleading of particulars of facts relied on in support of a defence of honest opinion.³²

The defendant is required to identify a sufficient factual basis for its opinion, so that readers or views may assess the validity of the opinion for themselves against the relevant facts truly stated.

[143] In her closing submissions, Ms Goatley submits the defendants' pleading of honest opinion is deficient because it does not plead honest opinion to the imputations pleaded by the identify and does not identify which imputation is said to have been conveyed as an opinion and does not establish that that imputation was conveyed as a comment.

[144] Technically, that submission is correct because, in paragraph 40 of the statement of defence, the defendants have pleaded honest opinion insofar as "the publication" consists of expressions of opinion. That is, they do not plead honest opinion directly with respect to the imputations pleaded by Mr Henry Lee. Despite that technical point, however, it was clear on the face of the pleadings and even more so from Mr Strauss's submissions that the defendants in effect assert the defence of honest opinion to the 15 pleaded and admitted imputations in so far as the defence of truth is not accepted.

[145] That is not the only difficulty, however, with the defendants' pleading. In essence, what the defendants say in their pleading is:

- (a) There are five established facts identified in the article. These are: the settlement of the purchase of the Cultural Centre in late March 23; the shortfall of \$423,000; Mr Kim's provision of \$423,000 to settle the purchase; the statement by Mr Hong on 3 April; Mr Kim's statement on 16 December 2013 on the funding arrangements for the Cultural Centre (paragraph 31(l), (m), (n), (o) and (s) of defendants' statement of claim).

³² *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [18].

- (b) Any other unspecified facts stated in the article were generally known at the time;
- (c) All the admitted imputations are true;
- (d) If an imputation is not true, it is honest opinion based on true facts.

[146] This attempt to cover all bases without identifying which imputations are said to be opinion rather than fact and which facts are relied on to support such imputations of opinion is far from satisfactory. However, in the context of this case, where the defendants have admitted all of the imputations, I do not consider that the plaintiffs have been significantly prejudiced in responding to the asserted defence of honest opinion. It is reasonably apparent in each case whether an imputation is a matter of fact or opinion, as I discuss below. It is axiomatic, however, that in order to succeed with the defence of honest opinion, the defendants must establish that the matters which are said to be opinions, were conveyed as expressions of opinion or comment and not as statements of fact.³³ However, as the Court of Appeal said in *Television New Zealand v Haines*, in deciding whether the imputations that have been found to exist were conveyed as expressions of opinion or statements of fact, it is necessary to consider the context in which the imputations arise.³⁴

Genuine opinion of Mr Steve Lee and the Sunday Times

[147] Under section 10 (1) of the Defamation Act, Mr Steve Lee's defence of honest opinion must fail unless he proves that any opinion expressed is his genuine opinion.

[148] In their evidence and in Mr Strauss's submissions, the defendants did not address the question of whether the opinion of the Sunday Times is to be considered separately under s 10(2) of the Defamation Act or whether the Sunday Times has adopted Mr Steve Lee's opinions as its own. In the former case, the Sunday Times would need to prove that Mr Steve Lee's opinions were not its own and that it believed that the opinions expressed by Mr Steve Lee were his genuine opinion. In the latter

³³ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [90].

³⁴ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [91] – [93].

case, the Sunday Times would need to prove, under s 10(1), that Mr Steve Lee's opinion was genuinely held.

[149] As Ms Goatley acknowledges in her closing submissions, it has been accepted that where a media publisher adopts as its own the opinions in an article it publishes, it may satisfy s 10(1) by proving the opinion was genuinely held by the person whose state of mind can be attributed to it, the publisher.³⁵ While Mr Strauss did not address the point, I am satisfied that it would be artificial in this case to draw a distinction between the opinion of Mr Steve Lee who is the sole shareholder and director of the Sunday Times and who states in his evidence that he produces all of the local content including the editorial or opinion content of the Sunday Times. In other words, both Mr Steve Lee and the Sunday Times can satisfy the requirements of s 10(1) if the defence prove that any opinions expressed in the article were the genuine opinions of Mr Steve Lee.

Nature of article

[150] Before considering each of the imputations, it is necessary to address the nature of the article. It appeared beneath the heading "Non-dan". The agreed translation of this word was "Editorial". There was some discussion in the evidence of the translators that the term might better be translated as "open forum", "panel discussion" or "column". However, I do not consider anything turns on this. I proceed on the basis that the article is an editorial or opinion piece in which views are expressed. However, whether statements in the editorial are statements of fact or expressions of opinion or comment turns on the statements themselves rather the heading of the article, although the heading may provide context for determining whether a statement is an assertion of fact or a comment.

[151] I accept that in an editorial piece, statements of opinion may not be accompanied by the usual qualifications associated with an expression of opinion such as "I think" or "it is our opinion". However, for a statement to be considered as an expression of opinion, it must be apparent to a reasonable reader that the author is

³⁵ *Hubbard v Fourth Estate Holdings Ltd* HC Auckland CIV-2004-404-5152, 13 June 2005 at [18].

expressing an opinion or comment on the facts in question and is not purporting to put forward another fact.³⁶

Were the imputations, in their context, expressions of genuine opinion?

*Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the agreement from the public*³⁷

[152] I have already found that the imputation that Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the agreement from the public was not true or not materially different from the truth.

[153] Mr Strauss does not say that this proposition was in the nature of a comment and was Mr Steve Lee's genuinely held opinion. Even if he did, the submission could not have succeeded. The imputation in the context of the article as a whole is that Mr Henry Lee had a plan to hide the 27 March 2013 agreement, which was a shameful and untowardly secretive agreement; and this is conveyed as a statement of fact rather than an expression of opinion, reinforced by the use of the term "yi-myin-gye-yak" in the headline. It follows that the defence of honest opinion does not apply.

*Mr Henry Lee was a party to a plan to engage in deception*³⁸

[154] As with the previous imputations, the two deception imputations are conveyed as statements of fact and not as expressions of opinion. It follows that the defence of honest opinion does not apply to the two imputations going to deception.

*Mr Henry Lee had not acted openly, honestly or honourably*³⁹

[155] I accept that, in the context of an editorial or opinion piece, an imputation that Mr Henry Lee had not acted openly, honestly or honourably is in the nature of a comment based on the established fact that Mr Henry Lee was a party to an agreement that had not been disclosed rather than a statement of fact. Regardless of whether that was a reasonable inference to draw, I am satisfied that Mr Steve Lee held that opinion

³⁶ *Templeton v Jones* [1984] 1 NZLR 448 (CA) at 455.

³⁷ Paragraphs 14(a) and 16(a) of Third Amended Statement of Claim.

³⁸ Paragraphs 14(b), 16(b) and 22(a) of Third Amended Statement of Claim.

³⁹ Paragraphs 14(c) and 16(d) of Third Amended Statement of Claim.

genuinely and that the Sunday Times adopted Mr Steve Lee's opinion as its own. Under cross examination, Mr Steve Lee maintained his view that Mr Henry Lee and Mr Hong had been motivated by concerns of power and money and did not accept that Mr Lee and Mr Hong were acting in the interests of the Korean community. I find that this opinion was based on the fact of the 27 March 2013 agreement and its subsequent disclosure as well as the disputes between Mr Henry Lee and Mr Kim over the governance arrangements for the Cultural Centre and Mr Henry Lee's obligations to Mr Kim under the 27 March 2013 agreement – all of which are facts identified in the article. Accordingly, I find that the defence of honest opinion to this imputation is made out.

*The existence of the 27 March 2013 agreement and by implication the behaviour of Mr Henry Lee as a party to it were "shocking"*⁴⁰

[156] I agree with Mr Strauss that the statement that something is "shocking" is a value judgment which is inherently a matter of opinion. I note the evidence of Bong Il Kim that he did not consider the announcement made by Mr Kim in November 2013 regarding the 27 March agreement as "shocking". Be that as it may, I am satisfied that Mr Steve Lee held that opinion genuinely and that the Sunday Times adopted Mr Steve Lee's opinion as its own and that the opinion was based on the fact of the 27 March 2013 agreement and its subsequent disclosure. Accordingly, I find that the defence of honest opinion is made out.

*Mr Henry Lee, together with Mr Hong, sought to control the BOD so as to avoid paying money they owed to Mr Kim*⁴¹

[157] The imputation contains two assertions: that Mr Henry Lee and Mr Hong sought to control the BOD and that they did so in order to avoid paying money they owed to Mr Kim. These are conveyed as assertions of fact and not as comment. Furthermore, this imputation is taken from a paragraph which purports to be a quotation from Mr Henry Lee and Mr Hong, although Mr Steve Lee acknowledged in cross examination that no-one said those words to him. Whether or not that is an acceptable journalistic device, the use of quotation marks in a manner which suggested

⁴⁰ Paragraph 16(c) of Third Amended Statement of Claim.

⁴¹ Paragraph 20(a) of Third Amended Statement of Claim.

that these were the words of the person being spoken of negates any inference that the imputation is an expression of the writer's opinion. Whether or not a reasonable person would have read the quoted words as the actual words of Mr Henry Lee and Mr Hong, their use was clearly intended to signal that these were their real thoughts – as Mr Steve Lee acknowledged in cross examination. It follows that the defence of honest opinion does not apply.

*Mr Henry Lee got involved in a “muddy fight” over the validity of the dismissal of the BOD to try to avoid paying money he owed to Mr Kim*⁴²

[158] The imputation and the paragraph from which it is drawn assert that Mr Henry Lee and Mr Hong started a fight on the legality of the dismissal of the BOD in order to avoid paying money owned to Mr Kim. Mr Strauss submits that it is not in issue that a serious dispute erupted and contend that, if not true, it is an honest opinion based on true facts.

[159] It is undeniable that a serious dispute erupted. Even if the facts are otherwise, as I have held, I also accept that it is Mr Steve Lee's genuinely held opinion that Mr Henry Lee and Mr Hong became involved in the fight over the validity of the BOD in order to avoid paying the money they owed to Mr Kim. The difficulty for Mr Steve Lee is that the assertions are conveyed as statements of fact and not as comment, including through the use of quotation marks suggesting these were the views of the person being spoken about rather than the opinion of the writer. Accordingly, I find that the defence of honest opinion does not apply.

*The reason why Mr Henry Lee hid the 27 March 2013 agreement was to avoid having to pay any money*⁴³

[160] I have held that the defendants have not established the truth of this imputation. I accept, however, that a reasonable reader could regard this imputation, which purports to give the writer's reasons for Mr Henry Lee's actions, as being in the nature of comment rather than a statement of fact.⁴⁴ However, this inference is also drawn from the section in quotation marks which suggest that the views attributed to

⁴² Paragraph 20(b) of Third Amended Statement of Claim.

⁴³ Paragraph 22(b) of Third Amended Statement of Claim.

⁴⁴ See *Mitchell v Spratt* [2002] 1 NZLR 766 (CA) at [27].

Mr Henry Lee are Mr Henry Lee's own views rather than the opinion of the writer. Accordingly, I find that the defence of honest opinion does not apply.

*When entering into the 27 March agreement to share the burden of the funding, Mr Henry Lee had no intention of actually paying any money*⁴⁵

[161] I make the same finding with respect to this imputation as I made for the previous imputation for the same reasons.

*If Mr Henry Lee had to pay any money, then his plan to avoid paying money would have gone wrong*⁴⁶

[162] While I am hesitant to place weight on the use of the conditional ("would have gone wrong") in the context of a translation, I consider that such a construction is more appropriate to a comment than an assertion of fact. Moreover, this imputation more obviously derives from the sentence in the paragraph that is not in quotation marks, which also suggests that it is a comment rather than a statement of fact. I also accept this is a statement of opinion which flows from Mr Steve Lee's genuinely held opinion that Mr Henry Lee had to plan to avoid paying any money, and that his opinion has been accepted by the Sunday Times as its own. The opinion is based on the same facts identified with respect to the previous imputation. Therefore, I find that the defence of honest opinion to this imputation has been made out.

*Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community*⁴⁷

[163] I accept that a reasonable reader would be likely to regard this imputation as being in the nature of comment rather than a statement of fact. Mr Steve Lee was emphatic in his evidence in chief and under cross examination that, at least with respect to the dispute over the governance arrangements, that Mr Henry Lee was pursuing his own ambitions rather than the interests of the Korean community. I accept that this is Mr Steve Lee's genuinely held opinion and that his opinion has been adopted by the Sunday Times as its own. The opinion is based on the same facts

⁴⁵ Paragraph 22(c) of Third Amended Statement of Claim.

⁴⁶ Paragraph 22(d) of Third Amended Statement of Claim.

⁴⁷ Paragraph 24(a) of Third Amended Statement of Claim.

identified with respect to the previous two imputations. Therefore, I find that the defence of honest opinion to this imputation has been made out.

*Mr Henry Lee was portraying his actions as if they were for the benefit of the Korean community and the Cultural Centre, when in fact he was engaging in a struggle over money in order to pursue his own personal ambitions*⁴⁸

[164] As noted above, this imputation deals with the same issues as the previous imputation. As with the previous imputation, I am satisfied that a reasonable reader would be likely to regard this imputation as being in the nature of comment rather than a statement of fact. It is an assessment of how Mr Henry Lee was portraying his actions and what his true ambitions were. While I have found that the truth of the imputation has not been made out, it is apparent from Mr Steve Lee's evidence that he genuinely believes that Mr Henry Lee, at least with respect to the dispute over the governance arrangements, was pursuing his own ambitions rather than acting in the interests of the Korean community and the Cultural Centre. I also accept that his opinion has been adopted by the Sunday Times as its own. The opinion is based on the same facts identified with respect to the previous three imputations plus disagreements that occurred at the meetings of the Korean Society, which are also identified in the article. Therefore, I find that the defence of honest opinion to this imputation has been made out.

*Mr Henry Lee is a hypocrite*⁴⁹

[165] I accepted above Mr Strauss's submission that the crux of this imputation is that of the imputation that Mr Henry Lee was pursuing his own personal ambitions rather than the interests of the Korean community. In other words, it is the same imputation as the previous two imputations. As with those imputations, I accept that it is Mr Steve Lee's genuine opinion and that his opinion has been adopted by the Sunday Times as its own. The opinion is based on the same facts identified with respect to the previous imputation. Therefore, I find that the defence of honest opinion to this imputation has been made out.

⁴⁸ Paragraph 24(b) of Third Amended Statement of Claim.

⁴⁹ Paragraph 24(c) of Third Amended Statement of Claim.

*By embellishing the true position, Mr Henry Lee was misleading the Korean community*⁵⁰

[166] While I have not accepted the truth of this imputation, I accept that, as with the previous imputations, it is Mr Steve Lee's genuine opinion that Mr Henry Lee was embellishing his position by claiming to be acting in the interests of the Korean community when in fact he was acting in his own interests. I accept that it is Mr Steve Lee's genuine opinion and that his opinion has been adopted by the Sunday Times as its own. The opinion is based on the same facts identified with respect to the previous imputation. Therefore, I find that the defence of honest opinion to this imputation has been made out.

Result on defences of truth and honest opinion

[167] I have found that one of the imputations is true or not materially different from the truth and that seven of the imputations are expressions of opinion that were genuinely held by Mr Steve Lee and that his opinions on these matters have been adopted by the Sunday Times as its own and that these opinions have been based on facts identified in the article. Accordingly, there are seven imputations which the defendants have admitted and for which they have not so far established an affirmative defence.

[168] The next question for the Court is whether those imputations are covered by the newly recognised defence of public interest communication.

Public interest communication

[169] In her closing submissions, Ms Goatley addressed the Court on the law of qualified privilege, including the extension by the Court of Appeal in *Lange v Atkinson*⁵¹ of common law qualified privilege to political statements that are published generally and relate to politicians. Ms Goatley contrasted the law on qualified privilege in New Zealand and Australia with that in the United Kingdom where, in *Reynolds v Times Newspapers Ltd*,⁵² the House of Lords decided not to follow the

⁵⁰ Paragraph 24(d) of Third Amended Statement of Claim.

⁵¹ *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

⁵² *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

Australian and New Zealand approach of developing a new category of qualified privilege for political discussion but accepted that qualified privilege can be available for general publications on matters of public concern, depending on the circumstances. Ms Goatley explained the approach taken by Lord Nicholls in *Reynolds* in identifying what came to be known as “the *Reynolds* factors” and noted the cases in New Zealand where there has been some discussion of, but no decision on, whether New Zealand law should develop in the direction of *Reynolds*.

[170] One of those cases was the decision of Mallon J in *Durie v Gardiner*⁵³ where the High Court considered an application to strike out a defence of qualified privilege based on *Reynolds*, being “neutral reportage or, alternatively, responsible communications on matters of public interest”, on the grounds such a defence could not succeed in New Zealand. In that decision, Mallon J undertook a comprehensive review of the law in New Zealand, the United Kingdom and Canada (where the Supreme Court of Canada had recognised a new defence of public interest communication⁵⁴) since the decisions in *Lange v Atkinson* and *Reynolds* and declined to strike out the pleaded defence of qualified privilege based on *Reynolds*, finding that it could not be said that the defence could not succeed and noting that in her view:⁵⁵

... it is tenable, indeed necessary, that such a defence be recognised if freedom of expression is to be given its proper weight in this country.

[171] After closing submissions had been made in the present case, the Court of Appeal issued its decision which dismissed the appeal brought against Mallon J’s decision. In doing so, the Court of Appeal established that there is in New Zealand law a new defence of public interest communication that is not confined to parliamentarians and politicians but extends to all matters of significant public concern and which is subject to a responsibility requirement.⁵⁶ It is important to note that the new defence is a standalone defence and not part of the rubric of qualified privilege.⁵⁷

⁵³ *Durie v Gardiner* [2017] NZHC 337, [2017] 3 NZLR 72.

⁵⁴ *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640.

⁵⁵ *Durie v Gardiner* [2017] NZHC 337, [2017] 3 NZLR 72 at [105].

⁵⁶ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [56].

⁵⁷ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [82].

[172] As noted at [4], following the release of the Court of Appeal's decision, I offered the parties the opportunity to make further submissions on the applicability of the new defence to the present case. Both Mr Strauss and Ms Goatley filed further submissions.

[173] Mr Strauss submits that the new defence applies to the circumstances of the present case. As noted at [5], the defendants sought and were granted leave to substitute the new defence for the previously pleaded defence of qualified privilege. Mr Strauss says the new defence is a complete answer to Mr Henry Lee's claim.

[174] Ms Goatley submits that the article in the present case was not in the public interest so is not covered by the new defence. In the alternative, Ms Goatley argues that if the Court finds the article was in the public interest, the new defence does not apply because the communication was not responsible.

The elements of the new defence of public interest communication

[175] The background to and rationale for the new defence of public interest are fully covered in the decisions of Mallon J and the Court of Appeal in *Durie v Gardiner* so I do not repeat them here. For present purposes, it is enough to set out the key elements of the defence as found by the Court of Appeal. It is not necessary for the purposes of this case to address the question of reportage, on which majority and minority views were expressed in *Durie v Gardiner*, because it is not contended that the article was reporting the views of a third party.

[176] The Court of Appeal held unanimously that the key elements of the new defence are:⁵⁸

- (a) The subject matter of the publication must be of public interest;
- (b) The communication must be responsible.

On both of these elements, the defendant bears the onus of proof.

⁵⁸ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [58] – [59] and [104].

[177] In relation to the public interest element:

- (a) The defence is available to all who publish material of public interest in any medium;⁵⁹
- (b) In determining whether the subject matter is of public interest, the judge should step back and look at the thrust of the publication as a whole; it is not necessary to find a separate public interest justification for each item of information;⁶⁰
- (c) To be of public interest, the subject matter should be one inviting public attention or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.⁶¹

[178] The Court of Appeal said that in determining whether the communication was responsible, relevant circumstances to be taken into account may include.⁶²

- (a) The seriousness of the allegation – the more serious the allegation, the greater the degree of diligence to verify it.
- (b) The degree of public importance.
- (c) The urgency of the matter – did the public’s need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.
- (d) The reliability of any source.
- (e) Whether comment was sought from the plaintiff and accurately reported – this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond.
- (f) The tone of the publication.
- (g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

⁵⁹ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [59].

⁶⁰ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [64].

⁶¹ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [65]; *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 at [96] – [97].

⁶² *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [66] – [67].

[179] The above list of factors clearly derives from the Supreme Court of Canada's decision in *Torstar*, which in turn drew from the *Reynolds* factors identified by Lord Nicholls in that case. The list is not exhaustive and in some cases not all factors may be relevant. The factors must be applied in a practical and flexible manner with regard to practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists.⁶³

Was the article of public interest?

[180] The article addresses issues of substantial and evident concern to a segment of the New Zealand public – namely, the Korean community in Auckland – and to which considerable public notoriety and controversy had attached. It is apparent from the evidence, including the articles published in the Korean media, the statements issued by the various protagonists, the ructions that arose at the various meetings of the Korean Society, the police call-outs and the issue of trespass notices, the legal proceedings that were commenced if not always completed, and the inquiry and report of the Department of Internal Affairs, that the fundraising arrangements for the purchase of the Cultural Centre and the governance arrangements for the Cultural Centre had attracted significant notoriety and controversy within the Korean community in Auckland.

[181] While I agree with Ms Goatley that the 27 March 2013 agreement was envisaged at the time of signature as a private arrangement between the three signatories, it was directed to resolving an issue of concern to the wider Korean community. Indeed, that was one of its key purposes. Moreover, whatever the intentions might have been at the time of signature, by the time of the publication of the article, the agreement and the other issues addressed in the article had become matters of much wider concern and understandable public interest that bore on the functioning of the Korean Society itself.

[182] It is clear from the Court of Appeal's judgment in *Durie v Gardiner* that the Court intended the new defence to apply to a very wide range of publications, including those by bloggers and users of Twitter and Facebook and other social

⁶³ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [68].

media.⁶⁴ It would be inconsistent with the spirit and intent of the judgment to hold in this case that an article by a professional journalist such as Mr Steve Lee about matters that have been of considerable public moment and controversy within the Korean community was not of public interest in the terms discussed by the Court of Appeal in *Durie v Gardiner* and by the Supreme Court of Canada in *Grant v Torstar Corp*. I hold, therefore, that the subject matter of the *Seed of Dispute* article was of public interest article.

Was publication of the article responsible?

Seriousness of allegations

[183] The article contained serious allegations going to the probity and honour of Mr Henry Lee and the members of the Foundation Committee and accused them of hiding things that should have been disclosed to the Korean community, deceiving the Korean community, acting dishonourably and dishonestly, of putting their personal interests ahead of the Korean community in carrying out their responsibilities, and of seeking to avoid obligations they had accepted under the 27 March 2013 agreement.

Urgency of publication

[184] There no urgency to the publication. It was published on 13 March 2015, some considerable time after the principal events to which it referred: almost two years after signature of the 27 March 2013 agreement; 16 months after Mr Kim's statement to NZKoreapost on 18 November 2013 in which the details of the 27 March 2013 agreement were made public; over 15 months since the special general meeting of the Korean Society on 29 November 2013 disestablished the BOD. It was also published 10 days after the release of the Department of Internal Affairs report. Despite the release of that report providing the impetus for the article, a few days further delay to have enabled comment and correction of factual errors would not have compromised the timeliness of the article.

⁶⁴ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [56](c).

Reliability of any source

[185] Mr Steve Lee acknowledged seeking the views of Mr Kim before he published the article. If Mr Kim was consulted as a source, which was not clear on the evidence, he was a partial, interested and compromised source, given the findings of the Department of Internal Affairs report. But whether or not Mr Kim was a source, there was no evidence to suggest this was a case where protection of a source was a relevant consideration.

Comment sought from the plaintiff

[186] Mr Steve Lee acknowledged that he did not seek any comment from Mr Henry Lee before publishing the article. In cross examination, he accepted a journalist had a responsibility to confirm “the matters you need to confirm” and a responsibility to check facts before publishing. He did not accept, however, that he always had an obligation to give people an opportunity to comment before publishing damaging allegations about them and said the obligation applied only if there was a need to check the facts.

[187] Mr Steve Lee accepted that he had reported Mr Kim’s views of the 27 March 2013 agreement and had reported that Mr Henry Lee did not agree, but Mr Steve Lee refused to accept he had any responsibility to seek Mr Henry Lee’s views on those matters or to give Mr Henry Lee an opportunity to comment. He insisted that he only reported facts and his genuine opinion.

Tone of article

[188] The tone of the article was critical of the signatories of the 27 March 2013 agreement, reflecting Mr Steve Lee’s view – which he reiterated in evidence – that the agreement and its non-disclosure were the cause of the divisions within the Korean community in Auckland. Apart from the use of the term “yi-myin-gye-yak”, however, I do not agree with Ms Goatley that the tone was “sensational” in the sense that term is normally used to describe journalism that seeks magnify issues for the purposes of gaining attention. The tone was more censorious than sensational – consistent with Mr Steve Lee’s view, which he also stated in evidence, that his role as a journalist was

to “suggest the right direction that the society and the community should go in”. But while the tone was critical, the problems with the article were much more to do with substance than with tone.

Inclusion of unnecessary defamatory statements

[189] It would have been quite possible for Mr Steve Lee to have published an article about the 27 March 2013 agreement, the fact that it was not disclosed, and to have commented on how he considered these matters had affected the Korean community without including the defamatory statements.

Other relevant considerations

[190] Ms Goatley submits that some regard should be had to the fact that article commented on the obligations of Mr Henry Lee and Mr Hong to Mr Kim under the 27 March agreement and told the three parties to settle their dispute at a time when Mr Kim’s proceeding based on the agreement was still under way. I agree that a publication that comments on matters that are *sub judice* may risk being found not to be responsible but I do not see the comments made in the article in these respects as being of particular moment.

Conclusion on whether communication was responsible

[191] Tone and “other relevant considerations” apart, all of the above factors weigh against finding publication of the article as responsible. The most significant factor, however, was Mr Steve Lee’s failure to provide an opportunity for Mr Henry Lee to comment on allegations that challenged his integrity and seriously damaged his reputation.

[192] While acknowledging the admonition of the Court of Appeal in *Durie v Gardiner* that the above factors must be applied in a practical and flexible manner with regard to the practical realities and with deference to the judgment of Mr Steve Lee as a professional journalist and publisher, I consider that Mr Steve Lee’s failure to seek Mr Henry Lee’s views but his refusal to accept he had any responsibility in that regard prevents the application of the defence of responsible communication from applying.

Despite Mr Strauss's attempt in his supplementary closing submissions to persuade me that this is one of those occasions referred to by Lord Nicholls in *Reynolds* where an approach to the plaintiff was not warranted, I do not accept that submission.

[193] As noted above, the Court of Appeal in *Durie v Gardiner* specifically endorsed the finding of the Supreme Court of Canada in *Torstar* that the factor of seeking comment from a plaintiff is core because it goes to the essential sense of fairness that the defence of responsible communication is intended to promote. As Lord Phillips said in *Flood v Times Newspapers Ltd* in a decision of the Supreme Court of the United Kingdom, there is a distinction between cases where the public interest lies in the fact of published allegations and those where the public interest lies in the content of the allegations. In the first, relatively rare, category of cases of reportage (of which this case is not one), the obligation of the publisher is to verify the making of the allegation. In the second category (into which this case falls), the responsible journalist must be satisfied that the allegation published is true, and the belief in its truth must be the result of a reasonable investigation and must be reasonable to hold.⁶⁵

[194] As Lord Phillips also said in *Flood*, the *Reynolds* factors are largely concerned with responsible journalism.⁶⁶ I consider the same observation applies to the factors identified by the Court of Appeal in *Durie v Gardiner*. In his evidence, Mr Steve Lee demonstrated that he has little understanding of the requirements of responsible journalism. He maintained, in effect, that he had the right to decide whether to seek comment from Mr Henry Lee and that he only had a responsibility to do so if he, Mr Steve Lee, considered he might need to check his facts. Otherwise, he asserted a right to publish the facts as he saw them to be and to make such comment on those facts as he considered appropriate, as long as his opinions were genuine.

[195] Mr Steve Lee also seemed to see no incongruity in his seeking and publishing the perspectives of Mr Kim, one of the key protagonists in the "muddy fight" but in not offering a similar opportunity to Mr Henry Lee, another key protagonist. In that respect, Mr Steve Lee's assertions in his evidence and through his counsel that he did no more than report the facts impartially lack credibility. The focus of the criticisms

⁶⁵ *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273 at 77 – 88.

⁶⁶ *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273 at 30.

is on Mr Henry Lee and Mr Hong. It is noteworthy that there is no mention in the article of the observations made by the Department of Internal Affairs of Mr Kim's actions with respect to the money he advanced to cover the fundraising shortfall. Yet Mr Steve Lee said it was the publication of that report, which makes no criticisms of Mr Henry Lee, that Mr Steve Lee said in evidence prompted the article.

[196] In all of these respects, Mr Steve Lee's approach was not consistent with responsible journalism and cannot be protected by the defence of responsible communication.

[197] My conclusion, therefore, is that the defence of responsible communication does not apply because the publication of the article was not responsible.

Finding on defamation

[198] I find that Mr Steve Lee and the Sunday Times defamed Mr Henry Lee in the *Seed of Dispute* article written by Mr Steve Lee and published by the Sunday Times on 13 March 2015 in respect of the following seven admitted imputations:

- (a) Mr Henry Lee and the other parties to the 27 March 2013 agreement planned to hide the 27 March 2013 agreement from the public;
- (b) Mr Henry Lee was a party to a plan to deceive the Korean community about the true nature of the fundraising arrangements for the Cultural Centre;
- (c) Mr Henry Lee was a party to a plan to deceive the Korean community by pretending that the fundraising was going well and hiding the 27 March 2013 agreement;
- (d) Mr Henry Lee, together with Mr Hong, sought to control the BOD so as to avoid paying money they owed to Mr Kim;

- (e) Mr Henry Lee got involved in a “muddy fight” over the validity of the dismissal of the BOD to try to avoid paying money he owed to Mr Kim;
- (f) The reason Mr Henry Lee hid the 27 March 2013 agreement was to avoid paying any money;
- (g) When entering into the 27 March 2013 agreement, Mr Henry Lee had no intention of actually paying any money.

Damages

[199] Mr Henry Lee seeks compensatory damages of \$250,000 against Mr Steve Lee, compensatory damages against the Sunday Times, and aggravated damages.

[200] Damages in defamation are directed towards compensation for the effects caused by the defamatory statements that are normal and to be expected when a person’s reputation is impaired. That is, they are an estimate, however rough, of the probable extent of actual loss a person has suffered and will likely suffer in the future. Since the interests served by way of protecting a good reputation are of a dignitary and peace of mind character, such damages are very difficult to measure in monetary terms.⁶⁷

[201] Having regard to the evidence and decisions that bear some similarities to the present,⁶⁸ I find the following considerations to be relevant in assessing the appropriate level of general damages:

- (a) Mr Henry Lee is a senior member of the Korean community in Auckland who took on the responsibilities of co-chairing the Foundation Committee in the interests of the Korean community of Auckland and not for any reasons of personal reward;

⁶⁷ *Siemer v Staissney* [2011] NZCA 106, [2011] 2 NZLR 361 at [48].

⁶⁸ *Kim v Cho* [2016] NZHC 1771, [2016] NZAR 1134; *Lee v New Korea Herald Ltd* (HC Auckland CIV-2008-404-5072), 9 November 2010; *Ahn v Lee* [2009] DCR 298.

- (b) On Mr Henry Lee's own evidence and that of others such as Mr Cho, In Myung Kim and Kijong An, the publication of the article has caused Mr Henry Lee considerable personal distress and made him the subject of gossip and speculation within the Korean community in Auckland;
- (c) The disagreements between Mr Henry Lee and Mr Kim over the 27 March 2013 agreement and the related issues over the governance of the Cultural Centre were already the subject of legal proceedings that both Mr Henry Lee and Mr Kim had commenced and of articles that Mr Henry Lee and Mr Kim had themselves put into the public domain;
- (d) The Sunday Times has a limited circulation and while the article was republished on one occasion and may still be available on-line, it is unlikely that the reach of the article extends much beyond the Korean community in New Zealand;
- (e) Mr Steve Lee and the Sunday Times which he owns and controls has refused to apologise for or to retract the article despite a number of approaches from Mr Henry Lee.

[202] Having regard to these considerations and the awards of damages in those other cases that bear some similarities to the present, I consider an award of compensatory damages of \$150,000 to be appropriate. This sum takes into account my finding that Mr Steve Lee defamed Mr Henry Lee with respect to seven of the 15 pleaded imputations and my view that they were the more serious of the 15 pleaded imputations.

[203] Because Mr Steve Lee is the owner and operator of the Sunday Times, I do not consider it appropriate to make a separate award of compensatory damages in respect of the Sunday Times. I hold that Mr Steve Lee and the Sunday Times are jointly and severally liable for the sum of \$150,000.

Claim for aggravated damages

[204] Mr Henry Lee sought aggravated damages given the importance of honour, maintaining dignity and not losing face in the Korean community. Mr Steve Lee denied there is any real difference between New Zealand and modern Korea in conceptions of honour. Mr Steve Lee himself, however, gave evidence about the importance of reputation and esteem in Korean society and, in cross examination, admitted that it was culturally important in the Korean community to maintain dignity and not lose face.

[205] I accept that concepts of honour, maintaining dignity and not losing face are of heightened importance in the Korean community. At the same time, I take into account that a number of the cases with similarities to the present case, whose awards I have taken into consideration when setting the level of compensatory damages, also involved New Zealand Korean litigants where issues of face and dignity would also have been at issue. *Kim v Cho*,⁶⁹ dealt with issues that arose in the present case. For that reason, I do not see a case for awarding aggravated damages to take account of the heightened importance of dignity and face in the Korean community. I consider it likely that a decision in favour of Mr Henry Lee will itself be significant amelioration of those aspects of the damage to his reputation.

[206] With regard to the other matters which Ms Goatley says warrant an award of aggravated damages:

- (a) I do not consider that publication of the article to a small, tight-knit community requires any uplift, bearing in mind that the other cases whose awards I have taken into account concerned the same community.
- (b) I do not consider there is a case for awarding aggravated damages for the use of the term “yi-myin-gye-yak” to describe the 27 March 2013 agreement. It was the use of that term that tipped the balance for my finding that the first imputation was not true or materially different

⁶⁹ *Kim v Cho* [2016] NZHC 1771, [2016] NZAR 1134, (2016) PRNZ 683.

from the truth. In that respect, the use of the term has already been taken into account in the award of compensatory damages.

- (c) I do not accept there is a case for awarding aggravated damages because the defendants pursued a defence of truth and failed to apologise. Both were the consequence of Mr Steve Lee's misplaced and stubborn belief that he knew what was true and had a right to state and comment on those matters regardless of the views of others. I do not consider his position was driven by ill-will or malice.

Result

[207] For the reasons given:

- (a) I hold that the defendants have defamed Mr Henry Lee in the *Seed of Dispute* article written by Mr Steve Lee and published by the New Zealand Sunday Times on 13 March 2015;
- (b) I award compensatory damages of \$150,000 in favour of Mr Henry Lee jointly and severally against Mr Steve Lee and the New Zealand Sunday Times.

Costs

[208] Mr Henry Lee is entitled to costs on a 2B basis with reasonable disbursements to be fixed by the Registrar. If costs cannot be agreed, the parties are to file memoranda of no more than five pages.

G J van Bohemen J

Appendix

English Translation of the Editorial, New Zealand Sunday Times, 13 March 2015

<Sunday Editorial⁷⁰, New Zealand Sunday Times, 13 March 2015>

Seed of Dispute

Behind Contract⁷¹ of Sung Hyuk KIM / Young Pyo HONG, Hyung Soo LEE

Before the due date for the payment of the balance for the Korean Community Centre (“the Centre”) in March 2013, Young Pyo HONG and Hyung Soo LEE, Co-Chairmen of the Foundation Committee “(the Committee) for the Korean Community Cultural Centre (‘the Cultural Centre’) announced⁷² that the purchase of the Centre had been completed as Sung Hyuk KIM, the then Vice-President of the Korean Society of Auckland Incorporated (“the KSAI”) as well as the then Co-Chairperson of the Committee, paid⁷³ the shortfall of \$423,000.00.

⁷⁰ The literal meaning of ‘non-dan’ in Korean can be translated as ‘panel discussion’ or ‘open forum’ which normally requires at least two or more debaters. However, given the actual format of the article, it is considered that ‘editorial’ or ‘column’ can be a closer translation.

⁷¹ ‘Yi-myun-gye-yak’ in Korean can be translated as ‘behind contract’, ‘unrevealed agreement’ or ‘hidden agreement’ which is normally entered into in a private, secret or not-open-to-the-public manner’ between/among interested parties. On the other hand, ‘yi-myun-gye-yak’ can also be translated as ‘under-the-table agreement’ or ‘informal agreement’ where there exists a formal/explicit agreement at the same time. Normally, for the ‘yi-myun-gye-yak’, the relevant parties agree not to disclose the existence of the agreement itself as well as its contents in the circumstances. The terms ‘contract’ and ‘agreement’ can be used interchangeably.

⁷² The writer of this article used the present tense for most of the verbs in the article although it can be seen that most of the events took place in the past given the dates mentioned in the article. However, this type of writing can be often found in the other writers’ articles as well and it is considered that any reasonable and sound reader can understand those articles to that effect. Considering the dates stated in this article, past tenses are used here in translating those verbs.

⁷³ ‘Dae-nab’ in Korean can also be translated literally as ‘to pay on behalf of someone else’. However, there is no mentioning of the article regarding for whom the payer paid.

Of course, they did not get an approval at the General Meeting of KSAI according to Section 23 of the Rules of the KSAI.

In addition to that, it was announced on 3 April (2013)⁷⁴ under the names of HONG and LEE that the fund-raising would be terminated by 26 April (2013) and KIM, HONG, and LEE would share the shortfall.

On 19 November (2013) six months after moving to the Centre, Sung Hyuk KIM, the President of the KSAI, announced the shocking fact that there has been a behind contract among three persons of the Committee.

The contents of the contract were that \$423,000.00 would be paid by the President KIM on 28 March (2013) and if that amount could not be repaid within two months, HONG and LEE, the Co-Chairmen, would repay one third of the shortfall each to the President KIM.

If the fund-raising for the establishment of the Centre was successful and the borrowed money was fully paid back, this behind contract would never been revealed to the public.

But the difference between the payment of the President KIM and the amount received reached \$330,000.00 at that time and thus, according to the contract, each of HONG and LEE was under the necessity of repaying \$110,000.00 to the President KIM.

Immediately before the announcement, the President KIM disclosed that he received the notification from the Management Committee of the Centre (BOD – the Chairperson Hyung Soo LEE) notifying that they would turn themselves into the superior organisation of the KSAI and would control the President of the KSAI.

The President KIM, who thought that the persons who did not pay back the money, tried to privatise the Centre, announced the dissolution of BOD by declaring that the General Meeting held on 31 May (2013) which approved the BOD was null and void due to lack of quorum.

⁷⁴ There is no mentioning about particular ‘year’ in dates. However, it can be inferred the year as ‘2013’ in the context. Otherwise, it is considered that those can be clarified by the writer.

As HONG and LEE said they would not pay back the money agreed in the behind contract, caveats⁷⁵ were put in place on their private properties.

If HONG and LEE controlled the BOD which had the mighty power, they could decide how to deal with the \$150,000.00 granted from the Overseas Koreans Foundation⁷⁶ and whether the share of 1/3 of the amount owed to Sung Hyuk KIM should be repaid or not, except the money to be repaid back to Sung Hyuk KIM personally. In other words, the repayment⁷⁷ of the money owed to Sung Hyuk KIM can be delayed if the relationship between them becomes sour, even when the Centre has sufficient funds.

When Sung Hyuk KIM, Young Pyo HONG and Hyung Soo LEE got it into their heads that the person who can take a control on execution⁷⁸ of the behind contract in which they agreed to share 1/3 of \$423,000.00 each could be changed according to who would be a main body of operation of the Centre, they started a ‘muddy’⁷⁹ fight on legality⁸⁰ of the dissolution of the BOD.

A series of embarrassing and shameful events occurred, i.e., General Meeting – disturbance⁸¹ - involvement of the Police – defamation proceedings and so on. The audit by the Department of Internal Affairs on the KSAI was requested by the main body which violated the Rules by borrowing \$423,000.00 without resolution of the General Meeting.

⁷⁵ The literal translation of ‘ga-ab-ryu’ is found in some Korean-English dictionaries as ‘provisional seizure’. However, to my best knowledge as a lawyer, a closer translation of ‘ga-ab-ryu’ as a legal term in New Zealand is ‘caveat’ which is normally lodged by the party who has any interest (s) on a particular property as a stop sign on transaction of that property. Further, it is considered that there can be different requirements and procedures between ‘provisional seizure’ and caveat’.

⁷⁶ This English translation is cited directly from the website of that organisation in Korea.

⁷⁷ It is considered that there is a typo of the Korean word in the article.

⁷⁸ It can also be translated as ‘carrying out’, ‘fulfilment’ or ‘implementation’.

⁷⁹ It can also be translated as ‘dogfight in the mud’ similarly.

⁸⁰ It can also be translated as ‘lawfulness’ or ‘legitimacy’.

⁸¹ It can also be translated as ‘disorderly and violent behaviours’.

This is the core point of disputes surrounding the BOD or the president of the KSAI.

“If (we) hide the contract in which (we) agreed to share 1/3 of \$423,000.00 each and create an atmosphere among the Korean community, we do not need to pay the money.” (They) did not expect that the things of which (they) thought lightly got entangled⁸² like this.

The fight over the money which was triggered⁸³ by personal desires for fame and honour and the behind contract shall not be embellished as if it was “for the Korean community” or “for the Centre”. (I) wish three persons settle the matters in anyway either through “fighting” or putting their heads together, without dragging the Korean community into the fight.

The Korean community is now sick and tired of it.

⁸² It can also be translated as ‘twisted’ or ‘went wrong’

⁸³ It can also be translated as ‘commenced’ or ‘caused’